PUBLIC HEARING  
STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS  
STATE OF CALIFORNIA  

---o0o---  

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

---o0o---  

Held in  
Resources Building  
Sacramento, California  
Wednesday, December 22, 1993  

VOLUME XXVIII  

---o0o---  

Reported by: Kelsey Davenport Anglin, RPR, CM, CSR No. 8553  

BOARD MEMBERS  

MARC DEL PIERO  
JOHN CAFFREY  
JAMES STUBCHAER  
JOHN W. BROWN  
MARY JANE FORSTER  

STAFF MEMBERS  

DAN FRINK, Counsel  
JAMES CANADAY, Environmental Specialist  
STEVE HERRERA, Environmental Specialist  
RICHARD SATKOWSKI, Engineer  
HUGH SMITH, Engineer
COUNSEL AND OTHERS

01
02 For the U.S. Fish and Wildlife Service:
02
03 ERIKA NIEBAUER
03 Assistant Regular Solicitor
04 Office of Solicitor
04 Pacific Southwest Region
05 2800 Cottage Way
05 Sacramento, California 95825
06
06 For the Sierra Club:
07
07 LARRY SILVER:
08
08 For California Department of Fish and Game:
09
09 HAL THOMAS
10
10 VIRGINIA CAHILL
11 McDonough, Holland & Allen
11 555 Capitol Mall, Suite 950
12 Sacramento, California 95814
12
13 For the U.S. Forest Service:
13
14 JACK GIPSMAN
14 Office of General Counsel
15 U.S. Department of Agriculture
15
16 For the National Audubon Society and Mono Lake Committee:
16
17 BRUCE DODGE
18 PATRICK FLINN
18 Attorneys at Law
19 755 Page Mill Road
19 Palo Alto, California 94304
20
For California Trout:

RICHARD ROOS-COLLINS
CYNTHIA KOEHLER
Attorneys at Law
114 Sansome Street, Suite 1200
San Francisco, California 94104

COUNSEL AND OTHERS

For the City of LA and LA DWP:

THOMAS W. BIRMINGHAM
JANET GOLDSMITH
Attorneys at Law
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, California 95814

For State Lands Commission, Department of Parks and Recreation:

MARY SCOONOVER
Assistant Attorney General
1515 K Street
Sacramento, California 95814

For Meter Water District of Southern California and LA MWD:

VICTOR GLEASON
Attorney at Law
1111 Sunset Boulevard
Los Angeles, California 90050-0153

FRANK HASELTON
Haselton Associates

JOHN ARCULARIUS
MIKE VALENTINE
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.
for the calendar year 1993 on the matter of the 
tributaries of Mono Lake.

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

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

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

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

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

MR. COLLINS: Stanford.

(Laughter.)

HEARING OFFICER DEL PIERO: Stanford.

Please continue, Mr. Flinn.

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

HEARING OFFICER DEL PIERO: Any objections?

None? Those will be ordered into the record.

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

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

HEARING OFFICER DEL PIERO: Any objections?

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

(Laughter.)

MR. FLINN: I'll be happy to.

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

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

MR. FLINN: And finally, just to save Mr. Dodge 
the trouble, Dr. Stine made two diagrams last night.
Those were Exhibits 243 and 244. We will be providing eight and a half by 11 versions of those, but I would move their admission now as well.

HEARING OFFICER DEL PIERO: I'm sure they'll be suitable for framing; is that true?

MR. FLINN: They will be.

HEARING OFFICER DEL PIERO: Any objections to note? Those will be ordered into the record, also.

(Exhibits Nos. 243 and 244 were admitted into evidence.)

MS. CAHILL: I would like to move admission of DFG 177, the memo I discussed yesterday.

HEARING OFFICER DEL PIERO: Any objection? So ordered.

(DFG Exhibit No. 177 was admitted into evidence.)

HEARING OFFICER DEL PIERO: Good morning, Mr. Dodge.

MR. DODGE: Good morning.

HEARING OFFICER DEL PIERO: You're looking fit this morning, Sir.

MR. DODGE: I am fit this morning. Looking forward to battling the crowds tomorrow on the mall. I would like to move the admission of the testimony of --

HEARING OFFICER DEL PIERO: Sweaters. Sweaters work well.

(Laughter.)

MR. DODGE: Referred to by yesterday's panel.

HEARING OFFICER DEL PIERO: See, all the women are nodding their heads vigorously.

MR. BIRMINGHAM: What do we do for eight-year-old children?

HEARING OFFICER DEL PIERO: Oh, Buddy, are you in trouble. I'll tutor you privately afterwards on that.

MR. FLINN: Star Trek action figures.

HEARING OFFICER DEL PIERO: They're girls, X-men don't cut it.

Please proceed.

MR. DODGE: That reminds me of a joke, but I can't tell it here.

HEARING OFFICER DEL PIERO: Okay.

MR. DODGE: I would like to move the admission of the testimony of Ms. Baldridge, Exhibit Cal-Trout 1.

The testimony of Mr. Trihey, National Audubon Society and Mono Lake Committee Exhibit 1-X and 1-Y, and the Audubon exhibits referred to in Mr. Trihey's testimony, those being Exhibits 104 through 140, Exhibit 217, Exhibit 240 and 241, which are the blowups that Mr. Trihey was using yesterday. And finally, I would like to move the admission of State Water Resources Control Board Exhibits 36-A through BB.

HEARING OFFICER DEL PIERO: Any objections? So ordered. I'm sorry.

MR. BIRMINGHAM: Yes. I don't really have an objection to the admission of any of these documents, but I would like to note that many of the exhibits that
are attached -- or that are referred to in Mr. Trihey's testimony are technical reports that were prepared by Mr. Trihey and they were not supplied to the parties. There was a note attached to -- a cover sheet of each one of those exhibits that stated that they were being -- that they were not being supplied to the parties because they had previously been distributed to all of the parties. In fact, we do not have all of the exhibits that -- or all of the reports that have been identified.

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

MR. DODGE: That's fine.

HEARING OFFICER DEL PIERO: Thank you very much.

(Cal Trout Exhibit No. 1 was admitted into evidence.)

(NAS/MLC Exhibits Nos. 1-X, 1-Y, 104 through 140, 217, 240, 241 were admitted into evidence.)

(SWRCB Exhibits Nos. 36-A through BB were admitted into evidence.)

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

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

HEARING OFFICER DEL PIERO: Sweaters, Mr. Dodge. Okay. This morning we have witnesses on behalf of the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the Sierra Club. Who's here on behalf of the Forest Service this morning?

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

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

MR. GIPSMAN: Nice to be here.

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

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

MR. MARTIN: I do.

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

MR. GIPSMAN: This Court Reporter hasn't seen me before so I will identify myself. I'm Jack Gipsman from the Office of General Counsel, U.S. Department of Agriculture, and I am the attorney representing the Forest Service.

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

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

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

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

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

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

Obviously, some changes will occur if the lake level is raised to 6390. Some of the known sand Tufa formations, or most of those, we've seen some toppling of the lithoid water-based Tufa, some other increases, and I won't go into the details on what the experts have already covered. However, regardless of the changes that might occur because of the raising of the lake level to what we've recommended in the plan, it would still be consistent with mandates for legislation.

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

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

We did have the caveat that obviously, it's going to take some time for the lake level to rise to 6390. Monitoring is something that we're certainly required
to do and would expect the Air Pollution Control
District to do also, and if it turns out that during
that period that the dust storms have been mitigated,
then we would hope that the Water Resources Control
Board would come back and take a look at diversions at
that time.

That's my statement.

HEARING OFFICER DEL PIERO: Thank you very much.

MR. GIPSMAN: That concludes our direct
examination.

HEARING OFFICER DEL PIERO: Thank you very much,

Mr. Gipsman.

CROSS-EXAMINATION BY MR. BIRMINGHAM

Q Good morning, Mr. Martin.

A Good morning.

Q I introduced myself earlier as Tom Birmingham, one
of the attorneys representing the Department of Water
and Power for the City of Los Angeles in this
proceeding. We -- we spoke with Nancy Upland several
days ago, and I examined her extensively regarding the
Comprehensive Management Plan and the DEIS, so I won't
cover the same ground the morning that I did with
Ms. Upland to save some time.

But I do have a couple of questions about the
Final Environmental Impact Statement that was prepared
in connection with adoption of the Comprehensive
Management Plan.

Do you have a copy of the Final Environmental
Impact Statement with you?

A Yes, I do.

Q And that's Forest Service Exhibit 2; is that
correct?

A That's correct -- 1, rather.

Q The Final Environmental Impact Statement is Forest
Service Exhibit 1; is that correct?

A That's correct.

Q I'd ask you to turn to Page 14 -- I'm sorry. Page
180, Table 14, of the Final Environmental Impact
Statement. Table 14 on Page 180 contains a description
of the environmental effects on various resources at
different lake levels. Is that correct?

A Yes, that's my understanding.

Q And there are letter designations that are
associated with different lake levels and different
resources; is that correct?

A Yes.

Q The M stands for maintain. Is that correct?

A I would have to read the --

Q I think if you look at Page 179, there's a
description of lake dependent and lake margin alkali
flat species.

A Right. Right. I see.

Q And there's a legend that says, "M signifies
resource maintained."

