

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

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Coordination Proceeding) No. JCCP No. 4594
Special Title (Rule 3.550))
Dept. 9A
DEPARTMENT OF WATER)
RESOURCES CASES) COURT TRIAL
Plaintiff,)
Pages 1 - 118
_____)
)

Tuesday, February 21, 2023 - 10:05 a.m.

DAY 1 of 2

The above-entitled matter came on for hearing
at the date and time above set forth before the HONORABLE
LYDIA M. VILLARREAL (Ret), Assistant Presiding Judge,
California Superior Court.

REPORTED BY: KAREN A. AUFDERMAUR, CSR 10919

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APPEARANCES OF COUNSEL:

CHRISTINE E. GARSKE, KELLY T. SMITH, MICHAEL GASBARRO, and COLIN SMITHEY, Deputy Attorney Generals, State of California, Office of the Attorney General, 1300 I Street, Suite 125, Sacramento, California 95814, appeared as counsel for and on behalf of the Petitioner State of California, by and through the Department of Water Resources.

DANTE J. NOMEILLINI, JR., Attorney at Law, of the Law Offices of Nomellini, Grilli & McDaniel, 235 East Weber Avenue, Stockton, California, 95202, appeared as counsel for and on behalf of Respondents Peggy Moore, Christopher A. Castello, and Annamarie E. Castello; Mary R. Perry; Snodgrass Lake, LLC; Jack Klein Trust Partnership; Passaglia, LLC; The Ishizuka Family Trust; Richard G. Klein, Trustee of the Klein Family 1996 Revocable Living Trust; Rindge Tract Partners, Inc.; San Joaquin Delta Farms, Inc.; Reclamation District 2037; and Ripken Home Ranch Family Limited Partnership.

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APPEARANCES OF COUNSEL (Continued):

THOMAS H. KEELING, J.D., Ph.D., Attorney at Law, of the Law Offices of Freeman Firm, 1818 Grand Canal Boulevard, Stockton, California, 95207, appeared as counsel for and on behalf of Respondents Peggy Moore, Christopher A. Castello, and Annamarie E. Castello; Mary R. Perry; Snodgrass Lake, LLC; Jack Klein Trust Partnership; Passaglia, LLC; The Ishizuka Family Trust; Richard G. Klein, Trustee of the Klein Family 1996 Revocable Living Trust; Rindge Tract Partners, Inc.; San Joaquin Delta Farms, Inc.; Reclamation District 2037; and Ripken Home Ranch Family Limited Partnership.

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1 (All parties present, the following
2 proceedings were had:

3
4 THE COURT: Good morning, everyone. The Court calls
5 the matter of Coordination Proceedings of Department of
6 Water Resources cases.

7 And if the parties would be so kind as to state
8 their appearances.

9 MS. GARSKE: Yes. Good morning, Your Honor.
10 Christine Garske for the Department of Water Resources.

11 MR. SMITH: Kelly Smith for the Department of Water
12 Resources. Your Honor, good morning.

13 MR. SMITHEY: Good morning. Colin Smithey for the
14 Department of Water Resources.

15 MR. GASBARRO: Good morning. Michael Gasbarro for
16 the Department of Water Resources.

17 MR. NOMELELLINI: Dante Nomellini, Jr. on behalf of
18 various landowner respondents.

19 MR. KEELING: Tom Keeling on behalf of various
20 landowners.

21 THE COURT: Thank you very much. Let me just start
22 with a couple of perhaps procedural issues. The Court did
23 issue an order to show cause as to whether or not the
24 Department of Water Resources had filed all of the
25 petitions. And it looks like a lot of that went on -- a lot
26 of the response of that went -- occurred online, and so I
27 just would like to give you an opportunity to formally
28 respond to that.

1 MS. GARSKE: Yes. Thank you, Your Honor. We did
2 provide the notices of the orders of entry of
3 coordination -- that's a mouthful -- in all the various
4 counties. There were some difficulties in locating I
5 believe two in Contra Costa County from the Department of
6 36, but we do have confirmation that those will be filed.

7 We did provide the Court via email a chart, if you
8 will, of all the various entry petitions, their initial
9 filing date, the date they were filed, and the dates on
10 which the notice -- notices of entry of the order for
11 coordination were filed. So we have all that with us today
12 if the Court would like to take a look at that.

13 THE COURT: I did look at it online. Is there --
14 does -- do the landowners have any issues on that?

15 MR. NOMEILLINI: No. (Shakes head.)

16 MR. KEELING: No, Your Honor.

17 THE COURT: All right. Thank you. The other issues
18 that I'd like to just briefly address is a couple of issues
19 that were raised in the briefs for this evidentiary hearing.

20 And is there anything in particular that you would
21 like to address, Ms. Garske?

22 MS. GARSKE: No, not at this time, Your Honor.

23 THE COURT: Tell me what that means. What does that
24 mean, "not at this time"?

25 MS. GARSKE: Well, I believe -- I'm kind of in the
26 blind here. We did submit all of our briefing on both
27 issues, the legal brief and the reply brief. Obviously we
28 have -- you know, we disagreed with opposing counsel for the

1 various landowners. So if there's a particular issue that
2 the Court would like us to address, we would be happy to do
3 so.

4 THE COURT: Well, I guess one issue that gave me
5 some pause was that you seem to be arguing that there were
6 certain issues that the landowners cannot raise because they
7 are collaterally estopped from doing so. I was a little
8 surprised by that position because it seems to me that the
9 Court had addressed that earlier when the landowners had
10 argued against having an evidentiary hearing at this moment
11 in time because of a concern about res judicata. And my
12 recollection was the Court assured them that each case would
13 be litigated on its own merits, that each landowner's
14 concerns would be addressed on its own merits, and each
15 person would -- each landowner person or entity would have
16 an opportunity to be heard. So I was just a little
17 surprised that you would make that argument.

18 MS. GARSKE: We'd be happy to address that now, Your
19 Honor, if you would like.

20 THE COURT: Yes, I would like you to.

21 MS. GARSKE: Okay. Great. We -- in our mind, the
22 collateral estoppel argument that opposing counsel was
23 making was specific to the individual landowners and their
24 specific unique pieces of property, not to any one
25 ubiquitous legal issue that affects all the property owners
26 across all the various entry orders. And we believe that
27 this was one of those issues where the nature of the
28 particular piece of property was not a dispositive issue.

1 It was really just this legal issue that we have addressed
2 at length, at great length, in fact, in the last round of
3 evidentiary hearings.

4 It was briefed, it was argued, the Court ruled on
5 it, we had a ruling, it went up on appeal, and then that
6 appeal was dismissed. So we made the argument out of an
7 abundance of caution to -- you know, we don't want this
8 continual recycling of arguments and, you know, kind of a
9 disguised motion for reconsideration continually recircling,
10 you know, resurfacing in this matter to the extent, you
11 know, we raise the argument. But we also are prepared to
12 address the merits of the argument which I believe were the
13 Water Code 250 and 11580.

14 THE COURT: I'm not quite sure I've understood you
15 correctly. Are you saying that you believe that some of the
16 landowners are collaterally estopped from raising an
17 argument because that person, persons, or entity was
18 involved in a prior action with the Department of Water
19 Resources and this particular petition just extends the
20 geography of the same actions?

21 MS. GARSKE: No, Your Honor. What we're saying is
22 that this particular argument is that threshold argument.
23 They're making the argument that Water Code 250 and 11580
24 requires that before we do any entry, irrespective of the
25 landowners, requires that my client fully authorize and
26 fully fund any ultimate project that may be chosen or may
27 transpire.

28 That issue to us is a -- we characterized it as a

1 threshold issue. Again, that is ubiquitous to any
2 landowner. That was our mindset when we made that argument,
3 and again we're happy to address the merits of 250 and
4 11580.

5 THE COURT: All right. Thank you.

6 Mr. Nomellini, would you like to respond to either
7 that particular issue or any other issues that you raised in
8 your evidentiary brief?

9 MR. NOMELLINI: Yes, Your Honor. Dante Nomellini,
10 Jr. I too was surprised to see the collateral estoppel
11 argument after what we went through on the add-on motion.
12 We were talking about the risk of future parties not being
13 able to revisit common issues that apply to future people
14 and existing people. We were not worried about any
15 individual specific issues that were specific to a future
16 party. We were talking about the common issues.

17 And this issue is easy to resolve. Although DWR
18 glossed over this, one of the mandatory requirements to
19 apply collateral estoppel is that there be a final judgment.
20 They cite a case in their brief that sets forth this
21 fundamental requirement. The requirement is that there was
22 a final judgment on the merits in the prior action.

23 Here because of the unique nature of this entire
24 proceeding, according to Judge Ferrall's words, we don't
25 have a final judgment. And Judge Ferrall in his April 8th,
26 2022 entry order, there was a comprehensive order that
27 incorporated all the prior orders including his order on the
28 Water Code 250 and 11580. He incorporated those into the

1 order and at the end of his order he states a whole section
2 called "Interim Order," and I quote, "This order is not a
3 final judgment and any party may make an ex parte motion
4 upon three days' notice in this court to amend the terms of
5 this order for good cause."

6 Furthermore, the legislature has made it clear that
7 anybody can amend an order as well. This is in Code of
8 Civil Procedure Section 1245.040 subdivision (a). I'll just
9 quote it. It says, "The court, after notice and hearing,
10 may modify any of the provisions of an order made under
11 Section 1245.030."

12 So Judge Ferrall believed we could revisit issues.
13 The legislature said we could revisit issues. And Your
14 Honor also noticed when we were talking about the add-on
15 motions, I'll quote your own order filed January 27th. You
16 stated, "That decisions have been issued on the earlier file
17 petitions does not prohibit a newly added respondent
18 landowner from appealing a decision or seeking a new
19 hearing."

20 So the collateral estoppel is not an issue in this
21 case. We don't have a final judgment which is critical
22 because until it's final. You're not locked in to the
23 determination. And I have a -- go ahead.

24 THE COURT: Thank you for reading to me my prior
25 words. That continues to be my position and I don't think
26 that collateral estoppel applies here. So to the extent
27 that anyone wishes to address the arguments regarding
28 Sections 250 or 11580, I am happy to hear arguments about

1 that. I certainly read what the parties submitted. I'm not
2 quite sure that this issue received the attention and
3 briefing that I think it deserves, so my preference on this
4 particular issue would be to move forward with the hearing
5 and reserve this particular issue for further briefing.

6 Do you have any objection to that, Mr. Nomellini?

7 MR. NOME LLINI: No, Your Honor.

8 THE COURT: Do you have any objection, Ms. Garske?

9 MS. GARSKE: No, Your Honor.

10 THE COURT: All right. Any other issues, Ms.
11 Garske, that you raised in your brief that you would like
12 the Court to address?

13 MS. GARSKE: No, not at this time.

14 THE COURT: Mr. Nomellini, anything that you raised
15 in your brief that you would like the Court to address?

16 MR. NOME LLINI: No, Your Honor. I was going to
17 elaborate on the Water Code 250, 11580, but in light of your
18 plan, I'm fine with leaving it at that. So no further
19 comments.

20 THE COURT: All right. Thank you. Okay. Then I
21 believe we are ready to start with the evidentiary part of
22 this hearing, and I'll turn to you, Ms. Garske.

23 MS. GARSKE: Yes, Your Honor. Would you like us to
24 give an opening statement?

25 THE COURT: Yes, please.

26 MS. GARSKE: Thank you. Good morning. My client,
27 the Department of Water Resources, seeks a court order for
28 entry to conduct precondemnation environmental and

1 geotechnical activity on various parcels, 16 in all, in
2 Sacramento, San Joaquin, Contra Costa, and Alameda counties
3 for a proposed Delta water conveyance system.

4 The Department of Water Resources' precondemnation
5 requests are being brought pursuant to Code of Civil
6 Procedure 1245.010 through 1245.060 in which it requires DWR
7 to identify its authority to conduct this precondemnation
8 activity, to set forth the purpose of the entry, describe
9 the nature and scope of the activities requested, and
10 suggest a probable amount of compensation.

11 In addition to the information that was included in
12 their declarations filed in support of the Department's
13 entry petitions for which we will be requesting judicial
14 notice, we will call Andrew Finney, a geotechnical engineer,
15 Katherine Marquez, a program manager III with the Department
16 of Water Resources, and Allan Davis, a senior right of way
17 agent also with the Department of Water Resources.

18 Mr. Finney will explain the need for and purpose of
19 the requested geotechnical entries as well as their nature
20 and scope. Mr. Finney will testify that the current entry
21 requests seek information to address data gaps relative to
22 all three proposed alternative alignments being considered.

23 In particular, Mr. Finney will explain that the
24 entries requested in Sacramento County will inform as to all
25 three alignments under consideration, that the requested
26 entries in San Joaquin County will inform as to the Eastern
27 and Bethany alignments, that the requested entries in Contra
28 Costa County will inform as to the Eastern and Central

1 alignments, and that the requested entry in Alameda County
2 will inform as to the Bethany alignment.

3 Mr. Finney will also explain that the current
4 geotechnical requests for soil borings and cone penetrometer
5 tests, or CPTs as we call them, do not differ from what the
6 Department informed and completed under the June 2017 and
7 the April 2022 entry orders.

8 Lastly, Mr. Finney will confirm that the
9 Department's request for precondemnation entries to perform
10 geotechnical activities are limited to the soil borings and
11 CPTs.

12 Next Ms. Marquez will discuss the need for and
13 purpose of the preset clearances and the requested
14 environmental wildlife and cultural entries as well their
15 nature and purpose. Ms. Marquez will also address the
16 Department's request to include surveys for the California
17 red-legged frog and the California tiger salamander.

18 In particular, Ms. Marquez will discuss the nature
19 of these surveys, why they were currently being requested,
20 and that the handling for these survey purposes is covered
21 under individual scientific existing approvals for listed
22 species and does not require a take permit.

23 Ms. Marquez will discuss two discreet modifications
24 to the Department's mitigation, monitoring, and reporting
25 program that the Department has adopted. Aside from the
26 requested addition and the discreet modifications, Ms.
27 Marquez will explain that the current environmental,
28 wildlife, and cultural entry requests do not differ from

1 what the Department informed and completed under the April
2 2022 entry order.

3 And finally, Mr. Davis will discuss the proposed
4 amounts of probable compensation for the parcels on which
5 the Department requests to do its entries and how he arrived
6 at those amounts. Mr. Davis will also address the
7 Department's request to increase the amount of time needed
8 to comply with the owner request for soil boring data.

9 At the end of these hearings, the Department of
10 Water Resources will ask the Court to issue an order
11 allowing it to enter to the real properties identified in
12 the petition to conduct the requested precondemnation
13 activities and to include the general and special terms and
14 conditions as those set forth in the April 2022 entry order
15 including its requests for modifications and for any other
16 terms and conditions the Court deems appropriate. Thank
17 you.

18 THE COURT: Would you like to make an opening
19 statement at this time, Mr. Nomellini?

20 MR. NOMELLINI: Your Honor, no, I was not prepared
21 for an opening statement, but thank you.

22 THE COURT: All right. Thank you.

23 Ms. Garske, please call your first witness.

24 MS. GARSKE: I guess that would be Mr. Finney. And
25 Mr. Smithey, he will handle the examination.

26 MR. SMITHEY: The Department of Water Resources will
27 call Andrew Finney as the first witness.

28 THE CLERK: Can I have you stop right there and

1 raise your right hand to be sworn.

2

3 ANDREW FINNEY,

4 called as a witness on behalf of the Petitioner, being first
5 duly sworn, was examined and testified as follows:

6 THE WITNESS: I do.

7 THE CLERK: Thank you. Once you're seated, if you
8 can please state your first and last name for the record,
9 also spell your last name if you don't mind.

10 THE WITNESS: Yes. It's Andrew Finney, last name
11 F-I-N-N-E-Y.

12

13 DIRECT EXAMINATION

14 BY MR. SMITHEY:

15 Q. Good morning, Mr. Finney. My name is Colin Smithey.
16 I am a deputy attorney general representing the Department
17 of Water Resources.

18 Mr. Finney, where are you currently employed?

19 A. Currently employed by Jacobs Engineering.

20 Q. And what's your title at Jacobs Engineering?

21 A. I am a principal geotechnical and tunnel engineer.

22 Q. And how long have you been with Jacobs Engineering?

23 A. Approximately 25 years.

24 Q. Are you licensed as an engineer in the State of
25 California?

26 A. Yeah, I have a civil engineering license and a
27 geotechnical engineering license in the State of California.

28 Q. And aside from California are you licensed in any

1 other states or jurisdictions?

2 A. Yeah, I believe I'm licensed in eight other states
3 and a few provinces in Canada.

4 Q. What year did you obtain your first engineering
5 license?

6 A. I believe that was 1997.

7 Q. And from that time to present have you remained
8 licensed as an engineer?

9 A. I have, yes.

10 Q. Could you please provide a brief background summary
11 of your education?

12 A. Yes. I have a bachelors in civil engineering and a
13 master's degree in civil engineering with a specialty in
14 geotechnical engineering.

15 Q. And you mentioned your title, but could you briefly
16 describe your role at Jacobs Engineering?

17 A. Yes. I'm responsible for design of generally
18 underground projects, anything to do with the earth,
19 primarily for water conveyance-type projects, but also for
20 transportation.

