

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 BEFORE THE HONORABLE CURTIS E. A. KARNOW  
 DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )  
 )  
 Petitioner and Plaintiff, ) Case No.  
 ) CPF-10-510830  
 vs. ) CPF-12-512466  
 )  
 METROPOLITAN WATER DISTRICT OF )  
 SOUTHERN CALIFORNIA; ALL )  
 PERSONS INTERESTED IN THE )  
 VALIDITY OF THE RATES ADOPTED BY ) Volume VII  
 THE METROPOLITAN WATER DISTRICT )  
 OF SOUTHERN CALIFORNIA ON APRIL )  
 10, 2012 TO BE EFFECTIVE JANUARY )  
 1, 2013 AND JANUARY 1, 2014, and )  
 DOES 1-10, )  
 ) Pages 966 - 1156  
 Respondents and Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 San Francisco Superior  
 San Francisco, California  
 Monday, March 30, 2015

Reported By:  
 TARA SANDFORD, RPR, CSR #3374

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1  
 2 INDEX  
 3 PLAINTIFF'S WITNESSES DIRECT CROSS REDIRECT RECROSS  
 4 CUSHMAN, Dennis 984 1026 1097 1101  
 5 DENHAM, Dan 1102 1127 1150 --  
 6

7 EXHIBITS  
 8 NUMBER DESCRIPTION FOR ID EVIDENCE  
 9 22 Letter to John Foley 12/6/96 993 993  
 10 38 Letter to Gastelum 9/8/99 996 996  
 11 65 2003 Exchange Agreement 1002 1002  
 12 71 Minutes of Board of MWD 3/11/08 1058 1058  
 13 80 Memo from Gastelum 6/18/04 1010 1010  
 14 128 2008 implementation strategy 1031 1031  
 15 256 Notice of Default 6/12/12 1096 1096  
 16 314 US Dept. of Interior Accounting '03 1111 1111  
 17 315 US Dept. of Interior Accounting 2004 " "  
 18 316 US Dept. of Interior Accounting 2005 " "  
 19 317 US Dept. of Interior Accounting 2006 " "  
 20 318 US Dept. of Interior Accounting 2007 " "  
 21 319 US Dept. of Interior Accounting 2008 " "  
 22 320 US Dept. of Interior Accounting 2009 " "  
 23 321 US Dept. of Interior Accounting 2010 " "  
 24 322 US Dept. of Interior Accounting 2011 " "  
 25 323 US Dept. of Interior Accounting 2012 " "

1 APPEARANCES  
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1 355 SDCWA document 5/18/07 1070 1070  
 2 EXHIBITS (CONTINUED)  
 3 430 US Dept. of Interior Accounting 2013 1110 1110  
 4 469 Metropolitan Invoices 1109 1109  
 5 471 Excel workbook summary 1107 1109  
 6 472 Section 135 Preferential Right 1124 1124  
 7 473 Spreadsheet - Adjusted Preferential  
 Rights 1124 1125  
 8  
 9 506 San Diego WSR payments chart 1015 1015  
 10 507 Exchange agreement deliveries chart 1015 1015  
 11 508 2011 Overcharge calculation 1114 1114  
 12 509 2012 Overcharge calculation 1116 1116  
 13 510 2013 Overcharge calculation 1118 1118  
 14 511 2014 Overcharge calculation 1119 1120  
 15 512 Summary of contract damages under  
 exchange agreement 2011-2014 1121 1121  
 16 794 Letter from Stapleton to  
 Gastelum 2/10/03 1038 1038  
 17  
 18 843 Email to Liarakos from Cushman  
 9/27/03 1029 1029  
 19 1130 Email from Denham to Chen 3/28/12 1076 1077  
 20  
 21  
 22  
 23  
 24  
 25

1 San Francisco, California  
 2 Monday, March 30, 2015  
 3 10:00 a.m.  
 4  
 5 THE COURT: Plan to go without a break to noon  
 6 but, by the same token, anybody who needs a break,  
 7 including the court reporter, should give me a  
 8 meaningful look and we will take one. The answer to a  
 9 request for a break is always yes.  
 10 Did people want to start with any oral  
 11 presentations?  
 12 MR. KEKER: Yes, your Honor.  
 13 But there are two matters I would like to bring  
 14 up before we begin with the oral presentation, which in  
 15 my case will be very brief, and that is that we move to  
 16 exclude witnesses, pursuant to Code of Civil Procedure.  
 17 Our corporate representative will be  
 18 Mr. Cushman, who will also be our first witness. He  
 19 will be here, but we move to exclude witnesses.  
 20 THE COURT: Let's pause any objection to that.  
 21 MR. QUINN: No, there's no objection to that.  
 22 THE COURT: Excuse me. Feel free. You can  
 23 have whoever your representatives are in the courtroom.  
 24 The motion is granted. Witnesses are excluded.  
 25 MR. KEKER: The second related issue is we have

970

1 sought to reach an agreement about giving each other  
 2 witness order and who is coming next. We have gotten as  
 3 far as one-day notice. That's not sufficient for us.  
 4 We're asking you to order them to tell us now who they  
 5 plan to call this week, among other things. They put  
 6 Miss Stapleton, the general manager, Miss Chen of the  
 7 Water Authority on their witness list. They are here.  
 8 If they are not going to call them this week,  
 9 they are going to go home. There is just no reason --  
 10 we told them who we intend to call in our case,  
 11 Mr. Cushman, Mr. Dennis, Mr. Slater, end of story.  
 12 THE COURT: Do you have a list that shows the  
 13 order in which they plan to call?  
 14 MR. KEKER: No. We don't have anything except  
 15 those witness statements that you required before.  
 16 THE COURT: Okay.  
 17 MR. KEKER: So we'd like the order and the  
 18 actual list. If they are not going to call Miss  
 19 Stapleton, for example, she would like to listen to the  
 20 opening statements.  
 21 MR. QUINN: Your Honor, I guess I'm a little  
 22 surprised by this. I thought we had an agreement 24  
 23 hours' notice. Indeed, mid-morning yesterday they gave  
 24 us their notice of who they were calling today. We are  
 25 prepared to live by that same rule. I don't think we

971

1 will be calling either Chen or Stapleton this week  
 2 unless we run out of witnesses. That is not our  
 3 intention.  
 4 THE COURT: Is 48 hours' notice agreeable to  
 5 you?  
 6 MR. QUINN: We would frankly prefer 24, your  
 7 Honor. That's what we got for today was 24. That's  
 8 what we had discussed with them.  
 9 THE COURT: Can you put your witnesses in  
 10 order? I think that will help for planning purposes,  
 11 the order in which you'll call them.  
 12 MR. QUINN: We can try to do that, your Honor.  
 13 Things -- things happen during the course of the trial  
 14 that will require us to juggle things. But we can try  
 15 to do that in good faith.  
 16 THE COURT: Twenty-four hours' notice and each  
 17 side --  
 18 MR. QUINN: Can we see how far we get today,  
 19 your Honor --  
 20 MR. KEKER: We would like to --  
 21 MR. QUINN: -- and revisit the issue at the end  
 22 of the day?  
 23 THE COURT: Think about it over lunch, and we  
 24 will take it up at 1:30, if necessary. Right now my  
 25 proposal is we have the witnesses at least in order.

972

1 That can be done 24 hours' notice. Let's continue.  
 2 MR. KEKER: And Miss Stapleton and Miss Chen  
 3 are still on their witness list, in good faith, so we  
 4 need to ask them to leave. Is that my understanding?  
 5 THE COURT: Right. Unless they are corporate  
 6 representatives or the equivalent. If you are in the  
 7 courtroom and may be testifying, unless you are the  
 8 first witness this morning, I would ask you to leave  
 9 until after you've testified, then you will be welcome  
 10 back in the courtroom.  
 11 MR. KEKER: The answer is, yes, I would like to  
 12 make a very brief opening statement recognizing it comes  
 13 out of our time.  
 14 Your Honor, this is a trial, as you know, about  
 15 contract and preferential rights. I know you've read  
 16 the trial brief. I urge you to interrupt both me and  
 17 any of the witnesses as we go along, since this is an  
 18 important trial, if there is something that doesn't make  
 19 sense or you want to clarify. So we're open, open  
 20 invitation.  
 21 The contract case we believe is very simple.  
 22 The exchange agreement allows San Diego to move water it  
 23 purchased from IID and water it is entitled to because  
 24 it lined the canals through Metropolitan's Colorado  
 25 River Aqueduct.

973

1 Your Phase 1 finding establishes the exchange  
 2 agreement was breached in that Section 5.2 of the 2003  
 3 exchange agreement expressly limits the price term for  
 4 that transportation to charges set by the Met board,  
 5 quote, pursuant to applicable law and regulation.  
 6 Phase 1 established that the price charged  
 7 under the exchange agreement from 2003 on was the sum of  
 8 the system access rate, the system power rate and the  
 9 water stewardship rate.  
 10 Your opinion found that all three of those  
 11 violated Prop 26, the wheeling statute, Government Code  
 12 5499.7(a) and the common law, i.e., they are not --  
 13 "They are not pursuant to applicable law." You found,  
 14 "Those Rates over-collect from wheelers because a  
 15 significant portion of the State Water Project and local  
 16 conservation costs are attributable to supply, not  
 17 transportation."  
 18 And I am referencing the last page of your  
 19 opinion, page 65.  
 20 For this trial we believe all of that is done  
 21 and the remaining issue is damages on the contract. San  
 22 Diego is not seeking to be paid everything it paid to  
 23 Met under the exchange agreement during the years these  
 24 rates were illegal. It is not seeking anything before  
 25 2011. It is seeking only the portion of those rates

974

1 that made them illegal, and then only for those four  
 2 years, 2011 through '14 for the system access rate and  
 3 the system power rate. That's the portion of the rates  
 4 from 2011 through 2014 that are attributable to State  
 5 Water Project costs.  
 6 For the water stewardship rate, it's all that  
 7 we made for those four years, first, because the local  
 8 conservation projects have nothing to do with the cost  
 9 of transporting water on the Colorado River and, second,  
 10 because the water stewardship rate is an illegal tax  
 11 under Propr 26.  
 12 Dan Denham, who is the Colorado River program  
 13 director for San Diego Water Authority County Water  
 14 Authority, he testified in Phase 1, and he will testify  
 15 again. And he will show the total damages are -- can we  
 16 put up those up? -- \$188,295,602 plus interest. The  
 17 contract provides for prejudgment -- provides for  
 18 interest.  
 19 And this chart explains what we did. There is  
 20 a certain amount of charges that are not disputed and  
 21 that's the bottom. They are in brown. And then  
 22 there's -- that is 136 to 164 acre-feet, depending on  
 23 what year you are talking about. This is a summary of  
 24 the four years.  
 25 During those years that range of undisputed

975

1 charges is 136 to 164.  
 2 The next portion is the State Water Project  
 3 costs that are in the system power rate and system  
 4 access rate. And Mr. Denham will add this up for you.  
 5 And it shows the amount there and depending on the year  
 6 ranges from 195 to \$274 which we say should not have  
 7 been included in the rate and equal the damages for  
 8 that.  
 9 And then the top portion is the water  
 10 stewardship rate, which we are contending should be  
 11 returned to San Diego Water Authority because it is not  
 12 related to the cost of transportation on the Colorado  
 13 River. And it is a tax, and that ranged from 41 to \$43  
 14 an acre-foot for the four years. We can't anticipate  
 15 Met's response because they simply refused to talk about  
 16 damages, which is what this trial is supposed to be  
 17 about. I expect they are going to seize on that portion  
 18 of your opinion that says there is no substantial  
 19 evidence to include 100 percent of the illegal rate in  
 20 Met's transportation rates, and they will then use that  
 21 to drive a truck through to try to establish that some  
 22 other rate, some other way of doing it would be -- would  
 23 have been proper and would have passed legal scrutiny.  
 24 We will be objecting to that effort.  
 25 Instead, we will be agreeing with their earlier

976

1 vociferous position and speculation about what Met's  
 2 staff would have recommended with respect to rates to  
 3 the board. And what the board would have done is simply  
 4 irrelevant, because it's too speculative and because it  
 5 would be improper for you to imagine a different rate  
 6 structure in calculating damages.  
 7 You have only one rate structure, the one they  
 8 adopted before you. That's the one you determined was  
 9 illegal, and that portion of that rate structure is what  
 10 we're using to calculate damages.  
 11 To the extent their imagined speculative rate  
 12 structure is one that is designed to punish San Diego,  
 13 which comes through from some of their other briefing  
 14 such as coming up with a maximum lawful rate or a  
 15 maximum power rate they could have charged that is  
 16 irrelevant for an additional reason besides speculation,  
 17 and that is because California law prohibits  
 18 discriminating against wheeling since that would violate  
 19 all the same cost of service legal principles that made  
 20 the actual rates unlawful.  
 21 As you know from reading the wheeling statute  
 22 in the Phase I trial, rates have to be set for  
 23 conveyance of water and encouraged, and not discouraged,  
 24 such transportation.  
 25 We do know from the witness statements and from

977

1 their affirmative defenses that Met will argue waiver,  
 2 estoppel, consent in order to avoid paying contract  
 3 damages. In that regard Met will have to avoid certain  
 4 inconvenient facts, most of which are already before the  
 5 Court in Phase 1.  
 6 First of all, the Phase 1 testimony that San  
 7 Diego was complaining about, even before 2003 and  
 8 continuously, is that the rates were invalid, improper,  
 9 illegal is in the record.  
 10 You will recall Dennis Cushman, the assistant  
 11 general manager's testimony from Phase 1. He testified  
 12 to the myriad occasions that San Diego told Met its  
 13 rates were invalid, that the State Water Project costs  
 14 shouldn't be included in the costs and so on.  
 15 We will bring them back in this phase to remind  
 16 you and deal with what we think is the fairy tale they  
 17 put in their brief about this contract.  
 18 You will remember June Skillman, who was the  
 19 Met budget director, and she's the one who helped write  
 20 the cost of service study that Mr. Raphael put his name  
 21 on. The reason she was helping write it, she said, is  
 22 because she expected to get sued in 2010.  
 23 She knew perfectly well that San Diego was  
 24 unhappy and when the cooling off period was over, they  
 25 were going to sue.

978

1 Indeed, the whole purpose behind the rate  
 2 structure integrity clause, which you know about from  
 3 Phase 1 because of all the motion practice and your  
 4 rulings on that, the whole purpose behind it in 2004 was  
 5 to deter San Diego from what Met knew they were going to  
 6 do, namely, sue over the rates if they didn't change  
 7 their practices when the five-year cooling period was  
 8 up.  
 9 In fact, their Phase 1 trial brief -- we have  
 10 new lawyers now -- but the Phase 1 trial brief that was  
 11 filed before you, asserted that, quote, the threat of  
 12 future litigation was made explicit by San Diego County  
 13 Water Authority in the context of negotiating, closed  
 14 quote, the exchange agreement.  
 15 And then they went on to say that San Diego,  
 16 quote, reserved its right to challenge the validity of  
 17 MWD's rates, closed quote. And, quote, openly threaten  
 18 to litigate over MWD's existing rate structure and  
 19 destabilize MWD's rates, closed quote.  
 20 They put that in their trial brief. And then  
 21 in this phase they are saying this is all consent and  
 22 waiver and so on.  
 23 In this brief, even in this brief it says on  
 24 page two at line 12, "San Diego had long objected to the  
 25 inclusion of the State Water Project and the cost of

979

1 conveyance. Second --"  
 2 That's one reason, all the testimony you  
 3 already have.  
 4 Second, the negotiated five-year timeout, the  
 5 cooling off period, about which you found in connection  
 6 with denying their summary judgment on this issue, you  
 7 found it says, "The five-year cooling off period in the  
 8 exchange agreement supports the inference that San Diego  
 9 intended to retain the ability to challenge [Met's]  
 10 rates under applicable law after the end of that  
 11 period."  
 12 I'm quoting you. You also went on to say,  
 13 "San Diego paid its bills under the contract and did not  
 14 bring a legal challenge to the 2003-2007 rates" and said  
 15 some other words, and then "is not a concession that the  
 16 rates complied with law, only that San Diego was  
 17 complying with the five-year hiatus agreement."  
 18 We are not seeking, I emphasize, we are not  
 19 seeking as contract damages the millions of dollars that  
 20 were paid under -- improperly paid under this agreement  
 21 from 2003 to 2011. Those are -- those are waived by the  
 22 five-year period, maybe. But what we're seeking is 2011  
 23 on.  
 24 San Diego respected the cooling-off period, and  
 25 finally sued when it became apparent that only a lawsuit

980

1 could change Met's ways.  
 2 And third, these defenses simply ignore the  
 3 contract which says in 13.9, Section 13.9, "No  
 4 waiver" -- I apologize but this is in the record and  
 5 these are such huge points that it seems to me they have  
 6 to just stay front and center.  
 7 "13.9 of the contract: No waiver of a breach,  
 8 a failure, condition or any right or remedy contained in  
 9 or granted by the provisions of this agreement is  
 10 effective unless it is in writing and signed by the  
 11 party waiving the breach, failure, right or remedy."  
 12 And Section 12.5 of the very contract that  
 13 we're talking about, the exchange agreement said, "If  
 14 the nonbreaching party fails to exercise or delays in  
 15 exercising such right or remedy, it does not thereby  
 16 waive that right or remedy."  
 17 The evidence will show that San Diego has not  
 18 waived its right to seek contract damages for 2011  
 19 through '14.  
 20 Finally, moving from contract to preferential  
 21 rights, you will be asked to decide this issue of  
 22 preferential rights which arises under Section 135 of  
 23 the Met act. Met claims that when San Diego buys water  
 24 from Imperial Irrigation District or develops itself by  
 25 lining the canals and entitling itself for more water

981

1 from the Colorado River, and it pays Met to transport  
 2 that water on the Colorado River aqueducts, those  
 3 contractual payments are actually payments for the  
 4 purchase of Met water.  
 5 That is nonsense. We will have Mr. Cushman  
 6 explain how preferential rights work and Mr. Denham  
 7 qualify why it matters. If the exchange agreement -- if  
 8 the exchange agreement is not a contract for the  
 9 purchase of water, as we believe it certainly is not,  
 10 then San Diego's preferential rights to water would go  
 11 up 28 percent from -- their current number of 18 point  
 12 something to 23 point something, an increase of  
 13 28 percent.  
 14 Our witnesses, as I said before, will be  
 15 Mr. Cushman, Mr. Denham and Scott Slater who helped  
 16 negotiate the 2003 agreement, and in that order, and  
 17 we're ready to proceed with testimony.  
 18 THE COURT: Thank you.  
 19 MR. QUINN: I will make a couple of remarks  
 20 really by way of placeholders.  
 21 First, Met does not agree that the issue of  
 22 breach is off the table at this point for reasons that I  
 23 think will become very apparent. We believe that breach  
 24 still needs to be established.  
 25 And I think the Court will see under the

982

1 evidence that the meaning of that five-year cooling off  
 2 period was really something very different than what San  
 3 Diego has told the Court, that the parties understood it  
 4 in a different way than it's now being characterized  
 5 and, indeed, the language itself, if you read it, says  
 6 something quite different.  
 7 And I believe that will become apparent in the  
 8 course of the trial, your Honor.  
 9 Thank you.  
 10 THE COURT: Thank you very much. I appreciate  
 11 it.  
 12 Mr. Kecker.  
 13 MR. KEKER: Mr. Purcell, your Honor.  
 14 THE COURT: Thank you.  
 15 MR. PURCELL: Your Honor, as our first witness  
 16 the San Diego Water Authority calls Dennis Cushman.  
 17  
 18 DENNIS CUSHMAN,  
 19 called as a witness by the Plaintiff, was sworn and  
 20 testified as follows:  
 21  
 22 THE WITNESS: I do.  
 23 THE CLERK: Thank you. Please be seated state  
 24 and spell your first and last name.  
 25 THE WITNESS: Dennis Cushman. D-E-N-N-I-S.

983

1 C-U-S-H-M-A-N.  
 2  
 3 DIRECT EXAMINATION  
 4 BY MR. PURCELL:  
 5 Q. What is your occupation?  
 6 A. **Assistant general manager of the San Diego**  
 7 **County Water Authority.**  
 8 Q. How long have you held that position?  
 9 A. **A little over 12 years.**  
 10 Q. Prior to the position as assistant general  
 11 manager do you have a prior stint being employed by the  
 12 Water Authority?  
 13 A. **Yes, from July of 1997 to 2001, January, I was**  
 14 **the director of public affairs of the water board.**  
 15 Q. I know you already testified about this in the  
 16 first phase of the trial but just to reorient the Court,  
 17 can you tell us what your responsibilities are as  
 18 assistant general manager?  
 19 A. **As assistant general manager I oversee the**  
 20 **Water Authority's externally focused water policy work.**  
 21 **I oversee the Metropolitan Water District's program and**  
 22 **the supplies that we obtain from the Metropolitan that**  
 23 **it obtains from the Colorado River and the State Water**  
 24 **Project. I oversee the Water Authority's advocacy**  
 25 **programs in Sacramento, California, and Washinton, D.C.**

984

1 **D.C. and oversee the public outreach and conservation**  
 2 **programs for the Water Authority.**  
 3 Q. In your role as assistant general manager of  
 4 the Water Authority have you worked on issues relating  
 5 to the Water Authority's agreement with Metropolitan?  
 6 A. **Yes.**  
 7 Q. Your responsibilities include the  
 8 implementation of that agreement?  
 9 A. **Yes.**  
 10 Q. What do you do to carry out your  
 11 responsibilities in implementing the exchange agreement?  
 12 A. **To ensure water we receive from IID and the**  
 13 **canal lining is delivered to Metropolitan in accordance**  
 14 **with the schedule and the payments we make as an agency**  
 15 **to IID for the water and -- to insure that the payments**  
 16 **we make to Metropolitan under the exchange agreement**  
 17 **conform to the terms of the exchange agreement.**  
 18 Q. In your role in working with the exchange  
 19 agreement, have you become familiar with the terms of  
 20 that agreement?  
 21 A. **Yes.**  
 22 Q. When did you first become familiar with the  
 23 exchange agreement and its terms?  
 24 A. **When it was being negotiated and in '02 and**  
 25 **'03.**

985

1 Q. What was your responsibility, if any, during  
2 the negotiations of the exchange agreement?

3 A. I supported the work of the general manager and  
4 her negotiating team on the exchange agreement. I did  
5 public outreach and relations work, spokesperson work on  
6 the exchange agreement and supported the general manager  
7 and her team on that effort.

8 Q. And what is your understanding, if you have  
9 one, of the Water Authority's obligations under the  
10 exchange agreement?

11 A. Our obligations are to pay Metropolitan Water  
12 District the exchange price under the exchange agreement  
13 for each acre-foot of water transported from  
14 Metropolitan to San Diego under the exchange agreement.

15 Q. Does the Water Authority also have  
16 responsibilities to make water available under the  
17 exchange agreement?

18 A. Yes, sir. We make water available to  
19 Metropolitan through our water transportation agreement  
20 with the Imperial Irrigation District and our investment  
21 in the canal lining projects.

22 The water we make available to Metropolitan at  
23 its intake at Lake Havasu is in exchange for the Water  
24 Authority at its service delivery points in northern San  
25 Diego County, about six miles south of the County line.

986

1 Irrigation District that is 100,000 acre-feet of water  
2 this year. And third, we receive water by means of our  
3 investment and responsibility to line the All-American  
4 and Coachella Canals in the Imperial Valley Desert and  
5 that is 800,000 acre feet this year.

6 Q. Does the Water Authority itself have the means  
7 to transport the IID and canal lining water to San Diego  
8 County?

9 A. No.

10 Q. Has the Water Authority arranged to move the  
11 IID canal lining water to San Diego County?

12 A. Yes, we have, through the exchange agreement  
13 with Metropolitan.

14 Q. Why did the Water Authority contract with  
15 Metropolitan to move the IID and canal lining water?

16 A. Because Metropolitan had the only facilities  
17 that connect Colorado River to the Water Authority's  
18 aqueduct system in San Diego County.

19 Q. In entering into the exchange agreement with  
20 Metropolitan, what services was the Water Authority  
21 seeking to have Metropolitan provide?

22 A. Transportation services.

23 Q. Did the Water Authority understand it was  
24 contracting for a water supply from Metropolitan?

25 A. No.

988

1 Q. Has the Water Authority performed all of its  
2 obligations under the exchange agreement?

3 A. Yes.

4 Q. Are you aware of any present assertion by  
5 Metropolitan that the Water Authority has failed to  
6 perform any obligation under the exchange agreement?

7 A. No.

8 Q. Mr. Cushman, you testified in Phase 1 of this  
9 case; correct?

10 A. Yes.

11 Q. Was one of the subjects you testified about the  
12 various sources of water that the Water Authority  
13 imports into its service area?

14 A. Yes.

15 Q. Just briefly to reorient the Court, how much of  
16 the Water Authority's water supply is imported from  
17 outside its service area?

18 A. About 80 percent of all water used to service  
19 San Diego's water needs are imported in the San Diego  
20 County.

21 Q. What are the water sources of imported water?

22 A. Our supplies we purchase from Metropolitan and  
23 that comprises about 50 percent of all water demands in  
24 San Diego County. Second, we purchase water under the  
25 long-term water transport agreement from the Imperial

987

1 Q. Why not?

2 A. Because we already contracted for the water  
3 supply from the Imperial Irrigation District and already  
4 obtained the water supply by taking on the All-American,  
5 Coachella Canal lining projects.

6 Q. You mentioned this earlier, but under the  
7 exchange agreement does the Water Authority make the IID  
8 and canal water available to Metropolitan?

9 A. Yes.

10 Q. How so?

11 A. It is delivered to Metropolitan at its take-out  
12 at Lake Havasu.

13 Q. Is that on the Colorado River?

14 A. Yes.

15 Q. Does Metropolitan transport to San Diego the  
16 same molecules via the canal lining water that the Water  
17 Authority makes available to Metropolitan and Lake  
18 Havasu?

19 A. No.

20 Q. Why not?

21 A. Because the water the Water Authority makes  
22 available to Metropolitan and Lake Havasu is commingled  
23 with the other water Metropolitan has taken off the  
24 Colorado River, its own water it is selling to its  
25 member agencies.

989

1 Q. Is there any way for Metropolitan to get the  
 2 Water Authority's IID and canal lining water to San  
 3 Diego other than through an exchange?  
 4 A. No.  
 5 Q. Did you testify in Phase 1 about the specific  
 6 objections that the Water Authority has made to the  
 7 Metropolitan rates at issue in this case?  
 8 A. Yes. I testified extensively to that.  
 9 Q. And I don't want you to repeat it in full  
 10 detail, but just to orient the Court, can you briefly  
 11 describe the substance of the Water Authority's  
 12 objections to the Metropolitan rates being challenged in  
 13 this case?  
 14 A. Yes. The Water Authority has been objecting to  
 15 the inclusion of State Water Project water in the  
 16 wheeling rate of Metropolitan since 1996 and  
 17 continuously since then. We have done so on countless  
 18 occasions, both in writing, both through multiple  
 19 processes that Metropolitan put forth on its long-range  
 20 finance plan; alternatively, its cost of service review  
 21 study process; alternatively, its rate refinement  
 22 processes, and other efforts both in monthly general  
 23 manager meetings on those processes, the work groups  
 24 that they created on those processes I participated and  
 25 other staff participated, in testimony by our

990

1 **Metropolitan Water District Board members at MWD board**  
 2 **and committee meetings, and the list goes on and on and**  
 3 **on.**  
 4 Q. Had the Water Authority also objected to  
 5 Metropolitan's water stewardship rate?  
 6 A. Yes.  
 7 Q. Why is that?  
 8 A. Because the water stewardship rate, it collects  
 9 revenues into a fund that Metropolitan creates to  
 10 subsidize water supply, development projects at the  
 11 local level and to conserve water supply at the local  
 12 level. They are water supply oriented subsidies.  
 13 Q. Were these the objections that were litigated  
 14 in the first phase of this trial?  
 15 A. Yes.  
 16 Q. Has the Water Authority suffered harm as the  
 17 result of Metropolitan's inclusion of the State Water  
 18 Project costs to its transportation rates?  
 19 A. Yes.  
 20 Q. And what harm has the Water Authority suffered?  
 21 A. We have been overcharged tens of millions of  
 22 dollars annually in improper allocations of State Water  
 23 Project supply costs to the transportation rate in  
 24 Metropolitan's wheeling rate we are paying under the  
 25 exchange agreement.

991

1 Q. Has the Water Authority suffered harm as a  
 2 result of Metropolitan charging the Water Authority the  
 3 water stewardship rate?  
 4 A. Yes, the Water Authority is paying millions to  
 5 tens of millions of dollars each year under the water  
 6 stewardship rate to Metropolitan.  
 7 Q. Mr. Cushman, did you instruct anyone at the  
 8 Water Authority to calculate the Water Authority's  
 9 damages from these overcharges?  
 10 A. Yes.  
 11 Q. And whom did you instruct to perform that task?  
 12 A. Dan Denham, our Colorado River program  
 13 director.  
 14 Q. Can you briefly describe your instructions to  
 15 Mr. Denham as far as calculating the Water Authority's  
 16 damages?  
 17 A. I instructed Mr. Denham to back out of the  
 18 Metropolitan wheeling charges the State Water Project  
 19 costs and the water stewardship rate costs.  
 20 Q. Did Mr. Denham perform that calculation?  
 21 A. Yes, he did.  
 22 Q. The objections to Metropolitan's rates that you  
 23 just outlined, that the Water Authority is raising in  
 24 this case, are those new objections?  
 25 A. No.

992

1 Q. How long has the Water Authority been objecting  
 2 to Metropolitan's inclusion of State Water Project  
 3 charges in its transportation rates?  
 4 A. Since at least the mid-1990s.  
 5 Q. Prior to establishing -- strike that.  
 6 At some point did Metropolitan establish a  
 7 wheeling rate?  
 8 A. Yes. They developed a wheeling rate in 1996  
 9 and established it or adopted it, in effect, in '97.  
 10 Q. Prior to establishing that wheeling rate, did  
 11 Metropolitan have a separate transportation rate?  
 12 A. No.  
 13 Q. How did Metropolitan charge for delivery of  
 14 water prior to establishing the wheeling rate?  
 15 A. Before establishing the wheeling rate it had a  
 16 bundled or uniform water rate where all the costs that  
 17 it incurred were rolled up into a single water rate.  
 18 Q. How long has the Water Authority been objecting  
 19 to the stewardship rate?  
 20 A. Since it was cited and developed in, I believe,  
 21 2001.  
 22 Q. I would like to show you PTX 22 which is in  
 23 evidence from Phase 1. It should be in your binder and  
 24 also in the binder with the judge.  
 25 THE COURT: State the exhibit number.

993

1 MR. PURCELL: PTX 22.  
 2 Q. Do you recognize this document?  
 3 A. Yes.  
 4 Q. What is it?  
 5 A. It is a letter to John Foley, who is chairman  
 6 of the Metropolitan board of directors, from the Water  
 7 Authority's general counsel at the time, Vincent Biando.  
 8 Q. What is the subject of the letter?  
 9 A. The proposed resolution establishing short-term  
 10 wheeling rates.  
 11 Q. Can you turn to page 2?  
 12 Could you read the paragraph starting with "In  
 13 short summary"?  
 14 A. "In short summary the Authority objects to  
 15 Metropolitan's imposition of costs upon a party  
 16 requesting the use of excess capacity because the costs  
 17 bear no relationship to the actual incremental cost of  
 18 wheeling the water through the conveyance  
 19 facility/system."  
 20 Q. And slightly farther down the page, could you  
 21 read the paragraph that starts "the authority believes"?  
 22 A. "The authority believes the intended result of  
 23 Metropolitan's pricing approach is to remove any  
 24 incentive for its customers or member agencies to  
 25 request the use of excess capacity. In turn, this will

994

1 allow Metropolitan to sustain its monopoly on imported  
 2 water supplies within its boundaries. As such, the  
 3 proposed resolution is contrary to the policy behind the  
 4 wheeling statute and raises state and federal antitrust  
 5 issues in the process."  
 6 Q. How, if at all, does the argument the Water  
 7 Authority made in this December 1996 letter compare to  
 8 the objections the Water Authority has raised in this  
 9 case about including State Water Project costs in  
 10 Metropolitan transportation rates?  
 11 A. They are the same objections.  
 12 Q. At some point after December 1996 did  
 13 Metropolitan publish the wheeling rate?  
 14 A. Yes.  
 15 Q. Was there a court proceeding regarding the  
 16 validity of that wheeling rate?  
 17 A. Yes. Shortly after publishing its wheeling  
 18 rate, Metropolitan itself filed a validation action  
 19 seeking to validate that rate.  
 20 Q. That lawsuit was initiated by Metropolitan?  
 21 A. Yes.  
 22 Q. What did Metropolitan contend in its validation  
 23 suit?  
 24 A. Metropolitan contended that the wheeling rate  
 25 they established was valid in accordance with the law.

995

1 Q. Did the Water Authority have any involvement in  
 2 that court proceeding?  
 3 A. The Water Authority along with other parties  
 4 entered that case as defendants in that litigation, in  
 5 the validation action.  
 6 Q. What position did the Water Authority take in  
 7 that case?  
 8 A. The Water Authority's position is that wheeling  
 9 rate was not legal.  
 10 Q. I would like to show you PTX 38 which is also  
 11 in evidence. Do you recognize this document?  
 12 A. Yes.  
 13 Q. What is this document, Mr. Cushman?  
 14 A. A letter dated September 8, 1999, addressed to  
 15 Mr. Ronald R. Gastelum, who is the general manager of  
 16 Metropolitan, from Maureen Stapleton, the general  
 17 manager of the Water Authority.  
 18 Q. As of September 1999 do you recall what the  
 19 status of the validation lawsuit was?  
 20 A. It was still -- I'm not sure a trial court  
 21 verdict had been reached in that case.  
 22 Q. It hadn't finally been resolved?  
 23 A. I don't recall.  
 24 Q. This September 8, 1999, letter, can you take a  
 25 look at the paragraph at the bottom of the first page

996

1 with the heading "cost shifting"?  
 2 A. Yes.  
 3 Q. Can you read that paragraph?  
 4 A. "There are significant problems with the  
 5 division of cost categories in the rate model between  
 6 supply, conveyance and distribution. Inappropriate  
 7 allocations between these categories shift costs and  
 8 make it appear that Metropolitan is designing the model  
 9 to predetermine the outcome and achieve two goals: One,  
 10 artificially suppress supply costs to appear competitive  
 11 with potential alternative suppliers; and two, inflate  
 12 conveyance costs to effectively preclude wheeling in  
 13 Metropolitan's system."  
 14 Q. Mr. Cushman, how, if at all, did the objections  
 15 in the September '99 letter compare to the Water  
 16 Authority's objections to Metropolitan's rates in this  
 17 case?  
 18 A. They are the same.  
 19 Q. At some point after this letter did  
 20 Metropolitan consider a proposal to adopt an unbundled  
 21 rate structure?  
 22 A. Yes.  
 23 Q. During what time period did that unbundled rate  
 24 structure proposal get evaluated by Metropolitan?  
 25 A. Up to and including 2001 they evaluated the

997



1 **unbundled rate structure and it was approved and put**  
 2 **into effect January 1, 2003.**  
 3 Q. Did the Water Authority participate in the  
 4 administrative process at the Metropolitan board  
 5 regarding the unbundled rate structure?  
 6 **A. Yes.**  
 7 Q. Did the Water Authority support or oppose the  
 8 unbundled rate structure?  
 9 **A. We opposed it.**  
 10 Q. Did the Water Authority communicate its  
 11 opposition to Metropolitan in writing?  
 12 **A. Yes, it did.**  
 13 Q. What was the substance of the Water Authority's  
 14 objections to the unbundled rate structure?  
 15 **A. The substance of the objections were that**  
 16 **Metropolitan was improperly including State Water**  
 17 **Project supply costs and State Water Project costs in**  
 18 **the wheeling rate and that it was improperly including**  
 19 **water stewardship rate and local water subsidy and**  
 20 **conservation program costs in the wheeling rate.**  
 21 Q. Did the Metropolitan board vote on the proposed  
 22 unbundled rate structure?  
 23 **A. Yes, they did.**  
 24 Q. How did the Water Authority delegates vote on  
 25 the unbundled rate structure?

998

1 **A. They opposed.**  
 2 Q. Did Metropolitan adopt the unbundled rate  
 3 structure anyway?  
 4 **A. Yes.**  
 5 Q. Since the Metropolitan board adopted the  
 6 unbundled rate structure has there been any action at  
 7 the Metropolitan board level to reconsider any aspect of  
 8 that rate structure?  
 9 **A. There was once in 2009 as a result of ongoing**  
 10 **discussions at that time during the rate refinement**  
 11 **process. Metropolitan management brought a proposal to**  
 12 **the board in November of 2009 to take costs of its**  
 13 **dry-year water storage costs in what's called flex**  
 14 **storage in Lake Castaic and Lake Perris, two of the**  
 15 **terminal reservoirs of the State Water Project system.**  
 16 **These are dry-year storage supplies available**  
 17 **to Metropolitan under the flex program. They were being**  
 18 **charged to transportation, whereas, other dry-year**  
 19 **storage costs that Metropolitan was incurring were**  
 20 **charged to supply. And management went to the board and**  
 21 **recommended that the costs of the flex dry-year storage**  
 22 **in fact be moved from the transportation rate category**  
 23 **to the supply rate category.**  
 24 Q. And did the Water Authority's delegates at the  
 25 Metropolitan board articulate a position to this

999

1 proposal?  
 2 **A. Yes.**  
 3 Q. What was that position?  
 4 **A. That --**  
 5 MR. QUINN: Objection, your Honor. Hearsay.  
 6 THE COURT: How do you know about this?  
 7 THE WITNESS: I was in attendance at the  
 8 meeting.  
 9 THE COURT: Overruled.  
 10 Go ahead.  
 11 THE WITNESS: They were in support of moving  
 12 those costs from transportation to supply.  
 13 Q. BY MR. PURCELL: Did the Metropolitan board  
 14 take any action on the proposal to move the dry-year  
 15 storage costs from transportation to supply?  
 16 **A. The Met board deferred action on it and**  
 17 **referred it to the then ongoing long-range finance plan**  
 18 **rate refinement process that was going on at the time.**  
 19 Q. Was any further action taken by the Met board  
 20 on the dry-year storage reallocation proposal after the  
 21 question was referred to the long-range finance plan  
 22 rate refinement process?  
 23 **A. No, never.**  
 24 Q. We will talk a little bit more about the  
 25 refinement process later. Other than that dry-year

1000

1 storage issue, has it reconsidered any aspect of its  
 2 unbundled rate structure since that rate structure was  
 3 enacted?  
 4 **A. No.**  
 5 Q. Since Metropolitan adopted its unbundled rate  
 6 structure has the Metropolitan board periodically voted  
 7 on increases to its individual rates within the rate  
 8 structure for a given calendar year?  
 9 **A. Yes.**  
 10 Q. Does a vote on an annual rate increase  
 11 constitute a vote on the rate structure itself?  
 12 **A. No.**  
 13 Q. If a majority of the Metropolitan board were to  
 14 vote against a rate increase for a particular year,  
 15 would that have any effect on the underlying rate  
 16 structure?  
 17 **A. No.**  
 18 Q. Have the Water Authority delegates cast votes  
 19 on the Metropolitan board on proposals for periodic rate  
 20 increase?  
 21 **A. Yes.**  
 22 Q. How have they voted on those proposals?  
 23 **A. In some years they opposed rate increases and**  
 24 **other years they supported them**  
 25 Q. As far as the rate -- strike that.

1001

1 Has anyone from the Water Authority, to your  
 2 knowledge, ever taken a public position in favor of the  
 3 Metropolitan rate structure?  
 4 **A. No.**  
 5 Q. You testified earlier you supported the  
 6 Metropolitan general manager during negotiations of the  
 7 curren exchange agreement.  
 8 **A. Yes.**  
 9 Q. Did the exchange agreement contain any  
 10 provisions designed to preserve the Water Authority's  
 11 objections to the Metropolitan rate structure?  
 12 **A. Yes.**  
 13 Q. I would like to show you PTX 65, which is in  
 14 evidence.  
 15 Mr. Cushman, do you recognize PTX 65?  
 16 **A. Yes.**  
 17 Q. What is PTX 65?  
 18 **A. It is the 2003 exchange agreement between**  
 19 **Metropolitan and the Water Authority.**  
 20 Q. Can you turn to page 16, in particular, Section  
 21 5.2.  
 22 **A. Yes.**  
 23 Q. It spills over on to page 17. What is Section  
 24 5.2 of the 2003?  
 25 **A. It is the price provision of the agreement.**

1002

1 Q. Did the Water Authority design this provision  
 2 to preserve its objections to the Metropolitan's rate  
 3 structure?  
 4 **A. Yes.**  
 5 Q. How does the price term do that? How does it  
 6 preserve the Water Authority's objections?  
 7 **A. It contains a provision on page 17, starting at**  
 8 **A, midway down the page, it reads, "After the conclusion**  
 9 **of the first five years nothing herein shall preclude**  
 10 **SDCWA from contesting an administrative or judicial**  
 11 **forum whether such charge or charges have been set in**  
 12 **accordance with applicable law and regulation. And, B,**  
 13 **SDCWA and Metropolitan policy may agree in writing at**  
 14 **any time to exempt any specified matter from the**  
 15 **foregoing limitation.**  
 16 **"In the event that SDCWA contests a matter**  
 17 **pursuant to the foregoing sentence, the prevailing party**  
 18 **shall be entitled to recovery of reasonable costs and**  
 19 **attorney's fees incurred in prosecuting or defending**  
 20 **against such contest."**  
 21 Q. How does the language you just read preserve  
 22 the Water Authority's objections to Metropolitan?  
 23 **A. After the five-year litigation timeout, the**  
 24 **Water Authority is free to sue at any time thereafter.**  
 25 Q. Let's look at the earlier language in Section

1003

1 5.2 regarding the price to be charged by Metropolitan.  
 2 What is the price term that Section 5.2 requires?  
 3 **A. It establishes the initial price at \$253.**  
 4 **Thereafter, the price shall be equal to the charge or**  
 5 **charges set by Metropolitan's board of directors**  
 6 **pursuant to applicable law and regulation and generally**  
 7 **applicable to the conveyance of water by Metropolitan on**  
 8 **behalf of its member agencies.**  
 9 Q. In the Water Authority's view, what does the  
 10 phrase "pursuant to applicable law and regulation" mean?  
 11 **A. That the rates be lawful.**  
 12 Q. And what about the phrase "generally applicable  
 13 to the conveyance of water by Metropolitan on behalf of  
 14 its member agencies"? What does that mean in the Water  
 15 Authority's view?  
 16 **A. That means that whatever charge Metropolitan**  
 17 **develops for the Water Authority will be the same charge**  
 18 **they would charge any of the member agencies. It**  
 19 **wouldn't be a one -- a one-off rate for the water.**  
 20 Q. Was the ability to sue after five years the  
 21 reason why the Water Authority was willing to agree to  
 22 the floating price term in section 5.2?  
 23 **A. Yes.**  
 24 Q. Without the right to sue after five years would  
 25 the Water Authority agree to the floating price term?

1004

1 **A. No.**  
 2 Q. Why not?  
 3 **A. Because it left a completely unbounded ability**  
 4 **for Metropolitan to establish rates of any amount**  
 5 **without regard to whether they were lawful or not.**  
 6 Q. In negotiating the 2003 exchange agreement did  
 7 the Water Authority agree to take on a canal lining  
 8 project?  
 9 **A. Could you repeat the question?**  
 10 Q. During the course of negotiating the 2003  
 11 exchange agreement did the Water Authority agree to take  
 12 on a project to line the All-American and Coachella  
 13 canals?  
 14 **A. Yes.**  
 15 Q. When the Water Authority agreed to take on the  
 16 canal lining project, did it give up its right to  
 17 invalidate Metropolitan's rates after five years?  
 18 **A. No.**  
 19 Q. Is there anything in its exchange agreement  
 20 that says the Water Authority gave up its rights to sue  
 21 as a result of taking on the canal lining project?  
 22 **A. No.**  
 23 Q. At the time of the negotiations over the 2003  
 24 exchange agreement, was there a prior exchange agreement  
 25 in effect between Metropolitan and the Water Authority?

1005

1           **A. Yes.**  
 2           Q. When had that agreement been signed?  
 3           **A. In 1998.**  
 4           Q. As of 2003 had the Water Authority actually  
 5 made any water available to Metropolitan under the 1998  
 6 agreement?  
 7           **A. No.**  
 8           Q. And likewise, I assume, Metropolitan hadn't  
 9 delivered any water to the Water Authority under the '98  
 10 agreement?  
 11           **A. No, they had not.**  
 12           Q. Once the 2003 exchange agreement was signed,  
 13 was there a schedule for delivery of water to the Water  
 14 Authority?  
 15           **A. Yes.**  
 16           Q. Have you prepared a chart showing the schedule  
 17 for water deliveries under the 2003 exchange agreement?  
 18           **A. Yes.**  
 19           Q. Is this the chart you prepared, Mr. Cushman?  
 20           **A. Yes.**  
 21           THE COURT: Is this a demonstrative exhibit?  
 22           MR. PURCELL: For now.  
 23           THE COURT: Read the bottom letters.  
 24           MR. PURCELL: Source material for this is PTX  
 25 8, PTX 469 and PTX 473A.

1006

1           Q. Mr. Cushman, what does this chart show?  
 2           **A. It shows the ramp-up in the delivery schedule**  
 3 **of the Imperial Irrigation District water transfer and**  
 4 **then the introduction as the projects were completed of**  
 5 **the lining of first the Coachella Canal and then the**  
 6 **All-American Canal.**  
 7           Q. Describe how the ramp-up of the IID water  
 8 worked under the exchange.  
 9           **A. It started in the first increment of 10,000**  
 10 **acre-feet in 2003, and that it increased by 10,000**  
 11 **acre-foot increments going forward for the first five**  
 12 **years of the agreement, such that in the fifth year of**  
 13 **the agreement 50,000 acre feet of water, IID water, was**  
 14 **being transferred to San Diego.**  
 15           Q. Does it continue to ramp up after that?  
 16           **A. It does. And then presently we are at 100,000**  
 17 **acre-feet. There is a plateau in the delivery schedule**  
 18 **at 100,000 acre-feet, which is shown by the flat line we**  
 19 **are presently in right now. And then it begins picking**  
 20 **up between in 2018 and 2019 and 2020 until it reaches**  
 21 **the ultimate 200,000 acre-feet of transfer in 2021.**  
 22           Q. Can you describe how the ramp-up of the canal  
 23 lining water works under the exchange agreement?  
 24           **A. The water became available to the Water**  
 25 **Authority under the canal lining projects as we**

1007

1           **completed the projects. So the Coachella Canal lining**  
 2 **project was completed first. You see that tranche of**  
 3 **water coming in in the 2006-2007 time frame. The**  
 4 **All-American Canal lining project was completed in, I**  
 5 **want to say, 2011, and you see all that water ramping in**  
 6 **that period of time.**  
 7           Q. Did the Water Authority take any risk in  
 8 agreeing to paying Metropolitan's wheeling rate for the  
 9 first five years of the exchange agreement without  
 10 making a judicial challenge?  
 11           **A. Yes. We faced risks but those risks were**  
 12 **bounded in the first five years by the ability to sue**  
 13 **after five years and also by virtue that the quantity of**  
 14 **water being moved over the first five years was a**  
 15 **comparatively small amount of water, in total 150,000**  
 16 **acre-feet of water, over the first five years. So we**  
 17 **had risk in the price.**  
 18           **We knew we had the right to challenge it**  
 19 **thereafter if the processes we were going through**  
 20 **Metropolitan were unsuccessful, and our dollar exposure**  
 21 **was bounded in part by the small quantity of water being**  
 22 **moved over that period.**  
 23           THE COURT: Let me ask you a question about the  
 24 first sentence of 5.2.  
 25           It says the price is \$253. You were not going

1008

1           to challenge that; right?  
 2           THE WITNESS: Correct.  
 3           THE COURT: And then it says thereafter, and we  
 4 have this language. When does the thereafter start?  
 5 What was your view of that?  
 6           THE WITNESS: The next calendar year.  
 7           Q. BY MR. PURCELL: Mr. Cushman, how, if at all,  
 8 did the risk the Water Authority faced under the 2003  
 9 exchange agreement compare to the risk it had faced  
 10 under the previously existing 1998 exchange agreement?  
 11           **A. It was a smaller risk.**  
 12           Q. Why do you say that?  
 13           **A. Because in the 1998 agreement the only**  
 14 **agreement we had from Metropolitan on price was the**  
 15 **first 30 years of our 45-year transfer with the Imperial**  
 16 **Irrigation District. We had unbounded risk for the**  
 17 **final 15 years of IID transfer on the transfer on the**  
 18 **price we would pay Metropolitan under that exchange**  
 19 **agreement.**  
 20           **Purchasing that last 15 years of the 45-year**  
 21 **deal we're moving 200,000 acre-feet of water per year,**  
 22 **so that is a risk on price for three million acre-feet**  
 23 **of water.**  
 24           Q. And what was the volume subject to the risk  
 25 during the five-year litigation timeout in 2003?

1009

1           **A. 150,000 acre-feet.**  
 2           Q. After the 2003 exchange agreement was signed,  
 3 did Metropolitan ever state publicly it was concerned  
 4 the Water Authority would sue over Metropolitan's  
 5 transportation rates?  
 6           **A. Yes.**  
 7           Q. Did Metropolitan take any steps to discourage  
 8 the Water Authority from filing suit?  
 9           **A. Yes.**  
 10          Q. What steps did Metropolitan take?  
 11          **A. Well, shortly after we signed the exchange**  
 12 **agreement in 2003 in October, six months or so later,**  
 13 **Metropolitan concocted the rate structure integrity**  
 14 **provision which was directly targeting San Diego and**  
 15 **intended to discourage San Diego by punishing it**  
 16 **monetarily if we filed -- merely filed suit to challenge**  
 17 **Metropolitan's rates.**  
 18          Q. I would like to show you PTX 80, which is also  
 19 in evidence.  
 20             Mr. Cushman, do you recognize PTX 80?  
 21          **A. Yes.**  
 22          Q. What is this document?  
 23          **A. That is a memo from Ron Gastelum, who was the**  
 24 **general manager and chief executive officer of**  
 25 **Metropolitan --**

1010

1           THE COURT: Is this 80 or 81, in your view?  
 2           MR. PURCELL: This is 80.  
 3           THE WITNESS: Eighty is not in the binder.  
 4           THE COURT: I think -- that's okay. We will  
 5 just read it from the screen.  
 6           THE WITNESS: Okay.  
 7           MR. PURCELL: I am happy to give you my copy.  
 8           THE COURT: I am happy to follow on the screen.  
 9 It is more important you have yours.  
 10          Q. BY MR. PURCELL: Sorry, Mr. Cushman.  
 11             What was PTX 80, the document on the screen?  
 12          **A. It's a memo from Ron Gastelum to the**  
 13 **Metropolitan member agencies managers, the general**  
 14 **managers of this 26-member agency.**  
 15          Q. Is the member agency manager group referred in  
 16 the "to" line, does that include the Water Authority  
 17 managers?  
 18          **A. Yes.**  
 19          Q. Can you read the first paragraph of  
 20 Mr. Gastelum's memo?  
 21          **A. "For several years we have discussed the**  
 22 **continuing financial risk to Metropolitan and the**  
 23 **member agencies from the threat of legal or legislative**  
 24 **actions undermining our rate structure. As in the past,**  
 25 **some entities for their own gain may challenge the rate**

1011

1           **structure in order to convey water at a lesser cost than**  
 2 **as required to properly maintain the system's integrity**  
 3 **and reliability. This challenge is not presented by**  
 4 **deficiencies in the rate structure but by the continuing**  
 5 **economic attraction of lower cost based on agricultural**  
 6 **transfer water if it can be conveyed into our service**  
 7 **area at marginal cost.**  
 8           **"Historically, this has specifically meant**  
 9 **challenges to the system access rate and in the future**  
 10 **perhaps the water stewardship change."**  
 11          Q. Mr. Cushman, how, if at all, does the statement  
 12 Mr. Gastelum made in that paragraph relate to the Water  
 13 Authority's objections in that lawsuit?  
 14          **A. Our objections to the inclusion of State Water**  
 15 **Project costs and the water stewardship rate costs were**  
 16 **well-known and well-articulated by the Water Authority**  
 17 **at Metropolitan and with Metropolitan over the course of**  
 18 **many years by this point in time.**  
 19          Q. Can you read the second paragraph?  
 20          **A. "One indication that such concerns are still**  
 21 **valid was the San Diego County Water Authority's**  
 22 **position in the QSA agreement reserving their right to**  
 23 **challenge Metropolitan's uniform wheeling rates after**  
 24 **five years from the date of execution of the QSA."**  
 25          Q. Did Metropolitan adopt the rate structure

1012

1 integrity program?  
 2          **A. Yes.**  
 3          Q. And did the water -- strike that.  
 4             Did Metropolitan begin including rate structure  
 5 integrity language in subsequent local programs, subsidy  
 6 contracts with the water authorities?  
 7          **A. Yes. They began including rate structure**  
 8 **integrity provisions in all local resource program**  
 9 **agreements and water conservation program agreements**  
 10 **after the effective date of that provision.**  
 11          Q. When did the Water Authority file this lawsuit?  
 12          **A. In June of 2010.**  
 13          Q. After the Water Authority filed this case, did  
 14 Metropolitan invoke the rate structure integrity clause  
 15 to take any action against the Water Authority?  
 16          **A. Yes.**  
 17          Q. What did Metropolitan do with regard to the  
 18 rate structure integrity?  
 19          **A. It served formal notice to the Water Authority**  
 20 **that it intended to terminate then in effect, in**  
 21 **progress, local resource program, local water supply**  
 22 **agreements that contain the rate structure integrity**  
 23 **provision and also to terminate water conservation**  
 24 **program agreements with the Water Authority that had the**  
 25 **rate structure integrity provision.**

1013

1 Q. Did Metropolitan take any action to -- did  
 2 Metropolitan take any action respecting the Water  
 3 Authority's eligibility for future local resource  
 4 programs?  
 5 **A. Yes, sir. Metropolitan also took action to**  
 6 **refuse to take action on the then pending additional**  
 7 **agreements that had been negotiated between the Water**  
 8 **Authority and Metropolitan for additional programs. And**  
 9 **also the board took action to bar the Water Authority**  
 10 **from receiving any new local resource program funding**  
 11 **under this provision.**  
 12 Q. After declaring the Water Authority eligible  
 13 for future funding, did the Water Authority continue to  
 14 charge the water stewardship rate to the Water  
 15 Authority?  
 16 **A. Yes.**  
 17 Q. Did the Water Authority continue to pay that  
 18 rate?  
 19 **A. Yes.**  
 20 Q. Did you prepare a demonstrative showing the  
 21 Water Authority's payment under the water stewardship  
 22 rate from 2011 to 2014, the years affected by this law  
 23 suit?  
 24 **A. Yes.**  
 25 Q. Is this the chart you prepared, Mr. Cushman?

1014

1 **A. Yes.**  
 2 THE COURT: This is just a demonstrative?  
 3 MR. PURCELL: Correct.  
 4 THE COURT: And it is San Diego WSR Payments  
 5 and Demand Management Program Benefits, 2011 to 2014.  
 6 MR. PURCELL: Your Honor, I would like to mark  
 7 these two demonstratives we have used for identification  
 8 and make them part of the record as demonstratives.  
 9 THE COURT: Why don't we do it one by one?  
 10 MR. PURCELL: Let's do this one first.  
 11 THE COURT: Okay.  
 12 What are we going to mark this as?  
 13 MR. PURCELL: PTX 506.  
 14 (Exhibit PTX 506 was marked for  
 15 identification.)  
 16 THE COURT: Any objection?  
 17 MR. QUINN: No objection.  
 18 THE COURT: It is admitted.  
 19 MR. PURCELL: The previous chart on the  
 20 exchange agreement deliveries, we would like to mark  
 21 that as PTX 507. Previous chart on exchange agreement  
 22 deliveries we would like to mark as PTX 507.  
 23 MR. QUINN: No objection.  
 24 THE COURT: 507 is admitted.  
 25 (Exhibit 507 was received in evidence.)

1015

1 Q. BY MR. PURCELL: Taking a look at PTX 506,  
 2 during the period at issue in this case, 2011 through  
 3 2014, how much money did the Water Authority pay to  
 4 Metropolitan in the water stewardship?  
 5 **A. Just under \$77 million.**  
 6 Q. Under that -- just under \$77 million, how much  
 7 of that water stewardship rate money was paid for  
 8 purchases of Metropolitan water?  
 9 **A. 48.3 million.**  
 10 Q. Is the Water Authority seeking that amount as  
 11 damages in this proceeding?  
 12 **A. No.**  
 13 Q. Why not?  
 14 **A. Because it's not covered under our exchange**  
 15 **agreement contract with Metropolitan.**  
 16 Q. How much of the just under \$77 million was  
 17 charged in water stewardship rate charges for conveyance  
 18 of third-party water?  
 19 **A. About 27 point -- excuse me. \$38.7 million.**  
 20 Q. Is the Water Authority seeking that amount as  
 21 damages?  
 22 **A. Yes.**  
 23 Q. Finally, how much money did the Water Authority  
 24 receive in local resource project funding from  
 25 Metropolitan during 2011 through 2014?

1016

1 **A. \$22.3 million.**  
 2 Q. And how much more has the Water Authority paid  
 3 in water stewardship rate charges as compared to the  
 4 local resource project funding it's got now?  
 5 **A. \$54.6 million.**  
 6 Q. How does that \$54.6 million deficit compare to  
 7 the damages the Water Authority is seeking here?  
 8 **A. It is nearly twice the amount we are seeking in**  
 9 **damages.**  
 10 MR. PURCELL: You can take that down. Thanks.  
 11 Q. You testified about this in Phase 1 and a  
 12 little bit earlier today, so I don't want to take a lot  
 13 of time.  
 14 During the five-year litigation timeout did the  
 15 Water Authority continue to object to Metropolitan about  
 16 the Metropolitan transportation rates at issue here?  
 17 **A. Yes. Regularly so.**  
 18 Q. How did the Water Authority communicate its  
 19 objections to Metropolitan during the five-year timeout?  
 20 **A. During the long-range finance plan update**  
 21 **processes during the rate refinement processes, during**  
 22 **the other cost of service review processes, that**  
 23 **Metropolitan developed and created work groups around in**  
 24 **that period of time, in testimony at Metropolitan board**  
 25 **and committee meetings by our directors on the**

1017

1 **Metropolitan board, any communications between the Water**  
 2 **Authority and management and Metropolitan staff and**  
 3 **management.**  
 4 Q. And I think you mentioned earlier that the one  
 5 rate structure issue the Metropolitan board had  
 6 considered about dry-year storage had been referred to  
 7 the rate refinement process?  
 8 **A. Correct.**  
 9 Q. What happened to the rate refinement process?  
 10 **A. All of those processes came to a quiet close**  
 11 **and end in the summer of 2012. Metropolitan simply**  
 12 **ended all work on those efforts.**  
 13 Q. How did the Water Authority learn that  
 14 Metropolitan had ended the rate refinement process?  
 15 **A. In a conversation I had with Metropolitan's**  
 16 **chief financial officer Gary Breaux and during a break**  
 17 **in the regular monthly Metropolitan member agency**  
 18 **managers meeting, I asked Mr. Breaux, when are we going**  
 19 **to restart these meetings on this effort. And he said**  
 20 **Metropolitan has decided to simply end the effort**  
 21 **altogether.**  
 22 Q. Mr. Cushman, in 2014, after this Court's  
 23 tentative decision in Phase 1 of this case, did  
 24 Metropolitan set rates to be imposed for water  
 25 deliveries in calendar years 2015 and 2016?

1018

1 **A. Yes.**  
 2 Q. Was the Water Authority involved in that  
 3 process?  
 4 **A. Yes.**  
 5 Q. Setting the 2015 and '16 rates did it make any  
 6 adjustments to its rate structure in response to this  
 7 Court's Phase 1 decision?  
 8 **A. No.**  
 9 Q. Did Metropolitan take any steps in setting the  
 10 2015 and 2016 rates to modify any rates invalidated by  
 11 this Court's decision?  
 12 **A. No.**  
 13 Q. And the last area I would like to cover with  
 14 you today, are you familiar with the term "preferential  
 15 rights"?  
 16 **A. Yes.**  
 17 Q. Do you use that term in your work at the Water  
 18 Authority?  
 19 **A. Yes.**  
 20 Q. What is your understanding of what the term  
 21 "preferential rights" mean?  
 22 **A. Preferential rights is a statutory right**  
 23 **embodied in the Metropolitan Water District Act itself,**  
 24 **Section 135. And it delineates the preferential right**  
 25 **to Metropolitan Water that each of its member agencies**

1019

1 **has as a percentage of all water available by**  
 2 **Metropolitan at any given time.**  
 3 Q. And under that statute how are Metropolitan  
 4 member agencies' preferential rights to Metropolitan  
 5 water calculated?  
 6 **A. They are calculated based on each agency's**  
 7 **total financial contributions to Metropolitan over time,**  
 8 **accepting the purchase of water, that becomes a dollar**  
 9 **figure that is a percentage of all dollars Metropolitan**  
 10 **has collected under that definition from all of its**  
 11 **member agencies, and that creates a percentage for each**  
 12 **agency, percentage of whatever available water**  
 13 **Metropolitan has at any given time.**  
 14 Q. What does the Water Authority's preferential  
 15 right entitle the Water Authority to do?  
 16 **A. Entitles the Water Authority to make use of its**  
 17 **amount of preferential rights to water at Metropolitan**  
 18 **at any time.**  
 19 Q. Has the Water Authority ever demanded delivery  
 20 of its preferential rights under the allotment of water  
 21 from Metropolitan?  
 22 **A. No.**  
 23 Q. Does the Water Authority believe its  
 24 preferential rights have value?  
 25 **A. Yes.**

1020

1 Q. How so?  
 2 **A. Water and a water right has economic value,**  
 3 **significant economic value. The Water Authority knows**  
 4 **in its preferential right and believes in its**  
 5 **preferential right with Metropolitan it has a right to a**  
 6 **significant amount of acre-feet of water every year from**  
 7 **Metropolitan. That becomes the core foundation of all**  
 8 **long-term water resource planning the Water Authority**  
 9 **does to ensure we have and provide to our region all of**  
 10 **the water necessary to support our economy and quality**  
 11 **of life.**  
 12 **Metropolitan is the single largest source of**  
 13 **supply for the Water Authority and for the San Diego**  
 14 **region, about half of all water supply. When we make**  
 15 **our long-term water supply plans we count on and**  
 16 **quantify what we believe our preferential right to water**  
 17 **would be in future years, what the total demands for**  
 18 **water will be in those future years, what the gap may be**  
 19 **between demands and that supply, and that's what we and**  
 20 **the member agencies fill by making investments in other**  
 21 **water resource programs and projects.**  
 22 Q. During your time as assistant general manager  
 23 of the Water Authority, how has the Water Authority's  
 24 preferential right to Metropolitan water informed the  
 25 Water Authority's imported water portfolio strategy?

1021

1       **A. I'm sorry. Could you repeat that?**  
 2       Q. That was a little confusing.  
 3       During your time as Metropolitan's assistant  
 4       general manager how, if at all, has Metropolitan -- has  
 5       the Water Authority used its preferential right to  
 6       Metropolitan water to inform its overall strategy for  
 7       acquiring imported water?  
 8       **A. Well, it's foundational to the Water**  
 9       **Authority's not only long-term water resource planning**  
 10       **but our water supply allocation planning or dry-year or**  
 11       **drought-year water planning. We know we have a**  
 12       **statutory right to a certain amount of Metropolitan**  
 13       **water, and that if that's insufficient to meet the**  
 14       **demands on the Water Authority, then we will have either**  
 15       **to acquire additional supplies, remove water we have in**  
 16       **storage or do our own shortage allocation to our member**  
 17       **agencies.**  
 18       Q. Are you aware of any dispute between the Water  
 19       Authority and Metropolitan related to the calculation of  
 20       preferential rights?  
 21       **A. Yes.**  
 22       Q. Could you describe that dispute?  
 23       **A. Yes. Fundamentally, the payments we have been**  
 24       **making to Metropolitan under the exchange agreement**  
 25       **since 2003 are payments for transportation of water.**

1022

1       **That's many hundreds of millions of dollars of payments**  
 2       **to Metropolitan that Metropolitan has excluded from the**  
 3       **calculation of the Water Authority's preferential right**  
 4       **to Met water.**  
 5       Q. Have you instructed anyone at the Water  
 6       Authority to quantify the extent to which the Water  
 7       Authority believes Metropolitan is undercalculating its  
 8       preferential rights?  
 9       **A. Yes. Dan Denham.**  
 10       Q. Did Mr. Denham provide a calculation to you?  
 11       **A. No.**  
 12       Q. Do you have an understanding of the basis of  
 13       that calculation?  
 14       **A. Yes.**  
 15       Q. What is your understanding?  
 16       **A. Mr. Denham went back, took Metropolitan's**  
 17       **version of its calculation of the preferential rights of**  
 18       **its 26 member agencies.**  
 19       **He added into the total financial contribution**  
 20       **of the Water Authority shown on that calculation all of**  
 21       **the payments the Water Authority has made under the**  
 22       **exchange agreement to Metropolitan since 2003, and then**  
 23       **recalculated each of the 26 agencies' preferential right**  
 24       **to water, including the Water Authority's. That raises**  
 25       **the Water Authority's preferential right to Met water.**

1023

1       Q. How much total water is Metropolitan projected  
 2       to deliver to its member agencies this year, in 2015?  
 3       **A. That hasn't been finally determined, but the**  
 4       **discussions have been around 1.7 million acre-feet of**  
 5       **Metropolitan water in 2015.**  
 6       Q. Assuming Metropolitan provides 1.7 million  
 7       acre-feet of water to its member agencies, has the Water  
 8       Authority quantified in acre-feet the difference between  
 9       its calculation of its preferential rights and  
 10       Metropolitan's calculation of the Water Authority's  
 11       preferential rights?  
 12       **A. Yes.**  
 13       Q. What is that difference?  
 14       **A. A little over 80,000 acre-feet of water. Not**  
 15       **only this year but every year that they had that amount**  
 16       **of water available.**  
 17       Q. So assuming sales at 1.7 million acre-feet by  
 18       Metropolitan in future years, the Water Authority would  
 19       be entitled to an extra 80,000 acre-feet every year?  
 20       **A. Yes.**  
 21       Q. How much canal lining water is the Water  
 22       Authority projected to receive this year?  
 23       **A. 80,000 acre-feet.**  
 24       Q. How much water is the Water Authority projected  
 25       to receive this year as a result of the IID transfer?

1024

1       **A. 100,000 acre-feet.**  
 2       Q. If the Water Authority were to buy 80 new  
 3       acre-feet in water supply from Metropolitan, how much  
 4       would that cost?  
 5       **A. Between 48 million and \$58 million.**  
 6       Q. Is that calculation based on Metropolitan's  
 7       current 2015 water rates?  
 8       **A. Yes. It's based on Metropolitan's untreated**  
 9       **Tier 1 and Tier 2 water rates. That's the range.**  
 10       Q. Has the Water Authority recently undertaken any  
 11       major capital expenditures to increase its local water  
 12       supply?  
 13       **A. Yes. The Water Authority committed in its**  
 14       **water purchase agreement for the Carlsbad desalination**  
 15       **project to invest a billion dollars in capital for the**  
 16       **Carlsbad desalination project now under construction.**  
 17       Q. When the Carlsbad desalination project comes on  
 18       line, how much water supply is it projected to generate  
 19       each year?  
 20       **A. Up to 56,000 acre-feet of water per year.**  
 21       MR. PURCELL: Pass the witness.  
 22       THE COURT: Off the record.  
 23       We will take five minutes.  
 24       (Recess.)  
 25

1025

1 CROSS-EXAMINATION  
 2 BY MR. QUINN:  
 3 Q. Good morning, Mr. Cushman. My name is John  
 4 Quinn, and I represent the Metropolitan Water District.  
 5 A. **Good morning.**  
 6 Q. Let's begin where you started. Counsel showed  
 7 you a document, Exhibit 22, dated back December 6, 1996.  
 8 If we can put it up on the screen.  
 9 This was in the context of you talking about  
 10 the fact that San Diego had objected to the inclusion of  
 11 certain costs, a cost structure that Met had employed.  
 12 Do you recall that discussion?  
 13 A. **Yes.**  
 14 Q. You said this had been going on for a long  
 15 time. Do you recall that?  
 16 A. **Yes.**  
 17 Q. If we could look at the bottom of this Exhibit  
 18 22, the last paragraph, there is a reference to a  
 19 postage stamp system; do you see that?  
 20 A. **Yes.**  
 21 Q. That is something that the San Diego Water  
 22 Authority objected to the use of that postage stamp  
 23 system; correct?  
 24 A. **Yes.**  
 25 Q. And that was something that was of concern at

1026

1 the time of this document that we're looking at?  
 2 A. **Yes.**  
 3 Q. I think you mentioned there was some litigation  
 4 as a result of that, that brought a validation  
 5 proceeding, and San Diego intervened as a defendant. Do  
 6 you recall that?  
 7 A. **Yes.**  
 8 Q. What was the outcome of that litigation?  
 9 A. **At the trial court it was a bifurcated trial so**  
 10 **the Court ruled on Phase I of that trial. The Phase I**  
 11 **ruling at the trial court level was that Metropolitan**  
 12 **could not develop or charge a postage stamp rate.**  
 13 **Metropolitan appealed that ruling, and the**  
 14 **appellate court overturned that ruling and remanded the**  
 15 **case back to the trial court for a trial on Phase II.**  
 16 **And Phase II of the case was whether or not the**  
 17 **rate Metropolitan adopted was lawful.**  
 18 Q. So that litigation, at least the Court of  
 19 Appeal -- the trial court determination that the postage  
 20 stamp rate was improper, that was reversed and remanded  
 21 by the Court of Appeal?  
 22 A. **Yes. It was remanded back to the trial court**  
 23 **for a Phase II trial.**  
 24 Q. So what is referenced here, this objection on  
 25 the bottom of the page here, is this postage stamp rate

1027

1 and that issue that was live at that time; correct?  
 2 A. **Yes.**  
 3 Q. You were involved in the negotiations of the  
 4 exchange agreement when those were happening in 2003?  
 5 A. **I was supporting the general manager and her**  
 6 **team on that.**  
 7 Q. And you knew at the time that that exchange  
 8 agreement was negotiated that the then existing wheeling  
 9 rates that Metropolitan employed included the systems  
 10 access rate and the system power rate; correct?  
 11 A. **In 2003?**  
 12 Q. Yes.  
 13 A. **Yes.**  
 14 Q. You knew that both those rates included these  
 15 State Water Project costs?  
 16 A. **Yes.**  
 17 Q. You knew at that time the rate included the  
 18 water stewardship rate, as well?  
 19 A. **Yes.**  
 20 Q. At the time of this exchange agreement we are  
 21 here talking about was being negotiated, San Diego knew  
 22 that those rates that it now objects to were built into  
 23 that conveyance rate; correct?  
 24 A. **Yes.**  
 25 Q. And you anticipated at the time, or I should

1028

1 say San Diego anticipated at the time, that the system  
 2 access rate would increase in 2004, isn't that true?  
 3 A. **I don't recall what the rate increase in 2004**  
 4 **was.**  
 5 Q. At the time that you were negotiating this  
 6 agreement, you anticipated there would be an increase in  
 7 the system access rate; that would go up in 2004;  
 8 correct?  
 9 A. **It would go up, perhaps, annually thereafter.**  
 10 Q. Let's take a look at Exhibit -- Defense Exhibit  
 11 843.  
 12 THE COURT: This isn't already in evidence?  
 13 MR. QUINN: We would offer that.  
 14 THE COURT: Any objection? Do we know what  
 15 that is?  
 16 MS. HADLOCK: This is Exhibit 843. This is an  
 17 email that you sent on September 17, 2003.  
 18 THE COURT: Is there any objection?  
 19 MR. PURCELL: I said no objection.  
 20 THE COURT: 843 is admitted.  
 21 (Exhibit 843 was received in evidence.)  
 22 Q. BY MR. QUINN: The date of this is September  
 23 17, 2003. This is at the time you are negotiating this  
 24 exchange agreement; correct?  
 25 A. **Yes.**

1029



1 Q. What you wrote is, "Please let Gig know that  
 2 Met's wheeling rate for 2004 is comprised of three  
 3 charges: The 163-dollar system access rate; the \$30 is  
 4 the water stewardship rate, and \$60 is the power rate.  
 5 These three charges add up to \$253 an acre-foot."  
 6 A. Yes.  
 7 Q. We know, because we looked at it, that was the  
 8 initial price that ends up going into the exchange  
 9 agreement; correct?  
 10 A. Yes.  
 11 Q. In fact, that was San Diego's idea; correct?  
 12 A. **What was San Diego's idea?**  
 13 Q. There was something called option two. Do you  
 14 recall an option one and an option two?  
 15 A. Yes.  
 16 Q. And San Diego came up with this idea, we can  
 17 either go under the old exchange agreement that the  
 18 parties had negotiated a couple of years before; right?  
 19 A. Yes.  
 20 Q. That was option one.  
 21 A. **I believe it was.**  
 22 Q. And then option two was we'll pay your existing  
 23 wheeling rate; correct?  
 24 A. Yes.  
 25 Q. That was San Diego's idea?

1030

1 A. **That we would pay Metropolitan's lawful**  
 2 **wheeling rate, which their wheeling rate at the time was**  
 3 **\$253 an acre-foot.**  
 4 Q. That was something that San Diego proposed;  
 5 correct?  
 6 A. Yes.  
 7 Q. And specifically San Diego proposed we will pay  
 8 this \$243, which is your present rate, correct, San  
 9 Diego's idea?  
 10 A. **As part of the overall negotiations, yes.**  
 11 Q. Yes.  
 12 You understood, looking at this email, you  
 13 understood in September 2003 that the system access rate  
 14 would increase from \$141 in 2003 to \$163 in 2004; right?  
 15 A. Yes.  
 16 Q. And, again, I think you've already told us that  
 17 these costs that San Diego is objecting to as being in  
 18 the conveyance rate, you already knew at this time those  
 19 were built into those rates; correct?  
 20 A. Yes.  
 21 Q. Would you take a look at Defense Exhibit 128.  
 22 This is in evidence. You see in number one, just above  
 23 exchange rate, it says higher power rate, incremental  
 24 power as to -- as opposed to system power rate. Do you  
 25 see that?

1031

1 A. Yes.  
 2 Q. Do you recognize this document?  
 3 A. Yes.  
 4 Q. It is a San Diego document?  
 5 A. Yes.  
 6 Q. This was prepared at the time the exchange  
 7 agreement was being negotiated; correct?  
 8 A. **I can't recall whether it was -- it was -- no,**  
 9 **there was -- this was developed in 2008.**  
 10 Q. Prepared in 2008?  
 11 A. Yes.  
 12 Q. San Diego knew both in 2008 and during the  
 13 negotiations of the exchange agreement that  
 14 Metropolitan's system power rate was lower than the  
 15 incremental power rate; correct?  
 16 A. **At that time, yes.**  
 17 Q. You knew that in 2008?  
 18 A. Yes.  
 19 Q. As we've seen, you already knew that back at  
 20 the time you were negotiating the exchange rate;  
 21 correct?  
 22 A. **That the system power rate was lower than the**  
 23 **incremental rate in 2003?**  
 24 Q. Yes.  
 25 A. **I don't recall.**

1032

1 Q. You don't recall that?  
 2 A. **I don't recall what the rates were, the**  
 3 **incremental rate would have been in 2003.**  
 4 Q. But you're not denying that you knew that at  
 5 the time; you just don't recall?  
 6 A. **I don't know what an incremental rate would**  
 7 **have been because Metropolitan never charged it.**  
 8 Q. You knew back in 2008 it was lower; you just  
 9 don't recall whether you knew in 2003?  
 10 A. **I had no basis to know in 2003.**  
 11 Q. As I understand your testimony, sir, San Diego  
 12 claims that Met first breached the exchange agreement in  
 13 2008 when it adopted rates to be effective in 2009; is  
 14 that correct?  
 15 A. **I believe so.**  
 16 Q. And Metropolitan similarly breached the  
 17 exchange agreement in 2009 when it adopted rates to be  
 18 effective in 2010?  
 19 A. **Possibly, yes. Uh-huh.**  
 20 Q. I'm -- do you recall that was your testimony at  
 21 your deposition?  
 22 A. Yes.  
 23 Q. And specifically that alleged breach was the  
 24 adoption of those rates in those years which, according  
 25 to San Diego, misallocated the system access, system

1033

1 power and water stewardship charges; correct?  
 2 **A. Correct.**  
 3 Q. Isn't it true that in 2008 and 2009 the San  
 4 Diego delegates on the Metropolitan board of directors  
 5 actually voted for those acts, those rates that San  
 6 Diego contends constitute the breach?  
 7 **A. I believe they voted yes on the rate increases**  
 8 **in those two years as well as several others.**  
 9 Q. So, is it your testimony, sir, that when they  
 10 voted at those times, you've said it was the adoption of  
 11 those rates. You just told us a moment ago it was the  
 12 adoption of those rates that were the breaches; right?  
 13 **A. Yes.**  
 14 Q. 2008, 2009 adopted rates, those were breaches;  
 15 right?  
 16 **A. Yes.**  
 17 Q. Isn't it true that the San Diego delegates  
 18 voted in favor of those very acts which you are telling  
 19 us were breaches of the contract?  
 20 **A. They voted yes on the rates for those following**  
 21 **years.**  
 22 Q. I wasn't sure from your direct testimony.  
 23 A little unclear on this. Were you saying  
 24 there was no opportunity at the time of that vote for  
 25 San Diego to make any objection to the rate structure,

1034

1 that the only thing being voted on were the increases;  
 2 is that your testimony, sir?  
 3 **A. No.**  
 4 Q. Because you know that those rate packages go to  
 5 the board with a full cost of service study and backup;  
 6 correct?  
 7 **A. It goes with a cost of study service.**  
 8 Q. Including these very costs that San Diego is  
 9 challenging here?  
 10 **A. Yes.**  
 11 Q. Those are laid out and submitted to the board?  
 12 **A. Yes.**  
 13 Q. And the board resolutions, the resolutions that  
 14 the board actually adopts aren't limited to rate  
 15 increases. The board approves the rate structure for  
 16 the next year; isn't that true?  
 17 **A. I don't recall what the resolutions say**  
 18 **specifically.**  
 19 Q. You wouldn't want to leave the impression that  
 20 everything voted on and approved there is a rate  
 21 increase because you just don't recall what the terms of  
 22 the resolution were; is that true?  
 23 **A. I don't recall what the terms of the resolution**  
 24 **are.**  
 25 Q. The allocations of costs which San Diego claims

1035

1 were breaches of contract were the same allocations that  
 2 have been included in Metropolitan's conveyance charges  
 3 since 2003; correct?  
 4 **A. Could you repeat the question?**  
 5 Q. The allocations of costs that San Diego claims  
 6 were breaches of contract, that is the State Water  
 7 Project and the water stewardship charges, were the same  
 8 allocations that had been included in Met's conveyance  
 9 charges since 2003; correct?  
 10 **A. Yes.**  
 11 Q. There was nothing different in 2008 as opposed  
 12 to prior years with regard to how Met allocated State  
 13 Water Project costs; true?  
 14 **A. I believe that's true.**  
 15 Q. There was nothing different in 2008 as opposed  
 16 to prior years as to how Met allocated the water  
 17 stewardship rate; correct?  
 18 **A. Since 2003?**  
 19 Q. Yes.  
 20 **A. Yes.**  
 21 Q. And before San Diego filed this lawsuit you  
 22 never contended, you, sir, never contended to anyone  
 23 outside of San Diego that Met had not complied with the  
 24 exchange agreement; true?  
 25 **A. Prior to when?**

1036

1 Q. Prior to San Diego filing this lawsuit, you  
 2 personally had never contended to anyone outside of San  
 3 Diego that Met had not complied with the exchange  
 4 agreement?  
 5 **A. No. I don't believe I --**  
 6 Q. My statement is correct? I don't want to get  
 7 caught in a double-negative.  
 8 **A. I am just trying to pay attention to your**  
 9 **question.**  
 10 Q. I appreciate that.  
 11 It is true to say that prior to filing this  
 12 lawsuit you never contended to anyone outside of San  
 13 Diego that Met had not complied with the exchange  
 14 agreement; correct?  
 15 **A. Correct.**  
 16 Q. Before 2010 you never contended to anyone  
 17 inside San Diego that Met had not complied with the  
 18 exchange agreement; correct?  
 19 **A. Correct.**  
 20 Q. If we could take a look at Defense Exhibit 794.  
 21 This is not in evidence. It is a letter from  
 22 Miss Stapleton to Mr. Gastelum.  
 23 I hope I'm pronouncing it right.  
 24 MR. QUINN: I don't think there's an objection  
 25 to it, your Honor.

1037

1 MR. PURCELL: We don't have an objection. I  
 2 think this is in evidence or at least the same document  
 3 is, but it can come in.  
 4 THE COURT: 794 is admitted.  
 5 (Exhibit 794 was received in evidence.)  
 6 MR. QUINN: If we can put this on the screen.  
 7 Q. This is a letter from Maureen Stapleton to Ron  
 8 Gastelum dated February 10, 2003; correct?  
 9 A. Yes.  
 10 Q. And they are, Miss Stapleton --  
 11 Will you remind us who Miss Stapleton is and  
 12 Mr. Gastelum was?  
 13 A. **Miss Stapleton was the general manager of the**  
 14 **San Diego Water Authority. And Mr. Gastelum was the**  
 15 **general manager or the president and CEO of the**  
 16 **Metropolitan Water District at the time.**  
 17 Q. Metropolitan's rate structure was unbundled, I  
 18 think you've told us, effective as of January 1, 2003?  
 19 Correct?  
 20 A. Yes.  
 21 Q. This letter was written shortly thereafter in  
 22 February 2003?  
 23 A. Yes.  
 24 Q. In this letter Miss Stapleton conveys a number  
 25 of concerns that San Diego has about proposed rates and

1038

1 charges; do you see that?  
 2 A. Yes.  
 3 Q. And you actually -- I don't want to go through  
 4 this in detail now because I actually read the trial  
 5 transcript of Phase 1, and you were asked about this in  
 6 your testimony during Phase 1; correct?  
 7 A. Yes.  
 8 Q. Do you recall the questions about the only  
 9 thing in here about the -- was that the water  
 10 stewardship rate or the system power rate is positive;  
 11 do you recall that?  
 12 A. **I recall what the letter says under item one.**  
 13 Q. That the only thing said in this letter about  
 14 the system power rate is that it is positive. It says  
 15 the system power rate provides an excellent system of  
 16 rate component transparency; do you see that?  
 17 A. Yes.  
 18 Q. There is nothing in here about these rates  
 19 being illegal, is there?  
 20 MR. PURCELL: Objection. This is asked and  
 21 answered from Phase 1.  
 22 THE COURT: Overruled.  
 23 Go ahead.  
 24 THE WITNESS: No, there's not, not in this  
 25 letter.

1039

1 Q. BY MR. QUINN: Can you identify for me, sir, a  
 2 single document, a single written communication going  
 3 from San Diego to Metropolitan after the rates are  
 4 unbundled effective January 1, 2003, prior to the filing  
 5 of this lawsuit, where San Diego informs Met that San  
 6 Diego believes the rates are unlawful? Can you identify  
 7 a single document?  
 8 A. **Is that right unlawful?**  
 9 Q. Yes.  
 10 A. **Not offhand, no.**  
 11 Q. Have you looked to see if there were any such  
 12 documents?  
 13 A. **No.**  
 14 Q. You know it's an issue in this case that Met  
 15 had asserted an affirmative defense of mistake. There  
 16 was a mistake between the parties, either mutual or  
 17 unilateral, as to the legality of the rate. Are you  
 18 aware of that?  
 19 A. **Yes.**  
 20 Q. Would it be important to find out, knowing  
 21 that, wouldn't it be important to find out whether San  
 22 Diego had given Met notice prior to the unbundling of  
 23 the rates, prior to the filing of this lawsuit, that San  
 24 Diego thought the rates were illegal?  
 25 Wouldn't you want to find out if there was such

1040

1 a written document?  
 2 A. **The words the Water Authority used over the**  
 3 **time to communicate our concerns to Metropolitan, I**  
 4 **don't recall ever using the word "illegal" in written**  
 5 **communications.**  
 6 **It was more improper allocation of State Water**  
 7 **Project supply costs to the wheeling rate. Improper**  
 8 **allocation or misallocation of the water stewardship**  
 9 **rate to the wheeling rate. I don't recall that it said**  
 10 **the illegal misallocation or the unlawful misallocation**  
 11 **of those costs to the wheeling rate.**  
 12 **I simply don't recall that being communicated**  
 13 **in the fashion you've asked.**  
 14 Q. Do you recall it ever being communicated orally  
 15 prior to filing of the lawsuit where San Diego says  
 16 these rates are illegal after unbundling and before the  
 17 filing of this lawsuit?  
 18 A. **That's just not the way we communicated our**  
 19 **concerns. That is less businesslike than the Water**  
 20 **Authority communicates its concerns. I think we said**  
 21 **they were improper, orally. I was not a lead**  
 22 **negotiator.**  
 23 **I am not in a position to say what was**  
 24 **communicated by our negotiators.**  
 25 Q. There is a difference between saying something

1041

1 is improper and something is illegal?  
 2 **A. Sure.**  
 3 Q. Especially when we're talking about --  
 4 **A. It can be.**  
 5 Q. -- a defense of mistake of law and whether or  
 6 not San Diego put Met on notice that the rates were  
 7 illegal. There's a difference; right?  
 8 MR. PURCELL: Objection, your Honor. He is  
 9 asking the witness to draw a legal conclusion.  
 10 THE COURT: I will not take this as a legal  
 11 discussion. This is going to the validity of this  
 12 witness to recall some specific sort of conclusions,  
 13 specific writing, and actually back about four questions  
 14 to whether or not he has looked for certain documents.  
 15 I will allow it in this context.  
 16 You agree there is some distinction between  
 17 those two terms?  
 18 THE WITNESS: Between doing something improper  
 19 and something that's illegal? Yes. There may not be.  
 20 They may be both improper and illegal.  
 21 Q. BY MR. QUINN: In terms of whether San Diego  
 22 put Met on notice that San Diego believed the rates were  
 23 illegal, that's an important distinction in that  
 24 context; would you agree with that?  
 25 **A. Put Met on notice. Can you --**

1042

1 Q. Told Met that San Diego believed the rates were  
 2 illegal?  
 3 THE COURT: I will sustain my own objection to  
 4 that question as argumentative.  
 5 Q. BY MR. QUINN: You testified in response to  
 6 counsel's questions about the language in the exchange  
 7 agreement, which is in evidence as Exhibit 65 -- if we  
 8 can put up on the screen page 16 -- the price term  
 9 counsel called your attention to, language at 4.2 at the  
 10 bottom of page 16.  
 11 **A. It's in the binder.**  
 12 Q. It's in the other binder, their binder.  
 13 MR. PURCELL: Mr. Cushman, it is PTX 51 in the  
 14 other binder, in the Metropolitan binder.  
 15 MR. QUINN: It is up on the screen.  
 16 Q. Do you see the price term, and counsel called  
 17 your attention to that second sentence, "Thereafter the  
 18 price shall be equal to the charge or charges set by  
 19 Metropolitan's board of directors pursuant to applicable  
 20 law and regulation." And then it goes on.  
 21 Do you recall counsel asking you what your  
 22 understanding of that phrase was?  
 23 **A. Yes.**  
 24 Q. And your answer was -- and I jotted this  
 25 down -- that the rates would be lawful; right?

1043

1 **A. Yes.**  
 2 Q. It doesn't say that, does it?  
 3 **A. It says it could be according to applicable --**  
 4 **pursuant to applicable law and regulation.**  
 5 Q. It said it would be set by Metropolitan's board  
 6 pursuant to applicable law and regulation. That is  
 7 different than saying the rates shall be lawful? Would  
 8 you agree there is a distinction between those two?  
 9 **A. Not in my mind.**  
 10 Q. To you, those mean the same?  
 11 **A. Yes.**  
 12 Q. It goes on to say, "And generally applicable to  
 13 the conveyance of water by Metropolitan on behalf of its  
 14 member agencies."  
 15 Do you see that?  
 16 **A. Yes.**  
 17 Q. Is there any instance that you're aware of  
 18 where a similarly situated party to San Diego has been  
 19 discriminated against or treated differently in terms of  
 20 the conveyance that Met charged?  
 21 **A. Metropolitan has developed other transactions**  
 22 **and other agreements to convey water through its**  
 23 **facilities that are different than that.**  
 24 Q. My question is, are you aware of any party that  
 25 is similarly situated to San Diego where Met has charged

1044

1 for transportation differently than the way San Diego  
 2 has been charged?  
 3 **A. Yes.**  
 4 Q. Tell us which ones you are thinking of.  
 5 **A. Metropolitan developed an agreement with Los**  
 6 **Angeles Department of Water and Power to allow LADWP to**  
 7 **use a Metropolitan pipeline -- I believe it's called the**  
 8 **north feeder or the west valley feeder -- to convey**  
 9 **LADWP water through that facility to LADWP customers'**  
 10 **turnouts through a capacity lease agreement between**  
 11 **LADWP and Metropolitan.**  
 12 **That is transporting third-party water, in this**  
 13 **case LADWP water, through a Metropolitan facility in a**  
 14 **manner that's quite different than this and under**  
 15 **financial terms that are quite different from this.**  
 16 Q. You say a manner that is quite different. Is  
 17 that situation on all fours with the situation San Diego  
 18 has under the exchange agreement?  
 19 **A. I don't know the meaning of the phrase "all**  
 20 **fours."**  
 21 Q. Are you saying that Los Angeles, the city of  
 22 Los Angeles, is in the same situation as San Diego is  
 23 under the exchange agreement?  
 24 **A. L.A. wanted to move independent water through a**  
 25 **Metropolitan facility from one point to another point.**

1045

1 **In that case it is very similar to this, this**  
2 **arrangement.**

3 Q. Has San Diego ever asserted that that was a  
4 breach of this provision of the exchange agreement? In  
5 other words, this wasn't something that San Diego was  
6 being discriminated here? This particular term in the  
7 exchange agreement was violated and breached by that  
8 transaction?

9 **A. I believe that agreement predated this**  
10 **agreement.**

11 Q. Right. So let's talk then about agreements,  
12 transactions after the exchange agreement was entered  
13 into.

14 Are you aware of any party that was in the same  
15 situation as San Diego who has been treated, say, worse  
16 off than San Diego has been under the exchange  
17 agreement?

18 **A. No.**

19 Q. And then to go back to that first phrase about,  
20 you know, that the charge or charges set pursuant to  
21 applicable law and regulations, does San Diego contend  
22 that the process, the process by which Met adopted its  
23 rates, that it charges San Diego under the exchange  
24 agreement was illegal or legally improper in any way?

25 **A. You mean like the public notice provisions, the**

1046

1 designated person most knowledgeable, you don't know  
2 whether San Diego would necessarily be better off under  
3 some of those alternative rate structures that  
4 Metropolitan could lawfully adopt; correct?

5 **A. Correct.**

6 Q. There might be other lawful rate structures, as  
7 far as you know, that Met could adopt for conveying  
8 water where San Diego would be worse off; correct?

9 **A. Possibly.**

10 MR. PURCELL: Objection. Foundation.

11 THE COURT: Overruled.

12 MR. QUINN: I'm sorry.

13 THE WITNESS: Possibly.

14 Q. BY MR. QUINN: You just don't know?

15 **A. We don't know.**

16 Q. One thing you do know is that if you move costs  
17 from transportation and put them all onto supply, the  
18 costs of supply, water supply, will go up. You know  
19 that; right?

20 **A. Yes.**

21 Q. And you know that if all these costs, the State  
22 Water Project costs and the water stewardship costs, are  
23 all moved over to supply, San Diego is going to pay more  
24 for water, supply of water; correct?

25 **A. In its purchase of water from Metropolitan,**

1048

1 **public hearing?**

2 Q. Anything about the process by which the rates  
3 were adopted, has San Diego ever contended that there  
4 was something unlawful or wrong about the process?

5 **A. Not the administrative process of rate making,**  
6 **no.**

7 THE CLERK: That last exhibit, was it 51 or 65?

8 MR. QUINN: Sixty-five.

9 Q. You were designated by San Diego as the person  
10 most knowledgeable to testify on various subjects, and  
11 your deposition was taken on those subjects; do you  
12 recall that?

13 **A. Yes.**

14 Q. Among those subjects was breach of contract and  
15 damages; correct?

16 **A. Correct.**

17 Q. As the person designated by San Diego as the  
18 person most knowledgeable to testify on those subjects,  
19 you agree that Met can adopt a variety of different rate  
20 structures that are lawful?

21 **A. Yes.**

22 Q. Including a variety of different rate  
23 structures for conveying water that are lawful?

24 **A. Yes.**

25 Q. And you don't know -- I mean as San Diego's

1047

1 **assuming no other changes, yes.**

2 Q. And did you have any conversations with San  
3 Diego's expert Mr. Denham about his expert work that he  
4 did in this case?

5 **A. Yes.**

6 Q. Did you have any conversations with him about  
7 whether he should run some numbers about what the  
8 increase in San Diego's supply costs would be?

9 **A. Under that scenario, yes.**

10 Q. And what did you tell him on that subject?

11 **A. I said take the water supply -- the State Water**  
12 **Project supply costs and the water stewardship costs**  
13 **that you removed from the transportation rate, now**  
14 **assign them over to the supply rate, and run what we**  
15 **would have paid in the supply costs to Metropolitan from**  
16 **the supplies we purchased from Metropolitan.**

17 Q. Did he do that?

18 **A. Yes.**

19 Q. And do you have any understanding about why he  
20 didn't include that information in his expert report?

21 **A. No.**

22 Q. Did you instruct him not to include that  
23 information in his expert report?

24 **A. No.**

25 Q. Do you know whether anyone instructed him not

1049

1 to include that information in his expert report?  
 2 **A. No.**  
 3 Q. To calculate an overcharge, you have to start  
 4 with the amount that was actually charged, would you  
 5 agree with that?  
 6 **A. Can you repeat the question?**  
 7 Q. To figure out what San Diego was overcharged,  
 8 what its damages are, you have to begin with an  
 9 understanding of what San Diego was actually charged;  
 10 correct?  
 11 **A. Yes.**  
 12 Q. And you have to calculate what San Diego should  
 13 have been charged; correct?  
 14 **A. Yes.**  
 15 Q. And the difference between those two would be  
 16 San Diego's damages; correct?  
 17 **A. The removal of the improper charges from what**  
 18 **we were charged would be the damages.**  
 19 Q. Well, the difference between what you were  
 20 charged and what you should have been charged, that's  
 21 the damages; correct?  
 22 **A. Yes.**  
 23 Q. So you've already said, you've already told us  
 24 that there may be several different lawful rate  
 25 structures that Met could adopt. You just told us that

1050

1 a few moments ago; right?  
 2 **A. Yes.**  
 3 Q. You just don't know what they are; correct?  
 4 **A. Correct.**  
 5 Q. And until you know, until you know what those  
 6 other lawful conveyance rate structures are that Met  
 7 could adopt, you can't calculate San Diego's damages;  
 8 correct?  
 9 **A. No, I don't think so.**  
 10 Q. You can't do it?  
 11 **A. If you removed the illegal charges off the**  
 12 **charges they charged us, that's the damages.**  
 13 Q. Are you now telling us that there are no other  
 14 lawful conveyance rate structures that Met could adopt?  
 15 Are you changing your testimony?  
 16 **A. No, I'm not.**  
 17 Q. Because you told us before, and correct me if  
 18 I'm wrong, that you believe there are such other lawful  
 19 conveyance rate structures Met could adopt; you just  
 20 don't know what they are?  
 21 **A. Correct.**  
 22 Q. If you don't know that, you cannot calculate  
 23 the difference between what San Diego was charged and  
 24 what it could be charged on some of these other lawful  
 25 rate structures which you don't know about; right?

1051

1 **A. Correct.**  
 2 Q. All right. And so until someone actually comes  
 3 up and presents what those alternative lawful conveyance  
 4 rate structures are, we're not in a position to measure  
 5 what San Diego's damages are; right?  
 6 **A. No, I don't agree with that.**  
 7 Q. Because you're telling us now that the only  
 8 lawful structure, your testimony now is the only lawful  
 9 structure that Met could adopt is what it charged minus  
 10 the State Water Project charges and the water  
 11 stewardship rate charges; is that what you're telling  
 12 us?  
 13 **A. No. What I'm telling you is that damages in**  
 14 **this case is what Met charged us for the transportation**  
 15 **and what Met should have charged us for the**  
 16 **transportation. Those are two different figures. And**  
 17 **the difference between those two figures is our estimate**  
 18 **of the damages in this case.**  
 19 **As to the question of could Met adopt all other**  
 20 **transportation rates that could be lawful, the answer to**  
 21 **that question is, yes, they could. Those are two**  
 22 **different questions, in my mind.**  
 23 Q. All right. So you're not a lawyer, I don't  
 24 think.  
 25 **A. No, I'm not.**

1052

1 Q. So you wouldn't know under California law what  
 2 the measure of damages are for a breach of contract  
 3 claim?  
 4 **A. No.**  
 5 Q. And as San Diego's person most knowledgeable,  
 6 and you understand because the Court invalidated Met's  
 7 rates, Met will have to go back and adopt lawful rates,  
 8 some other lawful rate structure, you understand that;  
 9 right?  
 10 **A. That's our expectation.**  
 11 Q. And how Met goes back and adopts lawful rates  
 12 and what rates it adopts is something at this point  
 13 which is unknown; correct?  
 14 **A. Because it's in the future, yes.**  
 15 Q. And also because Met had several different  
 16 alternatives; correct?  
 17 **A. I'm not aware of any other alternatives.**  
 18 Q. You said earlier there are alternative rate  
 19 structures that Met could adopt; do you recall that  
 20 testimony?  
 21 **A. Yes, that Met could adopt.**  
 22 Q. So how San Diego's damages would be affected by  
 23 the Court's ruling in Phase 1 in validating rates is  
 24 unknown until Met goes back and adopts lawful rates;  
 25 correct?

1053

1 MR. PURCELL: Objection. This again calls for  
 2 a legal conclusion.  
 3 THE COURT: Sustained. Why don't we stop here  
 4 and get together again at 1:30. I will see you at 1:30  
 5 sharp.  
 6 (Noon recess.)  
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1054

1 MR. KEKER: Correct.  
 2 MR. QUINN: The issue -- our understanding --  
 3 nobody can remember on our side whether we are required  
 4 to give an order in Phase 1. It was 24 hours' notice.  
 5 My issue with this, your Honor, at this point,  
 6 it is completely asymmetrical. They have three  
 7 witnesses.  
 8 THE COURT: Can you give them a list in order  
 9 today?  
 10 MR. QUINN: That seems unfair to me if that  
 11 wasn't the case in Phase 1, and that's something we  
 12 ought to be able to determine. Because our folks say  
 13 they don't remember that, and Mr. Kecker remembers it.  
 14 Surely, it can be determined.  
 15 If neither side was required to give an order  
 16 in Phase 1, why at this point, if it is so asymmetrical,  
 17 would we change the rule?  
 18 THE COURT: Because it is helpful to plan. You  
 19 are able to plan. We know what his order is and he  
 20 should know what your order is. So we have 24 hours'  
 21 notice and exchange lists in order.  
 22 Let's proceed with the questions.  
 23 MR. KEKER: Your Honor, just one other caveat.  
 24 The witness exclusion order includes them not reading  
 25 the transcript, I assume?

1056

1 San Francisco, California  
 2 March 30, 2015  
 3 1:30 p.m.  
 4  
 5 DENNIS CUSHMAN,  
 6 resumed the stand and testified further as follows:  
 7  
 8 THE COURT: Good afternoon.  
 9 MR. KEKER: Before Mr. Quinn proceeds, could I  
 10 ask the Court to revisit -- you said after lunch we will  
 11 talk about this witness order issue.  
 12 THE COURT: Yes, okay.  
 13 MR. KEKER: And can we get it -- we would like  
 14 an order that they give us forthwith a good-faith  
 15 witness order. And we would remind the Court that in  
 16 Phase 1, over the Metropolitan's objection, we used 48  
 17 hours' notice. We would ask you to order that.  
 18 I beg your pardon. I misspoke. There was an  
 19 order 48 hours --  
 20 A VOICE: Twenty-four hours.  
 21 THE COURT: Let's go off the record for a  
 22 moment. Let's find out.  
 23 (Discussion held off the record.)  
 24 THE COURT: Back on the record. The first  
 25 question --

1055

1 THE COURT: Of course. Although, I say "of  
 2 course." I have heard of a case in which it was not "of  
 3 course," and the attorneys provided the transcripts,  
 4 despite a witness exclusion order to the subsequently  
 5 appearing witnesses. And the judge wasn't -- it wasn't  
 6 me, but the judge was shocked. I'm sure we won't have  
 7 that here. It includes reading transcripts.  
 8 Let's go ahead.  
 9  
 10 CROSS-EXAMINATION (resumed)  
 11 BY MR. QUINN:  
 12 Q. Good afternoon, Mr. Cushman.  
 13 A. **Good afternoon.**  
 14 Q. You told us about the first occasion when Met  
 15 reached the exchange agreement in 2008 when they adopted  
 16 the rates for 2009.  
 17 Do you recall that?  
 18 A. **Yes.**  
 19 Q. Isn't it the case that, when those rates were  
 20 adopted, the party who actually made the motion at Met,  
 21 who approved those rates that you tell us was a breach  
 22 of contract, was San Diego?  
 23 A. **I don't recall.**  
 24 Q. Is there an individual named James Bond -- not  
 25 the Ian Fleming individual -- but is there a person

1057

1 affiliated with San Diego named James Bond?  
 2 **A. Yes.**  
 3 Q. Is he a San Diego delegate on the Met board, or  
 4 has he been?  
 5 **A. He has been in the past.**  
 6 Q. If we can look at Defense Exhibit 71, page 9,  
 7 in evidence, and down there at the bottom you will see  
 8 the motion there.  
 9 "Chairman Bond moved that the water rates  
 10 effective for January 1, shown in the table," et cetera,  
 11 "would be approved."  
 12 Does this refresh your recollection it was  
 13 actually a San Diego delegate that moved the adoption of  
 14 those rates which you contend was the first breach of  
 15 contract?  
 16 **A. Yes, it does. And as a matter of process of**  
 17 **Metropolitan, when committee action items come to the**  
 18 **board of directors at Metropolitan, each committee chair**  
 19 **reports out the recommended action from the committees.**  
 20 **And that's what that reflects.**  
 21 Q. In this case that was a San Diego delegate?  
 22 **A. Yes.**  
 23 Q. Now, during the years 2002 to 2009, was it your  
 24 understanding that San Diego's delegates to the  
 25 Metropolitan board had a fiduciary duty to the board?

1058

1 MR. PURCELL: Objection. Calls for a legal  
 2 conclusion.  
 3 THE COURT: Overruled. Not yet.  
 4 Go ahead.  
 5 THE WITNESS: Yes, I believe they have a duty  
 6 to -- to Metropolitan.  
 7 Q. BY MR. QUINN: Did you have an understanding  
 8 that San Diego's delegates, as part of that fiduciary  
 9 duty, would have a duty to advise the board that  
 10 adopting those rates in 2008 for 2009 would be a breach  
 11 of contract?  
 12 **A. I really don't know.**  
 13 Q. You don't know one way or another?  
 14 **A. No.**  
 15 Q. Was it -- would it be consistent with your  
 16 understanding, and the fiduciary duty which you  
 17 understood that San Diego delegates to the Met board  
 18 had, that they could vote for rates and secretly  
 19 maintain that adopting those rates would be a breach of  
 20 contract by Met?  
 21 MR. PURCELL: Objection. Argumentative.  
 22 THE COURT: Sustained.  
 23 Q. BY MR. QUINN: Do you think it would be  
 24 consistent with your understanding of the fiduciary  
 25 duties that San Diego's delegates to the Met board had

1059

1 to not disclose the fact that they thought adopting  
 2 rates would be a breach of contract?  
 3 **A. I don't know what those directors thought at**  
 4 **that time.**  
 5 Q. So you don't know whether the San Diego  
 6 directors at that time in 2008 thought it would be a  
 7 breach of contract to adopt those rates; is that true?  
 8 **A. I don't know.**  
 9 Q. Do you think that, in your understanding of  
 10 that fiduciary duty, do you believe that San Diego's  
 11 members had a duty to advise the board if they thought  
 12 that the rates that the board was voting on were  
 13 illegal?  
 14 **A. When?**  
 15 Q. At the time they were voting, do you believe  
 16 that if San Diego's delegates on the Met board had a  
 17 belief that the rates were illegal, do you believe that  
 18 consistent with their fiduciary duties they have an  
 19 obligation to advise the board they thought the rates  
 20 being voted on were illegal?  
 21 **A. I don't know what the directors thought at that**  
 22 **time.**  
 23 Q. So you don't know whether or not they thought  
 24 those rates were illegal at the time?  
 25 **A. I don't.**

1060

1 Q. Do you believe it would be consistent with the  
 2 fiduciary duties that the San Diego delegates had in  
 3 your understanding that they could vote for rates  
 4 secretly believing they were illegal and not disclose  
 5 that fact?  
 6 MR. PURCELL: Objection. Argumentative.  
 7 THE COURT: Sustained. Also on relevancy  
 8 grounds, his understanding of what would or would not  
 9 constitute a violation of fiduciary duty probably isn't  
 10 relevant.  
 11 Q. BY MR. QUINN: Well, did you attend these  
 12 meetings yourself, sir, when these rates were voted on,  
 13 say, in 2008 for 2009?  
 14 **A. I don't recall whether I was there at that**  
 15 **time. I attend a lot of meetings at Metropolitan, but I**  
 16 **don't keep records about every meeting I attend.**  
 17 Q. Do you recall in any of the meetings you  
 18 attended at the time of voting on rates that any of the  
 19 San Diego delegates ever said that the rates, if  
 20 adopted, would be a breach of contract or would be  
 21 illegal?  
 22 **A. I don't recall that.**  
 23 Q. Now, this morning you told us that you had  
 24 instructed Mr. Denham to determine how much San Diego's  
 25 water supply costs would go up if these costs we have

1061



1 been discussing were moved from transportation to  
 2 supply. Do you recall that?  
 3 **A. Yes.**  
 4 Q. Tell me if I'm right about this. The reason  
 5 you asked him to do that was because you couldn't give a  
 6 complete picture about what San Diego's damages were  
 7 unless you took that into account.  
 8 **A. No, not exactly.**  
 9 **We had maintained for many, many years that the**  
 10 **costs that we're contesting in this litigation belonged**  
 11 **on the supply rate. And I asked for a calculation of**  
 12 **what that would look like if they moved those costs from**  
 13 **transportation to the supply rate.**  
 14 Q. And would it be true to say that part of the  
 15 reason you asked him to do that was that you thought in  
 16 order to give a fair -- in order to have a fair  
 17 understanding of what the impact on San Diego would be,  
 18 you needed to know how much San Diego's supply costs  
 19 would go up?  
 20 **A. I asked them to look retrospectively at**  
 21 **Metropolitan's rates to calculate what if Met had**  
 22 **adopted -- had rates that moved those costs from the**  
 23 **transportation rates onto the supply rate, what that**  
 24 **would have looked like.**  
 25 Q. And why did you want to know that?

1062

1 **A. Because that's what we have been maintaining**  
 2 **for many years, that those belonged on the supply rate.**  
 3 Q. Why did you -- why did you want to know how  
 4 much the supply rate would go up?  
 5 **A. To understand what the impact would be if Met**  
 6 **adopted those supply rates for all of his member**  
 7 **agencies, how much would we pay for the supply rate**  
 8 **versus how much less we would pay for the transportation**  
 9 **rate.**  
 10 Q. You needed that to get the complete economic  
 11 impact of moving these costs from transportation to  
 12 supply?  
 13 **A. A calculation of those particular years, yes.**  
 14 Q. Do you recall how much historically that  
 15 determination showed that San Diego's supply costs went  
 16 up?  
 17 **A. I don't recall precisely. I think it was on**  
 18 **the magnitude of 15 percent, something along those**  
 19 **lines.**  
 20 Q. This morning on your direct exam I think I  
 21 heard you say that San Diego, as part of the exchange  
 22 agreement and some related agreements, that San Diego  
 23 assumed responsibility for canal lining.  
 24 Do you recall that?  
 25 **A. Yes.**

1063

1 Q. Actually, that was a spectacularly good deal  
 2 for San Diego, wasn't it?  
 3 **A. Yes. We received 80,000 acre feet of water a**  
 4 **year for 110 years, I believe.**  
 5 Q. San Diego had long wanted its own independent  
 6 source of water supply, isn't that true?  
 7 **A. We wanted a reliable supply of water. We could**  
 8 **get reliable supply of water from the single supplier,**  
 9 **but we didn't. And we were pursuing diversifying our**  
 10 **sources of water, including diversifying our sources of**  
 11 **imported water supply.**  
 12 **And the water transfer yield with Imperial**  
 13 **Irrigation District accomplished that. It was higher**  
 14 **priority water on the Colorado River than Metropolitan's**  
 15 **priority on the Colorado River. We accomplished that by**  
 16 **accepting the responsibility for the canal lining**  
 17 **projects, which is also higher reliable supply, the**  
 18 **Colorado River water and the Metropolitan supply of**  
 19 **Colorado River water, so it accomplished it.**  
 20 Q. Are you done?  
 21 **A. Yes.**  
 22 Q. Is it true that San Diego had long sought its  
 23 own independent supply of water?  
 24 **A. Yes.**  
 25 Q. And as part of this deal, San Diego received

1064

1 hundreds of millions of dollars?  
 2 **A. I'm sorry?**  
 3 Q. San Diego received hundreds of millions of  
 4 dollars to accomplish the lining of the canal?  
 5 **A. Yes, from the State of California.**  
 6 Q. As part of this deal, San Diego got the canal  
 7 lining water, the water saved, as a result of that for,  
 8 what, 110 years?  
 9 **A. Correct.**  
 10 Q. I think you said on direct that just this year  
 11 alone it's estimated to be about 80,000 acre-feet of  
 12 water per year?  
 13 **A. Yes.**  
 14 Q. When you say that you assumed that San Diego  
 15 assumed responsibility for lining the canal, that wasn't  
 16 just a favor that San Diego was doing for Met. San  
 17 Diego got some very substantial benefits as a part of  
 18 doing this deal; correct?  
 19 **A. Yes. Many parties I should say got a lot of**  
 20 **benefits.**  
 21 Q. The exchange agreement, the agreement pursuant  
 22 to which the canal lining water was done, this transfer  
 23 we're just talking about were all done as part of the  
 24 same deal essentially?  
 25 **A. In what we broadly refer to as the Colorado**

1065

1 **River Quantification Settlement Agreement in 2003,**  
 2 **there's a specific agreement that's called the**  
 3 **"Quantification Settlement Agreement," but more broadly,**  
 4 **in lay terms, it really refers to a collection of many**  
 5 **agreements.**  
 6 Q. And there was the exchange agreement, that was  
 7 one of them; right?  
 8 **A. Yes.**  
 9 Q. Another one was the quantification settlement  
 10 agreement?  
 11 **A. Yes.**  
 12 Q. Another one was something called an allocation  
 13 agreement?  
 14 **A. Yes.**  
 15 Q. And all these were part of the same  
 16 transaction, essentially?  
 17 **A. Well -- they were signed -- each of the**  
 18 **agreements is distinct and different because they**  
 19 **include different parties. For example, the Water**  
 20 **Authority's transfer agreement with the Imperial**  
 21 **Irrigation District is a two-party agreement. The**  
 22 **exchange agreement between the Water Authority and**  
 23 **Metropolitan is a two-party agreement. The**  
 24 **quantification settlement agreement was a different**  
 25 **agreement that had Metropolitan IID, Coachella and I**

1066

1 **think the Federal Government. Those were individual**  
 2 **agreements.**  
 3 Q. Individual agreements but, for example, in the  
 4 exchange agreement, that price, the \$253 price that San  
 5 Diego agreed to initially, San Diego only agreed to that  
 6 because they knew they were getting the canal lining  
 7 water and a couple million dollars to line the canal;  
 8 right?  
 9 **A. I wouldn't characterize it as that. Water**  
 10 **Authority accomplished a lot of objectives in the**  
 11 **exchange agreement beyond the transportation of the**  
 12 **canal lining water which is in the agreement. The Water**  
 13 **Authority covered -- reduced its risk exposure to the**  
 14 **transportation of the out years of the water transfer,**  
 15 **those last 15 years which were not covered under price**  
 16 **provision in the 1998 exchange agreement. That was**  
 17 **three million acre-feet of water that we had no price**  
 18 **on. That would be a risk exposure for the Water**  
 19 **Authority in those out years.**  
 20 **We were able to bracket our risk exposure in**  
 21 **the exchange agreement to those first five years in**  
 22 **agreeing to the starting price of the \$253, and then all**  
 23 **the rates thereafter.**  
 24 **So we accomplished actually quite a bit in the**  
 25 **exchange agreement.**

1067

1 Q. You already had in place an exchange agreement  
 2 from a few years before; right?  
 3 **A. Yes.**  
 4 Q. And the price in that was considerably lower  
 5 than the \$253; right?  
 6 **A. Yes.**  
 7 Q. And why did San Diego then agree to pay  
 8 substantially more in a new exchange agreement in 2003?  
 9 **A. Because we accomplished those other -- in all**  
 10 **of those objectives in the new exchange agreement. That**  
 11 **included trading 15 years of complete uncertainty as to**  
 12 **what the wheeling rate would be in years 36 through 45**  
 13 **in return for five years of paying whatever rate**  
 14 **Metropolitan asked without being able to challenge it in**  
 15 **the legislature or challenge it in court, but had that**  
 16 **bound risk around 150,000 acre-feet of water rather than**  
 17 **three million acre-feet of water.**  
 18 Q. Among the things you were able to accomplish at  
 19 the time you entered into the exchange agreement was  
 20 also to do this allocation agreement where you got the  
 21 canal lining water and the couple hundred million  
 22 dollars to line the canal?  
 23 **A. I want to be clear. Nobody wrote the Water**  
 24 **Authority a check for \$235 million at the time. We got**  
 25 **the allocation agreement and got the canal lining and**

1068

1 **with that came considerable risk in carrying out the**  
 2 **project, risks that many people at the time understood**  
 3 **would face whichever party constructed the All-American**  
 4 **Canal.**  
 5 **Those risks including risks of getting the**  
 6 **legislature to appropriate any of that \$235 million to**  
 7 **the Water Authority, to reimburse Water Authority for**  
 8 **expenditures on the construction project, engineering**  
 9 **risks of the project of building line canals of that**  
 10 **size and magnitude. The All-American Canal itself is**  
 11 **one of the largest canals in the world. There were**  
 12 **engineering risks of building it through sand dunes,**  
 13 **which were in the eastern-most region of that canal**  
 14 **lining project.**  
 15 **There were environmental risks on the**  
 16 **environmental mitigation and the environmental approvals**  
 17 **for the project. There were litigation risks. There**  
 18 **were a great deal of risks in accepting that project.**  
 19 Q. As I understood your testimony, you thought it  
 20 was a spectacularly good deal for San Diego?  
 21 **A. As you look back and you look at the success we**  
 22 **had in the project and then we secured the 80,000**  
 23 **acre-feet of water per year for 110 years by contract**  
 24 **with the United States Secretary of the Interior, yes,**  
 25 **it was a good deal for the Water Authority.**

1069

1 Q. Let me ask you some questions about the rate  
 2 integrity provision that you were -- contracts that you  
 3 were asked about on direct exam. There was a period of  
 4 time when San Diego was declining to sign agreements  
 5 that had this rate integrity provision in it. Isn't  
 6 that true?  
 7 A. Yes.  
 8 Q. And then there came a point where San Diego  
 9 decided to sign the rate provision contracts that had  
 10 the rate integrity provision in them; correct?  
 11 A. Yes.  
 12 Q. At that time, the Water Authority decided it  
 13 did not intend to litigate MWD's current rate structure;  
 14 correct?  
 15 A. At what time?  
 16 Q. Well, isn't it true --  
 17 Let me ask this question. In 2007, okay, so  
 18 we're six -- we're four years after the exchange  
 19 agreement has been signed. In 2007, isn't it true that  
 20 the Water Authority did not intend to litigate MWD's  
 21 current rate structure?  
 22 A. That's correct. In 2007, it did not.  
 23 MR. QUINN: Let's take a look at Defense  
 24 Exhibit 355. Is this in evidence?  
 25 It's in evidence.

1070

1 Q. This is a San Diego County Water Authority  
 2 document dated April 18, 2007.  
 3 Do you see that?  
 4 A. Yes.  
 5 Q. If we could go to the second page of the  
 6 document and blow up the last part of the -- there's a  
 7 paragraph that begins "At the same time." Blow up the  
 8 last sentence there.  
 9 It says, "The Water Authority does not intend  
 10 to litigate MWD's current rate structure, but it cannot  
 11 know what future actions the MWD board may take since  
 12 the MWD rates are established annually and subject to  
 13 change by the MWD's board of directors."  
 14 Do you see that?  
 15 A. Yes.  
 16 Q. It is true, isn't it, in terms of the  
 17 structure, MWD rate structure, as it relates to these  
 18 transportation charges, was the same in 2007 as it had  
 19 been in 2003; correct?  
 20 A. Yes.  
 21 Q. And the structure was the same in 2008?  
 22 A. Yes.  
 23 Q. 2009?  
 24 A. Yes.  
 25 Q. 2010?

1071

1 A. Yes.  
 2 Q. 2011?  
 3 A. Yes.  
 4 Q. So the structure itself had not changed. In  
 5 each -- each of those periods is still included the  
 6 State Water Project costs, as well as the water  
 7 stewardship rate; correct?  
 8 A. Can you repeat the question?  
 9 Q. Okay. This rate structure that existed in  
 10 2007, San Diego said it didn't intend to litigate. That  
 11 structure in all those years that I just mentioned  
 12 included the State Water Project costs, as well as the  
 13 water stewardship charges; correct?  
 14 A. Yes.  
 15 Q. For each of those years?  
 16 A. Each -- I'm sorry.  
 17 Each of which years?  
 18 Q. All those years from 2003 to 2011.  
 19 A. Yes.  
 20 Q. In fact, to date --  
 21 A. Yes.  
 22 Q. -- the structure has been the same in that  
 23 respect as it relates to the State Water Project and the  
 24 water stewardship; correct?  
 25 A. Yes. And what this memo says is at that time

1072

1 **the Water Authority does not intend to litigate the**  
 2 **rates.**  
 3 Q. Right. And this rate structure integrity  
 4 clause, that is something that when -- for a while, I  
 5 think you told us, San Diego was declining to sign those  
 6 agreements, but then later decided it would sign them  
 7 with those clauses in it; right?  
 8 A. Yes.  
 9 Q. And that is the bargain that San Diego agreed  
 10 to; correct?  
 11 A. San Diego at a point decided to sign those  
 12 agreements and expressed and reserved its objections to  
 13 the legality of the rate structure integrity provision.  
 14 Q. Sir, that is the agreement, the bargain that  
 15 San Diego agreed to; correct?  
 16 A. We signed those agreements with that structure  
 17 integrity provision in it.  
 18 Q. It would be possible to write a clause that  
 19 says you can bring a challenge to our rates, and if you  
 20 win, then the rate structure integrity bar does not  
 21 apply. You could write it that way; would you agree  
 22 with that?  
 23 A. Anyone could write it that way, yes.  
 24 Q. But that's not the deal that these parties  
 25 entered into, is it?

1073

1           **A. No. Metropolitan's language, which was**  
2           **nonnegotiable, said that the mere filing of a challenge**  
3           **would trigger reunification of the rate structure**  
4           **integrity provision.**  
5           Q. Was there any discussion -- did San Diego ask  
6           let's change this provision so that says if we bring a  
7           rate challenge and we prevail, then we will not be  
8           barred from participating in these programs? Did San  
9           Diego ask for that?  
10          **A. There was tremendous discussion around the rate**  
11          **structure integrity provision at Metropolitan leading up**  
12          **to that final language. It was hotly controversial.**  
13          Q. I'm not a clock.  
14          My question is, did San Diego ask for that  
15          term? Did San Diego say, no, let's change this so that  
16          it says if we challenge and we win, we find your rates  
17          are invalid, then we're not subject to this bar? Did  
18          San Diego ask for that?  
19          **A. We expressed our objections throughout the**  
20          **process leading up to the objection -- leading up to the**  
21          **adoption of that language to our objection to the entire**  
22          **concept of a rate structure integrity provision, some**  
23          **provision that would punish an agency for exercising its**  
24          **lawful rights to challenge Metropolitan's rates and**  
25          **whether they were lawful or not.**

1074

1           **We were very clear on that --**  
2           THE COURT: The question is whether you asked  
3           for some specific language that counsel has asked about.  
4           Did you ask for that language?  
5           THE WITNESS: I don't believe we asked for that  
6           language, no.  
7           Q. BY MR. QUINN: Let's turn to preferential  
8           rights. I believe in discovery, in your deposition, you  
9           were designated as the person most knowledgeable  
10          concerning the preferential rights issue?  
11          **A. Yes.**  
12          Q. And as I understand it, San Diego maintains  
13          that the payments it makes under the exchange agreement  
14          should be counted towards its preferential rights; is  
15          that correct?  
16          **A. Yes.**  
17          Q. And as I believe you have said, that San Diego  
18          wants those payments to count towards preferential  
19          rights because, according to you, we are not buying  
20          water from Metropolitan. We're paying the Imperial  
21          Irrigation District for the water supply and getting the  
22          other Colorado River supplies through the lining of the  
23          All-American, Coachella Canals through the allocation  
24          agreement; is that correct?  
25          **A. That's correct.**

1075

1           Q. Let me get the distinction you are making  
2           between buying Metropolitan water and transporting  
3           water, and let's make that clear.  
4           Let's start first with buying Metropolitan  
5           water.  
6           San Diego also buys water from Metropolitan,  
7           does it not?  
8           **A. Yes.**  
9           Q. When it does, it pays the full service rate?  
10          **A. Yes.**  
11          Q. That full service rate consists -- includes a  
12          system access rate, a system power rate, and a water  
13          stewardship rate; correct?  
14          **A. Yes. And it includes a water supply rate.**  
15          Q. Right. These are the same rates -- those are  
16          the same rates that San Diego pays for conveyance under  
17          the exchange agreement; correct?  
18          **A. The three rates that comprise the**  
19          **transportation rate, yes.**  
20          Q. Now, let me show you Plaintiff's Exhibit 357.  
21          MR. QUINN: I am told it is in evidence. I'm  
22          sorry. Exhibit 1130. That is not in evidence.  
23          Q. Do you have that before you, sir?  
24          **A. Yes.**  
25          Q. Can you identify that?

1076

1           **A. It's a Metropolitan invoice to the Water**  
2           **Authority, a monthly invoice.**  
3           MR. QUINN: I offer that into evidence.  
4           MR. PURCELL: No objection.  
5           THE COURT: 1130 is admitted.  
6           (Exhibit 1130 was received in evidence.)  
7           Q. BY MR. QUINN: If we could display that on the  
8           screen.  
9           That has the breakdown for the full service  
10          rates. Do you see that?  
11          **A. Yes.**  
12          Q. One of those components in the full service  
13          rates is transportation; right?  
14          **A. Where it says under "full service" --**  
15          Q. I'm sorry. At the top. It has those rates,  
16          the Tier 1 supply rate, system access rate, water  
17          stewardship rate, system power rate and treatment  
18          surcharge.  
19          Those are all charges that go into that full  
20          service rate; correct?  
21          **A. Yes. And to the extent on the treatment that**  
22          **we were purchasing treated water from Metropolitan.**  
23          Q. When San Diego buys Met water, it pays for  
24          transportation?  
25          **A. It pays all four rates: The supply rate,**

1077

1 **system access rate, water stewardship rate and system**  
 2 **power rate, and, if applicable, the treatment rate.**  
 3 Q. Those payments do not count towards  
 4 preferential rights when you are purchasing full service  
 5 water; correct?  
 6 **A. Correct.**  
 7 Q. In fact, San Diego had claimed that they should  
 8 count towards preferential rights at one point and filed  
 9 a lawsuit about that; correct?  
 10 **A. Yes.**  
 11 Q. And San Diego did not prevail; it lost in that  
 12 lawsuit? Correct?  
 13 **A. Correct.**  
 14 Q. And you understand that the rule is that when  
 15 Met delivers Met water, the costs of conveyance, these  
 16 particular -- including these particular components, do  
 17 not count towards preferential rights; correct?  
 18 **A. I'm sorry. Can you repeat the question?**  
 19 Q. When Met delivers Met water, the cost of these  
 20 components that go into conveyance do not count towards  
 21 preferential rights?  
 22 **A. It does not include them, that's correct.**  
 23 Q. That is true for water from any source,  
 24 including the Colorado River, if you are buying the  
 25 water; correct?

1078

1 **A. Buying Met water, yes.**  
 2 Q. When Met delivers Colorado River water to San  
 3 Diego, the water originates at Lake Havasu?  
 4 **A. That's where Metropolitan takes delivery of**  
 5 **Colorado River water.**  
 6 Q. It is conveyed down the Colorado River  
 7 Aqueduct?  
 8 **A. Yes.**  
 9 Q. And the San Diego payments include the cost of  
 10 conveying the water down that aqueduct?  
 11 **A. Yes.**  
 12 Q. And payments for conveyance down the aqueduct  
 13 don't count towards preferential rights either; correct?  
 14 **A. When we're buying Metropolitan water, they do**  
 15 **not.**  
 16 Q. Let's talk now -- we're talking about buying  
 17 water.  
 18 Now let's turn to the exchange water. The  
 19 exchange water comes out of Lake Havasu, just like all  
 20 the other Colorado River water that San Diego receives;  
 21 correct?  
 22 **A. Yes.**  
 23 Q. And San Diego must pay for the exchange water  
 24 pursuant to the exchange agreement?  
 25 **A. Yes.**

1079

1 Q. The price, we looked at that this morning in  
 2 Section 5.2, includes the price of conveyance like all  
 3 the other Colorado River water that San Diego receives;  
 4 correct?  
 5 **A. It includes three components of the upper rate,**  
 6 **system access rate, system power rate and the --**  
 7 Q. Water stewardship?  
 8 **A. Thank you. Water stewardship rate.**  
 9 Q. Those components are the same whether you are  
 10 buying water or exchanging water, San Diego is paying  
 11 for those components; correct?  
 12 **A. The distinction is there are three rates we are**  
 13 **paying for the transportation service, and there are**  
 14 **four rates that we're paying for untreated Met water.**  
 15 Q. What's the fourth one for untreated Met water?  
 16 **A. Supply rate.**  
 17 Q. Let's set that aside. Those other components,  
 18 San Diego is paying for both of them whether you are  
 19 buying water or exchanging water?  
 20 **A. Yes.**  
 21 Q. For Colorado River water, the conveyance rate  
 22 is the same for both the full service water and the  
 23 exchange water, the conveyance rate being those three  
 24 elements?  
 25 **A. Yes.**

1080

1 Q. But as I understand it, you are saying that  
 2 even though the conveyance is exactly the same for the  
 3 exchange water and the full service water, the Court  
 4 should treat those payments differently for preferential  
 5 rights purposes; is that true?  
 6 **A. Yes.**  
 7 Q. Every member agency that buys full service  
 8 water is paying the same conveyance charge for the same  
 9 conveyance as San Diego pays for its exchange water,  
 10 isn't that true?  
 11 **A. They are paying those three same rates as three**  
 12 **of the components they are paying in the Met water.**  
 13 Q. None of the member agencies who pay the  
 14 conveyance charge for full service water get credit for  
 15 preferential rights, do they?  
 16 **A. No, not the way Met calculates it.**  
 17 Q. You are saying even though the conveyance  
 18 charges for full service and conveyance water are  
 19 composed of the same elements, San Diego should get  
 20 greater preferential rights for exchange water than it  
 21 and everyone else receives for full service water.  
 22 That's what you're saying?  
 23 **A. Yes. There are two different and distinct**  
 24 **services. One is for purchasing water from**  
 25 **Metropolitan. And the second is requiring Metropolitan**

1081

1 **for transportation service to transport independently**  
2 **purchased water supply.**

3 Q. But that transportation service, those charges,  
4 I think you told me a couple of times, they are the same  
5 under both columns, whether you are buying or you're  
6 exchanging; right?

7 **A. Yes.**

8 Q. The preferential rights, that means that each  
9 member agency is entitled to a certain percentage of Met  
10 water?

11 **A. Yes.**

12 Q. And the greater the percentage, the more Met  
13 water that agency is entitled to when there is a  
14 shortage of water?

15 **A. A greater amount at any time.**

16 Q. Is it your position from a preferential rights  
17 standpoint, wheeled water, water which -- or exchange  
18 water should be treated -- strike that.

19 Is it your position that, from a preferential  
20 rights standpoint, wheeled water should be treated the  
21 same as exchange water?

22 **A. Wheeled water -- I don't understand the**  
23 **question. I'm sorry.**

24 Q. Well, if someone wheels water through the Met  
25 conveyance system, do they also get preferential rights

1082

1 rights that you are maintaining that San Diego should  
2 get for exchange water?

3 **A. If that entity is a member agency of**  
4 **Metropolitan, yes, they should.**

5 Q. Because San Diego is exchanging water, it  
6 contends that its payments are for conveyance -- San  
7 Diego maintains that its conveyance of -- because it's  
8 paying for conveyance, it gets to increase its  
9 preferential rights --

10 **A. Yes.**

11 Q. -- essentially?

12 Whenever San Diego's percentage -- and  
13 preferential rights is expressed as a percentage. Is  
14 that how it works?

15 **A. Metropolitan does a calculation once a year**  
16 **after it recalculates all the contributions made to**  
17 **Metropolitan, including changes in property tax**  
18 **assessments, and it produces a chart that shows not only**  
19 **percentages but total dollars paid into Metropolitan in**  
20 **the aggregate over all time.**

21 Q. But if San Diego's percentage of claim on  
22 preferential rights expressed as a percentage goes up,  
23 then that of some other agency has to go down. Does  
24 that follow?

25 **A. There would be a recalculation of all 26 of**

1084

1 because they wheeled water through the Met conveyance  
2 system?

3 **A. Well, only Metropolitan member agencies have**  
4 **preferential rights. There have been instances where**  
5 **Met has wheeled water for entities that aren't member**  
6 **agencies of Metropolitan, and they don't have**  
7 **preferential rights.**

8 Q. Suppose one of the agencies, one of the member  
9 agencies, wheels water through the Met conveyance  
10 system. Do they also get preferential rights for doing  
11 that?

12 **A. Not the way Metropolitan calculates that, no.**

13 Q. Do you have any issue with that? Is it San  
14 Diego's position that someone who just simply wheels  
15 water through Met's conveyance system should get credit  
16 for preferential rights for that water that's wheeled?

17 **A. We and that agency should be treated the same.**  
18 **And, yes, they should get credit to the preferential**  
19 **rights.**

20 **If they are transporting independently**  
21 **purchased water supply, they are not buying from**  
22 **Metropolitan.**

23 Q. You are saying from a preferential rights  
24 standpoint, some agency that merely wheels through the  
25 conveyance system should get the same preferential

1083

1 **Metropolitan's member agencies' preferential rights.**

2 Q. Isn't it true that every other member agency is  
3 helping to pay for the conveyance system through the  
4 full service rate?

5 **A. Yes.**

6 Q. But their preferential rights aren't changed  
7 based on the conveyance charges they pay?

8 **A. Correct. Not as Metropolitan calculates it.**

9 Q. But you claim San Diego's contention, that when  
10 San Diego is transporting non-Met water, then San  
11 Diego's preferential rights should go up?

12 **A. Yes.**

13 Q. Let's discuss whether the exchange agreement  
14 is, in fact, transportation. Do you believe that under  
15 the exchange agreement all San Diego gets is  
16 transportation? That's all it gets?

17 **A. I'm not sure I understand what you're after.**

18 Q. I mean, one of the things that San Diego  
19 clearly gets is this -- you have got the rights to this  
20 water up at Lake Havasu. You told us San Diego didn't  
21 have its own conveyance system. One of the things that  
22 San Diego gets under this is that water gets credit, get  
23 exchanged for water, then downward San Diego can use it.

24 **A. I'm sorry.**

25 **Yes, correct.**

1085

1 Q. But san Diego gets some other benefits from  
 2 that agreement. It's not just transportation. Isn't  
 3 that true?  
 4 A. **Possibly. I -- it's fundamentally a**  
 5 **transportation agreement. That's the key element for**  
 6 **San Diego. It contains a lot of different provisions in**  
 7 **it. What we went to Metropolitan for was transportation**  
 8 **service to move the water to San Diego.**  
 9 Q. If all that was happening was water was being  
 10 transported, the molecules were being transported, then  
 11 you'd have a wheeling agreement; right?  
 12 A. **Not necessarily.**  
 13 Q. That would be -- that is one description of a  
 14 wheeling agreement? If you are just transporting the  
 15 same water from one place to another place, that would  
 16 be a wheeling agreement; right?  
 17 A. **It can be, certainly. But Metropolitan wanted**  
 18 **to characterize this as an exchange agreement.**  
 19 Q. It's true that, back in 1995, when San Diego  
 20 first acquired IID water, San Diego tried to reach an  
 21 agreement for wheeling with Met? Do you recall that?  
 22 A. **Yes.**  
 23 Q. And the 1995 transfer agreement between San  
 24 Diego and IID was, in fact, contingent on a wheeling  
 25 agreement being put in place; correct?

1086

1 A. **I don't recall. I wasn't there at the time.**  
 2 Q. San Diego -- you know that San Diego and  
 3 Metropolitan never agreed to a wheeling agreement. In  
 4 1998, they agreed to an exchange agreement. Right?  
 5 A. **That's what it's called, yes.**  
 6 Q. They amended and restated that exchange  
 7 agreement in 2003?  
 8 A. **Yes.**  
 9 Q. At a much, much higher price?  
 10 A. **At a higher price.**  
 11 Q. Well, what was it in the 1998 agreement? Was  
 12 it like a \$90 number?  
 13 A. **Yes, \$90.**  
 14 Q. 2003 it was the \$253 number?  
 15 A. **That was the start pricing, yes.**  
 16 Q. Under the earlier agreement, for the first 30  
 17 years, the price could only go up by certain defined  
 18 amounts?  
 19 A. **It had -- I can't remember -- there's a first**  
 20 **duration where it started at 90, escalated by an index,**  
 21 **if you will.**  
 22 Q. Right.  
 23 A. **And then it reset and went up to 80, I think,**  
 24 **and escalated at a different percentage index rate.**  
 25 Q. There was a defined index in that earlier

1087

1 agreement; right?  
 2 A. **I think it's in there as a schedule, but I**  
 3 **don't recall.**  
 4 Q. The 2003 agreement, there is no index?  
 5 A. **That's correct.**  
 6 Q. There is nothing in the 2003 agreement other  
 7 than the terms that we've looked at and the price term  
 8 that sort of says the agreement -- the price can only go  
 9 up by a certain amount each year; there's nothing in  
 10 there?  
 11 A. **That is correct.**  
 12 Q. Like there was in the earlier agreement?  
 13 A. **Correct.**  
 14 Q. So between 1998 and 2003 San Diego agreed to  
 15 pay a considerably higher price and agreed to a price  
 16 term which wasn't indexed; correct?  
 17 A. **Yes.**  
 18 Q. I don't want to talk about all the differences  
 19 between wheeling water and exchanging water, but I just  
 20 want to focus for a minute on the 2003 exchange  
 21 agreement terms regarding quantity and timing of  
 22 delivery. Okay?  
 23 A. **Okay.**  
 24 Q. In a pure wheeling transaction, no water is  
 25 delivered until the wheeler makes it available; correct?

1088

1 A. **The transaction begins when the entity that's**  
 2 **wheeling it starts taking delivery of the molecules.**  
 3 Q. Right. Takes delivery of the molecules and  
 4 wheels them through a transport system?  
 5 A. **Right.**  
 6 Q. And the amount of water delivered under a pure  
 7 wheeling agreement is the amount that the wheeler has  
 8 made available to be transported; right?  
 9 A. **Presumably it would depend on whatever the**  
 10 **terms of the particular agreement said. For instance,**  
 11 **there are transfers where you take carriage losses. And**  
 12 **the amount that you received, the net amount at the end**  
 13 **of the transfer, is less than the amount that it started**  
 14 **with. So it might be a different quantity, and it would**  
 15 **be a different quality in some respects.**  
 16 Q. Carriage loss might include evaporation or  
 17 seeping into the ground, things like that?  
 18 A. **Yes. And environmental losses necessary to**  
 19 **support the environment.**  
 20 Q. But setting those aside, in a pure wheeling  
 21 agreement, the amount of water that's delivered is the  
 22 amount that the wheeler has made available, subject to  
 23 any of these losses that you referred to?  
 24 A. **Well, they could have different terms. I -- I**  
 25 **honestly don't understand the description of a pure**

1089

1 **wheeling agreement. I don't understand.**  
 2 Q. The idea is that someone who is a wheeler makes  
 3 water available, and they want to have it transported,  
 4 so they make it available at one end of the pipe and  
 5 want to have it transported to the other end of the  
 6 pipe.  
 7 **A. Each wheeling transaction is typically going to**  
 8 **have an agreement that specifically the things that you**  
 9 **mentioned: Losses --**  
 10 Q. Right.  
 11 **A. -- water quality, timing, when the water can be**  
 12 **moved, when the restrictions on -- other restrictions on**  
 13 **conveyance might be in place and can't move, what would**  
 14 **happen if it were interrupted. Those are typically**  
 15 **detailed in agreements.**  
 16 Q. If San Diego were wheeling water, if San Diego  
 17 had a deal with Met where they were just wheeling water  
 18 from Lake Havasu to San Diego's pipes in San Diego  
 19 County, nothing would move unless and until San Diego  
 20 had water to wheel; correct?  
 21 **A. Correct.**  
 22 Q. And that's not what happened under the exchange  
 23 agreement, is it?  
 24 **A. We have an agreement where water is made**  
 25 **available to Metropolitan under the terms of the**

1090

1 **exchange agreement, and Metropolitan makes a like amount**  
 2 **and a like quality of that water available at the Water**  
 3 **Authority's service area. It doesn't happen**  
 4 **instantaneously.**  
 5 Q. And it's more than that, isn't it? The  
 6 exchange agreement requires that Met deliver water in 12  
 7 equal monthly installments; right?  
 8 **A. Correct.**  
 9 Q. And Met is required to deliver water in 12  
 10 equal monthly installments regardless of the amount,  
 11 regardless of the amount that San Diego actually makes  
 12 available. Isn't that true?  
 13 **A. It is reconciled with the amount of water San**  
 14 **Diego makes available, but the agreement between the**  
 15 **Water Authority and Metropolitan requires equal**  
 16 **deliveries in 1/12th increments over the course of a**  
 17 **calendar year.**  
 18 Q. When you say it is reconciled, that means after  
 19 the fact there's a reconciliation that is done?  
 20 **A. Yes. The United States Bureau of Reclamation**  
 21 **approves water orders before the calendar year and then**  
 22 **reconciles what water was delivered or taken out after**  
 23 **the conclusion of the calendar year. There is a before**  
 24 **approved order and later on a reconciliation.**  
 25 Q. Unlike a pure wheeling agreement, where no

1091

1 water is delivered until water is made available,  
 2 actually, under the exchange agreement, the 2003  
 3 exchange agreement, one of the benefits that San Diego  
 4 had is that Met is committed to deliver water in 12  
 5 equal amounts, without regard to what San Diego has made  
 6 available, isn't that true?  
 7 **A. Yes.**  
 8 Q. So if the IID, for example, transferred no  
 9 water to San Diego in a particular month, say April, Met  
 10 would still have to deliver and it would simply be  
 11 deemed that the exchange water was made available at  
 12 Lake Havasu whether, in fact, a like quantity was made  
 13 available by San Diego; correct?  
 14 **A. I believe that's correct.**  
 15 Q. And it may happen that the amount IID can  
 16 deliver to San Diego, and accordingly the amount that  
 17 San Diego could exchange with Met, is substantially less  
 18 than San Diego agreed or projected; correct?  
 19 **A. I'm not sure I understand the question. Could**  
 20 **you repeat it?**  
 21 Q. In any given month San Diego may have no IID  
 22 water to exchange.  
 23 **A. That's possible.**  
 24 Q. Nonetheless, under the exchange agreement, Met  
 25 still has to deliver the quantity specified; true?

1092

1 **A. Yes.**  
 2 Q. And that would never happen under a pure  
 3 wheeling contract where there's no water delivered until  
 4 there's water made available at the other end of the  
 5 pipe?  
 6 MR. PURCELL: Objection. Calls for  
 7 speculation.  
 8 THE COURT: Overruled.  
 9 THE WITNESS: In other wheeling transactions,  
 10 no, that would not happen.  
 11 Q. BY MR. QUINN: If IID water is not made  
 12 available, San Diego will still get its water just like  
 13 it will get the water that it buys from them; right?  
 14 **A. I'm sorry. Can you repeat that?**  
 15 Q. If IID water is not made available, San Diego,  
 16 in the exchange agreement, will still get for any given  
 17 month that 1/12th that Metropolitan has committed to  
 18 deliver; correct?  
 19 **A. Yes.**  
 20 Q. Just like it would if it were buying water from  
 21 Met, it gets that quantity of water?  
 22 **A. If we buy water from Met, and Met has it**  
 23 **available, Met makes it available.**  
 24 Q. So isn't it true, would you agree, sir, that  
 25 San Diego, under the exchange agreement, is paying for

1093



1 more than just transporting water?  
 2 **A. No.**  
 3 Q. If you were only transporting water that San  
 4 Diego owned, if that's all you were doing, you wouldn't  
 5 have a commitment that Met would deliver water to San  
 6 Diego even if San Diego didn't deliver it to be wheeled,  
 7 would you?  
 8 **A. It depends on the terms of the agreement. But**  
 9 **in many instances, no.**  
 10 Q. I mean, it is true that San Diego has wheeled  
 11 water?  
 12 **A. Yes.**  
 13 Q. And let's look at how San Diego is billed for  
 14 water. Met charges each month, isn't that true, for all  
 15 the water it delivers and gives a credit for the  
 16 exchanged water that San Diego makes available?  
 17 **A. Yes.**  
 18 MR. QUINN: And here's an example. Let's take  
 19 a look at Defense Exhibit 1130. It is an invoice. I  
 20 understand this is in evidence.  
 21 Any objection?  
 22 MR. PURCELL: No. I think we just looked at  
 23 this.  
 24 THE COURT: You did just look at it.  
 25 MR. QUINN: I am offering it.

1094

1 MR. PURCELL: I think it's in, but we don't  
 2 have any objection.  
 3 THE COURT: 1130 is admitted.  
 4 Q. BY MR. QUINN: So what happens -- this is an  
 5 example of a -- can you describe for us what this is,  
 6 sir?  
 7 **A. That's one page of a monthly invoice from**  
 8 **Metropolitan to the Water Authority.**  
 9 Q. And it sort of indicates on there, Met  
 10 indicates the amounts delivered and the charges for it;  
 11 right?  
 12 **A. Yes.**  
 13 Q. And then a credit for exchange water?  
 14 **A. Yes.**  
 15 Q. So the exchange water in effect is like a  
 16 trade-in. Met delivers water and charges the full  
 17 service rate, and then gives a credit for the water that  
 18 San Diego trades in. Isn't that accurate?  
 19 **A. Yes.**  
 20 Q. That's how it works?  
 21 **A. That is how they treat it on the invoice, yes.**  
 22 Q. And isn't it true that there was a time when,  
 23 in fact, San Diego didn't have the exchange water that  
 24 it was supposed to have?  
 25 **A. Yes.**

1095

1 Q. If we could look at Defense Exhibit 256, which  
 2 I'm told is in evidence. It is a letter from Met to San  
 3 Diego. This is a notice of default.  
 4 Do you see that?  
 5 **A. I do.**  
 6 Q. And this is an instance where San Diego didn't  
 7 have the exchange water it was supposed to have. You  
 8 are familiar with this?  
 9 **A. Yes, I am.**  
 10 Q. What happened here is that San Diego ended up  
 11 paying the full service rate; correct?  
 12 **A. Yes.**  
 13 Q. Just like it had purchased the water without  
 14 any trade-in or credit for exchange water; correct?  
 15 **A. Yes.**  
 16 Q. So I mean, if you don't have water to exchange,  
 17 then you are purchasing; right? That's what happened  
 18 here?  
 19 **A. Yes.**  
 20 Q. And purchased water is excluded from  
 21 preferential rights?  
 22 **A. Right. On the way Met calculates it.**  
 23 MR. QUINN: I have nothing further.  
 24 Thank you.  
 25 THE COURT: Redirect.

1096

1 REDIRECT EXAMINATION  
 2 BY MR. PURCELL:  
 3 Q. PTX 65, if we can go to the price terms on  
 4 pages 16 and 17.  
 5 Mr. Cushman, specifically at the bottom of page  
 6 16, do you recall Mr. Quinn's questions about the  
 7 meaning of the term "charges set by the Metropolitan's  
 8 board of directors pursuant to applicable law and  
 9 regulation"?  
 10 **A. Yes.**  
 11 Q. Did the Water Authority bargain only for  
 12 procedural protections relating to the procedure at  
 13 Metropolitan's board in this term?  
 14 **A. No.**  
 15 Q. Would that have provided the Water Authority  
 16 with any legitimate, meaningful protection regarding  
 17 unlawful rates?  
 18 **A. No. Metropolitan could go through the public**  
 19 **noticing process to set rates and adopt completely**  
 20 **unlawful rates.**  
 21 Q. I would like to talk a little bit about the  
 22 board delegate votes on Metropolitan's yearly rate  
 23 increases. Does the Water Authority have an interest in  
 24 the amount of periodic Met rate increases?  
 25 **A. Yes.**

1097

1 Q. Why is that?

2 **A. Because the Metropolitan water rate is the**

3 **single largest input into what the Water Authority's**

4 **rates are to its member agencies. So whatever rate**

5 **increases Metropolitan adopts can have a profound impact**

6 **on the rates that the Water Authority subsequently**

7 **adopts and charges our 24 member agencies.**

8 Q. Does the Water Authority's interest in the

9 amount of periodic rate increases exist no matter what

10 rate structure is in effect?

11 **A. Yes.**

12 Q. Was there any way for Water Authority board

13 delegates in 2008 or 2009 to cast votes, yeah or nay, on

14 the annual rate increases but oppose the rate structure?

15 **A. No.**

16 Q. Is there any alternative rate structure

17 proposal on the table in 2008?

18 **A. No.**

19 Q. And at the Metropolitan board in 2009, was

20 there an alternative rate proposal structure on the

21 table?

22 **A. No.**

23 Q. In 2008 or 2009 at the Metropolitan board, were

24 there any alternative allocations the State Water

25 Project costs on the table?

1098

1 charged its State Water Project costs to its

2 transportation rates?

3 **A. No.**

4 Q. This is just for clarification. I apologize.

5 Do you recall when Mr. Quinn was asking you

6 about calculating the increase in supply costs to San

7 Diego resulting from reallocation of the State Water

8 Project?

9 **A. Yes.**

10 Q. I believe you said the increase would be about

11 15 percent?

12 **A. Yes.**

13 Q. And so the question is 15 percent of what?

14 What would the increase apply to?

15 **A. It would have increased in those years the**

16 **calculation was done on it. If Metropolitan had adopted**

17 **those supply rates, the Water Authority's supply**

18 **purchase costs at Metropolitan would have gone up by**

19 **about 15 percent.**

20 Q. That would have been on purchases of Met water?

21 **A. Yes.**

22 MR. PURCELL: Nothing further.

23 THE COURT: Recross.

24 /

25 //

1100

1 **A. No.**

2 Q. During those board years at Met, was there any

3 alternative allocation of water stewardship proposals on

4 the table?

5 **A. No.**

6 Q. Have you seen anything -- since Metropolitan

7 adopted the alternative rate structure, have you seen

8 anything in any Metropolitan document proposing an

9 alternative rate structure?

10 **A. No.**

11 Q. In your instructions to Mr. Denham, is there

12 basis in anything Metropolitan has generated that would

13 allow the Water Authority to calculate some alternative

14 damage amount based on some alternative rate structure?

15 **A. No.**

16 Q. You were asked whether San Diego could have

17 been charged even more under some alternative rate

18 structure. Do you recall that?

19 **A. Yes.**

20 Q. Are you aware of any rate structure proposal

21 consistent with cost causation principles that would

22 have charged San Diego more money?

23 **A. No.**

24 Q. Are you aware of any way, consistent with cost

25 causation principles, that Metropolitan could have

1099

1 **RECCROSS-EXAMINATION**

2 **BY MR. QUINN:**

3 Q. Is it your testimony that a member of the Met

4 board cannot make a motion, propose a different rate or

5 rate structure, that they can't do that?

6 **A. No.**

7 Q. Is there anything in the exchange agreement

8 that required the San Diego delegates to vote in favor

9 of the rate structures and rate increases we have been

10 talking about?

11 **A. No.**

12 MR. PURCELL: Objection. Foundation.

13 THE COURT: Overruled.

14 THE WITNESS: No.

15 Q. BY MR. QUINN: Is it true that board members

16 can put other options on the table, different rate

17 structures, and make proposals for consideration of the

18 board? Isn't that true?

19 **A. Yes.**

20 Q. I think you have been candid that you yourself

21 don't put yourself out as a rate-making expert?

22 **A. Correct.**

23 THE COURT: Off the record.

24 (Discussion held off the record.)

25 THE COURT: Why don't we call our next witness.

1101

1 We will go for about 15 minutes.  
 2  
 3 DAN DENHAM,  
 4 called as a witness by the Plaintiff, was sworn and  
 5 testified as follows:  
 6  
 7 MS. HADLOCK: The Water Authority calls Dan  
 8 Denham.  
 9 THE WITNESS: I do.  
 10 THE CLERK: Thank you. Please be seated.  
 11 THE WITNESS: My name is Dan Denham. D-A-N  
 12 D-E-N-H-A-M.  
 13  
 14 DIRECT EXAMINATION  
 15 BY MS. HADLOCK:  
 16 Q. Hello, Mr. Denham. Could you tell us how you  
 17 are currently employed?  
 18 A. **I am currently the Colorado River program**  
 19 **director at the San Diego County Water Authority.**  
 20 Q. You testified in this case before about a  
 21 year-and-a-half ago; correct?  
 22 A. **Yes, I did.**  
 23 Q. Has anything about your role at the Water  
 24 Authority changed since you were last testifying?  
 25 A. **Back then I was the active director of the**

1102

1 **Colorado River program, and my role in the -- as the**  
 2 **chief administrative officer of the QSA Joint Powers**  
 3 **Authority has slightly changed. I am now an alternate**  
 4 **commissioner, essentially being an outvoting member now.**  
 5 Q. Can you tell us briefly what types of work you  
 6 have done at the time at the Water Authority that  
 7 involved finance analysis and modeling?  
 8 A. **Yes. So my role as the director of the**  
 9 **Colorado River program involves responsibility of all of**  
 10 **the economic aspects related to the QSA transfers and**  
 11 **canal lining projects. So this is roughly a quarter of**  
 12 **our current supply portfolio; potentially it will be a**  
 13 **third.**  
 14 **In addition to those responsibilities, I work**  
 15 **pretty closely with our finance department on the Water**  
 16 **Authority's own rates and charges, rate modeling and**  
 17 **debt issuance.**  
 18 Q. Do you also have, though, experience other than  
 19 for the Water Authority with financial analysis and  
 20 modeling?  
 21 A. **Yes, I do.**  
 22 **Prior to the Water Authority I was the finance**  
 23 **rates and bonds manager for the City of San Diego**  
 24 **Metropolitan Wastewater Department.**  
 25 **Prior to that, on a more microlevel, for the**

1103

1 **City of San Diego, as well, I was the capital**  
 2 **improvements program coordinator, essentially**  
 3 **responsible for coordinating all capital projects within**  
 4 **the City.**  
 5 Q. And what's your educational background?  
 6 A. **I have a bachelor's degree in public**  
 7 **administration, a minor in economics, and a master's**  
 8 **degree in public administration with a concentration in**  
 9 **public finance.**  
 10 Q. When you testified in December 2013, can you  
 11 remind us the gist of that testimony about Met's  
 12 transportation rates?  
 13 A. **Yes. I was able to conclude that the range you**  
 14 **see on the screen of \$232 to \$315 per acre-foot were**  
 15 **overcharged for transportation services.**  
 16 Q. You have also been asked to calculate San  
 17 Diego's damages under the exchange agreement for the  
 18 year 2011 to 2012. Based on what you have calculated,  
 19 Metropolitan is overcharging?  
 20 A. **Yes, I have. I have calculated those damages**  
 21 **as \$188,295,602 under the exchange agreement.**  
 22 Q. Because it's been a while, let's briefly  
 23 summarize the analysis you already gave in  
 24 December 2013. Can you remind us what process you used  
 25 to determine corrected Metropolitan transportation

1104

1 rates?  
 2 A. **Absolutely.**  
 3 **So the Court recalls, as part of approving --**  
 4 **or as part of Metropolitan's board's approved rates and**  
 5 **charges, there is a cost of service study that supports**  
 6 **those rates and charges. I was able to take a look at**  
 7 **those documents, determine -- identify revenue**  
 8 **requirements for the State Water Project and local water**  
 9 **supply development, reallocate those revenue**  
 10 **requirements for the system access, system power and**  
 11 **water stewardship rate. Removed those components, those**  
 12 **supply components out of the transportation rate, and**  
 13 **recalculated the transportation rate based on the sales**  
 14 **assumption contained in the cost of service report.**  
 15 Q. So you were working with Met's cost of service?  
 16 A. **That's correct.**  
 17 Q. And the specific rates, just to be crystal  
 18 clear, you removed State Water Project costs from which  
 19 rates?  
 20 A. **The system access rate and system power rate.**  
 21 **And then I completely removed the water stewardship rate**  
 22 **from the transportation rate.**  
 23 Q. I would refer the Court to Mr. Denham's more  
 24 detailed analysis about that process, and just ask,  
 25 Mr. Denham, was there anything about that analysis you

1105

1 conducted, would it be different if you gave the same  
 2 testimony today?  
 3 **A. No, nothing has changed.**  
 4 THE COURT: When you say you refer me, you are  
 5 referring to the record in the first trial?  
 6 MS. HADLOCK: Yes. Yes, the Phase 1 testimony  
 7 that Mr. Denham gave.  
 8 Q. And you said in addition to calculating those  
 9 corrected rates, you were asked to calculate how much  
 10 Metropolitan has overcharged the Water Authority for  
 11 transporting water under the 2003 agreement from the  
 12 years 2011 through '14; correct?  
 13 **A. That's correct.**  
 14 Q. Are you offering opinions about what rates are  
 15 lawful or unlawful here?  
 16 **A. I am not.**  
 17 Q. Have you prepared a spreadsheet reflecting your  
 18 analysis and calculations of the amount of San Diego  
 19 damages under the exchange agreement?  
 20 **A. Yes, I have.**  
 21 Q. We'll walk through those calculations year by  
 22 year. Let's --  
 23 We have Exhibit PTX 471 on the screen. You  
 24 also have that in your binder, the first document in the  
 25 small binder in front of you.

1106

1 Can you explain what PTX 471 is?  
 2 **A. Yes. PTX 471 is an Excel workbook that I**  
 3 **developed based on actual exchange volumes. And the**  
 4 **exchange volume being the Water Authority's QSA**  
 5 **supplies, the IID transfer, and the canal lining**  
 6 **projects. This is based on actual Metropolitan invoices**  
 7 **from the period 2011 through '14. Those are separated**  
 8 **by month alongside the actual charges contained in those**  
 9 **invoices.**  
 10 Q. We will walk through that a little more step by  
 11 step.  
 12 To clarify, you mentioned QSA supplies. Is  
 13 that another phrase for the water that is delivered  
 14 under the exchange agreement?  
 15 **A. All of the Water Authority QSA supplies are**  
 16 **delivered under the exchange agreement.**  
 17 Q. Looking at the exhibit up on the screen, if you  
 18 look at the column headed "Exchange Volume," is that the  
 19 exchange volume you just described?  
 20 **A. Yes. The exchange volume, it is highlighted**  
 21 **there in yellow, is the QSA supplies I mentioned.**  
 22 Q. And that's month-by-month data from  
 23 January 2011 to December 2013, the highlighted column?  
 24 **A. The entire workbook goes to December '14, but**  
 25 **yes.**

1107

1 Q. And where specifically did you assemble these  
 2 exchange volume figures from?  
 3 **A. The exchange volume figures reflect the**  
 4 **compilation of invoices from Metropolitan during that**  
 5 **period.**  
 6 Q. And you -- is the information in the column  
 7 headed "Exchange Volume" an accurate summary of  
 8 information that you gathered from those records?  
 9 **A. Yes, it is.**  
 10 Q. Turning now to Exhibit PTX 469, can you take a  
 11 look at that? This one is in a binder, the largest  
 12 binder, a four-inch binder next to you. Can you tell us  
 13 what's contained in PTX 469?  
 14 **A. Yes. This appears -- it does represent the**  
 15 **invoices that allowed me to calculate the volumes on the**  
 16 **previous exhibit.**  
 17 MS. HADLOCK: We would move PTX 469 into  
 18 evidence. It's the large binder.  
 19 THE COURT: The obvious question is whether the  
 20 summary is going to be contested. If it is not, you  
 21 just move the summary in, as far as I'm concerned.  
 22 We can do it either way. Do you know if you  
 23 contest the summary or not?  
 24 MS. HADLOCK: Will you have objections?  
 25 MR. QUINN: We have no objection.

1108

1 THE COURT: To the summary?  
 2 MR. QUINN: No objection to the summary.  
 3 MS. HADLOCK: Then we'll move the summary in.  
 4 THE COURT: PTX 471?  
 5 MS. HADLOCK: Yes.  
 6 THE COURT: 471 is admitted.  
 7 (Exhibit 471 is received into evidence.)  
 8 MS. HADLOCK: We would like to move 469 in.  
 9 THE COURT: What do you think I would do with  
 10 that? The trees have already been slaughtered.  
 11 MS. HADLOCK: We can leave it out.  
 12 THE COURT: We are here already. Any objection  
 13 to 469?  
 14 MR. QUINN: No objection.  
 15 THE COURT: 469 is also admitted.  
 16 (Exhibit 469 was received into evidence.)  
 17 Q. BY MS. HADLOCK: Did you use any other  
 18 documents besides the Metropolitan invoices in gathering  
 19 the exchange volume and charges information in PTX 471?  
 20 **A. What's called official decree accounting from**  
 21 **the U.S. Bureau of Reclamation, oftentimes that may**  
 22 **differ only slightly from the Metropolitan bills.**  
 23 **So, yes, I did refer back to that as the**  
 24 **official Colorado River accounting.**  
 25 Q. If you turn to the middle binder, the

1109

1 medium-size binder, Volume II, you will see PTX 314  
 2 through 430. Are you in that binder? Can you tell us  
 3 what those are?  
 4 **A. These reports represent the reference I was**  
 5 **making to official decree accounting. They are issued**  
 6 **typically in May of each calendar year, and represent**  
 7 **the -- like I said, the official accounting of Colorado**  
 8 **River water.**  
 9 MS. HADLOCK: We would move PTX 314 through PTX  
 10 423 into evidence.  
 11 THE COURT: This is 314 through 323, but not  
 12 through 430. So only 314 through 323 are admitted  
 13 without objection.  
 14 MS. HADLOCK: And the next exhibit is PTX 430,  
 15 which is another of the same.  
 16 Any objection to that one?  
 17 (Exhibits 314 through 323 were received  
 18 into evidence.)  
 19 THE COURT: Any objection to that?  
 20 MR. QUINN: No objection.  
 21 THE COURT: Similar format, PTX 430 is  
 22 admitted.  
 23 (Exhibit 430 was received into evidence.)  
 24 Q. BY MS. HADLOCK: Looking back at PTX 471, and  
 25 just to be clear, the "Actual Charges" column in this

1110

1 document, what does that show?  
 2 **A. The actual charges represent invoices received**  
 3 **from Metropolitan for exchange volumes by month as**  
 4 **displayed and as summarized by calendar years '11**  
 5 **through '14.**  
 6 Q. Monthly totals and then an annual total for  
 7 each year. Since that's in evidence. We won't take  
 8 time to go through those.  
 9 Next, can you explain how did you use the  
 10 exchange volume and Met's actual charges to calculate  
 11 the total annual overcharges that the Water Authority  
 12 has paid on each of Metropolitan's transportation rates  
 13 under the exchange agreement?  
 14 **A. In the process that I described a bit earlier,**  
 15 **where I took a look at the cost of service reports, the**  
 16 **supported -- any given rate year, in this case 2011**  
 17 **through '14, the process by which I removed the supply**  
 18 **rates or supply components of the system access rates,**  
 19 **system power rate from the transportation rate, as well**  
 20 **as the water stewardship rate, I was able to recalculate**  
 21 **an exchange rate.**  
 22 **The document that we're speaking of currently,**  
 23 **PTX 0471, is simply a reflection of the board-approved**  
 24 **rate. The difference between the board-approved rate**  
 25 **and that recalculated rate, the difference being the**

1111

1 **overcharges labeled as "Overcharge Credits" in the three**  
 2 **columns you see there for the system access, system**  
 3 **power and water stewardship rates.**  
 4 Q. So the system access rate column in 471 is  
 5 what, for example?  
 6 **A. The system access rate column represents the**  
 7 **total overcharge by that rate category for 2011 through**  
 8 **'14.**  
 9 Q. It is multiplying your overcharge by the  
 10 exchange volume?  
 11 **A. Yes. It's the difference between**  
 12 **board-approved rate, the recalculated rate multiplied by**  
 13 **the exchange volume, actual exchange volume during that**  
 14 **month and calendar year.**  
 15 Q. We'll walk through the specifics in a moment.  
 16 First, just a little more background on the  
 17 data shown in PTX 471.  
 18 When you first prepared your overcharge  
 19 calculations for this case, did you have the actual  
 20 complete exchange volume and charges information for the  
 21 full time period through the end of 2014?  
 22 **A. I did not. When we were here last, the data**  
 23 **that was available was through September of 2013. I**  
 24 **have updated actual exchange volumes in the**  
 25 **corresponding charges through December '14 for this time**

1112

1 **period.**  
 2 Q. Has anything else about this calculation  
 3 changed because of updating the numbers to actual  
 4 figures?  
 5 **A. The grand total that you see as 188,295,602 has**  
 6 **gone down by roughly \$40,000.**  
 7 THE COURT: Let's take our afternoon recess. I  
 8 will see everybody in about ten minutes. Thank you very  
 9 much.  
 10 (Recess.)  
 11 THE COURT: Let's continue, please. Thank you.  
 12 MS. HADLOCK: Thank you, your Honor.  
 13 Q. Have you prepared a series of slides  
 14 summarizing your calculations that are shown in PTX 471?  
 15 **A. Yes, I have.**  
 16 Q. Let's have the 2011 slides.  
 17 THE COURT: PTX 471, that's the source. So  
 18 these are just the demonstrative exhibits now?  
 19 MS. HADLOCK: We would like to mark this as  
 20 508, which I believe is the next in order, PTX 508. Is  
 21 there any objection?  
 22 MR. QUINN: No. No objection.  
 23 MS. HADLOCK: We would move this into evidence,  
 24 as well as a summary.  
 25 MR. QUINN: No objection.

1113

1 THE COURT: 508 is admitted.  
 2 (Exhibit 508 is received in evidence.)  
 3 Q. BY MS. HADLOCK: Just to walk through the  
 4 explanation here, in 2011, how much did Metropolitan --  
 5 how much water did Metropolitan transport for San Diego  
 6 under the exchange agreement?  
 7 A. **143,240 acre-feet.**  
 8 Q. How much did Metropolitan overcharge San Diego  
 9 for that service?  
 10 A. **\$33,805,324.**  
 11 Q. And that was a total overcharge per acre-foot  
 12 of how much?  
 13 A. **\$236 per acre-foot.**  
 14 Q. Going by rate element, how much did  
 15 Metropolitan overcharge San Diego on the system access  
 16 rate in 2011?  
 17 A. **\$14,467,533.**  
 18 Q. And per acre-foot that was how much?  
 19 A. **\$101 per acre-foot.**  
 20 Q. And on the system power rate, what was the  
 21 total overcharge in 2011 under the exchange agreement?  
 22 A. **\$13,464,833.**  
 23 Q. And that amount overcharged per acre-foot was  
 24 how much?  
 25 A. **\$94 per acre-foot.**

1114

1 Q. And what was the total overcharge on the water  
 2 stewardship rate in 2011 under the exchange agreement?  
 3 A. **\$5,872,959.**  
 4 Q. And we can turn to the next slide, please.  
 5 We would mark this as PTX 509.  
 6 And, Mr. Denham, is this a summary of your  
 7 calculations for 2012?  
 8 A. **Yes.**  
 9 Q. What are the total damages that you calculated  
 10 for San Diego under the exchange agreement in 2012?  
 11 A. **\$43,351,752.**  
 12 Q. That's based on Metropolitan transporting how  
 13 much water for the Water Authority in that year?  
 14 A. **186,861 acre-feet.**  
 15 Q. What was the total amount of overcharge per  
 16 acre-foot in 2012?  
 17 A. **\$232 per acre-foot.**  
 18 Q. Looking again at the system access rate, the  
 19 first row of your calculations, what was the overcharge  
 20 under the exchange agreement in 2012?  
 21 A. **\$18,312,378.**  
 22 Q. And that was an overcharge per acre-foot of how  
 23 much on the system access rate?  
 24 A. **\$98.**  
 25 Q. And how much did Metropolitan overcharge San

1115

1 Diego on the system power rate in 2012?  
 2 A. **\$17,004,351.**  
 3 Q. And the amount of overcharge per acre-foot on  
 4 the system power rate was how much in 2012?  
 5 A. **\$91.**  
 6 Q. What was the total overcharge on the water  
 7 stewardship rate in 2012 under the exchange agreement?  
 8 A. **\$8,035,023.**  
 9 Q. And I believe you testified already, but that's  
 10 the total amount of water stewardship rate that was paid  
 11 under the exchange agreement for each of these years?  
 12 A. **That's correct, the entire \$43 per acre-foot.**  
 13 MS. HADLOCK: We would move PTX 509 into  
 14 evidence.  
 15 MR. QUINN: No objection.  
 16 THE COURT: 509 is admitted.  
 17 (Exhibit 509 is received in evidence.)  
 18 THE CLERK: Tell me what year 508 was.  
 19 THE COURT: 2011.  
 20 MS. HADLOCK: 2011.  
 21 Q. Next slide, please. We would -- what's this  
 22 slide, Mr. Denham?  
 23 A. **This slide represents the 2013 overcharge**  
 24 **calculation of \$56,780,640.**  
 25 Q. That was based on Met transporting how much

1116

1 water under the exchange agreement in the year 2013?  
 2 A. **180,256 acre-feet.**  
 3 Q. And the total amount of overcharge you used per  
 4 acre-foot in 2013 was how much?  
 5 A. **\$315 per acre-foot.**  
 6 Q. Looking at the system access rate, how much did  
 7 Metropolitan overcharge San Diego in 2013 under the  
 8 exchange rate?  
 9 A. **\$19,647,904.**  
 10 Q. And the amount of that overcharge per  
 11 acre-foot?  
 12 A. **\$109 per acre-foot.**  
 13 Q. How much did Metropolitan overcharge San Diego  
 14 on the system power rate in 2013 under the exchange  
 15 agreement?  
 16 A. **\$29,742,0240.**  
 17 Q. And per acre-foot, the amount of that  
 18 overcharge is how much?  
 19 A. **\$165 per acre-foot.**  
 20 Q. And what was the total overcharge on the water  
 21 stewardship rate in 2013?  
 22 A. **\$7,390,496.**  
 23 MS. HADLOCK: And we would move this into  
 24 evidence as PTX 510.  
 25 THE COURT: Any objection?

1117

1 MR. QUINN: No objection.  
 2 THE COURT: 510 is admitted. It's the slide  
 3 that refers to 2013.  
 4 (Exhibit 510 was received into evidence.)  
 5 Q. BY MS. HADLOCK: Is this a similar summary for  
 6 2014?  
 7 A. **Yes, it is.**  
 8 Q. Let me mark this slide as 511, PTX 511,  
 9 overcharge calculation 2014.  
 10 In 2014 how much water did Metropolitan  
 11 transport under the exchange agreement?  
 12 A. **179,993 acre-feet.**  
 13 Q. And how much did Metropolitan overcharge San  
 14 Diego for doing that?  
 15 A. **\$54,357,886.**  
 16 Q. What was the total amount of overcharge per  
 17 acre-foot in 2014?  
 18 A. **\$302 per acre-foot.**  
 19 Q. On the system access rate, how much did  
 20 Metropolitan overcharge San Diego in 2014 under the  
 21 exchange agreement?  
 22 A. **\$20,879,188.**  
 23 Q. Per acre-foot that was how much?  
 24 A. **\$116 per acre-foot.**  
 25 Q. On the system power rate for 2014, what were

1118

1 San Diego's damages under the exchange agreement?  
 2 A. **\$26,098,985.**  
 3 Q. What was that amount per acre-foot?  
 4 A. **\$145 per acre-foot.**  
 5 Q. And what were San Diego's total damages for the  
 6 water stewardship rate in 2014 under the exchange  
 7 agreement?  
 8 A. **\$7,379,713.**  
 9 MS. HADLOCK: We move PTX 511 into evidence.  
 10 MR. QUINN: No objection.  
 11 THE COURT: 511 is admitted.  
 12 (Exhibit 511 was received into evidence.)  
 13 Q. BY MS. HADLOCK: Looking briefly back at PTX  
 14 471, can you tell us what was the total amount that  
 15 Metropolitan charged the Water Authority under the  
 16 exchange agreement for the years 2011 through 2014?  
 17 A. **The total amount charged based on actual**  
 18 **invoices was \$289,036,167.**  
 19 Q. Based on your calculations, what are the Water  
 20 Authority's total damages under the exchange agreement  
 21 for all four years from 2011 through 2014?  
 22 A. **\$188,295,602.**  
 23 Q. And how much of that amount is from overcharges  
 24 on the water stewardship rate?  
 25 A. **\$28,678,191.**

1119

1 Q. And how much is from misallocation of State  
 2 Water Project costs?  
 3 A. **\$159,617,411.**  
 4 Q. And how much does that leave that San Diego  
 5 paid under the exchange agreement during these years but  
 6 is not challenging or claiming as damages here?  
 7 A. **That amount is \$100,740,565.**  
 8 MS. HADLOCK: We would mark this as PTX 512,  
 9 the slide headed "Summary of Contract Damages under  
 10 Exchange Agreement."  
 11 MR. QUINN: No objection.  
 12 THE COURT: She is just marking it. There is  
 13 no objection to people marking things. You also want it  
 14 admitted?  
 15 MS. HADLOCK: Yes. Move this into evidence.  
 16 MR. QUINN: No objection to either.  
 17 THE COURT: 512 is admitted. Thank you.  
 18 (Exhibit 512 was received into evidence.)  
 19 Q. BY MS. HADLOCK: Mr. Denham, does San Diego pay  
 20 Met's supply rate under the exchange agreement?  
 21 A. **No.**  
 22 Q. Have you calculated -- estimated how much the  
 23 Water Authority might have paid on Metropolitan's supply  
 24 rate if Metropolitan had allocated disputed costs in  
 25 this case from transportation onto supply? Have you

1120

1 estimated that?  
 2 A. **Yes, I have.**  
 3 Q. And, roughly, how much would San Diego's  
 4 damages change if hypothetically -- strike that.  
 5 What impact would -- if you were to include  
 6 that in your calculations here, roughly how much impact  
 7 would that have on the damages that you calculated  
 8 assuming --  
 9 MR. QUINN: Your Honor. I'm sorry.  
 10 MS. HADLOCK: Go ahead.  
 11 THE COURT: Why don't we have the full  
 12 question, and he can make a statement or an objection.  
 13 Q. BY MS. HADLOCK: How does the number, the  
 14 increase in amounts that San Diego might have paid,  
 15 hypothetically, on supplier rates, if these costs were  
 16 moved over, how does that amount compare to the amount  
 17 that you calculated as San Diego's damages here?  
 18 MR. QUINN: I object. At deposition and in his  
 19 report he testified that as part of his expert work he  
 20 did not do this. It turns out there are some documents  
 21 indicating, in fact, he had. He was quite clear that  
 22 it's not part of his report and it is not part of his  
 23 expert work.  
 24 I object to them affronting us in this way.  
 25 THE COURT: Are you going to get into it in

1121

1 cross-examination? And if so, why don't we defer it to  
 2 then?  
 3 I will sustain the objection for now, but you  
 4 are free on redirect, if it comes up on  
 5 cross-examination, to ask your questions.  
 6 MS. HADLOCK: They went into this issue, and we  
 7 would like to clarify a little bit.  
 8 THE COURT: Is it part of his expert report?  
 9 MS. HADLOCK: It is not, but we can clarify  
 10 that or we can --  
 11 THE COURT: I will sustain the objection.  
 12 MS. HADLOCK: In that case, we will move on to  
 13 a different topic.  
 14 Q. Are you familiar, Mr. Denham, with  
 15 Metropolitan's calculation of preferential rates?  
 16 A. I am.  
 17 Q. And you are aware that Metropolitan excludes  
 18 payments under the exchange agreement in calculating  
 19 preferential rates?  
 20 A. Yes.  
 21 Q. They also exclude wheeling payments made under  
 22 wheeling agreements in calculating preferential rights?  
 23 A. Yes.  
 24 Q. Has Mr. Cushman asked you to calculate how the  
 25 Water Authority's preferential rights would be different

1122

1 if Met did not exclude those amounts?  
 2 A. Yes.  
 3 Q. Have you done that?  
 4 A. Yes.  
 5 Q. Let's turn to PTX 472. What is PTX 472?  
 6 A. **PTX 472 is a document that is created and**  
 7 **calculated by Metropolitan staff for preferential rights**  
 8 **as of the period ending 6/30/14.**  
 9 Q. This is Metropolitan's calculation?  
 10 A. **That's correct.**  
 11 MS. HADLOCK: We move PTX 472 into evidence. I  
 12 believe there was no objection.  
 13 THE COURT: We will find out.  
 14 MR. QUINN: No objection.  
 15 THE COURT: 472 is admitted.  
 16 (Exhibit 472 was received into evidence.)  
 17 Q. BY MS. HADLOCK: In Exhibit 472, what  
 18 percentage did Metropolitan calculate as San Diego's  
 19 share of preferential rights?  
 20 A. **18.27 percent.**  
 21 Q. Let's turn now to PTX 473, the second page of  
 22 this exhibit. Can you tell us what PTX 473 is?  
 23 A. **473 is my attempt to take the document that was**  
 24 **produced by Metropolitan, which you can essentially see**  
 25 **in the non-shaded area, and recalculate it based on the**

1123

1 **inclusion of Water Authority's QSA water in addition to**  
 2 **other non-Metropolitan water.**  
 3 MS. HADLOCK: We will move PTX 473 into  
 4 evidence.  
 5 Any objection?  
 6 MR. QUINN: No objection.  
 7 THE COURT: 473 is admitted.  
 8 (Exhibit 473 was received in evidence.)  
 9 Q. BY MS. HADLOCK: Looking at the bottom right of  
 10 this chart, can you explain, first, what amount did you  
 11 add in to calculate the adjusted preferential rates if  
 12 those wheeling payments were included?  
 13 A. **The amount added in is what you see there in**  
 14 **the column entitled "SDCWA, QSA and Placer." The dollar**  
 15 **amount is \$409,517,198.**  
 16 Q. And how does that -- how does adding that  
 17 number in change the calculation of preferential rights?  
 18 If you could, just explain the math you've done here.  
 19 A. **Yes. The addition of the 409.5 million**  
 20 **included as part of the Water Authority's existing**  
 21 **1.2 billion, that you see in the non-shaded area**  
 22 **highlighted there in yellow, increased the Water**  
 23 **Authority's preferential rights from 18.27 percent to**  
 24 **23.02 percent, roughly four-and-three-quarters percent.**  
 25 Q. And your column is -- you mentioned Placer

1124

1 County. What does that refer to?  
 2 A. **Placer County was a dry-year transfer of**  
 3 **non-Metropolitan water. It was transported for the**  
 4 **Water Authority.**  
 5 Q. A wheeling transaction?  
 6 A. Yes.  
 7 Q. And if you look back at the first page of this  
 8 exhibit, 473, you have two charts there. Is the first  
 9 one a breakdown of your calculations of exchange  
 10 agreement delivery?  
 11 A. **Yes. The exchange agreement deliveries, the**  
 12 **column is entitled "IID Transfer and Canal Linings," and**  
 13 **then summarized into annual totals, represent the**  
 14 **exchange agreement deliveries based on Metropolitan**  
 15 **invoices during that period.**  
 16 Q. And the total payments in that time period,  
 17 2004 through 2014, under the exchange agreement is how  
 18 much, roughly?  
 19 A. **403.8 million.**  
 20 Q. The whole transaction with Placer County you  
 21 mentioned, how much is that?  
 22 A. **That is at the bottom there, and the total is**  
 23 **5.7 million.**  
 24 Q. You approximated a ballpark figure of how much  
 25 water an acre-foot, acre-feet, the change you calculated

1125



1 in preferential rights would amount to?

2 **A. Yes, it's roughly 80,000 acre-feet.**

3 Q. And it would depend on the sales projection?

4 **A. That's correct. Metropolitan's sales**

5 **projections.**

6 THE COURT: Just to be clear, that is

7 attributable to the distinction or the difference

8 between 23.02 and 18.27?

9 THE WITNESS: That's correct.

10 Q. BY MS. HADLOCK: Let's go back to the second

11 page of this exhibit, 473. Just briefly, to make sure

12 we're clear, at the bottom right portion, the bottom

13 right of this, where you added in the 409, you have

14 added that into San Diego's contributions and also into

15 the total contributions of all member agencies; right?

16 **A. That's correct. The 408.5 million was added to**

17 **the total of seven billion you see on the bottom there.**

18 Q. And then you recalculate the percentages of all

19 member agencies based on those new totals for each

20 member agencies?

21 **A. That's correct. The addition of 409 million**

22 **necessitates a recalculation of all other member**

23 **agencies.**

24 MS. HADLOCK: Pass the witness.

25 THE COURT: Cross-examination.

1126

1 you actually presented your opinion in the arbitration?

2 **A. I was deposed where my expert opinion was**

3 **given. The legalese of what actually occurred, I**

4 **couldn't tell you. But I gave my expert opinion under**

5 **oath.**

6 Q. In a deposition?

7 **A. Yes, that's correct.**

8 Q. You have been forthright that you don't

9 actually -- you're not a water rate-making expert;

10 right?

11 **A. That's correct.**

12 Q. Are you familiar with something called the

13 M1 manual?

14 **A. Yes.**

15 Q. And that's published by the AWWA?

16 **A. Yes.**

17 Q. What is the M1 manual?

18 **A. I would characterize it as a summary of, you**

19 **know, a way to go about calculating rates and charges**

20 **for a public water or wastewater, for that matter,**

21 **utility.**

22 Q. Would you regard it as an authoritative source

23 on that subject?

24 **A. Not the source. It's -- it is a good source.**

25 **It's a well-known source.**

1128

1 CROSS-EXAMINATION

2 BY MR. QUINN:

3 Q. Good afternoon, Mr. Denham. My name is John

4 Quinn.

5 **A. Good afternoon.**

6 Q. You told us you have a minor in economics in an

7 undergraduate degree?

8 **A. That's correct.**

9 Q. You don't have any publications that you've

10 published?

11 **A. None worth noting.**

12 Q. And you have never actually served as a damages

13 expert on any occasion except there was an arbitration

14 when you were designated to be an expert; is that right?

15 **A. That's correct.**

16 Q. And in terms of coming and testifying in a

17 court about damages opinion or that type of opinion,

18 you've never done that before?

19 **A. That's correct.**

20 Q. Or even been retained as a damages expert in

21 any court proceeding as opposed to the arbitration?

22 **A. That's correct.**

23 Q. Even in that arbitration -- it wasn't clear

24 from your deposition -- do I understand correctly that

25 actually you are -- that resolved in some fashion before

1127

1 Q. Did you participate at all in writing that

2 manual?

3 **A. No.**

4 Q. You were asked to make certain assumptions,

5 isn't that correct --

6 **A. Yes.**

7 Q. -- in doing your work?

8 Counsel told you to assume that all the State

9 Water Project costs which are on transport should be

10 moved over to supply; right?

11 **A. Correct.**

12 Q. And they also told you to assume that all water

13 stewardship costs should be moved over to supply;

14 correct?

15 **A. The water stewardship costs should be removed**

16 **from transportation to supply, yes.**

17 Q. And you took those assumptions and you

18 basically did --

19 You did some calculations; right?

20 **A. Yes.**

21 Q. I mean, you essentially were -- with probably a

22 computer, a guy with a computer or computer program, you

23 did these calculations with?

24 **A. I took one bucket of revenue and moved it to**

25 **another area.**

1129

1 Q. So you didn't -- you looked at some documents  
 2 to get this data.  
 3 I think you mentioned cost of service reports  
 4 and invoices and other Metropolitan documents; right?  
 5 **A. Yes.**  
 6 Q. And from those you isolated these costs that  
 7 you were going to move over to supply; right?  
 8 **A. Yes. After reviewing the cost of service**  
 9 **report, as you know, it's a pretty good-sized document.**  
 10 Q. Right. So you had to find where those numbers  
 11 were and isolate them, I think you said?  
 12 **A. That's correct.**  
 13 Q. In terms of your expert report, what you did in  
 14 your expert analysis in this case, you didn't actually  
 15 otherwise do any kind of an analysis of those costs; is  
 16 that correct?  
 17 MS. HADLOCK: Objection. Unclear. Vague.  
 18 THE COURT: Overruled.  
 19 THE WITNESS: You know, I'm not sure that  
 20 that's a fair statement. I think that what was provided  
 21 as a public record, that supports the rates and charges  
 22 for Metropolitan and its board-approved rates. To the  
 23 extent that's the document that's available, you know,  
 24 that's what I used.  
 25

1130

1 Q. BY MR. QUINN: Right. I mean, you didn't go  
 2 behind those published documents and do any kind of  
 3 analysis of the numbers?  
 4 **A. I only used data that was available as a part**  
 5 **of cost of service, part of board records, board**  
 6 **correspondence, only public information that was**  
 7 **available. So, yeah.**  
 8 Q. In doing these calculations, you didn't  
 9 actually form any judgments about any of those costs,  
 10 about whether the costs were appropriately charged or  
 11 anything like that?  
 12 **A. That's correct.**  
 13 Q. And you didn't actually form any opinions on  
 14 that subject either? You basically were the guy with  
 15 the computer and you ran some numbers after you had  
 16 extracted this data; right?  
 17 **A. Yes.**  
 18 Q. So let's -- let's talk about some other things  
 19 that really aren't within the scope of your expert work  
 20 here.  
 21 MS. HADLOCK: Objection to anything beyond the  
 22 expert work.  
 23 THE COURT: That is a terrible way to introduce  
 24 cross-examination.  
 25 MR. QUINN: Should I try that again?

1131

1 THE COURT: Yes.  
 2 Q. BY MR. QUINN: You were given these assumptions  
 3 that these costs don't belong in transport, and you  
 4 moved them over to supply. You did not do anything to,  
 5 yourself, to test those assumptions; correct?  
 6 **A. If by test you mean run through a model, a rate**  
 7 **model, for instance, no.**  
 8 Q. Well, I mean, in fact, you didn't --  
 9 You testified in your deposition you didn't  
 10 actually test these assumptions; right?  
 11 **A. That's correct.**  
 12 Q. And you didn't analyze whether there was any  
 13 beneficial or causal relationship with these costs, did  
 14 you? Are you familiar with that --  
 15 Let me withdraw that question.  
 16 Are you familiar with the concept of beneficial  
 17 and causal relationship?  
 18 **A. More generally cost causation.**  
 19 Q. You didn't do any type of analysis yourself as  
 20 to whether there was a beneficial or causal relationship  
 21 with these costs to where they had been burdened?  
 22 **A. That was outside the scope of my work, so no.**  
 23 Q. You didn't look at the state water -- the  
 24 contract Met has with the State Water Project?  
 25 **A. No, I did not.**

1132

1 Q. That contract, obviously, then, didn't play any  
 2 part in your analysis; correct?  
 3 **A. Well, to the extent that Metropolitan's rates**  
 4 **and charges for the State Water Project are based off**  
 5 **that report, and that's what the cost of service is**  
 6 **based off of, I think it is foundational.**  
 7 Q. Beyond that, your analysis didn't take into  
 8 account any of the terms of the state water contract?  
 9 **A. No.**  
 10 MS. HADLOCK: Objection. Relevance.  
 11 THE COURT: Overruled.  
 12 Q. BY MR. QUINN: There was something that Met has  
 13 called the financial planning model. Are you familiar  
 14 with that?  
 15 **A. Yes.**  
 16 Q. Could you tell the Court what that is?  
 17 **A. The Met financial planning model is a complex**  
 18 **Excel spreadsheet. Probably would take an individual**  
 19 **years to understand, a career to understand. It is very**  
 20 **complex and it produces rates.**  
 21 Q. That was -- at San Diego's request, that was  
 22 made available on two computers to San Diego. You are  
 23 familiar with that?  
 24 **A. Yes.**  
 25 Q. But you made no -- in doing your expert work,

1133

1 you made no use of that financial planning model. Is  
 2 that true?  
 3 **A. I reviewed the financial planning model. It is**  
 4 **not included in my analysis. The way the rates were**  
 5 **calculated in the model were based on a goal seek**  
 6 **function, which you cannot back into for the cost of**  
 7 **service study, the report.**  
 8 Q. Just to be clear, this is something that was  
 9 provided to San Diego. And at least in terms of your  
 10 expert work, you didn't make use of that financial  
 11 planning model; is that true?  
 12 **A. That's true. For my report, I did not use the**  
 13 **financial planning model.**  
 14 Q. You didn't make any analysis as to whether the  
 15 state, putting these State Water Project costs in  
 16 transportation, whether that was right or wrong, as part  
 17 of your expert work in this case?  
 18 **A. That's correct.**  
 19 Q. And the same for the water stewardship?  
 20 **A. Correct. I was asked to move supply components**  
 21 **related to those rate -- or functionalized revenue**  
 22 **requirements to the supply rate.**  
 23 Q. And these water stewardship costs, you didn't  
 24 take into account what those expenditures by Met paid  
 25 for as part of your expert work?

1134

1 **A. I'm not sure I understand that one.**  
 2 **What I did do was take the revenue requirement**  
 3 **and all of the background information for the water**  
 4 **stewardship rate as contained in every available**  
 5 **document that I could find and moved that to the supply**  
 6 **rate.**  
 7 Q. Exactly. But you didn't actually look into  
 8 what those -- what that revenue was applied to in terms  
 9 of the water stewardship rate as part of your analysis,  
 10 your expert opinion in this case?  
 11 **A. The water stewardship rate move was an all or**  
 12 **nothing. There's no detail provided in any Met document**  
 13 **as to what it is other than a local water supply**  
 14 **development revenue requirement.**  
 15 Q. And another thing that you were asked to assume  
 16 was that moving these costs for transportation, from  
 17 transportation to supply, would be revenue neutral;  
 18 correct?  
 19 **A. To the extent that you want to move, let's just**  
 20 **round number, \$100 million from transportation to**  
 21 **supply, you would make that 100-million-dollar move,**  
 22 **yes, I consider that revenue neutral.**  
 23 Q. For example, you didn't undertake any analysis  
 24 about -- as part of your expert work -- I'm focusing on  
 25 your expert report in the case -- that doesn't include

1135

1 any analysis on whether the supply costs would go up --  
 2 that if -- I'm sorry.  
 3 Your expert report in this case does not  
 4 include any information or analysis about whether if  
 5 supply costs went up, demand would go down?  
 6 **A. If supply -- let me make sure I heard you**  
 7 **correctly. If supply goes up, demand goes down?**  
 8 Q. As part of your expert work here, you assumed  
 9 revenue neutrality; correct?  
 10 **A. Revenue neutrality, correct.**  
 11 Q. What I'm asking here, isn't it true that as  
 12 part of your expert work, you didn't look into or  
 13 consider whether if the supply costs went up, the demand  
 14 would go down?  
 15 **A. That's correct.**  
 16 Q. You assumed it would actually -- everything  
 17 would stay the same?  
 18 **A. Well, in fact, all I did was, as you mentioned,**  
 19 **move supply costs to supply rate.**  
 20 Q. So you did nothing to test the assumption that  
 21 if supply costs went up, everything else would remain  
 22 the same; the demand would remain the same? You didn't  
 23 do anything to test that?  
 24 **A. No tests.**  
 25 Q. You didn't consider whether it would be a good

1136

1 idea to do a price elasticity analysis either?  
 2 **A. Again, it's not what I was tasked with doing.**  
 3 **Metropolitan has a revenue requirement that it**  
 4 **identified for State Water Project costs. Moving that**  
 5 **to supply is what I did.**  
 6 Q. Okay. And in your report, your expert report  
 7 that we provided, there is no analysis about how moving  
 8 transportation costs from transportation to supply, how  
 9 that would increase supply costs?  
 10 **A. In my expert report, no.**  
 11 Q. You would agree, though, other things being  
 12 equal, supply costs will go up if you move costs from  
 13 transportation to supply, it stands to reason?  
 14 **A. Yes.**  
 15 Q. Did anybody instruct you not to include in your  
 16 report any information on the impact of supply costs, of  
 17 moving costs from transportation to supply?  
 18 **A. No.**  
 19 Q. Was that a subject that you discussed with  
 20 anyone as to whether your report should include  
 21 information about the impact on supply costs of moving  
 22 costs from transportation to supply?  
 23 **A. As part of my report, no.**  
 24 Q. Nobody discussed whether your report should  
 25 address that?

1137

1           **A. That's correct.**  
 2           Q. So your report is not actually the -- the  
 3 report that was provided to us in this case is not  
 4 actually a calculation of net damages for a net impact  
 5 of moving costs from transportation to supply; correct?  
 6           **A. That's correct.**  
 7           Q. And you don't have any -- in your report, you  
 8 don't address how much San Diego would pay if there had  
 9 been no breach in this case?  
 10          **A. Yeah. I make no report if what you're**  
 11 **referring to is a net. I think that was the term you**  
 12 **used.**  
 13          Q. Yes.  
 14          **A. That's not addressed in my report.**  
 15          Q. As part of your expert report, you didn't make  
 16 any determination about how much San Diego would have  
 17 paid if there had been no breach?  
 18          **A. That's correct.**  
 19          Q. And you reached no conclusion as to whether or  
 20 not San Diego would have been better off as a general  
 21 matter if there had been no breach?  
 22               MS. HADLOCK: Objection; relevance.  
 23               THE COURT: Overruled. It goes to the scope of  
 24 the report.  
 25               Go ahead.

1138

1           THE WITNESS: Overall betterment, I think  
 2 that's very vague. You know, there are a lot of  
 3 possible outcomes as to how you measure betterment. To  
 4 answer your question directly, that's not included in my  
 5 report.  
 6          Q. BY MR. QUINN: Right. You reached no  
 7 conclusion as part of your expert work here as to  
 8 whether San Diego would be better off as a general  
 9 matter if these costs were moved from transportation to  
 10 supply?  
 11          **A. That's correct. It's impossible to tell.**  
 12          Q. You say it is impossible to tell, but, in fact,  
 13 you believe that it would be possible to do some -- make  
 14 some reasonable assumptions about whether San Diego  
 15 would be better off or not? Do you believe that?  
 16          **A. Yes. I can -- I can make a number of**  
 17 **assumptions about a future outcome of a lot of different**  
 18 **scenarios. I do that frequently.**  
 19          Q. But you didn't include anything like that in  
 20 your expert report?  
 21          **A. Correct.**  
 22          Q. You calculated -- in calculating the analysis  
 23 of overcharges, I think you said you identified the  
 24 State Water Project costs that were included in the cost  
 25 basis; is that correct?

1139

1           **A. I identified the State Water Project costs that**  
 2 **were functionalized, as a term of art, in rate making --**  
 3 **not my term -- in the exchange rate, that being the**  
 4 **system power rate, system access rate.**  
 5          Q. And then you removed those State Water Project  
 6 costs from the cost pool and divided the remaining  
 7 number by the accrued sales in each calendar year to  
 8 derive a corrected rate; correct?  
 9          **A. No. What you're saying is close, but not**  
 10 **sales. It is the cost of service sales assumption, the**  
 11 **sales assumption by which the rates are based.**  
 12          Q. So you removed those costs from the cost pool  
 13 and divided that by the sales assumption; is that  
 14 correct?  
 15          **A. Yes.**  
 16          Q. For each calendar year; correct?  
 17          **A. Yes.**  
 18          Q. That yielded for you a corrected rate; correct?  
 19          **A. Correct.**  
 20          Q. And then you subtracted that corrected rate  
 21 from the rate that was charged; right?  
 22          **A. Yes.**  
 23          Q. And multiplied that by the exchange water to  
 24 derive the damages rate; correct?  
 25          **A. Yes.**

1140

1          Q. So the first part of that, the smaller the  
 2 number, the smaller your corrected rate, the bigger the  
 3 Delta would be between the corrected rate and what was  
 4 actually charged; correct?  
 5          **A. Could you restate that?**  
 6          Q. The smaller the corrected -- you came up with a  
 7 corrected rate by doing that division we just talked  
 8 about.  
 9          **A. Yes.**  
 10          Q. The smaller that number, the larger the Delta  
 11 is going to be between the corrected rate and the rate  
 12 that was actually charged; correct?  
 13          **A. Yes.**  
 14          Q. And the larger that Delta, the larger San  
 15 Diego's damages are going to be under your approach;  
 16 correct?  
 17          **A. That's correct.**  
 18          Q. San Diego doesn't just exchange water with  
 19 Metropolitan. San Diego also purchases some water;  
 20 correct? You are aware of that?  
 21          **A. Yes.**  
 22          Q. Are you aware -- so far as you're aware, San  
 23 Diego has no issue with including State Water Project  
 24 costs in the costs for water that it purchases; correct?  
 25               MS. HADLOCK: Objection. Ambiguous.

1141

1 THE COURT: Do you understand the question?  
 2 THE WITNESS: I believe I do. It was not  
 3 something I considered in my report.  
 4 THE COURT: Overruled.  
 5 Q. BY MR. QUINN: There's no issue -- there's  
 6 really no issue here that -- the price for the water  
 7 that San Diego purchases, not talking about the exchange  
 8 water, but the purchased water, that also includes State  
 9 Water Project costs; right?  
 10 **A. Yes, to the extent that State Water Project is**  
 11 **included in the Tier 1 supply area, yes.**  
 12 Q. As far as you know, San Diego has no issue with  
 13 being charged in Tier 1 water for those State Water  
 14 Project costs; correct?  
 15 **A. Correct.**  
 16 Q. When you did this arithmetic, this arriving at  
 17 the corrected rate, you included as the denominator all  
 18 the water that San Diego gets from Met, both the  
 19 exchange water and the purchase water, isn't that true?  
 20 **A. Yes, that's --**  
 21 MS. HADLOCK: Objection --  
 22 THE COURT: I'm sorry.  
 23 MS. HADLOCK: Objection. Misstates testimony.  
 24 THE COURT: Overruled.  
 25 THE WITNESS: Yes, that's the basis by which

1142

1 Metropolitan calculates its rates. It's not my  
 2 calculation methodology. It's re-creating the basis by  
 3 which the rates were derived.  
 4 Q. BY MR. QUINN: So you are trying to arrive at a  
 5 corrected rate for what exchange water should be;  
 6 correct?  
 7 **A. Yes.**  
 8 Q. And that's that fraction we discussed a moment  
 9 ago; correct?  
 10 **A. Yes.**  
 11 Q. And you included in the denominator not just  
 12 the exchange water, but all the water that Met purchases  
 13 from San Diego; correct? Yes or no?  
 14 **A. Yes, as I mentioned, that's the basis.**  
 15 MR. KEKER: Met purchases from San Diego?  
 16 MR. QUINN: I'm sorry.  
 17 Q. That San Diego purchases from Met.  
 18 **A. Yes, I believe what you're referring to is**  
 19 **what's typically known as a sales assumption of two**  
 20 **million or so of acre-feet of an exchange volume. The**  
 21 **share of that is about 180. That's included in how**  
 22 **Metropolitan sets its rates and charges.**  
 23 **To make a corrected rate, I would need to**  
 24 **spread the revenue requirement over the same sales**  
 25 **assumption.**

1143

1 Q. So in the denominator you include not just what  
 2 San Diego is buying but all water in the till is the  
 3 assumption of what everybody is buying?  
 4 **A. That's correct.**  
 5 Q. The larger the denominator, the more you  
 6 include there, the smaller that corrected rate is going  
 7 to be; correct?  
 8 **A. Yes. The denominator has an impact like that,**  
 9 **as you mentioned.**  
 10 Q. And the larger San Diego's damages under your  
 11 approach will be; correct?  
 12 **A. My approach is based on the Met sales**  
 13 **assumption, so I would say it's the Met approach.**  
 14 Q. But in terms of doing the analysis that you  
 15 did -- we talked about the fact that San Diego exchanges  
 16 water but also buys water where they include these  
 17 charges, these State Water Project charges, where, so  
 18 far as you know, San Diego has no issue with the  
 19 inclusion of those charges for purchasing Tier 1 water.  
 20 **A. Yes.**  
 21 Q. All of that is included in the denominator in  
 22 your damages analysis; correct?  
 23 **A. Yes.**  
 24 Q. Your view was that all the exchange water could  
 25 or should have been delivered through the Colorado River

1144

1 aqueducts and not involve the State Water Project, isn't  
 2 that true?  
 3 MS. HADLOCK: Objection. Beyond the scope and  
 4 irrelevant.  
 5 THE COURT: Is this part -- was this one of the  
 6 assumptions you made in coming up with your opinions?  
 7 THE WITNESS: It was not.  
 8 THE COURT: Sustained.  
 9 Q. BY MR. QUINN: Can you tell us whether or not  
 10 you have an opinion as to whether all the exchange water  
 11 could or should have been delivered through the Colorado  
 12 River aqueducts and not involved the State Water Project  
 13 at all?  
 14 MS. HADLOCK: Objection.  
 15 THE COURT: Sustained. Beyond the scope.  
 16 Q. BY MR. QUINN: Isn't it true that your  
 17 calculations assume that all the exchange water could or  
 18 should have been delivered through the Colorado River  
 19 aqueducts?  
 20 MS. HADLOCK: Objection. Misstates.  
 21 THE COURT: Overruled.  
 22 THE WITNESS: My calculation is based simply  
 23 off the Met sales assumption, not knowing what the basis  
 24 by which they split the State Water Project or Colorado  
 25 River aqueducts. I know they give rough percentage.

1145

1 Again, this is simply taking a revenue requirement and  
 2 spreading it over the same denominator. What is in the  
 3 cost of service report is what I used.  
 4 Q. BY MR. QUINN: You actually have responsibility  
 5 for the Colorado River function at the San Diego Water  
 6 Authority, don't you?  
 7 A. Yes.  
 8 Q. And what is your responsibility for?  
 9 A. **Implementation of the Water Authority's QSA**  
 10 **programs.**  
 11 Q. Your use of the total in that denominator, the  
 12 total Met sales to divide the Colorado River revenue  
 13 requirements, is incorrect and inconsistent with your  
 14 theory that the State Water Project and Colorado River  
 15 aqueducts should bear separate costs, isn't that true?  
 16 MS. HADLOCK: Objection. Beyond the scope.  
 17 THE COURT: Overruled.  
 18 THE WITNESS: Yeah, I'm not quite sure I even  
 19 understand what you're asking.  
 20 Q. BY MR. QUINN: Can you tell us whether or not,  
 21 in your view, based upon the work that you did as an  
 22 expert, are you assuming that the State Water Project  
 23 and the Colorado River aqueduct should bear separate  
 24 cost structure?  
 25 A. **Separate cost structures? You know, I don't**

1146

1 THE COURT: Overruled.  
 2 THE WITNESS: The extent to which you change  
 3 the denominator in a calculation, you are correct.  
 4 Variations up and down, that would be expected.  
 5 Again, what I said is that I'm trying to  
 6 replicate a very simple process for comparison purposes.  
 7 Q. BY MR. QUINN: You acknowledge it could be done  
 8 a different way and get very different results?  
 9 A. **There are numerous results, yes.**  
 10 Q. You presented on direct examination some  
 11 information. Exhibits came in about preferential rights  
 12 and analysis and numbers and calculations you had done  
 13 on preferential rights.  
 14 A. Yes.  
 15 Q. None of that was in the expert report that we  
 16 were provided before trial; is that correct?  
 17 A. **That's correct.**  
 18 Q. You agree, I take it, that Met does, in fact,  
 19 need to recover these costs that you are excluding? The  
 20 State Water Project costs, the water conservation costs,  
 21 Met has to recover them from some customer? You agree  
 22 with that?  
 23 MS. HADLOCK: Objection. Beyond the scope.  
 24 THE COURT: I will allow it.  
 25 Go ahead.

1148

1 **believe that that's what my opinion was in the report.**  
 2 Q. If you had used as the denominator in that  
 3 arriving at that corrected rate, if you had used total  
 4 sales minus State Water Project sales to obtain the  
 5 appropriate number -- let me withdraw that.  
 6 Wouldn't it be more accurate and consistent  
 7 with your theory if you had used total sales minus State  
 8 Water Project sales in the denominator to arrive at the  
 9 appropriate number?  
 10 A. **I would answer that as not necessarily. You**  
 11 **know, big picture, my intent here was to take a process**  
 12 **that was developed by Met, and, to the greatest extent**  
 13 **possible, not change that process. So to the extent**  
 14 **that you're suggesting I do other things, include,**  
 15 **exclude, calculate rates in a different manner, that's**  
 16 **not what I was tasked with doing, nor did I do.**  
 17 **I tried to create the most simple replication**  
 18 **of Metropolitan's rate setting process.**  
 19 Q. You say "not necessarily."  
 20 It would make a very big difference in the  
 21 denominator and, therefore, the damages function as to  
 22 whether you used total sales minus State Water Project  
 23 sales in the denominator versus all sales? That would  
 24 make a big difference?  
 25 MS. HADLOCK: Objection. Asked and answered.

1147

1 THE WITNESS: Yes, assuming that it is a  
 2 revenue requirement and they have a need to recover that  
 3 revenue. It should be recovered somewhere.  
 4 Q. BY MR. QUINN: Right. And you don't challenge  
 5 the costs that are described in the cost of service  
 6 reports as being inappropriate. You just challenge  
 7 whether certain of those costs should have been charged  
 8 to San Diego for exchange water. Correct?  
 9 A. **My opinion is that they are supply costs on the**  
 10 **transportation rate.**  
 11 Q. In terms of your expert report, you were asked  
 12 simply to assume that, and you didn't do any analysis of  
 13 it; correct?  
 14 A. **Correct. I moved supply off of transportation.**  
 15 Q. In terms of whether the costs should be charged  
 16 as described in the cost of service reports, whether  
 17 they were appropriate, you don't challenge whether or  
 18 not those costs were appropriately incurred?  
 19 A. **Maybe if you could help me with clarifying it a**  
 20 **little more. I'm not following.**  
 21 Q. You are not saying any of these costs should  
 22 not be incurred by Met, the costs that you moved?  
 23 A. **That's correct.**  
 24 THE COURT: That's not part of what you were  
 25 hired to do, what you did as an expert; right?

1149

1 THE WITNESS: There is some confusion on what  
 2 exactly is being asked on my behalf.  
 3 THE COURT: Well, part of it has to do with the  
 4 phraseology of the question. My understanding is, for  
 5 example, you were not asked to investigate the bases of  
 6 the assumptions that these costs should be moved.  
 7 THE WITNESS: That's correct.  
 8 MR. QUINN: Nothing further, your Honor.  
 9 THE COURT: Any redirect?  
 10 MS. HADLOCK: If I can have just a moment?  
 11 THE COURT: Sure.  
 12  
 13 REDIRECT EXAMINATION  
 14 BY MS. HADLOCK:  
 15 Q. Mr. Denham, does San Diego pay Metropolitan  
 16 exchange rates under the exchange agreement?  
 17 A. No.  
 18 Q. Would changes to Metropolitan's supply rates  
 19 change Metropolitan's charges to San Diego under the  
 20 exchange agreement?  
 21 A. No.  
 22 Q. You calculated what San Diego would have paid  
 23 here if Metropolitan had not breached the agreement by  
 24 putting the costs that you've described onto  
 25 transportation rates that you then backed out; correct?

1150

1 A. Correct.  
 2 Q. You used the denominator in the system of  
 3 calculating rates that Met uses as much as it was  
 4 available to you?  
 5 A. Yes.  
 6 Q. Just to clarify, there were some questions  
 7 asked about Metropolitan's rate model. And would it be  
 8 possible for you to use that to back out the costs as  
 9 you've described and set new rates, or was that not  
 10 possible, given how that model works?  
 11 A. It -- my opinion is that it is not possible  
 12 without intimate knowledge of how the model works. I  
 13 have worked in models as complex as the Metropolitan  
 14 financial planning model. There are things going on in  
 15 the background of that model that make it very difficult  
 16 to, quote/unquote, "back into rates."  
 17 Q. So essentially without data that you didn't  
 18 have, that Met didn't make available, that was not a  
 19 useful model for you?  
 20 A. It is not.  
 21 Q. And you have made the best reasonable  
 22 approximation that you could with available data of how  
 23 San Diego -- how San Diego's payments under the exchange  
 24 agreement would have changed if these State Water  
 25 Project costs and water stewardship rates were not

1151

1 charged on the transportation costs; correct?  
 2 A. Correct. I think the assumption I took overall  
 3 is that this is the best available information provided  
 4 to support rates. This is what I have to work with, and  
 5 that's what I used.  
 6 Q. And Met has never created any other rate  
 7 structures that you could have analyzed, has it?  
 8 A. No.  
 9 Q. You were asked some questions about analyzing  
 10 supply rate impacts; right?  
 11 A. Yes.  
 12 Q. If you included supply rate impacts in your  
 13 analysis of damages in this case, wouldn't that mean  
 14 that San Diego would end up paying a higher rate than  
 15 other member agencies for calendar years 2011 through  
 16 2014?  
 17 A. Yes.  
 18 Q. Is that a reason for not counting it here?  
 19 A. Yes.  
 20 Q. If Metropolitan were to recover what you  
 21 described as the overcharges by assigning those  
 22 prospectively to different rates, would all of Met's  
 23 member agencies pay their fair share of those rates  
 24 assuming they were lawfully assessed?  
 25 A. Assuming the Tier 1 rate, for instance, the

1152

1 supply rate increased, all member agencies would pay,  
 2 yes.  
 3 Q. And because Metropolitan got into this on  
 4 cross-examination with the prior witness, have you  
 5 approximated what impacts on supply would be if the  
 6 costs that are at issue here, the State Water Project  
 7 and water stewardship charges, if those were  
 8 hypothetically included in a supply rate? Have you  
 9 estimated those amounts?  
 10 MR. QUINN: Objection, your Honor. It is not  
 11 in his report. I only asked him whether it was in his  
 12 report.  
 13 THE COURT: I understand. The objection is  
 14 sustained.  
 15 MS. HADLOCK: Your Honor, they did ask  
 16 Mr. Cushman about this analysis and --  
 17 THE COURT: He didn't report on it. This isn't  
 18 within the scope of direct. We are just not going to  
 19 get into it.  
 20 MS. HADLOCK: Fair enough. We certainly don't  
 21 think it should have come into the analysis.  
 22 THE COURT: That's what I think you're  
 23 thinking.  
 24 MS. HADLOCK: All right. I have nothing  
 25 further.

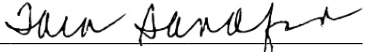
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1 THE COURT: Any re-cross?  
 2 MR. QUINN: No, your Honor.  
 3 THE COURT: Thank you. We will end for today.  
 4 I have another matter at four o'clock. I will see you  
 5 at ten o'clock.  
 6 MR. QUINN: We found in the record in Phase 1  
 7 what the rules were. That is 24 hours' notice and you  
 8 have to give notice of the order within the next day the  
 9 witnesses would be called. That is in the transcript  
 10 December 10, 2013, page 216, lines six to 11.  
 11 I think it is unfair to change the rules now.  
 12 THE COURT: The rules are exactly the same. I  
 13 don't see where you and I are different. I think 24  
 14 hours' notice is fine. I agree with you. And I think  
 15 giving the order of witnesses is a good idea. Surely,  
 16 you already have it.  
 17 MR. QUINN: For that day, for that day 24  
 18 hours' notice. That is not the way this case was tried  
 19 in Phase 1. We found it in the transcript. The rules  
 20 were you give 24 hours' notice and you say what order  
 21 people will be called that day.  
 22 Now what they are asking, when it is completely  
 23 assymmetric, at the end of the case, that we give them  
 24 our entire line up through the end of April.  
 25 THE COURT: You don't know what the order is

1154

1 you will be calling people?  
 2 MR. QUINN: Honestly, no. But if you order us  
 3 to, we will come up with it. Honestly, no. My  
 4 objection is not one about whether we could do it. My  
 5 objection is fair is fair. That's the way the case was  
 6 tried, and now it's our case and we change the rules?  
 7 And I've got to give him notice to the end of April the  
 8 sequence we are going to call everybody?  
 9 THE COURT: Yes, you do. You've got the same  
 10 thing from him. He gets the same thing from you. I  
 11 don't think we're having a tempest in a teapot. I will  
 12 see everybody at ten o'clock tomorrow.  
 13 MR. KEKER: Not tomorrow, your Honor.  
 14 THE COURT: Wednesday.  
 15 (Evening recess.)  
 16  
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1 REPORTER'S CERTIFICATE  
 2  
 3 STATE OF CALIFORNIA, )  
 4 ) ss  
 5 COUNTY OF SANTA BARBARA. )  
 6  
 7 I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand  
 8 Reporter, in the County of Santa Barbara, State of  
 9 California, hereby certify:  
 10 That the court proceedings were taken down by me in  
 11 stenotype at the time and place herein named and  
 12 thereafter reduced to typewriting by computer-aided  
 13 transcription under my direction.  
 14 I further certify that I am not interested in the  
 15 event of the action.  
 16 WITNESS my hand this 13th day of April,  
 17 2015, at San Francisco, California.  
 18  
 19  
 20  
 21  
 22   
 23 TARA SANDFORD, RPR, CSR No. 3374  
 24 Certified Shorthand Reporter  
 25 State of California  
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<p><b>A</b></p> <p><b>\$100</b> 1135:20  <b>\$100,740,565</b> 1120:7  <b>\$101</b> 1114:19  <b>\$109</b> 1117:12  <b>\$116</b> 1118:24  <b>\$13,464,833</b> 1114:22  <b>\$14,467,533</b> 1114:17  <b>\$141</b> 1031:14  <b>\$145</b> 1119:4  <b>\$159,617,411</b> 1120:3  <b>\$163</b> 1031:14  <b>\$165</b> 1117:19  <b>\$17,004,351</b> 1116:2  <b>\$18,312,378</b> 1115:21  <b>\$188,295,602</b> 975:16  1104:21 1119:22  <b>\$19,647,904</b> 1117:9  <b>\$20,879,188</b> 1118:22  <b>\$22.3</b> 1017:1  <b>\$232</b> 1104:14 1115:17  <b>\$235</b> 1068:24 1069:6  <b>\$236</b> 1114:13  <b>\$243</b> 1031:8  <b>\$253</b> 1004:3 1008:25  1030:5 1031:3 1067:4  1067:22 1068:5  1087:14  <b>\$26,098,985</b> 1119:2  <b>\$274</b> 976:6  <b>\$28,678,191</b> 1119:25  <b>\$289,036,167</b> 1119:18  <b>\$29,742,0240</b> 1117:16  <b>\$30</b> 1030:3  <b>\$302</b> 1118:18  <b>\$315</b> 1104:14 1117:5  <b>\$33,805,324</b> 1114:10  <b>\$38.7</b> 1016:19  <b>\$40,000</b> 1113:6  <b>\$409,517,198</b> 1124:15  <b>\$43</b> 976:13 1116:12  <b>\$43,351,752</b> 1115:11  <b>\$5,872,959</b> 1115:3  <b>\$54,357,886</b> 1118:15  <b>\$54.6</b> 1017:5,6  <b>\$56,780,640</b> 1116:24  <b>\$58</b> 1025:5  <b>\$60</b> 1030:4  <b>\$7,379,713</b> 1119:8  <b>\$7,390,496</b> 1117:22  <b>\$77</b> 1016:5,6,16  <b>\$8,035,023</b> 1116:8  <b>\$90</b> 1087:12,13  <b>\$91</b> 1116:5  <b>\$94</b> 1114:25  <b>\$98</b> 1115:24  <b>a.m</b> 970:3  <b>ability</b> 980:9 1004:20</p>	<p>1005:3 1008:12  <b>able</b> 1056:12,19  1067:20 1068:14,18  1104:13 1105:6  1111:20  <b>Absolutely</b> 1105:2  <b>accepting</b> 1020:8  1064:16 1069:18  <b>access</b> 974:8 975:2  976:4 1012:9 1028:10  1029:2,7 1030:3  1031:13 1033:25  1076:12 1077:16  1078:1 1080:6  1105:10,20 1111:18  1112:2,4,6 1114:15  1115:18,23 1117:6  1118:19 1140:4  <b>accomplish</b> 1065:4  1068:18  <b>accomplished</b> 1064:13  1064:15,19 1067:10  1067:24 1068:9  <b>account</b> 1062:7 1133:8  1134:24  <b>accounting</b> 968:16,17  968:18,19,20,21,22  968:23,24,25 969:3  1109:20,24 1110:5,7  <b>accrued</b> 1140:7  <b>accurate</b> 1095:18  1108:7 1147:6  <b>achieve</b> 997:9  <b>acknowledge</b> 1148:7  <b>acquire</b> 1022:15  <b>acquired</b> 1086:20  <b>acquiring</b> 1022:7  <b>acre</b> 988:5 1007:13  1064:3  <b>acre-feet</b> 975:22 988:1  1007:10,17,18,21  1008:16 1009:21,22  1010:1 1021:6 1024:4  1024:7,8,14,17,19,23  1025:1,3,20 1065:11  1067:17 1068:16,17  1069:23 1114:7  1115:14 1117:2  1118:12 1125:25  1126:2 1143:20  <b>acre-foot</b> 976:14  986:13 1007:11  1030:5 1031:3  1104:14 1114:11,13  1114:18,19,23,25  1115:16,17,22 1116:3  1116:12 1117:4,5,11  1117:12,17,19</p>	<p>1118:17,18,23,24  1119:3,4 1125:25  <b>act</b> 981:23 1019:23  <b>action</b> 995:18 996:5  999:6 1000:14,16,19  1013:15 1014:1,2,5,6  1014:9 1058:17,19  1156:15  <b>actions</b> 1011:24  1071:11  <b>active</b> 1102:25  <b>acts</b> 1034:5,18  <b>actual</b> 971:18 977:20  994:17 1107:3,6,8  1110:25 1111:2,10  1112:13,19,24 1113:3  1119:17  <b>add</b> 976:4 1030:5  1124:11  <b>added</b> 1023:19 1124:13  1126:13,14,16  <b>adding</b> 1124:16  <b>addition</b> 1103:14  1106:8 1124:1,19  1126:21  <b>additional</b> 977:16  1014:6,8 1022:15  <b>address</b> 1137:25  1138:8  <b>addressed</b> 996:14  1138:14  <b>adjusted</b> 969:7 1124:11  <b>adjustments</b> 1019:6  <b>administration</b> 1104:7  1104:8  <b>administrative</b> 998:4  1003:10 1047:5  1103:2  <b>admitted</b> 1015:18,24  1029:20 1038:4  1077:5 1095:3 1109:6  1109:15 1110:12,22  1114:1 1116:16  1118:2 1119:11  1120:14,17 1123:15  1124:7  <b>adopt</b> 997:20 999:2  1012:25 1047:19  1048:4,7 1050:25  1051:7,14,19 1052:9  1052:19 1053:7,19,21  1060:7 1097:19  <b>adopted</b> 966:10 977:8  993:9 999:5 1001:5  1027:17 1033:13,17  1034:14 1046:22  1047:3 1057:15,20  1061:20 1062:22</p>	<p>1063:6 1099:7  1100:16  <b>adopting</b> 1059:10,19  1060:1  <b>adoption</b> 1033:24  1034:10,12 1058:13  1074:21  <b>adopts</b> 1035:14  1053:11,12,24 1098:5  1098:7  <b>advise</b> 1059:9 1060:11  1060:19  <b>advocacy</b> 984:24  <b>affairs</b> 984:14  <b>affiliated</b> 1058:1  <b>affirmative</b> 978:1  1040:15  <b>affronting</b> 1121:24  <b>afternoon</b> 1055:8  1057:12,13 1113:7  1127:3,5  <b>agencies</b> 989:25 994:24  1004:8,14,18 1011:13  1011:23 1019:25  1020:4,11 1021:20  1022:17 1023:18,23  1024:2,7 1044:14  1063:7 1081:13  1083:3,6,8,9 1085:1  1098:4,7 1126:15,19  1126:20,23 1152:15  1152:23 1153:1  <b>agency</b> 985:14 1011:14  1011:15 1018:17  1020:12 1074:23  1081:7 1082:9,13  1083:17,24 1084:3,23  1085:2  <b>agency's</b> 1020:6  <b>aggregate</b> 1084:20  <b>ago</b> 1034:11 1051:1  1102:21 1143:9  <b>agree</b> 982:21 1003:13  1004:21,25 1005:7,11  1042:16,24 1044:8  1047:19 1050:5  1052:6 1068:7  1073:21 1093:24  1137:11 1148:18,21  1154:14  <b>agreeable</b> 972:4  <b>agreed</b> 1005:15 1067:5  1067:5 1073:9,15  1087:3,4 1088:14,15  1092:18  <b>agreeing</b> 976:25 1008:8  1067:22  <b>agreement</b> 968:11</p>	<p>969:9,15 971:1,22  973:22 974:2,3,7,23  979:14 980:8,17,20  981:9,13 982:7,8,16  985:5,8,11,16,17,19  985:20,23 986:2,4,6  986:10,12,14,17,19  987:2,6,25 988:12,19  989:7 991:25 1002:7  1002:9,18,25 1005:6  1005:11,19,24,24  1006:2,6,10,12,17  1007:12,13,23 1008:9  1009:9,10,13,14,19  1010:2,12 1012:22  1015:20,21 1016:15  1022:24 1023:22  1025:14 1028:4,8,20  1029:6,24 1030:9,17  1032:7,13 1033:12,17  1036:24 1037:4,14,18  1043:7 1045:5,10,18  1045:23 1046:4,7,9  1046:10,12,17,24  1057:15 1063:22  1065:21,21 1066:1,2  1066:3,6,10,13,20,21  1066:22,23,24,25  1067:4,11,12,16,21  1067:25 1068:1,8,10  1068:19,20,25  1070:19 1073:14  1075:13,24 1076:17  1079:24 1085:13,15  1086:2,5,11,14,16,18  1086:21,23,25 1087:3  1087:4,7,11,16  1088:1,4,6,8,12,21  1089:7,10,21 1090:1  1090:8,23,24 1091:1  1091:6,14,25 1092:2  1092:3,24 1093:16,25  1094:8 1101:7  1104:17,21 1106:11  1106:19 1107:14,16  1111:13 1114:6,21  1115:2,10,20 1116:7  1116:11 1117:1,15  1118:11,21 1119:1,7  1119:16,20 1120:5,10  1120:20 1122:18  1125:10,11,14,17  1150:16,20,23  1151:24  <b>agreements</b> 1013:9,9  1013:22,24 1014:7  1044:22 1046:11  1063:22 1066:5,18</p>
---	---	--	--	---

<p>1067:2,3 1070:4 1073:6,12,16 1090:15 1122:22 <b>agricultural</b> 1012:5 <b>ahadlock@kvn.com</b> 967:7 <b>ahead</b> 1000:10 1039:23 1057:8 1059:4 1121:10 1138:25 1148:25 <b>Alameda</b> 967:16 <b>All-American</b> 988:3 989:4 1005:12 1007:6 1008:4 1069:3,10 1075:23 <b>alleged</b> 1033:23 <b>allocated</b> 1036:12,16 1120:24 <b>allocation</b> 1022:10,16 1041:6,8 1066:12 1068:20,25 1075:23 1099:3 <b>allocations</b> 991:22 997:7 1035:25 1036:1 1036:5,8 1098:24 <b>allotment</b> 1020:20 <b>allow</b> 995:1 1042:15 1045:6 1099:13 1148:24 <b>allowed</b> 1108:15 <b>allows</b> 973:22 <b>alongside</b> 1107:8 <b>alternate</b> 1103:3 <b>alternative</b> 997:11 1048:3 1052:3 1053:18 1098:16,20 1098:24 1099:3,7,9 1099:13,14,17 <b>alternatives</b> 990:20,21 <b>alternatives</b> 1053:16,17 <b>altogether</b> 1018:21 <b>Ambiguous</b> 1141:25 <b>amended</b> 1087:6 <b>amount</b> 975:20 976:5 1005:4 1008:15 1016:10,20 1017:8 1020:17 1021:6 1022:12 1024:15 1050:4 1082:15 1088:9 1089:6,7,12 1089:12,13,21,22 1091:1,10,11,13 1092:15,16 1097:24 1098:9 1099:14 1106:18 1114:23 1115:15 1116:3,10 1117:3,10,17 1118:16 1119:3,14,17,23</p>	<p>1120:7 1121:16,16 1124:10,13,15 1126:1 <b>amounts</b> 1087:18 1092:5 1095:10 1121:14 1123:1 1153:9 <b>analysis</b> 1103:7,19 1104:23 1105:24,25 1106:18 1130:14,15 1131:3 1132:19 1133:2,7 1134:4,14 1135:9,23 1136:1,4 1137:1,7 1139:22 1144:14,22 1148:12 1149:12 1152:13 1153:16,21 <b>analyze</b> 1132:12 <b>analyzed</b> 1152:7 <b>analyzing</b> 1152:9 <b>Angeles</b> 967:13,16 1045:6,21,22 ANN 1156:7 <b>annual</b> 1001:10 1098:14 1111:6,11 1125:13 <b>annually</b> 991:22 1029:9 1071:12 <b>answer</b> 970:8 973:11 1043:24 1052:20 1139:4 1147:10 <b>answered</b> 1039:21 1147:25 <b>anticipate</b> 976:14 <b>anticipated</b> 1028:25 1029:1,6 <b>antitrust</b> 995:4 <b>anybody</b> 970:6 1137:15 <b>anyway</b> 999:3 <b>apologize</b> 981:4 1100:4 <b>apparent</b> 980:25 982:23 983:7 <b>Appeal</b> 1027:19,21 <b>appealed</b> 1027:13 <b>appear</b> 997:8,10 <b>APPEARANCES</b> 967:1 <b>appearing</b> 1057:5 <b>appears</b> 1108:14 <b>appellate</b> 1027:14 <b>applicable</b> 974:5,13 980:10 1003:12 1004:6,7,10,12 1043:19 1044:3,4,6 1044:12 1046:21 1078:2 1097:8 <b>applied</b> 1135:8 <b>apply</b> 1073:21 1100:14 <b>appreciate</b> 983:10</p>	<p>1037:10 <b>approach</b> 994:23 1141:15 1144:11,12 1144:13 <b>appropriate</b> 1069:6 1147:5,9 1149:17 <b>appropriately</b> 1131:10 1149:18 <b>approvals</b> 1069:16 <b>approved</b> 998:1 1035:20 1057:21 1058:11 1091:24 1105:4 <b>approves</b> 1035:15 1091:21 <b>approving</b> 1105:3 <b>approximated</b> 1125:24 1153:5 <b>approximation</b> 1151:22 <b>April</b> 966:11 1071:2 1092:9 1154:24 1155:7 1156:16 <b>aqueduct</b> 973:25 988:18 1079:7,10,12 1146:23 <b>aqueducts</b> 982:2 1145:1,12,19,25 1146:15 <b>arbitration</b> 1127:13,21 1127:23 1128:1 <b>area</b> 987:13,17 1012:7 1019:13 1091:3 1123:25 1124:21 1129:25 1142:11 <b>argue</b> 978:1 <b>argument</b> 995:6 <b>argumentative</b> 1043:4 1059:21 1061:6 <b>arises</b> 981:22 <b>arithmetic</b> 1142:16 <b>arranged</b> 988:10 <b>arrangement</b> 1046:2 <b>arrive</b> 1143:4 1147:8 <b>arriving</b> 1142:16 1147:3 <b>art</b> 1140:2 <b>articulate</b> 999:25 <b>artificially</b> 997:10 <b>aside</b> 1080:17 1089:20 <b>asked</b> 981:21 1018:18 1039:5,20 1041:13 1062:5,11,15,20 1068:14 1070:3 1075:2,3,5 1099:16 1104:16 1106:9 1122:24 1129:4 1134:20 1135:15</p>	<p>1147:25 1149:11 1150:2,5 1151:7 1152:9 1153:11 <b>asking</b> 971:4 1042:9 1043:21 1100:5 1136:11 1146:19 1154:22 <b>aspect</b> 999:7 1001:1 <b>aspects</b> 1103:10 <b>assemble</b> 1108:1 <b>asserted</b> 979:11 1040:15 1046:3 <b>assertion</b> 987:4 <b>assessed</b> 1152:24 <b>assessments</b> 1084:18 <b>assign</b> 1049:14 <b>assigning</b> 1152:21 <b>assistant</b> 978:10 984:6 984:10,18,19 985:3 1021:22 1022:3 <b>ASSOCIATES</b> 966:22 <b>assume</b> 1006:8 1056:25 1129:8,12 1135:15 1145:17 1149:12 <b>assumed</b> 1063:23 1065:14,15 1136:8,16 <b>assuming</b> 1024:6,17 1049:1 1121:8 1146:22 1149:1 1152:24,25 <b>assumption</b> 1105:14 1136:20 1140:10,11 1140:13 1143:19,25 1144:3,13 1145:23 1152:2 <b>assumptions</b> 1129:4,17 1132:2,5,10 1139:14 1139:17 1145:6 1150:6 <b>assymetric</b> 1154:23 <b>asymmetrical</b> 1056:6 1056:16 <b>attempt</b> 1123:23 <b>attend</b> 1061:11,15,16 <b>attendance</b> 1000:7 <b>attended</b> 1061:18 <b>attention</b> 1037:8 1043:9,17 <b>attorney's</b> 1003:19 <b>attorneys</b> 1057:3 <b>attraction</b> 1012:5 <b>attributable</b> 974:16 975:4 1126:7 <b>AUDREY</b> 967:5 <b>authoritative</b> 1128:22 <b>authorities</b> 1013:6 <b>authority</b> 966:6 971:7 975:13,14 976:11</p>	<p>979:13 983:16 984:7 984:12 985:2,4 986:15,24 987:1,5,12 988:6,10,14,20,23 989:7,17,21 990:6,14 991:4,16,20 992:1,2,4 992:8,23 993:1,18 994:14,21,22 995:7,8 996:1,3,6,17 998:3,7 998:10,24 1001:18 1002:1,19 1003:1,24 1004:17,21,25 1005:7 1005:11,15,20,25 1006:4,9,14 1007:25 1008:7 1009:8 1010:4 1010:8 1011:16 1012:16 1013:11,13 1013:15,19,24 1014:8 1014:9,12,13,15,17 1016:3,10,20,23 1017:2,7,15,18 1018:2,13 1019:2,18 1020:15,16,19,23 1021:3,8,13,23 1022:5,14,19 1023:6 1023:7,20,21 1024:8 1024:18,22,24 1025:2 1025:10,13 1026:22 1038:14 1041:2,20 1066:22 1067:10,13 1067:19 1068:24 1069:7,7,25 1070:12 1070:20 1071:1,9 1073:1 1077:2 1091:15 1095:8 1097:11,15,23 1098:6 1098:12 1099:13 1102:7,19,24 1103:3 1103:6,19,22 1106:10 1107:15 1111:11 1115:13 1119:15 1120:23 1125:4 1146:6 <b>Authority's</b> 984:20,24 985:5 986:9 987:16 988:17 990:2,11 992:8,15 994:7 996:8 997:16 998:13 999:24 1002:10 1003:6,22 1004:9,15 1012:13,21 1014:3,21 1020:14 1021:23,25 1022:9 1023:3,24,25 1024:10 1066:20 1091:3 1098:3,8 1100:17 1103:16 1107:4 1119:20 1122:25 1124:1,20,23 1146:9</p>
--	--	--	--	---

<p><b>available</b> 986:16,18,22 989:8,17,22 999:16 1006:5 1007:24 1020:1,12 1024:16 1088:25 1089:8,22 1090:3,4,25 1091:2 1091:12,14 1092:1,6 1092:11,13 1093:4,12 1093:15,23,23 1094:16 1112:23 1130:23 1131:4,7 1133:22 1135:4 1151:4,18,22 1152:3 <b>avoid</b> 978:2,3 <b>aware</b> 987:4 1022:18 1040:18 1044:17,24 1046:14 1053:17 1099:20,24 1122:17 1141:20,22,22 <b>AWWA</b> 1128:15</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 967:12 1003:12 <b>bachelor's</b> 1104:6 <b>back</b> 973:10 978:15 992:17 1023:16 1026:7 1027:15,22 1032:19 1033:8 1042:13 1046:19 1053:7,11,24 1055:24 1069:21 1086:19 1102:25 1109:23 1110:24 1119:13 1125:7 1126:10 1134:6 1151:8,16 <b>backed</b> 1150:25 <b>background</b> 1104:5 1112:16 1135:3 1151:15 <b>backup</b> 1035:5 <b>ballpark</b> 1125:24 <b>bar</b> 1014:9 1073:20 1074:17 <b>Barbara</b> 1156:4,8 <b>bargain</b> 1073:9,14 1097:11 <b>barred</b> 1074:8 <b>based</b> 1012:5 1020:6 1025:6,8 1085:7 1099:14 1104:18 1105:13 1107:3,6 1115:12 1116:25 1119:17,19 1123:25 1125:14 1126:19 1133:4,6 1134:5 1140:11 1144:12 1145:22 1146:21 <b>bases</b> 1150:5</p>	<p><b>basically</b> 1129:18 1131:14 <b>basis</b> 1023:12 1033:10 1099:12 1139:25 1142:25 1143:2,14 1145:23 <b>Battery</b> 966:24 967:6 <b>bear</b> 994:17 1146:15,23 <b>beg</b> 1055:18 <b>began</b> 1013:7 <b>begins</b> 1007:19 1071:7 1089:1 <b>behalf</b> 1004:8,13 1044:13 1150:2 <b>belief</b> 1060:17 <b>believe</b> 973:21 974:20 982:9,23 983:7 993:20 1020:23 1021:16 1030:21 1033:15 1034:7 1036:14 1037:5 1045:7 1046:9 1051:18 1059:5 1060:10,15,17 1061:1 1064:4 1075:5,8,17 1085:14 1092:14 1100:10 1113:20 1116:9 1123:12 1139:13,15 1142:2 1143:18 1147:1 <b>believed</b> 1042:22 1043:1 <b>believes</b> 994:21,22 1021:4 1023:7 1040:6 <b>believing</b> 1061:4 <b>belong</b> 1132:3 <b>belonged</b> 1062:10 1063:2 <b>beneficial</b> 1132:13,16 1132:20 <b>benefits</b> 1015:5 1065:17,20 1086:1 1092:3 <b>best</b> 1151:21 1152:3 <b>better</b> 1048:2 1138:20 1139:8,15 <b>betterment</b> 1139:1,3 <b>beyond</b> 1067:11 1131:21 1133:7 1145:3,15 1146:16 1148:23 <b>Biando</b> 994:7 <b>bifurcated</b> 1027:9 <b>big</b> 1147:11,20,24 <b>bigger</b> 1141:2 <b>billed</b> 1094:13 <b>billion</b> 1025:15 1124:21 1126:17</p>	<p><b>bills</b> 980:13 1109:22 <b>binder</b> 993:23,24 1011:3 1043:11,12,12 1043:14,14 1106:24 1106:25 1108:11,12 1108:12,18 1109:25 1110:1,2 <b>bit</b> 1000:24 1017:12 1067:24 1097:21 1111:14 1122:7 <b>blow</b> 1071:6,7 <b>board</b> 968:12 974:4 977:3,3 984:14 991:1 991:1 994:6 998:4,21 999:5,7,12,20,25 1000:13,16,19 1001:6 1001:13,19 1004:5 1014:9 1017:24 1018:1,5 1034:4 1035:5,11,13,14,15 1043:19 1044:5 1058:3,18,25,25 1059:9,17,25 1060:11 1060:12,16,19 1071:11,13 1097:8,13 1097:22 1098:12,19 1098:23 1099:2 1101:4,15,18 1131:5 1131:5 <b>board's</b> 1105:4 <b>board-approved</b> 1111:23,24 1112:12 1130:22 <b>Bond</b> 1057:24 1058:1,9 <b>bonds</b> 1103:23 <b>bottom</b> 975:21 996:25 1006:23 1026:17 1027:25 1043:10 1058:7 1097:5 1124:9 1125:22 1126:12,12 1126:17 <b>bound</b> 1068:16 <b>boundaries</b> 995:2 <b>bounded</b> 1008:12,21 <b>bracket</b> 1067:20 <b>breach</b> 981:7,11 982:22 982:23 1033:23 1034:6 1046:4 1047:14 1053:2 1057:21 1058:14 1059:10,19 1060:2,7 1061:20 1138:9,17,21 <b>breached</b> 974:2 1033:12,16 1046:7 1150:23 <b>breaches</b> 1034:12,14 1034:19 1036:1,6 <b>break</b> 970:5,6,9</p>	<p>1018:16 <b>breakdown</b> 1077:9 1125:9 <b>Breaux</b> 1018:16,18 <b>brief</b> 970:15 973:12,16 978:17 979:9,10,20 979:23,23 <b>briefing</b> 977:13 <b>briefly</b> 987:15 990:10 992:14 1103:5 1104:22 1119:13 1126:11 <b>bring</b> 970:13 978:15 980:14 1073:19 1074:6 <b>broadly</b> 1065:25 1066:3 <b>brought</b> 999:11 1027:4 <b>brown</b> 966:22 975:21 <b>bucket</b> 1129:24 <b>budget</b> 978:19 <b>building</b> 1069:9,12 <b>built</b> 1028:22 1031:19 <b>bundled</b> 993:16 <b>burdened</b> 1132:21 <b>Bureau</b> 1091:20 1109:21 <b>businesslike</b> 1041:19 <b>buy</b> 1025:2 1093:22 <b>buying</b> 1075:19 1076:2 1076:4 1078:24 1079:1,14,16 1080:10 1080:19 1082:5 1083:21 1093:20 1144:2,3 <b>buys</b> 981:23 1076:6 1077:23 1081:7 1093:13 1144:16</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C-U-S-H-M-A-N</b> 984:1 <b>CA</b> 966:24 <b>calculate</b> 977:10 992:8 1050:3,12 1051:7,22 1062:21 1099:13 1104:16 1106:9 1108:15 1111:10 1122:24 1123:18 1124:11 1147:15 <b>calculated</b> 1020:5,6 1104:18,20 1115:9 1120:22 1121:7,17 1123:7 1125:25 1134:5 1139:22 1150:22 <b>calculates</b> 1081:16 1083:12 1085:8 1096:22 1143:1</p>	<p><b>calculating</b> 977:6 992:15 1100:6 1106:8 1122:18,22 1128:19 1139:22 1151:3 <b>calculation</b> 969:10,11 969:12,13 992:20 1022:19 1023:3,10,13 1023:17,20 1024:9,10 1025:6 1062:11 1063:13 1084:15 1100:16 1113:2 1116:24 1118:9 1122:15 1123:9 1124:17 1138:4 1143:2 1145:22 1148:3 <b>calculations</b> 1106:18 1106:21 1112:19 1113:14 1115:7,19 1119:19 1121:6 1125:9 1129:19,23 1131:8 1145:17 1148:12 <b>calendar</b> 1001:8 1009:6 1018:25 1091:17,21 1091:23 1110:6 1111:4 1112:14 1140:7,16 1152:15 <b>California</b> 966:1,9,11 966:17 967:6,10,13 967:16 970:1 977:17 984:25 1053:1 1055:1 1065:5 1156:3,9,17 1156:25 <b>call</b> 971:5,8,10,13,18 972:11 1101:25 1155:8 <b>called</b> 983:19 999:13 1030:13 1043:9,16 1045:7 1066:2,12 1087:5 1102:4 1109:20 1128:12 1133:13 1154:9,21 <b>calling</b> 971:24 972:1 1155:1 <b>calls</b> 983:16 1054:1 1059:1 1093:6 1102:7 <b>canal</b> 985:13 986:21 988:7,11,15 989:5,8 989:16 990:2 1005:7 1005:16,21 1007:5,6 1007:22,25 1008:1,4 1024:21 1063:23 1064:16 1065:4,6,15 1065:22 1067:6,7,12 1068:21,22,25 1069:4 1069:10,13 1103:11 1107:5 1125:12</p>
---	---	---	---	---

<p><b>canals</b> 973:24 981:25  988:4 1005:13 1069:9  1069:11 1075:23  <b>candid</b> 1101:20  <b>capacity</b> 994:16,25  1045:10  <b>capital</b> 1025:11,15  1104:1,3  <b>career</b> 1133:19  <b>Carlsbad</b> 1025:14,16  1025:17  <b>carriage</b> 1089:11,16  <b>carry</b> 985:10  <b>carrying</b> 1069:1  <b>case</b> 966:7 970:15  971:10 973:21 987:9  990:7,13 992:24  995:9 996:4,7,21  997:17 1013:13  1016:2 1018:23  1027:15,16 1040:14  1045:13 1046:1  1049:4 1052:14,18  1056:11 1057:2,19  1058:21 1102:20  1111:16 1112:19  1120:25 1122:12  1130:14 1134:17  1135:10,25 1136:3  1138:3,9 1152:13  1154:18,23 1155:5,6  <b>cast</b> 1001:18 1098:13  <b>Castaic</b> 999:14  <b>categories</b> 997:5,7  <b>category</b> 999:22,23  1112:7  <b>caught</b> 1037:7  <b>causal</b> 1132:13,17,20  <b>causation</b> 1099:21,25  1132:18  <b>caveat</b> 1056:23  <b>center</b> 981:6  <b>CEO</b> 1038:15  <b>certain</b> 975:20 978:3  1022:12 1026:11  1042:14 1082:9  1087:17 1088:9  1129:4 1149:7  <b>certainly</b> 982:9  1086:17 1153:20  <b>CERTIFICATE</b>  1156:1  <b>Certified</b> 1156:7,24  <b>certify</b> 1156:9,14  <b>cetera</b> 1058:10  <b>chair</b> 1058:18  <b>chairman</b> 994:5 1058:9  <b>challenge</b> 979:16 980:9</p>	<p>980:14 1008:10,18  1009:1 1010:16  1011:25 1012:3,23  1068:14,15 1073:19  1074:2,7,16,24  1149:4,6,17  <b>challenged</b> 990:12  <b>challenges</b> 1012:9  <b>challenging</b> 1035:9  1120:6  <b>change</b> 979:6 981:1  1012:10 1056:17  1071:13 1074:6,15  1121:4 1124:17  1125:25 1147:13  1148:2 1150:19  1154:11 1155:6  <b>changed</b> 1072:4 1085:6  1102:24 1103:3  1106:3 1113:3  1151:24  <b>changes</b> 1049:1  1084:17 1150:18  <b>changing</b> 1051:15  <b>characterize</b> 1067:9  1086:18 1128:18  <b>characterized</b> 983:4  <b>charge</b> 993:13 1003:11  1004:4,16,17,18  1014:14 1027:12  1043:18 1046:20  1081:8,14  <b>charged</b> 974:6 977:15  999:18,20 1004:1  1016:17 1033:7  1044:20,25 1045:2  1050:4,9,13,18,20,20  1051:12,23,24 1052:9  1052:14,15 1099:17  1099:22 1100:1  1119:15,17 1131:10  1140:21 1141:4,12  1142:13 1149:7,15  1152:1  <b>charges</b> 974:4 975:20  976:1 992:18 993:3  1003:11 1004:5  1016:17 1017:3  1030:3,5 1034:1  1036:2,7,9 1039:1  1043:18 1046:20,23  1050:17 1051:11,12  1052:10,11 1071:18  1072:13 1077:19  1081:18 1082:3  1085:7 1094:14  1095:10,16 1097:7  1098:7 1103:16</p>	<p>1105:5,6 1107:8  1109:19 1110:25  1111:2,10 1112:20,25  1128:19 1130:21  1133:4 1143:22  1144:17,17,19  1150:19 1153:7  <b>charging</b> 992:2  <b>chart</b> 969:8,9 975:19  1006:16,19 1007:1  1014:25 1015:19,21  1084:18 1124:10  <b>charts</b> 1125:8  <b>check</b> 1068:24  <b>Chen</b> 969:19 971:6  972:1 973:2  <b>chief</b> 1010:24 1018:16  1103:2  <b>cited</b> 993:20  <b>city</b> 1045:21 1103:23  1104:1,4  <b>Civil</b> 970:16  <b>claim</b> 1053:3 1084:21  1085:9  <b>claimed</b> 1078:7  <b>claiming</b> 1120:6  <b>claims</b> 981:23 1033:12  1035:25 1036:5  <b>clarification</b> 1100:4  <b>clarify</b> 973:19 1107:12  1122:7,9 1151:6  <b>clarifying</b> 1149:19  <b>clause</b> 979:2 1013:14  1073:4,18  <b>clauses</b> 1073:7  <b>clear</b> 1068:23 1075:1  1076:3 1105:18  1110:25 1121:21  1126:6,12 1127:23  1134:8  <b>clearly</b> 1085:19  <b>CLERK</b> 983:23 1047:7  1102:10 1116:18  <b>clock</b> 1074:13  <b>close</b> 1018:10 1140:9  <b>closed</b> 979:13,17,19  <b>closely</b> 1103:15  <b>Coachella</b> 988:4 989:5  1005:12 1007:5  1008:1 1066:25  1075:23  <b>Code</b> 970:16 974:11  <b>collected</b> 1020:10  <b>collection</b> 1066:4  <b>collects</b> 991:8  <b>Colorado</b> 973:24 975:9  975:12 976:12 982:1  982:2 984:23 988:17</p>	<p>989:13,24 992:12  1064:14,15,18,19  1065:25 1075:22  1078:24 1079:2,5,6  1079:20 1080:3,21  1102:18 1103:1,9  1109:24 1110:7  1144:25 1145:11,18  1145:24 1146:5,12,14  1146:23  <b>column</b> 1107:18,23  1108:6 1110:25  1112:4,6 1124:14,25  1125:12  <b>columns</b> 1082:5 1112:2  <b>come</b> 1038:3 1058:17  1153:21 1155:3  <b>comes</b> 973:12 977:13  1025:17 1052:2  1079:19 1122:4  <b>coming</b> 971:2 977:14  1008:3 1127:16  1145:6  <b>commingled</b> 989:22  <b>commissioner</b> 1103:4  <b>commitment</b> 1094:5  <b>committed</b> 1025:13  1092:4 1093:17  <b>committee</b> 991:2  1017:25 1058:17,18  <b>committees</b> 1058:19  <b>common</b> 974:12  <b>communicate</b> 998:10  1017:18 1041:3  <b>communicated</b> 1041:12  1041:14,18,24  <b>communicates</b> 1041:20  <b>communication</b> 1040:2  <b>communications</b>  1018:1 1041:5  <b>comparatively</b> 1008:15  <b>compare</b> 995:7 997:15  1009:9 1017:6  1121:16  <b>compared</b> 1017:3  <b>comparison</b> 1148:6  <b>competitive</b> 997:10  <b>compilation</b> 1108:4  <b>complaining</b> 978:7  <b>complete</b> 1062:6  1063:10 1068:11  1112:20  <b>completed</b> 1007:4  1008:1,2,4  <b>completely</b> 1005:3  1056:6 1097:19  1105:21 1154:22  <b>complex</b> 1133:17,20</p>	<p>1151:13  <b>complied</b> 980:16  1036:23 1037:3,13,17  <b>complying</b> 980:17  <b>component</b> 1039:16  <b>components</b> 1077:12  1078:16,20 1080:5,9  1080:11,17 1081:12  1105:11,12 1111:18  1134:20  <b>composed</b> 1081:19  <b>comprise</b> 1076:18  <b>comprised</b> 1030:2  <b>comprises</b> 987:23  <b>computer</b> 1129:22,22  1129:22 1131:15  <b>computer-aided</b>  1156:12  <b>computers</b> 1133:22  <b>concentration</b> 1104:8  <b>concept</b> 1074:22  1132:16  <b>concern</b> 1026:25  <b>concerned</b> 1010:3  1108:21  <b>concerning</b> 1075:10  <b>concerns</b> 1012:20  1038:25 1041:3,19,20  <b>concession</b> 980:15  <b>conclude</b> 1104:13  <b>conclusion</b> 1003:8  1042:9 1054:2 1059:2  1091:23 1138:19  1139:7  <b>conclusions</b> 1042:12  <b>concocted</b> 1010:13  <b>condition</b> 981:8  <b>conducted</b> 1106:1  <b>conform</b> 985:17  <b>confusing</b> 1022:2  <b>confusion</b> 1150:1  <b>connect</b> 988:17  <b>connection</b> 980:5  <b>consent</b> 978:2 979:21  <b>conservation</b> 974:16  975:8 985:1 998:20  1013:9,23 1148:20  <b>conserve</b> 991:11  <b>consider</b> 997:20  1135:22 1136:13,25  <b>considerable</b> 1069:1  <b>considerably</b> 1068:4  1088:15  <b>consideration</b> 1101:17  <b>considered</b> 1018:6  1142:3  <b>consistent</b> 1059:15,24  1060:18 1061:1</p>
---	--	--	--	--

<p>1099:21,24 1147:6  <b>consists</b> 1076:11  <b>constitute</b> 1001:11  1034:6 1061:9  <b>constructed</b> 1069:3  <b>construction</b> 1025:16  1069:8  <b>contain</b> 1002:9 1013:22  <b>contained</b> 981:8  1105:14 1107:8  1108:13 1135:4  <b>contains</b> 1003:7 1086:6  <b>contend</b> 995:22  1046:21 1058:14  <b>contended</b> 995:24  1036:22,22 1037:2,12  1037:16 1047:3  <b>contending</b> 976:10  <b>contends</b> 1034:6  1084:6  <b>contention</b> 1085:9  <b>contest</b> 1003:20  1108:23  <b>contested</b> 1108:20  <b>contesting</b> 1003:10  1062:10  <b>contests</b> 1003:16  <b>context</b> 979:13 1026:9  1042:15,24  <b>contingent</b> 1086:24  <b>continue</b> 973:1 1007:15  1014:13,17 1017:15  1113:11  <b>CONTINUED</b> 969:2  <b>continuing</b> 1011:22  1012:4  <b>continuously</b> 978:8  990:17  <b>contract</b> 969:14 973:15  973:21 974:21 975:17  978:2,17 980:13,19  981:3,7,12,18,20  982:8 988:14 1016:15  1034:19 1036:1,6  1047:14 1053:2  1057:22 1058:15  1059:11,20 1060:2,7  1061:20 1069:23  1093:3 1120:9  1132:24 1133:1,8  <b>contracted</b> 989:2  <b>contracting</b> 988:24  <b>contracts</b> 1013:6  1070:2,9  <b>contractual</b> 982:3  <b>contrary</b> 995:3  <b>contribution</b> 1023:19  <b>contributions</b> 1020:7</p>	<p>1084:16 1126:14,15  <b>controversial</b> 1074:12  <b>conversation</b> 1018:15  <b>conversations</b> 1049:2,6  <b>convey</b> 1012:1 1044:22  1045:8  <b>conveyance</b> 977:23  980:1 994:18 997:6  997:12 1004:7,13  1016:17 1028:23  1031:18 1036:2,8  1044:13,20 1051:6,14  1051:19 1052:3  1076:16 1078:15,20  1079:12 1080:2,21,23  1081:2,8,9,14,17,18  1082:25 1083:1,9,15  1083:25 1084:6,7,8  1085:3,7,21 1090:13  <b>conveyed</b> 1012:6  1079:6  <b>conveying</b> 1047:23  1048:7 1079:10  <b>conveys</b> 1038:24  <b>cooling</b> 978:24 979:7  980:5,7 983:1  <b>cooling-off</b> 980:24  <b>coordinating</b> 1104:3  <b>coordinator</b> 1104:2  <b>copy</b> 1011:7  <b>core</b> 1021:7  <b>corporate</b> 970:17 973:5  <b>correct</b> 987:9 1009:2  1015:3 1018:8  1026:23 1028:1,10,23  1029:8,24 1030:9,11  1030:23 1031:5,8,19  1032:7,15,21 1033:14  1034:1,2 1035:6  1036:3,9,17 1037:6  1037:14,15,18,19  1038:8,19 1039:6  1047:15,16 1048:4,5  1048:8,24 1050:10,13  1050:16,21 1051:3,4  1051:8,17,21 1052:1  1053:13,16,25 1056:1  1065:9,18 1070:10,14  1070:22 1071:19  1072:7,13,24 1073:10  1073:15 1075:15,24  1075:25 1076:13,17  1077:20 1078:5,6,9  1078:12,13,17,22,25  1079:13,21 1080:4,11  1085:8,25 1086:25  1088:5,11,13,16,25  1090:20,21 1091:8</p>	<p>1092:13,14,18  1093:18 1096:11,14  1101:22 1102:21  1105:16 1106:12,13  1116:12 1123:10  1126:4,9,16,21  1127:8,15,19,22  1128:7,11 1129:5,11  1129:14 1130:12,16  1131:12 1132:5,11  1133:2 1134:18,20  1135:18 1136:9,10,15  1138:1,5,6,18  1139:11,21,25 1140:8  1140:14,16,18,19,24  1141:4,12,16,17,20  1141:24 1142:14,15  1143:6,9,13 1144:4,7  1144:11,22 1148:3,16  1148:17 1149:8,13,14  1149:23 1150:7,25  1151:1 1152:1,2  <b>corrected</b> 1104:25  1106:9 1140:8,18,20  1141:2,3,6,7,11  1142:17 1143:5,23  1144:6 1147:3  <b>correctly</b> 1127:24  1136:7  <b>correspondence</b> 1131:6  <b>corresponding</b> 1112:25  <b>cost</b> 975:8 976:12  977:19 978:20 979:25  990:20 994:17 997:1  997:5 1012:1,5,7  1017:22 1025:4  1026:11 1035:5,7  1078:19 1079:9  1099:21,24 1105:5,14  1105:15 1111:15  1130:3,8 1131:5  1132:18 1133:5  1134:6 1139:24  1140:6,10,12 1146:3  1146:24,25 1149:5,16  <b>costs</b> 974:16 975:5  976:3 978:13,14  991:18,23 992:19,19  993:16 994:15,16  995:9 997:7,10,12  998:17,17,20 999:12  999:13,19,21 1000:12  1000:15 1003:18  1012:15,15 1026:11  1028:15 1031:17  1035:8,25 1036:5,13  1041:7,11 1048:16,18  1048:21,22,22 1049:8</p>	<p>1049:12,12,15  1061:25,25 1062:10  1062:12,18,22  1063:11,15 1072:6,12  1078:15 1098:25  1100:1,6,18 1105:18  1120:2,24 1121:15  1129:9,13,15 1130:6  1130:15 1131:9,10  1132:3,13,21 1134:15  1134:23 1135:16  1136:1,5,13,19,21  1137:4,8,9,12,12,16  1137:17,21,22 1138:5  1139:9,24 1140:1,6  1140:12 1141:24,24  1142:9,14 1146:15  1148:19,20,20 1149:5  1149:7,9,15,18,21,22  1150:6,24 1151:8,25  1152:1 1153:6  <b>counsel</b> 967:15 994:7  1026:6 1043:9,16,21  1075:3 1129:8  <b>counsel's</b> 1043:6  <b>count</b> 1021:15 1075:18  1078:3,8,17,20  1079:13  <b>counted</b> 1075:14  <b>counting</b> 1152:18  <b>countless</b> 990:17  <b>County</b> 966:2 975:13  979:12 984:7 986:25  986:25 987:20,24  988:8,11,18 1012:21  1071:1 1090:19  1102:19 1125:1,2,20  1156:4,8  <b>couple</b> 982:19 1030:18  1067:7 1068:21  1082:4  <b>course</b> 972:13 983:8  1005:10 1012:17  1057:1,2,3 1091:16  <b>court</b> 966:1 970:5,7,20  970:22 971:12,16  972:4,9,16,23 973:5  978:5 982:18,25  983:3,10,14 984:16  987:15 990:10 993:25  995:15 996:2,20  1000:6,9 1006:21,23  1008:23 1009:3  1011:1,4,8 1015:2,4,9  1015:11,16,18,24  1025:22 1027:9,10,11  1027:14,15,18,19,21  1027:22 1029:12,14</p>	<p>1029:18,20 1038:4  1039:22 1042:10  1043:3 1048:11  1053:6 1054:3 1055:8  1055:10,12,15,21,24  1056:8,18 1057:1  1059:3,22 1061:7  1068:15 1075:2  1077:5 1081:3 1093:8  1094:24 1095:3  1096:25 1100:23  1101:13,23,25 1105:3  1105:23 1106:4  1108:19 1109:1,4,6,9  1109:12,15 1110:11  1110:19,21 1113:7,11  1113:17 1114:1  1116:16,19 1117:25  1118:2 1119:11  1120:12,17 1121:11  1121:25 1122:8,11  1123:13,15 1124:7  1126:6,25 1127:17,21  1130:18 1131:23  1132:1 1133:11,16  1138:23 1142:1,4,22  1142:24 1145:5,8,15  1145:21 1146:17  1148:1,24 1149:24  1150:3,9,11 1153:13  1153:17,22 1154:1,3  1154:12,25 1155:9,14  1156:10  <b>Court's</b> 1018:22 1019:7  1019:11 1053:23  <b>courtroom</b> 970:23  973:7,10  <b>cover</b> 1019:13  <b>covered</b> 1016:14  1067:13,15  <b>CPF-10-510830</b> 966:7  <b>CPF-12-512466</b> 966:8  <b>create</b> 1147:17  <b>created</b> 990:24 1017:23  1123:6 1152:6  <b>creates</b> 991:9 1020:11  <b>credit</b> 1081:14 1083:15  1083:18 1085:22  1094:15 1095:13,17  1096:14  <b>Credits</b> 1112:1  <b>CROSS</b> 968:3  <b>cross-examination</b>  1026:1 1057:10  1122:1,5 1126:25  1127:1 1131:24  1153:4  <b>crystal</b> 1105:17</p>
--	--	--	--	--

<p><b>CSR</b> 966:20 1156:7,23  <b>current</b> 1002:7  <b>current</b> 982:11 1025:7  1070:13,21 1071:10  1103:12  <b>currently</b> 1102:17,18  1111:22  <b>CURTIS</b> 966:3  <b>Cushman</b> 968:4 969:17  970:18 971:11 978:10  982:5,15 983:16,18  983:25 987:8 992:7  996:13 997:14  1002:15 1006:19  1007:1 1009:7  1010:20 1011:10  1012:11 1014:25  1018:22 1026:3  1043:13 1055:5  1057:12 1097:5  1122:24 1153:16  <b>customer</b> 1148:21  <b>customers</b> 994:24  1045:9</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D</b> 968:2  <b>D-A-N</b> 1102:11  <b>D-E-N-H-A-M</b> 1102:12  <b>D-E-N-N-I-S</b> 983:25  <b>D.C</b> 984:25 985:1  <b>damage</b> 1099:14  <b>damages</b> 969:14 974:21  975:15 976:7,16  977:6,10 978:3  980:19 981:18 992:9  992:16 1016:11,21  1017:7,9 1047:15  1050:8,16,18,21  1051:7,12 1052:5,13  1052:18 1053:2,22  1062:6 1104:17,20  1106:19 1115:9  1119:1,5,20 1120:6,9  1121:4,7,17 1127:12  1127:17,20 1138:4  1140:24 1141:15  1144:10,22 1147:21  1152:13  <b>Dan</b> 967:5 968:5  975:12 992:12 1023:9  1102:3,7,11  <b>data</b> 1107:22 1112:17  1112:22 1130:2  1131:4,16 1151:17,22  <b>date</b> 1012:24 1013:10  1029:22 1072:20  <b>dated</b> 996:14 1026:7</p>	<p>1038:8 1071:2  <b>day</b> 972:22 1154:8,17  1154:17,21 1156:16  <b>deal</b> 978:16 1009:21  1064:1,25 1065:6,18  1065:24 1069:18,20  1069:25 1073:24  1090:17  <b>debt</b> 1103:17  <b>December</b> 995:7,12  1026:7 1104:10,24  1107:23,24 1112:25  1154:10  <b>decide</b> 981:21  <b>decided</b> 1018:20  1070:9,12 1073:6,11  <b>decision</b> 1018:23  1019:7,11  <b>declaring</b> 1014:12  <b>declining</b> 1070:4  1073:5  <b>decree</b> 1109:20 1110:5  <b>deemed</b> 1092:11  <b>default</b> 968:15 1096:3  <b>defendant</b> 967:10  1027:5  <b>defendants</b> 966:14  996:4  <b>defending</b> 1003:19  <b>defense</b> 1029:10  1031:21 1037:20  1040:15 1042:5  1058:6 1070:23  1094:19 1096:1  <b>defenses</b> 978:1 981:2  <b>defer</b> 1122:1  <b>deferred</b> 1000:16  <b>deficiencies</b> 1012:4  <b>deficit</b> 1017:6  <b>defined</b> 1087:17,25  <b>definition</b> 1020:10  <b>degree</b> 1104:6,8 1127:7  <b>delays</b> 981:14  <b>delegate</b> 1058:3,13,21  1097:22  <b>delegates</b> 998:24  999:24 1001:18  1034:4,17 1058:24  1059:8,17,25 1060:16  1061:2,19 1098:13  1101:8  <b>delineates</b> 1019:24  <b>deliver</b> 1024:2 1091:6,9  1092:4,10,16,25  1093:18 1094:5,6  <b>delivered</b> 985:13  989:11 1006:9  1088:25 1089:6,21</p>	<p>1091:22 1092:1  1093:3 1095:10  1107:13,16 1144:25  1145:11,18  <b>deliveries</b> 969:9  1006:17 1015:20,22  1018:25 1091:16  1125:11,14  <b>delivers</b> 1078:15,19  1079:2 1094:15  1095:16  <b>delivery</b> 986:24 993:13  1006:13 1007:2,17  1020:19 1079:4  1088:22 1089:2,3  1125:10  <b>Delta</b> 1141:3,10,14  <b>demand</b> 1015:5 1136:5  1136:7,13,22  <b>demanding</b> 1020:19  <b>demands</b> 987:23  1021:17,19 1022:14  <b>demonstrative</b> 1006:21  1014:20 1015:2  1113:18  <b>demonstratives</b> 1015:7  1015:8  <b>Denham</b> 968:5 969:19  975:12 976:4 982:6  982:15 992:12,15,17  992:20 1023:9,10,16  1049:3 1061:24  1099:11 1102:3,8,11  1102:16 1105:25  1106:7 1115:6  1116:22 1120:19  1122:14 1127:3  1150:15  <b>Denham's</b> 1105:23  <b>Dennis</b> 968:4 971:11  978:10 983:16,18,25  1055:5  <b>denominator</b> 1142:17  1143:11 1144:1,5,8  1144:21 1146:2,11  1147:2,8,21,23  1148:3 1151:2  <b>denying</b> 980:6 1033:4  <b>department</b> 966:4  1045:6 1103:15,24  <b>depend</b> 1089:9 1126:3  <b>depending</b> 975:22  976:5  <b>depends</b> 1094:8  <b>deposed</b> 1128:2  <b>deposition</b> 966:23  1033:21 1047:11  1075:8 1121:18</p>	<p>1127:24 1128:6  1132:9  <b>Dept</b> 968:16,17,18,19  968:20,21,22,23,24  968:25 969:3  <b>derive</b> 1140:8,24  <b>derived</b> 1143:3  <b>desalination</b> 1025:14  1025:16,17  <b>describe</b> 990:11 992:14  1007:7,22 1022:22  1095:5  <b>described</b> 1107:19  1111:14 1149:5,16  1150:24 1151:9  1152:21  <b>description</b> 968:8  1086:13 1089:25  <b>Desert</b> 988:4  <b>design</b> 1003:1  <b>designated</b> 1047:9,17  1048:1 1075:9  1127:14  <b>designed</b> 977:12  1002:10  <b>designing</b> 997:8  <b>despite</b> 1057:4  <b>destabilize</b> 979:19  <b>detail</b> 990:10 1039:4  1135:12  <b>detailed</b> 1090:15  1105:24  <b>deter</b> 979:5  <b>determination</b> 1027:19  1063:15 1138:16  <b>determine</b> 1056:12  1061:24 1104:25  1105:7  <b>determined</b> 977:8  1024:3 1056:14  <b>develop</b> 1027:12  <b>developed</b> 993:8,20  1017:23 1032:9  1044:21 1045:5  1107:3 1147:12  <b>development</b> 991:10  1105:9 1135:14  <b>develops</b> 981:24  1004:17  <b>Diego</b> 966:6 969:8  973:22 974:22 975:13  976:11 977:12 978:7  978:12,23 979:5,12  979:15,24 980:8,13  980:16,24 981:17,23  983:3,16 984:6  986:14,25 987:19,24  988:7,11,18 989:15</p>	<p>990:3 1007:14  1010:14,15 1012:21  1015:4 1021:13  1026:10,21 1027:5  1028:21 1029:1  1030:16 1031:4,7,17  1032:4,12 1033:11,25  1034:4,6,17,25  1035:8,25 1036:5,21  1036:23 1037:1,3,13  1037:17 1038:14,25  1040:3,5,6,22,24  1041:15 1042:6,21,22  1043:1 1044:18,25  1045:1,17,22 1046:3  1046:5,15,16,21,23  1047:3,9,17 1048:2,8  1048:23 1050:7,9,12  1051:23 1057:22  1058:1,3,13,21  1059:17 1060:5  1061:2,19 1062:17  1063:21,22 1064:2,5  1064:22,25 1065:3,6  1065:14,16,17 1067:5  1067:5 1068:7  1069:20 1070:4,8  1071:1 1072:10  1073:5,9,11,15  1074:5,9,14,15,18  1075:12,17 1076:6,16  1077:23 1078:7,11  1079:3,9,20,23  1080:3,10,18 1081:9  1081:19 1084:1,5,7  1085:10,15,18,20,22  1085:23 1086:1,6,8  1086:19,20,24 1087:2  1087:2 1088:14  1090:16,16,18,19  1091:11,14 1092:3,5  1092:9,13,16,17,18  1092:21 1093:12,15  1093:25 1094:4,6,6  1094:10,13,16  1095:18,23 1096:3,6  1096:10 1099:16,22  1100:7 1101:8  1102:19 1103:23  1104:1 1106:18  1114:5,8,15 1115:10  1116:1 1117:7,13  1118:14,20 1120:4,19  1121:14 1133:22  1134:9 1138:8,16,20  1139:8,14 1141:18,19  1141:23 1142:7,12,18  1143:13,15,17 1144:2</p>
--	---	---	--	--

<p>1144:15,18 1146:5  1149:8 1150:15,19,22  1151:23 1152:14  <b>Diego's</b> 982:10 987:19  1030:11,12,25 1031:9  1047:25 1049:3,8  1050:16 1051:7  1052:5 1053:5,22  1058:24 1059:8,25  1060:10,16 1061:24  1062:6,18 1063:15  1083:14 1084:12,21  1085:9,11 1090:18  1104:17 1119:1,5  1121:3,17 1123:18  1126:14 1133:21  1141:15 1144:10  1151:23  <b>difference</b> 1024:8,13  1041:25 1042:7  1050:15,19 1051:23  1052:17 1111:24,25  1112:11 1126:7  1147:20,24  <b>differences</b> 1088:18  <b>different</b> 977:5 983:2,4  983:6 1036:11,15  1044:7,23 1045:14,15  1045:16 1047:19,22  1050:24 1052:16,22  1053:15 1066:18,19  1066:24 1081:23  1086:6 1087:24  1089:14,15,24 1101:4  1101:16 1106:1  1109:22 1122:13,25  1139:17 1147:15  1148:8,8 1152:22  1154:13  <b>differently</b> 1044:19  1045:1 1081:4  <b>difficult</b> 1151:15  <b>direct</b> 968:3 984:3  1034:22 1063:20  1065:10 1070:3  1102:14 1148:10  1153:18  <b>direction</b> 1156:13  <b>directly</b> 1010:14  1139:4  <b>director</b> 975:13 978:19  984:14 992:13  1102:19,25 1103:8  <b>directors</b> 994:6 1004:5  1017:25 1034:4  1043:19 1058:18  1060:3,6,21 1071:13  1097:8</p>	<p><b>disclose</b> 1060:1 1061:4  <b>discourage</b> 1010:7,15  <b>discouraged</b> 977:23  <b>discovery</b> 1075:8  <b>discriminated</b> 1044:19  1046:6  <b>discriminating</b> 977:18  <b>discuss</b> 1085:13  <b>discussed</b> 972:8  1011:21 1137:19,24  1143:8  <b>discussing</b> 1062:1  <b>discussion</b> 1026:12  1042:11 1055:23  1074:5,10 1101:24  <b>discussions</b> 999:10  1024:4  <b>display</b> 1077:7  <b>displayed</b> 1111:4  <b>dispute</b> 1022:18,22  <b>disputed</b> 975:20  1120:24  <b>distinct</b> 1066:18  1081:23  <b>distinction</b> 1042:16,23  1044:8 1076:1  1080:12 1126:7  <b>distribution</b> 997:6  <b>District</b> 966:9,11  967:10 981:24 986:12  986:20 988:1 989:3  991:1 1007:3 1009:16  1019:23 1026:4  1038:16 1064:13  1066:21 1075:21  <b>District's</b> 984:21  <b>diversifying</b> 1064:9,10  <b>divide</b> 1146:12  <b>divided</b> 1140:6,13  <b>division</b> 997:5 1141:7  <b>document</b> 969:1 994:2  996:11,13 1010:22  1011:11 1026:7  1027:1 1032:2,4  1038:2 1040:2,7  1041:1 1071:2,6  1099:8 1106:24  1111:1,22 1123:6,23  1130:9,23 1135:5,12  <b>documents</b> 1040:12  1042:14 1105:7  1109:18 1121:20  1130:1,4 1131:2  <b>doing</b> 976:22 1042:18  1065:16,18 1083:10  1094:4 1118:14  1129:7 1131:8  1133:25 1137:2</p>	<p>1141:7 1144:14  1147:16  <b>dollar</b> 1008:20 1020:8  1124:14  <b>dollars</b> 980:19 991:22  992:5 1020:9 1023:1  1025:15 1065:1,4  1067:7 1068:22  1084:19  <b>double-negative</b> 1037:7  <b>downward</b> 1085:23  <b>dpurcell@kvn.com</b>  967:8  <b>draw</b> 1042:9  <b>drive</b> 976:21  <b>drought-year</b> 1022:11  <b>dry-year</b> 999:13,16,18  999:21 1000:14,20,25  1018:6 1022:10  1125:2  <b>dunes</b> 1069:12  <b>duration</b> 1087:20  <b>duties</b> 1059:25 1060:18  1061:2  <b>duty</b> 1058:25 1059:5,9  1059:9,16 1060:10,11  1061:9</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 966:3 968:2  <b>earlier</b> 976:25 989:6  1002:5 1003:25  1017:12 1018:4  1053:18 1087:16,25  1088:12 1111:14  <b>eastern-most</b> 1069:13  <b>economic</b> 1012:5  1021:2,3 1063:10  1103:10  <b>economics</b> 1104:7  1127:6  <b>economy</b> 1021:10  <b>educational</b> 1104:5  <b>effect</b> 993:9 998:2  1001:15 1005:25  1013:20 1095:15  1098:10  <b>effective</b> 966:12 981:10  1013:10 1033:13,18  1038:18 1040:4  1058:10  <b>effectively</b> 997:12  <b>effort</b> 976:24 986:7  1018:19,20  <b>efforts</b> 990:22 1018:12  <b>Eighty</b> 1011:3  <b>either</b> 972:1 1022:14  1030:17 1040:16</p>	<p>1079:13 1108:22  1120:16 1131:14  1137:1  <b>elasticity</b> 1137:1  <b>element</b> 1086:5  1114:14  <b>elements</b> 1080:24  1081:19  <b>eligibility</b> 1014:3  <b>eligible</b> 1014:12  <b>email</b> 967:7,8,8,14  969:17,19 1029:17  1031:12  <b>EMANUEL</b> 967:11  <b>embodied</b> 1019:23  <b>emphasize</b> 980:18  <b>employed</b> 984:11  1026:11 1028:9  1102:17  <b>enacted</b> 1001:3  <b>encouraged</b> 977:23  <b>ended</b> 1018:12,14  1096:10  <b>ends</b> 1030:8  <b>engineering</b> 1069:8,12  <b>ensure</b> 985:12 1021:9  <b>entered</b> 996:4 1046:12  1068:19 1073:25  <b>entering</b> 988:19  <b>entire</b> 1074:21 1107:24  1116:12 1154:24  <b>entities</b> 1011:25 1083:5  <b>entitle</b> 1020:15  <b>entitled</b> 973:23 1003:18  1024:19 1082:9,13  1124:14 1125:12  <b>Entitles</b> 1020:16  <b>entitling</b> 981:25  <b>entity</b> 1084:3 1089:1  <b>environment</b> 1089:19  <b>environmental</b> 1069:15  1069:16,16 1089:18  <b>equal</b> 976:7 1004:4  1043:18 1091:7,10,15  1092:5 1137:12  <b>equivalent</b> 973:6  <b>escalated</b> 1087:20,24  <b>Especially</b> 1042:3  <b>ESQ</b> 967:4,5,5,15  <b>essentially</b> 1065:24  1066:16 1084:11  1103:4 1104:2  1123:24 1129:21  1151:17  <b>establish</b> 976:21 993:6  1005:4  <b>established</b> 974:6  982:24 993:9 995:25</p>	<p>1071:12  <b>establishes</b> 974:1  1004:3  <b>establishing</b> 993:5,10  993:14,15 994:9  <b>estimate</b> 1052:17  <b>estimated</b> 1065:11  1120:22 1121:1  1153:9  <b>estoppel</b> 978:2  <b>et</b> 1058:10  <b>evaluated</b> 997:24,25  <b>evaporation</b> 1089:16  <b>Evening</b> 1155:15  <b>event</b> 1003:16 1156:15  <b>everybody</b> 1113:8  1144:3 1155:8,12  <b>evidence</b> 968:8 976:19  981:17 983:1 993:23  996:11 1002:14  1010:19 1015:25  1029:12,21 1031:22  1037:21 1038:2,5  1043:7 1058:7  1070:24,25 1076:21  1076:22 1077:3,6  1094:20 1096:2  1108:18 1109:7,16  1110:10,18,23 1111:7  1113:23 1114:2  1116:14,17 1117:24  1118:4 1119:9,12  1120:15,18 1123:11  1123:16 1124:4,8  <b>exactly</b> 1062:8 1081:2  1135:7 1150:2  1154:12  <b>exam</b> 1063:20 1070:3  <b>examination</b> 984:3  1097:1 1102:14  1148:10 1150:13  <b>example</b> 971:19  1066:19 1067:3  1092:8 1094:18  1095:5 1112:5  1135:23 1150:5  <b>Excel</b> 969:5 1107:2  1133:18  <b>excellent</b> 1039:15  <b>excess</b> 994:16,25  <b>exchange</b> 968:11 969:9  969:15 973:22 974:1  974:3,7,23 979:14  980:8 981:13 982:7,8  985:11,16,17,18,23  986:2,4,6,10,12,12,14  986:17,23 987:2,6  988:12,19 989:7</p>
--	---	--	--	--

<p>990:3 991:25 1002:7  1002:9,18 1005:6,11  1005:19,24,24  1006:12,17 1007:8,23  1008:9 1009:9,10,18  1010:2,11 1015:20,21  1016:14 1022:24  1023:22 1028:4,7,20  1029:24 1030:8,17  1031:23 1032:6,13,20  1033:12,17 1036:24  1037:3,13,18 1043:6  1045:18,23 1046:4,7  1046:12,16,23  1056:21 1057:15  1063:21 1065:21  1066:6,22 1067:4,11  1067:16,21,25 1068:1  1068:8,10,19 1070:18  1075:13 1076:17  1079:18,19,23,24  1080:23 1081:3,9,20  1082:17,21 1084:2  1085:13,15 1086:18  1087:4,6 1088:20  1090:22 1091:1,6  1092:2,3,11,17,22,24  1093:16,25 1095:13  1095:15,23 1096:7,14  1096:16 1101:7  1104:17,21 1106:19  1107:3,4,14,16,18,19  1107:20 1108:2,3,7  1109:19 1111:3,10,13  1111:21 1112:10,13  1112:13,20,24 1114:6  1114:21 1115:2,10,20  1116:7,11 1117:1,8  1117:14 1118:11,21  1119:1,6,16,20  1120:5,10,20 1122:18  1125:9,11,14,17  1140:3,23 1141:18  1142:7,19 1143:5,12  1143:20 1144:24  1145:10,17 1149:8  1150:16,16,20  1151:23  <b>exchanged</b> 1085:23  1094:16  <b>exchanges</b> 1144:15  <b>exchanging</b> 1080:10,19  1082:6 1084:5  1088:19  <b>exclude</b> 970:16,19  1122:21 1123:1  1147:15  <b>excluded</b> 970:24</p>	<p>1023:2 1096:20  <b>excludes</b> 1122:17  <b>excluding</b> 1148:19  <b>exclusion</b> 1056:24  1057:4  <b>excuse</b> 970:22 1016:19  <b>execution</b> 1012:24  <b>executive</b> 1010:24  <b>exempt</b> 1003:14  <b>exercise</b> 981:14  <b>exercising</b> 981:15  1074:23  <b>exhibit</b> 993:25 1006:21  1015:14,25 1026:7,17  1029:10,10,16,21  1031:21 1037:20  1038:5 1043:7 1047:7  1058:6 1070:24  1076:20,22 1077:6  1094:19 1096:1  1106:23 1107:17  1108:10,16 1109:7,16  1110:14,23 1114:2  1116:17 1118:4  1119:12 1120:18  1123:16,17,22 1124:8  1125:8 1126:11  <b>exhibits</b> 968:7 969:2  1110:17 1113:18  1148:11  <b>exist</b> 1098:9  <b>existed</b> 1072:9  <b>existing</b> 979:18  1009:10 1028:8  1030:22 1124:20  <b>expect</b> 976:17  <b>expectation</b> 1053:10  <b>expected</b> 978:22 1148:4  <b>expenditures</b> 1025:11  1069:8 1134:24  <b>experience</b> 1103:18  <b>expert</b> 1049:3,3,20,23  1050:1 1101:21  1121:19,23 1122:8  1127:13,14,20 1128:2  1128:4,9 1130:13,14  1131:19,22 1133:25  1134:10,17,25  1135:10,24,25 1136:3  1136:8,12 1137:6,10  1138:15 1139:7,20  1146:22 1148:15  1149:11,25  <b>explain</b> 982:6 1107:1  1111:9 1124:10,18  <b>explains</b> 975:19  <b>explanation</b> 1114:4  <b>explicit</b> 979:12</p>	<p><b>exposure</b> 1008:20  1067:13,18,20  <b>expressed</b> 1073:12  1074:19 1084:13,22  <b>expressly</b> 974:3  <b>extensively</b> 990:8  <b>extent</b> 977:11 1023:6  1077:21 1130:23  1133:3 1135:19  1142:10 1147:12,13  1148:2  <b>externally</b> 984:20  <b>extra</b> 1024:19  <b>extracted</b> 1131:16</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> 1069:3  <b>faced</b> 1008:11 1009:8,9  <b>facilities</b> 988:16  1044:23  <b>facility</b> 1045:9,13,25  <b>facility/system</b> 994:19  <b>fact</b> 979:9 999:22  1026:10 1030:11  1060:1 1061:5  1072:20 1078:7  1085:14 1086:24  1091:19 1092:12  1095:23 1121:21  1132:8 1136:18  1139:12 1144:15  1148:18  <b>facts</b> 978:4  <b>failed</b> 987:5  <b>fails</b> 981:14  <b>failure</b> 981:8,11  <b>fair</b> 1062:16,16  1130:20 1152:23  1153:20 1155:5,5  <b>fairy</b> 978:16  <b>faith</b> 972:15 973:3  <b>familiar</b> 985:19,22  1019:14 1096:8  1122:14 1128:12  1132:14,16 1133:13  1133:23  <b>far</b> 971:3 972:18  992:15 1001:25  1048:7 1108:21  1141:22 1142:12  1144:18  <b>farther</b> 994:20  <b>fashion</b> 1041:13  1127:25  <b>favor</b> 1002:2 1034:18  1065:16 1101:8  <b>February</b> 1038:8,22  <b>federal</b> 995:4 1067:1</p>	<p><b>feeder</b> 1045:8,8  <b>Feel</b> 970:22  <b>fees</b> 1003:19  <b>feet</b> 988:5 1007:13  1064:3  <b>fiduciary</b> 1058:25  1059:8,16,24 1060:10  1060:18 1061:2,9  <b>fifth</b> 1007:12  <b>Figueroa</b> 967:12  <b>figure</b> 1020:9 1050:7  1125:24  <b>figures</b> 1052:16,17  1108:2,3 1113:4  <b>file</b> 1013:11  <b>filed</b> 979:11 995:18  1010:16,16 1013:13  1036:21 1078:8  <b>filing</b> 1010:8 1037:1,11  1040:4,23 1041:15,17  1074:2  <b>fill</b> 1021:20  <b>final</b> 1009:17 1074:12  <b>finally</b> 980:25 981:20  996:22 1016:23  1024:3  <b>finance</b> 990:20 1000:17  1000:21 1017:20  1103:7,15,22 1104:9  <b>financial</b> 1011:22  1018:16 1020:7  1023:19 1045:15  1103:19 1133:13,17  1134:1,3,10,13  1151:14  <b>find</b> 1040:20,21,25  1055:22 1074:16  1123:13 1130:10  1135:5  <b>finding</b> 974:1  <b>fine</b> 1154:14  <b>first</b> 970:18 973:8  975:7 978:6 982:21  983:15,24 984:16  985:22 991:14 996:25  1003:9 1007:5,9,11  1008:2,9,12,14,16,24  1009:15 1011:19  1015:10 1033:12  1046:19 1055:24  1057:14 1058:14  1067:21 1076:4  1086:20 1087:16,19  1106:5,24 1112:16,18  1115:19 1124:10  1125:7,8 1141:1  <b>five</b> 1003:9 1004:20,24  1005:17 1007:11</p>	<p>1008:9,12,13,14,16  1012:24 1025:23  1067:21 1068:13  <b>five-year</b> 979:7 980:4,7  980:17,22 983:1  1003:23 1009:25  1017:14,19  <b>flat</b> 1007:18  <b>Fleming</b> 1057:25  <b>flex</b> 999:13,17,21  <b>floating</b> 1004:22,25  <b>Floor</b> 966:24 967:12  <b>focus</b> 1088:20  <b>focused</b> 984:20  <b>focusing</b> 1135:24  <b>Foley</b> 968:9 994:5  <b>folks</b> 1056:12  <b>follow</b> 1011:8 1084:24  <b>following</b> 1034:20  1149:20  <b>follows</b> 983:20 1055:6  1102:5  <b>foregoing</b> 1003:15,17  <b>form</b> 1131:9,13  <b>formal</b> 1013:19  <b>format</b> 1110:21  <b>forth</b> 990:19  <b>forthright</b> 1128:8  <b>forthwith</b> 1055:14  <b>forum</b> 1003:11  <b>forward</b> 1007:11  <b>found</b> 974:10,13 980:5  980:7 1154:6,19  <b>foundation</b> 1021:7  1048:10 1101:12  <b>foundational</b> 1022:8  1133:6  <b>four</b> 975:1,7,24 976:14  1042:13 1070:18  1077:25 1080:14  1119:21 1154:4  <b>four-and-three-quar...</b>  1124:24  <b>four-inch</b> 1108:12  <b>fours</b> 1045:17,20  <b>fourth</b> 1080:15  <b>fraction</b> 1143:8  <b>frame</b> 1008:3  <b>Francisco</b> 966:2,16,17  966:24 967:6 970:1  1055:1 1156:17  <b>frankly</b> 972:6  <b>free</b> 970:22 1003:24  1122:4  <b>frequently</b> 1139:18  <b>front</b> 981:6 1106:25  <b>full</b> 990:9 1035:5  1076:9,11 1077:9,12</p>
--	--	--	---	--



