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01 PUBLIC HEARING
02 STATE WATER RESOURCES CONTROL BOARD
03 DIVISION OF WATER RIGHTS
04 STATE OF CALIFORNIA

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08 SUBJECT: AMENDMENT OF CITY OF LOS ANGELES' WATER RIGHT
09 LICENSES FOR DIVERSION OF WATER FROM STREAMS THAT ARE
10 TRIBUTARY TO MONO LAKE

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14 Held in
15 Resources Building
16 Sacramento, California
17 Wednesday, December 22, 1993

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19 VOLUME XXVIII

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23 Reported by: Kelsey Davenport Anglin, RPR,
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SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 22, 1993, 8:30 A.M.

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HEARING OFFICER DEL PIERO: Ladies and Gentlemen,
this hearing will come to order. On behalf of the
State Water Resources Control Board, let me extend our
appreciation and compliments of the season to everyone
who's participating here on the last day of hearings

09 for the calendar year 1993 on the matter of the
10 tributaries of Mono Lake.

11 This is the time and place for the continuation of
12 the hearing of the State Water Resources Control Board
13 regarding the amendment of the City of Los Angeles'
14 water rights licenses for the diversion of water from
15 the streams that are tributary to Mono Lake.

16 My name is Marc Del Piero. I'm the Vice-Chair of
17 the State Water Resources Control Board acting in the
18 capacity as Hearing Officer, and with me today is my
19 good friend, Mr. John Brown, who is also a member of
20 the State Water Resources Control Board.

21 Mr. Flinn, I understand we have some housekeeping
22 before we begin with the witnesses.

23 MR. FLINN: Yes, Sir, we do. Mr. Jeff Collins,
24 who joins us at the table, is a constant reminder that
25 I failed to get some of the documents officially moved

0007

01 into evidence, and I always do --

02 HEARING OFFICER DEL PIERO: Mr. Collins, where did
03 you go to school?

04 MR. COLLINS: Stanford.

05 (Laughter.)

06 HEARING OFFICER DEL PIERO: Stanford.

07 Please continue, Mr. Flinn.

08 MR. FLINN: Drs. Herbst and Winkler, during their
09 cross-examination, did some drawings of the chart. We
10 have passed out hand graphic versions of those. Those
11 are Exhibits 235 and 238, and I neglected to move their
12 admission previously.

13 HEARING OFFICER DEL PIERO: Any objections?

14 None? Those will be ordered into the record.

15 (NAS/MLC Exhibits Nos. 235 and
16 238 were admitted into
17 evidence.)

18 MR. FLINN: In addition, during the
19 cross-examination of Drs. Wade and Carson, I did an
20 overhead from a chart from the Draft EIR that
21 normalized some numbers that were handwritten on. I
22 have prepared and distributed Exhibit 242, which is a
23 typed up version of that normalized chart. I neglected
24 to move that -- I didn't neglect, I promised to do this
25 and move it into evidence when I had a handwritten

0008

01 version, and I will do that at this time.

02 HEARING OFFICER DEL PIERO: Any objections?

03 MR. BIRMINGHAM: We will stipulate to the
04 admission of this exhibit if my learned opposing
05 Counsel, all of them, will quit trying to prejudice the
06 Board by referring to the testimony of Drs. Wade and
07 Carson.

08 (Laughter.)

09 MR. FLINN: I'll be happy to.

10 HEARING OFFICER DEL PIERO: I don't hear a
11 resounding agreement from your -- those will be ordered
12 into the record, also.

13 (NAS/MLC Exhibit No. 242 was
14 admitted into evidence.)

15 MR. FLINN: And finally, just to save Mr. Dodge
16 the trouble, Dr. Stine made two diagrams last night.

17 Those were Exhibits 243 and 244. We will be providing
18 eight and a half by 11 versions of those, but I would
19 move their admission now as well.
20 HEARING OFFICER DEL PIERO: I'm sure they'll be
21 suitable for framing; is that true?
22 MR. FLINN: They will be.
23 HEARING OFFICER DEL PIERO: Any objections to
24 note? Those will be ordered into the record, also.
25 (NAS/MLC Exhibits Nos. 243 and
0009
01 244 were admitted into
02 evidence.)
03 MS. CAHILL: I would like to move admission of DFG
04 177, the memo I discussed yesterday.
05 HEARING OFFICER DEL PIERO: Any objection? So
06 ordered.
07 (DFG Exhibit No. 177 was
08 admitted into evidence.)
09 HEARING OFFICER DEL PIERO: Good morning,
10 Mr. Dodge.
11 MR. DODGE: Good morning.
12 HEARING OFFICER DEL PIERO: You're looking fit
13 this morning, Sir.
14 MR. DODGE: I am fit this morning. Looking
15 forward to battling the crowds tomorrow on the mall.
16 I would like to move the admission of the
17 testimony of --
18 HEARING OFFICER DEL PIERO: Sweaters. Sweaters
19 work well.
20 (Laughter.)
21 MR. DODGE: Referred to by yesterday's panel.
22 HEARING OFFICER DEL PIERO: See, all the women are
23 nodding their heads vigorously.
24 MR. BIRMINGHAM: What do we do for eight-year-old
25 children?
0010
01 HEARING OFFICER DEL PIERO: Oh, Buddy, are you in
02 trouble. I'll tutor you privately afterwards on that.
03 MR. FLINN: Star Trek action figures.
04 HEARING OFFICER DEL PIERO: They're girls, X-men
05 don't cut it.
06 Please proceed.
07 MR. DODGE: That reminds me of a joke, but I can't
08 tell it here.
09 HEARING OFFICER DEL PIERO: Okay.
10 MR. DODGE: I would like to move the admission of
11 the testimony of Ms. Baldrige, Exhibit Cal-Trout 1.
12 The testimony of Mr. Trihey, National Audubon Society
13 and Mono Lake Committee Exhibit 1-X and 1-Y, and the
14 Audubon exhibits referred to in Mr. Trihey's testimony,
15 those being Exhibits 104 through 140, Exhibit 217,
16 Exhibit 240 and 241, which are the blowups that
17 Mr. Trihey was using yesterday. And finally, I would
18 like to move the admission of State Water Resources
19 Control Board Exhibits 36-A through BB.
20 HEARING OFFICER DEL PIERO: Any objections? So
21 ordered. I'm sorry.
22 MR. BIRMINGHAM: Yes. I don't really have an
23 objection to the admission of any of these documents,
24 but I would like to note that many of the exhibits that

25 are attached -- or that are referred to in Mr. Trihey's
0011
01 testimony are technical reports that were prepared by
02 Mr. Trihey and they were not supplied to the parties.
03 There was a note attached to -- a cover sheet of each
04 one those exhibits that stated that they were being --
05 that they were not being supplied to the parties
06 because they had previously been distributed to all of
07 the parties. In fact, we do not have all of the
08 exhibits that -- or all of the reports that have been
09 identified.

10 I wasn't prepared to talk about this today because
11 Mr. Roos-Collins said that he was going move for the
12 admission of these later, but what I'd like to do is
13 stipulate to the admission of these documents at this
14 time but provide a list to Mr. Dodge of those reports
15 that we do not have, and then we can perhaps get them
16 from Mr. Trihey.

17 MR. DODGE: That's fine.

18 HEARING OFFICER DEL PIERO: Thank you very much.
19 (Cal Trout Exhibit No. 1 was
20 admitted into evidence.)
21 (NAS/MLC Exhibits Nos. 1-X,
22 1-Y, 104 through 140, 217,
23 240, 241 were admitted into
24 evidence.)
25 (SWRCB Exhibits Nos. 36-A

0012
01 through BB were admitted
02 into evidence.)

03 HEARING OFFICER DEL PIERO: Any other clean up
04 this morning before we start?

05 MR. SMITH: Just as a note for the record,
06 Mr. Chairman. We have been provided all of those
07 documents.

08 HEARING OFFICER DEL PIERO: Sweaters, Mr. Dodge.

09 Okay. This morning we have witnesses on behalf of
10 the U.S. Forest Service, the U.S. Fish and Wildlife
11 Service, and the Sierra Club. Who's here on behalf of
12 the Forest Service this morning?

13 MR. GIPSMAN: I am, Mr. Del Piero, Jack Gipsman.

14 HEARING OFFICER DEL PIERO: Good morning,
15 Mr. Gipsman. Nice to see you again, Sir.

16 MR. GIPSMAN: Nice to be here.

17 HEARING OFFICER DEL PIERO: Why don't you come up
18 and begin with your witness?

19 If you'd raise your right hand, Mr. Martin. Do
20 you promise to tell the truth during the course of this
21 proceeding?

22 MR. MARTIN: I do.

23 HEARING OFFICER DEL PIERO: Thank you. Have a
24 seat.

25 MR. GIPSMAN: This Court Reporter hasn't seen me

0013
01 before so I will identify myself. I'm Jack Gipsman
02 from the Office of General Counsel, U.S. Department of
03 Agriculture, and I am the attorney representing the
04 Forest Service.

05 HEARING OFFICER DEL PIERO: Mrs. Anglin is the
06 purveyor of cookies for today. That's got to go into

07 the record.
08 THE REPORTER: Preserved for posterity.
09 DIRECT EXAMINATION BY MR. GIPSMAN
10 Q Mr. Martin, would you identify yourself?
11 A Dennis W. Martin, D-E-N-N-I-S, initial W.,
12 M-A-R-T-I-N.
13 Q By whom are you employed?
14 A U.S. Department of Agriculture, Forest Service.
15 Q And what is your position with the Forest Service?
16 A Currently assigned as forest supervisor for the
17 Inyo National Forest in Bishop, California.
18 Q What are your responsibilities --
19 THE REPORTER: I'm sorry. Supervisor for --
20 MR. MARTIN: The Inyo National Forest in Bishop,
21 California.
22 HEARING OFFICER DEL PIERO: Mr. Martin, you may
23 want to pull the microphone --
24 Q BY MR. GIPSMAN: Inyo is spelled I-N-Y-O.
25 And what are your responsibilities in that
0014
01 position?
02 A BY MR. MARTIN: My responsibilities are basically the
03 overall administration of the forest, responsible for
04 all programs. The Inyo Forest includes about two
05 million acres, mostly in California, some in Nevada.
06 It also includes the Mono Basin National Forest.
07 Q Are you familiar with the U.S. Forest Service
08 Exhibit 14, statement of Dennis W. Martin?
09 A Yes, I am.
10 Q Did you prepare that exhibit?
11 A I did.
12 Q Is that a true and accurate statement of your
13 testimony?
14 A Yes, it is.
15 Q Would you please summarize your testimony for the
16 Board?
17 A Okay. I've pretty well gone over my bonafides and
18 background. When Public Law 38452 was signed into law,
19 they extended the boundary of the Inyo National Forest
20 to include the public lands that surrounded Mono Lake
21 known as the Mono Basin National Forest Scenic Area.
22 At that time, when the law was passed, we were required
23 to prepare a comprehensive management plan within three
24 years of the time that the -- of the signing of the
25 act. We went through that process of developing an
0015
01 Environmental Impact Statement, and finally, on March
02 16th, 1990, I approved the Final Environmental Impact
03 Statement and Comprehensive Management Plan for the
04 scenic area. Those are U.S. Forest Service Exhibit 1
05 and 2, and I did bring two copies of those this
06 morning. I understand they weren't available last
07 week.
08 The Comprehensive Management Plan represents a
09 lake level from 6377 to 6390 feet. When I agreed to
10 that particular alternative, I recognized that there
11 were a number of trade-offs as far as various resource
12 values were concerned, but we felt the management near
13 the midpoint represented a reasonable balance and
14 insured protection of geologic, scenic, and cultural

15 values within the basin, which was consistent with the
16 legislation established.

17 The CMP, Comprehensive Management Plan, I'll use
18 that abbreviation, if I may, is intended to provide
19 management direction for a 10- to 15-year period for
20 the scenic area. It also states in most of the plans
21 we prepared, there may be a need to vary from the
22 standards and guidelines and description for the
23 management direction due to unseen site conditions,
24 uncontrollable circumstances, natural phenomena, or new
25 information.

0016

01 If this does occur, then we're required by the
02 National Environmental Policy Act to do an appropriate
03 level of analysis and, if warranted, amend or revise
04 the plan.

05 At the time that I prepared this statement, the
06 Environmental Protection Agency was pursuing
07 classification of the Mono Lake Basin as a
08 non-attainment area, special PM-10 emissions, the Clean
09 Air Act. These come primarily from the relicted lands
10 and, of course, it's our responsibility, as a federal
11 agency, to comply with the state, with the Clean Air
12 Act requirements.

13 Once EPA's action was final, then we feel that we
14 need to reevaluate the CMP direction to make sure we
15 are consistent with the mandates of the Act.

16 Basically, there are three different -- three
17 general alternatives for reducing dust at the lake.
18 One is to provide for a water level at the lake of
19 approximately 6390. This is based on some modeling
20 done by the Great Basin Air Pollution Control District.
21 The other is some type of physical mitigation on the
22 relicted lands. Then the third alternative would be a
23 combination of the two.

24 Obviously, some changes will occur if the lake
25 level is raised to 6390. Some of the known sand Tufa

0017

01 formations, or most of those, we've seen some toppling
02 of the lithoid water-based Tufa, some other increases,
03 and I won't go into the details on what the experts
04 have already covered. However, regardless of the
05 changes that might occur because of the raising of the
06 lake level to what we've recommended in the plan, it
07 would still be consistent with mandates for
08 legislation.

09 As of this time, we're not aware of any proven or
10 feasible methods of physical mitigation that could be
11 applied that would be consistent with the primary
12 intent of the federal legislation which is preserve the
13 natural scenic beauty of the area, and the direction
14 that we put into the CMP, which classified the majority
15 of relicted land as a no-development zone.

16 As such, it is our position that the State Water
17 Resources Control Board select an alternative, the 6390
18 alternative, which will bring us into compliance with
19 the Clean Air Act.

20 We did have the caveat that obviously, it's going
21 to take some time for the lake level to rise to 6390.
22 Monitoring is something that we're certainly required

23 to do and would expect the Air Pollution Control
24 District to do also, and if it turns out that during
25 that period that the dust storms have been mitigated,
0018
01 then we would hope that the Water Resources Control
02 Board would come back and take a look at diversions at
03 that time.
04 That's my statement.
05 HEARING OFFICER DEL PIERO: Thank you very much.
06 MR. GIPSMAN: That concludes our direct
07 examination.
08 HEARING OFFICER DEL PIERO: Thank you very much,
09 Mr. Gipsman.
10 Mr. Birmingham?
11 CROSS-EXAMINATION BY MR. BIRMINGHAM
12 Q Good morning, Mr. Martin.
13 A Good morning.
14 Q I introduced myself earlier as Tom Birmingham, one
15 of the attorneys representing the Department of Water
16 and Power for the City of Los Angeles in this
17 proceeding. We -- we spoke with Nancy Upland several
18 days ago, and I examined her extensively regarding the
19 Comprehensive Management Plan and the DEIS, so I won't
20 cover the same ground the morning that I did with
21 Ms. Upland to save some time.
22 But I do have a couple of questions about the
23 Final Environmental Impact Statement that was prepared
24 in connection with adoption of the Comprehensive
25 Management Plan.
0019
01 Do you have a copy of the Final Environmental
02 Impact Statement with you?
03 A Yes, I do.
04 Q And that's Forest Service Exhibit 2; is that
05 correct?
06 A That's correct -- 1, rather.
07 Q The Final Environmental Impact Statement is Forest
08 Service Exhibit 1; is that correct?
09 A That's correct.
10 Q I'd ask you to turn to Page 14 -- I'm sorry. Page
11 180, Table 14, of the Final Environmental Impact
12 Statement. Table 14 on Page 180 contains a description
13 of the environmental effects on various resources at
14 different lake levels. Is that correct?
15 A Yes, that's my understanding.
16 Q And there are letter designations that are
17 associated with different lake levels and different
18 resources; is that correct?
19 A Yes.
20 Q The M stands for maintain. Is that correct?
21 Resource maintain?
22 A I would have to read the --
23 Q I think if you look at Page 179, there's a
24 description of lake dependent and lake margin alkali
25 flat species.
0020
01 A Right. Right. I see.
02 Q And there's a legend that says, "M signifies
03 resource maintained."
04 A Right. Right.

