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MEETING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
WATER RIGHTS HEARING ON
PERMITS 11308 AND 11310

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
COASTAL HEARING ROOM, SECOND FLOOR
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SACRAMENTO, CALIFORNIA

MONDAY, MAY 21, 2012
9:03 A.M.

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27
28 ALSO PRESENT

29 Ms. Mary Ann Andreas, Tribal Vice Chair, Morongo Band of
30 Mission Indians

31 Mr. Kevin Bearquiver, BIA

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1 PROCEEDINGS

2 CHAIRPERSON HOPPIN: Good morning, ladies and
3 gentlemen.

4 I'm Charlie Hoppin, Chair of the State Water
5 Resources Control Board.

6 This is the time and the place for the hearing
7 regarding the proposed revocation of License 659,
8 Application 553 of the Morongo Band of Mission Indians.

9 Also present with me today are staff assigned to
10 assist this hearing: Staff Counsel Dana Heinrich; Staff
11 Counsel Environmental Scientist Kathleen Groody; Water
12 Resources Control Engineer Ernie Mona.

13 At the outset, I would like to acknowledge that
14 we have received Morongo Band's latest Motion to Dismiss
15 this proceeding. The issues raised in this motion will be
16 addressed, but I'm not prepared to rule on the motion
17 today. I intend to proceed with the hearing as planned.

18 As many of you know, we need to go through our
19 evacuation procedures. If you look at the back of the
20 room, you will notice there are exit signs. If you hear a
21 horn or some odd sounding siren go off, please identify
22 those exits and proceed down the street -- down the
23 stairs, across the street, to the Cesar Chavez Park. And
24 be sure to obey all traffic signals, or little ladies in
25 hats will give you a very serious ticket.

1 This hearing will be held in accordance with
2 Notice of the Public Hearing dated January 26, 2012;
3 February 10th, 2012.

4 The purpose of this hearing is to afford the
5 Division of Water Rights prosecution team and the Morongo
6 Band an opportunity to present relevant oral testimony and
7 other evidence which addresses the following key issues:

8 Should the license 659 be revoked in whole or in
9 part in accordance with Water Code Section 1675?

10 Did the Morongo Band or its predecessors in
11 interest fail to use beneficially in accordance with the
12 Water Code in whole or in part the water authorized to be
13 used under License 659 or the applicable statutory period
14 for the applicable statutory period?

15 If so, what amount of water was unused during
16 what period and what periods of time?

17 Did the Morongo Band or its predecessors in
18 interest fail to comply with any of the terms or
19 conditions of the License 659?

20 If so, which terms or condition did the Morongo
21 Band or its predecessors in interest violate?

22 We are broadcasting this hearing on the Internet
23 and recording both audio and video. The court reporter
24 will present a prepared transcript of the proceedings. To
25 assist the court reporter, please provide her with your

1 business card and make sure that you use the microphone
2 whenever you speak.

3 Also, I caution you that the Internet broadcast
4 continues during all breaks. So be careful that you do
5 not have a private conversation near an open microphone at
6 any time.

7 Before we begin the evidentiary portion of the
8 hearing, we will hear from any speakers who wish to make
9 non-evidentiary policy statements. If you wish to make a
10 policy statement, please fill out a blue card, if you have
11 not already done so, and hand it to staff.

12 The Board will also accept written policy
13 statements. If you have written copies of your policy
14 statement, please give them to staff.

15 A policy statement is a non-evidentiary statement
16 and subject to the limitations identified in the hearing
17 notice. Persons making policy statements must not attempt
18 to use their statements to present factual evidence either
19 orally or introduction of written exhibits. The policy
20 statement should be limited to five minutes or less.

21 After hearing any policy statement, we will move
22 to the evidentiary portion of the hearing for presentation
23 of evidence and related cross-examinations by the two
24 parties who have submitted Notices of Intent to Appear.
25 The parties will present their cases in chief and conduct

1 cross-examination in the following order: Division of
2 Water Rights Prosecution Team, Samantha Olson; and the
3 Morongo Band of Mission Indians, Mr. Stuart Somach.

4 At the beginning of each case in chief, the party
5 may make an opening statement briefly summarizing the
6 party's position and what the party's evidence is intended
7 to establish. After any opening statement, we will hear
8 testimony from the party's witnesses.

9 Before testifying, witnesses should identify
10 their written testimony as their own and affirm that it is
11 true and correct. Witnesses should summarize the key
12 points of the written testimony. And please do not read
13 your written testimony into the record.

14 Direct testimony will be followed by an
15 opportunity for cross-examination by the other party,
16 Board staff. And redirect testimony and
17 recross-examination limited to the scope of their redirect
18 testimony may be permitted. After all the cases in chief
19 are completed, the parties may present rebuttal evidence.

20 The parties are encouraged to be efficient in
21 presenting their cases and their cross-examination.
22 Except where I approve a variation, we will follow the
23 procedures set forth in the Board's regulation and the
24 hearing notice.

25 The parties presentation are subject to the

1 following time limits:

2 Opening statements are limited to 20 minutes
3 each.

4 For oral presentations of direct testimony, both
5 parties will be allowed 20 minutes for each witness.

6 Cross-examination will be limited to one hour per
7 witness or panel of witnesses for the prosecution team and
8 Morongo Band of Mission Indian.

9 Additional time may be allowed upon showing good
10 cause.

11 Oral closing arguments will be permitted,
12 provided they do not extend the hearing into the third
13 day. An opportunity will be provided for submission of
14 written closing briefs. I will set the briefing schedule
15 at the end of the hearing.

16 Before we begin the evidentiary portion of this
17 hearing, we will hear policy statements from participants
18 who have submitted a Notice of Intent to Appear indicating
19 they will intend to present a policy statement, for those
20 who filled out a blue speakers card indicating interest in
21 making a policy statement. When I call each of you by
22 name please come to the microphone, state your name and
23 the party you represent, and proceed with your policy
24 statement.

25 Morongo Tribal Chairman Martin or Vice Chairman

1 Andreas representing the Bureau of Indian Affairs and
2 other blue speaker cards, would you like to start with the
3 tribe?

4 Now we'll move to the evidentiary portion --
5 excuse me. We have policy statements from Mary Ann
6 Andreas. Come forward, Mary Ann.

7 MS. ANDREAS: Thank you, Chairman.

8 My name is Mary Ann Andreas. I'm the Vice Chair
9 for the Morongo Band of Mission Indians. I have been in
10 tribal government for over 30 years on and off the Council
11 in the position of Chair, Vice Chair, and Councilperson.

12 I grew up on the reservation. I'm 67 years old.
13 As a child, our water ran in a ditch alongside of the
14 road. And we simply took a dish towel and strained it for
15 bugs, squirrels, rabbits whatever happened to die in
16 there. We had a cistern where we gathered water. I can
17 remember at times horse and cows falling in. And that was
18 the water we had then.

19 We now have the financial ability to hire a Water
20 Master. And we assure all of our members, all of our
21 enterprises, and all of the non-tribal members that live
22 on our reservations they have decent drinking water.

23 Water is very important. I don't need to tell
24 any of you here on the Board that, for not only our tribal
25 members and their personal use, but for our financial

1 future.

2 We look to our children to protect all of our
3 tribal sovereignty and the land and the water rights that
4 go along with it. Very important to the tribe. And I'm
5 here to represent that to you today.

6 CHAIRPERSON HOPPIN: Mary Ann, I'm curious. On
7 your drinking water, you mentioned when you were a child
8 contamination of things falling into the water supply. Is
9 the water you have now treated or is it just --

10 MS. ANDREAS: It is treated. I have here with me
11 today our Water Master. And we send out I think it's
12 quarterly to our tribal members a study of all the water
13 we do. And we have some of the most pristine water in the
14 area. We guard it very carefully so it's not contaminated
15 by any water basins around us. We're very careful. We're
16 very conservative with our water, and we want to do the
17 right thing for everyone. We thank you for the ability to
18 appear before you today.

19 CHAIRPERSON HOPPIN: Thank you, Mary.

20 Kevin Bearquiver.

21 MR. BEARQUIVER: Good morning. I'm Kevin
22 Bearquiver. I serve as the Deputy Regional Director of
23 Trust Services for the Bureau of Indian Affairs in the
24 Pacific Regional Office.

25 The Morongo Band of Mission Indians is under the

1 purview of my office. It's the policy of the
2 United States of America to promote Indian
3 self-determination and tribal economic development. This
4 means that the BIA will assist tribes when they request
5 assistance and that it will transfer federal programs and
6 responsibilities to tribes under their request. This is
7 done pursuant to the Indian Self-Determination Act, Public
8 Law 93638 as amended at 25 UCS Section 450.

9 The BIA will also assist tribes in managing the
10 natural resources in order to enhance their ability to
11 advance self-determination and achieve tribal economic
12 self-sufficiency.

13 One of the primary responsibilities of the
14 United States with respect to Indian tribes has always
15 been to hold legal title to Indian reservation lands in
16 trust for the tribes. The tribes, of course, retain
17 beneficial use of those lands.

18 The United States also accepts legal title to
19 lands which the tribes acquire within or adjacent to
20 existing reservations. An integral aspect of the
21 United States holding title to reservation lands is that,
22 unless water rights are reserved in some fashion at the
23 time the United States accepts legal title to those lands
24 held in trust for a tribe, the United States also holds
25 legal title to the water rights that are appurtenant to

1 those lands that it holds in trust for the tribes.

2 When reservations are established, the water
3 appurtenant to those lands are implied by set aside or
4 reserved to allow tribes to carry out the purposes of the
5 reservation. These water rights are paramount to the
6 water rights later perfected under state law. These
7 principles are confirmed by the United States Supreme
8 Court in the case Winters versus the U.S., also known as
9 the Winters Doctrine.

10 Specific to the instant situation, except where
11 water rights may have been reserved, the United States,
12 acting through the Secretary of Interior, holds legal
13 title to all the lands comprising the Morongo Indian
14 Reservation and the appurtenant water rights in trust for
15 the beneficial use of the Morongo Band of Mission Indians.
16 This includes lands which were included in the original
17 reservation that was established in 1876, federal lands
18 that were added to the reservation by subsequent Executive
19 Orders and acts of Congress, and lands which the tribe has
20 purchased and transferred to the United States in the past
21 20 years.

22 The Morongo Band has the legal ability and
23 responsibility for developing its own water systems on the
24 Morongo Indian reservation. Providing its own wastewater
25 treatment facilities, administering those systems and the

1 rights associated with them, providing its own roads,
2 except to the extent that they apply to seek Federal
3 Highway Funding for them, and providing other basic
4 municipal services for its members living on the
5 reservation.

6 Responsibility for many of the federal programs,
7 such as environmental protection, housing, Indian child
8 welfare, forestry, social services, land title and records
9 responsibilities, et cetera, have also been transferred to
10 the tribe and are no longer provided by the federal
11 government.

12 Water is a critical necessity for the tribe. Its
13 members need a reliable and adequate water supply and
14 water systems. The Morongo tribe has the responsibility
15 for providing safe drinking water and agricultural and
16 industrial water for the tribe, both at present and for
17 the future, including the administration of those water
18 rights.

19 Notwithstanding the tribe's ability to
20 administer those rights as noted above, the United States
21 has taken legal title to approximately 1,830 acres of land
22 in Millard Canyon in trust for the beneficial use of the
23 Morongo Band of Mission Indians. Along with the land, the
24 BIA has taken legal title to any appurtenant water rights
25 that are attached to the land as a matter of law.

1 Included in the lands and waters which have been taken
2 into trust are the Ahadpour property consisting of 715
3 acres of land and any appurtenant water rights.

4 Because the United States holds legal title to
5 the land in Millard Canyon as well as water rights
6 appurtenant to that land, there is a series of legal
7 issues concerning whether any such water rights could be
8 revoked in the absence of appropriate notice to the Bureau
9 of Indian Affairs, which administers the lands in trust
10 for the tribe.

11 There is no public road providing access to
12 Millard Canyon so that no one but the Morongo Band may
13 cross the sections of other reservation which lead to the
14 canyon. The BIA has not approved any rights-of-way
15 crossing tribal lands leading to Millard Canyon. The
16 BIA's approval would be required for any right-of-way to
17 be valid. Thus, no one but the tribe has the opportunity
18 to access the water in the canyon.

19 In any event, and based upon all the foregoing,
20 the BIA urges the SWRCB as a matter of good policy not to
21 revoke License 659 and to exercise its power in a manner
22 that allows the Morongo to consolidate License 659 with
23 other water rights to which it has beneficial interests so
24 that it can ensure these rights are put through reasonable
25 beneficial uses in a manner that fosters continuing Indian

1 economic development and self-sufficiency.

2 Thank you very much.

3 CHAIRPERSON HOPPIN: Thank you, Kevin.

4 We will now move to the evidentiary portion of
5 the hearing.

6 Next, I will invite appearances by the parties
7 who are participating in the evidentiary portion of the
8 hearing. Will those making appearances please state your
9 name and whom you represent so the court reporter can
10 enter that into the record?

11 The Division of Water Rights.

12 MS. OLSON: Good morning, Chairman Hoppin,
13 Members of the Advisory Staff. My name is Samantha Olson,
14 and I'm appearing today on behalf of the Division of Water
15 Rights prosecution team.

16 And I do have two procedural issues to discuss
17 before we get started. Would this be the appropriate
18 time?

19 CHAIRPERSON HOPPIN: Would you center up on that
20 microphone.

21 MS. OLSON: I could have two procedural issues to
22 discuss this morning. Would this be the appropriate time
23 to bring it up?

24 Okay. So first, I doubt I'll need it, but I'm
25 requesting an additional five minutes in my opening

1 statement to respond to some of the points made in the
2 motion filed by Mr. Kelly last week.

3 Second, unfortunately, Walt Pettit had to undergo
4 a surgery last week and is not able to appear in person
5 today. We worked with the Somach firm, and they developed
6 a series of questions for him to respond to in writing.
7 And we were able to make that happen trier to the surgery.
8 And so I have that, and I would like you to add that to
9 our exhibit list, Exhibit 3.1.

10 My understanding is that there is a remaining
11 question that the Somach firm would like to follow up with
12 with Mr. Pettit. And the issue with the remaining
13 question is they would like to have him state that all --
14 his entire declaration is based solely on his review of
15 the file. We would definitely disagree with that. So I'm
16 not sure --

17 CHAIRPERSON HOPPIN: You say you agree or
18 disagree?

19 MS. OLSON: We would disagree with that. I'm not
20 sure of the length of time it will make for him to
21 recover. My guess is one or two months.

22 So one approach we could take is to submit the
23 declaration and the responses to the questions as hearsay
24 evidence at this time, assuming that they object as
25 hearsay.

1 CHAIRPERSON HOPPIN: It's hard for me to imagine
2 hearsay evidence from Walt Pettit, but I understand
3 procedurally what you're going after.

4 MS. OLSON: Well, and Walt Pettit's testimony,
5 we've submitted it to corroborate other evidence in the
6 file. We're not asking the Board to rest the finding on
7 his declaration alone. We would be okay with that. And
8 depending on the Board's timing, we could try to follow up
9 with the final question once he's feeling better.

10 CHAIRPERSON HOPPIN: Does that make sense to you
11 Mr. Somach?

12 The one thing I don't want to do is put any
13 pleasure on Walt until his aneurysm is healed completely,
14 not that you would ever have the ability to elevate
15 anyone's blood pressure in a conversation.

16 MR. SOMACH: Let me make my appearance, Stuart
17 Somach. And with me is Daniel Kelly. We're with the Law
18 Firm of Somach Simmons & Dunn. And we represent the
19 Morongo Band of Mission Indians here in these proceedings.

20 Moving to the question that was just posed, you
21 know, I very carefully called Walt and had a conversation
22 with him. And I think that's reflected in this document
23 in the exhibit that Samantha wants to introduce. I have
24 no problem with the introduction of that exhibit. In
25 fact, that was the whole reason why we went through that

1 exercise, is to avoid putting Walt to any inconvenience.

2 The problem was when I talked to Walt, as is
3 reflected in the declaration, he said he had absolutely no
4 independent recollection of anything about this, other
5 than the fact that he said he remembered for some odd
6 reason being there all those years ago, but that was with
7 it.

8 That appears to be what the declaration says:
9 That what he did was he got this file from the Board. He
10 read through it. And then if you read the declaration
11 along with what he said, it appears that's all he did was
12 regurgitate what was in his earlier report back to 1968
13 into the file.

14 Now, 1968 was a year before I got married. I
15 remember that year, but whether or not I could remember
16 the kind of detail that is in this report that is
17 reflected in the materials independently is kind of
18 doubtful to me. And that's the sole question.

19 I thought Ms. Olson had admitted that into some
20 e-mails to us. And we actually said if you just stipulate
21 to that, we'll be fine. She's dancing around the issues
22 because what she just told you was basically I think what
23 I hear was nothing independent outside of what's in the
24 report. And we wouldn't want to rest our case on what
25 Walt said. We're resting it on the materials that are in

1 the files.

2 I don't know how to resolve this. I don't want
3 to wait two to three months. I don't want to bother Walt
4 at all about this.

5 And so if we have an understanding that, number
6 one, what Walt reflected was what was in the files and
7 what was provided to him, I don't have any problems with
8 that. But if they're going to try to draw something else
9 out of his testimony and his declaration, that's the issue
10 that I need to focus on. I wouldn't be doing my job if I
11 didn't.

12 CHAIRPERSON HOPPIN: Can we do this, Stuart?
13 Could we wait until the statements are made and if it is
14 contrary to your understanding and your beliefs, we'll get
15 together and figure out how to deal with this on both
16 sides? Because as important as this issue is to all of
17 us -- and I'm not saying that lightly at all -- Mr. Pettit
18 trumps all of this and his health, quite frankly.

19 MR. SOMACH: And I agree 100 percent.

20 CHAIRPERSON HOPPIN: Thank you.

21 MR. SOMACH: But I'll wait. Let's listen to what
22 they have to say about all this stuff, and then I'll let
23 you know how I feel about it then.

24 CHAIRPERSON HOPPIN: Samantha, does that make
25 sense to you? I mean, not being legal counsel here --

1 MS. OLSON: That makes sense to me, but I just
2 want to correct something that was said. I mean, we
3 definitely disagree that he's just testifying based on the
4 file. It's very common for somebody to read the documents
5 and have their recollection refreshed. That's what
6 happened here.

7 We do agree his conclusions based on the
8 follow-up inspection that happened in 1968, it's straight
9 from the file. And I'm fine waiting for the conclusion of
10 everybody's case in chief to resolve this issue.

11 And again, his testimony just corroborates
12 additional evidence in our case. And so if we just had to
13 leave it with his declaration, his responses in writing
14 and both parties' arguments about what his declaration
15 means, I think I would be okay with that for the time
16 being. And we agree, we don't want do bother him anymore.

17 CHAIRPERSON HOPPIN: Let's keep our minds open
18 until we get to a critical juncture here. I would not
19 want to get in a war of wits with Walt Pettit over what
20 happened in 1968. From my personal standpoint -- and I
21 know who would lose. It would be me.

22 Before we begin, I'd like to address a couple
23 procedural issues. Does either party plan to present
24 direct evidence from their witnesses as a panel?

25 MS. OLSON: We have four witnesses here today.

1 And I'm going to suggest that we bring up Mr. Mozafar
2 Behzad first so he can return back to work as soon as
3 possible. Mr. Mozafar Behzad is one of our witnesses.
4 But then we would like to bring the remaining three up as
5 a panel and proceed that way.

6 CHAIRPERSON HOPPIN: Very good.

7 Mr. Somach?

8 MR. SOMACH: We'll proceed as a panel.

9 I do have a problem with taking someone out of
10 order. That is, if I have a aggregate of 60 minutes to
11 cross-examine and I haven't heard everybody the way as
12 normally would be done in a panel, then I have no idea how
13 much to reserve.

14 So what I'd like to do is I won't object to them
15 doing what they're doing. But I'd like to pull the
16 cross-examination of this witness away from the 60-minute
17 cross-examination so I don't have to worry about
18 allocation of time.

19 CHAIRPERSON HOPPIN: In the event that you will
20 need extra time.

21 MR. SOMACH: Well, I may actually request for
22 even more time. Who knows.

23 CHAIRPERSON HOPPIN: Does either party plan to
24 present rebuttal witnesses?

25 We dealt with the issue of Mr. Pettit.

1 MS. OLSON: We don't have rebuttal witnesses at
2 this time. However, we would like to reserve the ability
3 to give you a better idea of idea what we need for
4 rebuttal based on the case in chief of the Morongo tribe.

5 CHAIRPERSON HOPPIN: I'm sorry you don't have a
6 microphone at your station. You're getting extra exercise
7 this morning.

8 MR. SOMACH: I know. I already hardly remember
9 yesterday, let alone 1968. But getting up and down
10 doesn't get any easier.

11 But -- in fact, I forgot what we were talking
12 about.

13 I know. I don't know what part of our case in
14 chief we haven't revealed to Ms. Olson. We read her case
15 in chief. We don't have any rebuttal. We'll deal with
16 everything in terms of our direct testimony generally.

17 So no, we have none. And if she surprises us
18 somehow, we want to research the right to rebut something
19 she hasn't told us up to this point in time.

20 CHAIRPERSON HOPPIN: I will now administer the
21 oath. Will those persons who may testify during this
22 proceeding please stand and raise your right hand.

23 (Whereupon all prospective witnesses were sworn.)

24 CHAIRPERSON HOPPIN: Thank you. You may be
25 seated.

1 We will now hear the opening and statements and
2 testimony from Division of Water Rights. Ms. Olson.

3 Samantha, I'm having a hard time hearing you this
4 morning. I don't know it's because I had the pleasure of
5 being outdoors in the dust all weekend or my ears are full
6 or whether you're suffering from allergies or whatever,
7 but if you would do your best to --

8 MS. OLSON: Is this better?

9 Good morning, again. Samantha Olson for the
10 enforcement team.

11 I want to say, first of all, that the enforcement
12 team respects the Morongo tribe, and we support the public
13 policy that favors tribal self-determination and
14 self-reliance. It was not our intent to single out the
15 tribe. In fact, as Mark Stretars will testify, we believe
16 that the Water Right License 659 was owned by Great
17 Springs Waters of America when we first posted the Notice
18 of Proposed Revocation.

19 Because the Morongo tribe had protested a
20 petition on this license in the 1990s, they received the
21 notice. And it wasn't until we received their response to
22 that notice that the team learned that the Morongo tribe
23 had purchased the license. Never the less, the Morongo's
24 acquisition of the license doesn't alter the underlying
25 facts that show cause to revoke.

1 Our case is straight forward. The file record
2 contains evidence that establishes extensive periods of
3 non-use, most likely beginning in the 1950s and extending
4 through to the year 2000. Our exhibits and testimony show
5 a prima facie case for revocation based on five
6 consecutive years of non-beneficial use, specifically in
7 the 1960s and the 1990s.

8 First off are the two division inspections in the
9 60s. We have inspection reports from 1964, which is Walt
10 Pettit's inspection, and again in 1968. And those reports
11 establish non-use and are corroborated by additional
12 evidence, including lapses in the submittal of licensee
13 reports, the purchase of the companion right license 660
14 by Cabazon Water District in 1961 and aerial paragraphs.
15 We have testimony from Walt Pettit that corroborates the
16 findings in his report.

17 And then for an unknown reason, the Division of
18 Water Rights didn't follow up with the 1969 inspection and
19 the license passed through a series of developers and
20 finally was purchased by the Ahadpours in the 1990s, the
21 early 1990s.

22 And it was at that time that license 659 came
23 back to the attention of the Division of Water Rights.
24 The Ahadpours filed a change of petition in 1995 for the
25 purpose of use to bottle and sell drinking water. And the

1 Ahadpours candidly admitted at that time that the water
2 was not being used. And we have Mr. Behzad here to
3 testify about the licensed water use during that time. So
4 it's pretty straight forward.

5 And the tribe's acquisition later of the Ahadpour
6 property and the conversion from fee title to trust
7 doesn't somehow convert License 659 to something that's
8 now not subject to the State Water Board continuing
9 regulatory authority.

10 In 2003, the 9th Circuit Court of Appeals decided
11 the State Engineers of the State of Nevada versus South
12 Fork Band of Te-Moak Tribe of Western Sho-Shone Indians.
13 And that citation is 339 F 3rd 804. In that case, the
14 Nevada State Court had completed an adjudication of the
15 Humboldt river and its tributaries and had entered a
16 decree in 1935. The decree encompassed five ranches that
17 were later purchased by the federal government for a
18 reservation for the Te-Moak tribe. And so then after a
19 series of colorful events and some ruckus between the
20 State and federal courts, the issue of water right
21 jurisdiction was before the Court of Appeals.

22 Now, enacted in 1956, the McCarran amendment
23 waves the sovereign immunity to joiner the United States
24 as a defendant in a general stream adjudication. The
25 Te-Moak court held that the McCarran amendment waives

1 immunity from suite for the administration of water rights
2 acquired after the statute's enactment and would also
3 apply retroactively to the administration of water rights
4 acquired before the law became into effect.

5 So like the water rights in Te-Moak License 659
6 is a creature of State law. It's subject the State
7 administration and the adjudication and decree of the
8 Riverside County Superior Court.

9 While the right was adjudicated before the
10 enactment of McCarran amendment, the rights under the
11 decree are subject to the State administration, even if
12 they're later acquired by the tribe. So the federal
13 government must submit itself to State jurisdiction like
14 any ordinary party here.

15 Quoting the Committee report, the Te-Moak court
16 noted -- I'm going to quote them -- "If a water user
17 possessing a decreed right is immune from suites and
18 proceedings in the courts for the enforcement of valid
19 decrees, the years of building the water laws of the
20 western states in the earnest endeavor of their proponents
21 to affect fair, honest, and equitable division of the
22 public waters will be seriously jeopardized.

23 "The United States has acquired many lands and
24 water rights in the states that have the doctrine of prior
25 appropriation. When these lands and water rights acquired

1 from the individuals, the government obtained no better
2 rights that had the persons from whom the rights were on
3 obtained."

4 Usability is a primary tenant of the
5 appropriation doctrine, and it's founded upon important
6 policy implications. As long construed by the courts, an
7 appropriated water right is lost after five consecutive
8 years of non-beneficial use. Water Code Section 1241
9 provides when a person who is entitled to use the water
10 fails to use beneficially all or any part of the vested
11 water right for the purpose for which it was appropriated
12 or adjudicated for a period of time of five years, such
13 water may revert to the public and such reversion shall
14 occur upon a finding by the Board. Prior to 1980, this
15 statute provided for an automatic reversion of a water
16 right for three years of non-beneficial use.

17 Amendments in 1980 extended that to five years
18 and added the word "may" and the finding by the Board
19 after a Notice of Public Hearing so that word "may" now
20 makes the statute read permissively. And the most logical
21 interpretation of these amendments is that the word "may"
22 relates to the contingency of the Board making the now
23 requisite finding. But that doesn't mean that the Board
24 has unfettered discretion to not revoke. If the facts
25 establish non-use and a valid defense does not exist, the

1 Board should revoke.

2 The doctrine of laches is not a valid defense to
3 forfeiture. I'm quoting another court. "Mere failure to
4 enforce the law will not estop the government from
5 subsequently enforcing it." In laches, it's not available
6 where it would nullify an important public policy.

7 In North Kern Water Storage District versus Kern
8 Delta Water District, the court rejected to estoppel
9 defense to a forfeiture of a water right. I'm going to
10 quote another court. "As a general matter, equitable
11 estoppel will not be invoked against a governmental entity
12 to contravene specific constitutional or statutory
13 limitations."

14 Here, even if the facts supported the contention
15 permitting the parties to freeze entitlement to
16 appropriate water, regardless of non-use by one of the
17 parties, would directly contravene the important public
18 policy embodied in Water Code Section 1241 and the
19 California Constitution Article 10 Section 2, "all water
20 that will be used reasonably and for beneficial purposes."

21 And even if the doctrine of laches could apply,
22 the elements have not been met here. Mr. Kelly is arguing
23 that because the Morongo tribe was not notified by this
24 agency of the license potential deficiencies that somehow
25 its acquisition should absolve any and all compliance

1 issues. If such a rule existed, anybody could sell their
2 permit or license and wipe out any compliance issues:

3 One, whether the Board knew about it or not; or two,
4 whether we have the resources to take action on it.

5 There is no such rule or regulation that requires
6 us to notify prospective purchasers of the uncertainties
7 of water rights.

8 Moreover, there is ample evidence that the
9 Morongo tribe knew or should have known of the non-use
10 associated with License 659. Loss for non-use is a
11 long-held and well-established and accepted principle of
12 water law. A party cannot revive a long lost right based
13 on the theory the agency didn't warn them that there is a
14 problem.

15 And finally, there is a pragmatic element to this
16 case. The Morongo tribe claims to hold many other water
17 rights, including a ground water and riparian right. The
18 enforcement team is not contesting the validity of any of
19 the rights that the Morongo -- any other rights that the
20 Morongo tribe may have or claim at this time. It's
21 outside the scope of this hearing. However, it does
22 appear the revocation of License 659 would have little, if
23 any, impact on the tribe's operations or activities.

24 I mentioned I have four witnesses here today, but
25 it's looking like I have three witnesses at this time.

1 Oh, I do have four. Thank you. Perfect. John O'Hagan is
2 here, and his testimony covers the various water rights in
3 Millard Canyon, the limitations on these rights, the
4 evidentiary support for revocation.

5 Mark Stretars is here, and he was supervising
6 staff when the Notice of Proposed Revocation was first
7 developed and posted. His testimony covers the contents
8 of the file and how staff processed the notice.

9 And then Robert Been is here. Thank you for
10 showing up. And he was the staff person who worked on the
11 Ahadpour change petition in the 1990s.

12 And then finally we have Mozafar Behzad, who's
13 here. He helped the Ahadpour, the owners of the License
14 659, in the 1990s.

15 And I don't know if the other side is going want
16 to do an opening statement after me, but if they don't, I
17 propose bringing up Mr. Behzad first and going through
18 direct, cross-exam, redirect, so we can have him return to
19 work as soon as possible

20 CHAIRPERSON HOPPIN: Would you like them to do
21 that before you make your opening statement, Stuart? Or
22 would you like to make your opening statement now?

23 MR. SOMACH: What I'd like to do -- I understood
24 the rules to be I had to wait until my case in chief. I
25 actually would like to do my opening statement now, if I

1 could.

2 CHAIRPERSON HOPPIN: Sure.

3 MR. SOMACH: First of all, while I appreciate the
4 recognition of Mr. Kelly's involvement in the development
5 of the Motion to Dismiss.

6 I will just simply modestly say I actually
7 assisted Mr. Kelly in preparing that. And the motion
8 actually is not on behalf of Mr. Kelly in any event; it's
9 on behalf of the Morongo tribe. I don't want to
10 personalize things because we are here representing the
11 tribe, and we take that representation very seriously. We
12 take the issues in this case very seriously on behalf of
13 the tribe.

14 We do appreciate your listening to us today and
15 the time that you've taken and, Mr. Chairman, the time
16 you've taken, in particular, over the past few years
17 dealing with other water right issues associated with the
18 tribe and do appreciate that.

19 It's unfortunate, in fact, that we're here at
20 all. The tribe would have liked to have resolved this
21 issue in a manner that would avoided all of the
22 contentiousness that's existed over the past few years.
23 Would have loved to have avoided the trip up to the
24 California Supreme Court and back down again. And it
25 would have preferred that the State Board had looked at

1 this from a broader perspective, one that looked at the
2 question of how water in the state can be put to full
3 beneficial use, as is mandated by the California
4 constitution to the maximum degree possible, and had
5 wished that the Board in that context would have
6 consolidated License 659 with the other license the tribe
7 has at the time it had petitioned to do that.

8 Ms. Olson had talked extensively about the
9 statutory provisions and has given you an interpretation
10 of the relevant statute. But the fact remains that that
11 statute was modified. It was modified to provide that --
12 revocation was discretionary with the Board, was
13 permissive.

14 Presumably the Legislature and the Governor in
15 their wisdom intended the Board not just to sit up here
16 and act in a mandatory fashion, but to actually weigh and
17 balance the evidence. And more importantly, to consider
18 the policy ramifications of its actions in the context of
19 what we're talking about.

20 And that state policy actually has two components
21 to it. The first component I think is a State water law
22 component, a question of -- on the line, the statute
23 certainly is one that seeks to ensure that water is put to
24 reasonable beneficial use to the maximum degree possible.

25 And I don't think that anyone can take a look at

1 Morongo's actions since it acquired these water rights and
2 argue anything other than that, if allowed to do so, if the
3 cloud of this revocation goes away, that it will, in fact,
4 put this water to full reasonable and beneficial use.

5 As a BIA representative noted and it is evident
6 by the fact there were no protests unresolved in the
7 context of the petition, no one else can access this
8 water. This water rises and it falls within the Morongo
9 reservation, and no one else has access to that
10 reservation. Therefore, the way water can be put to
11 reasonable beneficial use is through providing Morongo
12 with clear title to the water rights at issue here.

13 There is, of course, a second aspect to the
14 question of policy. And that's the one that revolves
15 around Indians and Indian tribes. You heard the Vice
16 Chairman talk a bit about her history there. And
17 predicated upon what we know to be a long history of
18 abuses, both State and federal policy encourage
19 self-determination of Indian tribes and economic stability
20 and development, encourage self-government and
21 sovereignty; all of the things that Morongo is attempting
22 to exercise here.

23 And I do underscore the fact that this isn't just
24 federal policy. This is State policy. State policy not
25 only of the State of California generally, but of the

1 current Administration and the current Governor. And
2 those issues cannot be ignored whatsoever.

3 Revocation of License 659 ignores these policies
4 and under the facts of the case at issue here actually
5 acts as an insult to the tribe in terms of it's attempting
6 to do everything it could possibly do in the context of
7 owning and developing these water rights.

8 Now, Ms. Olson talked about some case law in the
9 context of our Motion to Dismiss. And I actually had not
10 intended to argue the Motion to Dismiss here.

11 But let me say a few things about that. We
12 wouldn't be here if we didn't understand there was a
13 general stream adjudication. And while I have some
14 personal questions in terms of this court's -- this
15 Board's jurisdiction, we haven't raised any of those
16 issues. The point that Ms. Olson misses -- and I hope the
17 State Board itself does not miss -- is notwithstanding the
18 case law that she cited, there is nothing in those cases
19 that say that the legal owner of the water right that
20 you're attempting to revoke doesn't have to be provided
21 notice and doesn't have to, in fact, be noticed. There is
22 nothing in those cases that say that.

23 And one of the fundamental things that are
24 missing, which actually goes back to a lot of sloppiness
25 in terms of the way the State Board has handled these

1 issues dating all the way back is the fact it hasn't done
2 its homework. It should have known the United States was
3 legal owner to the title of this water because when those
4 water rights were brought into trust by the United States,
5 all of that was publicly noticed. And in fact, the State
6 of California was given specific notice of this through
7 the State Clearinghouse, as is required by federal law.

8 At that time, State of California, the State
9 Board could have -- anybody could have protested that
10 occurring based upon this notion that the water rights
11 should or were somehow subject to revocation. That was
12 never done.

13 So our motion really says you've got an
14 indispensable party -- the actual legal owner to the title
15 of the water who isn't here. And you can't revoke those
16 water rights, notwithstanding all the case law that
17 Samantha apparently cites, because it misses the
18 fundamental question of that presumes that the
19 United States was involved and given the proper notice of
20 the actions here.

21 Let's take a look at the question of laches and
22 statute of limitations generally. Any way you look at it,
23 you know, this revocation is time-barred. There is just
24 no question about the fact that it's time-barred.

25 Depending upon which period that the project team asserts

1 in its testimony -- and I quite frankly when you look at
2 the testimony, they actually go back to the 1930s for one
3 statement. They talk about how Southern Pacific didn't
4 put the water rights to use for the statutory period of
5 time.