<p>1077:14,19 1078:4 1080:22 1081:3,7,14 1081:18,21 1085:4 1095:16 1096:11 1112:21 1121:11 <b>function</b> 1134:6 1146:5 1147:21 <b>functionalized</b> 1134:21 1140:2 <b>fund</b> 991:9 <b>fundamentally</b> 1022:23 1086:4 <b>funding</b> 1014:10,13 1016:24 1017:4 <b>further</b> 1000:19 1055:6 1096:23 1100:22 1150:8 1153:25 1156:14 <b>future</b> 979:12 1012:9 1014:3,13 1021:17,18 1024:18 1053:14 1071:11 1139:17</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gain</b> 1011:25 <b>gap</b> 1021:18 <b>Gary</b> 1018:16 <b>Gastelum</b> 968:10,13 969:16 996:15 1010:23 1011:12 1012:12 1037:22 1038:8,12,14 <b>Gastelum's</b> 1011:20 <b>gathered</b> 1108:8 <b>gathering</b> 1109:18 <b>general</b> 967:15 971:6 978:11 984:6,10,18 984:19 985:3 986:3,6 990:22 994:7 996:15 996:16 1002:6 1010:24 1011:13 1021:22 1022:4 1028:5 1038:13,15 1138:20 1139:8 <b>generally</b> 1004:6,12 1044:12 1132:18 <b>generate</b> 1025:18 <b>generated</b> 1099:12 <b>getting</b> 1067:6 1069:5 1075:21 <b>Gig</b> 1030:1 <b>gist</b> 1104:11 <b>give</b> 970:7 1005:16 1011:7 1055:14 1056:4,8,15 1062:5 1062:16 1145:25 1154:8,20,23 1155:7 <b>given</b> 1001:8 1020:2,13</p>	<p>1040:22 1092:21 1093:16 1111:16 1128:3 1132:2 1151:10 <b>gives</b> 1094:15 1095:17 <b>giving</b> 971:1 1154:15 <b>go</b> 970:5 971:9 973:17 982:10 1000:10 1029:7,9 1030:17 1035:4 1039:3,23 1046:19 1048:18 1053:7 1055:21 1057:8 1059:4 1061:25 1062:19 1063:4 1071:5 1077:19 1078:20 1084:23 1085:11 1087:17 1088:8 1097:3,18 1102:1 1111:8 1121:10 1126:10 1128:19 1131:1 1136:1,5,14 1137:12 1138:25 1148:25 <b>goal</b> 1134:5 <b>goals</b> 997:9 <b>goes</b> 991:2 1035:7 1043:20 1044:12 1053:11,24 1084:22 1107:24 1136:7,7 1138:23 <b>going</b> 971:8,9,18 976:17 978:25 979:5 1000:18 1007:11 1008:19,25 1015:12 1018:18 1026:14 1030:8 1040:2 1042:11 1048:23 1090:7 1108:20 1114:14 1121:25 1130:7 1141:11,15 1144:6 1151:14 1153:18 1155:8 <b>good</b> 972:15 973:3 1026:3,5 1055:8 1057:12,13 1064:1 1069:20,25 1127:3,5 1128:24 1136:25 1154:15 <b>good-faith</b> 1055:14 <b>good-sized</b> 1130:9 <b>gotten</b> 971:2 <b>Government</b> 974:11 1067:1 <b>grand</b> 1113:5 <b>granted</b> 970:24 981:9 <b>great</b> 1069:18 <b>greater</b> 1081:20</p>	<p>1082:12,15 <b>greatest</b> 1147:12 <b>ground</b> 1089:17 <b>grounds</b> 1061:8 <b>group</b> 1011:15 <b>groups</b> 990:23 1017:23 <b>guess</b> 971:21 <b>guy</b> 1129:22 1131:14</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>HADLOCK</b> 967:5 1029:16 1102:7,15 1106:6 1108:17,24 1109:3,5,8,11,17 1110:9,14,24 1113:12 1113:19,23 1114:3 1116:13,20 1117:23 1118:5 1119:9,13 1120:8,15,19 1121:10 1121:13 1122:6,9,12 1123:11,17 1124:3,9 1126:10,24 1130:17 1131:21 1133:10 1138:22 1141:25 1142:21,23 1145:3,14 1145:20 1146:16 1147:25 1148:23 1150:10,14 1153:15 1153:20,24 <b>half</b> 1021:14 <b>hand</b> 1156:16 <b>happen</b> 972:13 1090:14 1091:3 1092:15 1093:2,10 <b>happened</b> 1018:9 1090:22 1096:10,17 <b>happening</b> 1028:4 1086:9 <b>happens</b> 1095:4 <b>happy</b> 1011:7,8 <b>harm</b> 991:16,20 992:1 <b>Havas</b> 986:23 989:12 989:18,22 1079:3,19 1085:20 1090:18 1092:12 <b>headed</b> 1107:18 1108:7 1120:9 <b>heading</b> 997:1 <b>heard</b> 1057:2 1063:21 1136:6 <b>hearing</b> 1047:1 <b>Hearsay</b> 1000:5 <b>held</b> 984:8 1055:23 1101:24 <b>Hello</b> 1102:16 <b>help</b> 972:10 1149:19 <b>helped</b> 978:19 982:15 <b>helpful</b> 1056:18</p>	<p><b>helping</b> 978:21 1085:3 <b>hiatus</b> 980:17 <b>higher</b> 1031:23 1064:13,17 1087:9,10 1088:15 1152:14 <b>highlighted</b> 1107:20,23 1124:22 <b>hired</b> 1149:25 <b>historically</b> 1012:8 1063:14 <b>home</b> 971:9 <b>honestly</b> 1089:25 1155:2,3 <b>Honor</b> 970:12 971:21 972:7,12,19 973:14 983:8,13,15 1000:5 1015:6 1037:25 1042:8 1056:5,23 1113:12 1121:9 1150:8 1153:10,15 1154:2 1155:13 <b>HONORABLE</b> 966:3 <b>hope</b> 1037:23 <b>hotly</b> 1074:12 <b>hours</b> 971:23 972:4,16 973:1 1055:17,19,20 1056:4,20 1154:7,14 1154:18,20 <b>huge</b> 981:5 <b>hundred</b> 1068:21 <b>hundreds</b> 1023:1 1065:1,3 <b>hypothetically</b> 1121:4 1121:15 1153:8</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>i.e</b> 974:12 <b>Ian</b> 1057:25 <b>ID</b> 968:8 <b>idea</b> 1030:11,12,16,25 1031:9 1090:2 1137:1 1154:15 <b>identification</b> 1015:7 1015:15 <b>identified</b> 1137:4 1139:23 1140:1 <b>identify</b> 1040:1,6 1076:25 1105:7 <b>ignore</b> 981:2 <b>II</b> 1027:15,16,23 1110:1 <b>IID</b> 973:23 985:12,15 988:7,11,15 989:7 990:2 1007:7,13 1009:17 1024:25 1066:25 1086:20,24 1092:8,15,21 1093:11 1093:15 1107:5</p>	<p>1125:12 <b>illegal</b> 974:24 975:1,10 976:19 977:9 978:9 1039:19 1040:24 1041:4,10,16 1042:1 1042:7,19,20,23 1043:2 1046:24 1051:11 1060:13,17 1060:20,24 1061:4,21 <b>imagine</b> 977:5 <b>imagined</b> 977:11 <b>impact</b> 1062:17 1063:5 1063:11 1098:5 1121:5,6 1137:16,21 1138:4 1144:8 <b>impacts</b> 1152:10,12 1153:5 <b>Imperial</b> 981:24 986:20 987:25 988:4 989:3 1007:3 1009:15 1064:12 1066:20 1075:20 <b>implementation</b> 968:14 985:8 1146:9 <b>implementing</b> 985:11 <b>important</b> 973:18 1011:9 1040:20,21 1042:23 <b>imported</b> 987:16,19,21 995:1 1021:25 1022:7 1064:11 <b>imports</b> 987:13 <b>imposed</b> 1018:24 <b>imposition</b> 994:15 <b>impossible</b> 1139:11,12 <b>impression</b> 1035:19 <b>improper</b> 977:5 978:8 991:22 1027:20 1041:6,7,21 1042:1 1042:18,20 1046:24 1050:17 <b>improperly</b> 980:20 998:16,18 <b>improvements</b> 1104:2 <b>inappropriate</b> 997:6 1149:6 <b>incentive</b> 994:24 <b>include</b> 976:19 985:7 1011:16 1049:20,22 1050:1 1066:19 1078:22 1079:9 1089:16 1121:5 1135:25 1136:4 1137:15,20 1139:19 1144:1,6,16 1147:14 <b>included</b> 976:7 978:14 1028:9,14,17 1036:2 1036:8 1068:11</p>
--	---	--	---	---

1072:5,12 1124:12,20 1134:4 1139:4,24 1142:11,17 1143:11 1143:21 1144:21 1152:12 1153:8 <b>includes</b> 1056:24 1057:7 1076:11,14 1080:2,5 1142:8 <b>including</b> 970:7 995:9 997:25 998:16,18 1013:4,7 1023:24 1035:8 1047:22 1064:10 1069:5 1078:16,24 1084:17 1141:23 <b>inclusion</b> 979:25 990:15 991:17 993:2 1012:14 1026:10 1124:1 1144:19 <b>inconsistent</b> 1146:13 <b>inconvenient</b> 978:4 <b>incorrect</b> 1146:13 <b>increase</b> 982:12 1001:10,14,20 1025:11 1029:2,3,6 1031:14 1035:21 1049:8 1084:8 1100:6 1100:10,14 1121:14 1137:9 <b>increased</b> 1007:10 1100:15 1124:22 1153:1 <b>increases</b> 1001:7,23 1034:7 1035:1,15 1097:23,24 1098:5,9 1098:14 1101:9 <b>increment</b> 1007:9 <b>incremental</b> 994:17 1031:23 1032:15,23 1033:3,6 <b>increments</b> 1007:11 1091:16 <b>incurred</b> 993:17 1003:19 1149:18,22 <b>incurring</b> 999:19 <b>independent</b> 1045:24 1064:5,23 <b>independently</b> 1082:1 1083:20 <b>index</b> 1087:20,24,25 1088:4 <b>indexed</b> 1088:16 <b>indicates</b> 1095:9,10 <b>indicating</b> 1121:21 <b>indication</b> 1012:20 <b>individual</b> 1001:7 1057:24,25 1067:1,3 1133:18	<b>inference</b> 980:8 <b>inflate</b> 997:11 <b>inform</b> 1022:6 <b>information</b> 1049:20 1049:23 1050:1 1108:6,8 1109:19 1112:20 1131:6 1135:3 1136:4 1137:16,21 1148:11 1152:3 <b>informed</b> 1021:24 <b>informs</b> 1040:5 <b>initial</b> 1004:3 1030:8 <b>initially</b> 1067:5 <b>initiated</b> 995:20 <b>input</b> 1098:3 <b>inside</b> 1037:17 <b>installments</b> 1091:7,10 <b>instance</b> 1044:17 1089:10 1096:6 1132:7 1152:25 <b>instances</b> 1083:4 1094:9 <b>instantaneously</b> 1091:4 <b>instruct</b> 992:7,11 1049:22 1137:15 <b>instructed</b> 992:17 1023:5 1049:25 1061:24 <b>instructions</b> 992:14 1099:11 <b>insufficient</b> 1022:13 <b>insure</b> 985:15 <b>intake</b> 986:23 <b>integrity</b> 979:2 1010:13 1012:2 1013:1,5,8,14 1013:18,22,25 1070:2 1070:5,10 1073:3,13 1073:17,20 1074:4,11 1074:22 <b>intend</b> 971:10 1070:13 1070:20 1071:9 1072:10 1073:1 <b>intended</b> 980:9 994:22 1010:15 1013:20 <b>intent</b> 1147:11 <b>intention</b> 972:3 <b>interest</b> 975:16,18 1097:23 1098:8 <b>interested</b> 966:10 1156:14 <b>Interior</b> 968:16,17,18 968:19,20,21,22,23 968:24,25 969:3 1069:24 <b>interrupt</b> 973:16 <b>interrupted</b> 1090:14 <b>intervened</b> 1027:5	<b>intimate</b> 1151:12 <b>introduce</b> 1131:23 <b>introduction</b> 1007:4 <b>invalid</b> 978:8,13 1074:17 <b>invalidated</b> 1019:10 1053:6 <b>invalidate</b> 1005:17 <b>invest</b> 1025:15 <b>investigate</b> 1150:5 <b>investment</b> 986:20 988:3 <b>investments</b> 1021:20 <b>invitation</b> 973:20 <b>invoice</b> 1077:1,2 1094:19 1095:7,21 <b>invoices</b> 969:4 1107:6,9 1108:4,15 1109:18 1111:2 1119:18 1125:15 1130:4 <b>invoke</b> 1013:14 <b>involve</b> 1145:1 <b>involved</b> 1019:2 1028:3 1103:7 1145:12 <b>involvement</b> 996:1 <b>involves</b> 1103:9 <b>irrelevant</b> 977:4,16 1145:4 <b>Irrigation</b> 981:24 986:20 988:1 989:3 1007:3 1009:16 1064:13 1066:21 1075:21 <b>isolate</b> 1130:11 <b>isolated</b> 1130:6 <b>issuance</b> 1103:17 <b>issue</b> 970:25 972:21 974:21 980:6 981:21 982:21 990:7 1001:1 1016:2 1017:16 1018:5 1028:1 1040:14 1055:11 1056:2,5 1075:10 1083:13 1122:6 1141:23 1142:5,6,12 1144:18 1153:6 <b>issued</b> 1110:5 <b>issues</b> 985:4 995:5 <b>item</b> 1039:12 <b>items</b> 1058:17	<b>jkeker@kvn.com</b> 967:8 <b>John</b> 967:4,12 968:9 994:5 1026:3 1127:3 <b>johnquinn@quinne...</b> 967:14 <b>Joint</b> 1103:2 <b>JOSEPH</b> 967:15 <b>jotted</b> 1043:24 <b>judge</b> 993:24 1057:5,6 <b>judgment</b> 980:6 <b>judgments</b> 1131:9 <b>judicial</b> 1003:10 1008:10 <b>juggle</b> 972:14 <b>July</b> 984:13 <b>June</b> 978:18 1013:12	1047:10,18 1048:1 1053:5 1075:9 <b>known</b> 1143:19 <b>knows</b> 1021:3
				<b>L</b>
				<b>L.A</b> 1045:24 <b>labeled</b> 1112:1 <b>LADWP</b> 1045:6,9,11 1045:13 <b>laid</b> 1035:11 <b>Lake</b> 986:23 989:12,17 989:22 999:14,14 1079:3,19 1085:20 1090:18 1092:12 <b>language</b> 983:5 1003:21,25 1009:4 1013:5 1043:6,9 1074:1,12,21 1075:3 1075:4,6 <b>large</b> 1108:18 <b>larger</b> 1141:10,14,14 1144:5,10 <b>largest</b> 1021:12 1069:11 1098:3 1108:11 <b>law</b> 974:5,12,13 977:17 980:10,16 995:25 1003:12 1004:6,10 1014:22 1042:5 1043:20 1044:4,6 1046:21 1053:1 1097:8 <b>lawful</b> 977:14 1004:11 1005:5 1027:17 1031:1 1043:25 1044:7 1047:20,23 1048:6 1050:24 1051:6,14,18,24 1052:3,8,8,20 1053:7 1053:8,11,24 1074:24 1074:25 1106:15 <b>lawfully</b> 1048:4 1152:24 <b>lawsuit</b> 980:25 995:20 996:19 1012:13 1013:11 1036:21 1037:1,12 1040:5,23 1041:15,17 1078:9,12 <b>lawyer</b> 1052:23 <b>lawyers</b> 979:10 <b>lay</b> 1066:4 <b>lead</b> 1041:21 <b>leading</b> 1074:11,20,20 <b>learn</b> 1018:13 <b>lease</b> 1045:10 <b>leave</b> 973:4,8 1035:19 1109:11 1120:4
				<b>K</b>
				<b>KARNOW</b> 966:3 <b>keep</b> 1061:16 <b>Keker</b> 967:3,4 970:12 970:25 971:14,17 972:20 973:2,11 983:12,13 1055:9,13 1056:1,13,23 1143:15 1155:13 <b>key</b> 1086:5 <b>kind</b> 1130:15 1131:2 <b>knew</b> 978:23 979:5 1008:18 1028:7,14,17 1028:21 1031:18 1032:12,17,19 1033:4 1033:8,9 1067:6 <b>know</b> 973:14,15 977:21 977:25 979:2 984:15 1000:6 1022:11 1029:14 1030:1,7 1033:6,10 1035:4 1040:14 1045:19 1046:20 1047:25 1048:1,7,14,15,16,18 1048:21 1049:25 1051:3,5,5,20,22,25 1053:1 1056:19,20 1059:12,13 1060:3,5 1060:8,21,23 1062:18 1062:25 1063:3 1071:11 1087:2 1108:22 1128:19 1130:9,19,23 1139:2 1142:12 1144:18 1145:25 1146:25 1147:11 1154:25 <b>knowing</b> 1040:20 1145:23 <b>knowledge</b> 1002:2 1151:12 <b>knowledgeable</b>
				<b>J</b>
				<b>James</b> 1057:24 1058:1 <b>JAN</b> 966:22 <b>January</b> 966:12,12 984:13 998:2 1038:18 1040:4 1058:10 1107:23

<p><b>left</b> 1005:3  <b>legal</b> 976:23 977:19  980:14 996:9 1011:23  1042:9,10 1054:2  1059:1  <b>legalese</b> 1128:3  <b>legality</b> 1040:17  1073:13  <b>legally</b> 1046:24  <b>legislative</b> 1011:23  <b>legislature</b> 1068:15  1069:6  <b>legitimate</b> 1097:16  <b>lesser</b> 1012:1  <b>let's</b> 970:20 973:1  1003:25 1015:10  1026:6 1029:10  1046:11 1055:21,22  1056:22 1057:8  1070:23 1074:6,15  1075:7 1076:3,4  1079:16,18 1080:17  1085:13 1094:13,18  1104:22 1106:22  1113:7,11,16 1123:5  1123:21 1126:10  1131:18,18 1135:19  <b>letter</b> 968:9,10 969:16  994:5,8 995:7 996:14  996:24 997:15,19  1037:21 1038:7,21,24  1039:12,13,25 1096:2  <b>letters</b> 1006:23  <b>level</b> 991:11,12 999:7  1027:11  <b>Liarakos</b> 969:17  <b>life</b> 1021:11  <b>likewise</b> 1006:8  <b>limitation</b> 1003:15  <b>limited</b> 1035:14  <b>limits</b> 974:3  <b>line</b> 979:24 986:25  988:3 1005:12  1007:18 1011:16  1025:18 1067:7  1068:22 1069:9  1154:24  <b>lined</b> 973:24  <b>lines</b> 1063:19 1154:10  <b>lining</b> 981:25 985:13  986:21 988:7,11,15  989:5,16 990:2  1005:7,16,21 1007:5  1007:23,25 1008:1,4  1024:21 1063:23  1064:16 1065:4,7,15  1065:22 1067:6,12  1068:21,25 1069:14</p>	<p>1075:22 1103:11  1107:5  <b>Linings</b> 1125:12  <b>list</b> 971:7,12,18 973:3  991:2 1056:8  <b>listen</b> 971:19  <b>lists</b> 1056:21  <b>litigate</b> 979:18 1070:13  1070:20 1071:10  1072:10 1073:1  <b>litigated</b> 991:13  <b>litigation</b> 979:12 996:4  1003:23 1009:25  1017:14 1027:3,8,18  1062:10 1069:17  <b>little</b> 971:21 984:9  1000:24 1017:12  1022:2 1024:14  1034:23 1097:21  1107:10 1112:16  1122:7 1149:20  <b>live</b> 971:25 1028:1  <b>local</b> 974:15 975:7  991:11,11 998:19  1013:5,8,21,21  1014:3,10 1016:24  1017:4 1025:11  1105:8 1135:13  <b>long</b> 979:24 984:8  993:1,18 1026:14  1064:5,22  <b>long-range</b> 990:19  1000:17,21 1017:20  <b>long-term</b> 987:25  1021:8,15 1022:9  <b>look</b> 970:8 996:25  1003:25 1016:1  1026:17 1029:10  1031:21 1037:20  1058:6 1062:12,20  1069:21,21 1070:23  1094:13,19,24 1096:1  1105:6 1107:18  1108:11 1111:15  1125:7 1132:23  1135:7 1136:12  <b>looked</b> 1030:7 1040:11  1042:14 1062:24  1080:1 1088:7  1094:22 1130:1  <b>looking</b> 1027:1 1031:12  1107:17 1110:24  1115:18 1117:6  1119:13 1124:9  <b>Los</b> 967:13,16 1045:5  1045:21,22  <b>loss</b> 1089:16  <b>losses</b> 1089:11,18,23</p>	<p>1090:9  <b>lost</b> 1078:11  <b>lot</b> 1017:12 1061:15  1065:19 1067:10  1086:6 1139:2,17  <b>lower</b> 1012:5 1032:14  1032:22 1033:8  1068:4  <b>lunch</b> 972:23 1055:10</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>M1</b> 1128:13,17  <b>magnitude</b> 1063:18  1069:10  <b>maintain</b> 1012:2  1059:19  <b>maintained</b> 1062:9  <b>maintaining</b> 1063:1  1084:1  <b>maintains</b> 1075:12  1084:7  <b>major</b> 1025:11  <b>majority</b> 1001:13  <b>making</b> 1008:10  1021:20 1022:24  1047:5 1076:1 1110:5  1140:2  <b>management</b> 999:11,20  1015:5 1018:2,3  <b>manager</b> 971:6 984:6  984:11,18,19 985:3  986:3,6 990:23  996:15,17 1002:6  1010:24 1011:15  1021:22 1022:4  1028:5 1038:13,15  1103:23  <b>manager's</b> 978:11  <b>managers</b> 1011:13,14  1011:17 1018:18  <b>manner</b> 1045:14,16  1147:15  <b>manual</b> 1128:13,17  1129:2  <b>March</b> 966:18 970:2  1055:2  <b>marginal</b> 1012:7  <b>mark</b> 1015:6,12,20,22  1113:19 1115:5  1118:8 1120:8  <b>marked</b> 1015:14  <b>marking</b> 1120:12,13  <b>master's</b> 1104:7  <b>material</b> 1006:24  <b>math</b> 1124:18  <b>matter</b> 1003:14,16  1058:16 1098:9  1128:20 1138:21</p>	<p>1139:9 1154:4  <b>matters</b> 970:13 982:7  <b>Maureen</b> 996:16  1038:7  <b>maximum</b> 977:14,15  <b>mean</b> 1004:10,14  1019:21 1044:10  1046:25 1047:25  1085:18 1094:10  1096:16 1129:21  1131:1 1132:6,8  1152:13  <b>meaning</b> 983:1 1045:19  1097:7  <b>meaningful</b> 970:8  1097:16  <b>means</b> 988:2,6 1004:16  1082:8 1091:18  <b>meant</b> 1012:8  <b>measure</b> 1052:4 1053:2  1139:3  <b>medium-size</b> 1110:1  <b>meet</b> 1022:13  <b>meeting</b> 1000:8  1018:18 1061:16  <b>meetings</b> 990:23 991:2  1017:25 1018:19  1061:12,15,17  <b>member</b> 989:25 994:24  1004:8,14,18 1011:13  1011:15,23 1018:17  1019:25 1020:4,11  1021:20 1022:16  1023:18 1024:2,7  1044:14 1063:6  1081:7,13 1082:9  1083:3,5,8 1084:3  1085:1,2 1098:4,7  1101:3 1103:4  1126:15,19,20,22  1152:15,23 1153:1  <b>members</b> 991:1  1060:11 1101:15  <b>memo</b> 968:13 1010:23  1011:12,20 1072:25  <b>mentioned</b> 989:6  1018:4 1027:3  1072:11 1090:9  1107:12,21 1124:25  1125:21 1130:3  1136:18 1143:14  1144:9  <b>mere</b> 1074:2  <b>merely</b> 1010:16  1083:24  <b>Met</b> 974:4,23 978:1,3  978:12,19 979:5  981:23,23 982:1,4,21</p>	<p>1000:16,19 1023:4,25  1026:11 1033:12  1036:12,16,23 1037:3  1037:13,17 1040:5,14  1040:22 1042:6,22,25  1043:1 1044:20,25  1046:22 1047:19  1048:7 1050:25  1051:6,14,19 1052:9  1052:14,15,19 1053:7  1053:11,15,19,21,24  1057:14,20 1058:3  1059:17,20,25  1060:16 1062:21  1063:5 1065:16  1077:23 1078:15,15  1078:19,19 1079:1,2  1080:14,15 1081:12  1081:16 1082:9,12,24  1083:1,5,9 1086:21  1090:17 1091:6,9  1092:4,9,17,24  1093:21,22,22,23  1094:5,14 1095:9,16  1096:2,22 1097:24  1099:2 1100:20  1101:3 1116:25  1123:1 1132:24  1133:12,17 1134:24  1135:12 1142:18  1143:12,15,17  1144:12,13 1145:23  1146:12 1147:12  1148:18,21 1149:22  1151:3,18 1152:6  <b>Met's</b> 976:15,20 977:1  980:9 981:1 1030:2  1036:8 1053:6  1083:15 1104:11  1105:15 1111:10  1120:20 1152:22  <b>methodology</b> 1143:2  <b>Metropolitan</b> 966:9,11  967:10 969:4 984:21  984:22 985:5,13,16  986:11,14,19,22  987:5,22 988:13,15  988:16,20,21,24  989:8,11,15,17,22,23  990:1,7,12,16,19  991:1,9 992:2,6,18  993:6,11,13 994:6  995:1,10,13,18,20,22  995:24 996:16 997:8  997:20,24 998:4,11  998:16,21 999:2,5,7  999:11,17,19,25  1000:13 1001:5,6,13</p>
---	---	---	---	--

<p>1001:19 1002:3,6,11                  1002:19 1003:13,22                  1004:1,7,13,16                  1005:4,25 1006:5,8                  1008:20 1009:14,18                  1010:3,7,10,13,25                  1011:13,22 1012:17                  1012:17,25 1013:4,14                  1013:17 1014:1,2,5,8                  1016:4,8,15,25                  1017:15,16,19,23,24                  1018:1,2,5,11,14,17                  1018:20,24 1019:9,23                  1019:25 1020:2,3,4,7                  1020:9,13,17,21                  1021:5,7,12,24                  1022:4,6,12,19,24                  1023:2,2,7,22 1024:1                  1024:5,6,18 1025:3                  1026:4 1027:11,13,17                  1028:9 1033:7,16                  1034:4 1038:16                  1040:3 1041:3                  1043:14 1044:13,21                  1045:5,7,11,13,25                  1048:4,25 1049:15,16                  1058:17,18,25 1059:6                  1061:15 1064:18                  1066:23,25 1068:14                  1074:11 1075:20                  1076:2,4,6 1077:1,22                  1079:4,14 1081:25,25                  1083:3,6,12,22                  1084:4,15,17,19                  1085:8 1086:7,17                  1087:3 1090:25                  1091:1,15 1093:17                  1095:8 1097:18                  1098:2,5,19,23                  1099:6,8,12,25                  1100:16,18 1103:24                  1104:19,25 1106:10                  1107:6 1108:4                  1109:18,22 1111:3                  1114:4,5,8,15                  1115:12,25 1117:7,13                  1118:10,13,20                  1119:15 1120:24                  1122:17 1123:7,18,24                  1125:14 1130:4,22                  1137:3 1141:19                  1143:1,22 1150:15,23                  1151:13 1152:20                  1153:3  <b>Metropolitan's</b> 973:24                  991:5,17,24 992:22                  993:2 994:15,23                  997:13,16 1003:2</p>	<p>1004:5 1005:17                  1008:8 1010:4,17                  1012:23 1018:15                  1022:3 1023:16                  1024:10 1025:6,8                  1031:1 1032:14                  1036:2 1038:17                  1043:19 1044:5                  1055:16 1062:21                  1064:14 1074:1,24                  1085:1 1097:7,13,22                  1105:4 1111:12                  1120:23 1122:15                  1123:9 1126:4 1133:3                  1147:18 1150:18,19                  1151:7  <b>microlevel</b> 1103:25  <b>mid-1990s</b> 993:4  <b>mid-morning</b> 971:23  <b>middle</b> 1109:25  <b>midway</b> 1003:8  <b>miles</b> 986:25  <b>million</b> 1009:22 1016:5                  1016:6,9,16,19                  1017:1,5,6 1024:4,6                  1024:17 1025:5,5                  1067:7,17 1068:17,21                  1068:24 1069:6                  1124:19 1125:19,23                  1126:16,21 1135:20                  1143:20  <b>millions</b> 980:19 991:21                  992:4,5 1023:1                  1065:1,3  <b>mind</b> 1044:9 1052:22  <b>minor</b> 1104:7 1127:6  <b>minus</b> 1052:9 1147:4,7                  1147:22  <b>minute</b> 1088:20  <b>minutes</b> 968:12                  1025:23 1102:1                  1113:8  <b>misallocated</b> 1033:25  <b>misallocation</b> 1041:8                  1041:10,10 1120:1  <b>misspoke</b> 1055:18  <b>Misstates</b> 1142:23                  1145:20  <b>mistake</b> 1040:15,16                  1042:5  <b>mitigation</b> 1069:16  <b>model</b> 997:5,8 1132:6,7                  1133:13,17 1134:1,3                  1134:5,11,13 1151:7                  1151:10,12,14,15,19  <b>modeling</b> 1103:7,16,20  <b>models</b> 1151:13  <b>modify</b> 1019:10</p>	<p><b>molecules</b> 989:16                  1086:10 1089:2,3  <b>moment</b> 1034:11                  1055:22 1112:15                  1143:8 1150:10  <b>moments</b> 1051:1  <b>Monday</b> 966:18 970:2  <b>monetarily</b> 1010:16  <b>money</b> 1016:3,7,23                  1099:22  <b>monopoly</b> 995:1  <b>month</b> 1092:9,21                  1093:17 1094:14                  1107:8 1111:3                  1112:14  <b>month-by-month</b>                  1107:22  <b>monthly</b> 990:22                  1018:17 1077:2                  1091:7,10 1095:7                  1111:6  <b>months</b> 1010:12  <b>morning</b> 973:8 1026:3                  1026:5 1061:23                  1063:20 1080:1  <b>motion</b> 970:24 979:3                  1057:20 1058:8                  1101:4  <b>move</b> 970:15,19 973:22                  988:10,15 1000:14                  1045:24 1048:16                  1086:8 1090:13,19                  1108:17,21 1109:3,8                  1110:9 1113:23                  1116:13 1117:23                  1119:9 1120:15                  1122:12 1123:11                  1124:3 1130:7                  1134:20 1135:11,19                  1135:21 1136:19                  1137:12  <b>moved</b> 999:22 1008:14                  1008:22 1048:23                  1058:9,13 1062:1,12                  1062:22 1090:12                  1121:16 1129:10,13                  1129:24 1132:4                  1135:5 1139:9                  1149:14,22 1150:6  <b>moving</b> 981:20 1000:11                  1009:21 1063:11                  1135:16 1137:4,7,17                  1137:21 1138:5  <b>multiple</b> 990:18  <b>multiplied</b> 1112:12                  1140:23  <b>multiplying</b> 1112:9  <b>mutual</b> 1040:16</p>	<p><b>MWD</b> 968:12 991:1                  1071:11,12,17  <b>MWD's</b> 979:17,18,19                  1070:13,20 1071:10                  1071:13  <b>myriad</b> 978:12</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 968:2  <b>name</b> 978:20 983:24                  1026:3 1102:11                  1127:3  <b>named</b> 1057:24 1058:1                  1156:11  <b>nay</b> 1098:13  <b>nearly</b> 1017:8  <b>necessarily</b> 1048:2                  1086:12 1147:10,19  <b>necessary</b> 972:24                  1021:10 1089:18  <b>necessitates</b> 1126:22  <b>need</b> 973:4 1143:23                  1148:19 1149:2  <b>needed</b> 1062:18                  1063:10  <b>needs</b> 970:6 982:24                  987:19  <b>negotiate</b> 982:16  <b>negotiated</b> 980:4                  985:24 1014:7 1028:8                  1028:21 1030:18                  1032:7  <b>negotiating</b> 979:13                  986:4 1005:6,10                  1029:5,23 1032:20  <b>negotiations</b> 986:2                  1002:6 1005:23                  1028:3 1031:10                  1032:13  <b>negotiator</b> 1041:22  <b>negotiators</b> 1041:24  <b>neither</b> 1056:15  <b>NEST</b> 967:3  <b>net</b> 1089:12 1138:4,4                  1138:11  <b>neutral</b> 1135:17,22  <b>neutrality</b> 1136:9,10  <b>never</b> 1000:23 1033:7                  1036:22,22 1037:2,12                  1037:16 1087:3                  1093:2 1127:12,18                  1152:6  <b>new</b> 979:10 992:24                  1014:10 1025:2                  1068:8,10 1126:19                  1151:9  <b>non-Met</b> 1085:10  <b>non-Metropolitan</b></p>	<p>1124:2 1125:3  <b>non-shaded</b> 1123:25                  1124:21  <b>nonbreaching</b> 981:14  <b>nonnegotiable</b> 1074:2  <b>nonsense</b> 982:5  <b>noon</b> 970:5 1054:6  <b>north</b> 967:16 1045:8  <b>northern</b> 986:24  <b>notice</b> 968:15 971:3,23                  971:24 972:4,16                  973:1 1013:19                  1040:22 1042:6,22,25                  1046:25 1055:17                  1056:4,21 1096:3                  1154:7,8,14,18,20                  1155:7  <b>noticing</b> 1097:19  <b>noting</b> 1127:11  <b>November</b> 999:12  <b>number</b> 968:8 982:11                  993:25 1031:22                  1038:24 1087:12,14                  1121:13 1124:17                  1135:20 1139:16                  1140:7 1141:2,10                  1147:5,9  <b>numbers</b> 1049:7 1113:3                  1130:10 1131:3,15                  1148:12  <b>numerous</b> 1148:9</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>o'clock</b> 1154:4,5                  1155:12  <b>oath</b> 1128:5  <b>object</b> 1017:15 1121:18                  1121:24  <b>objected</b> 979:24 991:4                  1026:10,22  <b>objecting</b> 976:24                  990:14 993:1,18                  1031:17  <b>objection</b> 970:20,21                  1000:5 1015:16,17,23                  1027:24 1029:14,18                  1029:19 1034:25                  1037:24 1038:1                  1039:20 1042:8                  1043:3 1048:10                  1054:1 1055:16                  1059:1,21 1061:6                  1074:20,21 1077:4                  1093:6 1094:21                  1095:2 1101:12                  1108:25 1109:2,12,14                  1110:13,16,19,20                  1113:21,22,25</p>
---	--	---	--	---

<p>1116:15 1117:25                  1118:1 1119:10                  1120:11,13,16                  1121:12 1122:3,11                  1123:12,14 1124:5,6                  1130:17 1131:21                  1133:10 1138:22                  1141:25 1142:21,23                  1145:3,14,20 1146:16                  1147:25 1148:23                  1153:10,13 1155:4,5  <b>objections</b> 990:6,12                  991:13 992:22,24                  995:8,11 997:14,16                  998:14,15 1002:11                  1003:2,6,22 1012:13                  1012:14 1017:19                  1073:12 1074:19                  1108:24  <b>objectives</b> 1067:10                  1068:10  <b>objects</b> 994:14 1028:22  <b>obligation</b> 987:6                  1060:19  <b>obligations</b> 986:9,11                  987:2  <b>obtain</b> 984:22 1147:4  <b>obtained</b> 989:4  <b>obtains</b> 984:23  <b>obvious</b> 1108:19  <b>obviously</b> 1133:1  <b>occasion</b> 1057:14                  1127:13  <b>occasions</b> 978:12                  990:18  <b>occupation</b> 984:5  <b>occurred</b> 1128:3  <b>October</b> 1010:12  <b>offer</b> 1029:13 1077:3  <b>offering</b> 1094:25                  1106:14  <b>offhand</b> 1040:10  <b>OFFICE</b> 967:15  <b>officer</b> 1010:24                  1018:16 1103:2  <b>official</b> 1109:20,24                  1110:5,7  <b>oftentimes</b> 1109:21  <b>okay</b> 971:16 1011:4,6                  1015:11 1055:12                  1070:17 1072:9                  1088:22,23 1137:6  <b>old</b> 1030:17  <b>once</b> 999:9 1006:12                  1084:15  <b>one-day</b> 971:3  <b>one-off</b> 1004:19  <b>ones</b> 1045:4</p>	<p><b>ongoing</b> 999:9 1000:17  <b>open</b> 973:19,19  <b>opening</b> 971:20 973:12  <b>openly</b> 979:17  <b>opinion</b> 974:10,19                  976:18 1127:17,17                  1128:1,2,4 1135:10                  1145:10 1147:1                  1149:9 1151:11  <b>opinions</b> 1106:14                  1131:13 1145:6  <b>opportunity</b> 1034:24  <b>oppose</b> 998:7 1098:14  <b>opposed</b> 998:9 999:1                  1001:23 1031:24                  1036:11,15 1127:21  <b>opposition</b> 998:11  <b>option</b> 1030:13,14,14                  1030:20,22  <b>options</b> 1101:16  <b>oral</b> 970:10,14  <b>orally</b> 1041:14,21  <b>order</b> 971:2,4,13,17                  972:10,11,25 978:2                  982:16 1012:1                  1055:11,14,15,17,19                  1056:4,8,15,19,20,21                  1056:24 1057:4                  1062:16,16 1091:24                  1113:20 1154:8,15,20                  1154:25 1155:2  <b>orders</b> 1091:21  <b>orient</b> 990:10  <b>oriented</b> 991:12  <b>originates</b> 1079:3  <b>ought</b> 1056:12  <b>outcome</b> 997:9 1027:8                  1139:17  <b>outcomes</b> 1139:3  <b>outlined</b> 992:23  <b>outreach</b> 985:1 986:5  <b>outside</b> 987:17 1036:23                  1037:2,12 1132:22  <b>outvoting</b> 1103:4  <b>over-collect</b> 974:14  <b>overall</b> 1022:6 1031:10                  1139:1 1152:2  <b>overcharge</b> 969:10,11                  969:12,13 1050:3                  1112:1,7,9,18 1114:8                  1114:11,15,21 1115:1                  1115:15,19,22,25                  1116:3,6,23 1117:3,7                  1117:10,13,18,20                  1118:9,13,16,20  <b>overcharged</b> 991:21                  1050:7 1104:15                  1106:10 1114:23</p>	<p><b>overcharges</b> 992:9                  1111:11 1112:1                  1119:23 1139:23                  1152:21  <b>overcharging</b> 1104:19  <b>Overruled</b> 1000:9                  1039:22 1048:11                  1059:3 1093:8                  1101:13 1130:18                  1133:11 1138:23                  1142:4,24 1145:21                  1146:17 1148:1  <b>oversee</b> 984:19,21,24                  985:1  <b>overtured</b> 1027:14  <b>owned</b> 1094:4</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1055:3  <b>packages</b> 1035:4  <b>page</b> 974:18,19 979:24                  994:11,20 996:25                  1002:20,23 1003:7,8                  1027:25 1043:8,10                  1058:6 1071:5 1095:7                  1097:5 1123:21                  1125:7 1126:11                  1154:10  <b>pages</b> 966:13 1097:4  <b>paid</b> 974:22,22 980:13                  980:20,20 1016:7                  1017:2 1049:15                  1084:19 1111:12                  1116:10 1120:5,23                  1121:14 1134:24                  1138:17 1150:22  <b>paragraph</b> 994:12,21                  996:25 997:3 1011:19                  1012:12,19 1026:18                  1071:7  <b>pardon</b> 1055:18  <b>part</b> 1008:21 1015:8                  1031:10 1059:8                  1062:14 1063:21                  1064:25 1065:6,17,23                  1066:15 1071:6                  1105:3,4 1121:19,22                  1121:22 1122:8                  1124:20 1131:4,5                  1133:2 1134:16,25                  1135:9,24 1136:8,12                  1137:23 1138:15                  1139:7 1141:1 1145:5                  1149:24 1150:3  <b>participate</b> 998:3                  1129:1  <b>participated</b> 990:24,25  <b>participating</b> 1074:8</p>	<p><b>particular</b> 1001:14                  1002:20 1046:6                  1063:13 1078:16,16                  1089:10 1092:9  <b>parties</b> 983:3 996:3                  1030:18 1040:16                  1065:19 1066:19                  1073:24  <b>party</b> 981:11,14 994:15                  1003:17 1044:18,24                  1046:14 1057:20                  1069:3  <b>Pass</b> 1025:21 1126:24  <b>passed</b> 976:23  <b>pause</b> 970:20  <b>pay</b> 986:11 1009:18                  1014:17 1016:3                  1030:22 1031:1,7                  1037:8 1048:23                  1063:7,8 1068:7                  1079:23 1081:13                  1085:3,7 1088:15                  1120:19 1138:8                  1150:15 1152:23                  1153:1  <b>paying</b> 978:2 991:24                  992:4 1008:8 1068:13                  1075:20 1080:10,13                  1080:14,18 1081:8,11                  1081:12 1084:8                  1093:25 1096:11                  1152:14  <b>payment</b> 1014:21  <b>payments</b> 969:8 982:3                  982:3 985:14,15                  1015:4 1022:23,25                  1023:1,21 1075:13,18                  1078:3 1079:9,12                  1081:4 1084:6                  1122:18,21 1124:12                  1125:16 1151:23  <b>pays</b> 982:1 1076:9,16                  1077:23,25 1081:9  <b>pending</b> 1014:6  <b>people</b> 970:10 1069:2                  1120:13 1154:21                  1155:1  <b>percent</b> 976:19 982:11                  982:13 987:18,23                  1063:18 1100:11,13                  1100:19 1123:20                  1124:23,24,24  <b>percentage</b> 1020:1,9,11                  1020:12 1082:9,12                  1084:12,13,21,22                  1087:24 1123:18                  1145:25  <b>percentages</b> 1084:19</p>	<p>1126:18  <b>perfectly</b> 978:23  <b>perform</b> 987:6 992:11                  992:20  <b>performed</b> 987:1  <b>period</b> 978:24 979:7                  980:5,7,11,22,24                  983:2 997:23 1008:6                  1008:22 1016:2                  1017:24 1070:3                  1107:7 1108:5                  1112:21 1113:1                  1123:8 1125:15,16  <b>periodic</b> 1001:19                  1097:24 1098:9  <b>periodically</b> 1001:6  <b>periods</b> 1072:5  <b>Perris</b> 999:14  <b>person</b> 1047:9,17,18                  1048:1 1053:5                  1057:25 1075:9  <b>personally</b> 1037:2  <b>PERSONS</b> 966:10  <b>Petitioner</b> 966:7 967:2  <b>phase</b> 974:1,6 975:14                  977:22 978:5,6,11,15                  979:3,9,10,21 984:16                  987:8 990:5 991:14                  993:23 1017:11                  1018:23 1019:7                  1027:10,10,15,16,23                  1039:5,6,21 1053:23                  1055:16 1056:4,11,16                  1106:6 1154:6,19  <b>phrase</b> 1004:10,12                  1043:22 1045:19                  1046:19 1107:13  <b>phraseology</b> 1150:4  <b>picking</b> 1007:19  <b>picture</b> 1062:6 1147:11  <b>pipe</b> 1090:4,6 1093:5  <b>pipeline</b> 1045:7  <b>pipes</b> 1090:18  <b>place</b> 1068:1 1086:15                  1086:15,25 1090:13                  1156:11  <b>placeholders</b> 982:20  <b>Placer</b> 1124:14,25                  1125:2,20  <b>Plaintiff</b> 966:7 967:2                  983:19 1102:4  <b>Plaintiff's</b> 968:3                  1076:20  <b>plan</b> 970:5 971:5,13                  990:20 1000:17,21                  1017:20 1056:18,19  <b>planning</b> 972:10                  1021:8 1022:9,10,11</p>
--	---	---	---	---

<p>1133:13,17 1134:1,3 1134:11,13 1151:14 <b>plans</b> 1021:15 <b>plateau</b> 1007:17 <b>play</b> 1133:1 <b>please</b> 983:23 1030:1 1102:10 1113:11 1115:4 1116:21 <b>plus</b> 975:16 <b>point</b> 982:11,12,22 993:6 995:12 997:19 1012:18 1016:19 1045:25,25 1053:12 1056:5,16 1070:8 1073:11 1078:8 <b>points</b> 981:5 986:24 <b>policy</b> 984:20 995:3 1003:13 <b>pool</b> 1140:6,12 <b>portfolio</b> 1021:25 1103:12 <b>portion</b> 974:15,25 975:3 976:2,9,17 977:9 1126:12 <b>position</b> 977:1 984:8,10 996:6,8 999:25 1000:3 1002:2 1012:22 1041:23 1052:4 1082:16,19 1083:14 <b>positive</b> 1039:10,14 <b>possible</b> 1073:18 1092:23 1139:3,13 1147:13 1151:8,10,11 <b>Possibly</b> 1033:19 1048:9,13 1086:4 <b>postage</b> 1026:19,22 1027:12,19,25 <b>potential</b> 997:11 <b>potentially</b> 1103:12 <b>power</b> 974:8 975:3 976:3 977:15 1028:10 1030:4 1031:23,24,24 1032:14,15,22 1034:1 1039:10,14,15 1045:6 1076:12 1077:17 1078:2 1080:6 1105:10,20 1111:19 1112:3 1114:20 1116:1,4 1117:14 1118:25 1140:4 <b>Powers</b> 1103:2 <b>practice</b> 979:3 <b>practices</b> 979:7 <b>precisely</b> 1063:17 <b>preclude</b> 997:12 1003:9 <b>predated</b> 1046:9 <b>predetermine</b> 997:9</p>	<p><b>prefer</b> 972:6 <b>preferential</b> 969:6,7 973:15 981:20,22 982:6,10 1019:14,21 1019:22,24 1020:4,14 1020:17,20,24 1021:4 1021:5,16,24 1022:5 1022:20 1023:3,8,17 1023:23,25 1024:9,11 1075:7,10,14,18 1078:4,8,17,21 1079:13 1081:4,15,20 1082:8,16,19,25 1083:4,7,10,16,18,23 1083:25 1084:9,13,22 1085:1,6,11 1096:21 1122:15,19,22,25 1123:7,19 1124:11,17 1124:23 1126:1 1148:11,13 <b>prejudgment</b> 975:17 <b>prepare</b> 1014:20 <b>prepared</b> 971:25 1006:16,19 1014:25 1032:6,10 1106:17 1112:18 1113:13 <b>present</b> 987:4 1031:8 <b>presentation</b> 970:14 <b>presentations</b> 970:11 <b>presented</b> 1012:3 1128:1 1148:10 <b>presently</b> 1007:16,19 <b>presents</b> 1052:3 <b>preserve</b> 1002:10 1003:2,6,21 <b>president</b> 1038:15 <b>Presumably</b> 1089:9 <b>pretty</b> 1103:15 1130:9 <b>prevail</b> 1074:7 1078:11 <b>prevailing</b> 1003:17 <b>previous</b> 1015:19,21 1108:16 <b>previously</b> 1009:10 <b>price</b> 974:3,6 986:12 1002:25 1003:5 1004:1,2,3,4,22,25 1008:17,25 1009:14 1009:18,22 1030:8 1043:8,16,18 1067:4 1067:4,15,17,22 1068:4 1080:1,2 1087:9,10,17 1088:7 1088:8,15,15 1097:3 1137:1 1142:6 <b>pricing</b> 994:23 1087:15 <b>principles</b> 977:19 1099:21,25 <b>prior</b> 984:10,11 993:5</p>	<p>993:10,14 1005:24 1036:12,16,25 1037:1 1037:11 1040:4,22,23 1041:15 1103:22,25 1153:4 <b>priority</b> 1064:14,15 <b>probably</b> 1061:9 1129:21 1133:18 <b>problems</b> 997:4 <b>procedural</b> 1097:12 <b>procedure</b> 970:16 1097:12 <b>proceed</b> 982:17 1056:22 <b>proceeding</b> 995:15 996:2 1016:11 1027:5 1127:21 <b>proceedings</b> 966:15 1156:10 <b>proceeds</b> 1055:9 <b>process</b> 990:21 995:5 998:4 999:11 1000:18 1000:22,25 1018:7,9 1018:14 1019:3 1046:22,22 1047:2,4 1047:5 1058:16 1074:20 1097:19 1104:24 1105:24 1111:14,17 1147:11 1147:13,18 1148:6 <b>processes</b> 990:19,22,23 990:24 1008:19 1017:21,21,22 1018:10 <b>produced</b> 1123:24 <b>produces</b> 1084:18 1133:20 <b>proof</b> 1098:5 <b>program</b> 975:12 984:21 992:12 998:20 999:17 1013:1,8,9,21 1013:24 1014:10 1015:5 1102:18 1103:1,9 1104:2 1129:22 <b>programs</b> 984:25 985:2 1013:5 1014:4,8 1021:21 1074:8 1146:10 <b>progress</b> 1013:21 <b>prohibits</b> 977:17 <b>project</b> 974:15 975:5 976:2 978:13 979:25 984:24 990:15 991:18 991:23 992:18 993:2 995:9 998:17,17 999:15 1005:8,12,16 1005:21 1008:2,4</p>	<p>1012:15 1016:24 1017:4 1025:15,16,17 1028:15 1036:7,13 1041:7 1048:22 1049:12 1052:10 1069:2,8,9,14,17,18 1069:22 1072:6,12,23 1098:25 1100:1,8 1105:8,18 1120:2 1129:9 1132:24 1133:4 1134:15 1137:4 1139:24 1140:1,5 1141:23 1142:9,10,14 1144:17 1145:1,12,24 1146:14 1146:22 1147:4,8,22 1148:20 1151:25 1153:6 <b>projected</b> 1024:1,22,24 1025:18 1092:18 <b>projection</b> 1126:3 <b>projections</b> 1126:5 <b>projects</b> 975:8 986:21 989:5 991:10 1007:4 1007:25 1008:1 1021:21 1064:17 1103:11 1104:3 1107:6 <b>pronouncing</b> 1037:23 <b>Prop</b> 974:11 <b>proper</b> 976:23 <b>properly</b> 1012:2 <b>property</b> 1084:17 <b>proposal</b> 972:25 997:20 997:24 999:11 1000:1 1000:14,20 1098:17 1098:20 1099:20 <b>proposals</b> 1001:19,22 1099:3 1101:17 <b>propose</b> 1101:4 <b>proposed</b> 994:9 995:3 998:21 1031:4,7 1038:25 <b>proposing</b> 1099:8 <b>Propr</b> 975:11 <b>prosecuting</b> 1003:19 <b>prospectively</b> 1152:22 <b>protection</b> 1097:16 <b>protections</b> 1097:12 <b>provide</b> 988:21 1021:9 1023:10 <b>provided</b> 1057:3 1097:15 1130:20 1134:9 1135:12 1137:7 1138:3 1148:16 1152:3 <b>provides</b> 975:17,17 1024:6 1039:15</p>	<p><b>provision</b> 1002:25 1003:1,7 1010:14 1013:10,23,25 1014:11 1046:4 1067:16 1070:2,5,9 1070:10 1073:13,17 1074:4,6,11,22,23 <b>provisions</b> 981:9 1002:10 1013:8 1046:25 1086:6 <b>PTX</b> 993:22 994:1 996:10 1002:13,15,17 1006:24,25,25 1010:18,20 1011:11 1015:13,14,21,22 1016:1 1043:13 1097:3 1106:23 1107:1,2 1108:10,13 1108:17 1109:4,19 1110:1,9,9,14,21,24 1111:23 1112:17 1113:14,17,20 1115:5 1116:13 1117:24 1118:8 1119:9,13 1120:8 1123:5,5,6,11 1123:21,22 1124:3 <b>public</b> 984:14 985:1 986:5 1002:2 1046:25 1047:1 1097:18 1104:6,8,9 1128:20 1130:21 1131:6 <b>publications</b> 1127:9 <b>publicly</b> 1010:3 <b>publish</b> 995:13 <b>published</b> 1127:10 1128:15 1131:2 <b>publishing</b> 995:17 <b>punish</b> 977:12 1074:23 <b>punishing</b> 1010:15 <b>Purcell</b> 967:5 983:13 983:15 984:4 994:1 1000:13 1006:22,24 1009:7 1011:2,7,10 1015:3,6,10,13,19 1016:1 1017:10 1025:21 1029:19 1038:1 1039:20 1042:8 1043:13 1048:10 1054:1 1059:1,21 1061:6 1077:4 1093:6 1094:22 1095:1 1097:2 1100:22 1101:12 <b>purchase</b> 982:4,9 987:22,24 1020:8 1025:14 1048:25 1100:18 1142:19</p>
---	--	---	--	--

<p><b>purchased</b> 973:23 1049:16 1082:2 1083:21 1096:13,20 1142:8</p> <p><b>purchases</b> 1016:8 1100:20 1141:19,24 1142:7 1143:12,15,17</p> <p><b>purchasing</b> 1009:20 1077:22 1078:4 1081:24 1096:17 1144:19</p> <p><b>pure</b> 1088:24 1089:6 1089:20,25 1091:25 1093:2</p> <p><b>purpose</b> 979:1,4</p> <p><b>purposes</b> 972:10 1081:5 1148:6</p> <p><b>pursuant</b> 970:16 974:5 974:13 1003:17 1004:6,10 1043:19 1044:4,6 1046:20 1065:21 1079:24 1097:8</p> <p><b>pursuing</b> 1064:9</p> <p><b>put</b> 971:5 972:9 975:16 978:17,20 979:20 990:19 998:1 1026:8 1038:6 1042:6,22,25 1043:8 1048:17 1086:25 1101:16,21</p> <p><b>putting</b> 1134:15 1150:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>QSA</b> 1012:22,24 1103:2,10 1107:4,12 1107:15,21 1124:1,14 1146:9</p> <p><b>qualify</b> 982:7</p> <p><b>quality</b> 1021:10 1089:15 1090:11 1091:2</p> <p><b>quantification</b> 1066:1,3 1066:9,24</p> <p><b>quantified</b> 1024:8</p> <p><b>quantify</b> 1021:16 1023:6</p> <p><b>quantity</b> 1008:13,21 1088:21 1089:14 1092:12,25 1093:21</p> <p><b>quarter</b> 1103:11</p> <p><b>question</b> 1000:21 1005:9 1008:23 1036:4 1037:9 1043:4 1044:24 1050:6 1052:19,21 1055:25 1070:17 1072:8 1074:14 1075:2</p>	<p>1078:18 1082:23 1092:19 1100:13 1108:19 1121:12 1132:15 1139:4 1142:1 1150:4</p> <p><b>questions</b> 1039:8 1042:13 1043:6 1052:22 1056:22 1070:1 1097:6 1122:5 1151:6 1152:9</p> <p><b>quiet</b> 1018:10</p> <p><b>Quinn</b> 967:11 970:21 971:21 972:6,12,18 972:21 982:19 1000:5 1015:17,23 1026:2,4 1029:13,22 1037:24 1038:6 1040:1 1042:21 1043:5,15 1047:8 1048:12,14 1055:9 1056:2,10 1057:11 1059:7,23 1061:11 1070:23 1075:7 1076:21 1077:3,7 1093:11 1094:18,25 1095:4 1096:23 1100:5 1101:2,15 1108:25 1109:2,14 1110:20 1113:22,25 1116:15 1118:1 1119:10 1120:11,16 1121:9,18 1123:14 1124:6 1127:2,4 1131:1,25 1132:2 1133:12 1139:6 1142:5 1143:4 1143:16 1145:9,16 1146:4,20 1148:7 1149:4 1150:8 1153:10 1154:2,6,17 1155:2</p> <p><b>Quinn's</b> 1097:6</p> <p><b>QUINN,ESQ</b> 967:12</p> <p><b>quite</b> 983:6 1045:14,15 1045:16 1067:24 1121:21 1146:18</p> <p><b>quote</b> 974:5 979:11,14 979:16,17,17,19</p> <p><b>quote/unquote</b> 1151:16</p> <p><b>quoting</b> 980:12</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 996:15</p> <p><b>raised</b> 995:8</p> <p><b>raises</b> 995:4 1023:24</p> <p><b>raising</b> 992:23</p> <p><b>ramp</b> 1007:15</p> <p><b>ramp-up</b> 1007:2,7,22</p> <p><b>ramping</b> 1008:5</p>	<p><b>ran</b> 1131:15</p> <p><b>range</b> 975:25 1025:9 1104:13</p> <p><b>ranged</b> 976:13</p> <p><b>ranges</b> 976:6</p> <p><b>Raphael</b> 978:20</p> <p><b>rate</b> 974:8,8,9 975:2,3 975:6,10 976:3,4,7,10 976:19,22 977:5,7,9 977:11,14,15 979:1 979:18 990:16,21 991:5,8,23,24 992:3,6 992:19 993:7,8,10,11 993:14,15,16,17,19 995:13,16,18,19,24 996:9 997:5,21,23 998:1,5,8,14,18,19,20 998:22,25 999:2,6,8 999:10,22,23 1000:18 1000:22 1001:2,2,5,7 1001:10,11,14,15,19 1001:23,25 1002:3,11 1003:2 1004:19 1008:8 1010:13 1011:24,25 1012:4,9 1012:15,25 1013:4,7 1013:14,18,22,25 1014:14,18,22 1016:7 1016:17 1017:3,21 1018:5,7,9,14 1019:6 1027:12,17,20,25 1028:10,10,17,18,23 1029:2,3,7 1030:2,3,4 1030:4,23 1031:2,2,8 1031:13,18,23,23,24 1032:14,15,20,22,23 1033:3,6 1034:7,25 1035:4,14,15,20 1036:17 1038:17 1039:10,10,14,15,16 1040:17 1041:7,9,9 1041:11 1047:5,19,22 1048:3,6 1049:13,14 1050:24 1051:6,14,19 1051:25 1052:4,11 1053:8,18 1062:11,13 1062:23 1063:2,4,7,9 1068:12,13 1070:1,5 1070:9,10,13,21 1071:10,17 1072:7,9 1073:3,13,20 1074:3 1074:7,10,22 1076:9 1076:11,12,12,13,14 1076:19 1077:16,16 1077:17,17,20,25 1078:1,1,2,2 1080:5,6 1080:6,8,16,21,23 1085:4 1087:24</p>	<p>1095:17 1096:11 1097:22,24 1098:2,4 1098:9,10,14,14,16 1098:20 1099:7,9,14 1099:17,20 1101:4,5 1101:9,9,16 1103:16 1105:11,12,13,20,20 1105:21,22 1111:16 1111:19,19,20,21,24 1111:24,25 1112:4,6 1112:7,12,12 1114:14 1114:16,20 1115:2,18 1115:23 1116:1,4,7 1116:10 1117:6,8,14 1117:21 1118:19,25 1119:6,24 1120:20,24 1132:6 1134:21,22 1135:4,6,9,11 1136:19 1140:2,3,4,4 1140:8,18,20,21,24 1141:2,3,7,11,11 1142:17 1143:5,23 1144:6 1147:3,18 1149:10 1151:7 1152:6,10,12,14,25 1153:1,8</p> <p><b>rate-making</b> 1101:21 1128:9</p> <p><b>rates</b> 966:10 974:14,24 974:25 975:3 976:20 977:2,20,22 978:8,13 979:6,17,19 980:10 980:14,16 990:7,12 991:18 992:22 993:3 994:10 995:10 997:16 1001:7 1004:11 1005:4,17 1010:5,17 1012:23 1017:16 1018:24 1019:5,10,10 1025:7,9 1028:9,14 1028:22 1031:19 1033:2,13,17,24 1034:5,11,12,14,20 1038:25 1039:18 1040:3,6,23,24 1041:16 1042:6,22 1043:1,25 1044:7 1046:23 1047:2 1052:20 1053:7,7,11 1053:12,23,24 1057:16,19,21 1058:9 1058:14 1059:10,18 1059:19 1060:2,7,12 1060:17,19,24 1061:3 1061:12,18,19 1062:21,22,23 1063:6 1067:23 1071:12 1073:2,19 1074:16,24</p>	<p>1076:15,16,18 1077:10,13,15,25 1080:12,14 1081:11 1097:17,19,20 1098:4 1098:6 1100:2,17 1103:16,23 1104:12 1105:1,4,6,17,19 1106:9,14 1111:12,18 1111:18 1112:3 1121:15 1122:15,19 1124:11 1128:19 1130:21,22 1133:3,20 1134:4 1140:11 1143:1,3,22 1147:15 1150:16,18,25 1151:3 1151:9,16,25 1152:4 1152:22,23</p> <p><b>re-creating</b> 1143:2</p> <p><b>re-cross</b> 1154:1</p> <p><b>reach</b> 971:1 1086:20</p> <p><b>reached</b> 996:21 1057:15 1138:19 1139:6</p> <p><b>reaches</b> 1007:20</p> <p><b>read</b> 973:15 983:5 994:12,21 997:3 1003:21 1006:23 1011:5,19 1012:19 1039:4</p> <p><b>reading</b> 977:21 1056:24 1057:7</p> <p><b>reads</b> 1003:8</p> <p><b>ready</b> 982:17</p> <p><b>reallocate</b> 1105:9</p> <p><b>reallocation</b> 1000:20 1100:7</p> <p><b>really</b> 982:20 983:2 1059:12 1066:4 1131:19 1142:6</p> <p><b>reason</b> 971:9 977:16 978:21 980:2 1004:21 1062:4,15 1137:13 1152:18</p> <p><b>reasonable</b> 1003:18 1139:14 1151:21</p> <p><b>reasons</b> 982:22</p> <p><b>recalculate</b> 1111:20 1123:25 1126:18</p> <p><b>recalculated</b> 1023:23 1105:13 1111:25 1112:12</p> <p><b>recalculates</b> 1084:16</p> <p><b>recalculation</b> 1084:25 1126:22</p> <p><b>recall</b> 978:10 996:18,23 1026:12,15 1027:6 1029:3 1030:14 1032:8,25 1033:1,2,5</p>
---	--	--	--	--

<p>1033:9,20 1035:17,21          1035:23 1039:8,11,12          1041:4,9,12,14          1042:12 1043:21          1047:12 1053:19          1057:17,23 1061:14          1061:17,22 1062:2          1063:14,17,24          1086:21 1087:1          1088:3 1097:6          1099:18 1100:5  <b>recalls</b> 1105:3  <b>receive</b> 985:12 988:2          1016:24 1024:22,25  <b>received</b> 1015:25          1029:21 1038:5          1064:3,25 1065:3          1077:6 1089:12          1109:7,16 1110:17,23          1111:2 1114:2          1116:17 1118:4          1119:12 1120:18          1123:16 1124:8  <b>receives</b> 1079:20          1080:3 1081:21  <b>receiving</b> 1014:10  <b>recess</b> 1025:24 1054:6          1113:7,10 1155:15  <b>Reclamation</b> 1091:20          1109:21  <b>recognize</b> 994:2 996:11          1002:15 1010:20          1032:2  <b>recognizing</b> 973:12  <b>recollection</b> 1058:12  <b>recommended</b> 977:2          999:21 1058:19  <b>reconciled</b> 1091:13,18  <b>reconciles</b> 1091:22  <b>reconciliation</b> 1091:19          1091:24  <b>reconsider</b> 999:7  <b>reconsidered</b> 1001:1  <b>record</b> 978:9 981:4          1015:8 1025:22          1055:21,23,24          1101:23,24 1106:5          1130:21 1154:6  <b>records</b> 1061:16 1108:8          1131:5  <b>recover</b> 1148:19,21          1149:2 1152:20  <b>recovered</b> 1149:3  <b>recovery</b> 1003:18  <b>Recross</b> 968:3 1100:23  <b>RECROSS-EXAMI...</b>          1101:1  <b>redirect</b> 968:3 1096:25</p>	<p>1097:1 1122:4 1150:9          1150:13  <b>reduced</b> 1067:13          1156:12  <b>refer</b> 1065:25 1105:23          1106:4 1109:23          1125:1  <b>reference</b> 1026:18          1110:4  <b>referenced</b> 1027:24  <b>referencing</b> 974:18  <b>referred</b> 1000:17,21          1011:15 1018:6          1089:23  <b>referring</b> 1106:5          1138:11 1143:18  <b>refers</b> 1066:4 1118:3  <b>refinement</b> 990:21          999:10 1000:18,22,25          1017:21 1018:7,9,14  <b>reflect</b> 1108:3  <b>reflecting</b> 1106:17  <b>reflection</b> 1111:23  <b>reflects</b> 1058:20  <b>refresh</b> 1058:12  <b>refuse</b> 1014:6  <b>refused</b> 976:15  <b>regard</b> 978:3 1005:5          1013:17 1036:12          1092:5 1128:22  <b>regarding</b> 995:15 998:5          1004:1 1088:21          1097:16  <b>regardless</b> 1091:10,11  <b>region</b> 1021:9,14          1069:13  <b>regular</b> 1018:17  <b>Regularly</b> 1017:17  <b>regulation</b> 974:5          1003:12 1004:6,10          1043:20 1044:4,6          1097:9  <b>regulations</b> 1046:21  <b>reimburse</b> 1069:7  <b>relate</b> 1012:12  <b>related</b> 970:25 976:12          1022:19 1063:22          1103:10 1134:21  <b>relates</b> 1071:17          1072:23  <b>relating</b> 985:4 1097:12  <b>relations</b> 986:5  <b>relationship</b> 994:17          1132:13,17,20  <b>relevance</b> 1133:10          1138:22  <b>relevancy</b> 1061:7  <b>relevant</b> 1061:10</p>	<p><b>reliability</b> 1012:3  <b>reliable</b> 1064:7,8,17  <b>remain</b> 1136:21,22  <b>remaining</b> 974:21          1140:6  <b>remanded</b> 1027:14,20          1027:22  <b>remarks</b> 982:19  <b>remedy</b> 981:8,11,15,16  <b>remember</b> 978:18          1056:3,13 1087:19  <b>remembers</b> 1056:13  <b>remind</b> 978:15 1038:11          1055:15 1104:11,24  <b>removal</b> 1050:17  <b>remove</b> 994:23 1022:15  <b>removed</b> 1049:13          1051:11 1105:11,18          1105:21 1111:17          1129:15 1140:5,12  <b>reorient</b> 984:16 987:15  <b>repeat</b> 990:9 1005:9          1022:1 1036:4 1050:6          1072:8 1078:18          1092:20 1093:14  <b>replicate</b> 1148:6  <b>replication</b> 1147:17  <b>report</b> 1049:20,23          1050:1 1105:14          1121:19,22 1122:8          1130:9,13 1133:5          1134:7,12 1135:25          1136:3 1137:6,6,10          1137:16,20,23,24          1138:2,3,7,10,14,15          1138:24 1139:5,20          1142:3 1146:3 1147:1          1148:15 1149:11          1153:11,12,17  <b>Reported</b> 966:19  <b>reporter</b> 970:7 1156:8          1156:24  <b>REPORTER'S</b> 966:15          1156:1  <b>reports</b> 1058:19 1110:4          1111:15 1130:3          1149:6,16  <b>represent</b> 1026:4          1108:14 1110:4,6          1111:2 1125:13  <b>representative</b> 970:17  <b>representatives</b> 970:23          973:6  <b>represents</b> 1112:6          1116:23  <b>request</b> 970:9 994:25          1133:21  <b>requesting</b> 994:16</p>	<p><b>require</b> 972:14  <b>required</b> 971:15 1012:2          1056:3,15 1091:9          1101:8  <b>requirement</b> 1135:2,14          1137:3 1143:24          1146:1 1149:2  <b>requirements</b> 1105:8          1105:10 1134:22          1146:13  <b>requires</b> 1004:2 1091:6          1091:15  <b>requiring</b> 1081:25  <b>reserved</b> 979:16          1073:12  <b>reserving</b> 1012:22  <b>reservoirs</b> 999:15  <b>reset</b> 1087:23  <b>resolution</b> 994:9 995:3          1035:22,23  <b>resolutions</b> 1035:13,13          1035:17  <b>resolved</b> 996:22          1127:25  <b>resource</b> 1013:8,21          1014:3,10 1016:24          1017:4 1021:8,21          1022:9  <b>respect</b> 977:2 1072:23  <b>respected</b> 980:24  <b>respecting</b> 1014:2  <b>respects</b> 1089:15  <b>Respondent</b> 967:10  <b>Respondents</b> 966:14  <b>response</b> 976:15 1019:6          1043:5  <b>responsibilities</b> 984:17          985:7,11 986:16          1103:14  <b>responsibility</b> 986:1          988:3 1063:23          1064:16 1065:15          1103:9 1146:4,8  <b>responsible</b> 1104:3  <b>restart</b> 1018:19  <b>restate</b> 1141:5  <b>restated</b> 1087:6  <b>restrictions</b> 1090:12,12  <b>result</b> 991:17 992:2          994:22 999:9 1005:21          1024:25 1027:4          1065:7  <b>resulting</b> 1100:7  <b>results</b> 1148:8,9  <b>resumed</b> 1055:6          1057:10  <b>retain</b> 980:9  <b>retained</b> 1127:20</p>	<p><b>retrospectively</b>          1062:20  <b>return</b> 1068:13  <b>returned</b> 976:11  <b>reunification</b> 1074:3  <b>revenue</b> 1105:7,9          1129:24 1134:21          1135:2,8,14,17,22          1136:9,10 1137:3          1143:24 1146:1,12          1149:2,3  <b>revenues</b> 991:9  <b>reversed</b> 1027:20  <b>review</b> 990:20 1017:22  <b>reviewed</b> 1134:3  <b>reviewing</b> 1130:8  <b>revisit</b> 972:21 1055:10  <b>right</b> 969:6 972:24          973:5 979:16 981:8          981:11,15,16,18          1004:24 1005:16          1007:19 1008:18          1009:1 1012:22          1019:22,24 1020:15          1021:2,4,5,5,16,24          1022:5,12 1023:3,23          1023:25 1030:18          1031:14 1034:12,15          1037:23 1040:8          1042:7 1043:25          1046:11 1048:19          1051:1,25 1052:2,5          1052:23 1053:9          1062:4 1066:7 1067:8          1068:2,5 1073:3,7          1076:15 1077:13          1082:6 1086:11,16          1087:4,22 1088:1          1089:3,5,8 1090:10          1091:7 1093:13          1095:11 1096:17,22          1124:9 1126:12,13,15          1127:14 1128:10          1129:10,19 1130:4,7          1130:10 1131:1,16          1132:10 1134:16          1139:6 1140:21          1142:9 1149:4,25          1152:10 1153:24  <b>rights</b> 969:7 973:15          981:21,22 982:6,10          1005:20 1019:15,21          1019:22 1020:4,17,20          1020:24 1022:20          1023:8,17 1024:9,11          1074:24 1075:8,10,14          1075:19 1078:4,8,17          1078:21 1079:13</p>
---	--	---	---	---



<p>1081:5,15,20 1082:8  1082:16,20,25 1083:4  1083:7,10,16,19,23  1084:1,9,13,22  1085:1,6,11,19  1096:21 1122:22,25  1123:7,19 1124:17,23  1126:1 1148:11,13  <b>risk</b> 1008:7,17 1009:8,9  1009:11,16,22,24  1011:22 1067:13,18  1067:20 1068:16  1069:1  <b>risks</b> 1008:11,11  1069:2,5,5,9,12,15,17  1069:18  <b>River</b> 973:25 975:9,12  976:13 982:1,2  984:23 988:17 989:13  989:24 992:12  1064:14,15,18,19  1066:1 1075:22  1078:24 1079:2,5,6  1079:20 1080:3,21  1102:18 1103:1,9  1109:24 1110:8  1144:25 1145:12,18  1145:25 1146:5,12,14  1146:23  <b>role</b> 985:3,18 1102:23  1103:1,8  <b>rolled</b> 993:17  <b>Ron</b> 1010:23 1011:12  1038:7  <b>Ronald</b> 996:15  <b>rough</b> 1145:25  <b>roughly</b> 1103:11  1113:6 1121:3,6  1124:24 1125:18  1126:2  <b>round</b> 1135:20  <b>row</b> 1115:19  <b>RPR</b> 966:20 1156:23  <b>rule</b> 971:25 1056:17  1078:14  <b>ruled</b> 1027:10  <b>rules</b> 1154:7,11,12,19  1155:6  <b>ruling</b> 1027:11,13,14  1053:23  <b>rulings</b> 979:4  <b>run</b> 972:2 1049:7,14  1132:6</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>Sacramento</b> 984:25  <b>sales</b> 1024:17 1105:13  1126:3,4 1140:7,10</p>	<p>1140:10,11,13  1143:19,24 1144:12  1145:23 1146:12  1147:4,4,7,8,22,23,23  <b>san</b> 966:2,6,16,17,24  967:6 969:8 970:1  973:22 974:21 975:13  976:11 977:12 978:6  978:12,23 979:5,12  979:15,24 980:8,13  980:16,24 981:17,23  982:10 983:2,16  984:6 986:14,24  987:19,19,24 988:7  988:11,18 989:15  990:2 1007:14  1010:14,15 1012:21  1015:4 1021:13  1026:10,21 1027:5  1028:21 1029:1  1030:11,12,16,25  1031:4,7,8,17 1032:4  1032:12 1033:11,25  1034:3,5,17,25  1035:8,25 1036:5,21  1036:23 1037:1,2,12  1037:17 1038:14,25  1040:3,5,5,21,23  1041:15 1042:6,21,22  1043:1 1044:18,25  1045:1,17,22 1046:3  1046:5,15,16,21,23  1047:3,9,17,25  1048:2,8,23 1049:2,8  1050:7,9,12,16  1051:7,23 1052:5  1053:5,22 1055:1  1057:22 1058:1,3,13  1058:21,24 1059:8,17  1059:25 1060:5,10,16  1061:2,19,24 1062:6  1062:17,18 1063:15  1063:21,22 1064:2,5  1064:22,25 1065:3,6  1065:14,16,16 1067:4  1067:5 1068:7  1069:20 1070:4,8  1071:1 1072:10  1073:5,9,11,15  1074:5,8,14,15,18  1075:12,17 1076:6,16  1077:23 1078:7,11  1079:2,9,20,23  1080:3,10,18 1081:9  1081:19 1083:13  1084:1,5,6,12,21  1085:9,10,10,15,18  1085:20,22,23 1086:1</p>	<p>1086:6,8,19,20,23  1087:2,2 1088:14  1090:16,16,18,18,19  1091:11,13 1092:3,5  1092:9,13,16,17,18  1092:21 1093:12,15  1093:25 1094:3,5,6  1094:10,13,16  1095:18,23 1096:2,6  1096:10 1099:16,22  1100:6 1101:8  1102:19 1103:23  1104:1,16 1106:18  1114:5,8,15 1115:10  1115:25 1117:7,13  1118:13,20 1119:1,5  1120:4,19 1121:3,14  1121:17 1123:18  1126:14 1133:21,22  1134:9 1138:8,16,20  1139:8,14 1141:14,18  1141:19,22 1142:7,12  1142:18 1143:13,15  1143:17 1144:2,10,15  1144:18 1146:5  1149:8 1150:15,19,22  1151:23,23 1152:14  1156:17  <b>sand</b> 1069:12  <b>SANDFORD</b> 966:20  1156:7,23  <b>Santa</b> 1156:4,8  <b>saved</b> 1065:7  <b>saying</b> 979:21 1034:23  1041:25 1044:7  1045:21 1081:1,17,22  1083:23 1140:9  1149:21  <b>says</b> 976:18 979:23  980:7 981:3 983:5  1005:20 1008:25  1009:3 1031:23  1039:12,14 1041:15  1044:3 1071:9  1072:25 1073:19  1074:6,16 1077:14  1088:8  <b>scenario</b> 1049:9  <b>scenarios</b> 1139:18  <b>schedule</b> 985:14  1006:13,16 1007:2,17  1088:2  <b>scope</b> 1131:19 1132:22  1138:23 1145:3,15  1146:16 1148:23  1153:18  <b>Scott</b> 982:15  <b>screen</b> 1011:5,8,11</p>	<p>1026:8 1038:6 1043:8  1043:15 1077:8  1104:14 1106:23  1107:17  <b>scrutiny</b> 976:23  <b>SDCWA</b> 969:1 1003:10  1003:13,16 1124:14  <b>seated</b> 983:23 1102:10  <b>second</b> 970:25 975:9  980:1,4 987:24  1012:19 1043:17  1071:5 1081:25  1123:21 1126:10  <b>Secretary</b> 1069:24  <b>secretly</b> 1059:18  1061:4  <b>section</b> 969:6 974:2  981:3,12,22 1002:20  1002:23 1003:25  1004:2,22 1019:24  1080:2  <b>secured</b> 1069:22  <b>see</b> 972:18 982:25  1008:2,5 1026:19  1031:22,25 1039:1,16  1040:11 1043:16  1044:15 1054:4  1058:7 1071:3,14  1077:10 1096:4  1104:14 1110:1  1112:2 1113:5,8  1123:24 1124:13,21  1126:17 1154:4,13  1155:12  <b>seek</b> 981:18 1134:5  <b>seeking</b> 974:22,24,25  980:18,19,22 988:21  995:19 1016:10,20  1017:7,8  <b>seen</b> 1032:19 1099:6,7  <b>seeping</b> 1089:17  <b>seize</b> 976:17  <b>selling</b> 989:24  <b>sense</b> 973:19  <b>sent</b> 1029:17  <b>sentence</b> 1003:17  1008:24 1043:17  1071:8  <b>separate</b> 993:11  1146:15,23,25  <b>separated</b> 1107:7  <b>September</b> 996:14,18  996:24 997:15  1029:17,22 1031:13  1112:23  <b>sequence</b> 1155:8  <b>series</b> 1113:13  <b>served</b> 1013:19</p>	<p>1127:12  <b>service</b> 977:19 978:20  986:24 987:13,17,18  990:20 1012:6  1017:22 1035:5,7  1076:9,11 1077:9,12  1077:14,20 1078:4  1080:13,22 1081:3,7  1081:14,18,21 1082:1  1082:3 1085:4 1086:8  1091:3 1095:17  1096:11 1105:5,14,15  1111:15 1114:9  1130:3,8 1131:5  1133:5 1134:7  1140:10 1146:3  1149:5,16  <b>services</b> 966:23 988:20  988:22 1081:24  1104:15  <b>set</b> 974:4 977:22  1003:11 1004:5  1018:24 1043:18  1044:5 1046:20  1080:17 1097:7,19  1151:9  <b>sets</b> 1143:22  <b>setting</b> 1019:5,9  1089:20 1147:18  <b>settlement</b> 1066:1,3,9  1066:24  <b>seven</b> 1126:17  <b>share</b> 1123:19 1143:21  1152:23  <b>sharp</b> 1054:5  <b>shift</b> 997:7  <b>shifting</b> 997:1  <b>shocked</b> 1057:6  <b>short</b> 994:13,14  <b>short-term</b> 994:9  <b>shortage</b> 1022:16  1082:14  <b>Shorthand</b> 1156:7,24  <b>shortly</b> 995:17 1010:11  1038:21  <b>show</b> 975:15 981:17  993:22 996:10  1002:13 1007:1  1010:18 1076:20  1111:1  <b>showed</b> 1026:6 1063:15  <b>showing</b> 1006:16  1014:20  <b>shown</b> 1007:18 1023:20  1058:10 1112:17  1113:14  <b>shows</b> 971:12 976:5  1007:2 1084:18</p>
--	---	--	---	---

<p><b>side</b> 972:17 1056:3,15  <b>sign</b> 1070:4,9 1073:5,6  1073:11  <b>signed</b> 981:10 1006:2  1006:12 1010:2,11  1066:17 1070:19  1073:16  <b>significant</b> 974:15  997:4 1021:3,6  <b>similar</b> 1046:1 1110:21  1118:5  <b>similarly</b> 1033:16  1044:18,25  <b>simple</b> 973:21 1147:17  1148:6  <b>simply</b> 976:15 977:3  981:2 1018:11,20  1041:12 1083:14  1092:10 1111:23  1145:22 1146:1  1149:12  <b>single</b> 993:17 1021:12  1040:2,2,7 1064:8  1098:3  <b>sir</b> 986:18 1014:5  1033:11 1034:9  1035:2 1036:22  1040:1 1061:12  1073:14 1076:23  1093:24 1095:6  <b>situated</b> 1044:18,25  <b>situation</b> 1045:17,17,22  1046:15  <b>six</b> 986:25 1010:12  1070:18 1154:10  <b>Sixty-five</b> 1047:8  <b>size</b> 1069:10  <b>Skillman</b> 978:18  <b>Slater</b> 971:11 982:15  <b>slaughtered</b> 1109:10  <b>slide</b> 1115:4 1116:21,22  1116:23 1118:2,8  1120:9  <b>slides</b> 1113:13,16  <b>slightly</b> 994:20 1103:3  1109:22  <b>small</b> 1008:15,21  1106:25  <b>smaller</b> 1009:11 1141:1  1141:2,6,10 1144:6  <b>sorry</b> 1011:10 1022:1  1048:12 1065:2  1072:16 1076:22  1077:15 1078:18  1082:23 1085:24  1093:14 1121:9  1136:2 1142:22  1143:16</p>	<p><b>sort</b> 1042:12 1088:8  1095:9  <b>sought</b> 971:1 1064:22  <b>source</b> 1006:24  1021:12 1064:6  1078:23 1113:17  1128:22,24,24,25  <b>sources</b> 987:12,21  1064:10,10  <b>south</b> 967:12 986:25  <b>Southern</b> 966:9,11  967:10  <b>speaking</b> 1111:22  <b>specific</b> 990:5 1042:12  1042:13 1066:2  1075:3 1105:17  <b>specifically</b> 1012:8  1031:7 1033:23  1035:18 1090:8  1097:5 1108:1  <b>specifics</b> 1112:15  <b>specified</b> 1003:14  1092:25  <b>spectacularly</b> 1064:1  1069:20  <b>speculation</b> 977:1,16  1093:7  <b>speculative</b> 977:4,11  <b>spell</b> 983:24  <b>spills</b> 1002:23  <b>split</b> 1145:24  <b>spokesperson</b> 986:5  <b>spread</b> 1143:24  <b>spreading</b> 1146:2  <b>spreadsheet</b> 969:7  1106:17 1133:18  <b>ss</b> 1156:4  <b>staff</b> 977:2 990:25  1018:2 1123:7  <b>stamp</b> 1026:19,22  1027:12,20,25  <b>stand</b> 1055:6  <b>standpoint</b> 1082:17,20  1083:24  <b>stands</b> 1137:13  <b>Stapleton</b> 969:16 971:6  971:19 972:1 973:2  996:16 1037:22  1038:7,10,11,13,24  <b>start</b> 970:10 1009:4  1050:3 1076:4  1087:15  <b>started</b> 1007:9 1026:6  1087:20 1089:13  <b>starting</b> 994:12 1003:7  1067:22  <b>starts</b> 994:21 1089:2  <b>state</b> 966:1 974:15</p>	<p>975:4 976:2 978:13  979:25 983:23 984:23  990:15 991:17,22  992:18 993:2,25  995:4,9 998:16,17  999:15 1010:3  1012:14 1028:15  1036:6,12 1041:6  1048:21 1049:11  1052:10 1065:5  1072:6,12,23 1098:24  1100:1,7 1105:8,18  1120:1 1129:8  1132:23,24 1133:4,8  1134:15,15 1137:4  1139:24 1140:1,5  1141:23 1142:8,10,13  1144:17 1145:1,12,24  1146:14,22 1147:4,7  1147:22 1148:20  1151:24 1153:6  1156:3,8,25  <b>statement</b> 973:12  1012:11 1037:6  1121:12 1130:20  <b>statements</b> 971:15,20  977:25  <b>States</b> 1069:24 1091:20  <b>status</b> 996:19  <b>statute</b> 974:11 977:21  995:4 1020:3  <b>statutory</b> 1019:22  1022:12  <b>stay</b> 981:6 1136:17  <b>stenotype</b> 1156:11  <b>step</b> 1107:10,11  <b>steps</b> 1010:7,10 1019:9  <b>stewardship</b> 974:9  975:6,10 976:10  991:5,8 992:3,6,19  993:19 998:19  1012:10,15 1014:14  1014:21 1016:4,7,17  1017:3 1028:18  1030:4 1034:1 1036:7  1036:17 1039:10  1041:8 1048:22  1049:12 1052:11  1072:7,13,24 1076:13  1077:17 1078:1  1080:7,8 1099:3  1105:11,21 1111:20  1112:3 1115:2 1116:7  1116:10 1117:21  1119:6,24 1129:13,15  1134:19,23 1135:4,9  1135:11 1151:25  1153:7</p>	<p><b>stint</b> 984:11  <b>stop</b> 1054:3  <b>storage</b> 999:13,14,16  999:19,21 1000:15,20  1001:1 1018:6  1022:16  <b>story</b> 971:11  <b>strategy</b> 968:14  1021:25 1022:6  <b>Street</b> 966:24 967:6,12  967:16  <b>strike</b> 993:5 1001:25  1013:3 1082:18  1121:4  <b>structure</b> 977:6,7,9,12  979:2,18 997:21,24  998:1,5,8,14,22,25  999:3,6,8 1001:2,2,6  1001:8,11,16 1002:3  1002:11 1003:3  1010:13 1011:24  1012:1,4,25 1013:4,7  1013:14,18,22,25  1018:5 1019:6  1026:11 1034:25  1035:15 1038:17  1052:8,9 1053:8  1070:13,21 1071:10  1071:17,17,21 1072:4  1072:9,11,22 1073:3  1073:13,16,20 1074:3  1074:11,22 1098:10  1098:14,16,20 1099:7  1099:9,14,18,20  1101:5 1146:24  <b>structures</b> 1047:20,23  1048:3,6 1050:25  1051:6,14,19,25  1052:4 1053:19  1101:9,17 1146:25  1152:7  <b>study</b> 978:20 990:21  1035:5,7 1105:5  1134:7  <b>subject</b> 994:8 1009:24  1049:10 1071:12  1074:17 1089:22  1128:23 1131:14  1137:19  <b>subjects</b> 987:11  1047:10,11,14,18  <b>submitted</b> 1035:11  <b>subsequent</b> 1013:5  <b>subsequently</b> 1057:4  1098:6  <b>subsidies</b> 991:12  <b>subsidize</b> 991:10  <b>subsidy</b> 998:19 1013:5</p>	<p><b>substance</b> 990:11  998:13,15  <b>substantial</b> 976:18  1065:17  <b>substantially</b> 1068:8  1092:17  <b>subtracted</b> 1140:20  <b>success</b> 1069:21  <b>sue</b> 978:25 979:6  1003:24 1004:20,24  1005:20 1008:12  1010:4  <b>sued</b> 978:22 980:25  <b>suffered</b> 991:16,20  992:1  <b>sufficient</b> 971:3  <b>suggesting</b> 1147:14  <b>suit</b> 995:23 1010:8,16  1014:23  <b>SULLIVAN</b> 967:11  <b>sum</b> 974:7  <b>summarize</b> 1104:23  <b>summarized</b> 1111:4  1125:13  <b>summarizing</b> 1113:14  <b>summary</b> 969:5,14  975:23 980:6 994:13  994:14 1108:7,20,21  1108:23 1109:1,2,3  1113:24 1115:6  1118:5 1120:9  1128:18  <b>summer</b> 1018:11  <b>Superior</b> 966:1,16  <b>supplier</b> 1064:8  1121:15  <b>suppliers</b> 997:11  <b>supplies</b> 984:22 987:22  995:2 999:16 1022:15  1049:16 1075:22  1107:5,12,15,21  <b>supply</b> 974:16 987:16  988:24 989:3,4  991:10,11,12,23  997:6,10 998:17  999:20,23 1000:12,15  1013:21 1021:13,14  1021:15,19 1022:10  1025:3,12,18 1041:7  1048:17,18,18,23,24  1049:8,11,12,14,15  1061:25 1062:2,11,13  1062:18,23 1063:2,4  1063:6,7,12,15  1064:6,7,8,11,17,18  1064:23 1075:21  1076:14 1077:16,25  1080:16 1082:2</p>
---	---	--	--	--

<p>1083:21 1100:6,17,17  1103:12 1105:9,12  1111:17,18 1120:20  1120:23,25 1129:10  1129:13,16 1130:7  1132:4 1134:20,22  1135:5,13,17,21  1136:1,5,6,7,13,19,19  1136:21 1137:5,8,9  1137:12,13,16,17,21  1137:22 1138:5  1139:10 1142:11  1149:9,14 1150:18  1152:10,12 1153:1,5  1153:8  <b>support</b> 998:7 1000:11  1021:10 1089:19  1152:4  <b>supported</b> 986:3,6  1001:24 1002:5  1111:16  <b>supporting</b> 1028:5  <b>supports</b> 980:8 1105:5  1130:21  <b>Suppose</b> 1083:8  <b>supposed</b> 976:16  1095:24 1096:7  <b>suppress</b> 997:10  <b>surcharge</b> 1077:18  <b>sure</b> 996:20 1034:22  1042:2 1057:6  1085:17 1092:19  1126:11 1130:19  1135:1 1136:6  1146:18 1150:11  <b>Surely</b> 1056:14  1154:15  <b>surprised</b> 971:22  <b>sustain</b> 995:1 1043:3  1122:3,11  <b>sustained</b> 1054:3  1059:22 1061:7  1145:8,15 1153:14  <b>sworn</b> 983:19 1102:4  <b>system</b> 974:8,8 975:2,3  976:3,3 988:18  997:13 999:15 1012:9  1026:19,23 1028:10  1029:1,7 1030:3  1031:13,24 1032:14  1032:22 1033:25,25  1039:10,14,15,15  1076:12,12 1077:16  1077:17 1078:1,1  1080:6,6 1082:2,5  1083:2,10,15,25  1085:3,21 1089:4  1105:10,10,20,20</p>	<p>1111:18,19 1112:2,2  1112:4,6 1114:15,20  1115:18,23 1116:1,4  1117:6,14 1118:19,25  1140:4,4 1151:2  <b>system's</b> 1012:2  <b>systems</b> 1028:9</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> 982:22 1058:10  1098:17,21,25 1099:4  1101:16  <b>take</b> 970:8 972:24  996:6,24 999:12  1000:14 1005:7,11,15  1008:7 1010:7,10  1013:15 1014:1,2,6  1017:10,12 1019:9  1025:23 1029:10  1031:21 1037:20  1042:10 1049:11  1070:23 1071:11  1089:11 1094:18  1105:6 1108:10  1111:7 1113:7  1123:23 1133:7,18  1134:24 1135:2  1147:11 1148:18  <b>take-out</b> 989:11  <b>taken</b> 989:23 1000:19  1002:2 1047:11  1091:22 1156:10  <b>takes</b> 1079:4 1089:3  <b>tale</b> 978:16  <b>talk</b> 976:15 1000:24  1046:11 1055:11  1079:16 1088:18  1097:21 1131:18  <b>talked</b> 1141:7 1144:15  <b>talking</b> 975:23 981:13  1026:9 1028:21  1042:3 1065:23  1079:16 1101:10  1142:7  <b>TARA</b> 966:20 1156:7  1156:23  <b>targeting</b> 1010:14  <b>task</b> 992:11  <b>tasked</b> 1137:2 1147:16  <b>tax</b> 975:10 976:13  1084:17  <b>team</b> 986:4,7 1028:6  <b>teapot</b> 1155:11  <b>tell</b> 971:4 984:17  1045:4 1049:10  1057:21 1062:4  1102:16 1103:5  1108:12 1110:2</p>	<p>1116:18 1119:14  1123:22 1128:4  1133:16 1139:11,12  1145:9 1146:20  <b>telling</b> 1034:18 1051:13  1052:7,11,13  <b>tempest</b> 1155:11  <b>ten</b> 1113:8 1154:5  1155:12  <b>tens</b> 991:21 992:5  <b>tentative</b> 1018:23  <b>term</b> 974:3 1003:5  1004:2,22,25 1019:14  1019:17,20 1043:8,16  1046:6 1074:15  1088:7,16 1097:7,13  1138:11 1140:2,3  <b>terminal</b> 999:15  <b>terminate</b> 1013:20,23  <b>terms</b> 985:17,19,23  1035:21,23 1042:17  1042:21 1044:19  1045:15 1066:4  1071:16 1088:7,21  1089:10,24 1090:25  1094:8 1097:3  1127:16 1130:13  1133:8 1134:9 1135:8  1144:14 1149:11,15  <b>terrible</b> 1131:23  <b>test</b> 1132:5,6,10  1136:20,23  <b>testified</b> 973:9 975:14  978:11 983:20 984:15  987:8,11 990:8  1002:5 1017:11  1043:5 1055:6 1102:5  1102:20 1104:10  1116:9 1121:19  1132:9  <b>testify</b> 975:14 990:5  1047:10,18  <b>testifying</b> 973:7  1102:24 1127:16  <b>testimony</b> 978:6,11  980:2 982:17 990:25  1017:24 1033:11,20  1034:9,22 1035:2  1039:6 1051:15  1052:8 1053:20  1069:19 1101:3  1104:11 1106:2,6  1142:23  <b>tests</b> 1136:24  <b>Thank</b> 982:18 983:9,10  983:14,23 1080:8  1096:24 1102:10  1113:8,11,12 1120:17</p>	<p>1154:3  <b>Thanks</b> 1017:10  <b>theory</b> 1146:14 1147:7  <b>thing</b> 1035:1 1039:9,13  1048:16 1135:15  1155:10,10  <b>things</b> 971:5 972:13,13  972:14 1068:18  1085:18,21 1089:17  1090:8 1120:13  1131:18 1137:11  1147:14 1151:14  <b>think</b> 971:25 972:10,23  978:16 982:23,25  1011:4 1018:4 1027:3  1031:16 1037:24  1038:2,18 1041:20  1051:9 1052:24  1059:23 1060:9  1063:17,20 1065:10  1067:1 1073:5 1082:4  1087:23 1088:2  1094:22 1095:1  1101:20 1109:9  1130:3,11,20 1133:6  1138:11 1139:1,23  1152:2 1153:21,22  1154:11,13,14  1155:11  <b>thinking</b> 1045:4  1153:23  <b>third</b> 981:2 988:2  1103:13  <b>third-party</b> 1016:18  1045:12  <b>thought</b> 971:22  1040:24 1060:1,3,6  1060:11,19,21,23  1062:15 1069:19  <b>threat</b> 979:11 1011:23  <b>threaten</b> 979:17  <b>three</b> 974:10 1009:22  1030:2,5 1056:6  1067:17 1068:17  1076:18 1080:5,12,23  1081:11,11 1112:1  <b>Tier</b> 1025:9,9 1077:16  1142:11,13 1144:19  1152:25  <b>till</b> 1144:2  <b>time</b> 973:13 994:7  997:23 999:10  1000:18 1003:14,24  1005:23 1008:3,6  1012:18 1017:13,24  1020:2,7,13,18  1021:22 1022:3  1026:15 1027:1</p>	<p>1028:1,7,17,20,25  1029:1,5,23 1031:2  1031:18 1032:6,16,20  1033:5 1034:24  1038:16 1041:3  1060:4,6,15,22,24  1061:15,18 1068:19  1068:24 1069:2  1070:4,12,15 1071:7  1072:25 1082:15  1084:20 1087:1  1095:22 1103:6  1111:8 1112:21,25  1125:16 1156:11  <b>timeout</b> 980:4 1003:23  1009:25 1017:14,19  <b>times</b> 1034:10 1082:4  <b>timing</b> 1088:21  1090:11  <b>today</b> 971:24 972:7,18  1017:12 1019:14  1056:9 1106:2 1154:3  <b>token</b> 970:6  <b>told</b> 971:10 978:12  983:3 1031:16  1034:11 1038:18  1043:1 1050:23,25  1051:17 1057:14  1061:23 1073:5  1076:21 1082:4  1085:20 1096:2  1127:6 1129:8,12  <b>tomorrow</b> 1155:12,13  <b>top</b> 976:9 1077:15  <b>topic</b> 1122:13  <b>total</b> 975:15 1008:15  1020:7 1021:17  1023:19 1024:1  1084:19 1111:6,11  1112:7 1113:5  1114:11,21 1115:1,9  1115:15 1116:6,10  1117:3,20 1118:16  1119:5,14,17,20  1125:16,22 1126:15  1126:17 1146:11,12  1147:3,7,22  <b>totals</b> 1111:6 1125:13  1126:19  <b>trade-in</b> 1095:16  1096:14  <b>trades</b> 1095:18  <b>trading</b> 1068:11  <b>tranche</b> 1008:2  <b>transaction</b> 1046:8  1066:16 1088:24  1089:1 1090:7 1125:5  1125:20</p>
--	--	---	--	--

<p><b>transactions</b> 1044:21 1046:12 1093:9 <b>transcript</b> 966:15 1039:5 1056:25 1154:9,19 <b>transcription</b> 1156:13 <b>transcripts</b> 1057:3,7 <b>transfer</b> 1007:3,21 1009:15,17,17 1012:6 1024:25 1064:12 1065:22 1066:20 1067:14 1086:23 1089:13 1107:5 1125:2,12 <b>transferred</b> 1007:14 1092:8 <b>transfers</b> 1089:11 1103:10 <b>transparency</b> 1039:16 <b>transport</b> 982:1 987:25 988:7 989:15 1082:1 1089:4 1114:5 1118:11 1129:9 1132:3 <b>transportation</b> 974:4 974:17 976:12,20 977:24 986:19 988:22 991:18,23 993:3,11 995:10 999:18,22 1000:12,15 1010:5 1017:16 1022:25 1045:1 1048:17 1049:13 1052:14,16 1052:20 1062:1,13,23 1063:8,11 1067:11,14 1071:18 1076:19 1077:13,24 1080:13 1082:1,3 1085:14,16 1086:2,5,7 1100:2 1104:12,15,25 1105:12,13,22 1111:12,19 1120:25 1129:16 1134:16 1135:16,17,20 1137:8 1137:8,13,17,22 1138:5 1139:9 1149:10,14 1150:25 1152:1 <b>transported</b> 986:13 1086:10,10 1089:8 1090:3,5 1125:3 <b>transporting</b> 975:9 1045:12 1076:2 1083:20 1085:10 1086:14 1094:1,3 1106:11 1115:12 1116:25 <b>treat</b> 1081:4 1095:21</p>	<p><b>treated</b> 1044:19 1046:15 1077:22 1082:18,20 1083:17 <b>treatment</b> 1077:17,21 1078:2 <b>trees</b> 1109:10 <b>tremendous</b> 1074:10 <b>trial</b> 972:13 973:14,16 973:18 974:20 976:16 977:22 979:9,10,20 983:8 984:16 991:14 996:20 1027:9,9,10 1027:11,15,15,19,22 1027:23 1039:4 1106:5 1148:16 <b>tried</b> 1086:20 1147:17 1154:18 1155:6 <b>trigger</b> 1074:3 <b>truck</b> 976:21 <b>true</b> 1029:2 1034:3,17 1035:16,22 1036:13 1036:14,24 1037:11 1060:7 1062:14 1064:6,22 1070:6,16 1070:19 1071:16 1078:23 1081:5,10 1085:2 1086:3,19 1091:12 1092:6,25 1093:24 1094:10,14 1095:22 1101:15,18 1134:2,11,12 1136:11 1142:19 1145:2,16 1146:15 <b>try</b> 972:12,14 976:21 1131:25 <b>trying</b> 1037:8 1143:4 1148:5 <b>turn</b> 994:11,25 1002:20 1075:7 1079:18 1109:25 1115:4 1123:5,21 <b>Turning</b> 1108:10 <b>turnouts</b> 1045:10 <b>turns</b> 1121:20 <b>Twenty-four</b> 972:16 1055:20 <b>twice</b> 1017:8 <b>two</b> 970:13 979:24 997:9,11 999:14 1015:7 1030:13,14,22 1034:8 1042:17 1044:8 1050:15 1052:16,17,21 1081:23 1125:8 1133:22 1143:19 <b>two-party</b> 1066:21,23 <b>type</b> 1127:17 1132:19 <b>types</b> 1103:5</p>	<p><b>typewriting</b> 1156:12 <b>typically</b> 1090:7,14 1110:6 1143:19</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> 1109:21 <b>Uh-huh</b> 1033:19 <b>ultimate</b> 1007:21 <b>unbounded</b> 1005:3 1009:16 <b>unbundled</b> 997:20,23 998:1,5,8,14,22,25 999:2,6 1001:2,5 1038:17 1040:4 <b>unbundling</b> 1040:22 1041:16 <b>uncertainty</b> 1068:11 <b>unclear</b> 1034:23 1130:17 <b>undercalculating</b> 1023:7 <b>undergraduate</b> 1127:7 <b>underlying</b> 1001:15 <b>undermining</b> 1011:24 <b>understand</b> 988:23 1033:11 1053:6,8 1063:5 1075:12 1078:14 1081:1 1082:22 1085:17 1089:25 1090:1 1092:19 1094:20 1127:24 1133:19,19 1135:1 1142:1 1146:19 1153:13 <b>understanding</b> 973:4 986:8 1019:20 1023:12,15 1043:22 1049:19 1050:9 1056:2 1058:24 1059:7,16,24 1060:9 1061:3,8 1062:17 1150:4 <b>understood</b> 983:3 1031:12,13 1059:17 1069:2,19 <b>undertake</b> 1135:23 <b>undertaken</b> 1025:10 <b>undisputed</b> 975:25 <b>unfair</b> 1056:10 1154:11 <b>unhappy</b> 978:24 <b>uniform</b> 993:16 1012:23 <b>unilateral</b> 1040:17 <b>United</b> 1069:24 1091:20 <b>unknown</b> 1053:13,24 <b>unlawful</b> 977:20 1040:6,8 1041:10</p>	<p>1047:4 1097:17,20 1106:15 <b>unsuccessful</b> 1008:20 <b>untreated</b> 1025:8 1080:14,15 <b>update</b> 1017:20 <b>updated</b> 1112:24 <b>updating</b> 1113:3 <b>upper</b> 1080:5 <b>urge</b> 973:16 <b>URQUHART</b> 967:11 <b>use</b> 976:20 994:16,25 1019:17 1020:16 1026:22 1045:7 1085:23 1109:17 1111:9 1134:1,10,12 1146:11 1151:8 <b>useful</b> 1151:19 <b>uses</b> 1151:3 <b>utility</b> 1128:21</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vague</b> 1130:17 1139:2 <b>valid</b> 995:25 1012:21 <b>validate</b> 995:19 <b>validating</b> 1053:23 <b>validation</b> 995:18,22 996:5,19 1027:4 <b>validity</b> 966:10 979:16 995:16 1042:11 <b>valley</b> 988:4 1045:8 <b>value</b> 1020:24 1021:2,3 <b>VAN</b> 967:3 <b>VANDERHORST</b> 967:15 <b>Variations</b> 1148:4 <b>variety</b> 1047:19,22 <b>various</b> 987:12 1047:10 <b>verdict</b> 996:21 <b>version</b> 1023:17 <b>versus</b> 1063:8 1147:23 <b>VIDEOGRAPHY</b> 966:23 <b>view</b> 1004:9,15 1009:5 1011:1 1144:24 1146:21 <b>VII</b> 966:10 <b>Vincent</b> 994:7 <b>violate</b> 977:18 <b>violated</b> 974:11 1046:7 <b>violation</b> 1061:9 <b>virtue</b> 1008:13 <b>vociferous</b> 977:1 <b>VOICE</b> 1055:20 <b>volume</b> 966:10 1009:24 1107:4,18,19,20 1108:2,3,7 1109:19 1110:1 1111:10</p>	<p>1112:10,13,13,20 1143:20 <b>volumes</b> 1107:3 1108:15 1111:3 1112:24 <b>vote</b> 998:21,24 1001:10 1001:11,14 1034:24 1059:18 1061:3 1101:8 <b>voted</b> 1001:6,22 1034:5 1034:7,10,18,20 1035:1,20 1060:20 1061:12 <b>votes</b> 1001:18 1097:22 1098:13 <b>voting</b> 1060:12,15 1061:18 <b>vs</b> 966:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>waive</b> 981:16 <b>waived</b> 980:21 981:18 <b>waiver</b> 978:1 979:22 981:4,7 <b>waiving</b> 981:11 <b>walk</b> 1106:21 1107:10 1112:15 1114:3 <b>want</b> 970:10 973:19 990:9 1008:5 1017:12 1035:19 1037:6 1039:3 1040:25 1062:25 1063:3 1068:23 1088:18,20 1090:3,5 1120:13 1135:19 <b>wanted</b> 1045:24 1064:5 1064:7 1086:17 <b>wants</b> 1075:18 <b>Washinton</b> 984:25 <b>wasn't</b> 1034:22 1046:5 1056:11 1057:5,5 1064:2 1065:15 1087:1 1088:16 1127:23 <b>wastewater</b> 1103:24 1128:20 <b>water</b> 966:6,9,11 967:10 971:7 973:22 973:23 974:9,15 975:5,6,9,10,13,13 976:2,9,11 977:23 978:13 979:13,25 981:23,25 982:2,4,9 982:10 983:16 984:7 984:12,14,20,20,21 984:23,24 985:2,4,5 985:12,15 986:9,11 986:13,15,16,18,19</p>
--	---	--	--	--

<p>986:22,23 987:1,5,12  987:12,16,16,18,19  987:21,21,23,24,25  988:1,2,6,7,10,11,14  988:15,17,20,23,24  989:2,4,7,8,16,16,21  989:21,23,24 990:2,2  990:6,11,14,15,15  991:1,4,5,8,10,11,12  991:16,17,20,22  992:1,2,3,4,5,8,8,15  992:18,19,23 993:1,2  993:14,16,17,18  994:6,18 995:2,6,8,9  996:1,3,6,8,17 997:15  998:3,7,10,13,16,17  998:19,19,24 999:13  999:15,24 1001:18  1002:1,10,19 1003:1  1003:6,22,24 1004:7  1004:9,13,14,17,19  1004:21,25 1005:7,11  1005:15,20,25 1006:4  1006:5,9,9,13,13,17  1007:3,7,13,13,23,24  1007:24 1008:3,5,7  1008:14,15,16,21  1009:8,21,23 1010:4  1010:8 1011:16  1012:1,6,10,12,14,15  1012:16,21 1013:3,6  1013:9,11,13,15,19  1013:21,23,24 1014:2  1014:7,9,12,13,14,14  1014:17,21,21 1016:3  1016:4,7,8,10,17,18  1016:20,23 1017:2,3  1017:7,15,18 1018:1  1018:13,24 1019:2,17  1019:23,25 1020:1,5  1020:8,12,14,15,16  1020:17,19,20,23  1021:2,2,3,6,8,8,10  1021:13,14,15,16,18  1021:21,23,23,24,25  1021:25 1022:5,6,7,8  1022:9,10,11,13,14  1022:15,18,25 1023:3  1023:4,5,6,20,21,24  1023:24,25,25 1024:1  1024:5,7,7,10,14,16  1024:18,21,21,24,24  1025:2,3,7,9,10,11,13  1025:14,18,20 1026:4  1026:21 1028:15,18  1030:4 1034:1 1036:6  1036:7,13,16 1038:14  1038:16 1039:9</p>	<p>1041:2,6,8,19  1044:13,22 1045:6,9  1045:12,13,24  1047:23 1048:8,18,22  1048:22,24,24,25  1049:11,11,12  1052:10,10 1058:9  1061:25 1064:3,6,7,8  1064:10,11,12,14,18  1064:19,23 1065:7,7  1065:12,22 1066:19  1066:22 1067:7,9,12  1067:12,14,17,18  1068:16,17,21,23  1069:7,7,23,25  1070:12,20 1071:1,9  1072:6,6,12,13,23,24  1073:1 1075:20,21  1076:2,3,5,6,12,14  1077:1,16,22,23  1078:1,5,15,19,23,25  1079:1,2,3,5,10,14,17  1079:18,19,20,23  1080:3,7,8,10,10,14  1080:15,19,19,21,22  1080:23 1081:3,3,8,9  1081:12,14,18,20,21  1081:24 1082:2,10,13  1082:14,17,17,18,20  1082:21,22,24 1083:1  1083:5,9,15,16,21  1084:2,5 1085:10,20  1085:22,23 1086:8,9  1086:15,20 1088:19  1088:19,24 1089:6,21  1090:3,11,11,16,17  1090:20,24 1091:2,2  1091:6,9,13,15,21,22  1092:1,1,4,9,11,22  1093:3,4,11,12,13,15  1093:20,21,22 1094:1  1094:3,5,11,14,15,16  1095:8,13,15,16,17  1095:23 1096:7,13,14  1096:16,20 1097:11  1097:15,23 1098:2,3  1098:6,8,12,24  1099:3,13 1100:1,7  1100:17,20 1102:7,19  1102:23 1103:6,15,19  1103:22 1105:8,8,11  1105:18,21 1106:10  1106:11 1107:4,13,15  1110:8 1111:11,20  1112:3 1114:5 1115:1  1115:13,13 1116:6,10  1117:1,20 1118:10  1119:6,15,19,24</p>	<p>1120:2,23 1122:25  1124:1,1,2,20,22  1125:3,4,25 1128:9  1128:20 1129:9,12,15  1132:23,24 1133:4,8  1134:15,19,23 1135:3  1135:9,11,13 1137:4  1139:24 1140:1,5,23  1141:18,19,23,24  1142:6,8,8,9,10,13,13  1142:18,19,19 1143:5  1143:12,12 1144:2,16  1144:16,17,19,24  1145:1,10,12,17,24  1146:5,9,14,22  1147:4,8,22 1148:20  1148:20 1149:8  1151:24,25 1153:6,7  <b>way</b> 976:22 982:20  983:4 990:1 1041:18  1045:1 1046:24  1059:13 1073:21,23  1081:16 1083:12  1096:22 1098:12  1099:24 1108:22  1121:24 1128:19  1131:23 1134:4  1148:8 1154:18  1155:5  <b>ways</b> 981:1  <b>we'll</b> 1030:22 1106:21  1109:3 1112:15  <b>we're</b> 971:4 973:19  977:10 980:22 981:13  982:17 1009:21  1027:1 1042:3 1052:4  1062:10 1065:23  1070:18,18 1074:17  1075:20 1079:14,16  1080:14 1111:22  1126:12 1155:11  <b>we've</b> 1032:19 1088:7  <b>Wednesday</b> 1155:14  <b>week</b> 971:5,8 972:1  <b>welcome</b> 973:9  <b>well-articulated</b>  1012:16  <b>well-known</b> 1012:16  1128:25  <b>went</b> 979:15 980:12  999:20 1023:16  1063:15 1086:7  1087:23 1122:6  1136:5,13,21  <b>west</b> 1045:8  <b>wheel</b> 1090:20  <b>wheeled</b> 1082:17,20,22  1083:1,5,16 1094:6</p>	<p>1094:10  <b>wheeler</b> 1088:25  1089:7,22 1090:2  <b>wheelers</b> 974:14  <b>wheeling</b> 974:11  977:18,21 990:16  991:24 992:18 993:7  993:8,10,14,15  994:10,18 995:4,13  995:16,17,24 996:8  997:12 998:18,20  1008:8 1012:23  1028:8 1030:2,23  1031:2,2 1041:7,9,11  1068:12 1086:11,14  1086:16,21,24 1087:3  1088:19,24 1089:2,7  1089:20 1090:1,7,16  1090:17 1091:25  1093:3,9 1122:21,22  1124:12 1125:5  <b>wheels</b> 1082:24 1083:9  1083:14,24 1089:4  <b>whichever</b> 1069:3  <b>willing</b> 1004:21  <b>win</b> 1073:20 1074:16  <b>withdraw</b> 1132:15  1147:5  <b>witness</b> 970:18 971:2,7  971:15 973:3,8  977:25 983:15,19,22  983:25 1000:7,11  1009:2,6 1011:3,6  1025:21 1039:24  1042:9,12,18 1048:13  1055:11,15 1056:24  1057:4 1059:5 1075:5  1093:9 1101:14,25  1102:4,9,11 1126:9  1126:24 1130:19  1139:1 1142:2,25  1145:7,22 1146:18  1148:2 1149:1 1150:1  1150:7 1153:4  1156:16  <b>witnesses</b> 968:3 970:16  970:19,24 972:2,9,25  973:17 982:14 1056:7  1057:5 1154:9,15  <b>word</b> 1041:4  <b>words</b> 980:15 1041:2  1046:5  <b>work</b> 982:6 984:20  986:3,5,5 990:23  1017:23 1018:12  1019:17 1049:3  1103:5,14 1121:19,23  1129:7 1131:19,22</p>	<p>1132:22 1133:25  1134:10,17,25  1135:24 1136:8,12  1139:7 1146:21  1152:4  <b>workbook</b> 969:5  1107:2,24  <b>worked</b> 985:4 1007:8  1151:13  <b>working</b> 985:18  1105:15  <b>works</b> 1007:23 1084:14  1095:20 1151:10,12  <b>world</b> 1069:11  <b>WORLDWIDE</b> 966:23  <b>worse</b> 1046:15 1048:8  <b>worth</b> 1127:11  <b>wouldn't</b> 1004:19  1035:19 1040:21,25  1053:1 1067:9 1094:4  1147:6 1152:13  <b>write</b> 978:19,21  1073:18,21,23  <b>writing</b> 981:10 990:18  998:11 1003:13  1042:13 1129:1  <b>written</b> 1038:21 1040:2  1041:1,4  <b>wrong</b> 1047:4 1051:18  1134:16  <b>wrote</b> 1030:1 1068:23  <b>WSR</b> 969:8 1015:4</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>X</b> 968:2</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>yeah</b> 1098:13 1131:7  1138:10 1146:18  <b>year</b> 975:23 976:5  988:2,5 992:5 1001:8  1001:14 1007:12  1009:6,21 1021:6  1024:2,15,15,19,22  1024:25 1025:19,20  1035:16 1064:4  1065:10,12 1069:23  1084:15 1088:9  1091:17,21,23  1104:18 1106:21,22  1110:6 1111:7,16  1112:14 1115:13  1116:18 1117:1  1140:7,16  <b>year-and-a-half</b>  1102:21  <b>yearly</b> 1097:22  <b>years</b> 974:23 975:2,7</p>
--	--	---	--	--

975:24,25 976:14 984:9 1001:23,24 1003:9 1004:20,24 1005:17 1007:12 1008:9,12,13,14,16 1009:15,17,20 1011:21 1012:18,24 1014:22 1018:25 1021:17,18 1024:18 1030:18 1033:24 1034:8,21 1036:12,16 1058:23 1062:9 1063:2,13 1064:4 1065:8 1067:14,15,19 1067:21 1068:2,11,12 1068:13 1069:23 1070:18 1072:11,15 1072:17,18 1087:17 1099:2 1100:15 1106:12 1111:4 1116:11 1119:16,21 1120:5 1133:19 1152:15 <b>yellow</b> 1107:21 1124:22 <b>yesterday</b> 971:23 <b>yield</b> 1064:12 <b>yielded</b> 1140:18	<b>10,000</b> 1007:9,10 <b>10:00</b> 970:3 <b>100</b> 976:19 <b>100-million-dollar</b> 1135:21 <b>100,000</b> 988:1 1007:16 1007:18 1025:1 <b>1002</b> 968:11,11 <b>1010</b> 968:13,13 <b>1015</b> 969:8,8,9,9 <b>1026</b> 968:4 <b>1029</b> 969:18,18 <b>1031</b> 968:14,14 <b>1038</b> 969:16,16 <b>1058</b> 968:12,12 <b>1070</b> 969:1,1 <b>1076</b> 969:19 <b>1077</b> 969:19 <b>1096</b> 968:15,15 <b>1097</b> 968:4 <b>10th</b> 967:12 <b>11</b> 1111:4 1154:10 <b>110</b> 1064:4 1065:8 1069:23 <b>1101</b> 968:4 <b>1102</b> 968:5 <b>1107</b> 969:5 <b>1109</b> 969:4,4,5 <b>1110</b> 969:3,3 <b>1111</b> 968:16,16 <b>1114</b> 969:10,10 <b>1116</b> 969:11,11 <b>1118</b> 969:12,12 <b>1119</b> 969:13 <b>1120</b> 969:13 <b>1121</b> 969:15,15 <b>1124</b> 969:6,6,7 <b>1125</b> 969:7 <b>1127</b> 968:5 <b>1130</b> 969:19 1076:22 1077:5,6 1094:19 1095:3 <b>1150</b> 968:5 <b>1156</b> 966:13 <b>12</b> 979:24 984:9 1091:6 1091:9 1092:4 <b>12.5</b> 981:12 <b>12/6/96</b> 968:9 <b>128</b> 968:14 1031:21 <b>13.9</b> 981:3,3,7 <b>135</b> 969:6 981:22 1019:24 <b>136</b> 975:22 976:1 <b>13th</b> 1156:16 <b>14</b> 975:2 981:19 1106:12 1107:7,24 1111:5,17 1112:8,25 <b>143,240</b> 1114:7	<b>15</b> 1009:17,20 1063:18 1067:15 1068:11 1100:11,13,19 1102:1 <b>150,000</b> 1008:15 1010:1 1068:16 <b>16</b> 1002:20 1019:5 1043:8,10 1097:4,6 <b>163-dollar</b> 1030:3 <b>164</b> 975:22 976:1 <b>17</b> 1002:23 1003:7 1029:17,23 1097:4 <b>179,993</b> 1118:12 <b>18</b> 982:11 1071:2 <b>18.27</b> 1123:20 1124:23 1126:8 <b>180</b> 1143:21 <b>180,256</b> 1117:2 <b>186,861</b> 1115:14 <b>188,295,602</b> 1113:5 <b>195</b> 976:6 <b>1995</b> 1086:19,23 <b>1996</b> 990:16 993:8 995:7,12 1026:7 <b>1997</b> 984:13 <b>1998</b> 1006:3,5 1009:10 1009:13 1067:16 1087:4,11 1088:14 <b>1999</b> 996:14,18,24	<b>2006</b> 968:19 <b>2006-2007</b> 1008:3 <b>2007</b> 968:20 1070:17 1070:19,22 1071:2,18 1072:10 <b>2008</b> 968:14,21 1032:9 1032:10,12,17 1033:8 1033:13 1034:3,14 1036:11,15 1057:15 1059:10 1060:6 1061:13 1071:21 1098:13,17,23 <b>2009</b> 968:22 999:9,12 1033:13,17 1034:3,14 1057:16 1058:23 1059:10 1061:13 1071:23 1098:13,19 1098:23 <b>2010</b> 968:23 978:22 1013:12 1033:18 1037:16 1071:25 <b>2011</b> 968:24 969:10 974:25 975:2,4 980:21,22 981:18 1008:5 1014:22 1015:5 1016:2,25 1072:2,18 1104:18 1106:12 1107:7,23 1111:16 1112:7 1113:16 1114:4,16,21 1115:2 1116:19,20 1119:16,21 1152:15 <b>2011-2014</b> 969:15 <b>2012</b> 966:12 968:25 969:11 1018:11 1104:18 1115:7,10,16 1115:20 1116:1,4,7 <b>2013</b> 966:12 969:3,12 1104:10,24 1107:23 1112:23 1116:23 1117:1,4,7,14,21 1118:3 1154:10 <b>2014</b> 966:12 969:13 975:4 1014:22 1015:5 1016:3,25 1018:22 1112:21 1118:6,9,10 1118:17,20,25 1119:6 1119:16,21 1125:17 1152:16 <b>2015</b> 966:18 970:2 1018:25 1019:5,10 1024:2,5 1025:7 1055:2 1156:17 <b>2016</b> 1018:25 1019:10 <b>2018</b> 1007:20 <b>2019</b> 1007:20 <b>2020</b> 1007:20 <b>2021</b> 1007:21	<b>213.217.6000</b> 967:17 <b>213.443.3000</b> 967:13 <b>216</b> 1154:10 <b>22</b> 968:9 993:22 994:1 1026:7,18 <b>23</b> 982:12 <b>23.02</b> 1124:24 1126:8 <b>24</b> 971:22 972:6,7 973:1 1056:4,20 1098:7 1154:7,13,17 1154:20 <b>256</b> 968:15 1096:1 <b>26</b> 974:11 975:11 1023:18,23 1084:25 <b>26-member</b> 1011:14 <b>27</b> 1016:19 <b>28</b> 982:11,13
		<b>2</b>		
			<b>3</b>	
			<b>3/11/08</b> 968:12 <b>3/28/12</b> 969:19 <b>30</b> 966:18 970:2 1009:15 1055:2 1087:16 <b>304</b> 966:4 <b>314</b> 968:16 1110:1,9,11 1110:12,17 <b>315</b> 968:17 <b>316</b> 968:18 <b>317</b> 968:19 <b>318</b> 968:20 <b>319</b> 968:21 <b>320</b> 968:22 <b>321</b> 968:23 <b>322</b> 968:24 <b>323</b> 968:25 1110:11,12 1110:17 <b>3374</b> 966:20 1156:7,23 <b>355</b> 969:1 1070:24 <b>357</b> 1076:20 <b>36</b> 1068:12 <b>38</b> 968:10 996:10 <b>3rd</b> 966:24	
			<b>4</b>	
			<b>4.2</b> 1043:9 <b>403.8</b> 1125:19 <b>408.5</b> 1126:16 <b>409</b> 1126:13,21 <b>409.5</b> 1124:19 <b>41</b> 976:13 <b>415</b> 966:25 <b>415.391.5400</b> 967:7 <b>423</b> 1110:10 <b>430</b> 969:3 1110:2,12,14 1110:21,23 <b>45</b> 1068:12 <b>45-year</b> 1009:15,20	

<p><b>469</b> 969:4 1006:25          1108:10,13,17 1109:8          1109:13,15,16  <b>471</b> 969:5 1106:23          1107:1,2 1109:4,6,7          1109:19 1110:24          1112:4,17 1113:14,17          1119:14  <b>472</b> 969:6 1123:5,5,6          1123:11,15,16,17  <b>473</b> 969:7 1123:21,22          1123:23 1124:3,7,8          1125:8 1126:11  <b>473A</b> 1006:25  <b>48</b> 972:4 1025:5          1055:16,19  <b>48.3</b> 1016:9</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>5.2</b> 974:2 1002:21,24          1004:1,2,22 1008:24          1080:2  <b>5.7</b> 1125:23  <b>5/18/07</b> 969:1  <b>50</b> 987:23  <b>50,000</b> 1007:13  <b>506</b> 969:8 1015:13,14          1016:1  <b>507</b> 969:9 1015:21,22          1015:24,25  <b>508</b> 969:10 1113:20,20          1114:1,2 1116:18  <b>509</b> 969:11 1115:5          1116:13,16,17  <b>51</b> 1043:13 1047:7  <b>510</b> 969:12 1117:24          1118:2,4  <b>511</b> 969:13 1118:8,8          1119:9,11,12  <b>512</b> 969:14 1120:8,17          1120:18  <b>522-7096</b> 966:25  <b>5499.7(a)</b> 974:12  <b>56,000</b> 1025:20</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> 1026:7  <b>6/12/12</b> 968:15  <b>6/18/04</b> 968:13  <b>6/30/14</b> 1123:8  <b>633</b> 967:6  <b>65</b> 968:11 974:19          1002:13,15,17 1043:7          1047:7 1097:3</p> <hr/> <p style="text-align: center;"><b>7</b></p> <p><b>700</b> 967:16  <b>701</b> 966:24</p>	<p><b>71</b> 968:12 1058:6  <b>794</b> 969:16 1037:20          1038:4,5</p> <hr/> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> 996:14,24 1006:25  <b>80</b> 968:13 987:18          1010:18,20 1011:1,2          1011:11 1025:2          1087:23  <b>80,000</b> 1024:14,19,23          1064:3 1065:11          1069:22 1126:2  <b>800</b> 966:25  <b>800,000</b> 988:5  <b>81</b> 1011:1  <b>843</b> 969:17 1029:11,16          1029:20,21  <b>865</b> 967:12</p> <hr/> <p style="text-align: center;"><b>9</b></p> <p><b>9</b> 1058:6  <b>9/27/03</b> 969:18  <b>9/8/99</b> 968:10  <b>90</b> 1087:20  <b>90012</b> 967:16  <b>90017-2543</b> 967:13  <b>94111</b> 966:24  <b>966</b> 966:13  <b>97</b> 993:9  <b>98</b> 1006:9  <b>981-3498</b> 966:25  <b>984</b> 968:4  <b>99</b> 997:15  <b>993</b> 968:9,9  <b>996</b> 968:10,10</p>			
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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 BEFORE THE HONORABLE CURTIS E. A. KARNOW  
 DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )  
 )

Petitioner and Plaintiff, ) Case No.  
 ) CPF-10-510830  
 vs. ) CPF-12-512466  
 )

METROPOLITAN WATER DISTRICT OF )  
 SOUTHERN CALIFORNIA; ALL )  
 PERSONS INTERESTED IN THE )  
 VALIDITY OF THE RATES ADOPTED BY ) Volume VIII  
 THE METROPOLITAN WATER DISTRICT )  
 OF SOUTHERN CALIFORNIA ON APRIL )  
 10, 2012 TO BE EFFECTIVE JANUARY )  
 1, 2013 AND JANUARY 1, 2014, and )  
 DOES 1-10, )  
 ) Pages 1157 - 1352  
 Respondents and Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 San Francisco Superior  
 San Francisco, California  
 Wednesday, April 1, 2015

Reported By:  
 TARA SANDFORD, RPR, CSR #3374

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 JAN BROWN & ASSOCIATES  
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1157

1 INDEX  
 2 PLAINTIFF'S WITNESSES DIRECT CROSS REDIRECT RECROSS  
 3 SLATER, Scott 1161 1203  
 4 CUSHMAN, Dennis  
 (recalled) 1257 1258 1260 --

6 Plaintiff Rests: Page 1265

8 DEFENDANT'S WITNESS DIRECT CROSS REDIRECT RECROSS  
 9 KIGHTLINGER, Jeff 1269 1316 --

11 EXHIBITS

Number	For ID	Evidence
56	2/19/03 email	1344 1344
246B	Interrogatory Responses	1265 1265
247B	Interrogatory Responses	1265 1265
398	2/19/03 email	1343 1343
481	"Suggestions Regarding Wheeling Rate"	1171 1171

18 513 through 517

19	Deposition Excerpts	1263 1263
20	811 7/8/03 email	1181 1181

1159

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1158

1 San Francisco, California  
 2 Wednesday, April 1, 2015  
 3 10:00 a.m.  
 4 Department 304 Hon. Curtis E. A. Karnow, Judge

5  
 6 THE COURT: Good morning. Call a witness.  
 7 MR. PURCELL: Your Honor, the Water Authority  
 8 calls as its next witness, Scott Slater.  
 9 THE COURT: Thank you.

10  
 11 SCOTT SLATER, ESQ.,  
 12 called as a witness by the Plaintiff, was sworn and  
 13 testified as follows:  
 14  
 15 THE WITNESS: I do.  
 16 THE CLERK: Thank you. Please be seated. If  
 17 you would state and spell your first and last name.  
 18 THE WITNESS: My name is Scott Slater. Spelled  
 19 S-L-A-T-E-R.  
 20 THE CLERK: I need you to spell your first  
 21 name, as well.  
 22 THE WITNESS: S-C-O-T-T.  
 23 /  
 24 //  
 25 ///

1160



1 DIRECT EXAMINATION  
 2 BY MR. PURCELL:  
 3 Q. What is your occupation?  
 4 A. **I'm a lawyer.**  
 5 Q. How are you currently employed?  
 6 A. **I'm employed by the law firm of Brownstein**  
 7 **Hyatt Farber Schreck.**  
 8 Q. When did you receive your law degree?  
 9 A. **1984.**  
 10 Q. Since 1984 have you focused on any particular  
 11 area of law in your day-to-day legal practice?  
 12 A. **My practice has been limited exclusively to**  
 13 **water work since 1984.**  
 14 Q. Have you ever published any books on water law,  
 15 water work issues?  
 16 A. **I wrote a two-volume treatise called**  
 17 **"California Water Law and Policy," initially published**  
 18 **in 1994 and updated annually every year since 1994.**  
 19 Q. And have you ever taught any courses on water  
 20 law at any educational institutions?  
 21 A. **I taught environmental water law and water law**  
 22 **and policy at universities in California, Australia,**  
 23 **China, Texas.**  
 24 Q. In your water law practice, what types of  
 25 clients do you serve?

1161

1 A. **A mix of private and public clients. On the**  
 2 **private side there will be anything from publicly traded**  
 3 **companies to agricultural interests, industrial**  
 4 **utilities.**  
 5 **And on the public side, it's usually special**  
 6 **districts, but commonly cities, as well.**  
 7 Q. What type of work do you do for your public  
 8 agency clients?  
 9 A. **Traditional business counseling on water**  
 10 **strategy and business negotiation. But for about 20, 25**  
 11 **years I also was responsible for litigating groundwater**  
 12 **and service water adjudication cases in California.**  
 13 Q. Have you ever done any legal work for the San  
 14 Diego County Water Authority?  
 15 A. **I have.**  
 16 Q. Did you participate in the negotiations between  
 17 the Water Authority and Metropolitan for an amended  
 18 exchange agreement in 2003?  
 19 A. **I did.**  
 20 Q. What was your role in those negotiations?  
 21 A. **I was the lead negotiator for the San Diego**  
 22 **County Water Authority in negotiating all of the**  
 23 **agreements pursuant to the QSA, and specifically the**  
 24 **exchange agreement.**  
 25 Q. Who at the Water Authority did you work with on

1162

1 the negotiations of the 2003 exchange agreement with  
 2 Metropolitan?  
 3 A. **Principally Maureen Stapleton, who was the**  
 4 **general manager. Bob Campbell, Robert Campbell, who was**  
 5 **the CFO. James Taylor, who was in the general counsel's**  
 6 **office. And for a time, Dan Hentschke in the general**  
 7 **counsel's office, as well as Dennis Cushman.**  
 8 Q. Who were your negotiating counterparts on the  
 9 2003 exchange agreement with Metropolitan?  
 10 A. **I believe that the list includes Dennis**  
 11 **Underwood, Brian Thomas, Jeff Kightlinger, Paul**  
 12 **Cunningham, Carl Kaseman, Ron Gastelum.**  
 13 Q. At the time you negotiated the 2003 exchange  
 14 agreement with Metropolitan, was there a previously  
 15 existing exchange agreement in effect between the Water  
 16 Authority and Metropolitan?  
 17 A. **There was.**  
 18 Q. When was that first exchange agreement signed?  
 19 A. **The first exchange agreement was negotiated and**  
 20 **executed in 1998.**  
 21 Q. Did you negotiate the 1998 exchange agreement  
 22 with Metropolitan?  
 23 A. **I did.**  
 24 Q. What was your role in negotiating that  
 25 agreement?

1163

1 A. **I was the lead negotiator for the San Diego**  
 2 **Water Authority.**  
 3 Q. At the time you negotiated the 2003 exchange  
 4 agreement with Metropolitan, did the Water Authority  
 5 have concerns about the terms of the 1998 exchange  
 6 agreement?  
 7 A. **It did.**  
 8 Q. What were those concerns?  
 9 A. **The initial continuing concern between 1998 and**  
 10 **2003 was a discrepancy in the length of the exchange**  
 11 **agreement as compared to the water transfer agreement**  
 12 **that had been negotiated with the Imperial Irrigation**  
 13 **District. The Imperial Irrigation District term was 45**  
 14 **years and the --**  
 15 THE COURT: It was for how many years?  
 16 THE WITNESS: Forty-five with a renewal right  
 17 for an additional 30. The exchange agreement was for 30  
 18 years.  
 19 Q. BY MR. PURCELL: Did Metropolitan have any  
 20 obligation under the 1998 exchange agreement to move IID  
 21 water for the Water Authority after year 30?  
 22 A. **It did not.**  
 23 Q. Was there a price schedule in the 1998 exchange  
 24 agreement with Metropolitan?  
 25 A. **There was.**

1164

1 Q. What was the term of the price schedule?  
 2 **A. The price schedule lasted for 30 years or the**  
 3 **length of the agreement.**  
 4 Q. Was there any commitment from Metropolitan to  
 5 charge a particular price for deliveries of IID water  
 6 after year 30?  
 7 **A. There was not.**  
 8 Q. Did this create concerns for the Water  
 9 Authority?  
 10 **A. It did.**  
 11 Q. What concerns did the lack of a price term  
 12 after year 30 create for the Water Authority?  
 13 **A. Again, if San Diego was to be obliged to pay**  
 14 **Imperial for water being produced over a 45-year period,**  
 15 **and San Diego did not have the ability to move the water**  
 16 **through the Met system, that would create a substantial**  
 17 **financial exposure to the Authority going forward.**  
 18 Q. How much water was scheduled to be delivered by  
 19 IID in the last 15 years of the transfer agreement where  
 20 there was no corresponding obligation on Metropolitan's  
 21 part to deliver the water?  
 22 **A. During the back 15 years, the transfer would**  
 23 **reach its full maximum and it would be 200,000 acre-feet**  
 24 **in each year of the 15 years.**  
 25 Q. So 200,000 times 15 years?  
 1165

1 **A. Correct.**  
 2 Q. That's 3 million acre-feet of water?  
 3 **A. Correct.**  
 4 Q. Would the Water Authority have executed any new  
 5 exchange agreement in 2003 that did not match the term  
 6 of the IID transfer agreement?  
 7 **A. No.**  
 8 Q. At the time you negotiated the 2003 exchange  
 9 agreement, did the Water Authority have concerns about  
 10 Metropolitan's performance of even the 30-year  
 11 obligation under the original 1998 exchange agreement?  
 12 **A. Yes.**  
 13 Q. Did the 1998 exchange agreement contain any  
 14 conditions precedent that needed to be satisfied before  
 15 Metropolitan had an obligation to move IID water for the  
 16 Water Authority?  
 17 **A. There was a condition precedent, yes.**  
 18 MR. PURCELL: Can we put on the screen PTX 31.  
 19 This is in evidence.  
 20 Q. Do you recognize this document?  
 21 **A. Yes.**  
 22 Q. What is it?  
 23 **A. It is an agreement between Metropolitan Water**  
 24 **District of Southern California and the San Diego County**  
 25 **Water Authority for the exchange of water, executed in**  
 1166

1 **1998. And for shorthand, we refer to this as the '98**  
 2 **agreement.**  
 3 Q. Is this the 1998 exchange agreement we have  
 4 been talking about so far?  
 5 **A. It is.**  
 6 Q. Could we turn to page 23. I would like to  
 7 focus on the bottom half of the page, the section  
 8 "Conditions Precedent."  
 9 Mr. Slater, do you see that section?  
 10 **A. I do.**  
 11 Q. Does this section, 8.1, state Metropolitan's  
 12 conditions precedent?  
 13 **A. It does.**  
 14 Q. If we could go to the next page, I would like  
 15 to focus on the second half of the page, subsection D.  
 16 Mr. Slater, was this one of the conditions  
 17 precedent that Metropolitan included in the exchange  
 18 agreement in 1998?  
 19 **A. It was.**  
 20 Q. Could you just read the first sentence of  
 21 subparagraph D?  
 22 **A. "There shall have been legal authorization,**  
 23 **appropriation and a legally binding commitment of the**  
 24 **State of California to provide the sum of \$235 million**  
 25 **for the purposes described in subparagraphs 1 and 2**  
 1167

1 **below."**  
 2 Q. Did this condition precedent relate to the  
 3 canal lining project?  
 4 **A. It did.**  
 5 Q. Who was the \$235 million required to be  
 6 appropriated for under this condition precedent?  
 7 **A. The money was to be appropriated by the State**  
 8 **for the benefit of the Metropolitan to implement the**  
 9 **canal lining project and some related projects.**  
 10 Q. During negotiations of the 2003 exchange  
 11 agreement, did Metropolitan take any position as to  
 12 whether this condition precedent had been satisfied?  
 13 **A. It did.**  
 14 Q. What position did Metropolitan take?  
 15 **A. That it was deeply concerned about the State's**  
 16 **ability to fund this commitment and to execute legally**  
 17 **binding authorization at that time.**  
 18 Q. As of the negotiation of the 2003 exchange  
 19 agreement, was there any contract in effect between the  
 20 State and Metropolitan that obligated the State to pay  
 21 the \$235 million?  
 22 **A. Not to my knowledge.**  
 23 Q. Did Metropolitan suggest that this lack of a  
 24 legally binding commitment might have an effect on  
 25 whether it had any obligation to perform the IID water  
 1168

1 transfer under the 1998 exchange agreement?  
 2 **A. It did.**  
 3 Q. What did Metropolitan say about that?  
 4 **A. It was reported that -- if I can explain**  
 5 **briefly. It was the summer of 2003, and the State was**  
 6 **in a pretty historic budget crisis. And there had been**  
 7 **runs on various funds that had been set aside, and my**  
 8 **understanding was, based upon a presentation that had**  
 9 **been made by Ron Gastelum in the Governor's office**  
 10 **during July and August, that Metropolitan's invoices**  
 11 **were not being paid, and that there was a -- pertinent**  
 12 **to the canal lining were not being reimbursed by the**  
 13 **State. And there was a continuing concern that the**  
 14 **State would be able to fund this.**  
 15 **There being no binding commitment, the**  
 16 **condition precedent for the exchange agreement would not**  
 17 **have been satisfied.**  
 18 Q. Did Mr. Gastelum tell you anything about how  
 19 this might affect Metropolitan's obligation to perform  
 20 the '98 exchange agreement?  
 21 **A. Yes. The condition precedent was a requirement**  
 22 **to give rise to Metropolitan's obligation to exchange**  
 23 **the water. And if there was a failure of this**  
 24 **provision, we understood there would be no ability to**  
 25 **exchange the water pursuant to the agreement.**

1169

1 Q. If Metropolitan had no obligation to move the  
 2 IID water under the 1998 exchange agreement, what value,  
 3 if any, would that agreement have for the Water  
 4 Authority?  
 5 **A. Well, then there wouldn't be value.**  
 6 Q. Did the Water Authority come up with a proposal  
 7 to deal with the condition precedent regarding the \$235  
 8 million for the canal lining?  
 9 **A. It did.**  
 10 Q. What proposal did the Water Authority come up  
 11 with to deal with that problem?  
 12 **A. The proposal was that given Metropolitan's**  
 13 **insecurity over funding and other issues related to**  
 14 **implementing the canal lining, San Diego ostensibly**  
 15 **agreed to flip the obligation and assume the role of**  
 16 **implementing the canal lining project under the theory**  
 17 **that if Met did not believe that this was capable of**  
 18 **being implemented or that there were limitations, then**  
 19 **San Diego would take that risk.**  
 20 Q. I would like to ask just a couple more  
 21 questions about the 1998 agreement. I'd like to put up  
 22 on the screen PTX 481.  
 23 THE COURT: Is this in evidence?  
 24 MR. PURCELL: This is not in evidence yet.  
 25 THE CLERK: 481.

1170

1 (Exhibit 481 was marked for identification.)  
 2 Q. BY MR. PURCELL: Do you recognize PTX 481?  
 3 **A. I do.**  
 4 Q. What is PTX 481?  
 5 **A. This is a letter from the director of the**  
 6 **Department of Water Resources, David Kenny, to the**  
 7 **Chairperson Chris Frahm and Chairman Jack Foley of their**  
 8 **respective agencies regarding the wheeling rate.**  
 9 Q. In your capacity as counsel for the Water  
 10 Authority, did you receive a copy of this letter around  
 11 the time it was sent to Ms. Frahm?  
 12 **A. I did.**  
 13 MR. PURCELL: I would like to move PTX 481 into  
 14 evidence.  
 15 MR. QUINN: No objection.  
 16 THE COURT: It is admitted.  
 17 (Exhibit 481 was received in evidence.)  
 18 Q. BY MR. PURCELL: You said Mr. Kenny was the  
 19 director of the California Department of Water  
 20 Resources.  
 21 **A. Yes.**  
 22 Q. Had he previously been the general manager of  
 23 Metropolitan?  
 24 **A. Yes, he was.**  
 25 Q. Could you read the first paragraph of this

1171

1 letter?  
 2 **A. Out loud?**  
 3 Q. Yes.  
 4 **A. "Your two agencies have now been negotiating**  
 5 **for considerable time on conditions under which**  
 6 **Metropolitan would wheel water that San Diego proposes**  
 7 **to buy from Imperial Irrigation District. There have**  
 8 **been many meetings and exchange of information and**  
 9 **position statements. In spite of these efforts,**  
 10 **representatives of both agencies have expressed**  
 11 **frustration that there is little evidence of finding**  
 12 **common ground for bringing the matter to resolution.**  
 13 **"In addition, the legislature and the Governor**  
 14 **have expressed concern that successful development of**  
 15 **California's 4.4 Plan for the Colorado River depends on**  
 16 **early resolution of the wheeling issue."**  
 17 Q. Does Mr. Kennedy's statement in the first  
 18 paragraph accurately reflect the state of the  
 19 negotiations between the Water Authority and  
 20 Metropolitan as of January 5, 1998?  
 21 **A. I think it is a fair representation, yes.**  
 22 Q. How did Mr. Kennedy get involved in the  
 23 negotiations between the Water Authority and  
 24 Metropolitan?  
 25 **A. My understanding is that the legislature, via a**

1172

1 **special addition to Water Code Section 1810, et seq.,**  
 2 **which was known as the Katz wheeling Law, the**  
 3 **legislature adopted a special law applicable to the**  
 4 **transportation of water through the Colorado River**  
 5 **Aqueduct by San Diego, and that code section, I believe,**  
 6 **was 1812.5. It was of limited duration.**  
 7 **That law required the director of the**  
 8 **Department of Water Resources to intercede and to make a**  
 9 **recommendation on how the conflict between San Diego and**  
 10 **Metropolitan could be resolved.**  
 11 Q. Does Mr. Kennedy's January 5 letter contain a  
 12 price proposal for a wheeling rate that Metropolitan  
 13 would charge the Water Authority for wheeling IID water  
 14 through the Colorado River Aqueduct?  
 15 **A. It did.**  
 16 MR. PURCELL: Could you put page three up on  
 17 the screen?  
 18 Q. Mr. Slater, does the chart on page three of  
 19 Mr. Kennedy's letter contain a proposal for a wheeling  
 20 rate?  
 21 **A. It does.**  
 22 Q. If you look at the fourth row of the chart,  
 23 there's a line item that says, "SD pays to MWD for  
 24 wheeling."  
 25 Do you see that?

1173

1 **A. I do.**  
 2 Q. What is the proposed wheeling rate Mr. Kennedy  
 3 recommends in this letter?  
 4 **A. \$80.**  
 5 Q. That's \$80 an acre-foot?  
 6 **A. \$80 per acre-foot.**  
 7 Q. What was the starting wheeling price the  
 8 parties agreed to in the 1998 exchange agreement?  
 9 **A. \$90 an acre-foot.**  
 10 Q. From your perspective, as lead negotiator for  
 11 the Water Authority, did Mr. Kennedy's letter have any  
 12 effect on the negotiations?  
 13 **A. It did.**  
 14 Q. What effect?  
 15 **A. David was an extremely well-regarded person,**  
 16 **state bureaucrat. He was well-regarded among the seven**  
 17 **states. He was well-regarded in California. He was**  
 18 **well-regarded at Met. The Governor trusted him. The**  
 19 **legislature trusted him.**  
 20 **And when he proposed this memo, this letter, as**  
 21 **an independent party, I think it had influence on public**  
 22 **sentiment about what was an appropriate wheeling charge**  
 23 **and set an environment for negotiation of the wheeling**  
 24 **rate.**  
 25 MR. PURCELL: All right. Can you put up PTX

1174

1 65. This is in evidence.  
 2 Q. Is PTX 65 the 2003 wheeling agreement between  
 3 the Water Authority and Metropolitan?  
 4 **A. Yes.**  
 5 MR. PURCELL: Could we turn to page 16 and 17,  
 6 bottom of page 16, Section 5.2.  
 7 Q. Mr. Slater, what is Section 5.2?  
 8 **A. Section 5.2 is the portion of the 2003 exchange**  
 9 **agreement which established the methodology for**  
 10 **determining price under -- as Met conveyed, transported**  
 11 **San Diego's water.**  
 12 Q. Did you negotiate this price term for the Water  
 13 Authority?  
 14 **A. With input from my client, yes.**  
 15 Q. Is the price term in the 2003 exchange  
 16 agreement fixed, or is it floating?  
 17 **A. It is fixed for the first five years and then**  
 18 **thereafter it is a variable price.**  
 19 Q. Is it fixed for the first five years?  
 20 **A. The 2003 agreement?**  
 21 Q. Yes.  
 22 **A. I believe it was five years. But it's just the**  
 23 **initial price and then escalated pursuant to a fixed**  
 24 **escalator.**  
 25 **Sorry. Apologize.**

1175

1 Q. So is there language in the floating price term  
 2 that puts limits on Metropolitan's discretion to set  
 3 rates?  
 4 **A. Yes, there is language that limits the exercise**  
 5 **of discretion.**  
 6 Q. Could you read the second sentence of Section  
 7 5.2?  
 8 **A. "After the initial start price of 253,**  
 9 **thereafter, the price shall be equal to the charge or**  
 10 **charges set by Metropolitan's board of directors**  
 11 **pursuant to applicable law and regulation and generally**  
 12 **applicable to the conveyance of water by Metropolitan on**  
 13 **behalf of its member agencies."**  
 14 Q. I want to take this sentence in a couple of  
 15 pieces.  
 16 I would like to first ask you about the  
 17 phrase, "Set by Metropolitan's board of directors  
 18 pursuant to applicable law and regulation."  
 19 During negotiations did you discuss the meaning  
 20 of that phrase with Metropolitan?  
 21 **A. Yes.**  
 22 Q. And with whom on Metropolitan's negotiating  
 23 team did you discuss the meaning of that phrase?  
 24 **A. This phrase and phrases like it were part of a**  
 25 **consistent dialogue between at least January of '03 and**

1176

1 **August of '03. And people involved in those**  
 2 **communications would have been Dennis Underwood, Brian**  
 3 **Thomas, Jeff Kightlinger, Paul Cunningham, Carl Kaseman,**  
 4 **and maybe others, but at least those.**  
 5 Q. Did Metropolitan's negotiations ask you about  
 6 the meaning of that term, "applicable law and  
 7 regulation," what that referred to?  
 8 **A. Between January of '03 and August of '03**  
 9 **multiple conversations around this language or**  
 10 **comparable language.**  
 11 Q. What did Metropolitan's negotiators ask you  
 12 about what applicable law and regulation referred to?  
 13 MR. QUINN: Objection. Vague. Who are we  
 14 talking about?  
 15 THE COURT: Understood. Do you have anybody  
 16 specific in mind?  
 17 Q. BY MR. PURCELL: Let's start with  
 18 Mr. Kightlinger.  
 19 Did Mr. Kightlinger ever ask you the meaning of  
 20 the term "applicable law and regulation"?  
 21 **A. Yes. Yes, we had several discussions around**  
 22 **applicable law and regulation.**  
 23 Q. What did he ask you about what that term meant?  
 24 **A. Well, it was more of a discussion. So the**  
 25 **question was what does it mean. And my response, as I**

1177

1 **understood it, is we were really looking at two things:**  
 2 **We were looking at a process and a sideboard on what**  
 3 **would be done.**  
 4 **A process which would afford San Diego to --**  
 5 **for Metropolitan to set a rate pursuant to its code,**  
 6 **which was a process point. What would be the process?**  
 7 **I can explain why, but process point.**  
 8 **And then, secondly, a substantive point as to**  
 9 **what were the parameters that would be limitations on a**  
 10 **rate. And I understood that, the parameters would be**  
 11 **the fabric of the law that pertained to rates and**  
 12 **whatever that would be, all of it.**  
 13 MR. QUINN: I move to strike everything after  
 14 "what I understood."  
 15 THE COURT: Sustained. Sustained.  
 16 And you can rephrase the question.  
 17 Q. BY MR. PURCELL: Sure.  
 18 Mr. Slater, what, if anything, did you tell  
 19 Metropolitan -- strike that.  
 20 What, if anything, did you tell Mr. Kightlinger  
 21 about what laws fit within the ambit of applicable law  
 22 and regulation?  
 23 **A. All law on the date of execution and whatever**  
 24 **they would be over the life of the agreement.**  
 25 Q. Did either party make any effort to create an

1178

1 actual list of every law that applied under the  
 2 applicable law and regulation term?  
 3 **A. I did not, and I'm not aware of any tender of a**  
 4 **proposal to list them.**  
 5 Q. Was it important to the Water Authority to have  
 6 an open-ended obligation for Metropolitan to comply with  
 7 applicable law and regulation?  
 8 **A. Well, I didn't view it as open-ended. I viewed**  
 9 **it as the touchstone being applicable law, and I could**  
 10 **be certain, based upon life experience, that whatever we**  
 11 **thought was the universe of applicable law in the field**  
 12 **of water was going to be evolving, and that whatever we**  
 13 **did had to capture the evolution in the law.**  
 14 MR. QUINN: Your Honor, I move to strike.  
 15 Nonresponsive to the question.  
 16 THE COURT: Overruled.  
 17 Q. BY MR. PURCELL: Did Metropolitan ever make a  
 18 proposal for some narrower category of law that would  
 19 govern their obligations to set rates?  
 20 **A. My recollection is the initial proposal for**  
 21 **this language was limited to Met code, the Met**  
 22 **Administrative Code, and that there were earlier similar**  
 23 **iterations of this language in other contexts that tried**  
 24 **to limit San Diego's ability to challenge anything other**  
 25 **than what was adopted in their code.**

1179

1 Q. Did San Diego respond to that proposal by  
 2 Metropolitan?  
 3 **A. We did.**  
 4 Q. What did you do with it?  
 5 **A. We consistently rejected the notion that it was**  
 6 **only the code.**  
 7 Q. Would a price term that required Metropolitan  
 8 only to comply with the requirements of its  
 9 Administrative Code have been acceptable to the Water  
 10 Authority?  
 11 **A. We would not have accepted a provision that**  
 12 **said notwithstanding applicable law, we'll pay what the**  
 13 **administrative code process determine -- is established.**  
 14 Q. Why not?  
 15 **A. That would be an unbounded standard where**  
 16 **somebody could set any rate they wanted.**  
 17 Q. Would the Water Authority have agreed to a  
 18 floating price term without a requirement that the rate  
 19 had to comply with all applicable law and regulations?  
 20 **A. No.**  
 21 Q. You have sort of alluded to this already, but  
 22 did you discuss with Metropolitan whether applicable law  
 23 and regulation was limited to the state of the law in  
 24 effect at the time the exchange agreement was signed?  
 25 **A. Yes.**

1180

1 MR. QUINN: Objection. Vague as to who is  
 2 speaking with --  
 3 Is this Mr. Kightlinger?  
 4 THE COURT: I think we will get that cleared up  
 5 in the next question. So the objection is overruled.  
 6 Go ahead.  
 7 Q. BY MR. PURCELL: With whom at Metropolitan did  
 8 you have discussions about whether the applicable law  
 9 term would be limited to the state of affairs at the  
 10 time the agreement was signed?  
 11 **A. Initially that dialogue occurred between me and**  
 12 **Carl Kaseman. Carl was a very experienced, very adroit**  
 13 **draftsperson, and we would have these exchanges about**  
 14 **the language confining our right to object to the status**  
 15 **of the law that existed on the date we were executing**  
 16 **the agreement.**  
 17 **I think I consistently made it clear to Carl**  
 18 **that was not a tolerable standard. So, conversations**  
 19 **with Carl and also conversations with Jeff during the**  
 20 **summer of '03.**  
 21 MR. PURCELL: Ben, can we put up DTX 811.  
 22 Q. Do you recognize this document?  
 23 MR. PURCELL: This is not yet in evidence, your  
 24 Honor.  
 25 (Exhibit 811 was marked for identification.)

1181

1 THE WITNESS: I do.  
 2 Q. BY MR. PURCELL: What is DTX 811?  
 3 **A. This is the end of an email exchange which**  
 4 **pertains to the concept of San Diego not contesting**  
 5 **Met's adoption of a wheeling rate. But this -- and at**  
 6 **this point the question was how preclusive or how**  
 7 **limiting the right to contest was going to be.**  
 8 Q. And this is an email chain between you and who?  
 9 **A. This is Carl Kaseman at law firm of Harkins and**  
 10 **Cunningham.**  
 11 Q. Mr. Kaseman is the  
 12 ack@harkinsandcunningham.com?  
 13 **A. Yes.**  
 14 Q. The cc's on this email, are those negotiators  
 15 for both the Water Authority and Metropolitan?  
 16 **A. They are.**  
 17 Q. Can you read the second paragraph of  
 18 Mr. Kaseman -- it's the third paragraph -- Ben is about  
 19 to highlight it -- of Mr. Kaseman's email to you.  
 20 **A. "I thought San Diego was going to be limited in**  
 21 **any judicial or administrative challenge to the issue**  
 22 **whether MWD, in establishing its charges, had done so in**  
 23 **accordance with applicable law and regulation as in**  
 24 **effect, including interpretations thereof, as of the**  
 25 **date of the amendment.**

1182

1 **"Under your new draft, San Diego would be able**  
 2 **to do much more than that; i.e., it would be free also**  
 3 **to contend that existing interpretations of applicable**  
 4 **law and regulation were incorrect or had become outmoded**  
 5 **and they should now be overturned, even though**  
 6 **Metropolitan's charges might have been set in accordance**  
 7 **with those pre-amendment interpretations."**  
 8 Q. Did Mr. Kaseman's email accurately capture the  
 9 Water Authority's position about the meaning of the  
 10 applicable law and regulation term as of July 28, 2003?  
 11 **A. It's a fair summary.**  
 12 Q. Did the Water Authority's position on that term  
 13 ever change prior to the negotiation and execution of  
 14 the exchange agreement?  
 15 **A. No.**  
 16 Q. Let's go back to the price term, PTX 65.  
 17 MR. PURCELL: Your Honor, I would like to move  
 18 DTX 811 into evidence.  
 19 MR. QUINN: No objection.  
 20 THE COURT: PTX 811 is admitted.  
 21 MR. PURCELL: It is DTX 811.  
 22 THE COURT: I'm sorry?  
 23 MR. PURCELL: It is DTX 811.  
 24 THE COURT: Thank you. DTX.  
 25 (Exhibit 811 was received in evidence.)

1183

1 Q. BY MR. PURCELL: Getting back to the second  
 2 sentence, the one that starts "Thereafter."  
 3 There's also language at the very top of page  
 4 17 that says, "Generally applicable to the conveyance of  
 5 water by Metropolitan on behalf of its member agencies."  
 6 Do you see that?  
 7 **A. I do.**  
 8 Q. Who proposed that language in the 2003 exchange  
 9 agreement?  
 10 **A. San Diego.**  
 11 Q. Did you tell Metropolitan what San Diego  
 12 intended that language to mean?  
 13 **A. Yes. We were -- we were trying to create a**  
 14 **context for the rate and that being conveyance,**  
 15 **transportation, wheeling.**  
 16 Q. And who at Metropolitan did you communicate  
 17 that to?  
 18 **A. At least Jeff Kightlinger.**  
 19 Q. Was it important for the Water Authority to  
 20 have Metropolitan charge a rate that was generally  
 21 applicable to other Metropolitan member agencies?  
 22 **A. It was.**  
 23 Q. Why was that important?  
 24 **A. We were surrendering a fixed price schedule for**  
 25 **30 years, and, in part, we were relying upon the idea in**

1184

1 **setting a rate it would not be discriminatory towards**  
 2 **San Diego, but it would be generally applicable to all**  
 3 **member agencies. We didn't want to have a one-off rate**  
 4 **that would apply only to San Diego.**  
 5 Q. At the time you were negotiating this language,  
 6 did you have in mind, did San Diego have in mind a  
 7 particular Metropolitan rate that was generally  
 8 applicable to the conveyance of water on behalf of  
 9 member agencies?  
 10 **A. What we know collectively as the wheeling rate.**  
 11 Q. Throughout negotiations, did you consistently  
 12 tell Metropolitan that the exchange agreement had to  
 13 require Metropolitan to charge a lawful wheeling rate?  
 14 **A. Between -- throughout -- whenever we discussed**  
 15 **the period between the 30-year and 45-year, because we**  
 16 **had the schedule for the first -- first 30 years. So**  
 17 **when we were addressing what should be done between**  
 18 **years 31 and 45, we continually made that point.**  
 19 **And then when we began to explore the option of**  
 20 **taking the canal lining and moving to a variable rate,**  
 21 **we, again, used the words "lawful rate."**  
 22 Q. I'd like to put up PTX 57, which is in  
 23 evidence.  
 24 Mr. Slater, do you recognize, not the top  
 25 email, but do you recognize the email that is appended

1185

1 to it? It starts with "from Scott Slater."  
 2 **A. I do.**  
 3 Q. Did you send that email to Mr. Kightlinger on  
 4 or about August 27, 2003?  
 5 **A. I did.**  
 6 Q. Can we scroll down to Point Number 4? Could  
 7 you just read the first sentence of Point Number 4,  
 8 Mr. Slater?  
 9 **A. "San Diego will pay the lawful wheeling rate on**  
 10 **all water in the CRA and no lobbying, per language,**  
 11 **Jeff, you previously proposed and agreed in the exchange**  
 12 **agreement."**  
 13 Q. This is you speaking to Mr. Kightlinger on  
 14 August 27, 2003?  
 15 **A. Yes.**  
 16 Q. What was the state of the negotiations between  
 17 the parties as of August 27, 2003?  
 18 **A. We were at a difficult impasse, and I feared**  
 19 **that we were not going to succeed if we didn't -- if we**  
 20 **did not reach an agreement on what to do. And the**  
 21 **proposal was the option of San Diego securing the canal**  
 22 **lining and implementing that project and agreeing to pay**  
 23 **the lawful wheeling rate.**  
 24 Q. At this point had the deal been presented to  
 25 San Diego's board for approval?

1186

1 **A. I believe it was on the precipice of being**  
 2 **presented, and we wanted assurance before we went to the**  
 3 **board that we understood the terms.**  
 4 MR. PURCELL: Can we put up DTX 841, which is  
 5 not yet in evidence.  
 6 (Exhibit 841 was marked for identification.)  
 7 Q. BY MR. PURCELL: Mr. Slater, what is this  
 8 document?  
 9 **A. The cover page is from a legal assistant who**  
 10 **was working for me at this time named Olga**  
 11 **Rittershaus -- spelled R-I-T-T-E-R-S-H-A-U-S -- to a**  
 12 **broad list of negotiators involved in the QSA.**  
 13 Q. Ms. Rittershaus, her email says, "Ladies and  
 14 gentlemen, per Scott's request, please see attached."  
 15 Do you see that?  
 16 **A. Yes.**  
 17 Q. Does "Scott" refer to you?  
 18 **A. It does.**  
 19 Q. What does Ms. Rittershaus attach to this cover  
 20 email?  
 21 **A. Can we show the --**  
 22 Q. Yes. Mr. Slater, it is also in the binder.  
 23 **A. This is great. I can actually read it without**  
 24 **eyeglasses.**  
 25 Q. Go to the next page. What is this that

1187

1 Ms. Rittershaus attached?  
 2 **A. This was a summation of the outline of the**  
 3 **canal lining option, as it was understood by me and the**  
 4 **San Diego team for their evaluation.**  
 5 **Again, we were trying to confirm with everybody**  
 6 **that they understand the elements prior to moving**  
 7 **forward.**  
 8 Q. At this point, September 16, 2003, had the deal  
 9 been presented to the San Diego board?  
 10 **A. I -- I believe that it had been.**  
 11 Q. And do you have an understanding as of the time  
 12 you sent this that Metropolitan had agreed to these  
 13 terms?  
 14 **A. My understanding is that we had an agreement on**  
 15 **these terms.**  
 16 Q. Would you have presented the deal to San  
 17 Diego's board if you didn't think Metropolitan had  
 18 agreed to the terms?  
 19 **A. I would not have.**  
 20 Q. Could you read Point Number 2 under the  
 21 "Conditions" heading?  
 22 **A. Number 2 says, "San Diego agrees to pay the**  
 23 **lawful wheeling rate."**  
 24 MR. PURCELL: I would like to move DTX 841 into  
 25 evidence.

1188

1 MR. QUINN: No objection.  
 2 THE COURT: DTX 841 is admitted.  
 3 (Exhibit 841 was received into evidence.)  
 4 Q. BY MR. PURCELL: At the time of the 2003  
 5 exchange agreement -- at the time the 2003 exchange  
 6 agreement was being negotiated, did the Water Authority  
 7 understand what the components of Metropolitan's  
 8 wheeling rate were?  
 9 A. It did.  
 10 Q. Do you recall, as you sit here today, what  
 11 those components were in 2003?  
 12 A. Yes. There was power, water stewardship and  
 13 system access.  
 14 Q. Did the Water Authority have objection, as of  
 15 the negotiation of the 2003 exchange agreement, as to  
 16 the way Metropolitan allocated costs that went into  
 17 those rates?  
 18 A. It did.  
 19 Q. Do you recall what the Water Authority's  
 20 objections to Metropolitan's cost allocations to its  
 21 wheeling rate were as of the time of the negotiations in  
 22 2003?  
 23 A. In the briefest of summation, they believed  
 24 that ascribing costs not attributable to the service  
 25 being provided was improper. And an example of that

1189

1 would be the allocation of State Water Project supply  
 2 costs on parties who were wheeling water.  
 3 Q. Had there been any prior litigation over the  
 4 validity of the way Metropolitan allocated its costs to  
 5 its wheeling rates?  
 6 A. There had been.  
 7 Q. Did the Water Authority participate in that  
 8 litigation?  
 9 A. It did.  
 10 Q. What position did the Water Authority take in  
 11 that prior litigation?  
 12 A. The Authority came in and opposed the  
 13 validation of the Met wheeling rates on the basis of  
 14 process points and substance. We didn't -- so based on  
 15 the process points and substance.  
 16 Q. And had there been any definitive resolution to  
 17 that suit? Was there any judgment in that suit  
 18 validating Metropolitan's wheeling rate?  
 19 A. There was not.  
 20 Q. At the time it negotiated the 2003 exchange  
 21 agreement, did the Water Authority still object to the  
 22 way Metropolitan allocated costs to its wheeling rates?  
 23 A. It objected to the cost allocation, correct.  
 24 Q. Were the objections the Water Authority was  
 25 raising in 2003 different than the ones it had raised in

1190

1 the validation action, or were they the same?  
 2 A. On substance they were principally the same,  
 3 yes.  
 4 Q. During negotiations of the 2003 exchange  
 5 agreement, did any of the Water Authority's negotiators  
 6 tell any of Metropolitan's negotiators that they  
 7 objected to the way Metropolitan was allocating costs to  
 8 its wheeling rates?  
 9 A. They did.  
 10 Q. Who from Water Authority's negotiating team  
 11 said that to Metropolitan's?  
 12 A. Bob Campbell, the CFO for the San Diego County  
 13 Water Authority, was quite an ardent advocate of the  
 14 point that there were improper cost allocations  
 15 occurring.  
 16 And his counterpart at Metropolitan was a guy  
 17 named Brian Thomas. And the two of them met frequently  
 18 and consistently discussed the subject of the cost  
 19 allocation.  
 20 MR. QUINN: Objection. Move to strike. Lacks  
 21 foundation.  
 22 THE COURT: Were you there during those  
 23 discussions?  
 24 THE WITNESS: I saw them personally, observed  
 25 them discuss cost allocation between 1998 and 2003.

1191

1 THE COURT: I will overrule the objection.  
 2 MR. QUINN: He said he observed it.  
 3 THE COURT: When you say "observed," do you  
 4 mean hear or looking at bodies in the distance?  
 5 THE WITNESS: I saw them and listened to them  
 6 and participated in discussions consistently between '98  
 7 and 2003. Brian sort of left the negotiating team in  
 8 2003 for periods of time.  
 9 But I personally observed them on a whiteboard  
 10 calculating the inputs in the Governor's office in the  
 11 spring of 2003.  
 12 THE COURT: Overruled.  
 13 Q. BY MR. PURCELL: During these negotiations,  
 14 these discussions between Mr. Thomas and Mr. Campbell,  
 15 did Mr. Thomas take the position that Metropolitan's  
 16 cost allocations were lawful?  
 17 A. Yes.  
 18 Q. Was there any definitive resolution as of the  
 19 negotiation of the 2003 agreement to the question  
 20 whether Metropolitan's cost allocations were valid or  
 21 invalid?  
 22 A. In my opinion, no.  
 23 Q. And why not? Why did you hold that opinion  
 24 that there was no definitive answer to that question?  
 25 MR. QUINN: I object. This is an expert

1192



1 opinion. He is not offered as an expert.  
 2 THE COURT: This is just his personal opinion.  
 3 I don't think this is a statement of expertise.  
 4 Overruled.  
 5 THE WITNESS: The -- the existence of law and  
 6 evolution was particularly pertinent to wheeling.  
 7 We had two Court of Appeal decisions that were  
 8 trying to construe the Katz wheeling Law, and one of the  
 9 opinions was a validation case, Appellate Court opinion  
 10 which was on appeal from the case that we had tried.  
 11 And the summation of that, as the Court of  
 12 Appeal ruled that, as a matter of law, that it wasn't  
 13 unlawful to set a system-wide charge, to set it by rates  
 14 and thereby protect against lost sales.  
 15 There was, almost within 30 to 60 days of that  
 16 opinion, a different opinion from a different division  
 17 within the district, District 2. And it was out of San  
 18 Luis Obispo. Morro Bay was the case. And the Court  
 19 concluded that including provisions to protect against  
 20 lost sales was an appliment to the wheeling legislation  
 21 and that it was to be on the basis of costs incurred in  
 22 terms of compensation.  
 23 To me, there was a lot more to be done. There  
 24 had been also a couple of efforts at the legislature to  
 25 try to provide clarification to what the Katz wheeling

1193

1 law meant. That was unsettled.  
 2 And then I think those of us who have watched  
 3 the evolution of Article 10 Section 2 of the California  
 4 Constitution and its influence on rate setting were  
 5 seeing entities, local agencies making reference to the  
 6 maximization of using water and transferring it.  
 7 There had been probably a half dozen efforts by  
 8 the legislature to encourage and facilitate water  
 9 transfers in the State. And so, in my view, the law was  
 10 going to move towards trying to encourage water  
 11 transfers and remove barriers to those transfers.  
 12 Q. Mr. Slater, did the 2003 exchange agreement  
 13 contain any provisions for resolving the uncertainty  
 14 about whether Met's wheeling rates were valid?  
 15 A. Yes.  
 16 MR. PURCELL: Let's put Section 5.2 back on the  
 17 screen. Page 17, the last part of the section.  
 18 THE COURT: We are looking at 65?  
 19 MR. PURCELL: Yes. PTX 65.  
 20 Q. Mr. Slater, about eight lines from the bottom  
 21 there's a small letter (a). And it says, "After the  
 22 conclusion of the first five years, nothing herein shall  
 23 preclude SDCWA from contesting in an administrative or  
 24 judicial forum whether such charge or charges have been  
 25 set in accordance with applicable law and regulation."

1194

1 Do you see that?  
 2 A. I do.  
 3 Q. What was that language intended to accomplish?  
 4 A. **This was a five-year timeout, and it said for**  
 5 **the initial five years there would not be a contest.**  
 6 **But at the end of the five-year period, San Diego would**  
 7 **be free to challenge whether the rate adopted by**  
 8 **Metropolitan was consistent with applicable law.**  
 9 Q. Was this term subject to negotiation with Met?  
 10 A. It was.  
 11 Q. Who proposed the five-year timeout period?  
 12 A. **That was a San Diego proposal.**  
 13 Q. Was that a response to a prior proposal by  
 14 Metropolitan?  
 15 A. Yes.  
 16 Q. What was Metropolitan's prior proposal?  
 17 A. **That the period would be co-terminus with the**  
 18 **agreement. Meaning, 45 years or in this -- the length**  
 19 **of the exchange agreement.**  
 20 Q. So just to be clear, Met proposed that San  
 21 Diego wouldn't be able to challenge the rates during the  
 22 duration of the exchange agreement?  
 23 A. **They would be limited to challenging only the**  
 24 **adoption procedural points pursuant to the**  
 25 **Administrative Code, and then evolve to no challenge at**

1195

1 **all for 30 -- or for the length of the deal.**  
 2 **And our counter was five years.**  
 3 Q. Did Metropolitan accept that counter?  
 4 A. It did.  
 5 Q. That's what's in the contract?  
 6 A. It did -- it is.  
 7 Q. Why was San Diego willing to agree not to sue  
 8 for five years?  
 9 A. **First and foremost, San Diego had been through**  
 10 **a sort of an unprecedented campaign to acquire the**  
 11 **conserved water from Imperial. Spent really countless,**  
 12 **unbelievable hours. In my experience, I've never seen**  
 13 **anything like the commitment that was necessary to**  
 14 **secure this deal. Seven states, two presidents, two**  
 15 **governors and a couple of secretaries of interior,**  
 16 **special intervention litigation.**  
 17 **It was an unbelievable, unbelievable Herculean**  
 18 **task to put the plan in place, and this was the lynchpin**  
 19 **for the 4.4 plan.**  
 20 **An agency that has put that kind of effort in**  
 21 **now reaches an agreement. Our thought was that we**  
 22 **needed to turn our attention and protect the agreements**  
 23 **during the five-year period against people who are going**  
 24 **to be attacking it and who might attack it. We were**  
 25 **looking at Mexico. We were looking at potentially**

1196

1 farming interests in Imperial. We were looking at  
 2 environmental groups and, indeed, litigation immediately  
 3 ensured.  
 4 So if you characterize it as circling the  
 5 wagons among those people who were participating in the  
 6 QSA, we felt like we didn't need to be suing or engaged  
 7 in a dispute resolution process with Met.  
 8 We also had a dispute resolution process with  
 9 the Imperial Irrigation District, which was not held in  
 10 abeyance. So for many reasons pertinent to circling the  
 11 wagons there was that element. There was a sheer  
 12 exhaustion element.  
 13 But I think the most -- single-most important  
 14 reason is this was a really historic transaction. It  
 15 was the largest ag-to-urban transfer in the history of  
 16 the United States. Billions of dollars were going to  
 17 exchange hands to allow that to occur.  
 18 My opinion was so much goodwill was going to  
 19 come from the resolution of the conflicts that there  
 20 would be ample opportunity over a five-year period to  
 21 bury the hatchet and to allow a negotiation of what I  
 22 will call a lawful rate, perhaps, less than Met's posted  
 23 rate and more than the scheduled rate.  
 24 Q. You mean the scheduled rate in the 1998  
 25 agreement?

1197

1 **A. Correct.**  
 2 MR. PURCELL: Could we go to page 24, Ben, and  
 3 Section 11. 1.  
 4 Q. This section is entitled "Dispute Resolution."  
 5 Mr. Slater, does this section contain another  
 6 reference to the five-year timeout?  
 7 **A. It does.**  
 8 Q. It says, "SDCWA shall not dispute whether the  
 9 price determined pursuant to paragraph 5.2 for the first  
 10 five years of this agreement was determined in  
 11 accordance with applicable law or regulation."  
 12 And then it defines the term "a price dispute."  
 13 Do you see that?  
 14 **A. I do.**  
 15 Q. I would like to turn to page 27. I think it is  
 16 PTX 65.  
 17 So Section 12.5 at the bottom of the page, and  
 18 spilling over into the next page, so it is at the top of  
 19 page 27, Mr. Slater. Sorry for confusing you.  
 20 Can you read the last two sentences of Section  
 21 12.5?  
 22 **A. The last two sentences beginning with the word**  
 23 **"if."**  
 24 **"If the nonbreaching party fails to exercise or**  
 25 **delays in exercising any such right or remedy, the**

1198

1 non-breaching party does not thereby waive that right or  
 2 remedy.  
 3 **"In addition, no single or partial exercise of**  
 4 **any right, power or privilege precludes any other or**  
 5 **further exercise of a right, power or privilege granted**  
 6 **by this agreement or otherwise."**  
 7 Q. From your perspective, as San Diego's lead  
 8 negotiator, what was the purpose of that language?  
 9 **A. Well, initially it's boilerplate, and**  
 10 **boilerplate borrowed from, more or less, the standard**  
 11 **custom available to public agencies and public agency**  
 12 **agreements.**  
 13 **The theory being that an entity the size of San**  
 14 **Diego or Metropolitan would have a lot on their plates**  
 15 **and might be negotiating or dealing with a lot of**  
 16 **variable matters at one time. They may make a strategic**  
 17 **decision in the best interests of their rate payers not**  
 18 **to initiate litigation, but wanted not to, at the same**  
 19 **time, waive their rights by virtue of not pursuing**  
 20 **litigation.**  
 21 Q. Does this term apply to only one of the parties  
 22 or is it symmetrical?  
 23 **A. No. It is symmetrical.**  
 24 Q. During negotiations, did Metropolitan object to  
 25 the inclusion of this in the contract?

1199

1 **A. No, I believe they drafted it.**  
 2 Q. Section 13.9 of the same exhibit, can you read  
 3 Section 13.9?  
 4 **A. "No waiver of a breach, failure of condition or**  
 5 **any right or remedy contained in or granted by the**  
 6 **provisions of this agreement is effective unless it is**  
 7 **in writing and signed by the party waiving the breach,**  
 8 **failure, right, or remedy. No waiver of breach, failure**  
 9 **of condition or right of remedy is or may be deemed a**  
 10 **waiver of any other breach, failure, right or remedy,**  
 11 **whether similar or not. In addition, no waiver will**  
 12 **constitute a continuing waiver unless the writing so**  
 13 **specifies."**  
 14 Q. Is this provision symmetrical?  
 15 **A. It is.**  
 16 Q. Did Metropolitan object to including this  
 17 provision in the 2003 exchange agreement?  
 18 **A. It did not.**  
 19 Q. Did anyone from San Diego ever tell  
 20 Metropolitan during negotiations of the 2003 exchange  
 21 agreement that it thought Metropolitan's wheeling rate  
 22 was valid?  
 23 MR. QUINN: Objection. Foundation.  
 24 THE COURT: Sustained.  
 25 Although you can limit to as far as he knows, I

1200

1 suppose.  
 2 MR. PURCELL: I will do that. I didn't intend  
 3 to go broader than that.  
 4 Q. Did anyone, as far as you're aware, Mr. Slater,  
 5 from the Water Authority ever tell anyone from  
 6 Metropolitan during negotiations of the 2003 exchange  
 7 agreement that the Water Authority believed  
 8 Metropolitan's wheeling rate was valid?  
 9 **A. I did not, and I never heard anybody from San**  
 10 **Diego say that.**  
 11 Q. As far as you know, did anyone from San Diego  
 12 ever tell anyone from Metropolitan during negotiations  
 13 of the 2003 exchange agreement that San Diego did not  
 14 intend to file a lawsuit after the five-year timeout  
 15 period expired?  
 16 **A. No.**  
 17 Q. Are you aware of any writing that was ever  
 18 created by the Water Authority to Metropolitan giving up  
 19 San Diego's right to file a lawsuit after the five-year  
 20 time-out expired?  
 21 **A. I am not aware of any.**  
 22 MR. PURCELL: Pass the witness, your Honor.  
 23 THE COURT: Let me just ask you one question.  
 24 THE WITNESS: Yes, sir.  
 25 THE COURT: Did you use the word "sideboard"?

1201

1 THE WITNESS: I did.  
 2 THE COURT: Can you just briefly explain that?  
 3 You were juxtaposing that to the process piece. You  
 4 were juxtaposing "sideboard" and "process."  
 5 What do you mean by this word "sideboard"?  
 6 THE WITNESS: There were -- my understanding is  
 7 that the language as negotiated did two things: First,  
 8 it set a process that both sides would know -- would be  
 9 used to set a rate and that referred to the  
 10 Administrative Code.  
 11 You have to remember that San Diego had sued  
 12 Metropolitan in 1998 saying you couldn't do it by rate.  
 13 You could only do it in an administrative process,  
 14 determine what your costs were and then charge. But  
 15 Metropolitan chose to proceed by rate.  
 16 So that was the first thing we did, identify a  
 17 specific process.  
 18 The second thing we did was substantive. The  
 19 question is, what are the limitations on the exercise of  
 20 discretion in setting a rate.  
 21 THE COURT: I understand that. I didn't want  
 22 to get into too much detail because it is really the  
 23 lawyers who will walk through that.  
 24 Is there just a brief answer as to how you used  
 25 the term "sideboard"?

1202

1 THE WITNESS: A limitation is all I meant.  
 2 THE COURT: Did you want to follow up on that  
 3 at all?  
 4 MR. PURCELL: I didn't.  
 5 THE COURT: Let's go ahead with  
 6 cross-examination.  
 7 MR. QUINN: Can I quickly go down to the end of  
 8 the hall?  
 9 THE COURT: Let's take a five-minute recess.  
 10 And let the clerk know when you're ready. Thank you so  
 11 much.  
 12 (Recess.)  
 13 THE COURT: Cross-examination.  
 14  
 15 **CROSS-EXAMINATION**  
 16 **BY MR. QUINN:**  
 17 Q. Good morning, Mr. Slater.  
 18 **A. Good morning, sir.**  
 19 Q. We looked at that letter from Mr. Kennedy, who  
 20 was with the State, dated back in 1998, where he had a  
 21 schedule and had a suggested wheeling price of, I think  
 22 it was, \$80.  
 23 Do you recall that?  
 24 **A. I do.**  
 25 Q. At the time that letter was written, there was

1203

1 ongoing litigation regarding Met's wheeling rate; isn't  
 2 that true?  
 3 **A. Yes, it is.**  
 4 Q. That was what was referred to as the postage  
 5 stamp wheeling rate that was then in dispute?  
 6 **A. Yes.**  
 7 Q. And then in the negotiation of the exchange  
 8 agreement that the parties signed in 1998, Met dropped  
 9 its rate to a compromise amount of, what was it, \$90?  
 10 **A. Correct.**  
 11 Q. With a fixed inflator?  
 12 **A. Correct.**  
 13 Q. And the State, as part of that deal, or at that  
 14 time, the State made Met whole by committing  
 15 \$235 million for canal lining to get more water to Met;  
 16 correct?  
 17 **A. No.**  
 18 Q. That didn't happen?  
 19 **A. No, it happened.**  
 20 Q. So you -- you represent -- you're a lawyer for  
 21 the San Diego Water Authority?  
 22 **A. I am.**  
 23 Q. How long have you represented the San Diego  
 24 Water Authority?  
 25 **A. I believe since the fall the 1997.**

1204

1 Q. And you're also CEO of something called Cadiz?  
 2 A. "Cadiz," I am.  
 3 Q. That is a public company?  
 4 A. It is.  
 5 Q. You at Cadiz own tens of thousands of acres out  
 6 in eastern San Bernardino; correct?  
 7 A. It's "Cadiz."  
 8 MR. PURCELL: Objection. Irrelevant.  
 9 THE COURT: Overruled.  
 10 Could spell that for us?  
 11 THE WITNESS: C-A-D-I-Z.  
 12 THE COURT: Thank you.  
 13 Q. BY MR. QUINN: A key part of your business  
 14 plan, maybe the purpose of Cadiz, actually, is to tap  
 15 into a water aquifer out there in that underground in  
 16 that desert; right?  
 17 A. That is correct.  
 18 Q. You want to transport tens of thousands of  
 19 acre-feet of water on the Colorado River Aqueduct;  
 20 correct?  
 21 A. That's correct.  
 22 Q. You would benefit from low wheeling rates, your  
 23 company; correct?  
 24 A. No.  
 25 Q. Do you intend to use the Colorado River

1205

1 Aqueduct if you get permission to do your business plan?  
 2 A. Our project participants do.  
 3 Q. You were designated by San Diego to be the  
 4 person most knowledgeable to testify on various subjects  
 5 in your deposition; correct?  
 6 A. Correct.  
 7 Q. Among those subjects were the negotiation and  
 8 terms of the exchange agreement, the consideration for  
 9 the exchange agreement, San Diego's interpretation of  
 10 the exchange agreement, the parties' course of dealing  
 11 under the exchange agreement and, lastly, mistake of  
 12 law; correct?  
 13 A. Correct.  
 14 Q. Isn't it true that, at the time of the exchange  
 15 agreement, the 2003 exchange agreement, was signed in  
 16 October, San Diego knew every single fact about the  
 17 components of Met's rate structure that it contends in  
 18 this lawsuit made it illegal; isn't that true?  
 19 A. I believe that's true.  
 20 Q. And that was known before the -- in the months  
 21 as you were negotiating that exchange agreement?  
 22 A. Yes.  
 23 Q. It was known at the time the exchange agreement  
 24 was signed up?  
 25 A. Yes.

1206

1 Q. So in this case, so far as you're aware, San  
 2 Diego is not claiming that Met's rates are illegal based  
 3 on anything that it didn't already know at the time it  
 4 signed the exchange agreement; correct?  
 5 A. I don't know.  
 6 Q. Well, so far as you're aware, is San Diego  
 7 claiming that there is anything illegal about Met's  
 8 rates that it didn't already know at the time it signed  
 9 the exchange agreement?  
 10 MR. PURCELL: Objection. Foundation.  
 11 THE COURT: Overruled.  
 12 THE WITNESS: I don't know.  
 13 Q. BY MR. QUINN: Well, you were the person  
 14 designated by San Diego to testify as the person most  
 15 knowledgeable on those various topics I listed earlier;  
 16 correct?  
 17 A. I was designated, and I do know that there were  
 18 charges and cost allocation that were contested in 2003  
 19 and before and continued to be contested now. I do not  
 20 know if there are additional.  
 21 Q. My question, sir, was whether you were the  
 22 person who was designated as most knowledgeable to  
 23 testify on those various subjects.  
 24 A. I was.  
 25 Q. You understand I'm not a clock, in my

1207

1 examination of you. And I request that if my questions  
 2 can fairly be answered yes or no, that you do that.  
 3 Would you do that, please?  
 4 A. I will do my best.  
 5 Q. Thank you.  
 6 In fact, those rates, those various rates that  
 7 San Diego is contesting were actually public  
 8 information, they were in Metropolitan's Administrative  
 9 Code back in 2003; correct?  
 10 A. Correct.  
 11 Q. And you recall -- we looked at it during your  
 12 direct examination -- that the initial price in the  
 13 exchange agreement was specified at \$253; right?  
 14 A. Correct.  
 15 Q. And you knew when you negotiated the exchange  
 16 agreement, that that initial price included those  
 17 various costs which San Diego is challenging in this  
 18 case; correct?  
 19 A. Correct.  
 20 Q. And that price represented the sum of those  
 21 costs; that is, the system access rate, the power rate,  
 22 and the water stewardship rate; correct?  
 23 A. Correct.  
 24 Q. And San Diego consented to paying those  
 25 charges?

1208

1 **A. Correct.**  
 2 Q. Now, you have been a lawyer for how many years?  
 3 Twenty, 25 years?  
 4 **A. Thirty.**  
 5 Q. Thirty years. You would never advise a client  
 6 to enter into an agreement that you knew was illegal;  
 7 isn't that true?  
 8 **A. That is true.**  
 9 Q. And you would, furthermore, never advise a  
 10 client to enter into an agreement which you knew in  
 11 either its implementation or its performance would be  
 12 illegal; isn't that true?  
 13 **A. That's true.**  
 14 Q. And if you had any doubt, sir, about the  
 15 legality about the implementation or performance in the  
 16 agreement, that is something you would want to  
 17 investigate and you would do a forensic analysis of?  
 18 **A. It's due diligence, yes.**  
 19 Q. You certainly wouldn't recommend to a client  
 20 that it enter into an agreement if you had any doubts  
 21 about the legality of either of the parties' performance  
 22 contemplated under that agreement; true?  
 23 **A. True.**  
 24 Q. You would want to satisfy yourself if you had  
 25 any doubt that the anticipated performance and

1209

1 implementation of the agreement by the parties was  
 2 legal; correct?  
 3 **A. Correct.**  
 4 Q. And we know that you didn't have any doubts  
 5 about the legality of the implementation and performance  
 6 of the exchange agreement because, as you said, you  
 7 didn't feel it necessary to do a forensic exercise in  
 8 this case; correct?  
 9 **A. I don't understand.**  
 10 MR. PURCELL: Objection. Foundation.  
 11 THE COURT: Do you -- do you not understand it  
 12 because he uses the word "forensic exercise"?  
 13 THE WITNESS: No. I tried to listen and I  
 14 didn't understand the question.  
 15 THE COURT: Could you rephrase it?  
 16 MR. QUINN: Okay.  
 17 Q. At the time this agreement was negotiated and  
 18 signed up, you did not do a forensic exercise to break  
 19 down the components and whether it was in compliance  
 20 with the law, these various rates?  
 21 **A. I personally did not.**  
 22 Q. And you've told us that you would, certainly,  
 23 if you had any doubts at all about it, you would do that  
 24 forensic exercise and break it down and make a  
 25 determination as to whether it was legal or not;

1210

1 correct?  
 2 **A. Correct.**  
 3 Q. And that is not something you did in this case?  
 4 **A. I asked that the allocation be reviewed by the**  
 5 **CFO from San Diego.**  
 6 Q. Again, you have told us, as a lawyer, if you  
 7 had any doubt at all about the legality of something,  
 8 either contemplated performance or the implementation,  
 9 you would want to do a forensic analysis of that  
 10 yourself. You told us that; correct?  
 11 **A. I am not a competent -- I'm not a competent**  
 12 **accountant, sir.**  
 13 Q. Well, you are an expert on water law?  
 14 **A. Yes.**  
 15 Q. And you knew this was a live issue between the  
 16 parties --  
 17 **A. Indeed.**  
 18 Q. -- in terms of the appropriateness of the  
 19 allocation of these rates?  
 20 **A. Yes.**  
 21 Q. So you didn't have any doubt at the time, or at  
 22 least enough doubt, to justify in your own mind it was  
 23 necessary to do that type of forensic analysis yourself  
 24 before you recommended to the client, your client, that  
 25 the client enter into this agreement; is that true?

1211

1 MR. PURCELL: Objection. Mischaracterizes the  
 2 testimony.  
 3 THE COURT: Overruled.  
 4 THE WITNESS: Individually, personally, no.  
 5 Q. BY MR. QUINN: And you did not -- you're not  
 6 telling us that you delegated your professional duties  
 7 in that regard in terms of the legal analysis of the  
 8 implementation and performance of the rates to somebody  
 9 else.  
 10 You are not telling us that you did that?  
 11 **A. The legal aspect, no.**  
 12 Q. And you understand that San Diego's contentions  
 13 in this case relate to the legal aspect of the rates.  
 14 You understand that, don't you, sir?  
 15 **A. The legality of apportioning certain costs,**  
 16 **correct.**  
 17 Q. You knew that those rates, the \$253, the  
 18 inclusion of the State Water Project cost and the water  
 19 stewardship rates, you know those have all been set by  
 20 Met pursuant to Met's administrative code; correct?  
 21 **A. I did.**  
 22 Q. And San Diego consented to paying those rates?  
 23 **A. San Diego agreed to a start price of 253.**  
 24 Q. San Diego agreed to that start price knowing it  
 25 included that rate structure?

1212

1           **A. Correct.**  
 2           Q. Consented to that and was satisfied with it;  
 3 correct?  
 4           **A. We signed the contract.**  
 5           Q. Sir, we were satisfied and consented to paying  
 6 that rate. Wasn't that your testimony as the person  
 7 most knowledgeable?  
 8           **A. Yes.**  
 9           Q. Satisfied?  
 10          **A. Satisfied.**  
 11          Q. Let's talk about the 1998 exchange agreement.  
 12 I think you indicated the price initially of that was  
 13 \$90 per acre-foot, and there was an indexed increase for  
 14 the first 30 years; correct?  
 15          **A. Correct.**  
 16          Q. And there was the last 15 years -- I mean, you  
 17 had -- San Diego had an additional 15 years where it  
 18 would get water from the IID, but that agreement didn't  
 19 cover what the wheeling rate would be for that period of  
 20 time, correct, or the conveyance rate?  
 21          **A. Correct.**  
 22          Q. And you've indicated it was important to San  
 23 Diego to amend the 1998 agreement to cover that last 15  
 24 years; correct?  
 25          **A. Correct.**

1213

1           Q. Now, in the negotiation of the 1998 agreement,  
 2 there came a point where the parties were discussing two  
 3 different options that became known as Option-1 and  
 4 Option-2; correct?  
 5           **A. Correct.**  
 6           Q. And, in fact, that was your brainchild, you  
 7 personally?  
 8           **A. Yes.**  
 9           Q. You came up with the idea?  
 10          **A. Yes.**  
 11          Q. Option-1 was let's just go forward under that  
 12 1998 agreement; correct?  
 13          **A. It -- more than that, but yes.**  
 14          Q. And Option-2 was a much more complicated deal  
 15 where basically L.A. would assign to San Diego the  
 16 rights to that canal lining water that we talked about  
 17 earlier and San Diego would also get that \$235 million  
 18 from the State of California; correct?  
 19          **A. You mean Metropolitan?**  
 20          Q. Yes. Metropolitan, yes.  
 21          **A. And the answer is yes.**  
 22          Q. As part of Option-2, your proposal was, hey,  
 23 we'll take responsibility for lining the canal; we'll  
 24 get that canal lining water, 80,000 acre-feet of water  
 25 per year, whatever the number was, and we'll take the

1214

1           235 million to accomplish that lining; correct?  
 2           **A. Correct.**  
 3           Q. And we will pay your full wheeling rate;  
 4 correct?  
 5           **A. No.**  
 6           Q. That was the deal?  
 7           **A. No.**  
 8           MR. QUINN: Well, let's take a look at  
 9 Defendant's Exhibit 50. I don't think there's --  
 10 This is in evidence, your Honor.  
 11 THE COURT: Thank you.  
 12          Q. BY MR. QUINN: You have seen this document  
 13 before?  
 14          **A. I'm catching up with you.**  
 15          Q. There should be a binder in front of you, if  
 16 you want to look at the hard copy. It is a memorandum  
 17 from Robert Campbell to the San Diego Board of  
 18 Directors, dated September 16, 2003.  
 19          **A. Yes, I see it.**  
 20          Q. Who is Robert Campbell?  
 21          **A. Robert Campbell was the executive assistant to**  
 22 **the general manager.**  
 23          Q. You have seen this memorandum before?  
 24          **A. I have.**  
 25          Q. And in that first paragraph it discusses

1215

1           Option-2 and Option-1; correct?  
 2           **A. I see that, yes.**  
 3           Q. It accurately describes those two options.  
 4           **A. Can I read it for a second?**  
 5           Q. Sure. In general terms it describes those two  
 6 options which were your ideas; correct?  
 7           **A. Yes.**  
 8           Q. And you will see there in the first paragraph  
 9 it says that Option-2 is the assignment of MWD's canal  
 10 lining water project rights to SDW in consideration for  
 11 SDWA paying MWD's wheeling rate in lieu of the exchange  
 12 agreement -- and it goes on -- in order to transport the  
 13 water; correct?  
 14          **A. Correct.**  
 15          Q. So the assignment of Met's canal lining project  
 16 rights included -- I think we've already acknowledged  
 17 the payment of some \$35 million by the State to San  
 18 Diego?  
 19          **A. I'm confused. Thirty-five million?**  
 20          Q. 235 million.  
 21          **A. 235 million.**  
 22          Q. And about 77,000 acre-feet per year of -- for  
 23 110 years of canal lining water?  
 24          **A. Correct.**  
 25          Q. Met's wheeling right was \$253 per acre-foot,

1216

1 which included those components that are challenged now?  
 2 **A. Yes.**  
 3 Q. And the consideration for Met under Option-2  
 4 was the payment of Met's wheeling rate at the time,  
 5 which at the time was that \$253 number?  
 6 **A. Correct.**  
 7 Q. Which was much, much higher than the \$90 even  
 8 with the escalator under the existing exchange  
 9 agreement?  
 10 **A. Correct.**  
 11 Q. Certainly San Diego would never have agreed to  
 12 pay that larger number if it wasn't also getting this  
 13 water for 110 years and the \$235 million to accomplish  
 14 the canal lining; correct?  
 15 **A. Correct.**  
 16 Q. That was kind of the whole point. They are  
 17 doing a swap here. San Diego is agreeing to pay more in  
 18 return for getting some spectacular benefits; correct?  
 19 **A. I don't think it was that simple, no.**  
 20 Q. Well, you do agree this was a great deal for  
 21 San Diego?  
 22 **A. I do.**  
 23 Q. And you -- you continue to hold that belief  
 24 today?  
 25 **A. I do.**

1217

1 Q. Because getting an independent source of water  
 2 at San Diego, that was a consummation that had been  
 3 devoutly wished for a long time. That is something that  
 4 San Diego really wanted to get?  
 5 **A. It did.**  
 6 Q. In the memorandum below, the table on page 1  
 7 says that you'll see the staff used two approaches to  
 8 evaluate the costs of both options.  
 9 Do you see that?  
 10 **A. I do.**  
 11 Q. If you look at the third paragraph there on  
 12 page 1, in the third sentence, in discussing the first  
 13 approach it says, "The MWD wheeling rate is established  
 14 annually by the MWD Board of Directors and is assumed to  
 15 escalate over time."  
 16 Do you see that?  
 17 **A. I do.**  
 18 Q. So San Diego assumed, in doing its analysis of  
 19 these two options, that its payments under Option-2  
 20 which started at \$253 and would escalate over time;  
 21 correct?  
 22 **A. Correct.**  
 23 Q. And in doing that, in doing this analysis, San  
 24 Diego assumed that the rate structure would be the same;  
 25 isn't that true?

1218

1 **A. That is what it appears to say, yes.**  
 2 Q. Right. This is a memorandum that went to the  
 3 board of directors on September 16, 2003?  
 4 **A. Yes.**  
 5 Q. Had -- the exchange agreement was signed up  
 6 like three weeks later?  
 7 **A. I believe the first or second week of October,**  
 8 **yes.**  
 9 Q. And then it says, "Thus the current 253-dollar  
 10 rate was escalated for inflation and arranged between  
 11 two percent and five percent which is the historical  
 12 range of escalation and MWD rates depending upon the  
 13 period assumed. The present value difference in the  
 14 total payments under the exchange agreement as compared  
 15 to the total escalated wheeling payments, assuming the  
 16 various inflation rates, is shown on the table below and  
 17 ranges between \$423 million and \$907 million."  
 18 Do you see that?  
 19 **A. I do.**  
 20 Q. So, under the first valuation approach that the  
 21 San Diego staff used in evaluating Option-2, the cost to  
 22 San Diego of conveying the IID water would increase by  
 23 some amount in the range of 423 million to 907 million;  
 24 correct?  
 25 **A. Correct.**

1219

1 Q. And then below the table, there still on page  
 2 2, the memorandum discusses the second approach to  
 3 evaluate the cost of Option-2.  
 4 Do you see that?  
 5 **A. I'm reading it, yes.**  
 6 Q. It says, "Under the second approach, a 20-year  
 7 demand forecast model was constructed and melded the  
 8 supply components for each option were modeled and the  
 9 total escalated costs were then compared for each  
 10 option."  
 11 Do you see that?  
 12 **A. I do.**  
 13 Q. So the San Diego staff analyzed the potential  
 14 costs under Option-2 assuming the price started at \$253  
 15 and escalated over time and concluded that Option-2  
 16 would cost in the range of 500 to 900 million more than  
 17 Option-1; right?  
 18 **A. Right.**  
 19 Q. And that -- that's the additional amount that  
 20 San Diego would have to pay Met over the course of the  
 21 contract; right?  
 22 **A. Pursuant to this projection, yes.**  
 23 Q. And then, reciprocally, that is the  
 24 consideration that Met would receive for assigning the  
 25 canal lining water and the \$235 million to San Diego;

1220

1 correct?

2 **A. The right to receive a wheeling fee was part of**

3 **the consideration Met received, yes.**

4 Q. And San Diego in assessing this deal -- I think

5 you've said this was an historic deal, the largest

6 transfer of water rights from agriculture to urban use

7 in U.S. history?

8 **A. That's correct.**

9 Q. In doing the projections and making this

10 decision, at least as reflected in this memorandum, San

11 Diego didn't just look at the next five years, did it?

12 **A. No.**

13 Q. It projected that wheeling rate, the \$253,

14 using the same rate structure, going forward for the

15 life of the contract; correct?

16 **A. It made -- yes, it made projections.**

17 Q. And this transaction, this consideration, this

18 larger deal we've been talking about, you didn't look

19 just at the exchange agreement to find all these terms,

20 can you?

21 **A. What terms?**

22 Q. Well, like the swapping of the canal lining

23 water and the 235 million. You have to look at several

24 documents together to understand what the transaction

25 was the parties were agreeing to; correct?

1221

1 **A. Correct.**

2 Q. And another agreement that you have to look at

3 is the -- is it the allocation agreement?

4 **A. Correct.**

5 Q. Between San Diego and Met?

6 **A. Correct.**

7 Q. That was a key part of this transaction?

8 **A. The allocation agreement enables the -- enables**

9 **the canal lining.**

10 Q. It is a key part of the transaction.

11 **A. It was a condition precedent to the '98.**

12 Q. And then there is something called the Quantum

13 Settlement Agreement. That's another key part of it

14 that you have to understand.

15 **A. Quantification --**

16 Q. Quantification.

17 **A. -- settlement agreement.**

18 Q. That is a key part of this transaction, as

19 well?

20 **A. It is not in this transaction. It was a**

21 **contemporaneous agreement.**

22 Q. But it is important that that had to be

23 accomplished in order to accomplish the parties'

24 objectives in the exchange agreement and the allocation

25 agreement; correct?

1222

1 **A. The IID water could not be transferred without**

2 **the Quantification Settlement Agreement, so it was a**

3 **predicate.**

4 Q. The answer to my question is "yes"?

5 **A. Yes.**

6 Q. You made the proposal in Option-2 as to what

7 the price should be; correct?

8 **A. Sorry. Which option is the canal lining**

9 **option?**

10 Q. In Option-2?

11 **A. Option-2.**

12 Q. Of the exchange agreement. You made the

13 proposal as to what the price, conveyance price should

14 be; correct?

15 **A. No.**

16 Q. Take a look at your deposition.

17 **A. Okay.**

18 MR. QUINN: Page 200, lines 18 to 20, your

19 Honor. I would request permission to read that.

20 THE COURT: I don't have that, do I?

21 MR. QUINN: It's in the back of the binder.

22 THE COURT: Volume 1?

23 MR. QUINN: Page 200, lines 18 to 20.

24 MR. PURCELL: I would request, your Honor, that

25 he read the following question and answer as well. It

1223

1 provides important context.

2 MR. QUINN: I have no objection to reading

3 that, your Honor.

4 THE COURT: Let's do both.

5 MR. QUINN: (Reading:)

6 "Q Did you make any proposal

7 at all as part of the option as

8 to what the price would be?

9 "A Yes.

10 "Q So what was your proposal

11 as part of the Option-2 as to

12 what the price should be?

13 "A We would not use the

14 schedule which was an Option-1

15 which was the exchange

16 agreement, and we would

17 substitute -- we would

18 substitute in exchange for a

19 lawful rate, which became then

20 the articulation that was a new

21 exchange agreement."

22 THE WITNESS: I agree with that.

23 Q. BY MR. QUINN: The number that went into that

24 agreement, the initial number, was the \$253 number;

25 correct.

1224



1           **A. That's correct.**  
 2           Q. Mr. Kightlinger, in your discussions with him,  
 3 he agreed that after that first year the price would be  
 4 set in accordance with the Administrative Code; correct?  
 5           **A. Correct.**  
 6           Q. You did not tell Mr. Kightlinger during the  
 7 discussions about the exchange agreement that you  
 8 believed that any of these rates were illegal; isn't  
 9 that true?  
 10          **A. I never used the word "illegal" in my life in**  
 11 **reference to a water rate.**  
 12          Q. So you're negotiating this historic agreement  
 13 with Mr. Kightlinger --  
 14          **A. Right.**  
 15          Q. -- you say you are telling him it needs to be a  
 16 lawful rate.  
 17          **A. Yes.**  
 18          Q. You know the rate is \$253; right?  
 19          **A. Yes.**  
 20          Q. And at no point during your discussions with  
 21 him did you tell him that that rate or any other rate or  
 22 the components of it were illegal; isn't that true?  
 23          **A. That's true.**  
 24          Q. And during the course of the negotiation of the  
 25 exchange agreement, neither you nor, to your knowledge,

1225

1 did anyone at San Diego ever propose excluding State  
 2 Water Project costs from the wheeling rate or the price;  
 3 isn't that true?  
 4          **A. That's not true.**  
 5          MR. QUINN: Request permission to read, your  
 6 Honor, from page 64 of the deposition, which I assume is  
 7 Volume I, lines 19 to 24.  
 8          THE COURT: Any objection?  
 9          MR. PURCELL: No objection.  
 10          MR. QUINN: (Reading:)  
 11 "Q 2003, the negotiations for  
 12 the 2003 agreement, was it ever  
 13 discussed excluding -- did any  
 14 party ever propose excluding  
 15 State Water Project costs from  
 16 the price -- the contract price  
 17 to be charged under the  
 18 agreement?  
 19 "A I do not recall that, no."  
 20          Q. The bottom line is that, in signing the  
 21 exchange agreement, San Diego consented to pay the  
 22 amount for conveyance charges calculated pursuant to the  
 23 Met Administrative Code; isn't that correct?  
 24          **A. That is -- calculated pursuant, true.**  
 25          Q. You didn't undertake at that time any type of

1226

1 forensic exercise to break down those components and  
 2 analyze them to determine whether they complied with  
 3 some legal standard outside the Met code; correct?  
 4          MR. PURCELL: Objection. Asked and answered.  
 5          THE COURT: Not quite in that form. Overruled.  
 6          Go ahead.  
 7          THE WITNESS: Did I ever take an analysis? I  
 8 undertook a general legal analysis of framework. And as  
 9 I testified on direct, I believe the area of law was  
 10 uncertain.  
 11          Q. BY MR. QUINN: Sir, you didn't do a forensic  
 12 exercise during those negotiations to break down the  
 13 components of the rate to determine whether they  
 14 complied with some other legal standard? I mean outside  
 15 the code, outside the Met code. You didn't do some type  
 16 of analysis to look at legal standards outside the Met  
 17 code to see whether the proposed wheeling rate complied  
 18 with that?  
 19          **A. I under -- I understood, again, the case law**  
 20 **that existed at the time that was pertinent to**  
 21 **allocation of costs, but I did not unpack or unbundle**  
 22 **the various elements that had been ascribed.**  
 23          MR. QUINN: I would request permission to read,  
 24 your Honor, from the deposition, page 68, lines 5  
 25 through 20, Volume I.

1227

1          MR. PURCELL: This is not proper impeachment,  
 2 your Honor. This is not contradicting anything he said.  
 3          THE COURT: Is this coming in for impeachment?  
 4 Is that the idea?  
 5          MR. QUINN: I think it is impeachment, but I  
 6 would also offer it as the PMK.  
 7          MR. PURCELL: If it's being offered as PMK,  
 8 then we don't object.  
 9          THE COURT: Go ahead, please.  
 10          MR. QUINN: (Reading:)  
 11 "Q And to your understanding,  
 12 at this point in time, did San  
 13 Diego believe the charges for  
 14 conveyance of water that Met  
 15 had adopted in that period of  
 16 time was consistent with  
 17 applicable law and regulation?  
 18 "A I believe that -- that San  
 19 Diego thought that they were  
 20 consistent with the application  
 21 of the Administrative Code that  
 22 -- that then prevailed, and  
 23 that San Diego was willing to  
 24 pay that charge as designated  
 25 under the context of the

1228

1 agreement -- the set of  
 2 agreements that were charged.  
 3 So they consented. I don't  
 4 recall doing a forensic  
 5 exercise like we had done in  
 6 '97 -- or '98 during the  
 7 wheeling case to break down the  
 8 components to determine whether  
 9 it complied with some other  
 10 standard. But on its face, I'm  
 11 certain it complied with the  
 12 Met Administrative Code."  
 13 Q. In any event, under Option-2, you agreed the  
 14 price in the exchange agreement be set pursuant to the  
 15 Met Administrative Code; correct?  
 16 A. Correct.  
 17 Q. And your expectation and understanding of the  
 18 agreement was that whatever rates were set had to comply  
 19 with the Met Administrative Code; correct?  
 20 A. Correct, unless they -- the Met administrative  
 21 code was unlawful.  
 22 Q. Well, when San Diego entered into the contract,  
 23 it understood that Met would have to comply with its  
 24 administrative code as a matter of law and as a matter  
 25 of contract; correct?

1229

1 A. Correct.  
 2 Q. And you're familiar with the -- if we could  
 3 take a look at Exhibit 1149, the Met administrative  
 4 code, paragraph 4405. This should be flagged in your  
 5 exhibit book. If you look at paragraph (b) there.  
 6 Again, you told us -- you understood that Met's rates  
 7 had to comply -- whatever wheeling rate was charged had  
 8 to comply with the Met administrative code. You will  
 9 see in paragraph (b) it says, in the administrative  
 10 code, "The rates for wheeling service shall include the  
 11 system access rate, water stewardship rate," and then it  
 12 goes on.  
 13 Do you see that?  
 14 A. I do.  
 15 Q. You understood the \$253 initial rate had been  
 16 properly adopted by Met and pursuant to the  
 17 administrative code?  
 18 A. I did.  
 19 Q. We made reference to the allocation agreement.  
 20 I don't believe that's in evidence, your Honor. That is  
 21 Defense Exhibit 884 and I would offer that, your Honor.  
 22 THE COURT: 884?  
 23 MR. QUINN: 884.  
 24 MR. PURCELL: Objection. Relevance.  
 25 (Exhibit 884 was marked for identification.)

1230

1 THE COURT: It is relevant to at least one of  
 2 the many theories that's being offered in the defense of  
 3 the case, so it is relevant to the defense of the case.  
 4 The objection is overruled.  
 5 Q. BY MR. QUINN: The allocation agreement, this  
 6 is the agreement that provides for the assignment of the  
 7 \$235 million and the canal lining water, that is San  
 8 Diego's consideration under Option-2; correct?  
 9 A. This is a portion of the consideration under  
 10 Option-2, correct.  
 11 Q. And then part of Met's consideration was  
 12 that -- the payment of the conveyance rate that we've  
 13 been discussing; correct?  
 14 A. Payment of a lawful rate, correct.  
 15 (Exhibit 884 was received into evidence.)  
 16 Q. BY MR. QUINN: You have no reason to believe  
 17 that Met thought that its conveyance rate was illegal in  
 18 2003, do you?  
 19 A. No.  
 20 Q. And as we've discussed, you never told Met in  
 21 2003 that you thought that rate or any of the components  
 22 of that rate were illegal or unlawful; correct?  
 23 A. In 2003?  
 24 Q. Yes, sir. In 2003 you never told Met that you  
 25 thought the wheeling rate or any of its components was

1231

1 illegal or unlawful?  
 2 A. I don't recall whether I did.  
 3 Q. Let's take a look at your deposition. Well,  
 4 you say you don't recall whether you did, or you don't  
 5 recall doing it?  
 6 A. I don't recall whether I did during 2003.  
 7 Q. But this was -- this was an important issue, I  
 8 think you told us; correct?  
 9 A. Correct.  
 10 Q. In fact, you don't even recall any instance in  
 11 2003 whether -- where you used either the word  
 12 "unlawful" or "illegal"; correct?  
 13 MR. PURCELL: Objection. Overbroad.  
 14 THE COURT: Overruled. Maybe that's his  
 15 testimony.  
 16 THE WITNESS: I certainly never said "illegal."  
 17 And I think the expression was always in the  
 18 affirmative, we will pay the lawful rate.  
 19 Q. BY MR. QUINN: So the answer to my question is  
 20 you don't recall any instance where you ever said  
 21 illegal or unlawful?  
 22 A. Me personally, I do not.  
 23 THE COURT: You need to wait for him to finish  
 24 his question. Thank you.  
 25 Q. BY MR. QUINN: So they're telling you this is

1232

1 our wheeling rate, this is what we are going to charge  
 2 you, it is the \$253. And you never, to your  
 3 recollection, ever say that's illegal or that's  
 4 unlawful? Your response to that always is we will pay a  
 5 lawful rate? Is that what your testimony is, sir?  
 6 **A. My response is that is my -- what I**  
 7 **communicated. There were other people on our team that**  
 8 **communicated with regard to the cost allocations.**  
 9 Q. The bottom line is that during these many  
 10 communications leading up to the execution of the  
 11 exchange agreement, during those negotiations between  
 12 San Diego and Met, you have no specific knowledge that  
 13 anyone from San Diego told anyone from Met that Met's  
 14 wheeling rates had not been set in accordance with  
 15 applicable law and regulations; isn't that true?  
 16 **A. I have specific knowledge that Bob Campbell had**  
 17 **meetings with Brian Thomas and Maureen had meetings with**  
 18 **Dennis Underwood in which they made the point that the**  
 19 **rates were unlawful.**  
 20 MR. QUINN: Let's take a look at your  
 21 deposition, page 117, line eight to 12. And I would  
 22 request permission to read that, your Honor, Volume I.  
 23 THE COURT: Any objection?  
 24 MR. PURCELL: I think you need to read the  
 25 prior question and answer starting on page 116, line

1233

1 ten, for context.  
 2 THE COURT: Do you want to do that, Mr. Quinn,  
 3 or not?  
 4 MR. QUINN: I am just reading it, your Honor.  
 5 THE COURT: Okay.  
 6 MR. QUINN: I have no objection to reading  
 7 that, your Honor.  
 8 THE COURT: Why don't you go ahead.  
 9 MR. QUINN: Beginning at 116, line ten.  
 10 (Reading.)  
 11 "Question after the 2007 discussions you  
 12 referred to earlier, can you point to any specific  
 13 situation in which San Diego conveyed to Met a belief  
 14 that the rates then in effect they were charging San  
 15 Diego pursuant to the exchange agreement were not set in  
 16 accordance with the applicable law and regulation?"  
 17 Q. So I did not --  
 18 THE COURT: He wants you to read the answer.  
 19 MR. QUINN: Answer, I'm sorry.  
 20 THE COURT: Somebody is going to be reading  
 21 this in a couple of years.  
 22 Answer.  
 23 MR. QUINN: (Reading:)  
 24 "A So I did not participate  
 25 directly in any communication

1234

1 that they were not -- that they  
 2 were either, A, illegal, or, B,  
 3 not set in accordance with  
 4 applicable law. I am informed  
 5 on the basis of constant  
 6 contact with Maureen over the  
 7 last 20 years that there had  
 8 been continuous communication  
 9 between the San Diego  
 10 delegation and the Met  
 11 delegation, that there had been  
 12 efforts to reach out to the  
 13 City of Los Angeles delegation  
 14 at various points, and that  
 15 there were meetings among the  
 16 delegates, and that there were  
 17 multiple efforts to try to  
 18 convey that the rate structure  
 19 was objectionable, and that if  
 20 it was not resolved, it would  
 21 lead to litigation.  
 22 "Q You're not sure that it  
 23 was conveyed that these rates  
 24 were not set -- strike that.  
 25 "A I have --

1235

1 "Q You were not sure that it  
 2 was conveyed that these rates  
 3 were not set in accordance --  
 4 THE COURT: I hate to interrupt. Question, you  
 5 were not sure.  
 6 MR. QUINN: Sorry.  
 7 "Q You're not sure that it  
 8 was conveyed that these rates  
 9 were not set -- strike that.  
 10 "A I have --  
 11 "Q You were not sure that it  
 12 was conveyed that these rates  
 13 were not set in accordance with  
 14 the applicable law and  
 15 regulation?  
 16 "A I have no -- no specific  
 17 knowledge that that was  
 18 conveyed."  
 19 THE WITNESS: This is referencing after 2007 --  
 20 THE COURT: There's no question.  
 21 THE WITNESS: Sorry.  
 22 Q. BY MR. QUINN: Let's turn -- if we could look  
 23 at Exhibit 51, the 2003 exchange agreement. And if we  
 24 could look at Section 5.2, which is on pages 16 and 17.  
 25 MR. KEKER: Your Honor, can the record show --

1236

1 this is Plaintiff's 65. We are using this agreement.  
 2 MR. QUINN: It is a 2003 exchange agreement.  
 3 Is it 65?  
 4 MR. KEKER: Plaintiff's 65. We ought to use  
 5 one number.  
 6 MR. QUINN: I agree.  
 7 THE COURT: Okay.  
 8 Q. BY MR. QUINN: Do you see on page 17, starting  
 9 at line 2, I would like to call your attention to the  
 10 paragraph that says "For the term of this agreement,  
 11 neither SDCWA nor Metropolitan shall seek or support in  
 12 any legislative, administrative or judicial form any  
 13 change in the form, substance or interpretation of any  
 14 applicable law or regulation (including the  
 15 Administrative Code).  
 16 "In effect on the date of this agreement and  
 17 pertaining to the charge or charges set by  
 18 Metropolitan's Board of Directors and generally  
 19 applicable to the conveyance of water by Metropolitan on  
 20 behalf of its member agencies." And then it goes on.  
 21 Do you see that, sir?  
 22 **A. I do.**  
 23 Q. And do you recall the origins of this  
 24 provision?  
 25 **A. I do.**

1237

1 Q. And the origins were that Met had conveyed to  
 2 you that it did not want after the exchange agreement  
 3 was signed for San Diego the next day to be in  
 4 Sacramento trying to change the provisions of Met's  
 5 Administrative Code or restrict its ability to do things  
 6 and thereby undercut the transaction; correct?  
 7 **A. Correct.**  
 8 Q. In terms of the judicial forum that is referred  
 9 to in that language, you understood that San Diego would  
 10 be restricted from seeking a change, a change in the  
 11 interpretation of applicable law; correct?  
 12 **A. Correct.**  
 13 Q. And in your understanding, the plain meaning of  
 14 this language is to prohibit San Diego from going to a  
 15 judicial forum and seeking to change the interpretation  
 16 of the law that was in effect at the time the agreement  
 17 was signed; right?  
 18 **A. I think -- no, I think the primary focus was on**  
 19 **keeping San Diego out of Sacramento trying to modify the**  
 20 **Met act. The element was not going to a judicial forum**  
 21 **to seek an interpretation of the law too.**  
 22 MR. QUINN: Request to read from the  
 23 deposition, Volume I, page 89, line 14 to line 19.  
 24 MR. PURCELL: What lines on page 89?  
 25 MR. QUINN: Fourteen to 19.

1238

1 MR. PURCELL: No objection.  
 2 THE COURT: Please.  
 3 MR. QUINN: (Reading.)  
 4 "Q Do you understand the  
 5 provision to prohibit San  
 6 Diego's going into a judicial  
 7 forum and seeking a change in  
 8 the interpretation of the law  
 9 that was in effect as of the  
 10 time of this agreement?  
 11 "A I think that's what the  
 12 plain meaning of the language  
 13 says."  
 14 Q. That was your testimony, sir?  
 15 **A. It was.**  
 16 Q. And then this general language that we have  
 17 been looking at is then followed by two provisoes, two  
 18 exceptions, in the paragraph; right?  
 19 There are two "provided however" clauses  
 20 following.  
 21 **A. Catching up. I see it.**  
 22 Q. You recall one of the concerns that San Diego  
 23 had was that it not be singled out, it be subject to the  
 24 same rules as everyone else, that it not be  
 25 discriminated against.

1239

1 Do you recall that?  
 2 **A. I do.**  
 3 Q. Another concern, I think you mentioned this in  
 4 your direct testimony, another concern San Diego had was  
 5 you are concerned about evolution and changes in the law  
 6 and how this might affect San Diego's rights; correct?  
 7 **A. Correct.**  
 8 Q. At one point during these negotiations, when  
 9 you were saying you wanted to add this language,  
 10 Mr. Kightlinger asked you, you recall, "Jeff, is there  
 11 something you aren't telling me? Is there a dog in the  
 12 manger?"  
 13 Do you recall that?  
 14 **A. No, I do not.**  
 15 MR. QUINN: Let's take a look at your  
 16 deposition -- before I do that, let's go to that  
 17 deposition, page 179.  
 18 THE COURT: Whenever you get to a good stopping  
 19 point, sir.  
 20 MR. QUINN: Almost there, your Honor. Volume  
 21 I.  
 22 Q. Just to refresh your recollection, if you could  
 23 look at page 180 of your deposition --  
 24 **A. I'm sorry. Where is it?**  
 25 Q. 180, in Volume I. That's in the back of the

1240

1 book. In the back of the exhibit book, Volume I.  
 2 **A. Volume I.**  
 3 THE COURT: Page 180.  
 4 MR. QUINN: There is an answer beginning on  
 5 line 4.  
 6 Q. My question to you is, do you recall at one  
 7 point in the negotiations with Mr. Kightlinger, in  
 8 response to the language that you were proposing here,  
 9 he said to you, "Jeff, is there something you aren't  
 10 telling me? Is there a dog in the manger?"  
 11 Do you now recall that?  
 12 **A. I'm reading; okay?**  
 13 Q. Okay.  
 14 **A. Okay, I've read it.**  
 15 Q. Do you recall that Mr. Kightlinger said to  
 16 you, "Jeff, is there something you aren't telling me?  
 17 Is there a dog in the manger?"  
 18 Do you recall that?  
 19 **A. Okay.**  
 20 Q. Neither at that point in time nor at any other  
 21 point in the negotiations did you tell him that you  
 22 thought the inclusion of these costs was illegal; isn't  
 23 that true?  
 24 **A. No. That's not true.**  
 25 MR. QUINN: Page 104, line seven to 21, Volume

1241

1 I.  
 2 THE WITNESS: What page again?  
 3 MR. QUINN: Page 104. Request permission to  
 4 read that.  
 5 THE COURT: Down to what?  
 6 MR. QUINN: Line 21.  
 7 MR. PURCELL: Your Honor, this is the end of a  
 8 long colloquy about this subject and it starts on page  
 9 102, line 21.  
 10 THE COURT: Why don't we go ahead and read this  
 11 now, and if you want to read in the other portions for  
 12 context later, we can do that.  
 13 MR. PURCELL: Okay.  
 14 THE COURT: Go ahead, sir.  
 15 MR. QUINN: (Reading.)  
 16 "Q When you told -- when you  
 17 told that -- when you conveyed  
 18 that to Jeff, did you convey  
 19 the belief the rates then in  
 20 effect were illegal?"  
 21 There's an objection.  
 22 "A I think we went through --  
 23 again, I don't recall saying  
 24 they were illegal. I don't  
 25 remember using that. Not to

1242

1 say that I didn't, but I think  
 2 he understood -- I think we  
 3 both understood the magnitude  
 4 of the moment. You probably --  
 5 in a lawyer's life, you do  
 6 something like this once, maybe  
 7 twice, if you're lucky, and  
 8 that -- a lot was riding on  
 9 coming to closure on this  
 10 point. And we were working on  
 11 trying to wordsmith in a way  
 12 that was acceptable to both  
 13 sides. I can't recall saying  
 14 it was illegal."  
 15 Is now a good time, your Honor?  
 16 THE COURT: It is a good time. I will see  
 17 everybody at 1:30 sharp. Thank you very much.  
 18 (Noon recess.)  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1243

1 San Francisco, California  
 2 April 1, 2015  
 3 1:30 p.m.  
 4 Department No. 304 Hon. Curtis E. A. Karnow, Judge  
 5  
 6 SCOTT SLATER, ESQ.,  
 7 resumed the stand and testified further as follows:  
 8  
 9 THE COURT: Let's continue with our questions.  
 10 MR. QUINN: Your Honor, I would like to move  
 11 into evidence the Administrative Code passage that I  
 12 referred to as Exhibit 1149.  
 13 MR. PURCELL: The entire exhibit or just that  
 14 passage?  
 15 THE COURT: Can you create an exhibit --  
 16 MR. QUINN: With just those pages, yes.  
 17 THE COURT: And remember to move that in.  
 18 MR. QUINN: I will do that.  
 19 THE COURT: I would appreciate that.  
 20  
 21 CROSS-EXAMINATION (resumed)  
 22 BY MR. QUINN:  
 23 Q. If we could put up PTX 481, the letter from  
 24 Mr. Kennedy, dated January 5, 1998, we were talking  
 25 about in your direct exam.

1244

1 I would like to call your attention to Table 1  
 2 at the back, Bates Number 19.  
 3 Counsel asked you about that \$80 number for  
 4 wheeling. Do you see that?  
 5 **A. Yes, I do.**  
 6 Q. San Diego.  
 7 There are two columns there, the first column,  
 8 Condition A, space is not available in the aqueduct, and  
 9 Condition B, space is available.  
 10 Do you see that?  
 11 **A. I do.**  
 12 Q. And so what this says under Condition A when  
 13 space is not available, it says "zero."  
 14 Do you see that?  
 15 **A. Yes, I do.**  
 16 Q. If space is available, what Mr. Kennedy is  
 17 proposing or suggesting is an \$80 wheeling charge;  
 18 right?  
 19 **A. That's correct.**  
 20 Q. That's a very, very different transaction if  
 21 you only have the right to wheel water on a  
 22 space-available basis. That's very different than the  
 23 exchange agreement that San Diego had with Met; correct?  
 24 **A. No.**  
 25 Q. Your understanding is under the 2003 exchange

1245

1 agreement, San Diego only has a right to get water on a  
 2 space-available basis. Is that what you're saying?  
 3 **A. No.**  
 4 Q. So you think it's essentially the same deal as  
 5 what Mr. Kennedy is talking about here?  
 6 **A. Mr. Kennedy is using a zero because he's**  
 7 **assuming that there would be no space so the water would**  
 8 **not move. Right? So no water is moving; therefore,**  
 9 **there is no wheeling charge to be paid.**  
 10 **And in 1998 you were forced, then, to forecast**  
 11 **what was the prospect for there being space available in**  
 12 **the Met-Colorado River Aqueduct and take that into**  
 13 **account when you negotiated a rate. The projections at**  
 14 **that time, which proved to be true, is the aqueduct**  
 15 **would rarely, if ever, be full again and so it**  
 16 **influenced negotiation. It was not determinative.**  
 17 Q. Under the 2003 exchange agreement which the  
 18 parties entered into, Met commits to deliver a fixed --  
 19 make available a fixed amount of water every single  
 20 month; correct?  
 21 **A. Correct.**  
 22 Q. So going back to your testimony this morning,  
 23 for years after the execution of the exchange agreement,  
 24 while Met set its rates and charged its member based  
 25 upon its published conveyance rate, San Diego never once

1246

1 wrote a letter or an email or any type of written  
 2 communication to Met saying the rates were unlawful  
 3 prior to filing a complaint; isn't that true?  
 4 **A. I don't know.**  
 5 Q. Even though San Diego voted to approve these  
 6 rates repeatedly and then claimed a breach for Met's use  
 7 of the rate components that San Diego had voted to  
 8 adopt, you are aware of no written communication from  
 9 San Diego, prior to the filing of this lawsuit, after  
 10 the execution of the exchange agreement, saying the  
 11 rates are unlawful; isn't that true?  
 12 **A. That is true.**  
 13 Q. And during that time, since 2003, San Diego had  
 14 the benefits that it negotiated for in the exchange  
 15 agreement and the allocation agreement; correct?  
 16 **A. It received its benefits.**  
 17 Q. And those benefits are worth hundreds of  
 18 millions of dollars; correct?  
 19 **A. That would be --**  
 20 MR. PURCELL: Objection. Foundation.  
 21 THE COURT: I'm sorry?  
 22 MR. PURCELL: Objection. Foundation.  
 23 THE COURT: Do you know what they're worth?  
 24 THE WITNESS: It's a guess. An educated guess  
 25 is arithmetically multiply the value of an acre-foot

1247

1 over that time period and you'd probably conclude it is  
 2 north of 100 million.  
 3 THE COURT: Overruled.  
 4 Q. BY MR. QUINN: This is a -- actually, San  
 5 Diego's entitlement to that water goes on for 110 years?  
 6 **A. That's correct.**  
 7 Q. And San Diego continues to enjoy all those  
 8 benefits it negotiated for under the exchange agreement  
 9 to this day; correct?  
 10 **A. Correct.**  
 11 MR. QUINN: Nothing further.  
 12 THE COURT: Any redirect?  
 13 MR. PURCELL: Your Honor, I had made an  
 14 objection to a deposition excerpt, and I wanted to read  
 15 it.  
 16 THE COURT: We will take this for context and  
 17 because you think this is necessary for a fair  
 18 understanding for what was read.  
 19 MR. PURCELL: Yes. What I am proposing to read  
 20 is page 101, line 15, through 104, line six, which is  
 21 immediately before the excerpt Mr. Quinn read from 101,  
 22 line 7 through 21.  
 23 THE COURT: Let Mr. Quinn take a look at that  
 24 and see his position on that --  
 25 MR. QUINN: No objection.

1248

<p>1 THE COURT: -- please. Remember the question  2 and the answer so we can distinguish it in the court  3 reporter's transcript.  4 MR. PURCELL: I will. And I know I will be  5 corrected if I don't.  6 (Reading:)  7 "Q Do you recall anybody on  8 the San Diego side conveying a  9 belief they would sue after the  10 expiration of five years under  11 any circumstances?  12 "A I do believe that they  13 conveyed the belief that, if  14 the rate was not set in  15 accordance with applicable law,  16 they would avail themselves of  17 their remedies, whatever they  18 may be.  19 "Q Which would be suing?  20 "A It could be.  21 "Q Who said that, to your  22 recollection?  23 "A On the negotiating team,  24 each of the three people in the  25 negotiating team, Jim Taylor,</p> <p style="text-align: right;">1249</p>	<p>1 negotiating team, but was  2 always an active part of the  3 dialogue at the board level.  4 "Q At San Diego's board  5 level?  6 "A Yes.  7 "Q Did anybody convey that  8 belief -- strike that.  9 Did anybody on San Diego's  10 negotiating team convey that  11 belief to MWD?"  12 "A Yes, I did personally to  13 Jeff when we negotiated this  14 provision.  15 "Q What did you say?  16 "A I said exactly that, that  17 the rate would be set in  18 accordance with Metropolitan's  19 administrative code and the  20 language is very specific that  21 it's not going to be by junta  22 or by contract -- sorry.  23 "It's not going to be done in  24 any way other than by the code.  25 It can't be a one-off</p> <p style="text-align: right;">1251</p>
<p>1 Maureen Stapleton, Bob  2 Campbell. And as part of the  3 -- the rationale for why they  4 couldn't accept" --  5 Strike that.  6 -- "the rationale for why they  7 could accept the arrangement  8 because they would not be  9 discriminated against by  10 Metropolitan if the law  11 provided the conveyance should  12 be provided at a certain price.  13 They shouldn't be in a position  14 where Metropolitan --  15 Metropolitan could adopt rates  16 for all its member agencies and  17 San Diego would have a -- its  18 own unique rate. There would  19 be circumstances that the law  20 evolved to prohibit certain  21 contact or conduct that San  22 Diego should not be precluded  23 from pursuing those remedies.  24 "A Yes, I think that not  25 only did everybody in the</p> <p style="text-align: right;">1250</p>	<p>1 operation. It has to be in  2 accordance with whatever  3 administrative procedures are  4 established uniformly pursuant  5 to code so there's protection  6 by devising the method into  7 which that was going to be  8 established.  9 There was also the  10 understanding that that process  11 had to take into account  12 evolution and the law, and that  13 Met or San Diego specifically  14 could not be singled out for  15 differential treatment on the  16 basis the code spit out a  17 number or they made a  18 determination this rate was  19 going to be applicable to San  20 Diego and that we had to have  21 the right to test what they did  22 if the law evolved. And I --  23 so I think that was absolute --  24 that absolutely was conveyed  25 and that's why the language was</p> <p style="text-align: right;">1252</p>

1 in there.  
 2 "Q Do you remember anything  
 3 else regarding what you  
 4 conveyed to Mr. Kightlinger in  
 5 that respect?  
 6 "A If you ask me questions,  
 7 it might bring stuff back,  
 8 but -- we talked about a lot of  
 9 things, but I can't -- the two  
 10 things that I remember most is  
 11 conveying how difficult it was  
 12 for us, for San Diego, to  
 13 absorb the no advocacy  
 14 provision and the requirement  
 15 that the Administrative Code  
 16 was acceptable as a methodology  
 17 to set the rate, but it had to  
 18 be within the umbrella of the  
 19 state statute and case law and  
 20 constitutional law."  
 21 I don't have any further questions, your Honor.  
 22  
 23 **RE CROSS-EXAMINATION**  
 24 **BY MR. QUINN:**  
 25 Q. In that passage that counsel just read, you are

1253

1 asked about what the discussion was in your  
 2 understanding about that five-year period, what that  
 3 was -- the purpose of that, why you wanted the right to  
 4 do some things after five years; right?  
 5 **A. I --**  
 6 Q. Take a look at page 99 --  
 7 **A. Thank you.**  
 8 Q. -- beginning at line 17. This is a question by  
 9 Mr. West, and this sort of leads into the testimony that  
 10 counsel read.  
 11 Do you see that reference to the statute of  
 12 limitations?  
 13 **A. I'm catching up. I'm catching up.**  
 14 Q. All right.  
 15 Page 99, line 17 to 20.  
 16 **A. Got it. Sorry.**  
 17 Q. The context here is you are actually talking  
 18 about that five-year -- what you refer to or the  
 19 questioner refers to as the statute of limitations  
 20 period; right?  
 21 **A. I believe the context is the statute of**  
 22 **limitations and the subject of tolling.**  
 23 Q. It refers to five years; right? Do you see  
 24 that? The question is --  
 25 **A. Yeah.**

1254

1 Q. -- whether the statute of limitations continued  
 2 to run during those five years.  
 3 Do you see that?  
 4 **A. I see the question.**  
 5 Q. And then your real concern, as expressed in the  
 6 answer that counsel just read, was that rates be adopted  
 7 in accordance with the Met code and that San Diego not  
 8 be discriminated against. And that's why you wanted the  
 9 ability to take action after five years; correct?  
 10 **A. A reason we wanted, correct.**  
 11 Q. In the answer that counsel just read, you refer  
 12 to not being discriminated against, no unique rate, not  
 13 done in a way other than by code, uniformly pursuant to  
 14 code, take into account evolution of law, differential  
 15 treatment, we would have the right to test what they did  
 16 if the law evolved. Those are all phrases you used in  
 17 that answer as to explaining why you wanted certain  
 18 rights after five years; correct?  
 19 **A. Correct.**  
 20 MR. QUINN: Nothing further.  
 21 THE COURT: Redirect.  
 22  
 23 **REDIRECT EXAMINATION**  
 24 **BY MR. PURCELL:**  
 25 Q. Mr. Slater, has the law evolved regarding the

1255

1 propriety of water rates in 2003?  
 2 **A. I believe it has.**  
 3 Q. What evolutions have taken place in the law  
 4 since 2003?  
 5 **A. We have a lot of case law around Prop 218, but**  
 6 **more particularly Proposition 26. And we still do not**  
 7 **have an answer from the Court of Appeals on wheeling,**  
 8 **but certainly Prop 26 and Proposition 218.**  
 9 MR. PURCELL: Nothing further.  
 10  
 11 **RE CROSS-EXAMINATION**  
 12 **BY MR. QUINN:**  
 13 Q. That's why this lawsuit was brought? Only  
 14 because of changes in the law that have happened since  
 15 then? Is that what you're telling us, the laws changed?  
 16 **A. I'm not --**  
 17 MR. PURCELL: Foundation, your Honor. He's not  
 18 the lawyer.  
 19 THE COURT: Sustained.  
 20 Q. BY MR. QUINN: All the facts on which San Diego  
 21 bases its claim of illegality in this case were known to  
 22 San Diego when the exchange agreement was signed in  
 23 2003?  
 24 MR. PURCELL: Objection. Asked and answered.  
 25 THE COURT: I am going to sustain.

1256



1 MR. QUINN: Nothing further.  
 2 THE COURT: Thank you very much. You are  
 3 excused.  
 4 MR. KEKER: May Mr. Slater be excused, your  
 5 Honor?  
 6 THE COURT: I believe so.  
 7 MR. KEKER: We are about to rest. We have  
 8 informed counsel for Met we want to recall Dennis  
 9 Cushman to correct an answer he gave yesterday. It will  
 10 take about a minute. So I would like to do that and  
 11 then move in some exhibits and we can rest.  
 12 May I recall Dennis Cushman?  
 13 THE COURT: Any objection?  
 14 MR. QUINN: No objection, your Honor.  
 15  
 16 DENNIS CUSHMAN,  
 17 resumed the stand and testified further as follows:  
 18  
 19 DIRECT EXAMINATION  
 20 BY MR. KEKER:  
 21 Q. Mr. Cushman, yesterday on cross-examination at  
 22 page 98 of the transcript and then on redirect  
 23 examination at page 135 of the transcript you were asked  
 24 about a number of 15 percent. Do you recall that?  
 25 A. I do.

1257

1 Q. And you gave an answer about what the  
 2 15 percent was 15 percent of.  
 3 A. Yes.  
 4 Q. Was that a correct statement as you reviewed  
 5 the transcript?  
 6 A. No.  
 7 Q. What is the 15 percent of?  
 8 A. **The 15 percent is if the water supply -- State**  
 9 **Water Project costs are moved off of transportation and**  
 10 **onto supply, it would reduce the damages by about**  
 11 **15 percent.**  
 12 Q. If it were proper to deduct that from the  
 13 damages?  
 14 A. **If it were proper to do that.**  
 15 Q. You had been asking for at least 20 years that  
 16 they move those State Water Project --  
 17 MR. QUINN: I object.  
 18 MR. KEKER: I'll stop. That's fine.  
 19 Thank you, your Honor.  
 20 THE COURT: Thank you. Would you like to cross  
 21 on that?  
 22  
 23 CROSS-EXAMINATION  
 24 BY MR. QUINN:  
 25 Q. As I recall your testimony yesterday, sir, this

1258

1 information about the increase in the cost of supply,  
 2 that is based on something that Mr. Denham did. You  
 3 asked him to do some calculations; is that true?  
 4 A. Yes.  
 5 Q. You asked him to do that because you knew to  
 6 give a complete picture of the economic impact to San  
 7 Diego of moving these costs to supply, you'd want to  
 8 take that into account; true?  
 9 A. **We wanted to know what the difference in the**  
 10 **price would be. The difference between the cost of the**  
 11 **transportation with those costs and the cost of the**  
 12 **transportation without those costs.**  
 13 Q. I don't think that answers my question. My  
 14 question was: The reason that you asked Mr. Denham to  
 15 do those calculations was that you knew that to give a  
 16 complete picture of the economic impact on San Diego of  
 17 moving those costs to supply, you would have to take  
 18 that into account; that is to say, the increase in the  
 19 cost of supply; correct?  
 20 A. **If Met were to charge those costs on supply,**  
 21 **that would provide a picture of that.**  
 22 Q. So the answer to my question is, yes, you need  
 23 to take that into account?  
 24 A. **You are asking would it be financial impact on**  
 25 **the water? In a hypothetical world, possibly, but that**

1259

1 **would be only if Met had done it that way.**  
 2 Q. You don't have any work papers with you that  
 3 supports this analysis that Mr. Denham did for you, do  
 4 you?  
 5 A. No.  
 6 Q. Why didn't you instruct Mr. Denham to include  
 7 this information in his damages report?  
 8 A. **That didn't occur to me.**  
 9 MR. QUINN: Nothing further.  
 10  
 11 REDIRECT EXAMINATION  
 12 BY MR. KEKER:  
 13 Q. You were asked about damages. Have you been  
 14 asking -- excuse me.  
 15 Has the Water Authority been asking Met for  
 16 nigh on 20 years to move State Water Project costs from  
 17 transportation to supply?  
 18 MR. QUINN: Objection. Outside the scope.  
 19 MR. KEKER: This is exactly what he asked  
 20 about.  
 21 THE COURT: It is a little outside. Let's go  
 22 ahead and get this answer.  
 23 The objection is overruled.  
 24 THE WITNESS: Yes.  
 25 Q. BY MR. KEKER: Did they ever do it?

1260

1           **A. No.**  
 2           Q. So when the Court determined certain rates that  
 3 were illegal and had been -- were illegal and improper  
 4 under the law, and Mr. Denham calculated damages, was  
 5 there any reason except to speculation, pure  
 6 speculation, to deduct what an increased supply cost  
 7 might have been?  
 8           MR. QUINN: Objection.  
 9           THE WITNESS: No.  
 10          MR. QUINN: Argumentative.  
 11          Move to strike.  
 12          THE COURT: Overruled.  
 13          MR. KEKER: No further questions, your Honor.  
 14          THE COURT: All right.  
 15          MR. KEKER: Your Honor, with that, we would  
 16 rest subject to Mr. Goldberg taking care of business.  
 17          MR. GOLDBERG: Nick Goldberg of Kecker and Van  
 18 Nest for the Water Authority to take care of business.  
 19          THE COURT: Yes, sir.  
 20          MR. GOLDBERG: If I could pass some exhibits to  
 21 your clerk.  
 22          THE COURT: Yes.  
 23          MR. GOLDBERG: Before we conclude our  
 24 case-in-chief, I would like to take a few moments to  
 25 offer into evidence a couple of item.

1261

1           First are the deposition designations of  
 2 Metropolitan most qualified witnesses. We submitted  
 3 those deposition designations to the Court along with  
 4 the marked-up transcripts excerpted last week. There  
 5 are five deposition transcripts. We would like to  
 6 introduce them into evidence, of course, subject to the  
 7 Court's later determination of any evidentiary  
 8 objections that Met has interposed, which were submitted  
 9 with the designations we filed last week.  
 10          The first is the designated transcript of Met's  
 11 witness Stephen Arakawa, last name spelled  
 12 A-R-A-K-A-W-A. First name is S-T-E-P-H-E-N. And I  
 13 believe that's going to be PTX 513.  
 14          The second is the transcript of June Skillman,  
 15 J-U-N-E, last name S-K-I-L-L-M-A-N, which I understand  
 16 is going to be 514.  
 17          The deposition of Brian Thomas, B-R-I-A-N,  
 18 T-H-O-M-A-S, is 515.  
 19          The deposition, for an expert, of Deven  
 20 Upadhyah, D-E-V-E-N, last name U-P-A-D-H-Y-A-H.  
 21          And then PTX 518 would be the transcript of  
 22 Arnout Van Den Berg. First name A-R-N-O-U-T. Last name  
 23 V-A-N, D-E-N, B-E-R-G.  
 24          THE CLERK: The last name.  
 25          MR. GOLDBERG: V-A-N, space, D-E-N, space,

1262

1           B-E-R-G.  
 2           We would like to move those designated  
 3 transcripts into evidence.  
 4           THE COURT: Any objection other than the  
 5 designated objections?  
 6           MR. QUINN: No. Assuming -- assuming that  
 7 those are the passages designated in the pretrial  
 8 procedure that we both followed, subject to the  
 9 objections we filed, we have no further objections, your  
 10 Honor.  
 11          THE COURT: PTX 517, 516, 515, 514 and 513 are  
 12 admitted subject to subsequent ruling.  
 13          (Exhibits 513 through 517 were  
 14 received into evidence.)  
 15          MR. GOLDBERG: Second, and your Honor may  
 16 recall, during the first phase of trial we moved into  
 17 evidence responses to certain interrogatories and  
 18 requests for admissions. Those were previously admitted  
 19 as PTX 235A, PTX 237A, PTX 245A, PTX 246A, PTX 247A, PTX  
 20 250A, and PTX 381A. And I just wanted to point out to  
 21 the Court that those interrogatory responses and RFA  
 22 responses are still relevant to this phase.  
 23          We are not going to re-enter them. They are  
 24 already in evidence.  
 25          In addition, there is one interrogatory

1263

1           response we would like to enter.  
 2           THE COURT: Do I have copies of these  
 3 responses?  
 4           MR. GOLDBERG: You should. They should already  
 5 be in evidence from the first phase, but if you don't  
 6 have them, we would be happy to provide them.  
 7           THE COURT: I would ask for courtesy copies of  
 8 those so I have everything for this phase in one place.  
 9           MR. GOLDBERG: I can certainly do that.  
 10          In addition to the ones that have already been  
 11 entered into evidence, there is one additional  
 12 interrogatory response in both the 2010 and 2012 cases  
 13 we would like to move into evidence. That interrogatory  
 14 response will be marked as PTX 246B. "A" was the one  
 15 from the first phase, and that's an interrogatory  
 16 response from the 2012 case. And then 246B and 247B is  
 17 the identical interrogatory response from the 2010 case  
 18 and they are excerpted.  
 19          You will see here, if you look at 246B,  
 20 Interrogatory Number 7 is highlighted and Interrogatory  
 21 Number 13 in the response is highlighted. 7 is already  
 22 in evidence. 13 is the one that's not. But we  
 23 highlighted 7 because 13 refers back to seven.  
 24          The same is true for 247B, but the numbers are  
 25 slightly different. The substance of the interrogatory

1264

1 is exactly the same. We would move those two exhibits  
 2 into evidence, as well.  
 3 THE COURT: Any objection?  
 4 MR. QUINN: No objection.  
 5 THE COURT: 246B and 247B are admitted.  
 6 MR. GOLDBERG: Thank you, your Honor.  
 7 (Exhibit 246B and Exhibit 247B were  
 8 received into evidence.)  
 9 MR. GOLDBERG: We rest.  
 10 THE COURT: Mr. Quinn, would you like a short  
 11 recess, or are you prepared to proceed? What would you  
 12 like?  
 13 MR. QUINN: We have a motion we would like to  
 14 make at this point. We actually have fresh off the  
 15 printer a brief in support of a motion for a partial  
 16 judgment. I don't know how the Court prefers to deal  
 17 with this, but we would -- I do not believe that  
 18 Plaintiff has made out the elements of its case.  
 19 THE COURT: Why don't you briefly make a record  
 20 so we know at what point in the litigation it occurred;  
 21 the proper point, that is. It is unlikely I will rule  
 22 on it right this second.  
 23 MR. QUINN: Right.  
 24 Well, I can -- rather than spending time  
 25 orally, I can file the brief.

1265

1 THE COURT: Why don't you briefly state for the  
 2 record, a minute or so, on what the nature of the motion  
 3 is so we all -- when we read the transcript, we know it  
 4 came at the appropriate time.  
 5 MR. QUINN: The motion we would make, your  
 6 Honor, is a motion in support of a motion for partial  
 7 summary judgment on the fourth cause of action for  
 8 breach of contract. The basis --  
 9 THE COURT: A motion for partial summary  
 10 judgment?  
 11 MR. QUINN: Sorry. Partial judgment on the  
 12 fourth cause of action for breach of contract.  
 13 The bases for the motion, basically two heads  
 14 for the motion, your Honor. San Diego has not proved  
 15 breach because San Diego paid what it agreed to pay, and  
 16 thus, as a matter of law, has failed to prove breach.  
 17 And San Diego proposed and agreed to a price  
 18 that included the water stewardship rate and the State  
 19 Water Project costs. There was no agreement that these  
 20 conveyance charges, that this particular rate structure,  
 21 would only last for five years. On that basis there was  
 22 no breach has been proven.  
 23 Second, San Diego failed to present evidence of  
 24 a proper measure of damages, has failed to make out its  
 25 damages case. Two heads to that part of the motion,

1266

1 your Honor.  
 2 San Diego, of course, concedes it's its burden  
 3 to prove damages, and as part of that is required to  
 4 prove what should have been charged. But it has not  
 5 made any proof at all about the alternative rate  
 6 structure, notwithstanding the fact that San Diego's  
 7 witnesses have acknowledged there would be alternative  
 8 lawful rate structures.  
 9 And then second, your Honor, Mr. Denham's  
 10 assumptions are not based on the evidence and are  
 11 contradicted by this Court's findings in Phase 1.  
 12 Mr. Denham assumed all the conveyance costs at issue are  
 13 properly simply moved to supply.  
 14 This Court indicated in Phase 1 that wasn't  
 15 necessarily the case, that the Court lacked evidence,  
 16 but that some of those charges might well properly be  
 17 properly allocated to transportation and conveyance.  
 18 And it was San Diego's burden to address that issue, and  
 19 San Diego hasn't addressed that issue at all. It has  
 20 simply wholesale moved all those costs over to supply  
 21 and claimed that as damages.  
 22 That's the basis of the motion, your Honor. It  
 23 is more fully set forth in the brief.  
 24 THE COURT: I appreciate that. I will take it  
 25 under submission, and the other side can let me know at

1267

1 the end of the day, next week, or the week after next  
 2 how they plan to respond to it. But for now --  
 3 MR. KEKER: Your Honor, I can respond. My  
 4 response -- I can tell you right now if you want me to.  
 5 THE COURT: I haven't read their papers. I  
 6 just wanted to make a record right now that this motion  
 7 has been filed at this juncture. I'm not going to be  
 8 reading it or evaluating the motion at this moment. I  
 9 think we should proceed --  
 10 MR. KEKER: Yes, sir.  
 11 THE COURT: -- with the Met's case. Would you  
 12 like a recess or are you prepared?  
 13 MR. QUINN: We're ready to proceed, your Honor.  
 14 So Met calls Jeff Kightlinger, who is out in  
 15 the hall, your Honor.  
 16 THE COURT: Absolutely.  
 17  
 18 JEFF KIGHTLINGER,  
 19 called as a witness by the Defendant, was sworn and  
 20 testified as follows:  
 21  
 22 THE WITNESS: I do.  
 23 THE CLERK: Thank you. Please be seated.  
 24 Please state and spell you full name for the  
 25 record.

1268

1 THE WITNESS: My name is Jeffrey,  
 2 J-E-F-F-R-E-Y, Kightlinger, K-I-G-H-T-L-I-N-G-E-R.  
 3 MR. EMANUEL: Good afternoon, your Honor. Eric  
 4 Emanuel.  
 5  
 6 DIRECT EXAMINATION  
 7 BY MR. EMANUEL:  
 8 Q. You are employed by Metropolitan, isn't that  
 9 true?  
 10 A. Yes.  
 11 Q. What is your position there?  
 12 A. I am the general manager and chief executive  
 13 officer.  
 14 Q. How long have you been general manager and  
 15 chief executive officer?  
 16 A. Since 2006.  
 17 Q. How long have you been with Metropolitan?  
 18 A. Since 1995.  
 19 Q. Do you report to the board of directors?  
 20 A. Yes, I do.  
 21 Q. How many directors are there at Metropolitan?  
 22 A. Thirty-seven directors.  
 23 Q. How many of those are representatives of San  
 24 Diego?  
 25 A. Four.

1269

1 with what IID transfer water is. Can you tell me what  
 2 that refers to, please?  
 3 A. Yes. The Water Authority and IID entered into  
 4 an agreement by which IID conserves water by several  
 5 different methods and makes that water available to San  
 6 Diego, and San Diego pays for it.  
 7 Q. Mr. Kightlinger, I have to step back because in  
 8 this era of apparent water shortages, how is it that  
 9 IID, the Imperial Irrigation District, has water to sell  
 10 or transfer?  
 11 A. They have a very large entitlement to Colorado  
 12 River water. And there are methods by which they could  
 13 more efficiently use that water, conserve it, and then  
 14 make it available for transfer and still continue to  
 15 farm.  
 16 Q. If we went back a few years, is it the case  
 17 that the IID was actually -- I don't want to say wasting  
 18 water. I don't want to -- they were not using water  
 19 most efficiently; is that true?  
 20 A. We have -- at Metropolitan, we have always  
 21 contended that IID is a very profligate in their use of  
 22 water. The State Board actually held hearings in 1984  
 23 and actually reached the conclusion that the Imperial  
 24 Irrigation District was, indeed, wasting water.  
 25 Q. What was the solution to that problem?

1271

1 Q. How many agencies are members?  
 2 A. We have 26 member agencies.  
 3 Q. It sounds like some agencies get more votes  
 4 than others.  
 5 A. We operate on a weighted vote system, and some  
 6 agencies do get more directors than one. Everybody gets  
 7 at least one. And then for every five percent of the  
 8 assessed valuation, you get additional board members.  
 9 So we have three agencies that have four board members  
 10 each. San Diego is one of them.  
 11 Q. Out of all the agencies, is San Diego the  
 12 second largest?  
 13 A. Yes, they are.  
 14 Q. So they have the second-most votes on the  
 15 board; is that right?  
 16 A. Correct.  
 17 Q. We are here, Mr. Kightlinger, because of a 2003  
 18 exchange agreement. You know that, don't you?  
 19 A. Yes.  
 20 Q. The subject of that agreement involves the  
 21 exchange of water, some of which is called the IID  
 22 transfer water and some of it is the canal lining water.  
 23 You are familiar with that; right?  
 24 A. Yes.  
 25 Q. Let's start, so we are all on the same page,

1270

1 A. The initial solution was that Imperial and  
 2 Metropolitan should do a transfer arrangement. We did  
 3 that. We entered into an arrangement in 1988 to  
 4 transfer water from IID to Metropolitan.  
 5 What we did was we paid IID a method -- to line  
 6 certain canals, to build some regulating reservoirs, to  
 7 operate another gate system where they deliver water  
 8 more efficiently.  
 9 We pay for all that, and they now transfer to  
 10 us every year about 105,000 acre-feet.  
 11 Q. In addition to Metropolitan, San Diego, the  
 12 County Water Authority also made a deal with IID; isn't  
 13 that true?  
 14 A. Yes. About a decade later, San Diego Water  
 15 Authority also entered into a similar type program with  
 16 IID.  
 17 Q. Can you give us a rough estimate of the volume  
 18 of water that IID transferred to the Water Authority?  
 19 A. The program calls for a ramp-up, a build-up  
 20 over time in which each year they would be transferring  
 21 more water. And eventually it tops out at 200,000  
 22 acre-feet.  
 23 Q. To your knowledge, does that transfer agreement  
 24 between IID and the Water Authority, was that contingent  
 25 on entering into a wheeling agreement with Metropolitan?

1272

1           **A. It was contingent on reaching an arrangement**  
 2           **with Metropolitan to deliver that water to the Water**  
 3           **Authority because San Diego had no independent means of**  
 4           **getting delivery of the water.**  
 5           Q. Was a wheeling agreement ever reached?  
 6           **A. No, it was not.**  
 7           Q. Why not?  
 8           **A. The number one issue that San Diego wanted was**  
 9           **guaranteed capacity, which wheelers are not entitled to,**  
 10           **so that was a sticking point. And then we began**  
 11           **discussing an exchange agreement instead.**  
 12           Q. Before we get to the exchange agreement, let's  
 13           get one other piece of background, which will all come  
 14           together eventually, and that's the canal lining water  
 15           that is also the subject of the 2003 exchange agreement.  
 16           Are you familiar with the canal lining water?  
 17           **A. Yes.**  
 18           Q. Let's back up. Was that something Metropolitan  
 19           was trying to obtain itself?  
 20           **A. Yes. We -- at the time of the State water**  
 21           **board order, and when we entered into our agreement with**  
 22           **IID in 1988, we began working on how best to -- other**  
 23           **methods to get water reductions out of the Imperial**  
 24           **Valley. And one of the projects that was very appealing**  
 25           **to us, and we began researching, was the potential**

1273

1           **lining of the Coachella and All-American Canals.**  
 2           Q. Who owns them?  
 3           **A. The United States, the Bureau of Reclamation.**  
 4           Q. For a deal to obtain canal lining water, who  
 5           did Metropolitan have to deal with?  
 6           **A. We did a feasibility analysis and determined**  
 7           **that it was feasible to construct, cost-effective to**  
 8           **build, and then we approached the United States and**  
 9           **reached a proposal with the United States to do that.**  
 10           **And then we went to Congress and got Congress**  
 11           **to pass an act enabling us to go and line the canals in**  
 12           **the 1996 time frame.**  
 13           Q. How long was this process?  
 14           **A. It took us about seven, eight years to work our**  
 15           **way through that up until we got Congress to act on**  
 16           **that.**  
 17           Q. It sounds to me like this is a project that  
 18           Metropolitan sought with a great deal of interest, and  
 19           it was not, shall we say, some sort of albatross or risk  
 20           that Metropolitan was unwilling to take; is that  
 21           correct?  
 22           MR. PURCELL: Objection. Leading.  
 23           THE COURT: Sustained.  
 24           Q. BY MR. EMANUEL: Explain to the Court, if you  
 25           will, why Metropolitan was interested in this project.

1274

1           **A. Our feasibility analysis showed there was a**  
 2           **significant amount of water that could be conserved.**  
 3           **Obviously, you can look around and see California, we**  
 4           **need significant chunks of water. They are not easy to**  
 5           **come by. Our estimates were to be 70- to 80,000**  
 6           **acre-feet of water, perhaps more, was leaking out of**  
 7           **those canals. They are earthen lined,**  
 8           **turn-of-the-century construction.**  
 9           **So 70- to 80,000 acre-feet, perhaps more,**  
 10           **significant amount of water that could be conserved and**  
 11           **could be done pretty cost-effectively, as well.**  
 12           THE COURT: Is that per year?  
 13           THE WITNESS: Yes, per year.  
 14           Q. BY MR. EMANUEL: You anticipated my next  
 15           question. When you say "cost effectiveness," obviously  
 16           there are costs and benefits to these projects. Please  
 17           explain what the costs and risks are, and then we'll  
 18           talk about what the benefits are.  
 19           **A. Some of the challenges would be how you would**  
 20           **be able to do the construction while delivering the**  
 21           **water 24/7. You could not turn off the water and then**  
 22           **line all the canals and then put it back into operation.**  
 23           **So we looked at various methods of either**  
 24           **lining in place with the water, and there are ways to do**  
 25           **that, or simply dividing the canal in half and lining**

1275

1           **half and going back and lining the other half and**  
 2           **putting the water in the other half.**  
 3           **There were some construction-type challenges.**  
 4           **All in all, it looked to be about a \$200**  
 5           **million or less project in 1999 dollars. It would save**  
 6           **that water for decades and hundreds of years, so it was**  
 7           **a very cost-effective and attractive proposal.**  
 8           Q. Had Metropolitan done feasibility studies?  
 9           **A. Yes, we had.**  
 10           Q. What were the results of those feasibility  
 11           studies?  
 12           **A. Like I said, it could be done in the range of a**  
 13           **couple hundred million dollars and generate 75- to**  
 14           **80,000 acre-feet, perhaps more, per year forever,**  
 15           **essentially, so that was very attractive.**  
 16           Q. Let's switch. We have -- we have talked about  
 17           the IID water and the canal lining water.  
 18           Finally, there's a deal with the Water  
 19           Authority to exchange the IID transfer water; correct?  
 20           **A. Yes.**  
 21           Q. What year was that reached?  
 22           **A. We reached agreement in 1998, but that**  
 23           **agreement had a number of conditions precedent before it**  
 24           **could go into effect.**  
 25           Q. What were those conditions?

1276

1 **A. Probably the most significant one was we had to**  
 2 **reach agreement on quantification of the agricultural**  
 3 **users of Colorado River water who weren't quantified at**  
 4 **that time. And until we did that, it was almost**  
 5 **impossible to really do an effective transfer because no**  
 6 **one really knew who the water would be coming from, what**  
 7 **amount another agricultural user would just increase**  
 8 **their use. So we needed to get the agricultural users**  
 9 **quantified before we could have effective transfer.**  
 10 Q. Of course, California has been taking water out  
 11 of the Colorado River for quite some time; isn't that  
 12 right?  
 13 **A. Yes.**  
 14 Q. Do you know what California's rights to the  
 15 Colorado River were?  
 16 **A. Yes. California has a basic apportionment of**  
 17 **4.4 million acre-feet. They can use more water than**  
 18 **that when it's either unused by another state or there**  
 19 **is excess or surplus water available on the river.**  
 20 Q. Was there a time when it was unused by other  
 21 states?  
 22 **A. Yes. Up until around 2000 California was able**  
 23 **to always use water not used by Arizona and Nevada, and**  
 24 **Metropolitan has a fourth priority of 550,000 acre-feet.**  
 25 **That is within the 4.4 million acre-feet. That only**

1277

1 **fills up half our aqueduct which can hold 1.2 million**  
 2 **acre-feet. It is beyond that fourth priority. So we**  
 3 **were only able to have a full aqueduct by using Arizona**  
 4 **and Nevada unused water up until 2000.**  
 5 Q. The total consumption in round numbers in or  
 6 about 2000 was how many million acre-feet?  
 7 **A. California was using about five million**  
 8 **acre-feet. Some years as high as 5.2 acre-feet. We**  
 9 **were using anywhere from 500- to 800,000 acre-feet, more**  
 10 **than our base apportionment of 4.4.**  
 11 Q. At some point did the Federal Government tell  
 12 Metropolitan and all the users of the Colorado River  
 13 Basin you have to get down to 4.4 million?  
 14 **A. Yes. It was a significant concern among the**  
 15 **other six basin states we share the Colorado River with,**  
 16 **that California would get used to this overreliance, and**  
 17 **at some point politically it would become very difficult**  
 18 **to turn California off when Arizona and Nevada needed**  
 19 **that water.**  
 20 Q. What is the name given to the negotiations to  
 21 apportion Colorado water among the Colorado River water  
 22 users?  
 23 **A. Originally we called it the California 4.4 Plan**  
 24 **as we were working throughout the '90s, and eventually**  
 25 **this became the quantification settlement agreement,**

1278

1 **which is a collection of a number of agreements.**  
 2 Q. And was the quantification settlement agreement  
 3 a central condition to the performance of the Water  
 4 Authority's agreement with the Imperial Irrigation  
 5 District?  
 6 **A. Yes, it was.**  
 7 Q. Why is that?  
 8 **A. The other parties along the river and within**  
 9 **California, Coachella, Metropolitan, who have rights to**  
 10 **Colorado River water, would not agree to any transfer**  
 11 **between San Diego and Imperial until there was a clear**  
 12 **quantification as to what exactly IID's rights were.**  
 13 Q. There was a quantification settlement  
 14 agreement, sir?  
 15 **A. We did reach agreement, yes.**  
 16 Q. What year was that?  
 17 **A. 2003.**  
 18 Q. How many parties and how many contracts would  
 19 you estimate were involved in that?  
 20 **A. Depending on how you count them, there were**  
 21 **over 30-some agreements as part of the overall package,**  
 22 **each with most of the parties along the Colorado River,**  
 23 **sometimes the United States and the State of California,**  
 24 **as well.**  
 25 Q. As part of that quantification settlement

1279

1 agreement, was the exchange agreement that is the  
 2 subject of this lawsuit, was that also negotiated?  
 3 **A. Yes.**  
 4 Q. Was there time pressure on the parties to reach  
 5 a quantification settlement agreement?  
 6 **A. Yes. California --**  
 7 Q. Please explain what that was.  
 8 **A. The Secretary of Interior actually put a**  
 9 **deadline of December 31, 2002, for California to reach**  
 10 **conclusions of the quantification settlement agreement**  
 11 **or -- and there was a stick involved. The Secretary of**  
 12 **Interior would just reduce California immediately down**  
 13 **to 4.4 million acre-feet.**  
 14 **The Secretary of Interior did that because we**  
 15 **failed to reach agreement by December 31. Metropolitan**  
 16 **went from a full aqueduct in 2002 to roughly a half**  
 17 **aqueduct in 2003. We took the hit from the United**  
 18 **States of -- a loss of about 5-, 600,000 acre-feet of**  
 19 **water overnight.**  
 20 **Then the negotiations continued in earnest**  
 21 **throughout 2003 to reach closure, and the State**  
 22 **eventually did.**  
 23 Q. It sounds like the parties were motivated in a  
 24 way they hadn't been before.  
 25 **A. The motivation had always been there, but this**

1280

1 **certainly carried an added impetus to the discussions.**  
 2 Q. When we get -- when we get to the negotiation  
 3 of the 2003 exchange agreement, there's another series  
 4 of historical events that come in to play. And I want  
 5 to go back and talk about those so when we get to 2003,  
 6 we can see all the pieces.  
 7 One of them is bundled rates. Would you  
 8 explain to the Court what bundled rates are?  
 9 **A. Yes. Metropolitan's rates, since the beginning**  
 10 **when we first began to deliver water in 1941, up until**  
 11 **around 2000, was a very simple approach. We had a full**  
 12 **system rate.**  
 13 **And so it was simply we had a rate for treated**  
 14 **water and a rate for untreated water. And those were**  
 15 **two different prices, and that was pretty much all there**  
 16 **was to it. It was just an all-in rate. We just bundled**  
 17 **all the costs into just that one simple rate.**  
 18 Q. And in coming up with a bundled cost was it  
 19 necessary to do any sort of allocation between supply  
 20 and conveyance?  
 21 **A. No. We had to know what the costs were, but**  
 22 **then we just bundled everything together so everything**  
 23 **would be in that rate: Supply, conveyance, staff,**  
 24 **labor, paper clips, everything was -- would go into it.**  
 25 Q. Just so you don't overlook one of the big ones,

1281

1 the State Water Project costs?  
 2 **A. All our costs. State Project Water is roughly**  
 3 **almost a third of all Metropolitan's costs. It is a**  
 4 **tremendous cost to Metropolitan, and those costs had to**  
 5 **be recovered.**  
 6 Q. You say a third, but can you give a ballpark of  
 7 what -- the millions we are talking about?  
 8 **A. Metropolitan's annual budget is about 1.7,**  
 9 **\$1.8 billion a year. And this past year we paid to the**  
 10 **State of California a little over \$500 million for State**  
 11 **Water Project costs. It is usually in that range of**  
 12 **450- to \$550 million a year at this point in time.**  
 13 Q. Then Metropolitan decided to make a decision to  
 14 unbundle their rates; is that correct?  
 15 **A. That's right.**  
 16 Q. When was that?  
 17 **A. Late 1990s we began the process and the**  
 18 **discussion on how to do that.**  
 19 Q. Why was that?  
 20 **A. Part of the impetus was the agreement that we**  
 21 **had executed with San Diego, even though the conditions**  
 22 **precedent hadn't been satisfied yet, but it was going to**  
 23 **be a new way -- a new conveying of water, so we had to**  
 24 **develop rates. We were going to -- we already had a**  
 25 **rate in that 1998 agreement, but there was a lot of**

1282

1 **discussion that there was going to be much more water**  
 2 **marketing out there in the world.**  
 3 **There was going to be a number of other**  
 4 **wheeling-type arrangements that might be coming**  
 5 **Metropolitan's way.**  
 6 **Up until then we had been developing a specific**  
 7 **rate effectively ad hoc when these transactions came up.**  
 8 **The idea is we would actually unbundle our rates, and**  
 9 **people would know what they would have to pay to use the**  
 10 **system.**  
 11 Q. When you say "ad hoc," does that -- to make  
 12 sure I understand the way you meant it, is that as each  
 13 request came in, a rate was determined for that  
 14 particular request; is that right?  
 15 **A. That's right. I mean, we did have a couple of**  
 16 **other small wheeling requests that were made in the late**  
 17 **1990s, early 2000 time frame involving Orange County.**  
 18 **And so we developed specific wheeling agreements for**  
 19 **those with a rate for that charge.**  
 20 Q. Part of the process of unbundling the rates  
 21 would establish a wheeling rate that wheelers would know  
 22 in advance; isn't that correct?  
 23 **A. That's right.**  
 24 Q. How long did this process take to unbundle the  
 25 rates?

1283

1 **A. It took a little over two years, almost three**  
 2 **years, to actually go through working with our member**  
 3 **agencies and working with all their staff. We had**  
 4 **numerous workshops. We took a number of proposals and**  
 5 **worked through them.**  
 6 **And even then, when we actually took a vote on**  
 7 **that, on the new rate structure and the approach, the**  
 8 **idea that we would take that into the -- we did take**  
 9 **that in 2001, but that we wouldn't set rates until the**  
 10 **next cycle, which we did in 2002, on the new structure,**  
 11 **which wouldn't go into effect until January 1, 2003.**  
 12 **It was a long, detailed process with a lot of**  
 13 **lead-in time.**  
 14 Q. Who made this decision to unbundle?  
 15 **A. The Metropolitan Board of Directors.**  
 16 Q. Including the San Diego representatives on the  
 17 board, I assume?  
 18 **A. That's correct.**  
 19 Q. And this information and workshop, was that  
 20 disseminated to all the member agencies?  
 21 **A. Yes.**  
 22 Q. Are you aware of any misinformation that was  
 23 given to any of the member agencies about the unbundling  
 24 the rates, the cost, including the State Project Water  
 25 costs?

1284

1           **A. No. No. There was quite a bit of information.**  
 2           Q. I take it some members were not in favor of  
 3 unbundling; is that correct?  
 4           **A. I don't know if people said they were in --**  
 5 **that they didn't like unbundling. But there was a**  
 6 **number of different proposals and we -- the people had**  
 7 **different ideas on how best to do it. I think most**  
 8 **people thought unbundling was a sound idea, but there**  
 9 **was all sorts of different ideas on how best it should**  
 10 **be done and what types of policies it should encourage**  
 11 **or discourage.**  
 12           Q. And would the right phrase be "rate structure"?  
 13 In other words, they are in favor of unbundling and in  
 14 favor of seeing what the elements of a rate was, but  
 15 they didn't agree with the rate structure?  
 16           MR. PURCELL: Objection. Leading.  
 17           THE COURT: Overruled.  
 18           THE WITNESS: There -- there were concerns  
 19 about exactly how to unbundle. What types of costs  
 20 should go into which pot, for instance. So a lot of  
 21 people had different ideas. And we actually allowed  
 22 member agencies to make their own proposals to be  
 23 considered. And some of them actually did that, and  
 24 some of them -- different people had different views  
 25 depending on how it would affect their area.

1285

1           A big issue always within Metropolitan's -- and  
 2 we're a collective. Everyone voluntarily belongs to  
 3 Metropolitan.  
 4           So some of our agencies have access to very  
 5 significant groundwater reserves and basins. They had  
 6 different ideas on how the rate structure should help us  
 7 work with groundwater, and others, without access to  
 8 groundwater, had different views. All these views were  
 9 worked through during the course of the entire  
 10 unbundling process.  
 11           Q. BY MR. EMANUEL: When was the vote that put  
 12 unbundled rates in the rate structure in place?  
 13           **A. In 2001.**  
 14           Q. When did the rates actually go into effect?  
 15           **A. January 1, 2003.**  
 16           Q. Was it 2003 in which the 2003 exchange  
 17 agreement was both negotiated and agreed upon?  
 18           **A. Yes.**  
 19           Q. Were you part of a negotiating team?  
 20           **A. Yes.**  
 21           Q. Who was your -- did you have teammates?  
 22           **A. The lead negotiators for Metropolitan in this**  
 23 **process were myself, as chief counsel at the time, and**  
 24 **Dennis Underwood, vice president to our president, CEO**  
 25 **at the time.**

1286

1           Q. I understand Mr. Underwood is deceased now; is  
 2 that correct?  
 3           **A. That's correct.**  
 4           Q. Who were your counterparts with the Water  
 5 Authority?  
 6           **A. Their lead negotiators were Maureen Stapleton,**  
 7 **then and current general manager, and Scott Slater,**  
 8 **their outside counsel.**  
 9           Q. Can you give an approximation of when the  
 10 negotiations specific to the -- that would ultimately be  
 11 the 2003 agreement, when did they get started?  
 12           **A. We already had in place the 1998 agreement.**  
 13 **And discussions on what changes and updates, if any, to**  
 14 **the 2003 exchange agreement didn't really begin until**  
 15 **mid-summer of 2003. And at that point we made**  
 16 **significant progress on the quantification agreement**  
 17 **with IID. So now people turned back to see what changes**  
 18 **had to be made.**  
 19           Q. Would you explain why there was -- you just  
 20 said there was a 1998 agreement. Why was there a need  
 21 to amend that?  
 22           **A. There -- there probably wasn't much that had to**  
 23 **be changed. We actually thought it was pretty much good**  
 24 **enough. A few of the conditions precedent had to be**  
 25 **updated.**

1287

1           **There was one significant issue we had to**  
 2 **tackle, and that was the 1998 agreement term of the**  
 3 **exchange was for 30 years and the actual IID San Diego**  
 4 **transfer was for 45 years. And between year 31 and year**  
 5 **45, the 1998 agreement was just silent. So we were**  
 6 **going to tackle how we were going to address those last**  
 7 **15 years.**  
 8           Q. Mr. Kightlinger, I think I skipped over one  
 9 part that occurred back in the negotiation, the '98  
 10 agreement. The price for that was a low \$90 an  
 11 acre-foot; correct?  
 12           **A. With inflation, yes.**  
 13           Q. And at that time, did Metropolitan believe that  
 14 the true cost of performing that contract would be  
 15 higher?  
 16           **A. Yes. We felt it was significantly higher.**  
 17           Q. Did Metropolitan go to the California State  
 18 legislature to try and cover that gap?  
 19           **A. San Diego and IID were effectively at**  
 20 **loggerheads as to what should be the correct price for**  
 21 **conveying water. They felt the marginal rate was**  
 22 **sufficient, and we felt it should really take into**  
 23 **account all the capital costs of building the structure.**  
 24 **We were 100-and-some-odd dollars per acre-foot apart.**  
 25 **At some point, because they didn't seem to be**

1288



1 making progress, and California was in a concern the 4.4  
2 plan would not be resolved without San Diego and IID  
3 reaching agreement, the State of California actually  
4 approached both parties and said that we would be  
5 interested in helping bridge that gap.

6 Q. That gap, be more specific. What is the gap  
7 that the State of California offered to help bridge?

8 A. Metropolitan believed that the true cost of  
9 conveying the water to San Diego was somewhere around  
10 \$250 an acre-foot, and San Diego's view was it was  
11 somewhere around 80, \$90 an acre-foot.

12 That gap over time amounted to a significant  
13 amount of money. And that is what the State of  
14 California offered to come in and help bridge that gap.

15 Q. Did they give it to you no strings attached, or  
16 did it come with a purpose that Metropolitan had to use  
17 it for?

18 A. The State of California dictated that while  
19 they were going to bridge the gap, they weren't just  
20 going to provide money for California. They wanted to  
21 make sure that it was used for a purpose that would  
22 benefit both Metropolitan and California.

23 Q. And that purpose was?

24 A. It was to help line the -- to help fund the  
25 lining of the All-American and Coachella Canal projects.

1289

1 come through with that. We did put it in as a condition  
2 precedent in the exchange agreement.

3 Q. Turning to the negotiation, without going  
4 through all the other elements, at some point is it not  
5 true that San Diego County Water Authority came to  
6 Metropolitan with two options; is that right?

7 A. Yes.

8 Q. And what was the first option?

9 A. The first option was based on the 1998 exchange  
10 agreement that they would continue to pay for the  
11 exchange of water based on the cost structure that was  
12 put in place in the 1998 agreement.

13 THE COURT: Which exhibit is this?

14 MR. EMANUEL: DTX 050, your Honor.

15 Q. This is a document that purports -- by the  
16 county -- by the Water Authority that purports to  
17 summarize the QSA options.

18 Do you see that?

19 A. I do.

20 Q. If you look at the line "Option-1 is the  
21 original IID/SDCWA water transfer."

22 A. Yes.

23 Q. Is that what we have been referring to as the  
24 1998 exchange agreement?

25 A. Yes.

1291

1 And there was a portion of it that also Metropolitan  
2 would be using for groundwater projects in the hope that  
3 we would have Colorado River water to store. These  
4 would be storage programs.

5 Q. Moving now to 2003. At the time of your  
6 negotiation with the Water Authority, did you -- did  
7 Metropolitan, in fact, have an agreement with the State  
8 of California for a sum of money to be used to line the  
9 canals?

10 A. Yes, we did.

11 Q. What was the sum of money?

12 A. \$235 million. 200 million to line the canals.  
13 \$35 million for groundwater storage programs.  
14 Legislation was passed appropriating the funds. And we  
15 had a signed agreement with the California Department of  
16 Water Resources to deliver those funds.

17 Q. And you went so quickly, I want to make sure.  
18 This wasn't a handshake deal with the State?

19 A. No, no. We had both legislation and signed  
20 agreements.

21 Q. And at the time of the negotiation with the  
22 Water Authority, did Metropolitan believe that the  
23 235 million already appropriated was a contingency that  
24 was a high risk of not receiving?

25 A. No. We were very confident the State would

1290

1 Q. And as you look at it, does that price look  
2 roughly in the ballpark?

3 A. Yes. It started at 1998 -- in 1998 it was \$90  
4 an acre-foot, and my recollection is this is updated for  
5 inflation to 2003 from '97.

6 Q. If you look at the sentence, it is already  
7 highlighted, Option-2, is this the essence of what the  
8 Water Authority proposed to Metropolitan?

9 A. Yes. Although I don't see -- in addition to  
10 signing the canal lining project water rights, we also  
11 were to assign over the \$235 million from the State of  
12 California. And they would then pay our full in  
13 conveyance costs of \$253 an acre-foot.

14 Q. It is accurately stated there, system access,  
15 water stewardship and power costs?

16 A. Correct.

17 Q. When this proposal was given to Metropolitan's  
18 negotiating team, did you take it to the Metropolitan  
19 board?

20 A. We took it first to what we called our  
21 negotiating team, which was a subset of our board. And  
22 we then eventually took it to our full board.

23 Q. What was the decision by the full board?

24 A. Well, the eventual decision was, after  
25 analysis, that both Option-1 and Option-2 would work for

1292

1 **Metropolitan, and then what we did was tell San Diego**  
 2 **that it was their choice.**  
 3 THE COURT: When you say "the full board," is  
 4 that everybody including the San Diego representatives?  
 5 THE WITNESS: When we were doing the  
 6 negotiations, San Diego did not participate in those  
 7 discussions.  
 8 Q. BY MR. EMANUEL: Did they participate in the  
 9 vote for this?  
 10 **A. They did not.**  
 11 Q. Is that because they had a conflict of  
 12 interest?  
 13 **A. Yes.**  
 14 MR. PURCELL: Objection. Calls for a legal  
 15 conclusion.  
 16 THE COURT: I will take it not as a legal  
 17 statement but his understanding as to why.  
 18 Go ahead.  
 19 MR. EMANUEL: Very well.  
 20 Q. Was it your mission, then, to convey that  
 21 decision back to the Water Authority's negotiating team?  
 22 **A. Yes.**  
 23 Q. What was their reaction to it?  
 24 **A. They were pleased, but then they had to go to**  
 25 **their board and determine which option they would**

1293

1 **choose.**  
 2 Q. What was the time period so far -- and  
 3 ultimately they chose Option-2; correct?  
 4 **A. Correct.**  
 5 Q. What was the time period between when it was  
 6 first proposed to Metropolitan and the Water Authority  
 7 came back to Metropolitan and said, "We choose  
 8 Option-2"?  
 9 **A. It was very short. It was a matter of weeks.**  
 10 **It was in September of 2003.**  
 11 MR. EMANUEL: And, Mike, would you put that  
 12 exhibit back up again because I wanted to --  
 13 Q. That sentence there, where it says "The  
 14 wheeling rate is set at 253," do you see that?  
 15 **A. Yes.**  
 16 Q. Was that 253 proposed by the Water Authority  
 17 negotiators?  
 18 **A. It was agreed to by the Water Authority because**  
 19 **it was the sum of the system access, the then current**  
 20 **system access, water stewardship rate and power cost.**  
 21 **We summed up those three costs and agreed it was 253.**  
 22 Q. I want to be clear, though. When they made the  
 23 proposal to Metropolitan and said Option-2, did Option-2  
 24 come with 253, or did it come with we'll pay wheeling or  
 25 conveyance or something like that?

