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STATE WATER RESOURCES CONTROL BOARD
OF THE STATE OF CALIFORNIA

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IN THE MATTER OF THE STATE WATER
RESOURCES CONTROL BOARD HEARING ON
PETITIONS TO REVISE THE DECLARATION OF
FULLY APPROPRIATED STREAM SYSTEM OF THE
KERN RIVER IN KERN AND TULARE COUNTIES,
_____ /

October 26 & 27, 2009
1001 I Street, Second Floor
Sierra Hearing Room
CAL-EPA Building
Sacramento, CA

BEFORE HEARING OFFICER, ARTHUR BAGGETT, JR.

Reporter:
SUSANA R. ABEYTA, CSR #13372

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1 APPEARANCES OF COUNSEL:

2 Kevin O'Brien, of the law firm of Downery Brand
3 LLP, 621 Capitol Mall, 18th Floor , Sacramento, CA 95814,
4 appeared as Counsel for and on behalf of KERN WATER BANK
5 AUTHORITY.

6 Scott Kuney, of the law firm of Young Wooldridge
7 LLP, 1800 30th Street, Fourth Floor, Bakersfield, CA
8 93301, appeared as Counsel for and on behalf of the NORTH
9 KERN WATER STORAGE DISTRICT.

10 Gene R. Mc Murtrey, of the law firm of Mc
11 Murtrey, Hartsock & Worth, 2001 22nd Street, Suite 100,
12 Bakersfield, CA 93301-3831, appeared as Counsel for and
13 on behalf of the BUENA VISTA WATER STORAGE DISTRICT.

14 Nicholas Jacobs, of the law firm of Somach
15 Simmons & Dunn, 500 Capitol Mall, Suite 1000, Sacramento,
16 CA 95814, appeared as Counsel for and on behalf of KERN
17 COUNTY WATER AGENCY.

18 Jill Willis, of the law firm of Best Best &
19 Krieger, 300 Grand Canal Ave, 25th Floor, Los Angeles, Ca
20 90071, appeared as Counsel for and on behalf of CITY OF
21 SHAFTER.

22 Jason Ackerman, of the law firm of Best Best &
23 Krieger, 3750 University Avenue, Suite 400, Riverside, CA
24 92502, appeared as Counsel for and on behalf of the CITY
25 OF SHAFTER.

1 Colin Pearce, of the law firm of Duane Morris,
2 One Market Plaza, Suite 2200, San Francisco, CA
3 94105-1127, appeared as Counsel for and on behalf of CITY
4 OF BAKERSFIELD.

5
6 ALSO PRESENT:

7 Thomas Nassif, President Western Growers, P.O.
8 Box 2130 Newport Beach, CA 92658.

9
10 --o0o--

11
12 October 26, 2009 At 9:00 a.m.

13 --o0o--

14 MR. BAGGETT: Good morning, this is the time and
15 place for the hearing to receive evidence relevant to
16 determining whether to revise the Declaration of Fully
17 Appropriated Stream Systems for the Kern River.

18 This hearing is being held in accordance with
19 the Notice of Public Hearing dated August 24th, 2009.

20 And I am State Water Board Member, Art Baggett.
21 Also present are the staff assigned to assist with the
22 hearing: Our Staff Counsel David Rose; Staff Geologist,
23 Paul Murphy; and Environmental Scientist, Jane Farwell.

24 This hearing provides parties who have filed a
25 Notice of Intent to Appear an opportunity to present

1 relevant testimony and other evidence that addresses the
2 three key issues contained in the hearing notice. I
3 won't repeat those issues here, but to summarize, the key
4 issues address whether there is enough information
5 available to determine if unappropriated water is
6 available on the Kern River in order to revise the FAS
7 declaration.

8 After the hearing record is closed, The Board
9 will prepare a proposed order for consideration of the
10 full Board. After the Board adopts an order, any person
11 who believes that the order is in error will have 30 days
12 within which to submit a written petition for
13 reconsideration by the full Board.

14 We have a court reporter present who will
15 prepare a transcript of the proceeding. If you would
16 like a copy of the transcript you should make separate
17 arrangements with the court reporter.

18 Evacuation procedures: Most of you are familiar
19 with these. If an alarm goes off, please take your
20 valuables with you and do not use the elevators, walk
21 down towards the parking lot across the street.

22 We will begin with the policy statements, before
23 we -- before we proceed to evidentiary presentations. We
24 will hear from speakers who wish to make non-evidentiary
25 policy statements. We have no blue cards, but we do have

1 a list of speakers who submitted notices earlier.

2 The Board will accept written policy statements,
3 which we have at least two from Fish and Wildlife
4 Services and Fish and Game. Those will be posted by the
5 end today or tomorrow on the website.

6 The policy statements are not evidentiary
7 statements. It's subject to limitations identified in
8 the written notice. Persons intending on making policy
9 statements may not attempt to use their statement to
10 present factual evidence, either orally or by introducing
11 written exhibits. They will be limited to five minutes
12 or less.

13 So we will begin with the parties who filed a
14 notice of intent, if they wish to make a policy
15 statement. Anyone from Kern County Farm Bureau?

16 (No response.)

17 We've a written policy statement from them that
18 will be in the record. How about the Kern Delta Water
19 District? We have a written policy statement also.

20 MR. MULKAY: Thank you. My name is Mark Mulkey,
21 M-U-L-K-A-Y. Mr. Baggett, I am the general manager of
22 Kern Delta Water District. You have my written
23 statement. I will be very, very brief.

24 Kern Delta is a First Point water user. We were
25 a participant in litigation which resulted in partial

1 forfeiture, which is most of this water that is being
2 discussed today -- partial forfeiture of our pre-1914
3 water rights. The court determined that the majority of
4 Kern Delta's pre-1914 water rights have been preserved as
5 of this date.

6 If your Board determines to accept applications
7 to appropriate Kern River water, we would request that
8 your Board preserve and protect Kern Delta's vested Kern
9 River water rights by making any permit to appropriate
10 Kern River water subject to Kern Delta's -- Kern River's
11 preserved entitlement as preserved by the courts. Thank
12 you.

13 MR. BAGGETT: Thank you. Western Growers. We
14 also have your written statement in the record.

15 MR. NASSIF: Thank you, Mr. Baggett, members of
16 the Board. My name is Tom Nassif, N-A-S-S-I-F. I am
17 President and CEO of Western Growers. Western Growers
18 represents the fresh vegetable, fruit and nut growers
19 industries in California and Arizona, and has nearly 200
20 members in Kern and Tulare counties. Combined Kern and
21 Tulare counties produce more than \$9 billion worth of
22 agriculture products each year, 4 and \$5 million
23 respectively. Almost half, 4.3 billion comes from
24 vegetable, fruit, and tree nut production.

25 Even in direct interest of our membership,

1 beside the agricultural industry in Kern and Tulare
2 counties, and the significant economic benefits the
3 industry provides the region and the state, Western
4 Growers is paying close attention to the decision of the
5 State Water Resources Control Board regarding the
6 petition to revise the declaration of fully appropriated
7 systems, stream water of Kern.

8 Western growers recognizes that since 1870s the
9 available Kern River water supplies have been
10 continuously diverted and used to irrigate a wide variety
11 of agricultural commodities the results have been the
12 development of one of the most agriculturally richest
13 regions in the world.

14 According to the Department of Conservation
15 Division of Land Resource Protection, Kern and Tulare
16 counties are home to more than one million acres of the
17 prime farm land 640,000 acres and 380,000 acres
18 respectively. In Kern County alone 320,000 of these
19 acres have been developed in association with substantial
20 pre-1914 Kern River water rights established by
21 agricultural users in the region. Irrigated agriculture
22 is a key component of the economy of Kern and Tulare
23 Counties.

24 However, the industry has already been hit hard
25 by the recent statewide drought and court-imposed

1 restrictions on water deliveries from Sacramento/San
2 Joaquin Delta and Friant Dam. With the availability of
3 state and water supplies being dramatically cut, any
4 reductions in the availability of local Kern water which
5 supplies agriculture, will further aggravate these --
6 aggravate these impacts because the Kern River is the
7 most significant local source of water for farmers in the
8 region, it is extremely important for the State Water
9 Resources Control Board to preserve the historic use of
10 the Kern River surface water supplied by agriculture.

11 Without such protections irrigated agricultural
12 will have to increase it's reliance on limited
13 groundwater resources which could create a negatively
14 impact on groundwater supplies and increase agricultural
15 production costs by between \$100 to \$250 per acre. It's
16 ironic that much of the added costs will be to attributed
17 to substantial increases in energy use, which is
18 inconsistent with efforts to reduce carbon emissions and
19 greenhouse gasses in California. With a drastically
20 reduced and significantly more expensive water supply,
21 the result will be a reduction in the amount of farm
22 lands in production in Kern and Tulare counties.

23 Based on the recent experience of farming
24 communities on the west side of the San Joaquin Valley,
25 less acreage and production will lead to an exacerbation

1 of the already extreme levels of unemployment in local
2 communities along with the subsequent ripple effect on
3 unrelated industries and the overall regional economy,
4 not to mention the fact that reduced production will
5 result in higher food prices for all consumers.

6 Kern River water is the most significant local
7 source of water available for agriculture in the region
8 and vital to the existing agricultural economy of Kern
9 and Tulare counties. For this reason the historic uses
10 of Kern River water must remain a reliable and stable
11 supply for the region and must remain at historical
12 levels without reduction. Without certainty of the
13 future supply of Kern River water, the necessary capital
14 investment for long-term operation of this productive
15 agricultural economy cannot be maintained.

16 Thank you very much for the opportunity to
17 provide these comments.

18 MR. BAGGETT: Thank you. Jack Pandol is the
19 last one. We have a written policy statement. There's
20 no other blue cards? That's it for the policy statement.

21 With that, we will now move to evidentiary
22 portion of the hearing for the presentation of evidence
23 and related cross-examination by parties who submitted a
24 notice of intend to appear.

25 While we are here, we will hear the parties'

1 case in chief in the following orderer: City of
2 Bakersfield, North Kern Petitioners, and Center for
3 Biological Diversity. The Center's case in chief will
4 consist of an opening statements and a closing statement
5 and possible cross-examination. They have no witnesses
6 of their own.

7 In the beginning of each case in chief, a
8 representative of the party may make an opening statement
9 briefly summarizing the objectives of the case, the major
10 points that the proposed evidence is intended to
11 establish, and the relationship between the major points
12 and the key issues.

13 After the opening statement, we will hear
14 testimony from the parties' witnesses. Before testifying
15 the witnesses should, one, identify they've taken the
16 oath; two, their written testimony is their own; and the
17 third affirms that it's true correct. The witness should
18 summarize the key points of their written testimony, but
19 please do not read the entire testimony.

20 At the prehearing conference on September 24th
21 the participants agreed that the oral summaries of the
22 North Kern Petitioners and the City of Bakersfield will
23 be allowed to 20 minutes per witness not to exceed 90
24 minutes total as clarified by my letter dated October
25 13th. The North Kern Petitioners will have 90 minutes

1 together to present their direct testimony of their
2 overlapping witnesses, and 20 minutes for additional
3 witnesses on a list of each parties, and the direct
4 testimony will be followed by cross-examination by the
5 other parties, the Board staff, and myself.

6 Redirect testimony will be permitted following
7 the recross-examination. Any redirect or any
8 recross-examination is limited to the scope of the
9 cross-examination and the redirect testimony,
10 respectively. After all the cases in chief are
11 completed, the parties may present any rebuttal evidence.

12 Parties are encouraged to be efficient in
13 presenting their cases and their cross-examination.
14 Except where I approve a variation, we will follow the
15 procedures as set forth in the Board's regulations, the
16 hearing notice, and the subsequent rulings. We do not
17 anticipate having oral closing arguments, but we can
18 discuss that in further proceedings.

19 We will allow parties to submit written briefs.
20 At this point I would propose ten pages, but we can talk
21 about that. If at the end of the proceeding, the court
22 reporter estimates transcripts will be available two
23 weeks after the closing of the hearings. With that in
24 mind, I would like the appearances by the parties who are
25 participating in the evidentiary portion of the hearing,

1 for those making appearance, will you please state your
2 name, address, and whom you represent so the court
3 reporter can enter the information on the record.

4 MR. PEARCE: Good morning, Mr. Baggett, hearing
5 staff. My name is Colin Pearce, C-O-L-I-N, P-E-A-R-C-E.
6 I'm with Duane Morris, One Market Street, 22nd Floor, San
7 Francisco, CA, 94105. And with me are Florn Core, the
8 head of the Bakersfield Water Department; and Gene
9 Bogart, formerly with City of Bakersfield; and Ken
10 Schwarz, our expert consultant.

11 MR. BAGGETT: North Kern Petitioners.

12 MR. KUNEY: Good morning, Mr. Baggett, members
13 of the staff. My name is Scott Kuney, K-U-N-E-Y, with
14 the law offices of Young Wooldridge representing the
15 North Kern Water Storage District, address is 1800 30th
16 Street, Bakersfield, California, Fourth Floor, 93301.
17 And, again, representing North Kern Water Storage
18 District. Present in the hearing room is Dick Diamond
19 who is the general manager of the North Kern Water
20 Storage District and engineer Dana Mum.

21 MR. BAGGETT: Thank you.

22 MR. O'BRIEN: Good morning, Mr. Baggett, members
23 of the staff. Kevin O'Brien of Downey Brand representing
24 the Kern Water Bank Authority. My address is 621 Capital
25 Mall, 18th floor, Sacramento, California, 95814.

1 MR. JACOBS: Good morning. My name is Nicholas
2 Jacobs. I'm with the law firm of Somach and Simmons &
3 Dunn. We're located at 500 Capital Mall, Tenth Floor,
4 95814. And I am here representing the Kern County Water
5 Agency.

6 MR. MC MURTREY: Good morning, Gene Mc Murtrey,
7 M-C, M-U-R-T-R-E-Y, with the law firm of Mc Murtrey
8 Hartstock and Worth, 2001 22nd Street, Bakersfield,
9 California, 93301. I'm representing the Buena Vista
10 Water Storage District. I have with me today Terry
11 Chicca, the president of the Board of Directors of this
12 district; Dan Bartel, the current manager; and Marty
13 Milobar, the former manager who will also be with us.

14 MS. WILLIS: Good morning, Mr. Baggett and
15 members of the staff. My name is Jill, J-I-L-L, Willis,
16 W-I-L-L-I-S. I am with the law firm of Best Best and
17 Krieger. We are located at 3750 University Avenue, Suite
18 400, Riverside, California 920-- 92502.

19 With me today I have my colleague Jason Ackerman
20 who is also with Best Best and Krieger. We're here today
21 on behalf of the City of Shafter. We have with us the
22 City Manager John Gwen.

23 MR. BAGGETT: Center for Biological Diversity.

24 MS. KUNTZ: They elected not to be present.
25 They wrote you a letter.

1 MR. PEARCE: Mr. Baggett, a letter came in I
2 believe late Friday indicating that they elected not to
3 participate in the hearing today.

4 MR. BAGGETT: Didn't come to myself or any of
5 the hearing team. We --

6 MR. PEARCE: I think maybe --

7 MS. KUNTZ: We received the letter.

8 MR. BAGGETT: Well, maybe if someone has a
9 copy --

10 MS. KUNTZ: We do.

11 MR. BAGGETT: -- to put in our records.

12 With that I will now administer the oath. Will
13 those persons who may testify today please stand and
14 raise your right hand.

15 Do you promise to tell the truth in these
16 proceedings? Answer I do.

17 (Response by all: I do.)

18 MR. BAGGETT: Before we begin, the City of
19 Bakersfield -- we did -- we did get notices from some
20 other parties on Friday -- just not the Center. We have
21 an objection to -- filed by the petitioners. And then
22 this morning we received the response to that requesting
23 to strike certain testimony the City of Bakersfield's
24 expert witnesses and the lack of a resume for one of the
25 expert witnesses, Mr. Bogart. Is that consistent? Does

1 the City have a resume? If this is going to be an expert
2 witness, generally, this Board requires it.

3 MR. PEARCE: Mr. Bogart is testifying primarily
4 as a percipient witness based on his own experience on
5 the Kern River, and since he's retired now, he doesn't
6 have a current resume. We're not asking him to give an
7 opinion --

8 MR. BAGGETT: He's not an expert?

9 MR. PEARCE: We're asking him to describe the
10 facts of the Kern River. We designated him as an expert
11 just because I know in trial if you have a percipient
12 witness expert, they need to be designated as an expert.
13 Generally, we did that as a preventative caution, he's a
14 fact witness.

15 MR. BAGGETT: A fact witness. Does someone want
16 to speak on behalf of the joint petitioners? Want to
17 make an oral -- I mean we've gotten your written
18 comments. Do you want to rest on the written submittal?

19 MR. KUNEY: This is with respect to the
20 objections?

21 MR. BAGGETT: Yes, the motions to strike.

22 MR. KUNEY: We would stand on our submittals on
23 the subject. We certainly are prepared to do that, but
24 we have no further written arguments.

25 MR. LINDSAY: You need to use the microphone.

1 Nobody can hear this outside of this room if you don't do
2 that.

3 MR. PEARCE: Thank you, Mr. Baggett. Colin
4 Pearce on behalf of the City of Bakersfield. We did file
5 an opposition, and our own objections to the witnesses
6 proposed by the North Kern parties this morning. I think
7 that covers most of our objection. Again, we just -- or
8 most of our response -- we received this late in the day
9 on Friday, you know what we laid out in our opposition
10 really -- which is, I think is our basic position, which
11 is that their objections seem to be based more on what
12 you would raise in court, not before the State Board.
13 The interest of the State Board, as I understand it, is
14 to figure out the facts and learn -- and figure out what
15 is happening, which is what we're trying to do. We cited
16 potential authority in our papers that the evidentiary
17 standard is not the same evidentiary standard the North
18 Kern Petitioners relied on.

19 Secondly, we pointed out that the issues in this
20 case are -- our testimony is directly relevant to the
21 issues in this proceeding, primarily the existence of a
22 change in circumstances on the river, and secondarily,
23 the existence of unappropriated water. And to explore
24 that issue, we necessarily have to talk about the legal
25 rights of the parties on the Kern River before -- before

1 the Board.

2 And it seems to me that the primary objection
3 from the North Kern parties is they don't want us to talk
4 about the water rights, and in their papers they didn't
5 submit any information about what water rights they have.
6 They say we have entitlement and that's all we see. And
7 our testimony -- we say here what the rights really are.
8 The fact of the matter is, we have forfeited water in the
9 Kern River.

10 We don't believe based on the evidence based on
11 the testimony that anyone has a right to divert the water
12 presently, and therefore there's surface water on the
13 Kern River. And, obviously, they don't want that to come
14 out. They are trying to stop the evidence from coming
15 out and stop the facts from coming out. We strenuously
16 object to that.

17 Which leads to my thought, which is, if they
18 have a problem with our evidence and our testimony, we
19 have a bigger problem with their evidence and their
20 testimony because their arguments and their testimony is
21 filled with opinions and conclusions. And their -- their
22 expert, Mr. Easton, has never worked on the Kern River
23 before, never kept a record on flow and diversion. He
24 read the numbers and came up with some opinion that
25 there's a deficit on the river. There's pure

1 unsupported, unsubstantiated opinion which lacks
2 foundation and gives a legal conclusion.

3 If you're inclined to exclude any portion of our
4 witness's testimony, we would move to exclude all of
5 their testimony because it's entirely incompetent and
6 based on inadmissible and incompetent evidence. Thank
7 you.

8 MR. BAGGETT: Petitioner is going to make a
9 response?

10 MR. KUNEY: Thank you. Scott Kuney for the
11 record. And this is on the motion, Mr. Baggett, with
12 regard to the various legal opinions that have been
13 rendered in the testimonies of Mr. Bogart and Mr. Core.
14 Interestingly now, we hear a very important fact and a
15 concession, which we agree, and that is Mr. Bogart is not
16 an expert. He's here as a percipient witness only, yet
17 what we have in his written testimony is -- only in
18 certain instances which we've highlighted to be -- legal
19 opinion, so we would find that objectionable.

20 And then with Mr. Core, there might be 27, 32
21 paragraphs where he has given his opinion and as to what
22 there is, complicated contracts or court decisions
23 provide for, our objections really are on three primary
24 grounds: One is relevance. What their opinion may be is
25 really not germane. You can see the opinion of any third

1 party. Ultimately, it's those documents that answer
2 questions, not the opinions of the third parties.

3 Secondly, the opinions that they have rendered,
4 are not reliable. We've been able to point to certain
5 points where they have made certain arguments but are
6 belied by the actual text of published decision, for
7 example.

8 And finally, and most importantly, Mr. Baggett,
9 we really don't think this is the expeditious way to
10 conduct this sort of hearing. Their kind of testimony is
11 really only going to engender a response, unfortunate
12 cross-examination, perhaps each rebuttal witnesses, when
13 ultimately it's within the province of you as hearing
14 officer and staff to be able to read the documents, make
15 your independent decisions, conclusions, and that can be
16 supplemented to the briefs that you already referenced to
17 be done.

18 There's no need for narrative testimony of
19 individuals giving their personal opinions. The
20 documents answer the question, so it would be -- and
21 again, consistent with Government Code Section 11513(c)
22 you certainly have within your province the discretion to
23 not unduly waste time in this proceeding and let this
24 hearing continue unnecessarily.

25 MR. BAGGETT: Thank you. We will note the

1 objection. The motion and the response are noted for the
2 record. You have anything else?

3 MS. WILLIS: If I can just respond briefly as to
4 our motion with respect to Dr. Schwarz. I think our
5 position is pretty well laid out in our motion. I don't
6 know if you have any specific question. I will be very
7 brief for the record. The gist of our argument therein
8 is not to exclude relevant testimony, but to argue that,
9 in fact, that testimony is not relevant because it falls
10 outside the scope of the key hearing issues, and also the
11 subsequent order that you issued after the prehearing
12 conference which specifically excluded testimony
13 regarding instream flows.

14 The testimony that we take issue with does not
15 discuss whether changes in circumstances exist, but
16 instead assumes the existence of changed circumstances
17 arises with the forfeiture judgment and then discusses
18 over the course of 12 pages what should be done with
19 those excess or surplus flow as described in that
20 testimony in the context of the forfeiture agreement.

21 So the 12 pages that we seem to exclude, relates
22 entirely to the importance of instream flows and uses
23 which we would argue would be relevant to the next phase
24 of the proceedings, if one were to occur.

25 MR. BAGGETT: Thank you.

1 MR. PEARCE: Can I respond? Thank you, Mr.
2 Baggett. Just to respond very quickly to objections to
3 Dr. Schwarz' testimony. His testimony serves two primary
4 purposes. One, he sets the environmental studies on the
5 Kern River which is important for the State Board to get
6 a sense what is really happening on the river. And, two,
7 he paints a picture of what happens on the river after
8 forfeiture, no different than the North Kern Petitioners
9 do.

10 Because the North Kern Petitioners do assume the
11 forfeited water is all going to be absorbed by some
12 unnamed or undefined entitlement, so their whole
13 testimony is based on the assumption that the water is
14 coming out of the river. Our testimony -- or Dr.
15 Schwarz' testimony, is basing on the assumption that
16 nobody owns the water, which is what the court of appeals
17 also said. So he's looking at it as if there's this new
18 block of water on the river and which is really the
19 situation and, again, it's no different from their own
20 testimony.

21 MR. BAGGETT: Thank you. We will note both,
22 again, the motion and the responses, are noted for the
23 record, and preserved with that.

24 A few comments. One is I think we will
25 appropriately state that this Board will determine what

1 is relevant during the proceeding. We can deal with a
2 case by case. For us to go through eight binders or six
3 binders of evidence right now and line by line, I think
4 would not be an expeditious use of any of our time, so
5 you can -- you still have an opportunity to object when a
6 witness comes forward in regard to the instream flow and
7 the public trust testimony.

8 I think we were pretty -- very clear that is
9 outside the scope of this proceeding. If this Board
10 makes a determination water is available, that would be
11 an incredibly very important relevant issue before this
12 body. Because as we would expect some obviously
13 extensive testimony would be provided, and if we didn't
14 get that on instream and public trust issues for us to
15 make that determination up front, and I think would be a
16 slippery slope for other action before this Board.
17 That's the -- not the way the law has been applied to
18 that. So as far as it's -- without going through line by
19 line and suffice it to say that is considered outside the
20 scope.

21 Second, in terms of Mr. Bogart as an expert
22 witness, I think that question was answered, so we will
23 hear him as a witness, but not as an expert.

24 Third, when it's non-attorneys or when one is
25 making a legal argument as evidence, that's

1 inappropriate. I think the attorneys in the room know
2 that, and I think we can decipher that on a case-by-case.

3 We will not use -- I think we will treat hearsay
4 as hearsay, and I think as those in practice before us
5 know, our rule is not to make findings based on hearsay,
6 and we have very broad hearsay rules, and it's a case by
7 case. We will determine that, and you will have an
8 opportunity if you disagree with our interpretation -- a
9 motion can be considered and remedies later through the
10 courts, but we can make that -- that determination.

11 Lastly, we will treat those legal opinions --
12 without, again, going through line by line. I know the
13 petitioners requested us to strike specific lines, and to
14 avoid going through a line by line rebuttal -- again, if
15 it's a party's or a manager's use of a judgment and how
16 they treat that as their capacity as a manager, that is
17 quite appropriate for this Board to consider that
18 witness's use of that material. If this is how they
19 manage a project or manage a facility based on their
20 understanding, that's one thing, not to interject this is
21 what the court said or thought it is inappropriate, and
22 we will make that determination with the evidence and
23 review the testimony.

24 So, again, I guess I would advise the parties
25 that legal opinions from non-attorneys or during

1 evidentiary issue is not appropriate. That's a closing
2 brief issues. You can make all the legal arguments there
3 on your limited pages, but if it's the way a manager ran
4 -- runs the district or runs the project based on their
5 reading of the order, that's a different matter and
6 that's appropriate. So with that, again, without
7 striking line by line, we've got the motions. We will
8 take them under submission and see how we deal with the
9 final order.

10 With that, let's proceed. City of Bakersfield
11 you're up first with opening statements.

12 MR. PEARCE: Thank you very much, Mr. Baggett,
13 members of the State Board staff. I have a brief opening
14 statement. I also submitted a written summary of my
15 statement this morning, and Mr. Piade is going to be
16 assisting me with the PowerPoint to cover the three main
17 points that I want to make in the opening statement.

18 Let me start out by saying I don't think it's
19 possible to overstate the importance of this hearing to
20 the people of Bakersfield the Kern River, Southern San
21 Joaquin Valley, and the entire State. At issue before
22 you is 50,000 acre-feet of high-quality pristine Kern
23 River water, and there has been a finding of forfeiture
24 in a recent decision, and as a result of that, we're here
25 to try figure out what to do with that water. That water

1 is the lifeblood of the City of Bakersfield. It's
2 critically important to the people of Bakersfield and to
3 the environment in and around Bakersfield.

4 The court of appeal has given clear direction to
5 the State Board to figure out who owns that water, and
6 what to do with that water. And these are issues we can
7 deal with later on. What really strikes me as highly
8 improper and just as galling at this stage, is the fact
9 that we have four large agricultural districts and one
10 small city who are fighting as hard as they can to keep
11 the State out of the Kern River and keep the State Board
12 away from the river, so that they can exploit the Kern
13 River without any right, without any claim. And so they
14 can keep the water from the people and keep the water
15 from the environment. So that's what's really going on
16 here.

17 We're prepared to respond to that. We're
18 prepared to help the State Board get to the right place
19 and figure out what to do with the water. In order to do
20 that we're going to make three points in this proceeding.

21 First of all, we're going to demonstrate --
22 first we maintain that the state water issue before the
23 Control Board must revise the declaration for the
24 appropriate stream system. And we believe the State
25 Board should do this for three reasons.

1 One, there's a change in circumstances as a
2 result of the recent finding of forfeiture. And I don't
3 think you can't find a more clear example of the change
4 in circumstances than a court judgment saying that a
5 pre-1914 water right holder has lost a significant
6 portion of their water rights. And at the same time the
7 courts have said, we're not going to decide who owns the
8 water because it's up to the State Board to decide
9 because it's unappropriated water.

10 We're also going -- we're not relying on the
11 judgment, however, our testimony will demonstrate that
12 the forfeit of water is surplus and always was surplus
13 water, surplus to the needs of Kern Delta, and there's
14 also surplus, and is surplus, to the needs of the demands
15 of other parties who use water on the Kern River.

16 We are going to demonstrate, and we will
17 demonstrate that the other parties who are here have no
18 right of entitlement to the forfeit of water; therefore,
19 the water is surplus and unappropriated.

20 And, finally, the third point -- this is I think
21 the critical public policy point -- the State Board
22 cannot simply let the water stay in the river to be used,
23 exploited, diverted, or done with whatever parties with
24 no rights wants to do with it. The State Board has to
25 get involved to decide who gets the water, so even if the

1 Board believes there might be junior rights on the river
2 that could get the water, that's something the State
3 Board has to decide.

4 The State Board cannot sit back while 50,000
5 acre-feet of water just sits there in the Kern River with
6 no rights, no claims, no public oversight, no protection
7 for the environment. The State Board has to get involved
8 and act and has to protect the Kern River. We,
9 therefore, ask you to revise the fully appropriated
10 status of the Kern River, accept the applications to
11 appropriate, and help save the Kern River, thank you.

12 MR. O'BRIEN: Mr. Kevin O'Brien for Kern Water
13 Bank Authority. I did find the letter dated October 4th
14 addressed to you from the Center For Biological
15 Diversity. Can I approach?

16 MR. BAGGETT: All right.

17 MR. O'BRIEN: Thank you. I would like to give a
18 brief opening, and it's my understanding that counsel for
19 the other joint entities as we are calling them are going
20 to reserve their openings for the start of our case in
21 chief, if that's acceptable.

22 MR. BAGGETT: Well, I thought I would hear all
23 the Bakersfield case in chief.

24 MR. PEARCE: I think that makes more sense
25 perhaps.

1 MR. KUNEY: I think perhaps best if I could
2 briefly just give my opening and response to a couple of
3 the points made by Mr. Pearce just to frame the issues
4 before we get to the evidence.

5 MR. PEARCE: Are we going to have multiple
6 opening statements? I missed that part.

7 MR. BAGGETT: Do you reserve the rest of them
8 until -- he is representing all the other parties.

9 MR. PEARCE: So they're going to have five
10 opening statements?

11 MR. BAGGETT: No, he will reserve. I will allow
12 a brief opening statement.

13 MR. O'BRIEN: Mr. Baggett, members of the staff,
14 as you know this is not the first time that the issue of
15 whether the Kern River is fully appropriated has come
16 before this Board. I am sure that you all are familiar
17 with the Decision 1196 decided in 1964 in which the State
18 Board, following a very extensive staff analysis of
19 70 years of hydrology, made a determination that the Kern
20 River was fully appropriated. And the Kern River was, in
21 fact, determined to be fully appropriated in all of the
22 appropriated stream declarations since the original one
23 Board order.

24 We're here today really because of the decision
25 on the North Kern case, which Mr. Pearce has already

1 mentioned, which determined there has been a partial
2 forfeiture on the water rights of the Kern River. In
3 that case I think there's some language in the case that
4 I think nicely framed this proceeding. It states in part
5 that if water rights are forfeited, however, the
6 cumulative effect could be that the river is no longer
7 oversubscribed, that is a determination not before the
8 courts but for the SWRCB in those resulting limitations
9 on appropriation rights might result in a determination
10 that the Kern River is no longer fully appropriated.
11 That determination will be made by the SWRCB application
12 of a potential appropriation of the excess. So that's
13 really the central focus of this proceeding whether as a
14 result of the North Kern decision there is unappropriated
15 water.

16 Now, turning to the evidence, I think if you
17 look at the evidence submitted by both the joint parties,
18 and the City of Bakersfield, you will see a very stark
19 contrast in the nature and extend of the evidence. The
20 joint parties' evidence is based on a very detailed
21 analysis of flow diversion and use data that has been
22 carefully recorded by the parties in this proceeding,
23 including the City of Bakersfield, since the late 1800s.

24 The City's case on the other hand, is very light
25 on hydrology. It really focuses on a legal argument and

1 that is the legal argument that Mr. Pearce made in his
2 opening statement, which is the notion that the North
3 Kern forfeit water is somehow new water to the Kern
4 River, which is not subject to the established rights of
5 the various parties uphold of pre-1914 rights on the
6 river.

7 I think it's worth noting, although I notice
8 it's not the time for legal argument, but the court of
9 appeals on the Kern Case specifically addressed this
10 issue and said the following: "When a natural water
11 force is fully appropriated as the Kern River is,
12 forfeiture of an appropriative right may or may not
13 result in unappropriated water being awarded to an
14 applicant through the statutory permitting system
15 administered by SWRCB."

16 That is a river may be so oversubscribe by
17 pre-1914 common-law rights, that any water released to
18 the river forfeiture by a senior rights holder, will
19 simply be used in full by existing junior rights holders
20 under their existing entitlement. That is precisely the
21 case that we're going to put on in this proceeding.

22 You will be hearing from Mr. Milobar who will be
23 providing come general background information about the
24 nature of the water rights distribution system
25 administration on the Kern River.

1 Q. And you provided testimony to the State Board
2 today?

3 A. Yes.

4 Q. Is that testimony Exhibit 1-1?

5 A. Yes.

6 Q. And you're sworn in this morning by the hearing
7 officer?

8 A. That's correct.

9 Q. And the testimony is your testimony and it's
10 accurate and truthful?

11 A. Yes.

12 Q. Can you describe your personal, educational
13 background please.

14 A. I'm a lifetime resident of Bakersfield,
15 California. I graduated from Bakersfield Junior College
16 in June of 1968, associate of arts degree. I received a
17 degree in business administration from California State
18 College in 1973.

19 Q. Could you describe your work -- prior work
20 experience and duties?

21 A. From 1969 until the end of 1976 I was the
22 hydrographer for the Kern County Canal and Water Company,
23 operated all the canals of the First Point service area
24 and was a subsidiary of Tenneco West Incorporated.

25 Q. And what was Tenneco West?

1 A. Tenneco West was the successor in interest of
2 the Kern County Land Company holdings that dated back to
3 prior 1870s and 1880s in the Kern County area.