A Right. Right.
SL indicates resource slightly affected; is that correct?
That's correct.
SE indicates that the resource is severely affected; is that correct?
That's correct.
And E indicates that the resource is eliminated.
Okay.
And now I'd like to talk about each one these resources. At elevation 6380, each one of the resources that's listed in Table 14 of the Environmental Impact Statement is maintained; is that correct? At elevation --
Yes, that's correct.
And that's the same analysis that's associated with lake elevation 6390; is that correct?
That's correct.
If we look at elevation 6370 -- elevation 6370 is below the historic low stand of Mono Lake. Is that correct?
Yes.
The historic low stand of Mono Lake is approximately 6372 feet?
I believe that's the right figure.
Now, brine shrimp at elevation 6370 -- according to the analysis in the Final Environmental Impact Statement, brine shrimp are maintained.
That's correct.
Alkali flies at elevation 6370 are slightly affected; is that correct?
That's consistent with the table.
Now, what is your understanding of the term "slightly affected"?
I can't -- if you're asking me to quantify that, I can't. There's some effect. It's probably a subjective determination in terms of actual populations. I don't know. There is some adverse effect on the alkali fly.
But the fact that it's slight would indicate, if we were to put it in terms of NEPA, would mean that it is not a significant impact; isn't that right?
I'm not sure you can draw that analogy. Significance usually has to deal with whether we do an environmental impact statement or environmental analysis, so I'm not sure they're comparable.
Now, grebes and gulls at elevation 6390 -- I'm sorry, elevation 6370 are both maintained as resources; is that correct?
That's, again, consistent.
And then Wilson's phalaropes, red-necked phalaropes, and snowy plovers are all slightly affected at an elevation of 6370?
That's correct.
Now, you have indicated that because of the designation of the Mono Basin as a non-attainment area, it may be necessary to amend the Comprehensive Management Plan.
Yes, that's correct.
Q    But, at this point, the Forest Service does not
know whether or not the Comprehensive Management Plan
will be amended?
A    That's true. We're waiting for some definite
information as to whether we would or not.
Q    Now, if this Board were to establish a lake level
where the lake was maintained between elevation 6374
and 6385, or 6384, isn't it correct that the
Comprehensive Management Plan probably would not be
amended?
A    No, that's not correct. It would be amended.
Whatever the Board's decision is, it would probably be
amended.
Q    Well, now, you've recommended -- the Comprehensive
Management Plan recommends a lake level of 6377 to 6390
with management somewhere in the middle, that's about
6383. Is that correct?
A    That's correct.
Q    Now, you've indicated -- the last paragraph of
your testimony contains what you referred to as a
caveat. Is that correct?
A    That's correct.
Q    This is on Page 4 of your testimony. It states
that, "It is projected that meeting this objective,"
and there you refer to the 6390 alternative, "meeting
this objective will require a transition period of some
30 years, and it is logical and important to require
that air quality as well as the effect on other
resources will be monitored. If monitoring discloses
that air quality standards can be achieved and
maintained at a lake level lower than 6390 feet and
that lake level is also consistent with that needed to
protect other public trust values, legislation creating
the scenic area and the Comprehensive Management Plan,
then the Board's action or rule may be modified to
allow additional diversions of tributary streams that
would maintain the lake at that level if the need for
such diversions still exists."
A    That's my statement.
Q    By that, do you mean that if it is established
that an elevation of 6390 is not required to meet air
quality standards, that it would be appropriate for the
Board to establish a lower lake level if that lower
lake level would be consistent with the
comprehensive -- the goal set out in the Comprehensive
Management Plan?
A    Yes, that's correct.
Q    When the Comprehensive Management Plan was
adopted, you've testified that you conducted a
balancing or there were some trade-offs with respect to
resources; is that correct?
A    That's correct.
Q    Now, when you adopted the Comprehensive Management
Plan, or when the Forest Service adopted the
Comprehensive Management Plan, it did not consider the
water supply needs of the people of the City of Los
Angeles. Isn't that correct?
We recognized the needs, but we did not do an analysis.

MR. BIRMINGHAM: Thank you very much. I have no further questions.

HEARING OFFICER DEL PIERO: Thank you,

Mr. Birmingham.
Ms. Cahill?
MS. CAHILL: No questions.

HEARING OFFICER DEL PIERO: Mr. Dodge?

MR. DODGE: I have no questions. I believe Mr. Flinn might have a couple of questions about Table 14.

MR. FLINN: Just very quickly.

CROSS-EXAMINATION BY MR. FLINN

Q Are you aware, Sir, that specifically with regard to the references there to brine shrimp and alkali fly, that since the date of that document, there have been additional research and modeling studies of the effects of lake level on those organisms?
A Yes.

Q And to the extent that they're revisions to the management plan and additional environmental studies, that an updated table reflecting this new information would be likely to be included?
A Probably what we would do is look at all the new information that's come out of the hearing and developed since that time and look at how that might affect the CMP.

MR. FLINN: Thank you, Sir.

HEARING OFFICER DEL PIERO: Thank you very much, Mr. Flinn.

Mr. Valentine?

CROSS-EXAMINATION BY MR. VALENTINE

Q Good morning, Mr. Martin. Mike Valentine. I just want to follow up on one question Mr. Birmingham asked you. With reference to the end of your written testimony at Page 4, the import of Mr. Birmingham's questions, as I understood it, was that if air quality problems could be solved at a lake level lower than 6390 and the goals of the management plan could be met at a lower lake level, then that would basically be acceptable to the Forest Service. Is that fairly consistent with your understanding as well?
A Yeah. What we're saying is basically in recognition that modeling has various degrees of accuracy, that over time, if the monitoring indicated that the P.M. Ten standards were met, then -- at lower levels than 6390, then we would --

Q It would also have to be consistent with the other public trust values protected and fostered by the Comprehensive Management Plan; is that right?
A That's true.

Q These would include visuals?
A Yes.

Q They would include recreation?
A Yes.
Q And to cut it short, they would also include the wildlife and biology and habitat associated with those?
A Certainly.
MR. VALENTINE: Thank you.
HEARING OFFICER DEL PIERO: Ms. Niebauer, any questions?
MS. NIEBAUER: No questions.
HEARING OFFICER DEL PIERO: Mr. Frink?
MR. FRINK: Yes, just a couple.
CROSS-EXAMINATION BY THE STAFF
Q BY MR. FRINK: Mr. Martin, in looking at Table 14 of the Final EIS, it presents a summary of the effects of the various lake elevations on the resources stated in the table. In evaluating the anticipated effect of those lake levels on the specified resources, I assume that the Forest Service was looking at the condition of the specified resources that they -- as it existed at the time of preparing the EIS; is that correct?
A I'm not sure -- yes, to some extent. I think this table was based primarily on the work done by the National Academy of Sciences in the Corey report in looking at those resources, and I'm sure they would have considered the existing condition at that time.
Q Right. And the table shouldn't be read as making any comparison with the condition of the resources as they existed --
A No.
Q -- before diversions began; is that correct?
A That's correct.
MR. FRINK: Thank you.
HEARING OFFICER DEL PIERO: Mr. Smith?
Q BY MR. SMITH: Good morning, Panel members, Board members, and Mr. Martin, good morning. I have just one question for you.
Please assume that we are going to do some restoration work in the scenic area. How would you, as an official of the Forest Service, feel or handle something in the way of restoration if it were required in the forest area? Would that pose permitting problems? Would you look favorably on the creation of wildlife, water fowl habitat in the scenic area? How would you -- how would you, as officials, react to that?
MR. GIPSMAN: Objection. I think the question's overbroad. Can we go through these areas one at a time?
HEARING OFFICER DEL PIERO: I think that's correct. Take them apart one issue at a time.
Q BY MR. SMITH: Okay. For instance, if we've set up some water fowl habitat on, for instance, the north shore of the lake at perhaps 6383.5 or 6377 or 6390 on the north side or the -- close to the shore at that particular point. That's one example. Another example might be at Simons Springs. Are you familiar with that area?
A Yes.
Q Those kinds of examples, if we came up with
restoration plans and -- specifically for water fowl mitigation plans, how would you feel about that? How would you react as an official?
A What we would do is, of course, we'd have to comply with the National Environmental Policy Act. We'd have to do some kind of environmental analysis, compare that to the direction in the Comprehensive Management Plan and look at it for consistency. For example, on Page 54 of the CMP, we talk about considering wildlife management activities, instructional improvements only when needed to restore and protect native species habitat. So if it were trying to restore water fowl habitat that had been there prior to diversion, that would certainly be very appropriate. So you would use a management plan as a guide to do environmental analysis of some sort. And many things, I suspect, would be approved.

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

HEARING OFFICER DEL PIERO: Thank you very much, Mr. Smith.
Mr. Herrera?
MR. HERRERA: I have no questions, Mr. Del Piero.
HEARING OFFICER DEL PIERO: Thank you very much.
Good morning, Mr. Canaday.
MR. CANADAY: Good morning.
Q BY MR. CANADAY: Well, Mr. Smith asked a question in the direction I was interested in. If there were mitigation responsibilities tied to the amended water rights, would we be working with the scenic area, the head of the scenic area, or would we be working with your office?
A You'd be working with our office.
Q And on the potential for amending the plan, the CMP, what kind of time frame does that take? So we could get an understanding of -- let's say, this year the Board has a decision this year and the time frame that your agency would make a decision to amend and then the length of the process, and I know that's hard to give actual numbers, but just kind of a ballpark.
A I can give you an overview of what we would have to do. More than likely, if it were a change in lake level, then we would be looking at a supplemental environmental impact statement which actually would amend our Forest Plan.
The Comprehensive Management Plan for the scenic area has been incorporated into the Forest Plan, so if we were looking at a supplemental EIS, then we would, of course, file a Notice of Intent, which we would probably do anyway, a Notice of Intent in the Federal Register. From that point on, it would probably take 12 to 18 months before we could get it amended. So it is a lengthy process.
Q Do you have the ability to work off of our document? Our final document?
A We might be able to use some of the analysis, but I think we would certainly have to put it in our format. It's just more process than anything else.
MR. CANADAY: That's all I have, Mr. Del Piero.