21 Q. And aside from a proposed Delta Conveyance Project,
22 do you have any experience working on projects that involve
23 a draft environmental impact report?

24 A. Yes. Many of the larger projects I've been involved
25 in involved an EIR or an EIS depending on the state that the
26 project was in.

27 Q. And when we say "EIR," we understand that to mean
28 environmental impact report?

1 A. That is correct.

2 Q. Can you give me a summary of the number of other
3 projects you've worked on that involved a draft EIR or EIS?

4 A. Likely on the order of 20 plus projects.

5 Q. Did any of those other projects involve -- proposed
6 projects involve water conveyance?

7 A. Yes, the majority of them did.

8 Q. And if you can recall, for any of those other
9 proposed projects that involved draft EIRs, did those draft
10 EIRs consider different project alternatives?

11 A. Yes. That's typical of the nature of an
12 environmental impact report.

13 Q. And just following up on that, for those other draft
14 EIRs of other proposed projects, did they consider a no
15 project alternative?

16 A. I believe so. That is also part of the process.

17 Q. And could you please generally describe for the
18 Court as it relates to the proposed Delta Conveyance Project
19 your duties?

20 A. Yes. I served as the geotechnical and fieldwork
21 lead for the DCA, which essentially reports to DWR, serves
22 as their engineering group. And I was responsible in my
23 fieldwork duties to identify data gaps, areas in the Delta
24 that the -- where insufficient subsurface data were
25 available and to recommend that we address those data gaps
26 to inform the EIR.

27 Q. And you mentioned DCA. Does that stand for the
28 Delta Conveyance Authority?

1 A. It does, yeah.

2 Q. Can you just give a brief description for the Court
3 what the DCA is, what it does?

4 A. Yes. The DCA is a joint powers authority formed by
5 the State Water Contractors that use the water. It's part
6 of the State project to serve as DWR's engineer for a
7 proposed Delta Conveyance Project.

8 Q. And you understand that we're here today on these 16
9 precondemnation entry petitions?

10 A. Yes.

11 Q. And did you submit a signed declaration in support
12 of DWR's 16 petitions?

13 A. I did, yes.

14 Q. And would those declarations describe your duties as
15 they related to the current request for precondemnation
16 entries?

17 A. They do, yes.

18 Q. And we discussed the proposed Delta Conveyance
19 Project, but as it relates to these current requests for
20 precondemnation entries, can you generally describe for the
21 Court what your duties were?

22 A. Yes. The -- my role was to identify, as I
23 mentioned, the data gaps and to recommend locations or
24 parcels where subsurface exploration would guide and inform
25 preparation of an EIR.

26 Q. Are you generally familiar with the June 2017 entry
27 order in its general terms and special conditions?

28 A. I am, yes.

1 Q. Okay. And a similar question for the April 2022
2 entry order, are you familiar with its general terms and
3 special conditions?

4 A. I am, yes.

5 Q. Now focusing on that latter order, the April 2022
6 one, are you familiar with DWR's request for entries that
7 were conducted under that entry order?

8 A. I am, yes.

9 Q. And how did you come to have an understanding as to
10 those entries requested under the April 2022 entry order?

11 A. I testified last year in support of those entries.

12 Q. And are you fully familiar with the geotechnical
13 protocols that were established for the requested entries
14 under the April 2022 entry order?

15 A. Yes, I am.

16 Q. Moving onto these 16 petitions that we're here on
17 today, are you familiar with the laboratory testing methods
18 established for the geotechnical studies sought via these 16
19 petitions?

20 A. I am, yes.

21 Q. And as part of your responsibilities and duties as
22 it relates to these 16 petitions, did you go out and visit
23 the individual parcels?

24 A. No, I did not visit the parcels as they were
25 generally private property. So no, I'm not familiar with
26 the individual parcels.

27 Q. And would it -- would visiting those parcels in
28 person have been necessary for you in order to carry out

1 your duties for these 16 precondemnation entry petitions?

2 A. No. With the use of available mapping and tools
3 such as GIS and Google Earth and Bing maps, you can
4 generally determine the layout of a parcel and site
5 explorations using that method.

6 Q. And so is that the method you utilized for these 16?

7 A. That is, yes.

8 Q. Moving onto your declarations in support of these
9 petitions, you testified that you recall preparing
10 declarations in support of the entry petitions. So what did
11 you do in order to prepare these declarations? For
12 instance, what documents did you review in order to prepare
13 your declarations?

14 A. The declarations were prepared -- well, I should
15 back up. So the individual parcels were selected because
16 they represented, as I mentioned, the data gaps. So the
17 initial activity was -- was to identify available existing
18 data so as to avoid the need to enter parcels wherever
19 possible. And that was done through publicly available
20 data, subsurface data such as would be available from
21 Caltrans at bridge locations.

22 It would also be through proprietary information
23 obtained by other agencies such as the City of Stockton or
24 East Bay Municipal Utility District. And those are subject
25 to confidentiality agreements. But again, it was to assess
26 the current state of -- and also prior -- explorations for
27 prior iterations of the proposed Delta Conveyance Project
28 purpose such as DCP.

1 And once all that information was obtained and the
2 locations identified, these data gaps were then also
3 identified and then individual -- and then it was moved down
4 to the individual parcel where exploration was requested.
5 And that's the nature of the 16 parcels we're here for,
6 generally the nature.

7 Q. So you testified as to your duties as it relates to
8 these 16 petitions and also what you did in order to get
9 ready to prepare your declarations. And you may have
10 already covered content of this next question in answering
11 those, but in case there's anything else, generally speaking
12 can you explain to the Court what you state in your
13 declarations in support of these 16 petitions?

14 A. Yes. If I could boil it, it is the subsurface
15 exploration on a particular parcel identified in the -- in
16 this case is necessary in order to -- in order to provide
17 subsurface data to inform an EIR at a similar level to --
18 for all three alternatives. That was the goal.

19 Q. Okay. And are you familiar with the request for
20 entries that are in these 16 entry petitions?

21 A. I am, yes.

22 Q. And focusing on the geotechnical studies, what's the
23 general nature of the types of geotechnical studies that DWR
24 is requesting under these petitions?

25 A. Generally speaking there's two types. There's the
26 soil boring and a cone penetrometer test or CPT.

27 Q. Now aside from those two types of geotechnical
28 testing, leaving geotechnical testing aside, are you aware

1 whether these entry petitions seek any other kind of testing
2 or investigation on these parcels?

3 A. They do not.

4 Q. And that -- I don't mean to suggest that they don't
5 request anything that would be outside of your purview, like
6 cultural or environmental, for example, but as it relates to
7 geotechnical, that's the limit?

8 A. That's correct, yeah.

9 Q. Okay. And you may have mentioned it already, and if
10 you did I apologize, but could you state to the Court the
11 depth to which the soil borings would go under these 16
12 entry petitions?

13 A. Yes. They are planned to extend to a depth of 200
14 feet below the ground surface.

15 Q. And on the subject of soil borings, could you
16 generally describe for the Court what that is, like what
17 would it involve and the purpose it has?

18 A. Yes. A soil boring is a means of exploring the
19 subsurface conditions. Generally in this case it's through
20 a hole eight inches in diameter drilled to the 200 foot
21 depth and periodic -- generally using a soil bentonite
22 mixture called drilling fluid to circulate the cuttings or
23 the soil back to the surface in order to advance the soil
24 boring.

25 Periodically at set intervals, maybe five feet, ten
26 feet, you take a soil sample in order to obtain a sample of
27 the soil for further laboratory testing. And then at the
28 completion, the boring hole would then be ground into the

1 surface in accordance with state law.

2 Q. And what type of information would be gained by
3 these soil borings and the soil samplings?

4 A. Yeah, so the soil boring again provides the soil
5 samples in order to conduct laboratory testing, but it also
6 allows you to delineate subsurface soils, sands, gravels,
7 clays, those types of materials. And then you transport the
8 samples back to the laboratory for further engineering,
9 characterization tests, strength tests, compressibility
10 tests, and other engineering tests.

11 Q. And why is it important or what's the importance of
12 conducting those tests?

13 A. The importance of conducting the tests is that you
14 can -- it's twofold. It's both to inform with regard to the
15 impacts of a proposed project such as a tunnel on how much
16 settlement you might experience. It also works the other
17 way to inform the conceptual design of a proposed tunnel.
18 Are you tunneling through sand or gravel. Is there -- you
19 know, the nature of the materials, the strength of the
20 materials, that kind of thing.

21 It also speaks to the -- one of the key features of
22 the Delta Conveyance Project for which the exploration is
23 being conducted is seismic resilience. And so it's very
24 important to understand how prone to strength loss the soils
25 would be during ground shaking from an earthquake.

26 Q. And approximately how much time is needed on a given
27 parcel to conduct a soil boring?

28 A. Soil borings generally take sort of, I think, seven

1 to ten days. Essentially two weeks on a parcel.

2 MR. SMITHEY: Your Honor, at this time I'd like to
3 mark a demonstrative exhibit. May I approach?

4 THE COURT: Yes. Has respondent seen the document?

5 MR. SMITHEY: Yes. I sent it to them on Friday. I
6 believe we also have copies.

7 THE COURT: All right.

8 MR. KEELING: What is the exhibit number for that?

9 THE CLERK: It will be Exhibit 1.

10 MR. KEELING: Thank you.

11 (Petitioner's Exhibit No. 1 marked for
12 identification.)

13 MR. SMITHEY: Q. Mr. Finney, could you describe for
14 the Court what type of equipment is used to perform a soil
15 boring?

16 A. Yes. This is a photograph of typical soil boring
17 equipment. It might be a tandem axle or two axles, but
18 essentially it's an over-the-road truck body with a drilling
19 rig on the back. The mast of the drill rig folds down for
20 transport and then lifts up when you're conducting the
21 exploration.

22 Q. And aside from a truck similar to this, aside from a
23 soil boring rig, are there any other types of trucks or
24 equipment needed to perform a soil boring?

25 A. There's generally a need for a water supply vehicle,
26 so that could be a trailer or a separate smaller truck with
27 a water tank on the back. And then generally there might be
28 a support truck with some additional drill rods on it. The

1 -- and then there would be the geologist or the engineer
2 that was logging the soil boring would typically have a
3 personal vehicle or a corporate vehicle. And then there
4 would also be an environmental vehicle associated with an
5 environmental monitor. That's typically how it would be.

6 Q. And you mentioned some different personnel.
7 Approximately how many people or personnel are needed to
8 perform the actual soil boring?

9 A. Generally two to three. As depicted here, there
10 would be a driller and driller helper. Sometimes there
11 could be a second driller's helper. So up to three. And
12 then there would be a geologist logging the bore hole.
13 Potentially there would be one other person making a
14 delivery of the drill rods, but not lingering onsite. And
15 then there would be the observer.

16 Q. And to confirm, you're familiar with the types of
17 requested entries sought under the April 2022 entry order?

18 A. I am, yes.

19 Q. And as it relates to soil borings, do the soil
20 borings that you just described differ from what DWR did
21 under that prior entry order?

22 A. They do not.

23 Q. And I believe you mentioned and we discussed the
24 concept of soil samples as they relate to soil borings.
25 After you perform the soil boring, are there any
26 requirements from what you must do with the hole from the
27 soil boring?

28 A. Yes. Under State water well requirements, you must

1 grout the bore hole primarily to prevent cross-contamination
2 of aquifers, that kind of thing. And so you would grout
3 from the bottom to the top with a cement and water and
4 bentonite clay mixture.

5 Q. Is that mixture that you use mandated by those
6 regulations you mentioned?

7 A. Yes. Grouting the bore hole is, yes.

8 Q. You mentioned cross-contamination. Is there any
9 other reason why you have to use that type of mixture?

10 A. The only -- yes. If you had an artesian ground
11 condition, groundwater condition, it would prevent -- which
12 is where the water table is higher than the ground surface,
13 it would prevent the water from continuing leaking to the
14 surface. So it would essentially seal the bore hole. And
15 it's also a safety issue, having a hole in the ground.

16 Q. Is it your understanding that that cement would fill
17 that hole in the ground?

18 A. That's correct, yes.

19 Q. So you mentioned State law regulations, and if you
20 can recall, can you be more specific as to the source of
21 that, those rules?

22 A. I knew you were going to ask me that. That was my
23 one bit of homework. I believe it's Bulletin like --
24 well -- oh, boy. Ninety- -- no. There's a -- off the top
25 of my head, I don't remember the number. I apologize.

26 Q. Did you say bulletin?

27 A. Yeah, it's a bulletin --

28 Q. Okay.

1 A. -- that provides guidance. And there have been two
2 iterations of that bulletin.

3 Q. What is your understanding as -- sorry. Did you say
4 something?

5 What is your understanding as to whether these
6 bulletins can be incorporated into the prior April 2022
7 entry order?

8 A. Oh, yeah, they are specifically cited and that is
9 our standard operating procedure is to grout the bore holes
10 at the completion.

11 Q. So that mixture of the cement/bentonite mixture that
12 you mentioned, is it impermeable?

13 A. Yes.

14 Q. Can you generally describe for the Court what that
15 means?

16 A. Water cannot pass through it.

17 Q. Would that cement mixture break down over time?

18 A. Not generally. It's -- it's -- you know, it's
19 cement, so -- and it has a small amount of bentonite in it
20 as well to give it some flexibility to avoid it cracking and
21 that kind of thing.

22 Q. You testified previously that the mixture will fill
23 the holes, but does it also seal the drill holes?

24 A. It does, yes, seal it.

25 Q. As you sit here today, are you aware of any
26 instances of soil boring drill holes from DWR's activities
27 under the April 2022 entry order leaking?

28 A. I am not. I am not aware.

1 Q. And the same question for the entries under the 2017
2 entry order, are you aware of any soil boring drill holes
3 leaking?

4 A. I'm not aware of it, no.

5 Q. I'd like to move on to the cone penetrometer test.
6 I'll also use the acronym CPT. Generally what does CPTs
7 involve?

8 A. CPTs involve pushing an instrumented cone, it's
9 referred to, into the ground to a planned depth of 200 feet.
10 And then upon completion of the test, withdrawing it and
11 filling any space that may be created again with the same
12 cement/bentonite mixture.

13 Q. And as it relates to the diameter of the hole, how
14 would that compare to a hole compared to a soil boring?

15 A. It's much smaller. It's on the order of one and a
16 half inches in diameter.

17 Q. And generally what's the purpose of a CPT?

18 A. The CPT is a much faster, lower cost means of
19 exploration. It doesn't give you the ability to obtain a
20 soil sample, but it does give you -- the benefit of it does
21 give you a continuous record of what's called the tip and
22 the sleeve resistance of this particular instrument. The
23 instrument is on the order of 18 inches to two feet long at
24 the end of the drill rod.

25 And from correlations to those resistances, how hard
26 it is to push in the ground, you can make correlations to
27 soil properties, soil strength, compressibility, and various
28 other engineering properties.

1 Q. You mention the phrase "continuous record." Can you
2 just describe that a little bit more as to what that means?

3 A. Yes. So a soil boring, unless it has what's called
4 continuous sampling, involves discreet sampling intervals.
5 So maybe that's every five feet or every ten feet you obtain
6 a soil sample that you can then characterize using
7 laboratory tests.

8 The cone penetrometer test provides continuous data
9 from the surface to its full completion. Again, it is
10 electronic data. It needs to be interpreted, but it is
11 without break.

12 Q. And you may have already addressed it when you
13 explained what CPTs involve for their purpose, but what can
14 you determine from the data yielded by a CPT?

15 A. Various engineering parameters such as strength and
16 compressibility. It's particularly important in the
17 evaluation of earthquake liquefaction susceptibility. In
18 fact, that's one of its primary benefits is that again it
19 gives you a continuous record.

20 Q. And as it compares to a soil boring, is there a
21 particular advantage or disadvantage to doing a CPT?

22 A. You -- they are lower cost. They are much faster to
23 complete than a soil boring. Again, but the downside is you
24 do not obtain actual soil samples. And so the other
25 downside is they need to be calibrated, and so you
26 occasionally perform a paired CPT and a soil boring together
27 so that you can make sure that the interpretations of that
28 electronic data match the physical soil properties obtained

1 from the soil boring. And that might be one in every ten or
2 some frequency determined by the engineer.

3 Q. You mentioned a couple times previously the concept
4 of data gaps. Could DWR rely solely on CPTs in order to
5 obtain the geotechnical testing data it requires under these
6 16 parcels?

7 A. They could not because of that truthing of the data
8 that is required with soil boring.

9 Q. In case you haven't covered it already, are there
10 any other reasons besides those that you previously
11 described why you would choose to perform a soil boring over
12 a CPT?

13 A. If the soil becomes too hard to push the cone
14 through it, it is necessary to drill a soil boring. And
15 there are harder, dense layers within the Delta subsurface,
16 particularly gravels, that cannot be penetrated by the cone
17 penetrometer test.