1294

1 **A. It was agreed it would start at 253.**  
 2 Q. And was there a discussion of how they arrived  
 3 at 253?  
 4 **A. Yes.**  
 5 MR. PURCELL: Objection. Foundation. Who is  
 6 "they"?  
 7 THE COURT: Sustained. Why don't you just  
 8 rephrase the question.  
 9 MR. EMANUEL: I will. Thank you.  
 10 Q. You are having conversations with the  
 11 negotiating team for the Water Authority; is that  
 12 correct?  
 13 **A. Yes.**  
 14 Q. And on that Water Authority negotiating team,  
 15 the two individuals were whom?  
 16 **A. Scott Slater and Maureen Stapleton.**  
 17 Q. As you sit here today, can you remember which  
 18 of the two made the proposal to you?  
 19 **A. Scott --**  
 20 MR. PURCELL: Objection. Foundation.  
 21 THE COURT: Overruled.  
 22 THE WITNESS: Scott Slater.  
 23 Q. BY MR. EMANUEL: When Mr. Slater made the  
 24 proposal to the Metropolitan water negotiating team,  
 25 including you, did he at that time say Option-2 is for

1295

1 253?  
 2 **A. No, he did not.**  
 3 Q. What did he say about the price when he offered  
 4 Option-2 the first time?  
 5 **A. That the Water Authority would pay**  
 6 **Metropolitan's full conveyance cost.**  
 7 Q. At some point did you and Mr. Slater, along  
 8 with others, but at least you and Mr. Slater, sit down  
 9 and say what is the full cost?  
 10 **A. Scott and I discussed what were the components**  
 11 **that would make up the full cost. We then asked other**  
 12 **people, in my case Brian Thomas, our then chief**  
 13 **financial officer, and I believe he sat down with Bob**  
 14 **Campbell working for the Water Authority. It might have**  
 15 **been other people. They agreed that the right number,**  
 16 **doing the math, which is pretty simple math, was \$253 an**  
 17 **acre-foot.**  
 18 Q. Was there any dissent or dispute from  
 19 Mr. Slater or anyone else from the Water Authority when  
 20 that 253 number was calculated?  
 21 **A. No.**  
 22 Q. Was there any dissent or disagreement from the  
 23 Water Authority as to how it was calculated?  
 24 **A. No.**  
 25 Q. Was there any dissent as to elements that went

1296

1 into it?  
 2 **A. No.**  
 3 Q. When this proposal was taken to the  
 4 Metropolitan board, which I understand is before it went  
 5 to the Water Authority board, when it went to the -- was  
 6 that number already determined and disclosed to the  
 7 board?  
 8 **A. Yes.**  
 9 Q. When the board decided San Diego could decide,  
 10 was that number already disclosed and included in the  
 11 choice that San Diego -- the Water Authority had?  
 12 **A. Yes.**  
 13 Q. Now, going back then to the question, between  
 14 the time it was proposed, Option-2 by Mr. Slater, and  
 15 between the time you received the information that it  
 16 had been agreed to by the Water Authority, how much time  
 17 had elapsed?  
 18 **A. My recollection was a couple of weeks.**  
 19 Q. What step was -- had to occur next then?  
 20 **A. Well, once we have concurrence by both of our**  
 21 **boards of directors, we had to revise the exchange**  
 22 **agreement, the 2003 exchange agreement, to reflect that.**  
 23 **We had to then work with the other parties to the**  
 24 **allocation agreement of how rights were quantified**  
 25 **because we had to update that the canal lining water**

1297

1 **would now be moved from Metropolitan to San Diego. We**  
 2 **had to revise the construction agreements. There were**  
 3 **agreements on how to construct the canal lining**  
 4 **projects, so we had to revise all those agreements.**  
 5 Q. Because of the acceptance of Option-2, other  
 6 agreements necessarily had to be negotiated and agreed  
 7 upon; correct?  
 8 **A. Correct.**  
 9 Q. One of them you mentioned was the allocation  
 10 agreement; is that right?  
 11 **A. Yes.**  
 12 Q. What was the provisions in the allocation  
 13 agreement that had to change?  
 14 **A. The rights to the canal lining water.**  
 15 Q. And by that I take it you mean Metropolitan's  
 16 rights would be transferred to the Water Authority;  
 17 correct?  
 18 **A. Correct.**  
 19 Q. What about that state appropriation, where did  
 20 that switch hands, in what document?  
 21 **A. Metropolitan had to then withdraw from its**  
 22 **funding agreement with the Department of Water Resources**  
 23 **and San Diego had to then step into our shoes, get their**  
 24 **own agreement with the State.**  
 25 Q. And what about the appropriation of the 235

1298

1 that already had been appropriated and was under  
 2 contractual obligation to Metropolitan? Was that  
 3 assigned to the Water Authority?  
 4 **A. That would be assigned to the Water Authority.**  
 5 Q. Were state representatives parties to these  
 6 agreements or at least to the agreements to which the  
 7 allocation or the re-allocation of the State  
 8 appropriation?  
 9 **A. Yes. The State of California did execute these**  
 10 **agreements, as well.**  
 11 Q. We talked before about how long this QSA  
 12 negotiation was going on. You are already past the  
 13 December 2002 deadline. We are now, from what I saw in  
 14 Exhibit 50, into September of 2003. What -- how long  
 15 did it take to finalize the agreement?  
 16 **A. We -- we moved pretty quickly. Once the boards**  
 17 **had reached agreement, we got everything finalized**  
 18 **within less than two weeks, and we executed everything,**  
 19 **my recollection is, early October, October 10 or**  
 20 **something like that.**  
 21 Q. Was the idea that when you say "everything,"  
 22 that these 30-some agreements would all be executed by  
 23 all parties on or about the same time?  
 24 **A. Yes. We had a signing event at Metropolitan in**  
 25 **our boardroom where all the parties came in to Los**

1299

1 **Angeles, and we signed all 30-some agreements and**  
 2 **everybody that had to sign them.**  
 3 Q. Would it be accurate to say that without  
 4 agreement on the exchange agreement and the allocation  
 5 agreement, that the quantification settlement agreement  
 6 might not have happened?  
 7 **A. It would not have happened, yes.**  
 8 Q. Thank you.  
 9 Now, one of the terms that was included in the  
 10 2003 exchange agreement is a five-year provision. Are  
 11 you familiar with that?  
 12 **A. Yes.**  
 13 Q. What was the motivation behind including a  
 14 five-year provision?  
 15 **A. When we first briefed our negotiating team on**  
 16 **this Option-2 that San Diego proposed, our analysis was**  
 17 **that even though the water was extremely valuable and**  
 18 **the \$235 million from the State of California, those**  
 19 **were extremely valuable assets. If our full conveyance**  
 20 **costs were covered, Option-1 and Option-2 were net,**  
 21 **neutral to Metropolitan.**  
 22 **The board members on our negotiating team,**  
 23 **though, had suggested -- some of them suggested that if**  
 24 **there were future litigation and it was changed, then it**  
 25 **would no longer be neutral to Metropolitan, and we would**

1300

1 **have already given up the canal lining water, the**  
 2 **\$235 million.**  
 3 **So they asked should we not get a provision**  
 4 **that for the life of the agreement, 45 years and any**  
 5 **30-year renewal, there be an agreement not to challenge**  
 6 **the rates.**  
 7 Q. And this arose out of a -- I don't want to put  
 8 words in your mouth -- a certain distrust between the  
 9 parties?  
 10 A. **That was no secret. We had a tough**  
 11 **relationship for the eight years -- for a number of**  
 12 **years leading up to the 2003 exchange agreement.**  
 13 Q. And I take it the Water Authority had some  
 14 distrust of Metropolitan; is that correct, sir?  
 15 A. **I would say it was, yes.**  
 16 Q. Did they express those concerns to you?  
 17 A. **Yes, during the negotiations.**  
 18 Q. Let me lay a foundation. And when I say  
 19 "they," did Scott Slater express those concerns to you?  
 20 A. **Yes. When we had the discussions on our**  
 21 **counter that there should be another clause in there,**  
 22 **that there can be no challenge to the rates for the life**  
 23 **of this agreement, the comeback I got from Scott Slater**  
 24 **was that San Diego was very concerned that Metropolitan**  
 25 **might then change its rate structure and do something**

1301

1 **that would discriminate against San Diego and harm it in**  
 2 **some fashion.**  
 3 Q. It sounds to me, then, that on Metropolitan's  
 4 side there was the concern that you were parting  
 5 immediately with \$235 millions and 110 years of canal  
 6 lining water, and in exchange you have a 45-year  
 7 agreement, which the concern was it may or may not be  
 8 performed by the Water Authority; correct?  
 9 MR. PURCELL: Objection. Counsel is  
 10 testifying.  
 11 THE COURT: It is a little compound. If you  
 12 could redo that, please. And sometime in the next five  
 13 or ten minutes, why don't you pick a nice time to break.  
 14 MR. EMANUEL: Let me finish this line of  
 15 thought, and that would be a good time.  
 16 THE COURT: Any time.  
 17 Q. BY MR. EMANUEL: We have on the one side  
 18 Metropolitan's concern because it was giving the Water  
 19 Authority something. That something was?  
 20 A. **The canal lining water for the 110 years of**  
 21 **that project and the \$235 million from the State of**  
 22 **California.**  
 23 Q. The concern is the Water Authority might what?  
 24 A. **In some fashion renege on its commitment to pay**  
 25 **the full conveyance cost.**

1302

1 Q. If we do the flip side, that the Water  
 2 Authority in the form of Mr. Slater says to you, we have  
 3 a concern about Metropolitan's performance; right?  
 4 A. **That's right.**  
 5 Q. What was the performance that he thought  
 6 Metropolitan might not do?  
 7 A. **Well, we had just completed the unbundling of**  
 8 **our rates and coming up with a new rate structure. And,**  
 9 **obviously, it was within the power of the board to come**  
 10 **up yet with another rate structure at some point down**  
 11 **the road and do things in a different fashion.**  
 12 **And San Diego expressed the view we could very**  
 13 **well do so during this 45-year period in a way that**  
 14 **harmed them and they would be powerless to do anything**  
 15 **about it because they would have signed something saying**  
 16 **we can't challenge it.**  
 17 Q. The five-year provision is the bargain that  
 18 worked this out; correct?  
 19 MR. PURCELL: Objection. Leading.  
 20 THE COURT: Overruled.  
 21 THE WITNESS: Yes. That was -- that was their  
 22 proposal. We discussed it with our board. There was a  
 23 fair amount of concern, but that became eventually what  
 24 we agreed to.  
 25 Q. BY MR. EMANUEL: And the agreement, based on

1303

1 your discussions with Mr. Slater, was that something  
 2 could be challenged. What was the something the Water  
 3 Authority could challenge?  
 4 A. **Well, what I was told by both Mr. Slater --**  
 5 MR. PURCELL: Objection. This is parol  
 6 evidence, your Honor. I know there has been a lot of  
 7 it, but we are not waiving our argument that the  
 8 contract is clear on its face. I would like to make the  
 9 objection this is veering from terms of the contract.  
 10 THE COURT: You are not objecting to parol  
 11 evidence in this case, are you, as a matter of practice?  
 12 MR. PURCELL: We realize there has been parol  
 13 evidence offered, and we do maintain the contract is  
 14 clear on its face.  
 15 THE COURT: I think your side also extracted  
 16 some parol evidence in this case. The objection is  
 17 overruled.  
 18 Go ahead.  
 19 Q. BY MR. EMANUEL: We were talking about what the  
 20 Water Authority could challenge. Please tell us what  
 21 Mr. Slater said the Water Authority wanted the right to  
 22 challenge.  
 23 A. **I asked Mr. Slater and Ms. Stapleton point**  
 24 **blank, are you going to be challenging our rate**  
 25 **structure, in which case we can't have agreement.**

1304

1           **They stated we have no objection to the rate**  
 2 **structure. We agree to pay that. What we are concerned**  
 3 **about are changes Metropolitan might make in the future,**  
 4 **and we want to reserve the right to challenge those.**  
 5       Q. The flip side, then, you walk away with -- what  
 6 was your understanding of what they would not challenge?  
 7       **A. The existing rate structure.**  
 8       Q. Was there also expressed a concern that  
 9 Metropolitan might discriminate against San Diego Water  
 10 Authority?  
 11       **A. Yes. That was the concern, that we might**  
 12 **change the rate structure in a way that would be**  
 13 **discriminatory to wheelers or San Diego or something**  
 14 **that they had an ultimate interest.**  
 15       Q. The purpose of that five-year was to address  
 16 both parties' concerns; correct?  
 17       **A. The idea of what we negotiated was there was**  
 18 **not supposed to be challenges to the existing rate**  
 19 **structure. As understood, that Metropolitan would be**  
 20 **amending its process or could amend its process from**  
 21 **time to time as conditions change, its rates and its**  
 22 **rate structure, and that the Water Authority, after five**  
 23 **years, could challenge, should those changes be made by**  
 24 **Metropolitan.**  
 25       Q. In the course of your negotiations with the

1305

1 Water Authority, with Mr. Slater and Ms. Stapleton, did  
 2 they ever come to you and say in so many words this  
 3 five-year provision is just a cooling-off period?  
 4       **A. No. They never used those words.**  
 5       Q. Did they say in substance this was some sort of  
 6 a timeout, placeholder, we are going to agree to  
 7 disagree?  
 8       **A. Not to me, no, they never said that.**  
 9       Q. Let me put it this way, sir. If Mr. Slater had  
 10 said to you or you understood the deal to be only a  
 11 five-year agreement to be on the rate structure, would  
 12 Metropolitan have made the deal?  
 13       THE COURT: I don't understand the question.  
 14       MR. EMANUEL: All right.  
 15       Q. If Metropolitan understood the deal to be we  
 16 only have an agreement on five years of the rate  
 17 structure, that after five years, even though you agreed  
 18 to pay these rates, we can sue you on what we had  
 19 proposed, would Metropolitan have agreed to a 45-year  
 20 deal?  
 21       **A. No.**  
 22       Q. Would it have agreed to any deal?  
 23       **A. No.**  
 24       Q. Wasn't part of the purpose to reach an  
 25 agreement on what the rate would be for 45 years?

1306

1           **A. And possibly if there were a 30-year renewal**  
 2 **for the length of the exchange agreement, yes.**  
 3       MR. EMANUEL: Your Honor, a break would be good  
 4 now.  
 5       THE COURT: Let's take about a ten-minute  
 6 break. Thank you very much.  
 7       MR. EMANUEL: Thank you, your Honor.  
 8       (Recess.)  
 9       THE COURT: All right. Thank you very much.  
 10 Let's get started.  
 11       MR. EMANUEL: Thank you, your Honor.  
 12       Q. We have been talking about a rate structure  
 13 that was agreed to in 2003. Did it change since then?  
 14       **A. Did the exchange agreement change since 2003?**  
 15       Q. The rate structure that was agreed upon in  
 16 2003, was it changed since then?  
 17       **A. No. The rate structure was agreed upon in**  
 18 **2001, and it has not been changed since.**  
 19       Q. Very well. I understand.  
 20       The rate structure that was put into the 2003  
 21 agreement --  
 22       **A. Has not.**  
 23       Q. -- it is still the same rate structure today?  
 24       **A. Yes.**  
 25       Q. When the Option-2 was brought to the

1307

1 Metropolitan Board of Directors, were financial  
 2 projections done as to the costs and revenues?  
 3       **A. Yes.**  
 4       Q. What period of time was used for those  
 5 financial projections?  
 6       **A. The 45 and 75 years.**  
 7       Q. In the five years since the execution of the  
 8 2003 agreement, that five-year period which some have  
 9 called a cooling-off or a timeout, in that five-year  
 10 period, did anyone come from the Water Authority to  
 11 renegotiate?  
 12       **A. No.**  
 13       Q. Did anyone come from the Water Authority and  
 14 say the five years are running, we have to do something  
 15 about the rate structure?  
 16       **A. No.**  
 17       Q. I would like to go to another topic. And this  
 18 agreement is called an exchange agreement; correct?  
 19       **A. Yes.**  
 20       Q. Prior to '98, there was an effort to make a  
 21 wheeling agreement, but ultimately the 1998 agreement  
 22 was also an exchange agreement; correct?  
 23       **A. Correct. Yes.**  
 24       Q. You understand the differences between a  
 25 wheeling agreement and an exchange agreement?

1308

1 **A. Yes.**  
 2 Q. Is that a mere technicality, or are there  
 3 different benefits to a wheeling agreement and an  
 4 exchange agreement?  
 5 **A. There are very significant differences.**  
 6 Q. I want you to explain to the Court the benefits  
 7 to the Water Authority of having an exchange agreement,  
 8 the 2003 exchange agreement, as opposed to a wheeling  
 9 agreement. Are you able to do that, sir?  
 10 **A. Absolutely.**  
 11 **Now, there are a number of benefits, but the**  
 12 **primary benefit, first and foremost, was the guaranteed**  
 13 **space. A wheeler would only have space as it was**  
 14 **available, and you'd have to look on an annual basis and**  
 15 **determine is there space to move a wheeler's water.**  
 16 **But San Diego's transfer with the Imperial**  
 17 **Irrigation District called for a firm transfer to be**  
 18 **made every single year. They would -- in some years, if**  
 19 **Metropolitan had a full aqueduct, they would simply have**  
 20 **to pay for the water, but lose it, not be able to access**  
 21 **it.**  
 22 **It was -- probably their number one priority**  
 23 **was to get guaranteed access and guaranteed capacity in**  
 24 **our system. But then there's a number of other benefits**  
 25 **that are smaller, but also significant. One of those is**

1309

1 **power. Metropolitan -- a wheeler would pay actual power**  
 2 **at the market rate when they moved the water.**  
 3 **Metropolitan has a melded power rate that is available**  
 4 **to our member agencies.**  
 5 **But then there are number of other benefits**  
 6 **that are smaller, but also significant. Metropolitan**  
 7 **has a melded power rate, and this melded power is much**  
 8 **lower because it is a beneficiary of long-term**  
 9 **hydroelectric power contracts we have with Hoover Dam,**  
 10 **Parker Dam, and on the State Water Project with**  
 11 **Hyatt-Thermalito Generating Station. That hydroelectric**  
 12 **power, which is essentially at cost, is significantly**  
 13 **below the market rate and our members get the benefit of**  
 14 **that melded power.**  
 15 **San Diego wanted that and that is something**  
 16 **they negotiated for.**  
 17 Q. I want to make sure we are clear. The wheeler  
 18 doesn't get melded power?  
 19 **A. No.**  
 20 Q. The wheeler pays market rate?  
 21 **A. Yes.**  
 22 **A third benefit would be because, by virtue of**  
 23 **the exchange agreement, Metropolitan takes the water at**  
 24 **our -- at our system, at Lake Havasu, at our intake. We**  
 25 **then, it being Metropolitan's water, we take all the**

1310

1 **carriage losses. There is water that's lost to**  
 2 **evaporation and system loss, and those losses now accrue**  
 3 **to Metropolitan.**  
 4 **If San Diego's transfer with IID calls for**  
 5 **100,000 acre-feet, they get delivered 100,000 acre-feet**  
 6 **credit, even though there has been losses that have**  
 7 **occurred. Those now are Metropolitan's losses.**  
 8 Q. Sir, are you saying if a wheeler would  
 9 typically -- there would be a deduction between the  
 10 amount of water the wheeler made available and the  
 11 amount of water at the other end that was delivered?  
 12 **A. Yes. When we have had wheeling arrangements**  
 13 **with San Diego and with others on our state project**  
 14 **system, we have debited those losses from their**  
 15 **transfer.**  
 16 Q. By contrast, under this exchange agreement,  
 17 your testimony is, I take it, the amount they make  
 18 available or deem available -- a topic we will talk  
 19 about in a second -- is the amount that's delivered?  
 20 MR. PURCELL: Objection. Leading.  
 21 THE COURT: It is leading.  
 22 I'll overrule it in this is case.  
 23 There have been quite a lot of leading  
 24 questions. I tend to allow them, obviously, when it's  
 25 undisputed material but some of the stuff is very

1311

1 obviously leading.  
 2 Go ahead, please.  
 3 MR. EMANUEL: I am trying to be efficient. I  
 4 can do it the other way.  
 5 Q. We talk about guaranteed space, carriage  
 6 losses, power. What about water quality?  
 7 **A. A couple other benefits, one of them being**  
 8 **water quality. The Water Authority gets access to --**  
 9 **because it becomes our water, we deliver to them**  
 10 **Metropolitan water. This is our -- Colorado River water**  
 11 **is higher in salinity than our State project water and**  
 12 **we have a blending policy at Metropolitan.**  
 13 **So what San Diego is receiving is blended**  
 14 **water, not pure Colorado River water that's being made**  
 15 **available by IID, but it is actually blended water. And**  
 16 **that has a significant water quality benefit which has a**  
 17 **significant financial benefit because it really cuts**  
 18 **down on corrosion, et cetera.**  
 19 **But another major benefit is the advantage of**  
 20 **Metropolitan's regulating capacity.**  
 21 **What that means is when IID conserves water,**  
 22 **it's usually doing it in the agricultural season. So it**  
 23 **doesn't necessarily match up with San Diego's demands**  
 24 **for an urban area. So as the water is conserved**  
 25 **throughout the course of the year, what we've agreed to**

1312

1 **do is Metropolitan will just, based on the contract**  
 2 **amount San Diego has with IID, we will deliver 1-12th of**  
 3 **that water every single month through Metropolitan's**  
 4 **regulating capacity and its facilities. And the water**  
 5 **may not be available yet from IID when we make those**  
 6 **deliveries. At some point it may catch up and at some**  
 7 **point it may get ahead.**  
 8 **All of that we take that onto ourselves and**  
 9 **regulate the deliveries from IID and make deliveries to**  
 10 **the Water Authority in 1/12th equal installments**  
 11 **regardless of whether it actually shows up from IID.**  
 12 Q. The contract uses the phrase "deemed made  
 13 available"; correct?  
 14 A. Yes, sir.  
 15 Q. Your explanation is that is different from  
 16 actually being made available?  
 17 A. Yes.  
 18 Q. What is the difference between "deemed made  
 19 available" and "actually made available"?  
 20 A. We don't actually know when that water has been  
 21 made available by IID exactly. They have to go and  
 22 conserve it. And then they have to prove up what they  
 23 conserved to the Bureau of Reclamation. It does an  
 24 accounting process to confirm it's actually been  
 25 conserved.

1313

1 explained between wheeling and this exchange agreement  
 2 was the power rate.  
 3 A. Yes.  
 4 Q. The wheeling agreement, I think you said, would  
 5 have been at the market and the exchange agreement was  
 6 the system power rate; is that right?  
 7 A. Correct.  
 8 Q. Who asked for the system power rate to be part  
 9 of the price?  
 10 A. San Diego.  
 11 Q. Did they give a reason why they wanted the  
 12 system power rate?  
 13 A. It was cheaper.  
 14 Q. At the time they requested the system power  
 15 rate, had it been disclosed to the member agencies, the  
 16 component of the system power rate?  
 17 A. Yes.  
 18 Q. And by that I mean -- and one of those  
 19 components was?  
 20 A. It was both -- it was really all of  
 21 Metropolitan's power costs, which includes actually what  
 22 we are paying the State Water Project to deliver water,  
 23 as well.  
 24 Q. You are familiar with the contract that says  
 25 that they will -- that Metropolitan would charge lawful

1315

1 **All those things don't happen in realtime.**  
 2 **They happen down the road.**  
 3 **We're making the deliveries in realtime to San**  
 4 **Diego, deeming that it's made available, and then we'll**  
 5 **adjust the accounting later.**  
 6 Q. Please contrast that with what would happen  
 7 with a wheeling contract.  
 8 A. With a wheeling, the water would actually have  
 9 to be delivered to Metropolitan. We would have to be  
 10 able to measure it, meter it, and then we would deliver  
 11 that amount, minus any losses.  
 12 MR. EMANUEL: May I have two minutes?  
 13 THE COURT: Did you want to take a little  
 14 recess?  
 15 MR. EMANUEL: A short one, just to make sure I  
 16 covered everything.  
 17 THE COURT: Is it a minute or five minutes?  
 18 MR. EMANUEL: Five minutes would be better.  
 19 THE COURT: Five minutes it is. Let's take a  
 20 five-minute recess.  
 21 (Recess.)  
 22 THE COURT: Anything else on direct?  
 23 MR. EMANUEL: Just a couple. Although every  
 24 attorney says that and it turns out to be more.  
 25 Q. Mr. Kightlinger, one of the differences you

1314

1 conveyance rates; correct?  
 2 A. Yes.  
 3 Q. At the time of this negotiation, at the  
 4 establishment of these rates, did you, sir, have any  
 5 doubt as to the lawfulness of the rates?  
 6 A. No. We can only charge lawful rates.  
 7 Q. At the time of this negotiation, did Mr. Slater  
 8 come to you and say, "I'm only going to do this but  
 9 realize, Mr. Kightlinger, after five years there's going  
 10 to be a lawsuit"?  
 11 A. No.  
 12 Q. What would have happened if you had -- someone  
 13 had come to you and said, "We have a problem here.  
 14 These rates aren't lawful"?  
 15 THE COURT: You mean during the negotiations?  
 16 MR. EMANUEL: Yes.  
 17 Q. Would we have a deal?  
 18 A. No. We would not have had a deal.  
 19 MR. EMANUEL: Your Honor, no more questions.  
 20 Thank you.  
 21 THE COURT: Thank you. Cross-examination.  
 22  
 23 CROSS-EXAMINATION  
 24 BY MR. PURCELL:  
 25 Q. Good afternoon, Mr. Kightlinger.

1316

1 **A. Good afternoon.**  
 2 Q. My name is Dan Purcell. I'll be asking you a  
 3 few questions today.  
 4 I am going to start off by doing something your  
 5 counsel didn't do, and we will actually look at the  
 6 contract.  
 7 MR. PURCELL: So, Ben, if I could get PTX 65 up  
 8 on the screen. Before I do that, I actually have a  
 9 binder.  
 10 Can we go to page 16, Section 5.2.  
 11 Q. Mr. Kightlinger, this is the price term of the  
 12 2003 exchange agreement; correct?  
 13 **A. Yes.**  
 14 Q. And I'm reading the second sentence. There's  
 15 language in this section that says, "Thereafter, after  
 16 the first year, the price shall be equal to the charge  
 17 or charges set by Metropolitan's Board of Directors  
 18 pursuant to applicable law and regulation and generally  
 19 applicable to conveyance of water by Metropolitan on  
 20 behalf of its member agencies."  
 21 Do you see that? Do you see that language that  
 22 is highlighted?  
 23 **A. Yes.**  
 24 Q. You were testifying for an hour or so. You  
 25 didn't mention this language, did you?

1317

1 **A. No.**  
 2 Q. We didn't discuss that.  
 3 This language requires Metropolitan's Board of  
 4 Directors to set charges that are pursuant to applicable  
 5 law and regulation; correct?  
 6 **A. Yes.**  
 7 Q. And generally applicable to conveyance of water  
 8 by member agencies?  
 9 **A. Yes. That part, yes.**  
 10 Q. This contract requires Metropolitan to set a  
 11 lawful rate; correct?  
 12 **A. We have to set a lawful rate. We cannot set**  
 13 **unlawful rates.**  
 14 Q. Are you saying it is impossible for  
 15 Metropolitan to set an unlawful rate?  
 16 **A. Yes. It would -- we might be mistaken, but we**  
 17 **cannot go out and set unlawful rates.**  
 18 THE COURT: I don't understand exactly what  
 19 you're saying. You are saying no matter what you do, by  
 20 definition, it can't be unlawful if Met does it?  
 21 THE WITNESS: I am saying we can't go out and  
 22 say we will set an unlawful rate. We may be mistaken as  
 23 to what the law is, but we can't go out and set an  
 24 unlawful rate as something we intend to do.  
 25 Q. BY MR. PURCELL: This isn't a specific intent

1318

1 crime. I am not trying to establish a mens rea here.  
 2 Met can set an unlawful rate even if it doesn't  
 3 intend to; correct?  
 4 **A. It could be mistaken, yes.**  
 5 Q. It could include costs and certain rates that  
 6 don't belong there, and that could render those rates  
 7 unlawful; correct?  
 8 **A. That's correct.**  
 9 Q. That is what this term prohibits Met from  
 10 doing; correct?  
 11 **A. I still would say we are prohibited from doing**  
 12 **it either by this term or just by general law.**  
 13 Q. This term gives San Diego contract remedies in  
 14 the event that Met sets an unlawful rate; correct?  
 15 **A. I don't see anything in here about a remedy.**  
 16 **It just says we will set our rates pursuant to**  
 17 **applicable law and regulation.**  
 18 Q. This term here gives San Diego a right under  
 19 the contract to have Met set a lawful rate?  
 20 MR. EMANUEL: Objection. This is argument and  
 21 seeking a legal opinion.  
 22 THE COURT: Overruled for now.  
 23 Q. BY MR. PURCELL: You are a lawyer; correct?  
 24 **A. Yes.**  
 25 Q. At the time --

1319

1 MR. EMANUEL: I am going to object. He is not  
 2 here as a lawyer. He is here as a percipient witness.  
 3 THE COURT: Understood. The fact that he is a  
 4 lawyer, it is not objectionable to extract that  
 5 information.  
 6 Q. BY MR. PURCELL: In fact, when this contract  
 7 was negotiated, you were Metropolitan's general counsel?  
 8 **A. That's correct.**  
 9 Q. You were the top lawyer within the Metropolitan  
 10 organization?  
 11 **A. Yes.**  
 12 Q. You had other lawyers at Metropolitan working  
 13 for you?  
 14 **A. Correct.**  
 15 Q. You were their boss?  
 16 **A. Correct.**  
 17 Q. And you were the lead negotiator on this  
 18 contract for Metropolitan; correct?  
 19 **A. Along with Dennis Underwood.**  
 20 Q. Along with Dennis Underwood.  
 21 Your testimony is, as I gathered from your  
 22 direct, that this price term sets a guaranteed price; it  
 23 provides a price guarantee for Metropolitan for 45 and  
 24 potentially for 75 years; is that right?  
 25 **A. It would be inflated by time. So that's how we**

1320



1 **would -- that's what was the purpose of this sentence,**  
 2 **it was how that would go up.**  
 3 Q. Was to provide a guaranteed price that San  
 4 Diego would have to pay to Metropolitan for conveyance  
 5 for up to 75 years?  
 6 **A. As --**  
 7 Q. That's your testimony about what this means?  
 8 **A. Yes.**  
 9 Q. All right. Could we go to Section 11.1. I  
 10 think it's page 27.  
 11 THE COURT: Page 24.  
 12 MR. PURCELL: Twenty-four. Thank you, your  
 13 Honor.  
 14 Q. Mr. Kightlinger, this section is called  
 15 "Dispute Resolution"; correct?  
 16 **A. Yes.**  
 17 Q. It provides for various things the parties have  
 18 to do in the event there is a dispute?  
 19 **A. Yes.**  
 20 Q. One of the things, in fact, the only specific  
 21 type of dispute that this section culls out is price  
 22 disputes; correct?  
 23 **A. Yes.**  
 24 Q. Why would you need to have a dispute resolution  
 25 section dealing with price disputes if the contract was

1321

1 designed to provide a guaranteed price for 75 years?  
 2 **A. Disputes arise, and we wouldn't have to have --**  
 3 **it -- it is usually a good form to have a dispute**  
 4 **resolution process when they arise.**  
 5 Q. Even though the contract was designed and  
 6 understood by the parties, in your testimony, to provide  
 7 for a guaranteed price for 75 years, there still might  
 8 be a price dispute?  
 9 **A. Correct.**  
 10 Q. This section talks about the five-year window  
 11 that we were discussing earlier. "San Diego shall not  
 12 dispute whether the price determined pursuant to  
 13 paragraph 5.2 for the first five years of this agreement  
 14 was determined in accordance with applicable law or  
 15 regulation."  
 16 Do you see that language?  
 17 **A. I do.**  
 18 Q. San Diego is entitled to raise the price  
 19 dispute after the first five years?  
 20 **A. They are entitled to -- certainly, if we made**  
 21 **changes to the structure, they are entitled to bring**  
 22 **that up as part of the dispute, yes.**  
 23 Q. There is nothing in this section that refers to  
 24 changes in the structure, is there?  
 25 **A. No. I think you have to go back to the other**

1322

1 **section.**  
 2 Q. All right. We will do that in a minute. In  
 3 this section there is no mention of changes to the rate  
 4 structure; correct?  
 5 **A. No.**  
 6 Q. There is nothing about San Diego being only  
 7 able to challenge a newly set price as opposed to the  
 8 older price?  
 9 **A. No. There's nothing in there. It doesn't say**  
 10 **that.**  
 11 Q. In this section there is no limitation  
 12 whatsoever on San Diego's ability to raise the price  
 13 dispute other than the five-year timeout; correct?  
 14 MR. EMANUEL: Object to the phrase, "five-year  
 15 timeout" is argumentative, your Honor.  
 16 THE COURT: Sorry?  
 17 MR. EMANUEL: Counsel is arguing by calling it  
 18 a five-year timeout.  
 19 THE COURT: You know, I can keep the positions  
 20 of the parties straight.  
 21 The objection is overruled.  
 22 THE WITNESS: What was the question?  
 23 Q. BY MR. PURCELL: The question is: There is no  
 24 limitation in this section whatsoever on San Diego's  
 25 ability to raise a price dispute other than the

1323

1 five-year timeout; correct?  
 2 **A. That is correct.**  
 3 Q. Let's go back to 5.2 on 16 and 17. I think  
 4 your testimony, Mr. Kightlinger, is to understand that  
 5 this -- San Diego's ability to challenge pricing would  
 6 be limited to new rate structures. I think you said  
 7 that you need to look at this section to make that  
 8 conclusion.  
 9 Is that your testimony earlier, a couple  
 10 minutes ago?  
 11 **A. It was that you should look at this section in**  
 12 **conjunction with the other.**  
 13 Q. There is nothing in this section, is there,  
 14 Mr. Kightlinger, that talks about new rate structures?  
 15 **A. It talks -- I am not quite sure how to point it**  
 16 **out to you, but if you talk through the second proviso,**  
 17 **halfway through on page 17, "provided, however, that**  
 18 **Metropolitan may at any time amend the Administrative**  
 19 **Code in accordance with paragraphs 13.12, the**  
 20 **Administration Code thereby amended shall be included**  
 21 **within the foregoing restriction."**  
 22 **The reference in the Administrative Code was to**  
 23 **changing Metropolitan's pricing.**  
 24 Q. There is nothing that says that San Diego can  
 25 only sue if Metropolitan changed its rate structure.

1324

1 Where does it say that?  
 2 **A. That proviso is saying that.**  
 3 MR. PURCELL: Can we scroll down, Ben? Can you  
 4 scroll up a little bit so we can see the remainder of  
 5 the section on the screen?  
 6 Q. The proviso immediately after that says, "And  
 7 provided further, A, after the conclusion of the first  
 8 five years, nothing herein shall preclude San Diego from  
 9 contesting an administrative or judicial forum whether  
 10 such charge or charges have been set in accordance with  
 11 applicable law and regulation."  
 12 Do you see that?  
 13 **A. Yes, sir.**  
 14 Q. That sentence says that nothing in this section  
 15 shall limit San Diego's ability to challenge the price  
 16 after five years. Isn't that what it says, the plain  
 17 language? Yes?  
 18 **A. That's what that part says, and then you have**  
 19 **to read it in conjunction with the whole sentence.**  
 20 Q. The part I just read, Mr. Kightlinger, says  
 21 "Nothing herein shall limit San Diego's ability to  
 22 challenge whether Met has set its price in accordance  
 23 with applicable law and regulation."  
 24 "Nothing herein," that's the language; correct?  
 25 **A. And if you go to the top of it, it says, "For**

1325

1 **the term of this agreement."**  
 2 **Now you're saying "Metropolitan shall seek or**  
 3 **support any legislative, administrative, or judicial**  
 4 **forum, any change in the form, substance or**  
 5 **interpretation of any applicable law or regulation**  
 6 **including the admin code, which is where our rate**  
 7 **structure is placed, in effect, on the date of this**  
 8 **agreement, pertaining to the charges or charges set by**  
 9 **Metropolitan's Board of Directors generally applicable**  
 10 **to the conveyance of water by Metropolitan."**  
 11 Q. And then there's a proviso that carves out from  
 12 that and says, "Nothing herein shall preclude San Diego  
 13 from challenging in an administrative or judicial forum  
 14 whether Met's charges have been set in accordance with  
 15 applicable law."  
 16 **A. There is the second proviso first that says,**  
 17 **"Metropolitan may amend it -- may amend its**  
 18 **Administrative Code."**  
 19 Q. Nobody is saying they can't.  
 20 **A. I understand that. That is what the second**  
 21 **proviso says.**  
 22 MR. EMANUEL: Your Honor, Counsel is  
 23 interrupting the answer.  
 24 THE COURT: What is happening is the witness  
 25 isn't answering the question, so counsel is getting

1326

1 frustrated.  
 2 Just ask a question and I want you to just --  
 3 if you can answer it yes or no, and if that isn't fair,  
 4 you can explain it.  
 5 Q. BY MR. PURCELL: This allows Metropolitan to  
 6 amend its Administrative Code; correct?  
 7 **A. The second proviso, yes.**  
 8 Q. The first proviso under -- regardless of  
 9 whether Met can amend its Administrative Code, this  
 10 section provides that nothing in the section shall  
 11 preclude San Diego from raising a challenge under  
 12 applicable law after five years?  
 13 **A. The first part does say that.**  
 14 Q. It does. "Nothing herein" means nothing else  
 15 in this section shall restrict San Diego from doing  
 16 that?  
 17 **A. Well, actually, I disagree with that. I**  
 18 **actually think those three sections actually lay out a**  
 19 **process by which San Diego and Metropolitan both have to**  
 20 **follow.**  
 21 Q. How does that process work, Mr. Kightlinger?  
 22 **A. So, for the term of the agreement, neither San**  
 23 **Diego nor Metropolitan may challenge the rate structure.**  
 24 **Neither party. That is that first sentence.**  
 25 **The second part does say that Metropolitan may**

1327

1 **amend its admin code, changing its price structure at**  
 2 **some point in the future.**  
 3 **The third part says that after five years San**  
 4 **Diego may challenge that.**  
 5 Q. So your view is that the third part is limited  
 6 to challenges to what is authorized -- Metropolitan is  
 7 authorized to do in the second part?  
 8 **A. Yes.**  
 9 Q. And was that communicated to San Diego?  
 10 **A. These were the discussions I had with**  
 11 **Mr. Slater, where he said San Diego has no intention of**  
 12 **challenging our rate structure. We are concerned,**  
 13 **though, that Metropolitan may make changes to its rate**  
 14 **structure in the future.**  
 15 Q. So your position, Mr. Kightlinger, is that the  
 16 language "nothing herein" doesn't have any meaning; it  
 17 is meaningless and surplusage?  
 18 **A. No. I believe it just has to be read in**  
 19 **context with the rest of the provisions above it.**  
 20 Q. It refers to the other provisions above it when  
 21 it says "nothing herein." It provides that the other  
 22 provisions above it don't apply. Correct?  
 23 **A. That's what the words say, "Nothing herein." I**  
 24 **still think they have to be read together in the three**  
 25 **sections.**

1328

1 Q. Mr. Kightlinger, I think you testified --  
 2 strike that.  
 3 Let me do something else first. You were  
 4 supported in the negotiations of the 2003 exchange  
 5 agreement by a gentleman named Brian Thomas?  
 6 **A. Correct.**  
 7 Q. He was Metropolitan's chief financial officer?  
 8 **A. Yes, sir.**  
 9 Q. He was Met's CFO until when, 2010, 2011?  
 10 **A. About 2010, I believe.**  
 11 Q. He was a long-time Met employee?  
 12 **A. Correct.**  
 13 Q. And you trusted him?  
 14 **A. Yes.**  
 15 Q. And he was intimately familiar with the  
 16 negotiations on Met's side?  
 17 **A. Yes.**  
 18 Q. And you would have kept him informed about  
 19 important deal points --  
 20 **A. Yes.**  
 21 Q. -- related to the exchange agreement?  
 22 Were you aware that Mr. Thomas was  
 23 Metropolitan's person most knowledgeable in this case to  
 24 testify about issues related to the negotiations of the  
 25 exchange agreement?

1329

1 **A. Yes.**  
 2 Q. You were still the Metropolitan general manager  
 3 when Mr. Thomas was designated; correct?  
 4 **A. Yes.**  
 5 Q. You were comfortable with Mr. Thomas being  
 6 designated as the person most knowledgeable?  
 7 **A. Yes.**  
 8 Q. You thought he understood the issues and would  
 9 give accurate testimony?  
 10 **A. Yes.**  
 11 Q. I would like to read from Mr. Thomas'  
 12 deposition.  
 13 MR. EMANUEL: I don't think this is impeachment  
 14 or anything to do with this witness. He is just reading  
 15 depo transcripts which I believe, if I'm not mistaken,  
 16 are in evidence. He can read them at any time.  
 17 MR. PURCELL: Your Honor, the deposition of a  
 18 party can be used for any purpose.  
 19 MR. EMANUEL: Of course it can be used for any  
 20 purpose.  
 21 MR. PURCELL: That is what I want to do.  
 22 MR. EMANUEL: We have a witness on the stand.  
 23 I do not think it is courteous to the witness to be  
 24 reading depo transcripts.  
 25 THE COURT: My guess is there may be a question

1330

1 after he reads this into the record. He may have  
 2 questions.  
 3 MR. EMANUEL: I hope it's a question of did I  
 4 read that correctly.  
 5 THE COURT: I do, too.  
 6 Let's go ahead, Please.  
 7 MR. PURCELL: Thank you.  
 8 I would like to read from Mr. Thomas'  
 9 deposition from page 122, line six to page 124, line 25.  
 10 THE COURT: I don't have that in front of me.  
 11 You have it there on the screen.  
 12 MR. PURCELL: (Reading:)  
 13 "Q And Metropolitan's  
 14 understanding at the time it  
 15 signed the exchange agreement  
 16 was that after five years the  
 17 Water Authority could file a  
 18 lawsuit to challenge its  
 19 rates."  
 20 There is an objection.  
 21 "A That's what it said, that  
 22 the Water Authority would be  
 23 afforded that opportunity to  
 24 address its concerns.  
 25 "Q That was Met's

1331

1 understanding at the time it  
 2 signed the exchange agreement?  
 3 "A Yes. And that's what it  
 4 says.  
 5 "Q So this Section 5.2 allows  
 6 the Water Authority to do what  
 7 it has done in this case so  
 8 long as it waited five years to  
 9 do so?  
 10 "A Yes.  
 11 "Q Now I want to draw your  
 12 attention to Section 11.1,  
 13 which is on page -- it looks  
 14 like you found it before I did.  
 15 Section -- page 24. This is a  
 16 paragraph under a heading  
 17 called 'Dispute Resolution';  
 18 right?  
 19 "A Yes.  
 20 "Q Okay. And this paragraph  
 21 also includes the language that  
 22 "Provided, however, that SDCWA  
 23 shall not dispute whether the  
 24 price determined pursuant to  
 25 paragraph 5.2 for the first

1332

1 five years of this agreement  
 2 was determined in accordance  
 3 with applicable law or  
 4 regulation."  
 5 "That's what -- that's what it  
 6 says. My question is: Why did  
 7 -- why did the parties put this  
 8 language in Section 11.1, as  
 9 well?  
 10 "A I believe this section was  
 11 intended to encourage the  
 12 parties to try and resolve any  
 13 price disputes either through  
 14 negotiation or other forums,  
 15 but clearly that -- it provided  
 16 that if that failed, San Diego  
 17 still had its -- the rights  
 18 that were provided to it in the  
 19 prior section.  
 20 "Q Section 11.1 makes clear  
 21 that the Water Authority could  
 22 only do that, could only  
 23 challenge the determination of  
 24 price under the exchange  
 25 agreement after five years;

1333

1 correct?  
 2 "A Well, it says San Diego  
 3 shall not dispute whether the  
 4 price determined for the first  
 5 five years is determined in  
 6 accordance with applicable law.  
 7 It could raise issues, could  
 8 raise concerns, could have and  
 9 often did raise issue with how  
 10 rates and charges were  
 11 assessed. But after five years  
 12 they could avail themselves of  
 13 legal remedies."  
 14 Q. My question, Mr. Kightlinger, is Mr. Thomas  
 15 wrong?  
 16 **A. I would reach a different conclusion than**  
 17 **Mr. Thomas on some of his points. On some of them they**  
 18 **are pretty fair.**  
 19 MR. PURCELL: I would like to read to you  
 20 another section of Mr. Thomas' deposition, page 135,  
 21 line 17 through page 136, line 16.  
 22 (Reading:)  
 23 "Q As of February 2003, the  
 24 Water Authority had raised  
 25 concerns about Metropolitan's

1334

1 allocation of sister -- State  
 2 Water Project costs to  
 3 Metropolitan's system access  
 4 rate; right?  
 5 "A Yes, in this letter.  
 6 "Q The five-year limitation  
 7 on the Water Authority's  
 8 ability to file a lawsuit was  
 9 aimed at delaying -- or strike  
 10 that.  
 11 In seeking or obtaining, as  
 12 part of the exchange agreement,  
 13 the five-year limitation on  
 14 filing a lawsuit, Metropolitan  
 15 prevented the Water Authority  
 16 from filing a lawsuit about  
 17 State Water Project costs for  
 18 five years; isn't that right?  
 19 "A Yeah. It was agreed they  
 20 would not file a lawsuit, but  
 21 they could raise their concerns  
 22 and they obviously did.  
 23 "Q But they wouldn't be able  
 24 to file a lawsuit concerning  
 25 this issue for five years?

1335

1 "A But they could point out  
 2 if it were legal or not legal;  
 3 they just couldn't file a  
 4 lawsuit."  
 5 Q. Mr. Kightlinger, the Water Authority had been  
 6 objecting about Metropolitan --  
 7 MR. EMANUEL: I am going to object and move to  
 8 strike. There wasn't a question at the end of all that.  
 9 THE COURT: I think we are going to have a  
 10 question.  
 11 MR. PURCELL: I was in the middle of a  
 12 question.  
 13 Q. Mr. Kightlinger, the Water Authority had been  
 14 objecting to Metropolitan's inclusion of State Water  
 15 Project costs in its transportation rates for years by  
 16 this point, hadn't it?  
 17 **A. At which point?**  
 18 Q. 2003, when they signed the exchange agreement.  
 19 MR. EMANUEL: I'm sorry, your Honor. I need to  
 20 make sure there is clarity. The transcript referred to  
 21 February 2003 and now counsel has jumped forward to the  
 22 end of 2003. I think there should be -- a time frame  
 23 should be specified.  
 24 THE COURT: Overruled.  
 25 Go ahead.

1336

1 THE WITNESS: Can you repeat the question?  
 2 Q. BY MR. PURCELL: Mr. Kightlinger, by the time  
 3 the exchange agreement was being negotiated, let's start  
 4 in early 2003, the Water Authority had been complaining  
 5 about Metropolitan's allocation of the State Water  
 6 Project costs through its transportation rates for  
 7 years, hadn't it.  
 8 **A. They complained when we were unbundling the**  
 9 **rates, yes.**  
 10 Q. Metropolitan was aware, because the Water  
 11 Authority had made them aware, that the Water Authority  
 12 viewed Metropolitan State Water Project costs as supply  
 13 costs; correct?  
 14 **A. During the unbundling process they made that**  
 15 **point, yes. They felt it should -- all the State Water**  
 16 **Project costs should go into the supply rate.**  
 17 Q. Rather than the transportation rates?  
 18 **A. Rather than being divvied up into different**  
 19 **bundles, the electricity, the electric rate, the**  
 20 **transportation and so forth.**  
 21 Q. So do you agree with Mr. Thomas that after five  
 22 years the Water Authority would be able to file a  
 23 lawsuit based on its concerns about Metropolitan's  
 24 allocation of the State Water Project cost through  
 25 transportation rates?

1337

1 Mr. Kightlinger: There wasn't a single piece of paper  
 2 transmitted from the Water Authority to Metropolitan  
 3 where the Water Authority said we're waiving all our  
 4 previous objections to State Water Project costs and we  
 5 will pay them on the transportation rates going forward?  
 6 **A. They never said we are waiving anything. They**  
 7 **did say we will pay those costs.**  
 8 Q. I think your testimony on direct was that  
 9 Mr. Slater agreed to pay, quote, full conveyance costs,  
 10 unquote, of Metropolitan?  
 11 **A. Yes.**  
 12 Q. That was the phrase you used, "full conveyance  
 13 costs"?  
 14 **A. When I testified moments ago?**  
 15 Q. Yes.  
 16 **A. That is my recollection. That's the phrase I**  
 17 **used.**  
 18 Q. That is what you say Mr. Slater told you;  
 19 right? You used that phrase, "full conveyance costs"?  
 20 **A. Basically, full costs for moving water. I**  
 21 **don't exactly know exactly what words he used.**  
 22 Q. That's what the deal was --  
 23 **A. Yes.**  
 24 Q. -- full conveyance costs?  
 25 **A. Yes.**

1339

1 **A. No.**  
 2 Q. And that is because --  
 3 MR. EMANUEL: Your Honor, objection.  
 4 THE COURT: Had you finished answering?  
 5 THE WITNESS: No.  
 6 THE COURT: Let's finish the answer first.  
 7 MR. EMANUEL: Could I ask the witness be --  
 8 THE COURT: Do you have the question in mind?  
 9 THE WITNESS: I have the question in mind.  
 10 THE COURT: We have the question in mind.  
 11 THE WITNESS: No. The Water Authority  
 12 basically said Option-2 is that we will agree to pay  
 13 your costs as proposed by Metropolitan, and we will put  
 14 down our objections to issues like such as the State  
 15 Water project, et cetera. We would agree to how you  
 16 construct your conveyance charges. That was their  
 17 option. It was their proposal.  
 18 Q. BY MR. PURCELL: That was never communicated to  
 19 Metropolitan in writing, was it?  
 20 **A. What we did when we developed Option-2 is Scott**  
 21 **Slater and I sat down and prepared a term sheet. And**  
 22 **they were emailed to that effect, where he basically**  
 23 **laid out what Option-2 and the various components were.**  
 24 Q. I have those emails and will be showing them to  
 25 you in a second. What I am saying to you,

1338

1 MR. PURCELL: Could we have PTX 56 up on the  
 2 screen.  
 3 Q. Mr. Kightlinger, this a February 19, 2003,  
 4 email sent on your behalf to Brian Thomas.  
 5 Do you see that?  
 6 **A. Yes.**  
 7 Q. And it forwards a proposal from Scott Slater?  
 8 **A. Okay.**  
 9 Q. Is that accurate?  
 10 **A. All I see is it says San Diego's latest**  
 11 **proposal.**  
 12 Q. And then the email that is attached to it, the  
 13 subject line is from Scott Slater?  
 14 **A. Yes, from Pam Wilson.**  
 15 Q. It is sent by someone who worked for Hatch and  
 16 Parent, which is Mr. Slater's firm at the time?  
 17 **A. Yes.**  
 18 Q. You don't have any reason to disbelieve that  
 19 this is Mr. Slater's proposal to you, do you?  
 20 **A. No.**  
 21 Q. Could you look at the next page. Just looking  
 22 at the heading there, this is titled "SDCWA Proposal to  
 23 Address Exchange Agreement Issues, PDID Costs and Term  
 24 Years 31 to 45."  
 25 Do you see that?

1340

1           **A. Yes.**  
 2           Q. You mentioned that was one of the issues the  
 3 parties were trying to resolve in early 2003 was  
 4 matching up the terms of the IID agreement with the  
 5 exchange agreement?  
 6           **A. Yes.**  
 7           Q. Let's go to the next page. And, actually,  
 8 let's go -- sorry -- to the page after that. There is a  
 9 heading midway down the page that says "Term."  
 10           This is Mr. Slater's proposal on how to true up  
 11 the terms of the IID transfer agreement with the  
 12 exchange agreement; correct?  
 13           **A. This was never adopted, so I would have to read**  
 14 **through it and remember. I assume that is what it says.**  
 15           Q. Let me know when you're done.  
 16           MR. EMANUEL: I'm sorry. Which parts?  
 17           THE COURT: He is looking at the section called  
 18 "Term." It's on the third page of the proposal. It's  
 19 on the third page of the proposal. Go ahead.  
 20           MR. EMANUEL: All the paragraphs?  
 21           THE COURT: He wants him to give it a scan and  
 22 tell him when he's ready.  
 23           MR. PURCELL: This is in evidence, by the way.  
 24 I wanted to make that statement.  
 25           MR. EMANUEL: Your Honor, I haven't seen an

1341

1 indication by the witness he finished reading it.  
 2           THE COURT: He has. He so indicated with a  
 3 gesture with his head. Let's proceed.  
 4           Q. BY MR. PURCELL: Taking a look at paragraph C,  
 5 at the very bottom of the page, Mr. Slater writes, "If  
 6 the financial equivalency of the exchange fee  
 7 established by an independent DWR review is no greater  
 8 than 15 percent of the lawful wheeling rate generally  
 9 equivalent to the continuation of the exchange rate  
 10 identified in the exchange agreement described in the  
 11 IID/SDCWA transfer, then San Diego will agree to pay the  
 12 exchange fee," and it goes on.  
 13           Mr. Slater, here in this proposal, is using the  
 14 phrase "lawful wheeling rate" to describe the proposed  
 15 charge that Metropolitan will levy; correct?  
 16           **A. Yes.**  
 17           Q. And in fact, he specifies that the lawful  
 18 wheeling rate in his view should be defined as generally  
 19 equivalent to the continuation of the exchange rate  
 20 identified in the exchange agreement; correct?  
 21           **A. That is his proposal.**  
 22           Q. And there is nothing in there about lawful  
 23 conveyance costs or -- full conveyance costs, is there?  
 24           **A. Not in this proposal.**  
 25           Q. I would like to show you PTX 398.

1342

1 Mr. Kightlinger, there appears to be an email from Brian  
 2 Thomas to you and Kathy Cole dated February 19, 2003.  
 3 Do you see that?  
 4           **A. Yes.**  
 5           MR. PURCELL: I would like to admit PTX 398  
 6 into evidence.  
 7           MR. EMANUEL: I am going to object to relevancy  
 8 grounds with the proposal of February 2003. That is not  
 9 what the parties agreed to. I didn't see any connection  
 10 to the suit.  
 11           THE COURT: I think people are introducing a  
 12 lot more documents than just the specific ones that  
 13 happen to be the agreement. People are looking at  
 14 documents that are evidence to what people are thinking  
 15 at the time.  
 16           Are you objecting because this isn't actually  
 17 the agreement?  
 18           MR. EMANUEL: I am objecting it is irrelevant  
 19 because we are talking about a proposal prior to the  
 20 Option-1, Option-2 which is the issue in this case.  
 21           THE COURT: Objection is overruled. 398 is  
 22 admitted.  
 23 (Exhibit 398 was received into evidence.)  
 24           MR. PURCELL: I was mistaken. PTX 56, the  
 25 prior e-mail is not in evidence. I would like to move

1343

1 that in.  
 2           THE COURT: Any objection?  
 3           MR. EMANUEL: The same objections. I would  
 4 submit, your Honor.  
 5           THE COURT: Same ruling. Fifty-six is  
 6 admitted.  
 7 (Exhibit 56 was received into evidence.)  
 8           Q. BY MR. PURCELL: This is Mr. Thomas writing to  
 9 you. The subject line is "Latest Slater Proposal."  
 10           **A. Yes.**  
 11           Q. This is later in the same day as the previous  
 12 email that you sent, PTX 56, transmitting Mr. Slater's  
 13 proposal?  
 14           **A. Yes.**  
 15           Q. Mr. Thomas, at the end of paragraph A, writes,  
 16 "It is clear where SDCWA is headed when they write that  
 17 the, quote, 'lawful wheeling rate generally equivalent  
 18 to the continuation of the exchange rate identified in  
 19 the exchange agreement,'" end quote.  
 20           That's the language I read earlier from  
 21 Mr. Slater's proposal; correct?  
 22           **A. I think so, yes.**  
 23           Q. That's the language where Mr. Slater defines  
 24 the lawful wheeling rate as generally equivalent to the  
 25 exchange rate in the prior exchange agreement?

1344

1 **A. Right.**  
 2 Q. Mr. Thomas concludes, "This implies they  
 3 believe that any rate different than the favorable rate  
 4 they have received is not lawful and they are already  
 5 arguing their case in their proposal."  
 6 Do you see that?  
 7 **A. I do.**  
 8 Q. This is an email from you to Dennis Underwood  
 9 and Brian Thomas forwarding an email from Scott Slater?  
 10 **A. Yes.**  
 11 Q. The date is August 27, 2003?  
 12 **A. Yes.**  
 13 Q. This was during the negotiations and what  
 14 became the final 2003 exchange agreement?  
 15 **A. Correct.**  
 16 Q. It was three weeks or a month or so before it  
 17 got approved?  
 18 **A. Yes.**  
 19 Q. So here Mr. Slater is giving you a number of  
 20 deal points. And this does relate to the Option-2  
 21 proposal on the canal line; correct?  
 22 **A. Not this part here, but maybe further down.**  
 23 Q. Let's scroll down to the point -- points three  
 24 and four.  
 25 So Point 3 does lay out Option-2, a version of

1345

1 Option-2, the canal lining deal; correct?  
 2 **A. Part of it. The part about the 82 million is a**  
 3 **completely separate issue.**  
 4 Q. But it does sketch out the terms of the canal  
 5 lining, the assignment of canal lining to San Diego, the  
 6 State sending 235 million -- I think he means to San  
 7 Diego for the canal lining.  
 8 **A. Yes.**  
 9 Q. So by this point, Mr. Slater was getting  
 10 Option-2 on the table as something for Metropolitan to  
 11 consider; correct?  
 12 **A. Well, we were still debating deal points. If**  
 13 **the part about the 82 million is separate and ended up**  
 14 **not being in the agreement, the part about (f) MWD will**  
 15 **also move the --**  
 16 THE COURT REPORTER: You'll have to say that  
 17 again.  
 18 THE COURT: Can you start that again? What you  
 19 are doing is squishing your words together when you  
 20 think what you are saying is not as important as what  
 21 you are about to say. But the court reporter still has  
 22 to get every single word down.  
 23 Let's have the question one more time and the  
 24 answer.  
 25 Q. BY MR. PURCELL: Let me just move on, actually,

1346

1 if that's all right.  
 2 Let's look at Point 4. Mr. Slater's proposal  
 3 is "San Diego will pay the lawful wheeling rate on all  
 4 water in the CRA and no lobbying per the language, Jeff,  
 5 you previously proposed and agreed in the exchange  
 6 agreement."  
 7 **A. Yes.**  
 8 Q. What Mr. Slater is proposing is a lawful  
 9 wheeling rate; correct? That is what San Diego is going  
 10 to pay?  
 11 **A. Those are the words he's using.**  
 12 Q. The words he is not using is full conveyance  
 13 cost; correct?  
 14 **A. People throughout this process have used**  
 15 **"wheeling" and "conveyance" almost as synonyms for each**  
 16 **other. They aren't, but people throughout have used it**  
 17 **as shorthand. So you will see in proposals where we say**  
 18 **an exchange agreement, yet people call it a wheeling**  
 19 **agreement. It's clearly an exchange agreement and not a**  
 20 **wheeling agreement.**  
 21 **Often, you will see in the PowerPoints -- I**  
 22 **know San Diego in some of their PowerPoints -- would put**  
 23 **wheeling at the start of it to describe the exchange**  
 24 **agreement. I know I did the same myself when I would**  
 25 **talk to the board. It just became a colloquialism to be**

1347

1 **synonymous with each other, wheeling and conveyance, but**  
 2 **they do have different meanings.**  
 3 Q. Mr. Kightlinger, Mr. Slater here is proposing  
 4 that the rate San Diego pay be lawful; correct?  
 5 **A. Yes.**  
 6 Q. He doesn't say anything about providing Met  
 7 with its full conveyance costs; he says lawful rate?  
 8 **A. He does use the word "lawful."**  
 9 Q. Let's look at DTX 841. So, Mr. Kightlinger,  
 10 this is an email from -- and it is in evidence from this  
 11 morning -- from Olga Rittershaus at Hatch and Parent.  
 12 It is to a number of people, including you.  
 13 Do you see your email address there?  
 14 **A. Yes.**  
 15 Q. And Mr. Underwood, your co-lead negotiator?  
 16 **A. Yes.**  
 17 Q. And Mr. Slater, for that matter, is one of the  
 18 two recipients, as well?  
 19 **A. Yes.**  
 20 Q. And right after Mr. Slater, Ms. Stapleton, who  
 21 is Mr. Slater's co-lead negotiator for the Water  
 22 Authority?  
 23 **A. Yes.**  
 24 Q. This is really sending -- the recipient list on  
 25 this basically includes all the significant parties

1348

1 involved in the negotiation; correct?  
 2 **A. Yes.**  
 3 Q. And this is dated December 16, 2003?  
 4 **A. Yes.**  
 5 Q. And that's -- not to be too obvious about it,  
 6 but that's two-and-a-half weeks or so after the previous  
 7 email we looked at?  
 8 **A. Yes.**  
 9 Q. Farther along in the negotiations?  
 10 **A. Yes.**  
 11 Q. This is around the time San Diego was getting  
 12 ready to present this to its board?  
 13 **A. Yeah, I believe so. The third week of**  
 14 **September, fourth week of September, somewhere in that**  
 15 **time frame.**  
 16 MR. PURCELL: Can we go to page 3, Ben.  
 17 Can you blow up Number A under "Conditions."  
 18 Actually, can we get the heading, "The Outline  
 19 of the Canal Lining Assignment Agreement."  
 20 Q. So this is Mr. Slater's outline of the canal  
 21 lining assignment agreement; correct?  
 22 **A. Yes, I assume that's from him, yes.**  
 23 Q. That's Option-2?  
 24 **A. It's an outline of it, yes.**  
 25 Q. Right. And Point Number 2 under "Conditions,"

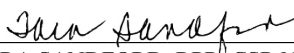
1349

1 Have a good evening.  
 2 (Evening recess.)  
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1351

1 "San Diego agrees to pay the lawful wheeling rate."  
 2 Do you see that?  
 3 **A. I do.**  
 4 Q. Again, Mr. Slater is saying that San Diego is  
 5 going to pay a lawful rate?  
 6 **A. Yes.**  
 7 Q. In exchange for Option-2; correct?  
 8 **A. Correct.**  
 9 Q. It doesn't say anything about paying conveyance  
 10 costs?  
 11 **A. No.**  
 12 Q. And then in paragraph 4, he says, "No judicial  
 13 or administrative challenge to the board-established  
 14 rate for the first five years."  
 15 Do you see that?  
 16 **A. That is what it says.**  
 17 Q. He doesn't say anything about challenges to new  
 18 rate structures?  
 19 **A. No.**  
 20 MR. PURCELL: Your Honor, I know you have a  
 21 four o'clock hearing. We are about five minutes short.  
 22 Is this a good time?  
 23 THE COURT: This is a good time. We'll break  
 24 now.  
 25 I will see everybody tomorrow at ten o'clock.

1350

1 REPORTER'S CERTIFICATE  
 2  
 3 STATE OF CALIFORNIA, )  
 4 ) ss  
 5 COUNTY OF SANTA BARBARA. )  
 6  
 7 I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand  
 8 Reporter, in the County of Santa Barbara, State of  
 9 California, hereby certify:  
 10 That the court proceedings were taken down by me in  
 11 stenotype at the time and place herein named and  
 12 thereafter reduced to typewriting by computer-aided  
 13 transcription under my direction.  
 14 I further certify that I am not interested in the  
 15 event of the action.  
 16 WITNESS my hand this 13th day of April,  
 17 2015, at San Francisco, California.  
 18  
 19  
 20  
 21  
 22   
 23 TARA SANDFORD, RPR, CSR No. 3374  
 24 Certified Shorthand Reporter  
 25 State of California  
 26

1352



<p><b>A</b></p> <p><b>\$1.8</b> 1282:9</p> <p><b>\$200</b> 1276:4</p> <p><b>\$235</b> 1167:24 1168:5 1168:21 1170:7 1204:15 1214:17 1217:13 1220:25 1231:7 1290:12 1292:11 1300:18 1301:2 1302:5,21</p> <p><b>\$250</b> 1289:10</p> <p><b>\$253</b> 1208:13 1212:17 1216:25 1217:5 1218:20 1220:14 1221:13 1224:24 1225:18 1230:15 1233:2 1292:13 1296:16</p> <p><b>\$35</b> 1216:17 1290:13</p> <p><b>\$423</b> 1219:17</p> <p><b>\$500</b> 1282:10</p> <p><b>\$550</b> 1282:12</p> <p><b>\$80</b> 1174:4,5,6 1203:22 1245:3,17</p> <p><b>\$90</b> 1174:9 1204:9 1213:13 1217:7 1288:10 1289:11 1292:3</p> <p><b>\$907</b> 1219:17</p> <p><b>A-R-A-K-A-W-A</b> 1262:12</p> <p><b>A-R-N-O-U-T</b> 1262:22</p> <p><b>a.m</b> 1160:3</p> <p><b>abeyance</b> 1197:10</p> <p><b>ability</b> 1165:15 1168:16 1169:24 1179:24 1238:5 1255:9 1323:12,25 1324:5 1325:15,21 1335:8</p> <p><b>able</b> 1169:14 1183:1 1195:21 1275:20 1277:22 1278:3 1309:9,20 1314:10 1323:7 1335:23 1337:22</p> <p><b>absolute</b> 1252:23</p> <p><b>absolutely</b> 1252:24 1268:16 1309:10</p> <p><b>absorb</b> 1253:13</p> <p><b>accept</b> 1196:3 1250:4,7</p> <p><b>acceptable</b> 1180:9 1243:12 1253:16</p> <p><b>acceptance</b> 1298:5</p> <p><b>accepted</b> 1180:11</p> <p><b>access</b> 1189:13 1208:21 1230:11 1286:4,7 1292:14 1294:19,20 1309:20,23 1312:8</p>	<p>1335:3</p> <p><b>accomplish</b> 1195:3 1215:1 1217:13 1222:23</p> <p><b>accomplished</b> 1222:23</p> <p><b>account</b> 1246:13 1252:11 1255:14 1259:8,18,23 1288:23</p> <p><b>accountant</b> 1211:12</p> <p><b>accounting</b> 1313:24 1314:5</p> <p><b>accrue</b> 1311:2</p> <p><b>accurate</b> 1300:3 1330:9 1340:9</p> <p><b>accurately</b> 1172:18 1183:8 1216:3 1292:14</p> <p><b>ack@harkinsandcun...</b> 1182:12</p> <p><b>acknowledged</b> 1216:16 1267:7</p> <p><b>acquire</b> 1196:10</p> <p><b>acre-feet</b> 1165:23 1166:2 1205:19 1214:24 1216:22 1272:10,22 1275:6,9 1276:14 1277:17,24 1277:25 1278:2,6,8,8 1278:9 1280:13,18 1311:5,5</p> <p><b>acre-foot</b> 1174:5,6,9 1213:13 1216:25 1247:25 1288:11,24 1289:10,11 1292:4,13 1296:17</p> <p><b>acres</b> 1205:5</p> <p><b>act</b> 1238:20 1274:11,15</p> <p><b>action</b> 1191:1 1255:9 1266:7,12 1352:14</p> <p><b>active</b> 1251:2</p> <p><b>actual</b> 1179:1 1288:3 1310:1</p> <p><b>ad</b> 1283:7,11</p> <p><b>add</b> 1240:9</p> <p><b>added</b> 1281:1</p> <p><b>addition</b> 1172:13 1173:1 1199:3 1200:11 1263:25 1264:10 1272:11 1292:9</p> <p><b>additional</b> 1164:17 1207:20 1213:17 1220:19 1264:11 1270:8</p> <p><b>address</b> 1267:18 1288:6 1305:15 1331:24 1340:23 1348:13</p>	<p><b>addressed</b> 1267:19</p> <p><b>addressing</b> 1185:17</p> <p><b>adjudication</b> 1162:12</p> <p><b>adjust</b> 1314:5</p> <p><b>admin</b> 1326:6 1328:1</p> <p><b>Administration</b> 1324:20</p> <p><b>administrative</b> 1179:22 1180:9,13 1182:21 1194:23 1195:25 1202:10,13 1208:8 1212:20 1225:4 1226:23 1228:21 1229:12,15,19,20,24 1230:3,8,9,17 1237:12,15 1238:5 1244:11 1251:19 1252:3 1253:15 1324:18,22 1325:9 1326:3,13,18 1327:6 1327:9 1350:13</p> <p><b>admissions</b> 1263:18</p> <p><b>admit</b> 1343:5</p> <p><b>admitted</b> 1171:16 1183:20 1189:2 1263:12,18 1265:5 1343:22 1344:6</p> <p><b>adopt</b> 1247:8 1250:15</p> <p><b>adopted</b> 1157:10 1173:3 1179:25 1195:7 1228:15 1230:16 1255:6 1341:13</p> <p><b>adoption</b> 1182:5 1195:24</p> <p><b>adroit</b> 1181:12</p> <p><b>advance</b> 1283:22</p> <p><b>advantage</b> 1312:19</p> <p><b>advise</b> 1209:5,9</p> <p><b>advocacy</b> 1253:13</p> <p><b>advocate</b> 1191:13</p> <p><b>affairs</b> 1181:9</p> <p><b>affect</b> 1169:19 1240:6 1285:25</p> <p><b>affirmative</b> 1232:18</p> <p><b>afford</b> 1178:4</p> <p><b>afforded</b> 1331:23</p> <p><b>afternoon</b> 1269:3 1316:25 1317:1</p> <p><b>ag-to-urban</b> 1197:15</p> <p><b>agencies</b> 1171:8 1172:4 1172:10 1176:13 1184:5,21 1185:3,9 1194:5 1199:11 1237:20 1250:16 1270:1,2,3,6,9,11 1284:3,20,23 1285:22 1286:4 1310:4</p>	<p>1315:15 1317:20 1318:8</p> <p><b>agency</b> 1162:8 1196:20 1199:11</p> <p><b>ago</b> 1324:10 1339:14</p> <p><b>agree</b> 1196:7 1217:20 1224:22 1237:6 1279:10 1285:15 1305:2 1306:6 1337:21 1338:12,15 1342:11</p> <p><b>agreed</b> 1170:15 1174:8 1180:17 1186:11 1188:12,18 1212:23 1212:24 1217:11 1225:3 1229:13 1266:15,17 1286:17 1294:18,21 1295:1 1296:15 1297:16 1298:6 1303:24 1306:17,19,22 1307:13,15,17 1312:25 1335:19 1339:9 1343:9 1347:5</p> <p><b>agreeing</b> 1186:22 1217:17 1221:25</p> <p><b>agreement</b> 1162:18,24 1163:1,9,14,15,18,19 1163:21,25 1164:4,6 1164:11,11,17,20,24 1165:3,19 1166:5,6,9 1166:11,13,23 1167:2 1167:3,18 1168:11,19 1169:1,16,20,25 1170:2,3,21 1174:8 1175:2,9,16,20 1178:24 1180:24 1181:10,16 1183:14 1184:9 1185:12 1186:12,20 1188:14 1189:5,6,15 1190:21 1191:5 1192:19 1194:12 1195:18,19 1195:22 1196:21 1197:25 1198:10 1199:6 1200:6,17,21 1201:7,13 1204:8 1206:8,9,10,11,15,15 1206:21,23 1207:4,9 1208:13,16 1209:6,10 1209:16,20,22 1210:1 1210:6,17 1211:25 1213:11,18,23 1214:1 1214:12 1216:12 1217:9 1219:5,14 1221:19 1222:2,3,8 1222:13,17,21,24,25 1223:2,12 1224:16,21</p>	<p>1224:24 1225:7,12,25 1226:12,18,21 1229:1 1229:14,18 1230:19 1231:5,6 1233:11 1234:15 1236:23 1237:1,2,10,16 1238:2,16 1239:10 1245:23 1246:1,17,23 1247:10,15,15 1248:8 1256:22 1266:19 1270:18,20 1271:4 1272:23,25 1273:5,11 1273:12,15,21 1276:22,23 1277:2 1278:25 1279:2,4,14 1279:15 1280:1,1,5 1280:10,15 1281:3 1282:20,25 1286:17 1287:11,12,14,16,20 1288:2,5,10 1289:3 1290:7,15 1291:2,10 1291:12,24 1297:22 1297:22,24 1298:10 1298:13,22,24 1299:15,17 1300:4,4 1300:5,5,10 1301:4,5 1301:12,23 1302:7 1303:25 1304:25 1306:11,16,25 1307:2 1307:14,21 1308:8,18 1308:18,21,21,22,25 1308:25 1309:3,4,7,8 1309:9 1310:23 1311:16 1315:1,4,5 1317:12 1322:13 1326:1,8 1327:22 1329:5,21,25 1331:15 1332:2 1333:1,25 1335:12 1336:18 1337:3 1340:23 1341:4,5,11,12 1342:10,20 1343:13 1343:17 1344:19,25 1345:14 1346:14 1347:6,18,19,19,20 1347:24 1349:19,21</p> <p><b>agreements</b> 1162:23 1196:22 1199:12 1229:2 1279:1,21 1283:18 1290:20 1298:2,3,4,6 1299:6,6 1299:10,22 1300:1</p> <p><b>agrees</b> 1188:22 1350:1</p> <p><b>agricultural</b> 1162:3 1277:2,7,8 1312:22</p> <p><b>agriculture</b> 1221:6</p> <p><b>ahadlock@kvn.com</b> 1158:7</p>
---	---	--	--	--

<p><b>ahead</b> 1181:6 1203:5 1227:6 1228:9 1234:8 1242:10,14 1260:22 1293:18 1304:18 1312:2 1313:7 1331:6 1336:25 1341:19</p> <p><b>aimed</b> 1335:9</p> <p><b>Alameda</b> 1158:16</p> <p><b>albatross</b> 1274:19</p> <p><b>All-American</b> 1274:1 1289:25</p> <p><b>all-in</b> 1281:16</p> <p><b>allocated</b> 1189:16 1190:4,22 1267:17</p> <p><b>allocating</b> 1191:7</p> <p><b>allocation</b> 1190:1,23 1191:19,25 1207:18 1211:4,19 1222:3,8 1222:24 1227:21 1230:19 1231:5 1247:15 1281:19 1297:24 1298:9,12 1299:7 1300:4 1335:1 1337:5,24</p> <p><b>allocations</b> 1189:20 1191:14 1192:16,20 1233:8</p> <p><b>allow</b> 1197:17,21 1311:24</p> <p><b>allowed</b> 1285:21</p> <p><b>allows</b> 1327:5 1332:5</p> <p><b>alluded</b> 1180:21</p> <p><b>alternative</b> 1267:5,7</p> <p><b>ambit</b> 1178:21</p> <p><b>amend</b> 1213:23 1287:21 1305:20 1324:18 1326:17,17 1327:6,9 1328:1</p> <p><b>amended</b> 1162:17 1324:20</p> <p><b>amending</b> 1305:20</p> <p><b>amendment</b> 1182:25</p> <p><b>amount</b> 1204:9 1219:23 1220:19 1226:22 1246:19 1275:2,10 1277:7 1289:13 1303:23 1311:10,11,17,19 1313:2 1314:11</p> <p><b>amounted</b> 1289:12</p> <p><b>ample</b> 1197:20</p> <p><b>analysis</b> 1209:17 1211:9,23 1212:7 1218:18,23 1227:7,8 1227:16 1260:3 1274:6 1275:1 1292:25 1300:16</p> <p><b>analyze</b> 1227:2</p>	<p><b>analyzed</b> 1220:13</p> <p><b>Angeles</b> 1158:13,17 1235:13 1300:1</p> <p><b>ANN</b> 1352:6</p> <p><b>annual</b> 1282:8 1309:14</p> <p><b>annually</b> 1161:18 1218:14</p> <p><b>answer</b> 1192:24 1202:24 1214:21 1223:4,25 1232:19 1233:25 1234:18,19 1234:22 1241:4 1249:2 1255:6,11,17 1256:7 1257:9 1258:1 1259:22 1260:22 1326:23 1327:3 1338:6 1346:24</p> <p><b>answered</b> 1208:2 1227:4 1256:24</p> <p><b>answering</b> 1326:25 1338:4</p> <p><b>answers</b> 1259:13</p> <p><b>anticipated</b> 1209:25 1275:14</p> <p><b>anybody</b> 1177:15 1201:9 1249:7 1251:7 1251:9</p> <p><b>apart</b> 1288:24</p> <p><b>Apologize</b> 1175:25</p> <p><b>apparent</b> 1271:8</p> <p><b>appeal</b> 1193:7,10,12</p> <p><b>appealing</b> 1273:24</p> <p><b>Appeals</b> 1256:7</p> <p><b>APPEARANCES</b> 1158:1</p> <p><b>appears</b> 1219:1 1343:1</p> <p><b>Appellate</b> 1193:9</p> <p><b>appended</b> 1185:25</p> <p><b>applicable</b> 1173:3 1176:11,12,18 1177:6 1177:12,20,22 1178:21 1179:2,7,9 1179:11 1180:12,19 1180:22 1181:8 1182:23 1183:3,10 1184:4,21 1185:2,8 1194:25 1195:8 1198:11 1228:17 1233:15 1234:16 1235:4 1236:14 1237:14,19 1238:11 1249:15 1252:19 1317:18,19 1318:4,7 1319:17 1322:14 1325:11,23 1326:5,9 1326:15 1327:12 1333:3 1334:6</p> <p><b>application</b> 1228:20</p>	<p><b>applied</b> 1179:1</p> <p><b>appliance</b> 1193:20</p> <p><b>apply</b> 1185:4 1199:21 1328:22</p> <p><b>apportion</b> 1278:21</p> <p><b>apportioning</b> 1212:15</p> <p><b>apportionment</b> 1277:16 1278:10</p> <p><b>appreciate</b> 1244:19 1267:24</p> <p><b>approach</b> 1218:13 1219:20 1220:2,6 1281:11 1284:7</p> <p><b>approached</b> 1274:8 1289:4</p> <p><b>approaches</b> 1218:7</p> <p><b>appropriate</b> 1174:22 1266:4</p> <p><b>appropriated</b> 1168:6,7 1290:23 1299:1</p> <p><b>appropriateness</b> 1211:18</p> <p><b>appropriating</b> 1290:14</p> <p><b>appropriation</b> 1167:23 1298:19,25 1299:8</p> <p><b>approval</b> 1186:25</p> <p><b>approve</b> 1247:5</p> <p><b>approved</b> 1345:17</p> <p><b>approximation</b> 1287:9</p> <p><b>April</b> 1157:11,17 1160:2 1244:2 1352:15</p> <p><b>aqueduct</b> 1173:5,14 1205:19 1206:1 1245:8 1246:12,14 1278:1,3 1280:16,17 1309:19</p> <p><b>aquifer</b> 1205:15</p> <p><b>Arakawa</b> 1262:11</p> <p><b>ardent</b> 1191:13</p> <p><b>area</b> 1161:11 1227:9 1285:25 1312:24</p> <p><b>arguing</b> 1323:17 1345:5</p> <p><b>argument</b> 1304:7 1319:20</p> <p><b>argumentative</b> 1261:10 1323:15</p> <p><b>arithmetically</b> 1247:25</p> <p><b>Arizona</b> 1277:23 1278:3,18</p> <p><b>Arnout</b> 1262:22</p> <p><b>arose</b> 1301:7</p> <p><b>arranged</b> 1219:10</p> <p><b>arrangement</b> 1250:7 1272:2,3 1273:1</p> <p><b>arrangements</b> 1283:4 1311:12</p>	<p><b>arrived</b> 1295:2</p> <p><b>Article</b> 1194:3</p> <p><b>articulation</b> 1224:20</p> <p><b>ascribed</b> 1227:22</p> <p><b>ascribing</b> 1189:24</p> <p><b>aside</b> 1169:7</p> <p><b>asked</b> 1211:4 1227:4 1240:10 1245:3 1254:1 1256:24 1257:23 1259:3,5,14 1260:13,19 1296:11 1301:3 1304:23 1315:8</p> <p><b>asking</b> 1258:15 1259:24 1260:14,15 1317:2</p> <p><b>aspect</b> 1212:11,13</p> <p><b>assessed</b> 1270:8 1334:11</p> <p><b>assessing</b> 1221:4</p> <p><b>assets</b> 1300:19</p> <p><b>assign</b> 1214:15 1292:11</p> <p><b>assigned</b> 1299:3,4</p> <p><b>assigning</b> 1220:24</p> <p><b>assignment</b> 1216:9,15 1231:6 1346:5 1349:19,21</p> <p><b>assistant</b> 1187:9 1215:21</p> <p><b>ASSOCIATES</b> 1157:22</p> <p><b>assume</b> 1170:15 1226:6 1284:17 1341:14 1349:22</p> <p><b>assumed</b> 1218:14,18,24 1219:13 1267:12</p> <p><b>assuming</b> 1219:15 1220:14 1246:7 1263:6,6</p> <p><b>assumptions</b> 1267:10</p> <p><b>assurance</b> 1187:2</p> <p><b>attach</b> 1187:19</p> <p><b>attached</b> 1187:14 1188:1 1289:15 1340:12</p> <p><b>attack</b> 1196:24</p> <p><b>attacking</b> 1196:24</p> <p><b>attention</b> 1196:22 1237:9 1245:1 1332:12</p> <p><b>attorney</b> 1314:24</p> <p><b>attractive</b> 1276:7,15</p> <p><b>attributable</b> 1189:24</p> <p><b>AUDREY</b> 1158:4</p> <p><b>August</b> 1169:10 1177:1 1177:8 1186:4,14,17 1345:11</p> <p><b>Australia</b> 1161:22</p>	<p><b>Authority</b> 1157:6 1160:7 1162:14,17,22 1162:25 1163:16 1164:2,4,21 1165:9 1165:12,17 1166:4,9 1166:16,25 1170:4,6 1170:10 1171:10 1172:19,23 1173:13 1174:11 1175:3,13 1179:5 1180:10,17 1182:15 1184:19 1189:6,14 1190:7,10 1190:12,21,24 1191:13 1201:5,7,18 1204:21,24 1260:15 1261:18 1271:3 1272:12,15,18,24 1273:3 1276:19 1287:5 1290:6,22 1291:5,16 1292:8 1294:6,16,18 1295:11 1295:14 1296:5,14,19 1296:23 1297:5,11,16 1298:16 1299:3,4 1301:13 1302:8,19,23 1303:2 1304:3,20,21 1305:10,22 1306:1 1308:10,13 1309:7 1312:8 1313:10 1331:17,22 1332:6 1333:21 1334:24 1335:15 1336:5,13 1337:4,11,11,22 1338:11 1339:2,3 1348:22</p> <p><b>Authority's</b> 1183:9,12 1189:9 1191:5,10 1279:4 1293:21 1335:7</p> <p><b>authorization</b> 1167:22 1168:17</p> <p><b>authorized</b> 1328:6,7</p> <p><b>avail</b> 1249:16 1334:12</p> <p><b>available</b> 1199:11 1245:8,9,13,16 1246:11,19 1271:5,14 1277:19 1309:14 1310:3 1311:10,18,18 1312:15 1313:5,13,16 1313:19,19,21 1314:4</p> <p><b>aware</b> 1179:3 1201:4 1201:17,21 1207:1,6 1247:8 1284:22 1329:22 1337:10,11</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>b</b> 1158:12 1230:5,9 1235:2 1245:9</p>
--	--	---	--	---

<p><b>B-E-R-G</b> 1262:23 1263:1 <b>B-R-I-A-N</b> 1262:17 <b>back</b> 1165:22 1183:16 1184:1 1194:16 1203:20 1208:9 1223:21 1240:25 1241:1 1245:2 1246:22 1253:7 1264:23 1271:7,16 1273:18 1275:22 1276:1 1281:5 1287:17 1288:9 1293:21 1294:7,12 1297:13 1322:25 1324:3 <b>background</b> 1273:13 <b>ballpark</b> 1282:6 1292:2 <b>Barbara</b> 1352:3,7 <b>bargain</b> 1303:17 <b>barriers</b> 1194:11 <b>base</b> 1278:10 <b>based</b> 1169:8 1179:10 1190:14 1207:2 1246:24 1259:2 1267:10 1291:9,11 1303:25 1313:1 1337:23 <b>bases</b> 1256:21 1266:13 <b>basic</b> 1277:16 <b>basically</b> 1214:15 1266:13 1338:12,22 1339:20 1348:25 <b>basin</b> 1278:13,15 <b>basins</b> 1286:5 <b>basis</b> 1190:13 1193:21 1235:5 1245:22 1246:2 1252:16 1266:8,21 1267:22 1309:14 <b>Bates</b> 1245:2 <b>Battery</b> 1157:24 1158:6 <b>Bay</b> 1193:18 <b>began</b> 1185:19 1273:10 1273:22,25 1281:10 1282:17 <b>beginning</b> 1198:22 1234:9 1241:4 1254:8 1281:9 <b>behalf</b> 1176:13 1184:5 1185:8 1237:20 1317:20 1340:4 <b>belief</b> 1217:23 1234:13 1242:19 1249:9,13 1251:8,11 <b>believe</b> 1163:10 1170:17 1173:5</p>	<p>1175:22 1187:1 1188:10 1200:1 1204:25 1206:19 1219:7 1227:9 1228:13,18 1230:20 1231:16 1249:12 1254:21 1256:2 1257:6 1262:13 1265:17 1288:13 1290:22 1296:13 1328:18 1329:10 1330:15 1333:10 1345:3 1349:13 <b>believed</b> 1189:23 1201:7 1225:8 1289:8 <b>belong</b> 1319:6 <b>belongs</b> 1286:2 <b>Ben</b> 1181:21 1182:18 1198:2 1317:7 1325:3 1349:16 <b>beneficiary</b> 1310:8 <b>benefit</b> 1168:8 1205:22 1289:22 1309:12 1310:13,22 1312:16 1312:17,19 <b>benefits</b> 1217:18 1247:14,16,17 1248:8 1275:16,18 1309:3,6 1309:11,24 1310:5 1312:7 <b>Berg</b> 1262:22 <b>Bernardino</b> 1205:6 <b>best</b> 1199:17 1208:4 1273:22 1285:7,9 <b>better</b> 1314:18 <b>beyond</b> 1278:2 <b>big</b> 1281:25 1286:1 <b>billion</b> 1282:9 <b>Billions</b> 1197:16 <b>binder</b> 1187:22 1215:15 1223:21 1317:9 <b>binding</b> 1167:23 1168:17,24 1169:15 <b>bit</b> 1285:1 1325:4 <b>blank</b> 1304:24 <b>blended</b> 1312:13,15 <b>blending</b> 1312:12 <b>blow</b> 1349:17 <b>board</b> 1176:10,17 1186:25 1187:3 1188:9,17 1215:17 1218:14 1219:3 1237:18 1251:3,4 1269:19 1270:8,9,15 1271:22 1273:21 1284:15,17 1292:19 1292:21,22,23 1293:3</p>	<p>1293:25 1297:4,5,7,9 1300:22 1303:9,22 1308:1 1317:17 1318:3 1326:9 1347:25 1349:12 <b>board-established</b> 1350:13 <b>boardroom</b> 1299:25 <b>boards</b> 1297:21 1299:16 <b>Bob</b> 1163:4 1191:12 1233:16 1250:1 1296:13 <b>bodies</b> 1192:4 <b>boilerplate</b> 1199:9,10 <b>book</b> 1230:5 1241:1,1 <b>books</b> 1161:14 <b>borrowed</b> 1199:10 <b>boss</b> 1320:15 <b>bottom</b> 1167:7 1175:6 1194:20 1198:17 1226:20 1233:9 1342:5 <b>brainchild</b> 1214:6 <b>BRAUNIG</b> 1158:5 <b>breach</b> 1200:4,7,8,10 1247:6 1266:8,12,15 1266:16,22 <b>break</b> 1210:18,24 1227:1,12 1229:7 1302:13 1307:3,6 1350:23 <b>Brian</b> 1163:11 1177:2 1191:17 1192:7 1233:17 1262:17 1296:12 1329:5 1340:4 1343:1 1345:9 <b>bridge</b> 1289:5,7,14,19 <b>brief</b> 1202:24 1265:15 1265:25 1267:23 <b>briefed</b> 1300:15 <b>briefest</b> 1189:23 <b>briefly</b> 1169:5 1202:2 1265:19 1266:1 <b>bring</b> 1253:7 1322:21 <b>bringing</b> 1172:12 <b>broad</b> 1187:12 <b>broader</b> 1201:3 <b>brought</b> 1256:13 1307:25 <b>BROWN</b> 1157:22 <b>Brownstein</b> 1161:6 <b>budget</b> 1169:6 1282:8 <b>build</b> 1272:6 1274:8 <b>build-up</b> 1272:19 <b>building</b> 1288:23 <b>bundled</b> 1281:7,8,16,18 1281:22</p>	<p><b>bundles</b> 1337:19 <b>burden</b> 1267:2,18 <b>Bureau</b> 1274:3 1313:23 <b>bureaucrat</b> 1174:16 <b>bury</b> 1197:21 <b>business</b> 1162:9,10 1205:13 1206:1 1261:16,18 <b>buy</b> 1172:7</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 1342:4 <b>C-A-D-I-Z</b> 1205:11 <b>CA</b> 1157:24 <b>Cadiz</b> 1205:1,2,5,7,14 <b>calculated</b> 1226:22,24 1261:4 1296:20,23 <b>calculating</b> 1192:10 <b>calculations</b> 1259:3,15 <b>California</b> 1157:1,9,11 1157:17 1158:6,10,13 1158:17 1160:1 1161:17,22 1162:12 1166:24 1167:24 1171:19 1174:17 1194:3 1214:18 1244:1 1275:3 1277:10,16,22 1278:7 1278:16,18,23 1279:9 1279:23 1280:6,9,12 1282:10 1288:17 1289:1,3,7,14,18,20 1289:22 1290:8,15 1292:12 1299:9 1300:18 1302:22 1352:2,8,16,25 <b>California's</b> 1172:15 1277:14 <b>call</b> 1160:6 1197:22 1237:9 1245:1 1347:18 <b>called</b> 1160:12 1161:16 1205:1 1222:12 1268:19 1270:21 1278:23 1292:20 1308:9,18 1309:17 1321:14 1332:17 1341:17 <b>calling</b> 1323:17 <b>calls</b> 1160:8 1268:14 1272:19 1293:14 1311:4 <b>campaign</b> 1196:10 <b>Campbell</b> 1163:4,4 1191:12 1192:14 1215:17,20,21 1233:16 1250:2 1296:14</p>	<p><b>canal</b> 1168:3,9 1169:12 1170:8,14,16 1185:20 1186:21 1188:3 1204:15 1214:16,23 1214:24 1216:9,15,23 1217:14 1220:25 1221:22 1222:9 1223:8 1231:7 1270:22 1273:14,16 1274:4 1275:25 1276:17 1289:25 1292:10 1297:25 1298:3,14 1301:1 1302:5,20 1345:21 1346:1,4,5,7 1349:19 1349:20 <b>canals</b> 1272:6 1274:1 1274:11 1275:7,22 1290:9,12 <b>capable</b> 1170:17 <b>capacity</b> 1171:9 1273:9 1309:23 1312:20 1313:4 <b>capital</b> 1288:23 <b>capture</b> 1179:13 1183:8 <b>care</b> 1261:16,18 <b>Carl</b> 1163:12 1177:3 1181:12,12,17,19 1182:9 <b>carriage</b> 1311:1 1312:5 <b>carried</b> 1281:1 <b>carves</b> 1326:11 <b>case</b> 1157:7 1193:9,10 1193:18 1207:1 1208:18 1210:8 1211:3 1212:13 1227:19 1229:7 1231:3,3 1253:19 1256:5,21 1264:16,17 1265:18 1266:25 1267:15 1268:11 1271:16 1296:12 1304:11,16,25 1311:22 1329:23 1332:7 1343:20 1345:5 <b>case-in-chief</b> 1261:24 <b>cases</b> 1162:12 1264:12 <b>catch</b> 1313:6 <b>catching</b> 1215:14 1239:21 1254:13,13 <b>category</b> 1179:18 <b>cause</b> 1266:7,12 <b>cc's</b> 1182:14 <b>central</b> 1279:3 <b>CEO</b> 1205:1 1286:24 <b>certain</b> 1179:10</p>
---	--	---	---	--

<p>1212:15 1229:11                  1250:12,20 1255:17                  1261:2 1263:17                  1272:6 1301:8 1319:5  <b>certainly</b> 1209:19                  1210:22 1217:11                  1232:16 1256:8                  1264:9 1281:1                  1322:20  <b>CERTIFICATE</b>                  1352:1  <b>Certified</b> 1352:6,24  <b>certify</b> 1352:8,13  <b>cetera</b> 1312:18 1338:15  <b>CFO</b> 1163:5 1191:12                  1211:5 1329:9  <b>chain</b> 1182:8  <b>Chairman</b> 1171:7  <b>Chairperson</b> 1171:7  <b>challenge</b> 1179:24                  1182:21 1195:7,21,25                  1301:5,22 1303:16                  1304:3,20,22 1305:4                  1305:6,23 1323:7                  1324:5 1325:15,22                  1327:11,23 1328:4                  1331:18 1333:23                  1350:13  <b>challenged</b> 1217:1                  1304:2  <b>challenges</b> 1275:19                  1276:3 1305:18                  1328:6 1350:17  <b>challenging</b> 1195:23                  1208:17 1304:24                  1326:13 1328:12  <b>change</b> 1183:13                  1237:13 1238:4,10,10                  1238:15 1239:7                  1298:13 1301:25                  1305:12,21 1307:13                  1307:14 1326:4  <b>changed</b> 1256:15                  1287:23 1300:24                  1307:16,18 1324:25  <b>changes</b> 1240:5                  1256:14 1287:13,17                  1305:3,23 1322:21,24                  1323:3 1328:13  <b>changing</b> 1324:23                  1328:1  <b>characterize</b> 1197:4  <b>charge</b> 1165:5 1173:13                  1174:22 1176:9                  1184:20 1185:13                  1193:13 1194:24                  1202:14 1228:24                  1233:1 1237:17</p>	<p>1245:17 1246:9                  1259:20 1283:19                  1315:25 1316:6                  1317:16 1325:10                  1342:15  <b>charged</b> 1226:17                  1229:2 1230:7                  1246:24 1267:4  <b>charges</b> 1176:10                  1182:22 1183:6                  1194:24 1207:18                  1208:25 1226:22                  1228:13 1237:17                  1266:20 1267:16                  1317:17 1318:4                  1325:10 1326:8,8,14                  1334:10 1338:16  <b>charging</b> 1234:14  <b>chart</b> 1173:18,22  <b>cheaper</b> 1315:13  <b>chief</b> 1269:12,15                  1286:23 1296:12                  1329:7  <b>China</b> 1161:23  <b>choice</b> 1293:2 1297:11  <b>choose</b> 1294:1,7  <b>chose</b> 1202:15 1294:3  <b>Chris</b> 1171:7  <b>chunks</b> 1275:4  <b>circling</b> 1197:4,10  <b>circumstances</b> 1249:11                  1250:19  <b>cities</b> 1162:6  <b>City</b> 1235:13  <b>claim</b> 1256:21  <b>claimed</b> 1247:6                  1267:21  <b>claiming</b> 1207:2,7  <b>clarification</b> 1193:25  <b>clarity</b> 1336:20  <b>clause</b> 1301:21  <b>clauses</b> 1239:19  <b>clear</b> 1181:17 1195:20                  1279:11 1294:22                  1304:8,14 1310:17                  1333:20 1344:16  <b>cleared</b> 1181:4  <b>clearly</b> 1333:15                  1347:19  <b>clerk</b> 1160:16,20                  1170:25 1203:10                  1261:21 1262:24                  1268:23  <b>client</b> 1175:14 1209:5                  1209:10,19 1211:24                  1211:24,25  <b>clients</b> 1161:25 1162:1                  1162:8</p>	<p><b>clips</b> 1281:24  <b>clock</b> 1207:25  <b>closure</b> 1243:9 1280:21  <b>co-lead</b> 1348:15,21  <b>co-terminus</b> 1195:17  <b>Coachella</b> 1274:1                  1279:9 1289:25  <b>code</b> 1173:1,5 1178:5                  1179:21,22,25 1180:6                  1180:9,13 1195:25                  1202:10 1208:9                  1212:20 1225:4                  1226:23 1227:3,15,15                  1227:17 1228:21                  1229:12,15,19,21,24                  1230:4,8,10,17                  1237:15 1238:5                  1244:11 1251:19,24                  1252:5,16 1253:15                  1255:7,13,14 1324:19                  1324:20,22 1326:6,18                  1327:6,9 1328:1  <b>Cole</b> 1343:2  <b>collection</b> 1279:1  <b>collective</b> 1286:2  <b>collectively</b> 1185:10  <b>colloquialism</b> 1347:25  <b>colloquy</b> 1242:8  <b>Colorado</b> 1172:15                  1173:4,14 1205:19,25                  1271:11 1277:3,11,15                  1278:12,15,21,21                  1279:10,22 1290:3                  1312:10,14  <b>column</b> 1245:7  <b>columns</b> 1245:7  <b>come</b> 1170:6,10                  1197:19 1273:13                  1275:5 1281:4                  1289:14,16 1291:1                  1294:24,24 1303:9                  1306:2 1308:10,13                  1316:8,13  <b>comeback</b> 1301:23  <b>comfortable</b> 1330:5  <b>coming</b> 1228:3 1243:9                  1277:6 1281:18                  1283:4 1303:8  <b>commitment</b> 1165:4                  1167:23 1168:16,24                  1169:15 1196:13                  1302:24  <b>commits</b> 1246:18  <b>committing</b> 1204:14  <b>common</b> 1172:12  <b>commonly</b> 1162:6  <b>communicate</b> 1184:16  <b>communicated</b> 1233:7</p>	<p>1233:8 1328:9                  1338:18  <b>communication</b>                  1234:25 1235:8                  1247:2,8  <b>communications</b>                  1177:2 1233:10  <b>companies</b> 1162:3  <b>company</b> 1205:3,23  <b>comparable</b> 1177:10  <b>compared</b> 1164:11                  1219:14 1220:9  <b>compensation</b> 1193:22  <b>competent</b> 1211:11,11  <b>complained</b> 1337:8  <b>complaining</b> 1337:4  <b>complaint</b> 1247:3  <b>complete</b> 1259:6,16  <b>completed</b> 1303:7  <b>completely</b> 1346:3  <b>compliance</b> 1210:19  <b>complicated</b> 1214:14  <b>complied</b> 1227:2,14,17                  1229:9,11  <b>comply</b> 1179:6 1180:8                  1180:19 1229:18,23                  1230:7,8  <b>component</b> 1315:16  <b>components</b> 1189:7,11                  1206:17 1210:19                  1217:1 1220:8                  1225:22 1227:1,13                  1229:8 1231:21,25                  1247:7 1296:10                  1315:19 1338:23  <b>compound</b> 1302:11  <b>compromise</b> 1204:9  <b>computer-aided</b>                  1352:11  <b>concedes</b> 1267:2  <b>concept</b> 1182:4  <b>concern</b> 1164:9                  1169:13 1172:14                  1240:3,4 1255:5                  1278:14 1289:1                  1302:4,7,18,23                  1303:3,23 1305:8,11  <b>concerned</b> 1168:15                  1240:5 1301:24                  1305:2 1328:12  <b>concerning</b> 1335:24  <b>concerns</b> 1164:5,8                  1165:8,11 1166:9                  1239:22 1285:18                  1301:16,19 1305:16                  1331:24 1334:8,25                  1335:21 1337:23  <b>conclude</b> 1248:1</p>	<p>1261:23  <b>concluded</b> 1193:19                  1220:15  <b>concludes</b> 1345:2  <b>conclusion</b> 1194:22                  1271:23 1293:15                  1324:8 1325:7                  1334:16  <b>conclusions</b> 1280:10  <b>concurrence</b> 1297:20  <b>condition</b> 1166:17                  1168:2,6,12 1169:16                  1169:21 1170:7                  1200:4,9 1222:11                  1245:8,9,12 1279:3                  1291:1  <b>conditions</b> 1166:14                  1167:8,12,16 1172:5                  1188:21 1276:23,25                  1282:21 1287:24                  1305:21 1349:17,25  <b>conduct</b> 1250:21  <b>confident</b> 1290:25  <b>confining</b> 1181:14  <b>confirm</b> 1188:5                  1313:24  <b>conflict</b> 1173:9 1293:11  <b>conflicts</b> 1197:19  <b>confused</b> 1216:19  <b>confusing</b> 1198:19  <b>Congress</b> 1274:10,10                  1274:15  <b>conjunction</b> 1324:12                  1325:19  <b>connection</b> 1343:9  <b>consented</b> 1208:24                  1212:22 1213:2,5                  1226:21 1229:3  <b>conserve</b> 1271:13                  1313:22  <b>conserved</b> 1196:11                  1275:2,10 1312:24                  1313:23,25  <b>conserves</b> 1271:4                  1312:21  <b>consider</b> 1346:11  <b>considerable</b> 1172:5  <b>consideration</b> 1206:8                  1216:10 1217:3                  1220:24 1221:3,17                  1231:8,9,11  <b>considered</b> 1285:23  <b>consistent</b> 1176:25                  1195:8 1228:16,20  <b>consistently</b> 1180:5                  1181:17 1185:11                  1191:18 1192:6  <b>constant</b> 1235:5</p>
---	---	---	--	--

<p><b>constitute</b> 1200:12  <b>Constitution</b> 1194:4  <b>constitutional</b> 1253:20  <b>construct</b> 1274:7  1298:3 1338:16  <b>constructed</b> 1220:7  <b>construction</b> 1275:8,20  1298:2  <b>construction-type</b>  1276:3  <b>construe</b> 1193:8  <b>consummation</b> 1218:2  <b>consumption</b> 1278:5  <b>contact</b> 1235:6 1250:21  <b>contain</b> 1166:13  1173:11,19 1194:13  1198:5  <b>contained</b> 1200:5  <b>contemplated</b> 1209:22  1211:8  <b>contemporaneous</b>  1222:21  <b>contend</b> 1183:3  <b>contended</b> 1271:21  <b>contends</b> 1206:17  <b>contentions</b> 1212:12  <b>contest</b> 1182:7 1195:5  <b>contested</b> 1207:18,19  <b>contesting</b> 1182:4  1194:23 1208:7  1325:9  <b>context</b> 1184:14 1224:1  1228:25 1234:1  1242:12 1248:16  1254:17,21 1328:19  <b>contexts</b> 1179:23  <b>contingency</b> 1290:23  <b>contingent</b> 1272:24  1273:1  <b>continually</b> 1185:18  <b>continuation</b> 1342:9,19  1344:18  <b>continue</b> 1217:23  1244:9 1271:14  1291:10  <b>continued</b> 1207:19  1255:1 1280:20  <b>continues</b> 1248:7  <b>continuing</b> 1164:9  1169:13 1200:12  <b>continuous</b> 1235:8  <b>contract</b> 1168:19  1196:5 1199:25  1213:4 1220:21  1221:15 1226:16  1229:22,25 1251:22  1266:8,12 1288:14  1304:8,9,13 1313:1</p>	<p>1313:12 1314:7  1315:24 1317:6  1318:10 1319:13,19  1320:6,18 1321:25  1322:5  <b>contracts</b> 1279:18  1310:9  <b>contractual</b> 1299:2  <b>contradicted</b> 1267:11  <b>contradicting</b> 1228:2  <b>contrast</b> 1311:16  1314:6  <b>conversations</b> 1177:9  1181:18,19 1295:10  <b>convey</b> 1235:18  1242:18 1251:7,10  1293:20  <b>conveyance</b> 1176:12  1184:4,14 1185:8  1213:20 1223:13  1226:22 1228:14  1231:12,17 1237:19  1246:25 1250:11  1266:20 1267:12,17  1281:20,23 1292:13  1294:25 1296:6  1300:19 1302:25  1316:1 1317:19  1318:7 1321:4  1326:10 1338:16  1339:9,12,19,24  1342:23,23 1347:12  1347:15 1348:1,7  1350:9  <b>conveyed</b> 1175:10  1234:13 1235:23  1236:2,8,12,18  1238:1 1242:17  1249:13 1252:24  1253:4  <b>conveying</b> 1219:22  1249:8 1253:11  1282:23 1288:21  1289:9  <b>cooling-off</b> 1306:3  1308:9  <b>copies</b> 1264:2,7  <b>copy</b> 1171:10 1215:16  <b>correct</b> 1166:1,3  1190:23 1198:1  1204:10,12,16 1205:6  1205:17,20,21,23  1206:5,6,12,13  1207:4,16 1208:9,10  1208:14,18,19,22,23  1209:1 1210:2,3,8  1211:1,2,10 1212:16  1212:20 1213:1,3,14</p>	<p>1213:15,20,21,24,25  1214:4,5,12,18  1215:1,2,4 1216:1,6  1216:13,14,24 1217:6  1217:10,14,15,18  1218:21,22 1219:24  1219:25 1221:1,8,15  1221:25 1222:1,4,6  1222:25 1223:7,14  1224:25 1225:1,4,5  1226:23 1227:3  1229:15,16,19,20,25  1230:1 1231:8,10,13  1231:14,22 1232:8,9  1232:12 1238:6,7,11  1238:12 1240:6,7  1245:19,23 1246:20  1246:21 1247:15,18  1248:6,9,10 1255:9  1255:10,18,19 1257:9  1258:4 1259:19  1270:16 1274:21  1276:19 1282:14  1283:22 1284:18  1285:3 1287:2,3  1288:11,20 1292:16  1294:3,4 1295:12  1298:7,8,17,18  1301:14 1302:8  1303:18 1305:16  1308:18,22,23  1313:13 1315:7  1316:1 1317:12  1318:5,11 1319:3,7,8  1319:10,14,23 1320:8  1320:14,16,18  1321:15,22 1322:9  1323:4,13 1324:1,2  1325:24 1327:6  1328:22 1329:6,12  1330:3 1334:1  1337:13 1341:12  1342:15,20 1344:21  1345:15,21 1346:1,11  1347:9,13 1348:4  1349:1,21 1350:7,8  <b>corrected</b> 1249:5  <b>correctly</b> 1331:4  <b>corresponding</b> 1165:20  <b>corrosion</b> 1312:18  <b>cost</b> 1189:20 1190:23  1191:14,18,25  1192:16,20 1207:18  1212:18 1219:21  1220:3,16 1233:8  1259:1,10,11,19  1261:6 1275:15  1281:18 1282:4</p>	<p>1284:24 1288:14  1289:8 1291:11  1294:20 1296:6,9,11  1302:25 1310:12  1337:24 1347:13  <b>cost-effective</b> 1274:7  1276:7  <b>cost-effectively</b>  1275:11  <b>costs</b> 1189:16,24  1190:2,4,22 1191:7  1193:21 1202:14  1208:17,21 1212:15  1218:8 1220:9,14  1226:2,15 1227:21  1241:22 1258:9  1259:7,11,12,17,20  1260:16 1266:19  1267:12,20 1275:16  1275:17 1281:17,21  1282:1,2,3,4,11  1284:25 1285:19  1288:23 1292:13,15  1294:21 1300:20  1308:2 1315:21  1319:5 1335:2,17  1336:15 1337:6,12,13  1337:16 1338:13  1339:4,7,9,13,19,20  1339:24 1340:23  1342:23,23 1348:7  1350:10  <b>counsel</b> 1158:15 1171:9  1245:3 1253:25  1254:10 1255:6,11  1257:8 1286:23  1287:8 1302:9 1317:5  1320:7 1323:17  1326:22,25 1336:21  <b>counsel's</b> 1163:5,7  <b>counseling</b> 1162:9  <b>count</b> 1279:20  <b>counter</b> 1196:2,3  1301:21  <b>counterpart</b> 1191:16  <b>counterparts</b> 1163:8  1287:4  <b>countless</b> 1196:11  <b>county</b> 1157:2 1162:14  1162:22 1166:24  1191:12 1272:12  1283:17 1291:5,16  1352:3,7  <b>couple</b> 1170:20  1176:14 1193:24  1196:15 1234:21  1261:25 1276:13  1283:15 1297:18</p>	<p>1312:7 1314:23  1324:9  <b>course</b> 1206:10  1220:20 1225:24  1262:6 1267:2  1277:10 1286:9  1305:25 1312:25  1330:19  <b>courses</b> 1161:19  <b>court</b> 1157:1 1160:6,9  1164:15 1170:23  1171:16 1177:15  1178:15 1179:16  1181:4 1183:20,22,24  1189:2 1191:22  1192:1,3,12 1193:2,7  1193:9,11,18 1194:18  1200:24 1201:23,25  1202:2,21 1203:2,5,9  1203:13 1205:9,12  1207:11 1210:11,15  1212:3 1215:11  1223:20,22 1224:4  1226:8 1227:5 1228:3  1228:9 1230:22  1231:1 1232:14,23  1233:23 1234:2,5,8  1234:18,20 1236:4,20  1237:7 1239:2  1240:18 1241:3  1242:5,10,14 1243:16  1244:9,15,17,19  1247:21,23 1248:3,12  1248:16,23 1249:1,2  1255:21 1256:7,19,25  1257:2,6,13 1258:20  1260:21 1261:2,12,14  1261:19,22 1262:3  1263:4,11,21 1264:2  1264:7 1265:3,5,10  1265:16,19 1266:1,9  1267:14,15,24 1268:5  1268:11,16 1274:23  1274:24 1275:12  1281:8 1285:17  1291:13 1293:3,16  1295:7,21 1302:11,16  1303:20 1304:10,15  1306:13 1307:5,9  1309:6 1311:21  1314:13,17,19,22  1316:15,21 1318:18  1319:22 1320:3  1321:11 1323:16,19  1326:24 1330:25  1331:5,10 1336:9,24  1338:4,6,8,10  1341:17,21 1342:2</p>
---	--	--	--	---

<p>1343:11,21 1344:2,5 1346:16,18,21 1350:23 1352:9 <b>Court's</b> 1262:7 1267:11 <b>courtesy</b> 1330:23 <b>courtesy</b> 1264:7 <b>cover</b> 1187:9,19 1213:19,23 1288:18 <b>covered</b> 1300:20 1314:16 <b>CPF-10-510830</b> 1157:7 <b>CPF-12-512466</b> 1157:8 <b>CRA</b> 1186:10 1347:4 <b>create</b> 1165:8,12,16 1178:25 1184:13 1244:15 <b>created</b> 1201:18 <b>credit</b> 1311:6 <b>crime</b> 1319:1 <b>crisis</b> 1169:6 <b>cross</b> 1159:2,8 1258:20 <b>cross-examination</b> 1203:6,13,15 1244:21 1257:21 1258:23 1316:21,23 <b>CSR</b> 1157:20 1352:6 1352:23 <b>culls</b> 1321:21 <b>Cunningham</b> 1163:12 1177:3 1182:10 <b>current</b> 1219:9 1287:7 1294:19 <b>currently</b> 1161:5 <b>Curtis</b> 1157:3 1160:4 1244:4 <b>Cushman</b> 1159:4 1163:7 1257:9,12,16 1257:21 <b>custom</b> 1199:11 <b>cuts</b> 1312:17 <b>cycle</b> 1284:10</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D</b> 1159:1 1167:15,21 <b>D-E-N</b> 1262:23,25 <b>D-E-V-E-N</b> 1262:20 <b>Dam</b> 1310:9,10 <b>damages</b> 1258:10,13 1260:7,13 1261:4 1266:24,25 1267:3,21 <b>Dan</b> 1158:4 1163:6 1317:2 <b>date</b> 1178:23 1181:15 1182:25 1237:16 1326:7 1345:11 <b>dated</b> 1203:20 1215:18 1244:24 1343:2 1349:3</p>	<p><b>David</b> 1171:6 1174:15 <b>day</b> 1238:3 1248:9 1268:1 1344:11 1352:15 <b>day-to-day</b> 1161:11 <b>days</b> 1193:15 <b>deadline</b> 1280:9 1299:13 <b>deal</b> 1170:7,11 1186:24 1188:8,16 1196:1,14 1204:13 1214:14 1215:6 1217:20 1221:4,5,18 1246:4 1265:16 1272:12 1274:4,5,18 1276:18 1290:18 1306:10,12 1306:15,20,22 1316:17,18 1329:19 1339:22 1345:20 1346:1,12 <b>dealing</b> 1199:15 1206:10 1321:25 <b>debating</b> 1346:12 <b>debited</b> 1311:14 <b>decade</b> 1272:14 <b>decades</b> 1276:6 <b>deceased</b> 1287:1 <b>December</b> 1280:9,15 1299:13 1349:3 <b>decide</b> 1297:9 <b>decided</b> 1282:13 1297:9 <b>decision</b> 1199:17 1221:10 1282:13 1284:14 1292:23,24 1293:21 <b>decisions</b> 1193:7 <b>deduct</b> 1258:12 1261:6 <b>deduction</b> 1311:9 <b>deem</b> 1311:18 <b>deemed</b> 1200:9 1313:12,18 <b>deeming</b> 1314:4 <b>deeply</b> 1168:15 <b>Defendant</b> 1158:10 1268:19 <b>Defendant's</b> 1159:8 1215:9 <b>Defendants</b> 1157:14 <b>defense</b> 1230:21 1231:2 1231:3 <b>defined</b> 1342:18 <b>defines</b> 1198:12 1344:23 <b>definition</b> 1318:20 <b>definitive</b> 1190:16 1192:18,24 <b>degree</b> 1161:8</p>	<p><b>delaying</b> 1335:9 <b>delays</b> 1198:25 <b>delegated</b> 1212:6 <b>delegates</b> 1235:16 <b>delegation</b> 1235:10,11 1235:13 <b>deliver</b> 1165:21 1246:18 1272:7 1273:2 1281:10 1290:16 1312:9 1313:2 1314:10 1315:22 <b>delivered</b> 1165:18 1311:5,11,19 1314:9 <b>deliveries</b> 1165:5 1313:6,9,9 1314:3 <b>delivering</b> 1275:20 <b>delivery</b> 1273:4 <b>demand</b> 1220:7 <b>demands</b> 1312:23 <b>Den</b> 1262:22 <b>Denham</b> 1259:2,14 1260:3,6 1261:4 1267:12 <b>Denham's</b> 1267:9 <b>Dennis</b> 1159:4 1163:7 1163:10 1177:2 1233:18 1257:8,12,16 1286:24 1320:19,20 1345:8 <b>Department</b> 1157:4 1160:4 1171:6,19 1173:8 1244:4 1290:15 1298:22 <b>depending</b> 1219:12 1279:20 1285:25 <b>depends</b> 1172:15 <b>depo</b> 1330:15,24 <b>deposition</b> 1157:23 1159:19 1206:5 1223:16 1226:6 1227:24 1232:3 1233:21 1238:23 1240:16,17,23 1248:14 1262:1,3,5 1262:17,19 1330:12 1330:17 1331:9 1334:20 <b>describe</b> 1342:14 1347:23 <b>described</b> 1167:25 1342:10 <b>describes</b> 1216:3,5 <b>desert</b> 1205:16 <b>designated</b> 1206:3 1207:14,17,22 1228:24 1262:10 1263:2,5,7 1330:3,6</p>	<p><b>designations</b> 1262:1,3,9 <b>designed</b> 1322:1,5 <b>detail</b> 1202:22 <b>detailed</b> 1284:12 <b>determination</b> 1210:25 1252:18 1262:7 1333:23 <b>determinative</b> 1246:16 <b>determine</b> 1180:13 1202:14 1227:2,13 1229:8 1293:25 1309:15 <b>determined</b> 1198:9,10 1261:2 1274:6 1283:13 1297:6 1322:12,14 1332:24 1333:2 1334:4,5 <b>determining</b> 1175:10 <b>develop</b> 1282:24 <b>developed</b> 1283:18 1338:20 <b>developing</b> 1283:6 <b>development</b> 1172:14 <b>Deven</b> 1262:19 <b>devising</b> 1252:6 <b>devoutly</b> 1218:3 <b>dialogue</b> 1176:25 1181:11 1251:3 <b>dictated</b> 1289:18 <b>Diego</b> 1157:6 1162:14 1162:21 1164:1 1165:13,15 1166:24 1170:14,19 1172:6 1173:5,9 1178:4 1180:1 1182:4,20 1183:1 1184:10,11 1185:2,4,6 1186:9,21 1188:4,9,22 1191:12 1195:6,12,21 1196:7 1196:9 1199:14 1200:19 1201:10,11 1201:13 1202:11 1204:21,23 1206:3,16 1207:2,6,14 1208:7 1208:17,24 1211:5 1212:22,23,24 1213:17,23 1214:15 1214:17 1215:17 1216:18 1217:11,17 1217:21 1218:2,4,18 1218:24 1219:21,22 1220:13,20,25 1221:4 1221:11 1222:5 1226:1,21 1228:13,19 1228:23 1229:22 1233:12,13 1234:13 1234:15 1235:9 1238:3,9,14,19</p>	<p>1239:22 1240:4 1245:6,23 1246:1,25 1247:5,7,9,13 1248:7 1249:8 1250:17,22 1252:13,20 1253:12 1255:7 1256:20,22 1259:7,16 1266:14,15 1266:17,23 1267:2,19 1269:24 1270:10,11 1271:6,6 1272:11,14 1273:3,8 1279:11 1282:21 1284:16 1288:3,19 1289:2,9 1291:5 1293:1,4,6 1297:9,11 1298:1,23 1300:16 1301:24 1302:1 1303:12 1305:9,13 1310:15 1311:13 1312:13 1313:2 1314:4 1315:10 1319:13,18 1321:4 1322:11,18 1323:6 1324:24 1325:8 1326:12 1327:11,15,19,23 1328:4,9,11 1333:16 1334:2 1342:11 1346:5,7 1347:3,9,22 1348:4 1349:11 1350:1,4 <b>Diego's</b> 1175:11 1179:24 1186:25 1188:17 1199:7 1201:19 1206:9 1212:12 1231:8 1239:6 1240:6 1248:5 1251:4,9 1267:6,18 1289:10 1309:16 1311:4 1312:23 1323:12,24 1324:5 1325:15,21 1340:10 <b>difference</b> 1219:13 1259:9,10 1313:18 <b>differences</b> 1308:24 1309:5 1314:25 <b>different</b> 1190:25 1193:16,16 1214:3 1245:20,22 1264:25 1271:5 1281:15 1285:6,7,9,21,24,24 1286:6,8 1303:11 1309:3 1313:15 1334:16 1337:18 1345:3 1348:2 <b>differential</b> 1252:15 1255:14 <b>difficult</b> 1186:18 1253:11 1278:17</p>
---	---	--	---	---

<p><b>diligence</b> 1209:18  <b>direct</b> 1159:2,8 1161:1          1208:12 1227:9          1240:4 1244:25          1257:19 1269:6          1314:22 1320:22          1339:8  <b>direction</b> 1352:12  <b>directly</b> 1234:25  <b>director</b> 1171:5,19          1173:7  <b>directors</b> 1176:10,17          1215:18 1218:14          1219:3 1237:18          1269:19,21,22 1270:6          1284:15 1297:21          1308:1 1317:17          1318:4 1326:9  <b>disagree</b> 1306:7          1327:17  <b>disagreement</b> 1296:22  <b>disbelieve</b> 1340:18  <b>disclosed</b> 1297:6,10          1315:15  <b>discourage</b> 1285:11  <b>discrepancy</b> 1164:10  <b>discretion</b> 1176:2,5          1202:20  <b>discriminate</b> 1302:1          1305:9  <b>discriminated</b> 1239:25          1250:9 1255:8,12  <b>discriminatory</b> 1185:1          1305:13  <b>discuss</b> 1176:19,23          1180:22 1191:25          1318:2  <b>discussed</b> 1185:14          1191:18 1226:13          1231:20 1296:10          1303:22  <b>discusses</b> 1215:25          1220:2  <b>discussing</b> 1214:2          1218:12 1231:13          1273:11 1322:11  <b>discussion</b> 1177:24          1254:1 1282:18          1283:1 1295:2  <b>discussions</b> 1177:21          1181:8 1191:23          1192:6,14 1225:2,7          1225:20 1234:11          1281:1 1287:13          1293:7 1301:20          1304:1 1328:10  <b>dispute</b> 1197:7,8          1198:4,8,12 1204:5</p>	<p>1296:18 1321:15,18          1321:21,24 1322:3,8          1322:12,19,22          1323:13,25 1332:17          1332:23 1334:3  <b>disputes</b> 1321:22,25          1322:2 1333:13  <b>disseminated</b> 1284:20  <b>dissent</b> 1296:18,22,25  <b>distance</b> 1192:4  <b>distinguish</b> 1249:2  <b>district</b> 1157:9,11          1158:10 1164:13,13          1166:24 1172:7          1193:17,17 1197:9          1271:9,24 1279:5          1309:17  <b>districts</b> 1162:6  <b>distrust</b> 1301:8,14  <b>dividing</b> 1275:25  <b>division</b> 1193:16  <b>divvied</b> 1337:18  <b>document</b> 1166:20          1181:22 1187:8          1215:12 1291:15          1298:20  <b>documents</b> 1221:24          1343:12,14  <b>dog</b> 1240:11 1241:10          1241:17  <b>doing</b> 1217:17 1218:18          1218:23,23 1221:9          1229:4 1232:5 1293:5          1296:16 1312:22          1317:4 1319:10,11          1327:15 1346:19  <b>dollars</b> 1197:16          1247:18 1276:5,13          1288:24  <b>doubt</b> 1209:14,25          1211:7,21,22 1316:5  <b>doubts</b> 1209:20 1210:4          1210:23  <b>dozen</b> 1194:7  <b>dpurcell@kvn.com</b>          1158:8  <b>draft</b> 1183:1  <b>drafted</b> 1200:1  <b>draftsperson</b> 1181:13  <b>draw</b> 1332:11  <b>dropped</b> 1204:8  <b>DTX</b> 1181:21 1182:2          1183:18,21,23,24          1187:4 1188:24          1189:2 1291:14          1348:9  <b>due</b> 1209:18  <b>duration</b> 1173:6</p>	<p>1195:22  <b>duties</b> 1212:6  <b>DWR</b> 1342:7</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 1157:3 1159:1 1160:4          1244:4  <b>e-mail</b> 1343:25  <b>earlier</b> 1179:22          1207:15 1214:17          1234:12 1322:11          1324:9 1344:20  <b>early</b> 1172:16 1283:17          1299:19 1337:4          1341:3  <b>earnest</b> 1280:20  <b>earthen</b> 1275:7  <b>eastern</b> 1205:6  <b>easy</b> 1275:4  <b>economic</b> 1259:6,16  <b>educated</b> 1247:24  <b>educational</b> 1161:20  <b>effect</b> 1163:15 1168:19          1168:24 1174:12,14          1180:24 1182:24          1234:14 1237:16          1238:16 1239:9          1242:20 1276:24          1284:11 1286:14          1326:7 1338:22  <b>effective</b> 1157:12          1200:6 1277:5,9  <b>effectively</b> 1283:7          1288:19  <b>effectiveness</b> 1275:15  <b>efficient</b> 1312:3  <b>efficiently</b> 1271:13,19          1272:8  <b>effort</b> 1178:25 1196:20          1308:20  <b>efforts</b> 1172:9 1193:24          1194:7 1235:12,17  <b>eight</b> 1194:20 1233:21          1274:14 1301:11  <b>either</b> 1178:25 1209:11          1209:21 1211:8          1232:11 1235:2          1275:23 1277:18          1319:12 1333:13  <b>elapsed</b> 1297:17  <b>electric</b> 1337:19  <b>electricity</b> 1337:19  <b>element</b> 1197:11,12          1238:20  <b>elements</b> 1188:6          1227:22 1265:18          1285:14 1291:4          1296:25</p>	<p><b>email</b> 1158:7,8,8,9,14          1159:13,16,20 1182:3          1182:8,14,19 1183:8          1185:25,25 1186:3          1187:13,20 1247:1          1340:4,12 1343:1          1344:12 1345:8,9          1348:10,13 1349:7  <b>emailed</b> 1338:22  <b>emails</b> 1338:24  <b>Emanuel</b> 1158:11,12          1269:3,4,7 1274:24          1275:14 1286:11          1291:14 1293:8,19          1294:11 1295:9,23          1302:14,17 1303:25          1304:19 1306:14          1307:3,7,11 1312:3          1314:12,15,18,23          1316:16,19 1319:20          1320:1 1323:14,17          1326:22 1330:13,19          1330:22 1331:3          1336:7,19 1338:3,7          1341:16,20,25 1343:7          1343:18 1344:3  <b>employed</b> 1161:5,6          1269:8  <b>employee</b> 1329:11  <b>enables</b> 1222:8,8  <b>enabling</b> 1274:11  <b>encourage</b> 1194:8,10          1285:10 1333:11  <b>ended</b> 1346:13  <b>engaged</b> 1197:6  <b>enjoy</b> 1248:7  <b>ensured</b> 1197:3  <b>enter</b> 1209:6,10,20          1211:25 1264:1  <b>entered</b> 1229:22          1246:18 1264:11          1271:3 1272:3,15          1273:21  <b>entering</b> 1272:25  <b>entire</b> 1244:13 1286:9  <b>entities</b> 1194:5  <b>entitled</b> 1198:4 1273:9          1322:18,20,21  <b>entitlement</b> 1248:5          1271:11  <b>entity</b> 1199:13  <b>environment</b> 1174:23  <b>environmental</b> 1161:21          1197:2  <b>equal</b> 1176:9 1313:10          1317:16  <b>equivalency</b> 1342:6  <b>equivalent</b> 1342:9,19</p>	<p>1344:17,24  <b>era</b> 1271:8  <b>Eric</b> 1158:12 1269:3  <b>escalate</b> 1218:15,20  <b>escalated</b> 1175:23          1219:10,15 1220:9,15  <b>escalation</b> 1219:12  <b>escalator</b> 1175:24          1217:8  <b>ESQ</b> 1158:3,4,4,5,5,12          1158:16 1160:11          1244:6  <b>essence</b> 1292:7  <b>essentially</b> 1246:4          1276:15 1310:12  <b>establish</b> 1283:21          1319:1  <b>established</b> 1175:9          1180:13 1218:13          1252:4,8 1342:7  <b>establishing</b> 1182:22  <b>establishment</b> 1316:4  <b>estimate</b> 1272:17          1279:19  <b>estimates</b> 1275:5  <b>et</b> 1173:1 1312:18          1338:15  <b>evaluate</b> 1218:8 1220:3  <b>evaluating</b> 1219:21          1268:8  <b>evaluation</b> 1188:4  <b>evaporation</b> 1311:2  <b>evening</b> 1351:1,2  <b>event</b> 1229:13 1299:24          1319:14 1321:18          1352:14  <b>events</b> 1281:4  <b>eventual</b> 1292:24  <b>eventually</b> 1272:21          1273:14 1278:24          1280:22 1292:22          1303:23  <b>everybody</b> 1188:5          1243:17 1250:25          1270:6 1293:4 1300:2          1350:25  <b>evidence</b> 1159:12          1166:19 1170:23,24          1171:14,17 1172:11          1175:1 1181:23          1183:18,25 1185:23          1187:5 1188:25          1189:3 1215:10          1230:20 1231:15          1244:11 1261:25          1262:6 1263:3,14,17          1263:24 1264:5,11,13          1264:22 1265:2,8</p>
---	---	--	--	--

<p>1266:23 1267:10,15          1304:6,11,13,16          1330:16 1341:23          1343:6,14,23,25          1344:7 1348:10  <b>evidentiary</b> 1262:7  <b>evolution</b> 1179:13          1193:6 1194:3 1240:5          1252:12 1255:14  <b>evolutions</b> 1256:3  <b>evolve</b> 1195:25  <b>evolved</b> 1250:20          1252:22 1255:16,25  <b>evolving</b> 1179:12  <b>exactly</b> 1251:16          1260:19 1265:1          1279:12 1285:19          1313:21 1318:18          1339:21,21  <b>exam</b> 1244:25  <b>examination</b> 1161:1          1208:1,12 1255:23          1257:19,23 1260:11          1269:6  <b>example</b> 1189:25  <b>exceptions</b> 1239:18  <b>excerpt</b> 1248:14,21  <b>excerpted</b> 1262:4          1264:18  <b>Excerpts</b> 1159:19  <b>excess</b> 1277:19  <b>exchange</b> 1162:18,24          1163:1,9,13,15,18,19          1163:21 1164:3,5,10          1164:17,20,23 1166:5          1166:8,11,13,25          1167:3,17 1168:10,18          1169:1,16,20,22,25          1170:2 1172:8 1174:8          1175:8,15 1180:24          1182:3 1183:14          1184:8 1185:12          1186:11 1189:5,5,15          1190:20 1191:4          1194:12 1195:19,22          1197:17 1200:17,20          1201:6,13 1204:7          1206:8,9,10,11,14,15          1206:21,23 1207:4,9          1208:13,15 1210:6          1213:11 1216:11          1217:8 1219:5,14          1221:19 1222:24          1223:12 1224:15,18          1224:21 1225:7,25          1226:21 1229:14          1233:11 1234:15          1236:23 1237:2</p>	<p>1238:2 1245:23,25          1246:17,23 1247:10          1247:14 1248:8          1256:22 1270:18,21          1273:11,12,15          1276:19 1280:1          1281:3 1286:16          1287:14 1288:3          1291:2,9,11,24          1297:21,22 1300:4,10          1301:12 1302:6          1307:2,14 1308:18,22          1308:25 1309:4,7,8          1310:23 1311:16          1315:1,5 1317:12          1329:4,21,25 1331:15          1332:2 1333:24          1335:12 1336:18          1337:3 1340:23          1341:5,12 1342:6,9          1342:10,12,19,20          1344:18,19,25,25          1345:14 1347:5,18,19          1347:23 1350:7  <b>exchanges</b> 1181:13  <b>excluding</b> 1226:1,13,14  <b>exclusively</b> 1161:12  <b>excuse</b> 1260:14  <b>excused</b> 1257:3,4  <b>execute</b> 1168:16 1299:9  <b>executed</b> 1163:20          1166:4,25 1282:21          1299:18,22  <b>executing</b> 1181:15  <b>execution</b> 1178:23          1183:13 1233:10          1246:23 1247:10          1308:7  <b>executive</b> 1215:21          1269:12,15  <b>exercise</b> 1176:4          1198:24 1199:3,5          1202:19 1210:7,12,18          1210:24 1227:1,12          1229:5  <b>exercising</b> 1198:25  <b>exhaustion</b> 1197:12  <b>exhibit</b> 1171:1,17          1181:25 1183:25          1187:6 1189:3 1200:2          1215:9 1230:3,5,21          1230:25 1231:15          1236:23 1241:1          1244:12,13,15 1265:7          1265:7 1291:13          1294:12 1299:14          1343:23 1344:7  <b>exhibits</b> 1159:11</p>	<p>1257:11 1261:20          1263:13 1265:1  <b>existed</b> 1181:15          1227:20  <b>existence</b> 1193:5  <b>existing</b> 1163:15          1183:3 1217:8 1305:7          1305:18  <b>expectation</b> 1229:17  <b>experience</b> 1179:10          1196:12  <b>experienced</b> 1181:12  <b>expert</b> 1192:25 1193:1          1211:13 1262:19  <b>expertise</b> 1193:3  <b>expiration</b> 1249:10  <b>expired</b> 1201:15,20  <b>explain</b> 1169:4 1178:7          1202:2 1274:24          1275:17 1280:7          1281:8 1287:19          1309:6 1327:4  <b>explained</b> 1315:1  <b>explaining</b> 1255:17  <b>explanation</b> 1313:15  <b>explore</b> 1185:19  <b>exposure</b> 1165:17  <b>express</b> 1301:16,19  <b>expressed</b> 1172:10,14          1255:5 1303:12          1305:8  <b>expression</b> 1232:17  <b>extract</b> 1320:4  <b>extracted</b> 1304:15  <b>extremely</b> 1174:15          1300:17,19  <b>eyeglasses</b> 1187:24</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>f</b> 1346:14  <b>fabric</b> 1178:11  <b>face</b> 1229:10 1304:8,14  <b>facilitate</b> 1194:8  <b>facilities</b> 1313:4  <b>fact</b> 1206:16 1208:6          1214:6 1232:10          1267:6 1290:7 1320:3          1320:6 1321:20          1342:17  <b>facts</b> 1256:20  <b>failed</b> 1266:16,23,24          1280:15 1333:16  <b>fails</b> 1198:24  <b>failure</b> 1169:23 1200:4          1200:8,8,10  <b>fair</b> 1172:21 1183:11          1248:17 1303:23          1327:3 1334:18</p>	<p><b>fairly</b> 1208:2  <b>fall</b> 1204:25  <b>familiar</b> 1230:2          1270:23 1273:16          1300:11 1315:24          1329:15  <b>far</b> 1167:4 1200:25          1201:4,11 1207:1,6          1294:2  <b>Farber</b> 1161:7  <b>farm</b> 1271:15  <b>farming</b> 1197:1  <b>Farther</b> 1349:9  <b>fashion</b> 1302:2,24          1303:11  <b>favor</b> 1285:2,13,14  <b>favorable</b> 1345:3  <b>feared</b> 1186:18  <b>feasibility</b> 1274:6          1275:1 1276:8,10  <b>feasible</b> 1274:7  <b>February</b> 1334:23          1336:21 1340:3          1343:2,8  <b>Federal</b> 1278:11  <b>fee</b> 1221:2 1342:6,12  <b>feel</b> 1210:7  <b>felt</b> 1197:6 1288:16,21          1288:22 1337:15  <b>field</b> 1179:11  <b>Fifty-six</b> 1344:5  <b>Figuroa</b> 1158:13  <b>file</b> 1201:14,19 1265:25          1331:17 1335:8,20,24          1336:3 1337:22  <b>filed</b> 1262:9 1263:9          1268:7  <b>filing</b> 1247:3,9 1335:14          1335:16  <b>fills</b> 1278:1  <b>final</b> 1345:14  <b>finalize</b> 1299:15  <b>finalized</b> 1299:17  <b>Finally</b> 1276:18  <b>financial</b> 1165:17          1259:24 1296:13          1308:1,5 1312:17          1329:7 1342:6  <b>find</b> 1221:19  <b>finding</b> 1172:11  <b>findings</b> 1267:11  <b>fine</b> 1258:18  <b>finish</b> 1232:23 1302:14          1338:6  <b>finished</b> 1338:4 1342:1  <b>firm</b> 1161:6 1182:9          1309:17 1340:16  <b>first</b> 1160:17,20</p>	<p>1163:18,19 1167:20          1171:25 1172:17          1175:17,19 1176:16          1185:16,16 1186:7          1194:22 1196:9          1198:9 1202:7,16          1213:14 1215:25          1216:8 1218:12          1219:7,20 1225:3          1245:7 1262:1,10,12          1262:22 1263:16          1264:5,15 1281:10          1291:8,9 1292:20          1294:6 1296:4          1300:15 1309:12          1317:16 1322:13,19          1325:7 1326:16          1327:8,13,24 1329:3          1332:25 1334:4          1338:6 1350:14  <b>fit</b> 1178:21  <b>five</b> 1175:17,19,22          1194:22 1195:5          1196:2,8 1198:10          1219:11 1221:11          1249:10 1254:4,23          1255:2,9,18 1262:5          1266:21 1270:7          1278:7 1302:12          1305:22 1306:16,17          1308:7,14 1314:17,18          1314:19 1316:9          1322:13,19 1325:8,16          1327:12 1328:3          1331:16 1332:8          1333:1,25 1334:5,11          1335:18,25 1337:21          1350:14,21  <b>five-minute</b> 1203:9          1314:20  <b>five-year</b> 1195:4,6,11          1196:23 1197:20          1198:6 1201:14,19          1254:2,18 1300:10,14          1303:17 1305:15          1306:3,11 1308:8,9          1322:10 1323:13,14          1323:18 1324:1          1335:6,13  <b>fixed</b> 1175:16,17,19,23          1184:24 1204:11          1246:18,19  <b>flagged</b> 1230:4  <b>flip</b> 1170:15 1303:1          1305:5  <b>floating</b> 1175:16          1176:1 1180:18  <b>Floor</b> 1157:24 1158:13</p>
--	--	--	--	--



<b>focus</b> 1167:7,15 1238:18	<b>frequently</b> 1191:17	1217:18 1218:1	<b>good</b> 1160:6 1203:17 1203:18 1240:18	<b>head</b> 1342:3
<b>focused</b> 1161:10	<b>fresh</b> 1265:14	1273:4 1326:25	1243:15,16 1269:3	<b>headed</b> 1344:16
<b>Foley</b> 1171:7	<b>front</b> 1215:15 1331:10	1346:9 1349:11	1287:23 1302:15	<b>heading</b> 1188:21 1332:16 1340:22
<b>follow</b> 1203:2 1327:20	<b>frustrated</b> 1327:1	<b>give</b> 1169:22 1259:6,15	1307:3 1316:25	1341:9 1349:18
<b>followed</b> 1239:17 1263:8	<b>frustration</b> 1172:11	1272:17 1282:6	1317:1 1322:3	<b>heads</b> 1266:13,25
<b>following</b> 1223:25 1239:20	<b>full</b> 1165:23 1215:3 1246:15 1268:24	1287:9 1289:15	1350:22,23 1351:1	<b>hear</b> 1192:4
<b>follows</b> 1160:13 1244:7 1257:17 1268:20	1278:3 1280:16	1315:11 1330:9	<b>goodwill</b> 1197:18	<b>heard</b> 1201:9
<b>forced</b> 1246:10	1281:11 1292:12,22	1341:21	<b>govern</b> 1179:19	<b>hearing</b> 1350:21
<b>forecast</b> 1220:7 1246:10	1292:23 1293:3	<b>given</b> 1170:12 1278:20 1284:23 1292:17	<b>Government</b> 1278:11	<b>hearings</b> 1271:22
<b>foregoing</b> 1324:21	1296:6,9,11 1300:19	1301:1	<b>Governor</b> 1172:13 1174:18	<b>held</b> 1197:9 1271:22
<b>foremost</b> 1196:9 1309:12	1302:25 1309:19	<b>gives</b> 1319:13,18	<b>Governor's</b> 1169:9 1192:10	<b>help</b> 1286:6 1289:7,14 1289:24,24
<b>forensic</b> 1209:17 1210:7,12,18,24	1339:9,12,19,20,24	<b>giving</b> 1201:18 1302:18 1345:19	<b>governors</b> 1196:15	<b>helping</b> 1289:5
1211:9,23 1227:1,11 1229:4	1342:23 1347:12	<b>go</b> 1167:14 1181:6 1183:16 1187:25	<b>granted</b> 1199:5 1200:5	<b>Hentschke</b> 1163:6
<b>forever</b> 1276:14	1348:7	1198:2 1201:3 1203:5	<b>great</b> 1187:23 1217:20 1274:18	<b>Herculean</b> 1196:17
<b>form</b> 1227:5 1237:12 1237:13 1303:2	<b>fully</b> 1267:23	1203:7 1214:11	<b>greater</b> 1342:7	<b>hey</b> 1214:22
1322:3 1326:4	<b>fund</b> 1168:16 1169:14 1289:24	1227:6 1228:9 1234:8	<b>ground</b> 1172:12	<b>high</b> 1278:8 1290:24
<b>forth</b> 1267:23 1337:20	<b>funding</b> 1170:13 1298:22	1240:16 1242:10,14	<b>grounds</b> 1343:8	<b>higher</b> 1217:7 1288:15 1288:16 1312:11
<b>Forty-five</b> 1164:16	<b>funds</b> 1169:7 1290:14 1290:16	1260:21 1274:11	<b>groundwater</b> 1162:11 1286:5,7,8 1290:2,13	<b>highlight</b> 1182:19
<b>forum</b> 1194:24 1238:8 1238:15,20 1239:7	<b>further</b> 1199:5 1244:7 1248:11 1253:21	1276:24 1281:5,24	<b>groups</b> 1197:2	<b>highlighted</b> 1264:20,21 1264:23 1292:7 1317:22
1325:9 1326:4,13	1255:20 1256:9	1284:2,11 1285:20	<b>guarantee</b> 1320:23	<b>historic</b> 1169:6 1197:14 1221:5 1225:12
<b>forums</b> 1333:14	1257:1,17 1260:9	1286:14 1288:17	<b>guaranteed</b> 1273:9 1309:12,23,23 1312:5	<b>historical</b> 1219:11 1281:4
<b>forward</b> 1165:17 1188:7 1214:11	1261:13 1263:9	1293:18,24 1304:18	1320:22 1321:3	<b>history</b> 1197:15 1221:7
1221:14 1336:21 1339:5	1325:7 1345:22	1308:17 1312:2	1322:1,7	<b>hit</b> 1280:17
<b>forwarding</b> 1345:9	1352:13	1313:21 1317:10	<b>guess</b> 1247:24,24 1330:25	<b>hoc</b> 1283:7,11
<b>forwards</b> 1340:7	<b>furthermore</b> 1209:9	1318:17,21,23 1321:2	<b>guy</b> 1191:16	<b>hold</b> 1192:23 1217:23 1278:1
<b>found</b> 1332:14	<b>future</b> 1300:24 1305:3 1328:2,14	1321:9 1322:25		<b>Hon</b> 1160:4 1244:4
<b>foundation</b> 1191:21 1200:23 1207:10	<hr/> <b>G</b> <hr/>	1324:3 1325:25	<hr/> <b>H</b> <hr/>	<b>Honor</b> 1160:7 1179:14 1181:24 1183:17
1210:10 1247:20,22	<b>gap</b> 1288:18 1289:5,6,6 1289:12,14,19	1331:6 1336:25	<b>HADLOCK</b> 1158:4	1201:22 1215:10
1256:17 1295:5,20 1301:18	<b>Gastelum</b> 1163:12 1169:9,18	1337:16 1341:7,8,19 1349:16	<b>half</b> 1167:7,15 1194:7 1275:25 1276:1,1,2 1278:1 1280:16	1223:19,24 1224:3 1226:6 1227:24
<b>four</b> 1269:25 1270:9 1345:24 1350:21	<b>gate</b> 1272:7	<b>goes</b> 1216:12 1230:12 1237:20 1248:5 1342:12	<b>halfway</b> 1324:17	1228:2 1230:20,21
<b>Fourteen</b> 1238:25	<b>gathered</b> 1320:21	<b>going</b> 1165:17 1179:12 1182:7,20 1186:19	<b>hall</b> 1203:8 1268:15	1233:22 1234:4,7
<b>fourth</b> 1173:22 1266:7 1266:12 1277:24	<b>general</b> 1158:15 1163:4 1163:5,6 1171:22	1194:10 1196:23	<b>hand</b> 1352:15	1236:25 1240:20
1278:2 1349:14	1215:22 1216:5	1197:16,18 1221:14	<b>hands</b> 1197:17 1298:20	1242:7 1243:15
<b>Frahm</b> 1171:7,11	1227:8 1239:16	1233:1 1234:20	<b>handshake</b> 1290:18	1244:10 1248:13
<b>frame</b> 1274:12 1283:17 1336:22 1349:15	1269:12,14 1287:7	1238:14,20 1239:6	<b>happen</b> 1204:18 1314:1 1314:2,6 1343:13	1253:21 1256:17
<b>framework</b> 1227:8	1319:12 1320:7	1246:22 1251:21,23	<b>happened</b> 1204:19 1256:14 1300:6,7 1316:12	1257:5,14 1258:19
<b>Francisco</b> 1157:2,16,17 1157:24 1158:6	1330:2	1252:7,19 1256:25	<b>happening</b> 1326:24	1261:13,15 1263:10
1160:1 1244:1 1352:16	<b>generally</b> 1176:11 1184:4,20 1185:2,7	1262:13,16 1263:23	<b>happy</b> 1264:6	1263:15 1265:6
<b>free</b> 1183:2 1195:7	1237:18 1317:18	1268:7 1276:1	<b>hard</b> 1215:16	1266:6,14 1267:1,9
	1318:7 1326:9 1342:8	1282:22,24 1283:1,3	<b>Harkins</b> 1182:9	1267:22 1268:3,13,15
	1342:18 1344:17,24	1288:6,6 1289:19,20	<b>harm</b> 1302:1	1269:3 1291:14
	<b>generate</b> 1276:13	1291:3 1297:13	<b>harm</b> 1302:1	1304:6 1307:3,7,11
	<b>Generating</b> 1310:11	1299:12 1304:24	<b>harmed</b> 1303:14	1316:19 1321:13
	<b>gentleman</b> 1329:5	1306:6 1316:8,9	<b>Hatch</b> 1340:15 1348:11	1323:15 1326:22
	<b>gentlemen</b> 1187:14	1317:4 1320:1 1336:7	<b>hatchet</b> 1197:21	1330:17 1336:19
	<b>gesture</b> 1342:3	1336:9 1339:5 1343:7	<b>hate</b> 1236:4	1338:3 1341:25
	<b>getting</b> 1184:1 1217:12	1347:9 1350:5	<b>Havasu</b> 1310:24	1344:4 1350:20
		<b>Goldberg</b> 1158:5 1261:16,17,17,20,23		<b>HONORABLE</b> 1157:3
		1262:25 1263:15		
		1264:4,9 1265:6,9		

<p><b>Hoover</b> 1310:9  <b>hope</b> 1290:2 1331:3  <b>hour</b> 1317:24  <b>hours</b> 1196:12  <b>hundred</b> 1276:13  <b>hundreds</b> 1247:17              1276:6  <b>Hyatt</b> 1161:7  <b>Hyatt-Thermalito</b>              1310:11  <b>hydroelectric</b> 1310:9              1310:11  <b>hypothetical</b> 1259:25</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>i.e</b> 1183:2  <b>ID</b> 1159:12  <b>idea</b> 1184:25 1214:9              1228:4 1283:8 1284:8              1285:8 1299:21              1305:17  <b>ideas</b> 1216:6 1285:7,9              1285:21 1286:6  <b>identical</b> 1264:17  <b>identification</b> 1171:1              1181:25 1187:6              1230:25  <b>identified</b> 1342:10,20              1344:18  <b>identify</b> 1202:16  <b>IID</b> 1164:20 1165:5,19              1166:6,15 1168:25              1170:2 1173:13              1213:18 1219:22              1223:1 1270:21              1271:1,3,4,9,17,21              1272:4,5,12,16,18,24              1273:22 1276:17,19              1287:17 1288:3,19              1289:2 1311:4              1312:15,21 1313:2,5              1313:9,11,21 1341:4              1341:11  <b>IID's</b> 1279:12  <b>IID/SDCWA</b> 1291:21              1342:11  <b>illegal</b> 1206:18 1207:2              1207:7 1209:6,12              1225:8,10,22 1231:17              1231:22 1232:1,12,16              1232:21 1233:3              1235:2 1241:22              1242:20,24 1243:14              1261:3,3  <b>illegality</b> 1256:21  <b>immediately</b> 1197:2              1248:21 1280:12              1302:5 1325:6</p>	<p><b>impact</b> 1259:6,16,24  <b>impasse</b> 1186:18  <b>impeachment</b> 1228:1,3              1228:5 1330:13  <b>Imperial</b> 1164:12,13              1165:14 1172:7              1196:11 1197:1,9              1271:9,23 1272:1              1273:23 1279:4,11              1309:16  <b>impetus</b> 1281:1              1282:20  <b>implement</b> 1168:8  <b>implementation</b>              1209:11,15 1210:1,5              1211:8 1212:8  <b>implemented</b> 1170:18  <b>implementing</b> 1170:14              1170:16 1186:22  <b>implies</b> 1345:2  <b>important</b> 1179:5              1184:19,23 1197:13              1213:22 1222:22              1224:1 1232:7              1329:19 1346:20  <b>impossible</b> 1277:5              1318:14  <b>improper</b> 1189:25              1191:14 1261:3  <b>include</b> 1230:10 1260:6              1319:5  <b>included</b> 1167:17              1208:16 1212:25              1216:16 1217:1              1266:18 1297:10              1300:9 1324:20  <b>includes</b> 1163:10              1315:21 1332:21              1348:25  <b>including</b> 1182:24              1193:19 1200:16              1237:14 1284:16,24              1293:4 1295:25              1300:13 1326:6              1348:12  <b>inclusion</b> 1199:25              1212:18 1241:22              1336:14  <b>incorrect</b> 1183:4  <b>increase</b> 1213:13              1219:22 1259:1,18              1277:7  <b>increased</b> 1261:6  <b>incurred</b> 1193:21  <b>independent</b> 1174:21              1218:1 1273:3 1342:7  <b>indexed</b> 1213:13  <b>indicated</b> 1213:12,22</p>	<p>    1267:14 1342:2  <b>indication</b> 1342:1  <b>Individually</b> 1212:4  <b>individuals</b> 1295:15  <b>industrial</b> 1162:3  <b>inflated</b> 1320:25  <b>inflation</b> 1219:10,16              1288:12 1292:5  <b>inflator</b> 1204:11  <b>influence</b> 1174:21              1194:4  <b>influenced</b> 1246:16  <b>information</b> 1172:8              1208:8 1259:1 1260:7              1284:19 1285:1              1297:15 1320:5  <b>informed</b> 1235:4              1257:8 1329:18  <b>initial</b> 1164:9 1175:23              1176:8 1179:20              1195:5 1208:12,16              1224:24 1230:15              1272:1  <b>initially</b> 1161:17              1181:11 1199:9              1213:12  <b>initiate</b> 1199:18  <b>input</b> 1175:14  <b>inputs</b> 1192:10  <b>insecurity</b> 1170:13  <b>installments</b> 1313:10  <b>instance</b> 1232:10,20              1285:20  <b>institutions</b> 1161:20  <b>instruct</b> 1260:6  <b>intake</b> 1310:24  <b>intend</b> 1201:2,14              1205:25 1318:24              1319:3  <b>intended</b> 1184:12              1195:3 1333:11  <b>intent</b> 1318:25  <b>intention</b> 1328:11  <b>intercede</b> 1173:8  <b>interest</b> 1274:18              1293:12 1305:14  <b>interested</b> 1157:10              1274:25 1289:5              1352:13  <b>interests</b> 1162:3 1197:1              1199:17  <b>interior</b> 1196:15              1280:8,12,14  <b>interposed</b> 1262:8  <b>interpretation</b> 1206:9              1237:13 1238:11,15              1238:21 1239:8              1326:5</p>	<p><b>interpretations</b>              1182:24 1183:3,7  <b>interrogatories</b>              1263:17  <b>interrogatory</b> 1159:14              1159:15 1263:21,25              1264:12,13,15,17,20              1264:20,25  <b>interrupt</b> 1236:4  <b>interrupting</b> 1326:23  <b>intervention</b> 1196:16  <b>intimately</b> 1329:15  <b>introduce</b> 1262:6  <b>introducing</b> 1343:11  <b>invalid</b> 1192:21  <b>investigate</b> 1209:17  <b>invoices</b> 1169:10  <b>involved</b> 1172:22              1177:1 1187:12              1279:19 1280:11              1349:1  <b>involves</b> 1270:20  <b>involving</b> 1283:17  <b>irrelevant</b> 1205:8              1343:18  <b>Irrigation</b> 1164:12,13              1172:7 1197:9 1271:9              1271:24 1279:4              1309:17  <b>issue</b> 1172:16 1182:21              1211:15 1232:7              1267:12,18,19 1273:8              1286:1 1288:1 1334:9              1335:25 1343:20              1346:3  <b>issues</b> 1161:15 1170:13              1329:24 1330:8              1334:7 1338:14              1340:23 1341:2  <b>item</b> 1173:23 1261:25  <b>iterations</b> 1179:23</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>J</b> 1158:12  <b>J-E-F-F-R-E-Y</b> 1269:2  <b>J-U-N-E</b> 1262:15  <b>Jack</b> 1171:7  <b>James</b> 1163:5  <b>JAN</b> 1157:22  <b>January</b> 1157:12,12              1172:20 1173:11              1176:25 1177:8              1244:24 1284:11              1286:15  <b>Jeff</b> 1159:9 1163:11              1177:3 1181:19              1184:18 1186:11              1240:10 1241:9,16</p>	<p>    1242:18 1251:13              1268:14,18 1347:4  <b>Jeffrey</b> 1269:1  <b>Jim</b> 1249:25  <b>jkeker@kvn.com</b>              1158:8  <b>JOHN</b> 1158:3,12  <b>johnquinn@quinne...</b>              1158:14  <b>JOSEPH</b> 1158:16  <b>Judge</b> 1160:4 1244:4  <b>judgment</b> 1190:17              1265:16 1266:7,10,11  <b>judicial</b> 1182:21              1194:24 1237:12              1238:8,15,20 1239:6              1325:9 1326:3,13              1350:12  <b>July</b> 1169:10 1183:10  <b>jumped</b> 1336:21  <b>juncture</b> 1268:7  <b>June</b> 1262:14  <b>junta</b> 1251:21  <b>justify</b> 1211:22  <b>juxtaposing</b> 1202:3,4</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>K-I-G-H-T-L-I-N-G-...</b>              1269:2  <b>Karnow</b> 1157:3 1160:4              1244:4  <b>Kaseman</b> 1163:12              1177:3 1181:12              1182:9,11,18  <b>Kaseman's</b> 1182:19              1183:8  <b>Kathy</b> 1343:2  <b>Katz</b> 1173:2 1193:8,25  <b>keep</b> 1323:19  <b>keeping</b> 1238:19  <b>Keker</b> 1158:3,3              1236:25 1237:4              1257:4,7,20 1258:18              1260:12,19,25              1261:13,15,17 1268:3              1268:10  <b>Kennedy</b> 1172:22              1174:2 1203:19              1244:24 1245:16              1246:5,6  <b>Kennedy's</b> 1172:17              1173:11,19 1174:11  <b>Kenny</b> 1171:6,18  <b>kept</b> 1329:18  <b>key</b> 1205:13 1222:7,10              1222:13,18  <b>Kightlinger</b> 1159:9              1163:11 1177:3,18,19</p>
---	--	--	--	---

1178:20 1181:3 1184:18 1186:3,13 1225:2,6,13 1240:10 1241:7,15 1253:4 1268:14,18 1269:2 1270:17 1271:7 1288:8 1314:25 1316:9,25 1317:11 1321:14 1324:4,14 1325:20 1327:21 1328:15 1329:1 1334:14 1336:5,13 1337:2 1339:1 1340:3 1343:1 1348:3,9 <b>kind</b> 1196:20 1217:16 <b>knew</b> 1206:16 1208:15 1209:6,10 1211:15 1212:17 1259:5,15 1277:6 <b>know</b> 1185:10 1201:11 1202:8 1203:10 1207:3,5,8,12,17,20 1210:4 1212:19 1225:18 1247:4,23 1249:4 1259:9 1265:16,20 1266:3 1267:25 1270:18 1277:14 1281:21 1283:9,21 1285:4 1304:6 1313:20 1323:19 1339:21 1341:15 1347:22,24 1350:20 <b>knowing</b> 1212:24 <b>knowledge</b> 1168:22 1225:25 1233:12,16 1236:17 1272:23 <b>knowledgeable</b> 1206:4 1207:15,22 1213:7 1329:23 1330:6 <b>known</b> 1173:2 1206:20 1206:23 1214:3 1256:21 <b>knows</b> 1200:25	1195:3 1199:8 1202:7 1238:9,14 1239:12,16 1240:9 1241:8 1251:20 1252:25 1317:15,21,25 1318:3 1322:16 1325:17,24 1328:16 1332:21 1333:8 1344:20,23 1347:4 <b>large</b> 1271:11 <b>larger</b> 1217:12 1221:18 <b>largest</b> 1197:15 1221:5 1270:12 <b>lasted</b> 1165:2 <b>lastly</b> 1206:11 <b>late</b> 1282:17 1283:16 <b>latest</b> 1340:10 1344:9 <b>law</b> 1161:6,8,11,14,17 1161:20,21,21,24 1173:2,3,7 1176:11 1176:18 1177:6,12,20 1177:22 1178:11,21 1178:23 1179:1,2,7,9 1179:11,13,18 1180:12,19,22,23 1181:8,15 1182:9,23 1183:4,10 1193:5,8 1193:12 1194:1,9,25 1195:8 1198:11 1206:12 1210:20 1211:13 1227:9,19 1228:17 1229:24 1233:15 1234:16 1235:4 1236:14 1237:14 1238:11,16 1238:21 1239:8 1240:5 1249:15 1250:10,19 1252:12 1252:22 1253:19,20 1255:14,16,25 1256:3 1256:5,14 1261:4 1266:16 1317:18 1318:5,23 1319:12,17 1322:14 1325:11,23 1326:5,15 1327:12 1333:3 1334:6 <b>lawful</b> 1185:13,21 1186:9,23 1188:23 1192:16 1197:22 1224:19 1225:16 1231:14 1232:18 1233:5 1267:8 1315:25 1316:6,14 1318:11,12 1319:19 1342:8,14,17,22 1344:17,24 1345:4 1347:3,8 1348:4,7,8 1350:1,5	<b>lawfulness</b> 1316:5 <b>laws</b> 1178:21 1256:15 <b>lawsuit</b> 1201:14,19 1206:18 1247:9 1256:13 1280:2 1316:10 1331:18 1335:8,14,16,20,24 1336:4 1337:23 <b>lawyer</b> 1161:4 1204:20 1209:2 1211:6 1256:18 1319:23 1320:2,4,9 <b>lawyer's</b> 1243:5 <b>lawyers</b> 1202:23 1320:12 <b>lay</b> 1301:18 1327:18 1345:25 <b>lead</b> 1162:21 1164:1 1174:10 1199:7 1235:21 1286:22 1287:6 1320:17 <b>lead-in</b> 1284:13 <b>leading</b> 1233:10 1274:22 1285:16 1301:12 1303:19 1311:20,21,23 1312:1 <b>leads</b> 1254:9 <b>leaking</b> 1275:6 <b>left</b> 1192:7 <b>legal</b> 1161:11 1162:13 1167:22 1187:9 1210:2,25 1212:7,11 1212:13 1227:3,8,14 1227:16 1293:14,16 1319:21 1334:13 1336:2,2 <b>legality</b> 1209:15,21 1210:5 1211:7 1212:15 <b>legally</b> 1167:23 1168:16,24 <b>legislation</b> 1193:20 1290:14,19 <b>legislative</b> 1237:12 1326:3 <b>legislature</b> 1172:13,25 1173:3 1174:19 1193:24 1194:8 1288:18 <b>length</b> 1164:10 1165:3 1195:18 1196:1 1307:2 <b>let's</b> 1177:17 1183:16 1194:16 1203:5,9 1213:11 1214:11 1215:8 1224:4 1232:3 1233:20 1236:22 1240:15,16 1244:9	1260:21 1270:25 1273:12,18 1276:16 1307:5,10 1314:19 1324:3 1331:6 1337:3 1338:6 1341:7,8 1342:3 1345:23 1346:23 1347:2 1348:9 <b>letter</b> 1171:5,10 1172:1 1173:11,19 1174:3,11 1174:20 1194:21 1203:19,25 1244:23 1247:1 1335:5 <b>level</b> 1251:3,5 <b>levy</b> 1342:15 <b>lieu</b> 1216:11 <b>life</b> 1178:24 1179:10 1221:15 1225:10 1243:5 1301:4,22 <b>limit</b> 1179:24 1200:25 1325:15,21 <b>limitation</b> 1203:1 1323:11,24 1335:6,13 <b>limitations</b> 1170:18 1178:9 1202:19 1254:12,19,22 1255:1 <b>limited</b> 1161:12 1173:6 1179:21 1180:23 1181:9 1182:20 1195:23 1324:6 1328:5 <b>limiting</b> 1182:7 <b>limits</b> 1176:2,4 <b>line</b> 1173:23 1226:20 1233:9,21,25 1234:9 1237:9 1238:23,23 1241:5,25 1242:6,9 1248:20,20,22 1254:8 1254:15 1272:5 1274:11 1275:22 1289:24 1290:8,12 1291:20 1302:14 1331:9,9 1334:21,21 1340:13 1344:9 1345:21 <b>lined</b> 1275:7 <b>lines</b> 1194:20 1223:18 1223:23 1226:7 1227:24 1238:24 <b>lining</b> 1168:3,9 1169:12 1170:8,14,16 1185:20 1186:22 1188:3 1204:15 1214:16,23 1214:24 1215:1 1216:10,15,23 1217:14 1220:25 1221:22 1222:9 1223:8 1231:7	1270:22 1273:14,16 1274:1,4 1275:24,25 1276:1,17 1289:25 1292:10 1297:25 1298:3,14 1301:1 1302:6,20 1346:1,5,5 1346:7 1349:19,21 <b>list</b> 1163:10 1179:1,4 1187:12 1348:24 <b>listed</b> 1207:15 <b>listen</b> 1210:13 <b>listened</b> 1192:5 <b>litigating</b> 1162:11 <b>litigation</b> 1190:3,8,11 1196:16 1197:2 1199:18,20 1204:1 1235:21 1265:20 1300:24 <b>little</b> 1172:11 1260:21 1282:10 1284:1 1302:11 1314:13 1325:4 <b>live</b> 1211:15 <b>lobbying</b> 1186:10 1347:4 <b>local</b> 1194:5 <b>loggerheads</b> 1288:20 <b>long</b> 1204:23 1218:3 1242:8 1269:14,17 1274:13 1283:24 1284:12 1299:11,14 1332:8 <b>long-term</b> 1310:8 <b>long-time</b> 1329:11 <b>longer</b> 1300:25 <b>look</b> 1173:22 1215:8,16 1218:11 1221:11,18 1221:23 1222:2 1223:16 1227:16 1230:3,5 1232:3 1233:20 1236:22,24 1240:15,23 1248:23 1254:6 1264:19 1275:3 1291:20 1292:1,1,6 1309:14 1317:5 1324:7,11 1340:21 1342:4 1347:2 1348:9 <b>looked</b> 1203:19 1208:11 1275:23 1276:4 1349:7 <b>looking</b> 1178:1,2 1192:4 1194:18 1196:25,25 1197:1 1239:17 1340:21 1341:17 1343:13 <b>looks</b> 1332:13 <b>Los</b> 1158:13,17
<b>L</b>				
<b>L.A</b> 1214:15 <b>labor</b> 1281:24 <b>lack</b> 1165:11 1168:23 <b>lacked</b> 1267:15 <b>Lacks</b> 1191:20 <b>Ladies</b> 1187:13 <b>laid</b> 1338:23 <b>Lake</b> 1310:24 <b>language</b> 1176:1,4 1177:9,10 1179:21,23 1181:14 1184:3,8,12 1185:5 1186:10				

<p>1235:13 1299:25  <b>lose</b> 1309:20  <b>loss</b> 1280:18 1311:2  <b>losses</b> 1311:1,2,6,7,14  1312:6 1314:11  <b>lost</b> 1193:14,20 1311:1  <b>lot</b> 1193:23 1199:14,15  1243:8 1253:8 1256:5  1282:25 1284:12  1285:20 1304:6  1311:23 1343:12  <b>loud</b> 1172:2  <b>low</b> 1205:22 1288:10  <b>lower</b> 1310:8  <b>lucky</b> 1243:7  <b>Luis</b> 1193:18  <b>lynchpin</b> 1196:18</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>magnitude</b> 1243:3  <b>maintain</b> 1304:13  <b>major</b> 1312:19  <b>making</b> 1194:5 1221:9  1289:1 1314:3  <b>manager</b> 1163:4  1171:22 1215:22  1269:12,14 1287:7  1330:2  <b>manger</b> 1240:12  1241:10,17  <b>marginal</b> 1288:21  <b>marked</b> 1171:1  1181:25 1187:6  1230:25 1264:14  <b>marked-up</b> 1262:4  <b>market</b> 1310:2,13,20  1315:5  <b>marketing</b> 1283:2  <b>match</b> 1166:5 1312:23  <b>matching</b> 1341:4  <b>material</b> 1311:25  <b>math</b> 1296:16,16  <b>matter</b> 1172:12  1193:12 1229:24,24  1266:16 1294:9  1304:11 1318:19  1348:17  <b>matters</b> 1199:16  <b>Maureen</b> 1163:3  1233:17 1235:6  1250:1 1287:6  1295:16  <b>maximization</b> 1194:6  <b>maximum</b> 1165:23  <b>mean</b> 1177:25 1184:12  1192:4 1197:24  1202:5 1213:16  1214:19 1227:14</p>	<p>1283:15 1298:15  1315:18 1316:15  <b>meaning</b> 1176:19,23  1177:6,19 1183:9  1195:18 1238:13  1239:12 1328:16  <b>meaningless</b> 1328:17  <b>meanings</b> 1348:2  <b>means</b> 1273:3 1312:21  1321:7 1327:14  1346:6  <b>meant</b> 1177:23 1194:1  1203:1 1283:12  <b>measure</b> 1266:24  1314:10  <b>meetings</b> 1172:8  1233:17,17 1235:15  <b>melled</b> 1220:7 1310:3  1310:7,7,14,18  <b>member</b> 1176:13  1184:5,21 1185:3,9  1237:20 1246:24  1250:16 1270:2  1284:2,20,23 1285:22  1310:4 1315:15  1317:20 1318:8  <b>members</b> 1270:1,8,9  1285:2 1300:22  1310:13  <b>memo</b> 1174:20  <b>memorandum</b> 1215:16  1215:23 1218:6  1219:2 1220:2  1221:10  <b>mens</b> 1319:1  <b>mention</b> 1317:25  1323:3  <b>mentioned</b> 1240:3  1298:9 1341:2  <b>mere</b> 1309:2  <b>met</b> 1165:16 1170:17  1174:18 1175:10  1179:21,21 1190:13  1191:17 1195:9,20  1197:7 1204:8,14,15  1212:20 1217:3  1220:20,24 1221:3  1222:5 1226:23  1227:3,15,16 1228:14  1229:12,15,19,20,23  1230:3,8,16 1231:17  1231:20,24 1233:12  1233:13 1234:13  1235:10 1238:1,20  1245:23 1246:18,24  1247:2 1252:13  1255:7 1257:8  1259:20 1260:1,15</p>	<p>1262:8 1268:14  1318:20 1319:2,9,14  1319:19 1325:22  1327:9 1329:11  1348:6  <b>Met's</b> 1182:5 1194:14  1197:22 1204:1  1206:17 1207:2,7  1212:20 1216:15,25  1217:4 1230:6  1231:11 1233:13  1238:4 1247:6  1262:10 1268:11  1326:14 1329:9,16  1331:25  <b>Met-Colorado</b> 1246:12  <b>meter</b> 1314:10  <b>method</b> 1252:6 1272:5  <b>methodology</b> 1175:9  1253:16  <b>methods</b> 1271:5,12  1273:23 1275:23  <b>Metropolitan</b> 1157:9  1157:11 1158:10  1162:17 1163:2,9,14  1163:16,22 1164:4,19  1164:24 1165:4  1166:15,23 1167:17  1168:8,11,14,20,23  1169:3 1170:1  1171:23 1172:6,20,24  1173:10,12 1175:3  1176:12,20 1178:5,19  1179:6,17 1180:2,7  1180:22 1181:7  1182:15 1184:5,11,16  1184:20,21 1185:7,12  1185:13 1188:12,17  1189:16 1190:4,22  1191:7,16 1195:8,14  1196:3 1199:14,24  1200:16,20 1201:6,12  1201:18 1202:12,15  1214:19,20 1237:11  1237:19 1250:10,14  1250:15 1262:2  1269:8,17,21 1271:20  1272:2,4,11,25  1273:2,18 1274:5,18  1274:20,25 1276:8  1277:24 1278:12  1279:9 1280:15  1282:4,13 1284:15  1286:3,22 1288:13,17  1289:8,16,22 1290:1  1290:7,22 1291:6  1292:8,18 1293:1  1294:6,7,23 1295:24</p>	<p>1297:4 1298:1,21  1299:2,24 1300:21,25  1301:14,24 1303:6  1305:3,9,19,24  1306:12,15,19 1308:1  1309:19 1310:1,3,6  1310:23 1311:3  1312:10,12 1313:1  1314:9 1315:25  1317:19 1318:10,15  1320:9,12,18,23  1321:4 1324:18,25  1326:2,10,17 1327:5  1327:19,23,25 1328:6  1328:13 1330:2  1335:14 1336:6  1337:10,12 1338:13  1338:19 1339:2,10  1342:15 1346:10  <b>Metropolitan's</b>  1165:20 1166:10  1167:11 1169:10,19  1169:22 1170:12  1176:2,10,17,22  1177:5,11 1183:6  1189:7,20 1190:18  1191:6,11 1192:15,20  1195:16 1200:21  1201:8 1208:8  1237:18 1251:18  1281:9 1282:3,8  1283:5 1286:1  1292:17 1296:6  1298:15 1302:3,18  1303:3 1310:25  1311:7 1312:20  1313:3 1315:21  1317:17 1318:3  1320:7 1324:23  1326:9 1329:7,23  1331:13 1334:25  1335:3 1336:14  1337:5,23  <b>Mexico</b> 1196:25  <b>mid-summer</b> 1287:15  <b>middle</b> 1336:11  <b>midway</b> 1341:9  <b>Mike</b> 1294:11  <b>million</b> 1166:2 1167:24  1168:5,21 1170:8  1204:15 1214:17  1215:1 1216:17,19,20  1216:21 1217:13  1219:17,17,23,23  1220:16,25 1221:23  1231:7 1248:2 1276:5  1276:13 1277:17,25  1278:1,6,7,13</p>	<p>1280:13 1282:10,12  1290:12,12,13,23  1292:11 1300:18  1301:2 1302:21  1346:2,6,13  <b>millions</b> 1247:18  1282:7 1302:5  <b>mind</b> 1177:16 1185:6,6  1211:22 1338:8,9,10  <b>minus</b> 1314:11  <b>minute</b> 1257:10 1266:2  1314:17 1323:2  <b>minutes</b> 1302:13  1314:12,17,18,19  1324:10 1350:21  <b>Mischaracterizes</b>  1212:1  <b>misinformation</b>  1284:22  <b>mission</b> 1293:20  <b>mistake</b> 1206:11  <b>mistaken</b> 1318:16,22  1319:4 1330:15  1343:24  <b>mix</b> 1162:1  <b>model</b> 1220:7  <b>modeled</b> 1220:8  <b>modify</b> 1238:19  <b>moment</b> 1243:4 1268:8  <b>moments</b> 1261:24  1339:14  <b>money</b> 1168:7 1289:13  1289:20 1290:8,11  <b>month</b> 1246:20 1313:3  1345:16  <b>months</b> 1206:20  <b>morning</b> 1160:6  1203:17,18 1246:22  1348:11  <b>Morro</b> 1193:18  <b>motion</b> 1265:13,15  1266:2,5,6,6,9,13,14  1266:25 1267:22  1268:6,8  <b>motivated</b> 1280:23  <b>motivation</b> 1280:25  1300:13  <b>mouth</b> 1301:8  <b>move</b> 1164:20 1165:15  1166:15 1170:1  1171:13 1178:13  1179:14 1183:17  1188:24 1191:20  1194:10 1244:10,17  1246:8 1257:11  1258:16 1260:16  1261:11 1263:2  1264:13 1265:1</p>
--	--	--	---	---

<p>1309:15 1336:7 1343:25 1346:15,25 <b>moved</b> 1258:9 1263:16 1267:13,20 1298:1 1299:16 1310:2 <b>moving</b> 1185:20 1188:6 1246:8 1259:7,17 1290:5 1339:20 <b>multiple</b> 1177:9 1235:17 <b>multiply</b> 1247:25 <b>MWD</b> 1173:23 1182:22 1218:13,14 1219:12 1251:11 1346:14 <b>MWD's</b> 1216:9,11</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 1159:1 <b>name</b> 1160:17,18,21 1262:11,12,15,20,22 1262:22,24 1268:24 1269:1 1278:20 1317:2 <b>named</b> 1187:10 1191:17 1329:5 1352:10 <b>narrower</b> 1179:18 <b>nature</b> 1266:2 <b>necessarily</b> 1267:15 1298:6 1312:23 <b>necessary</b> 1196:13 1210:7 1211:23 1248:17 1281:19 <b>need</b> 1160:20 1197:6 1232:23 1233:24 1259:22 1275:4 1287:20 1321:24 1324:7 1336:19 <b>needed</b> 1166:14 1196:22 1277:8 1278:18 <b>needs</b> 1225:15 <b>negotiate</b> 1163:21 1175:12 <b>negotiated</b> 1163:13,19 1164:3,12 1166:8 1189:6 1190:20 1202:7 1208:15 1210:17 1246:13 1247:14 1248:8 1251:13 1280:2 1286:17 1298:6 1305:17 1310:16 1320:7 1337:3 <b>negotiating</b> 1162:22 1163:8,24 1172:4 1176:22 1185:5 1191:10 1192:7</p>	<p>1199:15 1206:21 1225:12 1249:23,25 1251:1,10 1286:19 1292:18,21 1293:21 1295:11,14,24 1300:15,22 <b>negotiation</b> 1162:10 1168:18 1174:23 1183:13 1189:15 1192:19 1195:9 1197:21 1204:7 1206:7 1214:1 1225:24 1246:16 1281:2 1288:9 1290:6 1290:21 1291:3 1299:12 1316:3,7 1333:14 1349:1 <b>negotiations</b> 1162:16 1162:20 1163:1 1168:10 1172:19,23 1174:12 1176:19 1177:5 1185:11 1186:16 1189:21 1191:4 1192:13 1199:24 1200:20 1201:6,12 1226:11 1227:12 1233:11 1240:8 1241:7,21 1278:20 1280:20 1287:10 1293:6 1301:17 1305:25 1316:15 1329:4,16,24 1345:13 1349:9 <b>negotiator</b> 1162:21 1164:1 1174:10 1199:8 1320:17 1348:15,21 <b>negotiators</b> 1177:11 1182:14 1187:12 1191:5,6 1286:22 1287:6 1294:17 <b>neither</b> 1225:25 1237:11 1241:20 1327:22,24 <b>Nest</b> 1158:3 1261:18 <b>net</b> 1300:20 <b>neutral</b> 1300:21,25 <b>Nevada</b> 1277:23 1278:4 1278:18 <b>never</b> 1196:12 1201:9 1209:5,9 1217:11 1225:10 1231:20,24 1232:16 1233:2 1246:25 1306:4,8 1338:18 1339:6 1341:13 <b>new</b> 1166:4 1183:1 1224:20 1282:23,23</p>	<p>1284:7,10 1303:8 1324:6,14 1350:17 <b>newly</b> 1323:7 <b>nice</b> 1302:13 <b>NICHOLAS</b> 1158:5 <b>Nick</b> 1261:17 <b>nigh</b> 1260:16 <b>non-breaching</b> 1199:1 <b>nonbreaching</b> 1198:24 <b>Nonresponsive</b> 1179:15 <b>Noon</b> 1243:18 <b>north</b> 1158:16 1248:2 <b>notion</b> 1180:5 <b>notwithstanding</b> 1180:12 1267:6 <b>number</b> 1159:12 1186:6,7 1188:20,22 1214:25 1217:5,12 1224:23,24,24 1237:5 1245:2,3 1252:17 1257:24 1264:20,21 1273:8 1276:23 1279:1 1283:3 1284:4 1285:6 1296:15,20 1297:6,10 1301:11 1309:11,22,24 1310:5 1345:19 1348:12 1349:17,25 <b>numbers</b> 1264:24 1278:5 <b>numerous</b> 1284:4</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>o'clock</b> 1350:21,25 <b>Obispo</b> 1193:18 <b>object</b> 1181:14 1190:21 1192:25 1199:24 1200:16 1228:8 1258:17 1320:1 1323:14 1336:7 1343:7 <b>objected</b> 1190:23 1191:7 <b>objecting</b> 1304:10 1336:6,14 1343:16,18 <b>objection</b> 1171:15 1177:13 1181:1,5 1183:19 1189:1,14 1191:20 1192:1 1200:23 1205:8 1207:10 1210:10 1212:1 1224:2 1226:8 1226:9 1227:4 1230:24 1231:4 1232:13 1233:23 1234:6 1239:1 1242:21 1247:20,22 1248:14,25 1256:24</p>	<p>1257:13,14 1260:18 1260:23 1261:8 1263:4 1265:3,4 1274:22 1285:16 1293:14 1295:5,20 1302:9 1303:19 1304:5,9,16 1305:1 1311:20 1319:20 1323:21 1331:20 1338:3 1343:21 1344:2 <b>objectionable</b> 1235:19 1320:4 <b>objections</b> 1189:20 1190:24 1262:8 1263:5,9,9 1338:14 1339:4 1344:3 <b>objectives</b> 1222:24 <b>obligated</b> 1168:20 <b>obligation</b> 1164:20 1165:20 1166:11,15 1168:25 1169:19,22 1170:1,15 1179:6 1299:2 <b>obligations</b> 1179:19 <b>obliged</b> 1165:13 <b>observed</b> 1191:24 1192:2,3,9 <b>obtain</b> 1273:19 1274:4 <b>obtaining</b> 1335:11 <b>obvious</b> 1349:5 <b>obviously</b> 1275:3,15 1303:9 1311:24 1312:1 1335:22 <b>occupation</b> 1161:3 <b>occur</b> 1197:17 1260:8 1297:19 <b>occurred</b> 1181:11 1265:20 1288:9 1311:7 <b>occurring</b> 1191:15 <b>October</b> 1206:16 1219:7 1299:19,19 <b>offer</b> 1228:6 1230:21 1261:25 <b>offered</b> 1193:1 1228:7 1231:2 1289:7,14 1296:3 1304:13 <b>office</b> 1158:15 1163:6,7 1169:9 1192:10 <b>officer</b> 1269:13,15 1296:13 1329:7 <b>okay</b> 1210:16 1223:17 1234:5 1237:7 1241:12,13,14,19 1242:13 1332:20 1340:8 <b>older</b> 1323:8</p>	<p><b>Olga</b> 1187:10 1348:11 <b>once</b> 1243:6 1246:25 1297:20 1299:16 <b>one-off</b> 1185:3 1251:25 <b>ones</b> 1190:25 1264:10 1281:25 1343:12 <b>ongoing</b> 1204:1 <b>open-ended</b> 1179:6,8 <b>operate</b> 1270:5 1272:7 <b>operation</b> 1252:1 1275:22 <b>opinion</b> 1192:22,23 1193:1,2,9,16,16 1197:18 1319:21 <b>opinions</b> 1193:9 <b>opportunity</b> 1197:20 1331:23 <b>opposed</b> 1190:12 1309:8 1323:7 <b>option</b> 1185:19 1186:21 1188:3 1220:8,10 1223:8,9 1224:7 1291:8,9 1293:25 1338:17 <b>Option-1</b> 1214:3,11 1216:1 1220:17 1224:14 1291:20 1292:25 1300:20 1343:20 <b>Option-2</b> 1214:4,14,22 1216:1,9 1217:3 1218:19 1219:21 1220:3,14,15 1223:6 1223:10,11 1224:11 1229:13 1231:8,10 1292:7,25 1294:3,8 1294:23,23 1295:25 1296:4 1297:14 1298:5 1300:16,20 1307:25 1338:12,20 1338:23 1343:20 1345:20,25 1346:1,10 1349:23 1350:7 <b>options</b> 1214:3 1216:3 1216:6 1218:8,19 1291:6,17 <b>orally</b> 1265:25 <b>Orange</b> 1283:17 <b>order</b> 1216:12 1222:23 1273:21 <b>organization</b> 1320:10 <b>original</b> 1166:11 1291:21 <b>Originally</b> 1278:23 <b>origins</b> 1237:23 1238:1 <b>ostensibly</b> 1170:14 <b>ought</b> 1237:4 <b>outline</b> 1188:2 1349:18</p>
--	--	--	--	---

<p>1349:20,24  <b>outmoded</b> 1183:4  <b>outside</b> 1227:3,14,15  1227:16 1260:18,21  1287:8  <b>overall</b> 1279:21  <b>Overbroad</b> 1232:13  <b>overlook</b> 1281:25  <b>overnight</b> 1280:19  <b>overreliance</b> 1278:16  <b>overrule</b> 1192:1  1311:22  <b>overruled</b> 1179:16  1181:5 1192:12  1193:4 1205:9  1207:11 1212:3  1227:5 1231:4  1232:14 1248:3  1260:23 1261:12  1285:17 1295:21  1303:20 1304:17  1319:22 1323:21  1336:24 1343:21  <b>overturned</b> 1183:5  <b>owns</b> 1274:2</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1244:3  <b>package</b> 1279:21  <b>page</b> 1159:6 1167:6,7  1167:14,15 1173:16  1173:18 1175:5,6  1184:3 1187:9,25  1194:17 1198:2,15,17  1198:18,19 1218:6,12  1220:1 1223:18,23  1226:6 1227:24  1233:21,25 1237:8  1238:23,24 1240:17  1240:23 1241:3,25  1242:2,3,8 1248:20  1254:6,15 1257:22,23  1270:25 1317:10  1321:10,11 1324:17  1331:9,9 1332:13,15  1334:20,21 1340:21  1341:7,8,9,18,19  1342:5 1349:16  <b>pages</b> 1157:13 1236:24  1244:16  <b>paid</b> 1169:11 1246:9  1266:15 1272:5  1282:9  <b>Pam</b> 1340:14  <b>paper</b> 1281:24 1339:1  <b>papers</b> 1260:2 1268:5  <b>paragraph</b> 1171:25  1172:18 1182:17,18</p>	<p>1198:9 1215:25  1216:8 1218:11  1230:4,5,9 1237:10  1239:18 1322:13  1332:16,20,25 1342:4  1344:15 1350:12  <b>paragraphs</b> 1324:19  1341:20  <b>parameters</b> 1178:9,10  <b>Parent</b> 1340:16  1348:11  <b>Parker</b> 1310:10  <b>parol</b> 1304:5,10,12,16  <b>part</b> 1165:21 1176:24  1184:25 1194:17  1204:13 1205:13  1214:22 1221:2  1222:7,10,13,18  1224:7,11 1231:11  1250:2 1251:2  1266:25 1267:3  1279:21,25 1282:20  1283:20 1286:19  1288:9 1306:24  1315:8 1318:9  1322:22 1325:18,20  1327:13,25 1328:3,5  1328:7 1335:12  1345:22 1346:2,2,13  1346:14  <b>partial</b> 1199:3 1265:15  1266:6,9,11  <b>participants</b> 1206:2  <b>participate</b> 1162:16  1190:7 1234:24  1293:6,8  <b>participated</b> 1192:6  <b>participating</b> 1197:5  <b>particular</b> 1161:10  1165:5 1185:7  1266:20 1283:14  <b>particularly</b> 1193:6  1256:6  <b>parties</b> 1174:8 1186:17  1190:2 1199:21  1204:8 1206:10  1209:21 1210:1  1211:16 1214:2  1221:25 1222:23  1246:18 1279:8,18,22  1280:4,23 1289:4  1297:23 1299:5,23,25  1301:9 1305:16  1321:17 1322:6  1323:20 1333:7,12  1341:3 1343:9  1348:25  <b>parting</b> 1302:4</p>	<p><b>parts</b> 1341:16  <b>party</b> 1174:21 1178:25  1198:24 1199:1  1200:7 1226:14  1327:24 1330:18  <b>pass</b> 1201:22 1261:20  1274:11  <b>passage</b> 1244:11,14  1253:25  <b>passages</b> 1263:7  <b>passed</b> 1290:14  <b>Paul</b> 1163:11 1177:3  <b>pay</b> 1165:13 1168:20  1180:12 1186:9,22  1188:22 1215:3  1217:12,17 1220:20  1226:21 1228:24  1232:18 1233:4  1266:15 1272:9  1283:9 1291:10  1292:12 1294:24  1296:5 1302:24  1305:2 1306:18  1309:20 1310:1  1321:4 1338:12  1339:5,7,9 1342:11  1347:3,10 1348:4  1350:1,5  <b>payers</b> 1199:17  <b>paying</b> 1208:24  1212:22 1213:5  1216:11 1315:22  1350:9  <b>payment</b> 1216:17  1217:4 1231:12,14  <b>payments</b> 1218:19  1219:14,15  <b>pays</b> 1173:23 1271:6  1310:20  <b>PDID</b> 1340:23  <b>people</b> 1177:1 1196:23  1197:5 1233:7  1249:24 1283:9  1285:4,6,8,21,24  1287:17 1296:12,15  1343:11,13,14  1347:14,16,18  1348:12  <b>percent</b> 1219:11,11  1257:24 1258:2,2,7,8  1258:11 1270:7  1342:8  <b>percipient</b> 1320:2  <b>perform</b> 1168:25  1169:19  <b>performance</b> 1166:10  1209:11,15,21,25  1210:5 1211:8 1212:8</p>	<p>1279:3 1303:3,5  <b>performed</b> 1302:8  <b>performing</b> 1288:14  <b>period</b> 1165:14  1185:15 1195:6,11,17  1196:23 1197:20  1201:15 1213:19  1219:13 1228:15  1248:1 1254:2,20  1294:2,5 1303:13  1306:3 1308:4,8,10  <b>periods</b> 1192:8  <b>permission</b> 1206:1  1223:19 1226:5  1227:23 1233:22  1242:3  <b>person</b> 1174:15 1206:4  1207:13,14,22 1213:6  1329:23 1330:6  <b>personal</b> 1193:2  <b>personally</b> 1191:24  1192:9 1210:21  1212:4 1214:7  1232:22 1251:12  <b>PERSONS</b> 1157:10  <b>perspective</b> 1174:10  1199:7  <b>pertained</b> 1178:11  <b>pertaining</b> 1237:17  1326:8  <b>pertains</b> 1182:4  <b>pertinent</b> 1169:11  1193:6 1197:10  1227:20  <b>Petitioner</b> 1157:7  1158:2  <b>phase</b> 1263:16,22  1264:5,8,15 1267:11  1267:14  <b>phrase</b> 1176:17,20,23  1176:24 1285:12  1313:12 1323:14  1339:12,16,19  1342:14  <b>phrases</b> 1176:24  1255:16  <b>pick</b> 1302:13  <b>picture</b> 1259:6,16,21  <b>piece</b> 1202:3 1273:13  1339:1  <b>pieces</b> 1176:15 1281:6  <b>place</b> 1196:18 1256:3  1264:8 1275:24  1286:12 1287:12  1291:12 1352:10  <b>placed</b> 1326:7  <b>placeholder</b> 1306:6  <b>plain</b> 1238:13 1239:12</p>	<p>1325:16  <b>Plaintiff</b> 1157:7 1158:2  1159:6 1160:12  1265:18  <b>Plaintiff's</b> 1159:2  1237:1,4  <b>plan</b> 1172:15 1196:18  1196:19 1205:14  1206:1 1268:2  1278:23 1289:2  <b>plates</b> 1199:14  <b>play</b> 1281:4  <b>please</b> 1160:16 1187:14  1208:3 1228:9 1239:2  1249:1 1268:23,24  1271:2 1275:16  1280:7 1302:12  1304:20 1312:2  1314:6 1331:6  <b>pleased</b> 1293:24  <b>PMK</b> 1228:6,7  <b>point</b> 1178:6,7,8 1182:6  1185:18 1186:6,7,24  1188:8,20 1191:14  1214:2 1217:16  1225:20 1228:12  1233:18 1234:12  1240:8,19 1241:7,20  1241:21 1243:10  1263:20 1265:14,20  1265:21 1273:10  1278:11,17 1282:12  1287:15 1288:25  1291:4 1296:7  1303:10 1304:23  1313:6,7 1324:15  1328:2 1336:1,16,17  1337:15 1345:23,25  1346:9 1347:2  1349:25  <b>points</b> 1190:14,15  1195:24 1235:14  1329:19 1334:17  1345:20,23 1346:12  <b>policies</b> 1285:10  <b>policy</b> 1161:17,22  1312:12  <b>politically</b> 1278:17  <b>portion</b> 1175:8 1231:9  1290:1  <b>portions</b> 1242:11  <b>position</b> 1168:11,14  1172:9 1183:9,12  1190:10 1192:15  1248:24 1250:13  1269:11 1328:15  <b>positions</b> 1323:19  <b>possibly</b> 1259:25</p>
--	--	---	---	--

<p>1307:1  <b>postage</b> 1204:4  <b>posted</b> 1197:22  <b>pot</b> 1285:20  <b>potential</b> 1220:13  1273:25  <b>potentially</b> 1196:25  1320:24  <b>power</b> 1189:12 1199:4  1199:5 1208:21  1292:15 1294:20  1303:9 1310:1,1,3,7,7  1310:9,12,14,18  1312:6 1315:2,6,8,12  1315:14,16,21  <b>powerless</b> 1303:14  <b>PowerPoints</b> 1347:21  1347:22  <b>practice</b> 1161:11,12,24  1304:11  <b>pre-amendment</b> 1183:7  <b>precedent</b> 1166:14,17  1167:8,12,17 1168:2  1168:6,12 1169:16,21  1170:7 1222:11  1276:23 1282:22  1287:24 1291:2  <b>precipice</b> 1187:1  <b>preclude</b> 1194:23  1325:8 1326:12  1327:11  <b>precluded</b> 1250:22  <b>precludes</b> 1199:4  <b>preclusive</b> 1182:6  <b>predicate</b> 1223:3  <b>prefers</b> 1265:16  <b>prepared</b> 1265:11  1268:12 1338:21  <b>present</b> 1219:13  1266:23 1349:12  <b>presentation</b> 1169:8  <b>presented</b> 1186:24  1187:2 1188:9,16  <b>president</b> 1286:24,24  <b>presidents</b> 1196:14  <b>pressure</b> 1280:4  <b>pretrial</b> 1263:7  <b>pretty</b> 1169:6 1275:11  1281:15 1287:23  1296:16 1299:16  1334:18  <b>prevailed</b> 1228:22  <b>prevented</b> 1335:15  <b>previous</b> 1339:4  1344:11 1349:6  <b>previously</b> 1163:14  1171:22 1186:11  1263:18 1347:5</p>	<p><b>price</b> 1164:23 1165:1,2  1165:5,11 1173:12  1174:7 1175:10,12,15  1175:18,23 1176:1,8  1176:9 1180:7,18  1183:16 1184:24  1198:9,12 1203:21  1208:12,16,20  1212:23,24 1213:12  1220:14 1223:7,13,13  1224:8,12 1225:3  1226:2,16,16 1229:14  1250:12 1259:10  1266:17 1288:10,20  1292:1 1296:3 1315:9  1317:11,16 1320:22  1320:22,23 1321:3,21  1321:25 1322:1,7,8  1322:12,18 1323:7,8  1323:12,25 1325:15  1325:22 1328:1  1332:24 1333:13,24  1334:4  <b>prices</b> 1281:15  <b>pricing</b> 1324:5,23  <b>primary</b> 1238:18  1309:12  <b>principally</b> 1163:3  1191:2  <b>printer</b> 1265:15  <b>prior</b> 1183:13 1188:6  1190:3,11 1195:13,16  1233:25 1247:3,9  1308:20 1333:19  1343:19,25 1344:25  <b>priority</b> 1277:24  1278:2 1309:22  <b>private</b> 1162:1,2  <b>privilege</b> 1199:4,5  <b>probably</b> 1194:7  1243:4 1248:1 1277:1  1287:22 1309:22  <b>problem</b> 1170:11  1271:25 1316:13  <b>procedural</b> 1195:24  <b>procedure</b> 1263:8  <b>procedures</b> 1252:3  <b>proceed</b> 1202:15  1265:11 1268:9,13  1342:3  <b>proceedings</b> 1157:15  1352:9  <b>process</b> 1178:2,4,6,6,7  1180:13 1190:14,15  1197:7,8 1202:3,4,8  1202:13,17 1252:10  1274:13 1282:17  1283:20,24 1284:12</p>	<p>1286:10,23 1305:20  1305:20 1313:24  1322:4 1327:19,21  1337:14 1347:14  <b>produced</b> 1165:14  <b>professional</b> 1212:6  <b>profligate</b> 1271:21  <b>program</b> 1272:15,19  <b>programs</b> 1290:4,13  <b>progress</b> 1287:16  1289:1  <b>prohibit</b> 1238:14  1239:5 1250:20  <b>prohibited</b> 1319:11  <b>prohibits</b> 1319:9  <b>project</b> 1168:3,9  1170:16 1186:22  1190:1 1206:2  1212:18 1216:10,15  1226:2,15 1258:9,16  1260:16 1266:19  1274:17,25 1276:5  1282:1,2,11 1284:24  1292:10 1302:21  1310:10 1311:13  1312:11 1315:22  1335:2,17 1336:15  1337:6,12,16,24  1338:15 1339:4  <b>projected</b> 1221:13  <b>projection</b> 1220:22  <b>projections</b> 1221:9,16  1246:13 1308:2,5  <b>projects</b> 1168:9  1273:24 1275:16  1289:25 1290:2  1298:4  <b>proof</b> 1267:5  <b>Prop</b> 1256:5,8  <b>proper</b> 1228:1 1258:12  1258:14 1265:21  1266:24  <b>properly</b> 1230:16  1267:13,16,17  <b>proposal</b> 1170:6,10,12  1173:12,19 1179:4,18  1179:20 1180:1  1186:21 1195:12,13  1195:16 1214:22  1223:6,13 1224:6,10  1274:9 1276:7  1292:17 1294:23  1295:18,24 1297:3  1303:22 1338:17  1340:7,11,19,22  1341:10,18,19  1342:13,21,24 1343:8  1343:19 1344:9,13,21</p>	<p>1345:5,21 1347:2  <b>proposals</b> 1284:4  1285:6,22 1347:17  <b>propose</b> 1226:1,14  <b>proposed</b> 1174:2,20  1184:8 1186:11  1195:11,20 1227:17  1266:17 1292:8  1294:6,16 1297:14  1300:16 1306:19  1338:13 1342:14  1347:5  <b>proposes</b> 1172:6  <b>proposing</b> 1241:8  1245:17 1248:19  1347:8 1348:3  <b>Proposition</b> 1256:6,8  <b>propriety</b> 1256:1  <b>prospect</b> 1246:11  <b>protect</b> 1193:14,19  1196:22  <b>protection</b> 1252:5  <b>prove</b> 1266:16 1267:3,4  1313:22  <b>proved</b> 1246:14  1266:14  <b>proven</b> 1266:22  <b>provide</b> 1167:24  1193:25 1259:21  1264:6 1289:20  1321:3 1322:1,6  <b>provided</b> 1189:25  1239:19 1250:11,12  1324:17 1325:7  1332:22 1333:15,18  <b>provides</b> 1224:1 1231:6  1320:23 1321:17  1327:10 1328:21  <b>providing</b> 1348:6  <b>provision</b> 1169:24  1180:11 1200:14,17  1237:24 1239:5  1251:14 1253:14  1300:10,14 1301:3  1303:17 1306:3  <b>provisions</b> 1193:19  1194:13 1200:6  1238:4 1298:12  1328:19,20,22  <b>proviso</b> 1324:16 1325:2  1325:6 1326:11,16,21  1327:7,8  <b>provisoes</b> 1239:17  <b>PTX</b> 1166:18 1170:22  1171:2,4,13 1174:25  1175:2 1183:16,20  1185:22 1194:19  1198:16 1244:23</p>	<p>1262:13,21 1263:11  1263:19,19,19,19,19  1263:19,20 1264:14  1317:7 1340:1  1342:25 1343:5,24  1344:12  <b>public</b> 1162:1,5,7  1174:21 1199:11,11  1205:3 1208:7  <b>publicly</b> 1162:2  <b>published</b> 1161:14,17  1246:25  <b>Purcell</b> 1158:4 1160:7  1161:2 1164:19  1166:18 1170:24  1171:2,13,18 1173:16  1174:25 1175:5  1177:17 1178:17  1179:17 1181:7,21,23  1182:2 1183:17,21,23  1184:1 1187:4,7  1188:24 1189:4  1192:13 1194:16,19  1198:2 1201:2,22  1203:4 1205:8  1207:10 1210:10  1212:1 1223:24  1226:9 1227:4 1228:1  1228:7 1230:24  1232:13 1233:24  1238:24 1239:1  1242:7,13 1244:13  1247:20,22 1248:13  1248:19 1249:4  1255:24 1256:9,17,24  1274:22 1285:16  1293:14 1295:5,20  1302:9 1303:19  1304:5,12 1311:20  1316:24 1317:2,7  1318:25 1319:23  1320:6 1321:12  1323:23 1325:3  1327:5 1330:17,21  1331:7,12 1334:19  1336:11 1337:2  1338:18 1340:1  1341:23 1342:4  1343:5,24 1344:8  1346:25 1349:16  1350:20  <b>pure</b> 1261:5 1312:14  <b>purports</b> 1291:15,16  <b>purpose</b> 1199:8  1205:14 1254:3  1289:16,21,23  1305:15 1306:24  1321:1 1330:18,20</p>
--	---	---	--	---

<p><b>purposes</b> 1167:25  <b>pursuant</b> 1162:23  1169:25 1175:23  1176:11,18 1178:5  1195:24 1198:9  1212:20 1220:22  1226:22,24 1229:14  1230:16 1234:15  1252:4 1255:13  1317:18 1318:4  1319:16 1322:12  1332:24  <b>pursuing</b> 1199:19  1250:23  <b>put</b> 1166:18 1170:21  1173:16 1174:25  1181:21 1185:22  1187:4 1194:16  1196:18,20 1244:23  1275:22 1280:8  1286:11 1291:1,12  1294:11 1301:7  1306:9 1307:20  1333:7 1338:13  1347:22  <b>puts</b> 1176:2  <b>putting</b> 1276:2</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>QSA</b> 1162:23 1187:12  1197:6 1291:17  1299:11  <b>qualified</b> 1262:2  <b>quality</b> 1312:6,8,16  <b>quantification</b> 1222:15  1222:16 1223:2  1277:2 1278:25  1279:2,12,13,25  1280:5,10 1287:16  1300:5  <b>quantified</b> 1277:3,9  1297:24  <b>Quantum</b> 1222:12  <b>question</b> 1177:25  1178:16 1179:15  1181:5 1182:6  1192:19,24 1201:23  1202:19 1207:21  1210:14 1223:4,25  1232:19,24 1233:25  1234:11 1236:4,20  1241:6 1249:1 1254:8  1254:24 1255:4  1259:13,14,22  1275:15 1295:8  1297:13 1306:13  1323:22,23 1326:25  1327:2 1330:25</p>	<p>1331:3 1333:6  1334:14 1336:8,10,12  1337:1 1338:8,9,10  1346:23  <b>questioner</b> 1254:19  <b>questions</b> 1170:21  1208:1 1244:9 1253:6  1253:21 1261:13  1311:24 1316:19  1317:3 1331:2  <b>quickly</b> 1203:7 1290:17  1299:16  <b>Quinn</b> 1158:11 1171:15  1177:13 1178:13  1179:14 1181:1  1183:19 1189:1  1191:20 1192:2,25  1200:23 1203:7,16  1205:13 1207:13  1210:16 1212:5  1215:8,12 1223:18,21  1223:23 1224:2,5,23  1226:5,10 1227:11,23  1228:5,10 1230:23  1231:5,16 1232:19,25  1233:20 1234:2,4,6,9  1234:19,23 1236:6,22  1237:2,6,8 1238:22  1238:25 1239:3  1240:15,20 1241:4,25  1242:3,6,15 1244:10  1244:16,18,22 1248:4  1248:11,21,23,25  1253:24 1255:20  1256:12,20 1257:1,14  1258:17,24 1260:9,18  1261:8,10 1263:6  1265:4,10,13,23  1266:5,11 1268:13  <b>QUINN,ESQ</b> 1158:12  <b>quite</b> 1191:13 1227:5  1277:11 1285:1  1311:23 1324:15  <b>quote</b> 1339:9 1344:17  1344:19</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>R-I-T-T-E-R-S-H-A-...</b>  1187:11  <b>raise</b> 1322:18 1323:12  1323:25 1334:7,8,9  1335:21  <b>raised</b> 1190:25 1334:24  <b>raising</b> 1190:25  1327:11  <b>ramp-up</b> 1272:19  <b>range</b> 1219:12,23  1220:16 1276:12</p>	<p>1282:11  <b>ranges</b> 1219:17  <b>rarely</b> 1246:15  <b>rate</b> 1159:17 1171:8  1173:12,20 1174:2,24  1178:5,10 1180:16,18  1182:5 1184:14,20  1185:1,3,7,10,13,20  1185:21 1186:9,23  1188:23 1189:8,21  1190:18 1194:4  1195:7 1197:22,23,23  1197:24 1199:17  1200:21 1201:8  1202:9,12,15,20  1204:1,5,9 1206:17  1208:21,21,22  1212:25 1213:6,19,20  1215:3 1216:11  1217:4 1218:13,24  1219:10 1221:13,14  1224:19 1225:11,16  1225:18,21,21 1226:2  1227:13,17 1230:7,11  1230:11,15 1231:12  1231:14,17,21,22,25  1232:18 1233:1,5  1235:18 1246:13,25  1247:7 1249:14  1250:18 1251:17  1252:18 1253:17  1255:12 1266:18,20  1267:5,8 1281:12,13  1281:14,16,17,23  1282:25 1283:7,13,19  1283:21 1284:7  1285:12,14,15 1286:6  1286:12 1288:21  1294:14,20 1301:25  1303:8,10 1304:24  1305:1,7,12,18,22  1306:11,16,25  1307:12,15,17,20,23  1308:15 1310:2,3,7  1310:13,20 1315:2,6  1315:8,12,15,16  1318:11,12,15,22,24  1319:2,14,19 1323:3  1324:6,14,25 1326:6  1327:23 1328:12,13  1335:4 1337:16,19  1342:8,9,14,18,19  1344:17,18,24,25  1345:3,3 1347:3,9  1348:4,7 1350:1,5,14  1350:18  <b>rates</b> 1157:10 1176:3  1178:11 1179:19</p>	<p>1189:17 1190:5,13,22  1191:8 1193:13  1194:14 1195:21  1205:22 1207:2,8  1208:6,6 1210:20  1211:19 1212:8,13,17  1212:19,22 1219:12  1219:16 1225:8  1229:18 1230:6,10  1233:14,19 1234:14  1235:23 1236:2,8,12  1242:19 1246:24  1247:2,6,11 1250:15  1255:6 1256:1 1261:2  1281:7,8,9 1282:14  1282:24 1283:8,20,25  1284:9,24 1286:12,14  1301:6,22 1303:8  1305:21 1306:18  1316:1,4,5,6,14  1318:13,17 1319:5,6  1319:16 1331:19  1334:10 1336:15  1337:6,9,17,25  1339:5  <b>rationale</b> 1250:3,6  <b>re-allocation</b> 1299:7  <b>re-enter</b> 1263:23  <b>rea</b> 1319:1  <b>reach</b> 1165:23 1186:20  1235:12 1277:2  1279:15 1280:4,9,15  1280:21 1306:24  1334:16  <b>reached</b> 1271:23  1273:5 1274:9  1276:21,22 1299:17  <b>reaches</b> 1196:21  <b>reaching</b> 1273:1 1289:3  <b>reaction</b> 1293:23  <b>read</b> 1167:20 1171:25  1176:6 1182:17  1186:7 1187:23  1188:20 1198:20  1200:2 1216:4  1223:19,25 1226:5  1227:23 1233:22,24  1234:18 1238:22  1241:14 1242:4,10,11  1248:14,18,19,21  1253:25 1254:10  1255:6,11 1266:3  1268:5 1325:19,20  1328:18,24 1330:11  1330:16 1331:4,8  1334:19 1341:13  1344:20  <b>reading</b> 1220:5 1224:2</p>	<p>1224:5 1226:10  1228:10 1234:4,6,10  1234:20,23 1239:3  1241:12 1242:15  1249:6 1268:8  1317:14 1330:14,24  1331:12 1334:22  1342:1  <b>reads</b> 1331:1  <b>ready</b> 1203:10 1268:13  1341:22 1349:12  <b>real</b> 1255:5  <b>realize</b> 1304:12 1316:9  <b>really</b> 1178:1 1196:11  1197:14 1202:22  1218:4 1277:5,6  1287:14 1288:22  1312:17 1315:20  1348:24  <b>realtime</b> 1314:1,3  <b>reason</b> 1197:14  1231:16 1255:10  1259:14 1261:5  1315:11 1340:18  <b>reasons</b> 1197:10  <b>recall</b> 1189:10,19  1203:23 1208:11  1226:19 1229:4  1232:2,4,5,6,10,20  1237:23 1239:22  1240:1,10,13 1241:6  1241:11,15,18  1242:23 1243:13  1249:7 1257:8,12,24  1258:25 1263:16  <b>recalled</b> 1159:4  <b>receive</b> 1161:8 1171:10  1220:24 1221:2  <b>received</b> 1171:17  1183:25 1189:3  1221:3 1231:15  1247:16 1263:14  1265:8 1297:15  1343:23 1344:7  1345:4  <b>receiving</b> 1290:24  1312:13  <b>recess</b> 1203:9,12  1243:18 1265:11  1268:12 1307:8  1314:14,20,21 1351:2  <b>recipient</b> 1348:24  <b>recipients</b> 1348:18  <b>reciprocally</b> 1220:23  <b>Reclamation</b> 1274:3  1313:23  <b>recognize</b> 1166:20  1171:2 1181:22</p>
--	---	--	--	--



<p>1185:24,25  <b>recollection</b> 1179:20                  1233:3 1240:22                  1249:22 1292:4                  1297:18 1299:19                  1339:16  <b>recommend</b> 1209:19  <b>recommendation</b>                  1173:9  <b>recommended</b> 1211:24  <b>recommends</b> 1174:3  <b>record</b> 1236:25                  1265:19 1266:2                  1268:6,25 1331:1  <b>recovered</b> 1282:5  <b>RECROSS</b> 1159:2,8  <b>RECROSS-EXAMI...</b>                  1253:23 1256:11  <b>redirect</b> 1159:2,8                  1248:12 1255:21,23                  1257:22 1260:11  <b>redo</b> 1302:12  <b>reduce</b> 1258:10                  1280:12  <b>reduced</b> 1352:11  <b>reductions</b> 1273:23  <b>refer</b> 1167:1 1187:17                  1254:18 1255:11  <b>reference</b> 1194:5                  1198:6 1225:11                  1230:19 1254:11                  1324:22  <b>referencing</b> 1236:19  <b>referred</b> 1177:7,12                  1202:9 1204:4                  1234:12 1238:8                  1244:12 1336:20  <b>referring</b> 1291:23  <b>refers</b> 1254:19,23                  1264:23 1271:2                  1322:23 1328:20  <b>reflect</b> 1172:18 1297:22  <b>reflected</b> 1221:10  <b>refresh</b> 1240:22  <b>regard</b> 1212:7 1233:8  <b>regarding</b> 1159:17                  1170:7 1171:8 1204:1                  1253:3 1255:25  <b>regardless</b> 1313:11                  1327:8  <b>regulate</b> 1313:9  <b>regulating</b> 1272:6                  1312:20 1313:4  <b>regulation</b> 1176:11,18                  1177:7,12,20,22                  1178:22 1179:2,7                  1180:23 1182:23                  1183:4,10 1194:25</p>	<p>1198:11 1228:17                  1234:16 1236:15                  1237:14 1317:18                  1318:5 1319:17                  1322:15 1325:11,23                  1326:5 1333:4  <b>regulations</b> 1180:19                  1233:15  <b>reimbursed</b> 1169:12  <b>rejected</b> 1180:5  <b>relate</b> 1168:2 1212:13                  1345:20  <b>related</b> 1168:9 1170:13                  1329:21,24  <b>relationship</b> 1301:11  <b>Relevance</b> 1230:24  <b>relevancy</b> 1343:7  <b>relevant</b> 1231:1,3                  1263:22  <b>relying</b> 1184:25  <b>remainder</b> 1325:4  <b>remedies</b> 1249:17                  1250:23 1319:13                  1334:13  <b>remedy</b> 1198:25 1199:2                  1200:5,8,9,10                  1319:15  <b>remember</b> 1202:11                  1242:25 1244:17                  1249:1 1253:2,10                  1295:17 1341:14  <b>remove</b> 1194:11  <b>render</b> 1319:6  <b>renege</b> 1302:24  <b>renegotiate</b> 1308:11  <b>renewal</b> 1164:16                  1301:5 1307:1  <b>repeat</b> 1337:1  <b>repeatedly</b> 1247:6  <b>rephrase</b> 1178:16                  1210:15 1295:8  <b>report</b> 1260:7 1269:19  <b>reported</b> 1157:19                  1169:4  <b>reporter</b> 1346:16,21                  1352:7,24  <b>reporter's</b> 1157:15                  1249:3 1352:1  <b>represent</b> 1204:20  <b>representation</b> 1172:21  <b>representatives</b>                  1172:10 1269:23                  1284:16 1293:4                  1299:5  <b>represented</b> 1204:23                  1208:20  <b>request</b> 1187:14 1208:1                  1223:19,24 1226:5</p>	<p>1227:23 1233:22                  1238:22 1242:3                  1283:13,14  <b>requested</b> 1315:14  <b>requests</b> 1263:18                  1283:16  <b>require</b> 1185:13  <b>required</b> 1168:5 1173:7                  1180:7 1267:3  <b>requirement</b> 1169:21                  1180:18 1253:14  <b>requirements</b> 1180:8  <b>requires</b> 1318:3,10  <b>researching</b> 1273:25  <b>reserve</b> 1305:4  <b>reserves</b> 1286:5  <b>reservoirs</b> 1272:6  <b>resolution</b> 1172:12,16                  1190:16 1192:18                  1197:7,8,19 1198:4                  1321:15,24 1322:4                  1332:17  <b>resolve</b> 1333:12 1341:3  <b>resolved</b> 1173:10                  1235:20 1289:2  <b>resolving</b> 1194:13  <b>Resources</b> 1171:6,20                  1173:8 1290:16                  1298:22  <b>respect</b> 1253:5  <b>respective</b> 1171:8  <b>respond</b> 1180:1 1268:2                  1268:3  <b>Respondent</b> 1158:10  <b>Respondents</b> 1157:14  <b>response</b> 1177:25                  1195:13 1233:4,6                  1241:8 1264:1,12,14                  1264:16,17,21 1268:4  <b>responses</b> 1159:14,15                  1263:17,21,22 1264:3  <b>responsibility</b> 1214:23  <b>responsible</b> 1162:11  <b>rest</b> 1257:7,11 1261:16                  1265:9 1328:19  <b>restrict</b> 1238:5 1327:15  <b>restricted</b> 1238:10  <b>restriction</b> 1324:21  <b>Rests</b> 1159:6  <b>results</b> 1276:10  <b>resumed</b> 1244:7,21                  1257:17  <b>return</b> 1217:18  <b>revenues</b> 1308:2  <b>review</b> 1342:7  <b>reviewed</b> 1211:4                  1258:4  <b>revise</b> 1297:21 1298:2</p>	<p>1298:4  <b>RFA</b> 1263:21  <b>riding</b> 1243:8  <b>right</b> 1164:16 1174:25                  1181:14 1182:7                  1198:25 1199:1,4,5                  1200:5,8,9,10                  1201:19 1205:16                  1208:13 1216:25                  1219:2 1220:17,18,21                  1221:2 1225:14,18                  1238:17 1239:18                  1245:18,21 1246:1,8                  1252:21 1254:3,4,14                  1254:20,23 1255:15                  1261:14 1265:22,23                  1268:4,6 1270:15,23                  1277:12 1282:15                  1283:14,15,23                  1285:12 1291:6                  1296:15 1298:10                  1303:3,4 1304:21                  1305:4 1306:14                  1307:9 1315:6                  1319:18 1320:24                  1321:9 1323:2                  1332:18 1335:4,18                  1339:19 1345:1                  1347:1 1348:20                  1349:25  <b>rights</b> 1199:19 1214:16                  1216:10,16 1221:6                  1240:6 1255:18                  1277:14 1279:9,12                  1292:10 1297:24                  1298:14,16 1333:17  <b>rise</b> 1169:22  <b>risk</b> 1170:19 1274:19                  1290:24  <b>risks</b> 1275:17  <b>Rittershaus</b> 1187:11,13                  1187:19 1188:1                  1348:11  <b>river</b> 1172:15 1173:4                  1173:14 1205:19,25                  1246:12 1271:12                  1277:3,11,15,19                  1278:12,15,21 1279:8                  1279:10,22 1290:3                  1312:10,14  <b>road</b> 1303:11 1314:2  <b>Robert</b> 1163:4 1215:17                  1215:20,21  <b>role</b> 1162:20 1163:24                  1170:15  <b>Ron</b> 1163:12 1169:9  <b>rough</b> 1272:17  <b>roughly</b> 1280:16</p>	<p>1282:2 1292:2  <b>round</b> 1278:5  <b>row</b> 1173:22  <b>RPR</b> 1157:20 1352:23  <b>rule</b> 1265:21  <b>ruled</b> 1193:12  <b>rules</b> 1239:24  <b>ruling</b> 1263:12 1344:5  <b>run</b> 1255:2  <b>running</b> 1308:14  <b>runs</b> 1169:7</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>S</b> 1158:5  <b>S-C-O-T-T</b> 1160:22  <b>S-K-I-L-L-M-A-N</b>                  1262:15  <b>S-L-A-T-E-R</b> 1160:19  <b>S-T-E-P-H-E-N</b>                  1262:12  <b>Sacramento</b> 1238:4,19  <b>sales</b> 1193:14,20  <b>salinity</b> 1312:11  <b>San</b> 1157:2,6,16,17,24                  1158:6 1160:1                  1162:13,21 1164:1                  1165:13,15 1166:24                  1170:14,19 1172:6                  1173:5,9 1175:11                  1178:4 1179:24                  1180:1 1182:4,20                  1183:1 1184:10,11                  1185:2,4,6 1186:9,21                  1186:25 1188:4,9,16                  1188:22 1191:12                  1193:17 1195:6,12,20                  1196:7,9 1199:7,13                  1200:19 1201:9,11,13                  1201:19 1202:11                  1204:21,23 1205:6                  1206:3,9,16 1207:1,6                  1207:14 1208:7,17,24                  1211:5 1212:12,22,23                  1212:24 1213:17,22                  1214:15,17 1215:17                  1216:17 1217:11,17                  1217:21 1218:2,4,18                  1218:23 1219:21,22                  1220:13,20,25 1221:4                  1221:10 1222:5                  1226:1,21 1228:12,18                  1228:23 1229:22                  1231:7 1233:12,13                  1234:13,14 1235:9                  1238:3,9,14,19                  1239:5,22 1240:4,6                  1244:1 1245:6,23                  1246:1,25 1247:5,7,9</p>
---	--	--	---	---

<p>1247:13 1248:4,7                  1249:8 1250:17,21                  1251:4,9 1252:13,19                  1253:12 1255:7                  1256:20,22 1259:6,16                  1266:14,15,17,23                  1267:2,6,18,19                  1269:23 1270:10,11                  1271:5,6 1272:11,14                  1273:3,8 1279:11                  1282:21 1284:16                  1288:3,19 1289:2,9                  1289:10 1291:5                  1293:1,4,6 1297:9,11                  1298:1,23 1300:16                  1301:24 1302:1                  1303:12 1305:9,13                  1309:16 1310:15                  1311:4,13 1312:13,23                  1313:2 1314:3                  1315:10 1319:13,18                  1321:3 1322:11,18                  1323:6,12,24 1324:5                  1324:24 1325:8,15,21                  1326:12 1327:11,15                  1327:19,22 1328:3,9                  1328:11 1333:16                  1334:2 1340:10                  1342:11 1346:5,6                  1347:3,9,22 1348:4                  1349:11 1350:1,4                  1352:16  <b>SANDFORD</b> 1157:20                  1352:6,23  <b>Santa</b> 1352:3,7  <b>sat</b> 1296:13 1338:21  <b>satisfied</b> 1166:14                  1168:12 1169:17                  1213:2,5,9,10                  1282:22  <b>satisfy</b> 1209:24  <b>save</b> 1276:5  <b>saw</b> 1191:24 1192:5                  1299:13  <b>saying</b> 1202:12 1240:9                  1242:23 1243:13                  1246:2 1247:2,10                  1303:15 1311:8                  1318:14,19,19,21                  1325:2 1326:2,19                  1338:25 1346:20                  1350:4  <b>says</b> 1173:23 1184:4                  1187:13 1188:22                  1194:21 1198:8                  1216:9 1218:7,13                  1219:9 1220:6 1230:9                  1237:10 1239:13</p>	<p>1245:12,13 1294:13                  1303:2 1314:24                  1315:24 1317:15                  1319:16 1324:24                  1325:6,14,16,18,20                  1325:25 1326:12,16                  1326:21 1328:3,21                  1332:4 1333:6 1334:2                  1340:10 1341:9,14                  1348:7 1350:12,16  <b>scan</b> 1341:21  <b>schedule</b> 1164:23                  1165:1,2 1184:24                  1185:16 1203:21                  1224:14  <b>scheduled</b> 1165:18                  1197:23,24  <b>Schreck</b> 1161:7  <b>scope</b> 1260:18  <b>Scott</b> 1159:3 1160:8,11                  1160:18 1186:1                  1187:17 1244:6                  1287:7 1295:16,19,22                  1296:10 1301:19,23                  1338:20 1340:7,13                  1345:9  <b>Scott's</b> 1187:14  <b>screen</b> 1166:18 1170:22                  1173:17 1194:17                  1317:8 1325:5                  1331:11 1340:2  <b>scroll</b> 1186:6 1325:3,4                  1345:23  <b>SD</b> 1173:23  <b>SDCWA</b> 1194:23                  1198:8 1237:11                  1332:22 1340:22                  1344:16  <b>SDW</b> 1216:10  <b>SDWA</b> 1216:11  <b>season</b> 1312:22  <b>seated</b> 1160:16 1268:23  <b>second</b> 1167:15 1176:6                  1182:17 1184:1                  1202:18 1216:4                  1219:7 1220:2,6                  1262:14 1263:15                  1265:22 1266:23                  1267:9 1270:12                  1311:19 1317:14                  1324:16 1326:16,20                  1327:7,25 1328:7                  1338:25  <b>second-most</b> 1270:14  <b>secondly</b> 1178:8  <b>secret</b> 1301:10  <b>secretaries</b> 1196:15  <b>Secretary</b> 1280:8,11,14</p>	<p><b>section</b> 1167:7,9,11                  1173:1,5 1175:6,7,8                  1176:6 1194:3,16,17                  1198:3,4,5,17,20                  1200:2,3 1236:24                  1317:10,15 1321:9,14                  1321:21,25 1322:10                  1322:23 1323:1,3,11                  1323:24 1324:7,11,13                  1325:5,14 1327:10,10                  1327:15 1332:5,12,15                  1333:8,10,19,20                  1334:20 1341:17  <b>sections</b> 1327:18                  1328:25  <b>secure</b> 1196:14  <b>securing</b> 1186:21  <b>see</b> 1167:9 1173:25                  1184:6 1187:14,15                  1195:1 1198:13                  1215:19 1216:2,8                  1218:7,9,16 1219:18                  1220:4,11 1227:17                  1230:9,13 1237:8,21                  1239:21 1243:16                  1245:4,10,14 1248:24                  1254:11,23 1255:3,4                  1264:19 1275:3                  1281:6 1287:17                  1291:18 1292:9                  1294:14 1317:21,21                  1319:15 1322:16                  1325:4,12 1340:5,10                  1340:25 1343:3,9                  1345:6 1347:17,21                  1348:13 1350:2,15,25  <b>seeing</b> 1194:5 1285:14  <b>seek</b> 1237:11 1238:21                  1326:2  <b>seeking</b> 1238:10,15                  1239:7 1319:21                  1335:11  <b>seen</b> 1196:12 1215:12                  1215:23 1341:25  <b>sell</b> 1271:9  <b>send</b> 1186:3  <b>sending</b> 1346:6                  1348:24  <b>sent</b> 1171:11 1188:12                  1340:4,15 1344:12  <b>sentence</b> 1167:20                  1176:6,14 1184:2                  1186:7 1218:12                  1292:6 1294:13                  1317:14 1321:1                  1325:14,19 1327:24  <b>sentences</b> 1198:20,22  <b>sentiment</b> 1174:22</p>	<p><b>separate</b> 1346:3,13  <b>September</b> 1188:8                  1215:18 1219:3                  1294:10 1299:14                  1349:14,14  <b>seq</b> 1173:1  <b>series</b> 1281:3  <b>serve</b> 1161:25  <b>service</b> 1162:12                  1189:24 1230:10  <b>SERVICES</b> 1157:23  <b>set</b> 1169:7 1174:23                  1176:2,10,17 1178:5                  1179:19 1180:16                  1183:6 1193:13,13                  1194:25 1202:8,9                  1212:19 1225:4                  1229:1,14,18 1233:14                  1234:15 1235:3,24                  1236:3,9,13 1237:17                  1246:24 1249:14                  1251:17 1253:17                  1267:23 1284:9                  1294:14 1317:17                  1318:4,10,12,12,15                  1318:17,22,23 1319:2                  1319:16,19 1323:7                  1325:10,22 1326:8,14  <b>sets</b> 1319:14 1320:22  <b>setting</b> 1185:1 1194:4                  1202:20  <b>settlement</b> 1222:13,17                  1223:2 1278:25                  1279:2,13,25 1280:5                  1280:10 1300:5  <b>seven</b> 1174:16 1196:14                  1241:25 1264:23                  1274:14  <b>share</b> 1278:15  <b>sharp</b> 1243:17  <b>sheer</b> 1197:11  <b>sheet</b> 1338:21  <b>shoes</b> 1298:23  <b>short</b> 1265:10 1294:9                  1314:15 1350:21  <b>shortages</b> 1271:8  <b>shorthand</b> 1167:1                  1347:17 1352:6,24  <b>show</b> 1187:21 1236:25                  1342:25  <b>showed</b> 1275:1  <b>showing</b> 1338:24  <b>shown</b> 1219:16  <b>shows</b> 1313:11  <b>side</b> 1162:2,5 1249:8                  1267:25 1302:4,17                  1303:1 1304:15                  1305:5 1329:16</p>	<p><b>sideboard</b> 1178:2                  1201:25 1202:4,5,25  <b>sides</b> 1202:8 1243:13  <b>sign</b> 1300:2  <b>signed</b> 1163:18 1180:24                  1181:10 1200:7                  1204:8 1206:15,24                  1207:4,8 1210:18                  1213:4 1219:5 1238:3                  1238:17 1256:22                  1290:15,19 1300:1                  1303:15 1331:15                  1332:2 1336:18  <b>significant</b> 1275:2,4,10                  1277:1 1278:14                  1286:5 1287:16                  1288:1 1289:12                  1309:5,25 1310:6                  1312:16,17 1348:25  <b>significantly</b> 1288:16                  1310:12  <b>signing</b> 1226:20                  1292:10 1299:24  <b>silent</b> 1288:5  <b>similar</b> 1179:22                  1200:11 1272:15  <b>simple</b> 1217:19                  1281:11,17 1296:16  <b>simply</b> 1267:13,20                  1275:25 1281:13                  1309:19  <b>single</b> 1199:3 1206:16                  1246:19 1309:18                  1313:3 1339:1                  1346:22  <b>single-most</b> 1197:13  <b>singled</b> 1239:23                  1252:14  <b>sir</b> 1201:24 1203:18                  1207:21 1209:14                  1211:12 1212:14                  1213:5 1227:11                  1231:24 1233:5                  1237:21 1239:14                  1240:19 1242:14                  1258:25 1261:19                  1268:10 1279:14                  1301:14 1306:9                  1309:9 1311:8                  1313:14 1316:4                  1325:13 1329:8  <b>sister</b> 1335:1  <b>sit</b> 1189:10 1295:17                  1296:8  <b>situation</b> 1234:13  <b>six</b> 1248:20 1278:15                  1331:9  <b>size</b> 1199:13</p>
--	---	---	---	---

<p><b>sketch</b> 1346:4  <b>Skillman</b> 1262:14  <b>skipped</b> 1288:8  <b>Slater</b> 1159:3 1160:8  1160:11,18 1167:9,16  1173:18 1175:7  1178:18 1185:24  1186:1,8 1187:7,22  1194:12,20 1198:5,19  1201:4 1203:17  1244:6 1255:25  1257:4 1287:7  1295:16,22,23 1296:7  1296:8,19 1297:14  1301:19,23 1303:2  1304:1,4,21,23  1306:1,9 1316:7  1328:11 1338:21  1339:9,18 1340:7,13  1342:5,13 1344:9,23  1345:9,19 1346:9  1347:8 1348:3,17,20  1350:4  <b>Slater's</b> 1340:16,19  1341:10 1344:12,21  1347:2 1348:21  1349:20  <b>slightly</b> 1264:25  <b>small</b> 1194:21 1283:16  <b>smaller</b> 1309:25 1310:6  <b>solution</b> 1271:25  1272:1  <b>somebody</b> 1180:16  1212:8 1234:20  <b>sorry</b> 1175:25 1183:22  1198:19 1223:8  1234:19 1236:6,21  1240:24 1245:16  1251:22 1254:16  1266:11 1323:16  1336:19 1341:8,16  <b>sort</b> 1180:21 1192:7  1196:10 1254:9  1274:19 1281:19  1306:5  <b>sorts</b> 1285:9  <b>sought</b> 1274:18  <b>sound</b> 1285:8  <b>sounds</b> 1270:3 1274:17  1280:23 1302:3  <b>source</b> 1218:1  <b>South</b> 1158:13  <b>Southern</b> 1157:9,11  1158:10 1166:24  <b>space</b> 1245:8,9,13,16  1246:7,11 1262:25,25  1309:13,13,15 1312:5  <b>space-available</b></p>	<p>1245:22 1246:2  <b>speaking</b> 1181:2  1186:13  <b>special</b> 1162:5 1173:1,3  1196:16  <b>specific</b> 1177:16  1202:17 1233:12,16  1234:12 1236:16  1251:20 1283:6,18  1287:10 1289:6  1318:25 1321:20  1343:12  <b>specifically</b> 1162:23  1252:13  <b>specified</b> 1208:13  1336:23  <b>specifies</b> 1200:13  1342:17  <b>spectacular</b> 1217:18  <b>speculation</b> 1261:5,6  <b>spell</b> 1160:17,20  1205:10 1268:24  <b>spelled</b> 1160:18  1187:11 1262:11  <b>spending</b> 1265:24  <b>Spent</b> 1196:11  <b>spilling</b> 1198:18  <b>spit</b> 1252:16  <b>spite</b> 1172:9  <b>spring</b> 1192:11  <b>squishing</b> 1346:19  <b>ss</b> 1352:3  <b>staff</b> 1218:7 1219:21  1220:13 1281:23  1284:3  <b>stamp</b> 1204:5  <b>stand</b> 1244:7 1257:17  1330:22  <b>standard</b> 1180:15  1181:18 1199:10  1227:3,14 1229:10  <b>standards</b> 1227:16  <b>Stapleton</b> 1163:3  1250:1 1287:6  1295:16 1304:23  1306:1 1348:20  <b>start</b> 1176:8 1177:17  1212:23,24 1270:25  1295:1 1317:4 1337:3  1346:18 1347:23  <b>started</b> 1218:20  1220:14 1287:11  1292:3 1307:10  <b>starting</b> 1174:7  1233:25 1237:8  <b>starts</b> 1184:2 1186:1  1242:8  <b>state</b> 1157:1 1160:17</p>	<p>1167:11,24 1168:7,20  1168:20 1169:5,13,14  1172:18 1174:16  1180:23 1181:9  1186:16 1190:1  1194:9 1203:20  1204:13,14 1212:18  1214:18 1216:17  1226:1,15 1253:19  1258:8,16 1260:16  1266:1,18 1268:24  1271:22 1273:20  1277:18 1279:23  1280:21 1282:1,2,10  1282:10 1284:24  1288:17 1289:3,7,13  1289:18 1290:7,18,25  1292:11 1298:19,24  1299:5,7,9 1300:18  1302:21 1310:10  1311:13 1312:11  1315:22 1335:1,17  1336:14 1337:5,12,15  1337:24 1338:14  1339:4 1346:6 1352:2  1352:7,25  <b>State's</b> 1168:15  <b>stated</b> 1292:14 1305:1  <b>statement</b> 1172:17  1193:3 1258:4  1293:17 1341:24  <b>statements</b> 1172:9  <b>states</b> 1174:17 1196:14  1197:16 1274:3,8,9  1277:21 1278:15  1279:23 1280:18  <b>Station</b> 1310:11  <b>status</b> 1181:14  <b>statute</b> 1253:19  1254:11,19,21 1255:1  <b>stenotype</b> 1352:10  <b>step</b> 1271:7 1297:19  1298:23  <b>Stephen</b> 1262:11  <b>stewardship</b> 1189:12  1208:22 1212:19  1230:11 1266:18  1292:15 1294:20  <b>stick</b> 1280:11  <b>sticking</b> 1273:10  <b>stop</b> 1258:18  <b>stopping</b> 1240:18  <b>storage</b> 1290:4,13  <b>store</b> 1290:3  <b>straight</b> 1323:20  <b>strategic</b> 1199:16  <b>strategy</b> 1162:10  <b>Street</b> 1157:24 1158:6</p>	<p>1158:13,16  <b>strike</b> 1178:13,19  1179:14 1191:20  1235:24 1236:9  1250:5 1251:8  1261:11 1329:2  1335:9 1336:8  <b>strings</b> 1289:15  <b>structure</b> 1206:17  1212:25 1218:24  1221:14 1235:18  1266:20 1267:6  1284:7,10 1285:12,15  1286:6,12 1288:23  1291:11 1301:25  1303:8,10 1304:25  1305:2,7,12,19,22  1306:11,17 1307:12  1307:15,17,20,23  1308:15 1322:21,24  1323:4 1324:25  1326:7 1327:23  1328:1,12,14  <b>structures</b> 1267:8  1324:6,14 1350:18  <b>studies</b> 1276:8,11  <b>stuff</b> 1253:7 1311:25  <b>subject</b> 1191:18 1195:9  1239:23 1242:8  1254:22 1261:16  1262:6 1263:8,12  1270:20 1273:15  1280:2 1340:13  1344:9  <b>subjects</b> 1206:4,7  1207:23  <b>submission</b> 1267:25  <b>submit</b> 1344:4  <b>submitted</b> 1262:2,8  <b>subparagraph</b> 1167:21  <b>subparagraphs</b>  1167:25  <b>subsection</b> 1167:15  <b>subsequent</b> 1263:12  <b>subset</b> 1292:21  <b>substance</b> 1190:14,15  1191:2 1237:13  1264:25 1306:5  1326:4  <b>substantial</b> 1165:16  <b>substantive</b> 1178:8  1202:18  <b>substitute</b> 1224:17,18  <b>succeed</b> 1186:19  <b>successful</b> 1172:14  <b>sue</b> 1196:7 1249:9  1306:18 1324:25  <b>sued</b> 1202:11</p>	<p><b>sufficient</b> 1288:22  <b>suggest</b> 1168:23  <b>suggested</b> 1203:21  1300:23,23  <b>suggesting</b> 1245:17  <b>Suggestions</b> 1159:17  <b>suing</b> 1197:6 1249:19  <b>suit</b> 1190:17,17  1343:10  <b>SULLIVAN</b> 1158:11  <b>sum</b> 1167:24 1208:20  1290:8,11 1294:19  <b>summarize</b> 1291:17  <b>summary</b> 1183:11  1266:7,9  <b>summation</b> 1188:2  1189:23 1193:11  <b>summed</b> 1294:21  <b>summer</b> 1169:5  1181:20  <b>Superior</b> 1157:1,16  <b>supply</b> 1190:1 1220:8  1258:8,10 1259:1,7  1259:17,19,20  1260:17 1261:6  1267:13,20 1281:19  1281:23 1337:12,16  <b>support</b> 1237:11  1265:15 1266:6  1326:3  <b>supported</b> 1329:4  <b>supports</b> 1260:3  <b>suppose</b> 1201:1  <b>supposed</b> 1305:18  <b>sure</b> 1178:17 1216:5  1235:22 1236:1,5,7  1236:11 1283:12  1289:21 1290:17  1310:17 1314:15  1324:15 1336:20  <b>surplus</b> 1277:19  <b>surplusage</b> 1328:17  <b>surrendering</b> 1184:24  <b>sustain</b> 1256:25  <b>Sustained</b> 1178:15,15  1200:24 1256:19  1274:23 1295:7  <b>swap</b> 1217:17  <b>swapping</b> 1221:22  <b>switch</b> 1276:16 1298:20  <b>sworn</b> 1160:12 1268:19  <b>symmetrical</b> 1199:22  1199:23 1200:14  <b>synonymous</b> 1348:1  <b>synonyms</b> 1347:15  <b>system</b> 1165:16  1189:13 1208:21  1230:11 1270:5</p>
--	---	--	---	--

<p>1272:7 1281:12                  1283:10 1292:14                  1294:19,20 1309:24                  1310:24 1311:2,14                  1315:6,8,12,14,16                  1335:3  <b>system-wide</b> 1193:13</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T-H-O-M-A-S</b> 1262:18  <b>table</b> 1218:6 1219:16                  1220:1 1245:1                  1346:10  <b>tackle</b> 1288:2,6  <b>take</b> 1168:11,14                  1170:19 1176:14                  1190:10 1192:15                  1203:9 1214:23,25                  1215:8 1223:16                  1227:7 1230:3 1232:3                  1233:20 1240:15                  1246:12 1248:16,23                  1252:11 1254:6                  1255:9,14 1257:10                  1259:8,17,23 1261:18                  1261:24 1267:24                  1274:20 1283:24                  1284:8,8 1285:2                  1288:22 1292:18                  1293:16 1298:15                  1299:15 1301:13                  1307:5 1310:25                  1311:17 1313:8                  1314:13,19  <b>taken</b> 1256:3 1297:3                  1352:9  <b>takes</b> 1310:23  <b>talk</b> 1213:11 1275:18                  1281:5 1311:18                  1312:5 1324:16                  1347:25  <b>talked</b> 1214:16 1253:8                  1276:16 1299:11  <b>talking</b> 1167:4 1177:14                  1221:18 1244:24                  1246:5 1254:17                  1282:7 1304:19                  1307:12 1343:19  <b>talks</b> 1322:10 1324:14                  1324:15  <b>tap</b> 1205:14  <b>TARA</b> 1157:20 1352:6                  1352:23  <b>task</b> 1196:18  <b>taught</b> 1161:19,21  <b>Taylor</b> 1163:5 1249:25  <b>team</b> 1176:23 1188:4                  1191:10 1192:7</p>	<p>1233:7 1249:23,25                  1251:1,10 1286:19                  1292:18,21 1293:21                  1295:11,14,24                  1300:15,22  <b>teammates</b> 1286:21  <b>technicality</b> 1309:2  <b>tell</b> 1169:18 1178:18,20                  1184:11 1185:12                  1191:6 1200:19                  1201:5,12 1225:6,21                  1241:21 1268:4                  1271:1 1278:11                  1293:1 1304:20                  1341:22  <b>telling</b> 1212:6,10                  1225:15 1232:25                  1240:11 1241:10,16                  1256:15  <b>ten</b> 1234:1,9 1302:13                  1350:25  <b>ten-minute</b> 1307:5  <b>tend</b> 1311:24  <b>tender</b> 1179:3  <b>tens</b> 1205:5,18  <b>term</b> 1164:13 1165:1                  1165:11 1166:5                  1175:12,15 1176:1                  1177:6,20,23 1179:2                  1180:7,18 1181:9                  1183:10,12,16 1195:9                  1198:12 1199:21                  1202:25 1237:10                  1288:2 1317:11                  1319:9,12,13,18                  1320:22 1326:1                  1327:22 1338:21                  1340:23 1341:9,18  <b>terms</b> 1164:5 1187:3                  1188:13,15,18                  1193:22 1206:8                  1211:18 1212:7                  1216:5 1221:19,21                  1238:8 1300:9 1304:9                  1341:4,11 1346:4  <b>test</b> 1252:21 1255:15  <b>testified</b> 1160:13                  1227:9 1244:7                  1257:17 1268:20                  1329:1 1339:14  <b>testify</b> 1206:4 1207:14                  1207:23 1329:24  <b>testifying</b> 1302:10                  1317:24  <b>testimony</b> 1212:2                  1213:6 1232:15                  1233:5 1239:14                  1240:4 1246:22</p>	<p>1254:9 1258:25                  1311:17 1320:21                  1321:7 1322:6 1324:4                  1324:9 1330:9 1339:8  <b>Texas</b> 1161:23  <b>Thank</b> 1160:9,16                  1183:24 1203:10                  1205:12 1208:5                  1215:11 1232:24                  1243:17 1254:7                  1257:2 1258:19,20                  1265:6 1268:23                  1295:9 1300:8 1307:6                  1307:7,9,11 1316:20                  1316:21 1321:12                  1331:7  <b>theories</b> 1231:2  <b>theory</b> 1170:16                  1199:13  <b>thereof</b> 1182:24  <b>thing</b> 1202:16,18  <b>things</b> 1178:1 1202:7                  1238:5 1253:9,10                  1254:4 1303:11                  1314:1 1321:17,20  <b>think</b> 1172:21 1174:21                  1181:4,17 1188:17                  1193:3 1194:2                  1197:13 1198:15                  1203:21 1213:12                  1215:9 1216:16                  1217:19 1221:4                  1228:5 1232:8,17                  1233:24 1238:18,18                  1239:11 1240:3                  1242:22 1243:1,2                  1246:4 1248:17                  1250:24 1252:23                  1259:13 1268:9                  1285:7 1288:8                  1304:15 1315:4                  1321:10 1322:25                  1324:3,6 1327:18                  1328:24 1329:1                  1330:13,23 1336:9,22                  1339:8 1343:11                  1344:22 1346:6,20  <b>thinking</b> 1343:14  <b>third</b> 1182:18 1218:11                  1218:12 1282:3,6                  1310:22 1328:3,5                  1341:18,19 1349:13  <b>Thirty</b> 1209:4,5  <b>Thirty-five</b> 1216:19  <b>Thirty-seven</b> 1269:22  <b>Thomas</b> 1163:11                  1177:3 1191:17                  1192:14,15 1233:17</p>	<p>1262:17 1296:12                  1329:5,22 1330:3,5                  1330:11 1331:8                  1334:14,17,20                  1337:21 1340:4                  1343:2 1344:8,15                  1345:2,9  <b>thought</b> 1179:11                  1182:20 1196:21                  1200:21 1228:19                  1231:17,21,25                  1241:22 1285:8                  1287:23 1302:15                  1303:5 1330:8  <b>thousands</b> 1205:5,18  <b>three</b> 1173:16,18                  1219:6 1249:24                  1270:9 1284:1                  1294:21 1327:18                  1328:24 1345:16,23  <b>time</b> 1163:6,13 1164:3                  1166:8 1168:17                  1171:11 1172:5                  1180:24 1181:10                  1185:5 1187:10                  1188:11 1189:4,5,21                  1190:20 1192:8                  1199:16,19 1203:25                  1204:14 1206:14,23                  1207:3,8 1210:17                  1211:21 1213:20                  1217:4,5 1218:3,15                  1218:20 1220:15                  1226:25 1227:20                  1228:12,16 1238:16                  1239:10 1241:20                  1243:15,16 1246:14                  1247:13 1248:1                  1265:24 1266:4                  1272:20 1273:20                  1274:12 1277:4,11,20                  1280:4 1282:12                  1283:17 1284:13                  1286:23,25 1288:13                  1289:12 1290:5,21                  1294:2,5 1295:25                  1296:4 1297:14,15,16                  1299:23 1302:13,15                  1302:16 1305:21,21                  1308:4 1315:14                  1316:3,7 1319:25                  1320:25 1324:18                  1330:16 1331:14                  1332:1 1336:22                  1337:2 1340:16                  1343:15 1346:23                  1349:11,15 1350:22                  1350:23 1352:10</p>	<p><b>time-out</b> 1201:20  <b>timeout</b> 1195:4,11                  1198:6 1201:14                  1306:6 1308:9                  1323:13,15,18 1324:1  <b>times</b> 1165:25  <b>titled</b> 1340:22  <b>today</b> 1189:10 1217:24                  1295:17 1307:23                  1317:3  <b>told</b> 1210:22 1211:6,10                  1230:6 1231:20,24                  1232:8 1233:13                  1242:16,17 1304:4                  1339:18  <b>tolerable</b> 1181:18  <b>tolling</b> 1254:22  <b>tomorrow</b> 1350:25  <b>top</b> 1184:3 1185:24                  1198:18 1320:9                  1325:25  <b>topic</b> 1308:17 1311:18  <b>topics</b> 1207:15  <b>tops</b> 1272:21  <b>total</b> 1219:14,15 1220:9                  1278:5  <b>touchstone</b> 1179:9  <b>tough</b> 1301:10  <b>traded</b> 1162:2  <b>Traditional</b> 1162:9  <b>transaction</b> 1197:14                  1221:17,24 1222:7,10                  1222:18,20 1238:6                  1245:20  <b>transactions</b> 1283:7  <b>transcript</b> 1157:15                  1249:3 1257:22,23                  1258:5 1262:10,14,21                  1266:3 1336:20  <b>transcription</b> 1352:12  <b>transcripts</b> 1262:4,5                  1263:3 1330:15,24  <b>transfer</b> 1164:11                  1165:19,22 1166:6                  1169:1 1197:15                  1221:6 1270:22                  1271:1,10,14 1272:2                  1272:4,9,23 1276:19                  1277:5,9 1279:10                  1288:4 1291:21                  1309:16,17 1311:4,15                  1341:11 1342:11  <b>transferred</b> 1223:1                  1272:18 1298:16  <b>transferring</b> 1194:6                  1272:20  <b>transfers</b> 1194:9,11,11  <b>transmitted</b> 1339:2</p>
---	--	---	--	---

<p><b>transmitting</b> 1344:12  <b>transport</b> 1205:18  1216:12  <b>transportation</b> 1173:4  1184:15 1258:9  1259:11,12 1260:17  1267:17 1336:15  1337:6,17,20,25  1339:5  <b>transported</b> 1175:10  <b>treated</b> 1281:13  <b>treatise</b> 1161:16  <b>treatment</b> 1252:15  1255:15  <b>tremendous</b> 1282:4  <b>trial</b> 1263:16  <b>tried</b> 1179:23 1193:10  1210:13  <b>true</b> 1204:2 1206:14,18  1206:19 1209:7,8,12  1209:13,22,23  1211:25 1218:25  1225:9,22,23 1226:3  1226:4,24 1233:15  1241:23,24 1246:14  1247:3,11,12 1259:3  1259:8 1264:24  1269:9 1271:19  1272:13 1288:14  1289:8 1291:5  1341:10  <b>trusted</b> 1174:18,19  1329:13  <b>try</b> 1193:25 1235:17  1288:18 1333:12  <b>trying</b> 1184:13 1188:5  1193:8 1194:10  1238:4,19 1243:11  1273:19 1312:3  1319:1 1341:3  <b>turn</b> 1167:6 1175:5  1196:22 1198:15  1236:22 1275:21  1278:18  <b>turn-of-the-century</b>  1275:8  <b>turned</b> 1287:17  <b>Turning</b> 1291:3  <b>turns</b> 1314:24  <b>Twenty</b> 1209:3  <b>Twenty-four</b> 1321:12  <b>twice</b> 1243:7  <b>two</b> 1172:4 1178:1  1191:17 1193:7  1196:14,14 1198:20  1198:22 1202:7  1214:2 1216:3,5  1218:7,19 1219:11</p>	<p>1239:17,17,19 1245:7  1253:9 1265:1  1266:13,25 1281:15  1284:1 1291:6  1295:15,18 1299:18  1314:12 1348:18  <b>two-and-a-half</b> 1349:6  <b>two-volume</b> 1161:16  <b>type</b> 1162:7 1211:23  1226:25 1227:15  1247:1 1272:15  1321:21  <b>types</b> 1161:24 1285:10  1285:19  <b>typewriting</b> 1352:11  <b>typically</b> 1311:9</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U-P-A-D-H-Y-A-H</b>  1262:20  <b>U.S</b> 1221:7  <b>ultimate</b> 1305:14  <b>ultimately</b> 1287:10  1294:3 1308:21  <b>umbrella</b> 1253:18  <b>unbelievable</b> 1196:12  1196:17,17  <b>unbounded</b> 1180:15  <b>unbundle</b> 1227:21  1282:14 1283:8,24  1284:14 1285:19  <b>unbundled</b> 1286:12  <b>unbundling</b> 1283:20  1284:23 1285:3,5,8  1285:13 1286:10  1303:7 1337:8,14  <b>uncertain</b> 1227:10  <b>uncertainty</b> 1194:13  <b>undercut</b> 1238:6  <b>underground</b> 1205:15  <b>understand</b> 1188:6  1189:7 1202:21  1207:25 1210:9,11,14  1212:12,14 1221:24  1222:14 1239:4  1262:15 1283:12  1287:1 1297:4  1306:13 1307:19  1308:24 1318:18  1324:4 1326:20  <b>understanding</b> 1169:8  1172:25 1188:11,14  1202:6 1228:11  1229:17 1238:13  1245:25 1248:18  1252:10 1254:2  1293:17 1305:6  1331:14 1332:1</p>	<p><b>understood</b> 1169:24  1177:15 1178:1,10,14  1187:3 1188:3  1227:19 1229:23  1230:6,15 1238:9  1243:2,3 1305:19  1306:10,15 1320:3  1322:6 1330:8  <b>undertake</b> 1226:25  <b>undertook</b> 1227:8  <b>Underwood</b> 1163:11  1177:2 1233:18  1286:24 1287:1  1320:19,20 1345:8  1348:15  <b>undisputed</b> 1311:25  <b>uniformly</b> 1252:4  1255:13  <b>unique</b> 1250:18  1255:12  <b>United</b> 1197:16 1274:3  1274:8,9 1279:23  1280:17  <b>universe</b> 1179:11  <b>universities</b> 1161:22  <b>unlawful</b> 1193:13  1229:21 1231:22  1232:1,12,21 1233:4  1233:19 1247:2,11  1318:13,15,17,20,22  1318:24 1319:2,7,14  <b>unpack</b> 1227:21  <b>unprecedented</b>  1196:10  <b>unquote</b> 1339:10  <b>unsettled</b> 1194:1  <b>untreated</b> 1281:14  <b>unused</b> 1277:18,20  1278:4  <b>unwilling</b> 1274:20  <b>Upadhyah</b> 1262:20  <b>update</b> 1297:25  <b>updated</b> 1161:18  1287:25 1292:4  <b>updates</b> 1287:13  <b>urban</b> 1221:6 1312:24  <b>URQUHART</b> 1158:11  <b>use</b> 1201:25 1205:25  1221:6 1224:13  1237:4 1247:6  1271:13,21 1277:8,17  1277:23 1283:9  1289:16 1348:8  <b>user</b> 1277:7  <b>users</b> 1277:3,8 1278:12  1278:22  <b>uses</b> 1210:12 1313:12  <b>usually</b> 1162:5 1282:11</p>	<p>1312:22 1322:3  <b>utilities</b> 1162:4</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>V-A-N</b> 1262:23,25  <b>Vague</b> 1177:13 1181:1  <b>valid</b> 1192:20 1194:14  1200:22 1201:8  <b>validating</b> 1190:18  <b>validation</b> 1190:13  1191:1 1193:9  <b>validity</b> 1157:10 1190:4  <b>Valley</b> 1273:24  <b>valuable</b> 1300:17,19  <b>valuation</b> 1219:20  1270:8  <b>value</b> 1170:2,5 1219:13  1247:25  <b>Van</b> 1158:3 1261:17  1262:22  <b>VANDERHORST</b>  1158:16  <b>variable</b> 1175:18  1185:20 1199:16  <b>various</b> 1169:7 1206:4  1207:15,23 1208:6,17  1210:20 1219:16  1227:22 1235:14  1275:23 1321:17  1338:23  <b>veering</b> 1304:9  <b>version</b> 1345:25  <b>vice</b> 1286:24  <b>VIDEOGRAPHY</b>  1157:23  <b>view</b> 1179:8 1194:9  1289:10 1303:12  1328:5 1342:18  <b>viewed</b> 1179:8 1337:12  <b>views</b> 1285:24 1286:8,8  <b>VIII</b> 1157:10  <b>virtue</b> 1199:19 1310:22  <b>volume</b> 1157:10  1223:22 1226:7  1227:25 1233:22  1238:23 1240:20,25  1241:1,2,25 1272:17  <b>voluntarily</b> 1286:2  <b>vote</b> 1270:5 1284:6  1286:11 1293:9  <b>voted</b> 1247:5,7  <b>votes</b> 1270:3,14  <b>vs</b> 1157:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wagons</b> 1197:5,11  <b>wait</b> 1232:23  <b>waited</b> 1332:8</p>	<p><b>waive</b> 1199:1,19  <b>waiver</b> 1200:4,8,10,11  1200:12  <b>waiving</b> 1200:7 1304:7  1339:3,6  <b>walk</b> 1202:23 1305:5  <b>want</b> 1176:14 1185:3  1202:21 1203:2  1205:18 1209:16,24  1211:9 1215:16  1234:2 1238:2  1242:11 1257:8  1259:7 1268:4  1271:17,18 1281:4  1290:17 1294:22  1301:7 1305:4 1309:6  1310:17 1314:13  1327:2 1330:21  1332:11  <b>wanted</b> 1180:16 1187:2  1199:18 1218:4  1240:9 1248:14  1254:3 1255:8,10,17  1259:9 1263:20  1268:6 1273:8  1289:20 1294:12  1304:21 1310:15  1315:11 1341:24  <b>wants</b> 1234:18 1341:21  <b>WARREN</b> 1158:5  <b>wasn't</b> 1193:12 1213:6  1217:12 1267:14  1287:22 1290:18  1306:24 1336:8  1339:1  <b>wasting</b> 1271:17,24  <b>watched</b> 1194:2  <b>water</b> 1157:6,9,11  1158:10 1160:7  1161:13,14,15,17,19  1161:21,21,24 1162:9  1162:12,14,17,22,25  1163:15 1164:2,4,11  1164:21,21 1165:5,8  1165:12,14,15,18,21  1166:2,4,9,15,16,23  1166:25,25 1168:25  1169:23,25 1170:2,3  1170:6,10 1171:6,9  1171:19 1172:6,19,23  1173:1,4,8,13,13  1174:11 1175:3,11,12  1176:12 1179:5,12  1180:9,17 1182:15  1183:9,12 1184:5,19  1185:8 1186:10  1189:6,12,14,19  1190:1,2,7,10,21,24</p>
--	---	---	---	---

1191:5,10,13 1194:6 1194:8,10 1196:11 1201:5,7,18 1204:15 1204:21,24 1205:15 1205:19 1208:22 1211:13 1212:18,18 1213:18 1214:16,24 1214:24 1216:10,13 1216:23 1217:13 1218:1 1219:22 1220:25 1221:6,23 1223:1 1225:11 1226:2,15 1228:14 1230:11 1231:7 1237:19 1245:21 1246:1,7,8,19 1248:5 1256:1 1258:8,9,16 1259:25 1260:15,16 1261:18 1266:18,19 1270:21,22,22 1271:1 1271:3,4,5,8,9,12,13 1271:18,18,22,24 1272:4,7,12,14,18,18 1272:21,24 1273:2,2 1273:4,14,16,20,23 1274:4 1275:2,4,6,10 1275:21,21,24 1276:2 1276:6,17,17,18,19 1277:3,6,10,17,19,23 1278:4,19,21,21 1279:3,10 1280:19 1281:10,14,14 1282:1 1282:2,11,23 1283:1 1284:24 1287:4 1288:21 1289:9 1290:3,6,16,22 1291:5,11,16,21 1292:8,10,15 1293:21 1294:6,16,18,20 1295:11,14,24 1296:5 1296:14,19,23 1297:5 1297:11,16,25 1298:14,16,22 1299:3 1299:4 1300:17 1301:1,13 1302:6,8 1302:18,20,23 1303:1 1304:2,20,21 1305:9 1305:22 1306:1 1308:10,13 1309:7,15 1309:20 1310:2,10,23 1310:25 1311:1,10,11 1312:6,8,8,9,10,10,11 1312:14,14,15,16,21 1312:24 1313:3,4,10 1313:20 1314:8 1315:22,22 1317:19 1318:7 1326:10 1331:17,22 1332:6	1333:21 1334:24 1335:2,7,15,17 1336:5,13,14 1337:4 1337:5,10,11,12,15 1337:22,24 1338:11 1338:15 1339:2,3,4 1339:20 1347:4 1348:21 <b>way</b> 1189:16 1190:4,22 1191:7 1243:11 1251:24 1255:13 1260:1 1274:15 1280:24 1282:23 1283:5,12 1303:13 1305:12 1306:9 1312:4 1341:23 <b>ways</b> 1275:24 <b>wbraunig@kvn.com</b> 1158:9 <b>we'll</b> 1180:12 1214:23 1214:23,25 1275:17 1294:24 1314:4 1350:23 <b>we're</b> 1268:13 1286:2 1314:3 1339:3 <b>we've</b> 1216:16 1221:18 1231:12,20 1312:25 <b>Wednesday</b> 1157:17 1160:2 <b>week</b> 1219:7 1262:4,9 1268:1,1 1349:13,14 <b>weeks</b> 1219:6 1294:9 1297:18 1299:18 1345:16 1349:6 <b>weighted</b> 1270:5 <b>well-regarded</b> 1174:15 1174:16,17,18 <b>went</b> 1187:2 1189:16 1219:2 1224:23 1242:22 1271:16 1274:10 1280:16 1290:17 1296:25 1297:4,5 <b>weren't</b> 1277:3 1289:19 <b>West</b> 1254:9 <b>whatsoever</b> 1323:12,24 <b>wheel</b> 1172:6 1245:21 <b>wheeler</b> 1309:13 1310:1,17,20 1311:8 1311:10 <b>wheeler's</b> 1309:15 <b>wheelers</b> 1273:9 1283:21 1305:13 <b>wheeling</b> 1159:17 1171:8 1172:16 1173:2,12,13,19,24 1174:2,7,22,23 1175:2 1182:5	1184:15 1185:10,13 1186:9,23 1188:23 1189:8,21 1190:2,5 1190:13,18,22 1191:8 1193:6,8,20,25 1194:14 1200:21 1201:8 1203:21 1204:1,5 1205:22 1213:19 1215:3 1216:11,25 1217:4 1218:13 1219:15 1221:2,13 1226:2 1227:17 1229:7 1230:7,10 1231:25 1233:1,14 1245:4,17 1246:9 1256:7 1272:25 1273:5 1283:16,18,21 1294:14,24 1308:21 1308:25 1309:3,8 1311:12 1314:7,8 1315:1,4 1342:8,14 1342:18 1344:17,24 1347:3,9,15,18,20,23 1348:1 1350:1 <b>wheeling-type</b> 1283:4 <b>whiteboard</b> 1192:9 <b>wholesale</b> 1267:20 <b>willing</b> 1196:7 1228:23 <b>Wilson</b> 1340:14 <b>window</b> 1322:10 <b>wished</b> 1218:3 <b>withdraw</b> 1298:21 <b>witness</b> 1159:8 1160:6 1160:8,12,15,18,22 1164:16 1182:1 1191:24 1192:5 1193:5 1201:22,24 1202:1,6 1203:1 1205:11 1207:12 1210:13 1212:4 1224:22 1227:7 1232:16 1236:19,21 1242:2 1247:24 1260:24 1261:9 1262:11 1268:19,22 1269:1 1275:13 1285:18 1293:5 1295:22 1303:21 1318:21 1320:2 1323:22 1326:24 1330:14,22,23 1337:1 1338:5,7,9,11 1342:1 1352:15 <b>witnesses</b> 1159:2 1262:2 1267:7 <b>word</b> 1198:22 1201:25 1202:5 1210:12	1225:10 1232:11 1346:22 1348:8 <b>words</b> 1185:21 1285:13 1301:8 1306:2,4 1328:23 1339:21 1346:19 1347:11,12 <b>wordsmith</b> 1243:11 <b>work</b> 1161:13,15 1162:7,13,25 1260:2 1274:14 1286:7 1292:25 1297:23 1327:21 <b>worked</b> 1284:5 1286:9 1303:18 1340:15 <b>working</b> 1187:10 1243:10 1273:22 1278:24 1284:2,3 1296:14 1320:12 <b>workshop</b> 1284:19 <b>workshops</b> 1284:4 <b>world</b> 1259:25 1283:2 <b>WORLDWIDE</b> 1157:23 <b>worth</b> 1247:17,23 <b>wouldn't</b> 1170:5 1195:21 1209:19 1284:9,11 1322:2 1335:23 <b>write</b> 1344:16 <b>writes</b> 1342:5 1344:15 <b>writing</b> 1200:7,12 1201:17 1338:19 1344:8 <b>written</b> 1203:25 1247:1 1247:8 <b>wrong</b> 1334:15 <b>wrote</b> 1161:16 1247:1	1196:2,8 1198:10 1209:2,3,5 1213:14 1213:16,17,24 1216:23 1217:13 1221:11 1234:21 1235:7 1246:23 1248:5 1249:10 1254:4,23 1255:2,9 1255:18 1258:15 1260:16 1266:21 1271:16 1274:14 1276:6 1278:8 1284:1 1284:2 1288:3,4,7 1301:4,11,12 1302:5 1302:20 1305:23 1306:16,17,25 1308:6 1308:7,14 1309:18 1316:9 1320:24 1321:5 1322:1,7,13 1322:19 1325:8,16 1327:12 1328:3 1331:16 1332:8 1333:1,25 1334:5,11 1335:18,25 1336:15 1337:7,22 1340:24 1350:14 <b>yesterday</b> 1257:9,21 1258:25
<b>Z</b>				
<b>zero</b> 1245:13 1246:6				
<b>0</b>				
<b>03</b> 1176:25 1177:1,8,8 1181:20				
<b>050</b> 1291:14				
<b>1</b>				
<b>1</b> 1157:12,12,17 1160:2 1167:25 1198:3 1218:6,12 1223:22 1244:2 1245:1 1267:11,14 1284:11 1286:15				
<b>1-10</b> 1157:13				
<b>1-12th</b> 1313:2				
<b>1.2</b> 1278:1				
<b>1.7</b> 1282:8				
<b>1/12th</b> 1313:10				
<b>1:30</b> 1243:17 1244:3				
<b>10</b> 1157:12 1194:3 1299:19				
<b>10:00</b> 1160:3				
<b>100</b> 1248:2				
<b>100-and-some-odd</b> 1288:24				
<b>100,000</b> 1311:5,5				
<b>101</b> 1248:20,21				

<p><b>102</b> 1242:9  <b>104</b> 1241:25 1242:3  1248:20  <b>105,000</b> 1272:10  <b>10th</b> 1158:13  <b>11</b> 1198:3  <b>11.1</b> 1321:9 1332:12  1333:8,20  <b>110</b> 1216:23 1217:13  1248:5 1302:5,20  <b>1149</b> 1230:3 1244:12  <b>1157</b> 1157:13  <b>116</b> 1233:25 1234:9  <b>1161</b> 1159:3  <b>117</b> 1233:21  <b>1171</b> 1159:17,17  <b>1181</b> 1159:20,20  <b>12</b> 1233:21  <b>12.5</b> 1198:17,21  <b>1203</b> 1159:3  <b>122</b> 1331:9  <b>124</b> 1331:9  <b>1257</b> 1159:4  <b>1258</b> 1159:4  <b>1260</b> 1159:4  <b>1263</b> 1159:19,19  <b>1265</b> 1159:6,14,14,15  1159:15  <b>1269</b> 1159:9  <b>13</b> 1264:21,22,23  <b>13.12</b> 1324:19  <b>13.9</b> 1200:2,3  <b>1316</b> 1159:9  <b>1343</b> 1159:16,16  <b>1344</b> 1159:13,13  <b>135</b> 1257:23 1334:20  <b>1352</b> 1157:13  <b>136</b> 1334:21  <b>13th</b> 1352:15  <b>14</b> 1238:23  <b>15</b> 1165:19,22,24,25  1213:16,17,23  1248:20 1257:24  1258:2,2,7,8,11  1288:7 1342:8  <b>16</b> 1175:5,6 1188:8  1215:18 1219:3  1236:24 1317:10  1324:3 1334:21  1349:3  <b>17</b> 1175:5 1184:4  1194:17 1236:24  1237:8 1254:8,15  1324:3,17 1334:21  <b>179</b> 1240:17  <b>18</b> 1223:18,23  <b>180</b> 1240:23,25 1241:3  <b>1810</b> 1173:1</p>	<p><b>1812.5</b> 1173:6  <b>19</b> 1226:7 1238:23,25  1245:2 1340:3 1343:2  <b>1941</b> 1281:10  <b>1984</b> 1161:9,10,13  1271:22  <b>1988</b> 1272:3 1273:22  <b>1990s</b> 1282:17 1283:17  <b>1994</b> 1161:18,18  <b>1995</b> 1269:18  <b>1996</b> 1274:12  <b>1997</b> 1204:25  <b>1998</b> 1163:20,21  1164:5,9,20,23  1166:11,13 1167:1,3  1167:18 1169:1  1170:2,21 1172:20  1174:8 1191:25  1197:24 1202:12  1203:20 1204:8  1213:11,23 1214:1,12  1244:24 1246:10  1276:22 1282:25  1287:12,20 1288:2,5  1291:9,12,24 1292:3  1292:3 1308:21  <b>1999</b> 1276:5</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>2</b> 1167:25 1188:20,22  1193:17 1194:3  1220:2 1237:9  1349:25  <b>2/19/03</b> 1159:13,16  <b>20</b> 1162:10 1223:18,23  1227:25 1235:7  1254:15 1258:15  1260:16  <b>20-year</b> 1220:6  <b>200</b> 1223:18,23  1290:12  <b>200,000</b> 1165:23,25  1272:21  <b>2000</b> 1277:22 1278:4,6  1281:11 1283:17  <b>2001</b> 1284:9 1286:13  1307:18  <b>2002</b> 1280:9,16  1284:10 1299:13  <b>2003</b> 1162:18 1163:1,9  1163:13 1164:3,10  1166:5,8 1168:10,18  1169:5 1175:2,8,15  1175:20 1183:10  1184:8 1186:4,14,17  1188:8 1189:4,5,11  1189:15,22 1190:20  1190:25 1191:4,25</p>	<p>1192:7,8,11,19  1194:12 1200:17,20  1201:6,13 1206:15  1207:18 1208:9  1215:18 1219:3  1226:11,12 1231:18  1231:21,23,24 1232:6  1232:11 1236:23  1237:2 1245:25  1246:17 1247:13  1256:1,4,23 1270:17  1273:15 1279:17  1280:17,21 1281:3,5  1284:11 1286:15,16  1286:16 1287:11,14  1287:15 1290:5  1292:5 1294:10  1297:22 1299:14  1300:10 1301:12  1307:13,14,16,20  1308:8 1309:8  1317:12 1329:4  1334:23 1336:18,21  1336:22 1337:4  1340:3 1341:3 1343:2  1343:8 1345:11,14  1349:3  <b>2006</b> 1269:16  <b>2007</b> 1234:11 1236:19  <b>2010</b> 1264:12,17  1329:9,10  <b>2011</b> 1329:9  <b>2012</b> 1157:12 1264:12  1264:16  <b>2013</b> 1157:12  <b>2014</b> 1157:12  <b>2015</b> 1157:17 1160:2  1244:2 1352:16  <b>21</b> 1241:25 1242:6,9  1248:22  <b>213.217.6000</b> 1158:17  <b>213.443.3000</b> 1158:14  <b>218</b> 1256:5,8  <b>23</b> 1167:6  <b>235</b> 1215:1 1216:20,21  1221:23 1290:23  1298:25 1346:6  <b>235A</b> 1263:19  <b>237A</b> 1263:19  <b>24</b> 1198:2 1226:7  1321:11 1332:15  <b>24/7</b> 1275:21  <b>245A</b> 1263:19  <b>246A</b> 1263:19  <b>246B</b> 1159:14 1264:14  1264:16,19 1265:5,7  <b>247A</b> 1263:19  <b>247B</b> 1159:15 1264:16</p>	<p>1264:24 1265:5,7  <b>25</b> 1162:10 1209:3  1331:9  <b>250A</b> 1263:20  <b>253</b> 1176:8 1212:23  1294:14,16,21,24  1295:1,3 1296:1,20  <b>253-dollar</b> 1219:9  <b>26</b> 1256:6,8 1270:2  <b>27</b> 1186:4,14,17  1198:15,19 1321:10  1345:11  <b>28</b> 1183:10</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>3</b> 1166:2 1345:25  1349:16  <b>30</b> 1164:17,17,21  1165:2,6,12 1184:25  1185:16 1193:15  1196:1 1213:14  1288:3  <b>30-some</b> 1279:21  1299:22 1300:1  <b>30-year</b> 1166:10  1185:15 1301:5  1307:1  <b>304</b> 1157:4 1160:4  1244:4  <b>31</b> 1166:18 1185:18  1280:9,15 1288:4  1340:24  <b>3374</b> 1157:20 1352:6  1352:23  <b>381A</b> 1263:20  <b>398</b> 1159:16 1342:25  1343:5,21,23  <b>3rd</b> 1157:24</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p><b>4</b> 1186:6,7 1241:5  1347:2 1350:12  <b>4.4</b> 1172:15 1196:19  1277:17,25 1278:10  1278:13,23 1280:13  1289:1  <b>415</b> 1157:25  <b>415.391.5400</b> 1158:7  <b>423</b> 1219:23  <b>4405</b> 1230:4  <b>45</b> 1164:13 1185:18  1195:18 1288:4,5  1301:4 1306:25  1308:6 1320:23  1340:24  <b>45-year</b> 1165:14  1185:15 1302:6  1303:13 1306:19</p>	<p><b>450</b> 1282:12  <b>481</b> 1159:17 1170:22  1170:25 1171:1,2,4  1171:13,17 1244:23</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>5</b> 1172:20 1173:11  1227:24 1244:24  1280:18  <b>5.2</b> 1175:6,7,8 1176:7  1194:16 1198:9  1236:24 1278:8  1317:10 1322:13  1324:3 1332:5,25  <b>50</b> 1215:9 1299:14  <b>500</b> 1220:16 1278:9  <b>51</b> 1236:23  <b>513</b> 1159:18 1262:13  1263:11,13  <b>514</b> 1262:16 1263:11  <b>515</b> 1262:18 1263:11  <b>516</b> 1263:11  <b>517</b> 1159:18 1263:11  1263:13  <b>518</b> 1262:21  <b>522-7096</b> 1157:25  <b>550,000</b> 1277:24  <b>56</b> 1159:13 1340:1  1343:24 1344:7,12  <b>57</b> 1185:22</p> <hr/> <p style="text-align: center;"><b>6</b></p> <hr/> <p><b>60</b> 1193:15  <b>600,000</b> 1280:18  <b>633</b> 1158:6  <b>64</b> 1226:6  <b>65</b> 1175:1,2 1183:16  1194:18,19 1198:16  1237:1,3,4 1317:7  <b>68</b> 1227:24</p> <hr/> <p style="text-align: center;"><b>7</b></p> <hr/> <p><b>7</b> 1248:22 1264:20,21  1264:23  <b>7/8/03</b> 1159:20  <b>70</b> 1275:5,9  <b>700</b> 1158:16  <b>701</b> 1157:24  <b>75</b> 1276:13 1308:6  1320:24 1321:5  1322:1,7  <b>77,000</b> 1216:22</p> <hr/> <p style="text-align: center;"><b>8</b></p> <hr/> <p><b>8.1</b> 1167:11  <b>80</b> 1289:11  <b>80,000</b> 1214:24 1275:5  1275:9 1276:14</p>
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**800** 1157:25  
**800,000** 1278:9  
**811** 1159:20 1181:21  
1181:25 1182:2  
1183:18,20,21,23,25  
**82** 1346:2,13  
**841** 1187:4,6 1188:24  
1189:2,3 1348:9  
**865** 1158:13  
**884** 1230:21,22,23,25  
1231:15  
**89** 1238:23,24

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**9**

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**900** 1220:16  
**90012** 1158:17  
**90017-2543** 1158:13  
**907** 1219:23  
**90s** 1278:24  
**94111** 1157:24  
**97** 1229:6 1292:5  
**98** 1167:1 1169:20  
1192:6 1222:11  
1229:6 1257:22  
1288:9 1308:20  
**981-3498** 1157:25  
**99** 1254:6,15



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
BEFORE THE HONORABLE CURTIS E. A. KARNOW  
DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )

)  
Petitioner and Plaintiff, ) Case No.  
) CPF-10-510830  
vs. ) CPF-12-512466  
)

METROPOLITAN WATER DISTRICT OF )  
SOUTHERN CALIFORNIA; ALL )  
PERSONS INTERESTED IN THE )  
VALIDITY OF THE RATES ADOPTED BY ) Volume IX  
THE METROPOLITAN WATER DISTRICT )  
OF SOUTHERN CALIFORNIA ON APRIL )  
10, 2012 TO BE EFFECTIVE JANUARY )  
1, 2013 AND JANUARY 1, 2014, and )  
DOES 1-10, )

) Pages 1353 - 1534  
Respondents and Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
San Francisco Superior  
San Francisco, California  
Thursday, April 2, 2015

Reported By:  
TARA SANDFORD, RPR, CSR #3374

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JAN BROWN & ASSOCIATES  
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1353

I N D E X

DEFENDANT'S WITNESSES DIRECT CROSS REDIRECT RECROSS  
KIGHTLINGER, Jeff 1358 1382 --  
(resumed)

UPADHYAH, Devendra 1397 1411 1440 --

STAPLETON, Maureen 1443 1517 --

EXHIBITS

NUMBER FOR ID EVIDENCE

95 8/17/04 fax 1377 1377

169 5/3/10 letter 1362 1362

120 8/2/05 letter 1424 1420

175 6/30/10 letter 1363 1363

189 2/24/11 letter 1366 1366

207 8/26/11 letter 1364 1364

221 9/25/03 presentation 1486 1486

225 5/4/12 letter 1364 1365

229 10/2 letter from McCrae 1367 1367

230 10/15 letter from Breaux 1367 1367

232 2/5/13 letter 1367 1367

234 2/15/13 letter 1367 1367

243 6/18/13 letter 1367 1367

1355

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1354

302 7/3/06 email (EC54-547) 1367 1367

EXHIBITS (continued)

358 7/7/10 letter 1436 1436

475 12/28/01 Draft Report Rates 1447 1447

624 2/10/11 letter 1369 1369

767 10/11/01 MWD Rate Structure 1445 1445

772 2/28/02 Minutes 1449 1449

829 9/9/03 email 1464 1464

830 9/10/03 email 1470 1470

837 9/16/03 email 1473 1473

856 9/24/03 document re Water Policy

Committee 1479 1479

909 7/30/04 letter 1374 1374

979 2/2011 SB-60 Report 1411 1439

1114 Water Authority's MWD Work Plan 1514 1514

1356

1 San Francisco, California  
 2 Thursday, April 2, 2015  
 3 10:00 a.m.  
 4 Department 304 Hon. Curtis E. A. Karnow, Judge  
 5  
 6 THE COURT: Good morning.  
 7 I had a chance to look at Metropolitan's motion  
 8 brought at the conclusion of the Plaintiff's case. And  
 9 I am going to defer this until the end of trial. I  
 10 think I understand the differences in approaches here.  
 11 We've got two views as to how it is proper to  
 12 establish a breach and how it is proper to measure  
 13 damages. I think the wisest course is to defer ruling  
 14 until the end of this trial.  
 15 So let's proceed with our witnesses.  
 16  
 17 JEFF KIGHTLINGER,  
 18 resumed the stand and testified further as follows:  
 19  
 20 THE COURT: You recall you are still under  
 21 oath?  
 22 THE WITNESS: Yes, sir.  
 23 /  
 24 //  
 25 ///

1357

1 Q. I think you testified that San Diego during  
 2 that five years didn't try to persuade Metropolitan to  
 3 change the cost allocations that went into its rate  
 4 structure; correct?  
 5 A. Yes.  
 6 MR. PURCELL: All right. I'd like to read from  
 7 Brian Thomas's deposition again, the person most  
 8 knowledgeable for Metropolitan, pages 144, line 18, to  
 9 145, line 21.  
 10 THE COURT: Is that something that I have?  
 11 MR. PURCELL: We can get it up on the screen.  
 12 THE COURT: Let's follow along on the screen.  
 13 You don't have that?  
 14 THE WITNESS: I am not aware if I have it.  
 15 THE COURT: Let's follow along on the screen.  
 16 You don't have that?  
 17 THE WITNESS: I am not aware I have it. Maybe  
 18 it is in one of these binders.  
 19 MR. KEKER: 144, yes.  
 20 MR. PURCELL: This is in evidence as PTX 516.  
 21 May I proceed, your Honor?  
 22 THE COURT: Please.  
 23 MR. PURCELL: (Reading:)  
 24 Starting at page 144, line 18 and going to page  
 25 145 at line 21.

1359

1 CROSS-EXAMINATION (resumed)  
 2 BY MR. PURCELL:  
 3 Q. Good morning, Mr. Kightlinger.  
 4 A. Good morning, sir.  
 5 Q. I would just like to clear one thing up to  
 6 start with. There's a lot of testimony yesterday about  
 7 the Metropolitan rate structure; correct?  
 8 A. Yes.  
 9 Q. Now, the rate structure is the buckets that Met  
 10 arranges for the rates; right? There is a supply  
 11 bucket; there's a power bucket, and there is a system  
 12 access bucket?  
 13 A. Yes.  
 14 Q. San Diego's objections aren't to the buckets,  
 15 really; they are to the allocation of costs that go into  
 16 the buckets; correct?  
 17 A. That is how I understand their objections, yes.  
 18 Q. Okay, good.  
 19 So I am going to talk about in terms of cost  
 20 allocations, really, rather than the rate structure, and  
 21 if there is any confusion, please let me know.  
 22 You testified yesterday about the five-year  
 23 period following the execution of the exchange  
 24 agreement; correct?  
 25 A. Yes.

1358

1 "Q Okay. The Water Authority  
 2 waited until beyond that  
 3 five-year period before it  
 4 filed this lawsuit; correct?  
 5 "A Yes.  
 6 "Q During the -- during the  
 7 time between the filing of the  
 8 exchange agreement or, rather,  
 9 the signing of the exchange  
 10 agreement and the filing of  
 11 this lawsuit, the Water  
 12 Authority participated in  
 13 various Metropolitan processes  
 14 related to the setting of Met's  
 15 rates; right?  
 16 "A Yes.  
 17 "Q The Water Authority  
 18 continued to advocate for  
 19 changes to Met's rates in the  
 20 boardroom and in committee  
 21 meetings; right?  
 22 "A Yes.  
 23 "Q That was part of the rate  
 24 -- for example, the rate  
 25 refinement process?

1360

1 "A Yes. Staff, as well. In  
 2 staff meetings, as well.  
 3 "Q And in staff meetings, as  
 4 well.  
 5 "And likewise, there was a cost  
 6 of service review process that  
 7 the Water Authority  
 8 participated in during that  
 9 process?  
 10 "A Yes.  
 11 "Q And as part of the cost of  
 12 service review process, the  
 13 Water Authority again advocated  
 14 in the boardroom, and in  
 15 committee meetings and in staff  
 16 meetings for changes to  
 17 Metropolitan's rates?  
 18 "A Yes."  
 19 Q. Mr. Kightlinger, was Mr. Thomas wrong?  
 20 A. No.  
 21 Q. We talked yesterday a little bit about the  
 22 dispute resolution process in Section 11.1 of the  
 23 exchange agreement.  
 24 Do you remember that discussion?  
 25 A. Yes.

1361

1 Q. Prior to the Water Authority filing this  
 2 lawsuit, the Water Authority invoked that dispute  
 3 resolution process; correct?  
 4 A. Yes, they sent us a letter at some point,  
 5 around 2010, I believe.  
 6 Q. And Metropolitan responded with a letter of its  
 7 own?  
 8 A. I believe so. I don't think you showed it to  
 9 me yesterday. I think we did respond.  
 10 Q. I would just like to do that now and hopefully  
 11 we can do it quickly. Can I get PTX 169 up on the  
 12 screen?  
 13 Mr. Kightlinger, is this the letter the Water  
 14 Authority sent to you invoking paragraph 11.1?  
 15 A. Yes.  
 16 MR. PURCELL: I would like to move PTX 169 into  
 17 evidence, your Honor.  
 18 MR. EMANUEL: I really don't understand the  
 19 point of this.  
 20 THE COURT: What's your objection?  
 21 MR. EMANUEL: The objection is relevance, your  
 22 Honor.  
 23 THE COURT: Overruled.  
 24 PTX 169 is admitted.  
 25 (Exhibit PTX 169 was received into evidence.)

1362

1 MR. PURCELL: Can I get PTX 175 up on the  
 2 screen?  
 3 Q. Mr. Kightlinger, is this a subsequent letter to  
 4 the Water Authority sent to Karen Tachiki, your  
 5 successor as Metropolitan general counsel, involving the  
 6 resolution dispute process in paragraph 11.1?  
 7 A. Yes, it looks like it.  
 8 Q. Did you get a copy of this letter when it was  
 9 sent to Ms. Tachiki?  
 10 A. Probably.  
 11 MR. PURCELL: Your Honor, I would like to move  
 12 PTX 175 into evidence.  
 13 MR. EMANUEL: I have an objection. This was  
 14 not part of Plaintiff's exhibit list in advance of  
 15 trial. I will not object to it being admitted, but I do  
 16 want it noted that it is not really playing by the  
 17 rules.  
 18 MR. PURCELL: It is on our list, your Honor.  
 19 We are happy to provide a copy of the list.  
 20 THE COURT: We can take care of that at one of  
 21 the convenient breaks today. In the meantime, PTX 175  
 22 is admitted.  
 23 (Exhibit 175 was received into evidence.)  
 24 MR. PURCELL: Can I have PTX 207 up on the  
 25 screen?

1363

1 Q. Mr. Kightlinger, is this a letter that the  
 2 Water Authority sent to Metropolitan, to you  
 3 specifically, stating that all payments made to the  
 4 water stewardship rate after June 23, 2011, are made  
 5 under protest?  
 6 A. Yes.  
 7 MR. PURCELL: I would like to move PTX 207 into  
 8 evidence.  
 9 MR. EMANUEL: No objection, your Honor.  
 10 THE COURT: I am looking at the record. It  
 11 clearly reflects your position.  
 12 PTX 207 is admitted.  
 13 (PTX 207 was received into evidence.)  
 14 MR. PURCELL: Can I have PTX 225 up on the  
 15 screen?  
 16 Q. Mr. Kightlinger, is this a letter you sent in  
 17 response to the Water Authority's request for a  
 18 negotiation under paragraph 11.1 of the exchange  
 19 agreement?  
 20 A. I can't see the bottom. I don't know if I  
 21 signed it or Karen signed it, but this is certainly a  
 22 letter in response from Metropolitan, yes.  
 23 Q. I think PTX 225 is in the new binder I gave you  
 24 this morning, if you want to confirm that fact. It is  
 25 in fact.