HEARING OFFICER DEL PIERO: Thank you very much, Mr. Canaday.

Mr. Gipsman, redirect?

MR. GIPSMAN: No redirect.

HEARING OFFICER DEL PIERO: Thank you.

Mr. Birmingham?

MR. BIRMINGHAM: Nothing.

HEARING OFFICER DEL PIERO: Mr. Flinn?

MR. FLINN: Nothing.

HEARING OFFICER DEL PIERO: Ms. Cahill, I'm sorry. I passed over you.

Mr. Valentine?

MR. VALENTINE: Nothing, thank you.

HEARING OFFICER DEL PIERO: My goodness gracious.

Mr. Frink?

MR. GIPSMAN: I'd like to move for the admission of Exhibits 1, 2, and 14.

HEARING OFFICER DEL PIERO: Thank you very much, Sir. Hearing no objections, they're ordered into the record.

(U.S. Forest Service Exhibits Nos. 1, 2 and 14 were admitted into evidence.)

MR. CANADAY: Mr. Del Piero.

HEARING OFFICER DEL PIERO: I'm sorry, Mr. Canaday.

MR. CANADAY: I have just a comment to Mr. Martin. I want to express our appreciation for the use of the visitor's center in the Mono Basin that we had used a few weeks ago. You haven't received a thank you letter, which you will, but I've been a little bit busy. Mr. Del Piero's kept me a little bit busy in this room.

HEARING OFFICER DEL PIERO: Mr. Del Piero hasn't been out of this room.

MR. CANADAY: I just don't want you to think that the lack of a letter means that we don't appreciate and recognize the assistance from the Forest Service in that particular hearing.

HEARING OFFICER DEL PIERO: I'd like to personally express my appreciation on the part of the Board. The offering of your facilities helped us out tremendously. I know the public appreciated it, and we appreciated it as well.

MR. MARTIN: We're really proud of our visitor's center.

HEARING OFFICER DEL PIERO: You should be. It's a wonderful facility.


Would you all rise one last time and raise your right hand? Do you promise to tell the truth during the course of this proceeding?

(All say I do.)

MR. BIRMINGHAM: May I confer with Ms. Niebauer for a moment?

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

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

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

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

Mr. Birmingham, do you have an objection?

MR. BIRMINGHAM: Actually, I do. Mr. Bransfield was listed as a witness. There was no submission of written testimony, and therefore, we are -- I hate to use the word, but we're surprised he's even here. We have not had any witness appear to date who hasn't submitted written testimony, and there's the potential that any testimony that he may have submitted in writing will come in through cross-examination by some party. And --

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

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

MR. DODGE: I don't even know who he is,

Mr. Del Piero.

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

Ms. Cahill?

MS. CAHILL: I have none at this time.

HEARING OFFICER DEL PIERO: Mr. Valentine?

MR. VALENTINE: No.

HEARING OFFICER DEL PIERO: Mr. Flinn?

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

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

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

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

MR. VALENTINE: We'll stipulate to that.

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

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

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

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

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

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

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

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

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

MR. CANADAY: Mr. Del Piero?

HEARING OFFICER DEL PIERO: Yes, Sir.

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

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

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

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

I'm going to rule that the panel -- that these two individuals can present testimony. I'm not going to
allow an amendment to the submittal. However, if there are questions that arise and you're more capable of answering those questions than Ms. Brown, I suggest that you do that if you think it's appropriate. The fact that a witness qualification sheet was originally filed indicates that, at least from the standpoint of a resource, that that individual -- a lot of individuals whose witness qualification forms were filed is at least a resource that was relied on to a certain extent by the parties in the preparation of their case. A number of parties have filed witness identification forms in this process and have not presented witness. The fact that one has been filed and that individual is now present simply to answer questions and not necessarily to present testimony, I think, is appropriate.

Please proceed.

MS. NIEBAUER: Thank you.

DIRECT EXAMINATION BY MS. NIEBAUER

Q Mr. Bransfield, would you please state your name and your title?
A BY MR. BRANSFIELD: My name is Raymond Bransfield. My title is supervisory --
MR. HERRERA: Would you please speak into the microphone?
MR. BRANSFIELD: My name is Raymond Bransfield. My title is supervisory fish and wildlife biologist.
Q BY MS. NIEBAUER: And by whom are you employed?
A I'm employed by the Department of Interior, U.S. Fish and Wildlife Service.
Q Is U.S. Fish and Wildlife Service an accurate description of your qualifications?
A Yes, it is.
Q And did you review U.S. Fish and Wildlife Service 3, which is entitled the testimony of Cathy R. Brown?
A Yes, I did.
Q To the best of your knowledge, is that testimony true and correct?
A Yes, it is.
Q And what is your function here today?
A I am to assist Ms. Brown in cross-examination as part of the panel and to support her testimony.
Q Ms. Brown, would you please state your name, your employer, and your present position?
A BY MS. BROWN: My name is Cathy R. Brown. I'm a fish and wildlife biologist for the U.S. Fish and Wildlife Service in Ventura, California.
Q Is U.S. Fish and Wildlife Services 1 an accurate description of your qualifications?
A Yes, it is.
Q And did you prepare U.S. Fish and Wildlife Service Exhibit 3 entitled Testimony of Cathy R. Brown?
A Yes, I did.
Q Is that exhibit your written testimony for these proceedings?
A    Yes.
Q    And is that written testimony true and correct, to
the best of your knowledge?
A    Yes.
Q    Would you please summarize that testimony?
A    The primary concern of the U.S. Fish and Wildlife
Service is the conservation of public fish and wildlife
resources and their habitats. The Service administers
the Endangered Species Act, which includes listing and
recovery of endangered species. A species may be
determined to be endangered or threatened due to one of
factors, including the present or threatened
destruction, modification, or curtailment of its
habitat or range.
The Mono Lake brine shrimp is a species of fairy
shrimp that is known only from Mono Lake in Mono
County, California. In 1987, the Fish and Wildlife
Service was petitioned to add the Mono Lake brine
shrimp to the endangered species list. At present, the
Mono Lake brine shrimp is a Category One candidate for
listing. Category One means a taxa for which the
Service has on file substantial information on the
biological vulnerability and threats to support a
proposal to list that species as endangered or
threatened.
Degradation of the Mono Lake brine shrimp's
aquatic environment is the primary threat to the
species. Since 1941, fresh water exports from the Mono
Basin have resulted in a 100 percent increase in lake
salinities. Many studies have shown that high
salinities deleteriously affect brine shrimp
reproduction. Some of these negative effects on adult
brine shrimp fecundity occur at present lake levels.
Previous court cases have not specifically addressed
the aquatic ecosystem of Mono Lake, and the issue of
water exports could be resolved in a manner
satisfactory to the courts but without appropriate
protection for the Mono Lake brine shrimp.
Because the higher lake salinities and the
deleterious effects that accompany those salinities
negatively affect Mono Lake brine shrimp reproduction
and those effects are occurring at present salinities
and will continue if salinities increase, the Service
feels that the State Water Resources Control Board
should consider the effects that lake level and
associated salinities will have on the Mono Lake brine
shrimp in resolving the issue of Mono Basin water
rights.
Because many LAMP and modeling studies have shown
that the Mono Lake brine shrimp reproduction and
survival decreases with increasing salinity and the
Service has reviewed many -- many reports in the
literature and the Draft Environmental Impact Report
prepared for the State Board, the Service came to the
conclusion that a lake level of approximately 6390 feet
with a salinity of around 69 grams per liter would be
favorable for the long-term survival and viability of
the Mono Lake brine shrimp.
The reason -- part of reason why the Service settled on a level of 6390 is that this level would provide an adequate buffer for the species to protect the species during periodically recurring droughts which are natural in this region, in the region of the Mono Basin.

That's the end of my testimony.

HEARING OFFICER DEL PIERO: Thank you very much.

MS. NIEBAUER: That's all we have.

HEARING OFFICER DEL PIERO: Thank you very much,

Mr. Birmingham?

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

HEARING OFFICER DEL PIERO: Good. Good morning,

Mrs. Goldsmith. Do you think Mr. Dodge ought to get his wife a sweater?

MS. GOLDSMITH: Absolutely, cashmere.

MR. BIRMINGHAM: With all the money Los Angeles has paid Morrison and Forester, he ought to buy her a couple of sweaters.

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

Please proceed, Ms. Goldsmith.

CROSS-EXAMINATION BY MS. GOLDSMITH

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

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

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

MR. DODGE: Objection, unintelligible.