18 Q. And how do the costs compare between these two types
19 of testing?

20 A. It's generally on an order of a fifth of the cost of
21 a soil boring to complete a cone penetrometer test.

22 Q. And approximately how much time is needed to
23 complete a CPT?

24 A. I would say one to two days. Generally one, but
25 sometimes two. Two days to complete it and grout the hole.

26 Q. Which is faster than a soil boring?

27 A. It is faster, yeah.

28 Q. And as much as we did the soil boring, could you

1 generally describe the equipment required to perform a CPT?

2 A. Yes. It's very simple to the exhibit shown here of
3 the drilling rig, the soil boring rig, except that instead
4 of the drill mast there would be what looks like a truck
5 body on the back of the truck, an on-road type truck. And
6 the cones are advanced from inside that body through the
7 floor of the truck using the truck itself as the reaction or
8 the weight, if you will, to resist, you know, the pushing.

9 Q. Aside from the truck with the rig mounted on it, are
10 there any other types of equipment or vehicle needed to
11 perform the CPT?

12 A. You might have -- well, you might have some
13 equipment related to mixing of the soil -- sorry -- the
14 bentonite/cement grout. You would also have again an
15 environmental monitor onsite and generally a geologist or
16 engineer to oversee the CPT properties -- or CPT operations.
17 Sorry.

18 Q. You mentioned that the diameters of the hole tend to
19 be smaller, but are those drill holes from the CPT also
20 filled afterwards?

21 A. They are, yes.

22 Q. What substance is used to fill those holes?

23 A. The same cement/bentonite grout mixture would be
24 injected.

25 Q. Have you already mentioned all the personnel
26 required to complete a CPT?

27 A. I believe so, yes.

28 Q. And to confirm, what would the maximum depth be of

1 any of the CPT borings under these conditions?

2 A. Two hundred feet.

3 Q. You mentioned earlier that you're familiar with the
4 request for entry that DWR sought under the 2017 and April
5 2022 entry orders. Did those tests also include CPTs?

6 A. They did, yes.

7 Q. And are the CPTs requested under these 16 petitions
8 for entry similar to the CPTs that DWR requested under the
9 April 2022 entry order?

10 A. Yes, they are.

11 Q. And I'd like to ask the same question about soil
12 borings. Are the soil borings sought under these 16
13 petitions the same as those sought under the 2022 entry
14 order?

15 A. They are, yes.

16 Q. To move on and ask you some questions about the
17 laboratory testing, for the 16 entry petitions DWR is
18 seeking entry for here today, is DWR requesting any
19 monitoring wells?

20 A. No.

21 Q. For these 16 petitions is DWR seeking to extract and
22 test any groundwater?

23 A. No.

24 Q. You mentioned at multiple points the concept of data
25 gaps. Can you explain for the Court what the importance
26 would be in filling those gaps with DWR?

27 A. Yes. I've previously explained how the data would
28 be used, but another element of this was to make sure there

1 are three -- with the governor, governor's order to study a
2 single tunnel alternative, there were three alignment
3 alternatives developed: the Central alignment alternative,
4 the Eastern alignment alternative, and the Bethany
5 alternative.

6 And the Central alignment alternative generally, not
7 exactly, but generally follows the alignment of the
8 previously considered project, the Water Fix project which
9 was a twin tunnel alternative. And so, therefore, there had
10 been previous subsurface exploration along that alignment.

11 When the environmental and engineering team were
12 looking at other alternatives, we were tasked to generally
13 get the subsurface exploration to the same level so as not
14 to be predecisional, meaning that we should generally
15 fill -- have subsurface data on a one and a half mile
16 spacing for this very concept leveling engineering design.

17 Q. Okay. And I promise I'll follow up on the
18 alignments. If you can, can you generally describe the
19 geology of the Delta?

20 A. Yeah, it's extremely complex. So it's -- it
21 historically was a brackish saltwater sort of marsh area.
22 It has deep -- it's got a number of rivers, the Sacramento
23 and the San Joaquin rivers that are entering into it as it
24 was once miles and miles from the ocean, and now as the
25 ocean encroached, became this brackish marsh as I mentioned.
26 So there's been a complex evolution of river gravels coming
27 from the mountains as they eroded, soft clays being
28 deposited when it was sort of an almost inland lake, and,

1 you know, followed by a significant amount of organic
2 deposition related to the reeds, the tule reeds as it became
3 a marsh. So you have the potential for braided stream
4 channels buried within the subsurface and all manners of
5 soil materials. It's quite complex.

6 Q. When we discussed how you set about preparing your
7 declarations, you mentioned the data you reviewed.
8 Primarily speaking was that data from DWR or other sources?

9 A. I would say the primary source of data was from DWR.
10 Secondary sources, as I mentioned, included East Bay MUD,
11 Caltrans, a number of agencies, private companies operating
12 pipeline projects, that kind of thing. But I would say the
13 primary source was DWR.

14 Q. And I think you mentioned also a confidentiality
15 agreement of -- that data from the other sources, was it
16 proprietary or confidential?

17 A. Some of it was, yes. In particular East Bay MUD and
18 City of Stockton and a number of other entities, yeah.

19 Q. And on gathering the information you used to
20 identify the data gaps, how did you determine where to
21 drill, for example? What factors did you consider?

22 A. Yeah, that's good. Yeah, so the first we went
23 through a screening process. Just because there's a dot on
24 a map doesn't mean there's sufficient data at that location
25 to inform a potential tunnel project and surface element.
26 So we screened it by depth, by accuracy of data. Was the
27 soil borings logged correctly or were they just sort of
28 water logs with hand scribbles on them.

1 So once we identified data -- there's also a lot of
2 shallow data on there sometimes for levee reconstruction
3 projects and similar, and that would not inform us
4 necessarily of the depth of the proposed Delta conveyance
5 system. So it was really a screening process. And once the
6 applicable data was identified, we then essentially screened
7 it to see if there was -- or identified whether there were
8 large gaps in the subsurface data.

9 Q. I'd like to move onto the subject of those
10 alternative alignments if I could.

11 May I approach?

12 THE COURT: Yes.

13 THE CLERK: Marking Exhibit 2.

14 (Petitioner's Exhibit No. 2 marked for
15 identification.)

16 MS. GARSKE: And just for the record, Your Honor,
17 copies have been provided to counsel.

18 THE COURT: Thank you.

19 MR. SMITHEY: Q. So you testified previously that
20 you're familiar with the entry sought under these 16
21 petitions; correct?

22 A. That is correct.

23 Q. Could you generally describe for the Court what this
24 map is and what it depicts?

25 A. The map depicts the 16 parcels under discussion
26 today along with the individual exploration locations that
27 we've identified to fill the data gaps.

28 Q. And which counties do the proposed explorations fall

1 within?

2 A. Sacramento County, San Joaquin, Alameda, Contra
3 Costa. I believe that's it.

4 Q. All right. And briefly setting that map aside, I'd
5 like to mark one additional exhibit.

6 THE CLERK: Marking Exhibit 3.

7 (Petitioner's Exhibit No. 3 marked for
8 identification.)

9 MR. SMITHEY: Q. Can you briefly describe for the
10 Court what this maps depicts.

11 A. Yes. This map depicts the three alignment
12 alternatives under consideration in the draft EIR for the
13 Delta Conveyance Project. Do you want me to list the
14 alternatives or --

15 Q. In a moment. Actually, sure. Yes, can you please
16 list the alternative alignments?

17 A. Sure. So the westernmost one is actually referred
18 to as the Central alignment. It runs from the intake there
19 down to a proposed reservoir northwest of the Clifton Court
20 Forebay.

21 The Eastern alignment alternative branches off here
22 at Twin Cities Road and heads east just west of I-5 and then
23 loops back into the same proposed reservoir north of Clifton
24 Court Forebay.

25 And the Bethany alternative, although not shown in
26 its own color, does use the Eastern alignment alternative
27 primarily down here to Lower Roberts Island, and then heads
28 to an existing waterway reservoir called Bethany Reservoir

1 which is south and west a little bit of Clifton Court
2 Forebay.

3 Q. Now returning to the entry spots under the 16
4 precondemnation entry petitions, are they located along any
5 particular alignment?

6 A. They're -- they're located I mean generally along a
7 number of the, if not all, of the alignments.

8 Q. Okay. And I'll ask more specific questions. I'll
9 admit I don't have a copy of that map in front of me, but I
10 think I can do it at the County level. As it relates to --
11 well, actually I'm going to back up.

12 Can we pull up the other map briefly?

13 And there was one thing I wanted to address on it.
14 Do you see down at the bottom it's titled, "Court ordered
15 entry parcels"? Correct?

16 A. Yeah. Oh, yes, yes.

17 Q. Is it your understanding that these are the entries
18 that DWR is currently seeking here under these petitions?

19 A. Yes, yes.

20 Q. Okay. And in using that map that shows the
21 individual parcels, you'll note that there is some recurring
22 prefixes.

23 A. Yes.

24 Q. And those are SAC, I think, SJC, CCC, and ALA. Can
25 you just briefly say for the Court what those stand for?

26 A. Yes. That refers to the county that the exploration
27 and the parcels is located in.

28 Q. Now I want to return to the question I asked in the

1 more global sense of which alignments do these requested
2 entries fall along the -- I'm hoping I can do it at the
3 county level. Let's start with the top of the map.

4 For the parcels that have the prefix "SAC," which I
5 understand to be Sacramento County, which alignments would
6 those fall on?

7 A. Yes. All of the explorations in Sacramento County
8 are on properties that relate to all three alternatives.

9 Q. And when you say that they relate to all three
10 alternatives, what's your understanding as to whether they
11 can provide information as to those alignments' feasibility?

12 A. Yes. Well, one of the explorations is -- is
13 proposed at a location of one of the river intakes. Another
14 one, I don't know if you want to discuss it specifically,
15 but this particular parcel here, SAC-0270, is generally
16 along the tunnel alignment that runs from the southernmost
17 intake to the main worksite on Twin Cities Road over here.
18 And the other parcel is related to exploration of the Twin
19 Cities site itself, which is the primary worksite, for all
20 three alignment alternatives.

21 Q. So all three, would be that be Eastern, Bethany, and
22 Central?

23 A. That's correct.

24 Q. And let's move down on that parcel map to the
25 parcels with the prefix SJC.

26 A. Yes. So that --

27 Q. Could you briefly describe for the Court which
28 alignments would those parcels provide information as to

1 their feasibility?

2 A. Yes. All the parcels in San Joaquin County relate
3 to the Eastern and Bethany alternatives, both of those
4 alternatives.

5 Q. Okay. And moving down to the last inset for CCC.

6 A. Uh-huh.

7 Q. Confirm which county would that fall within.

8 A. That's Contra Costa County.

9 Q. And which of the alignments would studies on those
10 parcels provide information as to the alignments'
11 feasibility?

12 A. This particular parcel here, CCC-0220, provides data
13 for all three alternatives as it relates to the West Tracy
14 Fault which passes through here. So that's key to
15 understanding that particularly recently discovered fault.

16 The other two properties along the Byron Highway are
17 related to the Central and Eastern alternative, in
18 particular to realignments and modification made to the
19 Byron Highway as it relates to those two alignment
20 alternatives.

21 Q. Okay. And we have one more parcels in the bottom
22 corner with the prefix ALA.

23 A. Yes.

24 Q. Could you describe for the Court which alignments
25 that would provide information as to the feasibility?

26 A. That particular parcel is related to the Bethany
27 alternative. It's south of Clifton Court Forebay. As the
28 Bethany alternative comes in here, it enters a pumping plant

1 where body water is lifted out from the existing reservoir.
2 So that one is primarily related to the Bethany alternative.

3 Q. So globally for these 16 entry petitions, do they
4 provide information at one parcel or another as to the three
5 alternative alignments?

6 A. Yes.

7 Q. Could you generally describe to the Court what the
8 Bethany Reservoir is?

9 A. Yes. The Bethany Reservoir -- I'm not an expert in
10 the State Water Project, but the Bethany Reservoir is -- I
11 believe is a balancing reservoir that all the water or a lot
12 of the water that's headed south into the Central Valley and
13 to users south of there, all of the water passes through
14 there and then flows into the canals that heads to the
15 south. So it's an existing structure.

16 Q. And if you can see from where you're sitting on the
17 map titled, "Delta Conveyance Alternative Map," where would
18 the Bethany Reservoir be indicated?

19 A. It's at the very, very, very southern or bottom end
20 of the map there.

21 Q. Could you -- you mentioned it previously. Could you
22 generally describe to the Court what an intake is and why it
23 would be important for a proposed project?

24 A. Yes. So the intakes are integral to all three
25 alignment alternatives. It's where the water is -- intakes
26 from the Sacramento River generally north of the Delta at
27 the very, very northern limit of the Delta and where it
28 would then enter the tunnel to flow beneath the Delta, and

1 then it's lifted out another pumping plant.

2 The intakes are moderately large structures because
3 primarily they need a lot of screens. And it's screened to
4 protect juvenile fish, both salmon and also Delta smelt.
5 And so the goal is to keep the velocities of the water --
6 the velocity of the water entering the screen has to be
7 extremely low so as to avoid impinging fish or having them
8 pass through, especially juvenile fish. So they're
9 generally a glorified screen.

10 Q. Okay. Are there any pumps located at the intakes?

11 A. No. As one of the earlier modifications to the
12 prior project, the water project, all of the pumps were
13 relocated from the intakes to the southern end of the
14 project in areas that are not as -- yeah. The answer is no.
15 The pumps are at the southern end of the project.

16 Q. I think you mentioned that the intakes relate to
17 multiple alternatives, but to confirm, do each of the three
18 alignments depicted on the map titled, "Delta Conveyance
19 Alternative Map" being the Central, the Eastern, and the
20 Bethany Reservoir alternative alignments, do each of those
21 three, would they originate at the intakes that would be
22 located at the top of that map?

23 A. That is correct, yes. In fact, all three alignment
24 alternatives are identical until the Twin Cities shaft site
25 there, and then they branch out.

26 Q. Now shifting focus, are you aware of whether last
27 year DWR released a draft environmental impact report or EIR
28 for short?

1 A. I am aware, yes.

2 Q. Have you reviewed any portion of the draft EIR?

3 A. I have not reviewed any portion.

4 Q. Do you have a general understanding as to different
5 project alternatives considered under the draft EIR?

6 A. I do, yes.

7 Q. And do you know if the draft EIR considers more than
8 one alterative alignment for a proposed Delta Conveyance
9 Project?

10 A. Yes. I believe that it considers multiple
11 combinations of intakes, alignments, and including a no
12 action alternative.

13 Q. And just to clarify because you indicate you haven't
14 reviewed the draft EIR, how did you come to be familiar with
15 the different project alternatives considered under the
16 draft EIR?

17 A. Well, I was a contributor to the draft EIR from the
18 engineering standpoint.

19 Q. I might not have caught it. Did you mention whether
20 the draft EIR considers a no project alternative?

21 A. Yes, I believe it does.

22 Q. Did the draft EIR consider different alternative
23 alignments for a proposed Delta Conveyance Project?

24 A. It did, yes.

25 Q. Which would those be?

26 A. The Bethany, the Central, and the Eastern alignment
27 alternatives.

28 Q. Do you know whether DWR has since adopted a final

1 EIR document for a proposed Delta Conveyance Project?

2 A. I do not believe there is a final EIR.

3 Q. And do you know whether DWR identifies a preferred
4 alignment in the draft EIR document it released last year?

5 A. I believe it does and is typical for an EIR to
6 identify a preferred project, yes.

7 Q. As you sit here today do you recall which
8 alternative it selected as the preferred under the draft
9 EIR?

10 A. I believe the Bethany alternative is the preferred
11 alternative.

12 Q. In returning to the precondemnation entries sought
13 under last year's entry petitions in 2022, were those
14 entries part of the decisionmaking regarding the suitability
15 of different alternative alignments?

16 A. I believe that the data was incorporated in the
17 evaluation and consideration of the alternatives, yes.

18 Q. Do you recall whether the entries sought under the
19 23 petitions that were the subject of last year's hearings,
20 whether those were located along multiple alternative
21 alignments?

22 A. They were, yes, multiple alignments.

23 Q. Do you remember which ones?

24 A. I believe -- well, they would have definitely been
25 under the same three, the same three primary alternative
26 alignments.

27 Q. And to your knowledge has DWR formally approved the
28 Delta Conveyance Project at this time?

1 A. I do not believe they have.

2 Q. And we'll focus on each of the individual parcels in
3 a moment, but as it relates to the Bethany Reservoir
4 alignments, are there any data gaps along that alignment for
5 which DWR currently has data gaps?

6 A. Yeah, so the Eastern and Bethany alternatives in
7 general had by far the least available data. They were not
8 previously studied. Well, certainly the Bethany alternative
9 was not previously studied. An Eastern alternative was
10 studied many years ago, but not very much additional data
11 were available.

12 The primary data gaps were related to, I believe,
13 Rindge Tract and portions of the shared common alignment
14 along the Eastern alternative, and then again leading from
15 the Twin -- sorry. Not Twin Cities. Leading from -- in and
16 around Bethany Reservoir itself was also a relative data
17 gap.

18 Q. And is there any difference between the geotechnical
19 testing that DWR seeks to complete via these 16 petitions
20 and any studies that may be part of a later potential Delta
21 Conveyance Project?