6 If you assume 2003 -- and these are my rough
7 lawyer calculations of years that pass, 1930s was 70 years
8 ago. 1950s, which they refer to, 50 years ago. Walt
9 Pettit was out there in 1960s; we're talking 40 years ago.
10 I got married in 1969. I know for a fact, because my
11 anniversary is coming up, that's 43 years ago. And even
12 the 1990s are a period of time that is in some respects
13 long ago.

14 Let me do this. Let me quote from something
15 State Board attorneys themselves wrote. Now, as you know,
16 we have a little piece of litigation we represent other
17 folks in challenging the State Board's fees.

18 I might add that we're probably paying for 99
19 percent of the people that are sitting in this room right
20 now, for whatever reason they're sitting in this room.
21 But nonetheless --

22 CHAIRPERSON HOPPIN: We have enough things
23 without getting into that one --

24 MR. SOMACH: Without -- all I'm doing is quoting
25 this for the purposes of addressing this question of time,

1 passage of time.

2 We requested documents of the State Board with
3 respect to some issues in that litigation. And this is
4 what we got. And I will say that the documents and the
5 issues were eight years old. Okay. This goes back to
6 2004/2003. And the Board says in response, finally, this
7 request seeks documents that are almost eight years old.
8 And then he says, "Memories fade, employees retire or pass
9 away, making it difficult or impossible to meet this
10 request." That's eight years. That's the State Water
11 Resources Control Board talking about memories fading,
12 people dying, people retiring. Here, we're talking about
13 actions that allegedly took place 70, 50, 40 years ago and
14 then asking us to come up here because of the State
15 Board's lack of any diligence in terms of pursuing these
16 things and attempted to explain or defend the actions that
17 were involved here.

18 And then what happened -- and you know, we got to
19 remember that Samantha in her opening statement went by
20 this pretty quickly. We're not just talking about one or
21 two things. We're talking about quite a few things of
22 property. Since 19 -- well, since the 1930s certainly,
23 but since the 60s when Walt Pettit determined that there
24 was non-use. And one of the interesting things about his
25 determination is he understood why there was non-use at

1 that point in time. And he recommended not revoking the
2 license back then. He was very specific in not -- in
3 recommending not revoking the license. He thought that
4 follow-up needed to be done. And what happened? The
5 State Board did absolutely no follow-up until we get to
6 the 1990s.

7 What is relevant is the fact that Morongo had no
8 actual or record knowledge that these water rights were
9 subject to revocation. And the evidence that you'll hear
10 us talk about will talk about what they did in terms of
11 due diligence. What they did in attempting to make
12 certain that they understood the scope and extent and the
13 viability of these water rights.

14 Indeed, they challenged a prior owner's petition
15 to change its water rights, that which apparently
16 triggered the whole most recent discussion of revocation.
17 They challenged the petition to change, but they didn't
18 challenge it based upon any concept of non-use because
19 they were unaware of anything.

20 So the context that this is playing out in is,
21 number one, they protested what they thought was going to
22 be a change in the use of these water rights. No one
23 tells them that those water rights are subject to
24 revocation. But they're concerned about people having
25 water rights in an area that is basically land locked by

1 the reservation and where it may intrude upon other
2 interests and uses that the tribe has of its lands.

3 Number two, that water right then is sold with no
4 protest, no record notice, no nothing to the folks at
5 Nestle. And again, the tribe refuses access to these
6 lands and Nestle then turns around and sells those water
7 rights to the tribe.

8 During all of that time, there was no notice, no
9 notice at all. And I'll defy the enforcement team to show
10 that there was any actual or record notice by the tribe of
11 the revocation proceedings. They certainly knew about the
12 change petition and were concerned about that, but they
13 had no idea about the revocation hearing.

14 The bottom line of all this stuff is that there
15 was no way that the tribe could have or even should have
16 known that there was a revocation that was looming out
17 there. It ended up that the notice of revocation followed
18 on subsequent owners for a period of time before it even
19 got to Morongo, at which time they, of course, attempted
20 to address the issue and were ignored and actually again
21 treated poorly by the State Water Resources Control Board
22 in attempting to resolve that issue.

23 Bottom line is there are so many defects in terms
24 of the State's case starting from the way it proceeded and
25 handled this matter, to the fact that the United States,

1 the legal owner of the title to water, isn't even noticed,
2 isn't even here to defend those water rights as they
3 should be.

4 But putting all that aside, the statute provides
5 plenty of discretion to the Board to not withstanding and
6 here for the sake of argument let's assume that all the
7 facts they're alleging are true. Let's assume those
8 facts. Not withstanding all of that, we still assert that
9 as a matter of policy, State water law policy because
10 there could be no doubt -- there ought to be no doubt in
11 anybody's mind that once this cloud of revocation is
12 listed, the Morongo Band will put this water to full
13 reasonable beneficial use for appropriate purposes so that
14 that State policy is met and that not revoking these water
15 rights will further all of the interests articulated by
16 the State and federal government with respect to tribal
17 self-determination, self-governance, and sovereignty and
18 economic development. For those reasons, we not only
19 request that you not revoke the license, but that in
20 addition to that, you proceed and grant the petition for
21 License 659 that you granted for the other licensed water
22 rights so that the tribe can move forward in taking care
23 of its tribal interests.

24 Thank you.

25 CHAIRPERSON HOPPIN: Thank you, Mr. Somach.

1 Ms. Olson.

2 MS. OLSON: So we'd like to bring up our first
3 witness, Mr. Mozafar Behzad. I'm sure entirely --

4 CHAIRPERSON HOPPIN: It must be me.

5 MS. OLSON: I'm bad. I'm mumbling, I'm sure. Is
6 that better? You know, I sing. In my spare time for fun
7 I'm a singer.

8 CHAIRPERSON HOPPIN: When you sing I can hear
9 you.

10 I think I'm loud, but I'm not really that loud.

11 CHAIRPERSON HOPPIN: This is a dangerous counsel
12 to mumble with.

13 MS. OLSON: It's not good.

14 Anyway, I'm not sure about the arrangement, but
15 we'd like to bring up our first witness and go through our
16 testimony and cross.

17 Is he supposed to sit here and then the attorney
18 sits there?

19 CHAIRPERSON HOPPIN: For all of you that are
20 enjoying your Starbucks, we will do our best to try to
21 take our break around 10:30, something like that.

22 DIRECT EXAMINATION

23 BY MS. OLSON:

24 Q Good morning, Mr. Behzad.

25 A Good morning.

1 Q Thank you so much for being here and taking time out
2 of your day.

3 Q Could you please state your name and occupation
4 for the record?

5 A Mozafar Behzad, semi-retired civil engineer.

6 Q And have you reviewed your written testimony for this
7 hearing? And that's Water Right Exhibit 4.

8 A Yes, I have.

9 Q Would you stay that to the best of your knowledge it
10 is true and accurate?

11 A Yes, to the best of my knowledge it is.

12 Q Is there anything you'd like to correct from the
13 written testimony?

14 A No.

15 Q Did you help Ferydoun and Doris Ahadpour with certain
16 aspects of activities related to property located near
17 Millard Canyon associated with Water Right License 659?

18 A Yes.

19 Q And approximately what time period of time did the
20 Ahadpour's own the property in question?

21 A Early '90s to I think 2000.

22 Q And were you helping them the majority of that time?

23 A Off and on.

24 Q And what specific activities would you be helping the
25 Ahadpours with?

1 A For clarification, Mr. Ahadpour is my
2 ex-father-in-law. And just land investor. And often he
3 need help if I had -- he is 92 years old, and once in a
4 while he needed help so I tried to help any way I could.

5 Q So you helped with, for example, the change petition
6 that got filed with the Division of Water Rights?

7 A Yes, I believe I did.

8 Q Would it be correct to say that if there was an
9 activity associated with the Water Right License 659 that
10 you would have known about it?

11 A Yes, I would. He would provide it for me.

12 Q So, in 1995, you helped the Ahadpours file a Change of
13 Petition. Can you just briefly describe what the Change
14 of Petition was for?

15 A Well, at that time, the water was being wasted in the
16 canyon. And we talked about maybe possibly making use of
17 that water for water bottling plant. And we requested the
18 change of use.

19 Q Were you able to move forward with the proposed
20 project?

21 A No, we could not accomplish what we had in mind
22 because there was problem with the access to the property.
23 The Morongo tribe did not grant the access to the
24 property.

25 Q And so during the Ahadpour's ownership what, if any,

1 was the land use on the property?

2 A The land was vacant.

3 Q Was there -- did the Ahadpours have any lease to run
4 cattle on the property?

5 A Not that I know of.

6 Q Did the Ahadpours have any lease to let any other user
7 use the water, for any other purpose?

8 A To the best of my knowledge, I'm not aware of it.

9 Q Thank you.

10 CROSS-EXAMINATION

11 BY MR. SOMACH:

12 Q How do you produce your name?

13 A Behzad.

14 Q Behzad?

15 A Yes, sir.

16 Q And you've got to head off to work, is that right, to
17 work here in Sacramento?

18 A I'm sorry?

19 Q You work in Sacramento?

20 A No, I work in Redland, California.

21 Q So you've got to run off so you can be at work in
22 Redland?

23 A As soon as you're done with me, I'm going to rush to
24 the airport and go right back.

25 Q So what exactly was your role with respect to

1 assisting the Ahadpours?

2 A As I mentioned, he's my ex-father-in-law. And I was
3 involved in engineering business. So he had my help once
4 in a while.

5 Q I'm sorry?

6 A He was my ex-father-in-law.

7 Q Right. I heard that.

8 A I can remember once in a while, he asked for my help
9 in something he wants to do because I have a background in
10 engineering, I help.

11 Q How often were you on the property? Couldn't have
12 been very often --

13 A No. No. No. He did not visit the property. We had
14 a tough time getting into the property. Actually, once in
15 a while, the fence was closed by the tribe. And there was
16 a dirt road, not even a very defined road to get to the
17 property. So we did not visit the property often, no.

18 Q Now you're aware, of course, that the stream doesn't
19 run all the time; are you aware of that?

20 A When we visited the property, there was a pipe coming
21 out of the ground at all time and there was water coming
22 out of the pipe and ran down the canyon.

23 Q What time of the year was that?

24 A We visited the property I don't recall what time of
25 the year exactly. We went there once in a while we visit

1 the property. Could be -- I don't know -- fall, winter,
2 spring, summer. I have no idea what -- but we did every
3 few months, we visit the property.

4 Q So was it always running?

5 A When I noticed there was difference in quality of the
6 water running, but it was always some water running, yes.

7 Q Who did the Ahadpours obtain the property from?

8 A Who they bought the property from?

9 Q Yes.

10 A A gentleman named Nicholas Consuelas.

11 Q And what do you know, if anything, about Nicholas
12 Consuelas?

13 A He's a -- to my understanding, he's basically a land
14 investor.

15 Q Let me ask you this question: Did you have a
16 financial interest when your ex-father-in-law owned the
17 property?

18 A No. He was entirely 100 percent owner.

19 Q Did you know that your ex-father-in-law had written
20 Statements of Use of that water, he had filed those with
21 the State Water Resources Control Board?

22 A The only thing I knew, the part I was involved in. If
23 he did anything on his own, I'm not aware.

24 Q Is he still alive?

25 A He's still alive.

1 Q Is he prone to lying?

2 A No. Are you asking me if he's lying?

3 Q I'm asking you whether or not he was the kind of
4 person that would write or sign a statement under penalty
5 of perjury that water was being used when, in fact, water
6 was not being used.

7 A I don't believe so. That, you have to ask him. I
8 have no idea.

9 Q Okay. Now, I think attached to your testimony is --
10 whether it's attached to your testimony or not, there is a
11 statement that's attested to you -- actually, this is a
12 letter from you. This is the State's Exhibit 30. Do you
13 have that in front of you? Did anybody show you that in
14 the last 15 years?

15 Do you see a statement there that says, "At the
16 present time, the water is being completely wasted and run
17 down along Millard Canyon"? Do you see that?

18 A Yes.

19 Q That statement was based upon your observations, the
20 ones you just talked about, the not frequent visits to the
21 property; is that correct?

22 A Right.

23 Q And I presume the statement is made to bolster your
24 desire to change the purpose of use to allow you to do a
25 bottling plant; is that correct?

1 A This was based on exactly what was happening out there
2 and our plan to make use of the water.

3 Q Did you have an economic interest in the new bottling
4 facility, if it did --

5 A None whatsoever.

6 Q Did you make any effort to correct issues or problems
7 associated with the non-use or waste of water?

8 A I'm sorry. The question is not very clear. I don't
9 know.

10 Q Did you take any steps, any measures -- did you do
11 anything to attempt to stop the waste of water?

12 A No. The water was running down the canyon.

13 Q Now you ultimately -- or the Ahadpours ultimately sold
14 the property; is that correct?

15 A Correct.

16 Q Okay. Did you provide the folks you sold the property
17 to that in your view the water had been completely wasted
18 and that it had ran done Millard Canyon?

19 A We provided with everything we had in the file, Mr.
20 Ahadpour did.

21 Q What about your observations, the observations that
22 you made and the statements that you made to the State
23 Water Resources Control Board, provided those to the
24 prospective buyers?

25 A I recall that we did visit the site with prospective

1 buyers and they observed everything that was happening out
2 there.

3 Q Why did they sell the property?

4 A They had no -- Ahadpour could not do anything with the
5 property, so we sold it, based on the prospective buyers
6 being able to make some use of it.

7 Q And the only protestant to your water right change
8 petition was Morongo; is that correct?

9 A If I recall correctly, there could be an objection by
10 the Morongo. As you were talking few minutes ago, you
11 said you don't remember what you did yesterday. This was
12 17 years ago. And I only remember what generally
13 happened. I don't remember what I did really last week or
14 17 years ago. It's really tough to recall the details.

15 Q Memories fade, people retire --

16 A Retire, semi-retire.

17 Q Let me ask you again about this -- how do you spell
18 his name?

19 A Whose name? Whose name?

20 Q The person that your ex-father-in-law bought --

21 A Consuelas.

22 Q Consuelas. Is this the same person that sued you back
23 in around 2000?

24 A No. He never sued me, sir.

25 Q What about the Consuelas Development Company, was that

1 his company?

2 A That was his company, but I was never sued by that
3 company.

4 Q You weren't. Did you have any relationship with
5 CalPack Associates?

6 A That was my real estate company.

7 Q Don't you remember litigation in which --

8 A I sued him.

9 Q Right. And did you win that litigation?

10 A No, I did not. He was supposed to have paid something
11 to the company completely unrelated to this property. And
12 I sued him and he did not finally paid.

13 Q And, in fact, you had to pay his costs; is that
14 correct?

15 A Correct.

16 Q And that issue in this case had to do with your hiding
17 behind CalPack Associates to avoid liability; isn't that
18 correct?

19 A No. No. No. That's not true.

20 MS. OLSON: I'm going to object.

21 THE WITNESS: I don't know what that has anything
22 to do with this. That is the property in Redlands and
23 what that has to do anything --

24 MS. OLSON: I'm just going to --

25 THE WITNESS: This is ridiculous.

1 MS. OLSON: Mr. Behzad made the objection for me.
2 I'll object to these questions to the relevance, not
3 relevant to this case.

4 MR. SOMACH: I believe I'm entitled to impeach
5 the credibility of this witness. This is a witness who
6 has two judgments against him for -- and the Board can
7 read the cases -- for hiding the ball. And that's exactly
8 what I believe he was doing here. The last judgment was
9 in DL Wiest Enterprises, Inc., versus BEK Consulting --
10 that's your consulting firm --

11 THE WITNESS: Correct. Let me clarify this.
12 You're trying -- see, you've been paid hundreds to be
13 here. I'm not. You're getting into matters which is
14 completely unrelated. I'm going to clarify that, because
15 you're trying to put something in there that's not
16 correct.

17 First of all, I was the one that sued Consuelas
18 for not paying what he was supposed to pay. That's the
19 first case.

20 The second case, what you're talking about, the
21 property is in Redlands, California. He provided
22 equipment to the person who removed extra dirt from our
23 property. We didn't know the person. After the person
24 who had removed the dirt declared bankruptcy, he came
25 after us and he had rented equipment to that company. So

1 it's not through anything that we have done wrong. And it
2 was three partners. I was one of them. Don't try to get
3 into something that is not correct, sir.

4 MR. SOMACH: BEK Engineering was one of them.
5 First of all --

6 CHAIRPERSON HOPPIN: I think the point is I
7 understand what you're trying to establish. If we could
8 choose some other words than he's hiding behind his
9 company to try to avoid liability.

10 MR. SOMACH: Well, that's exactly what the court
11 determined. In December 28th, 2011, the California Court
12 of Appeals, Fourth Appellate District Court found exactly
13 that and found he was the alter ego hiding behind this BEK
14 Consulting and found him personally liable.

15 MS. OLSON: Objection. Is Mr. Somach testifying
16 at this point?

17 MR. SOMACH: No. I'm making an argument over
18 your objection.

19 MS. OLSON: The objection still stands.

20 THE WITNESS: Mr. Chairman, may I clarify this
21 again? He's insisting on the same thing. He's repeating
22 it and trying to brainwash type thing, just mixing up
23 things.

24 This lawsuit that this Wiest brought against
25 three partners on a property in Redlands, California. We

1 had asked someone -- we had extra dirt from this property
2 for the dirt to be removed. He removed the dirt. During
3 this process, he had rented equipment, which we were not
4 aware of it. And the gentleman that sued three of us,
5 which I was one of the partners, that he had rented
6 equipment to this company and the company did not pay him.
7 So he came after us. And that's entire lawsuit. Not that
8 any wrongdoing on our behalf. So it is to clarify his
9 statement that we did not do anything wrong. I just want
10 to make sure he understands that.

11 MR. SOMACH: If the Board -- I don't have any
12 other questions. But if the Board would like copies of
13 these cases, I'll certainly make them available. I think
14 they speak for themselves, the latest one being December
15 28th, 2011, less than a year ago.

16 CHAIRPERSON HOPPIN: Unrelated to this but to the
17 credibility of the witness?

18 MR. SOMACH: Yes, absolutely. Related to the
19 credibility of the witness.

20 The only witness that purports to have any
21 personal knowledge of what was -- as small as that was, I
22 admit, as little knowledge as that was, was the only one
23 of all of her witnesses that has personal knowledge what
24 was going on there in the 1990s.

25 MS. OLSON: Objection. Can we save these for

1 closing arguments?

2 THE WITNESS: Mr. Chairman, during his ten
3 minutes of speeches, there was not one word that indicated
4 I have done anything wrong that would affect my
5 credibility.

6 CHAIRPERSON HOPPIN: Thank you.

7 Would you like to redirect?

8 REDIRECT EXAMINATION

9 BY MS. OLSON:

10 Q Mr. Behzad, is there any part of your declaration that
11 you submitted for this matter, which is the License 659,
12 where you are trying to hide the ball in any way?

13 A Not at all.

14 Q In fact, isn't it true that you were completely honest
15 with the Division of Water Rights when you noticed us of
16 your observations of what was happening --

17 A Absolutely.

18 Q -- with the water. Okay. Thank you.

19 And then just to -- I don't know if you would
20 characterize this last question I have as rebuttal or
21 redirect, but it's related to Morongo's case. I'd like to
22 ask him one question so we can send him back on a plane,
23 but I'm not sure it was asked on cross. I'm being honest
24 in not hiding the ball. I have one question I'd like to
25 follow-up with Mr. Behzad on and it's related to the

1 exhibits and testimony in their case.

2 CHAIRPERSON HOPPIN: Mr. Somach?

3 MR. SOMACH: I didn't hear what she said.

4 MS. OLSON: I have a follow-up question I think
5 is more like a rebuttal, because it's related to something
6 in the Morongo tribe's case, but it wasn't asked about on
7 cross. I'd like to ask it now so Mr. Behzad can get on a
8 plane.

9 CHAIRPERSON HOPPIN: Can Mr. Somach respond to it
10 on recross-examination?

11 MR. SOMACH: Go ahead. I don't care.

12 BY MS. OLSON:

13 Q So just one question. And that is about the amount of
14 money and work that you guys put into the change petition
15 in the 1990s. Did you spend a lot of money and do a lot
16 of studies and try to process that change?

17 A Not that much. I don't believe so, because if Mr.
18 Ahadpour did anything on his own, which I'm not aware of
19 it, to my knowledge, best of my knowledge, there was not
20 much money spent.

21 Q But if he had done like, for example, a California
22 Environmental Quality Act, CEQA, report, you probably
23 would have known about it, right, because you were
24 handling that petition --

25 A I probably would have.

1 MR. SOMACH: Objection. Calls for speculation.

2 MS. OLSON: That's all I have really. Thank you.

3 MR. SOMACH: I have no questions.

4 CHAIRPERSON HOPPIN: Your next witness, Samantha.

5 MS. OLSON: At this time I'll bring a panel of
6 three up.

7 THE WITNESS: Thank you, Mr. Chairman.

8 MS. OLSON: We need to swear in Robert.

9 CHAIRPERSON HOPPIN: Robert, would you take your
10 oath?

11 (Whereupon Mr. Been was duly sworn.)

12 DIRECT EXAMINATION

13 BY MS. OLSON:

14 Q Good morning. Nice to see you, Mr. Been. I'll start
15 with you.

16 Would you please state your name and place of
17 employment for the record?

18 A Robert Been. I work at the Division of Financial
19 Assistance now at this time as the Water Resources Control
20 Engineer.

21 Q Have you reviewed your written testimony for this
22 exhibit, which is marked as Exhibit 4?

23 A Yes.

24 Q Would you say it's true and accurate, to the best of
25 your knowledge?

1 A Yes.

2 Q Is there anything you'd like to correct in your
3 written testimony?

4 A No.

5 Q Did you include a Statement of Qualifications for
6 these proceedings?

7 A Yes.

8 Q Is that statement still current and accurate?

9 A Yes.

10 Q I'm sorry. I'll correct. I said Exhibit 4, but it's
11 Exhibit 5, your declaration.

12 In 1995, you were the staff person processing the
13 License 659 Change Petition; is that correct?

14 A Yes.

15 Q And could you briefly describe the work that you did?

16 A I was working for Ogden Gallatti, now retired. I work
17 in the Petition Unit -- Applications of Petition Unit at
18 that time. And I was just starting the work on notices.
19 And it was probably -- we do about ten a month on notice.
20 And this one came in and I worked on the notice for
21 License 659 and processed it for notice. And if there was
22 any issues or questions, I had the ability to contact the
23 petitioner.

24 Q Great. Do you remember speaking with Mr. Behzad in
25 1995?

1 A Yes, after seeing the contact info.

2 Q What did he have to say about water use of License
3 659?

4 MR. SOMACH: Objection Hearsay.

5 MS. OLSON: We're going to go here now.

6 BY MS. OLSON:

7 Q Exhibit -- under the contact report. Exhibit 32 -- I
8 apologize there is a typo there. That's a contact report
9 dated October 16th, 1995.

10 CHAIRPERSON HOPPIN: Mr. Somach.

11 MR. SOMACH: I object to the exhibit and move to
12 have it stricken as also hearsay. They have this witness
13 here. He testified. They can't now come up here and just
14 simply say what he said. I didn't choose to have him
15 leave. They choose to have him leave.

16 MS. OLSON: Okay. I'll respond that the evidence
17 in the file is something that this agency relies on all
18 the time. It's an exception to the hearsay rule for
19 official records exemption and business records exemption.
20 I can get into the details of that. If they're going to
21 object, we might as well -- if they're going to object to
22 all the file records, we might as well have this argument
23 --

24 MR. SOMACH: I'm not objecting to all the file
25 record. This is a contract report from a specific person

1 that they had testifying under oath. They -- and I'm not
2 suggesting they did this for any nepherous purposes. They
3 chose to have him go on, leave. They never asked him
4 about this. And all he's testifying to is a conversation
5 with a third person they just had on here. I can't
6 cross-examine that person on this contact report. I can't
7 do anything, because of the way the State Board
8 Enforcement Team has decided to proceed.

9 Notwithstanding the fact that hearsay is often
10 admissible in an administrative hearing. This is an
11 exception. They just had this guy up here. They didn't
12 talk about the exhibit. They didn't ask him to reflect
13 upon this conversation at all. Now they have a third
14 party witness simply here trying to say this is what this
15 guy said. This is impermissible.

16 MS. OLSON: Chairman Hoppin.

17 CHAIRPERSON HOPPIN: It think Mr. Somach is
18 asking a reasonable question. I'm not the attorney here,
19 but if we were going to do this, couldn't the fellow have
20 waited a little bit longer --

21 MS. OLSON: We can try to go get him. I was
22 merely going to ask whether he remembered having this
23 conversation. The contact report is in the record. It
24 speaks for itself. If we don't want to ask him questions
25 about that.

1 I just thought it would be good to have Robert
2 Been here because we wanted to talk to him at the time. I
3 can't imagine what he would need to follow up with. It's
4 consistent with the testimony he just gave you.

5 CHAIRPERSON HOPPIN: It does seem odd that Mr.
6 Behzad just left and now we've got this.

7 MR. SOMACH: I'll stipulate that he talked to Mr.
8 Behzad.

9 CHAIRPERSON HOPPIN: Can we stipulate this is
10 hearsay evidence and let it go at that?

11 MS. OLSON: I would disagree. I don't think this
12 is hearsay evidence. I think it falls under two
13 exceptions to the hearsay rule and the business records
14 exemption.

15 CHAIRPERSON HOPPIN: It's either going to be
16 hearsay or if we need to go see if you can get Mr. Behzad
17 back up here.

18 MS. OLSON: Although -- are you saying his
19 testimony is hearsay or you're going to consider this
20 contact report hearsay?

21 CHAIRPERSON HOPPIN: This hearsay.

22 Why don't we take our ten-minute break that I
23 kind of promised you at 10:30 and we will resume.

24 (Whereupon a recess was taken.)

25 BY MS. OLSON:

1 Q Good morning, Mr. Stretars. Would you please state
2 your name and please of employment for the record?

3 A My name is Mark Stretars. I'm currently retired. And
4 I've come back.

5 Q Congratulations.

6 You submitted a copy of your resume for these
7 proceedings?

8 A I did.

9 Q Is that resume still current and accurate?

10 A It is.

11 Q Have you reviewed your written testimony for the
12 hearing, which is Exhibit 2?

13 A I have.

14 Q Would you say it's true and accurate?

15 A It is.

16 Q Is there anything you'd like to correct from your
17 written testimony?

18 A I have one correction.

19 Q Go ahead.

20 A In paragraph 11, the end paragraph should reference
21 Exhibit 11. I only reference Exhibit 12 right now.

22 CHAIRPERSON HOPPIN: I don't know if she heard
23 you, Mark. You might want to wait.

24 Are you multi-tasking there or would you like him
25 to repeat the answer?

1 MS. OLSON: Indeed.

2 THE WITNESS: Indeed repeat?

3 BY MS. OLSON:

4 Q I'm aware of your change in your testimony. Did you
5 get that?

6 Can you describe then your position from 1997 to
7 2003?

8 A I was the supervisor in charge of the Petition of
9 Change Unit, Division of Water Rights.

10 Q What was your involvement with License 659?

11 A At the point in time I took over the shop, the
12 license -- or the license had been noticed for proposed
13 changes. We were awaiting additional information from the
14 petitioner relative to environmental documentation to move
15 forward. It had been protested at one time by the Morongo
16 Indians. And at that point in time, we -- because of
17 timing, we began looking at and questioning the actual
18 usage -- beneficial use of water over the time frame prior
19 to the petition and the notice being issued.

20 Q So when was License 659 issued and what did it
21 authorize briefly?

22 A License 659 was issued -- let me refer to the
23 documents here. Was issued in about 1928 after being
24 revised. The original application was issued requesting
25 2.7 cubic feet per second to be served within a large

1 section of land down defined as subdivision three. After
2 three extensions of time in 1928, the license finally
3 issued for .16 CFS to cover 13 acres of land in the
4 northeast to the southwest of Section 32 and three within
5 the southeast of the southwest of Section 32, all within
6 two south, two east, and south San Bernardino basin.

7 Q Okay. Great.

8 Could you briefly describe any changes in the
9 reports of licenses before and after 1954?

10 A Basically, prior to 1954, there was indications within
11 the reports of license were submitted to us. They were
12 submitted as pairs. They were submitted by the Southern
13 Pacific Railroad Company identifying there was some usage
14 of water on that property. There was also usage down in
15 the town of Cabazon for railroad operations, their water
16 tanks, and their people that live there.

17 After 1954, the reports still being filed by
18 Southern Pacific showed a change. During that period of
19 time, this is when we received the United States basically
20 changing from steam locomotive kind of more to the
21 electric operations. So we see that the usage -- there
22 wasn't really any identified usage on the land at the
23 specified license point of diversion and that the usage at
24 Cabazon was reduced to some extent because of, again, the
25 changes over by some Southern Pacific in their operations.

1 Q Great. Can you briefly summarize the findings of the
2 two inspection reports in the 1960s?

3 A In 1964 --

4 MR. SOMACH: Objection. The reports speak for
5 themselves and are the best evidence.

6 MS. OLSON: Well --

7 MR. SOMACH: The reports speak for themselves.
8 They can be read, and they're the best evidence of what is
9 contained within the documents.

10 MS. OLSON: And we would agree. However, we
11 brought Mark here to summarize the evidence that's in the
12 file. So that is our intent.

13 CHAIRPERSON HOPPIN: Let's summarize and not go
14 completely through --

15 MR. SOMACH: It's summarized in your written
16 stuff, isn't it? How many times are you going to
17 summarize what is in the files?

18 MS. OLSON: Okay. We can move more quickly for
19 you, if you'd like.

20 BY MS. OLSON:

21 Q So you did you briefly summarize the two inspection
22 reports in the 1960s?

23 A Mr. Walt Pettit did the operation physically in
24 1964 --

25 MR. SOMACH: Objection. If he's going to

1 summarize Walt Pettit's report, Walt Pettit is technically
2 testifying -- that's got to be cumulative or something.
3 You just can't keep repeating the same stuff over and over
4 again.

5 CHAIRPERSON HOPPIN: I would agree with all that,
6 Mr. Somach, please.

7 MS. OLSON: So it's not clear to me whether Mr.
8 Somach is objecting to the file being admitted into
9 evidence or whether he's objecting to a witness testifying
10 about what's in the file.

11 MR. SOMACH: I'm not objecting to the file being
12 introduced as evidence. The file is a file. It speaks
13 for itself.

14 I'm actually not even objecting to summary of the
15 file to help you all understand what's in the file. But
16 he's now going to summarize Walt Pettit's report. That's
17 what Walt Pettit did in his testimony. So at some point,
18 it is cumulative. And under any evidentiary notion, it's
19 inappropriate.

20 CHAIRPERSON HOPPIN: I think it is. We don't
21 need to hear from Mr. Stretars about Walt's testimony I
22 don't think.

23 MS. OLSON: Okay. Without admitting there is any
24 evidentiary flaw in this, I will proceed and move forward.

25 BY MS. OLSON:

1 Q Can you briefly describe the purchase of License 660
2 by Cabazon Water District, which is reflected in the 1968
3 report?

4 MR. SOMACH: Objection. License 660 is not --

5 CHAIRPERSON HOPPIN: What we're hearing.

6 MS. OLSON: License 660 is relevant because it
7 was the companion right to 659. And it's relevant because
8 it was purchased by Cabazon Water District in 1961, which
9 explains the findings in the two inspection reports
10 better. That's why we have information about License 660.

11 CHAIRPERSON HOPPIN: As long as we establish the
12 relevance between the two, I would agree.

13 BY MS. OLSON:

14 Q So after reviewing the file, Mr. Stretars, did you
15 come to any conclusion about the water use of the License
16 659 in the 1960s?

17 A Yes. It appeared there had been no use for a rather
18 extended period of time. From those reports, it became
19 clear there had been no use at least for three years prior
20 to 1964 and then following the report in 19 -- the report
21 that identified information in 1968 the use had probably
22 not occurred 1964 through 1968.

23 Q So all told, how many years would that be?

24 A We have about seven to eight years all told that had
25 been no use.

1 Q So moving onto the 1990s then, can you briefly
2 describe the licensee report submitted by the Ahadpours
3 from 1991 through 1995?

4 You know what? Everybody is in a hurry. Forget
5 it. Scratch that question.

6 The Ahadpours filed a Change Petition in 1995; is
7 that correct?

8 A That's correct.

9 Q And how does the division go about processing a Change
10 Petition?

11 A Typically, the petition is reviewed, evaluated, and
12 notice is issued.

13 Q And so when reviewing and evaluating, what are some of
14 the necessary findings that you must find before the Board
15 can approve a Change Petition?

16 A Basically, that the proposed use cannot initiate a new
17 right for engineering use of water.

18 Q So in reviewing this Change Petition, was there any
19 protest?

20 A There was a protest by the Morongo Indians.

21 Q And so then the Change Petition would be evaluated to
22 see if there would be initiating a new right; is that
23 correct?

24 A That's correct.

25 Q And what is the purpose behind that evaluation?

1 A Under the Water Code, if you do initiate a water
2 right, you need to file an application for it.

3 Q Are you familiar with the no injury rule?

4 A Yes, I am.

5 Q What's the purpose behind the no injury rule?

6 A To protect prior uses --

7 MR. SOMACH: Objection. This is outside of scope
8 of anything in the written testimony.

9 MS. OLSON: We'll move on.

10 BY MS. OLSON:

11 Q So what happened -- so can you explain why the
12 division staff sent a letter dated September -- I'm not
13 sure the exact date -- in 2000 to the Ahadpours? That's
14 Exhibit 35. Can you bring that up?

15 CHAIRPERSON HOPPIN: What was that date,
16 Samantha?

17 MS. OLSON: The letter is --

18 THE WITNESS: September 28th, I believe

19 MS. OLSON: September 28th, 2000.

20 BY MS. OLSON:

21 Q Can you explain why the division staff sent the letter
22 to the Ahadpours and what the letter said?

23 A The notice was issued in 1995. We've been attempting
24 to get the Ahadpours to -- we have a protest had been
25 received by the Morongo Indians, and we were attempting to

1 get the Ahadpours to move forward on other relevant
2 information, including environmental documentation
3 basically to bring this thing, in that case, toward a
4 hearing relative to the issues there because of the
5 protest.

6 Things were not moving -- typical State Board,
7 they're moving at a probably the appropriate speed for the
8 time. And we were also evaluating many things. So this
9 letter -- then in evaluation of this process, this letter
10 was drafted to the Ahadpours eventually after further
11 evaluation questioning whether there really there had been
12 any use and whether this right was really still valid.

13 Q Can we scroll down to the top of the second page of
14 this Exhibit 35? Can you read that first paragraph for
15 us?

16 MR. SOMACH: Objection. The document is in the
17 record.

18 MS. OLSON: I'm allowed to have some summary of
19 testimony for emphasis.

20 CHAIRPERSON HOPPIN: One at a time, please.

21 MR. SOMACH: I'm making an objection. She can
22 object -- she can respond to the whole thing.

23 There's been no foundation that Mr. Stretars had
24 anything to do with this letter, among other things. It's
25 signed by Alana L Gibbs. He's not copied in on the

1 letter. And on top of it, my objection still stands that
2 just reading from the letter, the letter speaks for
3 itself. It's the best evidence of what the letter says.

4 CHAIRPERSON HOPPIN: Can you explain why Mr.
5 Stretars is answering questions --

6 MS. OLSON: Can we scroll down to the bottom of
7 page 2? All the way to the bottom, please. Sorry.
8 Bottom of first page.