1364

1           Actually, Mr. Kightlinger, you can see on the  
 2 screen, I pulled up the signature block.  
 3           **A. That is my signature, yes.**  
 4           MR. PURCELL: I would like to move 225 into  
 5 evidence.  
 6           MR. EMANUEL: No objection.  
 7           THE COURT: PTX 225 is admitted.  
 8           (Exhibit PTX 225 was received in evidence.)  
 9           Q. BY MR. PURCELL: Mr. Kightlinger, Metropolitan  
 10 has never contended that the Water Authority failed to  
 11 satisfy the dispute resolution obligation in paragraph  
 12 11.1 of the exchange agreement; correct?  
 13           **A. That's correct.**  
 14           Q. Similarly, there's a procedure under the  
 15 exchange agreement for Metropolitan to set aside  
 16 disputed amounts of payments under the exchange  
 17 agreement when there's a price dispute; correct?  
 18           **A. Yes.**  
 19           Q. And the Water Authority sent some  
 20 correspondence to Metropolitan invoking that set-aside  
 21 procedure?  
 22           **A. Yes.**  
 23           Q. And Metropolitan responded to the Water  
 24 Authority's letters?  
 25           **A. Yes, they did.**

1365

1           Q. In fact, money was set aside?  
 2           **A. Yes, it was.**  
 3           MR. PURCELL: I would like to show you a few  
 4 letters on that. PTX 189, please.  
 5           Q. Mr. Kightlinger, is this a letter that the  
 6 Metropolitan general counsel sent to Dan Hentschke, San  
 7 Diego general counsel, regarding payments under protest  
 8 under the exchange agreement?  
 9           **A. Yes, it is.**  
 10           MR. PURCELL: I would like to move PTX 189 into  
 11 evidence.  
 12           MR. EMANUEL: No objection, your Honor,  
 13 although the copy that is on the screen doesn't have a  
 14 number on it. Is it there someplace else?  
 15           MR. PURCELL: It is at the top.  
 16           MR. EMANUEL: That's all I needed.  
 17           THE COURT: PTX 189 is admitted.  
 18           (Exhibit 189 is received in evidence.)  
 19           MR. PURCELL: I am happy to do this one by one.  
 20 We invited Metropolitan to stipulate to admission of  
 21 these letters between the parties. I don't think there  
 22 is any objection to the authenticity of any of them.  
 23           MR. EMANUEL: I am a little put off that they  
 24 asked for a stipulation. That is not really appropriate  
 25 to argue in front of the Court. Right now I am just

1366

1           asking they lay a foundation and let's go through it.  
 2           THE COURT: All right. Let's go.  
 3           MR. PURCELL: Let's just do it.  
 4           PTX 229, next, please. I would like to move  
 5 PTX 229 in evidence, your Honor.  
 6           THE COURT: Any objection?  
 7           MR. EMANUEL: No objection.  
 8           THE COURT: PTX 229 is admitted.  
 9           (Exhibit 229 was received in evidence.)  
 10           MR. PURCELL: PTX 230 is the next exhibit. I  
 11 would like to move PTX 230 into evidence.  
 12           MR. EMANUEL: No objection.  
 13           THE COURT: PTX 230 is admitted.  
 14           (Exhibit 230 was received in evidence.)  
 15           MR. PURCELL: PTX 232. I would like to move  
 16 PTX 232 into evidence.  
 17           MR. EMANUEL: No objection.  
 18           THE COURT: PTX 232 is admitted.  
 19           MR. PURCELL: PTX 234. I would like to move  
 20 PTX 234 into evidence.  
 21           MR. EMANUEL: No objection.  
 22           THE COURT: PTX 234 is admitted.  
 23           MR. PURCELL: PTX 243. I would like to move  
 24 PTX 243 into evidence.  
 25           THE COURT: I would like to ask whether these

1367

1           are coming in to try to prove any disputed fact?  
 2           MR. PURCELL: Your Honor, these are trying --  
 3 these are being submitted for the purpose of proving the  
 4 amounts that were set aside -- under the set-aside  
 5 provision of the contract. We don't think there's a  
 6 dispute about it.  
 7           THE COURT: Is it part of your case that X  
 8 dollars were set aside or that money was set aside?  
 9           MR. PURCELL: It relates to the availability of  
 10 interest under the damages calculation.  
 11           THE COURT: Okay.  
 12           MR. EMANUEL: Your Honor, if I may, these don't  
 13 go to the amount that has been set aside.  
 14           THE COURT: How many of these are there?  
 15           MR. PURCELL: One more.  
 16           THE WITNESS: This letter is about a bond.  
 17           THE COURT: We will wait for a question. Is  
 18 there an objection to PTX 243?  
 19           MR. EMANUEL: No.  
 20           THE COURT: PTX 243 is admitted.  
 21           MR. PURCELL: The last one is DTX 624.  
 22           THE COURT: This last one only is a D; correct?  
 23           MR. EMANUEL: No objection, your Honor.  
 24           THE COURT: DTX 624 is admitted.  
 25           /

1368

1 (Exhibits 232, 234, 243 and 624 were  
 2 received in evidence.)  
 3 Q. BY MR. PURCELL: Mr. Kightlinger, getting back  
 4 to the substance of the case here for a second, one of  
 5 the issues that San Diego objected to, I think you  
 6 testified yesterday, was the inclusion of State Water  
 7 Project costs in Metropolitan's transportation rates;  
 8 correct?  
 9 A. Yes. Going back to the late '90s, they  
 10 protested that when we were doing the unbundling  
 11 process.  
 12 Q. Mr. Kightlinger, the State Water Project is not  
 13 the start of the Metropolitan's facilities and  
 14 infrastructure; correct?  
 15 A. It is owned by the State of California.  
 16 Q. I would like to put up PTX 302. Is this an  
 17 e-mail that you sent to your board of directors in July  
 18 of 2006 about the LADWP AVEK turnout agreement?  
 19 A. It appears to be. I don't recall the issue.  
 20 MR. PURCELL: I move Exhibit 302 into evidence.  
 21 MR. EMANUEL: No objection.  
 22 THE COURT: PTX 302 is admitted.  
 23 (Exhibit 302 was received in evidence.)  
 24 Q. BY MR. PURCELL: Going to the last paragraph on  
 25 page one, the second sentence says, "Distilled to its

1369

1 essence, this agreement permits AVEK to transport non  
 2 State Water Project, SWP water, through the California  
 3 aqueduct, and to deliver such water to LADWP at a  
 4 turnout to be constructed within AVEK's service area."  
 5 A. Yes.  
 6 Q. This refers to the agreement that permits LADWP  
 7 to obtain non State Water Project water through the  
 8 State Water Project facilities without needing to move  
 9 through Metropolitan's facilities; correct?  
 10 A. Yes.  
 11 Q. I would like to highlight the first paragraph  
 12 under Authority for the turnout agreement, page three.  
 13 This paragraph reads, "Another question that  
 14 has been raised is whether the former CEO had the  
 15 authority to execute the turnout agreement without  
 16 obtaining prior approval from the board of directors.  
 17 "As I explained at the meeting, Mr. Gastelum  
 18 posed this question to me, as then general counsel, and  
 19 it was my conclusion it was within his authority to  
 20 execute the turnout agreement because it is, "one, was  
 21 consistent with enforcement of Metropolitan's rights  
 22 under the State water contract; two, did not require the  
 23 use of Metropolitan's facilities or infrastructure;  
 24 three, did not require any expenditure of Metropolitan's  
 25 funds; and, four, did not conflict with any applicable

1370

1 provisions of the Metropolitan Water District Act,  
 2 Administrative Code or adopted board policies."  
 3 Do you see that?  
 4 A. I do.  
 5 Q. One of the reasons that this agreement was  
 6 within the authority of Mr. Gastelum to execute without  
 7 submitting to the Metropolitan board of directors was  
 8 because LADWP moving non State Water Project water  
 9 through the State Water Project did not require the use  
 10 of any Metropolitan facilities or infrastructure;  
 11 correct?  
 12 A. That's right.  
 13 Q. Mr. Kightlinger, you are familiar with the rate  
 14 structure integrity program; correct?  
 15 A. Yes.  
 16 Q. That was a program where Metropolitan included  
 17 certain language within local resource program  
 18 contracts; correct?  
 19 A. Yes.  
 20 Q. And that language that Metropolitan included in  
 21 contracts permitted Metropolitan to terminate the  
 22 contract if the recipient member agency mounted a  
 23 challenge to Metropolitan's current rate structure;  
 24 correct?  
 25 A. Yes.

1371

1 Q. It did not permit Metropolitan to terminate the  
 2 contract if Metropolitan were to change its rate  
 3 structure and then the agency were to mount a challenge  
 4 to the new rate structure; correct?  
 5 A. I don't recall that twist on it. That sounds  
 6 right. I would have to take a look at it.  
 7 Q. We can show you the documents and hopefully  
 8 refresh you.  
 9 Can we have PTX 80 to put on the screen. This  
 10 is in evidence.  
 11 This is a little bit of background. This is a  
 12 memo, June 18, 2004, from Ron Gastelum, who was then the  
 13 CEO and general manager of Metropolitan; correct?  
 14 A. Yes.  
 15 Q. Your predecessor. Not your immediate  
 16 predecessor, but one of them in that role?  
 17 A. Exactly.  
 18 Q. It's the job you have today?  
 19 A. Yes.  
 20 Q. The first paragraph says, "For years we have  
 21 been discussing the continuing financial risk to  
 22 Metropolitan and the member agencies from the threat of  
 23 legal or legislative actions undermining our rate  
 24 structure. As in the past, some entities for their own  
 25 gain may challenge the rate structure in order to convey

1372

1 water at a lesser cost than as required to properly  
 2 maintain the system's integrity and reliability. This  
 3 challenge is not presented by deficiencies in the rate  
 4 structure but by continuing economic attraction of lower  
 5 cost based agricultural transfer water, if it can be  
 6 conveyed into our service area at marginal cost."  
 7 Do you see that?  
 8 **A. I do.**  
 9 Q. That accurately summarizes why Metropolitan  
 10 wanted to put the rate structure integrity into place;  
 11 correct?  
 12 **A. Yes.**  
 13 Q. And then in the second paragraph Mr. Gastelum  
 14 writes: "One indication that such concern is still  
 15 valid was the San Diego Water Authority's position in  
 16 the QSA agreement reserving their right to challenge  
 17 Metropolitan's uniform wheeling rates after five years  
 18 from the date of execution of the QSA."  
 19 Do you see that?  
 20 **A. Yes.**  
 21 Q. Mr. Gastelum is specifically referring to San  
 22 Diego as a member agency that might litigate in the  
 23 future; correct?  
 24 **A. Yes.**  
 25 Q. That reference to five years, that's a

1373

1 clarifying at our July member agency managers' meeting  
 2 that the San Diego County Water Authority has no plans  
 3 to challenge Metropolitan's rate structure. At the same  
 4 time, you suggested a meeting with me would be useful to  
 5 address the reservation by the authority in the  
 6 quantification settlement agreement, QSA, to challenge  
 7 Metropolitan's rate structure after five years."  
 8 Do you see that?  
 9 **A. I do.**  
 10 Q. Mr. Gastelum is summarizing a meeting he had  
 11 with Miss Stapleton; correct?  
 12 **A. Yes, I think so. A phone call, meeting,**  
 13 **something.**  
 14 Q. Mr. Gastelum is stating what his impression is  
 15 of what Miss Stapleton told him; correct?  
 16 **A. That's my understanding of this.**  
 17 Q. Mr. Gastelum, when he talks about the  
 18 reservation by the authority to challenge Metropolitan's  
 19 rate structure after five years, he doesn't say anything  
 20 about a new rate structure, does he?  
 21 **A. Not in this sentence, no.**  
 22 Q. He doesn't limit his understanding of San  
 23 Diego's right to challenge Metropolitan's rate structure  
 24 as to some material change in the cost allocation?  
 25 **A. He doesn't go into that detail, no.**

1375

1 reference to the five-year provision in paragraph 5.2 of  
 2 the exchange agreement?  
 3 **A. Yes.**  
 4 Q. Mr. Gastelum doesn't say anything there about  
 5 San Diego reserving its right only to challenge new cost  
 6 allocations to Met's rate structure, does he?  
 7 **A. No. He certainly knew what the intent was, but**  
 8 **he also had his suspicions.**  
 9 Q. There is nothing in this language that limits  
 10 the concern about San Diego litigating -- to litigation  
 11 over new rate structures; correct?  
 12 **A. Not in this sentence, no.**  
 13 Q. And let's take a look at DTX 909. This is a  
 14 month-and-a-half later, July 30th, 2004. This is a  
 15 letter from Mr. Gastelum to Miss Stapleton, his  
 16 counterpart at the Water Authority.  
 17 Do you see that?  
 18 **A. Yes.**  
 19 MR. PURCELL: I would like to move DTX 909 into  
 20 evidence?  
 21 MR. EMANUEL: No objection.  
 22 THE COURT: 909 is admitted.  
 23 (Exhibit 909 was received in evidence.)  
 24 Q. BY MR. PURCELL: In the first paragraph  
 25 Mr. Gastelum writes Miss Stapleton, "Thank you for

1374

1 Q. I would like to show you PTX 95.  
 2 Is this an August 17, 2004, fax from you to  
 3 your then counterpart at the Water Authority, Dan  
 4 Hentschke, the general counsel?  
 5 **A. It looks like it, yes.**  
 6 MR. PURCELL: I would like to move PTX 95 into  
 7 evidence.  
 8 MR. EMANUEL: Can we see all the pages?  
 9 THE COURT: Of course. This is a one-page  
 10 document?  
 11 MR. PURCELL: I'm sorry. No, your Honor. It  
 12 is a three-page letter attached to the cover page.  
 13 MR. EMANUEL: Now they have handed me -- wait a  
 14 minute. Part of the problem, it wasn't on the exhibit  
 15 list. I am looking at it for the first time now.  
 16 Can I have a minute?  
 17 THE COURT: Of course.  
 18 MR. EMANUEL: Your Honor, because it wasn't on  
 19 the exhibit list and I haven't had a chance to prepare,  
 20 I am going to object to its use and admission.  
 21 THE COURT: Do you know if it was on the list  
 22 or not?  
 23 MR. PURCELL: I believe it was inadvertently  
 24 omitted. It was on our Phase 1 exhibit list.  
 25 MR. EMANUEL: It wasn't omitted in the Phase 1;

1376

1 is that correct?  
 2 THE COURT: PTX 95 is admitted.  
 3 (Exhibit 95 was received in evidence.)  
 4 Q. BY MR. PURCELL: If we could turn to page two  
 5 of the letter itself, which is the third page of the  
 6 document, the paragraph starting "likewise."  
 7 This paragraph reads: "Likewise, member  
 8 agencies are not being asked to forfeit any fundamental  
 9 First Amendment rights in exchange for such funding.  
 10 They are merely being asked to forego commencing a legal  
 11 or legislative action challenging the district's  
 12 existing rate structure. See Section 7, rate structure  
 13 integrity language.  
 14 "Paragraph 2: "Member agencies who accept such  
 15 finding remain free to challenge Metropolitan's existing  
 16 rate structure via the normal board process and  
 17 challenge any material changes to the existing rate  
 18 structure via whatever means are available. Such member  
 19 agencies also remain free to commence a legal action  
 20 against Metropolitan, quote, should Metropolitan in  
 21 setting rates under existing rate structure fail to  
 22 comply with public notice, open meeting or other legal  
 23 requirements associated with the process of setting  
 24 water rates and related taxes, fees and charges."  
 25 Do you see that, Mr. Kightlinger?

1377

1 **A. Yes.**  
 2 Q. This is your letter; correct?  
 3 **A. Yes.**  
 4 Q. You wrote this to Mr. Hentschke at the Water  
 5 Authority?  
 6 **A. And to Jerry Shoal at -- counsel, I believe at**  
 7 **this time, to Eastern MWD, as well.**  
 8 Q. This was in response to a letter they had  
 9 written to you objecting to the rate structure integrity  
 10 language as unconstitutional and objectionable in  
 11 various other ways?  
 12 **A. I don't remember exactly all their objections,**  
 13 **but I do know they were upset with it.**  
 14 Q. This accurately reflected your understanding of  
 15 what the language covered; correct?  
 16 **A. Yes.**  
 17 Q. And you say pretty clearly there that "member  
 18 agencies remain free to challenge any material change to  
 19 the existing rate structure under the RSI language."  
 20 Correct?  
 21 **A. Yes.**  
 22 Q. So if the RSA language limited only changes to  
 23 the existing rate structure, your testimony yesterday  
 24 was under the exchange agreement San Diego gave up the  
 25 right to challenge the existing rate structure; correct?

1378

1 MR. EMANUEL: I will object. The question was  
 2 confusing. Could I ask it be rephrased?  
 3 THE COURT: Could you start that again?  
 4 Q. BY MR. PURCELL: You testified yesterday under  
 5 the exchange agreement the intention of that, the  
 6 bargain between the parties, was San Diego gave up the  
 7 right to challenge the existing cost allocations in  
 8 Metropolitan's rate structure; correct?  
 9 **A. Within the term of the exchange agreement.**  
 10 Q. Within the 45 years of the exchange agreement?  
 11 **A. (Nods head affirmatively.)**  
 12 Q. For 45 years they were agreeing not to  
 13 challenge the existing cost allocations in the rate  
 14 structure; correct?  
 15 **A. Correct.**  
 16 Q. And the rate structure integrity program only  
 17 applies to the existing rate structure and not any  
 18 future rate structures; correct?  
 19 **A. That's right.**  
 20 Q. You read Mr. Gastelum's e-mail or memo from  
 21 June, which said that one of the reasons the rate  
 22 structure integrity program was being adopted was  
 23 because San Diego might sue later on?  
 24 **A. I think he said that San Diego had expressly**  
 25 **reserved a right to bring actions, as one of his reasons**

1379

1 **that we should be concerned about this.**  
 2 Q. But if San Diego had already given up its right  
 3 to challenge the existing rate structure under the  
 4 exchange agreement, there would be no need to impose the  
 5 RSI language on San Diego, would there?  
 6 **A. As a need -- we have 26 member agencies. This**  
 7 **letter came from two agencies. A number of agencies had**  
 8 **concerns. When we adopted the rate structure. It was**  
 9 **actually not 25 member agencies for it and San Diego**  
 10 **against it. It was a fairly split vote.**  
 11 **And a number of agencies had concerns. The**  
 12 **whole point of the RSI language was that we were signing**  
 13 **long-term program agreements. Some of these agreements**  
 14 **would be we would provide subsidies to projects that**  
 15 **would be 20 to 30 to 40 years. And the idea was to make**  
 16 **sure there was some commitment to be able to collect**  
 17 **those funds before we would sign those contracts. And**  
 18 **that is what this was intended to address.**  
 19 Q. Mr. Kightlinger, do you know the only agency  
 20 being called out by name in Gastelum's memos in San  
 21 Diego; correct?  
 22 **A. He calls out entities. He calls out one of the**  
 23 **basins that were attempted to sue -- if you go through**  
 24 **the memo, he really talks about it is really a broad**  
 25 **policy issue. There are a number of people that are**

1380

1 **seeking low-cost water he does call out by name, but he**  
 2 **does talk about other entities and organizations.**  
 3 Q. He doesn't call out any other Met member agency  
 4 by name other than San Diego?  
 5 **A. Not in that memo, no.**  
 6 Q. As regarding San Diego, if San Diego had really  
 7 given up its right to sue under the exchange agreement  
 8 over the existing rate structure, there would be no need  
 9 for the rate structure integrity provision as against  
 10 San Diego, would there?  
 11 **A. That was the intent, yes.**  
 12 MR. PURCELL: Nothing further.  
 13 THE COURT: Thank you.  
 14 Redirect, sir?  
 15 MR. EMANUEL: Thank you.  
 16 THE COURT: If you need a break because of this  
 17 new document, let me know.  
 18 MR. EMANUEL: I appreciate that. I have my  
 19 team looking at it.  
 20 THE COURT: In a situation like that, if there  
 21 is something I can do to ameliorate the situation, let  
 22 me know.  
 23 MR. EMANUEL: I apologize. It got the better  
 24 of me. It is such a long document, single space, it was  
 25 a lot.

1381

1 THE COURT: I understand.  
 2  
 3 REDIRECT EXAMINATION  
 4 BY MR. EMANUEL:  
 5 Q. Let's go back. Let's start with that last  
 6 point about there is an agreement under the exchange  
 7 that the -- limiting what San Diego could sue on.  
 8 Sir, isn't it true, or in your experience, San  
 9 Diego has found any number of reasons to sue  
 10 Metropolitan, isn't that true?  
 11 **A. In the last 15 years we've had probably four or**  
 12 **five different lawsuits over various issues with the**  
 13 **Water Authority.**  
 14 Q. Would it be accurate to say that your  
 15 understanding of the exchange agreement isn't a  
 16 guarantee that suit still couldn't be filed?  
 17 **A. No. It only dealt with the existing rate**  
 18 **structure. Their rate structure integrity language is**  
 19 **intended to sweep in all our member agencies as well,**  
 20 **but we've had lawsuits over the applicability of the**  
 21 **Brown Act. We've had lawsuits over preferential rights.**  
 22 **We've had lawsuits over point-to-point versus postage**  
 23 **stamp rates. So we had other challenges.**  
 24 Q. How can I put this question? It seems fair to  
 25 say that there is a certain lack of trust between these

1382

1 two organizations?  
 2 **A. Yes.**  
 3 Q. Which side of the equation would you say  
 4 Mr. Gastelum was on, trusting, not trusting, or trust  
 5 and verifying; how would you describe him?  
 6 **A. I would say I'm in the trust-but-verify mode as**  
 7 **the counsel. Mr. Gastelum was -- he came out of the**  
 8 **landfill industry, and he was a very not trusting person**  
 9 **in general.**  
 10 Q. You had involvement in creating this RSI  
 11 clause; correct?  
 12 **A. Yes. I went through and worked through with**  
 13 **Mr. Gastelum on the actual language of it, but the**  
 14 **policy proposal was his to the board.**  
 15 Q. Was it your understanding this RSI clause would  
 16 be a disincentive to file suit; right?  
 17 **A. Yes.**  
 18 MR. BRAUNIG: Objection. Leading.  
 19 THE COURT: I won't sustain the objection on  
 20 that one because it is so obvious. If we could avoid  
 21 leading questions.  
 22 MR. EMANUEL: Thank you. I will, your Honor.  
 23 THE COURT: That one is overruled.  
 24 Q. BY MR. EMANUEL: Would it apply to all  
 25 lawsuits?

1383

1 **A. No. Simply challenges to the existing rate**  
 2 **structure.**  
 3 Q. Would it apply to ill-conceived or  
 4 non-meritorious lawsuits?  
 5 **A. I assume they were challenging the existing**  
 6 **rate structure, it would apply to that.**  
 7 Q. I want to go back to some exhibits that were  
 8 shown you yesterday.  
 9 Could you put up PTX 56, please. Zoom this on  
 10 the date.  
 11 Mr. Kightlinger, do you see the date on this?  
 12 **A. Yes.**  
 13 Q. You see how it is "for your information, San  
 14 Diego's latest proposal," do you see that?  
 15 **A. Yes.**  
 16 Q. Based on the date, would this proposal have  
 17 been the one we talked about yesterday, Option-1 and  
 18 Option-2?  
 19 **A. No. This predated that by some months.**  
 20 Q. Can you give me an estimate of when Option-1  
 21 and Option-2 was proposed?  
 22 **A. The late July, early August time frame of 2003.**  
 23 **No. This preceded that by some months.**  
 24 Q. Can you give me an estimate of when Option-1  
 25 and Option-2 was proposed?

1384



1       **A. The late July, early August time frame of 2003.**  
 2       Q. Close enough. Give me PTX 57.  
 3       Do you see the date?  
 4       **A. Yes.**  
 5       Q. Do you see the subject line?  
 6       **A. "Getting to yes."**  
 7       Q. This originated with an email from Mr. Slater;  
 8       correct?  
 9       **A. Yes.**  
 10      Q. Was this part of that process after Option-1,  
 11      Option-2, to work out the points and reach an agreement?  
 12      **A. That's correct.**  
 13      Q. I take it as of this point, just by the phrase  
 14      "getting to yes," what was your understanding as to  
 15      whether you had in fact reached yes?  
 16      **A. No. We had a number of deal points that still**  
 17      **had not yet been worked out.**  
 18      Q. Can we go down to the bottom of this exhibit,  
 19      item number five. Do you see that?  
 20      **A. I do.**  
 21      Q. Was that literally true?  
 22      MR. PURCELL: Objection. Vague.  
 23      THE COURT: I am not sure what that question  
 24      means. The record will be a little bit easier if you  
 25      just read that line into the record.

1385

1       THE WITNESS: Certainly. "Item five, San Diego  
 2       will draft an 'I love you MWD' reso." Reso meaning  
 3       resolution.  
 4       Q. BY MR. EMANUEL: How did you understand that?  
 5       **A. We had talked about the intent was if we got to**  
 6       **yes and our agencies agreed on this, that this was**  
 7       **intended to start a new page and peace and harmony, et**  
 8       **cetera, between our two agencies and put aside the**  
 9       **lawsuits and the rancor. So they were going to draft a**  
 10      **resolution to that effect.**  
 11      Q. You were asked about the State Water Project?  
 12      **A. Yes.**  
 13      Q. Does Metropolitan consider it part of its  
 14      conveyance system? Do you remember that question?  
 15      **A. Yes.**  
 16      Q. I think your answer didn't answer the question.  
 17      You said, "The state owns it."  
 18      The question was, sir, as asked by Mr. Purcell,  
 19      does Metropolitan consider it part of its conveyance  
 20      system?  
 21      **A. We do not consider it part of our conveyance**  
 22      **system, but we do consider our agency as having an**  
 23      **ownership interest in the State Water Project based on**  
 24      **the contract we entered into with the State of**  
 25      **California and the way in which we make our payments on**

1386

1       **that project.**  
 2       Q. Please explain why you consider it to be a part  
 3       owner of that system?  
 4       **A. We have certain rights to use that facility.**  
 5       **We have transportation rights. We have to pay for it**  
 6       **every year, so a significant sum. But with that, even**  
 7       **if we don't -- aren't getting water just from the State**  
 8       **of California, if we wish to move water within it, we**  
 9       **have capacity rights that enable us to move water,**  
 10      **Metropolitan transfer water, in our ownership capacity**  
 11      **rights. And in fact we can do so on behalf of our**  
 12      **member agencies, and we have done so, including San**  
 13      **Diego.**  
 14      **They have purchased transfers in the past and**  
 15      **they have moved that water within Metropolitan's**  
 16      **capacity rights in the State Water Project system.**  
 17      Q. When San Diego moved non-State Water Project,  
 18      non-Metropolitan water through the conveyance system,  
 19      did San Diego have to pay a wheeling rate to  
 20      Metropolitan?  
 21      **A. Only when it reached our system and then they**  
 22      **had the ability to use the State system through our**  
 23      **ownership capacity.**  
 24      Q. Did they have to pay a wheeling rate through  
 25      the State or could they use Metropolitan's?

1387

1       **A. The latter. They used Metropolitan's capacity.**  
 2       Q. Are you aware of any litigation involving  
 3       whether the payments to the State for the State Water  
 4       Project are payment of costs of the State or costs of  
 5       the State water contract?  
 6       MR. PURCELL: Objection. Vague.  
 7       THE COURT: Do you understand that question?  
 8       THE WITNESS: I understood the question. I  
 9       believe I understand the question.  
 10      THE COURT: We are going with this witness'  
 11      understanding. This may be a legal issue, but go ahead  
 12      and answer it.  
 13      THE WITNESS: There were early validation  
 14      actions to establish the rights under the -- and  
 15      payments of the State Water Project. And so in that  
 16      validation action it was determined these were  
 17      obligations of the contractors for the State of  
 18      California.  
 19      Q. BY MR. EMANUEL: And Metropolitan is a State  
 20      water contractor; correct?  
 21      **A. Yes, sir.**  
 22      Q. And it makes payments to the State that the  
 23      State -- for the conveyance system and for the supply  
 24      water; is that correct?  
 25      **A. That's correct.**

1388

1 Q. What I'm asking you, have you ever heard or  
 2 have an understanding that the payments to the State is  
 3 the State's mere conduit?  
 4 MR. PURCELL: Objection. Vague.  
 5 THE COURT: Has he ever heard it? That's not  
 6 vague.  
 7 Have you ever heard that?  
 8 THE WITNESS: I've not heard it actually  
 9 expressed that way.  
 10 MR. EMANUEL: Can you pull up the 2003 exchange  
 11 agreement. Would you go to the paragraph just before  
 12 5.2?  
 13 THE COURT: For the record, the exhibit number  
 14 is --  
 15 MR. KEKER: 65 PTX and DTX 51, but they have 51  
 16 up, I think.  
 17 THE COURT: PTX 65 we will call it.  
 18 Q. BY MR. EMANUEL: Do you see paragraph 5.1 and  
 19 that deals with pricing? Do you see that, sir?  
 20 A. I do.  
 21 Q. Would you go to the paragraph above that? You  
 22 see paragraph 4.2?  
 23 A. I do.  
 24 Q. Let's back up. So 4.1 deals with  
 25 characterization of exchange water. Do you see that?

1389

1 A. Yes.  
 2 Q. And for some purpose it is characterized as  
 3 local water; is that right?  
 4 A. Yes.  
 5 Q. That has certain financial implications?  
 6 A. Yes. **This is something San Diego wanted. It**  
 7 **doesn't fit within the typical meaning of the word**  
 8 **"local." It is coming from several hundred miles away.**  
 9 **In our parlance, in our structure within Metropolitan,**  
 10 **local water has certain benefits, how we do our drought**  
 11 **management planning.**  
 12 **Local water is not considered regional water to**  
 13 **be shared. It is their own water, so it doesn't fit**  
 14 **into something that we would then pull back in a**  
 15 **drought, as part of drought management. So it is**  
 16 **important to them that it becomes an independent local**  
 17 **supply. It is also how we calculate a**  
 18 **readiness-to-serve charge. If it's a local supply, it**  
 19 **doesn't go into that calculation. So those were**  
 20 **benefits, how they wanted this water, the IID transfer**  
 21 **water to be treated.**  
 22 Q. Let's look at 4.2., the entire paragraph,  
 23 please.  
 24 Notwithstanding provisions of 4.1, "The water  
 25 delivered to SDCWA shall be characterized as

1390

1 Metropolitan water and not as local water."  
 2 Do you see that?  
 3 A. I do.  
 4 Q. What is your understanding of that?  
 5 A. **Notwithstanding for the purposes of drought**  
 6 **management and the readiness-to-serve charges, at the --**  
 7 **the way the exchange worked is that when the water hits**  
 8 **our intake, it's Metropolitan's water. And then we take**  
 9 **it and then what we exchange with San Diego is**  
 10 **Metropolitan water.**  
 11 Q. And when does it hit your intake?  
 12 A. **In theory, when it's made available by IID to**  
 13 **us, we order from the Bureau of Reclamation, and it**  
 14 **comes to Lake Havasu, and that is where our intake is**  
 15 **and that is where we pump the water.**  
 16 Q. You are still on the Colorado River?  
 17 A. Yes.  
 18 Q. The location is the Colorado River?  
 19 A. **Yes, it is a location on the Colorado River,**  
 20 **yes.**  
 21 MR. EMANUEL: Your Honor, if I could have a  
 22 minute?  
 23 THE COURT: Of course  
 24 MR. QUINN: Would it be possible for us to have  
 25 five minutes?

1391

1 THE COURT: See everybody in five minutes.  
 2 (Recess.)  
 3 THE COURT: Sir.  
 4 MR. PURCELL: Your Honor, before we get  
 5 started, we have a motion to strike.  
 6 THE COURT: All right.  
 7 MR. PURCELL: We move to strike  
 8 Mr. Kightlinger's testimony about Metropolitan having an  
 9 ownership interest in the State Water Project as being  
 10 directly contrary to Metropolitan's response to Request  
 11 for Admission 44, which is in evidence as PTX 237A.  
 12 THE COURT: How does that read?  
 13 MR. PURCELL: It reads, Request for Admission  
 14 Number 44, "Admit that Metropolitan does not own the  
 15 State Water Project."  
 16 Response to Request for Admission Number  
 17 44, "Admit."  
 18 THE COURT: I will tell you that I actually  
 19 made a note and he used the phrase "ownership interest"  
 20 but I don't think -- I didn't interpret the answer  
 21 actually to be that he says he has interest to certain  
 22 rights. My sense is that Metropolitan is not contending  
 23 they actually have any literal ownership interest in the  
 24 State Water Project. Right?  
 25 MR. EMANUEL: Right. And the witness said

1392

1 that.  
 2 THE COURT: I think it was a shorthand for --  
 3 it's like having rights to a license more than anything  
 4 else or rights to use, and that's how I interpreted it.  
 5 I will deny the motion to strike with that  
 6 understanding, that he really did not mean ownership in  
 7 the literal sense. RFA 44 actually governs here, and  
 8 let's proceed.  
 9 MR. EMANUEL: Would the Court permit I get that  
 10 on the record from the witness?  
 11 THE COURT: You don't have to. RFA 44 is  
 12 preclusive.  
 13 MR. EMANUEL: Not that. I meant what he was  
 14 referring to as those interests.  
 15 THE COURT: If you think it matters. I think I  
 16 understand that Metropolitan has certain rights to use  
 17 the State Water Project. I understand that. We went  
 18 through some of that in the first trial.  
 19 MR. EMANUEL: Very well.  
 20 THE COURT: And I recall that.  
 21 Q. BY MR. EMANUEL: In that case, then, I'll go  
 22 back to Exhibit DTX 51.  
 23 Mr. Kightlinger, we were discussing this  
 24 exception and --  
 25 THE COURT: Again, this has also been named PTX

1393

1 56.  
 2 MR. KEKER: Sixty-five.  
 3 THE COURT: Sixty-five.  
 4 Q. BY MR. EMANUEL: Unfortunately, it has two  
 5 numbers.  
 6 "The exchange water delivered to SDCWA shall be  
 7 characterized as Metropolitan and not as local water  
 8 only for the limited purposes of paragraph 5.2."  
 9 Do you see that?  
 10 A. I do.  
 11 Q. Let's -- let's look at 5.2 so we know what  
 12 we're talking about here.  
 13 5.2 is the price that the Water Authority would  
 14 pay; is that correct?  
 15 A. That is correct.  
 16 Q. Would you please explain, then, how 4.2 relates  
 17 to 5.2?  
 18 A. Yes. The Water Authority wanted this water to  
 19 be considered local water, the water they were getting  
 20 from IID, for purposes of how it would be dealt with in  
 21 terms of drought and calculation of our  
 22 readiness-to-serve charges.  
 23 But for the purpose of the pricing, it was  
 24 going to be treated as Metropolitan water and governed  
 25 by 5.2, the pricing terms.

1394

1 Q. Was there an advantage to the Water Authority  
 2 for the water to be considered Metropolitan water?  
 3 A. Yes. One of the complications in their  
 4 transfer with IID is the water from IID is Colorado  
 5 River water. The only parties that can receive Colorado  
 6 River water are parties that have what's called a  
 7 Section 5 contract with the Bureau of Reclamation under  
 8 the Boulder Canyon Project Act.  
 9 The Water Authority, not being a Colorado River  
 10 contractor, technically, unless it got such a contract  
 11 with the United States, could not receive Colorado River  
 12 water. So Metropolitan, by receiving that water as  
 13 Metropolitan and then exchanging it, solved the issue of  
 14 how to get delivery from the United States Bureau of  
 15 Reclamation.  
 16 Q. But explain, how did that solve that problem?  
 17 A. It was deemed Metropolitan's water. And so we  
 18 have a contract for delivery of Colorado River water  
 19 with the United States and, therefore, the Water  
 20 Authority wasn't deemed -- they were not getting a  
 21 delivery of Colorado River water. Metropolitan was.  
 22 Q. Thank you very much.  
 23 Let's turn back to this rate structure  
 24 integrity clause. I believe you testified this was a  
 25 subject that was discussed at the board level of

1395

1 Metropolitan; is that correct?  
 2 A. Yes.  
 3 Q. And were there agencies in favor of it,  
 4 agencies against it?  
 5 A. Yes.  
 6 No. It was a controversial proposal, and my  
 7 recollection there were a number of amendments proposed  
 8 by various board members on behalf of their agencies to  
 9 be made to the policy before it was adopted.  
 10 Q. Was the Water Authority for or against it?  
 11 A. They were flat-out opposed to it from the  
 12 get-go.  
 13 Q. Do you have a recollection whether or not the  
 14 Water Authority made an amendment that the rate  
 15 structuring integrity clause should only be triggered if  
 16 someone sued and lost?  
 17 A. I don't recall the Water Authority proposing  
 18 any suggested amendments to it. They felt it shouldn't  
 19 be adopted at all. The amendments I recall being  
 20 proposed were from agencies such as Orange County  
 21 agencies and the Riverside County agencies having a  
 22 number of concerns and proffering a number of  
 23 amendments.  
 24 MR. EMANUEL: Nothing more, your Honor.  
 25 MR. PURCELL: No recross.

1396

1 THE COURT: Thank you very much, sir.  
 2 You are excused.  
 3 THE WITNESS: Thank you.  
 4  
 5 DEVENDRA UPADHYAH,  
 6 called as a witness by the Defendant, was sworn and  
 7 testified as follows:  
 8  
 9 THE COURT: You are calling?  
 10 MR. EMANUEL: Mr. Upadhyah.  
 11 THE WITNESS: I do.  
 12 THE CLERK: Go ahead and be seated. Would you  
 13 please state and spell your full name for the record.  
 14 THE WITNESS: Devendra Upadhyah, and it's  
 15 D-E-V-E-N-D-R-A, U-P-A-D-H-Y-A-H.  
 16  
 17 DIRECT EXAMINATION  
 18 BY MR. EMANUEL:  
 19 Q. By whom are you employed?  
 20 A. **The Metropolitan Water District of Southern**  
 21 **California.**  
 22 Q. What is your position?  
 23 A. **My position is the group manager for the water**  
 24 **resources management group.**  
 25 Q. What programs fall within the water resources

1397

1 management group?  
 2 A. **Water resource management group manages demand**  
 3 **management programs, conservation programs that provide**  
 4 **incentives to consumers in Southern California, local**  
 5 **resources program aimed at helping to develop supplies**  
 6 **among the customer member agencies.**  
 7 **We have a group that looks at forecasting for**  
 8 **the needs of Southern California out in the future. We**  
 9 **also manage our contracts with the State Water Project,**  
 10 **the Department of Water Resources and with the U.S.**  
 11 **Bureau of Reclamation for supplies that we receive on**  
 12 **the Colorado River along with many other partners we**  
 13 **have. We manage the contracts for those supplies.**  
 14 MR. EMANUEL: In advance, and according to the  
 15 Court's deadline, we prepared a declaration for  
 16 Mr. Upadhyah that had been submitted to the other side  
 17 and filed with the Court.  
 18 Does the Court want a copy? I am not going to  
 19 direct him on those questions.  
 20 THE COURT: I would appreciate it if you have a  
 21 spare copy.  
 22 MR. EMANUEL: I will leave one for the witness  
 23 in case it comes up on cross.  
 24 Q. Sir, a topic not covered in your declaration  
 25 has to do with the demand management programs.

1398

1 Can you tell me what's under those programs?  
 2 A. **Sure. Demand management programs consist**  
 3 **really of two different programs that Metropolitan runs.**  
 4 **One of them is a conservation program. That program**  
 5 **provides incentives through throughout Southern**  
 6 **California for consumers to purchase water-efficient**  
 7 **devices, things like, for example would be,**  
 8 **high-efficiency clothes washers or high-efficiency**  
 9 **toilets that reduce demands for water. We provide**  
 10 **incentives that buy down the costs of those things for**  
 11 **consumers. That's the conservation program.**  
 12 **Another program is the local resources program.**  
 13 **That program provides financial incentives for our local**  
 14 **agencies to develop projects that fall into three major**  
 15 **categories: Wastewater recycling, groundwater recovery**  
 16 **and seawater desalination at some point in the future.**  
 17 **These would be projects that would produce supplies that**  
 18 **those local agencies are able to use to meet their**  
 19 **customers' needs.**  
 20 Q. You referred to incentives. Did you mean  
 21 financial incentives? Are there other kinds of  
 22 incentives?  
 23 A. **Financial incentives.**  
 24 Q. How long have you been the manager of the water  
 25 resources management group?

1399

1 A. **Since the beginning of 2010.**  
 2 Q. How long have you been an employee of  
 3 Metropolitan?  
 4 A. **I started with Met back in 1995, and there was**  
 5 **a period for about three years there where I was working**  
 6 **for another agency.**  
 7 Q. Going back to the local resources program, who  
 8 receives the dollars that are part of these financial  
 9 incentives?  
 10 A. **The local agencies, the member agencies and**  
 11 **their subagencies that actually develop the projects.**  
 12 Q. What are the benefits to local agencies for  
 13 these local resource programs?  
 14 A. **They are receiving a financial incentive from**  
 15 **Metropolitan. But ultimately the benefit of those**  
 16 **projects is that those projects produce supplies that**  
 17 **they are able to use to meet the needs of their**  
 18 **customers and they are able to sell those supplies to**  
 19 **their customers.**  
 20 Q. You used the word "they."  
 21 A. **They receive supplies.**  
 22 Q. What are the benefits to local agencies for  
 23 these local resource programs?  
 24 A. **They are receiving a financial incentive from**  
 25 **Metropolitan. But ultimately the benefit of those**

1400

1 **projects is that those projects produce supplies that**  
 2 **they are able to use to meet the needs of their**  
 3 **customers and they are able to sell those supplies to**  
 4 **their customers.**  
 5 Q. You used the word "they." They receive  
 6 supplies. Who is "they" referring to?  
 7 **A. The member agencies or the local agency that**  
 8 **develop the project.**  
 9 Q. Is that also true for other demand management  
 10 programs that these supply? Who owns the supplies that  
 11 were produced through those other demand management  
 12 programs?  
 13 **A. That's correct. There are supplies that are**  
 14 **produced by the local agencies. They are their**  
 15 **supplies. They are able to use those to meet their**  
 16 **customers' demands.**  
 17 Q. What I am asking, there are conservation  
 18 programs and there are other kinds of programs, all of  
 19 which produce water, I take it?  
 20 **A. Either produce water or reduce demand for**  
 21 **water, right.**  
 22 Q. And my point is, whose supply is it?  
 23 **A. It's those local agencies.**  
 24 Q. When this water is produced through these  
 25 demand management programs, who has the title to that

1401

1 water? I'm just speaking loosely. I don't know what  
 2 the word is in water law. Who owns the water?  
 3 MR. BRAUNIG: I am going to object to the  
 4 extent it calls for a legal conclusion.  
 5 THE COURT: We will get his understanding. Do  
 6 you know?  
 7 THE WITNESS: To the extent it is water  
 8 supplied that they are able to use through that project,  
 9 it's theirs to sell to their customers.  
 10 Q. BY MR. EMANUEL: From Metropolitan's point of  
 11 view, does Metropolitan consider whether or not this is  
 12 part of Metropolitan's supply?  
 13 **A. It is not part of Metropolitan's supply. These**  
 14 **aren't supplies that we have access to. It doesn't come**  
 15 **into our system. We don't sell them to our member**  
 16 **agencies. At no point is it a supply that Metropolitan**  
 17 **has to provide to our customers. Rather, it is at the**  
 18 **local level.**  
 19 Q. Why does Metropolitan have these demand  
 20 management programs?  
 21 **A. These demand management programs provide a**  
 22 **benefit to Metropolitan in that it reduces the demand**  
 23 **for water to move through our system.**  
 24 **But there's also a piece of legislation that**  
 25 **was passed in 1999, we refer to it as Senate Bill 60,**

1402

1 **that requires that Metropolitan increase or focus on**  
 2 **conservation, water recycling and groundwater recovery**  
 3 **recharge.**  
 4 Q. Are you familiar with the phrases "upstream"  
 5 and "downstream"?  
 6 **A. Yes, I am.**  
 7 Q. Would you explain what "upstream" means and  
 8 "downstream" means in the context of what we've been  
 9 talking, conservation?  
 10 **A. Sure. Metropolitan has service connections**  
 11 **that demark the point of delivery between Metropolitan's**  
 12 **distribution system into our member agencies'**  
 13 **distribution systems. And so we refer to anything that**  
 14 **is downstream of those service connections, that are**  
 15 **then within our member agencies and their local**  
 16 **agencies, as downstream.**  
 17 **Anything that is above those service**  
 18 **connections in Met's system and beyond is considered to**  
 19 **be upstream.**  
 20 Q. The demand management programs that you  
 21 referred to, are they upstream or downstream?  
 22 **A. They are downstream.**  
 23 Q. What rate at Metropolitan generates the income  
 24 that pays for demand management programs?  
 25 **A. The cost of the demand management programs is**

1403

1 **recovered through our water stewardship rate.**  
 2 Q. Are you aware of whether any part of that water  
 3 stewardship rate -- let me back up.  
 4 Does the entirety of the water stewardship rate  
 5 go upstream, downstream or split between the two  
 6 streams?  
 7 MR. BRAUNIG: Objection. Vague.  
 8 THE COURT: Overruled.  
 9 THE WITNESS: Can you please restate the  
 10 question?  
 11 Q. BY MR. EMANUEL: Let me take it one at a time.  
 12 So the costs that are paid through the water  
 13 stewardship rate, are they paid to downstream users or  
 14 upstream users or some combination?  
 15 **A. It is all downstream.**  
 16 Q. Has that been true -- how long has that been  
 17 true?  
 18 **A. To my knowledge, it's been true since the**  
 19 **beginning of the water stewardship rate.**  
 20 Q. Does Metropolitan have -- strike that.  
 21 What benefits -- what benefits, if any, do  
 22 wheelers enjoy because of demand management programs?  
 23 **A. Demand management programs that we run reduce**  
 24 **the need for water to move through Metropolitan's**  
 25 **system. And as a result of that it is creating capacity**

1404

1 **within Metropolitan's system to move supplies, to the**  
 2 **extent that a wheeler is acquiring a supply from another**  
 3 **entity and moving that water through Metropolitan's**  
 4 **system. Part of the reason the capacity is available to**  
 5 **do that is because of the demand management programs.**  
 6 Q. Mr. Upadhyah, are you aware of whether or not  
 7 Metropolitan purchases back the supplies generated --  
 8 purchases back from the local agencies the supplies  
 9 generated by the demand management program?  
 10 A. I'm not aware of a situation where that  
 11 happens, no.  
 12 Q. I would like to show you what has been marked  
 13 for identification as DTX 979.  
 14 Can you tell the Court what this is?  
 15 A. Yes. This is the February 2011 version of what  
 16 we refer to as our SB-60 report. I had mentioned  
 17 earlier Senate Bill 60 that placed some requirements on  
 18 Metropolitan, and one of those requirements was filing a  
 19 report to the State legislature each year that showed  
 20 some of the actions that we had taken in the areas of  
 21 conservation, recycling, groundwater recovery and  
 22 recharge.  
 23 Q. Is the production of this report one of your  
 24 duties and responsibilities, at least, to oversee?  
 25 A. Yes, it is.

1405

1 Q. If you would turn to page 7 of this report,  
 2 tell us what this achievement scorecard represents.  
 3 A. This -- what you see on the screen is the  
 4 scorecard that we include in the report that shows both  
 5 the acre-feet associated with the demand management  
 6 programs and the dollars associated with the demand  
 7 management programs.  
 8 This is a part of what we're reporting to the  
 9 legislature that we've been able to do in combination  
 10 with the member and local agencies.  
 11 Q. If we look at the very first line under  
 12 conservation, would you explain what that 15,500  
 13 acre-feet are?  
 14 A. Okay. So as part of the demand management  
 15 programs, I mentioned one of the programs we run is a  
 16 conservation program where we're providing incentives  
 17 for consumers, businesses, residents in our service area  
 18 to purchase devices that save water, are more efficient.  
 19 That line is showing that in fiscal year  
 20 2009-'10, which was the period that we were reporting on  
 21 for this year in this report, those new conservation  
 22 devices that were installed and funded by that program  
 23 saved 15,500 acre-feet. That is the new savings from  
 24 those actions.  
 25 Q. How is that line different from the line below

1406

1 it?  
 2 A. The line below it is showing that we've  
 3 actually been doing this program for a number of years,  
 4 and that devices that were installed in previous years  
 5 are also still saving water.  
 6 The first line is showing just the new things  
 7 that were installed that year and their savings. But  
 8 the next -- the second line, 147,000 acre-feet, depicts  
 9 the savings associated with things that had been  
 10 installed before that are still saving water in that  
 11 year.  
 12 Q. Now, if we look at the third line, what does  
 13 that represent?  
 14 A. The third line is showing that since the  
 15 program's inception in the early 1990s, the cumulative  
 16 water savings across all of those things that have been  
 17 installed is estimated to be about 1.4 million  
 18 acre-feet.  
 19 Q. Let's move down the chart to under "recycled  
 20 water." Look at the first line there.  
 21 Please explain what that represents.  
 22 A. The first line under "recycled water" is  
 23 similarly showing for 2009-'10 the acre-feet that was  
 24 produced in that year by wastewater recycling facilities  
 25 that were funded, in part, by this program.

1407

1 Q. Could you give us an example of a wastewater  
 2 recycling program or type of program?  
 3 A. Sure. The -- an example there, and there are  
 4 many different facilities that are funded that are  
 5 producing as part of this, but an example would be an  
 6 agency would take wastewater that is coming from the  
 7 wastewater plant and treat that wastewater to a higher  
 8 grade of treated supply, and then would pipe that to, as  
 9 an example, outdoor irrigation on a park or on a golf  
 10 course, so that they are able to use that treated  
 11 wastewater to meet the needs of that irrigated  
 12 territory.  
 13 Q. If we look two lines below that, see where it  
 14 says, "cumulative production." Please explain what that  
 15 represents.  
 16 A. The cumulative production line is showing that  
 17 since this program's inception, the projects that were  
 18 partially funded by these incentives for Metropolitan  
 19 are producing or have produced about 1.3 million  
 20 acre-feet.  
 21 Q. Move down to "groundwater recovery," and  
 22 looking at the first line. What is an example of a  
 23 groundwater recovery program?  
 24 A. Groundwater recovery refers to a situation  
 25 where there is groundwater that is contaminated in some

1408

1 way or may have salt content that is high enough that in  
 2 order to be able to use that water, you have to put some  
 3 measure of treatment to be able to get rid of that  
 4 contaminant.  
 5 So groundwater recovery are programs where  
 6 we're providing incentives similar to the wastewater  
 7 recycling to be able to help an agency develop a  
 8 project, to help them pay for that project, so they can  
 9 clean up that groundwater and be able to use it to meet  
 10 their customers' demands.  
 11 Q. Does the 50,000 acre-feet represent the amount  
 12 of water produced through this program for that  
 13 particular fiscal year?  
 14 A. Right. For 2009-'10 the production for those  
 15 facilities was 50,000 acre-feet.  
 16 Q. And two lines below that, "the cumulative  
 17 production," is that the same as what you explained  
 18 before, the life of these programs, this is your  
 19 estimate?  
 20 A. That's correct. Over the life of the program,  
 21 it's produced 515,000 acre-feet.  
 22 Q. Let me ask you to turn in this document to page  
 23 8. Do you see that sentence?  
 24 A. I do.  
 25 Q. To whom is conserved water a source of supply?

1409

1 A. This statement is showing that it is a source  
 2 of supply for Southern California. Specifically, it's a  
 3 source of supply for the local agencies that produce it  
 4 and they are able to take that supply and meet their  
 5 customers' demands.  
 6 Q. Would it be accurate to say not only -- when  
 7 you say use it, do they give it away or do they sell it  
 8 to their users?  
 9 A. To my knowledge, it's always sold to their  
 10 users. I'm not aware of a situation where it is simply  
 11 given away.  
 12 Q. Can you tell the Court whether or not conserved  
 13 water downstream is a source of supply for Metropolitan?  
 14 A. So, this -- these programs, they're not a  
 15 source of supply for Metropolitan. At no point are they  
 16 producing water that Metropolitan is able to take into  
 17 our system. We are not able to sell that water to our  
 18 customers. Rather, they are supplies that our member  
 19 agencies and local agencies are able to use to meet  
 20 their customer demands.  
 21 MR. EMANUEL: Thank you, your Honor. No more  
 22 questions.  
 23 THE COURT: Cross-examination. It looks like  
 24 maybe one more question.  
 25 MR. EMANUEL: I will move it into evidence.

1410

1 THE COURT: Exhibit 979.  
 2 MR. EMANUEL: DTX 979, your Honor, we move it  
 3 into evidence.  
 4 THE COURT: Are there more pages than the ones  
 5 we talked about that I'll be reading?  
 6 MR. EMANUEL: There are certainly more pages.  
 7 I don't know that you need to read them. Maybe we  
 8 should do a redacted.  
 9 THE COURT: Yes. Then remind me later on to  
 10 admit it as redacted.  
 11 (Exhibit 979 was marked for identification.)  
 12 THE COURT: Cross-examination.  
 13  
 14 CROSS-EXAMINATION  
 15 BY MR. BRAUNIG:  
 16 Q. Good morning, Mr. Upadhyah.  
 17 A. Good morning.  
 18 Q. I am Warren Braunig and we met at your  
 19 deposition.  
 20 You testified that the primary benefit of  
 21 the -- of the water stewardship rate in the demand  
 22 management programs is the creation of local supply for  
 23 use by -- by the local member agencies; correct?  
 24 A. The primary benefit to the local agencies is  
 25 the supply.

1411

1 Q. It is also a benefit to Metropolitan, that  
 2 Metropolitan, by investing in these demand management  
 3 programs, doesn't have to import or buy supplies of its  
 4 own; correct?  
 5 A. The benefit to Metropolitan is the reduced  
 6 demand on our system.  
 7 Q. And that's a supply benefit?  
 8 A. I would not argue that's a supply benefit.  
 9 Q. Met's investments in local water grow the  
 10 supply of water for Metropolitan in the region; correct?  
 11 A. That's not correct.  
 12 Q. You have Tab 1 of your deposition, Tab 1 of the  
 13 binder one, Volume I is your deposition, and I would ask  
 14 you to turn to page 109, line 16.  
 15 MR. EMANUEL: It's Tab 2, Volume I.  
 16 THE COURT: The page is 109?  
 17 MR. BRAUNIG: Yes.  
 18 (Reading:)  
 19 "Q And my question is does  
 20 Metropolitan invest in local  
 21 resources in order to grow the  
 22 pie of supply?  
 23 "A That's -- yes, that's one  
 24 of the benefits we're investing  
 25 for, yes."

1412

1 MR. EMANUEL: Where were we?  
 2 THE COURT: Sixteen through 20.  
 3 Q. BY MR. BRAUNIG: That's correct, that's true  
 4 testimony that you gave?  
 5 **A. That's correct.**  
 6 Q. The demand management programs also create a  
 7 benefit for Metropolitan by not having to spend money on  
 8 imported water supplies; correct?  
 9 **A. The demand management programs reduce the need**  
 10 **for the movement of water through the Metropolitan**  
 11 **system. It may not be Metropolitan's imported supplies.**  
 12 MR. BRAUNIG: Your deposition, page 109, line  
 13 21 through page 110, line one.  
 14 THE COURT: Go ahead.  
 15 MR. BRAUNIG: (Reading:)  
 16 "Q Okay. Is metropolitan's  
 17 -- is one of the benefits that  
 18 you articulated of these  
 19 programs, that it creates a  
 20 benefit of not having to spend  
 21 money on other imported  
 22 supplies?  
 23 "A Yeah. That's part of the  
 24 basis for the incentive."  
 25 Q. That's true testimony?

1413

1 **A. Correct.**  
 2 Q. Would you agree -- you testified in addition to  
 3 creating local supplies, the demand management programs  
 4 have regional benefits for Metropolitan; correct?  
 5 **A. Correct.**  
 6 Q. Met has never calculated the regional benefit  
 7 of the aggregate group of water supply projects and  
 8 desalination projects and conservation programs funded  
 9 in a given calendar year, has it?  
 10 **A. Metropolitan calculates the benefit of the**  
 11 **water that's produced, and we report that each year in**  
 12 **the SB-60 report.**  
 13 Q. You calculate the number of acre-feet created?  
 14 **A. Right.**  
 15 Q. Met does not calculate the regional benefit  
 16 beyond the calculation of acre-feet; it does not  
 17 calculate the regional benefit of the group of programs  
 18 that were funded in 2011, does it?  
 19 **A. The SB-60 report we are producing is showing**  
 20 **the supplies that are benefiting the local agencies as a**  
 21 **result of those programs. It is a characterization of**  
 22 **what's produced through those programs.**  
 23 Q. I am asking you a specific question. I am  
 24 asking you about the regional benefit. Met has not  
 25 calculated the regional benefit of the programs Met

1414

1 invested in in 2011?  
 2 MR. EMANUEL: I am going to object. It is  
 3 ambiguous. We need to know what regional benefit.  
 4 THE COURT: Aside from the calculation of  
 5 conserved acre-feet, there is some other regional  
 6 benefit that you have calculated?  
 7 THE WITNESS: On an annual basis we are not  
 8 calculating a separate benefit from what's being  
 9 reported in SB-60. Although the development of the  
 10 programs initially was based on a calculation of  
 11 benefits to the region overall, and we continue those  
 12 programs as a result of that.  
 13 Q. BY MR. BRAUNIG: To be clear, just so the  
 14 record is clear, for the programs that Met invested in  
 15 through the water stewardship rate in 2011, Met has not  
 16 gone in and said, here's what the -- in dollar terms --  
 17 here's what the regional benefits are to the region?  
 18 **A. No. I don't believe we've done it in dollar**  
 19 **terms.**  
 20 Q. You didn't do that in 2012, '13 or '14 either?  
 21 **A. Not to my knowledge.**  
 22 Q. Met doesn't do any regular calculation of the  
 23 benefits to Metropolitan in terms of avoided capital or  
 24 transportation costs associated with these programs,  
 25 does it?

1415

1 **A. We did that initially when the program was set**  
 2 **up, but we're not doing that on an annual basis, no.**  
 3 Q. And you didn't do that for the money that was  
 4 invested in 2011?  
 5 **A. Not to my knowledge.**  
 6 Q. Or 2012 through '14?  
 7 **A. Again, not to my knowledge.**  
 8 Q. On an ongoing basis the only thing that Met  
 9 keeps track of is how many acre-feet of water are we  
 10 creating for these programs?  
 11 **A. The acre-feet that are produced by the local**  
 12 **agencies and used by the local agencies.**  
 13 Q. You don't know what percentage of the benefits  
 14 to Metropolitan associated with these demand management  
 15 programs are associated with avoiding supply costs  
 16 versus what percentage are attributable to avoiding any  
 17 other costs, do you?  
 18 **A. We know that these programs are reducing the**  
 19 **demand for water moving through our system, so we know**  
 20 **that there is a benefit associated with that reduced**  
 21 **flow in our system.**  
 22 MR. BRAUNIG: I am going to use the deposition  
 23 again. Page 126, lines four through ten.  
 24 THE COURT: I really should do this the right  
 25 way, which is to ask if there is any objection.

1416



1 MR. EMANUEL: I am reading it right now.  
 2 Thank you, your Honor.  
 3 No objection.  
 4 THE COURT: Go ahead.  
 5 MR. BRAUNIG: (Reading:)  
 6 "Q Of the investment that  
 7 Metropolitan is making in LRP  
 8 programs, what percentage of  
 9 the benefits are attributable  
 10 to avoiding water supply costs  
 11 and what percentage are  
 12 attributable to avoiding some  
 13 of these other costs that you  
 14 described?  
 15 "A I don't know."  
 16 Q. That's true testimony?  
 17 A. Yes.  
 18 Q. When Met is deciding whether to invest in  
 19 specific demand management programs, Met doesn't  
 20 consider whether those specific programs will help Met  
 21 avoid some future transportation or facility costs, does  
 22 it?  
 23 A. **The basis for the program is the avoidance of**  
 24 **those costs and the reduced demand on our system and the**  
 25 **specific programs we're trying to implement in order to**

1417

1 **meet that overall objective.**  
 2 Q. On a project-by-project basis Met doesn't  
 3 evaluate whether a specific project it invests in will  
 4 have a transportation or facility benefit, does it?  
 5 A. No.  
 6 **Rather, we have overarching goals for the**  
 7 **programs. They are articulated in our integrated**  
 8 **resource plan in terms of goals. We are trying to put**  
 9 **programs together that meet those goals.**  
 10 Q. Water stewardship is not a service that is  
 11 inherent to the delivery of water, is it?  
 12 A. **A service that is inherent to the delivery of**  
 13 **water?**  
 14 Q. Met could supply and deliver water to its  
 15 member agencies without charging for water stewardship;  
 16 correct?  
 17 A. **If by that you mean we could exist without**  
 18 **running these programs, I think that's true.**  
 19 Q. Met has made a policy decision that it wants to  
 20 fund these demand management programs?  
 21 A. **That's correct.**  
 22 Q. And Met collects money from the water  
 23 stewardship rate to fund the programs; correct?  
 24 A. **That's correct. And one thing we're also doing**  
 25 **is complying with SB-60. We are carrying out these**

1418

1 **duties.**  
 2 Q. Met then, after it takes the money, after it  
 3 collects the money, then distributes -- then distributes  
 4 the demand management subsidies to its member agencies;  
 5 right?  
 6 A. **The conservation programs largely do not go**  
 7 **directly to the member agencies. They are benefit to**  
 8 **the consumers throughout Southern California. The local**  
 9 **resources program financial incentives are provided to**  
 10 **local agencies that enter into a contract with**  
 11 **Metropolitan and produce supplies for their customers**  
 12 **through those projects.**  
 13 Q. Met makes the decision, though, about how those  
 14 subsidies are going to be distributed out to the member  
 15 agents; right?  
 16 A. **To the extent member agencies are applying for**  
 17 **or consumers are applying for those rebates, then they**  
 18 **are ultimately going to be getting those benefits.**  
 19 **There isn't a pre-decision distribution of funds.**  
 20 Q. The decision about how these funds are going to  
 21 be distributed out is a decision made by Met in response  
 22 to applications made by the member agencies?  
 23 A. **That's correct.**  
 24 Q. That's created situations where some large  
 25 member agencies receive a lot more in demand management

1419

1 subsidies than they pay into the water stewardship rate;  
 2 right?  
 3 A. **I'm not sure.**  
 4 Q. You are not sure because Met hasn't done that  
 5 analysis?  
 6 A. **Because I know the projects that are pursued,**  
 7 **but I can't say as to whether that compares with the**  
 8 **amounts that agencies are paying in.**  
 9 Q. So Met has the data to determine how much each  
 10 agency contributes to the water stewardship rate; right?  
 11 A. **Probably, yes.**  
 12 Q. As far as you know, they would?  
 13 A. **As far as I know.**  
 14 Q. And Met also possesses data about how much it  
 15 pays out in subsidies to each member agency; correct?  
 16 A. **Correct.**  
 17 Q. Met has never compiled that data in order to  
 18 determine whether there's a proportional relationship  
 19 between the amount of water stewardship rate monies that  
 20 are contributed and the amount of subsidies that are  
 21 going out to those member agencies?  
 22 A. **Not to my knowledge, and, frankly, that's not**  
 23 **the way our programs are measured. Our programs are**  
 24 **measured against overall regional goals.**  
 25 Q. But Met has never done that; Met has never

1420

1 tried to see if there is a proportional relationship  
 2 between the funds that are created -- funds that are  
 3 received through these charges and the benefits to the  
 4 member agencies from the distribution of those funds as  
 5 subsidies?  
 6 **A. Not to my knowledge. And the reason for that**  
 7 **is, frankly, these are programs meant to provide**  
 8 **regional benefits. It's not designed to provide a**  
 9 **specific amount of benefit to any specific agency.**  
 10 Q. But they do provide a local benefit, don't  
 11 they?  
 12 **A. They do provide local benefit.**  
 13 Q. That local benefit is cash in the form of  
 14 subsidies; correct?  
 15 **A. There is a financial incentive Metropolitan is**  
 16 **providing.**  
 17 Q. There is also the water created that is a  
 18 benefit to the local member agency that is generated  
 19 through these subsidies; right?  
 20 **A. That is correct.**  
 21 Q. You don't measure what the benefits are that  
 22 are specific to those agencies compared to how much they  
 23 are contributing through the water stewardship rate?  
 24 **A. Not to my knowledge.**  
 25 Q. You're familiar with the rate structuring

1421

1 Q. And the actions that have been triggered are  
 2 because San Diego filed this lawsuit, they are not  
 3 allowed to participate in new local resource program  
 4 projects?  
 5 **A. That is a follow-on action that has occurred as**  
 6 **a result of San Diego's litigation.**  
 7 Q. That means no matter how good a program San  
 8 Diego might have to generate supply of water, no matter  
 9 how cost effective it is, no matter how shovel-ready it  
 10 is, Met is not going to fund it because San Diego filed  
 11 this lawsuit; correct?  
 12 MR. EMANUEL: I am going to object. The  
 13 question is argumentative and the Court may recall this  
 14 was the subject of a motion in limine, as well.  
 15 THE COURT: It is a little argumentative. I  
 16 will allow it.  
 17 Go ahead.  
 18 THE WITNESS: What was the question?  
 19 Q. BY MR. BRAUNIG: The question is no matter how  
 20 good the project is that San Diego might have, Met is  
 21 not going to fund it because of rate structure  
 22 integrity?  
 23 **A. To the extent that San Diego has a project, and**  
 24 **I can't speak to how good a project is or isn't, a**  
 25 **project that would be part of the LRP program, that**

1423

1 integrity provision?  
 2 **A. I am familiar with it, yes.**  
 3 Q. Because of the rate structure integrity  
 4 provision, San Diego isn't allowed to receive any new  
 5 contracts for local resource projects or conservation;  
 6 correct?  
 7 **A. Can you rephrase it? I didn't catch the last**  
 8 **part.**  
 9 Q. Since 2011, when rate structure integrity was  
 10 invoked, San Diego has not been allowed to participate  
 11 in new local resource projects or conservation programs;  
 12 correct?  
 13 **A. That's not correct.**  
 14 Q. Met has not entered into new contracts with San  
 15 Diego for local resource projects since 2011, has it?  
 16 **A. For local resources projects, I believe you're**  
 17 **correct. The conservation program continues to provide**  
 18 **incentives for consumers throughout Met's service area,**  
 19 **including the water authorities.**  
 20 Q. San Diego is no longer allowed to participate  
 21 in the local resource programs since 2011? Or into new  
 22 contracts?  
 23 **A. Since 2011 the County Water Authority has taken**  
 24 **actions that triggered the RSI provisions in the**  
 25 **agreements we've had.**

1422

1 **contract would contain rate structure integrity language**  
 2 **that would be triggered by the action San Diego has**  
 3 **taken with this litigation.**  
 4 Q. And therefore, Met wouldn't fund it?  
 5 **A. Ultimately, our board would have to consider**  
 6 **that but, yes, it would likely trigger that clause and**  
 7 **until that's settled, we wouldn't be funding it.**  
 8 Q. There have been some questions that have been  
 9 asked about whether San Diego at any point tried to get  
 10 Met to change the RSI provisions. In fact, San Diego  
 11 did try to change the provisions at one point in time  
 12 and Met said no. Correct?  
 13 **A. I actually don't recall that.**  
 14 Q. Can we go to Tab 17, please, PTX 120.  
 15 Do you recognize Tab 17, PTX 120, as a letter  
 16 from Metropolitan to San Diego County Water Authority  
 17 about the rate structure integrity on August 2, 2005?  
 18 **A. Yes, I recognize this as that letter.**  
 19 MR. BRAUNIG: We would move PTX 120 into  
 20 evidence.  
 21 MR. EMANUEL: No objection.  
 22 THE COURT: PTX 120 has the proposal as an  
 23 attachment and you are moving that in, as well?  
 24 MR. BRAUNIG: Yes.  
 25 THE COURT: PTX 120 is admitted.

1424

1 (Exhibit 120 was received in evidence.)  
 2 Q. BY MR. BRAUNIG: I want to draw your attention,  
 3 please, to the second line of that first paragraph.  
 4 "Metropolitan is unable to execute your agreement  
 5 because your modified version departs from the uniform  
 6 rate structure integrity provision required by  
 7 Metropolitan's board of directors for all new incentive  
 8 program agreements with the member agencies."  
 9 Does this refresh your recollection that when  
 10 attempted to modify the rate structure language, Met  
 11 told you it can't enter into a program that doesn't have  
 12 that specific language?  
 13 MR. EMANUEL: I don't think there was a  
 14 failure --  
 15 THE COURT: Sustained.  
 16 Q. BY MR. BRAUNIG: For member agencies the rate  
 17 structure integrity language is nonnegotiable; right?  
 18 **A. The process that we would consider or our board**  
 19 **would consider would be their own board process to take**  
 20 **a look at whether changes to the rate structure**  
 21 **integrity provision are things they would want to**  
 22 **undertake.**  
 23 Q. The RSI language is nonnegotiable; correct?  
 24 **A. Once the board has adopted the language, they**  
 25 **then gave us direction to include that in all of our**

1425

1 **contracts.**  
 2 THE COURT: Does that mean it's nonnegotiable?  
 3 THE WITNESS: The negotiation that could occur  
 4 would be at a board level.  
 5 MR. BRAUNIG: I am going to use his deposition,  
 6 please, your Honor.  
 7 Page 34, line 21, through 35, line four.  
 8 MR. EMANUEL: Give me a second, your Honor.  
 9 THE WITNESS: This was Tab 2.  
 10 MR. BRAUNIG: Tab 2. It will come up on the  
 11 board for you.  
 12 THE COURT: Any objection?  
 13 MR. EMANUEL: No objection.  
 14 MR. BRAUNIG: (Reading:)  
 15 "Q Is it negotiable?  
 16 "A No.  
 17 "Q So as a member agency your  
 18 choice is to sign an agreement  
 19 that includes the rate  
 20 structure integrity language or  
 21 you're not eligible to obtain  
 22 certain incentive benefits for  
 23 local resources or conservation  
 24 or desalination?  
 25 "A You need to sign an

1426

1 agreement that has standard  
 2 provisions."  
 3 MR. EMANUEL: To be fair, you should read the  
 4 question and answer above that.  
 5 THE COURT: The question and answer above that,  
 6 starting at line 13?  
 7 MR. EMANUEL: Starting at line seven.  
 8 THE COURT: Starting at line seven?  
 9 MR. BRAUNIG: I think it is a different  
 10 question. If he wants to read it in and spend his time  
 11 doing it, he can do that.  
 12 THE COURT: I don't think it changes the  
 13 meaning. Let's go ahead at this time and read that in,  
 14 line seven and ending at line 12.  
 15 MR. EMANUEL: Yes.  
 16 THE COURT: We can do that now.  
 17 MR. BRAUNIG: (Reading:)  
 18 "Q What if an agency -- what  
 19 if a member agency refuses to  
 20 sign an agreement with that  
 21 language?  
 22 "A To the extent that it's  
 23 part of the standard language  
 24 that the board has instructed  
 25 to have in all of these

1427

1 contracts, then the agency  
 2 would be agreeing to not  
 3 participate in those programs."  
 4 Q. You testified earlier when this program was  
 5 initiated, the demand management programs were initiated  
 6 back in the mid-1990s or so, Metropolitan evaluated the  
 7 regional benefits or the benefits associated with doing  
 8 these programs; correct?  
 9 **A. That's correct.**  
 10 Q. Metropolitan has never done a backward-looking  
 11 analysis to determine if demand management programs are  
 12 actually avoiding particular costs, has it?  
 13 **A. Not to my knowledge.**  
 14 Q. Since the mid-1990s Metropolitan has never done  
 15 another forward look to see if additional demand  
 16 management spending would avoid transportation facility  
 17 costs, has it?  
 18 **A. Additional demand management spending itself**  
 19 **may not be analyzed, but I do believe we looked at the**  
 20 **projected capital investment program at Metropolitan in**  
 21 **the, maybe, mid-2000s to see if reductions in demand**  
 22 **would help reduce the expenditures to our capital**  
 23 **program in the future. But I don't think it was**  
 24 **directly related to the incentive program itself.**  
 25 Q. Changing gears a little bit, when a member

1428

1 agency chooses to wheel water, that fact, the wheeling,  
 2 doesn't cause Met to need to spend more money on demand  
 3 management programs, does it?  
 4 **A. Does the wheeling itself cause Metropolitan to**  
 5 **spend more money on demand management?**  
 6 Q. That's right.  
 7 **A. I don't think so.**  
 8 Q. Likewise, the entry into the exchange agreement  
 9 by San Diego and Metropolitan, that didn't cause  
 10 Metropolitan to need to spend more money on local  
 11 resource projects and conservation, did it?  
 12 **A. That individual agreement may not, but when**  
 13 **Metropolitan is looking at our programs, as I said**  
 14 **before, you're looking back, say, the 1990s, we were**  
 15 **considering in the future the needs for the system to be**  
 16 **determined to be able to move water to meet customer**  
 17 **demands.**  
 18 **And that includes both supplies that**  
 19 **Metropolitan is providing but supplies that would be**  
 20 **wheeled by other parties through the system.**  
 21 Q. You're not able to identify any specific  
 22 wheeling transactions that are attributable to spending  
 23 on demand management programs, are you?  
 24 **A. What do you mean by attributable to spending?**  
 25 **I'm not sure I understand.**

1429

1 Q. Your testimony is that spending this money  
 2 frees up space that then makes wheeling possible; is  
 3 that right?  
 4 **A. It reduces demand for deliveries in our system.**  
 5 Q. But you're not able to identify any specific  
 6 wheeling transaction that's attributable to the spending  
 7 that's been made on demand management programs, are you?  
 8 **A. Again, I'm not sure what you mean by**  
 9 **"attributable."**  
 10 Q. It had been caused by or as a result of.  
 11 **A. I don't know why a wheeling transaction would**  
 12 **be caused by demand management programs.**  
 13 Q. You have been a Met staffer for more than a  
 14 decade; correct?  
 15 **A. That's true.**  
 16 Q. And you have been involved in a number of  
 17 different rate refinement or rate-related initiatives;  
 18 correct?  
 19 **A. Yes, sir.**  
 20 Q. Since 2003, when Met unbundled its rates, Met  
 21 has not presented any rate structures to its board other  
 22 than the one it's using today, has it?  
 23 **A. Not to my knowledge.**  
 24 Q. Met has not presented to its board any  
 25 different cost allocations that would move all of the

1430

1 State Water Project costs off of transportation, has it?  
 2 **A. Over the course of the years since the rate**  
 3 **structure was adopted, we have discussed many different**  
 4 **potential things with the board, but we've never made a**  
 5 **recommendation for a wholesale rate structure change, if**  
 6 **that's what you're getting at.**  
 7 Q. There has never been presented to the board an  
 8 option that would move State Water Project costs off of  
 9 transportation?  
 10 **A. In a -- as an option that the board would take**  
 11 **action on, I'm not sure.**  
 12 Q. You're not sure, or no?  
 13 **A. Well, we've had many discussions over the years**  
 14 **about different things that could be done. We've had**  
 15 **board workshops related to what we called our long-range**  
 16 **finance plans and things like that.**  
 17 **So there were concepts that were discussed, but**  
 18 **I don't know that there was ever a specific action to**  
 19 **make significant changes to the rate structure that the**  
 20 **board would have acted on.**  
 21 Q. The same goes for the demand management  
 22 programs, there's never been an option presented to the  
 23 board that would take those demand management programs  
 24 off of transportation and put them somewhere else?  
 25 **A. Not to my knowledge.**

1431

1 Q. Over the years that you've been working on  
 2 these rate initiatives, San Diego has frequently  
 3 complained about the fact that State Water Project costs  
 4 are on transportation, haven't they?  
 5 **A. San Diego has voiced that opinion in many**  
 6 **meetings.**  
 7 Q. Over the course of many years?  
 8 **A. That's correct.**  
 9 Q. Since 2003?  
 10 **A. I can't say the exact years, but yes.**  
 11 Q. Likewise, with the demand management programs,  
 12 they've been complaining for a decade or more that those  
 13 programs shouldn't be on Metropolitan's transportation  
 14 rates; correct?  
 15 **A. I can't say a decade or more, but I do know**  
 16 **that they have voiced that desire.**  
 17 Q. You can't say that they have voiced that  
 18 desire?  
 19 **A. I can say that they have.**  
 20 Q. Okay, thank you.  
 21 And they've voiced that desire repeatedly?  
 22 **A. Yes.**  
 23 Q. Over the course of many years?  
 24 **A. Yes.**  
 25 Q. In your declaration that was submitted into --

1432

1 as part of your testimony, you note that Metropolitan  
 2 and its member agencies have the right to wheel  
 3 third-party water on the State Water Project; do you  
 4 recall that?  
 5 **A. Yes.**  
 6 Q. Met has never attempted to put a financial  
 7 value on the right of Metropolitan or its member  
 8 agencies to wheel water on the State Water Project, has  
 9 it?  
 10 **A. A financial value on our right to wheel water?**  
 11 Q. Uh-huh.  
 12 **A. Metropolitan's right to wheel water?**  
 13 Q. That's right.  
 14 **A. Not to my knowledge. It is one of the benefits**  
 15 **we get as State water contractor and part of the fees we**  
 16 **pay under our State water contract allow us part of that**  
 17 **right.**  
 18 Q. But you've never attempted to put a financial  
 19 value on that right, Metropolitan hasn't?  
 20 **A. I don't believe that we put a financial value**  
 21 **on it other than the fact that the bill we pay for the**  
 22 **State Water Project is broken up into**  
 23 **conservation/supply and transportation from the**  
 24 **Department of Water Resources. We are getting that**  
 25 **value for the transportation.**

1433

1 Q. Is it your opinion that the disaggregation of  
 2 the DWR bill into conservation and conveyance that has  
 3 -- that has legal meaning, that that -- that that,  
 4 therefore, means that's the value to Metropolitan?  
 5 MR. EMANUEL: I will object to the question.  
 6 THE COURT: It is two different questions. I  
 7 think you mean the latter.  
 8 MR. BRAUNIG: I'll re-ask the question.  
 9 Q. Your -- you were present during the first phase  
 10 of this trial; correct?  
 11 **A. Correct.**  
 12 Q. Have you read the Court's statement of decision  
 13 on the issue of whether or not DWR -- the fact that DWR  
 14 disaggregates its bill means those are Met's  
 15 transportation costs?  
 16 **A. I have.**  
 17 Q. You have, okay.  
 18 Since 2013, since December of 2013, has the  
 19 structure of DWR's billing to Met changed?  
 20 **A. Not to my knowledge.**  
 21 Q. DWR still breaks up its bill in the same way?  
 22 **A. Correct.**  
 23 Q. Met still doesn't own the State Water Project,  
 24 does it?  
 25 **A. Correct.**

1434

1 Q. Met still doesn't operate the State Water  
 2 Project, does it?  
 3 **A. We don't operate the State Water Project, to my**  
 4 **knowledge.**  
 5 Q. And the State Water Project still is not part  
 6 of Met's conveyance system, is it?  
 7 **A. It is included in our conveyance rates.**  
 8 Q. With respect to this idea of State Water  
 9 Project wheeling, there are many years where Met doesn't  
 10 wheel any third-party water on the State Water Project;  
 11 correct?  
 12 **A. That's correct.**  
 13 Q. And there are many years where Metropolitan  
 14 member agencies don't wheel any water on the State Water  
 15 Project; correct?  
 16 **A. Correct.**  
 17 Q. In fact, isn't it true that of the water that's  
 18 been moved on the State Water Project over the last  
 19 decade, less than five percent of that is wheeling by  
 20 Metropolitan or its member agencies?  
 21 **A. I think that's probably right. I don't know**  
 22 **the exact statistic, but I would imagine that is a very**  
 23 **small amount.**  
 24 Q. Met makes decisions about whether a member  
 25 agency like San Diego can stand in Met's shoes and wheel

1435

1 water on the State Water Project, doesn't it?  
 2 **A. Can stand in Metropolitan's shoes and wheel**  
 3 **water? If -- in a scenario where San Diego wants to**  
 4 **execute a transfer that's purchasing supply from another**  
 5 **entity?**  
 6 Q. Right.  
 7 **A. Then they could enter into an arrangement with**  
 8 **Metropolitan to wheel the water, yes.**  
 9 Q. And Metropolitan would have the discretion to  
 10 decide whether or not San Diego is allowed to do that;  
 11 correct?  
 12 **A. Well, there are wheeling provisions that would**  
 13 **apply in terms of the ability to move the water.**  
 14 Q. Can we bring up PTX 358, please.  
 15 This is Tab 24 in your binder. It's in the  
 16 binder that's in the binder one.  
 17 This is PTX 358. This is a letter from  
 18 Metropolitan to San Diego concerning a proposed wheeling  
 19 transaction?  
 20 **A. Okay.**  
 21 Q. The answer is yes, that's what this is?  
 22 **A. Yes, it appears that way, yes.**  
 23 MR. BRAUNIG: We would move PTX 358 into  
 24 evidence.  
 25 MR. EMANUEL: No objection.

1436

1 THE COURT: PTX 358 is admitted.  
 2 (Exhibit 358 was received in evidence.)  
 3 Q. BY MR. BRAUNIG: In PTX 357 San Diego had  
 4 requested wheeling service on the State Water Project  
 5 for water it was getting from the San Juan Water  
 6 District? That's what is in the first paragraph.  
 7 A. **That appears to be, yes.**  
 8 Q. If you look on the third paragraph,  
 9 Metropolitan was refusing to consent to wheel this water  
 10 or to allow the State Water Project to wheel this water  
 11 on San Diego's behalf; correct?  
 12 A. **It -- yes, it appears we are not consenting to**  
 13 **it.**  
 14 Q. That is a decision that Metropolitan can make?  
 15 A. **Right. There would be many considerations**  
 16 **behind that, but yes.**  
 17 MR. BRAUNIG: We are five minutes from noon and  
 18 it is a good time.  
 19 THE COURT: Do you have more questions after  
 20 lunch?  
 21 MR. BRAUNIG: I might have a little more.  
 22 THE COURT: Why don't we get together again at  
 23 1:30. Thank you very much.  
 24 (Noon recess.)  
 25

1437

1 San Francisco, California  
 2 Thursday, April 2, 2015  
 3 1:30 p.m.  
 4 Department No. 304 Hon. Curtis E.A. Karnow, Judge  
 5  
 6 DEVENDRA UPADHYAH,  
 7 resumed the stand and testified further as follows:  
 8  
 9 THE COURT: Shall we continue. Do we have a  
 10 witness?  
 11 Sir, if you'll join us.  
 12  
 13 MR. BRAUNIG: Your Honor, counsel for Met had  
 14 sought to move in DTX 979, which is the SB-60 report, a  
 15 30-page document, and you had asked them to prepare an  
 16 excerpted version. We think for purposes of  
 17 completeness the entire 979 should come in, and we don't  
 18 object to it. Since he sought to move it in, we don't  
 19 object, if the Court would allow it.  
 20 MR. EMANUEL: I am withdrawing 979. I would  
 21 ask to enter evidence 979A which is only the two pages  
 22 we used. I think that would be more efficient.  
 23 MR. BRAUNIG: Your Honor, I think, that putting  
 24 in two pages of a 30-page document, it's not an enormous  
 25 document.

1438

1 THE COURT: Is there something else that when  
 2 you write the post-trial briefs you will be pointing me  
 3 to some of the other pages?  
 4 MR. BRAUNIG: Possibly. We would like to have  
 5 the opportunity to do that.  
 6 THE COURT: One of the requests -- I'll make it  
 7 now -- when we finish the exhibits, you are going to be  
 8 providing to me the courtesy copies, you are going to  
 9 take everything out of this room and you are going to be  
 10 providing me only the pages you will be relying on and  
 11 you think I need to read afterwards.  
 12 If you want the entire 979 in, I will admit the  
 13 entire 979. It is hereby admitted. And I apologize to  
 14 counsel for having gone to the trouble of doing what I  
 15 asked you to do.  
 16 MR. EMANUEL: No apologies necessary.  
 17 MR. BRAUNIG: Your Honor, also there is some  
 18 discrepancy as to whether or not I moved PTX 358 in.  
 19 THE COURT: I have an indication that you did.  
 20 MR. BRAUNIG: It's admitted.  
 21 THE COURT: That's my indication. The clerk  
 22 confirms.  
 23 THE CLERK: I do not. I do confirm now that  
 24 you saw it.  
 25 THE COURT: Now he does.

1439

1 MR. BRAUNIG: With that, your Honor, I have  
 2 nothing further.  
 3 THE COURT: Any further questions of this  
 4 witness, redirect?  
 5  
 6 REDIRECT EXAMINATION  
 7 BY MR. EMANUEL:  
 8 Q. We are going to look again at PTX 358.  
 9 Mr. Upadhyah, do you have that in front of you?  
 10 THE COURT: The July 7, 2010, letter under Tab  
 11 24.  
 12 THE WITNESS: Yes, I do.  
 13 Q. BY MR. EMANUEL: Let's look into the third  
 14 paragraph, and specifically, I think, to the third  
 15 sentence of the third paragraph.  
 16 For the record, "If SDCWA possesses a change in  
 17 place of use from the State Water Resources Control  
 18 Board for CVP supplies from SJWD, then Metropolitan will  
 19 provide transportation for this water as non-SWP  
 20 supplies."  
 21 Sir, would you explain to us what that means?  
 22 A. **Sure. When San Diego was proposing this**  
 23 **transfer at the time, it was with a party that has**  
 24 **rights on the Central Valley project, which in this**  
 25 **paragraph is referred to as CVP. And there is a certain**

1440

1 **place of use defined for the Central Valley Project and**  
 2 **contractors that are on the Central Valley Project, that**  
 3 **is separate from the place of use for the State Water**  
 4 **Project and contractors on the State Water Project.**  
 5 Q. Let's stop you right there. Would you explain  
 6 the importance of place of use?  
 7 **A. Sure. It's defined that permanent operations**  
 8 **of the CVP is for the benefit of contractors on the CVP**  
 9 **and its use of water in the CVP area, that place of use,**  
 10 **which is completely different than the State Water**  
 11 **Project and the place of use within the State Water**  
 12 **Project area.**  
 13 **So what we were saying there is there is a**  
 14 **process that is used to go to the State board and**  
 15 **request a change in place of use. There was risk from**  
 16 **Metropolitan if we were to agree to a wheeling**  
 17 **arrangement for a transfer that does not have that**  
 18 **approval, so we were saying if you are able to process**  
 19 **that change in place of use through the State board then**  
 20 **we'll move the water as nonproject water.**  
 21 THE COURT: Do you need the permission of the  
 22 State board to do any wheeling deal?  
 23 THE WITNESS: If it's in this situation where  
 24 there's the risk of not -- the State board not  
 25 acknowledging the change of place of use, then there is

1441

1 a risk that, for example, if we had done that without  
 2 that change in place of use, the State Board could look,  
 3 after the fact, could look and say, you took delivery of  
 4 your State Water Project allocation, we are not  
 5 acknowledging that it was a transfer.  
 6 Q. BY MR. EMANUEL: We were talking about the  
 7 conservation and the demand management program.  
 8 Do you have an estimate of how much water was  
 9 produced through these demand management programs?  
 10 **A. The number changes as we go through time, as**  
 11 **the benefits increase. It is more than three million**  
 12 **acre-feet over the life of the programs.**  
 13 MR. EMANUEL: Thank you. Nothing more, your  
 14 Honor.  
 15 MR. BRAUNIG: Nothing further.  
 16 THE COURT: Thank you. You are excused.  
 17 MR. KEKER: Let me get Miss Stapleton who is  
 18 next, your Honor.  
 19 THE COURT: Thank you.  
 20 MR. EMANUEL: Can we do administrative  
 21 housekeeping? Do you remember there was the  
 22 Administrative Code, the Court asked that only some  
 23 portion of it, so we have -- what was the number --  
 24 1149A, Metropolitan moves into evidence, your Honor.  
 25 THE COURT: Does San Diego have a copy of that?

1442

1 MR. EMANUEL: Yes, I gave that at the break.  
 2 MR. BRAUNIG: No objection.  
 3 (Exhibit 1149A was received into evidence.)  
 4 THE COURT: 1149A is admitted.  
 5 MR. QUINN: Metropolitan calls Maureen  
 6 Stapleton.  
 7  
 8 MAUREEN STAPLETON,  
 9 called as a witness by the Defendant, was sworn and  
 10 testified as follows:  
 11  
 12 THE WITNESS: I do.  
 13 THE CLERK: Please be seated. Maureen  
 14 Stapleton. M-A-U-R-E-E-N. S-T-A-P-L-E-T-O-N.  
 15  
 16 DIRECT EXAMINATION  
 17 BY MR. QUINN:  
 18 Q. Good afternoon, Miss Stapleton.  
 19 **A. Good afternoon.**  
 20 Q. My name is John Quinn. You are the general  
 21 manager of the Water Authority in San Diego?  
 22 **A. Correct.**  
 23 Q. How long have you been the general manager?  
 24 **A. Nineteen-and-a-half years.**  
 25 Q. Did you work for the Water Authority before you

1443

1 became general manager?  
 2 **A. No, I did not.**  
 3 Q. What are the scope of your responsibilities as  
 4 general manager of the San Diego Water Authority?  
 5 **A. I am responsible for the overall management of**  
 6 **the Water Authority and its 260 employees.**  
 7 Q. Do you recall back in 2001 that Metropolitan  
 8 went through a process of unbundling its rates?  
 9 **A. Yes.**  
 10 Q. Do you recall those unbundled rates went into  
 11 effect January 1, 2003?  
 12 **A. Yes.**  
 13 Q. As early as 2001, when Metropolitan was  
 14 considered unbundling its rates, you folks at the San  
 15 Diego Water Authority understood that the system access  
 16 rate was a component of the conveyance charges that Met  
 17 was implementing for these unbundled rates; correct?  
 18 **A. Yes.**  
 19 Q. And certainly you knew that power was another  
 20 component?  
 21 **A. Yes.**  
 22 Q. You knew the water stewardship rate was another  
 23 component of this unbundled conveyance rate?  
 24 **A. Yes.**  
 25 MR. QUINN: If we could look at Defense Exhibit

1444

1 767. There has been no objection to this, your Honor,  
 2 and I would offer it into evidence.  
 3 MR. KEKER: No objection.  
 4 MR. QUINN: You should have a binder up there  
 5 that will have copies of all the exhibits I will refer  
 6 to.  
 7 THE COURT: Exhibit 767, I take it that's a  
 8 DTX?  
 9 MR. QUINN: DTX 767.  
 10 THE COURT: It is admitted.  
 11 (Exhibit 767 was received in evidence.)  
 12 Q. BY MR. QUINN: Could you please identify this  
 13 document for us?  
 14 **A. It appears to be a PowerPoint presentation by**  
 15 **the Water Authority, or it's referenced as the Water**  
 16 **Authority.**  
 17 Q. And it bears a date that we see on the first  
 18 page of October 11, 2001?  
 19 **A. Yes.**  
 20 Q. And do you recall participating in a San Diego  
 21 Water Authority workshop concerning Met's unbundling  
 22 proposal back in October of 2001?  
 23 **A. Yes. I don't remember this specific meeting**  
 24 **per se, but I attended all of these workshops.**  
 25 Q. This exhibit appears to be a PowerPoint

1445

1 presentation that was used in connection with one of  
 2 those workshops in San Diego where you were considering  
 3 this unbundled rate proposal?  
 4 **A. It does.**  
 5 Q. If you could turn to, I think it is, slide  
 6 number five. It is page 28 of the document. It is the  
 7 page entitled "Wheeling." We've got it up on the  
 8 screen. If it is easier for you to look at the screen  
 9 there, there is a screen -- you can also see it right in  
 10 front of you on the left-hand side.  
 11 **A. Oh, yes. Thank you.**  
 12 Q. This slide, of course, shows that under this  
 13 unbundled proposal for wheeling there be a system access  
 14 rate and a water stewardship rate, an incremental power  
 15 cost, and there is a question mark there. You see that?  
 16 **A. Yes.**  
 17 Q. San Diego knew that these components were going  
 18 to be on this unbundled conveyance rate and also got  
 19 information about what the charges would be?  
 20 **A. Yes.**  
 21 Q. In fact, San Diego received cost of service  
 22 reports that specified, for example, the amount of the  
 23 State Water Project costs that would go into, for  
 24 example, the system access rate; do you recall that?  
 25 **A. Yes.**

1446

1 MR. QUINN: If you could look, please, at DTX  
 2 475. This has not been admitted, at least as marked,  
 3 your Honor. It was previously part of the administrative  
 4 record. There is no objection to it, as I understand  
 5 it, and we will offer Defense Exhibit 475.  
 6 MR. KEKER: No objection.  
 7 THE COURT: DTX 475 is admitted.  
 8 (Exhibit 475 was received into evidence.)  
 9 THE COURT: If we could put that up on the  
 10 screen.  
 11 MR. KEKER: Again, this is a 200-page document.  
 12 THE COURT: I think we're just going to have a  
 13 general conversation about this at the end Of the trial.  
 14 Q. BY MR. QUINN: Do you recognize this document,  
 15 Miss Stapleton?  
 16 **A. I do not.**  
 17 Q. But you did -- you did get information -- you  
 18 do recall receiving information from time to time about  
 19 specifically -- prior to January 1, 2003, when these  
 20 unbundled rates went into effect, you had very specific  
 21 information about what the particular charges would be  
 22 and what is contained in those charges.  
 23 Is that fair to say?  
 24 **A. Yes.**  
 25 Q. And in March of 2002, the specific rates for

1447

1 the unbundled rate structure, including the conveyance  
 2 rate, were considered and approved by the Met. But you  
 3 did -- you did get information -- you do recall  
 4 receiving information from time to time about  
 5 specifically -- prior to January 1, 2003, when these  
 6 unbundled rates went into effect, you had very specific  
 7 information about what the particular charges would be  
 8 and what was contained in those charges.  
 9 Is that fair to say?  
 10 **A. Yes.**  
 11 Q. And in March of 2002 the specific rates for the  
 12 unbundled rate structure, including the conveyance rate,  
 13 were considered and approved by the Met board.  
 14 Do you recall that?  
 15 **A. Yes.**  
 16 Q. If we can look at Defense Exhibit 129, which I  
 17 understand is in evidence. This document is entitled  
 18 "Delegate Votes at a Glance."  
 19 Do you see that?  
 20 **A. Yes, I do.**  
 21 Q. This is a document you can see in the lower  
 22 right-hand corner, depending -- if you hold it this way,  
 23 the long way, it's in the lower right-hand corner, you  
 24 can see a Bates number SDCWA, et cetera, which indicates  
 25 this is a document that came from San Diego's files.

1448



1 You understand that?  
 2 **A. Yes.**  
 3 Q. Can you tell us what this document is?  
 4 **A. This is an at-a-glance voting record of our MWD**  
 5 **delegates from the Water Authority.**  
 6 Q. So is it true, then, that in this document we  
 7 can see how the delegates from the San Diego Water  
 8 Authority, who sit on the Metropolitan board, how they  
 9 vote on various issues?  
 10 **A. Yes.**  
 11 MR. QUINN: That's what this reflects. And  
 12 then if we could turn, please, to Defense Exhibit 772,  
 13 DTX 772, not yet admitted, your Honor. As I understand  
 14 there is no objection to it. I am going to offer this,  
 15 as well.  
 16 (Exhibit 772 was received into evidence.)  
 17 MR. KEKER: No objection.  
 18 THE COURT: DTX 772 is admitted.  
 19 Q. BY MR. QUINN: You see this exhibit, 772, these  
 20 are minutes of a San Diego Water Authority board meeting  
 21 on February 28, 2002?  
 22 **A. Yes.**  
 23 Q. And if you turn, please, to page 11, that's  
 24 page 11 on the lower right-hand side. You can also see  
 25 that on the screen. You see there in the first

1449

1 paragraph, but I would like to read that to you. The  
 2 first paragraph under 1B it says, "Director of imported  
 3 water has provided reasons why CWA staff --"  
 4 What is CWA?  
 5 **A. County Water Authority. That's our agency.**  
 6 Q. -- "had recommended that the board take a  
 7 position on MWD's proposed rates and charges. He  
 8 reviewed the proposed rate structure and described rate  
 9 structure components. He showed potential impact to CWA  
 10 member agencies. Mr. Hess compared existing and  
 11 proposed MWD rates and charges, and said the IID  
 12 transfer would provide a benefit to the proposed MWD  
 13 rate structure."  
 14 You see that?  
 15 **A. Yes, I do.**  
 16 Q. The second paragraph says, "After a lengthy  
 17 discussion, the staff recommendation was revised to  
 18 read: "The board direct the Met delegates to support  
 19 the proposed Met rates and charges for 2003, with the  
 20 statement and understanding that the action is without  
 21 prejudice to the continuation of the preferential rights  
 22 lawsuit."  
 23 You see that?  
 24 **A. Yes, I do.**  
 25 Q. Apparently there was some lawsuit then going on

1450

1 between San Diego and who?  
 2 **A. And Metropolitan Water District.**  
 3 Q. About this preferential rights issues?  
 4 **A. Yes.**  
 5 Q. After a discussion at San Diego about the  
 6 unbundled rate structure and the components of it, the  
 7 San Diego board, after looking at this, directed the San  
 8 Diego delegates on the Met board to vote for the rates  
 9 that went into effect January 1, 2003; is that correct?  
 10 **A. Yes. To support the rate structure, correct.**  
 11 Q. And to vote, you understand that?  
 12 **A. Yes, to vote affirmative.**  
 13 Q. The only reservation related to this other  
 14 issue, which was the subject of a pending lawsuit  
 15 regarding preferential rights, at least as reflected in  
 16 the minutes?  
 17 **A. Yes.**  
 18 Q. There was no reservation, at least as reflected  
 19 in the minutes, in terms of the vote on these unbundled  
 20 rates with respect to either State Water Project costs  
 21 or the water stewardship rate; correct?  
 22 **A. Correct.**  
 23 Q. In fact, San Diego delegates, if we go back and  
 24 look at Defense Exhibit 129, San Diego's members on the  
 25 Met board did, in fact, vote in favor of those unbundled

1451

1 rates; correct?  
 2 **A. They voted in favor of the rate structure,**  
 3 **correct.**  
 4 Q. And those rates and that rate structure and the  
 5 components of it, that's the same structure which San  
 6 Diego maintains in this case is a breach of the 2003  
 7 exchange agreement?  
 8 **A. Yes.**  
 9 Q. You are aware Mr. Slater has been -- Mr. Scott  
 10 Slater was designated by San Diego as the person most  
 11 knowledgeable to testify on various issues relating to  
 12 damages, breach and mistake. You are aware of that?  
 13 **A. Yes, I am. I would like to read to you from**  
 14 **Mr. Slater's deposition as the person most**  
 15 **knowledgeable, from page 216 to 217, 12.**  
 16 MR. KEKER: No objection.  
 17 Q. BY MR. QUINN: I will read to you Mr. Slater's  
 18 testimony as the person most knowledgeable.  
 19 "Q. You knew that at the time  
 20 the October 2003 agreement was  
 21 signed, that that \$235 charge  
 22 included charges, costs  
 23 relating to the State Water  
 24 Project that were included in  
 25 the system access rate, that

1452

1 were rolled up into the  
 2 wheeling rate. You knew that?  
 3 "A Yes, I did.  
 4 "Q And you thought it was  
 5 inappropriate to include those  
 6 charges; correct?  
 7 "A Correct.  
 8 "Q And you believe that was actually not  
 9 lawful to do that; correct?  
 10 "A Agreed.  
 11 "Q And, similarly, if I ask  
 12 you the same questions about  
 13 the costs associated with power  
 14 and the State Water Project,  
 15 you knew those were included,  
 16 too, and you thought it was  
 17 illegal to include those in  
 18 that rate; correct?  
 19 "A That's correct.  
 20 "Q And -- but you knew they were  
 21 in that 235-dollar rate?  
 22 "A That's correct."  
 23 Now, back in 2003, you heard Mr. Slater  
 24 emphatically express that opinion at the time the  
 25 exchange agreement was being negotiated; correct?

1453

1 **A. Yes. We believed that they were not lawfully**  
 2 **to be included.**  
 3 Q. And you heard him express that opinion and you  
 4 believed that also, even before the exchange agreement  
 5 was signed up; correct?  
 6 **A. Correct.**  
 7 Q. When, Miss Stapleton, did you first reach the  
 8 conclusion that the inclusion of State Water Project  
 9 costs in the unbundled conveyance rate was unlawful?  
 10 When did you first reach that conclusion?  
 11 **A. When Metropolitan started talking about**  
 12 **unbundling of the rates and of the cost allocation of**  
 13 **the State Water Project. That's when we believed that**  
 14 **was a misinterpretation of what was allowed by law.**  
 15 Q. You had that belief when you first heard that  
 16 Metropolitan had proposed to include those costs in the  
 17 unbundled conveyance rate?  
 18 **A. Correct.**  
 19 Q. That could have been in 2001, 2002, but  
 20 certainly by 2003; correct?  
 21 **A. Correct.**  
 22 Q. You believed that it was unlawful, based upon  
 23 the law as it existed then in 2003; correct?  
 24 **A. Yes. We believed that the interpretation by**  
 25 **Metropolitan was not correct.**

1454

1 Q. My point is you believed it was unlawful under  
 2 the law, as it existed in 2003, the existing law at that  
 3 time?  
 4 **A. Yes.**  
 5 Q. Now, on occasion over the years, you haven't  
 6 been bashful about writing to Metropolitan to express  
 7 concerns that the San Diego Water Authority had about  
 8 various issues. Would that be fair to say?  
 9 **A. Yes. That is fair to say. I am not a bashful**  
 10 **woman.**  
 11 Q. And if an issue is important enough, you would  
 12 put those concerns in writing?  
 13 **A. It depends on what forum we would be at and it**  
 14 **depends on what we're trying to achieve. So I wouldn't**  
 15 **say wholesale I would put something like that in**  
 16 **writing.**  
 17 Q. What I'm saying is, without regard to the  
 18 forum, you wouldn't wait -- if you had a particular  
 19 concern you thought it was important enough -- you  
 20 wouldn't necessarily wait until the next board meeting.  
 21 You might send off a letter or an email and document  
 22 your strongly held views?  
 23 **A. Or make a phone call to let my views be known;**  
 24 **correct.**  
 25 Q. And if an issue was important enough that you

1455

1 thought it ought to be documented, you wouldn't hesitate  
 2 to put San Diego's views in writing; is that fair to  
 3 say?  
 4 **A. I guess I am hesitating on documented. I am**  
 5 **not sure I understand the question.**  
 6 Q. Let me withdraw it again.  
 7 I am saying if you thought it was important  
 8 enough, if you thought an issue was important enough, I  
 9 mean, you've been a general manager for, you told me, 19  
 10 years?  
 11 **A. Correct.**  
 12 Q. And you understand the value sometimes of  
 13 negotiating things, of documenting things when it  
 14 relates to issues that are important; correct?  
 15 **A. Correct.**  
 16 Q. Including issues about illegal conduct?  
 17 **A. Yes.**  
 18 Q. So if an issue is important enough --  
 19 **A. Uh-huh.**  
 20 Q. -- to you, you wouldn't hesitate to put San  
 21 Diego's concerns in writing; correct?  
 22 **A. Yes. I would put them in writing from time to**  
 23 **time, if it was appropriate. Again, depending upon what**  
 24 **venue I'm using to try to make a change.**  
 25 Q. So in particular, in 2003, after Metropolitan

1456

1 unbundled its rates, and after the new rates went into  
 2 effect, you wrote Mr. Gastelum --  
 3 **A. Yes.**  
 4 Q. -- your counterpart at Metropolitan at the  
 5 time, about those rates and documented your concerns.  
 6 Do you recall that?  
 7 **A. Yes, I do.**  
 8 Q. Let's take a look at DTX 794. This is in  
 9 evidence.  
 10 And you say in the first line of your letter  
 11 that you have identified some issues in the setting and  
 12 the adoption of Metropolitan's proposed rates.  
 13 Do you see that?  
 14 **A. I do see that.**  
 15 Q. And then it goes on -- and I am not going to  
 16 take the time to go through your three-page  
 17 single-spaced letter -- but continuing in the second  
 18 paragraph there, and on to the second paragraph, you  
 19 list certain of these issues; correct?  
 20 **A. Yes.**  
 21 Q. And these include something called  
 22 "pay-as-you-go funding." I'm not even going to ask you  
 23 what that is.  
 24 **A. Yes.**  
 25 Q. "Excess revenue collection. The use of

1457

1 reserved funds."  
 2 Do you see all that?  
 3 **A. I do see that.**  
 4 Q. And then on page two there is a -- you reach --  
 5 in the first full paragraph on page two, in the last  
 6 sentence, you refer to "rate stability." Do you see  
 7 that?  
 8 THE COURT: Can you say that one more time,  
 9 Mr. Quinn?  
 10 MR. QUINN: Yes.  
 11 Q. On page two, last sentence of the first full  
 12 paragraph on page two, if you look at the second-to-last  
 13 maybe you can highlight that, "rate stability."  
 14 This is in the second-to-last line of the  
 15 paragraph.  
 16 **A. Yes, I see it now.**  
 17 Q. And that was an issue. You thought that rate  
 18 stability was something that was important to  
 19 Metropolitan's members, including San Diego. Fair to  
 20 say?  
 21 **A. Yes, it was the use of reserves.**  
 22 Q. Okay. But the rate stability was something  
 23 that you thought was important; correct?  
 24 **A. Yes. That the use of the planned increase of**  
 25 **reserves could be more properly applied to maintaining**

1458

1 **existing rates, in this case, system access and water**  
 2 **stewardship. And that would provide rate stability to**  
 3 **the member agency, right.**  
 4 Q. So you say, "Thus providing overall rate  
 5 stability to agencies."  
 6 Just reading that I got the impression you  
 7 thought that was a useful thing to do?  
 8 **A. Yes.**  
 9 Q. Further, further down the page, you actually  
 10 discuss the system power rate. Do you see that? You  
 11 have a numbered paragraph.  
 12 **A. I do.**  
 13 Q. What you say there about the system power rate,  
 14 the only thing you say about it there is it is kind of  
 15 positive. Would you agree?  
 16 **A. Yes. It was the first time that we were able**  
 17 **to distinguish with specificity the system power rate in**  
 18 **its detail, so we thought that was -- we wanted to give**  
 19 **kudos where we could for doing that.**  
 20 Q. The answer to my question was, yes, it was a  
 21 positive thing?  
 22 **A. Yes, it was.**  
 23 Q. You say, "it is an excellent example of rate  
 24 component transparency." Is what you wrote?  
 25 **A. Yes.**

1459

1 Q. You don't -- you didn't actually hear, say, by  
 2 the way, we think it is unlawful; you don't see that in  
 3 that paragraph?  
 4 **A. Not in that paragraph.**  
 5 Q. Or anywhere in that letter. You don't say that  
 6 use of power, inclusion of power in the rate is  
 7 unlawful?  
 8 **A. Yes, that's true. We kind of reference State**  
 9 **Water Project in the next section.**  
 10 Q. Sure. We will come to that.  
 11 You did not request or even suggest that the  
 12 State Water Project costs come out of the power rate?  
 13 **A. Not in this paragraph, no.**  
 14 Q. In the next paragraph you write about water  
 15 delivery costs. Do you see that?  
 16 **A. Yes, I do.**  
 17 Q. There you do say that, "San Diego objects to  
 18 the inclusion of significant water supply costs, e.g.,  
 19 State Water Project costs, as a component in  
 20 Metropolitan's system access rate."  
 21 Do you see that?  
 22 **A. Yes, I do.**  
 23 Q. That is part of what we're talking about, what  
 24 this lawsuit is about; right?  
 25 **A. Correct.**

1460

1 Q. You go on to explain why San Diego objects.  
 2 You say, and I quote, "The inclusion of supply costs in  
 3 the system access rate creates subsidies for  
 4 Metropolitan's supplies and increased costs for water  
 5 delivery. This result sends inappropriate economic  
 6 signals on both the costs of alternative supplies and  
 7 appropriate delivery costs."  
 8 Do you see that?  
 9 **A. I do.**  
 10 Q. At that time you thought that those costs,  
 11 actually, that it was unlawful, it was illegal?  
 12 **A. Yes, we believed it was unlawful.**  
 13 Q. But you decided not to put that in the letter?  
 14 **A. Not in this letter.**  
 15 Q. Well, let me ask you: Before this lawsuit was  
 16 filed, are you aware of any written communication that  
 17 you wrote to anyone at Metropolitan saying that any of  
 18 these challenged rates were illegal or unlawful?  
 19 **A. I cannot recall offhand a written letter that**  
 20 **says, hello, these rates are unlawful.**  
 21 Q. Are you aware of any written communication,  
 22 prior to the filing of this lawsuit, at any time, where  
 23 anybody at San Diego tells anybody at Metropolitan that  
 24 the inclusion of these State Water Project costs and the  
 25 water stewardship rate in the unbundled conveyance rate

1461

1 is illegal?  
 2 **A. In writing?**  
 3 Q. Yes.  
 4 **A. No.**  
 5 Q. That would be a pretty important thing,  
 6 wouldn't it? I mean, these contracts involve millions  
 7 and millions of -- the conveyance of water in these  
 8 charges involve tens of millions of dollars, don't they?  
 9 **A. Yes, sir, they do.**  
 10 Q. If somebody thought it was illegal, they are  
 11 illegally being charged tens of millions of dollars, or  
 12 that a proposal was on the table that would contemplate  
 13 illegally charging tens of millions of dollars, that  
 14 would be something significant, wouldn't you agree?  
 15 **A. It is something significant, yes.**  
 16 Q. And there is nothing in this letter where you  
 17 say that --  
 18 Let me turn now to the water stewardship rate  
 19 and what you write there. The last paragraph on that  
 20 page, "The Water Authority" -- it says, "The Water  
 21 Authority supports the goal of increasing the production  
 22 of recycled water and increasing support for economic  
 23 water conservation programs, requiring an increase in  
 24 the water stewardship rate. The Water Authority would  
 25 like to continue to support local resource management

1462

1 and development programs," and it goes on. You can read  
 2 ahead and read it to yourself.  
 3 There is nothing there where you say the water  
 4 stewardship rate should not be included in the water  
 5 delivery costs or the costs of conveyance, is there?  
 6 **A. Well, it references that the Water Authority**  
 7 **believes that these goals could be met without**  
 8 **unnecessarily increasing the system access charge in the**  
 9 **water stewardship rate this year.**  
 10 **So that was our reference to they should not be**  
 11 **in the transportation rates.**  
 12 Q. There is nothing there where you indicate or  
 13 even suggest that you thought that the inclusion of the  
 14 water stewardship rate charges was actually unlawful or  
 15 illegal?  
 16 **A. Correct.**  
 17 Q. Did you have any role in the negotiation and  
 18 approval of the exchange agreement that ended up being  
 19 signed in October of 2003?  
 20 **A. Yes, I did.**  
 21 Q. And what was your role?  
 22 **A. I was the team leader of the negotiating team.**  
 23 Q. And do you recall that, just kind of jumping  
 24 into the middle of that, that around August of 2003, San  
 25 Diego proposed to Metropolitan two different ways of

1463

1 entering into this conveyance arrangement for the water  
 2 that San Diego had contracted to get; do you recall?  
 3 **A. I do.**  
 4 Q. And if we could take a look at DTX 8- -- just a  
 5 second. DTX 829.  
 6 MR. QUINN: This is not in evidence but there  
 7 isn't an objection to it and I would offer this, your  
 8 Honor.  
 9 MR. KEKER: No objection.  
 10 THE COURT: DTX 829 is admitted.  
 11 (exhibit 829 was received into evidence.)  
 12 Q. BY MR. QUINN: You are in the e-mail string  
 13 down at the bottom, between you and Mr. Campbell, and  
 14 Mr. Campbell refers it up to Lee Miller, I guess.  
 15 **A. Yes.**  
 16 THE COURT: Willer, W-I-L-L-E-R.  
 17 MR. QUINN: Thank you, your Honor.  
 18 Q. Who is Lee Willer?  
 19 **A. She was an employee of the Water Authority who**  
 20 **was a subordinate of Campbell.**  
 21 Q. This is dated in -- your email is dated  
 22 September 8. This is, I guess, kind of early on, not  
 23 too long after the idea of these two different options  
 24 have been put on the table; is that right?  
 25 **A. Correct.**

1464

1 Q. In your email you ask Mr. Campbell to develop  
 2 some written material for San Diego's board concerning  
 3 the potential deal points for this exchange agreement?  
 4 **A. Yes.**  
 5 Q. Mr. Campbell then writes to Mr. Willer asking  
 6 also, "How are you doing on the last canal lining  
 7 analysis? We talked about comparing the exchange  
 8 agreement versus wheeling rate differential and  
 9 spreading the difference over canal lining water for 75  
 10 years. I would like to do some escalation sensitivities  
 11 on the MWD wheeling rate, two percent, three percent,  
 12 four percent, to see the per AF" --  
 13 I have come to learn that's acre-foot.  
 14 **A. Yes, it is.**  
 15 Q. -- "on the canal lining water."  
 16 Do you see that?  
 17 **A. I do.**  
 18 Q. What was requested here was an analysis of the  
 19 assumption that the MWD conveyance or wheeling rate  
 20 would escalate over a 75-year period; correct?  
 21 **A. Right. We were doing a range of escalations.**  
 22 Q. Among the ranges you did, do you ever recall  
 23 being a range of escalations done where you only looked  
 24 at a five-year period, and assume those rates would only  
 25 be in effect for five years?

1465

1 **A. No. We actually did it on a worst-case**  
 2 **scenario.**  
 3 Q. If you look at your e-mail, the second at the  
 4 bottom, in the second sentence in the first paragraph,  
 5 where it says, "The handout needs to articulate the deal  
 6 points and identify the canal lining projects and its  
 7 water as an alternative path that is at the sole  
 8 discretion of the authority."  
 9 Do you see that?  
 10 **A. Yes.**  
 11 Q. Do you recall that Metropolitan, when these two  
 12 options were put on the table by San Diego, Metropolitan  
 13 came back to San Diego and said, "They look roughly the  
 14 same to us from an economic standpoint. San Diego, you  
 15 can choose which one. You choose, Option-1 or  
 16 Option-2." Do you recall that?  
 17 **A. I do recall that Metropolitan said that they**  
 18 **were okay with either Option-1 or Option-2.**  
 19 Q. Right. I was interested in an answer you gave  
 20 a moment ago. Are you telling us the reason you didn't  
 21 run the numbers, the projections for five years, is  
 22 you're only interested in a worst-case analysis?  
 23 **A. Yes, a worst-case scenario to present to my**  
 24 **board, so that they knew if, in fact, we were**  
 25 **unsuccessful in negotiating what we thought was the**

1466

1 **lawful wheeling rate, that they knew what their exposure**  
 2 **would be.**  
 3 Q. You didn't think the board would be interested  
 4 in knowing what the future scenarios might look like if  
 5 the rate structure was only in place for five years?  
 6 **A. No. They want to know what the worst case is.**  
 7 **You hope for the best but you plan for the worst.**  
 8 **So we did the worst-case scenario in a two to**  
 9 **five percent, I believe it was, escalation, so we knew**  
 10 **what our maximum exposure would be.**  
 11 Q. So that's your experience in the business world  
 12 when you're looking at a particular potential deal. You  
 13 don't look at -- you only look at a worst case. You  
 14 don't run the numbers for what the case is, for what you  
 15 hope to achieve, it's not the worst case; you don't run  
 16 those numbers?  
 17 **A. We did not. We were under a very short time**  
 18 **period. We were talking about a huge risk that we were**  
 19 **taking on, and I would rather tell my board what I**  
 20 **believed was the worst-case scenario so they wouldn't**  
 21 **come back and say, why didn't you tell me what that**  
 22 **maximum exposure was.**  
 23 Q. I understand, ma'am, why you -- the board would  
 24 want to know worst case, and I understand why you would  
 25 want to tell them worst case. My question is a little

1467

1 different.  
 2 Isn't it your experience in the business world,  
 3 that decision makers also want to see a projection based  
 4 on what you realistically think you can achieve,  
 5 something that is not the worst case?  
 6 MR. KEKER: Objection. Argumentative. No  
 7 foundation. And I move to strike the speech at the  
 8 beginning.  
 9 THE COURT: Overruled.  
 10 Go ahead.  
 11 THE WITNESS: We had been on a monthly or twice  
 12 or three times a month been talking to our board about  
 13 the various options. The All-American Canal option was  
 14 a new option, and that was the focus of what my board  
 15 needed to look at, was whether to take Option-1, which  
 16 was already out there, or Option-2, which was new. And,  
 17 therefore, I directed staff to take the number that  
 18 Metropolitan had, escalate it out, and assuming that it  
 19 would not change over that 45 years, what was our  
 20 exposure based on the escalation of two to five percent.  
 21 That is what I wanted the board to know, what the  
 22 maximum exposure would be so they could make the most  
 23 informed decision.  
 24 The worst thing for a manager is to have a  
 25 board member come back and say why didn't you tell me

1468

1 that was possible.  
 2 Q. You know with respect, I don't think that  
 3 answered my question, which was directed to, in the real  
 4 world, if you want to give them, I think you just said,  
 5 you want to give them the best information, don't you  
 6 also want to give them a projection, based not just on  
 7 the worst case but by what you hoped to achieve in  
 8 negotiating the agreement? Don't you want them also to  
 9 have that information?  
 10 **A. No. Because the exposure would be less than**  
 11 **that maximum that you provided to the board. It would**  
 12 **be nothing but better than what you gave to the board as**  
 13 **the worst-case scenario. That would be a positive.**  
 14 **They would be happy. So, no.**  
 15 Q. So the way it works at San Diego is the board  
 16 only wants to hear worst-case scenarios. They are not  
 17 interested in hearing what you think is actually  
 18 realistic or what you can achieve? Is that your  
 19 experience at San Diego?  
 20 **A. In this case it is.**  
 21 Q. Is it your testimony that you had some  
 22 discussion with some board members where they said to  
 23 you, "No, don't present us with any scenarios reflecting  
 24 what you really intend to achieve in this agreement or  
 25 what you can think you can realistically do. We are not

1469

1 interested in that. All we want to see is the absolute  
 2 worst case?" Did you have a conversation like that with  
 3 anybody on the San Diego board?  
 4 **A. No, I did not.**  
 5 MR. QUINN: Let's take a look at DTX 830.  
 6 I understand this is not in evidence and I  
 7 understand there is no objection.  
 8 THE COURT: The PowerPoint slides.  
 9 MR. KEKER: No objection, your Honor.  
 10 MR. QUINN: We have offered this.  
 11 THE COURT: DTX 830 is admitted.  
 12 (Exhibit 830 was received into evidence.)  
 13 Q. BY MR. QUINN: Just so you know where I'm  
 14 going, ma'am, I want to walk through the written records  
 15 that exist leading up to the execution of the exchange  
 16 agreement in October.  
 17 What we're looking at here, the cover note is  
 18 an e-mail from Amy Chen to some people, including  
 19 yourself, and it is dated September 10, 2003; correct?  
 20 **A. Correct.**  
 21 Q. Who is Amy Chen?  
 22 **A. She is one of my staff members who is assigned**  
 23 **the MWD program and she's located in Los Angeles in the**  
 24 **MWD building.**  
 25 Q. She lives in enemy territory. It's a joke.

1470

1 I'm sorry.  
 2 Does this appear to be -- maybe you can tell me  
 3 what that presentation, these PowerPoints seem to  
 4 reflect?  
 5 **A. Right. Based upon the cover memo of Gil Ivey,**  
 6 **who is an employee of Metropolitan was, sending to my**  
 7 **staff member the presentation that was made at the MWD**  
 8 **water planning quality and resources committee meeting**  
 9 **on the QSA.**  
 10 Q. This is a document generated by Metropolitan,  
 11 to your understanding?  
 12 **A. Yes.**  
 13 Q. Do you have any understanding why it was sent  
 14 to the folks at San Diego?  
 15 **A. I don't have any specific knowledge. We were**  
 16 **trying to keep each agency informed of what the other**  
 17 **one was doing.**  
 18 Q. If you thumb through, I think, four or five  
 19 pages, you will see one slide that is entitled at the  
 20 top "peace treaties." You see that?  
 21 **A. Yes.**  
 22 Q. It says, "Wheeling laws, no legislative change  
 23 by San Diego and MWD."  
 24 **A. Yes.**  
 25 Q. Do you see that?

1471

1 **A. I do.**  
 2 Q. And then if you skip forward a couple of pages  
 3 there is a heading that says, "Alternate SDCWA  
 4 Pathways." Two bullets. "Two options available. SDCWA  
 5 to choose by October 1."  
 6 **A. Yes.**  
 7 Q. That is probably referring to that San Diego  
 8 can choose which option?  
 9 **A. Correct.**  
 10 Q. The next slide at the top, it says, "SDCWA  
 11 Option-1."  
 12 And the second bullet there is "SDCWA pays  
 13 discount wheeling rate for 35 years or 5.1 MAF."  
 14 **A. Million acre-feet.**  
 15 Q. So Option-1, that was -- this is we are going  
 16 to continue just to go -- we will continue under that  
 17 exchange agreement that we negotiated a few years ago;  
 18 right?  
 19 **A. Correct.**  
 20 Q. Which had a discounted wheeling rate in it?  
 21 **A. We would argue it's not discounted.**  
 22 Q. If you look at the next slide on the top, SDCWA  
 23 Option-2, the second option, what Met is saying is here,  
 24 "SDCWA pays full wheeling rate for IID, SDCWA transfer  
 25 water and canal lining conserved water."

1472

1 Do you see that?  
 2 **A. I do.**  
 3 Q. And you understood that was Met's position  
 4 about what the proposal was?  
 5 **A. Yes. It doesn't reference a year on this one.**  
 6 **So I can't tell how long they thought that would be.**  
 7 Q. It just says full wheeling rate?  
 8 **A. Yes.**  
 9 Q. You understood that was their understanding and  
 10 expectation?  
 11 **A. No, I did not know that full wheeling rate --**  
 12 **it's not the same language we used, but I presume it**  
 13 **referenced the \$253 rate.**  
 14 Q. And that's what ultimately ended up going into  
 15 the agreement?  
 16 **A. It did.**  
 17 MR. QUINN: And then if we could look at DTX  
 18 837, which has not been admitted. I understand there is  
 19 no objection to it. We would offer it, your Honor.  
 20 MR. KEKER: No objection.  
 21 THE COURT: DTX 837 is admitted.  
 22 (Exhibit 837 was received into evidence.)  
 23 MR. KEKER: It is also 846. You're right. No  
 24 objection.  
 25 Q. BY MR. QUINN: The top document is an email

1473

1 from you dated September 16, 2003?  
 2 **A. Yes.**  
 3 Q. And you sent this to all board members --  
 4 **A. Yes.**  
 5 Q. -- is that right? Concerning QSA update and  
 6 attached fact sheet and Campbell memorandum, you  
 7 attached those two documents; right?  
 8 **A. I did.**  
 9 Q. The first attachment, if we could look at that,  
 10 the first page, it says, "Fact Sheet, September 16,  
 11 2003." And this is a fact sheet that was prepared at  
 12 San Diego outlining the two options; right?  
 13 **A. Yes.**  
 14 Q. And the second attachment is the memorandum  
 15 from Bob Campbell outlining the financial analysis of  
 16 the two options; correct?  
 17 **A. Yes.**  
 18 Q. So if we could just look first at the fact  
 19 sheet.  
 20 And if we could go to the second page, which  
 21 says, "Option-2" at the top. If we would just enlarge,  
 22 say, the top third. The second bullet, in describing  
 23 the Option-2, it says "MWD assigns its canal lining  
 24 rights to SDCWA. Canal lining water rights to SDCWA.  
 25 Project yields 77,700 acre-feet annually for 110 years.

1474

1 8.5 million acre-feet of water." That's a lot of water?  
 2 **A. It's a lot of water.**  
 3 Q. Worth a lot?  
 4 **A. Worth a lot.**  
 5 Q. Worth billions, with a B, of dollars; correct?  
 6 **A. I don't know. But it is worth a lot of -- it**  
 7 **has high value.**  
 8 Q. It is certainly worth -- 77,700 acre-feet  
 9 annually for 110 years is certainly worth more than  
 10 \$100 million?  
 11 **A. Absolutely.**  
 12 Q. Absolutely. Certainly worth more than  
 13 \$500 million?  
 14 **A. I don't know.**  
 15 Q. You don't know?  
 16 **A. I'd have to do a calculation of what it would**  
 17 **be worth compared to other transfers.**  
 18 Q. Would you dispute that that quantity of water  
 19 is worth -- I understand you don't know whether it's  
 20 worth billions. Are you in a position to dispute that?  
 21 Would you dispute -- if somebody said that was worth \$2  
 22 billion, with a B, would you dispute that?  
 23 **A. I would not, no.**  
 24 Q. You just don't know?  
 25 **A. I wouldn't know what, you know, what the costs**

1475

1 **would be over 110 years and how to present value the**  
 2 **cost of that water.**  
 3 Q. How about just the current cost? Let's talk in  
 4 terms of today. If you could get that much water  
 5 today -- let's not worry about for now the  
 6 discounting -- that would be worth billions of dollars?  
 7 **A. Yes, it would be worth a lot of money.**  
 8 Q. Billions?  
 9 **A. Sir, I don't want to say what it's worth unless**  
 10 **I had the ability to spend some time to calculate its**  
 11 **value.**  
 12 Q. Certainly anyone who said it might only be  
 13 worth \$100,000, that would be flat-out wrong?  
 14 **A. I would say it's worth much more than that.**  
 15 Q. Let's go to the second attachment, the  
 16 memorandum from Mr. Campbell. And I assume you would  
 17 read this memo before you sent it -- before you attached  
 18 it to your email to your board of directors?  
 19 **A. Yes, I would have read it.**  
 20 Q. And insofar as you know, everything that's in  
 21 this memo is accurate?  
 22 **A. Yes.**  
 23 Q. And the description of Option-2, in this memo,  
 24 there in that first paragraph, it says, "The assignment  
 25 of Met's canal lining project water rights to SDCWA, in

1476

1 consideration for SDCWA's paying Met's wheeling rate, in  
 2 lieu of the exchange agreement to transport the  
 3 IID/SDCWA transfer water and canal lining water.  
 4 Currently the Met wheeling rate is set at \$253 per  
 5 acre-foot, including the system access and water  
 6 stewardship rates and power cost."  
 7 Do you see that?  
 8 **A. I do.**  
 9 Q. And then it says, where it says, "In  
 10 consideration," what you understood that to mean was  
 11 that Met would get what's stated there, Met's wheeling  
 12 rate, instead of the rate under the 1998 exchange  
 13 agreement, which is what the existing exchange agreement  
 14 provided for; right?  
 15 **A. Yes. That we would pay the \$253 instead of**  
 16 **that 90-dollar rate.**  
 17 Q. So you were going to pay a lot more?  
 18 **A. Yes.**  
 19 Q. You understood that \$253, probably beating the  
 20 dead horse here, but it included that system access  
 21 rate, the power rate with the State Water Project costs  
 22 built into both of them, and the water stewardship rate;  
 23 correct?  
 24 **A. Yes. That would be included in that \$253 that**  
 25 **we would pay for a minimum of the five years.**

1477

1 Q. In the next full paragraph Mr. Campbell writes  
 2 about how the staff used two different approaches to  
 3 evaluate the costs of the two options.  
 4 **A. Yes.**  
 5 Q. And in both approaches he assumed that under  
 6 Option-2 Met's wheeling rate would escalate over the  
 7 term of the contract; correct?  
 8 **A. Correct.**  
 9 Q. In the last paragraph on page one, third  
 10 sentence he writes, "The Met wheeling rate is  
 11 established annually by the Met board of directors and  
 12 is assumed to escalate over time." Correct?  
 13 **A. Correct.**  
 14 Q. In this memorandum that you sent, you said we  
 15 are anticipating that the wheeling rate, at least for  
 16 purposes of trying to value this option, we assume the  
 17 wheeling rate will include these components, will be  
 18 starting at \$253, and there will be a factor for  
 19 inflation over time; correct?  
 20 **A. That -- I'm not sure about the way we would**  
 21 **value this option. But that -- what the potential costs**  
 22 **could be for this option.**  
 23 Q. Right.  
 24 **A. It would be done in this manner.**  
 25 Q. Thank you. You are trying to compare the two,

1478

1 and in looking at the potential costs of the second  
 2 option, the staff is looking at these two different  
 3 ways, but they are assuming it is going to start at 253  
 4 and escalate up over time; right?  
 5 **A. Right. In this calculation or analysis, that**  
 6 **is exactly what we're doing.**  
 7 Q. Again, there is no numbers here run on just a  
 8 five-year scenario. This only --  
 9 **A. No.**  
 10 Q. -- the 253 and escalator is only for five  
 11 years?  
 12 **A. No. Because the canal lining was for 110**  
 13 **years.**  
 14 Q. A week after that you helped prepare and  
 15 approved a memorandum to the water policy committee?  
 16 **A. Yes.**  
 17 MR. QUINN: And let's take a look at DTX 856.  
 18 Not admitted yet. No objection, as I understand it.  
 19 We'd offer this, your Honor.  
 20 MR. KEKER: No objection.  
 21 THE COURT: DTX 856 is admitted.  
 22 (Exhibit 856 was received into evidence.)  
 23 Q. BY MR. QUINN: What is the water policy  
 24 committee?  
 25 **A. It is a committee made up of approximately 14**

1479

1 **members of my board of directors.**  
 2 Q. If you go to the last page, you will see an  
 3 indication there, I think it's the last lines on the  
 4 page, this is a memorandum that was -- that you prepared  
 5 and approved?  
 6 **A. Yes.**  
 7 Q. Also prepared by Mr. Campbell and  
 8 Mr. Hentschke, the general counsel?  
 9 **A. Correct.**  
 10 Q. If you turn to page two in this memo that you  
 11 wrote, you describe Option-1 and Option-2?  
 12 **A. Yes.**  
 13 Q. In particular to Option-2, if we can enlarge  
 14 that paragraph, you wrote, "In consideration for Met's  
 15 assignment of All-American and Coachella canal lining  
 16 water rights to the authority, the authority would pay  
 17 Met's lawful wheeling rate in lieu of the exchange  
 18 agreement. The Met's current published wheeling rate is  
 19 \$253 per acre-foot and is comprised of the system access  
 20 charge, water stewardship charge and power cost."  
 21 Do you see that?  
 22 **A. I do.**  
 23 Q. In this memo, at any point, do you tell the  
 24 water policy committee when you're laying this out that  
 25 you think those charges are unlawful?

1480



1 **A. In the public sessions we did not.**  
 2 Q. Go back to my question. In this memo.  
 3 **A. In the memo, no, we did not.**  
 4 Q. Did you ever write a memo to your board, did  
 5 you, considering these various proposals and leading up  
 6 to the execution of the agreement, did you personally  
 7 write a memo to your board at any point which indicates  
 8 that any of these charges are unlawful?  
 9 **A. We never provided any written documentation to**  
 10 **our board related to this. It was never in writing.**  
 11 Q. Related to this --  
 12 **A. Related to our belief that Met's wheeling rate**  
 13 **at that time was not lawful. We did not provide**  
 14 **anything in writing to the board on that.**  
 15 Q. It wasn't important enough to include in any of  
 16 the documents?  
 17 **A. Oh, not in the documents. It was absolutely**  
 18 **important for the board to know that what our concerns**  
 19 **were about Met's rates not being lawful and those -- and**  
 20 **those discussions, and there were many of those**  
 21 **discussions were held with our board.**  
 22 Q. You don't have anything in writing that you can  
 23 share with us?  
 24 **A. We do not provide any written documentation to**  
 25 **the board for closed session items.**

1481

1 Q. So this is something that -- this view about  
 2 the illegality is something you wanted to keep in closed  
 3 session?  
 4 **A. Absolutely.**  
 5 Q. You regarded that as something that was  
 6 confidential?  
 7 **A. Absolutely.**  
 8 Q. You didn't want that to be publicly known, that  
 9 you thought these rates were --  
 10 **A. The discussions, it was not appropriate to have**  
 11 **those discussions in open session.**  
 12 THE COURT: Ma'am, you have to just let him  
 13 finish his question. Just give it a beat and then  
 14 answer.  
 15 Q. BY MR. QUINN: I am not asking about the  
 16 discussions. I am focusing on your view that these  
 17 rates were illegal. You didn't want that to be publicly  
 18 known.  
 19 **A. No, that is not true.**  
 20 Q. If you look at pages five and six, there is a  
 21 discussion of the staff, two approaches to the analysis  
 22 of the cost of Option-1 and -2.  
 23 Do you see that?  
 24 **A. Yes, I do.**  
 25 Q. And, again, each of those approaches assumes

1482

1 the \$253 rate will escalate over time, using inflation  
 2 factors ranging from two to five percent?  
 3 **A. Yes.**  
 4 Q. And, again, if we look in here, there's nothing  
 5 in here about proposed -- any other proposed alternative  
 6 scenario, like a five-year period, in terms of length of  
 7 the wheeling deal?  
 8 **A. There is not.**  
 9 Q. At the bottom of page six there is a beginning  
 10 of a summary in which you present various factors to  
 11 assist the board in assessing the risks and benefits of  
 12 Option-2. Do you see that?  
 13 **A. I do.**  
 14 Q. On the next page, page 7, you discuss supply  
 15 reliability, saying "There is no other readily available  
 16 water supply with the priority level, cost amount and  
 17 duration of water supply resulting from the canal  
 18 lining." Do you see that?  
 19 **A. I do.**  
 20 Q. How did you know that, that there wasn't other  
 21 similar available water supply?  
 22 **A. Because we had been negotiating for so long and**  
 23 **were very familiar with the Colorado River and the**  
 24 **availability of various supplies on the river.**  
 25 Q. On page 7 you indicate how the marginal cost of

1483

1 the canal lining water compares favorably to other water  
 2 transfers that range in supply costs alone --  
 3 **A. Yes.**  
 4 Q. -- between \$250 and \$300; do you see that?  
 5 **A. I do see that.**  
 6 Q. On page 8 under "Supply risks are significantly  
 7 lower," you write, and I quote, "While choosing Option-2  
 8 exposes the authority to higher wheeling costs,  
 9 comprised of Met rate components and system access  
 10 charge, stewardship and fluctuations of power costs, it  
 11 protects the authority from even greater exposure  
 12 associated with securing an alternative imported supply,  
 13 whether or not that supply" -- I'm sorry -- "securing an  
 14 alternative imported supply, whether or not that supply  
 15 comes from Met or another seller."  
 16 Did you believe that to be true at the time?  
 17 **A. Yes.**  
 18 Q. And you recommended that Option-2 be approved;  
 19 right?  
 20 **A. I did.**  
 21 Q. Notwithstanding your view that these rates are  
 22 illegal; correct?  
 23 **A. Correct.**  
 24 Q. And you concluded that this was a good deal for  
 25 San Diego, to start with the wheeling rate -- it was a

1484

1 good deal even if, worst-case scenario, if you had to  
 2 pay this illegal wheeling rate of \$253, with an  
 3 inflation factor of up to five percent over the life of  
 4 the contract, even at that scenario you were  
 5 recommending that this was a good deal for San Diego?  
 6 **A. Yes.**  
 7 MR. QUINN: If we could turn now to DTX 221,  
 8 which is not yet admitted, and to which the Plaintiff  
 9 has objected on the grounds of relevance.  
 10 THE COURT: Are you offering it now?  
 11 MR. QUINN: I am offering it, your Honor.  
 12 THE COURT: I am trying to figure out if you  
 13 are going to ask the witness some questions to lay a  
 14 foundation. Why don't you tell me what the relevance is  
 15 and then they can tell me why it's not.  
 16 MR. QUINN: This raises -- this addresses the  
 17 same issues, your Honor, about the risk, the wheeling  
 18 rate, the proposed exchange deal. It talks also about  
 19 the other related agreements, the allocation, the  
 20 quantification settlement agreement and identifies the  
 21 various risks of Option-2.  
 22 MR. KEKER: Your Honor, I think our  
 23 objection -- I know our objection as to relevance is  
 24 based on that portion that talks about everything but  
 25 what this trial about, which is the terms of the

1485

1 exchange agreement. And this going back to the motive,  
 2 the other benefits and so on is a complete red herring  
 3 to the issue of what the parties agreed to in 2003 and  
 4 5.2 of the agreement. We said before, we are all over  
 5 the place with parole evidence; we get it. But our  
 6 argument is going to be read the contract and follow it,  
 7 and none of this atmosphere and the earth cooled and  
 8 then land was formed and canals were dug and so on is  
 9 useful to making that decision.  
 10 So that's our objection, and I'll sit down.  
 11 THE COURT: I understand. I do understand your  
 12 position, you should look at the other contracts. And  
 13 part of the defense is that we should, and so it is  
 14 admissible on that basis. DTX 221 is admitted.  
 15 (Exhibit 221 was received in evidence.)  
 16 Q. BY MR. QUINN: Do you recall this -- we are now  
 17 up to September 25, 2003, just a few days, a couple of  
 18 weeks before the exchange agreement is actually signed?  
 19 **A. Yes, a few days before the deadline, where we**  
 20 **had to make a decision.**  
 21 Q. It actually was signed -- somebody help me --  
 22 do you remember the date of the exchange agreement?  
 23 **A. I want to say October 10.**  
 24 Q. I am hearing a chorus of October 10, so I think  
 25 you're right.

1486

1 You recall this PowerPoint presentation here,  
 2 DTX 221, was presented to the board at San Diego?  
 3 **A. Yes. This is our public PowerPoint**  
 4 **presentation.**  
 5 Q. You thought this was accurate?  
 6 **A. Yes.**  
 7 Q. You wouldn't have submitted it otherwise?  
 8 **A. Yes.**  
 9 Q. If you turn, please, to slide 2.  
 10 Fair to say that this shows that San Diego --  
 11 this pie here shows that San Diego was fairly dependent  
 12 on Metropolitan for their water supply?  
 13 **A. In 1991 we were 95 percent dependent.**  
 14 Q. Do you know what that was in 2003?  
 15 **A. In 2003 we had reduced it to maybe -- I am**  
 16 **going to say maybe 75 percent or so, 80 percent.**  
 17 Q. Would it be true to say that San Diego had, for  
 18 a long time, sought to secure its own independent supply  
 19 of water?  
 20 **A. Yes.**  
 21 Q. And if you turn, please, to slide 21, the  
 22 heading at the top is "Option-2, Financial  
 23 Risk/Benefit."  
 24 Here you identify the risk under Option-2,  
 25 risk: "Exposure to MWD wheeling rate."

1487

1 Do you see that?  
 2 **A. Yes.**  
 3 Q. Under that exchange agreement that had already  
 4 been in place, which would have been Option-1, for at  
 5 least 30 years you knew what the wheeling charges were  
 6 going to be; correct?  
 7 **A. Correct.**  
 8 Q. Because there was -- that starts out at a  
 9 certain number, \$80 and \$90, and then an index to  
 10 increases; right?  
 11 **A. Yes.**  
 12 Q. But you didn't have that under the proposal  
 13 under Option-2?  
 14 **A. Correct.**  
 15 Q. The risk was, it says here, "Exposure to the  
 16 MWD wheeling rate." You mean for the term of the  
 17 contract; right?  
 18 **A. Certainly for the first five years we were**  
 19 **exposed to it -- to Met's wheeling rate. And then after**  
 20 **five years, depending on what the Water Authority chose**  
 21 **to do, we were exposed to the lawful wheeling rate.**  
 22 Q. I mean, even under San Diego's interpretation,  
 23 if we look at that exchange agreement, we won't see  
 24 anything in there specifying what the price would be for  
 25 any year, you know, years two to five or after five?

1488

1 **A. We have -- yes, there's nothing in the**  
 2 **agreement that talks about what a specific dollar amount**  
 3 **would be after year five.**  
 4 Q. Or what the increases would be?  
 5 **A. Correct.**  
 6 Q. There was no index, in other words, like there  
 7 was under the previous exchange agreement?  
 8 **A. Correct.**  
 9 THE COURT: Whenever you get to a good point in  
 10 the next five minutes or so, just pick a time and take a  
 11 break.  
 12 MR. QUINN: Why don't I finish this exhibit.  
 13 It won't take long.  
 14 THE COURT: Sure.  
 15 Q. BY MR. QUINN: And then you say, you describe  
 16 here the cost for benefit received from canal lining.  
 17 You describe that as, "The present value difference  
 18 between the 1998 exchange agreement cost and the MWD  
 19 wheeling rate cost for 35 years." Do you see that?  
 20 **A. I do.**  
 21 Q. And it refers there, below that, to "Inflation  
 22 sensitivity for the wheeling rate." Do you see that?  
 23 **A. I do.**  
 24 Q. That is something that needs to be considered?  
 25 **A. Yes.**

1489

1 Q. So it is still anticipated that San Diego would  
 2 pay the MWD wheeling rate for 35 years and that rate  
 3 would increase over time; correct?  
 4 **A. Yes. As I explained earlier, we had a range of**  
 5 **escalations that we used to determine what we felt was**  
 6 **the maximum wheeling rate that we would be exposed to.**  
 7 Q. So if we look at the present value analysis  
 8 that's done here, and you are kind of summarizing here,  
 9 that present value analysis, again, was based on an  
 10 assumption that the Met wheeling rate would escalate  
 11 over the existing rate of the life term of the contract?  
 12 **A. Correct.**  
 13 Q. If we turn to slide 22, "Option-2, financial  
 14 risk analysis," that identifies what we have been  
 15 talking about, the price under the 1998 agreement as \$97  
 16 an acre-foot for 2003. Do you see that?  
 17 **A. Yes.**  
 18 Q. It goes on to say, "Risk is in difference  
 19 between Met wheeling rate cost and wheeling rate cost  
 20 under the exchange agreement." And using the numbers in  
 21 the slide the risk was the difference between \$253 and  
 22 \$97 per acre-foot or \$156 per acre-foot with an  
 23 inflation factor for each?  
 24 **A. Yes.**  
 25 Q. That was the important information that you

1490

1 were presenting to the board in making this decision;  
 2 correct?  
 3 **A. Absolutely.**  
 4 Q. It says, "The present value of differential is  
 5 the cost of getting the canal lining water benefit."  
 6 Right?  
 7 **A. Right.**  
 8 Q. So the board understood that the canal lining  
 9 water was a trade-off for the payment of the existing  
 10 Met wheeling rate plus an inflation factor?  
 11 **A. I don't think that's exactly correct.**  
 12 **I think that they felt that the canal lining**  
 13 **project was a trade for giving up the 1998 exchange**  
 14 **agreement for the exchange agreement that was proposed**  
 15 **in -- that now is the 2003. It is not correct that we**  
 16 **traded absolutely the canal lining project for the Met**  
 17 **determined wheeling rate for 45 years.**  
 18 Q. In terms of the analysis that was presented to  
 19 the board --  
 20 **A. Yes. In terms of the analysis, yes.**  
 21 Q. -- it was presented to the board, and what you  
 22 were asking the board to make its decision based on, you  
 23 were presenting them this present value analysis and  
 24 comparing the cost.  
 25 In terms of the analysis that was presented to

1491

1 the board --  
 2 **A. Yes. In terms of the analysis, yes.**  
 3 Q. It was presented to the board, and what you  
 4 were asking the board to make its decision based on, you  
 5 were presenting them this present value analysis and  
 6 comparing the cost; correct?  
 7 **A. Right. We were comparing the costs and the**  
 8 **maximum exposure of costs.**  
 9 Q. And we looked earlier at Mr. -- is it  
 10 Campbell's memorandum? -- where he talked in terms  
 11 about the consideration for the canal lining water  
 12 paying the wheeling rate; do you recall that?  
 13 **A. Yes.**  
 14 Q. You understand that -- I mean, you don't have  
 15 any disagreement with that? That was part of the  
 16 consideration, forgetting this huge volume of water for  
 17 110 years was agreeing to pay this much increased  
 18 wheeling rate; correct?  
 19 **A. Yes, yes. For that five years.**  
 20 Q. And that was -- those were key points in the  
 21 deal; fair?  
 22 **A. Yes.**  
 23 Q. They are reflected in the -- that deal, those  
 24 key points of this deal are reflected in different  
 25 documents, the exchange agreement and the allocation

1492

1 agreement; correct?  
 2 **A. Yes.**  
 3 Q. You can't just read one of those documents to  
 4 have an understanding of what the deal was; correct?  
 5 **A. The total deal?**  
 6 Q. Yes.  
 7 **A. It would be -- you would have to look at all**  
 8 **30-some documents in the QSA to actually understand the**  
 9 **total deal, not just one or two.**  
 10 Q. So, again, after considering all this and the  
 11 risk and benefits described in the information you gave  
 12 the board, the San Diego board approved Option-2;  
 13 correct?  
 14 **A. Yes.**  
 15 MR. QUINN: This would be a good time, your  
 16 Honor.  
 17 THE COURT: I will see everybody in 15 minutes.  
 18 Thank you very much.  
 19 (Recess.)  
 20 MR. KEKER: Your Honor, could I raise a point  
 21 that I was going to raise at the end of the day but I am  
 22 afraid if I wait it will be in a rush for 4:00 and we  
 23 should do it now. And that is the question of time.  
 24 When we -- we have used about four hours to  
 25 present our direct case, as promised. Your order says

1493

1 we get nine hours and they get 12 hours, and just  
 2 basically we don't think that's fair. We had three  
 3 witnesses. They've got seven witnesses. I'm not sure  
 4 our clocks and your chess clock are a little bit  
 5 different. The clerk let us look at your chess clock.  
 6 We basically used, we think, us about 4:45 and  
 7 them about 5:14. What I am suggesting is you give us  
 8 equal time and we use three days in the week that you  
 9 set aside four days, and we get in 12 hours of testimony  
 10 split evenly with the rest of the witnesses, rather than  
 11 have us at a three-hour disadvantage, for what we don't  
 12 think there is any good reason.  
 13 THE COURT: Would you like to be heard?  
 14 MR. QUINN: If the Court is going to consider  
 15 that, yes. Otherwise we -- we want some more time, too.  
 16 Remember, they were telling us this could all be done  
 17 this week. We cut witnesses. Told them to send Amy  
 18 Chen home, for example. We scrambled and cut  
 19 examinations and tried to squeeze in the time we had.  
 20 They just had a damages case to put on. They say  
 21 everything else has been decided. We have affirmative  
 22 defenses. I think the Court had good reasons for not  
 23 giving both sides, at this point, the same amount of  
 24 time.  
 25 THE COURT: I have actually already -- I spent

1494

1 quite a bit of time trying to figure this out, coming up  
 2 with some rules of thumb about how to deal with the  
 3 amount of time people need on direct and cross. I don't  
 4 think anything's changed. So I'm not going to grant the  
 5 motion. I am just going to live with the time we set.  
 6 MR. KEKER: The second request, your Honor, is  
 7 that in the back of the courtroom Jessica Fromm, who is  
 8 an 8th grade teacher from Denver, is here and she wanted  
 9 to take a picture of the courtroom to show her students,  
 10 and we wondered if you had any objection to her doing  
 11 that.  
 12 THE COURT: Of course not.  
 13 MR. QUINN: I object. Mr. Kecker is going to be  
 14 in the photo.  
 15 THE COURT: That I understand. I appreciate it  
 16 if you don't take pictures of someone who is on the  
 17 witness stand. We will arrange the room. Because the  
 18 witness might object to that. You can always take a  
 19 picture of everybody after the witness has stepped down,  
 20 if you want. If anybody else has any objection to being  
 21 in a picture, please just make that known and move when  
 22 the picture is being taken.  
 23 Let's proceed.  
 24 Q. BY MR. QUINN: Miss Stapleton, I would like to  
 25 read to you again some testimony from Mr. Slater, San

1495

1 Diego's person most knowledgeable. And this will be  
 2 from page 64 of his deposition, lines 14 to 25.  
 3 "Q I want to jump back to the  
 4 2003 agreement for a second.  
 5 I'm jumping back here like  
 6 Marty McFly. I'm jumping  
 7 between time frames here.  
 8 "A I'm not Marty McFly.  
 9 "Q Okay. Get that on the  
 10 record. 2003, the negotiations  
 11 for the 2003 agreement, was it  
 12 ever discussed excluding -- did  
 13 any party ever propose  
 14 excluding State Water Project  
 15 costs from the price -- from  
 16 the price, the contract price  
 17 to be charged under that  
 18 agreement?  
 19 "A I do not recall that, no."  
 20 Was Mr. Slater wrong about that?  
 21 **A. He was not. We did not propose a lower price.**  
 22 Q. And you also -- at no point did San Diego in  
 23 negotiations for that agreement, Mr. Slater, the person  
 24 most knowledgeable testified, never proposed taking out  
 25 the State Water Project costs from the wheeling rate, in

1496

1 connection with the negotiation of that agreement;  
 2 correct?  
 3 **A. For the price that started, that we started**  
 4 **within the exchange agreement?**  
 5 Q. At no point, did any party ever propose  
 6 excluding State Water Project costs from the price, the  
 7 contract price to be charged under that agreement; is  
 8 that true?  
 9 **A. That is true.**  
 10 Q. So is it your testimony, just reading between  
 11 the lines, Miss Stapleton, are you saying that you  
 12 brought up with Met excluding State Water Project costs  
 13 in year two?  
 14 **A. No.**  
 15 Q. Year three?  
 16 **A. No.**  
 17 Q. Four?  
 18 **A. No.**  
 19 Q. For any year?  
 20 **A. Yes.**  
 21 Q. What year did you propose backing out the State  
 22 Water Project costs on, you personally?  
 23 **A. Yes. In year six or beyond, that we had to**  
 24 **come to some agreement in that we believed the State**  
 25 **water projects were not lawfully included in the rates.**

1497

1 Q. And who did you propose that to on the Met  
 2 side?  
 3 **A. Dennis Underwood.**  
 4 Q. Anyone else?  
 5 **A. I believe it was referenced among the group,**  
 6 **which would be the Met team and the Water Authority**  
 7 **team.**  
 8 Q. I am trying to find out who, other than  
 9 Mr. Underwood, you say you proposed taking State Water  
 10 Project costs out after the five years you identified --  
 11 **A. I personally?**  
 12 Q. Yes.  
 13 **A. I personally?**  
 14 Q. Yes.  
 15 **A. No. It would be just Mr. Underwood.**  
 16 Q. And sadly he's deceased?  
 17 **A. Yes, unfortunately.**  
 18 Q. By 2005 the 2003 exchange agreement had been in  
 19 effect for over a year?  
 20 **A. Correct.**  
 21 Q. Met initially billed San Diego for conveyance  
 22 charges at that initial price of \$253?  
 23 **A. Yes.**  
 24 Q. And over the next five years that price  
 25 escalated, just as San Diego had anticipated in those

1498

1 projections that you presented to the board?  
 2 **A. It escalated. I can't tell you if it escalated**  
 3 **between the two and five percent. I do not recall.**  
 4 Q. But it did escalate every year?  
 5 **A. Yes, it did.**  
 6 Q. In 2005, it's true to say that San Diego did  
 7 not write to Metropolitan saying that the rates were  
 8 unlawful?  
 9 **A. Correct.**  
 10 Q. And in 2005, San Diego did not make any claim  
 11 with Met that charging a price based on these unlawful  
 12 rates was a breach of contract?  
 13 **A. Correct.**  
 14 Q. And San Diego, in 2005, did not object in  
 15 writing to the price or to any invoice; true?  
 16 **A. Correct.**  
 17 Q. And that would be true if I asked you those  
 18 same questions for 2006, 2007, 2008, 2009, your answers  
 19 would be the same? Do you want me to go through them?  
 20 **A. I believe we started some dialogue and there**  
 21 **may be in writing some references to us beginning --**  
 22 **wanting to talk about the negotiations for the wheeling**  
 23 **rate.**  
 24 Q. Is there any writing that you can point us to  
 25 in any of those years where San Diego wrote to Met,

1499

1 prior to 2010, stating that the rates being charged were  
 2 unlawful?  
 3 **A. I cannot go to any specific document. I cannot**  
 4 **recall any right now.**  
 5 Q. You cannot recall, can't identify for us any  
 6 document in any of those years where San Diego made a  
 7 claim with Met that it was charging a price that was in  
 8 breach of contract?  
 9 **A. No.**  
 10 Q. Or even objecting in writing to the price being  
 11 charged or to any invoice before 2010?  
 12 **A. I don't recall any.**  
 13 Q. If you'd look at -- if we could turn to the  
 14 exchange agreement itself, DTX 55, PTX 65, and turn to  
 15 page 26, there is a Section 12.4(c), if you would take a  
 16 look at that.  
 17 And you recall this provision here that says,  
 18 "In the event of a dispute over the price, SDCWA shall  
 19 pay, whenever due, the full amount claimed by  
 20 Metropolitan, provided, however, during the pendency of  
 21 the dispute, Metropolitan shall deposit . . ."  
 22 You know the provision I'm referring to?  
 23 **A. I do.**  
 24 Q. Unless you want me to, I won't read the whole  
 25 paragraph.

1500

1 **A. I do know that provision.**  
 2 Q. You understood since -- at any time after 2003,  
 3 if San Diego disputed a price, it could deposit money  
 4 with Met and Met would have to keep that money in an  
 5 account until the dispute was resolved?  
 6 **A. Yes.**  
 7 Q. The first time that San Diego did that was in  
 8 February of 2011; right?  
 9 **A. Yes.**  
 10 MR. QUINN: Let's look at DTX 624, not yet  
 11 admitted. I understand there is no objection, and I  
 12 would offer it, February 10, 2010, letter from  
 13 Mr. Hentschke to Mr. Kightlinger.  
 14 MR. KEKER: No objection.  
 15 THE COURT: DTX 624 is admitted.  
 16 (Exhibit 624 was received in evidence.)  
 17 Q. BY MR. QUINN: You recognize this as a letter  
 18 from San Diego's general counsel to Mr. Kightlinger?  
 19 **A. Yes.**  
 20 Q. This is the first time San Diego asked Met to  
 21 set aside money under that Section 12.4 (c); correct?  
 22 **A. Correct.**  
 23 Q. There is nothing in that five-year provision,  
 24 sometimes referred to as a standstill or year of good  
 25 feelings, whatever -- there is nothing in that that

1501

1 prevented San Diego during that time from invoking this  
 2 deposit procedure under 12.4 (c), was there?  
 3 **A. I believe we could not challenge the rate for**  
 4 **the first five years. So unless they were charging more**  
 5 **than the Met established rate, we could not -- we**  
 6 **couldn't dispute it.**  
 7 Q. Let's take a look at that section and see what  
 8 it provides that you couldn't do in the first five  
 9 years, Section 5.2, pages 16 and 17.  
 10 I think you will see in the second line there,  
 11 it says, "For the term of this agreement neither San  
 12 Diego nor Met shall seek or support in any legislative,  
 13 administrative or judicial forum any change in the form,  
 14 substance or interpretation of any applicable law or  
 15 regulation."  
 16 Do you see that?  
 17 **A. I do.**  
 18 Q. It refers to not taking actions in legislative,  
 19 administrative or judicial forums; correct?  
 20 **A. Yes.**  
 21 Q. Does that refresh your recollection there was  
 22 nothing that prevented San Diego from invoking this 12.4  
 23 (c) procedure even during the first five years?  
 24 **A. I see that.**  
 25 Q. You are aware that from 2000 -- during this

1502

1 time frame, 2005 through 2009, Met every single year,  
 2 Metropolitan's conveyance rates were submitted for  
 3 approval by the Met board every year; correct?  
 4 **A. Yes.**  
 5 Q. You recall, if we can look at DTX 129, I think  
 6 we looked at this already, in 2005 San Diego's members  
 7 of the Met board voted for the wheeling rate which  
 8 included the State Water Project costs and the water  
 9 stewardship rate; correct?  
 10 **A. Correct.**  
 11 Q. As we discussed earlier, San Diego's delegates  
 12 to the Met board received direction from the San Diego  
 13 board as to how to vote on certain matters; right?  
 14 **A. Only -- the only one I see is the one you**  
 15 **referenced earlier. That's the only one that I have**  
 16 **seen.**  
 17 Q. Let me ask, is it generally a custom and  
 18 practice on the issue of rates that San Diego's  
 19 delegates will be instructed how to vote?  
 20 **A. No. It's actually opposite of that. They are**  
 21 **not instructed by our board of directors on how to vote.**  
 22 Q. In any event, we can see here, this is a record  
 23 of how in fact they did vote; right?  
 24 **A. Yes.**  
 25 Q. And as part of that, you know that when these

1503

1 rates and rate structures come up for vote, there's a  
 2 whole package that goes to the whole members of the  
 3 board to support the requested action; correct?  
 4 **A. Correct.**  
 5 Q. And that includes a cost of service breakdown  
 6 which specifically identifies the components of the  
 7 rates that the delegates are being asked to vote on;  
 8 correct?  
 9 **A. Correct.**  
 10 Q. So it would not be true to say, would it, that  
 11 when these things come up for vote at the Met board, the  
 12 only thing the board members can vote on is whether the  
 13 rates should be increased?  
 14 **A. That is the primary issue. But in addition, it**  
 15 **is they are aware of how the costs are allocated.**  
 16 Q. Ma'am, it would not be true to say, that when  
 17 these packages come up for review, that the only thing  
 18 the board members have an opportunity to approve is an  
 19 increase in the rates; that they have no ability to  
 20 address the rate structures?  
 21 **A. I do not know what that specific package is. I**  
 22 **don't know what the resolution is. So I don't believe I**  
 23 **can answer that accurately.**  
 24 Q. As far as you know --  
 25 **A. I do not know.**

1504

1 THE COURT: She's still talking, Mr. Quinn.  
 2 MR. QUINN: Sorry.  
 3 THE WITNESS: I just don't know. I haven't  
 4 viewed it.  
 5 Q. BY MR. QUINN: You attend some of the  
 6 Metropolitan board meetings?  
 7 A. Rarely.  
 8 Q. You know that those -- there are recordings  
 9 made of those meetings?  
 10 A. Yes.  
 11 Q. As there are recordings made of the San Diego  
 12 meetings; right?  
 13 A. Correct.  
 14 Q. So far as you are aware, did any of the San  
 15 Diego delegates to the Met board ever disclose to the  
 16 Met board that San Diego believed any of these rates  
 17 that were being voted on were unlawful?  
 18 A. During what period of time?  
 19 Q. Prior to the filing of this lawsuit.  
 20 A. I believe that they did indicate that they did  
 21 not support, did not believe that the costs were  
 22 allocated correctly.  
 23 Q. At any time -- my question -- I'm not sure --  
 24 I might have misspoken and maybe you misheard  
 25 my question.

1505

1 My question is, when these votes -- when these  
 2 rates came up annually, at any time did any -- so far as  
 3 you know, did any of the San Diego delegates inform the  
 4 Met board that the rates on the table submitted for  
 5 voting were illegal or unlawful?  
 6 A. No.  
 7 Q. Is it your understanding the board members have  
 8 fiduciary duties to other board members?  
 9 A. To other board members?  
 10 Q. To the board. To the board as a whole.  
 11 A. To the agency, yes.  
 12 Q. As members of the board they are fiduciaries?  
 13 A. Yes.  
 14 Q. It is true, isn't it, that San Diego's  
 15 delegates to the Met board also voted to approve these  
 16 conveyance rates in 2006, 2007, 2008 and 2009?  
 17 A. Yes.  
 18 Q. During the period we've been talking about,  
 19 prior to 2010, San Diego requested, on occasion, that  
 20 Met wheel water, wheel water on San Diego's behalf,  
 21 isn't that correct?  
 22 A. Yes.  
 23 Q. And San Diego wanted water wheeled through the  
 24 State Water Project facilities under Met's contract with  
 25 the State; correct?

1506

1 A. Yes.  
 2 Q. For example, if we could look at DTX 75 -- this  
 3 is in evidence -- December 1, 2008, letter to  
 4 Mr. Kightlinger from you, this is an example of a -- one  
 5 instance where San Diego was requesting that water be  
 6 wheeled through Met -- through State Water Project  
 7 facilities under Met's contract with the State; is that  
 8 correct?  
 9 A. That is correct.  
 10 Q. And San Diego requested that Met -- San Diego  
 11 knew that Met had this ability, this right to use the  
 12 State Water Project facilities for that purpose; right?  
 13 A. Yes.  
 14 Q. And San Diego knew that Met pays for those  
 15 facilities through its contract with the State; correct?  
 16 A. Yes.  
 17 Q. And San Diego, when it did that, when it  
 18 wheeled water through the State Water Project  
 19 facilities, it would pay the full Met wheeling rate for  
 20 those services without objection; correct?  
 21 A. I don't know.  
 22 Q. You don't know whether or not the wheeling rate  
 23 that San Diego was charged for wheeling through the  
 24 State Water Project facilities included the system  
 25 access rate, power rate and including the State water

1507

1 costs, you just don't know?  
 2 A. I am aware that they included that. I am not  
 3 aware if it included other costs.  
 4 Q. Okay. You are aware when you request wheeling,  
 5 transportation of water, you are going to be paying  
 6 system access rate, power rate, including the State  
 7 Water Project costs; correct?  
 8 A. Correct.  
 9 Q. And San Diego pays those charges without  
 10 objections?  
 11 A. Correct.  
 12 Q. No objection to paying those costs when you are  
 13 wheeling water through the State Water Project?  
 14 A. We did not object when we moved this water in,  
 15 it looks like, probably 2009 when we moved this water.  
 16 Q. Similarly, if the State Water Project was being  
 17 used to perform under the exchange agreement, San Diego  
 18 would have no objection to paying those costs related to  
 19 use of the State Water Project?  
 20 A. Could you explain what "objection" is?  
 21 Q. San Diego would have no issue with being  
 22 charged for use of State Water Project facilities if  
 23 they had to be used to perform the exchange agreement;  
 24 correct?  
 25 A. I don't know.

1508

1 Q. Well, the use of -- it's true, isn't it, that  
 2 the use of the State Water Project facilities was  
 3 essential to Met's performance under the exchange  
 4 agreement; it had to be done? Correct?  
 5 A. **Not necessarily.**  
 6 Q. Is it your understanding that Met could perform  
 7 the exchange agreement simply by using the Colorado  
 8 River Aqueduct exclusively?  
 9 A. **Yes.**  
 10 Q. Well, you knew, in fact, that the State Water  
 11 Project facilities would be used to deliver water under  
 12 the exchange agreement; you knew that at the time the  
 13 exchange agreement was negotiated and signed; correct?  
 14 A. **No. I knew it could be used, but I did not**  
 15 **know it would be used.**  
 16 Q. In fact, San Diego understood, at the time that  
 17 the agreement was negotiated and signed, that even a  
 18 temporary inability to use the State Water Project  
 19 facilities could cause a change in the delivery of water  
 20 to San Diego under the exchange agreement?  
 21 A. **Yes, it could.**  
 22 Q. So if we look at DTX 51, Section -- this is the  
 23 exchange agreement -- Section 3.3, pages 13 to 14. You  
 24 see where it says, "SDCWA understands that any number of  
 25 factors, including emergencies, inspection, maintenance

1509

1 or repair of Metropolitan facilities or the State Water  
 2 Project facilities may result in a temporary and  
 3 incidental modification of the delivery schedule  
 4 contemplated in paragraph 3.2." Correct?  
 5 A. **Correct.**  
 6 Q. The parties clearly contemplated that the use  
 7 of the State Water Project facilities were an essential  
 8 aspect under the exchange agreement?  
 9 A. **I don't see that. "They may result." It**  
 10 **doesn't say "they shall result."**  
 11 Q. You understood if there were a shutdown of the  
 12 State Water Project facilities, that might have certain  
 13 consequences for the schedule of the deliveries?  
 14 A. **Yes, it might.**  
 15 Q. So you understood from that that Met might well  
 16 be using the State Water Project facilities to perform  
 17 under the exchange agreement?  
 18 A. **Yes, they might.**  
 19 Q. And as a historical fact, you know that a large  
 20 portion of the water that has been delivered under the  
 21 exchange agreement has come through the State Water  
 22 Project; you know that?  
 23 A. **Yes.**  
 24 Q. Do you know how much?  
 25 A. **I do not.**

1510

1 Q. Is it more than 50 percent of the water that's  
 2 been exchanged?  
 3 A. **I don't believe so.**  
 4 Q. Is it more than a third of the water that's  
 5 been exchanged?  
 6 A. **I don't know.**  
 7 Q. Can you give us an order of magnitude?  
 8 A. **I cannot. Sorry.**  
 9 MR. QUINN: I would like to read you another  
 10 passage of Mr. Slater's deposition, Volume II, page 243,  
 11 line 20, to 244, eight.  
 12 MR. KEKER: No objection, your Honor.  
 13 THE COURT: Go ahead, please.  
 14 MR. QUINN: (Reading:)  
 15 "Q So would it be true to say  
 16 that, as of 2007, San Diego  
 17 would sue if Met did not change  
 18 the way it calculated its  
 19 wheeling rate upon -- it would  
 20 sue upon the exp- -- sometime  
 21 between the expiration of the  
 22 five-year period and ten years  
 23 after that?  
 24 "A Correct.  
 25 "Q And that was San Diego's

1511

1 state of mind as of 2007?  
 2 "A Yes.  
 3 "Q And that if I ask you that  
 4 same question about 2006, 2005,  
 5 2004, your answer would be the  
 6 same"  
 7 "A Yes.  
 8 "Q And 2008?  
 9 "A Yes."  
 10 Q. That is flatly not true, isn't it? Correct?  
 11 A. **No. We had every intention to negotiate an**  
 12 **acceptable rate with Met and knew if we were unable to**  
 13 **do so that our only alternative was lawsuit.**  
 14 Q. Mr. Slater says as of 2007 they intend -- there  
 15 would be an intention to sue.  
 16 That is simply not true as of 2007?  
 17 A. **An intention to sue, no. We did not in 2007**  
 18 **intend to sue.**  
 19 Q. When he says that San Diego's state of mind as  
 20 of 2007 that it intended to sue upon expiration of the  
 21 five-year period, that's simply wrong?  
 22 MR. KEKER: Objection, your Honor.  
 23 THE COURT: Sustained.  
 24 Q. BY MR. QUINN: Let's take a look at DTX 555,  
 25 which is admitted. This is an April 18, 2007, memo to

1512



1 the imported water committee.  
 2 **A. Yes.**  
 3 Q. On the second page, this is a memorandum  
 4 prepared by Daniel Hentschke?  
 5 **A. Yes.**  
 6 Q. Approved by you?  
 7 **A. Yes.**  
 8 Q. The last sentence reads, "The Water Authority  
 9 does not intend to litigate Met's current rate structure  
 10 but it cannot know what future actions the Met board may  
 11 take since the Met rates are established annually and  
 12 are subject to change by Met's board of directors."  
 13 Do you see that?  
 14 **A. I do.**  
 15 Q. That is language you approved?  
 16 **A. Yes.**  
 17 Q. In 2007 there was no intention to sue; correct?  
 18 **A. Correct. We did not intend to litigate.**  
 19 Q. And this was --  
 20 Q. It was 2008 that five-year period expired?  
 21 **A. Yes.**  
 22 MR. QUINN: And then if we can look at DTX  
 23 1114. This is not yet admitted and I understand there  
 24 is no objection. I would offer it.  
 25 MR. KEKER: No objection.

1513

1 THE COURT: DTX 1114 is admitted.  
 2 (Exhibit 1114 was received into evidence.)  
 3 Q. BY MR. QUINN: Can you identify this document?  
 4 **A. This is a PowerPoint related to the MWD's work**  
 5 **plan.**  
 6 Q. If you turn to page 11, there is a reference to  
 7 "Transportation Issues re SDCWA Transfers."  
 8 **A. Yes.**  
 9 Q. And it says, "Approval of canal lining option  
 10 brought additional reliable water supplies for 110  
 11 years."  
 12 Do you see that?  
 13 **A. Yes.**  
 14 Q. After that it says, "No expectation of  
 15 litigation."  
 16 Do you see that?  
 17 **A. I do.**  
 18 Q. If you turn to page 12, "2007 Objectives," do  
 19 you see, "work in partnership with MWD" and below that  
 20 "peace treaty' expired - no litigation"?  
 21 Do you see that?  
 22 **A. Yes.**  
 23 Q. Again, as of 2007, the state of mind at San  
 24 Diego is there is no intention to sue?  
 25 **A. Correct.**

1514

1 Q. Since 2003 San Diego has received the benefits  
 2 it expected to get under the exchange agreement?  
 3 **A. Yes.**  
 4 Q. It has received that assignment of the water  
 5 and the water -- you have no criticisms of Met's  
 6 performance other than these charges which are the  
 7 subject of this case; is that true?  
 8 **A. That's true.**  
 9 Q. And San Diego has received and accepted the  
 10 benefits and Met has performed; correct?  
 11 **A. Correct.**  
 12 Q. Option-2 had that initial price of \$253 which  
 13 was assumed to escalate from there?  
 14 **A. Yes.**  
 15 Q. And the price that San Diego contends it should  
 16 pay for 2011, for example, according to your expert,  
 17 Mr. Denham is \$136 per square foot?  
 18 **A. Per acre-foot.**  
 19 Q. Per acre-foot.  
 20 **A. Yes.**  
 21 Q. So is it your understanding of the exchange  
 22 agreement San Diego is entitled to the benefits of  
 23 Option-2, the canal lining water, for 110 years and the  
 24 \$235 million, and the other thing it gets but should pay  
 25 about half of what San Diego assumed it would pay under

1515

1 option two when it was running those analyses?  
 2 **A. No. We assumed we would pay a lawful wheeling**  
 3 **rate, and we would get the benefit of the exchange**  
 4 **agreement by a lawful wheeling rate.**  
 5 Q. If I understand correctly what you're telling  
 6 us is you believe that Mr. Denham is right, that for  
 7 2011, for example, you can get all those same benefits  
 8 and only pay the \$136; correct?  
 9 **A. The benefits derived were not directly related**  
 10 **to the exchange agreement number. The benefits, the**  
 11 **totality of benefits of the QSA related to the exchange**  
 12 **agreement, the \$253.**  
 13 Q. I mean, again, not to gild the lily, I hope,  
 14 we've seen these memos that say the consideration for  
 15 the canal lining water was the wheeling rate, which  
 16 starts out \$238; right? I'm sorry. \$253?  
 17 **A. Correct.**  
 18 Q. And so San Diego's position now is it should be  
 19 able to get all those benefits anticipated under the  
 20 exchange agreement but actually it should only have to  
 21 pay much, much less than what that initial year's price  
 22 was?  
 23 **A. We should only have to pay the lawful wheeling**  
 24 **rate.**  
 25 Q. Your testimony, Miss Stapleton, was -- I was

1516

1 asking about whether you brought up taking out the State  
 2 Water Project costs, you personally brought it up with  
 3 anyone on the Met side. And you said that you did that  
 4 in -- I have 2009.  
 5 **A. About the State Water Project costs?**  
 6 Q. Yes.  
 7 **A. We raised that issue way before 2009.**  
 8 Q. I'm talking about the conversation with  
 9 Mr. Underwood.  
 10 **A. I raised that conversation with Dennis all the**  
 11 **way back to -- I mean, we were having conversations in**  
 12 **1999 or 2000, 2001, 2002, all the way up to the**  
 13 **execution of the exchange agreement.**  
 14 Q. I asked you what year did you propose backing  
 15 out the State Water Project costs on, you personally,  
 16 and you said, yes, in year six or beyond --  
 17 **A. Right.**  
 18 Q. Right?  
 19 **A. After the execution of the exchange agreement.**  
 20 Q. You did that with Mr. Underwood?  
 21 **A. No, no. Mr. Underwood had passed since then.**  
 22 Q. That is what I was going to ask. He passed in  
 23 2005?  
 24 **A. Yes. I'm sorry. I misunderstood.**  
 25 **I had ongoing discussions with Dennis Underwood**

1517

1 **in 2000, 2001, 2002, 2003. The 2009 is when the Water**  
 2 **Authority or I actually issued formal objections to the**  
 3 **State Water Project costs being included in the Met**  
 4 **rate.**  
 5 Q. Wasn't it your testimony that you said that you  
 6 did not bring -- you were asked, just reading between  
 7 the lines:  
 8 "Q Miss Stapleton, are you  
 9 saying you brought up with Met  
 10 excluding State Water Project  
 11 costs in year two?  
 12 "A No.  
 13 "Q Year three?  
 14 "A No.  
 15 "Q Year four?  
 16 "A. No.  
 17 "Q For any year?  
 18 "A Yes.  
 19 "Q What year did you propose  
 20 backing out the State Water  
 21 Project costs on you  
 22 personally?  
 23 "A Yes. In year six or  
 24 beyond. We had come to know --  
 25 come to some agreement and that

1518

1 we believed the State Water  
 2 Project costs were not lawfully  
 3 included in the rates.  
 4 "Q Who did you propose that  
 5 to on the Met side?  
 6 "A Dennis Underwood."  
 7 Was that your testimony?  
 8 **A. I'm sorry. I misunderstood then.**  
 9 **Basically my conversations with Dennis were**  
 10 **during the negotiations to 2003 and beyond, and I**  
 11 **continued those conversations with Dennis until he**  
 12 **passed in 2005.**  
 13 **The issue about 2009 was when we had formal**  
 14 **conversations about -- in 2009 we were raising the issue**  
 15 **in a much more public way.**  
 16 MR. QUINN: Can I have just a moment, your  
 17 Honor?  
 18 THE COURT: Of course.  
 19 MR. QUINN: Nothing further.  
 20  
 21 CROSS-EXAMINATION  
 22 BY MR. KEKER:  
 23 Q. With speed, Miss Stapleton, because of time.  
 24 When did San Diego raise with Met the problem  
 25 with cost allocation of the State Water Project costs?

1519

1 **A. Our first concerns regarding wheeling were in**  
 2 **1996 and they were -- we continued those dialogues for a**  
 3 **number of years.**  
 4 Q. Did -- did people that you talked to at Met  
 5 understand that you believed it was improper to allocate  
 6 State Water Project costs to the transportation rate?  
 7 MR. QUINN: Objection. Speculation.  
 8 Foundation.  
 9 THE COURT: Sustained.  
 10 Q. BY MR. KEKER: Did you talk to somebody at Met  
 11 about your objection to including State Water Project  
 12 costs in the transportation rates?  
 13 MR. QUINN: Objection. Vague. Time, as to  
 14 time.  
 15 THE COURT: Overruled.  
 16 THE WITNESS: Yes, I did.  
 17 Q. BY MR. KEKER: When?  
 18 **A. I had continuing conversations about this issue**  
 19 **with Dennis Underwood beginning in about 2000 and**  
 20 **continuing on.**  
 21 Q. To your knowledge, did San Diego staff have  
 22 similar conversations with people on Met staff objecting  
 23 to the inclusion of State Water Project costs in the  
 24 transportation rates?  
 25 **A. Yes.**

1520

1 MR. QUINN: Objection. Foundation.  
 2 Q. BY MR. KEKER: When --  
 3 THE COURT: Overruled. Give me a shot to rule  
 4 on it.  
 5 MR. KEKER: Sorry.  
 6 THE WITNESS: Yes, they did.  
 7 Q. BY MR. KEKER: When? Starting when?  
 8 MR. QUINN: Objection. Foundation.  
 9 THE COURT: Overruled.  
 10 THE WITNESS: In approximately 1997, '98, and  
 11 it continued through the execution of the exchange  
 12 agreement.  
 13 Q. BY MR. KEKER: To your knowledge did anybody at  
 14 the Water Authority ever stop saying that they believed  
 15 the State Water Project costs should not be in the  
 16 transportation rates?  
 17 A. No.  
 18 Q. What language did you use when you talked to  
 19 Vice President Underwood at Met in these many  
 20 conversations that you had about what was wrong with  
 21 including State Water Project costs in the  
 22 transportation rates?  
 23 A. I indicated to Dennis that I didn't believe  
 24 they were lawful, that it was improper to put the State  
 25 Water Project costs on transportation in lieu of supply;

1521

1 **that I thought it was inconsistent with the wheeling**  
 2 **statute.**  
 3 Q. What wheeling statute are you referring to?  
 4 A. **The Katz wheeling statute.**  
 5 Q. Do you know if that has a Water Code  
 6 designation?  
 7 A. **Yes. 1810.**  
 8 Q. Who is Mr. Katz?  
 9 A. **Mr. Katz was in the legislature and he was the**  
 10 **author of the wheeling statute.**  
 11 Q. Was Mr. Katz the author of the wheeling statute  
 12 involved in the negotiations -- in 2003, what was his  
 13 role in 2003?  
 14 A. **In 2003 Richard Katz actually was a -- was on**  
 15 **the Governor's staff and he and another individual on**  
 16 **behalf of Governor Davis participated and facilitated**  
 17 **the negotiations in 2003.**  
 18 Q. Did Mr. Katz, for example, understand there was  
 19 a dispute between San Diego and Met about how to  
 20 calculate the wheeling rate?  
 21 A. **Yes, he was aware.**  
 22 MR. QUINN: Objection. Foundation.  
 23 THE COURT: I'll sustain. We are probably  
 24 going off a little bit.  
 25 Q. BY MR. KEKER: Just generally, had this been a

1522

1 subject of a great deal of discussion and objection and  
 2 contention between San Diego and Met since the rates  
 3 were unbundled?  
 4 A. **Yes. We had many, many conversations with Met**  
 5 **staff and during this period of time trying to come to**  
 6 **resolution.**  
 7 Q. Could anybody in these agencies or involved in  
 8 this process not understand that there was a dispute  
 9 about where to allocate these State Water Project costs?  
 10 MR. QUINN: Objection. Foundation.  
 11 THE COURT: Sustained. It is argumentative.  
 12 Q. BY MR. KEKER: You mentioned something about  
 13 closed sessions and so on. Was San Diego's position  
 14 prior to 2003 about the proper allocation of State Water  
 15 Project costs, was it public or private? Was it  
 16 publicly known, publicly discussed?  
 17 A. **Yes. It was known by MWD and the member**  
 18 **agencies at Metropolitan that we disputed the inclusion**  
 19 **of the State Water Project in the wheeling rate.**  
 20 Q. When you talked about closed sessions during  
 21 Mr. Quinn's examination, what was your point about the  
 22 closed sessions?  
 23 A. **Was that we had repeated and frequent closed**  
 24 **sessions with our board of directors during the**  
 25 **negotiations of the QSA, and a huge amount of the**

1523

1 **information and the analysis were done in closed session**  
 2 **with the board as we continued to try to reach**  
 3 **agreement.**  
 4 Q. What about the water stewardship rate? When  
 5 had you directly begun communicating your concern about  
 6 the placement of the water stewardship rate costs on  
 7 transportation to anybody at Met?  
 8 A. **In about the year 2000.**  
 9 Q. And to whom did you communicate that concern  
 10 and what did you say about it?  
 11 A. **For me, it was to Dennis Underwood who was my**  
 12 **counterpart on the negotiating team of Met. And, again,**  
 13 **I indicated the water stewardship charge was directly**  
 14 **related to supply development and it didn't belong on**  
 15 **the transportation charge. I didn't believe it was**  
 16 **consistent, again, with the wheeling law.**  
 17 Q. And did you say -- did you tell him it was  
 18 improper, invalid or anything like that?  
 19 A. **Yes. The language I would use is it's improper**  
 20 **or that it's not consistent with the law or that it --**  
 21 **that is not a valid charge to the transportation or**  
 22 **system access rate.**  
 23 Q. To your knowledge did Met staff -- excuse me.  
 24 San Diego Water Authority staff communicate similar  
 25 concerns to their contemporaries at Met?

1524

1 MR. QUINN: Objection; foundation.  
 2 THE COURT: Did you overhear these  
 3 communications?  
 4 THE WITNESS: I did in some cases.  
 5 THE COURT: Tell us about what you heard.  
 6 THE WITNESS: I heard both Scott Slater, my  
 7 special counsel, and Bob Campbell, one of my staff  
 8 members, having discussions with either Brian Thomas,  
 9 who was an employee of Metropolitan, or Jeff  
 10 Kightlinger, the general counsel, about the wheeling  
 11 rate and our objections to the inclusion of certain  
 12 charges in that wheeling rate.  
 13 Q. BY MR. KEKER: By the way, was Mr. Gastelum,  
 14 who was the general manager in 2003, is he still around  
 15 and available to Met as a witness?  
 16 A. **Yes, he is around.**  
 17 Q. Miss Stapleton why did the Water Authority  
 18 agree -- let me back up. You said the \$253 wheeling  
 19 rate made up of the current system access rate, water  
 20 stewardship rate and system power rate, adding to \$253.  
 21 You said you believed at the time of the exchange  
 22 agreement that rate was not -- was illegal, was not  
 23 properly calculated. Do you remember that?  
 24 A. **Correct.**  
 25 Q. Why did San Diego agree in the exchange

1525

1 agreement to pay that rate for the initial year?  
 2 A. **For a couple reasons. We needed to make**  
 3 **modifications in the exchange agreement from 1998. We**  
 4 **had to solve some problems, which is the exchange**  
 5 **agreement term was shorter than our water transfer term**  
 6 **and we had 15 years of exposure.**  
 7 **The second issue was there was some conditions**  
 8 **precedent that we had been told by Ron Gastelum that**  
 9 **would invalidate the 1998 agreement.**  
 10 **So we decided if we could put boundaries on our**  
 11 **exposure to Met's wheeling rate and had the opportunity**  
 12 **to either negotiate something we both could live with**  
 13 **and that it was lawful, that that was worth -- that was**  
 14 **worth the risk.**  
 15 Q. You said you agreed as part of the exchange  
 16 agreement to pay Met's wheeling rate, whatever they  
 17 said, for five years?  
 18 A. **Correct.**  
 19 Q. And thereafter, what wheeling rate did you  
 20 agree to pay?  
 21 A. **The lawful wheeling rate.**  
 22 Q. Did you make sure that the agreement reflected  
 23 that agreement?  
 24 A. **Yes.**  
 25 Q. Could we look at Plaintiff's 65 and put up 5.2,

1526

1 please?  
 2 A. **I don't think I have 65.**  
 3 Q. Sorry, Miss Stapleton, I am rushing. Let's put  
 4 up 5.2 on the screen.  
 5 This is an agreement for exchange water, and in  
 6 5.2 it says the price on the date of execution is \$253;  
 7 right?  
 8 A. **Correct.**  
 9 Q. At the time was there a dispute between Met and  
 10 San Diego about whether or not that was a lawful  
 11 wheeling rate?  
 12 A. **Yes, that was.**  
 13 Q. Did Mr. Underwood understand there was a  
 14 dispute?  
 15 A. **Absolutely.**  
 16 Q. Did you understand there was a dispute?  
 17 A. **Yes.**  
 18 Q. Did anybody at Met not understand that there  
 19 was a dispute?  
 20 A. **No.**  
 21 MR. QUINN: I object. Move to strike.  
 22 THE COURT: Sustained.  
 23 Q. BY MR. KEKER: And it says, "Thereafter, the  
 24 price shall be equal to the charge or charges set by the  
 25 Met board of directors pursuant to applicable law and

1527

1 regulation."  
 2 What did that mean to you?  
 3 A. **That meant thereafter Met -- that the price**  
 4 **would be a lawful wheeling rate that was set by MWD.**  
 5 Q. And had there been some discussion about how  
 6 long San Diego would sit still if Met didn't change its  
 7 ways about cost allocation?  
 8 A. **Yes.**  
 9 Q. And what did the discussion lead to?  
 10 A. **It led to that we could not challenge the MWD**  
 11 **established rate for the first five years.**  
 12 Q. And what was the purpose for you, for San  
 13 Diego, to agree to a wheeling rate that you thought was  
 14 higher than the law permitted and to agree to it, to pay  
 15 it for five years?  
 16 A. **Because it provided an exchange agreement that**  
 17 **matched our water transfer agreement in the length of**  
 18 **time. And it got rid of the conditions precedent. So**  
 19 **we knew we would have a firm capacity within the**  
 20 **aqueduct in this exchange agreement, and we were willing**  
 21 **to take the risk.**  
 22 Q. During the negotiations, as Mr. Kightlinger  
 23 told us, did Met say we want you to agree to whatever we  
 24 say the wheeling rate is for the next 45 and maybe 75  
 25 years?

1528

1 **A. That was their initial offer to us.**  
 2 Q. And did San Diego agree to eat whatever they  
 3 wanted to call the wheel rate, whatever number they  
 4 wanted to put on it, for 45 to 75 years?  
 5 **A. Absolutely not.**  
 6 Q. What did the negotiation yield in that regard?  
 7 **A. We finally got down to a five-year time period**  
 8 **where we agreed to pay the MWD established rate, and**  
 9 **after five years we had the opportunity to seek either**  
 10 **administrative or judicial remedy.**  
 11 Q. Let's look at the next term. It says, still in  
 12 5.2, "For the term of this agreement neither San Diego  
 13 nor Met shall seek or support in any legislative,  
 14 administrative or judicial forum."  
 15 Does administrative include Met?  
 16 **A. Yes.**  
 17 Q. So you are promising you are not going to go to  
 18 Met, you are not going to go to the legislature and you  
 19 are not going to go to court for the life of this  
 20 agreement --  
 21 **A. Yes.**  
 22 Q. -- pertaining to the charge or charges set by  
 23 the board of directors. That's what that says; right?  
 24 **A. Correct.**  
 25 Q. And then it comes down and it says, "Provided

1529

1 further that, A, after the conclusion of the first five  
 2 years" --  
 3 What are the next two words?  
 4 **A. "Nothing herein."**  
 5 Q. -- "shall preclude San Diego from contesting in  
 6 an administrative or judicial forum," blah, blah, blah.  
 7 What did you understand that to mean about this  
 8 five-year period?  
 9 **A. After five years, if we were unsuccessful**  
 10 **reaching an agreement on what would be considered the**  
 11 **lawful rate, the Water Authority had the ability to**  
 12 **contest the wheeling rate that Met had established in**  
 13 **either an administrative or judicial manner.**  
 14 Q. After the five years with respect to what the  
 15 subject matter of your lawsuit could be, did you  
 16 understand that there was any condition about only  
 17 procedural or only something that didn't exist when we  
 18 started or anything, any limitation on that?  
 19 **A. Absolutely not.**  
 20 Q. Did you expect there was a possible -- did you  
 21 anticipate there was a possibility the law might change  
 22 or develop and make the wheeling situation work more  
 23 plain over the next five years?  
 24 **A. Yes. That there were some court cases**  
 25 **regarding wheeling during this period of time, and we**

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1 **thought that there may be additional court decisions**  
 2 **that might have an influence on -- an influence to help**  
 3 **clarify what a lawful wheeling rate might be.**  
 4 Q. In San Diego's mind did the term "lawful  
 5 wheeling rate" have meaning?  
 6 **A. It had essential meaning.**  
 7 Q. Was there any part of California or  
 8 constitutional law that was excluded from the term  
 9 "lawful"?  
 10 **A. No.**  
 11 Q. And in your discussions with Mr. Underwood, did  
 12 he seem to understand that, as well?  
 13 **A. He did.**  
 14 Q. Would you look at 11.1, please. 11.1 says you  
 15 have to negotiate if you have a problem, but it also  
 16 says, "San Diego shall not dispute whether the price  
 17 determined pursuant to paragraph 5.2 for the first five  
 18 years of this agreement was determined in accordance  
 19 with applicable law or regulation ('a price dispute')."  
 20 What price did you think they were talking  
 21 about that you couldn't dispute for five years?  
 22 **A. Met's wheeling rate as selected or as set by**  
 23 **the board of directors.**  
 24 Q. Where the parentheses are around "price  
 25 dispute," look over at 12.4, please, and 12.4(c), which

1531

1 says, "In the event of a dispute over the price, San  
 2 Diego shall pay when due. . ."  
 3 And then it goes and talks about the escrow  
 4 accounts?  
 5 **A. Right.**  
 6 Q. Was there anything in this agreement that  
 7 limited San Diego's ability to complain about any aspect  
 8 whatsoever of the price it was being charged by Met  
 9 after five years were over?  
 10 **A. No.**  
 11 Q. Was that something that was negotiated for  
 12 hard?  
 13 **A. Very hard.**  
 14 Q. And was that contrary to the position that Met  
 15 wanted, which is you can never challenge our prices?  
 16 **A. Yes.**  
 17 Q. That was the compromise?  
 18 **A. This was the compromise.**  
 19 Q. For five years you couldn't challenge --  
 20 THE COURT: I have to interrupt. I have  
 21 another case coming in at 4:00. I have a ferocious  
 22 amount of work to do.  
 23 Can we pick this up on our next trial date?  
 24 MR. KEKER: Yes, sir.  
 25 THE COURT: I do have some other cases. Thank

1532

1 you. I will see you next time we get together.  
2 (Evening recess was taken.)  
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1 REPORTER'S CERTIFICATE  
2  
3 STATE OF CALIFORNIA, )  
4 ) ss  
5 COUNTY OF SANTA BARBARA. )  
6  
7 I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand  
8 Reporter, in the County of Santa Barbara, State of  
9 California, hereby certify:  
10 That the court proceedings were taken down by me in  
11 stenotype at the time and place herein named and  
12 thereafter reduced to typewriting by computer-aided  
13 transcription under my direction.  
14 I further certify that I am not interested in the  
15 event of the action.  
16 WITNESS my hand this 13th day of April,  
17 2015, at Santa Barbara, California.  
18  
19  
20  
21  
22   
23 TARA SANDFORD, RPR, CSR No. 3374  
24 Certified Shorthand Reporter  
25 State of California

1534

<p><b>A</b></p> <p><b>\$100</b> 1475:10</p> <p><b>\$100,000</b> 1476:13</p> <p><b>\$136</b> 1515:17 1516:8</p> <p><b>\$156</b> 1490:22</p> <p><b>\$2</b> 1475:21</p> <p><b>\$235</b> 1452:21 1515:24</p> <p><b>\$238</b> 1516:16</p> <p><b>\$250</b> 1484:4</p> <p><b>\$253</b> 1473:13 1477:4</p> <p>1477:15,19,24</p> <p>1478:18 1480:19</p> <p>1483:1 1485:2</p> <p>1490:21 1498:22</p> <p>1515:12 1516:12,16</p> <p>1525:18,20 1527:6</p> <p><b>\$300</b> 1484:4</p> <p><b>\$500</b> 1475:13</p> <p><b>\$80</b> 1488:9</p> <p><b>\$90</b> 1488:9</p> <p><b>\$97</b> 1490:15,22</p> <p><b>a.m</b> 1357:3</p> <p><b>ability</b> 1387:22 1436:13</p> <p>1476:10 1504:19</p> <p>1507:11 1530:11</p> <p>1532:7</p> <p><b>able</b> 1380:16 1399:18</p> <p>1400:17,18 1401:2,3</p> <p>1401:15 1402:8</p> <p>1406:9 1408:10</p> <p>1409:2,3,7,9 1410:4</p> <p>1410:16,17,19</p> <p>1429:16,21 1430:5</p> <p>1441:18 1459:16</p> <p>1516:19</p> <p><b>absolute</b> 1470:1</p> <p><b>absolutely</b> 1475:11,12</p> <p>1481:17 1482:4,7</p> <p>1491:3,16 1527:15</p> <p>1529:5 1530:19</p> <p><b>accept</b> 1377:14</p> <p><b>acceptable</b> 1512:12</p> <p><b>accepted</b> 1515:9</p> <p><b>access</b> 1358:12 1402:14</p> <p>1444:15 1446:13,24</p> <p>1452:25 1459:1</p> <p>1460:20 1461:3</p> <p>1463:8 1477:5,20</p> <p>1480:19 1484:9</p> <p>1507:25 1508:6</p> <p>1524:22 1525:19</p> <p><b>account</b> 1501:5</p> <p><b>accounts</b> 1532:4</p> <p><b>accurate</b> 1382:14</p> <p>1410:6 1476:21</p> <p>1487:5</p> <p><b>accurately</b> 1373:9</p> <p>1378:14 1504:23</p>	<p><b>achieve</b> 1455:14</p> <p>1467:15 1468:4</p> <p>1469:7,18,24</p> <p><b>achievement</b> 1406:2</p> <p><b>acknowledging</b></p> <p>1441:25 1442:5</p> <p><b>acquiring</b> 1405:2</p> <p><b>acre-feet</b> 1406:5,13,23</p> <p>1407:8,18,23 1408:20</p> <p>1409:11,15,21</p> <p>1414:13,16 1415:5</p> <p>1416:9,11 1442:12</p> <p>1472:14 1474:25</p> <p>1475:1,8</p> <p><b>acre-foot</b> 1465:13</p> <p>1477:5 1480:19</p> <p>1490:16,22,22</p> <p>1515:18,19</p> <p><b>Act</b> 1371:1 1382:21</p> <p>1395:8</p> <p><b>acted</b> 1431:20</p> <p><b>action</b> 1377:11,19</p> <p>1388:16 1423:5</p> <p>1424:2 1431:11,18</p> <p>1450:20 1504:3</p> <p>1534:15</p> <p><b>actions</b> 1372:23</p> <p>1379:25 1388:14</p> <p>1405:20 1406:24</p> <p>1422:24 1423:1</p> <p>1502:18 1513:10</p> <p><b>actual</b> 1383:13</p> <p><b>adding</b> 1525:20</p> <p><b>addition</b> 1414:2</p> <p>1504:14</p> <p><b>additional</b> 1428:15,18</p> <p>1514:10 1531:1</p> <p><b>address</b> 1375:5</p> <p>1380:18 1504:20</p> <p><b>addresses</b> 1485:16</p> <p><b>administrative</b> 1371:2</p> <p>1442:20,22 1447:3</p> <p>1502:13,19 1529:10</p> <p>1529:14,15 1530:6,13</p> <p><b>admissible</b> 1486:14</p> <p><b>admission</b> 1366:20</p> <p>1376:20 1392:11,13</p> <p>1392:16</p> <p><b>admit</b> 1392:14,17</p> <p>1411:10 1439:12</p> <p><b>admitted</b> 1362:24</p> <p>1363:15,22 1364:12</p> <p>1365:7 1366:17</p> <p>1367:8,13,18,22</p> <p>1368:20,24 1369:22</p> <p>1374:22 1377:2</p> <p>1424:25 1437:1</p> <p>1439:13,20 1443:4</p>	<p>1445:10 1447:2,7</p> <p>1449:13,18 1464:10</p> <p>1470:11 1473:18,21</p> <p>1479:18,21 1485:8</p> <p>1486:14 1501:11,15</p> <p>1512:25 1513:23</p> <p>1514:1</p> <p><b>adopted</b> 1353:10</p> <p>1371:2 1379:22</p> <p>1380:8 1396:9,19</p> <p>1425:24 1431:3</p> <p><b>adoption</b> 1457:12</p> <p><b>advance</b> 1363:14</p> <p>1398:14</p> <p><b>advantage</b> 1395:1</p> <p><b>advocate</b> 1360:18</p> <p><b>advocated</b> 1361:13</p> <p><b>AF</b> 1465:12</p> <p><b>affirmative</b> 1451:12</p> <p>1494:21</p> <p><b>affirmatively</b> 1379:11</p> <p><b>afraid</b> 1493:22</p> <p><b>afternoon</b> 1443:18,19</p> <p><b>agencies</b> 1372:22</p> <p>1377:8,14,19 1378:18</p> <p>1380:6,7,7,9,11</p> <p>1382:19 1386:6,8</p> <p>1387:12 1396:3,4,8</p> <p>1396:20,21,21 1398:6</p> <p>1399:14,18 1400:10</p> <p>1400:10,12,22 1401:7</p> <p>1401:14,23 1402:16</p> <p>1403:12,15,16 1405:8</p> <p>1406:10 1410:3,19,19</p> <p>1411:23,24 1414:20</p> <p>1416:12,12 1418:15</p> <p>1419:4,7,10,16,22,25</p> <p>1420:8,21 1421:4,22</p> <p>1425:8,16 1433:2,8</p> <p>1435:14,20 1450:10</p> <p>1459:5 1523:7,18</p> <p><b>agency</b> 1371:22 1372:3</p> <p>1373:22 1375:1</p> <p>1380:19 1381:3</p> <p>1386:22 1400:6</p> <p>1401:7 1408:6 1409:7</p> <p>1420:10,15 1421:9,18</p> <p>1426:17 1427:18,19</p> <p>1428:1 1429:1</p> <p>1435:25 1450:5</p> <p>1459:3 1471:16</p> <p>1506:11</p> <p><b>agents</b> 1419:15</p> <p><b>aggregate</b> 1414:7</p> <p><b>ago</b> 1466:20 1472:17</p> <p><b>agree</b> 1414:2 1441:16</p> <p>1459:15 1462:14</p> <p>1525:18,25 1526:20</p>	<p>1528:13,14,23 1529:2</p> <p><b>agreed</b> 1386:6 1453:10</p> <p>1486:3 1526:15</p> <p>1529:8</p> <p><b>agreeing</b> 1379:12</p> <p>1428:2 1492:17</p> <p><b>agreement</b> 1358:24</p> <p>1360:8,10 1361:23</p> <p>1364:19 1365:12,15</p> <p>1365:17 1366:8</p> <p>1369:18 1370:1,6,12</p> <p>1370:15,20 1371:5</p> <p>1373:16 1374:2</p> <p>1375:6 1378:24</p> <p>1379:5,9,10 1380:4</p> <p>1381:7 1382:6,15</p> <p>1385:11 1389:11</p> <p>1425:4 1426:18</p> <p>1427:1,20 1429:8,12</p> <p>1452:7,20 1453:25</p> <p>1454:4 1463:18</p> <p>1465:3,8 1469:8,24</p> <p>1470:16 1472:17</p> <p>1473:15 1477:2,13,13</p> <p>1480:18 1481:6</p> <p>1485:20 1486:1,4,18</p> <p>1486:22 1488:3,23</p> <p>1489:2,7,18 1490:15</p> <p>1490:20 1491:14,14</p> <p>1492:25 1493:1</p> <p>1496:4,11,18,23</p> <p>1497:1,4,7,24</p> <p>1498:18 1500:14</p> <p>1502:11 1508:17,23</p> <p>1509:4,7,12,13,17,20</p> <p>1509:23 1510:8,17,21</p> <p>1515:2,22 1516:4,10</p> <p>1516:12,20 1517:13</p> <p>1517:19 1518:25</p> <p>1521:12 1524:3</p> <p>1525:22 1526:1,3,5,9</p> <p>1526:16,22,23 1527:5</p> <p>1528:16,17,20</p> <p>1529:12,20 1530:10</p> <p>1531:18 1532:6</p> <p><b>agreements</b> 1380:13,13</p> <p>1422:25 1425:8</p> <p>1485:19</p> <p><b>agricultural</b> 1373:5</p> <p><b>ahadlock@kvn.com</b></p> <p>1354:7</p> <p><b>ahead</b> 1388:11 1397:12</p> <p>1413:14 1417:4</p> <p>1423:17 1427:13</p> <p>1463:2 1468:10</p> <p>1511:13</p> <p><b>aimed</b> 1398:5</p> <p><b>Alameda</b> 1354:17</p>	<p><b>All-American</b> 1468:13</p> <p>1480:15</p> <p><b>allocate</b> 1520:5 1523:9</p> <p><b>allocated</b> 1504:15</p> <p>1505:22</p> <p><b>allocation</b> 1358:15</p> <p>1375:24 1442:4</p> <p>1454:12 1485:19</p> <p>1492:25 1519:25</p> <p>1523:14 1528:7</p> <p><b>allocations</b> 1358:20</p> <p>1359:3 1374:6 1379:7</p> <p>1379:13 1430:25</p> <p><b>allow</b> 1423:16 1433:16</p> <p>1437:10 1438:19</p> <p><b>allowed</b> 1422:4,10,20</p> <p>1423:3 1436:10</p> <p>1454:14</p> <p><b>Alternate</b> 1472:3</p> <p><b>alternative</b> 1461:6</p> <p>1466:7 1483:5</p> <p>1484:12,14 1512:13</p> <p><b>ambiguous</b> 1415:3</p> <p><b>ameliorate</b> 1381:21</p> <p><b>amendment</b> 1377:9</p> <p>1396:14</p> <p><b>amendments</b> 1396:7,18</p> <p>1396:19,23</p> <p><b>amount</b> 1368:13</p> <p>1409:11 1420:19,20</p> <p>1421:9 1435:23</p> <p>1446:22 1483:16</p> <p>1489:2 1494:23</p> <p>1495:3 1500:19</p> <p>1523:25 1532:22</p> <p><b>amounts</b> 1365:16</p> <p>1368:4 1420:8</p> <p><b>Amy</b> 1470:18,21</p> <p>1494:17</p> <p><b>analyses</b> 1516:1</p> <p><b>analysis</b> 1420:5</p> <p>1428:11 1465:7,18</p> <p>1466:22 1474:15</p> <p>1479:5 1482:21</p> <p>1490:7,9,14 1491:18</p> <p>1491:20,23,25 1492:2</p> <p>1492:5 1524:1</p> <p><b>analyzed</b> 1428:19</p> <p><b>Angeles</b> 1354:14,18</p> <p>1470:23</p> <p><b>ANN</b> 1534:7</p> <p><b>annual</b> 1415:7 1416:2</p> <p><b>annually</b> 1474:25</p> <p>1475:9 1478:11</p> <p>1506:2 1513:11</p> <p><b>answer</b> 1386:16,16</p> <p>1388:12 1392:20</p> <p>1427:4,5 1436:21</p>
--	--	--	---	---

<p>1459:20 1466:19 1482:14 1504:23 1512:5 <b>answered</b> 1469:3 <b>answers</b> 1499:18 <b>anticipate</b> 1530:21 <b>anticipated</b> 1490:1 1498:25 1516:19 <b>anticipating</b> 1478:15 <b>anybody</b> 1461:23,23 1470:3 1495:20 1521:13 1523:7 1524:7 1527:18 <b>anything's</b> 1495:4 <b>apologies</b> 1439:16 <b>apologize</b> 1381:23 1439:13 <b>Apparently</b> 1450:25 <b>appear</b> 1471:2 <b>APPEARANCES</b> 1354:1 <b>appears</b> 1369:19 1436:22 1437:7,12 1445:14,25 <b>applicability</b> 1382:20 <b>applicable</b> 1370:25 1502:14 1527:25 1531:19 <b>applications</b> 1419:22 <b>applied</b> 1458:25 <b>applies</b> 1379:17 <b>apply</b> 1383:24 1384:3,6 1436:13 <b>applying</b> 1419:16,17 <b>appreciate</b> 1381:18 1398:20 1495:15 <b>approaches</b> 1357:10 1478:2,5 1482:21,25 <b>appropriate</b> 1366:24 1456:23 1461:7 1482:10 <b>approval</b> 1370:16 1441:18 1463:18 1503:3 1514:9 <b>approve</b> 1504:18 1506:15 <b>approved</b> 1448:2,13 1479:15 1480:5 1484:18 1493:12 1513:6,15 <b>approximately</b> 1479:25 1521:10 <b>April</b> 1353:11,18 1357:2 1438:2 1512:25 1534:16 <b>aqueduct</b> 1370:3 1509:8 1528:20 <b>area</b> 1370:4 1373:6</p>	<p>1406:17 1422:18 1441:9,12 <b>areas</b> 1405:20 <b>argue</b> 1366:25 1412:8 1472:21 <b>argument</b> 1486:6 <b>argumentative</b> 1423:13 1423:15 1468:6 1523:11 <b>arrange</b> 1495:17 <b>arrangement</b> 1436:7 1441:17 1464:1 <b>arranges</b> 1358:10 <b>articulate</b> 1466:5 <b>articulated</b> 1413:18 1418:7 <b>aside</b> 1365:15 1366:1 1368:4,8,8,13 1386:6 1415:4 1494:9 1501:21 <b>asked</b> 1366:24 1377:8 1377:10 1386:11,18 1424:9 1438:15 1439:15 1442:22 1499:17 1501:20 1504:7 1517:14 1518:6 <b>asking</b> 1367:1 1389:1 1401:17 1414:23,24 1465:5 1482:15 1491:22 1492:4 1517:1 <b>aspect</b> 1510:8 1532:7 <b>assessing</b> 1483:11 <b>assigned</b> 1470:22 <b>assignment</b> 1476:24 1480:15 1515:4 <b>assists</b> 1474:23 <b>assist</b> 1483:11 <b>associated</b> 1377:23 1406:5,6 1407:9 1415:24 1416:14,15 1416:20 1428:7 1453:13 1484:12 <b>ASSOCIATES</b> 1353:22 <b>assume</b> 1384:5 1465:24 1476:16 1478:16 <b>assumed</b> 1478:5,12 1515:13,25 1516:2 <b>assumes</b> 1482:25 <b>assuming</b> 1468:18 1479:3 <b>assumption</b> 1465:19 1490:10 <b>at-a-glance</b> 1449:4 <b>atmosphere</b> 1486:7 <b>attached</b> 1376:12</p>	<p>1474:6,7 1476:17 <b>attachment</b> 1424:23 1474:9,14 1476:15 <b>attempted</b> 1380:23 1425:10 1433:6,18 <b>attend</b> 1505:5 <b>attended</b> 1445:24 <b>attention</b> 1425:2 <b>attraction</b> 1373:4 <b>attributable</b> 1416:16 1417:9,12 1429:22,24 1430:6,9 <b>AUDREY</b> 1354:4 <b>August</b> 1376:2 1384:22 1385:1 1424:17 1463:24 <b>authenticity</b> 1366:22 <b>author</b> 1522:10,11 <b>authorities</b> 1422:19 <b>authority</b> 1353:6 1360:1,12,17 1361:7 1361:13 1362:1,2,14 1363:4 1364:2 1365:10,19 1370:12 1370:15,19 1371:6 1374:16 1375:2,5,18 1376:3 1378:5 1382:13 1394:13,18 1395:1,9,20 1396:10 1396:14,17 1422:23 1424:16 1443:21,25 1444:4,6,15 1445:15 1445:16,21 1449:5,8 1449:20 1450:5 1455:7 1462:20,21,24 1463:6 1464:19 1466:8 1480:16,16 1484:8,11 1488:20 1498:6 1513:8 1518:2 1521:14 1524:24 1525:17 1530:11 <b>Authority's</b> 1356:14 1364:17 1365:24 1373:15 <b>availability</b> 1368:9 1483:24 <b>available</b> 1377:18 1391:12 1405:4 1472:4 1483:15,21 1525:15 <b>AVEK</b> 1369:18 1370:1 <b>AVEK's</b> 1370:4 <b>avoid</b> 1383:20 1417:21 1428:16 <b>avoidance</b> 1417:23 <b>avoided</b> 1415:23 <b>avoiding</b> 1416:15,16 1417:10,12 1428:12</p>	<p><b>aware</b> 1359:14,17 1388:2 1404:2 1405:6 1405:10 1410:10 1452:9,12 1461:16,21 1502:25 1504:15 1505:14 1508:2,3,4 1522:21</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 1354:13 1475:5,22 <b>back</b> 1369:3,9 1382:5 1384:7 1389:24 1390:14 1393:22 1395:23 1400:4,7 1404:3 1405:7,8 1428:6 1429:14 1444:7 1445:22 1451:23 1453:23 1466:13 1467:21 1468:25 1481:2 1486:1 1495:7 1496:3 1496:5 1517:11 1525:18 <b>background</b> 1372:11 <b>backing</b> 1497:21 1517:14 1518:20 <b>backward-looking</b> 1428:10 <b>Barbara</b> 1534:4,8,17 <b>bargain</b> 1379:6 <b>based</b> 1373:5 1384:16 1386:23 1415:10 1454:22 1468:3,20 1469:6 1471:5 1485:24 1490:9 1491:22 1492:4 1499:11 <b>bashful</b> 1455:6,9 <b>basically</b> 1494:2,6 1519:9 <b>basins</b> 1380:23 <b>basis</b> 1413:24 1415:7 1416:2,8 1417:23 1418:2 1486:14 <b>Bates</b> 1448:24 <b>Battery</b> 1353:24 1354:6 <b>bears</b> 1445:17 <b>beat</b> 1482:13 <b>beating</b> 1477:19 <b>beginning</b> 1400:1 1404:19 1468:8 1483:9 1499:21 1520:19 <b>begun</b> 1524:5 <b>behalf</b> 1387:11 1396:8 1437:11 1506:20 1522:16</p>	<p><b>belief</b> 1454:15 1481:12 <b>believe</b> 1362:5,8 1376:23 1378:6 1388:9 1395:24 1415:18 1422:16 1428:19 1433:20 1453:8 1467:9 1484:16 1498:5 1499:20 1502:3 1504:22 1505:20,21 1511:3 1516:6 1521:23 1524:15 <b>believed</b> 1454:1,4,13,22 1454:24 1455:1 1461:12 1467:20 1497:24 1505:16 1519:1 1520:5 1521:14 1525:21 <b>believes</b> 1463:7 <b>belong</b> 1524:14 <b>benefit</b> 1400:15,25 1402:22 1411:20,24 1412:1,5,7,8 1413:7 1413:20 1414:6,10,15 1414:17,24,25 1415:3 1415:6,8 1416:20 1418:4 1419:7 1421:9 1421:10,12,13,18 1441:8 1450:12 1489:16 1491:5 1516:3 <b>benefiting</b> 1414:20 <b>benefits</b> 1390:10,20 1400:12,22 1404:21 1404:21 1412:24 1413:17 1414:4 1415:11,17,23 1416:13 1417:9 1419:18 1421:3,8,21 1426:22 1428:7,7 1433:14 1442:11 1483:11 1486:2 1493:11 1515:1,10,22 1516:7,9,10,11,19 <b>best</b> 1467:7 1469:5 <b>better</b> 1381:23 1469:12 <b>beyond</b> 1360:2 1403:18 1414:16 1497:23 1517:16 1518:24 1519:10 <b>bill</b> 1402:25 1405:17 1433:21 1434:2,14,21 <b>billed</b> 1498:21 <b>billing</b> 1434:19 <b>billion</b> 1475:22 <b>billions</b> 1475:5,20 1476:6,8 <b>binder</b> 1364:23</p>
---	--	--	---	---



<p>1412:13 1436:15,16 1436:16 1445:4 <b>binders</b> 1359:18 <b>bit</b> 1361:21 1372:11 1385:24 1428:25 1494:4 1495:1 1522:24 <b>blah</b> 1530:6,6,6 <b>block</b> 1365:2 <b>board</b> 1369:17 1370:16 1371:2,7 1377:16 1383:14 1395:25 1396:8 1424:5 1425:7 1425:18,19,24 1426:4 1426:11 1427:24 1430:21,24 1431:4,7 1431:10,15,20,23 1440:18 1441:14,19 1441:22,24 1442:2 1448:13 1449:8,20 1450:6,18 1451:7,8 1451:25 1455:20 1465:2 1466:24 1467:3,19,23 1468:12 1468:14,21,25 1469:11,12,15,22 1470:3 1474:3 1476:18 1478:11 1480:1 1481:4,7,10 1481:14,18,21,25 1483:11 1487:2 1491:1,8,19,21,22 1492:1,3,4 1493:12 1493:12 1499:1 1503:3,7,12,13,21 1504:3,11,12,18 1505:6,15,16 1506:4 1506:7,8,9,10,12 1506:15 1513:10,12 1523:24 1524:2 1527:25 1529:23 1531:23 <b>boardroom</b> 1360:20 1361:14 <b>Bob</b> 1474:15 1525:7 <b>bond</b> 1368:16 <b>bottom</b> 1364:20 1385:18 1464:13 1466:4 1483:9 <b>Boulder</b> 1395:8 <b>boundaries</b> 1526:10 <b>Braunig</b> 1354:5 1383:18 1402:3 1404:7 1411:15,18 1412:17 1413:3,12,15 1415:13 1416:22 1417:5 1423:19 1424:19,24 1425:2,16</p>	<p>1426:5,10,14 1427:9 1427:17 1434:8 1436:23 1437:3,17,21 1438:13,23 1439:4,17 1439:20 1440:1 1442:15 1443:2 <b>breach</b> 1357:12 1452:6 1452:12 1499:12 1500:8 <b>break</b> 1381:16 1443:1 1489:11 <b>breakdown</b> 1504:5 <b>breaks</b> 1363:21 1434:21 <b>Breaux</b> 1355:22 <b>Brian</b> 1359:7 1525:8 <b>briefs</b> 1439:2 <b>bring</b> 1379:25 1436:14 1518:6 <b>broad</b> 1380:24 <b>broken</b> 1433:22 <b>brought</b> 1357:8 1497:12 1514:10 1517:1,2 1518:9 <b>Brown</b> 1353:22 1382:21 <b>bucket</b> 1358:11,11,12 <b>buckets</b> 1358:9,14,16 <b>building</b> 1470:24 <b>built</b> 1477:22 <b>bullet</b> 1472:12 1474:22 <b>bullets</b> 1472:4 <b>Bureau</b> 1391:13 1395:7 1395:14 1398:11 <b>business</b> 1467:11 1468:2 <b>businesses</b> 1406:17 <b>buy</b> 1399:10 1412:3</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>c</b> 1501:21 1502:2,23 <b>CA</b> 1353:24 <b>calculate</b> 1390:17 1414:13,15,17 1476:10 1522:20 <b>calculated</b> 1414:6,25 1415:6 1511:18 1525:23 <b>calculates</b> 1414:10 <b>calculating</b> 1415:8 <b>calculation</b> 1368:10 1390:19 1394:21 1414:16 1415:4,10,22 1475:16 1479:5 <b>calendar</b> 1414:9 <b>California</b> 1353:1,9,11 1353:17 1354:6,11,14 1354:18 1357:1</p>	<p>1369:15 1370:2 1386:25 1387:8 1388:18 1397:21 1398:4,8 1399:6 1410:2 1419:8 1438:1 1531:7 1534:3,9,17 1534:25 <b>call</b> 1375:12 1381:1,3 1389:17 1455:23 1529:3 <b>called</b> 1380:20 1395:6 1397:6 1431:15 1443:9 1457:21 <b>calling</b> 1397:9 <b>calls</b> 1380:22,22 1402:4 1443:5 <b>Campbell</b> 1464:13,14 1464:20 1465:1,5 1474:6,15 1476:16 1478:1 1480:7 1525:7 <b>Campbell's</b> 1492:10 <b>canal</b> 1465:6,9,15 1466:6 1468:13 1472:25 1474:23,24 1476:25 1477:3 1479:12 1480:15 1483:17 1484:1 1489:16 1491:5,8,12 1491:16 1492:11 1514:9 1515:23 1516:15 <b>canals</b> 1486:8 <b>Canyon</b> 1395:8 <b>capacity</b> 1387:9,10,16 1387:23 1388:1 1404:25 1405:4 1528:19 <b>capital</b> 1415:23 1428:20,22 <b>care</b> 1363:20 <b>carrying</b> 1418:25 <b>case</b> 1353:7 1357:8 1368:7 1369:4 1393:21 1398:23 1452:6 1459:1 1467:6 1467:13,14,15,24,25 1468:5 1469:7,20 1470:2 1493:25 1494:20 1515:7 1532:21 <b>cases</b> 1525:4 1530:24 1532:25 <b>cash</b> 1421:13 <b>catch</b> 1422:7 <b>categories</b> 1399:15 <b>cause</b> 1429:2,4,9 1509:19 <b>caused</b> 1430:10,12</p>	<p><b>Central</b> 1440:24 1441:1,2 <b>CEO</b> 1370:14 1372:13 <b>certain</b> 1371:17 1382:25 1387:4 1390:5,10 1392:21 1393:16 1426:22 1440:25 1457:19 1488:9 1503:13 1510:12 1525:11 <b>certainly</b> 1364:21 1374:7 1386:1 1411:6 1444:19 1454:20 1475:8,9,12 1476:12 1488:18 <b>CERTIFICATE</b> 1534:1 <b>Certified</b> 1534:7,24 <b>certify</b> 1534:9,14 <b>cetera</b> 1386:8 1448:24 <b>challenge</b> 1371:23 1372:3,25 1373:3,16 1374:5 1375:3,6,18 1375:23 1377:15,17 1378:18,25 1379:7,13 1380:3 1502:3 1528:10 1532:15,19 <b>challenged</b> 1461:18 <b>challenges</b> 1382:23 1384:1 <b>challenging</b> 1377:11 1384:5 <b>chance</b> 1357:7 1376:19 <b>change</b> 1359:3 1372:2 1375:24 1378:18 1424:10,11 1431:5 1440:16 1441:15,19 1441:25 1442:2 1456:24 1468:19 1471:22 1502:13 1509:19 1511:17 1513:12 1528:6 1530:21 <b>changed</b> 1434:19 1495:4 <b>changes</b> 1360:19 1361:16 1377:17 1378:22 1425:20 1427:12 1431:19 1442:10 <b>Changing</b> 1428:25 <b>characterization</b> 1389:25 1414:21 <b>characterized</b> 1390:2 1390:25 1394:7 <b>charge</b> 1390:18 1452:21 1463:8 1480:20,20 1484:10</p>	<p>1524:13,15,21 1527:24 1529:22 <b>charged</b> 1462:11 1496:17 1497:7 1500:1,11 1507:23 1508:22 1532:8 <b>charges</b> 1377:24 1391:6 1394:22 1421:3 1444:16 1446:19 1447:21,22 1448:7,8 1450:7,11 1450:19 1452:22 1453:6 1462:8 1463:14 1480:25 1481:8 1488:5 1498:22 1508:9 1515:6 1525:12 1527:24 1529:22 <b>charging</b> 1418:15 1462:13 1499:11 1500:7 1502:4 <b>chart</b> 1407:19 <b>Chen</b> 1470:18,21 1494:18 <b>chess</b> 1494:4,5 <b>choice</b> 1426:18 <b>choose</b> 1466:15,15 1472:5,8 <b>chooses</b> 1429:1 <b>choosing</b> 1484:7 <b>chorus</b> 1486:24 <b>chose</b> 1488:20 <b>claim</b> 1499:10 1500:7 <b>claimed</b> 1500:19 <b>clarify</b> 1531:3 <b>clarifying</b> 1375:1 <b>clause</b> 1383:11,15 1395:24 1396:15 1424:6 <b>clean</b> 1409:9 <b>clear</b> 1358:5 1415:13 1415:14 <b>clearly</b> 1364:11 1378:17 1510:6 <b>clerk</b> 1397:12 1439:21 1439:23 1443:13 1494:5 <b>clock</b> 1494:4,5 <b>clocks</b> 1494:4 <b>Close</b> 1385:2 <b>closed</b> 1481:25 1482:2 1523:13,20,22,23 1524:1 <b>clothes</b> 1399:8 <b>Coachella</b> 1480:15 <b>Code</b> 1371:2 1442:22 1522:5 <b>collect</b> 1380:16</p>
--	--	--	---	--

<p><b>collection</b> 1457:25  <b>collects</b> 1418:22 1419:3  <b>Colorado</b> 1391:16,18  1391:19 1395:4,5,9  1395:11,18,21  1398:12 1483:23  1509:7  <b>combination</b> 1404:14  1406:9  <b>come</b> 1402:14 1426:10  1438:17 1460:10,12  1465:13 1467:21  1468:25 1497:24  1504:1,11,17 1510:21  1518:24,25 1523:5  <b>comes</b> 1391:14 1398:23  1484:15 1529:25  <b>coming</b> 1368:1 1390:8  1408:6 1495:1  1532:21  <b>commence</b> 1377:19  <b>commencing</b> 1377:10  <b>commitment</b> 1380:16  <b>committee</b> 1356:11  1360:20 1361:15  1471:8 1479:15,24,25  1480:24 1513:1  <b>communicate</b> 1524:9  1524:24  <b>communicating</b> 1524:5  <b>communication</b>  1461:16,21  <b>communications</b>  1525:3  <b>compare</b> 1478:25  <b>compared</b> 1421:22  1450:10 1475:17  <b>compares</b> 1420:7  1484:1  <b>comparing</b> 1465:7  1491:24 1492:6,7  <b>compiled</b> 1420:17  <b>complain</b> 1532:7  <b>complained</b> 1432:3  <b>complaining</b> 1432:12  <b>complete</b> 1486:2  <b>completely</b> 1441:10  <b>completeness</b> 1438:17  <b>complications</b> 1395:3  <b>comply</b> 1377:22  <b>complying</b> 1418:25  <b>component</b> 1444:16,20  1444:23 1459:24  1460:19  <b>components</b> 1446:17  1450:9 1451:6 1452:5  1478:17 1484:9  1504:6</p>	<p><b>comprised</b> 1480:19  1484:9  <b>compromise</b> 1532:17  1532:18  <b>computer-aided</b>  1534:12  <b>concepts</b> 1431:17  <b>concern</b> 1373:14  1374:10 1455:19  1524:5,9  <b>concerned</b> 1380:1  <b>concerning</b> 1436:18  1445:21 1465:2  1474:5  <b>concerns</b> 1380:8,11  1396:22 1455:7,12  1456:21 1457:5  1481:18 1520:1  1524:25  <b>concluded</b> 1484:24  <b>conclusion</b> 1357:8  1370:19 1402:4  1454:8,10 1530:1  <b>condition</b> 1530:16  <b>conditions</b> 1526:7  1528:18  <b>conduct</b> 1456:16  <b>conduit</b> 1389:3  <b>confidential</b> 1482:6  <b>confirm</b> 1364:24  1439:23  <b>confirms</b> 1439:22  <b>conflict</b> 1370:25  <b>confusing</b> 1379:2  <b>confusion</b> 1358:21  <b>connection</b> 1446:1  1497:1  <b>connections</b> 1403:10,14  1403:18  <b>consent</b> 1437:9  <b>consenting</b> 1437:12  <b>consequences</b> 1510:13  <b>conservation</b> 1398:3  1399:4,11 1401:17  1403:2,9 1405:21  1406:12,16,21 1414:8  1419:6 1422:5,11,17  1426:23 1429:11  1434:2 1442:7  1462:23  <b>conservation/supply</b>  1433:23  <b>conserved</b> 1409:25  1410:12 1415:5  1472:25  <b>consider</b> 1386:13,19,21  1386:22 1387:2  1402:11 1417:20</p>	<p>1424:5 1425:18,19  1494:14  <b>consideration</b> 1477:1  1477:10 1480:14  1492:11,16 1516:14  <b>considerations</b> 1437:15  <b>considered</b> 1390:12  1394:19 1395:2  1403:18 1444:14  1448:2,13 1489:24  1530:10  <b>considering</b> 1429:15  1446:2 1481:5  1493:10  <b>consist</b> 1399:2  <b>consistent</b> 1370:21  1524:16,20  <b>constitutional</b> 1531:8  <b>constructed</b> 1370:4  <b>consumers</b> 1398:4  1399:6,11 1406:17  1419:8,17 1422:18  <b>contain</b> 1424:1  <b>contained</b> 1447:22  1448:8  <b>contaminant</b> 1409:4  <b>contaminated</b> 1408:25  <b>contemplate</b> 1462:12  <b>contemplated</b> 1510:4,6  <b>contemporaries</b>  1524:25  <b>contended</b> 1365:10  <b>contending</b> 1392:22  <b>contends</b> 1515:15  <b>content</b> 1409:1  <b>contention</b> 1523:2  <b>contest</b> 1530:12  <b>contesting</b> 1530:5  <b>context</b> 1403:8  <b>continuation</b> 1450:21  <b>continue</b> 1415:11  1438:9 1462:25  1472:16,16  <b>continued</b> 1356:2  1360:18 1519:11  1520:2 1521:11  1524:2  <b>continues</b> 1422:17  <b>continuing</b> 1372:21  1373:4 1457:17  1520:18,20  <b>contract</b> 1368:5  1370:22 1371:22  1372:2 1386:24  1388:5 1395:7,10,18  1419:10 1424:1  1433:16 1478:7  1485:4 1486:6</p>	<p>1488:17 1490:11  1496:16 1497:7  1499:12 1500:8  1506:24 1507:7,15  <b>contracted</b> 1464:2  <b>contractor</b> 1388:20  1395:10 1433:15  <b>contractors</b> 1388:17  1441:2,4,8  <b>contracts</b> 1371:18,21  1380:17 1398:9,13  1422:5,14,22 1426:1  1428:1 1462:6  1486:12  <b>contrary</b> 1392:10  1532:14  <b>contributed</b> 1420:20  <b>contributes</b> 1420:10  <b>contributing</b> 1421:23  <b>Control</b> 1440:17  <b>controversial</b> 1396:6  <b>convenient</b> 1363:21  <b>conversation</b> 1447:13  1470:2 1517:8,10  <b>conversations</b> 1517:11  1519:9,11,14 1520:18  1520:22 1521:20  1523:4  <b>convey</b> 1372:25  <b>conveyance</b> 1386:14,19  1386:21 1387:18  1388:23 1434:2  1435:6,7 1444:16,23  1446:18 1448:1,12  1454:9,17 1461:25  1462:7 1463:5 1464:1  1465:19 1498:21  1503:2 1506:16  <b>conveyed</b> 1373:6  <b>cooled</b> 1486:7  <b>copies</b> 1439:8 1445:5  <b>copy</b> 1363:8,19  1366:13 1398:18,21  1442:25  <b>corner</b> 1448:22,23  <b>correct</b> 1358:7,16,24  1359:4 1360:4 1362:3  1365:12,13,17  1368:22 1369:8,14  1370:9 1371:11,14,18  1371:24 1372:4,13  1373:11,23 1374:11  1375:11,15 1377:1  1378:2,15,20,25  1379:8,14,15,18  1380:21 1383:11  1385:8,12 1388:20,24  1388:25 1394:14,15</p>	<p>1396:1 1401:13  1409:20 1411:23  1412:4,10,11 1413:3  1413:5,8 1414:1,4,5  1418:16,21,23,24  1419:23 1420:15,16  1421:14,20 1422:6,12  1422:13,17 1423:11  1424:12 1425:23  1428:8,9 1430:14,18  1432:8,14 1434:10,11  1434:22,25 1435:11  1435:12,15,16  1436:11 1437:11  1443:22 1444:17  1451:9,10,21,22  1452:1,3 1453:6,7,9  1453:18,19,22,25  1454:5,6,18,20,21,23  1454:25 1455:24  1456:11,14,15,21  1457:19 1458:23  1460:25 1463:16  1464:25 1465:20  1470:19,20 1472:9,19  1474:16 1475:5  1477:23 1478:7,8,12  1478:13,19 1480:9  1484:22,23 1488:6,7  1488:14 1489:5,8  1490:3,12 1491:2,11  1491:15 1492:6,18  1493:1,4,13 1497:2  1498:20 1499:9,13,16  1501:21,22 1502:19  1503:3,9,10 1504:3,4  1504:8,9 1505:13  1506:21,25 1507:8,9  1507:15,20 1508:7,8  1508:11,24 1509:4,13  1510:4,5 1511:24  1512:10 1513:17,18  1514:25 1515:10,11  1516:8,17 1525:24  1526:18 1527:8  1529:24  <b>correctly</b> 1505:22  1516:5  <b>correspondence</b>  1365:20  <b>cost</b> 1358:19 1359:3  1361:5,11 1373:1,5,6  1374:5 1375:24  1379:7,13 1403:25  1423:9 1430:25  1446:15,21 1454:12  1476:2,3 1477:6  1480:20 1482:22</p>
--	--	---	--	---

<p>1483:16,25 1489:16                  1489:18,19 1490:19                  1490:19 1491:5,24                  1492:6 1504:5                  1519:25 1528:7  <b>costs</b> 1358:15 1369:7                  1388:4,4 1399:10                  1404:12 1415:24                  1416:15,17 1417:10                  1417:13,21,24                  1428:12,17 1431:1,8                  1432:3 1434:15                  1446:23 1451:20                  1452:22 1453:13                  1454:9,16 1460:12,15                  1460:18,19 1461:2,4                  1461:6,7,10,24                  1463:5,5 1475:25                  1477:21 1478:3,21                  1479:1 1484:2,8,10                  1492:7,8 1496:15,25                  1497:6,12,22 1498:10                  1503:8 1504:15                  1505:21 1508:1,3,7                  1508:12,18 1517:2,5                  1517:15 1518:3,11,21                  1519:2,25 1520:6,12                  1520:23 1521:15,21                  1521:25 1523:9,15                  1524:6  <b>counsel</b> 1354:16 1363:5                  1366:6,7 1370:18                  1376:4 1378:6 1383:7                  1438:13 1439:14                  1480:8 1501:18                  1525:7,10  <b>counterpart</b> 1374:16                  1376:3 1457:4                  1524:12  <b>County</b> 1353:2 1375:2                  1396:20,21 1422:23                  1424:16 1450:5                  1534:4,8  <b>couple</b> 1472:2 1486:17                  1526:2  <b>course</b> 1357:13 1376:9                  1376:17 1391:23                  1408:10 1431:2                  1432:7,23 1446:12                  1495:12 1519:18  <b>court</b> 1353:1 1357:6,20                  1359:10,12,15,22                  1362:20,23 1363:20                  1364:10 1365:7                  1366:17,25 1367:2,6                  1367:8,13,18,22,25                  1368:7,11,14,17,20                  1368:22,24 1369:22</p>	<p>1374:22 1376:9,17,21                  1377:2 1379:3                  1381:13,16,20 1382:1                  1383:19,23 1385:23                  1388:7,10 1389:5,13                  1389:17 1391:23                  1392:1,3,6,12,18                  1393:2,9,11,15,20,25                  1394:3 1397:1,9                  1398:17,18,20 1402:5                  1404:8 1405:14                  1410:12,23 1411:1,4                  1411:9,12 1412:16                  1413:2,14 1415:4                  1416:24 1417:4                  1423:13,15 1424:22                  1424:25 1425:15                  1426:2,12 1427:5,8                  1427:12,16 1434:6                  1437:1,19,22 1438:9                  1438:19 1439:1,6,19                  1439:21,25 1440:3,10                  1441:21 1442:16,19                  1442:22,25 1443:4                  1445:7,10 1447:7,9                  1447:12 1449:18                  1458:8 1464:10,16                  1468:9 1470:8,11                  1473:21 1479:21                  1482:12 1485:10,12                  1486:11 1489:9,14                  1493:17 1494:13,14                  1494:22,25 1495:12                  1495:15 1501:15                  1505:1 1511:13                  1512:23 1514:1                  1519:18 1520:9,15                  1521:3,9 1522:23                  1523:11 1525:2,5                  1527:22 1529:19                  1530:24 1531:1                  1532:20,25 1534:10  <b>Court's</b> 1398:15                  1434:12  <b>courtesy</b> 1439:8  <b>courtroom</b> 1495:7,9  <b>cover</b> 1376:12 1470:17                  1471:5  <b>covered</b> 1378:15                  1398:24  <b>CPF-10-510830</b> 1353:7  <b>CPF-12-512466</b> 1353:8  <b>create</b> 1413:6  <b>created</b> 1414:13                  1419:24 1421:2,17  <b>creates</b> 1413:19 1461:3  <b>creating</b> 1383:10                  1404:25 1414:3</p>	<p>1416:10  <b>creation</b> 1411:22  <b>criticisms</b> 1515:5  <b>cross</b> 1355:2 1398:23                  1495:3  <b>Cross-examination</b>                  1358:1 1410:23                  1411:12,14 1519:21  <b>CSR</b> 1353:20 1534:7                  1534:23  <b>cumulative</b> 1407:15                  1408:14,16 1409:16  <b>current</b> 1371:23 1476:3                  1480:18 1513:9                  1525:19  <b>Currently</b> 1477:4  <b>Curtis</b> 1353:3 1357:4                  1438:4  <b>custom</b> 1503:17  <b>customer</b> 1398:6                  1410:20 1429:16  <b>customers</b> 1399:19                  1400:18,19 1401:3,4                  1401:16 1402:9,17                  1409:10 1410:5,18                  1419:11  <b>cut</b> 1494:17,18  <b>CVP</b> 1440:18,25                  1441:8,8,9  <b>CWA</b> 1450:3,4,9</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 1355:1 1368:22  <b>D-E-V-E-N-D-R-A</b>                  1397:15  <b>damages</b> 1357:13                  1368:10 1452:12                  1494:20  <b>Dan</b> 1354:4 1366:6                  1376:3  <b>Daniel</b> 1513:4  <b>data</b> 1420:9,14,17  <b>date</b> 1373:18 1384:10                  1384:11,16 1385:3                  1445:17 1486:22                  1527:6 1532:23  <b>dated</b> 1464:21,21                  1470:19 1474:1  <b>Davis</b> 1522:16  <b>day</b> 1493:21 1534:16  <b>days</b> 1486:17,19 1494:8                  1494:9  <b>dead</b> 1477:20  <b>deadline</b> 1398:15                  1486:19  <b>deal</b> 1385:16 1441:22                  1465:3 1466:5                  1467:12 1483:7</p>	<p>1484:24 1485:1,5,18                  1492:21,23,24 1493:4                  1493:5,9 1495:2                  1523:1  <b>deals</b> 1389:19,24  <b>dealt</b> 1382:17 1394:20  <b>decade</b> 1430:14                  1432:12,15 1435:19  <b>deceased</b> 1498:16  <b>December</b> 1434:18                  1507:3  <b>decide</b> 1436:10  <b>decided</b> 1461:13                  1494:21 1526:10  <b>deciding</b> 1417:18  <b>decision</b> 1418:19                  1419:13,20,21                  1434:12 1437:14                  1468:3,23 1486:9,20                  1491:1,22 1492:4  <b>decisions</b> 1435:24                  1531:1  <b>declaration</b> 1398:15,24                  1432:25  <b>deemed</b> 1395:17,20  <b>Defendant</b> 1354:11                  1397:6 1443:9  <b>DEFENDANT'S</b>                  1355:2  <b>Defendants</b> 1353:14  <b>defense</b> 1444:25 1447:5                  1448:16 1449:12                  1451:24 1486:13  <b>defenses</b> 1494:22  <b>defer</b> 1357:9,13  <b>deficiencies</b> 1373:3  <b>defined</b> 1441:1,7  <b>Delegate</b> 1448:18  <b>delegates</b> 1449:5,7                  1450:18 1451:8,23                  1503:11,19 1504:7                  1505:15 1506:3,15  <b>deliver</b> 1370:3 1418:14                  1509:11  <b>delivered</b> 1390:25                  1394:6 1510:20  <b>deliveries</b> 1430:4                  1510:13  <b>delivery</b> 1395:14,18,21                  1403:11 1418:11,12                  1442:3 1460:15                  1461:5,7 1463:5                  1509:19 1510:3  <b>demand</b> 1398:2,25                  1399:2 1401:9,11,20                  1401:25 1402:19,21                  1402:22 1403:20,24                  1403:25 1404:22,23</p>	<p>1405:5,9 1406:5,6,14                  1411:21 1412:2,6                  1413:6,9 1414:3                  1416:14,19 1417:19                  1417:24 1418:20                  1419:4,25 1428:5,11                  1428:15,18,21 1429:2                  1429:5,23 1430:4,7                  1430:12 1431:21,23                  1432:11 1442:7,9  <b>demands</b> 1399:9                  1401:16 1409:10                  1410:5,20 1429:17  <b>demark</b> 1403:11  <b>Denham</b> 1515:17                  1516:6  <b>Dennis</b> 1498:3 1517:10                  1517:25 1519:6,9,11                  1520:19 1521:23                  1524:11  <b>Denver</b> 1495:8  <b>deny</b> 1393:5  <b>Department</b> 1353:4                  1357:4 1398:10                  1433:24 1438:4  <b>departs</b> 1425:5  <b>dependent</b> 1487:11,13  <b>depending</b> 1448:22                  1456:23 1488:20  <b>depends</b> 1455:13,14  <b>depicts</b> 1407:8  <b>deposit</b> 1500:21 1501:3                  1502:2  <b>deposition</b> 1353:23                  1359:7 1411:19                  1412:12,13 1413:12                  1416:22 1426:5                  1452:14 1496:2                  1511:10  <b>derived</b> 1516:9  <b>desalination</b> 1399:16                  1414:8 1426:24  <b>describe</b> 1383:5                  1480:11 1489:15,17  <b>described</b> 1417:14                  1450:8 1493:11  <b>describing</b> 1474:22  <b>description</b> 1476:23  <b>designated</b> 1452:10  <b>designation</b> 1522:6  <b>designed</b> 1421:8  <b>desire</b> 1432:16,18,21  <b>detail</b> 1375:25 1459:18  <b>determine</b> 1420:9,18                  1428:11 1490:5  <b>determined</b> 1388:16                  1429:16 1491:17                  1531:17,18</p>
--	---	--	---	---

<p><b>develop</b> 1398:5 1399:14 1400:11 1401:8 1409:7 1465:1 1530:22</p> <p><b>development</b> 1415:9 1463:1 1524:14</p> <p><b>Devendra</b> 1355:5 1397:5,14 1438:6</p> <p><b>devices</b> 1399:7 1406:18 1406:22 1407:4</p> <p><b>dialogue</b> 1499:20</p> <p><b>dialogues</b> 1520:2</p> <p><b>Diego</b> 1353:6 1359:1 1366:7 1369:5 1373:15,22 1374:5,10 1375:2 1378:24 1379:6,23,24 1380:2 1380:5,9,21 1381:4,6 1381:6,10 1382:7,9 1386:1 1387:13,17,19 1390:6 1391:9 1422:4 1422:10,15,20 1423:2 1423:8,10,20,23 1424:2,9,10,16 1429:9 1432:2,5 1435:25 1436:3,10,18 1437:3 1440:22 1442:25 1443:21 1444:4,15 1445:20 1446:2,17,21 1449:7 1449:20 1451:1,5,7,8 1451:23 1452:6,10 1455:7 1458:19 1460:17 1461:1,23 1463:25 1464:2 1466:12,13,14 1469:15,19 1470:3 1471:14,23 1472:7 1474:12 1484:25 1485:5 1487:2,10,11 1487:17 1490:1 1493:12 1496:22 1498:21,25 1499:6,10 1499:14,25 1500:6 1501:3,7,20 1502:1 1502:12,22 1503:12 1505:11,15,16 1506:3 1506:19,23 1507:5,10 1507:10,14,17,23 1508:9,17,21 1509:16 1509:20 1511:16 1514:24 1515:1,9,15 1515:22,25 1519:24 1520:21 1522:19 1523:2 1524:24 1525:25 1527:10 1528:6,13 1529:2,12 1530:5 1531:16</p>	<p>1532:2</p> <p><b>Diego's</b> 1358:14 1375:23 1384:14 1423:6 1437:11 1448:25 1451:24 1456:2,21 1465:2 1488:22 1496:1 1501:18 1503:6,11,18 1506:14,20 1511:25 1512:19 1516:18 1523:13 1531:4 1532:7</p> <p><b>difference</b> 1465:9 1489:17 1490:18,21</p> <p><b>differences</b> 1357:10</p> <p><b>different</b> 1382:12 1399:3 1406:25 1408:4 1427:9 1430:17,25 1431:3,14 1434:6 1441:10 1463:25 1464:23 1468:1 1478:2 1479:2 1492:24 1494:5</p> <p><b>differential</b> 1465:8 1491:4</p> <p><b>direct</b> 1355:2 1397:17 1398:19 1443:16 1450:18 1493:25 1495:3</p> <p><b>directed</b> 1451:7 1468:17 1469:3</p> <p><b>direction</b> 1425:25 1503:12 1534:13</p> <p><b>directly</b> 1392:10 1419:7 1428:24 1516:9 1524:5,13</p> <p><b>Director</b> 1450:2</p> <p><b>directors</b> 1369:17 1370:16 1371:7 1425:7 1476:18 1478:11 1480:1 1503:21 1513:12 1523:24 1527:25 1529:23 1531:23</p> <p><b>disadvantage</b> 1494:11</p> <p><b>disaggregates</b> 1434:14</p> <p><b>disaggregation</b> 1434:1</p> <p><b>disagreement</b> 1492:15</p> <p><b>disclose</b> 1505:15</p> <p><b>discount</b> 1472:13</p> <p><b>discounted</b> 1472:20,21</p> <p><b>discounting</b> 1476:6</p> <p><b>discrepancy</b> 1439:18</p> <p><b>discretion</b> 1436:9 1466:8</p> <p><b>discuss</b> 1459:10 1483:14</p> <p><b>discussed</b> 1395:25</p>	<p>1431:3,17 1496:12 1503:11 1523:16</p> <p><b>discussing</b> 1372:21 1393:23</p> <p><b>discussion</b> 1361:24 1450:17 1451:5 1469:22 1482:21 1523:1 1528:5,9</p> <p><b>discussions</b> 1431:13 1481:20,21 1482:10 1482:11,16 1517:25 1525:8 1531:11</p> <p><b>disincentive</b> 1383:16</p> <p><b>dispute</b> 1361:22 1362:2 1363:6 1365:11,17 1368:6 1475:18,20,21 1475:22 1500:18,21 1501:5 1502:6 1522:19 1523:8 1527:9,14,16,19 1531:16,19,21,25 1532:1</p> <p><b>disputed</b> 1365:16 1368:1 1501:3 1523:18</p> <p><b>Distilled</b> 1369:25</p> <p><b>distinguish</b> 1459:17</p> <p><b>distributed</b> 1419:14,21</p> <p><b>distributes</b> 1419:3,3</p> <p><b>distribution</b> 1403:12 1403:13 1419:19 1421:4</p> <p><b>District</b> 1353:9,11 1354:11 1371:1 1397:20 1437:6 1451:2</p> <p><b>district's</b> 1377:11</p> <p><b>document</b> 1356:11 1376:10 1377:6 1381:17,24 1409:22 1438:15,24,25 1445:13 1446:6 1447:11,14 1448:17 1448:21,25 1449:3,6 1455:21 1471:10 1473:25 1500:3,6 1514:3</p> <p><b>documentation</b> 1481:9 1481:24</p> <p><b>documented</b> 1456:1,4 1457:5</p> <p><b>documenting</b> 1456:13</p> <p><b>documents</b> 1372:7 1474:7 1481:16,17 1492:25 1493:3,8</p> <p><b>doing</b> 1369:10 1407:3 1416:2 1418:24 1427:11 1428:7</p>	<p>1439:14 1459:19 1465:6,21 1471:17 1479:6 1495:10 <b>dollar</b> 1415:16,18 1489:2</p> <p><b>dollars</b> 1368:8 1400:8 1406:6 1462:8,11,13 1475:5 1476:6</p> <p><b>downstream</b> 1403:5,8 1403:14,16,21,22 1404:5,13,15 1410:13</p> <p><b>dpurcell@kvn.com</b> 1354:8</p> <p><b>draft</b> 1356:4 1386:2,9</p> <p><b>draw</b> 1425:2</p> <p><b>drought</b> 1390:10,15,15 1391:5 1394:21</p> <p><b>DTX</b> 1368:21,24 1374:13,19 1389:15 1393:22 1405:13 1411:2 1438:14 1445:8,9 1447:1,7 1449:13,18 1457:8 1464:4,5,10 1470:5 1470:11 1473:17,21 1479:17,21 1485:7 1486:14 1487:2 1500:14 1501:10,15 1503:5 1507:2 1509:22 1512:24 1513:22 1514:1</p> <p><b>due</b> 1500:19 1532:2</p> <p><b>dug</b> 1486:8</p> <p><b>duration</b> 1483:17</p> <p><b>duties</b> 1405:24 1419:1 1506:8</p> <p><b>DWR</b> 1434:2,13,13,21</p> <p><b>DWR's</b> 1434:19</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 1353:3 1355:1 1357:4</p> <p><b>e-mail</b> 1369:17 1379:20 1464:12 1466:3 1470:18</p> <p><b>E.A</b> 1438:4</p> <p><b>e.g</b> 1460:18</p> <p><b>earlier</b> 1405:17 1428:4 1490:4 1492:9 1503:11,15</p> <p><b>early</b> 1384:22 1385:1 1388:13 1407:15 1444:13 1464:22</p> <p><b>earth</b> 1486:7</p> <p><b>easier</b> 1385:24 1446:8</p> <p><b>Eastern</b> 1378:7</p> <p><b>eat</b> 1529:2</p> <p><b>EC54-547</b> 1356:1</p> <p><b>economic</b> 1373:4</p>	<p>1461:5 1462:22 1466:14</p> <p><b>effect</b> 1386:10 1444:11 1447:20 1448:6 1451:9 1457:2 1465:25 1498:19</p> <p><b>effective</b> 1353:12 1423:9</p> <p><b>efficient</b> 1406:18 1438:22</p> <p><b>eight</b> 1511:11</p> <p><b>either</b> 1401:20 1415:20 1451:20 1466:18 1525:8 1526:12 1529:9 1530:13</p> <p><b>eligible</b> 1426:21</p> <p><b>email</b> 1354:7,8,8,9,9,15 1356:1,8,9,10 1385:7 1455:21 1464:21 1465:1 1473:25 1476:18</p> <p><b>EMANUEL</b> 1354:12 1354:13 1362:18,21 1363:13 1364:9 1365:6 1366:12,16,23 1367:7,12,17,21 1368:12,19,23 1369:21 1374:21 1376:8,13,18,25 1379:1 1381:15,18,23 1382:4 1383:22,24 1386:4 1388:19 1389:10,18 1391:21 1392:25 1393:9,13,19 1393:21 1394:4 1396:24 1397:10,18 1398:14,22 1402:10 1404:11 1410:21,25 1411:2,6 1412:15 1413:1 1415:2 1417:1 1423:12 1424:21 1425:13 1426:8,13 1427:3,7,15 1434:5 1436:25 1438:20 1439:16 1440:7,13 1442:6,13,20 1443:1</p> <p><b>emergencies</b> 1509:25</p> <p><b>emphatically</b> 1453:24</p> <p><b>employed</b> 1397:19</p> <p><b>employee</b> 1400:2 1464:19 1471:6 1525:9</p> <p><b>employees</b> 1444:6</p> <p><b>enable</b> 1387:9</p> <p><b>ended</b> 1463:18 1473:14</p> <p><b>enemy</b> 1470:25</p> <p><b>enforcement</b> 1370:21</p> <p><b>enjoy</b> 1404:22</p>
--	---	---	--	---

<p><b>enlarge</b> 1474:21 1480:13 <b>enormous</b> 1438:24 <b>enter</b> 1419:10 1425:11 1436:7 1438:21 <b>entered</b> 1386:24 1422:14 <b>entering</b> 1464:1 <b>entire</b> 1390:22 1438:17 1439:12,13 <b>entirety</b> 1404:4 <b>entities</b> 1372:24 1380:22 1381:2 <b>entitled</b> 1446:7 1448:17 1471:19 1515:22 <b>entity</b> 1405:3 1436:5 <b>entry</b> 1429:8 <b>equal</b> 1494:8 1527:24 <b>equation</b> 1383:3 <b>ERIC</b> 1354:13 <b>escalate</b> 1465:20 1468:18 1478:6,12 1479:4 1483:1 1490:10 1499:4 1515:13 <b>escalated</b> 1498:25 1499:2,2 <b>escalation</b> 1465:10 1467:9 1468:20 <b>escalations</b> 1465:21,23 1490:5 <b>escalator</b> 1479:10 <b>escrow</b> 1532:3 <b>ESQ</b> 1354:3,4,4,5,5,13 1354:17 <b>essence</b> 1370:1 <b>essential</b> 1509:3 1510:7 1531:6 <b>establish</b> 1357:12 1388:14 <b>established</b> 1478:11 1502:5 1513:11 1528:11 1529:8 1530:12 <b>estimate</b> 1384:20,24 1409:19 1442:8 <b>estimated</b> 1407:17 <b>et</b> 1386:7 1448:24 <b>evaluate</b> 1418:3 1478:3 <b>evaluated</b> 1428:6 <b>Evening</b> 1533:2 <b>evenly</b> 1494:10 <b>event</b> 1500:18 1503:22 1532:1 1534:15 <b>everybody</b> 1392:1 1493:17 1495:19 <b>evidence</b> 1355:12 1359:20 1362:17,25</p>	<p>1363:12,23 1364:8,13 1365:5,8 1366:11,18 1367:5,9,11,14,16,20 1367:24 1369:2,20,23 1372:10 1374:20,23 1376:7 1377:3 1392:11 1410:25 1411:3 1424:20 1425:1 1436:24 1437:2 1438:21 1442:24 1443:3 1445:2,11 1447:8 1448:17 1449:16 1457:9 1464:6,11 1470:6,12 1473:22 1479:22 1486:5,15 1501:16 1507:3 1514:2 <b>exact</b> 1432:10 1435:22 <b>exactly</b> 1372:17 1378:12 1479:6 1491:11 <b>examination</b> 1382:3 1397:17 1440:6 1443:16 1523:21 <b>examinations</b> 1494:19 <b>example</b> 1360:24 1399:7 1408:1,3,5,9 1408:22 1442:1 1446:22,24 1459:23 1494:18 1507:2,4 1515:16 1516:7 1522:18 <b>excellent</b> 1459:23 <b>exception</b> 1393:24 <b>excerpted</b> 1438:16 <b>Excess</b> 1457:25 <b>exchange</b> 1358:23 1360:8,9 1361:23 1364:18 1365:12,15 1365:16 1366:8 1374:2 1377:9 1378:24 1379:5,9,10 1380:4 1381:7 1382:6 1382:15 1389:10,25 1391:7,9 1394:6 1429:8 1452:7 1453:25 1454:4 1463:18 1465:3,7 1470:15 1472:17 1477:2,12,13 1480:17 1485:18 1486:1,18,22 1488:3,23 1489:7,18 1490:20 1491:13,14 1492:25 1497:4 1498:18 1500:14 1508:17,23 1509:3,7 1509:12,13,20,23</p>	<p>1510:8,17,21 1515:2 1515:20 1516:3,10,11 1516:20 1517:13,19 1521:11 1525:21,25 1526:3,4,15 1527:5 1528:16,20 <b>exchanged</b> 1511:2,5 <b>exchanging</b> 1395:13 <b>excluded</b> 1531:8 <b>excluding</b> 1496:12,14 1497:6,12 1518:10 <b>exclusively</b> 1509:8 <b>excuse</b> 1524:23 <b>excused</b> 1397:2 1442:16 <b>execute</b> 1370:15,20 1371:6 1425:4 1436:4 <b>execution</b> 1358:23 1373:18 1470:15 1481:6 1517:13,19 1521:11 1527:6 <b>exhibit</b> 1362:25 1363:14,23 1365:8 1366:18 1367:9,10,14 1369:20,23 1374:23 1376:14,19,24 1377:3 1385:18 1389:13 1393:22 1411:1,11 1425:1 1437:2 1443:3 1444:25 1445:7,11,25 1447:5,8 1448:16 1449:12,16,19 1451:24 1464:11 1470:12 1473:22 1479:22 1486:15 1489:12 1501:16 1514:2 <b>exhibits</b> 1355:11 1356:2 1369:1 1384:7 1439:7 1445:5 <b>exist</b> 1418:17 1470:15 1530:17 <b>existed</b> 1454:23 1455:2 <b>existing</b> 1377:12,15,17 1377:21 1378:19,23 1378:25 1379:7,13,17 1380:3 1381:8 1382:17 1384:1,5 1450:10 1455:2 1459:1 1477:13 1490:11 1491:9 <b>exp</b> 1511:20 <b>expect</b> 1530:20 <b>expectation</b> 1473:10 1514:14 <b>expected</b> 1515:2 <b>expenditure</b> 1370:24 <b>expenditures</b> 1428:22</p>	<p><b>experience</b> 1382:8 1467:11 1468:2 1469:19 <b>expert</b> 1515:16 <b>expiration</b> 1511:21 1512:20 <b>expired</b> 1513:20 1514:20 <b>explain</b> 1387:2 1394:16 1395:16 1403:7 1406:12 1407:21 1408:14 1440:21 1441:5 1461:1 1508:20 <b>explained</b> 1370:17 1409:17 1490:4 <b>exposed</b> 1488:19,21 1490:6 <b>exposes</b> 1484:8 <b>exposure</b> 1467:1,10,22 1468:20,22 1469:10 1484:11 1487:25 1488:15 1492:8 1526:6,11 <b>express</b> 1453:24 1454:3 1455:6 <b>expressed</b> 1389:9 <b>expressly</b> 1379:24 <b>extent</b> 1402:4,7 1405:2 1419:16 1423:23 1427:22</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facilitated</b> 1522:16 <b>facilities</b> 1369:13 1370:8,9,23 1371:10 1407:24 1408:4 1409:15 1506:24 1507:7,12,15,19,24 1508:22 1509:2,11,19 1510:1,2,7,12,16 <b>facility</b> 1387:4 1417:21 1418:4 1428:16 <b>fact</b> 1364:24,25 1366:1 1368:1 1385:15 1387:11 1424:10 1429:1 1432:3 1433:21 1434:13 1435:17 1442:3 1446:21 1451:23,25 1466:24 1474:6,10,11 1474:18 1503:23 1509:10,16 1510:19 <b>factor</b> 1478:18 1485:3 1490:23 1491:10 <b>factors</b> 1483:2,10 1509:25 <b>fail</b> 1377:21</p>	<p><b>failed</b> 1365:10 <b>failure</b> 1425:14 <b>fair</b> 1382:24 1427:3 1447:23 1448:9 1455:8,9 1456:2 1458:19 1487:10 1492:21 1494:2 <b>fairly</b> 1380:10 1487:11 <b>fall</b> 1397:25 1399:14 <b>familiar</b> 1371:13 1403:4 1421:25 1422:2 1483:23 <b>far</b> 1420:12,13 1504:24 1505:14 1506:2 <b>favor</b> 1396:3 1451:25 1452:2 <b>favorably</b> 1484:1 <b>fax</b> 1355:13 1376:2 <b>February</b> 1405:15 1449:21 1501:8,12 <b>feelings</b> 1501:25 <b>fees</b> 1377:24 1433:15 <b>felt</b> 1396:18 1490:5 1491:12 <b>ferocious</b> 1532:21 <b>fiduciaries</b> 1506:12 <b>fiduciary</b> 1506:8 <b>Figueroa</b> 1354:14 <b>figure</b> 1485:12 1495:1 <b>file</b> 1383:16 <b>filed</b> 1360:4 1382:16 1398:17 1423:2,10 1461:16 <b>files</b> 1448:25 <b>filing</b> 1360:7,10 1362:1 1405:18 1461:22 1505:19 <b>finally</b> 1529:7 <b>finance</b> 1431:16 <b>financial</b> 1372:21 1390:5 1399:13,21,23 1400:8,14,24 1419:9 1421:15 1433:6,10,18 1433:20 1474:15 1487:22 1490:13 <b>find</b> 1498:8 <b>finding</b> 1377:15 <b>finish</b> 1439:7 1482:13 1489:12 <b>firm</b> 1528:19 <b>first</b> 1370:11 1372:20 1374:24 1376:15 1377:9 1393:18 1406:11 1407:6,20,22 1408:22 1425:3 1434:9 1437:6 1445:17 1449:25 1450:2 1454:7,10,15</p>
---	--	---	---	---

1457:10 1458:5,11 1459:16 1466:4 1474:9,10,18 1476:24 1488:18 1501:7,20 1502:4,8,23 1520:1 1528:11 1530:1 1531:17 <b>fiscal</b> 1406:19 1409:13 <b>fit</b> 1390:7,13 <b>five</b> 1359:2 1373:17,25 1375:7,19 1382:12 1385:19 1386:1 1391:25 1392:1 1435:19 1437:17 1446:6 1465:25 1466:21 1467:5,9 1468:20 1471:18 1477:25 1479:10 1482:20 1483:2 1485:3 1488:18,20,25 1488:25 1489:3,10 1492:19 1498:10,24 1499:3 1502:4,8,23 1526:17 1528:11,15 1529:9 1530:1,9,14 1530:23 1531:17,21 1532:9,19 <b>five-year</b> 1358:22 1360:3 1374:1 1465:24 1479:8 1483:6 1501:23 1511:22 1512:21 1513:20 1529:7 1530:8 <b>flat-out</b> 1396:11 1476:13 <b>flatly</b> 1512:10 <b>Floor</b> 1353:24 1354:14 <b>flow</b> 1416:21 <b>fluctuations</b> 1484:10 <b>focus</b> 1403:1 1468:14 <b>focusing</b> 1482:16 <b>folks</b> 1444:14 1471:14 <b>follow</b> 1359:12,15 1486:6 <b>follow-on</b> 1423:5 <b>following</b> 1358:23 <b>follows</b> 1357:18 1397:7 1438:7 1443:10 <b>foot</b> 1515:17 <b>forecasting</b> 1398:7 <b>forego</b> 1377:10 <b>forfeit</b> 1377:8 <b>forgetting</b> 1492:16 <b>form</b> 1421:13 1502:13 <b>formal</b> 1518:2 1519:13 <b>formed</b> 1486:8 <b>former</b> 1370:14	<b>forum</b> 1455:13,18 1502:13 1529:14 1530:6 <b>forums</b> 1502:19 <b>forward</b> 1428:15 1472:2 <b>found</b> 1382:9 <b>foundation</b> 1367:1 1468:7 1485:14 1520:8 1521:1,8 1522:22 1523:10 1525:1 <b>four</b> 1370:25 1382:11 1416:23 1426:7 1465:12 1471:18 1493:24 1494:9 1497:17 1518:15 <b>frame</b> 1384:22 1385:1 1503:1 <b>frames</b> 1496:7 <b>Francisco</b> 1353:2,16,17 1353:24 1354:6 1357:1 1438:1 <b>frankly</b> 1420:22 1421:7 <b>free</b> 1377:15,19 1378:18 <b>frees</b> 1430:2 <b>frequent</b> 1523:23 <b>frequently</b> 1432:2 <b>Fromm</b> 1495:7 <b>front</b> 1366:25 1440:9 1446:10 <b>full</b> 1397:13 1458:5,11 1472:24 1473:7,11 1478:1 1500:19 1507:19 <b>fund</b> 1418:20,23 1423:10,21 1424:4 <b>fundamental</b> 1377:8 <b>funded</b> 1406:22 1407:25 1408:4,18 1414:8,18 <b>funding</b> 1377:9 1424:7 1457:22 <b>funds</b> 1370:25 1380:17 1419:19,20 1421:2,2 1421:4 1458:1 <b>further</b> 1357:18 1381:12 1438:7 1440:2,3 1442:15 1459:9,9 1519:19 1530:1 1534:14 <b>future</b> 1373:23 1379:18 1398:8 1399:16 1417:21 1428:23 1429:15 1467:4 1513:10	<b>G</b>	<b>gain</b> 1372:25 <b>Gastelum</b> 1370:17 1371:6 1372:12 1373:13,21 1374:4,15 1374:25 1375:10,14 1375:17 1383:4,7,13 1457:2 1525:13 1526:8 <b>Gastelum's</b> 1379:20 1380:20 <b>gears</b> 1428:25 <b>general</b> 1354:16 1363:5 1366:6,7 1370:18 1372:13 1376:4 1383:9 1443:20,23 1444:1,4 1447:13 1456:9 1480:8 1501:18 1525:10,14 <b>generally</b> 1503:17 1522:25 <b>generate</b> 1423:8 <b>generated</b> 1405:7,9 1421:18 1471:10 <b>generates</b> 1403:23 <b>get-go</b> 1396:12 <b>getting</b> 1369:3 1385:6 1385:14 1387:7 1394:19 1395:20 1419:18 1431:6 1433:24 1437:5 1491:5 <b>Gil</b> 1471:5 <b>gild</b> 1516:13 <b>give</b> 1384:20,24 1385:2 1408:1 1410:7 1426:8 1459:18 1469:4,5,6 1482:13 1494:7 1511:7 1521:3 <b>given</b> 1380:2 1381:7 1410:11 1414:9 <b>giving</b> 1491:13 1494:23 <b>Glance</b> 1448:18 <b>go</b> 1358:15 1367:1,2 1368:13 1375:25 1380:23 1382:5 1384:7 1385:18 1388:11 1389:11,21 1390:19 1393:21 1397:12 1404:5 1413:14 1417:4 1419:6 1423:17 1424:14 1427:13 1441:14 1442:10 1446:23 1451:23 1457:16 1461:1 1468:10 1472:16 1474:20 1476:15	1480:2 1481:2 1499:19 1500:3 1511:13 1529:17,18 1529:19 <b>goal</b> 1462:21 <b>goals</b> 1418:6,8,9 1420:24 1463:7 <b>goes</b> 1431:21 1457:15 1463:1 1490:18 1504:2 1532:3 <b>going</b> 1357:9 1358:19 1359:24 1369:9,24 1376:20 1386:9 1388:10 1394:24 1398:18 1400:7 1402:3 1415:2 1416:22 1419:14,18 1419:20 1420:21 1423:10,12,21 1426:5 1439:7,8,9 1440:8 1446:17 1447:12 1449:14 1450:25 1457:15,22 1470:14 1472:15 1473:14 1477:17 1479:3 1485:13 1486:1,6 1487:16 1488:6 1493:21 1494:14 1495:4,5,13 1508:5 1517:22 1522:24 1529:17,18,19 <b>GOLDBERG</b> 1354:5 <b>golf</b> 1408:9 <b>good</b> 1357:6 1358:3,4 1358:18 1411:16,17 1423:7,20,24 1437:18 1443:18,19 1484:24 1485:1,5 1489:9 1493:15 1494:12,22 1501:24 <b>governed</b> 1394:24 <b>Governor</b> 1522:16 <b>Governor's</b> 1522:15 <b>governs</b> 1393:7 <b>grade</b> 1408:8 1495:8 <b>grant</b> 1495:4 <b>great</b> 1523:1 <b>greater</b> 1484:11 <b>grounds</b> 1485:9 <b>groundwater</b> 1399:15 1403:2 1405:21 1408:21,23,24,25 1409:5,9 <b>group</b> 1397:23,24 1398:1,2,7 1399:25 1414:7,17 1498:5 <b>grow</b> 1412:9,21 <b>guarantee</b> 1382:16	<b>guess</b> 1456:4 1464:14 1464:22	<b>H</b>	<b>HADLOCK</b> 1354:4 <b>half</b> 1515:25 <b>hand</b> 1534:16 <b>handed</b> 1376:13 <b>handout</b> 1466:5 <b>happens</b> 1405:11 <b>happy</b> 1363:19 1366:19 1469:14 <b>hard</b> 1532:12,13 <b>harmony</b> 1386:7 <b>Havasu</b> 1391:14 <b>head</b> 1379:11 <b>heading</b> 1472:3 1487:22 <b>hear</b> 1460:1 1469:16 <b>heard</b> 1389:1,5,7,8 1453:23 1454:3,15 1494:13 1525:5,6 <b>hearing</b> 1469:17 1486:24 <b>held</b> 1455:22 1481:21 <b>hello</b> 1461:20 <b>help</b> 1409:7,8 1417:20 1428:22 1486:21 1531:2 <b>helped</b> 1479:14 <b>helping</b> 1398:5 <b>Hentschke</b> 1366:6 1376:4 1378:4 1480:8 1501:13 1513:4 <b>herring</b> 1486:2 <b>hesitate</b> 1456:1,20 <b>hesitating</b> 1456:4 <b>Hess</b> 1450:10 <b>high</b> 1409:1 1475:7 <b>high-efficiency</b> 1399:8 1399:8 <b>higher</b> 1408:7 1484:8 1528:14 <b>highlight</b> 1370:11 1458:13 <b>historical</b> 1510:19 <b>hit</b> 1391:11 <b>hits</b> 1391:7 <b>hold</b> 1448:22 <b>home</b> 1494:18 <b>Hon</b> 1357:4 1438:4 <b>Honor</b> 1359:21 1362:17,22 1363:11 1363:18 1364:9 1366:12 1367:5 1368:2,12,23 1376:11 1376:18 1383:22 1391:21 1392:4
---	---	----------	--	--	--	----------	---

1396:24 1410:21 1411:2 1417:2 1426:6 1426:8 1438:13,23 1439:17 1440:1 1442:14,18,24 1445:1 1447:3 1449:13 1464:8,17 1470:9 1473:19 1479:19 1485:11,17,22 1493:16,20 1495:6 1511:12 1512:22 1519:17 <b>HONORABLE</b> 1353:3 <b>hope</b> 1467:7,15 1516:13 <b>hoped</b> 1469:7 <b>hopefully</b> 1362:10 1372:7 <b>horse</b> 1477:20 <b>hours</b> 1493:24 1494:1,1 1494:9 <b>housekeeping</b> 1442:21 <b>huge</b> 1467:18 1492:16 1523:25 <b>hundred</b> 1390:8	<b>implications</b> 1390:5 <b>import</b> 1412:3 <b>importance</b> 1441:6 <b>important</b> 1390:16 1455:11,19,25 1456:7 1456:8,14,18 1458:18 1458:23 1462:5 1481:15,18 1490:25 <b>imported</b> 1413:8,11,21 1450:2 1484:12,14 1513:1 <b>impose</b> 1380:4 <b>impression</b> 1375:14 1459:6 <b>improper</b> 1520:5 1521:24 1524:18,19 <b>inability</b> 1509:18 <b>inadvertently</b> 1376:23 <b>inappropriate</b> 1453:5 1461:5 <b>incentive</b> 1400:14,24 1413:24 1421:15 1425:7 1426:22 1428:24 <b>incentives</b> 1398:4 1399:5,10,13,20,21 1399:22,23 1400:9 1406:16 1408:18 1409:6 1419:9 1422:18 <b>inception</b> 1407:15 1408:17 <b>incidental</b> 1510:3 <b>include</b> 1406:4 1425:25 1453:5,17 1454:16 1457:21 1478:17 1481:15 1529:15 <b>included</b> 1371:16,20 1435:7 1452:22,24 1453:15 1454:2 1463:4 1477:20,24 1497:25 1503:8 1507:24 1508:2,3 1518:3 1519:3 <b>includes</b> 1426:19 1429:18 1504:5 <b>including</b> 1387:12 1422:19 1448:1,12 1456:16 1458:19 1470:18 1477:5 1507:25 1508:6 1509:25 1520:11 1521:21 <b>inclusion</b> 1369:6 1454:8 1460:6,18 1461:2,24 1463:13 1520:23 1523:18 1525:11	<b>income</b> 1403:23 <b>inconsistent</b> 1522:1 <b>increase</b> 1403:1 1442:11 1458:24 1462:23 1490:3 1504:19 <b>increased</b> 1461:4 1492:17 1504:13 <b>increases</b> 1488:10 1489:4 <b>increasing</b> 1462:21,22 1463:8 <b>incremental</b> 1446:14 <b>independent</b> 1390:16 1487:18 <b>index</b> 1488:9 1489:6 <b>indicate</b> 1463:12 1483:25 1505:20 <b>indicated</b> 1521:23 1524:13 <b>indicates</b> 1448:24 1481:7 <b>indication</b> 1373:14 1439:19,21 1480:3 <b>individual</b> 1429:12 1522:15 <b>industry</b> 1383:8 <b>inflation</b> 1478:19 1483:1 1485:3 1489:21 1490:23 1491:10 <b>influence</b> 1531:2,2 <b>inform</b> 1506:3 <b>information</b> 1384:13 1446:19 1447:17,18 1447:21 1448:3,4,7 1469:5,9 1490:25 1493:11 1524:1 <b>informed</b> 1468:23 1471:16 <b>infrastructure</b> 1369:14 1370:23 1371:10 <b>inherent</b> 1418:11,12 <b>initial</b> 1498:22 1515:12 1516:21 1526:1 1529:1 <b>initially</b> 1415:10 1416:1 1498:21 <b>initiated</b> 1428:5,5 <b>initiatives</b> 1430:17 1432:2 <b>insofar</b> 1476:20 <b>inspection</b> 1509:25 <b>installed</b> 1406:22 1407:4,7,10,17 <b>instance</b> 1507:5 <b>instructed</b> 1427:24 1503:19,21	<b>intake</b> 1391:8,11,14 <b>integrated</b> 1418:7 <b>integrity</b> 1371:14 1373:2,10 1377:13 1378:9 1379:16,22 1381:9 1382:18 1395:24 1396:15 1422:1,3,9 1423:22 1424:1,17 1425:6,17 1425:21 1426:20 <b>intend</b> 1469:24 1512:14 1512:18 1513:9,18 <b>intended</b> 1380:18 1382:19 1386:7 1512:20 <b>intent</b> 1374:7 1381:11 1386:5 <b>intention</b> 1379:5 1512:11,15,17 1513:17 1514:24 <b>interest</b> 1368:10 1386:23 1392:9,19,21 1392:23 <b>interested</b> 1353:10 1466:19,22 1467:3 1469:17 1470:1 1534:14 <b>interests</b> 1393:14 <b>interpret</b> 1392:20 <b>interpretation</b> 1454:24 1488:22 1502:14 <b>interpreted</b> 1393:4 <b>interrupt</b> 1532:20 <b>invalid</b> 1524:18 <b>invalidate</b> 1526:9 <b>invest</b> 1412:20 1417:18 <b>invested</b> 1415:1,14 1416:4 <b>investing</b> 1412:2,24 <b>investment</b> 1417:6 1428:20 <b>investments</b> 1412:9 <b>invests</b> 1418:3 <b>invited</b> 1366:20 <b>invoice</b> 1499:15 1500:11 <b>invoked</b> 1362:2 1422:10 <b>invoking</b> 1362:14 1365:20 1502:1,22 <b>involve</b> 1462:6,8 <b>involved</b> 1430:16 1522:12 1523:7 <b>involvement</b> 1383:10 <b>involving</b> 1363:5 1388:2 <b>irrigated</b> 1408:11 <b>irrigation</b> 1408:9	<b>issue</b> 1369:19 1380:25 1388:11 1395:13 1434:13 1451:14 1455:11,25 1456:8,18 1458:17 1486:3 1503:18 1504:14 1508:21 1517:7 1519:13,14 1520:18 1526:7 <b>issued</b> 1518:2 <b>issues</b> 1369:5 1382:12 1449:9 1451:3 1452:11 1455:8 1456:14,16 1457:11 1457:19 1485:17 1514:7 <b>item</b> 1385:19 1386:1 <b>items</b> 1481:25 <b>Ivey</b> 1471:5 <b>IX</b> 1353:10
<hr/> <b>I</b> <hr/>				<hr/> <b>J</b> <hr/>
<b>ID</b> 1355:12 <b>idea</b> 1380:15 1435:8 1464:23 <b>identification</b> 1405:13 1411:11 <b>identified</b> 1457:11 1498:10 <b>identifies</b> 1485:20 1490:14 1504:6 <b>identify</b> 1429:21 1430:5 1445:12 1466:6 1487:24 1500:5 1514:3 <b>II</b> 1511:10 <b>IID</b> 1390:20 1391:12 1394:20 1395:4,4 1450:11 1472:24 <b>IID/SDCWA</b> 1477:3 <b>ill-conceived</b> 1384:3 <b>illegal</b> 1453:17 1456:16 1461:11,18 1462:1,10 1463:15 1482:17 1484:22 1485:2 1506:5 1525:22 <b>illegality</b> 1482:2 <b>illegally</b> 1462:11,13 <b>imagine</b> 1435:22 <b>immediate</b> 1372:15 <b>impact</b> 1450:9 <b>implement</b> 1417:25 <b>implementing</b> 1444:17			<b>J</b> 1354:13 <b>JAN</b> 1353:22 <b>January</b> 1353:12,12 1444:11 1447:19 1448:5 1451:9 <b>Jeff</b> 1355:3 1357:17 1525:9 <b>Jerry</b> 1378:6 <b>Jessica</b> 1495:7 <b>jkeker@kvn.com</b> 1354:8 <b>job</b> 1372:18 <b>John</b> 1354:3,13 1443:20 <b>johnquinn@quinne...</b> 1354:15 <b>join</b> 1438:11 <b>joke</b> 1470:25 <b>JOSEPH</b> 1354:17 <b>Juan</b> 1437:5 <b>Judge</b> 1357:4 1438:4 <b>judicial</b> 1502:13,19 1529:10,14 1530:6,13 <b>July</b> 1369:17 1374:14 1375:1 1384:22 1385:1 1440:10 <b>jump</b> 1496:3 <b>jumping</b> 1463:23 1496:5,6 <b>June</b> 1364:4 1372:12 1379:21	
				<hr/> <b>K</b> <hr/>
				<b>Karen</b> 1363:4 1364:21 <b>Karnow</b> 1353:3 1357:4 1438:4

<p><b>Katz</b> 1522:4,8,9,11,14 1522:18 <b>keep</b> 1471:16 1482:2 1501:4 <b>keeps</b> 1416:9 <b>Keker</b> 1354:3,3 1359:19 1389:15 1394:2 1442:17 1445:3 1447:6,11 1449:17 1452:16 1464:9 1468:6 1470:9 1473:20,23 1479:20 1485:22 1493:20 1495:6,13 1501:14 1511:12 1512:22 1513:25 1519:22 1520:10,17 1521:2,5 1521:7,13 1522:25 1523:12 1525:13 1527:23 1532:24 <b>key</b> 1492:20,24 <b>Kightlinger</b> 1355:3 1357:17 1358:3 1361:19 1362:13 1363:3 1364:1,16 1365:1,9 1366:5 1369:3,12 1371:13 1377:25 1380:19 1384:11 1393:23 1501:13,18 1507:4 1525:10 1528:22 <b>Kightlinger's</b> 1392:8 <b>kind</b> 1459:14 1460:8 1463:23 1464:22 1490:8 <b>kinds</b> 1399:21 1401:18 <b>knew</b> 1374:7 1444:19 1444:22 1446:17 1452:19 1453:2,15,20 1466:24 1467:1,9 1488:5 1507:11,14 1509:10,12,14 1512:12 1528:19 <b>know</b> 1358:21 1364:20 1376:21 1378:13 1380:19 1381:17,22 1394:11 1402:1,6 1411:7 1415:3 1416:13,18,19 1417:15 1420:6,12,13 1430:11 1431:18 1432:15 1435:21 1467:6,24 1468:21 1469:2 1470:13 1473:11 1475:6,14,15 1475:19,24,25,25 1476:20 1481:18 1483:20 1485:23</p>	<p>1487:14 1488:25 1500:22 1501:1 1503:25 1504:21,22 1504:24,25 1505:3,8 1506:3 1507:21,22 1508:1,25 1509:15 1510:19,22,24 1511:6 1513:10 1518:24 1522:5 <b>knowing</b> 1467:4 <b>knowledge</b> 1404:18 1410:9 1415:21 1416:5,7 1420:22 1421:6,24 1428:13 1430:23 1431:25 1433:14 1434:20 1435:4 1471:15 1520:21 1521:13 1524:23 <b>knowledgeable</b> 1359:8 1452:11,15,18 1496:1 1496:24 <b>known</b> 1455:23 1482:8 1482:18 1495:21 1523:16,17 <b>kudos</b> 1459:19</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>lack</b> 1382:25 <b>LADWP</b> 1369:18 1370:3,6 1371:8 <b>Lake</b> 1391:14 <b>land</b> 1486:8 <b>landfill</b> 1383:8 <b>language</b> 1371:17,20 1374:9 1377:13 1378:10,15,19,22 1380:5,12 1382:18 1383:13 1424:1 1425:10,12,17,23,24 1426:20 1427:21,23 1473:12 1513:15 1521:18 1524:19 <b>large</b> 1419:24 1510:19 <b>largely</b> 1419:6 <b>late</b> 1369:9 1384:22 1385:1 <b>latest</b> 1384:14 <b>law</b> 1402:2 1454:14,23 1455:2,2 1502:14 1524:16,20 1527:25 1528:14 1530:21 1531:8,19 <b>lawful</b> 1453:9 1467:1 1480:17 1481:13,19 1488:21 1516:2,4,23 1521:24 1526:13,21 1527:10 1528:4</p>	<p>1530:11 1531:3,4,9 <b>lawfully</b> 1454:1 1497:25 1519:2 <b>laws</b> 1471:22 <b>lawsuit</b> 1360:4,11 1362:2 1423:2,11 1450:22,25 1451:14 1460:24 1461:15,22 1505:19 1512:13 1530:15 <b>lawsuits</b> 1382:12,20,21 1382:22 1383:25 1384:4 1386:9 <b>lay</b> 1367:1 1485:13 <b>laying</b> 1480:24 <b>lead</b> 1528:9 <b>leader</b> 1463:22 <b>leading</b> 1383:18,21 1470:15 1481:5 <b>learn</b> 1465:13 <b>leave</b> 1398:22 <b>led</b> 1528:10 <b>Lee</b> 1464:14,18 <b>left-hand</b> 1446:10 <b>legal</b> 1372:23 1377:10 1377:19,22 1388:11 1402:4 1434:3 <b>legislation</b> 1402:24 <b>legislative</b> 1372:23 1377:11 1471:22 1502:12,18 1529:13 <b>legislature</b> 1405:19 1406:9 1522:9 1529:18 <b>length</b> 1483:6 1528:17 <b>lengthy</b> 1450:16 <b>lesser</b> 1373:1 <b>let's</b> 1357:15 1359:12 1359:15 1367:1,2,3 1374:13 1382:5,5 1389:24 1390:22 1393:8 1394:11,11 1395:23 1407:19 1427:13 1440:13 1441:5 1457:8 1470:5 1476:3,5,15 1479:17 1495:23 1501:10 1502:7 1512:24 1527:3 1529:11 <b>letter</b> 1355:14,15,16,17 1355:18,20,21,22,23 1355:24,25 1356:3,5 1356:12 1362:4,6,13 1363:3,8 1364:1,16 1364:22 1366:5 1368:16 1374:15 1376:12 1377:5 1378:2,8 1380:7</p>	<p>1424:15,18 1436:17 1440:10 1455:21 1457:10,17 1460:5 1461:13,14,19 1462:16 1501:12,17 1507:3 <b>letters</b> 1365:24 1366:4 1366:21 <b>level</b> 1395:25 1402:18 1426:4 1483:16 <b>license</b> 1393:3 <b>lieu</b> 1477:2 1480:17 1521:25 <b>life</b> 1409:18,20 1442:12 1485:3 1490:11 1529:19 <b>likewise</b> 1361:5 1377:6 1377:7 1429:8 1432:11 <b>lily</b> 1516:13 <b>limine</b> 1423:14 <b>limit</b> 1375:22 <b>limitation</b> 1530:18 <b>limited</b> 1378:22 1394:8 1532:7 <b>limiting</b> 1382:7 <b>limits</b> 1374:9 <b>line</b> 1359:8,9,24,25 1385:5,25 1406:11,19 1406:25,25 1407:2,6 1407:8,12,14,20,22 1408:16,22 1412:14 1413:12,13 1425:3 1426:7,7 1427:6,7,8 1427:14,14 1457:10 1458:14 1502:10 1511:11 <b>lines</b> 1408:13 1409:16 1416:23 1480:3 1496:2 1497:11 1518:7 <b>lining</b> 1465:6,9,15 1466:6 1472:25 1474:23,24 1476:25 1477:3 1479:12 1480:15 1483:18 1484:1 1489:16 1491:5,8,12,16 1492:11 1514:9 1515:23 1516:15 <b>list</b> 1363:14,18,19 1376:15,19,21,24 1457:19 <b>literal</b> 1392:23 1393:7 <b>literally</b> 1385:21 <b>litigate</b> 1373:22 1513:9 1513:18 <b>litigating</b> 1374:10</p>	<p><b>litigation</b> 1374:10 1388:2 1423:6 1424:3 1514:15,20 <b>little</b> 1361:21 1366:23 1372:11 1385:24 1423:15 1428:25 1437:21 1467:25 1494:4 1522:24 <b>live</b> 1495:5 1526:12 <b>lives</b> 1470:25 <b>local</b> 1371:17 1390:3,8 1390:10,12,16,18 1391:1 1394:7,19 1398:4 1399:12,13,18 1400:7,10,12,13,22 1400:23 1401:7,14,23 1402:18 1403:15 1405:8 1406:10 1410:3,19 1411:22,23 1411:24 1412:9,20 1414:3,20 1416:11,12 1419:8,10 1421:10,12 1421:13,18 1422:5,11 1422:15,16,21 1423:3 1426:23 1429:10 1462:25 <b>located</b> 1470:23 <b>location</b> 1391:18,19 <b>long</b> 1381:24 1399:24 1400:2 1404:16 1443:23 1448:23 1464:23 1473:6 1483:22 1487:18 1489:13 1528:6 <b>long-range</b> 1431:15 <b>long-term</b> 1380:13 <b>longer</b> 1422:20 <b>look</b> 1357:7 1372:6 1374:13 1390:22 1394:11 1406:11 1407:12,20 1408:13 1425:20 1428:15 1437:8 1440:8,13 1442:2,3 1444:25 1446:8 1447:1 1448:16 1451:24 1457:8 1458:12 1464:4 1466:3,13 1467:4,13,13 1468:15 1470:5 1472:22 1473:17 1474:9,18 1479:17 1482:20 1483:4 1486:12 1488:23 1490:7 1493:7 1494:5 1500:13,16 1501:10 1502:7 1503:5 1507:2 1509:22 1512:24</p>
---	---	--	--	---



