

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

)  
Public Hearings to Determine )  
Whether to Adopt Cease and Desist )  
Orders against: )  
)  
Mark and Valla Dunkel, Middle River )  
in San Joaquin County; )  
)  
Yong Pak and Sun Young (Pak/Young), )  
Duck Slough in San Joaquin County; )  
)  
Rudy Mussi, Toni Mussi and Lory C. )  
Mussi Investment LP (Mussi et al.), )  
Middle River in San Joaquin County )  
~~~~~ )

JOE SERNA JR./CALEPA BUILDING

1001 I STREET

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

VOLUME I

WEDNESDAY, MAY 5, 2010

9:08 A.M.

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CERTIFIED SHORTHAND REPORTER  
LICENSE NUMBER 13196

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P R O C E E D I N G S

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CO-HEARING OFFICER BAGGETT: Good morning.  
We're here today to conduct three separate hearings.

The first is Mark and Valla Dunkel, CDO hearing. Then Rudy Mussi, Tony Mussi and Laurie Mussi Investments, LLC CDO hearing. And finally Yong Pak and Sun Young CDO hearing.

I'm Mark Baggett, Co-Hearing Officer and a Member of the State Board with my colleague, Chairman Charlie Hoppin.

Before we get started, a few words on evacuation procedures. As you know, we have two exits behind. And I think you all probably know the drill at this point. In the event of a fire alarm, we leave immediately, go across the street to the park, and staff and we will assist you if you need it with the evacuation.

Each hearing will be webcast to the public. Each hearing will be recorded by audio and video.

In addition, a court reporter is present to prepare a transcript of each preceding. Anyone who wants a copy of the transcript should make separate arrangements with the court reporter. So when you speak, please make sure the green light's on on the mic

1 so that the court reporter can hear you.

2 I'd like to address the order in which the  
3 three hearings will be held.

4 I understand that there may be other  
5 housekeeping issues, but if possible I'd like to wait  
6 until we beginning each hearing before we address those  
7 particular issues.

8 Based on the hearing notice, we plan to proceed  
9 with the Dunkel hearing first followed by the Mussi  
10 hearing followed by the Pak and Young hearing.

11 Mr. Herrick has requested that we hold the  
12 Mussi hearing last and hold the Yong Pak and Sun Young  
13 hearing second. Are there any objections?

14 MR. O'LAUGHLIN: No objections by Modesto  
15 Irrigation District.

16 CO-HEARING OFFICER BAGGETT: Okay. Hearing  
17 none, that's fine.

18 So let's begin with the first hearing then.

19 (Whereupon the following proceedings  
20 regarding Dunkel were held.)

21 CO-HEARING OFFICER BAGGETT: This is a time and  
22 place for the hearing to receive evidence relevant to  
23 determining whether to adopt with or without revision a  
24 draft cease and desist order issued against Mark and  
25 Valla Dunkel.

1 I'm here with my colleague, Charlie Hoppin.

2 I'm Art Baggett, a Member and Co-Hearing Officer.

3 Also present are Staff Counsel Dana Heinrich,  
4 Staff Engineer Ernie Mona, and Environmental Scientist  
5 Jane Farwell.

6 Mr. Rubin.

7 MR. RUBIN: Board Member Baggett, Jon Rubin,  
8 for San Luis & Delta-Mendota Water Authority. I do have  
9 a question -- I apologize -- about the order of the  
10 proceedings.

11 There is some testimony, particularly with  
12 regard to Mussis and Pak and Young that's essentially  
13 submitted twice. And I don't know if there is a way to  
14 be more efficient.

15 I will be cross-examining. I intend to  
16 cross-examine two witnesses, both of which I submitted  
17 testimony that's virtually identical, if not identical.  
18 And rather than have to go through in each separate  
19 proceeding the same questions, I don't know if there is  
20 a way that we could expedite that.

21 I do recognize the need to try to keep these  
22 proceedings separate. I don't know if there is a way  
23 for the -- for the parties to stipulate that the direct  
24 and the cross, redirect, recrosses in one proceeding is  
25 sufficient for both proceedings, but I want to try to

1 avoid unnecessary duplication if we can.

2 CO-HEARING OFFICER BAGGETT: Any of the  
3 parties -- Mr. Herrick, do you have any?

4 MR. HERRICK: I don't have any objection to  
5 that. Speed things up a little bit.

6 We just have to make sure that the record's  
7 clear, you know, these questions are applying to one as  
8 opposed to the other. But that would certainly help  
9 this go along faster.

10 CO-HEARING OFFICER BAGGETT: Prosecution have  
11 any concerns?

12 MR. ROSE: I don't have any objections. I  
13 would have largely the same questions for the witnesses  
14 for both. As long as it's okay from your end from a  
15 record-keeping and transcript perspective, we have no  
16 objection.

17 CO-HEARING OFFICER BAGGETT: Okay.

18 With that, when we get to those witnesses, we  
19 can sort out the details on how to make sure the  
20 record's clear.

21 This hearing is being held in accordance with  
22 Public Notice dated February 18, 2010.

23 The hearing will afford the participants who  
24 have filed a Notice of Intent to Appear an opportunity  
25 to present relevant oral testimony and other evidence

1 that addresses the following key issues:

2           Should the State Water Board adopt a draft CDO  
3 issued on December 14th, 2009?

4           If the draft CDO should be adopted, should any  
5 modification be made to the measures in the draft CDO  
6 and, if so, what is basis for such modifications?

7           Before we begin the evidentiary portion of this  
8 hearing, we'll hear from any speaker who wishes to make  
9 a nonevidentiary policy statement.

10           It appears we've got a couple. If you wish to  
11 make a policy statement, fill in a blue card and hand it  
12 to the staff if you have not already done so. If you  
13 have written copies of a policy statement, if you could  
14 give them to staff it would be appreciated.

15           Persons making policy statements must not  
16 attempt to use their statements to present factual  
17 evidence, either orally or by introduction of written  
18 exhibits. They should be five minutes or less in  
19 length.

20           With that, we received two Notices of Intent to  
21 Appear to present policy statements, first from the San  
22 Joaquin Farm Bureau.

23           MR. BLODGETT: My name is Bruce Blodgett. I'm  
24 with the San Joaquin Farm Bureau Federation. I'm the  
25 Executive Director, and these comments go to all three

1 of the CDO hearings that you are going to go.

2 CO-HEARING OFFICER BAGGETT: Thank you.

3 MR. BLODGETT: So time is of the essence, we  
4 understand, for you. So we just wanted to make it very  
5 clear.

6 First of all, we are a 501(c)(5) nonprofit  
7 corporation, represents agriculture interests in San  
8 Joaquin County. We have more than 4,000 members who are  
9 deeply concerned about these CDO hearings today and  
10 oppose these CDO hearings today.

11 This is a position taken by our board of  
12 directors that includes representation from throughout  
13 the County, the east side of the County, the Delta,  
14 south of the County, every part of the region in support  
15 of landowners in the Delta who we will be being  
16 unfairly attacked in this process.

17 Delta agriculture has been an integral part of  
18 our economy since the 1800s. The one thing that we  
19 could always count on in our county is that Delta  
20 agriculture would be strong, that the acreage would be  
21 very stable, that production would always be stable.

22 The only thing that ever changes in the Delta  
23 is maybe the cropping rotation, but never the acreage,  
24 and we're extremely concerned again that this is an  
25 attack on long-standing Delta families who have water

1 rights that are well established and are being, in this  
2 case, brought into scrutiny for really no apparent  
3 reason.

4 We understand this challenge to water rights  
5 Delta farmers, and it is nothing more than that. It's a  
6 challenge of water rights to Delta farmers. It's not  
7 being done anyplace else in the state that we're seeing.

8 And our concern is the precedent is being set.  
9 And we find it real ironic that at the same time the  
10 administration is looking to build a peripheral canal  
11 tunnel, that again Delta farmers are the ones being  
12 targeted.

13 They're being targeted with a canal and loss of  
14 massive acreage, and they're now being targeted with  
15 water rights. And it's wearing down a very precious  
16 resource, and that is our Delta farmers.

17 We have serious doubts about the fairness of  
18 this process. We have very serious concerns.

19 We certainly hope it's a fair process and a  
20 factual process, but it seems like all agencies in the  
21 State are moving in one direction, and that is to  
22 eliminate as much Delta agriculture as possible.

23 We have some obvious concerns, but again, I'll  
24 just reemphasize this one key point, and I'll submit  
25 this comment again in the essence of time.



1           Delta agriculture is our heart. It is our soul  
2 in San Joaquin County for agriculture. It is the one  
3 thing that keeps the agricultural economy alive.

4           It is the one thing that we have that's most  
5 close or closest to a natural farming system in the  
6 state of California. It has available water. It has  
7 good soils. And it's the one place in the state that  
8 you can say that, that isn't contrived and has been  
9 farmed from the 1800s.

10           As a point of reference, my own family moved in  
11 the Delta, my mother's family in the 1800s, just like  
12 families that are represented here, just like the ground  
13 that has been farmed in those 1800s.

14           So I would encourage you to look at this with  
15 open eyes and support the landowners that are in the  
16 Delta.

17           With that, I'll submit comments.

18           CO-HEARING OFFICER BAGGETT: Thank you.

19           MR. BLODGETT: Any questions?

20           CO-HEARING OFFICER BAGGETT: No.

21           California Department of Water Resources.

22           MR. SODERLUND: Good morning, Board Chair  
23 Hoppin and Board Member Baggett.

24           My name is Erick Soderlund, and I'm here on  
25 behalf of the Department of Water Resources.

1           And like the Farm Bureau before me, the  
2 Department's policy statement is fairly general. It  
3 doesn't apply to any specific water user appearing  
4 before the Board today. As such, if it pleases the  
5 Board, we'd like to make one policy statement that  
6 applies throughout today.

7           CO-HEARING OFFICER BAGGETT: Fine.

8           MR. SODERLUND: DWR appreciates the Water Board  
9 undertaking these types of hearings and activities. We  
10 agree with the Water Board that the curtailment and  
11 identification of unauthorized diversions is important  
12 to protecting beneficial uses in the Bay Delta and  
13 upholding basic principles of the State's water rights  
14 laws.

15           Importantly though, DWR does not have any  
16 specific knowledge about the water rights of the water  
17 users in question today.

18           We do, aside from just upholding the basic  
19 principles of water law in California, DWR and SWP  
20 users, State Water Project users, can be injured by  
21 illegal diversions.

22           For example, there are times when the  
23 Department must make release from its reservoir to meet  
24 various water quality objectives and in-Delta water  
25 uses, and if there are entities that are unauthorized

1 diverting water, the Department essentially has to make  
2 up for that water and therefore can be harmed by it.

3           There is a lot of uncertainty in today's water  
4 right world, and specifically in the Bay-Delta, and  
5 there are a lot of proceedings may or may not address  
6 that uncertainty and may even actually increase it.

7           But the Department believes these types of  
8 proceedings do their part to increase certainty and  
9 increase our knowledge, and as such, we believe it's a  
10 worthwhile undertaking.

11           And that's the Department's statement.

12           Thank you.

13           CO-HEARING OFFICER BAGGETT: Thank you. Any  
14 other? That's the only cards I have.

15           In the order of proceeding today, we'll move to  
16 the evidentiary portion of hearing. Before hearing the  
17 participants' case-in-chief, we'll hear opening  
18 statements from any participants who have not submitted  
19 direct testimony and who do not intend to present a  
20 case-in-chief.

21           Next we'll hear the participants'  
22 case-in-chief, and the participants will present their  
23 cases-in-chief and conduct cross-examination in the  
24 following order:

25           Division of Water Rights, Mark and Valla

1 Dunkel, Modesto Irrigation District, State Contractors  
2 and San Luis & Delta-Mendota Water Authority as one  
3 party.

4 And then we have three parties listed for  
5 limited cross or rebuttal purposes: South Delta Water  
6 Agency, Central Delta Water Agency, and San Juan County,  
7 and San Juan County Flood Control and Water Conservation  
8 Districts.

9 Is there anyone else we're missing? I think  
10 that's the parties I have.

11 Beginning of each case-in-chief, the  
12 participant may make an opening statement. Briefly  
13 summarize participant's position what participant's  
14 evidence is intend to establish.

15 After opening, we'll hear testimony from the  
16 witnesses. Before testifying, the witnesses should  
17 identify the written testimony as their own and affirm  
18 it's true and correct.

19 Witnesses should summarize the key points in  
20 their written testimony and not read the written  
21 testimony into the record.

22 Direct testimony will be followed by  
23 cross-examination by other participants, Board staff,  
24 and the Hearing Officers.

25 Redirect testimony and recross limited to the

1 scope of the redirect may be permitted.

2 After all the cases-in-chief are complete,  
3 participants may present rebuttal evidence.

4 Participants are encouraged to be efficient in  
5 presenting their cases and their cross-examination.

6 Except as we approve a variation, we will  
7 follow the procedures set forth in the Boards regulation  
8 hearing.

9 The participants' presentation will be subject  
10 to the following time limits: Opening statements, five  
11 minutes per party.

12 Oral presentation of direct, and each witness  
13 will be limited to 20 minutes per witness or an hour  
14 total for panel of witness.

15 Cross-examination will be limited to one hour  
16 per witness or panel. But as always, if more time is  
17 needed and you show good cause, we generally will allow  
18 that.

19 Oral closing arguments will not be part of  
20 these proceedings.

21 We will discuss the opportunity for submission  
22 of closing briefs at the end of the proceeding.

23 Are there any procedural issues before we  
24 beginning?

25 MR. HERRICK: Mr. Chairman, John Herrick for

1 Mark and Valla Dunkel.

2 As I e-mailed everyone yesterday, I want to  
3 reraise my motion to recuse Mr. Baggett from the -- as a  
4 hearing officer. I submitted a declaration in support  
5 of that yesterday.

6 I think it's clear that this process began at  
7 the instigation of MID and their attorney,  
8 Mr. O'Laughlin, through the submitted of the Wee report;  
9 and as I've said in my declaration, certain facts have  
10 led me to conclude that Mr. O'Laughlin is able to, or  
11 has in the past, called Mr. Baggett during a hearing  
12 which I don't take any position whether that's illegal  
13 or something, but it certainly would be inappropriate if  
14 indeed it happened.

15 Those facts alone raise reasonable suspicion as  
16 to whether or not there's bias.

17 But I just want to add to that -- and we've  
18 gone through this via e-mail, and I understand the  
19 Hearing Officer's already ruled on that.

20 But the process is not, from the outside  
21 looking in, fair. And by that I mean today we're going  
22 to start off with the Dunkel case. It's a proposed  
23 Cease and Desist Order against someone who purchases  
24 water from Woods Irrigation District.

25 So we're here with testimony and, I don't know,

1 ten attorneys, the Board, all the staff to argue over  
2 nothing.

3 Now, if you want to order the Dunkels to stop  
4 doing something, I would like to know what that is. But  
5 there's nothing for us to be here for.

6 In the future, there -- it's possible that  
7 somebody, Woods Irrigation District, is found to be  
8 wrong or something. But that's a situation that might  
9 arise. It's not going to arise now.

10 So we're proceeding with the Dunkels based on  
11 no reason.

12 We have already -- the Board's already  
13 scheduled, or also scheduled, a hearing on Navarro. And  
14 I understand there's an e-mail this morning that  
15 continues that, but that's -- that was going to be one  
16 of the next set in June.

17 I've provided State Board staff with the deed  
18 which reserves the riparian right for the Navarro  
19 property, yet it's scheduled for a Cease and Desist  
20 Order hearing.

21 So when I put all those things together, I  
22 believe that there is a bias at work here, and I believe  
23 we have to make absolutely sure that the record is not  
24 tainted by that perceived bias.

25 Now we've gone through a number of discussions

1 over e-mail where I was inquiring as to various  
2 contacts. And as I've expressed, I have not be  
3 satisfied by the responses for that.

4 So I think it's best if we have Mr. Baggett  
5 recused from this proceeding and go forward with the  
6 understanding that something's wrong -- something's  
7 rotten in Denmark; we're proceeding on cases that have  
8 no apparent reason to be brought.

9 And anyway, that's my motion, and I appreciate  
10 your time.

11 CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
12 We'll deal with the motion.

13 MR. RUIZ: Mr. Baggett, I would just -- Dean  
14 Ruiz on behalf of Central Delta Water Agency, and  
15 Central Delta Water Agency supports the motion.

16 I think the allegations raised are substantial  
17 and are serious, and there's a well-established axiom in  
18 the law that the appearance of impropriety itself is  
19 just as bad as any impropriety.

20 Based on that, and the evidence that -- the  
21 information that Mr. Herrick's provided, Central Delta  
22 Water Agency sees no reason, logical reason whatsoever,  
23 that we would continue with Mr. Baggett, yourself, as  
24 the hearing officer.

25 MR. O'LAUGHLIN: Chairman Baggett, Tim



1 O'Laughlin, Modesto Irrigation District.

2 I don't know where this motion is going. I'm  
3 not going to opine on it. All I know is I have a  
4 subpoena that's been issued to me to appear today to  
5 testify.

6 So just so the record's clear, I'm here today,  
7 and I'm ready to testify.

8 So when you guys figure out what you want to  
9 do, you can or cannot -- or they can or cannot call me  
10 as a witness. I don't care.

11 But I just want the record to be clear that  
12 I've complied with the subpoena.

13 CO-HEARING OFFICER BAGGETT: So noted.

14 MS. GILLICK: DeeAnne Gillick on behalf of  
15 County of San Joaquin and the Flood Control District. I  
16 don't have a microphone, so I get to come up to the  
17 podium.

18 The County would support the motion on behalf  
19 of the parties, the Dunkel parties.

20 It is well recognized in the law that  
21 administrative hearing officers are still held to the  
22 same standards that would apply to judges or other  
23 judicial proceedings regarding bias as well conflict of  
24 interest and ex parte communications.

25 And specifically, this Board is bound to the ex

1 parte communication rules that apply in the  
2 Administrative Procedure Act, and the County supports  
3 and renews the motion on behalf of the parties that  
4 there is bias or inappropriate communications with the  
5 hearing officers.

6 And just to make sure that the record is  
7 complete as to this issue, the County would request that  
8 the Board take judicial notice of documents submitted in  
9 the State Board record, and specifically submitted on  
10 the -- posted on the State Board website regarding the  
11 communication referred to by Mr. Herrick in his  
12 declaration regarding Mr. O'Laughlin on behalf of the  
13 San Joaquin River Group Authority submitting the Wee  
14 report.

15 And that document is a letter dated July 8,  
16 2008, and is part of the record on adoption of the  
17 Strategic Plan, and it is listed on the State Board  
18 website, and I've got the address just for the record  
19 and to support that judicial notice request, just to  
20 preserve that record on this issue. And it's:  
21 [swrcbing.ca.gov/waterrights/water\\_issues/programs/bay\\_](http://swrcbing.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/index.shtml)  
22 [delta/strategic\\_plan/index.shtml](http://swrcbing.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/index.shtml).

23 Thank you.

24 CO-HEARING OFFICER BAGGETT: Anyone else?

25 MR. MUSSI: My name is Rudy Mussi. I'm one of

1 the participants in this hearing. I also would like to  
2 ask Mr. Baggett to recuse himself just because, you  
3 know, I'd like to believe that I would be getting a fair  
4 hearing.

5 And with just the uncertainty, in my case, it  
6 would set me -- it would comfort me to know that, you  
7 know, I'm here being challenged, my livelihood, that I'm  
8 receiving a fair hearing.

9 CO-HEARING OFFICER BAGGETT: Mr. Herrick.

10 MR. HERRICK: I'd just ask, is this the time?  
11 Would you like me to call Mr. O'Laughlin as a witness to  
12 explore this, or do you want me to do that later?

13 CO-HEARING OFFICER BAGGETT: I'm ready to rule  
14 on it. I don't know why we need to have a proceeding on  
15 this issue, unless counsel can -- I mean, that's a  
16 proceeding you can take someplace else, I think.

17 I don't understand. All eleven years here,  
18 we've never had a proceeding to determine an ex parte  
19 communication before this Board. I mean there have been  
20 challenges brought in the courts against staff and so on  
21 over the years.

22 But I'm quite comfortable.

23 Whether an issue occurred four and a half years  
24 ago in a quasi-legislative hearing has really no bearing  
25 on any of these issues before us today.

1 MR. NOMELEINI: Mr. Chairman, just for the  
2 record, Dante John Nomellini.

3 We addressed the very recusal issue at the  
4 beginning of the gaining D-1641. I raised the issue  
5 with regard to Board Member Caffrey. I was allowed to  
6 call witnesses, and we resolved that issue.

7 It was resolved there would be no recusal, but  
8 there is precedent for, and it was done at that time. I  
9 just want to call your attention to that.

10 CO-HEARING OFFICER BAGGETT: That's helpful.

11 MR. NOMELEINI: I wanted to call your attention.  
12 It was addressed.

13 It's not a comfortable thing to do, but it was  
14 done at the beginning of the hearing and due process was  
15 afforded to that.

16 CO-HEARING OFFICER BAGGETT: Okay. Any --  
17 Charlie? Do you have any --

18 CO-HEARING OFFICER HOPPIN: Up to you.

19 CO-HEARING OFFICER BAGGETT: If in fact it was  
20 done under 1641, that predates my time on this Board.  
21 The beginning of that order, as some of you know, and I  
22 think all of us up here.

23 So Mr. Herrick, you can proceed then.

24 ///

25 ///

1 MR. HERRICK: Then I'll call Mr. O'Laughlin.

2 TIM O'LAUGHLIN

3 Called by YONG PAK AND SUN YOUNG; RUDY MUSSI, TONI MUSSI

4 AND LORY C. MUSSI INVESTMENT LP; MARK and VALLA DUNKEL

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

7 MR. RUBIN: I do.

8 CO-HEARING OFFICER BAGGETT: Thank you.

9 DIRECT EXAMINATION

10 BY MR. HERRICK:

11 Q Mr. O'Laughlin, did you indeed call Mr. Baggett  
12 during one of the hearings leading to the Strategic Plan  
13 on the cell phone during the hearing?

14 A You'd have to be more specific. I did appear  
15 on behalf of the San Joaquin River Group Authority in  
16 regards to the Strategic Plan hearings which took place  
17 over a number of months.

18 There was an initial draft. There were  
19 subsequent Board hearings.

20 So you'd have to be more specific about dates  
21 and times for me to answer that. And I don't know what  
22 hearing you're talking about. If you're talking about  
23 the actual -- the actual Strategic Plan hearing, the  
24 answer would be no.

25 Q Did you call Mr. Baggett during one of the

1 State Board hearings considering the Salton Boron TMDL?

2 A What hearing and what time again? You're  
3 being -- I can't answer the question Mr. Herrick because  
4 you keep saying hearing, and I don't know what hearing  
5 you're talking about.

6 We have been involved in the San Joaquin River  
7 Basin Objectives. That started back with D1641. Mr.  
8 Baggett has come on the Board since that time.

9 We had a Basin Plan amendment review in 2005, I  
10 believe. We had one in 2007.

11 We're currently in a San Joaquin River Basin  
12 Salton Boron Objective Basin Plan Review currently.

13 So in that time -- if you want to talk from  
14 about 1995 when Mr. Baggett came on the Board to the  
15 present, there are -- there have been times that I have  
16 called Mr. Baggett on his cell phone.

17 Q During a hearing?

18 A What hearing? When, where, and how? I have no  
19 idea. I don't know what you're talking about in regards  
20 to anything.

21 Q Well, I'll narrow it down, but you just said  
22 that there have been times when you have called him, and  
23 I was just clarifying whether you make a phone calls  
24 during a hearing or not.

25 It doesn't have to be anything specific yet.

1 I'll get to that next.

2 A Without being more specific, I can't answer  
3 that question.

4 Q Okay. Do you recall the consideration of the  
5 Salton Boron TMDL adopted by the Regional Board and then  
6 presented to the State Board for consideration during  
7 the year 2005?

8 A Yes. Unfortunately, I do recall that.

9 Q Do you recall that we -- there were two  
10 hearings leading up to the eventual adoption by the  
11 State Water Board of that TMDL?

12 A I think there might have been three. Because I  
13 think we started it, it got booted once, and then we had  
14 two other days of testimony. So it might have been  
15 three days.

16 Q During any one of those three days, do you  
17 recall calling Mr. Baggett on the cell phone during the  
18 hearing or before the hearing was over?

19 A No. I don't recall any of that.

20 I did talk to -- I did make a presentation to  
21 the State Water Resources Control Board at the hearings  
22 regarding the Salton Boron TMDLs, but that's all.

23 Q And do you recall my e-mail to you after that  
24 hearing inquiring as to the same question?

25 A No, I do not.

1           Q       Okay.  Mr. O'Laughlin, did you have any  
2       conversations with any of the State Water Resources  
3       Control Board Members prior to the Strategic Plan  
4       process starting dealing with the issue of water rights  
5       in the South Delta?  By that, I mean alleged illegal  
6       diversions?

7           A       Prior to the Strategic Plan being adopted --

8           Q       No, prior to the Strategic Plan process  
9       beginning, I said.

10          A       Yes, yes.  I've had -- starting in 1995 up  
11       until the Strategic Plan, I have had numerous  
12       conversations with -- and I'll just expand on your  
13       question a little bit -- with Board Members and State  
14       Water Resources Control Board staff regarding what I  
15       thought were a massive quantity of illegal diversions  
16       that were taking place in the South Delta.

17                   And specifically what happened is that came to  
18       fruition in the D1641 hearings when the State Water  
19       Resources Control Board staff submitted an exhibit which  
20       clearly showed that in critically dry years and in dry  
21       years that there was no natural flow available below  
22       Vernalis in the summer months July through October.

23                   I took that and pushed it, and subsequently  
24       State Board staff did investigations which led to the  
25       Phelps CDO.



1 I participated on behalf of the San Joaquin  
2 River Group in the CDO hearings against Phelps, et al.

3 I was the lead attorney. I represented San  
4 Joaquin River Group in that hearing.

5 Coming out of that hearing in the subsequent  
6 affirmation by the superior court and affirmation by the  
7 appellate court of the decision in the CDO hearings, my  
8 client and I decided to push forward on further  
9 investigations into the Delta because my belief, which  
10 was being affirmed, was that, like a lot of things in  
11 the Delta, water rights were a myth.

12 So what we did is we commissioned Mr. Stephen  
13 Wee to draft a report looking at what had been presumed  
14 to be riparian rights, or assumed to be riparian rights,  
15 under the USBR mapping that was done in the early 1970s.

16 We took that map. We did our own map. We went  
17 in and we actually did title searches on numerous  
18 properties.

19 And we subsequently determined that a lot of  
20 what the Bureau had assumed to be riparian rights were  
21 truly not riparian rights, that they had been severed  
22 early on, much like we found in the Phelps case.

23 So with that, we took the Wee report, and as  
24 part of the Strategic Plan we submitted the Wee report  
25 as part of the Strategic Plan, and I argued vigorously

1 that the State Water Resources Control Board needed to  
2 look at Delta enforcement of water rights.

3 MR. HERRICK: Mr. Chairman, I understand the  
4 witness's desire to, shall we say, muddle the issue, but  
5 that was a simple "did you have a discussions" question.

6 CO-HEARING OFFICER BAGGETT: Appreciate that.

7 MR. HERRICK: So I'm not trying to be tactless  
8 here, but a long position statement is not responsive to  
9 the issues we're dealing with, and we could be here all  
10 day, and I don't want to do that.

11 BY MR. HERRICK:

12 Q Mr. O'Laughlin, once this Strategic Plan  
13 process started, did you have any conversation with  
14 Board members about the Wee report, whether it was in  
15 draft form or in a final form? I mean outside of an  
16 open hearing?

17 A No.

18 Q Did you have any -- make any phone calls with  
19 Board Members regarding the Wee report during the  
20 Strategic Plan process?

21 A In the Strategic Plan process, regarding the  
22 Wee report, the answer would be no.

23 Q After the Strategic Plan was adopted, did you  
24 have any conversations with Board Members regarding the  
25 Wee report or the topics of the Wee report?

1           A       No.

2           Q       Same question with regard to phone calls rather  
3 than meetings dealing with -- phone calls between you  
4 and State Board members discussing the issues contained  
5 in the Wee report?

6           A       No.

7           Q       Subsequent to the -- excuse me.

8                   Once the notices of the hearing for the ongoing  
9 matters that are pending today, did you have any  
10 conversations with State Board Members, personal  
11 meetings wherein you had conversations regarding the Wee  
12 report or facts alleged therein?

13          A       Are you saying the notice for these hearings,  
14 the actual notice that went out? Is that the date?

15          Q       Yes.

16          A       No.

17          Q       Okay. And did you have any phone calls  
18 subsequent to the notice going out on the issues  
19 contained and the facts contained in the Wee report with  
20 Board Members?

21          A       No.

22          Q       Could you please give us your cell phone  
23 numbers that you have now and that you've had for the  
24 past three years?

25          A       No.

1 MR. HERRICK: I don't have any other questions  
2 then.

3 CO-HEARING OFFICER BAGGETT: I think we have --

4 MR. O'LAUGHLIN: I want to make sure that we're  
5 done with this.

6 CO-HEARING OFFICER BAGGETT: We aren't yet.

7 MR. O'LAUGHLIN: Statement representing myself.

8 CO-HEARING OFFICER BAGGETT: Do you want to  
9 finish the --

10 MR. O'LAUGHLIN: Oh, we have more?

11 CO-HEARING OFFICER BAGGETT: You have more.

12 CROSS-EXAMINATION BY MS. GILLICK

13 FOR SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD  
14 CONTROL & WATER CONSERVATION DISTRICT

15 BY MS. GILLICK:

16 Q I just want to be clear on the questions and  
17 follow up: Mr. O'Laughlin, have you ever called  
18 Mr. Baggett on his cell phone?

19 A Yes.

20 Q Mr. O'Laughlin, have you ever called  
21 Mr. Baggett on his cell phone while he was sitting with  
22 the State Board in one of the meetings, hearings,  
23 proceedings, anything while it was proceeding?

24 A So -- just so I'm clear before I answer the  
25 question: Are you saying when Mr. Baggett is actually

1 in the hearing whether or not I called him on his cell  
2 phone?

3 Q Yeah. I think it's straightforward. While --

4 A I got it.

5 Q While Mr. Baggett --

6 A I got it.

7 Q -- was sitting at State Board meetings --

8 A I got it.

9 Q -- on the dais --

10 A I got it. No.

11 Q Okay.

12 MS. GILLICK: Thank you.

13 CO-HEARING OFFICER BAGGETT: Any other one want  
14 to examine the witness? Mr. O'Laughlin?

15 MR. O'LAUGHLIN: Yes.

16 I have been asked to comply with a subpoena,  
17 and I want to go through this very briefly.

18 I have appeared, and I have complied with the  
19 subpoena.

20 It requested a produce the following documents:  
21 It says: All correspondence with Board Members or staff  
22 from January 28 to the present.

23 I have not produced those because in the  
24 information and belief that's the basis of this  
25 proceeding that's being brought by South Delta Water

1 Agency, it says that Mr. O'Laughlin has engaged in ex  
2 parte communications with Board Members.

3 In regards to this proceeding, that is  
4 absolutely false and is false in any regards to any  
5 proceedings in front of the State Water Resources  
6 Control Board.

7 I represent the San Joaquin River Group  
8 Authority and numerous agriculture clients. I have  
9 numerous dealings with State Board Members on a wide  
10 variety of issues.

11 My clients' right to redress and to address  
12 this Board on numerous policy issues and otherwise will  
13 not be thwarted by threats of having me subpoenaed to  
14 talk about what I did or didn't talk about with Board  
15 Members when we have due process rights and access and  
16 First Amendment rights to seek issues being resolved by  
17 this Board.

18 So in regards to this, they asked for all  
19 correspondence with Board Members and staff from  
20 January 28th to the present.

21 I did not comply with that.

22 We have, as part of this proceeding when it  
23 started in August, we have made all of our  
24 communications to the State Water Resources Control  
25 Board prosecution team, those correspondence and records

1 have been available to South Delta Water Agency.

2 There are no other correspondence with Board  
3 Members and/or staff members in regards to that.

4 Item B, all phone records evidence  
5 communication with members of the Board or its staff  
6 from January 2008 to the present.

7 Once again, from August when this proceeding  
8 started to the present, there have been no  
9 communications with any members of this Board regarding  
10 this ongoing proceeding.

11 I did have a meeting with, I believe it was,  
12 you and Mr. Hoppin regarding Delta outflow, but I have  
13 had no other discussions regarding this.

14 And not only that, it was unduly burdensome to  
15 go back. My client, as you know, produces a great  
16 amount of material and communication with the State  
17 Board on a wide variety of issues.

18 All appointment logs, calendars pertaining to  
19 meetings with Board Members or staff from January 28 to  
20 the present.

21 Well, A, I assert my privilege -- confidential  
22 privilege as an attorney that I do not produce any of my  
23 phone logs, my calendars, or anything else.

24 I have reviewed my records. I have had no  
25 communications with the Board Members or the staff

1 regarding this matter from August of last year to the  
2 present except through the Prosecution Team.

3 Okay? So I want the Board and the record to be  
4 clear that I have complied with the subpoena.

5 CO-HEARING OFFICER BAGGETT: So noted.

6 Anything else, Mr. Herrick?

7 MR. HERRICK: I have nothing else.

8 CO-HEARING OFFICER HOPPIN: Mr. Herrick, I  
9 would like to address you all, particularly Mr. Mussi.

10 My name hasn't been brought into question at  
11 this point. I think I'll let Mr. Baggett speak for  
12 himself.

13 I can tell you all, I would not be sitting here  
14 today if I didn't feel that the respective defendants  
15 were not going to get a fair and objective hearing.

16 I appreciate the rules of law and the concerns  
17 that you have. I can tell you personally, plain and  
18 simply, I would not be here. You wouldn't have to ask  
19 me to recuse myself if I had predetermined anything in  
20 these hearings.

21 And it's important for me to have all of you  
22 know that, and I stand by that.

23 Thank you.

24 CO-HEARING OFFICER BAGGETT: I would second  
25 that, but make a couple comments.



1           I think, one, the issue raised in the specific  
2 declaration of a quasi-legislative hearing four and a  
3 half years ago has no bearing on any of these issues or  
4 any of these proceedings before us today with the three  
5 scheduled hearings and a bias of those.

6           Absolutely no ex parte communications have  
7 taken place on any of these three issues.

8           Two, I have not prejudged any of the hearing  
9 notices -- any of the hearing issues that are before us  
10 today, and I absolutely feel I am not biased against any  
11 of the parties, for or against any of the parties, in  
12 this proceeding before us.

13           To go off my prepared comments, I did the  
14 Phelps hearing. And not all of the Phelps -- as you  
15 recall, there were a lot of allegations in the Phelps  
16 hearing. Not all of them were proved.

17           I think we looked at each of those on a  
18 case-by-case basis. It wasn't a rubber stamp of  
19 anything the Prosecution Team brought to this Board.

20           And as I think the Prosecution Teams know here,  
21 I'm not always -- I don't rubber stamp anything that's  
22 brought before this Board and look at it on a  
23 case-by-case basis, sometimes to the consternation of  
24 some of my colleagues.

25           So again, to reiterate, there have been no ex

1 parte communications on any of these issues with anyone.

2 I absolutely have no prejudice on this case one  
3 way or the other, on these facts, and looking forward to  
4 hearing the facts and the issues raised.

5 So with that, let's continue. And the  
6 objections are noted for the record.

7 Mr. Herrick -- and I do concur with Mr. Hoppin.  
8 I wouldn't -- you wouldn't have to ask for me to recuse  
9 myself if I felt there were any biases on any issue  
10 before this Board in my eleven years here.

11 With that, I'll now invite appearance of the  
12 parties by participants in the evidentiary portion of  
13 this hearing.

14 CO-HEARING OFFICER BAGGETT: I think first --  
15 and this Board has been rather tied up in a lot of other  
16 issues the last week. Way aside from this, we were here  
17 till 6:45 last night on another preceding on water  
18 quality.

19 And I think once we -- my Co-Hearing Officer  
20 and I started looking at the evidence before us, we  
21 realized there are some challenges, as Mr. Herrick  
22 pointed out, in the first case before us today.

23 So I think we -- that's very valid. How do we  
24 proceed with the Dunkel case without the Woods  
25 Irrigation District case?

1 I would agree. It makes -- any suggestions,  
2 Mr. Herrick?

3 I mean you've got the witnesses here. We've  
4 got the information here. Is there some way we can at  
5 least resolve it and defer it until after the Woods --  
6 but at least take advantage of the time and effort  
7 you've --

8 MR. HERRICK: Well, I -- it's not -- I would  
9 not want to have my client waiting for the Board to find  
10 something to allege them of.

11 The Board noticed a hearing, did an  
12 investigation, concluded internally that there was  
13 evidence of a water right because they're purchasing  
14 water from someone else.

15 So I can't imagine why we would hold this  
16 hearing open. Why don't we proceed with it and come up  
17 with a ruling that says there's a water right,  
18 apparently, goodbye.

19 Because there's nothing to order the Dunkels to  
20 cease doing. Nothing. So I think we should proceed and  
21 then have a ruling.

22 MR. O'LAUGHLIN: Mr. Baggett, Tim O'Laughlin on  
23 behalf of Modesto Irrigation District.

24 I would agree with Mr. Herrick in that regard.

25 I think we should proceed forward with the

1 Dunkel matter. The witnesses are here. The parties are  
2 prepared. And let's do it --

3 CO-HEARING OFFICER BAGGETT: Okay. Very good.

4 It seems to me it would be rather short and  
5 relying on a right. And that was the whole idea. This  
6 shouldn't be a lengthy, multi-day proceeding.

7 Anyone else have any comments before we  
8 proceed.

9 MR. RUBIN: Jon Rubin, San Luis & Delta-Mendota  
10 Water Authority. I do have a question about the  
11 process.

12 You indicated the order, as I understood it, a  
13 presentation of cases-in-chief. I wanted to take the  
14 opportunity to talk about the order of  
15 cross-examination.

16 I do have a concern, and given the alignment of  
17 the parties and want to have this structured in a way to  
18 be most efficient and, frankly, fair.

19 I don't know if you have direction in terms of  
20 how you see cross-examination proceeding, but I would  
21 like to address that at this time.

22 CO-HEARING OFFICER BAGGETT: Do you have a  
23 proposal?

24 MR. RUBIN: I don't have a specific proposal.  
25 I do think we need to avoid allowing similarly aligned

1 parties an opportunity to cross-examination a witness  
2 allowing for additional testimony beyond the direct  
3 testimony.

4 We would be comfortable not having an  
5 opportunity to cross-examine a witness that's called by  
6 Modesto Irrigation District, as an example, and I think  
7 the same should be applied to the landowners.

8 As an example, if Mr. Herrick calls a witness  
9 on behalf of the landowners, are you going to give South  
10 Delta Water Agency an opportunity to cross-examine that  
11 witness, Central Delta Water Agency an opportunity to  
12 cross-examine that witness, San Joaquin County an  
13 opportunity to cross-examine that witness?

14 CO-HEARING OFFICER BAGGETT: That would be the  
15 normal proceeding.

16 MR. RUBIN: I understand that's the normal.

17 Oftentimes, the approach, I think that you have  
18 the discretion to limit that. We are talking about  
19 issues -- I don't want to thwart evidence presented to  
20 you, but when you have similarly aligned parties, there  
21 is a potential --

22 CO-HEARING OFFICER BAGGETT: I understand.

23 MR. RUBIN: -- an opportunity to elicit  
24 testimony that should have been presented as part of  
25 direct.

1 CO-HEARING OFFICER BAGGETT: I appreciate that.

2 But I also appreciate that all the attorneys  
3 before us in this proceeding have had many days and  
4 weeks and months of practice before this Board and  
5 understand our desire to try to make things efficient,  
6 and I think we will allow -- we will all parties an  
7 opportunity for cross.

8 But again, as always, we would ask the parties  
9 to try not to be redundant and be as expeditious as  
10 possible.

11 With that, for the court reporter, I would ask  
12 for appearances of the parties, your name, your address,  
13 and who you represent.

14 Division of Water Rights Prosecution Team?

15 MR. ROSE: David Rose for the Division of Water  
16 Rights Prosecution Team. You need my address?

17 CO-HEARING OFFICER BAGGETT: Address.

18 MR. ROSE: 1001 I Street, Sacramento,  
19 California 95814.

20 CO-HEARING OFFICER BAGGETT: For the Dunkels?

21 MR. HERRICK: John Herrick representing the  
22 Dunkels, 4255 Pacific Avenue, Suite No. 2, Stockton, Cal  
23 95207.

24 CO-HEARING OFFICER BAGGETT: Modesto Irrigation  
25 District, et al.

1           MR. O'LAUGHLIN: Well, I'm not going to give my  
2 Cliff and John's address.

3           My name is Tim O'Laughlin. I represent Modesto  
4 Irrigation District. 117 Meyers Street, Suite 110,  
5 Chico, California 95927.

6           MR. RUBIN: Good morning. Jon Rubin for San  
7 Luis & Delta-Mendota Water Authority. I'm joined by  
8 Valerie Kincaid, both attorneys at Diepenbrock Harrison,  
9 location 400 Capitol Mall, Suite 1800, Sacramento,  
10 California 95814.

11          MR. POWELL: Stan Powell representing the State  
12 Water Contractors. Address is 400 Capitol Mall, 27th  
13 Floor, Sacramento, California 95814.

14          MS. GILLICK: DeeAnne Gillick on behalf of the  
15 County of San Joaquin and the San Joaquin County Flood  
16 Control and Water Conservation District. I also have  
17 with me Mia S. Brown. Our address is 509 West Weber  
18 Avenue, Stockton, California 95201.

19          MR. RUIZ: Dean Ruiz on behalf of Central Delta  
20 Water Agency and South Delta Water Agency. 3439  
21 Brookside Road, Suite 210, Stockton, California 95219

22          CO-HEARING OFFICER BAGGETT: And south delta?  
23 I think we've already --

24          MR. RUIZ: Yes.

25          CO-HEARING OFFICER BAGGETT: You're for Central

1 Delta.

2 MR. RUIZ: Central Delta and South Delta.

3 CO-HEARING OFFICER BAGGETT: Okay.

4 With that, now I'll administer the oath. For  
5 those who plan to testify, could you please stand and  
6 raise your hand?

7 Do you promise to tell the truth in these  
8 proceedings?

9 PROSPECTIVE WITNESSES (collectively): I do.

10 CO-HEARING OFFICER BAGGETT: Thank you.

11 We'll now hear the opening statements from  
12 participants who do not intend to present a  
13 case-in-chief. Mr. Herrick -- or I guess Mr. Ruiz.  
14 Does South or Central Delta have an opening statement  
15 you'd like to make?

16 MR. RUIZ: Yes.

17 Mr. Chairman, Mr. Baggett, I make this  
18 statement on behalf of Central and South Delta Water  
19 Agency. Both agencies are opposed to the CDO  
20 proceedings.

21 It is clear that the Board is selectively  
22 focusing your efforts on diverters in the South Delta  
23 without a logical basis.

24 It's also clear that your focus on diverters in  
25 the South Delta is politically motivated and was



1 initiated in large part by the report of Stephen Wee  
2 which was commissioned by the San Joaquin River Group  
3 Authority and which is, not surprisingly, one of the  
4 primary topics, exhibits, in these proceedings.

5           It is well understood that the diversion of  
6 water onto land in the Delta, as opposed to allowing  
7 those lands to go fallow, result in a net gain of  
8 overall water available to the system than would  
9 otherwise occur and that the water used in the Central  
10 and South Delta remains in the system.

11           It is therefore obvious that the supposed  
12 benefits of reducing or eliminating supposedly alleged  
13 illegal diversions in the South Delta, even if there  
14 were illegal diversions -- which there are not -- will  
15 not result in any benefit to the State.