22 A. Sorry. Would you repeat the question?

23 Q. Yeah, I'll rephrase. To your knowledge would a
24 potential Delta Conveyance Project also involve geotechnical
25 testing?

26 A. Yes, it would.

27 Q. Okay. And focusing on the purpose of the testing as
28 it compared to the testing sought under these 16 entry

1 petitions or the 23 entry petitions of last year, can you
2 explain the differences, if any, in the purpose for doing
3 geotechnical testing as part of a later Delta Conveyance
4 Project?

5 A. Yeah, so any -- so the subsurface exploration that's
6 the subject of this hearing and has been completed to date
7 again is really to generate data on a one and a half mile
8 spacing in general to inform both this concept, the
9 conceptual design, and also an impacts analysis.

10 Future -- again, if a potential future project
11 exploration would be completed at a much tighter spacing and
12 would be used to refine design to a final design level of
13 engineering. It would also be used to sort of microsite
14 certain facilities. So within a given area, the location of
15 say a work shaft might be relocated to more favorable
16 geology. But generally the goal of this initial was to sort
17 of macrositing big picture whether any fatal flaws would --
18 and again, like I said, to inform the impacts analysis in
19 the EIR. So it would be a lot -- a lot more exploration at
20 tighter spacing and -- but generally of the same nature as
21 what we're discussing here.

22 Q. And we've discussed the data gaps and we've
23 discussed locating parcels along potential alignments, but
24 is there any other types of information or factors you
25 consider in selecting the sites for soil borings and CPTs?

26 A. Well, yeah. I mean there's many different factors,
27 not the least of which is access. For those explorations
28 that were conducted under a voluntary basis, we worked with

1 the landowner and the farmer to site them again on a micro
2 level to avoid impacts to their crops. You know, timing was
3 often adjusted to -- if they were, you know, using
4 pesticides or, you know, had to harvest, all kinds of things
5 working with the landowner to be -- you know, to reduce any
6 impacts to them whatsoever.

7 It also -- the siting also identified things like
8 environmental constraints such as wetlands or proximity of
9 potential nesting habitats, working with our environmental
10 team. And generally, you know, they were sited to reduce
11 impact is what it was. Where it was feasible to put them in
12 rights of way, that was always the first choice to go to.
13 The last choice was to go onto a property. And certainly
14 the last choice within a given property was to go into the
15 middle of a field. It was always put it on the side of a
16 dirt road or something like that.

17 Q. Was there any restrictions as it relates to the
18 location of levees for where you would locate a drilling
19 location?

20 A. Yes, we generally avoided any exploration on levees
21 at this time. Just -- yeah.

22 Q. And in determining where to perform geotechnical
23 studies, did you take into account the location of oil and
24 gas wells throughout the Delta?

25 A. Yes. We used the State's database of known existing
26 and historical oil and gas wells and avoided them, along
27 with the State's record of water well locations as well and
28 minimized the proximity of those elements.

1 Q. And you mentioned environmental factors. Do you
2 communicate with those who perform environmental and
3 cultural studies to determine the locations for geotechnical
4 studies?

5 A. Absolutely. So we generated the wish list and then
6 they reeled us in.

7 Q. Understood.

8 A. They made sure that we are complying with all State
9 laws and not impacting those, those areas.

10 Q. In the event that DWR would be granted access to a
11 parcel, would it try to meet with the property owner at the
12 site?

13 A. Sorry. Could you say that again?

14 Q. In the event that DWR would be granted access to a
15 parcel to do geotechnical studies, would meeting with the
16 property owner be part of that?

17 A. Oh, absolutely. Even for the nonvoluntary users,
18 there's a great deal of communication and coordination to
19 make sure that the impacts are still, you know, minimized to
20 the best of our ability, absolutely.

21 Q. Could you describe some of the types of things that
22 the owners will typically communicate to you to assist you
23 in locating the final drill site?

24 A. Yeah, so they would -- they would also inform us,
25 you know, potentially please don't come through this gate or
26 that gate. I prefer that you accessed here. I would prefer
27 if you accessed. If there was the ability to adjust it in
28 terms of timing as it relates to again harvests and

1 plantings and that kind of thing. They might inform us
2 about, well, that's, you know, in an area that's
3 historically that's been very soft and marshy, suggest you
4 move it over there. So it's all a manner of back and forth.

5 Q. And are there any properties in this round of 16
6 entry petitions where DWR is seeking to reenter a property
7 that it previously conducted geotechnical testing on?

8 A. Not to my knowledge, no. As it -- I should note as
9 it relates to this potential project and past iterations. I
10 can't speak to, you know, former levee investigations that
11 are unrelated to this.

12 Q. Sure. I should clarify. As it relates to a
13 proposed Delta Conveyance Project?

14 A. No, not to my knowledge they are not reentering.

15 Q. All right. I'd like to ask you a series of
16 questions regarding each parcel that's the subject of these
17 16 entry petitions. And I'm going to move through each one
18 at a time and ask you similar questions.

19 So as part of that I'd like to mark one additional
20 exhibit. May I approach?

21 THE COURT: Yes.

22 THE CLERK: Exhibit 4 marked.

23 (Petitioner's Exhibit No. 4 marked for
24 identification.)

25 MR. SMITHEY: Can I provide one to him?

26 THE COURT: I'll use the official. Thank you.

27 MR. SMITHEY: Thank you.

28 Q. And I think you may need to consult this one.

1 A. Do I need to consult that?

2 Q. To refresh your recollection.

3 May I provide a copy to the witness?

4 THE COURT: Yes.

5 THE WITNESS: Thank you.

6 MR. SMITHEY: Q. Mr. Finney, I just handed you a
7 piece of paper in chart form. Can you just generally
8 describe to the Court what it depicts?

9 A. Yes. It's a chart that explains and organizes the
10 16 parcels by county. It provides the owner's full name,
11 the parcel number, the APN number, and some additional
12 information about proposed activities on the parcel.

13 Q. Okay. And just to confirm, you are yourself
14 familiar with each of the entries for geotechnical studies
15 that DWR is seeking under these 16 precondemnation entries;
16 correct?

17 A. That is correct.

18 Q. Okay. So we provided you that chart to refresh your
19 recollection in organizing the information, but I'd also
20 like you to consult that map that we previously marked that
21 has the various parcels. And generally I'm going to be
22 going from north to south asking those series of repeating
23 questions for each parcel.

24 So could you please identify for the Court for
25 parcel number SAC-0207 who the owners would be.

26 A. Yes. That would be Bradford E. Nyman and Kristi J.
27 Nyman, trustees.

28 THE COURT: I'm sorry. Where are you?

1 THE WITNESS: Parcel -- Your Honor, parcel SAC-0207.
2 It's the first parcel in the Sacramento County list.

3 THE COURT: 0207?

4 THE WITNESS: Yes. It's the DCPN, which stands for
5 the Delta Conveyance Parcel Number.

6 THE COURT: So I would be able to see 0207 on
7 Exhibit 2?

8 THE WITNESS: You can, yes, Your Honor. It's the
9 second inset. Is that -- I'm sorry. Is that the --

10 MR. SMITHEY: 0207 -- I'm sorry. May I approach the
11 witness?

12 THE COURT: Yes.

13 MS. GARSKE: Also, Your Honor, if you'd like, we
14 also have individual maps that we used to compile the bigger
15 map if you would like to reference the individual county
16 maps.

17 THE COURT: Well, I just need to know what you're
18 talking about. All right. So it's not -- all right.

19 THE WITNESS: Even I messed that up.

20 MR. SMITHEY: Q. Okay. So you previously provided
21 the owners' names. Thank you for that. Can you describe
22 for the Court the types of geotechnical testing that are
23 sought to be performed on that parcel?

24 A. Yes, for SAC-0207, one soil boring is proposed.

25 Q. And could you generally describe for the Court what
26 the importance of the information to be gained from the
27 testing at that location would be?

28 A. Yes. That particular parcel was located at the

1 primary work shaft site or worksite for all of the
2 alternatives referred to as the Twin Cities site.

3 Q. All right. And when you mentioned all of the
4 alternatives, would that be Central, Eastern, and Bethany
5 Reservoir alignments?

6 A. That is correct.

7 Q. Okay. Now moving onto parcel number SAC-0280 which
8 is in the second inset down.

9 A. Yes.

10 Q. Could you please state the owner's name for that
11 parcel?

12 A. Yes. The owner is Snodgrass Lake, LLC.

13 Q. What type of entry is sought on that parcel?

14 A. That parcel is purely for access only to the parcel
15 to the south.

16 Q. Is there any geotechnical testing sought to be done
17 on that access parcel?

18 A. There is not.

19 Q. Okay. So moving to parcel number SAC-0270 to the
20 south, could you please tell the Court the owner of that
21 part?

22 A. Robert L. Silveira and Maria C. Bispo-Silveira.

23 Q. And what type of geotechnical activity is sought on
24 that parcel?

25 A. A one cone penetrometer test.

26 Q. What's the importance of the data that you derive
27 from that test?

28 A. That particular location is on -- again is on --

1 primarily it's approximate to all three alignment
2 alternatives, the Bethany, the Eastern, and the Central.

3 Q. Okay. And moving to the top inset on the map,
4 parcel number SAC-4372, could you tell the Court the owner
5 of that parcel, please?

6 A. Yes. Jackie Tarleton and Anna Tarleton.

7 Q. And what type of geotechnical activity is sought on
8 that parcel?

9 A. One soil boring.

10 Q. What's the importance of obtaining the data from
11 that soil boring?

12 A. That particular parcel is at the -- is just to the
13 north of intake number 3, and so it would inform
14 understanding of the geological conditions affecting the
15 intake number 3.

16 Q. Okay. Is intake number 3 implicated in how many of
17 the proposed alternative alignments?

18 A. It is -- intake 3 is involved in all of the
19 alignment alternatives.

20 Q. So that would be the Central, the Eastern, and the
21 Bethany Reservoir alignment sites?

22 A. That's correct.

23 Q. Alternatives. Sorry. I believe we covered all of
24 the parcels in Sacramento County. I'm going to move south
25 on the map to the parcels with the prefix SJC. But before I
26 do that, we have one parcel with a different prefix,
27 LMA-8732 situated right above I believe Rindge Tract.

28 A. That is correct, yes.

1 Q. Can you describe to the Court what that parcel is
2 for?

3 A. Yes. The only access to Rindge Tract is over an
4 existing I believe it was a former County bridge that --
5 that is currently maintained by Reclamation District 20337.
6 And so we're asking for access across that bridge to access
7 Rindge Tract.

8 Q. Are you seeking to perform any geotechnical testing
9 as it relates to that LMA-8732 parcel?

10 A. No, we're not.

11 Q. Okay. Now looking back at the third inset down, I
12 understand that that generally depicts Rindge Tract, an
13 island; is that correct?

14 A. That's correct.

15 Q. And starting with parcel SJC-0159, could you tell
16 the Court the owner?

17 A. Yes. That is Jack Klein Trust Partnership.

18 Q. Okay. And what type of access or activities are
19 sought there?

20 A. That is also access to other exploration on Rindge
21 Tract.

22 Q. Okay. Are you seeking to perform any sort of
23 geotechnical testing on that parcel?

24 A. No, we are not.

25 Q. Okay. And then moving to counterclockwise SJC-0495,
26 can you tell the Court the owner, please?

27 A. That is Richard G. Klein.

28 Q. What type of geotechnical activities are sought on

1 that parcel?

2 A. One cone penetrometer test.

3 Q. And what would be the importance of obtaining that
4 data from that CPT?

5 A. Well, as I mentioned, Rindge Tract is probably the
6 largest data gap of any of the alternative alignments under
7 consideration, and so that would be one of the two locations
8 that we would attempt to fill that data gap.

9 Q. And which alignments would that data gap inform the
10 feasibility of that alignment for?

11 A. That would be for the Central -- sorry. The Eastern
12 and Bethany alignment alternatives.

13 Q. And moving down to SJC-0589, could you please tell
14 the Court the owner of that parcel?

15 A. That's the Rindge Tract Partners.

16 Q. And what sort of geotechnical activity are sought on
17 that parcel?

18 A. Another cone penetrometer test, single.

19 Q. And what would be the importance of obtaining the
20 information from that CPT?

21 A. That would be the same as I mentioned, to fill a
22 very large data gap in the Eastern and Bethany alignment
23 alternatives.

24 Q. And then moving out of the inset to the parcel
25 directly below it, SJC-3393A, can you please tell the Court
26 the owner of that parcel?

27 A. Yes. That's Ripken Home Ranch Family.

28 Q. And what sort of geotechnical activities are sought

1 on that parcel?

2 A. That is one soil boring.

3 Q. And what would be the importance of obtaining the
4 information from that soil boring?

5 A. That's subsurface exploration at the site related to
6 the primary work shaft that's located to the west. And that
7 area would be -- is proposed to receive some of the soils
8 from the tunnelling activity themselves --

9 Q. Okay.

10 A. -- to understand the conditions there.

11 Q. So that site would be to deposit soils?

12 A. Yes.

13 Q. And would the soils deposited there be from
14 construction along any of the proposed alignments?

15 A. It would be related to the Central and -- sorry. I
16 keep saying -- it would be related to the Eastern and
17 Bethany alignment alternatives.

18 Q. Okay. I'd like to move just to the west. SJC-0217
19 below the inset there. Can you tell the Court the owner of
20 that parcel?

21 A. Yes. That is Passaglia, LLC.

22 Q. And what sort of geotechnical testing is sought on
23 that parcel?

24 A. That is one soil boring.

25 Q. And what would be the importance of obtaining the
26 data from that soil boring?

27 A. Again, that's a large -- continued large data gap
28 for the Eastern and Bethany alignment alternatives.

1 Q. And then I'd like to move to parcel SJC-0600. Could
2 you tell the Court the owner of that parcel, please?

3 A. That is San Joaquin Delta Farms.

4 Q. Okay. What sort of activity is sought to be
5 completed on that as it relates to geotechnical studies?

6 A. That would be one cone penetrometer test.

7 Q. And what would be the importance of obtaining the
8 data for that CPT?

9 A. That would be again continued a large data gap for
10 the central -- I keep saying central. I apologize.

11 Q. That's all right.

12 A. For the Eastern and Bethany alignment alternatives.

13 Q. And it looks like there is one more sort of
14 rectangular parcel further north that we did not cover.
15 It's titled SJC-0476B. You see it there?

16 A. I do, yes.

17 Q. Who's the owner of that?

18 A. It's the Ishizuka Family Trust.

19 Q. And what sort of geotechnical activities are sought
20 on that parcel?

21 A. One cone penetrometer test.

22 Q. And the importance of the data that you would derive
23 from that test?

24 A. That's a data gap identified on the Eastern and
25 Bethany alignment alternatives.

26 MR. KEELING: Your Honor, this is Tom Keeling. We
27 can barely hear the witness out here. Am I the only one
28 having a hard time hearing him?

1 THE COURT: Speak louder and bring the mic closer to
2 your mouth. Thank you.

3 MR. SMITHEY: Q. I'd like to move down on the map
4 to the parcels with the prefix CCC, which I understand are
5 the parcels located in Contra Costa County; correct?

6 A. That's correct.

7 Q. Okay. And in the bottom inset, parcel number
8 CCC-0220, can you please tell the Court the owner of that
9 parcel?

10 A. That is Mary Perry.

11 Q. What sort of geotechnical activity is sought to be
12 done on that?

13 A. One soil boring.

14 Q. And what's the importance of the data to be derived
15 from that boring?

16 A. That is proximal to the west Tracy fault which is a
17 potential contributor to the overall seismic risk in the
18 Delta and, therefore, exploration at that location is
19 applicable to all three alignment alternatives, the Central,
20 the Eastern, and the Bethany.

21 Q. And moving down on the inset to CCC-0385, who's the
22 owner of that parcel?

23 A. That is Byron Properties.

24 Q. And what sort of geotechnical activity is sought on
25 that parcel?

26 A. One cone penetrometer test.

27 Q. What would be the importance of the data derived
28 from that CPT?

1 A. This location is along the Byron Highway where there
2 is some proposed alignment changes to the Byron Highway
3 under consideration for the Central and Eastern alignment
4 alternatives.

5 Q. And then the parcel CCC-4371, can you tell the Court
6 the owner of that parcel?

7 A. Byron Mountain Farms, Incorporated.

8 Q. And what type of geotechnical activity is sought on
9 that parcel?

10 A. One soil boring.

11 Q. What's the importance of the data derived from that
12 soil boring?

13 A. That is also related to the configuration of the
14 Byron Highway related to the Central and Eastern alignment
15 alternatives.

16 Q. I believe we've covered all three in Contra Costa
17 County; correct?

18 A. That is correct.

19 Q. Okay. And now moving to that one parcel in the
20 bottom left of the map, parcel number ALA-2877A, could you
21 tell the Court the owner of that parcel?

22 A. Yes. Peggy Moore, Christopher Castello, and
23 Annamarie Castello.

24 Q. Okay. What sort of geotechnical activities are
25 sought on that parcel?

26 A. That would be one soil boring.

27 Q. Okay. And what's the importance of the data derived
28 from that soil boring?

1 A. That particular location fills a data gap related to
2 the Bethany alignment alternative as it leaves the proposed
3 pumping facility and heads to Bethany Reservoir.