9 BY MS. OLSON:

10 Q Do you see the surname column -- row; is that your
11 signature?

12 A That is my signature. Alana Gibbs was my staff
13 person.

14 CHAIRPERSON HOPPIN: Proceed.

15 BY MS. OLSON:

16 Q So do you remember reviewing this?

17 A Yes, I do.

18 Q And sending it?

19 A Yes.

20 Q And you already testified to why. I just want you to
21 read the top paragraph of page 2.

22 I won't take too much time.

23 MR. SOMACH: Same objection.

24 MS. OLSON: I'm allowed to have some amount of
25 summary --

1 CHAIRPERSON HOPPIN: I didn't say you couldn't do
2 it. Read the paragraph.

3 THE WITNESS: "Per Water Code Section 1241 and
4 1675, if the quantity of water authorized under License
5 659 has not been beneficially used for 5 years or more,
6 the right may have already been lost and the license would
7 be subject to revocation. If the water has been used
8 during this time period, please provide that information
9 to the Division on the enclosed report forms."

10 Q Thank you. And were any other parties copied on this
11 letter?

12 A I believe so.

13 CHAIRPERSON HOPPIN: Samantha, can I ask you a
14 question at this time? Could be out of order.

15 Can you tell me if we had seven years of records
16 of non-use reported in the 60s, why did we accept a
17 Petition for Change in 1995 and then respond to it after
18 the fact? Why was it even dealt with if we were so
19 confident we had seven years of non-use in the 60s?

20 THE WITNESS: Well, first of all, I didn't take
21 over that section until 1997. The notice had already been
22 issued. Staff -- general staff typically took a petition
23 and just evaluate it on a cursory evaluation and issued
24 based on the information they had in the notice without
25 getting into any depth in it

1 CHAIRPERSON HOPPIN: But I mean --

2 MS. OLSON: Mr. Been is going to get into that a
3 little bit because he was the one handling the Change
4 Petition. The short answer would be they go through a
5 certain process and certain facts come to light. That's
6 what we're talking about here.

7 CHAIRPERSON HOPPIN: Hopefully we'll hear the
8 answer to my question as we proceed.

9 MS. OLSON: I will say there have been several
10 occasions where the Board has processed a Change Petition,
11 and the issue of the underlying right that's asked to be
12 changed, you have to confirm the validity of that right
13 when you're processing a Change Petition. In fact, in
14 several Board Orders where the extent and scope of that
15 right has been reviewed in the context of the Change
16 Petition --

17 CHAIRPERSON HOPPIN: But I'm trying to establish,
18 Samantha, if the lack of use was such common knowledge for
19 a period of time, why wasn't it common enough knowledge
20 that we rejected the notion of the Change Petition at all?
21 And it just seems to be a bit of a disconnect. I'm sure
22 we'll hear more about that. Sorry to interrupt you.

23 THE WITNESS: No problem.

24 BY MS. OLSON:

25 Q So who do you see copied on that letter there,

1 Exhibit 35?

2 A Barbara Karshmer and Jim Fletcher, who both -- Barbara
3 I believe was the attorney for the -- at the time for the
4 Morongo, and Jim Fletcher was the agent for the Morongo
5 Band of Indians.

6 Q Thank you.

7 And then what happened after this letter?

8 A Following this letter, things calmed down for a little
9 bit. And then we had three changes in the ownership of
10 the property.

11 Q And so did a Mr. Saperstein contact you or the
12 division?

13 A Yes, he did.

14 Q And did he ask the division to file amended progress
15 reports for --

16 MR. SOMACH: Objection. Hearsay.

17 BY MS. OLSON:

18 Q Did Mr. Saperstein submit any evidence to support the
19 amended reports that he filed with the division that would
20 show 13 irrigated acres and 500 stock?

21 A Yes he did. The reports were submitted in June 28th
22 of 2001.

23 Q Okay. And did he submit any evidence to support those
24 statements?

25 A No, he did not.

1 Q Did you see any indication -- let's bring up the
2 aerial photographs, which is Exhibit 12, I believe, and
3 just walk through them quickly. And I'm going to ask you,
4 Mr. Stretars, if you see any evidence in these aerial
5 photographs of 13 irrigated acres or 500 stock. So we'll
6 just walk through these. You can scroll down --

7 A Scroll down to the lower half of 32. Okay.

8 Q So this first page of Exhibit 12 is an aerial
9 photograph where Section 32 is indicated, which would be
10 the place of use of the 13 irrigated acres; correct?

11 A That's correct.

12 Q Do you see any evidence of irrigated acres in that
13 section?

14 A This is a 1996 aerial photograph. And in the center
15 of Section 32 possibly where the spring would be and to
16 the west and south of that would be where the irrigated
17 acreage should be occurring and there is nothing shown.

18 Q Can we scroll down to the next aerial photo? So again
19 this one is in 1966 and indicates Section 32. Do you see
20 any evidence in Section 32 of irrigated acres?

21 A No. There is none.

22 Q I believe there is one more. Can we scroll down to
23 the next page of Exhibit 12.

24 A Samantha, if you have them scroll back up on that one
25 a little bit, if you'll note in the western portion --

1 northwestern portion of 29, you can see some definite
2 irrigated acreage in that photo of different lands. Now
3 if you scroll down to where they are, this is just to give
4 a comparison. Now we're looking at 32 again, the lower
5 half again within the northwest and the southwest
6 borders -- southwest, there is no obvious irrigation.

7 Q Thank you.

8 And did you come to any conclusions regarding
9 what, if any, water was used under License 659 to irrigate
10 13 acres in the 1990s?

11 A Should identify, first of all, this is a map of 1990.
12 Just for clarification. And we did come to the conclusion
13 there appeared to be no irrigated use of the waters during
14 the period of 1990s.

15 Q When we issued the Notice of Proposed Revocation in
16 2003, who did you think owned the license?

17 A At that time, it appeared that Great Springs -- let me
18 get their full title -- Great Springs was the owner of the
19 property at that point in time.

20 Q Is there anything that would cause you to change your
21 recommendation to revoke License 659?

22 A At this point in time, no.

23 Q Okay. Mr. O'Hagan, good morning.

24 A Good morning.

25 Q Please state your name and place of employment for the

1 record?

2 A John O'Hagan. O-h-a-g-a-n. I work with the State
3 Water Resources Control Board, Division of Water Rights.

4 Q You included a Statement of Qualifications for these
5 proceedings?

6 A Yes.

7 Q And is this Statement of Qualifications still correct
8 and accurate?

9 A Yes.

10 Q Have you reviewed your written testimony for this
11 hearing, which I believe is exhibit -- I'm sorry --
12 Exhibit 1?

13 A Exhibit 1, correct.

14 Q Is there anything that you'd like to correct from your
15 written testimony.

16 A Yes, I'd like to change exhibit number on page 2 --
17 the top of page 2, the White Water Decree, I refer to it
18 as Exhibit 50. I believe it should be Exhibit 49.

19 Q Okay. In your testimony, you provide a lot of detail
20 on the various water rights that authorize diversion from
21 Millard Canyon. Why is that important?

22 A I believe it's important to understand the different
23 points of diversion, places of use, and purpose of use
24 covered by these three water rights, and then also the
25 decreed rights that were recognized in the White Water

1 River Decree.

2 Q Okay. So I'd like to bring up Exhibit 9 and have you
3 explain briefly what this exhibit is. Scroll to the
4 second page.

5 A The Exhibit 9 is a map that was prepared for the White
6 Water River Decree. On page -- the first page, if you
7 scroll back up, that is the legend that shows it's the
8 white water watershed showing diversion systems and
9 irrigation areas. And the date of that map is 1923, and
10 that is identified in the final decree.

11 Now if you scroll to page 2, if you look at this
12 map in the center of the map, if you can focus a little
13 more, but up at the top section, there is a circle for 27.
14 That is diversion point 27 identified in the decree. And
15 that diversion point is covered by License 174. If you
16 look down -- if you follow the creek down, you run into
17 Point Number 28, which is diversion 28, and that is the
18 authorized point of diversion for License 659 and License
19 660, as well as a recognized decreed right of .12 CFS
20 Section 32.

21 Q What is the authorized use under License 659?

22 A Irrigation of 13 acres.

23 Q And what is the authorized use under the .12 CFS 1877
24 decreed water right?

25 A That is recognized in the decree with a domestic stock

1 watering and irrigation of 32.5 acres in Section 32.

2 Q Thank you.

3 And could we bring up Exhibit 11 now, which is
4 the Cabazon quadrangle. I'm going to have you point
5 generally to the place of use for the 13 acres of
6 irrigation authorized under License 659.

7 A Again, this is a copy of a 1988 USGS quadrangle. In
8 the center of the picture, you see the center of Section
9 32. It has found corners on the southwest corner and
10 bordered. Staff has subdivided this section with pencil
11 lines, so that is an alteration to that.

12 If you look in the southwest corner by the word
13 "spring," that is the general location of the diversion
14 point 28. And if you look at the road traveling south,
15 it's indicated by a dotted line. And then also the road
16 traveling a northwesterly direction towards the spring --
17 northeasterly direction, if you can move your pointer down
18 right there, there is some structures shown there. That
19 area where your pointer is and towards the east toward the
20 other road -- no. Excuse me -- towards the west, down in
21 that area is the general place of use for the license.

22 Q Okay. Thank you.

23 CHAIRPERSON HOPPIN: I have a question. John, do
24 we have any idea on the original documentation whether
25 this 13 acres was downgradient from the spring and it was

1 intended to be irrigated by gravity or do we have any idea
2 how the irrigation was attempted?

3 MR. O'HAGAN: It was irrigated by gravity flow.
4 And I think if we call up another exhibit --

5 BY MS. OLSON:

6 Q Exhibit 10 might show the acres of row crops and
7 whatnot.

8 A This is a blow-up of the map that was prepared in 1924
9 showing the irrigated place of use under -- if you look on
10 the lower right-hand corner, identifies Application 553
11 permit 486. And apologize for the quality of this, but in
12 that dark area is the place of use described in there.
13 And the spring diversion point 28 is up right by the
14 center of that Section 32. You see the 32 in the upper
15 right-hand corner. And it's diversion point 28 is pointed
16 to it in that location.

17 And then there is a dotted line coming down.
18 That's the ditch that formerly served it at times.

19 Inside that area, there is a total of probably
20 ten acres in the northeast of the southwestern corner and
21 then three acres in the southeast of the southwest corner.

22 There is also identification of crop types, one
23 of which was an orchard, alfalfa field, a garden area. So
24 it was clearly an active type of cropping pattern there.

25 CHAIRPERSON HOPPIN: Mr. Stretars though had

1 commented that on an earlier observation the water was
2 used for tanks and people that lived there and stock, if I
3 understood you correctly, Mark.

4 MR. STRETARS: That is correct.

5 CHAIRPERSON HOPPIN: Did that proceed then?

6 MR. STRETARS: Pardon?

7 CHAIRPERSON HOPPIN: Did that proceed this
8 agricultural activity that -- I'm trying TO get the time
9 frames.

10 MS. OLSON: I think he's referring to your
11 testimony about License 660.

12 MR. STRETARS: Yeah. I was referring to
13 license -- during the 1950s.

14 CHAIRPERSON HOPPIN: You're referring to 60 and
15 not 59?

16 MR. STRETARS: Both. During the 1950s, they
17 filed the licensee covering both and they reference
18 intermix, so you don't know exactly -- there was some
19 usage up there. Presumably, the party took the leasee or
20 something took care of the property at the upper end as
21 well as providing water down to the town of Cabazon under
22 659 and then 660 was the Cabazon portion.

23 CHAIRPERSON HOPPIN: All right.

24 BY MS. OLSON:

25 Q Mr. O'Hagan, what are the limitations in License 659?

1 A .16 CFS year-round diversion, but the specified use is
2 irrigation of 13 acres in Section 32.

3 Q Can you bring up Exhibit 16, the bottom of the first
4 page? I'm hoping you can read one sentence for us.

5 A This is a copy of actual License 659 issued pursuant
6 to permit 486. At the bottom of the page, you can see the
7 language that has a limiting condition of the water right.
8 And it's limiting the right to this diversion and use of
9 the water aforesaid hereby confirmed is restricted to the
10 point of diversion herein specified and to the lands or
11 place of use herein described.

12 And as you can see, the ten acres and the three
13 acres described up there for the place of use is within
14 the Section 32 down two south, two east, San Bernardino
15 basin.

16 Q The 1964 inspection mentioned some minor or stock
17 water use; is that correct?

18 A Can you repeat the question?

19 Q Well, actually I'm leading up to a question.

20 The 1964 inspection mentioned minor stock
21 watering use. My question to you is whether that would
22 constitute use under License 659.

23 A That would not, because the license does not authorize
24 stock water. Use only allows the license irrigation. The
25 .12 pre-14 degree right that was recognized in the White

1 Water River would authorize that.

2 Q Thank you.

3 And then same exercise we went through with Mark
4 Stretars, I'd like to bring up Exhibit 12 and have you
5 walk us through the aerial photograph and point out any
6 evidence of irrigation.

7 MR. SOMACH: Objection. This is exactly what Mr.
8 Stretars just did: Walked through, talked about the
9 irrigation. Are we going to do this all over again?

10 MS. OLSON: Are you going to stipulate --

11 CHAIRPERSON HOPPIN: They're going to be brief.

12 MR. O'HAGAN: I agree with the points that Mr.
13 Stretar made. And the 1966 photograph I think confirms
14 the inspection findings of the inspection reports for 1964
15 and 1968 that there was no actual irrigation use occurring
16 on the property. And then the 1990 photographs showed no
17 sign of irrigation or cultivation on that land at those
18 time periods.

19 BY MS. OLSON:

20 Q So what conclusions do you have use regarding the use
21 under License 659?

22 A I think the file record demonstrates that there has
23 been at least five consecutive years of non-use on this
24 property, both in the 1960s and the 1990s.

25 Q What is your recommendation to the --

1 MR. SOMACH: Objection. As I understand the
2 process, we're talking about a biased prosecutor here
3 who's now going to provide a recommendation as to what
4 you, as the Board Hearing Officer, is supposed to do.
5 That is not proper testimony.

6 MS. OLSON: I'm sorry. What's the objection?

7 MR. SOMACH: The objection is you're asking the
8 witness the ultimate question that the decider of fact and
9 law is supposed to make.

10 MS. OLSON: The point of the enforcement team is
11 to make a recommendation to the Board.

12 MR. SOMACH: The point of the enforcement team is
13 to, in a biased manner, present evidence to support
14 revocation.

15 MS. OLSON: Exactly.

16 MR. SOMACH: That doesn't equate to testifying
17 with respect to the ultimate fact that is before the
18 Board. That's stated in the notice of the hearing. The
19 Board Chair read that to everybody at the very beginning
20 when he read the key issues that are at issue in this
21 proceeding.

22 MS. OLSON: The purpose of the prosecution team
23 is to be an advocate for the underlying Notice of Proposed
24 Revocation. It's proposed by inherently, it's a
25 recommendation to the Board.

1 CHAIRPERSON HOPPIN: Proceed.

2 BY MS. OLSON:

3 Q What is your recommendation to the Board in this
4 matter, Mr. O'Hagan?

5 A Recommend that the license be revoked.

6 MS. OLSON: Thank you.

7 It looks like we are not able to --

8 CHAIRPERSON HOPPIN: Let's do this. Let's have
9 Mr. Been go ahead.

10 Mr. Somach, as I understand it, there is one
11 exhibit that you have concerns with of Mr. Been's
12 testimony. We will hear it. And if we deem it
13 appropriate, we will submit it as hearsay evidence with
14 the limitations that go along with that.

15 MR. SOMACH: Let me just simply say I don't think
16 there's any question it is hearsay. The question is
17 whether it is admissible hearsay or not. Our objection is
18 it's inadmissible under the facts that have already
19 articulated and I won't repeat here.

20 MS. OLSON: When I asked Mr. Been about the
21 contact report, I wasn't having him testify for the
22 purpose of proving the truth of the statement that Mr.
23 Behzad made to him. However, I think in a more general
24 way that contact report is -- falls under an exception to
25 the hearsay.

1 So for the purpose of Mr. Been's testimony, it's
2 not hearsay, because it's not submitted for the truth of
3 the matter. But it is an exhibit in our file that is
4 submitted to corroborate -- that's corroborated by Mr.
5 Behzad's statement.

6 So I guess I want to address the hearsay issue
7 more generally if he's objecting to this exhibit, period.

8 So, to me, there is two different issues:
9 Whether he's objecting to asking Mr. Been about it or
10 whether he's objecting to the entire content of the
11 report.

12 CHAIRPERSON HOPPIN: Mr. Somach, why don't you
13 and Ms. Olson come up here and with the benefit of my
14 counsel we can discuss this so I don't get this so
15 convoluted that you have an avenue and an advantage that I
16 don't want you to have.

17 Mr. Olson, would you come forth, please?

18 (Off record.)

19 BY MS. OLSON:

20 Q Mr. Been, can you respond to the question that
21 Chairman Hoppin had earlier about moving forward with the
22 Change of Petition when there was evidence already that
23 there was some non-use with this license?

24 A With -- at the time that I was working in Water Rights
25 the Petition Unit, the direction was not to question the

1 validity of a water right. And we had neither the
2 authority or the responsibility -- at the staff level to
3 do that and with any petition.

4 So the only thing -- well, one thing we would do
5 with petitions is clarify anything -- when we read a
6 petition coming into the Water Rights Division, if we had
7 any confusion on the matter of water use or place of use
8 or purpose of use, we would contact the applicant or the
9 representative of the applicant.

10 Q Would getting a protest sort of heighten that level
11 have scrutiny?

12 A I think in the record they show that the environmental
13 unit got involved.

14 But at my level, it wouldn't heighten anything I
15 would do at that point for the protest. At the time, we
16 were transitioning to -- Hone Gallati (phonetic) retired,
17 my supervisor retired. And we transitioned to a petition
18 unit. But immediately, no. Immediately, no.

19 Q I'm afraid to ask this last question.

20 CHAIRPERSON HOPPIN: Do you want to come to the
21 podium?

22 MS. OLSON: I'll just ask it.

23 BY MS. OLSON:

24 Q Can you confirm that the conversation that you had
25 with Mr. Behzad in 1995 is consistent with the testimony

1 that he provided today?

2 A From what I've heard from Mr. Behzad, yes.

3 MS. OLSON: Thank you.

4 CHAIRPERSON HOPPIN: Is that it?

5 MS. OLSON: That's it.

6 CHAIRPERSON HOPPIN: Mr. Somach, cross-exam.

7 CROSS-EXAMINATION

8 BY MR. SOMACH:

9 Q Mr. Been, let me confirm, you haven't worked in the
10 Water Rights Division --

11 CHAIRPERSON HOPPIN: We've learned over the years
12 the better the education, the more difficulty there is to
13 turn on a microphone.

14 MR. SOMACH: I take instructions. You said
15 they're always on. I remember you saying that.

16 CHAIRPERSON HOPPIN: What I really said is you
17 want to assume they're always on.

18 MR. SOMACH: I stand corrected.

19 BY MR. SOMACH:

20 Q Let me repeat the question now that the microphone is
21 apparently on.

22 You've not worked in the water rights -- in Water
23 Rights Division since 1998; is that correct?

24 A That's correct.

25 Q There has been a lot of discussion about Exhibit 32

1 and what Mr. -- I wrote it down phonetically, but I left
2 that paper down there, so I'm going to -- what is the
3 name?

4 MS. OLSON: Mr. Behzad.

5 BY MR. SOMACH:

6 Q Mr. Behzad had to say or didn't say. Did you ever
7 check with the actual owners of the property to confirm
8 whether or not what Mr. Behzad said was true and accurate?

9 A From what I recall, there was no other contact
10 information for the owners. And if an agent -- we had
11 agent phone number and address, and we contact the agent
12 as practice because he's speaking for the applicant.

13 Q Did you know whether or not the Ahadpours, the owners
14 of the property, had, in fact, filed a Statement of Use
15 for the property?

16 A Could you repeat that again?

17 Q Do you know whether or not the owners of the property
18 had filed a Statement of Use?

19 A I would have to look at the files to see if they did.
20 I kind of recall I thought they did.

21 Q And if that Statement of Use contradicted what Mr.
22 Behzad said, would you have done further inquiry at that
23 point in time?

24 A No.

25 Q Why not?

1 A That would be investigative-type process that I
2 wouldn't do as far as notice and petition that -- didn't
3 consider it relevant to the petition because the petition
4 states what the purpose of the petition is.

5 Q So the purpose of your telephone call with Mr. Behzad
6 was to clarify why he wanted a change of use; is that
7 correct?

8 A Clarify either the purpose of use or the place of use.
9 In this case, purpose of use because they're changing the
10 purpose of use.

11 Q But it wasn't for the purposes of revoking his water
12 rights; was it?

13 A No.

14 Q Now, you indicated -- I think it was you that
15 indicated that there had been a protest from the Morongo
16 tribe?

17 A Yes. That was actually Mark Stretars.

18 Q It was Mark. You don't recall that protest?

19 A I do recall that.

20 Q Do you know anything about that protest?

21 A Just from reading it recently.

22 Q Recently?

23 A At that time, I didn't do any other work with the
24 protest other than accept it.

25 Q Okay. Had you ever been out on the property?

1 A No.

2 Q Had you ever seen the stream?

3 A No.

4 Q So you're not testifying here about any personal
5 knowledge you have about the use or non-use of water; is
6 that correct?

7 A No personal knowledge.

8 Q Mr. O'Hagan?

9 A Yes.

10 Q You're a member of the -- what do you call yourself?
11 Enforcement team? Prosecution team? What is the title?

12 A Prosecution team.

13 Q Sounds cool.

14 And what's the purpose? What do you do in your
15 job?

16 A I'm the Manager of the Enforcement Section for the
17 Division of Water Rights.

18 Q And are you separated from the rest of the State Water
19 Resources Control Board in any way?

20 A Yes.

21 Q So that you're really a separate part of the State
22 Water Resources Control Board; is that correct?

23 A I wouldn't call me a separate part. I have a
24 enforcement obligation, and we want to make sure that we
25 do not have ex parte communication once we proceed with

1 enforcement type of actions. But as far as working within
2 the division, I'm Manager. Section of the division is the
3 Enforcement Section.

4 Q Do you interact with the other parts of the division
5 generally with respect to the policies and programs of the
6 State Water Resources Control Board?

7 A Yes.

8 Q How do you do that?

9 A We have meetings. And then I also -- as Manager, I'm
10 responsible for making sure my staff are consistent with
11 the policy of the Board.

12 Q What personal knowledge do you have about the
13 diversions in Millard Canyon associated with License 659?

14 A I have no personal knowledge.

15 Q You've never been in Millard Canyon?

16 A No.

17 Q Have you ever personally inspected any of the
18 diversion or water-related facilities in Millard Canyon?

19 A Could you repeat?

20 Q Have you ever inspected any of the diversion or
21 water-related facilities in Millard Canyon?

22 A No on-site inspections.

23 Q Can you independently verify Mr. Behzad's statement
24 that there was a pipe from which water was coming from at
25 the point of diversion for License 659?

1 A Not by personal observations.

2 Q In your testimony, there is a long -- it's divided
3 into sections. Let's take a look at what is Section 1,
4 Water Rights from Diversion for Millard Canyon watershed.
5 Do you see that?

6 A Yes. Section 1.

7 Q Where did you obtain --

8 A What exhibit are you referring to?

9 Q I'm sorry. This is --

10 A Water Right Exhibit 1.

11 Q Where did you gain the information associated with
12 what is written under the heading "Water Rights for
13 Diversion from Millard Canyon Watershed"?

14 A I personally reviewed the files for the licenses and
15 then I also reviewed the White Water River Decree.

16 Q So you just read the file; is that correct? And read
17 the decree?

18 A I reviewed it, that's correct.

19 Q Is your testimony with respect to the limitations in
20 water rights that you talk about in the -- your testimony
21 based solely upon your reading of License 659? See where
22 you say "limitations"?

23 A Yes, I do. If you're talking about the first
24 paragraph dealing with the terms and conditions that are
25 specified in the license, that would be correct, based on

1 review of the file. If you're talking about the
2 limitations that are stated in the decree, that's based on
3 my review of the decree.

4 Q Take a look at bottom of page 2 of this exhibit.

5 A Okay.

6 Q I mean, let me -- you know, we're being cute. Perhaps
7 you're not being cute. My question isn't specific enough.

8 It looks to me when I look at that testimony
9 above limitation of water rights that this is just a
10 recitation right down to quantities that come out of the
11 license; is that correct? You didn't -- let me let you
12 finish answering the question.

13 A Could you repeat the question?

14 Q Did you do any independent analysis or did you just
15 repeat what was in those documents that are referred to
16 under the heading number one, "Water Rights for Diversion
17 from Millard Canyon Watershed"?

18 A My testimony is based on the review of the files and
19 the review of the decree, my understanding of what those
20 terms and conditions mean.

21 Q Okay. At the bottom of page 2, you indicate that the
22 diversions -- are you saying that -- I'm trying to figure
23 out. There is discussion of beneficial use. Are you
24 saying that the uses are not a beneficial use provided for
25 in the license or are you saying they're not beneficial

1 uses?

2 A I'm saying that the limitation of the license specify
3 the only beneficial use as irrigation of 13 acres. Other
4 beneficial uses that are being made, if any, at that
5 location is not authorized under the license.

6 Q Okay. Okay. So groundwater recharge, for example,
7 and storage, you've indicated you know much -- you have
8 much broader policy knowledge of the State Board. Is
9 groundwater storage considered a beneficial use?

10 A No.

11 Q It's not considered a beneficial use of water?

12 A Not the storage of the groundwater. It has to be
13 stored and then reused for a beneficial purpose.

14 Q Okay. Are you familiar with the Petition for Change
15 that was filed by the Morongo Band of Mission Indians,
16 which included License 659?

17 A I'm familiar with it. As far as reviewing it --
18 excuse me. Can you repeat the question? I want to make
19 sure I'm responding to the right petition.

20 Q The Petition for Change and Consolidation of Uses and
21 Places of Uses filed by Morongo Band of Mission Indians in
22 2006, which was granted except for the License 659; are
23 you familiar with that?

24 A Yes. But my direct testimony did not bring that in,
25 but I'm familiar with it.

1 Q If you take a look at the third full paragraph on page
2 3 --

3 A Is this Exhibit 1?

4 Q Of still Exhibit 1.

5 A What's your question?

6 Q Isn't the stuff you're talking about there exactly
7 what the subject of the petition filed by the Morongo Band
8 of Mission Indians was intended to cover?

9 A My statement is prior to 2001.

10 Q I'm just asking whether or not the stuff you're
11 talking about there --

12 A What do you mean by "stuff"?

13 Q You talk about the fact that, "to my knowledge, prior
14 to 2000, there was no change made by the Superior Court to
15 the water rights authorizing the diversion of water from
16 division 28. To date, the State Water Board has not
17 authorized any Order to change the place of use or point
18 of diversion for License 659."

19 Isn't it true that that was the purpose of the
20 petition that was filed by the Morongo Band of Mission
21 Indians?

22 A In a petition that was filed in 2006 was filed for
23 changing the purpose of use and place of use.

24 Q Okay. If the petition were granted, would it have
25 cured the alleged defect you're talking about in that

1 paragraph?

2 MS. OLSON: Object. Calls for speculation and
3 opinion by perhaps the Board or the decision maker that
4 approved that petition.

5 CHAIRPERSON HOPPIN: Can you reword your question
6 to satisfy Ms. Olson, Mr. Somach?

7 MR. SOMACH: Well, he's rendered an opinion. I'm
8 asking his opinion. I'm just asking -- I mean, I'm
9 reading right from his thing. And I'm asking would that
10 cure the defect. That's a "yes" or "no" question.

11 MR. O'HAGAN: I don't think that's an opinion. I
12 said, "to my knowledge, there have not been any petition
13 filed with the Board or with the Supreme Court regarding
14 that license and the decree by prior to 2001."

15 BY MR. SOMACH:

16 Q In your expert opinion, would the granting of the
17 petition that was filed in 2006 cure the authorized place
18 of use and purpose of use issues that you've identified in
19 your testimony?

20 MS. OLSON: Object --

21 CHAIRPERSON HOPPIN: He's qualified to answer
22 that. I'd like to hear the answer.

23 MR. O'HAGAN: If the Board hearings and approves
24 the CEQA documentation and it finds that the petition did
25 not initiate a new right and that there is no injury,

1 then -- and approve that subsequent change petition, then
2 the place of use, purpose of use would be changed
3 according to the Board's order.

4 BY MR. SOMACH:

5 Q And in fact, the Board did do that for the other two
6 licensed rights that parallel License 659; is that
7 correct?

8 A Yes. The Board has issued an order making changes to
9 those two licenses.

10 Q Does the State Board record water rights when they're
11 granted?

12 A When a water right license is issued, the State Board
13 records the license in the county.

14 Q And it actually records just like any real property
15 transaction will record. The license is also recorded; is
16 that correct?

17 A Yes. Just the license and then orders subsequent to
18 that license.

19 Q Does it provide any record notice? Does it record any
20 cloud on title of water rights that might be subject to
21 revocation?

22 A Not with the county. Not until the Board acts on the
23 revocation and/or Change Petition. The order of the Board
24 is what gets recorded after that.

25 Q But up until that time, there is no indication in the

1 record if someone searched the record -- let's
2 hypothetically say when Morongo purchased these properties
3 and these water rights, it searched the record to see if,
4 in fact, there was a recorded water right. What would
5 they have said --

6 MS. OLSON: Object. Can we clarify what record
7 we're talking about?

8 MR. SOMACH: The county's recorder's office.

9 MR. O'HAGAN: The county recorder's office
10 record, there would be no notice, but the notice that we
11 provide is via the public noticing of water rights.

12 BY MR. SOMACH:

13 Q I'm not asking that question. That's another
14 question. I don't mind your saying that. But there is no
15 record notice in the county recorder's office; is that
16 correct?

17 A I believe that's correct.

18 CHAIRPERSON HOPPIN: John, only after there has
19 been a result from the hearing is there a record; is that
20 correct?

21 MR. O'HAGAN: To record a document, it's
22 specified in the Water Code that a licensed water right --
23 a permit, an application, or a permit are not recorded.
24 It's the final licensing gets recorded. And then if there
25 is any order by the Board or the division if we do a

1 revocation, that gets noticed back, but it's after the
2 order is issued.

3 CHAIRPERSON HOPPIN: So after the order is
4 issued, by prior to that, if someone examined the record,
5 it would indicate there was a valid water right in place,
6 and it would not indicate, as in the case of litigation,
7 for instance, that there was an action pending?

8 MR. O'HAGAN: If you're talking about the county
9 record, that is correct.

10 CHAIRPERSON HOPPIN: Thank you.

11 BY MR. SOMACH:

12 Q If I could have you take a look again at your page 3
13 of Exhibit 1, the second paragraph under support for
14 revocation, do you see that?

15 A Yes.

16 Q You recite various points of time of non-use, 1952 to
17 1957. Do you see that?

18 A I site the lack of specific reporting of irrigation
19 use.

20 Q So 1952 through 1957. And then another one 1958 to
21 1960. Do you see that?

22 A Yes. My testimony says that in that report it does
23 identify domestic use for seven persons on eight to ten
24 acres. It does not identify the use was within Section 32
25 as was previously done in the very early reports

1 consecutively.

2 Q But at the end -- you say at the end of that paragraph
3 you say, "therefore there may be nine years of non-use
4 under License 659 prior to 1961." Do you see that?

5 A Yes.

6 Q How much -- that's a long time ago, isn't it?

7 A Yes, it is.

8 Q The State Board do anything about it anywhere within
9 two, three decades, four decades, five decades -- 50 years
10 of the time that those events which you have put under a
11 heading "support for revocation," do you know of any
12 actions up until 1960 the State Board did to revoke this
13 license?

14 A Up to 1960?

15 Q Yes.

16 A No.

17 Q Then you site a report by Mr. Pettit; is that correct?

18 A Correct.

19 Q What was Mr. Pettit's recommendation in his report?

20 A He recommended a follow-up inspection.

21 Q Didn't he also recommend not to revoke that water
22 right at that time?

23 A I don't think he recommended not to revoke. He
24 recommended a follow-up inspection.

25 Q You say you've read Mr. Pettit's report?

1 A Yes, sir.

2 Q Do you want to refresh your memory?

3 A Certainly, please.

4 MR. SOMACH: Could we pause the clock from
5 running at this point?

6 CHAIRPERSON HOPPIN: I never heard an attorney
7 that wanted to pause the clock.

8 MR. SOMACH: Sometimes I want to turn back the
9 clock, but that doesn't work either.

10 MR. O'HAGAN: I'm looking at the inspection
11 report. Do you want to direct me to where you're
12 referring to?

13 BY MR. SOMACH:

14 Q No, I just want to ask. You're the one who testified
15 to what's in the report. Give you an opportunity to
16 recheck --

17 A I was looking in the remarks, the recommendation
18 section of the report. He indicates action should be
19 temporarily postponed.

20 Q So he recommended taking no action, is that correct,
21 except for a reinspection?

22 A To confirm, his last line on this same section -- go
23 down -- "reinspection will probably require to affirm
24 whatever information is submitted, particularly if
25 revocation is indicated." So he was asking more

1 information than a reinspection.

2 Q But he didn't recommend revocation, did he, in that
3 report?

4 A He -- no, he did not recommend revocation.

5 Q So what happened in the subsequent report or the
6 follow-up inspection that he recommended?

7 A The 1968 inspection?

8 Q I'm just asking you -- you're the person from the
9 State Board. Whatever inspection that was done to follow
10 up on Mr. Pettit's recommendation.

11 A That was the 1968. At that time, they recommended no
12 action at this time. Revisit in 1969 to determine if use
13 of water has been recommenced.

14 Q Okay. So in 1968, as a follow-up to Mr. Pettit's
15 prior year inspection, the recommendation of the
16 inspectors was what? Not to revoke; is that correct?

17 A To revisit to check if water use is continued to use.

18 Q That's not what you just read.

19 A No action at this time. Revisit in 1969 to determine
20 if use of water has been recommenced.

21 Q And when that reinspection took place, what occurred?

22 A There was no reinspection in 1969.

23 Q How many times between 1969 and today has the State
24 Water Resources Control Board been out there to inspect or
25 reinspect the property?

1 A None to my knowledge.

2 Q And how many times before the Morongo purchased this
3 property did the State Board go out there to inspect or
4 reinspect in order to make a determination on whether or
5 not water was being put to reasonable beneficial reuse?

6 A None to my knowledge.

7 Q Take a look at page five.

8 MR. BUCKMAN: Please identify the exhibit.

9 MR. SOMACH: I'm sorry. Five of Exhibit 1.

10 Unless otherwise indicated, I will be referring to
11 Exhibit 1.

12 BY MR. SOMACH:

13 Q First paragraph there, what is that doing?

14 A It's identifying the Water Code section that
15 authorizes the State Board to revoke respectively. And
16 it's giving examples of orders in which the State Board
17 has denied a Petition for Reconsideration, including Water
18 Code Section 67.

19 Q In the context of your expertise, does that include
20 being a lawyer?

21 A No.

22 Q Those three paragraphs on page 5 of Exhibit 1 appear
23 laden with legal conclusions, don't they?

24 MS. OLSON: Object. I think his testimony is
25 just summarizing the Board orders.

1 BY MR. SOMACH:

2 Q Well, paragraph one doesn't summarize the Board order,
3 does it. It interprets a statute.

4 A That's a recitation of what's in the order.

5 Q In the order, I notice that there are a lot of "mays"
6 there; correct. Do you see that?

7 A A lot of --

8 Q "Mays." Let's read, "Water Code Section 1675 provides
9 State Board may revoke a license." See that? Did I read
10 that right?

11 A Correct.

12 Q Under Water Code Section 1241, "A water right or
13 permit may be forfeited." Do you see that?

14 A Yes.

15 Q Did I read that correctly?

16 A Yes, you did.

17 Q Okay. Since you're opining as to what all this stuff
18 means, what does the word "may" mean?

19 A "May" means the Board has discretionary authority to
20 revoke or not to revoke based on the evidence that's
21 provided to them.

22 Q Are there limits in License 659 to ensure that there
23 are -- no more water than is necessary is diverted to meet
24 reasonable beneficial uses on the area that is covered
25 within the license?