<p>1513:22 1526:25  1529:11 1531:14,25  <b>looked</b> 1428:19  1465:23 1492:9  1503:6  <b>looking</b> 1364:10  1376:15 1381:19  1408:22 1429:13,14  1451:7 1467:12  1470:17 1479:1,2  <b>looks</b> 1363:7 1376:5  1398:7 1410:23  1508:15  <b>loosely</b> 1402:1  <b>Los</b> 1354:14,18  1470:23  <b>lost</b> 1396:16  <b>lot</b> 1358:6 1381:25  1419:25 1475:1,2,3,4  1475:6 1476:7  1477:17  <b>love</b> 1386:2  <b>low-cost</b> 1381:1  <b>lower</b> 1373:4 1448:21  1448:23 1449:24  1484:7 1496:21  <b>LRP</b> 1417:7 1423:25  <b>lunch</b> 1437:20</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>M-A-U-R-E-E-N</b>  1443:14  <b>ma'am</b> 1467:23  1470:14 1482:12  1504:16  <b>MAF</b> 1472:13  <b>magnitude</b> 1511:7  <b>maintain</b> 1373:2  <b>maintaining</b> 1458:25  <b>maintains</b> 1452:6  <b>maintenance</b> 1509:25  <b>major</b> 1399:14  <b>makers</b> 1468:3  <b>making</b> 1417:7 1486:9  1491:1  <b>manage</b> 1398:9,13  <b>management</b> 1390:11  1390:15 1391:6  1397:24 1398:1,2,3  1398:25 1399:2,25  1401:9,11,25 1402:20  1402:21 1403:20,24  1403:25 1404:22,23  1405:5,9 1406:5,7,14  1411:22 1412:2  1413:6,9 1414:3  1416:14 1417:19  1418:20 1419:4,25</p>	<p>1428:5,11,16,18  1429:3,5,23 1430:7  1430:12 1431:21,23  1432:11 1442:7,9  1444:5 1462:25  <b>manager</b> 1372:13  1397:23 1399:24  1443:21,23 1444:1,4  1456:9 1468:24  1525:14  <b>managers</b> 1375:1  <b>manages</b> 1398:2  <b>manner</b> 1478:24  1530:13  <b>March</b> 1447:25  1448:11  <b>marginal</b> 1373:6  1483:25  <b>mark</b> 1446:15  <b>marked</b> 1405:12  1411:11 1447:2  <b>Marty</b> 1496:6,8  <b>matched</b> 1528:17  <b>material</b> 1375:24  1377:17 1378:18  1465:2  <b>matter</b> 1423:7,8,9,19  1530:15  <b>matters</b> 1393:15  1503:13  <b>Maureen</b> 1355:6  1443:5,8,13  <b>maximum</b> 1467:10,22  1468:22 1469:11  1490:6 1492:8  <b>McCrae</b> 1355:21  <b>McFly</b> 1496:6,8  <b>mean</b> 1393:6 1399:20  1418:17 1426:2  1429:24 1430:8  1434:7 1456:9 1462:6  1477:10 1488:16,22  1492:14 1516:13  1517:11 1528:2  1530:7  <b>meaning</b> 1386:2 1390:7  1427:13 1434:3  1531:5,6  <b>means</b> 1377:18 1385:24  1403:7,8 1423:7  1434:4,14 1440:21  <b>meant</b> 1393:13 1421:7  1528:3  <b>measure</b> 1357:12  1409:3 1421:21  <b>measured</b> 1420:23,24  <b>meet</b> 1399:18 1400:17  1401:2,15 1408:11</p>	<p>1409:9 1410:4,19  1418:1,9 1429:16  <b>meeting</b> 1370:17  1375:1,4,10,12  1377:22 1445:23  1449:20 1455:20  1471:8  <b>meetings</b> 1360:21  1361:2,3,15,16  1432:6 1505:6,9,12  <b>member</b> 1371:22  1372:22 1373:22  1375:1 1377:7,14,18  1378:17 1380:6,9  1381:3 1382:19  1387:12 1398:6  1400:10 1401:7  1402:15 1403:12,15  1406:10 1410:18  1411:23 1418:15  1419:4,7,14,16,22,25  1420:15,21 1421:4,18  1425:8,16 1426:17  1427:19 1428:25  1433:2,7 1435:14,20  1435:24 1450:10  1459:3 1468:25  1471:7 1523:17  <b>members</b> 1396:8  1451:24 1458:19  1469:22 1470:22  1474:3 1480:1 1503:6  1504:2,12,18 1506:7  1506:8,9,12 1525:8  <b>memo</b> 1372:12 1379:20  1380:24 1381:5  1471:5 1476:17,21,23  1480:10,23 1481:2,3  1481:4,7 1512:25  <b>memorandum</b> 1474:6  1474:14 1476:16  1478:14 1479:15  1480:4 1492:10  1513:3  <b>memos</b> 1380:20  1516:14  <b>mentioned</b> 1405:16  1406:15 1523:12  <b>mere</b> 1389:3  <b>merely</b> 1377:10  <b>met</b> 1358:9 1381:3  1400:4 1411:18  1414:6,15,24,25  1415:14,15,22 1416:8  1417:18,19,20 1418:2  1418:14,19,22 1419:2  1419:13,21 1420:4,9  1420:14,17,25,25</p>	<p>1422:14 1423:10,20  1424:4,10,12 1425:10  1429:2 1430:13,20,20  1430:24 1433:6  1434:19,23 1435:1,9  1435:24 1438:13  1444:16 1448:13  1450:18,19 1451:8,25  1463:7 1472:23  1477:4,11 1478:10,11  1484:9,15 1490:10,19  1491:10,16 1497:12  1498:1,6,21 1499:11  1499:25 1500:7  1501:4,4,20 1502:5  1502:12 1503:1,3,7  1503:12 1504:11  1505:15,16 1506:4,15  1506:20 1507:6,10,11  1507:14,19 1509:6  1510:15 1511:17  1512:12 1513:10,11  1515:10 1517:3  1518:3,9 1519:5,24  1520:4,10,22 1521:19  1522:19 1523:2,4  1524:7,12,23,25  1525:15 1527:9,18,25  1528:3,6,23 1529:13  1529:15,18 1530:12  1532:8,14  <b>Met's</b> 1360:14,19  1374:6 1403:18  1412:9 1422:18  1434:14 1435:6,25  1445:21 1473:3  1476:25 1477:1,11  1478:6 1480:14,17,18  1481:12,19 1488:19  1506:24 1507:7  1509:3 1513:9,12  1515:5 1526:11,16  1531:22  <b>Met.But</b> 1448:2  <b>Metropolitan</b> 1353:9  1353:11 1354:11  1358:7 1359:2,8  1360:13 1362:6  1363:5 1364:2,22  1365:9,15,20,23  1366:6,20 1371:1,7  1371:10,16,20,21  1372:1,2,13,22  1373:9 1377:20,20  1382:10 1386:13,19  1387:10,20 1388:19  1390:9 1391:1,10  1392:8,14,22 1393:16</p>	<p>1394:7,24 1395:2,12  1395:13,21 1396:1  1397:20 1399:3  1400:3,15,25 1402:11  1402:16,19,22 1403:1  1403:10,23 1404:20  1405:7,18 1408:18  1410:13,15,16 1412:1  1412:2,5,10,20  1413:7,10 1414:4,10  1415:23 1416:14  1417:7 1419:11  1421:15 1424:16  1425:4 1428:6,10,14  1428:20 1429:4,9,10  1429:13,19 1433:1,7  1433:19 1434:4  1435:13,20 1436:8,9  1436:18 1437:9,14  1440:18 1441:16  1442:24 1443:5  1444:7,13 1449:8  1451:2 1454:11,16,25  1455:6 1456:25  1457:4 1461:17,23  1463:25 1466:11,12  1466:17 1468:18  1471:6,10 1487:12  1499:7 1500:20,21  1505:6 1510:1  1523:18 1525:9  <b>metropolitan's</b> 1357:7  1361:17 1369:7,13  1370:9,21,23,24  1371:23 1373:17  1375:3,7,18,23  1377:15 1379:8  1387:15,25 1388:1  1391:8 1392:10  1395:17 1402:10,12  1402:13 1403:11  1404:24 1405:1,3  1413:11,16 1425:7  1432:13 1433:12  1436:2 1457:12  1458:19 1460:20  1461:4 1503:2  <b>mid-1990s</b> 1428:6,14  <b>mid-2000s</b> 1428:21  <b>middle</b> 1463:24  <b>miles</b> 1390:8  <b>Miller</b> 1464:14  <b>million</b> 1407:17  1408:19 1442:11  1472:14 1475:1,10,13  1515:24  <b>millions</b> 1462:6,7,8,11  1462:13</p>
---	---	--	---	--

<p><b>mind</b> 1512:1,19 1514:23 1531:4 <b>minimum</b> 1477:25 <b>minute</b> 1376:14,16 1391:22 <b>minutes</b> 1356:7 1391:25 1392:1 1437:17 1449:20 1451:16,19 1489:10 1493:17 <b>misheard</b> 1505:24 <b>misinterpretation</b> 1454:14 <b>misspoken</b> 1505:24 <b>mistake</b> 1452:12 <b>misunderstood</b> 1517:24 1519:8 <b>mode</b> 1383:6 <b>modification</b> 1510:3 <b>modifications</b> 1526:3 <b>modified</b> 1425:5 <b>modify</b> 1425:10 <b>moment</b> 1466:20 1519:16 <b>money</b> 1366:1 1368:8 1413:7,21 1416:3 1418:22 1419:2,3 1429:2,5,10 1430:1 1476:7 1501:3,4,21 <b>monies</b> 1420:19 <b>month</b> 1468:12 <b>month-and-a-half</b> 1374:14 <b>monthly</b> 1468:11 <b>months</b> 1384:19,23 <b>morning</b> 1357:6 1358:3 1358:4 1364:24 1411:16,17 <b>motion</b> 1357:7 1392:5 1393:5 1423:14 1495:5 <b>motive</b> 1486:1 <b>mount</b> 1372:3 <b>mounted</b> 1371:22 <b>move</b> 1362:16 1363:11 1364:7 1365:4 1366:10 1367:4,11,15 1367:19,23 1369:20 1370:8 1374:19 1376:6 1387:8,9 1392:7 1402:23 1404:24 1405:1 1407:19 1408:21 1410:25 1411:2 1424:19 1429:16 1430:25 1431:8 1436:13,23 1438:14 1438:18 1441:20</p>	<p>1468:7 1495:21 1527:21 <b>moved</b> 1387:15,17 1435:18 1439:18 1508:14,15 <b>movement</b> 1413:10 <b>moves</b> 1442:24 <b>moving</b> 1371:8 1405:3 1416:19 1424:23 <b>MWD</b> 1356:6,14 1378:7 1386:2 1449:4 1450:11,12 1465:11 1465:19 1470:23,24 1471:7,23 1474:23 1487:25 1488:16 1489:18 1490:2 1514:19 1523:17 1528:4,10 1529:8 <b>MWD's</b> 1450:7 1514:4</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 1355:1 <b>name</b> 1380:20 1381:1,4 1397:13 1443:20 <b>named</b> 1393:25 1534:11 <b>necessarily</b> 1455:20 1509:5 <b>necessary</b> 1439:16 <b>need</b> 1380:4,6 1381:8 1381:16 1404:24 1411:7 1413:9 1415:3 1426:25 1429:2,10 1439:11 1441:21 1495:3 <b>needed</b> 1366:16 1468:15 1526:2 <b>needing</b> 1370:8 <b>needs</b> 1398:8 1399:19 1400:17 1401:2 1408:11 1429:15 1466:5 1489:24 <b>negotiable</b> 1426:15 <b>negotiate</b> 1512:11 1526:12 1531:15 <b>negotiated</b> 1453:25 1472:17 1509:13,17 1532:11 <b>negotiating</b> 1456:13 1463:22 1466:25 1469:8 1483:22 1524:12 <b>negotiation</b> 1364:18 1426:3 1463:17 1497:1 1529:6 <b>negotiations</b> 1496:10 1496:23 1499:22 1519:10 1522:12,17</p>	<p>1523:25 1528:22 <b>neither</b> 1502:11 1529:12 <b>NEST</b> 1354:3 <b>never</b> 1365:10 1414:6 1420:17,25,25 1428:10,14 1431:4,7 1431:22 1433:6,18 1481:9,10 1496:24 1532:15 <b>new</b> 1364:23 1372:4 1374:5,11 1375:20 1381:17 1386:7 1406:21,23 1407:6 1422:4,11,14,21 1423:3 1425:7 1457:1 1468:14,16 <b>ngoldberg@kvn.com</b> 1354:9 <b>NICHOLAS</b> 1354:5 <b>nine</b> 1494:1 <b>Nineteen-and-a-half</b> 1443:24 <b>Nods</b> 1379:11 <b>non</b> 1370:1,7 1371:8 <b>non-meritorious</b> 1384:4 <b>non-Metropolitan</b> 1387:18 <b>non-State</b> 1387:17 <b>non-SWP</b> 1440:19 <b>nonnegotiable</b> 1425:17 1425:23 1426:2 <b>nonproject</b> 1441:20 <b>noon</b> 1437:17,24 <b>normal</b> 1377:16 <b>North</b> 1354:17 <b>note</b> 1392:19 1433:1 1470:17 <b>noted</b> 1363:16 <b>notice</b> 1377:22 <b>Notwithstanding</b> 1390:24 1391:5 1484:21 <b>number</b> 1355:12 1366:14 1380:7,11,25 1382:9 1385:16,19 1389:13 1392:14,16 1396:7,22,22 1407:3 1414:13 1430:16 1442:10,23 1446:6 1448:24 1468:17 1488:9 1509:24 1516:10 1520:3 1529:3 <b>numbered</b> 1459:11 <b>numbers</b> 1394:5 1466:21 1467:14,16</p>	<p>1479:7 1490:20</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>oath</b> 1357:21 <b>object</b> 1363:15 1376:20 1379:1 1402:3 1415:2 1423:12 1434:5 1438:18,19 1495:13 1495:18 1499:14 1508:14 1527:21 <b>objected</b> 1369:5 1485:9 <b>objecting</b> 1378:9 1500:10 1520:22 <b>objection</b> 1362:20,21 1363:13 1364:9 1365:6 1366:12,22 1367:6,7,12,17,21 1368:18,23 1369:21 1374:21 1383:18,19 1385:22 1388:6 1389:4 1404:7 1416:25 1417:3 1424:21 1426:12,13 1436:25 1443:2 1445:1,3 1447:4,6 1449:14,17 1452:16 1464:7,9 1468:6 1470:7,9 1473:19,20 1473:24 1479:18,20 1485:23,23 1486:10 1495:10,20 1501:11 1501:14 1507:20 1508:12,18,20 1511:12 1512:22 1513:24,25 1520:7,11 1520:13 1521:1,8 1522:22 1523:1,10 1525:1 <b>objectionable</b> 1378:10 <b>objections</b> 1358:14,17 1378:12 1508:10 1518:2 1525:11 <b>objective</b> 1418:1 <b>Objectives</b> 1514:18 <b>objects</b> 1460:17 1461:1 <b>obligation</b> 1365:11 <b>obligations</b> 1388:17 <b>obtain</b> 1370:7 1426:21 <b>obtaining</b> 1370:16 <b>obvious</b> 1383:20 <b>occasion</b> 1455:5 1506:19 <b>occur</b> 1426:3 <b>occurred</b> 1423:5 <b>October</b> 1445:18,22 1452:20 1463:19 1470:16 1472:5 1486:23,24</p>	<p><b>offer</b> 1445:2 1447:5 1449:14 1464:7 1473:19 1479:19 1501:12 1513:24 1529:1 <b>offered</b> 1470:10 <b>offering</b> 1485:10,11 <b>offhand</b> 1461:19 <b>OFFICE</b> 1354:16 <b>Oh</b> 1446:11 1481:17 <b>okay</b> 1358:18 1360:1 1368:11 1406:14 1413:16 1432:20 1434:17 1436:20 1458:22 1466:18 1496:9 1508:4 <b>omitted</b> 1376:24,25 <b>Once</b> 1425:24 <b>one-page</b> 1376:9 <b>ones</b> 1411:4 <b>ongoing</b> 1416:8 1517:25 <b>open</b> 1377:22 1482:11 <b>operate</b> 1435:1,3 <b>operations</b> 1441:7 <b>opinion</b> 1432:5 1434:1 1453:24 1454:3 <b>opportunity</b> 1439:5 1504:18 1526:11 1529:9 <b>opposed</b> 1396:11 <b>opposite</b> 1503:20 <b>option</b> 1431:8,10,22 1468:13,14 1472:8,23 1478:16,21,22 1479:2 1514:9 1516:1 <b>Option-1</b> 1384:17,20 1384:24 1385:10 1466:15,18 1468:15 1472:11,15 1480:11 1482:22 1488:4 <b>Option-2</b> 1384:18,21 1384:25 1385:11 1466:16,18 1468:16 1472:23 1474:21,23 1476:23 1478:6 1480:11,13 1483:12 1484:7,18 1485:21 1487:22,24 1488:13 1490:13 1493:12 1515:12,23 <b>options</b> 1464:23 1466:12 1468:13 1472:4 1474:12,16 1478:3 <b>Orange</b> 1396:20 <b>order</b> 1372:25 1391:13 1409:2 1412:21</p>
--	--	---	--	--

<p>1417:25 1420:17 1493:25 1511:7 <b>organizations</b> 1381:2 1383:1 <b>originated</b> 1385:7 <b>ought</b> 1456:1 <b>outdoor</b> 1408:9 <b>outlining</b> 1474:12,15 <b>overall</b> 1415:11 1418:2 1420:24 1444:5 1459:4 <b>overarching</b> 1418:6 <b>overhear</b> 1525:2 <b>overruled</b> 1362:23 1383:23 1404:8 1468:9 1520:15 1521:3,9 <b>oversee</b> 1405:24 <b>owned</b> 1369:15 <b>owner</b> 1387:3 <b>ownership</b> 1386:23 1387:10,23 1392:9,19 1392:23 1393:6 <b>owns</b> 1386:17 1401:10 1402:2</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1438:3 <b>package</b> 1504:2,21 <b>packages</b> 1504:17 <b>page</b> 1359:24,24 1369:25 1370:12 1376:12 1377:4,5 1386:7 1406:1 1409:22 1412:14,16 1413:12,13 1416:23 1426:7 1445:18 1446:6,7 1449:23,24 1452:15 1458:4,5,11 1458:12 1459:9 1462:20 1474:10,20 1478:9 1480:2,4,10 1483:9,14,14,25 1484:6 1496:2 1500:15 1511:10 1513:3 1514:6,18 <b>pages</b> 1353:13 1359:8 1376:8 1411:4,6 1438:21,24 1439:3,10 1471:19 1472:2 1482:20 1502:9 1509:23 <b>paid</b> 1404:12,13 <b>paragraph</b> 1362:14 1363:6 1364:18 1365:11 1369:24 1370:11,13 1372:20 1373:13 1374:1,24</p>	<p>1377:6,7,14 1389:11 1389:18,21,22 1390:22 1394:8 1425:3 1437:6,8 1440:14,15,25 1450:1 1450:2,16 1457:18,18 1458:5,12,15 1459:11 1460:3,4,13,14 1462:19 1466:4 1476:24 1478:1,9 1480:14 1500:25 1510:4 1531:17 <b>parentheses</b> 1531:24 <b>park</b> 1408:9 <b>parlance</b> 1390:9 <b>parole</b> 1486:5 <b>part</b> 1360:23 1361:11 1363:14 1368:7 1376:14 1385:10 1386:13,19,21 1387:2 1390:15 1400:8 1402:12,13 1404:2 1405:4 1406:8,14 1407:25 1408:5 1413:23 1422:8 1423:25 1427:23 1433:1,15,16 1435:5 1447:3 1460:23 1486:13 1492:15 1503:25 1526:15 1531:7 <b>partially</b> 1408:18 <b>participate</b> 1422:10,20 1423:3 1428:3 <b>participated</b> 1360:12 1361:8 1522:16 <b>participating</b> 1445:20 <b>particular</b> 1409:13 1428:12 1447:21 1448:7 1455:18 1456:25 1467:12 1480:13 <b>parties</b> 1366:21 1379:6 1395:5,6 1429:20 1486:3 1510:6 <b>partners</b> 1398:12 <b>partnership</b> 1514:19 <b>party</b> 1440:23 1496:13 1497:5 <b>passage</b> 1511:10 <b>passed</b> 1402:25 1517:21,22 1519:12 <b>path</b> 1466:7 <b>Pathways</b> 1472:4 <b>pay</b> 1387:5,19,24 1394:14 1409:8 1420:1 1433:16,21 1477:15,17,25</p>	<p>1480:16 1485:2 1490:2 1492:17 1500:19 1507:19 1515:16,24,25 1516:2 1516:8,21,23 1526:1 1526:16,20 1528:14 1529:8 1532:2 <b>pay-as-you-go</b> 1457:22 <b>paying</b> 1420:8 1477:1 1492:12 1508:5,12,18 <b>payment</b> 1388:4 1491:9 <b>payments</b> 1364:3 1365:16 1366:7 1386:25 1388:3,15,22 1389:2 <b>pays</b> 1403:24 1420:15 1472:12,24 1507:14 1508:9 <b>peace</b> 1386:7 1471:20 1514:20 <b>pendency</b> 1500:20 <b>pending</b> 1451:14 <b>people</b> 1380:25 1470:18 1495:3 1520:4,22 <b>percent</b> 1435:19 1465:11,11,12 1467:9 1468:20 1483:2 1485:3 1487:13,16,16 1499:3 1511:1 <b>percentage</b> 1416:13,16 1417:8,11 <b>perform</b> 1508:17,23 1509:6 1510:16 <b>performance</b> 1509:3 1515:6 <b>performed</b> 1515:10 <b>period</b> 1358:23 1360:3 1400:5 1406:20 1465:20,24 1467:18 1483:6 1505:18 1506:18 1511:22 1512:21 1513:20 1523:5 1529:7 1530:8 1530:25 <b>permanent</b> 1441:7 <b>permission</b> 1441:21 <b>permit</b> 1372:1 1393:9 <b>permits</b> 1370:1,6 <b>permitted</b> 1371:21 1528:14 <b>person</b> 1359:7 1383:8 1452:10,14,18 1496:1 1496:23 <b>personally</b> 1481:6 1497:22 1498:11,13 1517:2,15 1518:22 <b>PERSONS</b> 1353:10</p>	<p><b>persuade</b> 1359:2 <b>pertaining</b> 1529:22 <b>Petitioner</b> 1353:7 1354:2 <b>phase</b> 1376:24,25 1434:9 <b>phone</b> 1375:12 1455:23 <b>photo</b> 1495:14 <b>phrase</b> 1385:13 1392:19 <b>phrases</b> 1403:4 <b>pick</b> 1489:10 1532:23 <b>picture</b> 1495:9,19,21 1495:22 <b>pictures</b> 1495:16 <b>pie</b> 1412:22 1487:11 <b>piece</b> 1402:24 <b>pipe</b> 1408:8 <b>place</b> 1373:10 1440:17 1441:1,3,6,9,11,15,19 1441:25 1442:2 1467:5 1486:5 1488:4 1534:11 <b>placed</b> 1405:17 <b>placement</b> 1524:6 <b>plain</b> 1530:23 <b>Plaintiff</b> 1353:7 1354:2 1485:8 <b>Plaintiff's</b> 1357:8 1363:14 1526:25 <b>plan</b> 1356:14 1418:8 1467:7 1514:5 <b>planned</b> 1458:24 <b>planning</b> 1390:11 1471:8 <b>plans</b> 1375:2 1431:16 <b>plant</b> 1408:7 <b>playing</b> 1363:16 <b>please</b> 1358:21 1359:22 1366:4 1367:4 1384:9 1387:2 1390:23 1394:16 1397:13 1404:9 1407:21 1408:14 1424:14 1425:3 1426:6 1436:14 1443:13 1445:12 1447:1 1449:12,23 1487:9,21 1495:21 1511:13 1527:1 1531:14,25 <b>plus</b> 1491:10 <b>point</b> 1362:4,19 1380:12 1382:6 1385:13 1399:16 1401:22 1402:10,16 1403:11 1410:15 1424:9,11 1455:1 1480:23 1481:7</p>	<p>1489:9 1493:20 1494:23 1496:22 1497:5 1499:24 1523:21 <b>point-to-point</b> 1382:22 <b>pointing</b> 1439:2 <b>points</b> 1385:11,16 1465:3 1466:6 1492:20,24 <b>policies</b> 1371:2 <b>policy</b> 1356:11 1380:25 1383:14 1396:9 1418:19 1479:15,23 1480:24 <b>portion</b> 1442:23 1485:24 1510:20 <b>posed</b> 1370:18 <b>position</b> 1364:11 1373:15 1397:22,23 1450:7 1473:3 1475:20 1486:12 1516:18 1523:13 1532:14 <b>positive</b> 1459:15,21 1469:13 <b>possesses</b> 1420:14 1440:16 <b>possibility</b> 1530:21 <b>possible</b> 1391:24 1430:2 1469:1 1530:20 <b>Possibly</b> 1439:4 <b>post-trial</b> 1439:2 <b>postage</b> 1382:22 <b>potential</b> 1431:4 1450:9 1465:3 1467:12 1478:21 1479:1 <b>power</b> 1358:11 1444:19 1446:14 1453:13 1459:10,13,17 1460:6 1460:6,12 1477:6,21 1480:20 1484:10 1507:25 1508:6 1525:20 <b>PowerPoint</b> 1445:14,25 1470:8 1487:1,3 1514:4 <b>PowerPoints</b> 1471:3 <b>practice</b> 1503:18 <b>pre-decision</b> 1419:19 <b>preceded</b> 1384:23 <b>precedent</b> 1526:8 1528:18 <b>preclude</b> 1530:5 <b>preclusive</b> 1393:12 <b>predated</b> 1384:19 <b>predecessor</b> 1372:15</p>
--	---	---	---	---

<p>1372:16  <b>preferential</b> 1382:21  1450:21 1451:3,15  <b>prejudice</b> 1450:21  <b>prepare</b> 1376:19  1438:15 1479:14  <b>prepared</b> 1398:15  1474:11 1480:4,7  1513:4  <b>present</b> 1434:9 1466:23  1469:23 1476:1  1483:10 1489:17  1490:7,9 1491:4,23  1492:5 1493:25  <b>presentation</b> 1355:19  1445:14 1446:1  1471:3,7 1487:1,4  <b>presented</b> 1373:3  1430:21,24 1431:7,22  1487:2 1491:18,21,25  1492:3 1499:1  <b>presenting</b> 1491:1,23  1492:5  <b>President</b> 1521:19  <b>presume</b> 1473:12  <b>pretty</b> 1378:17 1462:5  <b>prevented</b> 1502:1,22  <b>previous</b> 1407:4 1489:7  <b>previously</b> 1447:3  <b>price</b> 1365:17 1394:13  1488:24 1490:15  1496:15,16,16,21  1497:3,6,7 1498:22  1498:24 1499:11,15  1500:7,10,18 1501:3  1515:12,15 1516:21  1527:6,24 1528:3  1531:16,19,20,24  1532:1,8  <b>prices</b> 1532:15  <b>pricing</b> 1389:19  1394:23,25  <b>primary</b> 1411:20,24  1504:14  <b>prior</b> 1362:1 1370:16  1447:19 1448:5  1461:22 1500:1  1505:19 1506:19  1523:14  <b>priority</b> 1483:16  <b>private</b> 1523:15  <b>probably</b> 1363:10  1382:11 1420:11  1435:21 1472:7  1477:19 1508:15  1522:23  <b>problem</b> 1376:14  1395:16 1519:24</p>	<p>1531:15  <b>problems</b> 1526:4  <b>procedural</b> 1530:17  <b>procedure</b> 1365:14,21  1502:2,23  <b>proceed</b> 1357:15  1359:21 1393:8  1495:23  <b>proceedings</b> 1353:15  1534:10  <b>process</b> 1360:25 1361:6  1361:9,12,22 1362:3  1363:6 1369:11  1377:16,23 1385:10  1425:18,19 1441:14  1441:18 1444:8  1523:8  <b>processes</b> 1360:13  <b>produce</b> 1399:17  1400:16 1401:1,19,20  1410:3 1419:11  <b>produced</b> 1401:11,14  1401:24 1407:24  1408:19 1409:12,21  1414:11,22 1416:11  1442:9  <b>producing</b> 1408:5,19  1410:16 1414:19  <b>production</b> 1405:23  1408:14,16 1409:14  1409:17 1462:21  <b>proffering</b> 1396:22  <b>program</b> 1371:14,16,17  1379:16,22 1380:13  1398:5 1399:4,4,11  1399:12,12,13 1400:7  1405:9 1406:16,22  1407:3,25 1408:2,2  1408:23 1409:12,20  1416:1 1417:23  1419:9 1422:17  1423:3,7,25 1425:8  1425:11 1428:4,20,23  1428:24 1442:7  1470:23  <b>program's</b> 1407:15  1408:17  <b>programs</b> 1397:25  1398:3,3,25 1399:1,2  1399:3 1400:13,23  1401:10,12,18,18,25  1402:20,21 1403:20  1403:24,25 1404:22  1404:23 1405:5  1406:6,7,15,15  1409:5,18 1410:14  1411:22 1412:3  1413:6,9,19 1414:3,8</p>	<p>1414:17,21,22,25  1415:10,12,14,24  1416:10,15,18 1417:8  1417:19,20,25 1418:7  1418:9,18,20,23  1419:6 1420:23,23  1421:7 1422:11,21  1428:3,5,8,11 1429:3  1429:13,23 1430:7,12  1431:22,23 1432:11  1432:13 1442:9,12  1462:23 1463:1  <b>project</b> 1369:7,12  1370:2,7,8 1371:8,9  1386:11,23 1387:1,16  1387:17 1388:4,15  1392:9,15,24 1393:17  1395:8 1398:9 1401:8  1402:8 1409:8,8  1418:3 1423:20,23,24  1423:25 1431:1,8  1432:3 1433:3,8,22  1434:23 1435:2,3,5,9  1435:10,15,18 1436:1  1437:4,10 1440:24  1441:1,2,4,4,11,12  1442:4 1446:23  1451:20 1452:24  1453:14 1454:8,13  1460:9,12,19 1461:24  1474:25 1476:25  1477:21 1491:13,16  1496:14,25 1497:6,12  1497:22 1498:10  1503:8 1506:24  1507:6,12,18,24  1508:7,13,16,19,22  1509:2,11,18 1510:2  1510:7,12,16,22  1517:2,5,15 1518:3  1518:10,21 1519:2,25  1520:6,11,23 1521:15  1521:21,25 1523:9,15  1523:19  <b>project-by-project</b>  1418:2  <b>projected</b> 1428:20  <b>projection</b> 1468:3  1469:6  <b>projections</b> 1466:21  1499:1  <b>projects</b> 1380:14  1399:14,17 1400:11  1400:16,16 1401:1,1  1408:17 1414:7,8  1419:12 1420:6  1422:5,11,15,16  1423:4 1429:11</p>	<p>1466:6 1497:25  <b>promised</b> 1493:25  <b>promising</b> 1529:17  <b>proper</b> 1357:11,12  1523:14  <b>properly</b> 1373:1  1458:25 1525:23  <b>proportional</b> 1420:18  1421:1  <b>proposal</b> 1383:14  1384:14,16 1396:6  1424:22 1445:22  1446:3,13 1462:12  1473:4 1488:12  <b>proposals</b> 1481:5  <b>propose</b> 1496:13,21  1497:5,21 1498:1  1517:14 1518:19  1519:4  <b>proposed</b> 1384:21,25  1396:7,20 1436:18  1450:7,8,11,12,19  1454:16 1457:12  1463:25 1483:5,5  1485:18 1491:14  1496:24 1498:9  <b>proposing</b> 1396:17  1440:22  <b>protects</b> 1484:11  <b>protest</b> 1364:5 1366:7  <b>protested</b> 1369:10  <b>prove</b> 1368:1  <b>provide</b> 1363:19  1380:14 1398:3  1399:9 1402:17,21  1421:7,8,10,12  1422:17 1440:19  1450:12 1459:2  1481:13,24  <b>provided</b> 1419:9  1450:3 1469:11  1477:14 1481:9  1500:20 1528:16  1529:25  <b>provides</b> 1399:5,13  1502:8  <b>providing</b> 1406:16  1409:6 1421:16  1429:19 1439:8,10  1459:4  <b>proving</b> 1368:3  <b>provision</b> 1368:5  1374:1 1381:9 1422:1  1422:4 1425:6,21  1500:17,22 1501:1,23  <b>provisions</b> 1371:1  1390:24 1422:24  1424:10,11 1427:2</p>	<p>1436:12  <b>PTX</b> 1359:20 1362:11  1362:16,24,25 1363:1  1363:12,21,24 1364:7  1364:12,13,14,23  1365:7,8 1366:4,10  1366:17 1367:4,5,8  1367:10,11,13,15,16  1367:18,19,20,22,23  1367:24 1368:18,20  1369:16,22 1372:9  1376:1,6 1377:2  1384:9 1385:2  1389:15,17 1392:11  1393:25 1424:14,15  1424:19,22,25  1436:14,17,23 1437:1  1437:3 1439:18  1440:8 1500:14  <b>public</b> 1377:22 1481:1  1487:3 1519:15  1523:15  <b>publicly</b> 1482:8,17  1523:16,16  <b>published</b> 1480:18  <b>pull</b> 1389:10 1390:14  <b>pulled</b> 1365:2  <b>pump</b> 1391:15  <b>Purcell</b> 1354:4 1358:2  1359:6,11,20,23  1362:16 1363:1,11,18  1363:24 1364:7,14  1365:4,9 1366:3,10  1366:15,19 1367:3,10  1367:15,19,23 1368:2  1368:9,15,21 1369:3  1369:20,24 1374:19  1374:24 1376:6,11,23  1377:4 1379:4  1381:12 1385:22  1386:18 1388:6  1389:4 1392:4,7,13  1396:25  <b>purchase</b> 1399:6  1406:18  <b>purchased</b> 1387:14  <b>purchases</b> 1405:7,8  <b>purchasing</b> 1436:4  <b>purpose</b> 1368:3 1390:2  1394:23 1507:12  1528:12  <b>purposes</b> 1391:5  1394:8,20 1438:16  1478:16  <b>pursuant</b> 1527:25  1531:17  <b>pursued</b> 1420:6  <b>put</b> 1366:23 1369:16</p>
--	---	---	---	---

1372:9 1373:10 1382:24 1384:9 1386:8 1409:2 1418:8 1431:24 1433:6,18,20 1447:9 1455:12,15 1456:2,20,22 1461:13 1464:24 1466:12 1494:20 1521:24 1526:10,25 1527:3 1529:4 <b>putting</b> 1438:23	1521:1,8 1522:22 1523:10 1525:1 1527:21 <b>Quinn's</b> 1523:21 <b>QUINN,ESQ</b> 1354:13 <b>quite</b> 1495:1 <b>quote</b> 1377:20 1461:2 1484:7	1467:5 1472:13,20,24 1473:7,11,13 1477:1 1477:4,12,12,16,21 1477:21,22 1478:6,10 1478:15,17 1480:17 1480:18 1481:12 1483:1 1484:9,25 1485:2,18 1487:25 1488:16,19,21 1489:19,22 1490:2,2 1490:6,10,11,19,19 1491:10,17 1492:12 1492:18 1496:25 1499:23 1502:3,5 1503:7,9 1504:1,20 1507:19,22,25,25 1508:6,6 1511:19 1512:12 1513:9 1516:3,4,15,24 1518:4 1520:6 1522:20 1523:19 1524:4,6,22 1525:11 1525:12,19,19,20,20 1525:22 1526:1,11,16 1526:19,21 1527:11 1528:4,11,13,24 1529:3,8 1530:11,12 1531:3,5,22 <b>rate-related</b> 1430:17 <b>rates</b> 1353:10 1356:4 1358:10 1360:15,19 1361:17 1369:7 1373:17 1377:21,24 1382:23 1430:20 1432:14 1435:7 1444:8,10,14,17 1447:20,25 1448:6,11 1450:7,11,19 1451:8 1451:20 1452:1,4 1454:12 1457:1,1,5 1457:12 1459:1 1461:18,20 1463:11 1465:24 1477:6 1481:19 1482:9,17 1484:21 1497:25 1499:7,12 1500:1 1503:2,18 1504:1,7 1504:13,19 1505:16 1506:2,4,16 1513:11 1519:3 1520:12,24 1521:16,22 1523:2 <b>re-ask</b> 1434:8 <b>reach</b> 1385:11 1454:7 1454:10 1458:4 1524:2 <b>reached</b> 1385:15 1387:21 <b>reaching</b> 1530:10	<b>read</b> 1359:6 1379:20 1385:25 1392:12 1411:7 1427:3,10,13 1434:12 1439:11 1450:1,18 1452:13,17 1463:1,2 1476:17,19 1486:6 1493:3 1495:25 1500:24 1511:9 <b>readily</b> 1483:15 <b>readiness-to-serve</b> 1390:18 1391:6 1394:22 <b>reading</b> 1359:23 1411:5 1412:18 1413:15 1417:1,5 1426:14 1427:17 1459:6 1497:10 1511:14 1518:6 <b>reads</b> 1370:13 1377:7 1392:13 1513:8 <b>real</b> 1469:3 <b>realistic</b> 1469:18 <b>realistically</b> 1468:4 1469:25 <b>really</b> 1358:15,20 1362:18 1363:16 1366:24 1380:24,24 1381:6 1393:6 1399:3 1416:24 1469:24 <b>reason</b> 1405:4 1421:6 1466:20 1494:12 <b>reasons</b> 1371:5 1379:21 1379:25 1382:9 1450:3 1494:22 1526:2 <b>rebates</b> 1419:17 <b>recall</b> 1357:20 1369:19 1372:5 1393:20 1396:17,19 1423:13 1424:13 1433:4 1444:7,10 1445:20 1446:24 1447:18 1448:3,14 1457:6 1461:19 1463:23 1464:2 1465:22 1466:11,16,17 1486:16 1487:1 1492:12 1496:19 1499:3 1500:4,5,12 1500:17 1503:5 <b>receive</b> 1395:5,11 1398:11 1400:21 1401:5 1419:25 1422:4 <b>received</b> 1362:25 1363:23 1364:13 1365:8 1366:18	1367:9,14 1369:2,23 1374:23 1377:3 1421:3 1425:1 1437:2 1443:3 1445:11 1446:21 1447:8 1449:16 1464:11 1470:12 1473:22 1479:22 1486:15 1489:16 1501:16 1503:12 1514:2 1515:1,4,9 <b>receives</b> 1400:8 <b>receiving</b> 1395:12 1400:14,24 1447:18 1448:4 <b>recess</b> 1392:2 1437:24 1493:19 1533:2 <b>recharge</b> 1403:3 1405:22 <b>recipient</b> 1371:22 <b>Reclamation</b> 1391:13 1395:7,15 1398:11 <b>recognize</b> 1424:15,18 1447:14 1501:17 <b>recollection</b> 1396:7,13 1425:9 1502:21 <b>recommendation</b> 1431:5 1450:17 <b>recommended</b> 1450:6 1484:18 <b>recommending</b> 1485:5 <b>record</b> 1364:10 1385:24,25 1389:13 1393:10 1397:13 1415:14 1440:16 1447:4 1449:4 1496:10 1503:22 <b>recordings</b> 1505:8,11 <b>records</b> 1470:14 <b>recovered</b> 1404:1 <b>recovery</b> 1399:15 1403:2 1405:21 1408:21,23,24 1409:5 <b>recross</b> 1355:2 1396:25 <b>recycled</b> 1407:19,22 1462:22 <b>recycling</b> 1399:15 1403:2 1405:21 1407:24 1408:2 1409:7 <b>red</b> 1486:2 <b>redacted</b> 1411:8,10 <b>redirect</b> 1355:2 1381:14 1382:3 1440:4,6 <b>reduce</b> 1399:9 1401:20 1404:23 1413:9 1428:22
<b>Q</b>	<b>R</b>			
<b>QSA</b> 1373:16,18 1375:6 1471:9 1474:5 1493:8 1516:11 1523:25 <b>quality</b> 1471:8 <b>quantification</b> 1375:6 1485:20 <b>quantity</b> 1475:18 <b>question</b> 1368:17 1370:13,18 1379:1 1382:24 1385:23 1386:14,16,18 1388:7 1388:8,9 1404:10 1410:24 1412:19 1414:23 1423:13,18 1423:19 1427:4,5,10 1434:5,8 1446:15 1456:5 1459:20 1467:25 1469:3 1481:2 1482:13 1493:23 1505:23,25 1506:1 1512:4 <b>questions</b> 1383:21 1398:19 1410:22 1424:8 1434:6 1437:19 1440:3 1453:12 1485:13 1499:18 <b>quickly</b> 1362:11 <b>Quinn</b> 1354:12 1391:24 1443:5,17,20 1444:25 1445:4,9,12 1447:1 1447:14 1449:11,19 1452:17 1458:9,10 1464:6,12,17 1470:5 1470:10,13 1473:17 1473:25 1479:17,23 1482:15 1485:7,11,16 1486:16 1489:12,15 1493:15 1494:14 1495:13,24 1501:10 1501:17 1505:1,2,5 1511:9,14 1512:24 1513:22 1514:3 1519:16,19 1520:7,13	<b>raise</b> 1493:20,21 1519:24 <b>raised</b> 1370:14 1517:7 1517:10 <b>raises</b> 1485:16 <b>raising</b> 1519:14 <b>rancor</b> 1386:9 <b>range</b> 1465:21,23 1484:2 1490:4 <b>ranges</b> 1465:22 <b>ranging</b> 1483:2 <b>Rarely</b> 1505:7 <b>rate</b> 1356:6 1358:7,9 1358:20 1359:3 1360:23,24 1364:4 1371:13,23 1372:2,4 1372:23,25 1373:3,10 1374:6,11 1375:3,7 1375:19,20,23 1377:12,12,16,17,21 1378:9,19,23,25 1379:8,13,16,17,18 1379:21 1380:3,8 1381:8,9 1382:17,18 1384:1,6 1387:19,24 1395:23 1396:14 1403:23 1404:1,3,4 1404:13,19 1411:21 1415:15 1418:23 1420:1,10,19 1421:23 1421:25 1422:3,9 1423:21 1424:1,17 1425:6,10,16,20 1426:19 1430:17,21 1431:2,5,19 1432:2 1444:16,22,23 1446:3 1446:14,14,18,24 1448:1,2,12,12 1450:8,8,13 1451:6 1451:10,21 1452:2,4 1452:25 1453:2,18,21 1454:9,17 1458:6,13 1458:17,22 1459:2,4 1459:10,13,17,23 1460:6,12,20 1461:3 1461:25,25 1462:18 1462:24 1463:4,9,14 1465:8,11,19 1467:1			

<p><b>reduced</b> 1412:5 1416:20 1417:24 1487:15 1534:12 <b>reduces</b> 1402:22 1430:4 <b>reducing</b> 1416:18 <b>reductions</b> 1428:21 <b>refer</b> 1402:25 1403:13 1405:16 1445:5 1458:6 <b>reference</b> 1373:25 1374:1 1460:8 1463:10 1473:5 1514:6 <b>referenced</b> 1445:15 1473:13 1498:5 1503:15 <b>references</b> 1463:6 1499:21 <b>referred</b> 1399:20 1403:21 1440:25 1501:24 <b>referring</b> 1373:21 1393:14 1401:6 1472:7 1500:22 1522:3 <b>refers</b> 1370:6 1408:24 1464:14 1489:21 1502:18 <b>refinement</b> 1360:25 1430:17 <b>reflect</b> 1471:4 <b>reflected</b> 1378:14 1451:15,18 1492:23 1492:24 1526:22 <b>reflecting</b> 1469:23 <b>reflects</b> 1364:11 1449:11 <b>refresh</b> 1372:8 1425:9 1502:21 <b>refuses</b> 1427:19 <b>refusing</b> 1437:9 <b>regard</b> 1455:17 1529:6 <b>regarded</b> 1482:5 <b>regarding</b> 1366:7 1381:6 1451:15 1520:1 1530:25 <b>region</b> 1412:10 1415:11 1415:17 <b>regional</b> 1390:12 1414:4,6,15,17,24,25 1415:3,5,17 1420:24 1421:8 1428:7 <b>regular</b> 1415:22 <b>regulation</b> 1502:15 1528:1 1531:19 <b>related</b> 1360:14 1377:24 1428:24</p>	<p>1431:15 1451:13 1481:10,11,12 1485:19 1508:18 1514:4 1516:9,11 1524:14 <b>relates</b> 1368:9 1394:16 1456:14 <b>relating</b> 1452:11,23 <b>relationship</b> 1420:18 1421:1 <b>relevance</b> 1362:21 1485:9,14,23 <b>reliability</b> 1373:2 1483:15 <b>reliable</b> 1514:10 <b>relying</b> 1439:10 <b>remain</b> 1377:15,19 1378:18 <b>remedy</b> 1529:10 <b>remember</b> 1361:24 1378:12 1386:14 1442:21 1445:23 1486:22 1494:16 1525:23 <b>remind</b> 1411:9 <b>repair</b> 1510:1 <b>repeated</b> 1523:23 <b>repeatedly</b> 1432:21 <b>rephrase</b> 1422:7 <b>rephrased</b> 1379:2 <b>report</b> 1356:4,13 1405:16,19,23 1406:1 1406:4,21 1414:11,12 1414:19 1438:14 <b>reported</b> 1353:19 1415:9 <b>Reporter</b> 1534:8,24 <b>REPORTER'S</b> 1353:15 1534:1 <b>reporting</b> 1406:8,20 <b>reports</b> 1446:22 <b>represent</b> 1407:13 1409:11 <b>represents</b> 1406:2 1407:21 1408:15 <b>request</b> 1364:17 1392:10,13,16 1441:15 1460:11 1495:6 1508:4 <b>requested</b> 1437:4 1465:18 1504:3 1506:19 1507:10 <b>requesting</b> 1507:5 <b>requests</b> 1439:6 <b>require</b> 1370:22,24 1371:9 <b>required</b> 1373:1 1425:6 <b>requirements</b> 1377:23</p>	<p>1405:17,18 <b>requires</b> 1403:1 <b>requiring</b> 1462:23 <b>reservation</b> 1375:5,18 1451:13,18 <b>reserved</b> 1379:25 1458:1 <b>reserves</b> 1458:21,25 <b>reserving</b> 1373:16 1374:5 <b>residents</b> 1406:17 <b>reso</b> 1386:2,2 <b>resolution</b> 1361:22 1362:3 1363:6 1365:11 1386:3,10 1504:22 1523:6 <b>resolved</b> 1501:5 <b>resource</b> 1371:17 1398:2 1400:13,23 1418:8 1422:5,11,15 1422:21 1423:3 1429:11 1462:25 <b>resources</b> 1397:24,25 1398:5,10 1399:12,25 1400:7 1412:21 1419:9 1422:16 1426:23 1433:24 1440:17 1471:8 <b>respect</b> 1435:8 1451:20 1469:2 1530:14 <b>respond</b> 1362:9 <b>responded</b> 1362:6 1365:23 <b>Respondent</b> 1354:11 <b>Respondents</b> 1353:14 <b>response</b> 1364:17,22 1378:8 1392:10,16 1419:21 <b>responsibilities</b> 1405:24 1444:3 <b>responsible</b> 1444:5 <b>rest</b> 1494:10 <b>restate</b> 1404:9 <b>result</b> 1404:25 1414:21 1415:12 1423:6 1430:10 1461:5 1510:2,9,10 <b>resulting</b> 1483:17 <b>resumed</b> 1355:4 1357:18 1358:1 1438:7 <b>revenue</b> 1457:25 <b>review</b> 1361:6,12 1504:17 <b>reviewed</b> 1450:8 <b>revised</b> 1450:17 <b>RFA</b> 1393:7,11 <b>Richard</b> 1522:14</p>	<p><b>rid</b> 1409:3 1528:18 <b>right</b> 1358:10 1359:6 1360:15,21 1366:25 1367:2 1371:12 1372:6 1373:16 1374:5 1375:23 1378:25 1379:7,19,25 1380:2 1381:7 1383:16 1390:3 1392:6,24,25 1401:21 1409:14 1414:14 1416:24 1417:1 1419:5,15 1420:2,10 1421:19 1425:17 1429:6 1430:3 1433:2 1433:7,10,12,13,17 1433:19 1435:21 1436:6 1437:15 1441:5 1446:9 1459:3 1460:24 1464:24 1465:21 1466:19 1471:5 1472:18 1473:23 1474:5,7,12 1477:14 1478:23 1479:4,5 1484:19 1486:25 1488:10,17 1491:6,7 1492:7 1500:4 1501:8 1503:13,23 1505:12 1507:11,12 1516:6,16 1517:17,18 1527:7 1529:23 1532:5 <b>right-hand</b> 1448:22,23 1449:24 <b>rights</b> 1370:21 1377:9 1382:21 1387:4,5,9 1387:11,16 1388:14 1392:22 1393:3,4,16 1440:24 1450:21 1451:3,15 1474:24,24 1476:25 1480:16 <b>risk</b> 1372:21 1441:15 1441:24 1442:1 1467:18 1485:17 1487:24,25 1488:15 1490:14,18,21 1493:11 1526:14 1528:21 <b>Risk/Benefit</b> 1487:23 <b>risks</b> 1483:11 1484:6 1485:21 <b>river</b> 1391:16,18,19 1395:5,6,9,11,18,21 1398:12 1483:23,24 1509:8 <b>Riverside</b> 1396:21 <b>role</b> 1372:16 1463:17 1463:21 1522:13</p>	<p><b>rolled</b> 1453:1 <b>Ron</b> 1372:12 1526:8 <b>room</b> 1439:9 1495:17 <b>roughly</b> 1466:13 <b>RPR</b> 1353:20 1534:23 <b>RSA</b> 1378:22 <b>RSI</b> 1378:19 1380:5,12 1383:10,15 1422:24 1424:10 1425:23 <b>rule</b> 1521:3 <b>rules</b> 1363:17 1495:2 <b>ruling</b> 1357:13 <b>run</b> 1404:23 1406:15 1466:21 1467:14,15 1479:7 <b>running</b> 1418:18 1516:1 <b>runs</b> 1399:3 <b>rush</b> 1493:22 <b>rushing</b> 1527:3</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1354:5 <b>S-T-A-P-L-E-T-O-N</b> 1443:14 <b>sadly</b> 1498:16 <b>salt</b> 1409:1 <b>San</b> 1353:2,6,16,17,24 1354:6 1357:1 1358:14 1359:1 1366:6 1369:5 1373:15,21 1374:5,10 1375:2,22 1378:24 1379:6,23,24 1380:2 1380:5,9,20 1381:4,6 1381:6,10 1382:7,8 1384:13 1386:1 1387:12,17,19 1390:6 1391:9 1422:4,10,14 1422:20 1423:2,6,7 1423:10,20,23 1424:2 1424:9,10,16 1429:9 1432:2,5 1435:25 1436:3,10,18 1437:3 1437:5,11 1438:1 1440:22 1442:25 1443:21 1444:4,14 1445:20 1446:2,17,21 1448:25 1449:7,20 1451:1,5,7,7,23,24 1452:5,10 1455:7 1456:2,20 1458:19 1460:17 1461:1,23 1463:24 1464:2 1465:2 1466:12,13,14 1469:15,19 1470:3 1471:14,23 1472:7 1474:12 1484:25</p>
--	---	--	---	--

<p>1485:5 1487:2,10,11                  1487:17 1488:22                  1490:1 1493:12                  1495:25 1496:22                  1498:21,25 1499:6,10                  1499:14,25 1500:6                  1501:3,7,18,20                  1502:1,11,22 1503:6                  1503:11,12,18                  1505:11,14,16 1506:3                  1506:14,19,20,23                  1507:5,10,10,14,17                  1507:23 1508:9,17,21                  1509:16,20 1511:16                  1511:25 1512:19                  1514:23 1515:1,9,15                  1515:22,25 1516:18                  1519:24 1520:21                  1522:19 1523:2,13                  1524:24 1525:25                  1527:10 1528:6,12                  1529:2,12 1530:5                  1531:4,16 1532:1,7  <b>SANDFORD</b> 1353:20                  1534:7,23  <b>Santa</b> 1534:4,8,17  <b>satisfy</b> 1365:11  <b>save</b> 1406:18  <b>saved</b> 1406:23  <b>saving</b> 1407:5,10  <b>savings</b> 1406:23 1407:7                  1407:9,16  <b>saw</b> 1439:24  <b>saying</b> 1441:13,18                  1455:17 1456:7                  1461:17 1472:23                  1483:15 1497:11                  1499:7 1518:9                  1521:14  <b>says</b> 1369:25 1372:20                  1392:21 1408:14                  1450:2,16 1461:20                  1462:20 1466:5                  1471:22 1472:3,10                  1473:7 1474:10,21,23                  1476:24 1477:9,9                  1488:15 1491:4                  1493:25 1500:17                  1502:11 1509:24                  1512:14,19 1514:9,14                  1527:6,23 1529:11,23                  1529:25 1531:14,16                  1532:1  <b>SB-60</b> 1356:13 1405:16                  1414:12,19 1415:9                  1418:25 1438:14  <b>scenario</b> 1436:3 1466:2                  1466:23 1467:8,20</p>	<p>1469:13 1479:8                  1483:6 1485:1,4  <b>scenarios</b> 1467:4                  1469:16,23  <b>schedule</b> 1510:3,13  <b>scope</b> 1444:3  <b>scorecard</b> 1406:2,4  <b>Scott</b> 1452:9 1525:6  <b>scrambled</b> 1494:18  <b>screen</b> 1359:11,12,15                  1362:12 1363:2,25                  1364:15 1365:2                  1366:13 1372:9                  1406:3 1446:8,8,9                  1447:10 1449:25                  1527:4  <b>SDCWA</b> 1390:25                  1394:6 1440:16                  1448:24 1472:3,4,10                  1472:12,22,24,24                  1474:24,24 1476:25                  1500:18 1509:24                  1514:7  <b>SDCWA's</b> 1477:1  <b>se</b> 1445:24  <b>seated</b> 1397:12 1443:13  <b>seawater</b> 1399:16  <b>second</b> 1369:4,25                  1373:13 1407:8                  1425:3 1426:8                  1450:16 1457:17,18                  1464:5 1466:3,4                  1472:12,23 1474:14                  1474:20,22 1476:15                  1479:1 1495:6 1496:4                  1502:10 1513:3                  1526:7  <b>second-to-last</b> 1458:12                  1458:14  <b>section</b> 1361:22                  1377:12 1395:7                  1460:9 1500:15                  1501:21 1502:7,9                  1509:22,23  <b>secure</b> 1487:18  <b>securing</b> 1484:12,13  <b>see</b> 1364:20 1365:1                  1371:3 1373:7,19                  1374:17 1375:8                  1376:8 1377:12,25                  1384:11,13,14 1385:3                  1385:5,19 1389:18,19                  1389:22,25 1391:2                  1392:1 1394:9 1406:3                  1408:13 1409:23                  1421:1 1428:15,21                  1445:17 1446:9,15                  1448:19,21,24 1449:7</p>	<p>1449:19,24,25                  1450:14,23 1457:13                  1457:14 1458:2,3,6                  1458:16 1459:10                  1460:2,15,21 1461:8                  1465:12,16 1466:9                  1468:3 1470:1                  1471:19,20,25 1473:1                  1477:7 1480:2,21                  1482:23 1483:12,18                  1484:4,5 1488:1,23                  1489:19,22 1490:16                  1493:17 1502:7,10,16                  1502:24 1503:14,22                  1509:24 1510:9                  1513:13 1514:12,16                  1514:19,21 1533:1  <b>seek</b> 1502:12 1529:9,13  <b>seeking</b> 1381:1  <b>seen</b> 1503:16 1516:14  <b>selected</b> 1531:22  <b>sell</b> 1400:18 1401:3                  1402:9,15 1410:7,17  <b>seller</b> 1484:15  <b>Senate</b> 1402:25                  1405:17  <b>send</b> 1455:21 1494:17  <b>sending</b> 1471:6  <b>sends</b> 1461:5  <b>sense</b> 1392:22 1393:7  <b>sensitivities</b> 1465:10  <b>sensitivity</b> 1489:22  <b>sent</b> 1362:4,14 1363:4,9                  1364:2,16 1365:19                  1366:6 1369:17                  1471:13 1474:3                  1476:17 1478:14  <b>sentence</b> 1369:25                  1374:12 1375:21                  1409:23 1440:15                  1458:6,11 1466:4                  1478:10 1513:8  <b>separate</b> 1415:8 1441:3  <b>September</b> 1464:22                  1470:19 1474:1,10                  1486:17  <b>service</b> 1361:6,12                  1370:4 1373:6                  1403:10,14,17                  1406:17 1418:10,12                  1422:18 1437:4                  1446:21 1504:5  <b>services</b> 1353:23                  1507:20  <b>session</b> 1481:25 1482:3                  1482:11 1524:1  <b>sessions</b> 1481:1                  1523:13,20,22,24</p>	<p><b>set</b> 1365:15 1366:1                  1368:4,8,8,13 1416:1                  1477:4 1494:9 1495:5                  1501:21 1527:24                  1528:4 1529:22                  1531:22  <b>set-aside</b> 1365:20                  1368:4  <b>setting</b> 1360:14                  1377:21,23 1457:11  <b>settled</b> 1424:7  <b>settlement</b> 1375:6                  1485:20  <b>seven</b> 1427:7,8,14                  1494:3  <b>share</b> 1481:23  <b>shared</b> 1390:13  <b>sheet</b> 1474:6,10,11,19  <b>Shoal</b> 1378:6  <b>shoes</b> 1435:25 1436:2  <b>short</b> 1467:17  <b>shorter</b> 1526:5  <b>shorthand</b> 1393:2                  1534:7,24  <b>shot</b> 1521:3  <b>shovel-ready</b> 1423:9  <b>show</b> 1366:3 1372:7                  1376:1 1405:12                  1495:9  <b>showed</b> 1362:8 1405:19                  1450:9  <b>showing</b> 1406:19                  1407:2,6,14,23                  1408:16 1410:1                  1414:19  <b>shown</b> 1384:8  <b>shows</b> 1406:4 1446:12                  1487:10,11  <b>shutdown</b> 1510:11  <b>side</b> 1383:3 1398:16                  1446:10 1449:24                  1498:2 1517:3 1519:5  <b>sides</b> 1494:23  <b>sign</b> 1380:17 1426:18                  1426:25 1427:20  <b>signals</b> 1461:6  <b>signature</b> 1365:2,3  <b>signed</b> 1364:21,21                  1452:21 1454:5                  1463:19 1486:18,21                  1509:13,17  <b>significant</b> 1387:6                  1431:19 1460:18                  1462:14,15  <b>significantly</b> 1484:6  <b>signing</b> 1360:9 1380:12  <b>similar</b> 1409:6 1483:21                  1520:22 1524:24</p>	<p><b>similarly</b> 1365:14                  1407:23 1453:11                  1508:16  <b>simply</b> 1384:1 1410:10                  1509:7 1512:16,21  <b>single</b> 1381:24 1503:1  <b>single-spaced</b> 1457:17  <b>sir</b> 1357:22 1358:4                  1381:14 1382:8                  1386:18 1388:21                  1389:19 1392:3                  1397:1 1398:24                  1430:19 1438:11                  1440:21 1462:9                  1476:9 1532:24  <b>sit</b> 1449:8 1486:10                  1528:6  <b>situation</b> 1381:20,21                  1405:10 1408:24                  1410:10 1441:23                  1530:22  <b>situations</b> 1419:24  <b>six</b> 1482:20 1483:9                  1497:23 1517:16                  1518:23  <b>Sixteen</b> 1413:2  <b>Sixty-five</b> 1394:2,3  <b>SJWD</b> 1440:18  <b>skip</b> 1472:2  <b>Slater</b> 1385:7 1452:9                  1452:10 1453:23                  1495:25 1496:20,23                  1512:14 1525:6  <b>Slater's</b> 1452:14,17                  1511:10  <b>slide</b> 1446:5,12 1471:19                  1472:10,22 1487:9,21                  1490:13,21  <b>slides</b> 1470:8  <b>small</b> 1435:23  <b>sold</b> 1410:9  <b>sole</b> 1466:7  <b>solve</b> 1395:16 1526:4  <b>solved</b> 1395:13  <b>somebody</b> 1462:10                  1475:21 1486:21                  1520:10  <b>someplace</b> 1366:14  <b>sorry</b> 1376:11 1471:1                  1484:13 1505:2                  1511:8 1516:16                  1517:24 1519:8                  1521:5 1527:3  <b>sought</b> 1438:14,18                  1487:18  <b>sounds</b> 1372:5  <b>source</b> 1409:25 1410:1                  1410:3,13,15</p>
---	--	--	--	---

<p><b>South</b> 1354:14  <b>Southern</b> 1353:9,11  1354:11 1397:20  1398:4,8 1399:5  1410:2 1419:8  <b>space</b> 1381:24 1430:2  <b>spare</b> 1398:21  <b>speak</b> 1423:24  <b>speaking</b> 1402:1  <b>special</b> 1525:7  <b>specific</b> 1414:23  1417:19,20,25 1418:3  1421:9,9,22 1425:12  1429:21 1430:5  1431:18 1445:23  1447:20,25 1448:6,11  1471:15 1489:2  1500:3 1504:21  <b>specifically</b> 1364:3  1373:21 1410:2  1440:14 1447:19  1448:5 1504:6  <b>specificity</b> 1459:17  <b>specified</b> 1446:22  <b>specifying</b> 1488:24  <b>Speculation</b> 1520:7  <b>speech</b> 1468:7  <b>speed</b> 1519:23  <b>spell</b> 1397:13  <b>spend</b> 1413:7,20  1427:10 1429:2,5,10  1476:10  <b>spending</b> 1428:16,18  1429:22,24 1430:1,6  <b>spent</b> 1494:25  <b>split</b> 1380:10 1404:5  1494:10  <b>spreading</b> 1465:9  <b>square</b> 1515:17  <b>squeeze</b> 1494:19  <b>ss</b> 1534:4  <b>stability</b> 1458:6,13,18  1458:22 1459:2,5  <b>staff</b> 1361:1,2,3,15  1450:3,17 1468:17  1470:22 1471:7  1478:2 1479:2  1482:21 1520:21,22  1522:15 1523:5  1524:23,24 1525:7  <b>staffer</b> 1430:13  <b>stamp</b> 1382:23  <b>stand</b> 1357:18 1435:25  1436:2 1438:7  1495:17  <b>standard</b> 1427:1,23  <b>standpoint</b> 1466:14  <b>standstill</b> 1501:24</p>	<p><b>Stapleton</b> 1355:6  1374:15,25 1375:11  1375:15 1442:17  1443:6,8,14,18  1447:15 1454:7  1495:24 1497:11  1516:25 1518:8  1519:23 1525:17  1527:3  <b>start</b> 1358:6 1369:13  1379:3 1382:5 1386:7  1479:3 1484:25  <b>started</b> 1392:5 1400:4  1454:11 1497:3,3  1499:20 1530:18  <b>starting</b> 1359:24  1377:6 1427:6,7,8  1478:18 1521:7  <b>starts</b> 1488:8 1516:16  <b>state</b> 1353:1 1369:6,12  1369:15 1370:2,7,8  1370:22 1371:8,9  1386:11,17,23,24  1387:7,16,22,25  1388:3,3,4,5,15,17,19  1388:22,23 1389:2  1392:9,15,24 1393:17  1397:13 1398:9  1405:19 1431:1,8  1432:3 1433:3,8,15  1433:16,22 1434:23  1435:1,3,5,8,10,14,18  1436:1 1437:4,10  1440:17 1441:3,4,10  1441:11,14,19,22,24  1442:2,4 1446:23  1451:20 1452:23  1453:14 1454:8,13  1460:8,12,19 1461:24  1477:21 1496:14,25  1497:6,12,21,24  1498:9 1503:8  1506:24,25 1507:6,7  1507:12,15,18,24,25  1508:6,13,16,19,22  1509:2,10,18 1510:1  1510:7,12,16,21  1512:1,19 1514:23  1517:1,5,15 1518:3  1518:10,20 1519:1,25  1520:6,11,23 1521:15  1521:21,24 1523:9,14  1523:19 1534:3,8,25  <b>State's</b> 1389:3  <b>stated</b> 1477:11  <b>statement</b> 1410:1  1434:12 1450:20  <b>States</b> 1395:11,14,19</p>	<p><b>stating</b> 1364:3 1375:14  1500:1  <b>statistic</b> 1435:22  <b>statute</b> 1522:2,3,4,10  1522:11  <b>stenotype</b> 1534:11  <b>stepped</b> 1495:19  <b>stewardship</b> 1364:4  1404:1,3,4,13,19  1411:21 1415:15  1418:10,15,23 1420:1  1420:10,19 1421:23  1444:22 1446:14  1451:21 1459:2  1461:25 1462:18,24  1463:4,9,14 1477:6  1477:22 1480:20  1484:10 1503:9  1524:4,6,13 1525:20  <b>stipulate</b> 1366:20  <b>stipulation</b> 1366:24  <b>stop</b> 1441:5 1521:14  <b>streams</b> 1404:6  <b>Street</b> 1353:24 1354:6  1354:14,17  <b>strike</b> 1392:5,7 1393:5  1404:20 1468:7  1527:21  <b>string</b> 1464:12  <b>strongly</b> 1455:22  <b>structure</b> 1356:6  1358:7,9,20 1359:4  1371:14,23 1372:3,4  1372:24,25 1373:4,10  1374:6 1375:3,7,19  1375:20,23 1377:12  1377:12,16,18,21  1378:9,19,23,25  1379:8,14,16,17,22  1380:3,8 1381:8,9  1382:18,18 1384:2,6  1390:9 1395:23  1422:3,9 1423:21  1424:1,17 1425:6,10  1425:17,20 1426:20  1431:3,5,19 1434:19  1448:1,12 1450:8,9  1450:13 1451:6,10  1452:2,4,5 1467:5  1513:9  <b>structures</b> 1374:11  1379:18 1430:21  1504:1,20  <b>structuring</b> 1396:15  1421:25  <b>students</b> 1495:9  <b>subagencies</b> 1400:11  <b>subject</b> 1385:5 1395:25</p>	<p>1423:14 1451:14  1513:12 1515:7  1523:1 1530:15  <b>submitted</b> 1368:3  1398:16 1432:25  1487:7 1503:2 1506:4  <b>submitting</b> 1371:7  <b>subordinate</b> 1464:20  <b>subsequent</b> 1363:3  <b>subsidies</b> 1380:14  1419:4,14 1420:1,15  1420:20 1421:5,14,19  1461:3  <b>substance</b> 1369:4  1502:14  <b>successor</b> 1363:5  <b>sue</b> 1379:23 1380:23  1381:7 1382:7,9  1511:17,20 1512:15  1512:17,18,20  1513:17 1514:24  <b>sued</b> 1396:16  <b>suggest</b> 1460:11  1463:13  <b>suggested</b> 1375:4  1396:18  <b>suggesting</b> 1494:7  <b>suit</b> 1382:16 1383:16  <b>SULLIVAN</b> 1354:12  <b>sum</b> 1387:6  <b>summarizes</b> 1373:9  <b>summarizing</b> 1375:10  1490:8  <b>summary</b> 1483:10  <b>Superior</b> 1353:1,16  <b>supplied</b> 1402:8  <b>supplies</b> 1398:5,11,13  1399:17 1400:16,18  1400:21 1401:1,3,6  1401:10,13,15  1402:14 1405:1,7,8  1410:18 1412:3  1413:8,11,22 1414:3  1414:20 1419:11  1429:18,19 1440:18  1440:20 1461:4,6  1483:24 1514:10  <b>supply</b> 1358:10  1388:23 1390:17,18  1401:10,22 1402:12  1402:13,16 1405:2  1408:8 1409:25  1410:2,3,4,13,15  1411:22,25 1412:7,8  1412:10,22 1414:7  1416:15 1417:10  1418:14 1423:8  1436:4 1460:18</p>	<p>1461:2 1483:14,16,17  1483:21 1484:2,6,12  1484:13,14,14  1487:12,18 1521:25  1524:14  <b>support</b> 1450:18  1451:10 1462:22,25  1502:12 1504:3  1505:21 1529:13  <b>supports</b> 1462:21  <b>sure</b> 1380:16 1385:23  1399:2 1403:10  1408:3 1420:3,4  1429:25 1430:8  1431:11,12 1440:22  1441:7 1456:5  1460:10 1478:20  1489:14 1494:3  1505:23 1526:22  <b>suspicious</b> 1374:8  <b>sustain</b> 1383:19  1522:23  <b>Sustained</b> 1425:15  1512:23 1520:9  1523:11 1527:22  <b>sweep</b> 1382:19  <b>sworn</b> 1397:6 1443:9  <b>SWP</b> 1370:2  <b>system</b> 1358:11  1386:14,20,22 1387:3  1387:16,18,21,22  1388:23 1402:15,23  1403:12,18 1404:25  1405:1,4 1410:17  1412:6 1413:11  1416:19,21 1417:24  1429:15,20 1430:4  1435:6 1444:15  1446:13,24 1452:25  1459:1,10,13,17  1460:20 1461:3  1463:8 1477:5,20  1480:19 1484:9  1507:24 1508:6  1524:22 1525:19,20  <b>system's</b> 1373:2  <b>systems</b> 1403:13</p>
--	---	---	--	---

**T**

**Tab** 1412:12,12,15  
1424:14,15 1426:9,10  
1436:15 1440:10  
**table** 1462:12 1464:24  
1466:12 1506:4  
**Tachiki** 1363:4,9  
**take** 1363:20 1372:6  
1374:13 1385:13  
1391:8 1401:19



<p>1404:11 1408:6                  1410:4,16 1425:19                  1431:10,23 1439:9                  1445:7 1450:6 1457:8                  1457:16 1464:4                  1468:15,17 1470:5                  1479:17 1489:10,13                  1495:9,16,18 1500:15                  1502:7 1512:24                  1513:11 1528:21  <b>taken</b> 1405:20 1422:23                  1424:3 1495:22                  1533:2 1534:10  <b>takes</b> 1419:2  <b>talk</b> 1358:19 1381:2                  1476:3 1499:22                  1520:10  <b>talked</b> 1361:21 1384:17                  1386:5 1411:5 1465:7                  1492:10 1520:4                  1521:18 1523:20  <b>talking</b> 1394:12 1403:9                  1442:6 1454:11                  1460:23 1467:18                  1468:12 1490:15                  1505:1 1506:18                  1517:8 1531:20  <b>talks</b> 1375:17 1380:24                  1485:18,24 1489:2                  1532:3  <b>TARA</b> 1353:20 1534:7                  1534:23  <b>taxes</b> 1377:24  <b>teacher</b> 1495:8  <b>team</b> 1381:19 1463:22                  1463:22 1498:6,7                  1524:12  <b>technically</b> 1395:10  <b>tell</b> 1392:18 1399:1                  1405:14 1406:2                  1410:12 1449:3                  1467:19,21,25                  1468:25 1471:2                  1473:6 1480:23                  1485:14,15 1499:2                  1524:17 1525:5  <b>telling</b> 1466:20 1494:16                  1516:5  <b>tells</b> 1461:23  <b>temporary</b> 1509:18                  1510:2  <b>ten</b> 1416:23 1511:22  <b>tens</b> 1462:8,11,13  <b>term</b> 1379:9 1478:7                  1488:16 1490:11                  1502:11 1526:5,5                  1529:11,12 1531:4,8  <b>terminate</b> 1371:21</p>	<p>1372:1  <b>terms</b> 1358:19 1394:21                  1394:25 1415:16,19                  1415:23 1418:8                  1436:13 1451:19                  1476:4 1483:6                  1485:25 1491:18,20                  1491:25 1492:2,10  <b>territory</b> 1408:12                  1470:25  <b>testified</b> 1357:18                  1358:22 1359:1                  1369:6 1379:4                  1395:24 1397:7                  1411:20 1414:2                  1428:4 1438:7                  1443:10 1496:24  <b>testify</b> 1452:11  <b>testimony</b> 1358:6                  1378:23 1392:8                  1413:4,25 1417:16                  1430:1 1433:1                  1452:18 1469:21                  1494:9 1495:25                  1497:10 1516:25                  1518:5 1519:7  <b>thank</b> 1374:25 1381:13                  1381:15 1383:22                  1395:22 1397:1,3                  1410:21 1417:2                  1432:20 1437:23                  1442:13,16,19                  1446:11 1464:17                  1478:25 1493:18                  1532:25  <b>theirs</b> 1402:9  <b>theory</b> 1391:12  <b>thing</b> 1358:5 1416:8                  1418:24 1459:7,14,21                  1462:5 1468:24                  1504:12,17 1515:24  <b>things</b> 1399:7,10                  1407:6,9,16 1425:21                  1431:4,14,16 1456:13                  1456:13 1504:11  <b>think</b> 1357:10,13                  1359:1 1362:8,9                  1364:23 1366:21                  1368:5 1369:5                  1375:12 1379:24                  1386:16 1389:16                  1392:20 1393:2,15,15                  1418:18 1425:13                  1427:9,12 1428:23                  1429:7 1434:7                  1435:21 1438:16,22                  1438:23 1439:11                  1440:14 1446:5</p>	<p>1447:12 1460:2                  1467:3 1468:4 1469:2                  1469:4,17,25 1471:18                  1480:3,25 1485:22                  1486:24 1491:11,12                  1494:2,6,12,22                  1495:4 1502:10                  1503:5 1527:2                  1531:20  <b>third</b> 1377:5 1407:12                  1407:14 1437:8                  1440:13,14,15                  1474:22 1478:9                  1511:4  <b>third-party</b> 1433:3                  1435:10  <b>Thomas</b> 1361:19                  1525:8  <b>Thomas's</b> 1359:7  <b>thought</b> 1453:4,16                  1455:19 1456:1,7,8                  1458:17,23 1459:7,18                  1461:10 1462:10                  1463:13 1466:25                  1473:6 1482:9 1487:5                  1522:1 1528:13                  1531:1  <b>threat</b> 1372:22  <b>three</b> 1370:12,24                  1399:14 1400:5                  1442:11 1465:11                  1468:12 1494:2,8                  1497:15 1518:13  <b>three-hour</b> 1494:11  <b>three-page</b> 1376:12                  1457:16  <b>thumb</b> 1471:18 1495:2  <b>Thursday</b> 1353:18                  1357:2 1438:2  <b>time</b> 1360:7 1375:4                  1376:15 1378:7                  1384:22 1385:1                  1404:11 1424:11                  1427:10,13 1437:18                  1440:23 1442:10                  1447:18,18 1448:4,4                  1452:19 1453:24                  1455:3 1456:22,23                  1457:5,16 1458:8                  1459:16 1461:10,22                  1467:17 1476:10                  1478:12,19 1479:4                  1481:13 1483:1                  1484:16 1487:18                  1489:10 1490:3                  1493:15,23 1494:8,15                  1494:19,24 1495:1,3                  1495:5 1496:7 1501:2</p>	<p>1501:7,20 1502:1                  1503:1 1505:18,23                  1506:2 1509:12,16                  1519:23 1520:13,14                  1523:5 1525:21                  1527:9 1528:18                  1529:7 1530:25                  1533:1 1534:11  <b>times</b> 1468:12  <b>title</b> 1401:25  <b>today</b> 1363:21 1372:18                  1430:22 1476:4,5  <b>toilets</b> 1399:9  <b>told</b> 1375:15 1425:11                  1456:9 1494:17                  1526:8 1528:23  <b>top</b> 1366:15 1471:20                  1472:10,22 1473:25                  1474:21,22 1487:22  <b>topic</b> 1398:24  <b>total</b> 1493:5,9  <b>totality</b> 1516:11  <b>track</b> 1416:9  <b>trade</b> 1491:13  <b>trade-off</b> 1491:9  <b>traded</b> 1491:16  <b>transaction</b> 1430:6,11                  1436:19  <b>transactions</b> 1429:22  <b>TRANSCRIPT</b>                  1353:15  <b>transcription</b> 1534:13  <b>transfer</b> 1373:5                  1387:10 1390:20                  1395:4 1436:4                  1440:23 1441:17                  1442:5 1450:12                  1472:24 1477:3                  1526:5 1528:17  <b>transfers</b> 1387:14                  1475:17 1484:2                  1514:7  <b>transparency</b> 1459:24  <b>transport</b> 1370:1                  1477:2  <b>transportation</b> 1369:7                  1387:5 1415:24                  1417:21 1418:4                  1428:16 1431:1,9,24                  1432:4,13 1433:23,25                  1434:15 1440:19                  1463:11 1508:5                  1514:7 1520:6,12,24                  1521:16,22,25 1524:7                  1524:15,21  <b>treat</b> 1408:7  <b>treated</b> 1390:21                  1394:24 1408:8,10</p>	<p><b>treaties</b> 1471:20  <b>treatment</b> 1409:3  <b>treaty</b> 1514:20  <b>trial</b> 1357:9,14 1363:15                  1393:18 1434:10                  1447:13 1485:25                  1532:23  <b>tried</b> 1421:1 1424:9                  1494:19  <b>trigger</b> 1424:6  <b>triggered</b> 1396:15                  1422:24 1423:1                  1424:2  <b>trouble</b> 1439:14  <b>true</b> 1382:8,10 1385:21                  1401:9 1404:16,17,18                  1413:3,25 1417:16                  1418:18 1430:15                  1435:17 1449:6                  1460:8 1482:19                  1484:16 1487:17                  1497:8,9 1499:6,15                  1499:17 1504:10,16                  1506:14 1509:1                  1511:15 1512:10,16                  1515:7,8  <b>trust</b> 1382:25 1383:4  <b>trust-but-verify</b> 1383:6  <b>trusting</b> 1383:4,4,8  <b>try</b> 1359:2 1368:1                  1424:11 1456:24                  1524:2  <b>trying</b> 1368:2 1417:25                  1418:8 1455:14                  1471:16 1478:16,25                  1485:12 1495:1                  1498:8 1523:5  <b>turn</b> 1377:4 1395:23                  1406:1 1409:22                  1412:14 1446:5                  1449:12,23 1462:18                  1480:10 1485:7                  1487:9,21 1490:13                  1500:13,14 1514:6,18  <b>turnout</b> 1369:18                  1370:4,12,15,20  <b>twice</b> 1468:11  <b>twist</b> 1372:5  <b>two</b> 1357:11 1370:22                  1377:4 1380:7 1383:1                  1386:8 1394:4 1399:3                  1404:5 1408:13                  1409:16 1434:6                  1438:21,24 1458:4,5                  1458:11,12 1463:25                  1464:23 1465:11                  1466:11 1467:8                  1468:20 1472:4,4</p>
--	--	---	--	---

<p>1474:7,12,16 1478:2 1478:3,25 1479:2 1480:10 1482:21 1483:2 1488:25 1493:9 1497:13 1499:3 1516:1 1518:11 1530:3 <b>type</b> 1408:2 <b>typewriting</b> 1534:12 <b>typical</b> 1390:7</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U-P-A-D-H-Y-A-H</b> 1397:15 <b>U.S</b> 1398:10 <b>Uh-huh</b> 1433:11 1456:19 <b>ultimately</b> 1400:15,25 1419:18 1424:5 1473:14 <b>unable</b> 1425:4 1512:12 <b>unbundled</b> 1430:20 1444:10,17,23 1446:3 1446:13,18 1447:20 1448:1,6,12 1451:6 1451:19,25 1454:9,17 1457:1 1461:25 1523:3 <b>unbundling</b> 1369:10 1444:8,14 1445:21 1454:12 <b>unconstitutional</b> 1378:10 <b>undermining</b> 1372:23 <b>understand</b> 1357:10 1358:17 1362:18 1382:1 1386:4 1388:7 1388:9 1393:16,17 1429:25 1447:4 1448:17 1449:1,13 1451:11 1456:5,12 1467:23,24 1470:6,7 1473:18 1475:19 1479:18 1486:11,11 1492:14 1493:8 1495:15 1501:11 1513:23 1516:5 1520:5 1522:18 1523:8 1527:13,16,18 1530:7,16 1531:12 <b>understanding</b> 1375:16 1375:22 1378:14 1382:15 1383:15 1385:14 1388:11 1389:2 1391:4 1393:6 1402:5 1450:20 1471:11,13 1473:9 1493:4 1506:7 1509:6</p>	<p>1515:21 <b>understands</b> 1509:24 <b>understood</b> 1388:8 1444:15 1473:3,9 1477:10,19 1491:8 1501:2 1509:16 1510:11,15 <b>undertake</b> 1425:22 <b>Underwood</b> 1498:3,9 1498:15 1517:9,20,21 1517:25 1519:6 1520:19 1521:19 1524:11 1527:13 1531:11 <b>unfortunately</b> 1394:4 1498:17 <b>uniform</b> 1373:17 1425:5 <b>United</b> 1395:11,14,19 <b>unlawful</b> 1454:9,22 1455:1 1460:2,7 1461:11,12,18,20 1463:14 1480:25 1481:8 1499:8,11 1500:2 1505:17 1506:5 <b>unnecessarily</b> 1463:8 <b>unsuccessful</b> 1466:25 1530:9 <b>Upadhyah</b> 1355:5 1397:5,10,14 1398:16 1405:6 1411:16 1438:6 1440:9 <b>update</b> 1474:5 <b>upset</b> 1378:13 <b>upstream</b> 1403:4,7,19 1403:21 1404:5,14 <b>URQUHART</b> 1354:12 <b>use</b> 1370:23 1371:9 1376:20 1387:4,22,25 1393:4,16 1399:18 1400:17 1401:2,15 1402:8 1408:10 1409:2,9 1410:7,19 1411:23 1416:22 1426:5 1440:17 1441:1,3,6,9,9,11,15 1441:19,25 1442:2 1457:25 1458:21,24 1460:6 1494:8 1507:11 1508:19,22 1509:1,2,18 1510:6 1521:18 1524:19 <b>useful</b> 1375:4 1459:7 1486:9 <b>users</b> 1404:13,14 1410:8,10</p>	<p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vague</b> 1385:22 1388:6 1389:4,6 1404:7 1520:13 <b>valid</b> 1373:15 1524:21 <b>validation</b> 1388:13,16 <b>VALIDITY</b> 1353:10 <b>Valley</b> 1440:24 1441:1 1441:2 <b>value</b> 1433:7,10,19,20 1433:25 1434:4 1456:12 1475:7 1476:1,11 1478:16,21 1489:17 1490:7,9 1491:4,23 1492:5 <b>VAN</b> 1354:3 <b>VANDERHORST</b> 1354:17 <b>various</b> 1360:13 1378:11 1382:12 1396:8 1449:9 1452:11 1455:8 1468:13 1481:5 1483:10,24 1485:21 <b>venue</b> 1456:24 <b>verifying</b> 1383:5 <b>version</b> 1405:15 1425:5 1438:16 <b>versus</b> 1382:22 1416:16 1465:8 <b>Vice</b> 1521:19 <b>VIDEOGRAPHY</b> 1353:23 <b>view</b> 1402:11 1482:1,16 1484:21 <b>viewed</b> 1505:4 <b>views</b> 1357:11 1455:22 1455:23 1456:2 <b>voiced</b> 1432:5,16,17,21 <b>volume</b> 1353:10 1412:13,15 1492:16 1511:10 <b>vote</b> 1380:10 1449:9 1451:8,11,12,19,25 1503:13,19,21,23 1504:1,7,11,12 <b>voted</b> 1452:2 1503:7 1505:17 1506:15 <b>votes</b> 1448:18 1506:1 <b>voting</b> 1449:4 1506:5 <b>vs</b> 1353:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>W-I-L-L-E-R</b> 1464:16 <b>wait</b> 1368:17 1376:13 1455:18,20 1493:22 <b>waited</b> 1360:2 <b>walk</b> 1470:14</p>	<p><b>want</b> 1363:16 1364:24 1384:7 1398:18 1425:2,21 1439:12 1467:6,24,25 1468:3 1469:4,5,6,8 1470:1 1470:14 1476:9 1482:8,17 1486:23 1494:15 1495:20 1496:3 1499:19 1500:24 1528:23 <b>wanted</b> 1373:10 1390:6 1390:20 1394:18 1459:18 1468:21 1482:2 1495:8 1506:23 1529:3,4 1532:15 <b>wanting</b> 1499:22 <b>wants</b> 1418:19 1427:10 1436:3 1469:16 <b>Warren</b> 1354:5 1411:18 <b>washers</b> 1399:8 <b>wasn't</b> 1376:14,18,25 1395:20 1481:15 1483:20 1518:5 <b>wastewater</b> 1399:15 1407:24 1408:1,6,7,7 1408:11 1409:6 <b>water</b> 1353:6,9,11 1354:11 1356:11,14 1360:1,11,17 1361:7 1361:13 1362:1,2,13 1363:4 1364:2,4,17 1365:10,19,23 1369:6 1369:12 1370:2,2,3,7 1370:7,8,22 1371:1,8 1371:8,9 1373:1,5,15 1374:16 1375:2 1376:3 1377:24 1378:4 1381:1 1382:13 1386:11,23 1387:7,8,9,10,15,16 1387:17,18 1388:3,5 1388:15,20,24 1389:25 1390:3,10,12 1390:12,13,20,21,24 1391:1,1,7,8,10,15 1392:9,15,24 1393:17 1394:6,7,13,18,18,19 1394:19,24 1395:1,2 1395:2,4,5,6,9,12,12 1395:17,18,19,21 1396:10,14,17 1397:20,23,25 1398:2 1398:9,10 1399:9,24 1401:19,20,21,24 1402:1,2,2,7,23 1403:2 1404:1,2,4,12</p>	<p>1404:19,24 1405:3 1406:18 1407:5,10,16 1407:20,22 1409:2,12 1409:25 1410:13,16 1410:17 1411:21 1412:9,10 1413:8,10 1414:7,11 1415:15 1416:9,19 1417:10 1418:10,11,13,14,15 1418:22 1420:1,10,19 1421:17,23 1422:19 1422:23 1423:8 1424:16 1429:1,16 1431:1,8 1432:3 1433:3,3,8,8,10,12,15 1433:16,22,24 1434:23 1435:1,3,5,8 1435:10,10,14,14,17 1435:18 1436:1,1,3,8 1436:13 1437:4,5,5,9 1437:10,10 1440:17 1440:19 1441:3,4,9 1441:10,11,20,20 1442:4,8 1443:21,25 1444:4,6,15,22 1445:15,15,21 1446:14,23 1449:5,7 1449:20 1450:3,5 1451:2,20,21 1452:23 1453:14 1454:8,13 1455:7 1459:1 1460:9 1460:12,14,18,19 1461:4,24,25 1462:7 1462:18,20,20,22,23 1462:24,24 1463:3,4 1463:6,9,14 1464:1 1464:19 1465:9,15 1466:7 1471:8 1472:25,25 1474:24 1475:1,1,2,18 1476:2 1476:4,25 1477:3,3,5 1477:21,22 1479:15 1479:23 1480:16,20 1480:24 1483:16,17 1483:21 1484:1,1 1487:12,19 1488:20 1491:5,9 1492:11,16 1496:14,25 1497:6,12 1497:22,25 1498:6,9 1503:8,8 1506:20,20 1506:23,24 1507:5,6 1507:12,18,18,24,25 1508:5,7,13,13,14,15 1508:16,19,22 1509:2 1509:10,11,18,19 1510:1,7,12,16,20,21 1511:1,4 1513:1,8 1514:10 1515:4,5,23</p>
---	---	--	---	---

<p>1516:15 1517:2,5,15 1518:1,3,10,20 1519:1,25 1520:6,11 1520:23 1521:14,15 1521:21,25 1522:5 1523:9,14,19 1524:4 1524:6,13,24 1525:17 1525:19 1526:5 1527:5 1528:17 1530:11 <b>water-efficient</b> 1399:6 <b>way</b> 1386:25 1389:9 1391:7 1409:1 1416:25 1420:23 1434:21 1436:22 1448:22,23 1460:2 1469:15 1478:20 1511:18 1517:7,11,12 1519:15 1525:13 <b>ways</b> 1378:11 1463:25 1479:3 1528:7 <b>wbraunig@kvn.com</b> 1354:9 <b>we'll</b> 1441:20 <b>we're</b> 1394:12 1406:8 1406:16 1409:6 1412:24 1416:2 1417:25 1418:24 1447:12 1455:14 1460:23 1470:17 1479:6 <b>we've</b> 1357:11 1382:11 1382:20,21,22 1403:8 1406:9 1407:2 1415:18 1422:25 1431:4,13,14 1446:7 1506:18 1516:14 <b>week</b> 1479:14 1494:8 1494:17 <b>weeks</b> 1486:18 <b>went</b> 1359:3 1383:12 1393:17 1444:8,10 1447:20 1448:6 1451:9 1457:1 <b>whatsoever</b> 1532:8 <b>wheel</b> 1429:1 1433:2,8 1433:10,12 1435:10 1435:14,25 1436:2,8 1437:9,10 1506:20,20 1529:3 <b>wheeled</b> 1429:20 1506:23 1507:6,18 <b>wheeler</b> 1405:2 <b>wheelers</b> 1404:22 <b>wheeling</b> 1373:17 1387:19,24 1429:1,4 1429:22 1430:2,6,11 1435:9,19 1436:12,18</p>	<p>1437:4 1441:16,22 1446:7,13 1453:2 1465:8,11,19 1467:1 1471:22 1472:13,20 1472:24 1473:7,11 1477:1,4,11 1478:6 1478:10,15,17 1480:17,18 1481:12 1483:7 1484:8,25 1485:2,17 1487:25 1488:5,16,19,21 1489:19,22 1490:2,6 1490:10,19,19 1491:10,17 1492:12 1492:18 1496:25 1499:22 1503:7 1507:19,22,23 1508:4 1508:13 1511:19 1516:2,4,15,23 1520:1 1522:1,3,4,10 1522:11,20 1523:19 1524:16 1525:10,12 1525:18 1526:11,16 1526:19,21 1527:11 1528:4,13,24 1530:12 1530:22,25 1531:3,5 1531:22 <b>wholesale</b> 1431:5 1455:15 <b>Willer</b> 1464:16,18 1465:5 <b>willing</b> 1528:20 <b>wisest</b> 1357:13 <b>wish</b> 1387:8 <b>withdraw</b> 1456:6 <b>withdrawing</b> 1438:20 <b>witness</b> 1357:22 1359:14,17 1368:16 1386:1 1388:8,10,13 1389:8 1392:25 1393:10 1397:3,6,11 1397:14 1398:22 1402:7 1404:9 1415:7 1423:18 1426:3,9 1438:10 1440:4,12 1441:23 1443:9,12 1468:11 1485:13 1495:17,18,19 1505:3 1520:16 1521:6,10 1525:4,6,15 1534:16 <b>witnesses</b> 1355:2 1357:15 1494:3,3,10 1494:17 <b>woman</b> 1455:10 <b>wondered</b> 1495:10 <b>word</b> 1390:7 1400:20 1401:5 1402:2 <b>words</b> 1489:6 1530:3</p>	<p><b>work</b> 1356:14 1385:11 1443:25 1514:4,19 1530:22 1532:22 <b>worked</b> 1383:12 1385:17 1391:7 <b>working</b> 1400:5 1432:1 <b>works</b> 1469:15 <b>workshop</b> 1445:21 <b>workshops</b> 1431:15 1445:24 1446:2 <b>world</b> 1467:11 1468:2 1469:4 <b>WORLDWIDE</b> 1353:23 <b>worry</b> 1476:5 <b>worst</b> 1467:6,7,13,15 1467:24,25 1468:5,24 1469:7 1470:2 <b>worst-case</b> 1466:1,22 1466:23 1467:8,20 1469:13,16 1485:1 <b>worth</b> 1475:3,4,5,6,8,9 1475:12,17,19,20,21 1476:6,7,9,13,14 1526:13,14 <b>wouldn't</b> 1424:4,7 1455:14,18,20 1456:1 1456:20 1462:6,14 1467:20 1475:25 1487:7 <b>write</b> 1439:2 1460:14 1462:19 1481:4,7 1484:7 1499:7 <b>writes</b> 1373:14 1374:25 1465:5 1478:1,10 <b>writing</b> 1455:6,12,16 1456:2,21,22 1462:2 1481:10,14,22 1499:15,21,24 1500:10 <b>written</b> 1378:9 1461:16 1461:19,21 1465:2 1470:14 1481:9,24 <b>wrong</b> 1361:19 1476:13 1496:20 1512:21 1521:20 <b>wrote</b> 1378:4 1457:2 1459:24 1461:17 1480:11,14 1499:25</p>	<p>1414:9,11 1463:9 1473:5 1488:25 1489:3 1497:13,15,19 1497:21,23 1498:19 1499:4 1501:24 1503:1,3 1517:14,16 1518:11,13,15,17,19 1518:23 1524:8 1526:1 <b>year's</b> 1516:21 <b>years</b> 1359:2 1372:20 1373:17,25 1375:7,19 1379:10,12 1380:15 1382:11 1400:5 1407:3,4 1431:2,13 1432:1,7,10,23 1435:9,13 1443:24 1455:5 1456:10 1465:10,25 1466:21 1467:5 1468:19 1472:13,17 1474:25 1475:9 1476:1 1477:25 1479:11,13 1488:5,18,20,25 1489:19 1490:2 1491:17 1492:17,19 1498:10,24 1499:25 1500:6 1502:4,9,23 1511:22 1514:11 1515:23 1520:3 1526:6,17 1528:11,15 1528:25 1529:4,9 1530:2,9,14,23 1531:18,21 1532:9,19 <b>yesterday</b> 1358:6,22 1361:21 1362:9 1369:6 1378:23 1379:4 1384:8,17 <b>yield</b> 1529:6 <b>yields</b> 1474:25</p>	<p>1470:19 1486:23,24 1501:12 <b>10/11/01</b> 1356:6 <b>10/15</b> 1355:22 <b>10/2</b> 1355:21 <b>10:00</b> 1357:3 <b>109</b> 1412:14,16 1413:12 <b>10th</b> 1354:14 <b>11</b> 1445:18 1449:23,24 1514:6 <b>11.1</b> 1361:22 1362:14 1363:6 1364:18 1365:12 1531:14,14 <b>110</b> 1413:13 1474:25 1475:9 1476:1 1479:12 1492:17 1514:10 1515:23 <b>1114</b> 1356:14 1513:23 1514:1,2 <b>1149A</b> 1442:24 1443:3 1443:4 <b>12</b> 1427:14 1452:15 1494:1,9 1514:18 <b>12.4</b> 1501:21 1502:2,22 1531:25 <b>12.4(c)</b> 1500:15 1531:25 <b>12/28/01</b> 1356:4 <b>120</b> 1355:15 1424:14 1424:15,19,22,25 1425:1 <b>126</b> 1416:23 <b>129</b> 1448:16 1451:24 1503:5 <b>13</b> 1415:20 1427:6 1509:23 <b>1353</b> 1353:13 <b>1358</b> 1355:3 <b>1362</b> 1355:14,14 <b>1363</b> 1355:16,16 <b>1364</b> 1355:18,18,20 <b>1365</b> 1355:20 <b>1366</b> 1355:17,17 <b>1367</b> 1355:21,21,22,22 1355:23,23,24,24,25 1355:25 1356:1,1 <b>1369</b> 1356:5,5 <b>1374</b> 1356:12,12 <b>1377</b> 1355:13,13 <b>1382</b> 1355:3 <b>1397</b> 1355:5 <b>13th</b> 1534:16 <b>14</b> 1415:20 1416:6 1479:25 1496:2 1509:23 <b>1411</b> 1355:5 1356:13 <b>1420</b> 1355:15</p>
--	--	--	--	--

1424 1355:15	2/5/13 1355:23	1416:6	357 1437:3	7 1377:12 1406:1
1436 1356:3,3	20 1380:15 1413:2	2013 1353:12 1434:18	358 1356:3 1436:14,17	1440:10 1483:14,25
1439 1356:13	1511:11	1434:18	1436:23 1437:1,2	7/3/06 1356:1
144 1359:8,19,24	200-page 1447:11	2014 1353:12	1439:18 1440:8	7/30/04 1356:12
1440 1355:5	2000 1502:25 1517:12	2015 1353:18 1357:2	3rd 1353:24	7/7/10 1356:3
1443 1355:6	1518:1 1520:19	1438:2 1534:17		700 1354:17
1445 1356:6,6	1524:8	207 1355:18 1363:24	<u>4</u>	701 1353:24
1447 1356:4,4	2001 1444:7,13	1364:7,12,13	4.1 1389:24 1390:24	75 1465:9 1487:16
1449 1356:7,7	1445:18,22 1454:19	21 1359:9,25 1413:13	4.2 1389:22 1390:22	1507:2 1528:24
145 1359:9,25	1517:12 1518:1	1426:7 1487:21	1394:16	1529:4
1464 1356:8,8	2002 1447:25 1448:11	213.217.6000 1354:18	4:00 1493:22 1532:21	75-year 1465:20
147,000 1407:8	1449:21 1454:19	213.443.3000 1354:15	4:45 1494:6	767 1356:6 1445:1,7,9
1470 1356:9,9	1517:12 1518:1	216 1452:15	40 1380:15	1445:11
1473 1356:10,10	2003 1384:22 1385:1	217 1452:15	415 1353:25	77,700 1474:25 1475:8
1479 1356:11,11	1389:10 1430:20	22 1490:13	415.391.5400 1354:7	772 1356:7 1449:12,13
1486 1355:19,19	1432:9 1444:11	221 1355:19 1485:7	44 1392:11,14,17	1449:16,18,19
15 1382:11 1493:17	1447:19 1448:5	1486:14,15 1487:2	1393:7,11	794 1457:8
1526:6	1450:19 1451:9	225 1355:20 1364:14	45 1379:10,12 1468:19	
15,500 1406:12,23	1452:6,20 1453:23	1364:23 1365:4,7,8	1491:17 1528:24	<u>8</u>
1514 1356:14,14	1454:20,23 1455:2	229 1355:21 1367:4,5,8	1529:4	8 1409:23 1464:4,22
1517 1355:6	1456:25 1463:19,24	1367:9	475 1356:4 1447:2,5,7	1484:6
1534 1353:13	1470:19 1474:1,11	23 1364:4	1447:8	8.5 1475:1
16 1412:14 1474:1,10	1486:3,17 1487:14,15	230 1355:22 1367:10		8/17/04 1355:13
1502:9	1490:16 1491:15	1367:11,13,14	<u>5</u>	8/2/05 1355:15
169 1355:14 1362:11	1496:4,10,11 1498:18	232 1355:23 1367:15	5 1395:7	8/26/11 1355:18
1362:16,24,25	1501:2 1515:1 1518:1	1367:16,18 1369:1	5.1 1389:18 1472:13	80 1372:9 1487:16
17 1376:2 1424:14,15	1519:10 1522:12,13	234 1355:24 1367:19	5.2 1374:1 1389:12	800 1353:25
1502:9	1522:14,17 1523:14	1367:20,22 1369:1	1394:8,11,13,17,25	829 1356:8 1464:5,10
175 1355:16 1363:1,12	1525:14	235-dollar 1453:21	1486:4 1502:9	1464:11
1363:21,23	2004 1372:12 1374:14	237A 1392:11	1526:25 1527:4,6	830 1356:9 1470:5,11
18 1359:8,24 1372:12	1376:2 1512:5	24 1436:15 1440:11	1529:12 1531:17	1470:12
1512:25	2005 1424:17 1498:18	243 1355:25 1367:23	5/3/10 1355:14	837 1356:10 1473:18
1810 1522:7	1499:6,10,14 1503:1	1367:24 1368:18,20	5/4/12 1355:20	1473:21,22
189 1355:17 1366:4,10	1503:6 1512:4	1369:1 1511:10	5:14 1494:7	846 1473:23
1366:17,18	1517:23 1519:12	244 1511:11	50 1511:1	856 1356:11 1479:17
19 1456:9	2006 1369:18 1499:18	25 1380:9 1486:17	50,000 1409:11,15	1479:21,22
1990s 1407:15 1429:14	1506:16 1512:4	1496:2	51 1389:15,15 1393:22	865 1354:14
1991 1487:13	2007 1499:18 1506:16	253 1479:3,10	1509:22	8th 1495:8
1995 1400:4	1511:16 1512:1,14,16	26 1380:6 1500:15	515,000 1409:21	
1996 1520:2	1512:17,20,25	260 1444:6	516 1359:20	<u>9</u>
1997 1521:10	1513:17 1514:18,23	28 1446:6 1449:21	522-7096 1353:25	9/10/03 1356:9
1998 1477:12 1489:18	2008 1499:18 1506:16		55 1500:14	9/16/03 1356:10
1490:15 1491:13	1507:3 1512:8	<u>3</u>	555 1512:24	9/24/03 1356:11
1526:3,9	1513:20	3.2 1510:4	56 1384:9 1394:1	9/25/03 1355:19
1999 1402:25 1517:12	2009 1406:20 1407:23	3.3 1509:23	57 1385:2	9/9/03 1356:8
1B 1450:2	1409:14 1499:18	30 1380:15 1488:5		90-dollar 1477:16
<u>2</u>	1503:1 1506:16	30-page 1438:15,24	<u>6</u>	90012 1354:18
2 1353:18 1357:2	1508:15 1517:4,7	30-some 1493:8	6/18/13 1355:25	90017-2543 1354:14
1377:14 1412:15	1518:1 1519:13,14	302 1356:1 1369:16,20	6/30/10 1355:16	909 1356:12 1374:13
1424:17 1426:9,10	2010 1362:5 1400:1	1369:22,23	60 1402:25 1405:17	1374:19,22,23
1438:2 1482:22	1440:10 1500:1,11	304 1353:4 1357:4	624 1356:5 1368:21,24	90s 1369:9
1487:9	1501:12 1506:19	1438:4	1369:1 1501:10,15,16	94111 1353:24
2/10/11 1356:5	2011 1364:4 1405:15	30th 1374:14	633 1354:6	95 1355:13 1376:1,6
2/15/13 1355:24	1414:18 1415:1,15	3374 1353:20 1534:7	64 1496:2	1377:2,3 1487:13
2/2011 1356:13	1416:4 1422:9,15,21	1534:23	65 1389:15,17 1500:14	979 1356:13 1405:13
2/24/11 1355:17	1422:23 1501:8	34 1426:7	1526:25 1527:2	1411:1,2,11 1438:14
2/28/02 1356:7	1515:16 1516:7	35 1426:7 1472:13		1438:17,20 1439:12
	2012 1353:12 1415:20	1489:19 1490:2	<u>7</u>	1439:13

979A 1438:21  
98 1521:10  
981-3498 1353:25

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 BEFORE THE HONORABLE CURTIS E. A. KARNOW  
 DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )  
 )

Petitioner and Plaintiff, ) Case No.  
 ) No. CPF-10-510830  
 vs. ) No. CPF-12-512466  
 )

METROPOLITAN WATER DISTRICT OF )  
 SOUTHERN CALIFORNIA; ALL )  
 PERSONS INTERESTED IN THE )  
 VALIDITY OF THE RATES ADOPTED BY ) VOLUME X  
 THE METROPOLITAN WATER DISTRICT )  
 OF SOUTHERN CALIFORNIA ON APRIL )  
 10, 2012 TO BE EFFECTIVE JANUARY )  
 1, 2013 AND JANUARY 1, 2014, and )  
 DOES 1-10, )  
 ) Pages 1535 - 1727  
 Respondents and Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 San Francisco Superior  
 San Francisco, California  
 Monday, April 27, 2015

Reported By:  
 TARA SANDFORD, RPR, CSR #3374

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1535

1 INDEX  
 2 DEFENDANT'S WITNESSES DIRECT CROSS REDIRECT RECROSS  
 3 STAPLETON, Maureen -- 1554 1572 1645  
 (E.C. 776)

4 YAMASAKI, Brent 1661 1687 1701 1706

5 LAMBECK, Jon 1709 --

6 EXHIBITS

7 NUMBER FOR ID IN EVIDENCE  
 8 DTX 859 1566 1567  
 9 DTX 1096 1725 --  
 10 DTX 1143 1580 --  
 11 DTX 1103 1720 --  
 12 DTX 1105 1672 1673  
 13 DTX 1121 1710 1710  
 14 DTX 1122 1673 1674  
 15 DTX 1123 1715 1718  
 16 DTX 1124 1673 1674  
 17 DTX 1125 1716 1718  
 18 DTX 1126 1673 1674  
 19 DTX 1127 1719 1720  
 20 DTX 1128 1673 1674  
 21 DTX 1151 1710 1710  
 22 DTX 1154 1674 1678  
 23 DTX 1155 1683 1684  
 24 DTX 1156 1683 1685  
 25 DTX 1157 1685 1686

1537

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1536

1 San Francisco, California  
 2 Monday, April 27, 2015  
 3 10:00 a.m.  
 4 Department 304 Hon. Curtis E. A. Karnow, Judge  
 5  
 6 THE COURT: Good morning.  
 7 Did you want to talk first about the motion to  
 8 exclude?  
 9 MR. KEKER: Yes, your Honor. Your Honor, if I  
 10 could pass up a document that we received, several  
 11 documents that we received late morning yesterday, which  
 12 I won't summarize too much of it.  
 13 If you could, put up the sixth slide. This  
 14 purports to be their damage analysis. This is after  
 15 trial briefs. This is after opening statements. This  
 16 is after a lot of trial.  
 17 We have four hours left, and for the first time  
 18 we are receiving this, what purports to be a damage  
 19 analysis. We don't know who is going to testify to it,  
 20 but I suspect it is Mr. Woodcock. There is not a word  
 21 of this in his expert report, contrary to what they have  
 22 said in a motion that we just saw this morning, or in an  
 23 opposition.  
 24 THE COURT: I haven't seen it.  
 25 MR. KEKER: They filed something this morning

1538

1 that said this is not expert testimony, and I would ask  
 2 you -- and, therefore, what are you worried about. And  
 3 Mr. Woodcock has this in his report, which is --  
 4 Mr. Woodcock said I can't possibly calculate damages.  
 5 The supply charge -- the State Water Project charges are  
 6 very properly put in transportation. The water  
 7 stewardship rate is reasonably and properly put in  
 8 transportation -- that's all he said -- and I can't  
 9 calculate damages. And now they come up with this.  
 10 So we have so many objections to this that it  
 11 is going to take me a moment, but I would like to go  
 12 through and put them on the record.  
 13 First of all, it is undisclosed expert  
 14 testimony. And as we said in our motion, they made an  
 15 effort to reopen expert discovery. We would have been a  
 16 lot better off if they had reopened it and we had three  
 17 months to deal with this, rather than have it dumped on  
 18 us when we have four hours left at the last minute.  
 19 The opinions that are expressed there, you can  
 20 tell by looking, directly conflict with the Phase 1  
 21 ruling. They put State -- what they have done is  
 22 they're blending and they've gone and estimated what  
 23 State Water Project water they used for blending, and  
 24 then they say for that water we should be able to charge  
 25 access fees on the State Water Project, directly

1539

1 contrary to your ruling. They have included it in the  
 2 water stewardship rate. I have no idea what Woodcock is  
 3 going to come up with as a rationale for that, given  
 4 your ruling. These are, as I said, directly contrary to  
 5 the Phase 1 ruling. We have objected, and they said  
 6 that no attempt to speculate about alternative rates is  
 7 properly before you.  
 8 This is an attempt -- we think it's an illegal,  
 9 irrelevant attempt because it conflicts with the Phase 1  
 10 ruling. But even if it weren't, it's an effort to  
 11 speculate about some other set of rates that could have  
 12 been charged.  
 13 They come up, by the way, with we owe them  
 14 two-and-a-half million dollars, which is not surprising  
 15 here. The contract damages here is that we underpaid.  
 16 That is whoever's opinion.  
 17 You've already decided that a speculative  
 18 rate -- this speculative rate can't be a lawful rate  
 19 because of the cost of service principles, because they  
 20 are loading water stewardship rate and supply costs in  
 21 there. It's based on no record. It's based on no net  
 22 action. It violates the wheeling law because it is a  
 23 further effort to discourage wheeling by loading lots of  
 24 stuff on a wheeling so it doesn't happen. It is not  
 25 applicable as to what the wheeling statute and the

1540

1 contract requires. To all member agencies, it is a  
 2 one-off, let's-get-San-Diego kind of analysis.  
 3 No fact witness has or can testify in support  
 4 of these numbers. It contradicts PTX 235, which are  
 5 interrogatories, Response Number 20 -- this is in  
 6 evidence -- MWD does not break out its cost of  
 7 delivering exchange water from its cost of delivering  
 8 other MWD water. This damage analysis does. 235 goes  
 9 on to say -- Interrogatory Number 8 -- MWD does not  
 10 break out its cost of transporting MWD water from its  
 11 costs of transporting non-MWD water on behalf of member  
 12 agencies.  
 13 Same exhibit, PTX 235A, interrogatories, MWD's  
 14 cost of transporting water are the same whether the  
 15 member agency is transporting MWD water or not MWD  
 16 water.  
 17 We asked if there are any cost of service  
 18 reports associated with delivering San Diego's  
 19 third-party water; they say no such documents exist.  
 20 We asked for all data, analysis, calculations,  
 21 studies and other information that detail or evidence  
 22 Met's specific costs of delivery to San Diego, San  
 23 Diego's conserved water from IID or canal lining water  
 24 supplies; no such documents exist.  
 25 As you know, in the Skillman declaration, which

1541

1 we will move into evidence -- that's the April 5, 2013,  
 2 Skillman deposition -- declaration, she says they don't  
 3 retrospectively analyze the expenditures funded for each  
 4 of the rate components. She says they don't conduct a  
 5 retrospective cost of service analysis that would  
 6 reconcile MWD's cost of revenue of each component of  
 7 MWD's rates. She says not -- such a reconciliation  
 8 would require MWD to assign actual amounts to cost of  
 9 service categories, a time-consuming and imprecise task,  
 10 because the Oracle financial accounting system records  
 11 reports revenues and expenditures, according to MWD's  
 12 chart of accounts, not by cost of service category.  
 13 So, in short, somebody has done what we asked  
 14 for in discovery, and they said that they couldn't do,  
 15 didn't want to do. We moved to compel. You said the  
 16 whole game here is to make sure you're not surprised at  
 17 trial. If you are going to use something, tell them  
 18 now. We find out, for example, they've got state water  
 19 resources power charges in there that they never had  
 20 produced in discovery. They put them on their exhibit  
 21 list. We object to them, of course. And we object to a  
 22 lot of what the basis is for these numbers, and then we  
 23 take a breath.  
 24 Most tellingly, we don't know, and can't tell,  
 25 where these numbers come from. Take, for example, the

1542

1 actual State Water Project power costs, which they say  
 2 they break out. They produced, over our objection, and  
 3 put on the exhibit list, after not producing them in  
 4 discovery, DTX1096 through 1099. These are the sort of  
 5 things they insisted they didn't have, couldn't produce.  
 6 They add to that administrative and general costs. We  
 7 have no idea where they got that. And the basic  
 8 premise, as I said before, is irrelevant because State  
 9 Water Project -- they are treating State Water Project  
 10 charges as transportation charges to Met. That's the --  
 11 and that violates the Phase 1 ruling.  
 12 We tried to go to their cost of service study  
 13 and see what they had done and the numbers don't match.  
 14 Their cost of service study for the first two years is  
 15 Exhibit 90, DTX 90. For the last two years, '12 and --  
 16 no. '13 and '14, it's 110. And we try to do the math,  
 17 and we come up with lower numbers than they come up  
 18 with. There is this hole, where did you get these  
 19 numbers. It's not clear from that.  
 20 Our brief at page 4 lays out that hearing. We  
 21 attached the transcript of the hearing where we talked  
 22 about this, where you said the issue here is surprise;  
 23 we don't want anybody surprised and so on. I can --  
 24 Just basically there's five things: They put  
 25 in actual State Water Project power costs. You've ruled

1543

1 those are improper in the transportation rates.  
 2 They put in actual Colorado River power costs  
 3 they claim, but what they've used are spot market  
 4 charges, which they have never used, never will use and  
 5 don't use, and didn't use in these years. They just  
 6 made it up.  
 7 They put in State Water Project access charges  
 8 for the blended water that came to San Diego, they  
 9 claim, which they estimate. And, again, that's a supply  
 10 cost based on your ruling.  
 11 They have put in the water stewardship rate and  
 12 we just can't fathom how they can do that.  
 13 There was never a -- again, in your opinion,  
 14 you said to the extent that there's blending, that's  
 15 gratuitous. San Diego never bargained for and there is  
 16 nothing in this contract that requires them to do  
 17 anything except we make available to them the Colorado  
 18 River water, and they make it available to us. If they  
 19 want to put in State water, if they want to blend, if  
 20 they want to do something different, that's their  
 21 problem. San Diego doesn't care, and there's nothing in  
 22 the contract that says otherwise.  
 23 So bottom line is, this is a total sandbag.  
 24 It's wrong. It's irrelevant because of the reasons I've  
 25 just said. It's expert testimony, not percipient

1544

1 witness testimony, and it ought to be completely barred.  
 2 Not -- the least reason is that no expert has begun to  
 3 say anything about this, and the first we heard about it  
 4 is yesterday morning and we have four hours left.  
 5 THE COURT: Thank you.  
 6 Mr. Quinn, does anybody on your side want to  
 7 address this?  
 8 MR. QUINN: Yes, your Honor. We can.  
 9 We have filed a response this morning to the  
 10 motion. I don't know -- I'm sure the Court has not had  
 11 a chance to see that.  
 12 THE COURT: True. When are you expecting to  
 13 get into this? Is it now?  
 14 MR. QUINN: It would come today with June  
 15 Skillman. She is a percipient witness. I can address  
 16 some of these points now. The most efficient way to  
 17 deal with this might be, if I can suggest, that the  
 18 Court file our opposition, and then we have a chance to  
 19 talk about it. But I am fully prepared to try to  
 20 respond to Mr. Kecker's comments now.  
 21 THE COURT: What is your plan this morning?  
 22 That is up to you.  
 23 MR. QUINN: We have Ms. Stapleton on the stand,  
 24 and she is on their direct exam. We will have some  
 25 re-cross. And then we have Mr. Yamasaki, and we have

1545

1 Mr. Lambeck, and I'm pretty sure that is going to get us  
 2 to noon. I think at some point this afternoon June  
 3 Skillman, who is a percipient witness, and she is the  
 4 one who we would use this demonstrative -- and I will  
 5 say, by the way, your Honor, the agreement is and the  
 6 practice has been that demonstratives were exchanged the  
 7 day before, and that is what both sides have done. This  
 8 is all -- I'm sorry, your Honor.  
 9 There is no expert testimony here. And  
 10 calculations, doing calculations from records and just  
 11 running numbers, that is not the subject of expert  
 12 testimony in my understanding. They use Mr. Denham for  
 13 that. But in my own understanding, and in my own view  
 14 of Mr. Denham's testimony, none of that was expert  
 15 testimony.  
 16 THE COURT: The exhibit that we're looking at  
 17 up here on the screen, which is this demonstrative, is  
 18 it based on DTX 1096 through 1099 and 1103?  
 19 MR. KEKER: That is only the first -- that's  
 20 the State Water Project part. Each part, if you look at  
 21 these footnotes, presents a different problem. I can go  
 22 through them one by one.  
 23 MR. QUINN: It is based on that and other  
 24 documents that have been produced.  
 25 THE COURT: Were DTX 1096 through -99 produced

1546



1 in discovery to the other side? You might want to think  
 2 about that between now and lunch. I haven't read your  
 3 opposition, and it sounds like we can get through this  
 4 morning, so I can read your opposition over lunch and  
 5 have a further discussion of it.  
 6 I will tell you what some of my tentative  
 7 thoughts are on the issues, which might be helpful.  
 8 With respect to the sorts of objections  
 9 Mr. Keke was making, in my own mind, I divide them into  
 10 two kinds of categories. There is one category, which  
 11 is the admissibility category, which is the only  
 12 category I really care about right now.  
 13 There are other issues that Mr. Keke raised,  
 14 which may not really go to admissibility. For example,  
 15 if evidence is contradicted by other evidence and things  
 16 like that, that is for me to look at with my trier of  
 17 fact hat on and not my admissibility hat. So the fact  
 18 that something is or isn't supported by the evidence is  
 19 something I can handle, I think, as we hear the  
 20 testimony coming in.  
 21 The question I have is really whether things  
 22 are admissible or not. When it comes to expert  
 23 testimony, let me just give you some preliminary  
 24 thoughts, subject to my thinking about them again, as I  
 25 read the opposition filed by Met.

1547

1 With respect to Woodcock, there are -- his  
 2 testimony is circumscribed by his report. And Met might  
 3 be able to find some of these things for me, but there  
 4 are at least three areas that don't appear to be in his  
 5 report, and, therefore, would not be admissible.  
 6 The first is, "The fair and reasonable  
 7 alternatives available to MWD to recover proper costs  
 8 for exchange water, including fixed infrastructure  
 9 costs, power costs and costs associated with  
 10 conservation." He does not opine on that.  
 11 Next, quote, "Reasonable and fair rates MWD  
 12 could have charged SDCWA under the 2003 amended and  
 13 restated exchange agreement. Woodcock actually said it  
 14 was impossible to express an opinion on those subjects,  
 15 and he didn't offer an opinion on what are reasonable  
 16 and fair rates that Met could have charged." So  
 17 ordinarily I would exclude that testimony.  
 18 And, finally, "Mr. Woodcock's testimony will  
 19 establish what MWD could properly have charged SDCWA in  
 20 light of the rulings in Phase 1." I'm not exactly sure  
 21 what that means. The use of the word "properly" is  
 22 highly charged. It is a little unclear as to what  
 23 "properly" means. Does it mean lawfully? Does it mean  
 24 in conformity with certain facts on the ground as to  
 25 what something costs? I don't know.

1548

1 But he did state that it was impossible to  
 2 express an opinion on this. He did not express an  
 3 opinion on it, so ordinarily that information would be  
 4 -- or that testimony would be excluded.  
 5 With respect to the Skillman and Lambeck, at  
 6 this particular -- from this vantage right now it  
 7 doesn't look like they are being presented as experts.  
 8 It doesn't look like it. I think, generally speaking,  
 9 we could probably handle their issues as they come up at  
 10 trial. So if they are asked a question or they start  
 11 expressing what seems to be an expert opinion, I can  
 12 handle it on the spot.  
 13 But the concern I have with Skillman and  
 14 Lambeck is whether or not they are going to be  
 15 testifying based on documents that were not provided to  
 16 San Diego during discovery, but ought to be disclosed to  
 17 San Diego during discovery. We've got some spreadsheets  
 18 that calculate State Water Project power rates from a  
 19 2011 to 2014. We have a Skillman spreadsheet  
 20 calculating costs of supplemental power -- the cost of  
 21 supplemental power to transport exchange water. I don't  
 22 know if those are expert calculations or they're just  
 23 numbers put into an Excel spreadsheet, where somebody in  
 24 effect pressed a button and generated some sort of  
 25 answer.

1549

1 It is expert discovery to the extent there  
 2 are -- that there are algorithms or formulas buried in  
 3 the spreadsheet that generate a number, as there might  
 4 be. For example, averaging something is probably not  
 5 something you need an expert for. We can all, I think,  
 6 as laypeople, understand what an average is in other  
 7 sorts of contexts. But if there are other calculations  
 8 that are buried inside the spreadsheet, the validity  
 9 would require expert testimony, then the spreadsheet  
 10 itself is expert testimony and is subject to analysis,  
 11 for example, of whether or not those opinions were  
 12 disclosed in a report.  
 13 But I don't know the answer to those questions  
 14 about those documents right now. And that would be  
 15 something we would have to discuss. So the first  
 16 question is whether the documents were disclosed in  
 17 discovery, and the second question is whether they, in  
 18 effect, contain expert analysis of how numbers should be  
 19 related to each other.  
 20 Do you know the answer to those two questions?  
 21 MR. QUINN: I believe all the documents, and we  
 22 addressed this in the opposition --  
 23 THE COURT: Okay.  
 24 MR. QUINN: -- in the moving papers, there was  
 25 nothing specifically identified as to you want to use

1550

1 this, but you didn't give us this. So we are sort of  
 2 responding on a background.  
 3 THE COURT: Yeah.  
 4 MR. QUINN: We believe all the data on which  
 5 this analysis was done is information they have or is  
 6 available to them. We provided or it is publicly  
 7 available information. So in terms of -- I don't think  
 8 there is going to be any instance where they can say  
 9 here is a discovery request; we asked for this; you  
 10 didn't give it to us, and now your analysis is based on  
 11 that. I don't believe there will be any such instance.  
 12 I also do not believe there is going to be any  
 13 algorithms. It's all in the nature of pretty simple  
 14 arithmetic.  
 15 THE COURT: Maybe this is something we take up  
 16 as it comes. I will read the opposition at lunchtime,  
 17 and it sounds like the issue is not quite before us  
 18 until after lunch.  
 19 MR. KEKER: Before you read the opposition, and  
 20 while you're reading the opposition, can I state in  
 21 rebuttal --  
 22 THE COURT: Yeah.  
 23 MR. KEKER: -- our brief specifically mentioned  
 24 1096 through 1099 and said this was never provided in  
 25 discovery. They don't address it.

1551

1 Our brief also said 1103 -- I believe this is  
 2 right -- 1103 is Ms. Skillman's chart of what she calls  
 3 on-peak power rates, and she's taking them from  
 4 something call Platts reports.  
 5 All of that was never produced in discovery.  
 6 We objected to it as hearsay. Platts reports is  
 7 somebody out there who purports to say what the average  
 8 on-peak cost is for each month and so on. And she did  
 9 calculations in 1103 based on that, none of which was  
 10 done in discovery, none of which have we been able to  
 11 depose her on, and all of which is completely irrelevant  
 12 because they won't buy on-peak power. So this is a  
 13 monkey chasing its tail, as far as we're concerned.  
 14 If we are going to go forward, one of the  
 15 requests would be they should not be able to use  
 16 something like this without us -- and have us be limited  
 17 to a short time of cross-examining. It is going to take  
 18 a while to unpack this. We would like, if necessary, a  
 19 recess for Skillman. Leave her right there on the  
 20 stand, you go off and do other things in chambers, and  
 21 we will take her deposition and find out what goes into  
 22 this, if she is the one who is going to testify about  
 23 it. We can't figure it out. It doesn't make any sense,  
 24 and we believe it is completely wrong on a million  
 25 levels.

1552

1 THE COURT: Let's proceed. Who is the current  
 2 witness?  
 3 MR. KEKER: The current witness is  
 4 Ms. Stapleton who is outside, your Honor, and we are  
 5 ready to proceed.  
 6 Could you tell us what you -- we all have our  
 7 own views and the only one that matters is yours, how  
 8 much time we have?  
 9 THE COURT: This is always available for  
 10 anybody to look at. There is no secret. And it is  
 11 showing that you have used about five hours and 13  
 12 minutes. The other side, Met, has used about six hours  
 13 and 17 minutes. That is what it shows.  
 14 MR. KEKER: We are under four hours at this  
 15 point to go because we only have nine.  
 16 THE COURT: Whatever the math is, yeah.  
 17  
 18 MAUREEN STAPLETON,  
 19 having been previously sworn, testified further as  
 20 follows:  
 21  
 22 THE COURT: You are still under oath. The  
 23 witness has been previously sworn?  
 24 MR. KEKER: She was sworn. And she testified  
 25 at the end of the day. I can't understand why I can't

1553

1 remember what happened three-and-a-half weeks ago. She  
 2 was testifying then on redirect -- on direct  
 3 examination.  
 4  
 5 CROSS-EXAMINATION (resumed)  
 6 BY MR. KEKER:  
 7 Q. Ms. Stapleton, Mr. Kightlinger testified in  
 8 this courtroom at transcript page 1304, as follows -- I  
 9 am going to read it to you, and ask you if you agree  
 10 with it.  
 11 He said:  
 12 "Q I asked Mr. Slater and  
 13 Ms. Stapleton, point blank, are  
 14 you going to be challenging our  
 15 rate structure in which case we  
 16 can't have an agreement?"  
 17 Did that happen, ma'am?  
 18 A. No.  
 19 Q. He said at 1305, one through five --  
 20 THE COURT: Let's just take a second.  
 21 (Discussion held off the record.)  
 22 Q. BY MR. KEKER: At 1305 of the transcript of  
 23 this case, Mr. Kightlinger said, in connection with this  
 24 same conversation, they stated:  
 25 "We have no objection to the

1554

1 rate structure. We agree to  
 2 pay that. What we are  
 3 concerned about are changes  
 4 Metropolitan might make in the  
 5 future and we want to reserve  
 6 the right to challenge those."  
 7 Is that an accurate description of  
 8 conversations you had with Mr. Kightlinger during  
 9 negotiation of the exchange agreement?  
 10 **A. The first part of that is not accurate. We**  
 11 **always had concerns and we had raised them repeatedly**  
 12 **about the rate itself. We did express our concern about**  
 13 **future MWD activities, which may be harmful to the Water**  
 14 **Authority, as well.**  
 15 Q. After the exchange agreement was signed, did  
 16 you see a document from Met that recognized your view of  
 17 the five-year cooling off period was the same as theirs?  
 18 **A. I saw documents that expressed the concern**  
 19 **about us suing and the five-year period, yes.**  
 20 Q. Look at 342, please, which is in your binder.  
 21 That's a -- I believe this is in evidence. That is a  
 22 memorandum from Mr. Gastelum, who is the chief executive  
 23 officer of Met at the time, in 2004. You said, I think,  
 24 the last time we were here, that Mr. Gastelum is still  
 25 around and would have been available to testify if

1555

1 anybody wanted to call him.  
 2 **A. Yes.**  
 3 Q. And in the third paragraph he talks about a  
 4 response to the white paper and talks about the intent  
 5 of such a challenge would be to reduce QSA costs agreed  
 6 to by San Diego in the negotiations. These costs would  
 7 necessarily be paid by other member agencies. And then  
 8 attached to it is a memorandum from him to member agency  
 9 managers.  
 10 Were you a member agency manager?  
 11 **A. Yes.**  
 12 Q. Did you get this along with all the other  
 13 member agency managers?  
 14 **A. Yes.**  
 15 Q. In November of 2004, in that memorandum, if you  
 16 look at Number 2, in the response, he is talking about  
 17 the risk. He is talking about the risk of serious  
 18 attempts by San Diego to legislate changes in the  
 19 District's wheeling charges as well as litigation by IID  
 20 and SDCWA against Met to shift wheeling costs. Was such  
 21 litigation going on in 2004?  
 22 **A. Litigation on the wheeling costs, those were**  
 23 **done. It was sent back to the lower court. But we did**  
 24 **not have a litigation on the wheeling charges in 2004.**  
 25 **What this talked about is the reservation of our right**

1556

1 **to challenge the wheeling charges in the future.**  
 2 Q. That's the last sentence, "The reservation of  
 3 rights in the QSA negotiations by San Diego to contest  
 4 the District's wheeling charges is also a factor that  
 5 should be considered."  
 6 When you got that, did you think that  
 7 Mr. Gastelum thought there was some limitation other  
 8 than the five-year limitation on your right to challenge  
 9 those wheeling charges?  
 10 **A. No. I believe that Mr. Gastelum knew that we**  
 11 **had the right to challenge the wheeling charge after the**  
 12 **five-year period.**  
 13 Q. And this was in connection with rate structure  
 14 integrity. If you look at Number 4, Mr. Gastelum is  
 15 talking about, in the last sentence in the  
 16 response, "Member agencies benefit from the rate  
 17 structure integrity proposal because it's intended to  
 18 discourage cost shifting by legislative or legal actions  
 19 initiated by individual member agencies."  
 20 What was he talking about as far as you were  
 21 concerned?  
 22 **A. He was talking about the Water Authority's**  
 23 **potential to challenge the wheeling rates, which may**  
 24 **cost the other member agencies, if those costs are**  
 25 **shifted elsewhere.**

1557

1 Q. As of 2004, was there any question in your mind  
 2 that Met understood that if this cost allocation problem  
 3 didn't get resolved, after five years, San Diego had a  
 4 right to challenge and to say that the rate was not  
 5 lawful?  
 6 **A. There is no question in my mind whatsoever.**  
 7 Q. Look at Exhibit 81, which is in evidence.  
 8 THE COURT: Do you mean PTX, Plaintiff's  
 9 Exhibit 81?  
 10 Q. BY MR. KEKER: This is a memorandum from Kevin  
 11 Hunt to the board of directors at the Orange County  
 12 Water District; right?  
 13 MR. QUINN: We object. It's hearsay.  
 14 THE COURT: It's in evidence.  
 15 MR. QUINN: I'm sorry. I withdraw my  
 16 objection.  
 17 Q. BY MR. KEKER: And the date of this is 2004,  
 18 around the same time as Mr. Gastelum's memorandum?  
 19 **A. Yes.**  
 20 Q. Do you see where he says -- Mr. Hunt asks you,  
 21 "Ms. Stapleton, I asked whether San Diego would be  
 22 pursuing legal or legislative remedies at the end of the  
 23 five years' QSA delay, and she said absent any  
 24 negotiated changes, yes."  
 25 Is that an accurate description of what you

1558

1 would have said to Mr. Hunt at that time?  
 2 **A. Yes. It is accurate.**  
 3 Q. Did you work during this five-year period with  
 4 Met to try to come up with a cost allocation that San  
 5 Diego could live with?  
 6 **A. Yes, we did.**  
 7 Q. Who did you work with?  
 8 **A. Initially, after the execution of the QSA, I**  
 9 **worked with Dennis Underwood, and we had many**  
 10 **conversations regarding the potential to solve this**  
 11 **problem within the five-year time period.**  
 12 Q. Were you optimistic that you and Mr. Underwood  
 13 could solve this problem?  
 14 **A. Yes. I found him to be a problem solver. He**  
 15 **had a lot of experience under his belt. He was**  
 16 **commissioner of the Bureau of Reclamation prior to**  
 17 **coming to MWD, and we had spent hours and hours together**  
 18 **in the negotiations. I felt like I could trust that his**  
 19 **intent was true, and I did believe that we would find**  
 20 **that sweet spot of being able to come to an agreement.**  
 21 Q. He was the deputy general manager during the  
 22 negotiations?  
 23 **A. Yes, he was.**  
 24 Q. Was he later promoted to general manager of  
 25 Met?

1559

1 **A. Yes. He was promoted in, I believe, 2005.**  
 2 Q. 2005 or '4? When did he die?  
 3 **A. He died in November of 2005.**  
 4 Q. So he was promoted sometime during the year in  
 5 which he, then, unfortunately died?  
 6 **A. Yes. He was at Met the entire time until his**  
 7 **death.**  
 8 Q. Who became general manager after that?  
 9 **A. Jeff Kightlinger.**  
 10 Q. After Mr. Underwood died, did you continue to  
 11 hope or try to work out this cost allocation problem  
 12 with Met?  
 13 **A. Yes. There were a series of processes that Met**  
 14 **had set up regarding long-range financing plan and rate**  
 15 **refinement and so forth. My staff actively participated**  
 16 **in it and raised issues regarding it and tried to**  
 17 **advocate for changes in the allocation of costs. And we**  
 18 **were hopeful then.**  
 19 Q. Among the cost allocations you were talking  
 20 about, were the State Water Project --  
 21 MR. QUINN: Objection. Leading.  
 22 Q. BY MR. KEKER: What were a couple of the  
 23 allocation issues?  
 24 **A. They were regarding the allocation of the State**  
 25 **Water Project costs to the transportation charge, as**

1560

1 **well as the water stewardship charge. Those are**  
 2 **examples of what we were advocating that there be**  
 3 **modifications in their cost allocation.**  
 4 Q. Was San Diego successful in this rate  
 5 refinement process in getting Met to change?  
 6 **A. No, we were not. As a matter of fact, in one**  
 7 **instance, their staff had recommended a slight**  
 8 **modification, but it was not approved by the board of**  
 9 **directors.**  
 10 Q. At some point did you have a conversation with  
 11 Mr. Kightlinger?  
 12 **A. Yes. We had done a variety of presentations to**  
 13 **their board.**  
 14 THE COURT: Which board?  
 15 THE WITNESS: To the board of MWD. We had  
 16 actually submitted an alternative cost of service study  
 17 to them. We paid for some consultants to provide  
 18 material to them to try to show them why we believed our  
 19 interpretation was correct in properly allocating the  
 20 costs, and it was without success. Year after year, we  
 21 had tried different approaches.  
 22 And so in 2010, I had -- I called Jeff  
 23 Kightlinger after they had adopted their 2011 and 2012  
 24 rates. This was after we had provided a variety of  
 25 material to them and had testified. I said to Jeff

1561

1 basically is there anything else you believe we could do  
 2 that would changes MWD's mind about this improper  
 3 allocation.  
 4 Jeff's comment to me was, "Maureen, you are  
 5 asking our individual board members at Met to vote  
 6 against their own self-interest of their agency."  
 7 I said, "Is there anything you can think of  
 8 that would help?"  
 9 And he said, "No."  
 10 And I said, "Well, you know what that means  
 11 then, Jeff. That means our only alternative is court."  
 12 THE COURT: Were there any other member  
 13 agencies who were on your side in this at this point in  
 14 this dispute?  
 15 THE WITNESS: No, sir. We're the only agency  
 16 that wheels independent water through the Met system.  
 17 As a result, when I said --  
 18 Q. BY MR. KEKER: Stop right there. Were the  
 19 member agencies, around this time, calculating how much  
 20 it would cost them if this cost shifting you were  
 21 advocating occurred?  
 22 **A. Yes.**  
 23 MR. QUINN: Objection. Leading.  
 24 THE COURT: I will overrule in this case.  
 25 THE WITNESS: Yes. They had done the

1562

1 calculations of what we thought was the lawful wheeling  
 2 rate and what it would mean to moving those costs to the  
 3 supply rate.  
 4 MR. QUINN: Your Honor, I move to strike.  
 5 Lacks foundation.  
 6 THE COURT: I will sustain that.  
 7 MR. KEKER: Your Honor, there is, in the  
 8 record, a member agency chart that shows --  
 9 THE COURT: In which case, I will look at that.  
 10 Q. BY MR. KEKER: Let me go back to the  
 11 negotiations which you were asked about on the original  
 12 direct examination. Would you look at Defense Exhibit  
 13 837 in your binder.  
 14 A. Yes.  
 15 Q. You see Number 837? This is a memorandum from  
 16 you to your board members; right?  
 17 A. Correct.  
 18 Q. And attached to it is something entitled  
 19 "Quantification Settlement Agreement Option for San  
 20 Diego County Water Authority Fact Sheet, September 16,  
 21 2003."  
 22 A. Yes.  
 23 Q. Attached to that is a two-page letter from Bob  
 24 Campbell or memorandum from Robert Campbell to the board  
 25 of directors?

1563

1 A. Yes.  
 2 MR. KEKER: For the record, the two-page  
 3 memorandum from Campbell is Defense Exhibit 50, which  
 4 was shown to Mr. Slater, your Honor.  
 5 Q. But that was part of a larger package; right?  
 6 A. Yes.  
 7 Q. On the second page of the fact sheet, would you  
 8 look under Option-2, sixth bullet down. Can we blow up  
 9 that bullet?  
 10 It reads, "In consideration" -- and this --  
 11 Just to set a stage, this is you presenting  
 12 facts to your board about this deal that you are  
 13 negotiating with Met; right?  
 14 A. Yes. **This is a quick fact sheet a week before**  
 15 **our board is going to consider it in a formal board**  
 16 **meeting.**  
 17 Q. It says, "In consideration for MWD's assignment  
 18 of canal lining water rights to San Diego, San Diego  
 19 pays Met's lawful wheeling rate in lieu of the exchange  
 20 agreement rates. Neither MWD nor San Diego may lobby  
 21 for a change in law that affects the MWD wheeling rates.  
 22 San Diego may not contest the wheeling rate in a  
 23 judicial setting during the first five years."  
 24 And then down at the bottom it talks about  
 25 Option-2 provides exposure to potentially higher MWD

1564

1 wheeling costs over the initial term. Is that  
 2 information you provided to your board about how this  
 3 would work?  
 4 A. Yes, it is.  
 5 Q. And then is -- Mr. Campbell's analysis that  
 6 followed, you testified about that, and said it was a  
 7 worst-case analysis?  
 8 A. Yes.  
 9 Q. Let's look at 859, which occurred about a week  
 10 later. That is a memorandum from you to your executive  
 11 staff dated September 24, 2003. And to refresh the  
 12 Court's recollection, the exchange agreement was signed  
 13 October 10, Exhibit 65.  
 14 The second page of that is a memorandum. Who  
 15 got that memorandum?  
 16 A. **That was sent on to our board of directors. It**  
 17 **was also sent to our member agency general managers, as**  
 18 **well as it is posted as a public document as our board**  
 19 **agenda.**  
 20 Q. This was a public document for anybody to read  
 21 at the time, just before the exchange agreement was  
 22 entered?  
 23 A. Yes. **It is widely distributed and posted on**  
 24 **our website.**  
 25 Q. The second page of the September 24 memoranda,

1565

1 under "SDCWA Canal Lining Options," let's blow up  
 2 Option-2. In Option 2 it says, in the second -- third  
 3 sentence, "In consideration for MWD's assignment of All  
 4 American and Coachella canal lining water rights to the  
 5 Authority, the Authority would pay MWD's lawful wheeling  
 6 rate in lieu of the exchange agreement. The current  
 7 published wheeling rate is \$253 per acre-foot and is  
 8 comprised of the system access charge, water stewardship  
 9 charge and power cost."  
 10 Do you see that?  
 11 A. Yes.  
 12 Q. If you skip back to page 9 of 9 in this public  
 13 document, there is a paragraph that says, "Risks are  
 14 bounded."  
 15 Do you see that?  
 16 A. Yes, I do.  
 17 Q. That says, "It is important when considering  
 18 Option-2 to recognize that the cost risks are bounded in  
 19 the agreements and/or in law. The financial analysis  
 20 provided in this memo includes worst-case cost  
 21 projections."  
 22 And the last sentence says, "In short, there's  
 23 far greater definition over costs associated with  
 24 Option-2 than those that would be encountered in an  
 25 effort to secure as yet unidentified supplies to meet

1566

1 future demands."  
 2 And then finally, if you go back a number of  
 3 pages to A-7, and look at number 3.  
 4 MR. KEKER: Excuse me, your Honor. I am  
 5 reminded that 859 is not in evidence. I would move it  
 6 into evidence.  
 7 MR. QUINN: No objection, your Honor.  
 8 THE COURT: DTX 859 is admitted.  
 9 (DTX 859 was received in evidence.)  
 10 Q. BY MR. KEKER: Go to A-7. Number 3 says, "San  
 11 Diego shall pay rate established by MWD for all exchange  
 12 water. MWD and SDCWA agree not to seek changes to law  
 13 regulation regarding transportation-related charges for  
 14 water wheeled by MWD. However, after first five years,  
 15 SDCWA can contest lawfulness of MWD rate in an  
 16 administrative or judicial forum."  
 17 Does this memorandum exactly show what you  
 18 understood the agreement consisted of?  
 19 **A. Yes, it does.**  
 20 Q. There's been testimony about the fact that San  
 21 Diego receives equal monthly deliveries of its Colorado  
 22 River water. Who requested that term in the agreement?  
 23 **A. MWD requested they be equal allocations for the**  
 24 **12 months.**  
 25 Q. Was it explained to you why Met wanted it that

1567

1 way?  
 2 **A. It was for operational purposes. It was**  
 3 **something they could count on, they knew exactly how**  
 4 **much water they had to deliver each month to San Diego.**  
 5 Q. In the contract, did it give a right to blend  
 6 water?  
 7 **A. Yes. At Met's sole discretion they could blend**  
 8 **water with other water sources that they had.**  
 9 Q. Look at that in a second. Who asked for that  
 10 right to blend water?  
 11 **A. That was MWD, as well. They were very adamant**  
 12 **in our agreement that they have sole discretion to**  
 13 **operate their system, their total system, as they saw**  
 14 **fit and we had no objection to it.**  
 15 Q. Did you care whether or not they gave you  
 16 100 percent Colorado River water or something different?  
 17 **A. No. We were prepared to take 100 percent**  
 18 **Colorado River water. Met wanted that ability to take**  
 19 **it from whatever source they deemed appropriate.**  
 20 Q. In the contract, is there a provision -- let's  
 21 look at 3.2 of PTX 65. 3.2(a). It is in your book.  
 22 And 3.2(a), what does 3.2(a) provide, just generally?  
 23 The Court can read it.  
 24 **A. It basically says if we provide the water, then**  
 25 **they need to deliver it. They are not required to**

1568

1 **deliver water, if we have not provided it.**  
 2 Q. If you don't give them the Colorado River  
 3 water, they don't have any obligation under the exchange  
 4 agreement?  
 5 **A. Correct.**  
 6 Q. Look at 3.2(e).  
 7 **A. Yes.**  
 8 Q. Explain what that means.  
 9 **A. That -- that is an example of how Met wanted**  
 10 **the flexibility to operate their system, their physical**  
 11 **system, any way they saw fit. So they wanted the**  
 12 **ability to use whatever facility or whatever pipe they**  
 13 **wanted to deliver the exchange water in. It says**  
 14 **basically they have that right, and if they deliver it**  
 15 **in a certain manner in one year, it doesn't set a**  
 16 **precedent to have it delivered that same way in future**  
 17 **years.**  
 18 Q. If they deliver 100 percent Colorado River  
 19 water to meet their obligations under this agreement,  
 20 did San Diego have any concern about that?  
 21 **A. No, none at all.**  
 22 Q. If they chose, because of their own convenience  
 23 or something else, to mix -- to deliver a mix of  
 24 Colorado River and some other water that they bought  
 25 somewhere else, did Metropolitan care about that?

1569

1 Excuse me. Did San Diego care about that?  
 2 **A. No. We did not.**  
 3 Q. Let's look at 3.6, that's the water quality  
 4 provision. Explain that to the Court, please.  
 5 **A. Right. This is, again, an example of**  
 6 **Metropolitan wanting their discretion to deliver**  
 7 **whatever type of water blend. And it's a quality --**  
 8 **it's pretty much the same thing as before. It's a**  
 9 **quality issue. They could either blend it or they could**  
 10 **give us 100 percent Colorado River water. It was at**  
 11 **their discretion to make that decision. And then**  
 12 **finally, that whatever they did, if they did blend it,**  
 13 **it set no precedence for future years.**  
 14 Q. Was there ever a time up until now when there  
 15 was not enough Colorado River water available to Met to  
 16 make the monthly deliveries that it was committed to  
 17 make to San Diego?  
 18 **A. No. The Bureau of Reclamation actually has the**  
 19 **water available at the beginning of each water year, and**  
 20 **that water sits in Lake Mead and then is moved down to**  
 21 **Lake Havasu where the pumps are. So even if Imperial**  
 22 **Irrigation District conserved the water, technically, in**  
 23 **the latter part of the year, Met still has all the water**  
 24 **they need to move the exchange water in monthly**  
 25 **increments starting at the beginning of the year.**

1570

1           **The accounting is done at the end of the year,**  
 2 **so it isn't as if each month someone is checking to see**  
 3 **if IID conserved how much water and then only that water**  
 4 **is given to Met. Actually, the Bureau of Reclamation**  
 5 **allows Met to take that water uniformly, and then at the**  
 6 **end of the year, they do the accounting and true it up.**  
 7       Q. Through the years, up to now, has there ever  
 8 been a time when the Colorado River Aqueduct was volume  
 9 constrained where it couldn't move the water that Met  
 10 needed to move?  
 11       **A. The only time I can think of is when they bring**  
 12 **down a pump or they bring down the aqueduct for an**  
 13 **inspection or maintenance, and then they bring it back**  
 14 **up and the water is delivered -- there's provisions**  
 15 **within the contract that says you don't have to deliver**  
 16 **the water in that month, if you are doing maintenance or**  
 17 **an inspection or there's an emergency.**  
 18       Q. My final question, Ms. Stapleton, is by far the  
 19 most interesting fact I learned in this case. How many  
 20 gallons of water does it take to produce one  
 21 cheeseburger?  
 22       **A. 698 gallons.**  
 23       MR. KEKER: Thanks. No further questions, your  
 24 Honor.  
 25       THE COURT: Sir, any questions?

1571

1           **A. Oh, yes.**  
 2       Q. And on the Met side, the participants included,  
 3 I think you told us, Mr. Kightlinger?  
 4       **A. Yes.**  
 5       Q. Was there a gentleman by the name of Brian  
 6 Thomas?  
 7       **A. Brian Thomas was included in the negotiation**  
 8 **team, as well.**  
 9       Q. Was there an individual -- was Paul Cunningham  
 10 also involved?  
 11       **A. Yes.**  
 12       Q. Was Carl Kaseman involved, as well?  
 13       **A. He -- I do not recall him often at the table.**  
 14 **He did a variety of the writing of the documents, and I**  
 15 **believe is a peer of Paul Cunningham.**  
 16       Q. Whether he was involved a lot or not, he had  
 17 some involvement?  
 18       **A. Yes, he did.**  
 19       Q. As well as Mr. Gastelum?  
 20       **A. Yes.**  
 21       Q. He was involved, as well?  
 22       **A. On occasion, yes.**  
 23       THE COURT: Ma'am, if I could ask you to let  
 24 him completely finish the question, it will be easier.  
 25       THE WITNESS: Sorry.

1573

1           REDIRECT EXAMINATION  
 2 BY MR. QUINN:  
 3       Q. Do you recall the last time you testified, when  
 4 we were here, Mr. Kecker asked you some questions about  
 5 San Diego's objections to including State Water Project  
 6 costs in the conveyance rates? Do you recall that?  
 7       **A. Yes.**  
 8       Q. At that time you testified that you had  
 9 conversations with Dennis Underwood, the man who passed  
 10 away about that --  
 11       **A. Yes.**  
 12       Q. -- do you recall?  
 13       Now, there were a number of people who  
 14 participated in the negotiation of the 2003 exchange  
 15 agreement besides yourself and Mr. Underwood; isn't that  
 16 true?  
 17       **A. Yes.**  
 18       Q. And that would include, for example,  
 19 Mr. Cushman?  
 20       **A. He didn't participate much in the negotiations**  
 21 **itself.**  
 22       Q. But I mean he was involved in structuring the  
 23 deal?  
 24       **A. He was -- yes, he was aware of it.**  
 25       Q. And Mr. Slater, as well?

1572

1       Q. BY MR. QUINN: Now, in response to Mr. Kecker's  
 2 questions, you said that you told Mr. Underwood that  
 3 including the State Water Project costs in  
 4 transportation was unlawful because it violated the Katz  
 5 wheeling statute.  
 6       Do you recall saying that in response to one of  
 7 Mr. Kecker's questions last time?  
 8       **A. Yes.**  
 9       Q. Do you recall that you testified at a public  
 10 hearing before the State Water Resources Control Board  
 11 in April of 2002? This is going back in time, I know.  
 12 Do you have a recollection of that?  
 13       **A. Yes.**  
 14       Q. The subject of that hearing concerned a joint  
 15 petition by San Diego and the IID for approval of a  
 16 long-term transfer of conserved water pursuant to the  
 17 agreement between San Diego and the IID; correct?  
 18       **A. Yes.**  
 19       Q. That hearing was around the time you told us  
 20 you had those conversations with Mr. Underwood; correct?  
 21       **A. I had them throughout the entire process.**  
 22       Q. Including that time?  
 23       **A. Yes.**  
 24       Q. At that hearing -- actually, Mr. Slater was  
 25 asking you questions. He was your lawyer then and he

1574

1 was asking you questions like Mr. Kecker has been asking  
 2 you questions in this trial?  
 3 **A. That's true.**  
 4 Q. Do you recall in response to Mr. Slater's  
 5 questions you testified concerning your understanding of  
 6 that Katz wheeling law; do you recall that?  
 7 **A. I do not recall that specific.**  
 8 MR. QUINN: If we could take a look at PTX 224.  
 9 That is a transcript of that hearing. The Court  
 10 requested if we are only going to use a few pages we try  
 11 to put the few pages in. We will put the few pages we  
 12 use as Exhibit 44A. If we could look at, from this  
 13 transcript, page 437, line 15; 438, line six.  
 14 Mr. Slater asked you:  
 15 "Q Are you aware of the Katz  
 16 wheeling law?  
 17 And you said, "Yes."  
 18 If it is easier, you can look at the screen,  
 19 ma'am.  
 20 Mr. Slater asked you:  
 21 "Q Are you aware of whether  
 22 the Katz wheeling law provides  
 23 for firm capacity transfers or  
 24 space available?"  
 25 And your answer was:

1575

1 "A Yes, I'm aware that it is  
 2 space available."  
 3 Q. Do you see that?  
 4 **A. I do.**  
 5 Q. And you testified that the Katz wheeling law  
 6 applied to space available transfers?  
 7 **A. Yes.**  
 8 Q. You also testified that:  
 9 "A Sometimes, including at the  
 10 time of that hearing, that the  
 11 Colorado River Aqueduct is  
 12 full."  
 13 Do you recall that?  
 14 **A. I do.**  
 15 Q. You said:  
 16 "If there was not space  
 17 available in the Colorado  
 18 aqueduct at a given time, San  
 19 Diego could not move water  
 20 purchased from the IID."  
 21 Correct?  
 22 **A. Yes.**  
 23 Q. You understand and you testified at that  
 24 hearing that there is a radical difference, your words,  
 25 between the wheeling agreement and the exchange

1576

1 agreement which San Diego then had with Met; correct?  
 2 **A. Yes.**  
 3 Q. So, at the time, at the time of this hearing,  
 4 the 2003 agreement wasn't yet in effect. What you were  
 5 referring to was the 1998 agreement which was then in  
 6 effect?  
 7 **A. Correct.**  
 8 Q. But each of those exchange agreements, whether  
 9 it's the 1998 one or 2003 exchange agreement, they are  
 10 radically different than a wheeling agreement; correct?  
 11 **A. It was the difference between firm and space  
 12 available.**  
 13 Q. So at --  
 14 **A. That's the radical difference.**  
 15 Q. We will get to that. But your testimony is it  
 16 is radically different than a wheeling agreement;  
 17 correct?  
 18 **A. Yes.**  
 19 Q. You testified that the exchange agreement is  
 20 radically different from a Katz wheeling transfer in at  
 21 least two respects. One, that it is a trade of one  
 22 supply of water for another and, second, it is firm  
 23 capacity as opposed to space available; correct? That  
 24 was your testimony?  
 25 **A. Yes.**

1577

1 Q. You understand that the Katz wheeling statute  
 2 did not apply to the exchange agreement?  
 3 **A. That portion did not apply.**  
 4 Q. Because it didn't meet those requirements;  
 5 correct?  
 6 **A. Yes.**  
 7 Q. The rates under the exchange agreement, the --  
 8 since they are radically different, the rates under the  
 9 exchange agreement could not violate the Katz wheeling  
 10 law because it didn't apply to the exchange agreement;  
 11 isn't that true?  
 12 **A. No, that's not true.**  
 13 Q. You told us there was a radical difference  
 14 between a wheeling agreement and an exchange agreement;  
 15 true?  
 16 **A. True.**  
 17 Q. And the two things that you've indicated are  
 18 radically different is, first, it's a trade of one  
 19 supply of water for another; right?  
 20 **A. Correct.**  
 21 Q. And second, it's firm capacity as opposed to  
 22 space available; correct?  
 23 **A. Correct.**  
 24 Q. In fact, San Diego has acknowledged in other  
 25 litigation that the exchange agreement is not a wheeling

1578



1 agreement and falls outside the scope of the wheeling  
 2 law?  
 3 **A. That the exchange agreement falls outside the**  
 4 **wheeling law.**  
 5 Q. The exchange agreement is not a wheeling  
 6 agreement and falls outside the scope of the wheeling  
 7 law?  
 8 **A. I'm not sure I understand the question.**  
 9 Q. Is there a particular word I'm using?  
 10 **A. You said the wheeling law. The exchange**  
 11 **agreement includes components that rely on the wheeling**  
 12 **rate. So I'm uncertain as to how to answer that**  
 13 **question.**  
 14 Q. Isn't it true that it's been San Diego's  
 15 position in other litigation that the exchange  
 16 agreements do not trigger the application of wheeling  
 17 statutes; isn't that true?  
 18 **A. Doesn't trigger. I would be happy --**  
 19 THE COURT: It is a question about whether you  
 20 know what position San Diego has taken in other  
 21 litigation. You may or may not but that is what the  
 22 question is.  
 23 THE WITNESS: Right. I believe portions of the  
 24 Katz law apply to the exchange agreement, so I don't  
 25 know how to answer that. I'm sorry, your Honor.

1579

1 THE COURT: The question is, do you know what  
 2 positions San Diego has taken in other litigation?  
 3 THE WITNESS: Not specific legal components,  
 4 no, sir.  
 5 Q. BY MR. QUINN: Let's take a look at Defense  
 6 Exhibit 1143. This is not yet in evidence.  
 7 MR. KEKER: Can I look at it? Is it in here?  
 8 It is Appellant San Diego County Water Authority,  
 9 Coachella Valley Water District, and the Metropolitan  
 10 Water District of Southern California Joint Combined  
 11 Appellants' Reply and Cross-Defendants' and Respondents'  
 12 brief in QSA Coordinated Civil Cases. We objected to  
 13 this pretrial as hearsay.  
 14 THE COURT: Let's see what uses can be made out  
 15 of it. Let's reserve that ruling. Let's see what  
 16 Mr. Quinn wants to do with this.  
 17 MR. QUINN: This is a pleading filed on behalf  
 18 of San Diego. If we could turn to page 154, seven lines  
 19 from the top.  
 20 Q. What is written here in this brief filed by San  
 21 Diego is that Metropolitan and San Diego maintain that  
 22 the exchange agreement and the transfer agreements are  
 23 clear on their faces and they do not pertain to the  
 24 forced use of unused capacity in the water conveyance  
 25 system of an agency and thus do not trigger application

1580

1 of the wheeling statutes. Do you see that?  
 2 **A. I do.**  
 3 Q. And then if you look also at Defense DTX 78,  
 4 this is in evidence, joint motion of Met and San Diego  
 5 for summary adjudication in litigation entitled, "In re  
 6 QSA cases dated April 2, 2009, filed in Sacramento  
 7 County Superior Court."  
 8 You are familiar with that litigation, aren't  
 9 you?  
 10 **A. Yes.**  
 11 Q. If you turn to page 20 at line five, do you see  
 12 if it says -- do you see where it says, "Even if it were  
 13 subject to validation, the MWD-SDCWA exchange agreement  
 14 falls outside the scope of the wheeling law"?  
 15 Do you see that?  
 16 **A. I do.**  
 17 Q. Not only is the exchange agreement not a  
 18 wheeling agreement but the price under the exchange  
 19 agreement was never Met wheeling rate. Isn't that true?  
 20 **A. No, that's absolutely false.**  
 21 Q. Let's take a look at 1149A. This is in  
 22 evidence. The Met Administrative Code Section 4405, sub  
 23 (b), and if you look at 1149 at page six, sub (b), "The  
 24 rates for wheeling service shall include the system  
 25 access rate, the water stewardship rate and for treated

1581

1 water the treatment surcharge as set forth in Section  
 2 4401."  
 3 **A. Yes.**  
 4 Q. "In addition, wheeling parties must pay for  
 5 their own costs for power if such power can be scheduled  
 6 by the district or pay the district for the actual cost,  
 7 not system average, of power service used for delivery  
 8 of the wheeled water."  
 9 Do you see that?  
 10 **A. I do.**  
 11 Q. And as you can see, Met's wheeling rate from  
 12 this you can see is based on the actual cost of power  
 13 and the system power rate?  
 14 **A. Yes. I see that.**  
 15 Q. Metropolitan's wheeling rate is based on the  
 16 actual cost of power and not the system power rate;  
 17 correct?  
 18 **A. Yes, I see that.**  
 19 Q. But as you have previously testified, both the  
 20 initial price under the exchange agreement of \$253 and  
 21 the prices charged since then under the exchange  
 22 agreement were based on the system power rate; correct?  
 23 **A. Yes.**  
 24 Q. So the price under the exchange agreement was  
 25 not Met's wheeling rate as specified in the

1582

1 Administrative Code; correct?  
 2 **A. It's not in the -- it's not related to the**  
 3 **Administrative Code. It's what is the lawful wheeling**  
 4 **rate. So it is a determination of what is lawful to**  
 5 **charge, not per se what their Admin Code may or may not**  
 6 **say.**  
 7 Q. I understand your position on that, ma'am. My  
 8 question is a little bit different. Met's code sets  
 9 forth what its wheeling rate is; correct?  
 10 **A. That is their published rate, correct.**  
 11 Q. That is what they say their wheeling rate is;  
 12 correct?  
 13 **A. Yes.**  
 14 Q. And that's not, at least as it relates to  
 15 power, not the rate that was charged under the exchange  
 16 agreement; correct?  
 17 **A. Correct. Met decided the power rate they**  
 18 **charged.**  
 19 Q. Right. In connection with the water  
 20 stewardship rate, you testified that you communicated  
 21 your belief that it was unlawful to include that water  
 22 stewardship rate in the conveyance charges again to  
 23 Mr. Underwood; correct?  
 24 **A. Mr. Underwood as one. We also conveyed it to**  
 25 **others.**

1583

1 Q. Well, when you were asked about this by  
 2 Mr. Kecker, you identified Mr. Underwood as the one you  
 3 spoke to about that. Do you recall that?  
 4 **A. Yes, I do.**  
 5 Q. And again, the reason you told us, again, why  
 6 you thought it was improper in response to Mr. Kecker's  
 7 questions was, again, it wasn't consistent with the  
 8 wheeling law. Do you recall giving that answer?  
 9 **A. I do.**  
 10 Q. And we have talked about that now, what the  
 11 wheeling law provides and what San Diego's positions are  
 12 on that.  
 13 Let me ask you this question about this  
 14 conversation that you recall with Mr. Underwood relating  
 15 to the water stewardship rate. Was Mr. Cushman present  
 16 during any of your conversations with Mr. Underwood  
 17 about the water stewardship rate?  
 18 **A. No. My recollection is that it was -- Dennis**  
 19 **Underwood and I talked one-on-one and I do not recall an**  
 20 **incident where Mr. Cushman was present. He could have**  
 21 **been but I don't recall a specific incident.**  
 22 Q. Was Mr. Slater present during any of your  
 23 conversations about the water stewardship rate with  
 24 Mr. Underwood?  
 25 **A. I do not recall.**

1584

1 Q. Let me read to you from Mr. -- you are aware  
 2 Mr. Slater was designated by the San Diego Water  
 3 Authority as a person most knowledgeable to testify on  
 4 various subjects including the negotiation of the  
 5 exchange agreement. You know that, don't you?  
 6 **A. I do.**  
 7 Q. Let me read to you from Mr. Slater's deposition  
 8 as San Diego's person most knowledgeable. This is  
 9 Volume II, page 231, line 7 to 15.  
 10 "Q Let me focus now on the  
 11 water stewardship rate. Do you  
 12 recall Maureen Stapleton  
 13 telling Dennis Underwood that  
 14 in her view the inclusion of  
 15 water stewardship rate was  
 16 unlawful?  
 17 "A I don't believe she used  
 18 that phrase. I believe she  
 19 spoke, as we did at the time,  
 20 about a systemwide charge. And  
 21 her focus, I believe, was the  
 22 inclusion of the state project.  
 23 I don't recall her talking  
 24 about the stewardship rate."  
 25 Is that consistent with your recollection?

1585

1 **A. No. No, it isn't. I believe that Mr. Slater's**  
 2 **reference about, "She did not use that phrase" is the**  
 3 **reference to saying it's unlawful. We talked about that**  
 4 **before, that we don't say it's illegal. We say it's not**  
 5 **consistent with law. We say, you know, whatever.**  
 6 **But I did talk to Dennis and, as I said, Dennis**  
 7 **and I had numerous -- dozens of private conversations**  
 8 **because he was my peer on the negotiation team.**  
 9 Q. Would it be true to say that the only  
 10 conversation you had with anyone from Met that you can  
 11 recall about the lawfulness of the water stewardship  
 12 rate was Mr. Underwood who is deceased and nobody from  
 13 either side, including your attorney Mr. Slater, nothing  
 14 about that conversation?  
 15 **A. I also spoke to Ron Gastelum about it, the**  
 16 **RSI -- we are talking about the RSI now, sir?**  
 17 Q. We are talking about this conversation you had  
 18 with Mr. Underwood. I am asking you is there anyone  
 19 else. Is it true to say there is nobody on your side or  
 20 your lawyer who knows about this conversation who you  
 21 spoke to about this other than the deceased individual?  
 22 **A. Mr. Slater, Mr. Campbell, Mr. Taylor, they all**  
 23 **know that Dennis and I had frequent conversations and**  
 24 **they were aware I had expressed my concern about the**  
 25 **inclusion of certain costs in the wheeling rate. We**

1586

1 **were meeting on a regular basis and I mean sometimes**  
2 **daily. Many, many conversations were taking place and**  
3 **we would come back as a team and talk about what folks**  
4 **had said.**

5 Q. In terms of people who were actually present  
6 when you had this conversation, it would be you and  
7 Mr. Underwood; is that true?

8 **A. We did talk as teams about our disagreement**  
9 **with the wheeling rate and we had continued to talk**  
10 **about that right up until the negotiations for Option-2**  
11 **began.**

12 Q. Ma'am, the only persons present when you talked  
13 to Mr. Underwood about --

14 **A. No.**

15 Q. -- the water stewardship rate was you and  
16 Mr. Underwood?

17 **A. Water stewardship? No. I believe that we had**  
18 **conversations as a team as well with the MWD team about**  
19 **what was included in the wheeling rate.**

20 Q. You recall in response to Mr. Kecker's  
21 questions, when he asked you, and this is from the last  
22 session of the trial, page 1524, four to 16:

23 "Q And to whom did you  
24 communicate that concern and  
25 what did you say about it?"

1587

1 Q. And some of those communications concerned the  
2 legality of including the State Water Project costs?

3 **A. Yes.**

4 Q. And those communications also concerned the  
5 legality of including the State Water Project costs in  
6 Met's power charges?

7 **A. I don't recall that specific one.**

8 Q. Well, let me read to you from Mr. Slater's  
9 deposition and see if this jogs your recollection. This  
10 is from Volume II, page 212, line 22, to 213, line  
11 three?

12 "Q How about in the weeks and  
13 months leading up to the  
14 execution of the October 2003  
15 exchange agreement, did you  
16 have the conversations with  
17 people at San Diego about the  
18 legality of including power  
19 charges associated with the  
20 State Water Project in Met's  
21 wheeling rate?"

22 "A Yes."

23 Mr. Slater's testimony, does that jog your  
24 memory at all?

25 **A. I knew that he and Mr. Campbell were having**

1589

1 **A. For me, it was Dennis**  
2 **Underwood who was my**  
3 **counterpart on the negotiating**  
4 **team of Met. And again, I**  
5 **indicated the water stewardship**  
6 **charge was directly related to**  
7 **supply development and it**  
8 **didn't belong on the**  
9 **transportation charge. I**  
10 **didn't believe it was**  
11 **consistent, again, with the**  
12 **wheeling law."**

13 **Do you recall giving that testimony?**

14 **A. Absolutely. That is correct.**

15 Q. And let me change gears now and ask you about  
16 conversations regarding the legality of the rates  
17 leading up to the approval of the 2003 exchange  
18 agreement. In the months leading up to that, would it  
19 be true to say that Mr. Slater had many communications  
20 with the San Diego Water Authority about the legality of  
21 Met's rates?

22 **A. Yes.**

23 Q. Probably had more than 50 such communications  
24 in writing or orally?

25 **A. Yes.**

1588

1 **conversations about the power rate.**

2 Q. And those communications that Mr. Slater had  
3 also concerned the legality of including the water  
4 stewardship rate in what is sometimes referred to as the  
5 wheeling rate; correct?

6 **A. Yes.**

7 Q. Now, isn't it true that Mr. Slater did not see  
8 any violation of pertinent laws in 2003 in the inclusion  
9 of these rates at the time the exchange agreement was  
10 signed?

11 **A. I don't believe that statement is accurate. I**  
12 **believe that Mr. Slater felt our interpretation of the**  
13 **wheeling law was different than Met's.**

14 Q. Let me read from Mr. Slater's deposition,  
15 Volume I, page 72, line 25, to 73, line seven"

16 "Q And I don't want to put  
17 any words in your mouth at all.  
18 I don't want to do that at all  
19 today. So at this point in  
20 time, in 2003, you had not  
21 identified that Met's then  
22 existing rate structure might  
23 be in violation of --  
24 you had not identified any  
25 particular law or reg, law or

1590

1 regulation that Met's then  
 2 existing rate structure might  
 3 be in violation of?  
 4 "A We did -- we knew that  
 5 there were laws that could be  
 6 pertinent but we did not see a  
 7 violation."  
 8 Do you agree, as of the time of the exchange  
 9 agreement, San Diego did not see any violation of law in  
 10 the inclusion of these charges in the transportation  
 11 rate?  
 12 **A. There was a variety of court cases going on**  
 13 **that were inconclusive and, as a result, we thought**  
 14 **there was inconsistency with the law but we could not**  
 15 **say it is absolutely, it's illegal. And I don't know**  
 16 **Scott's reference to violation. But we couldn't be**  
 17 **absolute.**  
 18 Q. Would you agree that you didn't see any  
 19 violation in the inclusion of the power rate, the State  
 20 Water Project costs, the water stewardship rate in the  
 21 transportation rate as of the time the exchange  
 22 agreement was signed?  
 23 **A. I'm not sure I would -- I'm not sure I would**  
 24 **agree with the words that we didn't see a violation. We**  
 25 **did not -- we weren't certain there was a violation of.**

1591

1 Q. You don't have -- I take it you don't have a  
 2 law degree; ma'am?  
 3 **A. No. You can tell.**  
 4 Q. You would rely on Mr. Slater for determination  
 5 of whether there was a violation or not?  
 6 **A. Him and our general counsel, yes.**  
 7 Q. You told Mr. Kecker in response to one of his  
 8 questions that the time the exchange agreement was  
 9 signed up, there was then a dispute between Metropolitan  
 10 and San Diego about whether that initial price that was  
 11 in the agreement of \$253 was a lawful rate; do you  
 12 recall telling Mr. Kecker that?  
 13 **A. Yes.**  
 14 Q. Let me read to you a portion again of  
 15 Mr. Slater's deposition as San Diego's person most  
 16 knowledgeable, Volume I, page 36, line 25 to 37, line  
 17 11"  
 18 "Q The 2003 agreement, there  
 19 was a price provision for  
 20 roughly \$253 in addition. Do  
 21 you recall that?  
 22 "A Yeah.  
 23 "Q To your understanding was  
 24 that a legal rate at the time?  
 25 "A Do I understand that was a legal rate?"

1592

1 "Q To your understanding, was  
 2 that a legal rate?  
 3 "A Yeah. Look, I think the  
 4 rate was properly adopted by  
 5 their Administrative Code and I  
 6 think we agreed to pay it."  
 7 Did you agree with Mr. Slater back at the time  
 8 the exchange agreement was signed?  
 9 **A. I believe that his statement that the rate was**  
 10 **properly adopted by the Admin Code and that we agreed to**  
 11 **pay it for that period of time is correct.**  
 12 Q. How about the "yeah," which begins the answer  
 13 with "Yeah"?  
 14 "Q To your understanding, was  
 15 that a legal rate?"  
 16 The answer is, "Yeah."  
 17 Do you agree with that?  
 18 **A. No. And I don't know what the "yeah" reference**  
 19 **is.**  
 20 Q. Do you have any -- on the one hand -- can you  
 21 help me out on this?  
 22 **A. Sure.**  
 23 Q. On the one hand, Mr. Slater says we didn't see  
 24 a violation and here he says, "Yeah, we understand that  
 25 was a -- was it a legal rate?"

1593

1 "Yeah."  
 2 But you also tell us there was a dispute about  
 3 whether it was legal or not. All those things are true?  
 4 **A. No. I think that this answer by Mr. Slater**  
 5 **says we believed it was administratively adopted**  
 6 **correctly and we agreed to pay for it for a period of**  
 7 **time. It doesn't mean we didn't believe and didn't**  
 8 **express that we felt our interpretation was different**  
 9 **than MWD's. That was the whole basis for the five-year**  
 10 **timeout. If we agreed to pay for it, we wouldn't have**  
 11 **had a five-year timeout.**  
 12 Q. We will get to the five-year provision but we  
 13 looked at the testimony before when Mr. Slater said we  
 14 didn't see a violation. Do you recall that?  
 15 **A. Uh-huh.**  
 16 Q. You understand that referred to the same period  
 17 of time when the exchange agreement is signed up?  
 18 **A. Right.**  
 19 Q. There's been discussion, I think we talked  
 20 about this last time, about Option-1 and Option-2 that  
 21 were presented in connection with the negotiation of the  
 22 exchange agreement and it was actually Mr. Slater's  
 23 idea. Do you recall that?  
 24 **A. Yes.**  
 25 Q. Do you recall that San Diego proposed to pay

1594

1 Met's full wheeling rate as the initial price term under  
 2 Option-2?  
 3 **A. Yes.**  
 4 Q. Which at the time was the \$253 initial price in  
 5 the 2003 exchange agreement?  
 6 **A. Correct.**  
 7 Q. That's what San Diego proposed?  
 8 **A. Yes.**  
 9 Q. So San Diego proposed a price term which  
 10 actually are you telling us you thought was illegal at  
 11 the time?  
 12 **A. I'm saying at that time we thought our**  
 13 **interpretation was different than theirs and the 253**  
 14 **would -- was not the proper wheeling rate.**  
 15 Q. You thought it was illegal; is that what you've  
 16 told us, it was unlawful?  
 17 **A. It was unlawful.**  
 18 Q. So San Diego proposed that price term which you  
 19 thought was unlawful for five years; correct?  
 20 **A. We weren't sure but our interpretation was that**  
 21 **it wasn't lawful.**  
 22 Q. So even though you believe the price term was  
 23 unlawful, you recommended that to the San Diego board;  
 24 is that true?  
 25 **A. Yes.**

1595

1 Q. And the board did approve it before you told  
 2 the board orally in closed session that was an illegal  
 3 price; is that true?  
 4 **A. We told them we thought our interpretation was**  
 5 **different than Met's and that we had the right to**  
 6 **challenge after five years.**  
 7 Q. Did you tell your board -- you recommended this  
 8 \$253 price, which you told us you thought was illegal.  
 9 Did you tell your board that what you had proposed was  
 10 actually an illegal price?  
 11 **A. Again, sir, I don't use the word "illegal."**  
 12 **What I said was our interpretation was different that --**  
 13 **that our interpretation of the law was that that price**  
 14 **was not consistent with the law. So I didn't say this**  
 15 **is illegal, we are agreeing to something illegal. That**  
 16 **wouldn't be something I would say. I'm not a lawyer.**  
 17 Q. Whether or not you said unlawful or illegal or  
 18 not consistent with the law, did you tell your board  
 19 when you submitted this for recommendation that you had  
 20 proposed a price that was either illegal, unlawful or  
 21 not consistent with the law? Yes or no, did you tell  
 22 them that?  
 23 **A. Yes.**  
 24 Q. Is it your understanding -- I am focusing just  
 25 on your understanding now.

1596

1 **A. Yes, sir.**  
 2 Q. That a public agency such as San Diego can  
 3 enter into a contract believing the performance of that  
 4 contract is unlawful?  
 5 MR. KEKER: Objection. Calls for a legal  
 6 conclusion.  
 7 MR. QUINN: Her understanding.  
 8 THE COURT: Overruled. I won't take it as  
 9 that.  
 10 THE WITNESS: Pardon?  
 11 Q. BY MR. QUINN: Is it your understanding that a  
 12 public agency, like the San Diego Water Authority, can  
 13 enter into a contract believing that the performance of  
 14 that contract is illegal?  
 15 **A. I believe that we can enter into a contract**  
 16 **where there is a disagreement of an interpretation of a**  
 17 **law, yes.**  
 18 Q. We looked at various of the pro formas that you  
 19 had your staff work up. You asked or they worked up to  
 20 compare Option-1, Option-2 and what the costs and  
 21 savings would be for an additional volume of water  
 22 versus the different wheeling rates. Do you recall that  
 23 we looked at some of those?  
 24 **A. Yes.**  
 25 Q. We looked at in evidence DTX 829, that email

1597

1 chain between you and Mr. Campbell, and Mr. Campbell to  
 2 Mr. Willer, where he asked that he work up a pro forma  
 3 comparing that analysis over 75 years of what the cost  
 4 would be.  
 5 **A. Yes.**  
 6 Q. We looked at that? You recall that?  
 7 **A. I do.**  
 8 Q. And you also had an analysis done about what  
 9 the relative cost would be under the wheeling charges  
 10 and what the value of the water you would get over 45  
 11 years, as well; do you recall that?  
 12 **A. I do.**  
 13 Q. You also had your staff prepare an analysis as  
 14 to what the cost would be, including the wheeling  
 15 charges over 35 years; correct?  
 16 **A. Yes.**  
 17 Q. That DTX 221, which is in evidence, slide 21,  
 18 in this slide you describe the cost for benefit received  
 19 from canal lining as the present value difference  
 20 between the 1998 exchange agreement cost and the MWD  
 21 wheeling rate cost for 35 years. Do you see that?  
 22 **A. Yes, I do.**  
 23 Q. If we turn to slide 26, you also had a forecast  
 24 and analysis done over 20 years comparison of Option-1  
 25 and Option-2; do you see that?

1598

1 **A. I do.**  
 2 Q. In considering Option-1 and Option-2 and what  
 3 the cost would be under the relative wheeling rates and  
 4 other financial factors, San Diego did a 75-year  
 5 forecast, a 45-year forecast and a 35-year forecast and  
 6 a 20-year forecast but it never did a five-year  
 7 forecast, isn't that true?  
 8 **A. That's correct.**  
 9 Q. Let me ask you, which of these four forecasts  
 10 that you did do were the worst case? You said you  
 11 wanted to see the worst-case scenario. Which one of  
 12 these was the worst case?  
 13 **A. I believe all of the numbers used were assuming**  
 14 **that we were unable to change the MWD wheeling rate. So**  
 15 **they were all worst-case scenarios based on different**  
 16 **terms.**  
 17 Q. You say that -- I mean, you were insistent that  
 18 the price in the exchange agreement should be based on  
 19 lawful rates; correct?  
 20 **A. Yes. Yes.**  
 21 Q. But San Diego based all its analyses, every  
 22 single one of them, all four of these based on  
 23 escalations of what you are telling us you consider to  
 24 be unlawful rates; correct?  
 25 **A. That is correct.**

1599

1 Q. And we won't find anywhere a piece of paper  
 2 where you did an analysis of the first five years and  
 3 then some projection about what would be after that,  
 4 based on some other wheeling rate?  
 5 **A. No. Because you had Option-1, which was the**  
 6 **wheeling rate of the \$90. That is what we thought was a**  
 7 **fair and equitable wheeling rate, approximately, at the**  
 8 **time.**  
 9 Q. My question was a little bit different.  
 10 **A. Sorry.**  
 11 Q. In assessing the Option-2 and doing the various  
 12 forecasts under the Option-2 scenario, we won't find  
 13 anywhere any document where there was a forecast done of  
 14 what the cost would be for the wheeling rate for just  
 15 five years and then some other rate after those five  
 16 years?  
 17 **A. That is correct. Yes.**  
 18 Q. So let's now talk about -- I forget what term  
 19 you referred to it, either the standstill or the  
 20 timeout. Let's talk about that a little bit.  
 21 **A. (Nods head affirmatively.)**  
 22 Q. Mr. Kecker asked you some questions about this,  
 23 about how long San Diego agreed to pay that rate which  
 24 you thought was unlawful.  
 25 **A. Yes.**

1600

1 Q. Do you recall those questions?  
 2 **A. Yes, I do.**  
 3 Q. You said San Diego agreed to pay Met's wheeling  
 4 rate, whatever they said, for five years; do you recall  
 5 that?  
 6 **A. I do.**  
 7 Q. In 2003, you told us several times, that you  
 8 thought the then existing wheeling rate and its  
 9 components were unlawful; right?  
 10 **A. Correct.**  
 11 Q. But you agreed to pay those rates you thought  
 12 were unlawful for at least five years?  
 13 **A. Yes.**  
 14 Q. And when you testified that San Diego agreed to  
 15 pay Met's wheeling rate, whatever they set for five  
 16 years, did you mean that literally?  
 17 **A. Yes.**  
 18 Q. So did you understand there were any  
 19 limitations at all on the price that Met could charge in  
 20 the first five years?  
 21 **A. No. That we expected Met to continue to do the**  
 22 **cost of service analysis and charge what rate they**  
 23 **decided they wanted to charge. And we were willing to**  
 24 **take that risk.**  
 25 Q. You said you were prepared to pay Met's

1601

1 wheeling rate for five years, whatever they set?  
 2 **A. Yes.**  
 3 Q. Quote, unquote, for five years?  
 4 **A. Yes.**  
 5 Q. Was there any limitations at all?  
 6 **A. Not in the agreement.**  
 7 Q. Met could have set the price at \$10,000 per  
 8 acre-foot and San Diego would have paid that for five  
 9 years?  
 10 **A. We would have had to have paid it because we**  
 11 **were precluded from challenging in court.**  
 12 Q. No matter what the amount was?  
 13 **A. There was no -- there's no provision in the new**  
 14 **exchange agreement which had governors on the amount**  
 15 **they could charge.**  
 16 Q. Let's -- Let's take a look at that provision  
 17 and see if that's -- if you actually agree with that  
 18 after looking at the language.  
 19 If you take a look at the exchange agreement,  
 20 DTX 51, PTX 65, starting at page 16, I think you told us  
 21 that in your understanding San Diego could not challenge  
 22 the Met established rate for the first five years; that  
 23 was your testimony?  
 24 **A. Yes.**  
 25 Q. Mr. Kecker showed you the second proviso, kind

1602

1 of a complicated passage there. He showed you the  
 2 second proviso to the standstill agreement which says,  
 3 "Provided further that, A, after the conclusion of the  
 4 first five years, nothing herein shall preclude San  
 5 Diego from contesting in an administrative or judicial  
 6 forum whether such charge or charges have been set in  
 7 accordance with applicable law and regulations."  
 8 Do you see that?  
 9 **A. I do.**  
 10 Q. That's the second proviso. If you would,  
 11 please, back up and look at the main part of section  
 12 5.2, beginning on page 17, on the second line where it  
 13 says, "For the term of this agreement, neither SDCWA nor  
 14 Metropolitan shall seek or support in any legislative,  
 15 administrative or judicial forum any change in the form,  
 16 substance or interpretation of any applicable law or  
 17 regulation (including the Administrative Code) in effect  
 18 on the date of this agreement and pertaining to the  
 19 charge or charges set by Metropolitan's board of  
 20 directors and generally applicable to the conveyance of  
 21 water."  
 22 Do you see that?  
 23 **A. I do.**  
 24 Q. You understood from reading this provision that  
 25 San Diego was only restricted from seeking a change in

1603

1 the form, substance and interpretation of the then  
 2 existing law; correct?  
 3 **A. Laws or regulation. Yeah.**  
 4 Q. That was in effect on the date of this  
 5 agreement; correct?  
 6 **A. Yes.**  
 7 Q. And you understood that the change in form,  
 8 substance or interpretation of existing law, that  
 9 referred to -- that that refers to what was in effect in  
 10 2003?  
 11 **A. Yes.**  
 12 Q. But San Diego's understanding in 2003, that  
 13 Met's rates were illegal in 2003 --  
 14 Are you with me so far?  
 15 **A. I am.**  
 16 Q. -- was based on the then existing law in 2003,  
 17 necessarily; correct?  
 18 **A. Yes.**  
 19 Q. So you understood that San Diego did not have  
 20 to seek a change in the law in effect in 2003 to  
 21 challenge that Met's rates were unlawful in the first  
 22 five years? Correct?  
 23 **A. Could you repeat that question?**  
 24 Q. You understood that San Diego did not have to  
 25 seek a change in the law in effect in 2003, which is

1604

1 what you were prohibited from doing, to challenge Met's  
 2 rates as unlawful; correct?  
 3 MR. KEKER: Objection. Misstates what the --  
 4 what the contract states.  
 5 THE COURT: I will sustain on vagueness  
 6 grounds, "did not have to."  
 7 Q. BY MR. QUINN: San Diego could challenge Met's  
 8 rates -- it was San Diego's view that the rates were  
 9 unlawful under the then existing law of 2003?  
 10 MR. KEKER: Asked and answered.  
 11 THE COURT: Overruled.  
 12 Legitimate cross.  
 13 Q. BY MR. QUINN: Correct?  
 14 **A. Correct.**  
 15 Q. And you're only prohibited from seeking to  
 16 change the form, substance or interpretation of the then  
 17 existing law; that's what the proviso governs; correct?  
 18 **A. Correct.**  
 19 Q. So it would be true to say if you thought the  
 20 rates were illegal under the then existing law, it would  
 21 not be a violation of that proviso to challenge the  
 22 rates as being unlawful because you wouldn't have to be  
 23 seeking a change in the form, substance or  
 24 interpretation of the law?  
 25 MR. KEKER: Objection. Calls for a legal

1605

1 conclusion.  
 2 THE COURT: This will go to her understanding  
 3 of the agreement. I won't take it as a legal  
 4 conclusion.  
 5 THE WITNESS: No. No, that's not correct  
 6 because it's the interpretation of the law and, as you  
 7 said, that it says right there, interpretation of any  
 8 applicable law. We believed that we could not challenge  
 9 the rates for five years, period. That was the intent  
 10 of this language.  
 11 Q. BY MR. QUINN: Okay. But it doesn't say that,  
 12 does it?  
 13 **A. No. It says we won't -- neither San Diego nor  
 14 Met shall seek or support any blah, blah, blah,  
 15 including judicial forum, any change in the form,  
 16 substance or interpretation of the law.**  
 17 Q. I will try this once more and then I'll move  
 18 on.  
 19 If you thought it was illegal under the  
 20 existing law, which you told me you about --  
 21 **A. Yes.**  
 22 Q. -- then you wouldn't have to seek a change in  
 23 order to challenge it as being unlawful, isn't that  
 24 right?  
 25 MR. KEKER: Objection. Argumentative.

1606

1 THE COURT: Sustained.  
 2 Let me ask one question. I don't know if this  
 3 is part of what's -- I don't know if this is helpful or  
 4 not, so I'm only going to ask one question.  
 5 THE WITNESS: Okay.  
 6 THE COURT: At this point, which is if you look  
 7 at this phrase on the second line of page 17, "for the  
 8 term of this agreement" --  
 9 THE WITNESS: Yes.  
 10 THE COURT: -- what time period does that  
 11 cover, in your personal view?  
 12 THE WITNESS: Right. For the term of the  
 13 agreement, we were not -- we are not able to do --  
 14 THE COURT: I don't -- I'm not asking what --  
 15 THE WITNESS: Sorry.  
 16 THE COURT: Let me start again.  
 17 THE WITNESS: Sorry, sir.  
 18 THE COURT: I am not asking for what you have  
 19 to do or not have to do during that time period.  
 20 I am just asking what time period is that.  
 21 THE WITNESS: It's the term of the agreement.  
 22 THE COURT: Not just the five years?  
 23 THE WITNESS: Correct.  
 24 MR. QUINN: May I proceed, your Honor?  
 25 THE COURT: Please.

1607

1 Q. BY MR. QUINN: The first proviso in Section 5.2  
 2 on page 17 says, "Provided, however, that Metropolitan  
 3 may at any time amend the Administrative Code in  
 4 accordance with Paragraph 13.12 and the Administrative  
 5 Code as thereby amended shall be included within the  
 6 foregoing restriction."  
 7 Do you see that?  
 8 **A. Yes.**  
 9 Q. And you know Met changes its conveyance charges  
 10 by amending its Administrative Code; correct?  
 11 **A. Correct.**  
 12 Q. And this provision would allow Met to do that;  
 13 correct?  
 14 **A. Yes.**  
 15 Q. Then we have the third proviso, the one that  
 16 Mr. Keker called your attention to. You understood this  
 17 third proviso said that after five years San Diego  
 18 could -- you understood, you told us that this third  
 19 proviso said after five years San Diego could contest  
 20 whether the charges set forth in the first proviso, the  
 21 amendments to the Administrative Code were set in  
 22 accordance with applicable law; correct?  
 23 MR. KEKER: Objection. Misstates the statement  
 24 and is argumentative.  
 25 MR. QUINN: I am asking if that's her

1608

1 understanding, your Honor.  
 2 THE COURT: Overruled.  
 3 THE WITNESS: Could you --  
 4 THE COURT: Do you want the question?  
 5 THE WITNESS: Could you repeat the question?  
 6 Q. BY MR. QUINN: Sure. This third proviso, you  
 7 understood this third proviso said that after five years  
 8 San Diego could contest whether the charges set under  
 9 the first proviso, the amendments to the Administrative  
 10 Code were set in accordance with applicable law. That  
 11 was your understanding?  
 12 **A. No. My understanding, it was that we could --**  
 13 **we could challenge or contest the charges that have been**  
 14 **set in accordance with the applicable law. It did not**  
 15 **refer to the first proviso. So I am not sure how to**  
 16 **interpret your question.**  
 17 Q. Let's take a look at DTX 355 in evidence.  
 18 This is the April 18, 2007, memo to the  
 19 imported water committee. This is a memo that --  
 20 **A. What number is that again?**  
 21 Q. 355. This is a memorandum, we looked at this  
 22 before, and you said you approved and sent to San  
 23 Diego's imported water committee.  
 24 **A. Yes.**  
 25 Q. And the last sentence of the memorandum on page

1609

1 two reads, "The Water Authority does not intend to  
 2 litigate Met's current rate structure but it cannot know  
 3 what future actions the Met board may take since the Met  
 4 rates are established annually and are subject to change  
 5 by Met's board of directors."  
 6 Do you see that?  
 7 **A. I do.**  
 8 Q. This statement here that you approved reflects  
 9 the understanding that San Diego was not going to  
 10 litigate Met's existing rate structure but reserve the  
 11 right to litigate changes in the rates as set forth in  
 12 the Administrative Code; correct?  
 13 **A. No. What it says is at that time we don't**  
 14 **intend to litigate; in April of '07, we did not have the**  
 15 **intent to litigate. But we certainly stated that any**  
 16 **further action by Met we may, you know, reconsider.**  
 17 Q. You would agree this statement would be  
 18 consistent with an interpretation of that third proviso,  
 19 that what you were reserving was the right to challenge  
 20 amendments, future changes in the transportation rates?  
 21 **A. No. Our reservation of rights was always to**  
 22 **challenge the rate itself.**  
 23 Q. In response to a question by Mr. Keker, you  
 24 testified that there was nothing in the exchange  
 25 agreement that limited San Diego's ability to complain

1610



1 about any aspects of the price during the first five  
 2 years. You could complain and I think your testimony is  
 3 you complained a fair amount about the price; correct?  
 4 **A. Correct.**  
 5 Q. You said that was something that San Diego had  
 6 negotiated for, your words, very hard; correct?  
 7 **A. Correct.**  
 8 Q. Now this five-year period, under the exchange  
 9 agreement, that ended on December 31, 2007; correct?  
 10 **A. Yes.**  
 11 Q. So whatever you understood that five-year  
 12 restriction to be, it ended as of December 31, 2007?  
 13 **A. Yes.**  
 14 Q. And in response to questions by Mr. Kecker, you  
 15 referred to a five-year period in Section 11.1 of the  
 16 exchange agreement, also; do you recall this DTX 51,  
 17 page 24?  
 18 **A. Yes. Yes.**  
 19 Q. And that five-year period also ended on  
 20 December 31, 2007?  
 21 **A. Yes.**  
 22 Q. So let's -- let's look at what happened after  
 23 December 31, 2007. Let's look at the year 2008.  
 24 In 2008 you said that at that time you believed  
 25 that including the State Water Project costs and the

1 611

1 water stewardship rate and the conveyance charges was  
 2 illegal; right?  
 3 **A. Yes.**  
 4 Q. Had you -- actually, matters settled down, so  
 5 you actually formed a conclusion as of 2008, by golly,  
 6 it really is illegal?  
 7 **A. Yes. That it is not consistent with the law.**  
 8 Q. You believe that San Diego was being  
 9 overcharged by Met by tens of millions of dollars  
 10 annually; correct?  
 11 **A. Correct.**  
 12 Q. And you had negotiated very hard for this  
 13 provision that would enable you to challenge rates?  
 14 **A. Yes.**  
 15 Q. After five years; right?  
 16 **A. Yes.**  
 17 Q. And you believed San Diego was free to object  
 18 to the price being charged as of January 1, 2008?  
 19 **A. Yes.**  
 20 Q. And you believe that San Diego was free to file  
 21 a lawsuit to challenge Met's rates as of January 1,  
 22 2008; correct?  
 23 **A. Yes.**  
 24 Q. By the end of 2008, by the end of 2008,  
 25 focusing on that year, San Diego had not yet complained

1 612

1 in writing about the lawfulness of the rates -- at  
 2 least --  
 3 They hadn't complained in writing yet about the  
 4 unlawfulness of the rates, isn't that true?  
 5 **A. No -- that is correct.**  
 6 Q. In fact, you hadn't done it once? Since the  
 7 unbundling of the rate to the end of 2008, there is no  
 8 writing San Diego is complaining about the unlawfulness  
 9 of the rates; correct?  
 10 **A. There is nothing in writing.**  
 11 Q. In 2008 San Diego did not claim in writing that  
 12 Met was charging a price that was in breach of contract?  
 13 **A. That is correct. There was nothing in writing.**  
 14 Q. And nothing in writing in 2008 reflecting an  
 15 objection to the price being charged?  
 16 **A. That is correct.**  
 17 Q. You had not complained about the lawfulness of  
 18 the rates orally for at least three years because you  
 19 only complained to Mr. Underwood, and he passed away in  
 20 2005; correct?  
 21 **A. That is not correct.**  
 22 Q. Do you recall in response to a question from  
 23 Mr. Kecker asking you about who you complained to about  
 24 this, and you identified Mr. Underwood? Do you recall  
 25 that testimony?

1 613

1 **A. I do.**  
 2 Q. So far as you know, Mr. Cushman never  
 3 complained orally about the legality of the rates, isn't  
 4 that true?  
 5 **A. That is not true.**  
 6 Q. Let me read to you from Mr. Cushman's trial  
 7 testimony Volume VI of the trial testimony -- Volume  
 8 VII. Volume VII, page 1041, 14 to 22:  
 9 "Q Do you recall it ever  
 10 being communicated orally prior  
 11 to filing of the lawsuit where  
 12 San Diego says these rates are  
 13 illegal after unbundling and  
 14 before the filing of this  
 15 lawsuit?  
 16 "A That's just not the way we  
 17 communicated our concerns.  
 18 That is less businesslike than  
 19 the Water Authority  
 20 communicates its concerns. I  
 21 think we said they were  
 22 improper, orally. I was not a  
 23 lead negotiator. I am not in a  
 24 position to say that was  
 25 communicated by our

1 614

1 negotiators."  
 2 MR. KEKER: "What was communicated," not  
 3 "that."  
 4 Q. BY MR. QUINN: (Reading:)  
 5 "I am not in a position to say  
 6 what was communicated by our  
 7 negotiators."  
 8 Are you saying that you do recall now that  
 9 Mr. Cushman said that the rate -- said orally the rates  
 10 were illegal or unlawful?  
 11 **A. If you are asking if those exact words were**  
 12 **used, as I have testified earlier, we do not say those**  
 13 **words "illegal, unlawful."**  
 14 **We expressed our concerns.**  
 15 **We were trying to work it out with Met. If you**  
 16 **walk in and say they're illegal and that's all we're**  
 17 **going to say, that is not productive in these processes**  
 18 **we have been involved in.**  
 19 **So I believe his answer is correct, we never**  
 20 **said, hey, they are illegal.**  
 21 Q. And you have been -- I think you told us you  
 22 had been having these discussions for several years,  
 23 complaining about the rates; is that right?  
 24 **A. That is true.**  
 25 Q. So focusing then back on 2008, in 2008, isn't

1615

1 it true that San Diego never asked Met to deposit any  
 2 disputed amount under that Section 12.4(c) of the  
 3 exchange agreement?  
 4 **A. That is correct.**  
 5 Q. Obviously, we know a lawsuit was filed in 2008;  
 6 right?  
 7 **A. That is correct.**  
 8 Q. In fact, San Diego, at least as of that time,  
 9 had no expectation of litigation in 2008?  
 10 **A. We did not intend to sue at that point.**  
 11 Q. This is in evidence, DTX 1114, the Water  
 12 Authority's MWD Work Plan.  
 13 If you look at page 11, do you see where it  
 14 says, "No expectation of litigation"?  
 15 **A. That's right.**  
 16 Q. Page 12, "Peace treaty expired - no  
 17 litigation"?  
 18 **A. Correct.**  
 19 Q. Let me ask you about the votes that San Diego's  
 20 representatives on the board were making about these  
 21 rates.  
 22 You testified San Diego's board directed its  
 23 members on the Met board to vote in favor of the rate  
 24 structure, not just the rates; isn't that true?  
 25 **A. I'm sorry?**

1616

1 Q. When -- in 2008, when San Diego's  
 2 representatives voted in favor of the rates --  
 3 **A. Correct.**  
 4 Q. -- were they voting only on the rates or were  
 5 they voting on the entire rate structure in voting their  
 6 approval of the rate structure?  
 7 **A. They were voting on the rate increases, just**  
 8 **the rate increases.**  
 9 Q. How about in 2002, they voted to support the  
 10 rate structure in 2002, not just the --  
 11 **A. I believe they voted "no" on the rate structure**  
 12 **in -- in 2002. I believe they voted "no."**  
 13 Q. Let's take your trial testimony, page 1451,  
 14 line five to 1452, line eight -- at lines 28 to three.  
 15 This is talking about 2002.  
 16 "Q In fact, San Diego  
 17 delegates, if we go back and  
 18 look at Defense Exhibit 129,  
 19 San Diego's members on the  
 20 board did in fact vote in favor  
 21 of those unbundled rates?  
 22 "A They voted in favor of the  
 23 rate structure."  
 24 Do you see that?  
 25 **A. Where is it?**

1617

1 Q. Line 23 and it carries over.  
 2 **A. Thank you. Yes.**  
 3 Q. Do you recall back in 2002 when it was  
 4 unbundled, San Diego's delegates actually voted in favor  
 5 of the rate structure?  
 6 **A. I thought they voted "no" for the -- when they**  
 7 **unbundled the rates and then voted in favor of the new**  
 8 **unbundled rates.**  
 9 **So, I apologize.**  
 10 Q. Not a problem.  
 11 But we can agree in 2002 they voted in favor of  
 12 the rate structure?  
 13 MR. KEKER: Objection. It's the opposite of  
 14 what you said.  
 15 THE WITNESS: Right. Yeah, I thought --  
 16 THE COURT: Do you know what they voted in 2002  
 17 on?  
 18 THE WITNESS: I thought when they unbundled the  
 19 rates that our delegates initially voted "no" on the  
 20 rate structure. And then subsequently they did vote  
 21 affirmative for the, I believe it was, the 2003 rates.  
 22 THE COURT: Okay.  
 23 Q. BY MR. QUINN: So at least when they  
 24 actually -- the rates that were adopted in 2002, they  
 25 voted in favor of that structure that was implemented in

1618

1 2003; correct?  
 2 THE COURT: That's not how I heard her answer.  
 3 Q. BY MR. QUINN: Correct me if I'm wrong. You  
 4 are telling me they voted against the initial  
 5 unbundling?  
 6 **A. I believe they voted against the new unbundled**  
 7 **rate structure, and then I believe they voted "yes" on**  
 8 **the rates themselves.**  
 9 Q. So when you were saying here they voted in  
 10 favor of the rate structure --  
 11 **A. It should have been they voted in favor of the**  
 12 **rates. That's my error.**  
 13 Q. Well, the San Diego delegates on more than one  
 14 occasion actually did vote in favor not just of the  
 15 rates but the rate structure?  
 16 **A. It was --**  
 17 Q. Isn't that true?  
 18 **A. They voted in favor of the annual rate**  
 19 **increases that were -- that occurred over a period of**  
 20 **time. And I believe they voted affirmative in a number**  
 21 **of those years where a rate increase was proposed.**  
 22 Q. My question is a little bit different.  
 23 Several times the San Diego representatives  
 24 voted not just in favor of the rates but in favor of the  
 25 rate structure itself, isn't that true?

1619

1 **A. I would have to go back and look. But I**  
 2 **believe most, if not all, were related to the rates.**  
 3 Q. Let's take a look at Defense Exhibit 41, which  
 4 is a Met board action letter concerning the March 12,  
 5 2002, board meeting, including the resolution. And if  
 6 we could turn to Attachment 3 of DTX 41. And you will  
 7 see a resolution of the board of directors of the  
 8 Metropolitan Water District of Southern California  
 9 fixing and adopting rates and charges for fiscal year  
 10 2002/03. Do you see that?  
 11 **A. Yes.**  
 12 Q. And you understand that this is the resolution  
 13 the Met board passed in March of 2002; correct?  
 14 **A. Yes.**  
 15 Q. And if you turn to page three of the  
 16 resolution, it is Attachment 3, page three. Do you see  
 17 where it says, "Now, therefore, the board of directors  
 18 of the Metropolitan Water District of Southern  
 19 California does hereby resolve and determine and order  
 20 as follows." Do you see that?  
 21 **A. Yes.**  
 22 Q. And then section one below that, it says, "The  
 23 board fixes and adopts the rates and charges contained  
 24 in the chief executive officer's recommendation."  
 25 Do you see that?

1620

1 **A. Yes, I do.**  
 2 Q. On the next page, section two, it says, and I  
 3 quote, "The Board finds and determines that the rates  
 4 and charges contained in the chief executive officer's  
 5 recommendations are supported by the cost of service  
 6 process and that such rates and charges reasonably and  
 7 fairly allocate the costs of providing service of  
 8 Metropolitan's water system to its member agencies and  
 9 third-party transporters of water, if any."  
 10 Do you see that?  
 11 **A. Yes, I do.**  
 12 Q. Remind us what the cost of service process is.  
 13 **A. It is how MWD allocates their various costs to**  
 14 **categories.**  
 15 Q. And then in section three it says, and I  
 16 quote, "The board finds and determines that the cost of  
 17 service process reasonably and fairly, (i), allocates  
 18 costs to the service functions that Metropolitan  
 19 provides to its member agencies; (ii) classifies service  
 20 function costs based upon use of Metropolitan's system  
 21 and (iii) allocates costs to rates and charges based on  
 22 customary water industry standards. Accordingly, the  
 23 board finds that the cost of service process supports  
 24 the chief executive officer's rates and charges  
 25 recommendation by creating a logical nexus between the

1621

1 revenues required and the rates and charges necessary to  
 2 defray the costs of providing service of Metropolitan's  
 3 water system."  
 4 Do you see that?  
 5 **A. I do.**  
 6 Q. Whoever votes in favor of this is actually  
 7 approving those cost allocations?  
 8 **A. Yes, if they approve this resolution, they are**  
 9 **approving all of these provisions.**  
 10 Q. At the direction of the San Diego board, San  
 11 Diego's delegates to the Met board voted to approve this  
 12 very resolution that we are looking at?  
 13 **A. Our board did not approve the very resolution.**  
 14 **As I recall, that resolution was not before our board**  
 15 **for consideration. It would be before our MWD delegates**  
 16 **for consideration.**  
 17 Q. At the direction of the San Diego board, San  
 18 Diego's delegates to the Met board voted to approve this  
 19 resolution; correct?  
 20 **A. They voted to support -- I believe the language**  
 21 **was voted to support the rates.**  
 22 Q. Rate structure; correct?  
 23 **A. I would have to look at the board memo to see**  
 24 **what the language was.**  
 25 Q. They voted to approve all this information?

1622

1       **A. The delegates voted.**  
 2       Q. Including the San Diego delegates?  
 3       **A. Yes. Including San Diego delegates.**  
 4       Q. If I could read to you from your trial  
 5 testimony, 1451, five to 12:  
 6       "Q After a discussion at San  
 7 Diego about the unbundled rate  
 8 structure and the components of  
 9 it, the San Diego board, after  
 10 looking at this, directed the  
 11 San Diego delegates to the Met  
 12 board to vote for the rates  
 13 that went into effect  
 14 January 1, 2003; is that  
 15 correct?  
 16       "A Yes. To support the rate  
 17 structure; correct.  
 18       "Q And to vote, you understand that?  
 19       "A Yes, to vote affirmative?"  
 20       **A. Right.**  
 21       Q. Is that correct?  
 22       **A. Your question was did we vote for the rates**  
 23 **that went into effect. The answer is yes.**  
 24       **And I said to support the rate structure. I**  
 25 **meant, again, the rates.**

1623

1       Q. San Diego actually recommended, not directed  
 2 but recommended, its delegates to vote to approve Met's  
 3 rates and rate structure and the cost of service  
 4 analysis in later years, as well, isn't that true?  
 5       THE COURT: Whenever you get to a good stopping  
 6 point, Mr. Quinn.  
 7       Let's have this answer. Do you recall that?  
 8       THE WITNESS: I don't recall.  
 9       MR. QUINN: This is good, your Honor.  
 10       THE COURT: Okay. I'll see everybody at 1:30.  
 11 Thank you.  
 12       (Noon recess was taken.)

1625

1       Q. Based on what we just looked at, we know that  
 2 the San Diego delegates were directed and did vote to  
 3 approve findings and determinations that the rates and  
 4 charges were supported by the cost of service process;  
 5 correct?  
 6       **A. Correct.**  
 7       Q. They reasonably and fairly allocate the Met's  
 8 services to member agencies?  
 9       **A. Yes.**  
 10       Q. Including the conveyance charges?  
 11       **A. Yes.**  
 12       Q. To allocate the cost to rates and charges based  
 13 on customary water industry standards?  
 14       **A. Yes.**  
 15       Q. And they create a logical nexus between the  
 16 revenues required and the rates and charges necessary to  
 17 defray Met's costs?  
 18       **A. Yes. All of that is in the resolution.**  
 19       Q. You told us before, in this instance, the San  
 20 Diego board directed its delegates how to vote. That is  
 21 not usually how you do things, I think you told us?  
 22       **A. Correct.**  
 23       Q. That vote in 2002 was the only time you had  
 24 seen San Diego instruct its delegates how to vote?  
 25       **A. Correct.**

1624

1       San Francisco, California  
 2       Monday, April 27, 2015  
 3       1:35 p.m.

4         
 5       MAUREEN STAPLETON,  
 6 resumed the stand and testified further as follows:  
 7  
 8       THE COURT: Good afternoon. I suggest we  
 9 conclude with this witness and then we can have a chat  
 10 about the evidentiary issues we talked about this  
 11 morning.  
 12  
 13       CROSS-EXAMINATION (resumed)  
 14 BY MR. QUINN:  
 15       Q. Good afternoon, Ms. Stapleton.  
 16       **A. Good afternoon.**  
 17       Q. In terms of the language that you would use to  
 18 describe your objections or characterization of the  
 19 rates, we talked about that a little bit this morning.  
 20       Did you tell Mr. Underwood that you thought the  
 21 rates were unlawful?  
 22       **A. I think what I said was, you know, we have a**  
 23 **difference of opinion regarding the interpretation of**  
 24 **the law. We don't believe that some of the costs you**  
 25 **put in the transportation -- the transportation category**

1626

1 **are appropriate or consistent with our interpretation of**  
 2 **where they should be located.**  
 3 Q. My question is, did you tell Mr. Underwood that  
 4 you thought the rates were unlawful, using that phrase?  
 5 **A. "Not according to the law" would be the phrase**  
 6 **I would use.**  
 7 Q. So you did tell him you thought they were not  
 8 according to the law?  
 9 **A. Yes. Yeah, that's what I -- according to our**  
 10 **interpretation.**  
 11 Q. Before we broke we were talking about the vote  
 12 in 2002. And you had told us that this was the only  
 13 time you can recall when the San Diego board had  
 14 actually instructed its delegates on how to vote.  
 15 **A. Yes.**  
 16 Q. It is true, isn't it, in the years following  
 17 2002, San Diego recommended that its delegates vote to  
 18 approve Met's rates, including the cost of service  
 19 reports and the rate structure? Isn't that true?  
 20 **A. No. That there have been recommendations**  
 21 **regarding the percentage of increase of the rates. That**  
 22 **has been discussed. But the board has not -- my board,**  
 23 **not the Met board, but my board has not discussed cost**  
 24 **of service reports or anything like that.**  
 25 Q. Well, we looked at a resolution --

1627

1 **A. Uh-huh.**  
 2 Q. -- that was adopted back in 2002 that San  
 3 Diego's delegates voted in favor of. Isn't it true that  
 4 San Diego's delegates voted in favor of similar  
 5 resolutions with similar language in the years after  
 6 2000?  
 7 **A. I do not know that for a fact, but I presume**  
 8 **all of that boilerplate went into the rate resolutions**  
 9 **on a regular basis.**  
 10 Q. By "boilerplate," you are referring to the  
 11 determination that the rates and charges are supported  
 12 by the cost of service process?  
 13 **A. Yes.**  
 14 Q. And that they are reasonable -- they are  
 15 reasonably fair and allocate the cost of Met services to  
 16 member agencies? That is another item of that  
 17 boilerplate the delegates supported?  
 18 **A. Yes.**  
 19 Q. And that they allocate costs to rates and  
 20 charges based on customary water industry standards,  
 21 that is another piece of the boilerplate you are  
 22 referring to?  
 23 **A. Yes. That be would part of the boilerplate.**  
 24 Q. Another piece of the boilerplate would be that  
 25 the proposed rates and charges would create a logical

1628

1 nexus between the revenues required and the rates and  
 2 charges necessary to defray Met's costs?  
 3 **A. Yes.**  
 4 Q. And it is that type of boilerplate, you are  
 5 telling us, in the years after 2002 the San Diego  
 6 delegates voted in favor of?  
 7 **A. No. I do not know that for a fact. I said**  
 8 **that I would assume that boilerplate is added to any of**  
 9 **the rate resolutions that Met generated. I do not know**  
 10 **if the delegates actually read that material or that if**  
 11 **they were sitting here today that they would say, yes, I**  
 12 **read that in support of that.**  
 13 Q. My question isn't whether they read it.  
 14 Are you in a position to say whether or not San  
 15 Diego delegates voted for similar resolutions in the  
 16 years after 2002?  
 17 **A. I have not seen any other resolutions than the**  
 18 **one you showed me.**  
 19 Q. So you are saying you don't know one way or the  
 20 other?  
 21 **A. I do not know.**  
 22 Q. You would certainly expect that what you refer  
 23 to as the boilerplate, that would be the kind of  
 24 language that would be included in any such resolution;  
 25 correct?

1629

1 **A. Correct.**  
 2 Q. You do know that San Diego delegates did vote  
 3 in favor of such resolutions in the years after 2002?  
 4 **A. Yes.**  
 5 Q. If we take a look at DTX 129, San Diego -- it's  
 6 in evidence -- San Diego delegates' vote record  
 7 At-a-Glance.  
 8 If you look at page ten, please, the middle  
 9 entry for March of 2008, the second column says,  
 10 "Adopted calendar year 2009 rates and charges with COS."  
 11 Do you see that?  
 12 **A. Yes.**  
 13 Q. That is cost of service; right?  
 14 **A. Correct.**  
 15 Q. The third column says, "Per delegates' notes,  
 16 delegates to vote 'yes' on staff's recommendation."  
 17 Do you see that?  
 18 **A. Yes.**  
 19 Q. That's the recommendation of the San Diego  
 20 staff?  
 21 **A. Yes.**  
 22 Q. It says, "Actual MWD board vote by delegates  
 23 Bond and Parker voted "yes" to the motion, Barrett and  
 24 Pocklington were absent"; correct?  
 25 **A. Correct.**

1630

1 Q. So the San Diego staff recommended that the  
 2 delegates vote "yes" in 2008 to adopt the rates to be  
 3 effective in 2009; correct?  
 4 **A. Correct.**  
 5 Q. At that time, were the San Diego delegates to  
 6 Met's board informed of San Diego's belief that the  
 7 rates at issue were unlawful?  
 8 **A. Again, I don't think we had absolute confidence**  
 9 **that our interpretation of the law was correct.**  
 10 Q. I thought you told me before lunch, and maybe I  
 11 got it wrong, I thought you told me you absolutely had  
 12 gotten clarification on that issue, that there was a  
 13 violation?  
 14 **A. We believed that -- our interpretation was we**  
 15 **believed they were unlawful. Our interpretation.**  
 16 Q. So my question is, before these delegates voted  
 17 "yes" in 2008, were the delegates to Met's board  
 18 informed that the rates at issue that they were being  
 19 voted on were thought by San Diego to be unlawful?  
 20 **A. Yes. They knew what we thought.**  
 21 Q. Who told them that before they voted that these  
 22 rates were unlawful?  
 23 **A. It would be staff would indicate our**  
 24 **disagreement with Met's rate allocation or cost**  
 25 **allocation.**

1631

1 Q. I am focusing really on the "unlawful." You  
 2 told me they were told it was unlawful in 2008?  
 3 **A. Did I use that -- sorry.**  
 4 Q. I understood your testimony to be that before  
 5 these delegates voted in 2008, they were informed of San  
 6 Diego's view that these rates were unlawful; is that  
 7 true?  
 8 **A. Yes.**  
 9 Q. And who told them that?  
 10 **A. Staff, I believe. I probably mentioned it to**  
 11 **them in our various meetings.**  
 12 Q. Can you identify anyone else who told them the  
 13 rates they were about to vote on were unlawful besides  
 14 yourself?  
 15 **A. In this circumstance, sir?**  
 16 Q. Yes. In that vote, before they voted on that,  
 17 I am asking who told them that these rates they were  
 18 going to vote on were illegal.  
 19 **A. I would say that I cannot remember specifically**  
 20 **on this vote. But our general counsel, Mr. Cushman,**  
 21 **would have been one who would say something like that to**  
 22 **the delegates.**  
 23 Q. You just don't recall?  
 24 **A. I do not recall specifically.**  
 25 Q. At any time before March of 2008, when they

1632

1 voted, were the San Diego delegates to the Met board  
 2 ever advised to communicate to the full Met board that  
 3 any of the rates at issue might be unlawful or illegal?  
 4 **A. The -- yes. The delegates had conversations**  
 5 **about our concerns regarding the cost allocations with**  
 6 **various board members and with staff.**  
 7 Q. Were they ever told that they should, you know,  
 8 in the plenary session when they are voting before the  
 9 whole Met board, were they ever told that they should  
 10 tell the board that these rates which were being -- they  
 11 were voting on were illegal?  
 12 **A. No. They were not told -- they were not**  
 13 **directed or told to do that.**  
 14 Q. But in any case, we know they voted for the  
 15 cost of service, rate structure, and the rates in 2008,  
 16 as they had in prior years; correct?  
 17 **A. Correct.**  
 18 Q. Now, did San Diego believe that Met breached  
 19 the exchange agreement by adopting those rates in 2009?  
 20 **A. I don't know if our legal counsel would say**  
 21 **that or not. I am not sure.**  
 22 Q. Let me read to you from the deposition of  
 23 Mr. Cushman, who, as I think you know, is the person  
 24 most knowledgeable designated by San Diego on various  
 25 issues. You are aware of that?

1633

1 **A. Yes.**  
 2 Q. This is from Mr. Cushman's deposition, Volume  
 3 III, page 339, line one to 340, line nine.  
 4 MR. KEKER: May I have a moment, your Honor?  
 5 THE WITNESS: Am I supposed to have this on?  
 6 THE COURT: Yes. You are able to follow along.  
 7 THE WITNESS: It is just a black screen.  
 8 THE CLERK: Before you do that, I'm not sure if  
 9 they set each one of them up individually. Was that one  
 10 set up, as well?  
 11 THE COURT: Let's go off the record.  
 12 MR. QUINN: Stop the clock.  
 13 THE COURT: Stop the clock. Thank you for  
 14 reminding me.  
 15 (Discussion held off the record.)  
 16 THE COURT: Back on the record.  
 17 MR. QUINN: Thank you.  
 18 "Q So let me ask you, getting back  
 19 to the subject matter that you are  
 20 testifying about today, the breach --  
 21 this is another one of your broad questions  
 22 but I'll drill down on it some more --  
 23 how did MWD breach the 2003 exchange  
 24 agreement, to your understanding?  
 25 "A MWD first breached the

1634

1 2003 exchange agreement when it  
 2 adopted in the spring of 2008  
 3 water rates for 2009, when they  
 4 implemented those rates and  
 5 started collecting those rates  
 6 in 2009, when they adopted  
 7 rates in 2010, in the spring of  
 8 2010, and began collecting  
 9 those rates in -- excuse me --  
 10 in the spring of 2009 when they  
 11 adopted rates for 2010, again  
 12 when they began collecting  
 13 those rates, revenues beginning  
 14 in 2010, and each of the  
 15 rate-setting cycles in 2010 and  
 16 again in 2012 when they adopted  
 17 rates for their successive two  
 18 years. So in the case of 2010,  
 19 they adopted rates for both  
 20 calendar years '11 and '12. So  
 21 when they adopted those rates  
 22 and began collecting those  
 23 rates, beginning in 2011, in  
 24 the case of 2011 rates, and in  
 25 2012 in relation to the 2012

1635

1 rates, and then again when they  
 2 adopted rates in the spring of  
 3 2012 for calendar year '13,  
 4 they breached it then and they  
 5 breached it when they began  
 6 collecting revenues earlier  
 7 this year in 2013 under the  
 8 rates they adopted.  
 9 "Q So let's talk about how MW  
 10 breached the exchange agreement  
 11 when it adopted in the spring  
 12 of 2008 water rates. What did  
 13 you mean by that?  
 14 "A They did not abide by the  
 15 condition or the provision in  
 16 the exchange agreement that  
 17 required that Metropolitan set  
 18 its rates in conformance with  
 19 applicable law."  
 20 Q. Mr. Cushman was designated as the person most  
 21 knowledgeable on the subject of breach?  
 22 **A. Correct.**  
 23 Q. Do you disagree with Mr. Cushman, that Met  
 24 breached the contract, breached the exchange agreement  
 25 in 2008 when it adopted rates for 2009?

1636

1 **A. Yes.**  
 2 Q. So the San Diego staff -- what happened here is  
 3 the San Diego staff recommended that San Diego's  
 4 delegates to the Met board vote in favor of a breach of  
 5 the exchange agreement; true?  
 6 **A. They voted to increase the rates. They did  
 7 not -- again, I don't believe they voted specifically on  
 8 the allocation. So even though it was in the  
 9 resolution, that wasn't in our discussions. So, yeah.**  
 10 Q. That may be the answer to another question.  
 11 **A. Right. Sorry.**  
 12 Q. You assume that what you refer to as  
 13 boilerplate was in there; right?  
 14 **A. I presume so.**  
 15 Q. And you have told us that you know that staff  
 16 recommended that the San Diego delegates in 2008 vote  
 17 for those 2009 rates; right?  
 18 **A. Vote for one of the options that was offered,  
 19 correct.**  
 20 Q. You have no disagreement with Mr. Cushman's  
 21 testimony that the adoption of those rates was a breach  
 22 of contract?  
 23 **A. That they did not abide -- correct, that they  
 24 did not abide by the conditions.**  
 25 Q. So what happened here is the San Diego staff

1637

1 recommended that San Diego's delegates to the Met board  
 2 vote in favor of the act, which Mr. Cushman, the person  
 3 most knowledgeable, says was a breach of contract;  
 4 correct?  
 5 **A. Yes, it was staff who made that recommendation.**  
 6 Q. When did you personally, when did you believe  
 7 that Met first breached the exchange agreement?  
 8 **A. I believe that -- I believed that Met did not  
 9 charge the lawful wheeling rate -- our interpretation:  
 10 That from, you know, the beginning of the exchange  
 11 agreement, but we could not do anything about it until  
 12 the five years had passed. So --**  
 13 Q. I'm sorry. I interrupted you.  
 14 **A. Yeah.**  
 15 **So our interpretation was that they were not  
 16 charging the lawful rate.**  
 17 Q. So when do you believe that Met first breached  
 18 the exchange agreement?  
 19 **A. In -- at the end of the five-year agreement.**  
 20 Q. So that would be, what, January 1, 2008?  
 21 **A. Yes. Yes.**  
 22 Q. So you agree with Mr. Cushman that when they  
 23 first adopted, that was the first breach?  
 24 **A. Correct.**  
 25 Q. Let me ask you about the next year, 2009.

1638

1 In 2009, San Diego still did not complain about  
 2 the unlawfulness of any rates in writing. Isn't that  
 3 true?  
 4 **A. That is correct.**  
 5 Q. And San Diego, in 2009, still did not claim in  
 6 writing that Met was charging a price that was in breach  
 7 of contract?  
 8 **A. Not in writing, correct.**  
 9 Q. It did not, in writing, say anything -- any  
 10 objection to the price, at least in writing?  
 11 **A. In writing we did not.**  
 12 THE COURT: I am going to ask each of you not  
 13 to talk over each other. I understand what's going on,  
 14 but we are going to want to read this in a couple of  
 15 years.  
 16 Q. BY MR. QUINN: And then, in 2009, San Diego did  
 17 not request that Met make any deposit under that Section  
 18 12.4(c)?  
 19 **A. Correct.**  
 20 Q. And there was no lawsuit filed in 2009?  
 21 **A. Correct.**  
 22 Q. Once again, in 2009, the San Diego delegates  
 23 voted to approve those rates and the cost of service  
 24 report once again; isn't that true?  
 25 **A. Correct.**

1639

1 Q. We know that from DTX 129, page one?  
 2 **A. Correct.**  
 3 Q. If you could take a look, please, at JTX 2:936;  
 4 this is in evidence. JTX 2:936. This is a letter from  
 5 four of San Diego's delegates to the Met board dated  
 6 March 21, 2012; correct?  
 7 **A. Correct.**  
 8 Q. The subject of the letter is, "Recommendation  
 9 to Cap MWD Rate Increases at Three Percent for 2013 and  
 10 2014."  
 11 Do you see that?  
 12 **A. I do.**  
 13 Q. Did you see this letter at any time before it  
 14 was sent in 2012?  
 15 **A. I don't believe I did.**  
 16 Q. Do you see anywhere in this letter where it  
 17 says that including State Water Project costs or water  
 18 stewardship rate and conveyance charges is unlawful or a  
 19 breach of contract?  
 20 **A. I have not reviewed this. I would have to read  
 21 it first.**  
 22 Q. I won't take the time right now. If we could  
 23 step back for a second.  
 24 During the seven years from the execution of  
 25 the exchange agreement, until San Diego filed this

1640

1 lawsuit, and even until today, San Diego has accepted  
 2 the benefits that it received under the exchange  
 3 agreement; isn't that true?  
 4 **A. Correct.**  
 5 Q. Those benefits under the exchange agreement and  
 6 the related agreement include hundreds of millions of  
 7 dollars from the State of California?  
 8 **A. Yes.**  
 9 Q. And they also include hundreds of thousands of  
 10 acre-feet of water from the canal lining with another  
 11 100 years to go; correct?  
 12 **A. Yes.**  
 13 Q. It also includes the exchange of IID and canal  
 14 lining water on a fixed guaranteed schedule per month?  
 15 **A. Yes.**  
 16 Q. So from the time San Diego first approved the  
 17 rate structure and the findings in support of the rate  
 18 structure that we looked at in 2002, until 2010, San  
 19 Diego had agreed to and voted for the rate structure,  
 20 had performed under the exchange agreement without  
 21 objection, and had accepted the benefits of the  
 22 transaction; correct?  
 23 **A. I would disagree with that because we did have  
 24 objections. And during that period of time both with  
 25 the MWD staff, as well as in testimony to the board, we**

1641

1 **had indicated our objections.**  
 2 Q. So you are referring to oral objections?  
 3 **A. Yes.**  
 4 Q. So if we set that aside, the oral objections,  
 5 my statement is correct? That from the time San Diego  
 6 first approved the rate structure and the findings in  
 7 support of the rate structure in 2002, until 2010, San  
 8 Diego agreed to and voted for the rate structure,  
 9 performed under the exchange agreement without  
 10 objection, other than these oral objections you've  
 11 referred us to, and accepted the benefits of the  
 12 transaction; true?  
 13 **A. Yes.**  
 14 Q. By the way, as to the benefits from the canal  
 15 lining water, San Diego had received about 80,000  
 16 acre-feet last year?  
 17 **A. Correct.**  
 18 Q. If you multiply that out for 100 years, just to  
 19 keep it simple, that would be about eight million  
 20 acre-feet?  
 21 **A. Correct.**  
 22 Q. Are you aware Met's current charge for supply  
 23 is \$158 per acre-foot?  
 24 **A. Yes.**  
 25 MR. QUINN: Do we have a calculator?

1642



1 May I approach the witness, your Honor?  
 2 THE COURT: I have a calculator, too, but we  
 3 will use yours.  
 4 MR. QUINN: You can check the math, your Honor.  
 5 THE COURT: I was just so proud of having  
 6 brought one.  
 7 Q. BY MR. QUINN: Without getting into inflation  
 8 factors for the cost of water or any kind of present  
 9 value calculation, just to get an order of magnitude as  
 10 to the benefit that San Diego receives under this  
 11 transaction and the related agreements, what is eight  
 12 million acre-feet times \$158 per acre-foot?  
 13 **A. Right. If I did my math correctly, it is**  
 14 **1.2 billion.**  
 15 Q. 1.264 billion?  
 16 **A. Correct.**  
 17 Q. Would you agree with me that is a pretty good  
 18 deal for San Diego, even if it had to pay the \$253  
 19 initial price it agreed to pay, with the annual  
 20 increases that it voted for?  
 21 **A. Up to now?**  
 22 Q. Yes.  
 23 **A. Yes.**  
 24 Q. In fact, Mr. Campbell estimated that the cost  
 25 to San Diego of conveying the IID water under Option-2

1643

1 would exceed the cost under Option-1 by an amount in the  
 2 range of 423 million to 907 million.  
 3 Do you recall that?  
 4 **A. I do.**  
 5 Q. That is in DTX 50, which is in evidence.  
 6 Setting aside inflation factors for cost of water and  
 7 present value calculations, even if San Diego paid what  
 8 Mr. Campbell forecast, what you would call the  
 9 worst-case scenario, San Diego would still get the  
 10 benefit of 1.264 billion less an amount between --  
 11 Mr. Campbell calculated 423 to 907 million; right?  
 12 **A. And then less the amount of contribution we**  
 13 **made for the construction and the cost of that.**  
 14 Q. Well, looking just at Mr. Campbell's  
 15 calculations --  
 16 **A. Right.**  
 17 Q. -- San Diego's benefit after paying the full  
 18 wheeling rate would be, if you deduct the numbers that  
 19 Mr. Campbell computed based upon the full -- the full  
 20 wheeling rate, San Diego's benefit would be up to  
 21 \$840 million just from the supply of canal lining water;  
 22 correct?  
 23 **A. Yes.**  
 24 Q. That does not include any benefit you might  
 25 ascribe to having fixed and guaranteed delivery of the

1644

1 IID and the canal lining water?  
 2 **A. Yes.**  
 3 Q. You would consider that a pretty good deal for  
 4 San Diego, wouldn't you?  
 5 **A. Yes. I think this -- it's why our board voted**  
 6 **for it and I recommended it. That -- I thought this,**  
 7 **even with the exposure we had, I thought this was the**  
 8 **right thing to do.**  
 9 Q. You actually -- you think the right thing to do  
 10 is that San Diego should get approximately another  
 11 \$180 million just for 2011 to 2014 at the expense of the  
 12 other communities that are members of Met; isn't that  
 13 true?  
 14 **A. Yes, because we've been overcharged.**  
 15 MR. QUINN: Nothing further.  
 16 THE COURT: Thank you very much.  
 17  
 18 **REXCROSS-EXAMINATION**  
 19 BY MR. KEKER:  
 20 Q. Is San Diego a public agency?  
 21 **A. Yes.**  
 22 Q. Did it agree to pay a lawful rate for as long  
 23 as this water keeps flowing?  
 24 **A. Yes.**  
 25 Q. Did San Diego hire experts, spend a lot of

1645

1 money on them, to try to persuade Met to do the right  
 2 thing?  
 3 **A. Yes, over a number of years.**  
 4 Q. Was that successful?  
 5 **A. No.**  
 6 Q. Did San Diego have any option after 2010 when  
 7 you talked to Mr. Kightlinger except to bring a lawsuit?  
 8 **A. No.**  
 9 Q. What portions of the Katz wheeling law apply to  
 10 the exchange agreement in your view? You were asked  
 11 questions about whether or not the exchange agreement is  
 12 a wheeling transaction. I take it you don't think it is  
 13 a wheeling agreement?  
 14 **A. That's correct.**  
 15 Q. What does the Katz wheeling law have to do with  
 16 the exchange agreement?  
 17 **A. Because in the exchange agreement there is a**  
 18 **reference to the lawful wheeling rate, and that's the**  
 19 **component that I believe is applicable.**  
 20 **Also, it relates to what you can charge, which**  
 21 **is the State Water Project, because it is neither owned**  
 22 **nor operated by Metropolitan, should not be charged**  
 23 **within the transportation or the wheeling rate that**  
 24 **Metropolitan establishes.**  
 25 Q. What is the language in the exchange agreement

1646

1 "generally applicable," with respect to the price terms,  
 2 generally applicable to the conveyance of water by  
 3 member agencies? What's the function of that language  
 4 in the agreement?  
 5 **A. Right. That was important language for us**  
 6 **because we wanted to make sure that they did not charge**  
 7 **us something that was different than other member**  
 8 **agencies. So it had to be applicable both to the law**  
 9 **and what they were charging to others.**  
 10 Q. What they charged to other member agencies for  
 11 the conveyance of water, is that the wheeling rate?  
 12 **A. Yes, it is.**  
 13 Q. Whose idea was it to charge system power rate  
 14 instead of actual power charges?  
 15 **A. It was Metropolitan's. They're the ones that**  
 16 **determined to charge the melded rate.**  
 17 Q. Between 2005, when Mr. Underwood died, and  
 18 filing this lawsuit, did San Diego consistently make its  
 19 views about improper cost allocation known to Met?  
 20 **A. Yes.**  
 21 Q. Who did it?  
 22 **A. Staff did it, as well as board members in**  
 23 **one-on-one conversations. It was well known both**  
 24 **throughout Met and the other member agencies that we**  
 25 **objected to the cost allocation as it relates to**

1647

1 Can we have a brief discussion on this  
 2 exclusion issue? I read the opposition. I am not sure  
 3 there is a lot to add to what we said this morning,  
 4 although if you people want to address it, that's fine.  
 5 The central problem is that, for example, if I  
 6 look at the proposed exhibit that was sent to San Diego,  
 7 I suppose, over the weekend, it mentions, for example,  
 8 sometimes the source of the data that is reflected in  
 9 the spreadsheets; sometimes it does not. So I don't  
 10 have any more idea than Mr. Kecker does as to where the  
 11 information came from.  
 12 But for example, if you take the fifth page,  
 13 which is titled "Department of Water Resources Charges  
 14 for State Water Project Power, East Branch Deliveries,"  
 15 it gives you some sources. I don't know if those  
 16 documents DTX 90, 110 and so on were turned over to San  
 17 Diego or not. And if they were not turned over, I don't  
 18 know, I can't tell right now whether or not they were  
 19 demanded or the subject of court order or the extent of  
 20 time the court order issued or Metropolitan said they  
 21 would provide them. Nevertheless, Metropolitan failed  
 22 to provide them. It is a little difficult to tell right  
 23 now.  
 24 So, I do know, for example, Interrogatory  
 25 Number 20, this is under Tab I in the binder provided by

1649

1 **transportation.**  
 2 Q. Do you recall from Phase I Brian Thomas'  
 3 deposition testimony that everybody at Met knew about  
 4 these objections?  
 5 **A. Yes.**  
 6 Q. He was the CFO of Met?  
 7 **A. Yes.**  
 8 Q. You have been asked a lot of questions about  
 9 votes. Did any Met -- excuse me. San Diego delegate  
 10 vote for the rates at issue in this contract case,  
 11 namely the rates that have been charged for 2011 through  
 12 2014?  
 13 **A. They did not.**  
 14 Q. Are you seeking damages for any period before  
 15 2011 to '14?  
 16 **A. No. We are seeking damages only for '11 to**  
 17 **'14.**  
 18 Q. With respect to your view that you were  
 19 overcharged from 2003 on, you're not seeking damages, I  
 20 take it, until 2011 through 2014?  
 21 **A. That is correct.**  
 22 MR. KEKER: Nothing further. Thank you, your  
 23 Honor.  
 24 MR. QUINN: Nothing, your Honor.  
 25 THE COURT: Thank you. You are excused.

1648

1 San Diego, these are responses by Met to  
 2 interrogatories. Number 20, for example, asks for, "All  
 3 documents, data analysis, calculations, studies or other  
 4 information that detail or evidence Metropolitan's  
 5 specific costs of delivering to San Diego, San Diego's  
 6 water from IID. . . including, but not limited to any  
 7 cost of service reports associated with delivering the  
 8 third-party water."  
 9 And the response at the end is that no such  
 10 documents exist. The tenor of the hearing we had was  
 11 that Met certainly didn't have to create any documents  
 12 to comply with the discovery demand, but if they had  
 13 anything, they should have turned them over.  
 14 So I don't know if the documents that we have  
 15 here fit into the category of things that existed at the  
 16 time or were responsive to Interrogatory Number 20 and  
 17 Met failed to deliver them.  
 18 My guess is the most efficient way to proceed  
 19 is for us to -- subject to further discussion from the  
 20 attorneys, and, specifically Met, who has not had an  
 21 opportunity to address my tentative ruling, to proceed  
 22 with the witnesses as we have them, which includes  
 23 limiting Woodcock to his report, for example. During  
 24 cross-examination or during direct it may come out as to  
 25 what the foundational documents are, and it would be all

1650

1 subject to a motion to strike by San Diego and  
 2 conceivably a motion to augment the record if San Diego  
 3 was able to demonstrate that they had been caught by  
 4 surprise. In other words, sometimes you can get  
 5 alternative relief.  
 6 If it turns out, and we've had a little bit  
 7 more time to think it through, and not while anybody's  
 8 clock is ticking, that somebody has testified on the  
 9 basis of documents that really should not be admissible,  
 10 there are almost always at least two solutions. One is  
 11 to strike it, which is probably the best way to go, but  
 12 sometimes the other alternative is a motion to augment  
 13 so San Diego has an opportunity to, for example, recall  
 14 somebody. Because this is a bench trial and not a jury  
 15 trial, we have a little more flexibility than we might  
 16 have had.  
 17 That's one proposal, and we will move to  
 18 discussion.  
 19 MR. KEKER: Your Honor, I don't think that  
 20 proposal is fair or adequate.  
 21 If you were going to let this go forward, we  
 22 think that the best way to do it, given the limited time  
 23 that's remaining, and we've got three days to do it,  
 24 Ms. Skillman is outside. Let you go away and work on  
 25 something else. We'll take Ms. Skillman's deposition

1651

1 and ask her where all this came from.  
 2 THE COURT: Can't we do that now here?  
 3 MR. KEKER: Sure. But it shouldn't be -- they  
 4 get to put all this into the record. This should be  
 5 stricken. For example, the system that the -- we  
 6 already know that Ms. Skillman's 1103, and that on which  
 7 it is based, was not produced in discovery. We know  
 8 what interrogatory -- the interrogatories say, and we  
 9 also know the request for production that say all  
 10 documents discuss the allocation of MWD costs -- I can  
 11 cite these things to you. And they didn't -- we know  
 12 they weren't produced. We know that we saw them on the  
 13 witness list for the first time. For her to be able to  
 14 give direct testimony and then on cross-examination have  
 15 to get up and say, wait a minute, where did all this  
 16 come from is going to take much more time than we have.  
 17 THE COURT: Is the problem 1103?  
 18 MR. KEKER: 1103 and -- the problem is almost  
 19 all of it. The problem is 1096 through 1099, which is  
 20 actual State Water Project power, which they said we  
 21 don't do that, we don't break it out that way. And they  
 22 never produced it until they put them on their witness  
 23 list.  
 24 1103, again, they said that Met water is Met  
 25 water. We don't break out what's CRA -- we don't change

1652

1 the cost of transportation. And now she is doing that,  
 2 at least with respect to the power rate. She's just  
 3 made up something that we happen to think, on  
 4 cross-examination, which will take an hour to show, is  
 5 just a bunch of baloney in the first place. She  
 6 shouldn't be able to testify about it when this is total  
 7 sandbagging. We didn't get it over the weekend. We got  
 8 it yesterday morning. I think -- we've got problems all  
 9 the way through.  
 10 Actual CRA power, we asked them how much does  
 11 it cost you to run through the Colorado River Aqueduct.  
 12 They said we don't do it that way. We don't know. We  
 13 don't have documents about that.  
 14 They put in there a system -- a State Water  
 15 Project access cost that somehow they are going to try  
 16 to tie in violation, we think, of your ruling. They are  
 17 going to tie a State Water Project access cost to the  
 18 amount of water that they choose to use from the State  
 19 Water Project to blend to fulfill their commitments  
 20 under this exchange agreement. We have no idea how they  
 21 made their estimates. We have some idea how they made  
 22 their estimate, but it is an estimate and so on. I  
 23 don't see how --  
 24 THE COURT: I want to focus on the  
 25 admissibility issues and not whether this conflicts with

1653

1 something else, not whether we just don't understand  
 2 today how they can find their way through these numbers.  
 3 MR. KEKER: Let me stick with admissibility.  
 4 These numbers are things that they say, "No such  
 5 documents exist. We didn't produce them."  
 6 We had a hearing on this in which you said we  
 7 are not going to let people be blindsided. It made good  
 8 sense. You said go for it. They made a decision not to  
 9 produce this. For them to produce these documents late,  
 10 and then the testimony on what we couldn't figure out  
 11 what they were going to do with it, but now we see, and  
 12 to do that yesterday morning, this is basically an  
 13 expert report that is delivered to us based on documents  
 14 that are inadmissible and shouldn't come in.  
 15 THE COURT: The issue is, as I understand it,  
 16 the admissibility issue is testimony is going to be  
 17 based on 1096 through 1099, as well as 1103 --  
 18 MR. KEKER: And then exhibits attached to 1103  
 19 that show these hearsay documents about what Platts says  
 20 on-peak rate is. There is a lot of those.  
 21 THE COURT: I don't have 1103. When I say  
 22 1103, I guess I mean whatever is incorporated in that  
 23 document. Your position is that those things ought to  
 24 have been given to you, for example, pursuant to  
 25 Interrogatory Number 20. They were not, and, therefore,

1654

1 they are not -- it is not admissible and the testimony  
 2 based on it is not admissible.

3 MR. KEKER: Correct. And, similarly, they are  
 4 going to talk about the market cost of power at the CRA  
 5 and they have told us that no documents exist and so on.

6 THE COURT: It has to be a little more  
 7 specific. I don't know which interrogatory you mean,  
 8 for example, when it comes to CRA. It may be when  
 9 people testify this can be sorted out a little bit  
 10 longer.

11 I can probably pause here and ask Mr. Quinn  
 12 whether DTX 1096 through -99 and 1103 existed at the  
 13 time Interrogatory Number 20 was answered and that set  
 14 was answered and whether they were turned over or not so  
 15 we see what the record is.

16 MR. QUINN: The data we rely on comes from  
 17 documents created in the ordinary course of business at  
 18 Met. And we would anticipate on direct examination  
 19 asking witnesses where does this come from, laying that  
 20 foundation.

21 None of that data is found in documents that  
 22 are responsive to document requests served by San Diego.  
 23 Let's take, for example, Interrogatory Number 20:  
 24 Documents, data analysis, calculation studies or other  
 25 information that detail evidence of Met's specific costs

1655

1 of delivering to -- that is something very specific --  
 2 SDWCA's conserved water from IID and canal lining water  
 3 supplies.

4 None of these documents are based upon that,  
 5 that San Diego's -- the cost of Met delivering San  
 6 Diego's conserved water. That is a very narrow term,  
 7 and it refers to the IID and the canal lining water. We  
 8 will see on direct examination that none of this data  
 9 relates to that. And believe me, we looked -- since we  
 10 received their motion last Friday, we looked at this  
 11 pretty carefully, and I am comfortable representing to  
 12 the Court that none of this data comes from any document  
 13 that we are going to rely on, that these charts are  
 14 based on, comes from any document that they requested in  
 15 discovery.

16 THE COURT: Okay.

17 MR. QUINN: They are speculating about what  
 18 these things say and what the witnesses are going to  
 19 testify to.

20 THE COURT: I understand.

21 MR. KEKER: First of all, we delivered our  
 22 brief on Wednesday, not Friday. Can we put up 1103 and  
 23 put to lie to what he just said.

24 THE COURT: If you wish.

25 MR. KEKER: This is 1103, a document we have

1656

1 never seen before. The testimony is going to be from  
 2 Ms. Skillman.

3 We can tell, from looking at this chart,  
 4 that -- you see this on-peak SP15? That is on-peak  
 5 South of Path 15. Apparently, that's the on-peak  
 6 day-before energy price, according to the hearsay  
 7 documents that follow that we've never seen before.

8 What she is going to do is say we would have  
 9 sold Colorado River water, we would have paid for power  
 10 for Colorado River water at these on-peak rates. I have  
 11 figured out what all of that is. And for the month of  
 12 January it's \$87. And basically averaging out over the  
 13 year it is going to be about \$88. Mr. Denham says it's  
 14 less than that, the system power rate and so on.

15 She is going to say this is the actual cost to  
 16 them of delivering that water. I mean --

17 THE COURT: I understand.

18 MR. KEKER: -- this has never been produced.  
 19 The documents on which it's based are, as I said,  
 20 hearsay. Somebody's average, some Platts, we don't know  
 21 who that is. We never deposed them about how accurate  
 22 or how they do it. We won't get into the admissibility,  
 23 but the on-peak SP15 has nothing to do with anything.  
 24 That is what her testimony will be based on. She  
 25 shouldn't be able to do it given that this document fits

1657

1 squarely within requests to say tell us how you computed  
 2 your rates or however you allocate the rates.

3 All documents created on or before April 13,  
 4 2010, that discuss MWD's allocation into rate  
 5 categories, supplies, system access rates, system power  
 6 rate of charges or costs associated with MWD's purchase  
 7 of State Water Project water, and all documents created  
 8 after April 13, 2010, that discuss this subject with  
 9 respect to MWD's 2011, 2012.

10 Notice we said documents before, and if you  
 11 have documents afterwards that relate to these rates,  
 12 tell us. They didn't tell us. I picked the wrong one,  
 13 but we have a bunch of these that cover exactly this.

14 THE COURT: I think we will have a much better  
 15 record if instead of trying to project what the witness  
 16 is going to say or do or what the bases are or where the  
 17 information surely must have come from, the best thing  
 18 is just to have the record. We have this great benefit  
 19 where we can do this and we have this stuff coming in  
 20 subject to a motion to strike. If it turns out you have  
 21 wasted time in doing so, then as part of your motion to  
 22 strike and you want to augment the record and have some  
 23 more time, you are free to ask for that. I think,  
 24 really, the fastest way, the most efficient way to do it  
 25 is find out where the witness got this stuff.

1658

1 It's not true that, for example, simply being  
 2 surprised at trial is a basis for excluding evidence.  
 3 It is a little bit more tight than that. There has to  
 4 be a specific discovery demand. There has to be a  
 5 specific response for a court order saying it is going  
 6 to be produced. And the document itself, it has to be  
 7 clear that it existed at the time.  
 8 My only guess is this particular document here  
 9 was probably created thereafter. This looks like a  
 10 series of numbers that somebody went out and found in  
 11 some other documents that may or may not have been  
 12 within the possession of Metropolitan at the time or may  
 13 or may not have fit the description in the document  
 14 requests.  
 15 MR. KEKER: We have asked -- we asked for  
 16 documents that existed. And then documents that were  
 17 produced that were done after that. So again, Ms.  
 18 Skillman, who was not designated as an expert --  
 19 THE COURT: Right.  
 20 MR. KEKER: -- she is going to come in and try  
 21 to testify about something that is subject to expert  
 22 testimony.  
 23 THE COURT: We'll see.  
 24 MR. KEKER: She has gone out to gather  
 25 information about this, and she's going to claim to be

1659

1 an expert in what the on-peak rate is. This is not  
 2 something that is part of her job.  
 3 THE COURT: It is not a question of whether it  
 4 is part of her job. It is a question whether she is a  
 5 percipient or expert witness. If she starts giving  
 6 opinions, I think you should object and I will sustain  
 7 them. I think that is the most efficient way to handle  
 8 it.  
 9 MR. KEKER: We have less than four hours.  
 10 THE COURT: I understand your time concern.  
 11 MR. KEKER: And it is not fair not knowing what  
 12 Woodcock is going to try to do and needing to save time  
 13 for Woodcock to say that us exploring Ms. Skillman and  
 14 doing a thorough job with her is going to just shut us  
 15 off. I ask now for more time, at least even time with  
 16 the other side, given this embroglio.  
 17 THE COURT: I don't think this is necessarily  
 18 justification for it, but I will take it under  
 19 advisement.  
 20 Let's call the next witness.  
 21 MR. QUINN: Metropolitan calls Brent Yamasaki  
 22 to the stand.  
 23 /  
 24 //  
 25 ///

1660

1 BRENT YAMASAKI,  
 2 called as a witness by the Defendants, was sworn and  
 3 testified as follows:  
 4 THE WITNESS: I do.  
 5 THE CLERK: Thank you. Please be seated.  
 6 If you would adjust the microphone and then  
 7 state and spell your first and last name.  
 8 THE WITNESS: My name is Brent Yamasaki.  
 9 B-R-E-N-T, Y-A-M-A-S-A-K-I.  
 10  
 11 DIRECT EXAMINATION  
 12 BY MR. QUINN:  
 13 Q. Good afternoon, Mr. Yamasaki. By whom are you  
 14 employed?  
 15 A. **The Metropolitan Water District.**  
 16 Q. How long have you worked for the Metropolitan  
 17 Water District?  
 18 A. **Twenty-four years.**  
 19 Q. What is your position at the Metropolitan Water  
 20 District?  
 21 A. **I'm section manager of operations and planning.**  
 22 Q. As the section manager for operations and  
 23 planning, can you tell the Court generally what your job  
 24 duties are?  
 25 A. **Yes. I'm responsible for the district --**

1661

1 **movement and distribution of water in the Metropolitan**  
 2 **system. I am responsible for storage activities, system**  
 3 **operations, operations planning, emergency management.**  
 4 Q. Are you familiar with the exchange agreement  
 5 between Metropolitan and the San Diego Water Authority?  
 6 A. **Yes, I am.**  
 7 Q. Does Metropolitan have an obligation under that  
 8 agreement to deliver a certain volume of water to San  
 9 Diego every month under that agreement?  
 10 A. **Yes.**  
 11 Q. What is that amount?  
 12 A. **1/12th of the annual total.**  
 13 Q. Do you know how much it is this year?  
 14 A. **It is roughly 15,000 acre-feet per month.**  
 15 Q. Could you tell the Court, please, how the  
 16 amount that Metropolitan is obligated to deliver under  
 17 the exchange agreement, how that amount is determined?  
 18 A. **There's a schedule that represents the amounts**  
 19 **that are conserved by Imperial Irrigation District and**  
 20 **that schedule is provided to us.**  
 21 Q. Between 2011 and 2014, on average, how much  
 22 water was Metropolitan obligated to deliver to San Diego  
 23 each month?  
 24 A. **It averaged about 15,000 acre-feet per month.**  
 25 Q. Do you know whether Metropolitan's obligations

1662

1 to deliver under that contract, in terms of the volume  
 2 of water that it's obligated to deliver, whether that  
 3 will change over time under the terms -- under the life  
 4 of the exchange agreement?  
 5 **A. Yes. It's expected to increase.**  
 6 Q. Do you know how much -- when it reaches its  
 7 peak amount, do you know how much that obligation will  
 8 increase to?  
 9 **A. Yeah. It's on the order of 280,000 acre-feet**  
 10 **per year.**  
 11 Q. So about 23,000, roughly, per month?  
 12 **A. Per month, yes.**  
 13 Q. Will be the max it will grow to?  
 14 **A. Correct.**  
 15 Q. Is it possible for -- as the person who's  
 16 operations manager and knowledgeable about the Met  
 17 systems, can you tell the Court whether it's possible  
 18 for Metropolitan to satisfy its monthly delivery  
 19 obligations under the exchange agreement to San Diego by  
 20 using exclusively Colorado River water?  
 21 **A. No, it's not.**  
 22 Q. Why isn't it possible?  
 23 **A. Well, there's a number of reasons. Probably**  
 24 **the first and foremost, we have to shut down the**  
 25 **aqueduct for maintenance. We have been doing so for**

1663

1 **roughly about a month a year in recent years. So**  
 2 **without the aqueduct in service, we don't have the**  
 3 **ability to deliver Colorado River water during that**  
 4 **time.**  
 5 Q. Is that something that happens every year?  
 6 **A. Yes.**  
 7 Q. And so how is water provided to San Diego when  
 8 there's maintenance or shutdown on the Colorado River  
 9 aqueduct?  
 10 **A. It is delivered by State Water Project or**  
 11 **reservoirs that hold State Water Project water.**  
 12 Q. Based on your knowledge of the Colorado River  
 13 Aqueduct, can you tell us whether or not it is  
 14 anticipated in the future there will be more or less  
 15 renovation and taking out of service for the aqueduct in  
 16 the future?  
 17 **A. I would expect there would be more. The**  
 18 **aqueduct is 75 years old and so the maintenance needs**  
 19 **and the needs to upgrade in the future would probably be**  
 20 **more.**  
 21 Q. What is the term of the exchange agreement, do  
 22 you know, what it runs to?  
 23 **A. I believe it is 35 years.**  
 24 Q. Does it run to 2048? Does that sound right?  
 25 **A. That sounds right.**

1664

1 Q. Are there any other reasons why Metropolitan  
 2 cannot satisfy its monthly delivery obligations under  
 3 the exchange agreement using solely Colorado River  
 4 water?  
 5 **A. Yes, there are.**  
 6 Q. What other reasons are there?  
 7 **A. One is for operational reasons, like water**  
 8 **quality. There are times where we have algae blooms in**  
 9 **the aqueduct or the need to scrape algae off the**  
 10 **aqueduct and that limits the amount of water we can**  
 11 **deliver on the Colorado River Aqueduct.**  
 12 Q. When there are algae blooms, what consequence  
 13 does that have in terms of your ability to deliver  
 14 Colorado River water as opposed to State Water Project  
 15 water?  
 16 **A. Well, there's a lake in the area that collects**  
 17 **all the water that gets delivered to the San Diego area.**  
 18 **It's called Lake Skinner. To avoid running into**  
 19 **problems with algae in that lake, we will send water to**  
 20 **Lake Matthew. Colorado River water would travel away**  
 21 **from the area that delivers water to San Diego, and we**  
 22 **would replace that with another supply like State Water**  
 23 **Project.**  
 24 Q. Does the actual system, does the infrastructure  
 25 that Metropolitan has, actually permit Metropolitan to

1665

1 deliver exclusively Colorado River water to San Diego?  
 2 **A. No. It's a blended system.**  
 3 Q. Can you explain what you mean by that?  
 4 **A. Water deliveries to the Skinner area or --**  
 5 Q. Let me stop you right there. What is the  
 6 Skinner area?  
 7 **A. The Skinner area consists of Lake Skinner, the**  
 8 **Skinner filtration plant and the associated plumbing in**  
 9 **that area.**  
 10 Q. The water that San Diego gets under the  
 11 exchange agreement, does that come from a particular  
 12 location in the Met system?  
 13 **A. I'm sorry?**  
 14 Q. Does that come from a particular facility or  
 15 area in the Met system?  
 16 MR. BRAUNIG: Vague and ambiguous.  
 17 THE COURT: Let's have it rephrased.  
 18 Q. BY MR. KEKER: I'm focusing on where Met gets the  
 19 water that under the exchange agreement is provided to  
 20 San Diego.  
 21 **A. Yes.**  
 22 Q. Does that come from a particular location in  
 23 the Met system?  
 24 **A. It comes from the Colorado River Aqueduct and**  
 25 **the State Water Project.**

1666

1 Q. You referred to this Skinner area?  
 2 A. Yes.  
 3 Q. Can you tell us whether or not all the water  
 4 that ultimately goes to San Diego comes from the Skinner  
 5 area?  
 6 A. Yes, all of it goes through the Skinner area.  
 7 Q. The Skinner area, you said that consists of a  
 8 lake or reservoir?  
 9 A. Yes.  
 10 Q. As well as something else you mentioned?  
 11 A. Yes, a Skinner treatment plant.  
 12 Q. And the water that goes into the Skinner area,  
 13 where does that water come from?  
 14 A. It comes from the Colorado River Aqueduct, as  
 15 well as the State Water Project.  
 16 Q. You said that all the water that San Diego gets  
 17 under the exchange agreement comes from the Skinner  
 18 area?  
 19 A. Yes.  
 20 Q. At the Skinner area, is the State Water Project  
 21 water and the Colorado River water, are they kept  
 22 separate?  
 23 A. No. They are mixed together.  
 24 Q. Is it possible? Is there any way they can be  
 25 kept separate?

1667

1 A. No, there isn't.  
 2 Q. So, I mean, is it possible to shut off some  
 3 valves and change -- do something in the Skinner area so  
 4 that only Colorado River water flows or is provided to  
 5 San Diego under the exchange agreement?  
 6 A. No, there's not.  
 7 Q. So how does the existence -- how does the --  
 8 can you explain to the Court why the Skinner area, the  
 9 fact that that is where San Diego gets all its water  
 10 that's provided under the exchange agreement, why that  
 11 means that Met cannot provide simply Colorado River  
 12 water?  
 13 A. Well, San Diego is not the only agency that  
 14 receives this water. We have other member agencies, and  
 15 we have various needs to deliver the water. And it's  
 16 blended prior to going into the Skinner area. So  
 17 there's no way to separate the waters apart.  
 18 Q. Is there any way for Met to, you know, shift  
 19 valves or do something so that the water would not be  
 20 blended so that the State Water Project water and the  
 21 Colorado River water would be kept separate and not  
 22 intermingled?  
 23 A. No, there isn't.  
 24 Q. Are there any other reasons why Met cannot  
 25 supply solely Colorado River water -- fulfill its

1668

1 obligations under the exchange agreement by providing  
 2 solely Colorado River water?  
 3 A. Yes. There's a supply reason.  
 4 Q. What are you referring to there?  
 5 A. There are times where we have very high levels  
 6 of State Water Project supplies --  
 7 Q. Not in the recent past, I take it?  
 8 A. Not in the past couple of years, but just prior  
 9 to that.  
 10 Q. How does the fact that there are high levels of  
 11 State Water Project supplies affect Met's ability to  
 12 provide exclusively Colorado River water to San Diego?  
 13 A. Well, during those times State Water Project is  
 14 available, we have to be able to deliver the water to  
 15 meet demands. We also have to store the water or we  
 16 lose the opportunity to capture or utilize our water  
 17 supply.  
 18 Q. What do you mean by that, when you say when  
 19 there's State Water Project water available, what do you  
 20 mean when you say that you have to use that opportunity?  
 21 Could you explain that, please?  
 22 A. As you know, when there's wet weather, supplies  
 23 on the State Water Project are high. We have limited  
 24 capacity to deliver and store that water. So we have to  
 25 take every opportunity that we have to be able to do

1669

1 that when the supplies are available. The water is made  
 2 available, say, in a wet year and by the end of the year  
 3 we have to have figured out how to deliver or store all  
 4 of that water. Or the consequence is that we could  
 5 potentially lose that water.  
 6 Q. When you say lose that water, what do you mean  
 7 by that?  
 8 A. It stays in the State Water Project or it goes  
 9 out to the ocean.  
 10 Q. Can you tell us whether or not under the  
 11 exchange agreement Met has for these reasons always  
 12 provided a blend of State Water Project water and  
 13 Colorado River water to San Diego?  
 14 A. We have mostly delivered a blend of State Water  
 15 Project and Colorado River water. There have been times  
 16 where the State Water Project supplies were not  
 17 adequate, for example last year, where we were not able  
 18 to blend the water for short periods of time.  
 19 Q. And that's -- can you give the Court some idea  
 20 of how many times that has been true or how many months?  
 21 A. Probably a few months.  
 22 Q. Where does Met take delivery of the State Water  
 23 Project water that ends up being in the blend that Met  
 24 provides to Diego?  
 25 A. We get that delivered to us on the east branch

1670

1 **of the State Water Project.**  
 2 Q. Does Met have the ability to determine the  
 3 actual blend of State Water Project water and Colorado  
 4 River water that is delivered to San Diego pursuant to  
 5 the exchange agreement?  
 6 **A. Yes, we do.**  
 7 Q. And is that something that Met determines in a  
 8 regular course of business?  
 9 **A. Yes.**  
 10 Q. And how often does Met do that?  
 11 **A. We measure that daily.**  
 12 Q. I'm sorry?  
 13 **A. We measure that daily.**  
 14 Q. Are there records kept of what that blend is?  
 15 **A. Yes.**  
 16 Q. What are the names of those records?  
 17 **A. We have a water quality database. It's called**  
 18 **Lab Sheet where we capture salinity and other water**  
 19 **quality parameters that tell us about the water and its**  
 20 **quality that's delivered.**  
 21 Q. From that information, can you determine what  
 22 the blend is?  
 23 **A. Yes, we can.**  
 24 Q. How much came from the State and how much came  
 25 from the Colorado River?

1671

1 **A. Correct.**  
 2 Q. If we can look at Defense Exhibit 1105, and  
 3 that is not yet admitted, and I will ask you if you can  
 4 identify Exhibit 1105.  
 5 **A. Yes.**  
 6 Q. What is Exhibit 1105?  
 7 **A. That shows daily readings from the lab sheet**  
 8 **database program of the blends that are taken at the**  
 9 **Skinner plant. It is raw water and it shows the**  
 10 **percentage of State Water Project water in the**  
 11 **deliveries that are made each day.**  
 12 Q. Is this one of the documents that you were  
 13 referring to earlier that is created in the course of  
 14 business?  
 15 **A. Yes.**  
 16 Q. Are they created at or near the time that you  
 17 are actually measuring the blend and you create this at  
 18 that time?  
 19 **A. Yes.**  
 20 Q. And is this something that is created by you or  
 21 people acting under your direction?  
 22 **A. Yes.**  
 23 Q. And is the source of information that this  
 24 comes from, is this trustworthy information?  
 25 **A. Yes, it is.**

1672

1 MR. QUINN: We'd offer Exhibit 1105.  
 2 MR. BRAUNIG: No objection.  
 3 (DTX Exhibit 1105 was received in evidence.)  
 4 THE COURT: 1105 is admitted.  
 5 Q. BY MR. QUINN: In fact, I would like to address  
 6 four documents. We can do them as a group DTX 1122, DTX  
 7 1124, DTX 1126 and DTX 1128. If we could start with DTX  
 8 1122, can you tell us what this document is?  
 9 **A. Yes.**  
 10 Q. What is it?  
 11 **A. This is our weekly water quality system status.**  
 12 Q. The other exhibits 1124, 1126 and 1128, are  
 13 those other influences of this particular document?  
 14 **A. Yes. This first document shows the information**  
 15 **weekly for 2011 and the other documents show each year**  
 16 **all the way to 2014.**  
 17 Q. So, would you please tell the Court what these  
 18 weekly water quality systems status documents say?  
 19 What's the information that's in them?  
 20 **A. This is a report of the water quality**  
 21 **parameters that we measure.**  
 22 **There is a variety of them on there, including**  
 23 **the TDS, total dissolved solids, that we measure at each**  
 24 **of the treatment plants and at various locations in our**  
 25 **system.**

1673

1 Q. Does this also permit you to determine what the  
 2 blend is of State Water Project water and Colorado River  
 3 water that's provided to San Diego?  
 4 **A. Correct.**  
 5 Q. Are these documents created in the ordinary  
 6 course of business?  
 7 **A. Yes.**  
 8 Q. And by you and people acting under your  
 9 direction?  
 10 **A. Correct.**  
 11 Q. And these are made at the time that the  
 12 measurements are made?  
 13 **A. Yes. They are published weekly.**  
 14 MR. QUINN: We would offer these three  
 15 exhibits, your Honor, 1122, 1124, 1126 and 1128.  
 16 THE COURT: Four exhibits.  
 17 MR. QUINN: Yes. I'm sorry. Four exhibits.  
 18 MR. BRAUNIG: No objection.  
 19 THE COURT: DTX 1122, 1124, 1126 and 1128 are  
 20 admitted.  
 21 (DTX 1122, 1124, 1126 and 1128 were received  
 22 into evidence.)  
 23 Q. BY MR. QUINN: We can look at DTX 1154, not yet  
 24 admitted. Could you identify this document for us?  
 25 **A. This is a status update sheet that we received**

1674



1 **weekly from the San Diego Water Authority.**  
 2 Q. Who creates this document?  
 3 **A. Somebody at the Authority does.**  
 4 Q. At the San Diego Water Authority?  
 5 **A. That's correct.**  
 6 Q. Did you say this is something they provide to  
 7 you?  
 8 **A. Yes.**  
 9 Q. And what does this document show?  
 10 MR. BRAUNIG: Objection. Foundation.  
 11 THE COURT: He can -- the foundation to this  
 12 question? In other words, you don't think he has a  
 13 basis to know what this shows or are you objecting to  
 14 the admissibility of the document?  
 15 MR. BRAUNIG: Both, your Honor.  
 16 THE COURT: I will overrule the current  
 17 objection. It hasn't been moved into evidence.  
 18 MR. QUINN: I will offer it.  
 19 MR. BRAUNIG: Objection. Lack of foundation  
 20 for him to testify about this document that he didn't  
 21 create that isn't a Met document.  
 22 THE COURT: What is the foundation?  
 23 MR. QUINN: As I understood the witness'  
 24 testimony, this is a document created by San Diego that  
 25 is provided to Met.

1675

1 THE COURT: But how does he know what the  
 2 foundation is, the method of preparation, reliability,  
 3 at or about the time, all the standard?  
 4 MR. QUINN: I would submit it is a party  
 5 admission. This is a document that is created by San  
 6 Diego that they sent to us. So it's --  
 7 THE COURT: That is not the test. That is not  
 8 the test. I will sustain the objection.  
 9 MR. BRAUNIG: Take it down, please.  
 10 THE COURT: He can leave it up. There is no  
 11 jury. I know what not to look at. It's okay.  
 12 Q. BY MR. QUINN: Do you have an understanding --  
 13 I am going to try to lay some foundation and what you  
 14 know about this document.  
 15 Whatever it is you know about this document,  
 16 how do you know it?  
 17 **A. Just through our ordinary operational**  
 18 **coordination with San Diego, it's something that we do**  
 19 **in the normal course of business. It helps us -- makes**  
 20 **us aware of some of their planning parameters and,**  
 21 **likewise, we share documents like the status map with**  
 22 **San Diego so they can plan their operations.**  
 23 Q. Is this a document that -- that San Diego  
 24 provides to you and then is the subject of discussion  
 25 with people at San Diego, between Met and San Diego?

1676

1 **A. Periodically it is, yes.**  
 2 Q. And is this a document that people at Met rely  
 3 on in terms of providing that coordination between the  
 4 two agencies?  
 5 **A. Yes.**  
 6 Q. And do people at San Diego tell you this is a  
 7 document that they create and they rely on?  
 8 MR. BRAUNIG: Hearsay.  
 9 THE COURT: Overruled.  
 10 THE WITNESS: Yes, it is.  
 11 MR. QUINN: I would offer 1154, your Honor.  
 12 MR. BRAUNIG: It still has a foundation  
 13 objection. For him to testify as to what the meaning of  
 14 these specific statistics are that he didn't himself  
 15 create is improper. I will also note these are, if you  
 16 look at the bottom, they have page three of eight, page  
 17 three of eight. They are individual incomplete pages  
 18 from a random assorted variety of dates and they are  
 19 incomplete as they are. But more importantly, it is  
 20 this foundation objection.  
 21 MR. QUINN: Your Honor, he testified that he  
 22 actually works with this document, relies on it in  
 23 coordination with the folks at San Diego, that the  
 24 people at San Diego confirm that to him, that they also  
 25 use it and rely on it.

1677

1 MR. BRAUNIG: That's not what he testified.  
 2 THE COURT: There is actually an Evidence Code  
 3 on this. I am trying to find it. 1414(b), the writing  
 4 has been acted upon as authentic by the party against  
 5 whom it is offered. The question is whether this  
 6 witness has suggested that San Diego has acted as if the  
 7 document is authentic. That is probably the test. I  
 8 think that is where Mr. Quinn was going. All I know is  
 9 that San Diego, I guess, sends this to Met. What else  
 10 do we know?  
 11 MR. QUINN: He didn't say he sends it to him.  
 12 He says that it's the subject and used in connection  
 13 with coordination between the two agencies, that he uses  
 14 it and the people at San Diego tell him they use it, as  
 15 well.  
 16 THE COURT: The objection is overruled. The  
 17 document is admitted under 1414(b). I have my doubts as  
 18 to how much weight to give to any testimony that he  
 19 gives as to what this means. The objection is  
 20 overruled.  
 21 (DTX 1154 was received into evidence.)  
 22 Q. BY MR. QUINN: In your discussions with the  
 23 folks at San Diego and doing the coordination you  
 24 referred to, do the people at San Diego, have they told  
 25 you what this document reflects?

1678

1 MR. BRAUNIG: Hearsay.  
 2 THE COURT: Sustained.  
 3 Q. BY MR. QUINN: Who is it that you talk to at  
 4 San Diego concerning this document?  
 5 A. **We spoke to various operations managers at San**  
 6 **Diego.**  
 7 Q. Would those persons be your counterparts at San  
 8 Diego?  
 9 A. **Yes, at times, yes.**  
 10 Q. And do those operations managers at San Diego  
 11 tell you what this document reflects? Have they done  
 12 that?  
 13 MR. BRAUNIG: It is calling for hearsay.  
 14 THE COURT: At a general level I will allow it  
 15 in to give a general overview as to what the document is  
 16 and how it's used.  
 17 You can go and answer that question.  
 18 THE WITNESS: Can you repeat the question?  
 19 Q. BY MR. QUINN: Do the operations managers in  
 20 San Diego, when you have had discussions with them about  
 21 this document that they send you, did they tell you what  
 22 the document reflects?  
 23 A. **Yes.**  
 24 Q. What do they tell you that the document  
 25 reflects?

1679

1 or no.  
 2 THE WITNESS: With me directly, no. With my  
 3 staff, yes.  
 4 MR. BRAUNIG: Double hearsay.  
 5 THE COURT: I'll accept the first part of his  
 6 answer. I won't strike the second because it is  
 7 illuminating but it is hearsay.  
 8 Q. BY MR. QUINN: Have you personally ever had a  
 9 conversation with any operations manager at San Diego  
 10 where the San Diego operations manager has told you that  
 11 San Diego is itself able to determine the relative blend  
 12 of Colorado River water and State Water Project water  
 13 that it's receiving from Met pursuant to the exchange  
 14 agreement?  
 15 A. **I have not.**  
 16 Q. Quickly take a look at Demonstrative 2. Were  
 17 you able to use the monthly -- that information -- those  
 18 exhibits that we looked at, the daily records and the  
 19 weekly records, in terms of the blends, were you able to  
 20 use those to calculate the volumes of State Water  
 21 Project and Colorado River water that San Diego received  
 22 in its monthly exchange deliveries?  
 23 A. **Yes, I have.**  
 24 Q. And did you personally do that calculation?  
 25 A. **Yes.**

1681

1 MR. BRAUNIG: Hearsay.  
 2 THE COURT: Overruled.  
 3 THE WITNESS: It reflects the flows. There's  
 4 also reservoir information on this. They also -- we  
 5 talk about the blends, at this place the blends they  
 6 expect to receive from the Skinner area.  
 7 Q. BY MR. QUINN: Do they tell you whether or not  
 8 this document, this report that they provide to you,  
 9 reflects their own determination of what blends they are  
 10 receiving?  
 11 MR. BRAUNIG: Hearsay.  
 12 THE COURT: Overruled.  
 13 THE WITNESS: I haven't had that conversation  
 14 directly, but I would say --  
 15 THE COURT: That answers the question. Thank  
 16 you.  
 17 Q. BY MR. QUINN: Do they tell you whether or not  
 18 it's -- has any -- the operations managers at San Diego,  
 19 have they told you whether or not they can determine  
 20 what the blend is of Colorado River water versus State  
 21 Water Project water that they received pursuant to the  
 22 exchange agreement?  
 23 MR. BRAUNIG: Objection, your Honor. It is  
 24 still hearsay.  
 25 THE COURT: Overruled. That is probably a yes

1680

1 Q. Do you know whether or not that raw data about  
 2 monthly deliveries to San Diego can also be found in  
 3 Met's invoices to San Diego?  
 4 A. **I'm sorry?**  
 5 Q. Do you know whether or not the raw data about  
 6 the monthly deliveries to San Diego can actually be  
 7 found in Met's invoices to San Diego?  
 8 A. **Yes, it can.**  
 9 MR. QUINN: If we could look at PTX 469-A, that  
 10 is, as I understand, admitted, your Honor.  
 11 PTX 469 is admitted.  
 12 Q. Can you identify this document?  
 13 A. **Yes, this is the monthly invoice to San Diego**  
 14 **County Water Authority.**  
 15 Q. Does this exhibit include the invoices to San  
 16 Diego for 2011 to 2014?  
 17 A. **Yes.**  
 18 Q. Using your monthly calculations, did you  
 19 calculate the annual volumes of State Water Project and  
 20 Colorado River water that San Diego received in its  
 21 exchange agreements for each year 2011 through 2014?  
 22 A. **Yes, I did.**  
 23 Q. If we could take a look at Exhibit 1156. Is  
 24 this the first one?  
 25 A. **Sorry?**

1682

1 Q. 1155, please.  
 2 We are looking at Exhibit 1155.  
 3 MR. KEKER: 1105?  
 4 THE COURT: This is a DTX?  
 5 MR. QUINN: DTX, yes. 1155, I'm told.  
 6 THE COURT: Got it.  
 7 Q. BY MR. QUINN: The numbers we see here, is this  
 8 numbers you personally prepared?  
 9 **A. Yes, they are.**  
 10 Q. Can you explain to the Court what Exhibit 1155  
 11 shows?  
 12 **A. This shows the monthly average blend and it is**  
 13 **directly from data that was taken from the Lab Sheet**  
 14 **program, the daily data that we saw earlier.**  
 15 **So a monthly blend of State Water Project, the**  
 16 **amount was calculated for each month from 2011 to 2014.**  
 17 Q. For example, January of 2011 we see a 33. What  
 18 does that reflect?  
 19 **A. That reflects that in the deliveries that were**  
 20 **made to San Diego, 33 percent of that delivery was State**  
 21 **Water Project water.**  
 22 MR. QUINN: We would offer this exhibit, your  
 23 Honor.  
 24 MR. BRAUNIG: No objection.  
 25 THE COURT: 1155 DTX is admitted.

1683

1 (DTX 1155 was received into evidence.)  
 2 Q. BY MR. QUINN: If we could look at 1156, can  
 3 you identify this document for us, please?  
 4 **A. Yes. This is a document that shows the total**  
 5 **volume of the exchange from the period of 2011 to 2014.**  
 6 **And using the blend information from the prior exhibit,**  
 7 **the amount of State Water Project delivery and Colorado**  
 8 **River water deliveries were calculated for each month.**  
 9 Q. When you say the total volume, what do you mean  
 10 by the total volume?  
 11 **A. The total amount of acre-feet delivered from**  
 12 **each of the two sources.**  
 13 Q. Did you just apply the percentages that we  
 14 looked at in the preceding Exhibit 1155 to the volumes  
 15 that were delivered to come up with these numbers?  
 16 **A. Yes, that's correct.**  
 17 Q. Does this show us for each month in 2011  
 18 through 2014 and for the year as a whole what the total  
 19 water deliveries were to San Diego?  
 20 **A. Yes, from each water source.**  
 21 Q. From each water source?  
 22 **A. Yes.**  
 23 Q. Where do we see those two different water  
 24 sources?  
 25 **A. Right there up in the corner, you see first the**

1684

1 **State Project water that was delivered as part of the**  
 2 **exchange deliveries and it also shows the corresponding**  
 3 **Colorado River water amounts in the exchange deliveries.**  
 4 MR. QUINN: We offer Exhibit 1156.  
 5 MR. BRAUNIG: No objection.  
 6 THE COURT: 1156, DTX, is admitted.  
 7 (DTX 1156 was received in evidence.)  
 8 Q. BY MR. QUINN: DTX 1157. What does this  
 9 document show?  
 10 **A. This shows the monthly total untreated water**  
 11 **deliveries to the San Diego Water Authority as well as**  
 12 **the total exchanged volumes each month. And it shows**  
 13 **how much Colorado River water was delivered as part of**  
 14 **the total volume to San Diego County Water Authority per**  
 15 **month.**  
 16 Q. When you say total volume, what are you  
 17 including in that?  
 18 **A. When we look at all of the untreated deliveries**  
 19 **by month to San Diego County Water Authority and**  
 20 **applying those percentages from the blend -- the blend**  
 21 **table from two exhibits ago, we arrive at the amount of**  
 22 **Colorado River water that was made in their total**  
 23 **deliveries. That would be their full service firm**  
 24 **deliveries as well as the exchange deliveries.**  
 25 Q. So San Diego purchases full service water but

1685

1 also gets exchange deliveries; is that correct?  
 2 **A. That's correct.**  
 3 Q. You have done some calculations here relating  
 4 to the combination of the two?  
 5 **A. That's correct.**  
 6 Q. You show combining the two what the various  
 7 percentages are and what the deliveries are of State  
 8 Water Project water versus Colorado River water; is that  
 9 correct?  
 10 **A. Yes. This one shows Colorado River water and,**  
 11 **by subtraction, you can calculate how much State Water**  
 12 **Project is in the deliveries.**  
 13 Q. I see you have highlighted certain months here.  
 14 Why are those highlighted?  
 15 **A. Those are highlighted because those are months**  
 16 **where the amount of Colorado River water that was**  
 17 **delivered in total to San Diego Water Authority for**  
 18 **those months was less than the exchange volume.**  
 19 Q. How many months of the 48 at issue in this case  
 20 did that occur?  
 21 **A. Nineteen.**  
 22 Q. That is nearly roughly half or a little less  
 23 than half the months in question?  
 24 **A. Yes.**  
 25 MR. QUINN: We offer DTX 1156.

1686

1 THE COURT: 1157.  
 2 MR. QUINN: 1157.  
 3 THE COURT: Any objection?  
 4 MR. BRAUNIG: No objection.  
 5 THE COURT: DTX 1157 is admitted.  
 6 (DTX 1157 was received into evidence.)  
 7 THE COURT: Take a 15-minute recess. I will  
 8 see you at 3:00.  
 9 (Recess.)  
 10 THE COURT: Let's continue, please.  
 11 MR. QUINN: Thank you, your Honor.  
 12 Q. Mr. Yamasaki, is it possible to get the  
 13 exchange water that Met is obligated to provide to San  
 14 Diego without going through the Skinner reservoir and  
 15 the related Skinner facility known as the Skinner area,  
 16 is it possible to do that?  
 17 A. **No, it is not.**  
 18 MR. QUINN: Nothing further.  
 19 THE COURT: Cross-examination.  
 20  
 21 CROSS-EXAMINATION  
 22 BY MR. BRAUNIG:  
 23 Q. We will have binders coming to you in just a  
 24 second but in the interest of time I will get started.  
 25 Mr. Yamasaki, I'm Warren Braunig from the San

1687

1 Diego County Water Authority counsel.  
 2 You are familiar with Section 136 of the Met  
 3 act, are you not?  
 4 A. **I am, yes.**  
 5 Q. Section 136 requires Met, when it sells Met  
 6 water, to provide a 50 percent blend of State Water  
 7 Project water to the extent practicable; right?  
 8 A. **I believe that's what it says.**  
 9 Q. That obligation doesn't apply to water conveyed  
 10 as part of the exchange agreement, does it?  
 11 A. **I've never applied it in that way so I don't --**  
 12 **I've never thought of it in that way.**  
 13 Q. You testified that you're familiar with the  
 14 exchange agreement; right?  
 15 A. **Yes.**  
 16 Q. You have read the exchange agreement?  
 17 A. **Yes.**  
 18 Q. And you're aware that Met has no obligation  
 19 under the exchange agreement to blend the IID and canal  
 20 lining water with State Water Project water; right?  
 21 A. **I don't believe there's a commitment, no.**  
 22 Q. The exchange agreement only requires Met to  
 23 deliver a water of equal quality to the water that San  
 24 Diego provides at Lake Havasu; right?  
 25 A. **I believe so, yes.**

1688

1 Q. When we talk about the water that San Diego  
 2 provides at Lake Havasu, we are talking about water  
 3 that's conserved by IID and through the lining of two  
 4 canals in the Imperial Valley?  
 5 A. **Yes.**  
 6 Q. Lake Havasu is the sort of far out end point of  
 7 the Colorado River Aqueduct; right? That's the entry  
 8 point to the Colorado River Aqueduct?  
 9 A. **Yes, it is.**  
 10 Q. That IID and canal lining water that San Diego  
 11 has acquired, that passes through the Colorado River  
 12 Aqueduct?  
 13 A. **Yes.**  
 14 Q. It doesn't ever touch the State Water Project,  
 15 does it?  
 16 A. **No, it doesn't.**  
 17 Q. In fact, it would be physically impossible for  
 18 that water to go through the State Water Project from  
 19 Lake Havasu to the Met service area?  
 20 A. **It wouldn't be impossible, no.**  
 21 Q. The Colorado River Aqueduct flows from Lake  
 22 Havasu to Met service area; correct?  
 23 A. **Yes.**  
 24 Q. And that's where the IID and canal lining water  
 25 that San Diego acquires, that's where it travels is

1689

1 through the Colorado River Aqueduct?  
 2 A. **Yes.**  
 3 Q. The exchange agreement also gives Met sole  
 4 discretion to decide which facilities and delivery path  
 5 it wants to use in delivering exchange water; correct?  
 6 A. **Could you repeat that?**  
 7 Q. The exchange agreement gives Met sole  
 8 discretion to decide how it is going to deliver exchange  
 9 water to San Diego; right?  
 10 A. **I believe it does.**  
 11 Q. And Met, therefore, is able to decide in  
 12 delivering exchange water what the blend of State Water  
 13 Project versus Colorado River Aqueduct water San Diego  
 14 will get?  
 15 A. **Yes.**  
 16 Q. San Diego has no control over that, over what  
 17 that blend is going to be?  
 18 A. **San Diego through its demands, depending on if**  
 19 **they increase their demands, could.**  
 20 Q. You testified in Phase I, did you not, Phase I  
 21 of this trial, that San Diego doesn't have any ability  
 22 to dictate what blend of water it receives in terms of  
 23 its IID and canal lining water; that was your testimony;  
 24 right?  
 25 A. **I believe it was.**

1690

1 Q. That is true, that testimony was truthful?  
 2 A. Yes.  
 3 Q. And that's -- that gives Met operational  
 4 flexibility, right, the fact -- the ability to blend  
 5 these different sources of water gives Met operational  
 6 flexibility; right?  
 7 A. Yes.  
 8 Q. And you testified a little bit ago as to what  
 9 some of those operational flexibilities are?  
 10 A. Yes, I did.  
 11 Q. And that's a benefit to Met, to be able to  
 12 blend these different waters to satisfy Met's  
 13 operational needs; right?  
 14 A. I would say it's a benefit to Metropolitan and  
 15 the member agencies we serve.  
 16 Q. You testified about the use of the State Water  
 17 Project -- using State Water Project water when there  
 18 are shutdowns on the Colorado River Aqueduct; right?  
 19 A. Yes.  
 20 Q. Metropolitan could always deliver more Colorado  
 21 River water in the month before a shutdown and more  
 22 Colorado River Aqueduct water after a month of a  
 23 shutdown, couldn't it?  
 24 A. We could, yes.  
 25 Q. And that's something the exchange agreement

1691

1 would allow; right? If Metropolitan wanted to deliver  
 2 the IID and canal lining water to San Diego and wanted  
 3 to do that, and there was a shutdown on the Colorado  
 4 River Aqueduct, you could deliver more water the month  
 5 before or deliver more water the month after and that  
 6 would still be consistent, you would still satisfy Met's  
 7 obligations under the exchange agreement, wouldn't you?  
 8 A. I don't think we've done it that way.  
 9 Q. But you could?  
 10 A. Physically?  
 11 Q. Yes, physically.  
 12 A. I suppose we could.  
 13 Q. In fact, as a matter of fact, the amount of  
 14 water that Met delivers through the Colorado River  
 15 Aqueduct or conveys through the Colorado River Aqueduct  
 16 fluctuates pretty significantly from one month to the  
 17 next; right?  
 18 A. It can, yes.  
 19 Q. Let's look at DTX 1105 which you reviewed with  
 20 your counsel. Can we put that up, please?  
 21 It was your testimony that Metropolitan has to  
 22 blend State Water Project water with Colorado River  
 23 water in its system, correct, at the Skinner plant?  
 24 A. In the vicinity of the Skinner plant.  
 25 Q. But there have been periods of time where in

1692

1 fact Metropolitan -- the blend of water at Skinner is  
 2 entirely Colorado River water; right?  
 3 A. During periods where there's a lack of State  
 4 Water Project water, yes.  
 5 Q. Right. In other words, you are able to deliver  
 6 purely Colorado River water to San Diego?  
 7 A. Periodically, yes.  
 8 Q. As a matter of course, you do do it  
 9 periodically; right?  
 10 A. Yes, we have.  
 11 Q. You could do it more frequently, couldn't you?  
 12 A. It depends on a lot of factors.  
 13 Q. Operational factors?  
 14 A. Yes.  
 15 Q. But physically, you could deliver 100 percent  
 16 Colorado River water, as you have done, to San Diego;  
 17 correct?  
 18 A. In periods where there's no need to move other  
 19 supplies, perhaps.  
 20 Q. Physically? I am asking physically.  
 21 A. Physically.  
 22 Q. The physical capabilities, Met can deliver to  
 23 San Diego 100 percent Colorado River water; correct?  
 24 A. Correct.  
 25 Q. Let's look at DTX 1157, which is one of your

1693

1 charts. You gave some testimony about this. Do you  
 2 recall that?  
 3 A. Yes.  
 4 Q. You testified there were months in which the  
 5 CRA -- the volume of CRA untreated deliveries, as you  
 6 calculated them, is less than the total exchange volume;  
 7 right?  
 8 A. Yes.  
 9 Q. You identified and highlighted in yellow these  
 10 19 months?  
 11 A. Correct.  
 12 Q. Let's look at January 2011. Can we blow that  
 13 up, please.  
 14 Let's back up just a step. The capacity of the  
 15 Colorado River Aqueduct is about 100,000 acre-feet a  
 16 month; correct?  
 17 A. Yes.  
 18 Q. As a matter of course, Met regularly delivers  
 19 through the Colorado River Aqueduct to Met -- I should  
 20 say conveys through the Colorado River Aqueduct about  
 21 60,000 to 90,000 acre-feet of Colorado River water;  
 22 right?  
 23 A. I think it varies more widely than that.  
 24 Q. In most months it's above 50,000 acre-feet?  
 25 A. Yes, in most months.