05 Q SL indicates resource slightly affected; is that
06 correct?
07 A That's correct.
08 Q SE indicates that the resource is severely
09 effected; is that correct?
10 A That's correct.
11 Q And E indicates that the resource is eliminated.
12 A Okay.
13 Q And now I'd like to talk about each one these
14 resources. At elevation 6380, each one of the
15 resources that's listed in Table 14 of the
16 Environmental Impact Statement is maintained; is that
17 correct? At elevation --
18 A Yes, that's correct.
19 Q And that's the same analysis that's associated
20 with lake elevation 6390; is that correct?
21 A That's correct.
22 Q If we look at elevation 6370 -- elevation 6370 is
23 below the historic low stand of Mono Lake. Is that
24 correct?
25 A Yes.

0021

01 Q The historic low stand of Mono Lake is
02 approximately 6372 feet?
03 A I believe that's the right figure.
04 Q Now, brine shrimp at elevation 6370 -- according
05 to the analysis in the Final Environmental Impact
06 Statement, brine shrimp are maintained.
07 A That's correct.
08 Q Alkali flies at elevation 6370 are slightly
09 affected; is that correct?
10 A That's consistent with the table.
11 Q Now, what is your understanding of the term
12 "slightly affected"?
13 A I can't -- if you're asking me to quantify that, I
14 can't. There's some effect. It's probably a
15 subjective determination in terms of actual
16 populations. I don't know. There is some adverse
17 effect on the alkali fly.
18 Q But the fact that it's slight would indicate, if
19 we were to put it in terms of NEPA, would mean that it
20 is not a significant impact; isn't that right?
21 A I'm not sure you can draw that analogy.
22 Significance usually has to deal with whether we do an
23 environmental impact statement or environmental
24 analysis, so I'm not sure they're comparable.
25 Q Now, grebes and gulls at elevation 6390 -- I'm

0022

01 sorry, elevation 6370 are both maintained as resources;
02 is that correct?
03 A That's, again, consistent.
04 Q And then Wilson's phalaropes, red-necked
05 phalaropes, and snowy plovers are all slightly affected
06 at an elevation of 6370?
07 A That's correct.
08 Q Now, you have indicated that because of the
09 designation of the Mono Basin as a non-attainment area,
10 it may be necessary to amend the Comprehensive
11 Management Plan.
12 A Yes, that's correct.

13 Q But, at this point, the Forest Service does not
14 know whether or not the Comprehensive Management Plan
15 will be amended?

16 A That's true. We're waiting for some definite
17 information as to whether we would or not.

18 Q Now, if this Board were to establish a lake level
19 where the lake was maintained between elevation 6374
20 and 6385, or 6384, isn't it correct that the
21 Comprehensive Management Plan probably would not be
22 amended?

23 A No, that's not correct. It would be amended.
24 Whatever the Board's decision is, it would probably be
25 amended.

0023

01 Q Well, now, you've recommended -- the Comprehensive
02 Management Plan recommends a lake level of 6377 to 6390
03 with management somewhere in the middle, that's about
04 6383. Is that correct?

05 A That's correct.

06 Q Now, you've indicated -- the last paragraph of
07 your testimony contains what you referred to as a
08 caveat. Is that correct?

09 A That's correct.

10 Q This is on Page 4 of your testimony. It states
11 that, "It is projected that meeting this objective,"
12 and there you refer to the 6390 alternative, "meeting
13 this objective will require a transition period of some
14 30 years, and it is logical and important to require
15 that air quality as well as the effect on other
16 resources will be monitored. If monitoring discloses
17 that air quality standards can be achieved and
18 maintained at a lake level lower than 6390 feet and
19 that lake level is also consistent with that needed to
20 protect other public trust values, legislation creating
21 the scenic area and the Comprehensive Management Plan,
22 then the Board's action or rule may be modified to
23 allow additional diversions of tributary streams that
24 would maintain the lake at that level if the need for
25 such diversions still exists."

0024

01 Is that your --

02 A That's my statement.

03 Q By that, do you mean that if it is established
04 that an elevation of 6390 is not required to meet air
05 quality standards, that it would be appropriate for the
06 Board to establish a lower lake level if that lower
07 lake level would be consistent with the
08 comprehensive -- the goal set out in the Comprehensive
09 Management Plan?

10 A Yes, that's correct.

11 Q When the Comprehensive Management Plan was
12 adopted, you've testified that you conducted a
13 balancing or there were some trade-offs with respect to
14 resources; is that correct?

15 A That's correct.

16 Q Now, when you adopted the Comprehensive Management
17 Plan, or when the Forest Service adopted the
18 Comprehensive Management Plan, it did not consider the
19 water supply needs of the people of the City of Los
20 Angeles. Isn't that correct?

21 A We recognized the needs, but we did not do an
22 analysis.
23 MR. BIRMINGHAM: Thank you very much. I have no
24 further questions.
25 HEARING OFFICER DEL PIERO: Thank you,
0025
01 Mr. Birmingham.
02 Ms. Cahill?
03 MS. CAHILL: No questions.
04 HEARING OFFICER DEL PIERO: Mr. Dodge?
05 Mr. Flinn?
06 MR. DODGE: I have no questions. I believe
07 Mr. Flinn might have a couple of questions about Table
08 14.
09 MR. FLINN: Just very quickly.
10 CROSS-EXAMINATION BY MR. FLINN
11 Q Are you aware, Sir, that specifically with regard
12 to the references there to brine shrimp and alkali fly,
13 that since the date of that document, there have been
14 additional research and modeling studies of the effects
15 of lake level on those organisms?
16 A Yes.
17 Q And to the extent that they're revisions to the
18 management plan and additional environmental studies,
19 that an updated table reflecting this new information
20 would be likely to be included?
21 A Probably what we would do is look at all the new
22 information that's come out of the hearing and
23 developed since that time and look at how that might
24 affect the CMP.
25 MR. FLINN: Thank you, Sir.
0026
01 HEARING OFFICER DEL PIERO: Thank you very much,
02 Mr. Flinn.
03 Mr. Valentine?
04 CROSS-EXAMINATION BY MR. VALENTINE
05 Q Good morning, Mr. Martin. Mike Valentine.
06 I just want to follow up on one question
07 Mr. Birmingham asked you. With reference to the end of
08 your written testimony at Page 4, the import of
09 Mr. Birmingham's questions, as I understood it, was
10 that if air quality problems could be solved at a lake
11 level lower than 6390 and the goals of the management
12 plan could be met at a lower lake level, then that
13 would basically be acceptable to the Forest Service.
14 Is that fairly consistent with your understanding
15 as well?
16 A Yeah. What we're saying is basically in
17 recognition that modeling has various degrees of
18 accuracy, that over time, if the monitoring indicated
19 that the P.M. Ten standards were met, then -- at lower
20 levels than 6390, then we would --
21 Q It would also have to be consistent with the other
22 public trust values protected and fostered by the
23 Comprehensive Management Plan; is that right?
24 A That's true.
25 Q These would include visuals?
0027
01 A Yes.
02 Q They would include recreation?

03 A Yes.
04 Q And to cut it short, they would also include the
05 wildlife and biology and habitat associated with those?
06 A Certainly.
07 MR. VALENTINE: Thank you.
08 HEARING OFFICER DEL PIERO: Ms. Niebauer, any
09 questions?
10 MS. NIEBAUER: No questions.
11 HEARING OFFICER DEL PIERO: Mr. Frink?
12 MR. FRINK: Yes, just a couple.
13 CROSS-EXAMINATION BY THE STAFF
14 Q BY MR. FRINK: Mr. Martin, in looking at Table 14 of
15 the Final EIS, it presents a summary of the effects of
16 the various lake elevations on the resources stated in
17 the table. In evaluating the anticipated effect of
18 those lake levels on the specified resources, I assume
19 that the Forest Service was looking at the condition of
20 the specified resources that they -- as it existed at
21 the time of preparing the EIS; is that correct?
22 A I'm not sure -- yes, to some extent. I think this
23 was based -- this table was based primarily on the work
24 done by the National Academy of Sciences in the Corey
25 report in looking at those resources, and I'm sure they
0028
01 would have considered the existing condition at that
02 time.
03 Q Right. And the table shouldn't be read as making
04 any comparison with the condition of the resources as
05 they existed --
06 A No.
07 Q -- before diversions began; is that correct?
08 A That's correct.
09 MR. FRINK: Thank you.
10 HEARING OFFICER DEL PIERO: Mr. Smith?
11 Q BY MR. SMITH: Good morning, Panel members, Board
12 members, and Mr. Martin, good morning. I have just one
13 question for you.
14 Please assume that we are going to do some
15 restoration work in the scenic area. How would you, as
16 an official of the Forest Service, feel or handle
17 something in the way of restoration if it were required
18 in the forest area? Would that pose permitting
19 problems? Would you look favorably on the creation of
20 wildlife, water fowl habitat in the scenic area? How
21 would you -- how would you, as officials, react to
22 that?
23 MR. GIPSMAN: Objection. I think the question's
24 overbroad. Can we go through these areas one at a time?
25 HEARING OFFICER DEL PIERO: I think that's
0029
01 correct. Take them apart one issue at a time.
02 Q BY MR. SMITH: Okay. For instance, if we've set up
03 some water fowl habitat on, for instance, the north
04 shore of the lake at perhaps 6383.5 or 6377 or 6390 on
05 the north side or the -- close to the shore at that
06 particular point. That's one example. Another example
07 might be at Simons Springs. Are you familiar with that
08 area?
09 A Yes.
10 Q Those kinds of examples, if we came up with

11 restoration plans and -- specifically for water fowl
12 mitigation plans, how would you feel about that? How
13 would you react as an official?

14 A What we would do is, of course, we'd have to
15 comply with the National Environmental Policy Act.
16 We'd have to do some kind of environmental analysis,
17 compare that to the direction in the Comprehensive
18 Management Plan and look at it for consistency.

19 For example, on Page 54 of the CMP, we talk about
20 considering wildlife management activities,
21 instructional improvements only when needed to restore
22 and protect native species habitat. So if it were
23 trying to restore water fowl habitat that had been
24 there prior to diversion, that would certainly be very
25 appropriate. So you would use a management plan as a
0030
01 guide to do environmental analysis of some sort. And
02 many things, I suspect, would be approved.

03 MR. SMITH: Thank you. That's all the questions I
04 have.

05 HEARING OFFICER DEL PIERO: Thank you very much,
06 Mr. Smith.

07 Mr. Herrera?

08 MR. HERRERA: I have no questions, Mr. Del Piero.

09 HEARING OFFICER DEL PIERO: Thank you very much.
10 Good morning, Mr. Canaday.

11 MR. CANADAY: Good morning.

12 Q BY MR. CANADAY: Well, Mr. Smith asked a question in
13 the direction I was interested in. If there were
14 mitigation responsibilities tied to the amended water
15 rights, would we be working with the scenic area, the
16 head of the scenic area, or would we be working with
17 your office?

18 A You'd be working with our office.

19 Q And on the potential for amending the plan, the
20 CMP, what kind of time frame does that take? So we
21 could get an understanding of -- let's say, this year
22 the Board has a decision this year and the time frame
23 that your agency would make a decision to amend and
24 then the length of the process, and I know that's hard
25 to give actual numbers, but just kind of a ballpark.

0031

01 A I can give you an overview of what we would have
02 to do. More than likely, if it were a change in lake
03 level, then we would be looking at a supplemental
04 environmental impact statement which actually would
05 amend our Forest Plan.

06 The Comprehensive Management Plan for the scenic
07 area has been incorporated into the Forest Plan, so if
08 we were looking at a supplemental EIS, then we would,
09 of course, file a Notice of Intent, which we would
10 probably do anyway, a Notice of Intent in the Federal
11 Register. From that point on, it would probably take
12 12 to 18 months before we could get it amended. So it
13 is a lengthy process.

14 Q Do you have the ability to work off of our
15 document? Our final document?

16 A We might be able to use some of the analysis, but
17 I think we would certainly to have put it in our
18 format. It's just more process than anything else.

19 MR. CANADAY: That's all I have, Mr. Del Piero.
20 HEARING OFFICER DEL PIERO: Thank you very much,
21 Mr. Canaday.
22 Mr. Gipsman, redirect?
23 MR. GIPSMAN: No redirect.
24 HEARING OFFICER DEL PIERO: Thank you.
25 Mr. Birmingham?

0032
01 MR. BIRMINGHAM: Nothing.
02 HEARING OFFICER DEL PIERO: Mr. Flinn?
03 MR. FLINN: Nothing.
04 HEARING OFFICER DEL PIERO: Ms. Cahill, I'm sorry.
05 I passed over you.
06 Mr. Valentine?
07 MR. VALENTINE: Nothing, thank you.
08 HEARING OFFICER DEL PIERO: My goodness gracious.
09 Mr. Frink?
10 MR. GIPSMAN: I'd like to move for the admission
11 of Exhibits 1, 2, and 14.
12 HEARING OFFICER DEL PIERO: Thank you very much,
13 Sir. Hearing no objections, they're ordered into the
14 record.
15 (U.S. Forest Service Exhibits
16 Nos. 1, 2 and 14 were admitted
17 into evidence.)
18 MR. CANADAY: Mr. Del Piero.
19 HEARING OFFICER DEL PIERO: I'm sorry,
20 Mr. Canaday.
21 MR. CANADAY: I have just a comment to
22 Mr. Martin. I want to express our appreciation for the
23 use of the visitor's center in the Mono Basin that we
24 had used a few weeks ago. You haven't received a thank
25 you letter, which you will, but I've been a little bit
0033 busy. Mr. Del Piero's kept me a little bit busy in
01 this room.
02 HEARING OFFICER DEL PIERO: Mr. Del Piero hasn't
03 been out of this room.
04 MR. CANADAY: I just don't want you to think that
05 the lack of a letter means that we don't appreciate and
06 recognize the assistance from the Forest Service in
07 that particular hearing.
08 HEARING OFFICER DEL PIERO: I'd like to personally
09 express my appreciation on the part of the Board. The
10 offering of your facilities helped us out
11 tremendously. I know the public appreciated it, and we
12 appreciated it as well.
13 MR. MARTIN: We're really proud of our visitor's
14 center.
15 HEARING OFFICER DEL PIERO: You should be. It's a
16 wonderful facility.
17 Okay. Ms. Niebauer? Show time.
18 Would you all rise one last time and raise your
19 right hand? Do you promise to tell the truth during
20 the course of this proceeding?
21 (All say I do.)
22 MR. BIRMINGHAM: May I confer with Ms. Niebauer
23 for a moment?
24 HEARING OFFICER DEL PIERO: Sure.
0034

01 MS. NIEBAUER: Good morning. I'm Erika Niebauer
02 representing Fish and Wildlife Service this morning. I
03 have two witnesses this morning, Ray Bransfield and
04 Cathy Brown. They've both just been sworn. Ray has no
05 written testimony. He has not submitted written
06 testimony, but he's available for cross-examination as
07 part of the Fish and Wildlife Service panel. And I'm
08 assuming that that's acceptable. We have filed a
09 qualifications statement for him. We did that at the
10 outset with recognition that he would take part in the
11 cross-examination of this panel.