1 A Yeah. The license has a limitation on the rate of
2 diversion of .16 CFS.

3 Q Okay. And are there other means that you know of that
4 the State Board employs to ensure that no more than that
5 amount of water that is reasonably beneficially needed is
6 utilized on a piece of property?

7 A The Board may put an annual limitation amount on a
8 water right. These water rights are sold. I didn't use
9 that term. Now they would have annual limitation.

10 Q You're familiar with properties that have both
11 riparian and appropriated water rights?

12 A Yes.

13 Q Okay. And just because properties have both riparian
14 or appropriated right, that doesn't give the right holder
15 a right to put more than -- more water than can be
16 reasonably beneficially used on that property; isn't that
17 correct?

18 A Right. Riparian rights and all post-14 or pre-14 are
19 limited reasonable beneficial use.

20 Q Right. And that's a limitation that is carried with
21 respect to every right that's exercised in California; is
22 that correct?

23 A That's correct.

24 Q Is it in your opinion good State policy to maximize
25 reasonable beneficial use of water?

1 A Yes.

2 Q Is there anything, when you look through all the files
3 and records and all of the other stuff that you looked at,
4 whatever that might have been, to indicate that Morongo,
5 if this water right is not revoked -- and this is aside
6 from the technical issue of revocation. Do you have any
7 indications or anything demonstrated in the record that
8 you reviewed that Morongo wouldn't put water to reasonable
9 beneficial use if it was allowed to maintain this license?

10 MS. OLSON: I'll object as to relevance. The
11 relevance of this case is the reasonable beneficial use of
12 the prior owner's license.

13 MR. SOMACH: No. No. No. It involves a whole
14 policy determination with respect to use.

15 BY MR. SOMACH:

16 Q Is not the purpose of the forfeiture statute, Mr.
17 O'Hagan, to ensure that water is put to reasonable
18 beneficial use to the maximum degree possible; isn't that
19 the purpose of the forfeiture statute?

20 MR. O'HAGAN: I'm waiting for a ruling.

21 CHAIRPERSON HOPPIN: I think it's a reasonable
22 question, John, as to the reasonableness of use.

23 MR. O'HAGAN: Could you repeat your question?

24 BY MR. SOMACH:

25 Q In your review of the files and records, you spent

1 some time on this. Is there anything to indicate that if
2 this license is not revoked and Morongo is allowed to
3 maintain it that they would not put water to reasonable
4 beneficial use to the maximum degree possible?

5 A The proposed petition would be they identified
6 beneficial uses. Morongo's protest also identified uses
7 that they were protesting to protect to protect the
8 groundwater water that would be recharged if this water
9 was not allowed to flow downstream in the creek to
10 recharge the groundwater basin. So that's a use that
11 would be protected, the groundwater use for the tribe.

12 Q And in fact, isn't their 2006 petition that we've
13 talked about earlier, doesn't it include a groundwater
14 storage and use settlement?

15 A Right. Yes, it does.

16 CHAIRPERSON HOPPIN: Thank you.

17 MR. O'HAGAN: But they have wells downstream to
18 protect the groundwater wells. And that's one of the
19 reasons they filed this petition, this protest against the
20 petition.

21 CHAIRPERSON HOPPIN: That answer was important to
22 me. I'm sorry if I got a little off course and I realize
23 it may have. Thank you.

24 BY MR. SOMACH:

25 Q Mr. O'Hagan, you've testified about irrigation

1 practices, historic irrigation practices, is that correct,
2 on the property that is subject to the License 660?

3 A Yes. I identified the place of use showing what type
4 of crops were being grown on that. I think that is
5 Exhibit 10.

6 Q And Exhibit 10 dates back to when?

7 A Exhibit 10 is dated 1924.

8 Q Do you know whether or not the facilities that were in
9 place back then are still there?

10 A Based on the file record, I believe the facilities
11 have been altered to a pipe diversion.

12 Q But from a review of the records; is that correct?

13 A Only from review of the record, that's correct.

14 Q And that was a record in or around 1968, '69; isn't
15 that correct?

16 A Correct.

17 Q Okay. Does the State Water Board have a record of how
18 much flow is in the creek that's subject to the diversion
19 of every month from every year from the issuance of the
20 license?

21 A Are you talking about the flow of the springs or the
22 flow of the Millard Canyon.

23 Q I'm talking about flows in Millard Canyon that are
24 subject to License 659 diversion.

25 A There is no records of metered flows.

1 Q So you don't know if and when there is water within
2 the stream or available at the spring; is that correct?

3 A Based on the testimony of Mr. Behzad, every time he
4 visited, there was always a flow coming out of the spring.

5 Q And how often did he testify he was at the spring?

6 A I believe he said that it was a couple times during --
7 couple times of year, I believe he said.

8 Q And he didn't recall, as I recall, exactly what time
9 of the year?

10 A No, he did not.

11 Q Mr. Stretar, you're retired. You're enjoying
12 yourself. But you were a member of what we've decided
13 we'll call the prosecution team; is that correct?

14 A Yes.

15 Q Okay.

16 A Actually, a petition unit at that time.

17 Q So it was a different formulation?

18 A The prosecution team is what's sitting before you
19 today. With regards to where we came from during this
20 action to the Board, at the time, I was the Section Unit
21 Chief for the Petition Change Unit.

22 Q When this matter first came before the State Water
23 Resources Control Board -- when it came before the
24 Petition Unit -- is that what it's called?

25 A Yes.

1 Q Was there a strict separation of functions between the
2 unit you supervised and the rest of the State Water
3 Resources Control Board?

4 A For the most part, yes.

5 Q For the most part. Were other practices, to your
6 knowledge, put in place after you left?

7 A No. They were there -- I only left six months ago.
8 So the practices and the ex parte operations existed
9 within the division, from my knowledge, for the most part
10 from the time I was hired on in 1974. They weren't
11 specifically codified until recently.

12 Q In your testimony, which is for the record exhibit 2 I
13 believe?

14 A Yes.

15 Q You say that the alleged non-use associated with
16 License 659 first came to the units attention -- and I
17 couldn't figure out when it first came to the unit's
18 attention.

19 A I think in a discussion there -- you'll have to refer
20 back to the previous paragraph. I took over that unit in
21 1997. So it came to the unit's attention when I started
22 actually operating the unit, which I believe Mr. Been left
23 in '98. And Ms. Alana Gibbs who showed up as signatory to
24 some of those letters was operating the unit from 1998
25 through 2003 and was part of my staff. So we're talking

1 about that period 1997 to 2003 that, under my purview, we
2 started looking at this operation of this petition and
3 this license.

4 Q What was the trigger for your looking at the issue?

5 A The trigger I believe came as a result of the protest
6 that was received after Mr. Been noticed the Petition for
7 Change.

8 Q And so that was the trigger. And what time period did
9 you initially, if any -- I'm trying to figure out the
10 trigger was the petition that caused you to look at stuff;
11 right?

12 A The trigger was the protest, which came in in January
13 of '96. I took over the unit in '97. And so it was
14 essentially at the point in time I became familiar with
15 the project we began to question because of the issues
16 that were raised by the Morongo in the protest whether
17 there really was any use that had been occurring prior to
18 that point in time at all.

19 Q Now, the Morongo protest had nothing to do with
20 non-use, did it?

21 A No, it had nothing to do with non-use. It was an
22 access issue.

23 Q It doesn't mention non-use at all?

24 A That's correct.

25 Q And you started looking back -- now, in your

1 testimony, you've talked about the 1930s in addition to
2 the 1950s; is that correct?

3 A Right. Just to kind of give you an idea how things
4 progressed.

5 Q Now, what caused your concern with respect to the
6 1990s?

7 A My concern? Simply that it appeared from the
8 information and the direct testimony that the contract --
9 there was a definite conflict either in the fact they had
10 not submitted reports or the reports seemed to disagree
11 with factual information or information that was provided
12 by other parties to the situation at the time.

13 Q When you talk about factual information, what are you
14 talking about?

15 A Well, I'm talking about Mr. Been's report -- contact
16 report from the contracting agent and the agent saying
17 there had been no recent water on the property. And at
18 the same time, Mr. Ahadpour who submitted reports which
19 basically identified -- it appeared he just copied
20 previous reports indicating there had been some type of
21 use on the property.

22 Q Well, I mean, the filing of reports which simply
23 repeat itself each year isn't unusual, is it?

24 A It's not unusual, but when you're talking about
25 changes --

1 Q Say again.

2 A It's not unusual, but again you're talking about
3 someone proposing changes that may either, in fact,
4 initiate a new right or impact some other party. So you
5 have to look into it at this point in time and say this is
6 truly going to -- can we just bypass this and move on or
7 should we look at has there actually been a use? Or has
8 it gone back to prior -- we have an adjudicated water
9 source here. There are other downstream parties that have
10 the potential to be coming up short on an annual basis
11 simply because in an arid county area like this and those
12 parties under adjudication would be entitled to that water
13 prior to somebody -- me and different -- or reinventing
14 this water so to speak.

15 Q Are you saying that you know factually that this water
16 flows into a river system that anyone else can access?

17 A I'm not saying factually. I'm saying it's part of the
18 adjudication that was considered to that extent. And it
19 probably does -- I'm assuming -- I have to look at a map.
20 I'm assuming it does flow and be part of a White Water
21 River watershed.

22 Q Are you aware of any complaints associated with injury
23 to other uses of water?

24 A No. That was part of the reason the petition was
25 advertised, I believe -- it was before my time -- to see

1 if there were parties out there, whether downstream
2 parties had a concern. And there was nothing received,
3 per se. But then the issue still came up relative to
4 access. And then that brought up issues regarding whether
5 there actually had been any parties on the property, which
6 again because of the access, they were not allowing
7 anybody to approach the property. So you would say, so
8 who's using the water up there.

9 Q Well, let me ask you this question. Are you aware of
10 the petition the Morongo Band filed in 2006 to consolidate
11 purpose and place of use of this water rights, including
12 License 659?

13 A I'm aware of it, yes.

14 Q Do you know if there were any protests to that
15 petition?

16 A No, I'm not aware.

17 Q So you don't know?

18 A No.

19 Q Mr. O'Hagan, do you know?

20 MR. O'HAGAN: Could you repeat the question?

21 BY MR. SOMACH:

22 Q Do you know whether or not there were any protests
23 based upon impact to other uses or users of water that
24 were filed with respect to the 2006 Petition for Change
25 and Consolidation of Use, including License 659 by the

1 Morongo Band?

2 A I'm not familiar with the protest. I know the Board's
3 issued an order, so if there were a protest, everything
4 was resolved.

5 BY MR. SOMACH:

6 Q Let me ask you, Mr. Stretars, to take a look at the
7 State Board's Exhibit Number 29.

8 A Okay.

9 Q What is Exhibit 29?

10 A It's the report of licensee that was filed for the
11 years '91 to '93 by the licensee.

12 Q And who signed that?

13 A It appears Mr. and Ms. Ahadpour signed it.

14 Q Does that indicate that water was being used?

15 A Well, if you look at the first part of the report
16 there -- can you scroll up just a little bit? In your
17 case, down.

18 For the years '91 to '93, there is no indication
19 of any use right there. If you continue on down where it
20 says use, they talk about 2010 alfalfa and stock and
21 grass, which is nice, but the aerial photos we have show
22 there was nothing on the property at the time.

23 Q But that's what the Statement of Use says; is that
24 correct?

25 A That's true. I won't argue.

1 Q Who signed it again?

2 A Mr. Ahadpour signed it.

3 Q And doesn't it say -- I don't know about these things.
4 I'm just a lawyer. "I declare under penalty of perjury
5 that the information in this report is true to the best of
6 my knowledge and belief;" is that what it says?

7 A It does.

8 Q I assume that when someone signs something under
9 penalty of perjury -- and that's probably why the State
10 Board has it down there -- it's significant; is that
11 correct?

12 A It might be.

13 Q Do you sign documents under penalty of perjury and not
14 sign them truthfully?

15 A If I've read them, probably yes. If I haven't read
16 them, I simply just fill out something that goes --

17 Q Remember, you're under oath. You don't want anybody
18 to be reading this transcript.

19 A Let me ask you to repeat the question.

20 MS. OLSON: Objection. He's threatening any
21 witness.

22 MR. STRETARS: Maybe I misunderstood the wording
23 in the statement there. I'm saying if I had the read the
24 document and realized what I was signing and realized I
25 was signing under penalty of perjury, I probably either

1 would or would not have signed it, depending on what the
2 truth was behind it. Most of these licensees simply copy
3 what was done the year before --

4 CHAIRPERSON HOPPIN: We're getting an opinion I
5 don't particularly want to listen to and doesn't have much
6 validity. It may or may not be the case, but it's not
7 what we're going to rule on here.

8 BY MR. SOMACH:

9 Q If that is true, it contradicts, does it not, the
10 testimony of Mr. Behzad?

11 A Yes, but Mr. Behzad was here and Mr. Ahadpour was not.

12 Q I'm just asking. It does contradict that testimony,
13 does it not?

14 A I don't disagree with you.

15 Q Is it usual for the State Water Resources Control
16 Board -- is it normal course for someone who signs a
17 Statement of Diversion of Use to provide additional
18 factual evidence and information?

19 A If requested.

20 Q And how often does that take place?

21 A It's the number of licensees that we have within the
22 State system. It's not very common, unless there are
23 issues that come up.

24 Q So it's not a common practice of the State Board; is
25 that correct?

1 A No, it's not that common. Again, we're talking about
2 14,000 licensees we're looking at. So unless there is a
3 problem that occurs, something that triggers or brings it
4 to our attention, typically no, we would believe what the
5 party told us.

6 Q It's not part of any of the filing requirements, is
7 it?

8 A What do you mean?

9 Q There are State law requirements with respect to
10 filing of Statements of Diversion Use; is that correct?

11 A Yes.

12 Q Okay. And there are no requirements as part of that
13 law to append or to otherwise provide factual
14 documentation, is there?

15 A Other than what's within the license report itself,
16 which does require information.

17 Q Signed under penalty of perjury?

18 A Signed under penalty of perjury, which may or may not
19 be complete.

20 Q Let's take a look at Exhibit 12. What time of the
21 year was that aerial photo taken?

22 A Scroll up, please. I don't know if it has
23 identification of the month or not. It does -- it was
24 shot during 1996.

25 Q I know what year it was shot in, but what time of the

1 year was it shot in?

2 A There isn't an identification. I would assume it's
3 part of a dryer time of the year, but I can't guarantee
4 that because of the nature of the region we're located in.

5 Q So you don't know if this was taken in the dead of the
6 summer or the dead of the winter?

7 A No, we don't.

8 Q And how much flow is in the creek that's depicted in
9 Exhibit 12, the first -- since all these are 12, the first
10 plate of Exhibit 12?

11 A I don't know that you can visibly tell. This is an
12 aerial photo that was taken from a long distance out. It
13 appears there is some vegetation along there, but I can't
14 say there is stream flow or not.

15 Q How much? Is there much sufficient to divert at the
16 point of diversion for License 659? And if so, how much?

17 A It's identified as a spring. It's not flowing into
18 the creek. It's identified it's coming up from a spring.
19 It's a source basically. And whether you flow down the
20 creek or not, would not be able to identify whether there
21 is actual rising water at the spring that may arise right
22 there and dry back in the ground.

23 Q What evidence do you have with respect to how much
24 water was available at the spring, if the spring was
25 running?

1 MS. OLSON: Object. He's already identified he's
2 talking about an aerial photo that was taken many miles
3 above ground. He's already testified to that.

4 CHAIRPERSON HOPPIN: But we have a proposed
5 revocation act here. I think what Mr. Somach is getting
6 at is whether there was any water there or not or whether
7 this spring, in fact, had an ephemeral nature that at
8 times had no water in it. I believe I'm --

9 MR. SOMACH: Yes, that's it.

10 MS. OLSON: He's already testified --

11 CHAIRPERSON HOPPIN: That's what I understand the
12 question.

13 MS. OLSON: He was not able to visit the
14 property. It's asked and answered.

15 CHAIRPERSON HOPPIN: So how do you know -- well,
16 ask your question.

17 BY MR. SOMACH:

18 Q Explain to me what the Petition Unit does if there is
19 five years of non-use, during which time there is no flow
20 in the source of the licensed right?

21 A If there is no flow so the party cannot make
22 beneficial use, there would be no injury or no impact to
23 that license. However, we had reports from 1930 on
24 identifying that there typically was flow throughout a
25 good portion of most years; that, in fact, there was flow

1 when Mr. Pettit was there and Mr. Levy (phonetic) was
2 there in 1968. Mr. Ahadpour and his agent identified
3 there was flow that was being wasted on the ground. All
4 these various occasions at various times.

5 Q So that's the information you're relying upon, that
6 anecdotal information; is that correct?

7 A The -- yeah, that's part of the anecdotal information.
8 The information is there is no cropping. If there had
9 been crops on that property, there would be distinct
10 diversion lines. There would be distinct orchards
11 showing. There would be distinct furrowed tilled areas.
12 There is nothing showing on those to attach to an
13 irrigation of 13 acres.

14 Q If irrigated --

15 A Flow or no flow.

16 Q If irrigated orchards are abandoned and trees die,
17 from an aerial photo, can you tell whether or not that
18 land is being irrigated or not? Trees remain. They
19 haven't been pulled out. They're all sitting there dead
20 in rows just like is outlined here.

21 A You may or may not. In this case, I don't see any
22 trees sitting in lines there. I don't see, unless you
23 blow that up really close -- that photo doesn't show there
24 is an orchard there.

25 Q Do you have any idea what's there?

1 A I don't know. I did not visit the property. My staff

2 --

3 Q Let's take a look at slide two under Exhibit 12.

4 1966; is that correct?

5 A 1966.

6 Q And what month of the year was this photograph taken?

7 A Again, it's not identified.

8 Q And how much flow was in the creek?

9 A In this creek, I have no idea.

10 Q Do you know whether or not the characteristic of this
11 creek changes as it starts up the canyon down toward where
12 the diversion for License 659 is?

13 A I don't know the relevance of that.

14 Q Well, that doesn't answer my question.

15 A Well, what I'm implying is this is a spring. So
16 whether the character of the stream changes as it flows
17 downstream into the canyon, I don't see the relevance.

18 Q Well, can you answer my question and humor my
19 question?

20 A Okay. Give me the question again.

21 Q The question was: Do you have any information on the
22 relative flow in the creek as it flows from the upper
23 reaches up in the canyon down towards where the point of
24 diversion is for License 659?

25 A No, other than the identified amounts that were

1 established under the decree, which would indicate there
2 was some level of flow that was being used by the various
3 parties back in the 1920s.

4 Q Were you in charge of the unit when it issued the
5 initial notice regarding revocation in 2003?

6 A I was.

7 Q Okay. Do you know whether or not -- I'm just
8 confirming a supposition that was made by another witness.
9 Do you remember whether or not anything was recorded at
10 that time that would indicate there was a cloud on the
11 title to the water rights associated with License 659?

12 A No. There is nothing recorded -- issued by the Board.

13 Q What was the purpose of your siting in your testimony
14 Exhibit 42? I couldn't quite figure it out from your
15 testimony.

16 A Where did I site that in my testimony?

17 Q Take a look at Exhibit 42.

18 A This was sent after the original Notice of Revocation
19 was issued. And we, at that point in time, found out that
20 Springs had transferred the property onto Morongo's.

21 Q And did the State Board provide Morongo, to your
22 knowledge, of any indication prior to in fact allowing the
23 assignment that there was a cloud of title to License 659?

24 A Yes, I believe we did. Not intentionally, but we did
25 in our letter of September 28th, 2000, I believe.

1 Q What exhibit is that?

2 A Exhibit 35.

3 Q Let's take a look at that. This is a -- this is a
4 letter to who?

5 A This is a letter to the Ahadpours, then the owners of
6 the property and license at that time.

7 Q And what on the first page of that letter would
8 indicate that you're going to revoke the license?

9 A On the first page, I don't believe anything, unless
10 it's in the bottom there.

11 Q So then it must be on the second page?

12 A Yes.

13 Q It says, "If the quantity of water authorized under
14 License 659 has not been a beneficial use for five years
15 or more, the right may have already been lost and the
16 license would be subject to revocation." Is that the
17 notice you're talking about?

18 A That was -- no, I never said notice. Notice was
19 something formal. This was accept to the Ahadpours in
20 response to the various things that had been going on over
21 the time frame to let them know that they had been
22 protested, that we had concerns about the previous or
23 actual beneficial use of the water over the previous 30
24 years, 40 years.

25 Q But the question was: What knowledge did Morongo have

1 associated with the possible revocation and the hearing on
2 revocation or whatever you believe it does -- I'm just
3 trying to figure out where before assignment would Morongo
4 have understood that this license was subject to
5 revocation? Is this it?

6 A This would be it. If you scroll down further, you
7 will find they are CCed on the letter.

8 Q I will stipulate they received this letter. I'm just
9 asking, it's that sentence that you're talking about; is
10 that correct?

11 MS. OLSON: Objection. Asked and answered.

12 BY MR. SOMACH:

13 Q Is it that sentence you're referring to?

14 A That paragraph, yes.

15 Q And subsequent to this letter, were Statements of
16 Diversion of Use, in fact, filed with the State Water
17 Resources Control Board for the outstanding years?

18 A Yes. They were filed by Great Springs.

19 Q Okay. And they were signed under penalty of perjury;
20 is that correct?

21 A Yes.

22 Q But for the fact that you suspended them, they were,
23 in fact, the filings you were talking about in that
24 letter; is that correct?

25 MS. OLSON: Objection. Confusing question. Was

1 that a question?

2 MR. SOMACH: I don't know about an objection
3 associated with a confusing question.

4 CHAIRPERSON HOPPIN: He's asked the question.

5 MS. OLSON: Can you restate for me because it
6 wasn't clear what the question was.

7 MR. SOMACH: Now it demonstrates the problem with
8 memories fading. I have no idea what the question was.
9 Can someone read that back to me.

10 CHAIRPERSON HOPPIN: I can do it, but it might
11 not be as good as hers.

12 (Whereupon the question was read back.)

13 BY MR. SOMACH:

14 Q We were referring to the prior question, which dealt
15 with the Great Springs or Great Waters, whatever the heck
16 they're called, filings under penalty of perjury; is that
17 correct?

18 A That's correct.

19 Q They fulfilled the requirements of the law, even
20 though you suspected them?

21 A That's correct.

22 Q And presumably, do you know whether or not Morongo got
23 copies of those?

24 A I have no idea.

25 Q Okay.

1 A We were dealing with Great Springs at the time. They
2 were the most recent owners.

3 Q Paragraph 20 of Exhibit 2, do you see that?

4 A Uh-huh.

5 Q Again, I contend you've already made this objection
6 making a legal conclusion that the Board is supposed to
7 make. But notwithstanding that objection, you say under
8 the statute -- under the statute, the right should have
9 been forfeited. Well, that's past tense. Is it your
10 opinion that the right that is currently owned by Morongo
11 should be forfeited?

12 A It's my opinion the right probably never should have
13 gone to Morongo. It should have been forfeited in the 90s
14 when the actual non-use at the time was found.

15 Q So that's your testimony, it should have been
16 forfeited in the past?

17 A Yes. It should have already been gone. Shouldn't be
18 existing now to argue over.

19 Q But the State Water Resources Control Board did not
20 forfeit it in the past; is that correct?

21 A It had not been -- the issue had not been raised. It
22 had not been forfeited.

23 Q And the State Water Resources Control Board approved
24 assignments to a number of owners subsequent to the
25 periods of times you're talking about, including Morongo;

1 is that correct?

2 MS. OLSON: I'll make an objection here that that
3 assumes facts in evidence that the State Board approves of
4 an assignment, where in fact --

5 CHAIRPERSON HOPPIN: We didn't do anything to
6 disapprove the assignment.

7 MS. OLSON: The notice of assignment is an
8 administrative action that simply reflects an updated
9 ownership. There is no approval or disapproval that's
10 involved in that action.

11 CHAIRPERSON HOPPIN: Okay.

12 MR. STRETARS: Can you repeat the question?

13 BY MR. SOMACH:

14 Q That's the question. I haven't heard anybody overrule
15 my question. Go ahead. Answer it.

16 A Can you run it by me again?

17 Q Oh, man, Mr. Stretar. Your memory is worse than mine.
18 You can't remember five minutes, let alone 70 years.

19 CHAIRPERSON HOPPIN: He's retired. He doesn't
20 have to.

21 MR. SOMACH: I know, but I wish I could put
22 myself in that position.

23 CHAIRPERSON HOPPIN: I think there's somebody
24 sitting at this table that wishes you would, probably.

25 MR. SOMACH: This table or that table?

1 MR. STRETARS: Both.

2 BY MR. SOMACH:

3 Q If this had been -- the State Board did not revoke --
4 that was your prior answer?

5 A Right.

6 Q And in fact, whether it was ministerial or
7 discretionary, it approved or it allowed subsequent
8 assignments of these water rights, including the
9 assignment to Morongo?

10 CHAIRPERSON HOPPIN: We didn't react to it, I
11 guess --

12 MS. OLSON: I object to the question being formed
13 as approved or allowed. He can ask the question we
14 received the --

15 CHAIRPERSON HOPPIN: Can we reread to approve or
16 disallow and ask if we did not respond to the changes? Is
17 that --

18 MR. SOMACH: That's fine.

19 CHAIRPERSON HOPPIN: Is that the question? Does
20 that take care of your concern?

21 MS. OLSON: It's still suggesting or implying
22 that we were supposed to respond.

23 CHAIRPERSON HOPPIN: The question is, I believe,
24 if we have a proposed revocation in the works, do we have
25 any obligation or any history of making parties aware

1 prior to the time that they purchase a piece of property?

2 MS. OLSON: In my mind --

3 CHAIRPERSON HOPPIN: If you buy a house and it
4 has termites in it, somebody is going to inspect it and
5 say there was a chemical spill in the backyard. There is
6 going to be a matter of record.

7 I think the question is: Do we, as a matter of
8 course, provide any information if there is a potential
9 cloud or revocation action that is being considered? I
10 believe --

11 MR. SOMACH: That's fine.

12 MS. OLSON: But I mean, that is a larger
13 question. The question of Notice of Assignments, in fact,
14 come in a different unit than the one working on the
15 revocation. And so I just --

16 CHAIRPERSON HOPPIN: Is there someone more
17 qualified to answer Mr. Somach's question than Mr.
18 Stretar?

19 MS. OLSON: No. That's not what I'm suggesting.

20 I just object to the implication that the Notice
21 of Assignment and the division receiving the Notice of
22 Assignment somehow involves an affirmative approval of the
23 change or the entire record, for that matter, of that
24 water right. I think it's a ministerial action.

25 If he can ask it in that way, whether we received

1 a Notice of Assignment after already reviewing the record
2 and knowing there was a revocation possibly, that's fine.
3 I just don't want it to be asked in a form that suggests
4 that a Notice of Assignment is an approval of a change.

5 MR. SOMACH: I like both of your questions, you
6 know.

7 BY MR. SOMACH:

8 Q Why don't you answer both of those questions and I'll
9 forget my question?

10 A A Notice of Assignment, again as Samantha indicated,
11 is a general item that comes in before the Board and
12 typically sent to the licensing section, which was not at
13 that time the petition section. So we may not have even
14 known it was there.

15 Relative to this specific case, there was no
16 specific -- or the Board makes no specific notification to
17 parties relative to ongoing processes. If you found
18 within -- going back to one of your earlier questions. If
19 you found within a county recorder's office an order or a
20 license that existed and were concerned about how it
21 associated itself with the piece of property, you would
22 make your own specific connections with the division's
23 records to look at and see whether there was a cloud on
24 the title or not. We do not make any attempt.

25 In this case, because title had changed three

1 times from 1990 to 2000, we were not tracking whose title.
2 We knew that at the moment Great Springs was the title
3 owner of that parcel. And we were keeping them informed.
4 Although we CC'ed -- because the Morongo had protested
5 Change Petition were keeping them informed basically where
6 we stood. So they were aware through the correspondence
7 that was going on that there were issues. Not specific to
8 necessarily revocation or anything else, but there were
9 issues on this property and that water right.

10 CHAIRPERSON HOPPIN: Mr. Somach, can I interrupt
11 you for a second? 60 minutes is up. In portion to the
12 fact that I've asked more than five minutes' worth of
13 questions, are you getting --

14 MR. SOMACH: I'm actually right at the tail end
15 here. Depending upon how much filibustering he does, I'll
16 be done.

17 BY MR. SOMACH:

18 Q Part of what has me confused is you're speaking as if
19 you are different from the State Water Resources Control
20 Board or the Petition Unit is different from the State
21 Water Resources control Board. Isn't it all one body?

22 A Yes, it is.

23 Q Okay. So what you're really saying is one hand
24 doesn't know what the other hand is doing; is that not
25 correct?

1 A Historically, that was probably true to some extent.

2 Q So that's it? When you say the State Water Resources
3 Control Board, the body doesn't send out or provide
4 anything with respect to assignment, that's not true, is
5 it?

6 A No, we do send out. I didn't say we didn't.

7 Q So you do respond with respect to assignments and you
8 indicate that the assignment has been taken into notice.
9 Do you have all of the information that you need? We'll
10 provide you additional information, if you would like it.
11 Is that correct?

12 A That's correct.

13 Q Okay. So do you know when that assignment was sent to
14 the State Water Resources Control Board, to the Morongo
15 Band of Mission Indians that there was an indication as
16 part of that assignment and, oh, by the way, the rights
17 that you just bought by Mr. Behzad or his predecessor or
18 his ex-father-in-law are subject the revocation; is that
19 part of that -- was that part of that letter that came
20 recognizing the assignment?

21 A I believe you're referring to Exhibit 43 possibly,
22 June 16th, 2003, letter.

23 Q Take a look at --

24 A We updated to identify that Morongo at that point in
25 time had taken over ownership.

1 Q Could we have put up the Morongo Exhibit 6. I mean,
2 this is the letter that Morongo got based upon the
3 assignment?

4 A That's correct.

5 Q Where in this letter does it indicate, oh, by the way
6 or any other way that this license that we're confirming
7 the assignment on is subject to revocation?

8 A It doesn't. What I'm looking at here -- again, you'll
9 note in the upper right-hand corner it says reply to, we
10 have SM. If you scroll down, I don't know what we have on
11 the bottom on this. We have Steve Marquez, who is part of
12 the licensing unit, completely separate unit than the
13 petition and change unit. So this assignment came through
14 was sent to a separate unit and division and was handled
15 by a separate unit and division. Potentially, I would say
16 for the most part unbeknownst to my unit.

17 Q So this is one hand not knowing what the other is
18 doing?

19 A Right. This is a simple process. We received a
20 letter saying "we bought this," so we said sent a letter
21 back saying, "Thank you. We'll correct our records."
22 Period. No further indication one way or the other what's
23 involved.

24 Q This assignment -- and take a look at the date --
25 predated the Notice of Revocation; is that correct?

1 A It probably did. Again different unit. Completely as
2 administrative function.

3 Q I have no further questions.

4 CHAIRPERSON HOPPIN: Thank you. Ms. Olson, I
5 would like to take a lunch break until 1:30 and you can
6 begin with your redirect at that point.

7 (Whereupon a lunch recess was taken at
8 12:33 p.m.)

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1 AFTERNOON SESSION

2 1:31 P.M.

3 CHAIRPERSON HOPPIN: When you're ready for your
4 redirect, we're ready for you.

5 MS. OLSON: We're back on the record?

6 CHAIRPERSON HOPPIN: Yes.

7 MS. OLSON: Thank you.

8 REDIRECT EXAMINATION

9 BY MS. OLSON:

10 Q Mr. Stretars, did you or any of your staff -- back up.

11 You were asked a series of questions about
12 whether you inspected the property in question; right?

13 A That's correct.

14 Q And did you -- and you answered that you didn't?

15 A Yes.

16 Q Did you or your staff ever attempt to access the
17 property at any time?18 A Yes. When my staff was down in the area during the
19 period of time, we evaluate the change petition. And I
20 asked if he could get in contact with the parties down
21 there to go on the property. And he was successfully able
22 to get ahold -- I'm not sure which party, but he was
23 denied access at that point this time.

24 Q Who denied the access?

25 A As far as I know, it was -- it would have been the

1 Great Springs people, I think at the point in time.

2 Q It was Great Springs?

3 A I think so.

4 BY MS. OLSON:

5 Q Mr. O'Hagan, I'm going to ask you the same question.

6 Did you ever attempt to visit the property in question?

7 A Yes.

8 Q Were you successful?

9 A No.

10 Q So you were denied access to the property?

11 A Correct.

12 Q And who denied you access to the property and why?

13 A The Morongo Band of Mission Indians and their
14 representatives.

15 MR. SOMACH: I'm sorry. I didn't hear that.

16 MR. O'HAGAN: The representatives of Morongo.

17 BY MS. OLSON:

18 Q So you would have liked to have been able to tell the
19 Board what you saw out there at the inspection if you
20 could have; correct?

21 A Correct.

22 Q Mr. Stretars, you were asked a series of questions
23 about the crop showing up the aerial photos. My question
24 to you is if the crops that were indicated on the report
25 of licensee, such as alfalfa, were grown, what's the

1 seasonality of those crops?

2 A Alfalfa is a year-round crop.

3 Q What about an orchard?

4 A Orchard is year-round.

5 Q Would you agree if those crops were present on the
6 property they would show up at any time of the year on an
7 aerial photograph?

8 A They should, yes.

9 Q Mark, what was -- there were some questions about the
10 nature of the protest that Morongo filed to the Ahadpour
11 Change Petition; correct?

12 A Correct.

13 Q You talked about the nature of that protest not being
14 related to non-use; is that correct?

15 A Yes.

16 Q Can you add anything about the nature of the protest
17 and why it might bring up questions about non-use?

18 A Well, the issue was specific in the response relative
19 to them denying access to the Ahadpours, the license, to
20 their property. So the issue comes up there. As much as
21 that's an access issue, it's still if they're denied
22 access to the property, how can you actively farm the
23 property? How can you make beneficial use of that water?

24 Q Thank you.

25 Mr. O'Hagan, did you consider the availability --

1 let me back up.

2 There was a series of questions whether there was
3 actually water in the stream during the 1990s. My
4 question to you is: Do you have any evidence of water
5 availability in the 1990 period that you can think of?

6 A Look at the companion filing for the point of
7 diversion is License 660 and the reports under those, that
8 license show that there has been water available year
9 round.

10 Q Thank you.

11 CHAIRPERSON HOPPIN: John, I'm sorry. I was
12 writing. I can't write and listen at the same time.

13 Was your question, Samantha, about the adjoining
14 water right and availability of water?

15 MS. OLSON: Yes. This is in response to the
16 series of questions about how we can say there was
17 actually water in the spring during the 1990s when we
18 didn't get a chance to inspect and we're going based on
19 aerial photos.

20 My follow-up question to John was: Is there any
21 evidence that he can think of that would show water was in
22 fact there in the spring during the period.

23 CHAIRPERSON HOPPIN: And the answer was, John?

24 MR. O'HAGAN: The answer is that the companion
25 filing covers the same point of diversion, the spring.

1 CHAIRPERSON HOPPIN: That's what I thought you
2 said. I'm sorry. I was writing and wanted to make sure I
3 understood what you said. Thank you.

4 BY MS. OLSON:

5 Q Mr. Stretars, do you read everything that you're asked
6 to sign under penalty of perjury?

7 A Yes, I do.

8 Q And do you know personally if all licensees,
9 permitees, applicants, statement filers, et cetera,
10 carefully read everything they submit and sign?

11 A I wouldn't know personally, no.

12 Q I just wanted to clarify that for you personally.

13 And when you are looking at conflicting
14 information that may be on a report or a permittee report,
15 are you called on to use your professional judgment when
16 you look at those kind of conflicts?

17 A Yes. It's kind of a matter of determining what really
18 is happening out there in the real world, not necessarily
19 what the person thought or so forth. So yes
20 professionally, I evaluate and determine what has the most
21 potential for being the truth.