1694

1 Q. And the Bureau of Reclamation tracks, does it  
 2 not, the amount of water that's conveyed through the --  
 3 that's basically diverted into the Colorado River  
 4 Aqueduct for Met on a monthly basis? That's something  
 5 that the Bureau of Reclamation keeps track of?  
 6 **A. Yes.**  
 7 Q. And you should have in the binder that's in  
 8 front of you, it's PTX 322 which is in evidence. I  
 9 would ask you to turn to page 13, please. And it will  
 10 also be on your screen, Mr. Yamasaki.  
 11 Do you recognize PTX as a report generated by  
 12 the Bureau of Reclamation on an annual basis?  
 13 **A. Yes, I do.**  
 14 Q. Could we please blow up on page 13 the  
 15 Metropolitan Water District just through June. These  
 16 figures on Exhibit 322, this is the amount of water  
 17 actually diverted into the Colorado River aqueduct for  
 18 Met's use in January of 2011; right?  
 19 **A. Yes.**  
 20 Q. That amount is 51,748, do you see that?  
 21 **A. Yes.**  
 22 Q. Quite a bit more than the total volume of  
 23 exchange water, correct, that Met was required to  
 24 provide to San Diego in that month?  
 25 **A. Yes.**

1695

1 Q. And likewise, if you look at February,  
 2 22,000 -- the total amount of water that was diverted  
 3 into the Colorado River Aqueduct was 22,444; correct?  
 4 **A. Correct.**  
 5 Q. And that's more than the amount of exchange  
 6 water Met was obligated to provide?  
 7 **A. Yes.**  
 8 Q. The same is true in March and April and May;  
 9 correct?  
 10 **A. Correct.**  
 11 Q. So now let's bring back up DTX 1157.  
 12 In those months you highlighted January through  
 13 of May, in each of those months Met actually conveyed  
 14 through the Colorado River Aqueduct a volume that is  
 15 greater than the total exchange volume?  
 16 **A. Yes.**  
 17 Q. And it's Met that decides which of its  
 18 facilities are going to receive Colorado River Aqueduct  
 19 water; correct?  
 20 **A. Yes.**  
 21 Q. Met can deliver more Colorado River water to  
 22 San Diego and less to other parts of its system if it so  
 23 chooses?  
 24 **A. Yes.**  
 25 Q. It could increase the blend of Colorado River

1696

1 water at Skinner and decrease it somewhere else?  
 2 **A. Yes.**  
 3 Q. That is something Met can do; right?  
 4 **A. Yes.**  
 5 Q. In fact, Metropolitan has a way to deliver  
 6 untreated Colorado River water directly to San Diego  
 7 without going through the Skinner plant, doesn't it?  
 8 **A. We do, yes.**  
 9 Q. That's the Skinner bypass?  
 10 **A. Correct.**  
 11 Q. And through the Skinner bypass you could take  
 12 13,142 acre-feet of Colorado River water, untreated, and  
 13 deliver it straight into the San Diego pipeline going to  
 14 the San Diego Water Authority; correct?  
 15 **A. Not if we're delivering State Water Project**  
 16 **water also to that area, to San Diego and other**  
 17 **customers.**  
 18 Q. Physically, you can do that? Physically, you  
 19 can deliver pure -- you could deliver, physically,  
 20 13,142 acre-feet of water per month to San Diego via the  
 21 Skinner bypass?  
 22 **A. Yes.**  
 23 Q. And the reason that you don't is for  
 24 Metropolitan's operational considerations?  
 25 **A. And many other considerations.**

1697

1 Q. We looked at PTX 322, which is the Bureau of  
 2 Reclamation chart or the schedule for 2011. If we were  
 3 to look at 2012 and 2013 and 2014, we would see the same  
 4 information? In other words, we would see that the  
 5 amount of water that Metropolitan conveys through the  
 6 Colorado River Aqueduct is greater than the amount of  
 7 total exchange volume that is listed in your DTX 1157,  
 8 wouldn't we?  
 9 **A. I'd have to take a look at the information**  
 10 **myself.**  
 11 Q. Let's look at PTX 323. That should be in front  
 12 of you. That's the 2012 -- that's the 2012 Bureau of  
 13 Reclamation schedule. Do you recognize this?  
 14 **A. Yes.**  
 15 Q. This is in evidence.  
 16 Can we go, please, to page 13, again.  
 17 Looking at PTX 323, the amount of water that  
 18 Metropolitan is conveying through the Colorado River  
 19 Aqueduct is quite a bit greater than the total exchange  
 20 water; right?  
 21 **A. Yes.**  
 22 Q. And the only reason that Metropolitan doesn't  
 23 deliver the exchange volume of 100 percent untreated  
 24 Colorado River water directly to San Diego through the  
 25 Skinner bypass is because of the operational

1698

1 considerations that Met has?  
 2 **A. Once again, I would say operational and other**  
 3 **considerations.**  
 4 Q. Those are Met's considerations?  
 5 **A. Yes.**  
 6 Q. Met makes that decision?  
 7 **A. Correct.**  
 8 Q. Physically, Metropolitan could deliver all of  
 9 that water untreated, 100 percent Colorado River water  
 10 to San Diego?  
 11 **A. Yes.**  
 12 Q. In the volume specified in the exchange  
 13 agreement?  
 14 **A. Under the circumstances shown, yes.**  
 15 Q. When you say in DTX 1157 that the State Water  
 16 Project is necessary to deliver exchange water in those  
 17 19 months, that's only because Metropolitan has chosen  
 18 to do it that way for operational reasons; right?  
 19 **A. For operational reasons, water supply and**  
 20 **consideration of our other member agencies, yes.**  
 21 Q. One other thing about this chart. This is not  
 22 all of the Colorado River Aqueduct water that San Diego  
 23 gets each month; this is just the untreated deliveries?  
 24 **A. That's correct.**  
 25 Q. In fact, as a point of fact, San Diego also

1699

1 receives treated Colorado River Aqueduct water?  
 2 **A. Yes.**  
 3 Q. If you were to include in this chart both  
 4 treated and untreated deliveries to San Diego, the top  
 5 two rows in each year would increase sometimes by 5-  
 6 10,000 acre-feet, wouldn't they?  
 7 **A. I can't confirm whether they would increase by**  
 8 **that much but they would increase.**  
 9 Q. During the Phase I of the trial you testified  
 10 Met has never attempted to determine how its costs  
 11 fluctuate depending on what blend of water it delivers  
 12 to its member agencies. Do you recall that?  
 13 **A. I'm sorry. Could you repeat that?**  
 14 Q. Yeah. During the first phase of the trial,  
 15 isn't it correct you testified that Met has never  
 16 attempted to determine how its costs fluctuate depending  
 17 on what blend of water it delivers to its member  
 18 agencies?  
 19 **A. I don't recall that.**  
 20 Q. You don't recall that. Let's look at your  
 21 trial testimony which is Tab 1 in the binder. Page 542,  
 22 line 18 through 543, five.  
 23 Do you see the question?  
 24 "Q Has Met ever done any  
 25 study as to how its costs

1700

1 fluctuate depending on what  
 2 blend of water it's delivering  
 3 to member agencies?"  
 4 And there's an objection that is overruled.  
 5 "A I don't know of any.  
 6 "Q You are not aware of any  
 7 hard data on that issue?  
 8 "A Not that I know of."  
 9 That was truthful and accurate testimony?  
 10 **A. Yes.**  
 11 Q. Is the same true today, that as you sit here  
 12 today, you are not aware of any effort by Metropolitan  
 13 to determine how its costs fluctuate, how Metropolitan's  
 14 costs change depending on what blend of water it  
 15 provides to its member agencies?  
 16 **A. I am not aware of any.**  
 17 MR. BRAUNIG: Nothing further.  
 18 THE COURT: Any redirect?  
 19  
 20 REDIRECT EXAMINATION  
 21 BY MR. QUINN:  
 22 Q. You were asked some questions about whether it  
 23 would be physically possible to deliver pure Colorado  
 24 River water through something called the Skinner bypass.  
 25 Do you recall those questions?

1701

1 **A. Yes.**  
 2 Q. And you said it would be physically possible?  
 3 **A. That's correct.**  
 4 Q. And then you were asked, does Met choose not to  
 5 do that purely for operational reasons, and you said  
 6 operational and other reasons?  
 7 **A. Correct.**  
 8 Q. Can you please explain to the Court what the  
 9 reasons are why Colorado River water is delivered  
 10 through something called the Skinner bypass?  
 11 **A. Primarily for water supply reasons. As I**  
 12 **mentioned before, we move Colorado River water as well**  
 13 **as State Water Project supplies, and also it is**  
 14 **theoretically possible, maybe with the exception of 2013**  
 15 **and 2014, which were some of the driest and hottest**  
 16 **years of record where State Water Project supplies were**  
 17 **very short, we always have a need to move both supplies.**  
 18 **So we would then have to blend the water upstream of the**  
 19 **Skinner facility and we are compelled to do that because**  
 20 **in certain years to not do that we would not be able to**  
 21 **maximize the use or movement or storage of the water**  
 22 **supplies that are available when they are available.**  
 23 Q. When you say that last part of your answer, we  
 24 wouldn't be able to maximize the water supplies when  
 25 they are available, are you referring to the

1702

1 availability of State Water Project water that you told  
 2 us in direct exam?  
 3 **A. That's correct. Yes.**  
 4 Q. If that is not used --  
 5 **A. We have the potential to lose that water**  
 6 **supply.**  
 7 Q. Is it simply a matter of Met's discretion as to  
 8 whether or not to blend State Water Project water and  
 9 Colorado River water?  
 10 **A. I suppose theoretically it is.**  
 11 Q. Real world?  
 12 **A. The real world, yes. The State has standards**  
 13 **that talk about salinity standards for water deliveries**  
 14 **by water utilities.**  
 15 Q. The Skinner facility, the blending takes place  
 16 at what point?  
 17 **A. Upstream of the Skinner facility. We have a**  
 18 **canal that leads to the Skinner facility. It's called**  
 19 **the San Diego Canal. At the beginning of that canal is**  
 20 **the intersection of the State Water Project with the**  
 21 **Colorado River Aqueduct water. The blending takes place**  
 22 **far ahead of Lake Skinner and the Skinner facilities.**  
 23 **Think of it as a bucket. The two supplies go into that**  
 24 **bucket and get mixed together and there's not a way to**  
 25 **unmix them. The only way and time they aren't mixed is**

1703

1 **if there's something extraordinary like a lack of State**  
 2 **Water Project water supplies.**  
 3 Q. And that's what you talked about earlier?  
 4 **A. That's correct.**  
 5 Q. Has there ever been a time when water, pure  
 6 Colorado River water, has been routed to San Diego  
 7 through the Skinner bypass and that was the only water  
 8 that San Diego received as part of the exchange  
 9 agreement?  
 10 **A. You know, we do have a Skinner bypass. We use**  
 11 **it periodically. That is not the primary method of**  
 12 **making deliveries to San Diego. We use it a few times a**  
 13 **year but not frequently. The majority of the water is**  
 14 **delivered through Lake Skinner.**  
 15 Q. Is there a reason why you only use that a few  
 16 times a year?  
 17 **A. Mainly water quality purposes and it is not**  
 18 **part of our normal operations. We usually like to route**  
 19 **the water through the Lake Skinner facility.**  
 20 Q. You said you had some operational flexibility  
 21 to determine the blend. Do you recall that question?  
 22 **A. Yes, I do.**  
 23 Q. Are there limitations on the operational  
 24 flexibility that you have to determine the blend?  
 25 **A. Yes, there are.**

1704

1 Q. What are those limitations on your flexibility  
 2 to determine the blend?  
 3 **A. The first is system capacity during periods**  
 4 **where flows are high. Certain pipelines or canals can**  
 5 **only carry so much water from either supply. The other**  
 6 **is water supply related.**  
 7 **At times where, like I said, we have State**  
 8 **Water Project supplies to deliver, we are compelled to**  
 9 **deliver them to all of our member agencies where we can.**  
 10 **And in a very wet year we have -- I would say**  
 11 **we have to do so or else we risk losing a water supply**  
 12 **that's available for a calendar year that's wet.**  
 13 Q. Other than the times when there hasn't been  
 14 State Water Project water available, have there ever  
 15 been times when San Diego has received only Colorado  
 16 River water in the exchange agreement?  
 17 **A. None that I can think of specifically.**  
 18 Q. Have there ever been any complaints that you're  
 19 aware of from San Diego that we're not receiving pure  
 20 Colorado River water; what we're receiving is a blend?  
 21 **A. No.**  
 22 Q. As a practical matter, when there is State  
 23 Water Project water available, is it practically -- the  
 24 questions were asked about in theory, physically is it  
 25 possible. In the real world, is it practical, when

1705

1 there is State Water Project water available, to deliver  
 2 unblended Colorado River water to San Diego?  
 3 **A. No, it's not.**  
 4 MR. QUINN: Thank you.  
 5 MR. BRAUNIG: Hold on one second.  
 6  
 7 **RE-CROSS-EXAMINATION**  
 8 **BY MR. BRAUNIG:**  
 9 Q. If you delivered -- if you delivered 13,000  
 10 acre-feet of exchange water directly to San Diego  
 11 through the Skinner bypass, you could still blend  
 12 Colorado River water and State Water Project water when  
 13 delivering Met water through the Skinner facilities,  
 14 couldn't you?  
 15 **A. No.**  
 16 MR. QUINN: Objection. I didn't understand the  
 17 question.  
 18 THE COURT: I do. I think the witness does.  
 19 Did you understand the question?  
 20 THE WITNESS: I think I did.  
 21 THE COURT: Okay. We'll go with that.  
 22 Q. BY MR. BRAUNIG: And the -- you could -- you  
 23 could theoretically do both; right? You could  
 24 theoretically send some water untreated through the  
 25 Skinner bypass and blend water elsewhere in the system

1706



1 in Lake Skinner, for example; right?  
 2 **A. No.**  
 3 Q. Lake Skinner is a blend, isn't it?  
 4 **A. Yes.**  
 5 Q. And the San Diego Canal can take water, as you  
 6 testified, can take water in the Colorado River and  
 7 deliver that straight to San Diego; right?  
 8 **A. Theoretically you could. But --**  
 9 THE COURT: Could you do both at the same time  
 10 in effect, the same over the period of a couple of days,  
 11 do some bypass and send some into the Lake Skinner area?  
 12 THE WITNESS: No, it's not possible. The San  
 13 Diego Canal conveyance I spoke of where we mix the two  
 14 waters together, you can't unmix them. And the Skinner  
 15 bypass is simply a bypass that takes water from the San  
 16 Diego Canal, that is already mixed together, and goes  
 17 around Lake Skinner. So if Lake Skinner is a blend, you  
 18 would have to make this whole San Diego Canal Colorado  
 19 River water only and bypass that around.  
 20 Q. BY MR. BRAUNIG: You could do that? You could  
 21 do that, couldn't you? If you wanted to, if the  
 22 directive from the Met gods on high, your bosses, was  
 23 that you had to do that, you could do that, couldn't  
 24 you?  
 25 **A. I would have to say that it would be -- there**

1707

1 **are physical limitations in the San Diego Canal that**  
 2 **impair our ability to change the flows that frequently.**  
 3 Q. But you could. You could do it for some period  
 4 during the year and provide that bypass; right?  
 5 **A. I suppose to the detriment of possibly damaging**  
 6 **facilities or not being able to move other water**  
 7 **supplies.**  
 8 Q. You haven't documented what the damages to  
 9 other facilities or other water supplies would take  
 10 place if you did -- if you provided the IID and canal  
 11 lining water straight to San Diego; right?  
 12 **A. I haven't been asked. I haven't documented but**  
 13 **I haven't been asked.**  
 14 MR. BRAUNIG: Nothing further.  
 15 MR. QUINN: Nothing further.  
 16 THE COURT: Thank you very much. You are  
 17 excused.  
 18  
 19 JON LAMBECK,  
 20 called as a witness by the Defendants, was sworn and  
 21 testified as follows:  
 22  
 23 THE WITNESS: I do.  
 24 THE CLERK: Please be seated. Please state and  
 25 spell your full name for the record.

1708

1 THE WITNESS: Jon Lambeck. J-O-N,  
 2 L-A-M-B-E-C-K.  
 3  
 4 DIRECT EXAMINATION  
 5 BY MS. BORDEN:  
 6 Q. Who do you work for?  
 7 **A. The Metropolitan Water District of Southern**  
 8 **California.**  
 9 Q. What is your position at Metropolitan?  
 10 **A. I'm the manager of power operations and**  
 11 **planning.**  
 12 Q. How long have you worked at Met?  
 13 **A. A little over 16 years.**  
 14 Q. What are your job responsibilities?  
 15 **A. I'm responsible for acquiring and managing the**  
 16 **power requirements for the Colorado River Aqueduct. I**  
 17 **also work with the Department of Water Resources, with**  
 18 **the energy requirements on the State Water Project.**  
 19 Q. What is your educational background?  
 20 **A. I have a bachelor's of science in electrical**  
 21 **engineering from Michigan State University and a master**  
 22 **of science in electrical engineering from the University**  
 23 **of Southern California.**  
 24 Q. Do you have any professional license?  
 25 **A. I am a registered professional engineer in the**

1709

1 **state of California for electrical engineering.**  
 2 Q. Have you submitted a declaration in this case?  
 3 **A. Yes, I have.**  
 4 Q. Please turn to DTX 1151 in the binder. Is this  
 5 the declaration you referred to?  
 6 **A. Yes, it is.**  
 7 Q. Have you recently reviewed the declaration?  
 8 **A. Yes.**  
 9 Q. Does it remain accurate?  
 10 **A. Yes.**  
 11 MS. BORDEN: Met offers DTX 1151.  
 12 THE COURT: 1151 is admitted.  
 13 (Exhibit DTX 1151 was received into evidence.)  
 14 Q. BY MS. BORDEN: As part of your job, are you  
 15 responsible for purchasing power?  
 16 **A. Yes, I am.**  
 17 Q. Have you ever sold excess Met power?  
 18 **A. Yes, I have.**  
 19 Q. What rate did Met sell the power at?  
 20 **A. At the market power rate.**  
 21 Q. Please turn to DTX 1121 in the binder in front  
 22 of you.  
 23 MR. GOLDBERG: We object to this exhibit on  
 24 relevance grounds.  
 25 THE COURT: Let's have a question first and see

1710

1 how it comes out.  
 2 Q: BY MS. BORDEN: Do you recognize DTX 1121?  
 3 A. Yes.  
 4 Q. What is it?  
 5 A. **A page out of a publication called Energy**  
 6 **Trader from Platts.**  
 7 Q. What are Platts energy trader reports?  
 8 A. **It is a report that describes the energy**  
 9 **industry and different activities coming on as well as**  
 10 **different pricing at points within the country.**  
 11 Q. Does DTX 1121 contain the entire daily report?  
 12 A. **No, it does not.**  
 13 Q. Why not? What does it contain?  
 14 A. **It's a copy of one page that contains the**  
 15 **market prices for different locations in the western**  
 16 **United States.**  
 17 MR. GOLDBERG: Objection, your Honor. That's  
 18 hearsay.  
 19 THE COURT: Overruled.  
 20 Q. BY MS. BORDEN: How does Met obtain the Platts  
 21 market reports?  
 22 A. **We subscribe to it.**  
 23 Q. Do you look at these reports in the course of  
 24 your normal responsibilities?  
 25 A. **Yes.**

1711

1 coming in to be a series of accurate statements as to  
 2 what the price was for the market generally?  
 3 MS. BORDEN: It's coming in for the SB15 path  
 4 rate on monthly average.  
 5 MR. GOLDBERG: Your Honor, we have no basis and  
 6 I don't believe the witness even has a basis to know  
 7 whether this is true and accurate information that  
 8 reflects the actual market price at any given point in  
 9 time or that Met even used it.  
 10 THE COURT: This we can find out. Your  
 11 position is that this -- let me ask the witness some  
 12 questions. This will help.  
 13 What do you use this document for?  
 14 THE WITNESS: This document provides a basis  
 15 for the acquisition or the sale for Met's power  
 16 transactions. It gives us an idea of where the market  
 17 is.  
 18 THE COURT: Do you use it to set your prices?  
 19 THE WITNESS: We use it as a basis when we're  
 20 negotiating with -- with the buyers if we're selling, as  
 21 to what would be a reasonable number to sell the power  
 22 as a basis for --  
 23 THE COURT: Is it fair to say it is one of the  
 24 different -- one of a variety of inputs you use to  
 25 negotiate a price?

1713

1 Q. For what purpose do you use these reports?  
 2 A. **To track the market price of energy.**  
 3 Q. Do you use the reports regularly in the course  
 4 of business?  
 5 A. **Yes.**  
 6 Q. Do you rely on the reports as accurate?  
 7 A. **Yes.**  
 8 MS. BORDEN: Met offers DTX 1121.  
 9 MR. GOLDBERG: We object on hearsay grounds.  
 10 It is not a Met business record and, if not, the witness  
 11 has any percipient fact knowledge of the data on spot  
 12 market rates for power based on an energy trade  
 13 publication which Met does not publish.  
 14 THE COURT: Why should this be admitted?  
 15 MS. BORDEN: Evidence Code section 1340 for  
 16 commercial publications.  
 17 THE COURT: Does San Diego counsel have a copy  
 18 of that?  
 19 MR. GOLDBERG: I have a summary of it.  
 20 THE COURT: Not made inadmissible by the  
 21 hearsay rule if the compilation is generally used and  
 22 relied upon as accurate in the course of a business as  
 23 defined in 1270.  
 24 Is this coming in for more than just the  
 25 evidence of what Met priced its power at or is this

1712

1 THE WITNESS: Yes.  
 2 MR. GOLDBERG: Your Honor, he is talking about  
 3 selling power, not buying power. It is a fundamental  
 4 difference.  
 5 THE WITNESS: It is used for both.  
 6 THE COURT: It is used for both?  
 7 THE WITNESS: Yes. We're buying, as well.  
 8 THE COURT: I will admit it for the purposes of  
 9 showing what Met, as one of the inputs that Met uses in  
 10 deciding what to buy or sell power for. That's what it  
 11 is. I will admit it for that limited purpose. The  
 12 objection is overruled to that extent. 1121 is  
 13 admitted.  
 14 (Exhibit DTX 1121 was admitted into evidence.)  
 15 Q. BY MS. BORDEN: In your declaration you refer  
 16 to the regional index applicable to energy sold for use  
 17 in the Colorado River Aqueduct. Is that reflected in  
 18 DTX 1121?  
 19 A. **Yes, it is.**  
 20 Q. Where is that reflected?  
 21 A. **It's in the line for SP15.**  
 22 Q. Which rate would apply here?  
 23 MR. GOLDBERG: Vague, your Honor.  
 24 THE COURT: Are we talking about the first page  
 25 of DTX 1121?

1714

1 MS. BORDEN: Correct.  
 2 THE COURT: There are many pages. Are you  
 3 referring me to the table on the right-hand side where  
 4 it says SP15, index 38, change four?  
 5 THE WITNESS: Yes.  
 6 THE COURT: The vague objection is overruled.  
 7 Q. BY MS. BORDEN: Which rate would apply here?  
 8 **A. The SP15 on-peak price.**  
 9 Q. If you were selling excess Met power in  
 10 Southern California, what rate would apply?  
 11 **A. The SP15.**  
 12 Q. Which rate, on-peak or off-peak?  
 13 **A. The on-peak.**  
 14 Q. If Met needed to purchase power for a third  
 15 party to move non-Met water, what price would be  
 16 applicable?  
 17 **A. For purchasing power we would look for the**  
 18 **off-peak.**  
 19 Q. What time period is offered by the on-peak  
 20 rate?  
 21 **A. On-peak prices are from 6:00 a.m. to 10:00 p.m.**  
 22 **Monday through Saturday. That's a standard on-peak**  
 23 **period.**  
 24 Q. How much was the monthly on-peak price as of  
 25 January 31st, 2011?

1715

1 stated before as hearsay. And now the witness testified  
 2 that the on-peak price is irrelevant for buying power.  
 3 It is not what they use, so we don't see how this is  
 4 relevant.  
 5 THE COURT: This is coming in to show solely by  
 6 virtue of looking at the SP15 line in each case what Met  
 7 sells excess power at and it uses on-peak time as  
 8 reflected here and shows what Met buys power at and it  
 9 uses the off-peak number reflected here? Is that what  
 10 these are coming in for?  
 11 MS. BORDEN: Mr. Lambeck had previously  
 12 testified that the on-peak rate was also used in  
 13 purchasing power. I can elicit further testimony.  
 14 MR. GOLDBERG: That's not what he testified to.  
 15 THE COURT: Can you state that again?  
 16 MS. BORDEN: He testified previously in his  
 17 examination that Met sometimes purchases power at the  
 18 on-peak rate.  
 19 MR. GOLDBERG: He didn't. He testified they  
 20 buy the off-peak --  
 21 THE COURT: Does Met sometimes buy power at the  
 22 on-peak rate?  
 23 THE WITNESS: Sometimes. Very infrequently.  
 24 THE COURT: I will ask the question. Are these  
 25 numbers here where it says SP15 by and large for each of

1717

1 **A. Price was \$37.13.**  
 2 Q. Please turn to DTX 1123.  
 3 MR. GOLDBERG: Can we have a standing objection  
 4 to these on the same grounds?  
 5 THE COURT: I can't do standing objections but  
 6 you can be brief and I'll be brief.  
 7 MR. GOLDBERG: Objection on the grounds of  
 8 hearsay for the reasons stated previously.  
 9 THE COURT: We haven't done anything yet other  
 10 than to turn to the document. It is overruled. 1123.  
 11 Q. BY MS. BORDEN: Do you recognize DTX 1123?  
 12 **A. Yes, I do.**  
 13 Q. What is it?  
 14 **A. These are the same type of pricing information**  
 15 **sheets from the Platt's energy trader publication with**  
 16 **information for each month of the year. This is**  
 17 **calendar year 2012.**  
 18 Q. Please turn to DTX 1125. Do you recognize DTX  
 19 1125?  
 20 **A. Yes, I do.**  
 21 Q. What is it?  
 22 **A. It's the same pricing information on a monthly**  
 23 **basis for calendar year 2013.**  
 24 MS. BORDEN: Met offers DTX 1123 and DTX 1125.  
 25 MR. GOLDBERG: Objection on the same grounds

1716

1 these years, is it your testimony that if we look at the  
 2 on-peak rate, that will tell us what Met sold its excess  
 3 power at; yes?  
 4 THE WITNESS: Those -- yes -- well, we use this  
 5 information to help us determine what would be a market  
 6 price for the power when we go out to sell.  
 7 THE COURT: If the number here is 38, that may  
 8 or may not be actually what the final negotiations were  
 9 when you engaged in negotiations to sell power at in  
 10 January of 2011?  
 11 THE WITNESS: That's correct. Because we're  
 12 not selling every day.  
 13 THE COURT: Right.  
 14 THE WITNESS: It's only when we have the excess  
 15 power that we would be.  
 16 THE COURT: This again is one of the inputs  
 17 into these negotiations?  
 18 THE WITNESS: Yes.  
 19 THE COURT: I'll admit these documents for that  
 20 limited purpose. I am not sure how useful they are and  
 21 I don't know what you will do with them. This is one of  
 22 the inputs that's used to generate the ultimate  
 23 negotiated rates when Met buys or sells power to the  
 24 extent the objection is overruled.  
 25 MR. GOLDBERG: We just have to object because

1718

1 he says they very infrequently use the on-peak when they  
 2 buy.  
 3 THE COURT: Yes. I have that in mind.  
 4 MR. GOLDBERG: Thank you.  
 5 THE COURT: I have that in mind. Thank you.  
 6 Let's continue.  
 7 (DTX 1123 and 1125 were received in evidence.)  
 8 Q. BY MS. BORDEN: Please turn to DTX 1127. Do  
 9 you recognize DTX 1127?  
 10 **A. Yes, I do.**  
 11 Q. What is it?  
 12 **A. DTX 1127 is the same information as discussed**  
 13 **previously for the months January through November of**  
 14 **the year 2014. And then it includes information that's**  
 15 **taken from the California Independent System Operator or**  
 16 **the CALISO to provide information for the month of**  
 17 **December and this was done because the Platts energy**  
 18 **trader stops publishing the SP15 information in December**  
 19 **of 2014.**  
 20 Q. What is the California Independent System  
 21 Operator?  
 22 **A. It is an entity that controls and operates most**  
 23 **of the electric system in the state of California.**  
 24 Q. How does Met obtain this information?  
 25 **A. It's from the website. Publicly available on**

1719

1 **their website.**  
 2 Q. Do you look at this data in the course of your  
 3 normal responsibilities?  
 4 **A. Yes.**  
 5 Q. For what purpose do you use this data?  
 6 **A. It's another source of information as to the**  
 7 **market price for energy.**  
 8 Q. Do you use this information regularly in the  
 9 course of business?  
 10 **A. Yes.**  
 11 Q. Do you rely on the data as accurate?  
 12 **A. Yes.**  
 13 MS. BORDEN: Met offers DTX 1127.  
 14 MR. GOLDBERG: Objection. It's hearsay and  
 15 totally irrelevant. It has absolutely nothing to do  
 16 with the actual cost they use for buying or selling  
 17 power. That's now quite clear. I think it has no  
 18 evidentiary value at all.  
 19 THE COURT: The objection is overruled on the  
 20 same basis. It represents one of the many inputs into  
 21 the calculation of the price. I will use it for that  
 22 purpose. I agree it may not end up being very useful.  
 23 (DTX 1127 was received into evidence.)  
 24 Q. BY MS. BORDEN: Please turn to DTX 1103.  
 25 Do you recognize DTX 1103?

1720

1 **A. Yes, I do.**  
 2 Q. What is it?  
 3 **A. It is a compilation of the monthly average**  
 4 **energy prices for SP15 on-peak for the four years from**  
 5 **2011 through 2014. It includes a scheduling fee that**  
 6 **would -- is based upon an estimate of Metropolitan's**  
 7 **costs for scheduling power and that includes -- and then**  
 8 **it's the addition of those two amounts and then the**  
 9 **final column is multiplication of that sum against the**  
 10 **value 2.349 to come up with a dollar amount per**  
 11 **acre-foot.**  
 12 Q. What is the source of the on-peak monthly  
 13 average?  
 14 **A. It's from the Platts reports.**  
 15 Q. How is the scheduling fee calculated?  
 16 **A. Metropolitan looked at the types of tasks that**  
 17 **we do in scheduling power, the amount of time that is**  
 18 **spent to do those various tasks. We looked at the**  
 19 **buying of a standard block amount of energy. And we**  
 20 **looked at the labor rate with additional burden costs**  
 21 **and the administrative and general costs for**  
 22 **Metropolitan employees, and on a per-megawatt basis, we**  
 23 **came up with the values that you see here.**  
 24 Q. What is the source of the administrative and  
 25 general costs that go into this fee?

1721

1 **A. These are fees that are determined with**  
 2 **Metropolitan annually in setting its rates and**  
 3 **determining the costs. With Metropolitan these are**  
 4 **costs that don't necessarily apply directly to**  
 5 **particular functions. So those costs are collected and**  
 6 **then assigned to specific functions including the power**  
 7 **costs for Metropolitan. And a portion of those costs**  
 8 **are allocated to the system power rate, which is then**  
 9 **allocated into the costs for scheduling power.**  
 10 Q. What is the basis for the 2.349 number in the  
 11 upper right column?  
 12 **A. That is made up of three components. The first**  
 13 **component is the amount of power that is consumed at the**  
 14 **pumps on the Colorado River Aqueduct. It is two**  
 15 **megawatt hours per acre-foot. That's how much energy**  
 16 **the pump requires to move the water through the**  
 17 **aqueduct.**  
 18 **The second component is based upon the impact**  
 19 **of moving additional water in our aqueduct. We have a**  
 20 **contract with Southern California Edison in which they**  
 21 **provide a certain amount of power to Metropolitan on an**  
 22 **annual basis. The amount of power we receive is**  
 23 **determined by the usage of the aqueduct. The more we**  
 24 **use the aqueduct, the less power we get from Edison.**  
 25 **And on a continuing basis of additional use of**

1722

1 **the aqueduct there is a reduction in energy from Edison**  
 2 **of .317.**  
 3 THE COURT: Edison?  
 4 THE WITNESS: Southern California Edison, like  
 5 a utility.  
 6 THE COURT: Got it.  
 7 THE WITNESS: .317 megawatt hours per  
 8 acre-foot.  
 9 The third component making up the total of  
 10 2.349 is the loss of energy by diverting water around or  
 11 away from the Parker Dam Power Plant. Parker Dam is a  
 12 dam on the Colorado River, and the water that flows  
 13 through that dam generates power. And Metropolitan, per  
 14 contractual rights, receives half of the power that is  
 15 produced from that power plant. And the power  
 16 production is .064 megawatt hours per acre-foot, total.  
 17 We get half of that, so it is .032 megawatt hours per  
 18 acre-foot that Metropolitan doesn't receive if water  
 19 that normally would have gone through the dam, through  
 20 the power plant, is diverted before it gets there and  
 21 pumped through our aqueduct.  
 22 So there are three components that make up that  
 23 total of 2.349.  
 24 MS. BORDEN: Met offers DTX 1103.  
 25 MR. GOLDBERG: We have so many objections to

1723

1 this document.  
 2 THE COURT: You should choose.  
 3 MR. GOLDBERG: Number one, we've never seen  
 4 this document before.  
 5 THE COURT: That doesn't count.  
 6 MR. GOLDBERG: They said they don't perform  
 7 these kinds of calculations when we ask for them. They  
 8 said they don't break out the cost of delivering.  
 9 THE COURT: I am not going to belabor this. I  
 10 will sustain your objection.  
 11 The reason I am sustaining it, in particular,  
 12 the description of what went into this is completely  
 13 incoherent. The bases that were described that generate  
 14 all these numbers, it is completely incoherent. I  
 15 couldn't even understand what goes into 2.349 or why it  
 16 is this witness has this information or what the bases  
 17 are.  
 18 I think it is irrelevant. This is not a  
 19 helpful document and the explanation of what it is  
 20 not coherent. The objection is sustained.  
 21 MS. BORDEN: The basis for the 2.349 number is  
 22 a portion of his declaration that San Diego had no  
 23 objection to.  
 24 THE COURT: Before he got to the 2.349, all of  
 25 the suggestions he made as to how to calculate or what

1724

1 these other numbers mean made absolutely no sense to me.  
 2 MR. QUINN: Maybe we need to do a better job of  
 3 explaining those numbers.  
 4 THE COURT: That's my ruling for now. Let's  
 5 continue with the questions.  
 6 Do you have any other questions of this  
 7 witness?  
 8 MS. BORDEN: I do.  
 9 THE COURT: Let's go with those.  
 10 Q. BY MS. BORDEN: Your declaration describes  
 11 power required to deliver State Water Project water.  
 12 Has Met calculated power charges necessary to pump water  
 13 through the California Aqueduct to Met's service  
 14 area?  
 15 **A. Yes.**  
 16 Q. Please turn to DTX 1096.  
 17 THE COURT: Excuse me. Off the record.  
 18 (Discussion held off the record.)  
 19 THE COURT: Back on the record.  
 20 We are looking at 1096, DTX.  
 21 MR. QUINN: Before we start a new area, this  
 22 would be a good time.  
 23 THE COURT: Fine with me. We will pick up  
 24 again tomorrow at ten o'clock.  
 25 Thanks very much.

1725

1 (Evening recess taken until April 28, 2015,  
 2 at 10:00 a.m.)  
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REPORTER'S CERTIFICATE

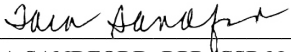
STATE OF CALIFORNIA,        )  
                                  ) ss  
COUNTY OF SANTA BARBARA.    )

I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand Reporter, in the County of Santa Barbara, State of California, hereby certify:

That the court proceedings were taken down by me in stenotype at the time and place herein named and thereafter reduced to typewriting by computer-aided transcription under my direction.

I further certify that I am not interested in the event of the action.

WITNESS my hand this 28th day of April, 2015, at Santa Barbara, California.

  
\_\_\_\_\_  
TARA SANDFORD, RPR, CSR No. 3374  
Certified Shorthand Reporter  
State of California

1727

<p><b>A</b></p> <p><b>\$10,000</b> 1602:7</p> <p><b>\$158</b> 1642:23 1643:12</p> <p><b>\$180</b> 1645:11</p> <p><b>\$253</b> 1566:7 1582:20 1592:11,20 1595:4 1596:8 1643:18</p> <p><b>\$37.13</b> 1716:1</p> <p><b>\$840</b> 1644:21</p> <p><b>\$87</b> 1657:12</p> <p><b>\$88</b> 1657:13</p> <p><b>\$90</b> 1600:6</p> <p><b>A-7</b> 1567:3,10</p> <p><b>a.m</b> 1538:3 1715:21 1726:2</p> <p><b>abide</b> 1636:14 1637:23 1637:24</p> <p><b>ability</b> 1568:18 1569:12 1610:25 1664:3 1665:13 1669:11 1671:2 1690:21 1691:4 1708:2</p> <p><b>able</b> 1539:24 1548:3 1552:10,15 1559:20 1607:13 1634:6 1651:3 1652:13 1653:6 1657:25 1669:14,25 1670:17 1681:11,17,19 1690:11 1691:11 1693:5 1702:20,24 1708:6</p> <p><b>absent</b> 1558:23 1630:24</p> <p><b>absolute</b> 1591:17 1631:8</p> <p><b>absolutely</b> 1581:20 1588:14 1591:15 1631:11 1720:15 1725:1</p> <p><b>accept</b> 1681:5</p> <p><b>accepted</b> 1641:1,21 1642:11</p> <p><b>access</b> 1539:25 1544:7 1566:8 1581:25 1653:15,17 1658:5</p> <p><b>accounting</b> 1542:10 1571:1,6</p> <p><b>accounts</b> 1542:12</p> <p><b>accurate</b> 1555:7,10 1558:25 1559:2 1590:11 1657:21 1701:9 1710:9 1712:6 1712:22 1713:1,7 1720:11</p> <p><b>acknowledged</b> 1578:24</p> <p><b>acquired</b> 1689:11</p> <p><b>acquires</b> 1689:25</p>	<p><b>acquiring</b> 1709:15</p> <p><b>acquisition</b> 1713:15</p> <p><b>acre-feet</b> 1641:10 1642:16,20 1643:12 1662:14,24 1663:9 1684:11 1694:15,21 1694:24 1697:12,20 1700:6 1706:10</p> <p><b>acre-foot</b> 1566:7 1602:8 1642:23 1643:12 1721:11 1722:15 1723:8,16,18</p> <p><b>act</b> 1638:2 1688:3</p> <p><b>acted</b> 1678:4,6</p> <p><b>acting</b> 1672:21 1674:8</p> <p><b>action</b> 1540:22 1610:16 1620:4 1727:16</p> <p><b>actions</b> 1557:18 1610:3</p> <p><b>actively</b> 1560:15</p> <p><b>activities</b> 1555:13 1662:2 1711:9</p> <p><b>actual</b> 1542:8 1543:1 1543:25 1544:2 1582:6,12,16 1630:22 1647:14 1652:20 1653:10 1657:15 1665:24 1671:3 1713:8 1720:16</p> <p><b>adamant</b> 1568:11</p> <p><b>add</b> 1543:6 1649:3</p> <p><b>added</b> 1629:8</p> <p><b>addition</b> 1582:4 1592:20 1721:8</p> <p><b>additional</b> 1597:21 1721:20 1722:19,25</p> <p><b>address</b> 1545:7,15 1551:25 1649:4 1650:21 1673:5</p> <p><b>addressed</b> 1550:22</p> <p><b>adequate</b> 1651:20 1670:17</p> <p><b>adjudication</b> 1581:5</p> <p><b>adjust</b> 1661:6</p> <p><b>Admin</b> 1583:5 1593:10</p> <p><b>administrative</b> 1543:6 1567:16 1581:22 1583:1,3 1593:5 1603:5,15,17 1608:3 1608:4,10,21 1609:9 1610:12 1721:21,24</p> <p><b>administratively</b> 1594:5</p> <p><b>admissibility</b> 1547:11 1547:14,17 1653:25 1654:3,16 1657:22 1675:14</p> <p><b>admissible</b> 1547:22 1548:5 1651:9 1655:1</p>	<p>1655:2</p> <p><b>admission</b> 1676:5</p> <p><b>admit</b> 1714:8,11 1718:19</p> <p><b>admitted</b> 1567:8 1672:3 1673:4 1674:20,24 1678:17 1682:10,11 1683:25 1685:6 1687:5 1710:12 1712:14 1714:13,14</p> <p><b>adopt</b> 1631:2</p> <p><b>adopted</b> 1535:10 1561:23 1593:4,10 1594:5 1618:24 1628:2 1630:10 1635:2,6,11,16,19,21 1636:2,8,11,25 1638:23</p> <p><b>adopting</b> 1620:9 1633:19</p> <p><b>adoption</b> 1637:21</p> <p><b>adopts</b> 1620:23</p> <p><b>advised</b> 1633:2</p> <p><b>advisement</b> 1660:19</p> <p><b>advocate</b> 1560:17</p> <p><b>advocating</b> 1561:2 1562:21</p> <p><b>affect</b> 1669:11</p> <p><b>affirmative</b> 1618:21 1619:20 1623:19</p> <p><b>affirmatively</b> 1600:21</p> <p><b>afternoon</b> 1546:2 1626:8,15,16 1661:13</p> <p><b>agencies</b> 1541:1,12 1556:7 1557:16,19,24 1562:13,19 1621:8,19 1624:8 1628:16 1647:3,8,10,24 1668:14 1677:4 1678:13 1691:15 1699:20 1700:12,18 1701:3,15 1705:9</p> <p><b>agency</b> 1541:15 1556:8 1556:10,13 1562:6,15 1563:8 1565:17 1580:25 1597:2,12 1645:20 1668:13</p> <p><b>agenda</b> 1565:19</p> <p><b>ago</b> 1554:1 1685:21 1691:8</p> <p><b>agree</b> 1554:9 1555:1 1567:12 1591:8,18,24 1593:7,17 1602:17 1610:17 1618:11 1638:22 1643:17 1645:22 1720:22</p> <p><b>agreed</b> 1556:5 1593:6</p>	<p>1593:10 1594:6,10 1600:23 1601:3,11,14 1641:19 1642:8 1643:19</p> <p><b>agreeing</b> 1596:15</p> <p><b>agreement</b> 1546:5 1548:13 1554:16 1555:9,15 1559:20 1563:19 1564:20 1565:12,21 1566:6 1567:18,22 1568:12 1569:4,19 1572:15 1574:17 1576:25 1577:1,4,5,9,10,16,19 1578:2,7,9,10,14,14 1578:25 1579:1,3,5,6 1579:11,24 1580:22 1581:13,17,18,19 1582:20,22,24 1583:16 1585:5 1588:18 1589:15 1590:9 1591:9,22 1592:8,11,18 1593:8 1594:17,22 1595:5 1598:20 1599:18 1602:6,14,19 1603:2 1603:13,18 1604:5 1606:3 1607:8,13,21 1610:25 1611:9,16 1616:3 1633:19 1634:24 1635:1 1636:10,16,24 1637:5 1638:7,11,18,19 1640:25 1641:3,5,6 1641:20 1642:9 1646:10,11,13,16,17 1646:25 1647:4 1653:20 1662:4,8,9 1662:17 1663:4,19 1664:21 1665:3 1666:11,19 1667:17 1668:5,10 1669:1 1670:11 1671:5 1680:22 1681:14 1688:10,14,16,19,22 1690:3,7 1691:25 1692:7 1699:13 1704:9 1705:16</p> <p><b>agreements</b> 1566:19 1577:8 1579:16 1580:22 1643:11 1682:21</p> <p><b>ahadlock@kvn.com</b> 1536:7</p> <p><b>ahead</b> 1703:22</p> <p><b>Alameda</b> 1536:19</p> <p><b>algae</b> 1665:8,9,12,19</p> <p><b>algorithms</b> 1550:2</p>	<p>1551:13</p> <p><b>allocate</b> 1621:7 1624:7 1624:12 1628:15,19 1658:2</p> <p><b>allocated</b> 1722:8,9</p> <p><b>allocates</b> 1621:13,17,21</p> <p><b>allocating</b> 1561:19</p> <p><b>allocation</b> 1558:2 1559:4 1560:11,17,23 1560:24 1561:3 1562:3 1631:24,25 1637:8 1647:19,25 1652:10 1658:4</p> <p><b>allocations</b> 1560:19 1567:23 1622:7 1633:5</p> <p><b>allow</b> 1608:12 1679:14 1692:1</p> <p><b>allows</b> 1571:5</p> <p><b>alternative</b> 1540:6 1561:16 1562:11 1651:5,12</p> <p><b>alternatives</b> 1548:7</p> <p><b>ambiguous</b> 1666:16</p> <p><b>amend</b> 1608:3</p> <p><b>amended</b> 1548:12 1608:5</p> <p><b>amending</b> 1608:10</p> <p><b>amendments</b> 1608:21 1609:9 1610:20</p> <p><b>American</b> 1566:4</p> <p><b>amount</b> 1602:12,14 1611:3 1616:2 1644:1 1644:10,12 1653:18 1662:11,16,17 1663:7 1665:10 1683:16 1684:7,11 1685:21 1686:16 1692:13 1695:2,16,20 1696:2 1696:5 1698:5,6,17 1721:10,17,19 1722:13,21,22</p> <p><b>amounts</b> 1542:8 1662:18 1685:3 1721:8</p> <p><b>analyses</b> 1599:21</p> <p><b>analysis</b> 1538:14,19 1541:2,8,20 1542:5 1550:10,18 1551:5,10 1565:5,7 1566:19 1598:3,8,13,24 1600:2 1601:22 1625:4 1650:3 1655:24</p> <p><b>analyze</b> 1542:3</p> <p><b>and/or</b> 1566:19</p> <p><b>Angeles</b> 1536:16,19</p> <p><b>ANN</b> 1727:8</p>
---	---	---	---	--

<p><b>annual</b> 1619:18 1643:19 1662:12 1682:19 1695:12 1722:22</p> <p><b>annually</b> 1610:4 1612:10 1722:2</p> <p><b>answer</b> 1549:25 1550:13,20 1575:25 1579:12,25 1584:8 1593:12,16 1594:4 1615:19 1619:2 1623:23 1625:7 1637:10 1679:17 1681:6 1702:23</p> <p><b>answered</b> 1605:10 1655:13,14</p> <p><b>answers</b> 1680:15</p> <p><b>anticipate</b> 1655:18</p> <p><b>anticipated</b> 1664:14</p> <p><b>anybody</b> 1543:23 1545:6 1553:10 1556:1 1565:20</p> <p><b>anybody's</b> 1651:7</p> <p><b>apart</b> 1668:17</p> <p><b>apologize</b> 1618:9</p> <p><b>Apparently</b> 1657:5</p> <p><b>appear</b> 1548:4</p> <p><b>APPEARANCES</b> 1536:1</p> <p><b>Appellant</b> 1580:8</p> <p><b>Appellants</b> 1580:11</p> <p><b>applicable</b> 1540:25 1603:7,16,20 1606:8 1608:22 1609:10,14 1636:19 1646:19 1647:1,2,8 1714:16 1715:16</p> <p><b>application</b> 1579:16 1580:25</p> <p><b>applied</b> 1576:6 1688:11</p> <p><b>apply</b> 1578:2,3,10 1579:24 1646:9 1684:13 1688:9 1714:22 1715:7,10 1722:4</p> <p><b>applying</b> 1685:20</p> <p><b>approach</b> 1643:1</p> <p><b>approaches</b> 1561:21</p> <p><b>appropriate</b> 1568:19 1627:1</p> <p><b>approval</b> 1574:15 1588:17 1617:6</p> <p><b>approve</b> 1596:1 1622:8 1622:11,13,18,25 1624:3 1625:2 1627:18 1639:23</p> <p><b>approved</b> 1561:8 1609:22 1610:8</p>	<p>1641:16 1642:6</p> <p><b>approving</b> 1622:7,9</p> <p><b>approximately</b> 1600:7 1645:10</p> <p><b>April</b> 1535:11,18 1538:2 1542:1 1574:11 1581:6 1609:18 1610:14 1626:2 1658:3,8 1696:8 1726:1 1727:17</p> <p><b>aqueduct</b> 1571:8,12 1576:11,18 1653:11 1663:25 1664:2,9,13 1664:15,18 1665:9,10 1665:11 1666:24 1667:14 1689:7,8,12 1689:21 1690:1,13 1691:18,22 1692:4,15 1692:15 1694:15,19 1694:20 1695:4,17 1696:3,14,18 1698:6 1698:19 1699:22 1700:1 1703:21 1709:16 1714:17 1722:14,17,19,23,24 1723:1,21 1725:13</p> <p><b>area</b> 1665:16,17,21 1666:4,6,7,9,15 1667:1,5,6,7,12,18,20 1668:3,8,16 1680:6 1687:15 1689:19,22 1697:16 1707:11 1725:14,21</p> <p><b>areas</b> 1548:4</p> <p><b>argumentative</b> 1606:25 1608:24</p> <p><b>arithmetic</b> 1551:14</p> <p><b>arrive</b> 1685:21</p> <p><b>ascribe</b> 1644:25</p> <p><b>aside</b> 1642:4 1644:6</p> <p><b>asked</b> 1541:17,20 1542:13 1549:10 1551:9 1554:12 1558:21 1563:11 1568:9 1572:4 1575:14,20 1584:1 1587:21 1597:19 1598:2 1600:22 1605:10 1616:1 1646:10 1648:8 1653:10 1659:15,15 1701:22 1702:4 1705:24 1708:12,13</p> <p><b>asking</b> 1562:5 1574:25 1575:1,1 1586:18 1607:14,18,20 1608:25 1613:23</p>	<p>1615:11 1632:17 1655:19 1693:20</p> <p><b>asks</b> 1558:20 1650:2</p> <p><b>aspects</b> 1611:1</p> <p><b>assessing</b> 1600:11</p> <p><b>assign</b> 1542:8</p> <p><b>assigned</b> 1722:6</p> <p><b>assignment</b> 1564:17 1566:3</p> <p><b>associated</b> 1541:18 1548:9 1566:23 1589:19 1650:7 1658:6 1666:8</p> <p><b>ASSOCIATES</b> 1535:22</p> <p><b>assorted</b> 1677:18</p> <p><b>assume</b> 1629:8 1637:12</p> <p><b>assuming</b> 1599:13</p> <p><b>At-a-Glance</b> 1630:7</p> <p><b>attached</b> 1543:21 1556:8 1563:18,23 1654:18</p> <p><b>Attachment</b> 1620:6,16</p> <p><b>attempt</b> 1540:6,8,9</p> <p><b>attempted</b> 1700:10,16</p> <p><b>attempts</b> 1556:18</p> <p><b>attention</b> 1608:16</p> <p><b>attorney</b> 1586:13</p> <p><b>attorneys</b> 1650:20</p> <p><b>AUDREY</b> 1536:4</p> <p><b>augment</b> 1651:2,12 1658:22</p> <p><b>authentic</b> 1678:4,7</p> <p><b>Authority</b> 1535:6 1555:14 1563:20 1566:5,5 1580:8 1585:3 1588:20 1597:12 1610:1 1614:19 1662:5 1675:1,3,4 1682:14 1685:11,14,19 1686:17 1688:1 1697:14</p> <p><b>Authority's</b> 1557:22 1616:12</p> <p><b>availability</b> 1703:1</p> <p><b>available</b> 1544:17,18 1548:7 1551:6,7 1553:9 1555:25 1570:15,19 1575:24 1576:2,6,17 1577:12 1577:23 1578:22 1669:14,19 1670:1,2 1702:22,22,25 1705:12,14,23 1706:1 1719:25</p> <p><b>average</b> 1550:6 1552:7 1582:7 1657:20</p>	<p>1662:21 1683:12 1713:4 1721:3,13</p> <p><b>averaged</b> 1662:24</p> <p><b>averaging</b> 1550:4 1657:12</p> <p><b>avoid</b> 1665:18</p> <p><b>aware</b> 1572:24 1575:15 1575:21 1576:1 1585:1 1586:24 1633:25 1642:22 1676:20 1688:18 1701:6,12,16 1705:19</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>b</b> 1536:14 1581:23,23</p> <p><b>B-R-E-N-T</b> 1661:9</p> <p><b>bachelor's</b> 1709:20</p> <p><b>back</b> 1556:23 1563:10 1566:12 1567:2 1571:13 1574:11 1587:3 1593:7 1603:11 1615:25 1617:17 1618:3 1620:1 1628:2 1634:16,18 1640:23 1694:14 1696:11 1725:19</p> <p><b>background</b> 1551:2 1709:19</p> <p><b>baloney</b> 1653:5</p> <p><b>Barbara</b> 1727:5,9,18</p> <p><b>bargained</b> 1544:15</p> <p><b>barred</b> 1545:1</p> <p><b>Barrett</b> 1630:23</p> <p><b>based</b> 1540:21,21 1544:10 1546:18,23 1549:15 1551:10 1552:9 1582:12,15,22 1599:15,18,21,22 1600:4 1604:16 1621:20,21 1624:1,12 1628:20 1644:19 1652:7 1654:13,17 1655:2 1656:4,14 1657:19,24 1664:12 1712:12 1721:6 1722:18</p> <p><b>bases</b> 1658:16 1724:13 1724:16</p> <p><b>basic</b> 1543:7</p> <p><b>basically</b> 1543:24 1562:1 1568:24 1569:14 1654:12 1657:12 1695:3</p> <p><b>basis</b> 1542:22 1587:1 1594:9 1628:9 1651:9 1659:2 1675:13 1695:4,12 1713:5,6</p>	<p>1713:14,19,22 1716:23 1720:20 1721:22 1722:10,22 1722:25 1724:21</p> <p><b>Battery</b> 1535:24 1536:6</p> <p><b>began</b> 1587:11 1635:8 1635:12,22 1636:5</p> <p><b>beginning</b> 1570:19,25 1603:12 1635:13,23 1638:10 1703:19</p> <p><b>begins</b> 1593:12</p> <p><b>begun</b> 1545:2</p> <p><b>behalf</b> 1541:11 1580:17</p> <p><b>belabor</b> 1724:9</p> <p><b>belief</b> 1583:21 1631:6</p> <p><b>believe</b> 1550:21 1551:4 1551:11,12 1552:1,24 1555:21 1557:10 1559:19 1560:1 1562:1 1573:15 1579:23 1585:17,18 1585:21 1586:1 1587:17 1588:10 1590:11,12 1593:9 1594:7 1595:22 1597:15 1599:13 1612:8,20 1615:19 1617:11,12 1618:21 1619:6,7,20 1620:2 1622:20 1626:24 1632:10 1633:18 1637:7 1638:6,8,17 1640:15 1646:19 1656:9 1664:23 1688:8,21,25 1690:10 1690:25 1713:6</p> <p><b>believed</b> 1561:18 1594:5 1606:8 1611:24 1612:17 1631:14,15 1638:8</p> <p><b>believing</b> 1597:3,13</p> <p><b>belong</b> 1588:8</p> <p><b>belt</b> 1559:15</p> <p><b>bench</b> 1651:14</p> <p><b>benefit</b> 1557:16 1598:18 1643:10 1644:10,17,20,24 1658:18 1691:11,14</p> <p><b>benefits</b> 1641:2,5,21 1642:11,14</p> <p><b>best</b> 1651:11,22 1658:17</p> <p><b>better</b> 1539:16 1658:14 1725:2</p> <p><b>billion</b> 1643:14,15 1644:10</p> <p><b>binder</b> 1555:20</p>
--	---	--	--	--



<p>1563:13 1649:25          1695:7 1700:21          1710:4,21  <b>binders</b> 1687:23  <b>bit</b> 1583:8 1600:9,20          1619:22 1626:19          1651:6 1655:9 1659:3          1691:8 1695:22          1698:19  <b>black</b> 1634:7  <b>blah</b> 1606:14,14,14  <b>blank</b> 1554:13  <b>blend</b> 1544:19 1568:5,7          1568:10 1570:7,9,12          1653:19 1670:12,14          1670:18,23 1671:3,14          1671:22 1672:17          1674:2 1680:20          1681:11 1683:12,15          1684:6 1685:20,20          1688:6,19 1690:12,17          1690:22 1691:4,12          1692:22 1693:1          1696:25 1700:11,17          1701:2,14 1702:18          1703:8 1704:21,24          1705:2,20 1706:11,25          1707:3,17  <b>blended</b> 1544:8 1666:2          1668:16,20  <b>blending</b> 1539:22,23          1544:14 1703:15,21  <b>blends</b> 1672:8 1680:5,5          1680:9 1681:19  <b>blindsided</b> 1654:7  <b>block</b> 1721:19  <b>blooms</b> 1665:8,12  <b>blow</b> 1564:8 1566:1          1694:12 1695:14  <b>board</b> 1558:11 1561:8          1561:13,14,15 1562:5          1563:16,24 1564:12          1564:15,15 1565:2,16          1565:18 1574:10          1595:23 1596:1,2,7,9          1596:18 1603:19          1610:3,5 1616:20,22          1616:23 1617:20          1620:4,5,7,13,17,23          1621:3,16,23 1622:10          1622:11,13,14,17,18          1622:23 1623:9,12          1624:20 1627:13,22          1627:22,23,23          1630:22 1631:6,17          1633:1,2,6,9,10          1637:4 1638:1 1640:5          1641:25 1645:5</p>	<p>1647:22  <b>Bob</b> 1563:23  <b>boilerplate</b> 1628:8,10          1628:17,21,23,24          1629:4,8,23 1637:13  <b>Bond</b> 1630:23  <b>book</b> 1568:21  <b>BORDEN</b> 1709:5          1710:11,14 1711:2,20          1712:8,15 1713:3          1714:15 1715:1,7          1716:11,24 1717:11          1717:16 1719:8          1720:13,24 1723:24          1724:21 1725:8,10  <b>BORDEN,ESQ</b>          1536:15  <b>bosses</b> 1707:22  <b>bottom</b> 1544:23          1564:24 1677:16  <b>bought</b> 1569:24  <b>bounded</b> 1566:14,18  <b>branch</b> 1649:14          1670:25  <b>Braunig</b> 1536:5          1666:16 1673:2          1674:18 1675:10,15          1675:19 1676:9          1677:8,12 1678:1          1679:1,13 1680:1,11          1680:23 1681:4          1683:24 1685:5          1687:4,22,25 1701:17          1706:5,8,22 1707:20          1708:14  <b>breach</b> 1613:12          1634:20,23 1636:21          1637:4,21 1638:3,23          1639:6 1640:19  <b>breached</b> 1633:18          1634:25 1636:4,5,10          1636:24,24 1638:7,17  <b>break</b> 1541:6,10          1543:2 1652:21,25          1724:8  <b>breath</b> 1542:23  <b>Brent</b> 1537:4 1660:21          1661:1,8  <b>Brian</b> 1573:5,7 1648:2  <b>brief</b> 1543:20 1551:23          1552:1 1580:12,20          1649:1 1656:22          1716:6,6  <b>briefs</b> 1538:15  <b>bring</b> 1571:11,12,13          1646:7 1696:11  <b>broad</b> 1634:21  <b>broke</b> 1627:11</p>	<p><b>brought</b> 1643:6  <b>BROWN</b> 1535:22  <b>bucket</b> 1703:23,24  <b>bullet</b> 1564:8,9  <b>bunch</b> 1653:5 1658:13  <b>burden</b> 1721:20  <b>Bureau</b> 1559:16          1570:18 1571:4          1695:1,5,12 1698:1          1698:12  <b>buried</b> 1550:2,8  <b>business</b> 1655:17          1671:8 1672:14          1674:6 1676:19          1712:4,10,22 1720:9  <b>businesslike</b> 1614:18  <b>button</b> 1549:24  <b>buy</b> 1552:12 1714:10          1717:20,21 1719:2  <b>buyers</b> 1713:20  <b>buying</b> 1714:3,7 1717:2          1720:16 1721:19  <b>buys</b> 1717:8 1718:23  <b>bypass</b> 1697:9,11,21          1698:25 1701:24          1702:10 1704:7,10          1706:11,25 1707:11          1707:15,15,19 1708:4</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>CA</b> 1535:24  <b>calculate</b> 1539:4,9          1549:18 1681:20          1682:19 1686:11          1724:25  <b>calculated</b> 1644:11          1683:16 1684:8          1694:6 1721:15          1725:12  <b>calculating</b> 1549:20          1562:19  <b>calculation</b> 1643:9          1655:24 1681:24          1720:21  <b>calculations</b> 1541:20          1546:10,10 1549:22          1550:7 1552:9 1563:1          1644:7,15 1650:3          1682:18 1686:3          1724:7  <b>calculator</b> 1642:25          1643:2  <b>calendar</b> 1630:10          1635:20 1636:3          1705:12 1716:17,23  <b>California</b> 1535:1,9,11          1535:17 1536:6,12,16          1536:19 1538:1</p>	<p>1580:10 1620:8,19          1626:1 1641:7 1709:8          1709:23 1710:1          1715:10 1719:15,20          1719:23 1722:20          1723:4 1725:13          1727:3,10,18,25  <b>CALISO</b> 1719:16  <b>call</b> 1552:4 1556:1          1644:8 1660:20  <b>called</b> 1561:22 1608:16          1661:2 1665:18          1671:17 1701:24          1702:10 1703:18          1708:20 1711:5  <b>calling</b> 1679:13  <b>calls</b> 1552:2 1597:5          1605:25 1660:21  <b>Campbell</b> 1563:24,24          1564:3 1586:22          1589:25 1598:1,1          1643:24 1644:8,11,19  <b>Campbell's</b> 1565:5          1644:14  <b>canal</b> 1541:23 1564:18          1566:1,4 1598:19          1641:10,13 1642:14          1644:21 1645:1          1656:2,7 1688:19          1689:10,24 1690:23          1692:2 1703:18,19,19          1707:5,13,16,18          1708:1,10  <b>canals</b> 1689:4 1705:4  <b>Cap</b> 1640:9  <b>capabilities</b> 1693:22  <b>capacity</b> 1575:23          1577:23 1578:21          1580:24 1669:24          1694:14 1705:3  <b>capture</b> 1669:16          1671:18  <b>care</b> 1544:21 1547:12          1568:15 1569:25          1570:1  <b>carefully</b> 1656:11  <b>Carl</b> 1573:12  <b>carries</b> 1618:1  <b>carry</b> 1705:5  <b>case</b> 1535:7 1554:15,23          1562:24 1563:9          1571:19 1599:10,12          1633:14 1635:18,24          1648:10 1686:19          1710:2 1717:6  <b>cases</b> 1580:12 1581:6          1591:12  <b>categories</b> 1542:9</p>	<p>1547:10 1621:14          1658:5  <b>category</b> 1542:12          1547:10,11,12          1626:25 1650:15  <b>caught</b> 1651:3  <b>central</b> 1649:5  <b>certain</b> 1548:24          1569:15 1586:25          1591:25 1662:8          1686:13 1702:20          1705:4 1722:21  <b>certainly</b> 1610:15          1629:22 1650:11  <b>CERTIFICATE</b>          1727:1  <b>Certified</b> 1727:8,24  <b>certify</b> 1727:10,15  <b>CFO</b> 1648:6  <b>chain</b> 1598:1  <b>challenge</b> 1555:6          1556:5 1557:1,8,11          1557:23 1558:4          1596:6 1602:21          1604:21 1605:1,7,21          1606:8,23 1609:13          1610:19,22 1612:13          1612:21  <b>challenging</b> 1554:14          1602:11  <b>chambers</b> 1552:20  <b>chance</b> 1545:11,18  <b>change</b> 1561:5 1564:21          1588:15 1599:14          1603:15,25 1604:7,20          1604:25 1605:16,23          1606:15,22 1610:4          1652:25 1663:3          1668:3 1701:14          1708:2 1715:4  <b>changes</b> 1555:3          1556:18 1558:24          1560:17 1562:2          1567:12 1608:9          1610:11,20  <b>characterization</b>          1626:18  <b>charge</b> 1539:5,24          1557:11 1560:25          1561:1 1566:8,9          1583:5 1585:20          1588:6,9 1601:19,22          1601:23 1602:15          1603:6,19 1638:9          1642:22 1646:20          1647:6,13,16  <b>charged</b> 1540:12          1548:12,16,19,22</p>
---	--	---	--	---

<p>1582:21 1583:15,18 1612:18 1613:15 1646:22 1647:10 1648:11 <b>charges</b> 1539:5 1542:19 1543:10,10 1544:4,7 1556:19,24 1557:1,4,9 1567:13 1583:22 1589:6,19 1591:10 1598:9,15 1603:6,19 1608:9,20 1609:8,13 1612:1 1620:9,23 1621:4,6 1621:21,24 1622:1 1624:4,10,12,16 1628:11,20,25 1629:2 1630:10 1640:18 1647:14 1649:13 1658:6 1725:12 <b>charging</b> 1613:12 1638:16 1639:6 1647:9 <b>chart</b> 1542:12 1552:2 1563:8 1657:3 1698:2 1699:21 1700:3 <b>charts</b> 1656:13 1694:1 <b>chasing</b> 1552:13 <b>chat</b> 1626:9 <b>check</b> 1643:4 <b>checking</b> 1571:2 <b>cheeseburger</b> 1571:21 <b>chief</b> 1555:22 1620:24 1621:4,24 <b>choose</b> 1653:18 1702:4 1724:2 <b>chooses</b> 1696:23 <b>chose</b> 1569:22 <b>chosen</b> 1699:17 <b>circumscribed</b> 1548:2 <b>circumstance</b> 1632:15 <b>circumstances</b> 1699:14 <b>cite</b> 1652:11 <b>Civil</b> 1580:12 <b>claim</b> 1544:3,9 1613:11 1639:5 1659:25 <b>clarification</b> 1631:12 <b>classifies</b> 1621:19 <b>clear</b> 1543:19 1580:23 1659:7 1720:17 <b>CLERK</b> 1634:8 1661:5 1708:24 <b>clock</b> 1634:12,13 1651:8 <b>closed</b> 1596:2 <b>Coachella</b> 1566:4 1580:9 <b>code</b> 1581:22 1583:1,3 1583:5,8 1593:5,10</p>	<p>1603:17 1608:3,5,10 1608:21 1609:10 1610:12 1678:2 1712:15 <b>coherent</b> 1724:20 <b>collected</b> 1722:5 <b>collecting</b> 1635:5,8,12 1635:22 1636:6 <b>collects</b> 1665:16 <b>Colorado</b> 1544:2,17 1567:21 1568:16,18 1569:2,18,24 1570:10 1570:15 1571:8 1576:11,17 1653:11 1657:9,10 1663:20 1664:3,8,12 1665:3 1665:11,14,20 1666:1 1666:24 1667:14,21 1668:4,11,21,25 1669:2,12 1670:13,15 1671:3,25 1674:2 1680:20 1681:12,21 1682:20 1684:7 1685:3,13,22 1686:8 1686:10,16 1689:7,8 1689:11,21 1690:1,13 1691:18,20,22 1692:3 1692:14,15,22 1693:2 1693:6,16,23 1694:15 1694:19,20,21 1695:3 1695:17 1696:3,14,18 1696:21,25 1697:6,12 1698:6,18,24 1699:9 1699:22 1700:1 1701:23 1702:9,12 1703:9,21 1704:6 1705:15,20 1706:2,12 1707:6,18 1709:16 1714:17 1722:14 1723:12 <b>column</b> 1630:9,15 1721:9 1722:11 <b>combination</b> 1686:4 <b>Combined</b> 1580:10 <b>combining</b> 1686:6 <b>come</b> 1539:9 1540:3,13 1542:25 1543:17,17 1545:14 1549:9 1559:4,20 1587:3 1650:24 1652:16 1654:14 1655:19 1658:17 1659:20 1666:11,14,22 1667:13 1684:15 1721:10 <b>comes</b> 1547:22 1551:16 1655:8,16 1656:12,14 1666:24 1667:4,14,17</p>	<p>1672:24 1711:1 <b>comfortable</b> 1656:11 <b>coming</b> 1547:20 1559:17 1658:19 1687:23 1711:9 1712:24 1713:1,3 1717:5,10 <b>comment</b> 1562:4 <b>comments</b> 1545:20 <b>commercial</b> 1712:16 <b>commissioner</b> 1559:16 <b>commitment</b> 1688:21 <b>commitments</b> 1653:19 <b>committed</b> 1570:16 <b>committee</b> 1609:19,23 <b>communicate</b> 1587:24 1633:2 <b>communicated</b> 1583:20 1614:10,17,25 1615:2 1615:6 <b>communicates</b> 1614:20 <b>communications</b> 1588:19,23 1589:1,4 1590:2 <b>communities</b> 1645:12 <b>compare</b> 1597:20 <b>comparing</b> 1598:3 <b>comparison</b> 1598:24 <b>compel</b> 1542:15 <b>compelled</b> 1702:19 1705:8 <b>compilation</b> 1712:21 1721:3 <b>complain</b> 1610:25 1611:2 1639:1 <b>complained</b> 1611:3 1612:25 1613:3,17,19 1613:23 1614:3 <b>complaining</b> 1613:8 1615:23 <b>complaints</b> 1705:18 <b>completely</b> 1545:1 1552:11,24 1573:24 1724:12,14 <b>complicated</b> 1603:1 <b>comply</b> 1650:12 <b>component</b> 1542:6 1646:19 1722:13,18 1723:9 <b>components</b> 1542:4 1579:11 1580:3 1601:9 1623:8 1722:12 1723:22 <b>comprised</b> 1566:8 <b>computed</b> 1644:19 1658:1 <b>computer-aided</b> 1727:13</p>	<p><b>conceivably</b> 1651:2 <b>concern</b> 1549:13 1555:12,18 1569:20 1586:24 1587:24 1660:10 <b>concerned</b> 1552:13 1555:3 1557:21 1574:14 1589:1,4 1590:3 <b>concerning</b> 1575:5 1620:4 1679:4 <b>concerns</b> 1555:11 1614:17,20 1615:14 1633:5 <b>conclude</b> 1626:9 <b>conclusion</b> 1597:6 1603:3 1606:1,4 1612:5 <b>condition</b> 1636:15 <b>conditions</b> 1637:24 <b>conduct</b> 1542:4 <b>confidence</b> 1631:8 <b>confirm</b> 1677:24 1700:7 <b>conflict</b> 1539:20 <b>conflicts</b> 1540:9 1653:25 <b>conformance</b> 1636:18 <b>conformity</b> 1548:24 <b>connection</b> 1554:23 1557:13 1583:19 1594:21 1678:12 <b>consequence</b> 1665:12 1670:4 <b>conservation</b> 1548:10 <b>conserved</b> 1541:23 1570:22 1571:3 1574:16 1656:2,6 1662:19 1689:3 <b>consider</b> 1564:15 1599:23 1645:3 <b>consideration</b> 1564:10 1564:17 1566:3 1622:15,16 1699:20 <b>considerations</b> 1697:24 1697:25 1699:1,3,4 <b>considered</b> 1557:5 <b>considering</b> 1566:17 1599:2 <b>consisted</b> 1567:18 <b>consistent</b> 1584:7 1585:25 1586:5 1588:11 1596:14,18 1596:21 1610:18 1612:7 1627:1 1692:6 <b>consistently</b> 1647:18 <b>consists</b> 1666:7 1667:7 <b>constrained</b> 1571:9</p>	<p><b>construction</b> 1644:13 <b>consultants</b> 1561:17 <b>consumed</b> 1722:13 <b>contain</b> 1550:18 1711:11,13 <b>contained</b> 1620:23 1621:4 <b>contains</b> 1711:14 <b>contest</b> 1557:3 1564:22 1567:15 1608:19 1609:8,13 <b>contesting</b> 1603:5 <b>contexts</b> 1550:7 <b>continue</b> 1560:10 1601:21 1687:10 1719:6 1725:5 <b>continued</b> 1587:9 <b>continuing</b> 1722:25 <b>contract</b> 1540:15 1541:1 1544:16,22 1568:5,20 1571:15 1597:3,4,13,14,15 1605:4 1613:12 1636:24 1637:22 1638:3 1639:7 1640:19 1648:10 1663:1 1722:20 <b>contractual</b> 1723:14 <b>contradicted</b> 1547:15 <b>contradicts</b> 1541:4 <b>contrary</b> 1538:21 1540:1,4 <b>contribution</b> 1644:12 <b>control</b> 1574:10 1690:16 <b>controls</b> 1719:22 <b>convenience</b> 1569:22 <b>conversation</b> 1554:24 1561:10 1584:14 1586:10,14,17,20 1587:6 1680:13 1681:9 <b>conversations</b> 1555:8 1559:10 1572:9 1574:20 1584:16,23 1586:7,23 1587:2,18 1588:16 1589:16 1590:1 1633:4 1647:23 <b>conveyance</b> 1572:6 1580:24 1583:22 1603:20 1608:9 1612:1 1624:10 1640:18 1647:2,11 1707:13 <b>conveyed</b> 1583:24 1688:9 1695:2 1696:13</p>
--	---	--	--	---

<p><b>conveying</b> 1643:25 1698:18 <b>conveys</b> 1692:15 1694:20 1698:5 <b>cooling</b> 1555:17 <b>Coordinated</b> 1580:12 <b>coordination</b> 1676:18 1677:3,23 1678:13,23 <b>copy</b> 1711:14 1712:17 <b>corner</b> 1684:25 <b>correct</b> 1561:19 1563:17 1569:5 1574:17,20 1576:21 1577:1,7,10,17,23 1578:5,20,22,23 1582:17,22 1583:1,9 1583:10,12,16,17,23 1588:14 1590:5 1593:11 1595:6,19 1598:15 1599:8,19,24 1599:25 1600:17 1601:10 1604:2,5,17 1604:22 1605:2,13,14 1605:17,18 1606:5 1607:23 1608:10,11 1608:13,22 1610:12 1611:3,4,6,7,9 1612:10,11,22 1613:5 1613:9,13,16,20,21 1615:19 1616:4,7,18 1617:3 1619:1,3 1620:13 1622:19,22 1623:15,17,21 1624:5 1624:6,22,25 1629:25 1630:1,14,24,25 1631:3,4,9 1633:16 1633:17 1636:22 1637:19,23 1638:4,24 1639:4,8,19,21,25 1640:2,6,7 1641:4,11 1641:22 1642:5,17,21 1643:16 1644:22 1646:14 1648:21 1655:3 1663:14 1672:1 1674:4,10 1675:5 1684:16 1686:1,2,5,9 1689:22 1690:5 1692:23 1693:17,23,24 1694:11,16 1695:23 1696:3,4,9,10,19 1697:10,14 1699:7,24 1700:15 1702:3,7 1703:3 1704:4 1715:1 1718:11 <b>correctly</b> 1594:6 1643:13 <b>corresponding</b> 1685:2</p>	<p><b>COS</b> 1630:10 <b>cost</b> 1540:19 1541:6,7 1541:10,14,17 1542:5 1542:6,8,12 1543:12 1543:14 1544:10 1549:20 1552:8 1557:18,24 1558:2 1559:4 1560:11,19 1561:3,16 1562:20,20 1566:9,18,20 1582:6 1582:12,16 1598:3,9 1598:14,18,20,21 1599:3 1600:14 1601:22 1621:5,12,16 1621:23 1622:7 1624:4,12 1625:3 1627:18,23 1628:12 1628:15 1630:13 1631:24 1633:5,15 1639:23 1643:8,24 1644:1,6,13 1647:19 1647:25 1650:7 1653:1,11,15,17 1655:4 1656:5 1657:15 1720:16 1724:8 <b>costs</b> 1540:20 1541:11 1541:22 1543:1,6,25 1544:2 1548:7,9,9,9 1548:25 1549:20 1556:5,6,20,22 1557:24 1560:17,25 1561:20 1563:2 1565:1 1566:23 1572:6 1574:3 1582:5 1586:25 1589:2,5 1591:20 1597:20 1611:25 1621:7,13,18 1621:20,21 1622:2 1624:17 1626:24 1628:19 1629:2 1640:17 1650:5 1652:10 1655:25 1658:6 1700:10,16,25 1701:13,14 1721:7,20 1721:21,25 1722:3,4 1722:5,7,7,9 <b>counsel</b> 1536:18 1592:6 1632:20 1633:20 1688:1 1692:20 1712:17 <b>count</b> 1568:3 1724:5 <b>counterpart</b> 1588:3 <b>counterparts</b> 1679:7 <b>country</b> 1711:10 <b>County</b> 1535:2 1558:11 1563:20 1580:8 1581:7 1682:14</p>	<p>1685:14,19 1688:1 1727:5,9 <b>couple</b> 1560:22 1639:14 1669:8 1707:10 <b>course</b> 1542:21 1655:17 1671:8 1672:13 1674:6 1676:19 1693:8 1694:18 1711:23 1712:3,22 1720:2,9 <b>court</b> 1535:1 1538:6,24 1545:5,10,12,18,21 1546:16,25 1550:23 1551:3,15,22 1553:1 1553:9,16,22 1554:20 1556:23 1558:8,14 1561:14 1562:11,12 1562:24 1563:6,9 1567:8 1568:23 1570:4 1571:25 1573:23 1575:9 1579:19 1580:1,14 1581:7 1591:12 1597:8 1602:11 1605:5,11 1606:2 1607:1,6,10,14,16,18 1607:22,25 1609:2,4 1618:16,22 1619:2 1625:5,10 1626:8 1634:6,11,13,16 1639:12 1643:2,5 1645:16 1648:25 1649:19,20 1652:2,17 1653:24 1654:15,21 1655:6 1656:12,16,20 1656:24 1657:17 1658:14 1659:5,19,23 1660:3,10,17 1661:23 1662:15 1663:17 1666:17 1668:8 1670:19 1673:4,17 1674:16,19 1675:11 1675:16,22 1676:1,7 1676:10 1677:9 1678:2,16 1679:2,14 1680:2,12,15,25 1681:5 1683:4,6,10 1683:25 1685:6 1687:1,3,5,7,10,19 1701:18 1702:8 1706:18,21 1707:9 1708:16 1710:12,25 1711:19 1712:14,17 1712:20 1713:10,18 1713:23 1714:6,8,24 1715:2,6 1716:5,9 1717:5,15,21,24</p>	<p>1718:7,13,16,19 1719:3,5 1720:19 1723:3,6 1724:2,5,9 1724:24 1725:4,9,17 1725:19,23 1727:11 <b>Court's</b> 1565:12 <b>courtroom</b> 1554:8 <b>cover</b> 1607:11 1658:13 <b>CPF-10-510830</b> 1535:7 <b>CPF-12-512466</b> 1535:8 <b>CRA</b> 1652:25 1653:10 1655:4,8 1694:5,5 <b>create</b> 1624:15 1628:25 1650:11 1672:17 1675:21 1677:7,15 <b>created</b> 1655:17 1658:3 1658:7 1659:9 1672:13,16,20 1674:5 1675:24 1676:5 <b>creates</b> 1675:2 <b>creating</b> 1621:25 <b>cross</b> 1537:2 1605:12 <b>Cross-Defendants</b> 1580:11 <b>cross-examination</b> 1554:5 1626:13 1650:24 1652:14 1653:4 1687:19,21 <b>cross-examining</b> 1552:17 <b>CSR</b> 1535:20 1727:8 1727:23 <b>Cunningham</b> 1573:9 1573:15 <b>current</b> 1553:1,3 1566:6 1610:2 1642:22 1675:16 <b>Curtis</b> 1535:3 1538:4 <b>Cushman</b> 1572:19 1584:15,20 1614:2 1615:9 1632:20 1633:23 1636:20,23 1638:2,22 <b>Cushman's</b> 1614:6 1634:2 1637:20 <b>customary</b> 1621:22 1624:13 1628:20 <b>customers</b> 1697:17 <b>cycles</b> 1635:15</p>	<p><b>damage</b> 1538:14,18 1541:8 <b>damages</b> 1539:4,9 1540:15 1648:14,16 1648:19 1708:8 <b>damaging</b> 1708:5 <b>DAN</b> 1536:4 <b>data</b> 1541:20 1551:4 1649:8 1650:3 1655:16,21,24 1656:8 1656:12 1682:1,5 1683:13,14 1701:7 1712:11 1720:2,5,11 <b>database</b> 1671:17 1672:8 <b>date</b> 1558:17 1603:18 1604:4 <b>dated</b> 1565:11 1581:6 1640:5 <b>dates</b> 1677:18 <b>day</b> 1546:7 1553:25 1672:11 1718:12 1727:17 <b>day-before</b> 1657:6 <b>days</b> 1651:23 1707:10 <b>deal</b> 1539:17 1545:17 1564:12 1572:23 1643:18 1645:3 <b>death</b> 1560:7 <b>deceased</b> 1586:12,21 <b>December</b> 1611:9,12 1611:20,23 1719:17 1719:18 <b>decide</b> 1690:4,8,11 <b>decided</b> 1540:17 1583:17 1601:23 <b>decides</b> 1696:17 <b>deciding</b> 1714:10 <b>decision</b> 1570:11 1654:8 1699:6 <b>declaration</b> 1541:25 1542:2 1710:2,5,7 1714:15 1724:22 1725:10 <b>decrease</b> 1697:1 <b>deduct</b> 1644:18 <b>deemed</b> 1568:19 <b>Defendant</b> 1536:11 <b>DEFENDANT'S</b> 1537:2 <b>Defendants</b> 1535:14 1661:2 1708:20 <b>Defense</b> 1563:12 1564:3 1580:5 1581:3 1617:18 1620:3 1672:2 <b>defined</b> 1712:23 <b>definition</b> 1566:23</p>
--	---	---	---	---

**D**

**D** 1537:1  
**daily** 1587:2 1671:11  
1671:13 1672:7  
1681:18 1683:14  
1711:11  
**dam** 1723:11,11,12,13  
1723:19

<p><b>defray</b> 1622:2 1624:17 1629:2 <b>degree</b> 1592:2 <b>delay</b> 1558:23 <b>delegate</b> 1648:9 <b>delegates</b> 1617:17 1618:4,19 1619:13 1622:11,15,18 1623:1 1623:2,3,11 1624:2 1624:20,24 1625:2 1627:14,17 1628:3,4 1628:17 1629:6,10,15 1630:2,6,15,16,22 1631:2,5,16,17 1632:5,22 1633:1,4 1637:4,16 1638:1 1639:22 1640:5 <b>deliver</b> 1568:4,25 1569:1,13,14,18,23 1570:6 1571:15 1650:17 1662:8,16,22 1663:1,2 1664:3 1665:11,13 1666:1 1668:15 1669:14,24 1670:3 1688:23 1690:8 1691:20 1692:1,4,5 1693:5,15 1693:22 1696:21 1697:5,13,19,19 1698:23 1699:8,16 1701:23 1705:8,9 1706:1 1707:7 1725:11 <b>delivered</b> 1569:16 1571:14 1654:13 1656:21 1664:10 1665:17 1670:14,25 1671:4,20 1684:11,15 1685:1,13 1686:17 1702:9 1704:14 1706:9,9 <b>deliveries</b> 1567:21 1570:16 1649:14 1666:4 1672:11 1681:22 1682:2,6 1683:19 1684:8,19 1685:2,3,11,18,23,24 1685:24 1686:1,7,12 1694:5 1699:23 1700:4 1703:13 1704:12 <b>delivering</b> 1541:7,7,18 1650:5,7 1656:1,5 1657:16 1690:5,12 1697:15 1701:2 1706:13 1724:8 <b>delivers</b> 1665:21 1692:14 1694:18</p>	<p>1700:11,17 <b>delivery</b> 1541:22 1582:7 1644:25 1663:18 1665:2 1670:22 1683:20 1684:7 1690:4 <b>demand</b> 1650:12 1659:4 <b>demanded</b> 1649:19 <b>demands</b> 1567:1 1669:15 1690:18,19 <b>demonstrate</b> 1651:3 <b>demonstrative</b> 1546:4 1546:17 1681:16 <b>demonstratives</b> 1546:6 <b>Denham</b> 1546:12 1657:13 <b>Denham's</b> 1546:14 <b>Dennis</b> 1559:9 1572:9 1584:18 1585:13 1586:6,6,23 1588:1 <b>Department</b> 1535:4 1538:4 1649:13 1709:17 <b>depending</b> 1690:18 1700:11,16 1701:1,14 <b>depends</b> 1693:12 <b>depose</b> 1552:11 <b>deposed</b> 1657:21 <b>deposit</b> 1616:1 1639:17 <b>deposition</b> 1535:23 1542:2 1552:21 1585:7 1589:9 1590:14 1592:15 1633:22 1634:2 1648:3 1651:25 <b>deputy</b> 1559:21 <b>describe</b> 1598:18 1626:18 <b>described</b> 1724:13 <b>describes</b> 1711:8 1725:10 <b>description</b> 1555:7 1558:25 1659:13 1724:12 <b>designated</b> 1585:2 1633:24 1636:20 1659:18 <b>detail</b> 1541:21 1650:4 1655:25 <b>determination</b> 1583:4 1592:4 1628:11 1680:9 <b>determinations</b> 1624:3 <b>determine</b> 1620:19 1671:2,21 1674:1 1680:19 1681:11 1700:10,16 1701:13</p>	<p>1704:21,24 1705:2 1718:5 <b>determined</b> 1647:16 1662:17 1722:1,23 <b>determines</b> 1621:3,16 1671:7 <b>determining</b> 1722:3 <b>detriment</b> 1708:5 <b>development</b> 1588:7 <b>dictate</b> 1690:22 <b>die</b> 1560:2 <b>died</b> 1560:3,5,10 1647:17 <b>Diego</b> 1535:6 1541:22 1544:8,15,21 1549:16 1549:17 1556:6,18 1557:3 1558:3,21 1559:5 1561:4 1563:20 1564:18,18 1564:20,22 1567:11 1567:21 1568:4 1569:20 1570:1,17 1574:15,17 1576:19 1577:1 1578:24 1579:20 1580:2,8,18 1580:21,21 1581:4 1585:2 1588:20 1589:17 1591:9 1592:10 1594:25 1595:7,9,18,23 1597:2,12 1599:4,21 1600:23 1601:3,14 1602:8,21 1603:5,25 1604:19,24 1605:7 1606:13 1608:17,19 1609:8 1610:9 1611:5 1612:8,17,20,25 1613:8,11 1614:12 1616:1,8 1617:16 1619:13,23 1622:10 1622:17 1623:2,3,7,9 1623:11 1624:2,20,24 1625:1 1627:13,17 1629:5,15 1630:2,5,6 1630:19 1631:1,5,19 1633:1,18,24 1637:2 1637:3,16,25 1639:1 1639:5,16,22 1640:25 1641:1,16,19 1642:5 1642:8,15 1643:10,18 1643:25 1644:7,9 1645:4,10,20,25 1646:6 1647:18 1648:9 1649:6,17 1650:1,5 1651:1,2,13 1655:22 1662:5,9,22 1663:19 1664:7 1665:17,21 1666:1,10</p>	<p>1666:20 1667:4,16 1668:5,9,13 1669:12 1670:13,24 1671:4 1674:3 1675:1,4,24 1676:6,18,22,23,25 1676:25 1677:6,23,24 1678:6,9,14,23,24 1679:4,6,8,10,20 1680:18 1681:9,10,11 1681:21 1682:2,3,6,7 1682:13,16,20 1683:20 1684:19 1685:11,14,19,25 1686:17 1687:14 1688:1,24 1689:1,10 1689:25 1690:9,13,16 1690:18,21 1692:2 1693:6,16,23 1695:24 1696:22 1697:6,13,14 1697:16,20 1698:24 1699:10,22,25 1700:4 1703:19 1704:6,8,12 1705:15,19 1706:2,10 1707:5,7,13,16,18 1708:1,11 1712:17 1724:22 <b>Diego's</b> 1541:18,23 1572:5 1579:14 1584:11 1585:8 1592:15 1604:12 1605:8 1609:23 1610:25 1616:19,22 1617:1,19 1618:4 1622:11,18 1628:3,4 1631:6 1632:6 1637:3 1638:1 1640:5 1644:17,20 1650:5 1656:5,6 <b>difference</b> 1576:24 1577:11,14 1578:13 1598:19 1626:23 1714:4 <b>different</b> 1544:20 1546:21 1561:21 1568:16 1577:10,16 1577:20 1578:8,18 1583:8 1590:13 1594:8 1595:13 1596:5,12 1597:22 1599:15 1600:9 1619:22 1647:7 1684:23 1691:5,12 1711:9,10,15 1713:24 <b>difficult</b> 1649:22 <b>direct</b> 1537:2 1545:24 1554:2 1563:12 1650:24 1652:14 1655:18 1656:8</p>	<p>1661:11 1703:2 1709:4 <b>directed</b> 1616:22 1623:10 1624:2,20 1625:1 1633:13 <b>direction</b> 1622:10,17 1672:21 1674:9 1727:14 <b>directive</b> 1707:22 <b>directly</b> 1539:20,25 1540:4 1588:6 1680:14 1681:2 1683:13 1697:6 1698:24 1706:10 1722:4 <b>directors</b> 1558:11 1561:9 1563:25 1565:16 1603:20 1610:5 1620:7,17 <b>disagree</b> 1636:23 1641:23 <b>disagreement</b> 1587:8 1597:16 1631:24 1637:20 <b>disclosed</b> 1549:16 1550:12,16 <b>discourage</b> 1540:23 1557:18 <b>discovery</b> 1539:15 1542:14,20 1543:4 1547:1 1549:16,17 1550:1,17 1551:9,25 1552:5,10 1650:12 1652:7 1656:15 1659:4 <b>discretion</b> 1568:7,12 1570:6,11 1690:4,8 1703:7 <b>discuss</b> 1550:15 1652:10 1658:4,8 <b>discussed</b> 1627:22,23 1719:12 <b>discussion</b> 1547:5 1554:21 1594:19 1623:6 1634:15 1649:1 1650:19 1651:18 1676:24 1725:18 <b>discussions</b> 1615:22 1637:9 1678:22 1679:20 <b>dispute</b> 1562:14 1592:9 1594:2 <b>disputed</b> 1616:2 <b>dissolved</b> 1673:23 <b>distributed</b> 1565:23 <b>distribution</b> 1662:1 <b>district</b> 1535:9,11</p>
--	---	--	---	--

<p>1536:11 1558:12  1570:22 1580:9,10  1582:6,6 1620:8,18  1661:15,17,20,25  1662:19 1695:15  1709:7  <b>District's</b> 1556:19  1557:4  <b>diverted</b> 1695:3,17  1696:2 1723:20  <b>diverting</b> 1723:10  <b>divide</b> 1547:9  <b>document</b> 1538:10  1555:16 1565:18,20  1566:13 1600:13  1654:23 1655:22  1656:12,14,25  1657:25 1659:6,8,13  1673:8,13,14 1674:24  1675:2,9,14,20,21,24  1676:5,14,15,23  1677:2,7,22 1678:7  1678:17,25 1679:4,11  1679:15,21,22,24  1680:8 1682:12  1684:3,4 1685:9  1713:13,14 1716:10  1724:1,4,19  <b>documented</b> 1708:8,12  <b>documents</b> 1538:11  1541:19,24 1546:24  1549:15 1550:14,16  1550:21 1555:18  1573:14 1649:16  1650:3,10,11,14,25  1651:9 1652:10  1653:13 1654:5,9,13  1654:19 1655:5,17,21  1655:24 1656:4  1657:7,19 1658:3,7  1658:10,11 1659:11  1659:16,16 1672:12  1673:6,15,18 1674:5  1676:21 1718:19  <b>doing</b> 1546:10 1571:16  1600:11 1605:1  1653:1 1658:21  1660:14 1663:25  1678:23  <b>dollar</b> 1721:10  <b>dollars</b> 1540:14 1612:9  1641:7  <b>Double</b> 1681:4  <b>doubts</b> 1678:17  <b>dozens</b> 1586:7  <b>dpurcell@kvn.com</b>  1536:8  <b>driest</b> 1702:15</p>	<p><b>drill</b> 1634:22  <b>DTX</b> 1537:8,9,10,11,12  1537:13,14,15,16,17  1537:18,19,20,21,22  1537:23,24,25  1543:15 1546:18,25  1567:8,9 1581:3  1597:25 1598:17  1602:20 1609:17  1611:16 1616:11  1620:6 1630:5 1640:1  1644:5 1649:16  1655:12 1673:3,6,6,7  1673:7,7 1674:19,21  1674:23 1678:21  1683:4,5,25 1684:1  1685:6,7,8 1686:25  1687:5,6 1692:19  1693:25 1696:11  1698:7 1699:15  1710:4,11,13,21  1711:2,11 1712:8  1714:14,18,25 1716:2  1716:11,18,18,24,24  1719:7,8,9,12  1720:13,23,24,25  1723:24 1725:16,20  <b>DTX1096</b> 1543:4  <b>dumped</b> 1539:17  <b>duties</b> 1661:24</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 1535:3 1537:1 1538:4  <b>E.C</b> 1537:3  <b>earlier</b> 1615:12 1636:6  1672:13 1683:14  1704:3  <b>easier</b> 1573:24 1575:18  <b>east</b> 1649:14 1670:25  <b>Edison</b> 1722:20,24  1723:1,3,4  <b>educational</b> 1709:19  <b>effect</b> 1549:24 1550:18  1577:4,6 1603:17  1604:4,9,20,25  1623:13,23 1707:10  <b>effective</b> 1535:12  1631:3  <b>efficient</b> 1545:16  1650:18 1658:24  1660:7  <b>effort</b> 1539:15 1540:10  1540:23 1566:25  1701:12  <b>eight</b> 1617:14 1642:19  1643:11 1677:16,17  <b>either</b> 1570:9 1586:13  1596:20 1600:19</p>	<p>1705:5  <b>electric</b> 1719:23  <b>electrical</b> 1709:20,22  1710:1  <b>elicit</b> 1717:13  <b>email</b> 1536:7,8,8,9,9,17  1597:25  <b>EMANUEL</b> 1536:13  <b>embroglio</b> 1660:16  <b>emergency</b> 1571:17  1662:3  <b>employed</b> 1661:14  <b>employees</b> 1721:22  <b>enable</b> 1612:13  <b>encountered</b> 1566:24  <b>ended</b> 1611:9,12,19  <b>ends</b> 1670:23  <b>energy</b> 1657:6 1709:18  1711:5,7,8 1712:2,12  1714:16 1716:15  1719:17 1720:7  1721:4,19 1722:15  1723:1,10  <b>engaged</b> 1718:9  <b>engineer</b> 1709:25  <b>engineering</b> 1709:21,22  1710:1  <b>enter</b> 1597:3,13,15  <b>entered</b> 1565:22  <b>entire</b> 1560:6 1574:21  1617:5 1711:11  <b>entirely</b> 1693:2  <b>entitled</b> 1563:18 1581:5  <b>entity</b> 1719:22  <b>entry</b> 1630:9 1689:7  <b>equal</b> 1567:21,23  1688:23  <b>equitable</b> 1600:7  <b>error</b> 1619:12  <b>escalations</b> 1599:23  <b>ESQ</b> 1536:3,4,4,5,5,14  1536:18  <b>establish</b> 1548:19  <b>established</b> 1567:11  1602:22 1610:4  <b>establishes</b> 1646:24  <b>estimate</b> 1544:9  1653:22,22 1721:6  <b>estimated</b> 1539:22  1643:24  <b>estimates</b> 1653:21  <b>Evening</b> 1726:1  <b>event</b> 1727:16  <b>everybody</b> 1625:10  1648:3  <b>evidence</b> 1537:7 1541:6  1541:21 1542:1  1547:15,15,18</p>	<p>1555:21 1558:7,14  1567:5,6,9 1580:6  1581:4,22 1597:25  1598:17 1609:17  1616:11 1630:6  1640:4 1644:5 1650:4  1655:25 1659:2  1673:3 1674:22  1675:17 1678:2,21  1684:1 1685:7 1687:6  1695:8 1698:15  1710:13 1712:15,25  1714:14 1719:7  1720:23  <b>evidentiary</b> 1626:10  1720:18  <b>exact</b> 1615:11  <b>exactly</b> 1548:20  1567:17 1568:3  1658:13  <b>exam</b> 1545:24 1703:2  <b>examination</b> 1554:3  1563:12 1572:1  1655:18 1656:8  1661:11 1701:20  1709:4 1717:17  <b>example</b> 1542:18,25  1547:14 1550:4,11  1569:9 1570:5  1572:18 1649:5,7,12  1649:24 1650:2,23  1651:13 1652:5  1654:24 1655:8,23  1659:1 1670:17  1683:17 1707:1  <b>examples</b> 1561:2  <b>exceed</b> 1644:1  <b>Excel</b> 1549:23  <b>exception</b> 1702:14  <b>excess</b> 1710:17 1715:9  1717:7 1718:2,14  <b>exchange</b> 1541:7  1548:8,13 1549:21  1555:9,15 1564:19  1565:12,21 1566:6  1567:11 1569:3,13  1570:24 1572:14  1576:25 1577:8,9,19  1578:2,7,9,10,14,25  1579:3,5,10,15,24  1580:22 1581:13,17  1581:18 1582:20,21  1582:24 1583:15  1585:5 1588:17  1589:15 1590:9  1591:8,21 1592:8  1593:8 1594:17,22  1595:5 1598:20</p>	<p>1599:18 1602:14,19  1610:24 1611:8,16  1616:3 1633:19  1634:23 1635:1  1636:10,16,24 1637:5  1638:7,10,18 1640:25  1641:2,5,13,20  1642:9 1646:10,11,16  1646:17,25 1653:20  1662:4,17 1663:4,19  1664:21 1665:3  1666:11,19 1667:17  1668:5,10 1669:1  1670:11 1671:5  1680:22 1681:13,22  1682:21 1684:5  1685:2,3,24 1686:1  1686:18 1687:13  1688:10,14,16,19,22  1690:3,5,7,8,12  1691:25 1692:7  1694:6 1695:23  1696:5,15 1698:7,19  1698:23 1699:12,16  1704:8 1705:16  1706:10  <b>exchanged</b> 1546:6  1685:12  <b>exclude</b> 1538:8 1548:17  <b>excluded</b> 1549:4  <b>excluding</b> 1659:2  <b>exclusion</b> 1649:2  <b>exclusively</b> 1663:20  1666:1 1669:12  <b>excuse</b> 1567:4 1570:1  1635:9 1648:9  1725:17  <b>excused</b> 1648:25  1708:17  <b>execution</b> 1559:8  1589:14 1640:24  <b>executive</b> 1555:22  1565:10 1620:24  1621:4,24  <b>exhibit</b> 1541:13  1542:20 1543:3,15  1546:16 1558:7,9  1563:12 1564:3  1565:13 1575:12  1580:6 1617:18  1620:3 1649:6 1672:2  1672:4,6 1673:1,3  1682:15,23 1683:2,10  1683:22 1684:6,14  1685:4 1695:16  1710:13,23 1714:14  <b>exhibits</b> 1537:6  1654:18 1673:12</p>
---	---	---	---	--

<p>1674:15,16,17 1681:18 1685:21 <b>exist</b> 1541:19,24 1650:10 1654:5 1655:5 <b>existed</b> 1650:15 1655:12 1659:7,16 <b>existence</b> 1668:7 <b>existing</b> 1590:22 1591:2 1601:8 1604:2 1604:8,16 1605:9,17 1605:20 1606:20 1610:10 <b>expect</b> 1629:22 1664:17 1680:6 <b>expectation</b> 1616:9,14 <b>expected</b> 1601:21 1663:5 <b>expecting</b> 1545:12 <b>expenditures</b> 1542:3,11 <b>expense</b> 1645:11 <b>experience</b> 1559:15 <b>expert</b> 1538:21 1539:1 1539:13,15 1544:25 1545:2 1546:9,11,14 1547:22 1549:11,22 1550:1,5,9,10,18 1654:13 1659:18,21 1660:1,5 <b>experts</b> 1549:7 1645:25 <b>expired</b> 1616:16 <b>explain</b> 1569:8 1570:4 1666:3 1668:8 1669:21 1683:10 1702:8 <b>explained</b> 1567:25 <b>explaining</b> 1725:3 <b>explanation</b> 1724:19 <b>exploring</b> 1660:13 <b>exposure</b> 1564:25 1645:7 <b>express</b> 1548:14 1549:2 1549:2 1555:12 1594:8 <b>expressed</b> 1539:19 1555:18 1586:24 1615:14 <b>expressing</b> 1549:11 <b>extent</b> 1544:14 1550:1 1649:19 1688:7 1714:12 1718:24 <b>extraordinary</b> 1704:1</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>faces</b> 1580:23 <b>facilities</b> 1690:4 1696:18 1703:22 1706:13 1708:6,9</p>	<p><b>facility</b> 1569:12 1666:14 1687:15 1702:19 1703:15,17 1703:18 1704:19 <b>fact</b> 1541:3 1547:17,17 1561:6 1563:20 1564:7,14 1567:20 1571:19 1578:24 1613:6 1616:8 1617:16,20 1628:7 1629:7 1643:24 1668:9 1669:10 1673:5 1689:17 1691:4 1692:13,13 1693:1 1697:5 1699:25,25 1712:11 <b>factor</b> 1557:4 <b>factors</b> 1599:4 1643:8 1644:6 1693:12,13 <b>facts</b> 1548:24 1564:12 <b>failed</b> 1649:21 1650:17 <b>fair</b> 1548:6,11,16 1600:7 1611:3 1628:15 1651:20 1660:11 1713:23 <b>fairly</b> 1621:7,17 1624:7 <b>falls</b> 1579:1,3,6 1581:14 <b>false</b> 1581:20 <b>familiar</b> 1581:8 1662:4 1688:2,13 <b>far</b> 1552:13 1557:20 1566:23 1571:18 1604:14 1614:2 1689:6 1703:22 <b>fastest</b> 1658:24 <b>fathom</b> 1544:12 <b>favor</b> 1616:23 1617:2 1617:20,22 1618:4,7 1618:11,25 1619:10 1619:11,14,18,24,24 1622:6 1628:3,4 1629:6 1630:3 1637:4 1638:2 <b>February</b> 1696:1 <b>fee</b> 1721:5,15,25 <b>fees</b> 1539:25 1722:1 <b>felt</b> 1559:18 1590:12 1594:8 <b>fifth</b> 1649:12 <b>Figuroa</b> 1536:15 <b>figure</b> 1552:23 1654:10 <b>figured</b> 1657:11 1670:3 <b>figures</b> 1695:16 <b>file</b> 1545:18 1612:20 <b>filed</b> 1538:25 1545:9 1547:25 1580:17,20 1581:6 1616:5</p>	<p>1639:20 1640:25 <b>filing</b> 1614:11,14 1647:18 <b>filtration</b> 1666:8 <b>final</b> 1571:18 1718:8 1721:9 <b>finally</b> 1548:18 1567:2 1570:12 <b>financial</b> 1542:10 1566:19 1599:4 <b>financing</b> 1560:14 <b>find</b> 1542:18 1548:3 1552:21 1559:19 1600:1,12 1654:2 1658:25 1678:3 1713:10 <b>findings</b> 1624:3 1641:17 1642:6 <b>finds</b> 1621:3,16,23 <b>fine</b> 1649:4 1725:23 <b>finish</b> 1573:24 <b>firm</b> 1575:23 1577:11 1577:22 1578:21 1685:23 <b>first</b> 1538:7,17 1539:13 1543:14 1545:3 1546:19 1548:6 1550:15 1555:10 1564:23 1567:14 1578:18 1600:2 1601:20 1602:22 1603:4 1604:21 1608:1,20 1609:9,15 1611:1 1634:25 1638:7,17,23,23 1640:21 1641:16 1642:6 1652:13 1653:5 1656:21 1661:7 1663:24 1673:14 1681:5 1682:24 1684:25 1700:14 1705:3 1710:25 1714:24 1722:12 <b>fiscal</b> 1620:9 <b>fit</b> 1568:14 1569:11 1650:15 1659:13 <b>fits</b> 1657:25 <b>five</b> 1543:24 1553:11 1554:19 1558:3,23 1564:23 1567:14 1581:11 1595:19 1596:6 1600:2,15,15 1601:4,12,15,20 1602:1,3,8,22 1603:4 1604:22 1606:9 1607:22 1608:17,19 1609:7 1611:1</p>	<p>1612:15 1617:14 1623:5 1638:12 1700:22 <b>five-year</b> 1555:17,19 1557:8,12 1559:3,11 1594:9,11,12 1599:6 1611:8,11,15,19 1638:19 <b>fixed</b> 1548:8 1641:14 1644:25 <b>fixes</b> 1620:23 <b>fixing</b> 1620:9 <b>flexibilities</b> 1691:9 <b>flexibility</b> 1569:10 1651:15 1691:4,6 1704:20,24 1705:1 <b>Floor</b> 1535:24 1536:15 <b>flowing</b> 1645:23 <b>flows</b> 1668:4 1680:3 1689:21 1705:4 1708:2 1723:12 <b>fluctuate</b> 1700:11,16 1701:1,13 <b>fluctuates</b> 1692:16 <b>focus</b> 1585:10,21 1653:24 <b>focusing</b> 1596:24 1612:25 1615:25 1632:1 1666:18 <b>folks</b> 1587:3 1677:23 1678:23 <b>follow</b> 1634:6 1657:7 <b>followed</b> 1565:6 <b>following</b> 1627:16 <b>follows</b> 1553:20 1554:8 1620:20 1626:6 1661:3 1708:21 <b>footnotes</b> 1546:21 <b>forced</b> 1580:24 <b>forecast</b> 1598:23 1599:5,5,5,6,7 1600:13 1644:8 <b>forecasts</b> 1599:9 1600:12 <b>foregoing</b> 1608:6 <b>foremost</b> 1663:24 <b>forget</b> 1600:18 <b>form</b> 1603:15 1604:1,7 1605:16,23 1606:15 <b>forma</b> 1598:2 <b>formal</b> 1564:15 <b>formas</b> 1597:18 <b>formed</b> 1612:5 <b>formulas</b> 1550:2 <b>forth</b> 1560:15 1582:1 1583:9 1608:20 1610:11 <b>forum</b> 1567:16 1603:6</p>	<p>1603:15 1606:15 <b>forward</b> 1552:14 1651:21 <b>found</b> 1559:14 1655:21 1659:10 1682:2,7 <b>foundation</b> 1563:5 1655:20 1675:10,11 1675:19,22 1676:2,13 1677:12,20 <b>foundational</b> 1650:25 <b>four</b> 1538:17 1539:18 1545:4 1553:14 1587:22 1599:9,22 1640:5 1660:9 1673:6 1674:16,17 1715:4 1721:4 <b>Francisco</b> 1535:2,16,17 1535:24 1536:6 1538:1 1626:1 <b>free</b> 1612:17,20 1658:23 <b>frequent</b> 1586:23 <b>frequently</b> 1693:11 1704:13 1708:2 <b>Friday</b> 1656:10,22 <b>front</b> 1695:8 1698:11 1710:21 <b>fulfill</b> 1653:19 1668:25 <b>full</b> 1576:12 1595:1 1633:2 1644:17,19,19 1685:23,25 1708:25 <b>fully</b> 1545:19 <b>function</b> 1621:20 1647:3 <b>functions</b> 1621:18 1722:5,6 <b>fundamental</b> 1714:3 <b>funded</b> 1542:3 <b>further</b> 1540:23 1547:5 1553:19 1571:23 1603:3 1610:16 1626:6 1645:15 1648:22 1650:19 1687:18 1701:17 1708:14,15 1717:13 1727:15 <b>future</b> 1555:5,13 1557:1 1567:1 1569:16 1570:13 1610:3,20 1664:14,16 1664:19</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gallons</b> 1571:20,22 <b>game</b> 1542:16 <b>GANS</b> 1536:14 <b>GARY</b> 1536:14 <b>Gastelum</b> 1555:22,24</p>
--	--	--	---	---

<p>1557:7,10,14 1573:19 1586:15 <b>Gastelum's</b> 1558:18 <b>gather</b> 1659:24 <b>gears</b> 1588:15 <b>general</b> 1536:18 1543:6 1559:21,24 1560:8 1565:17 1592:6 1632:20 1679:14,15 1721:21,25 <b>generally</b> 1549:8 1568:22 1603:20 1647:1,2 1661:23 1712:21 1713:2 <b>generate</b> 1550:3 1718:22 1724:13 <b>generated</b> 1549:24 1629:9 1695:11 <b>generates</b> 1723:13 <b>gentleman</b> 1573:5 <b>getting</b> 1561:5 1634:18 1643:7 <b>give</b> 1547:23 1551:1,10 1568:5 1569:2 1570:10 1652:14 1670:19 1678:18 1679:15 <b>given</b> 1540:3 1571:4 1576:18 1651:22 1654:24 1657:25 1660:16 1713:8 <b>gives</b> 1649:15 1678:19 1690:3,7 1691:3,5 1713:16 <b>giving</b> 1584:8 1588:13 1660:5 <b>go</b> 1539:11 1543:12 1546:21 1547:14 1552:14,20 1553:15 1563:10 1567:2,10 1606:2 1617:17 1620:1 1634:11 1641:11 1651:11,21 1651:24 1654:8 1679:17 1689:18 1698:16 1703:23 1706:21 1718:6 1721:25 1725:9 <b>gods</b> 1707:22 <b>goes</b> 1541:8 1552:21 1667:4,6,12 1670:8 1707:16 1724:15 <b>going</b> 1538:19 1539:11 1540:3 1542:17 1546:1 1549:14 1551:8,12 1552:14,17 1552:22 1554:9,14 1556:21 1564:15</p>	<p>1574:11 1575:10 1591:12 1607:4 1610:9 1615:17 1632:18 1639:12,13 1639:14 1651:21 1652:16 1653:15,17 1654:7,11,16 1655:4 1656:13,18 1657:1,8 1657:13,15 1658:16 1659:5,20,25 1660:12 1660:14 1668:16 1676:13 1678:8 1687:14 1690:8,17 1696:18 1697:7,13 1724:9 <b>GOLDBERG</b> 1536:5 1710:23 1711:17 1712:9,19 1713:5 1714:2,23 1716:3,7 1716:25 1717:14,19 1718:25 1719:4 1720:14 1723:25 1724:3,6 <b>golly</b> 1612:5 <b>good</b> 1538:6 1625:5,9 1626:8,15,16 1643:17 1645:3 1654:7 1661:13 1725:22 <b>gotten</b> 1631:12 <b>governors</b> 1602:14 <b>governs</b> 1605:17 <b>gratuitous</b> 1544:15 <b>great</b> 1658:18 <b>greater</b> 1566:23 1696:15 1698:6,19 <b>ground</b> 1548:24 <b>grounds</b> 1605:6 1710:24 1712:9 1716:4,7,25 <b>group</b> 1673:6 <b>grow</b> 1663:13 <b>guaranteed</b> 1641:14 1644:25 <b>guess</b> 1650:18 1654:22 1659:8 1678:9</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>HADLOCK</b> 1536:4 <b>half</b> 1686:22,23 1723:14,17 <b>hand</b> 1593:20,23 1727:17 <b>handle</b> 1547:19 1549:9 1549:12 1660:7 <b>happen</b> 1540:24 1554:17 1653:3 <b>happened</b> 1554:1 1611:22 1637:2,25</p>	<p><b>happens</b> 1664:5 <b>happy</b> 1579:18 <b>hard</b> 1611:6 1612:12 1701:7 <b>harmful</b> 1555:13 <b>hat</b> 1547:17,17 <b>Havas</b> 1570:21 1688:24 1689:2,6,19 1689:22 <b>head</b> 1600:21 <b>hear</b> 1547:19 <b>heard</b> 1545:3 1619:2 <b>hearing</b> 1543:20,21 1574:10,14,19,24 1575:9 1576:10,24 1577:3 1650:10 1654:6 <b>hearsay</b> 1552:6 1558:13 1580:13 1654:19 1657:6,20 1677:8 1679:1,13 1680:1,11,24 1681:4 1681:7 1711:18 1712:9,21 1716:8 1717:1 1720:14 <b>held</b> 1554:21 1634:15 1725:18 <b>help</b> 1562:8 1593:21 1713:12 1718:5 <b>helpful</b> 1547:7 1607:3 1724:19 <b>helps</b> 1676:19 <b>hey</b> 1615:20 <b>high</b> 1669:5,10,23 1705:4 1707:22 <b>higher</b> 1564:25 <b>highlighted</b> 1686:13,14 1686:15 1694:9 1696:12 <b>highly</b> 1548:22 <b>hire</b> 1645:25 <b>hold</b> 1664:11 1706:5 <b>hole</b> 1543:18 <b>Hon</b> 1538:4 <b>Honor</b> 1538:9,9 1545:8 1546:5,8 1553:4 1563:4,7 1564:4 1567:4,7 1571:24 1579:25 1607:24 1609:1 1625:9 1634:4 1643:1,4 1648:23,24 1651:19 1674:15 1675:15 1677:11,21 1680:23 1682:10 1683:23 1687:11 1711:17 1713:5 1714:2,23 <b>HONORABLE</b> 1535:3</p>	<p><b>hope</b> 1560:11 <b>hopeful</b> 1560:18 <b>hottest</b> 1702:15 <b>hour</b> 1653:4 <b>hours</b> 1538:17 1539:18 1545:4 1553:11,12,14 1559:17,17 1660:9 1722:15 1723:7,16,17 <b>hundreds</b> 1641:6,9 <b>Hunt</b> 1558:11,20 1559:1</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>ID</b> 1537:7 <b>idea</b> 1540:2 1543:7 1594:23 1647:13 1649:10 1653:20,21 1670:19 1713:16 <b>identified</b> 1550:25 1584:2 1590:21,24 1613:24 1694:9 <b>identify</b> 1672:4 1674:24 1682:12 1684:3 <b>identity</b> 1632:12 <b>ii</b> 1585:9 1589:10 1621:19 <b>IID</b> 1541:23 1556:19 1571:3 1574:15,17 1576:20 1641:13 1643:25 1645:1 1650:6 1656:2,7 1688:19 1689:3,10,24 1690:23 1692:2 1708:10 <b>iii</b> 1621:21 1634:3 <b>illegal</b> 1540:8 1586:4 1591:15 1595:10,15 1596:2,8,10,11,15,15 1596:17,20 1597:14 1604:13 1605:20 1606:19 1612:2,6 1614:13 1615:10,13 1615:16,20 1632:18 1633:3,11 <b>illuminating</b> 1681:7 <b>impact</b> 1722:18 <b>impair</b> 1708:2 <b>Imperial</b> 1570:21 1662:19 1689:4 <b>implemented</b> 1618:25 1635:4 <b>important</b> 1566:17 1647:5 <b>importantly</b> 1677:19 <b>imported</b> 1609:19,23 <b>impossible</b> 1548:14 1549:1 1689:17,20</p>	<p><b>imprecise</b> 1542:9 <b>improper</b> 1544:1 1562:2 1584:6 1614:22 1647:19 1677:15 <b>inadmissible</b> 1654:14 1712:20 <b>incident</b> 1584:20,21 <b>include</b> 1572:18 1581:24 1583:21 1641:6,9 1644:24 1682:15 1700:3 <b>included</b> 1540:1 1573:2 1573:7 1587:19 1608:5 1629:24 <b>includes</b> 1566:20 1579:11 1641:13 1650:22 1719:14 1721:5,7 <b>including</b> 1548:8 1572:5 1574:3,22 1576:9 1585:4 1586:13 1589:2,5,18 1590:3 1598:14 1603:17 1606:15 1611:25 1620:5 1623:2,3 1624:10 1627:18 1640:17 1650:6 1673:22 1685:17 1722:6 <b>inclusion</b> 1585:14,22 1586:25 1590:8 1591:10,19 <b>incoherent</b> 1724:13,14 <b>incomplete</b> 1677:17,19 <b>inconclusive</b> 1591:13 <b>inconsistency</b> 1591:14 <b>incorporated</b> 1654:22 <b>increase</b> 1619:21 1627:21 1637:6 1663:5,8 1690:19 1696:25 1700:5,7,8 <b>increases</b> 1617:7,8 1619:19 1640:9 1643:20 <b>increments</b> 1570:25 <b>independent</b> 1562:16 1719:15,20 <b>index</b> 1714:16 1715:4 <b>indicate</b> 1631:23 <b>indicated</b> 1578:17 1588:5 1642:1 <b>individual</b> 1557:19 1562:5 1573:9 1586:21 1677:17 <b>individually</b> 1634:9 <b>industry</b> 1621:22 1624:13 1628:20</p>
--	---	---	--	---

<p>1711:9  <b>inflation</b> 1643:7 1644:6  <b>influences</b> 1673:13  <b>information</b> 1541:21  1549:3 1551:5,7  1565:2 1622:25  1649:11 1650:4  1655:25 1658:17  1659:25 1671:21  1672:23,24 1673:14  1673:19 1680:4  1681:17 1684:6  1698:4,9 1713:7  1716:14,16,22 1718:5  1719:12,14,16,18,24  1720:6,8 1724:16  <b>informed</b> 1631:6,18  1632:5  <b>infrastructure</b> 1548:8  1665:24  <b>infrequently</b> 1717:23  1719:1  <b>initial</b> 1565:1 1582:20  1592:10 1595:1,4  1619:4 1643:19  <b>initially</b> 1559:8  1618:19  <b>initiated</b> 1557:19  <b>inputs</b> 1713:24 1714:9  1718:16,22 1720:20  <b>inside</b> 1550:8  <b>insisted</b> 1543:5  <b>insistent</b> 1599:17  <b>inspection</b> 1571:13,17  <b>instance</b> 1551:8,11  1561:7 1624:19  <b>instruct</b> 1624:24  <b>instructed</b> 1627:14  <b>integrity</b> 1557:14,17  <b>intend</b> 1610:1,14  1616:10  <b>intended</b> 1557:17  <b>intent</b> 1556:4 1559:19  1606:9 1610:15  <b>interest</b> 1687:24  <b>interested</b> 1535:10  1727:15  <b>interesting</b> 1571:19  <b>intermingled</b> 1668:22  <b>interpret</b> 1609:16  <b>interpretation</b> 1561:19  1590:12 1594:8  1595:13,20 1596:4,12  1596:13 1597:16  1603:16 1604:1,8  1605:16,24 1606:6,7  1606:16 1610:18  1626:23 1627:1,10</p>	<p>1631:9,14,15 1638:9  1638:15  <b>interrogatories</b> 1541:5  1541:13 1650:2  1652:8  <b>interrogatory</b> 1541:9  1649:24 1650:16  1652:8 1654:25  1655:7,13,23  <b>interrupted</b> 1638:13  <b>intersection</b> 1703:20  <b>invoice</b> 1682:13  <b>invoices</b> 1682:3,7,15  <b>involved</b> 1572:22  1573:10,12,16,21  1615:18  <b>involvement</b> 1573:17  <b>irrelevant</b> 1540:9  1543:8 1544:24  1552:11 1717:2  1720:15 1724:18  <b>Irrigation</b> 1570:22  1662:19  <b>issue</b> 1543:22 1551:17  1570:9 1631:7,12,18  1633:3 1648:10  1649:2 1654:15,16  1686:19 1701:7  <b>issued</b> 1649:20  <b>issues</b> 1547:7,13 1549:9  1560:16,23 1626:10  1633:25 1653:25  <b>item</b> 1628:16</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>J-O-N</b> 1709:1  <b>JAN</b> 1535:22  <b>January</b> 1535:12,12  1612:18,21 1623:14  1638:20 1657:12  1683:17 1694:12  1695:18 1696:12  1715:25 1718:10  1719:13  <b>Jeff</b> 1560:9 1561:22,25  1562:11  <b>Jeff's</b> 1562:4  <b>jkeker@kvn.com</b>  1536:8  <b>job</b> 1660:2,4,14  1661:23 1709:14  1710:14 1725:2  <b>jog</b> 1589:23  <b>jogs</b> 1589:9  <b>JOHN</b> 1536:3,14  <b>johnquinn@quinne...</b>  1536:17  <b>joint</b> 1574:14 1580:10</p>	<p>1581:4  <b>Jon</b> 1537:5 1708:19  1709:1  <b>JOSEPH</b> 1536:18  <b>JTX</b> 1640:3,4  <b>Judge</b> 1538:4  <b>judicial</b> 1564:23  1567:16 1603:5,15  1606:15  <b>June</b> 1545:14 1546:2  1695:15  <b>jury</b> 1651:14 1676:11  <b>justification</b> 1660:18</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KARA</b> 1536:15  <b>Karnow</b> 1535:3 1538:4  <b>Kaseman</b> 1573:12  <b>Katz</b> 1574:4 1575:6,15  1575:22 1576:5  1577:20 1578:1,9  1579:24 1646:9,15  <b>keep</b> 1642:19  <b>keeps</b> 1645:23 1695:5  <b>Keker</b> 1536:3,3 1538:9  1538:25 1546:19  1547:9,13 1551:19,23  1553:3,14,24 1554:6  1554:22 1558:10,17  1560:22 1562:18  1563:7,10 1564:2  1567:4,10 1571:23  1572:4 1575:1 1580:7  1584:2 1592:7,12  1597:5 1600:22  1602:25 1605:3,10,25  1606:25 1608:16,23  1610:23 1611:14  1613:23 1615:2  1618:13 1634:4  1645:19 1648:22  1649:10 1651:19  1652:3,18 1654:3,18  1655:3 1656:21,25  1657:18 1659:15,20  1659:24 1660:9,11  1666:18 1683:3  <b>Keker's</b> 1545:20  1574:1,7 1584:6  1587:20  <b>kept</b> 1667:21,25  1668:21 1671:14  <b>Kevin</b> 1558:10  <b>Kightlinger</b> 1554:7,23  1555:8 1560:9  1561:11,23 1573:3  1646:7  <b>kind</b> 1541:2 1602:25</p>	<p>1629:23 1643:8  <b>kinds</b> 1547:10 1724:7  <b>knew</b> 1557:10 1568:3  1589:25 1591:4  1631:20 1648:3  <b>know</b> 1538:19 1541:25  1542:24 1545:10  1548:25 1549:22  1550:13,20 1562:10  1574:11 1579:20,25  1580:1 1585:5 1586:5  1586:23 1591:15  1593:18 1607:2,3  1608:9 1610:2,16  1614:2 1616:5  1618:16 1624:1  1626:22 1628:7  1629:7,9,19,21  1630:2 1633:7,14,20  1633:23 1637:15  1638:10 1640:1  1649:15,18,24  1650:14 1652:6,7,9  1652:11,12 1653:12  1655:7 1657:20  1662:13,25 1663:6,7  1664:22 1668:18  1669:22 1675:13  1676:1,11,14,15,16  1678:8,10 1682:1,5  1701:5,8 1704:10  1713:6 1718:21  <b>knowing</b> 1660:11  <b>knowledge</b> 1664:12  1712:11  <b>knowledgeable</b> 1585:3  1585:8 1592:16  1633:24 1636:21  1638:3 1663:16  <b>known</b> 1647:19,23  1687:15  <b>knows</b> 1586:20</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>L-A-M-B-E-C-K</b>  1709:2  <b>lab</b> 1671:18 1672:7  1683:13  <b>labor</b> 1721:20  <b>lack</b> 1675:19 1693:3  1704:1  <b>Lacks</b> 1563:5  <b>lake</b> 1570:20,21  1665:16,18,19,20  1666:7 1667:8  1688:24 1689:2,6,19  1689:21 1703:22  1704:14,19 1707:1,3</p>	<p>1707:11,17,17  <b>Lambeck</b> 1537:5  1546:1 1549:5,14  1708:19 1709:1  1717:11  <b>language</b> 1602:18  1606:10 1622:20,24  1626:17 1628:5  1629:24 1646:25  1647:3,5  <b>large</b> 1717:25  <b>larger</b> 1564:5  <b>late</b> 1538:11 1654:9  <b>law</b> 1540:22 1564:21  1566:19 1567:12  1575:6,16,22 1576:5  1578:10 1579:2,4,7  1579:10,24 1581:14  1584:8,11 1586:5  1588:12 1590:13,25  1590:25 1591:9,14  1592:2 1596:13,14,18  1596:21 1597:17  1603:7,16 1604:2,8  1604:16,20,25 1605:9  1605:17,20,24 1606:6  1606:8,16,20 1608:22  1609:10,14 1612:7  1626:24 1627:5,8  1631:9 1636:19  1646:9,15 1647:8  <b>lawful</b> 1540:18 1558:5  1563:1 1564:19  1566:5 1583:3,4  1592:11 1595:21  1599:19 1638:9,16  1645:22 1646:18  <b>lawfully</b> 1548:23  <b>lawfulness</b> 1567:15  1586:11 1613:1,17  <b>laws</b> 1590:8 1591:5  1604:3  <b>lawsuit</b> 1612:21  1614:11,15 1616:5  1639:20 1641:1  1646:7 1647:18  <b>lawyer</b> 1574:25  1586:20 1596:16  <b>lay</b> 1676:13  <b>laying</b> 1655:19  <b>laypeople</b> 1550:6  <b>lays</b> 1543:20  <b>lead</b> 1614:23  <b>leading</b> 1560:21  1562:23 1588:17,18  1589:13  <b>leads</b> 1703:18  <b>learned</b> 1571:19</p>
---	---	--	---	---



<p><b>leave</b> 1552:19 1676:10  <b>left</b> 1538:17 1539:18  1545:4  <b>legal</b> 1557:18 1558:22  1580:3 1592:24,25  1593:2,15,25 1594:3  1597:5 1605:25  1606:3 1633:20  <b>legality</b> 1588:16,20  1589:2,5,18 1590:3  1614:3  <b>legislate</b> 1556:18  <b>legislative</b> 1557:18  1558:22 1603:14  <b>Legitimate</b> 1605:12  <b>let's</b> 1553:1 1554:20  1565:9 1566:1  1568:20 1570:3  1580:5,14,15,15  1581:21 1600:18,20  1602:16,16 1609:17  1611:22,22,23  1617:13 1620:3  1625:7 1634:11  1636:9 1655:23  1660:20 1666:17  1687:10 1692:19  1693:25 1694:12,14  1696:11 1698:11  1700:20 1710:25  1719:6 1725:4,9  <b>let's-get-San-Diego</b>  1541:2  <b>letter</b> 1563:23 1620:4  1640:4,8,13,16  <b>level</b> 1679:14  <b>levels</b> 1552:25 1669:5  1669:10  <b>license</b> 1709:24  <b>lie</b> 1656:23  <b>lieu</b> 1564:19 1566:6  <b>life</b> 1663:3  <b>light</b> 1548:20  <b>likewise</b> 1676:21  1696:1  <b>limitation</b> 1557:7,8  <b>limitations</b> 1601:19  1602:5 1704:23  1705:1 1708:1  <b>limited</b> 1552:16  1610:25 1650:6  1651:22 1669:23  1714:11 1718:20  <b>limiting</b> 1650:23  <b>limits</b> 1665:10  <b>line</b> 1544:23 1575:13  1575:13 1581:11  1585:9 1589:10,10</p>	<p>1590:15,15 1592:16  1592:16 1603:12  1607:7 1617:14,14  1618:1 1634:3,3  1700:22 1714:21  1717:6  <b>lines</b> 1580:18 1617:14  <b>lining</b> 1541:23 1564:18  1566:1,4 1598:19  1641:10,14 1642:15  1644:21 1645:1  1656:2,7 1688:20  1689:3,10,24 1690:23  1692:2 1708:11  <b>list</b> 1542:21 1543:3  1652:13,23  <b>listed</b> 1698:7  <b>literally</b> 1601:16  <b>litigate</b> 1610:2,10,11,14  1610:15  <b>litigation</b> 1556:19,21  1556:22,24 1578:25  1579:15,21 1580:2  1581:5,8 1616:9,14  1616:17  <b>little</b> 1548:22 1583:8  1600:9,20 1619:22  1626:19 1649:22  1651:6,15 1655:6,9  1659:3 1686:22  1691:8 1709:13  <b>live</b> 1559:5  <b>loading</b> 1540:20,23  <b>lobby</b> 1564:20  <b>located</b> 1627:2  <b>location</b> 1666:12,22  <b>locations</b> 1673:24  1711:15  <b>logical</b> 1621:25  1624:15 1628:25  <b>long</b> 1600:23 1645:22  1661:16 1709:12  <b>long-range</b> 1560:14  <b>long-term</b> 1574:16  <b>longer</b> 1655:10  <b>look</b> 1546:20 1547:16  1549:7,8 1553:10  1555:20 1556:16  1557:14 1558:7  1563:9,12 1564:8  1565:9 1567:3 1568:9  1568:21 1569:6  1570:3 1575:8,12,18  1580:5,7 1581:3,21  1581:23 1593:3  1602:16,19 1603:11  1607:6 1609:17  1611:22,23 1616:13</p>	<p>1617:18 1620:1,3  1622:23 1630:5,8  1640:3 1649:6 1672:2  1674:23 1676:11  1677:16 1681:16  1682:9,23 1684:2  1685:18 1692:19  1693:25 1694:12  1696:1 1698:3,9,11  1700:20 1711:23  1715:17 1718:1  1720:2  <b>looked</b> 1594:13  1597:18,23,25 1598:6  1609:21 1624:1  1627:25 1641:18  1656:9,10 1681:18  1684:14 1698:1  1721:16,18,20  <b>looking</b> 1539:20  1546:16 1602:18  1622:12 1623:10  1644:14 1657:3  1683:2 1698:17  1717:6 1725:20  <b>looks</b> 1659:9  <b>Los</b> 1536:16,19  <b>lose</b> 1669:16 1670:5,6  1703:5  <b>losing</b> 1705:11  <b>loss</b> 1723:10  <b>lot</b> 1538:16 1539:16  1542:22 1559:15  1573:16 1645:25  1648:8 1649:3  1654:20 1693:12  <b>lots</b> 1540:23  <b>lower</b> 1543:17 1556:23  <b>lunch</b> 1547:2,4 1551:18  1631:10  <b>lunchtime</b> 1551:16</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>ma'am</b> 1554:17  1573:23 1575:19  1583:7 1587:12  1592:2  <b>magnitude</b> 1643:9  <b>main</b> 1603:11  <b>maintain</b> 1580:21  <b>maintenance</b> 1571:13  1571:16 1663:25  1664:8,18  <b>majority</b> 1704:13  <b>making</b> 1547:9 1616:20  1704:12 1723:9  <b>man</b> 1572:9  <b>management</b> 1662:3</p>	<p><b>manager</b> 1556:10  1559:21,24 1560:8  1661:21,22 1663:16  1681:9,10 1709:10  <b>managers</b> 1556:9,13  1565:17 1679:5,10,19  1680:18  <b>managing</b> 1709:15  <b>manner</b> 1569:15  <b>map</b> 1676:21  <b>March</b> 1620:4,13  1630:9 1632:25  1640:6 1696:8  <b>market</b> 1544:3 1655:4  1710:20 1711:15,21  1712:2,12 1713:2,8  1713:16 1718:5  1720:7  <b>master</b> 1709:21  <b>match</b> 1543:13  <b>material</b> 1561:18,25  1629:10  <b>math</b> 1543:16 1553:16  1643:4,13  <b>matter</b> 1561:6 1602:12  1634:19 1692:13  1693:8 1694:18  1703:7 1705:22  <b>matters</b> 1553:7 1612:4  <b>Matthew</b> 1665:20  <b>Maureen</b> 1537:3  1553:18 1562:4  1585:12 1626:5  <b>max</b> 1663:13  <b>maximize</b> 1702:21,24  <b>Mead</b> 1570:20  <b>mean</b> 1548:23,23  1558:8 1563:2  1572:22 1587:1  1594:7 1599:17  1601:16 1636:13  1654:22 1655:7  1657:16 1666:3  1668:2 1669:18,20  1670:6 1684:9 1725:1  <b>meaning</b> 1677:13  <b>means</b> 1548:21,23  1562:10,11 1569:8  1668:11 1678:19  <b>meant</b> 1623:25  <b>measure</b> 1671:11,13  1673:21,23  <b>measurements</b> 1674:12  <b>measuring</b> 1672:17  <b>meet</b> 1566:25 1569:19  1578:4 1669:15  <b>meeting</b> 1564:16  1587:1 1620:5</p>	<p><b>meetings</b> 1632:11  <b>megawatt</b> 1722:15  1723:7,16,17  <b>melded</b> 1647:16  <b>member</b> 1541:1,11,15  1556:7,8,10,13  1557:16,19,24  1562:12,19 1563:8  1565:17 1621:8,19  1624:8 1628:16  1647:3,7,10,24  1668:14 1691:15  1699:20 1700:12,17  1701:3,15 1705:9  <b>members</b> 1562:5  1563:16 1616:23  1617:19 1633:6  1645:12 1647:22  <b>memo</b> 1566:20 1609:18  1609:19 1622:23  <b>memoranda</b> 1565:25  <b>memorandum</b> 1555:22  1556:8,15 1558:10,18  1563:15,24 1564:3  1565:10,14,15  1567:17 1609:21,25  <b>memory</b> 1589:24  <b>mentioned</b> 1551:23  1632:10 1667:10  1702:12  <b>mentions</b> 1649:7  <b>Met</b> 1543:10 1547:25  1548:2,16 1553:12  1555:16,23 1556:20  1558:2 1559:4,25  1560:6,12,13 1561:5  1562:5,16 1564:13  1567:25 1568:18  1569:9 1570:15,23  1571:4,5,9 1573:2  1577:1 1581:4,19,22  1583:17 1586:10  1588:4 1601:19,21  1602:7,22 1606:14  1608:9,12 1610:3,3  1610:16 1612:9  1613:12 1615:15  1616:1,23 1620:4,13  1622:11,18 1623:11  1627:23 1628:15  1629:9 1633:1,2,9,18  1636:23 1637:4  1638:1,7,8,17 1639:6  1639:17 1640:5  1645:12 1646:1  1647:19,24 1648:3,6  1648:9 1650:1,11,17  1650:20 1652:24,24</p>
---	---	---	--	--

<p>1655:18 1656:5          1663:16 1666:12,15          1666:18,23 1668:11          1668:18,24 1670:11          1670:22,23 1671:2,7          1671:10 1675:21,25          1676:25 1677:2          1678:9 1681:13          1687:13 1688:2,5,5          1688:18,22 1689:19          1689:22 1690:3,7,11          1691:3,5,11 1692:14          1693:22 1694:18,19          1695:4,23 1696:6,13          1696:17,21 1697:3          1699:1,6 1700:10,15          1700:24 1702:4          1706:13 1707:22          1709:12 1710:11,17          1710:19 1711:20          1712:8,10,13,25          1713:9 1714:9,9          1715:9,14 1716:24          1717:6,8,17,21          1718:2,23 1719:24          1720:13 1723:24          1725:12  <b>Met's</b> 1541:22 1564:19          1568:7 1582:11,25          1583:8 1588:21          1589:6,20 1590:13,21          1591:1 1595:1 1596:5          1601:3,15,25 1604:13          1604:21 1605:1,7          1610:2,5,10 1612:21          1624:7,17 1625:2          1627:18 1629:2          1631:6,17,24 1642:22          1655:25 1669:11          1682:3,7 1691:12          1692:6 1695:18          1699:4 1703:7          1713:15 1725:13  <b>method</b> 1676:2 1704:11  <b>Metropolitan</b> 1535:9          1535:11 1536:11          1555:4 1569:25          1570:6 1580:9,21          1592:9 1603:14          1608:2 1620:8,18          1621:18 1636:17          1646:22,24 1649:20          1649:21 1659:12          1660:21 1661:15,16          1661:19 1662:1,5,7          1662:16,22 1663:18          1665:1,25,25 1691:14          1691:20 1692:1,21</p>	<p>1693:1 1695:15          1697:5 1698:5,18,22          1699:8,17 1701:12          1709:7,9 1721:16,22          1722:2,3,7,21          1723:13,18  <b>Metropolitan's</b>          1582:15 1603:19          1621:8,20 1622:2          1647:15 1650:4          1662:25 1697:24          1701:13 1721:6  <b>Michigan</b> 1709:21  <b>microphone</b> 1661:6  <b>middle</b> 1630:8  <b>million</b> 1540:14          1552:24 1642:19          1643:12 1644:2,2,11          1644:21 1645:11  <b>millions</b> 1612:9 1641:6  <b>mind</b> 1547:9 1558:1,6          1562:2 1719:3,5  <b>minute</b> 1539:18          1652:15  <b>minutes</b> 1553:12,13  <b>Misstates</b> 1605:3          1608:23  <b>mix</b> 1569:23,23          1707:13  <b>mixed</b> 1667:23 1703:24          1703:25 1707:16  <b>modification</b> 1561:8  <b>modifications</b> 1561:3  <b>moment</b> 1539:11          1634:4  <b>Monday</b> 1535:18          1538:2 1626:2          1715:22  <b>money</b> 1646:1  <b>monkey</b> 1552:13  <b>month</b> 1552:8 1568:4          1571:2,16 1641:14          1657:11 1662:9,14,23          1662:24 1663:11,12          1664:1 1683:16          1684:8,17 1685:12,15          1685:19 1691:21,22          1692:4,5,16 1694:16          1695:24 1697:20          1699:23 1716:16          1719:16  <b>monthly</b> 1567:21          1570:16,24 1663:18          1665:2 1681:17,22          1682:2,6,13,18          1683:12,15 1685:10          1695:4 1713:4          1715:24 1716:22</p>	<p>1721:3,12  <b>months</b> 1539:17          1567:24 1588:18          1589:13 1670:20,21          1686:13,15,18,19,23          1694:4,10,24,25          1696:12,13 1699:17          1719:13  <b>morning</b> 1538:6,11,22          1538:25 1545:4,9,21          1547:4 1626:11,19          1649:3 1653:8          1654:12  <b>motion</b> 1538:7,22          1539:14 1545:10          1581:4 1630:23          1651:1,2,12 1656:10          1658:20,21  <b>mouth</b> 1590:17  <b>move</b> 1542:1 1563:4          1567:5 1570:24          1571:9,10 1576:19          1606:17 1651:17          1693:18 1702:12,17          1708:6 1715:15          1722:16  <b>moved</b> 1542:15          1570:20 1675:17  <b>movement</b> 1662:1          1702:21  <b>moving</b> 1550:24 1563:2          1722:19  <b>multiplication</b> 1721:9  <b>multiply</b> 1642:18  <b>MW</b> 1636:9  <b>MWD</b> 1541:6,8,9,10,15          1541:15 1542:8          1548:7,11,19 1555:13          1559:17 1561:15          1564:20,21,25          1567:11,12,14,15,23          1568:11 1587:18          1598:20 1599:14          1616:12 1621:13          1622:15 1630:22          1634:23,25 1640:9          1641:25 1652:10  <b>MWD's</b> 1541:13          1542:6,7,11 1562:2          1564:17 1566:3,5          1594:9 1658:4,6,9  <b>MWD-SDCWA</b>          1581:13</p>	<p><b>named</b> 1727:12  <b>names</b> 1671:16  <b>narrow</b> 1656:6  <b>nature</b> 1551:13  <b>near</b> 1672:16  <b>nearly</b> 1686:22  <b>necessarily</b> 1556:7          1604:17 1660:17          1722:4  <b>necessary</b> 1552:18          1622:1 1624:16          1629:2 1699:16          1725:12  <b>need</b> 1550:5 1568:25          1570:24 1665:9          1693:18 1702:17          1725:2  <b>needed</b> 1571:10          1715:14  <b>needing</b> 1660:12  <b>needs</b> 1664:18,19          1668:15 1691:13  <b>negotiate</b> 1713:25  <b>negotiated</b> 1558:24          1611:6 1612:12          1718:23  <b>negotiating</b> 1564:13          1588:3 1713:20  <b>negotiation</b> 1555:9          1572:14 1573:7          1585:4 1586:8          1594:21  <b>negotiations</b> 1556:6          1557:3 1559:18,22          1563:11 1572:20          1587:10 1718:8,9,17  <b>negotiator</b> 1614:23  <b>negotiators</b> 1615:1,7  <b>neither</b> 1564:20          1603:13 1606:13          1646:21  <b>NEST</b> 1536:3  <b>net</b> 1540:21  <b>never</b> 1542:19 1544:4,4          1544:13,15 1551:24          1552:5 1581:19          1599:6 1614:2          1615:19 1616:1          1652:22 1657:1,7,18          1657:21 1688:11,12          1700:10,15 1724:3  <b>Nevertheless</b> 1649:21  <b>new</b> 1602:13 1618:7          1619:6 1725:21  <b>nexus</b> 1621:25 1624:15          1629:1  <b>ngoldberg@kvn.com</b>          1536:9</p>	<p><b>NICHOLAS</b> 1536:5  <b>nine</b> 1553:15 1634:3  <b>Nineteen</b> 1686:21  <b>Nods</b> 1600:21  <b>non-Met</b> 1715:15  <b>non-MWD</b> 1541:11  <b>noon</b> 1546:2 1625:12  <b>normal</b> 1676:19          1704:18 1711:24          1720:3  <b>normally</b> 1723:19  <b>North</b> 1536:19  <b>note</b> 1677:15  <b>notes</b> 1630:15  <b>Notice</b> 1658:10  <b>November</b> 1556:15          1560:3 1719:13  <b>number</b> 1537:7 1541:5          1541:9 1550:3          1556:16 1557:14          1563:15 1567:2,3,10          1572:13 1609:20          1619:20 1646:3          1649:25 1650:2,16          1654:25 1655:13,23          1663:23 1713:21          1717:9 1718:7          1722:10 1724:3,21  <b>numbers</b> 1541:4          1542:22,25 1543:13          1543:17,19 1546:11          1549:23 1550:18          1599:13 1644:18          1654:2,4 1659:10          1683:7,8 1684:15          1717:25 1724:14          1725:1,3  <b>numerous</b> 1586:7</p>
<b>O</b>				
			<p><b>o'clock</b> 1725:24  <b>oath</b> 1553:22  <b>object</b> 1542:21,21          1558:13 1612:17          1660:6 1710:23          1712:9 1718:25  <b>objected</b> 1540:5 1552:6          1580:12 1647:25  <b>objecting</b> 1675:13  <b>objection</b> 1543:2          1554:25 1558:16          1560:21 1562:23          1567:7 1568:14          1597:5 1605:3,25          1606:25 1608:23          1613:15 1618:13          1639:10 1641:21          1642:10 1673:2</p>	
<b>N</b>				
		<p><b>N</b> 1537:1  <b>name</b> 1573:5 1661:7,8          1708:25</p>		

<p>1674:18 1675:10,17 1675:19 1676:8 1677:13,20 1678:16 1678:19 1680:23 1683:24 1685:5 1687:3,4 1701:4 1706:16 1711:17 1714:12 1715:6 1716:3,7,25 1718:24 1720:14,19 1724:10 1724:20,23 <b>objections</b> 1539:10 1547:8 1572:5 1626:18 1641:24 1642:1,2,4,10 1648:4 1716:5 1723:25 <b>obligated</b> 1662:16,22 1663:2 1687:13 1696:6 <b>obligation</b> 1569:3 1662:7 1663:7 1688:9 1688:18 <b>obligations</b> 1569:19 1662:25 1663:19 1665:2 1669:1 1692:7 <b>obtain</b> 1711:20 1719:24 <b>Obviously</b> 1616:5 <b>occasion</b> 1573:22 1619:14 <b>occur</b> 1686:20 <b>occurred</b> 1562:21 1565:9 1619:19 <b>ocean</b> 1670:9 <b>October</b> 1565:13 1589:14 <b>off-peak</b> 1715:12,18 1717:9,20 <b>offer</b> 1548:15 1673:1 1674:14 1675:18 1677:11 1683:22 1685:4 1686:25 <b>offered</b> 1637:18 1678:5 1715:19 <b>offers</b> 1710:11 1712:8 1716:24 1720:13 1723:24 <b>OFFICE</b> 1536:18 <b>officer</b> 1555:23 <b>officer's</b> 1620:24 1621:4,24 <b>Oh</b> 1573:1 <b>okay</b> 1550:23 1606:11 1607:5 1618:22 1625:10 1656:16 1676:11 1706:21 <b>old</b> 1664:18 <b>on-peak</b> 1552:3,8,12 1654:20 1657:4,4,5</p>	<p>1657:10,23 1660:1 1715:8,12,13,19,21 1715:22,24 1717:7,12 1717:18,22 1718:2 1719:1 1721:4,12 <b>on-peek</b> 1717:2 <b>once</b> 1606:17 1613:6 1639:22,24 1699:2 <b>one-off</b> 1541:2 <b>one-on-one</b> 1584:19 1647:23 <b>ones</b> 1647:15 <b>opening</b> 1538:15 <b>operate</b> 1568:13 1569:10 <b>operated</b> 1646:22 <b>operates</b> 1719:22 <b>operational</b> 1568:2 1665:7 1676:17 1691:3,5,9,13 1693:13 1697:24 1698:25 1699:2,18,19 1702:5,6 1704:20,23 <b>operations</b> 1661:21,22 1662:3,3 1663:16 1676:22 1679:5,10,19 1680:18 1681:9,10 1704:18 1709:10 <b>Operator</b> 1719:15,21 <b>opine</b> 1548:10 <b>opinion</b> 1540:16 1544:13 1548:14,15 1549:2,3,11 1626:23 <b>opinions</b> 1539:19 1550:11 1660:6 <b>opportunity</b> 1650:21 1651:13 1669:16,20 1669:25 <b>opposed</b> 1577:23 1578:21 1665:14 <b>opposite</b> 1618:13 <b>opposition</b> 1538:23 1545:18 1547:3,4,25 1550:22 1551:16,19 1551:20 1649:2 <b>optimistic</b> 1559:12 <b>option</b> 1563:19 1566:2 1646:6 <b>Option-1</b> 1594:20 1597:20 1598:24 1599:2 1600:5 1644:1 <b>Option-2</b> 1564:8,25 1566:2,18,24 1587:10 1594:20 1595:2 1597:20 1598:25 1599:2 1600:11,12 1643:25 <b>options</b> 1566:1 1637:18</p>	<p><b>Oracle</b> 1542:10 <b>oral</b> 1642:2,4,10 <b>orally</b> 1588:24 1596:2 1613:18 1614:3,10,22 1615:9 <b>Orange</b> 1558:11 <b>order</b> 1606:23 1620:19 1643:9 1649:19,20 1659:5 1663:9 <b>ordinarily</b> 1548:17 1549:3 <b>ordinary</b> 1655:17 1674:5 1676:17 <b>original</b> 1563:11 <b>ought</b> 1545:1 1549:16 1654:23 <b>outside</b> 1553:4 1579:1 1579:3,6 1581:14 1651:24 <b>overcharged</b> 1612:9 1645:14 1648:19 <b>overrule</b> 1562:24 1675:16 <b>overruled</b> 1597:8 1605:11 1609:2 1677:9 1678:16,20 1680:2,12,25 1701:4 1711:19 1714:12 1715:6 1716:10 1718:24 1720:19 <b>overview</b> 1679:15 <b>owe</b> 1540:13 <b>owned</b> 1646:21</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1626:3 1715:21 <b>package</b> 1564:5 <b>page</b> 1543:20 1554:8 1564:7 1565:14,25 1566:12 1575:13 1580:18 1581:11,23 1585:9 1587:22 1589:10 1590:15 1592:16 1602:20 1603:12 1607:7 1608:2 1609:25 1611:17 1614:8 1616:13,16 1617:13 1620:15,16 1621:2 1630:8 1634:3 1640:1 1649:12 1677:16,16 1695:9,14 1698:16 1700:21 1711:5,14 1714:24 <b>pages</b> 1535:13 1567:3 1575:10,11,11 1677:17 1715:2 <b>paid</b> 1556:7 1561:17</p>	<p>1602:8,10 1644:7 1657:9 <b>paper</b> 1556:4 1600:1 <b>papers</b> 1550:24 <b>paragraph</b> 1556:3 1566:13 1608:4 <b>parameters</b> 1671:19 1673:21 1676:20 <b>Pardon</b> 1597:10 <b>Parker</b> 1630:23 1723:11,11 <b>part</b> 1546:20,20 1555:10 1564:5 1570:23 1603:11 1607:3 1628:23 1658:21 1660:2,4 1681:5 1685:1,13 1688:10 1702:23 1704:8,18 1710:14 <b>participants</b> 1573:2 <b>participate</b> 1572:20 <b>participated</b> 1560:15 1572:14 <b>particular</b> 1549:6 1579:9 1590:25 1659:8 1666:11,14,22 1673:13 1722:5 1724:11 <b>parties</b> 1582:4 <b>parts</b> 1696:22 <b>party</b> 1676:4 1678:4 1715:15 <b>pass</b> 1538:10 <b>passage</b> 1603:1 <b>passed</b> 1572:9 1613:19 1620:13 1638:12 <b>passes</b> 1689:11 <b>path</b> 1657:5 1690:4 1713:3 <b>Paul</b> 1573:9,15 <b>pause</b> 1655:11 <b>pay</b> 1555:2 1566:5 1567:11 1582:4,6 1593:6,11 1594:6,10 1594:25 1600:23 1601:3,11,15,25 1643:18,19 1645:22 <b>paying</b> 1644:17 <b>pays</b> 1564:19 <b>Peace</b> 1616:16 <b>peak</b> 1663:7 <b>peer</b> 1573:15 1586:8 <b>people</b> 1572:13 1587:5 1589:17 1649:4 1654:7 1655:9 1672:21 1674:8 1676:25 1677:2,6,24 1678:14,24</p>	<p><b>per-megawatt</b> 1721:22 <b>percent</b> 1568:16,17 1569:18 1570:10 1640:9 1683:20 1688:6 1693:15,23 1698:23 1699:9 <b>percentage</b> 1627:21 1672:10 <b>percentages</b> 1684:13 1685:20 1686:7 <b>percipient</b> 1544:25 1545:15 1546:3 1660:5 1712:11 <b>perform</b> 1724:6 <b>performance</b> 1597:3,13 <b>performed</b> 1641:20 1642:9 <b>period</b> 1555:17,19 1557:12 1559:3,11 1593:11 1594:6,16 1606:9 1607:10,19,20 1611:8,15,19 1619:19 1641:24 1648:14 1684:5 1707:10 1708:3 1715:19,23 <b>periodically</b> 1677:1 1693:7,9 1704:11 <b>periods</b> 1670:18 1692:25 1693:3,18 1705:3 <b>permit</b> 1665:25 1674:1 <b>person</b> 1585:3,8 1592:15 1633:23 1636:20 1638:2 1663:15 <b>personal</b> 1607:11 <b>personally</b> 1638:6 1681:8,24 1683:8 <b>persons</b> 1535:10 1587:12 1679:7 <b>persuade</b> 1646:1 <b>pertain</b> 1580:23 <b>pertaining</b> 1603:18 <b>pertinent</b> 1590:8 1591:6 <b>petition</b> 1574:15 <b>Petitioner</b> 1535:7 1536:2 <b>phase</b> 1539:20 1540:5,9 1543:11 1548:20 1648:2 1690:20,20 1700:9,14 <b>phrase</b> 1585:18 1586:2 1607:7 1627:4,5 <b>physical</b> 1569:10 1693:22 1708:1 <b>physically</b> 1689:17 1692:10,11 1693:15</p>
--	--	--	---	--

<p>1693:20,20,21          1697:18,18,19 1699:8          1701:23 1702:2          1705:24  <b>pick</b> 1725:23  <b>picked</b> 1658:12  <b>piece</b> 1600:1 1628:21          1628:24  <b>pipe</b> 1569:12  <b>pipeline</b> 1697:13  <b>pipelines</b> 1705:4  <b>place</b> 1587:2 1653:5          1680:5 1703:15,21          1708:10 1727:12  <b>Plaintiff</b> 1535:7 1536:2  <b>Plaintiff's</b> 1558:8  <b>plan</b> 1545:21 1560:14          1616:12 1676:22  <b>planning</b> 1661:21,23          1662:3 1676:20          1709:11  <b>plant</b> 1666:8 1667:11          1672:9 1692:23,24          1697:7 1723:11,15,20  <b>plants</b> 1673:24  <b>Platt's</b> 1716:15  <b>Platts</b> 1552:4,6 1654:19          1657:20 1711:6,7,20          1719:17 1721:14  <b>pleading</b> 1580:17  <b>please</b> 1555:20 1570:4          1603:11 1607:25          1630:8 1640:3 1661:5          1662:15 1669:21          1673:17 1676:9          1683:1 1684:3          1687:10 1692:20          1694:13 1695:9,14          1698:16 1702:8          1708:24,24 1710:4,21          1716:2,18 1719:8          1720:24 1725:16  <b>plenary</b> 1633:8  <b>plumbing</b> 1666:8  <b>Pocklington</b> 1630:24  <b>point</b> 1546:2 1553:15          1554:13 1561:10          1562:13 1590:19          1607:6 1616:10          1625:6 1689:6,8          1699:25 1703:16          1713:8  <b>points</b> 1545:16 1711:10  <b>portion</b> 1578:3 1592:14          1722:7 1724:22  <b>portions</b> 1579:23          1646:9  <b>position</b> 1579:15,20</p>	<p>1583:7 1614:24          1615:5 1629:14          1654:23 1661:19          1709:9 1713:11  <b>positions</b> 1580:2          1584:11  <b>possession</b> 1659:12  <b>possible</b> 1663:15,17,22          1667:24 1668:2          1687:12,16 1701:23          1702:2,14 1705:25          1707:12  <b>possibly</b> 1539:4 1708:5  <b>posted</b> 1565:18,23  <b>potential</b> 1557:23          1559:10 1703:5  <b>potentially</b> 1564:25          1670:5  <b>power</b> 1542:19 1543:1          1543:25 1544:2          1548:9 1549:18,20,21          1552:3,12 1566:9          1582:5,5,7,12,13,16          1582:16,22 1583:15          1583:17 1589:6,18          1590:1 1591:19          1647:13,14 1649:14          1652:20 1653:2,10          1655:4 1657:9,14          1658:5 1709:10,16          1710:15,17,19,20          1712:12,25 1713:15          1713:21 1714:3,3,10          1715:9,14,17 1717:2          1717:7,8,13,17,21          1718:3,6,9,15,23          1720:17 1721:7,17          1722:6,8,9,13,21,22          1722:24 1723:11,13          1723:14,15,15,20          1725:11,12  <b>practicable</b> 1688:7  <b>practical</b> 1705:22,25  <b>practically</b> 1705:23  <b>practice</b> 1546:6  <b>precedence</b> 1570:13  <b>precedent</b> 1569:16  <b>preceding</b> 1684:14  <b>preclude</b> 1603:4  <b>precluded</b> 1602:11  <b>preliminary</b> 1547:23  <b>premise</b> 1543:8  <b>preparation</b> 1676:2  <b>prepare</b> 1598:13  <b>prepared</b> 1545:19          1568:17 1601:25          1683:8  <b>present</b> 1584:15,20,22</p>	<p>1587:5,12 1598:19          1643:8 1644:7  <b>presentations</b> 1561:12  <b>presented</b> 1549:7          1594:21  <b>presenting</b> 1564:11  <b>presents</b> 1546:21  <b>pressed</b> 1549:24  <b>presume</b> 1628:7          1637:14  <b>pretrial</b> 1580:13  <b>pretty</b> 1546:1 1551:13          1570:8 1643:17          1645:3 1656:11          1692:16  <b>previously</b> 1553:19,23          1582:19 1716:8          1717:11,16 1719:13  <b>price</b> 1581:18 1582:20          1582:24 1592:10,19          1595:1,4,9,18,22          1596:3,8,10,13,20          1599:18 1601:19          1602:7 1611:1,3          1612:18 1613:12,15          1639:6,10 1643:19          1647:1 1657:6 1712:2          1713:2,8,25 1715:8          1715:15,24 1716:1          1717:2 1718:6 1720:7          1720:21  <b>priced</b> 1712:25  <b>prices</b> 1582:21 1711:15          1713:18 1715:21          1721:4  <b>pricing</b> 1711:10          1716:14,22  <b>Primarily</b> 1702:11  <b>primary</b> 1704:11  <b>principles</b> 1540:19  <b>prior</b> 1559:16 1614:10          1633:16 1668:16          1669:8 1684:6  <b>private</b> 1586:7  <b>pro</b> 1597:18 1598:2  <b>probably</b> 1549:9          1550:4 1588:23          1632:10 1651:11          1655:11 1659:9          1663:23 1664:19          1670:21 1678:7          1680:25  <b>problem</b> 1544:21          1546:21 1558:2          1559:11,13,14          1560:11 1618:10          1649:5 1652:17,18,19  <b>problems</b> 1653:8</p>	<p>1665:19  <b>proceed</b> 1553:1,5          1607:24 1650:18,21  <b>proceedings</b> 1535:15          1727:11  <b>process</b> 1561:5 1574:21          1621:6,12,17,23          1624:4 1628:12  <b>processes</b> 1560:13          1615:17  <b>produce</b> 1543:5          1571:20 1654:5,9,9  <b>produced</b> 1542:20          1543:2 1546:24,25          1552:5 1652:7,12,22          1657:18 1659:6,17          1723:15  <b>producing</b> 1543:3  <b>production</b> 1652:9          1723:16  <b>productive</b> 1615:17  <b>professional</b> 1709:24          1709:25  <b>program</b> 1672:8          1683:14  <b>prohibited</b> 1605:1,15  <b>project</b> 1539:5,23,25          1543:1,9,9,25 1544:7          1546:20 1549:18          1560:20,25 1572:5          1574:3 1585:22          1589:2,5,20 1591:20          1611:25 1640:17          1646:21 1649:14          1652:20 1653:15,17          1653:19 1658:7,15          1664:10,11 1665:14          1665:23 1666:25          1667:15,20 1668:20          1669:6,11,13,19,23          1670:8,12,15,16,23          1671:1,3 1672:10          1674:2 1680:21          1681:12,21 1682:19          1683:15,21 1684:7          1685:1 1686:8,12          1688:7,20 1689:14,18          1690:13 1691:17,17          1692:22 1693:4          1697:15 1699:16          1702:13,16 1703:1,8          1703:20 1704:2          1705:8,14,23 1706:1          1706:12 1709:18          1725:11  <b>projection</b> 1600:3  <b>projections</b> 1566:21  <b>promoted</b> 1559:24</p>	<p>1560:1,4  <b>proper</b> 1548:7 1595:14  <b>properly</b> 1539:6,7          1540:7 1548:19,21,23          1561:19 1593:4,10  <b>proposal</b> 1557:17          1651:17,20  <b>proposed</b> 1594:25          1595:7,9,18 1596:9          1596:20 1619:21          1628:25 1649:6  <b>proud</b> 1643:5  <b>provide</b> 1561:17          1568:22,24 1649:21          1649:22 1668:11          1669:12 1675:6          1680:8 1687:13          1688:6 1695:24          1696:6 1708:4          1719:16 1722:21  <b>provided</b> 1549:15          1551:6,24 1561:24          1565:2 1566:20          1569:1 1603:3 1608:2          1649:25 1662:20          1664:7 1666:19          1668:4,10 1670:12          1674:3 1675:25          1708:10  <b>provides</b> 1564:25          1575:22 1584:11          1621:19 1670:24          1676:24 1688:24          1689:2 1701:15          1713:14  <b>providing</b> 1621:7          1622:2 1669:1 1677:3  <b>provision</b> 1568:20          1570:4 1592:19          1594:12 1602:13,16          1603:24 1608:12          1612:13 1636:15  <b>provisions</b> 1571:14          1622:9  <b>proviso</b> 1602:25 1603:2          1603:10 1605:17,21          1608:1,15,17,19,20          1609:6,7,9,15          1610:18  <b>PTX</b> 1541:4,13 1558:8          1568:21 1575:8          1602:20 1682:9,11          1695:8,11 1698:1,11          1698:17  <b>public</b> 1565:18,20          1566:12 1574:9          1597:2,12 1645:20  <b>publication</b> 1711:5</p>
---	--	--	--	--

<p>1712:13 1716:15  <b>publications</b> 1712:16  <b>publicly</b> 1551:6  1719:25  <b>publish</b> 1712:13  <b>published</b> 1566:7  1583:10 1674:13  <b>publishing</b> 1719:18  <b>pump</b> 1571:12 1722:16  1725:12  <b>pumped</b> 1723:21  <b>pumps</b> 1570:21  1722:14  <b>PURCELL</b> 1536:4  <b>purchase</b> 1658:6  1715:14  <b>purchased</b> 1576:20  <b>purchases</b> 1685:25  1717:17  <b>purchasing</b> 1710:15  1715:17 1717:13  <b>pure</b> 1697:19 1701:23  1704:5 1705:19  <b>purely</b> 1693:6 1702:5  <b>purports</b> 1538:14,18  1552:7  <b>purpose</b> 1712:1  1714:11 1718:20  1720:5,22  <b>purposes</b> 1568:2  1704:17 1714:8  <b>pursuant</b> 1574:16  1654:24 1671:4  1680:21 1681:13  <b>pursuing</b> 1558:22  <b>put</b> 1538:13 1539:6,7  1539:12,21 1542:20  1543:3,24 1544:2,7  1544:11,19 1549:23  1575:11,11 1590:16  1626:25 1652:4,22  1653:14 1656:22,23  1692:20</p>	<p>1583:8 1584:13  1600:9 1604:23  1607:2,4 1609:4,5,16  1610:23 1613:22  1619:22 1623:22  1627:3 1629:13  1631:16 1637:10  1660:3,4 1675:12  1678:5 1679:17,18  1680:15 1686:23  1700:23 1704:21  1706:17,19 1710:25  1717:24  <b>questions</b> 1550:13,20  1571:23,25 1572:4  1574:2,7,25 1575:1,2  1575:5 1584:7  1587:21 1592:8  1600:22 1601:1  1611:14 1634:21  1646:11 1648:8  1701:22,25 1705:24  1713:12 1725:5,6  <b>quick</b> 1564:14  <b>Quickly</b> 1681:16  <b>Quinn</b> 1536:13 1545:6  1545:8,14,23 1546:23  1550:21,24 1551:4  1558:13,15 1560:21  1562:23 1563:4  1567:7 1572:2 1574:1  1575:8 1580:5,16,17  1597:7,11 1605:7,13  1606:11 1607:24  1608:1,25 1609:6  1615:4 1618:23  1619:3 1625:6,9  1626:14 1634:12,17  1639:16 1642:25  1643:4,7 1645:15  1648:24 1655:11,16  1656:17 1660:21  1661:12 1673:1,5  1674:14,17,23  1675:18,23 1676:4,12  1677:11,21 1678:8,11  1678:22 1679:3,19  1680:7,17 1681:8  1682:9 1683:5,7,22  1684:2 1685:4,8  1686:25 1687:2,11,18  1701:21 1706:4,16  1708:15 1725:2,21  <b>QUINN,ESQ</b> 1536:14  <b>quite</b> 1551:17 1695:22  1698:19 1720:17  <b>quote</b> 1548:11 1602:3  1621:3,16</p>	<p style="text-align: center;"><b>R</b></p> <p><b>radical</b> 1576:24  1577:14 1578:13  <b>radically</b> 1577:10,16  1577:20 1578:8,18  <b>raised</b> 1547:13 1555:11  1560:16  <b>random</b> 1677:18  <b>range</b> 1644:2  <b>rate</b> 1539:7 1540:2,18  1540:18,18,20 1542:4  1544:11 1554:15  1555:1,12 1557:13,16  1558:4 1560:14  1561:4 1563:2,3  1564:19,22 1566:6,7  1567:11,15 1579:12  1581:19,25,25  1582:11,13,15,16,22  1582:25 1583:4,9,10  1583:11,15,17,20,22  1584:17,23 1585:11  1585:15,24 1586:12  1586:25 1587:9,15,19  1589:21 1590:1,4,5  1590:22 1591:2,11,19  1591:20,21 1592:11  1592:24,25 1593:2,4  1593:9,15,25 1595:1  1595:14 1598:21  1599:14 1600:4,6,7  1600:14,15,23 1601:4  1601:8,15,22 1602:1  1602:22 1610:2,10,22  1612:1 1613:7 1615:9  1616:23 1617:5,6,7,8  1617:10,11,23 1618:5  1618:12,20 1619:7,10  1619:15,18,21,25  1622:22 1623:7,16,24  1625:3 1627:19  1628:8 1629:9  1631:24 1633:15  1638:9,16 1640:9,18  1641:17,17,19 1642:6  1642:7,8 1644:18,20  1645:22 1646:18,23  1647:11,13,16 1653:2  1654:20 1657:14  1658:4,6 1660:1  1710:19,20 1713:4  1714:22 1715:7,10,12  1715:20 1717:12,18  1717:22 1718:2  1721:20 1722:8  <b>rate-setting</b> 1635:15  <b>rates</b> 1535:10 1540:6  1540:11 1542:7</p>	<p>1544:1 1548:11,16  1549:18 1552:3  1557:23 1561:24  1564:20,21 1572:6  1578:7,8 1581:24  1588:16,21 1590:9  1597:22 1599:3,19,24  1601:11 1604:13,21  1605:2,8,8,20,22  1606:9 1610:4,11,20  1612:13,21 1613:1,4  1613:9,18 1614:3,12  1615:9,23 1616:21,24  1617:2,4,21 1618:7,8  1618:19,21,24 1619:8  1619:12,15,24 1620:2  1620:9,23 1621:3,6  1621:21,24 1622:1,21  1623:12,22,25 1624:3  1624:12,16 1625:3  1626:19,21 1627:4,18  1627:21 1628:11,19  1628:25 1629:1  1630:10 1631:2,7,18  1631:22 1632:6,13,17  1633:3,10,15,19  1635:3,4,5,7,9,11,13  1635:17,19,21,23,24  1636:1,2,8,12,18,25  1637:6,17,21 1639:2  1639:23 1648:10,11  1657:10 1658:2,2,5  1658:11 1712:12  1718:23 1722:2  <b>rationale</b> 1540:3  <b>raw</b> 1672:9 1682:1,5  <b>re-cross</b> 1545:25  <b>reaches</b> 1663:6  <b>read</b> 1547:2,4,25  1551:16,19 1554:9  1565:20 1568:23  1585:1,7 1589:8  1590:14 1592:14  1614:6 1623:4  1629:10,12,13  1633:22 1639:14  1640:20 1649:2  1688:16  <b>reading</b> 1551:20  1603:24 1615:4  <b>readings</b> 1672:7  <b>reads</b> 1564:10 1610:1  <b>ready</b> 1553:5  <b>real</b> 1703:11,12  1705:25  <b>really</b> 1547:12,14,21  1612:6 1632:1 1651:9  1658:24</p>	<p><b>reason</b> 1545:2 1584:5  1669:3 1697:23  1698:22 1704:15  1724:11  <b>reasonable</b> 1548:6,11  1548:15 1628:14  1713:21  <b>reasonably</b> 1539:7  1621:6,17 1624:7  1628:15  <b>reasons</b> 1544:24  1663:23 1665:1,6,7  1668:24 1670:11  1699:18,19 1702:5,6  1702:9,11 1716:8  <b>rebuttal</b> 1551:21  <b>recall</b> 1572:3,6,12  1573:13 1574:6,9  1575:4,6,7 1576:13  1584:3,8,14,19,21,25  1585:12,23 1586:11  1587:20 1588:13  1589:7 1592:12,21  1594:14,23,25  1597:22 1598:6,11  1601:1,4 1611:16  1613:22,24 1614:9  1615:8 1618:3  1622:14 1625:7,8  1627:13 1632:23,24  1644:3 1648:2  1651:13 1694:2  1700:12,19,20  1701:25 1704:21  <b>receive</b> 1680:6 1696:18  1722:22 1723:18  <b>received</b> 1538:10,11  1567:9 1598:18  1641:2 1642:15  1656:10 1673:3  1674:21,25 1678:21  1680:21 1681:21  1682:20 1684:1  1685:7 1687:6 1704:8  1705:15 1710:13  1719:7 1720:23  <b>receives</b> 1567:21  1643:10 1668:14  1690:22 1700:1  1723:14  <b>receiving</b> 1538:18  1680:10 1681:13  1705:19,20  <b>recess</b> 1552:19 1625:12  1687:7,9 1726:1  <b>Reclamation</b> 1559:16  1570:18 1571:4  1695:1,5,12 1698:2</p>
---	--	--	--	---

<p>1698:13  <b>recognize</b> 1566:18  1695:11 1698:13  1711:2 1716:11,18  1719:9 1720:25  <b>recognized</b> 1555:16  <b>recollection</b> 1565:12  1574:12 1584:18  1585:25 1589:9  <b>recommendation</b>  1596:19 1620:24  1621:25 1630:16,19  1638:5 1640:8  <b>recommendations</b>  1621:5 1627:20  <b>recommended</b> 1561:7  1595:23 1596:7  1625:1,2 1627:17  1631:1 1637:3,16  1638:1 1645:6  <b>reconcile</b> 1542:6  <b>reconciliation</b> 1542:7  <b>reconsider</b> 1610:16  <b>record</b> 1539:12  1540:21 1554:21  1563:8 1564:2 1630:6  1634:11,15,16 1651:2  1652:4 1655:15  1658:15,18,22  1702:16 1708:25  1712:10 1725:17,18  1725:19  <b>records</b> 1542:10  1546:10 1671:14,16  1681:18,19  <b>recover</b> 1548:7  <b>RECROSS</b> 1537:2  <b>RECROSS-EXAMI...</b>  1645:18 1706:7  <b>redirect</b> 1537:2 1554:2  1572:1 1701:18,20  <b>reduce</b> 1556:5  <b>reduced</b> 1727:13  <b>reduction</b> 1723:1  <b>refer</b> 1609:15 1629:22  1637:12 1714:15  <b>reference</b> 1586:2,3  1591:16 1593:18  1646:18  <b>referred</b> 1590:4  1594:16 1600:19  1604:9 1611:15  1642:11 1667:1  1678:24 1710:5  <b>referring</b> 1577:5  1628:10,22 1642:2  1669:4 1672:13  1702:25 1715:3</p>	<p><b>refers</b> 1604:9 1656:7  <b>refinement</b> 1560:15  1561:5  <b>reflect</b> 1683:18  <b>reflected</b> 1649:8  1714:17,20 1717:8,9  <b>reflecting</b> 1613:14  <b>reflects</b> 1610:8 1678:25  1679:11,22,25 1680:3  1680:9 1683:19  1713:8  <b>refresh</b> 1565:11  <b>reg</b> 1590:25  <b>regarding</b> 1559:10  1560:14,16,24  1567:13 1588:16  1626:23 1627:21  1633:5  <b>regional</b> 1714:16  <b>registered</b> 1709:25  <b>regular</b> 1587:1 1628:9  1671:8  <b>regularly</b> 1694:18  1712:3 1720:8  <b>regulation</b> 1567:13  1591:1 1603:17  1604:3  <b>regulations</b> 1603:7  <b>relate</b> 1658:11  <b>related</b> 1550:19 1583:2  1588:6 1620:2 1641:6  1643:11 1687:15  1705:6  <b>relates</b> 1583:14  1646:20 1647:25  1656:9  <b>relating</b> 1584:14  1686:3  <b>relation</b> 1635:25  <b>relative</b> 1598:9 1599:3  1681:11  <b>relevance</b> 1710:24  <b>relevant</b> 1717:4  <b>reliability</b> 1676:2  <b>relied</b> 1712:22  <b>relief</b> 1651:5  <b>relies</b> 1677:22  <b>rely</b> 1579:11 1592:4  1655:16 1656:13  1677:2,7,25 1712:6  1720:11  <b>remain</b> 1710:9  <b>remaining</b> 1651:23  <b>remedies</b> 1558:22  <b>remember</b> 1554:1  1632:19  <b>Remind</b> 1621:12  <b>reminded</b> 1567:5</p>	<p><b>reminding</b> 1634:14  <b>renovation</b> 1664:15  <b>reopen</b> 1539:15  <b>reopened</b> 1539:16  <b>repeat</b> 1604:23 1609:5  1679:18 1690:6  1700:13  <b>repeatedly</b> 1555:11  <b>rephrased</b> 1666:17  <b>replace</b> 1665:22  <b>Reply</b> 1580:11  <b>report</b> 1538:21 1539:3  1548:2,5 1550:12  1639:24 1650:23  1654:13 1673:20  1680:8 1695:11  1711:8,11  <b>Reported</b> 1535:19  <b>Reporter</b> 1727:9,24  <b>REPORTER'S</b>  1535:15 1727:1  <b>reports</b> 1541:18  1542:11 1552:4,6  1627:19,24 1650:7  1711:7,21,23 1712:1  1712:3,6 1721:14  <b>representatives</b>  1616:20 1617:2  1619:23  <b>representing</b> 1656:11  <b>represents</b> 1662:18  1720:20  <b>request</b> 1551:9 1639:17  1652:9  <b>requested</b> 1567:22,23  1575:10 1656:14  <b>requests</b> 1552:15  1655:22 1658:1  1659:14  <b>require</b> 1542:8 1550:9  <b>required</b> 1568:25  1622:1 1624:16  1629:1 1636:17  1695:23 1725:11  <b>requirements</b> 1578:4  1709:16,18  <b>requires</b> 1541:1  1544:16 1688:5,22  1722:16  <b>reservation</b> 1556:25  1557:2 1610:21  <b>reserve</b> 1555:5 1580:15  1610:10  <b>reserving</b> 1610:19  <b>reservoir</b> 1667:8  1680:4 1687:14  <b>reservoirs</b> 1664:11  <b>resolution</b> 1620:5,7,12</p>	<p>1620:16 1622:8,12,13  1622:14,19 1624:18  1627:25 1629:24  1637:9  <b>resolutions</b> 1628:5,8  1629:9,15,17 1630:3  <b>resolve</b> 1620:19  <b>resolved</b> 1558:3  <b>resources</b> 1542:19  1574:10 1649:13  1709:17  <b>respect</b> 1547:8 1548:1  1549:5 1647:1  1648:18 1653:2  1658:9  <b>respects</b> 1577:21  <b>respond</b> 1545:20  <b>Respondent</b> 1536:11  <b>Respondents</b> 1535:14  1580:11  <b>responding</b> 1551:2  <b>response</b> 1541:5 1545:9  1556:4,16 1557:16  1574:1,6 1575:4  1584:6 1587:20  1592:7 1610:23  1611:14 1613:22  1650:9 1659:5  <b>responses</b> 1650:1  <b>responsibilities</b>  1709:14 1711:24  1720:3  <b>responsible</b> 1661:25  1662:2 1709:15  1710:15  <b>responsive</b> 1650:16  1655:22  <b>restated</b> 1548:13  <b>restricted</b> 1603:25  <b>restriction</b> 1608:6  1611:12  <b>result</b> 1562:17 1591:13  <b>resumed</b> 1554:5 1626:6  1626:13  <b>retrospective</b> 1542:5  <b>retrospectively</b> 1542:3  <b>revenue</b> 1542:6  <b>revenues</b> 1542:11  1622:1 1624:16  1629:1 1635:13  1636:6  <b>reviewed</b> 1640:20  1692:19 1710:7  <b>right</b> 1547:12 1549:6  1550:14 1552:2,19  1555:6 1556:25  1557:8,11 1558:4,12  1562:18 1563:16</p>	<p>1564:5,13 1568:5,10  1569:14 1570:5  1578:19 1579:23  1583:19 1587:10  1594:18 1596:5  1601:9 1606:7,24  1607:12 1610:11,19  1612:2,15 1615:23  1616:6,15 1618:15  1623:20 1630:13  1637:11,13,17  1640:22 1643:13  1644:11,16 1645:8,9  1646:1 1647:5  1649:18,22 1659:19  1664:24,25 1666:5  1684:25 1688:7,14,20  1688:24 1689:7  1690:9,24 1691:4,6  1691:13,18 1692:1,17  1693:2,5,9 1694:7,22  1695:18 1697:3  1698:20 1699:18  1706:23 1707:1,7  1708:4,11 1718:13  1722:11  <b>right-hand</b> 1715:3  <b>rights</b> 1557:3 1564:18  1566:4 1610:21  1723:14  <b>risk</b> 1556:17,17  1601:24 1705:11  <b>risks</b> 1566:13,18  <b>River</b> 1544:2,18  1567:22 1568:16,18  1569:2,18,24 1570:10  1570:15 1571:8  1576:11 1653:11  1657:9,10 1663:20  1664:3,8,12 1665:3  1665:11,14,20 1666:1  1666:24 1667:14,21  1668:4,11,21,25  1669:2,12 1670:13,15  1671:4,25 1674:2  1680:20 1681:12,21  1682:20 1684:8  1685:3,13,22 1686:8  1686:10,16 1689:7,8  1689:11,21 1690:1,13  1691:18,21,22 1692:4  1692:14,15,22 1693:2  1693:6,16,23 1694:15  1694:19,20,21 1695:3  1695:17 1696:3,14,18  1696:21,25 1697:6,12  1698:6,18,24 1699:9  1699:22 1700:1</p>
--	--	--	--	--

<p>1701:24 1702:9,12                  1703:9,21 1704:6                  1705:16,20 1706:2,12                  1707:6,19 1709:16                  1714:17 1722:14                  1723:12  <b>Robert</b> 1563:24  <b>Ron</b> 1586:15  <b>roughly</b> 1592:20                  1662:14 1663:11                  1664:1 1686:22  <b>route</b> 1704:18  <b>routed</b> 1704:6  <b>rows</b> 1700:5  <b>RPR</b> 1535:20 1727:23  <b>RSI</b> 1586:16,16  <b>rtae</b> 1584:15  <b>rule</b> 1712:21  <b>ruled</b> 1543:25  <b>ruling</b> 1539:21 1540:1                  1540:4,5,10 1543:11                  1544:10 1580:15                  1650:21 1653:16                  1725:4  <b>rulings</b> 1548:20  <b>run</b> 1653:11 1664:24  <b>running</b> 1546:11                  1665:18  <b>runs</b> 1664:22</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>S</b> 1536:5  <b>Sacramento</b> 1581:6  <b>sale</b> 1713:15  <b>salinity</b> 1671:18                  1703:13  <b>San</b> 1535:2,6,16,17,24                  1536:6 1538:1                  1541:18,22,22 1544:8                  1544:15,21 1549:16                  1549:17 1556:6,18                  1557:3 1558:3,21                  1559:4 1561:4                  1563:19 1564:18,18                  1564:20,22 1567:10                  1567:20 1568:4                  1569:20 1570:1,17                  1572:5 1574:15,17                  1576:18 1577:1                  1578:24 1579:14,20                  1580:2,8,18,20,21                  1581:4 1584:11                  1585:2,8 1588:20                  1589:17 1591:9                  1592:10,15 1594:25                  1595:7,9,18,23                  1597:2,12 1599:4,21                  1600:23 1601:3,14</p>	<p>1602:8,21 1603:4,25                  1604:12,19,24 1605:7                  1605:8 1606:13                  1608:17,19 1609:8,22                  1610:9,25 1611:5                  1612:8,17,20,25                  1613:8,11 1614:12                  1616:1,8,19,22                  1617:1,16,19 1618:4                  1619:13,23 1622:10                  1622:10,17,17 1623:2                  1623:3,6,9,11 1624:2                  1624:19,24 1625:1                  1626:1 1627:13,17                  1628:2,4 1629:5,14                  1630:2,5,6,19 1631:1                  1631:5,6,19 1632:5                  1633:1,18,24 1637:2                  1637:3,3,16,25                  1638:1 1639:1,5,16                  1639:22 1640:5,25                  1641:1,16,18 1642:5                  1642:7,15 1643:10,18                  1643:25 1644:7,9,17                  1644:20 1645:4,10,20                  1645:25 1646:6                  1647:18 1648:9                  1649:6,16 1650:1,5,5                  1651:1,2,13 1655:22                  1656:5,5 1662:5,8,22                  1663:19 1664:7                  1665:17,21 1666:1,10                  1666:20 1667:4,16                  1668:5,9,13 1669:12                  1670:13 1671:4                  1674:3 1675:1,4,24                  1676:5,18,22,23,25                  1676:25 1677:6,23,24                  1678:6,9,14,23,24                  1679:4,5,7,10,20                  1680:18 1681:9,10,11                  1681:21 1682:2,3,6,7                  1682:13,15,20                  1683:20 1684:19                  1685:11,14,19,25                  1686:17 1687:13,25                  1688:23 1689:1,10,25                  1690:9,13,16,18,21                  1692:2 1693:6,16,23                  1695:24 1696:22                  1697:6,13,14,16,20                  1698:24 1699:10,22                  1699:25 1700:4                  1703:19 1704:6,8,12                  1705:15,19 1706:2,10                  1707:5,7,12,15,18                  1708:1,11 1712:17                  1724:22</p>	<p><b>sandbag</b> 1544:23  <b>sandbagging</b> 1653:7  <b>SANDFORD</b> 1535:20                  1727:8,23  <b>Santa</b> 1727:5,9,18  <b>satisfy</b> 1663:18 1665:2                  1691:12 1692:6  <b>Saturday</b> 1715:22  <b>save</b> 1660:12  <b>savings</b> 1597:21  <b>saw</b> 1538:22 1555:18                  1568:13 1569:11                  1652:12 1683:14  <b>saying</b> 1574:6 1586:3                  1595:12 1615:8                  1619:9 1629:19                  1659:5  <b>says</b> 1542:2,4,7                  1544:22 1558:20                  1564:17 1566:2,13,17                  1566:22 1567:10                  1568:24 1569:13                  1571:15 1581:12,12                  1593:23,24 1594:5                  1603:2,13 1606:7,13                  1608:2 1610:13                  1614:12 1616:14                  1620:17,22 1621:2,15                  1630:9,15,22 1638:3                  1640:17 1654:19                  1657:13 1678:12                  1688:8 1715:4                  1717:25 1719:1  <b>SB15</b> 1713:3  <b>scenario</b> 1599:11                  1600:12 1644:9  <b>scenarios</b> 1599:15  <b>schedule</b> 1641:14                  1662:18,20 1698:2,13  <b>scheduled</b> 1582:5  <b>scheduling</b> 1721:5,7,15                  1721:17 1722:9  <b>science</b> 1709:20,22  <b>scope</b> 1579:1,6 1581:14  <b>Scott's</b> 1591:16  <b>scrape</b> 1665:9  <b>screen</b> 1546:17 1575:18                  1634:7 1695:10  <b>SDCWA</b> 1548:12,19                  1556:20 1566:1                  1567:12,15 1603:13  <b>SDWCA's</b> 1656:2  <b>se</b> 1583:5  <b>seated</b> 1661:5 1708:24  <b>second</b> 1550:17                  1554:20 1564:7                  1565:14,25 1566:2                  1568:9 1577:22</p>	<p>1578:21 1602:25                  1603:2,10,12 1607:7                  1630:9 1640:23                  1681:6 1687:24                  1706:5 1722:18  <b>secret</b> 1553:10  <b>section</b> 1581:22 1582:1                  1603:11 1608:1                  1611:15 1616:2                  1620:22 1621:2,15                  1639:17 1661:21,22                  1688:2,5 1712:15  <b>secure</b> 1566:25  <b>see</b> 1543:13 1545:11                  1555:16 1558:20                  1563:15 1566:10,15                  1571:2 1576:3                  1580:14,15 1581:1,11                  1581:12,15 1582:9,11                  1582:12,14,18 1589:9                  1590:7 1591:6,9,18                  1591:24 1593:23                  1594:14 1598:21,25                  1599:11 1602:17                  1603:8,22 1608:7                  1610:6 1616:13                  1617:24 1620:7,10,16                  1620:20,25 1621:10                  1622:4,23 1625:10                  1630:11,17 1640:11                  1640:13,16 1653:23                  1654:11 1655:15                  1656:8 1657:4                  1659:23 1683:7,17                  1684:23,25 1686:13                  1687:8 1695:20                  1698:3,4 1700:23                  1710:25 1717:3                  1721:23  <b>seek</b> 1567:12 1603:14                  1604:20,25 1606:14                  1606:22  <b>seeking</b> 1603:25                  1605:15,23 1648:14                  1648:16,19  <b>seen</b> 1538:24 1624:24                  1629:17 1657:1,7                  1724:3  <b>self-interest</b> 1562:6  <b>sell</b> 1710:19 1713:21                  1714:10 1718:6,9  <b>selling</b> 1713:20 1714:3                  1715:9 1718:12                  1720:16  <b>sells</b> 1688:5 1717:7                  1718:23  <b>send</b> 1665:19 1679:21                  1706:24 1707:11</p>	<p><b>sends</b> 1678:9,11  <b>sense</b> 1552:23 1654:8                  1725:1  <b>sent</b> 1556:23 1565:16                  1565:17 1609:22                  1640:14 1649:6                  1676:6  <b>sentence</b> 1557:2,15                  1566:3,22 1609:25  <b>separate</b> 1667:22,25                  1668:17,21  <b>September</b> 1563:20                  1565:11,25  <b>series</b> 1560:13 1659:10                  1713:1  <b>serious</b> 1556:17  <b>serve</b> 1691:15  <b>served</b> 1655:22  <b>service</b> 1540:19                  1541:17 1542:5,9,12                  1543:12,14 1561:16                  1581:24 1582:7                  1601:22 1621:5,7,12                  1621:17,18,19,23                  1622:2 1624:4 1625:3                  1627:18,24 1628:12                  1630:13 1633:15                  1639:23 1650:7                  1664:2,15 1685:23,25                  1689:19,22 1725:13  <b>services</b> 1535:23                  1624:8 1628:15  <b>session</b> 1587:22 1596:2                  1633:8  <b>set</b> 1540:11 1560:14                  1564:11 1569:15                  1570:13 1582:1                  1601:15 1602:1,7                  1603:6,19 1608:20,21                  1609:8,10,14 1610:11                  1634:9,10 1636:17                  1642:4 1655:13                  1713:18  <b>sets</b> 1583:8  <b>setting</b> 1564:23 1644:6                  1722:2  <b>settled</b> 1612:4  <b>Settlement</b> 1563:19  <b>seven</b> 1580:18 1590:15                  1640:24  <b>share</b> 1676:21  <b>sheet</b> 1563:20 1564:7                  1564:14 1671:18                  1672:7 1674:25                  1683:13  <b>sheets</b> 1716:15  <b>shift</b> 1556:20 1668:18  <b>shifted</b> 1557:25</p>
---	---	---	--	--

<p><b>shifting</b> 1557:18 1562:20 <b>short</b> 1542:13 1552:17 1566:22 1670:18 1702:17 <b>Shorthand</b> 1727:8,24 <b>show</b> 1561:18 1567:17 1653:4 1654:19 1673:15 1675:9 1684:17 1685:9 1686:6 1717:5 <b>showed</b> 1602:25 1603:1 1629:18 <b>showing</b> 1553:11 1714:9 <b>shown</b> 1564:4 1699:14 <b>shows</b> 1553:13 1563:8 1672:7,9 1673:14 1675:13 1683:11,12 1684:4 1685:2,10,12 1686:10 1717:8 <b>shut</b> 1660:14 1663:24 1668:2 <b>shutdown</b> 1664:8 1691:21,23 1692:3 <b>shutdowns</b> 1691:18 <b>side</b> 1545:6 1547:1 1553:12 1562:13 1573:2 1586:13,19 1660:16 1715:3 <b>sides</b> 1546:7 <b>signed</b> 1555:15 1565:12 1590:10 1591:22 1592:9 1593:8 1594:17 <b>significantly</b> 1692:16 <b>similar</b> 1628:4,5 1629:15 <b>similarly</b> 1655:3 <b>simple</b> 1551:13 1642:19 <b>simply</b> 1659:1 1668:11 1703:7 1707:15 <b>single</b> 1599:22 <b>sir</b> 1562:15 1571:25 1580:4 1586:16 1596:11 1597:1 1607:17 1632:15 <b>sit</b> 1701:11 <b>sits</b> 1570:20 <b>sitting</b> 1629:11 <b>six</b> 1553:12 1575:13 1581:23 <b>sixth</b> 1538:13 1564:8 <b>Skillman</b> 1541:25 1542:2 1545:15 1546:3 1549:5,13,19 1552:19 1651:24</p>	<p>1657:2 1659:18 1660:13 <b>Skillman's</b> 1552:2 1651:25 1652:6 <b>Skinner</b> 1665:18 1666:4,6,7,8 1667:1 1667:4,6,7,11,12,17 1667:20 1668:3,8,16 1672:9 1680:6 1687:14,15,15 1692:23,24 1693:1 1697:1,7,9,11,21 1698:25 1701:24 1702:10,19 1703:15 1703:17,18,22,22 1704:7,10,14,19 1706:11,13,25 1707:1 1707:3,11,14,17,17 <b>skip</b> 1566:12 <b>Slater</b> 1554:12 1564:4 1572:25 1574:24 1575:14,20 1584:22 1585:2 1586:13,22 1588:19 1590:2,7,12 1592:4 1593:7,23 1594:4,13 <b>Slater's</b> 1575:4 1585:7 1586:1 1589:8,23 1590:14 1592:15 1594:22 <b>slide</b> 1538:13 1598:17 1598:18,23 <b>slight</b> 1561:7 <b>sold</b> 1657:9 1710:17 1714:16 1718:2 <b>sole</b> 1568:7,12 1690:3,7 <b>solely</b> 1665:3 1668:25 1669:2 1717:5 <b>solids</b> 1673:23 <b>solutions</b> 1651:10 <b>solve</b> 1559:10,13 <b>solver</b> 1559:14 <b>somebody</b> 1542:13 1549:23 1552:7 1651:8,14 1659:10 1675:3 <b>Somebody's</b> 1657:20 <b>sorry</b> 1546:8 1558:15 1573:25 1579:25 1600:10 1607:15,17 1616:25 1632:3 1637:11 1638:13 1666:13 1671:12 1674:17 1682:4,25 1700:13 <b>sort</b> 1543:4 1549:24 1551:1 1689:6 <b>sorted</b> 1655:9</p>	<p><b>sorts</b> 1547:8 1550:7 <b>sound</b> 1664:24 <b>sounds</b> 1547:3 1551:17 1664:25 <b>source</b> 1568:19 1649:8 1672:23 1684:20,21 1720:6 1721:12,24 <b>sources</b> 1568:8 1649:15 1684:12,24 1691:5 <b>South</b> 1536:15 1657:5 <b>Southern</b> 1535:9,11 1536:12 1580:10 1620:8,18 1709:7,23 1715:10 1722:20 1723:4 <b>SP15</b> 1657:4,23 1714:21 1715:4,8,11 1717:6,25 1719:18 1721:4 <b>space</b> 1575:24 1576:2,6 1576:16 1577:11,23 1578:22 <b>speaking</b> 1549:8 <b>specific</b> 1541:22 1575:7 1580:3 1584:21 1589:7 1650:5 1655:7 1655:25 1656:1 1659:4,5 1677:14 1722:6 <b>specifically</b> 1550:25 1551:23 1632:19,24 1637:7 1650:20 1705:17 <b>specified</b> 1582:25 1699:12 <b>speculate</b> 1540:6,11 <b>speculating</b> 1656:17 <b>speculative</b> 1540:17,18 <b>spell</b> 1661:7 1708:25 <b>spend</b> 1645:25 <b>spent</b> 1559:17 1721:18 <b>spoke</b> 1584:3 1585:19 1586:15,21 1679:5 1707:13 <b>spot</b> 1544:3 1549:12 1559:20 1712:11 <b>spreadsheet</b> 1549:19 1549:23 1550:3,8,9 <b>spreadsheets</b> 1549:17 1649:9 <b>spring</b> 1635:2,7,10 1636:2,11 <b>squarely</b> 1658:1 <b>ss</b> 1727:4 <b>staff</b> 1560:15 1561:7 1565:11 1597:19 1598:13 1630:20 1631:1,23 1632:10</p>	<p>1633:6 1637:2,3,15 1637:25 1638:5 1641:25 1647:22 1681:3 <b>staff's</b> 1630:16 <b>stage</b> 1564:11 <b>stand</b> 1545:23 1552:20 1626:6 1660:22 <b>standard</b> 1676:3 1715:22 1721:19 <b>standards</b> 1621:22 1624:13 1628:20 1703:12,13 <b>standing</b> 1716:3,5 <b>standstill</b> 1600:19 1603:2 <b>Stapleton</b> 1537:3 1545:23 1553:4,18 1554:7,13 1558:21 1571:18 1585:12 1626:5,15 <b>start</b> 1549:10 1607:16 1673:7 1725:21 <b>started</b> 1635:5 1687:24 <b>starting</b> 1570:25 1602:20 <b>starts</b> 1660:5 <b>state</b> 1535:1 1539:5,21 1539:23,25 1542:18 1543:1,8,9,25 1544:7 1544:19 1546:20 1549:1,18 1551:20 1560:20,24 1572:5 1574:3,10 1585:22 1589:2,5,20 1591:19 1611:25 1640:17 1641:7 1646:21 1649:14 1652:20 1653:14,17,18 1658:7 1661:7 1664:10,11 1665:14,22 1666:25 1667:15,20 1668:20 1669:6,11,13,19,23 1670:8,12,14,16,22 1671:1,3,24 1672:10 1674:2 1680:20 1681:12,20 1682:19 1683:15,20 1684:7 1685:1 1686:7,11 1688:6,20 1689:14,18 1690:12 1691:16,17 1692:22 1693:3 1697:15 1699:15 1702:13,16 1703:1,8 1703:12,20 1704:1 1705:7,14,22 1706:1 1706:12 1708:24 1709:18,21 1710:1</p>	<p>1717:15 1719:23 1725:11 1727:3,9,25 <b>stated</b> 1554:24 1610:15 1716:8 1717:1 <b>statement</b> 1590:11 1593:9 1608:23 1610:8,17 1642:5 <b>statements</b> 1538:15 1713:1 <b>states</b> 1605:4 1711:16 <b>statistics</b> 1677:14 <b>status</b> 1673:11,18 1674:25 1676:21 <b>statute</b> 1540:25 1574:5 1578:1 <b>statutes</b> 1579:17 1581:1 <b>stays</b> 1670:8 <b>stenotype</b> 1727:12 <b>step</b> 1640:23 1694:14 <b>stewardship</b> 1539:7 1540:2,20 1544:11 1561:1 1566:8 1581:25 1583:20,22 1584:15,17,23 1585:11,15,24 1586:11 1587:15,17 1588:5 1590:4 1591:20 1612:1 1640:18 <b>stick</b> 1654:3 <b>stop</b> 1562:18 1634:12 1634:13 1666:5 <b>stopping</b> 1625:5 <b>stops</b> 1719:18 <b>storage</b> 1662:2 1702:21 <b>store</b> 1669:15,24 1670:3 <b>straight</b> 1697:13 1707:7 1708:11 <b>Street</b> 1535:24 1536:6 1536:15,19 <b>stricken</b> 1652:5 <b>strike</b> 1563:4 1651:1,11 1658:20,22 1681:6 <b>structure</b> 1554:15 1555:1 1557:13,17 1590:22 1591:2 1610:2,10 1616:24 1617:5,6,10,11,23 1618:5,12,20,25 1619:7,10,15,25 1622:22 1623:8,17,24 1625:3 1627:19 1633:15 1641:17,18 1641:19 1642:6,7,8 <b>structuring</b> 1572:22 <b>studies</b> 1541:21 1650:3</p>
---	---	--	---	--



<p>1655:24  <b>study</b> 1543:12,14  1561:16 1700:25  <b>stuff</b> 1540:24 1658:19  1658:25  <b>sub</b> 1581:22,23  <b>subject</b> 1546:11  1547:24 1550:10  1574:14 1581:13  1610:4 1634:19  1636:21 1640:8  1649:19 1650:19  1651:1 1658:8,20  1659:21 1676:24  1678:12  <b>subjects</b> 1548:14  1585:4  <b>submit</b> 1676:4  <b>submitted</b> 1561:16  1596:19 1710:2  <b>subscribe</b> 1711:22  <b>subsequently</b> 1618:20  <b>substance</b> 1603:16  1604:1,8 1605:16,23  1606:16  <b>subtraction</b> 1686:11  <b>success</b> 1561:20  <b>successful</b> 1561:4  1646:4  <b>successive</b> 1635:17  <b>sue</b> 1616:10  <b>suggest</b> 1545:17 1626:8  <b>suggested</b> 1678:6  <b>suggestions</b> 1724:25  <b>suing</b> 1555:19  <b>SULLIVAN</b> 1536:13  <b>sum</b> 1721:9  <b>summarize</b> 1538:12  <b>summary</b> 1581:5  1712:19  <b>Superior</b> 1535:1,16  1581:7  <b>supplemental</b> 1549:20  1549:21  <b>supplies</b> 1541:24  1566:25 1656:3  1658:5 1669:6,11,22  1670:1,16 1693:19  1702:13,16,17,22,24  1703:23 1704:2  1705:8 1708:7,9  <b>supply</b> 1539:5 1540:20  1544:9 1563:3  1577:22 1578:19  1588:7 1642:22  1644:21 1665:22  1668:25 1669:3,17  1699:19 1702:11</p>	<p>1703:6 1705:5,6,11  <b>support</b> 1541:3  1603:14 1606:14  1617:9 1622:20,21  1623:16,24 1629:12  1641:17 1642:7  <b>supported</b> 1547:18  1621:5 1624:4  1628:11,17  <b>supports</b> 1621:23  <b>suppose</b> 1649:7  1692:12 1703:10  1708:5  <b>supposed</b> 1634:5  <b>surcharge</b> 1582:1  <b>sure</b> 1542:16 1545:10  1546:1 1548:20  1579:8 1591:23,23  1593:22 1595:20  1609:6,15 1633:21  1634:8 1647:6 1649:2  1652:3 1718:20  <b>surely</b> 1658:17  <b>surprise</b> 1543:22  1651:4  <b>surprised</b> 1542:16  1543:23 1659:2  <b>surprising</b> 1540:14  <b>suspect</b> 1538:20  <b>sustain</b> 1563:6 1605:5  1660:6 1676:8  1724:10  <b>sustained</b> 1607:1  1679:2 1724:20  <b>sustaining</b> 1724:11  <b>sweet</b> 1559:20  <b>sworn</b> 1553:19,23,24  1661:2 1708:20  <b>system</b> 1542:10  1562:16 1566:8  1568:13,13 1569:10  1569:11 1580:25  1581:24 1582:7,13,16  1582:22 1621:8,20  1622:3 1647:13  1652:5 1653:14  1657:14 1658:5,5  1662:2,2 1665:24  1666:2,12,15,23  1673:11,25 1692:23  1696:22 1705:3  1706:25 1719:15,20  1719:23 1722:8  <b>systems</b> 1663:17  1673:18  <b>systemwide</b> 1585:20</p>	<p><b>Tab</b> 1649:25 1700:21  <b>table</b> 1573:13 1685:21  1715:3  <b>tail</b> 1552:13  <b>take</b> 1539:11 1542:23  1542:25 1551:15  1552:17,21 1554:20  1568:17,18 1571:5,20  1575:8 1580:5  1581:21 1592:1  1597:8 1601:24  1602:16,19 1606:3  1609:17 1610:3  1617:13 1620:3  1630:5 1640:3,22  1646:12 1648:20  1649:12 1651:25  1652:16 1653:4  1655:23 1660:18  1669:7,25 1670:22  1676:9 1681:16  1682:23 1687:7  1697:11 1698:9  1707:5,6 1708:9  <b>taken</b> 1579:20 1580:2  1625:12 1672:8  1683:13 1719:15  1726:1 1727:11  <b>takes</b> 1703:15,21  1707:15  <b>talk</b> 1538:7 1545:19  1586:6 1587:3,8,9  1600:18,20 1636:9  1639:13 1655:4  1679:3 1680:5 1689:1  1703:13  <b>talked</b> 1543:21 1556:25  1584:10,19 1586:3  1587:12 1594:19  1626:10,19 1646:7  1704:3  <b>talking</b> 1556:16,17  1557:15,20,22  1560:19 1585:23  1586:16,17 1617:15  1627:11 1689:2  1714:2,24  <b>talks</b> 1556:3,4 1564:24  <b>TARA</b> 1535:20 1727:8  1727:23  <b>task</b> 1542:9  <b>tasks</b> 1721:16,18  <b>Taylor</b> 1586:22  <b>TDS</b> 1673:23  <b>team</b> 1573:8 1586:8  1587:3,18,18 1588:4  <b>teams</b> 1587:8  <b>technically</b> 1570:22</p>	<p><b>tell</b> 1539:20 1542:17,24  1547:6 1553:6 1592:3  1594:2 1596:7,9,18  1596:21 1626:20  1627:3,7 1633:10  1649:18,22 1657:3  1658:1,12,12 1661:23  1662:15 1663:17  1664:13 1667:3  1670:10 1671:19  1673:8,17 1677:6  1678:14 1679:11,21  1679:24 1680:7,17  1718:2  <b>telling</b> 1585:13 1592:12  1595:10 1599:23  1619:4 1629:5  <b>tellingly</b> 1542:24  <b>ten</b> 1630:8 1725:24  <b>tenor</b> 1650:10  <b>tens</b> 1612:9  <b>tentative</b> 1547:6  1650:21  <b>term</b> 1565:1 1567:22  1595:1,9,18,22  1600:18 1603:13  1607:8,12,21 1656:6  1664:21  <b>terms</b> 1551:7 1587:5  1599:16 1626:17  1647:1 1663:1,3  1665:13 1677:3  1681:19 1690:22  <b>test</b> 1676:7,8 1678:7  <b>testified</b> 1553:19,24  1554:7 1561:25  1565:6 1572:3,8  1574:9 1575:5 1576:5  1576:8,23 1577:19  1582:19 1583:20  1601:14 1610:24  1615:12 1616:22  1626:6 1651:8 1661:3  1677:21 1678:1  1688:13 1690:20  1691:8,16 1694:4  1700:9,15 1707:6  1708:21 1717:1,12,14  1717:16,19  <b>testify</b> 1538:19 1541:3  1552:22 1555:25  1585:3 1653:6 1655:9  1656:19 1659:21  1675:20 1677:13  <b>testifying</b> 1549:15  1554:2 1634:20  <b>testimony</b> 1539:1,14  1544:25 1545:1</p>	<p>1546:9,12,14,15  1547:20,23 1548:2,17  1548:18 1549:4  1550:9,10 1567:20  1577:15,24 1588:13  1589:23 1594:13  1602:23 1611:2  1613:25 1614:7,7  1617:13 1623:5  1632:4 1637:21  1641:25 1648:3  1652:14 1654:10,16  1655:1 1657:1,24  1659:22 1675:24  1678:18 1690:23  1691:1 1692:21  1694:1 1700:21  1701:9 1717:13  1718:1  <b>Thank</b> 1545:5 1618:2  1625:11 1634:13,17  1645:16 1648:22,25  1661:5 1680:15  1687:11 1706:4  1708:16 1719:4,5  <b>Thanks</b> 1571:23  1725:25  <b>theirs</b> 1555:17 1595:13  <b>theoretically</b> 1702:14  1703:10 1706:23,24  1707:8  <b>theory</b> 1705:24  <b>thing</b> 1570:8 1645:8,9  1646:2 1658:17  1699:21  <b>things</b> 1543:5,24  1547:15,21 1548:3  1552:20 1578:17  1594:3 1624:21  1650:15 1652:11  1654:4,23 1656:18  <b>think</b> 1540:8 1546:2  1547:1,19 1549:8  1550:5 1551:7  1555:23 1557:6  1562:7 1571:11  1573:3 1593:3,6  1594:4,19 1602:20  1611:2 1614:21  1615:21 1624:21  1626:22 1631:8  1633:23 1645:5,9  1646:12 1651:7,19,22  1653:3,8,16 1658:14  1658:23 1660:6,7,17  1675:12 1678:8  1692:8 1694:23  1703:23 1705:17</p>
---	--	---	--	---

**T**

<p>1706:18,20 1720:17 1724:18 <b>thinking</b> 1547:24 <b>third</b> 1556:3 1566:2 1608:15,17,18 1609:6 1609:7 1610:18 1630:15 1715:14 1723:9 <b>third-party</b> 1541:19 1621:9 1650:8 <b>Thomas</b> 1573:6,7 1648:2 <b>thorough</b> 1660:14 <b>thought</b> 1557:7 1563:1 1584:6 1591:13 1595:10,12,15,19 1596:4,8 1600:6,24 1601:8,11 1605:19 1606:19 1618:6,15,18 1626:20 1627:4,7 1631:10,11,19,20 1645:6,7 1688:12 <b>thoughts</b> 1547:7,24 <b>thousands</b> 1641:9 <b>three</b> 1539:16 1548:4 1589:11 1613:18 1617:14 1620:15,16 1621:15 1640:9 1651:23 1674:14 1677:16,17 1722:12 1723:22 <b>three-and-a-half</b> 1554:1 <b>ticking</b> 1651:8 <b>tie</b> 1653:16,17 <b>tight</b> 1659:3 <b>time</b> 1538:17 1552:17 1553:8 1555:23,24 1558:18 1559:1,11 1560:6 1562:19 1565:21 1570:14 1571:8,11 1572:3,8 1574:7,11,19,22 1576:10,18 1577:3,3 1585:19 1590:9,20 1591:8,21 1592:8,24 1593:7,11 1594:7,17 1594:20 1595:4,11,12 1600:8 1607:10,19,20 1608:3 1610:13 1611:24 1616:8 1619:20 1624:23 1627:13 1631:5 1632:25 1640:13,22 1641:16,24 1642:5 1649:20 1650:16 1651:7,22 1652:13,16 1655:13 1658:21,23</p>	<p>1659:7,12 1660:10,12 1660:15,15 1663:3 1664:4 1670:18 1672:16,18 1674:11 1676:3 1687:24 1692:25 1703:25 1704:5 1707:9 1713:9 1715:19 1717:7 1721:17 1725:22 1727:12 <b>time-consuming</b> 1542:9 <b>timeout</b> 1594:10,11 1600:20 <b>times</b> 1601:7 1619:23 1643:12 1665:8 1669:5,13 1670:15,20 1679:9 1704:12,16 1705:7,13,15 <b>titled</b> 1649:13 <b>today</b> 1545:14 1590:19 1629:11 1634:20 1641:1 1654:2 1701:11,12 <b>told</b> 1573:3 1574:2,19 1578:13 1584:5 1592:7 1595:16 1596:1,4,8 1601:7 1602:20 1606:20 1608:18 1615:21 1624:19,21 1627:12 1631:10,11,21 1632:2 1632:2,9,12,17 1633:7,9,12,13 1637:15 1655:5 1678:24 1680:19 1681:10 1683:5 1703:1 <b>tomorrow</b> 1725:24 <b>top</b> 1580:19 1700:4 <b>total</b> 1544:23 1568:13 1653:6 1662:12 1673:23 1684:4,9,10 1684:11,18 1685:10 1685:12,14,16,22 1686:17 1694:6 1695:22 1696:2,15 1698:7,19 1723:9,16 1723:23 <b>totally</b> 1720:15 <b>touch</b> 1689:14 <b>track</b> 1695:5 1712:2 <b>tracks</b> 1695:1 <b>trade</b> 1577:21 1578:18 1712:12 <b>trader</b> 1711:6,7 1716:15 1719:18 <b>transaction</b> 1641:22 1642:12 1643:11</p>	<p>1646:12 <b>transactions</b> 1713:16 <b>transcript</b> 1535:15 1543:21 1554:8,22 1575:9,13 <b>transcription</b> 1727:14 <b>transfer</b> 1574:16 1577:20 1580:22 <b>transfers</b> 1575:23 1576:6 <b>transport</b> 1549:21 <b>transportation</b> 1539:6 1539:8 1543:10 1544:1 1560:25 1574:4 1588:9 1591:10,21 1610:20 1626:25,25 1646:23 1648:1 1653:1 <b>transportation-related</b> 1567:13 <b>transporters</b> 1621:9 <b>transporting</b> 1541:10 1541:11,14,15 <b>travel</b> 1665:20 <b>travels</b> 1689:25 <b>treated</b> 1581:25 1700:1 1700:4 <b>treating</b> 1543:9 <b>treatment</b> 1582:1 1667:11 1673:24 <b>treaty</b> 1616:16 <b>trial</b> 1538:15,16 1542:17 1549:10 1575:2 1587:22 1614:6,7 1617:13 1623:4 1651:14,15 1659:2 1690:21 1700:9,14,21 <b>tried</b> 1543:12 1560:16 1561:21 <b>trier</b> 1547:16 <b>trigger</b> 1579:16,18 1580:25 <b>true</b> 1545:12 1559:19 1571:6 1572:16 1575:3 1578:11,12,15 1578:16 1579:14,17 1581:19 1586:9,19 1587:7 1588:19 1590:7 1594:3 1595:24 1596:3 1599:7 1605:19 1613:4 1614:4,5 1615:24 1616:1,24 1619:17,25 1625:4 1627:16,19 1628:3 1632:7 1637:5 1639:3 1639:24 1641:3</p>	<p>1642:12 1645:13 1659:1 1670:20 1691:1 1696:8 1701:11 1713:7 <b>trust</b> 1559:18 <b>trustworthy</b> 1672:24 <b>truthful</b> 1691:1 1701:9 <b>try</b> 1543:16 1545:19 1559:4 1560:11 1561:18 1575:10 1606:17 1646:1 1653:15 1659:20 1660:12 1676:13 <b>trying</b> 1615:15 1658:15 1678:3 <b>turn</b> 1580:18 1581:11 1598:23 1620:6,15 1695:9 1710:4,21 1716:2,10,18 1719:8 1720:24 1725:16 <b>turned</b> 1649:16,17 1650:13 1655:14 <b>turns</b> 1651:6 1658:20 <b>Twenty-four</b> 1661:18 <b>two</b> 1543:14,15 1547:10 1550:20 1577:21 1578:17 1610:1 1621:2 1635:17 1651:10 1677:4 1678:13 1684:12,23 1685:21 1686:4,6 1689:3 1700:5 1703:23 1707:13 1721:8 1722:14 <b>two-and-a-half</b> 1540:14 <b>two-page</b> 1563:23 1564:2 <b>type</b> 1570:7 1629:4 1716:14 <b>types</b> 1721:16 <b>typewriting</b> 1727:13</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>Uh-huh</b> 1594:15 1628:1 <b>ultimate</b> 1718:22 <b>ultimately</b> 1667:4 <b>unable</b> 1599:14 <b>unblended</b> 1706:2 <b>unbundled</b> 1617:21 1618:4,7,8,18 1619:6 1623:7 <b>unbundling</b> 1613:7 1614:13 1619:5 <b>uncertain</b> 1579:12 <b>unclear</b> 1548:22</p>	<p><b>underpaid</b> 1540:15 <b>understand</b> 1550:6 1553:25 1576:23 1578:1 1579:8 1583:7 1592:25 1593:24 1594:16 1601:18 1620:12 1623:18 1639:13 1654:1,15 1656:20 1657:17 1660:10 1682:10 1706:16,19 1724:15 <b>understanding</b> 1546:12 1546:13 1575:5 1592:23 1593:1,14 1596:24,25 1597:7,11 1602:21 1604:12 1606:2 1609:1,11,12 1610:9 1634:24 1676:12 <b>understood</b> 1558:2 1567:18 1603:24 1604:7,19,24 1608:16 1608:18 1609:7 1611:11 1632:4 1675:23 <b>Underwood</b> 1559:9,12 1560:10 1572:9,15 1574:2,20 1583:23,24 1584:2,14,16,19,24 1585:13 1586:12,18 1587:7,13,16 1588:2 1613:19,24 1626:20 1627:3 1647:17 <b>undisclosed</b> 1539:13 <b>unfortunately</b> 1560:5 <b>unidentified</b> 1566:25 <b>uniformly</b> 1571:5 <b>United</b> 1711:16 <b>University</b> 1709:21,22 <b>unlawful</b> 1574:4 1583:21 1585:16 1586:3 1595:16,17,19 1595:23 1596:17,20 1597:4 1599:24 1600:24 1601:9,12 1604:21 1605:2,9,22 1606:23 1615:10,13 1626:21 1627:4 1631:7,15,19,22 1632:1,2,6,13 1633:3 1640:18 <b>unlawfulness</b> 1613:4,8 1639:2 <b>unmix</b> 1703:25 1707:14 <b>unpack</b> 1552:18 <b>unquote</b> 1602:3 <b>untreated</b> 1685:10,18 1694:5 1697:6,12</p>
--	--	---	--	---

<p>1698:23 1699:9,23 1700:4 1706:24 <b>unused</b> 1580:24 <b>update</b> 1674:25 <b>upgrade</b> 1664:19 <b>upper</b> 1722:11 <b>upstream</b> 1702:18 1703:17 <b>URQUHART</b> 1536:13 <b>usage</b> 1722:23 <b>use</b> 1542:17 1544:4,5,5 1546:4,12 1548:21 1550:25 1552:15 1569:12 1575:10,12 1580:24 1586:2 1596:11 1621:20 1626:17 1627:6 1632:3 1643:3 1653:18 1669:20 1677:25 1678:14 1681:17,20 1690:5 1691:16 1695:18 1702:21 1704:10,12 1704:15 1712:1,3 1713:13,18,19,24 1714:16 1717:3 1718:4 1719:1 1720:5 1720:8,16,21 1722:24 1722:25 <b>useful</b> 1718:20 1720:22 <b>uses</b> 1580:14 1678:13 1714:9 1717:7,9 <b>usually</b> 1624:21 1704:18 <b>utilities</b> 1703:14 <b>utility</b> 1723:5 <b>utilize</b> 1669:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vague</b> 1666:16 1714:23 1715:6 <b>vagueness</b> 1605:5 <b>validation</b> 1581:13 <b>validity</b> 1535:10 1550:8 <b>Valley</b> 1580:9 1689:4 <b>value</b> 1598:10,19 1643:9 1644:7 1720:18 1721:10 <b>values</b> 1721:23 <b>valves</b> 1668:3,19 <b>VAN</b> 1536:3 <b>VANDERHORST</b> 1536:18 <b>vantage</b> 1549:6 <b>varies</b> 1694:23 <b>variety</b> 1561:12,24 1573:14 1591:12 1673:22 1677:18</p>	<p>1713:24 <b>various</b> 1585:4 1597:18 1600:11 1621:13 1632:11 1633:6,24 1668:15 1673:24 1679:5 1686:6 1721:18 <b>versus</b> 1597:22 1680:20 1686:8 1690:13 <b>VI</b> 1614:7 <b>vicinity</b> 1692:24 <b>VIDEOGRAPHY</b> 1535:23 <b>view</b> 1546:13 1555:16 1585:14 1605:8 1607:11 1632:6 1646:10 1648:18 <b>views</b> 1553:7 1647:19 <b>VII</b> 1614:8,8 <b>violate</b> 1578:9 <b>violated</b> 1574:4 <b>violates</b> 1540:22 1543:11 <b>violation</b> 1590:8,23 1591:3,7,9,16,19,24 1591:25 1592:5 1593:24 1594:14 1605:21 1631:13 1653:16 <b>virtue</b> 1717:6 <b>volume</b> 1535:10 1571:8 1585:9 1589:10 1590:15 1592:16 1597:21 1614:7,7,8 1634:2 1662:8 1663:1 1684:5,9,10 1685:14 1685:16 1686:18 1694:5,6 1695:22 1696:14,15 1698:7,23 1699:12 <b>volumes</b> 1681:20 1682:19 1684:14 1685:12 <b>vote</b> 1562:5 1616:23 1617:20 1618:20 1619:14 1623:12,18 1623:19,22 1624:2,20 1624:23,24 1625:2 1627:11,14,17 1630:2 1630:6,16,22 1631:2 1632:13,16,18,20 1637:4,16,18 1638:2 1648:10 <b>voted</b> 1617:2,9,11,12 1617:22 1618:4,6,7 1618:11,16,19,25 1619:4,6,7,9,11,18,20 1619:24 1622:11,18</p>	<p>1622:20,21,25 1623:1 1628:3,4 1629:6,15 1630:23 1631:16,19 1631:21 1632:5,16 1633:1,14 1637:6,7 1639:23 1641:19 1642:8 1643:20 1645:5 <b>votes</b> 1616:19 1622:6 1648:9 <b>voting</b> 1617:4,5,5,7 1633:8,11 <b>vs</b> 1535:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> 1652:15 <b>walk</b> 1615:16 <b>want</b> 1538:7 1542:15 1543:23 1544:19,19 1544:20 1545:6 1547:1 1550:25 1555:5 1590:16,18 1609:4 1639:14 1649:4 1653:24 1658:22 <b>wanted</b> 1556:1 1567:25 1568:18 1569:9,11,13 1599:11 1601:23 1647:6 1692:1,2 1707:21 <b>wanting</b> 1570:6 <b>wants</b> 1580:16 1690:5 <b>Warren</b> 1536:5 1687:25 <b>wasn't</b> 1577:4 1584:7 1595:21 1637:9 <b>wasted</b> 1658:21 <b>water</b> 1535:6,9,11 1536:11 1539:5,6,23 1539:23,24,25 1540:2 1540:20 1541:7,8,10 1541:11,14,15,16,19 1541:23,23 1542:18 1543:1,9,9,25 1544:7 1544:8,11,18,19 1546:20 1548:8 1549:18,21 1555:13 1557:22 1558:12 1560:20,25 1561:1 1562:16 1563:20 1564:18 1566:4,8 1567:12,14,22 1568:4 1568:6,8,8,10,16,18 1568:24 1569:1,3,13 1569:19,24 1570:3,7 1570:10,15,19,19,20 1570:22,23,24 1571:3 1571:3,5,9,14,16,20</p>	<p>1572:5 1574:3,10,16 1576:19 1577:22 1578:19 1580:8,9,10 1580:24 1581:25 1582:1,8 1583:19,21 1584:15,17,23 1585:2 1585:11,15 1586:11 1587:15,17 1588:5,20 1589:2,5,20 1590:3 1591:20,20 1597:12 1597:21 1598:10 1603:21 1609:19,23 1610:1 1611:25 1612:1 1614:19 1616:11 1620:8,18 1621:8,9,22 1622:3 1624:13 1628:20 1635:3 1636:12 1640:17,17 1641:10 1641:14 1642:15 1643:8,25 1644:6,21 1645:1,23 1646:21 1647:2,11 1649:13,14 1650:6,8 1652:20,24 1652:25 1653:14,17 1653:18,19 1656:2,2 1656:6,7 1657:9,10 1657:16 1658:7,7 1661:15,17,19 1662:1 1662:5,8,22 1663:2 1663:20 1664:3,7,10 1664:11,11 1665:4,7 1665:10,14,14,15,17 1665:19,20,21,22 1666:1,4,10,19,25 1667:3,12,13,15,16 1667:20,21,21 1668:4 1668:9,12,14,15,19 1668:20,20,21,25 1669:2,6,11,12,13,14 1669:15,16,19,19,23 1669:24 1670:1,4,5,6 1670:8,12,12,13,14 1670:15,16,18,22,23 1671:1,3,3,4,17,18,19 1672:9,10,10 1673:11 1673:18,20 1674:2,2 1674:3 1675:1,4 1680:20,21,21 1681:12,12,12,20,21 1682:14,19,20 1683:15,21,21 1684:7 1684:8,19,20,21,23 1685:1,3,10,11,13,14 1685:19,22,25 1686:8 1686:8,8,10,11,16,17 1687:13 1688:1,6,6,7 1688:9,20,20,20,23</p>	<p>1688:23 1689:1,2,10 1689:14,18,18,24 1690:5,9,12,12,13,22 1690:23 1691:5,16,17 1691:17,21,22 1692:2 1692:4,5,14,22,22,23 1693:1,2,4,4,6,16,23 1694:21 1695:2,15,16 1695:23 1696:2,6,19 1696:21 1697:1,6,12 1697:14,15,16,20 1698:5,17,20,24 1699:9,9,15,16,19,22 1700:1,11,17 1701:2 1701:14,24 1702:9,11 1702:12,13,16,18,21 1702:24 1703:1,1,5,8 1703:8,9,13,14,20,21 1704:2,2,5,6,7,13,17 1704:19 1705:5,6,8 1705:11,14,14,16,20 1705:23,23 1706:1,1 1706:2,10,12,12,12 1706:13,24,25 1707:5 1707:6,15,19 1708:6 1708:9,11 1709:7,17 1709:18 1715:15 1722:16,19 1723:10 1723:12,18 1725:11 1725:11,12 <b>waters</b> 1668:17 1691:12 1707:14 <b>way</b> 1540:13 1545:16 1546:5 1568:1 1569:11,16 1614:16 1629:19 1642:14 1650:18 1651:11,22 1652:21 1653:9,12 1654:2 1658:24,24 1660:7 1667:24 1668:17,18 1673:16 1688:11,12 1692:8 1697:5 1699:18 1703:24,25 <b>wbraunig@kvn.com</b> 1536:9 <b>We'll</b> 1651:25 1659:23 1706:21 <b>we're</b> 1546:16 1552:13 1562:15 1615:16 1697:15 1705:19,20 1713:19,20 1714:7 1718:11 <b>we've</b> 1549:17 1645:14 1651:6,23 1653:8 1657:7 1692:8 1724:3 <b>weather</b> 1669:22 <b>website</b> 1565:24</p>
---	--	---	---	---

<p>1719:25 1720:1  <b>Wednesday</b> 1656:22  <b>week</b> 1564:14 1565:9  <b>weekend</b> 1649:7 1653:7  <b>weekly</b> 1673:11,15,18  1674:13 1675:1  1681:19  <b>weeks</b> 1554:1 1589:12  <b>weight</b> 1678:18  <b>went</b> 1623:13,23  1628:8 1659:10  1724:12  <b>weren't</b> 1540:10  1591:25 1595:20  1652:12  <b>western</b> 1711:15  <b>wet</b> 1669:22 1670:2  1705:10,12  <b>whatsoever</b> 1558:6  <b>wheeled</b> 1567:14  1582:8  <b>wheeling</b> 1540:22,23  1540:24,25 1556:19  1556:20,22,24 1557:1  1557:4,9,11,23  1563:1 1564:19,21,22  1565:1 1566:5,7  1574:5 1575:6,16,22  1576:5,25 1577:10,16  1577:20 1578:1,9,14  1578:25 1579:1,4,5,6  1579:10,11,16 1581:1  1581:14,18,19,24  1582:4,11,15,25  1583:3,9,11 1584:8  1584:11 1586:25  1587:9,19 1588:12  1589:21 1590:5,13  1595:1,14 1597:22  1598:9,14,21 1599:3  1599:14 1600:4,6,7  1600:14 1601:3,8,15  1602:1 1638:9  1644:18,20 1646:9,12  1646:13,15,18,23  1647:11  <b>wheels</b> 1562:16  <b>white</b> 1556:4  <b>whoever's</b> 1540:16  <b>widely</b> 1565:23  1694:23  <b>Willer</b> 1598:2  <b>willing</b> 1601:23  <b>wish</b> 1656:24  <b>withdraw</b> 1558:15  <b>witness</b> 1541:3 1545:1  1545:15 1546:3  1553:2,3,23 1561:15</p>	<p>1562:15,25 1573:25  1579:23 1580:3  1597:10 1606:5  1607:5,9,12,15,17,21  1607:23 1609:3,5  1618:15,18 1625:8  1626:9 1634:5,7  1643:1 1652:13,22  1658:15,25 1660:5,20  1661:2,4,8 1675:23  1677:10 1678:6  1679:18 1680:3,13  1681:2 1706:18,20  1707:12 1708:20,23  1709:1 1712:10  1713:6,11,14,19  1714:1,5,7 1715:5  1717:1,23 1718:4,11  1718:14,18 1723:4,7  1724:16 1725:7  1727:17  <b>witnesses</b> 1537:2  1650:22 1655:19  1656:18  <b>Woodcock</b> 1538:20  1539:3,4 1540:2  1548:1,13 1650:23  1660:12,13  <b>Woodcock's</b> 1548:18  <b>word</b> 1538:20 1548:21  1579:9 1596:11  <b>words</b> 1576:24 1590:17  1591:24 1611:6  1615:11,13 1651:4  1675:12 1693:5  1698:4  <b>work</b> 1559:3,7 1560:11  1565:3 1597:19  1598:2 1615:15  1616:12 1651:24  1709:6,17  <b>worked</b> 1559:9 1597:19  1661:16 1709:12  <b>works</b> 1677:22  <b>world</b> 1703:11,12  1705:25  <b>WORLDWIDE</b>  1535:23  <b>worried</b> 1539:2  <b>worst</b> 1599:10,12  <b>worst-case</b> 1565:7  1566:20 1599:11,15  1644:9  <b>wouldn't</b> 1594:10  1596:16 1605:22  1606:22 1645:4  1689:20 1692:7  1698:8 1700:6</p>	<p>1702:24  <b>writing</b> 1573:14  1588:24 1613:1,3,8  1613:10,11,13,14  1639:2,6,8,9,10,11  1678:3  <b>written</b> 1580:20  <b>wrong</b> 1544:24  1552:24 1619:3  1631:11 1658:12</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>X</b> 1535:10 1537:1</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Y-A-M-A-S-A-K-I</b>  1661:9  <b>Yamasaki</b> 1537:4  1545:25 1660:21  1661:1,8,13 1687:12  1687:25 1695:10  <b>yeah</b> 1551:3,22  1553:16 1592:22  1593:3,12,13,16,18  1593:24 1594:1  1604:3 1618:15  1627:9 1637:9  1638:14 1663:9  1700:14  <b>year</b> 1560:4 1561:20,20  1569:15 1570:19,23  1570:25 1571:1,6  1611:23 1612:25  1620:9 1630:10  1636:3,7 1638:25  1642:16 1657:13  1662:13 1663:10  1664:1,5 1670:2,2,17  1673:15 1682:21  1684:18 1700:5  1704:13,16 1705:10  1705:12 1708:4  1716:16,17,23  1719:14  <b>years</b> 1543:14,15  1544:5 1558:3,23  1564:23 1567:14  1569:17 1570:13  1571:7 1595:19  1596:6 1598:3,11,15  1598:21,24 1600:2,15  1600:16 1601:4,12,16  1601:20 1602:1,3,9  1602:22 1603:4  1604:22 1606:9  1607:22 1608:17,19  1609:7 1611:2  1612:15 1613:18</p>	<p>1615:22 1619:21  1625:4 1627:16  1628:5 1629:5,16  1630:3 1633:16  1635:18,20 1638:12  1639:15 1640:24  1641:11 1642:18  1646:3 1661:18  1664:1,18,23 1669:8  1702:16,20 1709:13  1718:1 1721:4  <b>yellow</b> 1694:9  <b>yesterday</b> 1538:11  1545:4 1653:8  1654:12</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p><b>032</b> 1723:17  <b>064</b> 1723:16  <b>07</b> 1610:14</p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 1535:12,12 1539:20  1540:5,9 1543:11  1548:20 1612:18,21  1623:14 1638:20  1700:21  <b>1-10</b> 1535:13  <b>1.2</b> 1643:14  <b>1.264</b> 1643:15 1644:10  <b>1/12th</b> 1662:12  <b>1:30</b> 1625:10  <b>1:35</b> 1626:3  <b>10</b> 1535:12 1565:13  <b>10,000</b> 1700:6  <b>10:00</b> 1538:3 1715:21  1726:2  <b>100</b> 1568:16,17  1569:18 1570:10  1641:11 1642:18  1693:15,23 1698:23  1699:9  <b>100,000</b> 1694:15  <b>1041</b> 1614:8  <b>1096</b> 1537:9 1546:18  1546:25 1551:24  1652:19 1654:17  1655:12 1725:16,20  <b>1099</b> 1543:4 1546:18  1551:24 1652:19  1654:17  <b>10th</b> 1536:15  <b>11</b> 1592:17 1616:13  1635:20 1648:16  <b>11.1</b> 1611:15  <b>110</b> 1543:16 1649:16</p>	<p><b>1103</b> 1537:11 1546:18  1552:1,2,9 1652:6,17  1652:18,24 1654:17  1654:18,21,22  1655:12 1656:22,25  1720:24,25 1723:24  <b>1105</b> 1537:12 1672:2,4  1672:6 1673:1,3,4  1683:3 1692:19  <b>1114</b> 1616:11  <b>1121</b> 1537:13 1710:21  1711:2,11 1712:8  1714:12,14,18,25  <b>1122</b> 1537:14 1673:6,8  1674:15,19,21  <b>1123</b> 1537:15 1716:2  1716:10,11,24 1719:7  <b>1124</b> 1537:16 1673:7  1673:12 1674:15,19  1674:21  <b>1125</b> 1537:17 1716:18  1716:19,24 1719:7  <b>1126</b> 1537:18 1673:7  1673:12 1674:15,19  1674:21  <b>1127</b> 1537:19 1719:8,9  1719:12 1720:13,23  <b>1128</b> 1537:20 1673:7  1673:12 1674:15,19  1674:21  <b>1143</b> 1537:10 1580:6  <b>1149</b> 1581:23  <b>1149A</b> 1581:21  <b>1151</b> 1537:21 1710:4  1710:11,12,13  <b>1154</b> 1537:22 1674:23  1677:11 1678:21  <b>1155</b> 1537:23 1683:1,2  1683:5,10,25 1684:1  1684:14  <b>1156</b> 1537:24 1682:23  1684:2 1685:4,6,7  1686:25  <b>1157</b> 1537:25 1685:8  1687:1,2,5,6 1693:25  1696:11 1698:7  1699:15  <b>12</b> 1543:15 1567:24  1616:16 1620:4  1623:5 1635:20  <b>12.4(c)</b> 1616:2 1639:18  <b>1270</b> 1712:23  <b>129</b> 1617:18 1630:5  1640:1  <b>13</b> 1543:16 1553:11  1636:3 1658:3,8  1695:9,14 1698:16  <b>13,000</b> 1706:9</p>
--	---	--	--	---

13,142 1697:12,20	2,349 1721:10 1722:10	1694:12 1695:18	323 1698:11,17	73 1590:15
13.12 1608:4	1723:10,23 1724:15	1698:2 1715:25	33 1683:17,20	75 1598:3 1664:18
1304 1554:8	1724:21,24	1718:10 1721:5	3374 1535:20 1727:8	75-year 1599:4
1305 1554:19,22	2:936 1640:3,4	2012 1535:12 1561:23	1727:23	776 1537:3
1340 1712:15	20 1541:5 1581:11	1635:16,25,25 1636:3	339 1634:3	78 1581:3
136 1688:2,5	1598:24 1649:25	1640:6,14 1658:9	340 1634:3	
14 1543:16 1614:8	1650:2,16 1654:25	1698:3,12,12 1716:17	342 1555:20	<hr/> 8
1648:15,17	1655:13,23	2013 1535:12 1542:1	35 1598:15,21 1664:23	8 1541:9
1414(b) 1678:3,17	20-year 1599:6	1636:7 1640:9 1698:3	35-year 1599:5	80,000 1642:15
1451 1617:13 1623:5	2000 1628:6	1702:14 1716:23	355 1609:17,21	800 1535:25
1452 1617:14	2002 1574:11 1617:9	2014 1535:12 1549:19	36 1592:16	81 1558:7,9
15 1575:13 1585:9	1617:10,12,15 1618:3	1640:10 1645:11	37 1592:16	829 1597:25
1657:5	1618:11,16,24 1620:5	1648:12,20 1662:21	38 1715:4 1718:7	837 1563:13,15
15-minute 1687:7	1620:13 1624:23	1673:16 1682:16,21	3rd 1535:24	859 1537:8 1565:9
15,000 1662:14,24	1627:12,17 1628:2	1683:16 1684:5,18		1567:5,8,9
1524 1587:22	1629:5,16 1630:3	1698:3 1702:15	<hr/> 4	865 1536:15
1535 1535:13	1641:18 1642:7	1719:14,19 1721:5	4 1543:20 1557:14	
154 1580:18	2002/03 1620:10	2015 1535:18 1538:2	1560:2	<hr/> 9
1554 1537:3	2003 1548:12 1563:21	1626:2 1726:1	41 1620:3,6	9 1566:12,12
1566 1537:8	1565:11 1572:14	1727:18	415 1535:25	90 1543:15,15 1649:16
1567 1537:8	1577:4,9 1588:17	2048 1664:24	415,391,5400 1536:7	90,000 1694:21
1572 1537:3	1589:14 1590:8,20	21 1598:17 1640:6	423 1644:2,11	90012 1536:19
1580 1537:10	1592:18 1595:5	212 1589:10	437 1575:13	90017-2543 1536:16
16 1563:20 1587:22	1601:7 1604:10,12,13	213 1589:10	438 1575:13	907 1644:2,11
1602:20 1709:13	1604:16,20,25 1605:9	213,217,6000 1536:20	4401 1582:2	94111 1535:24
1645 1537:3	1618:21 1619:1	213,443,3000 1536:16	4405 1581:22	981-3498 1535:25
1661 1537:4	1623:14 1634:23	22 1589:10 1614:8	44A 1575:12	99 1546:25 1655:12
1672 1537:12	1635:1 1648:19	22,000 1696:2	45 1598:10	
1673 1537:12,14,16,18	2004 1555:23 1556:15	22,444 1696:3	45-year 1599:5	
1537:20	1556:21,24 1558:1,17	221 1598:17	469 1682:11	
1674 1537:14,16,18,20	2005 1560:1,2,3	224 1575:8	469-A 1682:9	
1537:22	1613:20 1647:17	23 1618:1	48 1686:19	
1678 1537:22	2007 1609:18 1611:9	23,000 1663:11		<hr/> 5
1683 1537:23,24	1611:12,20,23	231 1585:9	5 1542:1 1700:5	
1684 1537:23	2008 1611:23,24	235 1541:4,8	5.2 1603:12 1608:1	
1685 1537:24,25	1612:5,18,22,24,24	235A 1541:13	50 1564:3 1588:23	
1686 1537:25	1613:7,11,14 1615:25	24 1565:11,25 1611:17	1644:5 1688:6	
1687 1537:4	1615:25 1616:5,9	25 1590:15 1592:16	50,000 1694:24	
17 1553:13 1603:12	1617:1 1630:9 1631:2	253 1595:13	51 1602:20 1611:16	
1607:7 1608:2	1631:17 1632:2,5,25	26 1598:23	51,748 1695:20	
1701 1537:4	1633:15 1635:2	27 1535:18 1538:2	522-7096 1535:25	
1706 1537:4	1636:12,25 1637:16	1626:2	542 1700:21	
1709 1537:5	1638:20	28 1617:14 1726:1	543 1700:22	
1710 1537:13,13,21,21	2009 1581:6 1630:10	280,000 1663:9		<hr/> 6
1715 1537:15	1631:3 1633:19	28th 1727:17		6:00 1715:21
1716 1537:17	1635:3,6,10 1636:25			60,000 1694:21
1718 1537:15,17	1637:17 1638:25	<hr/> 3		633 1536:6
1719 1537:19	1639:1,5,16,20,22	3 1567:3,10 1620:6,16		65 1565:13 1568:21
1720 1537:11,19	2010 1561:22 1635:7,8	3.2 1568:21		1602:20
1725 1537:9	1635:11,14,15,18	3.2(a) 1568:21,22,22		698 1571:22
1727 1535:13	1641:18 1642:7	3.2(e) 1569:6		
18 1609:18 1700:22	1646:6 1658:4,8	3.6 1570:3		<hr/> 7
19 1694:10 1699:17	2011 1549:19 1561:23	3:00 1687:8		7 1585:9
1998 1577:5,9 1598:20	1635:23,24 1645:11	304 1535:4 1538:4		700 1536:19
	1648:11,15,20 1658:9	31 1611:9,12,20,23		701 1535:24
<hr/> 2	1662:21 1673:15	317 1723:2,7		72 1590:15
2 1556:16 1566:2	1682:16,21 1683:16	31st 1715:25		
1581:6 1681:16	1683:17 1684:5,17	322 1695:8,16 1698:1		

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 BEFORE THE HONORABLE CURTIS E. A. KARNOW  
 DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )  
 )  
 Petitioner and Plaintiff, ) Case No.  
 ) No. CPF-10-510830  
 vs. ) No. CPF-12-512466  
 )  
 METROPOLITAN WATER DISTRICT OF )  
 SOUTHERN CALIFORNIA; ALL )  
 PERSONS INTERESTED IN THE )  
 VALIDITY OF THE RATES ADOPTED BY) VOLUME XI  
 THE METROPOLITAN WATER DISTRICT )  
 OF SOUTHERN CALIFORNIA ON APRIL )  
 10, 2012 TO BE EFFECTIVE JANUARY )  
 1, 2013 AND JANUARY 1, 2014, and )  
 DOES 1-10, )  
 ) Pages 1728 - 1840  
 Respondents and Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 San Francisco Superior  
 San Francisco, California  
 Tuesday, April 28, 2015

Reported By:  
 TARA SANDFORD, RPR, CSR #3374

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 JAN BROWN & ASSOCIATES  
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1728

INDEX

DEFENDANT'S WITNESSES DIRECT CROSS REDIRECT RECROSS

LAMBECK, Jon  
 (resumed) 1734 1760 1790 --

SKILLMAN, June 1796 --

1730

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1729

EXHIBITS

NUMBER	DESCRIPTION	ID	EVIDENCE
3	DTX 159 Market Cost of Power 2011-14	1753	--
4	DTX 1074 10/21/13 letter from SDCWA	1769	--
5	DTX 1160 Chart of Rates and Damages	1802	--
7	PTX 497 MWD Board Actions 3/8/11	1774	1774
8	PTX 479 1/14/10 email form Lambeck	1790	1790
9	DTX 953 MWD Fiscal Year 2011/12 Cost of Service	1813	1814

1731

1 San Francisco, California  
 2 Tuesday, April 28, 2015  
 3 10:00 a.m.  
 4 Department 304 Hon. Curtis E. A. Karnow, Judge  
 5  
 6 THE COURT: Good morning.  
 7 MR. KEKER: Good morning, your Honor. Before  
 8 we start, could I raise an issue about time?  
 9 THE COURT: Sure.  
 10 MR. KEKER: Your clock -- we thought that  
 11 yesterday we spent 49 minutes and they spent two hours  
 12 and 32 minutes. Your clock indicates that we spent an  
 13 hour and 15 minutes and they spent only two hours and  
 14 three minutes. So there is a half an hour and I  
 15 wonder -- I wonder if the clock didn't get pushed down  
 16 or something, but we have the times and would like to  
 17 get the time back.  
 18 THE COURT: How much time do you think you  
 19 should get back?  
 20 MR. KEKER: We believe that you have a half an  
 21 hour -- 25 minutes too short for us and a half an hour  
 22 too long for -- they should get a half an hour less and  
 23 we should get a half an hour more is the way we count.  
 24 THE COURT: Maybe to compromise I will give you  
 25 a half an hour back. How's that?

1732

1 MR. KEKER: Okay.  
 2 THE COURT: Any objection?  
 3 MR. QUINN: No objection.  
 4 THE COURT: Shall we continue with our witness.  
 5  
 6 JON LAMBECK,  
 7 called as a witness by the Defendants, resumed the stand  
 8 and testified as follows:  
 9  
 10 MR. EMANUEL: With the Court's permission, may  
 11 I resume the examination?  
 12 MR. GOLDBERG: We understood it is one lawyer,  
 13 one witness, but it is up to you.  
 14 THE COURT: I assume there is some reason for  
 15 that. You have some insight into the new topic?  
 16 MR. EMANUEL: I steeped myself into power more  
 17 than any human being except for the witness.  
 18 THE COURT: I will ask the People to avoid  
 19 this. This is frankly irritating to opposing counsel  
 20 when this happens, but it is not going to be fatal.  
 21 MR. EMANUEL: This won't be a practice, your  
 22 Honor.  
 23 THE COURT: Okay.  
 24 /  
 25 //

1733

1 DIRECT EXAMINATION (resumed)  
 2 BY MR. EMANUEL:  
 3 Q. Mr. Lambeck, you are still under oath.  
 4 Yesterday there was some confusion about the use of  
 5 electric power to pump water. I want to go back just  
 6 for a moment.  
 7 Does Metropolitan generate the power it uses to  
 8 pump water along the California River Aqueduct?  
 9 A. No.  
 10 Q. Where does it get its power?  
 11 A. **It has several sources. From the Federal**  
 12 **Government. For installations along the Colorado River,**  
 13 **as well as a contract with Southern California Edison**  
 14 **Utility Company.**  
 15 Q. Maybe it would speed things up if we put up PTX  
 16 490. Sir, look at your monitor. This is the pie chart.  
 17 Would you explain to the Court what this pie chart  
 18 shows?  
 19 A. **This shows the energy sources for pumping on**  
 20 **the Colorado River Aqueduct.**  
 21 Q. And tell the Court what the "Hoover" is and  
 22 "Parker," and then I'll ask about the next slices.  
 23 A. **Metropolitan has contracts with the Federal**  
 24 **Government for cost-based power from the Hoover**  
 25 **Powerplant and the Parker Powerplant, both located on**

1734

1 **the Colorado River.**  
 2 Q. As we go clockwise around the pie, what is the  
 3 "Edison Benefit"?  
 4 A. **Benefit refers to energy that we receive from**  
 5 **Edison under a contract with them at no cost.**  
 6 Q. And the narrower slice is "Edison Exchange,"  
 7 would you explain what that is?  
 8 A. **Under the contract with Edison we have the**  
 9 **ability to exchange or to bank energy with Edison.**  
 10 Q. And the final slice is "Energy Purchases."  
 11 A. **These are the purchases that we make when the**  
 12 **supply of energy from our contractual resources are not**  
 13 **sufficient for the pumping required on the aqueduct.**  
 14 Q. When the aqueduct is running full, are the  
 15 other sources, Hoover, Parker, Edison, Edison Exchange,  
 16 sufficient to move the water through the aqueduct?  
 17 A. No.  
 18 Q. However, are there some years in which so  
 19 little water is moving through the aqueduct you have  
 20 excess power?  
 21 A. Yes.  
 22 Q. What do you do in the years there is excess  
 23 power?  
 24 A. **We will either sell the power or bank it with**  
 25 **Edison.**

1735

1 Q. And how does -- how do you or how does  
 2 Metropolitan decide which sources of power to use to  
 3 move water through the aqueduct?  
 4 **A. We optimize the resources that we have on both**  
 5 **the power cost, as well as the flexibility of use**  
 6 **standpoint to achieve a lowest overall cost to our**  
 7 **member agencies.**  
 8 Q. If you look at the pie chart there, would you  
 9 say which ones are the lowest cost and which ones are  
 10 the most expensive?  
 11 **A. The Edison Benefit is zero cost. Hoover and**  
 12 **Parker are cost-based. And the Edison Exchange, the**  
 13 **exchange is valued at market prices when it's made,**  
 14 **either deposits or withdrawals, so there can be a cost,**  
 15 **but often at the end of the year there is no cost for**  
 16 **Edison Exchange power.**  
 17 Q. And the most expensive?  
 18 **A. And then the most expensive would be the**  
 19 **market-priced power we purchase, the purchased power.**  
 20 Q. Do you have a purchasing strategy in which you  
 21 try to keep energy purchases to be the least expensive?  
 22 **A. We utilize our resources to avoid having to**  
 23 **purchase power at a higher cost time periods.**  
 24 Q. Is that yesterday what was referred to as  
 25 on-peak and off-peak?

1736

1 **A. Yes. We move our resources so that we are not**  
 2 **minimize -- maximize the amount of energy we purchase**  
 3 **off-peak, which is the cheapest time period to purchase**  
 4 **the power.**  
 5 Q. Because you had said minimize, maximize --  
 6 **A. I'm sorry.**  
 7 Q. -- let's take the situation, you don't have  
 8 enough energy to move the water down the aqueduct. You  
 9 have to go out into the market. What are you buying  
 10 off-peak or on-peak to move Metropolitan's water?  
 11 **A. To move Metropolitan's water we are buying**  
 12 **off-peak power.**  
 13 Q. If it's a year in which you have excess power  
 14 to sell, are you selling on-peak or off-peak power?  
 15 **A. We would strive to sell on-peak to achieve the**  
 16 **highest value for that energy.**  
 17 Q. If Metropolitan is selling its excess power,  
 18 does it have power left over to move non-Metropolitan  
 19 water?  
 20 MR. GOLDBERG: Objection, your Honor.  
 21 THE COURT: Overruled.  
 22 Do you know?  
 23 THE WITNESS: Yes.  
 24 No.  
 25 Q. BY MR. EMANUEL: Just to make sure we are clear

1737

1 on that: What happens, then, if a third party or a  
 2 member agency wants to move Metropolitan water through  
 3 the aqueduct? Where does that power come from?  
 4 MR. GOLDBERG: Objection, your Honor. It lacks  
 5 foundation and, again, it is expert testimony.  
 6 THE COURT: I don't think it calls for expert  
 7 testimony. I think this is just to be a question of  
 8 fact and the foundation has been laid as to his duties.  
 9 I will just take this as a question of fact. Do you  
 10 have the question in mind?  
 11 THE WITNESS: Could you repeat the question,  
 12 please?  
 13 Q. BY MR. EMANUEL: To move non-Metropolitan  
 14 water, where does the power come from?  
 15 **A. Metropolitan would purchase the power.**  
 16 Q. Would Metropolitan use its own power to move  
 17 non-Metropolitan water?  
 18 **A. No.**  
 19 Q. When you are going into the market to buy  
 20 power -- let me lay a foundation.  
 21 Sir, it is your duties and responsibilities to  
 22 go into the market and buy power; correct?  
 23 **A. That's correct.**  
 24 Q. At the present time the aqueduct is running  
 25 full, so I take it you have had to buy power lately?

1738

1 **A. Yes, we are buying power every day, every**  
 2 **workday.**  
 3 Q. Does the price of power fluctuate day to day?  
 4 **A. Yes, it does.**  
 5 Q. And to buy and sell power, do you need to know  
 6 what the market price of the power is?  
 7 **A. Yes.**  
 8 Q. I take it from the testimony yesterday there's  
 9 some negotiation goes on in setting the price of the  
 10 power; correct?  
 11 **A. Correct. And in determining what our**  
 12 **negotiating strategy is, what we offer for the power we**  
 13 **wish to purchase, we base that on what the market prices**  
 14 **have been. If they are going up, we know that there may**  
 15 **be tougher negotiation. If they are going down, we can**  
 16 **strive to push them down even more.**  
 17 Q. Yesterday we were talking about the DTX 1121.  
 18 Can we put that back up again, please?  
 19 If you would highlight the right-hand corner  
 20 graph, please.  
 21 Sir, prior to going into a negotiation for the  
 22 purchase of power, is this the information you look to  
 23 to determine what the market -- fair market price would  
 24 be for the power?  
 25 **A. Yes.**

1739



1 Q. I take it, sir, from your testimony, this isn't  
 2 the price of the -- this is the price from the preceding  
 3 day?  
 4 **A. That's correct.**  
 5 Q. How is it helpful to know what the price is on  
 6 preceding days going into a negotiation where market  
 7 price fluctuates day to day?  
 8 **A. It can give you the trends of where the market**  
 9 **prices are going, if they are remaining relatively**  
 10 **stable or moving up or down. It influences our**  
 11 **negotiating strategy for buying power for the next day.**  
 12 Q. And to make sure I've laid the foundation for  
 13 this, this DTX 1121, this is a market report for which  
 14 part of the United States?  
 15 **A. It's the Western United States.**  
 16 Q. On the graph here, which numbers apply to the  
 17 power that you would buy for the Colorado River  
 18 Aqueduct?  
 19 **A. To move Metropolitan water?**  
 20 Q. Yes.  
 21 MR. GOLDBERG: Objection, your Honor. He  
 22 testified yesterday this is not the price they use to  
 23 either buy or sell power.  
 24 THE COURT: I take the word "used" as used in  
 25 the overall calculation. Overruled.

1740

1 Go ahead.  
 2 THE WITNESS: For buying power we would be on  
 3 the off-peak, SP15.  
 4 Q. BY MR. EMANUEL: Because counsel makes a good  
 5 point about what do you mean by use, could you explain  
 6 the use that you would put yesterday's market price to  
 7 in trying to negotiate the current day's market price?  
 8 **A. We would look at the index price, the second**  
 9 **column from the left, as to what the market price was**  
 10 **for yesterday. It also provides the change from the**  
 11 **prior day to that day, so we can see that the cost of**  
 12 **power moved up pretty substantially. And we also get an**  
 13 **indication, depending upon what prior days were, if this**  
 14 **escalation was something that was kind of a trend or if**  
 15 **this was a one-day anomaly. All of those types of**  
 16 **pieces of information we would extract from this. And**  
 17 **prior days' values would go into our strategy for**  
 18 **purchasing power.**  
 19 Q. I think you anticipated my next question.  
 20 Extracting this information, you use it in the  
 21 negotiation with whomever you are buying power from; is  
 22 that correct?  
 23 **A. Correct.**  
 24 Q. How many years had you used this Platts market  
 25 information?

1741

1 **A. I am not sure how long we have had the**  
 2 **subscription to Platts. It's been a while.**  
 3 Q. Was it proven to be a reliable source of market  
 4 price information for you?  
 5 MR. GOLDBERG: Objection, your Honor. It's  
 6 foundation. It's hearsay. I have no idea how he is  
 7 going to testify to this as a fact witness.  
 8 THE COURT: As to whether it is reliable or  
 9 not?  
 10 MR. GOLDBERG: On a day-to-day basis when he  
 11 already said they don't track what they buy or sell  
 12 power at, how is he going to tell us whether this is  
 13 reliable or accurate?  
 14 THE COURT: I will allow the question. You can  
 15 examine on that.  
 16 Go ahead.  
 17 Q. BY MR. EMANUEL: I will do it a little  
 18 different way, your Honor. With this information in  
 19 hand, and you go out to negotiate, has it been your  
 20 experience that the negotiation seems to begin or end  
 21 within the range you would expect, based on the market  
 22 information you had in hand going into the negotiation?  
 23 THE COURT: Sustained.  
 24 Q. BY MR. EMANUEL: Based on the experience you've  
 25 had, with the results you've attained in your

1742

1 negotiation, does that confirm that this is a reliable  
 2 source of market information?  
 3 MR. GOLDBERG: Objection.  
 4 THE COURT: Sustained.  
 5 Q. BY MR. EMANUEL: Why do you think it's  
 6 reliable?  
 7 **A. Because the negotiations that we have with**  
 8 **parties who are sellers of energy we find that it's**  
 9 **consistent with the information that we extracted and**  
 10 **our expectations for the market.**  
 11 Q. I think we talked before there is on-peak and  
 12 off-peak information here; correct?  
 13 **A. Correct.**  
 14 Q. Can you point to the number that -- so -- if we  
 15 want the on-peak number, that would be the number in the  
 16 middle of the page?  
 17 **A. It would be the --**  
 18 Q. Or SP15?  
 19 **A. SP15 on-peak?**  
 20 Q. Yes.  
 21 **A. Yes, it would be the value there in the middle**  
 22 **of the page that's now highlighted.**  
 23 Q. DTX 1121 is showing the average cost for  
 24 megawatt hour of power for the month; is that correct?  
 25 MR. GOLDBERG: Objection. Leading.

1743

1 THE COURT: Sustained.  
 2 Q. BY MR. EMANUEL: Would you explain if there is  
 3 a number there that shows the cost for megawatt hour of  
 4 power for January 2011?  
 5 MR. GOLDBERG: Objection. Vague as to "cost."  
 6 THE COURT: Cost to who? Somebody? These  
 7 people? Something else?  
 8 Q. BY MR. EMANUEL: This document shows -- has  
 9 dollar numbers. Would you explain what those dollar  
 10 amounts are?  
 11 **A. They're the cost of power in the marketplace on**  
 12 **a megawatt-hour basis.**  
 13 Q. Would you tell us what is the cost of megawatt  
 14 hour basis on-peak for average for the month of  
 15 January 2011?  
 16 MR. GOLDBERG: Objection. Calls for expert  
 17 testimony. Lack of foundation.  
 18 THE COURT: I think all he is going to do is  
 19 read some numbers into the record. I don't think it is  
 20 expert opinion.  
 21 Overruled.  
 22 THE WITNESS: The average cost per megawatt  
 23 hour for the month of January was \$37.13.  
 24 THE COURT: Do you know what that is an average  
 25 of or what the market is defined as?

1744

1 THE WITNESS: Market is defined as the  
 2 information Platts has extracted from participants in  
 3 the market as to what was sold at that price.  
 4 THE COURT: Do you know who those participants  
 5 are?  
 6 THE WITNESS: It's a process that Platts goes  
 7 through to obtain the data.  
 8 Q. BY MR. EMANUEL: So we were talking about the  
 9 on-peak amount. That's not the amount you seek to buy?  
 10 **A. No.**  
 11 Q. For Metropolitan water, you seek to buy the  
 12 off-peak amount; correct?  
 13 **A. Correct.**  
 14 Q. And what is that number?  
 15 MR. GOLDBERG: Objection, your Honor. Is he  
 16 talking only about --  
 17 THE COURT: Sustained.  
 18 Q. BY MR. EMANUEL: What is the average cost of  
 19 power off-peak?  
 20 THE COURT: You are just asking him to read  
 21 from this document?  
 22 MR. EMANUEL: Yes.  
 23 MR. GOLDBERG: As long as he is talking about  
 24 the document.  
 25 THE COURT: That is why I inserted the

1745

1 clarification. Go ahead.  
 2 THE WITNESS: \$26.27.  
 3 Q. BY MR. EMANUEL: If you need power, what is it  
 4 you can do so that you can take advantage of off-peak  
 5 prices?  
 6 MR. GOLDBERG: Objection. Vague. Calls for  
 7 expert testimony. Lack of foundation.  
 8 THE COURT: Overruled.  
 9 THE WITNESS: We utilize the resources  
 10 available to us from the contracts, and we utilize that  
 11 energy in the most expensive time periods. So we create  
 12 the need only in the off-peak period, and we would  
 13 purchase the power in the off-peak as the cheapest of  
 14 the supplemental energy we would have to acquire.  
 15 Q. BY MR. EMANUEL: Now I want to add a different  
 16 qualification to the question. Let's take the situation  
 17 of buying power for a third party, conveying non-Met  
 18 water through the Colorado River Aqueduct. What power  
 19 are you buying in that situation?  
 20 MR. GOLDBERG: Objection. Lack of foundation.  
 21 Calls for expert testimony.  
 22 THE COURT: Overruled.  
 23 THE WITNESS: We would utilize our resources to  
 24 satisfy the needs first for the Metropolitan water that  
 25 was being conveyed. And we would go out and purchase

1746

1 on-peak power to move the non-Met water.  
 2 THE COURT: You buy on-peak power to move  
 3 non-Met water regardless of when the movement is  
 4 occurring?  
 5 THE WITNESS: The movement would be occurring  
 6 during the on-peak hours.  
 7 THE COURT: You wouldn't be moving it during  
 8 the off-peak hours?  
 9 THE WITNESS: No. We would utilize our  
 10 resources to move our water in the off-peak hours.  
 11 Q. BY MR. EMANUEL: Mr. Lambeck, I want to  
 12 clarify. I think you misspoke yesterday. There was  
 13 some reference to using off-peak prices for  
 14 non-Metropolitan water. That was a mistake?  
 15 **A. That was a misstatement, that's correct.**  
 16 Q. We have been talking about the first page of  
 17 DTX 1121. There are several more pages to it. Are you  
 18 familiar with this document, sir?  
 19 **A. Yes, I am.**  
 20 Q. Do the remaining pages in the exhibit show the  
 21 end-of-month averages for the other months in 2011?  
 22 **A. Yes, they do.**  
 23 MR. GOLDBERG: Objection as to if he's  
 24 testifying about what the actual average was versus  
 25 what's in the document.

1747

1 THE COURT: I take it the question is merely do  
 2 the other documents in effect show the same information  
 3 as this document?  
 4 MR. EMANUEL: Correct.  
 5 THE COURT: With that understanding, go ahead.  
 6 Q. BY MR. EMANUEL: To speed things up just a  
 7 little bit, I will have you look at DTX 1123.  
 8 Can I have that up?  
 9 And that, too, is a document with information  
 10 on it about power costs for 2012; correct?  
 11 A. Correct.  
 12 Q. So it would be accurate to say that the same  
 13 questions I asked you about 2011 would also be true for  
 14 2012? There are 12 pages with end-of-the-month reports  
 15 reflecting monthly average prices on the report?  
 16 A. Correct.  
 17 Q. And DTX 1125 -- need to see this, too -- this  
 18 is another collection of pages. Do they show power for  
 19 monthly averages for 2013?  
 20 A. Yes.  
 21 Q. DTX 1127, do they show power costs for  
 22 monthly -- monthly average power costs for 2014?  
 23 A. Yes.  
 24 THE COURT: Not that they show average monthly  
 25 power costs for anyone in particular, but the same

1748

1 information we went over with respect to DTX 1121?  
 2 MR. EMANUEL: Yes.  
 3 THE COURT: That is my understanding.  
 4 MR. EMANUEL: I appreciate the clarification.  
 5 Q. I am going to change subjects for a second.  
 6 I take it there is a cost, internally a cost of  
 7 scheduling power; is that correct?  
 8 A. That's correct.  
 9 Q. Do you have staff devoted to doing that?  
 10 A. Yes, I do.  
 11 Q. Have you had an occasion to calculate the  
 12 internal cost of scheduling power?  
 13 MR. GOLDBERG: Objection. Undisclosed expert  
 14 testimony.  
 15 THE COURT: I believe it is. Feel free to lay  
 16 a foundation. This is just percipient testimony. I  
 17 don't know if this is something that can be done without  
 18 some expertise in analyzing internal costs. Generally  
 19 speaking, that is a matter of expert testimony.  
 20 MR. EMANUEL: I think it is more pertinent than  
 21 that.  
 22 THE COURT: I think it is. Here is a fact what  
 23 this costs and what that costs and maybe you will leave  
 24 it to argument to decide what that shows.  
 25 MR. EMANUEL: I understand, your Honor, but I

1749

1 take the comment --  
 2 Q. Did you look at the employees' salaries that  
 3 are being devoted to scheduling power?  
 4 A. Yes.  
 5 Q. And did you divide that cost by the amount of  
 6 power they were scheduling?  
 7 MR. GOLDBERG: Your Honor, objection. It is  
 8 undisclosed expert testimony. We have never seen the  
 9 calculation. I object to it coming in.  
 10 THE COURT: Overruled.  
 11 Go ahead.  
 12 Q. BY MR. EMANUEL: We have the component, you  
 13 know, the cost of the salaries of your staff. You  
 14 divide that -- I'm sorry.  
 15 Let's make sure we've got this right.  
 16 The cost of the salary of the staff devoted to  
 17 scheduling --  
 18 A. Yes.  
 19 Q. -- and you divide that by the power that they  
 20 schedule; correct?  
 21 A. That's --  
 22 MR. GOLDBERG: Objection. Vague as to "power  
 23 they schedule."  
 24 THE COURT: Sustained.  
 25 Q. BY MR. EMANUEL: When you buy power, you have

1750

1 to schedule it; is that right?  
 2 MR. GOLDBERG: Objection as to whose power.  
 3 Vague.  
 4 THE COURT: Overruled.  
 5 THE WITNESS: Yes.  
 6 Q. BY MR. EMANUEL: Would you explain to the Court  
 7 what "scheduling" means?  
 8 A. Scheduling is the negotiation and acquisition  
 9 of power from the marketplace, and as well as the  
 10 accounting and settlement process that occurs with the  
 11 parties at the end of the month.  
 12 Q. And you have made a calculation of the time it  
 13 takes to do that?  
 14 MR. GOLDBERG: Objection, your Honor. Expert  
 15 testimony.  
 16 THE COURT: Not quite yet. Not with that  
 17 question.  
 18 Overruled.  
 19 THE WITNESS: Yes.  
 20 Q. BY MR. EMANUEL: And you made a calculation of  
 21 the dollars per hour paid to the people who make this  
 22 calculation?  
 23 MR. GOLDBERG: Objection, your Honor. That is  
 24 calling for a dollar per hour that we've never seen.  
 25 THE COURT: It calls for a yes or no.

1751

1 Overruled.  
 2 THE WITNESS: Yes.  
 3 Q. BY MR. EMANUEL: And when, at the end of the  
 4 day, you calculate the amount of time, the cost of that  
 5 time and the amount of power that they have scheduled,  
 6 are you able to do a mathematical calculation of the  
 7 cost per megawatt hour?  
 8 MR. GOLDBERG: Same objection.  
 9 THE COURT: Overruled.  
 10 THE WITNESS: Yes.  
 11 Q. BY MR. EMANUEL: What is that number?  
 12 MR. GOLDBERG: Same objection.  
 13 THE COURT: Sustained.  
 14 MR. EMANUEL: Let's put up DTX 1096.  
 15 Q. Do you recognize this document?  
 16 A. Yes, I do.  
 17 Q. What is it?  
 18 A. **This is a statement that's created annually for**  
 19 **billing purposes to non-member agency.**  
 20 Q. Is this created and maintained in the regular  
 21 course of business?  
 22 A. Yes.  
 23 Q. What is it used for?  
 24 A. **It's used to -- as part of the billing process**  
 25 **for water delivery to a non-member agency.**

1752

1 Q. Is another way to put it this is a bill you  
 2 send and expect to be paid?  
 3 MR. GOLDBERG: Objection. I think that's  
 4 vague.  
 5 THE COURT: Overruled.  
 6 THE WITNESS: This is used in the preparation  
 7 of a bill that would be sent.  
 8 Q. BY MR. EMANUEL: Who creates this document?  
 9 A. **This is created by Metropolitan staff.**  
 10 Q. Is it their duty and responsibility to create  
 11 these documents?  
 12 A. Yes.  
 13 Q. And what -- what is the source of the  
 14 information of the power costs used in this document?  
 15 A. **They come from the Department of Water**  
 16 **Resources for State Water Project costs.**  
 17 Q. Is the information -- does Metropolitan  
 18 consider the information provided by the Department of  
 19 Water Resources reliable?  
 20 A. Yes.  
 21 Q. In fact, isn't it true, sir, that the  
 22 Department of Water Resources sends bills to  
 23 Metropolitan, as well?  
 24 A. Yes.  
 25 Q. And Metropolitan pays them?

1753

1 A. Yes.  
 2 Q. This bill refers to variable power?  
 3 THE COURT: It is not a bill.  
 4 Q. BY MR. EMANUEL: This document -- this document  
 5 refers to variable power and off-aqueduct power. Do you  
 6 see that?  
 7 A. Yes, I do.  
 8 Q. Would you explain what those are?  
 9 A. **There's two components in the cost of power on**  
 10 **the State Water Project.**  
 11 **The first is variable. And these are costs**  
 12 **that vary with the amount of water that is conveyed**  
 13 **through the State Water Project. The off-aqueduct**  
 14 **charge is to recover costs associated with facilities**  
 15 **that are not located on the State Water Project but are**  
 16 **off the project or off-aqueduct that are used to -- as**  
 17 **providing power and supporting the pumping on the**  
 18 **aqueduct, and there's two different methodologies to**  
 19 **those values.**  
 20 Q. Do you see on the bottom there, East Branch,  
 21 West Branch? Would you explain what the East Branch and  
 22 West Branches are?  
 23 A. **Those are the two delivery points at which**  
 24 **Metropolitan receives water from the State Water**  
 25 **Project, and it is a locational indication. One comes**

1754

1 **in on the east side of our system and one comes in on**  
 2 **the west side of our system.**  
 3 Q. If State Water Project water is delivered to  
 4 San Diego, which branch would it go down?  
 5 A. **It would go down the East Branch.**  
 6 Q. And that number going across there next to East  
 7 Branch, does that reflect the cost per acre-foot for  
 8 water flowing down the East Branch during this -- for  
 9 this document, January 2012?  
 10 MR. GOLDBERG: Objection, your Honor. Lacks  
 11 foundation. Calls for expert testimony.  
 12 This document was specifically called for by  
 13 numerous document requests. We object to him testifying  
 14 as to the numbers. We have no basis to believe --  
 15 THE COURT: What is the foundation? Can you  
 16 lay some foundation as to why he knows the answer to all  
 17 these questions about this document?  
 18 Let me ask one basic question. Is this a  
 19 document you interact with in your work?  
 20 THE WITNESS: No.  
 21 Q. BY MR. EMANUEL: But you are familiar with the  
 22 document?  
 23 A. **Yes, I am familiar with the document.**  
 24 THE COURT: Are you familiar with the document  
 25 because of your work in this litigation or because of

1755

1 your job?  
 2 THE WITNESS: Because of the work with the  
 3 litigation.  
 4 THE COURT: Objection sustained. He doesn't  
 5 have a foundation to talk to me about this.  
 6 MR. GOLDBERG: Move to strike, your Honor, all  
 7 the testimony that relates to this document.  
 8 THE COURT: Motion is granted.  
 9 THE CLERK: This is DTX 1096?  
 10 THE COURT: It is 1096.  
 11 MR. EMANUEL: Can I have a minute, your Honor?  
 12 THE COURT: Of course.  
 13 Q. BY MR. EMANUEL: Mr. Lambeck, if we can go back  
 14 to DTX 1121.  
 15 THE COURT: 1101?  
 16 MR. EMANUEL: 1121.  
 17 Q. And if we can zoom in on the on-peak costs and  
 18 the \$37.13. Do you see that?  
 19 **A. Yes, I do.**  
 20 Q. Have you had -- have you been asked to  
 21 calculate the average cost based on these reports for  
 22 the years 2011 and -- through 2014?  
 23 MR. GOLDBERG: Objection. Expert testimony,  
 24 undisclosed. Foundation.  
 25 THE COURT: Overruled.

1756

1 THE WITNESS: Yes.  
 2 Q. BY MR. EMANUEL: In doing that calculation, did  
 3 you multiply the costs per megawatt hour times the  
 4 number of megawatt hours it takes to move an acre-foot  
 5 of water?  
 6 MR. GOLDBERG: Objection. Leading, and the  
 7 same objections.  
 8 THE COURT: Overruled.  
 9 THE WITNESS: Yes.  
 10 Q. BY MR. EMANUEL: Did you do that for every  
 11 month of 2011, 2012, 2013 and 2014?  
 12 MR. GOLDBERG: Same objections.  
 13 THE COURT: Overruled.  
 14 THE WITNESS: Yes.  
 15 Q. BY MR. EMANUEL: And when you derived that  
 16 average, did you then create those numbers? Did you  
 17 then create a weighted average based on the volume of  
 18 Colorado River water delivered as exchange water each  
 19 month?  
 20 MR. GOLDBERG: Same objections and lack of  
 21 foundation.  
 22 THE COURT: Overruled.  
 23 THE WITNESS: Yes.  
 24 MR. EMANUEL: I am just going to mark this for  
 25 identification, your Honor, as DTX 1159.

1757

1 Q. Do the amounts in each cell under January,  
 2 February through December for 2011, 2012, 2013 and 2014  
 3 reflect the calculation you just described?  
 4 MR. GOLDBERG: Objection. Leading. Same  
 5 objections as to undisclosed testimony. Foundation.  
 6 THE COURT: Overruled.  
 7 THE WITNESS: Yes.  
 8 Q. BY MR. EMANUEL: And if we look in the  
 9 next-to-last column, we have four numbers, 87.80, 83.30,  
 10 115.15, 122.32. Is that the weighted average that you  
 11 calculated based on exchange water going through the  
 12 Colorado River?  
 13 MR. GOLDBERG: Objection, your Honor. It is  
 14 undisclosed expert testimony. Now he is telling him to  
 15 calculate the amount based on the reports that he says  
 16 don't accurately reflect the actual costs they buy or  
 17 sell power at.  
 18 THE COURT: I understand. I think this  
 19 document is simply to be a reflection of some  
 20 mathematics.  
 21 MR. EMANUEL: That is all it is.  
 22 THE COURT: So far that's all it is. The  
 23 objection is overruled.  
 24 You may want an answer to the question.  
 25 Q. BY MR. EMANUEL: I'm sorry.

1758

1 **A. Yes.**  
 2 Q. The last column adds a total with A&G. Where  
 3 did the A&G come from?  
 4 MR. GOLDBERG: Asked and answered.  
 5 THE COURT: Overruled.  
 6 THE WITNESS: June Skillman.  
 7 MR. EMANUEL: I will ask her about that.  
 8 MR. GOLDBERG: Lack of foundation.  
 9 THE COURT: The foundation, he doesn't know it  
 10 came from June Skillman?  
 11 MR. EMANUEL: Foundation as to where the number  
 12 came from.  
 13 THE COURT: It came from June Skillman.  
 14 Overruled.  
 15 MR. EMANUEL: Nothing more, your Honor.  
 16 Thank you.  
 17 THE COURT: Cross-examination.  
 18 MR. GOLDBERG: Yes, your Honor.  
 19 Before I begin, we will be moving to strike  
 20 Mr. Lambeck's testimony in its entirety, all the  
 21 documents we looked at in his direct. And pursuant to  
 22 your guidance yesterday in connection with the motion to  
 23 exclude, I am happy to cross-examine Mr. Lambeck now  
 24 without waiving that motion to strike or I can make the  
 25 motion now.

1759

1 THE COURT: I think you should go ahead and  
 2 cross now. What I had in mind was -- part of your  
 3 motion has to do with an analysis of prior discovery  
 4 demands, prior rulings and analyzing and matching up  
 5 with what's come in. I think it is better to do after  
 6 the fact.  
 7 MR. GOLDBERG: Understood, your Honor.  
 8  
 9 CROSS-EXAMINATION  
 10 BY MR. GOLDBERG:  
 11 Q. I am Nick Goldberg from the Water Authority,  
 12 and we will hand you a binder.  
 13 Yesterday you testified on direct examination  
 14 that if Met needed to purchase power for a third party  
 15 to move non-Metropolitan water, the purchase price would  
 16 be based on the off-peak price; isn't that correct?  
 17 A. Yes. I misspoke.  
 18 Q. That was your answer yesterday?  
 19 A. Yes.  
 20 Q. I will read it to you:  
 21 "If Met needed to purchase  
 22 power for a third party to move  
 23 non-Met water, what price would  
 24 be applicable?  
 25 "A For purchasing power we

1760

1 would look for the off-peak."  
 2 That's what you testified to yesterday?  
 3 A. Yes.  
 4 Q. If you could put up 717, lines 21 through 23.  
 5 And then the Court asked you:  
 6 "Does Met sometimes buy power  
 7 at beyond peak rate?  
 8 "A Sometimes. Very infrequently."  
 9 Was that your testimony, sir?  
 10 A. Yes.  
 11 Q. You met with your counsel after we broke  
 12 yesterday; isn't that true?  
 13 A. Yes.  
 14 Q. And now less than a day later you testified to  
 15 something completely different today; isn't that true?  
 16 A. That's correct. Yesterday I misspoke.  
 17 Q. We just looked at two different questions, one  
 18 that your own lawyer, Ms. Borden in the back, asked you,  
 19 and another that the Court asked you. And it wasn't  
 20 just misspeaking, was it, sir?  
 21 MR. EMANUEL: Objection, your Honor.  
 22 Argumentative.  
 23 THE COURT: Overruled.  
 24 THE WITNESS: I misunderstood the question that  
 25 was asked on the purchasing for the power.

1761

1 Q. BY MR. GOLDBERG: Both when your lawyer asked  
 2 you the question and when the judge asked you the  
 3 question?  
 4 A. Those are two different questions.  
 5 Q. Let's take them one at time.  
 6 When Ms. Borden asked you yesterday if the  
 7 purchase price for moving non-Met water was what  
 8 purchase price you would use, and you said off-peak, you  
 9 misunderstood that question? That's your testimony  
 10 today?  
 11 A. Yes.  
 12 Q. When the Court asked you separately, "Does Met  
 13 sometimes buy power at the on-peak rate," and you  
 14 answered "very infrequently," did you misunderstand that  
 15 question, as well?  
 16 A. No.  
 17 Q. Is it your testimony when Met buys its own  
 18 power, it is on-peak, it is very infrequent; that's what  
 19 you are saying?  
 20 A. That's correct.  
 21 Q. Let me ask you to look at your declaration and  
 22 specifically at the top of page five.  
 23 The on-peak price index published in Platts  
 24 Market Report is indicative of the price that would be  
 25 paid to non-MWD water. That is contrary to what you

1762

1 testified to yesterday?  
 2 A. That is correct.  
 3 Q. You didn't write this declaration yourself, did  
 4 you?  
 5 A. No. I -- I worked on it. I wrote part of it.  
 6 It was a collaborative process.  
 7 Q. It was a collaborative process with Met's  
 8 lawyers; isn't that true?  
 9 A. Correct.  
 10 Q. You didn't write every word in here? In fact,  
 11 some of that was written by Met's counsel in this  
 12 litigation; true?  
 13 A. The outside counsel?  
 14 Q. Or in-house counsel.  
 15 A. It was a collaborative process with the  
 16 in-house counsel.  
 17 Q. When you say collaborative process, you are  
 18 talking about the fact they would draft the declaration  
 19 and supply it to you for you to review; correct?  
 20 A. We would draft it together.  
 21 Q. You are not testifying today you drafted every  
 22 word of this declaration?  
 23 A. Not every word.  
 24 Q. So the record is clear, Met's lawyers that are  
 25 involved in this litigation, whether in-house or outside

1763

1 counsel, also participated in drafting this declaration?  
 2 **A. I do not know if the outside counsel**  
 3 **participated in drafting this.**  
 4 Q. You don't know one way or the other?  
 5 **A. No.**  
 6 Q. They could have?  
 7 **A. Yeah.**  
 8 Q. And the in-house counsel, we know they sure did  
 9 participate in drafting the declaration you submitted to  
 10 the Court today?  
 11 **A. We worked together on it, yes.**  
 12 Q. You testified yesterday the off-peak hours are  
 13 from 6:00 a.m. to 10:00 p.m. Monday through Saturday?  
 14 **A. That is the market definition.**  
 15 Q. Is it your testimony that Met has never pumped  
 16 the Water Authority' IID and canal lining water during  
 17 off-peak hours?  
 18 **A. Could you repeat that question?**  
 19 Q. I'm asking you whether -- whether you're saying  
 20 that Met has never pumped the Water Authority's IID and  
 21 canal lining water during off-peak hours?  
 22 **A. I do not know.**  
 23 Q. You don't know one way or the other?  
 24 **A. I do not know one way or the other.**  
 25 Q. You're testifying that Met ought to charge San

1764

1 own water for purposes of moving it through the CRA, the  
 2 Colorado River Aqueduct?  
 3 **A. Not that I'm aware of.**  
 4 Q. That water moves through the aqueduct all at  
 5 the same time? It is not like you are separately  
 6 disaggregating the Water Authority's IID and canal  
 7 lining water from Metropolitan's own supplies?  
 8 **A. Not at this time that I'm aware of, no.**  
 9 Q. Is it true Met has moved its own supplies  
 10 during off-peak times; you testified to that on direct  
 11 just a moment ago?  
 12 **A. Yes, we move our water.**  
 13 Q. So if you're not disaggregating the Water  
 14 Authority's IID and canal lining water, isn't it true,  
 15 sir, that Met has also necessarily moved the Water  
 16 Authority's canal lining and IID water during off-peak  
 17 hours? That's just true?  
 18 **A. I don't have anything to refute that.**  
 19 Q. So it's true?  
 20 **A. I don't know anything that would refute it.**  
 21 Q. I am asking you a specific question. The  
 22 statement I said is true, is it not? I am not asking  
 23 whether you have anything to refute it. I am asking you  
 24 whether it's true.  
 25 **A. I do not know of any distinction in the water**

1766

1 Diego the on-peak price because it is third-party water  
 2 but you don't know if that water moves at off-peak  
 3 times?  
 4 MR. EMANUEL: Objection, your Honor.  
 5 THE COURT: It is argumentative.  
 6 Sustained.  
 7 Q. BY MR. GOLDBERG: You don't know if Met has  
 8 ever moved the Water Authority's water after 10:00 p.m.  
 9 at night?  
 10 MR. EMANUEL: Asked and answered, your Honor.  
 11 THE COURT: Sustained.  
 12 Q. BY MR. GOLDBERG: It is true, sir, Met has  
 13 moved the Water Authority's IID and canal lining water  
 14 on Sunday, for example?  
 15 MR. EMANUEL: Objection, your Honor.  
 16 THE COURT: Overruled.  
 17 THE WITNESS: I do not know when the specific  
 18 water was moved for IID or --  
 19 Q. BY MR. GOLDBERG: I didn't mean to interrupt  
 20 you. Please finish.  
 21 **A. For Metropolitan I do not know of the**  
 22 **distinction in the water that has been moved through the**  
 23 **aqueduct.**  
 24 Q. Met does not draw a distinction between the  
 25 Water Authority's IID and canal lining water and Met's

1765

1 **that today is being moved through the aqueduct.**  
 2 Q. That is not my question, sir.  
 3 **A. I'm sorry.**  
 4 Q. I am asking you whether it is true that the  
 5 Water Authority's IID and canal lining water gets moved  
 6 through the Colorado River Aqueduct at off-peak times.  
 7 **A. I believe the water that you're referring to is**  
 8 **treated as a Met supply, and it is moved as all the**  
 9 **other water is moved, that is, Met's supply of our**  
 10 **member agencies.**  
 11 Q. Which moves at times during off-peak hours,  
 12 correct?  
 13 **A. Presumably.**  
 14 Q. Yes or no? Presumably, it does. You testified  
 15 to that on direct. You testified on --  
 16 THE COURT: Let's wait to see if there is an  
 17 answer. Let's take a pause.  
 18 Do you have the question in mind?  
 19 THE WITNESS: Yes, I do.  
 20 If it's aggregated, then all the water is moved  
 21 together.  
 22 Q. BY MR. GOLDBERG: You testified on direct  
 23 examination, did you not, that Met's own supplies moved  
 24 during off-peak hours?  
 25 **A. Yes.**

1767

1 Q. And if it's not disaggregated and it includes  
 2 the Water Authority's IID and canal lining water, the  
 3 Water Authority's IID and canal lining water also moves  
 4 during off-peak hours; correct?  
 5 **A. Correct.**  
 6 Q. Today and yesterday, in fact, we looked at some  
 7 exhibits from Platts Market Index; do you remember that?  
 8 **A. Yes.**  
 9 Q. This is one of the Platts reports you testified  
 10 about today and yesterday; correct?  
 11 **A. Correct.**  
 12 Q. And you testified yesterday that these prices  
 13 on the Platts reports are just one of a variety of  
 14 inputs that Met looks at when it's negotiating with  
 15 buyers to sell Met's power. That's what you testified  
 16 to yesterday; right?  
 17 **A. Yes.**  
 18 Q. Specifically we were looking at the on-peak and  
 19 off-peak price for SP15, isn't that right?  
 20 **A. Yes.**  
 21 Q. And you testified there was some confusion but  
 22 you testified these numbers in the far right corner,  
 23 37.13 and 26.27, they reflect something. We don't know  
 24 exactly what, but it is some price that Platts  
 25 calculated?