12 HEARING OFFICER DEL PIERO: He, however, has no
13 prepared statement?

14 MS. NIEBAUER: He has no prepared statement. I
15 could go forward if, indeed --

16 HEARING OFFICER DEL PIERO: He's available only
17 for questions? It's my understanding that Ms. Brown is
18 the person whose primary testimony was being presented
19 today and the Gentleman's available for questions.
20 Unless someone has objections to that, I don't know if
21 anybody's got any questions of him. We'll find out.

22 Mr. Birmingham, do you have an objection?

23 MR. BIRMINGHAM: Actually, I do. Mr. Bransfield
24 was listed as a witness. There was no submission of
25 written testimony, and therefore, we are -- I hate to
0035

01 use the word, but we're surprised he's even here. We
02 have not had any witness appear to date who hasn't
03 submitted written testimony, and there's the potential
04 that any testimony that he may have submitted in
05 writing will come in through cross-examination by some
06 party. And --

07 HEARING OFFICER DEL PIERO: Well, let's see if
08 that's a real concern.

09 Mr. Dodge? Do you have questions of
10 Mr. Bransfield?

11 MR. DODGE: I don't even know who he is,
12 Mr. Del Piero.

13 HEARING OFFICER DEL PIERO: Mr. Birmingham, let me
14 see if I can get this matter resolved.

15 Ms. Cahill?

16 MS. CAHILL: I have none at this time.

17 HEARING OFFICER DEL PIERO: Mr. Valentine?

18 MR. VALENTINE: No.

19 HEARING OFFICER DEL PIERO: Mr. Flinn?

20 MR. FLINN: I certainly don't have any questions.

21 HEARING OFFICER DEL PIERO: Mr. Birmingham,
22 inasmuch as no one has any questions of him, why don't
23 we just allow him to retain his seat in the event that
24 the Hearing Officer might have a question of him. I
25 have the prerogative to ask anybody anything.

0036

01 MR. BIRMINGHAM: I know that the Hearing Officer
02 and the Board members have that prerogative, but I
03 wonder if the reason that he is here is because he --
04 Ms. Brown isn't qualified to express opinions that are
05 contained in her testimony. If that's case, then --
06 and I'm not suggesting that it is, but if that's the
07 case, then that testimony should be stricken and
08 there's no evidence in the record from Fish and

09 Wildlife Service on the subject.

10 MS. NIEBAUER: Can I step in here? Maybe I can
11 clarify this. Would the Board entertain a motion to
12 amend Ms. Brown's testimony to include both names at
13 the top of that testimony, and the Fish and Wildlife
14 Service would then submit it as joint testimony of the
15 two? As I stated, we have submitted qualification
16 statements. They've been in the record since Day One.

17 MR. VALENTINE: We'll stipulate to that.

18 HEARING OFFICER DEL PIERO: Mr. Frink, I don't
19 think within our administrative regulations we have any
20 precedent for that one way or the other.

21 MR. FRINK: I know in the past if one witness has
22 been unavailable and both witnesses are familiar with
23 the material contained in a written statement, that the
24 Board has allowed an alternative witness to adopt the
25 written statement as their own.

0037

01 HEARING OFFICER DEL PIERO: I think we did that on
02 Mokelumne a couple of times.

03 MR. FRINK: It's my understanding that
04 Ms. Niebauer had asked Mr. Bransfield to be available
05 simply as an accommodation to answer questions that he
06 may be better qualified to answer than Ms. Brown, so I
07 think whether he is only available for
08 cross-examination or whether he is in a position to
09 jointly adopt testimony previously submitted, either
10 way, it would be permissible for him to participate on
11 the panel.

12 MR. BIRMINGHAM: If what Mr. Frink is saying is
13 correct, then the Fish and Wildlife Service has
14 submitted no evidence in its direct testimony that --
15 on certain subjects. If Ms. Brown isn't qualified to
16 answer the questions, then there's no evidence.

17 MR. FRINK: Mr. Birmingham, I was not assuming she
18 is not qualified. I have no idea what questions to
19 expect.

20 MR. BIRMINGHAM: Why don't we do this, just so we
21 can move along, since I have a bet with Mr. Dodge we're
22 going to get out of here before noon, why don't we go
23 ahead and see what happens, and we'll --

24 HEARING OFFICER DEL PIERO: Oh, really, you two
25 have a bet, huh? What are the odds?

0038

01 MR. DODGE: The bet, Mr. Del Piero, was that the
02 joint team of Dodge and Flinn would ask fewer questions
03 than the DWP team. That was the bet.

04 MR. CANADAY: Mr. Del Piero?

05 HEARING OFFICER DEL PIERO: Yes, Sir.

06 MR. CANADAY: The Sierra Club does not expect to
07 go on until one o'clock.

08 HEARING OFFICER DEL PIERO: The Sierra Club does
09 not expect to go on until one o'clock?

10 MR. CANADAY: I assumed that they would be in the
11 afternoon, and I told them --

12 HEARING OFFICER DEL PIERO: I know. I know. We
13 notified them of that several days ago, as a matter of
14 fact.

15 I'm going to rule that the panel -- that these two
16 individuals can present testimony. I'm not going to

17 allow an amendment to the submittal. However, if there
18 are questions that arise and you're more capable of
19 answering those questions than Ms. Brown, I suggest
20 that you do that if you think it's appropriate. The
21 fact that a witness qualification sheet was originally
22 filed indicates that, at least from the standpoint of a
23 resource, that that individual -- a lot of individuals
24 whose witness qualification forms were filed is at
25 least a resource that was relied on to a certain extent

0039

01 by the parties in the preparation of their case. A
02 number of parties have filed witness identification
03 forms in this process and have not presented witness.
04 The fact that one has been filed and that individual is
05 now present simply to answer questions and not
06 necessarily to present testimony, I think, is
07 appropriate.

08 Please proceed.

09 MS. NIEBAUER: Thank you.

10 DIRECT EXAMINATION BY MS. NIEBAUER

11 Q Mr. Bransfield, would you please state your name
12 and your title?

13 A BY MR. BRANSFIELD: My name is Raymond Bransfield.
14 My title is supervisory --

15 MR. HERRERA: Would you please speak into the
16 microphone?

17 MR. BRANSFIELD: My name is Raymond Bransfield.
18 My title is supervisory fish and wildlife biologist.

19 Q BY MS. NIEBAUER: And by whom are you employed?

20 A I'm employed by the Department of Interior, U.S.
21 Fish and Wildlife Service.

22 Q Is U.S. Fish and Wildlife Service 2 an accurate
23 description of your qualifications?

24 A Sorry?

25 Q Is U.S. Fish and Wildlife Service Exhibit 2 an
0040

01 accurate description of your qualifications?

02 A Yes, it is.

03 Q And did you review U.S. Fish and Wildlife Service
04 3, which is entitled the testimony of Cathy R. Brown?

05 A Yes, I did.

06 Q To the best of your knowledge, is that testimony
07 true and correct?

08 A Yes, it is.

09 Q And what is your function here today?

10 A I am to assist Ms. Brown in cross-examination as
11 part of the panel and to support her testimony.

12 Q Ms. Brown, would you please state your name, your
13 employer, and your present position?

14 A BY MS. BROWN: My name is Cathy R. Brown. I'm a fish
15 and wildlife biologist for the U.S. Fish and Wildlife
16 Service in Ventura, California.

17 Q Is U.S. Fish and Wildlife Services 1 an accurate
18 description of your qualifications?

19 A Yes, it is.

20 Q And did you prepare U.S. Fish and Wildlife Service
21 Exhibit 3 entitled Testimony of Cathy R. Brown?

22 A Yes, I did.

23 Q Is that exhibit your written testimony for these
24 proceedings?

25 A Yes.

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01 Q And is that written testimony true and correct, to
02 the best of your knowledge?

03 A Yes.

04 Q Would you please summarize that testimony?

05 A The primary concern of the U.S. Fish and Wildlife
06 Service is the conservation of public fish and wildlife
07 resources and their habitats. The Service administers
08 the Endangered Species Act, which includes listing and
09 recovery of endangered species. A species may be
10 determined to be endangered or threatened due to one of
11 factors, including the present or threatened
12 destruction, modification, or curtailment of its
13 habitat or range.

14 The Mono Lake brine shrimp is a species of fairy
15 shrimp that is known only from Mono Lake in Mono
16 County, California. In 1987, the Fish and Wildlife
17 Service was petitioned to add the Mono Lake brine
18 shrimp to the endangered species list. At present, the
19 Mono Lake brine shrimp is a Category One candidate for
20 listing. Category One means a taxa for which the
21 Service has on file substantial information on the
22 biological vulnerability and threats to support a
23 proposal to list that species as endangered or
24 threatened.

25 Degradation of the Mono Lake brine shrimp's

0042

01 aquatic environment is the primary threat to the
02 species. Since 1941, fresh water exports from the Mono
03 Basin have resulted in a 100 percent increase in lake
04 salinities. Many studies have shown that high
05 salinities deleteriously affect brine shrimp
06 reproduction. Some of these negative effects on adult
07 brine shrimp fecundity occur at present lake levels.
08 Previous court cases have not specifically addressed
09 the aquatic ecosystem of Mono Lake, and the issue of
10 water exports could be resolved in a manner
11 satisfactory to the courts but without appropriate
12 protection for the Mono Lake brine shrimp.

13 Because the higher lake salinities and the
14 deleterious effects that accompany those salinities
15 negatively affect Mono Lake brine shrimp reproduction
16 and those effects are occurring at present salinities
17 and will continue if salinities increase, the Service
18 feels that the State Water Resources Control Board
19 should consider the effects that lake level and
20 associated salinities will have on the Mono Lake brine
21 shrimp in resolving the issue of Mono Basin water
22 rights.

23 Because many LAMP and modeling studies have shown
24 that the Mono Lake brine shrimp reproduction and
25 survival decreases with increasing salinity and the

0043

01 Service has reviewed many -- many reports in the
02 literature and the Draft Environmental Impact Report
03 prepared for the State Board, the Service came to the
04 conclusion that a lake level of approximately 6390 feet
05 with a salinity of around 69 grams per liter would be
06 favorable for the long-term survival and viability of

07 the Mono Lake brine shrimp.

08 The reason -- part of reason why the Service
09 settled on a level of 6390 is that this level would
10 provide an adequate buffer for the species to protect
11 the species during periodically recurring droughts
12 which are natural in this region, in the region of the
13 Mono Basin.

14 That's the end of my testimony.

15 HEARING OFFICER DEL PIERO: Thank you very much.

16 MS. NIEBAUER: That's all we have.

17 HEARING OFFICER DEL PIERO: Thank you very much,
18 Mr. Birmingham?

19 MR. BIRMINGHAM: Mrs. Goldsmith will cross-examine
20 this witness.

21 HEARING OFFICER DEL PIERO: Good. Good morning,
22 Mrs. Goldsmith. Do you think Mr. Dodge ought to get
23 his wife a sweater?

24 MS. GOLDSMITH: Absolutely, cashmere.

25 MR. BIRMINGHAM: With all the money Los Angeles
0044

01 has paid Morrison and Forester, he ought to buy her a
02 couple of sweaters.

03 MR. GLEASON: He ought to buy my wife a sweater.

04 MR. BIRMINGHAM: Jewelry's always nice, as well.

05 HEARING OFFICER DEL PIERO: We're going to send a
06 certified copy of two or three pages of the record to
07 your wife for a Christmas present.

08 MR. DODGE: I do have one unfortunate event in my
09 past where we went to pots and pans, and I will not
10 forget it.

11 (Laughter.)

12 HEARING OFFICER DEL PIERO: Missed the medication
13 that day, did you?

14 (Laughter.)

15 MR. FLINN: The Board should also be aware that
16 Mr. Dodge's spouse is an attorney and a previous
17 partner in Morrison and Forester, and knows the binding
18 effect of these sorts of proceedings.

19 HEARING OFFICER DEL PIERO: Some people send
20 little notes in their holiday cards telling about
21 everything they've done during the course of the year.
22 We'll send a few pages out of the record for you.

23 Please proceed, Ms. Goldsmith.

24 CROSS-EXAMINATION BY MS. GOLDSMITH

25 Q I'm going to ask my questions to you, Ms. Brown,
0045

01 and only in the event that you have trouble answering
02 them, I will expect Mr. Bransfield's assistance.

03 Now, under the Endangered Species Act, as you
04 understand it, a species is listed as endangered or
05 threatened on account of habitat only if the present or
06 threatened destruction, modification, or curtailment of
07 its habitat or range brings it into danger of
08 extinction in the event of endangered species; is that
09 right?

10 MR. DODGE: Objection, unintelligible.

11 Q BY MS. GOLDSMITH: What is the definition of an
12 endangered species, as you understand it?

13 A BY MS. BROWN: An endangered species is a species in
14 danger of becoming extinct.

15 Q And what is a definition, as you understand it, of
16 a threatened species?

17 A A threatened species is a species in danger of
18 becoming endangered.

19 Q So both standards deal with the threat of
20 extinction?

21 A Yes.

22 Q And as it relates to habitat, the qualification of
23 becoming endangered or threatened is based on the
24 present or threatened destruction modification or
25 curtailment of the habitat or range; is that right?

0046

01 A Yes.

02 Q Which is likely to cause either extinction or
03 classification as endangered?

04 A Yes.

05 Q Do you know what the current estimate of abundance
06 is for the Mono Lake brine shrimp?

07 A No, I don't. I'm sure it's in the billions.

08 Q Billions and billions perhaps?

09 A Perhaps.

10 Q Excuse me. I'm getting over a cold.

11 HEARING OFFICER DEL PIERO: That's okay.

12 Everybody in the room's got one.

13 MS. GOLDSMITH: I'm afraid they may have me to
14 thank for it as well.

15 Q BY MS. GOLDSMITH: I looked at your testimony and I
16 note that you have listed a number of references on
17 which you relied; is that right?

18 A BY MS. BROWN: Yes.

19 Q Literature cited as the basis for your testimony?

20 A Yes.

21 Q And in going through that -- those -- that list, I
22 note that there's very heavy reliance on work by
23 Dr. John Melack; is that right?

24 A Well, actually, I didn't support anything --
25 didn't cite anything directly by Dr. Melack, but he has

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01 been involved in many studies and his studies are, in
02 turn, cited by a number of these references, yes.

03 Q Do you know who John Melack is?

04 A Yes, I do.

05 Q Who is Dr. Melack?

06 A He's a professor at the University of California
07 Santa Barbara, and he has testified for Los Angeles in
08 this proceedings.

09 Q Isn't it true that Dr. Melack and the people who
10 have worked with him have studied the Mono Lake brine
11 shrimp more intensively than any other group or
12 individual?