22 MS. OLSON: Thank you very much. That's all I
23 have.

24 CHAIRPERSON HOPPIN: I think Mr. Mono has a
25 question and I have a question.

1 During the period of time from, say, the mid 60s
2 to 2005, it's my understanding -- correct me if I'm wrong,
3 please -- that users of water were required to file
4 reports, but we didn't necessarily take enforcement action
5 against them or did we?

6 MR. O'HAGAN: The requirement to file a triennial
7 report of a licensee has been a condition on these
8 licenses. The Board has not had an active enforcement at
9 those reporting, whether they filed or not. And then in
10 the past, people could just check boxes and there was no
11 enforcement of that.

12 We did identify on reports sometimes if it should
13 be a compliance inspection, but we also had limited staff
14 to conduct compliance inspections statewide.

15 CHAIRPERSON HOPPIN: Would it be correct, John --
16 I'm not trying to put words in his mouth, so you can lash
17 out at my --

18 MS. OLSON: I won't object to your questions.

19 CHAIRPERSON HOPPIN: Would it be correct to say
20 that prior to legislation, in 2007, we didn't have an
21 enforcement policy that required people to file the
22 reports and there wasn't necessarily much of a consequence
23 if they didn't.

24 MR. O'HAGAN: That is correct.

25 CHAIRPERSON HOPPIN: I believe Ernie has a

1 question

2 ENGINEER MONA: My questions are more generally
3 related to their direct testimony as opposed to their
4 redirect.

5 So if I may, no one objects, Mr. O'Hagan, I have
6 some questions regarding the treatment that different
7 water rights that utilize State water diversion, place of
8 use.

9 Understand based on your Exhibit 1, you have 30
10 years of experience. And part of the experience you were
11 a licensed inspector; is that correct?

12 MR. O'HAGAN: That is correct.

13 ENGINEER MONA: If you came across a project that
14 had a spring water from a single point of diversion to an
15 identified place of use and that diversion was based on a
16 pre-1914 and a post-14 right, how would you evaluate the
17 use of water under those different rights?

18 Would you first rely on the establishing the use
19 of water under the higher priority right than evaluate the
20 use of water under the second right?

21 MR. O'HAGAN: First off, we would identify the
22 total beneficial use of water that we had considered made
23 under the license during the authorized period under the
24 permit and come up with a total amount, regardless of the
25 basis of right. And it would depend on whether we would

1 reduce our recommendation on whether this other right was
2 adjudicated. If it was not, then we would recognize the
3 full amount and the license get a term that says if it's
4 later adjudicated, this license may be reduced
5 accordingly.

6 ENGINEER MONA: In this instance, we have the
7 White Water Decree, as stated in your page number 2 of
8 your Exhibit Number 1 where you state that, "The decree
9 recognized rates and priorities from a diversion 28 which
10 is a POD described under License 659;" is that correct?

11 MR. O'HAGAN: That's correct.

12 ENGINEER MONA: And for the pre-1914 right, it
13 states, "The decree recognized 12 CFS and for the
14 post-1914 right identified .16 CFS." That is equivalent
15 to the license rate diversion authorized under License
16 659; is that correct?

17 MR. O'HAGAN: I think you're talking about the --
18 if you go down to paragraph 40.

19 ENGINEER MONA: It's the fourth paragraph,
20 page 2.

21 MR. O'HAGAN: Paragraph 40.

22 ENGINEER MONA: Correct.

23 MR. O'HAGAN: Yes. No. What I'm saying is the
24 total rights that the -- were recognized were .2 CFS under
25 the decree, but the licensed quantity is only .16 CFS of

1 that total quantity. And that's because of the different
2 priority base. The .12 CFS, which is a recognized
3 pre-1914 for domestic stock water and irrigation use, that
4 has a priority date of 1877.

5 ENGINEER MONA: In that case, I'd like to refer
6 you to Exhibit Number 16, which is a copy of the license.
7 Attached to that copy is a license inspection report.
8 It's signed by a hydraulic engineer dated 1928, looks
9 like.

10 Anyway, on the second page of the inspection
11 report, third paragraph down, the report states that, "In
12 filing proof of appropriation of water under the White
13 Water adjudication proceeding, the applicant claimed to
14 have irrigated 32.5 acres in the past. However, it has
15 not shown that any such acreage has been irrigated. The
16 area which has been cleared has been under cultivation
17 from time to time is about equal to that claimed for
18 irrigation. About eight acres of the cleared land is high
19 and could not be irrigated by the present diversion system
20 unless pumps were used to elevate the water."

21 In your review of the record, has there ever been
22 any diversion from the licensed point of diversion other
23 than gravity that would have been able to irrigate
24 anything more than the apparently 13 acre feet of water
25 described under the license? 13 acres of land described

1 in the license?

2 MR. O'HAGAN: To my knowledge, there is no
3 improvements that allow more than -- allows even the 13
4 acre irrigation since the records after Mr. Pettit
5 inspection.

6 ENGINEER MONA: Is it possible the diversion
7 water under the report of diversion water under the
8 license, which have been reported under the statements
9 filed or the reports of licensing filed, is it possible
10 that the person filing those reports were strictly
11 reporting use of water under their claimed pre-1914 right
12 as opposed to the post-1914 right because use of water did
13 not exceed the amount that would have been able to divert
14 under the pre-1914?

15 MR. SOMACH: Objection. That calls for
16 speculation.

17 CHAIRPERSON HOPPIN: Would you come up to the
18 microphone?

19 MR. SOMACH: Objection. That calls for
20 speculation.

21 CHAIRPERSON HOPPIN: And while you're there, you
22 know, if I had done this correctly, I would have called
23 Mr. Mona after you did your re-cross. So if you could
24 avoid asking questions under re-cross that deal with Mr.
25 Mona's questions, I would appreciate you covering for my

1 mistake.

2 MR. SOMACH: I will be more than happy to cover
3 for your mistake.

4 MS. OLSON: I'll respond to the objection that
5 Mr. O'Hagan is listed as a witness and is allowed to opine
6 on these types of questions.

7 CHAIRPERSON HOPPIN: Overruled. Thank you. Go
8 ahead.

9 MR. SOMACH: The question -- the objection is not
10 he rendered an opinion. It's that he's speculating in
11 rendering the opinion and it calls for speculation.
12 Speculation is not appropriate.

13 CHAIRPERSON HOPPIN: So that point, how would
14 someone know what you think?

15 MS. OLSON: I think Mr. O'Hagan's direct
16 testimony does respond in part to this type of questioning
17 that if you were going to use one or the other right, you
18 would begin with higher priority right. If I'm
19 understanding Mr. Mona's question, it goes to that. If
20 there was only X amount of acres to be irrigated, couldn't
21 that be covered under the pre-14 right? And it just seems
22 like a similar question to something that's already
23 testified to in Mr. O'Hagan's declaration.

24 CHAIRPERSON HOPPIN: Go ahead, Mr. Mona.

25 ENGINEER MONA: Thank you.

1 Just one final question. On Exhibit 16, the
2 actual license, it states that, "The diversion of this
3 license, which are to be directly applied to irrigation
4 with use without storage should not exceed the rate of one
5 cubic foot per second continuous flow to each 80 acres of
6 irrigated land." That phrase "without storage," does that
7 include any future for storage whether it be surface or
8 underground, in your opinion?

9 MR. O'HAGAN: As existing, that term prohibits
10 storage of water under this license. A petition was filed
11 for adding underground storage, the Board would consider
12 that and make a decision to add that under the petitioning
13 process.

14 ENGINEER MONA: Thank you very much.

15 CHAIRPERSON HOPPIN: Thank you.

16 Mr. Somach, recross.

17 MR. SOMACH: Just a short recross.

18 RECROSS EXAMINATION

19 BY MR. SOMACH:

20 Q Just following up, Mr. O'Hagan, on that last question,
21 the approval of underground storage, the following up on
22 the last question that you were asked about underground
23 storage from Mr. Mona, am allowed --

24 MS. OLSON: Can I object. The follow-up would be
25 on questions from the Advisory Team and the Board.

1 MR. SOMACH: When do I get to ask the question --
2 wouldn't it be better if I do it when it's fresh in
3 everybody's memory?

4 CHAIRPERSON HOPPIN: I think we're in the
5 crossfire of me having him come up here at an
6 inappropriate time. It was no fault of his. So I'm going
7 to have to ask you not to ask that. All I can do is
8 sincerely apologize.

9 MR. SOMACH: You'll remember as a placeholder.

10 BY MR. SOMACH:

11 Q Let me ask, Mr. O'Hagan, you testified that you were
12 denied access by the Morongo Band of Mission Indians to
13 the diversion site?

14 A Their representatives, yes.

15 Q When were you denied?

16 A This was after the notice was proposed revocation was
17 out --

18 CHAIRPERSON HOPPIN: Ms. Olson, I'd like to think
19 he can answer that question himself.

20 MR. SOMACH: Not only that, I don't think he's
21 supposed to be coached

22 MS. OLSON: I'm not coaching.

23 Let me just explain this denial of access came up
24 in two different occasions; one in the context of
25 confidential settlement agreement. I want to make sure we

1 don't get in trouble. So that's what the consultation was
2 about.

3 CHAIRPERSON HOPPIN: Okay. That was a real good
4 save or one of the two.

5 MR. O'HAGAN: As Samantha said, it was during
6 settlement discussions.

7 BY MR. SOMACH:

8 Q Are you saying I denied you access?

9 A It was -- yeah, we were trying to get access to the
10 property and we were denied.

11 Q When you say "we were trying to get access," are you
12 saying the prosecution team was trying to get access?

13 A Yes.

14 Q Did we ever deny access to any State Water Resources
15 Control Board member, other than the prosecution team, in
16 terms of undertaking normally an ordinary inspection, to
17 your knowledge?

18 A To my knowledge, no.

19 MR. SOMACH: I'll remember the question. That's
20 all the questions I have.

21 CHAIRPERSON HOPPIN: Ms. Olson, your exhibits.

22 MS. OLSON: Chairman Hoppin at this time --

23 CHAIRPERSON HOPPIN: On Mr. Been's comments, I
24 feel it is subject to the hearsay rule. We will let you
25 submit it, but it subject to hearsay.

1 MS. OLSON: So at this time, I'd like to submit
2 all of our Exhibits 1 through 50, in addition adding
3 Exhibit 3.1, which would be the Somach firm questions to
4 Walt Pettit's written responses into the record.

5 CHAIRPERSON HOPPIN: Do you have any objections,
6 Mr. Somach?

7 MR. SOMACH: The only objection I have is in the
8 context of the supplemental document. We have a
9 declaration that we would like to introduce that would, in
10 our view, complete the discourse of questions associated
11 with that supplemental testimony. I have here a
12 declaration from Mr. Kelly with the various correspondence
13 between he and Ms. Olson that I think should round out the
14 discussion.

15 MS. OLSON: I'm not asking that we -- if you
16 admit any of their exhibits at this time. I would like
17 the opportunity to read the declaration. I'm just asking
18 to admit our exhibits. If they want to leave out 3.1 for
19 the time being, that's fine, too.

20 MR. SOMACH: Then I have no objection, with the
21 exception of the hearsay objection I made previously to
22 the -- what number is that? 32. I've already made that
23 objection. You've addressed that. So with that one
24 exception and with the exception of this supplemental
25 document that Ms. Olson said she would hold back, I have

1 no objection.

2 CHAIRPERSON HOPPIN: Thank you.

3 MS. OLSON: Just confirm, they're now admitted
4 into the record Exhibits 1 through 50?

5 CHAIRPERSON HOPPIN: Yes.

6 MS. OLSON: Thank you.

7 (Whereupon the above-referenced Exhibits 1-50
8 were admitted into evidence by the
9 Hearing Officer.)

10 CHAIRPERSON HOPPIN: Are you ready for your
11 opening statement?

12 MR. SOMACH: I made my opening statement a long
13 time ago.

14 CHAIRPERSON HOPPIN: So we'll move to your --

15 MR. SOMACH: Just get right into it, although if
16 you want to hear it again -- it was that good.

17 CHAIRPERSON HOPPIN: No. I want to make sure
18 that was all of it. I don't want to cut you short.

19 MS. OLSON: Chairman Hoppin, while they're
20 getting ready. I wanted to make available five written
21 copies of my opening statement, if that's okay. And I can
22 provide another copy to the Morongo Tribe and also submit
23 after the hearing an electronic copy.

24 CHAIRPERSON HOPPIN: Thank you.

25 MR. KELLY: I'll check to make sure this is on.

1 CHAIRPERSON HOPPIN: It's not.

2 MR. KELLY: Ready to go?

3 DIRECT EXAMINATION

4 BY MR. KELLY:

5 Q Good afternoon, Mr. Chair.

6 Would you each please state your name and spell
7 your last name for the record?

8 MR. JOHNSON: My name is Steven B. Johnson. Last
9 name, J-o-h-n-s-o-n.

10 MR. COVINGTON: John L. Covington. Last name,
11 C-o-v-i-n-g-t-o-n.

12 MS. KARSHMER: Barbara Karshmer. Last name is
13 spelled K-a-r-s-h-m-e-r.

14 MR. SAPERSTEIN: Robert Saperstein,
15 S-a-p-e-r-s-t-e-i-n.

16 BY MR. KELLY:

17 Q And Mr. Johnson, have you had an opportunity to review
18 your direct written testimony?

19 A Yes, I have.

20 Q Is that testimony, your testimony, is correct?

21 A Yes, it is.

22 Q Mr. Covington, have you had an opportunity to review
23 your written direct testimony?

24 A Yes, I have.

25 Q Is it correct?

1 A Yes, it is.

2 Q Ms. Karshmer, have you had an opportunity to review
3 your written and direct testimony?

4 A Yes, I have.

5 Q Is that testimony correct?

6 A It is.

7 Q Mr. Saperstein, have you had an opportunity to review
8 your direct testimony?

9 A Yes, sir.

10 Q Is that correct?

11 A Yes.

12 Q Mr. Johnson, can you explain for the Board your
13 position, your expertise, and your experience with the
14 tribe?

15 A My position, I'm the Corporate Vice President of
16 Stetson Engineers and also principle engineer. Stetson
17 Engineers was founded by Tom Stetson in 1957 was a water
18 resources/water supply firm. It's a full service water
19 resource/water supply firm. That's all we is water
20 resources and water supply for western United States. We
21 work for several Indian tribes.

22 My experience, the firm's experience with the
23 Morongo Band of Mission Indians goes back about 30, 35
24 years. My personal experience is about 20, 25 years.
25 We've been representing the Morongo Band of Mission

1 Indians in water supply and water resources and on
2 occasion water rights issues during that period of time.

3 Q And so when you say that you've represented the
4 Morongo tribe, that's in relation to the reservation
5 within which this property we're talking about now is
6 encompassed?

7 A That's correct.

8 Q And what, if anything, did you do or your firm do with
9 respect to the water rights that are at issue in this
10 proceeding?

11 A Related to License 659 when the tribe was considering
12 the land purchase, the property purchase, obviously, we
13 became aware there were water rights associated with that
14 land purchase. We were asked through legal counsel --
15 through Ms. Karshmer's office, we were asked by legal
16 counsel to review the water rights to make sure the water
17 rights were in good standing associated with the property
18 acquisition, which is what we do.

19 We have general contact with the State Board
20 Division of Water Rights on a regular basis who we
21 represent on a lot of different clients in relation to
22 water rights in the state of California. So it was a
23 normal procedure for us to review the water rights
24 associated with the property acquisition.

25 Q So did you then review the water right file or make

1 any contact with respect to license number 659?

2 A Yes, we did. As a matter of normal practice, we did
3 contact the State Board and acquire copies of the State
4 Board file, whatever the State Board had in their file.
5 And at that time -- today, it's not as easy to get those
6 files. But back then, we were able to acquire files
7 direct from the State Board and review those files.

8 And as part of that review -- it's all been
9 presented, so far I'm doing a little bit of a repeat. As
10 part of that review, there were some notice of outstanding
11 reports of licensee that we became aware of. And part of
12 our work was to contact the State Board and find out what
13 the status of those were and report that to the tribe's
14 legal counsel.

15 And as a result, those reports of licensee were
16 subsequently submitted to complete the record. And our
17 job was to double back with the State Board staff and make
18 sure that the records were intact and complete and there
19 were no outstanding issues associated with those water
20 rights in relation to the property transaction to complete
21 the sale. That was our job.

22 Q So when you say you contacted the Board, do you know
23 who you talked to?

24 A I don't remember. Again, this was back in the -- talk
25 about memory in this group. This is over ten years ago.

1 But we have like I said, we have regular contact with the
2 State Board. It was State Board staff Division of Water
3 Rights. And it was more than one contact. It was at
4 least three or four contacts initially and then subsequent
5 contact to make sure that the records were complete and
6 intact --

7 MS. OLSON: Chairman Hoppin, I'm sorry. I need
8 to make a tiny objection. None of this stuff about
9 contacting the division for the purpose of Great Springs
10 submitting reports is in his direct testimony at all. He
11 talks about doing a reconnaissance later after the fact
12 looking at historical record. But based on this
13 declaration, it looks like you only got started in 2003.

14 CHAIRPERSON HOPPIN: Clarification so it
15 coincides with the written record.

16 MR. KELLY: I can do it one of two ways. I can
17 have -- Mr. Johnson can up back on rebuttal and explain in
18 a little bit more detail what he covered at the
19 reconnaissance level in his written testimony, or I can
20 just try to speed this along and get done today and just
21 have him explain in more detail what I would have him
22 testify on rebuttal. So I can do it on rebuttal to
23 rebut --

24 MS. OLSON: We would object. I don't understand
25 why that would be rebuttal testimony and not in the

1 direct -- the original declaration.

2 CHAIRPERSON HOPPIN: We're asking for a
3 clarification of definition of reconnaissance, I believe,
4 aren't we?

5 MS. OLSON: Well, I was objecting because he's
6 testifying to matters before his actual declaration states
7 he became involved. That would be testimony outside the
8 scope of his direct.

9 MR. KELLY: Mr. Chairman.

10 CHAIRPERSON HOPPIN: Respond to that, please.

11 MR. KELLY: There was quite a bit of testimony on
12 direct testimony that the prosecution team elicited with
13 regard to notice that was in the record and whether the
14 tribes knew certain things at certain times and what
15 happened.

16 So what I would do is I could wait for rebuttal
17 and call Mr. Johnson and ask him these questions to
18 rebut --

19 CHAIRPERSON HOPPIN: But if Mr. Johnson's tenure
20 was after the period of time in question, it seems like
21 maybe there was someone else from Stetson that may have
22 investigated this and not Mr. Johnson. Seems like there
23 is a disconnect in the time period here.

24 MR. KELLY: Understood. And I'll ask that and
25 we'll see if we can clear this up.

1 BY MR. KELLY:

2 Q Mr. Johnson, you had indicated you've worked with and
3 for the Morongo Tribe on their water rights for 25 years.

4 A That's correct. Actually, I have been working with
5 Stetson -- I've been with Stetson for just over 35 years.
6 So the work that we're discussing here working for the
7 Morongo Indians has always been under my supervision. We
8 did have other staff that contacted State Board, but it
9 was always under my supervision.

10 Q So to the extent Stetson Engineering contacted the
11 Board and inquired and did investigations about water
12 rights, that happened under your supervision?

13 A Absolutely correct. Yes.

14 CHAIRPERSON HOPPIN: That satisfies me. Thank
15 you.

16 MR. KELLY: Thank you.

17 BY MR. KELLY:

18 Q And so when your office contacted -- in your regular
19 communications with the State Water Resources Control
20 Board and the Division of Water Rights, does your office
21 regularly try to contact different departments in a
22 Division of Water Rights to make sure you've covered all
23 your basis or do you normally make a single contact?

24 A Typically, our contacts have been directly with the
25 State Division of Water Rights staff. And we always have

1 been able to get the information we needed directly from
2 staff.

3 Q As a result of your firm's work, was there any
4 indication that there was a revocation pending prior to
5 the acquisition of the property by the Morongo Band?

6 A No, sir, there was not.

7 Q I'd like to go to Morongo Exhibit 8, please.

8 Mr. Johnson, if you can just generally describe
9 what we're looking at and if it's of any help orient what
10 we see here with the aerial paragraphs that the
11 prosecution team used earlier so we can get an idea of
12 where we are.

13 A Sure, I can do that first, actually. You see I've got
14 a pointer that can help.

15 As you can see in the middle of this exhibit, it
16 says point of diversion and there is an arrow to this area
17 here, that's the same point of diversion that was shown on
18 the aerial photographs. They were showing several
19 sections of land going north/south in this area. So they
20 were showing an area that would basically go right through
21 here.

22 Q So what does this exhibit depict?

23 A To get -- just to get referenced a little bit, you can
24 see in the legend here we're depicting the area of the
25 Morongo Indians reservation as the hashed area. So all of

1 the hashed area you see here are areas that represent the
2 Morongo Indians reservation.

3 Q Is that the current reservation?

4 A That's the current reservation boundary. And as was
5 described earlier and probably can be described better,
6 you will see some gaps in the contiguous reservation
7 boundary, and those are being picked up as time goes on to
8 make the boundaries more current. So this was not the
9 original boundary. But this is the current reservation
10 boundary.

11 Q Okay. So the hashed area is the existing reservation,
12 the present reservation. What are the -- I also see some
13 dashed lines. What are the black dashed lines?

14 A These dashed lines that you see are State of
15 California Department of Water Resources designated
16 boundaries for groundwater basin. We call them hydrologic
17 subunits. The purpose of the depicting those here is to
18 show this heavier dashed line, which is the Cabazon
19 subunit, which is essentially what we call the Cabazon
20 groundwater basin, the dark line there.

21 Q I also see there is a dark red line that goes from
22 about the middle of the reservation, kind of travels a
23 little bit southeast, labeled "AA."

24 A Yes.

25 Q What is that line?

1 A That is a cross section we're going to show in a
2 subsequent exhibit. What I refer to A, that's A in the
3 circle and A prime.

4 Typically, when you show something on a planned
5 view like this and you want to show it in a cross section
6 so you can see the cut away or the geology of the area,
7 you do a cross-sectional cut here, and we'll show it in
8 the other next slide.

9 But physically so I prepare you for this, when
10 you're looking at the next exhibit, you'll be looking in
11 this direction. You'll be looking from the west looking
12 easterly at a cross section of the geology through this
13 area.

14 Q And I think --

15 A Just so we picked this area, this cross section,
16 because it goes through known well locations where you
17 have good geologic information.

18 MS. OLSON: I would like to note an objection for
19 the record based on relevance for the scope and the extent
20 of the groundwater subbasin.

21 CHAIRPERSON HOPPIN: Overruled. Get to the point
22 of your questions.

23 BY MR. KELLY:

24 Q So the red line, is that the actual stream channel
25 that comes out of Millard Canyon, or is that just a

1 section?

2 A It's just a section. The stream channel actually runs
3 a little bit to the east of this down along this area
4 along the reservation.

5 Q Okay. Can we go to --

6 A Can I mention two more things?

7 I would like to point out the position of the
8 Morongo Indians reservation's north well here. We have a
9 well the tribe installed right at that location and the
10 location of the south well, which is shown as right here.
11 Those were both wells installed by the Mission Indians,
12 the Morongo Indians, to access water supplies in that
13 area.

14 Q Okay. Anything else significant about this map?

15 A No. That's it.

16 Q Can we go to Exhibit Number 9, please? Perhaps very
17 briefly, explain what this cross-section is.

18 A I had mentioned before this is looking from the west
19 looking east in a cross-section. It's basically showing a
20 cross-section of the groundwater basin, the Cabazon
21 groundwater basin and side flow into the groundwater basin
22 from the side canyon. If you took different sections
23 throughout the San Gorgonio River of canyons, you would
24 see something similar to this.

25 So here is the point -- this is the A, the A

1 prime I described. So this is the cross-section that
2 we're looking. And we're looking straight at it, looking
3 to the east. Point of diversion of this corner.

4 The important part of this particular exhibit
5 is -- and understand that the scales are different in
6 order to get all of this on the one exhibit. The vertical
7 scale is a different scale than the horizontal scale.
8 That's why you see the steep gradient here. That's
9 because we're using two different scales.

10 But effectively what's happening here is once
11 water goes underground up in this canyon area, the water
12 very rapidly goes very, very deep. And we have
13 documentation of this because of the wells in this area.
14 The water goes very, very deep and ends up supplying the
15 groundwater basin in that area, that Cabazon subunit
16 groundwater basin. Instead of these are depicted as clay
17 layers that actually underlay the San Gorgonio River. And
18 this would be considered subsurface flow of the San
19 Gorgonio River.

20 When you look at this from the cross-sectional
21 area, side flow from the canyon, unless you have an
22 extremely significant storm event where you have surface
23 water flow that will flow on the surface into the area,
24 essentially, 95, 99 percent of the time flow out of that
25 canyon does not contribute to subsurface flow of the San

1 Gorgonio River. It contributes to groundwater storage.
2 That's what this is here to show.

3 CHAIRPERSON HOPPIN: Mr. Johnson -- may I ask
4 him?

5 MR. KELLY: Absolutely.

6 CHAIRPERSON HOPPIN: Do you have any information
7 as to the relative quality of the water from the time it
8 leaves the surface versus the time it's in the aquifer
9 that you depicted here? Is there any improvement or
10 degradation of the water? Is it pretty much stagnant

11 MR. JOHNSON: It's a good question. And the
12 water quality is very high water quality coming out of
13 this canyon. Very pristine water. Very little impact to
14 the water quality upgradient and very little impact to the
15 water quality all the way in the basin.

16 The groundwater in the storage basin is also very
17 high water quality. And this is not a State Water
18 Project, but to show the concerns the tribe has about the
19 water quality in the groundwater basin, there have been
20 discussions of trying to replenish this groundwater basin
21 from the State Water Project. And the tribe has expressed
22 concerns about THMs and some of the other concerns and the
23 organics that might be present that might impact this
24 water quality.

25 And in fact, I'm a big supporter of the State

1 Water Project. I don't know if that will be an issue.
2 But, yes, this is very high water quality.

3 CHAIRPERSON HOPPIN: We have some way of getting
4 rid of salt in northern California.

5 MR. JOHNSON: Yes.

6 MR. KELLY: May I continue?

7 CHAIRPERSON HOPPIN: Please.

8 BY MR. KELLY:

9 Q And so the groundwater grade you show -- that's the
10 blue shaded area, essentially?

11 A That's the groundwater basin, yes, sir.

12 Q And does that generally reflect -- I note that up in
13 the top left-hand corner you have a point of diversion.
14 There is a precipitous drop-off.

15 A Yes.

16 Q Of course, the scales are exaggerated. But the
17 groundwater depth gets significantly deeper once you pass
18 that point of diversion.

19 Is that generally -- is it similar to what
20 happens on the surface? I mean, in other words, if you
21 get surface water coming down out of Millard Canyon, once
22 it gets past that licensed point of diversion, what
23 happens to it?

24 A Well, first of all, there is not much water above that
25 point of diversion. It's a very, very dry stream bed if

1 you saw the aerial paragraphs. It looks like an ancient
2 stream bed. It's very, very dry up there.

3 There is a bit of raising water at the point of
4 diversion at times where it's basically just wet. It's
5 damp. You see some greenery. But there is not much flow
6 here. But any wetness you see, any flow at all that you
7 see almost immediately within typically 100 or 200 yards
8 of the area that's wet, immediately percolates into the
9 ground and goes very deep and it's very dry below that
10 location.

11 Q Okay. And Mr. Chairman, I actually have a couple of
12 questions that are related to some of the direct testimony
13 about what kind of facilities are up there. I prefer to
14 just ask Mr. Johnson those questions now instead of having
15 him come back, unless there is an objection?

16 CHAIRPERSON HOPPIN: Is that all right with you?

17 MS. OLSON: This is rebuttal?

18 MR. KELLY: It would otherwise be rebuttal
19 because it wasn't contained in his direct testimony. It
20 asks him about what he's seen up on the property when he's
21 been up there.

22 MS. OLSON: I'm looking for some sort of standard
23 to know what would be appropriate rebuttal versus what
24 appropriately should have been in his direct. So if you
25 could explain that and it seems reasonable -- you have

1 your expert here. It's not clear to me why he wouldn't
2 have spoken to all these items in his direct.

3 MR. KELLY: Mr. Behzad testified on direct
4 testimony that there is a pipe in the ground that spews
5 water up on this property. And we had no idea that would
6 even be an issue of how the water actually gets above
7 ground.

8 And so Mr. Johnson and I think Mr. Covington as
9 well are going to testify about their knowledge of
10 whatever facilities Mr. Behzad talked about on direct.

11 MS. OLSON: So as long as they're clear, because
12 it's in his testimony he says he didn't start working with
13 the Morongo Tribe until 2003, or somewhere there about.
14 So, you know, right away he was saying he's been working
15 with the tribe for 25 years, so we're taken aback by that.
16 And I'm not sure how we resolve that.

17 CHAIRPERSON HOPPIN: I think we're better off if
18 we do this during rebuttal, if your witness doesn't have a
19 problem traveling and going some places so we don't get
20 this --

21 MR. KELLY: That's fine.

22 BY MR. KELLY:

23 Q Mr. Johnson, were you involved at all with the tribe's
24 Petition for Change of water license?

25 A Yes.

1 Q Do you have any idea why they were seeking to change
2 the authorized place and purpose of use of the license?

3 A Sure. To help facilitate the use of the water and
4 make good use of the water.

5 Q So can you explain generally what they've done to
6 achieve that end?

7 A Well, one of the things I was going to point out -- if
8 we can put that last exhibit back up. Because this is
9 actually -- I had mentioned this on the previous exhibit,
10 but you'll see the north well here, which I described on
11 the other exhibit and you can see the south well over
12 here.

13 The intent of the north well install was
14 originally designed and sited to pull subsurface flow out
15 of the canyon in an attempt to divert subsurface flow or
16 the surface water rights established in the canyon. That
17 was the intent of the location. That's why it was drilled
18 at this location and so deep to try to access the
19 subsurface flow.

20 On the other hand, the south well, which is down
21 in this location, was designed specifically to pump
22 groundwater out of the Cabazon basin. So both facilities
23 were installed at a cost of well over \$2 million with the
24 intent of accessing these water supplies.

25 Q Thank you.

1 And I just want to I guess clear up this question
2 of the length of time that you've worked with the tribe,
3 because there seems to be some question about that. Do
4 you have your testimony in front of you?

5 A Yes, I do.

6 Q Is there somewhere in your testimony that you're aware
7 of that you said you've only been working with the tribe
8 on water issues since 2003?

9 A No, there is not. If there was, it should not have
10 been there because I've been working with the tribe for
11 20, 25 years.

12 Q So the record is clear, you've been working with the
13 tribe on water-related matters on the Morongo reservation
14 that we saw in Exhibit 8 for 20 to 25 years?

15 A Twenty to 25 years for all types of resources and
16 water supply issues.

17 Q Thank you.

18 Mr. Covington, can you explain a little bit about
19 your background, your position, your experience with the
20 tribe?

21 A Yes. I started with the tribe in 2005 as a
22 Water/Wastewater Division Manager. Shortly thereafter,
23 within about three years, I moved into an administration
24 position. And so my day-to-day efforts include overseeing
25 the day-to-day operation of the tribe's water/wastewater

1 facilities, the conveyance systems, the irrigation systems
2 up in numerous canyons location on the reservation. Of
3 course, one being Millard Canyon. And working closely
4 with the local municipalities on water -- regional water
5 issues that may or may not effect -- directly effect the
6 Morongo tribal lands.

7 Q Okay. And do you know a little bit about what the
8 tribe intends to do with water on the reservation,
9 including water authorized for diversion under License
10 659?

11 A Yes, I do. Looking at the big picture, we looked
12 at -- it all kind of came around in 2006 under the
13 petition that we filed for consolidation of all three
14 licenses in Millard Canyon. Specifically, License 659 was
15 going to be a part of that equation. We were looking to
16 be able to utilize that water, one, on the tribe's land
17 that it presently owns as well as change the types of use
18 for that water, most notably domestic municipal supplies
19 for that area.

20 Q And where does the tribe -- so does the tribe supply
21 water to the reservation?

22 A Yes, we do.

23 Q Does anybody else supply water to the reservation?

24 A No. No one supplies water to the reservation.

25 Q And so the water right portfolio essentially that the

1 tribe had, is that the sole source of water supply for the
2 reservation land?

3 A Sorry. I didn't hear the first part of your question.

4 Q The water right portfolio, the group of water rights
5 that the tribe holds, riparian, pre-1914 license right is
6 that the sole source of water supply for the reservation?

7 A Yes, it is.

8 Q Mr. Covington, thank you.

9 Ms. Karshmer, can you explain a little bit about
10 your background, former and current position, and
11 experience with the tribe, please?

12 A Essentially. I've been the attorney for Morongo in
13 various capacities since the mid 1970s. I started working
14 with Morongo on various projects early in my career.

15 In around 1980, early 1980s, I became general
16 counsel to the tribe. Stayed in that position until about
17 a year-and-a-half ago when I went into semi-retirement.
18 And I'm still doing work on projects for the tribe as
19 well.

20 Q And what was your involvement at all -- well, let me
21 back up. Can we get Exhibit 8 back up, please?

22 So you're familiar with the current exterior
23 boundary of the reservation?

24 A Yes, I am.

25 Q One of the things I noticed when we saw the older maps

1 of the reservation the prosecution team had up there,
2 there was more gaps or more holes in the reservation area.
3 Why the change?

4 A When the reservation was first established in the
5 1870s, land had been given to the railroads in order to
6 coerce them and convince them to come west. And the
7 railroads were given every other section of land. And so
8 the tribe, even though it was there at the time, lost a
9 lot of the land going through that area to the railroads.
10 The federal government had already given the alternate
11 section of land to the railroad. So the tribe was left
12 with the other pieces of land.

13 Now that the -- in the last 20 to 30 years, now
14 that the tribe has some financial resources, the tribe has
15 been making every effort to buy up the land so they have a
16 consolidated piece of land because they're the only
17 government on that land. They're the ones that regulate
18 land use. They're the ones that regulate water use.
19 They're the ones that regulate environmental quality. No
20 one else does that for them. It's up to them.

21 In order to best regulate and protect their
22 lands, they need to control the lands immediately -- the
23 land they surround as well as the lands that are part of
24 their reservation.

25 Q So was the acquisition of the Ahadpour property unique

1 or is that part of a larger sequence of acquisition?

2 A That was part of a larger sequence of acquisitions.

3 The tribe bought up a total of 1800 acres of property just
4 in Millard Canyon alone.

5 It's hard to tell from this map and all the
6 pictures you've seen, but there is a fair amount of
7 reservation where most of the people live down kind of in
8 the flats. And the tribe is -- actually goes up both
9 mountains on both sides of the San Gorgonio Pass and
10 Millard Canyon is heading up into the mountains. And it's
11 all that land that the tribe has protected that they have
12 and that they have bought up to protect in order to
13 protect their watershed.

14 CHAIRPERSON HOPPIN: Counsel, may I ask a
15 question?

16 MR. KELLY: Absolutely.

17 CHAIRPERSON HOPPIN: When the tribe acquires new
18 parcels, are they held in separate trust documents? Or
19 are they considered an addendum to a master trust holding,
20 if you will? You have to pardon my ignorance.

21 MS. KARSHMER: That's not at all ignorance.
22 That's an excellent question.

23 What happens is when the tribe itself buys land,
24 they buy land in a fee simple title. The tribe then
25 transfers it to the United States. There is a whole

1 process that's gone through where they have to get a
2 special title report. The United States has to do an
3 environmental assessment. The United States sends out
4 public notice that it's considering taking this land into
5 trust, because the land is being taken off the tax base
6 and put under the tribe's jurisdiction.

