FRIDAY, FEBRUARY 18, 1994, 8:30 A.M.

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MR. DEL PIERO: Ladies and gentlemen, this hearing will again come to order.

This is the 40th day of the Mono Lake Basin Water Rights Hearing being conducted by the State Water Resources Control Board and the continuation of the hearing by the board on Amendment to the City of Los Angeles' water rights licenses for the diversion of water from streams tributary to Mono Lake.

My name is Marc Del Piero. I am Vice-Chair of the State Water Resources Control Board, and I have been acting as the Hearing Officer for the Board on this matter for a very long time.

Today we have the end of the presentation of surrebuttal witnesses on behalf of the National Audubon Society and Mono Lake Committee and the Los Angeles Department of Water and Power, and then after completion of those surrebuttal witnesses, we will proceed to the closing arguments.

Good morning, Mr. Dodge.

MR. DODGE: Good morning.

MR. DEL PIERO: You have three witnesses today, Mr. Messick, Mr. Vorster, and then Mr. Sheikh; is that correct?

MR. DODGE: That's true.
MR. DEL PIERO: Do we have anything from a procedural standpoint before I make a couple of comments?

MR. DODGE: Yes, I do have two issues I would like to get resolved. One is the one I referred to yesterday, and I am wondering what the Board's intent is with respect to the finalization of the reports by the Planning Team. The second issue is apparently there is a meeting of the LAAMP-type folks next Tuesday.

MR. DEL PIERO: A variety of type folks that are involved with several models.

MR. DODGE: I am not familiar with the details, but from what I understand, out of that meeting there may come some adjustments, and my concern is that some party may wish to address the Board on those adjustments, either in terms of comments or witnesses, or whatever, and from what I know, I believe that to be unlikely.

I believe the changes, if any, will be so minor that there will be no need to come back here, but I would hate to lose the opportunity to do that in the event that I am wrong, and I think we ought to address that issue.

MR. DEL PIERO: Mr. Frink and I have had the occasion to discuss this. We share the same opinion. It seems to me that given the uncertainties of a variety of factors influencing the completion of those reports, and a number of them have been occupied on the record already, so I am not
going to talk about them today. There is no assurance that
the Board can receive from anybody when those reports will be
complete. Sooner or later it will become apparent that
additional information that was not elicited during the
course of the evidentiary portion of this process will come
to light. Reports will be done in the future and, as was
pointed out yesterday frankly by Dr. Stine, the degree of
information and science that ultimately is to be developed
about the ecosystem in Mono Lake at this point in time is not
fully developed and may never be fully developed. Sooner or
later the Board's record has to come to a close. If there is
a compelling reason that develops for the Board to reopen
that record, the Board, based on its own motion, can consider
it at that time. However, at this point it appears that we
have a full and fair evidentiary record that has been
assimilated over the last 40 days and will be completed after
today. And I think my four colleagues are, in fact, prepared
to close the evidentiary record received and the final
submittals and pursue the development of an order.
Mr. Frink, do you have anything to comment on?
MR. FRINK: Just very briefly to clarify that the
meetings regarding the economic models are regarding the
changes in the models, they were just to make sure that our
staff understands sufficiently well that they could run the
model using different assumptions and so forth, and so far as
the LAAMP model is concerned, if changes are made that are significant enough to warrant reopening the record in order that the Board could utilize the modified version of LAAMP, the Board could consider that in the future, as you indicated, but in the absence of reopening the record, we would assume that we would work with 3.3.

If the record is reopened, it could be done either by stipulation, if everybody who is involved is satisfied that, in fact, have improved and there is no need for further hearing, and hopefully that would be the preferable way in the event it becomes necessary to reopen the record.

MR. DEL PIERO: Mr. Birmingham.

MR. BIRMINGHAM: The only observation I was going to make was the one Mr. Frink made. There are very few parties who are interested in LAAMP, and there are very few parties, in fact, who have the expertise to comment on the revisions to LAAMP. Those are Mr. Vorster for the Mono Lake Committee/National Audubon Society, Cal-Trout, Fish and Game, and Mr. Hasencamp and Mr. Deas on behalf of the Department of Water and Power, and Mr. Hutchison and staff members on behalf of the Board.

If those individuals reach agreement about proposed modifications to LAAMP, it's doubtful that anyone would need to cross-examine those individuals on any modification, and a stipulation can be made that that revised model can be used.
But we would be opposed to having a record left open so that a model or any other evidence could come in if we would not have the opportunity to cross-examine.

MR. DEL PIERO: Mr. Roos-Collins.

MR. ROOS-COLLINS: This hearing has gone on for 40 days. This time represents what we expect to see in Rush and Lee Vining creeks, and this Board's order takes effect. This hearing has gone on long enough. Cal-Trout supports enthusiastically this Board's intent to issue its order as expeditiously as practical.

As we said, when we raised the question of Mr. Trihey's planning reports, we view those reports as important, if not essential, on certain limited questions which this Board is considering.