13 A Dr. Melack and his student and associates
14 together, yes, have studied the brine shrimp more than
15 any one group of people, but there are some divergent
16 opinions within that group.

17 Q In fact, from the first citation that you have,
18 Botkin (phonetic)?

19 A Yes.

20 Q Which is the Corey report, as I understand; is
21 that right?

22 A Yes.

23 Q Dr. Melack wrote the limnology section; is that
24 right?
25 A I believe he did.

0048
01 Q And Dr. Dana Lenz or --
02 A Gail Dana.
03 Q I always confuse them -- and Lenz worked with
04 Dr. Melack; is that right?
05 A Yes.
06 Q And the third reference that you cite is also
07 authored by Dr. Melack?
08 A He is the author on that paper.
09 Q And the next to the last citation that you have,
10 National Academy of Science, which is L.A. DWP Exhibit
11 25 in these proceedings, Dr. Melack did the
12 limnological section in that work, didn't he?
13 A Yes. He was part of that proposal.
14 Q Now, in the National Academy study, which is L.A.
15 DWP 25, it's true, isn't it, that the National Academy
16 of Sciences concluded that the brine shrimp resource is
17 maintained at lake levels down to 6365 feet in
18 elevation?
19 A Yes. I believe that's -- I don't know the exact
20 number, but if I may explain a little bit, the purpose
21 of the National Academy of Sciences' study was to
22 determine the lake level at which current wildlife
23 population would be maintained. Somewhat circular, if
24 you think about it, to find out what would maintain
25 current populations. Of course, the answer was current
0049
01 lake levels.
02 The Service, in evaluating the status of the
03 species and in determining whether or not it should be
04 listed as endangered, it's a very heavy responsibility,
05 and it's necessary to err on the side of the species.
06 If we're wrong, it could mean the extinction of a
07 species. So the Service has to take not only what is
08 fine right now, but what will protect the species in
09 the face of future natural and man-made variations in
10 the environment.
11 Q You're not testifying, are you, that if a species
12 with billions and billions of individuals is maintained
13 at its current level, then it's in danger of becoming
14 extinct?
15 A Oh, absolutely.
16 Q You're testifying that it's currently in danger of
17 becoming extinct?
18 A It could be. When a species is an aquatic
19 species, it's very different when you consider a
20 terrestrial versus an aquatic species. The aquatic
21 species all live or die based on the quality of that
22 aquatic environment. If that aquatic environment were
23 to become of very poor quality, all of individuals
24 could die within one season because we're talking about
25 something that affects all of the individuals at once.
0050
01 Whereas a terrestrial species -- it's somewhat
02 different. The individuals are more independent. So
03 billions and billions of -- individuals of one species
04 now does not mean that they could fail to -- they might

05 not fail to reproduce next year. I don't think it
06 would happen next year, but if the lake level fell low
07 enough, it could become so highly saline, that they
08 would fail to hatch the next year.
09 Q And according to the National Academy of Science,
10 how low would the lake level have to fall in order for
11 the resource to become slightly affected? I'll show
12 you the graph on Page 210 of L.A. DWP Exhibit 25 so you
13 can refresh your recollection since you've cited it in
14 your testimony.

15 Isn't it true that the lake would have to fall
16 below elevation 6365 in order to become slightly
17 affected?

18 A I don't think I used the word "slightly affected,"
19 and I notice in reviewing the information for the
20 status review, the Service has primarily considered
21 salinity, not lake level, because that's something you
22 can infer from the salinity. A salinity of a hundred
23 and -- 159 grams per liter would mean no brine shrimp
24 would survive. I don't know what lake level that would
25 equate to.

0051

01 Q Before we go into equating salinity to lake level,
02 I'd like you to answer my question. Isn't it true that
03 according to table -- Figure 6.3 at Page 210 of the NAS
04 report, which is L.A. DWP 25, the lake would have to
05 fall to elevation 6365 approximately before the
06 resource would be slightly affected?

07 MS. NIEBAUER: I'm going to object. I think she
08 answered that question.

09 MS. GOLDSMITH: I don't think she did.

10 HEARING OFFICER DEL PIERO: I'm going to overrule
11 the objection. I don't think she did, either. You
12 want the question reread?

13 MS. BROWN: Please.

14 (Whereupon the record was read as requested.)

15 MS. BROWN: I don't think that's true. I think
16 that many of the studies that have been done show that
17 brine shrimp reproduction is affected at current
18 salinities and current lake levels.

19 Q BY MS. GOLDSMITH: My question, Ms. Brown, is is that
20 what the NAS concluded?

21 MR. FLINN: I'll object. The document's
22 evidence. It speaks for itself. We don't need her to
23 tell us what it says.

24 HEARING OFFICER DEL PIERO: Your response? The
25 document does speak for itself. I'd like to hear your

0052

01 response, if you have one.

02 MS. GOLDSMITH: The document does speak for
03 itself, and I'm frankly surprised as to why Ms. Brown
04 cannot read a graph that's in the document on which she
05 relied.

06 MR. VALENTINE: That response was argumentative.
07 Just because she cited it in her document or cited
08 somebody who relied on the document, doesn't mean she
09 relied on it. She has testified that she disagrees
10 with that conclusion. If that disagreement needs to be
11 examined and inquired into, then maybe we should go do
12 that rather than arguing over what the NAS report says.

13 HEARING OFFICER DEL PIERO: I think I'm going to
14 sustain the objection. However, Ms. Goldsmith, if you
15 want to pursue the difference in opinion as opposed to
16 the chart, then you're welcome to do that.
17 Q BY MS. GOLDSMITH: Now, is it true that -- I'm
18 correctly understanding your response to the last
19 question that you disagree with the chart because it's
20 based on lake level rather than salinity?
21 A No, I didn't say that.
22 Q What is the basis for your disagreement with the
23 chart?
24 A The word "slightly," that the lake would have to
25 fall to 6350? Is that what it says.

0053

01 Q 6365.
02 A Before the resource was slightly affected. Well,
03 I'm not sure how the NAS would define "slightly," but I
04 think the Service would easily conclude that the
05 resources slightly affected now at salinities which
06 have doubled since pre-diversion salinity.
07 Q It is slightly affected compared to what,
08 Ms. Brown?
09 A Pre-diversion standards. Brine shrimp
10 reproduction is impaired at current lake salinities. I
11 believe that is certainly slightly, if not more than
12 slightly, affected. So I wonder if because the NAS
13 report, their goal was to determine what was necessary
14 to maintain current wildlife populations, their
15 baseline is different. Their baseline was the lake
16 level at the time of the NAS report.
17 Q My understanding of your testimony is that it's
18 based upon the premise that the brine shrimp may become
19 threatened or endangered. Is that a correct
20 understanding of your testimony?
21 A Yes, it could be.
22 Q It could be or it is?
23 A No. Brine shrimp could become endangered or
24 threatened if lake salinities increase.
25 Q And that's the basis of your testimony?

0054

01 A Yes.
02 Q Now, do you disagree with the conclusion of the
03 National Academy of Science that the current population
04 of brine shrimp will be maintained at lake levels down
05 to 6365?
06 MR. FLINN: Just -- could you cite us a page?
07 MS. GOLDSMITH: 210.
08 MS. BROWN: Would you repeat the question?
09 (Whereupon the record was read as requested.)
10 MS. BROWN: I recognize the expertise that went
11 into the preparation of that report, but the lake level
12 will not be maintained at a specific level because
13 there is natural variation. So in evaluating the
14 status of the Mono Lake brine shrimp, the Service
15 requires a buffer against natural and man-made
16 variations, which is why we have chosen a level that is
17 significantly higher because there have been very, very
18 major droughts in the region in prehistorical time. We
19 want to make sure that the shrimp is protected against
20 those natural variations which will be added to the

21 man-made variations in the lake.
22 Q BY MS. GOLDSMITH: What is the extent of drought
23 against which you want to protect the Mono Lake brine
24 shrimp?
25 A BY MS. BROWN: I'm sorry. I don't understand "what
0055
01 is the extent of drought."
02 Q Well, my understanding of your testimony, and you
03 can correct me if I'm wrong, is that your testimony is
04 based on your desire to protect the brine shrimp
05 against droughts of prehistoric and enormous magnitude;
06 is that right?
07 A Yes.
08 Q What is the extent of the droughts against which
09 you wish to protect Mono Lake brine shrimp?
10 A I guess the extent of drought could be measured in
11 a falling lake level and an accompanying salinity. We
12 wish to protect the brine shrimp against a salinity so
13 high that it would fail to reproduce or that it would
14 fail to reproduce in appropriate numbers that would
15 also -- that would be of benefit to the other wildlife
16 resources that use the lake. I'm afraid I can't give
17 you an exact number. I know that I have read a paper
18 on the historic and -- historic droughts of the Mono
19 Basin, but I don't have that handy.
20 Q Can you tell me how long they are? These droughts
21 that you want to protect the shrimp against?
22 A I believe there is prehistorical evidence of
23 droughts of many decades.
24 Q In your testimony at Page 3, you state that, "The
25 Draft Environmental Impact Report concluded that a lake
0056
01 level of not less than 6390 feet would provide
02 protection for the species during periodically
03 recurring droughts which are natural in the region."
04 A Yes.
05 Q So are these droughts identified in the DEIR?
06 A Yes, I believe they are.
07 Q Can you cite to me where they are discussed?
08 A I assume that they're in the hydrology section.
09 I'm sorry. It's been awhile since I've read that
10 part. I relied mostly on the aquatic productivity
11 section when I was reviewing the EIR.
12 Q So your testimony is based on protection of the
13 Mono Lake brine shrimp against catastrophic droughts
14 which have not occurred in historical times; is that
15 right?
16 A It's not based only on that, no. I believe that
17 it's the Service's responsibility to protect species
18 from becoming endangered, and if Mono Lake had never
19 been subject to diversions of water, then the brine
20 shrimp evolved with substantial, large and substantial
21 droughts over its evolutionary history. The lake is
22 now 40 some feet lower than it was before diversion
23 began, so there's -- there's a big chunk off the top of
24 the lake that I think the brine shrimp now, if there
25 were a substantial drought, may not be able to get back
0057
01 to.
02 MS. GOLDSMITH: I'd ask to have that answer

03 stricken as nonresponsive.

04 HEARING OFFICER DEL PIERO: Well, I'm going to --
05 you can ask. I'm not going to grant. I'll say it
06 again. If I had struck every nonresponsive answer by
07 witnesses on the part of virtually -- not virtually,
08 on the part of every party in this room during the 28
09 or 29 days of hearings, including witnesses on the part
10 of L.A. DWP, our record would be about a third of what
11 it is. If you didn't get a satisfactory answer, I
12 suggest you do what all counsel for all parties have
13 done in the past, ask the question in a different way
14 to get to where you want to go. Okay?

15 MS. GOLDSMITH: Yes. I might say something about
16 the length of the proceedings as a result as well.

17 MR. BIRMINGHAM: But she won't say that.

18 (Laughter.)

19 MR. DODGE: Well, the irony is that Ms. Brown's
20 answer was perfectly responsive to the question.

21 Q BY MS. GOLDSMITH: The question was whether or not
22 your recommendation is based on your desire to protect
23 the Mono Lake brine shrimp from droughts if
24 catastrophic dimension not occurred in historic times.

25 MS. NIEBAUER: I'm going to object to that. I
0058

01 think that she did answer it with the phrase that no,
02 that's not entirely what her testimony is based upon.
03 I object to the question. Asked and answered.

04 HEARING OFFICER DEL PIERO: I'm going to sustain
05 the objection. If you want to pursue it --

06 MR. BROWN: Mr. Chairman, I'd like to know, too,
07 and I --

08 HEARING OFFICER DEL PIERO: Can you --

09 MR. BROWN: Excuse me. You can pursue what other
10 issues were involved in her opinion. Okay? That's --
11 you're welcome to do that. But in terms of that
12 particular question, I think that the objection ought
13 to be sustained because I think it was asked and
14 answered.

15 There's another -- the other reason for her
16 opinion, you can investigate.

17 Q BY MS. GOLDSMITH: What are the other bases for your
18 recommendation?

19 A BY MS. BROWN: Well, the -- I'm sorry. The
20 recommendation -- I have not made a recommendation that
21 the species be listed at this point. The basis of my
22 testimony is that the brine shrimp could become
23 endangered if diversions continue because there may not
24 be an adequate buffer to protect the shrimp in the
25 event of a catastrophic drought.

0059

01 So I would say my -- my role as an employee of the
02 Fish and Wildlife Service is to evaluate the
03 information that is out there in the scientific
04 literature about this species and, as I said earlier,
05 drought alone would probably not be reason to list the
06 brine shrimp. Drought plus 50 years of diversions and
07 a 40-foot drop in elevation of the lake is a reason to
08 consider listing the brine shrimp. So it's the
09 diversions much more than possible drought.

10 Q Let's assume away the possibility of a

11 catastrophic drought. Leaving catastrophic drought
12 aside, would you agree with me that the Mono Lake brine
13 shrimp is not in danger of extinction at lake levels
14 above 6365?

15 A If you're considering endangerment to be at an
16 instant in time, this afternoon the Mono Lake brine
17 shrimp is not endangered, I agree. But we cannot
18 assume away the possibility of a catastrophic drought.

19 Q My question is assume away the possibility of a
20 catastrophic drought.

21 A Fine. My answer, then, assuming that we are
22 looking at a split second in time, we could say at any
23 one point in time a species is not endangered. But I
24 don't believe that's a realistic assumption.

25 HEARING OFFICER DEL PIERO: Excuse me,
0060

01 Ms. Goldsmith? Mr. Brown has a question.

02 MR. BROWN: The hydrology out there, I'm sure, is
03 well-known, so it appears that you're striving to have
04 a minimum level lake elevation which relates to
05 salinity, but then there needs to be a factor in there
06 that you're suggesting that gives some windage, so to
07 speak, to make sure that something doesn't come along
08 that adversely affects the brine shrimp.

09 MS. BROWN: Yes.

10 MR. BROWN: Do you know any idea how much that
11 should be?

12 MS. BROWN: If I can use an analogy, when a
13 highway engineer designs a bridge, he does not design a
14 bridge exactly as wide as a single car. He designs it
15 to be as wide as that car plus some buffer. There
16 might be some wind. There might be a rock on the road,
17 and they can still get through the bridge without
18 destroying the car.

19 It's the same principle, but biology is an
20 incredibly complicated field. Not to say anything
21 terrible about highway engineers, but I believe it's
22 more complex and we deal with a lot more unknowns. So
23 we can never know exactly what that margin is.

24 I believe that if Mono Lake were to be maintained
25 and never fall below today's elevation, the shrimp are
0061

01 there and they're surviving. But because there are
02 these environmental -- there is environmental
03 variability that we need to account for, the Service,
04 in reviewing all of the literature, believes that a
05 level of around 6390, which equates to a salinity
06 that -- at which brine shrimp could be reproduced very
07 well, is an adequate buffer. That's a buffer something
08 more than 20 vertical feet. It's a large buffer.

09 MR. BROWN: Yes. But you need to narrow it down
10 more than that. You need to have some science that
11 identifies what the appropriate buffer should be. I
12 don't know, is that a two-to-one factor of safety or
13 100-to-one factor of safety? You need to be able to
14 quantify it in some way to where we can get an idea of
15 what's right and reasonable.