16           Similarly, to the extent reduction of so-called  
17 authorized diversions would result in a benefit to the  
18 State, any such benefits could be received by focusing  
19 on diversions in other parts of the system.

20           But for reasons that are in our view  
21 inappropriate and transparent, the Board is not  
22 surprisingly focusing on the South Delta.

23           The Board also issued a draft CDO pursuant to  
24 Water Code Water Code sections 1831 and 1052. These  
25 sections do not apply to diverters who have claimed and

1 have provided evidence to support and substantiate  
2 riparian and pre-1914 water rights.

3           The Board's own materials correctly state that  
4 only the courts, not the Board, have jurisdiction to  
5 determine the validity and extent of riparian and  
6 pre-1914 water rights, and there's no precedent for the  
7 Board to pursue CDOs in this context against individuals  
8 who have provided substantial evidence of the riparian  
9 and pre-1914 water rights.

10           Yet the Board in our view continues to proceed  
11 without jurisdiction.

12           To the extent the illogical notion that you as  
13 the Board are allowed to first determine whether or not  
14 you have jurisdiction to do what you seek to do here in  
15 these CDO proceedings, you should conclude that you  
16 don't have jurisdiction because to date the Board has  
17 provided no basis for same.

18           The draft CDOs were issued on December 14,  
19 2009. Since then, substantial evidence has been  
20 presented to you regarding these diverters at issue and  
21 their riparian and pre-1914 water rights, and there have  
22 been a several settlement meetings as a result of same.

23           Yet we are here today as if none of that has  
24 occurred. Your process is flawed and causes confusion  
25 and inefficiency.

1           At a minimum the proceeding should have been  
2   renoticed, narrowed, and refocused based on the current  
3   state of the information provided to you subsequent to  
4   the issuance of the draft CDOs.

5           It would appear it would be appropriate if you  
6   had taken some cues from the manner in which the civil  
7   courts proceed and have an issue conference or require a  
8   settlement conference or the like, something to narrow  
9   these issues.

10           Instead, we're here wasting time and resources  
11   on issues which not should even be considered issues at  
12   this point. I'm confident the State's limited resources  
13   could be better utilized.

14           Thank you.

15           CO-HEARING OFFICER BAGGETT: Thank you.

16           MS. GILLICK: DeeAnne Gillick on behalf of the  
17   County of San Joaquin.

18           For purposes of the record, I'd like to join in  
19   the comments just made by Dean Ruiz for Central Delta  
20   and South Delta.

21           Most of the legal arguments as well as the  
22   factual issues that the County anticipated making in the  
23   opening statements were made by Dean.

24           Just a little bit in addition to those  
25   statements made by Dean. All the property owners, the

1 Dunkel property as well as other matters we're going to  
2 be getting into, are property located within San Joaquin  
3 County.

4 The property located within San Joaquin County,  
5 the farmers within San Joaquin County, the water rights  
6 that exist within San Joaquin County, are all vitally  
7 important to the County and the Flood Control and Water  
8 Conservation District.

9 The County, as stated before and will state  
10 again in these proceedings, does not support the illegal  
11 diversion of water rights.

12 However, with that said, the County believes  
13 that this proceeding as well as the current effort by  
14 the State Board is not well taken and does not have a  
15 valid point.

16 There is, as Mr. Ruiz indicated, clear  
17 statements in the record and by the Dunkels representing  
18 that they have riparian and/or pre-1914 water rights.

19 As Mr. Ruiz indicated, there's a strong legal  
20 argument that the State Board just clearly does not have  
21 authority to issue a Cease and Desist Order under Water  
22 Code section 1831, referencing Water Code section 1052,  
23 which relates to diversions subject to division 10 of  
24 the Water Code.

25 Pre-1914 water rights or riparian water rights

1 are not subject to that division.

2 And the evidence submitted to the State Board  
3 staff clearly indicates that there is riparian water  
4 rights and intent to retain that, and a 1911 agreement  
5 perfecting the pre-1914 water rights.

6 The State Board Prosecution Team has not  
7 presented any argument or any evidence that a forfeiture  
8 has occurred of the 1914 water rights.

9 Is the burden of the party asserting a  
10 forfeiture to -- has that burden? Again, there's been  
11 absolutely nothing presented.

12 Again, I'd like to renew the request of  
13 Mr. Ruiz that says this CDO, if it wanted to be  
14 considered, should have been gone back, the facts  
15 reevaluated, and the State Board come forward with a  
16 case-in-chief that can be supported by the evidence.

17 We don't have that here before us today.

18 Thank you very much.

19 CO-HEARING OFFICER BAGGETT: Thank you. That's  
20 why we are here. Why it's before this Board as opposed  
21 to between the parties. There's obviously a dispute.

22 With that, let's begin with the cases-in-chief.  
23 Prosecution Team, you're up first you have an opening  
24 statement and witnesses.

25 MR. ROSE: Good morning, Chairman Hoppin, Board

1 Member Baggett, Members of the Hearing Team. Again, my  
2 name is David Rose on behalf of the Division of Water  
3 Rights Prosecution Team.

4 The purpose of this hearing is to determine  
5 whether the Draft Cease and Desist Order should be  
6 adopted pursuant to Water Code section 1831 based on the  
7 threat of unauthorized diversion and use.

8 The Prosecution Team's evidence will show the  
9 parcel at issue in this case is not riparian to any  
10 natural watercourse, and no information has been  
11 provided to support retention of a riparian right.

12 No evidence has been provided to the Division  
13 showing irrigation on the parcel prior to 1914 and  
14 documenting subsequent continuous use of water.

15 The Dunkels property is within the Woods  
16 Irrigation company service boundaries. The Dunkels  
17 parcel is currently receiving water exclusively from  
18 Woods, but Woods has also been issued a Draft Cease and  
19 Desist Order.

20 In the event that Woods ceases to or is  
21 determined to be unable to provide sufficient water to  
22 the Dunkels under Woods' own rights, no evidence has  
23 been provided to establish any other basis of right for  
24 Dunkels diversions.

25 Therefore, while there may or may not currently

1 be unauthorized diversion and use, there exist the  
2 threat of future unauthorized diversion and use.

3 I'll call my first witnesses, Mark Stretars and  
4 Brian Coats from the Division of Water Rights.

5 --o0o--

6 BRIAN COATS

7 MARK STRETARS

8 Called by PROSECUTION TEAM

9 DIRECT EXAMINATION BY MR. ROSE

10 --o0o--

11 MR. ROSE: Would you please state your names  
12 and places of employment for the record.

13 WATER RESOURCE CONTROL ENGINEER COATS: Brian  
14 Coats, Water Resource Control Engineer with the Division  
15 of Water Rights.

16 SENIOR WATER RESOURCE CONTROL ENGINEER  
17 STRETARS: Mark Stretars, Senior Water Resource Control  
18 Engineer with the Division of Water Rights.

19 MR. ROSE: And you submitted copies of your  
20 resumes for these proceedings?

21 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: Yes, I did.

24 MR. ROSE: Are those resumes still current and  
25 accurate?

1 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

2 SENIOR WATER RESOURCE CONTROL ENGINEER

3 STRETARS: It is.

4 MR. ROSE: Have you reviewed your written

5 testimony for this hearing?

6 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

7 SENIOR WATER RESOURCE CONTROL ENGINEER

8 STRETARS: Yes.

9 MR. ROSE: Would you say that it is true and

10 accurate?

11 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

12 SENIOR WATER RESOURCE CONTROL ENGINEER

13 STRETARS: Yes.

14 MR. ROSE: Is there anything you'd like to

15 correct from your written testimony?

16 WATER RESOURCE CONTROL ENGINEER COATS: No.

17 SENIOR WATER RESOURCE CONTROL ENGINEER

18 STRETARS: No.

19 MR. ROSE: A few questions for Mr. Coats first.

20 Mr. Coats, what information informed the

21 Division's decision to issue the Draft Cease and Desist

22 Order at issue here?

23 WATER RESOURCE CONTROL ENGINEER COATS: The

24 property in question had lost all of its continuity with

25 the surface stream, and as a result of that, we had no



1 other evidence to support a pre-1914 claim or any  
2 appropriative water right on record.

3 MR. ROSE: What information was submitted by  
4 the parties prior to issuing this Draft Cease and Desist  
5 Order for you to base on your conclusions on?

6 WATER RESOURCE CONTROL ENGINEER COATS: The  
7 parties submitted no evidence prior to the issuance of  
8 the Draft Cease and Desist Order.

9 MR. ROSE: Have you received any information,  
10 any evidence, since the Draft Cease and Desist Order was  
11 issued?

12 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

13 MR. ROSE: And has any of that subsequently  
14 received information changed your mind about the  
15 conclusions you made in the Draft Cease and Desist  
16 Order?

17 WATER RESOURCE CONTROL ENGINEER COATS: Yes and  
18 no. To the extent that Woods is able to provide the  
19 Dunkels with the amount of water that they need, then it  
20 appears as though that would be acceptable.

21 But if it's determined at a later date in the  
22 CDO hearing for Woods that Woods is unable to provide  
23 the amount of water the Dunkels require, and the Dunkels  
24 need that amount of water, then the threat of  
25 unauthorized diversion exists.

1           MR. ROSE:  When you say if Woods would be able  
2 to provide the Dunkels sufficient water that would be  
3 acceptable, could you elaborate?

4           Is that acceptable as in that would provide  
5 them a right to water?  Or that would be acceptable,  
6 they would not be an unauthorized diversion of water at  
7 this time?

8           WATER RESOURCE CONTROL ENGINEER COATS:  Could  
9 you repeat that again?

10          MR. ROSE:  Could you elaborate a little bit on  
11 what you mean by whether that would be acceptable if  
12 Woods is providing water under Woods' own rights.

13          WATER RESOURCE CONTROL ENGINEER COATS:  If  
14 Woods is able to provide water to the Dunkels, and the  
15 Dunkels are purchasing that water, that would appear as  
16 though they have a valid basis of right to use that  
17 water.

18          But if Woods is unable to provide that water or  
19 the amount of water that they need, then there would  
20 appear to be the threat of unauthorized diversion.

21          MR. ROSE:  That would be -- you're talking  
22 about Woods providing water under Woods' own rights; is  
23 that correct?

24          WATER RESOURCE CONTROL ENGINEER COATS:  
25 Correct.

1 MR. ROSE: Okay. Do you have any evidence  
2 submitted, or have you seen any evidence, supporting the  
3 Dunkels having their own rights?

4 WATER RESOURCE CONTROL ENGINEER COATS: No.

5 MR. ROSE: A few brief questions for  
6 Mr. Stretars.

7 What is your position in the Division in  
8 relation to Mr. Coats?

9 SENIOR WATER RESOURCE CONTROL ENGINEER  
10 STRETARS: I am Senior Water Resources Control Engineer.  
11 I am Mr. Coats' direct supervisor.

12 MR. ROSE: Did you review the Draft Cease and  
13 Desist Order prior to issuance?

14 SENIOR WATER RESOURCE CONTROL ENGINEER  
15 STRETARS: Yes, I did.

16 MR. ROSE: Did you agree with that draft order?

17 SENIOR WATER RESOURCE CONTROL ENGINEER  
18 STRETARS: I did.

19 MR. ROSE: Have you seen the additional  
20 information that Mr. Coats discussed that was submitted  
21 after the draft order was issued?

22 SENIOR WATER RESOURCE CONTROL ENGINEER  
23 STRETARS: Yes, I have.

24 MR. ROSE: And do you still agree with Mr.  
25 Coats' conclusions regarding that additional information

1 and the current state of the Dunkels' right to divert  
2 and use water?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: I do.

5 MR. ROSE: I have no further question.

6 CO-HEARING OFFICER BAGGETT: Thank you.

7 Mr. Herrick, you're up for cross.

8 --o0o--

9 CROSS-EXAMINATION BY MR. HERRICK

10 FOR MARK and VALLA DUNKEL

11 --o0o--

12 MR. HERRICK: John Herrick on behalf of the --

13 I don't know. I guess respondents, Dunkels.

14 Gentlemen, we have had discussions on this  
15 issue. I just want to ask a few questions.

16 I'll be just directing this to Mr. Stretars,  
17 but either party may -- witness may respond if they  
18 think they have additional information.

19 Mr. Stretars, the initial investigation into  
20 the water rights of Dunkels was seeking information from  
21 them to show under what right or basis they get water;  
22 is that correct?

23 SENIOR WATER RESOURCE CONTROL ENGINEER

24 STRETARS: That's correct.

25 MR. HERRICK: And unfortunately, the Dunkels

1 themselves didn't respond in a timely manner; is that  
2 correct?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: That's correct.

5 MR. HERRICK: And after I became involved in  
6 that, we had communication and provided information to  
7 you; is that right?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: Yes.

10 MR. HERRICK: And that information included the  
11 fact that Woods Irrigation District was in existence and  
12 supplying water to a large area, including the Dunkel  
13 property; is that correct?

14 SENIOR WATER RESOURCE CONTROL ENGINEER

15 STRETARS: That is correct.

16 MR. HERRICK: Okay. In your investigation, did  
17 you look at any information indicating when the parcel  
18 may have lost its surface continuity with the river?

19 WATER RESOURCE CONTROL ENGINEER COATS: Yes.  
20 We looked at some submitted exhibits that were on our  
21 web page regarding the chronological history of the  
22 Dunkel -- or the land that the Dunkel parcel is  
23 currently on.

24 MR. HERRICK: And the reason I asked that  
25 question is I believe -- and I'm not testing your

1 knowledge -- but I believe in the Strategic Plan process  
2 it noted that staff had reviewed county assessor maps in  
3 its evaluation of who may or may not have surface  
4 continuity to a river?

5 WATER RESOURCE CONTROL ENGINEER COATS:

6 Correct.

7 MR. HERRICK: Did you review those assessor's  
8 maps for this case to see if you could determine or  
9 estimate when the Dunkel parcel lost its surface  
10 continuity with the surrounding waterway?

11 WATER RESOURCE CONTROL ENGINEER COATS: Yes.

12 That was the basis for our letter.

13 MR. HERRICK: Did you conclude the date of  
14 that?

15 WATER RESOURCE CONTROL ENGINEER COATS: The  
16 letter we sent out?

17 MR. HERRICK: No, excuse me. Did you  
18 conclude -- what was the date that you found that it  
19 lost surface continuity?

20 WATER RESOURCE CONTROL ENGINEER COATS: Prior  
21 to the, I think, the February 8, 2009 letter that went  
22 out.

23 SENIOR WATER RESOURCE CONTROL ENGINEER

24 STRETARS: Oh, no.

25 WATER RESOURCE CONTROL ENGINEER COATS: Oh.

1 Historically -- could you repeat the question again?

2 MR. HERRICK: Do you recall the date that you  
3 estimated or determined that the property lost its  
4 physical continuity with Middle River?

5 WATER RESOURCE CONTROL ENGINEER COATS: I don't  
6 have the exact date.

7 MR. HERRICK: Okay. In your investigation, did  
8 you also then look at one of the 1911 agreements that  
9 Woods Irrigation Company was part of at the time the  
10 district was formed?

11 WATER RESOURCE CONTROL ENGINEER COATS: Yes.  
12 The September 29, 1911 agreement, correct.

13 MR. HERRICK: And that agreement then committed  
14 the company to providing water to various lands?

15 WATER RESOURCE CONTROL ENGINEER COATS:  
16 Correct.

17 MR. HERRICK: Did that agreement predate the  
18 loss of surface continuity by the Dunkel property?

19 WATER RESOURCE CONTROL ENGINEER COATS: No.

20 MR. HERRICK: Okay.

21 Mr. Stretars, what is it that you are asking  
22 the State Board to order the Dunkels to cease doing?

23 SENIOR WATER RESOURCE CONTROL ENGINEER

24 STRETARS: We're asking that they cease any diversions  
25 that might be occurring under their own claimed rights.

1           MR. HERRICK: In your experience, do you  
2 require people to prove any other possible rights if  
3 they're operating under somebody else's water right?

4           Let me give you a hypothetical.

5           SENIOR WATER RESOURCE CONTROL ENGINEER

6 STRETARS: No, I'm thinking how I want to phrase it, is  
7 all.

8           I guess the answer would be yes and no.

9           In this case, because we got no response and  
10 because the CDO went out at any point in time it did, we  
11 would have said -- you know, the answer would have been  
12 yes, we would require any basis to be established.

13           There has been information submitted since then  
14 that has clarified it, not necessarily to our full  
15 comfort level or to our -- the point we could step back  
16 and say all the issues are revolved.

17           MR. HERRICK: Are you talking about an internal  
18 State Board procedural issue as to how you might end a  
19 Draft CDO? Or are you talking about a water right  
20 requirement of the parties?

21           Let me put it to you this way: If you  
22 investigate somebody that receives water from a multiple  
23 utility district, and they show you that they get water  
24 from that district, do you then say to them: Well, just  
25 in case the district is found to be lacking in a water



1 right, prove to me some other right. Do you ever do  
2 that?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: I don't know we have in the past.

5 MR. HERRICK: Okay. And without littering the  
6 record with legal terms, the issue of future potential  
7 illegal diversions on the Dunkel property is, would you  
8 say, not ripe yet?

9 SENIOR WATER RESOURCE CONTROL ENGINEER

10 STRETARS: Correct.

11 MR. ROSE: I'll object. I think that calls for  
12 a legal conclusion by Mr. Stretars.

13 I know you tried to phrase it so it wouldn't,  
14 but the question of ripeness is not necessarily one  
15 Mr. Stretars is appropriate to answer at this point.

16 MR. HERRICK: That's fine. He actually  
17 answered it, but I'll just follow up and try to rephrase  
18 it differently.

19 CO-HEARING OFFICER BAGGETT: Thank you.

20 MR. HERRICK: Mr. Stretars, the fact that some  
21 situation might arise in the future that could be  
22 alleged to be an illegal diversion, that's not something  
23 you typically deal with is, it? Preventing future  
24 possibilities?

25 SENIOR WATER RESOURCE CONTROL ENGINEER

1 STRETARS: When it's not within the realm of our  
2 knowledge.

3 To go slightly astray, the fact that we have  
4 Woods and we have some information to clarify there, it  
5 puts it within our realm of knowledge and therefore  
6 would allow us to look a little further into it.

7 MR. HERRICK: But it's still a future  
8 possibility that you're trying to provide for in this  
9 hearing; is that correct?

10 SENIOR WATER RESOURCE CONTROL ENGINEER

11 STRETARS: I don't know how to answer that one.

12 MR. HERRICK: Well, let me put it this way?  
13 Next year, Mr. Dunkel might partition his property, and  
14 one part might not be connected to the Woods Irrigation  
15 District lands.

16 Would you want to make sure at this time that  
17 some water right for this to-be-parcelled thing in the  
18 future are proven now?

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: Since has each come up, I'd say it's as  
21 pertinent now as in the future to address it, if we have  
22 the information before us.

23 MR. HERRICK: How do you -- how would you  
24 recommend we address a possible future happening?

25 SENIOR WATER RESOURCE CONTROL ENGINEER

1 STRETARS: Again, we're not looking at the future  
2 happening. We're looking at the property as it stands  
3 today.

4 MR. HERRICK: But that gets back to my original  
5 question, is: What is it that you want the Dunkels to  
6 stop doing?

7 SENIOR WATER RESOURCE CONTROL ENGINEER

8 STRETARS: Up until the point -- when the CDO was  
9 issued, at that point in time, we wanted them to stop  
10 and cease and desist to the extent they didn't have any  
11 basis of right.

12 The information that's come in since then, that  
13 has indicated there is some basis for their diversions  
14 that are occurring at this present time relative to the  
15 issue of what we were looking for, and the original was  
16 some basis which would have been either pre-14  
17 establishment or riparian basis of right.

18 There was a settlement agreement that was  
19 approached beyond that point with middle management  
20 which I'm not a party to and which I can't address.

21 The resolution of that left us where we are  
22 today.

23 MR. HERRICK: I understand that.

24 I'm not trying to beat a dead horse here, but  
25 anybody that comes before this Board might have a change

1 in circumstances later that could be construed as  
2 resulting in illegal diversion if they use water.

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: Exactly.

5 MR. HERRICK: In this case, we have maybe an  
6 uncooperative landowner who didn't initially provide you  
7 with information; is that correct?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: Right.

10 MR. HERRICK: But subsequent to that, we now  
11 know that the diverter doesn't operate a diversion. He  
12 asks someone else to pump water out of Middle River, and  
13 he pays for it pursuant to a 1911 agreement to do that;  
14 is that correct?

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: That's correct.

17 MR. HERRICK: Okay. So again, I'm not trying  
18 to be rude: What is it that you want the State Board to  
19 order them to stop --

20 MR. O'LAUGHLIN: Objection; asked and answered.

21 He's gotten -- he's done this four times and  
22 asked the same question four times. He doesn't like the  
23 response. Let's move on.

24 CO-HEARING OFFICER BAGGETT: Mr. Herrick.

25 MR. HERRICK: I think it's perfectly

1 appropriate. I'm just trying to get the State's  
2 official position as to why we're here.

3 MR. O'LAUGHLIN: And he said that. He said  
4 that basically that the goal of the State Water  
5 Resources Control Board Prosecution Team was to not --  
6 tell Mr. Dunkel that he would cease and desist using his  
7 own rights to divert water out of the river.

8 So it's pretty clear what they're here for.

9 And if that's not the end-all/be-all, we have  
10 Woods as a backup.

11 And this is pretty important because  
12 remember --

13 CO-HEARING OFFICER BAGGETT: All right.

14 MR. O'LAUGHLIN: -- in the Phelps case --

15 CO-HEARING OFFICER BAGGETT: No, I --

16 MR. O'LAUGHLIN: Okay.

17 CO-HEARING OFFICER BAGGETT: I understand.  
18 Let's resolve this objection first.

19 So rephrase one more -- I'll give you another  
20 shot.

21 MR. HERRICK: Each time I've asked the  
22 question, it's been followed by an inquiry into  
23 different specifics of what he's answered.

24 CO-HEARING OFFICER BAGGETT: I would agree.

25 MR. HERRICK: So I am just trying to figure

1 out -- obviously, I'm trying to make a point in this,  
2 and I hope I'm not being rude to him.

3 But there is a serious issue here as to why and  
4 what the State Board staff is seeking through this  
5 process, and I don't know what they're seeking.

6 What I have heard is there is a potential that  
7 if Woods is found somehow to not have enough rights to  
8 deliver water and then doesn't, or does, then something  
9 might be of interest to the State Board.

10 But that has nothing to do with this hearing.

11 So if the witnesses say that that's all they  
12 can say on it, that's fine. But I am trying to make  
13 sure I know --

14 CO-HEARING OFFICER BAGGETT: I understand.

15 MR. HERRICK: -- what we're seeking because I  
16 don't know how to make a closing argument if the --  
17 because the Draft Cease and Desist Order doesn't apply.

18 MR. O'LAUGHLIN: But that's not the end of the  
19 inquiry.

20 If Dunkels want to stipulate that they have no  
21 independent rights other than what Woods Irrigation  
22 Company has, then the inquiry in the Dunkel case is what  
23 rights does Woods Irrigation Company have. Okay?

24 And not only that, this is an important point  
25 for calculation of civil penalties. Because in the

1 Phelps case, it was a major push by the Phelps parties  
2 that they shouldn't be assessed for actions they took  
3 while the CDO was pending.

4 And in fact, the State Board did fine the  
5 parties for actions that went back earlier, and the  
6 Phelps party objected to it, and the appellate court  
7 affirmed and said that.

8 So this is an important point for Dunkel  
9 because if Dunkel's diverting right on the belief that  
10 Woods Irrigation Company has a water right that's  
11 supporting him, and in fact he doesn't, then he may be  
12 held liable -- may be.

13 CO-HEARING OFFICER BAGGETT: I understand.

14 MR. HERRICK: I have to address that.

15 CO-HEARING OFFICER BAGGETT: Okay.

16 MR. HERRICK: There is no penalty phase in this  
17 CDO. If someone wants to speculate or try to make a  
18 record so they can do something later, that's their  
19 business. It doesn't have anything to do with the  
20 hearing notice.

21 Number two, no party is obligated to come  
22 before this Board to spend its time and money to prove a  
23 riparian water right if it's getting water from someone  
24 else and doesn't have to.

25 If it's okay for them to purchase water from

1 Woods, there is no reason to inquire into their other  
2 potential water rights.

3 There is no law. There is no Board ruling.  
4 There is no case law that says prove me your riparian  
5 right because it might be important later.

6 That doesn't exist.

7 CO-HEARING OFFICER BAGGETT: Continue.

8 MR. HERRICK: I will conclude with those. I  
9 think the witnesses have answered as best they can.

10 Thank you.

11 CO-HEARING OFFICER BAGGETT: Yeah.

12 MID, et al? Mr. O'Laughlin, Mr. Rubin?

13 MR. O'LAUGHLIN: Modesto Irrigation District  
14 has no questions of the Prosecution Team. I do not know  
15 if San Luis & Delta-Mendota Water Authority --

16 CO-HEARING OFFICER BAGGETT: Mr. Rubin.

17 MR. RUBIN: Jon Rubin, San Luis & Delta-Mendota  
18 Water Authority. I have no questions for the  
19 Prosecution Team.

20 CO-HEARING OFFICER BAGGETT: Mr. Powell.

21 MR. POWELL: No questions.

22 CO-HEARING OFFICER BAGGETT: South Delta,  
23 Central Delta.

24 MR. RUIZ: No questions for these witnesses.

25 CO-HEARING OFFICER HOPPIN: San Joaquin County.



1 MS. GILLICK: No questions.

2 CO-HEARING OFFICER BAGGETT: Thank you. Any  
3 staff?

4 CO-HEARING OFFICER HOPPIN: Mr. Stretars, I  
5 have a question for you to add a bit clarity for me.

6 It was my original understanding that there was  
7 serious question as to whether the Dunkels had  
8 continuing riparian water rights, but the contention was  
9 that they had a pre-14 water right that in fact the  
10 water was being delivered not through their own  
11 diversion but on a tolling arrangement, if you will,  
12 through the Woods Irrigation District.

13 Are you saying that you don't feel that the  
14 Dunkel family has a pre-1914 water right?

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: No, I don't think we're saying that.

17 We're saying we have not received any evidence  
18 specifically as to their diversion and continued  
19 diversion up to the current day of that development and  
20 use of water.

21 CO-HEARING OFFICER HOPPIN: Have you determined  
22 in your opinion whether they in fact have lost their  
23 pre-1914 water right?

24 SENIOR WATER RESOURCE CONTROL ENGINEER

25 STRETARS: No, we have not determined they have not

1 lost. What -- I don't know if I should go on or not.

2           What we typically look at in all these cases,  
3 we look at what we can find as State Board staff that  
4 would define a right for the party.

5           And finding none, or finding something along  
6 those lines, then we would proceed to then define -- or  
7 to approach under a CDO type of action what we haven't  
8 been able to find.

9           We're basically not trying to define or  
10 determine their rights. We're saying based on the fact  
11 we can't find something else, it would appear that  
12 there's an authorized diversion, and we do have  
13 jurisdiction over that.

14           CO-HEARING OFFICER HOPPIN: And this 1911  
15 agreement that was referred to doesn't satisfy the  
16 requirements of a pre-14 entitlement that's being  
17 delivered by a third party?

18           SENIOR WATER RESOURCE CONTROL ENGINEER  
19 STRETARS: First of all, because it's being delivered by  
20 a third party, we did not look at what that party's  
21 rights in itself had to deliver, basically.

22           Second of all, relative to in general looking  
23 at pre-1914 rights, the law was rather specific in  
24 essentially defining that as of 1914 you either notified  
25 us that you had a right and were working to conclude it,

1 that you already established by filing with the county  
2 or someone else that -- that right. Or you file with us  
3 and proceeded coming forward.

4 And under those old rights, the party needs to  
5 basically have maintained some type of record what  
6 they've actually done historically to show that over any  
7 five-year period of time they haven't lost that right or  
8 haven't -- not necessarily lost, but either lost or  
9 reduced that right.

10 We haven't received anyway type of information  
11 to that extent.

12 We know there was agreement in 1911 that  
13 relates to Woods, but whether Dunkel actually farmed and  
14 what extent he farmed from that time coming forward or  
15 whether Woods provided that water from that time  
16 forward, we don't know.

17 CO-HEARING OFFICER HOPPIN: Thank you for your  
18 answer.

19 CO-HEARING OFFICER BAGGETT: Okay. Would you  
20 like to enter the exhibits into the record?

21 MR. ROSE: I have one further question on  
22 redirect that could be answered by either of the two  
23 witnesses.

24 --o0o--

25 REDIRECT-EXAMINATION BY MR. ROSE

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FOR PROSECUTION TEAM

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MR. ROSE: This was raised on cross-examination but Mr. Stretars, I suppose because you're the supervisor in this case: Do you have any control over the scheduling of the order of these hearings once you issue a Draft Cease and Desist Order?

SENIOR WATER RESOURCE CONTROL ENGINEER

STRETARS: No, we do not.

MR. ROSE: Thank you.

At this time the Prosecution Team would like to move its exhibits --

CO-HEARING OFFICER BAGGETT: Any recross on that last? If there's no recross from any party, okay. Exhibits?

MR. ROSE: The Prosecution Team would like to move its exhibits into evidence.

CO-HEARING OFFICER BAGGETT: Any objection? Hearing none, they are admitted.

(Whereupon the Prosecution Team's exhibits were accepted in evidence.)

CO-HEARING OFFICER BAGGETT: Mr. Herrick, why don't we take a short break now, or do you want to --

MR. HERRICK: Let's take a break.

CO-HEARING OFFICER BAGGETT: Okay. Let's take

1 ten minutes, and we'll come back.

2 (Recess)

3 CO-HEARING OFFICER BAGGETT: Mr. Herrick?

4 Well --

5 MS. GILLICK: DeeAnne Gillick on behalf of  
6 County of San Joaquin.

7 The County would like to make a motion to  
8 dismiss based upon the Prosecution's case-in-chief.

9 They have indicated there was a 1911 agreement  
10 regarding this property. A 1911 agreement documents a  
11 1914, pre-1914 water right.

12 There is no indication of forfeiture. I don't  
13 know why we're here. There is a threat that maybe in  
14 the future they won't have their 1911 water right. I  
15 think that that's speculation.

16 We shouldn't be here today wasting all of our  
17 resources.

18 CO-HEARING OFFICER BAGGETT: Anyone else like  
19 to address the --

20 MR. ROSE: The Prosecution Team could provide a  
21 response if you need one.

22 CO-HEARING OFFICER BAGGETT: Why don't you  
23 provide a short response for the record.

24 MR. ROSE: I think that what Ms. Gillick is  
25 talking about is a 1911 agreement providing somebody

1 else with a pre-1914 water right.

2           And as I believe the witnesses stated fairly  
3 clearly, what's as issue here is whether or not there  
4 will be -- there is the threat of an unauthorized  
5 diversion by the Dunkels who, as our witnesses showed,  
6 don't have their own water right, and the water right  
7 they are diverting water under currently is the issue of  
8 a Draft Cease and Desist Order and that the Division has  
9 no control over the order of the processing.

10           CO-HEARING OFFICER BAGGETT: I understand that.

11           MR. HERRICK: That is not quite correct. The  
12 witnesses have not made conclusions about the existence  
13 of a riparian or pre-1914 water right specifically.

14           They stated that when asked what supports your  
15 diversion, they received information that Woods is  
16 supplying them with water.

17           Although I was looking forward to putting my  
18 witnesses on, the motion is correct. There is no  
19 showing of an illegal diversion, and there's no  
20 indication that there will be a threatened or there is a  
21 threatened illegal diversion.

22           It's a possibility if Woods somehow decides to  
23 deliver them water after it's found to not have water to  
24 deliver them, but that's a very difficult scenario to  
25 imagine.

1           And actually, the motion is proper. There is  
2 no evidence of any need to order somebody to stop doing  
3 something.

4           CO-HEARING OFFICER BAGGETT: Well. Mr.  
5 O'Laughlin.

6           MR. O'LAUGHLIN: I find this whole discussion  
7 to be somewhat ironic.

8           Basically -- and we'll get to this probably in  
9 greater detail in Woods Irrigation Company -- but these  
10 lands either have their own rights and can assert their  
11 own rights in this proceeding.

12           I agree with Mr. Herrick. There has been no  
13 showing that they either have a riparian right or pre-14  
14 right. Nor has there been a showing that they don't  
15 have those rights.

16           There's been no showing at all because no  
17 evidence has been produced, even though it's been  
18 required to be produced by the CDO.

19           Now they're relying on Woods Irrigation  
20 Company. Well, if Woods Irrigation Company has a right  
21 that they can deliver to those properties, that's fine.

22           But the 1911 deed, when you read it -- and  
23 you'll have to read it and base your own opinion on  
24 it -- doesn't say that at all.

25           And so when you read the actual 1911 agreement,

1 Woods Irrigation Company agrees to convey water.

2 The question -- the true question for this  
3 hearing is: Whose water is it?

4 Is it Dunkels' water under a pre-1914 riparian  
5 right? Or is it Woods Irrigation Company's water under  
6 a separate and distinct right?

7 Either way, it's applicable to this hearing,  
8 and we need to get to the answer. And I think it's very  
9 compelling that Mr. Grunsky is here from Woods  
10 Irrigation Company to testify that it's their water  
11 they're delivering.

12 CO-HEARING OFFICER BAGGETT: One last comment?

13 MR. HERRICK: I mean, you know, excuse my  
14 bluntness, but that doesn't make any sense.

15 We're not here to determine if Woods Irrigation  
16 Company has a pre-1914 right --

17 CO-HEARING OFFICER BAGGETT: I agree.

18 MR. HERRICK: -- is delivering someone else's  
19 pre-1914 right, has riparian right.

20 We're here to answer the question that these  
21 people do or do not have a basis for receiving water.

22 CO-HEARING OFFICER BAGGETT: Okay.

23 MR. HERRICK: And clearly they do have a basis  
24 for receiving water.

25 MR. O'LAUGHLIN: No.



1 CO-HEARING OFFICER BAGGETT: Let's proceed on  
2 that. I would agree that's the issue, the narrow issue.

3 Why don't you put your witnesses on to  
4 demonstrate there is an agreement. Put the facts before  
5 us so we can determine that.

6 And this is not a proceeding on Woods. That is  
7 for another day and other hearing officers, actually.

8 MR. O'LAUGHLIN: Well, yes and no.

9 MR. HERRICK: This is John Herrick for the  
10 Dunkels. I have as witnesses today Mr. Gino Celli and  
11 Mr. Timothy Grunsky.

12 --o0o--

13 GINO CELLI

14 TIMOTHY GRUNSKY

15 Called by MARK and VALLA DUNKEL

16 DIRECT EXAMINATION BY MR. HERRICK

17 --o0o--

18 MR. HERRICK: Let me start with Mr. Grunsky.

19 Mr. Grunsky, are you familiar with Exhibit 2  
20 which is labeled your testimony for this proceeding?

21 MR. GRUNSKY: Yes.

22 MR. HERRICK: And is Exhibit 2 a correct copy  
23 of that testimony?

24 MR. GRUNSKY: Yes.

25 MR. HERRICK: Mr. Celli, you're familiar with

1 Exhibit 1 that's before you?

2 MR. CELLI: Yes.

3 MR. HERRICK: And Exhibit 1 is a true and  
4 correct copy of your testimony?

5 MR. CELLI: Yes.

6 MR. HERRICK: Mr. Grunsky, would you please  
7 summarize your testimony for the Board?

8 MR. GRUNSKY: Well, I'm president of Woods  
9 Irrigation Company. It was established somewhere  
10 between 1910, 1911, and basically to serve the interior  
11 farmers through a system of canals and ditches for a  
12 fee, essentially.

13 And have been doing that continuously, you  
14 know, since prior to 1910 or '11, probably, close as I  
15 can -- my family records, maybe 1890s, mid 1890s.

16 And basically, essentially, I'm here to say  
17 that -- verify the Dunkels are in our district. They  
18 are. They're on the eastern irrigation canal.

19 MR. HERRICK: Mr. Grunsky, your testimony has a  
20 couple of exhibits. One of them is a copy of an  
21 assessor's map locating the Dunkels' property; is that  
22 correct?

23 MR. GRUNSKY: Yes.

24 MR. HERRICK: And according to your testimony,  
25 it shows that property actually abuts one of the main

1 irrigation canals of Woodbridge --

2 MR. GRUNSKY: Eastern canal.

3 MR. HERRICK: Woods, excuse me.

4 And you also have attached to your testimony an  
5 exhibit which is a September 29, 1911 agreement?

6 MR. GRUNSKY: Yes.

7 MR. HERRICK: And that agreement is between the  
8 Woods Irrigation Company and Wilhoit and Douglass?

9 MR. GRUNSKY: Mm-hmm. Yes.

10 MR. HERRICK: And that agreement provides that  
11 Woods Irrigation Company will provide water to the land  
12 specified in the agreement at that time owned by Wilhoit  
13 and Douglass?

14 MR. GRUNSKY: Right, and that shows as of 1911  
15 on that agreement.

16 MR. HERRICK: And you've examined your current  
17 records for Woods to determine whether or not the Dunkel  
18 property is within the service area?

19 MR. GRUNSKY: Oh, yes.

20 MR. HERRICK: And Woods bills them for  
21 delivering water each year?

22 MR. GRUNSKY: Yes.

23 MR. HERRICK: Okay. Mr. Celli, would you  
24 please summarize your testimony?

25 MR. CELLI: I farm various properties in the

1 Delta for myself and other parties, and one of the  
2 parcels is this Dunkel parcel. And I have been farming  
3 this parcel for the last four years. And that's it.

4 MR. HERRICK: Okay. When you irrigate the  
5 property, how do you get water for your crops?

6 MR. CELLI: I call a man who runs the Woods  
7 Irrigation who coordinates all the water and who gets  
8 water, and I call him, and he gives me the water when we  
9 need it.

10 MR. HERRICK: Okay. That's all I have.

11 CO-HEARING OFFICER BAGGETT: Okay.

12 Any cross-examination? Prosecution Team?

13 MR. O'LAUGHLIN: Oh. Prosecution Team.

14 CO-HEARING OFFICER BAGGETT: You'll get your  
15 chance, Mr. O'Laughlin.

16 --o0o--

17 CROSS-EXAMINATION BY MR. ROSE

18 FOR PROSECUTION TEAM

19 --o0o--

20 MR. ROSE: Good morning. Very briefly, I just  
21 have a few questions specifically for Mr. Grunsky.

22 Mr. Grunsky, Woods Irrigation Company diverts  
23 water under its pre-1914 water right and other rights of  
24 some of its shareholders of company; is that correct?

25 MR. GRUNSKY: Yes.

1           MR. ROSE: Woods' pre-1914 rights, you said, is  
2 sufficient to cover the property if it doesn't have its  
3 own riparian or pre-1914 water rights? Is that what you  
4 said in your testimony?

5           That Woods' own rights are sufficient to cover  
6 the diversions on the Dunkel property if the Dunkels do  
7 not have their own rights? Is that --

8           MR. GRUNSKY: I don't know that that's for me  
9 to assume they don't have their own right.

10          MR. ROSE: I'm not asking you to assume. It's  
11 just that in your testimony that they do -- Woods has  
12 its own sufficient rights. I can point you to it if  
13 you'd like.

14          Specifically Exhibit 2, page -- which is your  
15 testimony -- page 2. You say:

16                 From all this, I can state without  
17                 condition that the Dunkel property  
18                 receives water via Woods Irrigation  
19                 Company system. The Woods IC's pre-14  
20                 right is sufficient to cover the property  
21                 if it does not have riparian, its own  
22                 pre-1914, or other water right.

23                 Is that correct?

24                 MR. GRUNSKY: Yes.

25                 MR. ROSE: Okay. Is it your understanding that

1 Woods is currently serving the Dunkels parcel under  
2 Woods' own rights and not any rights held by the  
3 Dunkels?

4 MR. HERRICK: If you know.

5 MR. ROSE: Obviously.

6 If you know, is it your understanding that  
7 Woods --

8 MR. GRUNSKY: Woods is servicing the Dunkels,  
9 if that's what you're asking.

10 MR. ROSE: No. Actually, I think we've  
11 established that. Is it your understanding that Woods  
12 is serving the Dunkels under Woods' own rights?

13 MR. GRUNSKY: Yes.

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

16 CO-HEARING OFFICER BAGGETT: Modesto Irrigation  
17 District? Do you have any questions?

18 MR. O'LAUGHLIN: Is it okay if I do my  
19 cross-examination from here?

20 CO-HEARING OFFICER BAGGETT: I'd rather have  
21 you over here.

22 MR. O'LAUGHLIN: Okay.

23 CO-HEARING OFFICER BAGGETT: Then the court  
24 reporter can see you, for one.

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CROSS-EXAMINATION BY MR. O'LAUGHLIN

FOR MODESTO IRRIGATION DISTRICT

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MR. O'LAUGHLIN: Good morning, my name is Tim O'Laughlin. I represent Modesto Irrigation District.

I'd like to first turn my cross-examination to Gino -- is it Celli?

MR. CELLI: Yes.

MR. HERRICK: Mr. Celli, do you own the property that's in question here, APN 16209001?

MR. CELLI: No, I do not.

MR. O'LAUGHLIN: Okay. Have you been authorized to testify on behalf of Mark and Valla Dunkel?

MR. CELLI: Yes.

MR. O'LAUGHLIN: Okay. Do you have a written statement from them that you can testify on their behalf?

MR. CELLI: I do not.

MR. O'LAUGHLIN: Okay. Do you hold yourself out as being an expert on water rights in regards to the Dunkel property?

MR. CELLI: Can you repeat that again? I'm sorry.

MR. O'LAUGHLIN: Yes. Do you hold yourself out

1 as an expert in regards to the water rights on the Dunkel  
2 property?

3 MR. CELLI: No.

4 MR. O'LAUGHLIN: Do you in your -- do you have  
5 any idea knowledge of this property other than the  
6 knowledge that you have acquired in the last four years  
7 as a tenant?

8 MR. CELLI: No.

9 MR. O'LAUGHLIN: Have you conducted any  
10 independent investigation of the Dunkel water rights in  
11 regards to your farming of this property?

12 MR. CELLI: No.

13 MR. O'LAUGHLIN: When you -- did you sign an  
14 agreement with the Dunkels to lease this property?

15 MR. CELLI: Yes.

16 MR. O'LAUGHLIN: Okay. When you signed the  
17 lease agreement with the Dunkel property, did they  
18 inform you of what water rights they had for the  
19 property?

20 MR. CELLI: Yes.

21 MR. O'LAUGHLIN: And what did they inform you?

22 MR. CELLI: Woods Irrigation.

23 MR. O'LAUGHLIN: So you were to get your water  
24 from Woods Irrigation Company; is that correct?

25 MR. CELLI: Correct.



1 MR. O'LAUGHLIN: Okay. And in the last four  
2 year you've gotten your water solely from Woods  
3 Irrigation Company?

4 MR. CELLI: Yes.

5 MR. O'LAUGHLIN: Have you asserted on behalf of  
6 Mark and Valla Dunkel any independent right separate and  
7 apart from Woods Irrigation to a riparian right?

8 MR. CELLI: No.

9 MR. O'LAUGHLIN: To a pre-1914 right?

10 MR. CELLI: Not that I'm aware of, no.

11 MR. O'LAUGHLIN: To an appropriative right from  
12 the State Water Resources Control Board?

13 MR. CELLI: Excuse me?

14 MR. O'LAUGHLIN: To an appropriative right from  
15 the State Water Resources Control Board?

16 MR. CELLI: Not that I discussed, no.

17 MR. O'LAUGHLIN: Okay. Did you draft your  
18 testimony?