4 Q. Okay. One moment.

5 May I approach?

6 THE COURT: Yes.

7 THE CLERK: Marking Exhibit 5.

8 (Petitioner's Exhibit No. 5 marked for
9 identification.)

10 MR. SMITHEY: May I hand the witness this?

11 THE COURT: Yes.

12 MR. SMITHEY: Q. I won't go into too much detail
13 about this exhibit here, but do you have a general
14 understanding what the specific location of the geotechnical
15 study on this Alameda parcel has been relocated within the
16 parcel?

17 A. Yes, that is my understanding.

18 Q. Okay. And I won't ask you the specifics as to the
19 reasons behind relocating the geotechnical study. My
20 understanding is that will be addressed later, but as it
21 relates to any data gap that testing on this parcel would
22 serve to fill, does the location on that exhibit you have
23 there in front of you, number one, does it reflect the
24 relocated location of the geotechnical test?

25 A. It does, yes.

26 Q. Okay. Can you speak to whether that relocation of
27 the testing site will still serve to fill the same data gap
28 you identified for the Court?

1 A. Yes, it will, absolutely.

2 Q. Okay.

3 A. I think -- I believe it was relocated to provide
4 easier access and avoid driving down a narrow canal road.

5 Q. But to confirm, it would still be one soil boring?

6 A. That is correct.

7 Q. And the information, would that serve to inform the
8 Bethany alignment?

9 A. Yes, it would.

10 MR. SMITHEY: That's all the questions I have at
11 this time, Your Honor.

12 THE COURT: Cross-examination?

13 MR. KEELING: We have no cross for this witness.

14 THE COURT: All right. Thank you. Witness is
15 excused.

16 Why don't we go ahead and swear in your next
17 witness, and then we'll take a break for lunch. But let's
18 just get it started so we'll be ready to go right after
19 lunch.

20 MS. GARSKE: Okay. Great. Thank you very much.
21 Mr. Kelly Smith will question the next witness, Ms. Marquez.

22 MR. SMITH: At this time DWR would call Katherine
23 Marquez, Your Honor.

24 THE CLERK: Go ahead and raise your right hand to be
25 sworn.

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KATHERINE MARQUEZ,
called as a witness on behalf of the Petitioner, being first
duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Please state for the record your full
name and please spell it for the record.

THE WITNESS: Katherine Marquez, K-A-T-H-E-R-I-N-E
M-A-R-Q-U-E-Z.

THE COURT: All right. We will pick up after lunch
and we'll ask you to just come on in and take the witness
stand and we'll be ready to go. Thank you.

All right. We will reconvene at 1:15. What that
means is that everyone is ready to go at 1:15. It doesn't
mean you start walking in the door at 1:15. Thank you very
much. We'll see you then.

(Lunch recess.)

(Time noted: 11:51 a.m.)

THE COURT: Mr. Smith.

MR. SMITH: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SMITH:

Q. Ms. Marquez, what is your current employment and how long have you been in that position?

A. I currently work for the Delta Conveyance Office within the Department of Water Resources. I am a program manager III and I've been in that position for about three years now.

Q. Did you submit a signed declaration in support of the precondemnation entry petitions?

A. Yes.

Q. Okay. Does that declaration detail your educational and professional background as it relates to the entries?

A. Yes.

Q. Would you though please provide a brief summary of your education and professional experience as it relates to the precondemnation entries?

A. Sure. I've been working for the Department of Water Resources for about 14 and a half years. I started as an environmental scientist, then became a senior environmental scientist supervisor, then a program manager II and now a program manager III. And I've been more specifically working in the Delta Conveyance Office for about six years

1 now. I have a bachelors of science in animal biology and a
2 master of science in biological sciences with a
3 concentration in biological conservation.

4 Q. And what has been your role in preparing the
5 precondemnation studies?

6 A. So I oversee the teams that conduct the
7 environmental analysis for terrestrial resources and
8 cultural resources for the Delta Conveyance Project's
9 environmental impact report. And I also work with the teams
10 on Endangered Species Act compliance. So Endangered Species
11 Act supporting documents as well. And then I also for the
12 soil investigations project, I oversee the implementation of
13 the mitigation measures.

14 Q. Okay. Does that work involve overseeing
15 environmental documentation and so forth?

16 A. Yes. So for the environmental surveys, as part of
17 this hearing would support the information for the
18 environmental impact analysis, for the environmental
19 analysis for the Delta Conveyance Project. And then the
20 implementation of the mitigation measures for the soil
21 investigation project include the preconstruction site
22 clearances, site clearance surveys.

23 Q. Okay. You mentioned site clearances and
24 environmental surveys. Are those two different things?

25 A. Yes, they are. The site clearance surveys are more
26 near term and very specifically focused on the areas for the
27 soil investigations. So those are the borings and the CPTs
28 that was referenced earlier. And then the environmental

1 surveys -- sorry. And those are required per our mitigation
2 measures from the approved project for the soil
3 investigation project.

4 And the environmental surveys are not required, but
5 they provide an opportunity to collect valuable information
6 that would inform the environmental analysis for the Delta
7 Conveyance Project and increase our overall understanding of
8 the Delta.

9 Q. Okay. So if I use those two terms, environmental
10 surveys and preconstruction site clearances, we all
11 understand that they're what you just generally described.
12 Okay? Going forward.

13 A. Yes.

14 Q. Now what did the environmental surveys actually
15 consist of?

16 A. So they're described in more detail in my
17 declaration, but typically they include either botanical,
18 wetland, fisheries, wildlife, or cultural surveys. In the
19 case of the properties we're discussing today, we're really
20 focused on wildlife and cultural surveys, and those are
21 generally observational surveys.

22 So we would just document what we see out in the
23 site. So this includes the substrate, the vegetation, and
24 any wildlife we observe. The equipment we would use would
25 be binoculars, a GPS unit, a camera, maybe a small hand
26 trowel.

27 And in addition to that there are a couple of
28 properties that we're discussing today that have potential

1 for special status amphibians, and for those properties we
2 are also proposing to use dip nets or seines for those
3 surveys. Sorry. And then cultural surveys, again,
4 observational, same type of equipment except for they
5 wouldn't use the nets.

6 Q. Okay. So when you say "environmental surveys,"
7 however, you're including cultural surveys as part of that.
8 Is that what you're saying?

9 A. Yes.

10 Q. And when you would do an environmental survey, you
11 would also do the cultural resources surveys at the same
12 time; is that right?

13 A. Not for all properties. So for this set of
14 properties we have indicated that five out of the 16 would
15 require environmental surveys. And so we have one that only
16 requires wildlife surveys, three that would require wildlife
17 and cultural surveys, and one that requires just cultural
18 surveys.

19 Q. Let's come back to some of those details of what you
20 talked about, but the preconstruction site clearances,
21 preconstruction site clearances, how are those different
22 from the environmental surveys?

23 A. So those preconstruction site clearances, as I
24 mentioned before, they were part of a commitment in our 2020
25 initial study mitigated negative declaration for the soil
26 investigation project. So they are a requirement for
27 implementation of those activities. And we would be really
28 focused on the specific areas associated with those soil

1 investigation activities. And so that's more of a smaller
2 area, near-term type of survey, whereas the environmental
3 surveys are a much broader survey area in consideration of
4 potential Delta Conveyance Project and the many alternatives
5 being considered.

6 Q. Okay. So are you aware of an environmental impact
7 report for a Delta Conveyance Project?

8 A. Yes. The draft environmental impact report for the
9 Delta Conveyance Project was released last summer for public
10 comment which closed in December of last year.

11 Q. And is that EIR the same as the initial study and
12 mitigated negative declaration that you mentioned?

13 A. No, it's not the same. So the initial study
14 mitigated negative declaration is part of data collection
15 that's been ongoing for a while now in consideration of
16 different potential conveyance projects and it's not
17 specific in the way that the draft environment impact report
18 is.

19 Q. To your knowledge has a conveyance project EIR been
20 certified?

21 A. No.

22 Q. Has a conveyance project been approved by your
23 agency?

24 A. The Delta Conveyance Project Draft EIR has not been
25 approved by our agency.

26 Q. Well, specifically was -- is there separate from the
27 EIR, has there been a project approved without an EIR?

28 A. The Delta Conveyance Project has not been approved,

1 no.

2 Q. Okay. Has any specific alignment, conveyance
3 alignment been approved by your agency?

4 A. No.

5 Q. Let's talk about the environmental surveys first in
6 more detail. How many of the current entry petitions seek
7 to perform environmental surveys?

8 A. Five of the 16.

9 Q. That's what you mentioned earlier, the five of the
10 16.

11 A. Uh-huh.

12 Q. And how were those chosen?

13 A. So I turned to our technical teams and they did a
14 desktop review of the properties looking at aerial imagery
15 and available databases. What we looked at were the
16 properties that were requested for geotechnical activities.
17 We then reviewed those properties in comparison to proposed
18 project footprints of any alternative being proposed and --
19 and identified which ones we would benefit from additional
20 information from.

21 So for the cultural surveys, this was more of a
22 mapping exercise where if there was a surface footprint, we
23 would flag that for cultural surveys. But for the
24 biological surveys for the wildlife surveys, we actually
25 went a step further and looked at the information we had
26 available from our desktop review and decided whether or not
27 there was a high value in ground truthing some of that
28 analysis on the -- in the field, and that's how we

1 identified which properties to survey for wildlife.

2 Q. Okay. So just for clarification here, when you say
3 "cultural surveys," how was that the same or different from
4 tribal surveys, tribal cultural surveys?

5 A. So we would conduct both under this description. So
6 just like we said cultural surveys fell under the discussion
7 of environmental surveys, under cultural surveys we have the
8 more focused archeological surveys versus the tribal
9 cultural surveys. So those are two subsets.

10 For the archeological surveys, those are conducted
11 by an archeologist typically, like I said, observing the
12 ground surface. And those are defined differently in the
13 California Environmental Quality Act than tribal cultural
14 resources, which has a much broader definition and could
15 be something that is a little bit harder to identify.

16 So for tribal cultural resources surveys, we invite
17 a tribal representative to participate in the surveys and
18 identify any concerns in the field.

19 Q. I think we'll be coming back to that, those
20 activities in more detail, but just to establish here,
21 tribal surveys are part of the cultural surveys that you do;
22 correct?

23 A. Yes, uh-huh.

24 Q. And are the environmental surveys the same for each
25 of the five sites that you described that you testified to?

26 A. No. So as I mentioned before, there is one property
27 that only requires cultural surveys, three properties that
28 require cultural and environmental surveys, and one property

1 that requires -- sorry. Wildlife surveys, and one property
2 that requires only wildlife surveys. And then even further
3 for the ones that have been identified for wildlife surveys,
4 there are potentially different species that we're looking
5 for on those sites.

6 MR. SMITH: And so I think the easiest, Your Honor,
7 if we could refer to Exhibit 2 which is the County map. And
8 I'll ask her to go through those five sites and talk a
9 little bit more about it.

10 THE COURT: Thank you.

11 MR. SMITH: Q. So, Ms. Marquez, on the exhibit that
12 you have before you, are the five sites that you were just
13 describing, are those on that map?

14 A. Yes.

15 Q. Okay. If you want to start at the top where it says
16 "Sacramento County," and can you identify -- how do you --
17 strike that.

18 How would you identify the sites where environmental
19 surveys are going on?

20 A. So on this exhibit, the sites where environmental
21 surveys would occur are in the pale green color. So if we
22 start at the top in Sacramento County, the first one is
23 SAC-0207. And for that property we have specifically just
24 identified cultural surveys.

25 Q. Okay. And the next one if we go from north to south
26 would be which one?

27 A. SJC-3393A.

28 Q. And what kind of activities are occurring there?

1 A. And for that property we've identified wildlife and
2 cultural surveys.

3 Q. And the next two, would that be the pullout section
4 with Byron Tract?

5 A. Yes. So it's that bottom pullout section, and
6 that's CCC-0220. And for that property we've only
7 identified wildlife surveys.

8 Q. And the next one?

9 A. The next one is CCC-4371, and for that property
10 we've identified wildlife and cultural surveys.

11 Q. And then finally it looks like there's one little
12 tiny one in the bottom left-hand corner for Alameda County.
13 Can you describe what you're doing there?

14 A. Yes. So that one is ALA-2877A, and for that one
15 we've identified wildlife and cultural surveys.

16 Q. Okay. Are any permits needed to perform the
17 environmental surveys or the preconstruction site
18 clearances?

19 A. So for the preconstruction site clearances or the
20 environmental surveys that are just sort of observational,
21 just documenting what we see on the site, those do not
22 require any permits. However, as I mentioned before we are
23 proposing some surveys specifically for special status
24 amphibians, and for those if we identify appropriate
25 habitat, we would do some dip netting or seines, and that
26 would require a permit because we would be handling or
27 potentially handling listed species if we find them there.

28 So the permit required to conduct those surveys

1 would be from the State. We would have a scientific
2 collecting permit. From the federal government we would
3 have a recovery permit. And that is issued to an individual
4 biologist who has demonstrated expertise in surveying and
5 handling for specific species.

6 Q. I'm not sure if you said one way or another, but are
7 any of these specimens or samples taken off the property or
8 what do you do with them?

9 A. So for the special status amphibian surveys, as I
10 mentioned before, it's a dip net or a seines, which is
11 another type of net, and you would pass that through the
12 water and see what you collect. And if there is special
13 status amphibian, in this case we're looking for California
14 tiger salamander or California red-legged frog, we would
15 then photograph the identifying characteristics of that
16 larva in the net or in maybe a small jar, but we wouldn't
17 take them away from the pond that we're surveying. We would
18 then once we've taken photos if we've identified a listed
19 species, we would put them right back where we found them
20 and leave the site.

21 Q. Okay. Let's go back to the preconstruction site
22 clearances. Which parcels will have these preconstruction
23 site clearances?

24 A. So all of the parcels would have the preconstruction
25 site clearances because those are associated with the
26 geotechnical activities.

27 Q. Because what? I'm sorry.

28 A. Those are associated with the geotechnical

1 activities.

2 Q. Okay. What about the -- this occurred to me while
3 the previous witness was talking. What about the access
4 parcels, do you do the preconstruction site clearances there
5 also?

6 A. Yes. So the preconstruction site clearances would
7 be for anything associated with those geotechnical
8 activities. So that includes access, parking, staging
9 areas, anything required to conduct the activities.

10 Q. Okay. So all 16 would get these preconstruction
11 site clearances. And when are these done?

12 A. So yes, all 16 would get the preconstruction site
13 clearances and these would be done approximately two weeks
14 prior to the field investigations.

15 Q. Why is it done so near in time to the actual
16 activity?

17 A. Because we are trying to identify what's potentially
18 on the site at the time of the field investigations. And
19 wildlife move, so there is potential for them to move into
20 the area.

21 There's also a requirement in some of those
22 mitigation measures for different species to do additional
23 surveys. So, for example, if we are trying to conduct work
24 within the nesting bird season, we may have to do an
25 additional survey 72 hours prior to the fieldwork occurring.

26 Q. Okay. How were these clearances designed?

27 A. So the site clearance surveys, as I mentioned
28 before, were focused on the areas associated with the

1 geotechnical activities. And that includes parking,
2 staging, access and the immediate area of the work
3 activities, which is roughly 100 by 20 feet, but can vary in
4 configuration depending on the way the site looks and what's
5 there. So it can vary in configuration.

6 We would also survey a buffer to that area as well
7 depending on what species had potential to occur there. The
8 way the site clearance surveys are conducted is that it's a
9 team of people that go out and do those site clearances.
10 This includes an archeologist, a biologist, a tribal
11 representative, a geologist, somebody from the contractor,
12 the drilling contractor, and a real estate representative.

13 And the reason they go out altogether is to try to
14 minimize the amount of times that we will have to go out and
15 do the surveys. This is because depending on the site
16 conditions, there may be a potential to adjust a site
17 location in the field. And this is something that we have
18 done for properties where we have negotiated entry permits
19 with the property owners' permission which is why we have
20 our real estate representative out there to make sure we're
21 coordinating with the property owner.

22 So an example of this would be if we went out into
23 the field to do a clearance survey and the contractor
24 identified overhead lines, power lines that maybe we
25 couldn't identify without being in the field that pose a
26 safety risk for their equipment, in that case they might
27 have to adjust the site. But when we're adjusting the site,
28 we want to make sure that we're not moving it closer to any

1 other known resources. So we wouldn't, for example, want to
2 move it closer to a known archeological resource, so that's
3 why everybody is out there altogether.

4 Q. You mentioned that these surveys had a relationship
5 to the mitigation measures for the initial study and
6 negative declaration. Can you describe that?

7 A. Sure. So the surveys, the preconstruction site
8 clearance surveys are a commitment from our 2020 initial
9 study mitigated negative declaration. We have adopted a
10 revised 2023 mitigation monitoring and reporting program,
11 but that was -- the only changes that were made were to
12 clarify two submeasures of Mitigation Measure Bio 1.