16 MS. BROWN: I don't think I can quantify it by a
17 two-to-one or four-to-one --

18 MR. BROWN: Well, the hydrology should be

19 well-known out there?
20 MS. BROWN: I am not a hydrologist. I evaluate
21 the information, primarily. I've read primarily the
22 biological information produced by Drs. Dana Lenz,
23 Herbst, and others.
24 MR. BROWN: Okay.
25 HEARING OFFICER DEL PIERO: Please proceed,
0062
01 Ms. Goldsmith.
02 Q BY MS. GOLDSMITH: You mentioned that the DEIR had
03 discussed these catastrophic droughts; is that right?
04 A Yes, I believe it had.
05 Q And isn't it true that the --
06 MR. FLINN: Do you have a page number for us?
07 MS. GOLDSMITH: I have no idea what she's talking
08 about.
09 MR. FLINN: I thought you had one there.
10 MS. GOLDSMITH: I'm -- I have the table. I'm
11 looking currently at page -- it gets into summary.
12 It's Table S-3.
13 MR. FLINN: What?
14 MS. GOLDSMITH: S-3.
15 And it's true, isn't it, that the DEIR, the Draft
16 DEIR, concluded that the brine shrimp were not
17 significantly affected at any lake level alternative
18 above 6377?
19 MS. BROWN: The Draft Environmental Impact Report
20 came to two different conclusions. I believe they
21 evaluated direct impacts and cumulative impacts.
22 Q BY MS. GOLDSMITH: I'm talking about the direct
23 impacts.
24 A Direct impacts said, "No significant impacts above
25 the certain level." Cumulative impacts, though, I
0063
01 think are more important for the Fish and Wildlife
02 Service's evaluation, and it did find no significant
03 cumulative impacts at 6390. But at all levels below
04 that, there were significant cumulatives.
05 Q Based on pre-diversion effects?
06 A Based on salinity effects to brine shrimp
07 reproduction, yes.
08 Q Have you read Dr. Melack's testimony as well?
09 A Yes, I have.
10 Q And are you familiar with his conclusion that
11 based on his 14 years of monitoring of brine shrimp at
12 Mono Lake, the data show no -- no trend in population
13 abundance at lake levels between 6372 and 6381?
14 A Yes, I'm aware of that conclusion. His 14 years
15 of data were dominated by a very unusual event,
16 meromixis for five years.
17 Q And despite that very unusual event, the data
18 showed no trend; is that right?
19 A I think possibly because of that unusual event,
20 because it could have cancelled out something.
21 MR. FLINN: Madam Reporter, would you mark that
22 part of the tape, please?
23 Q BY MS. GOLDSMITH: Assuming away any catastrophic
24 drought, such as you talked about, and assuming that
25 this Board rendered a decision which, based on current
0064

01 hydrology, guaranteed that the lake would not fall
02 below historical levels, would you reach a conclusion
03 that there is a threat to the brine shrimp?
04 A Could you define "historical levels"? Would not
05 fall below what levels?
06 Q 6372.
07 A Again, I stated I don't think your assumption is
08 reasonable --
09 HEARING OFFICER DEL PIERO: Regardless of whether
10 you think her assumption is reasonable, you need to
11 assume it is and then answer the question.
12 MS. BROWN: Yes. If the lake would never fall
13 below that level, the brine shrimp likely would not
14 become extinct.
15 MS. GOLDSMITH: Thank you.
16 MR. BIRMINGHAM: May I confer with Ms. Goldsmith?
17 Q BY MS. GOLDSMITH: Ms. Brown, in your testimony, you
18 described an initial petition to list the brine shrimp
19 that was filed in 19 --
20 A BY MS. BROWN: '87.
21 Q -- '87. What was the disposition of that
22 petition?
23 A In 1988, the Service published an erroneously
24 called 90-day finding. It took much longer than 90
25 days. But we published a finding that says that this
0065
01 petition may be warranted and a status review was
02 initiated.
03 Q This was in 1988?
04 A Yes. So the Service has been reviewing the status
05 of the Mono Lake brine shrimp for over five years.
06 MS. GOLDSMITH: Thank you.
07 HEARING OFFICER DEL PIERO: Thank you very much,
08 Ms. Goldsmith.
09 Ms. Cahill?
10 MS. CAHILL: Mr. Del Piero, we have no questions.
11 HEARING OFFICER DEL PIERO: Mr. Flinn?
12 MR. FLINN: I do.
13 HEARING OFFICER DEL PIERO: I assume it's you,
14 Mr. Flinn, because Mr. Dodge is up.
15 MR. FLINN: Madam Reporter, could you read back
16 the question and answer that I had asked be marked,
17 please?
18 Before she does that, my name is Patrick Flinn.
19 I'm one of the attorneys for the National Audubon
20 Society.
21 HEARING OFFICER DEL PIERO: Actually, Mr. Flinn,
22 forgive me, but we're going to take a break.
23 (Whereupon a short recess was taken.)
24 HEARING OFFICER DEL PIERO: Ladies and Gentlemen,
25 we're back on the record.
0066
01 Mr. Flinn?
02 CROSS-EXAMINATION BY MR. FLINN
03 Q Ma'am, I first wanted to follow up with the
04 questions that Board Member Brown was asking you about
05 buffers and historical levels and the like, and I want
06 to preface my questions by acknowledging my
07 understanding that you are not a hydrologist, and I
08 don't want to ask you any opinions about how far the

09 lake might fall or how common droughts of any given
10 severity are.

11 Instead, I'm going to ask you to make some
12 assumptions that are based on evidence and facts
13 already in the record, but I'll ask you to assume them
14 to be correct. First of all, just to set the stage
15 here, the lowest the lake has ever fallen in historical
16 times and 6372 and that was about 1981; is that right?

17 A BY MS. BROWN: Yes.

18 MR. BIRMINGHAM: I didn't hear the answer.

19 MS. BROWN: Yes.

20 HEARING OFFICER DEL PIERO: The response was I
21 believe so, yes.

22 Q BY MR. FLINN: Do you understand -- let me ask you to
23 assume that in a drought in any one year, the lake can
24 fall as much as two feet in one year. Do you follow me
25 so far?

0067

01 A BY MS. BROWN: Yes.

02 Q And then let me ask you to assume that in the
03 historical -- in the prehistorical record, that the --
04 there may be a drought that could extend for more than
05 a decade, 10, 15, even 20 years.

06 A Yes.

07 Q Okay. I take it, then, to avoid getting below the
08 historical 6372, you might want to have at least 20
09 feet or more to protect against that kind of drought.
10 Would that be consistent with the kind of buffer
11 against the bridge -- sides of the bridges that you
12 were talking about earlier?

13 A Yes.

14 Q Now, let me talk more specifically about
15 historical times and droughts that we accomplished
16 here. Let me ask you to assume that DWP's got a scheme
17 to manage Mono Lake that would allow it to get at 6374,
18 okay?

19 A Yes.

20 Q And now let me ask you further to assume that
21 under DWP's original plan, the lake would get high
22 enough to destroy a lot of gull habitat, that they
23 would have the gulls move to when they land bridge
24 Negit Island, and so that they would tend to bring down
25 the upper range that they had originally planned so

0068

01 that the lake would spend a lot more time closer to
02 6374 than they had originally proposed. Do you follow
03 me so far?

04 A Yes.

05 Q Now, in 1989, you're aware that the Superior Court
06 presiding in the controversy ordered all the water
07 available for Mono Lake to actually to go Mono Lake.
08 Do you recall that?

09 A Yes.

10 Q And you understand that notwithstanding that order
11 in 1989, that all the water go to Mono Lake because of
12 an historical drought, the lake fell four feet?

13 A Yes.

14 Q And I think that the same historical events were
15 duplicated with L.A. getting us down to 6374, that it
16 goes down two feet below the historical lake level; is

17 that right?

18 A Yes.

19 Q Now, let's talk about what happened when the lake
20 actually got to 6372, two feet above where DWP's
21 management plan might possibly take us. Were you aware
22 that in that year 1980 -- back up for a second. Do you
23 understand that the brine shrimp breed in two
24 generations in one year?

25 A Yes.

0069

01 Q And do you understand that in 1981, when this
02 historical high salinity was reached, that there was
03 what has been described as a crash in that
04 first-generation productivity?

05 A Yes.

06 Q And you understand that shortly after that, we had
07 an unusually high wet year and that we didn't stay at
08 that lower level and high salinity for an extended
09 period of time. You're aware of that?

10 A Yes.

11 Q So I take it we don't know what might have
12 happened if we'd stayed at 6372 for a few more years?

13 A We don't know exactly what would have happened,
14 yes.

15 HEARING OFFICER DEL PIERO: Excuse me, what does
16 that mean?

17 MS. BROWN: I'm sorry. What I mean is that if
18 brine shrimp crashed, did not reproduce successfully at
19 a certain salinity, I believe they would have continued
20 to not reproduce successfully. But there are so many
21 factors that play into the population's success that we
22 don't exactly know.

23 MS. GOLDSMITH: Would you mark that answer,
24 please?

25 Q BY MR. FLINN: Is this crash that occurred when we
0070

01 hit 6372 in the first generation one of the reasons why
02 you would be concerned at even approaching those
03 historical levels, even historical levels, and
04 maintaining them for any particular period of time?

05 A BY MS. BROWN: Yes.

06 Q Now, during -- during your cross-examination by
07 Ms. Goldsmith, I asked the Reporter to mark a part of
08 the tape and during the break, I actually wrote down a
09 question Ms. Goldsmith asked you, and I want to read
10 the question and follow up on it. She asked you about
11 Dr. Melack, and she specifically said, "Are you
12 familiar with his conclusion that based on his 14 years
13 of monitoring brine shrimp at Mono Lake, the data show
14 no trend in population abundance at lake levels between
15 6372 and 6381?" Let me stop. Do you understand that
16 conclusion to be the conclusion referred to in his
17 written testimony submitted in this proceeding?

18 A Yes.

19 Q Now, are you also aware that a group working under
20 Dr. Melack's supervision at his Santa Barbara area,
21 submitted an auxiliary report to the Water Board,
22 Number 12, that contained the following conclusion:
23 Referring to the data record of 14 years of monitoring,
24 the group concluded, quote, despite this extended data

25 record, the direct observation of effects on salinity
0071
01 in the Artemia population is difficult and unlikely to
02 be detected even if present. The past decade included
03 a period of unusual climatological conditions at Mono
04 Lake, changes in the physical mixing regime of Mono
05 Lake associated with the onset, persistent, and
06 breakdown of meromixis dramatically alter plankton
07 dynamics and most likely obscure defects due to changes
08 in salinity."
09 Is that a conclusion that you're aware of?
10 A Yes.
11 Q And that is a conclusion that Dr. Melack, you
12 understand, did not specifically mention in his
13 discussion of the 14-year monitoring period; is that
14 right?
15 A Yes.
16 Q Now, you're also aware that in the same auxiliary
17 report, there was data -- in fact, there were 12
18 diagrams showing the salinity effects on a wide variety
19 of shrimp productivity and growth. You were aware of
20 those?
21 A Yes, I've heard that before.
22 Q And you're aware of the only thing Dr. Melack
23 chose to say about those in his direct testimony here
24 was that, quote, salinity bioassay laboratory
25 experiments of the effects of salinity on individual
0072
01 organisms indicate gradual effects of increasing
02 salinity on nearly every life history parameter, e.g.,
03 hatching, mortality, growth, and reproduction of the
04 only macrozooplankton in Mono Lake the brine shrimp"?
05 MS. GOLDSMITH: Objection. Mischaracterizes the
06 testimony. Dr. Melack testified that he did take that
07 into his consideration, but that the population and the
08 ecological interactions were so complex that the
09 laboratory studies alone did not describe the
10 population dynamics of the Mono Lake brine shrimp.
11 MR. FLINN: The only characterization I'm
12 intending to make of Dr. Melack's testimony is what I
13 quoted verbatim, and I hadn't finished my question yet.
14 HEARING OFFICER DEL PIERO: Go ahead and finish
15 your question, and then, Ms. Goldsmith, I'll entertain
16 your objection when he's finished.
17 MR. FLINN: Let me withdraw the question and just
18 read the sentence to you.
19 HEARING OFFICER DEL PIERO: Fine.
20 MR. FLINN: The sentence that I just read simply
21 tells us that there are effects of increasing salinity
22 but doesn't tell us whether they're positive with
23 respect to growth or even negative with respect to
24 growth. Is that how you interpret the sentence that I
25 just read?
0073
01 MS. GOLDSMITH: I again object to the question
02 because it mischaracterizes the testimony. Dr. Melack
03 testified that he cited the paper which does include
04 those facts.
05 HEARING OFFICER DEL PIERO: I'm going to sustain
06 that objection. I want you to rephrase the question,

07 Mr. Flinn. If you want the question read back, you're
08 welcome to have that. I'm interested in the answer,
09 but the way you're phrasing the question, Ms. Goldsmith
10 is completely correct in her objection.

11 Q BY MR. FLINN: Let me just read a sentence to you and
12 ask you if reading this sentence alone, you can tell
13 one way or the other whether the effects of salinity
14 are positive or negative. Quote, salinity bioassay
15 laboratory experiments of the effects of salinity on
16 individual organisms indicate gradual effects of
17 increasing salinity on nearly every life history
18 parameter, e.g., hatching, mortality, growth, and
19 reproduction of the only macrozooplankton in Mono Lake,
20 the brine shrimp *Artemia Monica*."

21 A BY MS. BROWN: From that sentence, no.

22 Q If you wanted to know what those effects were,
23 you'd have to dredge out either Dana and Lenz 1986 or
24 Dana et al. 1993, the paper cited there; is that right?

25 A If I was only able to look at that one sentence,
0074

01 yes.

02 Q Now, speaking of Dr. Melack, Ms. Goldsmith asked
03 about the National Academy of Sciences' paper, in
04 particularly graph 210 -- or the graph on Page 210.
05 Let me show you the references cited at the end of that
06 chapter -- this is Page 211, and ask if you can tell me
07 how many references are cited in that entire chapter on
08 issues related to the brine shrimp?

09 A There are six references cited at the end of this
10 chapter.

11 Q And how many of them relate to brine shrimp?

12 A None of them.

13 Q Well, there is one paper by Melack; is that right?

14 A Interactions of Detritan Particulate and Plankton,
15 yes.

16 Q And what's the date of the Melack paper?

17 A 1985.

18 Q Are you aware that there has been substantial
19 research since 1985 both by Dr. Melack and others on
20 the brine shrimp?

21 A Yes.

22 Q And is it the policy of the Fish and Wildlife
23 Service to rely on the most current data it has to the
24 extent it's available?

25 A Yes, we do.

0075

01 Q And the listing -- or the action the Service took
02 with respect to the listing took place in 1988; is that
03 right?

04 A Yes.

05 Q That would have been three years after the one
06 paper, which may or may not even be related to brine
07 shrimp, cited in the National Academy study; is that
08 right?

09 A Yes.

10 Q Now, finally, I want to just clear up some
11 confusion about Table S-3 and the Draft Environmental
12 Impact Report. Ms. Goldsmith asked you whether or not
13 the Draft EIR found any significant impacts on the
14 brine shrimp at the lake level alternatives listed, and

15 she didn't show you a copy of the report. And I recall
16 your answer being no.

17 Let me now show you a copy of that and ask you to
18 look at Table S-3 and see if you can find brine
19 shrimp. I've circled them.

20 A Yes.

21 Q And if you assume that an X means that there is a
22 significant impact, can you tell us what the DEIR
23 concludes about that?