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

A BY MS. BROWN: An endangered species is a species in danger of becoming extinct.
Q    And what is a definition, as you understand it, of a threatened species?
A    A threatened species is a species in danger of becoming endangered.
Q    So both standards deal with the threat of extinction?
A    Yes.
Q    And as it relates to habitat, the qualification of becoming endangered or threatened is based on the present or threatened destruction modification or curtailment of the habitat or range; is that right?
A    Yes.
Q    Which is likely to cause either extinction or classification as endangered?
A    Yes.
Q    Do you know what the current estimate of abundance is for the Mono Lake brine shrimp?
A    No, I don't. I'm sure it's in the billions.
Q    Billions and billions perhaps?
A    Perhaps.
Q    Excuse me. I'm getting over a cold.
HEARING OFFICER DEL PIERO: That's okay.
Everybody in the room's got one.
MS. GOLDSMITH: I'm afraid they may have me to thank for it as well.
Q BY MS. GOLDSMITH: I looked at your testimony and I note that you have listed a number of references on which you relied; is that right?
A BY MS. BROWN: Yes.
Q    Literature cited as the basis for your testimony?
A    Yes.
Q    And in going through that -- those -- that list, I note that there's very heavy reliance on work by Dr. John Melack; is that right?
A    Well, actually, I didn't support anything -- didn't cite anything directly by Dr. Melack, but he has been involved in many studies and his studies are, in turn, cited by a number of these references, yes.
Q    Do you know who John Melack is?
A    Yes, I do.
Q    Who is Dr. Melack?
A    He's a professor at the University of California Santa Barbara, and he has testified for Los Angeles in this proceedings.
Q    Isn't it true that Dr. Melack and the people who have worked with him have studied the Mono Lake brine shrimp more intensively than any other group or individual?
A    Dr. Melack and his student and associates together, yes, have studied the brine shrimp more than any one group of people, but there are some divergent opinions within that group.
Q    In fact, from the first citation that you have, Botkin (phonetic)?
A    Yes.
Q    Which is the Corey report, as I understand; is that right?
A    Yes.
Q  Dr. Melack wrote the limnology section; is that right?
A  I believe he did.

Q  And Dr. Dana Lenz or --
A  Gail Dana.
Q  I always confuse them -- and Lenz worked with Dr. Melack; is that right?
A  Yes.
Q  And the third reference that you cite is also authored by Dr. Melack?
A  He is the author on that paper.
Q  And the next to the last citation that you have, National Academy of Science, which is L.A. DWP Exhibit 25 in these proceedings, Dr. Melack did the limnological section in that work, didn't he?
A  Yes. He was part of that proposal.
Q  Now, in the National Academy study, which is L.A. DWP 25, it's true, isn't it, that the National Academy of Sciences concluded that the brine shrimp resource is maintained at lake levels down to 6365 feet in elevation?
A  Yes. I believe that's -- I don't know the exact number, but if I may explain a little bit, the purpose of the National Academy of Sciences' study was to determine the lake level at which current wildlife populations would be maintained. Somewhat circular, if you think about it, to find out what would maintain current populations. Of course, the answer was current lake levels.

The Service, in evaluating the status of the species and in determining whether or not it should be listed as endangered, it's a very heavy responsibility, and it's necessary to err on the side of the species. If we're wrong, it could mean the extinction of a species. So the Service has to take not only what is fine right now, but what will protect the species in the face of future natural and man-made variations in the environment.

Q  You're not testifying, are you, that if a species with billions and billions of individuals is maintained at its current level, then it's in danger of becoming extinct?
A  Oh, absolutely.
Q  You're testifying that it's currently in danger of becoming extinct?
A  It could be. When a species is an aquatic species, it's very different when you consider a terrestrial versus an aquatic species. The aquatic species all live or die based on the quality of that aquatic environment. If that aquatic environment were to become of very poor quality, all of individuals could die within one season because we're talking about something that affects all of the individuals at once.

Whereas a terrestrial species -- it's somewhat different. The individuals are more independent. So billions and billions of -- individuals of one species now does not mean that they could fail to -- they might
not fail to reproduce next year. I don't think it
would happen next year, but if the lake level fell low
enough, it could become so highly saline, that they
would fail to hatch the next year.
Q And according to the National Academy of Science,
how low would the lake level have to fall in order for
the resource to become slightly affected? I'll show
you the graph on Page 210 of L.A. DWP Exhibit 25 so you
can refresh your recollection since you've cited it in
your testimony.
Isn't it true that the lake would have to fall
below elevation 6365 in order to become slightly
affected?
A I don't think I used the word "slightly affected,"
and I notice in reviewing the information for the
status review, the Service has primarily considered
salinity, not lake level, because that's something you
can infer from the salinity. A salinity of a hundred
and -- 159 grams per liter would mean no brine shrimp
would survive. I don't know what lake level that would
equate to.

Q Before we go into equating salinity to lake level,
I'd like you to answer my question. Isn't it true that
according to table -- Figure 6.3 at Page 210 of the NAS
report, which is L.A. DWP 25, the lake would have to
fall to elevation 6365 approximately before the
resource would be slightly affected?
MS. NIEBAUER: I'm going to object. I think she
answered that question.
MS. GOLDSMITH: I don't think she did.
HEARING OFFICER DEL PIERO: I'm going to overrule
the objection. I don't think she did, either. You
want the question reread?
MS. BROWN: Please.
(Whereupon the record was read as requested.)
MS. BROWN: I don't think that's true. I think
that many of the studies that have been done show that
brine shrimp reproduction is affected at current
salinities and current lake levels.
Q BY MS. GOLDSMITH: My question, Ms. Brown, is that
what the NAS concluded?
MR. FLINN: I'll object. The document's
evidence. It speaks for itself. We don't need her to
tell us what it says.
HEARING OFFICER DEL PIERO: Your response? The
document does speak for itself. I'd like to hear your
response, if you have one.
MS. GOLDSMITH: The document does speak for
itself, and I'm frankly surprised as to why Ms. Brown
cannot read a graph that's in the document on which she
relied.
MR. VALENTINE: That response was argumentative.
Just because she cited it in her document or cited
somebody who relied on the document, doesn't mean she
relied on it. She has testified that she disagrees
with that conclusion. If that disagreement needs to be
examined and inquired into, then maybe we should go do
that rather than arguing over what the NAS report says.
HEARING OFFICER DEL PIERO: I think I'm going to sustain the objection. However, Ms. Goldsmith, if you want to pursue the difference in opinion as opposed to the chart, then you're welcome to do that.

Q BY MS. GOLDSMITH: Now, is it true that -- I'm correctly understanding your response to the last question that you disagree with the chart because it's based on lake level rather than salinity?

A No, I didn't say that.

Q What is the basis for your disagreement with the chart?

A The word "slightly," that the lake would have to fall to 6350? Is that what it says.

Q 6365.

A Before the resource was slightly affected. Well, I'm not sure how the NAS would define "slightly," but I think the Service would easily conclude that the resources slightly affected now at salinities which have doubled since pre-diversion salinity.

Q It is slightly affected compared to what, Ms. Brown?

A Pre-diversion standards. Brine shrimp reproduction is impaired at current lake salinities. I believe that is certainly slightly, if not more than slightly, affected. So I wonder if because the NAS report, their goal was to determine what was necessary to maintain current wildlife populations, their baseline is different. Their baseline was the lake level at the time of the NAS report.

Q My understanding of your testimony is that it's based upon the premise that the brine shrimp may become threatened or endangered. Is that a correct understanding of your testimony?

A Yes, it could be.

Q It could be or it is?

A No. Brine shrimp could become endangered or threatened if lake salinities increase.

Q And that's the basis of your testimony?

A Yes.

Q Now, do you disagree with the conclusion of the National Academy of Science that the current population of brine shrimp will be maintained at lake levels down to 6365?

MR. FLINN: Just -- could you cite us a page?


MS. BROWN: Would you repeat the question?

(Whereupon the record was read as requested.)

MR. FLINN: I recognize the expertise that went into the preparation of that report, but the lake level will not be maintained at a specific level because there is natural variation. So in evaluating the status of the Mono Lake brine shrimp, the Service requires a buffer against natural and man-made variations, which is why we have chosen a level that is significantly higher because there have been very, very major droughts in the region in prehistorical time. We want to make sure that the shrimp is protected against those natural variations which will be added to the
man-made variations in the lake.

Q BY MS. GOLDSMITH: What is the extent of drought
against which you want to protect the Mono Lake brine
shrimp?

A BY MS. BROWN: I'm sorry. I don't understand "what
is the extent of drought."

Q Well, my understanding of your testimony, and you
can correct me if I'm wrong, is that your testimony is
based on your desire to protect the brine shrimp
against droughts of prehistoric and enormous magnitude;
is that right?

A Yes.

Q What is the extent of the droughts against which
you wish to protect Mono Lake brine shrimp?

A I guess the extent of drought could be measured in
a falling lake level and an accompanying salinity. We
wish to protect the brine shrimp against a salinity so
high that it would fail to reproduce or that it would
fail to reproduce in appropriate numbers that would
also -- that would be of benefit to the other wildlife
resources that use the lake. I'm afraid I can't give
you an exact number. I know that I have read a paper
on the historic and -- historic droughts of the Mono
Basin, but I don't have that handy.

Q Can you tell me how long they are? These droughts
that you want to protect the shrimp against?

A I believe there is prehistorical evidence of
droughts of many decades.

Q In your testimony at Page 3, you state that, "The
Draft Environmental Impact Report concluded that a lake
level of not less than 6390 feet would provide
protection for the species during periodically
recurring droughts which are natural in the region."

A Yes.

Q So are these droughts identified in the DEIR?

A Yes, I believe they are.

Q Can you cite to me where they are discussed?

A I assume that they're in the hydrology section.
I'm sorry. It's been awhile since I've read that
part. I relied mostly on the aquatic productivity
section when I was reviewing the EIR.

Q So your testimony is based on protection of the
Mono Lake brine shrimp against catastrophic droughts
which have not occurred in historical times; is that
right?