4 Q. And after 1976, what job responsibilities and
5 duties did you have?

6 A. In 1976 the City of Bakersfield purchased the
7 Kern County Canal and Water Company, and they took over
8 the operation and record keeping responsibilities of the
9 Kern River previously done under Kern County Canal and
10 Water Company and Tenneco West.

11 Q. Go over your duties after 1976.

12 A. At that point I became the water superintendent
13 for the City of Bakersfield and was responsible for the
14 daily operations, oversight of the record keeping, and
15 on-going maintenance and budget operations for the canal
16 company.

17 Q. And as a result of your experience with the Kern
18 River, did you become familiar with the history of the
19 Kern River?

20 A. Yes.

21 Q. Have you provided some of that background
22 history in your testimony?

23 A. Yes, I have.

24 Q. Where -- is there an exhibit that encapsulates
25 that --

1 A. Yes.

2 Q. -- that history?

3 A. When I retired in December of 2003, I was
4 approached by a numerous people in the City of
5 Bakersfield, councilmen and such -- ex-city managers --
6 to put together a history, a chronological history
7 really, of how the water purchase was done, who was
8 involved with it, and was asked to put together a report,
9 which turned out to be this exhibit -- I believe you
10 have, Exhibit 1 - 2. It's called the Kern River Purchase
11 City of Bakersfield, California.

12 In that brochure it's an outline first of an
13 overall history of the Kern County Land Company and its
14 acquisition of Kern River water rights and properties in
15 the Kern County area at the turn of the century and
16 beyond, how that history led up to the acquisition by the
17 City of Bakersfield in 1976.

18 At which chapter two then takes into the account
19 how the City was able to acquire it through the bond
20 election and the public operation, and then the last
21 chapter is what we bought. In fact, it's what the City
22 of Bakersfield bought from Kern County Canal and Water
23 Company.

24 Q. And what was the understand of what the City
25 bought from the Tenneco and Kern County Canal and Water

1 Company?

2 A. The easiest way to say that is just to quickly
3 explain the units that were purchased by the City of
4 Bakersfield. Number one, they bought the Kern Island
5 Canal Company, which included the Ashe Domestic Water
6 Service Area, which also included with the Kern Island
7 Water Company, there were other canals with Kern Island
8 besides the Buena Vista, Stine, and Farmers. There was
9 the South Side canal system under the jurisdiction of the
10 public utility.

11 Number two, they purchased the Kern Canal
12 Irrigating Company which is an irrigation company located
13 about -- at that time -- about five miles northwest of
14 the City of Bakersfield, and it operated about a 50,000
15 acre service area and had its own water rights and
16 facilities.

17 Number three, the City purchased the Kern River
18 conduit which is a concrete-lined canal that extends from
19 Bakersfield downstream to the southerly side of the Kern
20 River junction with interstate Highway I-5. This canal
21 is about ten miles long. It's concrete, has a flow
22 capacity of 1100 CFS, and it's located very close to
23 Second Point of measurement at its terminals.

24 The fourth item that was acquired was the water
25 rights and the facilities of the Kern County Canal and

1 Water Company and other rights owned by Tenneco identify
2 as the Castro/Wilson/Calloway/Railroad water lands.

3 The fifth item was storage rights at Lake
4 Isabella which included 34 percent of all the
5 conservation storage space available in Isabella.

6 Number six, 2800 acres of land that was astride
7 the Kern River between the extension of Renfro Road,
8 which is locate just west of Bakersfield, all the way
9 down to Interstate Highway 5, and basically it's the
10 river and the floodplain extending on both sides of the
11 river, which is later turned into our groundwater
12 recharge area.

13 That summarizes essentially what was purchased
14 by the City.

15 Q. And your -- did your job duties change
16 significantly from the time you worked at Tenneco and
17 until the time you worked at Bakersfield?

18 A. Yes, I was hired as a hydrographer in 1969 to do
19 the records and the measurements of the canal systems and
20 the Kern River Canal for the period I worked for Tenneco.
21 And with the purchase by the City of Bakersfield, those
22 duties plus the operational duties of canal maintenance,
23 budgeting, oversight and forecasting, and the operation
24 of the Isabella daily operations, that was all part of
25 the package that came with the new job at the City of

1 Bakersfield, and at that time I became the water
2 superintendent.

3 Q. Now, there's been reference to record keeping in
4 your testimony as well as some of the discussion this
5 morning.

6 MR. PEARCE: Can you put up Exhibit 1-5?

7 MR. PEARCE: Q. Can you describe this record
8 that you've been discussing, which you discussed in your
9 testimony?

10 A. This I refer to as the purchase brochure in
11 the --

12 Q. I'm sorry. I meant the flow and diversion
13 record.

14 A. Yes, okay. The flow and diversion record. This
15 is a later version of the same record that's been -- been
16 around with us for some 120 years. This was the way the
17 Kern County Land Company established the operation and
18 the ownership of water within the First Point system.
19 That would be all of the water rights that were
20 originally adjudged on the Shaw Decree of 1900.

21 And this shows the accounting for the gross
22 diversion each day, the entitlement which was based on
23 the natural flow of the river each day, and then this
24 form stayed essentially the same as it is -- only
25 modified over the years -- to reflect what was happening

1 with the additional Isabella Reservoir operations in
2 1954, we had to reflect the storage ability and the
3 storage columns and the adjustment for the Kern River
4 conduit, which was the use of the Kern River Canal which
5 was an alternate way to deliver water to Second Point of
6 measurement according to Miller-Haggin requirements.

7 Q. Mr. Bogart, what are we looking at up there
8 exactly? What are these rights? What are these names
9 right here in the left-hand column? Where do these come
10 from?

11 A. Those are the First Point water rights,
12 essential outlined one by one in the Shaw Decree.

13 Q. And what is the numbers to the left of that?
14 What were those and where do they come from?

15 A. The first column is the one referred to as the
16 base entitlement. It is the entitlement assigned to that
17 right by the Shaw Decree judgment.

18 Q. That's stated in CFS?

19 A. Yes.

20 Q. That's a flow rate?

21 A. That is a rate of flow and that's -- for
22 instance, on the Kern Island that day had an initial
23 right of 300 CFS.

24 Q. How practically would you as the hydrographer
25 for Tenneco and Bakersfield, how would you fill out or

1 use this diversion record?

2 A. The starting point of the diversion records
3 since each and every day starts as a new day, would start
4 off with the natural flow of the river and the time of
5 the year. First you would look to see if you were either
6 in or out of the Miller-Haggin season which ran six
7 months of the year. Miller-Haggin ran March through
8 August.

9 Outside of the Miller-Haggin was the period of
10 September through February. Miller-Haggin being the
11 obligation of Kern River water to the Second Point of
12 measurement and to the Second Point of interest. And
13 that was during that six month spring and summer period.

14 The reason that made a difference, is other than
15 the Kern Island Canal, all the other canals had to
16 contribute to the losses to deliver the water to the
17 Second Point of measurement without -- without
18 diminishment.

19 So if the calculated entitlement to the Second
20 Point of measurement that day was 200 CFS, you had to
21 allow the loss water to get that water to Second Point of
22 measurement and make that delivery. All canals
23 contributed to that except for the Kern Island Canal.

24 Q. Now, when you record it, would this sheet record
25 actual diversions by the canal rights listed there?

1 A. Yes. After the entitlement was -- the base
2 entitlement was assigned to each canal based on the
3 natural flow that day and after their contribution to the
4 Second Point diverter under the Miller-Haggin, then that
5 water would be compared against the total amount of water
6 diverted by that canal that day, and if they had an
7 excess of entitlement beyond their demand that day, which
8 was surplus water, that would be released down to the
9 next junior holder.

10 Q. If they didn't have demand for water, they would
11 release it to the river?

12 A. That's correct.

13 Q. Did that system take place during your
14 employment with both Tenneco and the City?

15 A. Yes, it was a very consistent operation. It did
16 not change other than -- as I said earlier that when we
17 added the columns in for the affect of Isabella storage.

18 Q. This is a daily record that would be kept?

19 A. This is a daily record that was maintained
20 consistently since 1896.

21 Q. What was done with the daily record, were there
22 more detailed records prepared based on that?

23 A. The daily record was summarized into a monthly
24 record summarized both by CFS and acre-feet and then that
25 monthly record was then summarized into an annual report.

1 Q. And you discussed the concept of rights
2 releasing water. What did you mean by that? Can you
3 explain that in more detail?

4 A. To explain the release water you have to go back
5 in time go back prior to Isabella and look at what was
6 happening out of the canal systems. The first canal
7 diversion on the south side of the river was the Kern
8 Island Canal. Basically it was a -- if you go back in
9 history, you can find that the history of the river, the
10 old South Fork of the Kern River, in fact, was developed
11 and improved and turned into the original river more and
12 later the Kern Island Canal.

13 And that canal system really represents the old
14 alignment of the South Fork of the Kern River channel.
15 It had the paramount right of 300 CFS each and every day.
16 That was uncontested throughout history. There was never
17 a question about that first 300 on the river belonging to
18 the Kern Island.

19 The issue is if there was not a demand that day
20 or any given day for the full 300 CFS by the Kern Island
21 Canal, then the water it didn't use was released down to
22 the next junior right, and then that canal owner would
23 take his share of the water if he had any up to the
24 demand that he had that day until the flow of the river
25 was exhausted. And it was done that way each and every

1 day. It was a fill and go operation throughout the
2 entire period, and it is still done that way today.

3 Q. Now, you mentioned the entitlement or the Kern
4 Island entitlement of 300 CSF, is that something that is
5 available every day in your experience?

6 A. The base entitlement is the natural flow of the
7 river, but some days it is less than 300. And on days it
8 is less than 300, then the base entitlement of Kern
9 Island is what it is. It's the total flow of the river
10 up to the first 300 CSF.

11 Q. So if there's less than 300 CFS flowing on the
12 Kern River, the entitlement at the time would be less
13 than 300?

14 A. Correct.

15 Q. Then the released water, that's a function of
16 demand, so if the Kern Island didn't have demand for 300
17 CFS, it would release a portion of that water to the
18 river?

19 A. That is correct.

20 Q. Now, you're aware -- and you were in charge of
21 the water department during the litigation, you were
22 aware there were multiple findings of forfeiture in that
23 litigation; is that correct?

24 A. Yes.

25 Q. And are you aware that the Kern Island right is

1 one of the rights that was found forfeited partially?

2 A. Yes.

3 Q. In your experience, do you have an understanding
4 as to why the Kern Island right historically was
5 releasing water?

6 A. Over time the Kern Island has demonstrated that
7 it had water in surplus to it's demand.

8 Q. Why was that?

9 A. The Kern Island, really, when you set down to do
10 the record each and every day and you start with a blank
11 sheet, you look at the natural flow of the Kern River and
12 the one that starts the action or starts the process that
13 day, is the Kern Island Canal. It's the first right of
14 the river who decides what it's going to be. If it has a
15 demand for water, if it has a entitlement, it uses it.
16 If it had less demand than it has entitlement that day,
17 then the difference is released.

18 Over time, historically, there's always been
19 water surplus to the demand of the Kern Island Canal. If
20 you look at it on an annual basis.

21 Q. I guess my question is why was there less demand
22 for Kern Island compared to other canal rights
23 potentially?

24 A. The Kern Island system was never fully
25 developed.

1 Q. What do you mean?

2 A. Obviously, there was not a demand to match the
3 entitlement available to the Kern Island Canal.

4 Q. And if that released water would go to other
5 rights on the river, it would be actually used by the
6 rights?

7 A. It would go to the next junior right.

8 Q. Now, would it go to that other right through
9 some right or some entitlement, how would that work?

10 A. Now, you can see from the left column, the base
11 entitlement -- each canal company has an entitlement
12 assigned to it from the Shaw Decree. The next on the
13 list would be the Castro, and it's kind of a rough print,
14 but you can see the next 20 CFS on the river after the
15 first 300 belongs to the Castro water right. So if there
16 was a 20 CFS release from the Kern Island that day
17 because they had no demand for it, then the Castro could
18 take that water up to the full amount that it had a
19 demand for and within it's entitlement up to a maximum of
20 20 a day.

21 Q. Now, if a right did not have entitled on a given
22 day, could it still take the release water?

23 A. If there was no entitlement to the Castro for
24 the base entitlement, it could utilize the releases from
25 the Kern Island, yes.

1 Q. So the entitled -- strike that.

2 So their water would go where there's demand
3 irrespective of whether it had right to that entitlement,
4 correct?

5 A. Irrespective if that canal had a base
6 entitlement, correct.

7 Q. This was the way the system, the river operated
8 under the land company; is that correct?

9 A. Yes.

10 Q. As well as under the City?

11 A. Yes.

12 Q. Do you have an understanding as to why it was
13 that the land company and later the City would send
14 released water to other rights? What was the purpose of
15 the whole release?

16 A. To maintain order on the Kern River and make
17 sure water got to where it's -- where the demand was that
18 day based on a priority system on the water rights. In
19 other words, the Kern Island, Castro, Buena Vista, those
20 were the most senior canals on the river. They had the
21 first rights of the entitlement that day. And if there
22 was still entitlement available, you worked down the list
23 until you satisfied the demands on those canals.

24 Q. And I guess why was it important to the land
25 company to keep track of all of these diversions and

1 releases and the entitlements?

2 MR. MC MURTREY: I am going to object,
3 Mr. Baggett. I think we're getting into speculation.
4 The witness has testified he never worked for the land
5 company, only for Tenneco and/or the Kern County Canal
6 and Water Company. Why they did something, would be
7 beyond his knowledge.

8 MR. PEARCE: Q. I can rephrase that. In your
9 experience, why was it important when your employed by
10 the Kern County Canal and Water Company as well as the
11 City, to keep track of the entitlements, releases, and
12 diversions?

13 A. Just for clarification, the first year I worked
14 for Tenneco West, my checks were cut and signed by Kern
15 County Canal and Water Company, and I think it's
16 important to understand the Kern County Canal and Water
17 Company was the water operation arm of Kern County Land
18 Company.

19 Kern County Land Company was a very large
20 conglomerate of some 400,000 acres at one time back in
21 the 1890s. And they had cattle operations, water
22 operations. They had oil operations and development
23 branching ahead -- just a major part of Kern County
24 property at that time, but the KCC&W Company was always
25 the water arm of Kern County Land Company.

1 And when I was hired, I was hired and my checks
2 did come from Kern County Canal and Water Company. We
3 were in a transition. At the time I was hired in 1967,
4 the Kern County Land Company was bought by Tenneco, and
5 it took several years for the transition to go from the
6 land company over to the new operation under Tenneco.
7 And so the water people stayed under the umbrella of Kern
8 County Canal.

9 Q. Now, Mr. Bogart, just to -- I guess we're
10 running out of time. Let me finish the thought. Then
11 why was it important to keep the records of the
12 entitlements of releases, flow and diversion?

13 A. I was told, and I always understood, that KCL
14 and later Tenneco believed it was very important to keep
15 the detailed records of diversion and use of the water of
16 the Kern River in order to protect and preserve the Kern
17 River water rights and protect those rights from claims
18 by outsiders or other third parties.

19 For that reason, KCL and Tenneco maintained
20 detailed records of diversion and use of the river since
21 the 1800s. We still have those records today.

22 MR. PEARCE: We're out of time. Thank you very
23 much.

24 MR. BAGGETT: Next witness.

25 MR. PEARCE: Give me a moment. I need to get my

1 material. We're going to call Florn Core is our next
2 witness.

3 MR. BAGGETT: Off the record.

4 (Discussion was held off the record.)

5 MR. KUNEY: Our principal hydrology witness
6 Mr. Easton, came down yesterday with an illness. I spoke
7 to Mr. Pearce this morning and my proposal to you would
8 be to put Mr. Easton on first thing tomorrow morning. I
9 am not sure we would get to him today. In any event,
10 it's a situation if we could have a day that would be
11 very helpful to him. I don't think Mr. Pearce has an
12 objection to that, but I want to check with the hearing
13 officer to see if that was acceptable.

14 MR. BAGGETT: So it sounds like we will go to
15 where we get to today. We will see what tomorrow -- it
16 depends on how long this cross-examination this might
17 take. We will know by lunch.

18 MR. KUNEY: I just need to know whether I can
19 send him home. He is prepared to testify today if he has
20 to. He would be our last witness, in any event, so our
21 thought was if we put him on first thing tomorrow
22 morning, it wouldn't slow the down the proceedings.

23 MR. BAGGETT: Well, I guess optimistically we
24 can still go through cross of the other parties, other
25 than your own witness and just save one witness and one

1 close if necessary.

2 MR. O'BRIEN: Yes.

3 MR. BAGGETT: That would give an opportunity for
4 rebuttal tomorrow.

5
6 DIRECT EXAMINATION

7
8 BY MR. PEARCE:

9 Q. Mr. Florn Core, you provided testimony to us in
10 this proceeding?

11 A. Yes, I did.

12 Q. Is that testimony Exhibit 2-1 to this?

13 A. Yes, it is.

14 Q. You were sworn in this morning. Is the written
15 testimony truthful and accurate?

16 A. Yes, it is.

17 Q. What is your -- can you give us a description of
18 your educational and personal background?

19 A. Similar to Mr. Bogart, I was born and raised in
20 Bakersfield, went to local schools, and then graduated
21 from Cal State Bakersfield in 1974 with a degree in earth
22 sciences with a concentration in geology and hydrology.

23 Q. What is your current job title and duties?

24 A. I am the City's Water Resources Manager. My job
25 duties are varied, but for this proceeding, the

1 concentration I have is in the record keeping on the Kern
2 River, overseeing that, the measurement, the diversion,
3 compiling the orders, and making sure that the Kern canal
4 head gets their -- their water supply on a daily basis.

5 The City crews do that. And then the compiling
6 of the daily measurements of each and every drop of Kern
7 River water that goes through the First Point service
8 area and compiling that into daily record and compiling
9 that into monthly and also annual reports which is
10 publish on behalf the First Point interest.

11 Q. What is the City's relationship with the Kern
12 River?

13 A. Well, physically the Kern River runs through the
14 middle of the city. It is major water source for the
15 City by direct diversion, also by groundwater pumping
16 from the recharges the Kern River channels. It's one of
17 the most important sources of the water for the City of
18 Bakersfield, not only in water quantity but water
19 quality. The river channel is also the high point of
20 water levels that go through Bakersfield, so it's
21 important to maintain flows and channels.

22 Q. As Water Resources Manager, have you become
23 familiar with the water rights held by the City of
24 Bakersfield with regard to the Kern River?

25 A. Yes, I have.

1 Q. That's based on your administration of the Kern
2 River and your overseeing of the flow and diversion
3 record on the Kern River?

4 A. That is correct.

5 Q. What current water rights does the City have?

6 MR. KUNEY: Objection. Calls for a legal
7 conclusion.

8 MR. BAGGETT: Do you have a response? I would
9 overrule. I think you can answer to your experience as a
10 manager.

11 THE WITNESS: The water rights the City holds
12 are the rights that were purchased from Tenneco in 1976,
13 Tenneco West, which includes the rights listed on the
14 Shaw Decree under the Kern County Canal and Water
15 Company, and we administrate those rights of the Kern
16 River conduit and that's it.

17 MR. PEARCE: Q. And your -- earlier we saw Mr.
18 Bogart's testimony. We saw a flow and diversion record,
19 the one page of sheet --

20 Jeff, can you pull that up again?

21 MR. PIADE: 1.5?

22 MR. PEARCE: Q. Yes. This is the sheet that
23 you're familiar with, you worked with for the City of
24 Bakersfield?

25 A. Yes.

1 Q. This is Mr. Bogart's daily flow and diversion
2 sheet?

3 A. That's correct.

4 Q. Now, the rights listed here, does the City own
5 some of the rights?

6 A. That's the First Point flow rights.

7 Q. And the City owns some of these rights?

8 A. Yes, it does.

9 Q. Is there an easy way to describe which ones they
10 own without going through all of them?

11 A. The easiest is the Castro right, the Wilson
12 right, and then the conduit entitlement right. That's
13 the bulk of the rights.

14 Q. Does the City acquire other rights which it had
15 administered?

16 A. It has other rights that are currently under the
17 1952 Agreement with the North Kern Water Storage District
18 and North Kern rights and North Kern did not use those
19 rights.

20 Q. We talked about the First Point parties. That's
21 three entities; is that's correct?

22 A. Yes.

23 Q. What are the three entities that use the water
24 from the First Point?

25 A. Kern Delta Water District, Kern Water District,

1 and the City of Bakersfield.

2 Q. Is it fair to say that the City owns all the
3 water rights on the list other than the four rights that
4 are held by Kern Delta?

5 A. The four rights that Kern Delta owns are the
6 Kern Island, Stine, Farmers, and Buena Vista. The City
7 owns the rest.

8 Q. The City owns the rest. North Kern uses some of
9 those rights from time to time?

10 MR. KUNEY: Objection. Call for a legal
11 conclusion.

12 THE WITNESS: -- by contract.

13 MR. KUNEY: I made an objection.

14 MR. BAGGETT: It's hard to -- we're going to
15 have to have a better way to use the mikes. If you have
16 an objection come up to the mike. It's hard to -- a lot
17 of people can't hear it.

18 MR. KUNEY: Mr. Baggett, my objection is that
19 the witness is being asked to provide testimony in the
20 form of a legal conclusion about what water rights
21 Bakersfield may or may not hold, and then going a step
22 further, sort of a subcharacterization of how Bakersfield
23 holds certain rights, perhaps. But the North Kern Water
24 Storage District only has an option to use that water.
25 These are sorts of the legal characterizations, but

1 they're not an appropriate subject of witness testimony.

2 MR. PEARCE: He administered the record. He
3 records those diversion flows. He is the head of the
4 Bakersfield Water Department. He is qualified to talk
5 about what water rights the City holds. It's his
6 experience on the river and in administration of these
7 rights. It's not a legal conclusion.

8 MR. BAGGETT: The objection is noted. Overrule
9 it. The witness can answer to the extent to which you
10 rely on this information in managing the information.

11 MR. PEARCE: Q. Mr. Core, in addition to
12 certain water rights the City acquired, they acquired
13 some duties and responsibilities with the Kern River in
14 1976?

15 A. Yes.

16 Q. What are those duties and responsibilities?

17 A. Maintaining the record measurement, flow and
18 diversion records, compiling those records daily,
19 monthly, and annual reports, and also as I stated
20 earlier, the City --

21 MR. BAGGETT: Is your mike on?

22 THE WITNESS: The green light is on.

23 MR. BAGGETT: Okay.

24 THE WITNESS: The City is responsible for the
25 diversion to all canal headgates within the First Point

1 service area. In other words, we receive the order from
2 the districts. We take the compilation of the orders and
3 Isabella Reservoir water is released from Isabella
4 Reservoir to make sure each pump of the canal headgates
5 received the water they ordered.

6 MR. PEARCE: Q. And after which the
7 responsibilities of this is something that Kern Delta and
8 North Kern come to?

9 A. That's correct.

10 Q. And your testimony covers four general issues
11 and questions; is that correct?

12 A. Yes.

13 Q. Can you tell what those four issues and
14 questions are?

15 A. Well, one of the questions is, is there a change
16 of circumstances on the Kern River.

17 Q. What was your conclusion to in that regard?

18 A. Well, in going through what's called --

19 MR. KUNEY: I will object to that as a legal
20 conclusion as to change in circumstances. That's a
21 determined under the rules and regulations. Now we're
22 having him apply a legal conclusion. He can -- can
23 describe physical circumstances, but not the ultimate
24 conclusion as to whether or not it constitutes a change
25 in conditions and circumstances under the regulations.

1 MR. PEARCE: We're summarizing his testimony as
2 it's given. I mean we're either talking about forfeiture
3 -- I can say are you familiar with the forfeiture
4 judgment -- how did that -- what is that? How did it
5 affect --

6 MR. BAGGETT: I will sustain it. Rephrase.

7 MR. PEARCE: Q. You're aware that there's a
8 judgment of forfeiture on the Kern River, correct?

9 A. Yes.

10 Q. Can you describe that subject, again, based on
11 your experience as Water Resources Manager?

12 MR. KUNEY: Objection. Calls for a legal
13 conclusion.

14 MR BAGGETT: I will overrule. As the City's
15 Water Resources Manager you can answer.

16 THE WITNESS: I will also like to state I
17 administer the water rights in that column based on the
18 Shaw Decree. I've read the Shaw Decree. This same
19 principle applies to any judgment that may come along
20 within the Kern River. I need to look at it. I need to
21 decide whether to make a change in our water rights.

22 MR. BAGGETT: We already overruled. Rephrase
23 the question or restate your question.

24 MR. PEARCE: Q. You're familiar with the
25 judgment of forfeiture; is that correct?

1 A. Yes.

2 Q. Can you describe that briefly to the State
3 Board?

4 A. From what I read in the opinions, the forfeiture
5 occurs several months out of the year. Kern Island is
6 the primary source of the forfeited water in the months
7 of October, November, December, and January each year.
8 It was determined that those months there was a preserved
9 entitlement established on the Kern Island rights, for
10 instance, and the surplus water to that was available for
11 use.

12 Q. As a result of the forfeiture there's caps
13 placed on the Kern Delta rights?

14 A. Yes.

15 Q. Those right are listed on the daily diversion
16 sheet?

17 A. Yes, they are. Kern Island, Buena Vista --
18 primarily the Kern Island is the bulk of the forfeited
19 surplus water, but Buena, Vista Stine, Farmers.

20 Q. There's caps in place in certain months of the
21 year?

22 A. That's correct.

23 Q. These caps were not in place when you first
24 started working for Bakersfield?

25 A. That's correct.

1 Q. This is a change while you were there. This was
2 a significant change?

3 A. Huge change, I believe.

4 Q. What was the effect of that change?

5 A. The fact of that is -- has been proven there's
6 surplus water available off of those certain rights that
7 Kern Delta owns primarily the Kern Island Canal.

8 Q. If you could quantify the extend or the --

9 MR. KUNEY: I am going to object to that answer
10 and move to strike. He is now characterizing that effect
11 as surplus water subject to an appropriation, which is
12 the ultimate issue in this case. He can describe the
13 manner in which he operates, but to characterize that as
14 surplus water, is inappropriate.

15 MR. PEARCE: He is describing the operations of
16 the river and is about to testify how he views it as
17 Water Resources Manager and as the operator of the Kern
18 River.

19 MR. BAGGETT: I will allow it to stand. He
20 didn't know whether it's legally available. He just said
21 in terms of running the river there's surplus water from
22 his perspective. He's the manager under that ground and
23 that understanding. I will allow it.

24 MR. PEARCE: Q. Now, Mr. Core, you were asked
25 to quantify the extent and the amount of the water

1 forfeited by Kern Delta; is that correct?

2 A. Yes.

3 Q. Is that chart Exhibit 2-22 which is in your
4 testimony?

5 A. Yes.

6 Q. And this is something you personally worked on,
7 this chart?

8 A. Yes, it is.

9 Q. And how did you calculate the quantity of water
10 forfeited by Kern Delta in Exhibit 2-22?

11 A. I chose the period 1954 to 2008 simply because
12 1954 was the beginning of the operation of Isabella
13 Reservoir which effectively the water was diverted on the
14 Kern River, and through 2008, because we had a full one
15 year of record. I went back and placed the preserved
16 entitlement numbers of on each and every month that it
17 occurred for each canal right. For instance, if you look
18 and see the Kern Island showing a preserved entitlement
19 of 8,678 [sic] from January, and then October, November,
20 December. So I placed that number as the cap on
21 diversions. And from that the excess water -- the
22 surplus water that was generated based on actual
23 hydraulic conditions from 1954 to 2008, came up with --
24 for instance on the Kern Island a total of
25 40,500 acre-feet on average of water that was in excess

1 of preserved entitlement for the cap for that month for
2 that -- for that period -- I'm sorry, the forfeiture
3 period.

4 And then the same for each and every other of
5 the individual rights of -- with a total, I think, of
6 around 50,000 if the chart opened up. That's an annual
7 average with a range of between 15,000 and 720,000
8 acre-feet.

9 Q. Does this represent the quantity of water that
10 would have been forfeited from Kern Delta had the
11 diversion caps been in place since 1954?

12 A. Yes, it is.

13 Q. And just to reiterate this -- you -- you looked
14 at the entitlement and the actual entitlement, the
15 diversion cap and the differences in the quantities
16 forfeited?

17 A. Yes.

18 Q. Then you averaged that number to come up with
19 the 50,646?

20 A. Yes.

21 Q. And since the actual forfeiture judgment came
22 down from the court, how has Bakersfield reacted to that?
23 Have they changed the flow and diversion record?

24 A. We have not changed the flow and diversion
25 record because we're not sure what to do.

1 Q. What do you mean by that?

2 A. We're waiting for somebody to tell -- tell us
3 how to administer surplus water -- how to show it on the
4 record.

5 Q. So right now the forfeit water is not reflected
6 on the record?

7 A. That's correct.

8 Q. Would it be possible to depict or show the
9 forfeited water on the record?

10 A. Yes.

11 Q. And what's --

12 Flip to Exhibit 2-21.

13 MR. PIADE: 2-19?

14 MR. PEARCE: Q. Start with 2-19. This is a
15 blank flow and diversion record. Could you tell what is
16 depicted on the top right-hand side towards the top after
17 -- you're good Jeff -- -- after gross entitlement, what
18 have you done up here at the top part of the record?

19 A. The column entitled forfeit entitlement, the
20 forfeiture was simply moved, any forfeited water into
21 that column. The -- the gross entitlement would have a
22 cap on those particular months that have the forfeiture.
23 And the water, once they reached those caps, any
24 additional water would be moved to forfeited entitlement
25 column.

1 Q. So if you're talk about the Kern Island right,
2 once they hit their diversion cap would show -- assuming
3 there was sufficient flow in the river -- it would show
4 the 300 CFS entitlement under the forfeiture?

5 A. That's correct. An example would be the month
6 of December. The Kern Island cap is 2,050 acre-feet. If
7 there happens to be a flow of 300 cubic feet on the
8 river, after the third day or so, they reached their cap.
9 Any additional diversion from the daily record would have
10 to move the water over to the forfeited water column.

11 Q. And these are flow and diversion records, so if
12 they presumably show diversion of water at some point you
13 could show diversion of that 300 CFS?

14 A. That's correct.

15 Q. And you haven't done that yet?

16 A. I am not sure where to put it.

17 Q. You don't know who owns it, right?

18 A. That's correct.

19 Q. And you're waiting for the State Board to tell
20 us that?

21 A. Absolutely.

22 Q. Now, the flow and diversion records have been
23 described as the First Point flow and diversion records.
24 Did they -- there's also been discussions about Second
25 Point. Do these records show diversion of water by the

1 Second Point interest?

2 A. It does not.

3 Q. Who are the Second Point interests?

4 A. The Second Point interest is currently with the
5 Buena Vista Water Storage District.

6 Q. What about other interests that are there in
7 addition to Second Point on the Kern River?

8 A. Yes, what's called the lower river right --
9 Hacienda river right.

10 Q. Who holds that right?

11 A. Kern County Water Agency.

12 Q. Are those entitlements listed on the flow and
13 diversion sheet?

14 A. They are not.

15 Q. I was going through the four questions. I asked
16 you to look at the first one. Are there changed
17 circumstances, after -- what was the second question?

18 A. There is surplus water.

19 Q. And that in your estimation the surplus water is
20 forfeited water that can be listed on the flow and
21 diversion record?

22 A. In my estimation.

23 Q. Third question which was what?

24 A. What's the amount of water?

25 Q. The amount and the extent of the surplus water.

1 A. Yes.

2 Q. That's the 50,000 number?

3 A. The range of 15 to 120,000.

4 Q. Now, you indicated you have not changed the
5 record. And the City keeps this record, right? We
6 won't. This is the City's record, the City maintains the
7 records, the First Point record?

8 A. That is correct. That obligation we picked up
9 through the Kern County Canal and Water Company.

10 Q. And if the State Board decided not to act in
11 status of the river flow, based on your experience of the
12 river, what is going to happen to that forfeited water?

13 A. I'm not sure. It would be based on my
14 experience. Somebody would sue due to the uncertainty
15 and chaos. I will call it that.

16 MR. PEARCE: That's all I have. Thank you.

17 MR. BAGGETT: Take your last witness.

18 MR. PEARCE: Can I request a very brief break?
19 Our next and last witness is Mr. Schwarz. Given your
20 ruling this morning, I want to make sure we're not going
21 into any areas which --

22 MR. BAGGETT: Very good. Take a ten minute
23 recess and we will come back.

24 (Recess taken at 10:37 a.m.)

25 MR. BAGGETT: Back on the record.

1 MR. PEARCE: Thank you, Mr. Baggett. City of
2 Bakersfield calls it's next witness Ken Schwarz, Ph.D.
3 and Mr. Schwarz is an expert, and I think he is going to
4 go through his testimony without -- hopefully without a
5 lot of prompting from me.

6 MR. BAGGETT: Without a lot of objections.

7

8 DIRECT EXAMINATION

9

10 BY MR. PEARCE:

11 MR. SCHWARZ: Thank you. With that I've
12 prepared a PowerPoint presentation, and I believe you all
13 have that pulled up on the monitor. I will be showing up
14 over the larger screen. With that, by way of
15 introduction, really what I was called here to do on
16 behalf of the City of Bakersfield is to provide a
17 description of the environmental setting of the Kern
18 River, historical conditions and in addition to the --
19 actual describe what we believe is a the basis for the
20 change in circumstances.

21 And I think there were a number of objections to
22 my testimony. If that comes up, I will certainly won't
23 seek to involve anything here that would be beyond the
24 scope of the hearing. I will try to avoid that. Thank
25 you.

1 My own professional experience is I've a Ph.D
2 advanced degrees. I studied geomorphology which is the
3 science of landforms, and hydrology which involves how
4 moving water affects landforms and focused on river flow.
5 Sixteen years as a professional consultant. I
6 specialized in river, stream flow, sediment, and
7 calibration hydrology.

8 I've worked throughout California on many rivers
9 from the arid south to more humid temperate north. I
10 have worked with seven out of the nine Regional Water
11 Quality Control Boards. I worked on Clean Water Act 401
12 certification, waste discharge requirements, MPS permits,
13 storm water quality management plans, currently working
14 together with the State Board on developing preparing for
15 guidelines, also working with the State Board in
16 combination with the Department of Fish and Game grant
17 program.