24 A Okay. This is a table that is significant impacts
25 of the alternatives relative to the point of reference,
0076

01 and for brine shrimp there are significant impacts in
02 this table at no restriction and at 6372.

03 Q Okay. Now, if you look at Table S-4, could you
04 tell us the same thing with regard to Table S-4, which
05 is a measure of the significance of impacts relative to
06 pre-diversion lake levels?

07 A Yes. This is what I was referring to in
08 cumulative impacts. Significant cumulative impacts of
09 the alternatives relative to pre-diversion conditions
10 shows a significant impact on brine shrimp at every
11 lake level up to 6383.5 and then no significant impact
12 at 6393.

13 Q Okay. Now, if you assume that a parenthesis
14 around an X -- wait a second. If you assume that a
15 parenthesis indicates that the impact is substantially
16 mitigable, can you tell us whether, under both pages,
17 the impacts on the brine shrimps are substantially
18 mitigable?

19 A According to the EIR, they are not. None of the
20 Xs in the brine shrimp row are in parenthesis.

21 Q Finally, your testimony has focused here today on
22 the brine shrimp -- are you aware that the brine shrimp
23 are part of a larger ecosystem on Mono Lake?

24 A Yes. And if I may expand just a little bit. The
25 purpose of the Endangered Species Act, Section 2 of the
0077

01 Act, says that the purpose of the Act is to preserve
02 endangered species and the ecosystems on which they
03 depend.

04 Q So are you aware that other organisms,
05 particularly birds, at Mono Lake rely on the billions
06 and billions of brineshrimp that are at the lake and
07 would be in greater numbers at higher levels?

08 A Yes.

09 Q And assuming that we were to reduce it from
10 billions and billions to merely millions or thousands
11 and assuming that that would have some consequence to
12 the birds that feed on the brine shrimp, would that be
13 something that would be of concern to the Service?

14 A Yes.

15 Q And this would be a concern even if we were able
16 to maintain in some dwindling parts of the -- areas of
17 the lake some few thousand remnants of the population?

18 A Yes.

19 MR. FLINN: Thank you.

20 HEARING OFFICER DEL PIERO: Thank you, Mr. Flinn.
21 Mr. Valentine?

22 MR. VALENTINE: We have no questions.

23 HEARING OFFICER DEL PIERO: Ms. Niebauer? I'm
24 sorry. Mr. Gipsman is gone?
25 Somebody want to go out -- where on the phone?
0078
01 Did Staff have any questions?
02 MR. DODGE: Mr. Del Piero, you've bypassed Staff.
03 HEARING OFFICER DEL PIERO: I haven't bypassed
04 them. I just had a momentary lapse. I bypassed
05 Mr. Gipsman -- Mr. Gipsman has no questions.
06 Mr. Frink.
07 MR. FRINK: No questions.
08 HEARING OFFICER DEL PIERO: Mr. Smith?
09 MR. SMITH: I just have one question. I think you
10 can probably hear me from here.
11 CROSS-EXAMINATION BY THE STAFF
12 Q BY MR. SMITH: The status of the report you said
13 you've been studying it for five years. Can you tell
14 us something about the status of the report? Is it
15 near finished. Is it three-quarters of the way
16 finished? Is it under review? Just about where is it?
17 A The petition was made in 1987, and our finding in
18 1988 initiated a status review which we completed at
19 the field level some time ago. It is now under review
20 in our regional office. The Fish and Wildlife Service,
21 like all federal agencies, is a big bureaucracy, so it
22 has to go through quite a few levels before it reaches
23 the director of the Fish and Wildlife Service who makes
24 the final decision. So it's somewhere in the process.
25 I don't mean to be unhelpful, but I don't understand
0079
01 the process all that well once it gets up into the
02 higher levels.
03 MR. SMITH: That's all the questions I have.
04 Thank you.
05 HEARING OFFICER DEL PIERO: Not many people here.
06 Mr. Herrera?
07 MR. HERRERA: Thank you, Mr. Del Piero.
08 Q BY MR. HERRERA: I just have a couple of questions
09 relating to your evaluations of and your ultimate
10 recommendation of 6390. Did you look at productivity
11 effects on the brine shrimp at salinities that would
12 occur at lake levels above 6390?
13 A Yes.
14 Q And what was the source of that information?
15 A I used primarily the EIR because it's the most
16 current summary of information, but I've also looked at
17 a number of the other -- most of the other studies on
18 brine shrimp have been cited by the EIR.
19 Q And did they study -- study lake levels and
20 salinities that would occur above 6390?
21 A Yes.
22 Q I'm looking at Table S-1 on the Draft EIR, Page
23 8. And on that page, it indicates that Mono Lake brine
24 shrimp productivity at 6410, no diversion and
25 pre-diversion, it's got a notation that says, "Similar
0080
01 or greater to the 6390 alternative." Would you agree
02 to that?
03 A I'm sorry, would you repeat it?
04 Q You will note that at the 6410 alternatives, no

05 diversion and pre-diversion, there is a notation of the
06 small E, and that indicates that it says, "Similar to
07 or greater than the 6390 alternative."

08 A Yes.

09 Q Do you agree with that?

10 A Yes.

11 Q And that's based on your review again?

12 A Yes. If I can elaborate a little bit.

13 Q Certainly.

14 A I think it's obvious that for the Fish and
15 Wildlife Service, the closer we can get to original
16 conditions is always the healthiest for the species in
17 most cases. However, those are often not conditions we
18 can return to, so in selecting 6390, it is a level that
19 would appear to protect the shrimp and yet it's not
20 asking for the whole pie.

21 Q Do you have an opinion of whether or not at
22 salinities equivalent to the 6410 or no diversion type
23 alternatives, anything less than that would at least
24 slightly affect the shrimp, or -- was there an effect
25 upon the shrimp at salinities below that?

0081

01 A I believe that at salinities -- at lake levels
02 below 6410, there might be a very slight effect. At
03 levels of 6410 or higher, I think what that would
04 equate to is a larger buffer against environmental
05 variations, but from the information summarized in the
06 EIR and the other reports that I have read, 6390 would
07 be an adequate buffer that the Service would likely
08 include --

09 Q There is a slight effect from pre-diversion over
10 6410 salinities --

11 A Studies have shown that brine shrimp reproduction
12 is affected by increasing salinity, and it doesn't seem
13 to be a threshold. It seems to be at ever-increasing
14 salinity, there is some small effect.

15 MR. HERRERA: That concludes my questions. Thank
16 you.

17 HEARING OFFICER DEL PIERO: Mr. Canaday?

18 MR. CANADAY: No.

19 HEARING OFFICER DEL PIERO: Ms. Niebauer?

20 MS. NIEBAUER: Just a couple of quick questions.

21 REDIRECT EXAMINATION BY MS. NIEBAUER

22 Q Ms. Goldsmith took you through part of the
23 Endangered Species Act, and I wonder if you could
24 explain for us what happens when a particular species
25 is petitioned?

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01 A Yes. When the Service is petitioned to list a
02 species, we must consider the threats that may be --
03 the threats to the species, and we consider five
04 categories of threats. The first is the present or
05 threatened curtailment or destruction of habitat or
06 range. The second is predation or disease. The third
07 is over collection for scientific or recreational
08 purposes. The fourth is inadequacy of other regulatory
09 mechanisms to protect the species, and the fifth is
10 other natural and man-made factors.

11 Q And -- excuse me. After you receive a petition to
12 list a particular species, what happens?

13 A It is reviewed at the field office level, and we
14 review all -- the best available biological and
15 commercial information to come to a conclusion as to
16 whether the petitions list the species as warranted or
17 not. So we do dig into everything we can find, contact
18 experts on the species.

19 Q And is a determination then made after -- after
20 your -- after -- I assume that's called a status
21 review? Is the determination made, then, whether the
22 petition is warranted or not warranted?

23 A A determination is made at the field level and
24 again, then, it moves to higher levels.

25 Q And that is indeed termed a status review under
0083 the Endangered Species Act; is that correct?

02 A Yes.

03 Q And does the Fish and Wildlife Service then only
04 rely on individual scientific information in conducting
05 their status review? Or is it a more comprehensive
06 type of a review?

07 MS. GOLDSMITH: Objection. Ambiguous.

08 HEARING OFFICER DEL PIERO: Sustained.

09 Q BY MS. NIEBAUER: What type of information does the
10 Fish and Wildlife Service rely upon when initiating a
11 status review?

12 A BY MS. BROWN: All the available information that has
13 to do with that species.

14 Q And in this particular instance, would that
15 include information prepared by Dr. Melack?

16 A Yes. Dr. Melack and many other researchers who
17 have done research on the brine shrimp.

18 Q Would it also include information that has been
19 prepared by Dr. Herbst?

20 A Drs. Herbst, Dana, Lenz, Jellison, some of the
21 other major researchers that we have reviewed.

22 MS. NIEBAUER: That's all I have. Thank you.

23 HEARING OFFICER DEL PIERO: Thank you very much.

24 Ms. Goldsmith? We've got a lot of time this
25 morning, Miss Goldsmith. Take your time, for once.

0084
01 What's the deal between you and Birmingham?

02 MR. BIRMINGHAM: I've already lost.

03 HEARING OFFICER DEL PIERO: What are the stakes in
04 this process here? Have we identified them or is it
05 appropriate to mention them on the record?

06 MS. GOLDSMITH: Ego, so they're very high.

07 HEARING OFFICER DEL PIERO: Please proceed.

08 RE-CROSS EXAMINATION BY MS. GOLDSMITH

09 Q I just have a couple of questions, Ms. Brown. We
10 talked about the initial petition to the U.S. Fish and
11 Wildlife Service listing of the Mono Lake brine
12 shrimp. And I believe you testified that the fate of
13 that petition was that the brine shrimp are currently
14 under review for listing; is that right?

15 A BY MS. BROWN: Yes.

16 Q But isn't it correct that in 1989, the Fish and
17 Wildlife Service published a decision that inadequate
18 evidence existed to establish the Artemia
19 Monica matched the definition of endangered species?

20 A I believe the 1989 Notice of Review for animal

21 candidates concluded that at that time. We have
22 subsequently concluded, based on newer information,
23 that the species is a valid species, and that we -- it
24 is now a Category One candidate for listing.

25 Q I just wanted to clear that up because the
0085
01 original petition, it was my understanding, was not
02 acted on. It was dismissed.

03 A Not technically dismissed.

04 Q Now, when Mr. Flinn asked you his questions about
05 the catastrophic drought and asked you to assume a
06 number of -- a number of hydrologic things, one of the
07 things that he asked you to assume was that Mono Lake
08 can fall as much as two feet per year.

09 Do you remember that?

10 A Yes.

11 Q Would your answer be affected if you knew that two
12 feet per year was the maximum that the lake has, in
13 fact, fallen in a year? So that in some years of the
14 drought, it might fall less than two feet?

15 A Again, I need to take a pretty long view of
16 things. My answer might be affected if we had
17 information going back hundreds and hundreds of years.
18 We don't. The information we have on the Mono Basin is
19 a few decades. So I think it's important that when we
20 evaluate the status of a species for listing, we have
21 to consider the probability that the species will
22 continue to survive for 100 or 500 years, generally,
23 given the information we have.

24 Q One last question. Mr. Flinn asked you to look at
25 the references listed on Page 211 of the NAS report,

0086
01 which is L.A. DWP Exhibit 25.

02 A Yes.

03 Q Following the graph we had been talking about in
04 my original cross of you, and he asked you, I believe,
05 how many of those references related to brine shrimp.

06 A Yes.

07 Q Are those all of the references that are listed in
08 the L.A. DWP Exhibit 25?

09 A No. I believe there's many more.

10 Q I'd ask you to look at the list of references that
11 begin on Page 110 following the chapter Biologic System
12 of Mono Lake and ask you to, if you can, get an
13 approximate count of the number of references that
14 relate to brine shrimp?

15 A It looks like perhaps 20 or more.

16 Q There are ten pages of references cited at that
17 location?

18 A Yes.

19 MS. GOLDSMITH: That's all the questions I have.

20 HEARING OFFICER DEL PIERO: Ms. Cahill?

21 MS. CAHILL: No questions.

22 HEARING OFFICER DEL PIERO: You look remarkably
23 relaxed.

24 MS. CAHILL: Relaxed, yes.

25 HEARING OFFICER DEL PIERO: Mr. Flinn?

0087
01 RE-CROSS EXAMINATION BY MR. FLINN

02 Q One question on these references. Would you look

03 at this and confirm that the most recent one is 1985?
04 A BY MS. BROWN: Well, yes. This report was prepared
05 in 1987. It was published in '87 so, of course, it
06 doesn't reflect studies done since then.
07 MR. FLINN: No further questions.
08 HEARING OFFICER DEL PIERO: Thank you.
09 Mr. Valentine?
10 MR. VALENTINE: No questions. Thank you.
11 HEARING OFFICER DEL PIERO: Mr. Gipsman?
12 MR. GIPSMAN: No questions.
13 HEARING OFFICER DEL PIERO: Mr. Frink?
14 MR. FRINK: No questions.
15 HEARING OFFICER DEL PIERO: Mr. Smith, I know
16 you've got one.
17 MR. SMITH: I have one question.
18 RE-CROSS EXAMINATION BY THE STAFF
19 Q BY MR. SMITH: You mentioned Dr. Jellison in the
20 people that you were citing. Are you aware of the fact
21 that he has submitted a policy statement putting forth
22 6390 as the lake level?
23 A BY MS. BROWN: No, I'm not.
24 Q Are you aware of any --
25 HEARING OFFICER DEL PIERO: Mr. Birmingham, are
0088
01 you going to object?
02 MR. BIRMINGHAM: No, I'm not because I don't want
03 to fall into the category of Mr. Thomas.
04 MS. GOLDSMITH: I would now object on the basis of
05 relevance.
06 MR. SMITH: I can make it relevant.
07 MR. THOMAS: I'm a Government attorney. It's a
08 nice category.
09 HEARING OFFICER DEL PIERO: I'm going to overrule
10 the objection as to relevance. Policy statements, by
11 definition in your regulations, are part of this
12 process. Whether they're appropriate for introduction
13 as evidence is inappropriate. Our regulations say it's
14 inappropriate to have policy statements introduced.
15 However, the fact that they took place, and are part of
16 our administrative record, clearly there's a provision,
17 not only in our Administrative Code, but in terms of
18 our authorizing statute, that provides for public
19 participation in process.
20 MS. GOLDSMITH: My objection goes to the relevance
21 of having her testify about anything in the policy
22 statement she was unfamiliar with, and I also object to
23 the line of questioning on the grounds that it is not
24 supposed to be evidence.
25 HEARING OFFICER DEL PIERO: That's fine. That
0089
01 objection is overruled -- the first one is premature.
02 The second one is overruled, so at this point in time,
03 I didn't even hear the answer, so I don't know if she's
04 even aware of the policy statement.
05 MS. BROWN: I said no, I have not read it.
06 HEARING OFFICER DEL PIERO: You have not read it.
07 Do you have any other further questions?
08 MR. SMITH: No.
09 HEARING OFFICER DEL PIERO: Fine. Mr. Herrera?
10 MR. HERRERA: No questions, Mr. Del Piero