A It's not based only on that, no. I believe that
it's the Service's responsibility to protect species
from becoming endangered, and if Mono Lake had never
been subject to diversions of water, then the brine
shrimp evolved with substantial, large and substantial
droughts over its evolutionary history. The lake is
now 40 some feet lower than it was before diversion
began, so there's -- there's a big chunk off the top of
the lake that I think the brine shrimp now, if there
were a substantial drought, may not be able to get back
to.

MS. GOLDSMITH: I'd ask to have that answer
stricken as nonresponsive.

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

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

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

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

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

MS. NIEBAUER: I'm going to object to that. I think that she did answer it with the phrase that no, that's not entirely what her testimony is based upon. I object to the question. Asked and answered.

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

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

HEARING OFFICER DEL PIERO: Can you --

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

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

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

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

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

Q    Let's assume away the possibility of a
catastrophic drought. Leaving catastrophic drought aside, would you agree with me that the Mono Lake brine shrimp is not in danger of extinction at lake levels above 6365?

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

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

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

HEARING OFFICER DEL PIERO: Excuse me,

0060

Ms. Goldsmith? Mr. Brown has a question.

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

MS. BROWN: Yes.

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

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

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

I believe that if Mono Lake were to be maintained and never fall below today's elevation, the shrimp are there and they're surviving. But because there are these environmental -- there is environmental variability that we need to account for, the Service, in reviewing all of the literature, believes that a level of around 6390, which equates to a salinity that -- at which brine shrimp could be reproduced very well, is an adequate buffer. That's a buffer something more than 20 vertical feet. It's a large buffer.

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

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

MR. BROWN: Well, the hydrology should be
well-known out there?

MS. BROWN: I am not a hydrologist. I evaluate the information, primarily. I've read primarily the biological information produced by Drs. Dana Lenz, Herbst, and others.

MR. BROWN: Okay.

HEARING OFFICER DEL PIERO: Please proceed,

Ms. Goldsmith.

Q BY MS. GOLDSMITH: You mentioned that the DEIR had discussed these catastrophic droughts; is that right?

A Yes, I believe it had.

Q And isn't it true that the --

MR. FLINN: Do you have a page number for us?

MS. GOLDSMITH: I have no idea what she's talking about.

MR. FLINN: I thought you had one there.

MS. GOLDSMITH: I'm -- I have the table. I'm looking currently at page -- it gets into summary. It's Table S-3.

MR. FLINN: What?

MS. GOLDSMITH: S-3.

And it's true, isn't it, that the DEIR, the Draft DEIR, concluded that the brine shrimp were not significantly affected at any lake level alternative above 6377?

MS. BROWN: The Draft Environmental Impact Report came to two different conclusions. I believe they evaluated direct impacts and cumulative impacts.

Q BY MS. GOLDSMITH: I'm talking about the direct DEIR, concluded that the brine shrimp were not significantly affected at any lake level alternative above 6377?

A Direct impacts said, "No significant impacts above the certain level." Cumulative impacts, though, I think are more important for the Fish and Wildlife Service's evaluation, and it did find no significant cumulative impacts at 6390. But at all levels below that, there were significant cumulatives.

Q Based on pre-diversion effects?

A Based on salinity effects to brine shrimp reproduction, yes.

Q Have you read Dr. Melack's testimony as well?

A Yes, I have.

Q And are you familiar with his conclusion that based on his 14 years of monitoring of brine shrimp at Mono Lake, the data show no -- no trend in population abundance at lake levels between 6372 and 6381?

A Yes, I'm aware of that conclusion. His 14 years of data were dominated by a very unusual event, meromixis for five years.

Q And despite that very unusual event, the data showed no trend; is that right?

A I think possibly because of that unusual event, because it could have cancelled out something.

MR. FLINN: Madam Reporter, would you mark that part of the tape, please?

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

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

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

MS. BROWN: Yes.

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

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

A BY MS. BROWN: Yes.

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

A Yes.

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

A Yes.

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

A Yes.

Q And now let me ask you further to assume that under DWP's original plan, the lake would get high enough to destroy a lot of gull habitat, that they would have the gulls move to when they land bridge Negit Island, and so that they would tend to bring down the upper range that they had originally planned so that the lake would spend a lot more time closer to 6374 than they had originally proposed. Do you follow me so far?

A Yes.

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

A Yes.

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

A Yes.

Q And I think that the same historical events were duplicated with L.A. getting us down to 6374, that it goes down two feet below the historical lake level; is
that right?
A Yes.
Q Now, let's talk about what happened when the lake actually got to 6372, two feet above where DWP's management plan might possibly take us. Were you aware that in that year 1980 -- back up for a second. Do you understand that the brine shrimp breed in two generations in one year?
A Yes.
Q And do you understand that in 1981, when this historical high salinity was reached, that there was what has been described as a crash in that first-generation productivity?
A Yes.
Q And you understand that shortly after that, we had an unusually high wet year and that we didn't stay at that lower level and high salinity for an extended period of time. You're aware of that?
A Yes.
Q So I take it we don't know what might have happened if we'd stayed at 6372 for a few more years?
A We don't know exactly what would have happened, yes.

HEARING OFFICER DEL PIERO: Excuse me, what does that mean?
MS. BROWN: I'm sorry. What I mean is that if brine shrimp crashed, did not reproduce successfully at a certain salinity, I believe they would have continued to not reproduce successfully. But there are so many factors that play into the population's success that we don't exactly know.
MS. GOLDSMITH: Would you mark that answer, please?
Q BY MR. FLINN: Is this crash that occurred when we hit 6372 in the first generation one of the reasons why you would be concerned at even approaching those historical levels, even historical levels, and maintaining them for any particular period of time?
A BY MS. BROWN: Yes.
Q Now, during -- during your cross-examination by Ms. Goldsmith, I asked the Reporter to mark a part of the tape and during the break, I actually wrote down a question Ms. Goldsmith asked you, and I want to read the question and follow up on it. She asked you about Dr. Melack, and she specifically said, "Are you familiar with his conclusion that based on his 14 years of monitoring brine shrimp at Mono Lake, the data show no trend in population abundance at lake levels between 6372 and 6381?" Let me stop. Do you understand that conclusion to be the conclusion referred to in his written testimony submitted in this proceeding?
A Yes.
Q Now, are you also aware that a group working under Dr. Melack's supervision at his Santa Barbara area, submitted an auxiliary report to the Water Board, Number 12, that contained the following conclusion: Referring to the data record of 14 years of monitoring, the group concluded, quote, despite this extended data
record, the direct observation of effects on salinity
in the Artemia population is difficult and unlikely to
be detected even if present. The past decade included
a period of unusual climatological conditions at Mono
Lake, changes in the physical mixing regime of Mono
Lake associated with the onset, persistent, and
depth breakdown of meromixis dramatically alter plankton
dynamics and most likely obscure defects due to changes
in salinity."

Is that a conclusion that you're aware of?

A Yes.

Q And that is a conclusion that Dr. Melack, you
understand, did not specifically mention in his
discussion of the 14-year monitoring period; is that
right?

A Yes.

Q Now, you're also aware that in the same auxiliary
report, there was data -- in fact, there were 12
diagrams showing the salinity effects on a wide variety
of shrimp productivity and growth. You were aware of
those?

A Yes, I've heard that before.

Q And you're aware of the only thing Dr. Melack
chose to say about those in his direct testimony here
was that, quote, salinity bioassay laboratory
experiments of the effects of salinity on individual
organisms indicate gradual effects of increasing
salinity on nearly every life history parameter, e.g.,
hatching, mortality, growth, and reproduction of the
only macrozooplankter in Mono Lake the brine shrimp"?

MS. GOLDSMITH: Objection. Mischaracterizes the
testimony. Dr. Melack testified that he did take that
into his consideration, but that the population and the
ecological interactions were so complex that the
laboratory studies alone did not describe the
population dynamics of the Mono Lake brine shrimp.

MR. FLINN: The only characterization I'm
intending to make of Dr. Melack's testimony is what I
quoted verbatim, and I hadn't finished my question yet.

HEARING OFFICER DEL PIERO: Go ahead and finish
your question, and then, Ms. Goldsmith, I'll entertain
your objection when he's finished.

MR. FLINN: Let me withdraw the question and just
read the sentence to you.

HEARING OFFICER DEL PIERO: Fine.

MR. FLINN: The sentence that I just read simply
tells us that there are effects of increasing salinity
but doesn't tell us whether they're positive with
respect to growth or even negative with respect to
growth. Is that how you interpret the sentence that I
just read?

MS. GOLDSMITH: I again object to the question
because it mischaracterizes the testimony. Dr. Melack
testified that he cited the paper which does include
those facts.

HEARING OFFICER DEL PIERO: I'm going to sustain
that objection. I want you to rephrase the question,
Mr. Flinn. If you want the question read back, you're welcome to have that. I'm interested in the answer, but the way you're phrasing the question, Ms. Goldsmith is completely correct in her objection.

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

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

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

A If I was only able to look at that one sentence, yes.

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

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

Q And how many of them relate to brine shrimp?

A None of them.

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

A Interactions of Detritan Particulate and Plankton, yes.

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


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

A Yes.

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

A Yes, we do.

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

A Yes.

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

A Yes.