Given your ruling once those records are available, we will seek to obtain a stipulation by the parties for their admission. Failing that, what is the proper mechanism by which this Board on its own motion will reconsider opening the record?

MR. DEL PIERO: There is one of two ways. You can petition the Board to reopen the record, or the Board, once it is made aware of those studies, can, in fact, on its own, act to reopen the hearing.

MR. ROOS-COLLINS: Thank you.

MR. DEL PIERO: Mr. Dodge.
MR. DODGE: I have a witness if you are ready.

MR. DEL PIERO: One other thing before we go on. Ms. Koehler, I am in receipt of correspondence addressed to me from you.

MS. KOEHLER: And all parties have a copy of it. The letter you are referring to is my correspondence to the parties about rules for the final briefing. If you would like to dispose of that now, that would be convenient for us.

MR. DEL PIERO: Mr. Canaday, have you computed the dates on the calendar?

MR. CANADAY: No, but that can be done.

MR. DEL PIERO: Mr. Frink, have you?

MR. FRINK: You indicated last week, I believe, that closing briefs, initial closing briefs, would be due 30 days from the close of the hearing, assuming that we end today. Thirty days from the close of the hearing would be Sunday, March 20. Moving the due date up a day to the next business day would make them due, Monday, March 21.

MR. DEL PIERO: Closing briefs will be due no later than 4:00 p.m. on the 21st of March.

MR. FRINK: You also indicated rebuttal briefs would be due 20 days after the closing briefs. Again, if we go 20 days from the 21st, that would end on a Sunday, so moving it ahead a day would make the rebuttal briefs due Monday, April 11.
MS. KOEHLER: Could I ask for clarification. Due, does that mean received in everybody's hands?

MR. DEL PIERO: Due means they will have been received no later than 4:00 p.m., March 21, by all parties.

MS. KOEHLER: I appreciate that clarification.

MR. DEL PIERO: And the response briefs 20 days later. What is the date?

MR. FRINK: April 11.

MR. DEL PIERO: They will be received by all parties no later than 4:00 p.m., April 11.

Now let me ask a question. Does anyone have an objection to closing briefs being limited to 75 pages?

MR. ROOS-COLLINS: Mr. Del Piero, before we discuss length of briefs, let me ask one question regarding the due date for closing briefs. Last week we discussed a 30-day deadline from the availability of the last transcript. When will the last transcript from this proceeding be available?

MR. DEL PIERO: Actually, we didn't discuss the 30-day deadline from the availability of the last transcript. It was 30 days from the close of this hearing, and the discussion was that the vast majority of the transcripts for this hearing have already been received by all parties. The last day, I think, is probably going to available when, Ms. Book?

THE REPORTER: Within a week to ten days, no later
than that.

MR. DEL PIERO: Unless I am woefully mistaken, today
in terms of the presentation of surrebuttal evidence, I don't
think that's going to impede anybody's ability to prepare
their closing briefs. Of course, I've been wrong before.

MR. DODGE: That's not a comment, I'm sure, about Mr.
Vorster. (Laughter.)

MR. DEL PIERO: No, this is a comment on the new test
that has been established by the State Water Resources
Control Board. It is an interesting test. (Laughter.) Mr.
Birmingham.

MR. BIRMINGHAM: You raised a question about whether
there should be a 75-page limit on closing briefs. I
certainly hope that the Department of Water and Power can
address the issues that need to be addressed in less than 75
pages, but as we were at the beginning of this proceeding,
the Department of Water and Power is confronted with what is,
in essence, 12 opposing parties, all of whom have interests
in particular issues, or parties that can coordinate the
arguments to be presented in closing briefs. And I would not
want to be faced with an artificial limit on how long the
brief can be.

MR. DEL PIERO: Mr. Birmingham, I am not inclined to
set a limit on the length of either closing briefs or the
response briefs. You all are obliged to represent your
clients in the best fashion possible. It is inappropriate for me or the Board to set a limit on your ability to represent your client's interests simply based on the weight of the paper you all wish to submit. Now, your clients may want to give some consideration if you bill by the page, but I think we have gone way beyond that, too. Mr. Frink.

MR. FRINK: Yes, I just had a question. You indicated that reply briefs also had to be received by all of the parties on April 11 at 4:00 p.m. In view of the fact that the parties aren't going to have to be responding to reply briefs, I wondered if it might not he acceptable to just say that they had to be received by the Board and served by mail on all other parties by April 11.

MR. DEL PIERO: No, April 11, 4:00 p.m., all parties will be in receipt.

MS. KOEHLER: Thank you very much.

MR. BIRMINGHAM: Mr. Del Piero, I may have missed this, and I apologize. Is it understood that all parties will be in receipt by 4:00 p.m. on March 21?

MR. DEL PIERO: Yes. Mr. Dodge, your witnesses, sir. That's what we are here for.

MR. DODGE: We call Tim Messick. I should indicate that Mr. Messick is in surrebuttal to portions of the Department of Water and Power's rebuttal case that relates to...
riparian vegetation.