1768

1 MR. EMANUEL: I am going to object.  
 2 THE COURT: Sustained. Let's just have a  
 3 question.  
 4 Q. BY MR. GOLDBERG: Let me start again. That  
 5 price in the bottom right-hand corner is something that  
 6 Platts calculated; correct?  
 7 **A. Correct.**  
 8 Q. In fact, you can't tell us whether that price  
 9 for on-peak SP15 is the same price at which Met bought  
 10 or sold power in January 2011?  
 11 **A. That's correct.**  
 12 Q. And the same is true for the off-peak number;  
 13 right?  
 14 **A. That's correct.**  
 15 Q. If we were to look at all of these pages from  
 16 2011 to 2014 and I asked you the same question, you'd  
 17 give me the same answer; right?  
 18 **A. Yes, I would.**  
 19 Q. So, in fact, that price that Platts reports,  
 20 you are not in a position to tell me one way or the  
 21 other whether that reflects Met's cost of either buying  
 22 or selling power; true?  
 23 **A. True. It's a market price.**  
 24 Q. At the top of the table in DTX 1121, do you see  
 25 where it says "day-ahead markets"?

1769

1 **A. Yes.**  
 2 Q. We talked a little bit -- I think your counsel  
 3 asked you some questions about what "day-ahead" meant.  
 4 And that is where you go to buy power the day  
 5 before you need it; right?  
 6 **A. Correct.**  
 7 Q. And under the exchange agreement Met has  
 8 advance notice of the amount of water it delivers  
 9 through the Colorado River Aqueduct to San Diego;  
 10 correct?  
 11 **A. I'm sorry. Which agreement?**  
 12 Q. Under the exchange agreement that is at issue  
 13 in this case.  
 14 **A. I'm not familiar with the exchange agreement.**  
 15 Q. You're not familiar with the exchange  
 16 agreement, sir?  
 17 **A. No.**  
 18 Q. And you testified earlier about a price that  
 19 ought to be charged under the exchange agreement?  
 20 MR. EMANUEL: Objection, your Honor.  
 21 THE COURT: Sustained. Argumentative.  
 22 Q. BY MR. GOLDBERG: How about this: Do you know,  
 23 sir, one way or the other -- this is a yes or no  
 24 question -- whether Met gets advanced notice of the  
 25 amount of water that San Diego delivers to it at

1770

1 Metropolitan's intake at Lake Havasu?  
 2 **A. I do not know.**  
 3 Q. Put up DTX 1074. This is a letter from the  
 4 Water Authority dated October 21, 2013. And the subject  
 5 is "Annual notice of quantity of water to be transferred  
 6 in calendar year 2014."  
 7 Do you see that?  
 8 **A. Yes, I do.**  
 9 Q. It is going to Mr. Jan Matusak?  
 10 **A. Matusak.**  
 11 Q. Do you know who that individual is?  
 12 **A. Yes.**  
 13 Q. That is someone who works at Met; right?  
 14 **A. Yes.**  
 15 Q. Do you see, "In accordance with the exchange  
 16 agreement this water is required to be delivered in  
 17 equal monthly installments during 2014 or 14,808.33  
 18 acre-feet per month."  
 19 And then the sentence before that, it says,  
 20 "Thus, the total amount of water expected to be  
 21 transferred in calendar year 2014 is 177,700 acre feet."  
 22 Do you see that?  
 23 **A. Yes. I do.**  
 24 Q. Met knows in advance the total amount of water  
 25 expected to be transferred in any calendar year; true?

1771



1 **A. Met does.**  
 2 Q. It also knows that water is to be delivered by  
 3 Metropolitan in equal monthly increments; correct?  
 4 **A. It's to be transferred?**  
 5 Q. It says "delivered"; right?  
 6 **A. To be delivered by Met, yes. Yes, I see it.**  
 7 Q. So Met knows in advance how much water is going  
 8 to be transferred in any calendar year, and it knows the  
 9 schedule of delivery; correct?  
 10 **A. Correct.**  
 11 Q. So Met doesn't need to wait until the day  
 12 before it's going to pump San Diego's water to purchase  
 13 power on the spot market; correct?  
 14 **A. We don't have to, but in our determination of**  
 15 **scheduling energy, we find that to be the best way to**  
 16 **achieve the overall lowest costs for our member**  
 17 **agencies.**  
 18 Q. But you don't have to do that; right?  
 19 **A. We don't have to -- no, no, we don't have to do**  
 20 **that.**  
 21 Q. You know well in advance that the expected  
 22 number of acre-feet and the schedule of deliveries  
 23 before the year; right?  
 24 **A. Correct.**  
 25 Q. You could buy that power in advance if you

1772

1 wanted to, couldn't you?  
 2 **A. Yes. But that wouldn't achieve the most**  
 3 **effective price.**  
 4 Q. But you could buy it in advance? Yes or no?  
 5 **A. Yes.**  
 6 MR. GOLDBERG: DTX 1074 isn't in evidence, and  
 7 I will move it in.  
 8 THE COURT: Do you have any objection to 1074?  
 9 The suggestion is it is not yet in evidence.  
 10 MR. GOLDBERG: I don't believe it is.  
 11 MR. EMANUEL: It can't come in through this  
 12 witness. He doesn't have a foundation for it.  
 13 THE COURT: I'm sure that's true. Do you have  
 14 a position? Or is that your position?  
 15 MR. EMANUEL: It is hearsay and lacks  
 16 foundation.  
 17 THE COURT: The objection is sustained at this  
 18 time.  
 19 MR. GOLDBERG: It is also on their exhibit  
 20 list, as I am reminded by Mr. Purcell.  
 21 THE COURT: It is not quite enough.  
 22 MR. GOLDBERG: I thought I would take a shot at  
 23 it, right.  
 24 Q. Isn't it true, sir, when Met does buy  
 25 supplemental power in the market, it doesn't purchase

1773

1 its supplemental power on only the day-ahead market;  
 2 right?  
 3 **A. Historically, it has not.**  
 4 Q. It typically buys that power in advance; right?  
 5 **A. The non day of?**  
 6 Q. I am talking about supplemental power now.  
 7 **A. Supplemental power?**  
 8 Q. Met typically buys that power in advance and  
 9 not on the day-ahead market; true?  
 10 **A. No. That's not specifically true. We do buy**  
 11 **supplemental power, what's called forwards, on occasion**  
 12 **if we believe there's risk in the marketplace, but today**  
 13 **we are only buying day-ahead.**  
 14 Q. BY MR. GOLDBERG: You mentioned forward.  
 15 **A. Yes, sir.**  
 16 Q. You are familiar with Met's forward energy  
 17 program?  
 18 **A. Oh, yes.**  
 19 MR. GOLDBERG: Could you put up PTX 497? This  
 20 isn't in evidence. It is a Met board memo. I will move  
 21 it in.  
 22 THE COURT: PTX 497, any objection?  
 23 MR. EMANUEL: No objection.  
 24 THE COURT: PTX 497 is admitted.  
 25 (PTX 497 was received in evidence.)

1774

1 Q. BY MR. GOLDBERG: You see this is a memo to the  
 2 board of directors, the finance and insurance committee,  
 3 "An increase in the total authorized payment obligation  
 4 for Colorado River Aqueduct forward energy commitments."  
 5 Do you see that?  
 6 **A. Yes.**  
 7 Q. In fact, you have delivered presentations to  
 8 Met's board about this program, have you not?  
 9 **A. Yes.**  
 10 Q. And you delivered this presentation; correct?  
 11 **A. I don't recall specifically if I did this**  
 12 **presentation or not.**  
 13 Q. But presentations like this?  
 14 **A. Yes. I've talked to the board about this**  
 15 **program.**  
 16 Q. And if you can blow up -- you have it there.  
 17 The sentence that says, the second sentence,  
 18 "In order to reduce price and supply volatility and  
 19 risk, Metropolitan has utilized forward purchase  
 20 contracts to lock in prices and quantities for up to 24  
 21 months in advance of need."  
 22 Do you see that?  
 23 **A. Yes.**  
 24 Q. That is true?  
 25 **A. Yes, we do.**

1775

1 Q. Met buys -- purchases power in the market for  
 2 up to 24 months before it needs it; correct?  
 3 A. **We have.**  
 4 Q. Scroll down to page two. And do you see where  
 5 it says, "Day-ahead purchases meet the pumping needs of  
 6 the CRA for the next day after accounting for the  
 7 resources from the federal hydro projects, SCE and the  
 8 forward energy purchases."  
 9 Right?  
 10 A. **Yes.**  
 11 Q. The next sentence, "At times, energy suppliers  
 12 will raise their prices if they believe a buyer must  
 13 have the energy."  
 14 Right?  
 15 A. **Yes.**  
 16 Q. "Forward energy purchases afford Metropolitan  
 17 the flexibility to defer day-ahead energy purchases,  
 18 which helps bring a supplier's prices down."  
 19 Do you see that?  
 20 A. **Yes. I do.**  
 21 Q. That's true; right?  
 22 A. **It is one of our strategies, yes.**  
 23 Q. Met buys power in advance which defers its need  
 24 to buy power on the day-ahead market?  
 25 A. **We buy power in advance if we believe the**

1776

1 Q. That's true; right?  
 2 A. **That was true, yes.**  
 3 Q. In fact, it is not just some of the time;  
 4 right? It's 70 percent of the time?  
 5 A. **No. It's not 70 percent of the time.**  
 6 Q. I take it back. It is 70 percent of the  
 7 supplemental energy that you buy?  
 8 A. **Some 2010.**  
 9 Q. For the next two years; right?  
 10 A. **Looking out two years, that's correct.**  
 11 Q. Which would take you through 2012; true?  
 12 A. **True.**  
 13 Q. That's a true statement; correct?  
 14 A. **Yes.**  
 15 Q. In your declaration you submitted in this case  
 16 you talked about Met's various sources of energy for  
 17 moving water on the Colorado River Aqueduct?  
 18 A. **Yes.**  
 19 Q. You talked about the power from the federal  
 20 hydro plant at Hoover?  
 21 A. **Yes.**  
 22 Q. You talked about the power from the federal  
 23 hydro plant at Parker; right?  
 24 A. **Yes.**  
 25 Q. You talked about the Edison energy; correct?

1778

1 **market is acting in such a way it is going to provide**  
 2 **the risk/benefit in a forward purchase. That is not the**  
 3 **way the market is always responding. That was the way**  
 4 **things were happening back in 2011, which is why we went**  
 5 **to the board to increase this program.**  
 6 Q. In 2011 is one of the years that you looked at,  
 7 right, in the Platts day-ahead reports? That was the  
 8 first report, in fact, we looked at; right?  
 9 A. **Yes.**  
 10 Q. So this is the same exact time frame, correct,  
 11 2011?  
 12 A. **This is happening during that time, yes.**  
 13 Q. So when you're buying power and forward energy  
 14 in 2011, that's different than buying it at the  
 15 day-ahead market; correct?  
 16 A. **Yes.**  
 17 Q. You testified just a moment ago that sometimes  
 18 you do, sometimes you don't; it depends on the  
 19 conditions. Why don't you look at the bottom part of  
 20 this same page.  
 21 It says in early 2010 Metropolitan had acquired  
 22 a little over 70 percent of the supplemental energy  
 23 needed for the next two years through forward energy  
 24 purchases. Do you see that?  
 25 A. **Yes, I do.**

1777

1 A. **Yes.**  
 2 Q. When it came to supplemental purchases for the  
 3 market, what you talked about was the day-ahead, on-peak  
 4 price; correct?  
 5 A. **Yes.**  
 6 Q. You didn't mention anything about this forward  
 7 energy program, did you?  
 8 A. **No.**  
 9 Q. You didn't mention it during your direct  
 10 examination either, correct?  
 11 A. **Correct.**  
 12 MR. GOLDBERG: Your Honor, maybe now is a good  
 13 time for a break.  
 14 THE COURT: Why don't we get together again in  
 15 ten minutes. Thank you.  
 16 (Recess.)  
 17 THE COURT: Let's continue.  
 18 MR. GOLDBERG: Thank you, your Honor.  
 19 Q. Put up on screen DTX 1121 which is Platts  
 20 Energy Trader Report, and blow up the first column  
 21 there. That's fine.  
 22 Mr. Lambeck again, this DTX 1121, one of the  
 23 Platts reports; right?  
 24 A. **Yes.**  
 25 Q. And if you look in the SP15 row, you see

1779

1 columns there for deals; right?  
 2 **A. Yes.**  
 3 Q. And deals is presuming the number of deals that  
 4 are done at that rate?  
 5 **A. I would presume so.**  
 6 Q. And it says NA; right?  
 7 **A. Yes.**  
 8 Q. Not applicable?  
 9 **A. Maybe available.**  
 10 Q. Not available?  
 11 **A. I don't know what "NA" specifically stands for.**  
 12 **They didn't have the data for it.**  
 13 Q. There is certainly no data here?  
 14 **A. Right.**  
 15 Q. That is true for the off-peak, as well?  
 16 **A. Yes.**  
 17 Q. What about volume; do you see volume?  
 18 **A. Yes, I do.**  
 19 Q. And volume is the volume of purchases or sales?  
 20 **A. Yes.**  
 21 Q. Do you know one way or the other what that  
 22 means?  
 23 **A. What the volume means?**  
 24 Q. Yes.  
 25 **A. No. I presume that it's the volume of megawatt**

1780

1 **hours that are transacted.**  
 2 Q. You don't know one way or the other?  
 3 **A. No.**  
 4 Q. The same is true for deals; right?  
 5 **A. Correct.**  
 6 Q. And range, what's that?  
 7 **A. That would be the range for the specific**  
 8 **transactions that took place.**  
 9 Q. The price range, is that what you're telling  
 10 me?  
 11 **A. Yes.**  
 12 Q. The price range for SP15 is 38 to 38 and the  
 13 average is 37.13. That can't be right.  
 14 **A. 37.13 is the average for the month.**  
 15 Q. But the range was 38 to 38?  
 16 **A. That's for the day.**  
 17 Q. Do you know? You don't know what "range"  
 18 means, do you?  
 19 **A. I presume it's the range of the deals.**  
 20 Q. But you don't know?  
 21 **A. No.**  
 22 Q. And the same is true for change; you presume  
 23 that means a change of something? You don't really know  
 24 what that means, do you?  
 25 **A. It should be the change of the index price.**

1781

1 Q. Should --  
 2 **A. For one day.**  
 3 Q. Should be or is it? I am asking whether you  
 4 actually know.  
 5 **A. That is what we take it to be.**  
 6 Q. That is what you interpret this to be?  
 7 **A. Yes.**  
 8 Q. You don't know what Platts did when they came  
 9 up with change; right?  
 10 **A. I do not know the process that they go through**  
 11 **to come up with all of the these numbers.**  
 12 Q. In fact, you don't really know the product of  
 13 any of these numbers on this chart; right?  
 14 **A. The product?**  
 15 Q. You don't know what Platts is doing at Platts  
 16 headquarters to come up with these numbers?  
 17 **A. I do not know specifically what they are doing**  
 18 **to come up with these numbers. They are making a**  
 19 **determination as to the market price at these different**  
 20 **points. Specifically how they do that, I do not know.**  
 21 Q. You know they've made some determination but  
 22 you don't know how they made that determination?  
 23 **A. That's correct.**  
 24 Q. And that's true for every single number on this  
 25 chart; correct?

1782

1 **A. That's correct.**  
 2 Q. That would be true for every single number on  
 3 every single one of these charts, on DTX 1121, 1123,  
 4 1125 and 1127?  
 5 **A. Yes.**  
 6 Q. Okay. And instead of calculating some  
 7 day-ahead, on-peak spot market rate, another way you  
 8 could do it would be to calculate a melded power rate;  
 9 right?  
 10 **A. For what purpose?**  
 11 Q. For the purpose of calculating a melded cost of  
 12 power of moving water on the Colorado River Aqueduct;  
 13 correct?  
 14 **A. For moving Metropolitan's water, yes.**  
 15 Q. You could also calculate that for non-Met  
 16 water; right?  
 17 **A. But that's not what we would do.**  
 18 Q. You could calculate that; right?  
 19 **A. I can do the math.**  
 20 Q. In fact, you testified earlier that Met, for  
 21 your purposes, doesn't disaggregate Met water versus  
 22 non-Met water that moves through the CRA?  
 23 **A. What we are moving through the CRA is all Met**  
 24 **water.**  
 25 Q. Are you telling me that San Diego's IID and

1783

1 canal lining water does not move through the Colorado  
 2 River Aqueduct?  
 3 **A. It does, but it is treated as a member agency**  
 4 **for Metropolitan's purposes.**  
 5 Q. What you are testifying to is you are treating  
 6 it all as Met's own water?  
 7 **A. Yes.**  
 8 Q. If you are treating it all as Met's own water,  
 9 you could calculate a melded average cost of power for  
 10 that water?  
 11 **A. That's what we've done with achieving --**  
 12 **working to achieve the lowest power costs to move water**  
 13 **on the aqueduct from Met's water to our member agencies.**  
 14 Q. You would agree that rather than charging the  
 15 day-ahead market price, Met should instead calculate and  
 16 come up with some cost for the melded cost of power for  
 17 that water; right?  
 18 MR. EMANUEL: I'm sorry. Which water?  
 19 THE COURT: Sustained.  
 20 Q. BY MR. GOLDBERG: You testified earlier,  
 21 literally just a few seconds ago, that you consider the  
 22 IID and canal lining water that the Water Authority  
 23 delivers to Metropolitan at its intake at Lake Havasu  
 24 Met's own water; right?  
 25 **A. That's how we're treating it today, yes.**

1784

1 Q. You testified just a moment ago for that  
 2 purpose you can calculate a melded cost of power; right?  
 3 **A. We do. Yes.**  
 4 Q. My question is, isn't it true, then, that the  
 5 melded cost of the power, since that's what you are  
 6 already calculating, is not the same thing as this  
 7 day-ahead cost of power of the on-peak spot market rate?  
 8 MR. EMANUEL: Objection, your Honor. I didn't  
 9 understand the question.  
 10 THE COURT: As I understand it, he is asking  
 11 whether the melded power rate would be the same as the  
 12 on-peak rate in, for example, DTX 1121.  
 13 THE WITNESS: The melded rate would be lower.  
 14 Q. BY MR. GOLDBERG: A lot lower?  
 15 **A. It would be lower.**  
 16 Q. In fact, that's what you calculate for  
 17 Metropolitan's own water? That includes the Water  
 18 Authority's canal lining and IID water; right?  
 19 **A. Yes.**  
 20 Q. Why don't we look at PTX 479, please.  
 21 This is an email, Mr. Lambeck, that you wrote  
 22 to Armando Acuna at Metropolitan?  
 23 **A. Yes.**  
 24 Q. Mr. Acuna is an employee in the media services  
 25 department; right?

1785

1 **A. Yes.**  
 2 Q. Do you see the subject of this email, San Diego  
 3 Union Tribune was looking for info re power costs for  
 4 the State Water Project and the Colorado River. You  
 5 understood?  
 6 **A. Uh-huh.**  
 7 Q. San Diego Union Tribune was looking for  
 8 information regarding the power costs for the State  
 9 Water Project and the Colorado River?  
 10 **A. Yes.**  
 11 Q. Start with the bottom email in the chain.  
 12 This is from Mike Gardner. This is part of the  
 13 same email; right?  
 14 **A. Yes.**  
 15 Q. This is an email from Mr. Gardner to R. Muir of  
 16 the MWD. Who is R. Muir?  
 17 **A. Bob Muir.**  
 18 Q. An employee at Met?  
 19 **A. Yes.**  
 20 Q. Mr. Gardner is asking how much does Met spend  
 21 on power costs for the SWP and Colorado River; do you  
 22 see that?  
 23 **A. Yes.**  
 24 Q. Mr. Gardner is a reporter at the San Diego  
 25 Union Tribune, is he not?

1786

1 **A. That's what it appears, yes. I don't know him**  
 2 **personally.**  
 3 Q. "It looks like I have a graph that talks about  
 4 power generation that I want to also not the costs of  
 5 wheeling."  
 6 I think he means know the costs of wheeling;  
 7 right?  
 8 MR. EMANUEL: Calls for speculation, your  
 9 Honor.  
 10 THE COURT: I will take this as his  
 11 understanding.  
 12 Overruled.  
 13 THE WITNESS: I would assume so, yes.  
 14 Q. BY MR. GOLDBERG: Go to the next email in the  
 15 chain here. This is an email from Mr. Acuna, and he is  
 16 sending this to other folks at Met. And he is saying,  
 17 "Reporter Mike Gardner writes."  
 18 This jogs your recollection that Mr. Gardner  
 19 was a reporter for the then San Diego Union Tribune?  
 20 **A. Yes.**  
 21 Q. He is working on a story re how San Diego gets  
 22 its water; right? That's what it says?  
 23 **A. Yes.**  
 24 Q. This all ultimately gets forwarded to you and  
 25 you respond in the top email in the chain --

1787

1 Why don't you read to the Court what you say in  
 2 the second paragraph about "on the CRA"?

3 **A. "On the CRA the total estimated power cost,**  
 4 **both contractual power and market purchases, to move**  
 5 **1.2 million acre-feet in calendar year 2010 is**  
 6 **59.9 million or approximately \$50 per acre-foot."**

7 Q. And the Water Authority moved San Diego's IID  
 8 and canal lining water through the CRA in 2010; right?

9 **A. I believe so.**

10 Q. And you're calculating here a melded cost of  
 11 power, aren't you?

12 **A. I am because we treat that as all Met water for**  
 13 **the CRA conveyance purposes.**

14 Q. Right. You are looking at both the contractual  
 15 power and the market purchases; right?

16 **A. Yes.**

17 Q. You are not just looking at the market  
 18 purchases at the day-ahead spot market on-peak rate;  
 19 correct?

20 **A. Correct.**

21 Q. And we talked about -- this is 1.2 million  
 22 acre-feet in calendar year 2010; right?

23 **A. Correct.**

24 Q. At capacity the CRA can only really move 1.2  
 25 million acre-feet; right?

1788

1 **A. We can move a little bit more. Our capacity is**  
 2 **1.25 with the shutdown.**

3 Q. So near full conditions?

4 **A. Yes.**

5 Q. You are calculating at near full conditions a  
 6 \$50 per acre-foot melded cost of power?

7 **A. Yes.**

8 Q. For the CRA?

9 **A. Right.**

10 Q. Including the Water Authority's IID and canal  
 11 lining water; right?

12 **A. All the water, yes.**

13 Q. That is a lot more than a day-ahead spot market  
 14 on-peak rate would be -- excuse me. Let me strike that.  
 15 That is a lot less than the day-ahead on-peak  
 16 spot market would be?

17 **A. During this time period, that's correct.**

18 Q. In fact, in 2010, Met charged the Water  
 19 Authority the system power rate; right?

20 **A. Yes.**

21 Q. And the system power rate in 2010 was \$119 per  
 22 acre-foot, was it not?

23 **A. I do not know.**

24 Q. Why don't you put up PTX 357. This is in  
 25 evidence. About midway through you will see the system

1789

1 power rate. If you could blow that up.

2 And the column that is at the top, this is  
 3 telling you in 2010 the system power rate was \$119 per  
 4 acre-foot; right?

5 **A. Yes.**

6 Q. So in 2010, the system power rate that Met  
 7 charged the Water Authority under the exchange agreement  
 8 was more than double the actual cost of power for moving  
 9 the Water Authority's IID and canal lining water through  
 10 the CRA; right?

11 **A. It was twice as much as the melded cost on the**  
 12 **CRA.**

13 MR. GOLDBERG: I will move PTX 479 into  
 14 evidence, which is Mr. Lambeck's email.

15 MR. EMANUEL: No objection.

16 THE COURT: 479 is admitted.  
 17 (PTX 479 was received in evidence.)

18 MR. GOLDBERG: Nothing further.

19 THE COURT: Redirect.

20 MR. EMANUEL: Yes, your Honor.

21

22 **REDIRECT EXAMINATION**

23 **BY MR. EMANUEL:**

24 Q. Sir, you were never asked if that forward power  
 25 buying program ended up being cheaper, more expensive or

1790

1 neutral?

2 **A. It was more expensive.**

3 Q. Why was it more expensive?

4 **A. Well, the forward power purchase is like an**  
 5 **insurance policy. You are insuring yourself against**  
 6 **rate spikes, increasing power costs, and it reduces the**  
 7 **risk to you of seeing those and having to buy in that**  
 8 **type of a market. So you lock in the price of power**  
 9 **going out forward into the marketplace.**

10 THE COURT: Is it basically like buying futures  
 11 in energy?

12 THE WITNESS: It is not so much -- you are  
 13 agreeing with the supplier that they will provide you  
 14 the power for that price and you're obligated to take it  
 15 at that price at some point in the future. So it's an  
 16 insurance policy.

17 And we did not have spikes. We did not have  
 18 dramatic increasing and as anybody selling insurance,  
 19 they add to the price to cover their risk.

20 Q. BY MR. EMANUEL: In hindsight, would  
 21 Metropolitan had been better off if they had purchased  
 22 water in the day-ahead --

23 MR. GOLDBERG: Objection. Calls for  
 24 speculation and lack of foundation.

25 THE COURT: It is a question of comparing the

1791

1 two prices. I think he has the foundation for it.  
 2 MR. EMANUEL: I misspoke. Can I rephrase my  
 3 question?  
 4 THE COURT: Yes.  
 5 Q. BY MR. EMANUEL: Looking back historically,  
 6 would Metropolitan have been better off buying power in  
 7 the day-ahead spot market?  
 8 MR. GOLDBERG: Lacks foundation.  
 9 THE COURT: For which period of time?  
 10 MR. EMANUEL: For the period of the forward  
 11 purchase program.  
 12 MR. GOLDBERG: Lacks foundation. There is no  
 13 foundation for how he would know that.  
 14 THE COURT: I assume he is able to compute in  
 15 his mind what he actually --  
 16 Do you know what you actually paid and what the  
 17 actual prices were in the forward market? Do you have  
 18 all those numbers in your head?  
 19 THE WITNESS: No, I do not have them in my  
 20 head.  
 21 THE COURT: Sustained.  
 22 Q. BY MR. EMANUEL: Without -- without knowing the  
 23 exact number, do you have in your head whether it was  
 24 more or less going into using the forward purchase  
 25 program or the spot market?

1792

1 MR. GOLDBERG: Same objection. He just said he  
 2 didn't know.  
 3 THE COURT: Overruled. If you know the answer.  
 4 THE WITNESS: We would not, looking back,  
 5 Monday-morning quarterbacking, we would not have made  
 6 those purchases had we known what the day-ahead market  
 7 was going to do.  
 8 Q. BY MR. EMANUEL: You were asked some questions  
 9 about melded rates. Is melded rate another word for the  
 10 system power rate?  
 11 **A. No. The melded rate for the CRA includes all**  
 12 **of the resources and the costs of those resources, the**  
 13 **low-cost hydro that we receive from Hoover and Parker,**  
 14 **incorporating the zero-cost energy that we get from**  
 15 **Edison as benefit energy, as well as the supplemental**  
 16 **purchase. It is all of that gets melded together, the**  
 17 **total cost versus total megawatt hours needed.**  
 18 Q. Recalling that pie chart, there are some slices  
 19 of virtually free power in there?  
 20 **A. Yes, the benefit, as well as the exchange**  
 21 **typically turns out to be no cost.**  
 22 Q. Would you be able to compare for me -- when  
 23 you're talking about melded costs, those are only  
 24 charged to Met -- that is only charged to Metropolitan  
 25 water, isn't that correct?

1793

1 MR. GOLDBERG: Vague.  
 2 THE COURT: Overruled.  
 3 THE WITNESS: Yes. It's -- it's the movement  
 4 of the Met water and the cost that it takes.  
 5 Q. BY MR. EMANUEL: In the event a third party  
 6 came along and said they wanted to wheel water down the  
 7 Colorado River Aqueduct, would they be entitled to the  
 8 melded rate?  
 9 MR. GOLDBERG: Objection, your Honor.  
 10 THE COURT: Sustained. Legal conclusion.  
 11 MR. GOLDBERG: Thank you.  
 12 Q. BY MR. EMANUEL: If a wheeler came along and  
 13 said they wanted to convey water down the Colorado River  
 14 Aqueduct, would you have to go into the market to buy  
 15 power?  
 16 MR. GOLDBERG: Same objection.  
 17 THE COURT: Sustained. Wouldn't it all  
 18 depend -- it seems to depend on legal issues that this  
 19 witness hasn't been presented for.  
 20 MR. EMANUEL: Let me put it a different way,  
 21 your Honor.  
 22 Q. In reality, what actually happens when a  
 23 wheeler asks to send water down the Colorado River  
 24 Aqueduct?  
 25 MR. GOLDBERG: Objection, your Honor. I think

1794

1 this was covered, and he testified that they look at it  
 2 all the same.  
 3 THE COURT: We'll find out.  
 4 Overruled. This was a question about  
 5 historical practice.  
 6 MR. EMANUEL: Yes. Thank you.  
 7 THE COURT: Go ahead.  
 8 THE WITNESS: A third party coming in to wheel  
 9 water down the Colorado would not be charged the melded  
 10 rate. They would be charged the cost for us to go out  
 11 and acquire the power.  
 12 Q. BY MR. EMANUEL: And the power you acquired,  
 13 would that be on-peak or off-peak?  
 14 **A. We would be --**  
 15 MR. GOLDBERG: Same objections we had earlier.  
 16 THE COURT: Overruled. Go ahead.  
 17 THE WITNESS: We would be acquiring on-peak  
 18 power.  
 19 MR. EMANUEL: Thank you. Nothing more.  
 20 MR. GOLDBERG: Nothing from us, your Honor.  
 21 THE COURT: Thank you so much. You are  
 22 excused.  
 23 Call your next witness. Just for the record  
 24 who are we calling?  
 25 /

1795

1 JUNE SKILLMAN,  
 2 called as a witness by the Defendants, was sworn and  
 3 testified as follows:  
 4  
 5 THE WITNESS: Yes.  
 6 THE CLERK: Thank you. Please be seated.  
 7 MR. OLIVER: Your Honor, my name is Dale  
 8 Oliver.  
 9 THE CLERK: And state and spell your first and  
 10 last name for the record.  
 11 THE WITNESS: My name is June Skillman.  
 12 S-K-I-L-L-M-A-N, J-U-N-E.  
 13 THE COURT: Sir.  
 14 MR. OLIVER: My name is Dale Oliver, and I am  
 15 with Quinn Emanuel. I will be conducting the direct  
 16 examination of Ms. Skillman.  
 17  
 18 DIRECT EXAMINATION  
 19 BY MR. OLIVER:  
 20 Q. Are you employed at Metropolitan?  
 21 A. Yes.  
 22 Q. What is your job description?  
 23 A. **I am the manager of the budget and financial**  
 24 **planning section.**  
 25 Q. With that job title what are your general

1796

1 responsibilities?  
 2 A. **I am responsible for the development of**  
 3 **Metropolitan's biennial budget and the rates and charges**  
 4 **that support the revenue to support the budget.**  
 5 Q. Do you have employees that work for you in that  
 6 connection?  
 7 A. Yes.  
 8 Q. Were you asked to conduct and supervise an  
 9 analysis of costs associated with the Phase I ruling in  
 10 this case and its impact on the rate structure that was  
 11 then in place at Metropolitan as pertaining to exchange  
 12 water?  
 13 A. Yes.  
 14 Q. In that analysis that you undertook, did you  
 15 give effect to the impact of removing State Water  
 16 Project costs from the system access rate that had been  
 17 used by Metropolitan?  
 18 A. Yes.  
 19 Q. Did you give effect to the impact costwise in  
 20 removing the State Water Project costs from the system  
 21 power rate then being utilized by Metropolitan?  
 22 A. Yes.  
 23 Q. But for the removal of the State Water Project  
 24 water costs from the various system rates, did you  
 25 otherwise utilize the existing rate structure then in

1797

1 place, now in place at Metropolitan, in determining what  
 2 the possible cost impacts would be in relationship to  
 3 the exchange agreement?  
 4 A. Yes.  
 5 Q. Did you, in essence, then, in your analysis  
 6 shift the SWP costs, that is to say, the State Water  
 7 Project water costs to other cost objectives?  
 8 MR. KEKER: Cost objectives? I didn't hear.  
 9 Q. BY MR. OLIVER: Cost objectives other than the  
 10 exchange water.  
 11 A. Yes.  
 12 MR. KEKER: Objection. Vague and  
 13 incomprehensible. I don't understand the question.  
 14 THE COURT: I don't either, but I am going to  
 15 overrule the objection and see if the rest of the  
 16 context makes it clear.  
 17 Q. BY MR. OLIVER: If one removes the State Water  
 18 Project costs from the cost pool, do those costs, under  
 19 your existing structure, then have to be assigned some  
 20 other cost objective?  
 21 A. Yes.  
 22 Q. Is this an expression or a need that is framed  
 23 by the requirements that there be income for revenue  
 24 neutrality?  
 25 A. Yes.

1798

1 Q. What do you understand is revenue neutrality?  
 2 A. **In undertaking the analysis we need to insure**  
 3 **that the -- that anything that changes that we're**  
 4 **collecting the same amount of revenue under any revised**  
 5 **analysis that we do as we did under the existing rate**  
 6 **structure. And that way we can make sure that the**  
 7 **analysis has integrity in terms of accounting for all**  
 8 **changes.**  
 9 Q. Costs that are incurred by Metropolitan have to  
 10 be absorbed by some cost objective? Is that correct?  
 11 A. Yes.  
 12 MR. OLIVER: Next I would like to have  
 13 displayed a document that has been marked for  
 14 identification as DTX 1160.  
 15 MR. KEKER: Excuse me. Before this is put up  
 16 even, your Honor, I have objections to what Ms. Skillman  
 17 is about to try to do. This -- and the objections are  
 18 she has not been --  
 19 Can we take this down, Mr. Oliver, please?  
 20 THE COURT: Yes.  
 21 MR. KEKER: She has not been designated as an  
 22 expert. If Mr. Woodcock can't testify, you said  
 23 yesterday, about fair and reasonable alternatives  
 24 available to MWD, I don't know why Ms. Skillman, who is  
 25 not designated as an expert, can.

1799

1 If Mr. Woodcock can't testify to fair and  
 2 reasonable rates that Met could have charged in some  
 3 different world, then I don't think that Ms. Skillman  
 4 can either.  
 5 If Mr. Woodcock can't testify as to what Met  
 6 could have properly charged in the light of the rulings  
 7 in Phase I, Ms. Skillman can't either. She's never been  
 8 designated. They've never -- the opinion is based on  
 9 documents that weren't produced in discovery. We talked  
 10 about that before.  
 11 They contradict sworn interrogatory answers  
 12 that she has signed as the verifier that such documents  
 13 don't exist. They were requested and never produced.  
 14 The notion they can pop this new analysis about  
 15 what fair and reasonable rates are and how this all  
 16 could have been worked out and how we could have reached  
 17 net neutrality if we move this to this to this, if they  
 18 could pop this on us on Sunday morning on a trial that  
 19 started in December of 2012, when we didn't hear about  
 20 it then, and then we waited and started again on  
 21 March 30th. We didn't hear it in their witness  
 22 designations or their briefs. We heard nothing about  
 23 this. And they put it on us when we have three hours  
 24 left on a Sunday morning.  
 25 It is not just a question of unfair. It is

1800

1 beyond ridiculous. This is expert testimony. She  
 2 shouldn't be able to give it.  
 3 THE COURT: Mr. Oliver.  
 4 MR. OLIVER: Yes, thank you, your Honor.  
 5 What seems to me, Mr. Kecker is a tad before the  
 6 cart or perhaps before the horse. I am introducing  
 7 this. I have laid no foundation yet. I have not asked  
 8 the witness to describe it. His characterization with  
 9 regard to this document truly are unsubstantiated since  
 10 we haven't heard anything from the witness about it.  
 11 This is going to be used as a demonstrative for  
 12 purposes of facilitating and assisting this witness'  
 13 testimony. It remains to be seen at the end of the day  
 14 whether there's sufficient reliability and usefulness in  
 15 terms of marking it as an exhibit for purposes of this  
 16 trial.  
 17 But in advance, without any description as to  
 18 what this document is, we cannot make a determination as  
 19 to whether it calls for expert testimony because there  
 20 is no basis or foundation for that ruling.  
 21 THE COURT: Your present intention is not to  
 22 present her as an expert; right?  
 23 MR. OLIVER: That is correct.  
 24 THE COURT: What you are going to be doing, I  
 25 take it, she is in effect going to be doing as Mr. Quinn

1801

1 suggested the other day, math? She is going to say if  
 2 you take \$100 and delete \$30 here and I put \$30 in these  
 3 two columns, this is how this adds up? That is what she  
 4 is going to be doing?  
 5 MR. OLIVER: That is correct. As you will see,  
 6 and we will specifically describe, the only exercise  
 7 will be addition, subtraction, multiplication and  
 8 division.  
 9 THE COURT: The objection is overruled at this  
 10 time, subject to motion to strike.  
 11 Let's continue.  
 12 Q. BY MR. OLIVER: Ms. Skillman, do you recognize  
 13 this document which has been marked for purposes of  
 14 identification as DTX 1160?  
 15 A. Yes.  
 16 Q. Did you and the people that were working under  
 17 your supervision prepare this document?  
 18 A. Yes.  
 19 Q. I would direct your attention to the first  
 20 third of this page. Would you describe what is set  
 21 forth in that block of information?  
 22 A. **This information sets forth Metropolitan's**  
 23 **existing rate structure for the four calendar years in**  
 24 **question. It shows, for example, on lines one through**  
 25 **four, summarized in line five, Metropolitan's full**

1802

1 **service rates for the respective calendar years shown in**  
 2 **columns A, B, C and D.**  
 3 **Lines six and seven are the rates that are**  
 4 **associated with two discounted water programs**  
 5 **Metropolitan had that were in effect in calendar years**  
 6 **2000 and 2012.**  
 7 **Lines eight through ten, and summarized in line**  
 8 **11, is the price that was charged for the exchange water**  
 9 **to the Water Authority for the four calendar years.**  
 10 **The next block, which is highlighted in blue,**  
 11 **shows the actual volumes of water purchased by the Water**  
 12 **Authority for full service on line 12. The discounted**  
 13 **programs on line 13, and the exchange water on line 14**  
 14 **for the four calendar years in question.**  
 15 **And finally, line 16, 17 and 18, and summarized**  
 16 **on line 19, show the actual volumetric revenue that was**  
 17 **received by Metropolitan for the sales that are shown in**  
 18 **the lines above.**  
 19 Q. I would note before we proceed that each column  
 20 has a letter designation; correct?  
 21 A. Correct.  
 22 Q. And each line has a number designation?  
 23 A. Correct.  
 24 Q. I would ask that to the extent you are focusing  
 25 or directing your testimony later on to the specific

1803



1 line or item, that you use those designations for  
 2 assistance in terms of later reference.  
 3 Now back to this first third of the page,  
 4 indeed, is this the information and rates that were  
 5 challenged in the first phase of this litigation?  
 6 **A. Yes.**  
 7 Q. Do you know whether it was these rates that  
 8 Mr. Denham proceeded from in deciding his calculation as  
 9 to how much damage was associated with the exchange  
 10 agreement?  
 11 MR. KEKER: Objection, your Honor. Calls for  
 12 expert testimony. She's criticizing the work of another  
 13 expert. She is analyzing what Mr. Denham did. That's  
 14 expert testimony. We object.  
 15 THE COURT: Overruled on that particular  
 16 question.  
 17 Go ahead.  
 18 Q. BY MR. OLIVER: Do you remember the question?  
 19 **A. I'm sorry. Can you repeat the question?**  
 20 Q. Did Mr. Denham use this specific set of  
 21 information? Let me ask that question again.  
 22 Is this the rate information that Mr. Denham  
 23 used in undertaking his calculation?  
 24 MR. KEKER: Objection. No foundation.  
 25 THE COURT: Overruled.

1804

1 THE WITNESS: Yes.  
 2 Q. BY MR. OLIVER: Does this first third represent  
 3 the baseline against which we then measure the possible  
 4 impacts of rate adjustments and unit cost adjustments  
 5 for purposes of associated costs with the exchange  
 6 agreement?  
 7 **A. Yes.**  
 8 Q. The middle part of this document, which has  
 9 been marked as Exhibit DTX 1160, is entitled "Denham's  
 10 Damage Calculation."  
 11 Do you see that?  
 12 **A. Yes, I do.**  
 13 Q. What does this aggregation of information  
 14 represent?  
 15 MR. KEKER: Objection. This calls for expert  
 16 testimony.  
 17 THE COURT: Overruled.  
 18 THE WITNESS: This just presents the summary of  
 19 the information that was provided by the Water Authority  
 20 in their damages calculation.  
 21 Q. BY MR. OLIVER: By Water Authority you are  
 22 referring to San Diego; correct?  
 23 **A. Correct.**  
 24 Q. I note that at line one, you have a designation  
 25 of system power rate and the word "system" is in

1805

1 quotations. Why did you use quotations with regard to  
 2 that designation?  
 3 **A. The analysis removed State Water Project costs  
 4 from the system power rate, so it no longer represents a  
 5 systemwide cost.**  
 6 MR. KEKER: Excuse me. Move to strike and  
 7 object. She is --  
 8 THE COURT: Sustained.  
 9 Let me tell you, and it may be helpful, me  
 10 telling you my reason for overruling Mr. Kecker's  
 11 objections with respect to this Denham's damages  
 12 calculation.  
 13 It doesn't necessarily take an expert to read  
 14 an expert report. We ask juries, for example, to do it  
 15 all the time and we ask judges, who are clearly not  
 16 experts, to do it all the time. Reading an expert  
 17 report doesn't require expertise.  
 18 Criticizing and analyzing it might. But the  
 19 reason the muddle column is in here and is admissible  
 20 and why she can talk about it because it might be  
 21 contradicted by Denham's own declaration but it doesn't  
 22 take an expert to read an expert report and understand  
 23 it as a jury may, for example.  
 24 MR. OLIVER: Thank you, your Honor. I  
 25 understand.

1806

1 Q. Did the analysis that you undertook, and you  
 2 had others under your supervision engaged in, involve  
 3 utilization of information and facts and records that  
 4 you utilize on a daily basis in performance of your  
 5 other duties at Metropolitan?  
 6 **A. Yes.**  
 7 Q. Is the analysis undertaken and reflected on DTX  
 8 1160 similar to the types of exercises that you  
 9 undertake in performance of your duties?  
 10 MR. KEKER: Objection, your Honor. She is not  
 11 an expert, and I am going to object to leading questions  
 12 of Ms. Skillman.  
 13 THE COURT: That particular question I'll  
 14 allow, and I take it you are talking about the last  
 15 table on this page, or are you talking about the first  
 16 two tables?  
 17 MR. OLIVER: Well, I was --  
 18 THE COURT: The first and the third, perhaps?  
 19 MR. OLIVER: I think what we've established is  
 20 that the first and the second really are simply setting  
 21 forth something that existed, so I will direct myself to  
 22 the third which does involve rate applications.  
 23 THE COURT: All right. The objection is  
 24 overruled as to the third column, on that question.  
 25 Q. BY MR. OLIVER: I would, specifically, then

1807

1 turn your attention to the last third of this page,  
 2 which has been designated as DTX 1160.  
 3 Were you responsible for the preparation of the  
 4 information set forth in this block of information?  
 5 **A. Yes.**  
 6 Q. In undertaking the exercise to drive this  
 7 information, were you utilizing the type of financial  
 8 records that you normally utilized in performing your  
 9 duties otherwise at Metropolitan?  
 10 **A. Yes.**  
 11 Q. Does this collection of information involve  
 12 consideration of costs, inclusion in pools and  
 13 associated -- and association with cost objectives in  
 14 order to establish unit costs?  
 15 **A. Yes.**  
 16 Q. Do you do similar type activities when you  
 17 prepare cost of service reports, for example?  
 18 **A. Yes.**  
 19 Q. And indeed, are you primarily responsible for  
 20 the establishment of costs of service reports at  
 21 Metropolitan?  
 22 **A. Yes.**  
 23 Q. What are cost of service reports?  
 24 **A. Cost of service analyses lay out the costs**  
 25 **of -- in Metropolitan and through a process, an**

1808

1 (Noon recess.)  
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1810

1 **analytical process, assign them to services that we**  
 2 **recover through rates and charges.**  
 3 Q. Are cost of service reports utilized by the  
 4 board in terms of deciding appropriate rates?  
 5 **A. They are provided to the board for their review**  
 6 **and analysis when they set rates, yes.**  
 7 Q. In front of you there, I believe, will be a  
 8 booklet. And I would like to direct your attention to a  
 9 document which is labeled DTX 90-A.  
 10 Are you familiar with this document?  
 11 **A. Yes.**  
 12 Q. What is the document?  
 13 **A. This is the cost of service report that was**  
 14 **attached to the April 2010 board letter that went to the**  
 15 **board in April of 2010 for their budget rate setting**  
 16 **approval.**  
 17 Q. Were you responsible for the preparation of  
 18 this document?  
 19 **A. I was partially responsible for it at the time**  
 20 **it was presented in April of 2010.**  
 21 THE COURT: Whenever you get to a good breaking  
 22 spot, just let me know.  
 23 MR. OLIVER: This would be fine, your Honor.  
 24 THE COURT: I will see everybody at 1:30.  
 25 Thank you so much.

1809

1 San Francisco, California  
 2 Tuesday, April 28, 2015  
 3 Department No. 304 Hon. Curtis E.A. Karnow, Judge  
 4  
 5 JUNE SKILLMAN,  
 6 resumed the stand and testified further as follows:  
 7  
 8 THE COURT: Good afternoon.  
 9 MR. KEKER: Good afternoon, your Honor. Before  
 10 Mr. Oliver starts --  
 11 (Interruption in proceedings.)  
 12 THE COURT: Yes, sir.  
 13 MR. KEKER: Your Honor, with your permission,  
 14 before Mr. Oliver proceeds, and in keeping with your  
 15 statement yesterday about motions to strike, we have  
 16 a -- would like to make a motion to strike parts of the  
 17 declaration of Jon Lambeck, which was admitted into  
 18 evidence as DTX 1151.  
 19 I have as 1150-A a marked-up copy showing what  
 20 we object on the grounds of expert testimony and no  
 21 foundation based on his testimony. I propose to give  
 22 the other side and you a copy of this, if that's all  
 23 right with you.  
 24 The things we are moving to exclude are the  
 25 third sentence of paragraph 11, all of paragraph 12, all

1811

1 of paragraph 14 and 15 and the last sentence of  
 2 paragraph 17. We are prepared to submit it.  
 3 THE COURT: I will take it under advisement.  
 4 MR. QUINN: As part of the pretrial scheduling  
 5 order, this was filed on a specified date several weeks  
 6 before trial. Objections were due a certain period  
 7 after that. And it was offered yesterday and there was  
 8 a statement made with no objection. If the Court is  
 9 going to consider this, we would like to have a chance  
 10 to respond.  
 11 THE COURT: Of course.  
 12 MR. GOLDBERG: May I approach with the  
 13 highlighted exhibit?  
 14 THE COURT: All right. Anticipation is by the  
 15 time we are finished, there might be a couple of motions  
 16 from both sides -- I don't know -- to strike. I am  
 17 happy to entertain them at that time.  
 18 May we continue with the questions in the  
 19 meantime?  
 20  
 21 DIRECT EXAMINATION (resumed)  
 22 BY MR. OLIVER:  
 23 Q. At the lunch break we were discussing the  
 24 document which has been designated as DTX 90-A. Do you  
 25 have DTX 90-A in front of you?

1812

1 **A. Yes.**  
 2 Q. Does this cost of service study set forth  
 3 financial and cost information that you utilized in  
 4 connection with your examination of the unit costs for  
 5 the exchange water?  
 6 **A. Yes.**  
 7 MR. OLIVER: I know, your Honor, this document  
 8 has been admitted previously.  
 9 Q. The next document I would like you to turn to,  
 10 Ms. Skillman, is DTX 953.  
 11 Do you recognize this document?  
 12 **A. Yes, I do.**  
 13 Q. What is the document?  
 14 **A. At the April 2010 board meeting, the board**  
 15 **adopted rates and charges for two years. At that**  
 16 **meeting, the board letter actually only had one -- the**  
 17 **cost of service for fiscal year 2010-11 attached to it.**  
 18 Q. Is this a cost of service report?  
 19 **A. Yes.**  
 20 Q. And is this the cost of service report that you  
 21 utilized in connection with financial and cost  
 22 information pertaining to your examination of unit costs  
 23 for 2012?  
 24 **A. Yes.**  
 25 MR. OLIVER: Here, your Honor, for some reason

1813

1 this document has not been admitted, and it's the only  
 2 one of the four cost of service documents that  
 3 heretofore has not been admitted. I would move its  
 4 admission and note there is no objection indicated.  
 5 MR. KEKER: There is an objection as to  
 6 relevance in this phase of the trial, but that's the  
 7 only one.  
 8 THE COURT: I'll admit it at this time, DTX  
 9 953.  
 10 (DTX 953 was received into evidence.)  
 11 Q. BY MR. OLIVER: Next document I would ask you  
 12 to turn to, Ms. Skillman, is DTX 110-A.  
 13 Do you recognize this document?  
 14 **A. Yes, I do.**  
 15 Q. What is the document?  
 16 **A. It's the cost of service report that was**  
 17 **prepared for fiscal year 2012-13 and provided to the**  
 18 **board in March of 2012.**  
 19 Q. Did you utilize the costs and financial  
 20 information set forth in this cost of service in  
 21 connection with your examination of the unit costs for  
 22 2013?  
 23 **A. Yes.**  
 24 MR. OLIVER: This document has been admitted  
 25 previously.

1814

1 Q. I would like next to have you turn to DTX  
 2 110-B.  
 3 Do you recognize this document?  
 4 **A. Yes, I do.**  
 5 Q. What is the document?  
 6 **A. This is the fiscal year 2013-14 cost of service**  
 7 **that was approved by the board in April of 2012,**  
 8 **presented to them first in March of 2012.**  
 9 Q. Were you responsible in whole or in part for  
 10 the preparation of this document?  
 11 **A. Yes.**  
 12 Q. Does the document, which has been marked as DTX  
 13 110-B, set forth financial and cost information that you  
 14 referenced for purposes of your examination of unit  
 15 costs pertaining to the exchange water?  
 16 **A. Yes.**  
 17 MR. OLIVER: I would like to have displayed a  
 18 demonstrative that has been marked for purposes of  
 19 identification as DTX 1161.  
 20 Q. Do you recognize this demonstrative,  
 21 Ms. Skillman?  
 22 **A. Yes, I do.**  
 23 Q. Does this document that has been marked for  
 24 purposes of identification constitute an exact extract  
 25 from the document we previously had been discussing,

1815

1 which was marked for identification as 1160?  
 2 **A. Yes, it is.**  
 3 Q. So that this document is simply a subset of the  
 4 earlier chart?  
 5 **A. Yes, the information for 2011.**  
 6 Q. What does this subset pertain to?  
 7 **A. This subset pertains to a calculation of unit**  
 8 **costs that would be applicable to the exchange water,**  
 9 **taking into consideration the Phase I ruling by the**  
 10 **Court.**  
 11 MR. KEKER: Objection, your Honor, and move to  
 12 strike. This would be expert testimony.  
 13 THE COURT: I will strike it because this  
 14 notion of taking it into consideration seems like some  
 15 sort of judgment is being exercised. It may be that  
 16 this witness means -- and I am going back two answers --  
 17 is that if you look at these numbers on the right-hand  
 18 column here, 203, 94, 204, all the way down, that those  
 19 are numbers that are just extracted from 1160, in which  
 20 case there is nothing wrong with this.  
 21 If there is something else going on with this  
 22 document, I am concerned. This notion that it, quote,  
 23 takes into consideration, suggests to us a judgment that  
 24 this witness is not being presented for.  
 25 MR. OLIVER: This document does nothing more

1816

1 than simply reflect the 1160 document.  
 2 THE COURT: Make that clear, and that will be  
 3 fine.  
 4 That would overrule Mr. Kecker's objection.  
 5 MR. KEKER: Except, your Honor, now that we're  
 6 getting to this, this does not reflect numbers that are  
 7 just plugged out of something. These are calculations,  
 8 computations. This is expert testimony.  
 9 THE COURT: I need to hear from the witness.  
 10 The witness may confirm that. The witness may not  
 11 confirm that. I don't know.  
 12 I will turn it over to Mr. Oliver.  
 13 Q. BY MR. OLIVER: Are the numbers set forth in  
 14 this document, 1161, exactly the same numbers that are  
 15 set forth in 1160?  
 16 **A. Yes, they are.**  
 17 Q. My prior question was, what specifically is  
 18 being calculated in terms of this collection of  
 19 information under exchange costs?  
 20 MR. KEKER: Objection, your Honor. It calls  
 21 for --  
 22 THE COURT: Sustained.  
 23 Q. BY MR. OLIVER: I have to ask a different  
 24 question.  
 25 Did you undertake to consider what the cost

1817

1 impact would be of removing the State Water Project  
 2 costs from the system access rate that had been  
 3 challenged in the Phase I trial?  
 4 MR. KEKER: Objection. Calls for expert  
 5 testimony.  
 6 THE COURT: Overruled, so far.  
 7 THE WITNESS: Yes.  
 8 Q. BY MR. OLIVER: Previously you stated that one  
 9 of your responsibilities was consideration and  
 10 preparation of financial costs relating to the rate  
 11 structure; is that correct?  
 12 **A. Correct.**  
 13 Q. Mathematically, did you seek to extract the  
 14 numbers that had been identified by Mr. Denham and  
 15 challenged by San Diego from the system access rate --  
 16 MR. KEKER: Objection -- I'm sorry.  
 17 THE COURT: Let's have a full question.  
 18 Mr. Oliver.  
 19 Q. BY MR. OLIVER: -- as those costs pertain to  
 20 the State Water Project?  
 21 MR. KEKER: Objection. Leading.  
 22 THE COURT: Overruled.  
 23 THE WITNESS: Yes.  
 24 Q. BY MR. OLIVER: In the chart, there is, at  
 25 lines one and two, two separate power unit cost

1818

1 designations. Why do you employ two designations there?  
 2 MR. KEKER: Objection. Calls for --  
 3 THE COURT: Sustained. If it calls for the  
 4 exercise of judgment, or something like that, that only  
 5 somebody with her background and experience can provide  
 6 to me, then it's expert opinion, probably. It may or  
 7 may not be in this specific case, but it probably is. I  
 8 am just saying that to maybe be helpful.  
 9 If you want to walk her through she took column  
 10 X and deducted column Y and what we are looking at is  
 11 the net of that, that's fine. That is walking me  
 12 through the math, and I don't mind that at all.  
 13 MR. OLIVER: Thank you, your Honor.  
 14 Q. What are the numbers set forth here?  
 15 **A. Line one represents the actual State Water**  
 16 **Project power costs for 2011.**  
 17 MR. KEKER: Objection. Calls for expert  
 18 opinion and move to strike.  
 19 THE COURT: Overruled. I take it from this  
 20 answer that she is simply extracting the 203 from, for  
 21 example, 1160; is that right? Is that what you did?  
 22 THE WITNESS: Yes.  
 23 MR. KEKER: I'm sorry. We are confused. The  
 24 203 -- 1160 is the expert report. This is just a  
 25 breakout of a piece of it. The 203 has no foundation

1819

1 anywhere except she's going to come up with an expert  
 2 opinion. The basis of this 203 was supposed to be 1103.  
 3 That's -- not that one. That was going to be 1096  
 4 through 1099. Those aren't in evidence.  
 5 For her to testify about numbers that don't  
 6 come from anything that's in evidence as a percipient or  
 7 expert witness is improper. This -- there is no  
 8 foundation for this.  
 9 THE COURT: Where did the 203 come from, for  
 10 example? Where is 203 from? Where did you extract  
 11 that?  
 12 THE WITNESS: The number for 203 comes from a  
 13 schedule that's developed by our water research  
 14 management group.  
 15 THE COURT: Is it from some document we just  
 16 talked about in the last 15 to 20 minutes?  
 17 THE WITNESS: It could be.  
 18 THE COURT: It could be?  
 19 THE WITNESS: Yes.  
 20 THE COURT: I don't know what that means. I  
 21 will turn it over to Mr. Oliver.  
 22 MR. OLIVER: Let me come to this in a different  
 23 way.  
 24 THE COURT: Sure.  
 25 Q. BY MR. OLIVER: I would like displayed an

1820

1 exhibit which has been admitted, which is 1156.  
 2 MR. KEKER: Excuse me, your Honor. This  
 3 exhibit -- it's been admitted?  
 4 MR. OLIVER: Yes, it has.  
 5 Q. Are you familiar with this document that has  
 6 been marked as DTX 1156?  
 7 A. Yes.  
 8 Q. What does this document inform you of?  
 9 A. It --  
 10 MR. KEKER: Objection. No foundation. Calls  
 11 for expert opinion.  
 12 THE COURT: Is 1156 in evidence?  
 13 MR. OLIVER: Yes, sir, it is. It was in  
 14 through Mr. Yamasaki yesterday. And it was admitted.  
 15 THE COURT: I will let her discuss it.  
 16 Go ahead.  
 17 THE WITNESS: This document summarizes the  
 18 exchange deliveries by month for the four calendar  
 19 years, and breaks out the exchange deliveries by State  
 20 Water Project and Colorado River Aqueduct source for the  
 21 exchange water.  
 22 Q. BY MR. OLIVER: Looking for the total set forth  
 23 at the far right-hand of the page, can you ascertain how  
 24 much exchange water in a given year was sourced from the  
 25 State Water Project?

1821

1 A. Yes.  
 2 Q. And in 2011, how much water was sourced from  
 3 the State Water Project?  
 4 A. 76,581.1 acre-feet came from the State Water  
 5 Project.  
 6 Q. Does this document, and the totals, report the  
 7 amount of water in the exchange that was sourced from  
 8 the Colorado River?  
 9 A. Yes.  
 10 Q. How much is that amount?  
 11 MR. KEKER: Objection, your Honor. No  
 12 foundation. The evidence established that a lot more  
 13 than 66,000 acre-feet came from the Colorado River.  
 14 This is them interpreting and doing their own internal  
 15 numbers. She doesn't know about this. There was  
 16 probably a million acre-feet that came from the Colorado  
 17 River and Met chose to call some of it exchange water  
 18 and then some of it State Water Project water.  
 19 She has no basis to know anything about this.  
 20 THE COURT: Have you seen this document before  
 21 that we are looking at now?  
 22 MR. KEKER: Other than with lawyers, your  
 23 Honor. I'm sure they have shown it.  
 24 THE COURT: Outside of discussing it with  
 25 attorneys, is this a document you have worked with

1822

1 before?  
 2 THE WITNESS: No.  
 3 THE COURT: Why do you think 66,000 is the  
 4 answer to the question that was just posed? Are you  
 5 just reading the number off the document?  
 6 THE WITNESS: To my knowledge, it was prepared  
 7 by our water system operations people. And they had a  
 8 methodology for determining, based on the water quality,  
 9 how much water was State Water Project and how much  
 10 water was Colorado River on a monthly basis.  
 11 THE COURT: I will sustain the objection. We  
 12 are way, way afield of what this witness is here  
 13 prepared to do in terms of her own knowledge.  
 14 Q. BY MR. OLIVER: Do you understand -- and I  
 15 recall that we had testimony yesterday as to measurable  
 16 blend of the exchange water actually transmitted to San  
 17 Diego in various proportions over the years.  
 18 I will ask this witness, do you understand that  
 19 a portion of the exchange water is sourced from the  
 20 State Water Project?  
 21 MR. KEKER: Objection. Leading.  
 22 THE COURT: Let me see if I can cut through  
 23 this so we can actually get in the admissible evidence.  
 24 If you want her to make certain assumptions -- forget  
 25 that. That's not the way to approach it.

1823

1 If you want her to say, look, I took this  
 2 number from this document and I took that number from  
 3 that document and mechanically this is what I did, here  
 4 you are, I think that's fine. And later on people can  
 5 argue whether that is a meaningful gesture or not,  
 6 whether she had -- whether those numbers that she used  
 7 are linked to anything that is useful in this case. We  
 8 can have that discussion later on.

9 But if you want to walk her through  
 10 mechanically, I took the third number of the fourth  
 11 column and I put it over here in this other document, I  
 12 netted these items and I walked through it, I think  
 13 that's fine. We can have that in the record. And that  
 14 is something she can testify she did.

15 Her understanding of what all these numbers are  
 16 probably will just get us into trouble and probably will  
 17 just delay proceedings is my guess, unless you think  
 18 personally her understanding as to what these numbers  
 19 are is relevant and it's not expert opinion. But if you  
 20 just want to walk her through mechanically what she did,  
 21 that is probably the fastest way to do it.

22 Q. BY MR. OLIVER: In your analysis, did you  
 23 utilize the total for 2011 of SWP exchange water of  
 24 76,581?  
 25 MR. KEKER: Object to her analysis. That's

1824

1 expert opinion.  
 2 THE COURT: Overruled.  
 3 THE WITNESS: Yes, I did, on DTX 1160. It is  
 4 not shown on K-17.

5 Q. BY MR. OLIVER: Did you utilize the 2011 number  
 6 total of 66,661.8 for the calculation of the CRA  
 7 exchange water?  
 8 **A. I used the CRA number of 66,661.8 acre-feet and  
 9 it is shown in -- on DTX 1160 in K-18.**

10 Q. In terms of the assignment of costs in  
 11 connection with the system power costs as to which -- as  
 12 a result of the Phase I ruling -- there was a removal of  
 13 the State Water Projects, how in your analysis would  
 14 those costs be assigned?  
 15 MR. KEKER: Objection. Leading.  
 16 THE COURT: Sustained. I sustained an  
 17 objection.  
 18 We will wait for another question.  
 19 Q. BY MR. OLIVER: What did you do to accommodate  
 20 the removal of the State Water Project costs from the  
 21 system access rate?  
 22 MR. KEKER: Objection. It calls for expert  
 23 testimony.  
 24 THE COURT: Sustained.  
 25 Q. BY MR. OLIVER: In your calculation of the

1825

1 financial impact as to the unit cost under the existing  
 2 rate structure that you prepared and were familiar with,  
 3 what did you do?  
 4 MR. KEKER: Same objection.  
 5 THE COURT: Sustained.

6 Q. BY MR. OLIVER: Did you arrive at a unit cost  
 7 for the system power?  
 8 MR. KEKER: Objection. Vague and  
 9 unintelligible and probably expert opinion.  
 10 THE COURT: I am not sure yet.  
 11 Overruled.  
 12 THE WITNESS: For the system power, I developed  
 13 three rates.  
 14 THE COURT: Three what?  
 15 THE WITNESS: Three separate rates to  
 16 accommodate -- to accommodate the fact there is State  
 17 Water Project in the exchange -- State Water Project or  
 18 Colorado River Aqueduct water in the exchange, and we  
 19 still have a full service rate we needed to charge.  
 20 MR. KEKER: Objection and move to strike.  
 21 That's expert testimony. She's accommodating and  
 22 getting to a goal and so on.  
 23 THE COURT: I understand. I will allow that  
 24 answer to remain, but I think we are probably right at  
 25 the edge of expert testimony.

1826

1 The objection is overruled.  
 2 Q. BY MR. OLIVER: I am going to ask you to refer  
 3 back to the chart, which has been marked for  
 4 identification as 1160.  
 5 What did you do to calculate the amounts in  
 6 K-1?  
 7 **A. The calculation I performed is shown in  
 8 Footnote 4. In order to determine the number, I took  
 9 the Department of Water Resources charges for State  
 10 Water Project deliveries to the East Branch and added  
 11 Metropolitan administrative and general costs to that.**

12 MR. KEKER: I object to that. There is no  
 13 foundation. None of that is in evidence. There is  
 14 no -- there is no DWR charges for SWP deliveries, and  
 15 there's no MWD administrative and general charges to be  
 16 added together. You can't do math if you don't have  
 17 integers or decimals.  
 18 THE COURT: I understand. That objection is  
 19 overruled. She's told us what she did.  
 20 Q. BY MR. OLIVER: Where did you derive the  
 21 information to be able to calculate that number?  
 22 **A. I used information provided to me by our water  
 23 resource management group with regard to the Department  
 24 of Water Resources charges for State Water Project  
 25 deliveries.**

1827

1 **And for the administrative and general costs I**  
 2 **relied on the cost of service study.**  
 3 Q. Are these documents regularly maintained in the  
 4 course of business at Metropolitan?  
 5 **A. The DWR charges for State Water Project**  
 6 **deliveries to the East Branch are performed in the**  
 7 **normal course of business.**  
 8 Q. The cost of service is, in fact, a report to  
 9 the board including San Diego; correct?  
 10 **A. Yes.**  
 11 Q. What did you do to calculate the number in K-2?  
 12 **A. The calculation is shown in Footnote 5. The**  
 13 **calculation, it uses the market cost of power for**  
 14 **Colorado River Aqueduct, plus a cost of scheduling fee**  
 15 **and Metropolitan administrative general costs as**  
 16 **described in Footnote 4.**  
 17 Q. How did you calculate the number set forth at  
 18 K-3?  
 19 **A. For the access costs, I calculated three access**  
 20 **costs. I calculated State Water Project access costs.**  
 21 **I calculated a Colorado River Aqueduct access cost, and**  
 22 **I calculated an access rate for the full service.**  
 23 Q. In the cost of service reports utilized by  
 24 Metropolitan, what is included within the access system  
 25 costs?

1828

1 **A. The system access rate that's put forward in**  
 2 **the cost of service includes costs for the State Water**  
 3 **Project conveyance system, costs for the Colorado River**  
 4 **Aqueduct conveyance system, and costs associated with**  
 5 **Metropolitan's distribution system.**  
 6 Q. What did you do to calculate the number at K-4?  
 7 **A. The number at K-4 is the Colorado River access**  
 8 **costs, and Footnote 7 explains that it is the Colorado**  
 9 **River Aqueduct cost and the system access rate, which**  
 10 **comes from Schedule 7 in the cost of service analysis,**  
 11 **divided by the Colorado River Aqueduct sales in that**  
 12 **fiscal year, plus the distribution system costs minus**  
 13 **hydroelectric revenues, which also comes from the same**  
 14 **Schedule 7, divided by total sales.**  
 15 **I developed two separate unit costs, and then**  
 16 **added them together, and that derived the number at K-4**  
 17 **of \$119 an acre-foot.**  
 18 Q. Why did you -- and I'm now referring to the  
 19 piece of information you were just discussing, Footnote  
 20 7 -- did you divide the CRA cost by CRA sales?  
 21 MR. KEKER: Objection. Calls for expert  
 22 testimony.  
 23 THE COURT: Sustained.  
 24 Q. BY MR. OLIVER: In your experience as financial  
 25 manager and one who works and collects costs, is there a

1829

1 need to associate costs with cost objectives?  
 2 MR. KEKER: Objection.  
 3 THE COURT: Sustained. The clue that that's  
 4 expert testimony is when you preface it, as you have to,  
 5 by "in your experience do you." That's the red flag  
 6 that you are asking for an expert opinion.  
 7 Unless it is something I could figure out or  
 8 someone off the street who sat in the jury box could  
 9 figure out, the chances are it probably asks for expert  
 10 opinion and testimony.  
 11 The reason she is able to give these answers  
 12 and come up with formulas appears to be a function of  
 13 her long-time expertise, which I admire, but she is not  
 14 here as an expert witness.  
 15 Q. BY MR. OLIVER: What does the denominator at  
 16 the first portion of Footnote 7 represent?  
 17 **A. That represents the portion of Metropolitan**  
 18 **sales that were from the Colorado River Aqueduct.**  
 19 Q. Adding to that grouping you have distribution  
 20 costs minus hydroelectric revenues. Do you see that?  
 21 **A. Yes.**  
 22 Q. What are hydroelectric revenues?  
 23 **A. Metropolitan's distribution system has 16 small**  
 24 **hydroelectric generators. They are basically generating**  
 25 **electricity as water flows through the pipeline.**

1830

1 Q. What are the revenues associated with those?  
 2 **A. The revenues are associated with the use of the**  
 3 **distribution system, the water flowing through the**  
 4 **distribution system that generates those revenues.**  
 5 Q. Why are you subtracting those amounts here?  
 6 MR. KEKER: Objection, your Honor.  
 7 THE COURT: Sustained.  
 8 Q. BY MR. OLIVER: What is left over when you  
 9 subtract hydroelectric revenue from distribution system  
 10 costs?  
 11 MR. KEKER: Same objection.  
 12 THE COURT: Overruled.  
 13 THE WITNESS: The net distribution system  
 14 costs, which we used in this particular case to  
 15 calculate the distribution system unit costs.  
 16 MR. KEKER: Objection. Move to strike.  
 17 THE COURT: Sustained. Motion to strike is  
 18 granted.  
 19 Q. BY MR. OLIVER: What are distribution costs?  
 20 **A. Those are costs that are associated with the**  
 21 **Metropolitan's in base and distribution system.**  
 22 **Basically, it's where the Colorado River Aqueduct and**  
 23 **the State Water Project delivery points terminate.**  
 24 Q. What are the total sales used as a denominator  
 25 in that last part of the equation?

1831

1           **A. All of the water that is sold by Metropolitan**  
 2           **is delivered through our distribution system.**  
 3           Q. So what amount utilizes SW -- I'm sorry -- uses  
 4           CRA sales as a denominator, and the second portion of  
 5           that additive amount uses total sales; correct?  
 6           MR. KEKER: Objection. Leading and -- leading.  
 7           THE COURT: Sorry. Leading? Overruled.  
 8           Did you understand the question?  
 9           THE WITNESS: I didn't understand the question.  
 10          THE COURT: That's my clue.  
 11          Why don't we have another one?  
 12          Q. BY MR. OLIVER: The two denominators you  
 13          utilized are different?  
 14          **A. Yes.**  
 15          Q. Why are they different?  
 16          MR. KEKER: Objection.  
 17          THE COURT: Sustained.  
 18          Q. BY MR. OLIVER: What are they?  
 19          MR. KEKER: Asked and answered. She said they  
 20          are.  
 21          THE COURT: Overruled.  
 22          Go ahead.  
 23          THE WITNESS: So the total sales are all the  
 24          sales that Metropolitan was expected to or projected to  
 25          sell in that fiscal year and all the sales that used the

1832

1           distribution system. Those sales are made up of State  
 2           Water Project sales and Colorado River Aqueduct sales as  
 3           those are the only two sources of water Metropolitan  
 4           has.  
 5           Q. BY MR. OLIVER: We have been discussing 2011.  
 6           Did you undertake the same type of calculation with  
 7           regard to 2012 through 2014?  
 8           **A. Yes.**  
 9           Q. As to the identity of the numbers, the analysis  
 10          is the same as to those years?  
 11          **A. Yes.**  
 12          Q. What is described at line five?  
 13          **A. Line five is the water stewardship rate.**  
 14          Q. Did Metropolitan undertake an examination with  
 15          regard to its water stewardship costs in light of the  
 16          Phase I decision?  
 17          **A. Yes.**  
 18          Q. What was the conclusion of that analysis?  
 19          MR. KEKER: Objection.  
 20          THE COURT: Sustained.  
 21          Q. BY MR. OLIVER: Do any of the water -- do any  
 22          of the costs that are in the water stewardship rate  
 23          presently relate to the creation of supply that  
 24          Metropolitan purchases?  
 25          MR. KEKER: Objection, your Honor.

1833

1           THE COURT: Sustained.  
 2           MR. QUINN: Your Honor, may we have a brief  
 3           break?  
 4           THE COURT: Of course. I will see anybody in  
 5           whatever you like. Shall we say ten minutes?  
 6           MR. QUINN: Sounds good, your Honor. Thank  
 7           you.  
 8           THE COURT: While we are on the record, off the  
 9           clock, in case it is helpful, the other concern I have,  
 10          in addition to the ones you can see me struggling with,  
 11          are that some of the numbers that we're talking about  
 12          here appear to be based or to be summaries of documents  
 13          which, A, are not yet in evidence. Maybe they will be  
 14          some day, I don't know. But, B, don't seem to be  
 15          available to the other side to inspect.  
 16          That is to say, sometimes you can have  
 17          summaries. And I think summaries are great. You can  
 18          have a summary of voluminous documents and have that  
 19          introduced, but the prerequisite is usually the  
 20          production of the documents to the other side so they  
 21          can double-check that these are, in fact, accurate  
 22          summaries.  
 23          I haven't yet seen the basis to think that all  
 24          the numbers we talked about that are in, for example  
 25          1160, are extracted from documents that have previously

1834

1           been made available to San Diego. I may be wrong about  
 2           that, and I am willing to be corrected. It is a concern  
 3           I have. I will see everybody when you are ready.  
 4           Thank you.  
 5           (Recess.)  
 6           MR. QUINN: Your Honor, obviously, this is at  
 7           the heart of our alternative damages case and obviously  
 8           we have some issues here. I would request permission to  
 9           stop this examination now and move on to our final  
 10          witness.  
 11          THE COURT: Okay.  
 12          MR. QUINN: And call Miss Skillman back  
 13          tomorrow morning.  
 14          THE COURT: She will be available for  
 15          cross-examination thereafter?  
 16          MR. QUINN: Yes.  
 17          THE COURT: Any objection?  
 18          MR. KEKER: Yes. The witness order was pretty  
 19          clear. The final witness is Woodcock. Mr. Woodcock  
 20          shouldn't be able, based on his report, to give any  
 21          information about anything that is useful to the  
 22          decision you have to make. And that's going to be our  
 23          position.  
 24          To the extent that he wants to say something --  
 25          we anticipated they would try to use Ms. Skillman and

1835



1 maybe Mr. Lambeck to prop him up and then he would try  
 2 to say something about what they said. But I think the  
 3 order is prejudicial.  
 4 Let's find out what Ms. Skillman is -- has to  
 5 say that's nonexpert, percipient witness testimony. We  
 6 ought to go on. If they are going to -- I think keep  
 7 the order. So if they want to -- if they want to spend  
 8 a day, a night with her, so be it, but let's keep the  
 9 order.  
 10 MR. QUINN: The objection I'm hearing --  
 11 THE COURT: Are you suggesting we just stop for  
 12 today?  
 13 MR. KEKER: I guess. If they've got a final  
 14 witness who is Mr. Woodcock and I can't imagine -- you  
 15 have read the report. We have read the report. There's  
 16 nothing in it.  
 17 THE COURT: I don't want to have that argument  
 18 right now. It is an order of witnesses. I don't know  
 19 if you are suggesting if Woodcock testifies now, you  
 20 would be prejudiced because you are not prepared to  
 21 cross him. If you are suggesting in fairness it is  
 22 better to stop today and start with this witness  
 23 tomorrow morning.  
 24 MR. KEKER: I think we would like to know what  
 25 the evidentiary record is from percipient witnesses

1836

1 before their expert testifies as they promised. So the  
 2 request is --  
 3 THE COURT: I think I can ask Mr. Quinn. I  
 4 take it you don't need Ms. Skillman to lay whatever the  
 5 foundation is for Woodcock's testimony, no more than  
 6 what you have?  
 7 MR. QUINN: That's correct.  
 8 THE COURT: He can decide that. That's what he  
 9 thinks.  
 10 MR. QUINN: I am happy to do whatever the Court  
 11 prefers, whether we break today or go on with Woodcock  
 12 today.  
 13 THE COURT: I am happy to do it either way, as  
 14 well. I don't have anything invested in this one way or  
 15 the other.  
 16 If there is something that will disrupt our  
 17 ability to cross-examine Woodcock, we could postpone  
 18 Woodcock's cross or altogether.  
 19 MR. KEKER: If we could postpone Woodcock's  
 20 cross until Ms. Skillman finishes, that's good.  
 21 MR. QUINN: Your Honor, I realize I'm asking  
 22 for a favor, your Honor. I understand that. But that  
 23 seems a little unfair. What I represented to the Court  
 24 is Mr. Woodcock does not rely on Miss Stillman at all.  
 25 THE COURT: Okay. We can have Woodcock. We

1837

1 can either have him now or we can have him tomorrow.  
 2 Either way.  
 3 Mr. Keker, do you have a preference?  
 4 MR. KEKER: Tomorrow, your Honor.  
 5 THE COURT: Tomorrow?  
 6 MR. KEKER: Yes.  
 7 THE COURT: At nine o'clock.  
 8 MR. QUINN: That's fine, your Honor.  
 9 THE COURT: We will stop for today. The clocks  
 10 have stopped ticking, and I will see you tomorrow at  
 11 nine o'clock. Yes. 9:00.  
 12 MR. QUINN: Was our clock ticking then while we  
 13 were talking?  
 14 THE COURT: It was ticking for at least --  
 15 actually, it wasn't your clock. You shouldn't have said  
 16 anything.  
 17 MR. KEKER: Our clock keeps ticking.  
 18 THE COURT: We will give Mr. Keker another four  
 19 minutes. That was on my clock. I think tomorrow we can  
 20 start at nine o'clock. Nine o'clock tomorrow.  
 21 MR. QUINN: Got it, your Honor.  
 22 THE COURT: I will see you then. Thank you  
 23 very much. I assume we are starting with Woodcock, is  
 24 that right, tomorrow morning?  
 25 MR. QUINN: We can start with Skillman or

1838

1 Woodcock.  
 2 THE COURT: If it is okay, in that event, I  
 3 would suggest we finish this witness.  
 4 MR. QUINN: Yes.  
 5 THE COURT: Tomorrow at 9:00 and we will move  
 6 on.  
 7 MR. QUINN: Yes, your Honor.  
 8 THE COURT: Thank you very much.  
 9 (Court is recessed at 2:30 p.m. until 9:00 a.m.  
 10 April 28, 2015.)  
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REPORTER'S CERTIFICATE

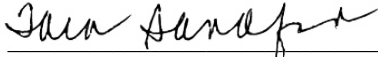
STATE OF CALIFORNIA,        )  
                                  ) ss  
COUNTY OF SANTA BARBARA.    )

I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand Reporter, in the County of Santa Barbara, State of California, hereby certify:

That the court proceedings were taken down by me in stenotype at the time and place herein named and thereafter reduced to typewriting by computer-aided transcription under my direction.

I further certify that I am not interested in the event of the action.

WITNESS my hand this 28th day of April, 2015, at Santa Barbara, California.



TARA SANDFORD, RPR, CSR No. 3374  
Certified Shorthand Reporter  
State of California

1840

<b>A</b>	<p><b>add</b> 1746:15 1791:19  <b>added</b> 1827:10,16                      1829:16  <b>Adding</b> 1830:19  <b>addition</b> 1802:7                      1834:10  <b>additive</b> 1832:5  <b>adds</b> 1759:2 1802:3  <b>adjustments</b> 1805:4,4  <b>administrative</b> 1827:11                      1827:15 1828:1,15  <b>admire</b> 1830:13  <b>admissible</b> 1806:19                      1823:23  <b>admission</b> 1814:4  <b>admit</b> 1814:8  <b>admitted</b> 1774:24                      1790:16 1811:17                      1813:8 1814:1,3,24                      1821:1,3,14  <b>adopted</b> 1728:10                      1813:15  <b>advance</b> 1770:8                      1771:24 1772:7,21,25                      1773:4 1774:4,8                      1775:21 1776:23,25                      1801:17  <b>advanced</b> 1770:24  <b>advantage</b> 1746:4  <b>advisement</b> 1812:3  <b>afford</b> 1776:16  <b>affield</b> 1823:12  <b>afternoon</b> 1811:8,9  <b>agencies</b> 1736:7                      1767:10 1772:17                      1784:13  <b>agency</b> 1738:2 1752:19                      1752:25 1784:3  <b>aggregated</b> 1767:20  <b>aggregation</b> 1805:13  <b>ago</b> 1766:11 1777:17                      1784:21 1785:1  <b>agree</b> 1784:14  <b>agreeing</b> 1791:13  <b>agreement</b> 1770:7,11                      1770:12,14,16,19                      1771:16 1790:7                      1798:3 1804:10                      1805:6  <b>ahadlock@kvn.com</b>                      1729:7  <b>ahead</b> 1741:1 1742:16                      1746:1 1748:5                      1750:11 1760:1                      1795:7,16 1804:17                      1821:16 1832:22  <b>Alameda</b> 1729:18  <b>allow</b> 1742:14 1807:14</p>	<p>1826:23  <b>alternative</b> 1835:7  <b>alternatives</b> 1799:23  <b>altogether</b> 1837:18  <b>amount</b> 1737:2 1745:9                      1745:9,12 1750:5                      1752:4,5 1754:12                      1758:15 1770:8,25                      1771:20,24 1799:4                      1822:7,10 1832:3,5  <b>amounts</b> 1744:10                      1758:1 1827:5 1831:5  <b>analyses</b> 1808:24  <b>analysis</b> 1760:3 1797:9                      1797:14 1798:5                      1799:2,5,7 1800:14                      1806:3 1807:1,7                      1809:6 1824:22,25                      1825:13 1829:10                      1833:9,18  <b>analytical</b> 1809:1  <b>analyzing</b> 1749:18                      1760:4 1804:13                      1806:18  <b>Angeles</b> 1729:15,19  <b>ANN</b> 1840:8  <b>Annual</b> 1771:5  <b>annually</b> 1752:18  <b>anomaly</b> 1741:15  <b>answer</b> 1755:16                      1758:24 1760:18                      1767:17 1769:17                      1793:3 1819:20                      1823:4 1826:24  <b>answered</b> 1759:4                      1762:14 1765:10                      1832:19  <b>answers</b> 1800:11                      1816:16 1830:11  <b>anticipated</b> 1741:19                      1835:25  <b>Anticipation</b> 1812:14  <b>anybody</b> 1791:18                      1834:4  <b>appear</b> 1834:12  <b>APPEARANCES</b>                      1729:1  <b>appears</b> 1787:1                      1830:12  <b>applicable</b> 1760:24                      1780:8 1816:8  <b>applications</b> 1807:22  <b>apply</b> 1740:16  <b>appreciate</b> 1749:4  <b>approach</b> 1812:12                      1823:25  <b>appropriate</b> 1809:4  <b>approval</b> 1809:16</p>	<p><b>approved</b> 1815:7  <b>approximately</b> 1788:6  <b>April</b> 1728:11,19                      1732:2 1809:14,15,20                      1811:2 1813:14                      1815:7 1839:10                      1840:17  <b>aqueduct</b> 1734:8,20                      1735:13,14,16,19                      1736:3 1737:8 1738:3                      1738:24 1740:18                      1746:18 1754:18                      1765:23 1766:2,4                      1767:1,6 1770:9                      1775:4 1778:17                      1783:12 1784:2,13                      1794:7,14,24 1821:20                      1826:18 1828:14,21                      1829:4,9,11 1830:18                      1831:22 1833:2  <b>argue</b> 1824:5  <b>argument</b> 1749:24                      1836:17  <b>argumentative</b> 1761:22                      1765:5 1770:21  <b>Armando</b> 1785:22  <b>arrive</b> 1826:6  <b>ascertain</b> 1821:23  <b>asked</b> 1748:13 1756:20                      1759:4 1761:5,18,19                      1761:25 1762:1,2,6                      1762:12 1765:10                      1769:16 1770:3                      1790:24 1793:8                      1797:8 1801:7                      1832:19  <b>asking</b> 1745:20                      1764:19 1766:21,22                      1766:23 1767:4                      1782:3 1785:10                      1786:20 1830:6                      1837:21  <b>asks</b> 1794:23 1830:9  <b>assign</b> 1809:1  <b>assigned</b> 1798:19                      1825:14  <b>assignment</b> 1825:10  <b>assistance</b> 1804:2  <b>assisting</b> 1801:12  <b>associate</b> 1830:1  <b>associated</b> 1754:14                      1797:9 1803:4 1804:9                      1805:5 1808:13                      1829:4 1831:1,2,20  <b>ASSOCIATES</b>                      1728:22  <b>association</b> 1808:13  <b>assume</b> 1733:14</p>	<p>1787:13 1792:14                      1838:23  <b>assumptions</b> 1823:24  <b>attached</b> 1809:14                      1813:17  <b>attained</b> 1742:25  <b>attention</b> 1802:19                      1808:1 1809:8  <b>attorneys</b> 1822:25  <b>AUDREY</b> 1729:4  <b>Authority</b> 1728:6                      1760:11 1764:16                      1771:4 1784:22                      1788:7 1789:19                      1790:7 1803:9,12                      1805:19,21  <b>Authority's</b> 1764:20                      1765:8,13,25 1766:6                      1766:14,16 1767:5                      1768:2,3 1785:18                      1789:10 1790:9  <b>authorized</b> 1775:3  <b>available</b> 1746:10                      1780:9,10 1799:24                      1834:15 1835:1,14  <b>average</b> 1743:23                      1744:14,22,24                      1745:18 1747:24                      1748:15,22,24                      1756:21 1757:16,17                      1758:10 1781:13,14                      1784:9  <b>averages</b> 1747:21                      1748:19  <b>avoid</b> 1733:18 1736:22  <b>aware</b> 1766:3,8</p>
			<b>B</b>	
			<p><b>B</b> 1729:13 1803:2                      1834:14  <b>back</b> 1732:17,19,25                      1734:5 1739:18                      1756:13 1761:18                      1777:4 1778:6 1792:5                      1793:4 1804:3                      1816:16 1827:3                      1835:12  <b>background</b> 1819:5  <b>bank</b> 1735:9,24  <b>Barbara</b> 1840:5,9,18  <b>base</b> 1739:13 1831:21  <b>based</b> 1742:21,24                      1756:21 1757:17                      1758:11,15 1760:16                      1800:8 1811:21                      1823:8 1834:12                      1835:20  <b>baseline</b> 1805:3</p>	

<p><b>basic</b> 1755:18  <b>basically</b> 1791:10  1830:24 1831:22  <b>basis</b> 1742:10 1744:12  1744:14 1755:14  1801:20 1807:4  1820:2 1822:19  1823:10 1834:23  <b>Battery</b> 1728:24  1729:6  <b>believe</b> 1732:20  1749:15 1755:14  1767:7 1773:10  1774:12 1776:12,25  1788:9 1809:7  <b>benefit</b> 1735:3,4  1736:11 1793:15,20  <b>best</b> 1772:15  <b>better</b> 1760:5 1791:21  1792:6 1836:22  <b>beyond</b> 1761:7 1801:1  <b>biennial</b> 1797:3  <b>bill</b> 1753:1,7 1754:2,3  <b>billing</b> 1752:19,24  <b>bills</b> 1753:22  <b>binder</b> 1760:12  <b>bit</b> 1748:7 1770:2  1789:1  <b>blend</b> 1823:16  <b>block</b> 1802:21 1803:10  1808:4  <b>blow</b> 1775:16 1779:20  1790:1  <b>blue</b> 1803:10  <b>board</b> 1731:7 1774:20  1775:2,8,14 1777:5  1809:4,5,14,15  1813:14,14,16  1814:18 1815:7  1828:9  <b>Bob</b> 1786:17  <b>booklet</b> 1809:8  <b>Borden</b> 1761:18 1762:6  <b>bottom</b> 1754:20 1769:5  1777:19 1786:11  <b>bought</b> 1769:9  <b>box</b> 1830:8  <b>branch</b> 1754:20,21,21  1755:4,5,7,8 1827:10  1828:6  <b>Branches</b> 1754:22  <b>BRAUNIG</b> 1729:5  <b>break</b> 1779:13 1812:23  1834:3 1837:11  <b>breaking</b> 1809:21  <b>breakout</b> 1819:25  <b>breaks</b> 1821:19  <b>brief</b> 1834:2</p>	<p><b>briefs</b> 1800:22  <b>bring</b> 1776:18  <b>broke</b> 1761:11  <b>BROWN</b> 1728:22  <b>budget</b> 1796:23 1797:3  1797:4 1809:15  <b>business</b> 1752:21  1828:4,7  <b>buy</b> 1738:19,22,25  1739:5 1740:17,23  1742:11 1745:9,11  1747:2 1750:25  1758:16 1761:6  1762:13 1770:4  1772:25 1773:4,24  1774:10 1776:24,25  1778:7 1791:7  1794:14  <b>buyer</b> 1776:12  <b>buyers</b> 1768:15  <b>buying</b> 1737:9,11  1739:1 1740:11  1741:2,21 1746:17,19  1769:21 1774:13  1777:13,14 1790:25  1791:10 1792:6  <b>buys</b> 1762:17 1774:4,8  1776:1,23</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 1803:2  <b>CA</b> 1728:24  <b>calculate</b> 1749:11  1752:4 1756:21  1758:15 1783:8,15,18  1784:9,15 1785:2,16  1827:5,21 1828:11,17  1829:6 1831:15  <b>calculated</b> 1758:11  1768:25 1769:6  1817:18 1828:19,20  1828:21,22  <b>calculating</b> 1783:6,11  1785:6 1788:10  1789:5  <b>calculation</b> 1740:25  1750:9 1751:12,20,22  1752:6 1757:2 1758:3  1804:8,23 1805:10,20  1806:12 1816:7  1825:6,25 1827:7  1828:12,13 1833:6  <b>calculations</b> 1817:7  <b>calendar</b> 1771:6,21,25  1772:8 1788:5,22  1802:23 1803:1,5,9  1803:14 1821:18  <b>California</b> 1728:1,9,11</p>	<p>1728:18 1729:6,11,15  1729:19 1732:1  1734:8,13 1811:1  1840:3,10,18,25  <b>call</b> 1795:23 1822:17  1835:12  <b>called</b> 1733:7 1755:12  1774:11 1796:2  <b>calling</b> 1751:24  1795:24  <b>calls</b> 1738:6 1744:16  1746:6,21 1751:25  1755:11 1787:8  1791:23 1801:19  1804:11 1805:15  1817:20 1818:4  1819:2,3,17 1821:10  1825:22 1829:21  <b>canal</b> 1764:16,21  1765:13,25 1766:6,14  1766:16 1767:5  1768:2,3 1784:1,22  1785:18 1788:8  1789:10 1790:9  <b>capacity</b> 1788:24  1789:1  <b>cart</b> 1801:6  <b>case</b> 1728:7 1770:13  1778:15 1797:10  1816:20 1819:7  1824:7 1831:14  1834:9 1835:7  <b>cell</b> 1758:1  <b>certain</b> 1812:6 1823:24  <b>certainly</b> 1780:13  <b>CERTIFICATE</b>  1840:1  <b>Certified</b> 1840:8,24  <b>certify</b> 1840:10,15  <b>chain</b> 1786:11 1787:15  1787:25  <b>challenged</b> 1804:5  1818:3,15  <b>chance</b> 1812:9  <b>chances</b> 1830:9  <b>change</b> 1741:10 1749:5  1781:22,23,25 1782:9  <b>changes</b> 1799:3,8  <b>characterization</b>  1801:8  <b>charge</b> 1754:14  1764:25 1826:19  <b>charged</b> 1770:19  1789:18 1790:7  1793:24,24 1795:9,10  1800:2,6 1803:8  <b>charges</b> 1797:3 1809:2  1813:15 1827:9,14,15</p>	<p>1827:24 1828:5  <b>charging</b> 1784:14  <b>chart</b> 1731:5 1734:16  1734:17 1736:8  1782:13,25 1793:18  1816:4 1818:24  1827:3  <b>charts</b> 1783:3  <b>cheaper</b> 1790:25  <b>cheapest</b> 1737:3  1746:13  <b>chose</b> 1822:17  <b>clarification</b> 1746:1  1749:4  <b>clarify</b> 1747:12  <b>clear</b> 1737:25 1763:24  1798:16 1817:2  1835:19  <b>clearly</b> 1806:15  <b>CLERK</b> 1756:9 1796:6  1796:9  <b>clock</b> 1732:10,12,15  1834:9 1838:12,15,17  1838:19  <b>clocks</b> 1838:9  <b>clockwise</b> 1735:2  <b>clue</b> 1830:3 1832:10  <b>collaborative</b> 1763:6,7  1763:15,17  <b>collecting</b> 1799:4  <b>collection</b> 1748:18  1808:11 1817:18  <b>collects</b> 1829:25  <b>Colorado</b> 1734:12,20  1735:1 1740:17  1746:18 1757:18  1758:12 1766:2  1767:6 1770:9 1775:4  1778:17 1783:12  1784:1 1786:4,9,21  1794:7,13,23 1795:9  1821:20 1822:8,13,16  1823:10 1826:18  1828:14,21 1829:3,7  1829:8,11 1830:18  1831:22 1833:2  <b>column</b> 1741:9 1758:9  1759:2 1779:20  1790:2 1803:19  1806:19 1807:24  1816:18 1819:9,10  1824:11  <b>columns</b> 1780:1 1802:3  1803:2  <b>come</b> 1738:3,14  1753:15 1759:3  1760:5 1773:11  1782:11,16,18</p>	<p>1784:16 1820:1,6,9  1820:22 1830:12  <b>comes</b> 1754:25 1755:1  1820:12 1829:10,13  <b>coming</b> 1750:9 1795:8  <b>comment</b> 1750:1  <b>commitments</b> 1775:4  <b>committee</b> 1775:2  <b>Company</b> 1734:14  <b>compare</b> 1793:22  <b>comparing</b> 1791:25  <b>completely</b> 1761:15  <b>component</b> 1750:12  <b>components</b> 1754:9  <b>compromise</b> 1732:24  <b>computations</b> 1817:8  <b>compute</b> 1792:14  <b>computer-aided</b>  1840:13  <b>concern</b> 1834:9 1835:2  <b>concerned</b> 1816:22  <b>conclusion</b> 1794:10  1833:18  <b>conditions</b> 1777:19  1789:3,5  <b>conduct</b> 1797:8  <b>conducting</b> 1796:15  <b>confirm</b> 1743:1  1817:10,11  <b>confused</b> 1819:23  <b>confusion</b> 1734:4  1768:21  <b>connection</b> 1759:22  1797:6 1813:4,21  1814:21 1825:11  <b>consider</b> 1753:18  1784:21 1812:9  1817:25  <b>consideration</b> 1808:12  1816:9,14,23 1818:9  <b>consistent</b> 1743:9  <b>constitute</b> 1815:24  <b>context</b> 1798:16  <b>continue</b> 1733:4  1779:17 1802:11  1812:18  <b>contract</b> 1734:13  1735:5,8  <b>contracts</b> 1734:23  1746:10 1775:20  <b>contractual</b> 1735:12  1788:4,14  <b>contradict</b> 1800:11  <b>contradicted</b> 1806:21  <b>contrary</b> 1762:25  <b>convey</b> 1794:13  <b>conveyance</b> 1788:13  1829:3,4</p>
--	---	---	--	--

<p><b>conveyed</b> 1746:25 1754:12 <b>conveying</b> 1746:17 <b>copy</b> 1811:19,22 <b>corner</b> 1739:19 1768:22 1769:5 <b>correct</b> 1738:22,23 1739:10,11 1740:4 1741:22,23 1743:12 1743:13,24 1745:12 1745:13 1747:15 1748:4,10,11,16 1749:7,8 1750:20 1760:16 1761:16 1762:20 1763:2,9,19 1767:12 1768:4,5,10 1768:11 1769:6,7,11 1769:14 1770:6,10 1772:3,9,10,13,24 1775:10 1776:2 1777:10,15 1778:10 1778:13,25 1779:4,10 1779:11 1781:5 1782:23,25 1783:1,13 1788:19,20,23 1789:17 1793:25 1799:10 1801:23 1802:5 1803:20,21,23 1805:22,23 1818:11 1818:12 1828:9 1832:5 1837:7 <b>corrected</b> 1835:2 <b>cost</b> 1731:3,9 1735:5 1736:5,6,9,11,14,15 1736:23 1741:11 1743:23 1744:3,5,6 1744:11,13,22 1745:18 1749:6,6,12 1750:5,13,16 1752:4 1752:7 1754:9 1755:7 1756:21 1769:21 1783:11 1784:9,16,16 1785:2,5,7 1788:3,10 1789:6 1790:8,11 1793:17,21 1794:4 1795:10 1798:2,7,8,9 1798:18,20 1799:10 1805:4 1806:5 1808:13,17,23,24 1809:3,13 1813:2,3 1813:17,18,20,21 1814:2,16,20 1815:6 1815:13 1817:25 1818:25 1826:1,6 1828:2,8,13,14,21,23 1829:2,9,10,20 1830:1 <b>cost-based</b> 1734:24</p>	<p>1736:12 <b>costs</b> 1748:10,21,22,25 1749:18,23,23 1753:14,16 1754:11 1754:14 1756:17 1757:3 1758:16 1772:16 1784:12 1786:3,8,21 1787:4,6 1791:6 1793:12,23 1797:9,16,20,24 1798:6,7,18,18 1799:9 1805:5 1806:3 1808:12,14,20,24 1813:4,22 1814:19,21 1815:15 1816:8 1817:19 1818:2,10,19 1819:16 1825:10,11 1825:14,20 1827:11 1828:1,15,19,20,20 1828:25 1829:2,3,4,8 1829:12,15,25 1830:1 1830:20 1831:10,14 1831:15,19,20 1833:15,22 <b>costwise</b> 1797:19 <b>counsel</b> 1729:17 1733:19 1741:4 1761:11 1763:11,13 1763:14,16 1764:1,2 1764:8 1770:2 <b>count</b> 1732:23 <b>County</b> 1728:2 1840:5 1840:9 <b>couple</b> 1812:15 <b>course</b> 1752:21 1756:12 1812:11 1828:4,7 1834:4 <b>court</b> 1728:1 1732:6,9 1732:18,24 1733:2,4 1733:14,18,23 1734:17,21 1737:21 1738:6 1740:24 1742:8,14,23 1743:4 1744:1,6,18,24 1745:4,17,20,25 1746:8,22 1747:2,7 1748:1,5,24 1749:3 1749:15,22 1750:10 1750:24 1751:4,6,16 1751:25 1752:9,13 1753:5 1754:3 1755:15,24 1756:4,8 1756:10,12,15,25 1757:8,13,22 1758:6 1758:18,22 1759:5,9 1759:13,17 1760:1 1761:5,19,23 1762:12 1764:10 1765:5,11,16</p>	<p>1767:16 1769:2 1770:21 1773:8,13,17 1773:21 1774:22,24 1779:14,17 1784:19 1785:10 1787:10 1788:1 1790:16,19 1791:10,25 1792:4,9 1792:14,21 1793:3 1794:2,10,17 1795:3 1795:7,16,21 1796:13 1798:14 1799:20 1801:3,21,24 1802:9 1804:15,25 1805:17 1806:8 1807:13,18,23 1809:21,24 1811:8,12 1812:3,8,11,14 1814:8 1816:10,13 1817:2,9,22 1818:6 1818:17,22 1819:3,19 1820:9,15,18,20,24 1821:12,15 1822:20 1822:24 1823:3,11,22 1825:2,16,24 1826:5 1826:10,14,23 1827:18 1829:23 1830:3 1831:7,12,17 1832:7,10,17,21 1833:20 1834:1,4,8 1835:11,14,17 1836:11,17 1837:3,8 1837:10,13,23,25 1838:5,7,9,14,18,22 1839:2,5,8,9 1840:11 <b>Court's</b> 1733:10 <b>cover</b> 1791:19 <b>covered</b> 1795:1 <b>CPF-10-510830</b> 1728:7 <b>CPF-12-512466</b> 1728:8 <b>CRA</b> 1766:1 1776:6 1783:22,23 1788:2,3 1788:8,13,24 1789:8 1790:10,12 1793:11 1825:6,8 1829:20,20 1832:4 <b>create</b> 1746:11 1753:10 1757:16,17 <b>created</b> 1752:18,20 1753:9 <b>creates</b> 1753:8 <b>creation</b> 1833:23 <b>criticizing</b> 1804:12 1806:18 <b>cross</b> 1730:2 1760:2 1836:21 1837:18,20 <b>cross-examination</b> 1759:17 1760:9 1835:15 <b>cross-examine</b> 1759:23</p>	<p>1837:17 <b>CSR</b> 1728:20 1840:8 1840:23 <b>current</b> 1741:7 <b>Curtis</b> 1728:3 1732:4 1811:3 <b>cut</b> 1823:22 <hr/><p style="text-align:center"><b>D</b></p><hr/><b>D</b> 1730:1 1803:2 <b>daily</b> 1807:4 <b>Dale</b> 1729:14 1796:7,14 <b>damage</b> 1804:9 1805:10 <b>damages</b> 1731:5 1805:20 1806:11 1835:7 <b>DAN</b> 1729:4 <b>data</b> 1745:7 1780:12,13 <b>date</b> 1812:5 <b>dated</b> 1771:4 <b>day</b> 1739:1,3,3 1740:3 1740:7,7,11 1741:11 1741:11 1752:4 1761:14 1770:4 1772:11 1774:5 1776:6 1781:16 1782:2 1801:13 1802:1 1834:14 1836:8 1840:17 <b>day's</b> 1741:7 <b>day-ahead</b> 1769:25 1770:3 1774:1,9,13 1776:5,17,24 1777:7 1777:15 1779:3 1783:7 1784:15 1785:7 1788:18 1789:13,15 1791:22 1792:7 1793:6 <b>day-to-day</b> 1742:10 <b>days</b> 1740:6 1741:13,17 <b>deals</b> 1780:1,3,3 1781:4 1781:19 <b>December</b> 1758:2 1800:19 <b>decide</b> 1736:2 1749:24 1837:8 <b>deciding</b> 1804:8 1809:4 <b>decimals</b> 1827:17 <b>decision</b> 1833:16 1835:22 <b>declaration</b> 1762:21 1763:3,18,22 1764:1 1764:9 1778:15 1806:21 1811:17 <b>deducted</b> 1819:10 <b>Defendant</b> 1729:11 <b>DEFENDANT'S</b></p>	<p>1730:2 <b>Defendants</b> 1728:14 1733:7 1796:2 <b>defer</b> 1776:17 <b>defers</b> 1776:23 <b>defined</b> 1744:25 1745:1 <b>definition</b> 1764:14 <b>delay</b> 1824:17 <b>delete</b> 1802:2 <b>delivered</b> 1755:3 1757:18 1771:16 1772:2,5,6 1775:7,10 1832:2 <b>deliveries</b> 1772:22 1821:18,19 1827:10 1827:14,25 1828:6 <b>delivers</b> 1770:8,25 1784:23 <b>delivery</b> 1752:25 1754:23 1772:9 1831:23 <b>demands</b> 1760:4 <b>demonstrative</b> 1801:11 1815:18,20 <b>Denham</b> 1804:8,13,20 1804:22 1818:14 <b>Denham's</b> 1805:9 1806:11,21 <b>denominator</b> 1830:15 1831:24 1832:4 <b>denominators</b> 1832:12 <b>department</b> 1728:4 1732:4 1753:15,18,22 1785:25 1811:3 1827:9,23 <b>depend</b> 1794:18,18 <b>depending</b> 1741:13 <b>depends</b> 1777:18 <b>DEPOSITION</b> 1728:23 <b>deposits</b> 1736:14 <b>derive</b> 1827:20 <b>derived</b> 1757:15 1829:16 <b>describe</b> 1801:8 1802:6 1802:20 <b>described</b> 1758:3 1828:16 1833:12 <b>description</b> 1731:2 1796:22 1801:17 <b>designated</b> 1799:21,25 1800:8 1808:2 1812:24 <b>designation</b> 1803:20,22 1805:24 1806:2 <b>designations</b> 1800:22 1804:1 1819:1,1 <b>determination</b> 1772:14 1782:19,21,22</p>
--	---	--	---	---

<p>1801:18  <b>determine</b> 1739:23                  1827:8  <b>determining</b> 1739:11                  1798:1 1823:8  <b>developed</b> 1820:13                  1826:12 1829:15  <b>development</b> 1797:2  <b>devoted</b> 1749:9 1750:3                  1750:16  <b>Diego</b> 1728:6 1755:4                  1765:1 1770:9,25                  1786:2,7,24 1787:19                  1787:21 1805:22                  1818:15 1823:17                  1828:9 1835:1  <b>Diego's</b> 1772:12                  1783:25 1788:7  <b>different</b> 1742:18                  1746:15 1754:18                  1761:15,17 1762:4                  1777:14 1782:19                  1794:20 1800:3                  1817:23 1820:22                  1832:13,15  <b>direct</b> 1730:2 1734:1                  1759:21 1760:13                  1766:10 1767:15,22                  1779:9 1796:15,18                  1802:19 1807:21                  1809:8 1812:21  <b>directing</b> 1803:25  <b>direction</b> 1840:14  <b>directors</b> 1775:2  <b>disaggregate</b> 1783:21  <b>disaggregated</b> 1768:1  <b>disaggregating</b> 1766:6                  1766:13  <b>discounted</b> 1803:4,12  <b>discovery</b> 1760:3                  1800:9  <b>discuss</b> 1821:15  <b>discussing</b> 1812:23                  1815:25 1822:24                  1829:19 1833:5  <b>discussion</b> 1824:8  <b>displayed</b> 1799:13                  1815:17 1820:25  <b>disrupt</b> 1837:16  <b>distinction</b> 1765:22,24                  1766:25  <b>distribution</b> 1829:5,12                  1830:19,23 1831:3,4                  1831:9,13,15,19,21                  1832:2 1833:1  <b>District</b> 1728:9,11                  1729:11  <b>divide</b> 1750:5,14,19</p>	<p>1829:20  <b>divided</b> 1829:11,14  <b>division</b> 1802:8  <b>document</b> 1744:8                  1745:21,24 1747:18                  1747:25 1748:3,9                  1752:15 1753:8,14                  1754:4,4 1755:9,12                  1755:13,17,19,22,23                  1755:24 1756:7                  1758:19 1799:13                  1801:9,18 1802:13,17                  1805:8 1809:9,10,12                  1809:18 1812:24                  1813:7,9,11,13                  1814:1,11,13,15,24                  1815:3,5,10,12,23,25                  1816:3,22,25 1817:1                  1817:14 1820:15                  1821:5,8,17 1822:6                  1822:20,25 1823:5                  1824:2,3,11  <b>documents</b> 1748:2                  1753:11 1759:21                  1800:9,12 1814:2                  1828:3 1834:12,18,20                  1834:25  <b>doing</b> 1749:9 1757:2                  1782:15,17 1801:24                  1801:25 1802:4                  1822:14  <b>dollar</b> 1744:9,9                  1751:24  <b>dollars</b> 1751:21  <b>double</b> 1790:8  <b>double-check</b> 1834:21  <b>dpurcell@kvn.com</b>                  1729:8  <b>draft</b> 1763:18,20  <b>drafted</b> 1763:21  <b>drafting</b> 1764:1,3,9  <b>dramatic</b> 1791:18  <b>draw</b> 1765:24  <b>drive</b> 1808:6  <b>DTX</b> 1731:3,4,5,9                  1739:17 1740:13                  1743:23 1747:17                  1748:7,17,21 1749:1                  1752:14 1756:9,14                  1757:25 1769:24                  1771:3 1773:6                  1779:19,22 1783:3                  1785:12 1799:14                  1802:14 1805:9                  1807:7 1808:2 1809:9                  1811:18 1812:24,25                  1813:10 1814:8,10,12                  1815:1,12,19 1821:6</p>	<p>1825:3,9  <b>due</b> 1812:6  <b>duties</b> 1738:8,21                  1807:5,9 1808:9  <b>duty</b> 1753:10  <b>DWR</b> 1827:14 1828:5</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 1728:3 1730:1 1732:4  <b>E.A</b> 1811:3  <b>earlier</b> 1770:18                  1783:20 1784:20                  1795:15 1816:4  <b>early</b> 1777:21  <b>east</b> 1754:20,21 1755:1                  1755:5,6,8 1827:10                  1828:6  <b>edge</b> 1826:25  <b>Edison</b> 1734:13 1735:3                  1735:5,6,8,9,15,15,25                  1736:11,12,16                  1778:25 1793:15  <b>effect</b> 1748:2 1797:15                  1797:19 1801:25                  1803:5  <b>effective</b> 1728:12                  1773:3  <b>eight</b> 1803:7  <b>either</b> 1735:24 1736:14                  1740:23 1769:21                  1779:10 1798:14                  1800:4,7 1837:13                  1838:1,2  <b>electric</b> 1734:5  <b>electricity</b> 1830:25  <b>email</b> 1729:7,8,8,9,9,16                  1731:8 1785:21                  1786:2,11,13,15                  1787:14,15,25                  1790:14  <b>Emanuel</b> 1729:12                  1733:10,16,21 1734:2                  1737:25 1738:13                  1741:4 1742:17,24                  1743:5 1744:2,8                  1745:8,18,22 1746:3                  1746:15 1747:11                  1748:4,6 1749:2,4,20                  1749:25 1750:12,25                  1751:6,20 1752:3,11                  1752:14 1753:8                  1754:4 1755:21                  1756:11,13,16 1757:2                  1757:10,15,24 1758:8                  1758:21,25 1759:7,11                  1759:15 1761:21                  1765:4,10,15 1769:1                  1770:20 1773:11,15</p>	<p>1774:23 1784:18                  1785:8 1787:8                  1790:15,20,23                  1791:20 1792:2,5,10                  1792:22 1793:8                  1794:5,12,20 1795:6                  1795:12,19 1796:15  <b>EMANUEL,ESQ</b>                  1729:14  <b>employ</b> 1819:1  <b>employed</b> 1796:20  <b>employee</b> 1785:24                  1786:18  <b>employees</b> 1750:2                  1797:5  <b>end-of-month</b> 1747:21  <b>end-of-the-month</b>                  1748:14  <b>ended</b> 1790:25  <b>energy</b> 1734:19 1735:4                  1735:9,10,12 1736:21                  1737:2,8,16 1743:8                  1746:11,14 1772:15                  1774:16 1775:4                  1776:8,11,13,16,17                  1777:13,22,23 1778:7                  1778:16,25 1779:7,20                  1791:11 1793:14,15  <b>engaged</b> 1807:2  <b>entertain</b> 1812:17  <b>entirety</b> 1759:20  <b>entitled</b> 1794:7 1805:9  <b>equal</b> 1771:17 1772:3  <b>equation</b> 1831:25  <b>ERIC</b> 1729:14  <b>escalation</b> 1741:14  <b>ESQ</b> 1729:3,4,4,5,5,13                  1729:14,18  <b>essence</b> 1798:5  <b>establish</b> 1808:14  <b>established</b> 1807:19                  1822:12  <b>establishment</b> 1808:20  <b>estimated</b> 1788:3  <b>event</b> 1794:5 1839:2                  1840:16  <b>everybody</b> 1809:24                  1835:3  <b>evidence</b> 1731:2 1773:6                  1773:9 1774:20,25                  1789:25 1790:14,17                  1811:18 1814:10                  1820:4,6 1821:12                  1822:12 1823:23                  1827:13 1834:13  <b>evidentiary</b> 1836:25  <b>exact</b> 1777:10 1792:23                  1815:24</p>	<p><b>exactly</b> 1768:24                  1817:14  <b>examination</b> 1733:11                  1734:1 1760:13                  1767:23 1779:10                  1790:22 1796:16,18                  1812:21 1813:4,22                  1814:21 1815:14                  1833:14 1835:9  <b>examine</b> 1742:15  <b>example</b> 1765:14                  1785:12 1802:24                  1806:14,23 1808:17                  1819:21 1820:10                  1834:24  <b>excess</b> 1735:20,22                  1737:13,17  <b>exchange</b> 1735:6,9,15                  1736:12,13,16                  1757:18 1758:11                  1770:7,12,14,15,19                  1771:15 1790:7                  1793:20 1797:11                  1798:3,10 1803:8,13                  1804:9 1805:5 1813:5                  1815:15 1816:8                  1817:19 1821:18,19                  1821:21,24 1822:7,17                  1823:16,19 1824:23                  1825:7 1826:17,18  <b>exclude</b> 1759:23                  1811:24  <b>excuse</b> 1789:14                  1799:15 1806:6                  1821:2  <b>excused</b> 1795:22  <b>exercise</b> 1802:6 1808:6                  1819:4  <b>exercised</b> 1816:15  <b>exercises</b> 1807:8  <b>exhibit</b> 1747:20                  1773:19 1801:15                  1805:9 1812:13                  1821:1,3  <b>exhibits</b> 1731:1 1768:7  <b>exist</b> 1800:13  <b>existed</b> 1807:21  <b>existing</b> 1797:25                  1798:19 1799:5                  1802:23 1826:1  <b>expect</b> 1742:21 1753:2  <b>expectations</b> 1743:10  <b>expected</b> 1771:20,25                  1772:21 1832:24  <b>expensive</b> 1736:10,17                  1736:18,21 1746:11                  1790:25 1791:2,3  <b>experience</b> 1742:20,24</p>
--	---	--	---	--

1819:5 1829:24 1830:5 <b>expert</b> 1738:5,6 1744:16,20 1746:7,21 1749:13,19 1750:8 1751:14 1755:11 1756:23 1758:14 1799:22,25 1801:1,19 1801:22 1804:12,13 1804:14 1805:15 1806:13,14,16,22,22 1807:11 1811:20 1816:12 1817:8 1818:4 1819:6,17,24 1820:1,7 1821:11 1824:19 1825:1,22 1826:9,21,25 1829:21 1830:4,6,9,14 1837:1 <b>expertise</b> 1749:18 1806:17 1830:13 <b>experts</b> 1806:16 <b>explain</b> 1734:17 1735:7 1741:5 1744:2,9 1751:6 1754:8,21 <b>explains</b> 1829:8 <b>expression</b> 1798:22 <b>extent</b> 1803:24 1835:24 <b>extract</b> 1741:16 1815:24 1818:13 1820:10 <b>extracted</b> 1743:9 1745:2 1816:19 1834:25 <b>extracting</b> 1741:20 1819:20	1818:6 1821:23 <b>fastest</b> 1824:21 <b>fatal</b> 1733:20 <b>favor</b> 1837:22 <b>February</b> 1758:2 <b>federal</b> 1734:11,23 1776:7 1778:19,22 <b>fee</b> 1828:14 <b>Feel</b> 1749:15 <b>feet</b> 1771:21 <b>Figueroa</b> 1729:15 <b>figure</b> 1830:7,9 <b>filed</b> 1812:5 <b>final</b> 1735:10 1835:9,19 1836:13 <b>finally</b> 1803:15 <b>finance</b> 1775:2 <b>financial</b> 1796:23 1808:7 1813:3,21 1814:19 1815:13 1818:10 1826:1 1829:24 <b>find</b> 1743:8 1772:15 1795:3 1836:4 <b>fine</b> 1779:21 1809:23 1817:3 1819:11 1824:4,13 1838:8 <b>finish</b> 1765:20 1839:3 <b>finished</b> 1812:15 <b>finishes</b> 1837:20 <b>first</b> 1746:24 1747:16 1754:11 1777:8 1779:20 1796:9 1802:19 1804:3,5 1805:2 1807:15,18,20 1815:8 1830:16 <b>fiscal</b> 1731:9 1813:17 1814:17 1815:6 1829:12 1832:25 <b>five</b> 1762:22 1802:25 1833:12,13 <b>flag</b> 1830:5 <b>flexibility</b> 1736:5 1776:17 <b>Floor</b> 1728:24 1729:15 <b>flowing</b> 1755:8 1831:3 <b>flows</b> 1830:25 <b>fluctuate</b> 1739:3 <b>fluctuates</b> 1740:7 <b>focusing</b> 1803:24 <b>folks</b> 1787:16 <b>follows</b> 1733:8 1796:3 1811:6 <b>Footnote</b> 1827:8 1828:12,16 1829:8,19 1830:16 <b>forget</b> 1823:24 <b>form</b> 1731:8	<b>formulas</b> 1830:12 <b>forth</b> 1802:21,22 1807:21 1808:4 1813:2 1814:20 1815:13 1817:13,15 1819:14 1821:22 1828:17 <b>forward</b> 1774:14,16 1775:4,19 1776:8,16 1777:2,13,23 1779:6 1790:24 1791:4,9 1792:10,17,24 1829:1 <b>forwarded</b> 1787:24 <b>forwards</b> 1774:11 <b>foundation</b> 1738:5,8,20 1740:12 1742:6 1744:17 1746:7,20 1749:16 1755:11,15 1755:16 1756:5,24 1757:21 1758:5 1759:8,9,11 1773:12 1773:16 1791:24 1792:1,8,12,13 1801:7,20 1804:24 1811:21 1819:25 1820:8 1821:10 1822:12 1827:13 1837:5 <b>four</b> 1758:9 1802:23,25 1803:9,14 1814:2 1821:18 1838:18 <b>fourth</b> 1824:10 <b>frame</b> 1777:10 <b>framed</b> 1798:22 <b>Francisco</b> 1728:2,17,18 1728:24 1729:6 1732:1 1811:1 <b>frankly</b> 1733:19 <b>free</b> 1749:15 1793:19 <b>front</b> 1809:7 1812:25 <b>full</b> 1735:14 1738:25 1789:3,5 1802:25 1803:12 1818:17 1826:19 1828:22 <b>function</b> 1830:12 <b>further</b> 1790:18 1811:6 1840:15 <b>future</b> 1791:15 <b>futures</b> 1791:10	<b>Generally</b> 1749:18 <b>generate</b> 1734:7 <b>generates</b> 1831:4 <b>generating</b> 1830:24 <b>generation</b> 1787:4 <b>generators</b> 1830:24 <b>gesture</b> 1824:5 <b>getting</b> 1817:6 1826:22 <b>give</b> 1732:24 1740:8 1769:17 1797:15,19 1801:2 1811:21 1830:11 1835:20 1838:18 <b>given</b> 1821:24 <b>go</b> 1734:5 1735:2 1737:9 1738:22 1741:1,17 1742:16,19 1746:1,25 1748:5 1750:11 1755:4,5 1756:13 1760:1 1770:4 1782:10 1787:14 1794:14 1795:7,10,16 1804:17 1821:16 1832:22 1836:6 1837:11 <b>goal</b> 1826:22 <b>goes</b> 1739:9 1745:6 <b>going</b> 1733:20 1738:19 1739:14,15,21 1740:6 1740:9 1742:7,12,22 1744:18 1749:5 1755:6 1757:24 1758:11 1769:1 1771:9 1772:7,12 1777:1 1791:9 1792:24 1793:7 1798:14 1801:11,24 1801:25 1802:1,4 1807:11 1812:9 1816:16,21 1820:1,3 1827:2 1835:22 1836:6 <b>Goldberg</b> 1729:5 1733:12 1737:20 1738:4 1740:21 1742:5,10 1743:3,25 1744:5,16 1745:15,23 1746:6,20 1747:23 1749:13 1750:7,22 1751:2,14,23 1752:8 1752:12 1753:3 1755:10 1756:6,23 1757:6,12,20 1758:4 1758:13 1759:4,8,18 1760:7,10,11 1762:1 1765:7,12,19 1767:22 1769:4 1770:22 1773:6,10,19,22	1774:14,19 1775:1 1779:12,18 1784:20 1785:14 1787:14 1790:13,18 1791:23 1792:8,12 1793:1 1794:1,9,11,16,25 1795:15,20 1812:12 <b>good</b> 1732:6,7 1741:4 1779:12 1809:21 1811:8,9 1834:6 1837:20 <b>Government</b> 1734:12 1734:24 <b>granted</b> 1756:8 1831:18 <b>graph</b> 1739:20 1740:16 1787:3 <b>great</b> 1834:17 <b>grounds</b> 1811:20 <b>group</b> 1820:14 1827:23 <b>grouping</b> 1830:19 <b>guess</b> 1824:17 1836:13 <b>guidance</b> 1759:22	
<b>F</b>					
<b>facilitating</b> 1801:12 <b>facilities</b> 1754:14 <b>fact</b> 1738:8,9 1742:7 1749:22 1753:21 1760:6 1763:10,18 1768:6 1769:8,19 1775:7 1777:8 1778:3 1782:12 1783:20 1785:16 1789:18 1826:16 1828:8 1834:21 <b>facts</b> 1807:3 <b>fair</b> 1739:23 1799:23 1800:1,15 <b>fairness</b> 1836:21 <b>familiar</b> 1747:18 1755:21,23,24 1770:14,15 1774:16 1809:10 1821:5 1826:2 <b>far</b> 1758:22 1768:22	<b>fiscal</b> 1731:9 1813:17 1814:17 1815:6 1829:12 1832:25 <b>five</b> 1762:22 1802:25 1833:12,13 <b>flag</b> 1830:5 <b>flexibility</b> 1736:5 1776:17 <b>Floor</b> 1728:24 1729:15 <b>flowing</b> 1755:8 1831:3 <b>flows</b> 1830:25 <b>fluctuate</b> 1739:3 <b>fluctuates</b> 1740:7 <b>focusing</b> 1803:24 <b>folks</b> 1787:16 <b>follows</b> 1733:8 1796:3 1811:6 <b>Footnote</b> 1827:8 1828:12,16 1829:8,19 1830:16 <b>forget</b> 1823:24 <b>form</b> 1731:8	<b>G</b>	<b>GANS</b> 1729:13 <b>Gardner</b> 1786:12,15,20 1786:24 1787:17,18 <b>GARY</b> 1729:13 <b>general</b> 1729:17 1796:25 1827:11,15 1828:1,15	<b>Goldberg</b> 1729:5 1733:12 1737:20 1738:4 1740:21 1742:5,10 1743:3,25 1744:5,16 1745:15,23 1746:6,20 1747:23 1749:13 1750:7,22 1751:2,14,23 1752:8 1752:12 1753:3 1755:10 1756:6,23 1757:6,12,20 1758:4 1758:13 1759:4,8,18 1760:7,10,11 1762:1 1765:7,12,19 1767:22 1769:4 1770:22 1773:6,10,19,22	<b>H</b>
				<b>HADLOCK</b> 1729:4 <b>half</b> 1732:14,20,21,22 1732:23,25 <b>hand</b> 1742:19,22 1760:12 1840:17 <b>happening</b> 1777:4,12 <b>happens</b> 1733:20 1738:1 1794:22 <b>happy</b> 1759:23 1812:17 1837:10,13 <b>Havas</b> 1771:1 1784:23 <b>head</b> 1792:18,20,23 <b>headquarters</b> 1782:16 <b>hear</b> 1798:8 1800:19,21 1817:9 <b>heard</b> 1800:22 1801:10 <b>hearing</b> 1836:10 <b>hearsay</b> 1742:6 1773:15 <b>heart</b> 1835:7 <b>helpful</b> 1740:5 1806:9 1819:8 1834:9 <b>helps</b> 1776:18 <b>heretofore</b> 1814:3 <b>higher</b> 1736:23 <b>highest</b> 1737:16 <b>highlight</b> 1739:19 <b>highlighted</b> 1743:22 1803:10 1812:13 <b>hindsight</b> 1791:20 <b>historical</b> 1795:5 <b>historically</b> 1774:3 1792:5	

<b>Hon</b> 1732:4 1811:3	1766:14,16 1767:5	<b>installations</b> 1734:12	<b>jury</b> 1806:23 1830:8	<b>known</b> 1793:6
<b>Honor</b> 1732:7 1733:22	1768:2,3 1783:25	<b>installments</b> 1771:17		<b>knows</b> 1755:16 1771:24
1737:20 1738:4	1784:22 1785:18	<b>insurance</b> 1775:2	<b>K</b>	1772:2,7,8
1740:21 1742:5,18	1788:7 1789:10	1791:5,16,18	<b>K-1</b> 1827:6	
1745:15 1749:25	1790:9	<b>insure</b> 1799:2	<b>K-17</b> 1825:4	<b>L</b>
1750:7 1751:14,23	<b>imagine</b> 1836:14	<b>insuring</b> 1791:5	<b>K-18</b> 1825:9	<b>labeled</b> 1809:9
1755:10 1756:6,11	<b>impact</b> 1797:10,15,19	<b>intake</b> 1771:1 1784:23	<b>K-2</b> 1828:11	<b>lack</b> 1744:17 1746:7,20
1757:25 1758:13	1818:1 1826:1	<b>integers</b> 1827:17	<b>K-3</b> 1828:18	1757:20 1759:8
1759:15,18 1760:7	<b>impacts</b> 1798:2 1805:4	<b>integrity</b> 1799:7	<b>K-4</b> 1829:6,7,16	1791:24
1761:21 1765:4,10,15	<b>improper</b> 1820:7	<b>intention</b> 1801:21	<b>Karnow</b> 1728:3 1732:4	<b>lacks</b> 1738:4 1755:10
1770:20 1779:12,18	<b>in-house</b> 1763:14,16,25	<b>interact</b> 1755:19	1811:3	1773:15 1792:8,12
1785:8 1787:9	1764:8	<b>interested</b> 1728:10	<b>keep</b> 1736:21 1836:6,8	<b>laid</b> 1738:8 1740:12
1790:20 1794:9,21,25	<b>included</b> 1828:24	1840:15	<b>keeping</b> 1811:14	1801:7
1795:20 1796:7	<b>includes</b> 1768:1	<b>internal</b> 1749:12,18	<b>keeps</b> 1838:17	<b>Lake</b> 1771:1 1784:23
1799:16 1801:4	1785:17 1793:11	1822:14	<b>Keker</b> 1729:3,3 1732:7	<b>Lambeck</b> 1730:4
1804:11 1806:24	1829:2	<b>internally</b> 1749:6	1732:10,20 1733:1	1731:8 1733:6 1734:3
1807:10 1809:23	<b>including</b> 1789:10	<b>interpret</b> 1782:6	1798:8,12 1799:15,21	1747:11 1756:13
1811:9,13 1813:7,25	1828:9	<b>interpreting</b> 1822:14	1801:5 1804:11,24	1759:23 1779:22
1816:11 1817:5,20	<b>inclusion</b> 1808:12	<b>interrogatory</b> 1800:11	1805:15 1806:6	1785:21 1811:17
1819:13 1821:2	<b>income</b> 1798:23	<b>interrupt</b> 1765:19	1807:10 1811:9,13	1836:1
1822:11,23 1831:6	<b>incomprehensible</b>	<b>Interruption</b> 1811:11	1814:5 1816:11	<b>Lambeck's</b> 1759:20
1833:25 1834:2,6	1798:13	<b>introduced</b> 1834:19	1817:5,20 1818:4,16	1790:14
1835:6 1837:21,22	<b>incorporating</b> 1793:14	<b>introducing</b> 1801:6	1818:21 1819:2,17,23	<b>lately</b> 1738:25
1838:4,8,21 1839:7	<b>increase</b> 1775:3 1777:5	<b>invested</b> 1837:14	1821:2,10 1822:11,22	<b>lawyer</b> 1733:12
<b>HONORABLE</b> 1728:3	<b>increasing</b> 1791:6,18	<b>involve</b> 1807:2,22	1823:21 1824:25	1761:18 1762:1
<b>Hoover</b> 1734:21,24	<b>increments</b> 1772:3	1808:11	1825:15,22 1826:4,8	<b>lawyers</b> 1763:8,24
1735:15 1736:11	<b>incurred</b> 1799:9	<b>involved</b> 1763:25	1826:20 1827:12	1822:22
1778:20 1793:13	<b>index</b> 1741:8 1762:23	<b>irritating</b> 1733:19	1829:21 1830:2	<b>lay</b> 1738:20 1749:15
<b>horse</b> 1801:6	1768:7 1781:25	<b>issue</b> 1732:8 1770:12	1831:6,11,16 1832:6	1755:16 1808:24
<b>hour</b> 1732:13,14,21,21	<b>indicated</b> 1814:4	<b>issues</b> 1794:18 1835:8	1832:16,19 1833:19	1837:4
1732:22,23,25	<b>indicates</b> 1732:12	<b>item</b> 1804:1	1833:25 1835:18	<b>leading</b> 1743:25 1757:6
1743:24 1744:3,14,23	<b>indication</b> 1741:13	<b>items</b> 1824:12	1836:13,24 1837:19	1758:4 1807:11
1751:21,24 1752:7	1754:25		1838:3,4,6,17,18	1818:21 1823:21
1757:3	<b>indicative</b> 1762:24	<b>J</b>	<b>Keker's</b> 1806:10	1825:15 1832:6,6,7
<b>hours</b> 1732:11,13	<b>individual</b> 1771:11	<b>J-U-N-E</b> 1796:12	1817:4	<b>leave</b> 1749:23
1747:6,8,10 1757:4	<b>influences</b> 1740:10	<b>Jan</b> 1728:22 1771:9	<b>kind</b> 1741:14	<b>left</b> 1737:18 1741:9
1764:12,17,21	<b>info</b> 1786:3	<b>January</b> 1728:12,12	<b>know</b> 1737:22 1739:5	1800:24 1831:8
1766:17 1767:11,24	<b>inform</b> 1821:8	1744:4,15,23 1755:9	1739:14 1740:5	<b>legal</b> 1794:10,18
1768:4 1781:1	<b>information</b> 1739:22	1758:1 1769:10	1744:24 1745:4	<b>let's</b> 1737:7 1746:16
1793:17 1800:23	1741:16,20,25 1742:4	<b>jkeker@kvn.com</b>	1749:17 1750:13	1750:15 1752:14
<b>How's</b> 1732:25	1742:18,22 1743:2,9	1729:8	1759:9 1764:2,4,8,22	1762:5 1767:16,17
<b>human</b> 1733:17	1743:12 1745:2	<b>job</b> 1756:1 1796:22,25	1764:23,24 1765:2,7	1769:2 1779:17
<b>hydro</b> 1776:7 1778:20	1748:2,9 1749:1	<b>jogs</b> 1787:18	1765:17,21 1766:20	1802:11 1818:17
1778:23 1793:13	1753:14,17,18 1786:8	<b>JOHN</b> 1729:3,13	1766:25 1768:23	1836:4,8
<b>hydroelectric</b> 1829:13	1802:21,22 1804:4,21	<b>johnquinn@quinne...</b>	1770:22 1771:2,11	<b>letter</b> 1731:4 1771:3
1830:20,22,24 1831:9	1804:22 1805:13,19	1729:16	1772:21 1780:11,21	1803:20 1809:14
<b>I</b>	1807:3 1808:4,4,7,11	<b>Jon</b> 1730:4 1733:6	1781:2,17,17,20,23	1813:16
<b>ID</b> 1731:2	1813:3,22 1814:20	1811:17	1782:4,8,10,12,15,17	<b>light</b> 1800:6 1833:15
<b>idea</b> 1742:6	1815:13 1816:5	<b>JOSEPH</b> 1729:18	1782:20,21,22 1787:1	<b>line</b> 1802:25 1803:7,12
<b>identification</b> 1757:25	1817:19 1827:21,22	<b>judge</b> 1732:4 1762:2	1787:6 1789:23	1803:13,13,15,16,22
1799:14 1802:14	1829:19 1835:21	1811:3	1792:13,16 1793:2,3	1804:1 1805:24
1815:19,24 1816:1	<b>infrequent</b> 1762:18	<b>judges</b> 1806:15	1799:24 1804:7	1819:15 1833:12,13
1827:4	<b>infrequently</b> 1761:8	<b>judgment</b> 1816:15,23	1809:22 1812:16	<b>lines</b> 1761:4 1802:24
<b>identified</b> 1818:14	1762:14	1819:4	1813:7 1817:11	1803:3,7,18 1818:25
<b>identity</b> 1833:9	<b>inputs</b> 1768:14	<b>June</b> 1730:6 1759:6,10	1820:20 1822:15,19	<b>lining</b> 1764:16,21
<b>IID</b> 1764:16,20	<b>inserted</b> 1745:25	1759:13 1796:1,11	1834:14 1836:18,24	1765:13,25 1766:7,14
1765:13,18,25 1766:6	<b>insight</b> 1733:15	1811:5	<b>knowing</b> 1792:22	1766:16 1767:5
	<b>inspect</b> 1834:15	<b>juries</b> 1806:14	<b>knowledge</b> 1823:6,13	1768:2,3 1784:1,22



1785:18 1788:8 1789:11 1790:9 <b>linked</b> 1824:7 <b>list</b> 1773:20 <b>literally</b> 1784:21 <b>litigation</b> 1755:25 1756:3 1763:12,25 1804:5 <b>little</b> 1735:19 1742:17 1748:7 1770:2 1777:22 1789:1 1837:23 <b>located</b> 1734:25 1754:15 <b>locational</b> 1754:25 <b>lock</b> 1775:20 1791:8 <b>long</b> 1732:22 1742:1 1745:23 <b>long-time</b> 1830:13 <b>longer</b> 1806:4 <b>look</b> 1734:16 1736:8 1739:22 1741:8 1748:7 1750:2 1758:8 1761:1 1762:21 1769:15 1777:19 1779:25 1785:20 1795:1 1816:17 1824:1 <b>looked</b> 1759:21 1761:17 1768:6 1777:6,8 <b>looking</b> 1768:18 1778:10 1786:3,7 1788:14,17 1792:5 1793:4 1819:10 1821:22 1822:21 <b>looks</b> 1768:14 1787:3 <b>Los</b> 1729:15,19 <b>lot</b> 1785:14 1789:13,15 1822:12 <b>low-cost</b> 1793:13 <b>lower</b> 1785:13,14,15 <b>lowest</b> 1736:6,9 1772:16 1784:12 <b>lunch</b> 1812:23	1802:13 1805:9 1815:12,18,23 1816:1 1821:6 1827:3 <b>marked-up</b> 1811:19 <b>market</b> 1731:3 1736:13 1737:9 1738:19,22 1739:6,13,23,23 1740:6,8,13 1741:6,7 1741:9,24 1742:3,21 1743:2,10 1744:25 1745:1,3 1762:24 1764:14 1768:7 1769:23 1772:13 1773:25 1774:1,9 1776:1,24 1777:1,3 1777:15 1779:3 1782:19 1783:7 1784:15 1785:7 1788:4,15,17,18 1789:13,16 1791:8 1792:7,17,25 1793:6 1794:14 1828:13 <b>market-priced</b> 1736:19 <b>marketplace</b> 1744:11 1751:9 1774:12 1791:9 <b>markets</b> 1769:25 <b>marking</b> 1801:15 <b>matching</b> 1760:4 <b>math</b> 1783:19 1802:1 1819:12 1827:16 <b>mathematical</b> 1752:6 <b>Mathematically</b> 1818:13 <b>mathematics</b> 1758:20 <b>matter</b> 1749:19 <b>Matusak</b> 1771:9,10 <b>maximize</b> 1737:2,5 <b>mean</b> 1741:5 1765:19 <b>meaningful</b> 1824:5 <b>means</b> 1751:7 1780:22 1780:23 1781:18,23 1781:24 1787:6 1816:16 1820:20 <b>meant</b> 1770:3 <b>measurable</b> 1823:15 <b>measure</b> 1805:3 <b>mechanically</b> 1824:3 1824:10,20 <b>media</b> 1785:24 <b>meet</b> 1776:5 <b>meeting</b> 1813:14,16 <b>megawatt</b> 1743:24 1744:3,13,22 1752:7 1757:3,4 1780:25 1793:17 <b>megawatt-hour</b> 1744:12	<b>melded</b> 1783:8,11 1784:9,16 1785:2,5 1785:11,13 1788:10 1789:6 1790:11 1793:9,9,11,16,23 1794:8 1795:9 <b>member</b> 1736:7 1738:2 1767:10 1772:16 1784:3,13 <b>memo</b> 1774:20 1775:1 <b>mention</b> 1779:6,9 <b>mentioned</b> 1774:14 <b>merely</b> 1748:1 <b>met</b> 1760:14,21 1761:6 1761:11 1762:12,17 1764:15,20,25 1765:7 1765:12,24 1766:9,15 1767:8 1768:14 1769:9 1770:7,24 1771:13,24 1772:1,6 1772:7,11 1773:24 1774:8,20 1776:1,23 1783:20,21,23 1784:15 1786:18,20 1787:16 1788:12 1789:18 1790:6 1793:24 1794:4 1800:2,5 1822:17 <b>Met's</b> 1763:7,11,24 1765:25 1767:9,23 1768:15 1769:21 1774:16 1775:8 1778:16 1784:6,8,13 1784:24 <b>methodologies</b> 1754:18 <b>methodology</b> 1823:8 <b>Metropolitan</b> 1728:9 1728:11 1729:11 1734:7,23 1736:2 1737:17 1738:2,15,16 1740:19 1745:11 1746:24 1753:9,17,23 1753:25 1754:24 1765:21 1772:3 1775:19 1776:16 1777:21 1784:23 1785:22 1791:21 1792:6 1793:24 1796:20 1797:11,17 1797:21 1798:1 1799:9 1803:5,17 1807:5 1808:9,21,25 1827:11 1828:4,15,24 1830:17 1832:1,24 1833:3,14,24 <b>Metropolitan's</b> 1737:10,11 1766:7 1771:1 1783:14	1784:4 1785:17 1797:3 1802:22,25 1829:5 1830:23 1831:21 <b>middle</b> 1743:16,21 1805:8 <b>midway</b> 1789:25 <b>Mike</b> 1786:12 1787:17 <b>million</b> 1788:5,6,21,25 1822:16 <b>mind</b> 1738:10 1760:2 1767:18 1792:15 1819:12 <b>minimize</b> 1737:2,5 <b>minus</b> 1829:12 1830:20 <b>minute</b> 1756:11 <b>minutes</b> 1732:11,12,13 1732:14,21 1779:15 1820:16 1834:5 1838:19 <b>misspeaking</b> 1761:20 <b>misspoke</b> 1747:12 1760:17 1761:16 1792:2 <b>misstatement</b> 1747:15 <b>mistake</b> 1747:14 <b>misunderstand</b> 1762:14 <b>misunderstood</b> 1761:24 1762:9 <b>moment</b> 1734:6 1766:11 1777:17 1785:1 <b>Monday</b> 1764:13 <b>Monday-morning</b> 1793:5 <b>monitor</b> 1734:16 <b>month</b> 1743:24 1744:14,23 1751:11 1757:11,19 1771:18 1781:14 1821:18 <b>monthly</b> 1748:15,19,22 1748:22,24 1771:17 1772:3 1823:10 <b>months</b> 1747:21 1775:21 1776:2 <b>morning</b> 1732:6,7 1800:18,24 1835:13 1836:23 1838:24 <b>motion</b> 1756:8 1759:22 1759:24,25 1760:3 1802:10 1811:16 1831:17 <b>motions</b> 1811:15 1812:15 <b>move</b> 1735:16 1736:3 1737:1,8,10,11,18 1738:2,13,16 1740:19	1747:1,2,10 1756:6 1757:4 1760:15,22 1766:12 1773:7 1774:20 1784:1,12 1788:4,24 1789:1 1790:13 1800:17 1806:6 1814:3 1816:11 1819:18 1826:20 1831:16 1835:9 1839:5 <b>moved</b> 1741:12 1765:8 1765:13,18,22 1766:9 1766:15 1767:1,5,8,9 1767:20,23 1788:7 <b>movement</b> 1747:3,5 1794:3 <b>moves</b> 1765:2 1766:4 1767:11 1768:3 1783:22 <b>moving</b> 1735:19 1740:10 1747:7 1759:19 1762:7 1766:1 1778:17 1783:12,14,23 1790:8 1811:24 <b>muddle</b> 1806:19 <b>Muir</b> 1786:15,16,17 <b>multiplication</b> 1802:7 <b>multiply</b> 1757:3 <b>MWD</b> 1731:7,9 1786:16 1799:24 1827:15
<hr/> <b>M</b> <hr/>				
<b>maintained</b> 1752:20 1828:3 <b>making</b> 1782:18 <b>management</b> 1820:14 1827:23 <b>manager</b> 1796:23 1829:25 <b>March</b> 1800:21 1814:18 1815:8 <b>mark</b> 1757:24 <b>marked</b> 1799:13				
<hr/> <b>N</b> <hr/>				
				<b>N</b> 1730:1 <b>name</b> 1796:7,10,11,14 <b>named</b> 1840:12 <b>narrower</b> 1735:6 <b>near</b> 1789:3,5 <b>necessarily</b> 1766:15 1806:13 <b>need</b> 1739:5 1746:3,12 1748:17 1770:5 1772:11 1775:21 1776:23 1798:22 1799:2 1817:9 1830:1 1837:4 <b>needed</b> 1760:14,21 1777:23 1793:17 1826:19 <b>needs</b> 1746:24 1776:2,5 <b>negotiate</b> 1741:7 1742:19 <b>negotiating</b> 1739:12 1740:11 1768:14 <b>negotiation</b> 1739:9,15 1739:21 1740:6 1741:21 1742:20,22

<p>1743:1 1751:8  <b>negotiations</b> 1743:7  <b>NEST</b> 1729:3  <b>net</b> 1800:17 1819:11  1831:13  <b>netted</b> 1824:12  <b>neutral</b> 1791:1  <b>neutrality</b> 1798:24  1799:1 1800:17  <b>never</b> 1750:8 1751:24  1764:15,20 1790:24  1800:7,8,13  <b>new</b> 1733:15 1800:14  <b>next-to-last</b> 1758:9  <b>ngoldberg@kvn.com</b>  1729:9  <b>NICHOLAS</b> 1729:5  <b>Nick</b> 1760:11  <b>night</b> 1765:9 1836:8  <b>nine</b> 1838:7,11,20,20  <b>non</b> 1774:5  <b>non-member</b> 1752:19  1752:25  <b>non-Met</b> 1746:17  1747:1,3 1760:23  1762:7 1783:15,22  <b>non-Metropolitan</b>  1737:18 1738:13,17  1747:14 1760:15  <b>non-MWD</b> 1762:25  <b>nonexpert</b> 1836:5  <b>Noon</b> 1810:1  <b>normal</b> 1828:7  <b>normally</b> 1808:8  <b>North</b> 1729:18  <b>note</b> 1803:19 1805:24  1814:4  <b>notice</b> 1770:8,24  1771:5  <b>notion</b> 1800:14 1816:14  1816:22  <b>number</b> 1731:2  1743:14,15,15 1744:3  1745:14 1752:11  1755:6 1757:4  1759:11 1769:12  1772:22 1780:3  1782:24 1783:2  1792:23 1803:22  1820:12 1823:5  1824:2,2,10 1825:5,8  1827:8,21 1828:11,17  1829:6,7,16  <b>numbers</b> 1740:16  1744:9,19 1755:14  1757:16 1758:9  1768:22 1782:11,13  1782:16,18 1792:18</p>	<p>1816:17,19 1817:6,13  1817:14 1818:14  1819:14 1820:5  1822:15 1824:6,15,18  1833:9 1834:11,24  <b>numerous</b> 1755:13</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>o'clock</b> 1838:7,11,20,20  <b>oath</b> 1734:3  <b>object</b> 1750:9 1755:13  1769:1 1804:14  1806:7 1807:11  1811:20 1824:25  1827:12  <b>objection</b> 1733:2,3  1737:20 1738:4  1740:21 1742:5  1743:3,25 1744:5,16  1745:15 1746:6,20  1747:23 1749:13  1750:7,22 1751:2,14  1751:23 1752:8,12  1753:3 1755:10  1756:4,23 1757:6  1758:4,13,23 1761:21  1765:4,15 1770:20  1773:8,17 1774:22,23  1785:8 1790:15  1791:23 1793:1  1794:9,16,25 1798:12  1798:15 1802:9  1804:11,24 1805:15  1807:10,23 1812:8  1814:4,5 1816:11  1817:4,20 1818:4,16  1818:21 1819:2,17  1821:10 1822:11  1823:11,21 1825:15  1825:17,22 1826:4,8  1826:20 1827:1,18  1829:21 1830:2  1831:6,11,16 1832:6  1832:16 1833:19,25  1835:17 1836:10  <b>objections</b> 1757:7,12  1757:20 1758:5  1795:15 1799:16,17  1806:11 1812:6  <b>objective</b> 1798:20  1799:10  <b>objectives</b> 1798:7,8,9  1808:13 1830:1  <b>obligated</b> 1791:14  <b>obligation</b> 1775:3  <b>obtain</b> 1745:7  <b>obviously</b> 1835:6,7  <b>occasion</b> 1749:11</p>	<p>1774:11  <b>occurring</b> 1747:4,5  <b>occurs</b> 1751:10  <b>October</b> 1771:4  <b>off-aqueduct</b> 1754:5,13  1754:16  <b>off-peak</b> 1736:25  1737:3,10,12,14  1741:3 1743:12  1745:12,19 1746:4,12  1746:13 1747:8,10,13  1760:16 1761:1  1762:8 1764:12,17,21  1765:2 1766:10,16  1767:6,11,24 1768:4  1768:19 1769:12  1780:15 1795:13  <b>offer</b> 1739:12  <b>offered</b> 1812:7  <b>OFFICE</b> 1729:17  <b>Oh</b> 1774:18  <b>okay</b> 1733:1,23 1783:6  1835:11 1837:25  1839:2  <b>Oliver</b> 1729:14 1796:7  1796:8,14,14,19  1798:9,17 1799:12,19  1801:3,4,23 1802:5  1802:12 1804:18  1805:2,21 1806:24  1807:17,19,25  1809:23 1811:10,14  1812:22 1813:7,25  1814:11,24 1815:17  1816:25 1817:12,13  1817:23 1818:8,18,19  1818:24 1819:13  1820:21,22,25 1821:4  1821:13,22 1823:14  1824:22 1825:5,19,25  1826:6 1827:2,20  1829:24 1830:15  1831:8,19 1832:12,18  1833:5,21  <b>on-peak</b> 1736:25  1737:10,14,15  1743:11,15,19  1744:14 1745:9  1747:1,2,6 1756:17  1762:13,18,23 1765:1  1768:18 1769:9  1779:3 1783:7 1785:7  1785:12 1788:18  1789:14,15 1795:13  1795:17  <b>one-day</b> 1741:15  <b>ones</b> 1736:9,9 1834:10  <b>operations</b> 1823:7</p>	<p><b>opinion</b> 1744:20 1800:8  1819:6,18 1820:2  1821:11 1824:19  1825:1 1826:9 1830:6  1830:10  <b>opposing</b> 1733:19  <b>optimize</b> 1736:4  <b>order</b> 1775:18 1808:14  1812:5 1827:8  1835:18 1836:3,7,9  1836:18  <b>ought</b> 1764:25 1770:19  1836:6  <b>outside</b> 1763:13,25  1764:2 1822:24  <b>overall</b> 1736:6 1740:25  1772:16  <b>overrule</b> 1798:15  1817:4  <b>overruled</b> 1737:21  1740:25 1744:21  1746:8,22 1750:10  1751:4,18 1752:1,9  1753:5 1756:25  1757:8,13,22 1758:6  1758:23 1759:5,14  1761:23 1765:16  1787:12 1793:3  1794:2 1795:4,16  1802:9 1804:15,25  1805:17 1807:24  1818:6,22 1819:19  1825:2 1826:11  1827:1,19 1831:12  1832:7,21  <b>overruling</b> 1806:10</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1764:13 1765:8  1839:9  <b>page</b> 1743:16,22  1747:16 1762:22  1776:4 1777:20  1802:20 1804:3  1807:15 1808:1  1821:23  <b>pages</b> 1728:13 1747:17  1747:20 1748:14,18  1769:15  <b>paid</b> 1751:21 1753:2  1762:25 1792:16  <b>paragraph</b> 1788:2  1811:25,25 1812:1,2  <b>Parker</b> 1734:22,25  1735:15 1736:12  1778:23 1793:13  <b>part</b> 1740:14 1752:24  1760:2 1763:5</p>	<p>1777:19 1786:12  1805:8 1812:4 1815:9  1831:25  <b>partially</b> 1809:19  <b>participants</b> 1745:2,4  <b>participate</b> 1764:9  <b>participated</b> 1764:1,3  <b>particular</b> 1748:25  1804:15 1807:13  1831:14  <b>parties</b> 1743:8 1751:11  <b>parts</b> 1811:16  <b>party</b> 1738:1 1746:17  1760:14,22 1794:5  1795:8  <b>pause</b> 1767:17  <b>payment</b> 1775:3  <b>pays</b> 1753:25  <b>peak</b> 1761:7  <b>people</b> 1733:18 1744:7  1751:21 1802:16  1823:7 1824:4  <b>percent</b> 1777:22 1778:4  1778:5,6  <b>percipient</b> 1749:16  1820:6 1836:5,25  <b>performance</b> 1807:4,9  <b>performed</b> 1827:7  1828:6  <b>performing</b> 1808:8  <b>period</b> 1737:3 1746:12  1789:17 1792:9,10  1812:6  <b>periods</b> 1736:23  1746:11  <b>permission</b> 1733:10  1811:13 1835:8  <b>personally</b> 1787:2  1824:18  <b>PERSONS</b> 1728:10  <b>pertain</b> 1816:6 1818:19  <b>pertaining</b> 1797:11  1813:22 1815:15  <b>pertains</b> 1816:7  <b>pertinent</b> 1749:20  <b>Petitioner</b> 1728:7  1729:2  <b>phase</b> 1797:9 1800:7  1804:5 1814:6 1816:9  1818:3 1825:12  1833:16  <b>pie</b> 1734:16,17 1735:2  1736:8 1793:18  <b>piece</b> 1819:25 1829:19  <b>pieces</b> 1741:16  <b>pipeline</b> 1830:25  <b>place</b> 1781:8 1797:11  1798:1,1 1840:12</p>
---	---	---	---	---

<p><b>Plaintiff</b> 1728:7 1729:2  <b>planning</b> 1796:24  <b>plant</b> 1778:20,23  <b>Platts</b> 1741:24 1742:2  1745:2,6 1762:23  1768:7,9,13,24  1769:6,19 1777:7  1779:19,23 1782:8,15  1782:15  <b>please</b> 1738:12 1739:18  1739:20 1765:20  1785:20 1796:6  1799:19  <b>plugged</b> 1817:7  <b>plus</b> 1828:14 1829:12  <b>point</b> 1741:5 1743:14  1791:15  <b>points</b> 1754:23 1782:20  1831:23  <b>policy</b> 1791:5,16  <b>pool</b> 1798:18  <b>pools</b> 1808:12  <b>pop</b> 1800:14,18  <b>portion</b> 1823:19  1830:16,17 1832:4  <b>posed</b> 1823:4  <b>position</b> 1769:20  1773:14,14 1835:23  <b>possible</b> 1798:2 1805:3  <b>postpone</b> 1837:17,19  <b>power</b> 1731:3 1733:16  1734:5,7,10,24  1735:20,23,24 1736:2  1736:5,16,19,19,23  1737:4,12,13,14,17  1737:18 1738:3,14,15  1738:16,20,22,25  1739:1,3,5,6,10,12,22  1739:24 1740:11,17  1740:23 1741:2,12,18  1741:21 1742:12  1743:24 1744:4,11  1745:19 1746:3,13,17  1746:18 1747:1,2  1748:10,18,21,22,25  1749:7,12 1750:3,6  1750:19,22,25 1751:2  1751:9 1752:5  1753:14 1754:2,5,5,9  1754:17 1758:17  1760:14,22,25 1761:6  1761:25 1762:13,18  1768:15 1769:10,22  1770:4 1772:13,25  1773:25 1774:1,4,6,7  1774:8,11 1776:1,23  1776:24,25 1777:13  1778:19,22 1783:8,12</p>	<p>1784:9,12,16 1785:2  1785:5,7,11 1786:3,8  1786:21 1787:4  1788:3,4,11,15  1789:6,19,21 1790:1  1790:3,6,8,24 1791:4  1791:6,8,14 1792:6  1793:10,19 1794:15  1795:11,12,18  1797:21 1805:25  1806:4 1818:25  1819:16 1825:11  1826:7,12 1828:13  <b>Powerplant</b> 1734:25,25  <b>practice</b> 1733:21  1795:5  <b>preceding</b> 1740:2,6  <b>preface</b> 1830:4  <b>preference</b> 1838:3  <b>prefers</b> 1837:11  <b>prejudiced</b> 1836:20  <b>prejudicial</b> 1836:3  <b>preparation</b> 1753:6  1808:3 1809:17  1815:10 1818:10  <b>prepare</b> 1802:17  1808:17  <b>prepared</b> 1812:2  1814:17 1823:6,13  1826:2 1836:20  <b>prerequisite</b> 1834:19  <b>present</b> 1738:24  1801:21,22  <b>presentation</b> 1775:10  1775:12  <b>presentations</b> 1775:7  1775:13  <b>presented</b> 1794:19  1809:20 1815:8  1816:24  <b>presently</b> 1833:23  <b>presents</b> 1805:18  <b>Presumably</b> 1767:13  1767:14  <b>presume</b> 1780:5,25  1781:19,22  <b>presuming</b> 1780:3  <b>pretrial</b> 1812:4  <b>pretty</b> 1741:12 1835:18  <b>previously</b> 1813:8  1814:25 1815:25  1818:8 1834:25  <b>price</b> 1739:3,6,9,23  1740:2,2,5,7,22  1741:6,7,8,9 1742:4  1745:3 1760:15,16,23  1762:7,8,23,24  1765:1 1768:19,24</p>	<p>1769:5,8,9,19,23  1770:18 1773:3  1775:18 1779:4  1781:9,12,25 1782:19  1784:15 1791:8,14,15  1791:19 1803:8  <b>prices</b> 1736:13 1739:13  1740:9 1746:5  1747:13 1748:15  1768:12 1775:20  1776:12,18 1792:1,17  <b>primarily</b> 1808:19  <b>prior</b> 1739:21 1741:11  1741:13,17 1760:3,4  1817:17  <b>probably</b> 1819:6,7  1822:16 1824:16,16  1824:21 1826:9,24  1830:9  <b>proceed</b> 1803:19  <b>proceeded</b> 1804:8  <b>proceedings</b> 1728:16  1811:11 1824:17  1840:11  <b>proceeds</b> 1811:14  <b>process</b> 1745:6 1751:10  1752:24 1763:6,7,15  1763:17 1782:10  1808:25 1809:1  <b>produced</b> 1800:9,13  <b>product</b> 1782:12,14  <b>production</b> 1834:20  <b>program</b> 1774:17  1775:8,15 1777:5  1779:7 1790:25  1792:11,25  <b>programs</b> 1803:4,13  <b>project</b> 1753:16  1754:10,13,15,16,25  1755:3 1786:4,9  1797:16,20,23 1798:7  1798:18 1806:3  1818:1,20 1819:16  1821:20,25 1822:3,5  1822:18 1823:9,20  1825:20 1826:17,17  1827:10,24 1828:5,20  1829:3 1831:23  1833:2  <b>projected</b> 1832:24  <b>projects</b> 1776:7  1825:13  <b>promised</b> 1837:1  <b>prop</b> 1836:1  <b>properly</b> 1800:6  <b>proportions</b> 1823:17  <b>propose</b> 1811:21  <b>proven</b> 1742:3</p>	<p><b>provide</b> 1777:1  1791:13 1819:5  <b>provided</b> 1753:18  1805:19 1809:5  1814:17 1827:22  <b>provides</b> 1741:10  <b>providing</b> 1754:17  <b>PTX</b> 1731:7,8 1734:15  1774:19,22,24,25  1785:20 1789:24  1790:13,17  <b>published</b> 1762:23  <b>pump</b> 1734:5,8 1772:12  <b>pumped</b> 1764:15,20  <b>pumping</b> 1734:19  1735:13 1754:17  1776:5  <b>Purcell</b> 1729:4 1773:20  <b>purchase</b> 1736:19,23  1737:2,3 1738:15  1739:13,22 1746:13  1746:25 1760:14,15  1760:21 1762:7,8  1772:12 1773:25  1775:19 1777:2  1791:4 1792:11,24  1793:16  <b>purchased</b> 1736:19  1791:21 1803:11  <b>purchases</b> 1735:10,11  1736:21 1776:1,5,8  1776:16,17 1777:24  1779:2 1780:19  1788:4,15,18 1793:6  1833:24  <b>purchasing</b> 1736:20  1741:18 1760:25  1761:25  <b>purpose</b> 1783:10,11  1785:2  <b>purposes</b> 1752:19  1766:1 1783:21  1784:4 1788:13  1801:12,15 1802:13  1805:5 1815:14,18,24  <b>pursuant</b> 1759:21  <b>push</b> 1739:16  <b>pushed</b> 1732:15  <b>put</b> 1734:15 1739:18  1741:6 1752:14  1753:1 1761:4 1771:3  1774:19 1779:19  1789:24 1794:20  1799:15 1800:23  1802:2 1824:11  1829:1</p>	<p><b>qualification</b> 1746:16  <b>quality</b> 1823:8  <b>quantity</b> 1775:20  <b>quantities</b> 1771:5  <b>quarterbacking</b> 1793:5  <b>question</b> 1738:7,9,10  1738:11 1741:19  1742:14 1746:16  1748:1 1751:17  1755:18 1758:24  1761:24 1762:2,3,9  1762:15 1764:18  1766:21 1767:2,18  1769:3,16 1770:24  1785:4,9 1791:25  1792:3 1795:4  1798:13 1800:25  1802:24 1803:14  1804:16,18,19,21  1807:13,24 1817:17  1817:24 1818:17  1823:4 1825:18  1832:8,9  <b>questions</b> 1748:13  1755:17 1761:17  1762:4 1770:3 1793:8  1807:11 1812:18  <b>Quinn</b> 1729:12 1733:3  1796:15 1801:25  1812:4 1834:2,6  1835:6,12,16 1836:10  1837:3,7,10,21  1838:8,12,21,25  1839:4,7  <b>QUINN,ESQ</b> 1729:13  <b>quite</b> 1751:16 1773:21  <b>quotations</b> 1806:1,1  <b>quote</b> 1816:22</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 1786:15,16  <b>raise</b> 1732:8 1776:12  <b>range</b> 1742:21 1781:6,7  1781:9,12,15,17,19  <b>rate</b> 1761:7 1762:13  1780:4 1783:7,8  1785:7,11,12,13  1788:18 1789:14,19  1789:21 1790:1,3,6  1791:6 1793:9,10,11  1794:8 1795:10  1797:10,16,21,25  1799:5 1802:23  1804:22 1805:4,25  1806:4 1807:22  1809:15 1818:2,10,15  1825:21 1826:2,19  1828:22 1829:1,9</p>
---	---	---	---	--

**Q**

<p>1833:13,22  <b>rates</b> 1728:10 1731:5  1793:9 1797:3,24  1800:2,15 1803:1,3  1804:4,7 1809:2,4,6  1813:15 1826:13,15  <b>reached</b> 1800:16  <b>read</b> 1744:19 1745:20  1760:20 1788:1  1806:13,22 1836:15  1836:15  <b>reading</b> 1806:16  1823:5  <b>ready</b> 1835:3  <b>reality</b> 1794:22  <b>realize</b> 1837:21  <b>really</b> 1781:23 1782:12  1788:24 1807:20  <b>reason</b> 1733:14  1806:10,19 1813:25  1830:11  <b>reasonable</b> 1799:23  1800:2,15  <b>recall</b> 1775:11 1823:15  <b>Recalling</b> 1793:18  <b>receive</b> 1735:4 1793:13  <b>received</b> 1774:25  1790:17 1803:17  1814:10  <b>receives</b> 1754:24  <b>recess</b> 1779:16 1810:1  1835:5  <b>recessed</b> 1839:9  <b>recognize</b> 1752:15  1802:12 1813:11  1814:13 1815:3,20  <b>recollection</b> 1787:18  <b>record</b> 1744:19  1763:24 1795:23  1796:10 1824:13  1834:8 1836:25  <b>records</b> 1807:3 1808:8  <b>recover</b> 1754:14 1809:2  <b>RECROSS</b> 1730:2  <b>red</b> 1830:5  <b>Redirect</b> 1730:2  1790:19,22  <b>reduce</b> 1775:18  <b>reduced</b> 1840:13  <b>reduces</b> 1791:6  <b>refer</b> 1827:2  <b>reference</b> 1747:13  1804:2  <b>referenced</b> 1815:14  <b>referred</b> 1736:24  <b>referring</b> 1767:7  1805:22 1829:18  <b>refers</b> 1735:4 1754:2,5</p>	<p><b>reflect</b> 1755:7 1758:3  1758:16 1768:23  1817:1,6  <b>reflected</b> 1807:7  <b>reflecting</b> 1748:15  <b>reflection</b> 1758:19  <b>reflects</b> 1769:21  <b>refute</b> 1766:18,20,23  <b>regard</b> 1801:9 1806:1  1827:23 1833:7,15  <b>regarding</b> 1786:8  <b>regardless</b> 1747:3  <b>regular</b> 1752:20  <b>regularly</b> 1828:3  <b>relate</b> 1833:23  <b>relates</b> 1756:7  <b>relating</b> 1818:10  <b>relationship</b> 1798:2  <b>relatively</b> 1740:9  <b>relevance</b> 1814:6  <b>relevant</b> 1824:19  <b>reliability</b> 1801:14  <b>reliable</b> 1742:3,8,13  1743:1,6 1753:19  <b>relied</b> 1828:2  <b>rely</b> 1837:24  <b>remain</b> 1826:24  <b>remaining</b> 1740:9  1747:20  <b>remains</b> 1801:13  <b>remember</b> 1768:7  1804:18  <b>reminded</b> 1773:20  <b>removal</b> 1797:23  1825:12,20  <b>removed</b> 1806:3  <b>removes</b> 1798:17  <b>removing</b> 1797:15,20  1818:1  <b>repeat</b> 1738:11 1764:18  1804:19  <b>rephrase</b> 1792:2  <b>report</b> 1740:13 1748:15  1762:24 1777:8  1779:20 1806:14,17  1806:22 1809:13  1813:18,20 1814:16  1819:24 1822:6  1828:8 1835:20  1836:15,15  <b>Reported</b> 1728:20  <b>reporter</b> 1786:24  1787:17,19 1840:9,24  <b>REPORTER'S</b>  1728:16 1840:1  <b>reports</b> 1748:14  1756:21 1758:15  1768:9,13 1769:19</p>	<p>1777:7 1779:23  1808:17,20,23 1809:3  1828:23  <b>represent</b> 1805:2,14  1830:16  <b>represented</b> 1837:23  <b>represents</b> 1806:4  1819:15 1830:17  <b>request</b> 1835:8 1837:2  <b>requested</b> 1800:13  <b>requests</b> 1755:13  <b>require</b> 1806:17  <b>required</b> 1735:13  1771:16  <b>requirements</b> 1798:23  <b>research</b> 1820:13  <b>resource</b> 1827:23  <b>resources</b> 1735:12  1736:4,22 1737:1  1746:9,23 1747:10  1753:16,19,22 1776:7  1793:12,12 1827:9,24  <b>respect</b> 1749:1 1806:11  <b>respective</b> 1803:1  <b>respond</b> 1787:25  1812:10  <b>Respondent</b> 1729:11  <b>Respondents</b> 1728:14  <b>responding</b> 1777:3  <b>responsibilities</b>  1738:21 1797:1  1818:9  <b>responsibility</b> 1753:10  <b>responsible</b> 1797:2  1808:3,19 1809:17,19  1815:9  <b>rest</b> 1798:15  <b>result</b> 1825:12  <b>results</b> 1742:25  <b>resume</b> 1733:11  <b>resumed</b> 1730:5 1733:7  1734:1 1811:6  1812:21  <b>revenue</b> 1797:4  1798:23 1799:1,4  1803:16 1831:9  <b>revenues</b> 1829:13  1830:20,22 1831:1,2  1831:4  <b>review</b> 1763:19 1809:5  <b>revised</b> 1799:4  <b>ridiculous</b> 1801:1  <b>right</b> 1750:15 1751:1  1768:16,19,22  1769:13,17 1770:5  1771:13 1772:5,18,23  1773:23 1774:2,4  1776:9,14,21 1777:7</p>	<p>1777:8 1778:1,4,9,23  1779:23 1780:1,6,14  1781:4,13 1782:9,13  1783:9,16,18 1784:17  1784:24 1785:2,18,25  1786:13 1787:7,22  1788:8,14,15,22,25  1789:9,11,19 1790:4  1790:10 1801:22  1807:23 1811:23  1812:14 1819:21  1826:24 1836:18  1838:24  <b>right-hand</b> 1739:19  1769:5 1816:17  1821:23  <b>risk</b> 1774:12 1775:19  1791:7,19  <b>risk/benefit</b> 1777:2  <b>River</b> 1734:8,12,20  1735:1 1740:17  1746:18 1757:18  1758:12 1766:2  1767:6 1770:9 1775:4  1778:17 1783:12  1784:2 1786:4,9,21  1794:7,13,23 1821:20  1822:8,13,17 1823:10  1826:18 1828:14,21  1829:3,7,9,11  1830:18 1831:22  1833:2  <b>row</b> 1779:25  <b>RPR</b> 1728:20 1840:23  <b>ruling</b> 1797:9 1801:20  1816:9 1825:12  <b>rulings</b> 1760:4 1800:6  <b>running</b> 1735:14  1738:24</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1729:5  <b>S-K-I-L-L-M-A-N</b>  1796:12  <b>salaries</b> 1750:2,13  <b>salary</b> 1750:16  <b>sales</b> 1780:19 1803:17  1829:11,14,20  1830:18 1831:24  1832:4,5,23,24,25  1833:1,2,2  <b>San</b> 1728:2,6,17,18,24  1729:6 1732:1 1755:4  1764:25 1770:9,25  1772:12 1783:25  1786:2,7,24 1787:19  1787:21 1788:7  1805:22 1811:1</p>	<p>1818:15 1823:16  1828:9 1835:1  <b>SANDFORD</b> 1728:20  1840:8,23  <b>Santa</b> 1840:5,9,18  <b>sat</b> 1830:8  <b>satisfy</b> 1746:24  <b>Saturday</b> 1764:13  <b>saying</b> 1762:19 1764:19  1787:16 1819:8  <b>says</b> 1758:15 1769:25  1771:19 1772:5  1775:17 1776:5  1777:21 1780:6  1787:22  <b>SCE</b> 1776:7  <b>schedule</b> 1750:20,23  1751:1 1772:9,22  1820:13 1829:10,14  <b>scheduled</b> 1752:5  <b>scheduling</b> 1749:7,12  1750:3,6,17 1751:7,8  1772:15 1812:4  1828:14  <b>screen</b> 1779:19  <b>Scroll</b> 1776:4  <b>SDCWA</b> 1731:4  <b>seated</b> 1796:6  <b>second</b> 1741:8 1749:5  1775:17 1788:2  1807:20 1832:4  <b>seconds</b> 1784:21  <b>section</b> 1796:24  <b>see</b> 1741:11 1748:17  1754:6,20 1756:18  1767:16 1769:24  1771:7,15,22 1772:6  1775:1,5,22 1776:4  1776:19 1777:24  1779:25 1780:17  1786:2,22 1789:25  1798:15 1802:5  1805:11 1809:24  1823:22 1830:20  1834:4,10 1835:3  1838:10,22  <b>seeing</b> 1791:7  <b>seek</b> 1745:9,11 1818:13  <b>seen</b> 1750:8 1751:24  1801:13 1822:20  1834:23  <b>sell</b> 1735:24 1737:14,15  1739:5 1740:23  1742:11 1758:17  1768:15 1832:25  <b>sellers</b> 1743:8  <b>selling</b> 1737:14,17  1769:22 1791:18</p>
---	---	--	--	---

<p><b>send</b> 1753:2 1794:23  <b>sending</b> 1787:16  <b>sends</b> 1753:22  <b>sent</b> 1753:7  <b>sentence</b> 1771:19  1775:17,17 1776:11  1811:25 1812:1  <b>separate</b> 1818:25  1826:15 1829:15  <b>separately</b> 1762:12  1766:5  <b>service</b> 1731:10 1803:1  1803:12 1808:17,20  1808:23,24 1809:3,13  1813:2,17,18,20  1814:2,16,20 1815:6  1826:19 1828:2,8,22  1828:23 1829:2,10  <b>services</b> 1728:23  1785:24 1809:1  <b>set</b> 1802:20 1804:20  1808:4 1809:6 1813:2  1814:20 1815:13  1817:13,15 1819:14  1821:22 1828:17  <b>sets</b> 1802:22  <b>setting</b> 1739:9 1807:20  1809:15  <b>settlement</b> 1751:10  <b>seven</b> 1803:3  <b>shift</b> 1798:6  <b>short</b> 1732:21  <b>Shorthand</b> 1840:8,24  <b>shot</b> 1773:22  <b>show</b> 1747:20 1748:2  1748:18,21,24  1803:16  <b>showing</b> 1743:23  1811:19  <b>shown</b> 1803:1,17  1822:23 1825:4,9  1827:7 1828:12  <b>shows</b> 1734:18,19  1744:3,8 1749:24  1802:24 1803:11  <b>shutdown</b> 1789:2  <b>side</b> 1755:1,2 1811:22  1834:15,20  <b>sides</b> 1812:16  <b>signed</b> 1800:12  <b>similar</b> 1807:8 1808:16  <b>simply</b> 1758:19  1807:20 1816:3  1817:1 1819:20  <b>single</b> 1782:24 1783:2,3  <b>sir</b> 1734:16 1738:21  1739:21 1740:1  1747:18 1753:21</p>	<p>1761:9,20 1765:12  1766:15 1767:2  1770:16,23 1773:24  1774:15 1790:24  1796:13 1811:12  1821:13  <b>situation</b> 1737:7  1746:16,19  <b>six</b> 1803:3  <b>Skillman</b> 1730:6  1759:6,10,13 1796:1  1796:11,16 1799:16  1799:24 1800:3,7  1802:12 1807:12  1811:5 1813:10  1814:12 1815:21  1835:12,25 1836:4  1837:4,20 1838:25  <b>slice</b> 1735:6,10  <b>slices</b> 1734:22 1793:18  <b>small</b> 1830:23  <b>sold</b> 1745:3 1769:10  1832:1  <b>somebody</b> 1744:6  1819:5  <b>sorry</b> 1737:6 1750:14  1758:25 1767:3  1770:11 1784:18  1804:19 1818:16  1819:23 1832:3,7  <b>sort</b> 1816:15  <b>Sounds</b> 1834:6  <b>source</b> 1742:3 1743:2  1753:13 1821:20  <b>sourced</b> 1821:24  1822:2,7 1823:19  <b>sources</b> 1734:11,19  1735:15 1736:2  1778:16 1833:3  <b>South</b> 1729:15  <b>Southern</b> 1728:9,11  1729:11 1734:13  <b>SP15</b> 1741:3 1743:18  1743:19 1768:19  1769:9 1779:25  1781:12  <b>speaking</b> 1749:19  <b>specific</b> 1765:17  1766:21 1781:7  1803:25 1804:20  1819:7  <b>specifically</b> 1755:12  1762:22 1768:18  1774:10 1775:11  1780:11 1782:17,20  1802:6 1807:25  1817:17  <b>specified</b> 1812:5</p>	<p><b>speculation</b> 1787:8  1791:24  <b>speed</b> 1734:15 1748:6  <b>spell</b> 1796:9  <b>spend</b> 1786:20 1836:7  <b>spent</b> 1732:11,11,12,13  <b>spikes</b> 1791:6,17  <b>spot</b> 1772:13 1783:7  1785:7 1788:18  1789:13,16 1792:7,25  1809:22  <b>ss</b> 1840:4  <b>stable</b> 1740:10  <b>staff</b> 1749:9 1750:13,16  1753:9  <b>stand</b> 1733:7 1811:6  <b>standpoint</b> 1736:6  <b>stands</b> 1780:11  <b>start</b> 1732:8 1769:4  1786:11 1836:22  1838:20,25  <b>started</b> 1800:19,20  <b>starting</b> 1838:23  <b>starts</b> 1811:10  <b>state</b> 1728:1 1753:16  1754:10,13,15,24  1755:3 1786:4,8  1796:9 1797:15,20,23  1798:6,17 1806:3  1818:1,20 1819:15  1821:19,25 1822:3,4  1822:18 1823:9,20  1825:13,20 1826:16  1826:17 1827:9,24  1828:5,20 1829:2  1831:23 1833:1  1840:3,9,25  <b>stated</b> 1818:8  <b>statement</b> 1752:18  1766:22 1778:13  1811:15 1812:8  <b>States</b> 1740:14,15  <b>steeped</b> 1733:16  <b>stereotype</b> 1840:12  <b>stewardship</b> 1833:13  1833:15,22  <b>Stillman</b> 1837:24  <b>stop</b> 1835:9 1836:11,22  1838:9  <b>stopped</b> 1838:10  <b>story</b> 1787:21  <b>strategies</b> 1776:22  <b>strategy</b> 1736:20  1739:12 1740:11  1741:17  <b>street</b> 1728:24 1729:6  1729:15,18 1830:8  <b>strike</b> 1756:6 1759:19</p>	<p>1759:24 1789:14  1802:10 1806:6  1811:15,16 1812:16  1816:12,13 1819:18  1826:20 1831:16,17  <b>strive</b> 1737:15 1739:16  <b>structure</b> 1797:10,25  1798:19 1799:6  1802:23 1818:11  1826:2  <b>struggling</b> 1834:10  <b>study</b> 1813:2 1828:2  <b>subject</b> 1771:4 1786:2  1802:10  <b>subjects</b> 1749:5  <b>submit</b> 1812:2  <b>submitted</b> 1764:9  1778:15  <b>subscription</b> 1742:2  <b>subset</b> 1816:3,6,7  <b>substantially</b> 1741:12  <b>subtract</b> 1831:9  <b>subtracting</b> 1831:5  <b>subtraction</b> 1802:7  <b>sufficient</b> 1735:13,16  1801:14  <b>suggest</b> 1839:3  <b>suggested</b> 1802:1  <b>suggesting</b> 1836:11,19  1836:21  <b>suggestion</b> 1773:9  <b>suggests</b> 1816:23  <b>SULLIVAN</b> 1729:12  <b>summaries</b> 1834:12,17  1834:17,22  <b>summarized</b> 1802:25  1803:7,15  <b>summarizes</b> 1821:17  <b>summary</b> 1805:18  1834:18  <b>Sunday</b> 1765:14  1800:18,24  <b>Superior</b> 1728:1,17  <b>supervise</b> 1797:8  <b>supervision</b> 1802:17  1807:2  <b>supplemental</b> 1746:14  1773:25 1774:1,6,7  1774:11 1777:22  1778:7 1779:2  1793:15  <b>supplier</b> 1791:13  <b>supplier's</b> 1776:18  <b>suppliers</b> 1776:11  <b>supplies</b> 1766:7,9  1767:23  <b>supply</b> 1735:12  1763:19 1767:8,9</p>	<p>1775:18 1833:23  <b>support</b> 1797:4,4  <b>supporting</b> 1754:17  <b>supported</b> 1820:2  <b>sure</b> 1732:9 1737:25  1740:12 1742:1  1750:15 1764:8  1773:13 1799:6  1820:24 1822:23  1826:10  <b>sustain</b> 1823:11  <b>sustained</b> 1742:23  1743:4 1744:1  1745:17 1750:24  1752:13 1756:4  1765:6,11 1769:2  1770:21 1773:17  1784:19 1792:21  1794:10,17 1806:8  1817:22 1819:3  1825:16,16,24 1826:5  1829:23 1830:3  1831:7,17 1832:17  1833:20 1834:1  <b>SW</b> 1832:3  <b>sworn</b> 1796:2 1800:11  <b>SWP</b> 1786:21 1798:6  1824:23 1827:14  <b>system</b> 1755:1,2  1789:19,21,25 1790:3  1790:6 1793:10  1797:16,20,24  1805:25,25 1806:4  1818:2,15 1823:7  1825:11,21 1826:7,12  1828:24 1829:1,3,4,5  1829:9,12 1830:23  1831:3,4,9,13,15,21  1832:2 1833:1  <b>systemwide</b> 1806:5</p>
---	--	---	---	---

**T**

**table** 1769:24 1807:15  
**tables** 1807:16  
**tad** 1801:5  
**take** 1737:7 1738:9,25  
1739:8 1740:1,24  
1746:4,16 1748:1  
1749:6 1750:1 1762:5  
1767:17 1773:22  
1778:6,11 1782:5  
1787:10 1791:14  
1799:19 1801:25  
1802:2 1806:13,22  
1807:14 1812:3  
1819:19 1837:4  
**taken** 1840:11  
**takes** 1751:13 1757:4

1794:4 1816:23 <b>talk</b> 1756:5 1806:20 <b>talked</b> 1743:11 1770:2 1775:14 1778:16,19 1778:22,25 1779:3 1788:21 1800:9 1820:16 1834:24 <b>talking</b> 1739:17 1745:8 1745:16,23 1747:16 1763:18 1774:6 1793:23 1807:14,15 1834:11 1838:13 <b>talks</b> 1787:3 <b>TARA</b> 1728:20 1840:8 1840:23 <b>tell</b> 1734:21 1742:12 1744:13 1769:8,20 1806:9 <b>telling</b> 1758:14 1781:9 1783:25 1790:3 1806:10 <b>ten</b> 1779:15 1803:7 1834:5 <b>terminate</b> 1831:23 <b>terms</b> 1799:7 1801:15 1804:2 1809:4 1817:18 1823:13 1825:10 <b>testified</b> 1733:8 1740:22 1760:13 1761:2,14 1763:1 1764:12 1766:10 1767:14,15,22 1768:9 1768:12,15,21,22 1770:18 1777:17 1783:20 1784:20 1785:1 1795:1 1796:3 1811:6 <b>testifies</b> 1836:19 1837:1 <b>testify</b> 1742:7 1799:22 1800:1,5 1820:5 1824:14 <b>testifying</b> 1747:24 1755:13 1763:21 1764:25 1784:5 <b>testimony</b> 1738:5,7 1739:8 1740:1 1744:17 1746:7,21 1749:14,16,19 1750:8 1751:15 1755:11 1756:7,23 1758:5,14 1759:20 1761:9 1762:9,17 1764:15 1801:1,13,19 1803:25 1804:12,14 1805:16 1811:20,21 1816:12 1817:8 1818:5 1823:15 1825:23	1826:21,25 1829:22 1830:4,10 1836:5 1837:5 <b>thank</b> 1759:16 1779:15 1779:18 1794:11 1795:6,19,21 1796:6 1801:4 1806:24 1809:25 1819:13 1834:6 1835:4 1838:22 1839:8 <b>thing</b> 1785:6 <b>things</b> 1734:15 1748:6 1777:4 1811:24 <b>think</b> 1732:18 1738:6,7 1741:19 1743:5,11 1744:18,19 1747:12 1749:20,22 1753:3 1758:18 1760:1,5 1770:2 1787:6 1792:1 1794:25 1800:3 1807:19 1823:3 1824:4,12,17 1826:24 1834:17,23 1836:2,6 1836:24 1837:3 1838:19 <b>thinks</b> 1837:9 <b>third</b> 1738:1 1746:17 1760:14,22 1794:5 1795:8 1802:20 1804:3 1805:2 1807:18,22,24 1808:1 1811:25 1824:10 <b>third-party</b> 1765:1 <b>thought</b> 1732:10 1773:22 <b>three</b> 1732:14 1800:23 1826:13,14,15 1828:19 <b>ticking</b> 1838:10,12,14 1838:17 <b>time</b> 1732:8,17,18 1736:23 1737:3 1738:24 1746:11 1751:12 1752:4,5 1762:5 1766:5,8 1773:18 1777:10,12 1778:3,4,5 1779:13 1789:17 1792:9 1802:10 1806:15,16 1809:19 1812:15,17 1814:8 1840:12 <b>times</b> 1732:16 1757:3 1765:3 1766:10 1767:6,11 1776:11 <b>title</b> 1796:25 <b>today</b> 1761:15 1762:10 1763:21 1764:10 1767:1 1768:6,10	1774:12 1784:25 1836:12,22 1837:11 1837:12 1838:9 <b>told</b> 1827:19 <b>tomorrow</b> 1835:13 1836:23 1838:1,4,5 1838:10,19,20,24 1839:5 <b>top</b> 1762:22 1769:24 1787:25 1790:2 <b>topic</b> 1733:15 <b>total</b> 1759:2 1771:20,24 1775:3 1788:3 1793:17,17 1821:22 1824:23 1825:6 1829:14 1831:24 1832:5,23 <b>totals</b> 1822:6 <b>tougher</b> 1739:15 <b>track</b> 1742:11 <b>Trader</b> 1779:20 <b>transacted</b> 1781:1 <b>transactions</b> 1781:8 <b>TRANSCRIPT</b> 1728:16 <b>transcription</b> 1840:14 <b>transferred</b> 1771:5,21 1771:25 1772:4,8 <b>transmitted</b> 1823:16 <b>treat</b> 1788:12 <b>treated</b> 1767:8 1784:3 <b>treating</b> 1784:5,8,25 <b>trend</b> 1741:14 <b>trends</b> 1740:8 <b>trial</b> 1800:18 1801:16 1812:6 1814:6 1818:3 <b>Tribune</b> 1786:3,7,25 1787:19 <b>trouble</b> 1824:16 <b>true</b> 1748:13 1753:21 1761:12,15 1763:8,12 1765:12 1766:9,14,17 1766:19,22,24 1767:4 1769:12,22,23 1771:25 1773:13,24 1774:9,10 1775:24 1776:21 1778:1,2,11 1778:12,13 1780:15 1781:4,22 1782:24 1783:2 1785:4 <b>truly</b> 1801:9 <b>try</b> 1736:21 1799:17 1835:25 1836:1 <b>trying</b> 1741:7 <b>Tuesday</b> 1728:19 1732:2 1811:2 <b>turn</b> 1808:1 1813:9 1814:12 1815:1	1817:12 1820:21 <b>turns</b> 1793:21 <b>twice</b> 1790:11 <b>two</b> 1732:11,13 1754:9 1754:18,23 1761:17 1762:4 1776:4 1777:23 1778:9,10 1792:1 1802:3 1803:4 1807:16 1813:15 1816:16 1818:25,25 1819:1 1829:15 1832:12 1833:3 <b>type</b> 1791:8 1808:7,16 1833:6 <b>types</b> 1741:15 1807:8 <b>typewriting</b> 1840:13 <b>typically</b> 1774:4,8 1793:21	1738:16 1740:22 1741:5,6,20 1762:8 1804:1,20 1806:1 1831:2 1835:25 <b>useful</b> 1824:7 1835:21 <b>usefulness</b> 1801:14 <b>uses</b> 1734:7 1828:13 1832:3,5 <b>usually</b> 1834:19 <b>Utility</b> 1734:14 <b>utilization</b> 1807:3 <b>utilize</b> 1736:22 1746:9 1746:10,23 1747:9 1797:25 1807:4 1814:19 1824:23 1825:5 <b>utilized</b> 1775:19 1797:21 1808:8 1809:3 1813:3,21 1828:23 1832:13 <b>utilizes</b> 1832:3 <b>utilizing</b> 1808:7
<b>U</b>				
<b>Uh-huh</b> 1786:6 <b>ultimately</b> 1787:24 <b>understand</b> 1749:25 1758:18 1785:9,10 1798:13 1799:1 1806:22,25 1823:14 1823:18 1826:23 1827:18 1832:8,9 1837:22 <b>understanding</b> 1748:5 1749:3 1787:11 1824:15,18 <b>understood</b> 1733:12 1760:7 1786:5 <b>undertake</b> 1807:9 1817:25 1833:6,14 <b>undertaken</b> 1807:7 <b>undertaking</b> 1799:2 1804:23 1808:6 <b>undertook</b> 1797:14 1807:1 <b>undisclosed</b> 1749:13 1750:8 1756:24 1758:5,14 <b>unfair</b> 1800:25 1837:23 <b>unintelligible</b> 1826:9 <b>Union</b> 1786:3,7,25 1787:19 <b>unit</b> 1805:4 1808:14 1813:4,22 1814:21 1815:14 1816:7 1818:25 1826:1,6 1829:15 1831:15 <b>United</b> 1740:14,15 <b>unsubstantiated</b> 1801:9 <b>URQUHART</b> 1729:12 <b>use</b> 1734:4 1736:2,5				
<b>V</b>				
<b>vague</b> 1744:5 1746:6 1750:22 1751:3 1753:4 1794:1 1798:12 1826:8 <b>VALIDITY</b> 1728:10 <b>value</b> 1737:16 1743:21 <b>valued</b> 1736:13 <b>values</b> 1741:17 1754:19 <b>VAN</b> 1729:3 <b>VANDERHORST</b> 1729:18 <b>variable</b> 1754:2,5,11 <b>variety</b> 1768:13 <b>various</b> 1778:16 1797:24 1823:17 <b>vary</b> 1754:12 <b>verifier</b> 1800:12 <b>versus</b> 1747:24 1783:21 1793:17 <b>VIDEOGRAPHY</b> 1728:23 <b>virtually</b> 1793:19 <b>volatility</b> 1775:18 <b>volume</b> 1728:10 1757:17 1780:17,17 1780:19,19,23,25 <b>volumes</b> 1803:11 <b>volumetric</b> 1803:16 <b>voluminous</b> 1834:18 <b>vs</b> 1728:8				
<b>W</b>				
<b>wait</b> 1767:16 1772:11 1825:18				

<p><b>waited</b> 1800:20  <b>waiving</b> 1759:24  <b>walk</b> 1819:9 1824:9,20  <b>walked</b> 1824:12  <b>walking</b> 1819:11  <b>want</b> 1734:5 1743:15  1746:15 1747:11  1758:24 1787:4  1819:9 1823:24  1824:1,9,20 1836:7,7  1836:17  <b>wanted</b> 1773:1 1794:6  1794:13  <b>wants</b> 1738:2 1835:24  <b>WARREN</b> 1729:5  <b>wasn't</b> 1761:19  1838:15  <b>water</b> 1728:6,9,11  1729:11 1734:5,8  1735:16,19 1736:3  1737:8,10,11,19  1738:2,14,17 1740:19  1745:11 1746:18,24  1747:1,3,10,14  1752:25 1753:15,16  1753:19,22 1754:10  1754:12,13,15,24,24  1755:3,3,8 1757:5,18  1757:18 1758:11  1760:11,15,23 1762:7  1762:25 1764:16,16  1764:20,21 1765:1,2  1765:8,8,13,13,18,22  1765:25,25 1766:1,4  1766:6,7,12,13,14,15  1766:16,25 1767:5,5  1767:7,9,20 1768:2,2  1768:3,3 1770:8,25  1771:4,5,16,20,24  1772:2,7,12 1778:17  1783:12,14,16,21,22  1783:24 1784:1,6,8  1784:10,12,13,17,18  1784:22,22,24  1785:17,17,18 1786:4  1786:9 1787:22  1788:7,8,12 1789:10  1789:11,12,18 1790:7  1790:9,9 1791:22  1793:25 1794:4,6,13  1794:23 1795:9  1797:12,15,20,23,24  1798:6,7,10,17  1803:4,8,9,11,11,13  1805:19,21 1806:3  1813:5 1815:15  1816:8 1818:1,20  1819:15 1820:13</p>	<p>1821:20,21,24,25  1822:2,3,4,7,17,18,18  1823:7,8,9,9,10,16,19  1823:20 1824:23  1825:7,13,20 1826:17  1826:17,18 1827:9,10  1827:22,24,24 1828:5  1828:20 1829:2  1830:25 1831:3,23  1832:1 1833:2,3,13  1833:15,21,22  <b>way</b> 1732:23 1742:18  1753:1 1764:4,23,24  1769:20 1770:23  1772:15 1777:1,3,3  1780:21 1781:2  1783:7 1794:20  1799:6 1816:18  1820:23 1823:12,12  1823:25 1824:21  1837:13,14 1838:2  <b>wbraunig@kvn.com</b>  1729:9  <b>We'll</b> 1795:3  <b>we're</b> 1784:25 1799:3  1817:5 1834:11  <b>we've</b> 1750:15 1751:24  1784:11 1807:19  <b>weeks</b> 1812:5  <b>weighted</b> 1757:17  1758:10  <b>went</b> 1749:1 1777:4  1809:14  <b>weren't</b> 1800:9  <b>west</b> 1754:21,22 1755:2  <b>Western</b> 1740:15  <b>wheel</b> 1794:6 1795:8  <b>wheeler</b> 1794:12,23  <b>wheeling</b> 1787:5,6  <b>willing</b> 1835:2  <b>wish</b> 1739:13  <b>withdrawals</b> 1736:14  <b>witness</b> 1733:4,7,13,17  1737:23 1738:11  1741:2 1742:7  1744:22 1745:1,6  1746:2,9,23 1747:5,9  1751:5,19 1752:2,10  1753:6 1755:20  1756:2 1757:1,9,14  1757:23 1758:7  1759:6 1761:24  1765:17 1767:19  1773:12 1785:13  1787:13 1791:12  1792:19 1793:4  1794:3,19 1795:8,17  1795:23 1796:2,5,11</p>	<p>1800:21 1801:8,10,12  1805:1,18 1816:16,24  1817:9,10,10 1818:7  1818:23 1819:22  1820:7,12,17,19  1821:17 1823:2,6,12  1823:18 1825:3  1826:12,15 1830:14  1831:13 1832:9,23  1835:10,18,19 1836:5  1836:14,22 1839:3  1840:17  <b>witnesses</b> 1730:2  1836:18,25  <b>wonder</b> 1732:15,15  <b>Woodcock</b> 1799:22  1800:1,5 1835:19,19  1836:14,19 1837:11  1837:17,24,25  1838:23 1839:1  <b>Woodcock's</b> 1837:5,18  1837:19  <b>word</b> 1740:24 1763:10  1763:22,23 1793:9  1805:25  <b>work</b> 1755:19,25  1756:2 1797:5  1804:12  <b>workday</b> 1739:2  <b>worked</b> 1763:5 1764:11  1800:16 1822:25  <b>working</b> 1784:12  1787:21 1802:16  <b>works</b> 1771:13 1829:25  <b>world</b> 1800:3  <b>WORLDWIDE</b>  1728:23  <b>wouldn't</b> 1747:7  1773:2 1794:17  <b>write</b> 1763:3,10  <b>writes</b> 1787:17  <b>written</b> 1763:11  <b>wrong</b> 1816:20 1835:1  <b>wrote</b> 1763:5 1785:21</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>X</b> 1730:1 1819:10  <b>XI</b> 1728:10</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Y</b> 1819:10  <b>Yamasaki</b> 1821:14  <b>Yeah</b> 1764:7  <b>year</b> 1731:9 1736:15  1737:13 1771:6,21,25  1772:8,23 1788:5,22  1813:17 1814:17  1815:6 1821:24</p>	<p>1829:12 1832:25  <b>years</b> 1735:18,22  1741:24 1756:22  1777:6,23 1778:9,10  1802:23 1803:1,5,9  1803:14 1813:15  1821:19 1823:17  1833:10  <b>yesterday</b> 1732:11  1734:4 1736:24  1739:8,17 1740:22  1741:10 1747:12  1759:22 1760:13,18  1761:2,12,16 1762:6  1763:1 1764:12  1768:6,10,12,16  1799:23 1811:15  1812:7 1821:14  1823:15  <b>yesterday's</b> 1741:6</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zero</b> 1736:11  <b>zero-cost</b> 1793:14  <b>zoom</b> 1756:17</p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 1728:12,12  <b>1-10</b> 1728:13  <b>1.2</b> 1788:5,21,24  <b>1.25</b> 1789:2  <b>1/14/10</b> 1731:8  <b>1:30</b> 1809:24  <b>10</b> 1728:12  <b>10/21/13</b> 1731:4  <b>10:00</b> 1732:3 1764:13  1765:8  <b>1074</b> 1731:4 1771:3  1773:6,8  <b>1096</b> 1752:14 1756:9  1756:10 1820:3  <b>1099</b> 1820:4  <b>10th</b> 1729:15  <b>11</b> 1803:8 1811:25  <b>110-A</b> 1814:12  <b>110-B</b> 1815:2,13  <b>1101</b> 1756:15  <b>1103</b> 1820:2  <b>1121</b> 1739:17 1740:13  1743:23 1747:17  1749:1 1756:14,16  1769:24 1779:19,22  1783:3 1785:12  <b>1123</b> 1748:7 1783:3  <b>1125</b> 1748:17 1783:4  <b>1127</b> 1748:21 1783:4</p>	<p><b>115.15</b> 1758:10  <b>1150-A</b> 1811:19  <b>1151</b> 1811:18  <b>1156</b> 1821:1,6,12  <b>1159</b> 1757:25  <b>1160</b> 1731:5 1799:14  1802:14 1805:9  1807:8 1808:2 1816:1  1816:19 1817:1,15  1819:21,24 1825:3,9  1827:4 1834:25  <b>1161</b> 1815:19 1817:14  <b>12</b> 1748:14 1803:12  1811:25  <b>122.32</b> 1758:10  <b>13</b> 1803:13  <b>14</b> 1803:13 1812:1  <b>14,808.33</b> 1771:17  <b>15</b> 1732:13 1812:1  1820:16  <b>159</b> 1731:3  <b>16</b> 1803:15 1830:23  <b>17</b> 1803:15 1812:2  <b>1728</b> 1728:13  <b>1734</b> 1730:5  <b>1753</b> 1731:3  <b>1760</b> 1730:5  <b>1769</b> 1731:4  <b>177,700</b> 1771:21  <b>1774</b> 1731:7,7  <b>1790</b> 1730:5 1731:8,8  <b>1796</b> 1730:6  <b>18</b> 1803:15  <b>1802</b> 1731:5  <b>1813</b> 1731:9  <b>1814</b> 1731:9  <b>1840</b> 1728:13  <b>19</b> 1803:16</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>2:30</b> 1839:9  <b>20</b> 1820:16  <b>2000</b> 1803:6  <b>2010</b> 1777:21 1778:8  1788:5,8,22 1789:18  1789:21 1790:3,6  1809:14,15,20  1813:14  <b>2010-11</b> 1813:17  <b>2011</b> 1744:4,15  1747:21 1748:13  1756:22 1757:11  1758:2 1769:10,16  1777:4,6,11,14  1816:5 1819:16  1822:2 1824:23  1825:5 1833:5  <b>2011-14</b> 1731:3</p>
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<b>2011/12</b> 1731:9	1774:24,25			
<b>2012</b> 1728:12 1748:10				
1748:14 1755:9	<b>5</b>			
1757:11 1758:2	<b>5</b> 1828:12			
1778:11 1800:19	<b>522-7096</b> 1728:25			
1803:6 1813:23	<b>59.9</b> 1788:6			
1814:18 1815:7,8				
1833:7	<b>6</b>			
<b>2012-13</b> 1814:17	<b>6:00</b> 1764:13			
<b>2013</b> 1728:12 1748:19	<b>633</b> 1729:6			
1757:11 1758:2	<b>66,000</b> 1822:13 1823:3			
1771:4 1814:22	<b>66,661.8</b> 1825:6,8			
<b>2013-14</b> 1815:6				
<b>2014</b> 1728:12 1748:22	<b>7</b>			
1756:22 1757:11	<b>7</b> 1829:8,10,14,20			
1758:2 1769:16	1830:16			
1771:6,17,21 1833:7	<b>70</b> 1777:22 1778:4,5,6			
<b>2015</b> 1728:19 1732:2	<b>700</b> 1729:18			
1811:2 1839:10	<b>701</b> 1728:24			
1840:18	<b>717</b> 1761:4			
<b>203</b> 1816:18 1819:20	<b>76,581</b> 1824:24			
1819:24,25 1820:2,9	<b>76,581.1</b> 1822:4			
1820:10,12				
<b>204</b> 1816:18	<b>8</b>			
<b>21</b> 1761:4 1771:4	<b>800</b> 1728:25			
<b>213.217.6000</b> 1729:19	<b>83.30</b> 1758:9			
<b>213.443.3000</b> 1729:16	<b>865</b> 1729:15			
<b>23</b> 1761:4	<b>87.80</b> 1758:9			
<b>24</b> 1775:20 1776:2				
<b>25</b> 1732:21	<b>9</b>			
<b>26.27</b> 1768:23	<b>9:00</b> 1838:11 1839:5,9			
<b>28</b> 1728:19 1732:2	<b>90-A</b> 1809:9 1812:24			
1811:2 1839:10	1812:25			
<b>28th</b> 1840:17	<b>90012</b> 1729:19			
	<b>90017-2543</b> 1729:15			
	<b>94</b> 1816:18			
<b>3</b>	<b>94111</b> 1728:24			
<b>3/8/11</b> 1731:7	<b>953</b> 1731:9 1813:10			
<b>304</b> 1728:4 1732:4	1814:9,10			
1811:3	<b>981-3498</b> 1728:25			
<b>30th</b> 1800:21				
<b>32</b> 1732:12				
<b>3374</b> 1728:20 1840:8				
1840:23				
<b>357</b> 1789:24				
<b>37.13</b> 1768:23 1781:13				
1781:14				
<b>38</b> 1781:12,12,15,15				
<b>3rd</b> 1728:24				
	<b>4</b>			
<b>4</b> 1827:8 1828:16				
<b>415</b> 1728:25				
<b>415.391.5400</b> 1729:7				
<b>479</b> 1731:8 1785:20				
1790:13,16,17				
<b>49</b> 1732:11				
<b>490</b> 1734:16				
<b>497</b> 1731:7 1774:19,22				



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF SAN FRANCISCO  
 BEFORE THE HONORABLE CURTIS E. A. KARNOW  
 DEPARTMENT 304

SAN DIEGO WATER AUTHORITY, )  
 )  
 Petitioner and Plaintiff, ) Case No.  
 ) CPF-10-510830  
 vs. ) CPF-12-512466  
 )  
 METROPOLITAN WATER DISTRICT OF )  
 SOUTHERN CALIFORNIA; ALL )  
 PERSONS INTERESTED IN THE )  
 VALIDITY OF THE RATES ADOPTED BY ) Volume XII  
 THE METROPOLITAN WATER DISTRICT )  
 OF SOUTHERN CALIFORNIA ON APRIL )  
 10, 2012 TO BE EFFECTIVE JANUARY )  
 1, 2013 AND JANUARY 1, 2014, and )  
 DOES 1-10, )  
 ) Pages 1841 - 1971  
 Respondents and Defendants. )

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 San Francisco Superior  
 San Francisco, California  
 Wednesday, April 29, 2015

Reported By:  
 TARA SANDFORD, RPR, CSR #3374

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1841

INDEX

1  
 2 DEFENDANT'S WITNESSES DIRECT CROSS REDIRECT RECROSS  
 3 SKILLMAN, June 1845 1848 --  
 4 WOODCOCK, Christopher 1859 1904 1941 1948  
 1954  
 5  
 6 Defendant Rests: 1970  
 7 Plaintiff Rests: 1970  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

1843

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1842

EXHIBITS

NUMBER	DESCRIPTION	ID	EVIDENCE
2	PTX 487 6/12/09 email from Skillman	1849	1849
4	PTX 487A Excepts from MWD Annual Reports	1849	1849
6	PTX 488A	"	"
7	PTX 489A	"	"
8	PTX 490A	"	"
9	PTX 519 5/7/10 email from Kostopoulos	1855	1856
10	PTX 520 7/19/10 email from Kostopoulos	1856	1856
11	PTX 521 7/7/10 email from Skillman	1857	1858
12	DTX 123 Woodcock Expert Disclosure	1865	1866
13	DTX 884 -- --	1957	
14	DTX 1143 Brief by San Diego Water	--	1956
15	DTX 1152 Declaration of Upadhyay	1957	1957
16	DTX 1165 9/3/99 letter from Hess	1957	--
17	DTX 1166 12/20/01 letter from Stapleton	1957	--
18	DTX 1167 3/5/98 letter from Stapleton	1957	--
19			
20			
21			
22			
23			
24			
25			

1844

1 San Francisco, California  
 2 Wednesday, April 29, 2015  
 3 9:00 a.m.  
 4 Department No. 304 Hon. Curtis E.A. Karnow, Judge  
 5  
 6 THE COURT: Good morning.  
 7 Are we ready to continue with the witness?  
 8 MR. OLIVER: Yes, your Honor.  
 9 THE COURT: Good morning, ma'am.  
 10 THE WITNESS: Good morning.  
 11 THE COURT: Let's continue.  
 12  
 13 JUNE SKILLMAN,  
 14 resumed the stand and testified further as follows:  
 15  
 16 DIRECT EXAMINATION (resumed)  
 17 BY MR. OLIVER:  
 18 Q. Good morning, Ms. Skillman. Is it possible  
 19 from the financial records at Met to determine the unit  
 20 cost for SWP water that's included in the exchange water  
 21 for years 2011 through '14?  
 22 MR. KEKER: Objection, your Honor. Calls for  
 23 expert testimony.  
 24 THE COURT: Overruled on that question.  
 25 Go ahead, please.

1845

1 Q. What is your involvement in terms of  
 2 preferential rights at Met?  
 3 **A. My staff annually calculates preferential**  
 4 **rights.**  
 5 Q. What is included in terms of credits for  
 6 purposes of determining the preferences under the  
 7 preferential right calculation?  
 8 **A. The act states that it's the payments for taxes**  
 9 **and others. Currently Metropolitan includes property**  
 10 **tax payments, any other revenues that we might receive**  
 11 **that are related to connections, construction of**  
 12 **connections and two fixed charges that we have, the**  
 13 **readiness-to-serve charge and the capacity charge. And**  
 14 **those are the four elements that go into the**  
 15 **calculation.**  
 16 Q. Are there payments received from your member  
 17 agencies for the supply of water that are not included  
 18 in the calculation of preferential rights?  
 19 **A. The purchase of water isn't included in**  
 20 **preferential rights.**  
 21 Q. Have your calculations of preferential rights  
 22 credits included consideration of San Diego?  
 23 **A. To the degree the Water Authority pays property**  
 24 **taxes or constructs the service connection or pays the**  
 25 **readiness-to-serve charge and the capacity charge, those**

1847

1 THE WITNESS: Yes.  
 2 Q. BY MR. OLIVER: As a result of your employment  
 3 at Met, are you familiar with the term "preferential  
 4 rights"?  
 5 **A. Yes.**  
 6 Q. What are preferential rights?  
 7 **A. Preferential rights are a statutory calculation**  
 8 **of Metropolitan's Act.**  
 9 Q. I heard a portion of that. Could you repeat  
 10 it, please?  
 11 **A. Preferential rights are a statutory calculation**  
 12 **in Metropolitan's act.**  
 13 Q. Of your understanding, why is a calculation  
 14 undertaken?  
 15 **A. It is undertaken annually and it allocates**  
 16 **Metropolitan's water to member agencies based on their**  
 17 **proportion of accumulated payments for property taxes**  
 18 **and others and excluding the purchase of water.**  
 19 Q. What are preferential rights?  
 20 **A. A calculation.**  
 21 Q. What -- preference for what?  
 22 **A. Water.**  
 23 Q. And water in what circumstance?  
 24 **A. The act doesn't say. It just says each member**  
 25 **agency has a preferential right to water.**

1846

1 **revenues have been included in the calculation.**  
 2 Q. Is that the same type of credit that other  
 3 member agencies receive credit for in the calculation of  
 4 preferential rights?  
 5 **A. Yes.**  
 6 Q. In your experience, has the calculation of  
 7 preferential rights remained the same?  
 8 **A. Metropolitan's Act was amended in 1931 to --**  
 9 **for the current calculation and my understanding is that**  
 10 **it's been done the same way since then.**  
 11 Q. However, in your personal experience, has the  
 12 calculation remained the same?  
 13 **A. Yes.**  
 14 Q. And has it remained the same with regard to San  
 15 Diego?  
 16 **A. Yes.**  
 17 MR. OLIVER: Thank you, your Honor. That  
 18 completes my direct examination.  
 19 THE COURT: Thank you.  
 20 Cross-examination.  
 21  
 22 CROSS-EXAMINATION  
 23 BY MR. KEKER:  
 24 Q. Just a little, Ms. Skillman.  
 25 MR. KEKER: Your Honor, it is my understanding

1848

1 that Met has filed this morning an offer of proof with  
 2 respect to Ms. Skillman. And I haven't really had a  
 3 chance to analyze it yet so I just want to ask a couple  
 4 of questions.  
 5 THE COURT: I haven't seen it.  
 6 MR. KEKER: So let me -- can she have a  
 7 notebook? First of all, Exhibits 487-A through 490-A,  
 8 this is Plaintiff's PTX 487-A, 488-A, 489-A and 490-A,  
 9 are excerpts from the Met annual report and we would  
 10 move those exhibits into evidence in this phase.  
 11 MR. OLIVER: I believe, your Honor, they  
 12 already are in evidence as part of the administrative  
 13 record previously already entered into that case.  
 14 MR. KEKER: If they are -- we're not sure, but  
 15 if they are not, we would like them to be part of the  
 16 record.  
 17 THE COURT: I will admit 487-A, 488-A, 489-A  
 18 and 490-A.  
 19 MR. KEKER: One other, an email, 478 is an  
 20 email, I think, to Ms. Skillman. Ms. Skillman, look in  
 21 there -- 478 is at Tab 15 in your binder.  
 22 THE COURT: This is PTX 478.  
 23 MR. KEKER: PTX 478 is at Tab 15, and that is  
 24 an email from June Skillman dated Friday, June 12. And  
 25 attached to it are answers to some questions. I would

1849

1 like to move that into evidence.  
 2 THE COURT: Any objection?  
 3 MR. OLIVER: No objection, your Honor.  
 4 THE COURT: PTX 478 is admitted.  
 5 (PTX 478 was received in evidence.)  
 6 MR. KEKER: And then, finally, a few  
 7 questions -- not finally. What I would like to do is  
 8 ask these questions and then ask for a break and consult  
 9 with my team for just a couple of minutes, but I think  
 10 this may be all I have.  
 11 Q. Yesterday you testified about some cost of  
 12 service studies -- excuse me, your Honor.  
 13 THE COURT: These were, for example, DTX 11- --  
 14 MR. KEKER: 1190 and 110.  
 15 THE COURT: let's go off the record.  
 16 (Short recess.)  
 17 THE COURT: Back on the record.  
 18 MR. KEKER: Back on the record, your Honor.  
 19 Q. You testified about DTX 90-A. Do you have that  
 20 in front of you? That's the fiscal year 2010-11  
 21 cost-of-service, April 2010.  
 22 A. Yes.  
 23 Q. Now, the board adopted the 2011 and 2012 rates  
 24 in April of 2010, isn't that right?  
 25 A. Correct.

1850

1 Q. And San Diego sued in June of 2010; correct?  
 2 A. Correct.  
 3 Q. DTX 90-A is a cost-of-service study that has on  
 4 it the date of April 2010. But that's for an option  
 5 that was not adopted by the board; right?  
 6 A. That's correct. The costs are the same. The  
 7 only difference was that the board adopted lower rates.  
 8 So the cost-of-service, in terms of cost, was still  
 9 valid. It's just the revenues that would have been  
 10 generated were different.  
 11 Q. This is a proposal. This cost-of-service study  
 12 is supporting a recommendation of 12.4 percent increase  
 13 in rates across the board; right?  
 14 A. It was a 12 percent increase in rates --  
 15 12.4 percent increase in rates.  
 16 Q. And the board refused to do that; right?  
 17 A. The board adopted seven-and-a-half percent.  
 18 Q. So this cost-of-service study is not the  
 19 cost-of-service study that the board relied on to  
 20 approve rates different than the ones that are listed in  
 21 this cost-of-service study; right?  
 22 A. The board adopted the costs that are in this  
 23 cost-of-service study. They simply adopted lower rates  
 24 that generated less revenue, and, therefore, we used  
 25 reserves to cover the difference.

1851

1 Q. Could we put up -- in DTX 90 -- the entire DTX  
 2 90 I think is in the record. Could we put up page 7 of  
 3 that? This is the board letter. Blow up that sentence  
 4 that's about right in the middle of the page, a two-line  
 5 sentence.  
 6 This is the letter that went to the board in  
 7 connection with -- it's actually the letter that goes  
 8 with DTX 90-A and says, "Depending on the rate option  
 9 adopted by the board, the detailed cost-of-service study  
 10 will be updated to reflect that option, consistent with  
 11 the current methodology."  
 12 MR. OLIVER: Objection. Is this --  
 13 THE COURT: Let me just pause here. Are we  
 14 reading from DTX 90?  
 15 MR. KEKER: Ninety, your Honor.  
 16 THE COURT: The version that's in the  
 17 Skillman's binder?  
 18 MR. KEKER: That is 90-A. Following your  
 19 instructions, I think, Met put in less. If you take all  
 20 of 90, which I think is in evidence -- it is in  
 21 evidence. There is a board letter -- and what 90-A is  
 22 is Attachment 2 to the board letter we are looking at.  
 23 THE COURT: I want to pause to make sure the  
 24 other side has access to this so they can follow along.  
 25 MR. OLIVER: If they have a copy, I would like

1852

1 to offer it now but with the representation -- we have  
 2 no objection to admission if the document is not in  
 3 evidence.  
 4 THE COURT: The discussion is it is in  
 5 evidence. It's a question of all of us being able to  
 6 follow along. You are being handed a copy right now of  
 7 the entirety of 90 and I will rely on what is being  
 8 posted on the display board.  
 9 MR. KEKER: It is in evidence and part of the  
 10 record and now Mr. Oliver has a copy.  
 11 Q. Page 7 of this board letter that precedes the  
 12 attachment to the cost-of-service study that is 90-A has  
 13 this sentence: "Depending on the rate option adopted by  
 14 the board, the detailed cost-of-service study will be  
 15 updated to reflect that option, consistent with the  
 16 current methodology."  
 17 Do you see that?  
 18 A. Yes.  
 19 Q. As a matter of fact, the staff continued to  
 20 work on a cost-of-service study to support the rates  
 21 that were actually adopted. You continued to work on  
 22 that well after the rates had been adopted; right?  
 23 A. Yes.  
 24 Q. You didn't finalize that until well after San  
 25 Diego had sued; right?

1853

1 A. We actually finalized it in May.  
 2 Q. Finalized it in May?  
 3 A. Uh-huh.  
 4 Q. Let's look at 953, DTX 953.  
 5 Is that the cost-of-service study that was  
 6 finalized in May of 2010?  
 7 A. For fiscal year '11-'12.  
 8 Q. Was there another cost-of-service study that  
 9 was finalized in 2010 for some other years?  
 10 A. Not in my book.  
 11 Q. You said it says 2011-2012. This is the --  
 12 let's back up.  
 13 The 2011 and 2012 rates were adopted by the  
 14 board in April of 2010?  
 15 A. Correct.  
 16 Q. You are telling us that the cost-of-service  
 17 study to support the rates that were adopted was  
 18 finalized in May of 2010?  
 19 A. The information that was needed for the board  
 20 to act on the '11-'12 rates was provided to them in the  
 21 presentation at the time they adopted this. We just  
 22 didn't have the report prepared.  
 23 Q. Did you have the report finalized by May of  
 24 2010?  
 25 A. Yes. It is dated May of 2010.

1854

1 Q. You remember that? You remember that?  
 2 A. Yes.  
 3 Q. You are sure about that as you are about  
 4 everything else in your testimony?  
 5 A. Yes.  
 6 MR. KEKER: Can we have marked as the next in  
 7 order PTX 518, MWD 2010-00373724.  
 8 THE CLERK: I show there is already a PTX 518.  
 9 MR. KEKER: That was the next in order. We  
 10 will come back to that one. Let's look at another one  
 11 which we may have.  
 12 Could we have marked as next in order -- so we  
 13 don't confuse the record, can we make this PTX 519. Can  
 14 we give one to the witness. I have given one to the  
 15 other side.  
 16 (PTX 519 was marked for identification.)  
 17 Q. BY MR. KEKER: Ms. Skillman, do you recognize  
 18 519 as a memorandum you received from Stathis  
 19 Kostupoulos on or about May 27, 2010?  
 20 A. Okay. Yes.  
 21 Q. Does that reference --  
 22 MR. KEKER: May we move it in, your Honor?  
 23 THE COURT: Any objection?  
 24 MR. OLIVER: No objection.  
 25 THE COURT: It looks like it appears to be an

1855

1 email. With that caveat, PTX 519 is admitted.  
 2 (PTX 519 was received in evidence.)  
 3 Q. BY MR. KEKER: Does this indicate that study to  
 4 support the April 2011 resolutions? What  
 5 cost-of-service study is he working on?  
 6 A. In 2010 he would have been working on the  
 7 May 2010 --  
 8 Q. The one you said was adopted in May of 2010?  
 9 A. Right.  
 10 MR. KEKER: Let's look at PTX 519, Bates MWD  
 11 2010-00207563.  
 12 Q. Is that an email you received a copy on, on or  
 13 about July 19, 2010?  
 14 A. I did.  
 15 MR. KEKER: We would move it in.  
 16 THE COURT: Any objection?  
 17 MR. OLIVER: No objection.  
 18 THE COURT: PTX 520 is admitted.  
 19 (PTX 520 was received in evidence.)  
 20 Q. BY MR. KEKER: Mr. Kostupoulos is the same  
 21 person we saw in the previous email?  
 22 A. Yes.  
 23 Q. Ms. Bennion is a lawyer at Met you have  
 24 identified in your testimony in Phase I?  
 25 A. Correct.

1856

1 Q. And then your copy, along with Mr. Vandenberg.  
 2 What Mr. Kostopoulos is sending on to Sid Bennion is the  
 3 final cost-of-service based on the adopted 7.5  
 4 increases. Is that the first time that you had  
 5 finalized the cost-of-service study based on these  
 6 adopted increases that happened back in April?  
 7 **A. Perhaps that was when the letters were final --**  
 8 **it has the letter.**  
 9 Q. When the board passed the resolution about  
 10 rates in 2011 and '12, it did not have a final  
 11 cost-of-service study to support what it did, did it?  
 12 **A. The information was provided to the board in**  
 13 **the presentation in April for them to act on that**  
 14 **supported the seven-and-a-half percent.**  
 15 MR. KEKER: Your Honor, could I ask for a  
 16 five-minute break to see if I have any more questions?  
 17 I may not.  
 18 THE COURT: Of course.  
 19 (Recess.)  
 20 THE COURT: Sir.  
 21 MR. KEKER: One more exhibit, your Honor, on  
 22 the same subject. PTX 521 is an email string from and  
 23 to June Skillman dated July 7, 2010. We would move it  
 24 in.  
 25 THE COURT: Any objection?

1857

1 MR. OLIVER: No objection.  
 2 THE COURT: PTX 521 admitted.  
 3 (PTX 521 was received in evidence.)  
 4 Q. BY MR. KEKER: Ms. Skillman, the bottom email  
 5 says -- from you to Joanne Gonzales says, "Did Brian/Sid  
 6 ever review the COS report?"  
 7 Does this refer to this COS report you told us  
 8 was adopted and finalized in May of 2010?  
 9 **A. Probably.**  
 10 Q. Is Brian, Brian Thomas?  
 11 **A. Yes.**  
 12 Q. Is Brian Thomas your boss?  
 13 **A. At the time.**  
 14 Q. And Sid is Sid Bennion the lawyer?  
 15 **A. Yes.**  
 16 Q. You couldn't finalize the cost-of-service  
 17 report yourself, could you, before they reviewed it?  
 18 **A. That's correct.**  
 19 Q. If you are asking whether or not they reviewed  
 20 this cost-of-service report, it was not finalized as of  
 21 the date of your email, July 7?  
 22 **A. That would be correct.**  
 23 Q. That's after the lawsuit from San Diego?  
 24 **A. That would be after.**  
 25 Q. Still working on it. Still getting it

1858

1 reviewed?  
 2 **A. For a report to the board.**  
 3 MR. KEKER: That is all I have with one  
 4 request. We gave a list of exhibits that were annual  
 5 reports. When you said what was in evidence, I am not  
 6 sure you said 489-A. We moved for 487-A, PTX 488-A,  
 7 489-A, and 490-A.  
 8 THE COURT: I believe I did. This will confirm  
 9 it.  
 10 MR. KEKER: Thank you.  
 11 THE COURT: Any redirect?  
 12 MR. OLIVER: No, your Honor.  
 13 MR. QUINN: Met calls Christopher Woodcock.  
 14 THE COURT: Thank you.  
 15  
 16 CHRISTOPHER WOODCOCK,  
 17 called as a witness by the Defendant, was sworn and  
 18 testified as follows:  
 19  
 20 THE WITNESS: I do.  
 21 THE CLERK: Thank you. Please be seated.  
 22 State and spell your first and last name.  
 23 THE WITNESS: Christopher,  
 24 C-H-R-I-S-T-O-P-H-E-R. Last name Woodcock,  
 25 W-O-O-D-C-O-C-K.

1859

1 MR. QUINN: May I proceed, your Honor?  
 2 THE COURT: Please.  
 3  
 4 DIRECT EXAMINATION  
 5 BY MR. QUINN:  
 6 Q. Good morning, Mr. Woodcock.  
 7 **A. Good morning.**  
 8 Q. What is your area of expertise?  
 9 **A. Water and sewer rates, primarily, including**  
 10 **financing, setting of rates, cost-of-service studies,**  
 11 **some management issues associated with it, financing**  
 12 **bonds, that type of thing.**  
 13 Q. What is water ratemaking?  
 14 **A. Water ratemaking is a process that one goes**  
 15 **through with different utilities to determine what the**  
 16 **costs of providing service are, what the requirements**  
 17 **are for revenues, how to fairly allocate or assign those**  
 18 **costs, and then come up with rates that recover those**  
 19 **costs in proportion to the expenses incurred.**  
 20 Q. Is there a publication that is recognized in  
 21 the water ratemaking field as being authoritative in  
 22 terms of establishing the basic recognized principles of  
 23 water ratemaking?  
 24 **A. Yes.**  
 25 Q. What is the name of that publication?

1860

1       **A. That publication is called the "M-1 Manual of**  
2       **Practice" published by the American Water Works**  
3       **Association. The title is "Principles of Water Rates,**  
4       **Fees and Charges."**  
5       Q. You said you are an expert in water ratemaking?  
6       **A. Yes.**  
7       Q. What do you base your claim that you are an  
8       expert in this area on?  
9       **A. I have spent in excess of four decades helping**  
10       **municipalities, water authorities, water districts, some**  
11       **private water companies in determining water and sewer**  
12       **rates. I have stopped counting some time ago, but it is**  
13       **in excess of 500 of such studies over my career.**  
14       Q. Have you been retained previously to provide  
15       expert testimony in connection with trials or regulatory  
16       bodies on water ratemaking issues?  
17       **A. Yes, I have.**  
18       Q. Have you previously been involved in disputes  
19       as to the appropriate amount of corrected charges; that  
20       is to say, undercharges or overcharges, with respect to  
21       water rates?  
22       **A. Yes, I have.**  
23       Q. Have any of your engagements resulted in your  
24       testifying in court or before regulatory bodies as an  
25       expert on the subject of water ratemaking?

1861

1       **A. Yes.**  
2       Q. What does that organization do?  
3       **A. The American Water Works Association is a**  
4       **professional trade association made up of water**  
5       **utilities, consultants, manufacturers. It's nominally**  
6       **throughout North America, United States, Canada and**  
7       **Mexico. But its influence and reach certainly goes**  
8       **around the world.**  
9       Q. Is that the organization that published that  
10       manual you referred to?  
11       **A. Yes, it is.**  
12       Q. The M1 manual?  
13       **A. Yes.**  
14       Q. Have you ever served as an officer -- we will  
15       refer to it as the AWA.  
16       **A. Yes, I have.**  
17       Q. What positions have you held?  
18       **A. I was the president of the New England section**  
19       **of the American Water Works which makes me a trustee, if**  
20       **you will, of the association. I have been chairman of**  
21       **the financial management committee for American Water**  
22       **Works.**  
23       **I was chairman of the rates and charges**  
24       **committee and subcommittee of the American Water Works**  
25       **Association. I have been treasurer of the New England**

1863

1       **A. Yes, they have.**  
2       Q. Can you please tell the Court approximately how  
3       many times you have actually testified in court or  
4       before some type of regulatory body on the subject of  
5       water ratemaking?  
6       **A. Seventy-five, 85, somewhere in that order of**  
7       **magnitude.**  
8       Q. Are there instances where you have actually --  
9       you were engaged as an expert to give testimony but the  
10       matter resolved itself one way or the other before you  
11       actually were called upon to testify in a proceeding?  
12       **A. Yes.**  
13       Q. Can you tell the Court approximately how many  
14       times that has happened?  
15       **A. Another two dozen, 20 times, maybe.**  
16       Q. When you have testified on these occasions were  
17       you qualified as an expert?  
18       **A. Yes, I was.**  
19       Q. Has there ever been an occasion where you were  
20       not qualified as an expert; that is to say that the  
21       Court or regulatory body rejected the proffer of your  
22       testimony as expert testimony?  
23       **A. No, that's never happened.**  
24       Q. You referred to previously an organization  
25       called the American Water Works Association?

1862

1       **Section, board of directors, various committees.**  
2       Q. Have you also contributed to the M1 manual you  
3       referred to?  
4       **A. Yes, many editions.**  
5       Q. Can you describe for the Court just in general  
6       terms what that contribution has consisted of?  
7       **A. The M1 manual is prepared by the rates and**  
8       **charges committee of the American Water Works**  
9       **Association. They prepare a number of manuals on water**  
10       **rates and charges and associated fees. My involvement**  
11       **as a member of the committee has been going from a**  
12       **contributor to that manual to the -- being on the**  
13       **editorial board, which is a group of maybe four or five**  
14       **people of the committee that take disparate views on**  
15       **subjects and decide what is going to be in the manual.**  
16       **I was chairman of the committee for the -- I**  
17       **remember it was the fourth or fifth edition. On the**  
18       **editorial board of the most recent sixth edition. I am**  
19       **leading the effort on the most current update, the**  
20       **seventh edition, which is winding its way through**  
21       **preparation right now.**  
22       Q. In addition to the M1 manual, have you,  
23       yourself, written and published materials pertaining to  
24       water ratemaking and the appropriate assessment of costs  
25       pertaining to the distribution of water?

1864

1 **A. Yes, I have.**  
 2 Q. Can you tell the Court how many such  
 3 publications you have authored?  
 4 **A. I know there is a listing. It was attached to**  
 5 **my report. More than 50. If it's 100 different**  
 6 **occasions, I would believe. But it is somewhere between**  
 7 **50 and 100, I believe, maybe more.**  
 8 Q. That is attached, I believe, to your report,  
 9 which is DTX 123 and the appendices to that report, I  
 10 believe?  
 11 **A. Yes.**  
 12 Q. Have you actually ever been retained and done  
 13 some work, expert work for the San Diego County Water  
 14 Authority?  
 15 **A. Yes.**  
 16 Q. If we can take a look at your report and put  
 17 that up on the screen.  
 18 MR. KEKER: Excuse me, your Honor. The report  
 19 is not in evidence. We would object to it. We don't  
 20 object to him testifying.  
 21 MR. QUINN: We would -- I would first like to  
 22 identify the report, your Honor.  
 23 THE COURT: Let's take a pause and wait for  
 24 someone to move to admit it.  
 25 MR. QUINN: What we have on the screen is DTX

1865

1 123.  
 2 Q. Is this a copy of your report?  
 3 **A. Yes, it appears to be.**  
 4 Q. And does it have annexed to it that information  
 5 we referred to earlier, your C.V. and the publication?  
 6 **A. The copy I have in front of me that is marked**  
 7 **DTX 123 does have that, yes. It is Appendix B.**  
 8 MR. QUINN: Your Honor, we would offer this.  
 9 Mr. Denham's report came into evidence. We think it  
 10 would be useful to the Court to have this report, as  
 11 well. We would offer it.  
 12 MR. KEKER: We don't have any objection to the  
 13 resume coming in with the list but the report itself is  
 14 hearsay and shouldn't be in evidence. He should  
 15 testify.  
 16 THE COURT: The report dated October 28, 2013?  
 17 MR. QUINN: Yes.  
 18 MR. KEKER: Yes.  
 19 THE COURT: I am going to admit it. DTX 123 is  
 20 admitted.  
 21 (DTX 123 was received into evidence.)  
 22 Q. BY MR. QUINN: Mr. Woodcock, have you seen this  
 23 Court's opinion that was issued after and as a result of  
 24 the Phase I of this trial?  
 25 **A. Yes, I have.**

1866

1 Q. And you are aware that your report and your  
 2 opinion were not before the Court in the Phase I portion  
 3 of this proceeding?  
 4 **A. That is my understanding, yes.**  
 5 Q. Are you aware that the Court in its opinion  
 6 resulting from the Phase I of this trial reached some  
 7 conclusions which are at odds with some of the opinions  
 8 expressed in your expert report? You are aware of that?  
 9 **A. I am aware of that, yes.**  
 10 Q. So have you taken into account this Court's  
 11 ruling in Phase I in connection with the opinions that  
 12 you are going to give here today?  
 13 **A. I have, yes.**  
 14 Q. And how so? How have you taken the Court's  
 15 opinion into account?  
 16 **A. The Court's opinion stands as the opinion.**  
 17 **It's a given, if you will, in this case on what the**  
 18 **Court has ruled.**  
 19 **I accept the Court's ruling, certainly.**  
 20 Q. Let's first talk about principles of cost  
 21 recovery. And let me ask you, do the costs incurred by  
 22 Met have to be recovered through Met's rate structure?  
 23 **A. Yes, they do.**  
 24 Q. Why is that?  
 25 **A. The Metropolitan Water District is a**

1867

1 **governmental or quasi-governmental agency. Its only**  
 2 **source of revenue that covers its expenses is its rates**  
 3 **and charges. In essence, it can't operate at a loss.**  
 4 **It must recover its expenses and so, therefore, it has**  
 5 **to fully recover them.**  
 6 Q. We heard about cost-of-service reports. Can  
 7 you tell us what a cost-of-service report is?  
 8 **A. A cost-of-service report is, in general terms,**  
 9 **a report that's prepared for a utility, a water utility**  
 10 **in this case, that looks at what the total revenue needs**  
 11 **are of the utility, how those costs should be**  
 12 **functionalized and allocated, what they are, what**  
 13 **services are provided with the different expenditures,**  
 14 **and once those costs have been allocated, how those**  
 15 **should be distributed to different classes of customers**  
 16 **or types of use which then is instructive in determining**  
 17 **rates and the determination of rates that would recover**  
 18 **those allocated costs in proportion to the causes of the**  
 19 **costs, if you will.**  
 20 Q. When you refer to "allocation of costs," what  
 21 do you mean by that?  
 22 **A. Essentially what you do is you look at the**  
 23 **different expenses of the utility, determine what they**  
 24 **are and who caused them or what classes or groups caused**  
 25 **those costs to then determine how to most equitably or**

1868

1 **fairly recover them based on principles. I'll call them**  
2 **cost causation.**

3 Q. When you refer to cost causation, what do you  
4 mean by that?

5 **A. It's a principle that those that cause costs,**  
6 **those that benefit from services should be paying for**  
7 **them.**

8 **If I can give you a quick example. Meter**  
9 **reading on a retail water utility is a service that's**  
10 **provided by the utility. If everybody has their meter**  
11 **read, everybody should share equally in those costs.**

12 Q. Have you reviewed the cost-of-service reports  
13 of Metropolitan for the four years in question in this  
14 case?

15 **A. Yes, I have.**

16 Q. Putting aside the issues addressed by this  
17 Court's opinion in Phase I, do you have an opinion as to  
18 whether or not Met's cost-of-service reports fairly and  
19 adequately reflect the appropriate allocation of costs?

20 **A. I believe they do. Again, putting aside the**  
21 **Court's opinion.**

22 Q. You have read the report that was prepared by  
23 Mr. Denham, the expert retained by the San Diego Water  
24 Authority?

25 **A. Yes, I have.**

1869

1 **they are not enough to satisfy the needs of those 26**  
2 **agencies so they must find an additional source of**  
3 **water. The Metropolitan water district is the agency**  
4 **that provides that supplemental water to fulfill the**  
5 **needs they have to serve their customers.**

6 Q. Just in general terms, who are these 26 member  
7 agencies you referred to? I am not asking you to list  
8 all the names but tell the Court roughly who these  
9 agencies are.

10 **A. They are municipalities, some cities, Los**  
11 **Angeles, Beverly Hills. They are water districts that**  
12 **serve different areas. It's 26 different agencies, some**  
13 **of them wholesale, that re-wholesale the water like the**  
14 **San Diego County Water Authority. Some of them retail**  
15 **like Beverly Hills, City of Los Angeles.**

16 Q. Would it be fair to say, based on your  
17 experience as you described it, you have had dealings  
18 with and familiarity with hundreds, if not thousands, of  
19 different types of water districts or water agencies in  
20 the United States and around the world?

21 **A. Yes.**

22 Q. Is Met similar to other water agencies in the  
23 United States?

24 **A. No, it's not.**

25 Q. How so?

1871

1 Q. Did Mr. Denham have any disagreement with the  
2 idea that Met was required to cover its costs projected  
3 in the cost-of-service reports?

4 **A. He did not, no.**

5 Q. Did Mr. Denham make any separate finding that  
6 Met's costs that are addressed in its cost-of-service  
7 reports were not allowable or what they were spent on  
8 was somehow inappropriate?

9 **A. No. I think he accepted that all of the costs,**  
10 **expenses of Metropolitan were accept -- frankly, I don't**  
11 **know if he opined one way or the other. He certainly**  
12 **didn't suggest any of them were disallowable.**

13 Q. Let's turn now to the Metropolitan system big  
14 picture: Can you tell the Court your understanding  
15 about what is the service that Met provides?

16 **A. Metropolitan obtains water from two different**  
17 **sources, transmits it through its system of pipes and**  
18 **pumps and reservoirs to 26 member agencies.**

19 Q. Is it -- we've heard reference to the idea of  
20 supplemental water supply. Does Met have part of its  
21 mission to provide a supplemental water supply?

22 **A. Yes, it does.**

23 Q. Can you explain that, please?

24 **A. The 26 member agencies in general have their**  
25 **own sources of water, sources of supply of water. But**

1870

1 **A. Metropolitan in some ways is similar but in**  
2 **many ways is very unique.**

3 MR. KEKER: Excuse me, your Honor. I will  
4 object on the grounds of relevance.

5 THE COURT: Overruled.

6 Go ahead.

7 THE WITNESS: In many ways it's very unique.

8 I think first it's huge. It is much bigger  
9 than any other agency in the United States in terms of  
10 the number of acre-feet of water it provides, the number  
11 of customers, nearly 20 million it's budgeted. It is a  
12 very big agency which in itself results in some  
13 complications, some issues.

14 It's not a retailer. Most water supply, water  
15 companies, water agencies in the United States and North  
16 America provide retail service. That is not to say they  
17 all do. There are other wholesale entities but the vast  
18 majority provide retail service to an end user, a house,  
19 a business, a factory, that type of thing.

20 And thirdly, and perhaps the most unique  
21 factor, especially considering its size, is that  
22 Metropolitan does not own or control the water that it  
23 supplies, the supplemental water supplies. It's  
24 dependent on other agencies to get them water. Most  
25 other agencies, not all, but most -- a vast majority own

1872



1 their own supplies and control their own supplies.  
 2 Q. Where does Met get its water?  
 3 A. Metropolitan gets water from two different  
 4 sources. The main source, at least in terms of rights  
 5 to water, is from the Department of Water Resources of  
 6 the State of California through the State Water Project  
 7 where it gets water generally north of here, Lake  
 8 Oroville. And the next source is the Colorado River  
 9 from the, I believe it's from the Department of Interior  
 10 at Lake Havasu off Parker Dam.  
 11 Q. Does Met get a consistent amount of water from  
 12 those two sources every year?  
 13 A. No, it does not.  
 14 Q. Can you explain that?  
 15 A. They have a right to a certain volume of water  
 16 to the extent it's available. From the Colorado River  
 17 water, it's fairly consistent from year to year.  
 18 Sometimes they are able to take more than they are  
 19 allowed, if others don't take their full amount.  
 20 The biggest variation, however, comes from the  
 21 State Water Project where they have the rights to water  
 22 and every year the State determines an allocation, what  
 23 percentage of the rights they will get from year to  
 24 year. Sometimes it changes throughout the year but the  
 25 State makes a determination as to how much they will

1873

1 get. Recently they have been getting a very small  
 2 percentage of that right to water from the State Water  
 3 Project.  
 4 Q. Can the allocations from the State Water  
 5 Project vary -- can they vary a lot from year to year?  
 6 A. They can vary extraordinarily. Like I said,  
 7 recently it has been fairly low. At one point they were  
 8 given a zero allocation and it was later bumped up to, I  
 9 believe, five percent. I think this year it is in the  
 10 order of 15 percent, their allocation.  
 11 Q. You have described to us some ways in which  
 12 Metropolitan is a unique water agency in your  
 13 experience. Do these unique features of Metropolitan's  
 14 system have any impact on its physical infrastructure?  
 15 A. Yes, it does.  
 16 Q. Can you explain that for us, please?  
 17 A. It ends up being a -- the Metropolitan system  
 18 is one where they take the water they get and whatever  
 19 they can, again depending on the allocations we just  
 20 discussed, they take that water and they bring it into  
 21 their system. They, through a series of integrated  
 22 types of reservoirs and pumps, are able to take that  
 23 water, move it around and distribute it as needed to the  
 24 26 member agencies. And those demands can vary from  
 25 year to year, month to month. And if needed, move it to

1874

1 reservoirs to store it, take it out when they need it.  
 2 They have been doing that recently with the  
 3 cutback in the State water. It is like a big black box  
 4 where you have water coming from two sources and going  
 5 out to 26 different agencies. And within that black box  
 6 they have to have this somewhat complicated series of  
 7 pipes, pumps, reservoirs -- there is also treatment  
 8 which isn't at issue here -- to distribute that water to  
 9 the agencies.  
 10 Q. Have you had an opportunity to review any of  
 11 the contractual or legal documents relating to Met's  
 12 financial responsibilities regarding the State Water  
 13 Project?  
 14 A. I have, yes.  
 15 Q. Is the relationship between Met and the  
 16 California Department of Water Resources the same as  
 17 that -- as that between the typical water supplier on  
 18 the one hand and wholesaler or retailer on the other  
 19 hand?  
 20 A. No, it's not.  
 21 Q. How is the relationship between Met and the  
 22 California Department of Water Resources different?  
 23 MR. KEKER: I am going to object. We are in a  
 24 contract trial where the issue is contract and damages  
 25 and this sounds like testimony that could have been put

1875

1 in in Phase I but it's not relevant to this case, to  
 2 this part of the trial.  
 3 THE COURT: It may or may not be. This is in  
 4 part why we have time limits, so the attorneys can  
 5 decide how they like to best spend their time. I don't  
 6 think this will injure anybody. I will let it continue.  
 7 Q. BY MR. QUINN: Do you have the question in  
 8 mind, sir?  
 9 A. I do. Let -- actually, if I can have it back  
 10 again? I'm sorry.  
 11 Q. How is the relationship between Met and the  
 12 Department of Water Resources different between that of  
 13 a typical supplier of water and a water wholesaler or  
 14 retailer?  
 15 A. Sure.  
 16 The -- the typical relationship is one where  
 17 the supplier of water provides water on demand to the  
 18 end user. In the case of a wholesaler, in this case to  
 19 the 26 member agencies as they need it.  
 20 It's generally priced on a per gallon, per  
 21 acre-foot basis whereas you take the commodity, water in  
 22 this case, you pay for it. You pay for what you use.  
 23 That's not the relationship at all between the  
 24 Metropolitan and the State of California, Department of  
 25 Water Resources and the State Water Project. That is a

1876

1 **very different arrangement.**  
 2 **Metropolitan's agreement with them is**  
 3 **essentially a take-or-pay situation where Metropolitan**  
 4 **must make payments to the State of California for those**  
 5 **capacity rights, whether they are used or not.**  
 6 **In fact, if no water is made available,**  
 7 **Metropolitan still is on the hook, must pay for those**  
 8 **full costs of capacity rights even if no product is**  
 9 **delivered.**  
 10 MR. KEKER: Objection, your Honor. And move to  
 11 strike. This is not in his report. He is talking about  
 12 relations between Met and DWR, other places. It's not  
 13 in the report. We move to strike it.  
 14 THE COURT: Overruled.  
 15 Q. BY MR. QUINN: In terms of its contractual  
 16 relationship with the California Department of Water, is  
 17 Met guaranteed any particular volume of water?  
 18 **A. They are not guaranteed any particular water**  
 19 **volume.**  
 20 Q. What is it exactly Met is paying for when it  
 21 pays the California Department of Water and Power?  
 22 **A. The only thing they're guaranteed is a capacity**  
 23 **in the transportation network, if you will. They are**  
 24 **guaranteed there will be a certain volume of capacity in**  
 25 **that piping system, if it's available. If it is not**

1877

1 **available, they can put somebody else's water in if they**  
 2 **want.**  
 3 Q. Whether or not there is water available, did I  
 4 understand you to say that Met still has certain payment  
 5 obligations to the State?  
 6 **A. Yes. Met has to make payments whether they use**  
 7 **water or not.**  
 8 Q. Whether there is water available or not?  
 9 **A. Whether there is water available or not, they**  
 10 **still, for the most part, have to make payments to them.**  
 11 **There are some other payments based on power costs and**  
 12 **things like that that are variable. But the vast**  
 13 **majority of the payments are take or pay. They pay**  
 14 **whether they get water or not.**  
 15 Q. Do you know what those payments are for, what  
 16 they are used for at the State of California?  
 17 **A. They are used by the State to make the payments**  
 18 **on the bonds that were used to finance the State Water**  
 19 **Project. When the State of California built the State**  
 20 **Water Project they issued bonds to pay for the**  
 21 **construction. Those bonds are guaranteed by the**  
 22 **payments from the different contractors of the State**  
 23 **Water Project.**  
 24 **So those are payments that are used to pay off**  
 25 **the State's bonds.**

1878

1 Q. When you refer to contractors, the State Water  
 2 Project, Met -- is Met one of those contractors?  
 3 **A. Met is one of those contractors.**  
 4 Q. Is it true that Met and the other contractors  
 5 are paying for the bonds which were used to raise the  
 6 money to create that State Water Project infrastructure?  
 7 **A. That's correct.**  
 8 Q. From a rate-making perspective, does it make  
 9 any difference whether or not Met actually owns the  
 10 State Water Project?  
 11 MR. KEKER: Objection, your Honor. This calls  
 12 for an opinion that it may be relevant to Phase I.  
 13 THE COURT: We are going over a lot of Phase I  
 14 material which is in great part why I'm allowing it in.  
 15 I think it is sort of no harm-no foul. We went through  
 16 a lot of this in Phase I. Mr. Quinn wants to emphasize  
 17 it now. I don't see the harm, do you?  
 18 MR. KEKER: I do.  
 19 THE COURT: Okay.  
 20 MR. KEKER: In the first phase they made a  
 21 motion that experts can't opine on what is proper  
 22 ratemaking, that is a legal conclusion. We concurred in  
 23 the motion. You said, level playing field for  
 24 everybody.  
 25 The idea their experts are now coming in and

1879

1 giving opinions, for example, that ownership makes no  
 2 difference, that it is improper to call State Water  
 3 Project water supply, the water stewardship rate is  
 4 honky dory, that is not something that you said before  
 5 experts were going to be able to do. So we object to  
 6 it.  
 7 THE COURT: I understand. I am going to allow  
 8 it. It may not be useful. We are not going to use this  
 9 phase to revisit the first phase.  
 10 MR. QUINN: Understood, your Honor.  
 11 MR. KEKER: But we're concerned that they are  
 12 setting themselves up for appeal. They are going to use  
 13 this phase to try to revisit Phase I. A decision was  
 14 made in Phase I. Mr. Woodcock was designated as an  
 15 expert and they didn't call him. And they are now  
 16 trying to, I guess, impeach your Phase I decision by  
 17 calling an expert in this phase that has nothing to do  
 18 with this phase. That's our objection.  
 19 THE COURT: Understood.  
 20 Mr. Quinn, do you want to walk me through a  
 21 little bit of what you think we are going to end up with  
 22 now?  
 23 MR. QUINN: Your Honor, we ultimately will be  
 24 submitting an alternative damages case.  
 25 THE COURT: Sure.

1880

1 MR. QUINN: We think it's in the record here.  
 2 We think the issue -- this is an issue that is relevant  
 3 to that in terms of whether in his expert opinion --  
 4 this is not a legal opinion -- whether in his expert  
 5 opinion as a rate maker ownership of the facility makes  
 6 any difference at arriving at rates.  
 7 At the end of the day we are going to be  
 8 briefing an alternative damage scenario and we think  
 9 this is important for that.  
 10 THE COURT: You think it will be consistent  
 11 with the Phase I rulings?  
 12 MR. QUINN: Yes, your Honor.  
 13 MR. KEKER: That is simply impossible. The  
 14 Phase I ruling said that ownership was -- was very  
 15 relevant to the decision that was made. This witness  
 16 has said in his report it's irrelevant, it's just -- the  
 17 only proper way to deal with the State Water Project  
 18 costs is transportation, not supply. That's what he  
 19 said in his report.  
 20 They could have called him in Phase I to talk  
 21 about that. You made a decision about that. This is  
 22 peppering the record with something that they didn't put  
 23 in that new lawyers have now decided they wished they  
 24 put in Phase I. It has nothing to do with the contract  
 25 damages.

1881

1 THE COURT: We'll see. Overruled.  
 2 Go ahead.  
 3 THE WITNESS: I'm sorry.  
 4 MR. QUINN: I understand. Let me re-ask the  
 5 question.  
 6 Q. From a ratemaking perspective, does it make any  
 7 difference whether or not Met actually owned the State  
 8 Water Project?  
 9 MR. KEKER: Objection. Improper expert  
 10 opinion.  
 11 THE COURT: Overruled.  
 12 THE WITNESS: No, it does not.  
 13 Q. BY MR. QUINN: Why is that?  
 14 A. **The process of ratemaking we discussed a few**  
 15 **minutes ago involves the determination of expenses and**  
 16 **then the allocation of those expenses to come up with**  
 17 **rates. The expenses in this case are payments that are**  
 18 **made by Metropolitan that go to the State that go to pay**  
 19 **off the bonds.**  
 20 **It doesn't really matter for ratemaking whether**  
 21 **those bonds are in the name of the State of California**  
 22 **or in the name of the Metropolitan Water District. The**  
 23 **payments are still payments that go to pay off those**  
 24 **bonds. And then the treatment of those payments, how**  
 25 **those should be allocated, how they should be fairly**

1882

1 **recovered is irrelevant of the ownership. They would be**  
 2 **exactly the same if Metropolitan owned it or the State**  
 3 **of California owned it or the United States Government**  
 4 **owned it.**  
 5 Q. Under generally accepted ratemaking principles,  
 6 does Met need to recover the costs that it incurs for  
 7 having that capacity with the State Water Project?  
 8 A. **Yes, it does.**  
 9 Q. Why is that?  
 10 A. **It is an expense, as I said, that Metropolitan**  
 11 **has. They have to make those payments to the State of**  
 12 **California and they have to recover -- they have no --**  
 13 **they can't operate at a loss. They have to recover**  
 14 **those expenses.**  
 15 Q. From a rate-making perspective, are there  
 16 accepted principles that govern how Met should be  
 17 recovering those costs?  
 18 A. **Yes.**  
 19 Q. What are those principles?  
 20 A. **Well, the principles, again, are the costs**  
 21 **should be recovered from those that cause the costs,**  
 22 **from those that benefit from the expenditures.**  
 23 Q. You are aware that the exchange water that  
 24 we're concerned about in this case is it's available as  
 25 a result of an agreement between the IID and San Diego

1883

1 and certain related agreements; you're aware of that?  
 2 A. **I am, yes.**  
 3 Q. Do you know where that water is brought into  
 4 the Metropolitan system?  
 5 A. **Yes.**  
 6 Q. Where is it brought into the Metropolitan  
 7 system?  
 8 A. **It's brought into the Metropolitan system**  
 9 **through the intake of the Colorado River Aqueduct at**  
 10 **Lake Havasu.**  
 11 Q. Let me turn now to the water stewardship rate.  
 12 Do you understand that Metropolitan utilizes a water  
 13 stewardship rate?  
 14 A. **Yes, I do.**  
 15 Q. What is your understanding of the cost that  
 16 that rate seeks to recover from Met clients?  
 17 A. **The costs are investment that the Metropolitan**  
 18 **Water District makes, investment in the 26 member**  
 19 **agencies or they are all eligible for it -- I don't know**  
 20 **if they have all gotten money from it -- but investments**  
 21 **that are made by the member agencies for groundwater**  
 22 **augmentation, desalination, conservation programs,**  
 23 **things that would augment the supply of water or supply**  
 24 **of water at the agency level, not at the Metropolitan**  
 25 **level but by the 26 member agencies.**

1884

1 Q. Why would Met seek to recover those costs?  
 2 **A. It would seek to recover those costs because it**  
 3 **has to -- if it is going to make that expenditure,**  
 4 **again, it has to recover all of its costs.**  
 5 Q. Why would Met make that expenditure?  
 6 **A. It would make that expenditure solely for the**  
 7 **purpose of making that black box I talked about function**  
 8 **better, to make capacity available in its transmission**  
 9 **system, to make capacity in its reservoirs available,**  
 10 **offset it by -- reducing the amount of supplemental**  
 11 **water that it might have to take and offsetting the**  
 12 **costs of moving that water, storing that water, reducing**  
 13 **their former -- the future -- their future capital**  
 14 **expenditures by not having to make more capacity**  
 15 **available.**  
 16 Q. If as a result of this water stewardship  
 17 program Met is selling less water to particular agencies  
 18 that participate in it, doesn't Met also save some costs  
 19 on Met's supply for water?  
 20 **A. No.**  
 21 Q. Why not?  
 22 **A. It -- it is not saving Met anything at all on**  
 23 **supply. Metropolitan Water District buys all the water**  
 24 **it can. It needs all the water it has rights to. It**  
 25 **buys all it can and uses it to distribute to the 26**

1885

1 procedure. If he has comments on the facts that  
 2 Mr. Denham relied on, that's appropriate.  
 3 I have cases if you want to --  
 4 THE COURT: I am generally familiar with the  
 5 area. I think the question at the bottom is the extent  
 6 to which he was disclosed and an opportunity for  
 7 deposition was available for his opinion on the Denham  
 8 report.  
 9 MR. KEKER: He was deposed two days after  
 10 Mr. Denham was deposed. His report and Mr. Denham's  
 11 report came in the same day, a month before their  
 12 depositions. He had plenty of opportunity. And, as I  
 13 say, the proper way to do it is if there's a rebuttal  
 14 report, from this witness or anybody else, another  
 15 expert, you have 20 days to do it under the Code of  
 16 Civil Procedure.  
 17 In any event, all he can do -- and I would like  
 18 to cite that one -- the best case, the clearest case.  
 19 It is Collins versus Navistar at 214 Cal.App.4th 1486.  
 20 It's a 2013 case in the Third District. And it talks  
 21 about this rebuttal to experts and how you can't do  
 22 opinions. And that's what the Code says.  
 23 THE COURT: Mr. Quinn.  
 24 MR. QUINN: I have to admit, I am not  
 25 familiar -- I don't have this off the top of my head.

1887

1 **agencies or, if they are not demanding it in a**  
 2 **particular year, to put it in storage for emergencies,**  
 3 **for droughts, situations like we have right now. It**  
 4 **doesn't impact how much water Met needs to purchase or**  
 5 **purchases in any way or form.**  
 6 Q. Does Met ever take less water than the supply  
 7 of water that is made available to it?  
 8 **A. I don't think Met has ever taken less water**  
 9 **than it can take. And particularly given the current**  
 10 **circumstance, I can't imagine a situation where they**  
 11 **ever would.**  
 12 Q. In the course of your engagement, have you had  
 13 occasion to read the report prepared by Mr. Denham?  
 14 **A. Yes, I have.**  
 15 Q. That was proffered by San Diego?  
 16 **A. Yes, I have.**  
 17 Q. Do you have any general conclusions as to the  
 18 adequacy of Mr. Denham's report?  
 19 MR. KEKER: Excuse me, your Honor. This is  
 20 improper pursuant to CCP 2034.310. An expert cannot  
 21 opine -- first of all, he had an opportunity to file a  
 22 rebuttal report. He did not. The 20 days went by,  
 23 according to the Code.  
 24 An expert cannot comment on another expert's  
 25 opinions without doing that, going through that rebuttal

1886

1 THE COURT: I understand.  
 2 MR. QUINN: There is case law, particularly I  
 3 can cite the Court to Easterby versus Clark, 171  
 4 Cal.App.4th 772, 780, 2009, where the Court summarizes  
 5 the law about experts' reports and issues that come  
 6 outside the report.  
 7 He did not -- Mr. Kecker is correct, he did not  
 8 critique Mr. Denham in his report. He was not asked  
 9 about Mr. Denham's report, I don't think, in his  
 10 deposition, and he certainly did not file a supplemental  
 11 report.  
 12 The Easterby case, if I can read the Court a  
 13 passage, "The overarching principle in Kennemur, Jones  
 14 and Bonds" -- those being cases that this Court is  
 15 summarizing -- "is clear. A party's expert may not  
 16 offer testimony at trial that exceeds the scope of his  
 17 deposition testimony if the opposing party has no notice  
 18 or expectation that the expert will offer the new  
 19 testimony, or if the notice of the new testimony comes  
 20 at a time when deposing the expert is unreasonably  
 21 difficult."  
 22 In our CMC statement that was filed -- I can't  
 23 recall when, some number of weeks, if not months, before  
 24 the trial -- we clearly said he will critique  
 25 Mr. Denham's report.

1888

1 They certainly could have said we want to hear  
 2 what that critique is going to be and take his  
 3 deposition, and we would have certainly made him  
 4 available. The Court will remember we wanted to reopen  
 5 expert testimony. We wanted to have some more expert  
 6 discovery. They were the ones that really didn't want  
 7 to do that. So I don't think it is unfair for -- I  
 8 think it would be useful for the Court to hear his  
 9 response to what Mr. Denham said.

10 THE COURT: The issue is not whether it is fair  
 11 or unfair. The issue is whether fair notice was given  
 12 to the other side that the expert was going to be  
 13 providing a new opinion. And typically what happens,  
 14 even under Easterby, is then this witness is provided or  
 15 offered to the other side for a further deposition. The  
 16 idea -- your notion is that if you mention it in a CMC  
 17 statement that's enough notice?

18 MR. QUINN: Well, it's February 2. I am  
 19 reading from it now. February 2, 2015, we said, and I  
 20 quote, "Mr. Woodcock has been designated as MWD's expert  
 21 on contract damages. Mr. Woodcock will critique the  
 22 opinions of SDCWA's expert."

23 I could not have been any clearer. If  
 24 Mr. Kecker is saying we can be faulted for not sending  
 25 him an email and saying he's available for deposition,

1889

1 that seems kind of a small thing on which to make a  
 2 decision like this. They could equally have said,  
 3 surprise, surprise, we understand your expert is going  
 4 to critique our expert; we would like to hear what he  
 5 has to say. Is that what this really comes down to?

6 MR. KEKER: No. What this comes down to is we  
 7 asked him twice in his deposition, "Do you have any  
 8 other opinions?"

9 And he said, "No. I have no other opinions."  
 10 Twice we asked him.

11 And we are aware of CCP 2034.310, that the  
 12 expert called as a witness to impeach the testimony of  
 13 an expert witness offered by any other party at trial,  
 14 the impeachment may include testimony to the falsity or  
 15 nonexistence of any fact used as the foundation for any  
 16 opinion. He can get up and say he got the number wrong;  
 17 I looked at the same document, but may not include  
 18 testimony that contradicts the opinion.

19 And there's a series of cases, Collins is one.  
 20 Let me -- "The trial court properly excluded Friedman's  
 21 proposed rebuttal under this CCP Section. Friedman did  
 22 not propose to testify to the falsity or nonexistence of  
 23 any fact in the databases Dr. Ray used. Instead, he  
 24 testified in his opinion the databases were not reliable  
 25 and so on." He gave opinion testimony.

1890

1 That's what we are objecting to. If he has  
 2 something to say that Denham got a number wrong,  
 3 calculated something wrong, we accept that. That's fair  
 4 game, and that's what we thought they were talking  
 5 about.

6 If he is going to do opinions in contradiction  
 7 of his twice asked-and-answered questions in his  
 8 deposition, I have no more opinions," after Denham's  
 9 report was a month old, after the time for filing  
 10 rebuttal testimony was over, and after Denham had been  
 11 deposed, we think that's wrong.

12 THE COURT: I am going to take a ten-minute  
 13 recess. But before I do that -- I am going to read a  
 14 couple of cases during that recess. Before I do that is  
 15 there anything else you want me to look at, Mr. Quinn?

16 MR. QUINN: I don't have anything else.

17 MR. KEKER: Your Honor, can I cite a couple of  
 18 other cases, if you are interested. The Fish versus  
 19 Guevara, 1993, Sixth District, 12 Cal.App.4th 142 at 145  
 20 and 146; Mizel v. City of Santa Monica, 93 Cal.App.4th  
 21 1059, a 2002 case, from the Second District at 1068.

22 THE COURT: Probably enough.

23 MR. KEKER: Okay. And I gave you the Collins  
 24 one.

25 MR. QUINN: Your Honor, I would just point out

1891

1 that San Diego did the exact same thing in their joint  
 2 CMC statement. They said on page 3, lines three to  
 3 four, "In addition, Mr. Denham may offer testimony  
 4 and/or opinions in response to the specific testimony of  
 5 Met's experts or percipient witnesses and to rebut any  
 6 defenses Met may offer at trial."

7 They served the same placeholder that we did.

8 MR. KEKER: We have a lot of objections, as you  
 9 know, to what they said Mr. Woodcock would talk about.  
 10 When someone puts in that kind of statement, it doesn't  
 11 mean you waived all your objections. We have identified  
 12 some and here is another.

13 THE COURT: I will see everybody in ten  
 14 minutes. Thank you so much.

15 (Recess.)

16 THE COURT: I thank you for indulging me. I  
 17 wanted to have a look at some of these cases.

18 The issue that is presented is whether or not  
 19 the CMC statement is a sufficient disclosure that the  
 20 expert would provide the opinion that is now being  
 21 sought at trial. This is not an issue which is  
 22 addressed in Cottini, C-O-T-T-I-N-I, 226 Cal.App.4th,  
 23 401. It is also not addressed by the principle that is  
 24 espoused in -- discussed in Mizel, M-I-Z-E-L, 93  
 25 Cal.App.4th 1059 at 1067 through -68. Those cases don't

1892

1 address this issue.  
 2 The issue is, I think, addressed in the  
 3 Easterby case. And there the issue, again, is notice.  
 4 So given indeed an expert's disclaimer that he or she  
 5 will not testify on a certain subject, that gets  
 6 overcome at such time; in other words, such time in the  
 7 Easterby case where it is quoting another case, as the  
 8 Appellant, in that case, disclosed that the expert had  
 9 conducted a further investigation and had reached  
 10 additional opinions. When the opposing side is on  
 11 notice that an additional opinion is indeed going to be  
 12 forthcoming, the first piece of the test is satisfied.  
 13 The second piece of the test is whether there's  
 14 enough time, in fairness, to allow for a deposition to  
 15 address that opinion.  
 16 Those are the two branches of the test as  
 17 discussed in Easterby. As in Easterby, we have a  
 18 situation here where the other side was put on notice.  
 19 In Easterby, it was a letter that went from one side to  
 20 the other. Here was a CMC statement which I've  
 21 reviewed.  
 22 The February 2015 CMC statement tells San Diego  
 23 that Woodcock will testify as to analysis of San Diego's  
 24 expert testimony that was in 2015. I think that was  
 25 probably in enough time to have a deposition taken if

1893

1 San Diego had wanted it. I will allow the questioning  
 2 to continue.  
 3 MR. KEKER: Can I be heard for a second on  
 4 that? I don't think you've dealt with 2034.310. Yes,  
 5 they can ask him questions about facts. But what that  
 6 talks about is the distinction which the cases say  
 7 should be strictly construed by the trial court between  
 8 facts and opinions.  
 9 THE COURT: That is why I talked about the  
 10 Mizel opinion. You are talking about the Mizel  
 11 principle, and you are absolutely right. You don't have  
 12 to give them or they don't have to give you notice  
 13 probably at all if you want to call an expert, for  
 14 example, to undermine the foundation for expert opinion.  
 15 So, for example, if this gentleman is relying  
 16 on facts about how he thinks the Met system works and  
 17 the configuration that he thinks water comes from the  
 18 Colorado River, but you want to bring somebody in to  
 19 testify that the water does not come from the Colorado  
 20 River, you can do it. That is what Mizel talks about.  
 21 That is the distinction between underlying facts and  
 22 actually rebutting an opinion. That is not what is  
 23 going on here.  
 24 What is going on here is, under Easterby, you  
 25 were put on notice that they were going to extract this

1894

1 opinion, not an attack on the underlying fact. And in  
 2 fairness, you were given enough notice of that. So you  
 3 could have taken the deposition if you had wanted to.  
 4 The matter is submitted and we will proceed  
 5 with the questions.  
 6 Mr. Quinn.  
 7 MR. KEKER: Can I raise one other issue? It  
 8 was objected to. Mr. Denham's report had come into  
 9 evidence. It turns out they misspoke. It has not come  
 10 into evidence. We renew our objection.  
 11 The report itself is hearsay and part of the  
 12 mischief is it violates the motion in limine by opining  
 13 on what proper rates are under the law, and you said  
 14 that's your job and not the expert's job. And we at  
 15 least move to exclude that part of the report from the  
 16 record and strike any testimony about it in which an  
 17 expert opines on what a legal rate is and not a legal  
 18 rate.  
 19 THE COURT: Why don't you make that the subject  
 20 of a motion so I can see what pieces you are talking  
 21 about. My impression -- why don't you do that. Tell me  
 22 what pages you believe violated the in limine order and  
 23 I am happy to rule on that.  
 24 Q. BY MR. QUINN: Did you have any general  
 25 conclusions regarding the adequacy of Mr. Denham's

1895

1 report?  
 2 A. Yes.  
 3 Q. What are those?  
 4 A. **I thought the report only went part way. It**  
 5 **didn't address the full issue.**  
 6 Q. And could you explain what you're referring to?  
 7 A. **The calculations that Mr. Denham did**  
 8 **essentially took the Court's ruling in Phase I, removed**  
 9 **a large number of costs from transportation, calculated**  
 10 **a new transportation rate or charge and came up with**  
 11 **damages that way. What happened to those costs that**  
 12 **were removed, that were to be put to supply were really**  
 13 **left hanging. How they impacted the calculations, there**  
 14 **was no calculation by Mr. Denham as to what the impact**  
 15 **of that would be.**  
 16 Q. Let me call your attention to a sentence in  
 17 your report, DTX 123, at 24, where you wrote, "If one or  
 18 more of the rates and charges is changed, it will be  
 19 necessary to adjust one or more of the other rates or  
 20 charges to still collect the same total revenue."  
 21 Do you recall that passage in your report?  
 22 A. I do.  
 23 Q. And then at page 25, "Rate setting is a zero  
 24 sum proposition. If one or more rates are reduced,  
 25 something else needs to increase to keep MWD whole."

1896

1 Do you recall that?  
 2 **A. I do.**  
 3 Q. Does that have some -- do those points have  
 4 some application to the critique you just made of  
 5 Mr. Denham's report?  
 6 **A. That's exactly the points I was making in the**  
 7 **critique.**  
 8 Q. Did Mr. Denham's report take into account  
 9 elasticity of demand as it relates to how demand would  
 10 be affected by changes in supply prices?  
 11 **A. No, it did not.**  
 12 Q. I want to call your attention to a passage at  
 13 page 24 in your report, where you wrote, "For example, a  
 14 revision to the supply rates would impact total water  
 15 sales and therefore the revenues that are available to  
 16 pay MWD's costs. This in turn may cause changes to  
 17 other rates and charges such as the water stewardship  
 18 rate."  
 19 Do you recall that passage?  
 20 **A. I do.**  
 21 Q. And then the passage on page 25, "Many member  
 22 agencies renewed their purchase orders in 2012 based on  
 23 the existing rates. It is unknown if they would agree  
 24 to a renewal of supply rates that may be structured  
 25 differently (higher) because the only commitment they

1897

1 make under the purchase order is under the supply rate."  
 2 Could you please explain to the Court what you meant by  
 3 that?  
 4 **A. In 12 -- let me step back. Metropolitan has**  
 5 **two different supply rates, a tier one and tier two**  
 6 **rate. The tier two rate is a higher rate that is**  
 7 **charged to the member agencies, and it kicks in or**  
 8 **applies when member agencies exceed certain volumes that**  
 9 **they take within a year in order to try to plan better.**  
 10 **Metropolitan went through an effort in the beginning of**  
 11 **this decade looking for the member agencies to enter**  
 12 **into supply agreements, if you will, where they said how**  
 13 **much they would commit to taking and pay for under the**  
 14 **supply rates.**  
 15 **They made those commitments. Most of them, not**  
 16 **all of them, as I understand, but most of the member**  
 17 **agencies signed those new commitments to take a certain**  
 18 **amount of water that would apply at the tier one rate**  
 19 **with the understanding of what the rates were at that**  
 20 **time, how much the supply rates were vis-a-vis the**  
 21 **transportation or power or any other rate.**  
 22 **When they made those rates, they did it with**  
 23 **the presumption as to how much was in the supply rates.**  
 24 **If Metropolitan then goes and has to change that supply**  
 25 **rate, and significantly change the supply rate, as a**

1898

1 **result of the Court's ruling, I suspect that the member**  
 2 **agencies might have a different view as to how much they**  
 3 **would have committed to under tier one or tier two.**  
 4 **I know as a board member, as I was -- I would**  
 5 **certainly be upset that the rules of the game changed to**  
 6 **some degree like that by changing the rates so**  
 7 **significantly.**  
 8 Q. Do you have any other comments regarding the  
 9 adequacy of Mr. Denham's report?  
 10 **A. The other area that I thought was a problem was**  
 11 **in -- the denominator that Mr. Denham used in his**  
 12 **calculations. He essentially looked at what Colorado**  
 13 **River Aqueduct costs were and then divided those by**  
 14 **total amounts of water supplied.**  
 15 **And that violates, frankly, what is known as a**  
 16 **matching principle in rate setting where one needs to**  
 17 **match costs with gallons or acre-feet, basically.**  
 18 **In this case he was taking some of the costs**  
 19 **and dividing them by all of the sales. He should have**  
 20 **taken some of those costs, Colorado River costs and**  
 21 **divided by Colorado River sales. And the impact of that**  
 22 **with the much smaller denominator, Colorado River sales**  
 23 **would have been a much lower -- a much higher rate and a**  
 24 **larger delta.**  
 25 Q. By including all water sales in the

1899

1 denominator, does that result in having a smaller  
 2 fraction, a smaller number?  
 3 **A. Yes, it does.**  
 4 Q. And what was the consequences of that for the  
 5 purpose of determining the damages number that he  
 6 arrived at?  
 7 **A. I believe it inflated the number.**  
 8 Q. Establishing the unit costs for Colorado River  
 9 water and Colorado River costs and unique Colorado River  
 10 costs, should he have divided those costs by the CRA  
 11 sales, that is to say the Colorado River Aqueduct sales,  
 12 instead of all sales which include both CRA and SWD?  
 13 **A. Yes, I believe that is what he should have**  
 14 **done.**  
 15 Q. Let me back up for a second.  
 16 Have you been informed that roughly 40 percent  
 17 of the exchange water that San Diego has received over  
 18 the four years at issue in this case actually came from  
 19 the State Water Project?  
 20 **A. That's correct.**  
 21 MR. KEKER: Objection, your Honor. No  
 22 foundation.  
 23 THE COURT: I think we're just putting this in  
 24 as an assumption. I understand. This is not coming in  
 25 for the truth of that statement.

1900

1 MR. QUINN: Correct.  
 2 THE COURT: With that understanding, the  
 3 objection is overruled.  
 4 THE WITNESS: Yes, that's my understanding.  
 5 Q. BY MR. QUINN: Would the fact that a  
 6 substantial part of the exchange water is actually from  
 7 the State Water Project in any way bear from a  
 8 rate-making perspective on whether State Water Project  
 9 costs are appropriately charged to San Diego in part, at  
 10 least those as related to that State water that is  
 11 included in the exchange?  
 12 MR. KEKER: Objection, your Honor. Motion in  
 13 limine.  
 14 He is opining on what is an appropriate cost to  
 15 include in the rate, in a legal rate. He is giving a  
 16 legal conclusion.  
 17 MR. QUINN: I don't think so, your Honor. He  
 18 is saying from a rate-making perspective, in terms of --  
 19 the principles he's employed, cost causation, burden and  
 20 benefit for the appropriate costs and benefits, would it  
 21 be -- is it appropriate to include the costs for that  
 22 portion of the State Water Project water that's included  
 23 in the exchange water. He is being asked from -- this  
 24 is his expertise, from the rate-making standpoint.  
 25 MR. KEKER: His expertise from a rate-making

1901

1 standpoint is not the point in a case where what we're  
 2 looking for is the lawful, legal rate and where you  
 3 ruled in motions in limine from both sides that experts  
 4 shouldn't opine on what a legal rate is. And this is a  
 5 way to simply get around that motion in limine.  
 6 THE COURT: Are you going to be answering this  
 7 question from the perspective what is or what is not  
 8 cost causation?  
 9 THE WITNESS: Yes.  
 10 THE COURT: I will allow that within those  
 11 confines.  
 12 MR. KEKER: It is also not in the report, your  
 13 Honor.  
 14 THE COURT: Mr. Quinn.  
 15 MR. QUINN: I would refer to DTX 128 --  
 16 THE COURT: This is the report?  
 17 MR. QUINN: Yeah.  
 18 -- where he makes the general -- he makes the  
 19 statement that MWD's rates and charges result in a  
 20 reasonable allocation of costs to member agencies that  
 21 are served and result in an appropriate assignment of  
 22 costs.  
 23 THE COURT: I think this is under that heading.  
 24 We talked about cost causation, and he has been allowed  
 25 to testify on these issues and he can talk about it.

1902

1 Overruled.  
 2 Let's proceed.  
 3 MR. QUINN: Let me frame the question again.  
 4 Q. Again, from a rate-making perspective, does the  
 5 fact that a substantial part of the exchange water that  
 6 San Diego received is actually from the State Water  
 7 Project in any way bear on whether State water costs are  
 8 appropriately charged to San Diego?  
 9 MR. KEKER: Objection; form of the question.  
 10 He stated as a fact something he told me he had to  
 11 assume.  
 12 THE COURT: I understand it is not coming in as  
 13 a fact. It is coming in as part of a hypothetical  
 14 question, in effect. I do have my doubts as to whether  
 15 it relates to the damages in this case. But go ahead.  
 16 THE WITNESS: The answer is yes.  
 17 Q. BY MR. QUINN: How so?  
 18 **A. That 40 percent that I understand is coming**  
 19 **from the State Water Project, there is a cost to provide**  
 20 **that 40 percent of the exchange water that is caused by**  
 21 **that water coming through the State Water Project into**  
 22 **the black box we talked about, and it's caused by coming**  
 23 **through the State Water Project and it would therefore**  
 24 **be appropriate to include those to reflect that cost**  
 25 **causation of that 40 percent of water.**

1903

1 Q. And then just -- I am asking a general question  
 2 now. I am not asking you now to get into any specifics  
 3 that the question might implicate.  
 4 Is the rate structure that Met adopted in 2003  
 5 the only one that Met could have selected to fairly and  
 6 reasonably apportion its costs to its customers,  
 7 including San Diego?  
 8 MR. KEKER: Same objection, your Honor.  
 9 THE COURT: I will allow that question.  
 10 THE WITNESS: No, it's not.  
 11 Q. BY MR. QUINN: Can you tell us whether or not  
 12 there are multiple different rate structures that  
 13 Metropolitan could have adopted in 2003 which would have  
 14 fairly and reasonably apportioned its costs to its  
 15 customers, including San Diego?  
 16 **A. Yes, there are.**  
 17 MR. QUINN: Nothing further.  
 18 THE COURT: Cross-examination.  
 19  
 20 CROSS-EXAMINATION  
 21 BY MR. KEKER:  
 22 Q. Good morning, Mr. Woodcock.  
 23 **A. Good morning.**  
 24 Q. I am John Keker, representing San Diego.  
 25 You are not a lawyer, are you, sir?

1904



1           **A. No, I'm not.**  
 2           Q. Are you an expert in the application of the  
 3 constitutional amendment to the California Constitution  
 4 that is generally called Proposition 26?  
 5           **A. From -- let me try answering it this way. From**  
 6 **a legal perspective I am not a lawyer, so I can't -- as**  
 7 **to how it impacts ratemaking, I'm generally familiar**  
 8 **with it.**  
 9           Q. Your report concluded that the State Water  
 10 Project costs were all properly charged to conveyance;  
 11 is that right? The transportation?  
 12           **A. I am not quite sure all of them but the**  
 13 **majority of them, certainly.**  
 14           Q. The system access rate and system power rate  
 15 were properly charged to conveyance?  
 16           **A. The portions that were included in that, yes.**  
 17           Q. In your report or your deposition, I guess, you  
 18 said it would have been unreasonable to call these  
 19 charges supply; that was your opinion?  
 20           **A. Correct.**  
 21           Q. And your report says that the -- you believe  
 22 that the ownership of the State Water Project is simply  
 23 irrelevant to any analysis of the law?  
 24           **A. I don't believe I --**  
 25           MR. QUINN: Vague as to "law," your Honor.

1905

1           THE COURT: Cross-examination. The witness can  
 2 explain if he meant something else or if he said  
 3 something else.  
 4           THE WITNESS: I don't believe I said "of the  
 5 law." I think I said it was irrelevant in the  
 6 determination of rates.  
 7           Q. BY MR. KEKER: But were you referring to what  
 8 you thought were legal rates?  
 9           **A. I was talking more generally in that deposition**  
 10 **as to the appropriateness of including those costs, that**  
 11 **those were an appropriate cost to include in the rates.**  
 12 **At the time they were legal, but I am mindful of the**  
 13 **Court's decision in Phase I. As I said earlier, I**  
 14 **certainly accept the Court's ruling.**  
 15           Q. Your ultimate conclusion was the transportation  
 16 costs in the State Water Project were -- were properly  
 17 classified and allocated correctly; that was your  
 18 conclusion; right?  
 19           **A. Correct.**  
 20           Q. That was notwithstanding the fact -- what is  
 21 NARUC?  
 22           **A. National Association of Regulatory Utility**  
 23 **Commissioners.**  
 24           Q. You opine that if the classification had been  
 25 done according to NARUC standards, the classification

1906

1           would have been that State water costs were supply  
 2 costs; right?  
 3           **A. That is part of what I stated about that, yes.**  
 4           Q. With respect to the water stewardship rate, you  
 5 were a little softer in your report, weren't you?  
 6           MR. QUINN: Vague.  
 7           THE WITNESS: I --  
 8           THE COURT: Overruled. Go ahead. I don't know  
 9 what you mean by that.  
 10           Q. BY MR. KEKER: You said, "I understand the  
 11 point that with respect to the water stewardship rate, I  
 12 understand the point that San Diego has asserted and it  
 13 may have validity in other -- in another situation."  
 14           **A. Right.**  
 15           Q. That being the water stewardship rate has an  
 16 effect on supply; it is a supply rate or supply charge?  
 17           **A. What I was saying is in another situation, if**  
 18 **the investments that were made from the revenues from**  
 19 **the water stewardship rate had impacted the supply costs**  
 20 **of the Metropolitan Water District, if that were the**  
 21 **case, I could understand that.**  
 22           **That wasn't the case. It didn't impact the**  
 23 **supply costs of Met at all.**  
 24           Q. In your deposition, didn't you say it was not  
 25 unreasonable? It would not have been unreasonable to

1907

1           treat the water stewardship rate as the supply cost?  
 2           **A. I think what you just said, in another**  
 3 **situation, if it had impacted the supply costs of Met,**  
 4 **that would not be unreasonable. But it impacted the**  
 5 **supply costs of the 26 member agencies, not of Met, and**  
 6 **that's why I don't think it's reasonable to call it a**  
 7 **supply cost in this situation.**  
 8           Q. Were you asked in your deposition at page 224,  
 9 lines 19 through 23 --  
 10           THE COURT: Do you want him to actually --  
 11 You have it up on the screen.  
 12           MR. KEKER: (Reading:)  
 13 "Q Would it also be  
 14 reasonable for them to recover  
 15 the" -- referring to the water  
 16 stewardship rate -- "to recover  
 17 the costs of supply?  
 18 "A Can I say it wouldn't be  
 19 unreasonable in certain  
 20 circumstances to do that."  
 21           THE WITNESS: That's what I said and, again,  
 22 it's the certain circumstances we were just talking  
 23 about that I was referring to, and that is why I said  
 24 certain circumstances in that response.  
 25           Q. BY MR. KEKER: I think you agreed in your

1908

1 deposition, at least, with Mr. Raftelis that it would be  
 2 appropriate and prudent to analyze on a  
 3 project-by-project basis whether or not a water  
 4 conservation project affected supply or transportation  
 5 or both or neither, I suppose?  
 6 **A. That's what I have been saying, yes. Again,**  
 7 **it's the Metropolitan's supply or transportation or**  
 8 **both.**  
 9 Q. Let me ask you about your comments on the  
 10 Denham report.  
 11 As I understand it, you agree with Mr. Denham  
 12 under the Court's Phase I opinion, San Diego has been  
 13 overcharged during the years 2011 to 2014 for  
 14 transportation costs; in short, the system access rate  
 15 and the system power rate were inflated?  
 16 **A. I certainly accept the Court's ruling regarding**  
 17 **the transportation costs.**  
 18 **As I said at the beginning, as it applies to**  
 19 **Colorado River water, I accept that, as well, too.**  
 20 Q. And you accept the Court's ruling that the  
 21 water stewardship rate was not a legal rate during these  
 22 four years that are at issue for the damages?  
 23 MR. QUINN: Actually, I think that misstates  
 24 the Court's ruling.  
 25 THE COURT: It is a little confusing because he

1909

1 may personally disagree with me, which he is entitled to  
 2 do. I don't know what "accept" means.  
 3 MR. QUINN: Actually, my point was I think it  
 4 actually misstated the Court's ruling on that issue. I  
 5 am happy to --  
 6 THE COURT: I don't think we need to belabor  
 7 it.  
 8 Ask Mr. Kecker to rephrase.  
 9 MR. KEKER: Yes, sir.  
 10 Q. Mr. Denham took the charges that Met had given  
 11 to San Diego for system access rate, system power rate  
 12 and water stewardship rate and removed from them certain  
 13 items that he said were consistent with the Court's  
 14 Phase I ruling. Is that the way you understood what he  
 15 did?  
 16 **A. That is what Mr. Denham did, that is my**  
 17 **understanding.**  
 18 Q. You don't disagree with that portion of his  
 19 opinion?  
 20 **A. I don't disagree that he did it. As far as the**  
 21 **removal of the water stewardship rates -- again, I'm not**  
 22 **a lawyer and I may have misunderstood what the Court**  
 23 **said. My lay reading of that opinion was not as certain**  
 24 **as you're portraying it, I think, Mr. Kecker.**  
 25 **I read the Court more to say they weren't --**

1910

1 **they didn't think compelling evidence had been provided**  
 2 **to say one way or another. They particularly -- I**  
 3 **recall the Court particularly critiqued a portion of**  
 4 **Mr. Raftelis' report that said maybe it should be 50-50,**  
 5 **that there was no basis for that.**  
 6 **Again, my reading -- and if I'm wrong, I'm**  
 7 **wrong -- but my reading of the Court's decision on the**  
 8 **water stewardship rate is it was still up in the air and**  
 9 **it needed to be demonstrated one way or another as to**  
 10 **where and how that should be recovered.**  
 11 Q. Let's stick, for just a moment, with the water  
 12 stewardship costs. Do you disagree with Mr. Denham when  
 13 he looked at the water stewardship -- excuse me -- the  
 14 State Water Project costs that were included in the  
 15 system access rate and the system power rate and removed  
 16 those in his damage calculation?  
 17 MR. QUINN: Vague. Disagree as to the  
 18 calculation or disagree with something else?  
 19 MR. KEKER: Disagree with the calculation.  
 20 THE WITNESS: I don't disagree with what he did  
 21 and how he calculated it.  
 22 I disagree with the denominator he used to come  
 23 up with the result of that.  
 24 Q. BY MR. KEKER: Was San Diego --  
 25 Let me ask you this: If you accept the Court's

1911

1 premise that the State Water Project costs should not  
 2 have been included during the four damage years of 2011  
 3 to 2014, do you believe that San Diego overpaid those  
 4 damages during those four years?  
 5 **A. Those portions of the charges for Colorado**  
 6 **River water, yes.**  
 7 Q. They overpaid those for exchange water, they  
 8 overpaid those charges?  
 9 **A. Yes.**  
 10 Q. With respect to the water stewardship rate, do  
 11 you agree, if you accept the Court's premise in Phase I,  
 12 that they overpaid for water stewardship rate costs?  
 13 **A. Again, I am going to get back to my**  
 14 **understanding. As I said, it may be wrong, but my**  
 15 **understanding of the Court's opinion I don't think was**  
 16 **quite as firm as yours, Mr. Kecker. You are suggesting**  
 17 **to me in the question that the Court said 100 percent of**  
 18 **the water stewardship costs should be removed --**  
 19 Q. I am asking the opposite.  
 20 MR. QUINN: Can he finish his answer?  
 21 THE COURT: Let's finish the answer.  
 22 THE WITNESS: What I'm understanding you to be  
 23 asking me is the Court said that 100 percent of those  
 24 costs should be removed from the transportation costs.  
 25 My reading of the opinion was somewhat less

1912

1 definitive than yours, I think.  
 2 Q. BY MR. KEKER: Did you understand the Court's  
 3 opinion as saying that 100 percent of the water  
 4 stewardship rate costs should not have been charged to  
 5 transportation and, therefore, the rate as charged was  
 6 illegal?  
 7 A. **I didn't understand it as firm as you do.**  
 8 Q. So do you believe, based on reading the Court's  
 9 opinion, San Diego was damaged in any way in paying the  
 10 water stewardship rate that it did during those four  
 11 years?  
 12 A. **Can you repeat that again?**  
 13 Q. Do you understand whether or not San Diego was  
 14 damaged in any way during those four damage years by  
 15 paying the full water stewardship rate?  
 16 MR. QUINN: Objection. Legal conclusion.  
 17 THE COURT: We will take it as his  
 18 understanding.  
 19 Overruled.  
 20 THE WITNESS: I don't know.  
 21 Q. BY MR. KEKER: Did Mr. Denham correctly, from a  
 22 mathematical point of view, in your opinion, remove  
 23 State Water Project costs from what San Diego paid for  
 24 system access rates and state power rates during the  
 25 four years, system power rates during the four years?