19 MR. CELLI: No.

20 MR. O'LAUGHLIN: Who drafted your testimony for  
21 you?

22 MR. CELLI: Herrick.

23 MR. O'LAUGHLIN: Is that Mr. John Herrick --

24 MR. CELLI: Yes.

25 MR. O'LAUGHLIN: -- the attorney sitting next

1 to you?

2 MR. CELLI: Yes.

3 MR. O'LAUGHLIN: Okay.

4 I'd next like to turn my attention to Mr.  
5 Timothy Grunsky. It says you're the president of Woods  
6 Irrigation Company; is that correct?

7 MR. GRUNSKY: Yes.

8 MR. O'LAUGHLIN: Is that a nomination by the  
9 board of directors of Woods Irrigation Company?

10 MR. HERRICK: I object. It's unclear. Is what  
11 a nomination? Is the position, or was he nominated?

12 MR. O'LAUGHLIN: Yeah.

13 MR. GRUNSKY: Yes.

14 MR. O'LAUGHLIN: I'm curious. You said you had  
15 family records. Are you an heir to the Woods?

16 MR. GRUNSKY: Yes.

17 MR. O'LAUGHLIN: What Woods are you an heir to?

18 MR. GRUNSKY: E.W.S. Woods was my  
19 great-grandfather.

20 MR. O'LAUGHLIN: Thank you. Okay.

21 And you -- do you, as an heir to the Woods and  
22 as president of Woods Irrigation Company, have records  
23 showing deliveries of water in Woods Irrigation Company?

24 MR. GRUNSKY: Well, I just have the records  
25 that the company has.

1           MR. O'LAUGHLIN: Okay. And how far back do the  
2 records that the company has?

3           MR. GRUNSKY: I haven't been through them all.  
4 You're probably better off checking with our attorney.

5           MR. O'LAUGHLIN: Okay. Would you consider  
6 yourself as probably the person most knowledgeable  
7 regarding the operations and histories of Woods  
8 Irrigation Company?

9           MR. GRUNSKY: No.

10          MR. O'LAUGHLIN: Who would you consider the  
11 person most knowledgeable about the operation of Woods  
12 Irrigation Company?

13          MR. GRUNSKY: In terms of how the water flows?  
14 The manager is the most knowledgeable person.

15          MR. O'LAUGHLIN: Okay. Who in your opinion is  
16 the person most knowledgeable regarding the history of  
17 Woods Irrigation Company?

18          MR. GRUNSKY: Well.

19          MR. HERRICK: If you know.

20          MR. GRUNSKY: Yeah. I mean my educated guess  
21 would be Dan Nomellini.

22          MR. O'LAUGHLIN: Okay. Are you familiar -- so  
23 let me understand this in regards -- I'm going to focus,  
24 if you want to turn to the second page of your  
25 testimony.

1           In regards to this specific property, are  
2 you -- is Woods Irrigation Company delivering its,  
3 Woods', pre-14 water right water to this property?

4           MR. GRUNSKY: Yeah, we are delivering it. Yes.

5           MR. O'LAUGHLIN: Okay. So your assertion is  
6 that's Woods Irrigation Company's pre-1914 water that  
7 you're delivering to the Dunkel property, correct?

8           MR. GRUNSKY: No, I'm not a lawyer. But yes,  
9 we are delivering, if that's what you're asking, we're  
10 delivering them water.

11          MR. O'LAUGHLIN: No, that's not what I'm  
12 asking. I'm asking -- I know you're delivering them  
13 water. That's been established. It says right here in  
14 your testimony -- did you draft this testimony, by the  
15 way?

16          MR. GRUNSKY: With John.

17          MR. HERRICK: I'm going to object. That was  
18 asked and answered. And also I object; he's asking the  
19 witness for a legal conclusion that the witness is not  
20 necessarily qualified to provide.

21          MR. O'LAUGHLIN: Well, no. It wasn't asked and  
22 answered. I asked the other person --

23          CO-HEARING OFFICER BAGGETT: Correct.

24          MR. O'LAUGHLIN: -- whose testimony had been  
25 prepared.

1           And not only that, he says in here Woods  
2 Irrigation Company's pre-14 right. So I'm asking and  
3 inquiring about the scope and extent of their pre-14  
4 right and what amount of water is being delivered under  
5 that right to the property.

6           CO-HEARING OFFICER BAGGETT: Please answer.  
7 Overruled on that objection. It's right in the  
8 testimony. So answer it to whatever knowledge --

9           MR. O'LAUGHLIN: Okay. So your knowledge is  
10 that -- okay.

11           So let's take last year, for example, when  
12 Woods Irrigation Company delivered water to the Dunkel  
13 property: Did the Dunkels assert that any of that water  
14 that was delivered to them was their own riparian water?

15           MR. GRUNSKY: Of course not. I mean --

16           MR. O'LAUGHLIN: I didn't hear.

17           MR. GRUNSKY: We don't even -- we just deliver  
18 when requested water.

19           MR. O'LAUGHLIN: Okay. And did Dunkels assert  
20 that any of that water was its own pre-14 water that was  
21 delivered?

22           MR. HERRICK: You mean their own?

23           MR. O'LAUGHLIN: Yeah, Dunkels own.

24           MR. HERRICK: You said "its" own.

25           MR. O'LAUGHLIN: Oh, sorry. Thank you.

1 Dunkels' own pre-1914 water?

2 MR. GRUNSKY: No.

3 MR. O'LAUGHLIN: Okay. Let me -- do -- do the  
4 members within Woods Irrigation Company actually pay for  
5 the commodity of water, actually pay for the water? Or  
6 do they only pay for the operation and maintenance of  
7 the canals and delivery systems?

8 MR. GRUNSKY: I would say they're paying for  
9 both.

10 MR. O'LAUGHLIN: Okay. So when you set up your  
11 rate structure, you have a charge for water?

12 MR. GRUNSKY: We have a charge for irrigation.  
13 We have a charge for drainage.

14 MR. O'LAUGHLIN: Okay. So if I understand  
15 then, to get to the essence of this point, then: Woods  
16 Irrigation Company has a service area that you've  
17 delineated in your exhibit, correct?

18 MR. GRUNSKY: Yes.

19 MR. O'LAUGHLIN: And in regards to that service  
20 area, you are asserting that you have pre-14 rights to  
21 deliver to that service area, correct?

22 MR. GRUNSKY: We're asserting pre-14 among  
23 potentially other rights as well.

24 MR. O'LAUGHLIN: Okay. So in regards to  
25 Dunkel, are you asserting any other rights in regards to

1 Dunkels' property?

2 MR. HERRICK: Objection. I don't think Woods  
3 Irrigation Company is here to assert the water rights of  
4 the Dunkels.

5 CO-HEARING OFFICER BAGGETT: I would agree.

6 MR. O'LAUGHLIN: No.

7 MR. HERRICK: Yes.

8 MR. O'LAUGHLIN: But wait.

9 CO-HEARING OFFICER BAGGETT: Sustained.  
10 Rephrase.

11 MR. O'LAUGHLIN: Yeah, but I get a chance to  
12 respond because it's a key point.

13 He has said earlier that they are delivering  
14 their water. He just now said that they deliver water  
15 of other rights.

16 And now all I'm asking is specifically in  
17 regards to the Dunkel property are they asserting any  
18 other rights in regards to the delivery of the water?

19 MR. HERRICK: Mr. Chairman, I understand the  
20 question, and I understand you sustaining the objection.

21 On redirect, I will clarify what Mr. O'Laughlin  
22 failed to do, which was to ask the witnesses their  
23 understands of pre-1914 water, whether riparian water is  
24 preserved if it's delivered or not.

25 There's all sorts of legal conclusions wrapped

1 up in that which were not explored, and I'll clarify on  
2 redirect.

3 CO-HEARING OFFICER BAGGETT: Very good.

4 So you'll get an opportunity to come back on  
5 that one on recross.

6 MR. O'LAUGHLIN: Mr. Grunsky, are you aware of  
7 a case called Woods Irrigation Company, a corporation,  
8 versus the Department of Employment of the State of  
9 California?

10 MR. GRUNSKY: No.

11 MR. O'LAUGHLIN: Okay. Are you aware of an  
12 attorney by the name of Mr. Jones who was with the firm  
13 Jones, Lane, Weber & Daily in Stockton, California?

14 MR. GRUNSKY: No.

15 MR. O'LAUGHLIN: Do you know that at one time  
16 Mr. Jones represented the Woods Irrigation Company from  
17 1932 to 1958?

18 MR. GRUNSKY: No.

19 MR. O'LAUGHLIN: Have you reviewed any of the  
20 proceedings that occurred in the matter of Woods  
21 Irrigation Company versus the Department of Employment  
22 of the State of California?

23 MR. HERRICK: I'll object. Although this is  
24 extremely interesting, I'm not sure what it has to do  
25 with the direct testimony.



1 CO-HEARING OFFICER BAGGETT: I would agree.

2 MR. O'LAUGHLIN: You'll see the link --

3 CO-HEARING OFFICER BAGGETT: Relevance --

4 MR. O'LAUGHLIN: Just give me about five more  
5 minutes, and you'll see the link up.

6 MR. RUIZ: We would at this point request an  
7 offer of proof as to the relevance or where this is  
8 going. It could be done a lot quicker than five minutes  
9 of questioning.

10 CO-HEARING OFFICER BAGGETT: I would sustain  
11 that. Can you --

12 MR. O'LAUGHLIN: Yeah. No. I got questions  
13 coming right now. Just -- it's going to be here in a  
14 minute.

15 CO-HEARING OFFICER BAGGETT: So what are you --  
16 just give us the conclusion, and then you can get there.  
17 What are you trying to --

18 MR. O'LAUGHLIN: He can state the conclusion.  
19 I'm not going to state it for him.

20 Are you aware that --

21 CO-HEARING OFFICER BAGGETT: Wait. The  
22 objection was ask an offer of proof. Can you --

23 MR. O'LAUGHLIN: Well, you haven't told me to  
24 make an offer of proof.

25 CO-HEARING OFFICER BAGGETT: Make an offer of

1 proof.

2 MR. O'LAUGHLIN: Okay. The offer of proof is  
3 that Woods Irrigation District Company has no water  
4 rights.

5 MR. RUIZ: That's a conclusion, not an offer of  
6 proof.

7 MR. O'LAUGHLIN: No, that's -- you -- hey. You  
8 can argue about it. You asked for the offer of proof.  
9 I gave it.

10 The offer of proof is: Woods Irrigation  
11 Company has no water rights.

12 MR. RUIZ: That's not an offer of proof.

13 If you want to say that: I have a case that  
14 says -- a holding that they didn't do that and the  
15 evidence will show, that's an offer of proof.

16 But an assertion of a position is not an offer  
17 of proof.

18 MR. O'LAUGHLIN: Oh, no. Because the offer of  
19 proof isn't done by me. It's done by the California  
20 Supreme Court.

21 So can I ask my questions now?

22 CO-HEARING OFFICER BAGGETT: Expeditiously.

23 MR. O'LAUGHLIN: Thank you.

24 Are you aware in the 1958 case of Woods  
25 Irrigation Company versus the Department of Employment

1 State of California Supreme Court judgment at 1958 on  
2 page 158, the California Supreme Court stated:

3 Woods Irrigation Company, it owns no land  
4 or water rights of its own.

5 Are you aware of that?

6 MR. GRUNSKY: Not aware of that.

7 MR. O'LAUGHLIN: Okay. Are you aware of in the  
8 California Supreme Court case of Woods Irrigation  
9 Company versus the Department of Employment:

10 It thus appears that plaintiff, i.e.  
11 Woods Irrigation Company, is not a mere  
12 water company supplying water to the  
13 public for general purposes, but it is an  
14 irrigation company engaged in irrigation  
15 and drainage services solely for its  
16 farmers, stockholders and operating  
17 solely upon the lands of said  
18 shareholders.

19 Are you aware of that?

20 MR. GRUNSKY: Yes.

21 MR. O'LAUGHLIN: Are you aware of the fact that  
22 in the actual testimony that was proffered by Mr. Jones  
23 on behalf of Woods Irrigation Company that he stated,  
24 which was the finding both at the superior court, the  
25 appellate court, and the California Supreme Court:

1                   Question: Mr. Daily, Mr. Jones --

2                   MR. HERRICK: Is there a chance of other people

3 being providing with documents that the witness is being

4 cross-examined on and quoted into the record --

5                   MR. O'LAUGHLIN: Not yet.

6                   MR. HERRICK: -- as would be the normal --

7                   MR. O'LAUGHLIN: I haven't offered them into

8 evidence yet.

9                   CO-HEARING OFFICER BAGGETT: I assume he will.

10                  MR. O'LAUGHLIN: Oh, I will. Yeah.

11                  CO-HEARING OFFICER BAGGETT: They are court

12 documents.

13                  MR. O'LAUGHLIN: Well, not only that,

14 California Supreme Court case is a public record

15 available to anybody. Doesn't have to be --

16                  CO-HEARING OFFICER BAGGETT: We can take notice

17 of that.

18                  MR. HERRICK: But counsel is cross-examining

19 the witnesses on a document and refusing to show

20 everybody what he's reading. I mean, that's just,

21 besides inappropriate, it's wrong.

22                  CO-HEARING OFFICER BAGGETT: Do you have

23 copies? It would be --

24                  MR. O'LAUGHLIN: No.

25                  CO-HEARING OFFICER BAGGETT: -- helpful.

1 MR. O'LAUGHLIN: Not yet.

2 MR. HERRICK: So we're going to grill a witness  
3 on a document he's never seen --

4 MR. O'LAUGHLIN: Yeah.

5 MR. HERRICK: -- and which is not going to be  
6 provided to him.

7 MR. O'LAUGHLIN: We don't have to.

8 CO-HEARING OFFICER BAGGETT: I would concur.

9 MR. O'LAUGHLIN: I mean I --

10 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin can  
11 ask the questions. You have a witness --

12 MR. O'LAUGHLIN: Right.

13 CO-HEARING OFFICER BAGGETT: -- who's president  
14 of a water company who has some knowledge. And if he  
15 doesn't have the answers, he can always say he doesn't  
16 know the answer.

17 I mean I think that's -- it's the appropriate  
18 person to ask these questions of. And if you don't know  
19 the answer, you aren't obligated to --

20 MR. HERRICK: The witness said he was  
21 unfamiliar with the case, and now we're going to ask him  
22 a string of questions whether we agrees or knows of  
23 something in the case. What's the purpose of that?

24 MR. O'LAUGHLIN: I -- John, you know, the  
25 problem is I get to build my record as well you building

1 yours.

2 MR. HERRICK: You address your comments to the  
3 Chair, I believe.

4 But the issue is addressing what was presented  
5 on direct.

6 MR. O'LAUGHLIN: Yeah, and he asserted he had  
7 pre-14 rights.

8 MR. HERRICK: If you want to ask someone if  
9 they are familiar with a case, and they say no, then how  
10 are we addressing the direct case by asking them  
11 questions on something they said they are not aware of?

12 MR. RUBIN: Hearing Officer Baggett, can I --

13 CO-HEARING OFFICER BAGGETT: But the testimony  
14 of the witness is very clear --

15 MR. O'LAUGHLIN: Yeah.

16 CO-HEARING OFFICER BAGGETT: -- that they  
17 alleged pre-1914. It's black and white. Was in the  
18 evidence.

19 So I think it's appropriate to ask those  
20 questions since the witness did state that in his  
21 testimony, to go to his knowledge of that.

22 I mean if you don't have knowledge, if it's  
23 beyond your legal -- your understanding of the law,  
24 that's quite -- he can so state.

25 But it's in the testimony. If it wasn't, I

1 think that would be a different state.

2 Mr. Rubin?

3 MR. RUBIN: I was just going to add that for  
4 purposes of cross-examination you're not limited to the  
5 direct testimony, was the issue that I raised.

6 You have the potential to cross-examine on any  
7 potentially relevant issues. And not only does this  
8 implicate testimony in the direct testimony, but it is  
9 clearly relevant.

10 MR. RUIZ: I wouldn't dispute that.

11 I would just -- if there is a case, he's asked  
12 the witness if he's aware of the case, he's read the  
13 case. What is the point of going through the findings,  
14 supposed findings, of the case and asking if he's aware  
15 of it? He can submit the case into the record.

16 MR. RUBIN: I would add a response. If  
17 Mr. O'Laughlin does not seek to have this Board take  
18 official notice of the case, the testimony will be given  
19 due weight, and if it's not something that's before you,  
20 the case is not something before you, then you might not  
21 give it the same weight. But it's still relevant  
22 questions.

23 CO-HEARING OFFICER BAGGETT: Continue.

24 MR. O'LAUGHLIN: Do you know a Mr. Daily, an  
25 attorney by the name of Mr. Daily?

1 MR. GRUNSKY: No.

2 MR. O'LAUGHLIN: On page 140 of the official  
3 transcript, appellate review, it states:

4 Question by Mr. Daily: Is that located  
5 on land that is owned by the District?

6 Answer by Mr. Jones: Well, the Woods  
7 Irrigation Company owns, in that sense,  
8 owns no land.

9 Would you agree with that?

10 MR. GRUNSKY: We actually own a couple acres  
11 where the irrigation pumps are.

12 MR. O'LAUGHLIN: Okay. But the canals,  
13 laterals, and the drainage courses: Do you own those?

14 MR. GRUNSKY: No, no. Essentially, we deliver  
15 it to the ranches. So no.

16 MR. O'LAUGHLIN: So you would agree with Mr.  
17 Jones that Woods Irrigation District has easements and  
18 rights of ways over the land, but Woods Irrigation  
19 Company itself does not own the land; is that correct?

20 MR. GRUNSKY: Does not own the land that it's  
21 delivering the water to. That is correct.

22 MR. O'LAUGHLIN: Or the canals and easements  
23 upon which those delivers are made?

24 MR. GRUNSKY: I'm not sure on the canals.

25 MR. O'LAUGHLIN: You're not sure. Okay.



1           Question: I see -- by Mr. Daily -- and  
2           does it, Woods Irrigation, own any water  
3           rights?

4           Answer: No water rights whatever are  
5           transferred by the owner of this land to  
6           this company.

7           Would you agree with that statement?

8           MR. GRUNSKY: I'm not familiar with that  
9           statement at all.

10          MR. O'LAUGHLIN: You put into your testimony a  
11          1911 agreement; is that correct?

12          MR. GRUNSKY: Yes.

13          MR. O'LAUGHLIN: Have you -- are you familiar  
14          with that agreement?

15          MR. GRUNSKY: Not completely.

16          MR. O'LAUGHLIN: Okay. Have you ever mapped  
17          the scope and extent of Woods Irrigation Company that  
18          supposedly made available under the 1911 agreement, or  
19          so stated in the 1911 agreement?

20          MR. GRUNSKY: There is a map included here.

21          MR. O'LAUGHLIN: Yep. And do you believe that  
22          map to be true and correct?

23          MR. GRUNSKY: Yeah. As far as I know, yes.

24          MR. O'LAUGHLIN: In the 1911 agreement, was  
25          there any statement made in the 1911 agreement that

1 water wasn't currently available to serve properties  
2 within the Woods Irrigation Company service areas  
3 defined by the map?

4 MR. GRUNSKY: One more time?

5 MR. O'LAUGHLIN: Yes.

6 In the agreement, the 1911 agreement, is there  
7 a statement that water is not available to serve certain  
8 lands outlined in the 1911 depiction of Woods Irrigation  
9 Company?

10 MR. GRUNSKY: Not that I am aware of.

11 MR. O'LAUGHLIN: So your understanding is the  
12 1911 agreement that Woods Irrigation District agreed to  
13 provide water to all the lands that were within its  
14 service areas, correct?

15 MR. GRUNSKY: Yes.

16 MR. O'LAUGHLIN: Have you in regards to the  
17 Dunkel property reviewed the records of Woods Irrigation  
18 Company to see if any delivery of water had been made by  
19 Woods Irrigation Company prior to 1914 to the Dunkel  
20 property?

21 MR. GRUNSKY: No.

22 MR. O'LAUGHLIN: Okay. Do you believe that  
23 those records exist?

24 MR. GRUNSKY: I have no way of knowing.

25 MR. O'LAUGHLIN: All right. Were you asked by

1 counsel to look and review if there was any water -- I  
2 mean any records showing a delivery of water to Dunkels'  
3 property prior to 1914?

4 MR. GRUNSKY: No.

5 MR. O'LAUGHLIN: Do you have any billing  
6 statements to the Dunkels property prior to 1914?

7 MR. GRUNSKY: Not that I am aware of.

8 MR. O'LAUGHLIN: Were you asking by counsel to  
9 see if there were any billing records to Dunkel property  
10 prior to 1914?

11 MR. GRUNSKY: No.

12 MR. O'LAUGHLIN: Has Woods Irrigation Company  
13 to your knowledge made an independent investigation as  
14 to whether or not the Dunkel property has a riparian  
15 right?

16 MR. GRUNSKY: That's not our job. That's the  
17 Dunkels'.

18 MR. O'LAUGHLIN: Okay. Have you made any  
19 determination as to whether the Dunkels have a pre-1914  
20 water right?

21 MR. GRUNSKY: Have I?

22 MR. O'LAUGHLIN: Yes. Woods Irrigation  
23 Company.

24 MR. GRUNSKY: No.

25 MR. O'LAUGHLIN: I have no further questions.

1 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

2 MR. RUBIN: Good morning, gentlemen. Jon  
3 Rubin. I'm an attorney who represents San Luis &  
4 Delta-Mendota Water Authority.

5 I just have a couple of questions, and I think  
6 they are all directed to Mr. Grunsky.

7 Mr. Grunsky, on page 2 of your written  
8 testimony, there's a statement that we've been talking  
9 about this morning a little bit regarding the  
10 sufficiency of Woods Irrigation Company's pre-14 water  
11 rights; is that correct?

12 MR. GRUNSKY: Yes.

13 MR. RUBIN: And in your written testimony, you  
14 indicate that Woods Irrigation Company's pre-1914 right  
15 is sufficient to cover the property if it does not have  
16 a riparian, its own pre-1914, or other water right; is  
17 that correct?

18 MR. GRUNSKY: Yes.

19 MR. RUBIN: And in that statement, when you  
20 refer to "the property," you are referring to the Dunkel  
21 property that's the subject of this proceeding?

22 MR. GRUNSKY: Yes.

23 MR. RUBIN: When you made that statement, did  
24 you base it upon review of any historical documents?

25 MR. GRUNSKY: I based it on the fact that they

1 were in Woods in 1911, essentially.

2 MR. RUBIN: I'm sorry?

3 MR. GRUNSKY: They were part of the Woods  
4 Irrigation Company in 1911 which is pre-1914. That's  
5 what I based it on.

6 MR. RUBIN: And based on the fact that the  
7 Dunkel property was within Woods Irrigation Company  
8 prior to 1914, you were able to conclude that Woods  
9 Irrigation Company has sufficient pre-1914 water rights?

10 MR. GRUNSKY: That was my assumption, yes.

11 MR. RUBIN: Was there anything else that you  
12 based your statement on?

13 MR. GRUNSKY: No.

14 MR. RUBIN: Mr. Grunsky, is Woods Irrigation  
15 Company currently delivering water to the Dunkel  
16 property?

17 MR. GRUNSKY: I mean, I don't know if today  
18 they are delivering water; but they are in our district,  
19 and if they request it they'll get it, yes.

20 MR. RUBIN: Mr. -- is it Celli?

21 MR. CELLI: Yes. Celli.

22 MR. RUBIN: Excuse me for that. Mr. Celli,  
23 have you requested any delivery of water for the Dunkel  
24 property that you are currently farming?

25 MR. CELLI: Recently?

1 MR. RUBIN: This year.

2 MR. CELLI: This year, once.

3 MR. RUBIN: Mr. Grunsky, you're not aware that  
4 Woods Irrigation Company has delivered water to the  
5 Dunkel property this year?

6 MR. GRUNSKY: No. I mean I'm -- we have a  
7 manager that takes care of that. I don't know where he  
8 specifically delivers the water.

9 MR. RUBIN: Okay. Thank you.

10 I have no further questions.

11 CO-HEARING OFFICER BAGGETT: Mr. Powell?

12 Mr. Ruiz do you have any?

13 MR. RUIZ: No questions, your Honor -- I mean  
14 Mr. Chairman.

15 CO-HEARING OFFICER BAGGETT: Whatever.

16 MS. GILLICK: No questions on behalf of the  
17 County of San Joaquin.

18 CO-HEARING OFFICER BAGGETT: Staff or Charlie?

19 CO-HEARING OFFICER HOPPIN: Mr. Grunsky, I have  
20 one question of you.

21 Does the Woods Irrigation Company wheel water  
22 for individuals under those individuals' water rights?  
23 Do you provide a service of wheeling or delivering  
24 someone else's water?

25 MR. GRUNSKY: I really don't understand the

1 question really.

2 CO-HEARING OFFICER HOPPIN: Wheeling would be  
3 transferring someone else's water, under my definition,  
4 through your system.

5 Do you deliver someone else's water and charge  
6 them just a service fee for delivering their water  
7 through your infrastructure?

8 Let me restate it.

9 Is all of your water that's delivered, not just  
10 to the Dunkels as you stated, but is all the water  
11 delivered by Woods Irrigation Company under your own  
12 water right?

13 You say pre-1914 or other right. I guess what  
14 I'm trying to clarify is: Are those other rights your  
15 own rights, or is some of that delivery under others'  
16 individual rights?

17 MR. GRUNSKY: I think we feel we have riparian  
18 rights as well. So that's what the other rights are, I  
19 would say.

20 CO-HEARING OFFICER BAGGETT: I think maybe I  
21 can help. I think what Charlie's asking, Mr. Hoppin's  
22 asking is, for example, on the State Project, they  
23 deliver -- they use their canal to deliver other  
24 people's water and charge them a fee. That's wheeling.

25 I think so he's just asking whether your canals

1 only have water which Woods Irrigation District has  
2 title to, or does it have -- do you move other people's  
3 water for them, other farmers, back and forth. That's  
4 what he's asking.

5 MR. GRUNSKY: Yeah. If you're going to -- if  
6 you're going to assume that they have riparian rights,  
7 if the other people within the District have riparian  
8 rights, then maybe potentially we're moving some of  
9 their water.

10 CO-HEARING OFFICER BAGGETT: Okay. Is that it?  
11 I have no other questions. Redirect.

12 --o0o--

13 REDIRECT-EXAMINATION BY MR. HERRICK  
14 FOR MARK and VALLA DUNKEL

15 --o0o--

16 MR. HERRICK: Mr. Grunsky, just to follow up on  
17 that: Are you aware of the legal definitions of  
18 riparian and pre-14 rights?

19 MR. GRUNSKY: No.

20 MR. HERRICK: Are you aware of the actions or  
21 indications or facilities that might preserve a riparian  
22 right on properties within the Woods' boundary?

23 MR. GRUNSKY: No.

24 MR. HERRICK: Do you know whether or not the  
25 Woods Irrigation District's stated pre-1914 water right



1 is a right that the company itself may own or actually  
2 may be an indication of the pre-1914 rights of all the  
3 parties who have been receiving water?

4 MR. GRUNSKY: One more time?

5 MR. HERRICK: Do you know whether or not the  
6 water being delivered is actually a right physically  
7 owned or under the law owned by Woods Irrigation Company  
8 or perhaps the water being delivered is someone else's  
9 pre-1914 right within the district?

10 MR. GRUNSKY: No.

11 MR. HERRICK: And so when people ask you  
12 questions about whether or not Woods Irrigation  
13 Company's water right is what's being delivered to a  
14 party within the area, do you know the answer to that?

15 MR. GRUNSKY: No.

16 MR. HERRICK: Okay. And you're not here to  
17 assert or prove Woods Irrigation Company water rights,  
18 are you?

19 MR. GRUNSKY: No.

20 MR. HERRICK: Your testimony was to show that  
21 the Woods Irrigation Company which has been operating  
22 since 1911 as part of its practices is delivering water  
23 to the Dunkel property; is that correct?

24 MR. GRUNSKY: My testimony was on behalf of the  
25 Dunkels, yes.

1 MR. HERRICK: Okay. Thank you. That's all I  
2 have.

3 CO-HEARING OFFICER BAGGETT: Any recross?

4 Mr. O'Laughlin. Does the Prosecution have any?

5 MR. ROSE: No, we don't have any recross.

6 --o0o--

7 RE-CROSS-EXAMINATION BY MR. O'LAUGHLIN

8 FOR MODESTO IRRIGATION DISTRICT

9 MR. O'LAUGHLIN: Earlier in your testimony and  
10 now in regards to the questions by the Hearing Officers,  
11 you said earlier that your customers pay a water charge;  
12 is that correct?

13 MR. GRUNSKY: Irrigation and drainage.

14 MS. GILLICK: Objection. I'm going to object  
15 to cross-examination based on questions of the Hearing  
16 Officers.

17 He can cross-examine based upon something on  
18 redirect, not something that another party or the  
19 Hearing Officers ask.

20 MR. O'LAUGHLIN: I'll make it up.

21 CO-HEARING OFFICER BAGGETT: I would agree.  
22 You can strike that.

23 Any other questions?

24 MR. O'LAUGHLIN: Yes. Thank you.

25 When you said that you -- do you make a

1 determination when you deliver the water as to whether  
2 it is a riparian right, a pre-14 right of the landowner,  
3 when you charge them for the water?

4 MR. GRUNSKY: No.

5 MR. O'LAUGHLIN: Okay. Is there a -- has there  
6 been a time that you are aware of in the district where  
7 a landowner calls up and says I want my .5 CFS of  
8 riparian water delivered, and since it's my water, you  
9 can't charge me for it?

10 MR. GRUNSKY: No.

11 MR. O'LAUGHLIN: Okay. Is there a breakdown  
12 between, in your water charge, between water delivered  
13 by and under the right of Woods Irrigation Company as  
14 opposed to water delivered under individual property  
15 owner rights?

16 MR. GRUNSKY: No.

17 MR. O'LAUGHLIN: So it's one rate for  
18 everything?

19 MR. GRUNSKY: Yeah.

20 MR. O'LAUGHLIN: Okay. Thank you.

21 CO-HEARING OFFICER BAGGETT: Any other party  
22 recross? If not, exhibits?

23 MR. HERRICK: I'd like to move the exhibits  
24 into evidence. They are 1 and 2.

25 And I didn't give an opening statement, so I

1 would just incorporate my previous comments, and I would  
2 adopt the opening statement of Mr. Ruiz on behalf of the  
3 two water agencies.

4 CO-HEARING OFFICER BAGGETT: Very good. Any  
5 objection?

6 MR. RUBIN: Just point of clarification.

7 Is Mr. Herrick moving his opening statement and  
8 Mr. Ruiz's opening statement into evidence?

9 CO-HEARING OFFICER BAGGETT: He's just, I  
10 think, stating that he adopted them. They weren't being  
11 moved into evidence, obviously.

12 MR. HERRICK: I was moving the exhibits into  
13 evidence, comma, since I didn't give an opening  
14 statement blah, blah, blah.

15 CO-HEARING OFFICER BAGGETT: Very good and  
16 appreciated.

17 So any objection?

18 MR. O'LAUGHLIN: No objection by Modesto  
19 Irrigation District.

20 CO-HEARING OFFICER BAGGETT: Okay. So hearing  
21 no objection, they're admitted into evidence.

22 (Whereupon Dunkel Exhibits 1 and 2 were  
23 accepted in evidence.)

24 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin, do  
25 you have any documents you want to enter into evidence?

1           MR. O'LAUGHLIN: Not at this time your Honor --  
2 Hearing Officer, sorry.

3           CO-HEARING OFFICER BAGGETT: Okay. Thank you.  
4 Modesto, State and -- or Delta-Mendota. You all are up.  
5 Do you have a case?

6           MR. RUBIN: Mr. O'Laughlin, do you mind if I  
7 make a brief opening statement before you start the  
8 case-in-chief?

9           Good morning. Again, Jon Rubin for San Luis &  
10 Delta-Mendota Water Authority. I do have a very brief  
11 opening statement.

12           The San Luis & Delta-Mendota Water Authority is  
13 participating in this proceeding for a single purpose,  
14 to help reduce the uncertainty that currently exists  
15 with the quantity and timing of diversions occurring in  
16 the Delta.

17           This issue of uncertainty is not something  
18 specific to this Dunkel property or other properties  
19 that are subject to the proceeding today. As many in  
20 this room are well aware, it's an issue that's been  
21 raised through the Delta Visioning process that the  
22 State of California has conducted as well as the  
23 Strategic Plan of the State Water Resources Control  
24 Board for the Bay-Delta.

25           And the concern with uncertainty stems from the

1 issues that the Delta is facing. Clearly there's a  
2 water supply crisis that's occurring. Those that depend  
3 upon water that's conveyed through the Delta are  
4 suffering significant harm.

5 There's also some concern about the state of  
6 the Delta from an environmental standpoint.

7 And we're participating in this process to help  
8 reduce the uncertainty associated with water diversions  
9 within the Delta.

10 What you have heard from South and Central  
11 Delta Water Agency and the landowners, what you may hear  
12 moving forward, are legal theories that have been long  
13 dispelled by the State Water Resources Control Board and  
14 the courts of this state.

15 What you will hear from South and Central Delta  
16 Water Agency and the landowners that are the subject of  
17 this proceeding are general tales of history that may be  
18 ground in some truth but that ultimately are not based  
19 on the full facts and ultimately are often not supported  
20 by accurate historical accounts.

21 I would like to note two provisions of evidence  
22 rules that do apply to the State Water Resources Control  
23 Board.

24 First, Government Code section 11513 provides a  
25 standard upon which you need to judge evidence, and I

1 would like to read it. I understand that the rules of  
2 evidence are relatively lax in these proceedings, but  
3 there is a standard.

4 And the standard is that:

5 All relevant evidence shall be admitted  
6 if it is the sort of evidence on which  
7 reasonable persons are accustomed to rely  
8 in the conduct of serious affairs.

9 And I would ask that you keep that standard in  
10 mind as you are hearing evidence in these proceedings.

11 I would also like to note a requirement that  
12 you have imposed in your Notice for this proceeding  
13 under paragraph 4 of the notice. And there's a  
14 subsection A that appears on page 3, and it says:

15 The following requirements apply to  
16 exhibits. Exhibits based on technical  
17 studies or models shall be accompanied by  
18 sufficient information to clearly  
19 identify and explain the logic,  
20 assumptions, development, and operation  
21 of the studies or models.

22 Again, I recognize the lax nature of the  
23 evidentiary rules, but these are two requirements that I  
24 think are implicated by evidence that has been and will  
25 be presented to you today, not only in this proceeding

1 but the two that follow.

2 By the end of this proceeding, you'll hear  
3 testimony and receive substantial evidence that  
4 demonstrates the rights asserted by landowners that are  
5 the subject of this proceeding simply do not exist.

6 By diverting water to properties that do not  
7 have water rights, landowners, water users are  
8 committing a trespass upon the waters of California.  
9 Their diversions are harming those who receive water  
10 appropriated under permits and licenses issued by the  
11 State Water Resources Control Board including those  
12 members of the San Luis & Delta-Mendota Water Authority.

13 Thank you.

14 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin.

15 --o0o--

16 STEPHEN WEE

17 Called by MODESTO IRRIGATION DISTRICT

18 DIRECT EXAMINATION BY MR. O'LAUGHLIN

19 --o0o--

20 MR. O'LAUGHLIN: My name is Tim O'Laughlin. I  
21 represent Modesto Irrigation District. Could you please  
22 state your name for the record?

23 MR. WEE: Stephen Wee.

24 MR. O'LAUGHLIN: Just so we're clear, I  
25 previously sent a letter to the State Water Resources



1 Control Board and the participants. Mr. Wee has  
2 pneumonia. If you can't hear him or you need him to  
3 speak up, let us know.

4 He's under a doctor's care, so -- in order to  
5 have him here today -- so if that happens, just let us  
6 know, and we'll try to speak loudly and make the record  
7 clear.

8 CO-HEARING OFFICER BAGGETT: Okay.

9 MR. O'LAUGHLIN: Thank you.

10 Mr. Wee, can you give your address please.

11 MR. WEE: 2850 Spafford Street, Davis,  
12 California 95618.

13 MR. O'LAUGHLIN: Have you -- did you prepare  
14 your declaration and exhibits for this matter?

15 MR. WEE: Yes, I did.

16 MR. O'LAUGHLIN: Okay. Have you made any  
17 changes to your testimony since you prepared it?

18 MR. WEE: I have not.

19 MR. O'LAUGHLIN: Okay. Do you affirm that your  
20 testimony as you presented it is true and correct?

21 MR. WEE: I do.

22 MR. O'LAUGHLIN: Can you briefly summarize for  
23 the Hearing Officers your testimony please?

24 MR. WEE: The testimony mostly is based on  
25 chain ever title research that was conducted by me and

1 my employees in San Joaquin County.

2 On the basis of that research, I conclude that  
3 the subject parcel was severed from all connection to  
4 all waterways on December 14, 1909 by a transfer from  
5 E.W.S. Woods to Jesse Wilhoit and Mary Douglass.

6 MR. O'LAUGHLIN: I have no further questions  
7 for Mr. Wee.

8 CO-HEARING OFFICER BAGGETT: That's it?

9 MR. O'LAUGHLIN: Yep.

10 CO-HEARING OFFICER BAGGETT: Okay.

11 Cross-examination?

12 MR. ROSE: Prosecution Team has none.

13 CO-HEARING OFFICER BAGGETT: Mr. Herrick?

14 --o0o--

15 CROSS-EXAMINATION BY MR. HERRICK

16 FOR MARK and VALLA DUNKEL

17 --o0o--

18 MR. HERRICK: John Herrick for the Dunkels.

19 Mr. Wee, is it correct from my reading of your  
20 testimony that you are not making any conclusions with  
21 regard to the existence of riparian or pre-1914 water  
22 rights?

23 MR. WEE: That is not correct.

24 MR. HERRICK: Okay. I see in your testimony  
25 where you note -- let me use the right words here --

1 things such as lost continuity with Middle River, but I  
2 don't see anyplace in your testimony where you say as an  
3 expert I therefore conclude the property does not have  
4 any riparian or pre-1914 water right.

5 If I'm incorrect, please show me. Please  
6 correct me.

7 MR. WEE: My conclusion that it -- the property  
8 was severed from any connection with all of the natural  
9 waterways near to it or that were once included within  
10 larger historical parcels was severed and therefore the  
11 riparian right was lost because there was no reservation  
12 in the deed, severance deed, that preserved or reserved  
13 riparian rights.

14 MR. O'LAUGHLIN: I understand you are saying  
15 that now.

16 But again, I don't see in your testimony where  
17 you make any conclusion regarding riparian or pre-1914  
18 rights. Could you point out in your testimony where you  
19 make that conclusion?

20 And something like "I therefore conclude" or  
21 "based on this, it's my opinion that."

22 MR. WEE: No -- well, on pre-14, there is not.

23 With regard to riparian, I think that my  
24 statement that -- that the parcel was severed from  
25 connection to the river and that was no reservation is a

1 statement that their riparian right had been lost, if  
2 any existed.

3 MR. HERRICK: Okay. Without being  
4 argumentative: So there is no language you can point to  
5 in your testimony that was submitted that says I  
6 therefore conclude or it's is my opinion that. Is that  
7 correct?

8 MR. RUBIN: I'm going to object to the  
9 question. It' been asked and answered. I think the  
10 document speaks for itself, and Mr. Wee has explained  
11 his answer.

12 MR. HERRICK: Well, the issue here is Mr. Wee  
13 is offered as an experience in riparian and pre-1914  
14 rights, and he produced testimony for us which makes no  
15 such conclusion.

16 CO-HEARING OFFICER BAGGETT: He just --

17 MR. O'LAUGHLIN: You're making the jump that he  
18 has to make the conclusion. That's your assertion, and  
19 you can argue it later.

20 His testimony stands that under his basis he  
21 found it was no longer contiguous and that no  
22 reservation of rights had been contained in the deeds.

23 You can argue what you want later.

24 CO-HEARING OFFICER BAGGETT: Right.

25 MR. RUBIN: Let me just add. Mr. Herrick has

1 asked this question. Mr. Wee has explained. And  
2 whether it's written or not, Mr. Wee has given his  
3 professional opinion as to whether it maintains riparian  
4 rights.

5 CO-HEARING OFFICER BAGGETT: Yeah.

6 MR. HERRICK: I'll get into that on the further  
7 questions, but it's a very important issue.

8 CO-HEARING OFFICER BAGGETT: He answered the  
9 question saying that that was his conclusion.

10 You're just asking the point -- so I think it  
11 has been answered, but feel free to give it another shot  
12 if you want. He's answered it. I will give you one  
13 more try.

14 MR. HERRICK: The issue is witnesses providing  
15 their written testimony and experts providing their  
16 conclusions ahead of time.

17 We received Mr. Wee's testimony that gives  
18 factual references to documents and statements about  
19 surface continuity. You cannot read his testimony and  
20 find where he's made a conclusion that I, as the  
21 attorney for the Dunkels, would prepare to rebut.

22 CO-HEARING OFFICER BAGGETT: Right, but --

23 MR. HERRICK: Now he can say it today, but that  
24 puts us at an unfair disadvantage. I'll explore his  
25 basis.

1 CO-HEARING OFFICER BAGGETT: Explore his basis.  
2 Continue.

3 MR. HERRICK: Mr. Wee, in order to determine a  
4 riparian right, a number of inquiries would normally be  
5 made; is that correct?

6 MR. WEE: Yes.

7 MR. HERRICK: And that inquiry would include  
8 such things as current surface continuity with some sort  
9 of water way; is that correct?

10 MR. WEE: Yes.

11 MR. HERRICK: And of course you might delve  
12 into what the waterway was, how big, is it natural, is  
13 it unnatural, but that would be part of the inquiry,  
14 correct?

15 MR. WEE: Yes.

16 MR. HERRICK: And another way to do that would  
17 be to look at deeds and examine language in deeds; is  
18 that correct?

19 MR. WEE: Yes.

20 MR. HERRICK: And another way would be to  
21 investigate intent other than that contained in deeds,  
22 and that would include such things as what? Histories,  
23 talking to landowners, looking to see if there are any  
24 agreements, things like that; is that correct?

25 MR. WEE: Normally, yes.

1           In this case, severance occurred in 1909. It's  
2 highly unlikely that I'm going to find somebody that  
3 could reliably tell me through oral history they had,  
4 you know, any knowledge about that event so I would  
5 discount doing the oral history kind of work.

6           But yes. Through documentary evidence, you can  
7 determine these things.

8           MR. HERRICK: When you say you discounted in  
9 this case, does that mean you made no inquiry into those  
10 other potential indications of intent that I just went  
11 through?

12           MR. WEE: Oh, no. I looked all the other ones.

13           I was referring -- one of your items was oral  
14 testimony of people who were knowledgeable, and I was  
15 just pointing out that we didn't make any great effort  
16 to try to contact somebody who would be knowledgeable  
17 about the severance in 1909 because it's highly unlikely  
18 that anybody lives today who was a party to that.

19           MR. HERRICK: Did you make any inquiries,  
20 though, to see if people had things like unrecorded  
21 agreements or records of improvements? By that, I mean  
22 canals or pumps or something. Did you make any of those  
23 inquiries?

24           MR. WEE: Yes. During the course of historic  
25 research, we did research each individual landowner and

1 try to find out what we could about them through  
2 whatever is available in archives, county records, all  
3 the normal sources that one would go to in order to try  
4 to do a land use history.

5 MR. HERRICK: Did you make any inquiries to  
6 Woods Irrigation Company?

7 MR. WEE: I have looked at Woods Irrigation  
8 Company, yes.

9 MR. HERRICK: No. I asked you if you'd made  
10 any inquiries to Woods Irrigation Company.