18 A few years ago I founded my own firm Horizon
19 Water and Environment with the goal or vision of creating
20 a firm with specialization in a balance of water
21 resources management while also protecting natural
22 resources.

23 Let's see. I'm trying to click here. The --
24 the central purpose of my testimony is to really describe
25 in a hydrologic context the environmental setting of the

1 Kern River to build a basis to understand the changing
2 conditions prior to and following the 2007 forfeiture
3 judgment.

4 Next slide please. There are additional
5 objectives in my testimony -- written testimony -- I
6 won't will go through all of these today in the oral
7 portion. But I will touch on describing the Kern
8 groundwater basis as it relates to the river. Recharge
9 of the Kern River is very important. I will provide a
10 summary and description of the forfeited flows which we
11 build on what we just heard. I would like to acknowledge
12 that there's statewide directives and guidance on the
13 importance of instream flows which identifies the
14 beneficial uses, functions, and values enabling forfeited
15 discharge to remain part of the flows of the Kern River.

16 I would like to describe the City of Bakersfield
17 currently in their use of municipal water and implements
18 wise water management and recycling programs, and finally
19 provide a conclusion regarding the status of these flows.
20 I might as well jump to the conclusions and not -- I will
21 come back to these general -- more or less follow a
22 logical sequence.

23 I believe, one, the forfeited Kern River flows
24 provide an important and valuable water resource. The
25 availability of the forfeited flows reflects a

1 fundamental change in circumstances in the environment --

2 MR. KUNEY: Objection, Mr. Baggett. These are
3 legal conclusions in contravention of your earlier
4 instream flows or talk about public trust or similar
5 matters, and, frankly, the prior slide which listed all
6 the bullet points, every single one of those was in
7 contravention of your order.

8 MR. BAGGETT: I would argue that a few of them
9 are. I think we made it pretty clear, and I will make it
10 clear again, that the issue of end-stream flows is not
11 before this committee. I think to the extend that the
12 witness wants to explain how the system operates or the
13 physical setting, while that might not be directly
14 relevant, I think it would be useful information at least
15 for myself and the hearing team. And, therefore, we can
16 allow that in with the understanding that it's not
17 evidence. It's just background information on the
18 physical setting of the river. How does the river flow.

19 That is useful background information for those
20 of us who don't live in Bakersfield and see it every day,
21 but that's what it would be limited to in terms of the
22 use by the Board and the orders.

23 So I don't know where to begin here. I would
24 sustain the objection. I don't know if, counsel, do you
25 have any --

1 MR. PEARCE: We want to follow order and present
2 only relevant evidence. On the other hand, I'm not sure
3 -- he can talk about environmental studies. My only
4 concern is that the North Kern parties are going to
5 provide testimony as to what is happening or what should
6 happen to the forfeited water, and their entire case is
7 premised on that.

8 It's going to be taken out of the river by these
9 vague and unknown entitlements, and we asked Mr. Schwarz
10 a long time ago to look at forfeited water and what the
11 impact of that 50,000 acre-feet of forfeited water -- if
12 it's not taken out of the river. And I know he talks
13 about the benefits of end-stream flows, but, for example,
14 if we asked him is that 50,000 acre-feet of water really
15 going to make a difference in the end flow, and so how far
16 is that going to go down the river.

17 MR. BAGGETT: If this Board finds there is
18 additional water, that will be an incredibly relevant,
19 relevant information which I think we would welcome into
20 the record. But at this point, just like we're not going
21 to rule whether they have pre-fourteen rights, that's not
22 before this Board's purview. You can fight that one out
23 in court. So I think we will -- the other parties will
24 be under the same constraints.

25 I don't expect them to come here and present

1 testimony about irrelevant issues that aren't relevant to
2 us making a determination whether it's excess water, but
3 you're talking about the use. Does this have a water
4 right. Is this a public trust right.

5 This is something that the Board is not
6 determining, and that won't be determined in this
7 proceeding. Whether Bakersfield is the gold star of
8 water conservation, really isn't relevant to this
9 proceeding either. If that's one of the goals, that's
10 not -- that's not what we're here to determine.

11 MR. PEARCE: Why don't we stick to the
12 environmental study.

13 MR. SCHWARZ: I will pursue carefully. If
14 people will let me know if I go astray. The outline of
15 the system more or less follows this. As I've heard just
16 now from you, really I will stay focused on the
17 environmental setting.

18 I am going to show you pictures of the river to
19 give you a sense of what the river looks like. Let's
20 start with the watershed itself. It's 2,074 square miles
21 to Lake Isabella. You can see the outline of the
22 Southern Kern River watershed here. What's very
23 interesting is you can pick up on the very inset map here
24 down below is Kern River watershed and here's the lower
25 Kern River coming out of the canyon down it to the cap

1 above the Lake Isabella.

2 What's interesting is the northern part of the
3 San Joaquin system here it's an interior draining system
4 and pretty much going to an interior basin and that will
5 become important. The upper watershed is dominated by
6 the Sierra Nevada. It's two primary tributaries that
7 surround this -- this large watershed, and it's principal
8 source area for runoff and flows that are delivered to
9 the lower river. That's what we are here to talk about.

10 This table is probably hard to read, so let me
11 summarize the key points. What I am trying to show here
12 is last a lot of climatic variability here across the
13 state of California, particularly as you move south in
14 the southern Sierra Nevada. But what's important here is
15 that there's highly variable monthly and annual
16 precipitation as well as the storage capacity of Lake
17 Isabella moderates much of the runoff there's still a lot
18 of variability. So we've in terms of precipitation we've
19 had a maximum about little over 22 inches at Lake
20 Isabella, minimum -- that was the 1982-1983 El Niño year
21 -- if we got that this year, that would be terrific -- At
22 minimum, an annual average of about 3.8 inches back in
23 1958, with an average annual of about 11.3 inches.

24 Now, an important consideration for hydrology is
25 the watershed and the Kern River is really the role of

1 snowpack. It is similar to many -- most of the Sierra
2 Nevada head watersheds. I would say particularly in the
3 southern Sierras areas it's very relevant, very important
4 because the kind of in terms of supply water, upper head
5 water and the Kern River water is quite severe.

6 The average water content here is shown in this
7 table, and that's important because we're talking about
8 snowpack. I just told you that kind of the average
9 annual precipitation is about 11 inches. But once you're
10 talking about the water content of the snowpack, you see
11 that the numbers go up, and that really is the reservoir
12 is the snowpack here. It's also -- it's important in
13 terms of understanding the timing of the seasonality of
14 the flows. Peak flows of the Kern River really are
15 coming down through the later spring or summer in late
16 May or June.

17 We're going to take just a moment on that.
18 That's important to keep in mind as the snow is melting.
19 Another important aspect of the headwater watershed is
20 that the pristine quality of the water quality of these
21 flows here. And you can see on the map and see the water
22 is coming from, again, this is a varied terrain forest
23 lands and etcetera with not a lot of development. That's
24 the upper watershed. The lower watershed is an
25 interesting system in that the kind coming out of the

1 Kern River canyon, travels across Bakersfield and Kern
2 River, and historically the river kind of splayed out in
3 this alluvial fan system to be distributed to the
4 channels.

5 What's important here is that, again, this is an
6 interior draining system historically which main arm of
7 the river carried the river varied from year to year.
8 And prior to flood control works, and prior to Lake
9 Isabella up stream, and the ultimate terminus of the
10 flows would have arrived to Buena Vista Lake or Kern Lake
11 or even to the Tulare Lake to the north. Substantially
12 directionally the flows would vary year to year as well
13 as -- and this is probably relevant to today is the
14 longitudinal direction and how far actually the flows
15 came down year to year kind of like the rain fall or
16 snowpack, etcetera.

17 We're fortunate with the Kern River in that we
18 have a long record, and that's really a good thing here.
19 Just this summary of flow, what we're looking at across
20 here are mean monthly flows. In the top row -- and if
21 you kind of take your eye from January, February, March,
22 April, May, June, July -- these are in acre-feet -- what
23 you can see are the peak flows in May and June.

24 Again, that's the role of the snowpack melting
25 off there. It starts to decrease in July until August

1 and then kind of gets to the annual low points there in
2 September and October and building back up in November,
3 December. That's the mean monthly flow in acre-feet, and
4 then below that second foot days, that would be the
5 average CFS over the course of the month.

6 There's a lot of information here, lots of
7 useful information. And I don't have time, but I think
8 it paints the picture of the general seasonality of
9 flows.

10 Maps are important to understand the area we're
11 talking about. Over the course of development in the
12 19th century and the 20th century, and all the complexity
13 of water rights that we're discussing today -- pretty
14 complex system of canals and those are shown on the map
15 here the system of the canals that we've been talking
16 about that we will come back to this map in just a
17 moment.

18 Kern River passing through the center of town.
19 Here's the summary of flows from 2008 measured in
20 acre-feet. The first row there is the First Point of
21 measurement. We have about 455,874 acre-feet. The
22 column to the right is just offering that flow -- volume
23 of flow as a percentage, 100 percent of the First Point.

24 The subsequent rows kind of look at different
25 diversions going into the canals and the relevant

1 percentage of that flow of First Point. So to illustrate
2 that we will come back to the map here, and so we will
3 have for 2008 this would have been First Point at 100
4 percent of the flow here as we worked down this we're
5 looking at 31 percent of the flow into the Beardsley
6 Canal, Eastside Canal 3.4 percent, Kern Island Canal 32
7 percent -- about a third of the flow, Calloway Canal is
8 6.1 percent, Stine Canal little over 3 percent,
9 Arvin-Edison Canal there 1.6 percent, Buena Vista Canal
10 4.6 percent.

11 Ultimately at Second Point of discharge you will
12 have 12 percent of that original 100 percent remaining
13 available at Second Point. There's other seepage losses
14 in some other areas of those going in here, so that won't
15 exactly add up on the spread sheet, but that --
16 eventually that will add up to the 100 percent. There
17 really is no way to portray that.

18 Now, what I am going to do is I will show you
19 some pictures what this looks like. Actually a couple of
20 graphs before the pictures. This is the summary
21 statement we heard a little bit about operations on the
22 Kern River prior to the City of Bakersfield purchasing of
23 the Tenneco West operations in 1975-76. This is the
24 longitudinal turnabout on the river. It shows you
25 locations through Bakersfield, Chester Avenue, Manor

1 Street, Freeway 99, Coffee Road, Stockdale Highway down
2 stream. And then the graphs below are really showing you
3 water flowing in the river according to those locations
4 on the -- on the profile during different runoff kind of
5 years.

6 Let's look back through the 100 percent of
7 normal, that would be a kind of average year so to speak.
8 And what we see is that in an average year flow would
9 have reached Manor Street in May, June, July, and August.
10 Again, this is average year during the period of 1890 to
11 1975. In a wet year, you would have flow throughout the
12 year, flow at Chester kind of starting in the late
13 spring/early summer through the summer. Some flow
14 getting to the freeway, and little -- little bit of the
15 Stockdale and dryer years nothing really happening
16 through the central City of Bakersfield.

17 Our -- this is representative of a drier
18 situation that would have been historically prior to all
19 the diversions. This chart presents kind of conditions
20 following the purchase of these water rights by the City
21 of Bakersfield. What we are seeing in each box there is
22 water conditions.

23 So under the 100 percent of normal runoff
24 condition now we're having runoff in Manor Street
25 throughout the year, runoff arriving instream flow of

1 Chester throughout a good portion of the year and taking
2 it down to Stockdale Highway, but a wetter condition
3 under the City's management.

4 This chart does also recognize there's also the
5 important state water during this period as well. The
6 record here ends at 1980-88 which was produced for the
7 river parkway VIR at that time, but our understanding is
8 that from 1988 to the current time, this is more or less
9 reflects conditions. Although, we might change it if
10 we've had climatic conditions. If you've had a
11 particularly dry year, you may change the amount of water
12 delivered by the State, but this is -- again, things
13 might change it -- but this is a general schematic to
14 describe the conditions.

15 Now, we will look at some pictures. First
16 Point, you've heard a lot about First Point this is the
17 First Point of measurement here. You're at the base of
18 the Kern River canyon here. You're upstream from the
19 heart of Bakersfield. You're looking at south here kind
20 of getting into the base of the foothills there, alluvial
21 bluff. This is a concrete weir. It's a good solid
22 measurement cross section here. We measured 508 CFS on
23 September 30th on the river there. It's about 80 feet
24 wide there, probably flow two to three feet deep that
25 day, some places a little deeper and some places a little

1 shallower. Flow on that picture is probably about two to
2 three feet per second on average, until you get to deeper
3 water a little bit in the distance there, maybe three or
4 four feet per second. The flow rate overall CFS was 508
5 CFS on that date just to give you a feel of what the
6 river looks like.

7 Here's about a mile downstream at First Point.
8 What we're seeing here is a good cross section of the
9 Kern River Channel here that flows into the channel here
10 supports a riparian corridor and a variety of instream
11 geomorphic conditions including a bars, and swales, and
12 back channels, with diffuse flow conditions with eddies
13 and riffles and bars and all sorts of complex features
14 that you would find in a river with flow.

15 Now, we're a little bit further downstream.
16 We're at the first -- really entrance to Beardsley Canal.
17 So you're looking at gates that's right along the Kern
18 River. At the right is the entrance to Beardsley Canal,
19 and you're seeing really one of the first gated ponding
20 of the Kern River. There are some physical changes right
21 there in the water behind it to provide access for the
22 canal.

23 Further downstream in the main arm of the Kern
24 River now at Manor Street looking up stream. You have
25 river ponding here behind the gates and a lot of stagnant

1 flow, not a lot of riparian vegetation here that can
2 provide shaded to shade the channel so there's not an
3 abundance of shading and a lot of water primrose growing
4 here to give you stagnant water.

5 We're now looking at downstream at Riverview
6 Park. And you can actually see in the distance some of
7 the upper watershed in the Sierra Nevada. They have
8 fishing and, again, this ponded water behind gates on the
9 Kern River and two other canals. We will get to those in
10 just a second here.

11 Here's the entrance to the Calloway Canal, very
12 similar location to the previous picture.

13 And that's looking downstream into the Calloway
14 Canal.

15 Here's looking down into the entrance of the
16 Kern River at the Riverview Park. And in the distance
17 the entrance gateway to the Carrier Canal seen in the
18 distance over there.

19 This is now the Carrier Canal downstream of the
20 four weirs diversion.

21 And now we're looking at the main arm of the
22 Kern River just another mile or so, less than a mile
23 perhaps downstream at the Highway 204 crossing. With the
24 diversion to two other canals up stream, the river now
25 has no surface flow.

1 This is now the Highway 58 crossing. Again, no
2 surface flow in the river, channel bed is dry and
3 homogenous.

4 Highway 99 crossing, similar conditions. There
5 are changes in sediment texture in the river as you go
6 downstream some of the courser materials have been
7 trapped at this crossing, but in general in river becomes
8 progressively a sandier system as you move downstream.

9 Here we're in the heart of Bakersfield looking
10 down from Highway 99 at the riverbed. And little further
11 downstream at Truxton Avenue again a sand-dominated dry
12 riverbed, no surface flow.

13 Further downstream towards Coffee Road.

14 Now, the Stockdale Highway crossing.

15 And finally here at the McClung weir this is
16 within the recharge facility as you move down to the
17 Second Point of measurement. These are areas where when
18 there is flow here, usually related to storm flow events,
19 it will kind of sweep into this area and be available for
20 recharge, which is an important function.

21 Now, a few words just on -- I only have two
22 minutes left here -- so if you were to speak on the
23 importance of groundwater -- talked a lot about surface
24 flow here, but of groundwater is really very much related
25 to the Kern River and the Kern River really being the

1 primary recharge vehicle here. You can see that.

2 What happens over time with a lot of extractions
3 and -- oops, here the computer, let's restart it later.
4 You see the water level in the groundwater levels
5 dropping here. This record goes back between 1940 and
6 1975. What is kind of interesting here and relevant is
7 the mounding under the Kern River. You kind of see this
8 mounding effect where groundwater is kind of elevated
9 below the river and that's where the role of recharge
10 comes related to the river through the elevating
11 groundwater.

12 What we're looking at the record here in the
13 last couple of years we see the continued decline in
14 groundwater between 2006, 2007, 2008 are shown on these
15 maps in the salmon colored areas, are areas where the
16 groundwater level has dropped over ten feet over the
17 previous year.

18 In terms of water quality an important aspect
19 here is that previous mounding condition that's shown
20 kind of here -- kind -- kind of mounding beneath the Kern
21 River. And now, we're in a situation where that mounding
22 is actually dropped and we actually have a drop in
23 groundwater elevation below the river, which has changed
24 the gradient which means the groundwater gradient is not
25 trending towards the river which has some negative

1 affects to water quality.

2 Yeah, this is --

3 MR. PEARCE: Can you go back to slide 3-8 the
4 slide showing the canals, the metro-Bakersfield canals
5 and show on the map what we're looking to show where
6 these canals are and where the dry river conditions
7 begin?

8 MR. SCHWARZ: Sure. Let me back up to that.

9 Here we are. Okay. So here is First Point that
10 was the picture of the crossing. The next picture I
11 showed you had some of this kind of riparian conditions
12 in the channels right in here. Then the first dam, I
13 showed you was the Beardsley Canal right here. That's
14 the flow coming down that way.

15 The next location I think in my photo was the
16 Manor and -- or, no -- yeah, the Manor right about here.
17 Then we got to Riverview Park where we have gates for the
18 Calloway Canal here and the Carrier Canal coming out
19 here. And what the really relates to -- by the time you
20 get downstream, this is -- the photo where it looked dry,
21 basically, that's right in here, just down from the canal
22 diversions. And then I progressively kind of showed you
23 the Highway 99 crossing and kind of worked down the
24 system to a dry riverbed.

25 So the shading here which is shown in blue,

1 that's really an indication of recharge. You're not
2 looking at the flow. It's dry, dry, dry all the way down
3 through the recharge facility. Does that --

4 MR. PEARCE: Q. Perfect. Just, again, the
5 river -- the dry conditions, start exactly where on the
6 map?

7 A. Right about here.

8 Q. So everything we saw water on the river was
9 above there, and everything dry was below there?

10 A. Correct.

11 Seems like I am out of time.

12 MR. PEARCE: I think that concludes it. Thank
13 you.

14 MR. BAGGETT: Thank you. Do you want to have
15 your witnesses available? I think it's easier if we have
16 the panel of witnesses to allow cross.

17 (A discussion was held off the record.)

18 MR. PEARCE: Mr. Baggett, before we start I just
19 have a clarification on the procedure. We're on the
20 record. And on this panel there are five or six lawyers
21 against us, I think -- I guess I am a little bit concern
22 about if we're going to have an attacking approach or
23 some sort of division or structure so we're not hit with
24 six different lawyers.

25 MR. MC MURTREY: If I may --

1 MR. BAGGETT: They're all parties, so I would
2 allow them to hopefully they took our suggestion and
3 we're expeditious in divided it up, so we're not hearing
4 the same questions five times.

5 MR. MC MURTREY: I will give a rundown. I plan
6 on starting with Mr. Bogart. I know Mr. Kuney has some
7 questions for Mr. Core. Then I believe another attorney
8 will be questioning Mr. Schwarz.

9 MR. PEARCE: Very good. That's fine.

10 MR. MC MURTREY: If I may, Gene McMurtrey for
11 the record.

12 MR. BAGGETT: Proceed.

13

14 CROSS-EXAMINATION

15

16 BY MR. MC MURTREY:

17 Q. Mr. Bogart, I am going to make it know that we
18 have known each other for many, many years. For the
19 record I will introduce myself. I am Gene Mc Murtrey. I
20 am going to examine you on behalf of the Buena Vista
21 Water Board District. And I -- there's just a few
22 matters that I would like to clarify with respect to your
23 written testimony.

24 First of all, the issue came up this morning as
25 to when you became employed by Tenneco. It's my

1 understanding is that you were first employed by Tenneco
2 or Kern County Canal and Water Company in 1969; is that
3 correct?

4 A. That's correct. I was hired April of 1969.

5 Q. And okay. And Tenneco had actually taken over
6 from the Kern County Land Company all the assets of the
7 river in 1967; is that correct?

8 A. That's correct.

9 Q. So it's accurate that you did not, in fact, ever
10 work for the Kern County Land Company?

11 A. No. Who I worked for was the Kern County Canal
12 and Water Company, which was still an arm of Tenneco.
13 They kept it in place for a couple of years.

14 Q. Right. They were -- the Kern County Canal and
15 Water Company was a subsidiary of Tenneco?

16 A. Yes.

17 Q. But not the land company at the time that you
18 became employed; is that accurate?

19 A. The Kern County Canal and Water Company was
20 always the operating arm of the Kern County Land Company
21 and when Tenneco bought them, they kept KCC and W in
22 place for a while.

23 Q. They being?

24 A. Being Tenneco.

25 Q. So you never got a paycheck from the Kern County

1 Land Company?

2 A. No, it was Kern County Canal and Water Company.

3 Q. Fine. With respect to historic operations on
4 the Kern River, I believe you testified that -- that
5 through your 35 years of employment with Tenneco and the
6 City of Bakersfield you become knowledgeable about the
7 diversion and use of water on the Kern River?

8 A. Yes.

9 Q. About also about the operations and the record
10 keeping both presently and historically?

11 A. Yes.

12 Q. And also about the history and background of the
13 river; is that correct?

14 A. Yes.

15 Q. I believe you also indicated in your written
16 testimony that based on your knowledge and expertise by
17 the 1870s, substantially all of the flow of the Kern
18 River had been applied to various uses; is that right?

19 A. Yes. If I can make just a quick reference to
20 the 1877 map that we seen on the screen. That is an
21 early representation of where the water was going at that
22 time.

23 Q. Right. And virtually all the water that Kern
24 River was being put to some beneficial use even in the
25 1870s; is that right?

1 A. That's correct.

2 Q. It's still the same today is it not?

3 A. That's correct.

4 Q. In your written testimony you referred to the
5 law of the river?

6 A. Yes.

7 Q. That term ring a bell?

8 A. Yes.

9 Q. I believe you described the law of the river as
10 an accumulation of agreements, historic practices,
11 customs, traditions, and record keeping functions
12 involving and surrounding the operation of the river; is
13 that right?

14 A. Yes.

15 Q. Based on your knowledge and expertise, is it
16 accurate that the Kern River has been operated in
17 accordance with this law of the river since the City of
18 Bakersfield acquired its water rights in 1976?

19 A. Yes.

20 Q. Is it accurate that the City -- that the Kern
21 River was operated in accordance with the law of the
22 river for as long as they've kept records of the river
23 from the 1800s?

24 A. Yes, that's correct.

25 Q. Is the Miller-Haggin Agreement of 1888 a part of

1 this law of the river?

2 A. Yes.

3 Q. Is it accurate that the Miller-Haggin Agreement
4 of 1888 basically divides the river between First Point
5 diverters and Second Point diverters?

6 A. Correct.

7 Q. Has that agreement been amended over time?

8 A. Yes.

9 Q. It was amended in 1955?

10 A. Yes.

11 Q. Did that amendment result in an adjustment of
12 some kind between -- in the manner in which water was
13 allocated between First Point diversion and Second Point
14 diversion?

15 A. What it did was build in the operations of
16 Isabella Reservoir, how it affected the water rights.

17 Q. You mentioned there was a Miller-Haggin season
18 and a non-Miller-Haggin season?

19 A. Yes.

20 Q. Under the Miller-Haggin Agreement of 1888, is it
21 accurate that the Second Point diverters received a
22 portion of the river, one-third of the river, during the
23 Miller-Haggin season?

24 A. Yes.

25 Q. And they did not receive a portion of the river

1 during the non-Miller-Haggin season?

2 A. That's correct.

3 Q. But in 1955 that amendment allocated some
4 portion of the river to Second Point diverters even in
5 the non-Miller-Haggin season; is that correct?

6 A. Yes.

7 Q. Is the Kern River still today divided between
8 First Point and Second Point diverters in accordance with
9 the Miller-Haggin Agreement as amended?

10 A. Is it still provided today?

11 Q. Yes.

12 A. Yes.

13 Q. Are you familiar with the Shaw Decree of 1900?

14 A. Yes.

15 Q. Is it part of the law of the river?

16 A. Yes, for the First Point interest.

17 Q. That was my next question. Is it accurate that
18 the Shaw Decree represented an adjudication of the rights
19 among the First Point entities?

20 A. That is correct.

21 Q. And did it establish certain entitlements and
22 priorities for those First Point entities?

23 A. Yes.

24 Q. And those first -- entitlements, I believe, are
25 reflected in the flow and diversion records of which you

1 referred to today?

2 A. Yes.

3 Q. Are those entitlements and those priorities
4 still in use today?

5 A. Yes.

6 Q. Have they been recognized and utilized for
7 dividing water among First Point entities since 1900?

8 A. The allocation of the distribution of water has
9 been done constantly since 1890s using the distribution
10 format that was shown on the screen.

11 Q. I will come back to that. This allocation
12 methodology hasn't changed since 1900?

13 A. That's correct.

14 Q. Is record keeping part of the law of the river?

15 A. Record keeping keeps track of the law of the
16 river. How is that?

17 Q. Is it accurate that the Kern River interests
18 have maintained detailed records of flow and diversion of
19 the Kern River?

20 A. Kern County Canal and Water Company has
21 maintained those detailed records, yes.

22 Q. At the expense of the Kern River interests,
23 correct?

24 A. At the expense?

25 Q. The bills to do the work are paid by the Kern

1 River interests?

2 A. There are cost-sharing agreements that came into
3 place after 1976.

4 Q. Right.

5 A. We had -- within the First Point system, we had
6 a system we called clearing accounts wherein we all
7 shared different levels of ownership on different
8 structures, and there were different costs associated
9 with that and the record keeping.

10 Q. But the physical work of the record keeping was
11 done by the Kern County Canal and Water Company?

12 A. Yes.

13 Q. And the City of Bakersfield has succeeded to
14 that role?

15 A. Yes. In fact, that's what one of the entities
16 bought by the City of Bakersfield was the Kern County
17 Canal and Water Company with that record keeping
18 function.

19 Q. And these records have been maintained since the
20 1890s; is that correct?

21 A. Yes.

22 Q. Are they are entitled daily records of diversion
23 and use --

24 A. Yes.

25 Q. -- of water? I believe you testified they've

1 been kept in basically the same format?

2 A. Yes, modified slightly over the years and
3 adapted when the computers finally came in.

4 Q. And is its accuracy important?

5 A. Yes.

6 Q. So they're accurate as they can possibly be?

7 A. Yes.

8 Q. Did -- in your opinion, based on your expertise,
9 do they accurately reflect the diversion and use of Kern
10 River water by the various First Point entities?

11 A. Yes.

12 Q. Do they reflect the diversion and use of water
13 by Second Point diverters?

14 A. Only as it relates to the Miller-Haggin
15 Agreement and the deliveries at Second Point.

16 Q. There is a line item on the flow and diversion
17 record for the allocation of the entitlement to the
18 Second Point diverters?

19 A. Yes, that's at the top of the sheet where -- if
20 you're in Miller-Haggin season, and in fact some First
21 Point canals have to contribute to that losses on the
22 river to Second Point of measure, March through August.

23 Q. Just to clarify that. Let's go to your
24 Exhibit 1-5. Do you see in the upper right under the
25 date line there's a space for insertion of information

1 regarding K.C.L. Co. entitlement at Second Point. What
2 is that?

3 A. That's Kern County Land Company entitlement at
4 Second Point of measurement.

5 Q. Part of the Second Point diverters rights?

6 A. No, K.C.L. entitlement at Second Point was a
7 right because K.C.L. has ownership of land below the
8 Second Point of diversion.

9 Q. But it's part of the Second Point diversion?

10 MR. PEARCE: I will object. It calls for a
11 legal conclusion, and he already answered the question.

12 MR. MC MURTREY: I thought we had been down that
13 road that based on your understanding, your expertise,
14 your operation of the river and your past practices.

15 MR. BAGGETT: You can answer.

16 THE WITNESS: Can I restate that?

17 MR. BAGGETT: Yes.

18 THE WITNESS: K.C.L.'s entitlement is a First
19 Point entitlement, but because the land is located below
20 the Second Point of measurement. So a small portion of
21 the Second Point entitlement is assigned to the K.C.L.
22 entitlement. That's why the K.C.L. Second Point
23 entitlement is subtracting from --

24 MR. MC MURTREY: Q. Okay.

25 A. -- gross entitlement of Buena Vista water

1 source.

2 Q. If I understand it a small part of the Second
3 Point entitlement is assigned to K.C.L.; is that what you
4 said?

5 A. Correct.

6 Q. That's good then. And then next I see
7 B.V.W.S.D. entitlement?

8 A. Yes.

9 Q. And is that Second Point entitlement?

10 A. That is Second Point entitlement calculated from
11 the natural flow.

12 Q. And further down I can see Hacienda W.D.
13 entitlement at First Point. Is that lower river
14 entitlement?

15 A. That would be lower river entitlement when they
16 have entitlement.

17 Q. Okay. So when you're filling out the flow and
18 diversion record, on a given day --

19 A. Uh-huh.

20 Q. -- you first determine computed natural flow at
21 First Point, correct?

22 A. Date.

23 Q. Pardon me?

24 A. Date is number one. First you need to know the
25 time of the year that you're in. Once you figure in or

1 out of the Miller-Haggin season, from that point then you
2 go on to the next step which is what you just --

3 Q. Okay. So you compute -- you determine what the
4 computed natural flow is?

5 A. Yes, correct.

6 Q. And my understanding is that's a formula of some
7 kind intended to reflect the amount of water that would
8 be at First Point on that given day, absent the presence
9 of Isabella Reservoir?

10 A. Yes.

11 Q. Once you've determined the computed natural flow
12 at First Point, assuming it's a -- you're in the
13 Miller-Haggin season -- you would then allocate between
14 First Point and Second Point; is that correct?

15 A. You would allocate the Second Point entitlement
16 on the sheet.

17 Q. Right. And you put that over here on the right?

18 A. Exactly.

19 Q. Then you will take off losses and so forth.
20 Eventually you will end up with an amount of water that
21 is available to First Point?

22 A. Correct.

23 Q. Then you will allocate the amount of water
24 available to First Point to these various rights in
25 accordance with their priorities and the quantities; is

1 that correct?

2 A. After contributions to other canals.

3 Q. Right.

4 A. Yes.

5 Q. Mr. Bogart, you stated in your written testimony
6 that since 1976, the City of Bakersfield has operated,
7 managed, and controlled the diversion of water from the
8 Kern River; is that correct?

9 A. Yes.

10 Q. Now, that you're -- you're referring, are you
11 not, to the diversion of water above Second Point of
12 measure?

13 A. That's correct.

14 Q. The City does not, in fact, manage the diversion
15 of Kern River water at or below the Second Point of
16 measurement; is that correct?

17 A. That's true.

18 Q. And that is managed by Buena Vista Water
19 Resources?

20 A. Yes.

21 Q. You testified with respect to the release
22 practice and you described it as a fill and go?

23 A. Uh-huh.

24 Q. I would like to review that briefly with you and
25 maybe it's the best way to, again, look at this flow and

1 diversion record. My understanding is that once you have
2 determined the amount of water available to the First
3 Point diversion, you would then allocate it in accordance
4 with this schedule of rights shown on the flow and
5 diversion record; is that correct?

6 A. That's correct.

7 Q. If the -- let's just assume that the available
8 flow for the First Point diverters is 600 second feet.
9 The first 300 second feet would be allocated to the Kern
10 Island?

11 A. Yes.

12 Q. Then you just go on down the list and allocate
13 it until you used the 600 second feet?

14 A. Yes.

15 Q. Now, if the Kern Island -- if a canal down on
16 the list like the Beardsley didn't have -- there wasn't
17 enough water to reach the Beardsley, right, then they
18 would have no entitlement that day; is that correct?

19 A. That's correct.

20 Q. Now, if the Kern Island did not divert all of
21 the water available to it that day, what would happen to
22 it?

23 MR. PEARCE: Objection. Lacks foundation.
24 First of all, we're not clear whether you're talking
25 about pre-forfeiture or post forfeiture.

1 MR. MC MURTREY: Either.

2 MR. BAGGETT: Please lay foundation.

3 MR. MC MURTREY: Q. Let's do pre-forfeiture.

4 Then we will come to post forfeiture.

5 The 300 second feet is available at Kern Island
6 if they don't use it?

7 A. As I said earlier, this is really a key point to
8 the daily operations of the river. The whole stage is
9 set each day by the Kern Island Canal. They make the
10 decision on how much water they need for their uses that
11 day.

12 Q. Right.

13 A. It's less than the available entitlement that
14 day they release the difference. They make that
15 decision. It's voluntary. It's up to them. They set
16 the stage for the rest of the river operation. Then that
17 water goes down to the next junior right, and that junior
18 right if they have a demand, takes up to their entitled
19 right for that day --

20 Q. So --

21 A. -- right on down the list.

22 Q. So the released water is redistributed to the
23 junior rights in the same order that we see on the flow
24 and diversion record?

25 A. Correct.

1 Q. And they can take up to their full share of
2 demand entitlement?

3 A. Correct.

4 Q. But not more?

5 A. Correct. Under extremely usual situations, if
6 you have a major storm, and you're talking about
7 somewhere in the neighborhood of 20 or 30 thousand CFS,
8 and water available -- and that is very unusual but it
9 does happen occasionally -- then there is a chance that
10 the rights would could get more than their 100 percent
11 allocation.

12 Q. Okay.

13 A. But that's very unusual.

14 Q. Now, the circumstances we're describing here
15 would require the release water is being redistributed,
16 that release water is not -- it's not put up for bid --
17 is it -- it's not auctioned off?

18 A. It's a voluntary release by the Kern Island that
19 starts the release process.

20 Q. Yes, but once it's been released --

21 A. Once it's been released --

22 Q. -- not redistributed. It's not a
23 first-come/first-serve. It's not an auction?

24 A. Senior to junior.

25 Q. Senior to junior, fill and go?

1 A. Yes.

2 Q. Following the Shaw Decree entitlements and
3 priorities?

4 A. Yes.

5 Q. That's the way it's always been done?

6 A. That's the way it's always been done.

7 Q. Still being done that way today?

8 A. I assume.

9 MR. PEARCE: I am going to object. Lack of
10 foundation. He testified that he stopped working for the
11 City in 2003.

12 THE WITNESS: Yes, I retired December of 2003.
13 I assume nothing has changed.

14 MR. MC MURTREY: Q. Well, up to 2003?

15 A. Okay. That's fine.

16 Q. Then this release water that's being
17 redistributed is only redistributed to within the First
18 Point group; is that correct?