7 So notice is sent to the State Clearinghouse so
8 all the State agencies have notice of that. All the local
9 governments have notice of it and an opportunity to
10 comment. That happened on these properties.

11 CHAIRPERSON HOPPIN: When they add land into the
12 trust holding, does it take a long period of time? Or
13 once there is initial holdings, is it --

14 MS. KARSHMER: Usually, it takes a few years
15 because there's various lead times on all the notices that
16 have to be published. I think in the case of the Ahadpour
17 property, the Bureau of Indian affairs apparently
18 misplaced the papers for a year or two, so it took a
19 little longer than usual.

20 CHAIRPERSON HOPPIN: People think that happens
21 around here, too.

22 MS. KARSHMER: No, I don't believe that. So it
23 took a little bit longer than usual. But I think it was
24 placed into trust in about 2004.

25 CHAIRPERSON HOPPIN: My last question relating to

1 that, to be held in trust as a unit, do the parcels have
2 to be contiguous, or as shown in this map with the hashes,
3 can they, in fact, be separated and held? I'm going to
4 use master trust, probably a better phrase for it.

5 MS. KARSHMER: Everything that's shown in hashes
6 is part of the Morongo Indians reservation and is held in
7 trust. They don't have to all be contiguous. The
8 United States has the authority to take land into trust
9 that's either adjacent to or contiguous with existing
10 reservation land. So it will all be part of the
11 reservation.

12 CHAIRPERSON HOPPIN: So if there is a gap in it
13 for a period of time, it is still held as part of -- is
14 there a better word than a master trust? I mean, it's
15 all --

16 MS. KARSHMER: Everything else is held in trust.
17 You see there is --

18 CHAIRPERSON HOPPIN: Has one unit basically.

19 MS. KARSHMER: There is some -- like a box
20 that -- that little box there, that little piece of land
21 is not in trust. It hasn't been purchased by the tribe.
22 It's owned by non-Indians. So that land is not part of
23 the reservation, per se. But it's surrounded by the
24 reservation.

25 CHAIRPERSON HOPPIN: Thank you.

1 BY MR. KELLY:

2 Q I actually may have a follow-up on the Chair's
3 question. And that is what he talked about a master
4 trust. I was going to ask this a little bit, but I'll ask
5 it now. It's a good time.

6 When land is taken into trust is there some
7 document that aggregates the reservation together again,
8 or does the United States take a piece of property in
9 trust as a State-owned piece of property and it's part of
10 the reservation?

11 A It's my understanding it becomes -- once it's taken
12 into trust, as long as it's within the exterior
13 boundaries, it becomes part of the reservation itself.
14 There is not a separate document saying this is now -- the
15 reservation is different because we now have this piece
16 filled, but it just becomes part of the reservation.

17 CHAIRPERSON HOPPIN: We don't have subsets to a
18 master reservation, if you will.

19 MS. KARSHMER: No. They're all part of the
20 reservation.

21 BY MR. KELLY:

22 Q So when a property is transferred, when a tribe
23 acquires a piece of property in fee, there is application
24 made to the United States to accept that land into trust
25 status as part of that reservation. When that happens, is

1 the conveyance of that property that the tribe held in fee
2 to the United States kind of a stand alone or is there
3 some other action required, other than simply transferring
4 that individual property into trust?

5 A My understanding it's simply that piece of land needs
6 to -- is transferred to the United States in trust. And
7 the deed is recorded in the county recorder's office
8 showing now the United States holds that piece of land in
9 trust for the Morongo Band of Mission Indians.

10 Q And perhaps for the benefit of the Chair, that whole
11 process and the documents that did that for this property,
12 do you know whether or not we've supplied those to the
13 State Water Resources Control Board?

14 A I believe that's part of my testimony.

15 Q Do you know whether it was attached to the motion to
16 dismiss that was filed and discussed earlier today?

17 A I believe they were.

18 Q A lot of that documents in that whole process is laid
19 out in those documents.

20 Let's back up, because we will be able to skip
21 ahead in a second here. Tell me about your involvement
22 with the acquisition of the Ahadpour property.

23 A The Ahadpour property -- at the time the Ahadpour
24 property was being purchased, there had been other land
25 that had -- in Millard Canyon also that had been owned by

1 the Cabazon Water District. Cabazon Water District sold
2 their property to the tribe. They had previously used
3 that land up in Millard Canyon as well as pipelines for
4 their water supply for their non-Indian population for
5 service area.

6 The tribe determined and Cabazon determined that
7 they didn't even have a right-of-way to get into that
8 land. They thought they had a right-of-way, but it turned
9 out it had never been properly approved. So they had no
10 access to the land. And Cabazon came to the tribe and
11 asked if they could get a new right-of-way. The tribe
12 said, no, we're not giving rights away across the
13 reservation. We don't want heavy commercial use in
14 Millard Canyon, because they were talking about building a
15 water treatment plant or trucking water. They didn't want
16 that kind of use going back and forth across the
17 reservation.

18 So they turned down the request of Cabazon and
19 ended up buying Cabazon's land. At the same time, Great
20 Springs Waters had purchased the land that the Ahadpours
21 had, and the tribe entered into an agreement with Great
22 Springs Waters of America to acquire that land from them,
23 the land and water rights that were attached.

24 And there was mentioned today of the Ahadpours
25 and their desire to have a water bottling facility or

1 truck water out. And there was also mention of the fact
2 that people were denied access to the land. That's not
3 exactly true. People who lived in that area and had land
4 in that area were allowed to go and come to their land.
5 But they weren't allowed to carry out commercial ventures
6 in that canyon, because it was very pristine land and the
7 tribe was concerned about their water quality being
8 degraded and their general environmental quality on the
9 reservation being degraded if that land were use for
10 commercial ventures.

11 Q So in paragraph eight of your direct testimony, you
12 talked about the lack of public access, those properties
13 being landlocked, and that you state here that the tribe
14 doesn't grant right-of-ways across the reservation for
15 access. Did the tribe ever deny the Ahadpours access?

16 A Not for their personal use. Not that I'm aware of.
17 It may be on occasion a gate was locked, but that was not
18 intended to be a denial of access. Perhaps John could
19 speak to that better than I could though since he's on the
20 ground.

21 Q Okay. And then after you -- after the tribe -- when
22 the tribe acquire the property, the Ahadpour property?

23 A In 2002. In October -- September or October 2002.

24 Q And then did the tribe engage in the process to put
25 that land in trust?

1 A The tribe immediately sent the State Water
2 Resources -- my office immediately sent the State Water
3 Resources Control Board a notice that we had obtained the
4 land.

5 Q If we can stop there because that -- can you pull up
6 exhibit number -- Morongo Exhibit Number 16, please?

7 You said you immediately notified the State Water
8 Resources Control Board. Is this a copy of that letter?

9 A I believe it is.

10 Q And so this went -- so you purchased the property you
11 said October?

12 A I believe it was October.

13 Q Of '02. And so November?

14 A November we sent the letter.

15 Q To notify the State Water Resources -- State Water
16 Resources Control Board you were the owner of the property
17 and the water associated with that property?

18 A We sent it certified return receipt requested and we
19 also sent along with it a Notice of Assignment, which
20 follows this.

21 Q And the Notice of Assignment?

22 A Notice of Assignment of the water rights.

23 Q Begins on page 3 of this exhibit. So that assignment
24 shows received there November 4th of 2002 by the State
25 Water Resources Control Board up right-hand corner?

1 A That's what it says.

2 Q If we can go down a little bit. So that was dated
3 then October 31, 2002?

4 A Yes.

5 Q Is that consistent with your memory of notification to
6 the State Water Resources Control Board?

7 A Absolutely.

8 Q Do you know when the revocation -- the Notice of
9 Revocation went out for this proceeding?

10 A It went out about five or six months later. I think
11 in April 2003 was the revocation. So the tribe had
12 already notified the Board that the transfer had taken
13 place.

14 But I think I maybe skipped ahead. Maybe I
15 didn't fully answer your question. But I don't -- talking
16 about memories, I don't remember what your question was.
17 But I think I may have gotten off on the wrong track.

18 Q We talked a little bit about after the tribe had
19 purchased the property and I was asking about whether or
20 not the tribe initiated the process to put the property in
21 trust. You had said you immediately notified the State
22 Water Board.

23 A The way the tribe would do it would be very shortly
24 after acquiring the land, they would submit a petition to
25 BIA to take the land into trust.

1 Q Was that done?

2 A That was absolutely done.

3 Q And did the BIA approve it? Is the Ahadpour property
4 now in trust?

5 A Absolutely. Yes.

6 Q Thank you.

7 When the tribe purchased this property, were you
8 aware of any pending revocation proceeding?

9 A No, we weren't. I wasn't -- my firm was not.

10 Q Did the tribe conduct or obtain the title -- do a
11 title search prior to acquiring the property?

12 A The tribe always does a title search.

13 Q Was there anything on title search that indicated a
14 revocation of proceeding?

15 A There was nothing on the title search that indicated a
16 revocation of right proceeding. Stetson Engineers found
17 there was no reason not to go ahead with the purchase
18 because there was no revocation of water rights pending.

19 And earlier -- if I'm not getting myself into
20 trouble -- it was said that the tribe had notice based on
21 a September 28th, 2000, letter. That was --

22 Q That's the prosecution team Exhibit Number 35.

23 A Yes. They said that gave the tribe notice there was a
24 problem with the water rights.

25 Well, if you read the whole letter, on the next

1 to last paragraph on the first page it talks about there
2 having been a phone call with me and that I requested that
3 the division hold processing of the petition for the
4 change because we were trying to work out a purchase of
5 the land. And there was perhaps going to be some sort of
6 a overall settlement of the issues. And the State Board
7 says that unless the division adheres to the contrary,
8 this is the course the division will pursue. They were
9 going to simply hold off on processing the change petition
10 for the Ahadpours, which led us to believe that all was
11 well.

12 And then it does go on to say that they -- this
13 is the letter. The Ahadpours they didn't receive reports
14 in certain times so the reports had some inconsistencies
15 in them. And there is a final paragraph saying they were
16 going to revoke if you don't get your reports right.

17 But I assumed that is the same thing that goes
18 out in every Board letter that says you have to follow
19 state law. And it's simply a boiler plate language to
20 warn people they have to keep up with their reports. In
21 fact, I think other respondents at the time had similar
22 admonishments at that time that needed to file the reports
23 timely.

24 Q And Mr. Johnson, when your firm looked into this, the
25 copy of the water file, did you know the reports were

1 missing? And did you contact anybody at the State Water
2 Board, Division of Water Rights about that?

3 A Yes, we did. I alluded to it briefly. Yes, we were
4 aware of this. And we did talk to the State Board and
5 they indicated there were some outstanding reports. And
6 as I alluded to earlier, we did discuss this with legal
7 counsel indicating that there were some outstanding
8 reports that we needed to have addressed or make sure at
9 least things were in order before we move forward.

10 Q And to your knowledge, was that taken care of before
11 the property changed hands?

12 A Yes.

13 Q Were the reports filed?

14 A Yes. Actually, the reports were filed. As I
15 mentioned earlier, we actually did a follow-up with the
16 State Board staff to ensure they were filed and accepted
17 and everything was in order before we moved forward.

18 MS. OLSON: Chairman Hoppin, I'm having a hard
19 time understanding why this testimony from Mr. Johnson
20 wasn't in his direct. There is nothing. His testimony
21 starts with a review of the file, and he starts with,
22 "It's my understanding in 2003."

23 So I'm struggling to understand it. Now, he's
24 testifying that he was very involved in 2001 working with
25 Great Springs to file amended reports, when none of that

1 is in his declaration. And why that's appropriate for
2 rebuttal, I'm struggling with understanding that.

3 CHAIRPERSON HOPPIN: I'm having a bit of a
4 problem understanding that.

5 MR. KELLY: I understand that, Mr. Chairman.

6 And here's where we are, is that sometime ago, we
7 requested that the State Board issue something that
8 provided us more specific notice of what we were going to
9 be faced with when we got here. And we were told no. So
10 we did the best job that we could under the circumstances
11 to get evidence of alleged non-use for 80 or 90 years of
12 time.

13 And without knowing the specifics about what this
14 proceeding was going to be about, we didn't get their
15 direct testimony until after we filed our direct
16 testimony. So we had no idea what the specifics of this
17 proceeding were going to be. And to the extent that there
18 has been testimony about what we knew and when we knew it,
19 well, we didn't know any of that from the hearing notice.
20 We didn't know any of that pursuant to the Notice of
21 Proposed Revocation.

22 MS. OLSON: With all due respect --

23 MR. KELLY: I'll be done in just a moment.

24 And then so when our witnesses put together their
25 testimony, our witnesses, given the very vague nature of

1 the allegations in the notice and in the hearing notice,
2 put together testimony that they thought was relevant to
3 the issues that were raised in that notice.

4 Well, it turns out after being here and after
5 seeing the direct testimony, there is a lot of allegations
6 about notice that these good folks have. And so the
7 testimony that they're providing now, they would have
8 provided much more detail in their written direct, had we
9 known that the proceeding was going to occur as it's
10 occurring.

11 MS. OLSON: However, the issue with notice is
12 their issue. The issue of whether the tribe was on notice
13 about non-use is a defense they've raised to the
14 prosecution.

15 So I'll answer that. And also the Morongo tribe
16 got a delay in this hearing originally because they knew
17 that Robert Saperstein, who is the person who's testified
18 in his direct about the submittal of those reports, was a
19 key witness. And so they knew that these reports were
20 important, yet Mr. Johnson, who's an engineer, who's now
21 testifying as to personal knowledge what's in those
22 reports, is not in his direct testimony.

23 And they knew full well that those reports were a
24 key issue in this hearing. So that's what I don't
25 understand why you needed to hear our direct to know that

1 that testimony was important and it should be in your
2 direct.

3 MR. SOMACH: Can we pull up Mr. Johnson's written
4 direct testimony, please? That is Exhibit 5, Morongo
5 Exhibit 5.

6 CHAIRPERSON HOPPIN: Before you go on, Ms. Olson,
7 would it take care of your concerns if we save this for
8 the rebuttal portion?

9 MS. OLSON: I'm not so sure it would, because
10 rebuttal is meant to respond to something that gets raised
11 by our case-in-chief. And they had knowledge of the
12 original Notice of Proposed Revocation that the issue of
13 non-use in the 1990s was going to be addressed. They had
14 knowledge of their own witness, Mr. Saperstein who filed
15 the reports of the amended reports for that time period.
16 So it's not clear to me why that would be a rebuttal
17 testimony rather than direct.

18 And it's little misleading if you read Mr.
19 Johnson's declaration, he said he did an historic review.
20 Today, he's saying he worked with the tribe for 20, 30
21 years. I was under the impression when I reviewed this he
22 was looking at the file after the fact and now he's doing
23 personal testimony. And it's just not appropriate for
24 rebuttal.

25 CHAIRPERSON HOPPIN: I'm trying to find someplace

1 where it fits, because I find it interestingly, quite
2 frankly, the series of events that people have gone
3 through to try and do this purchase of land and do the
4 transfer in a diligent way.

5 And so why it wasn't included, I don't know.
6 But, to me, it seemed like it's very pertinent information
7 to what we're hearing today.

8 MS. OLSON: We can simply notice for the record
9 it's surprise testimony. I'm interested, too. However,
10 it seems somewhat unfair to have a bunch of new testimony
11 that we didn't get to see in advance.

12 I'm interested. I was interested in evidence
13 that would support Saperstein's declaration as well and
14 looked for it and couldn't find it. So I just want it to
15 be clear --

16 CHAIRPERSON HOPPIN: We're not done with these
17 concern yet?

18 MS. OLSON: I don't think we are. But I don't
19 necessarily want to exclude it either, because I think
20 it's interesting and important. But I wanted our
21 objections noted for the record.

22 CHAIRPERSON HOPPIN: I'm going to take a moment
23 with my counsel so I don't do something that a non-jurist
24 would do in the interest of trying to be fair here. So
25 we're going to take a five-minute break and then we will

1 resume.

2 (Whereupon a recess was taken.)

3 CHAIRPERSON HOPPIN: In conversation with
4 counsel, I'm confirming my concerns going back to the
5 letter from Mr. Stretar that said because of lack of
6 reporting there may be a revocation of a water right. And
7 I believe that's what we're trying to get here, but I do
8 feel it's more appropriate to handle this in rebuttal than
9 right now.

10 But if I were in receipt of the letter signed by
11 Mr. Stretar saying that it was part of your effort that
12 this water right may be subject to revocation for lack of
13 reporting, I would want to respond to that. I'm going to
14 let them do that on rebuttal.

15 MS. OLSON: If that's the case and because of the
16 scope -- it seems like to be an enormous amount of new
17 testimony, I would prefer we have it here so I have the
18 ability to cross-examine on that.

19 CHAIRPERSON HOPPIN: Okay. Fair enough.

20 MR. KELLY: Mr. Chair, I appreciate that. If I
21 can just maybe to a little better explain our position.
22 If you can go ahead and put that up on the screen.

23 CHAIRPERSON HOPPIN: That would help because I'm
24 trying to explain what I assume your position is.

25 MR. KELLY: I appreciate that. And this is the

1 hearing team's ruling on our, among other things, request
2 for more specificity in the hearing notice so we can
3 actually better prepare our direct testimony.

4 And if you look at the last two sentences of that
5 paragraph, it says, "It's required by the hearing notice
6 the prosecution team will serve Morongo with the
7 prosecution team's written testimony and exhibits in
8 advance of the hearing. And accordingly, the Morongo Band
9 will have ample time to prepare for cross-examination and
10 rebuttal."

11 And that's what we've done. To the extent there
12 is actually testimony about all this environmental quality
13 stuff, I think we should have a leeway given we were
14 denied more specificity. Early on we tried to do
15 discovery to find out more detail about what was going to
16 happen at this hearing. We were denied that request as
17 well. I would just ask for a little bit of latitude in
18 having these folks explain in more detail what they did.

19 And if we can pull up Morongo Exhibit 5 again and
20 go to page 3, paragraph nine, and Mr. Johnson, can you
21 just explain generally what that paragraph nine is?

22 MR. JOHNSON: Sure. Basically the intent of the
23 paragraph -- there was no intent to mislead anything. The
24 point of the paragraph is to describe the fact this tribe
25 performed a due diligence exercise associated with License

1 659 in the process of acquiring this real property and
2 that we, as their consultant, were assigned to do that due
3 diligence.

4 That's the intent of number nine is to explain
5 the fact that's what we were doing is due diligence. The
6 section in here that describes the review of historical
7 records, simply the fact that we didn't own -- the tribe
8 didn't own the right at that time, so we had to look at
9 historic agriculture records from other sources being the
10 State Board.

11 So there is no intention to suggest that we
12 weren't working for the tribe before that because we've
13 been working for the tribe for many, many years. We
14 needed to look at historical records because somebody else
15 was using that right. That was a review of the records to
16 make use the historical records were complete for use and
17 recording?

18 BY MR. KELLY:

19 Q The process you were describing when I was asking my
20 question, is that more detail on the due diligence that
21 you conducted?

22 A Absolutely. Correct.

23 CHAIRPERSON HOPPIN: Mr. Olson, I will concur
24 when I listened to Mr. Johnson give his explanation in
25 reference to due diligence in quotes, what he was talking

1 about is what they went through doing their due diligence.
2 I don't know that it could have been much else than what
3 he described to you.

4 MS. OLSON: Except that in his testimony -- he
5 makes it seem pretty clear he was just reviewing the
6 historical file. Yet, today, he's saying I was actually
7 involved in it.

8 My point is that the issue of being notified,
9 regardless of its relevance for this, was their defense.
10 That's part of their case in chief. And it's their burden
11 and they didn't include it in their direct testimony.

12 CHAIRPERSON HOPPIN: Mr. Kelly.

13 BY MR. KELLY:

14 Q Mr. Karshmer, you were testifying a bit about the
15 process of putting this property in trust. And if my
16 memory is as bad as everybody else's who's been up here, I
17 think you said the property actually had been taken in
18 trust; is that correct?

19 A As far as I recall, it was around 2004 when it was put
20 into trust.

21 Q When the tribe purchased the property, were you aware
22 of any pending revocation proceeding?

23 A Absolutely not.

24 Q And the prosecution team's Exhibit 35 I think we
25 talked about it -- but I'm not certain. We did talk about

1 that. We asked the questions.

2 Okay. Mr. Saperstein, what was your involvement
3 with the Ahadpour property?

4 A I'll start a little bit further back from just
5 straight on the Ahadpour property.

6 I'm enacted as Special Water Rights Council down
7 to first Great Springs Waters of North America who was
8 wholly owned subsidiary of Nestle Waters North America.
9 They purchased the Ahadpour property prior to my firm's
10 involvement. So there was a real estate firm that handled
11 that underlying transaction.

12 At some point -- the date is slippery going back
13 over 12, 13 years. Probably around 1999, early 2000,
14 after it had closed on the purchase of that property, we
15 got involved in helping them deal with the last-minute
16 issues that came up over the failure to file the
17 statements and get the assignment from Ahadpour over to
18 Great Springs. And that's when I got involved.

19 Q Do you work for the tribe?

20 A No.

21 Q So you worked for a party, not -- you worked for a
22 business not party to this proceeding?

23 A That's correct.

24 Q And you said you got involved with the missing reports
25 or the lack of reports?

1 A I don't remember whether it came from the tribe or
2 from a contact through my client, Great Springs. The way
3 they provide responsibility, they have a natural resources
4 manager that was responsible for the development of their
5 intended use on the property. And somehow I think he got
6 notice of this misdirected letter vintage 2000 to the
7 Ahadpour saying you haven't filed statements of diversion
8 for some number of years.

9 And then I think Great Springs realized, wait a
10 minute, not only did the Ahadpours not own the property or
11 the water rights, Great Springs needed to figure out how
12 to get the records and the reporting up to date and asked
13 for my involvement.

14 Q Did you fill out those forms?

15 A With the interaction in coordination with the natural
16 resource manager, my office filled out the forms and I
17 signed.

18 Q Did you send those to the state Water Board?

19 A Yes.

20 Q And those are the reports that were attached to your
21 direct testimony?

22 A That's correct.

23 MR. KELLY: With that, I have no more questions,
24 Mr. Chair.

25 CHAIRPERSON HOPPIN: I suspect the question I was

1 going to ask has been asked.

2 Ms. Olson, cross.

3 CROSS-EXAMINATION

4 BY MS. OLSON:

5 Q Good afternoon. Thank you for being here.

6 Mr. Johnson, just so I'm clear, can you give me
7 your specific involvement working for the Morongo tribe
8 with dates and activities?

9 A All of my work or associated with License 659?

10 Q Let's go with License 659.

11 A License 659. I was contacted by the tribe in early
12 2000, 2001, in that range. And indicated that the tribe
13 would be purchasing some property that had water rights
14 associated with it. And we were asked to look at the
15 water rights that were associated with the land to make
16 sure that they were valid and in good standing with the
17 State Board.

18 Q So beginning early 2000, 2001 you say?

19 A In that range, yeah.

20 Q Did you ever visit the property in question during the
21 relevant time period of 1991 through 1995?

22 A I don't know. I may have. I've been on the
23 reservation probably several hundred times and I've been
24 in the area of Millard Spring probably eight to twelve
25 times. But I don't know -- that far back, I don't know I

1 was there at this particular time.

2 Q Did you ever visit the property how about from 1995 to
3 1999?

4 A I don't know. I'd be guessing and I shouldn't do
5 that.

6 Q No, I appreciate that.

7 The follow-up question was did you ever observe
8 any acreage being irrigated on that property during that
9 time period? But I suppose you don't remember visiting
10 you might not seeing irrigation?

11 A Normal irrigation, I know we did visit an area a
12 little upstream of Wild Bear Ranch. When I was there, it
13 was not being irrigated, but it was certainly evident
14 irrigation had occurred.

15 Q Wild Bear ranch?

16 A Yes.

17 Q Do you know what section number that?

18 A It's a section above 32.

19 Q So did you see the aerial photographs that we were
20 putting up?

21 A Yes.

22 Q Would that be the section immediately above 32?

23 A Yes.

24 Q Did you ever personally observe 500 stock animals on
25 the property?

1 A I never counted stock animals, but I did observe stock
2 animals on the property, yes.

3 Q What time what year?

4 A During the entire period. Every time we were out
5 there, we observed either stock animals or talked to staff
6 that stock animals were present on the property.

7 Q Do you know what the stock animals they might have
8 been?

9 A No. Actually, that question did come up and the
10 answer was generally owned by folks on the reservation.
11 Could be several different tribal members.

12 Q So there is a letter from Mr. Saperstein to the
13 division. It's dated July 6th, 2001. That's Exhibit 37.
14 And on page 6, Mr. Saperstein mention engineer experts
15 that estimated flow. Are you one of the engineers he's
16 referring to?

17 A I don't believe so. I don't recall working with Mr.
18 Saperstein at this time. I think he had his own
19 consultants.

20 Q So did you assist Mr. Saperstein in preparing any of
21 the amended license reports?

22 A I don't believe.

23 Q For 1988 through 1999?

24 A I don't believe so. I could have had a discussion
25 with him back but we did not participate in those

1 findings.

2 Q So you're testifying the Morongo tribe exercised due
3 diligence before acquiring License 659; correct?

4 A That's correct.

5 Q And so now I'm hearing that you actually yourself went
6 through the file and conducted due diligence?

7 A Myself and my staff.

8 Q Rather than reviewing what the Morongo tribe had
9 actually done?

10 A No. We were actually -- I'm not sure what you mean by
11 the tribe had actually done.

12 We were actually asked to review License 659 to
13 get information we could so we could advise legal counsel
14 whether or not that license was in good standing with the
15 State Board ready for transfer. That was my participation
16 from the initial assignment until they actually acquired
17 the property was I actually was able to come to legal
18 counsel and say that in our discussions with State Board
19 staff and our review of the files and State Board staff
20 the license was in good standing and ready for transfer.

21 Q Is it your opinion in exercising due diligence before
22 purchasing a water right that you would want to go through
23 the water right file, rather than perhaps maybe county
24 records, for example?

25 A Yes. We went through the water right file absolutely.

1 Q So then in your opinion, if you saw in the file the
2 licensee reports that are not indicating irrigation, would
3 that raise a flag for you?

4 A Not particularly. What did raise the flag were the
5 missing reports and discussion with State Board staff of
6 recognition of the missing reports to make sure the
7 reports are made current -- that the file and the reports
8 are made current.

9 Q So, Mr. Johnson, did you personally discussion with
10 division staff License 659?

11 A I do don't believe so. I believe it was one of my
12 supervising engineers.

13 Q You were just testifying as to what they told you?

14 A Yeah. Under my supervision. I'm responsible for our
15 office. I'm actually the responsible person to all work
16 done for the tribe. I assume that responsibility. So I
17 do have staff that sometimes do assignments. But
18 ultimately, it's my job to make sure that work is done and
19 that I report it to my client.

20 Q Thank you. So then back to diligently reviewing the
21 file, you noticed that the actual owner in the 1990s had
22 not submitted complete progress reports or had ceased
23 submitting reports after 1995; correct?

24 A That's what it looked like, yes.

25 Q So are you the original person that notified Great

1 Springs of this? I'm kind of curious. I guess I can ask
2 Robert later. Did you notify anybody about that?

3 A Only legal counsel. That's all. I have very little
4 contract with Great Springs.

5 Q You notified your legal counsel there was a series of
6 years where there was no report from the licensee?

7 A There appeared to be some missing reports, yes.

8 Q What about the inspection reports way back in '64 and
9 '68 indicating all irrigation had ceased. Did that raise
10 a flag for you?

11 A Sure, it did. We read some of the discussion with Mr.
12 Pettit and Mr. Pettit before. So we did review those
13 files. It was interesting to see he was the field
14 engineer at that time.

15 So we did look at those. And our conclusions
16 that was described here is that we concluded at the end
17 that no action was taken. There was some irregularity at
18 the time, but no action was taken.

19 And from our position -- from my position in
20 working with the State Board and Division of Water Rights,
21 our position was if there was a problem, it would have
22 been addressed long before now. So based upon Mr.
23 Pettit's report and the timing involved between that
24 period of time and what we were looking at, it's not that
25 we didn't notice it, but we certainly didn't give it much

1 pause.

2 Q So let me give you a hypothetical, since you're an
3 expert.

4 Say you didn't know that the Morongo tribe was
5 interested in purchasing this water right and there was
6 evidence in the file of historic non-use. And you were
7 looking at it from the perspective of protecting the
8 Morongo tribe's groundwater rights or other rights they
9 may have. Would you still feel the same way about the
10 relevance of old reports showing non-use?

11 A I would have done exactly the same thing. I would
12 have reported it to legal counsel and I would have done
13 everything that we would normally do, because I didn't
14 know of any other way to do it at the time, what we
15 normally do to check with State Board.

16 Q Would you take the same position that it probably
17 wasn't a problem with the file and some reports saying
18 water had been used and there's not going to be a problem.
19 We won't object to somebody changing the purpose of use,
20 would you have objected had -- I'm confusing. I'm
21 confusing myself.

22 MR. KELLY: I'm going to interpose an objection
23 here.

24 I don't know -- I mean, it might be relevant what
25 Mr. Johnson's firm told the tribe. But I don't know if

1 it's really relevant to pose a whole bunch of different
2 hypotheticals about what might have happened.

3 I think the only relevant information for the
4 purpose of this proceeding is what work they actually did
5 and what flags were raised from what they reviewed and
6 what was conveyed?

7 CHAIRPERSON HOPPIN: I think we were getting a
8 little abstract here.

9 MS. OLSON: Except that Mr. Johnson did enter
10 into testimony that he was of the opinion that these flags
11 in the record weren't really a problem.

12 So I just merely wanted to know what he would
13 think if he was on a different side of things. If Morongo
14 hasn't purchased the right and, in fact, if something else
15 was trying to exercise this right that hasn't been used
16 whether he would be so nonchalant about the non-use in the
17 file.

18 MR. JOHNSON: I wouldn't characterize our look at
19 nonchalant. We looked at those. Our work was to look to
20 State Board staff to see whether there was an issue with
21 State Board, whether they had a concern with them. If
22 State Board staff didn't have a concern with them, we made
23 the assumption everything was okay.

24 BY MS. OLSON:

25 Q Your testimony about State Board staff not having a

1 concern is based on a conversation that somebody else had
2 with division staff who's not here?

3 A Yeah. Supervising -- he's a licensed engineer,
4 supervising engineer. He's a licensed State Engineer.

5 Q It's still hearsay, nonetheless. And we don't have
6 that person here.

7 So can we bring up -- let's go to more flags
8 then. Exhibit 35, which is the division's 2000 letter.

9 I know you testified, but I just want you to look
10 at the first paragraph on the top of page 2, that letter
11 again and tell me why that wouldn't put Morongo tribe on
12 notice that there might be a possible revocation action
13 with this license?

14 MR. KELLY: I'm going to object. That would call
15 for a legal conclusion about whether or not they were
16 probably on notice about revocation proceeding.

17 MS. OLSON: Mr. Johnson is testifying here as an
18 expert in water rights. He went through the file to do
19 due diligence for a purchaser. I think it's fair to ask
20 him. Everything with water rights is legal in some sort
21 of nature. I think it's a fair question.

22 CHAIRPERSON HOPPIN: I'll agree with Mr. Olson.

23 BY MS. OLSON:

24 Q If we can go to top of page 2, I'm going to have you
25 re-read that paragraph that mentions the specific Water

1 Code sections that deal with revocation and tell me why
2 that wouldn't put you or Morongo tribe on notice that
3 there might be a possible revocation in the works here.

4 A Well, because several reasons.

5 But one, I think legal counsel Karshmer mentioned
6 earlier that in context -- this appeared to be included in
7 context with discussions that was earlier in the letter
8 about the same missing reports that I talked about a few
9 minutes ago. When we looked at this and saw it was
10 referencing the missing reports and we discussed it with
11 State Board staff and then when the State Board received
12 and acknowledged the written reports, this became no
13 longer very relevant.

14 Q Let's go to that exhibit where the State Board
15 received Mr. Saperstein's amended reports. If we can go
16 to Exhibit 37, page 2. Underneath basis of information
17 regarding exercise of License 659. Do you see that first
18 paragraph here where it says you asked that I provide you
19 with some explanation regarding the information relied
20 upon to complete the report of licensee for the years
21 prior to Great Springs ownership. Do you see that written
22 there?

23 A Yes, I do.

24 Q Would that suggest to you that the division was
25 interested in evidence that would support the subsequent

1 filing of missing reports?

2 A I mean, I don't know what they were thinking. This is
3 a correspondence between I believe -- I didn't see the
4 cover. I believe between State Board and Rob Saperstein.

5 Q That's correct.

6 A I assume it's just correspondence between the two to
7 get the filings squared away and make sure they're
8 appropriately filed.

9 Q That's correct. I'm asking you based on that
10 sentence, does it look like division staff was wanting
11 some evidence to support those reports?

12 MR. KELLY: Calls for speculation.

13 MS. OLSON: Okay. I'll move on.

14 CHAIRPERSON HOPPIN: Ms. Olson, if you're going
15 to read -- I have what may be considered a speculative
16 question. And I will take your interruption if need.

17 But Mr. Johnson, we've heard this water goes a
18 couple of hundred feet, at best, past the point, if you
19 will. And that it isn't like big springs up in Shasta
20 County.

21 Why would you consider this to be more valuable
22 on the surface than having it just go into the groundwater
23 that underlies the land that we're dealing with anyhow?

24 We heard earlier that the quality is essentially
25 the same. There is no degradation of groundwater without

1 us adding State Water Project, which I appreciate.

2 And counsel, if you object to me asking this
3 question, it's something that's confused me for quite some
4 time. And Ms. Olson, if you'd like to object --

5 MS. OLSON: No objection.

6 MR. KELLY: No objection.

7 CHAIRPERSON HOPPIN: It seems like we're
8 quibbling over something that by default someone would
9 have had -- other than the fact they have to list it a
10 little bit further may be quite a little bit further --
11 but if you're not comfortable answering the question, just
12 tell me so.

13 MR. JOHNSON: I'm fine answering the question
14 because, as I mentioned, we've done a lot of water
15 resources/water supply for the tribe. The tribe
16 considered both supplies, both the surface water and
17 availability of whatever surface water supplies they can
18 get up in that area and utilize for beneficial use to be
19 very valuable, along with the ability to allow the water
20 to proceed downstream and be stored in the Cabazon basin
21 and produce it out of the Cabazon basin.

22 So both ways of exercising beneficial uses are
23 important to the tribe. And that's why they ultimately --
24 and we helped them site and design the wells for that
25 purpose. The south well being a well that will be

1 producing water out of the groundwater basin that's
2 ultimately the source of supply to that groundwater basin
3 is Millard Canyon subsurface flow and groundwater out of
4 the canyon.

5 And the north well is water we produced as a
6 subsurface division of the subsurface flow. Both are very
7 important.

8 We have looked at ways in which -- with the
9 tribes's involvement we have look at ways in which the
10 surface water up in the canyon can be used directly
11 because, as you point out, you can save pumping costs if
12 you can divert it on the surface and use it locally using
13 gravity flow. So we've looked at different ways to do
14 that.

15 The surface water supply in that canyon is -- I
16 would -- significantly -- I wouldn't say extremely, but
17 it's significantly scarce. As you can see by the aerial
18 photographs, there is very little water flow up there.
19 And it is an unusual situation when you drive up there and
20 see water flow from the top of the canyon and all the way
21 down to the 10 freeway. So there is an extremely rare
22 condition.

23 So having a surface water diversion for
24 beneficial use is a little tough. But having subsurface
25 diversions are possible and the groundwater supply is the

1 ultimate location where we can pump the water and recover
2 it for beneficial uses, too.

3 CHAIRPERSON HOPPIN: Thank you for your
4 indulgence in my question.

5 BY MS. OLSON:

6 Q So you say you've had a longstanding experience
7 working with staff in the Division of Water Rights;
8 correct?

9 A Yes.

10 Q In your experience, does the division always provide
11 everyone with all their potential concerns clearly and
12 unequivocally when you talk to them?