11 MR. WEE: Oh, to the company itself?

12 MR. HERRICK: To see if they had any records  
13 that might pertain to this issue.

14 MR. WEE: No, I hadn't and I haven't. At the  
15 time that I wrote this, I wasn't aware that there was a  
16 Woods Irrigation Company still in existence. I found  
17 that out about the time that this document was  
18 submitted.

19 But I -- so I did not look for any company  
20 records held by the company. I did do research on the  
21 company.

22 MR. HERRICK: When you say you didn't  
23 understand Woods was still in existence, after you found  
24 the 1911 agreement between Woods Irrigation Company and  
25 the Wilhoit-Douglass parties, you didn't -- I'm just



1 confused. You didn't make any inquiry to see if that  
2 was still in existence, that company?

3 MR. WEE: No. I did at that point.

4 I also learned at about the same point that it  
5 had been alleged that the records of the company all had  
6 burned up in a fire and that there was no company  
7 records that went back into the historical period far  
8 enough that I would be interested in them.

9 MR. HERRICK: Did you make any examination to  
10 determine if the Woods Irrigation Company canals existed  
11 prior to 1911?

12 MR. WEE: Yes, I have done some research on the  
13 issue.

14 MR. HERRICK: And that inquiry did not include  
15 any discussion with Woods Irrigation Company?

16 MR. WEE: No, it did not.

17 MR. HERRICK: Did it include any discussion  
18 with current landowners within Woods Irrigation service  
19 area?

20 MR. WEE: No, it hasn't. I haven't.

21 MR. HERRICK: So when you say you did an  
22 inquiry, who if anybody did you talk to about whether or  
23 not the delivery system for Woods was in existence at  
24 the time you say that the Dunkel property was severed  
25 from surface continuity?

1           MR. WEE: I didn't do it by talking to people.  
2 I did it by doing historical research.

3           MR. HERRICK: What does historical research  
4 mean? What did you look at?

5           MR. WEE: I looked at things like the articles  
6 of incorporation for the company.

7           I researched the company to see if it had been  
8 involved in any legal matters related to water or  
9 otherwise that might shed some light on the history of  
10 operations of the company.

11           I did newspaper research for the period in and  
12 around the time that it was organized and the time that  
13 the agreements were written.

14           I did research at the county to find the  
15 agreements that were written in 1911 and the contracts  
16 from 1911.

17           Worked at Micke Grove in Lodi, looking for  
18 information on the Woods and the irrigation company.

19           Research at the state library on the same  
20 issues. Research at the Bancroft Library. Research at  
21 the UCD library.

22           I'm probably missing some. But that's the type  
23 of work that I did.

24           MR. HERRICK: And do you know -- then can you  
25 make any conclusion whether or not you believe that the

1 canals of the Woods Irrigation Company existed prior to  
2 1911?

3 MR. WEE: I do have some evidence that a system  
4 of irrigation existed sometime before 1911. It was a  
5 system that was pretty primitive. It was based upon --  
6 totally upon gravity flow and only reached the part of  
7 the Woods property that was low enough in elevation to  
8 be served by that gravity flow system.

9 I don't know the extent of that area other than  
10 that it was the lowest -- it was a portion of the land,  
11 and it was the part that was the lowest in elevation.

12 MR. HERRICK: And did your investigation look  
13 at any old interior island sloughs that might have  
14 existed prior to 1911, at or prior to 1937?

15 MR. WEE: Yes, of course it did.

16 MR. HERRICK: Okay. And did you locate any  
17 interior island sloughs on Middle Roberts Island?

18 MR. WEE: Yes. There are several.

19 MR. HERRICK: Okay. And would being next to a  
20 slough in your opinion provide evidence that land had  
21 maintained a riparian connection?

22 MR. WEE: Yes.

23 MR. HERRICK: Okay. Now in your testimony you  
24 note that a deed prior to 1909 includes the statement  
25 of -- I'm sorry. It's in here -- together with all and

1 singular, the tenements -- excuse me. I'll start over:  
2 -- together with all the singular the  
3 tenements, hereditaments, and  
4 appurtenances thereto belonging or in  
5 anywise appertaining and the reversion  
6 and reversions, remainder and remainders,  
7 rents, issues, and profits thereof.

8 Do you see that where you say that on page 3,  
9 very top of the page?

10 MR. WEE: Yes. Yes.

11 MR. HERRICK: What was your purpose for putting  
12 that in your testimony?

13 MR. WEE: That that -- that was the only  
14 language that might be construed to have reserved  
15 anything, although my understanding of riparian water  
16 rights is that the reservation needs to be specific and  
17 that that language appears oftentimes as, you know,  
18 printed on the document.

19 It's a general clause that one finds in deeds  
20 of all sorts. It's a -- you know, it's fairly common to  
21 see that language in a deed, especially from that  
22 appeared.

23 MR. HERRICK: Does the fact that it's common  
24 somehow affect your conclusion about whether or not it  
25 includes retention of a riparian right?

1           MR. WEE: Well, as I said, my understanding of  
2 what the rulings on riparian rights have been is that a  
3 specific reservation is required and that this type of  
4 general language is -- I believe is held not to fulfill  
5 that requirement.

6           MR. HERRICK: But you don't know of any case  
7 that makes that specific holding, do you?

8           MR. WEE: I couldn't -- I couldn't name that  
9 case for you, no.

10          MR. HERRICK: You put this language in there  
11 because there are assertions that it does retain a  
12 riparian right?

13          MR. WEE: Well, I put it in there because I  
14 wanted to be clear that there -- that this language did  
15 appear in the deed. I didn't want to overlook it.

16          MR. HERRICK: Okay. Mr. Wee, I notice that on  
17 your -- some of your exhibits you designate certificates  
18 of purchase; is that correct?

19          MR. WEE: That's correct.

20          MR. HERRICK: Is it your assertion that  
21 certificates of purchase somehow constitute a severance  
22 of land or transfer of land from the government to an  
23 individual?

24          MR. WEE: Yes.

25          MR. HERRICK: The certificate of purchase does,

1 not the patent? As opposed to the patent?

2 MR. WEE: Well, for a swamp and overflow lands,  
3 there was a kind of complicated route to issuance of a  
4 patent. And that route included the purchaser to  
5 demonstrate that they had -- well, under various -- at  
6 various time periods under various laws, the situation  
7 was different.

8 But generally speaking, the claimant was  
9 required to demonstrate that they had spent money  
10 reclaiming; and in some periods, they actually had to  
11 demonstrate that they had reclaimed and cultivated the  
12 soil prior to being issued a patent because the whole  
13 purpose of the land grant was for individuals to turn  
14 useless or swamp land or overflow land into agricultural  
15 land, and if they did so, they would be rewarded by  
16 being granted a patent for the property.

17 So the certificate of purchase was issued by  
18 the State of California to a claimant upon payment of a  
19 percentage of the cost of the land, and it was -- for  
20 most of the period it was 20 percent which gave that  
21 person the right to demonstrate that they had reclaimed  
22 the land and earned a patent.

23 In the interim, they also had the right to  
24 transfer ownership of that certificate of purchase much  
25 like one would transfer title by deed.

1           MR. HERRICK: But that was -- again, I'm not  
2 trying to be too technical on this, but that was a --  
3 you could transfer the ownership of the certificate of  
4 purchase, but until there was patent, the State  
5 technically still owned the land; isn't that correct.

6           MR. WEE: Until -- yeah. Until -- until the  
7 conditions of the grant were fulfilled, the claimant did  
8 not hold fee title.

9           MR. HERRICK: I believe I have no other  
10 questions, thank you.

11           CO-HEARING OFFICER BAGGETT: Thank you. South  
12 Delta Central Delta?

13           MR. RUIZ: No questions by Central or South  
14 Delta at this time.

15           CO-HEARING OFFICER BAGGETT: San Joaquin?

16           MS. GILLICK: No questions.

17           CO-HEARING OFFICER BAGGETT: Thank you. Staff?  
18 Charlie?

19           CO-HEARING OFFICER HOPPIN: I have none.

20           CO-HEARING OFFICER BAGGETT: Okay. Any  
21 redirect?

22           MR. O'LAUGHLIN: No redirect.

23           CO-HEARING OFFICER BAGGETT: Exhibits?

24           MR. O'LAUGHLIN: I would like to move into  
25 evidence Mr. Wee's testimony and the associated exhibits

1 please.

2 CO-HEARING OFFICER BAGGETT: Any objection? No  
3 objection, they're admitted.

4 MR. O'LAUGHLIN: Thank you.

5 (Whereupon the above-named exhibits were  
6 accepted in evidence.)

7 CO-HEARING OFFICER BAGGETT: Any party have any  
8 rebuttal testimony they want to put on?

9 CO-HEARING OFFICER BAGGETT: Hearing none --

10 MR. O'LAUGHLIN: No, no, no.

11 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin.

12 MR. O'LAUGHLIN: Yes. We have a short rebuttal  
13 that we'd like to present, and there's a couple copies  
14 that we're going to be making.

15 CO-HEARING OFFICER BAGGETT: Can you speak up.

16 MR. O'LAUGHLIN: So we have copies that we'd  
17 like to make, and we'll be making those copies, and we  
18 have a very short rebuttal in regards to the Dunkel  
19 matter. So we can --

20 CO-HEARING OFFICER BAGGETT: Take an early --

21 MR. O'LAUGHLIN: Early lunch, and we can come  
22 back.

23 CO-HEARING OFFICER BAGGETT: How long?

24 MR. O'LAUGHLIN: Half hour?

25 CO-HEARING OFFICER BAGGETT: Till you come back



1 with the copies.

2 MR. O'LAUGHLIN: Oh.

3 CO-HEARING OFFICER BAGGETT: We prefer a short  
4 lunch.

5 MR. O'LAUGHLIN: Half hour.

6 CO-HEARING OFFICER BAGGETT: Half hour. Does  
7 anybody object to a short lunch break?

8 MR. HERRICK: Half hour is fine with me, but I  
9 have another question on the issue.

10 CO-HEARING OFFICER BAGGETT: Proceed.

11 MR. HERRICK: My original estimation was it was  
12 impossible to do three hearings in one day.

13 I think since Dunkel has taken us through noon,  
14 we're going to have a lunch, I have told the rebuttal  
15 witness I was going to have for the Mussi case to be on  
16 call, but I didn't expect him today.

17 So if you want me to have him drive up here, we  
18 need to call him now.

19 And as I pointed out earlier, one of the  
20 witnesses for the Mussi case told me on Monday, gee, I  
21 don't think I can be there, and I won't be back in town  
22 till late afternoon.

23 And I said well, it's probably pretty flexible.  
24 I don't think we'll finish in one day. So I assume we  
25 could, you know, address those concerns and have him

1 back when this continues. So.

2 CO-HEARING OFFICER BAGGETT: We can go off the  
3 record for this.

4 (Discussion off the record)

5 CO-HEARING OFFICER BAGGETT: We'll recess, half  
6 hour.

7 (Lunch recess)

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A F T E R N O O N S E S S I O N

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CO-HEARING OFFICER BAGGETT: Back on the record.

MR. HERRICK: If it's not too late, we would like an opportunity put on a brief rebuttal on the Dunkel matter, and I understand the copies are not quite ready. That would actually be a good use of time, instead of waiting, for rebuttal.

CO-HEARING OFFICER BAGGETT: Okay. You're up. Rebut away.

--o0o--

KENNETH R. LAJOIE, PhD  
DANTE JOHN NOME LLINI  
RUDY MUSSI

Called by MARK and VALLA DUNKEL

REBUTTAL EXAMINATION BY MR. HERRICK

--o0o--

MR. HERRICK: John Herrick on behalf of the Dunkels. The Hearing Officers have allowed us to put on a rebuttal after initially declining.

I've called as witnesses Ken Lajoie, Dante Nomellini, and Rudy Mussi. Their qualifications, if any, are as part of the record in the Mussi and Pak matter, so we'll just refer to that. I won't go into

1 much introduction unless somebody wants it.

2 But let me start with Mr. Nomellini.

3 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

4 MR. RUBIN: I thought somebody was speaking.

5 CO-HEARING OFFICER BAGGETT: You're up.

6 MR. RUBIN: Maybe Mr. Herrick could offer proof  
7 as to the subject matter of the rebuttal testimony?  
8 Obviously, we don't know the subject.

9 I do have concerns with Mr. Nomellini  
10 testifying, depending on the scope of his testimony and  
11 obviously --

12 CO-HEARING OFFICER BAGGETT: Very good.

13 MR. HERRICK: Certainly.

14 As I stated in my questioning, Mr. Wee's  
15 testimony presented certain evidence, but in the  
16 testimony itself did not specifically state any  
17 conclusions.

18 Once he became a witness and the Hearing  
19 Officers allowed him to make those conclusions, and so I  
20 feel the need to offer some sort of rebuttal to his  
21 conclusions which, you know, I'm not trying to overstate  
22 this but were not apparent in his testimony.

23 So I need to try to make sure the record is not  
24 left one-sided, even though I was not aware he was going  
25 to make those conclusions.

1           So the testimony I'm going to offer here will  
2 address the issue of whether or not there were  
3 connections between the Dunkel property around and  
4 during or at that time of alleged discontinuity from  
5 Middle River.

6           CO-HEARING OFFICER BAGGETT: Okay. Very good.

7           MR. HERRICK: With that, Mr. Nomellini, you  
8 heard the testimony given by Mr. Wee this morning?

9           MR. NOMELLINI: Yes.

10           My statement of qualifications covers my  
11 experience. I live in the area. I have worked in the  
12 legal field in the area. I've done a lot of work on the  
13 levees in flood times.

14           I'm familiar with the facilities. I actually  
15 farmed in the area. Not like these real farmers, but  
16 long my life my family's always been in farming in the  
17 area with the exception of the last three or four years.  
18 We discontinued or operation.

19           The Woods facilities I'm familiar with. The  
20 intake off of Middle River, and this is -- you can go  
21 out and look at it -- that goes by the Dunkel property  
22 is a wiggly line.

23           And my experience is that when these canals are  
24 wiggly they follow a natural slough. None of us have  
25 ever gone out and built a canal that wiggled like a

1 serpent. And therefore, I feel quite comfortable that  
2 these facilities of Woods, when they first went in,  
3 which I understood were gravity. They were up until I  
4 think about 1980, gravity alone for a while even before  
5 that.

6 But these properties, these Dunkel properties,  
7 easily serve with the water from Middle River by gravity  
8 through that facility, and I think that because it  
9 followed a natural path was a connection.

10 And even if you have a canal, a depression in  
11 the soil in this area of the Delta, because of its  
12 elevation, it will have water in it even if you didn't  
13 pour it in there through a gate or pump. It's going to  
14 fill with water.

15 The other point I'd like to make is that -- and  
16 this is in my primary testimony as well in the other  
17 matters -- is that overlooked in this analysis that's  
18 going on in this debate on whether or not lands are  
19 riparian is the fact that you could be riparian to the  
20 Delta pool.

21 The Delta pool is like a lake. You could have  
22 riparian rights to the lake. You could have riparian  
23 rights to a nonflowing slough or stream, and I think  
24 that's clear in the law.

25 And these properties, were it not for the

1 levees and the drainage systems operated, would be  
2 periodically inundated with the tides. So I believe  
3 these properties are riparian to the Delta pool as well  
4 because of their elevation.

5           Anyway, I know that the technical issue is  
6 whether or not it's tied to the Woods thing, but since  
7 the testimony came in, I actually urged Mr. Herrick that  
8 we put forth what we know about it in rebuttal.

9           Thank you.

10           MR. HERRICK: Mr. Lajoie, could you just  
11 briefly touch upon how your work does or does not  
12 indicate that the area of the Dunkel property was within  
13 that one of the old offshoots or distributaries of  
14 Middle River?

15           DR. LAJOIE: The geologic interpretations that  
16 I prepared for the -- in another case happened to just  
17 coincidentally include the area of the Dunkel property.

18           MR. HERRICK: And before you go any further,  
19 can we pull up his exhibit number --

20           DR. LAJOIE: 8.

21           MR. HERRICK: 8.

22           DR. LAJOIE: Excuse me. It would be figure 9.

23           MR. HERRICK: I'm sorry. Figure 9.

24           CHIEF LINDSAY: Which is the one I'm looking  
25 for under Dunkel? Which exhibit?

1 MR. HERRICK: It's under either Mussi or Pak  
2 and Young, but Mr. Lajoie's testimony.

3 MS. GILLICK: And it's 1-9 under either Mussi  
4 or Pak and Young.

5 CHIEF LINDSAY: Thank you.

6 (Discussion off the record)

7 DR. LAJOIE: That's it. Could you slide it to  
8 the figure up, please? Thank you.

9 MR. HERRICK: Mr. Lajoie, if you'll just  
10 continue as to how your investigations apply to this  
11 issue of the distributary off of Middle River.

12 MR. NOMELENI: If I might add, the Dunkel  
13 property is right where the red line kind of slides  
14 across horizontally at the bottom, right above. It  
15 looks like 87.

16 DR. LAJOIE: I might just explain what this  
17 diagram is.

18 This is a soil -- the 1952 soils map produced  
19 by Dr. Weir at University of California at Davis, and  
20 this is the soils map of San Joaquin County.

21 And I outlined in red here all the soils on his  
22 map in the old quadrangle area, all the soils on his map  
23 that are mineral rich.

24 And those soils are generally soils that lie  
25 along natural channels, natural waterways in the Delta



1 and they've built up the -- they lie on the levee, the  
2 natural levees of these channels, and they're built up  
3 by flood waters that bring sediment from higher in the  
4 basin.

5           So everything in red here are the what are  
6 called mineral-rich soils. The areas in white would be  
7 organic-rich soils. Those are the basins that are  
8 underlain by organic deposits, the tule peats.

9           And the area -- if you want to point where the  
10 property is -- the area right there is red. That red  
11 area is the natural levee underlain by mineral-rich  
12 deposits and characterized by mineral-rich soils of  
13 Middle River and three distributary channels.

14           Distributary channels are channels that branch  
15 off from a main stream. Three distributary channels  
16 that flow to the north, and eventually one of them or  
17 maybe several of them connect up with the San Joaquin  
18 River.

19           So the property that is under discussion lies  
20 directly on the natural levee of Middle River and at  
21 least three of its distributary channels and from a  
22 geologic standpoint therefore would lie within the  
23 riparian zone of Middle River or those distributary  
24 channels.

25           MR. HERRICK: Now, either Mr. Mussi or

1 Mr. Nomellini, those I'll say vertical lines on the map  
2 around which there are red, do those indeed reflect the  
3 locations in general of the Woods Irrigation District  
4 main channels?

5 MR. NOMELEINI: Yeah, if you look at figure 8 --

6 DR. LAJOIE: Excuse me one second, Dante. We  
7 don't have to go to figure 8.

8 What I did on this map in blue was plot the  
9 channels that are shown on the 1941 Woods Irrigation  
10 District map.

11 Now it might be a little bit difficult to see  
12 from here, but you can see in the basin the white area,  
13 you see some wiggly blue lines going north. Those are  
14 natural channels that are draining that basin into Duck  
15 Slough.

16 To the right are the three squiggly red areas.

17 Laying on or adjacent to those three squiggly  
18 areas are blue lines which were channels that I took off  
19 the Woods 1941 irrigation map.

20 MR. NOMELEINI: If you compare the figure 8 of  
21 Lajoie, I think you'll see the figure 8 is the Woods  
22 1941 map which lays out the laterals.

23 If you can go up a little bit. Right.

24 Right there at the bottom is the Lajoie  
25 parcel -- not Lajoie; excuse me. Dunkel parcel is right

1 there.

2 And you can see that these lines, when you go  
3 out in the field, you'll see how wiggly this line is.  
4 They go over and they fit that area.

5 So that's the basis upon which I conclude as  
6 well that that wiggly line following an old slough would  
7 have been a natural thing to do.

8 MR. HERRICK: And Mr. Mussi, you're familiar  
9 with Woods Irrigation Company in general?

10 MR. MUSSI: Yeah. I served on the Board in the  
11 1980s.

12 MR. HERRICK: And would you -- do you believe  
13 that the Dunkel property is property that can be served  
14 through gravity alone on the Woods Irrigation canals?

15 MR. MUSSI: Yeah. When I got on the Board, we  
16 had a gate system that we used a lot of times.

17 What we would do is unscrew the gates which  
18 would raise up, oh, probably maybe eight feet gate that  
19 would open up. And we would use gravity flow to feed a  
20 lot of the canals.

21 MR. HERRICK: Okay. Mr. Nomellini, let me ask  
22 just one last question here. Given the -- excuse me.  
23 Let me go back.

24 Mr. Lajoie, the red markings you've produced  
25 have a straight flat line at the bottom. That's just

1 the edge of where you were investigating?

2 DR. LAJOIE: That's correct.

3 MR. HERRICK: That doesn't indicate that the  
4 soils change there?

5 DR. LAJOIE: Not whatsoever.

6 MR. HERRICK: Thank you.

7 Mr. Nomellini, based on your knowledge of Woods  
8 Irrigation Company, the ownership and agricultural  
9 practices of Middle Roberts Island in combination Mr.  
10 Lajoie's testimony and Mr. Mussi's testimony, what  
11 conclusions do you draw with regard to whether or not  
12 the Dunkel property was able to receive water through  
13 surface means at and around the 1909 time frame?

14 MR. NOME LLINI: Well, the testimony that came  
15 in that we're rebutting established that the facilities  
16 were there I think in 1909 if I heard it correct.

17 And if those facilities were there in 1909,  
18 which I believe they were based on what I have looked  
19 at, they would have followed the natural channel, and  
20 that land, if that levee wasn't there in Middle River,  
21 that land would be inundated, and it's easily fed by  
22 gravity water from Middle River.

23 I agree with Rudy. For many years, they did  
24 serve the water through a lot of the canals by gravity.  
25 Of course, you save the electrical power, and so they

1     tried to do that, I think, more often than not.

2             MR. HERRICK:    So you would conclude that the  
3     property did maintain a connection to the river which  
4     would support a riparian right?

5             MR. NOMELLINI:   Yeah.

6             And as I pointed out, I think that even if you  
7     didn't have the direct connection to the river, the fact  
8     it was on a slough or a channel that was a depression in  
9     the ground would have had water in it.  It would have  
10    been riparian to that.

11            And I believe it's also riparian to the Delta  
12    pool which I think is being overlooked in the debate  
13    between ourselves and others in this hearing.

14            MR. HERRICK:    That's all I have in rebuttal.

15            CO-HEARING OFFICER BAGGETT:   Thank you.

16            Any cross from Prosecution Team?

17            MR. O'LAUGHLIN:   Yes, I have cross if they're  
18    not going to go.  Can I go first and they can go second?

19            MR. ROSE:        We don't have any cross-examination.

20            CO-HEARING OFFICER BAGGETT:   Mr. O'Laughlin.

21                               --o0o--

22                               CROSS-EXAMINATION BY MR. O'LAUGHLIN

23                               FOR MODESTO IRRIGATION DISTRICT

24                               --o0o--

25            MR. O'LAUGHLIN:   Good afternoon, gentlemen.

1 Since you're in the group, Mr. Nomellini, I give you  
2 that distinction.

3 Tim O'Laughlin, Modesto Irrigation District.

4 Mr. Nomellini, have you made any inquiry as to  
5 whether or not Woods Irrigation District followed the  
6 civil code and filed a pre-1914 filing in San Joaquin  
7 County?

8 MR. NOMELLINI: I have not made that inquiry.

9 MR. O'LAUGHLIN: Okay. And I don't want to go  
10 into it in great deal here. You talk about a natural  
11 slough; is that correct?

12 MR. NOMELLINI: Yes.

13 MR. O'LAUGHLIN: So your assertion is that the  
14 Dunkel property has a canal next to it that was probably  
15 a natural slough at one time that therefore is  
16 hydrologically connected to Middle River, correct?

17 MR. NOMELLINI: Correct.

18 MR. O'LAUGHLIN: Okay. In all of the exhibits  
19 that have been presented, can you pull up a map that  
20 shows this slough prior to the canal being built?

21 MR. NOMELLINI: I think the geology shows that.  
22 I think Mr. Lajoie's geology and examination of the soil  
23 shows that being there.

24 MR. O'LAUGHLIN: No. I asked a more specific  
25 question: Is there a map that shows that?

1           MR. NOMELLINI: I can't point you to a map  
2 right now. I'm not sure one doesn't exist in those 40  
3 disks I gave you of all the mapping that we had, but.

4           MR. O'LAUGHLIN: Okay.

5           One other thing you opined on is that it seems  
6 to be following a natural slough or natural watercourse  
7 when they put in the canal; is that correct?

8           MR. NOMELLINI: That's correct.

9           MR. O'LAUGHLIN: Okay. Is this similar to the  
10 testimony you presented in regards to Duck Slough, that  
11 the Duck Slough was a natural watercourse that  
12 eventually got turned into a canal?

13          MR. NOMELLINI: Is it similar?

14          MR. O'LAUGHLIN: Yeah.

15          MR. NOMELLINI: Yeah. My opinion is that when  
16 you find a wiggly line out there, in that area, that it  
17 followed a path of a slough.

18          And the only deviation from what your question  
19 has implicated is that those in many case were  
20 artificially enhanced or modified through dredging and  
21 developing canals and stuff like that, so I would only  
22 add that it may not be purely natural, that it may be  
23 artificially enhanced.

24          MR. O'LAUGHLIN: Right. So in other words,  
25 they may have gone in and had a natural slough, dug out

1 the slough, put the soils materials on the bank, created  
2 levees, widened the channel, and in effect have a canal  
3 that has artificial features like a levee and a --

4 MR. NOMELLINI: Correct. Or extended it so  
5 they could make a connection for navigation and also for  
6 water delivery.

7 MR. O'LAUGHLIN: Have you made any  
8 determination as to when the levee was built on Middle  
9 River adjacent to the Dunkel property?

10 MR. NOMELLINI: Well, I know the those levees  
11 were built in the -- well, in the late 1800s. But it  
12 even started sooner than that.

13 There was a major reclamation effort that  
14 encompassed a much larger area that would have included,  
15 from all that I looked at, the levee along Middle River  
16 in that area that we're talking about.

17 MR. O'LAUGHLIN: Okay. Prior to the conveyance  
18 in 1909, do you know of an existence of a canal that  
19 would serve water to the Dunkel property from Middle  
20 River?

21 MR. NOMELLINI: I'd have to go back and look at  
22 the maps specifically at that. I didn't look -- didn't  
23 expect to testify on this subject, but --

24 MR. O'LAUGHLIN: Okay. Did you find anything  
25 in the Woods Irrigation Company records that shows a



1 canal being built at or before December 14, 1909 in  
2 regards to -- adjacent to the Dunkel property?

3 MR. NOMELLINI: I haven't examined the Woods  
4 records in that regard. I'm generally familiar with a  
5 number of the documents in which Woods system, but I  
6 have not made an examination of the Woods documents.

7 MR. O'LAUGHLIN: Okay.

8 Mr. Lajoie, you've provided testimony in the  
9 Mussi and Pak matter as well; is that correct?

10 DR. LAJOIE: Yes.

11 MR. O'LAUGHLIN: And the map that you have  
12 shown us in your exhibit is one that you prepared for  
13 those two matters; is that correct?

14 DR. LAJOIE: That's correct.

15 MR. O'LAUGHLIN: Okay. In regards to your  
16 testimony that you have or are putting forward here, is  
17 it generally like your testimony in regards to Duck  
18 Slough, that there's a natural slough, the slough was  
19 then widened, improved, the soils were put on levees so  
20 that canals and drainage were provided in the interior  
21 of Middle Roberts Island?

22 DR. LAJOIE: I was not asked to do that, and I  
23 did not do that.

24 MR. O'LAUGHLIN: Okay.

25 DR. LAJOIE: I mapped the geology.

1 MR. O'LAUGHLIN: So you mapped the geology.

2 Did you look at any maps prior to 1909 to  
3 determine whether or not a natural slough existed in  
4 this area next to the Dunkel property?

5 DR. LAJOIE: No.

6 MR. O'LAUGHLIN: And you didn't review the  
7 chain of title, I'm assuming?

8 DR. LAJOIE: No, I didn't.

9 MR. O'LAUGHLIN: And you have no independent  
10 knowledge of Woods Irrigation Company?

11 DR. LAJOIE: No, I don't.

12 MR. O'LAUGHLIN: One quick question, Mr.  
13 Lajoie. When you were doing your work, other than the  
14 geology did you review any aerial photos to determine  
15 whether features on Middle Roberts Island adjacent to  
16 the Dunkel property had been manmade or were natural?

17 DR. LAJOIE: I have analyzed aerial photographs  
18 probably of that area because I've analyzed maybe 12 to  
19 14 aerial photographs besides the two that I have  
20 reported on.

21 So I probably have analyzed that area, but I  
22 made no specific notes of the issues of the features  
23 that you just referenced.

24 MR. O'LAUGHLIN: In regards to the Dunkel  
25 property --

1 DR. LAJOIE: No.

2 MR. O'LAUGHLIN: -- correct? Okay.

3 Now, in those photos that you reviewed, were  
4 any of those photos prior to 1930?

5 DR. LAJOIE: No.

6 MR. O'LAUGHLIN: Thank you.

7 I have no further questions.

8 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

9 --o0o--

10 CROSS-EXAMINATION BY MR. RUBIN

11 FOR SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

12 --o0o--

13 MR. RUBIN: Good afternoon, gentlemen. Jon  
14 Rubin for San Luis & Delta-Mendota Water Authority. I  
15 think I just have one area of questioning, and it's  
16 directed to you, Mr. Nomellini.

17 You spoke of a concept that, if I understood it  
18 correctly, was the Dunkel property is riparian to the  
19 Delta pool; is that correct?

20 MR. NOME LLINI: Correct.

21 MR. RUBIN: Are you aware of that concept being  
22 advanced to the State Water Resources Control Board  
23 previously?

24 MR. NOME LLINI: I don't recall it being  
25 advanced.

1           MR. RUBIN: Do you know if the concept of a  
2 Delta pool was argued in the Phelps matter that was  
3 before the State Water Resources Control Board?

4           MR. NOMELLINI: I don't think it was, but I  
5 don't have a specific recollection of the entire scope  
6 of that.

7           MR. RUBIN: Have you ever previously argued the  
8 concept of a Delta pool and a riparian right attaching  
9 to a Delta pool?

10          MR. NOMELLINI: In a legal water right matter?  
11 No.

12          But I've argued that the Delta, being swamp and  
13 overflow lands, and following the 1956, you know,  
14 studies by the Department and the Central Valley Project  
15 where their conclusion was based on land being -- the  
16 Delta lowlands being those lands less than five feet  
17 above sea level as being riparian, it was my assumption  
18 that was based on the fact that they were looking at the  
19 Delta pool.

20          MR. RUBIN: Mr. Nomellini, historically, you've  
21 been counsel for Central Delta Water Agency?

22          MR. NOMELLINI: Yes.

23          MR. RUBIN: Are you still?

24          MR. NOMELLINI: I am. I'm not a counsel in  
25 this proceeding, but I serve as manager and co-counsel

1 of the agency, yes.

2 MR. RUBIN: Do you know if the Central Delta  
3 Water Agency has ever argued that lands are riparian to  
4 the Delta pool before the State Water Resources Control  
5 Board?

6 MR. NOMELLINI: I don't recall us arguing that  
7 as specifically as we're going to argue it now.

8 MR. RUBIN: I'm sorry? But you have argued it,  
9 but just not specifically?

10 MR. NOMELLINI: We felt the Delta entirely  
11 should be treated as riparian, and it should be  
12 recognized -- and you'll see in -- you probably read my  
13 testimony that actually there's no water saved by  
14 shutting down agricultural operations in the Delta, and  
15 the state had the obligation when it took on the  
16 property from the federal government on the Arkansas Act  
17 to make a good-faith effort to reclaim it.

18 So I see no policy basis for depriving the  
19 Delta of riparian status.

20 MR. RUBIN: Hearing Officer Baggett, I would  
21 ask that you instruct the witness, as Mr. Herrick had  
22 asked you earlier, for the witness to be responsive.

23 These long positional statements are not  
24 directly responsive to the question.

25 (Interruption)

1 MR. NOMESELLINI: I was trying to make a complete  
2 answer, and I apologize for this quacking noise coming  
3 out of my pocket. I didn't realize it was in there.

4 MR. RUBIN: I'll refrain from commenting on  
5 that.

6 MR. NOMESELLINI: I will try to be more specific,  
7 Jon.

8 CO-HEARING OFFICER HOPPIN: I'm just glad it  
9 was coming out of your pocket. I thought it was out of  
10 your mouth there for a minute. I was really getting  
11 worried.

12 (Laughter)

13 CO-HEARING OFFICER BAGGETT: Can you maybe ask  
14 the question with yes-or-no answers.

15 MR. RUBIN: I think any question was a  
16 yes-or-no, required a yes-or-no answer specifically.

17 MR. NOMESELLINI: All right. You wanted to know  
18 whether we ever articulated this specifically as a water  
19 rights issue before the Board, and I would say I don't  
20 recall that we've ever done that specifically.

21 MR. RUBIN: Has Central Delta Water Agency  
22 argued the concept of a riparian right to the Delta pool  
23 before a state court?

24 MR. NOMESELLINI: You know, we've cited those  
25 reports that made the assumption that the Delta was --

1 Delta lowlands were riparian. We've argued that.

2 MR. RUBIN: And was that in a court?

3 MR. NOMELLINI: I think we raised it in the  
4 briefs in front of the courts.

5 MR. RUBIN: And did the court issue a decision  
6 in support of the argument raised in your brief?

7 MR. NOMELLINI: No. Specifically in the Phelps  
8 case, no.

9 MR. RUBIN: Thank you.

10 No further questions.

11 CO-HEARING OFFICER BAGGETT: Any other cross?  
12 Hearing none, exhibits?

13 MR. HERRICK: Since the witness has referred to  
14 two pages of Mr. Lajoie's testimony from the Mussi  
15 proceeding, I would then submit those two pages in  
16 support of their rebuttal here.

17 CO-HEARING OFFICER BAGGETT: Any objection?  
18 Hearing no objection, they are entered.

19 (Whereupon the above-referenced exhibits  
20 were accepted in evidence.)

21 MR. HERRICK: Can I as clarifying question  
22 please?

23 Mr. O'Laughlin's case ended, and he's going  
24 into rebuttal, but is it correct that there was a  
25 witness and testify not offered, so that is not in

1 evidence? Wasn't there a second witness you had that  
2 you didn't put on?

3 CO-HEARING OFFICER BAGGETT: Turn on your mic.  
4 The question was Mr. O'Laughlin had a witness -- two  
5 witnesses, as I recall.

6 MR. O'LAUGHLIN: Yes.

7 What we decided early on was to submit the  
8 testimony out of an abundance of caution.

9 Given the filing that was made in the testimony  
10 today, the testimony by those two witnesses will not be  
11 moved into evidence. And that's going to be the same  
12 for Mussi and Pak.

13 CO-HEARING OFFICER BAGGETT: Okay. Very good.  
14 Rebuttal. Mr. O'Laughlin, you're up.

15 Waiting for you. On the record.

16 MR. O'LAUGHLIN: What?

17 CO-HEARING OFFICER BAGGETT: You're on.

18 --o0o--

19 STEPHEN WEE

20 Called by MODESTO IRRIGATION DISTRICT

21 REBUTTAL EXAMINATION BY MR. O'LAUGHLIN

22 --o0o--

23 MR. O'LAUGHLIN: Thank you.

24 First of all -- and I don't think I have to get  
25 Mr. Wee to verify this -- there is a California Supreme



1 Court case, 50 Cal.2d 174.

2 We would ask that the Hearing Team take  
3 judicial notice of this. This is a published Supreme  
4 Court case and as such does not need anyone to testify  
5 about the truth or veracity of what's been asserted in  
6 that matter.

7 CO-HEARING OFFICER BAGGETT: No objection?  
8 It's admitted.

9 MR. O'LAUGHLIN: Thank you.

10 Mr. Wee, you have in front of you a document.  
11 Can you tell me what the title of that document is?

12 MR. WEE: Yes. It's the Reporter's Transcript  
13 on Appeal from the judgment in the superior court,  
14 Sacramento, in the case of Woods Irrigation Company  
15 versus the Department of Employment of the State of  
16 California.

17 MR. O'LAUGHLIN: Mr. Wee, did I ask you to look  
18 for the records which were the basis of the Supreme  
19 Court case, 50 Cal.2d 174?

20 MR. WEE: Yes.

21 MR. O'LAUGHLIN: And did you ascertain where  
22 those documents were located?

23 MR. WEE: Yes. I located them at the  
24 California State Archives.

25 MR. O'LAUGHLIN: Okay. Now at the last minute,

1 were you able to -- I mean were you able to copy the  
2 entire transcript that was included as part of the  
3 reporter's transcript?

4 MR. WEE: No, I wasn't not.

5 MR. O'LAUGHLIN: And why was that?

6 MR. WEE: I pled with the archives to get me a  
7 copy of this by Tuesday, yesterday. And they were too  
8 busy to guarantee to me that they could do that, and  
9 they were unwilling to put me at the top of the line.

10 So I negotiated with them that if I got the  
11 partial transcript of just the pages that I absolutely  
12 needed would they try to get it done for me, and they  
13 agreed and did so.

14 MR. O'LAUGHLIN: So there is an entire record,  
15 if other parties wanted to ascertain that record.  
16 They're available at the archives; is that correct?

17 MR. WEE: That's correct.

18 MR. O'LAUGHLIN: Okay. In regards to that, the  
19 document you had requested to be copied, what was your  
20 thought process in determining that this section should  
21 be copied and not other sections be copied?

22 MR. WEE: Well, the case, as you could see from  
23 the title of it, does not seem to be a case about water  
24 rights. It was more a case that involved the  
25 classification of workers as agricultural labor and

1 their -- the requirements of the company to pay workers'  
2 compensation fees for those workers.

3 And so I didn't -- I chose not to copy those  
4 pages that were exclusively related to those types of  
5 issues and focused on anything that was related to the  
6 history of the operation and construction of the system  
7 as well as anything that bore upon statements related to  
8 water rights.

9 MR. O'LAUGHLIN: Thank you.

10 I have no further questions.

11 CO-HEARING OFFICER BAGGETT: Any  
12 cross-examination?

13 MR. ROSE: None for the Prosecution Team.

14 CO-HEARING OFFICER BAGGETT: Anyone else?

15 MR. HERRICK: I don't have any cross.

16 CO-HEARING OFFICER BAGGETT: Hearing none.

17 MR. O'LAUGHLIN: Thank you.

18 Then Mr. Baggett, I would like to move into  
19 evidence -- I don't know what the marking will be --  
20 both the California Supreme Court case of which the  
21 Hearing Officers already taken -- the Hearing Team has  
22 already taken judicial notice as well as Woods  
23 Irrigation Company, et al -- sorry -- a corporation  
24 versus a Department of Employment of the State of  
25 California, Reporter's Transcript on Appeal. It's a

1 partial reporter's transcript, and I just need a number  
2 so we can enter it.

3 MR. RUBIN: Hearing Officer Baggett, this is  
4 Jon Rubin for San Luis & Delta-Mendota Water Authority.

5 Consistent with the way we've been marking  
6 these as joint exhibits, the next in order would be  
7 Exhibit MSS 5.

8 CO-HEARING OFFICER BAGGETT: Okay. There's no  
9 objection? So admitted.

10 MR. O'LAUGHLIN: Thank you very much.

11 (Discussion off the record)

12 CO-HEARING OFFICER BAGGETT: Wait. State it on  
13 the record here, Mr. O'Laughlin.

14 MR. O'LAUGHLIN: The Supreme Court case should  
15 be MSS 5. And the transcript of -- the Reporter's  
16 Transcript on Appeal should be MSS 6. Thank you.

17 (Whereupon Exhibits MSS 5 and 6 were  
18 accepted in evidence.)

19 CO-HEARING OFFICER BAGGETT: Very good. So  
20 that's the cases-in-chief for all three parties.

21 At this point, I think the Board will have to  
22 take this under submission.

23 But at the same time, I think we need to hold  
24 the record open, and we'll allow all parties equal  
25 opportunity on whether to augment the record once -- I

1 think it was pointed out early this morning that once  
2 the Woods hearing is concluded, since they obviously are  
3 very integral to each other, so I don't know how we can  
4 make that decision.

5 So we'll hold the record open. And at that  
6 point, we'll talk about closing briefs and so on if  
7 necessary or, as I think some argued, if this is just  
8 dismissed.

9 But we'll doing the Woods hearing or some -- I  
10 think as I recall it's another Hearing Team does the  
11 Woods hearing besides Mr. Hoppin and I.

12 But after that, then we will conclude this.

13 MR. O'LAUGHLIN: May I make a statement on that  
14 point very briefly.

15 CO-HEARING OFFICER BAGGETT: Proceed.

16 MR. O'LAUGHLIN: Really, there is no reason to  
17 hold the hearing record open.

18 The evidence -- I know. Just -- I got it.  
19 Just making a record.

20 There's no reason to hold the hearing record  
21 open. Mr. Dunkel has and -- Mr. and Mrs. Dunkel have  
22 provided no evidence of a riparian right or pre-1914  
23 right or appropriative right. We have no indication  
24 from them that they will.

25 And secondly, the only evidence that's been put

1 in of any nature is a California Supreme Court case  
2 which basically has already -- is res judicata on the  
3 issue of whether or not Woods Irrigation District has  
4 pre-1914 water rights.

5 And they have asserted that they have no water  
6 rights.

7 So I don't see the reason to hold the hearing  
8 record open. And thank you for the time to make the  
9 statement. I don't need a response. I understand what  
10 you are doing.

11 CO-HEARING OFFICER BAGGETT: Very good.

12 Mr. Herrick.

13 MR. HERRICK: I would just agree with the  
14 Hearing Officer's decision to hold the record open.

15 As you know, the Dunkels came here telling you  
16 that they were -- had provided sufficient evidence and  
17 were not providing additional evidence for other water  
18 rights because they were receiving it from somebody who  
19 is providing the water.

20 If this needs to be addressed after we've had  
21 time to review the testimony and the exhibits, then we  
22 may ask to put on additional evidence to further firm up  
23 those other rights.

24 But obviously, at the time of this hearing,  
25 there was no indication that those other rights needed

1 to be proved out.

2 CO-HEARING OFFICER BAGGETT: Very good.

3 MR. RUBIN: Hearing Officer Baggett, I  
4 apologize. I realize you want to move this forward. I  
5 want to as well.

6 I want to be clear, though, the purposes of the  
7 record being open, as I understand it, is very limited.  
8 And it relates specifically to the allegations raised  
9 with regard to the Cease and Desist Order -- Draft Cease  
10 and Desist Order issued against Woods Irrigation  
11 District.

12 I don't want to get into a situation where a  
13 week from now, couple weeks from now, additional  
14 evidence is submitted as to alleged rights held directly  
15 by the Dunkels which I don't believe is the purpose for  
16 leaving the record open.

17 CO-HEARING OFFICER BAGGETT: Correct.

18 The record is left open for the -- after the  
19 Woods hearing, we'll determine whether those -- if it's  
20 determined those rights are a valid right or valid for  
21 this purposes, end of story.

22 If they aren't, then we go back to what  
23 Mr. Herrick just suggested. We'll be back to determine  
24 whether there are other rights.

25 MR. HERRICK: I appreciate that Mr. Hearing --

1           MR. O'LAUGHLIN: You can say that, but that's  
2 not -- that's incorrect.

3           Because the CDO which was specifically issued  
4 by the Prosecution Team from which this is based upon is  
5 that it specifically stated that they did not have  
6 pre-14 or riparian rights.

7           They had a duty to put on a case. They haven't  
8 put on that case.