Q Now, finally, I want to just clear up some confusion about Table S-3 and the Draft Environmental Impact Report. Ms. Goldsmith asked you whether or not the Draft EIR found any significant impacts on the brine shrimp at the lake level alternatives listed, and
she didn't show you a copy of the report. And I recall
your answer being no.
Let me now show you a copy of that and ask you to
look at Table S-3 and see if you can find brine
shrimp. I've circled them.
A    Yes.
Q    And if you assume that an X means that there is a
significant impact, can you tell us what the DEIR
concludes about that?
A    Okay. This is a table that is significant impacts
of the alternatives relative to the point of reference,
and for brine shrimp there are significant impacts in
this table at no restriction and at 6372.
Q    Okay. Now, if you look at Table S-4, could you
tell us the same thing with regard to Table S-4, which
is a measure of the significance of impacts relative to
pre-diversion lake levels?
A    Yes. This is what I was referring to in
cumulative impacts. Significant cumulative impacts of
the alternatives relative to pre-diversion conditions
shows a significant impact on brine shrimp at every
lake level up to 6383.5 and then no significant impact
at 6393.
Q    Okay. Now, if you assume that a parenthesis
around an X -- wait a second. If you assume that a
parenthesis indicates that the impact is substantially
mitigable, can you tell us whether, under both pages,
the impacts on the brine shrimps are substantially
mitigable?
A    According to the EIR, they are not. None of the
Xs in the brine shrimp row are in parenthesis.
Q    Finally, your testimony has focused here today on
the brine shrimp -- are you aware that the brine shrimp
are part of a larger ecosystem on Mono Lake?
A    Yes. And if I may expand just a little bit. The
purpose of the Endangered Species Act, Section 2 of the
Act, says that the purpose of the Act is to preserve
endangered species and the ecosystems on which they
depend.
Q    So are you aware that other organisms,
particularly birds, at Mono Lake rely on the billions
and billions of brine shrimp that are at the lake and
would be in greater numbers at higher levels?
A    Yes.
Q    And assuming that we were to reduce it from
billions and billions to merely millions or thousands
and assuming that that would have some consequence to
the birds that feed on the brine shrimp, would that be
something that would be of concern to the Service?
A    Yes.
Q    And this would be a concern even if we were able
to maintain in some dwindling parts of the -- areas of
the lake some few thousand remnants of the population?
A    Yes.
MR. FLINN: Thank you.
HEARING OFFICER DEL PIERO: Thank you, Mr. Flinn.
Mr. Valentine?
MR. VALENTINE: We have no questions.
HEARING OFFICER DEL PIERO: Ms. Niebauer? I'm sorry. Mr. Gipsman is gone?
Somebody want to go out -- where on the phone?

Did Staff have any questions?
MR. DODGE: Mr. Del Piero, you've bypassed Staff.

HEARING OFFICER DEL PIERO: I haven't bypassed them. I just had a momentary lapse. I bypassed Mr. Gipsman -- Mr. Gipsman has no questions.

Mr. Frink.
MR. FRINK: No questions.

HEARING OFFICER DEL PIERO: Mr. Smith?
MR. SMITH: I just have one question. I think you can probably hear me from here.

CROSS-EXAMINATION BY THE STAFF
Q BY MR. SMITH: The status of the report you said you've been studying it for five years. Can you tell us me something about the status of the report? Is it near finished. Is it three-quarters of the way finished? Is it under review? Just about where is it?
A    The petition was made in 1987, and our finding in 1988 initiated a status review which we completed at the field level some time ago. It is now under review in our regional office. The Fish and Wildlife Service, like all federal agencies, is a big bureaucracy, so it has to go through quite a few levels before it reaches the director of the Fish and Wildlife Service who makes the final decision. So it's somewhere in the process. I don't mean to be unhelpful, but I don't understand the process all that well once it gets up into the higher levels.

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

HEARING OFFICER DEL PIERO: Not many people here.

Mr. Herrera?
MR. HERRERA: Thank you, Mr. Del Piero.

Q BY MR. HERRERA: I just have a couple of questions relating to your evaluations of and your ultimate recommendation of 6390. Did you look at productivity effects on the brine shrimp at salinities that would occur at lake levels above 6390?
A    Yes.
Q    And what was the source of that information?
A    I used primarily the EIR because it's the most current summary of information, but I've also looked at a number of the other -- most of the other studies on brine shrimp have been cited by the EIR.
Q    And did they study -- study lake levels and salinities that would occur above 6390?
A    Yes.
Q    I'm looking at Table S-1 on the Draft EIR, Page 8. And on that page, it indicates that Mono Lake brine shrimp productivity at 6410, no diversion and pre-diversion, it's got a notation that says, "Similar or greater to the 6390 alternative." Would you agree to that?
A    I'm sorry, would you repeat it?
Q    You will note that at the 6410 alternatives, no
diversion and pre-diversion, there is a notation of the small E, and that indicates that it says, "Similar to or greater than the 6390 alternative."

Q: Do you agree with that?
A: Yes.

Q: And that's based on your review again?
A: Yes. If I can elaborate a little bit.

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

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

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

Q: There is a slight effect from pre-diversion over 6410 salinities --
A: Studies have shown that brine shrimp reproduction is affected by increasing salinity, and it doesn't seem to be a threshold. It seems to be at ever-increasing salinity, there is some small effect.

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

HEARING OFFICER DEL PIERO: Mr. Canaday?
MR. CANADAY: No.

HEARING OFFICER DEL PIERO: Ms. Niebauer?
MS. NIEBAUER: Just a couple of quick questions.

REDIRECT EXAMINATION BY MS. NIEBAUER
Q: Ms. Goldsmith took you through part of the Endangered Species Act, and I wonder if you could explain for us what happens when a particular species is petitioned?
A: Yes. When the Service is petitioned to list a species, we must consider the threats that may be --

the threats to the species, and we consider five categories of threats. The first is the present or threatened curtailment or destruction of habitat or range. The second is predation or disease. The third is over collection for scientific or recreational purposes. The fourth is inadequacy of other regulatory mechanisms to protect the species, and the fifth is other natural and man-made factors.

Q: And -- excuse me. After you receive a petition to list a particular species, what happens?
A    It is reviewed at the field office level, and we
review all -- the best available biological and
commercial information to come to a conclusion as to
whether the petitions list the species as warranted or
not. So we do dig into everything we can find, contact
experts on the species.
Q    And is a determination then made after -- after
your -- after -- I assume that's called a status
review? Is the determination made, then, whether the
petition is warranted or not warranted?
A    A determination is made at the field level and
again, then, it moves to higher levels.
Q    And that is indeed termed a status review under
the Endangered Species Act; is that correct?
A    Yes.
Q    And does the Fish and Wildlife Service then only
rely on individual scientific information in conducting
their status review? Or is it a more comprehensive
type of a review?
MS. GOLDSMITH: Objection. Ambiguous.
HEARING OFFICER DEL PIERO: Sustained.
Q BY MS. NIEBAUER: What type of information does the
Fish and Wildlife Service rely upon when initiating a
status review?
A BY MS. BROWN: All the available information that has
to do with that species.
Q    And in this particular instance, would that
include information prepared by Dr. Melack?
A    Yes. Dr. Melack and many other researchers who
have done research on the brine shrimp.
Q    Would it also include information that has been
prepared by Dr. Herbst?
A    Drs. Herbst, Dana, Lenz, Jellison, some of the
other major researchers that we have reviewed.
HEARING OFFICER DEL PIERO: Thank you.
Ms. Goldsmith? We've got a lot of time this
morning, Miss Goldsmith. Take your time, for once.
0084
What's the deal between you and Birmingham?
MR. BIRMINGHAM: I've already lost.
HEARING OFFICER DEL PIERO: What are the stakes in
this process here? Have we identified them or is it
appropriate to mention them on the record?
MS. GOLDSMITH: Ego, so they're very high.
HEARING OFFICER DEL PIERO: Please proceed.
RECROSS EXAMINATION BY MS. GOLDSMITH
Q    I just have a couple of questions, Ms. Brown. We
talked about the initial petition to the U.S. Fish and
Wildlife Service listing of the Mono Lake brine
shrimp. And I believe you testified that the fate of
that petition was that the brine shrimp are currently
under review for listing; is that right?
A BY MS. BROWN: Yes.
Q    But isn't it correct that in 1989, the Fish and
Wildlife Service published a decision that inadequate
evidence existed to establish the Artemia
Monica matched the definition of endangered species?
A    I believe the 1989 Notice of Review for animal
candidates concluded that at that time. We have subsequently concluded, based on newer information, that the species is a valid species, and that we -- it is now a Category One candidate for listing.

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

A Not technically dismissed.

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

A Yes.

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

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

Q One last question. Mr. Flinn asked you to look at the references listed on Page 211 of the NAS report, which is L.A. DWP Exhibit 25.

A Yes.

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

A Yes.

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

A No. I believe there's many more.

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

A It looks like perhaps 20 or more.

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

A Yes.

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

HEARING OFFICER DEL PIERO: Ms. Cahill?

MS. CAHILL: No questions.

HEARING OFFICER DEL PIERO: You look remarkably relaxed.

MS. CAHILL: Relaxed, yes.

HEARING OFFICER DEL PIERO: Mr. Flinn?

RE CROSS EXAMINATION BY MR. FLINN

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

MR. CANADAY: Mr. Del Piero, I was running in and out of the room, so forgive me if I start to ask a question that's been asked. I'll put a halt to it.

HEARING OFFICER DEL PIERO: 'Tis the season, Mr. Canaday. Go ahead.

MR. BIRMINGHAM: There isn't any reason Mr. Canaday should be any different than most of the lawyers in the room.

MR. CANADAY: They're certainly paid different. (Laughter.)

HEARING OFFICER DEL PIERO: Mr. Birmingham, I don't need much more help like that. I can see that request for a raise coming in very quickly.

