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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.

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1 MR. DEL PIERO: Do we have anything from a procedural  
2 standpoint before I make a couple of comments?

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

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

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

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

21 MR. DEL PIERO: Mr. Frink and I have had the occasion  
22 to discuss this. We share the same opinion. It seems to me  
23 that given the uncertainties of a variety of factors  
24 influencing the completion of those reports, and a number of  
25 them have been occupied on the record already, so I am not

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1 going to talk about them today. There is no assurance that  
2 the Board can receive from anybody when those reports will be  
3 complete. Sooner or later it will become apparent that  
4 additional information that was not elicited during the  
5 course of the evidentiary portion of this process will come  
6 to light. Reports will be done in the future and, as was  
7 pointed out yesterday frankly by Dr. Stine, the degree of  
8 information and science that ultimately is to be developed  
9 about the ecosystem in Mono Lake at this point in time is not  
10 fully developed and may never be fully developed. Sooner or  
11 later the Board's record has to come to a close. If there is  
12 a compelling reason that develops for the Board to reopen  
13 that record, the Board, based on its own motion, can consider  
14 it at that time. However, at this point it appears that we  
15 have a full and fair evidentiary record that has been  
16 assimilated over the last 40 days and will be completed after  
17 today. And I think my four colleagues are, in fact, prepared  
18 to close the evidentiary record received and the final  
19 submittals and pursue the development of an order.

20 Mr. Frink, do you have anything to comment on?

21 MR. FRINK: Just very briefly to clarify that the  
22 meetings regarding the economic models are regarding the  
23 changes in the models, they were just to make sure that our  
24 staff understands sufficiently well that they could run the  
25 model using different assumptions and so forth, and so far as

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1 the LAAMP model is concerned, if changes are made that are  
2 significant enough to warrant reopening the record in order  
3 that the Board could utilize the modified version of LAAMP,  
4 the Board could consider that in the future, as you  
5 indicated, but in the absence of reopening the record, we  
6 would assume that we would work with 3.3.

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

12 MR. DEL PIERO: Mr. Birmingham.

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

22 If those individuals reach agreement about proposed  
23 modifications to LAAMP, it's doubtful that anyone would need  
24 to cross-examine those individuals on any modification, and a  
25 stipulation can be made that that revised model can be used.

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1           But we would be opposed to having a record left open  
2 so that a model or any other evidence could come in if we  
3 would not have the opportunity to cross-examine.

4           MR. DEL PIERO: Mr. Roos-Collins.

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

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

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

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

24           MR. ROOS-COLLINS: Thank you.

25           MR. DEL PIERO: Mr. Dodge.

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1 MR. DODGE: I have a witness if you are ready.

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

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

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

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

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

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

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

21 MR. FRINK: You also indicated rebuttal briefs would  
22 be due 20 days after the closing briefs. Again, if we go 20  
23 days from the 21st, that would end on a Sunday, so moving it  
24 ahead a day would make the rebuttal briefs due Monday,  
25 April 11.

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1 MS. KOEHLER: Could I ask for clarification. Due,  
2 does that mean received in everybody's hands?

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

5 MS. KOEHLER: I appreciate that clarification.

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

8 MR. FRINK: April 11.

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

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

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

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

25 THE REPORTER: Within a week to ten days, no later

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1 than that.

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

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

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

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

23 MR. DEL PIERO: Mr. Birmingham, I am not inclined to  
24 set a limit on the length of either closing briefs or the  
25 response briefs. You all are obliged to represent your



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1 clients in the best fashion possible. It is inappropriate  
2 for me or the Board to set a limit on your ability to  
3 represent your client's interests simply based on the weight  
4 of the paper you all wish to submit.

5 Now, your clients may want to give some consideration  
6 if you bill by the page, but I think we have gone way beyond  
7 that, too. Mr. Frink.

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

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

17 MS. KOEHLER: Thank you very much.

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

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

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

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1 riparian vegetation.

2 TIM MESSICK,

3 having been sworn, testified as follows.

4 DIRECT EXAMINATION ON SURREBUTTAL

5 by MR. DODGE:

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

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

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

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

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

18 I have been employed for over 11 years as a botanist  
19 with Jones and Stokes Associates here in Sacramento. I have  
20 worked on many different environmental impact assessments,  
21 wetland delineations, botanical resource surveys, mitigation  
22 plans, including a number of projects dealing with riparian  
23 vegetation. And I also contributed to the riparian  
24 vegetation section of the Mono Basin Environmental Impact  
25 Report.

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1 Q Would you tell the Board a little bit about your  
2 background in the Mono Basin, sir?

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

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

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

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

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

25 A Yes, I have.

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1 Q Now, did you take a look at the rebuttal testimony of  
2 Dr. Beschta regarding riparian vegetation and the Planning  
3 Team work thereon?

4 A Yes, I did.

5 Q And you have read that testimony?

6 A Yes.

7 Q And could you basically summarize Dr. Beschta's  
8 testimony and your comments thereon?

9 A Well, I would like to comment on a couple of specific  
10 points in Dr. Beschta's testimony. He makes the statement on  
11 page 10 of his rebuttal testimony regarding Trihey and  
12 Associates and the Planning Team's consideration of riparian  
13 vegetation in the restoration process.

14 He says, and I am quoting, it would appear that the  
15 fundamental importance of riparian vegetation for the  
16 restoration of conditions that benefited the fisheries along  
17 both Lee Vining and Rush creeks has been overlooked,  
18 unappreciated, and misunderstood.

19 This is completely false and untrue. The truth is  
20 that for as long as I have been involved with the Planning  
21 Team, they have been very aware that the recovery of riparian  
22 vegetation is essential to the recovery of the fisheries in  
23 Lee Vining and Rush creeks, and to the recovery many of the  
24 specific conditions that benefit those fisheries. They have  
25 also been fully aware of the causes and extent of past

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1 impacts on riparian vegetation from both dewatering and  
2 grazing, and they have been fully supportive of the  
3 Department of Water and Power's moratorium on grazing along  
4 the streams.

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

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

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

24 Well, I think this is a petty and ludicrous argument,  
25 but since DWP wants you to think it is important, I think it

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1 deserves a response, and I will try to do that briefly.

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

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

18           I have copies of these tables if you would like