9           I understand the strategy and tactics behind  
10 waiting behind Woods Irrigation Company before they  
11 expose their rights. That's their decision and call not  
12 to put on a case.

13           But that doesn't mean that they can come back  
14 in at a later date after Woods has basically found that  
15 they don't have a water right then start asserting that  
16 they do have rights because the time and place for that  
17 was today.

18           MR. HERRICK: That's not correct.

19           This body does not make ultimate final  
20 determinations of water rights.

21           CO-HEARING OFFICER BAGGETT: True.

22           MR. HERRICK: If the exporters and upstream  
23 interests are looking for determination, they need to go  
24 to court for that.

25           This proceeding was, as everybody knows, based



1 on the fact that the Prosecution Team didn't have  
2 information at first and then later learned that they  
3 were part of Woods Irrigation District.

4 The goal here is not to shut off diverters, but  
5 the goal is to determine whether or not a Cease and  
6 Desist Order should follow.

7 So again, after we go through the Woods,  
8 whether or not motions to do other things are there are  
9 made, that's to be determined.

10 But it is appropriate to hold the record open  
11 so that the Dunkels at least have a fair chance to  
12 present stuff to support their rights when they didn't  
13 believe they needed to at this point.

14 MR. ROSE: Mr. Baggett, David Rose for the  
15 Prosecution Team, if I may.

16 CO-HEARING OFFICER BAGGETT: Yes.

17 MR. ROSE: And Mr. Hoppin, Chair Hoppin.

18 I essentially agree with the points raised by  
19 Mr. O'Laughlin and Mr. Rubin that this hearing has  
20 already been conducted in its entirety with every  
21 opportunity to present all evidence regarding riparian  
22 or pre-14 claims of water right.

23 If this hearing record is only being held open  
24 for the purpose of additional information as presented  
25 in the Woods Irrigation Company hearing as to whether

1 Woods is exercising its own rights and how that impacts  
2 the case that the Dunkels have presented in hearing  
3 today, we would have no problem with that.

4 But having to have an entirely -- a repeat of  
5 this entire hearing after the Woods hearing doesn't make  
6 any sense to us.

7 CO-HEARING OFFICER BAGGETT: At this point, the  
8 record -- I think we've heard from everyone.

9 So at this point, the record will remain open  
10 for consideration of any evidence or outcome in the  
11 Woods proceeding.

12 If the parties, the I guess defendant in this  
13 case, determines that they need this hearing to be open  
14 for something else, Mr. Herrick can file a motion and we  
15 can consider that.

16 But at this point, it's open for the narrow  
17 purpose, as stated by the Prosecution, for the Woods  
18 record only.

19 If we need to go beyond that, you have a venue  
20 to make a motion and we can deal with that. If there's  
21 new evidence or some compelling reason for this Board to  
22 reopen other portions of this proceeding, we can, and  
23 we'll take that on its merits when the type time is  
24 ripe. Okay. Finished. Thank you.

25 Next. And I think I can probably abbreviate

1 some of this.

2 --o0o--

3 (Whereupon the following proceedings  
4 regarding Yong Pak and Sun Young were  
5 held.)

6 --o0o--

7 CO-HEARING OFFICER BAGGETT: This is the time  
8 and place for the hearing to seek relevant evidence to  
9 determine whether to adopt with or without revision the  
10 Draft Cease and Desist Order issued against Yong Pak and  
11 Sun Young.

12 It's the same Hearing Officers as prior, Mr.  
13 Hoppin and myself, and the same staff will be involved  
14 in this proceeding.

15 The Notice was send out on February 18, 2010.

16 This hearing will afford participants who have  
17 filed a Notice of Intent an opportunity to present  
18 relevant oral testimony and other evidence that address  
19 the following key issues:

20 Should the State Water Board adopt a draft CDO  
21 issued on December 14th, 2009.

22 If the draft CDO should be adopted, should any  
23 modifications be made to the measures in the draft CDO  
24 and, what is basis for such modifications?

25 Are there any additional policy statements? I

1 think it was stated earlier that they were both for all  
2 three proceedings, so it's so noted that San Joaquin  
3 Farm Bureau and California Department of Water Resources  
4 statements, policy statements, are for this proceeding  
5 also.

6 So the witnesses to testify, we'll have the  
7 Division of Water Rights Prosecution Team, Young Pak and  
8 Sun Young represented by Mr. Herrick, and Modesto  
9 Irrigation District et al.

10 To save time, same parties, same attorneys. If  
11 there's any differences, let me know. They will be  
12 noted for the record.

13 Are there any other participants present who  
14 want to be involved besides South Central Delta and San  
15 Joaquin?

16 MR. O'LAUGHLIN: Can we just note for the  
17 record that the affirmation of the oath that was given  
18 in the Dunkel matter is applicable as well in the  
19 upcoming Pak matter?

20 CO-HEARING OFFICER BAGGETT: If there's no  
21 objection? It's the same witnesses who took the oath  
22 before.

23 So noted.

24 With that, let's just go straight to the  
25 opening statements. Any opening statements from any of

1 the interveners, interested parties, who are not  
2 presenting a case in chief?

3 MS. GILLICK: For purposes of the record, we  
4 want to renew the opening statement and issues and  
5 preservation of the record in the opening statement from  
6 the previous hearing, particularly the State Board's  
7 jurisdiction to be proceeding in this case in the first  
8 place. We can go through it.

9 And particularly on this property, there is  
10 clear evidence that in 1911 on the USGS map there was a  
11 blue line stream. And we have a 1911 agreement in the  
12 chain of title showing service from Woods Irrigation  
13 Company, showing that intent to keep that blue line  
14 stream, those riparian water rights.

15 So again, the County just wants to assert that  
16 these Cease and Desist Order proceedings are just an  
17 abuse of discretion; the State Board staff and the State  
18 Board has not evaluated the evidence, has not evaluated  
19 the property owners' assertions that they have riparian  
20 and pre-1914 water rights; and the fact that the State  
21 Board has no authority to adjudicate the nature, extent,  
22 and validity of those pre-1914 or riparian water rights.

23 So again, just incorporate those previous  
24 opening statements and the statement I just made.

25 CO-HEARING OFFICER BAGGETT: Very good.

1           MR. RUIZ:  And it will be the same for Central  
2 and South Delta Water Agency as well.

3           CO-HEARING OFFICER BAGGETT:  Appreciate that,  
4 and they are noted for the record.

5           With that, Mr. Rose.

6           MR. ROSE:  Good afternoon, Chair Hoppin, Board  
7 Member Baggett, members of the Hearing Team.

8           As you know, I'm Dave Rose on behalf of the  
9 Division of Water Rights Prosecution Team.

10           Essentially, the purpose of this hearing is to  
11 determine whether the Draft Cease and Desist Order  
12 should be adopted pursuant to Water Code section 1831  
13 based on the threat of unauthorized diversion and use.

14           The primary question in this hearing is whether  
15 there's sufficient evidence to support that riparian  
16 status was preserved continually from the time that the  
17 parcel abutted Duck Slough, a natural watercourse, to  
18 the present day when no such natural watercourse exists.

19           The Prosecution Team's evidence will show the  
20 subject parcel was riparian to Duck Slough, a natural  
21 watercourse.

22           The parcel ceased using water from Duck Slough  
23 and began receiving all water from another source in  
24 1911.

25           Sometime between 1911 and 1925, Duck Slough was

1 filled in.

2 In approximately 1925, the subject parcel began  
3 receiving water via artificial canals that follow a  
4 similar course to the former Duck Slough.

5 The parcel has received water in largely the  
6 same manner since 1925, but without sufficient evidence  
7 of Pak and Young having retained a riparian right to  
8 divert water and use water on the subject parcel or  
9 having verified the first year of irrigation on the  
10 parcel prior to 1914 and documenting subsequent  
11 continuous use of water, there exists the threat of  
12 unauthorized diversion and use.

13 Issuance of the Draft Cease and Desist Order is  
14 appropriate.

15 With that I'll introduce, Mark Stretars and  
16 Matt Quint as the Division's witnesses.

17 --o0o--

18 MARK STRETARS

19 MATTHEW QUINT

20 Called by PROSECUTION TEAM

21 DIRECT EXAMINATION BY MR. ROSE

22 --o0o--

23 MR. ROSE: Could you please state your names  
24 and places of employment for the record.

25 WATER RESOURCES CONTROL ENGINEER QUINT: Yeah,

1 my name is Matthew Quint, Water Resources Control  
2 Engineer for Division of Water Rights.

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: My name is Mark Stretars, Senior Water  
5 Resources Control Engineer for the Division of Water  
6 Rights.

7 MR. ROSE: And you submitted copies of your  
8 resumes for these proceedings?

9 WATER RESOURCES CONTROL ENGINEER QUINT: I did.

10 SENIOR WATER RESOURCE CONTROL ENGINEER

11 STRETARS: I did.

12 MR. ROSE: Are those resumes still current and  
13 accurate?

14 WATER RESOURCES CONTROL ENGINEER QUINT: Yes.

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: Yes.

17 MR. ROSE: Have you reviewed your written  
18 testimony for this hearing?

19 WATER RESOURCES CONTROL ENGINEER QUINT: Yes.

20 SENIOR WATER RESOURCE CONTROL ENGINEER

21 STRETARS: Yes.

22 MR. ROSE: Would you say that it is true and  
23 accurate?

24 WATER RESOURCES CONTROL ENGINEER QUINT: It is.

25 SENIOR WATER RESOURCE CONTROL ENGINEER



1 STRETARS: It is.

2 MR. ROSE: Is there anything you'd like to  
3 correct from your written testimony?

4 WATER RESOURCES CONTROL ENGINEER QUINT: No.

5 SENIOR WATER RESOURCE CONTROL ENGINEER

6 STRETARS: No.

7 MR. ROSE: Thank you. A few brief questions  
8 for Mr. Quint first.

9 Mr. Quint, what information informed the  
10 Division's decision to issue the Draft Cease and Desist  
11 Order at issue here?

12 WATER RESOURCES CONTROL ENGINEER QUINT: Just  
13 insufficient evidence to support a basis of right for  
14 water use on Pak and Young's property.

15 MR. ROSE: That was insufficient evidence at  
16 the time the Draft Cease and Desist Order was issued; is  
17 that correct?

18 WATER RESOURCES CONTROL ENGINEER QUINT: That's  
19 right.

20 MR. ROSE: Have you received any additional  
21 information since the Draft Cease and Desist Order was  
22 issued?

23 WATER RESOURCES CONTROL ENGINEER QUINT: We  
24 have.

25 MR. ROSE: Has any of that subsequently

1 received information changed your mind, your conclusions  
2 that you made, in the Draft Cease and Desist Order?

3 WATER RESOURCES CONTROL ENGINEER QUINT: Hasn't  
4 changed our mind. Even though we received additional  
5 information after the draft CDO, still insufficient  
6 evidence to support basis of right.

7 MR. ROSE: And briefly, Mr. Stretars, what's  
8 your position in the Division in relation to Mr. Quint?

9 SENIOR WATER RESOURCE CONTROL ENGINEER  
10 STRETARS: I'm Senior Water Resource Control Engineer.  
11 It's immediate supervisor to Matthew Quint.

12 MR. ROSE: Did you review the Draft Cease and  
13 Desist Order prior to issuance?

14 SENIOR WATER RESOURCE CONTROL ENGINEER  
15 STRETARS: I did.

16 MR. ROSE: Did you agree with that draft order?

17 SENIOR WATER RESOURCE CONTROL ENGINEER  
18 STRETARS: I did.

19 MR. ROSE: Having you seen the additional  
20 information submitted after the draft order was issued?

21 SENIOR WATER RESOURCE CONTROL ENGINEER  
22 STRETARS: Yes, I reviewed that information.

23 MR. ROSE: And do you agree with Mr. Quint's  
24 conclusions regarding the additional information and the  
25 current state of Pak and Young's rights to divert and

1 use water?

2 SENIOR WATER RESOURCE CONTROL ENGINEER

3 STRETARS: I do.

4 MR. ROSE: No further questions from the  
5 Prosecution Team.

6 CO-HEARING OFFICER BAGGETT: Okay.

7 Mr. Herrick, you're up.

8 --o0o--

9 CROSS-EXAMINATION BY MR. HERRICK

10 FOR PAK and YOUNG

11 MR. HERRICK: Mr. Stretars, Mr. Quint, you  
12 referred to additional information that you reviewed.  
13 Could you tell us what that additional information is?

14 WATER RESOURCES CONTROL ENGINEER QUINT: Yeah,  
15 just information that Pak and Young received water from  
16 Woods-Robinson-Vasquez water system through the  
17 irrigation ditch that abuts their property.

18 MR. HERRICK: Isn't it correct that I provided  
19 you with a copy of another 1911 agreement between Woods  
20 Irrigation Company and E.W.S. Woods?

21 SENIOR WATER RESOURCE CONTROL ENGINEER

22 STRETARS: I believe you identified it. I was looking  
23 this morning through our records, and I don't seem to  
24 have gotten ahold of the exhibits you submitted along  
25 with your written letter of March 5th, I believe it was.

1           So I'm assuming we got it, but we're not  
2 totally familiar with it. Or I'm not totally familiar  
3 with it.

4           MR. HERRICK: And the easiest way, it's  
5 actually MSS Exhibit 2A. Perhaps we could bring that  
6 up.

7           Let me just represent to you that the agreement  
8 that's going to be brought up here between Woods  
9 Irrigation Company and E.W.S. Woods is a water supply  
10 contract agreement similarity to the one we had in the  
11 prior hearing between Wilhoit Douglass and Woods  
12 Irrigation.

13           MR. O'LAUGHLIN: Excuse me. What exhibit  
14 number are you referring to? Is it in the Pak matter or  
15 the Mussi matter? Which one are you referring to?

16           MR. HERRICK: Yours. MSS2-A.

17           MR. O'LAUGHLIN: 2-A. Thank you very much.

18           MR. HERRICK: I'm sorry. I had the wrong  
19 number there. I believe it would be MSS1-J. Sorry about  
20 that.

21           Anyway, Mr. Stretars or Mr. Quint: Are you  
22 familiar with this exhibit that's been produced by both  
23 us and by the MID, et al.?

24           WATER RESOURCES CONTROL ENGINEER QUINT: I'm  
25 not familiar with it.

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: I am to some extent.

3 MR. HERRICK: This agreement is similar --  
4 would you agree that this is a similar contract to  
5 furnish water as is the one we previously discussed in  
6 the Dunkel matter between Woods Irrigation Company and  
7 Wilhoit Douglass.

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: I would agree that's the case.

10 MR. HERRICK: By similar, just to explain, that  
11 means they're both agreements between the company and  
12 certain parties to furnish water under various  
13 conditions?

14 SENIOR WATER RESOURCE CONTROL ENGINEER

15 STRETARS: That's correct.

16 MR. HERRICK: And this agreement like the other  
17 one has that same date of 29th of September 1911; is  
18 that correct?

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: That's correct.

21 MR. HERRICK: I'm not going to test you on  
22 reading the legal descriptions here but there are maps  
23 at the back of the agreement. Perhaps we can go to the  
24 second to last page.

25 And this page has a map which outlines a

1 portion of the lands described in the agreement for  
2 which water service is being made available.

3 And Mr. Stretars, we can see the designation of  
4 the Vasquez property and so we can estimate where the  
5 Dunkel property is which would be generally a little bit  
6 to the north and slightly to the northeast; is that  
7 correct?

8 MR. ROSE: I'm sorry. Are you talking about  
9 the Pak and Young property? You said Dunkel.

10 MR. HERRICK: I said Dunkel; I'm sorry.

11 SENIOR WATER RESOURCE CONTROL ENGINEER

12 STRETARS: Yes. Probably right about there.

13 MR. HERRICK: And when he says right about  
14 there, he's using a pointer on the map which is just  
15 slightly above the property designated at Vasquez.

16 SENIOR WATER RESOURCE CONTROL ENGINEER

17 STRETARS: Vasquez. That's correct.

18 MR. HERRICK: Mr. Stretars, if this agreement  
19 does represent what I say, which is a method by which  
20 water can be provided to the Pak and Young property,  
21 would that be an indication to you that a riparian right  
22 that may have existed along Duck Slough would then be  
23 preserved through a different place of diversion?

24 SENIOR WATER RESOURCE CONTROL ENGINEER

25 STRETARS: That's possible, yes.

1           MR. HERRICK:  So in your considerations today,  
2  if that indeed turns out to be the case pursuant to our  
3  case-in-chief showing exactly what lands and what's  
4  agreed to, would you then change your opinion as to  
5  about whether or not a CDO would issue based on a lack  
6  of showing of a water right?

7           SENIOR WATER RESOURCE CONTROL ENGINEER

8  STRETARS:  Because of the agreement, I would say it  
9  might hinge on what's the outcome of the Woods case.

10          MR. HERRICK:  Well, I'll explore that with you.

11          Whether or not Woods is supplying its own water  
12  or water that it represents it owns, doesn't this  
13  agreement provide the Pak and Young property the  
14  opportunity to divert its own riparian water through  
15  this new point of diversion?

16          MR. ROSE:  I'm going to object to the extent  
17  that Mr. Stretars hasn't read this.  He said that he  
18  wasn't completely familiar with it and hasn't had a  
19  chance to get through it.

20          That's what you're suggesting at this point,  
21  but whether he can agree to that at this point, I'm not  
22  sure he can.

23          MR. HERRICK:  I understand that.

24          My questions are based on if indeed the  
25  evidence shows that this agreement is a method of

1 getting water somewhere else, then I'm just asking --

2 CO-HEARING OFFICER BAGGETT: A hypothetical?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: Yeah, but under a hypothetical --

5 MR. O'LAUGHLIN: Objection --

6 SENIOR WATER RESOURCE CONTROL ENGINEER

7 STRETARS: -- It's conceivable --

8 MR. O'LAUGHLIN: Objection, objection.

9 (Interruption by the reporter)

10 MR. O'LAUGHLIN: Objection; calls for a legal

11 conclusion.

12 The ultimate determination of whether or not

13 it's riparian will not be made by Mr. Stretars. It will

14 be made by the Hearing Officers. And what Mr. Stretars

15 may or may not do with his CDO is irrelevant.

16 MR. HERRICK: I understand that objection.

17 I'm not asking Mr. Stretars to make a legal

18 decision. I'm asking him what his conclusions would be

19 because he's the one making recommendations to the

20 Board.

21 CO-HEARING OFFICER BAGGETT: Overruled.

22 Continue.

23 MR. HERRICK: Thank you.

24 So again Mr. Stretars, let me just back up for

25 a minute. You are familiar with the Term 91 cases that



1 we went through a few years ago; is that correct?

2 SENIOR WATER RESOURCE CONTROL ENGINEER

3 STRETARS: Yes.

4 MR. HERRICK: And one of those diverters had  
5 property near the Dunkel property, and his alleged  
6 severance from Middle River occurred at a time when he  
7 was able to get water through the Woods Irrigation  
8 Company. Do you recall that?

9 SENIOR WATER RESOURCE CONTROL ENGINEER

10 STRETARS: Yes.

11 MR. HERRICK: And based on that -- and these  
12 are my words not; I'm not trying to over- or understate  
13 it -- based on that, the State Board then concluded that  
14 that party had reserved the ability to still get water  
15 so that his severance did not interrupt a riparian  
16 right. That's a general statement by me.

17 SENIOR WATER RESOURCE CONTROL ENGINEER

18 STRETARS: Okay.

19 MR. HERRICK: Okay. And so again in this case,  
20 if we determine then that this agreement maintains the  
21 ability for land that's riparian to Duck Slough as of  
22 1911, it retained the ability in 1911 to get water some  
23 other place, some other manner, that would be an  
24 indication to you of the preservation of a water right;  
25 is that correct?

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: It's conceivable, yes.

3 MR. HERRICK: Okay. Mr. Stretars, your  
4 evaluation of the various documents in evidence  
5 presented does indicate that the property was riparian  
6 to Duck Slough as of at least 1911?

7 SENIOR WATER RESOURCE CONTROL ENGINEER

8 STRETARS: That's correct.

9 MR. HERRICK: And were there any other  
10 documents that suggested that the watercourse existed  
11 past 1911? Or do you have no opinion on that?

12 SENIOR WATER RESOURCE CONTROL ENGINEER

13 STRETARS: Do you want to speak to that?

14 MR. HERRICK: Mr. Quint, if you know?

15 WATER RESOURCES CONTROL ENGINEER QUINT: There  
16 is no evidence.

17 MR. HERRICK: So we don't know if and when Duck  
18 Slough may have been -- may have ceased to have been a  
19 waterway after 1911?

20 WATER RESOURCES CONTROL ENGINEER QUINT:

21 Correct.

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: Correct.

24 WATER RESOURCES CONTROL ENGINEER QUINT: Yeah.

25 MR. HERRICK: Okay. I've no further questions.

1 Thank you.

2 CO-HEARING OFFICER BAGGETT: Mr. Rubin?  
3 O'Laughlin?

4 MR. O'LAUGHLIN: Yes.

5 CO-HEARING OFFICER BAGGETT: Powell? Whichever  
6 first is up to you.

7 --o0o--

8 CROSS-EXAMINATION BY MR. O'LAUGHLIN  
9 FOR MODESTO IRRIGATION DISTRICT

10 MR. O'LAUGHLIN: Good afternoon. Tim  
11 O'Laughlin representing Modesto Irrigation District.

12 Mr. Stretars, you made a statement that the  
13 subject property at one time may have been riparian to  
14 Duck Slough; is that correct?

15 SENIOR WATER RESOURCE CONTROL ENGINEER  
16 STRETARS: That's correct.

17 MR. O'LAUGHLIN: Okay. Now, what evidence,  
18 what documents or evidence, did you rely on to show that  
19 Duck Slough was adjacent to this parcel at one time in  
20 history?

21 SENIOR WATER RESOURCE CONTROL ENGINEER  
22 STRETARS: We had several old assessor's maps and such  
23 that we evaluated that identified that Duck Slough was a  
24 distributary of Middle River and that at one point in  
25 time the parcel shown up there actually was adjacent to

1 Duck Slough.

2 MR. O'LAUGHLIN: When you say assessor parcel  
3 map, can you be more specific in regards to what  
4 assessor parcel maps you relied upon for that  
5 determination, what year?

6 SENIOR WATER RESOURCE CONTROL ENGINEER

7 STRETARS: We looked at a number of them from about 1874  
8 to 1890.

9 MR. O'LAUGHLIN: Okay.

10 SENIOR WATER RESOURCE CONTROL ENGINEER

11 STRETARS: Odd years in there. I don't recall the years  
12 specific.

13 MR. O'LAUGHLIN: And how did you determine that  
14 Duck Slough existed adjacent to this parcel based on the  
15 assessor parcel map?

16 What was it about the assessor parcel map that  
17 led you to believe that Duck Slough existed adjacent to  
18 it?

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: It was identified in some of the maps. And I  
21 don't recall if it was specific to the San Joaquin  
22 County assessor's records maps or whether it was  
23 identified on a few of the other maps of the era.

24 But there was some --

25 MR. O'LAUGHLIN: Identified in what way?

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: It was identified. It was named.

3 MR. O'LAUGHLIN: Named as Duck Slough?

4 SENIOR WATER RESOURCE CONTROL ENGINEER

5 STRETARS: I believe it was one or two maps actually had  
6 it identified as Duck Slough on it.

7 MR. O'LAUGHLIN: Any other map or any other  
8 documents that you relied upon for your assessment that  
9 Duck Slough was in fact adjacent to this parcel at one  
10 time?

11 SENIOR WATER RESOURCE CONTROL ENGINEER

12 STRETARS: Not that I am familiar with, no.

13 MR. O'LAUGHLIN: Okay. So you have some  
14 assessor parcel maps that you can't identify right now,  
15 and maybe some other map that labeled it Duck Slough.

16 And that's the scope and extent of your inquiry  
17 as to determining that Duck Slough at one time prior to  
18 1911 was contiguous to this parcel; is that correct?

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: Yes.

21 MR. O'LAUGHLIN: Thank you.

22 Did you make any other independent  
23 investigation to determine through documents or maps or  
24 any other evidentiary stream the scope and extent of  
25 Duck Slough other than the ones that you just

1 identified, the assessor parcel map and that one other  
2 map. Anything else? Aerial photos, oral histories,  
3 written histories, anything?

4 SENIOR WATER RESOURCE CONTROL ENGINEER

5 STRETARS: All of the above to some extent.

6 MR. O'LAUGHLIN: Okay. What oral histories did  
7 you rely upon that Duck Slough existed prior to 1911?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: We found a couple of documents in the  
10 records, county records, archives, which we didn't  
11 identify but we just -- we evaluated.

12 MR. O'LAUGHLIN: Excuse me; I couldn't hear  
13 you.

14 SENIOR WATER RESOURCE CONTROL ENGINEER

15 STRETARS: I said we picked up some records from the  
16 archives of San Joaquin County and also from -- forget  
17 what the other -- it was listed here. I forgot the name  
18 of the --

19 MR. O'LAUGHLIN: Are those records part of  
20 your --

21 SENIOR WATER RESOURCE CONTROL ENGINEER

22 STRETARS: No, they're not. No, they're not. They were  
23 some initial stuff that we looked at originally prior to  
24 issuing the CDO and were part of our background  
25 information. That was the extent of it.

1 MR. O'LAUGHLIN: Okay. What records did you  
2 get from San Joaquin County.  
3 SENIOR WATER RESOURCE CONTROL ENGINEER  
4 STRETARS: Specifically?  
5 MR. O'LAUGHLIN: Yeah. Specifically.  
6 SENIOR WATER RESOURCE CONTROL ENGINEER  
7 STRETARS: We picked up some aerials, aerial photos from  
8 the -- wish I could think of the park now, what's the  
9 down there. Micke Grove.  
10 MR. O'LAUGHLIN: Yep.  
11 SENIOR WATER RESOURCE CONTROL ENGINEER  
12 STRETARS: Aerial photos 1941.  
13 MR. O'LAUGHLIN: Did they show that Duck Slough  
14 existed in 1940 adjacent to this parcel?  
15 SENIOR WATER RESOURCE CONTROL ENGINEER  
16 STRETARS: No, it did not.  
17 MR. O'LAUGHLIN: Okay.  
18 SENIOR WATER RESOURCE CONTROL ENGINEER  
19 STRETARS: That's part of our issue.  
20 MR. O'LAUGHLIN: What else did you dig up?  
21 SENIOR WATER RESOURCE CONTROL ENGINEER  
22 STRETARS: 1911 map of Holt, put out by USGS which does  
23 so, the slough coming up from the cut on the upper end,  
24 coming up to and approximately being near or upriver of,  
25 which in that case would be going toward Middle River as

1 we show as a blue line stream, blue line body of water.

2 MR. O'LAUGHLIN: Okay. In that 1911 map, is  
3 the San Joaquin River depicted in blue?

4 SENIOR WATER RESOURCE CONTROL ENGINEER

5 STRETARS: I don't know why it wouldn't be, but I can't  
6 recall specifically at this point in time.

7 MR. HERRICK: Was the Middle River depicted in  
8 blue on that map?

9 SENIOR WATER RESOURCE CONTROL ENGINEER

10 STRETARS: Since I don't have a copy, I can't answer  
11 that.

12 MR. O'LAUGHLIN: Okay. Do you know if anything  
13 else on the map was labeled in blue?

14 SENIOR WATER RESOURCE CONTROL ENGINEER

15 STRETARS: No.

16 MR. O'LAUGHLIN: Do you know if there is a  
17 legend associated with the map depicting that items  
18 labeled in blue are stream channels?

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: Typically --

21 MR. O'LAUGHLIN: No, not typically. In regards  
22 to this specific 1911 map.

23 SENIOR WATER RESOURCE CONTROL ENGINEER

24 STRETARS: Since I don't have it before me, no, I can't  
25 answer that.



1 MR. O'LAUGHLIN: Okay. And this wasn't part of  
2 the Prosecution Team's documents; is that correct?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: Pardon?

5 MR. O'LAUGHLIN: This wasn't part of your  
6 Prosecution Team documents that you made available; is  
7 that correct?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: No. These were not.

10 MR. O'LAUGHLIN: Okay.

11 Just -- I don't -- we're not going to dwell on  
12 this in any great detail. I made a Public Records Act  
13 request to the State Water Resources Control Board to  
14 have any and all documents that were associated with  
15 this matter to be produced.

16 I have been assured that those matters would be  
17 produced and had been produced; and in fact, now I find  
18 out that they hadn't been produced because I'd been  
19 assured by counsel that the documents that were  
20 submitted as part of the Prosecution Team were the full  
21 scope and extent of the documentation regarding this  
22 matter.

23 Just an FYI because I may come back and ask for  
24 additional documents and/or cross-examination testimony.

25 CO-HEARING OFFICER BAGGETT: Okay. Can you

1 proceed?

2 MR. O'LAUGHLIN: Thank you.

3 Other than the aerial photos and the 1911 Holt  
4 map, do you have any other information or evidence or  
5 documents to support your statement that Duck Slough  
6 prior to 1911 had been contiguous to the parcel in  
7 question?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: Sorry? I --

10 MR. O'LAUGHLIN: Any other documents? You  
11 had --

12 SENIOR WATER RESOURCE CONTROL ENGINEER

13 STRETARS: Not that I'm aware of.

14 MR. O'LAUGHLIN: -- San Joaquin County.

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: No.

17 MR. O'LAUGHLIN: Not that you're aware of.  
18 Thank you. Okay.

19 Mr. Herrick put up on the screen for you a map  
20 depicting the -- that was attached to the 1911  
21 agreement. Do you see that map?

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: Yes.

24 MR. O'LAUGHLIN: Can you tell me on the map why  
25 it's shaded?

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: I believe that area is an expansion area of  
3 Woods Irrigation Company.

4 MR. O'LAUGHLIN: So is that belief much like  
5 your belief in regards to the 1911 Holt map, that it's  
6 labeled in blue and therefore is a natural watercourse?

7 Do you have any corroborating evidence to make  
8 that statement other than your belief?

9 SENIOR WATER RESOURCE CONTROL ENGINEER

10 STRETARS: I don't follow your line of questioning.

11 MR. O'LAUGHLIN: Well, other than your belief,  
12 do you have any corroborating evidence to support your  
13 statement that those are the expansion lands for Woods  
14 Irrigation Company?

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: I don't follow why I should even have to  
17 answer that question.

18 The map was put up, and we identified that that  
19 was the location for Mr. Herrick's exhibit. We didn't  
20 present that as one of our exhibits.

21 MR. O'LAUGHLIN: But you've opined that it's  
22 the expansion area based on your reading of the map --

23 CO-HEARING OFFICER BAGGETT: Can you move to  
24 your mic?

25 MR. O'LAUGHLIN: Based on your reading of the

1 map, you've now made another opinion, belief statement  
2 much like you did with the Holt statement in reading the  
3 map that these are the expansion areas for Woods  
4 Irrigation Company.

5 And all I want to know is what corroborating  
6 evidence you have to support that belief.

7 SENIOR WATER RESOURCE CONTROL ENGINEER  
8 STRETARS: I believe it was stated in that document that  
9 attached to that map.

10 MR. O'LAUGHLIN: That that document says -- if  
11 I read that document then, it's going to support your  
12 belief that those are the expansion lands for Woods  
13 Irrigation Company. Is that what you just said?

14 SENIOR WATER RESOURCE CONTROL ENGINEER  
15 STRETARS: I believe that's what that document was about  
16 and development of their water into that area.

17 MR. O'LAUGHLIN: Is that yes or no?  
18 It's a simple question. If I read that  
19 document, is it going to say that those are the  
20 expansion lands for Woods Irrigation Company?

21 MR. ROSE: Objection. I believe the question  
22 was whether that was his belief, and he answered that  
23 question.

24 So Mr. Stretars has already answered as to his  
25 belief that that's stated in the document.

1 CO-HEARING OFFICER BAGGETT: I would agree.

2 MR. O'LAUGHLIN: Okay.

3 When you're -- in regards to the 1911 Holt map,  
4 do you have any corroborating evidence other than your  
5 belief that the blue line depicted there is in fact Duck  
6 Slough?

7 SENIOR WATER RESOURCE CONTROL ENGINEER

8 STRETARS: No. Other than the map was put out by USGS.

9 MR. O'LAUGHLIN: Okay. So what is it about a  
10 map that's put out by USGS that would lead you to  
11 believe that that blue line is in fact Duck Slough and  
12 not some other water body? Could it be a canal?

13 SENIOR WATER RESOURCE CONTROL ENGINEER

14 STRETARS: It could be.

15 MR. O'LAUGHLIN: Okay. So why have you called  
16 it Duck Slough and not a canal?

17 SENIOR WATER RESOURCE CONTROL ENGINEER

18 STRETARS: Going back to other maps of the area we  
19 looked at is why I would have called it that because  
20 there was a reference to Duck Slough in some of the  
21 documents, some of the maps.

22 MR. O'LAUGHLIN: Those are two assessor parcel  
23 maps that you don't currently know or have in your  
24 possession and were not submitted as part of your  
25 testimony.

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: That's correct.

3 MR. O'LAUGHLIN: And secondly, it's an unknown  
4 map that you've talked about but don't have the date and  
5 time or know where it's from. Is that correct?

6 SENIOR WATER RESOURCE CONTROL ENGINEER

7 STRETARS: Yes.

8 SENIOR STAFF COUNSEL HEINRICH: Mr. O'Laughlin  
9 and Mr. Rose, if I may:

10 The USGS map that you're taking about, is that  
11 PT-10?

12 SENIOR WATER RESOURCE CONTROL ENGINEER

13 STRETARS: Might be.

14 MR. O'LAUGHLIN: Okay.

15 Now, in regards to Duck Slough, did you make a  
16 determination as to whether or not a levee had been  
17 built along Duck Slough in 1911 or before?

18 SENIOR WATER RESOURCE CONTROL ENGINEER

19 STRETARS: No, we did not.

20 MR. O'LAUGHLIN: Okay. Do you know if the Pak  
21 property call lines -- did you review the chain of title  
22 on these? On this property?

23 SENIOR WATER RESOURCE CONTROL ENGINEER

24 STRETARS: To some extent, yes.

25 MR. O'LAUGHLIN: Okay. Now in the calls, it's

1 interesting. Can you tell me why the calls are to the  
2 levee and not to Duck Slough?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: No, I can't.

5 MR. O'LAUGHLIN: Okay. Do you know on the call  
6 on the Pak property if it's to the west side or the east  
7 side of the high ridge levee?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: No, I do not.

10 MR. O'LAUGHLIN: Okay. Did you make any  
11 determination independent in reviewing the chain of  
12 title as to whether or not the levee did or didn't cut  
13 Pak's property off from what you deem to be Duck Slough?

14 SENIOR WATER RESOURCE CONTROL ENGINEER

15 STRETARS: No, we didn't. We were asking for that from  
16 the party more specifically.

17 MR. O'LAUGHLIN: Okay. I can go through the  
18 same questions, I guess. Do -- what's -- I'm sorry.  
19 What's your name?

20 WATER RESOURCES CONTROL ENGINEER QUINT: Matt  
21 Quint.

22 MR. O'LAUGHLIN: Matt. Do you -- other than  
23 what Mr. Stretars has testified, do you have any other  
24 documents that you relied upon in your conclusion in  
25 regards to the property being adjacent to Duck Slough

1 prior to 1911?

2 WATER RESOURCES CONTROL ENGINEER QUINT: No.

3 MR. O'LAUGHLIN: Okay.

4 WATER RESOURCES CONTROL ENGINEER QUINT:

5 Everything I've seen, Mark has seen.

6 MR. O'LAUGHLIN: Okay. Do you have any

7 independent other statements you'd like to make on that

8 map as to what the black portion shows or doesn't?

9 WATER RESOURCES CONTROL ENGINEER QUINT: No.

10 I'm not familiar with it.

11 MR. O'LAUGHLIN: Okay. One other final

12 question: Do you know in your investigation down

13 here -- I'm assuming -- have you made a determination as

14 to whether Woods-Robinson-Vasquez is the same as Woods

15 Irrigation Company?

16 SENIOR WATER RESOURCE CONTROL ENGINEER

17 STRETARS: Dressing to me?

18 MR. O'LAUGHLIN: To you.

19 SENIOR WATER RESOURCE CONTROL ENGINEER

20 STRETARS: Okay. They are not.

21 MR. O'LAUGHLIN: Okay. Thank you.

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: I was able to find your map for you. It's

24 PT09 1870 title map that designates Duck Slough.

25 MR. O'LAUGHLIN: PT09.



1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: Yes.

3 MR. O'LAUGHLIN: Love that. JFK.

4 Thank you. I have no further questions.

5 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

6 --o0o--

7 CROSS-EXAMINATION BY MR. RUBIN

8 FOR SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

9 --o0o--

10 MR. RUBIN: Good afternoon. Jon Rubin San Luis  
11 & Delta-Mendota Water Authority. I just have a single  
12 area of questioning, and it's directed to Mr. Stretars.

13 Mr. Stretars, your testimony is labeled  
14 Prosecution Team Exhibit 01; is that correct?

15 SENIOR WATER RESOURCE CONTROL ENGINEER

16 STRETARS: That's correct.

17 MR. RUBIN: And on page 3, I think, is where  
18 you make some statements that Mr. O'Laughlin was  
19 questioning you on. And specifically, there's some  
20 bulleted points at the top of page 3. Do you see those  
21 bullets?

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: That's correct. Yes, I do.

24 MR. RUBIN: If I understand your testimony  
25 correctly, you cite a single document to support a

1 conclusion that the property at issue in this proceeding  
2 was riparian to Duck Slough; is that correct?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: Up until 1870, yes.

5 MR. RUBIN: And if I understand it correctly,  
6 you're citing to Prosecution Team 09 to support a  
7 statement that the property was riparian to Duck Slough?

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: Yes.

10 WATER RESOURCES CONTROL ENGINEER QUINT: That's  
11 right.

12 SENIOR WATER RESOURCE CONTROL ENGINEER

13 STRETARS: That's correct.

14 MR. RUBIN: Thank you. I'm sorry. Either  
15 witness, I guess, since it's joint testimony can, answer  
16 my questions.

17 WATER RESOURCES CONTROL ENGINEER QUINT: No  
18 problem.

19 MR. RUBIN: I would ask Mr. Lindsay, if you  
20 wouldn't mind, to put up Prosecution Team Exhibit 09 on  
21 the overhead. Thank you very much.

22 Is Prosecution Team 09 now displayed here in  
23 the hearing room?

24 WATER RESOURCES CONTROL ENGINEER QUINT: It is.

25 SENIOR WATER RESOURCE CONTROL ENGINEER

1 STRETARS: That's good.

2 MR. RUBIN: And you responded to a question  
3 from Mr. O'Laughlin that you concluded that the property  
4 at issue in this proceeding was adjacent to Duck Slough  
5 based upon the depiction of Duck Slough in this map  
6 PT-09?

7 WATER RESOURCES CONTROL ENGINEER QUINT: Yes.

8 SENIOR WATER RESOURCE CONTROL ENGINEER

9 STRETARS: Yes.

10 MR. RUBIN: Duck Slough appears in the --  
11 essentially the center of the map a little bit to the  
12 top; is that correct?

13 SENIOR WATER RESOURCE CONTROL ENGINEER

14 STRETARS: Yes.

15 MR. RUBIN: And Duck Slough -- well, there is a  
16 line that connects Middle River to Burns Cutoff; is that  
17 correct?

18 SENIOR WATER RESOURCE CONTROL ENGINEER

19 STRETARS: That's correct.

20 MR. RUBIN: And that line is what you believe  
21 to be Duck Slough?

22 SENIOR WATER RESOURCE CONTROL ENGINEER

23 STRETARS: Yeah, what's classified on the map as Duck  
24 Slough.

25 MR. RUBIN: And the reference on that line to

1 Duck Slough appears very close to Burns Cutoff; is that  
2 correct?

3 SENIOR WATER RESOURCE CONTROL ENGINEER

4 STRETARS: That's correct.

5 MR. RUBIN: Do you have any explanation why  
6 this map would label Duck Slough in such a way that Duck  
7 Slough appeared at the very end of Duck Slough at the  
8 point where it connects to Burns Cutoff?

9 SENIOR WATER RESOURCE CONTROL ENGINEER

10 STRETARS: No, I have not idea.

11 MR. RUBIN: In most cases on this map where  
12 there is a water course, the label is placed roughly in  
13 the middle of the watercourse, correct?

14 MR. HERRICK: Objection. That misstates the  
15 map. All you have to do is look at Whiskey Slough above  
16 the word Roberts, and that's not in the middle of the  
17 slough.

18 MR. RUBIN: I'm not sure if Mr. Herrick is  
19 testifying. I asked a question and I --

20 MR. HERRICK: I was objecting to the question  
21 as misstating the map.

22 MR. RUBIN: Okay.

23 To either of the witnesses, it is possible for  
24 Duck Slough, if it were to the full extent of the line,  
25 for Duck Slough to be labeled in the middle of the line?

1 SENIOR WATER RESOURCE CONTROL ENGINEER

2 STRETARS: That's possible, yes.

3 MR. RUBIN: And again, neither of the witnesses  
4 have any explanation of why somebody would label this  
5 line, if it were Duck Slough, so close to Burns Cutoff?

6 WATER RESOURCES CONTROL ENGINEER QUINT: No.  
7 No reason.

8 MR. RUBIN: Thank you.

9 No further questions.

10 CO-HEARING OFFICER BAGGETT: Any other party  
11 have any cross? No? Any redirect? Mr. Rose, redirect?

12 MR. ROSE: No redirect.

13 CO-HEARING OFFICER BAGGETT: Okay. Exhibits?

14 MR. ROSE: The Prosecution Team would like to  
15 move in all the exhibits it's previously submitted for  
16 this matter into evidence.

17 CO-HEARING OFFICER BAGGETT: Any objection? If  
18 not, they're admitted.

19 (Whereupon the Prosecution Team's  
20 exhibits were accepted in evidence.)

21 CO-HEARING OFFICER BAGGETT: Let's take five  
22 minutes. Well, it looks like Mr. Herrick's got quite a  
23 few witnesses, so you want to take a ten-minute recess.

24 (Recess)

25 CO-HEARING OFFICER BAGGETT: Okay. Mr. Rubin,

1 back on the record. Let's go.

2 MR. RUBIN: Hearing Officer Baggett, I  
3 apologize. I do have an objection to one of the  
4 exhibits and didn't have time to stand up and raise it.

5 I would object to PT-09 been entered into  
6 evidence. I don't think the foundation was laid for the  
7 document to be admitted.

8 MR. HERRICK: May we have that identified so we  
9 could see what he's talking about?

10 MR. RUBIN: During examination, I think  
11 Mr. O'Laughlin asked questions about the documents that  
12 relied upon it. It was very unclear from the testimony  
13 which documents were conflicting testimony. I don't  
14 believe there's a clear foundation for this document to  
15 be admitted.

16 MS. GILLICK: For the testimony, I think the  
17 witness said oh, here's the map, it's the 1870s, and  
18 that's the assessor's map I relied upon.

19 MR. RUBIN: That's a great example of why this  
20 foundation hasn't been laid. It doesn't indicate that  
21 this is an assessor's map.

22 In fact, it reflects a title map, something  
23 very different.

24 Again, the foundation has not been laid to  
25 allow it to be admitted into evidence.

1 MS. GILLICK: I'm sorry. I misspoke.

2 I think he indicated -- and I'll let the  
3 prosecution talk -- but indicated he went to Micke Grove  
4 park, he reviewed historical records, and this is the  
5 map I received.

6 CO-HEARING OFFICER BAGGETT: Well, since it's  
7 their exhibit I think we'll probably let the  
8 prosecution --

9 MS. GILLICK: Yeah.

10 MR. ROSE: I believe Mr. Stretars testified  
11 that these were the maps that he looked at in forming  
12 his opinion.