Q BY MR. CANADAY: Ms. Brown, a lot of the concern expressed by some of the questions to you, which is typical, earlier you referred to engineers and scientists or biologists, and most people relate to catastrophic short-term events, comets crashing through the atmosphere and causing the extinction of living things. And that is a concern of the Service, correct? These very drastic immediate changes in the environment that could cause an impact to brine shrimp, correct?

A BY MS. BROWN: Yes.

Q But in reality, what the Service, when it makes its recommendation, it's based more likely on the long-term subtle changes that, in many cases, are not measurable in very short periods, decades, that do, in fact, reduce the product -- potential productivity of the species in the long-term, correct?

A Yes.

Q And so that when you make your recommendation, the Service makes its recommendation, it's making a recommendation not on the hysteria of a laboratory experiment that you can create a salinity that does, in fact, kill brine shrimp, but on the biological basis of a long-term understanding of maintenance of the species habitat and its productivity; is that correct?

A That's right. And as I mentioned before, we consider those five categories of information, so it's habitat and other things as well.

MR. CANADAY: Thank you. That's all I have.

HEARING OFFICER DEL PIERO: Thank you very much. Questions?

MR. BROWN: No question, just my thanks to Mr. Flinn for helping me with that question and clearing it up.

HEARING OFFICER DEL PIERO: No questions?

MS. NIEBAUER: I have no further questions. I would like to offer in evidence U.S. Fish and Wildlife Service 1 through 6.

HEARING OFFICER DEL PIERO: Any objection? No objection? It will be ordered into the record. Thank you very much.

(USFWS Exhibits Nos. 1 through 6 were admitted into evidence.)
HEARING OFFICER DEL PIERO: The Sierra Club witness as well as Counsel have yet to arrive. We had indicated to them we would have them on at one o'clock; is that not correct?
MR. CANADAY: That's correct.
HEARING OFFICER DEL PIERO: Ladies and Gentlemen, I'd encourage you to enjoy your two-hour lunch, and we'll see you back here at one o'clock and try and finish up as quickly as possible.
MR. CANADAY: Mr. Del Piero, I do have one bit of housekeeping to clear up. I have to hand out more copies of the schedule that we set that I gave you the other day, but I want to make -- for you to make notice of some changes. Do you want to hand them out now? These schedules are exactly the ones that I've handed out, in case you don't have it here. I'd like you to have to opportunity to write on it to be aware of the changes, some dates to add, and those were discussed yesterday. And you might want to put them on your schedule.
Dan, correct me if these dates are wrong, that on January 7th, which is a Friday, exhibits for rebuttal are due to the Board at 5:00 p.m. On January 10th, Mr. Gipsman has informed me that he would like to panel Ms. McKey (phonetic), who is scheduled for the following day, the 11th, on the air resources panel since a good -- the import of a great part of her testimony will deal with the Forest Service and air quality. So we will have Ms. McKey on -- also paneled with the great basins and the air resources board on the 10th. So therefore, on the 11th, there will only be Dr. Stine, Dr. Vorster, and, Mr. Dodge, is it -- was it your witness, Dr. Mesick, who was ill yesterday?
MR. DODGE: Yes, that's right.
MR. CANADAY: Can he be available on the 11th?
MR. DODGE: On the 11th? I will check.
MR. CANADAY: I would like to schedule him that day.
HEARING OFFICER DEL PIERO: It would be convenient, Mr. Dodge, if he could be. We can get all the direct testimony out of the way then and start rebuttal.
MR. CANADAY: And then the final date would be the 12th.
MR. DODGE: Let me ask a procedural question here. Looks to me like the 11th is being pretty loaded up. I don't know how long you expect the testimony on the 10th to go. Do you expect a full day?
MR. CANADAY: I would expect the 10th to be a full day.
HEARING OFFICER DEL PIERO: Mr. Birmingham? A lot of cross-examination on the air stuff?
MR. BIRMINGHAM: I would say probably no.
HEARING OFFICER DEL PIERO: An hour? Two?
MR. BIRMINGHAM: An hour at the most.
HEARING OFFICER DEL PIERO: I'll plan on two.
Meaning no offense. I learned that from Flinn, you know? Five minutes --

MR. BIRMINGHAM: No offense taken.

HEARING OFFICER DEL PIERO: -- times 45 minutes.

Why don't we do this? Why don't you have your panel ready to go in the afternoon on the 10th, Mr. Dodge, okay?

MR. DODGE: It's just Dr. Mesick. It's not a panel.

HEARING OFFICER DEL PIERO: Well, then, why don't we have just Dr. Mesick? That'll be easy. How much time did you think Dr. Mesick's going to take?

MS. CAHILL: He's fish.

MR. DODGE: He's fish oriented, so it tends to draw a lot of players. I would think two or three hours.

HEARING OFFICER DEL PIERO: He's also one witness. What, three hours? If we get him on at four, we get him off at seven, we're out of here, right?

MR. BIRMINGHAM: I can't imagine that we could not finish the Great Basin and Dr. Mesick in one day.

HEARING OFFICER DEL PIERO: Let's plan on that.

Mr. Canaday, Dr. Mesick -- how do we spell his name?

MR. BIRMINGHAM: M-E-S-I-C-K.

HEARING OFFICER DEL PIERO: Plan on him on the 10th, Mr. Canaday, unless we hear otherwise, and Mr. Dodge is going to confirm his availability for us; is that correct, Sir?

MR. DODGE: That's correct.

HEARING OFFICER DEL PIERO: Okay. What else do we have, Mr. Canaday?

MR. CANADAY: The only other date that I have on my calendar, and I need confirmation by Mr. Frink, is the remainder that on the 12th that the rebuttal written testimony was due at 5:00 p.m.

MR. FRINK: That's correct.

MR. CANADAY: You should make note of that.

HEARING OFFICER DEL PIERO: All parties are aware of that.

MR. FLINN: Are we also beginning rebuttal testimony on the 12th?

HEARING OFFICER DEL PIERO: On the 12th, we begin with the environmental consultants.

MR. FLINN: That's right. Yeah.

HEARING OFFICER DEL PIERO: Nobody has any -- this is your last opportunity. Any objections? Okay.

Thank you very much. And Mr. Valentine?

MR. VALENTINE: I just have one minor housekeeping announcement. When Mr. Carl from the Department of Parks and Recreation testified last week, he introduced a series of slides in his testimony. I have made copies, distributed ten copies to the Staff and one of each to the parties that are present. I will mail the rest to the balance who aren't here, and I have a few extra if people --

HEARING OFFICER DEL PIERO: And were those entered into the record at the time?
MR. VALENTINE: They were.

HEARING OFFICER DEL PIERO: Everyone got theirs?

Thank you very much, Mr. Valentine.

Any other housekeeping?

We'll see you at one o'clock, Ladies and Gentlemen.

(Whereupon the lunch recess was taken.)

HEARING OFFICER DEL PIERO: Ladies and Gentlemen,

this hearing will again come to order.

Mr. Silver? Mr. Silver, your appointed place is behind that rostrum there.

You've not been sworn yet, have you? Would you please rise and raise your right hand? Do you promise to tell the truth during the course of this proceeding?

MS. VOLIN: Yes.

HEARING OFFICER DEL PIERO: Please proceed.

MR. SILVER: I'm Larry Silver, Staff Attorney with the Sierra Club and I'm representing, in this proceeding, the Sierra Club. We have one witness, and we'd like to put on her testimony at this time.

DIRECT EXAMINATION BY MR. SILVER

Q Would you give your name for the Board?


Q And by whom are you employed?

A I'm a writer at the Sierra Club Legal Defense Fund.

Q And could you describe, Jacqueline, in what task I have requested you to perform in connection with these hearings?

A You asked that I review historical records and documents about recreation on Mono Lake and -- for the late 1920s and thirties and early forties.

Q And what documents -- what was the nature of the documents that you reviewed?

A Back issues of the Bridgeport Chronicle-Union, and the Inyo Register. Oral histories from the Mono Lake residents. Wallace McPherson was one of them and some other residents, and photos that the Mono Lake Committee had as well.

Q Your testimony is in the record. Would you now be able to summarize your report based on the historical studies that you performed?

A I can't look at you because I don't have it memorized.

HEARING OFFICER DEL PIERO: There's no rule that you're obliged to either look at me or have it memorized.

MS. VOLIN: Here goes. For anyone traveling in the eastern Sierra roads that wind into the Mono Basin, nothing is more dramatic than the gradual emergence of Mono Lake, a vast spread of silver that grows more alluring the closer one moves to its shores.

HEARING OFFICER DEL PIERO: There is a rule. You have to read it slow enough so that the Court Reporter can take it down.

MS. VOLIN: Okay. Do you want me to start again?

It seems a quiet, peaceful destination to today's
travelers, but in the 1920s and thirties, the atmosphere there fairly bussed with recreation, attracting many visitors to the basin's lodges and resorts. Since at least the 1880s, Mono Lake had enjoyed a reputation as a fashionable and healthful vacation spot. Its healthy waters credited with everything from cleansing one's skin, hair, and clothing, to soothing sore throats, not to mention being a lovely place to swim, boat, fish, hike, camp, hold boat races, and hunt water fowl.

Is that slow enough?