11 HEARING OFFICER DEL PIERO: Mr. Canaday?
12 MR. CANADAY: Mr. Del Piero, I was running in and
13 out of the room, so forgive me if I start to ask a
14 question that's been asked. I'll put a halt to it.
15 HEARING OFFICER DEL PIERO: 'Tis the season,
16 Mr. Canaday. Go ahead.
17 MR. BIRMINGHAM: There isn't any reason
18 Mr. Canaday should be any different than most of the
19 lawyers in the room.
20 MR. CANADAY: They're certainly paid different.
21 (Laughter.)
22 HEARING OFFICER DEL PIERO: Mr. Birmingham, I
23 don't need much more help like that. I can see that
24 request for a raise coming in very quickly.
25 Q BY MR. CANADAY: Ms. Brown, a lot of the concern
0090
01 expressed by some of the questions to you, which is
02 typical, earlier you referred to engineers and
03 scientists or biologists, and most people relate to
04 catastrophic short-term events, comets crashing through
05 the atmosphere and causing the extinction of living
06 things. And that is a concern of the Service,
07 correct? These very drastic immediate changes in the
08 environment that could cause an impact to brine shrimp,
09 correct?
10 A BY MS. BROWN: Yes.
11 Q But in reality, what the Service, when it makes
12 its recommendation, it's based more likely on the
13 long-term subtle changes that, in many cases, are not
14 measurable in very short periods, decades, that do, in
15 fact, reduce the product -- potential productivity of
16 the species in the long-term, correct?
17 A Yes.
18 Q And so that when you make your recommendation, the
19 Service makes its recommendation, it's making a
20 recommendation not on the hysteria of a laboratory
21 experiment that you can create a salinity that does, in
22 fact, kill brine shrimp, but on the biological basis of
23 a long-term understanding of maintenance of the species
24 habitat and its productivity; is that correct?
25 A That's right. And as I mentioned before, we
0091
01 consider those five categories of information, so it's
02 habitat and other things as well.
03 MR. CANADAY: Thank you. That's all I have.
04 HEARING OFFICER DEL PIERO: Thank you very much.
05 Questions?
06 MR. BROWN: No question, just my thanks to
07 Mr. Flinn for helping me with that question and
08 clearing it up.
09 HEARING OFFICER DEL PIERO: No questions?
10 Ms. Niebauer?
11 MS. NIEBAUER: I have no further questions. I
12 would like to offer in evidence U.S. Fish and Wildlife
13 Service 1 through 6.
14 HEARING OFFICER DEL PIERO: Any objection? No
15 objection? It will be ordered into the record. Thank
16 you very much.
17 (USFWS Exhibits Nos. 1 through
18 6 were admitted into

19 evidence.)

20 HEARING OFFICER DEL PIERO: The Sierra Club

21 witness as well as Counsel have yet to arrive. We had

22 indicated to them we would have them on at one o'clock;

23 is that not correct?

24 MR. CANADAY: That's correct.

25 HEARING OFFICER DEL PIERO: Ladies and Gentlemen,

0092

01 I'd encourage you to enjoy your two-hour lunch, and

02 we'll see you back here at one o'clock and try and

03 finish up as quickly as possible.

04 MR. CANADAY: Mr. Del Piero, I do have one bit of

05 housekeeping to clear up. I have to hand out more

06 copies of the schedule that we set that I gave you the

07 other day, but I want to make -- for you to make notice

08 of some changes. Do you want to hand them out now?

09 These schedules are exactly the ones that I've handed

10 out, in case you don't have it here. I'd like you to

11 have to opportunity to write on it to be aware of the

12 changes, some dates to add, and those were discussed

13 yesterday. And you might want to put them on your

14 schedule.

15 Dan, correct me if these dates are wrong, that on

16 January 7th, which is a Friday, exhibits for rebuttal

17 are due to the Board at 5:00 p.m. On January 10th,

18 Mr. Gipsman has informed me that he would like to panel

19 Ms. McKey (phonetic), who is scheduled for the

20 following day, the 11th, on the air resources panel

21 since a good -- the import of a great part of her

22 testimony will deal with the Forest Service and air

23 quality. So we will have Ms. McKey on -- also paneled

24 with the great basins and the air resources board on

25 the 10th. So therefore, on the 11th, there will only

0093

01 be Dr. Stine, Dr. Vorster, and, Mr. Dodge, is it -- was

02 it your witness, Dr. Mesick, who was ill yesterday?

03 MR. DODGE: Yes, that's right.

04 MR. CANADAY: Can he be available on the 11th?

05 MR. DODGE: On the 11th? I will check.

06 MR. CANADAY: I would like to schedule him that

07 day.

08 HEARING OFFICER DEL PIERO: It would be

09 convenient, Mr. Dodge, if he could be. We can get all

10 the direct testimony out of the way then and start

11 rebuttal.

12 MR. CANADAY: And then the final date would be the

13 12th.

14 MR. DODGE: Let me ask a procedural question

15 here. Looks to me like the 11th is being pretty loaded

16 up. I don't know how long you expect the testimony on

17 the 10th to go. Do you expect a full day?

18 MR. CANADAY: I would expect the 10th to be a full

19 day.

20 HEARING OFFICER DEL PIERO: Mr. Birmingham? A lot

21 of cross-examination on the air stuff?

22 MR. BIRMINGHAM: I would say probably no.

23 HEARING OFFICER DEL PIERO: An hour? Two?

24 MR. BIRMINGHAM: An hour at the most.

25 HEARING OFFICER DEL PIERO: I'll plan on two.

0094

01 Meaning no offense. I learned that from Flinn, you
02 know? Five minutes --
03 MR. BIRMINGHAM: No offense taken.
04 HEARING OFFICER DEL PIERO: -- times 45 minutes.
05 Why don't we do this? Why don't you have your
06 panel ready to go in the afternoon on the 10th,
07 Mr. Dodge, okay?
08 MR. DODGE: It's just Dr. Mesick. It's not a
09 panel.
10 HEARING OFFICER DEL PIERO: Well, then, why don't
11 we have just Dr. Mesick? That'll be easy. How much
12 time did you think Dr. Mesick's going to take?
13 MS. CAHILL: He's fish.
14 MR. DODGE: He's fish oriented, so it tends to
15 draw a lot of players. I would think two or three
16 hours.
17 HEARING OFFICER DEL PIERO: He's also one
18 witness. What, three hours? If we get him on at four,
19 we get him off at seven, we're out of here, right?
20 MR. BIRMINGHAM: I can't imagine that we could not
21 finish the Great Basin and Dr. Mesick in one day.
22 HEARING OFFICER DEL PIERO: Let's plan on that.
23 Mr. Canaday, Dr. Mesick -- how do we spell his
24 name?
25 MR. BIRMINGHAM: M-E-S-I-C-K.

0095

01 HEARING OFFICER DEL PIERO: Plan on him on the
02 10th, Mr. Canaday, unless we hear otherwise, and
03 Mr. Dodge is going to confirm his availability for us;
04 is that correct, Sir?
05 MR. DODGE: That's correct.
06 HEARING OFFICER DEL PIERO: Okay. What else do we
07 have, Mr. Canaday?
08 MR. CANADAY: The only other date that I have on
09 my calendar, and I need confirmation by Mr. Frink, is
10 the remainder that on the 12th that the rebuttal
11 written testimony was due at 5:00 p.m.
12 MR. FRINK: That's correct.
13 MR. CANADAY: You should make note of that.
14 HEARING OFFICER DEL PIERO: All parties are aware
15 of that.
16 MR. FLINN: Are we also beginning rebuttal
17 testimony on the 12th?
18 HEARING OFFICER DEL PIERO: On the 12th, we begin
19 with the environmental consultants.
20 MR. FLINN: That's right. Yeah.
21 HEARING OFFICER DEL PIERO: Nobody has any -- this
22 is your last opportunity. Any objections? Okay.
23 Thank you very much. And Mr. Valentine?
24 MR. VALENTINE: I just have one minor housekeeping
25 announcement. When Mr. Carl from the Department of

0096

01 Parks and Recreation testified last week, he introduced
02 a series of slides in his testimony. I have made
03 copies, distributed ten copies to the Staff and one of
04 each to the parties that are present. I will mail the
05 rest to the balance who aren't here, and I have a few
06 extra if people --
07 HEARING OFFICER DEL PIERO: And were those entered
08 into the record at the time?

09 MR. VALENTINE: They were.
10 HEARING OFFICER DEL PIERO: Everyone got theirs?
11 Thank you very much, Mr. Valentine.
12 Any other housekeeping?
13 We'll see you at one o'clock, Ladies and
14 Gentlemen.
15 (Whereupon the lunch recess was taken.)
16 HEARING OFFICER DEL PIERO: Ladies and Gentlemen,
17 this hearing will again come to order.
18 Mr. Silver? Mr. Silver, your appointed place is
19 behind that rostrum there.
20 You've not been sworn yet, have you? Would you
21 please rise and raise your right hand? Do you promise
22 to tell the truth during the course of this proceeding?
23 MS. VOLIN: Yes.
24 HEARING OFFICER DEL PIERO: Please proceed.
25 MR. SILVER: I'm Larry Silver, Staff Attorney with
0097
01 the Sierra Club and I'm representing, in this
02 proceeding, the Sierra Club. We have one witness, and
03 we'd like to put on her testimony at this time.
04 DIRECT EXAMINATION BY MR. SILVER
05 Q Would you give your name for the Board?
06 A Jacqueline Volin, J-A-C-Q-U-E-L-I-N-E, Volin,
07 V-O-L-I-N.
08 Q And by whom are you employed?
09 A I'm a writer at the Sierra Club Legal Defense
10 Fund.
11 Q And could you describe, Jaqueline, in what task I
12 have requested you to perform in connection with these
13 hearings?
14 A You asked that I review historical records and
15 documents about recreation on Mono Lake and -- for the
16 late 1920s and thirties and early forties.
17 Q And what documents -- what was the nature of the
18 documents that you reviewed?
19 A Back issues of the Bridgeport Chronicle-Union, and
20 the Inyo Register. Oral histories from the Mono Lake
21 residents. Wallace McPherson was one of them and some
22 other residents, and photos that the Mono Lake
23 Committee had as well.
24 Q Your testimony is in the record. Would you now be
25 able to summarize your report based on the historical
0098
01 studies that you performed?
02 A I can't look at you because I don't have it
03 memorized.
04 HEARING OFFICER DEL PIERO: There's no rule that
05 you're obliged to either look at me or have it
06 memorized.
07 MS. VOLIN: Here goes. For anyone traveling in
08 the eastern Sierra roads that wind into the Mono Basin,
09 nothing is more dramatic than the gradual emergence of
10 Mono Lake, a vast spread of silver that grows more
11 alluring the closer one moves to its shores.
12 HEARING OFFICER DEL PIERO: There is a rule. You
13 have to read it slow enough so that the Court Reporter
14 can take it down.
15 MS. VOLIN: Okay. Do you want me to start again?
16 It seems a quiet, peaceful destination to today's

17 travelers, but in the 1920s and thirties, the
18 atmosphere there fairly busied with recreation,
19 attracting many visitors to the basin's lodges and
20 resorts. Since at least the 1880s, Mono Lake had
21 enjoyed a reputation as a fashionable and healthful
22 vacation spot. Its healthy waters credited with
23 everything from cleansing one's skin, hair, and
24 clothing, to soothing sore throats, not to mention
25 being a lovely place to swim, boat, fish, hike, camp,

0099

01 hold boat races, and hunt water fowl.

02 Is that slow enough?

03 Because tourism was such an important economic
04 resource for Mono County, the proprietors of Mono
05 Lake's guest lodges used to travel the state in
06 wintertime pushing Mono Lake as a summer holiday
07 retreat. Benita McPherson, who ran the Mono Inn, even
08 brought packages of Mono Lake's cleansing and healing
09 salts with her when she traveled in the winter.

10 Rex Foster, another Mono County lodge owner, went
11 to travel conventions around the state with motion
12 picture footage of Mono County which a representative
13 from the Touring Bureau of the Automobile Club of
14 Southern California hailed predicting they would bring
15 a healthy flow of tourists to the area.

16 In the 1920s and thirties, duck hunting was very
17 good all around Mono Lake. The seeps, streams, and
18 lagoons that once existed near the shore provided
19 excellent habitat and sustenance for the huge flocks of
20 water fowl and other migrating birds that used to grace
21 Mono's water and skies. On the road that ran along the
22 southwest shore of the lake between Rush and Lee Vining
23 Creeks, on the south shore near the mouth of Rush Creek
24 at the confluence of the former Weisman (phonetic)
25 properties on the southeast shore of the lake at Simons

0100

01 Springs and Warm Springs on the eastern shores, at the
02 north shore Stanburg (phonetic) Beach, and at Black
03 Point and the DeChambeau Ponds on the northwest shore,
04 good duck hunting was as reliable as a change of
05 seasons.

06 Walter Dumbrowski ran a successful duck club along
07 the Rush Creek delta throughout the 1930s, and one
08 attraction for the lodges for nearby June and Silver
09 Lakes was the opportunity their owners offered to go
10 duck hunting on the southeast shore of Mono Lake.

11 Tourists and locals also used to enjoy great trout
12 fishing near Mono Lake in the areas of Rush and Lee
13 Vining Creeks -- and that status was important enough
14 to prompt the formation of a club in 1932 to insure
15 that Fish and Game continued to prosper in the county.
16 Wallace McPherson and Jack Preston, both of whom lived
17 near the lake in the 1920s and thirties, even
18 remembered catching fish out of Mono Lake, itself. The
19 flows in pre-diversion Rush and Lee Vining Creeks were
20 so strong that fish used to ride the fresh water
21 currents out to the lake.

22 Boating on Mono Lake was another primary
23 attraction. James Clover, who, at the time, owned
24 property at the Rush Creek delta, used to keep rowboats

25 on his beach front land. In fact, Clover used to rent
0101
01 spots on his property to campers because of the ideal
02 duck hunting, fishing, swimming, boating, and hiking
03 opportunity there. As one of the proprietors of the
04 Mono Inn, which used to be so close to the shore that
05 it had a dock right up front, Wallace McPherson ran
06 tours out on the lake on a boat he named for his
07 mother, Benita. He would lead visitors past Negit
08 Island, pausing long enough to give his guests a chance
09 to feed the noisy flocks, and would dock at Paoha where
10 his passengers trooped off to explore the island's
11 natural hot springs and crater lakes.

12 Do you have the photos? If you want to look at
13 them, Exhibit SC-2 shows an ad for McPherson's boat
14 trips. SC-3 shows McPherson's boat near the gull
15 colony, SC-7 shows Paoha Island to Crater Lake.

16 Did you want me to wait?

17 HEARING OFFICER DEL PIERO: No.

18 MS. VOLIN: I didn't know if you were looking.

19 HEARING OFFICER DEL PIERO: There's no rule that I
20 have to keep up with you either.

21 MS. VOLIN: Okay. When beach parties were thrown
22 on Paoha, McPherson was often was the one to provide
23 the rides there and back. And his moonlight rides on
24 the lake were very popular, inspiring at least one
25 romance.

0102

01 Boat races for canoes, rowboats, and power boats
02 were the highlight of the annual Mark Twain Day, a
03 summer festival that brought crowds to Mono Lake each
04 August from the 1930s. Exhibit SC-5 shows one of the
05 speedboat races on the lake in 1933.

06 By 1936, the Los Angeles Speedboat Association was
07 hosting races on Mono Lake for Mark Twain Day, and by
08 the close of the decade, the festival was one of the
09 best-known speedboat racing events of the year with the
10 National Outboard Racing Commission and the American
11 Power Boat Association sanctioning an all-day regata at
12 the 1940s Mark Twain Days.