13 Now if they end up being something else, that  
14 doesn't change the fact that he referred and relied on  
15 these maps in making his opinion.

16 So offered for that purpose at the very least.

17 If there is evidence submitted that these are  
18 not what they appear to be or purport to be, then  
19 obviously that wouldn't go to Mr. Stretars forming his  
20 conclusions based on that.

21 CO-HEARING OFFICER BAGGETT: Okay. The  
22 objection is noted for the record. It's overruled and  
23 it's admitted. Okay.

24 Now, Mr. Herrick.

25 MS. GILLICK: And just for the record, on

1 behalf of the County San Joaquin, we're going to renew  
2 in this hearing as well just the motion to dismiss in  
3 these proceedings.

4           It's just very unclear why we're here. The  
5 Cease and Desist Order authority is based upon, under  
6 1052 illegal diversions.

7           Riparian water rights and pre-1914 water rights  
8 are not something the State Board has jurisdiction over.  
9 They can't determine the nature, extent, or validity of  
10 that.

11           And that's what you're looking at doing here.  
12 Based on the Prosecution Team, they're relying upon, you  
13 know, looking at the riparian slough in 1911 on Duck  
14 Slough as well as the 1911 water right agreement --

15           CO-HEARING OFFICER BAGGETT: Okay.

16           MS. GILLICK: -- on pre-1914 is not something  
17 before us. The Prosecution hasn't made their case, and  
18 it's not something the State Board has jurisdiction  
19 over.

20           CO-HEARING OFFICER BAGGETT: Very good.  
21 Objection noted. I suspect the courts will be making a  
22 lot of these determinations soon.

23           First we have to finish the record.

24           Mr. Herrick.

25           MR. HERRICK: John Herrick for Yong Pak and Sun



1 Young.

2 Before I give any opening statement, which I'd  
3 like to do, just to get Mr. Pankey in and out.

4 He's the gentleman who is a partner in a  
5 company that investigates -- or, excuse me -- pulls up  
6 documents from county records in order to produce chains  
7 of title, so I just want to put him on real quickly so  
8 that the two chains of title that are in both the Pak  
9 and Young case and the Mussi case are put in there.

10 I don't think there is any cross-examination,  
11 but he's here to do it. But I just want to do it real  
12 quickly for both things.

13 CO-HEARING OFFICER BAGGETT: Very good.

14 --o0o--

15 THURL PANKEY, II

16 Called by RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI  
17 INVESTMENT LP; YONG PAK AND SUN YOUNG  
18 DIRECT EXAMINATION BY MR. HERRICK

19 --o0o--

20 MR. HERRICK: Mr. Pankey, would you please  
21 introduce yourself to the Board?

22 MR. PANKEY: My name is Thurl Pankey, II. I'm  
23 a partner of Central Valley Land Service. And we do  
24 title research.

25 MR. HERRICK: And you have before you today for

1 the Yong Pak and Sun Young matter, you have Exhibit 6  
2 which is a -- is that a true and correct copy of your  
3 testimony?

4 MR. PANKEY: Yes, it is.

5 MR. HERRICK: And does that testimony reference  
6 Exhibit 6-A which is the complete set of title documents  
7 you produced upon my request?

8 MR. PANKEY: Yes, it is.

9 MR. HERRICK: Could you just briefly explain  
10 what you do in order to seek out and produce all the  
11 documents in a title, chain of title.

12 MR. PANKEY: What we do is get -- what I do is  
13 go through -- from the current owner, I take it back  
14 through the history all the way back to the patent, and  
15 the patent was issued.

16 I did my research out of a title company named  
17 Chicago Title in San Joaquin County out of and San  
18 Joaquin County records. I used the assessor's maps,  
19 assessor's numbers, and so forth.

20 MR. HERRICK: And you in fact did that in this  
21 case for Exhibit 6-A for the parcel number 131-180-07  
22 owned currently by Yong Pak and Sun Young?

23 MR. PANKEY: Yes.

24 MR. HERRICK: And would you just confirm that  
25 you did the same thing for the Mussi matter which deals

1 with parcel number 131-170-03?

2 MR. PANKEY: Yes.

3 MR. HERRICK: And that title document or chain  
4 of title is in the Mussi matter, also as Exhibit 6-A to  
5 your testimony Exhibit 6?

6 MR. PANKEY: Yes.

7 MR. HERRICK: Thank you. I just wanted to  
8 introduce that, and I think he can go unless somebody  
9 wants to ask.

10 CO-HEARING OFFICER BAGGETT: Any  
11 cross-examination from any of the parties?

12 MR. O'LAUGHLIN: Yes.

13 CO-HEARING OFFICER BAGGETT: Anyone else?

14 MR. ROSE: None from the Prosecution Team.

15 CO-HEARING OFFICER BAGGETT: Okay.

16 --o0o--

17 CROSS-EXAMINATION BY MR. O'LAUGHLIN

18 FOR MODESTO IRRIGATION DISTRICT

19 --o0o--

20 MR. O'LAUGHLIN: Good afternoon, Mr. Pankey.

21 My name is Tim O'Laughlin. I represent Modesto  
22 Irrigation District.

23 Who contacted you to do the work? Wait.

24 Before we start --

25 CO-HEARING OFFICER BAGGETT: We --

1 MR. O'LAUGHLIN: Pankey first. Sorry?

2 CO-HEARING OFFICER BAGGETT: Before we begin,  
3 let me make it real clear:

4 This witness is on both cases. We haven't even  
5 started the other case yet. I just want to make sure  
6 there's no objection to this by any party? Everybody  
7 will stipulate to that?

8 MR. O'LAUGHLIN: Yes, we will stipulate, and it  
9 will make it easier if we just keep my questions to --  
10 so they're applicable in both cases. That would be fine  
11 with me.

12 CO-HEARING OFFICER BAGGETT: Just make it clear  
13 which case the question's for.

14 Very good. Thank you.

15 MR. O'LAUGHLIN: Mr. Pankey, who contacted you  
16 to do the title search in regards to the Pak property?

17 MR. PANKEY: Mr. Herrick.

18 MR. O'LAUGHLIN: Okay. And who contacted you  
19 in regards to doing the title search in regards to the  
20 Mussi property?

21 MR. PANKEY: Mr. Herrick.

22 MR. O'LAUGHLIN: Okay. Did you have a written  
23 agreement with Mr. Herrick about the scope and extent of  
24 your work?

25 MR. PANKEY: He gave me -- he looked at the --

1 he gave me guidelines to follow.

2 MR. O'LAUGHLIN: Okay. What guidelines did Mr.  
3 Herrick give you to follow?

4 MR. PANKEY: He wanted chain of title from the  
5 patent all the way out to current owner.

6 MR. O'LAUGHLIN: Do you know why or did you ask  
7 Mr. Herrick why on the Pak property you did not look at  
8 the certificates of purchase?

9 MR. PANKEY: I don't -- I really don't remember  
10 on that one.

11 MR. O'LAUGHLIN: Okay. On the Mussi property,  
12 did you ask Mr. Herrick why you were not to look at the  
13 certificates of purchase?

14 MR. PANKEY: I concentrated on chains of title,  
15 on the conveyances.

16 MR. O'LAUGHLIN: Okay. Is it true that on  
17 certificate of purchase that are done that multiple  
18 certificates of purchase can transfer from one owner to  
19 the other and change the scope and extent of the  
20 original certificate of purchase?

21 MR. PANKEY: I'm -- I -- I'm not too sure of  
22 that.

23 MR. O'LAUGHLIN: Okay. Do you have any opinion  
24 on whether or not a certificate of purchase that is  
25 granted in a scope or extent can be diminished when a

1 patent is actually issued?

2 MR. PANKEY: I have no opinion.

3 MR. O'LAUGHLIN: Okay. Who paid you to do your  
4 work?

5 MR. PANKEY: The property owners.

6 MR. O'LAUGHLIN: Have you reviewed Mr. Stephen  
7 Wee's testimony in regards to the Pak property?

8 MR. PANKEY: No, I haven't.

9 MR. O'LAUGHLIN: Have you reviewed Mr. Stephen  
10 Wee's testimony in regards to the Mussi property?

11 MR. PANKEY: No, I haven't.

12 MR. O'LAUGHLIN: Do you have any opinion or  
13 comment in regards to Mr. Wee's testimony in regards to  
14 the Pak property?

15 MR. PANKEY: No, I haven't.

16 MR. O'LAUGHLIN: Do you have any comment or  
17 opinion on Mr. Wee's testimony in regards to the Mussi  
18 property?

19 MR. PANKEY: No, I don't.

20 MR. O'LAUGHLIN: All right.

21 I have no further questions.

22 CO-HEARING OFFICER BAGGETT: No one else is  
23 stepping forward. We can save the exhibit to admit with  
24 the rest of your exhibits.

25 Do you have any redirect?

1 MR. HERRICK: No.

2 CO-HEARING OFFICER BAGGETT: Very good. Thank  
3 you.

4 I think to the extent we can do both at once,  
5 and the extent we can corroborate both hearings, I think  
6 that works well. If nobody seems to object to that, it  
7 will save a lot of time.

8 MR. HERRICK: As much as we can. When we get  
9 done, I may ask that I need to do something else for one  
10 but not in other.

11 CO-HEARING OFFICER BAGGETT: Right.

12 MR. HERRICK: But I agree with that, and I'll  
13 try to make sure it's that way.

14 CO-HEARING OFFICER BAGGETT: Thank you.

15 MR. O'LAUGHLIN: Mr. Baggett, we have no  
16 objection to these witnesses testifying currently and  
17 their testimony being usable in both matters.

18 And all we would ask is that Mr. Herrick and  
19 Mr. Rubin just try, to the extent there's specific  
20 questions in regards to either Pak or Mussi that they  
21 make them.

22 Otherwise, we believe that's a very efficient  
23 use of time.

24 CO-HEARING OFFICER BAGGETT: Very good.

25 Continue.

1           MR. HERRICK: Briefly, I guess this would be  
2 the time for me to give an opening statement, so I'll be  
3 very brief.

4           This proceeding is similar to the Dunkel  
5 proceeding in that we should not be here doing it.

6           The evidence will show that there's an  
7 extremely large amount of documents and other records  
8 which identify Duck Slough running from Burns Cutoff  
9 sort of in a southwesterly direction towards Middle  
10 River or to Middle River and that this parcel -- and  
11 we'll find in the future other parcels, were along that  
12 same line.

13           It's not speculation. It's not conclusions  
14 drawn from limiting evidence.

15           It's specific evidence including descriptions  
16 of dredges which initially tried to build levees along  
17 waterway and those dredges improved that waterway by the  
18 size of 30 feet by 8 feet.

19           This waterway continued on.

20           The last map that we've found or document that  
21 physically shows it on there is the 1911 quad map which  
22 traces a blue line down to the subject property.

23           Now the 1911 date becomes important because, as  
24 we've seen earlier, 1911 is the time -- or is the same  
25 year in which the owner of the land entered an agreement



1 by which he could get water in a different method. That  
2 different method was through the Woods Irrigation  
3 Company.

4 So as we've seen in previous hearings, when a  
5 piece of land that abuts a waterway and has a riparian  
6 right then preserves the method by which it can get  
7 water through some other place, any future severance  
8 becomes irrelevant.

9 Now there can be arguments about when and what  
10 and how -- what degree Duck Slough finally eventually  
11 disappeared. But the evidence shows that while it was  
12 there abutting this property the landowner got a  
13 different method to -- or a new method to deliver water  
14 to it.

15 Now, just to close the loop there, that method  
16 did not become the permanent long-term method because a  
17 few years later the parties decided that it was better  
18 to set up their own new system.

19 But the point is: There's no break in the  
20 ability to get water.

21 And as we saw in the Term 91 cases, which will  
22 be in our briefs later, that preservation of the  
23 ability, that access to water, is the indication on  
24 which the Board can conclude that the party intended to  
25 maintain a riparian right.

1           The evidence will also show nothing else makes  
2 sense.

3           One would have to conclude that land abutting  
4 waterways was intentionally shut off from all other  
5 sources of surface water and then suddenly somebody a  
6 few years later decided to reestablish that connection.

7           That's the conclusion that has to be made in  
8 order to find there is no riparian right in this case,  
9 and we think that is unreasonable.

10           We also have arguments which we'll get into  
11 mostly on briefing, but Mr. Nomellini's testimony will  
12 get to that, dealing with these issues that we briefly  
13 touched upon including the Delta pool, overlying rights,  
14 and the situation that we have.

15           It's important to remember that this land is on  
16 that -- excuse me -- is on Middle Roberts. And without  
17 the levees, it would be under water.

18           So again, in order to conclude that land  
19 doesn't have a riparian right, you'd have to ignore  
20 geology and physics and say, well, people went and  
21 bought a piece of property in the middle of a swamp and  
22 overflow area because they wanted to make sure or at  
23 some point they wanted to not be able to put water on  
24 it.

25           That flies in the face of all the evidence of

1 land ownership, farming, and actually access to  
2 property.

3 Remember, there were no roads in the Delta in  
4 the later part of the 19th century, or very few. People  
5 got to their properties by waterways.

6 So it's unreasonable to conclude that people  
7 had these and then cut off permanently their ability to  
8 both get to their property and to deliver water to it,  
9 and then five, six, eight years later decided to  
10 reestablish that. That doesn't make any sense.

11 Anyway, with that, we also are including in all  
12 these proceedings our objections to the State Board  
13 making findings on riparian and pre-1914 water rights.  
14 We will brief that. We don't think -- as Mr. Ruiz said  
15 in his policy opening statement, we don't think the  
16 Board has the right to do that.

17 Thank you for the opportunity, and now we'll  
18 turn to the first two witnesses.

19 And gentleman would you just please first  
20 identify yourself, then I'll get to your written  
21 testimony.

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KENNETH R. LAJOIE, PhD

DONALD W. MOORE

Called by RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI

INVESTMENT LP; YONG PAK AND SUN YOUNG

DIRECT EXAMINATION BY MR. HERRICK

--o0o--

DR. LAJOIE: My name is Ken Lajoie.

MR. MOORE: My name is Don Moore.

MR. HERRICK: Mr. Lajoie, we've submitted  
Exhibit 1-A which is your resume. Have you seen that?

DR. LAJOIE: Yes, I have.

MR. HERRICK: Is that a true and correct copy  
of the resume you provided to us?

DR. LAJOIE: Correct.

MR. HERRICK: And that resume provides your  
professional background; is that correct?

DR. LAJOIE: That's correct.

MR. HERRICK: And would you briefly describe  
what areas of expertise are included in that and for  
which you believe you are an expert?

DR. LAJOIE: My training at UC Berkeley back in  
the '50s and '60s was in geology, particularly a branch  
of geology called Quaternary geology, meaning the  
geology of the last two million years which focuses on

1 the surface of the earth and not on rocks, the processes  
2 that take place in the surface of the earth, the erosion  
3 and deposition and crustal movements of the crust of the  
4 earth.

5 That's my specialty and was for 30 years at US  
6 Geological Survey.

7 MR. HERRICK: And Mr. Moore, Exhibit 2-A is a  
8 resume or work experience of you; is that correct?

9 MR. MOORE: That's correct.

10 MR. HERRICK: And would you briefly tell us  
11 what your area of expertise is according to your resume?

12 MR. MOORE: I am a Registered Professional  
13 Geologist and certified groundwater geologist, and for  
14 the past 25 years, I've work in groundwater geologist.

15 I own an aerial photography company that  
16 specializes in remote sensing, and I have been  
17 photographing streams and rivers throughout northern  
18 California for the last 25 years and studying stream  
19 morphology and making maps of various streams and  
20 detection of old buried watercourses.

21 MR. HERRICK: Mr. Lajoie, would you please  
22 briefly describe the job description you were given  
23 which resulted in the testimony you've produced for  
24 today?

25 DR. LAJOIE: I was approached by Jim Wallace of

1 Wallace Environmental which was under contract with your  
2 law firm. And his initial approach to me was that he  
3 was going to be doing a geomorphological study of part  
4 of the San Joaquin Delta and asked me if I would be  
5 willing to join the group.

6 And that basically was the extent of my  
7 mandate. We were just going to look at the  
8 geomorphology part of the San Joaquin Delta.

9 And it was left to me then to decide how to go  
10 about doing that.

11 MR. HERRICK: And Mr. Moore, you had a similar  
12 involvement; is that correct?

13 MR. MOORE: Similar, but it was more to  
14 complement what Mr. Lajoie is doing.

15 I primarily was doing the remote sensing and  
16 analysis of the aerial photos and the GIS or  
17 rectification of the maps and map overlays and mosaics,  
18 and then I was working with Mr. Lajoie assisting on his  
19 geology.

20 But he was the primary geologist, and my  
21 services mainly assisted what he was doing.

22 MR. HERRICK: Mr. Lajoie, you have before you  
23 Exhibit 1 in, again, the Pak and Young matter for now.

24 Is that a true and correct copy of the  
25 testimony you produced for this proceeding?

1 DR. LAJOIE: Yes, it is.

2 MR. HERRICK: Would you then go through and --  
3 I'll say briefly, but it will take a while. Would you  
4 please recap your testimony with the exhibits that --

5 DR. LAJOIE: Surely.

6 MR. HERRICK: -- the staff will help us put up?

7 DR. LAJOIE: When I was first approached by Jim  
8 Wallace to take part in this study, we had a brief  
9 meeting with Mr. Herrick and Mr. Nomellini as to what  
10 they required in this project.

11 And generally, it was to determine the  
12 importance of Duck Slough in the natural, which is  
13 pre-1850, drainage system between Middle River and the  
14 San Joaquin River which -- and I include Burns Cutoff as  
15 part of the San Joaquin River.

16 This specific target that we were -- that I was  
17 assigned was to determine the relationship of a couple  
18 parcels of lands, the two here, the Mussi property and  
19 the Pak and Young, determine the relationship of those  
20 parcels to any riparian zones specifically along Duck  
21 Slough.

22 The area in red is the whole -- the area of the  
23 Holt -- USGS Holt Quadrangle dated 1913, but surveyed in  
24 1911. So it's primarily there that I focused my study.

25 I used virtually all digital images, records of

1 aerial photographs, historic maps, and a few historical  
2 documents.

3 I relied on Don Moore for guidance in treatment  
4 of some of these -- the digital documents so that I  
5 didn't do anything that introduced artifacts into them.

6 As I pointed out, the area that I concentrated  
7 on was between Middle River and San Joaquin River and on  
8 this 1894 map of the Stockton Belotta Drainage District.  
9 It includes Middle and Lower Roberts Island, Honker  
10 Lake, and an area called the pocket just below the two  
11 properties.

12 Next slide, please.

13 I started by looking at the assessor's maps,  
14 earliest assessor's maps that I was provided digital  
15 copies of. This is the assessor's map of 1876. Very  
16 little -- and this is Township 1 North, Range 5 East  
17 relative to the Diablo meridian and baseline. Baseline  
18 is at the base of this map.

19 On this map, there are three rather  
20 natural-looking scribbly lines, one at the bottom which  
21 later maps -- or comparison with any other map shows as  
22 Middle River.

23 And up in the upper right hand corner a  
24 scribbly little line that is obviously Burns Cutoff,  
25 then a line connecting the two that is obvious in the



1 general area of Duck Slough.

2 I should point out none of these lines was  
3 labeled, and -- but it's a reasonable interpretation  
4 they represent those three waterways.

5 Next slide, please.

6 The next assessor's map I looked at was an -- I  
7 looked at about ten assessor's maps, but I only show  
8 three here for illustrative purposes.

9 As more property changed hands, more names  
10 showed up on this 1893 assessor's map, and more  
11 waterways were added to the map.

12 I must point out here though that the line that  
13 connects Middle River at the bottom to Burns Cutoff in  
14 the upper right on this map is labeled cross levee, and  
15 I should point out that I use the names Whiskey Slough  
16 which is here and Duck Slough which is here.

17 Both those waterways, natural waterways, appear  
18 on various maps under different names. I've chosen to  
19 use the names that appear on the 1894 Stockton Belotta  
20 map. So this is Whiskey Slough, and that is Duck Slough  
21 no matter what the name on the map is.

22 CO-HEARING OFFICER BAGGETT: Mr. Rubin?

23 MR. RUBIN: I just would ask that you instruct  
24 the witness to summarize his testimony.

25 It appears as though, although he's speaking

1 about maps, he's going beyond the written testimony.

2 DR. LAJOIE: The written testimony was of the  
3 geology, and I'll try to brief -- cut my comments down.

4 CO-HEARING OFFICER BAGGETT: That would be very  
5 good.

6 DR. LAJOIE: Next slide, please.

7 The third assessor's map, 1898, again shows  
8 more line is shown on these map, labeled as various  
9 waterways.

10 And the two properties in red lie, as on the  
11 previous map, lie adjacent to Duck Slough and therefore  
12 by geological -- in a geological context are riparian to  
13 Duck Slough.

14 Next slide.

15 This is a simple diagrammatic cross-section  
16 just to show what the levees, natural levees, look like,  
17 the type of information that I'm going to be analyzing  
18 on later maps.

19 Basically the channel is bounded on both sides  
20 by natural levees made of mineral deposits brought in  
21 from higher in the basin.

22 The basins between natural levees are water  
23 basins, and in this instance have perennial water in  
24 them and are filled with organic debris accumulated from  
25 tule marshes.

1           The next couple maps I'm going to point out are  
2 mapping levees here based on topographic expression on  
3 the 1913 USGS Holt Quadrangle and on the 1952 Weir soils  
4 map that we've seen previously.

5           So those are the features that I wanted to  
6 stress here, that I'm concentrating on mapping levees  
7 based on topography and soils.

8           The riparian zone in a geologic context of this  
9 channel would include both the natural levees, and the  
10 riparian zone to the basin would be in this area right  
11 here.

12           Next slide.

13           This is the 1913 USGS map surveyed in 1911 of  
14 the Holt Quadrangle. I've done nothing more here than  
15 highlight in red the area that lies between sea level  
16 and the elevation of 5 feet.

17           The area in red outlines a series of  
18 topography -- areas of topography that lie above the  
19 general basins that are here in white and yellow and  
20 therefore are the natural levees of the streams in  
21 the -- the natural streams in this area, the natural  
22 watercourses.

23           And I want to point out this is Middle River.  
24 This is Duck Slough which has a very large levee, built  
25 a very large levee. That's extremely important.

1           It's bringing mineral deposits, minerals --  
2 sediments into the lower part of the basin, building  
3 this very intricate slough -- levee complex. We're  
4 going to take a brief look at some of the details of  
5 this -- of the levee right here.

6           The point I want to make is that this is a  
7 prominent watercourse in this part of the San Joaquin  
8 Delta.

9           Next slide, please.

10          This is a 1927 1-foot contour map. Could you  
11 lower that please? That's -- thank you very much.

12          1-foot contour map of the area along Duck  
13 Slough showing in blue the areas that lie above sea  
14 level. So we see not only Duck Slough itself and its  
15 natural levee on both sides, but its natural levee built  
16 up of a series of smaller tributaries that branch off  
17 and have built their own small levees.

18          A little bit later we'll take a look at an  
19 example of this levee which has about 2 feet of relief  
20 on it.

21          So again, the properties in question lie  
22 adjacent to Duck Slough, have branches of Duck Slough,  
23 tributaries of Duck Slough running through them, and  
24 therefore this property and this one also tributary to  
25 Duck Slough.

1           Next slide, please.

2           This is the 1941 Woods Irrigation District map.  
3   And I've just highlighted in red the channels, various  
4   channels, that I interpret as being natural because  
5   they're very irregular as compared to the very geometric  
6   pattern of other channels.

7           Here we have Duck Slough connecting from Middle  
8   River past the properties under study up to Burns  
9   Cutoff.

10           What we'll see or the point that I want to make  
11   with this map is that Duck Slough is not one of the  
12   minor channels in this area, minor waterways. It is a  
13   prominent waterway. It actually has tributaries of its  
14   own coming in from the south.

15           Next slide, please.

16           This is the 1952 Weir soils map of San Joaquin  
17   County on which I've highlighted in red those soils  
18   which are -- have been defined as being mineral-rich  
19   soils, meaning they consist of soils that lie on the  
20   natural levees of the natural streams.

21           And is this sediment that's been brought in  
22   from the upper part of the drainage basin.

23           Again, Middle River here. And I didn't  
24   highlight the area to the south, only to the north.

25           Very broad -- Duck Slough has a very broad

1 levee indicating it's a very prominent channel in this  
2 region connecting up with Middle River.

3 But beyond its own levee which is very  
4 extensive as indicated by this map, it has sent several  
5 distributary channels to the north.

6 And if we lower the map please -- go the other  
7 direction please. These channels actually connect up  
8 with Black Slough and directly with -- and which drains  
9 directly into the San Joaquin River.

10 So from the topographic expression of the  
11 levees and the soils expression of the levees, Duck  
12 Slough is the prominent channel in this region sending  
13 out distributary channels to Burns River and all the way  
14 up to the San Joaquin River itself.

15 Next slide, please.

16 This map, it was produced by a student from the  
17 University of Delaware in the late '70s, early 1980s,  
18 named Brian Atwater who worked with the Geological  
19 Survey. I was his supervisor for a while.

20 His PhD thesis at the University of Delaware  
21 was to produce a map of the entire Sacramento-San  
22 Joaquin Delta region, reconstructing the natural  
23 conditions, the natural waterways prior to 1850 prior to  
24 when agricultural practices start altering the natural  
25 drainage stem.

1           This is Holt Quadrangle sheet 16 of 21 from his  
2 thesis, and on this map I've highlighted in red all the  
3 channels that he mapped using this topographic map, a  
4 1970 orthophotographic map looking at tomal changes on  
5 that map, and using aerial photographs post-dating 1965.

6           Again, we have Middle River, Duck Slough, a  
7 prominent channel connecting Middle River to Burns  
8 Cutoff and sending numerous distributary channels all  
9 the way through Black Slough and up to the San Joaquin  
10 River.

11           Next slide, please.

12           I want to check Brian's work because this work  
13 was done 25 years ago, and we have much more modern  
14 techniques and better aerial photographs.

15           So Don Moore supplied me with this map which is  
16 a compilation of stitched-together aerial photographs,  
17 agricultural photographs of the whole quadrangle. These  
18 photographs date to the year 2005, so they're very  
19 recent.

20           And I did a very detailed analysis of these  
21 using computer techniques in which I altered the image  
22 slightly to enhance the channel features that I wanted  
23 to map.

24           This is Duck Slough here, and these are the  
25 properties under consideration.

1           Next slide, please.

2           These are the results of my analysis of this  
3 composite aerial photograph.

4           In black are all the channel features that I've  
5 mapped. In red I've superimposed the channel features  
6 mapped by Brian Atwater published in 1982, and we see  
7 very strong agreement between the two data sets.

8           In effect, Duck Slough is the prominent channel  
9 branching off Middle River and connecting to the Burns  
10 Cutoff, sending numerous distributary channels northward  
11 into Black Slough and ultimately into the San Joaquin  
12 River itself.

13           And the properties in question lie directly  
14 along the course of Duck Slough and are therefore  
15 riparian to it.

16           Next slide, please.

17           This is just to illustrate the technique I  
18 used. I converted that previous image to a gray scale  
19 enhanced it in Adobe Photoshop, throwing different  
20 colored gradients on it so that the very subtle features  
21 on this map could be seen and more easily mapped using a  
22 computer.

23           Next slide.

24           This just shows for illustrative purposes the  
25 image that I started out with, very faint features,



1 channel features. Enhancing them in color, they are  
2 much more easily identified.

3 I want to point out that nothing I did here,  
4 Don Moore assures me, added or subtracted any features  
5 to the aerial photographs.

6 Next slide, please.

7 I took a look at the 1940 aerial photographs,  
8 and this is image aerial photograph number 68 in that  
9 sequence, and I'm using that same color enhancement  
10 technique, computer enlargement in mapping.

11 I have mapped in black again all of the channel  
12 features that I could see on this aerial photograph.  
13 And superimposed on this map in red are Brian Atwater's  
14 channels that agree with -- and the data sets agree very  
15 closely.

16 And in blue, I have added the channels as  
17 expressed on the 1941 Woods Irrigation map.

18 All three data sets show that Duck Slough is a  
19 prominent channel in the area with variation  
20 distributary channels.

21 And the two properties lie adjacent to Duck  
22 Slough and therefore riparian to it.

23 I want to point out here, there's a very deep  
24 meander here that actually penetrates through the Mussi  
25 property. And it's typical throughout the Delta as

1 agriculture expanded through the Delta region that the  
2 very sinuous courses of the sloughs were straightened,  
3 and I suspect that this very deep meander here was  
4 straightened artificially along Duck Slough.

5 I can't see them very clearly here, but I've  
6 outlined in green a series of -- like right here -- a  
7 series of green circles that highlight where farmsteads  
8 exist as of 1940 on this aerial photograph.

9 And the point that I want to make by outlining  
10 those farmsteads is a point that John Herrick made  
11 earlier, that before there was this -- there was road  
12 access deep into the Delta, the only access was along  
13 existing channels, and that the farmsteads well into the  
14 1900s probably occupied sites that -- many of them most  
15 likely occupied sites were first occupied when  
16 settlement first began in this -- in the Delta.

17 The next slide will be of a --

18 Next slide, please.

19 -- an illustration from a 1988 publication on  
20 the Chinese farming practices in the Delta in the late  
21 1800s, early 1900s. And the caption and discussion of  
22 this image is that here is the farmstead of this Chinese  
23 farmer. The only access they had to their land was by  
24 the waterways themselves.

25 And I suspect that these early farmsteads were

1 then passed from hand to hand, and many of them are the  
2 farmsteads that we see in the Delta today.

3           So the very existence of farmsteads along these  
4 very sinuous channels I think are strong evidence that  
5 the channels were even -- were there and were on  
6 navigable waterways.

7           Next slide, please.

8           Photograph 68, just north of the previous one.  
9 Here are the properties in question on Duck Slough. If  
10 we can move it down a little bit please. Down. The  
11 other direction.

12           And again, we see Duck Slough as the prominent  
13 channel sending numerous distributary channels to the  
14 north to connect up with Black Slough and ultimately to  
15 the San Joaquin River itself.

16           Next slide.

17           This is the detail of -- this is Duck Slough  
18 right here. This is an aerial photograph showing how  
19 the levees of Duck Slough itself were actually built up.

20           You see breaches in the levees where sediment  
21 is pouring out of the main channel. And I suspect that  
22 this particular breach represented by this light area  
23 here was maybe within the early 1900s, which means to me  
24 that the channel was there still transporting sand and  
25 silt, and that when the levee broke some of that sand

1 and silt spilled out onto the lowlands adjacent to the  
2 channel.

3           The interesting aspect of that, if we look back  
4 at the 1927 one-foot contour map which I've plotted here  
5 over a modified version of this aerial photograph,  
6 there's two feet of relief on that deposit.

7           This is how the levees are built up by  
8 distributary channels.

9           And the properties in question have -- are not  
10 only adjacent to the main channel, actually have these  
11 minor channels running through them.

12           Next slide, please.

13           This is the last slide. Just to make the  
14 point, you might ask the question is it reasonable that  
15 all these very minor channels that I've mapped from  
16 aerial photographs were real?

17           And this is a slide from a talk that Robin  
18 Grossinger from the San Francisco Estuary Institute  
19 presented in 2008.

20           He's done an ecological study of the entire  
21 Delta, trying to reconstruct the natural environment of  
22 the Delta, and he's using many of the same documents  
23 that have been discussed here today.

24           This particular map, early 1900s topographic  
25 map of area north of -- this is Lower Roberts Island

1 right here, but it illustrates a point that I want to  
2 make regarding minor channels.

3 This is the survey line 1879, these lines, when  
4 the township ranges were surveyed. What Robin did was  
5 pull out the field notes from the actual surveys and  
6 looked at the field notes, what the actual surveyors  
7 wrote about the traverses they making.

8 They traversed the main channels right here and  
9 documented how wide they are. So there's no problem.  
10 These red marks indicate where those notes come from.

11 But look along this line and down here.  
12 There's a series of notes in the field notes that  
13 document channel -- they're crossing channels as much as  
14 40 feet, say between 25 and 40 feet wide, that don't  
15 appear on any map.

16 So it's very reasonable that many of the  
17 channels that we've mapped with aerial photographs were  
18 actually there, even though they appear on no other  
19 maps -- have never been published any other map.

20 And that concludes my testimony.

21 Thank you.

22 MR. HERRICK: Mr. Moore, you have before you  
23 Exhibit 2. Is that a true and correct copy of the  
24 testimony you have prepared for this proceeding?

25 MR. MOORE: Yes, it is.

1           MR. HERRICK:  Would you briefly summarize that  
2  testimony for the Board?

3           MR. MOORE:  As Ken said in his testimony, my  
4  main function here is much of the maps and all he used  
5  in his demonstration, I used -- I rectified the maps.  I  
6  got the maps scaled and matched to a specific base so  
7  that when he did the overlays as he represented, the  
8  different soils maps and all, everything was accurate  
9  and he got correct fits on it.

10           Additionally in the interpretation of the  
11  photos, I laid the groundwork, basically the rules of  
12  the -- follow pretty much the rules of photogrammetry  
13  and all so we did our enhancements and all with without  
14  destroying any data or adding any false data.

15           Additionally since I have extensive experience  
16  over the last 30 years of interpreting aerial photos, I  
17  also interpreted the photos.

18           And basically we were in 100 percent agreement  
19  in separate offices doing the same interpretation using  
20  different techniques.  We came up with 100 hundred  
21  percent agreement on identifying the various features  
22  from the photos.

23           And I ensured that it met the standards of the  
24  industry for imagery assessment and evaluation, and I  
25  assured that the maps and all were correctly registered

1 using geographic information software and so he had good  
2 accurate overlays to do the comparisons he just  
3 testified to.

4 MR. HERRICK: Okay.

5 Mr. Lajoie, your testimony includes a page of  
6 conclusions. Would you briefly go over those just to  
7 make sure you haven't missed any in your presentation.

8 DR. LAJOIE: The conclusion that I came to  
9 regarding all of the documents that I looked at is that  
10 Duck Slough is the dominant waterway -- channel, if you  
11 will -- connecting Middle River and Burns Cutoff in this  
12 part of the Delta.

13 Slightly to the north and west, Whiskey Slough  
14 is another prominent connection between Middle River and  
15 the San Joaquin.

16 But in this area, Duck Slough is the main  
17 channel. It's brought -- it was dominant enough that it  
18 brought sediment into the basin and fed numerous  
19 distributary channels that made their own levees.

20 And so secondly -- and then secondly, whether  
21 or not the parcels in question were riparian, it was  
22 obvious from every map that I studied they lie directly  
23 adjacent to, if not straddling, the channel itself and  
24 therefore were riparian to that channel, Duck Slough.

25 And in the case of the deep meander on the

1 Mussi property, it was probably riparian to that channel  
2 from both sides.

3           Because of the -- and one of the points that I  
4 should have made with the 1982 Atwater map is that he  
5 had plotted on that map his best estimate of where the  
6 tide influence was within the basins of the San Joaquin  
7 Delta.

8           And that line was very difficult to see on  
9 these maps, but I plotted it on the maps that I have so  
10 they are in testimony.

11           That line lies about two and a half feet above  
12 sea level, and it's the area that most people agree was  
13 the upper limit of tidal influence.

14           Doesn't mean salt water got there. It just  
15 means that the freshwater marshes rose and fell with  
16 some lag time of the tides -- the tides that came in  
17 through the Carquinez Straits.

18           The point there being that the two properties,  
19 besides being riparian to the natural channel, Duck  
20 Slough and its tributaries, were also riparian to the  
21 broad permanent basins, year-around basins that  
22 separated the natural levees.

23           MR. HERRICK: And Mr. Moore, same question. At  
24 the end of your testimony you have some conclusions.  
25 Would you just go over those so we don't miss any of



1 them?

2 MR. MOORE: My conclusions parallel Ken's.

3 The primary features, the meander scrolls, as I  
4 call them, or point bars on the Mussi property and  
5 channels on the Pak and Young property were classic.

6 I've analyzed literally hundreds of meander  
7 scrolls doing from -- aerial photos for agricultural  
8 purposes, many of them basically starting in Chico and  
9 Red Bluff and south and to the Delta where they're doing  
10 soil analysis.

11 Additionally I've done hundreds of these for  
12 water well locations in the foothills where we identify  
13 ancient stream channels, and it was very clear to me the  
14 meander scrolls and point bars on the Mussi property and  
15 the channels and evidence of blow-out on the Pak and  
16 Young properties.

17 DR. LAJOIE: John, could I make one addition to  
18 my statements?

19 MR. HERRICK: Absolutely.

20 DR. LAJOIE: I should point out that the high  
21 tide, the line that Atwater mapped as the highest  
22 influence of tidal action, actually ran through both  
23 parcels in question here today.

24 So the lower parts of the -- topographically  
25 the lower parts of the channels were in the basins; the

1 upper parts were on the natural levees, and so that even  
2 strengthened the comment that the parcels were tributary  
3 to Duck Slough as well to the basins adjacent to them.

4 MR. MOORE: I'd like to add one point too  
5 though. The points I made that I summarized on, they  
6 could not have been created unless there was significant  
7 amounts of water, there it was from flooding or the  
8 actual meander or possible meander or movement of the  
9 channels.

10 But they definitely indicate a lot of water had  
11 flown through that area.

12 MR. HERRICK: Thank you. I think that covers  
13 our direct.

14 CO-HEARING OFFICER BAGGETT: No other  
15 witnesses? So that the other witnesses, Mr. Herrick,  
16 you're passing on?

17 MR. HERRICK: I thought I said at the beginning  
18 I'd put these two on as a panel, and you can cross them,  
19 and the rest of witnesses you can get to next.

20 MR. O'LAUGHLIN: That's fine with us.

21 CO-HEARING OFFICER BAGGETT: Prosecution Team,  
22 any cross?

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CROSS-EXAMINATION BY MR. ROSE  
FOR PROSECUTION TEAM  
--o0o--

MR. ROSE: Good afternoon, gentlemen. I believe I just have a few questions as to some of the testimony and exhibits that you presented here today.

Actually all of my questions will be for Mr. Lajoie. Is that pronounced correctly?

DR. LAJOIE: Correct.

MR. ROSE: Okay. First question is in your testimony. You say that you are referring to pretty much all the waterways by a name shown on an 1894 map; is that correct?

DR. LAJOIE: Correct.

MR. ROSE: So you're not saying that any particular waterway has remained unchanged from 1894; is that correct?

DR. LAJOIE: No. The -- my implication in using those names is that the names appear differently on different maps, but I was going to use the names that appeared on the 1894 maps so as to avoid confusion.

MR. ROSE: But the names may have changed and --

DR. LAJOIE: The names did change. For

1 example, Duck Slough on some maps is called High Ridge  
2 Levee. On other maps it's called Cross Levee. And that  
3 name Cross Levee appears on different stream courses  
4 depending on the maps.

5 So in order to avoid confusion, I used the  
6 names from the 1894 map.

7 MR. ROSE: But simply to avoid confusion --

8 DR. LAJOIE: Yes.

9 MR. ROSE: -- correct?

10 You are in no way saying that a waterway that's  
11 in the general location of Duck Slough now is actually  
12 Duck Slough?

13 DR. LAJOIE: No.

14 MR. ROSE: Okay. Let me point you to  
15 Exhibit 1, figure 6 accompanying your testimony. This  
16 is a 1913 map; is that correct?

17 DR. LAJOIE: That's correct.

18 MR. ROSE: It says in the key that it was  
19 surveyed in 1911 --

20 DR. LAJOIE: That's correct.

21 MR. ROSE: -- is that correct?

22 So this map doesn't necessarily show anything  
23 that was in place after 1911 --

24 DR. LAJOIE: That's correct.

25 MR. ROSE: Thank you.

1 Point you to Exhibit 1, figure 8 please. I'm  
2 sorry. I do have a question on Exhibit 1, figure 7  
3 first.

4 Mr. Lajoie, this map doesn't show any natural  
5 channels, does it?

6 DR. LAJOIE: I interpret the dark line on this  
7 map as the course of the natural channel of Duck Slough.  
8 There's no way I can tell whether that is a channel  
9 there today or at the time of this map, no.

10 MR. ROSE: Simply showing the levees; is that  
11 correct?

12 DR. LAJOIE: I would interpret that line as  
13 being a levee.

14 MR. ROSE: Okay. Thank you.

15 Now, Exhibit 1 figure 8.

16 Mr. Lajoie, who added the red highlights to  
17 this document?

18 DR. LAJOIE: I'm sorry?

19 MR. ROSE: Who added the red highlights to this  
20 document?

21 DR. LAJOIE: I did.

22 MR. ROSE: And in your testimony, you describe  
23 these red highlights as natural channels; that is  
24 correct?

25 DR. LAJOIE: That's correct. My interpretation

1 of natural channels.

2 MR. ROSE: So this map doesn't in any way,  
3 maybe in the legend --

4 DR. LAJOIE: No, it doesn't identify them.  
5 That's a geologic interpretation of the irregular  
6 channels on this map as being natural channels.

7 MR. ROSE: Again, but the map itself does  
8 not --

9 DR. LAJOIE: It does not. That's my  
10 interpretation.

11 MR. ROSE: Based on the geologic --

12 DR. LAJOIE: On geologic considerations.

13 MR. ROSE: Thank you.

14 I'd like to point you to Exhibit 1, figure 10  
15 please. Essentially the same question as the previous  
16 ones. When Atwater -- you said that the red lines  
17 reflect Atwater's determinations; is that correct?

18 DR. LAJOIE: That's correct. His  
19 interpretation of where natural channels, the courses of  
20 natural channels.

21 MR. ROSE: Where natural channels may have  
22 been?

23 DR. LAJOIE: That's correct.

24 MR. ROSE: And he was looking at the geology;  
25 is that correct?

1 DR. LAJOIE: That's correct.

2 MR. ROSE: And he was not describing the  
3 current state of any particular waterways, was he?

4 DR. LAJOIE: That's correct.

5 As a matter of fact, specifically in his study  
6 and my study, we're looking -- we're trying to  
7 reconstruct the topography as it was in 1850.

8 MR. ROSE: Thank you. So the red lines as  
9 depicted from any of your exhibits that reference  
10 Atwater, those are showing what his determination was  
11 for where there may have been a natural channel in 1850?

12 DR. LAJOIE: That's correct.

13 MR. ROSE: Thank you.

14 Point to Exhibit 1, figure 18 please.

15 Mr. Lajoie, straight black lines on these figures -- I'm  
16 sorry. Straight red lines outline the Pak and Young  
17 parcel; is that correct?

18 DR. LAJOIE: That's correct.

19 MR. ROSE: And you have stated in your  
20 testimony that you were not sure whether this photo  
21 showed the breach of a natural or artificial levee?

22 DR. LAJOIE: That's correct.

23 MR. ROSE: So the Pak and Young parcel may have  
24 been separated from this waterway by an artificial levee  
25 as early as 1850. Is that what you --

1 DR. LAJOIE: Since I wrote that --

2 MR. HERRICK: If I may just for clarification,

3 when you say "separated from this waterway" you mean the

4 one running off the Duck Slough line or the Duck Slough?

5 MR. ROSE: I mean the one that Mr. Lajoie is

6 testifying that the break came from.

7 MR. HERRICK: Came from or the break itself?

8 MR. ROSE: That the break came from.

9 MR. HERRICK: The Duck Slough line.

10 MR. ROSE: The line labeled Duck Slough on

11 there which is where the break --

12 DR. LAJOIE: Originally --

13 MR. ROSE: -- the break occurred on a levee

14 that --

15 DR. LAJOIE: Okay.

16 MR. ROSE: -- was on Duck Slough? Is that what

17 you're saying on there.