13 A Until recently -- I know there is budget problems with
14 the State. We won't go into those. But until recently,
15 our historic experience with the State Board staff
16 Division of Water Rights has been very good. We've always
17 been able to get good information from State Board staff.

18 Q I'm happy to hear that.

19 Mr. Covington, good afternoon.

20 A Good afternoon.

21 Q You testified that the water portfolio listed in your
22 declaration is the entire sole source of water to the
23 Indian reservation?

24 MR. KELLY: Actually, misstates his testimony.

25 BY MS. OLSON:

1 Q I thought that you had asked the question whether his
2 declaration stated that all the sole -- I wrote down sole
3 source of water to the reservation. So that's what I'm
4 asking about. If that's incorrect, maybe you can correct
5 me.

6 A All the water -- well, all the water that is on the
7 reservation is -- I don't believe I put it in my
8 declaration. Mr. Kelly did ask me that question.

9 All the water, whether it's surface water,
10 groundwater that is on the Morongo Indian reservation is
11 our sole source of supply. Is that what you're asking?

12 Q That wasn't exactly what I was asking. I was going to
13 ask --

14 CHAIRPERSON HOPPIN: That was his answer though.

15 MS. OLSON: Bring up Exhibit 50, Water Rights
16 Exhibit 50. And it's page 29, 30.

17 BY MS. OLSON:

18 Q This is a little bit beside the point, but I want to
19 ask somebody about this because I'm curious. You'll see
20 here Decreed Water Right 2.1 is 52 and one is 53. I'm
21 interested in what you can tell us about the decreed water
22 rights to the United States of America for the benefit of
23 Morongo reservation.

24 MR. KELLY: I would object. I don't even know if
25 any of our witnesses have actually read this decree, know

1 its contents. Without some foundation, I don't know it's
2 appropriate to ask those folks their interpretation of a
3 judicial decree.

4 CHAIRPERSON HOPPIN: Ask him if he feels
5 comfortable answering.

6 MS. OLSON: His testimony talks about the tribal
7 need for water. I think it's appropriate to ask whether
8 they have another decreed right or two from the original
9 White Water Decree. I'm not asking you to opine or
10 interpret it. I'm asking you to read it and tell me if
11 that is a decreed water right that the Morongo tribe has
12 and uses.

13 CHAIRPERSON HOPPIN: Go ahead.

14 MR. KELLY: Again, I would object. I don't know
15 if Mr. Covington has ever even seen this decree. And I
16 don't know if there has ever been a change to the decree,
17 if we have all of the subsequent decisions where the court
18 has modified the decree. And so he didn't testify about
19 this right under the decree.

20 So I'm just concerned that we're getting to a
21 point now where we're asking the witness to read and
22 speculate as to the meaning of a judicial decree.

23 I don't know what the relevance of this is, but
24 there is another component to it, another type of water
25 right they have for use somewhere on the reservation.

1 MS. OLSON: I would just respond that Mr. Kelly
2 asked a line of questions about the source of water to the
3 reservation. And I'm just noting that there are two
4 decreed rights for the United States of America for the
5 benefit of the Morongo reservation that I -- if you don't
6 know, you don't know. Maybe I can ask Barbara later.

7 MR. KELLY: We'll stipulate there are other
8 decreed rights that apply that are for the reservation.

9 MS. OLSON: Thank you.

10 BY MS. OLSON:

11 Q Mr. Covington, did you ever visit the property during
12 the relevant time period 1991 through 1995?

13 A No.

14 Q Did you ever visit the property during 1995 to 1999?

15 A No.

16 Q On page 6 of Mr. Saperstein's letter to the division
17 that's dated July 6th, he mentions engineers that were
18 helping him submit amended reports. Were you one of those
19 engineers?

20 A I was not.

21 Q Did you ever personally observe any acreage being
22 irrigated in this time frame?

23 A As I mentioned before, I was never on the property.

24 Q Okay. Is the tribe currently using the water
25 United States License 659?

1 MR. KELLY: Objection. Relevance.

2 CHAIRPERSON HOPPIN: I would like to know if we
3 are using the water or not. Are they using it or aren't
4 they?

5 MS. OLSON: I think it's relevant. Sort of --

6 MR. KELLY: I feel that we're going to stray off
7 into discussions and settlements and agreements we've had
8 with the Board regarding the need to continue to use this
9 water while petitions are pending and while the
10 litigation --

11 MS. OLSON: Is there a settlement that I don't
12 know about the Board --

13 MR. SOMACH: Can I respond to that question? And
14 I think it has been responded to that, number one, they
15 still can run cattle up there.

16 MS. OLSON: Excuse me. Mr. Somach has not been
17 sworn in as a witness. If he's going to testify --

18 MR. SOMACH: It's regarding to the testimony and
19 the whole testimony on the south well and north well talks
20 about utilizing this exact water. To suggest anything
21 otherwise -- and third, with respect to this particular
22 water right, well, I'll just leave it at that.

23 BY MS. OLSON:

24 Q Is it possible that the tribe is using this water
25 under a different right?

1 A No.

2 Q If nobody picks up the water under License 659, where
3 does it go?

4 A The water would traverse downstream for approximately
5 no more than maybe 100 yards, at best.

6 Q And then what happens?

7 A It goes underground.

8 Q And does the tribe then have a well that picks up that
9 water underground?

10 A We have the potential to do that. We have not done
11 that as of yet.

12 Q The tribe is not diverting any water from underground
13 water wells?

14 A We are not. Well, I'm sorry. Let me correct myself.
15 I was thinking of the south well. We do have one other
16 additional well farther to the west. So I would say yes.
17 And I don't believe -- I believe it's Exhibit 9 or
18 Exhibit 8. I don't believe it was listed on there.

19 Q And if license 659 is properly revoked and there are
20 no intervening users between the point of diversion and
21 the Morongo tribe's well, can you think of any reason why
22 the tribe couldn't just pick it up from its well under
23 ground?

24 MR. KELLY: Objection. Calls for speculation. I
25 don't know that it's necessarily relevant to the

1 revocation.

2 CHAIRPERSON HOPPIN: Doesn't call for
3 speculation. It gets back to the question you asked of
4 Mr. Johnson a bit earlier. And I don't know that I do see
5 that as speculation.

6 MS. OLSON: Do you want me to repeat the
7 question?

8 MR. JOHNSON: I'm just making sure I can answer.

9 BY MS. OLSON:

10 Q My question is if license 659 is properly revoked and
11 there are no intervening water users in between the point
12 of diversion of that right and the wells where Morongo has
13 groundwater wells, is there any reason why they wouldn't
14 pick it up under a groundwater right?

15 A I don't believe there is any reason why they could
16 not.

17 Q Okay. And you testified that you're an expert in
18 water rights generally?

19 A Generally, yes. General stating.

20 Q And you state in paragraph 7 of your testimony that
21 the surface water associated with licenses 659 and 174
22 have historically been used for stock watering; is that
23 correct?

24 A That is -- may I answer that? What I put in there as
25 far as 659 is the pre-1914 water rights that are read

1 under the white water adjudication.

2 Q Are you referring instead not to License 659, but the
3 .12 companion June 1977 decreed right?

4 A Yes. That's correct.

5 Q Thank you. So then I guess I don't need to ask you
6 where in License 659 stock water is authorized?

7 A No, you do not.

8 Q Thank you. Are there any other water users that have
9 wells in the Cabazon subunit groundwater?

10 A Yes. Surface.

11 Q I think I might have asked this already. So if
12 Morongo haven't purchased this right and somebody else had
13 picked up the right and started to use it after it hadn't
14 been used, then a certain amount of water wouldn't have
15 flowed to the groundwater basin and might have caused
16 injury to Morongo or some other user of that sub-basin; is
17 that correct?

18 A I would assume that, yes.

19 Q Hi, Barbara. Thank you for being here.

20 CHAIRPERSON HOPPIN: Notice she's nice to the
21 woman. I don't understand.

22 BY MS. OLSON:

23 Q I like Barbara. I like how she said the settlement
24 was amicably rebuffed. Anyway I appreciate that.

25 I don't have too many questions, but I would like

1 to ask you whether you ever notified the division of
2 Morongo's intent to purchase the water right from Great
3 Springs?

4 MR. KELLY: Objection. Relevance there. I don't
5 know that there is any requirement that a property owner
6 notify the Board of an intent to purchase this property.

7 CHAIRPERSON HOPPIN: I mean --

8 MS. OLSON: Except they're saying we had a duty
9 to notice them there was a problem.

10 CHAIRPERSON HOPPIN: If I buy a piece of property
11 I that has a water right, I don't have a duty to notify
12 you or us until after the time of purchase.

13 MS. OLSON: My point is we might have been able
14 to warn them had they notified us that they were intending
15 to buy it.

16 CHAIRPERSON HOPPIN: We don't have a requirement
17 to do that.

18 MS. OLSON: No, that wasn't my question.

19 CHAIRPERSON HOPPIN: The requirement is
20 post-purchase. And it's my recollection that there was a
21 post-purchase letter sent by Ms. Karshmer's firm in a very
22 prompt form afterwards

23 MS. OLSON: Absolutely. My question was did you
24 ever let us know before your purchase of the right that
25 you were going to --

1 MR. KELLY: Same objection.

2 CHAIRPERSON HOPPIN: Please understand you're not
3 obligated to do that.

4 MS. KARSHMER: I realize we're not obligated. We
5 had Stetson Engineers here working for us doing due
6 diligence for the tribe. We did title reports, title
7 searches to make sure there was nothing on the title
8 search on the title to the land that would indicate that
9 there was a problem with the water rights. We did our due
10 diligence. We did not notify you other than through
11 Stetson Engineers coming here and working with the staff
12 here to check the records that we thought was interested
13 in buying those rights.

14 BY MS. OLSON:

15 Q To your knowledge, do you know if Stetson ever advised
16 the division that Morongo was interested in purchasing the
17 rights?

18 MR. KELLY: That calls for speculation. Mr.
19 Johnson is here and she can just ask Mr. Johnson.

20 MS. OLSON: I will. Thank you. You're right.

21 BY MS. OLSON:

22 Q Can we bring up Exhibit 35, top of page 2.

23 Ms. Karshmer, do you recognize this letter?

24 A I believe I spoke about it earlier.

25 Q So you do recognize it?

1 A Yes.

2 Q And you see the courtesy copy at the bottom of the
3 letter to you?

4 A Yes.

5 Q Do you remember receiving the letter?

6 A I can't say that I have a specific memory of having
7 received it.

8 Q So on page 3 of your testimony, end of paragraph nine,
9 you say Morongo never -- "never received from the State
10 Board any notice or other indication of any kind that the
11 license operationally was subject the revocation as a
12 result of the Ahadpour's failure or alleged failure to use
13 the water subject to the license"; is that --

14 A That's correct.

15 Q Do you have any interest in changing your testimony?

16 A I'm sorry?

17 Q Do you have any interest in changing that testimony?

18 A No, I don't, because I don't believe that letter does
19 that. This is a letter about the petition to change water
20 rights, water usage.

21 And if you look at the top of it, it's a Petition
22 to Change. And the bottom two paragraphs on the first
23 page talk about the condition to change. As I testified
24 earlier, I read that last paragraph and I still read that
25 last paragraph as a general admonition that people need to

1 make their filings regularly with the State Water Board.
2 Not that this was particularly different than any other
3 situation because the tribe has received other letters
4 from the State Board that at the end says, remember to
5 make your filings.

6 Q Okay. But this says -- this letter says for Water
7 Code Section 1241 and 1675 if the quantity of water
8 authorized under the license has not been officially used
9 for five years or more, the right may have already been
10 lost. And the license would be subject to revocation.

11 A That I understood as simply a statement of the state
12 law. And they're talking about -- in the letter it talks
13 about the fact that reports are missing. And so, to me,
14 what this meant was get the reports in. It wasn't and
15 that if you don't get your reports in and show us, then it
16 wasn't anything.

17 Q Can you show me another correspondence to the tribe
18 where this language is included?

19 A Not the exact language, but they're similar.

20 Q To, me this language seems very different from saying
21 submit your reports.

22 A That's how I read it. As an attorney, that's what I
23 read. I assumed it was boilerplate language that the
24 Board put in all of its letters to say that you keep up
25 your reports and keep up the reporting water rights to

1 make sure it's been used.

2 Q So with all due respect, as an attorney, are you
3 saying that boilerplate language isn't important or
4 they're not important admonitions?

5 A That's not my testimony and you know that.

6 CHAIRPERSON HOPPIN: I think you asked for her
7 interpretation and she gave it to you. I don't know that
8 you agree with it.

9 MS. OLSON: Okay. I'm finished with
10 Ms. Karshmer. Thank you very much.

11 Mr. Saperstein, good afternoon. How are you?

12 CHAIRPERSON HOPPIN: See now she's been nice to
13 you.

14 MR. SAPERSTEIN: Won't last long.

15 BY MS. OLSON:

16 Q So you testified that in the spring of 2001 you became
17 aware that the division was attempting to contact the
18 prior holder of License 659; is that correct?

19 A I don't think it was so specific as to spring of 2001,
20 but around that time frame.

21 Q So let's bring up -- doesn't really matter, but just
22 make sure I'm reading things right.

23 In your declaration the very last line, line 28,
24 this is testimony of Saperstein -- do you have it in front
25 of you?

1 A I do.

2 Q So line 28?

3 A I see it.

4 Q Do you see where it says in spring of 2001 Nwana became
5 aware?

6 A Yes.

7 Q That so Nwana that's Nestle?

8 A Nestle Waters of North America.

9 Q Okay. And at that time -- well, first of all, I'm
10 wondering how you became aware. Was it the 2000 letter
11 that's Exhibit 25?

12 A I tried to answer this before clumsily. I'll do it
13 again clumsily, because I don't remember the exact
14 sequence.

15 Best of my recollection, we're talking well over
16 a decade ago. I think what happened was the principles
17 were talking. Nestle Waters America of America were in
18 negotiations with the tribe over the actual purchase of
19 the property. And what I suspect happened is that 2000
20 letter was brought to the attention of the Nestle Waters
21 folks what needs to be done. And they -- the Nestle
22 waters folks -- probably then brought the letter to my
23 firm asking what do we do and how do we properly respond
24 to this.

25 Q And so obviously the letter was important enough that

1 it got people's attention. I'm just wondering if you knew
2 why they were attempting to contact the current owners of
3 that license?

4 A As I understood it -- and actually I was reinforced
5 with my conversation with Alana who was the signator of
6 that 2000 letter, the dual concern was, number one, they
7 didn't have the right owner -- weren't contacting the
8 right owner of the property. So letters -- who knows what
9 communication was going to the Ahadpours well after they
10 no longer owned the property. That was the primary
11 concern. What are we missing, because they had seen the
12 report that property owners get timely communication.
13 That was my first concern for Nestle.

14 Secondary to that, after speaking with Alana, is
15 there is sitting on file a relatively stagnant Petition
16 for Change that hasn't been acted on for many, many years.
17 And there were missing statement of diversion reports that
18 hasn't been filed. So you said there were -- I submitted
19 to the State Board on behalf of Nestle amended statements.
20 Some of them were amended because there were clear
21 omissions in some of the filings that the Ahadpours tried
22 to make. And then there were missing reports. Those
23 weren't amended. Those were back filed reports.

24 And my discussion was Ms. Gibbs was how do we
25 handle those missing pieces? Is it appropriate for Nestle

1 to back file those reports? And she was unequivocal yes,
2 we would be delighted to receive those back filed reports.

3 Q At some point, did Alana ask for evidence to support
4 the statements in the report?

5 A She asked for the reports. And in my experience, this
6 is not the only client that I work for in submitting the
7 statements. She asked for the reports and whatever was
8 appropriate. And there is a remark section in the
9 statements to make sure that the State Board got a full
10 picture of whatever it was that Nestle chose to file.

11 Q So was the answer yes?

12 A The answer was what I just told you.

13 Q So in your July 6th, 2000, letter, Exhibit 37, under
14 basis of information regarding exercise of License 659,
15 this is your letter -- you say you asked that I provide
16 you with some explanation regarding the information relied
17 upon to complete the report. So Alana is not with here
18 with us. We couldn't locate her. I want to confirm with
19 you that she requested additional explanation?

20 A She requested that the forms be filed. And my
21 interpretation of her request that the forms be filed
22 because they were being back filed and because they're
23 half of -- roughly half of whatever the dates were being
24 amended that I provide her with some explanation of what
25 it is that they were filing. And that was done in the

1 cover letter to the reports themselves. There was no --

2 Q That's fine. So when did Great Springs of America
3 acquire License 659?

4 A I don't have that date memorized. It's not records.
5 The time of records are all part of the exhibit package.

6 Q Does 2001 sound correct?

7 A Actually, I thought it was 2000 -- October 2000, but I
8 don't -- again, I try not to memorize these kind of
9 things.

10 Q It's water rights 39, fourth page that's actually the
11 deed. Let's just bring that up.

12 And so I'm just looking at this exhibit and it
13 shows a recorded deed transferring the property and
14 recorded April 4th, 2000.

15 A The record speaks for itself. I'm trying to see the
16 date.

17 MR. KELLY: I'm going to not object. I guess I'm
18 going to ask -- I'm looking for a date as well.

19 MR. SAPERSTEIN: If you scroll down, there may be
20 an actual signing date.

21 MS. OLSON: I see dated March 30th, 2000.

22 MR. KELLY: There are quite a few dates. I guess
23 I'm going to object. The record speaks for itself. There
24 are quite a few dates on there.

25 BY MS. OLSON:

1 Q Really, the reason for the date is I want to know when
2 Great Springs notified the Division of Water Rights that
3 Great Springs had acquired the right?

4 A That would be in the Notice of Assignment that was by
5 telephone. Was probably a month before the Notice of
6 Assignment was provided. So they were slowly providing
7 notice to the State Board. And that's part of what I
8 understood to be Ms. Gibbs' concern.

9 Q So why did you file the amended and back filed the
10 other licensing reports from 1988 to 1999?

11 MR. KELLY: Object. That's been asked and
12 answered about why he filed the reports.

13 MS. OLSON: I'm not so sure. We talked about
14 whether that letter -- you know, what he was concerned
15 about.

16 CHAIRPERSON HOPPIN: He was requested to file
17 back reports; right?

18 MR. SAPERSTEIN: Yes, sir.

19 MS. OLSON: Okay.

20 BY MS. OLSON:

21 Q I'm wondering if you had a discussion with Morongo
22 tribe about the back filing of those reports and why you
23 did it?

24 A My recollection was I had no direct discussion with
25 the tribe over filing -- the filing some of the amended --

1 some of them, back filed reports.

2 Q So when you're getting together with the Morongo tribe
3 and you're thinking about purchasing this right, you
4 didn't have a discussion about possible non-use?

5 A We didn't purchase the rights from the tribe. The
6 tribe purchased the rights from us.

7 Q That's what I mean. When you had a discussion with
8 the Morongo and they were interested in purchasing the
9 right, was there ever a conversation about possible
10 non-use?

11 A I had no discussion with the tribe over purchase of
12 the property. And I testified I did not participate in
13 those negotiations.

14 Q You do not have your engineers here that helped assist
15 in preparing those reports?

16 A No.

17 Q Did you ever submit any additional evidence to help
18 support the statements that you made?

19 A No. Was never asked to. And it's not my normal
20 course of business to do anything other than file the
21 reports single page, double page reports for all my
22 clients. Never been asked to provide additional evidence.

23 Q I'm just curious now that we have established that
24 there were reports from the original owner up until 1995
25 and then you needed to back file from 1995 up until 2000,

1 did the division ask you to amend the reports from 1988 to
2 1995 or that was just your inclination?

3 A No. Sorry. I didn't mean to talk over you. Are you
4 done.

5 Q Finished.

6 A The discussion I had with Ms. Gibbs was there are two
7 issues with the Ahadpour's reporting. One was incomplete
8 forms and the other was a failure to file for a specific
9 period of time of years. My attempt was to solve both
10 those problems. She raised those issues to me.

11 Q And in those reports -- this is my last question. In
12 those reports, do you actually identify actual use of the
13 water rather than just the flow of the water?

14 A Yes.

15 Q And I'm wondering if there is any evidence to support
16 that. I mean, I'm afraid to ask because I think you would
17 have submitted it in your case in chief. But I have to
18 ask because I'm wondering why your reports would be more
19 credible than the actual owners of the property at the
20 time?

21 A I'm not sure which of the four or five questions
22 you've just sort of discussed that you might ask.

23 Q Well, my question was -- well, let me ask you this.
24 Did you visit the property from 1988 to 1995 personally?

25 A From 1988 to 1995, no.

1 Q But you signed reports under penalty of perjury that
2 use was taking place?

3 A Yes.

4 Q And so if you didn't visit the property personally,
5 I'm wondering what evidence that you have to support those
6 statements?

7 A The discussions I had with two different engineers
8 with Nestle Waters north America who had direct knowledge
9 of what they believed occurred on the property.

10 Q Who are not here today?

11 A They're not here.

12 Q And not provided any evidence in this case?

13 A Other than my testimony, no.

14 Q Okay. Well, I'm going to object to that answer is
15 hearsay as to what your engineers told you.

16 MR. SOMACH: You can't object to a question that
17 you asked.

18 MS. OLSON: Oh, yes, I can, as he's testifying as
19 a third party statement who's not present in court. I'm
20 going to very much object.

21 CHAIRPERSON HOPPIN: Mr. Kelly, I cannot see how
22 he can fill out these reports based on the opinion of
23 somebody that is not here or hasn't given testimony and be
24 reasonably comfortable that they're accurate. I mean, if
25 that isn't hearsay, please tell me the legal definition

1 thereof. To a non-jurist, that seems like hearsay.

2 I mean, there is no -- it's not like they sent
3 him the record book of actual diversions. He was asked to
4 put something together in retrospect and probably did it
5 to the best of his ability. But I don't know how we can
6 consider information that came from other parties that
7 aren't here.

8 MR. KELLY: And I can appreciate that. And the
9 question was where did that information come from. Mr.
10 Saperstein explained where that information came from.
11 And then we wanted to go being further back into that
12 information. Mr. Saperstein responded to the question
13 about where that information came from. And then to
14 object to the answer I don't think makes --

15 CHAIRPERSON HOPPIN: If someone told him -- if
16 someone that's not here that hasn't testified told him
17 that is what happened, how would that not be hearsay?

18 MR. KELLY: Well, it may be hearsay. The
19 record -- almost every document that you've been shown
20 today is hearsay. Alana Gibbs is not here. Other
21 folks --

22 CHAIRPERSON HOPPIN: We have her signature on a
23 letter, however.

24 MS. OLSON: Not only this is a critical
25 question --

1 MR. KELLY: But there is a signature on a letter.
2 The letter is hearsay. She is not here to authenticate --

3 MS. OLSON: There are exceptions to the hearsay,
4 which is official records. And we have to be able to rely
5 on officials records. I'm okay with the answer.

6 MR. KELLY: The records that have been filed with
7 the State Water Resources Control Board that Mr.
8 Saperstein signed are officials records of the State Water
9 Resources Control Board treated the same as a letter that
10 was signed by Ms. Gibbs that is in the water right file.

11 MS. OLSON: I agree they're official records and
12 I asked what evidentiary basis supports that. And what
13 you can't do is testify to a third party to support those
14 statements.

15 So I'm okay with him answering about where he got
16 the information from. But I want my hearsay objection
17 noticed in the record for the content of what he was told
18 because that is not before the Board. That information
19 was not submitted in your case.

20 CHAIRPERSON HOPPIN: So noted.

21 MS. OLSON: And I will objectively try to bring
22 in a rebuttal because it's only fair that we have an
23 opportunity to review this kind of evidence that exists.
24 Obviously, you need to bring it here in your direct case.
25 So thank you very much for your answers. Thanks very

1 much.

2 CHAIRPERSON HOPPIN: Redirect.

3 MR. SOMACH: Can we take a five-minute break?

4 CHAIRPERSON HOPPIN: Let's take a break until
5 quarter until so the court reporter can stretch her
6 fingers.

7 (Whereupon a recess was taken.)

8 CHAIRPERSON HOPPIN: Mr. Kelly, before we get
9 going on the redirect, I think staff has a couple of
10 questions, if you don't mind.

11 SENIOR STAFF COUNSEL HEINRICH: For the record,
12 I'll go first. I have a question for Mr. Covington and
13 Mr. Johnson.

14 And first of all, I should just ask whether
15 either of you have been out and seen the point of
16 diversion, if you're familiar with the location based on
17 your visits to the reservation or to the property?

18 MR. JOHNSON: I'll go first because it will be
19 short. I testified I've been on the reservation maybe two
20 or 300 times. But to this site, maybe eight to twelve
21 times.

22 But John works on the reservation every day.
23 He's been the reservation for five, six, seven years as an
24 employee.

25 SENIOR STAFF COUNSEL HEINRICH: I guess for both

1 of you, there's been some testimony today about water
2 availability at the spring, whether it was sufficient
3 during the time frames that the prosecution believes water
4 wasn't used. There is an issue there as to whether the
5 water was available to be used.

6 I'm wondering if either or both of you could
7 address that, whether you based on your observations are
8 aware of how frequently water is available at that point
9 of diversion, whether it dries up during certain times of
10 year or year types?

11 MR. COVINGTON: Let me take a stab at that.

12 As I testified earlier, when Ms. Olson asked me
13 have I ever been there, I believe -- well, I know it was
14 mid 90s or prior to. In my testimony, I started working
15 for the Morongo Band in 2005. So my knowledge is 2005
16 forward.

17 Maybe to follow up with your second question, for
18 water arising from that spring is at best during wet
19 years. And when I say wet years, I say at least average
20 rainfall or better, which does not occur a lot in southern
21 California, and most especially where we're located at,
22 just 20 miles west of Palm Springs.

23 So when you look at those maps and you see how
24 arid -- I'll use the word because I've heard the term
25 prior to today -- arid is actually exactly what it looks

1 like. So unless we have very wet years, you don't get a
2 lot of spring flow or a lot of flow from that surface.

3 SENIOR STAFF COUNSEL HEINRICH: Do you think that
4 would be true if the spring -- my understanding is right
5 now the original diversion works have been dismantled. Do
6 you have an opinion on whether it can be developed and
7 thereby improve the surface water supply at that point of
8 diversion or not?

9 MR. COVINGTON: I think you always have the
10 potential for better development here. But you're going
11 to have to have a source. That's really the key here. It
12 is so seasonal in that canyon. And again, it's more of a
13 crystal ball. When we have a good amount of rain, you
14 will see a fair amount of water. Nothing like we see --
15 it cannot compare to northern California, needless to say
16 or even central. What we consider a fair amount of water
17 is very -- it's not even relevant to the folks that live
18 in northern California.

19 SENIOR STAFF COUNSEL HEINRICH: Mr. Johnson, did
20 you want to add to that?

21 MR. JOHNSON: Just briefly. From the time I've
22 been up there looking at the canyon and the flows in the
23 canyon, it would be my opinion that the only way to
24 develop a reliable -- a reasonably reliable supply would
25 be some extensive improvements and it would be diversion

1 of subsurface flow. You would have to go underground and
2 put wells in. Surface water just doesn't flow, except in
3 small areas that are actually very beautiful. There's
4 riparian growth up there that are very nice, but it's
5 very, very short areas. You'd have to develop something
6 much greater than surface water supply up there.

7 SENIOR STAFF COUNSEL HEINRICH: Do you have any
8 personal knowledge about water available during the time
9 frames relevant to this proceeding, namely from the 60s
10 forward to the present?

11 MR. JOHNSON: Direct involvement, no, I don't. I
12 was not up there.

13 MR. COVINGTON: May I? I'll try to answer that
14 question.

15 In the early 90s from '90 to '95, even though I
16 did not work for the Morongo Band, I still worked for a
17 Municipal Water District. So during that time frame, I
18 can definitely tell you southern California was very, very
19 dry. We were what we consider drought conditions. And
20 I'm saying 1990 to 1995.

21 SENIOR STAFF COUNSEL HEINRICH: Thank you, both.

22 ENGINEER MONA: I think this is directed to Mr.
23 Johnson.

24 CHAIRPERSON HOPPIN: You need to identify
25 yourself.

1 ENGINEER MONA: I'm Ernie Mona.

2 CHAIRPERSON HOPPIN: Just because you've been
3 here a long time --

4 ENGINEER MONA: Mr. Johnson, on your testimony,
5 which is Morongo Number 5, paragraph 12, you make the
6 following statement: "During normal rainfall conditions,
7 all subsurface outflow from Millard Canyon flows very deep
8 beneath the clay barriers under the San Gorgonio River and
9 stores groundwater in the Cabazon storage unit. Surface
10 flow in the vicinity of License 659 was put to beneficial
11 use by way of storage in the Cabazon storage unit as
12 groundwater."

13 Then you support that statement with Exhibits
14 Number 8 and 9, particularly can you put up number 9,
15 please?

16 So the question I have is in regards to your
17 extension of knowledge of the hydrogeology in Millard
18 Canyon. The spring source that everyone is referring to
19 is that commonly known as the SP spring?

20 MR. JOHNSON: That is one of the springs up
21 there, southern Pacific spring, yes.

22 ENGINEER MONA: And why does that spring source
23 originate where it does?

24 MR. JOHNSON: There is a bit of a narrows right
25 there in the canyon. And also some vaulting, some

1 identified vaulting in the ground that creates a -- not a
2 total barrier, but at least a hindrance of subsurface
3 flow. A subsurface flow does come out of the canyon and
4 back up there. And you see it on the surface. And then
5 as soon as it gets past that vaulting area, it goes right
6 back into the ground.

7 ENGINEER MONA: Would you say there is some -- at
8 the groundwater basin of Millard Canyon is hydraulically
9 separated from the deep groundwater basin in Cabazon
10 storage units?

11 MR. JOHNSON: They're connected in that when it
12 does overflow -- typically with vaulting, we run into this
13 all the time when we're looking at groundwater basins and
14 vaulting.

15 The idea that it would be completely separated,
16 we don't try to go that far. The idea that there might be
17 a hindrance to the flow that it might either back up and
18 flow over the top or that as pressure builds up, you get
19 flow through the vault. But completely separated, not
20 normally. But there certainly would be a constriction of
21 the flow through that vaulting area.

22 ENGINEER MONA: If you pump from swells in the
23 Millard Canyon, would that effect well pumping in the
24 Cabazon unit?

25 MR. JOHNSON: Not directly, but it would effect

1 the water supply to the Cabazon supply.

2 ENGINEER MONA: As a result of the stream water
3 flowing that's not used -- not pumped out from the
4 groundwater source though.

5 MR. JOHNSON: Exactly. Exactly. One of the
6 thoughts that we've had -- I think we're going to talk
7 about this in a minute.

8 One of the thoughts we've always had is that the
9 Cabazon sub unit is not an adjudicated basin. As we've
10 described in Exhibit 8, shown in Exhibit 8, the
11 reservation overlies a large portion of that groundwater
12 basin.

13 The tribe has been active in looking at a
14 potential State AB 3030 Groundwater Management Plan to
15 manage the supplies. And License 659 would be an active
16 source of supply going forward with the changes and the
17 changes in use would be an active potential source of
18 supply to that Groundwater Management Plan.

19 ENGINEER MONA: So the efficient way to take
20 water out of the Millard Canyon groundwater basin is to
21 either drill wells, pump it out, or develop a spring
22 source as a surface direct diversion and pipe that down to
23 some basins -- spring basins in the Cabazon unit?

24 MR. JOHNSON: That's correct. Or wait until it
25 gets into the groundwater basin and pump it out of the

1 groundwater basin.

2 ENGINEER MONA: Thank you.

3 CHAIRPERSON HOPPIN: Thank you.

4 MR. KELLY: Thank you, Mr. Chair. And I
5 understand I'm not supposed to run afoul of asking
6 questions related to the questions that the Hearing Panel
7 has asked; is that true? Because I have some questions
8 that are related. And I tried to ask them before and was
9 told to wait until rebuttal. So just let me know --

10 CHAIRPERSON HOPPIN: Just treat them like they
11 were your idea and maybe we won't notice.

12 REDIRECT EXAMINATION

13 BY MR. KELLY:

14 Q Mr. Covington, did you testify there were other
15 groundwater wells pumpers in the Cabazon unit?

16 A I did.

17 Q And as part of the Petition for Change that the tribe
18 has filed, does that include a groundwater storage
19 supplement?

20 A It does.

21 Q And so if that Petition for Change was granted, would
22 that have the effect then of essentially protecting that
23 License 659 water supply when it reached the basin?

24 A It would.

25 Q So if you lost License 659, then any spill that came

1 out of Millard Canyon and made it into the Cabazon storage
2 unit would not only be available to the tribe, but would
3 be available to anybody that ground pumps out of the
4 groundwater basin?

5 A That's correct.

6 Q As part of the strategy for doing all this and trying
7 to consolidate all the water supplies is to protect the
8 total supply even when it does reach the groundwater
9 basin?

10 A That's correct.

11 Q Thank you.

12 There were questions about whether or not you had
13 been up to the property in 1995 in the 1990s. And you
14 said that you hadn't. Have you been to the property since
15 the Ahadpour's transferred the property?

16 A I have been to the property as recent as also then a
17 month ago.

18 Q So when is the first time you started going to the
19 property?

20 A I believe it would most likely have been shortly after
21 my employment with the tribe.

22 Q When you went to the property, were cattle on the
23 property then?

24 A Yes.

25 Q Anything growing?

1 A Riparian growth.

2 Q Any facilities up there when you went to visit the
3 property?

4 A There is still existing aged facilities.

5 Q When you say existing aged facilities, what do you
6 mean?

7 A I'll specify conveyance, pipes. Pipes, vaults, sand
8 traps, the like.

9 MS. OLSON: I'm going to object, Chairman Hoppin.
10 I'm not sure how this is related to the questions I was
11 asking which was for the relevant time period whether he
12 had visited the property. Seems inappropriate for
13 redirect.

14 MR. KELLY: When the panel was under direct
15 examination, I actually believe the Chair may have asked
16 questions about any current use up in the canyon. So I'm
17 merely asking the witnesses if they have actually been to
18 that property since the tribe has owned it. And if so, if
19 they've seen anything up there.

20 CHAIRPERSON HOPPIN: Okay.

21 BY MR. KELLY:

22 Q And so when you say -- are these distribution
23 facilities?

24 A They are. Yes, they are.

25 Q Do you know whether or not they are the same

1 facilities that were installed -- we saw information in
2 the reports. I think we saw Walt Pettit's report. Does
3 this seem like the same type of facilities that existed at
4 that time?

5 A There is a diagram, if you will, in the Board's
6 package. And there is some definite facilities that are
7 shown and there relevant facilities that still exist
8 today.

9 Q Is there a pipe in the ground that water bubbles up
10 out of?

11 A No.

12 Q Mr. Johnson, you said you've been to the property
13 about eight times?

14 A Eight to twelve times over the last probably
15 ten years.

16 Q Have you seen cattle there when you've been up there?

17 A Yes, I have.

18 Q Have you seen similar facilities to the ones Mr.
19 Covington has seen?

20 A Yes. Actually, probably most of the trips were with
21 Mr. Covington.

22 Q So can you describe the -- whatever kind of system
23 exists up there?

24 A It's the remnants of an active irrigation system and
25 the facilities are there. We've had discussion in the

1 past about what it would take to rejuvenate and make these
2 active because certainly we see evidence clear up in the
3 canyon of potential diversion facilities. And we see
4 evidence clear down in the flat areas of valves and pipes
5 above the ground and blow off and things like that. So
6 there has been some testing that has gone on to try to see
7 where the waters go if we get everything hooked up and
8 operated.

9 Q Mr. Covington, there was a series of questions and you
10 were shown the White Water Decree. I objected and
11 stipulated that the tribe has additional water rights
12 aside from what are contained in here for use on the
13 reservation. Can you just very briefly describe what
14 those rights are. There are some for another canyons on
15 the property?