13 Regional power boating associations used the Mark
14 Twain Day races to determine sectional state champions,
15 and in July 1934, the Outboard Motor Club of Mono Lake
16 hosted its own races, an event that also became a
17 popular yearly draw.

18 Swimming in Mono Lake and its feeder streams was
19 another popular pastime. Swimmers on the lake saw
20 swimming parties thrown on the beach or on Paoha Island
21 with picnics, bonfires, and barbecues carrying on into
22 the evening. Two popular spots for swimming in the
23 lake were near mouths of Lee Vining and Rush Creeks.

24 People could swim in Mono's salty waters then wash
25 off in the fresh waters from the streams. And

0103

01 actually, ducks used to settle near the mouth of Rush
02 Creek for much the same reason. They'd feast on the
03 brine shrimp in the lake and rinse the salt off their
04 feathers in the fresh water from the creek.

05 Another good swimming spot was at the western tip
06 of the lake near what is now called called the Old

07 Marina, and some people swam in Rush Creek as well.

08 Mark Twain Day featured swimming races for men,
09 women, and kids, and a curious work called horse
10 swimming which essentially, was a horse race in the
11 lake.

12 Benita McPherson started the annual Mark Twain Day
13 celebration as a was of bringing the people of Mono
14 County together for a day of fun and socializing. This
15 grand Mono Lake tradition began with fanfare in August
16 1929 when between 750 and a thousand people attended an
17 event featuring skits, music, speeches by politicians,
18 and all sorts of tests of skill, boats, swimming,
19 running, and sack races, horse swimming, pistol
20 shooting, and the ever-popular parade of bathing
21 beauties. The festivities closed with a dance that
22 evening, the beginning of a tradition whose popularity
23 grew with each passing year.

24 By 1933, the Inyo Register reported that Mark
25 Twain Day was already, quote, becoming a fixed summer

0104
01 feature of Mono Lake and that it included, quote, about
02 every activity that could be though of for an aquatic
03 occasion, including the sports already mentioned plus
04 aqua-planing. Exhibit SC-6 shows someone aqua-planing
05 behind the McPherson's boat on the lake.

06 The Mark Twain Day boat races were very popular,
07 as mentioned, and by 1940, Mark Twain Day had become
08 such a draw that it covered a weekend and warranted its
09 own supplement in the newspaper.

10 In addition to the usual events, 1940's Mark Twain
11 Day includes tennis tournaments, a softball game,
12 performances of Native American ceremonial dances, and
13 a water ballet.

14 But 1941, the same year that saw the United States
15 enter World War II and Los Angeles became its Mono
16 Basin stream diversions, also saw the last of the great
17 Mark Twain Days.

18 For those who lived out or visited pre-diversion
19 Mono Lake, the area had it all. Far from the
20 desolation, Twain depicted with characteristic
21 hyperbole in the book Roughing It, tourists and locals
22 recognized Mono Lake as a beautiful little corner of
23 the world, brimming with recreational opportunities. A
24 place that had inspired other writers to string words
25 together in praise of the lake.

0105
01 It is with an excerpt from one these poems
02 published in 1930 that I conclude. This is by Alan A.
03 Perry, and it's from a poem called Mono, Land of
04 Beauty. "Heed oh Mono's invitation, come in auto,
05 cart, or plane. Come that we may vacation and dream
06 through a summer's day of the gold we have sought, of
07 the trout we have caught, and the ones that got away,
08 by the campfires bright and the pale moonlight, we'll
09 rehearse of the deer we have shot and our search for
10 the mallard duck. When the embers grow dim, we will
11 rouse again from our reverie and fill each glass to the
12 brim. We'll offer a toast to old Mono our host, old
13 Mono beneath the Sierra's rim."

14 HEARING OFFICER DEL PIERO: Thank you.

15 Mr. Silver, does that conclude your presentation?
16 MR. SILVER: I have nothing further.
17 HEARING OFFICER DEL PIERO: Thank you very much.
18 Mr. Birmingham?
19 MR. BIRMINGHAM: May I confer with Mr. Dodge for
20 just a moment?
21 HEARING OFFICER DEL PIERO: Yes, Mr. Birmingham.
22 MR. BIRMINGHAM: We have no cross-examination. As
23 difficult as that is to believe, we have no
24 cross-examination.
25 MR. BROWN: What was that, Tom? I didn't hear.

0106

01 MR. BIRMINGHAM: We have no cross-examination.
02 HEARING OFFICER DEL PIERO: Mrs. Anglin, do you
03 think you've gotten that clarified in the record?
04 Thank you very much, Mr. Birmingham.
05 Mr. Dodge?
06 MR. DODGE: No questions.
07 HEARING OFFICER DEL PIERO: No questions.
08 Mr. Dodge, I thought for sure you might have questions
09 about -- I know mine and your acknowledged personal
10 favorite photograph, the bathing Beauties at Mark Twain
11 Day.
12 MR. DODGE: I do like that photograph,
13 Mr. Del Piero, but I don't like it any more by asking
14 questions about it.
15 HEARING OFFICER DEL PIERO: Oh. Some things
16 better left unsaid, I think.
17 Ms. Cahill?
18 MS. CAHILL: We have no cross-examination.
19 HEARING OFFICER DEL PIERO: Thank you very much.
20 Mr. Valentine?
21 MR. VALENTINE: No questions. Thank you.
22 HEARING OFFICER DEL PIERO: Mr. Gipsman?
23 MR. GIPSMAN: No questions.
24 HEARING OFFICER DEL PIERO: Mr. Frink?
25 MR. FRINK: No questions.

0107

01 HEARING OFFICER DEL PIERO: Mr. Smith?
02 MR. SMITH: I wouldn't dare ask a question.
03 HEARING OFFICER DEL PIERO: Uh-huh.
04 Mr. Herrera?
05 MR. HERRERA: No questions.
06 HEARING OFFICER DEL PIERO: Mr. Canaday.
07 MR. CANADAY: I have one.
08 HEARING OFFICER DEL PIERO: Mr. Canaday has one
09 question.

10 CROSS-EXAMINATION BY THE STAFF

11 Q BY MR. CANADAY: In your testimony, you mentioned the
12 water fowl. Did your information come -- where did you
13 get your information on the water fowl?
14 A BY MS. VOLIN: From the newspapers and from the oral
15 histories. Do you want the specific names of the
16 people whose oral histories I used for --
17 Q That would be helpful, yes.
18 A They all -- they all pretty much talked about the
19 hunting, Wallace McPherson, there were three different
20 interviews with Wallace McPherson conducted by people
21 from the Mono Lake Committee. Actually, two interviews
22 and one declaration. One was an interview with Emily

23 *Strause in 1989, and then another was an interview
24 with David *Gaines and Eileen *Mendelbaum, and that was
25 in 1985, and then his declaration is from 1990. Bobby
0108

01 *Hessinger Andrews did a joint interview with Eileen
02 Mendelbaum and Emily Strause, and that was in October
03 1991, and I took some of the information their
04 interview. Stuff from John *Dondero and Dorothy
05 *Andrews. They also had a joint interview with Eileen
06 Mendelbaum and Brian *Flake, and that was in April
07 1992. They also did some talking about the water fowl,
08 Jesse *Durant, from an interview with Emily Strause in
09 1991, and also from issues of the -- mostly the
10 Bridgeport Chronicle-Union, from the late twenties and
11 all through the 1930s.

12 Is that specific enough?

13 MR. CANADAY: Thank you.

14 HEARING OFFICER DEL PIERO: Nothing else?

15 Mr. Smith?

16 MR. SMITH: Just one housekeeping. On your -- on
17 your exhibit identification index, could you put --
18 type up a new one that says SC-A with the written
19 testimony and then put SC-1, 2 with a brief description
20 of each one of the pictures, you know, for the official
21 record? If you want to introduce these things. Do you
22 want to introduce these pictures as part of the
23 testimony?

24 MR. SILVER: Yes. It's intended that the pictures
25 are an integral part of the document.

0109

01 MR. SMITH: My problem is that they're not on the
02 index of exhibits.

03 HEARING OFFICER DEL PIERO: If you could get
04 together for form with Mr. Smith afterwards.

05 MR. SMITH: Yeah.

06 HEARING OFFICER DEL PIERO: No other questions?
07 Mr. Frink?

08 MR. FRINK: In order that our record is clear, it
09 looks like the pictures all do have an Exhibit No. 1
10 through 7. The only thing that didn't have a number as
11 such was your written statement, and if we could just
12 make that rather than Sierra Club A, make it Sierra
13 Club 8, and that way we'll have Exhibit 1 through 8,
14 and you won't have to renumber everything. Is that
15 agreeable?

16 MR. SILVER: That will be fine.

17 MS. VOLIN: Because actually other people have
18 already referred to these exhibits in their testimony.
19 Some of the historical witnesses did, referred to the
20 photographs by numbers.

21 MR. FRINK: If there are no objections, it would
22 be appropriate to admit Sierra Club Exhibit 1 through 8
23 as renumbered.

24 HEARING OFFICER DEL PIERO: No objections?

25 MR. DODGE: No objections.

0110

01 HEARING OFFICER DEL PIERO: So ordered.
02 (Sierra Club Exhibits Nos. 1
03 through 8 were admitted into
04 evidence.)

05 HEARING OFFICER DEL PIERO: Thank you very much,
06 Mr. Silver. Thank you very much for your time. I
07 appreciate it.
08 Anything else Ladies and Gentlemen?
09 MS. CAHILL: Mr. Del Piero, did you want to put on
10 the record the agreement with the attorneys present?
11 HEARING OFFICER DEL PIERO: Why don't you
12 articulate it for us, Ms. Cahill, since you've been the
13 person discussing it with all the various
14 representatives.
15 MS. CAHILL: It's been agreed among the attorneys
16 present today that following the exchange of witness
17 names and subjects on January 7th, all parties will
18 have 'til close of business on Monday, January 10th, to
19 name an expert of their own in a subject listed by any
20 other party. The new expert will not be required to
21 submit written testimony but will be limited to the
22 confines of the subject in the written testimony which
23 he or she is called to address. And I have volunteered
24 to notify the attorneys for Cal-Trout of that
25 agreement.

0111

01 Is it your desire that we send a letter to all
02 parties?
03 HEARING OFFICER DEL PIERO: Yeah. That would be
04 nice, if you would be so kind as to do that. Okay?
05 But specifically to Cal-Trout.
06 Anything else, Ladies and Gentlemen?
07 MR. DODGE: If there's nothing else, I have a
08 fairly important procedural matter.
09 HEARING OFFICER DEL PIERO: Yes, Sir.
10 MR. DODGE: I got a present from the --
11 Mr. Del Piero, and I thank you for that. I'll open it
12 on Christmas morning.
13 In the spirit of the holidays, I was hopeful that
14 someone in the room could help the Del Piero family or
15 specifically, Mrs. Del Piero. Does anyone want to buy
16 a copy of the Encyclopedia Britannia? She has one for
17 sale. Mr. Birmingham may suggest that -- may be
18 thinking that I have been having side-bar conferences
19 with Mr. Del Piero, but it's not so. It's right here
20 in Herb Caen. He talks about an ad. For sale by
21 owner, Encyclopedia Britannica. Excellent condition.
22 No longer needed. Husband knows everything.
23 (Laughter.)
24 (Applause.)
25 HEARING OFFICER DEL PIERO: Did you get that

0112

01 down?
02 THE REPORTER: I got it down. I put the applause
03 in, too.
04 HEARING OFFICER DEL PIERO: Thank you.
05 Mr. Dodge, I'll let you know after the holidays
06 whether or not there's a sale. Thank you. Okay.
07 Ladies and Gentlemen, Mr. Canaday, anything else?
08 We have some cider on ice, Ladies and Gentlemen, and
09 beyond that, let me wish you all the most wonderful
10 holidays. I'll see you after the first of the year.
11 Ladies and Gentlemen, the poet laureate of the
12 Mono Lake hearings, Mr. Frink, has prepared something

13 to close the hearings on. Let me read it into the
14 record.

15

16 THREE NIGHTS BEFORE CHRISTMAS
17 aka the Mono Basin Water Right Hearings
18 (With malice toward none and
19 apologies to Clement Clarke Moore)

20

21 'Twas three nights before Christmas and all
22 through the room
23 Not a witness was sweating for they'd be going
24 home soon.
25 The exhibits were placed in the binders with care

0113

01 In hopes that the covers would prevent excess
02 wear.

03

04 The attorneys were nestled snug in their chairs
05 Visions of billable hours removed all their cares.
06 With Del Piero presiding and Alice/Kelsey taking
07 it down
08 The crowd assembled hoped soon to leave town.

09

10 When out in the lobby there arose such a clatter
11 People sprang from their chairs to see what was
12 the matter.

13 Away to the doors they flew like a flash
14 Tripping over mike wires and causing a crash.

15

16 And there through the door at a leisurely pace
17 Strolled Barret McInerney with a grin on his face.
18 When asked his purpose, he said with a grin,
19 I missed the first part, could we begin again?

20

21 Upon hearing this, Del Piero's mouth hung agape
22 Until Roos-Collins suggested Barrett borrow the
23 tape.

24

25 Cahill called her last witness before Christmas

0114

01 break
02 An elderly man who answers to "Jake."
03 The direct went smoothly,
04 Hal Thomas heaved a slight sigh.

05

06 But Birmingham never yet had taken a bye.
07 More piercing than arrows, Tom's questions they
08 came,
09 Followed by Flinn's striking insights
10 As he sized up the new game.

11

12 Time's running short,
13 But there's no reason to fear.
14 Koehler will cover in 10 minutes
15 What takes most folks a year.

16

17 Scoonover politely asked a few questions more
18 And Jake thought he was done as he edged toward
19 the door.
20 But wait, that's not all, there's staff still to

21 go.
22 Bring out the projector and start the show.
23
24 All evidence presented, and some of it new,
25 It's beginning to look like there's no more to do.
0115
01 But Goldsmith sensed quickly as she heard growing
02 clatter.
03 That Dodge was preparing to raise a procedural
04 matter.
05
06 The question was pondered and all had their say.
07 This hearing will resume 6 A.M. New Year's Day.
08
09 Then all rushed to their care and paid the garage
10 fee,
11 As they tried to imagine that for the next week
12 they'd be free.
13 I heard someone exclaim as he sped out of sight,
14 "Merry Christmas to All and to Mono Lake a Good
15 Night."
16
17 This hearing's adjourned until January 10th.
18 (Whereupon the hearing was adjourned
19 at 1:42 p.m.)
20
21
22
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24
25

0116

REPORTER'S CERTIFICATE

01

01

02

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02

03

STATE OF CALIFORNIA)

03

) ss.

04

COUNTY OF SACRAMENTO)

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I, KELSEY DAVENPORT ANGLIN, certify that I was the official court reporter for the proceedings named herein; and that as such reporter, I reported, in verbatim shorthand writing, those proceedings, that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 115 herein constitute a complete, true and correct record of the proceedings:

PRESIDING OFFICER: Marc Del Piero
JURISDICTION: State Water Resources Control Board
CAUSE: Mono Lake Diversions
DATE OF PROCEEDINGS: December 22, 1993

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 10th day of January 1994.

24
25
25

Kelsey Davenport Anglin, RPR
CM, CSR No. 8553