18 DR. LAJOIE: Yes. I will make a -- since I put

19 this out, I have thought about this diagram and regret

20 not having added a few comments regarding it.

21 That feature that we see, this feature right

22 here which is -- obviously originates at this point

23 where nobody's going to contest Duck Slough once flowed,

24 this feature is a breakout.

25 It broke through the levee. I don't know



1 whether it broke through once or numerous times. We can  
2 see other breakouts here. As I said, this is how the  
3 levee is built up.

4 The interesting thing about this is that Duck  
5 Slough, as I pointed out, is a major source of mineral  
6 sediment, sand and silt coming from higher in the basin.

7 This feature could not have been built unless  
8 Duck Slough was still conducting sediment into the  
9 basin.

10 So my consideration now, the wording I would  
11 use, is that this is evidence that Duck Slough was still  
12 at the time of formation of this feature a dominant  
13 drainage waterway and was transporting sediment from the  
14 upper parts of the basin.

15 MR. ROSE: Thank you for that clarification.

16 But you don't have any particular evidence or  
17 knowledge as to whether the levee that was separating  
18 Duck Slough from the parcel was artificial or natural at  
19 this point, do you?

20 DR. LAJOIE: Would you state that again,  
21 please?

22 MR. ROSE: In your testimony, you say that this  
23 may have been an artificial levee as early as 1850?

24 DR. LAJOIE: You mean along here?

25 MR. ROSE: Where the break occurred.

1 DR. LAJOIE: Where the break occurred. Yes, I  
2 have no proof one way or another that that had been  
3 enhanced at the time.

4 But the fact that that much sediment poured out  
5 of the main channel, Duck Slough, shows me the channel  
6 was still a dominant channel transporting sediment.

7 MR. ROSE: I don't believe I have any further  
8 questions at this point.

9 Thank you.

10 CO-HEARING OFFICER BAGGETT: Thank you.

11 Mr. Rubin, Mr. O'Laughlin? Mr. Paul?

12 MR. O'LAUGHLIN: Mr. Rubin is going to take the  
13 majority of this. I might have a few follow-up  
14 questions.

15 --o0o--

16 CROSS-EXAMINATION BY MR. RUBIN

17 FOR SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

18 --o0o--

19 MR. RUBIN: Good afternoon, Mr. Lajoie,  
20 Mr. Moore. My name is Jon Rubin. I'm an attorney for  
21 San Luis & Delta-Mendota Water Authority. I have some  
22 questions.

23 My first question: Mr. Lajoie, I noticed that  
24 you were reading off some notes when you were  
25 summarizing your testimony; is that correct?

1 DR. LAJOIE: My personal notes. Yes, that's  
2 correct.

3 MR. RUBIN: And did you prepare those notes?

4 DR. LAJOIE: Yes, I did.

5 MR. RUBIN: When you prepared those notes, did  
6 you get any guidance from counsel?

7 DR. LAJOIE: None whatsoever.

8 MR. RUBIN: Thank you.

9 I'll direct these questions to Mr. Lajoie  
10 first. Although, Mr. Moore, if you have a comment or  
11 response, please feel free to respond.

12 Is assessor's map number 131-180-07 property  
13 owned by Pak and Young?

14 DR. LAJOIE: Yes.

15 MR. RUBIN: And is assessor's parcel 131-170-03  
16 property owned by Mussi?

17 DR. LAJOIE: Correct.

18 MR. RUBIN: Mr. Lindsay, can you please put up  
19 figure 4 to the testimony of Mr. Lajoie.

20 Mr. Lajoie, I believe figure 4 is now on the  
21 screen. Thank you, Mr. Lindsay.

22 You would agree, would you not, that the Pak  
23 and Young property exists on the southwest quarter of  
24 the southeast quarter of Section 22 in Township 2 North,  
25 Range 5 East?

1 DR. LAJOIE: That's correct.

2 MR. HERRICK: Just for clarification, I believe  
3 the outline goes beyond that section, but I just don't  
4 want the record to suggest that it's all within that one  
5 section.

6 MR. RUBIN: It's a very good comment and will  
7 be addressed by my next question.

8 You would agree, would you not, that the Pak  
9 and Young property also exists on the northwest quarter  
10 of the northwest quarter of section 27 in Township 2  
11 North, Range 5 East?

12 DR. LAJOIE: That is depicted on this map.

13 I should point out, as I notice on the very  
14 first assessor's map that I put up, I did not attempt to  
15 locate the two properties on that map because the line  
16 was drawn so crudely.

17 All of these maps are drawn crudely. They  
18 weren't surveyed.

19 So any placement of the properties as depicted  
20 on these maps would be in error insofar as the  
21 hand-drawn lines were in error. And I admit to that.

22 MR. MOORE: I can confirm that. When I was --

23 MR. RUBIN: Make sure your microphone is on.

24 MR. MOORE: I can concur with this. When I did  
25 some of the rectifications in the overlays, there were

1 significant errors.

2 MR. RUBIN: The way I have raised the questions  
3 and the way you've responded, is it accurate in terms of  
4 the location of the property?

5 DR. LAJOIE: It's not accurate. It's my  
6 depiction -- it's an approximate location.

7 MR. RUBIN: Okay. And you would agree, would  
8 you not, that the Mussi property exists approximately on  
9 the eastern half of Section 27 in Township 2 North,  
10 Range 5 East?

11 DR. LAJOIE: It's in the western half, correct.

12 MR. RUBIN: Has the location of either the Pak  
13 and Young or Mussi property changed since the late  
14 1800s?

15 DR. LAJOIE: I have -- how do you mean that?  
16 Has it -- how do you mean has it changed?

17 MR. RUBIN: I just want to make sure the  
18 record's clear. The boundaries of the property, has it  
19 changed since the last 1800s?

20 MR. HERRICK: I'm going to object. The -- I  
21 believe the Pak parcel was part of a larger parcel until  
22 after this date. So I just don't want the confusion  
23 about testing his knowledge of the subdivision of the --  
24 which eventually resulted in the current Pak parcel.

25 MR. RUBIN: I'll move to some other questions.

1 And thank you, Mr. Lindsay. I'm done with figure 4.

2 Mr. Lajoie, on whose behalf are you testifying  
3 today?

4 DR. LAJOIE: I was hired by Wallace  
5 Environmental to do a project paid for by the Nomellini,  
6 Grilli & McDaniel's law firm.

7 MR. RUBIN: And the law firm is paying for your  
8 services today?

9 DR. LAJOIE: I hope so.

10 MR. NOMELENI: We'll pay for it.

11 MR. RUBIN: In your written testimony, you  
12 state that, and I quote:

13 Most of the aerial photographs, maps, and  
14 text documents analyzed for this project  
15 were supplied as digital files by Dante  
16 Nomellini.

17 DR. LAJOIE: That's correct.

18 MR. RUBIN: And how do you define project as  
19 used in your testimony?

20 DR. LAJOIE: That was never very explicitly  
21 stated from the very beginning of this project.

22 It was left entirely to my discretion as to how  
23 to progress with the material that was provided to me,  
24 and I should point out that even prior to my receiving  
25 those files, I went online and downloaded numerous

1 aerial paragraphs, satellite images, and started the  
2 project myself before any discussion took place as to  
3 what it should amount to because I was fairly confident  
4 that it was basically going to be a reconstruction of  
5 where the channels were in the Delta.

6           And I was correct in that assumption. That's  
7 what it turned out to be.

8           MR. RUBIN: That leads into a series of  
9 questions regarding the material that you reviewed as  
10 you prepared your testimony.

11           How many aerial photographs did Mr. Nomellini  
12 provide to you?

13           DR. LAJOIE: I don't know the exact number, but  
14 between the 1940 set there must be, oh, at least 30 or  
15 40.

16           And the 1937 set -- which I didn't analyze in  
17 any great detail; they had been tinkered with  
18 digitally -- there must be at least 40 or 50 in that  
19 set.

20           And then the aerial photographs that Don Moore  
21 supplied to me. And satellite images that I downloaded  
22 from the net itself. I've analyzed extensive areas of  
23 the Delta using those.

24           MR. RUBIN: And Mr. Moore provided you with  
25 photographs?

1 DR. LAJOIE: He provided the large composite  
2 agriculture photograph that he'll make a comment on.

3 MR. RUBIN: And do you recall the year when  
4 that photograph --

5 DR. LAJOIE: 2005. Those are agricultural  
6 photographs.

7 MR. RUBIN: And you indicated that you  
8 downloaded aerial photographs from the --

9 DR. LAJOIE: Yes, I did.

10 MR. RUBIN: Just for the record, allow me to  
11 complete my question so that we can accurately reflect  
12 this proceeding.

13 And the photographs that you downloaded from  
14 the web, do you recall the dates of those, when those --

15 DR. LAJOIE: 2010.

16 MR. RUBIN: And you also indicate that  
17 Mr. Nomellini provided you maps; is that correct?

18 DR. LAJOIE: That's correct.

19 MR. RUBIN: And what maps did Mr. Nomellini  
20 provide to you?

21 DR. LAJOIE: Assessor's maps dating from 1876  
22 to the early 1900s, probably 1910 or so. The maps that  
23 I presented were three.

24 MR. RUBIN: Which maps did you not present that  
25 Mr. Nomellini provided to you?



1 DR. LAJOIE: I'd have to look at a list. I  
2 have a list here. A partial list of those. I could  
3 enumerate them, if you'd like.

4 MR. RUBIN: How many maps did you -- are on  
5 your list?

6 DR. LAJOIE: Maybe 7 or 8.

7 MR. RUBIN: That's okay.

8 And you also indicate Mr. Nomellini provided  
9 you text documents; is that correct?

10 DR. LAJOIE: There were digital documents of  
11 historical nature. That book, the Chinese agriculture  
12 in the Delta. Documents of that sort.

13 MR. RUBIN: I would like to have some more  
14 specifics.

15 Aside from the book in which you have a  
16 photograph referenced as an exhibit, exhibit -- excuse  
17 me -- figure 16 in your testimony --

18 DR. LAJOIE: Correct.

19 MR. RUBIN: -- what other materials, written  
20 materials, text documents, did --

21 DR. LAJOIE: There were testimony presented by  
22 various witnesses, technical witnesses in the past  
23 regarding some aerial -- excuse me -- surveys and that  
24 sort of thing. Some aerial photograph interpretation,  
25 just rather cursory.

1 MR. RUBIN: I assume if the text documents that  
2 were provided were cursory, you did not rely upon them  
3 for the purpose of your testimony?

4 DR. LAJOIE: Not whatsoever. Unless they  
5 provided information that I could obtain from no other  
6 documents, such as the photograph -- the diagram from  
7 the Chinese publication.

8 MR. RUBIN: Aside from that diagram, which is  
9 figure 16 to your testimony, was there anything else  
10 from text documents that Mr. Nomellini provided?

11 DR. LAJOIE: Nothing significant.

12 MR. RUBIN: Are you familiar with the testimony  
13 that's been submitted by Christopher Neudeck?

14 DR. LAJOIE: Yes, I am.

15 MR. RUBIN: Are the documents -- excuse me --  
16 the information upon which you base your testimony part  
17 of the information Mr. Neudeck presents?

18 DR. LAJOIE: Not whatsoever. But I should  
19 point out --

20 MR. RUBIN: I'm sorry --

21 DR. LAJOIE: No. They weren't.

22 But I should point out he used the 2005  
23 agricultural composite images that Don Moore supplied to  
24 me. He used the same images, it appears.

25 MR. RUBIN: Again, I apologize. You answered

1 very quickly, and maybe I missed it but: The  
2 information upon which you base your testimony --

3 DR. LAJOIE: The --

4 MR. RUBIN: -- isn't that part of the  
5 information Mr. Neudeck presents in this hearing?

6 DR. LAJOIE: No.

7 MR. RUBIN: Mr. Lajoie, on the second page of  
8 your written testimony, you state and I quote:

9 Any attempt to reconstruct the original  
10 conditions in the Delta depends mainly on  
11 historical maps and written records (late  
12 1800s to early 1900s) and on aerial  
13 paragraphs parentheses (mid 1900s to the  
14 present).

15 Close quote. Is that correct?

16 DR. LAJOIE: That's correct.

17 MR. RUBIN: Based upon this statement, do you  
18 define original conditions as conditions that existed in  
19 the late 1800s?

20 DR. LAJOIE: 1850.

21 MR. RUBIN: And again, just for clarity's sake,  
22 original conditions in your mind is conditions that  
23 existed in 1850?

24 DR. LAJOIE: Prior to agriculture, 1850.

25 That's correct.

1 MR. RUBIN: What is the oldest evidence you  
2 considered for purposes of your written testimony?

3 DR. LAJOIE: 1876.

4 MR. RUBIN: And if I understand, if I read your  
5 testimony correctly, the information from 1876 is a San  
6 Joaquin assessor's map which is figure 2.

7 DR. LAJOIE: That's correct.

8 MR. RUBIN: Mr. Lindsay, I would now ask you  
9 put figure 1 on the overhead.

10 Thank you very much.

11 Mr. Lajoie, I'd ask that you focus your  
12 attention on sections -- I believe there are 13 and 14,  
13 22 and 23, 27 and 34, which appear in the small box on  
14 figure 1.

15 MR. HERRICK: Would you repeat those sections  
16 again, please, Mr. Rubin?

17 MR. RUBIN: Sure. The sections I was hoping to  
18 draw your attention to are sections 13 and 14, 22 and  
19 23, 27 and 34. Do you see those?

20 DR. LAJOIE: I can't see those. Here's a  
21 pointer.

22 MR. RUBIN: Thank you. The sections that I  
23 referenced intended to be 13 and 14, 22 and 23, 27 and  
24 34.

25 DR. LAJOIE: Okay.

1           MR. RUBIN: It appears there are two different  
2 types of lines depicted on the section I just noted; is  
3 that correct?

4           DR. LAJOIE: That's correct.

5           MR. RUBIN: The first line appears in sections  
6 13 and 14 on figure 1; is that correct?

7           DR. LAJOIE: That's correct.

8           MR. RUBIN: And then there is a second line  
9 that appears within section 22, 23, 27, and 34 on figure  
10 1; is that correct?

11          DR. LAJOIE: That's correct.

12          MR. RUBIN: And the two lines are separated; is  
13 that correct?

14          DR. LAJOIE: They're not separate but one --  
15 those lines aren't separated on the map. The lower line  
16 which is a single line is a continuation of the double  
17 line to the north.

18          MR. RUBIN: Thank you.

19          Mr. Lindsay, can you now place figure 2 on the  
20 overhead?

21          Mr. Lajoie, if I am reading this map correctly,  
22 there is a blue line depicted on figure 2; is; that  
23 correct?

24          DR. LAJOIE: That's correct.

25          MR. RUBIN: And that blue line depicted on

1 figure 2 runs on the easterly quarters of the easterly  
2 half of sections 22 and 27; is that correct?

3 DR. LAJOIE: That's correct.

4 MR. RUBIN: And according to your testimony,  
5 that blue line depicts where you believe Duck Slough  
6 existed in 1876?

7 DR. LAJOIE: No. It depicts -- my  
8 interpretation of that line is that there was a channel,  
9 waterway, connecting Middle River to Burns Cutoff  
10 somewhere approximately along that route.

11 I would not vouch its location whatsoever.

12 MR. RUBIN: Okay. So you believe that there  
13 was a watercourse that connected Burns Cutoff and Middle  
14 River?

15 DR. LAJOIE: Absolutely.

16 MR. RUBIN: But you can't tell me where that  
17 watercourse was?

18 DR. LAJOIE: That was hand-drawn. That was not  
19 surveyed.

20 MR. RUBIN: Today can you tell me, based upon  
21 the map that's before us, figure 2, where the  
22 watercourse that connected Burns Cutoff to Middle River  
23 was?

24 DR. LAJOIE: Not on that map.

25 MR. RUBIN: Okay. And again, this is a figure

1 which you relied upon for your testimony?

2 DR. LAJOIE: Only to show that there was a  
3 watercourse connecting the two. Not its exact location.

4 MR. RUBIN: You did not rely upon this map to  
5 draw a conclusion --

6 DR. LAJOIE: Yes, I did. I drew a conclusion  
7 that there was a waterway connecting Middle River and  
8 Burns Cutoff.

9 MR. RUBIN: I appreciate that.

10 If you would, let me finish my question because  
11 it was a little bit more detailed than that.

12 Isn't it true that you relied upon this map to  
13 draw a conclusion that the parcels at issue in this  
14 proceeding and the proceeding that follows were riparian  
15 to a watercourse?

16 DR. LAJOIE: They're not shown on that map, are  
17 they? And I refused to put them on that map because  
18 that was so crudely depicted that I wasn't going to  
19 put -- I know exactly where the parcels lie relative to  
20 the survey lines, and they didn't come close to that  
21 line.

22 MR. RUBIN: Okay.

23 DR. LAJOIE: That doesn't mean that line is not  
24 Duck Slough. It represents a waterway that I'm  
25 identifying as Duck Slough. It's very poorly located.

1           MR. RUBIN: But if you were to depict the Pak  
2 and Young parcel and the Mussi parcel that are the  
3 subject of this proceeding and the following, would they  
4 be located adjacent to the line that's drawn on figure  
5 2?

6           DR. LAJOIE: I didn't put them on the maps  
7 specifically because that line is not accurately  
8 depicted.

9           MR. RUBIN: I --

10          DR. LAJOIE: They don't appear on this map.  
11           And I refuse to put them on this map or comment  
12 on where they lie relative to that line based on that  
13 crude hand-drawing.

14          MR. RUBIN: If I recall your testimony  
15 correctly, from -- in response to my questions, you  
16 indicated that the Pak and Young parcel existed within  
17 the southwest quarter of the southeast quarter of  
18 Section 22 in Township 2 North, Range 5 East. Is that  
19 correct?

20          DR. LAJOIE: That's correct.

21          MR. RUBIN: And on this map, you can identify  
22 Section 22; is that correct?

23          DR. LAJOIE: I understand that, yes.

24          MR. RUBIN: And the southwest corner -- excuse  
25 me -- southwest quarter of the southeast quarter of



1 Section 22 is not adjacent to the line that is drawn on  
2 figure 2, is it?

3 DR. LAJOIE: I've explained that.

4 That's a very crudely drawn line, and the fact  
5 that I did not plot those two properties indicates I  
6 don't trust its location. I only indicate that it is a  
7 watercourse, and it's a watercourse I interpret as Duck  
8 Slough, very crudely depicted.

9 MR. RUBIN: I understand your view, Mr. Lajoie,  
10 and your testimony is clearly in the record here that  
11 you believe the line that's drawn is crude.

12 But I would appreciate if you would answer my  
13 question, and my question has been: If you were to plot  
14 on figure 2 the location of the two parcels, the Pak and  
15 Young and the Mussi, would they be adjacent to the line  
16 that's drawn on --

17 DR. LAJOIE: No, they wouldn't.

18 MR. RUBIN: Thank you.

19 Mr. Lajoie, nowhere in your testimony do you  
20 testify as to the volume of water that you believe  
21 historically existed within Duck Slough, do you?

22 DR. LAJOIE: No, I don't.

23 MR. RUBIN: And nowhere in your testimony do  
24 you testify as to the season or seasons in which water  
25 historically was within Duck Slough?

1 DR. LAJOIE: That's correct.

2 MR. RUBIN: And nowhere in your testimony do  
3 you testify as to the quality of water that may have  
4 historically been within Duck Slough?

5 DR. LAJOIE: That's correct.

6 MR. RUBIN: Mr. Lindsay, could you please place  
7 on the overhead figure 4?

8 And Mr. Lindsay, I'm going to be going from  
9 this to figure 3, so I beg your indulgence.

10 On figure 4 -- let me rephrase my question.

11 Figure 4 is a San Joaquin County assessor's map  
12 from 1896; is that correct?

13 DR. LAJOIE: That's correct.

14 MR. RUBIN: And on the figure, there is a line  
15 that appears in section -- I believe it is 16, which I'm  
16 pointing to on the overhead?

17 DR. LAJOIE: That's correct.

18 MR. RUBIN: And there's a line labeled Whiskey  
19 Slough; is that correct?

20 DR. LAJOIE: That's correct.

21 MR. RUBIN: And the line that is labeled  
22 Whiskey Slough moves from section 16 in figure 4 to the  
23 upper left corner of figure 4; is that --

24 DR. LAJOIE: That's correct.

25 MR. RUBIN: And the line that's labeled Whiskey

1 Slough on figure 4 is intended to depict Whiskey Slough;  
2 is that correct?

3 DR. LAJOIE: That's correct. They want to name  
4 it that.

5 MR. RUBIN: Did you draw the line that is  
6 labeled Whiskey Slough that has been the subject of my  
7 last couple of questions?

8 DR. LAJOIE: No, I didn't draw them. I  
9 highlighted them in blue, the ones that were on that  
10 map.

11 MR. RUBIN: Thank you.

12 I now ask that Mr. Lindsay place figure 3 onto  
13 the overhead.

14 Mr. Lajoie, if I understand this correctly,  
15 figure 3 is an 1893 San Joaquin County assessor's map.

16 DR. LAJOIE: That's correct.

17 MR. RUBIN: So this is three years prior to the  
18 figure 4 map we were just discussing?

19 DR. LAJOIE: That's correct.

20 MR. RUBIN: On this figure 4, there is no  
21 northerly branch of the Whiskey Town Slough like the one  
22 that we were just discussing on figure 4, is there?

23 DR. LAJOIE: No, there isn't. And in my verbal  
24 presentation, I explained why.

25 MR. RUBIN: And can you -- well, thank you.

1           There are in fact other features of Whiskey  
2 Town Slough that are depicted differently on figure 3 as  
3 compared to figure 4?

4           DR. LAJOIE: That's correct.

5           MR. RUBIN: Mr. Lajoie, I ask now that you turn  
6 if you have it before you to figure 9.

7           Ask Mr. Lindsay if he may place figure 9 on the  
8 overhead.

9           Mr. Lajoie, if I understand figure 9 correctly,  
10 figure 9 characterizes channels A through D as  
11 irrigation canals from the 1941 map of land served by  
12 Woods Irrigation Company?

13          DR. LAJOIE: That's correct. Want to go --  
14 move the diagram farther up.

15          MR. RUBIN: So just for clarity, there is a  
16 label and a depiction of a parcel in yellow labeled  
17 131-170-03?

18          DR. LAJOIE: That's correct.

19          MR. RUBIN: And underneath that is a letter A.

20          DR. LAJOIE: Right.

21          MR. RUBIN: And that is the A, and if you move  
22 from left to right, A through D is depicted on a number  
23 of different irrigation channels as you --

24          DR. LAJOIE: That's correct.

25          MR. RUBIN: Is it your opinion that channels A

1 through D were used as irrigation channels by Woods  
2 Irrigation District?

3 DR. LAJOIE: I have no idea. I would interpret  
4 it that way, but that's not a geologic question.

5 MR. RUBIN: Okay. Is it your opinion that flow  
6 in channels A through D is from south to north as  
7 depicted on figure 9?

8 DR. LAJOIE: That's a very interesting  
9 question. Because the three that are highlighted in red  
10 obviously flow from south to north because there's  
11 sediment derived -- the mineral sediment's derived from  
12 Middle River forming levees along those three channels.

13 The three channels A, B, and C don't have those  
14 levees because they're not tributary to -- or  
15 distributary channels of Middle River. They are  
16 tributary channels to Duck Slough.

17 Meaning they are draining that basin, and they  
18 flow into Duck Slough.

19 Now, notice along Duck Slough, just to the  
20 northeast of the two yellow parcels, there is small  
21 levees in red that sort of poke down to the southeast  
22 intercept that those channels.

23 Those indicate to me that there is water  
24 flowing from Duck Slough into the basin. The fact that  
25 those levees are so attenuated indicates to me that most

1 of the flow flows out of the basin into the Duck Slough.

2 We are at such a low elevation, such low relief  
3 in this area that's tidally influenced, that water is  
4 flowing both ways in those channels at various times.

5 MR. RUBIN: Thank you.

6 Let's take for example the channel that you've  
7 labeled A.

8 DR. LAJOIE: Yes.

9 MR. RUBIN: Do you believe that that's an  
10 irrigation channel that was used by Woods Irrigation  
11 Company?

12 DR. LAJOIE: I mapped it as a natural tributary  
13 to Duck Slough.

14 MR. RUBIN: I'm sorry. If I'm looking at the  
15 what I'll call a key in the top right corner --

16 DR. LAJOIE: That's correct.

17 MR. RUBIN: Where does it indicate that it was  
18 a tributary to Duck Slough?

19 DR. LAJOIE: On the map, it clearly indicates  
20 it is.

21 MR. RUBIN: Okay. I see. That's in the bottom  
22 of the key?

23 DR. LAJOIE: No, it's right on the map.

24 A tributary is defined as a stream that flows  
25 into another stream. You can see that on the map,

1 that's what happens. Those channels flow into Duck  
2 Slough. They are tributary to Duck Slough.

3 Those channels that flow out of Duck Slough are  
4 distributary channels from Duck Slough.

5 MR. RUBIN: Okay. If I understand, the  
6 information that's in figure 9 is derived in large -- or  
7 in part from what's depicted the figure 8. Is that  
8 correct?

9 DR. LAJOIE: No.

10 MR. RUBIN: No?

11 DR. LAJOIE: Everything in red there is soils.  
12 I merely superimposed what I interpret as natural  
13 channels from figure 8, the Woods Irrigation District  
14 map, the natural channels that I interpreted from that  
15 map, I superimposed on this map.

16 MR. RUBIN: Okay.

17 Mr. Lindsay, if you wouldn't mind placing  
18 figure 8 onto the overhead. Figure 8 of this part of  
19 Mr. Lajoie's testimony.

20 If I were to understand your testimony  
21 correctly, what's labeled as B on figure 8 is not a  
22 canal used by Woods Irrigation District to deliver  
23 water?

24 DR. LAJOIE: I interpret that as a channel  
25 that's been highly modified. And so I would interpret

1 that as an irrigation channel, if you are going to ask  
2 me about what that maps depicts, yes.

3 MR. RUBIN: And again, would you -- is it your  
4 conclusion that the line that's depicted as B on figure  
5 8 is a canal used by Woods Irrigation District to  
6 deliver water?

7 DR. LAJOIE: I have no idea what the hydrology  
8 of their irrigation system is. I'd have to talk to  
9 somebody in the company.

10 MR. RUBIN: Mr. Lindsay, I apologize. I would  
11 ask that you now turn back to figure 9.

12 Mr. Lajoie, if I understand it correctly, it's  
13 your assertion that the lands -- excuse me -- the  
14 colored material that's red is natural levees?

15 DR. LAJOIE: That's correct.

16 MR. RUBIN: How can you distinguish between, in  
17 this map, a natural levee versus a manmade levee?

18 DR. LAJOIE: Very simply.

19 The breath of these -- and I should point out  
20 these levees I mapped on the basis of mineral soils as  
21 depicted on the 1952 Weir soils map.

22 The width of those levees, the area that I have  
23 highlighted in red, is many, many times wider than any  
24 sensible artificial levee would ever be built. Orders  
25 of magnitude wider.



1 MR. RUBIN: Figure 9 does not indicate whether  
2 there are manmade levees, does it?

3 DR. LAJOIE: Where?

4 MR. RUBIN: Does figure 9 reflect any manmade  
5 levees?

6 DR. LAJOIE: I don't see any levees on --

7 MR. RUBIN: Thank you.

8 DR. LAJOIE: No. I'm just depicting all  
9 natural -- what I interpret as natural levees from the  
10 soils superimposed what I interpret as natural levees  
11 from the 1941 Woods Irrigation map.

12 MR. RUBIN: Mr. Lindsay, I ask that you put  
13 figure 19 onto the overhead.

14 Mr. Lajoie, did you prepare figure 19?

15 DR. LAJOIE: No, I didn't.

16 MR. RUBIN: And I believe you indicated -- you  
17 referred to a person by the name of Robert?

18 DR. LAJOIE: No, Robin Grossinger, the name is  
19 there on the map in the lower right just above the  
20 scale.

21 He works for San Francisco Estuary Institute.  
22 He's an ecological historian. He reconstructs natural  
23 ecological systems using historical data.

24 MR. RUBIN: And Robin Grossinger is the person  
25 that prepared figure 19?

1 DR. LAJOIE: That's correct.

2 MR. RUBIN: And I presume that there were data  
3 underlying what's depicted in figure 19; is that  
4 correct?

5 DR. LAJOIE: That's correct.

6 MR. RUBIN: Did you review the data prior to  
7 this proceeding?

8 DR. LAJOIE: No, I didn't.

9 MR. RUBIN: Thank you.

10 Mr. Lajoie, you discussed with -- well, you  
11 discussed as part of your direct testimony as well as  
12 with the Prosecution Team figure 18. Do you recall  
13 discussing figure 18 earlier today?

14 DR. LAJOIE: Yes.

15 MR. RUBIN: I believe it was your testimony  
16 that you suspected there was a levee breach in the early  
17 1900s?

18 DR. LAJOIE: That's correct.

19 MR. RUBIN: You are not certain there was one,  
20 are you?

21 DR. LAJOIE: Not 100 -- well, let me put it  
22 this way. I interpreted that as a levee breach. Brian  
23 Atwater interpreted very similar features as levee  
24 breaches. Whether or not they are breaching the natural  
25 levee or an artificial levee, we can't tell, and the

1 exact date of that breach is not known.

2 But they are -- there's no geologist that would  
3 interpret that any differently.

4 MR. RUBIN: And what we're looking at, if I  
5 understand it correctly, is an aerial photograph from  
6 1940?

7 DR. LAJOIE: That's correct.

8 MR. RUBIN: So based upon this photograph,  
9 there was a breach sometime prior 1940.

10 DR. LAJOIE: That's correct. And I don't know  
11 the date.

12 MR. RUBIN: Thank you.

13 DR. LAJOIE: I would point out that it shows up  
14 as a topographic feature on the 1927 one-foot contour  
15 map.

16 MR. RUBIN: Mr. Lajoie, figure 14, is it also a  
17 1940 aerial photograph? Is that correct?

18 DR. LAJOIE: Number 14?

19 MR. RUBIN: Yes, sir.

20 DR. LAJOIE: Yes, that is.

21 MR. RUBIN: Does figure 14 depict either the  
22 Pak and Young or Mussi property?

23 DR. LAJOIE: Neither.

24 MR. RUBIN: Thank you.

25 Mr. Lajoie, I now ask that you -- or I have a

1 question regarding figure 12. If I understand figure 12  
2 correctly, you're depicting data that you derived as  
3 well as that you assert Atwater derived?

4 DR. LAJOIE: That's correct.

5 MR. RUBIN: From where did you find the Atwater  
6 data?

7 DR. LAJOIE: From his 1982 publication.

8 MR. RUBIN: In his 1982 publication, is there a  
9 map that depicts --

10 DR. LAJOIE: Absolutely. The red lines are  
11 from his map.

12 MR. RUBIN: You didn't provide that 1982  
13 Atwater map?

14 DR. LAJOIE: None whatsoever. I just  
15 highlighted his data by putting it in red so I could  
16 compare it to my data in black.

17 I made no -- as a matter of fact, I even showed  
18 a few place where we differed. And I suspect he would  
19 point out a few differences to me.

20 MR. RUBIN: But the Atwater report that you're  
21 referring to in a 1982 report is not part of the  
22 evidence that you've --

23 DR. LAJOIE: Yes, it is.

24 MR. RUBIN: I'm sorry?

25 DR. LAJOIE: Yes it is.

1           MR. RUBIN: The report is attached to your  
2 written testimony?

3           DR. LAJOIE: It is in the -- it's one of the  
4 exhibits that's been presented by Herrick and Nomellini.

5           MR. RUBIN: Do you know which exhibit that is?

6           DR. LAJOIE: Do you know which one that is?

7           MR. HERRICK: The complete Atwater?

8           DR. LAJOIE: The complete Atwater.

9           MR. HERRICK: I don't know.

10          DR. LAJOIE: Was it ever, the whole thing, put  
11 in?

12          MR. HERRICK: I don't think the complete set of  
13 Atwater maps have been presented through a witness or  
14 are to be presented through a witness.

15                 We have them.

16          MR. RUBIN: Thank you.

17          MR. NOME LLINI: Just for the record, we  
18 provided 40 CDs which include those Atwater maps to  
19 Mr. O'Laughlin in response to the subpoena.

20                 But I don't know that they're part of the  
21 record, but we have them. And anybody wants them, we  
22 tried to index those 40 CDs, and as we're getting new  
23 stuff, we're going to give them to everybody.

24          MR. RUBIN: Just for the record being clear,  
25 what has been done pursuant to a subpoena may be

1 important, but obviously that's not part of the  
2 evidentiary record that's been submitted for this  
3 proceeding or --

4 CO-HEARING OFFICER BAGGETT: Someone can put it  
5 in if they feel it's necessary.

6 MR. RUBIN: Mr. Lajoie, I believe -- and I  
7 don't want mischaracterize your testimony -- but I  
8 believe you indicated that the levees that exist within  
9 the Holt -- is it quadrangle?

10 DR. LAJOIE: Holt, seven and a half minute  
11 quadrangle.

12 MR. RUBIN: Were built, and I believe in your  
13 words, by lots of water?

14 DR. LAJOIE: Yes.

15 MR. RUBIN: Isn't it possible that levees were  
16 also built by man?

17 DR. LAJOIE: But not the levees I mapped.

18 MR. RUBIN: Okay.

19 DR. LAJOIE: Impossible.

20 MR. RUBIN: Mr. Lajoie, I believe you also were  
21 testifying -- and I apologize; I don't recall the  
22 figure -- but that on some maps that you reviewed there  
23 were features that were labeled as sloughs; is that  
24 correct?

25 DR. LAJOIE: That's correct.

1           MR. RUBIN:  And you also testified that there  
2  were also features that were labeled as levees; is that  
3  correct?

4           DR. LAJOIE:  That's correct.

5           MR. RUBIN:  And for purposes of your testimony,  
6  you maintain consistency, and even if there were a  
7  feature labeled a levee, you called it a slough?

8           DR. LAJOIE:  I didn't call that levee a slough.  
9  I called it the route of a natural channel.

10          MR. RUBIN:  But you used your judgment and  
11  changed a feature that was labeled a levee to  
12  something --

13          DR. LAJOIE:  I didn't change anything.

14          MR. RUBIN:  You didn't change the label of the  
15  feature?

16          DR. LAJOIE:  I put the label that I  
17  consistently stated early on that I was going to use.  
18  No matter what other name was put on that route, I used  
19  the name from the 1894 map.

20          MR. RUBIN:  Okay.  I'm not -- I just want to  
21  understand how you approach this.

22                 So on the 1894 map, if there was something  
23  label a slough, you maintain that even if maps  
24  subsequent to that labelled it a levee?

25          DR. LAJOIE:  That's correct.  There was a levee

1 in that area doesn't exclude the fact that the channel  
2 was still there or even that later on, today, when  
3 there's no natural channel there, the road still follows  
4 the route of the natural levee --

5 MR. RUBIN: And --

6 DR. LAJOIE: -- natural slough.

7 MR. RUBIN: I apologize for interrupting you.

8 Let me ask you a question about figure 7, part  
9 of your testimony, and see if this is an example of how  
10 you might have approached the issue that we're just  
11 speaking of.

12 On figure 7 -- Mr. Lindsay, if you wouldn't  
13 mind placing that on the overhead.

14 I ask that you look at the bottom, just  
15 close -- at the bottom of the figure 7, there is a label  
16 of Duck Slough. Do you see that?

17 DR. LAJOIE: Yes. That's my label.

18 MR. RUBIN: And this is an example, I believe,  
19 where the map indicates it's an irrigation ditch, and  
20 you've labeled it Duck Slough?

21 DR. LAJOIE: Notice that it's in parentheses?

22 MR. RUBIN: Mm-hmm.

23 DR. LAJOIE: Wherever I have put the label Duck  
24 Slough or Whiskey Slough or any other slough from the  
25 1894 map on a map, I have put it in parentheses to



1 indicate that is my addition to the map.

2 MR. RUBIN: Okay. And I just want --

3 DR. LAJOIE: And on the map, there is a hashed  
4 dark line that's labeled levee.

5 MR. RUBIN: Thank you.

6 Mr. Moore, I have a few questions for you. I'm  
7 a little bit confused, and I hope that you can clear up  
8 my confusion.

9 I read your statement of qualifications,  
10 Exhibit 2A. As I read it, there was no description of  
11 any hydrogeological work that you've done; is that  
12 correct?

13 MR. MOORE: Well, hydro -- it mentions the well  
14 drilling and so on and on my resume, and so I've done  
15 extensive hydrogeological work in groundwater, well  
16 drilling, well locations.

17 MR. RUBIN: Okay. If I understand Exhibit 2A,  
18 the extent of your experience has been almost  
19 exclusively on geoimagery; is that correct?

20 MR. MOORE: Well, geoimagery encompasses both  
21 the aerial photography and the mapping as well as the  
22 geology.

23 Virtually every groundwater geology job I work  
24 on, I fly my own aircraft. I shoot stereo pairs of  
25 aerial photos, and I interpret those photos for the

1 geomorphology or the geologic structure.

2           And I also have worked a lot with soil  
3 scientists and shooting the morphology of various  
4 rivers.

5           MR. RUBIN: Thank you for that clarification.

6           Are you also being paid by the Nomellini law  
7 firm for your services today?

8           MR. MOORE: That's what I understand. My  
9 checks have come from Jim Wallace, but I guess they're  
10 paying him.

11           MR. RUBIN: In your testimony, you explain the  
12 techniques you employ to analyze historic and current  
13 data sets; is that correct?

14           MR. MOORE: Correct.

15           MR. RUBIN: And specifically, you conducted  
16 photographic analyses.

17           MR. MOORE: Yes, I did both. I worked with  
18 Ken -- I worked separately and with Ken on doing the  
19 geologic interpretations of photos.

20           And on the GIS version, the mapping version, I  
21 built the layers. I built the color photos that Ken  
22 mentioned.

23           I also mosaic'd all the 1940 photos, the 1913,  
24 1978 quads. I rectified those so we all had a good  
25 accurate close fit and we had a base we could work from.

1           For instance, his Atwater map he showed and  
2 all, he could work on an accurate --

3           MR. RUBIN: How many times did you and  
4 Mr. Lajoie meet to discuss issues related to your  
5 analysis?

6           MR. MOORE: I was at his home in Menlo Park  
7 twice. Then we also met several times in Stockton at  
8 the Nomellini office, and we conversed extensively over  
9 the phone and e-mails.

10          MR. RUBIN: If I understand your testimony  
11 correctly, Exhibit 2, the photographic analyses that you  
12 conducted, involved aerial photographs taken in 1937 and  
13 1940, and then current photographs acquired in 2005?

14          MR. MOORE: Correct.

15          MR. RUBIN: And are those photographs exhibits  
16 to your testimony?

17          MR. MOORE: They were the same exhibits use in  
18 Ken. My analysis -- all my work went through Ken, and  
19 he made the exhibits.

20          MR. RUBIN: And if I understand correctly,  
21 Mr. Lajoie has some photographs that are exhibits to his  
22 testimony, and I believe they have been marked as  
23 figures 13 and 14; is that correct?

24          MR. HERRICK: Could you repeat that please?

25          MR. RUBIN: The photographs that were attached

1 to Mr. Lajoie's testimony were figures 13 and 14?

2 MR. MOORE: Yes. Well, 13 and 14 are the  
3 aerial photos. I did not do anything -- figure 14 was  
4 just his example of the enhancement techniques he used.  
5 It does not represent anything on either of the  
6 properties in question.

7 MR. RUBIN: Figure 15 is an aerial photograph?

8 MR. MOORE: No, that is not an aerial  
9 photograph.

10 MR. RUBIN: So this is not a figure that you've  
11 worked on?

12 MR. MOORE: No, I did not work on that figure.  
13 That figure was based on the 2005 ortho photo that I  
14 provided as a base.

15 MR. RUBIN: And do we have as an exhibit to  
16 your testimony or Mr. Lajoie's testimony the ortho  
17 photograph that you just referenced?

18 MR. MOORE: That's figure -- that's the color  
19 photo which is figure 11.

20 That's what I used. That's the entire Holt  
21 Quadrangle. That's an ortho photo. That was used as  
22 the base for rectifying the 1913, the 1978, the 1940  
23 photos so we had everything on a common base.

24 MR. RUBIN: Thank you.

25 Mr. Moore, on page 5 in the first photograph of

1 your written testimony, you indicate that you used -- I  
2 believe the term is nonaltered photographs; is that  
3 correct?

4 MR. MOORE: That's correct.

5 MR. RUBIN: And all of the photographs were not  
6 altered that are the basis of your testimony and  
7 Mr. Lajoie.

8 MR. MOORE: They -- was that directed to Ken or  
9 me?

10 MR. RUBIN: It sounds like the two of you  
11 worked together.

12 MR. MOORE: The fundamental procedure here  
13 is -- when you take the fundamental procedures of remote  
14 sensing, the number one rule is to do your initial  
15 analysis without any alteration of the photo.

16 That's one justification for, I believe, it was  
17 figure 14 to show the difference.

18 And the emphasis there was that when we looked  
19 at the nonaltered, nonenhanced photos in the Pak and  
20 Young and Mussi properties we could still clearly  
21 identify the various features, fluvial morphology  
22 features.

23 Then after those were positively identified,  
24 those photos were maintained intact, set aside, copies  
25 were made to do the various degrees of enhancement so we

1 always had a nonaltered base to ensure that nothing was  
2 falsified on it.

3 But I was confident with my findings and the  
4 conclusions that Ken made that we identified the same  
5 features.

6 DR. LAJOIE: I'd like to add to this figure 14.

7 Modern computer techniques allow us to take  
8 these enhanced, these color-enhanced aerial photographs  
9 such as figure 14, the two sort of very strange, weird  
10 colors -- photographs -- as different layers so that for  
11 rapid analysis you can have as many as a hundred if you  
12 wanted to.

13 But here I only used three -- time was a very  
14 serious constraint -- on each of the analyses that I  
15 did, and I experimented with various colors that would  
16 give me the best results.

17 They were on layers. I could instantaneously  
18 go from one to the other with absolutely no movement  
19 whatsoever, one photo over the other. They are  
20 perfectly registered.

21 So as Don said, map it on the gray scale  
22 photograph, the original unaltered. Immediately flip to  
23 the color, and the feature's still there, maybe  
24 something I could add. Flip to the other color, and  
25 maybe there is even more I can add. And flip back to

1 the natural and start over on a different feature.

2 MR. RUBIN: If I understand your testimony, you  
3 use a base of unaltered photographs and then multiple  
4 altered photographs.

5 DR. LAJOIE: That's correct.

6 MR. MOORE: Just to elaborate, two weeks ago I  
7 delivered 48 photos I took for a large environmental  
8 company in Roseville, and that's been our procedure for  
9 years.

10 When they have to document monitoring, I always  
11 give them two sets. I give them the original raw photos  
12 unaltered they can do the analysis on. And then I give  
13 them a second set that has been georectified and  
14 modified for their presentation.

15 MR. RUBIN: If you take a photograph from a --  
16 let's pick a period, 1940. The photograph would reflect  
17 any changes to the topography that occurred as of that  
18 date?

19 DR. LAJOIE: Change from when?

20 MR. RUBIN: From 1876.

21 DR. LAJOIE: No. Because you don't know what  
22 happened in 1876. You'd have to have an aerial  
23 photograph in 1876, and they don't exist.

24 The earliest aerial photographs were in 1927.

25 MR. RUBIN: My question was: If you are

1 evaluating the topography based upon a 1940 map, you are  
2 evaluating the topography as it existed in 1940?