13 So these clarifications include for Bio 1B, we have
14 defined what "nearby" means for aquatic resources. And then
15 for Mitigation Measure Bio 1D, we have provided a more clear
16 connection between what is a general commitment to do
17 surveys to the more detailed species specific mitigation
18 measures.

19 But both of these clarifications do not affect or
20 change in any substantial way the way we've been
21 implementing the measures.

22 Q. Okay. And you mentioned that this activity takes
23 place two weeks prior to the geotechnical or whatever field
24 activities are going on, field investigations, but is there
25 any kind of seasonal considerations or species
26 considerations that determine when you do these presite
27 clearances?

28 A. Yes. Like I mentioned before, so generally we go

1 out two weeks prior to do the site clearance surveys, but if
2 we are within the nesting bird season, we may also have to
3 go out and do additional surveys within 72 hours of the
4 fieldwork to make sure that nests haven't been built in that
5 time period.

6 And at that point in time what we might have to do
7 is if a nest has moved into the area, we might have to
8 adjust the site at that point in time to minimize and avoid
9 impacts to that resource.

10 Q. Can you discuss what kind of time is required to
11 conduct these surveys once you're on the site, please.

12 A. Yes. So typically the initial site survey is maybe
13 about a day of coordination. It will vary depending on how
14 many soil investigations are proposed on a property. Or if
15 the site needed to be adjusted, so how many different
16 locations are surveyed.

17 But then as I mentioned before, there may be a
18 requirement to do additional surveys like the 72-hour
19 nesting bird survey. So that would take an additional
20 survey visit, although that one would require less people
21 and likely take maybe less -- maybe about a half a day. And
22 if at that point in time, as I mentioned, you know, a new
23 resource is identified and they have to adjust the site
24 again, then -- or for the first time, then at that point the
25 whole group may need to go out to the site again to do an
26 additional survey. So I think that is why we proposed I
27 believe it's four days for a site clearance survey in the
28 order.

1 Q. And that four days would include any return visits,
2 last minute adjustments, and --

3 A. Yes.

4 Q. -- reinspections essentially; right?

5 A. Yes.

6 Q. Okay. Depending on the conditions that you actually
7 find once you get there?

8 A. Yes.

9 Q. Okay. Have you reviewed the Court's April 2022
10 order permitting entry?

11 A. Yes.

12 Q. And are you familiar with Attachment B, the scope of
13 work for all activities?

14 A. Yes.

15 Q. Are the proposed activities in this cycle of entry
16 orders sought, are they the same activities as the previous
17 scope of work?

18 A. Yes, with the exception of the dip netting and
19 seines. That was described in the 2017 order. And so what
20 we're proposing is to add back in a couple sentences from
21 that order regarding the nets and seines for -- specifically
22 for appropriate habitat for California tiger salamander and
23 California red-legged frog back into the order at the bottom
24 of Section C1.

25 Q. Okay. So the -- the language concerning the
26 salamander and frog was already in the 2017 entry order; is
27 is that what you're saying?

28 A. (Nods head.)

1 Q. And it was taken out last time, but you want to put
2 it back in; is that correct?

3 A. Yes.

4 Q. Okay. Have you reviewed the general conditions in
5 Attachment C and the special conditions in Attachment D from
6 the last entry order?

7 A. Yes.

8 Q. Are the same or similar terms and conditions sought
9 for the current round of environmental studies?

10 A. Yes.

11 Q. The general terms of Attachment C, are those the
12 same proposed for the current round in terms of the
13 environmental surveys?

14 A. Yes.

15 Q. All right. Specifically the provisions for land
16 owner confidentiality over survey results or study results,
17 are those the same?

18 A. Yes.

19 Q. The limitations on recording?

20 A. Yes.

21 Q. The limitations on disturbance of the site vehicles
22 flagging markers and so forth, is that the same?

23 A. Yes.

24 Q. All right. Are there any other changes that you
25 know about?

26 A. I believe Al Davis will be talking about some
27 changes to the timing of when the soil investigation data
28 report may be released, but I don't know about that.

1 Q. Okay. And the special conditions of Attachment D,
2 are they the same proposed for these entries?

3 A. Yes.

4 Q. Including the date and time limitations of
5 subsection A?

6 A. Yes.

7 Q. The maximum days and personnel at the site,
8 subsection F?

9 A. Yes.

10 Q. Limitations on activities affecting the hunting
11 lands, levees, structures, conservation areas, those of
12 subsection B, G, H, and I?

13 A. Yes.

14 Q. Okay. What -- in the broader sense, what is the
15 purpose of the studies and surveys that you're doing?

16 A. So the purpose of the soil investigation project is
17 to determine the composition, location, and geotechnical
18 properties of soils commonly found in the Delta which would
19 inform Delta Conveyance Project environmental analysis,
20 design and consideration of alternatives, but would also
21 increase DWR's overall understanding of the Delta geology.

22 The purpose for the environmental surveys is to
23 support Delta Conveyance Project planning, which is to --
24 Delta Conveyance Project planning to protect water supply,
25 reliability of the State Water Project, address climate
26 change and sea level rise impacts on State Water Project
27 water supplies, and minimize potential disruptions to State
28 Water Project supply due to seismic risk and provide

1 operational flexibility to improve aquatic conditions in the
2 Delta.

3 MR. SMITH: Thank you very much. That's all I have,
4 Your Honor. Thank you.

5 THE COURT: Cross-examination?

6 MR. KEELING: Your Honor, may we have five minutes?

7 THE COURT: Yes.

8 MR. KEELING: Thank you.

9 Thank you, Your Honor. We have no questions for
10 this witness.

11 THE COURT: Witness can be excused.

12 Please call your next witness.

13 MS. GARSKE: Yes, Your Honor. DWR will be calling
14 Mr. Al Davis. And my colleague, Mr. Gasbarro, will be
15 handling the direct examination.

16 THE COURT: Thank you.

17 THE CLERK: Can I have you stop there and raise your
18 right hand.

19
20 ALLAN DAVIS,
21 called as a witness on behalf of the Petitioner, being first
22 duly sworn, was examined and testified as follows:

23 THE WITNESS: I do.

24 THE CLERK: Thank you. Go ahead and take a seat in
25 the witness stand. Once you're situated, please state and
26 spell your first and last name for the record.

27 THE WITNESS: Okay. My -- is this the one that's
28 working? That one don't sound like nothing. Maybe it's

1 this one. Sorry, Your Honor.

2 My name is Allan Davis, A-L-L-A-N D-A-V-I-S.

3

4

DIRECT EXAMINATION

5

BY MR. GASBARRO:

6

Q. Thank you, Mr. Davis. Where are you currently
7 employed, Mr. Davis?

8

A. I am currently employed at the Department of Water
9 Resources.

10

Q. And how long have you worked for the Department of
11 Water Resources?

12

A. I have worked for the Department of Water Resources
13 for over 33 years.

14

Q. And what is your professional background and your
15 responsibilities with the Department of Water Resources?

16

A. Currently I'm a supervising right of way agent with
17 the Department of Water Resources. Those responsibilities
18 include planning, organizing, and directing the work
19 activities of subordinate right of way agents.

20

I also have budgeting responsibilities to ensure
21 that the necessary resources are available for each
22 individual program.

23

Q. Okay. And can you please provide a brief summary of
24 your professional experience as it relates to these
25 precondemnation entries?

26

A. Yes. I have performed the evaluations throughout
27 the whole entire State of California including Sacramento,
28 San Joaquin, Contra Costa, and Alameda counties. I have

1 also provided probable damages amounts associated with each
2 entry order throughout the State as well.

3 Q. And can you describe generally what your experience
4 has been with the Department of Water Resources Conveyance
5 Project over time?

6 A. Yes. In 2008 I was made a part of the conveyance
7 management team with oversight responsibilities as it
8 relates to all real estate activities. I also had to work
9 in coordination with our legal office, executive program,
10 environmental engineering, as well as public outreach. One
11 of our initial assignments was to secure temporary entry
12 permits to allow various surveys and studies on multiple
13 properties.

14 If we were unsuccessful in obtaining the owner's
15 permission, then we work with our legal office and the
16 Attorney General's Office to secure court-ordered entry. If
17 that was the case, we provide the Attorney General's Office
18 with all the necessary information and documentation.

19 In 2010, the Court granted our environmental entry
20 order, but denied our geotechnical soil exploration entry
21 order. That issue has since been resolved and the Court has
22 issued a geotechnical entry order both in 2017 and 2022.

23 Q. And did you testify in support of the June 2017
24 entry petitions?

25 A. Yes, I did.

26 Q. And are you generally familiar with the June 2017
27 entry order and its general and special terms and
28 conditions?

1 A. Yes, I am.

2 Q. And for the February 2022 entry petitions, did you
3 testify in support of those?

4 A. Yes, I did.

5 Q. And are you familiar with the April 2022 entry order
6 and its general and special terms and conditions?

7 A. Yes.

8 Q. Can you generally describe to the Court your duties
9 and responsibilities as they relate to DWR's current request
10 for precondemnation entries?

11 A. My basic responsibilities as they relate to these
12 individual entry orders, my responsibility is to work with
13 our geotechnical teams as well as our environmental folks to
14 make a determination on which properties they feel are
15 necessity for this particular entry order.

16 Along those same lines I need to ensure that the
17 appropriate resources are available, and I guess in a
18 nutshell, I would say that I'm DWR's point of contact or
19 point person for these entry orders.

20 Q. Okay. So does that mean you were involved with the
21 implementation of the geotechnical entries that were
22 authorized by the April 2022 entry order?

23 A. Yes.

24 Q. Can you -- excuse me. Can you generally describe
25 for the Court what those duties and responsibilities were as
26 they related to the implementation of the entries done
27 pursuant to the April 2022 entry order?

28 A. Yes. Once we received the entry order, as I've

1 stated again, I had to work with our environmental and our
2 geotechnical team as well as our drilling contractor to
3 develop a schedule. Once that schedule was developed, I
4 sent out a letter to all property owners notifying them when
5 we were going to be on their property performing the site
6 clearance activities, as well as when our drilling and
7 environmental activities would commence.

8 I would -- either myself or my staff would be
9 present at the site clearance activities as well as the
10 first day of commencement of any activities on any
11 individual piece of property. And either myself or staff
12 was also available once the activities had been completed.
13 An inspection was done on the -- on each individual piece of
14 property to ensure that the property was in as close
15 condition as it was when we previously arrived.

16 Once I was satisfied with those inspections, then I
17 sent out a letter to those individual property owners
18 notifying them that DWR had completed all of this activity
19 for their individual piece of property.

20 Q. So were these duties and responsibilities that you
21 just described substantially the same as your
22 responsibilities in the 2017 entry?

23 A. Yes, they were.

24 Q. And other than what you've just testified to, do you
25 have any other duties as they relate to the currently
26 proposed Delta Conveyance Project?

27 A. Well, yes. Fortunately or unfortunately I have to
28 wear multiple hats. And so, again, sometimes I have to

1 provide real estate oversight for some of the -- my right of
2 way subordinates that are working on this particular
3 project.

4 Also I have responsibilities in working with, again,
5 our legal office program, our program executive,
6 engineering, environmental and public outreach to support
7 our overall objective which is project implementation.

8 Q. Okay. So are you generally familiar with the 16
9 entry petitions that are the subject of these hearings
10 today?

11 A. Yes.

12 Q. And are you familiar with the declarations and the
13 testimony of Mr. Andrew Finney as they relate to these 16
14 entry petitions?

15 A. Yes.

16 Q. And are you familiar with the declarations and the
17 testimony of Ms. Katherine Marquez as they relate to these
18 16 entry petitions?

19 A. Yes.

20 Q. Did you review both of their declarations to prepare
21 your declaration in support of the 16 entry petitions?

22 A. Yes.

23 Q. And did you review their declarations to prepare for
24 your testimony here today?

25 A. Yes.

26 Q. So, Mr. Davis, I'd like to talk about the types of
27 entries that will take place during this -- during these
28 entries. So based on that understanding, what types of

1 activities are DWR currently requesting entries for?

2 A. DWR is requesting entry in a couple of categories.
3 One category is access only. Another category is
4 environmental. Another category is soil exploration
5 activities. And on some of those parcels there's a
6 combination of those activities that I just described.

7 Q. So more than one activity can take place on a single
8 property?

9 A. That is correct.

10 Q. Okay. So let's start with access. What's your
11 general understanding of what an access only entry involves?

12 A. Basically access only entry is to allow us to
13 basically transverse the property. We're talking about
14 egress and ingress that allows us to get to a location where
15 the activities that I just described will be performed.

16 Q. And will any geotechnical activities take place on
17 access only parcels?

18 A. No, they will not.

19 Q. And what is your understanding of the time needed to
20 access only properties? So how much time is involved?

21 A. It depends on which activity we're referring to. If
22 we're referring to geotechnical soil exploration, there's a
23 time allotment for that activity. And if we're talking
24 about environmental only, there's a time allotment for that
25 as well.

26 Q. And what is your understanding of the type of
27 equipment that will be traversing over these access only
28 properties?

1 A. Well, as we've heard testimony from Mr. Finney, he's
2 more knowledgeable than I am, but my general understanding
3 is that you have a drill rig, you have some support
4 equipment, which primarily includes sometimes water barrels,
5 and most importantly a Porta Potty. And also staff vehicles
6 that generally consist of vehicles and light trucks.

7 Q. Okay. So it's essential the equipment that you
8 would need specifically for the other types of entries,
9 environmental or geotechnical entries?

10 A. Well, no, that's just exclusively for our soil
11 exploration activities. Environmental, as Ms. Marquez has
12 stated, they have different equipment.

13 Q. Okay. So let's move on to environmental entries.
14 Have you observed an environmental entry or environmental
15 study with this -- in the past?

16 A. Yes, I have.

17 Q. And what is your general understanding of what an
18 environmental entry entails?

19 A. Basically it's a pedestrian survey where staff walks
20 around and takes photographs and categorizes and catalogs
21 various different plant and animal species.

22 Q. And what is your understanding of the time needed to
23 perform the environmental entries?

24 A. Again it varies depending on the type of surveys and
25 studies to be performed.

26 Q. And what are the equipment and personnel
27 requirements for an environmental entry based on your
28 understanding?

1 A. Based on my understanding, it's primarily a camera
2 and some other ancillary equipment. And again, Ms. Marquez
3 has testified to the types of equipment that are needed for
4 environmental surveys.

5 Q. Okay. And based on your understanding, are these
6 activities substantially the same as they were in the April
7 2022 entry order?

8 A. Yes.

9 Q. Are there any differences between this entry and the
10 2022 entry? Entries?

11 A. Can you repeat the question?

12 Q. Are there any differences in the environmental entry
13 activities between this entry and the April 2022 entries?

14 A. Yes. I believe Ms. Marquez testified that there
15 were some additional surveys regarding amphibians.

16 Q. Okay. Does that change the amount of probable
17 damages you would recommend?

18 A. No, it does not.

19 Q. Okay. So let's move on to the geotechnical entries.
20 Have you personally observed a geotechnical entry including
21 a cone penetrometer test or CPT?

22 A. Yes, I have.

23 Q. And a soil boring?

24 A. Yes, I have.

25 Q. So based on your understanding, what does a
26 geotechnical entry for a CPT require or what does that type
27 of entry entail?

28 A. I think in Mr. Finney's testimony he described both

1 the CPT and the drill hole activities. My interpretation
2 and understanding is that a CPT is just a general, for lack
3 of a better term, rod that is driven into the soil to
4 determine most of the time pressures at various levels and
5 also shear velocity.

6 As far as the soil exploration is concerned, it's a
7 slight difference because we're collecting soil samples at
8 various depths.

9 Q. And for the CPT, what is your understanding of how
10 much time that will require?

11 A. Generally speaking, it can take up to two days.

12 Q. And for a soil boring?

13 A. For a soil boring, it can take up to 11 days.

14 Q. Okay. So based on your experience with the prior
15 entry orders, is it your understanding -- is it your
16 understanding that the nature of the present activities does
17 not differ from what DWR did under the April 2022 entry
18 order?

19 A. No, they do not.

20 Q. Was the same amount of time for the soil borings and
21 CPTs allowed under the April 2022 entry order?

22 A. Yes, it was.

23 Q. And what is your general understanding of the type
24 of equipment that's needed for a soil boring or a CPT site?

25 A. Like I stated earlier, generally there's just a
26 drill rig, other support and ancillary equipment like water
27 barrels and water devices, and then support vehicles as well
28 as staff vehicles that include sedans and light trucks and

1 also a Porta Potty.

2 Q. So for both the CPT and the soil borings, was this
3 the same type of equipment that was used during the April
4 2022 entries?

5 A. That is correct.

6 Q. And other than what you've just described for the
7 soil borings and the CPTs and the environmental entries and
8 access only parcels, based on your understanding is DWR
9 seeking to access the property to perform any other type of
10 activity?

11 A. No, we're not.

12 Q. So did you prepare declarations in support of each
13 of these 16 entry petitions?

14 A. Yes, I did.

15 Q. And can you describe what you did to prepare your
16 declarations?

17 A. Basically I reviewed Ms. Marquez's declaration, Mr.
18 Finney's declaration. I reviewed the statute and DWR's
19 scope of work, and then I also looked at Google Maps and
20 some GIS information.