19 A. That's correct.

20 Q. But it's not offered to the Buena Vista Water
21 Storage District at Second Point diverter, and it's not
22 offered to the lower river interest; is that correct?

23 A. That's correct.

24 Q. Mr. Bogart, in your written testimony, you
25 discussed high flow water occurring during very wet

1 years. Do you recall that?

2 A. Yes.

3 Q. I believe you stated that Kern River flows can
4 exceed the maximum river entitlement of 3,162 CFS; do you
5 recall that?

6 A. Yes.

7 Q. Do you consider 3,162 CFS to be the maximum
8 river entitlement?

9 A. Under the Shaw Decree, if you add up all of the
10 base entitlements you come up with 3,162.5. That's at
11 the very left-hand side of the sheet.

12 Q. That's just the First Point?

13 A. First Point.

14 Q. Doesn't take into account Second Point or lower
15 river?

16 A. That's correct.

17 Q. In your written testimony you state all of the
18 entitlements or rights are filled up when the river is
19 running over 3,162 CFS. Again, we're only talking about
20 First Point rights?

21 A. Correct.

22 Q. In your written testimony you said any flow over
23 3,162 CFS would also necessarily be surplus excess water.
24 Do you mean surplus to First Point rights?

25 A. You have two things happening here. We have a

1 prorated call that you will notice on the release sheet.
2 If there's water in excess of the 3,162, that would be
3 not a direct release captured by the next junior right,
4 but it would be prorated to the available water in excess
5 of 3,162.

6 Q. But go back through and be redistributed again?

7 A. Yes. But also you have to keep in mind that
8 there's a provision in the Miller-Hague that any First
9 Point water that passes the Second Point of measurement
10 becomes Second Point water.

11 Q. Right.

12 A. At the delivery point of Second Point.

13 Q. But the release water is --

14 A. Internally redistributed.

15 Q. -- and continually redistributed until it gets
16 all used if at all possible; is that correct?

17 A. Yes.

18 Q. That effort is to keep it in First Point?

19 A. Yes.

20 Q. Now, Mr. Bogart, you described in your written
21 testimony that the forfeiture ruling in the North Kern
22 case you represent it to be a significant and radical
23 change to the operations and customs and practices on the
24 Kern River; is that correct?

25 A. Yes.

1 Q. I'm curious why you consider it significant and
2 radical?

3 A. Because for all of these years on the
4 distribution sheets the stage of the river, the daily
5 operations, was set by a volunteer decision by the Kern
6 Island Water Company to use or not use all of their
7 entitlement that day. They made that decision.

8 Now, what I see -- and I am not putting a legal
9 view onto it -- but now what I see is a cap that's
10 imposed on the Kern Island Canal that was never there
11 before. It is something different, something new. It's
12 a new block of water so to speak because they didn't
13 voluntarily release it. And so it reduces the
14 entitlement.

15 Q. It's it accurate that the Kern Island has always
16 has a cap. The 300 CFS flow rate available to the Kern
17 Island itself it its maximum entitlement under the Shaw
18 -- under the Miller-Haggin Agreement?

19 A. Yes, that's the amount assigned to it.

20 Q. The Kern -- if you converted that 300 second
21 foot flow rate into acre-foot day, it's roughly 300
22 second feet is roughly 600 acre-feet in a day. And if
23 you had a 30-day month, it's roughly 18,000 acre-feet and
24 that was and always has been the cap of the -- the Kern
25 Island right; isn't that right?

1 A. I don't know if that's the cap. That's the
2 maximum yield. That was what was given to them.

3 Q. Correct. So in the month of December which has
4 31 days --

5 A. Uh-huh.

6 Q. -- the Shaw Decree and the Miller-Haggin
7 Agreement cap would have been 18,600 acre-feet roughly,
8 31 days times 300 CFS, times two, right?

9 A. Well, the way I look at that would be -- that
10 would be 300 CFS a day for 30 days, yields 18,000
11 acre-feet a month. That's the entitlement --

12 Q. And that's the entitlement?

13 A. -- that was assigned by the Shaw Decree.

14 Q. That's the entitlement?

15 A. That's the entitlement.

16 Q. That's the cap?

17 A. That is right.

18 Q. If there's more water available on the
19 Kern Island can't have --

20 A. More than the 300?

21 Q. -- more than 18,000 acre-feet in a month, it
22 can't have it because it's reached its cap; isn't that
23 right?

24 A. It's reached the limit of entitlement.

25 Q. Yes. Now, comes --

1 A. I don't see that as a cap.

2 Q. Now, comes the North Kern Judgment. This
3 December -- I will call it a cap that used to be
4 18,600 acre-feet is reduced to 18,000 acre-feet, still a
5 cap. Everything operates the same, does it not?
6 Methodology for allocating water among the First Point
7 entitlements is exactly the same as it's always been?

8 MR. PEARCE: Objection. Lacks foundation.
9 Misstates the prior testimony. He testified that he
10 testified up to 2003, not after the forfeiture judgment.

11 MR. BAGGETT: Sustained. Can you rephrase? Lay
12 a foundation and rephrase.

13 MR. MC MURTREY: I will move on.

14 MR. BAGGETT: Okay.

15 MR. MC MURTREY: Q. Mr. Bogart, in your written
16 testimony you state that the forfeiture has created
17 significant uncertainty and confusion with regard to the
18 Kern River water rights structure. Is this, again, based
19 on the fact that -- that the -- the cap on certain rights
20 has been reduced?

21 A. Throughout the period of time the record has
22 been kept, the first 300 on the river always -- for lack
23 of a better word -- was always considered the sacred
24 right on the river, because the first 300 is exempt from
25 contributing to the Miller-Haggin deliveries to the

1 Second Point. It is the first call on the first water on
2 the river each day of the 300 CFS.

3 It's up to Kern Island to make that decision
4 that day, and all of a sudden now, there's an outside
5 reduction of that during certain months of the year, and
6 so that right is no longer 300 during those months.

7 So to me, that is a major change, and it does
8 create a new block of water. Now, what we do with that
9 water, that's why we're here.

10 Q. Are you aware of what has been done with that
11 water?

12 A. I assume we're in a treading water pattern right
13 now. We're waiting to find out what is going on.

14 Q. You know you retired in 2003. I am wondering if
15 you're aware of what happened to that water in 2007/2008?

16 A. No, I am not.

17 MR. MC MURTREY: I am through with the witness.

18 MR. BAGGETT: Thank you. Who is next?

19 MR. KUNEY: Scott Kuney.

20 MR. BAGGETT: Off the record for a couple of
21 moments.

22 MR. BAGGETT: Are you ready? Back on the
23 record.

24 ///

25 ///

CROSS-EXAMINATION

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BY MR. KUNEY

Q. Mr. Bogart, you and I have known each other for a long time. I am Scott Kuney. I am representing North Kern Water Storage District.

Now, you have testified on matters relating to the Kern River at two prior trials; is that correct?

A. That's correct.

Q. And in both of those instances, just like it was today, you were administered an oath. You gave your sworn testimony in both of those proceedings; is that right?

A. Yes.

Q. Okay. Earlier today, there was some examinations with regard to a form flow and diversion record, and I believe it's the City's -- I believe 1-5; do you recall that?

A. Yes.

Q. And, Mr. Bogart, that form was a completely blank form. It was a standard form but blank; is that right?

A. Yes.

Q. Now, do you -- do you have in front of you the joint exhibits and they're in a brown cover, those are

1 the joint exhibits of North Kern and other parties. Do
2 you have those available to you? It's right --

3 And if you can go to -- I believe it's the first
4 binder, Mr. Bogart, there's an exhibit at the very end of
5 that. It's number 32. At the very --

6 A. 30?

7 Q. Thirty-two at the very end. The very last
8 exhibit. Go all the way to the end.

9 A. Okay.

10 Q. That's great, Exhibit 32. You recognized that
11 exhibit, don't you?

12 A. Yes. This appears to be a First Point flow and
13 diversion record during the period of the last 20 years.

14 Q. Okay. And I recall in the second trial you
15 testified that that actually was prepared by the City of
16 Bakersfield; is that right?

17 A. Yes.

18 Q. Okay. And, in fact, you supervised the
19 preparation of this particular exhibit with the colors on
20 it, didn't you?

21 A. Yes.

22 Q. And then at that second trial you explained what
23 those different colors were on the flow and diversion
24 record, and you indicated that was the easiest way to
25 show the ownership of the various First Point interests;

1 is that right?

2 A. Yes.

3 Q. So, for example, on this Exhibit 32, the color
4 green was for the Kern Delta Water District, right?

5 A. Yes.

6 Q. Those are the diversion rights administered by
7 that public agency, correct?

8 A. Yes.

9 Q. Then you have highlighted in yellow on your
10 exhibit certain rights administered by the City of
11 Bakersfield, like the conduit entitlement, right?

12 A. Yes.

13 Q. Then there was a blue designation, that had
14 certain -- those were Kern characterized really as minor
15 diversion rights like South Fork; is that right?

16 A. Correct.

17 Q. And then in the last color designation was in
18 pink. That was with regard to the North Kern Water
19 Storage District, correct?

20 A. Yes.

21 Q. Okay. And this is an example of a record that's
22 been kept by the employees of the City of Bakersfield; is
23 that right?

24 A. Yes.

25 Q. And I believe you testified that a form like

1 this, although this is modernized, it is
2 computer-generated, it's colored, has been the form that
3 has been utilized in the administration of the Kern River
4 since the turn of the last century, the 19th century?

5 A. That's correct.

6 Q. Now, it lists on the left-hand side all of the
7 diversion rights administered in the -- by the First
8 Point diverters; is that right?

9 A. I'm sorry. You're saying starting with the
10 river stage column?

11 Q. Yeah, if we were to look under the column
12 diversion rights, and it starts off at the top with the
13 KCL entitlement down, all the way down to the Kern Island
14 second -- at the very bottom of the name of canal column,
15 those are all the diversion rights administered in the
16 First Point by First Point interest; isn't that correct?

17 A. That's correct.

18 Q. Okay. That's all the questions I had had on
19 that exhibit.

20 Do you recall, in your written testimony that
21 you submitted here to the Board, that you had certain
22 responsibilities when you were an employees both
23 originally with Tenneco and then with the City, with
24 regard to tasks of maintaining records of flow and
25 diversion, correct?

1 A. Yes.

2 Q. In your written testimony at page seven, it's
3 paragraph 38, the last sentence, and I will just read it
4 you say, quote, "At the end of each year I would compile
5 the summaries," and I think that's in reference to the
6 dailies and the monthly summaries, "into an annual report
7 reflecting the entitlement, the diversion, and the use of
8 the water from the Kern River," end quote. Do you recall
9 that?

10 A. Could you give me that page.

11 Q. It's page seven. I believe it's the 38th
12 paragraph of your written testimony, and I am reading the
13 last sentence, I think it is.

14 A. Okay.

15 Q. So you see there?

16 A. Yes.

17 Q. And so, again, building from the daily diversion
18 records to the monthly flow and diversion records, which
19 is sometimes called the recap, and ultimately into an
20 annual report summarizing what occurred in the prior
21 year?

22 A. That's correct.

23 Q. And you had personal responsibility with those
24 records as well?

25 A. Yes.

1 Q. Now, since 1976 when the City first came on the
2 scene, those annual hydrographic reports were prepared by
3 the hydrographic section of the City of Bakersfield; is
4 that what it's called?

5 A. That's correct. It was also called the
6 hydrographic section in Kern County Water Company in our
7 case.

8 Q. Are these annual hydrographic reports that are
9 prepared each and every year, they are part of the
10 official records of the Kern River, aren't they?

11 A. Yes.

12 Q. Like the flow and diversion records, they're --
13 I think your testimony is that the flow and diversion
14 records are really a byproduct, a result of the law of
15 the river, right?

16 A. Correct.

17 Q. Would you say the same is true for the annual
18 hydrographic records? They also illustrate the law of a
19 river; is that right?

20 A. Yes.

21 Q. And just like the flow and diversion records
22 they're accurate, aren't they?

23 A. Yes.

24 Q. And just like the flow and diversion records,
25 they're reliable records of the Kern River, are they not?

1 A. Yes.

2 Q. Now, each annual hydrographic report, is
3 organized into separate chapters typically addressing --
4 the Kern Delta Water District is a chapter, correct?

5 A. Yes.

6 Q. Another chapter is the City of Bakersfield,
7 right?

8 A. Yes.

9 Q. And a third chapter is the North Kern Water
10 Storage District?

11 A. Yes.

12 Q. Then these annual hydrographic reports, again,
13 summarize all of the days accumulated by the hydrographic
14 section for each day of the year, each month of the year,
15 and bring those numbers unchanged into the annual report;
16 is that right?

17 A. Yes. The hydrographic annual report prior to
18 the acquisition in 1976, we were dealing with one entity,
19 Kern County Canal and Water Company produced the annual
20 report. After 1976, we suddenly had three new entities
21 on the river City of Bakersfield, North Kern Water
22 Storage District, and Kern Delta Water District, and they
23 were all wanting to operate their own systems by
24 themselves, but all participated in the county record
25 keeping.

1 Q. Before 1976, there were annual hydrographic
2 reports?

3 A. Yes, but they were not divided into those three
4 segments.

5 Q. After '76 they were divided into three chapters?

6 A. Yes.

7 Q. But the data was no less reliable after '76 as
8 it was before?

9 A. That's correct.

10 Q. It's still trustworthy and accurate Kern River
11 records?

12 A. Yes.

13 Q. I would like to examine you, Mr. Bogart, with
14 regard to some exhibits that were not included in the
15 City's submittals or in the joint exhibits of the
16 parties, but actually relate to your testimony from prior
17 trials.

18 And the first one I would like to have marked
19 next in order -- and I believe our joint exhibits end at
20 74, so I presume we would mark this as 75; is that
21 appropriate then? Okay.

22 (Exhibit 75 marked for identification.)

23 MR. KUNEY: Mr. Skolefield is going to help me
24 work through the logistics. He will pass out for me for
25 Mr. Bogart and for Colin and all of you who would like a

1 copy and the Board and staff, and then I have some
2 questions.

3 MR. KUNEY: Q. Mr. Bogart, please take a moment
4 to review this. What I provided to you is an exhibit
5 that was actually examined on in the first trial back in
6 1998, and it is an expert of one of these hydrographic
7 reports we've been talking about and in this instance
8 it's 1997.

9 A. Okay.

10 Q. See that? If you would if we turned to the
11 sixth page in, you're going to come to a table I believe
12 is going to be entitled Kern Delta Water District; do you
13 see that?

14 A. Yes.

15 Q. This is a table that you typically find in one
16 of those chapters of the annual hydrographic report; is
17 that right?

18 A. Yes.

19 Q. And if we look at the top of the page in the
20 left column, the first words we have are Kern River
21 entitlement; do you see that?

22 A. Yes.

23 Q. And that's what you've been referring to in your
24 testimony as either base or computed entitlement; is that
25 correct?

1 A. Yes.

2 Q. And that's what you have also talked about --
3 that's a number that's is calculated based upon river
4 stage as the first go around; is that right?

5 A. That's correct. That would be the first column
6 on the left-hand side of the daily distribution sheet.

7 Q. And if we look further down on this table, we
8 see the words entitlement plus or minus releases. Do you
9 see that?

10 A. Yes.

11 Q. And that is the final result of the base
12 entitlement plus or minus releases and then that equals
13 the entitlement, correct?

14 A. That equaled the entitled use.

15 Q. Equaled the entitlement used. And you explained
16 previously that you start off at the base entitlement
17 plus or minus the releases and then you end up with the
18 entitlement as shown on this exhibit; is that right?

19 A. Correct.

20 Q. If you would, let's turn a couple of pages.
21 We're going to find an excerpt of the North Kern chapter.
22 It is similar to the Kern Delta and is entitled at the
23 top and says North Kern Water Storage District. Do you
24 have that?

25 A. Yes.

1 Q. It's organized in the same fashion; isn't it?

2 A. Yes.

3 Q. At the top we have -- top left column N.K.W.S.D.
4 river entitlement, the which stands for the North Kern
5 Water Storage District, don't they?

6 A. Yes.

7 Q. Okay. Then --

8 A. Can I -- I will just say that North Kern
9 entitlement is the summary of those pink canals shown on
10 the diversion sheet. Those pink canals reflecting the
11 1952 Agreement --

12 Q. Okay.

13 A. -- for the North Kern, acquired Isabella.

14 Q. Back to Joint Exhibit 32 those are all the
15 diversion rights administered by the North Kern Water
16 Storage District in pink?

17 A. All of those -- all of those water supplies
18 during the '52 agreement.

19 Q. Okay. And then this record then shows of those
20 rights that are listed in Exhibit 32 in pink, what was
21 the base entitlement for each of the months in the total
22 for this year, and this is 1997, correct?

23 A. Yes.

24 Q. Then it also identifies all of the releases plus
25 or minus accrued to those rights, of those months, of

1 those years; is that correct?

2 A. Yes.

3 Q. Okay. And so then if we get to the end of this
4 official Kern River record, we see for each of the months
5 a summing of the base entitlement plus the releases. And
6 we get to then, for example, a total in the far
7 right-hand side corner of 255,007 acre-feet?

8 A. Yes.

9 Q. And that's all assigned to the North Kern Water
10 Storage District, that's what, in fact, happened in 1997,
11 correct?

12 A. That would be the amount utilized by the North
13 Kern Water Storage District to cover all of those
14 deliveries into storage for irrigation uses under their
15 exchanges whatever uses are shown on the rest of the
16 sheet, those are the entitlements they use to cover
17 these.

18 Q. And that has figure 255,007 acre-feet is
19 comprised of both the base entitlement and the releases
20 according to the diversion rights that are colored in
21 pink on Joint Exhibit 32; is that correct?

22 A. Yes.

23 Q. Thank you. I would like to ask you -- we're
24 through with that exhibit -- I want to ask you some
25 questions in regard to a second exhibit. This would be

1 marked for identification as Joint Exhibit 76.

2 (Joint Exhibit 76 marked for identification.)

3 MR. KUNEY: Q. I will give everyone a moment to
4 receive that before I ask any questions.

5 Take a moment to familiarize yourself with this.
6 In the prior trial this was identified as Exhibit 7022 in
7 this proceeding. It's now identified as Joint
8 Exhibit 75[sic]. This too is an excerpt of an annual
9 report. I will -- will be from the 1996 annual
10 hydrographic report. Do you recognize this?

11 A. Yes.

12 Q. We won't go into the details of this but this is
13 the same methodology with the same process with regard to
14 entitlement and releases, and it shows a cap in 1996; is
15 that right?

16 A. There, again, the North Kern River entitlement
17 based on the summary of the 1952 Water Agreement water
18 supply and then releases plus or minus, and coming to a
19 total of entitlement used.

20 Q. Okay. And I didn't ask you -- can you -- we've
21 got this term plus or minus. We're all so used to this,
22 but these are all pluses, aren't they? This is actually
23 more water to North Kern; these aren't minuses; isn't
24 that correct?

25 A. It can be minus sometimes if North Kern exceeds

1 it's maximum diversion right, then it will release to the
2 river.

3 Q. Okay. But let's look at 1996. This is an
4 example where every instance the release is actually a
5 plus; isn't that correct?

6 A. In this example, yes.

7 Q. Thank you. That's the only questions I have for
8 that exhibit. Mr. Bogart, I appreciate that.

9 We now have the next exhibit, please, that is
10 going to be a daily diversion record of January 10, 2003,
11 diversion record. Thank you.

12 MR. BAGGETT: Should be number 77; is that
13 correct?

14 (Joint Exhibit 77 marked for identification.)

15 MR. KUNEY: Yes. Thank you, Mr. Baggett. This
16 is Joint Exhibit 77.

17 BY MR. KUNEY:

18 Q. You recognize this to be one of the standard
19 daily diversion -- flow and diversion records that are
20 prepared by the hydrographic section of the City of
21 Bakersfield; is that correct?

22 A. Yes.

23 Q. This is actually the 10th of January 2003. So I
24 think you're still in the saddle. You're still working
25 for the City?

1 A. Yes.

2 Q. Okay. If we look -- look into the center of
3 this form, we see these columns, entitlement less
4 releases, and/or plus distributed releases; you see that?

5 A. Yes.

6 Q. Now, this column is sometimes called or referred
7 to as the net entitlement; isn't that right?

8 A. Yes.

9 Q. And this form shows the amount of water
10 allocated. Let's do this. We have these initials up
11 here, see that N.K.W.S.D. right under the heading of
12 those columns; do you see that?

13 A. Yes.

14 Q. And those initials reference the North Kern
15 Water Storage District; is that correct?

16 A. Yes.

17 Q. And then you've had some testimony here earlier
18 about the Kern County Canal and Water Company and those
19 initials KCC&W and Co. is an abbreviation for that
20 entity, correct?

21 A. Yes.

22 Q. And in this era of 2003 that's, in fact, the
23 City of Bakersfield; is that right; is that correct?

24 A. Correct.

25 Q. These initials K.D.W.D. that's an abbreviation

1 for the Kern Delta Water District?

2 A. Yes.

3 Q. So when we look at those and we go down to the
4 bottom, we can see what, in fact, has been allocated to
5 those various entities if we look down at the very bottom
6 the column for example N.K.W.S.D., we see the value of
7 409 second feet days; is that right?

8 A. Yes.

9 Q. So that was the amount of water on the 10th of
10 January 2003 allocated for the North Kern Water Storage
11 District that day, right?

12 A. Yes. Now, that's the amount of yield from the
13 1952 Agreement. Yes? Those rights.

14 Q. Right.

15 A. I will explain at this point, where it says
16 entitlement less release or plus distributed releases, it
17 has North Kern, KCC&W. If you notice those columns those
18 run parallel to each other top to bottom and always next
19 -- or right of the North Kern column is the KCC & W.
20 Column.

21 The right is owned by KCC&W. And the 1952
22 Agreement rights, the North Kern purchased the use of.
23 In fact, if they don't use those, then those will slide
24 over or revert back to KCC&W. That's why you see it's
25 always open to the right of North Kern, but it's not

1 always open to the left of KCC&W, that water moves in one
2 direction. I want to clarify that.

3 Q. Okay. But if, in fact, North Kern does have a
4 demand and it does take it, it goes to North Kern first,
5 doesn't it?

6 A. Under the 1952 Agreement, that's what they
7 purchased. And as an example, just look at the first
8 opening for North Kern under the James right, the base
9 entitlement to the James right per the Shaw Decree, was
10 116 CFS. They can pick up an additional four CFS to
11 bring them up to their full right of the 120 that day.

12 That would be their full entitlement assigned to
13 the James right and under the Shaw Decree. That gives
14 them the 120. That's as far as it goes. Then you go
15 down to the next junior right, and you just keep going.

16 Q. And I appreciate that you brought up a good
17 example here. Let's do that. So we see -- you've given
18 us the example of the James 116 was the base entitlement
19 for that right, that day, correct?

20 A. Yes.

21 Q. And then they received a distributed release of
22 four more CFS days because these are the units measured
23 here to maximize the right under the Shaw Decree to the
24 120?

25 A. Correct to bring them up to the total

1 entitlement.

2 Q. And then if we go to the next right, the
3 Anderson first, we see the same relationship?

4 A. Yes.

5 Q. The base entitlement was 19, correct?

6 A. Yes.

7 Q. And then there was an additional distributed
8 release of one -- one to total the 20, which is equal to
9 -- if we go to the far left column -- or second to the
10 left column where it says 20, under the amount, that's
11 the limit of the Shaw Decree amount; is that correct?

12 A. Correct.

13 Q. So we had the 19 to the one to fulfill the Shaw
14 Decree right, correct?

15 A. Yes.

16 Q. Then we notice all of that -- 100 percent of
17 that 20, is allocated to the North Kern Water Storage
18 District?

19 A. That day.

20 Q. That day. We're just dealing with one day.
21 Thank you. That's all the questions I have on that
22 exhibit. I appreciate that.

23 MR. KUNEY: Mr. Baggett, I have one further
24 exhibit. Would you prefer we cleaned up -- I have some
25 other questions -- do you prefer to --

1 MR. BAGGETT: Finish before we take lunch.
2 Let's finish your cross-examination.

3 MR. KUNEY: I won't be finished with cross.

4 MR. BAGGETT: I will keep going until you're
5 done with cross. We don't have that much time.

6 MR. KUNEY: That's fine. So is it my
7 understanding that I am left with seven minutes left.

8 MR. BAGGETT: I thought we agreed with
9 90 minutes for your panel, and it was set at 30, so
10 there's 30 some minutes left, but there's still how many
11 more attorneys?

12 MR. KUNEY: Let's go to the next in order, which
13 would be 78. Thank you.

14 (Joint Exhibit 78 marked for identification.)

15 MR. KUNEY: Q. Take a moment, Mr. Bogart,
16 familiarize yourself with the flow and diversion sheet.
17 This is November 11, 2002.

18 Do you recognize that? And I think you actually
19 have already assisted explaining how this works, but if
20 we -- see let's -- go just to the James right to
21 illustrate this same point. We see that on this date
22 November 11, 2002 the base entitlement of the James first
23 was 108 second feet days; is that correct?

24 A. Yes.

25 Q. Then we see that they received that right --

1 that canal right received a distributed release of
2 12 units; is that correct?

3 A. That's correct.

4 Q. Then bringing it to a total equal to the Shaw
5 Decree limit of 120?

6 A. Yes.

7 Q. We would see that same relationship as it was
8 back to your testimony of fill and go, they're being
9 filled to their limit, are they not?

10 A. Yes.

11 Q. I'm through with that exhibit, and I would like
12 to then go to -- switch subjects to one last subject, I
13 would like to ask you about. And I will have some
14 preliminary questions and then some -- you may recall in
15 your written testimony -- and again it's at page 13, and
16 it's paragraph 69, you made mention that there are on
17 occasion very high flow years with significant stream
18 flow in the Kern River; is that right?

19 A. Yes.

20 Q. Now, in 1983 you were still employed by the
21 City; is that right?

22 A. Yes.

23 Q. Let's mark the last next in order 79.

24 (Joint Exhibit 79 marked for identification.)

25 MR. KUNEY: Q. Mr. Bogart, what is being marked

1 for identification it's an excerpt of another annual
2 hydrographic report which is one that is somewhat
3 unusual. This is for the 1983 year.

4 A. Okay.

5 Q. You remember 1983, don't you?

6 A. Just like yesterday.

7 Q. And you remember the Kern River operations in
8 '83?

9 A. I know 1983 was a 300 percent of normal year.

10 Q. So that we can help the State Board and staff
11 understand the conditions that occurred in 1983, I would
12 like you to turn to the -- really the second page of this
13 exhibit. It's got a number six at the bottom right-hand
14 corner and actually says at the top Kern River in review
15 1983.

16 A. Yes.

17 Q. And just so the Board and staff understands the
18 conditions that occurred in 1983, if you would please
19 would you read this page?

20 A. The whole page?

21 Q. Yeah, I think so.

22 A. [Reading] "Record setting rainfall and runoff
23 amounts experienced on the Kern River watershed during
24 the fall of 1982 carried over into 1983 as severe storm
25 systems continually saturated the southern Sierras.

1 Precipitation amounts recorded at Isabella Dam and
2 Reservoir totaled 14.63 inches between January 1 and
3 March 31st. Record high water content readings were
4 found on several of the snow courses, in the Kern River
5 basin, some with measurement records dating back to the
6 year 1930.

7 "An unusually cool month of April delayed the
8 melt of the record-breaking snowpack in the Sierras, but
9 warm temperatures towards the end of May caused Kern
10 River flow to climb to new highs for the April through
11 July runoff period. Mandatory flood control releases at
12 Isabella Reservoir were initiated by the Corps of
13 Engineers on March 9, 1983 and except for the period of
14 August 1st through August 16th continued throughout the
15 remainder of the year.

16 "Storage evacuation efforts were hampered by the
17 extremely high natural flow of the Kern. However,
18 Isabella Reservoir storage was drawn down to 352,377
19 acre-feet on May 15th, the lowest point it had been since
20 February 27th, 1983. Forty-six consecutive days passed
21 after May 15th before withdrawal from Isabella Reservoir
22 could be accomplished. On this date, 5,721 CFS was
23 flowing over the dam spillway.

24 "Kern River natural flow during the 1983 April
25 to July runoff period totaled 1,545,810 acre-feet, 323

1 percent of average and 407 percent of the historical
2 median, placing the third largest of 90 years of record.
3 Water year and calendar year run-off amounts exceeded
4 those experienced in 1969, thus becoming the highest
5 amounts recorded in 67 years. As of December 31, 1983,
6 311, 944 acre-feet retained in storage behind Isabella
7 Dam. On the following page..."

8 This -- I might add one more thing. That year
9 -- I remember this well because we were very sensitive to
10 water leaving the basin -- the Kern River -- which was
11 constructed as a flood control facility that connected
12 physically the Kern River to the California Aqueduct --

13 Q. I apologize for interrupting you. I think it's
14 better that I ask the questions, then you can answer
15 them.

16 A. Okay.

17 Q. There are things that you want to share. I am
18 sure your counsel can ask you questions and you can
19 share. Okay.

20 The only -- the last thing I would like you to
21 do -- I appreciate this was some year. As a matter of
22 fact, the hydrographic notes that followed this report
23 the very next page of this exhibit really put into
24 context how extreme the 1983 flood control operations
25 were and that -- in fact, again, just to get a flavor for

1 this there are 43 notes of record in 1983, but can you
2 just -- maybe read how about the first 19, why don't you
3 read some of it.

4 A. The first 19?

5 MR. BAGGETT: It's your time.

6 He can proceed if he wants to use his time
7 having you read.

8 THE WITNESS: I am running out of time.

9 MR. BAGGETT: Well, he has 30 more minutes for
10 the panel.

11 THE WITNESS: [Reading]"Highest minimum natural
12 flow day on record for calendar year. Highest -- or
13 largest June natural flow on record 571,846. Largest
14 August natural flow on record 154,935 acre-feet. Largest
15 September natural flow on record 68,503 acre-feet.
16 Largest October natural flow on record 53,300. Largest
17 natural flow day on record for May, May 29th, 14,038 CFS.
18 Largest natural flow day on record for August, August 19,
19 3,795..."

20 Q. That's sufficient I appreciate that. It was a
21 spectacular year, wasn't it?

22 A. Yes.

23 MR. KUNEY: I have no further questions. Thank
24 you.

25 MR. BAGGETT: Thank you.

1 (A discussion was held off the record.)

2
3 CROSS-EXAMINATION

4
5 BY MR. O'BRIEN:

6 Q. All of my questions are for Mr. Core. I am
7 Kevin O'Brien. I represent Kern Water Bank Authority in
8 this proceeding. I would like to ask you a few questions
9 about your professional background in relation to the
10 field of water rights. And for purposes of the these
11 next few questions, I would like you to focus not on your
12 knowledge on Kern River water rights, but your knowledge
13 or water right principles in general; is that acceptable?

14 A. Okay.

15 Q. Okay. Are you generally aware that under
16 California water law there are essentially two categories
17 of surface water rights riparian and appropriative?

18 A. Yes.

19 Q. And with respect to the riparian rights, have
20 you ever personally undertaken an analysis as to whether
21 a particular parcel of land contains riparian rights or
22 holds riparian rights?

23 A. No, I have not.

24 Q. Do you have a detailed understanding of how one
25 would go about preparing such an analysis?

1 A. I have some general knowledge of that as working
2 with -- years ago on some parcels of land in
3 unincorporated area along the Kern River in relationship
4 with the County of Kern, and some work was done along
5 those lines. I reviewed some of this.

6 Q. You didn't do the work?

7 A. No.

8 Q. With respect to appropriative rights, you're
9 aware, are you not, that there are two subcategories of
10 such rights under California law pre-1914 rights and
11 post-1914 rights?

12 A. Yes, I am aware of that.

13 Q. What's the difference between the two? What is
14 your understanding of that?

15 A. My understands is that pre-1914, California
16 Water Law was enacted and those appropriate rights that
17 have patents filed with the United States Government
18 first in time and their diversion.

19 Q. Have you ever personally undertaken an analysis
20 to determine whether a particular parcel of land holds
21 pre-1914 water rights?

22 A. I have not.

23 Q. And you're not an attorney; is that correct?

24 A. That's correct.

25 Q. I would like to refer you to your written

1 testimony that was submitted in this proceeding,
2 specifically page 22, line -- in between 24 and 25. Let
3 me just read the sentence. Quote, "Finally, the City of
4 Shafter," parenthesis, Shafter, closed paren, "and the
5 Kern Water Bank Authority," parenthesis, K.W.B.A., closed
6 parenthesis, "have no Kern River water rights and no
7 ability to take new forfeited water."

8 Do you see that sentence?

9 A. Yes, I do.

10 Q. I take it from your earlier testimony that you
11 have not undertaken any analysis of the question of
12 whether the Kern Water Bank Authority owns any riparian
13 rights; is that correct?

14 A. That is correct.

15 Q. And so similarly, you have not undertaken any
16 analysis as to whether the Kern Water Bank Authority
17 holds any pre-1914 appropriative rights?

18 A. Yes.

19 Q. Same for post-1914 appropriative rights?

20 A. Yes.

21 Q. So similarly, have you -- is it fair to say that
22 you have not undertaken any analysis to determine whether
23 the Kern Water Bank Authority may be utilizing water
24 pursuant to the any kind of contractual relationships?

25 A. I have none.

1 MR. O'BRIEN: Mr. Baggett, I am going to move to
2 strike from the record the sentence on page 22, lines 24
3 through 26 that I read a moment ago, on the basis there's
4 no foundation for this witness having done any analysis
5 of Kern Water Bank Authority water rights.

6 MR. PEARCE: I can on redirect. I think I can
7 establish the foundation, but I think on the limited
8 question of ability, some analysis has nothing to do with
9 his testimony. He has administrated the river for almost
10 30 years. Who has responsibilities of the river; who's
11 taken water actually from the river; who uses water from
12 the river; that's what he's talking about.