TIM MESSICK,
having been sworn, testified as follows.

DIRECT EXAMINATION ON SURREBUTAL

by MR. DODGE:

Q Will you give the Board a brief summary of your
background.

MR. BIRMINGHAM: We will stipulate Mr. Messick is an
expert in the area of riparian vegetation and has studied the
streams in the Mono Basin.

MR. DEL PIERO: Anyone else have any problems with
stipulating to that? Seeing none, proceed.

MR. DODGE: Q Just take a minute and tell Mr. Del
Piero a little bit about yourself anyway.

A I have a Bachelor's Degree in Botany received in 1980,
and I received a Master's in Biology in 1982, both from
Humboldt State University.

I have been employed for over 11 years as a botanist
with Jones and Stokes Associates here in Sacramento. I have
worked on many different environmental impact assessments,
wetland delineations, botanical resource surveys, mitigation
plans, including a number of projects dealing with riparian
vegetation. And I also contributed to the riparian
vegetation section of the Mono Basin Environmental Impact
Report.
Would you tell the Board a little bit about your background in the Mono Basin, sir?

The Environmental Impact Report process began so long ago I don't remember when it did begin, but I was involved in that from the beginning, from the proposal stage, and have been involved in the DEIR preparation throughout that period.

Long before that I conducted my Master's thesis research in the Bodie hills, just north of Mono Basin, so I've been familiar with the overall area for quite a long time.

Mr. Trihey asked me to become involved in the Planning Team in December of 1991. He wanted me to provide some information on the extent and condition of existing and prediversion riparian vegetation along Lee Vining and Rush creeks, which I did, and I also helped to plan and implement the revegetation component of the restoration work that has been done to date.

I helped plan and implement some vegetation monitoring in the riparian zone. I helped to carry out some plant inventories on both Lee Vining and Rush creeks and helped with a wetland restoration feasibility study on Lee Vining and Rush creeks.

Have you been involved in the Planning Team efforts fairly continuously since late 1991?

Yes, I have.
Q      Now, did you take a look at the rebuttal testimony of
Dr. Beschta regarding riparian vegetation and the Planning
Team work thereon?
A      Yes, I did.
Q      And you have read that testimony?
A      Yes.
Q      And could you basically summarize Dr. Beschta's
testimony and your comments thereon?
A      Well, I would like to comment on a couple of specific
points in Dr. Beschta's testimony. He makes the statement on
page 10 of his rebuttal testimony regarding Trihey and
Associates and the Planning Team's consideration of riparian
vegetation in the restoration process.
He says, and I am quoting, it would appear that the
fundamental importance of riparian vegetation for the
restoration of conditions that benefited the fisheries along
both Lee Vining and Rush creeks has been overlooked,
unappreciated, and misunderstood.
This is completely false and untrue. The truth is
that for as long as I have been involved with the Planning
Team, they have been very aware that the recovery of riparian
vegetation is essential to the recovery of the fisheries in
Lee Vining and Rush creeks, and to the recovery many of the
specific conditions that benefit those fisheries. They have
also been fully aware of the causes and extent of past
impacts on riparian vegetation from both dewatering and
grazing, and they have been fully supportive of the
Department of Water and Power's moratorium on grazing along
the streams.

They have been fully aware of the extent and also the
variability of natural recovery of vegetation along the
streams, and they have agreed with DWP's consultants that
rewatering the dewatered channels is the best way to maximize
the natural riparian vegetation recovery on both of the
streams.

Also on page 10 of his rebuttal testimony, Dr. Beschta
states that certain figures in a 1992 document prepared by
the Planning Team, entitled, Description and Evaluation of
Restoration Alternatives for Lower Lee Vining Creek, Mono
County, California, are inaccurate, and he says that the
conceptual sketches of naturally recovering streamside
vegetation confirm their existing assumptions and concepts
regarding the rapidity of recovery, and hence the fundamental
importance of vegetation and restoration of conditions
beneficial to the fish are flawed.

And he goes on to say that, whereas those figures
depict little or no recovery in the vegetation for 40 to 60
years, the reality is quite the opposite.

Well, I think this is a petty and ludicrous argument,
but since DWP wants you to think it is important, I think it
deserves a response, and I will try to do that briefly.

What Dr. Beschta has done here is to create a biased picture of the Planning Team's work. He has done that by removing information from its proper context, drawing conclusions from it that are actually contradicted elsewhere in the very same document.

First of all, the illustrations cited by Dr. Beschta are conceptual, which he acknowledges. The fact that they are conceptual should have put him on notice that they are not intended to be detailed or precise as, for example, a survey on a cross-section would be. They also have no scale attached to them, and they are not intended to represent uniform conditions along the streams. He doesn't make note of this. So, I am not sure how he can base his conclusions on sketches that are so generalized, especially when there are three tables in the same document that clearly contradict his conclusion.

I have copies of these tables if you would like