21 Q. And generally speaking, what is included in your
22 declaration?

23 A. In my declaration it primarily discusses my overall
24 experience and how I valued or how I arrived at the
25 determination of the probable damages amount.

26 Q. And you testified earlier that you were familiar
27 with the June 2017 and the April 2022 entry orders; correct?

28 A. That is correct.

1 Q. And that you were familiar with the implementation
2 of those entries; correct?

3 A. That is correct.

4 Q. How would you generally describe the entries that
5 were conducted pursuant prior to the June 2017 entry order?

6 A. Well, they were primarily uneventful. All the
7 activities were handled in a very businesslike and
8 professional manner.

9 Although again we like to be perfect, but we had a
10 damage that occurred on one individual piece of property.
11 Our drill rig created some ruts along the access road. I
12 immediately contacted that individual property owner and we
13 were able to work out agreement without that individual
14 property owner petitioning the Court for a release of the
15 probable damages that had been deposited.

16 Q. And how would you generally describe the entries
17 that were conducted pursuant to the April 2022 entry order?

18 A. Basically the same, uneventful. To date I have not
19 received any inquiries or calls from any property owner
20 talking about damages to their individual piece of property.

21 Q. Okay. So based on your experience with the April
22 2022 entry order, were the general and special terms
23 associated with that entry order workable for DWR?

24 A. Yes, they were.

25 Q. Is DWR suggesting any changes for this current entry
26 order that differ from the April 2022 entry order?

27 A. Yes, we are.

28 Q. And can you describe what that change is?

1 A. The change is that a property owner can request the
2 soil exploration information/report once -- let me back up.

3 The property owners can request the information, and
4 we had allocated 60 days. The challenge that we have is
5 that 60 has turned out to be not enough. We have to collect
6 the sample, send them to the lab, the lab has to analyze,
7 review them, and prepare a report which comes back to the
8 Department. The Department has to review and analyze and
9 evaluate the information, and then a report is completed.

10 Primarily with all the activities that we have going
11 on at one time, it was very difficult to be able to comply
12 with the 60 days; therefore, in order for us to accommodate
13 the property owner's request, we're asking for 150 days.

14 Q. Okay. Thank you for that explanation.

15 So moving onto the specifics about the parcels, are
16 you familiar with the properties where precondemnation is
17 currently being sought?

18 A. Yes, I am.

19 Q. And how are you familiar with the nature of the
20 properties that are currently at issue here today?

21 A. I'm basically familiar with those individual
22 properties, as I attempted to perform site visits for each
23 one of the individual properties. Unfortunately, it was
24 very difficult to, what I call, boots on the ground on each
25 one of those individual pieces of property. In order for me
26 to do that, I would be trespassing.

27 So I was able to observe some of those properties
28 from public roads. I also looked at, you know, Google Maps,

1 and DWR's basic scope of work again and I also reviewed the
2 statute again.

3 Q. Okay. So generally speaking what are the current
4 land uses for the 16 parcels?

5 A. They're primarily agricultural.

6 Q. And are there any other commercial or industrial
7 activities on these 16?

8 A. Not that I'm aware of.

9 Q. And in your declaration did you set out the amounts
10 of probable compensation that the Department of Water
11 Resources is recommending for each of these 16 parcels?

12 A. Yes, I did.

13 Q. And other than what we just discussed and your
14 previous testimony, what documents did you review in
15 preparation to propose those amounts?

16 A. Again, I reviewed the statute. I reviewed DWR's
17 scope of work. I reviewed the aerial photography, and then
18 I also sort of, you know, relied on my experience as I have
19 prepared probable damages again throughout the whole entire
20 state of California.

21 Q. So in recommending the amounts, did you take into
22 consideration the scope of work that was being performed on
23 each parcel?

24 A. Yes, I did.

25 Q. And did you take into consideration the nature of
26 the properties or the parcels?

27 A. Yes, I did.

28 Q. And did you take into consideration the approximate

1 amount of time needed on each parcel or being requested on
2 each parcel?

3 A. Yes, I did.

4 Q. And did you factor in or take into consideration the
5 type of equipment that may be needed on each parcel?

6 A. Yes, I did.

7 Q. And did you take into consideration the number of
8 personnel DWR -- did you take into consideration the number
9 of drilling personnel or DWR personnel that may be required
10 on each parcel?

11 A. Yes, I did.

12 Q. You testified that you prepared your declaration and
13 that you reviewed them in preparation for your testimony
14 today. Do the amounts of probable compensation differ from
15 parcel to parcel based on the considerations we just
16 discussed?

17 A. Yes, they do.

18 MR. GASBARRO: May I approach to --

19 THE COURT: Yes.

20 THE CLERK: Marked as Exhibit 6.

21 (Petitioner's Exhibit No. 6 marked for
22 identification.)

23 MR. GASBARRO: And this is the same information as
24 Exhibit 5, but organized by activity versus by encounter.
25 May I approach the witness?

26 THE COURT: Yes.

27 MR. GASBARRO: Q. So, Mr. Davis, what does the
28 document you have in front of you represent?

1 A. The document in front of me sort of summarizes the
2 activities and the determination of probable damages that I
3 put forth in my declaration.

4 Q. And was it prepared at your dec- -- at your
5 direction in preparation for your testimony today?

6 A. Yes, it was.

7 Q. And are you using this to refresh your recollection
8 today?

9 A. Yes, I am.

10 Q. Does it accurately reflect the information contained
11 in your declaration just in a summary form?

12 A. Yes, for the most part. One of the different
13 changes is for access only parcels. There's a difference in
14 the amounts.

15 Q. Okay. We'll come back to that. Could you generally
16 describe for the Court how you categorized the type of
17 entries and the amounts of probable compensation?

18 A. Okay. Based upon this summary sheet, and again as I
19 stated earlier, we have access only, we have access
20 geotechnical, we have environmental and geotechnical, and we
21 have geotechnical only.

22 Q. So starting with the access only parcels, could you
23 please identify for the Court the parcels and the amount of
24 probable compensation you proposed for each parcel?

25 A. Okay. How would you like for me to present this?
26 Would you like for me to present it on the owner's name or
27 the DPCN number, or how would you like for me to address
28 that?

1 Q. Could you read the owner's name, the DCPN number,
2 and the amount of probable compensation for each of the
3 access only parcels?

4 A. Okay. Thank you. First of all we have Snodgrass
5 Lake, DCPN SAC-0208, and the probable damages amount is
6 \$500.

7 Then we have Reclamation District 2037, which some
8 folks know as Rindge Tract Island Bridge. The amount of
9 compensation for them is \$500.

10 And then we have Jack Kline Trust Partnership, DCPN
11 number SJC-0159C, and that amount is also \$500.

12 Q. Okay. Were any of the amounts changed or altered
13 since the time you prepared and filed your declarations?

14 A. Yes. These three access only parcels have been
15 changed.

16 Q. And what is the basis for the reduced amount of
17 probable compensation?

18 A. After going back and looking at previous entry
19 orders and again the scope of work and looking at the
20 statute, I made the determination that \$500 for access only
21 parcels was appropriate.

22 Q. And does your testimony here today in combination
23 with your declarations reflect your estimation of the
24 proposed amounts of probable compensation for each of these
25 three parcels?

26 A. Yes.

27 Q. Okay. So move on to the next category, access and
28 geotechnical. Could you please identify the parcels by the

1 owner's name and the DCPN map number and the amount of
2 probable compensation you proposed.

3 A. Yes. I have the Ishizuka Family Trust, SJC-0476B.
4 The amount of compensation is \$3500.

5 Next I have San Joaquin Delta Farms, DCPN number
6 SJC-0600. The amount of probable compensation, also \$3500.

7 Q. And were either of these amounts changed or altered
8 since the time you prepared and filed your declarations?

9 A. No, they were not.

10 Q. And does your testimony here today in combination
11 with your declaration reflect your estimation of the
12 proposed amounts of probable compensation for these two
13 parcels?

14 A. Yes, they do.

15 Q. So moving onto the third category, environmental and
16 geotechnical, can you identify for the Court the parcels by
17 the owner's name, the DCPN number, and the amount of
18 probable compensation you proposed?

19 A. Okay. Yes. We have Peggy Moore, Christopher A.
20 Castello, and Annamarie E. Castello, DCPN number ALA-2877A,
21 and the amount of probable compensation is \$3500.

22 The next one is Bradford E. Nyman and Kristi J.
23 Nyman, Trustees, DCPN number SJC-0207. The amount of
24 probable compensation, \$3500.

25 The next one is Ripken Home Ranch, DCPN number
26 SJC-3393A. The amount of probable compensation is \$3500.

27 Q. Are the amounts of probable compensation for those
28 three parcels the same amounts you included in your

1 declaration?

2 A. Yes, they are.

3 Q. And does your testimony here today in combination
4 with your declarations reflect your estimation of the
5 proposed amounts of probable compensation --

6 A. Yes.

7 Q. -- for parcels for those environmental and
8 geotechnical activities?

9 A. Yes, they do.

10 Q. Okay. So for the final category, and I know there's
11 a few. For geotechnical only parcels, can you identify the
12 parcels by the owner's name, the DCPN number, and identify
13 the amount of probable compensation you proposed?

14 A. Yes. The first one here is Mary Perry, DCPN number
15 CCC-0220. The amount of probable damages is \$3500.

16 The next one is Byron Mountain Farms, number
17 CCC-4371. The amount of probable damages is \$3500.

18 The next one is Byron Properties, number CCC-0385.
19 The amount of probable compensation is \$3500.

20 Then we have Jackie Tarleton and Anna Tarleton,
21 husband and wife, number SAC-4372. Amount of probable
22 compensation, \$3500.

23 The next one -- I've got to keep this straight. The
24 next one is Robert Silveira and Maria Bispo-Silveira, number
25 SAC-0270. Amount of compensation, \$3500.

26 The next one is Richard G. Klein, number SJC-0495.
27 Amount of compensation, \$3500.

28 The next owner is Rindge Tract Partners, number

1 SJC-0587 -- excuse me -- 89. The amount of probable
2 compensation is \$3500.

3 And then the last one, Passaglia -- hopefully I
4 didn't butcher that property owner's name -- number
5 SJC-0217. Amount of probable compensation, \$3500.

6 Q. Okay. So are those amounts you just described the
7 same amounts that are included in your declarations?

8 A. Yes, they are.

9 Q. And does your testimony here today in combination
10 with your declarations reflect your estimation of the
11 proposed amounts of probable compensation for parcels where
12 there's geotechnical entries only?

13 A. Yes, they do.

14 Q. So -- excuse me. So I have one final group of
15 questions. And I believe Mr. Finney and Ms. Marquez
16 mentioned it, but are there some changes to the drill site
17 locations identified in the maps attached to your
18 declarations?

19 A. Yes, there has been one modification and that's on
20 the Castello parcel. The access roads that go along the
21 side of the canal are somewhat narrow and there was concerns
22 about the drill rig going down the actual access road and
23 the ability of the driver and the assistant to safely get
24 out of the vehicle.

25 The other thing is that when you access that
26 individual piece of property, you have to go a little bit of
27 a distance before you would be able to see the drill rig and
28 that vehicle would not be able to turn around. That vehicle

1 would have to back all the way up. And so for safety
2 concerns, we worked corroboratively together to relocate
3 that particular location.

4 Q. Okay. I -- may I approach to show the witness
5 Exhibit 5 which is already entered?

6 THE COURT: Yes. Just to be clear, I don't know
7 that it's been entered, but --

8 MR. GASBARRO: Sorry.

9 THE COURT: -- it's been numbered for
10 identification.

11 MR. GASBARRO: Marked.

12 Q. So is this -- sorry. Is what you're holding in
13 front of you the map for the Moore/Castello property?

14 A. Yes, it is.

15 Q. And can you read the map number?

16 A. The map number is ALA-2877A.

17 Q. And my final question is could you just confirm the
18 primary reason for moving the drill site was related to
19 safety?

20 A. That is correct.

21 MR. GASBARRO: All right. I have no further
22 questions. Thank you, Mr. Davis.

23 THE COURT: You're welcome.

24 MR. KEELING: May we have a moment, Your Honor?

25 THE COURT: Yes, uh-huh.

26 MR. KEELING: Thank you.

27 Your Honor, we have no questions of this witness.

28 THE COURT: All right. This witness can be excused.

1 MS. GARSKE: Yes. Your Honor, those are all the
2 witnesses that the Department of Water Resources has.

3 THE COURT: All right. So you rest?

4 MS. GARSKE: Yes, Your Honor. Or I should say --
5 I'm sorry. Before I rest -- I spoke too soon.

6 THE COURT: Go ahead.

7 MS. GARSKE: I apologize. We did have a few
8 housekeeping issues that I don't know if now is the
9 appropriate time to address with the Court. It's dealing
10 with the actual 16 entry petitions themselves with all the
11 supporting documents that have been filed in all the various
12 counties and how we have binders for everyone with
13 everything in them. We are requesting to take judicial
14 notice of all of them in lieu of filing every single last
15 piece of paper. It's quite a bit of paper. So we weren't
16 sure how the Court really would like us to handle that.

17 THE COURT: Well, before we get to that, let me ask
18 you a few housekeeping questions related to the evidence.
19 Are you moving to enter each of these exhibits into
20 evidence?

21 MS. GARSKE: Yes, Your Honor.

22 THE COURT: Is there any objection?

23 MR. KEELING: Subject to two adjustments, no.

24 MS. GARSKE: And, I'm sorry, I think I know which
25 two adjustments they are. Regarding the wildlife surveys
26 that were noted.

27 MR. NOMELELLINI: Yeah. Dante Nomellini, Jr. Exhibit
28 4 and Exhibit 6 look similar. They are kind of just an

1 order of a different arrangement, but both of these have
2 left out some of the environmental activities. Exhibit 2
3 shows five environmental activity sites and these charts
4 only show three. So just --

5 MS. GARSKE: Yes. I can address that, Your Honor.
6 It was inadvertently left off of our Exhibit 4. Just for
7 ease, ease of reference, Mary Perry, which is CCC-0220, it
8 says environmental activities N/A. That's inaccurate. That
9 was a wildlife survey for the --

10 THE COURT: Where are you reading from?

11 MS. GARSKE: From Exhibit 4, Your Honor.

12 THE COURT: All right. Go ahead. Start again.

13 MS. GARSKE: Yes. Sure. Absolutely. So again, I
14 just picked 4 because it seemed the easiest. In the Contra
15 Costa County section, the second column down, Mary Perry is
16 the owner's name. The reference number is CCC-022. And
17 over in the -- under the environmental activities, it
18 inadvertently says N/A or meaning nonapplicable, but per the
19 testify of Ms. Marquez, that would be a wildlife survey.

20 Similarly in Contra Costa County for Byron Mountain
21 Farms, Inc. which is reference CCC-4371, that too would be
22 an environmental wildlife survey as well. So as I said,
23 those were inadvertently mislabelled on Exhibit 4.

24 THE COURT: Please finish, Mr. Nomellini.

25 MR. NOME LLINI: Dante Nomellini, Jr. A
26 substantially similar chart to Exhibit 4 has been marked as
27 Exhibit 6, so the same two adjustments need to be made to
28 Exhibit 6.

1 MS. GARSKE: Yes. Exhibit 6, Your Honor, differs
2 only in that it was sort of reshuffled to be grouped by
3 category of type of entry as opposed to county. So my
4 statement regarding the two changes would apply to Exhibit 6
5 as it would apply to Exhibit 4, correct.

6 THE COURT: Mr. Nomellini, anything else?

7 MR. NOME LLINI: No, Your Honor.

8 THE COURT: Any objections to these being admitted
9 into evidence?

10 MR. KEELING: No.

11 MR. NOME LLINI: No, Your Honor.

12 THE COURT: All right. They'll be admitted into
13 evidence.

14 (Petitioner's Exhibit Nos. 1-6 received into
15 evidence.)

16 THE COURT: There was reference during the testimony
17 to declarations that the parties had submitted to the court
18 in different documents. I assume those are not being
19 entered into evidence.

20 MS. GARSKE: Well, that's what we would like to
21 address with Your Honor. We were going to, for ease of the
22 Court, is just to request judicial notice of those entry
23 petitions with the supporting declarations. It's quite --
24 it's quite large, the binder. Again because we had to file
25 these in each individual county, they're not technically in
26 this coordinated proceeding as filings per se, but we do
27 have copies of all of them if it's easiest for the Court to
28 just take judicial notice of them.

1 We do have charts with all the corresponding, you
2 know, individual county case numbers. It's a lot of
3 documents and we didn't want to burden the Court or the
4 clerks with actually filing them.

5 So whichever the Court would prefer. And those were
6 sample -- the sample declarations were also attached when we
7 did a supplemental declaration, Mr. Smith, to our
8 coordination petition.

9 THE COURT: Well, I guess I would like to hear from
10 Mr. Nomellini, but I'm a little confused about how the Court
11 can take judicial notice of a declaration. A declaration is
12 hearsay.

13 But what's your position, Mr. Nomellini?

14 MR. NOMELLINI: If they're talking about this stack
15 of pleadings that were filed in various counties for each 16
16 actions, we accept them as they are. I'm going to differ to
17 my esteemed colleague here, Mr. Keeling.