13 He says they have no water rights based on
14 30 years. Nobody has ever told him before. I am certain
15 if I asked him, he would say I worked for the Kern Water
16 Bank for 30 years, they've never -- as long as I've
17 worked there, they've never claimed any water rights.
18 They don't have any water rights on the flow and
19 diversion records. That's what it's based on, not some
20 academic excise. That's what lawyers typically do to
21 figure out what rights in theory --

22 MR. BAGGETT: I understand and can appreciate
23 that. The fact was there's no foundation, and you're
24 saying counsel raises a valid point, legal conclusion
25 with no -- no foundation. So the question is, do we

1 allow you -- you can, of course, come back under redirect
2 and lay that foundation and agreement if necessary, the
3 necessary information. I am just trying to be
4 expeditious here.

5 MR. O'BRIEN: I do think it's quite clear from
6 the testimony that the witness doesn't have any personal
7 knowledge or -- and is not competent to provide an
8 opinion as to any water rights held by Kern Water Bank.
9 I understand Mr. Pearce at the same time he is going to
10 come back on redirect and provide a bunch of hearsay
11 statements as to what other people have told him. That's
12 not an appropriate subject for the witness.

13 He's -- in this sentence he is giving an opinion
14 as an expert, and I think that's inappropriate given his
15 testimony.

16 MR. BAGGETT: Mr. Pearce.

17 MR. PEARCE: I will lay sufficient foundation.
18 I think we have in his testimony based on his experience
19 on his knowledge of the river and the administration of
20 the rights, he is qualified to talk about who has water
21 right and who doesn't. I don't need a foundation beyond
22 what we already laid. I can come back after lunch and
23 lay a foundation if you need more, but, again, for
24 somebody who has dealt with the First Point interest and
25 dealt with the release water, and now has this forfeit

1 water law, he is certainly competent and qualified to
2 talk about who has a right and who can take the water and
3 who can't take the water. We're talking about the real
4 world here.

5 MR. BAGGETT: I can appreciate that, but that's
6 not what this sentence is. It makes a very clear legal
7 conclusion. It doesn't say based on his 30 years of
8 management. It doesn't say any of that. It says in here
9 -- includes they have no water rights, and I think it's a
10 pretty strong statement. I would agree with
11 Mr. O'Brien's analysis. That conclusion does not --
12 there's nothing to support it here.

13 The paragraph above talks about contracts and
14 supplemental agreements and supply agreements and things
15 and clearly would be in his -- this makes a pretty
16 definitive statement. So why don't we take that under
17 advisement. You can come back, and I will give you a
18 chance. We can strike it now, and it can come back under
19 redirect. If you have some information you want to bring
20 back in, we have that opportunity.

21 MR. PEARCE: Thank you.

22 MR. BAGGETT: Anything else?

23 MR. O'BRIEN: No.

24 MR. BAGGETT: So there's no other cross?

25 MR. KUNEY: Mr. Baggett, I apologize. I think I

1 misunderstood the process. And I was examining with
2 regard to --

3 MR. BAGGETT: It was by the panel, okay. Any
4 witness on the panel you want to examine?

5 MR. KUNEY: I do have questions of Mr. Core, not
6 with Mr. Bogart and Mr. Schwarz. Are we within this
7 budget?

8 MR. BAGGETT: How much -- I mean the question
9 is: Do you want to try to do it before lunch? How many
10 questions?

11 MR. KUNEY: I will endeavor to do that. I will
12 try be brief with it now.

13 MR. BAGGETT: Let's don't -- I would like to try
14 to conclude this part before lunch and take lunch and
15 come back with questions from staff and any redirect.

16 MR. KUNEY: I misunderstood the protocol here.

17

18

19

CROSS-EXAMINATION

20 BY MR. KUNEY:

21 Q. So, Mr. Core, if you would please turn to your
22 Exhibit 2-22, which is the your summary table of surplus
23 entitlements as you characterized it and the follow-up
24 sheets. That's fine. Do you have that? I will do the
25 same.

1 Do you have that in front of you?

2 A. Yes, I do.

3 Q. And this was an analysis that you prepared and
4 explained that earlier?

5 A. Yes.

6 Q. Okay. And what you've done is on this first
7 sheet, you have determined the various values for the
8 given diversion rights and then calculated some averages;
9 is that right?

10 A. Yes.

11 Q. Okay. And you've calculated some maximum and
12 minimum values, right?

13 A. Yes.

14 Q. Then at the far right-hand side, you've summed
15 that as the total of the various diversion rights for the
16 various months, correct?

17 A. Yes.

18 Q. Then when we look at the average value, the one
19 that you testified to, we see that value of 50,646, and
20 that's just the sum of the various columns, right?

21 A. Correct.

22 Q. I would like to compare your surplus entitlement
23 analysis to the actual flow and diversion records to see
24 if your conclusions that you've drawn are reflected in
25 the actual official records of the Kern River.

1 If you would, let's go to -- you ought to find,
2 Mr. Core, it would be Joint Exhibit 38. It's --

3 Mr. Pearce, if you could help him with that.

4 Now, Joint Exhibit 38 is a compilation of the
5 City of Bakersfield Kern River First Point flow and
6 diversion records for the year 2007, but with regard to
7 the forfeiture months August through December, the ones
8 that are in this. Do you see that?

9 A. Yes.

10 Q. Okay. And if we -- this is a period of time
11 after the North Kern Judgment, correct?

12 A. That's correct.

13 Q. And so if we were to turn -- if you would,
14 please, let's turn behind the December tab, which is
15 towards the back of that exhibit. Do you have that?

16 A. Yes.

17 Q. First of all, you agree these are copies of the
18 City of Bakersfield's daily flow and diversion records
19 for the -- in this instance, the month of December 2007,
20 correct?

21 A. Yes, that's what I see here.

22 Q. And on the first sheet we have a recap sheet in
23 units of acre-feet; is that correct?

24 A. That's correct.

25 Q. If we look at the column underneath, we've had

1 some testimony here about entitlements and releases -- if
2 we look into the column under the initials K.D.W.D that's
3 Kern Delta Water District?

4 A. Under what?

5 Q. Under entitlement less releases, and then under
6 the subheading of K.D.W.D, do you see that?

7 A. Yes.

8 Q. And then that's the Kern Delta Water District?

9 A. Yes.

10 Q. Then we see a value underneath that of 2,050.

11 You recognize that to be the preserved entitlement for
12 the Kern Island right of the month of December since the
13 judgment?

14 A. That's my understanding.

15 Q. If we followed that down, we see the value of
16 191, and that's opposite the Buena Vista first. And
17 that, likewise, is the preserved entitlement for that
18 right in the month of December, correct?

19 A. Yes.

20 Q. And, again, we see the value 12, and that's the
21 preserved entitlement for the Stine in the month of
22 December since the judgment?

23 A. Yes.

24 Q. Then we see the value 207, and that's the
25 preserved entitlement for the Farmers in the month of

1 December, right?

2 A. That's what I see, yes.

3 Q. Okay. Now, under the column of releases -- and
4 you're familiar with how these records work, aren't you?

5 A. Yes.

6 Q. So under the column of releases with -- see
7 releases to the river; is that right?

8 A. Yes.

9 Q. And the very first value we see, and it's
10 opposite the Kern Island first diversion right, is 9,960
11 acre-feet, correct?

12 A. Correct, that's what I see, yes.

13 Q. And that entire amount released to the river
14 was, in fact, distributed to the diversion rights shown
15 on this monthly recap sheet in the year 2007; is that
16 correct?

17 A. For December, yes.

18 Q. Yes. And we know that by -- we see the -- let's
19 familiarize the Board and staff -- if we followed the
20 releases to river column all the way down to the end, we
21 see a value of 10,113 acre-feet, correct?

22 A. Yes.

23 Q. And then right next to that we see that very
24 same number, correct?

25 A. Yes.

1 Q. And it shows and tells you that, in fact, those
2 entire releases were distributed to the other diversion
3 rights in December of 2007, correct?

4 A. Yes.

5 Q. And they were distributed in this month of this
6 year, 2007, in accordance with the law of the river and
7 the Shaw Decree rights that Mr. Bogart and yourself
8 testified to, correct?

9 A. Yes.

10 Q. No change in the administration is shown in this
11 record, is there?

12 A. No change.

13 Q. From the historic -- that's the way it's been
14 done for over a hundred years, correct?

15 A. Yes.

16 Q. Now, if you would -- so now we're looking at --
17 and Mr. Bogart has talked about this -- there's daily
18 records and monthly records, this is an example of one of
19 those monthly records?

20 A. Yes.

21 Q. If we went then flipping through into this
22 exhibit in the month of December, we will see the daily
23 sheets, won't we? We saw the December 1st and progress
24 on through the days of the month, correct?

25 A. Yes.

1 Q. And is it correct that starting on December 9th
2 of December of 2007, we begin to see that the Kern Island
3 is releasing water to the river, correct? Do you have
4 December 9th?

5 A. I am almost there.

6 Q. Go ahead. I'm sorry.

7 A. I am there.

8 Q. We see a release to the river by the Kern Island
9 first right of 229 second feet days, correct?

10 A. Yes.

11 Q. And then we see and, again, following that
12 column all the way down, you see the 229 at the bottom of
13 the column, correct?

14 A. Yes.

15 Q. And we see that very same value 229 in the very
16 next column of the direct distribution, correct?

17 A. Yes.

18 Q. For the entire release to the river by Kern
19 Island on December 9, 2007, was distributed to the other
20 diversion rights in the order of priority of the Shaw
21 Decree, as per the flow and diversion schedule; is that
22 correct?

23 A. That's correct.

24 Q. And that's how it's always been done, isn't it?

25 A. Yes. The only exception with this is this water

1 is beyond the cap of 2,050 acre-feet.

2 Q. That's why it was released, isn't it, Mr. Core?
3 It was released because it was beyond the cap?

4 A. Yes.

5 Q. Okay. It was released, and then it was
6 distributed in the exact same way as it has always been
7 distributed in order of priority according to the
8 diversion rights, correct?

9 A. (Witness nods.)

10 Q. And this is just one example, but if we went
11 through the rest of the month of December of 2007, would
12 you agree -- and feel free to look through this record --
13 would you agree that you would see that exact same
14 consistent historic practice of the distributed releases
15 going to the diversion rights in order of priority up to
16 the Shaw Decree maximum limits?

17 A. Yes.

18 Q. That's exactly how it's been done for over a
19 hundred and -- hundred years, correct?

20 A. Yes.

21 Q. No change?

22 A. No change.

23 Q. And this is after the judgment though, isn't it?

24 A. This is after the judgment, yes, it is.

25 Q. So the City was able to fill out the boxes --

1 fill out the form just as it's always been done for over
2 a hundred years, even though the judgment had preceded;
3 is that correct?

4 A. That's correct.

5 Q. Now, Mr. Core, in your records -- this is you're
6 analysis 2-22 -- you indicate in December of 2007 -- if
7 we follow this chart -- I am now looking now at the --
8 not the summary page of your exhibit, but the very first
9 page -- because you're organized and did a spreadsheet
10 for each of the diversion rights, Kern Island first?

11 A. Correct.

12 Q. So if we turned to the first page of your more
13 detailed analysis for the Kern Island Canal, and we go to
14 2007. You're analysis says -- and you call this surplus
15 entitlement -- your analysis says, 9,772 acre-feet is
16 surplus entitlement, correct? For December of -- excuse
17 me. I am look at the wrong 9,960 -- excuse me --

18 A. For December?

19 Q. For December.

20 A. Yes.

21 Q. And you say all of that is surplus entitlement,
22 correct?

23 A. Surplus as the calculation I performed putting
24 the -- artificially putting on the preserve entitlement
25 from 1954 to 2008.

1 Q. But, in fact, the flow and diversion records
2 show that all of that 9,960 acre-feet was, in fact,
3 distributed to the diversion rights listed on the flow
4 and diversion sheet in priority order according to the
5 Shaw Decree; is that correct?

6 A. That's how it was done, yes.

7 Q. Now, we have in the hearing room all of the
8 monthly recap summaries from 1954 through 2008, and what
9 I am seeing here in this analysis is you're saying that
10 it's surplus entitlement, but, in fact, the flow and
11 diversion records show that the water is, in fact,
12 distributed and used by the diversion canals according to
13 the Shaw Decree?

14 A. Yes.

15 Q. The numbers are showing that?

16 A. Yes.

17 Q. So what I want to ask you is: If we went
18 through -- or maybe I am missing it -- if we went through
19 some of the other monthly recaps or the daily sheets,
20 would we find a single flow and diversion record from
21 1954 to 2008 that shows surplus entitlement as you have
22 shown in your Exhibit 2-22?

23 A. You won't see it written that way.

24 Q. No, it won't be there?

25 A. No, you're correct.

1 Q. I will give you as much time as you want. You
2 won't find it?

3 A. I -- I don't believe so.

4 Q. The actual records do not support your
5 conclusion of surplus entitlement?

6 MR. PEARCE: Objection. Argumentative and also
7 misstatements his testimony. He explained how he
8 prepared it. It was a projection based on the judgment.
9 That's my objection. Objection. Argumentative.

10 MR. BAGGETT: Okay. I would sustain. If you
11 want to rephrase.

12 MR. KUNEY: Q. Let me rephrase it, so it's not
13 objectionable. What I want to understand, Mr. Core, if
14 we look at the actual official records from -- on the
15 Kern River from 1964 to 2008, will we find a single
16 instance where the flow and diversion records that have
17 been prepared by either the Kern County Canal and Water
18 Company or the City of Bakersfield, will they support the
19 conclusion that you've reached of surplus?

20 A. They won't show the surplus. Those records will
21 not.

22 Q. Those records will not?

23 A. Not the analysis I did perform was postjudgment
24 to see what kind of water would be available --

25 Q. But we've looked at --

1 A. -- surplus.

2 Q. I didn't mean to interrupt. We have looked at
3 postjudgment flow and diversion records, haven't we, in
4 2007?

5 A. Yes.

6 Q. And they don't comport with your analysis, do
7 they?

8 A. And you will find that 2008 will be similar.

9 Q. Thank you. I wanted to ask you, and they would
10 be similar?

11 A. Yes.

12 MR. KUNEY: Thank you. Nothing further.

13 MR. BAGGETT: Any further questions, staff?

14 MR. ROSE: I have one question. Some
15 clarification will help me, Mr. Bogart. This first came
16 up in your testimony, as well as on cross-examination.
17 You and, Mr. Core, may be able to answer this as well.
18 You said something to the affect that if there
19 was -- there were releases above and beyond some of the
20 more senior appropriators, they would be released down to
21 junior appropriators. But then there's some sort of
22 effort to keep water at the -- among the First Point
23 users.

24 MR. BOGART: I'm sorry. The Miller-Haggin
25 Agreement was a hard-fought battle. It went on for

1 almost ten years. And there's a lot of animosity between
2 the First Point and the Second Point group that carried
3 over for a hundred years. And one thing we were always
4 told in the field office is don't let any First Point
5 water make it to Second Point. Whatever you do make full
6 use of that water. Don't let it go below Second Point.
7 That was a standing order.

8 MR. ROSE: So, for example, on your diversion
9 records sheet, if there was water above and beyond either
10 through releases or just excess water above and beyond
11 the Shaw Decree amounts, that each -- each diversion was
12 entitled, what would happen to that?

13 MR. BOGART: If you got into the extreme
14 circumstances, we have a major rain flood, you're talking
15 10 to 15,000 CFS coming down the river, the First Point
16 wasn't able to absorb that water, and it would be First
17 Point passing Second Point, which becomes Second Point
18 water at Second Point of measurement. That was clearly
19 defined in the Shaw -- in the Miller-Haggin Agreement.

20 MR. ROSE: What about anything above the 3162.5
21 that's on your diversion record. What happens to
22 water -- does all water above the 3162.5, excess water go
23 down past the Second Point?

24 MR. BOGART: Not necessarily. It depends on
25 what the circumstances are and the time of year. After

1 Isabella, you had a place to put a large portion of water
2 and that was in storage.

3 MR. ROSE: Ignoring Isabella, I think for a lot
4 of years you have a conversion process. Are there times
5 when any of these diversions listed by the second column
6 amount, the 300 and the 20 CFS, get more than that amount
7 that they're decreed to have in the Shaw Decree?

8 MR. BOGART: Yes.

9 MR. ROSE: To keep water -- and that's to keep
10 water -- not counting storage releases in Isabella --
11 that in some circumstances people are getting more water
12 by CFS than they have a need by the numbers in these
13 columns?

14 MR. BOGART: There are days when you have large
15 storm conditions where the yield of the river is -- is
16 much larger than 3162. And if you have that situation,
17 all you can do is prorate the excess above 3162 back to
18 the original Shaw Decree owners and raise that value
19 proportionately. That's why we have a prorated column.

20 MR. ROSE: Okay. Thank you. I needed that
21 explanation. Thank you.

22 MR. BAGGETT: Thank you. Anything other
23 questions? We can go off the record. We will take a
24 lunch.

25 (Recess taken from 12:37 p.m. to 1:31 p.m.)

1 MR. BAGGETT: Back on the record. We're recall
2 the City of Bakersfield for redirect.

3 MR. PEARCE: Thank you, Mr. Baggett. I will sit
4 over here.

5

6

REDIRECT EXAMINATION

7

BY MR. PEARCE:

8 Q. Good afternoon, Mr. Baggett, and members of the
9 staff. I have a few quick redirect questions with
10 Mr. Bogart.

11 Mr. Mc Murtrey asked you some questions about --
12 about the -- the division of water between first and
13 Second Point, and he also asked you a series of questions
14 about flow and diversion records. My question is: Is
15 the amount of waterer which is -- goes to Second Point,
16 that's something that's affected by the seasons; is that
17 correct.

18 A. That's correct, Miller-Haggin season runs March
19 through August.

20 Q. During the Miller-Haggin season, that is when
21 the water is typically divided between first and Second
22 Point; is that correct?

23 A. That's correct.

24 Q. Now, there's some testimony that in the
25 nonMiller-Haggin season, under some circumstances water

1 can still go to Second Point; do you recall that?

2 A. Yes.

3 Q. Under what circumstances would that be?

4 A. If there was a storm event on the Kern River
5 watershed, and water was beyond the demand or the ability
6 of the First Point service area to take that water, you
7 could have First Point water passing Second Point outside
8 the Miller-Haggin season.

9 Q. That's an unusual event?

10 A. It's an usual event, and they're very short-term
11 in essence three or four days.

12 Q. Now, let's go back to the nonMiller-Haggin
13 season, during the normal year, not high flow year,
14 there's no division of water from the First Point to
15 Second Point; is that correct?

16 A. That's correct.

17 Q. And in nonMiller-Haggin months, is the amount of
18 water either diverted or released by senior water
19 holders, does that have any impact on the Second Point?

20 A. No, releases within the First Point system are
21 strictly First Point. It had nothing with the Second
22 Point.

23 Q. The flow and diversion records which we've
24 referred to and seen repeatedly, that's a First Point
25 flow and diversion record; is that correct?

1 A. That is correct.

2 Q. Do you know if the Second Point maintains a
3 similar flow and diversion record?

4 A. I don't know.

5 Q. Thank you.

6

7

REDIRECT EXAMINATION

8

9 BY MR. PEARCE:

10 Q. And then, Mr. Core, Mr. Kuney asked you some
11 questions about your Exhibit 2-22, which is the chart
12 through which you summarize the amount of water which
13 would have been forfeited by the Kern Delta rights; do
14 you remember that?

15 A. Yes, I do.

16 Q. And Mr. Kuney asked you to compare the actual
17 record of diversion and use from the '60s and '70s and
18 '80s and '90s, and he's stated -- as you testified that
19 the numbers were different than -- the actual numbers
20 were different than the numbers in your chart; do you
21 recall that?

22 A. Yes, I do.

23 Q. When was the forfeiture judgment finalized?
24 When was the Kern River litigation?

25 A. 2007.

1 Q. And your calculation -- your numbers were based
2 on a projection as to what would have happened had the
3 judgment had been put in place previously?

4 A. That's correct.

5 Q. You weren't really trying to show what happened
6 on the river?

7 A. No.

8 Q. Mr. Kuney asked you during your direct
9 testimony, he asked you about changes that had been made
10 or not made to the flow and diversion record post
11 judgment in 1997. And you've testified a couple of times
12 today that the City has not changed the flow and
13 diversion records to reflect the judgment at this point
14 in time?

15 A. No, we have not.

16 Q. Could the City -- could the City have changed
17 the flow and diversion records to reflect the judgment?

18 A. I think we could -- could have probably would
19 have led to some unhappy water right holders.

20 Q. And your motivation for not changing it was
21 because -- as you testified why you're here today?

22 A. We're here today.

23 Q. The an additional motivation was trying to
24 maintain peace and stability on the river?

25 A. Trying to maintain some order and get some sort

1 of direction on how to handle that water.

2 Q. And then -- let me go back to the issue that we
3 had some discussion about Mr. O'Brien about the status of
4 the Kern Water Bank Authority and City of Shafter, what
5 is the Kern Water Bank Authority?

6 A. My understanding, Kern Water Bank Authority is a
7 public agency formed to --- by a group of water
8 districts, Kern County Water District, in order to
9 acquire and operate its about a 20,000 acre water banking
10 and water extraction product in Kern County.

11 Q. Why did the water districts form?

12 A. I don't know all of them, but I believe it's
13 mostly what's called westside districts, Bell Ridge and
14 the --

15 Q. Nobody in the First Point family?

16 A. I don't believe so.

17 Q. Has -- based on your experience with the Kern
18 River and your employment with the City of Bakersfield,
19 to your knowledge, has the Kern Water Bank ever received
20 any deliveries of Kern River water?

21 A. Yes, they have.

22 Q. Under what circumstances?

23 A. Flood conditions, mandatory releases.

24 Q. Have they ever received any water with -- are
25 they listed on the First Point flow and diversion record?

1 A. They were not.

2 Q. Do you know if they've ever taken any release
3 water?

4 A. Not to my knowledge.

5 Q. Has -- do you know has the Kern Water Bank,
6 during your experience -- or during your time with
7 Bakersfield, have they ever claimed any First Point water
8 rights?

9 MR. KUNEY: Objection. Hearsay.

10 MR. BAGGETT: He's asking -- I don't know that
11 he's asking for his opinion or his knowledge.

12 MR. PEARCE: Knowledge. Opinion.

13 MR. BAGGETT: To the extent, do you know the
14 answer?

15 THE WITNESS: I have never received a request,
16 and the City of Bakersfield has never received a request
17 for diversion of water.

18 MR. PEARCE: Q. What is the City of Shafter?

19 A. City of Shafter is an incorporated city
20 approximately 15 miles northwest of the City of
21 Bakersfield.

22 Q. And does the city of Shafter have any diversion
23 facilities along the Kern River?

24 A. Not to my knowledge.

25 Q. And has the City of Shafter ever claimed any

1 Kern River water rights?

2 A. Not to my knowledge.

3 Q. Have they you ever received any Kern River
4 water?

5 A. Not to my knowledge.

6 Q. Have they received any release water?

7 A. Not to my knowledge.

8 MR. PEARCE: That's all I have. Mr. Baggett, I
9 ask that the testimony in question be restored to the
10 record, based on his testimony that he's not aware of any
11 water rights held by the Kern Water Bank Authority or the
12 City of Shafter. Saying the statement is too definitive,
13 we submit something in which more accurately reflects his
14 testimony.

15 MR. KUNEY: May I respond to that?

16 MR. BAGGETT: Sure.

17 MR. KUNEY: He has given his testimony that the
18 written testimony was stricken that particular sentence
19 which gave an unvarnished opinion about the water rights
20 of the Kern Water Bank Authority and the City of Shafter.
21 He in the redirect indicated the extent of his knowledge,
22 which, frankly, doesn't come anywhere near close to a
23 basis of an opinion. I am prepared to let the redirect
24 -- there's no basis for reinstating the written portion.

25 MR. BAGGETT: I would agree. You have the

1 redirect examination and that's stands, unless there's an
2 objection to it?

3 MR. PEARCE: Fair enough.

4 MR. BAGGETT: Let's recross -- any parties have
5 any recross on the redirect? On the limited scope?
6
7

8 RECCROSS-EXAMINATION

9 BY MR. MC MURTREY:

10 Q. I just wanted to clarify this point on
11 Miller-Haggin season and nonMiller-Haggin season, and the
12 clarification I am looking for -- I believe you testified
13 that water could come to Second Point in a
14 nonMiller-Haggin season, if there was a high flow event
15 or something like that, correct?

16 A. Yes.

17 Q. And you're referring to water that has escaped
18 First Point and found it's way to Second Point, would
19 become the property of Second Point?

20 A. At Second Point of measurement.

21 Q. But my clarification, isn't it's also accurate
22 that the 1955 amendment to the Miller-Haggin Agreement
23 recognized that the construction of Isabelle affected the
24 historic flow of water to the Second Point during the
25 nonMiller-Haggin season, and it recognized and quantified

1 a certain amount of water that should continue to Second
2 Point even during the nonMiller-Haggin season, after the
3 construction of Isabelle; isn't that right?

4 A. Yes, after the '55 agreement, Buena Vista Water
5 and Second Point, we acquired a percentage of flow above
6 1500 CFS, as I remember.

7 Q. So there was an entitlement, if you will, of
8 Second Point during the nonMiller-Haggin season?

9 A. It's a direct calculation against the natural
10 flow which is assigned that water.

11 MR. MC MURTREY: There's a clarification.

12 MR. BAGGETT: Any other recross questions of the
13 staff, if not, submission of exhibits?

14 MR. PEARCE: We move to submit all of our
15 exhibits into evidence.

16 MR. BAGGETT: Any objection?

17 MR. O'BRIEN: Mr. Baggett, we would prefer to
18 have all of these at the end of the proceedings -- all of
19 those handled -- would that be acceptable? There's
20 exhibits coming in on cross.

21 MR. BAGGETT: Well, I normally allow parties to
22 submit their exhibits upon close of their case in chief,
23 including the exhibits which would be used for
24 cross-examination, which I think we have four or five of
25 them here. So --

1 MR. PEARCE: We have no objection to the
2 exhibits coming out on cross-examination.

3 MR. BAGGETT: There's no objection to the
4 exhibits under the directive, which we ruled in the
5 beginning regarding the public trust issues and concerns?

6 MR. JACOBS: And, Mr. Baggett, the only concern
7 I think we've, based on your ruling regarding Schwartz,
8 and the limits on his testimony. You have the written
9 testimony, which in some respects went beyond your
10 ruling, as long as it's understood that your ruling
11 controls. And that by the written testimony coming in as
12 exhibits, we don't somehow waive that objection. I think
13 that's the --

14 MR. BAGGETT: The objection remains on the
15 record. You got my oral ruling. I think counsel adhered
16 to that, and the way the witness has presented oral
17 testimony, Mr. Pearce understands that and his witness
18 understood, so we will take those, if there's no
19 objection under those conditions, exhibits are accepted.

20 Do you still have that microphone? If you can
21 use that, just for broadcasting purposes, and, secondly,
22 I don't know whose exhibits they were, but we had 75
23 through 79 that someone wanted earlier for the record.

24 MR. KUNEY: Scott Kuney, we introduced those.
25 We can either -- Mr. Baggett, have those moved with our

1 joint exhibits or have them moved in now. Whatever is
2 more convenient.

3 MR. BAGGETT: Doesn't matter. Let's just take
4 care of it now.

5 MR. KUNEY: We would move for, I believe, 75-79
6 to be brought in.

7 MR. BAGGETT: Any objection?

8 MR. PEARCE: No objection.

9 MR. BAGGETT: Very good. Thank you.

10 MR. PEARCE: Thank you.

11 MR. BAGGETT: North Kern Petitioners, I guess we
12 have two or three brief openings? No? Okay. We have a
13 witness.

14 MR. MC MURTREY: A witness.

15 MR. BAGGETT: Off the record.

16 (Discussion held off the record.)

17 MR. BAGGETT: We will start tomorrow at 8:30.

18 MR. MC MURTREY: Thank you, Mr. Baggett. I am
19 going to make this very brief. Most of the material has
20 already been covered.

21 DIRECT EXAMINATION

22

23 BY MR. MC MURTREY:

24 Q. Mr. Milobar, will you please state your name and
25 address for the record?

1 A. Martin N. Milobar, M-I-L-O-B-A-R, 154 East White
2 Lane, Bakersfield, California, 93307.

3 Q. Mr. Milobar, did you provide written testimony
4 in connection with your appearance here today?

5 A. Yes.

6 Q. Would you refer to Joint Exhibit 69. Is that a
7 true and correct copy of your written testimony?

8 A. Yes, it is.

9 Q. Is it true and correct as of your -- as of
10 today?

11 A. Yes.

12 Q. Did you also provide a resume in connection with
13 your appearance?

14 A. Yes, I did.

15 Q. Refer you to Joint Exhibit 70; is that a full,
16 true, and correct copy of your resume?

17 A. Yes.

18 Q. Mr. Milobar, I understand that you were employed
19 by the Buena Vista Water Storage District for
20 approximately 24 years; is that correct?

21 A. Yes.

22 Q. And 21 of those years you were the manager of
23 that district; is that right?

24 A. That's correct.

25 Q. And during the period of your employment, did

1 you become familiar with the physical aspects of the Kern
2 River?

3 A. Yes.

4 Q. I will refer you to Joint Exhibit 27, and
5 indicate to you that that is a map -- you're going to
6 have to get another binder. That is a map of the Kern
7 River watershed, is it not?

8 A. I believe it is.

9 Q. I believe Mr. Schwarz has already provided a
10 similar map, so I am not going to go through the
11 details of it. You recognize that to be a true and
12 accurate representation of the Kern River watershed?

13 A. Yes, it is.

14 Q. Now, I will refer you to Joint Exhibit 28, do
15 you recognize that?

16 A. Yes.

17 Q. That's also a map of the Kern River service
18 area, is it not?

19 A. That's correct.

20 Q. Did it identify there on certain public
21 agencies?

22 A. Yes.

23 Q. You heard testimony about First Point diverters,
24 Second Point diverters, and lower river diverters?

25 A. Yes.

1 Q. Can you identify the First Point diverters?

2 A. On the map on the lower end of the Kern Delta
3 Water District in the area shown in the green and light
4 green area on the bottom, the area is Kern Delta Water
5 District. A gray area kind of in the middle is the City
6 of Bakersfield area, and the area to the north shown in
7 yellow is the Northern Kern Water Storage District.

8 Q. Are those First Point diverters?

9 A. Those are First Point.

10 Q. Who today are the Second Point diverters?

11 A. Buena Vista Water Storage District, and it's
12 shown kind of parallel to the aqueduct in the green and
13 brown.

14 Q. Who today is the lower river?

15 A. That's the Kern County Water Agency, and it's
16 kind of covers the whole county.

17 Q. Okay. Mr. Milobar, you've provided testimony
18 regarding the Miller-Haggin Agreement of 1888, the Shaw
19 Decree of 1900, and 1955 Amendment, and I think that
20 subject has been pretty well covered. I am not going to
21 ask you any further questions about that. That's all I
22 have.

23 MR. PEARCE: Mr. Baggett, I just have a
24 housekeeping question. I don't anticipate taking very
25 long with Mr. Milobar, but I just want to clarify how

1 much cross-examination time I have total for this witness
2 as well as for the witness tomorrow?

3 MR. BAGGETT: I said both parties have 90
4 minutes. That's more than ample time.

5 MR. PEARCE: Thank you.

6

7

CROSS-EXAMINATION

8 BY MR. PEARCE:

9 Q. Mr. Milobar, good afternoon. My name is Colin
10 Pearce. I represent the City of Bakersfield.

11 Can you tell me what the Buena Vista Water
12 Storage District is?

13 A. It's actually in the Buttonwillow area. North
14 and south of that area is comprised of 50,000 acres of
15 farmland, most of it is west of Interstate 5, and the
16 boundaries actually do cover the old Buena Vista Lake
17 area also.

18 Q. Have you ever worked for the North Kern Water
19 Storage District?

20 A. No, I have not.

21 Q. Have you ever worked for the Kern County Water
22 Agency?

23 A. No, I have not.

24 Q. Kern Water Bank Authority?

25 A. No, I have not.

1 Q. Have ever worked for the City of Shafter?

2 A. No.

3 Q. And are you here testifying today on behalf of
4 just Buena Vista Water Storage District?

5 A. Yes.

6 Q. You're not prepared to provide any testimony in
7 support of the position of the other North Kern
8 Petitioners being the North Kern Water Storage District,
9 City of Shafter, Kern Water Bank Authority, and Kern
10 County Water Agency?

11 A. I am here on behalf of Buena Vista and requested
12 by Buena Vista, maybe the attorneys might have something
13 else to say.

14 Q. Are you -- I would assume based on your
15 long-time employment with the Buena Vista Water Storage
16 District that you are familiar with the rights held by
17 Buena Vista?

18 A. Yes, I am.

19 Q. Are you familiar with the diversion of water
20 used by Buena Vista?

21 A. Yes.

22 Q. Are you familiar with any water rights that are
23 held by the Northern Kern Water Storage District?

24 A. Just through my experience on the river, you
25 know, watching the diversion records and things like

1 that. I am familiar with how the Miller-Haggin division
2 is, and the 1955 amendment, how it applies. Things like
3 that.

4 Q. And there's been a lot of testimony today about
5 the flow and diversion records, single sheet of paper,
6 the list rights and flow amounts. Are you familiar with
7 that sheet, the daily flow and diversion record?

8 A. Yes.

9 Q. Is that something that you worked with during
10 your employment with Buena Vista Water Storage District?

11 A. No.

12 Q. No?

13 A. No.

14 Q. Why is that?

15 A. That was -- that's the First Point allocated
16 share of Kern River water. It's divided up in that area,
17 and doesn't impact the amount of water that is allocated
18 to Buena Vista.

19 Q. The amount of water allocated to Buena Vista is
20 dependent on the flow; isn't that correct?

21 A. The calculated flow amount.

22 Q. Then once the water is divided between First and
23 Second Point, the water is diverted and used within the
24 First Point of measurement, that's not something that
25 Buena Vista is involved with; is that correct?