16 A Yes. You have the Hathaway Canyon. And those rights
17 are listed on the White Water Decree at two CFS.
18 Currently, the tribe is using those rights for irrigation
19 purposes, which is consistent with the decree.

20 Q And so is there a kind of a larger plan for all the
21 water resources that involve all these rights?

22 A There is.

23 Q Mr. Johnson, you were asked some questions about red
24 flags that you should have or may have seen in the State
25 Water Board's materials when you went through them. When

1 you read the letter -- I think it's Exhibit 35 that talked
2 about missing reports and possible non-use, did you -- was
3 it your understanding that the issues that were raised in
4 that letter had been resolved?

5 A Ultimately, yes. Not when we first were introduced,
6 but ultimately that's correct, yes.

7 Q Prior to the time the tribe purchased the property,
8 you understand those issues had all been resolved?

9 A Yes, sir.

10 Q Ms. Karshmer, did you participate at all in the
11 negotiations for the property with Nestle?

12 A As I recall, I did.

13 Q And during that period and in your role as counsel to
14 the tribe, did Nestle inform you at any point that there
15 was non-use that had occurred on that property in the
16 1990s?

17 A No.

18 Q Mr. Johnson, when you conduct a due diligence -- do
19 you do due diligence work for clients frequently?

20 A Well, I wouldn't necessarily call it due diligence,
21 but we do coordination for our clients through the State
22 Board in processing changes of use point of diversion
23 changes of licensees or permittees. We've worked with the
24 State Board for our clients, yes.

25 Q So when you're conducting that kind of due diligence,

1 do you generally rely on the information you find in the
2 State Water Board's files?

3 A Sure. And discussions with State Board staff, yes.

4 Q And you don't expect to have to go to the county
5 recorder's office to find things?

6 A We don't normally do that, no.

7 Q If you are doing due diligence work on a file at the
8 State Water Resources Control Board and you come across
9 reports that have been filed by a third person and those
10 reports indicate that there has been a use of a water --
11 beneficial use of water, whether it's 80 years ago, 60
12 years ago, 20 years ago or three years ago, do you
13 generally accept the representations that are made in
14 those reports in those files?

15 A Certainly, we would, unless we had some reason not to
16 assume they're correct. We assume they are correct, yes.

17 Q As it relates to this proceeding, you had followed up
18 and the Board was satisfied with what it had actually
19 received in the way of back reports?

20 A That's correct.

21 MS. OLSON: I'm going to object to the question.
22 Assumes facts in evidence that the Board was satisfied
23 with the reports.

24 CHAIRPERSON HOPPIN: We accepted the reports. If
25 we accepted them, we were satisfied.

1 MS. OLSON: I think that's a pretty big leap to
2 say we accepted a report, that means we were satisfied
3 with it, I guess is my point.

4 CHAIRPERSON HOPPIN: If we received a report and
5 we weren't satisfied with it, what would our option be?

6 MS. OLSON: To issue a notice of proposed
7 revocation. I mean, that's similar to say when we accept
8 a Notice of Assignment we're approving the underlying
9 right --

10 CHAIRPERSON HOPPIN: I mean, I think -- please
11 correct me if I'm wrong. You correct me if I'm wrong.

12 But I think what we're talking about is if there
13 is a record of licensee -- a report of licensee on file
14 and it's on file and there isn't anything marked on it
15 that is rejected or is questionable or what have you, that
16 it's deemed to be acceptable.

17 MS. OLSON: We'll have some rebuttal witnesses on
18 that because that is not the case. It's not deemed
19 acceptable just because it's entered into the record that
20 somebody submitted a report.

21 CHAIRPERSON HOPPIN: If somebody files a report
22 that isn't right, you automatically revoke their license?

23 MS. OLSON: No. It's not automatic. It takes a
24 while obviously.

25 I don't think there was any follow up evidence,

1 even though Alana Gibbs had asked -- we're getting --
2 Alana is not here. There was no additional evidence to
3 support the record that they submitted. That's what the
4 whole question with Robert Saperstein was. And there was
5 no evidence that -- to support the additional reports that
6 were filed. I think that's primarily lead to issuing the
7 Notice of Proposed Revocation.

8 MR. KELLY: Mr. Chairman, I have a couple
9 questions to help this along.

10 BY MR. KELLY:

11 Q Mr. Johnson, you said you've been in contact with
12 folks at the Division of Water Rights about the water
13 right and about the missing reports?

14 A That's correct.

15 Q And did your office do -- did your office do any
16 follow-up to determine whether or not those reports had
17 been filed?

18 A Yes, we did. And to be clear, our discussions with
19 State Board staff, the Division of Water Rights staff were
20 discussions around the purchase of real property and water
21 rights that were associated with those.

22 So our due diligence was couched around the fact
23 that there was going to be a pending property transaction
24 and there were water rights associated. And my job -- our
25 job was to make sure that the water rights were in good

1 standing with the State Board before the property
2 transaction could go through. So we certainly did discuss
3 the fact that there was a property transaction and these
4 water rights.

5 MS. OLSON: Mr. Chairman, I have to object again.
6 He's testifying on a conversation he says his staff had
7 with another person. Neither person is here. And he's
8 implying there was this open candid discussion about the
9 validity or the satisfaction of division with these
10 reports. We have no evidence that any such conversation
11 existed. And his testimony is based on what he heard from
12 his staff. So I have to object.

13 CHAIRPERSON HOPPIN: It's not necessarily what he
14 heard from staff. He was supervising staff that reported
15 back to him. Are you not supposed to accept a report that
16 comes back from someone you're supervising?

17 MS. OLSON: Not only is that hearsay, it's double
18 hearsay. He's accepting the person's report who's
19 testifying to what another person said from the division.
20 It's double hearsay.

21 MR. KELLY: He's an expert and he can rely upon
22 the people he's supervising.

23 MS. OLSON: Being an expert does not give you a
24 reason to testify about hearsay evidence. There is no
25 rule of that that I'm aware of.

1 CHAIRPERSON HOPPIN: If Ms. Gibbs reported
2 something to you during this conversation and you told us
3 about it, would that be hearsay evidence?

4 MS. OLSON: They would be objecting as hearsay,
5 believe me.

6 We rely on evidence in the file because there is
7 a specific exemption to hearsay for official records.
8 That's what goes in the file. There's no record -- in
9 fact, I would submit to you that if Alana Gibbs was
10 satisfied with the reports that were submitted, we
11 wouldn't all be here today. But I'm not testifying. I'd
12 like to. I'd love to have Alana here. I'm not testifying
13 to what she told me because that would be hearsay and they
14 would be objecting all over the place.

15 CHAIRPERSON HOPPIN: You wouldn't suspect Mr.
16 Johnson saw the documents that were received from the
17 State Water Board staff -- would that be hearsay if they
18 presented him with the reports of licensee? I mean, it's
19 not a conversation. It's whether the reports were done or
20 if they weren't done. If he has reports -- evidence that
21 reports were done, how is that hearsay?

22 MS. OLSON: That's not. Clearly, they were done
23 and submitted. What he's implying with his testimony is
24 somehow the division staff found the reports satisfactory
25 and there is no evidence in the file to indicate that.

1 CHAIRPERSON HOPPIN: That gets back to my
2 question I asked you earlier. If someone reports a report
3 of licensee and there isn't any rejection of that report,
4 isn't it a reasonable assumption that it's accepted?

5 I mean, how -- I don't see that there is anything
6 in between in our process between an accepted report of
7 licensee and what you're talking about is a revocation of
8 license. There is no correspondence that they felt that
9 they were incomplete or of questionable validity or
10 anything like that. So --

11 MS. OLSON: They've not shown you any evidence
12 that the reports were found to be satisfactory either.
13 And you can see from the letters --

14 CHAIRPERSON HOPPIN: Shouldn't we have some
15 process that calls into question -- I mean, reports that
16 we don't feel are valid? I mean, if I went through the
17 moth room up there and went through all the folders and
18 everything and I saw a file that had reports of licensee
19 and there was no notes or any indication whatsoever that
20 we felt that they were invalid, they were inaccurate or
21 incomplete, wouldn't it be reasonable to deem them to be
22 acceptable?

23 MS. OLSON: That's why I asked Robert Saperstein
24 a series of questions.

25 CHAIRPERSON HOPPIN: I'm talking about Mr.

1 Johnson's comments, not Mr. Saperstein's.

2 MS. OLSON: But Alana Gibbs' communication with
3 Great Springs regarding the submittal of those reports are
4 reflected in Saperstein's letters to the division. He
5 reflects Alana Gibbs had asked him for additional evidence
6 to support what he's listing in the record.

7 MR. KELLY: That misstates his testimony. That
8 misstates Mr. Saperstein's testimony. I object to that.

9 MS. OLSON: It's hearsay for Mr. Johnson to
10 testify about that his staff had a conversation with
11 division staff and neither of those people are here.
12 That's my objection.

13 CHAIRPERSON HOPPIN: That is not the
14 conversation, the reports that were the basis of the
15 conversation. That's what he saw were the reports.

16 MS. OLSON: Right. And he can testify that he
17 might have thought those were reasonably resolved. But he
18 has no evidence to say the division thought it was
19 resolved or those reports were satisfactory.

20 CHAIRPERSON HOPPIN: And I'm asking you and I'll
21 ask it again, do we have anything in the file that
22 indicated those reports were inadequate?

23 MS. OLSON: Yes. We have a notice of Proposed
24 Revocation.

25 CHAIRPERSON HOPPIN: Based on the inadequacy of

1 reports or non-use? It doesn't show --

2 MS. OLSON: I think it's division practice to
3 give licensees a chance to submit evidence, like if we
4 have an inclination this thing hasn't been used. We give
5 everybody every opportunity to provide evidence of use
6 because we don't -- if you used it, we don't revoke a
7 license.

8 So I think that's what Alana Gibbs is doing. I
9 don't want to testify about what she's saying because that
10 would be hearsay. It seemed clear she was asking for
11 evidence to support what Great Springs is saying is no,
12 no, don't believe the owners of the 1990s. Believe us
13 water has been used. But nothing has been submitted.
14 There is nothing in the file. That's why we proceeded to
15 Notice of Proposed Revocation. That's the evidence in
16 front of you.

17 CHAIRPERSON HOPPIN: Please proceed, Mr. Kelly.

18 MR. KELLY: I actually have a couple more very
19 quick questions.

20 BY MR. KELLY:

21 Q Ms. Karshmer, if you know, was the Notice of
22 Revocation issued prior to Morongo purchasing the
23 property?

24 A No.

25 Q So when Morongo purchased this property, there was no

1 pending Notice of Revocation that had gone out and you and
2 the tribe relied upon the information contained in the
3 State Water Resources Control Board's files as to prior
4 use of water?

5 A That's absolutely right. And the way I would see it
6 is that really, in effect, we were bona fide purchasers in
7 good faith of land and water because there was no record
8 anywhere in the public sector and the title report, nor in
9 the notice having gone out here that the State was
10 actually going to revoke these water rights. And in fact,
11 to me, as an attorney, the fact that they were never
12 previously revoked said to me that the State did not feel
13 they had a strong case or strong enough case to revoke
14 them. So haven't proceeded with those revocations, but
15 simply let them go.

16 Q So the tribe purchased the property, sent the Notice
17 of Assignment notifying the State Board the tribe was the
18 owner in November of 2000, late October, and the Notice of
19 Revocation came out in this early to mid 2003; is that
20 correct?

21 A Came out on in late April, 2003, about six months
22 later.

23 MR. KELLY: I have no further questions.

24 CHAIRPERSON HOPPIN: Thank you.

25 Mr. Olson, do you have recross?

RECROSS-EXAMINATION

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BY MS. OLSON:

Q I think was Mr. Covington.

A Thank you.

Q You were asked some questions about the existing facilities?

A Yes.

Q On the property?

A Yes.

Q Are you familiar with License 174?

A Yes.

Q And where is the point of diversion for License 174?

A Section 20.

Q Is License 174 from the same source that License 659 is?

A No.

MR. KELLY: I object. I didn't ask about license 174 on redirect.

MS. OLSON: He asked about the existing facilities that are there right now.

CHAIRPERSON HOPPIN: He did not ask specifically the other license.

MS. OLSON: He didn't, but he talks about facilities and various pipes. And I want to ask if they're diverting water because License 174 they purchased

1 from Cabazon. I'm wondering if they're diverting water
2 above where you would divert water from License 659.

3 CHAIRPERSON HOPPIN: That wasn't part of the
4 redirect though.

5 MS. OLSON: You know, I didn't object when they
6 started asking questions in response to the Board's
7 questions. And so this is partly in response to some of
8 the Board's questions they were asking about water
9 available in the canyon and how it flows down. I would
10 ask a certain amount of latitude

11 CHAIRPERSON HOPPIN: They didn't ask questions
12 about the other water license.

13 MS. OLSON: They did ask a question about the
14 flow of the water down the canyon. And I'm asking
15 specifically about a point of diversion that's above this
16 point of diversion in question. And I'm wondering if
17 their diverting water from that now and whether that would
18 affect water availability in the surfacing of the spring
19 at diversion 28, which is where License 659 is.

20 CHAIRPERSON HOPPIN: I'll allow the question.

21 MR. COVINGTON: Currently, that license -- the
22 water is not technically being diverted. The water is
23 still running within the stream bed. We were not from the
24 point of diversion wastewater not taking that water to a
25 separate location.

1 BY MS. OLSON:

2 Q Not technically being diverted, can you explain that a
3 little bit more?

4 A What I mean, we have a licensed point of diversion as
5 I believe referenced License 174. We are not taking that
6 water and moving it to a separate location in which it's
7 licensed for at this point. The water is merely still and
8 currently just flowing past the actual point of diversion
9 and stays within the actual stream bed. That's the way
10 upper part of that canyon.

11 Q Does water eventually flow down to where the diversion
12 for License 659 --

13 A It does in the -- on the surface it does not make it
14 down to 659.

15 Q Is it in the same underground channel?

16 A Yes. It's in the same watershed is what I would
17 characterize that as.

18 Q Is there water available under License 174 currently?

19 A Today?

20 Q Yes.

21 A Yes.

22 Q Is there some reason no water was available under 174
23 that wouldn't be available under License 659?

24 A Because of the distance. Here's your water resource
25 engineer, but I'm going to say it has got to be at least

1 two miles between point to point, point to point. So that
2 water from 174 is on the surface at point of diversion or
3 pointed of license diversion. Let me specify that. The
4 water flows down the creek for a distance of probably
5 maybe a 1,000 to 2,000 feet and goes subsurface for a very
6 long period of time. There is no water that arises until
7 you actually get to the point of 659.

8 Q So would the water from 174 goes anywhere else but
9 past 169 and into the Cabazon --

10 A It could flow to the east -- sorry -- to the west side
11 of the canyon very possible and very likely that it could
12 do that, that the geology in that area is sand and gravel.
13 There is not a lot of contained clays in the upper part of
14 the watershed. It's very loose material. It goes
15 underground. And if I tell you exactly where it goes, I
16 will be honest, I would just be guessing.

17 Q Okay. Was it you who testified that there is
18 currently irrigation taking place?

19 A Where?

20 Q Well, that's my question. I just thought I heard
21 somebody testify there was irrigation taking place?

22 A There is irrigation taking place under the White Water
23 Decree in Hathaway Canyon.

24 Q What crops are you irrigating?

25 A We're not irrigating any crops, per se., No orchards.

1 That irrigation goes down onto the tribal lands in which
2 it's licensed to and the residents use that for their own
3 irrigation purposes.

4 So when you say crops, maybe you should specify.
5 But I'm thinking you're thinking like an orchard. It is
6 not. It is individual parcels of land that they have
7 their own little gardens and fruit trees and the like.

8 Q Thank you.

9 Mr. Covington, you talked about this, but I still
10 am not understanding the basis for you believing that all
11 the issues have been resolved with the Division of Water
12 Rights. Can you -- without testifying to hearsay
13 evidence?

14 A Are you speaking to me?

15 Q I'm sorry.

16 Mr. Johnson, you testified you thought all the
17 issues were resolved. I'm trying to figure out what the
18 basis of that belief was?

19 MR. KELLY: I'm going to object. This has been
20 asked and answered. And Ms. Olson objected at some point.
21 This becomes badgering the witness about issues that we've
22 gone over in direct and cross-examination, redirect. At
23 some point I would just --

24 MS. OLSON: I hardly think it's badgering, but I
25 just want to know if there is any written evidence that

1 the division was satisfied with the reports that have been
2 subsequently filed.

3 MR. KELLY: I would object again. Mr. Johnson
4 testified as to his findings --

5 CHAIRPERSON HOPPIN: Just he's answered the
6 question at least twice.

7 BY MS. OLSON:

8 Q Mr. Saperstein, did Great Springs end up conducting or
9 constructing a water bottling facility near the premises
10 of the property?

11 MR. KELLY: I'm going the object as to the
12 relevance of that.

13 MS. OLSON: Well, we were talking about the
14 existing facilities and what the tribe is doing now with
15 its water. And I think it's an appropriate question.

16 CHAIRPERSON HOPPIN: I'd like to know if they did
17 anything there at all.

18 MR. SAPERSTEIN: I'm not hour how to answer the
19 question. Yes, Nestle Waters North America and the tribe
20 did enter into an agreement. It included the construction
21 of a water bottling facility. It's located in the flats
22 somewhat southeast of Cabazon.

23 BY MS. OLSON:

24 Q Is the facility up and running?

25 A Yes.

1 Q And where are the points of diversion for the water in
2 that facility?

3 MR. KELLY: I'm going to object to the relevance
4 of that question.

5 MS. OLSON: It might be relevant to the issue of
6 whether water is available now in the canyon if they are
7 diverting it higher up.

8 CHAIRPERSON HOPPIN: I would agree. Please
9 answer her question.

10 MR. SAPERSTEIN: I don't know. I can't answer
11 the question. Can't answer because I don't know.

12 BY MS. OLSON:

13 Q Mr. Covington, you're familiar with the activities in
14 all water matters of the tribe. Can you answer the
15 question?

16 A Nestle bottling plant is located down in Section 14
17 below the Interstate 10 freeway.

18 Q And where is water being diverted for that facility in
19 that operation?

20 A Millard Canyon.

21 Q Is that above the point of diversion for license 59 or
22 below?

23 A Above.

24 Q Is it more than one point of diversion?

25 A No.

1 Q So would it be where License 174 is?

2 A Below. Between 174 and 659.

3 Q How long has that facility been diverting water? When
4 did it start diverting water?

5 A I don't know, to be honest. It was before I worked
6 there.

7 Q It was before 2005?

8 A Yes.

9 Q And do you know the maximum amount of water that's
10 being diverted for that facility?

11 A I do not.

12 MR SAPERSTEIN: While I'm not a lawyer in this
13 proceeding, I'm a lawyer to Nestle. I object. The amount
14 of water being diverted is under confidentiality.

15 MS. OLSON: Except there is testimony submitted
16 in the case of chief of the need of the tribe, what water
17 rights it has, what the future needs are. And I think
18 it's an important question. If you can't answer, you
19 can't answer.

20 CHAIRPERSON HOPPIN: How does it relate back to
21 the rights and revocation?

22 MS. OLSON: It does relate if they're diverting
23 water above where this water would surface and they're
24 making an argument that water is not available, it's dry.
25 That's why I'm asking these questions.

1 The creek is dry. Well, if you're diverting it
2 all above where the spring would normally surface, that
3 would explain it. So that's why I'm asking.

4 But if they can't answer, they can't answer. I'm
5 curious though if the license was not revoked, is it the
6 tribe's intention to irrigate 13 acres. And if so, what
7 would you grow? What crops?

8 MR. JOHNSON: I just pushed the button. I'm not
9 sure. If it was not revoked, the first thing we would
10 want to do is go back to the application that was
11 consolidated for water rights and extend the availability
12 of use throughout the reservation and combine the water
13 rights with the plan the tribe has for development
14 throughout the reservation. Those plans currently
15 indicate demands on the tribal reservation of about 12,000
16 acre feet a year.

17 MS. OLSON: So the .16 CFS at issue here, would
18 that be needed for the water bottling facility for some
19 other use by the tribes

20 MR. JOHNSON: I would say other uses.

21 MS. OLSON: Really?

22 MR. JOHNSON: Our estimation of total reliable
23 water supply out of the canyon is about 12- or 1300 acre
24 feet out of that canyon. And total demands that the tribe
25 is looking at for their development is on the order of

1 twelve or 13,000 acre feet a year. They're going to need
2 those water supplies for lots of other uses.

3 MS. OLSON: I just want to note for the record, I
4 find it problematic that a confidentiality agreement would
5 prevent this State Board from getting information about
6 use under another State licensed water right. We have no
7 way to know how much is being used under those other
8 rights, whether there would be any left for this water
9 right. And it's frustrated our ability as a prosecution
10 team to really let you guys know what's going on.

11 MR. KELLY: I need to object to that. At no time
12 did any of witnesses refuse to testify as to information
13 about water diverted under any State-issue water rights.

14 MS. OLSON: I asked under the point of diversion
15 for the water bottling plant what's the maximum amount of
16 water being taken and diverted for the water bottling
17 facility.

18 MS. KARSHMER: Can I point out a basic error
19 here? There is no water diverted from that facility.
20 There are deep groundwater wells.

21 MS. OLSON: There was testimony that it was taken
22 high up in Millard Canyon.

23 MS. KARSHMER: Through groundwater basin deep
24 wells. It's not a surface diversion.

25 MS. OLSON: So the water bottling facility is

1 taking water below Millard Canyon from the groundwater
2 basin?

3 MS. KARSHMER: Groundwater basin.

4 MS. OLSON: There is no point of diversion
5 upstream of Millard Canyon?

6 MS. KARSHMER: None. So you're off on a tangent
7 that's really irrelevant.

8 MS. OLSON: It's inconsistent with an answer from
9 the witness.

10 MS. KARSHMER: It was simply a misstatement, a
11 misunderstanding.

12 CHAIRPERSON HOPPIN: I don't see that they're
13 changing the statement. I think they're clarifying what
14 they said. I can understand why you misunderstood because
15 I misunderstood it as well. But now we're hearing it's
16 not coming out of the stream, but it's coming from a deep
17 water well in the canyon.

18 MS. OLSON: I suppose we can all read back in the
19 transcript and see. I mean --

20 MS. KARSHMER: I think --

21 MS. OLSON: It wasn't just one question. It was
22 a series of questions related to the water availability
23 below that diversion. I don't see how that would be a
24 misstatement.

25 CHAIRPERSON HOPPIN: I would remind you the

1 witnesses are under oath. I would like to respect the
2 fact that they are testifying under oath.

3 MS. KARSHMER: I think Mr. Covington -- and he
4 can certainly speak for himself -- misspoke in terms of
5 using the word "diversion." The water is taken from the
6 ground deep well around from the groundwater to serve that
7 facility. There is no surface diversion whatsoever. Not
8 a drop of water is taken from the surface through any
9 State license or serving that facility.

10 CHAIRPERSON HOPPIN: We're disadvantaged here,
11 Ms. Olson, in the fact that no one from the State Water
12 Board has apparently stepped foot on that property since
13 1968. And so we're trying to have a visual of what's
14 going on up there, which is difficult. So we're relying
15 on people that are on the property and people that have
16 had long association with the area for their opinion. And
17 I understand trying to get to the bottom of this. I don't
18 want the situation where we're questioning the integrity
19 of the witnesses.

20 MS. OLSON: And I didn't mean to. I think I
21 understand what the mix up is.

22 BY MS. OLSON:

23 Q Is water being taken in Millard Canyon pursuant to a
24 pre-14 right or some other water right, not under a
25 license?

1 MS. KARSHMER: For Nestle bottling plant, no
2 surface water is being taken from Millard Canyon.

3 MR. KELLY: A single question, Mr. Chair.

4 BY MR. KELLY:

5 Q Mr. Covington, you were asked a question about License
6 Number I believe 174?

7 A Yes.

8 Q And you had said that you're currently not taking
9 water from there and putting moving it to its place of
10 use. Is that because License 174 is part of a package of
11 water rights tribes are trying to consolidate for
12 beneficial use throughout the reservation?

13 A It was one of the licenses that was consolidated or
14 was granted the change of use and change of -- type of use
15 change of place.

16 Q So if this water right is not revoked, how soon can
17 the tribe start putting all this water to beneficial use?

18 A Well, as you previously mentioned, we were looking
19 from 2006 to consolidate and that would better help us
20 meet our master plan goals. So it's kind of a hard
21 question to ask because should this license not be
22 revoked, we need to come back to the Board and re-file
23 that petition for 659.

24 Q Let me say assuming the license was not revoked and
25 assuming the State Board granted that Petition for Change

1 in a short time frame, how soon could the tribe put it to
2 the beneficial use?

3 A Under that license, we could put it to beneficial use
4 within 60 days.

5 MR. KELLY: I have no more questions.

6 CHAIRPERSON HOPPIN: Mr. Somach, are you the one
7 that is going to present your exhibits into evidence or
8 will that be Mr. Kelly?

9 MR. KELLY: I'll do it. And I would move all of
10 our testimony and exhibits into evidence, please.

11 CHAIRPERSON HOPPIN: Can you put some language in
12 about the declaration of Mr. Pettit.

13 MR. KELLY: I have here and I don't know whether
14 Ms. Olson has had an opportunity --

15 MS. OLSON: No objection.

16 MR. KELLY: It's just simply his supplemental
17 questions and the e-mail exchange about the agreement we
18 had about how we would treat the responses to the
19 questions.

20 Do you have a copy?

21 MS. OLSON: I do.

22 MR. KELLY: If I may provide the Board with the
23 rest of the copies.

24 CHAIRPERSON HOPPIN: We'll admit the presentation
25 3.1, Pettit declaration; is that correct?

1 (Whereupon the above-referenced exhibits were
2 admitted into evidence by the Hearing Officer.)

3 CHAIRPERSON HOPPIN: Ms. Olson, do you have any
4 rebuttal?

5 MS. OLSON: We'd like the Board to take official
6 notice of the file 660 the response to the series of
7 questions about water availability in the 1990s. License
8 660 will indicate that water from the same source was
9 available consistently through the 1990 period.

10 CHAIRPERSON HOPPIN: Do you have something in
11 your eye, Mr. Somach?

12 MR. SOMACH: Yes, I do. We would object to
13 notice of 660 for the purposes that she articulated. I
14 don't have any problems with anybody looks at the file.
15 It's an official file. But they spent all this time
16 questioning the very kinds of uses stated in 659 and now
17 they want you to look at 660 as if somehow qualitatively
18 something different is going on there.

19 And without knowing exactly what they're pointing
20 to, exactly how they're going to utilize or argue the
21 totality of file, which is a pretty big file because I've
22 read through it, 660, it's impossible to understand
23 exactly the material relevant information out of there
24 that would at all be relevant to 659.

25 MS. OLSON: Well, I'll provide specificity.

1 Specifically, we're looking at reports of licensee for the
2 year 1990 -- let's go 1988 through 1999. Cabazon Water
3 District purchased 660 in 1961, and it's the exact same
4 source as License 659.

5 I'm simply asking that you look at that by
6 reference to refute this idea that there was -- the water
7 was just dry in the 1990s and that's why it wasn't used.
8 That's the purpose of looking at the reports of licensee
9 for 660 because Cabazon made a lot of use of their portion
10 of that water source.

11 CHAIRPERSON HOPPIN: Does that narrow down the
12 intent?

13 MR. SOMACH: But again I don't understand the
14 relevance of that. We've just had all this testimony
15 about how inherently unreliable these statements of
16 diversion and use are, even when they're assigned under
17 penalty of perjury. Rejecting a witness and his
18 statements of diversion use and now we're going to an
19 entirely different water right. And we're going to expect
20 that somehow qualitatively the very same kind of
21 statements of diversion and use signed under penalty of
22 perjury are somehow qualitatively better than what you
23 have in the file is actually relevant. The file is
24 associated with 659 --

25 CHAIRPERSON HOPPIN: Wasn't that other record

1 more complete?

2 MR. SOMACH: It was no more or less complete. It
3 was the file. They kept these files parallel through the
4 entire time. In fact, they were all part of the same file
5 until a certain point in time they broke them apart.

6 CHAIRPERSON HOPPIN: There was no association
7 between one right and the other.

8 MR. SOMACH: There may be difference. I would
9 argue those very differences are what make the file on a
10 different water license irrelevant on the one hand. And
11 if it's relevant at all, it's exactly the same. You got
12 the exact file in front of you, which what she's asking
13 you to do is reject the statements of diversion and use
14 for the actual license that is the subject of the
15 revocation hearing, as if somehow magically qualitatively
16 it's any different than what exists in 660, which isn't
17 even a subject of this hearing. It makes no rational
18 sense. It certainly makes no evidentiary sense at all.

19 You know -- and so do I care if you look at 660?
20 I don't care. You can look at them all. Do I care
21 whether or not you use your review and look in the terms
22 of evaluation of the revocation issues that are before you
23 in this? I certainly do. Because you have all of the
24 relevant files and materials with respect to 659,
25 including statements of diversion and use. And there are

1 qualitatively no different because they're all signed
2 under penalty of perjury. Just like the ones in 660, only
3 they're relevant to the actual license that we're talking
4 about.

5 CHAIRPERSON HOPPIN: Ms. Olson, you can have
6 another cut, but Mr. Somach makes a compelling point.
7 We're dealing here with people that have signed statements
8 under oath and given testimony under oath and I don't know
9 that I see the difference.

10 MS. OLSON: Just a moment, please. I have an
11 idea --

12 CHAIRPERSON HOPPIN: You have -- both of you have
13 the advantage of having looked at this file and we don't.
14 So I look like I'm watching a ping-pong game here. I'm a
15 little bit -- I don't know what this file looks like. And
16 I don't know that my staff here with me knows what the
17 file --

18 MS. OLSON: I have a possible solution. I want
19 to ask maybe if I can ask Mr. Covington I think I read
20 that perhaps you worked for Cabazon Water District. What
21 about you, Mr. Johnson?

22 MR. JOHNSON: No.

23 MS. OLSON: Let me just summarize what I can
24 about these reports of license. We have talked a lot
25 about some of them are reliable; some of them aren't.

1 The difference between 659 and 660 is they're
2 different licenses. And so you have Cabazon Water
3 District reporting its water use. And I'm simply asking
4 the Board to look at that file for the purpose of whether
5 there was actually water coming out of Millard Canyon in
6 the 1990s. That's the only reason. And we know Cabazon
7 was using that water.

8 So you can look at the reports like everybody
9 else has to and exercise some professional judgment about
10 its reliability. Sometimes they're right on. Sometimes
11 they're not. Sometimes they change and that can be
12 reliable indicator. So it all depends on who's submitting
13 the report in the context that you find it in. And all
14 I'm suggesting is on rebuttal that is one way that we can
15 show that water was in this spring in the 1990s. So rebut
16 their --

17 CHAIRPERSON HOPPIN: I'm willing to look at the
18 file, but I'm not willing to say that we are going to use
19 it. And from a legal perspective, the two of you are
20 going to have to tell me whether that throws you into
21 catatonic shock or something. I can't rule on something I
22 haven't seen.

23 MS. OLSON: We have plenty of credible evidence
24 what was happening with water in the 1990s. There was an
25 implication made there might not have been water

1 available. And that is a valid defense of forfeiture.
2 You can't forfeit a right for non-use if you can't have
3 used it because of the climate because you were in a
4 drought. That is a valid defense of forfeiture. And we
5 just want that file available because it shows water was
6 in the spring during that time.

7 CHAIRPERSON HOPPIN: I think a portion of it is.

8 MS. OLSON: And I'll just sum up also, they
9 didn't submit any other evidence that water wasn't
10 available. They just made that suggestion. We're just
11 trying to be ultra diligent. Thank you.

12 CHAIRPERSON HOPPIN: We will look at the file,
13 Mr. Somach and see if we garner anything from it.

14 MR. SOMACH: I assume the Board will provide
15 notice if it intends to rely upon factually anything that
16 you review within that file and allow us to respond to
17 that.

18 CHAIRPERSON HOPPIN: Yes, sir.

19 MR. SOMACH: So I take it there is no rebuttal
20 testimony from the state?

21 MS. OLSON: That was our rebuttal exhibit.

22 I do want to follow up that I know we're going to
23 close the hearing. You're probably going to close the
24 hearing at some point. But if Mr. Pettit is feeling
25 better and we are able to have him answer the question, I

1 would like the reserve the ability to submit his answer to
2 that question.

3 CHAIRPERSON HOPPIN: I'll go along with that, but
4 I'm not going to have this thing held up for months if he
5 isn't feeling well. One thing I'm not going to do is put
6 Mr. Pettit's health in jeopardy over that. It's important
7 but --

8 MS. OLSON: Agreed.

9 CHAIRPERSON HOPPIN: I'm not going to do that.

10 MS. OLSON: Agreed.

11 CHAIRPERSON HOPPIN: Thank you.

12 MR. SOMACH: We have no rebuttal. I was
13 reflecting upon the Walt testimony, but I think at this
14 point I'm exhausted from it. But we have no rebuttal
15 testimony.

16 And the question I have for the Board is whether
17 or not you would like to have any post-trial briefing in
18 the way of -- in lieu of a verbal closing argument and
19 whether or not you want any page limit on that if you'd
20 like to see any written closing.

21 CHAIRPERSON HOPPIN: Well, we're going to have
22 closing briefs obviously, but would you like to have
23 something prior to that? Is that what you're saying?

24 MR. SOMACH: No. Actually was there -- this is
25 showing the fact I didn't reread evidently the procedures.

1 Is there as part of this a process for post-hearing
2 briefing? We'll just simply rest on that.

3 CHAIRPERSON HOPPIN: Thank you.

4 And to the point of briefings, we will have
5 closing briefs due 30 days following the date the
6 transcripts are released and are limited to a maximum of
7 ten pages, double spaced twelve point Arial font, which
8 I'm reading because I don't know what the hell Arial font
9 is, to be perfectly honest with you.

10 MR. SOMACH: Do you know what twelve point is?

11 CHAIRPERSON HOPPIN: I do. The court reporter
12 estimates the transcript will be available eleven to 15
13 days after the close of the hearing. Do either of you
14 have any objections to the amount of pages that are being
15 suggested for your closing briefs?

16 MS. OLSON: No objection.

17 MR. SOMACH: No objection.

18 CHAIRPERSON HOPPIN: Thank you.

19 The Board will take this matter under submission.
20 The participants in this hearing will be sent notice of
21 the Board's proposed order in this matter and the date of
22 the Board meeting in which the proposed Order will be
23 considered.

24 After the Board adopts an Order, any person who
25 believes the Order is in error has 30 days within which to

1 submit a written petition for reconsideration by the
2 Board.

3 Thank you all for your interest, cooperation, and
4 patience with me as I have gone through my first hearing
5 not riding shotgun.

6 Mr. Somach

7 MR. SOMACH: You did good. But I did have a
8 question because we had filed that Motion to Dismiss. You
9 indicated you weren't going to rule on that prior to the
10 time of the hearing. And I was just curious if you were
11 going to refer a ruling when you finally issued you Order
12 or whether there would be a supplemental ruling? I'm
13 trying to figure out if I have to deal with it at all in
14 my closing brief.

15 CHAIRPERSON HOPPIN: Ms. Heinrich, would you
16 answer Mr. Somach, please?

17 SENIOR STAFF COUNSEL HEINRICH: I'm not sure.
18 But I don't see a need to repeat arguments that are
19 already in your motion in the closing brief, you know,
20 that you've already submitted it. Those arguments are
21 pending. We'll take a look at that obviously. And I
22 don't think you need to take up any of your pages with
23 repeating arguments you made already.

24 MR. SOMACH: That's fair enough.

25 CHAIRPERSON HOPPIN: Ms. Olson, one last word?

1 Are you done?

2 Thank you all.

3 (Whereupon the hearing adjourned at 04:48 PM)

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