18 MR. KEELING: Well, I interpret this really as a
19 request for judicial notice of the attached documents, not
20 to the narrative in the declaration. And if I'm right about
21 that, then we do not have an objection.

22 MS. GARSKE: (Nods head.)

23 THE COURT: So you're not asking the Court to pay
24 any attention to the actual substance of the declaration,
25 but merely the documents that are contained as exhibits.

26 MS. GARSKE: Correct, Your Honor, that they were in
27 fact filed in these courts. The testimony that we have
28 today would supplant that, so yes.

1 THE COURT: Okay. So you have no objection?

2 MR. KEELING: No, Your Honor. And we're in a
3 similar spot. We have three declarations, the declarations
4 of January 3, 2023, January 31, 2023, February 10, 2023.
5 Those are all Mr. Nomellini, Jr.'s declarations with
6 documents attached. And rather than flood the Court with
7 more, yet more copies, we, subject to a better idea from the
8 Court, we would simply request that the Court for purposes
9 of trial take judicial notice not of the declarations
10 themselves, but of the documents attached to those three.
11 And I don't know if DWR has any objections to that.

12 MS. GARSKE: No, Your Honor.

13 THE COURT: We're going to take our afternoon break
14 in about 20 minutes to 3:00. If folks can come back five
15 minutes to 3:00, that will give us about 15 minutes and
16 we're going to be -- but before I do that, assuming we can
17 figure out how these documents are coming in, do you have
18 anything else that you're going to present today?

19 MR. KEELING: I don't believe so. We're mindful of
20 Your Honor's initial comments about supplemental briefing on
21 Water Code 250, 11580 issues, so I don't believe we have
22 anything today.

23 THE COURT: Let's go off the record.

24 (Off the record.)

25 THE COURT: Back on the record. Let's everybody
26 come back at 3:00 o'clock and we'll figure this out.

27 (Recess from 2:38 p.m. to 3:00 p.m.)

28 THE COURT: I have a proposal for you. We're back

1 on the record. That the Court accept the binder and the
2 declarations with the exhibits as an exhibit as appropriate
3 for each side. The Court won't accept the information
4 contained in the declarations because it's hearsay, but will
5 accept the declarations as limited for the purposes of
6 verifying the documents that are attached thereto.

7 So the Court will accept the information, the
8 documents presented by each side as an exhibit. The Court
9 will review the documents, and once a decision is made, the
10 Court will return the documents to each side with an order
11 that the documents have to be preserved in case someone
12 wants to file an appeal and those documents can be presented
13 to the Court of Appeal so the Court of Appeals will know
14 what it was that I relied upon in making my decision.

15 So that's step one. Does -- any questions about any
16 of that? Any objections to any of that?

17 MS. GARSKE: No, Your Honor.

18 MR. KEELING: None, Your Honor.

19 THE COURT: So what I would like is for the parties
20 to submit a stipulation designating the documents that are
21 attached to the respective declarations and to describe in
22 sufficient detail what the document is again so the Court of
23 Appeal would know what it was that I looked at. And frankly
24 not only the Court of Appeal, but as I said jokingly, when
25 I'm dead in ten years and you all are still fighting about
26 this, someone needs to know what it is that the Court looked
27 at.

28 So that's that on the exhibits. Anything else about

1 that?

2 MS. GARSKE: On the petitions, no, Your Honor. And
3 I think we have the -- we have a binder. We provided a
4 courtesy copy to counsel. And then we have a copy for the
5 Court that we can use as an exhibit, and then we have one
6 for ourselves, so -- and we can mark it as Exhibit, I guess,
7 7.

8 THE COURT: So do you have one copy for the Court?

9 MS. GARSKE: Correct, yes, with all the --
10 everything, all the documents in there.

11 THE COURT: Okay. I'd like a stipulation by Friday.
12 Can it be done by Friday?

13 MS. GARSKE: Yes, Your Honor.

14 (Petitioner's Exhibit No. 7 marked for
15 identification and received into evidence.)

16 THE COURT: Anything else, Ms. Garske?

17 MS. GARSKE: We also will be -- I'm filing our
18 declaration in support of our notice to the mineral right
19 holders. It's a declaration talking about what we did and
20 all the newspaper articles that we placed our notices in to
21 those. And we were requested to provide notice of the
22 hearings to the mineral right owners, so we do have that
23 document ready that we can go ahead and file tomorrow if
24 that's okay with the Court.

25 THE COURT: Okay. Anything else?

26 MS. GARSKE: No.

27 THE COURT: Mr. Nomellini?

28 MR. NOME LLINI: You mentioned the potential

1 supplemental briefing.

2 THE COURT: Yeah, before I get to that, let me just
3 do one more thing to clean this up. I'm inclined at this
4 point -- well, let's talk about the briefing. I'm inclined
5 at this point to rule in favor of the petitioners on that
6 issue. I'm sort of in the 51/49 percentage inclination, and
7 so I would appreciate further briefing.

8 But pending that further briefing, I think it makes
9 sense for the Court to attempt to put together an order
10 along the lines of the April 2022 order. And my proposal
11 for that is that I work on that tomorrow and that we get
12 together Thursday morning. I'll get it to you as quickly as
13 I can, but we get together Thursday morning to review it to
14 see if in your opinion I have missed anything or gotten
15 anything wrong so that those changes can be made before the
16 order actually goes out.

17 Any thoughts on that approach, Ms. Garske?

18 MS. GARSKE: No, Your Honor. That would be fine.

19 THE COURT: Mr. Nomellini?

20 MR. NOMELELLINI: That sounds fine. We'll get
21 together Thursday morning and go over the proposed entry
22 order.

23 THE COURT: All right. And if there's anything in
24 particular that you think that needs to be a part of that,
25 if you would either email it to the Court or bring it with
26 you on Thursday morning so that we can look at that.

27 Then if we're clear on all of that, then we just
28 need a briefing schedule for the Water Code sections. And

1 let me just tell you very -- just give you some thoughts on
2 the Water Code section. It seems to me that respondent
3 landowners have raised an important point about whether or
4 not funding was required. And in my opinion it's pretty
5 clear that if funding is required, that it would not be
6 funding for the entire tunnel project, but as I believe it
7 was suggested by Mr. Nomellini, that a project can be
8 defined as an investigation so should there be approved
9 funding for a project like an investigation. So that's one
10 of the thoughts that I had as I was going through this.

11 The other thought that I had is that while there is
12 some mention of the legislative history of Section 250 and
13 11580, I think that it would be much more helpful to the
14 Court to have some of the history that is post the Supreme
15 Court's decision in the water resources cases. And I'm not
16 sure that that was as fulsome a discussion as or is
17 necessary for the Court in order to fully understand this
18 funding issue. So those are my thoughts.

19 So with that in mind, Ms. Garske, if you can tell me
20 by when you can submit a brief on that issue.

21 MS. GARSKE: Oh, gosh. By next week. It's the end
22 of February.

23 THE COURT: Are you saying by February 28th?

24 MS. GARSKE: Certainly, yes.

25 THE COURT: Mr. Nomellini, your thoughts?

26 MR. NOMELELLINI: Yes, February 28th would be fine,
27 but --

28 THE COURT: No. I'm sorry. In response to Ms.

1 Garske. So if you need a week or I don't know how much time
2 you need to respond.

3 MR. NOMELLINI: Okay. We'll file a responding
4 brief. Five days?

5 THE COURT: How about March 6th?

6 MR. NOMELLINI: That sounds fine.

7 THE COURT: And, Ms. Garske, you can file a reply by
8 March 9?

9 MS. GARSKE: Okay.

10 THE COURT: All right. Anything else that we need
11 to talk about before we come back on Thursday morning?

12 MR. NOMELLINI: If I could just clarify, you're
13 interested in some of the legislative history following the
14 2016 property reserve case?

15 THE COURT: Well, I'm interested in your argument
16 about funding and whether or not --

17 MR. NOMELLINI: Okay.

18 THE COURT: -- there has to be an approval and
19 funding. And what I found interesting about your argument
20 is that as I understood your argument, you're not saying
21 that this funding, this approval on funding must be for the
22 entire tunnel. If that were your argument, I would disagree
23 with you. But I understood your argument to be that when
24 there is a substantial activity that is undertaken, that
25 that activity in and of itself can be a project.

26 So, for example, the investigation of whether or not
27 a tunnel is viable, that would -- that that could be a
28 project, and if it was a project would it need to be funded.

1 I find that an interesting argument.

2 MR. NOMELLINI: Yeah. Okay.

3 THE COURT: Working against that is the language of
4 those two code sections and how the legislature has
5 responded or not to the property reserve decision by the
6 Supreme Court. It seems to me that both the language of the
7 code sections you're citing as well as the legislative
8 history might give the Court the answer to that question.
9 Does that make sense?

10 MR. NOMELLINI: Yeah. In terms of Water Code 250
11 and 11580, I'm positive there's been no legislative activity
12 on those sections following the 2016 property reserve. But
13 one of our big pitches is if there's a problem with the
14 authorization and funding, DWR should go to the legislature
15 whose job is to make adjustments when cases come down and
16 they kind of rock the boat, the legislature cleans it up.

17 So one of our big pitches is the legislature should
18 be the arena where these statutes get adjusted if there are
19 problems, but I'm pretty sure there's been no activity, yet
20 but there should be.

21 THE COURT: Well, I think you're right on that. I
22 think you're right that there have been no changes. And
23 that might be the answer to the question because it might be
24 that the legislature is just fine with the language the way
25 it is, and if the legislature is fine with the language just
26 the way it is, then that I think answers the question. So
27 action or inaction tells the Court, I think gives the Court
28 a lot of information.

1 MR. KEELING: It may -- this is Tom Keeling. It
2 may, Your Honor. For example, when the legislature enacts
3 legislation in the wake of judicial decisionmaking, it is
4 presumed, this is a candor of statutory structure, it is
5 presumed to know what the courts have ruled. I'm not so
6 sure that the other way around is accurate, where courts
7 make a decision and there's no legislation presented to the
8 legislature to respond to it. I'm not sure there's a
9 presumption that the legislature in not doing anything is
10 making a statement about a judicial decision.

11 THE COURT: Well, the question then is if the
12 legislature looks at the code section or looks at the body
13 of code sections relating to this and decides not to do
14 anything about the language, it seems to me that does say
15 something.

16 MR. KEELING: Well, the key is what do you mean by
17 "looks at." Is there a record in the legislature having
18 been asked to look at the statutes in the wake of the
19 property reserve decision. I think the answer is no.

20 THE COURT: Well, I don't know if that's true. If,
21 for example, the legislature has not made any changes to
22 these particular statutes but has made changes to other
23 statutes, neighboring statutes let me call them, one could
24 infer that they looked at section X and said we're going to
25 change that one, looked at section Y and said that one is
26 just fine; we're not going to make any changes. I don't
27 know the answer to that. That's why you're attorneys. You
28 get to answer the questions.

1 MR. KEELING: Well, this is one of the reasons why
2 what the Supreme Court did in 2016 is so unusual. And they
3 said so. They, as you may recall what happened, and I think
4 this was alluded to in earlier testimony, Judge Ferrall was
5 presented with proposal for entrance in 2010 when this
6 decision began. In 2011 he issued two orders. The first
7 was an order allowing the requested environmental entries.
8 We petitioned for writ of mandate which was granted.

9 The next order while that was pending was an order
10 denying the request for geotech. DWR directly appealed
11 that. They didn't petition for mandate. That was a direct
12 appeal. The two were consolidated. The decision was -- a
13 very lengthy decision came out a couple years later with the
14 Justices descending word for word the same as the majority.
15 The Court of Appeal affirmed Judge Ferrall on his denial of
16 geotech and reversed him on granting the environmental
17 entry. Then, of course, it went to the Supreme Court. One
18 need to no more have read the Justices' descent to know that
19 that would happen.

20 So it went to the Supreme Court, and the Supreme
21 Court said, yes, Judge Ferrall, you were right about this
22 being a taking. Okay. And then in light of Jacobson, which
23 is almost a hundred years old I guess at this point, you
24 can't do that under the precondemnation legislature, but we
25 at the Supreme Court really thought it was creating two
26 different systems for taking so we're going to judicially
27 reform -- their words; not mine -- judicially reform the
28 statute. We're not going to call research legislators in

1 and have legislative sessions. We're just going to reform
2 it.

3 That's fine, but one of the problems is that those
4 statutes did not exist and were not implemented in isolation
5 from literally dozens of other statutes. And by saying
6 suddenly that you can have takes, take property under the
7 precondemnation entry statutes, they changed California
8 eminent domain law profoundly. I don't think -- I know you
9 didn't ask for extra briefing on that.

10 So to my knowledge, other than eminent domain
11 practitioners scratching their heads around the state from
12 all sides -- because I usually represent agencies. And when
13 it went back to the Court of Appeals, it got even more
14 complicated because the Court of Appeals said now these are
15 takes. Now that you're taking property through the
16 precondemnation entry statute, you couldn't do that before,
17 what's the issue. And of course the issue we raised was
18 this right to discovery. Okay. Now you have a right to
19 discovery in precondemnation which you never did before.

20 And that was just the beginning. There are other
21 dominoes that are going to fall. I don't believe the
22 legislature has ever been presented with as gnarly,
23 complicated set of circumstances created by property
24 reserve.

25 THE COURT: Okay. Anything else, Ms. Garske?

26 MS. GARSKE: No, Your Honor. Would you like us at
27 10:00 o'clock on Thursday?

28 THE COURT: No. I would like to get started

1 earlier. We'll start at 8:30 on Monday.

2 MS. GARSKE: 8:30. Thank you.

3 THE COURT: Anything else?

4 MR. NOMEILLINI: No, Your Honor.

5 MS. GARSKE: No, Your Honor.

6 THE COURT: All right. Thank you very much. Court
7 is in recess.

8 (Whereupon, the proceedings concluded at 3:22 p.m.)
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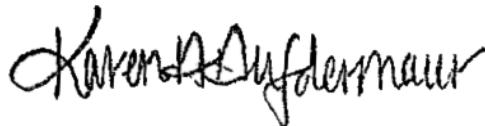
1 STATE OF CALIFORNIA.)
) ss.
2 COUNTY OF SAN JOAQUIN)
3

4 REPORTER'S CERTIFICATION OF RECORD AND
5 REPORTER'S DECLARATION PURSUANT TO CCP SECTION 237
6
7

8 I, KAREN A. AUFDERMAUR, CSR 10919, Pro Tempore
9 Reporter of the Superior Court of the State of California,
10 do hereby certify:

11 That I was present in the Superior Court, County of
12 San Joaquin, State of California, at the hearing of the
13 above-entitled matter; that at said time and place, I took
14 down in shorthand notes all the testimony given and
15 proceedings had; that I thereafter caused said shorthand
16 notes to be transcribed into longhand typewriting by
17 computer-aided transcription, the above and foregoing being
18 a full, true, and correct transcript of all testimony taken
19 and proceedings had.

20 I also do hereby declare under penalty of perjury
21 that all personal juror identifying information has been
22 redacted from the foregoing transcript pursuant to CCP
23 Section 237(a)(2).
24



25 KAREN A. AUFDERMAUR, CSR #10919
26 PRO TEMPORE REPORTER
27 CSR #10919
28

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California Code of Civil Procedure

Article 5. Transcript or Recording

Section 2025.520

(a) If the deposition testimony is stenographically recorded, the deposition officer shall send written notice to the deponent and to all parties attending the deposition when the Original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing, unless the deponent and the attending parties agree on the record that the reading, correcting, and signing of the transcript of the testimony will be waived or that the reading, correcting, and signing of a transcript of the testimony will take place after the entire deposition has been concluded or at some other specific time.

(b) For 30 days following each notice under subdivision (a), unless the attending parties and the deponent agree on the record or otherwise in writing to a longer or shorter time period, the deponent may change the form or the substance of the answer to a question, and may either approve the transcript of the deposition by signing it, or

refuse to approve the transcript by not signing it.

(c) Alternatively, within this same period, the deponent may change the form or the substance of the answer to any question and may approve or refuse to approve the transcript by means of a letter to the deposition officer signed by the deponent which is mailed by certified or registered mail with return receipt requested. A copy of that letter shall be sent by first-class mail to all parties attending the deposition.

(d) For good cause shown, the court may shorten the 30-day period for making changes, approving, or refusing to approve the transcript.

(e) The deposition officer shall indicate on the original of the transcript, if the deponent has not already done so at the office of the deposition officer, any action taken by the deponent and indicate on the original of the transcript, the deponent's approval of, or failure or refusal to approve, the transcript. The deposition officer shall also notify in writing the parties attending the deposition of any changes which the deponent timely made in person.

(f) If the deponent fails or refuses to approve the transcript within the allotted period, the

deposition shall be given the same effect as though it had been approved, subject to any changes timely made by the deponent.

(g) Notwithstanding subdivision (f), on a seasonable motion to suppress the deposition, accompanied by a meet and confer declaration under Section 2016.040, the court may determine that the reasons given for the failure or refusal to approve the transcript require rejection of the deposition in whole or in part.

(h) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition under this section, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

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