1 A. That is correct.

2 Q. That's not something that you have specific
3 knowledge of or experience?

4 A. Other than my general knowledge of the Kern
5 River and the way it's divided as I experienced.

6 Q. Do you know if the -- strike that.
7 Are you familiar with the Kern County Water
8 Agency?

9 A. Yes.

10 Q. What is the Kern County Water Agency?

11 A. That was formed to contract for State Board
12 project water by its member units. Buena Vista is one of
13 those member units.

14 Q. And so Buena Vista is a member of the Kern
15 County Water Agency?

16 A. Yes.

17 Q. Do you know if the Kern County Water Agency
18 holds or claims to have Kern River water rights?

19 MR. JACOBS: Objection. Calls for a legal
20 conclusion. Lack of foundation, and it's the beyond the
21 scope of his direct.

22 MR. PEARCE: I am not limited to the scope of
23 his direct.

24 MR. BAGGETT: I will sustain. Will you lay a
25 foundation and rephrase.

1 MR. PEARCE: Q. You indicated you know what the
2 Kern County Water Agency is?

3 A. Yes.

4 Q. Have you worked with the Kern County Water
5 Agency in the past?

6 A. Yes.

7 Q. Do you have an understanding as to what water
8 rights, if any, they hold beyond the State water project?

9 A. Specifically Kern River water?

10 Q. Yes.

11 A. They hold the lower river water rights.

12 Q. Do you know what sort of right that is? Do you
13 know anything about that right?

14 A. Well, it's -- it's defined in the '62 Agreement.
15 It was water historically that -- that had passed Highway
16 46. The water passed the Second Point, when it passed 46
17 becomes lower river water because the construction of
18 Isabella Reservoir. That interrupted that natural
19 process, and so it had to be recognized and quantified in
20 that agreement.

21 Q. And in terms of overall priority on the Kern
22 River, is the lower river right lower than the Stine,
23 Buena Vista right?

24 A. Yes.

25 Q. Do you know if the lower river right is affected

1 in any way by the amount of water diverted and used at
2 First Point?

3 A. No, I don't think it is.

4 Q. Tell me again, it's similar to the Buena Vista
5 right? Isn't it true that the lower river right is
6 merely a function impacted by the amount of water flowing
7 in the Kern River?

8 A. Correct, it's the calculated number based on the
9 flow.

10 Q. It's in the lower river right like the Buena
11 Vista right are not affected in any way by the amount of
12 water used, diverted, or released into the First Point
13 family?

14 A. Yeah, except, you know, if they do -- if they
15 don't use all of their flow, and it finds its way to
16 Second Point, then it's Second Point water.

17 Q. That happens in very certain high flow years; is
18 that correct?

19 A. That would be most of the time that it happened.

20 Q. That has been typically happened during high
21 flow. It's not affected by releases, correct?

22 A. It's not part of the normal release procedure
23 that First Point administers. If the flow is large
24 enough, it can be -- it still falls in that category. It
25 depends on the size of the year or the flow in the river.

1 Q. Okay. Are you familiar with the City of
2 Shafter?

3 A. Yes.

4 Q. Where is the City of Shafter located?

5 A. It's kind of just north of Bakersfield.

6 Q. And based on your work on the Kern River, are
7 you aware of any claim ever being made by the City of
8 Shafter to have permanent water rights?

9 MS. WILLIS: Objection. Lacks foundation. Also
10 calls for a legal conclusion. It's -- I fail to see the
11 relevance to the out -- the scope of this witness's
12 testimony.

13 MR. PEARCE: Once, again, I am not limited by
14 the scope of his direct. I will lay more of a
15 foundation. I am a little bit -- and I just wanted to
16 point out a concern -- that he is testifying on behalf of
17 everybody that doesn't have knowledge of everybody, so I
18 am trying to -- trying to figure out what he knows.
19 That's all.

20 MS. WILLIS: I'm not sure it's within the scope
21 of his written testimony either.

22 MR. PEARCE: I'm not limited by that.

23 MR. BAGGETT: He is an expert, but I think maybe
24 to save some time, it's clear he is not a witness for all
25 the districts. He's not an expert for all the districts.

1 You have to go through each one, and show that he's in
2 the -- that's what counsel examined him, he stated he was
3 a witness for Buena Vista. You're welcome to proceed,
4 but I don't know if it's necessary.

5 MR. PEARCE: Q. To conclude this issue, you're
6 not familiar with, and have not worked with the water
7 rights, and are not here to testify and give opinions
8 about the water rights about anything besides Buena
9 Vista?

10 A. That's correct.

11 Q. So you don't know if -- we're here today to deal
12 with forfeit of water. You're not here to give an
13 opinion as to whether other water right holders of the
14 Kern River can take and use the forfeited water?

15 A. That's correct.

16 Q. One the party is not here, the Kern Delta Water
17 District, are you familiar with the Kern Delta Water
18 District?

19 A. Yes.

20 Q. What is the Kern Delta Water District?

21 A. It's one of the three First Point primary
22 branches.

23 Q. And the Kern Delta Water District takes and
24 diverts water from the Kern River from within the First
25 Point family?

1 A. That's correct.

2 Q. Are you aware of a forfeiture judgment that was
3 issued in -- and final judgment issued in 2007?

4 A. Yes.

5 Q. And are you aware that forfeit affected and
6 limited the rights held by Kern Delta?

7 A. Yes.

8 Q. And do you know what water rights, specifically
9 by name, Kern Delta Water District holds on the Kern
10 River?

11 A. The first right on the river is the Kern Island
12 Right, and the remaining portions of the First Point
13 water distributive as described here. I am aware of
14 that.

15 Q. Are you aware that in addition to the Kern
16 Island right, the Kern Delta holds more junior water
17 rights?

18 A. Yes.

19 Q. Do you know if the junior water rights held by
20 Kern Delta -- do you know if they typically divert water
21 released by more senior rights of the river?

22 A. I didn't specifically work with those procedures
23 or management or taking those records, so my knowledge is
24 based on what I've learned over the years, and what I've
25 heard today.

1 Q. Okay. And okay. Does the Second Point interest
2 or does Buena Vista or lower river, do they keep flow and
3 diversion records that are similar to the flow and
4 diversion records kept by First Point?

5 A. Yes.

6 Q. What are -- can you describe?

7 A. The Buena Vista Water Storage District uses the
8 watermaster for flow at Second Point, so they keep daily
9 records of the flows that reach Second Point on behalf of
10 Buena Vista, lower river, or other contractual
11 arrangements of the water that reach Second Point.

12 Q. And did you introduce or did you attach any
13 copies of the Second Point flow and diversion records to
14 your testimony?

15 A. No, I did not.

16 Q. Do those -- those Second Point flow and
17 diversion records, do they reflect diversion of Kern
18 River water to Buena Vista?

19 A. Yes.

20 Q. Is there a reason why you didn't include that
21 with your testimony, those records?

22 A. I didn't think it was something that had to be
23 in there for the subject.

24 Q. Now, in your testimony on page 3 -- if you have
25 it handy there or not -- you don't have to refer to this

1 necessarily. On page 3, you talk about the Shaw Decree,
2 is -- when you write about -- are any of those rights
3 adjudicated in the Shaw Decree?

4 A. Any of what rights?

5 Q. Any Kern River rights held by the Buena Vista
6 Water Storage District, were any of those rights
7 adjudicated in the Shaw Decree?

8 A. No.

9 Q. And your testimony -- you refer several times to
10 the Kern River flow and diversion records. And I want to
11 clarify, when you talk about Kern River flow and
12 diversion records, you're really talking about First
13 Point flow and diversion records?

14 A. And in the upper right-hand corner is where
15 Buena Vista's calculated right is shown on a daily basis.

16 Q. And that right is the allocation of the flow of
17 the Kern River, correct?

18 A. With the calculated First Point flow.

19 Q. So the First Point flow and diversion records
20 show the allocation of the flow of the river to the
21 Second Point; is that correct?

22 A. It shows the second daily allocation, the second
23 one.

24 Q. Then the actual diversion within Second Point,
25 that's something else? That's a different record,

1 correct?

2 A. Because of the storage in Isabella Reservoir, we
3 order water -- the natural flow doesn't come down the
4 river to us on a daily basis.

5 Q. When you refer in your testimony to the flow and
6 diversion record, you're referring to the First Point
7 flow and diversion record not the Second Point flow and
8 diversion record, which we haven't seen today?

9 A. That's correct.

10 Q. Page five of your testimony, paragraph 26, you
11 refer to the official watermaster records which are
12 currently maintained under supervision of the Kern River
13 watermaster; who is the Kern River watermaster that you
14 refer to?

15 A. Chuck Williams.

16 Q. Who is Chuck Williams?

17 A. He works for -- he had previously worked for
18 North Kern Water Storage District and performed
19 watermaster duties, and it's my understanding now that he
20 is mostly confined to the watermaster duties.

21 Q. What were the watermaster duties, if you know?

22 A. He supervises the recordkeeping on the Kern
23 River. He is involved in high flow year circumstances.
24 Things like that. He works for the Corps of Engineers.
25 He has to answer questions that different public groups

1 may have about the Kern River. It's somewhat intimate
2 exposure.

3 Q. That's something different than the City of
4 Bakersfield's administration of the Kern River and
5 keeping of the record; is that right?

6 A. They keep the records on behalf of the
7 watermaster under his -- he is watching over how they do
8 it, that it's being done properly as per the agreements
9 and amendments and produce the record.

10 Q. What about the actual administration of the Kern
11 River, the headgates, the canals and diversion points?

12 A. The First Point area of the City of Bakersfield
13 as they pointed out, inherited, administration of the
14 diversion of water to First Point family entities of
15 there -- that's separate from the watermaster duty.

16 Q. So the actual administration at the First Point
17 is not something that involves the watermaster; is that
18 correct?

19 A. Other than the correct amount of water is being
20 allocated.

21 Q. Do you know when the watermaster position
22 currently held by Mr. Williams, do you know when that was
23 created?

24 A. It's specifically spoken to in the '62 water
25 rights and storage agreement.

1 Q. Do you know if there was a watermaster who
2 performs the same function as Mr. Williams before '62?

3 A. I think Kern County Land Company kept all the
4 records. Once in -- 1976 when all of that occurred and
5 the Isabella Reservoir when all of that stuff happened,
6 it was necessary to create a formal position there, and
7 he's held that position, I believe, since that time.

8 Q. Is that a full-time position?

9 A. I wouldn't call it a full-time position. I
10 think prior to that time, Bill Walsh was the watermaster.

11 Q. Now, you know we're here today to discuss the
12 issue involving forfeiture and the forfeiture of the
13 portion of the Kern Delta water rights. You were present
14 with the testimony of Mr. Core. He determined the fact
15 that the forfeiture judgment would have produced an
16 average of 50,000 acre-feet of water historically had the
17 forfeiture of water been applied?

18 A. Yes.

19 Q. Do you have any reason to doubt or question his
20 opinions with regard to that number and that methodology?

21 A. I was able to review the tables that was
22 displayed showing the application of the caps and how
23 that resulted in that average flow. I have no reason to
24 dispute those numbers.

25 Q. Do you have any reason to dispute the fact that

1 if the caps had been in place historically, that the caps
2 would have produced the quantity of forfeited water which
3 Mr. Core determined?

4 A. I suppose -- I mean, all I know that happened
5 recently -- and that's from that point forward -- that's
6 what's occurring. I don't have an opinion on looking
7 back a hundred years or 50 years. That wasn't the case.

8 Q. You've no reason to doubt the accuracy of his
9 record; is that correct?

10 A. I don't dispute the numbers that are shown as he
11 described them based on what I've heard from our legal
12 counsel.

13 Q. Well, I don't want to get into what you heard
14 from your legal counsel. Do you have any reason to doubt
15 that as a result of the recent judgment of the forfeiture
16 that there's approximately 50,000 acre-feet of water now
17 available on the Kern River?

18 A. I don't think you want my opinion.

19 Q. Yes.

20 A. Is that what you want?

21 Q. Yes.

22 A. My opinion is that the -- it looks to me looking
23 at the flow and diversion record that the water all gets
24 distributed according to the Shaw Decree as it always
25 has, and is being called something different, but it

1 looks to me like it all gets absorbed just like it has
2 for the last hundred years.

3 Q. It looks like that because that's what's shown
4 in the flow and diversion chart?

5 A. That's what happened.

6 Q. But you're not familiar with the actual water
7 rights held by North Kern?

8 A. I'm not an expert.

9 Q. You don't know if North Kern has the right to
10 take the water?

11 A. I don't have an expert opinion about water.

12 Q. Do you know if Kern Delta can take back the
13 water that was forfeited through their junior rights?

14 A. Are you talking about the -- I assume you're
15 talking about the trial and right basically during the
16 winter months.

17 Q. So --

18 A. Yes, they release the water. I just -- I've
19 witnessed what I've heard today that the release
20 procedure redistributes the water.

21 Q. So let's say on a forfeiture day -- so if the
22 Kern Island is capped during the forfeit program, instead
23 of having 300 CFS of forfeiture entitlement, do you know
24 if the junior Kern Delta right can pick up some of that
25 300 CFS picked up and created by the forfeiture and use

1 it?

2 MR. MC MURTREY: I am going to object. Calls
3 for speculation. Lacks foundation.

4 MR. BAGGETT: I think the witness has already
5 stated, asked and answered that he cannot as an expert on
6 water rights. It's been stipulated, so I would sustain
7 the objection. Continue but --

8 MR. PEARCE: I understand. I won't belabor the
9 point.

10 MR. PEARCE: Q. Let's go back to something you
11 do know about, Buena Vista Water Storage District. Do
12 you know if Buena Vista Water Storage District can take
13 any of the forfeited water?

14 A. If it finds its way to Second Point, we can. If
15 that happened, it would be Buena Vista water -- any water
16 that finds its way.

17 Q. That's based on the flow in the river if the
18 flow is high enough and some water makes it?

19 A. There's that and the calculated portion that
20 resulted from the 1955 amendment where Buena Vista
21 actually allocated a portion of the flow above 1500 cubic
22 feet per second daily.

23 Q. That 1955 formula is based on the flow of the
24 river, correct? It's not affected by releases or by
25 diversion and use?

1 A. That portion is calculated just like the other
2 rights.

3 Q. Okay. Just -- has in the past -- has Buena
4 Vista taken release water released by First Point rights?

5 A. If water is First Point water and it reaches
6 Second Point, we regress.

7 Q. You don't know if that's release water or high
8 point flow?

9 A. It's a different matter to me if the flow
10 reaches Second Point, it's our water and we divert it.

11 Q. You don't know how it got there and you have
12 extra water and take it?

13 A. It comes down the river.

14 Q. When you say take it, what does Buena Vista use
15 water for?

16 A. Irrigate approximately 50,000 acres within the
17 district, irrigation and recharge.

18 Q. Buena Vista also is a State water contractor?

19 A. Yes, it is.

20 Q. Now, the nonMiller-Haggin season that's the time
21 of year when rights are not divided on the river between
22 First Point, Second Point, two-thirds, one-third; is that
23 correct?

24 A. The two-thirds, one-third is confined to the
25 Miller-Haggin season in the March through August. That

1 1500 cubic feet per second does occurred in the
2 nonMiller-Haggin season.

3 Q. Didn't the forfeiture of the rights also occur
4 during the nonMiller-Haggin season?

5 A. Yeah, it did, if it didn't go to August.

6 Q. Other than August, the forfeiture months occur
7 during the nonMiller-Haggin season?

8 A. Yes.

9 MR. PEARCE: Thank you. That's all I have.
10 Nothing further.

11 MR. BAGGETT: Staff anything? Have none?
12 Exhibits.

13 MR. MC MURTREY: We will move the exhibits
14 identified by the witness or do you want to wait until we
15 finish the case in chief tomorrow and go through them
16 all? I guess we have one more witness. We can wait
17 until tomorrow, okay?

18 MR. BAGGETT: We can go off the record.

19 (Discussion held off the record.)

20 MR. BAGGETT: We will start tomorrow at 8:30.
21 We have one witness, anticipate 20 minutes or less for
22 the direct.

23 MR. KUNEY: For this witness, Mr. Baggett?

24 MR. O'BRIEN: We may need a little more than
25 20 minutes, this is our primary hydrology witness, and I

1 think we can really walk through some of the steps of the
2 analysis probably looking at more like 30 minutes, maybe,
3 I would say.

4 MR. BAGGETT: Okay. And cross I assume you will
5 use your time for one witness, anticipate an hour, hour
6 and a half total? I am just trying to an anticipate -- I
7 know some of you have flights and travel times you can
8 anticipate.

9 MR. KUNEY: We've been originally working on our
10 90-minute allocations.

11 MR. BAGGETT: Yeah.

12 MR. KUNEY: And our rough approximation for
13 Mr. Milobar about 30 as much as an hour for Mr. Easton.
14 We are going to try to finish other than that, but it is
15 -- there it's a complicated analysis. He's going to try
16 to give a summation of all of his exhibits.

17 I hate to -- I don't think we can get it in
18 30 minutes.

19 MR. BAGGETT: 30-45 we can --

20 MR. KUNEY: What I understood we have a gross
21 full of time for 90 minutes. Given the disparity of
22 their work, we budget him at no more than an hour and
23 less if better that's what we believe.

24 MR. PEARCE: I understand the orders were
25 20 minutes for each witness, cumulative total of 90. So

1 I don't -- I am really concern about going over 20, but
2 when our witnesses, who are equally important, were
3 limited to 20 minutes. If I just asked for 30 or
4 40 minutes, I would have done so. I would object to
5 that.

6 MR. BAGGETT: We made it clear, a party can
7 always ask for more time if they have cause. You were
8 certainly welcome to do that. You had something you
9 thought you had to get through, and you needed more time,
10 we will -- I am just trying to anticipate, so it will be
11 easily out of here in the morning. That's all I am
12 trying to ask.

13 And so we can have closing briefs -- we can
14 cover that tomorrow. That won't take long. They will be
15 relatively short. We will put a ten-page limit on it.
16 Resolve sooner than later. We're finished. 8:30
17 tomorrow.

18 (Proceedings adjourned at 2:18 p.m.)

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October 27, 2009 at 8:29 a.m.

1
2
3 MR. BAGGETT: You're up.

4
5 DIRECT EXAMINATION

6 BY MR. KUNEY:

7 Q. I've been asked to assist in the presentation of
8 the oral testimony of Mr. Easton of MBK Engineers, and
9 this presentation is actually being presented jointly on
10 behalf of the joint parties that we've talked about. I
11 would like to, at first, give you a bit of a road map as
12 to what we're going today to walk you through with it
13 briefly.

14 MR. BAGGETT: Has the witness taken an oath?

15 MR. KUNEY: No.

16 MR. BAGGETT: Do you promise to tell the truth
17 in these proceedings?

18 MR. EASTON: Yes, I do.

19 MR. BAGGETT: Now, are the joint parties'
20 detailed written testimony and the joint exhibits in the
21 four binders providing a summary of that?

22 MR. KUNEY: After reviewing his professional
23 engineering qualifications, we will be explaining Mr.
24 Easton's findings with regard to the hydrology of the
25 Kern River. In that regard, Joint Exhibit 45, and then

1 Mr. Easton will be explaining his three-step engineering
2 analysis by using a single illustrative example.

3 You may recall a longer period, and the months
4 -- he will single out one example to illustrate his
5 analyses. He is providing a detailed discussion with the
6 use of a PowerPoint presentation to help facilitate that
7 analysis, going through the baseline conditions analysis
8 on the Kern River.

9 Table one analysis is baseline use, the
10 restricted rights use analysis shown in table two and
11 concerns the North Kern judgment, and finally an
12 assessment of changes to the river system shown in his
13 table three analysis that are presented in the binders.

14 He will conclude his analysis and testimony here
15 this morning by a review of Joint Exhibit 68, which is
16 his statement of principal conclusions.

17 Q. Now, Mr. Easton, if you would please turn to
18 Joint Exhibit 46, which is your testimony of Daniel
19 Easton. Do you have that binder?

20 A. Yes, I do.

21 Q. Okay. And was this written testimony prepared
22 under your direction? Go ahead and look.

23 A. Yes, it was.

24 Q. Okay. Do you have your microphone on? There we
25 go.

1 A. I do now.

2 Q. Can everybody hear him? Very good, okay. Is
3 that written testimony a true and accurate copy of your
4 final written testimony in this matter?

5 A. Yes, it is.

6 Q. Do you have any changes that you want to make?

7 A. No, I do not.

8 Q. Do you adopt that written testimony as part of
9 this proceeding here today?

10 A. Yes.

11 Q. Okay. Mr. Easton, if you would, let's turn to
12 Joint Exhibit 47, which I believe is your professional
13 resume. Do you have that exhibit in front of you?

14 A. Yes, I do.

15 Q. Can you explain to me -- what professional
16 licenses do you hold?

17 A. I have a California Professional Engineering
18 license.

19 Q. Okay. And what is your college education?

20 A. I -- I received a bachelor of science degree in
21 civil engineering from Loyola Marymount University.

22 Q. Do you have any post graduate degree in
23 engineering?

24 A. Yes, I do a masters of science degree in water
25 resource engineering.

1 Q. In your resume of profession qualifications
2 you've identified that you had formerly worked at the
3 California State Department of Water Resources; is that
4 correct?

5 A. Yes.

6 Q. What would be an example of some of the
7 principal engineering work you performed with the State
8 of California Department of Water Resources?

9 A. I -- I worked on many projects for the
10 Department of Water Resources. Two that come to mind are
11 the In-Delta Storage Project Feasibility Study which I
12 did the planning operations analysis for that. Another
13 was I analyzed the water supply impacts to CVP and due to
14 climate change.

15 Q. And are you currently employed?

16 A. Yes.

17 Q. And where do you work?

18 A. I work with MBK Engineers.

19 Q. That's a water resource engineering firm here in
20 the state?

21 A. Yes, it is.

22 Q. What would be an example of the significant
23 engineering work you performed by working at MBK
24 Engineers?

25 A. Two of the recent projects I've been working on,

1 performing water supply analyses for the upper San
2 Joaquin storage investigations, and also for the San
3 Joaquin River Restoration Program.

4 Q. Okay. Other than the work that you performed in
5 this matter, have you ever performed professional
6 engineering services for any of the joint parties?

7 A. No, I have not.

8 Q. If you would please, let's turn to your Joint
9 Exhibit 66, which I believe is entitled "A summary of
10 Engineer Methodology". I would like to ask you a couple
11 of questions.

12 A. This is part of the slides.

13 Q. Okay. What background investigation did you
14 conduct in this matter?

15 A. I reviewed the State Water Board Decision 1196
16 and related documents and reviewed the North Kern
17 judgment, and reviewed records of flow and diversion
18 hydrology on the Kern River. I toured the Kern River and
19 it's diversion facilities, and I considered the issues
20 identified by the State Board.

21 Q. And what engineering analysis did you conduct?
22 What evaluation analysis did you perform?

23 A. I looked at the water supply characteristics of
24 the Kern River. I reviewing historical records. I
25 considered whether the Kern River Judgment created any

1 other water supply, and then I employed a three-step
2 methodology to determine whether the Kern remains fully
3 appropriated under the North Kern judgment, and the
4 evaluation that I employed for that step -- it takes
5 three steps.

6 First, I look at the baseline operations of the
7 system, then I quantified decreases in use by the
8 restricted rights of the North Kern judgment, restricted
9 rights of the Kern Island, Buena Vista first, and Stine
10 and Farmers, and then I assessed whether that changed the
11 baseline water conditions on the Kern River.

12 Q. And after you had completed your engineering and
13 analysis, did you then summarize your results?

14 A. Yes, I did. I prepared my written testimony,
15 and I have plots and tables as exhibits, and I also
16 prepared a statement of conclusions.

17 Q. Okay. Now, let's maybe turn to the substance of
18 your analysis. Let's first address the subject of the
19 hydrology of the Kern River. If you would please turn to
20 Joint Exhibit 45. Do you have that?

21 A. Yes, I do.

22 Q. Okay. What was the source of data that -- that
23 you utilized to develop this chart?

24 A. The 2008 annual hydrographic report.

25 Q. That's one of the official records on the Kern

1 River; is that correct?

2 A. That's correct.

3 Q. And what significant information with regarding
4 Kern River hydrology were you able to determine from that
5 information?

6 A. Well, I saw that for the period of records from
7 1894 to 2008 the maximum annual flow recorded occurred in
8 1916, approximately 2.5 million acre-feet. There were
9 two other years that were close to that 1983 and 1969,
10 but on the other side of the annual flow spectrum we see
11 that nearly two-thirds of the years are below average --
12 the calculated average for the 1894 through 2008 period
13 is approximately 726,000 a year acre-feet.

14 Q. So most of the years are below the annual
15 average of flow?

16 A. Yes.

17 Q. Did you in your engineering analysis evaluate
18 whether the North Kern judgment resulted in a physical
19 change in the Kern River hydrology? Did it add water
20 physically into the river channel? Did you evaluate
21 that?

22 A. Yes, I did. It was -- it's a quick analysis.
23 The entirety of the water supply for Kern entitlement
24 holders on the Kern River is the computed natural flow at
25 First Point, and the North Kern judgment has no effect on

1 that quantity, so it has no physical impact on the amount
2 of water available to Kern or to existing entitlements.

3 Q. Before the North Kern Judgment, all of the
4 natural flow was measured, correct?

5 A. Yes.

6 Q. And after the North Kern judgment all of the
7 flow was measured in the exact same manner; isn't that
8 correct?

9 A. Based on my review of the 2007/2008 flow and
10 diversion records, I saw no difference in how it was
11 measured.

12 Q. Okay. Let's turn to an explanation of your
13 three-step engineering analysis, and that is shown
14 collectively in the binders as joint exhibits, I believe,
15 48 through 65; is that correct? All the table ones,
16 twos, and threes; is that right?

17 A. Yes.

18 Q. And your analysis was with regard to six months
19 being the six months where there was a finding of
20 forfeiture in the North Kern judgment; correct?

21 A. Repeat the question.

22 Q. Your analysis was limited to the six months that
23 was determined to be forfeiture months in the North Kern
24 judgment; is that right?

25 A. Yes.

1 Q. What was the period of records that you
2 analyzed?

3 A. The period of records that I analyzed was 1964
4 through 2008.

5 Q. And was the methodology that you performed the
6 same for all of those years and all of those months?

7 A. Yes.

8 Q. Is there one example that you've identified that
9 best illustrates the analysis that you performed as part
10 of this matter?

11 A. I have. I identified December of 2001, December
12 being a forfeiture month, 2001, and I've identified that
13 because that is the month that we have the largest
14 increase in the release to other rights, and we -- I
15 stepped through the examples to see what I mean by that.

16 Q. Why don't you, if you would please, explain to
17 Mr. Baggett and staff the analysis that you performed in
18 the context of this one example, December 2001.

19 A. So as I had explained earlier -- I need to talk
20 into the microphone -- as I explained earlier this is a
21 three-step methodology, and table one is essentially step
22 one, and in table one I identified the baseline.

23 And I've -- these are two Joint Exhibits 33 and
24 63. Joint Exhibit 33 is the Kern River First Point flow
25 and diversion record; 63 is an excerpt from my table one

1 analysis, and you can see the flow and diversion record
2 is the monthly recap for December of 2001. That's in the
3 upper right-hand corner of the record.

4 And you can see my table one is for the same
5 time period. I can retrieve computed natural flow at
6 First Point from the Kern River First Point flow and
7 diversion record, and the computed natural flow at First
8 Point is a portion between the First Point, Second Point,
9 and lower river diverters and their recorded entitlement.

10 The First Point recorded entitlement is found in
11 the lower left-hand corner of the record. The Second
12 Point diverters' entitlement is found up in the numbers
13 of the upper right-hand corner of the record, and the
14 lower river diverter is also found in the upper
15 right-hand corner of the record.

16 In these three the columns we have the releases
17 and distributions of gross entitlement of various
18 diversion rights the -- well, the releases are of the
19 diversion rights and gross entitlement. We have
20 distribution to other diversion rights of that release,
21 and you can see at the summations at the bottom of those
22 two columns, the releases to the river in this month are
23 equal to the distribution to the two other diversion
24 rights.

25 These four columns of the record, for the

1 various -- for the various entitlement or various First
2 Point entities -- this is the actual diversions of those
3 entities, and they are totaled on the bottom of the
4 table. Next.

5 And I sum those values up as my recorded use of
6 First Point diverters in my table one analysis. It also
7 included in the upper right-hand corner, the seepage loss
8 associated with conveying the water to First Point
9 diverters. This the recorded released to Second Point is
10 retrieved from the annual hydrographic reports, and
11 notice that recorded entitlements of First Point
12 diverters is equal to the recorded use in this instance,
13 and therefore the recorded release to Second Point is
14 zero. They are not releasing any of their entitlement to
15 Second Point.

16 The total supply available to Second Point lower
17 diverters is their recorded entitlement plus the release
18 to Second Point. They have no release to Second Point,
19 so the 119 -- 119 acre-feet of available water supply to
20 them is solely their entitlement.

21 These two cells I have calculated the -- the use
22 of the First Point, Second Point, and lower river
23 diverters and the recorded Kern River water discharged to
24 the intertie is pulled from the annual hydrographic
25 reports.

1 I did not get the use from the records of Second
2 Point diverters. It's simply is acknowledging just as
3 the D1196 did, it's a closed basin. The only change from
4 D1196 to now is that we have the intertie where water can
5 obviously leave the basin. So I can calculate the
6 diversion use of Second Point and lower river diverters
7 by simply taking the difference of the recorded -- of the
8 supply and the amount of water that is of Kern River
9 water discharged north intertie.

10 Next. So at the end of table one we -- we sum
11 up the results. We have our computed natural flow, which
12 is equal to the total recorded entitlement -- the sum of
13 the First Point, Second Point, and lower river diverter
14 entitlement, and that is equal to the total use. Based
15 on standard engineering practices and principals, I
16 conclude that the basins is in the end review of the flow
17 and diversion, and the basins is in a state of deficit in
18 this month.

19 So now that we have identified the baseline
20 conditions, we now can apply the North Kern judgment to
21 the restricted rights. And so first, what we need is to
22 retrieve a preserved entitlement from the North Kern
23 judgment. We find that in Joint Exhibit 4, and we're
24 talking about the month of December.

25 Next. So the preserved entitlements for the

1 four restricted rights are listed on the Kern Island
2 first, Buena Vista first, Stine, and Farmers. So let's
3 look at the flow and diversion record. Next. And you
4 can see the restricted rights listed over in the
5 diversion rights column, and I've highlighted over to the
6 right under the entitlement less releases column, what
7 their actual diversions were in this month. The
8 preserved entitlements are going to limit how much they
9 can divert in this month. Next.

10 So let's look at Kern Island first from the flow
11 and diversion records you can retrieve the gross
12 entitlement for Kern Island first. You can retrieve the
13 actual use of -- of Kern Island first, and then we can
14 apply a preserved entitlement. The preserved entitlement
15 is less than what they actually diverted in this month.

16 So now that we apply the North Kern judgment,
17 they are going to be limited to that preserved
18 entitlement. So my projected use for Kern Island first
19 in this month is 2050 acre-feet. So the change in Kern
20 Island first diversions is in column eight. This is the
21 decreased use. That has changed by 5,116 acre-feet.

22 I skipped over forfeiture release so I can put
23 it in context in the decreased use. Forfeit release is
24 the gross entitlement minus the preserved entitlement,
25 but it is not a measure of what is actually changing in

1 historically operations, but is actual changes in
2 decreased use.

3 If you look at the flow and diversion record,
4 I've highlighted up top in the releases column the Kern
5 Island first is already releasing more than 10,000
6 acre-feet, and that 10,000 acre-feet is part of the
7 forfeiture release that we're now considering under the
8 North Kern judgment, but that is not a change from the
9 historical operations. The only change from the
10 historical operations is the decreased use. Next.

11 Okay. So now we have applied the same
12 calculations to Buena Vista first, and I've just
13 highlighted up top the difference between the gross
14 entitlement the actual use. We're going to apply the
15 preserved entitlement to the actual use, and you will see
16 that preserved entitlement is less than what they actual
17 use. So the projected use in the 191 acre-feet.

18 Before we get into forfeiture release and
19 decreased use, notice in this case that the gross
20 entitlement is less than the actual use historically.
21 And the reason for this is that most of Buena Vista first
22 water supply, in this case, is coming from a distribution
23 of released water. It is not all from their gross
24 entitlement. And because of that -- if you look at the
25 right -- you can see that in this case forfeiture release

1 is actually less than the decreased use because
2 forfeiture release is simply their gross entitlement
3 minus their preserved entitlement, but the actual change
4 in the system is the decreased use, in this case it is
5 bigger than the forfeiture, unlike what we saw for the
6 Kern Island first.

7 So for Stine we apply the same methodology. For
8 Farmers, we apply the same methodology. At the end of
9 table two, we can sum our results. And as I've stated,
10 the actual change in the system is the decreased use from
11 the historical operations. And in the decreased use what
12 it becomes is an increase in release available to other
13 rights.

14 And so in my table three analysis -- this is
15 step three -- I assessed whether this causes any change
16 in the water supply conditions of Kern River. So I've --
17 in my table three -- I first bring in the 10,081 increase
18 in release available to other rights. So now we're going
19 to skip ahead just a little bit so I can explain
20 something.

21 The recorded entitlement and the recorded use of
22 entitlement that's simply numbers I had retrieved for my
23 table one analysis, but I want to explain that this
24 increase in release available to other rights, does not
25 change the recorded entitlement for First Point

1 diverters. It's part of the recorded entitlement for
2 First Point diverters. The North Kern judgment, all it
3 does is redistribute that amongst First Point
4 diverters --

5 MR. PIERCE: I'm going to object to that. He's
6 stating a legal conclusion, and it lacks foundation.

7 MR. EASTON: This is what my annual --

8 MR. KUNEY: He stated an objection. Mr. Baggett
9 needs to respond.

10 MR. BAGGETT: Do you have a response?

11 MR. KUNEY: I do. What he is describing is his
12 analytical methodology from his engineering and how he
13 applied the judgment to the records. And I don't believe
14 his testimony is not, in fact, for a legal conclusion
15 whatsoever. It's just to explain his methodology of how
16 the preserved entitlement caps affect the availability of
17 supply to the Kern Island other forfeited rights.