3 DR. LAJOIE: That's correct.

4 MR. RUBIN: Okay. Thank you.

5 And Mr. Moore, if I understand your testimony  
6 correctly, you used several computer programs to  
7 enhance -- to modify photographs?

8 MR. MOORE: Yes. For the GIS versions of it, I  
9 use the industry standard ESRI ArcView, I believe is  
10 9.3. And Global Mapper.

11 And I also have a full photogrammetric  
12 orthomapping program which I didn't use for these  
13 because it just wasn't necessary on these small parcels.

14 And then -- that was for the GIS and getting  
15 the correct map scales and all. And then I use the  
16 Adobe Photoshop as my main tool for the enhancements and  
17 analysis.

18 DR. LAJOIE: I'll add to that I used Adobe  
19 Photoshop for the enhancements and Adobe Illustrator for  
20 the tracing.

21 MR. RUBIN: If I understand these computer  
22 programs correctly, they essentially assist in mapping;  
23 is that correct?

24 MR. MOORE: The GIS, the ortho mapper, the ESRI  
25 I mentioned. Those are the ones that do the mapping



1 function.

2 MR. RUBIN: Thank you.

3 MR. MOORE: Photoshop is not a mapping program.  
4 It's a color photo enhancement program.

5 DR. LAJOIE: Adobe Illustrator is mapping  
6 program. And if Brian Atwater had had Illustrator at  
7 his disposal, any of these computer techniques, he could  
8 have done a much better in 1970 than he did.

9 MR. RUBIN: Mr. Moore, you use a term, I  
10 believe, "riparian features" in your testimony; that is  
11 correct?

12 MR. MOORE: Correct.

13 MR. RUBIN: How do you define riparian  
14 features?

15 MR. MOORE: I basically go on the geologic  
16 terms. If there was water there. If it's associated  
17 with a natural waterway or a waterway, the features with  
18 that are associated to it.

19 MR. RUBIN: On page 6 of your written  
20 testimony, Exhibit 2, I believe you conclude that the  
21 Pak and Young parcel is riparian to Duck Slough; is that  
22 correct?

23 MR. MOORE: Yes.

24 MR. RUBIN: I believe you have two bases for  
25 that conclusion; is that correct?

1           MR. MOORE: I'm not looking at it now, but I  
2 believe there was.

3           MR. RUBIN: I believe the first basis for your  
4 opinion is the presence of possible levee blow-out. Is  
5 that correct?

6           MR. MOORE: Yes. That's that feature that Ken  
7 showed in his diagrams.

8           MR. RUBIN: And again, that levee blow-out  
9 occurred sometime prior to 1940, possibly --

10          MR. MOORE: It's also on the 1937, so it's  
11 prior to 1937.

12          But also in the very northeast corner of Pak  
13 and Young's property, there is another feature there  
14 that someone classified as a blow-out. I would -- I see  
15 it almost as a channel.

16          MR. RUBIN: Okay.

17          The second basis for your opinion is what you  
18 characterize as an apparent natural riparian channel; is  
19 that correct?

20          MR. MOORE: I'm referring to -- yeah. That's  
21 probably the one I just mentioned in the northeast  
22 corner. I'm seeing it as a little more of a channel.  
23 The other one is obviously a blow-out as Ken testified.

24          MR. RUBIN: Again, I -- it's my understanding  
25 that you deduce these two bases from historical and

1 current photographs that are of the subject property?

2 MR. MOORE: Yes. I studied the same historical  
3 maps from the 1881, 1886, the blue line that's clearly  
4 shown on the 1913 Holt Quadrangle, and then the features  
5 we see on both the 1937 and 1940 photos definitely  
6 convince me there was waterways there and riparian  
7 features.

8 MR. RUBIN: Let me take a little bit of a step  
9 back. And I would appreciate -- I'll go through all  
10 this hopefully with some questions, so I'm hoping you  
11 can focus on my questions, also help us get through this  
12 a little bit.

13 You relied upon photographs for your  
14 conclusion, correct?

15 MR. MOORE: My main conclusions were the  
16 photographs supported by the older maps.

17 MR. RUBIN: And the photographs that you relied  
18 upon are all post 1937?

19 MR. MOORE: 1937, the 1940, and the 2005.

20 MR. RUBIN: Right. Thank you.

21 CO-HEARING OFFICER BAGGETT: I should let you  
22 know you're down to less than seven minutes.

23 MR. RUBIN: I'm hopefully going to be --

24 CO-HEARING OFFICER BAGGETT: You and Mr.  
25 O'Laughlin, so.

1           MR. O'LAUGHLIN: We can talk about scheduling  
2 after Mr. Rubin's done.

3           MR. RUBIN: Did you independently analyze  
4 assessor parcel maps as part of your analysis?

5           MR. MOORE: Yes, I did.

6           MR. RUBIN: Is assessor parcel map that's dated  
7 1876 one of the maps upon which you've based your  
8 conclusions.

9           MR. MOORE: I believe so. If it was one of Mr.  
10 Lajoie's -- yes, I did look at that map. I made the  
11 same conclusions Ken did, that it's kind of a roughed-in  
12 hand-drawn map that just convinced me there was a  
13 waterway there, but the location is not accurate.

14          MR. RUBIN: And again, the basis for you  
15 determining that it's not accurate is simply --

16          MR. MOORE: It doesn't fit within -- it roughly  
17 represents what we see generally as Duck Slough, and it  
18 shows us at that time there was a slough there, but  
19 somebody drew it in inaccurately, so it doesn't fit  
20 the -- anything later that was surveyed in.

21          MR. RUBIN: What basis do you have to conclude  
22 that it was inaccurately drawn?

23          MR. MOORE: Just from looking at it. It  
24 doesn't show any detail. There was none of the tight  
25 meanders or anything else that are there.

1 MR. RUBIN: Mr. Moore, is it correct that  
2 nowhere in your testimony do you testify as to the  
3 volume of water that historically occurred in Duck  
4 Slough?

5 MR. MOORE: No. I could do no calculation. I  
6 knew there was a lot of water from the geologic  
7 features, but no way could I calculate the volume.

8 MR. RUBIN: And nowhere in your testimony do  
9 you testify as to the season in which water historically  
10 may have been in Duck Slough?

11 MR. MOORE: No, I don't make that testimony.

12 MR. RUBIN: And likewise nowhere in your  
13 testimony do you testify as to the quality of water that  
14 may have been in Duck Slough?

15 MR. MOORE: No.

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

18 CO-HEARING OFFICER BAGGETT: Thank you. Let's  
19 take a break.

20 (Recess)

21 CO-HEARING OFFICER BAGGETT: Mr. O'Laughlin.

22 --oOo--

23 CROSS-EXAMINATION BY MR. O'LAUGHLIN

24 FOR MODESTO IRRIGATION DISTRICT

25 MR. O'LAUGHLIN: My name is Tim O'Laughlin. I

1 represent Modesto Irrigation District. Mr. Lajoie, my  
2 questions are directed to you.

3           What date did you get the assignment to prepare  
4 the documents and exhibits that you have set forth in  
5 this proceeding?

6           DR. LAJOIE: February 2nd.

7           MR. HERRICK: February 2nd when?

8           DR. LAJOIE: 2010.

9           MR. O'LAUGHLIN: Okay. Were you given a time  
10 limit on the amount of time you could spend on this  
11 project by Mr. Herrick?

12           DR. LAJOIE: I contracted with -- I had nothing  
13 directly to do with Mr. Herrick. I contracted with  
14 James Wallace for 200 hours.

15           MR. O'LAUGHLIN: Did you expend all 200 hours?

16           DR. LAJOIE: Yes, I did.

17           MR. O'LAUGHLIN: Okay. When you were given  
18 your assignment, you mentioned earlier, is there a  
19 written statement that you were given as to the scope  
20 and extent of your assignment?

21           DR. LAJOIE: No.

22           MR. O'LAUGHLIN: Would it be safe to say that  
23 you pursued your assignment in your professional  
24 judgment?

25           DR. LAJOIE: Yes.

1           MR. O'LAUGHLIN: The documents that you have  
2 presented here today, have you -- did you do any  
3 independent research at libraries or archives or  
4 anyplace else to determine what the development of  
5 Middle Roberts Island looked like prior to 1911?

6           DR. LAJOIE: Very little. I depended on the  
7 documents that I had at hand, some that I got on the  
8 Internet, and I looked close to the US Geological  
9 Survey, and I did a bit of work there looking a soils  
10 maps and other things.

11          MR. O'LAUGHLIN: In your line of work, do you  
12 think it's important that if you can find corroborating  
13 historical documents that that gives you some comfort  
14 level when you're rendering your opinion?

15          DR. LAJOIE: Yes, it does.

16          MR. O'LAUGHLIN: You can still render your  
17 opinion without the documents, but if the documents seem  
18 to support your statement it just makes it much firmer,  
19 I guess?

20          DR. LAJOIE: That's correct.

21          MR. O'LAUGHLIN: Okay. Now, what would happen  
22 if you found historical documents that didn't agree with  
23 your aerial interpretation? How would you handle that?

24          DR. LAJOIE: I'd dig in on both sides, trying  
25 to -- I'd try to figure out which model was correct, and

1 then I'd have to make a professional decision as to  
2 which one I believed, and I'd progress from there.

3 MR. O'LAUGHLIN: Okay. Have you done any study  
4 of how levees were constructed on Roberts Island?

5 DR. LAJOIE: Artificial or natural?

6 MR. O'LAUGHLIN: Artificial.

7 DR. LAJOIE: Only from the aerial photographic  
8 work that I've done in analyzing the topographic maps  
9 that I had in my possession.

10 MR. O'LAUGHLIN: And what was your opinion or  
11 conclusion in regards to how artificial channels were  
12 constructed on Roberts Island?

13 DR. LAJOIE: Artificial channels?

14 MR. O'LAUGHLIN: Artificial.

15 DR. LAJOIE: They straightened the natural  
16 meanders of the various sloughs and channels.

17 MR. O'LAUGHLIN: But my -- maybe I'll ask it a  
18 different way. Do you know how they were actually  
19 constructed? Were they constructed with dredgers?

20 DR. LAJOIE: I have no idea.

21 MR. O'LAUGHLIN: Okay. In regards to a feature  
22 that's been labeled Duck Slough, it connects to Burns  
23 Cutoff; is that correct?

24 DR. LAJOIE: Which map are you looking at?

25 MR. O'LAUGHLIN: Just Duck Slough.



1 DR. LAJOIE: Yes, it is.

2 MR. O'LAUGHLIN: Okay. It doesn't actually  
3 connect to the San Joaquin River; is that correct?

4 DR. LAJOIE: Its tributaries do. And I  
5 interpret Duck Slough -- excuse me -- Burns Cutoff as a  
6 channel of the San Joaquin River.

7 MR. O'LAUGHLIN: Okay. Did you review Mr.  
8 Neudeck's testimony prior to him submitting it into  
9 evidence?

10 DR. LAJOIE: Very briefly.

11 MR. O'LAUGHLIN: Okay. Did you have any  
12 discussion or disagreements with -- let me ask it this  
13 way.

14 Did you have any disagreements with Mr. Neudeck  
15 in his testimony in regards to how the levee was built  
16 up along Duck Slough?

17 DR. LAJOIE: No.

18 MR. O'LAUGHLIN: Would your opinions and  
19 conclusions seem to support Mr. Neudeck's analysis that  
20 in fact a dredger had gone down Duck Slough and  
21 deposited material from the channel onto a berm or  
22 levee.

23 DR. LAJOIE: That's an engineering concern, and  
24 I didn't concern myself with that.

25 MR. O'LAUGHLIN: Did that concern you at all

1 when you were rendering your opinion as to whether the  
2 levee there was artificial or natural?

3 DR. LAJOIE: No.

4 MR. O'LAUGHLIN: Because you'd already made a  
5 determination it was natural?

6 DR. LAJOIE: Other data sets indicated it was  
7 natural.

8 MR. O'LAUGHLIN: Okay. If I understand your  
9 testimony, you believe that -- let me ask it a different  
10 way.

11 Can you give me you -- seem pretty good with  
12 definitions. Can you give me the definition of what a  
13 slough is?

14 DR. LAJOIE: In the geologic connection, it's a  
15 long linear body of water in which there's very little,  
16 if any, flow at various times.

17 MR. O'LAUGHLIN: Do sloughs have a terminus, a  
18 beginning point and ending point?

19 DR. LAJOIE: That's not part of the definition.

20 MR. O'LAUGHLIN: Okay. If you were looking at  
21 this and -- in your estimation, you believe that Duck  
22 Slough ran from Burns Cutoff to points down on American  
23 River; is that --

24 DR. LAJOIE: No. Just the reverse. Ran from  
25 Middle River to Burns Cutoff.

1           MR. O'LAUGHLIN: Okay. So the flow would have  
2 to come out of Middle River if it entered Duck Slough  
3 and flow in a northeasterly direction.

4           DR. LAJOIE: Primarily, yes. But it is tidally  
5 influenced in the lower part of Duck Slough, so there  
6 would probably be backwash in the lower reaches of Duck  
7 Slough adjacent to Burns Cutoff.

8           MR. O'LAUGHLIN: Have you found any material  
9 that says just the opposite, that the mouth of Duck  
10 Slough was at Burns Cutoff?

11          DR. LAJOIE: No, I have only seen it, the mouth  
12 being at Duck Slough -- excuse me -- of Duck Slough's  
13 mouth being on Burns Cutoff in every map that I have  
14 seen.

15          MR. O'LAUGHLIN: Okay. Do you know if there --  
16 what the gradient is from Middle River in the invert of  
17 the channel to the invert of the channel at Burns  
18 Cutoff?

19          DR. LAJOIE: The elevation, the five-foot  
20 contour crosses Duck Slough about halfway along, and the  
21 five to ten foot contour is well within Middle River.  
22 So I'd say it's probably seven feet at most at Middle  
23 River, and probably in order of three to four feet at  
24 Burns Cutoff.

25          That would be my best estimate without looking

1 at a map.

2 MR. O'LAUGHLIN: Did you go out in the field  
3 and take actual soil samples out in the field to confirm  
4 your photo interpretation?

5 DR. LAJOIE: No, I didn't.

6 I took photographs on the ground. I visited  
7 the various sites and various features that I mapped and  
8 walked out in some of the fields and photograph them to  
9 verify that there was silt there and not organic  
10 material.

11 MR. O'LAUGHLIN: Did you take any core samples  
12 at --

13 DR. LAJOIE: No, I didn't.

14 MR. O'LAUGHLIN: Wait. We got -- I know this  
15 is conversational and it's very informal, but you really  
16 have to wait until I finish asking my questions, and  
17 I'll extend you hopefully the same courtesy in your --

18 DR. LAJOIE: Okay.

19 MR. O'LAUGHLIN: -- responses. Okay?

20 Because it makes her job as a court reporter  
21 very difficult.

22 Did you take any core samples out in the field?

23 DR. LAJOIE: No.

24 MR. O'LAUGHLIN: Can we throw Exhibit 9 up on  
25 the Board please?

1 CHIEF LINDSAY: Figure 9?

2 MR. O'LAUGHLIN: Figure 9. Whatever.

3 So as you as you sit here today and you look at  
4 this map, can you tell whether or not the -- oh. I have  
5 a question. Sorry.

6 It says right here, it says areas underlain by  
7 soils. What do you mean by the term "underlain?"

8 DR. LAJOIE: Just means the soils are at the  
9 surface of the ground.

10 MR. O'LAUGHLIN: Okay. So if I -- under to me  
11 means below. So geologists have their own --

12 DR. LAJOIE: Yes.

13 MR. O'LAUGHLIN: So you're talking that these  
14 minerals soils are on top of the lands that are out  
15 there, and this is how they're depicted, correct?

16 DR. LAJOIE: That's correct.

17 MR. O'LAUGHLIN: Perfect. Okay.

18 Then you didn't take core samples. So can you  
19 tell on this map anywhere how thick the sedimentary soil  
20 is at any point on this map?

21 DR. LAJOIE: Yes.

22 MR. O'LAUGHLIN: You can? Okay. Great. How  
23 thick is it?

24 DR. LAJOIE: The topographic expression. On  
25 the 1913 topographic map, there's at least five feet of

1 relief on some of the channels. Oh, five -- let's see.  
2 Zero to five. Yes. And up to ten.

3 So there's about five -- well, I'd say two to  
4 five feet of relief on these features.

5 MR. O'LAUGHLIN: Okay. Did you make any  
6 determination and look at any soil samples, maps from  
7 the Delta, to determine on Middle River whether or not  
8 that was organic or peat material underneath Middle  
9 River?

10 DR. LAJOIE: No, I didn't.

11 MR. O'LAUGHLIN: Did you look at the soils  
12 on -- that are adjacent to Middle River that are  
13 overlain by this mineral deposit to see if they were in  
14 fact peat soils?

15 DR. LAJOIE: No, I didn't.

16 MR. O'LAUGHLIN: Have you made any review of  
17 the history of the building of the levees on Middle  
18 River and the problems they encountered?

19 DR. LAJOIE: The artificial levees?

20 MR. O'LAUGHLIN: Yes.

21 DR. LAJOIE: No, I didn't.

22 MR. O'LAUGHLIN: Would it be possible, when you  
23 look at -- you make a statement, mineral soils. Can you  
24 describe for me what you mean by mineral soils?

25 DR. LAJOIE: Mineral soils is a soils term.

1 And it's used by soils mappers to differentiate  
2 deposits, sedimentary deposits that are made up  
3 primarily of particulate quartz, sand, and silt as  
4 opposed to the organic-rich soils of the basins that are  
5 composed almost entirely of organic material from the  
6 bullrush marshes.

7           So the mineral soils would be developed on  
8 sediments that are transported into the basin, into this  
9 area, from the headwaters of the basin, primarily the  
10 Sierra Nevada.

11           MR. O'LAUGHLIN: Prior to 1911, do you know --  
12 let me put it this way.

13           Did you go out to Duck Slough and observe where  
14 it's currently connected to Burns Cutoff?

15           DR. LAJOIE: I have been there.

16           MR. O'LAUGHLIN: Okay. Is there a levee  
17 across --

18           DR. LAJOIE: There is an artificial levee, yes.

19           MR. O'LAUGHLIN: Wait a second. Got to wait.

20           DR. LAJOIE: Oh, I'm sorry.

21           MR. O'LAUGHLIN: I know you're jumping. Don't  
22 worry. We'll get out of here. Okay.

23           So there's an artificial levee across the --  
24 what we'll call the entrance of Duck Slough into Burns  
25 Cutoff, correct?

1 DR. LAJOIE: The day that I was there, I was  
2 not focusing on whether or not it was connected so I  
3 wouldn't want to testify specifically as to what that  
4 looks like, no.

5 MR. O'LAUGHLIN: Okay. Do you know at any time  
6 during the course of the work that you've done if and  
7 when a levee was built across the entrance of Duck  
8 Slough as it entered Burns Cutoff?

9 DR. LAJOIE: An artificial levee?

10 MR. O'LAUGHLIN: Yes, an --

11 DR. LAJOIE: No.

12 MR. O'LAUGHLIN: Okay. Do you have any  
13 knowledge of when an artificial levee was built across  
14 the entrance of Duck Slough to Middle Slough?

15 DR. LAJOIE: No.

16 MR. O'LAUGHLIN: Okay.

17 MR. HERRICK: I'm sorry. I just object. What  
18 are you referring, to Middle Slough?

19 MR. O'LAUGHLIN: I'm sorry. Middle River.  
20 I'll rephrase the question.

21 DR. LAJOIE: It doesn't enter Middle River.  
22 The slough exits Middle River at that point.

23 MR. O'LAUGHLIN: I thought we -- you said  
24 before that --

25 DR. LAJOIE: The flow is to the north, from



1 Middle River to Burns Cutoff. So it exits Middle River  
2 and enters Burns Cutoff.

3 MR. O'LAUGHLIN: Thank you for clarifying that.

4 Do you know when a levee was built -- an  
5 artificial levee was built across that feature?

6 DR. LAJOIE: No.

7 MR. O'LAUGHLIN: Did you review Mr. Neudeck's  
8 testimony to figure out if in fact in 1875 Duck Slough  
9 had a levee built across the exit point as it went into  
10 Burns Cutoff?

11 DR. LAJOIE: No independent review of that  
12 feature.

13 MR. O'LAUGHLIN: Okay. Is it possible that if  
14 you -- excuse me. Sorry.

15 Are you familiar with the term on these legends  
16 called the high ridge levee?

17 DR. LAJOIE: Yes.

18 MR. O'LAUGHLIN: Okay.

19 Now in your opinion is the high ridge levee a  
20 natural levee, or is it an artificial levee, or did it  
21 start out as a natural levee and get improved?

22 DR. LAJOIE: The latter, I would assume. But  
23 that's -- I didn't concern myself with that issue. I  
24 just used it as the course of the natural -- what had  
25 had been the natural course of Duck Slough.

1           MR. O'LAUGHLIN: Do you have any knowledge or  
2 understanding of why the high ridge levee was improved  
3 upon?

4           DR. LAJOIE: I have no idea.

5           MR. O'LAUGHLIN: Do you know when it was  
6 improved upon?

7           DR. LAJOIE: I have no idea.

8           MR. O'LAUGHLIN: Do you know how it was  
9 approved upon?

10          DR. LAJOIE: I have no idea.

11          MR. O'LAUGHLIN: If there -- let me ask -- if  
12 there was -- you said the water flows from the Middle  
13 River up on this slough. How -- if a levee had been  
14 built -- and I will offer to you that a levee had been  
15 built across the mouth of Duck Slough at Middle River  
16 prior to this blow-out that you've been talking about.

17          DR. LAJOIE: Correct.

18          MR. O'LAUGHLIN: Okay. So how is it that all  
19 that sediment ended up on that property?

20          DR. LAJOIE: I would just say the blow-out  
21 itself is evidence that there was enough discharge,  
22 meaning stream flow, in Duck Slough to supply the amount  
23 of water and the amount of sediment that produced that  
24 blow-out. And I didn't concern myself with whether or  
25 not the slough was connected to Middle River in that

1 interpretation.

2 MR. O'LAUGHLIN: All right. Do you know -- one  
3 of the things you relied upon is this map, the  
4 assessor's map, that shows the blue line on it. Did the  
5 other maps that you received from the assessor have blue  
6 lines on them depicting Duck Slough?

7 DR. LAJOIE: Which dates are you referring to?

8 MR. O'LAUGHLIN: You have the Duck Slough one  
9 dated --

10 DR. LAJOIE: 1876, '93, and '98.

11 MR. O'LAUGHLIN: Yes. Either one. Any of  
12 them. There's other assessor's maps that don't show a  
13 blue line; is that correct?

14 DR. LAJOIE: Those blue lines were not on the  
15 original maps. Those are my interpretation what  
16 those -- the hand-drawn lines on those maps represent,  
17 waterways.

18 MR. O'LAUGHLIN: Okay. Do you know what the  
19 job of an assessor was in 1875?

20 DR. LAJOIE: I have no idea.

21 MR. O'LAUGHLIN: Do you know when assessors  
22 went out and assessed properties for the purposes of  
23 taxing?

24 DR. LAJOIE: No idea.

25 MR. O'LAUGHLIN: I'm concerned -- puzzled by

1 this graphic feature. If the slough goes from Middle  
2 River to Burns Cutoff, then why isn't the area to the  
3 south of that a separate island? Because the -- it  
4 would be disconnected from a watercourse, it would seem  
5 to be a separate island. Why wasn't it labeled a  
6 different island?

7 DR. LAJOIE: Again, I have no idea why they  
8 labeled certain things and didn't label others on these  
9 maps.

10 I did note that as I used each map as more  
11 names were added, which I assumed meant that the land  
12 was subdivided more and more through time. More names  
13 were added. More -- and moved from the southeast to the  
14 northwest. That more features appeared on these maps.

15 That had nothing whatsoever to do with my  
16 geologic interpretation. It was merely an incidental  
17 observation.

18 MR. O'LAUGHLIN: I mean as a geologist, it  
19 seems to me that like Burns Cut. Burns Cut cuts off  
20 from the San Joaquin River and created Rough and Ready  
21 Island.

22 If Duck Slough ran across the island, as you  
23 depicted, wouldn't this southern portion of Roberts  
24 Island be a totally separate island?

25 DR. LAJOIE: Yes.

1 MR. O'LAUGHLIN: All right.

2 DR. LAJOIE: But an island would have to be  
3 something with the waterway on the other side. So it  
4 would be an island between Duck Slough and the main  
5 course of the river, if that's what your point is.

6 And to me that -- the name that's given that is  
7 Middle Roberts Island.

8 MR. O'LAUGHLIN: Okay. Item number 18 in that  
9 photo, if we look out the blow-out photo, and then we  
10 look back at your Exhibit number 9, would the mineral  
11 deposits that are depicted in 18 show up on Exhibit 9?

12 DR. LAJOIE: Yes, they would.

13 MR. O'LAUGHLIN: When you received mister --  
14 did you receive Mr. Neudeck's testimony in time prior to  
15 it being submitted to the State Board? Did you get a  
16 chance to see it ahead of time?

17 DR. LAJOIE: When I see Neudeck? I saw that  
18 fairly early on.

19 MR. O'LAUGHLIN: Okay. Did you call him up and  
20 ask him any questions --

21 DR. LAJOIE: No.

22 MR. O'LAUGHLIN: -- about the history that he's  
23 depicted in his --

24 DR. LAJOIE: None whatsoever.

25 MR. O'LAUGHLIN: Okay. Do sloughs normally

1 have distributaries?

2 DR. LAJOIE: I would have to look at a map, and  
3 if they have distributaries, yes, they do. If they  
4 don't, no, they don't.

5 MR. O'LAUGHLIN: From --

6 DR. LAJOIE: There's no rule one way or the  
7 other.

8 MR. O'LAUGHLIN: Okay. You said you received  
9 some documents from Mr. Nomellini regarding technical  
10 witnesses in the past. Do you know who those witnesses  
11 were or --

12 DR. LAJOIE: There was Wilcox. There was  
13 Neudeck. I can't think of -- maybe -- those were the  
14 two that stand out my mind.

15 MR. O'LAUGHLIN: If Duck Slough had a levee  
16 built across Burns Cut and a levee across Middle River,  
17 how in your opinion did Middle River -- I mean how did  
18 Duck Slough continue to conduct sediment into Roberts  
19 Island?

20 DR. LAJOIE: At what time?

21 MR. O'LAUGHLIN: At any time prior to 1911.

22 DR. LAJOIE: That would -- I don't know if I  
23 can answer the question the way you ask it.

24 MR. O'LAUGHLIN: Let me ask it another way.

25 Isn't it true that if a levee was built across

1 the entrance at Middle River and a levee was built  
2 across the exit point on Burns Cut, there would be no  
3 ability for Duck Slough to conduct sediment into the  
4 basin after that time period, correct?

5 DR. LAJOIE: Probably, yes.

6 MR. O'LAUGHLIN: Do you agree with Mr.  
7 Neudeck's assessment that Duck Slough was widened by 30  
8 feet by 7 feet by a clamshell steam engine?

9 DR. LAJOIE: I took --

10 MR. O'LAUGHLIN: Did you see that in your  
11 geographic review?

12 DR. LAJOIE: I didn't consider any -- testing  
13 that data whatsoever.

14 MR. O'LAUGHLIN: All right.

15 I have no further questions. Thank you for  
16 time your. Appreciate it.

17 CO-HEARING OFFICER BAGGETT: Any other parties  
18 wish to cross-examine this panel? If not, any redirect.

19 MR. HERRICK: Yes. I would like to cover a  
20 couple of issue that were raised on cross.

21 WATER RESOURCE CONTROL ENGINEER MONA: I had  
22 one question.

23 Can you tell us when did -- what point in time  
24 did Duck Slough cease to exist as a natural channel?

25 DR. LAJOIE: I have no idea. From the data

1 that I analyzed, it would have to be, I would say, after  
2 1911. Because the 1913 USGS quadrangle shows a blue  
3 line connecting Middle River with Burns Cutoff, and I  
4 interpret that as a through-flowing channel. So I  
5 suspect it would be after that date.

6 WATER RESOURCE CONTROL ENGINEER MONA:  
7 Presently though, it's just a manmade channel that  
8 follows the course of what used to be Duck Slough?

9 DR. LAJOIE: I'm sorry; repeat that?

10 WATER RESOURCE CONTROL ENGINEER MONA:  
11 Presently it's just a manmade channel now?

12 DR. LAJOIE: There is no channel there.

13 There are cement-lined drainage -- excuse me --  
14 irrigation ditches on both sides of the road. The main  
15 channel's been filled, and it's now the road. It's  
16 called Inland Road.

17 WATER RESOURCE CONTROL ENGINEER MONA: Okay.  
18 Thank you.

19 CO-HEARING OFFICER HOPPIN: Mr. Lajoie, a  
20 follow-up to that.

21 Would the USGS map that you mentioned have  
22 shown a blue line if the slough was in fact a dead  
23 slough and had been cut off on both ends?

24 DR. LAJOIE: The USGS topographic maps are very  
25 inconsistent on the way they depict waterways, whether



1 isolated or not.

2               There are some maps that I have worked with  
3 where there was no disruption whatsoever on a waterway  
4 and it's not shown on the map.

5               Others where in the later USGS topo of this  
6 area shows numerous, numerous, dozens and dozens of blue  
7 lines that show every little irrigation channel or  
8 drainage channels on it.

9               So it's very -- it's extremely variable, and I  
10 have no idea how the decision's made what is to -- how  
11 it's depicted on a map or what is depicted on those  
12 maps.

13               CO-HEARING OFFICER HOPPIN: Thank you for your  
14 answer.

15               CO-HEARING OFFICER BAGGETT: Anything else?  
16 Mr. Herrick?

17                                         --o0o--

18               REDIRECT-EXAMINATION BY MR. HERRICK  
19 FOR RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI INVESTMENT  
20               LP; YONG PAK AND SUN YOUNG

21               MR. HERRICK: Could we put figure 9 back up  
22 there please?

23               Mr. Lajoie, it's been questioned as to whether  
24 the soils you've highlighted in red ended up there  
25 naturally. In your expert opinion, could this

1 configuration of mineral soils surrounded by other soils  
2 of different types have resulted from anything except  
3 natural condition?

4 DR. LAJOIE: No.

5 MR. HERRICK: And the only way those soils  
6 could have gotten there would be through, is it correct  
7 to say, alluvial deposition?

8 DR. LAJOIE: Yes, stream flow.

9 MR. HERRICK: So stream flow.

10 And you can trace that stream flow and the  
11 amount of the deposit and determine the direction of the  
12 flow; is that correct?

13 DR. LAJOIE: That's correct.

14 MR. HERRICK: And whether or not some channel  
15 starts one direction but then cuts iis way into another  
16 channel is irrelevant to whether or not you determine  
17 the initial cause of the those alluvial deposits?

18 DR. LAJOIE: That's correct.

19 Although I would add that the general slope of  
20 this area is to the north. So it's reasonable to assume  
21 that when you see two major large levees connected by  
22 smaller channels with levees that the flow is primarily  
23 to the north.

24 Keep in mind that the source of the mineral  
25 sediment is to the south, higher in the drainage basin,

1 so all that sediment is moving northward through the  
2 Delta system.

3 MR. HERRICK: And I believe you said in your  
4 direct testimony that once these channels have connected  
5 in a new spot, then given the elevation of the land and  
6 the tidal action, water can actually flow in either  
7 direction depending on the conditions.

8 DR. LAJOIE: That's correct.

9 MR. HERRICK: And that would have been true for  
10 Duck Slough in your opinion?

11 DR. LAJOIE: That's correct.

12 Those parts of Duck Slough that lie below the  
13 Atwater high tide line, if he's made a correct  
14 amendment, and I think he has. Higher than that, there  
15 would be very little influence of the tides.

16 MR. HERRICK: It's a question of the height of  
17 the land and the water?

18 DR. LAJOIE: That's correct.

19 MR. HERRICK: And did your answer take into  
20 account any groundwater that may be connected to the  
21 channels?

22 DR. LAJOIE: No.

23 MR. HERRICK: Okay. But that too might affect  
24 whether or not water is on the land; is that correct?

25 DR. LAJOIE: That's correct, especially in the

1 inter-levee basins.

2 MR. HERRICK: Mr. Lajoie, you were asked  
3 whether or not in your investigation you would use  
4 corroborating historical documents if they were present.

5 DR. LAJOIE: That's correct.

6 MR. HERRICK: And in this case, there were  
7 corroborating historical documents; is that correct?

8 DR. LAJOIE: On occasion, yes.

9 MR. HERRICK: So when you locate what you think  
10 was a major distributary off of Middle River which has  
11 been labeled Duck Slough, you then found or were  
12 provided with other documents included maps and  
13 assessor's maps and things like that which also had this  
14 feature or a similarly situated feature; is that  
15 correct?

16 DR. LAJOIE: That's correct.

17 MR. HERRICK: And one of those documents was  
18 the 1911 USGS quad data that was on the 1913 map; is  
19 that correct?

20 DR. LAJOIE: That's correct.

21 MR. HERRICK: And that map doesn't show water  
22 in say Woods Irrigation District channels or anything,  
23 does it? I'm sorry. That would be --

24 DR. LAJOIE: Number 6.

25 MR. HERRICK: 6. Sorry.

1 DR. LAJOIE: No. I haven't superimposed any of  
2 the Woods Irrigation District channels on this map.

3 MR. HERRICK: Yes, but my point is if USGS puts  
4 water in Duck Slough but doesn't put it in what we  
5 believe to be irrigation channels, then in this  
6 particular instance it is the -- it appears to be the  
7 USGS opinion there is a waterway there?

8 DR. LAJOIE: That's correct.

9 MR. HERRICK: And whether or not somebody's  
10 expanded it, moved it two feet to the left, or widened  
11 it doesn't have anything to do with the fact that there  
12 was water in it?

13 DR. LAJOIE: No. And the disturbing thing on  
14 this map, as all the other maps, and that's why I showed  
15 Robin Grossinger's map, is that for, I'm sure, practical  
16 purposes all of the existing channels were never mapped  
17 in detail on these topographic maps or any other map,  
18 for example.

19 So I interpret what's depicted here on the USGS  
20 map as a minimum of the number of the channels that  
21 existed in this area, and they're probably only the  
22 prominent ones.

23 MR. HERRICK: If you could pull up figure 2,  
24 Mr. Lindsay, please?

25 Mr. Lajoie, you testified about whether or not

1 the blue line on this assessor's map was any sort of  
2 indication of the exact line of a Duck Slough?

3 DR. LAJOIE: Yes, I testified to that.

4 MR. HERRICK: And your answer was you assumed  
5 this was just some representation drawn by the assessor  
6 and not a survey of the actual line.

7 DR. LAJOIE: That's correct.

8 MR. HERRICK: And you do have other evidence,  
9 other maps, that put the Duck Slough line along what  
10 you've identified as geographical features; is that  
11 correct?

12 DR. LAJOIE: That's correct.

13 MR. HERRICK: So the fact that this blue line  
14 doesn't necessarily match those geological features  
15 doesn't affect your opinion that the blue line on the  
16 map was meant to represent some channel?

17 DR. LAJOIE: No, it doesn't.

18 MR. HERRICK: And you don't think that it  
19 represented some separate channel in Duck Slough which  
20 was on a later map, do you?

21 DR. LAJOIE: Not in any way.

22 MR. HERRICK: Now Mr. Lajoie, there was a  
23 question about the following assessor's map used by you,  
24 and -- excuse me -- the following figures 3 and 4.  
25 Would you just look at those briefly?

1           And the question noted that on figure 3 there's  
2 no Whiskey Slough up to the top.

3           DR. LAJOIE: That's correct.

4           MR. HERRICK: And on figure 4 there is.

5           DR. LAJOIE: That's correct.

6           MR. HERRICK: You note that on figure 3 one  
7 person or company owned all that property where Whiskey  
8 Slough was; is that correct?

9           DR. LAJOIE: Well, I didn't indicate that, but  
10 the indication of that one name there implies that.

11          MR. HERRICK: And on figure 4, there are all  
12 sorts of new peoples whose properties either abut or are  
13 affected by Whiskey Slough.

14          DR. LAJOIE: That's correct.

15          MR. HERRICK: So in your opinion as somebody  
16 who reviews maps like this, it doesn't appear the  
17 assessor had any reason to draw in what the Whiskey  
18 Slough was.

19          DR. LAJOIE: That's correct.

20          MR. HERRICK: So the fact that it doesn't  
21 appear on both maps doesn't change your opinion about  
22 the conclusions you made based on geological features.

23          DR. LAJOIE: None whatsoever.

24          MR. HERRICK: I feel like I'm wasting time. I  
25 don't mean to.

1           Mr. Lajoie, we had a brief discussion or you  
2 had questions regarding whether Photoshop altered maps  
3 or not. But isn't it correct that the artificial  
4 colorings you put on maps or overlays on the maps are  
5 merely to allow a more visual -- a more easily visual  
6 detection of changes; is that correct?

7           DR. LAJOIE: Of the features that are on that  
8 photograph; that's correct.

9           MR. HERRICK: It's not adding features. It's  
10 just changing the colors for a better --

11           DR. LAJOIE: For better visual effect. And  
12 that's a technique used extensively throughout science  
13 in every field and pioneered, actually, by NASA to  
14 illustrate data from astronomical studies.

15           I use the same techniques they do and that they  
16 recommended.

17           MR. HERRICK: Then of course in your  
18 description of Adobe Illustrator, that's GIS work trying  
19 to make maps, different maps --

20           DR. LAJOIE: It's not GIS, in that there is no  
21 rectification aspect to Adobe Illustrator and that those  
22 are the programs that Don Moore uses.

23           I use Adobe Illustrator on a map, on an aerial  
24 photograph that's been rectified, or even if it hasn't,  
25 only to trace lines, not to make precise alignments. I



1 only trace lines on Adobe Illustrator.

2 MR. HERRICK: And it's not your intent in your  
3 testimony to say that when you have placed a line for a  
4 feature that you're correct down to the specific inch or  
5 anything, correct?

6 DR. LAJOIE: No, but I would add this. That  
7 prior to the advent of computerized analysis of digital  
8 files of maps and aerial photographs, it was extremely  
9 difficult using optical tools to transfer features from  
10 say an aerial photograph to a map or vice versa.

11 The digital techniques we use now make that an  
12 extremely efficient and extremely accurate means of  
13 mapping.

14 And what maybe in the past -- say Brian  
15 Atwater's work, at that era, the techniques he used,  
16 maybe 50 to 100 feet would be acceptable.

17 I think -- and Don and I have talked about  
18 this -- we're down -- we can put a line between a  
19 tractor and a barn on the aerial photograph, so we're  
20 down to within five feet whereas just 25 years ago you  
21 couldn't get within say 50 feet.

22 So the computer techniques greatly enhance the  
23 accuracy of the work that we do now with the very same  
24 documents.

25 MR. HERRICK: So your work presented today and

1 Mr. Moore's work reflect that increased accuracy, not --  
2 are not an indication of some failure to draw lines  
3 correctly?

4 DR. LAJOIE: That's correct.

5 MR. HERRICK: If we could pull up figure 8  
6 please.

7 Mr. Lajoie, you were asked questions about  
8 whether or not the lines on this figure, which is a map  
9 including the Woods Irrigation Company boundaries, I'll  
10 say -- that's not quite right.

11 But when you reviewed this map, you weren't  
12 trying to make any distinction between lines that were  
13 for irrigation canals or drainage canals, were you?

14 DR. LAJOIE: No.

15 MR. HERRICK: You were just identifying the  
16 features that the canals reflected, and then you  
17 eventually compared them to the soil maps that you were  
18 developing?

19 DR. LAJOIE: No.

20 MR. HERRICK: Sorry. Please clarify.

21 DR. LAJOIE: All of the channels that are shown  
22 on this map that are geometrically simples -- north,  
23 south, east, west lines -- or even segments of some of  
24 the irregular channels that obviously are very straight  
25 I interpreted as artificial channels.

1           Those features that are rather sinuous, very  
2 irregular, just parading across the countryside, I  
3 interpreted as natural channels.

4           And I didn't -- none of my interpretation of  
5 this map was influenced in any way whatsoever by any  
6 other document that I had analyzed.

7           I took the information from this map and  
8 superimposed it on the other documents and found  
9 striking resemblance and completeness.

10           MR. HERRICK: And that striking resemblance is  
11 on figure 9 where your highlighted red areas actually  
12 match up to all of the distributaries of Middle River  
13 and/or Duck Slough?

14           DR. LAJOIE: Both the tributaries and the  
15 distributaries, and I superimposed them only the later  
16 figures in which I compared my mapping, Brian Atwater's  
17 mapping, and the channels from this map, and there's  
18 striking similarities amongst the three data sets.

19           And those further documents would be figure 15  
20 and I think 17. That's correct. Figure 15 and figure  
21 17 have all three data sets, and they match very  
22 closely.

23           And each of the data sets was generated  
24 completely independent of the others. No influence from  
25 interpreting one data set to the other.

1           MR. HERRICK:  So as sort of a summary question,  
2  you looked at elevations and soils and geological  
3  features and we see squiggly lines from Woods maps and  
4  we see assessor's maps, and everything corroborates your  
5  view, your opinion, that Duck Slough was a main channel  
6  off of Middle River flowing towards Burns Cutoff; is  
7  that correct?

8           DR. LAJOIE:  It was the main channel in this  
9  area.

10          MR. HERRICK:  And other evidence suggests that  
11  water was still in it through 1911; is that correct?

12          DR. LAJOIE:  That's correct.

13          MR. HERRICK:  Now lastly, the discussion -- the  
14  questions that you were asked dealt with the time frame  
15  for your conclusions, and you defined original  
16  conditions as 1850; is that correct?

17          DR. LAJOIE:  That's correct.

18          MR. HERRICK:  And although that's what your  
19  examination of the geological or physical evidence might  
20  be, in this case you also had extra corroborating  
21  evidence for time periods for time frames past 1850; is  
22  that correct.

23          DR. LAJOIE:  That's correct.

24          MR. HERRICK:  And without being too redundant,  
25  that includes documentation that suggests to you that

1 this main channel off of Middle River actually had water  
2 in it through 1911; is that correct?

3 DR. LAJOIE: Yes, that's correct.

4 MR. HERRICK: And you of course don't know  
5 whether or not that main channel lasted one year, two  
6 years, ten years later or was immediately filled in  
7 after the USGS produced their data?

8 DR. LAJOIE: That's correct.

9 MR. HERRICK: Okay.

10 Those are all the questions I have. Thank you  
11 very much.

12 CO-HEARING OFFICER BAGGETT: Any recross?

13 Mr. O'Laughlin?

14 MR. O'LAUGHLIN: I have no recross.

15 CO-HEARING OFFICER BAGGETT: Mr. Rubin? Anyone  
16 else? Going once. Okay. Thank you. Exhibits -- do  
17 you want to wait till we're done with the entire case?

18 MR. HERRICK: We should probably wait until the  
19 case-in-chief is done to offer any --

20 CO-HEARING OFFICER BAGGETT: That would be  
21 fine.

22 MR. O'LAUGHLIN: I would agree with that.

23 CO-HEARING OFFICER BAGGETT: Very good. We'll  
24 send out a note. Find a date.

25 MR. HERRICK: So it will be pursuant to further

1 notice?

2 CO-HEARING OFFICER BAGGETT: Probably quite  
3 further. At least a month.

4 MR. HERRICK: Okay. Thank you.

5 CO-HEARING OFFICER BAGGETT: Thanks.

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7 (Thereupon the WATER RESOURCES CONTROL  
8 BOARD meeting was continued at 4:42 p.m.)

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1 CERTIFICATE OF REPORTER

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

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

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

12 IN WITNESS WHEREOF, I have hereunto set my hand  
13 this May 24, 2010.

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

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