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

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

In the 1920s and thirties, duck hunting was very good all around Mono Lake. The seeps, streams, and lagoons that once existed near the shore provided excellent habitat and sustenance for the huge flocks of water fowl and other migrating birds that used to grace Mono's water and skies. On the road that ran along the southwest shore of the lake between Rush and Lee Vining Creeks, on the south shore near the mouth of Rush Creek at the convert of the former Weisman (phonetic) properties on the southeast shore of the lake at Simons Springs and Warm Springs on the eastern shores, at the north shore Stanburg (phonetic) Beach, and at Black Point and the DeChambeau Ponds on the northwest shore, good duck hunting was as reliable as a change of seasons.

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

Tourists and locals also used to enjoy great trout fishing near Mono Lake in the areas of Rush and Lee Vinings Creeks -- and that status was important enough to prompt the formation of a club in 1932 to insure that Fish and Game continued to prosper in the county.

Wallace McPherson and Jack Preston, both of whom lived near the lake in the 1920s and thirties, even remembered catching fish out of Mono Lake, itself. The flows in pre-diversion Rush and Lee Vining Creeks were so strong that fish used to ride the fresh water currents out to the lake.

Boating on Mono Lake was another primary attraction. James Clover, who, at the time, owned property at the Rush Creek delta, used to keep rowboats
on his beach front land. In fact, Clover used to rent spots on his property to campers because of the ideal duck hunting, fishing, swimming, boating, and hiking opportunity there. As one of the proprietors of the Mono Inn, which used to be so close to the shore that it had a dock right up front, Wallace McPherson ran tours out on the lake on a boat he named for his mother, Benita. He would lead visitors past Negit Island, pausing long enough to give his guests a chance to feed the noisy flocks, and would dock at Paoha where his passengers trooped off to explore the island's natural hot springs and crater lakes.

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

Did you want me to wait?

HEARING OFFICER DEL PIERO: No.

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

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

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

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

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

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

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

People could swim in Mono's salty waters then wash off in the fresh waters from the streams. And actually, ducks used to settle near the mouth of Rush Creek for much the same reason. They'd feast on the brine shrimp in the lake and rinse the salt off their feathers in the fresh water from the creek.

Another good swimming spot was at the western tip of the lake near what is now called called the Old
Marina, and some people swam in Rush Creek as well. Mark Twain Day featured swimming races for men, women, and kids, and a curious work called horse swimming which essentially, was a horse race in the lake.

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

By 1933, the Inyo Register reported that Mark Twain Day was already, quote, becoming a fixed summer feature of Mono Lake and that it included, quote, about every activity that could be thought of for an aquatic occasion, including the sports already mentioned plus aqua-planing. Exhibit SC-6 shows someone aqua-planing behind the McPherson's boat on the lake.

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

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

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

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

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

HEARING OFFICER DEL PIERO: Thank you.
Mr. Silver, does that conclude your presentation?

MR. SILVER: I have nothing further.

HEARING OFFICER DEL PIERO: Thank you very much.

Mr. Birmingham?

MR. BIRMINGHAM: May I confer with Mr. Dodge for just a moment?

HEARING OFFICER DEL PIERO: Yes, Mr. Birmingham.

MR. BIRMINGHAM: We have no cross-examination. As difficult as that is to believe, we have no cross-examination.

MR. BROWN: What was that, Tom? I didn't hear.

MR. BIRMINGHAM: We have no cross-examination.

HEARING OFFICER DEL PIERO: Mrs. Anglin, do you think you've gotten that clarified in the record?

Thank you very much, Mr. Birmingham.

Mr. Dodge?

MR. DODGE: No questions.

HEARING OFFICER DEL PIERO: No questions.

Mr. Dodge, I thought for sure you might have questions about -- I know mine and your acknowledged personal favorite photograph, the bathing Beauties at Mark Twain Day.

MR. DODGE: I do like that photograph, Mr. Del Piero, but I don't like it any more by asking questions about it.

HEARING OFFICER DEL PIERO: Oh. Some things better left unsaid, I think.

Ms. Cahill?

MS. CAHILL: We have no cross-examination.

HEARING OFFICER DEL PIERO: Thank you very much.

Mr. Valentine?

MR. VALENTINE: No questions. Thank you.

HEARING OFFICER DEL PIERO: Mr. Gipsman?

MR. GIPSMAN: No questions.

HEARING OFFICER DEL PIERO: Mr. Frink?

MR. FRINK: No questions.

Mr. Smith?

MR. SMITH: I wouldn't dare ask a question.

HEARING OFFICER DEL PIERO: Uh-huh.

Mr. Herrera?

MR. HERRERA: No questions.

HEARING OFFICER DEL PIERO: Mr. Canaday.

MR. CANADAY: I have one.

HEARING OFFICER DEL PIERO: Mr. Canaday has one question.

CROSS-EXAMINATION BY THE STAFF

Q BY MR. CANADAY: In your testimony, you mentioned the water fowl. Did your information come -- where did you get your information on the water fowl?

A BY MS. VOLIN: From the newspapers and from the oral histories. Do you want the specific names of the people whose oral histories I used for --

Q That would be helpful, yes.

A They all -- they all pretty much talked about the hunting, Wallace McPherson, there were three different interviews with Wallace McPherson conducted by people from the Mono Lake Committee. Actually, two interviews and one declaration. One was an interview with Emily...
*Strause in 1989, and then another was an interview with David *Gaines and Eileen *Mendelbaum, and that was in 1985, and then his declaration is from 1990. Bobby

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

Is that specific enough?

MR. CANADAY: Thank you.

HEARING OFFICER DEL PIERO: Nothing else?

Mr. Smith?

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

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

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

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

MR. SMITH: Yeah.

HEARING OFFICER DEL PIERO: No other questions?

Mr. Frink?

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

MR. SILVER: That will be fine.

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

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

HEARING OFFICER DEL PIERO: No objections?

MR. DODGE: No objections.

HEARING OFFICER DEL PIERO: So ordered.

(Sierra Club Exhibits Nos. 1 through 8 were admitted into evidence.)
HEARING OFFICER DEL PIERO: Thank you very much, Mr. Silver. Thank you very much for your time. I appreciate it.

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

Is it your desire that we send a letter to all parties?
HEARING OFFICER DEL PIERO: Yeah. That would be nice, if you would be so kind as to do that. Okay? But specifically to Cal-Trout.
Anything else, Ladies and Gentlemen?
MR. DODGE: If there's nothing else, I have a fairly important procedural matter.
HEARING OFFICER DEL PIERO: Yes, Sir.
MR. DODGE: I got a present from the -- Mr. Del Piero, and I thank you for that. I'll open it on Christmas morning.

In the spirit of the holidays, I was hopeful that someone in the room could help the Del Piero family or specifically, Mrs. Del Piero. Does anyone want to buy a copy of the Encyclopedia Britannia? She has one for sale. Mr. Birmingham may suggest that -- may be thinking that I have been having side-bar conferences with Mr. Del Piero, but it's not so. It's right here in Herb Caen. He talks about an ad. For sale by owner, Encyclopedia Britannica. Excellent condition. No longer needed. Husband knows everything.

(Laughter.)

(Applause.)

HEARING OFFICER DEL PIERO: Did you get that down?
THE REPORTER: I got it down. I put the applause in, too.

HEARING OFFICER DEL PIERO: Thank you.
Mr. Dodge, I'll let you know after the holidays whether or not there's a sale. Thank you. Okay.
Ladies and Gentlemen, Mr. Canaday, anything else? We have some cider on ice, Ladies and Gentlemen, and beyond that, let me wish you all the most wonderful holidays. I'll see you after the first of the year.
Ladies and Gentlemen, the poet laureate of the Mono Lake hearings, Mr. Frink, has prepared something
Twas three nights before Christmas and all through the room
Not a witness was sweating for they'd be going home soon.
The exhibits were placed in the binders with care
In hopes that the covers would prevent excess wear.
The attorneys were nestled snug in their chairs
Visions of billable hours removed all their cares.
With Del Piero presiding and Alice/Kelsey taking it down
The crowd assembled hoped soon to leave town.
When out in the lobby there arose such a clatter
People sprang from their chairs to see what was the matter.
Away to the doors they flew like a flash
Tripping over mike wires and causing a crash.
And there through the door at a leisurely pace
Strolled Barret McInerney with a grin on his face.
When asked his purpose, he said with a grin,
I missed the first part, could we begin again?
Upon hearing this, Del Piero's mouth hung agape
Until Roos-Collins suggested Barrett borrow the tape.
Cahill called her last witness before Christmas break
An elderly man who answers to "Jake."
The direct went smoothly,
Hal Thomas heaved a slight sigh.
But Birmingham never yet had taken a bye.
More piercing than arrows, Tom's questions they came,
Followed by Flinn's striking insights
As he sized up the new game.
Time's running short,
But there's no reason to fear.
Koehler will cover in 10 minutes
What takes most folks a year.
Scoonover politely asked a few questions more
And Jake thought he was done as he edged toward the door.
But wait, that's not all, there's staff still to
Bring out the projector and start the show.

All evidence presented, and some of it new,
It's beginning to look like there's no more to do.

But Goldsmith sensed quickly as she heard growing clatter.
That Dodge was preparing to raise a procedural matter.
The question was pondered and all had their say.
This hearing will resume 6 A.M. New Year's Day.

Then all rushed to their care and paid the garage fee,
As they tried to imagine that for the next week they'd be free.
I heard someone exclaim as he sped out of sight,
"Merry Christmas to All and to Mono Lake a Good Night."

This hearing's adjourned until January 10th.
(Whereupon the hearing was adjourned at 1:42 p.m.)

REPORTER'S CERTIFICATE

---o0o---

STATE OF CALIFORNIA )
COUNTY OF SACRAMENTO ) ss.

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.

________________________________________