18 MR. PEARCE: I heard him give an opinion and
19 description of what the they call a North Kern judgment.
20 I think he answered Mr. Kuney's question then he went on
21 to explain how he interpreted the judgment. That's what
22 I object to.

23 MR. EASTON: Well --

24 MR. BAGGETT: Can you restate -- just please
25 restate how you derived the numbers from the judgment.

1 MR EASTON: Okay. I am -- my analysis is
2 constrained by the water rights as outlined in D1196 and
3 as verified by review of the flow and diversion records
4 that I have looked at. So I am just as releases to the
5 river in the -- prior to the North Kern judgment were
6 treated as available to distribution other diversion
7 rights, and I am essentially -- I am applying the same --
8 the same rights that I've seen in previous records to the
9 releases that are caused by the North Kern Judgment.

10 MR. PEARCE: If I understand correctly, he is
11 now interpreting water rights based on the State Board's
12 decision and the North Kern judgment. At the very least,
13 that lacks foundation, and I think he's also trying to
14 give a legal opinion.

15 MR. BAGGETT: Overruled on the legal opinion. I
16 think it's foundation would be helpful, how you derived
17 the numbers.

18 MR. KUNEY: Q. You reviewed the D1196 decision
19 and it's administrative records in terms of what it
20 identified to be the First Point, Second Point, and lower
21 river entitlements; is that correct?

22 A. Yes, I did.

23 Q. Did you make any change in regard to that
24 characterization or description in your analysis?

25 A. No, I did not.

1 Q. You also reviewed the manner and method of
2 administration of the Kern River from both before and
3 after the North Kern judgment; is that correct?

4 A. Yes, I did.

5 Q. And in that manner and method and flow and
6 diversion, for example, they identify certain diversion
7 rights in order of priority on the schedule; is that
8 correct?

9 A. Yes.

10 Q. Did you change that in any aspect in terms of
11 your analysis?

12 A. No, I did not.

13 Q. Is it correct that the only fact that you
14 applied differently than historic administration, is the
15 preserved entitlements that are articulated in the North
16 Kern judgment?

17 A. Yes.

18 Q. So in all other respects, you administered in
19 your analysis the supply that is shown from the records
20 in the exact same manner as was done historically; is
21 that correct?

22 A. Yes.

23 MR. BAGGETT: Let's continue.

24 MR. EASTON: So we have our increased release
25 available to other rights, the -- the question is whether

1 First Point diverters would have the capacity to divert
2 this water. And using standard engineering practices and
3 principles, I determined what was constraining other
4 rights at this time. They were essentially taking all
5 the supply available to them, so I knew supply was
6 constraining their operations.

7 And they're ability to take more water is
8 evident in identifying that constraint, so I -- through
9 the flow diversion records, I analyzed what could they
10 potentially take beyond that, and the column six the
11 proven use capacity as limited by the North Kern judgment
12 -- this is from 1966 of December. That's just an upper
13 bound on what their actual use was.

14 I found evidence of many instances where they
15 were easily able to absorb more than this increase in
16 release available to other rights, so in my judgment the
17 projected use of entitlement or the increase in release
18 available to other rights, would be entirely absorbed by
19 the First Point diverters in this instance. So I
20 projected the use of entitlement to be the same as it was
21 in recorded in history the 24,750 now given --

22 MR. KUNEY: Q. I am going to stop you there for
23 a second. When you're talking about columns 5 and 6, is
24 it correct you're looking at the record and the records
25 actually show many instances where there has, in fact,

1 been recorded in the official records of the Kern River a
2 diversion in excess of this value of 10,081 in your
3 example?

4 A. Yes.

5 Q. For example, at the extreme -- the highest
6 record of use taking into account the restrictions from
7 the North Kern judgment is 1966, so the records actually
8 show that in that year there was, in fact, a diversion of
9 220,806 acre-feet, correct?

10 A. Yes.

11 Q. And so from that you didn't concluded that there
12 was evidence to be capacity within the system for them to
13 divert this much smaller number of 10,081 acre-feet?

14 A. Yes.

15 Q. Okay. Go ahead.

16 A. So, next slide. So we -- I projected that First
17 Point diverters would be able to absorb this increase in
18 release. And so the projected increase in release to
19 Second Point would be zero. None of this is going to
20 make it to Second Point. So the Second Point diverters'
21 operations will not change at all.

22 The historical state of the stream system was in
23 deficit. The projected state the of the stream system,
24 they're continuing to divert all of the supply of the
25 Kern River, so it remains in deficit and the state of the

1 stream system has not changed in this month.

2 Q. And back to your column 22. You're assessing --
3 well before it was in deficit, you projected to be in
4 deficit so the result is no change?

5 A. Yes.

6 Q. Does that then -- now, you walked through in the
7 context of a single example, the three steps of your
8 engineering methodology; is that correct?

9 A. Yes.

10 Q. If we took -- and take a look now at Joint
11 Exhibit 67, what information is shown on this table
12 entitled summary of changes 1964-2008?

13 A. On the slide is an excerpt of the 67. I am only
14 showing columns two through five, and this focuses on the
15 results that we find in table two. It's essentially an
16 accumulation of the results. And, for instance, if you
17 look at column five, the maximum increase in release by
18 restricted rights, you see that in December the maximum
19 increase in release is 10,081 acre-feet. And that's the
20 example that I just walked you through.

21 Continuing with the table, if you look at
22 columns, 9, 10, and 11 -- or 9 and 10, this is a
23 summation of the period where we find that there is water
24 released to the river that is not diverted by existing
25 rights holders, and you can see that in January, August,

1 September, and November. There is one year, in which
2 that occurs. And then December there are two years;
3 October there are no years.

4 You will notice that this principally occurs in
5 1983. The two anomalies are December of '82 and January
6 of '84, so essentially the shoulders of 1983, and then I
7 conclude at the end of the table that the state of the
8 stream system -- in none of the forfeiture months, in
9 none of the years -- has changed from what had existed --
10 had occurred previously.

11 So, for instance, in the case that there was
12 water that was unused by the existing rights, there was
13 already water that was unused by the existing rights;
14 therefore, it did not change the state of water supply
15 conditions within the system.

16 Q. Now, when you say "it," you're referring to the
17 North Kern judgment, correct?

18 A. Yes, the North Kern judgment.

19 Q. In particular, the result of the imposition of
20 the preserved entitlement caps, correct? That's what you
21 mean by "it"?

22 A. Right.

23 Q. Okay. Thank you, Mr. Easton. Why don't we now
24 turn to your ultimate or principal conclusions, and for
25 that let's take a look at Joint Exhibit 68. Do you have

1 that?

2 Can you please give a summary of what
3 conclusions you reached with regard to your investigation
4 of Kern River hydrology?

5 A. My investigation of the hydrology, I found that
6 nearly two-thirds of the year's annual flow was below
7 average, and that is based on my review of the hydrologic
8 records including the flow and diversion records is the
9 overall Kern River system remains in a state of
10 deficiency just as it was in D1196.

11 Q. Deficiency, namely there's less water than
12 demand?

13 A. Exactly.

14 Q. What were the principal conclusions you reached
15 with regard to whether or not the North Kern judgment
16 created a physical increase in the supply of water
17 available in the Kern River Channel?

18 A. I concluded that it does not.

19 Q. And, again, with regard to your three-step
20 engineering analysis, what principal conclusions did you
21 reach in that regard?

22 A. Well, looking at the baseline conditions, I
23 found that the Kern River system was in deficit in 262 of
24 the 270 forfeiture months, and the water released through
25 the North Kern Judgment and all the flood control

1 operations, will be fully distributed to existing rights.
2 There are only three years out of the 45 years analyzed
3 where the judgment is not fully distributed to existing
4 rights.

5 The projected State of the Kern River stream
6 system, following the North Kern judgment, remains in a
7 deficit condition. The 2007/2008 flow and diversion
8 records substantiate the conclusion of water released to
9 the North Kern due to the North Kern Judgment will be
10 used by existing rights under existing entitlements. And
11 the North Kern Judgment does not find -- does not support
12 a finding that there's water available for appropriation
13 from the Kern River.

14 MR. KUNEY: Thank you, Mr. Easton.

15 Mr. Baggett, the one additional exhibit we would
16 mark for identification which would be the actual
17 PowerPoint presentation that was presented here this
18 morning, and that, I believe, would be Joint Exhibit 80.
19 I believe that's the next in order. Thank you.

20 (Joint Exhibit 80 marked for identification.)

21 MR. KUNEY: And we do have -- unfortunately, I
22 don't think I brought enough. I do have five copies of
23 that that we can pass out, and certainly Mr. Pearce and
24 others, so that concludes our direct examination of this
25 witness.

1 business.

2 Q. Prior to your engagement by the North Kern
3 Petitioners for this proceeding, have you undertaken any
4 work with regard to the Kern River?

5 A. No.

6 Q. When did you first start working on the Kern
7 River -- on this assignment regarding the Kern River?

8 A. It was the last week of August of this year.

9 Q. Have you ever -- as I take it, you haven't
10 actually been involved in the keeping of the records on
11 flow and diversion of the river?

12 A. No, I have not.

13 Q. Did you -- do you know who prepared the flow and
14 diversion records that you based your testimony on?

15 A. I -- I assumed it is the City of Bakersfield,
16 and I believe that's been explained to me at some point,
17 but that's my recollection.

18 Q. Have you ever spoken to anyone -- or in
19 connection with your assignment, did you speak to anyone
20 at the City of Bakersfield who was involved in the
21 preparation of the record?

22 A. No, I did not.

23 Q. You didn't call them to ask them questions about
24 these records, how they prepared them or why they
25 prepared them?

1 A. No, I did not.

2 Q. Have you ever worked on recording a flow and
3 diversion of a stream system?

4 A. No.

5 Q. Have you ever worked for an entity that was
6 actually diverting and using water?

7 A. No.

8 Q. Have you ever worked for an entity that held
9 water rights?

10 A. Have I ever worked for an entity that --

11 Q. Yes, directly employed by, but I'm not asking
12 about consultant work. Have you actual worked for a
13 company that has water rights or an entitlement that had
14 water rights?

15 A. No, I have not.

16 Q. Have you ever had any legal training?

17 A. No, I have not.

18 Q. And you're not a lawyer?

19 A. No, I am not.

20 Q. Are you familiar with the California water
21 rights structures, specifically the difference between
22 riparian and appropriative water rights?

23 A. I -- I have familiarity with that from my
24 graduate school studies, but it's not something that I
25 regularly deal with in my line of business.

1 Q. Have you ever asked -- been asked in connection
2 with your work to prepare an analysis of water rights?

3 A. Have I ever been asked to prepare an analysis of
4 water rights?

5 Q. Yes.

6 A. With the -- I've been involved, say, with the
7 Sacramento Municipal Utility District to do a water
8 supply analysis for water rights applications that they
9 did, but it was mostly in verifying that their modeling
10 was correctly done.

11 Q. And whom did you work for when you did that
12 work?

13 A. I was working for MBK Engineers.

14 Q. Your resume mentions modeling. Is that your
15 expertise, modeling?

16 A. Yes.

17 Q. What do you mean by modeling? What is that?

18 A. I essentially analyze the changes in water
19 supply systems based on the existing constraints on the
20 system and analyze the impacts that those changes have.

21 Q. Did you do a model for the Kern River in
22 connection with your work today?

23 A. Yes.

24 Q. Okay. And that model is described in your
25 conclusions; is that correct?

1 A. The -- I mean, it's a very -- the model is
2 essentially the -- it is constrained by the flow and
3 diversion records, so, I mean, the model is simple logic
4 of stepping through the flow and diversion records and
5 making a determination based on my understanding of the
6 water rights explained in Decision 1196 and my
7 understanding of the flow and diversion records and how
8 the North Kern Judgment would affect water supply
9 operations.

10 Q. Now then, when you do a model, you base your
11 model on data, correct?

12 A. Yes.

13 Q. And the model is only as good the as the data
14 itself?

15 A. Yes.

16 Q. So if the data is incomplete then the model may
17 be off?

18 A. Yes.

19 Q. Do you have any reason to believe that the data
20 in the information you relied on coming to the conclusion
21 which you presented today; do you have any reason to
22 believe that was incorrect?

23 A. No, I do not.

24 Q. Your basic conclusion -- just to cut to the
25 chase, here -- your Exhibit 68, one of the conclusions

1 you reach is that the water released due to the North
2 Kern judgment will -- all the flow control operations
3 will be fully distributed by the First Point, Second
4 Point, and lower river diverters under existing water
5 rights entitlements. My question is: What do you mean
6 by water right entitlements?

7 A. The water right entitlements that were
8 summarized in the engineer staff analysis in Decision
9 1196.

10 Q. So you're assuming that the water rights
11 described in Decision 1196 are valid water rights still
12 in existence still effective today?

13 A. Yes.

14 Q. What year was Decision 1196 decided?

15 A. It was in 1964.

16 Q. When was the judgment of forfeiture in the --
17 what you call it, North Kern judgment, forfeiture
18 judgment?

19 A. It was 2008. I'm sorry --

20 Q. 2007?

21 A. 2007, I mean.

22 Q. Didn't that decision change the water rights
23 that were described in Decision 1196?

24 MR. KUNEY: Objection. Calls for a legal
25 conclusion.

1 MR. BAGGETT: Overruled. You can answer the
2 question to your the best of your knowledge. You
3 obviously relied on this information.

4 MR. EASTON: Based on my analysis of the flow
5 and diversion records in 2007 and 2008 when the North
6 Kern judgment was in effect, I did not see any change in
7 the way that the river was operated under existing
8 entitlements.

9 MR. PEARCE: Q. That's not what I asked you. I
10 asked you if the water rights had changed. You said you
11 based your assumptions on water rights as described in
12 the 1964 decision. I asked you, "Didn't the water rights
13 change?"

14 A. I -- I -- based on my reviews of the flow and
15 diversion records, I assume the water rights have not
16 changed because the water was distributed in exactly the
17 same way after the North Kern judgment as it was prior to
18 the North Kern judgment.

19 Q. So it's your opinion that the forfeiture
20 judgment did not change the water rights described in
21 1964?

22 MR. KUNEY: I would like to impose an objection
23 of vagueness, which water rights is he referring to Kern
24 Delta rights or which rights?

25 MR. BAGGETT: Can you rephrase.

1 MR. PEARCE: Q. Sure. Do you recall if the
2 Kern Island right was described in the 1964 water rights
3 decision?

4 A. Not if -- you're talking about the 1964 decision
5 or the Decision 1196?

6 Q. Yes.

7 A. I can't recall if it was specifically. I think
8 it was mentioned in general, the diversion rights at the
9 First Point diverters.

10 Q. And do you know if the court in the North Kern
11 case found the Kern Island rights had forfeited part of
12 its water rights?

13 A. They did not. You're talking about Decision
14 1196?

15 Q. No, I am talking about the 2007 forfeiture. Do
16 you know if the Kern Island right was one of the rights
17 that forfeited water rights?

18 A. They did forfeit some of their entitlement.

19 Q. So the water rights in Decision 1196 changed as
20 of 2007 based in part on the forfeiture, correct?

21 A. Yes.

22 Q. And but you based your analysis on the 1964
23 description of the water rights, not the latter?

24 A. Well, I based my analysis on my understanding of
25 the water rights of reading the 1964 decision and in

1 verifying that my understanding still matched what was
2 occurring in 2007 and 2008 with the flow and diversion
3 records.

4 Q. Now, in your testimony -- and I am going to be
5 sticking to -- just to be specific, I am sticking to
6 Exhibit 68, and it's the third bullet point under the
7 North Kern judgment. That to me seems to be your basic
8 conclusion. The water released due to the North Kern
9 judgment will be used by first, second -- First Point,
10 Second Point, and lower river diverters under existing
11 water right entitlements.

12 I want to ask you some more questions about the
13 entitlements. Are you familiar with the water right
14 entitlements held by the First Point -- First Point
15 diverters?

16 A. Yes.

17 Q. Are you familiar with the entitlements held by
18 the North Kern Water Storage District?

19 A. I -- I am not familiar with the details of their
20 entitlements except as they are part of the First Point
21 diverters, and so that they -- they have -- they receive
22 their water in order of priority according to the
23 diversion rights specified in the flow and diversion
24 records and as specified in the Shaw Decree.

25 Q. What kind of water rights does North Kern hold?

1 A. What kind of water rights?

2 Q. Are they riparian, are they pre-'14 or post-'14?

3 Are they contract rights? What are they?

4 A. It's my understanding they're pre-1914.

5 Q. And what is your understand based on?

6 A. The -- I have read it in one of the documents
7 that I've read it in, but I can't tell you specifically
8 what document.

9 Q. Now, are you familiar with the 1952 Agreement
10 between Kern County Land Company and other entities and
11 the various -- and the North Kern Water Storage District?

12 A. Would could you be more specific? What was the
13 agreement regarding?

14 Q. Regarding water rights on the Kern River.

15 A. What year was this?

16 Q. 1952.

17 A. 1952, was that the storage agreement?

18 Q. No. I guess you're not aware of the 1952
19 Agreement between North Kern and Kern County Land Company
20 and other canal companies?

21 A. I cannot recall the agreement right now.

22 Q. All right. And you're presenting testimony on
23 behalf of North Kern, correct?

24 A. Yes.

25 Q. And you're assuming that they can take increased

1 amounts of -- of release water based on some unknown
2 water rights; is that correct?

3 A. They have been taking released water for as long
4 as these flow and diversion records have been generated.
5 So I am assuming that they will continue to take released
6 water as part of their diversion right.

7 Q. We're not talk about continuing to take released
8 water. You're talking about new released water or new
9 amounts of released water based on a forfeiture judgment,
10 correct?

11 A. I have assumed that the forfeiture released
12 water will be treated in the same way as the released
13 water as was prior to judgment.

14 Q. So you assume because North Kern has been taking
15 released water, they can also take forfeiture releases,
16 correct?

17 A. Based on my analysis of the 2007-2008 flow and
18 diversion records, they did continue to take that
19 released water, so, yes.

20 Q. But you don't know if they have a right to
21 actually take that forfeiture released water?

22 MR. KUNEY: Objection. Calls for a legal
23 conclusion. He now wants this witness to interpret what
24 the contract according to what the interstate rights may
25 be on the contract. And back to this whole argument of

1 are they the City's or are they North Kern's. It's not
2 competent evidence for any of these witnesses to testify
3 to, and he has not attempted to evaluate and give
4 opinions on that.

5 MR. BAGGETT: Mr. Pearce.

6 MR. PEARCE: I am just trying to understand the
7 basis. If he says that they hold entitlements to take
8 the water, what's that based on, if he knows anything
9 about these entitlements.

10 MR. BAGGETT: I think he stated he is not an
11 attorney. He didn't read it at that level. He's asked
12 directly where he's gotten that from.

13 MR. PEARCE: Q. You're basing this conclusion
14 that North Kern can take new amounts of released water or
15 forfeiture water just based entirely on the fact that
16 they have taken released water in the past and they've
17 taken these amounts of water in 2007 and 2008?

18 A. Yes.

19 Q. And you're not a lawyer and you're going to make
20 an opinion and you're not going to give any testimony as
21 to if they have a right to take that water, correct?

22 A. No.

23 Q. You don't know if they have a right to take it?

24 A. I am basing my testimony solely on what I've
25 seen on the operations record.

1 Q. You read the record. They were prepared by the
2 City and that forms your conclusion, correct?

3 A. That's what my on conclusions are based on.

4 Q. What specifically did you review to determine
5 the water rights held by North Kern, if anything?

6 MR. KUNEY: I am going to object again. He did
7 not make that determination.

8 MR. BAGGETT: Sustained, I think he's already
9 answered the question.

10 MR. PEARCE: Q. You're also testifying on
11 behalf of the Kern County Water Agency, correct?

12 A. Yes.

13 Q. Are they First Point, Second Point, or lower
14 river diverters?

15 A. My understanding they're lower river diverters.

16 Q. Your testimony assumes that the water released
17 from the North Kern judgment can be taken by lower river
18 diverters; is that correct?

19 A. In the event that it -- that it's first
20 available in my analysis to First Point diverters, and if
21 First Point diverters don't use the water, it's released
22 to Second Point, and at that point I don't make a
23 determination whether it's Second Point or lower river
24 diverters.

25 Obviously, Second Point would have first

1 entitlement to it. And then if they don't take it, it's
2 available to the lower river diverters.

3 Q. Do you know if the Kern County Water Agency in
4 the past has taken release water?

5 A. I do not.

6 Q. Do you know if they could take new amounts of
7 released water or forfeited water?

8 A. The -- actually, I take that back. The question
9 previous to that. Do I know whether the lower river
10 diverters have taken released water.

11 Q. Yes.

12 A. There have been instances where First Point
13 diverters have released water and it has been diverted by
14 lower river.

15 Q. Now, are you aware that Second Point and lower
16 river diverters only receive water from the Kern River
17 when the flow of water in the river reaches a certain
18 level; do you understand that?

19 A. That's how their entitlement is calculated.

20 Q. And water which is within First Point, that's
21 reflected on the First Point flow and diversion records,
22 correct?

23 A. Would you repeat.

24 Q. You earlier in your testimony, you referred to
25 or put up a sheet listing water rights, and that's the

1 document commonly referred to as the flow and diversion
2 records; do you recall that?

3 A. Yes, the flow and diversion records.

4 Q. Is the Kern County Water Agency listed on those
5 flow and diversion records?

6 A. The Kern County Water Agency is specifically
7 referred to as Hacienda Water District.

8 Q. Do those flow and diversion records, do they
9 reflect diversions of the Hacienda water rights held by
10 the Kern County Water Agency?

11 A. Do they reflect?

12 Q. Yes. Do they reflect diversions to the Kern
13 County Water Agency or the Hacienda, right?

14 A. No, I do not -- that would be calculated
15 entitlement.

16 Q. That's the amount of water that would go to the
17 Second Point or lower river diverters for then later
18 distribution?

19 A. Yes, correct. It is water available to them to
20 use in that entitlement.

21 Q. Now, you assumed based on your testimony for
22 North Kern, that you haven't undertaken any analysis or
23 review of Kern River water rights held by the Kern County
24 Water Agency?

25 A. No.

1 Q. You don't know if they -- what kind of water
2 rights they have, if any?

3 A. Aside from their -- their water rights that they
4 have on the Kern River, I am not aware of.

5 Q. What kind of water rights do they have for the
6 Kern River?

7 A. They possess the lower river diverters, I guess
8 some portion of it. If they're the only agency in the
9 flow of the river or if they possess the entire
10 entitlement.

11 Q. You don't know anything of the nature of the
12 water rights or the pre-'14 or post-'14; is that correct?

13 MR. KUNEY: I am going to object. This calls
14 for a legal conclusion. Goes beyond the scope of what he
15 testified to.

16 MR. PEARCE: I am trying to establish the
17 foundation and the background of his opinions about
18 entitlements. If he's going to come in here and talk
19 about water right entitlements, I am entitled to know
20 what he means by that, what he bases that on, whether
21 entitlement means water rights, and that's outside the
22 scope? So we're clear, I am not limited to the scope of
23 the direct.

24 MR. BAGGETT: It's not outside the scope. I
25 will rule on this, but I think he's already answered

1 that. Asked and answered. So I would appreciate if you
2 could get more to the point. Ask him what he relied on.
3 We could be here for the rest of your hour with
4 objections.

5 MR. PEARCE: Q. Okay. I will move to strike
6 that. You also testified on the behalf of the Buena
7 Vista Water Storage District, correct?

8 A. Yes.

9 Q. Do you know anything about that water rights?

10 A. They are the Second Point diverters.

11 Q. Did you -- what did you review, if anything, to
12 reach your conclusion that the Buena Vista right could
13 take -- Buena Vista entitlements could take water
14 released through the North Kern Judgment?

15 A. In my analysis any water that I found wasn't
16 diverted by First Point entitlements was released to
17 Second Point, and any water released to Second Point is
18 -- by right, it can be diverted by Second Point.

19 Q. That's what you base your opinion on?

20 A. Yes.

21 Q. You didn't review any other documents, water
22 right decisions, anything like that?

23 A. Again, I am basing it on my understanding of the
24 water rights structure as outlined in the Decision 1196.

25 Q. Now, you also presented testimony, I assume, on

1 behalf of the City of Shafter?

2 A. Yes.

3 Q. What water right entitlement, if any, does the
4 City of Shafter hold which would allow them to take water
5 released due to the North Kern Judgment?

6 A. I am not familiar with the specifics of Shafter
7 water rights.

8 Q. Do you know if they have any Kern water rights?

9 A. I assume they would because otherwise they
10 wouldn't have hired me for this project.

11 Q. Now, the Kern Water Bank Authority, do you know
12 if they have any Kern River water rights?

13 MR. JACOBS: Objection. Call for a legal
14 conclusion. Lack of Foundation.

15 MR. BAGGETT: Sustain that again. You know the
16 witness has already stated numerous times what he relied
17 on, it was the law in those tables, that information and
18 charts prepared with the data.

19 MR. PEARCE: Q. I can ask a better question.
20 In all the material you reviewed including the flow and
21 diversion records, do you ever see any entry or diversion
22 for the Kern Water Bank Authority?

23 A. I do not.

24 Q. In your testimony -- in your written testimony,
25 several times, you indicate that the First Point, Second

1 Point, lower river rights can divert and utilize the
2 water released by Kern Delta; do you recall that?

3 A. That doesn't --

4 Q. Actually, can you turn to page 9 of your written
5 testimony, specifically line 24. And on line 24 you
6 state that "As set forth in --" sorry, line 23, "... as
7 set forth in more detail below, my analysis examines
8 whether these existing Kern River entitlements will
9 utilize the water released..." What did you mean by
10 utilize?

11 A. My analysis stops at the point of diversion, so
12 I -- I am specifically talking about whether they would
13 divert the water to storage or ground or immediately use.

14 Q. So you're -- when you say "utilize," you really
15 mean divert, correct?

16 A. Yes.

17 Q. You weren't asked to make any analysis or
18 studies as to the actual use of water diverted by First
19 Point, Second Point, or lower river diverters, were you?

20 A. No, my analysis stops at the point of diversion.

21 Q. You weren't asked to undertake any analysis as
22 to whether these First Point, Second Point, or lower
23 river diverters had actual demand for increased amounts
24 of release water?

25 A. In my review of the flow and diversion records,

1 reviewing the quantities of the water that they divert,
2 implied demand to me.

3 Q. So you assumed that if they had demand they
4 diverted water?

5 A. Correct.

6 Q. But you don't know what they actually do with
7 the water?

8 A. I assume they used it.

9 Q. Do you know who the Kern River Watermaster is?

10 A. I do not.

11 Q. I take it you didn't speak to him, did you?

12 A. No, I did not.

13 Q. Let's go to your exhibit, turn to your
14 Exhibit 48. This is one of the tables that you prepared
15 in connection with your testimony. This is for the month
16 of January. This is the analysis of baseline, assessing
17 the historical state of the Kern River through
18 observation of the records. I believe you walked through
19 a chart like this in your testimony with Mr. Kuney?

20 A. Yes.

21 Q. And I -- before I get to that, let me ask you:
22 Did you review any materials or data prepared by the City
23 of Bakersfield in connection with this proceeding?

24 A. Other than the flow and diversion records, no.

25 Q. And are you aware of a chart prepared by the

1 Bakersfield which indicates that there's an average of
2 50,000 acre-feet of water created by the forfeiture in
3 2007?

4 A. I am aware of a table. I haven't looked at it
5 in that kind of detail.

6 Q. And based on your cursory review, do you have
7 any opinions or conclusions about that table?

8 A. It depends on what it is you're talking about.

9 MR. PEARCE: Okay. Jeff, can you put
10 Exhibit 2-22 up?

11 MR. PEARCE: Q. Now, I can represent to you this
12 is Bakersfield's Exhibit 2-22.

13 A. I have not seen that table, and I can't tell
14 what it's about.

15 Q. Okay. You weren't asked to review this or give
16 any opinions or conclusions as to whether this document
17 is accurate?

18 A. No, I was not.

19 Q. Let's go back to your Exhibit 48 -- strike that.

20 Put 49 up. This is the second page of the
21 analysis. Now, your column forfeiture release, what does
22 that mean again?

23 A. Forfeiture release is the gross entitlement
24 minus the preserved entitlement.

25 Q. What does that give you? What's the result of

1 that?

2 A. It's the difference of the gross entitlement
3 minus the preserved entitlement.

4 Q. Is that the amount of water that is created by
5 the forfeiture judgment?

6 A. Not if you analyze it historically as I have
7 done.

8 Q. But you still recorded forfeiture release for
9 every year, at least in this chart, for January for the
10 Kern Island, right?

11 A. Yes, I have.

12 Q. And you recorded the forfeiture release, which
13 would be the difference between the preserved entitlement
14 and the base entitlement for various water rights. You
15 calculated the forfeiture release for every right and
16 every month whether there's forfeiture; is that correct?

17 A. Yes.

18 Q. And did you add up or average or total all of
19 the forfeiture releases for the various rights?

20 A. Yes, I did.

21 Q. And what was the result of that? What -- what
22 was the final conclusion for that?

23 A. In my exhibit that's column 15.

24 Q. I guess what I am asking for, though, is: Did
25 you come up -- for example, for the January -- in January

1 did you come up with an average amount of forfeiture
2 release for the Kern Island?

3 A. Did -- I would have seen no purpose to average
4 that value.

5 Q. And you didn't total up the averages of the
6 forfeiture releases, did you?

7 A. No, I did not. The forfeiture release is not
8 the change in historical operations -- the change in
9 historical operations is the decreased use.

10 Q. And you weren't asked to calculate how much
11 forfeiture release was created by the forfeiture
12 judgment?

13 A. I had this in the --- as a calculation because
14 it had been calculated in the North Kern judgment because
15 it wasn't -- the North Kern judgment did not specifically
16 do a historical analysis to determine how that changes
17 operations, and that's what I did there.

18 Q. Let's turn to your page, page ten of your
19 testimony.

20 A. Uh-huh.

21 Q. This is where you have a definition of
22 forfeiture release. And this on page ten, paragraph 25
23 begins, quote -- you -- well, paragraph 25 lists a number
24 of terms that you quote, and then you defined. And you
25 indicate in paragraph 25 that, following that "...the

1 terminology utilized... was adapted from that used in the
2 City of Bakersfield's Kern River flow and diversion
3 records..."

4 Now, is the term "forfeiture release" which is
5 listed on paragraph 25, is that found in the City of
6 Bakersfield's flow and diversion records?

7 A. No, it's not.

8 Q. And you also have in this paragraph 25 -- you
9 have the term "deficit," is that term found in the City
10 of Bakersfield's flow and diversion records?

11 A. No, it's not.

12 Q. And you also have next going over to the next
13 page also in paragraph 25 terms "other rights,"
14 "restricted rights," and "undistributed release." Are
15 any of those terms found in the flow and diversion
16 records?

17 A. No, they are not.

18 Q. Those were terms you created based on the
19 forfeiture judgments; is that correct?

20 A. They are terms that I created to help explain my
21 analysis.

22 Q. You needed to have these terms in addition to
23 the terms that are already used in this flow and
24 diversion records, correct?

25 A. Yes.

1 Q. What was in the flow and diversion records
2 wasn't sufficient for you to explain the impact of the
3 judgment. You had to create new terms to describe what
4 had happened, right?

5 A. Well, the -- the value of and the flow and
6 diversion records were sufficient for me to perform my
7 analysis. I just had language in order to describe my
8 analysis.

9 Q. These were new terms that were not used
10 previously, correct, not been used historically?

11 A. Not to my knowledge.

12 Q. And, again, you weren't asked -- going back to
13 forfeiture release -- you weren't asked to quantify the
14 release that had been created by the judgment, were you?

15 A. No.

16 Q. If I were to tell you that the forfeiture
17 release total created by the forfeiture judgment was
18 approximately 50,000 acre-feet per year, would that seem
19 unreasonable to you?

20 A. I haven't quantified that.

21 Q. You can't tell me whether that number is high or
22 low or reasonable or in the ballpark?

23 A. My focus was on what the actual change in
24 operations were. Forfeiture was not a change in
25 operation.

1 Q. An increase in the release was the change in
2 operation; is that correct? Isn't that what you said in
3 your testimony?

4 A. Forfeiture release is not an increase in
5 release, it's part of what they're already releasing to
6 the river.

7 Q. You -- in your definition of forfeiture release
8 on page 23[sic], you say that this term relates to water
9 within the gross entitlement of Kern Island, Buena Vista,
10 Stine or Farmers, but that is prohibited from being used
11 -- diverted and used in excess of the preserved
12 entitlement. That prohibition on diversion, that came
13 from the 2007 judgment, correct?

14 A. The preserved entitlement?

15 Q. No, the prohibition on diversion came from the
16 2007 judgment, correct?

17 A. The preserved entitlement came from the 2007 --

18 Q. There's no prohibition on diversion before 2007,
19 correct?

20 A. The analysis I am doing -- I am applying the
21 preserved entitlement to what was occurring in history,
22 so I am determining a change in operation in history and
23 the forfeiture release is not a correct measure of that
24 change.

25 Q. My question is to you is: Were there a

1 prohibition on diversion by any of the rights listed Kern
2 Island, Buena Vista, Stine or Farmers before 2007?

3 A. I'm sorry. I thought I've answered your
4 question.

5 Q. No, you haven't, actually. It's was there a
6 prohibition on diversion on these rights before 2007?

7 A. Were there a prohibition on these rights before
8 2007?

9 Q. Was there a prohibition on diversion -- I am
10 using your terminology. You said in your report -- you
11 came up with the term forfeiture release -- and you said
12 this release is based on the prohibition on diversion and
13 that's based on the preserved entitlement. Was this
14 prohibition on diversion in place before 2007?

15 A. Not with regard to the forfeiture release, no.

16 Q. You're familiar with the term release water,
17 correct?

18 A. Yes.

19 Q. Okay. And that's something that's been used
20 historically?

21 A. Yes.

22 Q. That is a term that is found in the flow and
23 diversion records, correct?

24 A. Yes. Correct.

25 Q. And is it your testimony that there's no

1 distinction between released water that has been used and
2 diverted and released historically, and water, and then
3 forfeiture release?

4 A. Is it my testimony that the distinction between
5 -- that in my analysis there's there distinction between
6 that in the 2007 and 2008 flow and diversion records when
7 the forfeiture judgment was in place.

8 Q. Okay. Now, your analysis, you don't make a
9 distinction. You don't know legally or factually if
10 there's a distinction, do you?

11 A. No, I do not.

12 Q. But you assume for purposes of your analysis
13 that historical releases and forfeiture releases are the
14 same thing?

15 A. And I base that, again, on the 2007/2008 flow
16 and diversion records.

17 Q. Let's talk about these 2007/2008 records. Now,
18 again, you didn't talk to anybody at the City about the
19 flow and diversion records, did you?

20 A. No, I did not.

21 Q. And you're basing your opinion on the fact that
22 the flow and diversion record hasn't changed in
23 2007/2008? The terminology of the terms the categories
24 haven't changed, correct?

25 A. The fact that the releases caused by forfeiture

1 were included right in the release column, and they were
2 distributed to other diversion rights in the other
3 column.

4 Q. Now, do you know why the City did that?

5 A. No, I do not.

6 Q. Do you know if the City could have prepared the
7 records any differently? Could they have proceeded with
8 the forfeiture release differently?

9 MR. KUNEY: Objection. Calls for speculation.

10 MR. PEARCE: I am asking if he knows or if he
11 doesn't know.

12 MR. BAGGETT: Please answer.

13 MR. EASTON: No, I don't know.

14 MR. PEARCE: Q. Are you aware that the City has
15 -- during this proceeding -- proposed adding a new column
16 to the flow and diversion record for forfeiture
17 entitlement to reflect the water forfeited by Kern Delta?
18 Are you aware of that?

19 A. No.

20 Q. Now, let's go back to the term "release water."
21 Are you familiar, based upon your review of the
22 historical records, how released water is created -- how
23 historically it was created?

24 A. I am not familiar with how historically it was
25 created.

1 Q. You just put down the numbers based on what you
2 find in the record; is that correct?

3 A. The records reflect that the -- the -- water --
4 the gross entitlement unused by the diversion right was
5 released to the river, and that was my -- that's what I
6 understood by reviewing the record.

7 Q. And based on your review of the record, was the
8 water released to the river within the gross entitlement,
9 was that lost by the water right? Did they lose rights
10 to it?

11 A. That was not part of my review.

12 Q. Do -- you don't know. Let's say the Kern Island
13 has a flow rate of 300 CFS. If it releases it's 300 CFS,
14 on the next day are they limited by that release or were
15 they able to take back the 300 CFS the next day?

16 A. They were able to -- when they -- if they
17 released water one day, and -- didn't mean they couldn't
18 divert their water the next day.

19 Q. So that right -- they still held rights to that
20 watery released, is that correct?

21 MR. KUNEY: Objection. Calls for a legal
22 conclusion.

23 MR. PEARCE: Q. It appeared to you based on
24 their use, they had some sort of entitlement; is that
25 correct?

1 A. Yes.

2 Q. I guess you're using the word entitlement. I
3 guess I will be careful to use the word entitlement as
4 opposed to right. So Kern Island releases water one day,
5 the next day they can take it back, and that's in the
6 record, correct?

7 A. They can't take back the water they released.

8 Q. They can divert another 300 CFS, correct?

9 A. If the water is available, they can divert it
10 under their --

11 Q. Okay. And then let's go to 2007 and 2008. If
12 -- if we're in a month, let's say, December or January
13 when the Kern Island right is now capped, and there's a
14 preserved entitlement in place.

15 Let's assume that the Kern Island has already
16 reached their cap, and they are then -- in your
17 terminology -- in the forfeiture release category. If
18 they release water based on the forfeiture judgment one
19 day, can they divert water the next day after the full
20 300 CFS?

21 A. Once they reached their preserved entitlement,
22 they are unable to divert water until the end of that
23 month.

24 Q. So every day after they reach their cap, they
25 can't take water, right?

1 A. They cannot once they reach their cap. They are
2 not diverting anymore water until they reach the next
3 month.

4 Q. So that forfeiture release is always going to be
5 there, right? It's always going to be released. It's
6 always going to be available on the river, right?

7 A. Well, it is going to be released, yes.

8 Q. And so unlike released water, that may vary on
9 depending on the demand of the water. The forfeiture
10 release is always going to be there because Kern Island
11 reaches it's cap; is that right?

12 A. Yes.

13 Q. Is that a -- in your mind is there a difference
14 then between released water historically and forfeiture
15 released water?

16 A. The only difference is that now it's a forced
17 released; whereas before, it was -- they had over reasons
18 for releasing it.

19 Q. And in addition to the forfeiture release, Kern
20 Delta still -- rights held by Kern Delta, Kern Island,
21 Buena Vista, Stine those rights still release water in
22 addition to the forfeiture release; is that correct?

23 A. Buena Vista, Stine, and Farmers you're referring
24 to?

25 Q. Or any of the rights held by Kern Delta. No,

1 let me withdraw the question. I will refer you to your
2 testimony, page 13, paragraph 29, which starts on the
3 prior page. I have questions specifically about
4 subparagraph (b). Do you see that?

5 A. Yes.

6 Q. Okay. In this subparagraph (b) you say,
7 "...when a restricted right's actual use is below
8 preserve entitlement --" and I think restricted right you
9 define that as essentially a right held by Kern Delta,
10 which is the subject of forfeiture; is that correct?

11 A. Yes.

12 Q. So any "...use is below the preserved
13 entitlement, and gross entitlement would support
14 increased diversions by the restricted right, it is
15 conceivable, that the restricted right would divert its
16 gross entitlement up to but not beyond its preserved
17 entitlement." Now, I think I know what you mean, but can
18 you tell us what you mean by that?

19 A. What I mean by that is I have made an assumption
20 in my historical analysis that if the actual use is below
21 the preserved entitlement -- that in my historical
22 analysis I held that actual use to what it was going
23 forward depending on the demands of the restricted
24 rights. They may decide to use more of the water up to
25 their preserved entitlement. I did not consider that in

1 my analysis. It would -- if I did, it would have only
2 reinforced the conclusions I already made. It would have
3 further removed water from the system by existing right
4 holders.

5 Q. Now, by this you mean that in the past Kern
6 Delta rights combined with Kern Island, Stine and
7 Farmers, had released water that was in addition to the
8 -- separate from the forfeiture release. They released
9 -- in the forfeiture releases is one quantity of water,
10 but the fact is you've testified the forfeiture release
11 increased the amount of water released by Kern Delta?

12 MR. KUNEY: I want to interpose an objection.
13 It's vague and ambiguous. You're talking about
14 historically before the judgment and yet your using the
15 term forfeiture release back in a period of time to which
16 it wasn't applied. You're mixing principles and
17 chronology. Can you clarify the question?

18 MR. BAGGETT: Please clarify.

19 MR. PEARCE: Q. I am trying to understand what
20 you mean by that. Let me lay a foundation here. You've
21 testified previously today that the forfeiture release
22 increased the amount of water released by Kern Delta; do
23 you recall that?

24 A. By Kern Delta?

25 Q. The Kern Delta water rights.

1 A. Can we return to my example so we can look at it
2 in detail?

3 Q. No, not really. But Kern Delta rights released
4 historically, they've released water; is that correct?

5 A. Yes.

6 Q. And they released water even though there was no
7 forfeiture cap in place, even though there was no
8 forfeiture judgment, correct?

9 A. Yes.

10 Q. That release was based on the fact that they
11 didn't have a demander for the water; is that correct?

12 A. They didn't have the demand or the capacity to
13 control it.

14 Q. So let's take it to the present day. You now
15 have -- we now have diversion caps in place on the rights
16 held by Kern Delta in certain months. And the question
17 to you now is: Do you know if Kern Delta is going to
18 stop releasing water other than water they're forced to
19 release through the forfeiture judgment?

20 A. Do I know if Kern Delta is going to stop
21 releasing water other than their --

22 Q. Yes.

23 A. You're saying, do they have -- will they release
24 water above and beyond what would be required by the
25 forfeit?

1 Q. Yes, but are they going to continue to do that
2 in the future?

3 A. I don't.

4 Q. Aren't you describing a situation where Kern
5 Delta is no longer releasing water in certain months,
6 they were going to try to use all the water up to their
7 preserved entitlement?

8 A. They could use the water up to the preserved
9 entitlement. That's all I am saying.

10 Q. But you don't know if Kern Delta intends to
11 release any water in the future in addition to the
12 forfeiture release, do you?

13 A. I do not.

14 Q. Has anyone told you that Kern Delta intends to
15 stop releasing water other than the water they are forced
16 to release from the forfeiture judgment?

17 MR. KUNEY: Objection. Hearsay.

18 MR. PEARCE: If you know.

19 MR. BAGGETT: Please answer the question.

20 MR. EASTON: Could you re...

21 MR. PEARCE: Q. Has anyone told you or do you
22 have any understanding as to whether Kern Delta in the
23 future intends to not release any water other than the
24 water they're forced to release through the forfeiture
25 judgment?

1 A. It has been discussed that they may in the
2 future divert more water, and I've seen it before on the
3 flow and diversion records. You can see they released --
4 early in the records they released more water than what
5 you say later in the records. And you can see that -- if
6 that there's a progression of releasing less and less
7 water. But I did not do that in my analysis.

8 Q. In the water released by forfeiture releases,
9 you're assume that's going to be taken by the First Point
10 rights, Second Point rights, and lower river rights,
11 correct?

12 A. In most instances my -- it is diverted by First
13 Point, Second Point, lower river diverters.

14 Q. Some of the Kern Delta rights, specifically
15 Buena Vista, Stine, and Farmers, those are rights that
16 are junior to the Kern Island, right?

17 A. Yes.

18 Q. Do you know if historically the Buena Vista,
19 Stine, or Farmers diverted released water?

20 A. Yes.

21 Q. I think you actual went through an example that
22 you showed Buena Vista had diverted more than it's
23 entitlement; do you recall that?

24 A. Yes.

25 Q. And that was release water they were picking up

1 presumably released by a senior right such as Kern
2 Island, correct?

3 A. It was -- I'm sorry could you repeat that
4 question?

5 Q. Yes. The release water picked up by Buena Vista
6 was presumably released by a senior water right such as
7 the Kern Island, right?

8 A. Yes.

9 Q. Do you know if the junior rights held by Kern
10 Delta, Buena Vista, Stine, and Farmers whether they have
11 any entitlement to divert forfeiture release water?

12 A. In my analysis I always assumed they will divert
13 forfeiture released water as they have released or as
14 they have diverted -- voluntary release water in the
15 past.

16 Q. And --

17 A. Actually, I take that back. In my analysis I
18 actually assumed that they aren't going to take the
19 water, but it's my understanding that they could and
20 that's something I explain in paragraph (a).

21 Q. That's what I was going to go to next, paragraph
22 (a).

23 A. I'm sorry.

24 Q. On page 13 subparagraph (a) of paragraph 29 --
25 and that's why I was asking you. I thought that's what

1 you were talking about.

2 A. I -- I -- I -- I'm sorry.

3 Q. And I will -- let me just tell you what I -- let
4 me try it again. "As I understand that an increase in
5 release due to the North Kern judgment can also be
6 available to a junior restricted right..." That's one of
7 the junior rights held by Kern Delta, correct?

8 A. Right.

9 Q. "...provided that the junior... right does not
10 use its preserved entitlement..." up to its cap, right?

11 A. That is correct. As long as it hasn't reached
12 it's preserved entitlement, yes.

13 Q. Okay. And the fact that one of the junior
14 rights -- you have the junior Kern Delta rights -- could
15 take forfeiture release water, that doesn't change your
16 conclusions and only reinforces your ultimate conclusion,
17 correct?

18 A. Correct. Right.

19 Q. Is it possible -- do you know if it's possible
20 that one of the junior Kern Delta rights could divert
21 water released by Kern Island due to the forfeiture
22 judgment and then transfer that same water through
23 lateral canals back to the Kern Island service area?

24 A. No.

25 Q. Did anyone ever tell you that might be a way for

1 Kern Delta to avoid the forfeiture judgment, by taking
2 forfeiture water through junior canals and pipe it back
3 or move it back into the Kern Island service area?

4 A. No.

5 Q. Would that change your analysis if you
6 understood that was going to happen?

7 A. No, it would not because I based my analysis on
8 the understanding of existing water rights and analyses
9 of what would be applied under the existing water rights.

10 Q. This would have no bearing on whether or not
11 Kern Delta was violating the judgment? That doesn't
12 concern you?

13 MR. KUNEY: I will move to strike.

14 MR. PEARCE: I will withdraw the question.

15 MR. BAGGETT: All right.

16 MR. PEARCE: Q. Now, you're, again, going back
17 to North Kern, you assumed they have an entitlement to
18 take the forfeiture water, released water because they
19 took it in the past; is that correct?

20 MR. KUNEY: Objection. Asked and answered.

21 MR. PEARCE: Q. This is a foundational
22 question. Just -- I am proving on a different topics. I
23 was trying to set the --

24 MR. BAGGETT: We agree. It's been asked and
25 answered. Can you answer the question?

1 MR. EASTON: Can you repeat the question?

2 MR. PEARCE: Q. Has anyone ever told you that
3 North Kern did not have a right to take the forfeiture
4 release water?

5 A. No, no one has told me.

6 Q. Would it change your conclusion if, in fact,
7 North Kern was not allowed to take the forfeiture release
8 water? Would it change your conclusion about whether
9 there's a deficit on the river?

10 A. If -- just North Kern?

11 Q. Yes.

12 A. That would be speculative. I would have to do
13 the analysis knowing that information.

14 Q. Would it change your conclusion if both North
15 Kern and Kern Delta were barred from taking forfeiture
16 release water?

17 A. Both Kern Delta and --

18 Q. And North Kern were barred from taking any
19 forfeiture release water, would that change your --

20 A. Kern Delta.

21 Q. -- opinions?

22 A. It's speculative. I would have to do the
23 analysis.

24 Q. Do you know if -- if North Kern is required to
25 use Kern River water only within it's boundaries? Are

1 you aware of that?

2 MR. KUNEY: Objection. Now, we're going into
3 terms and conditions of the '52 Agreement. It's, again,
4 beyond the scope of his analysis. He has not analyzed
5 that subject in any manner.

6 MR. BAGGETT: I think he can answer to the
7 extend he knows what he's asking.

8 MR. PEARCE: Q. Are you aware of any
9 restrictions on the diversion and use of North Kern River
10 water diverted by Kern River?

11 A. No, I am not.

12 Q. I believe you testified today that you don't
13 know how North Kern or other entities are going to use
14 the water if it's diverted based on the forfeiture
15 judgment?

16 A. No, I do not.

17 Q. You don't know if they can sell it outside of
18 the district boundaries or transfer outside of the
19 district?

20 A. My analysis stopped at the point of diversion.

21 Q. Do you know if North Kern has ever tried to
22 transfer any quantities of released water to somebody
23 else?

24 MR. JACOBS: Objection. Relevance.

25 MR. BAGGETT: Sustained. Can you --

1 MR. PEARCE: I am just trying to figure out --
2 strike that.

3 I will ask a different question.

4 MR. PEARCE: Q. Did you come up with any
5 analysis or determination of how much of the forfeiture
6 release water could be diverted by the Second Point
7 interest?

8 A. I came up with an analysis. In my analysis this
9 was an infrequent occurrence that the release water would
10 make it to Second Point. In my analysis, it was the
11 Second Point or lower river diverters were aggregated. I
12 didn't specifically determine what Second Point --

13 Q. So you don't know in the future if any of the
14 Second Point interest could divert forfeiture release
15 water?

16 A. If any of the released water was released to
17 Second Point in my analysis, I assumed that it would be
18 available for diversion to Second Point.

19 Q. But you didn't actually quantify that to or come
20 up with some quantity in the future?

21 A. I quantified for each of the forfeit months in
22 each of the years analyzed.

23 Q. And your analysis, you went back in time based
24 on the forfeiture judgment; is that correct?

25 A. Correct.

1 Q. So your charts and graphs, they don't reflect
2 what actually happened on the river. They reflect what
3 would have happened if the forfeiture judgment had been
4 in place, correct?

5 A. Yes, based on my understanding of the water
6 rights.

7 Q. And based also on the assumption that all the
8 forfeiture water would have been diverted by the same
9 rights that divert release water, correct?

10 A. Yes.

11 Q. But, again, you didn't do any analysis as to
12 whether those rights had a right or ability to divert the
13 forfeiture release water?

14 A. I -- did an analysis assuming they had the right
15 to divert the water. I did an analysis whether they had
16 the ability to divert the water.

17 Q. Did anyone ask you to review or analyze what
18 would -- what the result would have been if the forfeited
19 release water was not forfeited by anyone?

20 A. If the forfeiture release was not diverted by
21 anyone, could you -- did you ask if anybody asked me to
22 -- could you repeat the question?

23 Q. Has anyone asked you to do any analysis or study
24 what would happen with -- what the result would be if no
25 one diverted the forfeiture release water?

1 A. No, no one asked me to do that analysis.

2 Q. So you don't know if nobody diverted the water,
3 correct?

4 A. Given that it's in my conclusions, the only time
5 that it is not diverted is when intertie operations are
6 -- when there's Kern River water discharged to the
7 intertie -- given it's closed basin -- would necessarily
8 be diverted by Second Point or lower end users.

9 Q. Now, you've talked about Second Point and lower
10 river. Do you know if Second Point and lower river
11 rights have any entitlement to Kern River water in what's
12 called the nonMiller-Haggin months where there's
13 forfeiture?

14 A. In the nonMiller-Haggin months the Second Point
15 diverters, their entitlement is one-third of any of the
16 computed natural flow above 1500 CFS.

17 Q. So their availability to get -- receive water is
18 dependent entirely on the flow of the Kern River,
19 correct?

20 A. Well, that is their entitlement. They're also
21 entitled to any water that is released by the Second
22 Point diverters that reaches the Second Point.

23 Q. So any water that's in excess or surplus to the
24 First Point demand, correct?

25 A. Correct.

1 Q. Otherwise the 1500 CFS -- that's the right or
2 the entitlement that comes from that -- that's not
3 affected by the amount of water actually diverted and
4 used within First Point; is that correct?

5 A. Could you repeat that question?

6 Q. The 1500 CFS is not affected by the amount of
7 water diverted or used within the First Point. For
8 example, Kern Island releases more water on a given day,
9 that, doesn't change the Second Point entitlement that's
10 based on the 1500?

11 A. That's based on the computed natural flow and
12 releases.

13 MR. BAGGETT: You've taken an hour.

14 MR. PEARCE: I have about five more minutes. I
15 think I used 15 or 20 minutes with Mr. Milobar. I think
16 I am within my time. I have about five more minutes.

17 MR. BAGGETT: I'm asking you to conclude.

18 MR. PEARCE: I will wrap it up.

19 MR. PEARCE: Q. Your testimony, you mentioned
20 several times a Decision 1196, of the State Water
21 Resource Control Board, that's the 1964 Decision in which
22 the State Water Board found that the Kern River was fully
23 appropriated; is that correct?

24 A. Correct.

25 Q. And as of 1964 do you have any understanding as

1 to which entities or entity held the first Kern River
2 water rights, who owned the water rights?

3 A. Since then?

4 Q. No, in 1964 at the time of the 1964 Decision?

5 A. I am not familiar with who owned the rights at
6 that time.

7 Q. And the release water program and the release
8 water they discussed, do you know if the rights held by
9 Kern Delta now, such as Kern Island, Buena Vista,
10 Farmers, and Stine, do you know if those rights released
11 water prior to 1964?

12 A. I have reviewed flow and diversion records prior
13 to 1964, and they -- they did release water through --
14 prior to 1964.

15 Q. Do you know if any released water because they
16 didn't have a demand for water; is that correct?

17 A. I think they always have a long-term demand for
18 water. They certainly didn't have the ability to control
19 the water in that particular instance.

20 Q. And the fact of the matter is when the Kern
21 Delta rights didn't divert water, and they released it,
22 they didn't use the water; is that correct?

23 A. Correct.

24 Q. And isn't it true that the forfeiture judgment
25 result, was the natural result or was the inevitable

1 result of the released water program? The water -- the
2 Kern Delta water they didn't use they forfeited, correct?

3 A. My understanding is the forfeiture was based on
4 nonuse.

5 Q. Do you understand if the State Water Resources
6 Control Board was informed in 1964 any way that the Kern
7 Island, Buena Vista, Stine or Farmers were releasing
8 water?

9 A. It is my recollection in 1964 it was a
10 recognized operation that -- that they were releasing and
11 diverting by the diversion units.

12 Q. You're aware -- you have a specific recollection
13 as to whether the State Water Resources Control Board was
14 told or informed that the rights held by Kern Delta were
15 not using all the water to which they were entitled?

16 MR. KUNEY: Objection. He's -- he wasn't
17 present to know what they were told. I don't know how he
18 could possibly know.

19 MR. BAGGETT: I guess you could rephrase. I
20 would overrule that.

21 THE WITNESS: What's the question?

22 MR. PEARCE: Q. In your review of the materials
23 in reading of the 1196 Decision, do you see any reference
24 to the fact that Kern Delta rights -- the rights now held
25 by Kern Delta -- were releasing water which was water

1 they didn't have a demand for, do you remember seeing
2 anything specific like that?

3 A. No.

4 Q. You don't recall if there was somebody who told
5 the State Water Control Board?

6 A. I can't remember.

7 Q. And what do you call a forfeiture judgment? Did
8 you review any materials or documents or current
9 litigation of the 1964 judgment other than the 2007
10 recorded decision?

11 A. I read portions of the final opinion
12 specifically my interest for my analysis was solely
13 preserved entitlements to the system.

14 Q. You didn't review any other documents from the
15 litigation?

16 A. No.

17 Q. Are you aware of the allegations from that
18 lawsuit?

19 A. No.

20 Q. Would it change your conclusions if you were
21 aware that certain parties claimed that North Kern has no
22 right to divert the forfeiture release water?

23 MR. KUNEY: Objection. Relevance.

24 MR. JACOBS: Objection. Argumentative.

25 MR. BAGGETT: I will sustain both.

1 MR. PEARCE: Q. Again, you're assuming that --
2 your testimony is based on the assumption that the North
3 Kern -- North Kern and the other parties have a right to
4 take the release water or the forfeiture release water;
5 is that correct?

6 A. I assume that that release water is available to
7 other diversion rights and just as released water has
8 been available to other diverse rights.

9 Q. But you don't know whether they actually have
10 the right to take the water because you are not a lawyer,
11 correct?

12 MS. WILLIS: Objection calls for a legal
13 conclusion. Asked and answered.

14 MR. BAGGETT: Sustained. It's been asked and
15 answered at least a dozen times.

16 MR. PEARCE: Q. And in your final conclusion
17 you state there's a deficit on the river. You're
18 speaking of the river -- strike that.

19 Your -- your -- opinion there's a deficit on the
20 river is based on the conclusion that all of the water
21 released on the Kern River all -- either by lack of
22 demand or forfeiture -- can be absorbed and utilized by
23 existing rights; is that correct?

24 A. That's correct.

25 Q. So, again, you're assuming that the existing

1 rights can take water -- all the water that is available
2 on the river; is that correct?

3 MR. KUNEY: Objection. Asked and answered.

4 MR. PEARCE: I'm talking about deficit now, not
5 anything else.

6 MR. BAGGETT: I think he's answered that, again,
7 numerous times what his assumption was.

8 MR. PEARCE: Q. Have you worked on other stream
9 systems in California?

10 A. Primarily I worked on projects related to the
11 Sacramento/San Joaquin River systems, and the Delta.

12 Q. Are you aware of whether there's a deficits on
13 those other streams?

14 A. It depends on -- well, there are deficits. I've
15 -- the deficit I define here is specific to the monthly
16 analysis that I've performed here.

17 Q. So you made a specific finding of deficit on the
18 Kern, but isn't it true there's a water shortage in
19 California?

20 A. Yes.

21 MR. O'BRIEN: Objection. Relevance.

22 MR. BAGGETT: I will sustain.

23 MS. WILLIS: Objection. Relevance.

24 MR. PEARCE: Q. You mentioned that you had
25 applied -- you assisted in the Sacramento Municipal

1 Utilities District in the preparation of the water rights
2 application; is that correct?

3 A. I was primarily responsible for reviewing the
4 model.

5 Q. Have you been involved in any other water rights
6 applications or any other water rights determinations?

7 A. No, I have not.

8 MR. PEARCE: Okay. Thank you. That's all I
9 have.

10 MR. KUNEY: Mr. Baggett, given that we've got a
11 number of lawyers, can I have a quick moment to confirm
12 with what kind of redirect examination would be
13 appropriate?

14 MR. BAGGETT: I think we have a few questions
15 too. I know Paul has. I've got -- why don't we start
16 down there.

17

18 EXAMINATION

19 BY MR. MURPHY:

20 Q. Couple of questions for Mr. Easton. Based on
21 your knowledge of the river can you explain the function
22 of the intertie?

23 A. It's my understanding that it is a flood-control
24 structure, and that when they open it up to discharge
25 Kern River water to the California Aqueduct, it's

1 primarily to protect property.

2 Q. Do you know how many times since 1964 fill has
3 reached the intertie?

4 A. I've seen the tables, and I can't tell you
5 exactly the number of times. In my analysis of the
6 forfeiture months, I recall that it occurred in, just
7 forfeiture months from 1994 to 2008 it was.

8 Q. Can you estimate a range of volumes of the water
9 that reaches the tie?

10 A. I don't have that information.

11 Q. So once flow reaches the intertie, did you
12 conclude that all First Point diversion, Second Point
13 diversion, and lower river diversions are taken?

14 A. Once it reaches the intertie --

15 Q. Yes.

16 A. -- Or once it actually opens the gates up and
17 started discharging water?

18 Q. When water flows into the intertie, all of those
19 First Point, Second Point, lower river entitlements have
20 been satisfied?

21 A. Yes. It's my understanding when water is
22 discharged to the California Aqueduct, the existing
23 entitlement holders are not diverting that water.

24 Q. Okay. Thank you. That's all I have.

25 MR. BAGGETT: Okay David. I guess I do have

1 one.

2 EXAMINATION

3 BY MR. BAGGETT:

4 Q. Your conclusion was that there were three years
5 where water was released -- was not fully distributed by
6 the bullet number four in your conclusion. Do you know
7 where we might find -- and in the record assuming it's in
8 the record -- the volume that actually was released
9 coincided with flood control?

10 A. In my exhibits, how much of the --

11 Q. You said you didn't recall how much, but I
12 assume --

13 A. How much -- how much are you talking about
14 historically, how much Kern water was discharged in the
15 intertie?

16 Q. Yes, during '82-'83.

17 A. That's in the annual hydrographic reports. I
18 have it in my exhibits. I would need to look at it.

19 Q. We could find it under those two years?

20 A. Yes, you could.

21 MR. BAGGETT: That's all the questions I have.
22 Why don't we take a five-minute break. You can consult
23 with your counsel, and we can do redirect examination.

24 MR. KUNEY: No redirect.

25 MR. BAGGETT: So we're finished. Do you have

1 any exhibits to enter?

2 MR. KUNEY: We would move one through --

3 MR. BAGGETT: Can you use a microphone please.

4 MR. KUNEY: Yeah. Let me get up there. Yes,
5 the joint parties, Joint Exhibits 1 through 74. We have
6 previously moved 75 through 79. We would also move Joint
7 Exhibit 80, which was the PowerPoint.

8 MR. BAGGETT: Any objection?

9 MR. PEARCE: I am going to object to Exhibits 42
10 through 68, which are the exhibits used and referred to
11 by Mr. Easton. I am objecting on the grounds they lack
12 foundation, and his testimony is reflected in these
13 exhibits which is ultimately a legal conclusion which
14 lacks foundation.

15 MR. BAGGETT: Specifically?

16 MR. PEARCE: Based on my cross-examination he
17 admits he doesn't know anything about the water rights.
18 He just knows the defendant relies on the reporting
19 information from the City's records. And Ultimately he
20 tries to reach some legal conclusions based on that. So
21 I am objecting to his testimony in written form in the
22 exhibits, as well as the all the other exhibits.

23 MR. BAGGETT: Mr. Pearce, can you repeat those
24 exhibit numbers?

25 MR. PEARCE: I'm sorry. Actually it's 42 -- I

1 thought you referred to it, but in the reality I guess
2 his testimony -- Mr. Easton's testimony starts at
3 Exhibit 46. I think that would be accurate, everything
4 Exhibit 46 through Exhibit 68.

5 MR. BAGGETT: One of the parties.

6 MR. KUNEY: I will respond. Those were,
7 obviously, his written testimony and all of his
8 supporting tables and authorities explaining his
9 analysis, and that analysis is predicated on the official
10 records of the City of Bakersfield and/or the Kern River
11 Watermaster hydrographic records, the annual flow and
12 diversion records, and all of that is well-supported and
13 factual basis and these are his assessments and
14 evaluations that applies engineering principles and
15 judgment as a professionally licensed civil engineer in
16 the State of California, and I think that's all the
17 appropriate basis.

18 MR. BAGGETT: Well, that wasn't the basis for
19 the objection was not his engineering expertise, it was
20 the fact that he relied on taking legal opinions in his
21 -- expounding, I guess would be my phrase of on those
22 legal opinions. I will note the objection for the
23 record, but I would overrule.

24 We allowed information to come in. I think the
25 witness made it clear that he wasn't opining on whether

1 they had a legal right to use water or not use water. It
2 was just the fact that those were the assumptions he made
3 with his engineering analysis.

4 It didn't all go to a legal conclusion. Based
5 on his testimony, these were the facts. He is an
6 engineer. He used these terms based on what he was told
7 to use and whether he legally used diversion or not,
8 that's another discussion for another day, which if the
9 proceedings go to the next phase, we will probably take
10 many days of the Board's time on how much water and who
11 is using water. And those issues will become very
12 relevant, but at this point, that is not before this
13 Board.

14 He made an analysis, and we can take it under
15 our judgment as to whether and how we want to use that
16 and give him an opportunity. We will note the objection,
17 but anything else with that, we will accept the evidence
18 and exhibits into the record as requested.

19 MR. PEARCE: This is the portion of the
20 proceeding where I beg and plead for additional pages of
21 the brief.

22 MR. PEARCE: And actually, Mr. O'Brien, we going
23 to get to rebuttal. I do have one issue. It is
24 appropriate for rebuttal, but before we get to the final
25 briefs and evidentiary issues also, I assume that they're

1 -- I wasn't sure if they're done.

2 MR. BAGGETT: They're done with their case and
3 chief. They're done with the cross of all witnesses. If
4 it's appropriate, I'm not --

5 MR. PEARCE: I -- maybe this is just a note for
6 the record. There was a specific question asked, I
7 believe, by Mr. Murphy about the amount of water going
8 into the California Aqueduct intertie. We do have an
9 Exhibit 2-18 which provides that information.

10 Again, I don't know if there's a proper
11 rebuttal. I would be happy to put Mr. Core to explain it
12 to -- at the very least refer you to the exhibit -- the
13 City's Exhibit 2-18 which gives the total quantity of
14 water for various years which went into the -- went into
15 the weir tie.

16 MR. BAGGETT: It's information requested. Does
17 anybody have any problem with that or do you want to just
18 point us to the exhibit?

19 MR. KUNEY: I think our assessment that exhibit
20 is already in evidence previously introduced by the City.
21 We have no objection, no need for any testimony on the
22 subject.

23 MR. PEARCE: I am not requesting testimony. I
24 am just offering if necessary.

25 MR. BAGGETT: Very good.

1 MR. PEARCE: It's Exhibit 2-18 which is already
2 in evidence.

3 MR. BAGGETT: We will note that for the record.
4 Now --

5 MR. PEARCE: I'm sorry, counsel.

6 MR. BAGGETT: Thank you. That's helpful. This
7 is not a trial court. This is an administrative
8 proceeding. We appreciate the parties cooperating. We
9 just trying to get a full and open record to make a
10 decision. I appreciate that.

11 With that, closing briefs. I think yesterday I
12 mentioned ten pages. You have a request for additional
13 pages. What I would propose --

14 MR. O'BRIEN: Before the joint parties are
15 planning to prepare a joint brief, and I propose that the
16 joint brief be limited to 20 pages. Kern County Water
17 Agency is continuing to file a separate brief, and
18 Mr. Jacobs has indicated that that would be about ten
19 pages. We would request 20 and 10 as our maximum page
20 limits.

21 MR. PEARCE: I told Mr. O'Brien I had no
22 objection to that other than, I guess, I would like more
23 pages as well if he has more pages. Twenty would be more
24 sufficient for us.

25 MR. BAGGETT: Then we will allow up to 20 pages,

1 double spaced, and we're to go into 12 point Arial type.
2 We have done that in the past when everybody has single
3 spaces and very small type. I will trust the parties
4 will respect our eyes, and we will leave it up for 20
5 pages to make it expeditious use a pretty straightforward
6 words -- particularly interested in defining -- we have
7 to make it there -- some quantity of water, so I think
8 you all know that if that's not appropriate, we can move
9 to phase two, if we make that finding. So with that --

10 MR. PEARCE: Can we have a due date for the
11 briefs?

12 MR. BAGGETT: Why don't we say a couple of weeks
13 for the transcript. The week after this two weeks after
14 that.

15 MR. O'BRIEN: If we could go a month from today.
16 I am worried about Thanksgiving.

17 MR. BAGGETT: Is that before Thanksgiving?

18 MR. O'BRIEN: That date does that put us Tuesday
19 before Thanksgiving.

20 MR. BAGGETT: Is that sufficient?

21 MR. PEARCE: That works for us.

22 MR. BAGGETT: Okay. It will be reasonably due
23 close of business on the 24th of November.

24 There's no other questions, comments we're
25 concluded. Thank you.

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(Proceedings adjourned at 10:39 a.m.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF CALAVERAS.)

I, Susana R. Abeyta, a Certified Shorthand Reporter licensed to practice in and for the State of California, do hereby certify:

That on Monday and Tuesday, the 26th and 27th day of October, 2009, thereof, I was present at the above-entitled matter; that I took down in shorthand notes all proceedings had and testimony given; that I thereafter caused said shorthand notes to be reduced to typewriting using computer-aided transcription, the foregoing being a full, true and correct transcription thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my hand this 16th day of November, 2009.

Susana R. Abeyta
Certified Shorthand Reporter No. 13372