1913

1 A. **His math -- taking it out 100 percent was -- he**  
 2 **took out 100 percent. The math was not incorrect.**  
 3 Q. Your position is that had a different set of  
 4 rates been in effect, then there might have been an  
 5 offset against that, the rate would have -- the money  
 6 would have shown up somewhere else?  
 7 A. **Certainly, the money must have shown up**  
 8 **somewhere else. It is a zero sum game. Metropolitan**  
 9 **must recover its costs somewhere. If they don't through**  
 10 **the water stewardship rate portion of the transportation**  
 11 **rate, it needs to show up somewhere else.**  
 12 Q. Have you looked at the exchange agreement, 2003  
 13 exchange agreement?  
 14 A. **Yes, I have.**  
 15 Q. Are you aware of the provision that talks about  
 16 an escrow if there is a dispute about rates?  
 17 A. **I am.**  
 18 Q. Are you aware the money in the escrow could be  
 19 used to pay damages in this case without anybody  
 20 changing any rates for those four years?  
 21 A. **Yes.**  
 22 MR. QUINN: Objection. Relevance.  
 23 THE COURT: Overruled.  
 24 Q. BY MR. KEKER: And plus they have -- Met can  
 25 pay whatever the damages are in this case without going

1914

1 back and recalculating rates for the four years, 2011 to  
 2 2014, can't it?  
 3 A. **Are we talking about Metropolitan's rates or**  
 4 **the damage calculation rates?**  
 5 Q. I am talking about the damage --  
 6 THE COURT: I'm sorry. We are talking over  
 7 each other. I would like you to finish first and  
 8 Mr. Keker will have his next question.  
 9 THE WITNESS: I am getting a little confused,  
 10 Mr. Keker, whether you are talking about Metropolitan's  
 11 rates in general or if you're talking about calculation  
 12 of damages.  
 13 Q. BY MR. KEKER: I am talking about calculation  
 14 of damages.  
 15 Do you understand there is was a contract  
 16 between Met and San Diego, that San Diego at least  
 17 claims, has been breached and that this trial is and  
 18 your testimony is about the appropriate damage that that  
 19 breach of contract might have caused; right?  
 20 A. **Correct.**  
 21 Q. You understand Mr. Denham came in and said what  
 22 I did was read Phase I, saw that the State Water Project  
 23 charges should not properly have been in the conveyance  
 24 rate, took them out and recalculated what should have  
 25 been paid for system access rates and system power rates

1915

1 during those four years. And then he also looked at the  
 2 part about the water stewardship rate where it said it  
 3 was illegal, said taking that out and adding all that  
 4 up, those are the damages. Do you understand that's  
 5 what he did?  
 6 A. **I understand that is what he did.**  
 7 Q. You don't have any quarrel with his math at  
 8 all, do you?  
 9 A. **I don't have any quarrel with the math.**  
 10 Q. Your position is that maybe there would have  
 11 been some other set of rates that would have caused San  
 12 Diego to pay something more than they actually paid in  
 13 some other area and that that should be, I guess, I  
 14 offset against those damages?  
 15 A. **What I'm saying is in terms of damages**  
 16 **calculations, Mr. Denham only went part way. He did**  
 17 **what you just described in taking out a number of**  
 18 **expenses from the transportation charges that you**  
 19 **described. The math was proper in what he did with**  
 20 **that.**  
 21 **But what I'm saying is to calculate those**  
 22 **damages under there, you must do something with that**  
 23 **money to fully calculate what the damages are and that**  
 24 **he did not do that. He left that money hanging.**  
 25 Q. Okay. So what would you do to fully calculate

1916

1 the damages?  
 2 **A. Well, there's a number of things I would do to**  
 3 **fully calculate the damages.**  
 4 **First, I would put that money back into a**  
 5 **supply rate.**  
 6 Q. Just one second. Did the Met board say that  
 7 any money we have to pay in damages for those four years  
 8 is going to be charged to the supply rate?  
 9 **A. I'm sorry. I am trying to answer your question**  
 10 **about what you asked I would do if I --**  
 11 Q. Let me ask another question.  
 12 **A. If I did that and not what the Met board would**  
 13 **say --**  
 14 THE COURT: Do you want him to answer that  
 15 question?  
 16 MR. KEKER: No, I don't, your Honor. I want to  
 17 ask him --  
 18 THE COURT: A different question.  
 19 Q. BY MR. KEKER: I want to ask him whether or not  
 20 you said that if, in your report, if 12 people looked at  
 21 this situation, 12 experts looked at the situation and  
 22 decided what a good rate structure would be, they would  
 23 come up with 12 different answers; right?  
 24 **A. Again, in that situation, in my report, I was**  
 25 **talking about rates in general and not the damages, but**

1917

1 **I did say that, yes.**  
 2 Q. When you were asked in your deposition if you  
 3 could calculate what effect on the supply rate it would  
 4 have if these costs came out of the State Water Project  
 5 and were no longer transportation costs for the water  
 6 stewardship rate, you said that you wouldn't assume they  
 7 would go -- that somebody would decide to charge these  
 8 costs to the supply rate, didn't you?  
 9 **A. That's what I said in my deposition regarding**  
 10 **that. But what Mr. Denham did, he actually moved them**  
 11 **to supply rates and then left them hanging there.**  
 12 Q. He didn't move them anyplace. All he did was  
 13 calculate the overcharge; right?  
 14 MR. QUINN: This is argument now, your Honor.  
 15 Q. BY MR. KEKER: Are you saying you found in his  
 16 report --  
 17 THE COURT: Mr. Keker, if when he objects, you  
 18 need to give me at least a second.  
 19 The objection is overruled.  
 20 Please continue.  
 21 Q. BY MR. KEKER: Are you saying Mr. Denham said  
 22 in his report that these charges are going to the supply  
 23 rate?  
 24 **A. That is my understanding is what he did, he**  
 25 **removed them from transportation to supply.**

1918

1 Q. Did he calculate how much -- you understand  
 2 that from reading his report?  
 3 **A. Yes, sir.**  
 4 Q. Are you aware when Mr. Denham testified and we  
 5 tried to ask him what happened, if they had been moved  
 6 to supply, that the Met lawyer objected and the Court  
 7 didn't let that evidence in? It is not in his report.  
 8 **A. Yes, I did read the transcript of his**  
 9 **deposition. And my understanding is that the**  
 10 **questioning had to do with dollars, not rates.**  
 11 **My understanding of Mr. Denham's report is he**  
 12 **actually did calculate a supply rate in his report.**  
 13 **He never did calculate what the dollar impact**  
 14 **of that within the damages are. That is what I'm**  
 15 **saying, Mr. Keker.**  
 16 Q. What I'm saying is you have opined, and what  
 17 I'm asking you, you have opined, haven't you, sir, that  
 18 you can't assume that whatever damages are paid in this  
 19 case would be made up in the supply rate?  
 20 **A. At the time I wrote my report I said exactly**  
 21 **what you said, yes.**  
 22 MR. KEKER: You were asked in your deposition  
 23 at 259, at line 17:  
 24 "Q We're moving 100 percent  
 25 of the State Water Project cost

1919

1 to supply rate as San Diego  
 2 contends should be done in this  
 3 case. Wouldn't it be  
 4 relatively simple to calculate  
 5 the effect of each -- of that  
 6 on each member agency?  
 7 "A I don't think so."  
 8 And then referring to lines 16 to 19 --  
 9 MR. QUINN: I think you should read the whole  
 10 answer.  
 11 MR. KEKER: He goes on --  
 12 MR. QUINN: I know, but --  
 13 MR. KEKER: (Reading:)  
 14 "I don't think so. As I said  
 15 in here, the suite of rates the  
 16 board had adopted were  
 17 developed over a long period of  
 18 time. Long in comparison to  
 19 what most agencies look at when  
 20 they make changes."  
 21 THE WITNESS: I'm losing on the screen what  
 22 you're reading.  
 23 MR. KEKER: (Reading:)  
 24 "It's usually a year or two  
 25 that they look. In the case of

1920

1 Metropolitan, they've really  
 2 been looking at this going back  
 3 to, you know, the 1990s. So  
 4 it's within at least a decade  
 5 that they have been doing it  
 6 and it has been a very  
 7 deliberate process with a lot  
 8 of input from the various  
 9 member agencies. They have  
 10 arrived at a point today, a  
 11 year ago, two years ago, where  
 12 I think the board had come to  
 13 some degrees of not -- I can't  
 14 -- not unanimous agreement, but  
 15 not even consensus but  
 16 certainly majority, feeling  
 17 that this is the proper  
 18 mixture. If you were to move  
 19 the State Water Project rates  
 20 all to supply, it would -- it  
 21 would upset the mixture that's  
 22 taken this decade for the board  
 23 to come in. I would be really  
 24 surprised if the board didn't  
 25 say, 'Whoa, wait a minute.' If

1921

1 that's what you're going to do,  
 2 I've got to step back and look  
 3 at everything and see how  
 4 everything mixes together now  
 5 and how that impacts the -- the  
 6 capacity charge, the  
 7 readiness-to-serve charge,  
 8 the -- do I have one, two,  
 9 maybe three or four different  
 10 supply rates?"  
 11 I'll stop reading.  
 12 MR. QUINN: Your Honor, I think he should read  
 13 the whole answer. He chose --  
 14 THE COURT: How much longer does this go on?  
 15 MR. QUINN: It --  
 16 MR. KEKER: It goes on for quite a while.  
 17 MR. QUINN: It goes on for a page-and-a-half.  
 18 THE COURT: You can have it introduced, if  
 19 necessary, separately.  
 20 Let's go on to the next question.  
 21 Q. BY MR. KEKER: Were you asked at page 262, line  
 22 five:  
 23 "Q. I understand the board  
 24 might take action in response  
 25 to the change. But my question

1922

1 is, isn't the change relatively  
 2 easy to do as a matter of math?  
 3 Don't you just move a certain  
 4 sum from one column to another?  
 5 "A I understand what you're  
 6 saying, that the math is  
 7 simple. But the implication in  
 8 what would happen is not that  
 9 simple because I don't think  
 10 the board would just say, oh,  
 11 okay, move 300 million from  
 12 here to there."  
 13 I will skip the next two paragraphs unless  
 14 counsel insists --  
 15 MR. QUINN: I think he should read it. He  
 16 shouldn't read part of the answer.  
 17 THE COURT: Why don't we read the whole thing,  
 18 if that's what it is going to be.  
 19 The other way to do it is ask him -- I will not  
 20 tell Mr. Kecker how to ask this witness questions. You  
 21 can just read it in.  
 22 Q. BY MR. KEKER: Did you say, sir:  
 23 "They were all interrelated.  
 24 The math is really simple but  
 25 math isn't what changes.

1923

1 Everything changes if you make  
 2 that kind of huge change in the  
 3 revenue allocation"?"  
 4 **A. Yes, I did say that.**  
 5 Q. So what Mr. Denham calculated, what he said,  
 6 were the costs of the system, in the system access rate  
 7 and system power rate, attributable to the State Water  
 8 Project, and he calculated the water stewardship rate.  
 9 And what he didn't calculate was some offsetting charge  
 10 to San Diego that might show up somewhere in some rate  
 11 structure sometime if the Met board ever got around to  
 12 doing it; is that correct?  
 13 **A. I'm sorry. My confusion here is there's two  
 14 different things that seem to be going on here.**  
 15 **You are talking about the transcript of my  
 16 deposition where there's a supposition that we took some  
 17 costs out of transportation and then moved them to  
 18 supply. And under the supposition that was going on in  
 19 the transcript, we were talking in very generic terms  
 20 before any decisions clearly by the Court here.**  
 21 **What I was saying is talking about the  
 22 interrelationship that I discussed in my report and the  
 23 supposition it just be moved to supply was an incorrect  
 24 one, I thought when we were talking about in my  
 25 deposition.**

1924

1           **Then you started asking me about what**  
 2 **Mr. Denham did. What Mr. Denham did is he said, no,**  
 3 **this is a simple thing. I am just going to take it out**  
 4 **of the transportation and move it to supply.**  
 5           **In my deposition I was saying I don't think**  
 6 **it's clearcut and simple to just plain move it. That's**  
 7 **what Mr. Denham did.**  
 8           **The second part of that, then, is once he did**  
 9 **that, once we start talking about damages now, put aside**  
 10 **what the board might or might not do going forward with**  
 11 **those costs, the Court -- given the Court's ruling, what**  
 12 **Mr. Denham did, though, looking at damages, separate**  
 13 **from what the board might do with the rates, is he only**  
 14 **calculated part of the damages because he took some**  
 15 **money out, put it into supply and never calculated what**  
 16 **the impact of that movement would be.**  
 17           Q. But are you testifying that the -- that during  
 18 the period 2011 to 2014 the supply rate was somehow  
 19 different than the one that it was?  
 20           **A. No, I'm not.**  
 21           Q. So the Met board had a supply rate during that  
 22 period?  
 23           **A. That's correct.**  
 24           Q. San Diego paid it?  
 25           **A. Yes, it did.**

1925

1           Q. What are you saying, that somehow the supply  
 2 rate should have been different if the Met board did  
 3 something?  
 4           **A. No. I'm sorry. You seem to be mixing up, at**  
 5 **least in my mind, what the board might do as a result of**  
 6 **the Court's decision with rates, mixing that with what**  
 7 **are the implications in terms of damages here, which**  
 8 **aren't necessarily the same as what the board might do**  
 9 **with rates.**  
 10           Q. Fair enough. Let's stick with that. Let's  
 11 stick with what are the implications for damages.  
 12 Mr. Denham said I read the Court's opinion. I found out  
 13 which rates were illegal and I found out how much that  
 14 added to.  
 15           What are you saying? Are you saying there  
 16 should be something that reduces that?  
 17           **A. Yes. I am saying Mr. Denham only went part way**  
 18 **when he took the money out of the transportation rate,**  
 19 **the three components he talked about. When he took**  
 20 **those monies out, in order to completely or fairly**  
 21 **calculate what the damages were, he needed to figure out**  
 22 **what happened to that money he took out from those three**  
 23 **components. Put it back in and figure out what the**  
 24 **total damages were to San Diego, not just what half the**  
 25 **damages were. I am using half as an example. It**

1926

1           **wasn't --**  
 2           Q. Mr. Woodcock, what happened to that money is it  
 3 went into an escrow account, pursuant to 12.4(c), right,  
 4 and is sitting there in San Diego's escrow account in  
 5 its reserves; right?  
 6           **A. That's correct.**  
 7           Q. So that's what happened to the money. What are  
 8 you saying? Are you saying that if the world had been  
 9 different, if Met had listened to San Diego back in 2010  
 10 and if they had done the rate structure that the Court  
 11 suggests to them in the Phase I was the legal rate  
 12 structure, it would have been a different rate structure  
 13 and we would have different amounts of money sitting in  
 14 escrow?  
 15           **A. I am not saying that.**  
 16           Q. What you are saying, you are assuming -- you  
 17 are making up where San Diego -- where the Met board, if  
 18 something had happened, would have made up this money to  
 19 get zero -- to get this neutral position where all their  
 20 costs were covered going forward; right?  
 21           **A. I'm saying on the one hand, putting the damages**  
 22 **aside, if we had been given the Court's ruling back in**  
 23 **2010, and the Met board had done something, we don't**  
 24 **really know where they would have put the money. But**  
 25 **we're not at 2010. We are at 2015.**

1927

1           **We have the Court's ruling in this case. The**  
 2 **Court said you should not be charging the Colorado River**  
 3 **water for certain costs, State Water Project water**  
 4 **costs. And Mr. Denham then went and said given that**  
 5 **ruling, I am going to take those out and that the**  
 6 **damages are approximately 188 million, I gather. What**  
 7 **he didn't say was I took those out to fully calculate**  
 8 **what the impact of the damages -- forget 2010 and what**  
 9 **might or might not have happened then. But sticking to**  
 10 **the calculation of the damages, he only went part way**  
 11 **and he never figured out that money that he took out,**  
 12 **how that would -- how that impacts the damage**  
 13 **calculation.**  
 14           Q. Why -- Mr. Denham knew that there's an escrow  
 15 account set aside with the money in it. He figured out  
 16 what the money was. You are saying he should have  
 17 figured out something about a supply charge?  
 18           MR. QUINN: You know, that's --  
 19           THE COURT: Sustained. It's vague.  
 20           We are getting a little far.  
 21           Q. BY MR. KEKER: You have termed the ability to  
 22 predict what the Metropolitan board would do with the  
 23 rate structure if San Diego prevailed in this lawsuit,  
 24 you have termed that knowledge as impossible; right?  
 25 You just can't know what the Met board would do if the

1928

1 judge's ruling was as it is?  
 2 **A. That's correct.**  
 3 Q. And it's impossible to know, if they decide to  
 4 accept the judge's ruling and change their cost  
 5 allocations in the future or their rate structure or way  
 6 of collecting money, for example, property taxes, they  
 7 have a lot of options, and 12 experts would come up with  
 8 12 different ways to do it?  
 9 **A. That's correct.**  
 10 Q. It is simply impossible to know what that might  
 11 be? Not what it might be but what it's going to be?  
 12 **A. It is impossible to know what the board might**  
 13 **do with their rates given the Court's ruling.**  
 14 Q. Let me ask you a couple of questions about the  
 15 denominator.  
 16 As I understand your criticism of Mr. Denham is  
 17 that he took out the rates that the Court said were  
 18 improperly put on transportation from the State Water  
 19 Project and he added the water stewardship rate,  
 20 100 percent of the water stewardship rate, according to  
 21 his reading of the opinion, and created a new system  
 22 access rate and system power rate?  
 23 **A. That's correct.**  
 24 Q. And the system access rate and the system power  
 25 rate by definition are systemwide rates; right?

1929

1 **A. Under Metropolitan's rates, yes, they are.**  
 2 Q. And the system we're talking about is all  
 3 sales?  
 4 **A. Correct.**  
 5 Q. There's no division between Colorado River  
 6 sales and State Water Project sales; the system is all  
 7 sales?  
 8 **A. That's correct.**  
 9 Q. When Mr. Denham took out costs that according  
 10 to his reading of Judge Karnow's opinion, Phase I  
 11 opinion, when he took out those costs, his unit cost was  
 12 divided by all sales; right?  
 13 **A. That's what he did, yes.**  
 14 Q. You say that somehow he should have created a  
 15 new rate structure limited to Colorado River sales;  
 16 right?  
 17 **A. That's correct.**  
 18 Q. And he should have come up with a new system  
 19 access rate and system power rate just for Colorado  
 20 River sales; is that your testimony?  
 21 **A. That's in effect what he did and I believe he**  
 22 **did it incorrectly, yes.**  
 23 Q. What he did was take out State Water Project  
 24 costs from the transportation rates and State Water  
 25 Project power costs from the transportation rates and

1930

1 water stewardship rates out of the transportation rates  
 2 and create a new systemwide, system access rate and  
 3 system power rate; right?  
 4 **A. That's what he did.**  
 5 Q. And divided them by all the sales in the  
 6 system?  
 7 **A. That's what he did, yes.**  
 8 Q. What is wrong with that?  
 9 **A. The problem with that is it calculates a charge**  
 10 **for water that comes from the Colorado River Aqueduct by**  
 11 **taking all of those out of those rates. However, under**  
 12 **the exchange agreement, the amount of water that comes**  
 13 **from Colorado River or comes from the State Water**  
 14 **Project is left up to Metropolitan and the system to**  
 15 **decide how that gets split out. By necessity, some**  
 16 **40 percent of it comes from the State Water Project.**  
 17 **That 40 percent of the water that comes from**  
 18 **the State Water Project has certain costs associated**  
 19 **with it, including the State Water Project costs,**  
 20 **including the system power costs in there, including all**  
 21 **of the transportation portion of the State Water Project**  
 22 **costs. Those are State Water Project costs that need to**  
 23 **match with that State Water Project water.**  
 24 **The exchange agreement does not provide that**  
 25 **it's only Colorado River water. It provides it can be**

1931

1 **any mix that happens to be needed or necessary. Over**  
 2 **the four years we're looking at 40 percent of it,**  
 3 **roughly, is State Water Project costs and those need to**  
 4 **be reflected to fairly charge San Diego County Water**  
 5 **Authority for that 40 percent that comes from the State**  
 6 **Water Project. If you don't, you are leaving everybody**  
 7 **else to pay for those.**  
 8 Q. Let me see if I can understand something about  
 9 cost causation. This fixed cost that's the State Water  
 10 Project cost, that existed before 2003, didn't it?  
 11 **A. Yes, it did.**  
 12 Q. Those bonds had to be paid before 2003; they  
 13 had to be paid annually?  
 14 **A. Yes, they did.**  
 15 Q. 2003 came along and the bonds still had to be  
 16 paid; right?  
 17 **A. Correct.**  
 18 Q. In 2004 and the bonds still have to be paid?  
 19 **A. Yes.**  
 20 Q. In 2003 San Diego made an exchange agreement to  
 21 provide Colorado River water to Met, and Met said we're  
 22 going to use it anyway we want to but we will give you  
 23 your share. You'll get it, you'll get our stuff.  
 24 When the exchange agreement --  
 25 MR. QUINN: Is that a question?

1932

1 THE COURT: It is leading up to one.  
 2 Q. BY MR. KEKER: When the exchange agreement came  
 3 into effect, did that cause the payments, the fixed  
 4 costs of the State Water Project to go up?  
 5 **A. It didn't impact the costs of the State Water**  
 6 **Project.**  
 7 Q. Okay. So a deal to get Colorado River water to  
 8 Met had no effect whatsoever on State Water Project  
 9 fixed costs which existed before and after; right?  
 10 **A. It didn't impact the costs to Metropolitan, no.**  
 11 Q. Your testimony is that exchange agreement for  
 12 Colorado River water caused costs in the State Water  
 13 Project, that's your testimony?  
 14 **A. No, it's not.**  
 15 Q. I thought that's what you said.  
 16 **A. If I said that, I was incorrect.**  
 17 **The exchange agreement did not change or cause**  
 18 **any costs for State Water Project.**  
 19 **What I'm saying is the implementation of the**  
 20 **State Water Project -- sorry. The implementation of the**  
 21 **exchange agreement -- under the terms of that agreement**  
 22 **has State Water Project costs going to San Diego Water**  
 23 **Authority. That is some of the exchange water. And**  
 24 **there are costs associated with that State Water Project**  
 25 **water that is delivered under the terms of that**

1933

1 **agreement that must be reflected in the charges to the**  
 2 **San Diego Water Authority, if we're going to associate**  
 3 **cause with effect, cost causation rates.**  
 4 Q. Sir, you are aware that every year of the  
 5 exchange agreement to date is and probably going on  
 6 until it's over the amount of water moved by the  
 7 Colorado River Aqueduct is far, far in excess of the  
 8 requirements under the exchange agreement; right?  
 9 **A. I am.**  
 10 Q. You are aware that whatever blending occurs is  
 11 something that is entirely for the convenience at the  
 12 sole discretion of Met?  
 13 **A. That is incorrect.**  
 14 Q. Have you read the exchange agreement?  
 15 **A. I read the exchange agreement.**  
 16 Q. Is there anything in the exchange agreement  
 17 that says that San Diego has the right under the  
 18 exchange agreement to one drop of the State Water  
 19 Project water?  
 20 **A. There's wording in the exchange agreement that**  
 21 **says the amount of water that Metropolitan provides to**  
 22 **San Diego County Water Authority under the agreement is**  
 23 **up to the discretion of the Metropolitan Water**  
 24 **Authority. It doesn't say one way or another whose**  
 25 **drops or where those come from. It is up to the**

1934

1 **discretion of the Metropolitan Water District.**  
 2 Q. The only thing that the exchange agreement says  
 3 about this is in order for the exchange agreement to put  
 4 any burden at all on Met, San Diego has to make sure  
 5 that Met gets Colorado River water at the intake at Lake  
 6 Havasu; right?  
 7 **A. The agreement says that Met has to get water**  
 8 **from the Colorado River.**  
 9 Q. Colorado River, not State Water Project water,  
 10 Colorado River?  
 11 **A. Met has to get that water, yes.**  
 12 Q. And the agreement makes clear that once that  
 13 water gets into Met's system, it is up to Met how they  
 14 deal with it and what they gave -- the equivalent amount  
 15 they give; right?  
 16 **A. That's correct.**  
 17 Q. You are saying that causes State Water Project  
 18 costs?  
 19 **A. I'm saying the agreement leaves it up to the**  
 20 **discretion of the Metropolitan Water District as to what**  
 21 **that mix of water provided to San Diego in exchange is.**  
 22 Q. Has the Colorado River Aqueduct ever been  
 23 capacity constrained to your knowledge?  
 24 **A. It shut down.**  
 25 Q. Other than being repaired, has it been capacity

1935

1 constrained?  
 2 **A. That is a constraint. Other than it being**  
 3 **constrained (sic), it hasn't been constrained.**  
 4 Q. It runs about 100,000 acre-feet of water a  
 5 month? 1.2 a year?  
 6 **A. I don't remember the numbers. I'll accept**  
 7 **that.**  
 8 Q. It doesn't run full, does it?  
 9 **A. I'm not sure when it runs full or not.**  
 10 Q. There is plenty of Colorado River water to  
 11 fulfill this exchange agreement?  
 12 **A. Some months there are, but not in all months.**  
 13 MR. KEKER: Can I have a moment to check with  
 14 folks?  
 15 THE COURT: Just a moment or five or ten  
 16 minutes?  
 17 MR. KEKER: How about -- I'd like five minutes.  
 18 THE COURT: Okay. I'll see everybody in five  
 19 minutes.  
 20 (Recess.)  
 21 MR. KEKER: A couple of other questions about  
 22 this.  
 23 Q. Your assumption is that somehow 40 percent  
 24 blending means something in terms of calculating  
 25 damages.

1936



1 Any rates that were set based on percentage of  
 2 blending would have to change every day, every week and  
 3 every hour, wouldn't they?  
 4 **A. Yeah, you might be able to make that a monthly**  
 5 **calculation. I don't know you'd need to do it every**  
 6 **hour. You could, but you could get the monthly blend**  
 7 **and do it on a monthly basis. I think that would be**  
 8 **reasonable.**  
 9 Q. Let's look at 1126. Can we put it up? This is  
 10 a big map.  
 11 MR. KEKER: DTX 1126.  
 12 Q. This is really hard to read. What this  
 13 shows -- this is a weekly status system for  
 14 January 2013. You look down at the Skinner Plant and  
 15 this month there is a 80 percent State Water Project  
 16 blend over here. The Jensen Plant has 100 percent State  
 17 water blend. This Weymouth Plant has got a 39 percent  
 18 State Water Project blend.  
 19 Let's go to the last page of this. That was  
 20 January 2, 2013. Stop right here.  
 21 March 20, 2013. Now the Skinner Plant, the  
 22 blend is 63. Let's go back up to the other. Weymouth  
 23 Plant is down to 37.  
 24 These blends change all the time, don't they?  
 25 **A. Yes, they do.**

1937

1 Q. And each different agency gets water from the  
 2 different plants and has a different blend as Met mixes  
 3 Colorado River and State Water Project water together;  
 4 right?  
 5 **A. Yes. These are water treatment plant blends**  
 6 **you are talking about; right?**  
 7 Q. Yes.  
 8 **A. Okay.**  
 9 Q. So a rate, a rate that was set up trying to  
 10 figure out what a blend was going to be would be  
 11 impossible to be uniform among member agencies, wouldn't  
 12 it?  
 13 **A. I don't know that's necessarily true. I don't**  
 14 **think that's necessarily true.**  
 15 Q. If they -- if a rate was set up, for example,  
 16 for San Diego, we are going to assume that the blend is  
 17 60-40 Colorado River State Water Project and another  
 18 member agency has 100 percent State water and another  
 19 member agency has ten percent State Water Project and  
 20 90 percent Colorado River, and another member agency has  
 21 still a different blend, and the rate is going to be set  
 22 according to the blend; there can't be a rate that's  
 23 uniform for the conveyance of water by member agencies,  
 24 can there?  
 25 **A. No. I think the problem again here -- and I'm**

1938

1 **sorry if I have confused the discussion on this.**  
 2 **But you're talking now about setting rates for**  
 3 **26 member agencies based on blends. I've never**  
 4 **suggested that they set rates for the 26 member agencies**  
 5 **based on blends. I'm talking about damages for the San**  
 6 **Diego Water Authority for the four years in question**  
 7 **only for exchange water.**  
 8 **I am not talking about the normal supply of San**  
 9 **Diego County. I am talking about the exchange water and**  
 10 **what the damage implications are.**  
 11 Q. What you are saying, because Met chose in some  
 12 years --  
 13 By the way, in 2014 Met didn't get much State  
 14 Water Project water, did it?  
 15 **A. That's correct.**  
 16 Q. So almost all of the water that San Diego got  
 17 in 2014 was Colorado River water?  
 18 **A. The number is the number. If you want to**  
 19 **characterize it as almost all, okay.**  
 20 Q. In other years that changed according to Met's  
 21 operational whims; right?  
 22 **A. I wouldn't call them operational whims, no.**  
 23 Q. What you are saying is that the exchange  
 24 agreement which calls for San Diego to give Colorado  
 25 River water to Met, at that point Met can do whatever it

1939

1 wants with its other water supplies and Colorado River  
 2 and eventually just deliver exchange water to San Diego.  
 3 You are saying somehow that Met's operational  
 4 considerations should be charged to San Diego for buying  
 5 that Colorado River water from IID?  
 6 **A. Boy, I am sorry. I really didn't follow that.**  
 7 **I sort of lost you with the whims. It's not a whims**  
 8 **thing. There is real practical constraints there. And**  
 9 **I am not sure what you are really asking me with that.**  
 10 Q. You can't have a situation under the exchange  
 11 agreement where every -- the exchange agreement requires  
 12 a rate that's generally applicable to member agencies  
 13 when they conveyed water; are you aware of that?  
 14 **A. Exchange agreement requires the rates to be**  
 15 **charged the same as to all the member agencies, yes.**  
 16 Q. For the conveyance of water?  
 17 **A. I don't recall that section of the agreement**  
 18 **saying conveyance of water. If it is there, I will**  
 19 **accept that. I don't recall it is saying that.**  
 20 Q. Your understanding is the lawful rate that is  
 21 to be set to be used in the exchange agreement to set  
 22 the price for this Colorado River water is a price that  
 23 is both lawful and generally applicable to the  
 24 conveyance of something by member agencies?  
 25 **A. The agreement says that the rate charged for**

1940

1 the exchange water shall be the same rate charged to all  
 2 other agencies for that service. There's not a  
 3 treatment charge, for example, charged in the exchange  
 4 rate. Even though that's charged to some agencies,  
 5 that's not charged.  
 6 But the same rate for the same services is  
 7 charged to the other 26 agencies, including San Diego's  
 8 normal supply is the same rate that will be charged for  
 9 the exchange water is what it says.  
 10 Q. Fair enough. It would be completely  
 11 impractical and, indeed, impossible to set a rate based  
 12 on blending that met that criteria, that was the same  
 13 for everybody?  
 14 A. I don't know that it would be impossible. It  
 15 would certainly would be difficult.  
 16 Q. There's no indication that Met has ever tried  
 17 to do it?  
 18 A. Not that I'm aware of, no, sir.  
 19 MR. KEKER: No further questions. Thank you,  
 20 Mr. Woodcock.  
 21 THE COURT: Redirect.  
 22  
 23 REDIRECT EXAMINATION  
 24 BY MR. QUINN:  
 25 Q. Mr. Woodcock, if you were to seek to recover

1941

1 the costs associated with State Water Project water  
 2 which is in a particular blend, would it be necessary to  
 3 have different rates for different blends?  
 4 A. Yes.  
 5 Q. Is it possible to determine what the costs are  
 6 for State Water Project water and allocate that based on  
 7 the percentage of water that's in the blend?  
 8 A. Yes, it is.  
 9 Q. Could you explain that?  
 10 A. We could take the costs of the State Water  
 11 Project, divide it by the cost of the State Water  
 12 Project deliveries to come up with the rate. I am  
 13 simplifying this a little bit. We could come up with  
 14 the Colorado River Aqueduct cost and divide that by the  
 15 Colorado River Aqueduct sales, come up with a rate for  
 16 Colorado River Aqueduct. And then based on what the  
 17 blend is, weight those two to come up with a rate for  
 18 the blended water.  
 19 Q. And that's a rate that you could come up with  
 20 that you could just apply at any given time, depending  
 21 upon what the blend was; is that true?  
 22 A. To the exchange water, yes.  
 23 Q. And that could be done with any mixture of  
 24 water? If you knew what the State Water Project costs  
 25 were, you could do that division and that allocation

1942

1 based on the percentage if somebody told you what the  
 2 percentage of the blend was?  
 3 A. Correct, yes, you could.  
 4 Q. And that wouldn't require that you re-do those  
 5 numbers for the State Water Project costs every time you  
 6 went through that exercise?  
 7 A. No, it would not.  
 8 Q. That is something you could just do as a matter  
 9 of a formula if you had an input as to what the  
 10 percentage was of the State Water Project water in a  
 11 particular blend?  
 12 A. Correct.  
 13 Q. Mr. Kecker asked you some questions about before  
 14 2003 weren't those bonds outstanding; after 2003 weren't  
 15 the bonds still outstanding. Do you recall those  
 16 questions?  
 17 A. I do.  
 18 Q. As a matter of cost causation and standard  
 19 rate-mixing principles, do fixed costs also have to be  
 20 covered under the same cost causation principles?  
 21 A. Yes, they do.  
 22 Q. In response to one of Mr. Kecker's questions, he  
 23 used the term "operational whims" with respect to  
 24 blending. Do you remember him asking you about that?  
 25 A. I do.

1943

1 Q. And you said you didn't think it was  
 2 operational whims?  
 3 A. Correct.  
 4 Q. In terms of what Met's blend was?  
 5 A. That's what I said, yes.  
 6 Q. In response to one question you said the blend  
 7 was within the discretion of Met. Do you recall that?  
 8 A. Yes.  
 9 Q. What did you mean when you said that?  
 10 A. Under the exchange agreement there is very  
 11 specific wording that the mixture of water that's  
 12 delivered to San Diego, the water provided in exchange  
 13 for the IID and the canal lining water that is up to the  
 14 discretion of the Metropolitan Water District and what  
 15 that mixture will be.  
 16 Q. So were you responding in terms of what the  
 17 contract provided?  
 18 A. The contractual requirements, yes.  
 19 Q. Let me ask a different question now. As a  
 20 practical matter, are there constraints on  
 21 Metropolitan's ability to use exclusively Colorado River  
 22 water or exclusively State Water Project water or to  
 23 implement whatever blend it wants?  
 24 A. To San Diego, yes.  
 25 Q. What are those constraints?

1944

1 **A. They are operational and structural. The**  
 2 **system, the way it's laid out, the black box, if you**  
 3 **will -- where the -- I don't know if we need to bring**  
 4 **the map up again. But where the water comes in from the**  
 5 **Colorado River Aqueduct, it meets with a pipe that comes**  
 6 **in from State Water Project. Those two pipes meet and**  
 7 **blend the water there. There is not getting away from**  
 8 **that blending. That then comes down, goes down to**  
 9 **Skinner and ultimately goes to San Diego, as well as**  
 10 **several other agencies. The configuration of the**  
 11 **system, the hardware as such, there is no way of**  
 12 **escaping that blending.**

13 Q. Could you imagine circumstances -- is it  
 14 physically possible or could you imagine circumstances  
 15 where there would be no blending; there would only be  
 16 Colorado River water?

17 **A. The only way that could happen is if there was**  
 18 **no Colorado River water coming down that other pipe.**

19 Q. You said no Colorado River water?

20 **A. I'm sorry.**

21 **No State Water Project water coming down from**  
 22 **the State Water Project. There is no allocation, no**  
 23 **water from the State Water Project. The only water**  
 24 **coming from the Metropolitan system is from the Colorado**  
 25 **River water. So where those pipes meet, you would only**

1945

1 **have one water coming down.**

2 **You would have to bypass Diamond Valley to not**  
 3 **get any of the mixed water that was in Diamond Valley.**  
 4 **You would have to bypass the Skinner Reservoir to make**  
 5 **sure you didn't get any of the mix there.**

6 **I think, theoretically, that could happen, you**  
 7 **could bypass those two reservoirs. If there were no**  
 8 **State Water Project water and you bypassed the two**  
 9 **reservoirs, theoretically you could get just Colorado**  
 10 **River water. As a practical matter, I am not sure**  
 11 **Metropolitan could operate without having State Water**  
 12 **Project water for too long a period of time.**

13 Q. You refer to this location where these two  
 14 types from the Colorado River and the State Water  
 15 Project join, is that -- did you say that's above this  
 16 Skinner Reservoir?

17 **A. Yes.**

18 Q. And it's above the Skinner bypass?

19 **A. Yes.**

20 Q. Are there any other constraints in the system  
 21 or any other constraints, as a practical matter, that  
 22 limit Metropolitan's ability to control the blend of  
 23 Colorado River water and State Water Project water?

24 **A. There's a couple. There's a period of time**  
 25 **when the Colorado River Aqueduct is shut down for**

1946

1 **maintenance and no Colorado River water can get in other**  
 2 **than what may be blended in the reservoirs that come in**  
 3 **below there. There is a period where it is shut down**  
 4 **and it is, in effect, only State Water Project water**  
 5 **because of that shutdown.**

6 Q. Any other constraints that limit Met's ability  
 7 to adjust the blend?

8 **A. Under the exchange agreement Metropolitan gives**  
 9 **an equal annual volume of exchange water every 12**  
 10 **months. The IID water is really conserved in the summer**  
 11 **but Metropolitan still has to give it equal amount every**  
 12 **12 months. So theoretically, the IID water comes in the**  
 13 **summer and the other months, when there's no**  
 14 **conservation savings, Metropolitan still has to deliver**  
 15 **1-12th of the annual amount to San Diego.**

16 Q. IID water is Colorado River water?

17 **A. IID water is Colorado River water, yes.**

18 Q. How about the availability of State Water  
 19 Project water, does that limit Met's ability to control  
 20 the blend?

21 **A. Well, if -- yes. I mean, Metropolitan takes**  
 22 **whatever State Water Project it can get, all of it.**

23 Q. Why?

24 **A. It needs it to supply Southern California. It**  
 25 **needs as much State Water Project as it can to either**

1947

1 **supply the agencies directly or, if they're not taking**  
 2 **it right away today, to put it in a reservoir when they**  
 3 **need it tomorrow.**

4 Q. What happens if Metropolitan did not take State  
 5 Water Project water that was available?

6 **A. I don't mean to be facetious but there would be**  
 7 **an awful lot of thirsty people in Southern California.**  
 8 **They need State Water Project water to meet their**  
 9 **obligations to supply the 26 member agencies.**

10 Q. They have to take it when it is available?

11 **A. They have to take all that they can when it's**  
 12 **available, yes.**

13 Q. Does that mean necessarily that is going to  
 14 affect the blend with the Colorado River water that goes  
 15 into the exchange water?

16 **A. Yes, whatever the State decides is the**  
 17 **allocation for that period of time is certainly going to**  
 18 **impact the blend.**

19 MR. QUINN: Nothing further.

20 MR. KEKER: A few questions, Mr. Woodcock.

21

22 **RE-CROSS-EXAMINATION**

23 **BY MR. KEKER:**

24 Q. This IID water, it is some water sitting in  
 25 Lake Mead that IID has a right to take out and it has

1948

1 sold that right to San Diego?  
2 **A. That's correct.**  
3 Q. It is sitting at Lake Mead and IID, when they  
4 don't use it, they don't use it in the summer, maybe but  
5 it's not the -- the water is there available to be taken  
6 to Lake Havasu and be taken out at any month that San  
7 Diego chooses to get it, right?  
8 **A. That's correct.**  
9 Q. That is what Met does, and it takes it out on a  
10 regular basis every month. So it doesn't matter --  
11 MR. QUINN: Objection --  
12 THE COURT: Sustained.  
13 MR. KEKER: It doesn't matter --  
14 THE COURT: Is that a question about taking it  
15 out every month? Why don't we pause and, Mr. Keker,  
16 just ask a question.  
17 MR. KEKER: Yes, sir.  
18 Q. The IID water sitting in Lake Mead can be taken  
19 out each month in equal amounts as Met chooses; right?  
20 **A. It can be taken out each month. There's this**  
21 **constraint of them shutting down the pipeline. So that**  
22 **period when it is shut down, they can't.**  
23 **There is also the reality of the fact that the**  
24 **way Metropolitan maximizes the amount of water it can**  
25 **take is it takes more than 1-12th of its Colorado River**

1949

1 **allocation in the early months of the year. The**  
2 **exhibits that Mr. Denham had of the annual reports from**  
3 **the Colorado River Aqueduct showed monthly withdrawals**  
4 **from the Colorado River Aqueduct by the Metropolitan**  
5 **Water District. If you look at those, you will see at**  
6 **the end of the year, October, November, December, those**  
7 **withdrawals pretty much universally tend to be very low.**  
8 **That is because what Metropolitan does is they**  
9 **take all they can, not in equal monthly installments,**  
10 **but they tend to take it up front. In case somebody**  
11 **doesn't use all of their allocation, Met then says I'll**  
12 **take it, I'll take it, I need it, and then takes it.**  
13 **Often there isn't any available, there isn't water**  
14 **available.**  
15 **What you will see is October, November,**  
16 **December months the amount withdrawn by Metropolitan is**  
17 **much lower. That's because of this operational**  
18 **consideration that they do to try to maximize the amount**  
19 **they can do.**  
20 Q. The amount that they take out each of those  
21 months at the beginning of the year going on through the  
22 year is always far greater than the exchange water  
23 allotment that is committed to San Diego; right?  
24 **A. I don't know that, no. I don't know that.**  
25 Q. It's in the record.

1950

1 You understand it gets to Lake Skinner, Met can  
2 choose to say this Colorado River water that's coming  
3 in, we are going to call the first 13,000 acre-feet,  
4 exchange water, and then assign the rest of the water to  
5 somebody else; right? How they -- for Met to say 8000  
6 acre-feet, 9000 acre-feet, 10,000 acre-feet when they  
7 are getting 50,000 or 80,000 acre-feet each month, to  
8 say this lesser amount is the exchange water is just  
9 kind of Met's accounting system. Lake Skinner doesn't  
10 know?  
11 MR. QUINN: Compound, I think, and  
12 argumentative.  
13 THE COURT: It is a little compound.  
14 Do you understand the question?  
15 THE WITNESS: I do. I think I understand, your  
16 Honor.  
17 What you're talking about, Mr. Keker, is  
18 probably true in a very theoretical sense. On paper I  
19 can say I blocked off the reservoir and I kept these  
20 molecules aside and I will only deliver them to San  
21 Diego.  
22 In reality, it doesn't work that way. And it  
23 would be -- you mentioned earlier the water at Lake  
24 Havasu that is there for IID, theoretically that water  
25 is there for June. If you are going to go through the

1951

1 theoretical changes of molecules, I think you really  
2 need to go back to the IID water is really summer water  
3 and not 1-12th every month, as in reality it is.  
4 Once you get back to reality, you can't do what  
5 you said. In theory, maybe. On paper, maybe.  
6 But the real world, that's not true. It  
7 doesn't happen that way.  
8 Q. BY MR. KEKER: I didn't mean on paper or  
9 theory.  
10 If I'm getting through the pipe, through  
11 Colorado River Aqueduct, I'm getting 50,000 acre-feet of  
12 Colorado River water, and it's about to dump into the  
13 Skinner Lake where it is going to be mixed with State  
14 Water Project water, I have a choice, if I'm Met, of  
15 categorizing which water is which? I can say the 15,000  
16 acre-feet of the Colorado River water, I'm going to  
17 check, okay, that's my obligation under the exchange  
18 agreement to San Diego and now I know it's all going to  
19 be mixed and I will eventually give them 15,000  
20 acre-feet of mixed water.  
21 But I could say I'm going to account for the  
22 exchange agreement water from only Colorado River water,  
23 even though I know it's going to be mixed eventually;  
24 right?  
25 **A. You could say that. You could account for it**

1952

1 **on paper or electronically. In reality you can't. I**  
 2 **hear what you are saying, and I think I understand what**  
 3 **you are saying. You would like to be able to say I can**  
 4 **block it off and say it is Colorado River water, but in**  
 5 **reality it is not -- in reality, there is no way of**  
 6 **doing it.**  
 7 **I am not sure even in reality, when the**  
 8 **Colorado River Aqueduct is shut down for maintenance, if**  
 9 **there is enough water left in that month to meet the**  
 10 **obligation of 1-12th of the water and to be able to meet**  
 11 **all the other obligations of Metropolitan to its other**  
 12 **agencies. The reality is one thing; the theory is**  
 13 **another.**  
 14 **Q. Last try. Why isn't it reality? If I am**  
 15 **getting 50,000 acre feet of water and it's about to get**  
 16 **mixed, why can't I categorize the 50,000 acre-feet any**  
 17 **way I want to? I am going to say 15,000 of it is**  
 18 **exchange water. I am going to say something else about**  
 19 **the other 35,000 acre-feet. What is wrong with doing**  
 20 **that?**  
 21 **A. I mean, it is basically the same answer. You**  
 22 **can do that. But the reality is you can't. And I am**  
 23 **pretty sure when the parties reached the exchange**  
 24 **agreement, put in the wording to the exchange agreement**  
 25 **that it is not Colorado River water that is being**

1953

1 **delivered to San Diego under this agreement, we are**  
 2 **taking Colorado River water and in exchange we are**  
 3 **giving you other water because the reality is we can't**  
 4 **do what you would theoretically like to do.**  
 5 **MR. KEKER: No further questions, your Honor.**  
 6  
 7 **FURTHER REDIRECT EXAMINATION**  
 8 **BY MR. QUINN:**  
 9 **Q. Do you know if the deliveries to San Diego also**  
 10 **go through the same pipe as Eastern and Western?**  
 11 **A. Yes, they do.**  
 12 **Q. Could you explain to the Court what that means?**  
 13 **A. The water that is provided to San Diego County**  
 14 **Water Authority -- there is not a separate pipe that**  
 15 **goes to the San Diego County Water Authority. That pipe**  
 16 **also serves Eastern and Western Water Districts, and**  
 17 **there is no way of breaking them up.**  
 18 **I suppose on paper we could but in reality they**  
 19 **get the same water.**  
 20 **Q. They get the same mix?**  
 21 **A. They get the same mix.**  
 22 **Q. The Eastern and Western Districts, where are**  
 23 **they?**  
 24 **A. They are in that southeast portion of the**  
 25 **district where the -- down by Lake Skinner.**

1954

1 **Q. And Mr. Kecker asked you a question where he**  
 2 **says, we take the Colorado River water, it's about -- it**  
 3 **is about to be dumped into Skinner and there it is going**  
 4 **to get mixed. Is it your testimony the mixture actually**  
 5 **happens at a juncture that is above Skinner?**  
 6 **A. Yes. The mixtures doesn't happen at Skinner.**  
 7 **The mixture happens when two pipes come together above**  
 8 **Diamond Lake or Diamond Valley. It is even farther**  
 9 **above Skinner.**  
 10 **MR. QUINN: Nothing further.**  
 11 **MR. KEKER: Nothing further.**  
 12 **THE COURT: Thank you very much, sir. You are**  
 13 **excused.**  
 14 **MR. QUINN: Your Honor, can we break for lunch?**  
 15 **THE COURT: We are off the record.**  
 16 **(Noon recess was taken.)**  
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1955

1 **San Francisco, California**  
 2 **Wednesday, April 29, 2015**  
 3 **1:30 p.m.**  
 4  
 5 **THE COURT: Sir.**  
 6 **MR. QUINN: Your Honor, I do think we are**  
 7 **prepared to rest and we won't be calling any other**  
 8 **witnesses. There are a few documents we would like to**  
 9 **move into evidence. There is no controversy to this**  
 10 **first batch. And then we are going to ask you to look**  
 11 **at three documents we would like to offer which**  
 12 **Mr. Kecker has some positions on.**  
 13 **And the first document I would like to move**  
 14 **into evidence is DTX 1153, which are Met's deposition**  
 15 **designations.**  
 16 **THE COURT: Any objection?**  
 17 **MR. KEKER: We filed -- we filed objections and**  
 18 **move in our objections to the deposition designations.**  
 19 **THE COURT: Subject to those objections?**  
 20 **MR. KEKER: Yes.**  
 21 **THE COURT: DTX 1153 admitted, subject to**  
 22 **objections.**  
 23 **(DTX 1153 was received in evidence.)**  
 24 **MR. QUINN: And then, your Honor, DTX 1143,**  
 25 **which is a brief filed by San Diego County Water**

1956

1 Authority and others that I questioned Ms. Stapleton  
 2 about, I failed to move it into evidence at the time.  
 3 MR. KEKER: No objection.  
 4 THE COURT: DTX 1143 is admitted.  
 5 (DTX 1143 was received in evidence.)  
 6 MR. QUINN: And then DTX 884, which is the  
 7 allocation agreement between the United States of  
 8 America and a whole bunch of different public entities,  
 9 I would like to move that into evidence.  
 10 MR. KEKER: Without conceding relevance, your  
 11 Honor, no objection.  
 12 THE COURT: DTX 884 admitted.  
 13 (DTX 884 was received in evidence.)  
 14 MR. QUINN: We have a declaration of Devendra  
 15 Upadhyah, DTX 1152, move that into evidence.  
 16 MR. KEKER: No objection.  
 17 THE COURT: Peaks 1152 is admitted.  
 18 (DTX 1152 was received in evidence.)  
 19 MR. QUINN: We have three documents we need to  
 20 talk about, your Honor. I believe we have given the  
 21 Court copies of these. We marked them for exhibits as  
 22 DTX 1165 through 1167. And as to these, there's no  
 23 dispute, as I understand it, about authenticity.  
 24 These documents come from San Diego's Public  
 25 Record Act production. We offer these documents as

1957

1 being, among other things, we think they are  
 2 substantively relevant but they are also impeaching  
 3 Ms. Stapleton's testimony at page 1568 of the trial  
 4 transcript.  
 5 THE COURT: I don't have that. You can  
 6 summarize what she was talking about.  
 7 MR. QUINN: Basically -- I can give it to you.  
 8 Basically she says she didn't care whether or not Met  
 9 provided pure Colorado River water. It was a matter of  
 10 indifference to them, prepared to take 100 percent  
 11 Colorado River water.  
 12 These documents show that San Diego was very  
 13 focused on salinity issues and wanted reassurances from  
 14 Met that water provided would meet certain salinity  
 15 requirements of threshold levels and also recognized  
 16 constraints on the blends that Metropolitan was  
 17 providing.  
 18 And they show concern on the part of San Diego  
 19 that they get the blend that gives them the minimum  
 20 salinity they are looking for but also recognizing that  
 21 Metropolitan doesn't have complete discretion as to what  
 22 it delivers.  
 23 We believe it is relevant both substantively  
 24 and as impeachment.  
 25 MR. KEKER: We object to these three documents

1958

1 which are dated -- 1167 is a 1998 document. 1166 is  
 2 2001, and 1165 is 1999. All before negotiation of the  
 3 2003 exchange agreement, which was what Ms. Stapleton  
 4 was talking about.  
 5 This is at a time when Ms. Stapleton, to the  
 6 extent she was concerned about it or anybody was  
 7 concerned about anything, they were looking at the water  
 8 that they were getting from the State Water Project, as  
 9 I understand it, which under the Met Act has to meet  
 10 certain salinity. This was not the subject of any  
 11 negotiation or concern about the exchange agreement.  
 12 They were talking about whether or not the  
 13 water they got from Met met the Met Act requirements.  
 14 THE COURT: Before 2003 there was another  
 15 agreement, as I understand it, independent of the  
 16 ordinary sort of agreement that San Diego and other  
 17 agencies had to get from Met.  
 18 Was Met, during the time period of 1998 through  
 19 2001, getting Colorado River water, do we know?  
 20 MR. KEKER: In 1998 there was an agreement to  
 21 provide Colorado River water. Ms. Stapleton talked  
 22 about that.  
 23 Let me just look at these one at a time. This  
 24 is a letter from Ms. Stapleton who was saying the  
 25 purpose of Section 136 -- this is on page two -- service

1959

1 of State water blending was to insure that member  
 2 agencies who contribute funds to the State Water Project  
 3 would receive its benefits. Met's long-term blending  
 4 policy must be consistent with the intent of Section 136  
 5 of the Met Act.  
 6 She talks about Metropolitan's long-term policy  
 7 must insure that agencies receive benefits commensurate  
 8 with payments made for SWP water or at a minimum provide  
 9 differential water rates depending on the source of  
 10 water to compensate for this inequity.  
 11 She is talking about water delivered under  
 12 Metropolitan's 1998 interim salinity blending plan.  
 13 This does not have anything to do with her statement we  
 14 are perfectly happy to take 100 percent Colorado River  
 15 water pursuant to the exchange agreement. That is what  
 16 she was testifying about.  
 17 The second one is 1999, Mr. Hess says, "As you  
 18 know, it would be unacceptable for the Authority's  
 19 service area to receive water from Metropolitan that  
 20 does not meet its board's, Met's boards adopted salinity  
 21 water quality service objective."  
 22 They are saying you are supposed to be  
 23 delivering water of a certain quality and they are  
 24 complaining about that. That has nothing to do with  
 25 whether or not they were perfectly happy and negotiated

1960

1 to get 100 percent Colorado River water.  
 2 The third one, 2001, again talks about  
 3 Metropolitan's 1999 salinity management study and goes  
 4 on and talks about an increase in salinity from historic  
 5 levels. These are Metropolitan's policies that its  
 6 members are supposed to benefit from. That is what  
 7 they're talking about. There is nothing in here to  
 8 impeach or even comment on her testimony that we  
 9 negotiated an exchange agreement, and it would have been  
 10 perfectly happy to take all Colorado River water.  
 11 We think these are irrelevant. They weren't  
 12 identified on the witness list. Ms. Stapleton wasn't  
 13 asked about them. And we object to their admission.  
 14 THE COURT: Mr. Quinn, is there anything other  
 15 than the following in these documents, an expression by  
 16 the author or Ms. Stapleton that with respect to water  
 17 secured from Met outside of an exchange agreement she  
 18 cares about and expects Met to comply with certain  
 19 salinity standards that Met either has or ought to have?  
 20 That is to say, to make that slightly different, what  
 21 she is really talking about here is as a member agency,  
 22 not necessarily as a water exchange recipient but as a  
 23 member agency, I want you, Met, under 136 to adhere to  
 24 certain standards, for example, 500 milligrams per  
 25 litre?

1961

1 Isn't that what is going on in these letters?  
 2 She cares about that and she wants Met to play ball  
 3 according to the rules as she thought were in place with  
 4 respect to member agency, generally speaking.  
 5 MR. QUINN: Well, that is part of it.  
 6 THE COURT: Is there anything else in here that  
 7 suggests her position with respect to this sort of  
 8 independent status that San Diego may have as a  
 9 recipient of exchange water?  
 10 MR. QUINN: There is a recognition that water  
 11 above a certain saline --  
 12 Looking at Defense Exhibit 1166 --  
 13 THE COURT: Yes.  
 14 MR. QUINN: -- on the bottom paragraph of that  
 15 first page that there is a recognition this can be  
 16 damaging, may cause damage to the system. I think the  
 17 Court knows it's in the record that if the Colorado  
 18 River water is more saline --  
 19 THE COURT: We actually went through this in  
 20 Phase I. There was evidence to suggest, and everybody  
 21 in the room would probably agree, you would rather have  
 22 less saline water than not, and that saline water does  
 23 damage in a way that non-saline water doesn't.  
 24 That is understood here. It doesn't seem these  
 25 letters -- add much more to the record than that.

1962

1 MR. QUINN: What this does battle with is the  
 2 testimony of Ms. Stapleton that we were happy to get  
 3 pure Colorado River water; whereas, those documents  
 4 express a concern that the long-term blending policy  
 5 must in fact make sure that it reaches -- the water we  
 6 get reaches certain levels with respect to salinity. If  
 7 that's true, it does do battle with the idea,  
 8 Ms. Stapleton said, it is a matter of indifference to us  
 9 whether we get pure Colorado River water.  
 10 I think it is some evidence that bears on that  
 11 dispute. I think it is relevant to it that back in  
 12 1998, when, by the way, there is an exchange agreement  
 13 then in place, which the 2003 agreement amends and  
 14 restates, that we have a consistent recognition in 1998,  
 15 1999, 2001 that we, San Diego, have certain expectations  
 16 in that regard, recognizing that too much of a salinity  
 17 content can be damaging, and we are concerned about  
 18 that. I think it would be fair for a trier of fact to  
 19 take that into account in assessing the credibility of  
 20 Ms. Stapleton's testimony that we really didn't care  
 21 whether there was any blending at all, when here she's  
 22 saying we really need to get blending because we don't  
 23 want to incur this kind of damage.  
 24 THE COURT: The only kind of statement this  
 25 tends to impeach is a statement along the following

1963

1 lines: We at San Diego don't care. When we get water  
 2 from whatever sources, we don't care whether it has a  
 3 high or low level of salinity. That doesn't concern us.  
 4 That is a different kind of statement from when  
 5 we were negotiating the exchange agreement we did or  
 6 didn't care about the level of salinity that we got. I  
 7 don't think Miss Stapleton said anything like the former  
 8 statement. She was talking about the intent that went  
 9 into the formation of the exchange agreement.  
 10 These letters don't say anything other than  
 11 what you have in the letter that any reasonable person  
 12 that deals with water on behalf of an agency -- I can  
 13 almost assume that person would, as a general matter,  
 14 prefer to have less saline water than more saline water.  
 15 The real question in this case, at least as  
 16 we've been trying over the last week or two, has been  
 17 what was the intent with respect to the salinity of the  
 18 water under the exchange agreement. These don't go to  
 19 that. They don't impeach her statement under it.  
 20 The objection is sustained.  
 21 MR. QUINN: Can I read the testimony?  
 22 THE COURT: Absolutely.  
 23 MR. QUINN: 1568, lines five to 19:  
 24 "Q In the contract did it  
 25 give a right to blend water?"

1964

1 "A Yes.  
 2 "Q In Met's sole discretion  
 3 they could blend water with  
 4 other water sources?"  
 5 It's in the record. I won't bother reading it.  
 6 The Court can see it.  
 7 I think we are putting blinders on, frankly,  
 8 your Honor, if we're saying all she is saying is we were  
 9 indifferent to Colorado -- whether we got 100 percent  
 10 Colorado River water, but she's not saying we are  
 11 indifferent to salinity levels.  
 12 If she is saying I am indifferent to salinity  
 13 levels, this could come in as impeachment but because  
 14 she only said, "I am indifferent to whether it is pure  
 15 Colorado river," and it is not impeaching, I think we  
 16 are all putting blinders on.  
 17 We all know what the facts are about the  
 18 salinity of the Colorado River.  
 19 THE COURT: I don't think they get to add  
 20 anything to the argument. You still get to make the  
 21 argument. I don't think it adds anything.  
 22 The objection is sustained as to 1165, 1166 and  
 23 1167.  
 24 MR. QUINN: With that we do indeed rest.  
 25 THE COURT: Any rebuttal from San Diego?

1965

1 MR. KEKER: No. We rest, as well.  
 2 THE COURT: Let's talk about what you would  
 3 like to do next. I don't know if you have had a chance  
 4 to talk to each other.  
 5 MR. KEKER: We sent a schedule --  
 6 Sorry. I interrupted you.  
 7 We sent a schedule proposing the following and  
 8 we haven't heard back.  
 9 Opening briefs May 22. Argument, if it meets  
 10 the Court's -- doing like we did last time. Opening  
 11 briefs, giving the Court the opportunity to read the  
 12 briefs. And if you wanted to send us questions ahead of  
 13 time to be sure to address, like you did last time, that  
 14 was extremely helpful.  
 15 If you don't, we show up on June 4 and either  
 16 answer your questions or simply argue our case and then  
 17 you take it under submission. That's our proposal.  
 18 THE COURT: I may not be able to do those exact  
 19 dates, but let me hear from Met as to your preferred  
 20 course.  
 21 MR. QUINN: What Mr. Kecker proposes seems fine  
 22 with us, your Honor. I am reminded that we did file a  
 23 motion for non-suit which the Court said it would  
 24 consider at the close.  
 25 THE COURT: I will. I think I will consider

1966

1 those together.  
 2 MR. QUINN: There are a couple of motions that  
 3 San Diego made which are hanging fire, a motion to  
 4 exclude, a motion to strike.  
 5 THE COURT: Let's put all those together and  
 6 make sure I have courtesy copies of everything. And I  
 7 will review all of those in advance of the hearing. In  
 8 advance of the arguments, I will give you some tentative  
 9 thoughts on those before we get together to talk after I  
 10 have read your briefs.  
 11 MR. QUINN: We won't have the rulings on those  
 12 at the time we file our briefs?  
 13 THE COURT: Right.  
 14 How does June 5 look on your calendar?  
 15 MR. KEKER: I have an incredibly hard to  
 16 make --  
 17 THE COURT: That is fine.  
 18 MR. KEKER: -- at 8:30. So if it didn't start  
 19 until ten o'clock or after.  
 20 THE COURT: We could do it at 10:30, if you  
 21 would like.  
 22 MR. KEKER: Fine. That would work.  
 23 MR. EMANUEL: A later afternoon hearing.  
 24 THE COURT: I can do it from 2:00 to 4:00.  
 25 MR. KEKER: 2:00 p.m. on June 5.

1967

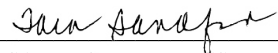
1 THE COURT: 2:00 p.m. June 5 for the hearing.  
 2 Briefs May 22. And I'll make every effort to get out  
 3 any obvious questions and tentatives on what's hanging  
 4 fire.  
 5 MR. KEKER: We owe a few things. We owe a  
 6 motion dealing with Mr. Lambeck's declaration, which you  
 7 invited us to make or said we could make after the  
 8 trial. And we owe some Denham demonstratives.  
 9 MR. PURCELL: These are exhibits that have been  
 10 marked and admitted. We haven't delivered the marked  
 11 copies to the clerk. We will try to do that as soon as  
 12 possible.  
 13 THE COURT: Maybe we can set a date by sometime  
 14 around -- let me try out the 7th of May as a date by  
 15 which any pending motions that haven't been reduced to  
 16 writing can be made so that everybody knows what the end  
 17 is.  
 18 May 7, would that work for everybody? Motions  
 19 to strike, for example.  
 20 MR. QUINN: That's fine, your Honor.  
 21 MR. KEKER: That's fine, your Honor. When I  
 22 said Lambeck, I should have also said Woodcock.  
 23 THE COURT: Right.  
 24 MR. QUINN: And a date, oppositions a week  
 25 later.

1968



1 THE COURT: Do you want to fold it into your  
 2 brief in chief? Do you want it May 22?  
 3 MR. QUINN: It might be easier, frankly, to  
 4 keep those separate.  
 5 THE COURT: Okay. If we went about two weeks  
 6 after that, it would be roughly the 21st of May. A  
 7 slightly different date for oppositions to motions.  
 8 MR. KEKER: Your Honor, could we ask for page  
 9 limits? They don't need to be too tight but just in  
 10 deference to you and in deference to all of us, if  
 11 somebody files --  
 12 THE COURT: In deference to me.  
 13 MR. KEKER: Twenty-five pages?  
 14 MR. QUINN: How long were the -- I don't know.  
 15 THE COURT: Met's briefs were very long in the  
 16 first phase. They were too long. I will tell you, they  
 17 were too long. They were really too long, and it didn't  
 18 help.  
 19 I have a vague recollection -- I pray I'm  
 20 wrong -- but they were closer to 70 or 80 pages or  
 21 something like that.  
 22 MR. KEKER: Some were 100.  
 23 THE COURT: Some were 100 pages.  
 24 Thirty-five pages. The issues are a little  
 25 simpler. I'm flexible. Chief Justice Roberts said, he

1969

1 REPORTER'S CERTIFICATE  
 2  
 3 STATE OF CALIFORNIA, )  
 4 ) ss  
 5 COUNTY OF SANTA BARBARA. )  
 6  
 7  
 8 I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand  
 9 Reporter, in the County of Santa Barbara, State of  
 10 California, hereby certify:  
 11 That the court proceedings were taken down by me in  
 12 stenotype at the time and place herein named and  
 13 thereafter reduced to typewriting by computer-aided  
 14 transcription under my direction.  
 15 I further certify that I am not interested in the  
 16 event of the action.  
 17 WITNESS my hand this 30th day of April,  
 18 2015, at Santa Barbara, California.  
 19  
 20  
 21  
 22   
 23 TARA SANDFORD, RPR, CSR No. 3374  
 24 Certified Shorthand Reporter  
 25 State of California

1971

1 said, "I have never picked up a brief and put it down  
 2 and said to myself I wish it had been longer."  
 3 MR. QUINN: How about 40, your Honor?  
 4 THE COURT: Forty it is.  
 5 MR. KEKER: How about 37-and-a-half?  
 6 THE COURT: Forty pages on May 22, but not  
 7 necessarily. They may even be shorter.  
 8 Thank you very much. I appreciate everyone's  
 9 help.  
 10 (Trial concluded.)  
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<p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> 1845:3</p> <p><b>ability</b> 1928:21 1944:21 1946:22 1947:6,19</p> <p><b>able</b> 1853:5 1873:18 1874:22 1880:5 1937:4 1953:3,10 1966:18</p> <p><b>absolutely</b> 1894:11 1964:22</p> <p><b>accept</b> 1867:19 1870:10 1891:3 1906:14 1909:16,19,20 1910:2 1911:25 1912:11 1929:4 1936:6 1940:19</p> <p><b>accepted</b> 1870:9 1883:5 1883:16</p> <p><b>access</b> 1852:24 1905:14 1909:14 1910:11 1911:15 1913:24 1915:25 1924:6 1929:22,24 1930:19 1931:2</p> <p><b>account</b> 1867:10,15 1897:8 1927:3,4 1928:15 1952:21,25 1963:19</p> <p><b>accounting</b> 1951:9</p> <p><b>accumulated</b> 1846:17</p> <p><b>acre</b> 1953:15</p> <p><b>acre-feet</b> 1872:10 1899:17 1936:4 1951:3,6,6,6,7 1952:11,16,20 1953:16,19</p> <p><b>acre-foot</b> 1876:21</p> <p><b>act</b> 1846:8,12,24 1847:8 1848:8 1854:20 1857:13 1957:25 1959:9,13 1960:5</p> <p><b>action</b> 1922:24 1971:16</p> <p><b>add</b> 1962:25 1965:19</p> <p><b>added</b> 1926:14 1929:19</p> <p><b>adding</b> 1916:3</p> <p><b>addition</b> 1864:22 1892:3</p> <p><b>additional</b> 1871:2 1893:10,11</p> <p><b>address</b> 1893:1,15 1896:5 1966:13</p> <p><b>addressed</b> 1869:16 1870:6 1892:22,23 1893:2</p> <p><b>adds</b> 1965:21</p> <p><b>adequacy</b> 1886:18 1895:25 1899:9</p>	<p><b>adequately</b> 1869:19</p> <p><b>adhere</b> 1961:23</p> <p><b>adjust</b> 1896:19 1947:7</p> <p><b>administrative</b> 1849:12</p> <p><b>admission</b> 1853:2 1961:13</p> <p><b>admit</b> 1849:17 1865:24 1866:19 1887:24</p> <p><b>admitted</b> 1850:4 1856:1,18 1858:2 1866:20 1956:21 1957:4,12,17 1968:10</p> <p><b>adopted</b> 1841:10 1850:23 1851:5,7,17 1851:22,23 1852:9 1853:13,21,22 1854:13,17,21 1856:8 1857:3,6 1858:8 1904:4,13 1920:16 1960:20</p> <p><b>advance</b> 1967:7,8</p> <p><b>affect</b> 1948:14</p> <p><b>afternoon</b> 1967:23</p> <p><b>agencies</b> 1846:16 1847:17 1848:3 1870:18,24 1871:2,7 1871:9,12,19,22 1872:15,24,25 1874:24 1875:5,9 1876:19 1884:19,21 1884:25 1885:17 1886:1 1897:22 1898:7,8,11,17 1899:2 1902:20 1908:5 1920:19 1921:9 1938:11,23 1939:3,4 1940:12,15 1940:24 1941:2,4,7 1945:10 1948:1,9 1953:12 1959:17 1960:2,7</p> <p><b>agency</b> 1846:25 1868:1 1871:3 1872:9,12 1874:12 1884:24 1920:6 1938:1,18,19 1938:20 1961:21,23 1962:4 1964:12</p> <p><b>ago</b> 1861:12 1882:15 1921:11,11</p> <p><b>agree</b> 1897:23 1909:11 1912:11 1962:21</p> <p><b>agreed</b> 1908:25</p> <p><b>agreement</b> 1877:2 1883:25 1914:12,13 1921:14 1931:12,24 1932:20,24 1933:2,11 1933:17,21,21 1934:1 1934:5,8,14,15,16,18</p>	<p>1934:20,22 1935:2,3 1935:7,12,19 1936:11 1939:24 1940:11,11 1940:14,17,21,25 1944:10 1947:8 1952:18,22 1953:24 1953:24 1954:1 1957:7 1959:3,11,15 1959:16,20 1960:15 1961:9,17 1963:12,13 1964:5,9,18</p> <p><b>agreements</b> 1884:1 1898:12</p> <p><b>ahadlock@kvn.com</b> 1842:7</p> <p><b>ahead</b> 1845:25 1872:6 1882:2 1903:15 1907:8 1966:12</p> <p><b>air</b> 1911:8</p> <p><b>Alameda</b> 1842:18</p> <p><b>allocate</b> 1860:17 1942:6</p> <p><b>allocated</b> 1868:12,14 1868:18 1882:25 1906:17</p> <p><b>allocates</b> 1846:15</p> <p><b>allocation</b> 1868:20 1869:19 1873:22 1874:8,10 1882:16 1902:20 1924:3 1942:25 1945:22 1948:17 1950:1,11 1957:7</p> <p><b>allocations</b> 1874:4,19 1929:5</p> <p><b>allotment</b> 1950:23</p> <p><b>allow</b> 1880:7 1893:14 1894:1 1902:10 1904:9</p> <p><b>allowable</b> 1870:7</p> <p><b>allowed</b> 1873:19 1902:24</p> <p><b>allowing</b> 1879:14</p> <p><b>alternative</b> 1880:24 1881:8</p> <p><b>amended</b> 1848:8</p> <p><b>amendment</b> 1905:3</p> <p><b>amends</b> 1963:13</p> <p><b>America</b> 1863:6 1872:16 1957:8</p> <p><b>American</b> 1861:2 1862:25 1863:3,19,21 1863:24 1864:8</p> <p><b>amount</b> 1861:19 1873:11,19 1885:10 1898:18 1931:12 1934:6,21 1935:14 1947:11,15 1949:24</p>	<p>1950:16,18,20 1951:8</p> <p><b>amounts</b> 1899:14 1927:13 1949:19</p> <p><b>analysis</b> 1893:23 1905:23</p> <p><b>analyze</b> 1849:3 1909:2</p> <p><b>and/or</b> 1892:4</p> <p><b>Angeles</b> 1842:15,19 1871:11,15</p> <p><b>ANN</b> 1971:8</p> <p><b>annexed</b> 1866:4</p> <p><b>annual</b> 1844:4 1849:9 1859:4 1947:9,15 1950:2</p> <p><b>annually</b> 1846:15 1847:3 1932:13</p> <p><b>answer</b> 1903:16 1912:20,21 1917:9,14 1920:10 1922:13 1923:16 1953:21 1966:16</p> <p><b>answering</b> 1902:6 1905:5</p> <p><b>answers</b> 1849:25 1917:23</p> <p><b>anybody</b> 1876:6 1887:14 1914:19 1959:6</p> <p><b>anyplace</b> 1918:12</p> <p><b>anyway</b> 1932:22</p> <p><b>appeal</b> 1880:12</p> <p><b>APPEARANCES</b> 1842:1</p> <p><b>appears</b> 1855:25 1866:3</p> <p><b>Appellant</b> 1893:8</p> <p><b>appendices</b> 1865:9</p> <p><b>Appendix</b> 1866:7</p> <p><b>applicable</b> 1940:12,23</p> <p><b>application</b> 1897:4 1905:2</p> <p><b>applies</b> 1898:8 1909:18</p> <p><b>apply</b> 1898:18 1942:20</p> <p><b>apportion</b> 1904:6</p> <p><b>apportioned</b> 1904:14</p> <p><b>appreciate</b> 1970:8</p> <p><b>appropriate</b> 1861:19 1864:24 1869:19 1887:2 1901:14,20,21 1902:21 1903:24 1906:11 1909:2 1915:18</p> <p><b>appropriately</b> 1901:9 1903:8</p> <p><b>appropriateness</b> 1906:10</p> <p><b>approve</b> 1851:20</p> <p><b>approximately</b> 1862:2</p>	<p>1862:13 1928:6</p> <p><b>April</b> 1841:11,18 1845:2 1850:21,24 1851:4 1854:14 1856:4 1857:6,13 1956:2 1971:17</p> <p><b>Aqueduct</b> 1884:9 1899:13 1900:11 1931:10 1934:7 1935:22 1942:14,15 1942:16 1945:5 1946:25 1950:3,4 1952:11 1953:8</p> <p><b>area</b> 1860:8 1861:8 1887:5 1899:10 1916:13 1960:19</p> <p><b>areas</b> 1871:12</p> <p><b>argue</b> 1966:16</p> <p><b>argument</b> 1918:14 1965:20,21 1966:9</p> <p><b>argumentative</b> 1951:12</p> <p><b>arguments</b> 1967:8</p> <p><b>arrangement</b> 1877:1</p> <p><b>arrived</b> 1900:6 1921:10</p> <p><b>arriving</b> 1881:6</p> <p><b>aside</b> 1869:16,20 1925:9 1927:22 1928:15 1951:20</p> <p><b>asked</b> 1888:8 1890:7,10 1901:23 1908:8 1917:10 1918:2 1919:22 1922:21 1943:13 1955:1 1961:13</p> <p><b>asked-and-answered</b> 1891:7</p> <p><b>asking</b> 1858:19 1871:7 1904:1,2 1912:19,23 1919:17 1925:1 1940:9 1943:24</p> <p><b>asserted</b> 1907:12</p> <p><b>assessing</b> 1963:19</p> <p><b>assessment</b> 1864:24</p> <p><b>assign</b> 1860:17 1951:4</p> <p><b>assignment</b> 1902:21</p> <p><b>associate</b> 1934:2</p> <p><b>associated</b> 1860:11 1864:10 1931:18 1933:24 1942:1</p> <p><b>ASSOCIATES</b> 1841:22</p> <p><b>association</b> 1861:3 1862:25 1863:3,4,20 1863:25 1864:9 1906:22</p> <p><b>assume</b> 1903:11 1918:6 1919:18 1938:16 1964:13</p>
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<p><b>assuming</b> 1927:16  <b>assumption</b> 1900:24  1936:23  <b>attached</b> 1849:25  1865:4,8  <b>attachment</b> 1852:22  1853:12  <b>attack</b> 1895:1  <b>attention</b> 1896:16  1897:12  <b>attorneys</b> 1876:4  <b>attributable</b> 1924:7  <b>AUDREY</b> 1842:4  <b>augment</b> 1884:23  <b>augmentation</b> 1884:22  <b>authenticity</b> 1957:23  <b>author</b> 1961:16  <b>authored</b> 1865:3  <b>authoritative</b> 1860:21  <b>authorities</b> 1861:10  <b>Authority</b> 1841:6  1847:23 1865:14  1869:24 1871:14  1932:5 1933:23  1934:2,22,24 1939:6  1954:14,15 1957:1  <b>Authority's</b> 1960:18  <b>availability</b> 1947:18  <b>available</b> 1873:16  1877:6,25 1878:1,3,8  1878:9 1883:24  1885:8,9,15 1886:7  1887:7 1889:4,25  1897:15 1948:5,10,12  1949:5 1950:13,14  <b>AWA</b> 1863:15  <b>aware</b> 1867:1,5,8,9  1883:23 1884:1  1890:11 1914:15,18  1919:4 1934:4,10  1940:13 1941:18  <b>awful</b> 1948:7</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>B</b> 1842:13 1866:7  <b>back</b> 1850:17,18  1854:12 1855:10  1857:6 1876:9 1898:4  1900:15 1912:13  1915:1 1917:4 1921:2  1922:2 1926:23  1927:9,22 1937:22  1952:2,4 1963:11  1966:8  <b>ball</b> 1962:2  <b>Barbara</b> 1971:5,9,18  <b>base</b> 1861:7  <b>based</b> 1846:16 1857:3,5</p>	<p>1869:1 1871:16  1878:11 1897:22  1913:8 1937:1 1939:3  1939:5 1941:11  1942:6,16 1943:1  <b>basic</b> 1860:22  <b>basically</b> 1899:17  1953:21 1958:7,8  <b>basis</b> 1876:21 1909:3  1911:5 1937:7  1949:10  <b>batch</b> 1956:10  <b>Bates</b> 1856:10  <b>Battery</b> 1841:24  1842:6  <b>battle</b> 1963:1,7  <b>bear</b> 1901:7 1903:7  <b>bears</b> 1963:10  <b>beginning</b> 1898:10  1909:18 1950:21  <b>behalf</b> 1964:12  <b>belabor</b> 1910:6  <b>believe</b> 1849:11 1859:8  1865:6,7,8,10  1869:20 1873:9  1874:9 1895:22  1900:7,13 1905:21,24  1906:4 1912:3 1913:8  1930:21 1957:20  1958:23  <b>benefit</b> 1869:6 1883:22  1901:20 1961:6  <b>benefits</b> 1901:20  1960:3,7  <b>Bennion</b> 1856:23  1857:2 1858:14  <b>best</b> 1876:5 1887:18  <b>better</b> 1885:8 1898:9  <b>Beverly</b> 1871:11,15  <b>big</b> 1870:13 1872:12  1875:3 1937:10  <b>bigger</b> 1872:8  <b>biggest</b> 1873:20  <b>binder</b> 1849:21  1852:17  <b>bit</b> 1880:21 1942:13  <b>black</b> 1875:3,5 1885:7  1903:22 1945:2  <b>blend</b> 1937:6,16,17,18  1937:22 1938:2,10,16  1938:21,22 1942:2,7  1942:17,21 1943:2,11  1944:4,6,23 1945:7  1946:22 1947:7,20  1948:14,18 1958:19  1964:25 1965:3  <b>blended</b> 1942:18  1947:2</p>	<p><b>blending</b> 1934:10  1936:24 1937:2  1941:12 1943:24  1945:8,12,15 1960:1  1960:3,12 1963:4,21  1963:22  <b>blends</b> 1937:24 1938:5  1939:3,5 1942:3  1958:16  <b>blinders</b> 1965:7,16  <b>block</b> 1953:4  <b>blocked</b> 1951:19  <b>Blow</b> 1852:3  <b>board</b> 1850:23 1851:5  1851:7,13,16,17,19  1851:22 1852:3,6,9  1852:21,22 1853:8,11  1853:14 1854:14,19  1857:9,12 1859:2  1864:1,13,18 1899:4  1917:6,12 1920:16  1921:12,22,24  1922:23 1923:10  1924:11 1925:10,13  1925:21 1926:2,5,8  1927:17,23 1928:22  1928:25 1929:12  <b>board's</b> 1960:20  <b>boards</b> 1960:20  <b>bodies</b> 1861:16,24  <b>body</b> 1862:4,21  <b>bonds</b> 1860:12 1878:18  1878:20,21,25 1879:5  1882:19,21,24  1888:14 1932:12,15  1932:18 1943:14,15  <b>book</b> 1854:10  <b>boss</b> 1858:12  <b>bother</b> 1965:5  <b>bottom</b> 1858:4 1887:5  1962:14  <b>box</b> 1875:3,5 1885:7  1903:22 1945:2  <b>Boy</b> 1940:6  <b>branches</b> 1893:16  <b>BRAUNIG</b> 1842:5  <b>breach</b> 1915:19  <b>breached</b> 1915:17  <b>break</b> 1850:8 1857:16  1955:14  <b>breaking</b> 1954:17  <b>Brian</b> 1858:10,10,12  <b>Brian/Sid</b> 1858:5  <b>brief</b> 1844:14 1956:25  1969:2 1970:1  <b>briefing</b> 1881:8  <b>briefs</b> 1966:9,11,12  1967:10,12 1968:2</p>	<p>1969:15  <b>bring</b> 1874:20 1894:18  1945:3  <b>brought</b> 1884:3,6,8  <b>BROWN</b> 1841:22  <b>budgeted</b> 1872:11  <b>built</b> 1878:19  <b>bumped</b> 1874:8  <b>bunch</b> 1957:8  <b>burden</b> 1901:19 1935:4  <b>business</b> 1872:19  <b>buying</b> 1940:4  <b>buys</b> 1885:23,25  <b>bypass</b> 1946:2,4,7,18  <b>bypassed</b> 1946:8</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C-H-R-I-S-T-O-P-H-...</b>  1859:24  <b>C-O-T-T-I-N-I</b>  1892:22  <b>C.V</b> 1866:5  <b>CA</b> 1841:24  <b>Cal.App.4th</b> 1887:19  1888:4 1891:19,20  1892:22,25  <b>calculate</b> 1916:21,23  1916:25 1917:3  1918:3,13 1919:1,12  1919:13 1920:4  1924:9 1926:21  1928:7  <b>calculated</b> 1891:3  1896:9 1911:21  1924:5,8 1925:14,15  <b>calculates</b> 1847:3  1931:9  <b>calculating</b> 1936:24  <b>calculation</b> 1846:7,11  1846:13,20 1847:7,15  1847:18 1848:1,3,6,9  1848:12 1896:14  1911:16,18,19 1915:4  1915:11,13 1928:10  1928:13 1937:5  <b>calculations</b> 1847:21  1896:7,13 1899:12  1916:16  <b>calendar</b> 1967:14  <b>California</b> 1841:1,9,11  1841:17 1842:6,11,15  1842:19 1845:1  1873:6 1875:16,22  1876:24 1877:4,16,21  1878:16,19 1882:21  1883:3,12 1905:3  1947:24 1948:7  1956:1 1971:3,10,18</p>	<p>1971:25  <b>call</b> 1869:1 1880:2,15  1894:13 1896:16  1897:12 1905:18  1908:6 1939:22  1951:3  <b>called</b> 1859:17 1861:1  1862:11,25 1881:20  1890:12 1905:4  <b>calling</b> 1880:17 1956:7  <b>calls</b> 1845:22 1859:13  1879:11 1939:24  <b>Canada</b> 1863:6  <b>canal</b> 1944:13  <b>capacity</b> 1847:13,25  1877:5,8,22,24  1883:7 1885:8,9,14  1922:6 1935:23,25  <b>capital</b> 1885:13  <b>care</b> 1958:8 1963:20  1964:1,2,6  <b>career</b> 1861:13  <b>cares</b> 1961:18 1962:2  <b>case</b> 1841:7 1849:13  1867:17 1868:10  1869:14 1876:1,18,18  1876:22 1880:24  1882:17 1883:24  1887:18,18,20 1888:2  1888:12 1891:21  1893:3,7,7,8 1899:18  1900:18 1902:1  1903:15 1907:21,22  1914:19,25 1919:19  1920:3,25 1928:1  1950:10 1964:15  1966:16  <b>cases</b> 1887:3 1888:14  1890:19 1891:14,18  1892:17,25 1894:6  <b>categorize</b> 1953:16  <b>categorizing</b> 1952:15  <b>causation</b> 1869:2,3  1901:19 1902:8,24  1903:25 1932:9  1934:3 1943:18,20  <b>cause</b> 1869:5 1883:21  1897:16 1933:3,17  1934:3 1962:16  <b>caused</b> 1868:24,24  1903:20,22 1915:19  1916:11 1933:12  <b>causes</b> 1868:18 1935:17  <b>caveat</b> 1856:1  <b>CCP</b> 1886:20 1890:11  1890:21  <b>certain</b> 1873:15  1877:24 1878:4</p>
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<p>1884:1 1893:5 1898:8 1898:17 1908:19,22 1908:24 1910:12,23 1923:3 1928:3 1931:18 1958:14 1959:10 1960:23 1961:18,24 1962:11 1963:6,15 <b>certainly</b> 1863:7 1867:19 1870:11 1888:10 1889:1,3 1899:5 1905:13 1906:14 1909:16 1914:7 1921:16 1941:15 1948:17 <b>CERTIFICATE</b> 1971:1 <b>Certified</b> 1971:8,24 <b>certify</b> 1971:10,15 <b>chairman</b> 1863:20,23 1864:16 <b>chance</b> 1849:3 1966:3 <b>change</b> 1898:24,25 1922:25 1923:1 1924:2 1929:4 1933:17 1937:2,24 <b>changed</b> 1896:18 1899:5 1939:20 <b>changes</b> 1873:24 1897:10,16 1920:20 1923:25 1924:1 1952:1 <b>changing</b> 1899:6 1914:20 <b>characterize</b> 1939:19 <b>charge</b> 1847:13,13,25 1847:25 1896:10 1907:16 1918:7 1922:6,7 1924:9 1928:17 1931:9 1932:4 1941:3 <b>charged</b> 1898:7 1901:9 1903:8 1905:10,15 1913:4,5 1917:8 1940:4,15,25 1941:1 1941:3,4,5,7,8 <b>charges</b> 1847:12 1861:4,19 1863:23 1864:8,10 1868:3 1896:18,20 1897:17 1902:19 1905:19 1910:10 1912:5,8 1915:23 1916:18 1918:22 1934:1 <b>charging</b> 1928:2 <b>check</b> 1936:13 1952:17 <b>chief</b> 1969:2,25 <b>choice</b> 1952:14</p>	<p><b>choose</b> 1951:2 <b>chooses</b> 1949:7,19 <b>chose</b> 1922:13 1939:11 <b>Christopher</b> 1843:4 1859:13,16,23 <b>circumstance</b> 1846:23 1886:10 <b>circumstances</b> 1908:20 1908:22,24 1945:13 1945:14 <b>cite</b> 1887:18 1888:3 1891:17 <b>cities</b> 1871:10 <b>City</b> 1871:15 1891:20 <b>Civil</b> 1887:16 <b>claim</b> 1861:7 <b>claims</b> 1915:17 <b>Clark</b> 1888:3 <b>classes</b> 1868:15,24 <b>classification</b> 1906:24 1906:25 <b>classified</b> 1906:17 <b>clear</b> 1888:15 1935:12 <b>clearcut</b> 1925:6 <b>clearer</b> 1889:23 <b>clearest</b> 1887:18 <b>clearly</b> 1888:24 1924:20 <b>clerk</b> 1855:8 1859:21 1968:11 <b>clients</b> 1884:16 <b>close</b> 1966:24 <b>closer</b> 1969:20 <b>CMC</b> 1888:22 1889:16 1892:2,19 1893:20,22 <b>Code</b> 1886:23 1887:15 1887:22 <b>collect</b> 1896:20 <b>collecting</b> 1929:6 <b>Collins</b> 1887:19 1890:19 1891:23 <b>Colorado</b> 1873:8,16 1884:9 1894:18,19 1899:12,20,21,22 1900:8,9,9,11 1909:19 1912:5 1928:2 1930:5,15,19 1931:10,13,25 1932:21 1933:7,12 1934:7 1935:5,8,9,10 1935:22 1936:10 1938:3,17,20 1939:17 1939:24 1940:1,5,22 1942:14,15,16 1944:21 1945:5,16,18 1945:19,24 1946:9,14 1946:23,25 1947:1,16 1947:17 1948:14</p>	<p>1949:25 1950:3,4 1951:2 1952:11,12,16 1952:22 1953:4,8,25 1954:2 1955:2 1958:9 1958:11 1959:19,21 1960:14 1961:1,10 1962:17 1963:3,9 1965:9,10,15,18 <b>column</b> 1923:4 <b>come</b> 1855:10 1860:18 1882:16 1888:5 1894:19 1895:8,9 1911:22 1917:23 1921:12,23 1929:7 1930:18 1934:25 1942:12,13,15,17,19 1947:2 1955:7 1957:24 1965:13 <b>comes</b> 1873:20 1888:19 1890:5,6 1894:17 1931:10,12,13,16,17 1932:5 1945:4,5,8 1947:12 <b>coming</b> 1866:13 1875:4 1879:25 1900:24 1903:12,13,18,21,22 1945:18,21,24 1946:1 1951:2 <b>commensurate</b> 1960:7 <b>comment</b> 1886:24 1961:8 <b>comments</b> 1887:1 1899:8 1909:9 <b>Commissioners</b> 1906:23 <b>commit</b> 1898:13 <b>commitment</b> 1897:25 <b>commitments</b> 1898:15 1898:17 <b>committed</b> 1899:3 1950:23 <b>committee</b> 1863:21,24 1864:8,11,14,16 <b>committees</b> 1864:1 <b>commodity</b> 1876:21 <b>companies</b> 1861:11 1872:15 <b>comparison</b> 1920:18 <b>compelling</b> 1911:1 <b>compensate</b> 1960:10 <b>complaining</b> 1960:24 <b>complete</b> 1958:21 <b>completely</b> 1926:20 1941:10 <b>completes</b> 1848:18 <b>complicated</b> 1875:6 <b>complications</b> 1872:13 <b>comply</b> 1961:18</p>	<p><b>components</b> 1926:19 1926:23 <b>compound</b> 1951:11,13 <b>computer-aided</b> 1971:13 <b>conceding</b> 1957:10 <b>concern</b> 1958:18 1959:11 1963:4 1964:3 <b>concerned</b> 1880:11 1883:24 1959:6,7 1963:17 <b>concluded</b> 1905:9 1970:10 <b>conclusion</b> 1879:22 1901:16 1906:15,18 1913:16 <b>conclusions</b> 1867:7 1886:17 1895:25 <b>concurred</b> 1879:22 <b>conducted</b> 1893:9 <b>configuration</b> 1894:17 1945:10 <b>confines</b> 1902:11 <b>confirm</b> 1859:8 <b>confuse</b> 1855:13 <b>confused</b> 1915:9 1939:1 <b>confusing</b> 1909:25 <b>confusion</b> 1924:13 <b>connection</b> 1847:24 1852:7 1861:15 1867:11 <b>connections</b> 1847:11,12 <b>consensus</b> 1921:15 <b>consequences</b> 1900:4 <b>conservation</b> 1884:22 1909:4 1947:14 <b>conserved</b> 1947:10 <b>consider</b> 1966:24,25 <b>consideration</b> 1847:22 1950:18 <b>considerations</b> 1940:4 <b>considering</b> 1872:21 <b>consisted</b> 1864:6 <b>consistent</b> 1852:10 1853:15 1873:11,17 1881:10 1910:13 1960:4 1963:14 <b>Constitution</b> 1905:3 <b>constitutional</b> 1905:3 <b>constrained</b> 1935:23 1936:1,3,3 <b>constraint</b> 1936:2 1949:21 <b>constraints</b> 1940:8 1944:20,25 1946:20 1946:21 1947:6</p>	<p>1958:16 <b>construction</b> 1847:11 1878:21 <b>constructs</b> 1847:24 <b>construed</b> 1894:7 <b>consult</b> 1850:8 <b>consultants</b> 1863:5 <b>contends</b> 1920:2 <b>content</b> 1963:17 <b>continue</b> 1845:7,11 1876:6 1894:2 1918:20 <b>continued</b> 1853:19,21 <b>contract</b> 1875:24,24 1881:24 1889:21 1915:15,19 1944:17 1964:24 <b>contractors</b> 1878:22 1879:1,2,3,4 <b>contractual</b> 1875:11 1877:15 1944:18 <b>contradiction</b> 1891:6 <b>contradicts</b> 1890:18 <b>contribute</b> 1960:2 <b>contributed</b> 1864:2 <b>contribution</b> 1864:6 <b>contributor</b> 1864:12 <b>control</b> 1872:22 1873:1 1946:22 1947:19 <b>controversy</b> 1956:9 <b>convenience</b> 1934:11 <b>conveyance</b> 1905:10,15 1915:23 1938:23 1940:16,18,24 <b>conveyed</b> 1940:13 <b>copies</b> 1957:21 1967:6 1968:11 <b>copy</b> 1852:25 1853:6 1853:10 1856:12 1857:1 1866:2,6 <b>correct</b> 1850:25 1851:1 1851:2,6 1854:15 1856:25 1858:18,22 1879:7 1888:7 1900:20 1901:1 1905:20 1906:19 1915:20 1924:12 1925:23 1927:6 1929:2,9,23 1930:4,8 1930:17 1932:17 1935:16 1939:15 1943:3,12 1944:3 1949:2,8 <b>corrected</b> 1861:19 <b>correctly</b> 1906:17 1913:21 <b>COS</b> 1858:6,7 <b>cost</b> 1845:20 1850:11</p>
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<p>1851:8 1867:20                  1869:2,3 1884:15                  1901:14,19 1902:8,24                  1903:19,24 1906:11                  1908:1,7 1919:25                  1929:4 1930:11                  1932:9,9,10 1934:3                  1942:11,14 1943:18                  1943:20  <b>cost-of-service</b> 1850:21                  1851:3,8,11,18,19,21                  1851:23 1852:9                  1853:12,14,20 1854:5                  1854:8,16 1856:5                  1857:3,5,11 1858:16                  1858:20 1860:10                  1868:6,7,8 1869:12                  1869:18 1870:3,6  <b>costs</b> 1851:6,22                  1860:16,18,19                  1864:24 1867:21                  1868:11,14,18,19,20                  1868:25 1869:5,11,19                  1870:2,6,9 1877:8                  1878:11 1881:18                  1883:6,17,20,21                  1884:17 1885:1,2,4                  1885:12,18 1896:9,11                  1897:16 1899:13,17                  1899:18,20,20 1900:8                  1900:9,10,10 1901:9                  1901:20,21 1902:20                  1902:22 1903:7                  1904:6,14 1905:10                  1906:10,16 1907:1,2                  1907:19,23 1908:3,5                  1908:17 1909:14,17                  1911:12,14 1912:1,12                  1912:18,24,24 1913:4                  1913:23 1914:9                  1918:4,5,8 1924:6,17                  1925:11 1927:20                  1928:3,4 1930:9,11                  1930:24,25 1931:18                  1931:19,20,22,22                  1932:3 1933:4,5,9,10                  1933:12,18,22,24                  1935:18 1942:1,5,10                  1942:24 1943:5,19  <b>Cottini</b> 1892:22  <b>counsel</b> 1842:17                  1923:14  <b>counting</b> 1861:12  <b>County</b> 1841:2 1865:13                  1871:14 1932:4                  1934:22 1939:9                  1954:13,15 1956:25                  1971:5,9</p>	<p><b>couple</b> 1849:3 1850:9                  1891:14,17 1929:14                  1936:21 1946:24                  1967:2  <b>course</b> 1857:18                  1886:12 1966:20  <b>court</b> 1841:1 1845:6,9                  1845:11,24 1848:19                  1849:5,17,22 1850:2                  1850:4,13,15,17                  1852:13,16,23 1853:4                  1855:23,25 1856:16                  1856:18 1857:18,20                  1857:25 1858:2                  1859:8,11,14 1860:2                  1861:24 1862:2,3,13                  1862:21 1864:5                  1865:2,23 1866:10,16                  1866:19 1867:2,5,18                  1870:14 1871:8                  1872:5 1876:3                  1877:14 1879:13,19                  1880:7,19,25 1881:10                  1882:1,11 1887:4,23                  1888:1,3,4,12,14                  1889:4,8,10 1890:20                  1891:12,22 1892:13                  1892:16 1894:7,9                  1895:19 1898:2                  1900:23 1901:2                  1902:6,10,14,16,23                  1903:12 1904:9,18                  1906:1 1907:8                  1908:10 1909:25                  1910:6,22,25 1911:3                  1912:17,21,23                  1913:17 1914:23                  1915:6 1917:14,18                  1918:17 1919:6                  1922:14,18 1923:17                  1924:20 1925:11                  1927:10 1928:2,19                  1929:17 1933:1                  1936:15,18 1941:21                  1949:12,14 1951:13                  1954:12 1955:12,15                  1956:5,16,19,21                  1957:4,12,17,21                  1958:5 1959:14                  1961:14 1962:6,13,17                  1962:19 1963:24                  1964:22 1965:6,19,25                  1966:2,11,18,23,25                  1967:5,13,17,20,24                  1968:1,13,23 1969:1                  1969:5,12,15,23                  1970:4,6 1971:11  <b>Court's</b> 1866:23</p>	<p>1867:10,14,16,19                  1869:17,21 1896:8                  1899:1 1906:13,14                  1909:12,16,20,24                  1910:4,13 1911:7,25                  1912:11,15 1913:2,8                  1925:11 1926:6,12                  1927:22 1928:1                  1929:13 1966:10  <b>courtesy</b> 1967:6  <b>cover</b> 1851:25 1870:2  <b>covered</b> 1927:20                  1943:20  <b>covers</b> 1868:2  <b>CPF-10-510830</b> 1841:7  <b>CPF-12-512466</b> 1841:8  <b>CRA</b> 1900:10,12  <b>create</b> 1879:6 1931:2  <b>created</b> 1929:21                  1930:14  <b>credibility</b> 1963:19  <b>credit</b> 1848:2,3  <b>credits</b> 1847:5,22  <b>criteria</b> 1941:12  <b>criticism</b> 1929:16  <b>critique</b> 1888:8,24                  1889:2,21 1890:4                  1897:4,7  <b>critiqued</b> 1911:3  <b>CROSS</b> 1843:2  <b>Cross-examination</b>                  1848:20,22 1904:18                  1904:20 1906:1  <b>CSR</b> 1841:20 1971:8                  1971:23  <b>current</b> 1848:9 1852:11                  1853:16 1864:19                  1886:9  <b>Currently</b> 1847:9  <b>Curtis</b> 1841:3 1845:4  <b>customers</b> 1868:15                  1871:5 1872:11                  1904:6,15  <b>cutback</b> 1875:3</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 1843:1  <b>DALE</b> 1842:14  <b>Dam</b> 1873:10  <b>damage</b> 1881:8                  1911:16 1912:2                  1913:14 1915:4,5,18                  1928:12 1939:10                  1962:16,23 1963:23  <b>damaged</b> 1913:9,14  <b>damages</b> 1875:24                  1880:24 1881:25                  1889:21 1896:11</p>	<p>1900:5 1903:15                  1909:22 1912:4                  1914:19,25 1915:12                  1915:14 1916:4,14,15                  1916:22,23 1917:1,3                  1917:7,25 1919:14,18                  1925:9,12,14 1926:7                  1926:11,21,24,25                  1927:21 1928:6,8,10                  1936:25 1939:5  <b>damaging</b> 1962:16                  1963:17  <b>DAN</b> 1842:4  <b>databases</b> 1890:23,24  <b>date</b> 1851:4 1858:21                  1934:5 1968:13,14,24                  1969:7  <b>dated</b> 1849:24 1854:25                  1857:23 1866:16                  1959:1  <b>dates</b> 1966:19  <b>day</b> 1881:7 1887:11                  1937:2 1971:17  <b>days</b> 1886:22 1887:9,15  <b>deal</b> 1881:17 1933:7                  1935:14  <b>dealing</b> 1968:6  <b>dealings</b> 1871:17  <b>deals</b> 1964:12  <b>dealt</b> 1894:4  <b>decade</b> 1898:11 1921:4                  1921:22  <b>decades</b> 1861:9  <b>December</b> 1950:6,16  <b>decide</b> 1864:15 1876:5                  1918:7 1929:3                  1931:15  <b>decided</b> 1881:23                  1917:22  <b>decides</b> 1948:16  <b>decision</b> 1880:13,16                  1881:15,21 1890:2                  1906:13 1911:7                  1926:6  <b>decisions</b> 1924:20  <b>declaration</b> 1844:15                  1957:14 1968:6  <b>Defendant</b> 1842:11                  1843:6 1859:17  <b>DEFENDANT'S</b>                  1843:2  <b>Defendants</b> 1841:14  <b>Defense</b> 1962:12  <b>defenses</b> 1892:6  <b>deference</b> 1969:10,10                  1969:12  <b>definition</b> 1929:25  <b>definitive</b> 1913:1</p>	<p><b>degree</b> 1847:23 1899:6  <b>degrees</b> 1921:13  <b>deliberate</b> 1921:7  <b>deliver</b> 1940:2 1947:14                  1951:20  <b>delivered</b> 1877:9                  1933:25 1944:12                  1954:1 1960:11                  1968:10  <b>deliveries</b> 1942:12                  1954:9  <b>delivering</b> 1960:23  <b>delivers</b> 1958:22  <b>delta</b> 1899:24  <b>demand</b> 1876:17                  1897:9,9  <b>demanding</b> 1886:1  <b>demands</b> 1874:24  <b>demonstrated</b> 1911:9  <b>demonstratives</b> 1968:8  <b>Denham</b> 1869:23                  1870:1,5 1886:13                  1887:2,7,10 1888:8                  1889:9 1891:2,10                  1892:3 1896:7,14                  1899:11 1909:10,11                  1910:10,16 1911:12                  1913:21 1915:21                  1916:16 1918:10,21                  1919:4 1924:5 1925:2                  1925:2,7,12 1926:12                  1926:17 1928:4,14                  1929:16 1930:9                  1950:2 1968:8  <b>Denham's</b> 1866:9                  1886:18 1887:10                  1888:9,25 1891:8                  1895:8,25 1897:5,8                  1899:9 1919:11  <b>denominator</b> 1899:11                  1899:22 1900:1                  1911:22 1929:15  <b>Department</b> 1841:4                  1845:4 1873:5,9                  1875:16,22 1876:12                  1876:24 1877:16,21  <b>dependent</b> 1872:24  <b>depending</b> 1852:8                  1853:13 1874:19                  1942:20 1960:9  <b>deposed</b> 1887:9,10                  1891:11  <b>deposing</b> 1888:20  <b>deposition</b> 1841:23                  1887:7 1888:10,17                  1889:3,15,25 1890:7                  1891:8 1893:14,25                  1895:3 1905:17</p>
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<p>1906:9 1907:24  1908:8 1909:1 1918:2  1918:9 1919:9,22  1924:16,25 1925:5  1956:14,18  <b>depositions</b> 1887:12  <b>desalination</b> 1884:22  <b>describe</b> 1864:5  <b>described</b> 1871:17  1874:11 1916:17,19  <b>DESCRIPTION</b>  1844:2  <b>designated</b> 1880:14  1889:20  <b>designations</b> 1956:15  1956:18  <b>detailed</b> 1852:9  1853:14  <b>determination</b> 1868:17  1873:25 1882:15  1906:6  <b>determine</b> 1845:19  1860:15 1868:23,25  1942:5  <b>determines</b> 1873:22  <b>determining</b> 1847:6  1861:11 1868:16  1900:5  <b>developed</b> 1920:17  <b>Devendra</b> 1957:14  <b>Diamond</b> 1946:2,3  1955:8,8  <b>Diego</b> 1841:6 1844:14  1847:22 1848:15  1851:1 1853:25  1858:23 1865:13  1869:23 1871:14  1883:25 1886:15  1892:1 1893:22  1894:1 1900:17  1901:9 1903:6,8  1904:7,15,24 1907:12  1909:12 1910:11  1911:24 1912:3  1913:9,13,23 1915:16  1915:16 1916:12  1920:1 1924:10  1925:24 1926:24  1927:9,17 1928:23  1932:4,20 1933:22  1934:2,17,22 1935:4  1935:21 1938:16  1939:6,9,16,24  1940:2,4 1944:12,24  1945:9 1947:15  1949:1,7 1950:23  1951:21 1952:18  1954:1,9,13,15</p>	<p>1956:25 1958:12,18  1959:16 1962:8  1963:15 1964:1  1965:25 1967:3  <b>Diego's</b> 1893:23 1927:4  1941:7 1957:24  <b>difference</b> 1851:7,25  1879:9 1880:2 1881:6  1882:7  <b>different</b> 1851:10,20  1860:15 1865:5  1868:13,15,23  1870:16 1871:12,12  1871:19 1873:3  1875:5,22 1876:12  1877:1 1878:22  1898:5 1899:2  1904:12 1914:3  1917:18,23 1922:9  1924:14 1925:19  1926:2 1927:9,12,13  1929:8 1938:1,2,2,21  1942:3,3 1944:19  1957:8 1961:20  1964:4 1969:7  <b>differential</b> 1960:9  <b>differently</b> 1897:25  <b>difficult</b> 1888:21  1941:15  <b>direct</b> 1843:2 1845:16  1848:18 1860:4  <b>direction</b> 1971:14  <b>directly</b> 1948:1  <b>directors</b> 1864:1  <b>disagree</b> 1910:1,18,20  1911:12,17,18,19,20  1911:22  <b>disagreement</b> 1870:1  <b>disallowable</b> 1870:12  <b>disclaimer</b> 1893:4  <b>disclosed</b> 1887:6  1893:8  <b>disclosure</b> 1844:12  1892:19  <b>discovery</b> 1889:6  <b>discretion</b> 1934:12,23  1935:1,20 1944:7,14  1958:21 1965:2  <b>discussed</b> 1874:20  1882:14 1892:24  1893:17 1924:22  <b>discussion</b> 1853:4  1939:1  <b>disparate</b> 1864:14  <b>display</b> 1853:8  <b>dispute</b> 1914:16  1957:23 1963:11  <b>disputes</b> 1861:18</p>	<p><b>distinction</b> 1894:6,21  <b>distribute</b> 1874:23  1875:8 1885:25  <b>distributed</b> 1868:15  <b>distribution</b> 1864:25  <b>district</b> 1841:9,11  1842:11 1867:25  1871:3 1882:22  1884:18 1885:23  1887:20 1891:19,21  1907:20 1935:1,20  1944:14 1950:5  1954:25  <b>districts</b> 1861:10  1871:11,19 1954:16  1954:22  <b>divide</b> 1942:11,14  <b>divided</b> 1899:13,21  1900:10 1930:12  1931:5  <b>dividing</b> 1899:19  <b>division</b> 1930:5  1942:25  <b>document</b> 1853:2  1890:17 1956:13  1959:1  <b>documents</b> 1875:11  1956:8,11 1957:19,24  1957:25 1958:12,25  1961:15 1963:3  <b>doing</b> 1875:2 1886:25  1921:5 1924:12  1953:6,19 1966:10  <b>dollar</b> 1919:13  <b>dollars</b> 1919:10  <b>dory</b> 1880:4  <b>doubts</b> 1903:14  <b>dozen</b> 1862:15  <b>dpurcell@kvn.com</b>  1842:8  <b>Dr</b> 1890:23  <b>drop</b> 1934:18  <b>drops</b> 1934:25  <b>droughts</b> 1886:3  <b>DTX</b> 1844:12,13,14,15  1844:16,17,18  1850:13,19 1851:3  1852:1,1,8,14 1854:4  1865:9,25 1866:7,19  1866:21 1896:17  1902:15 1937:11  1956:14,21,23,24  1957:4,5,6,12,13,15  1957:18,22  <b>dump</b> 1952:12  <b>dumped</b> 1955:3  <b>DWR</b> 1877:12</p>	<p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 1841:3 1843:1  <b>E.A</b> 1845:4  <b>earlier</b> 1866:5 1906:13  1951:23  <b>early</b> 1950:1  <b>easier</b> 1969:3  <b>Easterby</b> 1888:3,12  1889:14 1893:3,7,17  1893:17,19 1894:24  <b>Eastern</b> 1954:10,16,22  <b>easy</b> 1923:2  <b>edition</b> 1864:17,18,20  <b>editions</b> 1864:4  <b>editorial</b> 1864:13,18  <b>effect</b> 1903:14 1907:16  1914:4 1918:3 1920:5  1930:21 1933:3,8  1934:3 1947:4  <b>EFFECTIVE</b> 1841:12  <b>effort</b> 1864:19 1898:10  1968:2  <b>either</b> 1947:25 1961:19  1966:15  <b>elasticity</b> 1897:9  <b>electronically</b> 1953:1  <b>elements</b> 1847:14  <b>eligible</b> 1884:19  <b>else's</b> 1878:1  <b>email</b> 1842:7,8,8,9,9,16  1844:3,8,9,10  1849:19,20,24 1856:1  1856:12,21 1857:22  1858:4,21 1889:25  <b>EMANUEL</b> 1842:12  1842:13 1967:23  <b>emergencies</b> 1886:2  <b>emphasize</b> 1879:16  <b>employed</b> 1901:19  <b>employment</b> 1846:2  <b>ends</b> 1874:17  <b>engaged</b> 1862:9  <b>engagement</b> 1886:12  <b>engagements</b> 1861:23  <b>England</b> 1863:18,25  <b>enter</b> 1898:11  <b>entered</b> 1849:13  <b>entire</b> 1852:1  <b>entirely</b> 1934:11  <b>entirety</b> 1853:7  <b>entities</b> 1872:17 1957:8  <b>entitled</b> 1910:1  <b>equal</b> 1947:9,11  1949:19 1950:9  <b>equally</b> 1869:11 1890:2  <b>equitably</b> 1868:25  <b>equivalent</b> 1935:14  <b>ERIC</b> 1842:13</p>	<p><b>escaping</b> 1945:12  <b>escrow</b> 1914:16,18  1927:3,4,14 1928:14  <b>especially</b> 1872:21  <b>espoused</b> 1892:24  <b>ESQ</b> 1842:3,4,4,5,5,13  1842:14,14,18  <b>essence</b> 1868:3  <b>essentially</b> 1868:22  1877:3 1896:8  1899:12  <b>establishing</b> 1860:22  1900:8  <b>event</b> 1887:17 1971:16  <b>eventually</b> 1940:2  1952:19,23  <b>everybody</b> 1869:10,11  1879:24 1892:13  1932:6 1936:18  1941:13 1962:20  1968:16,18  <b>everyone's</b> 1970:8  <b>evidence</b> 1844:2  1849:10,12 1850:1,5  1852:20,21 1853:3,5  1853:9 1856:2,19  1858:3 1859:5  1865:19 1866:9,14,21  1895:9,10 1911:1  1919:7 1956:9,14,23  1957:2,5,9,13,15,18  1962:20 1963:10  <b>exact</b> 1892:1 1966:18  <b>exactly</b> 1877:20 1883:2  1897:6 1919:20  <b>examination</b> 1845:16  1848:18 1860:4  1941:23 1954:7  <b>example</b> 1850:13  1869:8 1880:1  1894:14,15 1897:13  1926:25 1929:6  1938:15 1941:3  1961:24 1968:19  <b>exceed</b> 1898:8  <b>exceeds</b> 1888:16  <b>Excepts</b> 1844:4  <b>excerpts</b> 1849:9  <b>excess</b> 1861:9,13  1934:7  <b>exchange</b> 1845:20  1883:23 1900:17  1901:6,11,23 1903:5  1903:20 1912:7  1914:12,13 1931:12  1931:24 1932:20,24  1933:2,11,17,21,23  1934:5,8,14,15,16,18</p>
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1934:20 1935:2,3,21 1936:11 1939:7,9,23 1940:2,10,11,14,21 1941:1,3,9 1942:22 1944:10,12 1947:8,9 1948:15 1950:22 1951:4,8 1952:17,22 1953:18,23,24 1954:2 1959:3,11 1960:15 1961:9,17,22 1962:9 1963:12 1964:5,9,18 <b>exclude</b> 1895:15 1967:4 <b>excluded</b> 1890:20 <b>excluding</b> 1846:18 <b>exclusively</b> 1944:21,22 <b>excuse</b> 1850:12 1865:18 1872:3 1886:19 1911:13 <b>excused</b> 1955:13 <b>exercise</b> 1943:6 <b>exhibit</b> 1857:21 1962:12 <b>exhibits</b> 1844:1 1849:7 1849:10 1859:4 1950:2 1957:21 1968:9 <b>existed</b> 1932:10 1933:9 <b>existing</b> 1897:23 <b>expectation</b> 1888:18 <b>expectations</b> 1963:15 <b>expects</b> 1961:18 <b>expenditure</b> 1885:3,5,6 <b>expenditures</b> 1868:13 1883:22 1885:14 <b>expense</b> 1883:10 <b>expenses</b> 1860:19 1868:2,4,23 1870:10 1882:15,16,17 1883:14 1916:18 <b>experience</b> 1848:6,11 1871:17 1874:13 <b>expert</b> 1844:12 1845:23 1861:5,8,15,25 1862:9,17,20,22 1865:13 1867:8 1869:23 1880:15,17 1881:3,4 1882:9 1886:20,24 1887:15 1888:15,18,20 1889:5 1889:5,12,20,22 1890:3,4,12,13 1892:20 1893:8,24 1894:13,14 1895:17 1905:2 <b>expert's</b> 1886:24 1893:4 1895:14 <b>expertise</b> 1860:8 1901:24,25	<b>experts</b> 1879:21,25 1880:5 1887:21 1888:5 1892:5 1902:3 1917:21 1929:7 <b>explain</b> 1870:23 1873:14 1874:16 1896:6 1898:2 1906:2 1942:9 1954:12 <b>express</b> 1963:4 <b>expressed</b> 1867:8 <b>expression</b> 1961:15 <b>extent</b> 1873:16 1887:5 1959:6 <b>extract</b> 1894:25 <b>extraordinarily</b> 1874:6 <b>extremely</b> 1966:14 <hr/> <p style="text-align:center"><b>F</b></p> <hr/> <b>facetious</b> 1948:6 <b>facility</b> 1881:5 <b>fact</b> 1853:19 1877:6 1890:15,23 1895:1 1901:5 1903:5,10,13 1906:20 1949:23 1963:5,18 <b>factor</b> 1872:21 <b>factory</b> 1872:19 <b>facts</b> 1887:1 1894:5,8 1894:16,21 1965:17 <b>failed</b> 1957:2 <b>fair</b> 1871:16 1889:10 1889:11 1891:3 1926:10 1941:10 1963:18 <b>fairly</b> 1860:17 1869:1 1869:18 1873:17 1874:7 1882:25 1904:5,14 1926:20 1932:4 <b>fairness</b> 1893:14 1895:2 <b>falsity</b> 1890:14,22 <b>familiar</b> 1846:3 1887:4 1887:25 1905:7 <b>familiarity</b> 1871:18 <b>far</b> 1910:20 1928:20 1934:7,7 1950:22 <b>farther</b> 1955:8 <b>faulted</b> 1889:24 <b>features</b> 1874:13 <b>February</b> 1889:18,19 1893:22 <b>feeling</b> 1921:16 <b>fees</b> 1861:4 1864:10 <b>feet</b> 1953:15 <b>field</b> 1860:21 1879:23 <b>fifth</b> 1864:17 <b>Figuroa</b> 1842:15	<b>figure</b> 1926:21,23 1938:10 <b>figured</b> 1928:11,15,17 <b>file</b> 1886:21 1888:10 1966:22 1967:12 <b>filed</b> 1849:1 1888:22 1956:17,17,25 <b>files</b> 1969:11 <b>filing</b> 1891:9 <b>final</b> 1857:3,7,10 <b>finalize</b> 1853:24 1858:16 <b>finalized</b> 1854:1,2,6,9 1854:18,23 1857:5 1858:8,20 <b>finally</b> 1850:6,7 <b>finance</b> 1878:18 <b>financial</b> 1845:19 1863:21 1875:12 <b>financing</b> 1860:10,11 <b>find</b> 1871:2 <b>finding</b> 1870:5 <b>fine</b> 1966:21 1967:17 1967:22 1968:20,21 <b>finish</b> 1912:20,21 1915:7 <b>fire</b> 1967:3 1968:4 <b>firm</b> 1912:16 1913:7 <b>first</b> 1849:7 1857:4 1859:22 1865:21 1867:20 1872:8 1879:20 1880:9 1886:21 1893:12 1915:7 1917:4 1951:3 1956:10,13 1962:15 1969:16 <b>fiscal</b> 1850:20 1854:7 <b>Fish</b> 1891:18 <b>five</b> 1864:13 1874:9 1922:22 1936:15,17 1936:18 1964:23 <b>five-minute</b> 1857:16 <b>fixed</b> 1847:12 1932:9 1933:3,9 1943:19 <b>flexible</b> 1969:25 <b>Floor</b> 1841:24 1842:15 <b>focused</b> 1958:13 <b>fold</b> 1969:1 <b>folks</b> 1936:14 <b>follow</b> 1852:24 1853:6 1940:6 <b>following</b> 1852:18 1961:15 1963:25 1966:7 <b>follows</b> 1845:14 1859:18 <b>forget</b> 1928:8 <b>form</b> 1886:5 1903:9	<b>formation</b> 1964:9 <b>former</b> 1885:13 1964:7 <b>formula</b> 1943:9 <b>forthcoming</b> 1893:12 <b>Forty</b> 1970:4,6 <b>forward</b> 1925:10 1927:20 <b>foul</b> 1879:15 <b>found</b> 1918:15 1926:12 1926:13 <b>foundation</b> 1890:15 1894:14 1900:22 <b>four</b> 1847:14 1861:9 1864:13 1869:13 1892:3 1900:18 1909:22 1912:2 1913:10,14,25,25 1914:20 1915:1 1916:1 1917:7 1922:9 1932:2 1939:6 <b>fours</b> 1912:4 <b>fourth</b> 1864:17 <b>fraction</b> 1900:2 <b>frame</b> 1903:3 <b>Francisco</b> 1841:2,16,17 1841:24 1842:6 1845:1 1956:1 <b>frankly</b> 1870:10 1899:15 1965:7 1969:3 <b>Friday</b> 1849:24 <b>Friedman</b> 1890:21 <b>Friedman's</b> 1890:20 <b>front</b> 1850:20 1866:6 1950:10 <b>fulfill</b> 1871:4 1936:11 <b>full</b> 1873:19 1877:8 1896:5 1913:15 1936:8,9 <b>fully</b> 1868:5 1916:23,25 1917:3 1928:7 <b>function</b> 1885:7 <b>functionalized</b> 1868:12 <b>funds</b> 1960:2 <b>further</b> 1845:14 1889:15 1893:9 1904:17 1941:19 1948:19 1954:5,7 1955:10,11 1971:15 <b>future</b> 1885:13,13 1929:5 <hr/> <p style="text-align:center"><b>G</b></p> <hr/> <b>gallon</b> 1876:20 <b>gallons</b> 1899:17 <b>game</b> 1891:4 1899:5 1914:8 <b>GANS</b> 1842:14	<b>GARY</b> 1842:14 <b>gather</b> 1928:6 <b>general</b> 1842:17 1864:5 1868:8 1870:24 1871:6 1886:17 1895:24 1902:18 1904:1 1915:11 1917:25 1964:13 <b>generally</b> 1873:7 1876:20 1883:5 1887:4 1905:4,7 1906:9 1940:12,23 1962:4 <b>generated</b> 1851:10,24 <b>generic</b> 1924:19 <b>gentleman</b> 1894:15 <b>getting</b> 1858:25 1874:1 1915:9 1928:20 1945:7 1951:7 1952:10,11 1953:15 1959:8,19 <b>give</b> 1855:14 1862:9 1867:12 1869:8 1894:12,12 1918:18 1932:22 1935:15 1939:24 1947:11 1952:19 1958:7 1964:25 1967:8 <b>given</b> 1855:14 1867:17 1874:8 1886:9 1889:11 1893:4 1895:2 1910:10 1925:11 1927:22 1928:4 1929:13 1942:20 1957:20 <b>gives</b> 1947:8 1958:19 <b>giving</b> 1880:1 1901:15 1954:3 1966:11 <b>go</b> 1845:25 1847:14 1850:15 1872:6 1882:2,18,18,23 1903:15 1907:8 1918:7 1922:14,20 1933:4 1937:19,22 1951:25 1952:2 1954:10 1964:18 <b>goes</b> 1852:7 1860:14 1863:7 1898:24 1920:11 1922:16,17 1945:8,9 1948:14 1954:15 1961:3 <b>going</b> 1864:11,15 1866:19 1867:12 1875:4,23 1879:13 1880:5,7,8,12,21 1881:7 1885:3 1886:25 1889:2,12 1890:3 1891:6,12,13
--	--	--	--	--

1893:11 1894:23,24 1894:25 1902:6 1912:13 1914:25 1917:8 1918:22 1921:2 1922:1 1923:18 1924:14,18 1925:3,10 1927:20 1928:5 1929:11 1932:22 1933:22 1934:2,5 1938:10,16 1938:21 1948:13,17 1950:21 1951:3,25 1952:13,16,18,21,23 1953:17,18 1955:3 1956:10 1962:1 <b>GOLDBERG</b> 1842:5 <b>Gonzales</b> 1858:5 <b>good</b> 1845:6,9,10,18 1860:6,7 1904:22,23 1917:22 <b>gotten</b> 1884:20 <b>govern</b> 1883:16 <b>Government</b> 1883:3 <b>governmental</b> 1868:1 <b>great</b> 1879:14 <b>greater</b> 1950:22 <b>grounds</b> 1872:4 <b>groundwater</b> 1884:21 <b>group</b> 1864:13 <b>groups</b> 1868:24 <b>guaranteed</b> 1877:17,18 1877:22,24 1878:21 <b>guess</b> 1880:16 1905:17 1916:13 <b>Guevara</b> 1891:19	<b>hardware</b> 1945:11 <b>harm</b> 1879:17 <b>harm-no</b> 1879:15 <b>Havasu</b> 1873:10 1884:10 1935:6 1949:6 1951:24 <b>head</b> 1887:25 <b>heading</b> 1902:23 <b>hear</b> 1889:1,8 1890:4 1953:2 1966:19 <b>heard</b> 1846:9 1868:6 1870:19 1894:3 1966:8 <b>hearing</b> 1967:7,23 1968:1 <b>hearsay</b> 1866:14 1895:11 <b>held</b> 1863:17 <b>help</b> 1969:18 1970:9 <b>helpful</b> 1966:14 <b>helping</b> 1861:9 <b>Hess</b> 1844:16 1960:17 <b>high</b> 1964:3 <b>higher</b> 1897:25 1898:6 1899:23 <b>Hills</b> 1871:11,15 <b>historic</b> 1961:4 <b>Hon</b> 1845:4 <b>honky</b> 1880:4 <b>Honor</b> 1845:8,22 1848:17,25 1849:11 1850:3,12,18 1852:15 1855:22 1857:15,21 1859:12 1860:1 1865:18,22 1866:8 1872:3 1877:10 1879:11 1880:10,23 1881:12 1886:19 1891:17,25 1900:21 1901:12,17 1902:13 1904:8 1905:25 1917:16 1918:14 1922:12 1951:16 1954:5 1955:14 1956:6,24 1957:11,20 1965:8 1966:22 1968:20,21 1969:8 1970:3 <b>HONORABLE</b> 1841:3 <b>hook</b> 1877:7 <b>hour</b> 1937:3,6 <b>house</b> 1872:18 <b>huge</b> 1872:8 1924:2 <b>hundreds</b> 1871:18 <b>hypothetical</b> 1903:13	<b>idea</b> 1870:2,19 1879:25 1889:16 1963:7 <b>identification</b> 1855:16 <b>identified</b> 1856:24 1892:11 1961:12 <b>identify</b> 1865:22 <b>IID</b> 1883:25 1940:5 1944:13 1947:10,12 1947:16,17 1948:24 1948:25 1949:3,18 1951:24 1952:2 <b>illegal</b> 1913:6 1916:3 1926:13 <b>imagine</b> 1886:10 1945:13,14 <b>impact</b> 1874:14 1886:4 1896:14 1897:14 1899:21 1907:22 1919:13 1925:16 1928:8 1933:5,10 1948:18 <b>impacted</b> 1896:13 1907:19 1908:3,4 <b>impacts</b> 1905:7 1922:5 1928:12 <b>impeach</b> 1880:16 1890:12 1961:8 1963:25 1964:19 <b>impeaching</b> 1958:2 1965:15 <b>impeachment</b> 1890:14 1958:24 1965:13 <b>implement</b> 1944:23 <b>implementation</b> 1933:19,20 <b>implicate</b> 1904:3 <b>implication</b> 1923:7 <b>implications</b> 1926:7,11 1939:10 <b>important</b> 1881:9 <b>impossible</b> 1881:13 1928:24 1929:3,10,12 1938:11 1941:11,14 <b>impractical</b> 1941:11 <b>impression</b> 1895:21 <b>improper</b> 1880:2 1882:9 1886:20 <b>improperly</b> 1929:18 <b>inappropriate</b> 1870:8 <b>include</b> 1890:14,17 1900:12 1901:15,21 1903:24 1906:11 <b>included</b> 1845:20 1847:5,17,19,22 1848:1 1901:11,22 1905:16 1911:14 1912:2 <b>includes</b> 1847:9	<b>including</b> 1860:9 1899:25 1904:7,15 1906:10 1931:19,20 1931:20 1941:7 <b>incorrect</b> 1914:2 1924:23 1933:16 1934:13 <b>incorrectly</b> 1930:22 <b>increase</b> 1851:12,14,15 1896:25 1961:4 <b>increases</b> 1857:4,6 <b>incredibly</b> 1967:15 <b>incur</b> 1963:23 <b>incurred</b> 1860:19 1867:21 <b>incurs</b> 1883:6 <b>independent</b> 1959:15 1962:8 <b>indicate</b> 1856:3 <b>indication</b> 1941:16 <b>indifference</b> 1958:10 1963:8 <b>indifferent</b> 1965:9,11 1965:12,14 <b>indulging</b> 1892:16 <b>inequity</b> 1960:10 <b>inflated</b> 1900:7 1909:15 <b>influence</b> 1863:7 <b>information</b> 1854:19 1857:12 1866:4 <b>informed</b> 1900:16 <b>infrastructure</b> 1874:14 1879:6 <b>injure</b> 1876:6 <b>input</b> 1921:8 1943:9 <b>insists</b> 1923:14 <b>installments</b> 1950:9 <b>instances</b> 1862:8 <b>instructions</b> 1852:19 <b>instructive</b> 1868:16 <b>insure</b> 1960:1,7 <b>intake</b> 1884:9 1935:5 <b>integrated</b> 1874:21 <b>intent</b> 1960:4 1964:8 1964:17 <b>interested</b> 1841:10 1891:18 1971:15 <b>interim</b> 1960:12 <b>Interior</b> 1873:9 <b>interrelated</b> 1923:23 <b>interrelationship</b> 1924:22 <b>interrupted</b> 1966:6 <b>introduced</b> 1922:18 <b>investigation</b> 1893:9 <b>investment</b> 1884:17,18 <b>investments</b> 1884:20	1907:18 <b>invited</b> 1968:7 <b>involved</b> 1861:18 <b>involvement</b> 1847:1 1864:10 <b>involves</b> 1882:15 <b>irrelevant</b> 1881:16 1883:1 1905:23 1906:5 1961:11 <b>issue</b> 1875:8,24 1881:2 1881:2 1889:10,11 1892:18,21 1893:1,2 1893:3 1895:7 1896:5 1900:18 1909:22 1910:4 <b>issued</b> 1866:23 1878:20 <b>issues</b> 1860:11 1861:16 1869:16 1872:13 1888:5 1902:25 1958:13 1969:24 <b>items</b> 1910:13
<hr/> <b>H</b> <hr/> <b>HADLOCK</b> 1842:4 <b>half</b> 1926:24,25 <b>hand</b> 1875:18,19 1927:21 1971:17 <b>handed</b> 1853:6 <b>hanging</b> 1896:13 1916:24 1918:11 1967:3 1968:3 <b>happen</b> 1923:8 1945:17 1946:6 1952:7 1955:6 <b>happened</b> 1857:6 1862:14,23 1896:11 1919:5 1926:22 1927:2,7,18 1928:9 <b>happens</b> 1889:13 1932:1 1948:4 1955:5 1955:7 <b>happy</b> 1895:23 1910:5 1960:14,25 1961:10 1963:2 <b>hard</b> 1937:12 1967:15	<hr/> <b>I</b> <hr/> <b>ID</b> 1844:2	<hr/> <b>J</b> <hr/> <b>JAN</b> 1841:22 <b>January</b> 1841:12,12 1937:14,20 <b>Jensen</b> 1937:16 <b>jkeker@kvn.com</b> 1842:8 <b>Joanne</b> 1858:5 <b>job</b> 1895:14,14 <b>John</b> 1842:3,13 1904:24 <b>johnquinn@quinne...</b> 1842:16 <b>join</b> 1946:15 <b>joint</b> 1892:1 <b>Jones</b> 1888:13 <b>JOSEPH</b> 1842:18 <b>Judge</b> 1845:4 1930:10 <b>judge's</b> 1929:1,4 <b>July</b> 1856:13 1857:23 1858:21 <b>junction</b> 1955:5 <b>June</b> 1843:3 1845:13 1849:24,24 1851:1 1857:23 1951:25 1966:15 1967:14,25 1968:1 <b>Justice</b> 1969:25	<hr/> <b>K</b> <hr/> <b>Karnow</b> 1841:3 1845:4 <b>Karnow's</b> 1930:10 <b>keep</b> 1896:25 1969:4 <b>Keker</b> 1842:3,3 1845:22 1848:23,25 1849:6,14,19,23	



1850:6,14,18 1852:15	1954:9 1959:19	1853:11 1857:8	<b>loss</b> 1868:3 1883:13	<b>mean</b> 1868:21 1869:4
1852:18 1853:9	1960:18 1965:17	1893:19 1959:24	<b>lost</b> 1940:7	1892:11 1907:9
1855:6,9,17,22	1966:3 1969:14	1964:11	<b>lot</b> 1874:5 1879:13,16	1944:9 1947:21
1856:3,10,15,20	<b>knowledge</b> 1928:24	<b>letters</b> 1857:7 1962:1	1892:8 1921:7 1929:7	1948:6,13 1952:8
1857:15,21 1858:4	1935:23	1962:25 1964:10	1948:7	1953:21
1859:3,10 1865:18	<b>known</b> 1899:15	<b>level</b> 1879:23 1884:24	<b>low</b> 1874:7 1950:7	<b>means</b> 1910:2 1936:24
1866:12,18 1872:3	<b>knows</b> 1962:17 1968:16	1884:25 1964:3,6	1964:3	1954:12
1875:23 1877:10	<b>Kostopoulos</b> 1844:8,9	<b>levels</b> 1958:15 1961:5	<b>lower</b> 1851:7,23	<b>meant</b> 1898:2 1906:2
1879:11,18,20	<b>Kostopoulos</b> 1855:19	1963:6 1965:11,13	1899:23 1950:17	<b>meet</b> 1945:6,25 1948:8
1880:11 1881:13	1856:20 1857:2	<b>limine</b> 1895:12,22	<b>lunch</b> 1955:14	1953:9,10 1958:14
1882:9 1886:19		1901:13 1902:3,5		1959:9 1960:20
1887:9 1888:7	<b>L</b>	<b>limit</b> 1946:22 1947:6,19	<b>M</b>	<b>meets</b> 1945:5 1966:9
1889:24 1890:6	<b>laid</b> 1945:2	<b>limited</b> 1930:15	<b>M-1</b> 1861:1	<b>member</b> 1846:16,24
1891:17,23 1892:8	<b>Lake</b> 1873:7,10	<b>limits</b> 1876:4 1969:9	<b>M-I-Z-E-L</b> 1892:24	1847:16 1848:3
1894:3 1895:7	1884:10 1935:5	<b>line</b> 1919:23 1922:21	<b>M1</b> 1863:12 1864:2,7	1864:11 1870:18,24
1900:21 1901:12,25	1948:25 1949:3,6,18	<b>lines</b> 1892:2 1908:9	1864:22	1871:6 1874:24
1902:12 1903:9	1951:1,9,23 1952:13	1920:8 1964:1,23	<b>ma'am</b> 1845:9	1876:19 1884:18,21
1904:8,21,24 1906:7	1954:25 1955:8	<b>lining</b> 1944:13	<b>magnitude</b> 1862:7	1884:25 1897:21
1907:10 1908:12,25	<b>Lambeck</b> 1968:22	<b>list</b> 1859:4 1866:13	<b>main</b> 1873:4	1898:7,8,11,16
1910:8,9,24 1911:19	<b>Lambeck's</b> 1968:6	1871:7 1961:12	<b>maintenance</b> 1947:1	1899:1,4 1902:20
1911:24 1912:16	<b>large</b> 1896:9	<b>listed</b> 1851:20	1953:8	1908:5 1920:6 1921:9
1913:2,21 1914:24	<b>larger</b> 1899:24	<b>listened</b> 1927:9	<b>majority</b> 1872:18,25	1938:11,18,19,20,23
1915:8,10,13 1917:16	<b>law</b> 1888:2,5 1895:13	<b>listing</b> 1865:4	1878:13 1905:13	1939:3,4 1940:12,15
1917:19 1918:15,17	1905:23,25 1906:5	<b>litre</b> 1961:25	1921:16	1940:24 1948:9
1918:21 1919:15,22	<b>lawful</b> 1902:2 1940:20	<b>little</b> 1848:24 1880:21	<b>maker</b> 1881:5	1960:1 1961:21,23
1920:11,13,23	1940:23	1907:5 1909:25	<b>making</b> 1885:7 1897:6	1962:4
1922:16,21 1923:20	<b>lawsuit</b> 1858:23	1915:9 1928:20	1927:17	<b>members</b> 1961:6
1923:22 1928:21	1928:23	1942:13 1951:13	<b>management</b> 1860:11	<b>memorandum</b> 1855:18
1933:2 1936:13,17,21	<b>lawyer</b> 1856:23	1969:24	1863:21 1961:3	<b>mention</b> 1889:16
1937:11 1941:19	1858:14 1904:25	<b>location</b> 1946:13	<b>manual</b> 1861:1 1863:10	<b>mentioned</b> 1951:23
1943:13 1948:20,23	1905:6 1910:22	<b>long</b> 1920:17,18	1863:12 1864:2,7,12	<b>met</b> 1845:19 1846:3
1949:13,15,17	1919:6	1946:12 1969:14,15	1864:15,22	1847:2 1849:1,9
1951:17 1952:8	<b>lawyers</b> 1881:23	1969:16,17,17	<b>manuals</b> 1864:9	1852:19 1856:23
1954:5 1955:1,11	<b>lay</b> 1910:23	<b>long-term</b> 1960:3,6	<b>manufacturers</b> 1863:5	1859:13 1867:22
1956:12,17,20 1957:3	<b>leading</b> 1864:19 1933:1	1963:4	<b>map</b> 1937:10 1945:4	1870:2,15,20 1871:22
1957:10,16 1958:25	<b>leaves</b> 1935:19	<b>longer</b> 1918:5 1922:14	<b>March</b> 1937:21	1873:2,11 1875:15,21
1959:20 1966:1,5,21	<b>leaving</b> 1932:6	1970:2	<b>marked</b> 1855:6,12,16	1876:11 1877:12,17
1967:15,18,22,25	<b>left</b> 1896:13 1916:24	<b>look</b> 1849:20 1854:4	1866:6 1957:21	1877:20 1878:4,6
1968:5,21 1969:8,13	1918:11 1931:14	1855:10 1856:10	1968:10,10	1879:2,2,3,4,9 1882:7
1969:22 1970:5	1953:9	1865:16 1868:22	<b>match</b> 1899:17 1931:23	1883:6,16 1884:16
<b>Keker's</b> 1943:22	<b>legal</b> 1875:11 1879:22	1891:15 1892:17	<b>matching</b> 1899:16	1885:1,5,17,18,22
<b>Kennemur</b> 1888:13	1881:4 1895:17,17	1920:19,25 1922:2	<b>material</b> 1879:14	1886:4,6,8 1892:6
<b>kept</b> 1951:19	1901:15,16 1902:2,4	1937:9,14 1950:5	<b>materials</b> 1864:23	1894:16 1904:4,5
<b>kicks</b> 1898:7	1905:6 1906:8,12	1956:10 1959:23	<b>math</b> 1914:1,2 1916:7,9	1907:23 1908:3,5
<b>kind</b> 1890:1 1892:10	1909:21 1913:16	1967:14	1916:19 1923:2,6,24	1910:10 1914:24
1924:2 1951:9	1927:11	<b>looked</b> 1890:17	1923:25	1915:16 1917:6,12
1963:23,24 1964:4	<b>lesser</b> 1951:8	1899:12 1911:13	<b>mathematical</b> 1913:22	1919:6 1924:11
<b>knew</b> 1928:14 1942:24	<b>let's</b> 1845:11 1850:15	1914:12 1916:1	<b>matter</b> 1853:19	1925:21 1926:2
<b>know</b> 1865:4 1870:11	1854:4,12 1855:10	1917:20,21	1862:10 1882:20	1927:9,17,23 1928:25
1878:15 1884:3,19	1856:10 1865:23	<b>looking</b> 1852:22	1895:4 1923:2 1943:8	1932:21,21 1933:8
1892:9 1899:4 1907:8	1867:20 1870:13	1898:11 1902:2	1943:18 1944:20	1934:12 1935:4,5,7
1910:2 1913:20	1903:2 1911:11	1921:2 1925:12	1946:10,21 1949:10	1935:11,13 1938:2
1920:12 1921:3	1912:21 1922:20	1932:2 1958:20	1949:13 1958:9	1939:11,13,25,25
1927:24 1928:18,25	1926:10,10 1937:9,19	1959:7 1962:12	1963:8 1964:13	1941:12,16 1944:7
1929:3,10,12 1937:5	1937:22 1966:2	<b>looks</b> 1855:25 1868:10	<b>maximize</b> 1950:18	1949:9,19 1950:11
1938:13 1941:14	1967:5	<b>Los</b> 1842:15,19	<b>maximizes</b> 1949:24	1951:1,5 1952:14
1945:3 1950:24,24	<b>letter</b> 1844:16,17,18	1871:10,15	<b>Mead</b> 1948:25 1949:3	1958:8,14 1959:9,13
1951:10 1952:18,23	1852:3,6,7,21,22	<b>losing</b> 1920:21	1949:18	1959:13,13,17,18

<p>1960:5 1961:17,18,19 1961:23 1962:2 1966:19 <b>Met's</b> 1867:22 1869:18 1870:6 1875:11 1885:19 1892:5 1935:13 1939:20 1940:3 1944:4 1947:6 1947:19 1951:9 1956:14 1960:3,20 1965:2 1969:15 <b>meter</b> 1869:8,10 <b>methodology</b> 1852:11 1853:16 <b>Metropolitan</b> 1841:9 1841:11 1842:11 1847:9 1867:25 1869:13 1870:10,13 1870:16 1871:3 1872:1,22 1873:3 1874:12,17 1876:24 1877:3,7 1882:18,22 1883:2,10 1884:4,6,8 1884:12,17,24 1885:23 1898:4,10,24 1904:13 1907:20 1914:8 1921:1 1928:22 1931:14 1933:10 1934:21,23 1935:1,20 1944:14 1945:24 1946:11 1947:8,11,14,21 1948:4 1949:24 1950:4,8,16 1953:11 1958:16,21 1960:19 <b>Metropolitan's</b> 1846:8 1846:12,16 1848:8 1874:13 1877:2 1909:7 1915:3,10 1930:1 1944:21 1946:22 1960:6,12 1961:3,5 <b>Mexico</b> 1863:7 <b>middle</b> 1852:4 <b>milligrams</b> 1961:24 <b>million</b> 1872:11 1923:11 1928:6 <b>mind</b> 1876:8 1926:5 <b>mindful</b> 1906:12 <b>minimum</b> 1958:19 1960:8 <b>minute</b> 1921:25 <b>minutes</b> 1850:9 1882:15 1892:14 1936:16,17,19 <b>mischievous</b> 1895:12 <b>mission</b> 1870:21 <b>misspoke</b> 1895:9</p>	<p><b>misstated</b> 1910:4 <b>misstates</b> 1909:23 <b>misunderstood</b> 1910:22 <b>mix</b> 1932:1 1935:21 1946:5 1954:20,21 <b>mixed</b> 1946:3 1952:13 1952:19,20,23 1953:16 1955:4 <b>mixes</b> 1922:4 1938:2 <b>mixing</b> 1926:4,6 <b>mixture</b> 1921:18,21 1942:23 1944:11,15 1955:4,7 <b>mixtures</b> 1955:6 <b>Mizel</b> 1891:20 1892:24 1894:10,10,20 <b>molecules</b> 1951:20 1952:1 <b>moment</b> 1911:11 1936:13,15 <b>money</b> 1879:6 1884:20 1914:5,7,18 1916:23 1916:24 1917:4,7 1925:15 1926:18,22 1927:2,7,13,18,24 1928:11,15,16 1929:6 <b>Monica</b> 1891:20 <b>monies</b> 1926:20 <b>month</b> 1874:25,25 1887:11 1891:9 1936:5 1937:15 1949:6,10,15,19,20 1951:7 1952:3 1953:9 <b>monthly</b> 1937:4,6,7 1950:3,9 <b>months</b> 1888:23 1936:12,12 1947:10 1947:12,13 1950:1,16 1950:21 <b>morning</b> 1845:6,9,10 1845:18 1849:1 1860:6,7 1904:22,23 <b>motion</b> 1879:21,23 1895:12,20 1901:12 1902:5 1966:23 1967:3,4 1968:6 <b>motions</b> 1902:3 1967:2 1968:15,18 1969:7 <b>move</b> 1849:10 1850:1 1855:22 1856:15 1857:23 1865:24 1874:23,25 1877:10 1877:13 1895:15 1918:12 1921:18 1923:3,11 1925:4,6 1956:9,13,18 1957:2 1957:9,15</p>	<p><b>moved</b> 1859:6 1918:10 1919:5 1924:17,23 1934:6 <b>movement</b> 1925:16 <b>moving</b> 1885:12 1919:24 <b>multiple</b> 1904:12 <b>municipalities</b> 1861:10 1871:10 <b>MWD</b> 1844:4 1855:7 1856:10 1896:25 <b>MWD's</b> 1889:20 1897:16 1902:19</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 1843:1 <b>name</b> 1859:22,24 1860:25 1882:21,22 <b>named</b> 1971:12 <b>names</b> 1871:8 <b>NARUC</b> 1906:21,25 <b>National</b> 1906:22 <b>Navistar</b> 1887:19 <b>nearly</b> 1872:11 <b>necessarily</b> 1926:8 1938:13,14 1948:13 1961:22 1970:7 <b>necessary</b> 1896:19 1922:19 1932:1 1942:2 <b>necessity</b> 1931:15 <b>need</b> 1875:1 1876:19 1883:6 1910:6 1918:18 1931:22 1932:3 1937:5 1945:3 1948:3,8 1950:12 1952:2 1957:19 1963:22 1969:9 <b>needed</b> 1854:19 1874:23,25 1911:9 1926:21 1932:1 <b>needs</b> 1868:10 1871:1,5 1885:24 1886:4 1896:25 1899:16 1914:11 1947:24,25 <b>negotiated</b> 1960:25 1961:9 <b>negotiating</b> 1964:5 <b>negotiation</b> 1959:2,11 <b>neither</b> 1909:5 <b>NEST</b> 1842:3 <b>network</b> 1877:23 <b>neutral</b> 1927:19 <b>never</b> 1862:23 1919:13 1925:15 1928:11 1939:3 1970:1 <b>new</b> 1863:18,25 1881:23 1888:18,19</p>	<p>1889:13 1896:10 1898:17 1929:21 1930:15,18 1931:2 <b>ngoldberg@kvn.com</b> 1842:9 <b>NICHOLAS</b> 1842:5 <b>Ninety</b> 1852:15 <b>nominally</b> 1863:5 <b>non-saline</b> 1962:23 <b>non-suit</b> 1966:23 <b>nonexistence</b> 1890:15 1890:22 <b>Noon</b> 1955:16 <b>normal</b> 1939:8 1941:8 <b>north</b> 1842:18 1863:6 1872:15 1873:7 <b>notebook</b> 1849:7 <b>notice</b> 1888:17,19 1889:11,17 1893:3,11 1893:18 1894:12,25 1895:2 <b>notion</b> 1889:16 <b>notwithstanding</b> 1906:20 <b>November</b> 1950:6,15 <b>number</b> 1844:2 1864:9 1872:10,10 1888:23 1890:16 1891:2 1896:9 1900:2,5,7 1916:17 1917:2 1939:18,18 <b>numbers</b> 1936:6 1943:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>o'clock</b> 1967:19 <b>object</b> 1865:19,20 1872:4 1875:23 1880:5 1958:25 1961:13 <b>objected</b> 1895:8 1919:6 <b>objecting</b> 1891:1 <b>objection</b> 1845:22 1850:2,3 1852:12 1853:2 1855:23,24 1856:16,17 1857:25 1858:1 1866:12 1877:10 1879:11 1880:18 1882:9 1895:10 1900:21 1901:3,12 1903:9 1904:8 1913:16 1914:22 1918:19 1949:11 1956:16 1957:3,11,16 1964:20 1965:22 <b>objections</b> 1892:8,11 1956:17,18,19,22 <b>objective</b> 1960:21</p>	<p><b>objects</b> 1918:17 <b>obligation</b> 1952:17 1953:10 <b>obligations</b> 1878:5 1948:9 1953:11 <b>obtains</b> 1870:16 <b>obvious</b> 1968:3 <b>occasion</b> 1862:19 1886:13 <b>occasions</b> 1862:16 1865:6 <b>occurs</b> 1934:10 <b>October</b> 1866:16 1950:6,15 <b>odds</b> 1867:7 <b>offer</b> 1849:1 1853:1 1866:8,11 1888:16,18 1892:3,6 1956:11 1957:25 <b>offered</b> 1889:15 1890:13 <b>OFFICE</b> 1842:17 <b>officer</b> 1863:14 <b>offset</b> 1885:10 1914:5 1916:14 <b>offsetting</b> 1885:11 1924:9 <b>oh</b> 1923:10 <b>okay</b> 1855:20 1879:19 1891:23 1916:25 1923:11 1933:7 1936:18 1938:8 1939:19 1952:17 1969:5 <b>old</b> 1891:9 <b>Oliver</b> 1842:14 1845:8 1845:17 1846:2 1848:17 1849:11 1850:3 1852:12,25 1853:10 1855:24 1856:17 1858:1 1859:12 <b>once</b> 1868:14 1925:8,9 1935:12 1952:4 <b>ones</b> 1851:20 1889:6 <b>Opening</b> 1966:9,10 <b>operate</b> 1868:3 1883:13 1946:11 <b>operational</b> 1939:21,22 1940:3 1943:23 1944:2 1945:1 1950:17 <b>opine</b> 1879:21 1886:21 1902:4 1906:24 <b>opined</b> 1870:11 1919:16,17 <b>opines</b> 1895:17 <b>opining</b> 1895:12</p>
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<p>1901:14  <b>opinion</b> 1866:23 1867:2  1867:5,15,16,16  1869:17,17,21  1879:12 1881:3,4,5  1882:10 1887:7  1889:13 1890:16,18  1890:24,25 1892:20  1893:11,15 1894:10  1894:14,22 1895:1  1905:19 1909:12  1910:19,23 1912:15  1912:25 1913:3,9,22  1926:12 1929:21  1930:10,11  <b>opinions</b> 1867:7,11  1880:1 1886:25  1887:22 1889:22  1890:8,9 1891:6,8  1892:4 1893:10  1894:8  <b>opportunity</b> 1875:10  1886:21 1887:6,12  1966:11  <b>opposing</b> 1888:17  1893:10  <b>opposite</b> 1912:19  <b>oppositions</b> 1968:24  1969:7  <b>option</b> 1851:4 1852:8  1852:10 1853:13,15  <b>options</b> 1929:7  <b>order</b> 1855:7,9,12  1862:6 1874:10  1895:22 1898:1,9  1926:20 1935:3  <b>orders</b> 1897:22  <b>ordinary</b> 1959:16  <b>organization</b> 1862:24  1863:2,9  <b>Oroville</b> 1873:8  <b>ought</b> 1961:19  <b>outside</b> 1888:6 1961:17  <b>outstanding</b> 1943:14  1943:15  <b>overarching</b> 1888:13  <b>overcharge</b> 1918:13  <b>overcharged</b> 1909:13  <b>overcharges</b> 1861:20  <b>overcome</b> 1893:6  <b>overpaid</b> 1912:3,7,8,12  <b>overruled</b> 1845:24  1872:5 1877:14  1882:1,11 1901:3  1903:1 1907:8  1913:19 1914:23  1918:19  <b>owe</b> 1968:5,5,8</p>	<p><b>owned</b> 1882:7 1883:2,3  1883:4  <b>ownership</b> 1880:1  1881:5,14 1883:1  1905:22  <b>owns</b> 1879:9</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> 1956:3 1967:25  1968:1  <b>page</b> 1852:2,4 1853:11  1892:2 1896:23  1897:13,21 1908:8  1922:21 1937:19  1958:3 1959:25  1962:15 1969:8  <b>page-and-a-half</b>  1922:17  <b>pages</b> 1841:13 1895:22  1969:13,20,23,24  1970:6  <b>paid</b> 1913:23 1915:25  1916:12 1919:18  1925:24 1932:12,13  1932:16,18  <b>paper</b> 1951:18 1952:5  1952:8 1953:1  1954:18  <b>paragraph</b> 1962:14  <b>paragraphs</b> 1923:13  <b>Parker</b> 1873:10  <b>part</b> 1849:12,15 1853:9  1870:20 1876:2,4  1878:10 1879:14  1895:11,15 1896:4  1901:6,9 1903:5,13  1907:3 1916:2,16  1923:16 1925:8,14  1926:17 1928:10  1958:18 1962:5  <b>participate</b> 1885:18  <b>particular</b> 1877:17,18  1885:17 1886:2  1942:2 1943:11  <b>particularly</b> 1886:9  1888:2 1911:2,3  <b>parties</b> 1953:23  <b>party</b> 1888:17 1890:13  <b>party's</b> 1888:15  <b>passage</b> 1888:13  1896:21 1897:12,19  1897:21  <b>passed</b> 1857:9  <b>pause</b> 1852:13,23  1865:23 1949:15  <b>pay</b> 1876:22,22 1877:7  1878:13,13,20,24  1882:18,23 1897:16</p>	<p>1898:13 1914:19,25  1916:12 1917:7  1932:7  <b>paying</b> 1869:6 1877:20  1879:5 1913:9,15  <b>payment</b> 1878:4  <b>payments</b> 1846:17  1847:8,10,16 1877:4  1878:6,10,11,13,15  1878:17,22,24  1882:17,23,23,24  1883:11 1933:3  1960:8  <b>pays</b> 1847:23,24  1877:21  <b>Peaks</b> 1957:17  <b>pending</b> 1968:15  <b>people</b> 1864:14  1917:20 1948:7  <b>peppering</b> 1881:22  <b>percent</b> 1851:12,14,15  1851:17 1857:14  1874:9,10 1900:16  1903:18,20,25  1912:17,23 1913:3  1914:1,2 1919:24  1929:20 1931:16,17  1932:2,5 1936:23  1937:15,16,17  1938:18,19,20  1958:10 1960:14  1961:1 1965:9  <b>percentage</b> 1873:23  1874:2 1937:1 1942:7  1943:1,2,10  <b>percipient</b> 1892:5  <b>perfectly</b> 1960:14,25  1961:10  <b>period</b> 1920:17  1925:18,22 1946:12  1946:24 1947:3  1948:17 1949:22  1959:18  <b>person</b> 1856:21  1964:11,13  <b>personal</b> 1848:11  <b>personally</b> 1910:1  <b>PERSONS</b> 1841:10  <b>perspective</b> 1879:8  1882:6 1883:15  1901:8,18 1902:7  1903:4 1905:6  <b>pertaining</b> 1864:23,25  <b>Petitioner</b> 1841:7  1842:2  <b>phase</b> 1849:10 1856:24  1866:24 1867:2,6,11  1869:17 1876:1</p>	<p>1879:12,13,16,20  1880:9,9,13,13,14,16  1880:17,18 1881:11  1881:14,20,24 1896:8  1906:13 1909:12  1910:14 1912:11  1915:22 1927:11  1930:10 1962:20  1969:16  <b>physical</b> 1874:14  <b>physically</b> 1945:14  <b>picked</b> 1970:1  <b>picture</b> 1870:14  <b>piece</b> 1893:12,13  <b>pieces</b> 1895:20  <b>pipe</b> 1945:5,18 1952:10  1954:10,14,15  <b>pipeline</b> 1949:21  <b>pipes</b> 1870:17 1875:7  1945:6,25 1955:7  <b>piping</b> 1877:25  <b>place</b> 1962:3 1963:13  1971:12  <b>placeholder</b> 1892:7  <b>places</b> 1877:12  <b>plain</b> 1925:6  <b>Plaintiff</b> 1841:7 1842:2  1843:7  <b>Plaintiff's</b> 1849:8  <b>plan</b> 1898:9 1960:12  <b>plant</b> 1937:14,16,17,21  1937:23 1938:5  <b>plants</b> 1938:2  <b>play</b> 1962:2  <b>playing</b> 1879:23  <b>please</b> 1845:25 1846:10  1859:21 1860:2  1862:2 1870:23  1874:16 1898:2  1918:20  <b>plenty</b> 1887:12 1936:10  <b>plus</b> 1914:24  <b>point</b> 1874:7 1891:25  1902:1 1907:11,12  1910:3 1913:22  1921:10 1939:25  <b>points</b> 1897:3,6  <b>policies</b> 1961:5  <b>policy</b> 1960:4,6 1963:4  <b>portion</b> 1846:9 1867:2  1901:22 1910:18  1911:3 1914:10  1931:21 1954:24  <b>portions</b> 1905:16  1912:5  <b>portraying</b> 1910:24  <b>position</b> 1914:3  1916:10 1927:19</p>	<p>1962:7  <b>positions</b> 1863:17  1956:12  <b>possible</b> 1845:18  1942:5 1945:14  1968:12  <b>posted</b> 1853:8  <b>power</b> 1877:21 1878:11  1898:21 1905:14  1909:15 1910:11  1911:15 1913:24,25  1915:25 1924:7  1929:22,24 1930:19  1930:25 1931:3,20  <b>practical</b> 1940:8  1944:20 1946:10,21  <b>Practice</b> 1861:2  <b>pray</b> 1969:19  <b>precedes</b> 1853:11  <b>predict</b> 1928:22  <b>prefer</b> 1964:14  <b>preference</b> 1846:21  <b>preferences</b> 1847:6  <b>preferential</b> 1846:3,6,7  1846:11,19,25 1847:2  1847:3,7,18,20,21  1848:4,7  <b>preferred</b> 1966:19  <b>premise</b> 1912:1,11  <b>preparation</b> 1864:21  <b>prepare</b> 1864:9  <b>prepared</b> 1854:22  1864:7 1868:9  1869:22 1886:13  1956:7 1958:10  <b>presentation</b> 1854:21  1857:13  <b>presented</b> 1892:18  <b>president</b> 1863:18  <b>presumption</b> 1898:23  <b>pretty</b> 1950:7 1953:23  <b>prevailed</b> 1928:23  <b>previous</b> 1856:21  <b>previously</b> 1849:13  1861:14,18 1862:24  <b>price</b> 1940:22,22  <b>priced</b> 1876:20  <b>prices</b> 1897:10  <b>primarily</b> 1860:9  <b>principle</b> 1869:5  1888:13 1892:23  1894:11 1899:16  <b>principles</b> 1860:22  1861:3 1867:20  1869:1 1883:5,16,19  1883:20 1901:19  1943:19,20  <b>private</b> 1861:11</p>
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<p><b>probably</b> 1858:9 1891:22 1893:25 1894:13 1934:5 1951:18 1962:21</p> <p><b>problem</b> 1899:10 1931:9 1938:25</p> <p><b>procedure</b> 1887:1,16</p> <p><b>proceed</b> 1860:1 1895:4 1903:2</p> <p><b>proceeding</b> 1862:11 1867:3</p> <p><b>proceedings</b> 1841:15 1971:11</p> <p><b>process</b> 1860:14 1882:14 1921:7</p> <p><b>product</b> 1877:8</p> <p><b>production</b> 1957:25</p> <p><b>professional</b> 1863:4</p> <p><b>proffer</b> 1862:21</p> <p><b>proffered</b> 1886:15</p> <p><b>program</b> 1885:17</p> <p><b>programs</b> 1884:22</p> <p><b>project</b> 1873:6,21 1874:3,5 1875:13 1876:25 1878:19,20 1878:23 1879:2,6,10 1880:3 1881:17 1882:8 1883:7 1900:19 1901:7,8,22 1903:7,19,21,23 1905:10,22 1906:16 1909:4 1911:14 1912:1 1913:23 1915:22 1918:4 1919:25 1921:19 1924:8 1928:3 1929:19 1930:6,23,25 1931:14,16,18,19,21 1931:22,23 1932:3,6 1932:10 1933:4,6,8 1933:13,18,20,22,24 1934:19 1935:9,17 1937:15,18 1938:3,17 1938:19 1939:14 1942:1,6,11,12,24 1943:5,10 1944:22 1945:6,21,22,23 1946:8,12,15,23 1947:4,19,22,25 1948:5,8 1952:14 1959:8 1960:2</p> <p><b>project-by-project</b> 1909:3</p> <p><b>projected</b> 1870:2</p> <p><b>proof</b> 1849:1</p> <p><b>proper</b> 1879:21 1881:17 1887:13 1895:13 1916:19</p>	<p>1921:17</p> <p><b>properly</b> 1890:20 1905:10,15 1906:16 1915:23</p> <p><b>property</b> 1846:17 1847:9,23 1929:6</p> <p><b>proportion</b> 1846:17 1860:19 1868:18</p> <p><b>proposal</b> 1851:11 1966:17</p> <p><b>propose</b> 1890:22</p> <p><b>proposed</b> 1890:21</p> <p><b>proposes</b> 1966:21</p> <p><b>proposing</b> 1966:7</p> <p><b>proposition</b> 1896:24 1905:4</p> <p><b>provide</b> 1861:14 1870:21 1872:16,18 1892:20 1903:19 1931:24 1932:21 1959:21 1960:8</p> <p><b>provided</b> 1854:20 1857:12 1868:13 1869:10 1889:14 1911:1 1935:21 1944:12,17 1954:13 1958:9,14</p> <p><b>provides</b> 1870:15 1871:4 1872:10 1876:17 1931:25 1934:21</p> <p><b>providing</b> 1860:16 1889:13 1958:17</p> <p><b>provision</b> 1914:15</p> <p><b>prudent</b> 1909:2</p> <p><b>PTX</b> 1844:3,4,5,6,7,8,9 1844:10 1849:8,22,23 1850:4,5 1855:7,8,13 1855:16 1856:1,2,10 1856:18,19 1857:22 1858:2,3 1859:6</p> <p><b>public</b> 1957:8,24</p> <p><b>publication</b> 1860:20,25 1861:1 1866:5</p> <p><b>publications</b> 1865:3</p> <p><b>published</b> 1861:2 1863:9 1864:23</p> <p><b>pumps</b> 1870:18 1874:22 1875:7</p> <p><b>PURCELL</b> 1842:4 1968:9</p> <p><b>purchase</b> 1846:18 1847:19 1886:4 1897:22 1898:1</p> <p><b>purchases</b> 1886:5</p> <p><b>pure</b> 1958:9 1963:3,9 1965:14</p> <p><b>purpose</b> 1885:7 1900:5</p>	<p>1959:25</p> <p><b>purposes</b> 1847:6</p> <p><b>pursuant</b> 1886:20 1927:3 1960:15</p> <p><b>put</b> 1852:1,2,19 1865:16 1875:25 1878:1 1881:22,24 1886:2 1893:18 1894:25 1896:12 1917:4 1925:9,15 1926:23 1927:24 1929:18 1935:3 1937:9 1948:2 1953:24 1967:5 1970:1</p> <p><b>puts</b> 1892:10</p> <p><b>putting</b> 1869:16,20 1900:23 1927:21 1965:7,16</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualified</b> 1862:17,20</p> <p><b>quality</b> 1960:21,23</p> <p><b>quarrel</b> 1916:7,9</p> <p><b>quasi-governmental</b> 1868:1</p> <p><b>question</b> 1845:24 1853:5 1869:13 1876:7 1882:5 1887:5 1902:7 1903:3,9,14 1904:1,3,9 1912:17 1915:8 1917:9,11,15 1917:18 1922:20,25 1932:25 1939:6 1944:6,19 1949:14,16 1951:14 1955:1 1964:15</p> <p><b>questioned</b> 1957:1</p> <p><b>questioning</b> 1894:1 1919:10</p> <p><b>questions</b> 1849:4,25 1850:7,8 1857:16 1891:7 1894:5 1895:5 1923:20 1929:14 1936:21 1941:19 1943:13,16,22 1948:20 1954:5 1966:12,16 1968:3</p> <p><b>quick</b> 1869:8</p> <p><b>Quinn</b> 1842:12 1859:13 1860:1,5 1865:21,25 1866:8,17,22 1876:7 1877:15 1879:16 1880:10,20,23 1881:1 1881:12 1882:4,13 1887:23,24 1888:2 1889:18 1891:15,16 1891:25 1895:6,24</p>	<p>1901:1,5,17 1902:14 1902:15,17 1903:3,17 1904:11,17 1905:25 1907:6 1909:23 1910:3 1911:17 1912:20 1913:16 1914:22 1918:14 1920:9,12 1922:12,15 1922:17 1923:15 1928:18 1932:25 1941:24 1948:19 1949:11 1951:11 1954:8 1955:10,14 1956:6,24 1957:6,14 1957:19 1958:7 1961:14 1962:5,10,14 1963:1 1964:21,23 1965:24 1966:21 1967:2,11 1968:20,24 1969:3,14 1970:3</p> <p><b>QUINN,ESQ</b> 1842:13</p> <p><b>quite</b> 1905:12 1912:16 1922:16</p> <p><b>quote</b> 1889:20</p> <p><b>quoting</b> 1893:7</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>Raftelis</b> 1909:1 1911:4</p> <p><b>raise</b> 1879:5 1895:7</p> <p><b>rate</b> 1852:8 1853:13 1867:22 1880:3 1881:5 1884:11,13,16 1895:17,18 1896:10 1896:23 1897:18 1898:1,6,6,6,18,21,25 1898:25 1899:16,23 1901:15,15 1902:2,4 1904:4,12 1905:14,14 1907:4,11,15,16,19 1908:1,16 1909:14,15 1909:21,21 1910:11 1910:11,12 1911:8,15 1911:15 1912:10,12 1913:4,5,10,15 1914:5,10,11 1915:24 1916:2 1917:5,8,22 1918:3,6,8,23 1919:12,19 1920:1 1924:6,7,8,10 1925:18,21 1926:2,18 1927:10,11,12 1928:23 1929:5,19,20 1929:22,22,24,25 1930:15,19,19 1931:2 1931:3 1938:9,9,15 1938:21,22 1940:12 1940:20,25 1941:1,4 1941:6,8,11 1942:12</p>	<p>1942:15,17,19</p> <p><b>rate-making</b> 1879:8 1883:15 1901:8,18,24 1901:25 1903:4</p> <p><b>rate-mixing</b> 1943:19</p> <p><b>ratemaking</b> 1860:13,14 1860:21,23 1861:5,16 1861:25 1862:5 1864:24 1879:22 1882:6,14,20 1883:5 1905:7</p> <p><b>rates</b> 1841:10 1850:23 1851:7,13,14,15,20 1851:23 1853:20,22 1854:13,17,20 1857:10 1860:9,10,18 1861:3,12,21 1863:23 1864:7,10 1868:2,17 1868:17 1881:6 1882:17 1895:13 1896:18,19,24 1897:14,17,23,24 1898:5,14,19,20,22 1898:23 1899:6 1902:19 1906:6,8,11 1910:21 1913:24,24 1913:25 1914:4,16,20 1915:1,3,4,11,25,25 1916:11 1917:25 1918:11 1919:10 1920:15 1921:19 1922:10 1925:13 1926:6,9,13 1929:13 1929:17,25 1930:1,24 1930:25 1931:1,1,11 1934:3 1937:1 1939:2 1939:4 1940:14 1942:3 1960:9</p> <p><b>Ray</b> 1890:23</p> <p><b>re-ask</b> 1882:4</p> <p><b>re-do</b> 1943:4</p> <p><b>re-wholesale</b> 1871:13</p> <p><b>reach</b> 1863:7</p> <p><b>reached</b> 1867:6 1893:9 1953:23</p> <p><b>reaches</b> 1963:5,6</p> <p><b>read</b> 1869:11,22 1886:13 1888:12 1891:13 1910:25 1915:22 1919:8 1920:9 1922:12 1923:15,16,17,21 1926:12 1934:14,15 1937:12 1964:21 1966:11 1967:10</p> <p><b>readiness-to-serve</b> 1847:13,25 1922:7</p> <p><b>reading</b> 1852:14</p>
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<p>1869:9 1889:19 1908:12 1910:23 1911:6,7 1912:25 1913:8 1919:2 1920:13,22,23 1922:11 1929:21 1930:10 1965:5 <b>ready</b> 1845:7 <b>real</b> 1940:8 1952:6 1964:15 <b>reality</b> 1949:23 1951:22 1952:3,4 1953:1,5,5,7,12,14,22 1954:3,18 <b>really</b> 1849:2 1882:20 1889:6 1890:5 1896:12 1921:1,23 1923:24 1927:24 1937:12 1940:6,9 1947:10 1952:1,2 1961:21 1963:20,22 1969:17 <b>reasonable</b> 1902:20 1908:6,14 1937:8 1964:11 <b>reasonably</b> 1904:6,14 <b>reassurances</b> 1958:13 <b>rebut</b> 1892:5 <b>rebuttal</b> 1886:22,25 1887:13,21 1890:21 1891:10 1965:25 <b>rebutting</b> 1894:22 <b>recalculated</b> 1915:24 <b>recalculating</b> 1915:1 <b>recall</b> 1888:23 1896:21 1897:1,19 1911:3 1940:17,19 1943:15 1944:7 <b>receive</b> 1847:10 1848:3 1960:3,7,19 <b>received</b> 1847:16 1850:5 1855:18 1856:2,12,19 1858:3 1866:21 1900:17 1903:6 1956:23 1957:5,13,18 <b>recess</b> 1850:16 1857:19 1891:13,14 1892:15 1936:20 1955:16 <b>recipient</b> 1961:22 1962:9 <b>recognition</b> 1962:10,15 1963:14 <b>recognize</b> 1855:17 <b>recognized</b> 1860:20,22 1958:15 <b>recognizing</b> 1958:20 1963:16</p>	<p><b>recollection</b> 1969:19 <b>recommendation</b> 1851:12 <b>record</b> 1849:13,16 1850:15,17,18 1852:2 1853:10 1855:13 1881:1,22 1895:16 1950:25 1955:15 1957:25 1962:17,25 1965:5 <b>records</b> 1845:19 <b>recover</b> 1860:18 1868:4 1868:5,17 1869:1 1883:6,12,13 1884:16 1885:1,2,4 1908:14 1908:16 1914:9 1941:25 <b>recovered</b> 1867:22 1883:1,21 1911:10 <b>recovering</b> 1883:17 <b>recovery</b> 1867:21 <b>RECROSS</b> 1843:2 <b>RECROSS-EXAMI...</b> 1948:22 <b>redirect</b> 1843:2 1859:11 1941:21,23 1954:7 <b>reduced</b> 1896:24 1968:15 1971:13 <b>reduces</b> 1926:16 <b>reducing</b> 1885:10,12 <b>refer</b> 1858:7 1863:15 1868:20 1869:3 1879:1 1902:15 1946:13 <b>reference</b> 1855:21 1870:19 <b>referred</b> 1862:24 1863:10 1864:3 1866:5 1871:7 <b>referring</b> 1896:6 1906:7 1908:15,23 1920:8 <b>reflect</b> 1852:10 1853:15 1869:19 1903:24 <b>reflected</b> 1932:4 1934:1 <b>refused</b> 1851:16 <b>regard</b> 1848:14 1963:16 <b>regarding</b> 1875:12 1895:25 1899:8 1909:16 1918:9 <b>regular</b> 1949:10 <b>regulatory</b> 1861:15,24 1862:4,21 1906:22 <b>rejected</b> 1862:21 <b>related</b> 1847:11 1884:1 1901:10</p>	<p><b>relates</b> 1897:9 1903:15 <b>relating</b> 1875:11 <b>relations</b> 1877:12 <b>relationship</b> 1875:15 1875:21 1876:11,16 1876:23 1877:16 <b>relatively</b> 1920:4 1923:1 <b>relevance</b> 1872:4 1914:22 1957:10 <b>relevant</b> 1876:1 1879:12 1881:2,15 1958:2,23 1963:11 <b>reliable</b> 1890:24 <b>relied</b> 1851:19 1887:2 <b>rely</b> 1853:7 <b>relying</b> 1894:15 <b>remained</b> 1848:7,12,14 <b>remember</b> 1855:1,1 1864:17 1889:4 1936:6 1943:24 <b>reminded</b> 1966:22 <b>removal</b> 1910:21 <b>remove</b> 1913:22 <b>removed</b> 1896:8,12 1910:12 1911:15 1912:18,24 1918:25 <b>renew</b> 1895:10 <b>renewal</b> 1897:24 <b>renewed</b> 1897:22 <b>reopen</b> 1889:4 <b>repaired</b> 1935:25 <b>repeat</b> 1846:9 1913:12 <b>rephrase</b> 1910:8 <b>report</b> 1849:9 1854:22 1854:23 1858:6,7,17 1858:20 1859:2 1865:5,8,9,16,18,22 1866:2,9,10,13,16 1867:1,8 1868:7,8,9 1869:22 1877:11,13 1881:16,19 1886:13 1886:18,22 1887:8,10 1887:11,14 1888:6,8 1888:9,11,25 1891:9 1895:8,11,15 1896:1 1896:4,17,21 1897:5 1897:8,13 1899:9 1902:12,16 1905:9,17 1905:21 1907:5 1909:10 1911:4 1917:20,24 1918:16 1918:22 1919:2,7,11 1919:12,20 1924:22 <b>Reported</b> 1841:19 <b>Reporter</b> 1971:9,24 <b>REPORTER'S</b> 1841:15 1971:1</p>	<p><b>reports</b> 1844:4 1859:5 1868:6 1869:12,18 1870:3,7 1888:5 1950:2 <b>representation</b> 1853:1 <b>representing</b> 1904:24 <b>request</b> 1859:4 <b>require</b> 1943:4 <b>required</b> 1870:2 <b>requirements</b> 1860:16 1934:8 1944:18 1958:15 1959:13 <b>requires</b> 1940:11,14 <b>reserves</b> 1851:25 1927:5 <b>reservoir</b> 1946:4,16 1948:2 1951:19 <b>reservoirs</b> 1870:18 1874:22 1875:1,7 1885:9 1946:7,9 1947:2 <b>resolution</b> 1857:9 <b>resolutions</b> 1856:4 <b>resolved</b> 1862:10 <b>Resources</b> 1873:5 1875:16,22 1876:12 1876:25 <b>respect</b> 1849:2 1861:20 1907:4,11 1912:10 1943:23 1961:16 1962:4,7 1963:6 1964:17 <b>Respondent</b> 1842:11 <b>Respondents</b> 1841:14 <b>responding</b> 1944:16 <b>response</b> 1889:9 1892:4 1908:24 1922:24 1943:22 1944:6 <b>responsibilities</b> 1875:12 <b>rest</b> 1951:4 1956:7 1965:24 1966:1 <b>restates</b> 1963:14 <b>Rests</b> 1843:6,7 <b>result</b> 1846:2 1866:23 1883:25 1885:16 1899:1 1900:1 1902:19,21 1911:23 1926:5 <b>resulted</b> 1861:23 <b>resulting</b> 1867:6 <b>results</b> 1872:12 <b>resume</b> 1866:13 <b>resumed</b> 1845:14,16 <b>retail</b> 1869:9 1871:14 1872:16,18 <b>retailer</b> 1872:14 1875:18 1876:14</p>	<p><b>retained</b> 1861:14 1865:12 1869:23 <b>revenue</b> 1851:24 1868:2,10 1896:20 1924:3 <b>revenues</b> 1847:10 1848:1 1851:9 1860:17 1897:15 1907:18 <b>review</b> 1858:6 1875:10 1967:7 <b>reviewed</b> 1858:17,19 1859:1 1869:12 1893:21 <b>revision</b> 1897:14 <b>revisit</b> 1880:9,13 <b>right</b> 1846:25 1847:7 1850:24 1851:5,13,16 1851:21 1852:4 1853:6,22,25 1856:9 1864:21 1873:15 1874:2 1886:3 1894:11 1905:11 1906:18 1907:2,14 1915:19 1917:23 1918:13 1927:3,5,20 1928:24 1929:25 1930:12,16 1931:3 1932:16 1933:9 1934:8,17 1935:6,15 1937:20 1938:4,6 1939:21 1948:2,25 1949:1,7,19 1950:23 1951:5 1952:24 1964:25 1967:13 1968:23 <b>rights</b> 1846:4,6,7,11,19 1847:2,4,18,20,21 1848:4,7 1873:4,21 1873:23 1877:5,8 1885:24 <b>river</b> 1873:8,16 1884:9 1894:18,20 1899:13 1899:20,21,22 1900:8 1900:9,9,11 1909:19 1912:6 1928:2 1930:5 1930:15,20 1931:10 1931:13,25 1932:21 1933:7,12 1934:7 1935:5,8,9,10,22 1936:10 1938:3,17,20 1939:17,25 1940:1,5 1940:22 1942:14,15 1942:16 1944:21 1945:5,16,18,19,25 1946:10,14,23,25 1947:1,16,17 1948:14 1949:25 1950:3,4</p>
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<p>1951:2 1952:11,12,16                  1952:22 1953:4,8,25                  1954:2 1955:2 1958:9                  1958:11 1959:19,21                  1960:14 1961:1,10                  1962:18 1963:3,9                  1965:10,15,18  <b>Roberts</b> 1969:25  <b>room</b> 1962:21  <b>roughly</b> 1871:8                  1900:16 1932:3                  1969:6  <b>RPR</b> 1841:20 1971:23  <b>rule</b> 1895:23  <b>ruled</b> 1867:18 1902:3  <b>rules</b> 1899:5 1962:3  <b>ruling</b> 1867:11,19                  1881:14 1896:8                  1899:1 1906:14                  1909:16,20,24 1910:4                  1910:14 1925:11                  1927:22 1928:1,5                  1929:1,4,13  <b>rulings</b> 1881:11                  1967:11  <b>run</b> 1936:8  <b>runs</b> 1936:4,9</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1842:5  <b>sales</b> 1897:15 1899:19                  1899:21,22,25                  1900:11,11,12 1930:3                  1930:6,6,7,12,15,20                  1931:5 1942:15  <b>saline</b> 1962:11,18,22,22                  1964:14,14  <b>salinity</b> 1958:13,14,20                  1959:10 1960:12,20                  1961:3,4,19 1963:6                  1963:16 1964:3,6,17                  1965:11,12,18  <b>San</b> 1841:2,6,16,17,24                  1842:6 1844:14                  1845:1 1847:22                  1848:14 1851:1                  1853:24 1858:23                  1865:13 1869:23                  1871:14 1883:25                  1886:15 1892:1                  1893:22,23 1894:1                  1900:17 1901:9                  1903:6,8 1904:7,15                  1904:24 1907:12                  1909:12 1910:11                  1911:24 1912:3                  1913:9,13,23 1915:16                  1915:16 1916:11</p>	<p>1920:1 1924:10                  1925:24 1926:24                  1927:4,9,17 1928:23                  1932:4,20 1933:22                  1934:2,17,22 1935:4                  1935:21 1938:16                  1939:5,8,16,24                  1940:2,4 1941:7                  1944:12,24 1945:9                  1947:15 1949:1,6                  1950:23 1951:20                  1952:18 1954:1,9,13                  1954:15 1956:1,25                  1957:24 1958:12,18                  1959:16 1962:8                  1963:15 1964:1                  1965:25 1967:3  <b>SANDFORD</b> 1841:20                  1971:8,23  <b>Santa</b> 1891:20 1971:5,9                  1971:18  <b>satisfied</b> 1893:12  <b>satisfy</b> 1871:1  <b>save</b> 1885:18  <b>saving</b> 1885:22  <b>savings</b> 1947:14  <b>saw</b> 1856:21 1915:22  <b>saying</b> 1889:24,25                  1901:18 1907:17                  1909:6 1913:3                  1916:15,21 1918:15                  1918:21 1919:15,16                  1923:6 1924:21                  1925:5 1926:1,15,15                  1926:17 1927:8,8,15                  1927:16,21 1928:16                  1933:19 1935:17,19                  1939:11,23 1940:3,18                  1940:19 1953:2,3                  1959:24 1960:22                  1963:22 1965:8,8,10                  1965:12  <b>says</b> 1846:24 1852:8                  1854:11 1858:5,5                  1887:22 1905:21                  1934:17,21 1935:2,7                  1940:25 1941:9                  1950:11 1955:2                  1958:8 1960:17  <b>scenario</b> 1881:8  <b>schedule</b> 1966:5,7  <b>scope</b> 1888:16  <b>screen</b> 1865:17,25                  1908:11 1920:21  <b>SDCWA's</b> 1889:22  <b>seated</b> 1859:21  <b>second</b> 1891:21                  1893:13 1894:3</p>	<p>1900:15 1917:6                  1918:18 1925:8                  1960:17  <b>section</b> 1863:18 1864:1                  1890:21 1940:17                  1959:25 1960:4  <b>secured</b> 1961:17  <b>see</b> 1853:17 1857:16                  1879:17 1882:1                  1892:13 1895:20                  1922:3 1932:8                  1936:18 1950:5,15                  1965:6  <b>seek</b> 1885:1,2 1941:25  <b>seeks</b> 1884:16  <b>seen</b> 1849:5 1866:22  <b>selected</b> 1904:5  <b>selling</b> 1885:17  <b>send</b> 1966:12  <b>sending</b> 1857:2                  1889:24  <b>sense</b> 1951:18  <b>sent</b> 1966:5,7  <b>sentence</b> 1852:3,5                  1853:13 1896:16  <b>separate</b> 1870:5                  1925:12 1954:14                  1969:4  <b>separately</b> 1922:19  <b>series</b> 1874:21 1875:6                  1890:19  <b>serve</b> 1871:5,12  <b>served</b> 1863:14 1892:7                  1902:21  <b>serves</b> 1954:16  <b>service</b> 1847:24                  1850:12 1860:16                  1869:9 1870:15                  1872:16,18 1941:2                  1959:25 1960:19,21  <b>services</b> 1841:23                  1868:13 1869:6                  1941:6  <b>set</b> 1914:3 1916:11                  1928:15 1937:1                  1938:9,15,21 1939:4                  1940:21,21 1941:11                  1968:13  <b>setting</b> 1860:10                  1880:12 1896:23                  1899:16 1939:2  <b>seven-and-a-half</b>                  1851:17 1857:14  <b>seventh</b> 1864:20  <b>Seventy-five</b> 1862:6  <b>sewer</b> 1860:9 1861:11  <b>share</b> 1869:11 1932:23  <b>short</b> 1850:16 1909:14</p>	<p><b>shorter</b> 1970:7  <b>Shorthand</b> 1971:8,24  <b>show</b> 1855:8 1914:11                  1924:10 1958:12,18                  1966:15  <b>showed</b> 1950:3  <b>shown</b> 1914:6,7  <b>shows</b> 1937:13  <b>shut</b> 1935:24 1946:25                  1947:3 1949:22                  1953:8  <b>shutdown</b> 1947:5  <b>shutting</b> 1949:21  <b>sic</b> 1936:3  <b>Sid</b> 1857:2 1858:14,14  <b>side</b> 1852:24 1855:15                  1889:12,15 1893:10                  1893:18,19  <b>sides</b> 1902:3  <b>signed</b> 1898:17  <b>significantly</b> 1898:25                  1899:7  <b>similar</b> 1871:22 1872:1  <b>simple</b> 1920:4 1923:7,9                  1923:24 1925:3,6  <b>simpler</b> 1969:25  <b>simplifying</b> 1942:13  <b>simply</b> 1851:23                  1881:13 1902:5                  1905:22 1929:10                  1966:16  <b>sir</b> 1857:20 1876:8                  1904:25 1910:9                  1919:3,17 1923:22                  1934:4 1941:18                  1949:17 1955:12                  1956:5  <b>sitting</b> 1927:4,13                  1948:24 1949:3,18  <b>situation</b> 1877:3                  1886:10 1893:18                  1907:13,17 1908:3,7                  1917:21,21,24                  1940:10  <b>situations</b> 1886:3  <b>sixth</b> 1864:18 1891:19  <b>size</b> 1872:21  <b>Skillman</b> 1843:3                  1844:3,10 1845:13,18                  1848:24 1849:2,20,20                  1849:24 1855:17                  1857:23 1858:4  <b>Skillman's</b> 1852:17  <b>Skinner</b> 1937:14,21                  1945:9 1946:4,16,18                  1951:1,9 1952:13                  1954:25 1955:3,5,6,9  <b>skip</b> 1923:13</p>	<p><b>slightly</b> 1961:20 1969:7  <b>small</b> 1874:1 1890:1  <b>smaller</b> 1899:22 1900:1                  1900:2  <b>softer</b> 1907:5  <b>sold</b> 1949:1  <b>sole</b> 1934:12 1965:2  <b>solely</b> 1885:6  <b>somebody</b> 1878:1                  1894:18 1918:7                  1943:1 1950:10                  1951:5 1969:11  <b>somewhat</b> 1875:6                  1912:25  <b>soon</b> 1968:11  <b>sorry</b> 1876:10 1882:3                  1915:6 1917:9                  1924:13 1926:4                  1933:20 1939:1                  1940:6 1945:20                  1966:6  <b>sort</b> 1879:15 1940:7                  1959:16 1962:7  <b>sought</b> 1892:21  <b>sounds</b> 1875:25  <b>source</b> 1868:2 1871:2                  1873:4,8 1960:9  <b>sources</b> 1870:17,25,25                  1873:4,12 1875:4                  1964:2 1965:4  <b>South</b> 1842:15  <b>southeast</b> 1954:24  <b>Southern</b> 1841:9,11                  1842:11 1947:24                  1948:7  <b>speaking</b> 1962:4  <b>specific</b> 1892:4 1944:11  <b>specifics</b> 1904:2  <b>spell</b> 1859:22  <b>spend</b> 1876:5  <b>spent</b> 1861:9 1870:7  <b>split</b> 1931:15  <b>ss</b> 1971:4  <b>staff</b> 1847:3 1853:19  <b>stand</b> 1845:14  <b>standard</b> 1943:18  <b>standards</b> 1906:25                  1961:19,24  <b>standpoint</b> 1901:24                  1902:1  <b>stands</b> 1867:16  <b>Stapleton</b> 1844:17,18                  1957:1 1959:3,5,21                  1959:24 1961:12,16                  1963:2,8 1964:7  <b>Stapleton's</b> 1958:3                  1963:20  <b>start</b> 1925:9 1967:18</p>
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<p><b>started</b> 1925:1  <b>state</b> 1841:1 1859:22  1873:6,6,21,22,25  1874:2,4 1875:3,12  1876:24,25 1877:4  1878:5,16,17,18,19  1878:19,22 1879:1,6  1879:10 1880:2  1881:17 1882:7,18,21  1883:2,7,11 1900:19  1901:7,8,10,22  1903:6,7,19,21,23  1905:9,22 1906:16  1907:1 1911:14  1912:1 1913:23,24  1915:22 1918:4  1919:25 1921:19  1924:7 1928:3  1929:18 1930:6,23,24  1931:13,16,18,19,21  1931:22,23 1932:3,5  1932:9 1933:4,5,8,12  1933:18,20,22,24  1934:18 1935:9,17  1937:15,16,18 1938:3  1938:17,18,19  1939:13 1942:1,6,10  1942:11,24 1943:5,10  1944:22 1945:6,21,22  1945:23 1946:8,11,14  1946:23 1947:4,18,22  1947:25 1948:4,8,16  1952:13 1959:8  1960:1,2 1971:3,9,25  <b>State's</b> 1878:25  <b>stated</b> 1903:10 1907:3  <b>statement</b> 1888:22  1889:17 1892:2,10,19  1893:20,22 1900:25  1902:19 1960:13  1963:24,25 1964:4,8  1964:19  <b>states</b> 1847:8 1863:6  1871:20,23 1872:9,15  1883:3 1957:7  <b>Stathis</b> 1855:18  <b>status</b> 1937:13 1962:8  <b>statutory</b> 1846:7,11  <b>stenotype</b> 1971:12  <b>step</b> 1898:4 1922:2  <b>stewardship</b> 1880:3  1884:11,13 1885:16  1897:17 1907:4,11,15  1907:19 1908:1,16  1909:21 1910:12,21  1911:8,12,13 1912:10  1912:12,18 1913:4,10  1913:15 1914:10</p>	<p>1916:2 1918:6 1924:8  1929:19,20 1931:1  <b>stick</b> 1911:11 1926:10  1926:11  <b>sticking</b> 1928:9  <b>stop</b> 1922:11 1937:20  <b>stopped</b> 1861:12  <b>storage</b> 1886:2  <b>store</b> 1875:1  <b>storing</b> 1885:12  <b>Street</b> 1841:24 1842:6  1842:15,18  <b>strictly</b> 1894:7  <b>strike</b> 1877:11,13  1895:16 1967:4  1968:19  <b>string</b> 1857:22  <b>structural</b> 1945:1  <b>structure</b> 1867:22  1904:4 1917:22  1924:11 1927:10,12  1927:12 1928:23  1929:5 1930:15  <b>structured</b> 1897:24  <b>structures</b> 1904:12  <b>studies</b> 1850:12  1860:10 1861:13  <b>study</b> 1851:3,11,18,19  1851:21,23 1852:9  1853:12,14,20 1854:5  1854:8,17 1856:3,5  1857:5,11 1961:3  <b>stuff</b> 1932:23  <b>subcommittee</b> 1863:24  <b>subject</b> 1857:22  1861:25 1862:4  1893:5 1895:19  1956:19,21 1959:10  <b>subjects</b> 1864:15  <b>submission</b> 1966:17  <b>submitted</b> 1895:4  <b>submitting</b> 1880:24  <b>substantial</b> 1901:6  1903:5  <b>substantively</b> 1958:2  1958:23  <b>sued</b> 1851:1 1853:25  <b>sufficient</b> 1892:19  <b>suggest</b> 1870:12  1962:20  <b>suggested</b> 1939:4  <b>suggesting</b> 1912:16  <b>suggests</b> 1927:11  1962:7  <b>suite</b> 1920:15  <b>SULLIVAN</b> 1842:12  <b>sum</b> 1896:24 1914:8  1923:4</p>	<p><b>summarize</b> 1958:6  <b>summarizes</b> 1888:4  <b>summarizing</b> 1888:15  <b>summer</b> 1947:10,13  1949:4 1952:2  <b>Superior</b> 1841:1,16  <b>supplemental</b> 1870:20  1870:21 1871:4  1872:23 1885:10  1888:10  <b>supplied</b> 1899:14  <b>supplier</b> 1875:17  1876:13,17  <b>supplies</b> 1872:23,23  1873:1,1 1940:1  <b>supply</b> 1847:17  1870:20,21,25  1872:14 1880:3  1881:18 1884:23,23  1885:19,23 1886:6  1896:12 1897:10,14  1897:24 1898:1,5,12  1898:14,20,23,24,25  1905:19 1907:1,16,16  1907:16,19,23 1908:1  1908:3,5,7,17 1909:4  1909:7 1917:5,8  1918:3,8,11,22,25  1919:6,12,19 1920:1  1921:20 1922:10  1924:18,23 1925:4,15  1925:18,21 1926:1  1928:17 1939:8  1941:8 1947:24  1948:1,9  <b>support</b> 1853:20  1854:17 1856:4  1857:11  <b>supported</b> 1857:14  <b>supporting</b> 1851:12  <b>suppose</b> 1909:5  1954:18  <b>supposed</b> 1960:22  1961:6  <b>supposition</b> 1924:16,18  1924:23  <b>sure</b> 1849:14 1852:23  1855:3 1859:6  1876:15 1880:25  1905:12 1935:4  1936:9 1940:9 1946:5  1946:10 1953:7,23  1963:5 1966:13  1967:6  <b>surprise</b> 1890:3,3  <b>surprised</b> 1921:24  <b>suspect</b> 1899:1  <b>sustained</b> 1928:19</p>	<p>1949:12 1964:20  1965:22  <b>SWD</b> 1900:12  <b>sworn</b> 1859:17  <b>SWP</b> 1845:20 1960:8  <b>system</b> 1870:13,17  1874:14,17,21  1877:25 1884:4,7,8  1885:9 1894:16  1905:14,14 1909:14  1909:15 1910:11,11  1911:15,15 1913:24  1913:25 1915:25,25  1924:6,6,7 1929:21  1929:22,24,24 1930:2  1930:6,18,19 1931:2  1931:3,6,14,20  1935:13 1937:13  1945:2,11,24 1946:20  1951:9 1962:16  <b>systemwide</b> 1929:25  1931:2</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>Tab</b> 1849:21,23  <b>take</b> 1852:19 1864:14  1865:16,23 1873:18  1873:19 1874:18,20  1874:22 1875:1  1876:21 1878:13  1885:11 1886:6,9  1889:2 1891:12  1897:8 1898:9,17  1913:17 1922:24  1925:3 1928:5  1930:23 1942:10  1948:4,10,11,25  1949:25 1950:9,10,12  1950:12,20 1955:2  1958:10 1960:14  1961:10 1963:19  1966:17  <b>take-or-pay</b> 1877:3  <b>taken</b> 1867:10,14  1886:8 1893:25  1895:3 1899:20  1921:22 1949:5,6,18  1949:20 1955:16  1971:11  <b>takes</b> 1947:21 1949:9  1949:25 1950:12  <b>talk</b> 1867:20 1881:20  1892:9 1902:25  1957:20 1966:2,4  1967:9  <b>talked</b> 1885:7 1894:9  1902:24 1903:22  1926:19 1959:21</p>	<p><b>talking</b> 1877:11 1891:4  1894:10 1895:20  1906:9 1908:22  1915:3,5,6,10,11,13  1917:25 1924:15,19  1924:21,24 1925:9  1930:2 1938:6 1939:2  1939:5,8,9 1951:17  1958:6 1959:4,12  1960:11 1961:7,21  1964:8  <b>talks</b> 1887:20 1894:6  1894:20 1914:15  1960:6 1961:2,4  <b>TARA</b> 1841:20 1971:8  1971:23  <b>tax</b> 1847:10  <b>taxes</b> 1846:17 1847:8  1847:24 1929:6  <b>team</b> 1850:9  <b>tell</b> 1862:2,13 1865:2  1868:7 1870:14  1871:8 1895:21  1904:11 1923:20  1969:16  <b>telling</b> 1854:16  <b>tells</b> 1893:22  <b>ten</b> 1892:13 1936:15  1938:19 1967:19  <b>ten-minute</b> 1891:12  <b>tend</b> 1950:7,10  <b>tends</b> 1963:25  <b>tentative</b> 1967:8  <b>tentatives</b> 1968:3  <b>term</b> 1846:3 1943:23  <b>termed</b> 1928:21,24  <b>terms</b> 1847:1,5 1851:8  1860:22 1864:6  1868:8 1871:6 1872:9  1873:4 1877:15  1881:3 1901:18  1916:15 1924:19  1926:7 1933:21,25  1936:24 1944:4,16  <b>test</b> 1893:12,13,16  <b>testified</b> 1845:14  1850:11,19 1859:18  1862:3,16 1890:24  1919:4  <b>testify</b> 1862:11 1866:15  1890:22 1893:5,23  1894:19 1902:25  <b>testifying</b> 1861:24  1865:20 1925:17  1960:16  <b>testimony</b> 1845:23  1855:4 1856:24  1861:15 1862:9,22,22</p>
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1875:25 1888:16,17 1888:19,19 1889:5 1890:12,14,18,25 1891:10 1892:3,4 1893:24 1895:16 1915:18 1930:20 1933:11,13 1955:4 1958:3 1961:8 1963:2 1963:20 1964:21 <b>thank</b> 1848:17,19 1859:10,14,21 1892:14,16 1941:19 1955:12 1970:8 <b>theoretical</b> 1951:18 1952:1 <b>theoretically</b> 1946:6,9 1947:12 1951:24 1954:4 <b>theory</b> 1952:5,9 1953:12 <b>thing</b> 1860:12 1872:19 1877:22 1890:1 1892:1 1923:17 1925:3 1935:2 1940:8 1953:12 <b>things</b> 1878:12 1884:23 1917:2 1924:14 1958:1 1968:5 <b>think</b> 1849:20 1850:9 1852:2,19,20 1866:9 1870:9 1872:8 1874:9 1876:6 1879:15 1880:21 1881:1,2,8 1881:10 1886:8 1887:5 1888:9 1889:7 1889:8 1891:11 1893:2,24 1894:4 1900:23 1901:17 1902:23 1906:5 1908:2,6,25 1909:23 1910:3,6,24 1911:1 1912:15 1913:1 1920:7,9,14 1921:12 1922:12 1923:9,15 1925:5 1937:7 1938:14,25 1944:1 1946:6 1951:11,15 1952:1 1953:2 1956:6 1958:1 1961:11 1962:16 1963:10,11 1963:18 1964:7 1965:7,15,19,21 1966:25 <b>thinks</b> 1894:16,17 <b>third</b> 1887:20 1961:2 <b>thirdly</b> 1872:20 <b>thirsty</b> 1948:7 <b>Thirty-five</b> 1969:24	<b>Thomas</b> 1858:10,12 <b>thought</b> 1891:4 1896:4 1899:10 1906:8 1924:24 1933:15 1962:3 <b>thoughts</b> 1967:9 <b>thousands</b> 1871:18 <b>three</b> 1892:2 1922:9 1926:19,22 1956:11 1957:19 1958:25 <b>threshold</b> 1958:15 <b>tier</b> 1898:5,5,6,18 1899:3,3 <b>tight</b> 1969:9 <b>time</b> 1854:21 1857:4 1858:13 1861:12 1876:4,5 1888:20 1891:9 1893:6,6,14 1893:25 1898:20 1906:12 1919:20 1920:18 1937:24 1942:20 1943:5 1946:12,24 1948:17 1957:2 1959:5,18,23 1966:10,13,13 1967:12 1971:12 <b>times</b> 1862:3,14,15 <b>title</b> 1861:3 <b>today</b> 1867:12 1921:10 1948:2 <b>told</b> 1858:7 1903:10 1943:1 <b>tomorrow</b> 1948:3 <b>top</b> 1887:25 <b>total</b> 1868:10 1896:20 1897:14 1899:14 1926:24 <b>trade</b> 1863:4 <b>transcript</b> 1841:15 1919:8 1924:15,19 1958:4 <b>transcription</b> 1971:14 <b>transmission</b> 1885:8 <b>transmits</b> 1870:17 <b>transportation</b> 1877:23 1881:18 1896:9,10 1898:21 1905:11 1906:15 1909:4,7,14 1909:17 1912:24 1913:5 1914:10 1916:18 1918:5,25 1924:17 1925:4 1926:18 1929:18 1930:24,25 1931:1,21 <b>treasurer</b> 1863:25 <b>treat</b> 1908:1 <b>treatment</b> 1875:7 1882:24 1938:5	1941:3 <b>trial</b> 1866:24 1867:6 1875:24 1876:2 1888:16,24 1890:13 1890:20 1892:6,21 1894:7 1915:17 1958:3 1968:8 1970:10 <b>trials</b> 1861:15 <b>tried</b> 1919:5 1941:16 <b>trier</b> 1963:18 <b>true</b> 1879:4 1938:13,14 1942:21 1951:18 1952:6 1963:7 <b>trustee</b> 1863:19 <b>truth</b> 1900:25 <b>try</b> 1880:13 1898:9 1905:5 1950:18 1953:14 1968:11,14 <b>trying</b> 1880:16 1917:9 1938:9 1964:16 <b>turn</b> 1870:13 1884:11 1897:16 <b>turns</b> 1895:9 <b>Twenty-five</b> 1969:13 <b>twice</b> 1890:7,10 1891:7 <b>two</b> 1847:12 1862:15 1870:16 1873:3,12 1875:4 1887:9 1893:16 1898:5,5,6 1899:3 1920:24 1921:11 1922:8 1923:13 1924:13 1942:17 1945:6 1946:7,8,13 1955:7 1959:25 1964:16 1969:5 <b>two-line</b> 1852:4 <b>type</b> 1848:2 1860:12 1862:4 1872:19 <b>types</b> 1868:16 1871:19 1874:22 1946:14 <b>typewriting</b> 1971:13 <b>typical</b> 1875:17 1876:13,16 <b>typically</b> 1889:13	<b>understand</b> 1878:4 1880:7 1882:4 1884:12 1888:1 1890:3 1898:16 1900:24 1903:12,18 1907:10,12,21 1909:11 1913:2,7,13 1915:15,21 1916:4,6 1919:1 1922:23 1923:5 1929:16 1932:8 1951:1,14,15 1953:2 1957:23 1959:9,15 <b>understanding</b> 1846:13 1848:9,25 1867:4 1870:14 1884:15 1898:19 1901:2,4 1910:17 1912:14,15 1912:22 1913:18 1918:24 1919:9,11 1940:20 <b>understood</b> 1880:10,19 1910:14 1962:24 <b>undertaken</b> 1846:14,15 <b>unfair</b> 1889:7,11 <b>uniform</b> 1938:11,23 <b>unique</b> 1872:2,7,20 1874:12,13 1900:9 <b>unit</b> 1845:19 1900:8 1930:11 <b>United</b> 1863:6 1871:20 1871:23 1872:9,15 1883:3 1957:7 <b>universally</b> 1950:7 <b>unknown</b> 1897:23 <b>unreasonable</b> 1905:18 1907:25,25 1908:4,19 <b>unreasonably</b> 1888:20 <b>Upadhyah</b> 1957:15 <b>Upadhyay</b> 1844:15 <b>update</b> 1864:19 <b>updated</b> 1852:10 1853:15 <b>upset</b> 1899:5 1921:21 <b>URQUHART</b> 1842:12 <b>use</b> 1868:16 1876:22 1878:6 1880:8,12 1932:22 1944:21 1949:4,4 1950:11 <b>useful</b> 1866:10 1880:8 1889:8 <b>user</b> 1872:18 1876:18 <b>uses</b> 1885:25 <b>usually</b> 1920:24 <b>utilities</b> 1860:15 1863:5 <b>utility</b> 1868:9,9,11,23 1869:9,10 1906:22 <b>utilizes</b> 1884:12	<b>V</b>	<b>v</b> 1891:20 <b>vague</b> 1905:25 1907:6 1911:17 1928:19 1969:19 <b>valid</b> 1851:9 <b>validity</b> 1841:10 1907:13 <b>Valley</b> 1946:2,3 1955:8 <b>VAN</b> 1842:3 <b>Vandenberg</b> 1857:1 <b>VANDERHORST</b> 1842:18 <b>variable</b> 1878:12 <b>variation</b> 1873:20 <b>various</b> 1864:1 1921:8 <b>vary</b> 1874:5,5,6,24 <b>vast</b> 1872:17,25 1878:12 <b>version</b> 1852:16 <b>versus</b> 1887:19 1888:3 1891:18 <b>VIDEOGRAPHY</b> 1841:23 <b>view</b> 1899:2 1913:22 <b>views</b> 1864:14 <b>violated</b> 1895:22 <b>violates</b> 1895:12 1899:15 <b>vis-a-vis</b> 1898:20 <b>volume</b> 1841:10 1873:15 1877:17,19 1877:24 1947:9 <b>volumes</b> 1898:8 <b>vs</b> 1841:8	<b>W</b>	<b>W-O-O-D-C-O-C-K</b> 1859:25 <b>wait</b> 1865:23 1921:25 <b>waived</b> 1892:11 <b>walk</b> 1880:20 <b>want</b> 1849:3 1852:23 1878:2 1880:20 1887:3 1889:1,6 1891:15 1894:13,18 1897:12 1908:10 1917:14,16,19 1932:22 1939:18 1953:17 1961:23 1963:23 1969:1,2 <b>wanted</b> 1889:4,5 1892:17 1894:1 1895:3 1958:13 1966:12 <b>wants</b> 1879:16 1940:1 1944:23 1962:2 <b>WARREN</b> 1842:5
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<p><b>wasn't</b> 1907:22 1927:1 1961:12 <b>water</b> 1841:6,9,11 1842:11 1844:14 1845:20,20 1846:16 1846:18,22,23,25 1847:17,19,23 1860:9 1860:13,14,21,23 1861:2,3,5,10,10,11 1861:11,16,21,25 1862:5,25 1863:3,4 1863:19,21,24 1864:8 1864:9,24,25 1865:13 1867:25 1868:9 1869:9,23 1870:16,20 1870:21,25,25 1871:3 1871:3,4,11,13,14,19 1871:19,22 1872:10 1872:14,14,15,22,23 1872:24 1873:2,3,5,5 1873:6,7,11,15,17,21 1873:21 1874:2,2,4 1874:12,18,20,23 1875:3,4,8,12,16,17 1875:22 1876:12,13 1876:13,17,17,21,25 1876:25 1877:6,16,17 1877:18,21 1878:1,3 1878:7,8,9,14,18,20 1878:23 1879:1,6,10 1880:2,3,3 1881:17 1882:8,22 1883:7,23 1884:3,11,12,18,23 1884:24 1885:11,12 1885:12,16,17,19,23 1885:23,24 1886:4,6 1886:7,8 1894:17,19 1897:14,17 1898:18 1899:14,25 1900:9,17 1900:19 1901:6,7,8 1901:10,22,22,23 1903:5,6,7,19,20,21 1903:21,23,25 1905:9 1905:22 1906:16 1907:1,4,11,15,19,20 1908:1,15 1909:3,19 1909:21 1910:12,21 1911:8,11,13,14 1912:1,6,7,10,12,18 1913:3,10,15,23 1914:10 1915:22 1916:2 1918:4,5 1919:25 1921:19 1924:7,8 1928:3,3,3 1929:18,19,20 1930:6 1930:23,24 1931:1,10 1931:12,13,16,17,18 1931:19,21,22,23,23</p>	<p>1931:25 1932:3,4,6,9 1932:21 1933:4,5,7,8 1933:12,12,18,20,22 1933:22,23,24,25 1934:2,6,18,19,21,22 1934:23 1935:1,5,7,9 1935:9,11,13,17,20 1935:21 1936:4,10 1937:15,17,18 1938:1 1938:3,3,5,17,18,19 1938:23 1939:6,7,9 1939:14,14,16,17,25 1940:1,2,5,13,16,18 1940:22 1941:1,9 1942:1,1,6,6,7,10,11 1942:18,22,24,24 1943:5,10,10 1944:11 1944:12,13,14,22,22 1944:22 1945:4,6,7 1945:16,18,19,21,21 1945:22,23,23,23,25 1946:1,3,8,8,10,11,12 1946:14,23,23,23 1947:1,4,4,9,10,12,16 1947:16,17,17,18,19 1947:22,25 1948:5,5 1948:8,8,14,15,24,24 1949:5,18,24 1950:5 1950:13,22 1951:2,4 1951:4,8,23,24 1952:2,2,12,14,14,15 1952:16,20,22,22 1953:4,9,10,15,18,25 1954:2,3,13,14,15,16 1954:19 1955:2 1956:25 1958:9,11,14 1959:7,8,13,19,21 1960:1,2,8,9,10,11,15 1960:19,21,23 1961:1 1961:10,16,22 1962:9 1962:10,18,22,22,23 1963:3,5,9 1964:1,12 1964:14,14,18,25 1965:3,4,10 <b>way</b> 1848:10 1862:10 1864:20 1870:11 1881:17 1886:5 1887:13 1896:4,11 1901:7 1902:5 1903:7 1905:5 1910:14 1911:2,9 1913:9,14 1916:16 1923:19 1926:17 1928:10 1929:5 1934:24 1939:13 1945:2,11,17 1949:24 1951:22 1952:7 1953:5,17 1954:17 1962:23</p>	<p>1963:12 <b>ways</b> 1872:1,2,7 1874:11 1929:8 <b>wbraunig@kvn.com</b> 1842:9 <b>We'll</b> 1882:1 <b>we're</b> 1849:14 1880:11 1883:24 1900:23 1902:1 1919:24 1927:25 1930:2 1932:2,21 1934:2 1965:8 <b>we've</b> 1870:19 1964:16 <b>Wednesday</b> 1841:18 1845:2 1956:2 <b>week</b> 1937:2 1964:16 1968:24 <b>weekly</b> 1937:13 <b>weeks</b> 1888:23 1969:5 <b>weight</b> 1942:17 <b>went</b> 1852:6 1879:15 1886:22 1893:19 1896:4 1898:10 1916:16 1926:17 1927:3 1928:4,10 1943:6 1962:19 1964:8 1969:5 <b>weren't</b> 1907:5 1910:25 1943:14,14 1961:11 <b>Western</b> 1954:10,16,22 <b>Weymouth</b> 1937:17,22 <b>whatsoever</b> 1933:8 <b>whims</b> 1939:21,22 1940:7,7 1943:23 1944:2 <b>Whoa</b> 1921:25 <b>wholesale</b> 1871:13 1872:17 <b>wholesaler</b> 1875:18 1876:13,18 <b>winding</b> 1864:20 <b>wish</b> 1970:2 <b>wished</b> 1881:23 <b>withdrawals</b> 1950:3,7 <b>withdrawn</b> 1950:16 <b>witness</b> 1845:7,10 1846:1 1855:14 1859:17,20,23 1872:7 1881:15 1882:3,12 1887:14 1889:14 1890:12,13 1901:4 1902:9 1903:16 1904:10 1906:1,4 1907:7 1908:21 1911:20 1912:22 1913:20 1915:9 1920:21 1923:20 1951:15 1961:12</p>	<p>1971:17 <b>witnesses</b> 1843:2 1892:5 1956:8 <b>Woodcock</b> 1843:4 1844:12 1859:13,16 1859:24 1860:6 1866:22 1880:14 1889:20,21 1892:9 1893:23 1904:22 1927:2 1941:20,25 1948:20 1968:22 <b>wording</b> 1934:20 1944:11 1953:24 <b>words</b> 1893:6 <b>work</b> 1853:20,21 1865:13,13 1951:22 1967:22 1968:18 <b>working</b> 1856:5,6 1858:25 <b>works</b> 1861:2 1862:25 1863:3,19,22,24 1864:8 1894:16 <b>world</b> 1863:8 1871:20 1927:8 1952:6 <b>WORLDWIDE</b> 1841:23 <b>wouldn't</b> 1908:18 1918:6 1920:3 1937:3 1938:11 1939:22 1943:4 <b>writing</b> 1968:16 <b>written</b> 1864:23 <b>wrong</b> 1890:16 1891:2 1891:3,11 1911:6,7 1912:14 1931:8 1953:19 1969:20 <b>wrote</b> 1896:17 1897:13 1919:20</p>	<p>1916:1 1917:7 1921:11 1932:2 1939:6,12,20 <b>Yesterday</b> 1850:11</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zero</b> 1874:8 1896:23 1914:8 1927:19</p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 1841:12,12 <b>1-10</b> 1841:13 <b>1-12th</b> 1947:15 1949:25 1952:3 1953:10 <b>1.2</b> 1936:5 <b>1:30</b> 1956:3 <b>10</b> 1841:12 <b>10,000</b> 1951:6 <b>10:30</b> 1967:20 <b>100</b> 1865:5,7 1912:17 1912:23 1913:3 1914:1,2 1919:24 1929:20 1937:16 1938:18 1958:10 1960:14 1961:1 1965:9 1969:22,23 <b>100,000</b> 1936:4 <b>1059</b> 1891:21 1892:25 <b>1067</b> 1892:25 <b>1068</b> 1891:21 <b>10th</b> 1842:15 <b>11</b> 1850:13 1854:7,20 <b>110</b> 1850:14 <b>1126</b> 1937:9,11 <b>1143</b> 1844:14 1956:24 1957:4,5 <b>1152</b> 1844:15 1957:15 1957:17,18 <b>1153</b> 1956:14,21,23 <b>1165</b> 1844:16 1957:22 1959:2 1965:22 <b>1166</b> 1844:17 1959:1 1962:12 1965:22 <b>1167</b> 1844:18 1957:22 1959:1 1965:23 <b>1190</b> 1850:14 <b>12</b> 1849:24 1851:14 1854:7,20 1857:10 1891:19 1898:4 1917:20,21,23 1929:7 1929:8 1947:9,12 <b>12.4</b> 1851:12,15 <b>12.4(c)</b> 1927:3 <b>12/20/01</b> 1844:17 <b>123</b> 1844:12 1865:9</p>
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1866:1,7,19,21 1896:17 128 1902:15 13,000 1951:3 136 1959:25 1960:4 1961:23 14 1845:21 142 1891:19 145 1891:19 146 1891:20 1486 1887:19 15 1849:21,23 1874:10 15,000 1952:15,19 1953:17 1568 1958:3 1964:23 16 1920:8 17 1919:23 171 1888:3 1841 1841:13 1845 1843:3 1848 1843:3 1849 1844:3,3,4,4 1855 1844:8 1856 1844:8,9,9 1857 1844:10 1858 1844:10 1859 1843:4 1865 1844:12 1866 1844:12 188 1928:6 19 1856:13 1908:9 1920:8 1964:23 1904 1843:4 1931 1848:8 1941 1843:4 1948 1843:4 1954 1843:4 1956 1844:14 1957 1844:13,15,15,16 1844:17,18 1970 1843:6,7 1971 1841:13 1990s 1921:3 1993 1891:19 1998 1959:1,18,20 1960:12 1963:12,14 1999 1959:2 1960:17 1961:3 1963:15	2002 1891:21 2003 1904:4,13 1914:12 1932:10,12 1932:15,20 1943:14 1943:14 1959:3,14 1963:13 2004 1932:18 2009 1888:4 2010 1850:21,24 1851:1,4 1854:6,9,14 1854:18,24,25 1855:19 1856:6,7,8 1856:13 1857:23 1858:8 1927:9,23,25 1928:8 2010-00207563 1856:11 2010-00373724 1855:7 2010-11 1850:20 2011 1845:21 1850:23 1854:13 1856:4 1857:10 1909:13 1912:2 1915:1 1925:18 2011-2012 1854:11 2012 1841:12 1850:23 1854:13 1897:22 2013 1841:12 1866:16 1887:20 1937:14,20 1937:21 2014 1841:12 1909:13 1912:3 1915:2 1925:18 1939:13,17 2015 1841:18 1845:2 1889:19 1893:22,24 1927:25 1956:2 1971:18 2034.310 1886:20 1890:11 1894:4 213.217.6000 1842:19 213.443.3000 1842:16 214 1887:19 21st 1969:6 22 1966:9 1968:2 1969:2 1970:6 224 1908:8 226 1892:22 23 1908:9 24 1896:17 1897:13 25 1896:23 1897:21 259 1919:23 26 1870:18,24 1871:1,6 1871:12 1874:24 1875:5 1876:19 1884:18,25 1885:25 1905:4 1908:5 1939:3 1939:4 1941:7 1948:9 262 1922:21	27 1855:19 28 1866:16 29 1841:18 1845:2 1956:2	1858:2,3 522-7096 1841:25
		<b>3</b>	<b>6</b>
		3 1892:2 3/5/98 1844:18 300 1923:11 304 1841:4 1845:4 30th 1971:17 3374 1841:20 1971:8 1971:23 35,000 1953:19 37 1937:23 37-and-a-half 1970:5 39 1937:17 3rd 1841:24	6/12/09 1844:3 60-40 1938:17 63 1937:22 633 1842:6 68 1892:25
		<b>4</b>	<b>7</b>
		4 1966:15 4:00 1967:24 40 1900:16 1903:18,20 1903:25 1931:16,17 1932:2,5 1936:23 1970:3 401 1892:23 415 1841:25 415.391.5400 1842:7 478 1849:19,21,22,23 1850:4,5 487 1844:3 487-A 1849:7,8,17 1859:6 487A 1844:4 488-A 1849:8,17 1859:6 488A 1844:5 489-A 1849:8,17 1859:6,7 489A 1844:6 490-A 1849:7,8,18 1859:7 490A 1844:7	7 1852:2 1853:11 1857:23 1858:21 1968:18 7.5 1857:3 7/19/10 1844:9 7/7/10 1844:10 70 1969:20 700 1842:18 701 1841:24 772 1888:4 780 1888:4 7th 1968:14
		<b>5</b>	<b>8</b>
		5 1967:14,25 1968:1 5/7/10 1844:8 50 1865:5,7 50-50 1911:4 50,000 1951:7 1952:11 1953:15,16 500 1861:13 1961:24 518 1855:7,8 519 1844:8 1855:13,16 1855:18 1856:1,2,10 520 1844:9 1856:18,19 521 1844:10 1857:22	8:30 1967:18 80 1937:15 1969:20 80,000 1951:7 800 1841:25 8000 1951:5 85 1862:6 865 1842:15 884 1844:13 1957:6,12 1957:13
			<b>9</b>
2 1852:22 1889:18,19 1937:20 2:00 1967:24,25 1968:1 20 1862:15 1872:11 1886:22 1887:15 1937:21 2001 1959:2,19 1961:2 1963:15			9/3/99 1844:16 9:00 1845:3 90 1852:1,2,14,20 1853:7 1938:20 90-A 1850:19 1851:3 1852:8,18,21 1853:12 9000 1951:6 90012 1842:19 90017-2543 1842:15 93 1891:20 1892:24 94111 1841:24 953 1854:4,4 981-3498 1841:25

<p style="text-align: center;">SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF SAN FRANCISCO BEFORE THE HONORABLE CURTIS E. A. KARNOW DEPARTMENT 304</p> <p>SAN DIEGO WATER AUTHORITY, ) ) Petitioner and Plaintiff, ) ) vs. ) No. CPF-10-510830 ) No. CPF-12-512466</p> <p>METROPOLITAN WATER DISTRICT OF ) SOUTHERN CALIFORNIA; ALL ) PERSONS INTERESTED IN THE ) VALIDITY OF THE RATES ADOPTED BY ) VOLUME XIII THE METROPOLITAN WATER DISTRICT ) OF SOUTHERN CALIFORNIA ON APRIL ) 10, 2012 TO BE EFFECTIVE JANUARY ) 1, 2013 AND JANUARY 1, 2014, and ) DOES 1-10, ) ) Pages 1972 - 2058 Respondents and Defendants. )</p> <hr/> <p style="text-align: center;">REPORTER'S TRANSCRIPT OF PROCEEDINGS San Francisco Superior San Francisco, California Friday, June 5, 2015</p> <p>Reported By: TARA SANDFORD, RPR, CSR #3374</p> <hr/> <p style="text-align: center;">JAN BROWN &amp; ASSOCIATES WORLDWIDE DEPOSITION &amp; VIDEOGRAPHY SERVICES 701 Battery Street, 3rd Floor, San Francisco, CA 94111 (800) 522-7096 or (415) 981-3498</p> <p style="text-align: right;">1972</p>	<p style="text-align: center;">INDEX</p> <p style="text-align: center;">Friday, June 5, 2015 (Dept. 304, Judge Karnow) Volume XIII (Pages 1972 through 2058)</p> <p>CLOSING ARGUMENTS: <span style="float: right;">PAGE</span></p> <p>BY MR. KEKER <span style="float: right;">1976</span></p> <p>BY MR. QUINN <span style="float: right;">2010</span></p> <p>BY MR. KEKER <span style="float: right;">2049</span></p> <p>BY MR. QUINN <span style="float: right;">2055</span></p> <p style="text-align: right;">1974</p>
<p>1 APPEARANCES</p> <p>2 For Petitioner and Plaintiff:</p> <p>3 KEKER &amp; VAN NEST</p> <p>4 BY: JOHN KEKER, ESQ.</p> <p>5 BY: DAN PURCELL, ESQ.</p> <p>6 BY: AUDREY HADLOCK, ESQ.</p> <p>7 BY: WARREN A. BRAUNIG, ESQ.</p> <p>8 BY: NICHOLAS S. GOLDBERG, ESQ.</p> <p>9 633 Battery Street</p> <p>10 San Francisco, California</p> <p>11 415.391.5400</p> <p>12 ahadlock@kvn.com</p> <p>13 dpurcell@kvn.com</p> <p>14 jkeker@kvn.com</p> <p>15 wbraunig@kvn.com</p> <p>16 ngoldberg@kvn.com</p> <p>17 For Respondent and Defendant Metropolitan Water District</p> <p>18 of Southern California:</p> <p>19 QUINN EMANUEL URQUHART &amp; SULLIVAN</p> <p>20 BY: JOHN B. QUINN, ESQ.</p> <p>21 BY: ERIC EMANUEL, ESQ.</p> <p>22 BY: GARY GANS, ESQ.</p> <p>23 865 South Figueroa Street, 10th Floor</p> <p>24 Los Angeles, California 90017-2543</p> <p>25 213.443.3000</p> <p>johnquinn@quinnemanuel.com</p> <p>and</p> <p>OFFICE OF THE GENERAL COUNSEL</p> <p>BY: HEATHER BEATTY, ESQ.</p> <p>BY: MARCIA SCULLY, ESQ.</p> <p>700 North Alameda Street</p> <p>Los Angeles, California 90012</p> <p>213.217.6000</p> <p style="text-align: right;">1973</p>	<p>1 San Francisco, California</p> <p>2 Friday, June 5, 2015</p> <p>3 2:05 p.m.</p> <p>4</p> <p>5 THE COURT: Good afternoon. Just one or two</p> <p>6 words before we get started. I have an electronic</p> <p>7 version of San Diego County Water Authority's brief and</p> <p>8 I also would like one from Metropolitan, if you would.</p> <p>9 Any kind of electronic.</p> <p>10 MR. QUINN: Will do.</p> <p>11 THE COURT: Something that is editable so I can</p> <p>12 shamelessly steal from whatever brief I think will be</p> <p>13 useful.</p> <p>14 With respect to Met's motion for partial</p> <p>15 judgment, that is subsumed in the talk we are going to</p> <p>16 have today and the general merits of the case. It is my</p> <p>17 current plan, unless you think I should do something</p> <p>18 otherwise, to fold my discussion of that into the</p> <p>19 proposed statement of decision that will come out of</p> <p>20 today's hearing.</p> <p>21 With respect to timing, I will try to get out a</p> <p>22 proposed statement within two weeks, but I may not make</p> <p>23 it. If I don't -- I am leaving on a trip -- it won't be</p> <p>24 until mid-July until the proposed statement and</p> <p>25 tentative decision come out.</p> <p style="text-align: right;">1975</p>

1 When it does come out, we will have time for  
 2 written objections, and that will be followed by a final  
 3 statement of decision.  
 4 Why don't I turn it first over to San Diego and  
 5 we can turn it over to Met.  
 6 MR. KEKER: You have asked several questions of  
 7 San Diego, and I intend to answer them, and believe my  
 8 answers will also be comments on questions to them.  
 9 So I am going to start there and not go to any  
 10 of your tentative rulings. If that comes up later,  
 11 we'll do it. We have a lot to say about your questions.  
 12 The first question was, as far as we know,  
 13 might there be a lawful rate that generates zero  
 14 damages? And our answer to that is an unqualified no,  
 15 that you cannot.  
 16 You found in Phase I that you cannot put  
 17 100 percent of State Water Project costs and water  
 18 stewardship rate costs in a lawful wheeling rate to  
 19 charge. There simply is no evidence and no imaginable  
 20 evidence before you -- it is pure speculation -- about a  
 21 rate structure that would be based on lawful cost  
 22 causation that could include some substantial or all of  
 23 the State Water Project costs or the water stewardship  
 24 costs.  
 25 It's a -- I think I understand where the

1976

1 question is coming from, and it may have come from  
 2 questioning of Mr. Cushman which was cited in their  
 3 brief.  
 4 I want to put up what Mr. Cushman actually said  
 5 when it was cleared up. Before we do that, you will  
 6 recall, I'm sure, that everybody agreed that figuring  
 7 out what a rate structure would be, a lawful rate  
 8 structure, other than the one that you were adjudicating  
 9 in Phase I, was an effort of pure speculation.  
 10 Mr. Woodcock said 12 people would come up with 12  
 11 answers. Met in their brief said you can't do it; you  
 12 don't have the authority to do it; none of us had done  
 13 it. And there is no evidence of what it might be.  
 14 THE COURT: The question, then, is whose  
 15 problem is that? Met's position is that's really your  
 16 problem. Your position is that that's Met's problem.  
 17 Let's say the issue is, is there a lawful rate  
 18 that generates 25 cents in damages. Maybe not zero.  
 19 You're right, because there is something about the rates  
 20 that were previously set that have to be reduced. But  
 21 how do I know where the rate should be from your -- on  
 22 the spectrum of your position, what the damages should  
 23 be with respect to your position, which was 100 percent  
 24 of all of those items that were put into the rate  
 25 structure, versus, perhaps, some other position, which

1977

1 would be there is a tiny fraction of them that were  
 2 inappropriately put on.  
 3 MR. KEKER: You look in the record to see if  
 4 there's any evidence of nonspeculative damage proof that  
 5 has been presented. I will get to that in a second.  
 6 Our position is that is Mr. Denham's analysis.  
 7 Mr. Denham took your Phase I position, and you said  
 8 certain rates were illegal, and he figured out if those  
 9 rates were illegal and hadn't been charged, what the  
 10 damages would be.  
 11 I will get to that in a second. But then you  
 12 reminded -- and we said -- we said over and over again,  
 13 we say what the damages are and if somebody thinks that  
 14 there is some offset or there's some amount of money  
 15 that should cause those damages to be reduced because of  
 16 some other payment, that that burden is on the -- is on  
 17 Met. We have said that. They have never responded to  
 18 it.  
 19 You have reminded them in your CMC order which  
 20 was November of 2014. Ben, can we put that up?  
 21 Before the trial, citing the Meister case, you  
 22 said even if damages are difficult to determine, a trial  
 23 court, nevertheless, should attempt to do it if there is  
 24 liability. See Meister versus Mensinger. We have cited  
 25 and talked to you in the brief about Meister. I will

1978

1 remind you, somewhere around 396 or 397. For the fact  
 2 the damages is certain, the amount of damages need not  
 3 be calculated with absolutely certainty. The law  
 4 requires only some reasonable computation of damages be  
 5 used. The damages may be computed even if the result  
 6 reached is an approximation. This is especially true  
 7 where it is the wrongful acts of the Defendant that have  
 8 caused the damages. We believe that is precisely the  
 9 situation here. There is a dispute about what the  
 10 contract amount was. You decided that the contract  
 11 amount included the charges were too rich.  
 12 We have shown in a nonspeculative way --  
 13 remember, Mr. Woodcock said Denham's math is right. So  
 14 a nonspeculative way. If you took State water costs out  
 15 and water stewardship rates costs out, what it would be.  
 16 Then you have to turn to Met for them to say,  
 17 no, that's too much because the number should be  
 18 something else. They put a big emphasis on the fact  
 19 that you said -- you didn't say zero. You said not  
 20 100 percent. We say the only thing that is in this  
 21 record is what 100 percent of the charges for system  
 22 access rate, system power rate attributable to the State  
 23 Water Project costs are. And the only other thing  
 24 that's in the record is what the water stewardship rate  
 25 costs actually are.

1979

1 I will get to that in a minute because you have  
 2 another question that is related to this.  
 3 Basically, this burden argument we think is  
 4 done. They never responded to it. The only thing they  
 5 cited from Meister is the proposition in business cases  
 6 damages are based on net profits, not gross revenues.  
 7 This isn't a business case. Even if it were, it  
 8 detracts from the Court's fundamental point that once a  
 9 plaintiff has offered reasonable proof that there were  
 10 damages, which is what your finding is, we believe the  
 11 burden of proving those damages -- of reducing those  
 12 damages should be resting on the Defendant.  
 13 They said, quote, where it is clear a defendant  
 14 has been at fault and has caused some part of the  
 15 plaintiff's damages, the burden of proof should rest on  
 16 him to show the extent of his contribution and if he  
 17 cannot sustain it, he should be liable for the entire  
 18 loss.  
 19 Mr. Denham brought you what the numbers would  
 20 be. And I emphasize, I will go back -- before I get to  
 21 the numbers, so Meister is the case that we rely on.  
 22 When you get to the unjust enrichment part of Meister,  
 23 it's just -- it's just added to. "In measuring the  
 24 amount" --  
 25 "In measuring the amount of Defendant's unjust

1980

1 enrichment, the Plaintiff may present evidence of total  
 2 or gross amount of the benefit or the reasonable  
 3 approximation thereof, and the Defendant may present  
 4 evidence of cost, expenses and other deductions to show  
 5 the actual or net benefit the Defendant received. The  
 6 party seeking disgorgement has the burden of producing  
 7 evidence, at least a reasonable approximation of the  
 8 amount. Wrongful gain and the residual risk of the  
 9 uncertainty in calculating net profit is assigned to the  
 10 wrongdoer."  
 11 We cited cases dealing with overcharge rates.  
 12 The MCI case is the most important. I am not going to  
 13 read it to you. But at 1414 and 1415 of the MCI case,  
 14 this point is made in spades about once you have  
 15 established that the rate is unlawful, if somebody wants  
 16 to reduce the full amount of that as the measure of  
 17 damages, the burden is on them to do it. And I don't  
 18 need to remind the Court, despite many opportunities and  
 19 despite what we anticipated they would do, they never  
 20 presented any evidence of what a reasonable reduction  
 21 would have been.  
 22 THE COURT: Well, they presented a way of  
 23 approaching it, which is to wait until they do so, until  
 24 they come up with a lawful rate, and then come back and  
 25 figure it out at that point.

1981

1 MR. KEKER: That's not a reasonable -- our  
 2 position is that's not a reasonable way of approaching  
 3 it. In fact, it is absurd, given 12.4(c) of the  
 4 agreement. 12.4(c) of the agreement said if there's a  
 5 dispute, we are going to set aside money and put it in  
 6 an escrow account. And at the end of the day -- I know  
 7 we made a motion and you said that's not the measure of  
 8 damages. But it's a pot of money that is sitting there.  
 9 When the fight is over, who -- and damages are  
 10 determined, you go to the escrow account and say give  
 11 me, give me the money. You don't wait until they decide  
 12 rates.  
 13 Actually, the absurdity of that position, the  
 14 unlawfulness of that position, were you to decide a rate  
 15 and say, for example, well, this could have -- these  
 16 charges could have been put on the supply rate. Supply  
 17 rate would have gone up. And I will explain that later  
 18 about Mr. Cushman. That's the 15 percent reduction. If  
 19 they had all been on the supply rate, then everybody  
 20 would have paid more for the supply rate, and San Diego  
 21 would have paid a higher supply rate. And according to  
 22 Mr. Denham's calculations that Mr. Cushman testified  
 23 about would be -- that 188 million would be reduced by  
 24 about 15 percent.  
 25 The problem with that is they can't set rates

1982

1 that aren't applicable to everybody. Nobody else is  
 2 going to pay a 15 percent greater supply rate.  
 3 What they're asking you to do is decide that  
 4 San Diego, and only San Diego, should pay some rate for  
 5 something that nobody else is paying. That is unlawful  
 6 under the exchange agreement. It is unlawful, we  
 7 believe, under the Met act. Just plain unlawful.  
 8 That's why the contract was shaped the way it  
 9 was.  
 10 We have a contract. We have a price. We  
 11 recognize it may be a dispute about whether or not the  
 12 price meets applicable law. There is a way of dealing  
 13 with it. We set aside the money while we fight about  
 14 it. The judge decides. The Court of Appeals decides,  
 15 whatever. And that escrow account takes care of it.  
 16 That way nobody gets charged different rates. That's  
 17 it. This is just part of Met's operating expenses.  
 18 They have an escrow account which pays damages.  
 19 So this idea that you wait -- it makes no  
 20 sense. What are they going to do? They are in the  
 21 future going to say, now that we've lost to San Diego,  
 22 we would have charged in 2011 through 2015 some rate  
 23 that nobody -- we are not going to charge anybody else  
 24 that rate but that is what we would have done, approve  
 25 it, stamp it, and now we are going to mitigate our

1983

<p>1 damages that way. Wrong. We don't think they can do 2 it, and it makes no sense.</p> <p>3 THE COURT: You think they can't do it not only 4 with respect to San Diego but all the other members of 5 Met, you don't think they can go back and redo all these 6 numbers for everybody going backwards in time? Just 7 reset the rates?</p> <p>8 MR. KEKER: I don't think -- that doesn't -- 9 No, I don't think they can. Their obligation, 10 as they've told you many times, is to meet their costs.</p> <p>11 So when they are setting rates for 2016, if 12 they have some obligation from the past, they have some 13 unexpected costs they have to pay, then build that into 14 the rates. That is part of what you do when you set 15 rates for the future.</p> <p>16 Here it doesn't work like that, thanks to 17 12.4(c). People anticipated it and set this up and the 18 money is already set aside. It's in the system. And 19 they pay what they pay and 2016 takes care of itself.</p> <p>20 So that's our answer to zero.</p> <p>21 The second question is do we agree that some 22 portion of the system access rate, system power rate or 23 water stewardship rate are attributable to 24 transportation or otherwise a proper basis to charge San 25 Diego for exchange water. And then your subset, does a</p> <p style="text-align: right;">1984</p>	<p>1 what he did, he took that out, not in their entirety but 2 only the State Water Project costs.</p> <p>3 And our answer to that, of course, is yes. I 4 remind you that Mr. Woodcock says there is no question 5 about the math involved. And our answer to your 6 question, does this come from a fair reading of your 7 prior opinion, and we believe it does.</p> <p>8 Their entire theory seems to be that because 9 exchange water is blended, then we get to charge the 10 State Water Project costs in some measure. You have 11 dealt with that. You dealt with that the first time 12 around, the Phase I decision.</p> <p>13 Can we see statement of decision, page 53? 14 Walk through it, the top.</p> <p>15 You found Met's contract with the State makes 16 clear that they don't own or operate, and your 17 conclusion was no reasonable basis appears in the record 18 as to why this has changed. What has changed is they 19 used to charge this to supply and now they are charging 20 it to transportation.</p> <p>21 The only thing I would quibble with is there's 22 no reasonable basis, but the basis in the record is 23 pretty clear. San Diego wanting to wheel water. That 24 is why they changed it.</p> <p>25 And this was confirmed, and then it goes on to</p> <p style="text-align: right;">1986</p>
<p>1 fair reading of my opinion make that clear or not?</p> <p>2 Again, our answer is no. Assuming what the 3 Court is talking about when you talk about the system 4 access rate and the system power rate is only the State 5 Water Project costs. If we could put up PTX 512. You 6 will remember Mr. Denham's chart. It shows how he got 7 to the 188 million.</p> <p>8 What San Diego is not seeking damages for is 9 that \$100 million down at the bottom. There is a system 10 access rate. Take the State Water Project charges out 11 of the system access rate, the same with the system 12 power rate. What remains is a properly paid -- we 13 could, I suppose, if we wanted to go wild, say we should 14 be able to get all of the system access rate or all the 15 system power rate because they haven't proved anything 16 different.</p> <p>17 We didn't do that. The reasonable position was 18 why did you say it was illegal, and we took out the 19 parts of it that were the reason you said it was illegal 20 and aren't challenging that \$100 million.</p> <p>21 So the question here is whether or not it was 22 proper for Denham to remove the State Water Project 23 costs from the system access rate. I am talking about 24 State Water Project now. I will get to water 25 stewardship. Whether the SAR and the SPR, and that's</p> <p style="text-align: right;">1985</p>	<p>1 say you found that the SWP costs are the State's 2 transportation costs, not Met's. And you noted that the 3 record doesn't establish that State Water Project is 4 necessary for wheeling at all. It is not necessary for 5 wheeling at all nor does it matter whether Met delivers 6 a blend of water to wheelers. The blend might be useful 7 but as to wheelers, the benefit is gratuitous and not 8 required by wheeling agreements.</p> <p>9 There was a footnote about salinity. Their 10 argument was much broader than that. You heard from the 11 stand here and you heard in the first phase the evidence 12 that supports your opinion. This business about 13 blending is purely Met's convenience.</p> <p>14 And it was confirmed by Mr. Woodcock, who 15 testified that the foundation of proper ratemaking is 16 cost causation, but that the exchange agreement does not 17 cause Met to incur any additional State Water Project 18 costs. And that's at page 1933, one through ten.</p> <p>19 And then you've got your dispositive finding in 20 Phase I which Met completely ignores in their brief. 21 Nor does it matter that Met delivers a blend of water to 22 wheelers and so on.</p> <p>23 We put it up, so I won't do it again.</p> <p>24 Their damages theory on blending and some 25 alternative as something that matters is almost -- they</p> <p style="text-align: right;">1987</p>

<p>1 just completely ignored the statement of decision. And                  2 we believe the statement of decision was right and                  3 shouldn't be changed. They are not even arguing it                  4 should be changed. They just ignore it.                  5 The only aspect of the Phase I decision they                  6 seem to recognize in their brief is this 100 percent                  7 business, that the Court didn't find -- you said                  8 100 percent can't be charged, but you didn't say some                  9 other percent couldn't be charged. But they can't avoid                  10 mentioning in that very sentence in their brief, which                  11 is on page 12, that the percentage they could lawfully                  12 charge is certainly not 100 percent and all of their                  13 arguments are that, that just forget everything that you                  14 found because -- and treat it as though 100 percent was                  15 properly charged. And their burden is to show that some                  16 different number was proper.                  17 So unless there are questions about the State                  18 Water Project resources -- State Water Project part of                  19 that second question, I am going to turn to the water                  20 stewardship rate.                  21 Again, they don't make any effort to establish                  22 that it could charge any amount other than 100 percent,                  23 but they do admit they can't charge 100 percent, which                  24 is what they did.                  25 They argue that the causal and beneficial</p> <p style="text-align: right;">1988</p>	<p>1 any money on demand management.                  2 Let's put Mr. Upadhyah's testimony on the                  3 screen. You will remember him from both Phase I and                  4 Phase II. Page 1428, line 25, to 1429, line seven,                  5 Mr. Upadhyah was asked:                  6 "Q When a member agency                  7 chooses to wheel water, that                  8 fact, the wheeling, doesn't                  9 cause Met to need to spend more                  10 money on demand management                  11 programs, does it?                  12 He clarify the question:                  13 "A Does the wheeling itself                  14 cause Metropolitan to spend                  15 more money on demand                  16 management?                  17 "Q That's right.                  18 "A I don't think so."                  19 And back to the statement of decision at the                  20 bottom of page 60, top of 61. "It is worth noting here                  21 that the wheelers secure their benefits only when there                  22 is unused capacity in the extant transportation system."                  23 THE COURT: That's not the case under the                  24 exchange agreement; right?                  25 MR. KEKER: Except our position is the exchange</p> <p style="text-align: right;">1990</p>
<p>1 effect of reducing demand from the downstream member                  2 agency is in the infrastructure. That is at their                  3 brief, 12 and 13. But you've already rejected that                  4 argument.                  5 We see the statement of decision at 61. "The                  6 cost of wheeling, while properly a function of                  7 system-wide costs associated with transportation as                  8 such, should not be a function of system-wide avoided                  9 costs of transporting purchased water."                  10 There is a lot of discussion in Phase I about                  11 that, and that is the decision you reached. The entire                  12 section of 58 to 61 of the statement of the decision                  13 contradicts the argument that Met is making.                  14 I would like to focus on this last sentence                  15 which says, "The cost of wheeling should not be a                  16 function of system-wide avoided costs." In other words,                  17 Metropolitan water.                  18 Met ignores this crucial point and continues to                  19 argue that if it didn't invest in local supplies, quote,                  20 it would have to enlarge the transportation system,                  21 closed quote.                  22 But they never attempted any causal nexus                  23 between the water stewardship rate and the cost of                  24 wheeling non-Met water. And now Met's own witnesses                  25 have admitted that wheeling does not cause Met to spend</p> <p style="text-align: right;">1989</p>	<p>1 agreement, when it talks about a lawful rate for the                  2 conveyance of water applicable to all members and the                  3 testimony, is that's the wheeling rate. They are trying                  4 to figure out what the wheeling rate is.                  5 THE COURT: I am just suggesting, there is a                  6 jump between moving from that particular sentence to                  7 suggesting that that logic applies to the exchange                  8 agreement. Because, for example, under the exchange                  9 agreement, whether there's unused capacity or not may                  10 not matter. They still are their obligation to deliver                  11 you the exchange water.                  12 MR. KEKER: We agree. And our position has                  13 always been, and I think the evidence has uniformly                  14 been, when they were negotiating the price term, the                  15 reference to prices applicable under State law and                  16 applicable to the conveyance of water and equivalent for                  17 all member agencies, that was understood by everybody                  18 to be a wheeling rate. So the exchange agreement, whether                  19 it is a wheeling agreement or not, set as its price a                  20 reference outside of it, which is the lawful wheeling                  21 rate. And that's the way we are supposed to measure it.                  22 I understand the jump, but we think the jump is                  23 pretty easy, and the evidence supports that connection.                  24 So we think that Mr. Upadhyah's admission                  25 really should be the end of this water stewardship rate</p> <p style="text-align: right;">1991</p>

1 discussion. He's admitted that there's no cost  
 2 causation basis for charging any part of the water  
 3 stewardship in the exchange agreement price. I will  
 4 remind the Court you also mentioned in the statement of  
 5 decision that Mr. Raftelis, in a throw-away line  
 6 someplace in the history of this, had mentioned maybe  
 7 you could divide it 50-50 between supply and  
 8 transportation. But you mentioned in the statement of  
 9 decision, and it was absolutely right, he was just  
 10 talking. It was speculation. There was no basis.  
 11 And we know from the evidence at no point did  
 12 Met do the work that would be required to make some kind  
 13 of reasoned connection. You look at a project or you  
 14 look at projects in gross, and you would say this much  
 15 goes this way and this much goes that way. It is just  
 16 completely not in the record.  
 17 So we believe that given this admission by  
 18 Upadhyah and the evidence, that was completely proper  
 19 for Mr. Denham to remove all of it.  
 20 Again, we go back to whose burden it is. We  
 21 look at the decision. The water stewardship rate is  
 22 illegal as charged. We say how much it is and take it  
 23 out of the rates. And if they have -- if they want to  
 24 make something and say we could have done something  
 25 different or something else makes sense or something

1992

1 else is not speculative or whatever, something else  
 2 should be set, that was their burden and they didn't  
 3 meet it.  
 4 THE COURT: It all depends on how you phrase  
 5 it. I think Met's position is you are the Plaintiff and  
 6 you have to prove what a lawful rate was. And if you  
 7 don't, then you haven't established your damages.  
 8 MR. KEKER: Okay. If that's their position,  
 9 then I think they are really, really, really wrong  
 10 because they said it is absolutely impossible -- we go  
 11 back to Meister. It is impossible to prove what a  
 12 lawful rate was because, A, it's speculation; B,  
 13 according to their expert, ten different people would  
 14 come up with a different lawful rate and, C, it is  
 15 something the Court has no jurisdiction in deciding or  
 16 doing. So their position is that it cannot be done --  
 17 THE COURT: That may be true, and I will be  
 18 asking them when they get up to talk. Their position  
 19 seems to be, at least in the brief, that until and  
 20 unless you've established what the lawful rate is,  
 21 something which previously as you and I know they had  
 22 talked about doing themselves, perhaps, at the last  
 23 hearing, their position today, as I understand it, is  
 24 unless and until you have done that, you haven't  
 25 established damages.

1993

1 MR. KEKER: And our position is that we read  
 2 your decision. We learned what rates we had been  
 3 charged were unlawful. There is the fact of damages we  
 4 believe the decision has established.  
 5 The Meister case says it's not capable of exact  
 6 measurement. Approximation is okay. The best  
 7 approximation we can do is take out the parts of the  
 8 rates that are illegal under your decision, and we took  
 9 out those rates and came up with \$188 million. And that  
 10 is a nonspeculative number. It is a number that can be  
 11 explained. We say they are damages.  
 12 If they say they are too gross damages and they  
 13 should be mitigated, reduced, offset, that's their  
 14 burden. This is something we have been talking about  
 15 from the beginning briefs all the way through. And they  
 16 never respond to it except maybe -- and for them --  
 17 Again, go back to that case management. For  
 18 them to stand up now and say it's our burden to prove  
 19 what the lawful rate is when they have been arguing from  
 20 the beginning that it is impossible for anybody in this  
 21 courtroom to know what a lawful rate is and it would be  
 22 beyond your jurisdiction to set one or to make a  
 23 decision based on one is wrong.  
 24 I just repeat, our briefs have been a broken  
 25 record on this point and they won't deal with it.

1994

1 THE COURT: The section, just so the record is  
 2 clear, I was talking about the bottom of Met's brief on  
 3 page three. And they chastise you for not showing and  
 4 never trying to prove you paid more than the amount of a  
 5 lawful charge. That's at least one place that issue  
 6 comes up.  
 7 MR. KEKER: I am going to get to -- there is  
 8 proof in the record about why this is a lawful rate.  
 9 Maybe I should just get to it now. Under your decision,  
 10 you could find easily that Denham's rate is a lawful  
 11 rate.  
 12 If they had charged -- given your rationale, if  
 13 they said we are looking at wheeling and we are not  
 14 going to put State Water Project costs in the wheeling  
 15 rate, we are not going to put water stewardship costs  
 16 into the wheeling rate, I don't think there's any  
 17 question that what Denham -- by taking those things out,  
 18 you would get a lawful wheeling rate.  
 19 I will show you in a minute that that's exactly  
 20 what happened when they were fighting about the wheeling  
 21 rate back in 1997. Maybe I will show you now. Put up  
 22 that Kennedy summary slide.  
 23 In 1997 these parties were fighting about what  
 24 a lawful wheeling rate should be. And they were in  
 25 court. And at some point the legislature grew

1995



1 frustrated and they passed AB 1082, which directed the  
 2 head of the water resources, Kennedy -- this is in our  
 3 brief -- to go out and figure it out. He said no cost  
 4 shifting. We want to figure out what the burdens and  
 5 benefits without cost shifting of a wheeling rate would  
 6 be.  
 7 Kennedy went out and he studied the situation.  
 8 He was supposed to account for costs but also for the  
 9 benefits up to net of San Diego bringing in water that  
 10 they didn't have to supply.  
 11 He came up and concluded that it was an  
 12 80-dollar an acre-foot was a lawful wheeling rate. That  
 13 became the basis. That became the basis for the 1998  
 14 exchange agreement, which you will recall started at 90.  
 15 There was a price term in it. There was a  
 16 price term in it. That is Exhibit 31 in the record,  
 17 Plaintiffs' Exhibit 31. We will start at 80, and here  
 18 it is going to ratchet up over the years as a lawful  
 19 wheeling rate in the original exchange agreement.  
 20 The evidence you have before you is when  
 21 Kennedy was ordered by the legislature to figure out a  
 22 fair and proper wheeling rate, he came up with \$80.  
 23 The 1998 exchange agreement in Exhibit 31,  
 24 which took that \$80 and played it out, has for the years  
 25 in question in this case a rate of 109 to 115 as a

1996

1 lawful wheeling rate. Mr. Denham's corrected exchange  
 2 price, the work that he did, is higher than that, 136 to  
 3 164. And the last line is what their actual rate is  
 4 charged.  
 5 So you do have evidence before you of what a  
 6 lawful wheeling rate would be. It is Denham's rate. It  
 7 is Kennedy's rate projected out. If you remember the  
 8 RMI report, in the RMI report option three came in at  
 9 \$100, if you just put the costs of actually doing the  
 10 transaction.  
 11 There is a lot of evidence in the record, your  
 12 Honor, of what a lawful wheeling rate would be.  
 13 And we didn't pay it. And so what we're saying  
 14 is our damages are the difference between what we were  
 15 charged and a lawful wheeling rate. Denham has been  
 16 conservative according to some of the evidence we could  
 17 put in about lawful wheeling rates.  
 18 THE COURT: You are suggesting the Kennedy  
 19 number acts as a cross-check on your expert's view of  
 20 what the damages ought to be?  
 21 MR. KEKER: Yes, sir. Yes. Absolutely, we're  
 22 saying that. He was assigned by the legislature to do  
 23 the job. No cost shifting. If you get into the details  
 24 of it, he was asked to try and figure out -- one of the  
 25 things he did was when -- if for some reason, there's

1997

1 unused capacity, so that's the legal rate, maybe. But  
 2 if there's -- if you are running water through when  
 3 there's not unused capacity, then they could charge you  
 4 the full rate but you have to give San Diego a credit  
 5 for the regional benefit. The regional benefit he  
 6 calculated was somewhere up around \$250 an acre-foot.  
 7 So Met could charge their big rate, but then they had to  
 8 give a 250 acre-foot credit, which worked out to sort of  
 9 the same thing.  
 10 In short, people who have gone through this --  
 11 the only evidence that this is not a way to think about  
 12 the wheeling rate is when June Skillman, which you heard  
 13 in the first trial, when June Skillman sent back the  
 14 report that Raftelis was doing, that was supposed to be  
 15 a cost-of-service study, and told him to put in the  
 16 State Water Project. That's the only evidence of any  
 17 other rate.  
 18 But there's more. The water stewardship rate  
 19 is, our position is, nothing but an unlawful tax, and  
 20 you ought to think about it that way. And not just by  
 21 virtue of the Court's ruling that it violates Prop 26.  
 22 It is a tax under any analysis.  
 23 Mr. Upadhyah testified that the water  
 24 stewardship rate collections go into Met's general  
 25 reserves. They are used as Met sees fit. And he

1998

1 admitted in both Phase I and Phase II that they don't  
 2 make any effort to establish a reasonable relationship  
 3 between the manner in which the water stewardship is  
 4 allocated and the benefit its agencies receive.  
 5 So we say it's a tax. And the other part of it  
 6 is that there's absolute failure on Met's part because  
 7 they intentionally deny San Diego anything like a  
 8 proportional benefit with the water stewardship rate.  
 9 That's in retaliation. That's the effect of the RSI  
 10 clause.  
 11 Can we see Plaintiffs' Exhibit 506?  
 12 You saw this before. Blow up the 54 million  
 13 number on the lower right.  
 14 This is the total. The testimony about this  
 15 was this was what San Diego is losing, its water  
 16 stewardship deficit, by not getting money because of the  
 17 RSI clause. It was \$54 million.  
 18 Compare that to what we're asking for in our  
 19 damage calculation, which is only \$28 million. 28- is  
 20 the amount of money that the water stewardship rate --  
 21 28 million is the amount of money that the water  
 22 stewardship rate contributes to the damages of  
 23 188 million.  
 24 If we look at PTX 471, down at the bottom,  
 25 that's where the 28- is. Our deficit of 54 million,

1999

1 instead of seeking that as a damage number, we are  
 2 seeking the far more conservative amount we paid, that  
 3 San Diego paid as a result of water stewardship rate  
 4 charges.  
 5 It's extremely conservative.  
 6 If you look at the refund cases that we cited  
 7 in our pre- and post-trial briefs, they all stand for  
 8 the proposition that an entity that imposes an illegal  
 9 tax can't shift the burden to the plaintiff to prove  
 10 that some part of the illegal tax could have been legal  
 11 or was legal after all or to prove a negative. If  
 12 defendant cannot prove that its tax was unlawful, the  
 13 plaintiff certainly isn't required to -- excuse me. If  
 14 the defendant can't prove that its tax was lawful, the  
 15 plaintiff isn't required to show what the lawful tax  
 16 would be and then measure the difference.  
 17 You just get the money back that you paid for  
 18 the illegal tax. That's the General Motors versus San  
 19 Francisco case; Modesto versus National Medical, which  
 20 are cited in our brief.  
 21 Another argument they make, which we think is  
 22 completely wrong -- and I addressed it a little bit --  
 23 is that the amounts that Denham calculated, other member  
 24 agencies would make up the shortfall. And as I said  
 25 before, you rejected that argument in Phase I. Met

2000

1 argued its full service customers would end up  
 2 subsidizing the cost of wheeling transaction but you  
 3 held in Phase I Met must, nevertheless, permit such  
 4 wheelings -- I can't remember that case now. It is down  
 5 in Carmel -- and can only charge costs by the charge of  
 6 wheeling. That is your decision, 55 through 58.  
 7 I have already mentioned that they don't have  
 8 to go to other member agencies. They have got 12.4  
 9 escrow to draw down. They have been planning for this.  
 10 THE COURT: The money comes from someplace.  
 11 I mean, if they win the case, it comes out of  
 12 escrow. I take it, it goes back. The fact that the  
 13 money has been put in escrow doesn't seem to me to be a  
 14 reason to think -- that alone doesn't tell me the money  
 15 isn't going to come out of the hide of all the other  
 16 member agencies in some way and the rates in some  
 17 fashion are going to have to be adjusted to accommodate.  
 18 MR. KEKER: Two questions: One is certainly  
 19 any expense that Met incurs is going to be paid for by  
 20 the member agencies as long as it is going to be  
 21 recovered in a legal rate structure. We get it. If  
 22 they lose a lawsuit and somebody slips and falls in the  
 23 front door, yes. If they lose a lawsuit, the member  
 24 agencies are going to pay.  
 25 How it is going to be adjusted in the future or

2001

1 how rates are going to be set in the future to take into  
 2 account your opinion is a completely different matter.  
 3 Your opinion is about a little limited -- not  
 4 your opinion. Your -- this damage calculation is about  
 5 a little limited four-year period. What the future is  
 6 going to be, as we've agreed, is all speculative. It is  
 7 going to be something. They will have to do something,  
 8 and so far they haven't paid much attention to your  
 9 opinion in setting rates for the future years.  
 10 If the Court of Appeals agrees, then I suppose  
 11 they will have to adjust their rates not to pay for the  
 12 past but just because that's what the law is, so that  
 13 people are charged a lawful rate, that doesn't undercut  
 14 our right to get damages for breach of contract is our  
 15 view.  
 16 So your question was, are the damages claimed  
 17 by San Diego overstated. And you can probably guess, we  
 18 say no.  
 19 And we think it's reinforced completely by a  
 20 comparison of the Kennedy analysis back then and the RMI  
 21 analysis and what the 1998 exchange agreement projected  
 22 were being charged during this period as a lawful  
 23 wheeling rate. We think, no, it's not overstated.  
 24 The next question was how should I use  
 25 Cushman's testimony that the State Water Project costs

2002

1 are moved off of -- if they were moved off of conveyance  
 2 and onto supply. It would reduce the damages by about  
 3 15 percent. Where does that 15 percent come from?  
 4 I think I addressed that. The testimony came  
 5 up on cross at 1063 of the transcript. It was in  
 6 Mr. Cushman's deposition. I don't know if it was  
 7 designated or not. What he said was that Mr. Denham  
 8 calculated what the supply rate would have been if these  
 9 costs, State Water Project and WSR costs that were  
 10 imposed on the exchange water had been not done that way  
 11 but, instead, had been included in the supply rate. The  
 12 supply rate would have gone up. Everybody would have  
 13 paid more, including San Diego. And if you take the  
 14 amount that San Diego would have paid as a result of  
 15 that analysis for supply, the increase, then the result  
 16 would be a number equal to 15 percent of what we're  
 17 asking for for damages. That's just a straight  
 18 calculation.  
 19 THE COURT: The supply costs would have been  
 20 incurred by San Diego and everybody else under or  
 21 pursuant to agreements that are not the exchange  
 22 agreement; right?  
 23 MR. KEKER: Correct.  
 24 THE COURT: It's a function of other contracts  
 25 that are out there.

2003

1 MR. KEKER: I don't know. It's a function of  
 2 what the -- remember, Met charges people. When you get  
 3 water from Met, you get a supply rate, a system access.  
 4 THE COURT: Right.  
 5 MR. KEKER: So the supply rate would have been  
 6 a little higher. System access rate would be whatever.  
 7 The other rates would be whatever.  
 8 But San Diego, according to Mr. Denham's  
 9 calculations, would have paid a higher supply rate with  
 10 everybody else.  
 11 THE COURT: I understand that. I am just  
 12 trying to make sure I am correct in my assumption that  
 13 the obligation to pay the supply rate in the way that  
 14 Mr. Cushman was talking about is a function not of any  
 15 obligation under the exchange agreement. It is a  
 16 function under obligation that comes from being a member  
 17 of Met, so on and so forth, preexisting, separate,  
 18 distinguishable, extraneous agreements.  
 19 MR. KEKER: Yes, sir. All true. Remember the  
 20 context. We have been anticipating all along  
 21 Mr. Denham, when asking him to do various calculations,  
 22 because San Diego's position before Met had been you  
 23 shouldn't be charging these costs to transportation.  
 24 They should be on supply.  
 25 And Met had always said, forget it, we're not

2004

1 doing that.  
 2 Mr. Denham said what if they had? What if they  
 3 agreed back when, then their supply rate would have been  
 4 different. How much different? It wasn't very hard to  
 5 calculate. What was it? Add these things in and divide  
 6 it by the amount of water they sold, and you get a  
 7 different supply rate which would be higher and San  
 8 Diego would have paid their share of it. The number,  
 9 the result -- it is 18 plus nine so -- 27 million,  
 10 something like that. They would have paid more, and  
 11 that would have reduced the damages by 27 million.  
 12 We don't think you ought to do that because of  
 13 all these arguments about speculation. And we don't  
 14 know how they would have adjusted the rates. There were  
 15 many things they could do. And the burden is on them to  
 16 show something about this and they never did.  
 17 We argued in our pre- and post-trial briefs to  
 18 award an offset based on increased supply rates couldn't  
 19 be done if no other member agency paid those rates.  
 20 This is pure speculation. To reduce our damages because  
 21 under some system that never happened and maybe never  
 22 would happen and so on, we might have paid more for  
 23 supply we think is wrong. And it violates -- not just  
 24 wrong but it violates Water Code Sections 109 through  
 25 134 which talks about a statutory requirement that rates

2005

1 be uniform for like classes of service throughout the  
 2 district.  
 3 So San Diego can't have its damages calculated  
 4 on a supply rate or reduced based on a supply rate that  
 5 nobody else paid.  
 6 And that's another reference to the MCI case,  
 7 the 59 F.3d at 1419. They talked about that, too. You  
 8 can't be charged for offsetting category of service at a  
 9 rate above or different from what others paid for that  
 10 service. It is inconsistent with statutory and  
 11 regulatory goals of preventing discrimination.  
 12 Because there's no proof of such a rate,  
 13 because they insisted that nobody could prove that,  
 14 nobody knows if that would have happened, there were so  
 15 many other ways to make up this difference and nobody  
 16 knows what they would do in the future, we think you  
 17 should disregard the 15 percent. You can take the 188-  
 18 and reduce it by 27-, if you found evidence in the  
 19 record that made that less speculative than what we say  
 20 is nonspeculative, which is the 188-. We just don't  
 21 know how that would be reduced, if it would be.  
 22 Now, the last two questions to both of us about  
 23 preferential rights, unless you have more about that.  
 24 THE COURT: Go ahead, please.  
 25 MR. KEKER: The first one, do the parties agree

2006

1 that in a pure wheeling transaction Met should give the  
 2 purchasing party preferential rights credit?  
 3 The first point is this notion of a pure  
 4 wheeling transaction is made for litigation. There is  
 5 no such thing, according to them, because every time  
 6 they use their system, there's an exchange of water. So  
 7 "pure" makes no sense.  
 8 But the answer is yes. We certainly agree Met  
 9 should give wheeling parties preferential rights  
 10 credits. They are paying for conveyance of water and  
 11 not purchase of water.  
 12 And the fact that they don't do that, even for  
 13 what they call pure wheeling transactions, shows the  
 14 logic -- the illogic of their position on preferential  
 15 rights.  
 16 And then your final question to us, and this  
 17 one to both parties, whether or not the preferential  
 18 rights dispute comes down to whether the exchange  
 19 agreement is for the water purchase or for conveyance.  
 20 And we think that is basically correct, although we are  
 21 asking for a broader ruling than that.  
 22 We are asking that for other conveyance  
 23 payments for what Met concedes is wheeling, they should  
 24 count for preferential rights, too.  
 25 But the big ticket item here definitely is

2007

1 exchange agreement water. It is not -- it is a purchase  
 2 according to 5.2. What the price is for is for the  
 3 conveyance of water and not for the purchase of water.  
 4 THE COURT: Why is it that the agreement called  
 5 this Met Water? Met has five reasons why the  
 6 preferential rights don't kick in.  
 7 I think the first reason is the parties seem to  
 8 have gone out of their way in this agreement to call the  
 9 water San Diego is receiving Metropolitan water. They  
 10 call it that. One inference from that is, regardless of  
 11 whatever is happening in the real world with water  
 12 molecules and the fact whether it is wheeling or  
 13 anything else, there is always in effect an exchange of  
 14 water. The parties appear to have agreed in the  
 15 contract that it was going to be called Metropolitan  
 16 Water so that, perhaps, it would be a purchase of water,  
 17 treated as a purchase of water for these purposes.  
 18 MR. KEKER: The reason it was called -- the  
 19 reason that 5.2 was set up as it is was because San  
 20 Diego wanted to make sure that Met treated this water  
 21 running through the Colorado River Aqueduct as  
 22 Metropolitan Water so it couldn't make the kind of  
 23 arguments it is making now, which is the water in the  
 24 bottom is our water and we use cheap power to push it  
 25 through, and the water on the top is your water and any

2008

1 expensive power you have to pay. So once it gets into  
 2 the aqueduct, it's Metropolitan Water for purposes of  
 3 pricing. That's the reason that they said it there.  
 4 There is a very important section they haven't  
 5 talked about. This came up just in their brief this  
 6 time. And that is 4.1.  
 7 Can we put up 4.1?  
 8 It is only Metropolitan Water for purposes of  
 9 4.2 and 5.2, the price mechanism. 4.1 makes plain that  
 10 the exchange water shall be characterized for the  
 11 purposes of all of Metropolitan's ordinances, plans,  
 12 programs, like preferential rights, rules and  
 13 regulations, like preferential rights, including any  
 14 then effective drought management plan and for  
 15 calculation of any readiness-to-serve charge share in  
 16 the same manner as the local water of other Metropolitan  
 17 member agencies, except as provided in the places where  
 18 it is treated as Metropolitan Water, 4.2 and 5.2.  
 19 So when it comes to -- that's really our point.  
 20 When it comes to preferential rights, which is Met's  
 21 ordinances, plans, programs, rules, regulations, all  
 22 that stuff, it is local water. Just like Los Angeles or  
 23 Orange County, when they get a good rainfall, when they  
 24 get a nice year of groundwater, they don't want to be  
 25 charged for moving that around. So local water and

2009

1 Metropolitan water are distinguished in the exchange  
 2 agreement in these two ways.  
 3 We think Met must treat the Met exchange water  
 4 as local water under this provision. And that covers  
 5 preferential rights. And the price term where it is  
 6 treated as Metropolitan water, 5.2, says what we've just  
 7 talked about. Needless to say, we agree with your  
 8 tentative conclusions about affirmative defenses.  
 9 I will talk about them if you want me to or  
 10 later.  
 11 THE COURT: We should probably take a short  
 12 break and allow Met to talk and, perhaps, you would like  
 13 to save that for the rebuttal.  
 14 MR. KEKER: Great. Yes, sir.  
 15 THE COURT: Take a five-minute recess.  
 16 (Recess.)  
 17 THE COURT: Mr. Quinn.  
 18 MR. QUINN: Thank you, your Honor. Good  
 19 afternoon.  
 20 THE COURT: Good afternoon, sir.  
 21 MR. QUINN: I welcome interruptions, by the  
 22 way.  
 23 THE COURT: I'll try to control myself. As you  
 24 can see, I'm not very good at it.  
 25 MR. QUINN: Your Honor, I proposed also to go

2010

1 through the Court's questions.  
 2 THE COURT: However you would like to proceed  
 3 is fine.  
 4 MR. QUINN: I may wander a little bit beyond  
 5 them.  
 6 Did my last opinion establish at least the fact  
 7 of damages?  
 8 We submit, no, your Honor, that the Court -- we  
 9 weren't involved in Phase I, our firm. We read the  
 10 record, and it was pretty clear from that that the  
 11 focus -- and both sides agreed on this and it was  
 12 brought up many times -- that that was not about the  
 13 exchange agreement per se. Many times both sides and  
 14 the Court said we're not talking about the exchange  
 15 agreement. We are going to get into that in Phase II.  
 16 That was a proceeding that focused on the legality of  
 17 certain rates.  
 18 And the Court's opinion is phrased in terms of  
 19 exchange rates and overcharging wheelers and it being  
 20 unlawful as far as those rates would overcharge  
 21 wheelers.  
 22 At no point does the Court go to the extent of  
 23 talking about the rates under the exchange agreement as  
 24 applied here.  
 25 THE COURT: What does the contract say the

2011

1 rates are going to be after the first year?  
 2 MR. QUINN: After the first year?  
 3 THE COURT: Yes. After the year which  
 4 everybody is in agreement.  
 5 MR. QUINN: There is a dollar number.  
 6 THE COURT: After that, the contract says the  
 7 rates are going to be what?  
 8 MR. QUINN: It talks in terms of conveyance  
 9 rates. It talks in terms of conveyance rates.  
 10 I'm told we can look at Met's rate schedule and  
 11 look for the term "conveyance rates" and, interestingly,  
 12 one doesn't find it. It is not something that -- a lot  
 13 of issues have been explored in this case, but the issue  
 14 of conveyance rate, as such, what that is, is not  
 15 something that's gotten a lot of attention.  
 16 I think there's been a lot of discussion -- the  
 17 terms "exchange rate" or "wheeling rate" has been used  
 18 to mean a couple of different things at different times,  
 19 at least. It has been used kind of loosely. I don't  
 20 think we should jump to the conclusion that that is a  
 21 wheeling rate as such. And I think that becomes  
 22 significant when we talk, and as I will in a little bit,  
 23 about the significance of the blending. But it is not  
 24 a -- we all know it is not a wheeling transaction.  
 25 Miss Stapleton told you it is radically

2012

1 different than a wheeling transaction. But the fact  
 2 that the rates the Court found were unlawful in Phase I,  
 3 the fact that those were unlawful does not necessarily  
 4 follow that San Diego agreed -- that San Diego, in fact,  
 5 paid more than what would be a lawful rate.  
 6 The Court found the rates were unlawful, but  
 7 the Court didn't find in Phase I that San Diego paid  
 8 more than what would be a lawful rate.  
 9 The Court would have to find that to establish  
 10 the fact of damages. If it had been determined in Phase  
 11 I that not only were the rates unlawful but that they  
 12 were more than Met could lawfully charge, they would  
 13 have a pretty good argument that the fact of damage has  
 14 been established. But it wasn't established in Phase I.  
 15 So we then get to the question, and this is  
 16 characterized by San Diego as a burden of proof issue,  
 17 and the 60,000-dollar question in this context, given  
 18 the state of the record, the evidence, whose burden was  
 19 it to establish what a lawful rate would be? Or as we  
 20 put it, and the authority we've cited we think supports  
 21 the notion, what is the maximum amount we could lawfully  
 22 charge.  
 23 Under those cases it says when there are  
 24 different alternatives, the Court should use the measure  
 25 that would yield the lowest number of damages, the

2013

1 lowest, the lowest delta. And I submit -- their  
 2 argument on the burden of proof, the notion they are  
 3 pitching to the Court is we have established the fact of  
 4 damages, you did in Phase I.  
 5 Okay. Given that that's true, the fact that it  
 6 is then hard to figure out what harm the wrongdoer has  
 7 done. Under these cases the burden shifts, and it's now  
 8 Met's obligation. That falls apart if you don't accept  
 9 the first proposition, that they've established the  
 10 damages. The thing sort of eats itself.  
 11 We submit we are comfortable with the standard  
 12 statutory measure of damages here, the difference  
 13 between what was charged and what could have been  
 14 charged.  
 15 THE COURT: Walk me through, again, that first  
 16 part.  
 17 How is it that -- or what more ought San Diego  
 18 to have shown, let's say in this phase, having completed  
 19 the work it did in Phase I and established whatever it  
 20 established in Phase I, given that, what is it that San  
 21 Diego failed to do to establish the fact of damages?  
 22 MR. QUINN: Fantastic question. Fantastic  
 23 question, your Honor.  
 24 THE COURT: Well, thank you.  
 25 MR. QUINN: They could have called an expert, a

2014

1 rate-making expert.  
 2 THE COURT: You would have objected --  
 3 MR. QUINN: Why would we have done that?  
 4 THE COURT: -- to a ratemaking expert.  
 5 MR. QUINN: I am saying this is what they could  
 6 have done. And I am not clear as to why I would have  
 7 objected to this because of some earlier ruling,  
 8 perhaps. I would think if I would, then I would like to  
 9 lay down a marker through expert testimony, a couple of  
 10 different models, this is what could have been done  
 11 here, and that there was some delta between what we were  
 12 charged and what could have been done under different  
 13 scenarios.  
 14 THE COURT: Phase I would have been of no  
 15 utility to San Diego in this context. They would have  
 16 been essentially starting from scratch in this endeavor.  
 17 MR. QUINN: No. I don't think so, because what  
 18 you have established there is the rates they were  
 19 charged were the wrong rates. They were more than  
 20 problematical. They were wrong.  
 21 THE COURT: Right.  
 22 MR. QUINN: They paid that amount of money.  
 23 THE COURT: Right.  
 24 MR. QUINN: But the question is, and it wasn't  
 25 established, should they have paid less? And it

2015

<p>1 wouldn't be possible in this day and age, I suspect, to                  2 find an expert witness who could address that. Instead,                  3 what did we get? What did we get, your Honor?                  4 The sum total of their effort was to call                  5 Mr. Denham, who I submit was not an expert and gave zero                  6 expert testimony. The sum total of their effort was to                  7 call a man with a calculator and computer and to give                  8 him certain assumptions and tell him to back all this                  9 out and, presto, that difference, those are our damages.                  10 That was it.                  11 That wasn't expert testimony. I trust the                  12 Court understands why I say that.                  13 THE COURT: I do understand why you say that.                  14 MR. QUINN: So, there was no effort made here                  15 at all to address the issue about what the Delta was,                  16 what could we have been charged. They just asked                  17 Mr. Denham to make the assumption, and they asked this                  18 Court to make the assumption, that's it, not taking into                  19 account any other factors.                  20 I can address and will address some of the                  21 other factors that could and should have been taken into                  22 account.                  23 But I submit, since they didn't prove the fact                  24 of damage, it still was -- we're still in the world                  25 where the Plaintiff has the burden of proof to show</p> <p style="text-align: right;">2016</p>	<p>1 MR. QUINN: Your Honor, with all respect, that                  2 has been our consistent view.                  3 THE COURT: That has been --                  4 MR. QUINN: True.                  5 THE COURT: I think that's right, it has been.                  6 MR. QUINN: It has been our view. We got past                  7 that. We needed to.                  8 THE COURT: Okay.                  9 MR. QUINN: So given that, that the Court                  10 does -- given that the law of this case is the Court has                  11 that jurisdiction, they could have proved -- they could                  12 have proved up a case there. It wasn't because -- we                  13 were never saying you can't get into the minds of the                  14 people on the Met board and decide what they would have                  15 come up with. That was never our position, that it is                  16 speculative in that sense.                  17 THE COURT: Suppose I disagree with you on the                  18 first issue, and I will give it more thought, on the                  19 first issue that the fact of damages has not been                  20 established.                  21 What are your thoughts as to what kind of a                  22 situation you are in if the fact of damages has been                  23 established? What should I do now?                  24 MR. QUINN: We have a lot of issues --                  25 THE COURT: Just in terms of the speculation.</p> <p style="text-align: right;">2018</p>
<p>1 where they should have been. If they had gotten there                  2 and there was any uncertainty, they would put an expert                  3 up there and he painted a different picture, a different                  4 scenario, then they would have an argument: The burden                  5 shifts, you wrongdoer, you created this problem; the                  6 burden is yours now.                  7 We didn't get that. We got a man who had a                  8 calculator and was given certain assumptions, period,                  9 full stop. That was their whole damages case. That was                  10 it.                  11 So I think they haven't proved the fact of                  12 damages. We never said, as I recall, it couldn't be                  13 done; it was speculative; it was impossible. They cited                  14 Mr. Woodcock's report where he said you could call 10                  15 people or 12 people and they would do different things.                  16 If you look at the context in which he said that, I                  17 don't think he was talking about this particular issue,                  18 about how to design rates.                  19 I think that is their -- no, the Court hasn't                  20 decided the fact of damage. It was still their burden                  21 and they didn't prove they were overcharged, that there                  22 were damages.                  23 THE COURT: Your view has not been in this case                  24 that the Court was without jurisdiction to engage in                  25 some equivalent of a rate-making procedure?</p> <p style="text-align: right;">2017</p>	<p>1 We seem to have a situation where each side is saying                  2 that the responsibility for firming up that number,                  3 which could be, according to your brief, anywhere from                  4 zero to 100 percent of the items that had been removed                  5 by San Diego from the rates, as far as San Diego is                  6 concerned pursuant to the Phase I opinion. Your view is                  7 that it could be zero. Their view is it is 100 percent.                  8 And you are each pointing to the other as responsible to                  9 bear the burden of any ambiguity or speculation that                  10 would be involved in trying to put it somewhere within                  11 that range.                  12 MR. QUINN: Let's assume they have proved the                  13 fact of damage. I don't think that relieves them from                  14 the obligation of putting forward a, for want of a                  15 better word, a decent damages case, one that isn't                  16 subject to some pretty obvious problems.                  17 I mean, these include the failure to take into                  18 account the increase in supply costs which, by the way,                  19 we don't think is an offset problem but is something                  20 which to be an offset, as we understand the law, it has                  21 to be the sort of thing that has to be the subject of a                  22 separate cause of action, in this case, a counterclaim.                  23 Completely ignoring that they now kind of, sort                  24 of would like the Court to pay attention to                  25 Mr. Cushman's testimony about the 15 percent, what he</p> <p style="text-align: right;">2019</p>

1 was told by Mr. Denham, they don't really embrace that.  
 2 What does the Court know about that? Is that  
 3 the sort of -- Mr. Cushman testified that's what he was  
 4 told. We don't know how they arrived at that number.  
 5 It is certainly not the type of evidence that the Court  
 6 would accept if Mr. Denham was on the stand, if he  
 7 just -- without giving some explanation about what he  
 8 did.  
 9 THE COURT: I have some question about why I  
 10 should pay any attention to it at all. If San Diego  
 11 conceivably, and maybe speculatively, get a hit on  
 12 supply costs, that would be under -- it strikes me, as I  
 13 was suggesting when Mr. Kecker was talking -- under a  
 14 completely different set of contractual agreements.  
 15 Under the exchange agreement, maybe this is what the  
 16 damages are and maybe, as a consequence, under these  
 17 other agreements, as rates get modified, the supply  
 18 costs go up to some extent.  
 19 Why is it that I would consider the effects on  
 20 supply costs as I am trying to figure out what the  
 21 damages are under the exchange agreements?  
 22 MR. QUINN: I don't understand, frankly, your  
 23 Honor, why that would make any difference at all. It is  
 24 not a question of an issue about whether that's a result  
 25 of some other contract or agreement or transaction. It

2020

1 is a necessary consequence, a necessary inevitable,  
 2 acknowledged consequence of doing what they asked the  
 3 Court to do.  
 4 You know perfectly well, you take it out of  
 5 conveyance and move it to supply, supply costs go up.  
 6 It's night and day. You don't have to go look at the  
 7 terms of some other agreement and say is this a breach  
 8 of that or what's the consequences of that. It's by  
 9 definition it happens. That is nature. You have to  
 10 look at net damages. It's a consequence of it.  
 11 THE COURT: San Diego, perhaps San Diego --  
 12 let's say San Diego had never been a member of the Met  
 13 board and never been a member of the Met assemblage at  
 14 all. They just had this exchange agreement, that's it.  
 15 We have the situation we have today. Arguably, you  
 16 breached it and, arguably, there is the damages. And  
 17 you are supposed to figure out what the damages are.  
 18 In a situation like that, I would confine  
 19 myself to what the problem is under the exchange  
 20 agreement. I wouldn't look at some other potential  
 21 series of arrangements that San Diego did or didn't have  
 22 with Met, would I?  
 23 MR. QUINN: I don't think the Court, I hope,  
 24 would close its ears to the testimony of Mr. Denham,  
 25 that a consequence of that -- albeit, a separate

2021

1 agreement with a nonmember agency -- their supply costs  
 2 would go up. The fact that they -- if they are not a  
 3 member agency, that doesn't change the result. Their  
 4 supply cost goes up.  
 5 They sort of realize that's an issue for them  
 6 and that's why they are telling you, you know, you don't  
 7 really have to take into account but you do have the  
 8 testimony out of Mr. Denham's mouth as to what he was  
 9 told -- testimony from Mr. Cushman as to what Mr. Denham  
 10 told him.  
 11 THE COURT: Do you think the numbers should be  
 12 something other than 15 percent and, if you do, what is  
 13 the basis and evidence for that suggestion?  
 14 MR. QUINN: Not my problem.  
 15 THE COURT: Okay.  
 16 MR. QUINN: That's my answer to that.  
 17 THE COURT: Fair enough.  
 18 MR. QUINN: But another issue with that, not  
 19 only do you not know what Mr. Denham did to come up with  
 20 that, one thing you do know is he closed his eyes to the  
 21 potential effects on supply and pricing from the  
 22 elasticity of demand. That if prices go up, how that  
 23 will affect purchases, what the consequence of that is,  
 24 he acknowledged he didn't do that.  
 25 Is that important? The Court only has the

2022

1 testimony of Mr. Woodcock, who told you that's  
 2 important. That is something -- he criticized  
 3 Mr. Denham for that. He said that's important; that is  
 4 something you would have to take into account.  
 5 We think that's a real -- that's a real problem  
 6 with this model. Again, addressing the Court's issue,  
 7 assume there is a fact of damages, then what? That  
 8 doesn't mean that you can accept any theory that's  
 9 trotted out. That's one problem.  
 10 The other problem, the denominator issue. That  
 11 cuts across every calculation, every single calculation  
 12 that Mr. Denham made, whether for power, backing out the  
 13 system access, all the rest of it. He purported to  
 14 calculate what the costs were on a per-acre basis for  
 15 Colorado River water but he didn't use that denominator.  
 16 He used all water.  
 17 Of course, San Diego gets State Water Project  
 18 water more than they get exchange water.  
 19 And the result of that is the denominator gets  
 20 big, the total number of the fraction smaller, the delta  
 21 bigger, and it yields another damages number. This is a  
 22 problem, your Honor. It shouldn't be the Court's  
 23 problem. It's a problem of proof for the Plaintiff.  
 24 Now I'm going to go a little bit more  
 25 generally, your Honor, and I am going to sort of trench

2023

1 on candidly addressing some of the issues which I'll say  
 2 are dicta in the Phase I ruling because, as I understand  
 3 it, that was focused on ratemaking. Because, as I said,  
 4 the record reflects -- I wasn't here -- but the record  
 5 reflects that all parties in the court understood that  
 6 the Phase I was not about the exchange agreement per se.  
 7 So a lot of things I think the Court said in  
 8 that opinion were dicta and don't necessarily bind the  
 9 Court here.  
 10 I take it, it's undisputed that this is not a  
 11 wheeling agreement. It is an exchange agreement,  
 12 something radically different. And that the Court said  
 13 in the Phase I opinion -- again, I think this was  
 14 dicta -- the Court had limited evidence before it, the  
 15 Court was limited, except for one cause of action, to  
 16 the administrative record. Different now. The Court  
 17 said, and San Diego relies on this -- I can't remember  
 18 the exact word -- but gratuitously provided a blend.  
 19 That was our own decision that we did that. It  
 20 may have been of benefit to San Diego, but that was  
 21 something that we did and it was our decision.  
 22 I submit, the evidence is absolutely clear now  
 23 that we had to provide a blend. It was expected we  
 24 would provide a blend. We had no choice but to provide  
 25 a blend. You shut down the State Water Project -- first

2024

1 empty the reservoirs, empty the aqueducts and shut down  
 2 the State Water Project so none of that water was coming  
 3 south, so you could only bring in through Colorado River  
 4 water. That is what it would take to deliver a non  
 5 blend. The system is set up in a way where it had to be  
 6 a blend.  
 7 THE COURT: Your system is set up that way.  
 8 MR. QUINN: It is.  
 9 THE COURT: It is for your convenience. That  
 10 makes it easy for you to fulfill these contractual  
 11 obligations. It might have been you had a system set up  
 12 so that water comes in from Alaska, too.  
 13 MR. QUINN: The system has been set up for  
 14 decades.  
 15 THE COURT: Sure.  
 16 MR. QUINN: It is not a surprise to our board  
 17 to know how our system is set up. Everybody knows how  
 18 our system is set up and where the Colorado River water  
 19 comes in.  
 20 There is nothing in that contract anywhere that  
 21 contemplates that we're going to build a new aqueduct or  
 22 bypass or something like that. There's a physical  
 23 structure out there that was not a secret to anybody,  
 24 which the undisputed evidence is. You could not deliver  
 25 pure Colorado River water, notwithstanding what

2025

1 Ms. Stapleton, bless her heart, says, it is a matter of  
 2 indifference to her. Of course, the contract says, by  
 3 the way, if the State Water Project is down or there's  
 4 interruptions there, it may affect our ability to  
 5 deliver water. Clearly, the parties knew State Water  
 6 Project water was coming through.  
 7 In our brief -- I can't remember them all of  
 8 them off the top of my head -- but in our brief we gave  
 9 six reasons why we had to deliver a blend.  
 10 THE COURT: I completely agree with that. It  
 11 is clear as day that there's no way that any of this can  
 12 be done without a blend being delivered.  
 13 MR. QUINN: Right.  
 14 THE COURT: I'm less clear as to what I'm  
 15 supposed to do with that.  
 16 MR. QUINN: If the Court is open to suggestions  
 17 on what to do with that.  
 18 THE COURT: I am.  
 19 MR. QUINN: What I'm sensing the Court may be  
 20 grappling with is, "Listen, Met, you signed this  
 21 contract, and it doesn't say that you're going to  
 22 deliver a blend. It doesn't say you are not going to  
 23 deliver a blend. It's your problem."  
 24 I think the only thing you can deduce from the  
 25 words of that contract is that people knew it was going

2026

1 to be a blend.  
 2 It says we can deliver either kind. When the  
 3 one is down, you know, it may cause problems for our  
 4 ability to perform under this. Everybody knows the  
 5 structure of our system. It's not like we entered into  
 6 a contract which we, by definition, could not perform.  
 7 That would be the alternative view of this,  
 8 that they expected unblended water; you could have given  
 9 them unblended water but, too bad, so sad, Met. It just  
 10 happens you have a system you couldn't do that.  
 11 No, that's not the situation here. Everybody  
 12 knew what the scenario was. There really isn't any  
 13 dispute about that. You didn't hear anybody from San  
 14 Diego give you some theory about how physically  
 15 unblended water could have been provided.  
 16 Am I making progress on that, your Honor?  
 17 THE COURT: Not yet. I am still convinced that  
 18 you're right, that everybody knew it had to be -- it was  
 19 going to be blended water.  
 20 I'm convinced your brief is correct, that when  
 21 you track out the course of water, no matter what  
 22 anybody from San Diego said, it was going to be blended  
 23 water, and there is no way around that. Everybody knew  
 24 it. I don't know where to go with that.  
 25 MR. QUINN: I will show you. I will tell you,

2027



1 the first thing is the Court had some dicta in the first  
 2 opinion about how that was just our -- whatever it was  
 3 the Court said.  
 4 THE COURT: It was just -- right, it still  
 5 seems right to me that the fact it is blended water,  
 6 that's the way it is. It seems to be a matter of  
 7 indifference to San Diego, and nobody at San Diego  
 8 cares.  
 9 MR. QUINN: The Court, if I recall what the  
 10 language was, the Court said something like -- this is  
 11 dicta and the Court didn't have all the records it has  
 12 now -- something like it was our choice or it was a  
 13 gratuitous benefit or something like that. I don't  
 14 think it matters much.  
 15 THE COURT: Probably not.  
 16 MR. QUINN: My point is, and I think we may be  
 17 together on this, it wasn't a matter of our choice.  
 18 What does the Court do with that?  
 19 We have an exchange agreement which necessarily  
 20 requires a blend and it includes some amount of State  
 21 Water Project water. It has to be there. It has to be  
 22 there.  
 23 The question is, is it fair under this exchange  
 24 agreement for Met to charge for some of those State  
 25 Water Project costs which are attributable to the State

2028

1 Water Project water which is necessarily included in  
 2 that blend? I think that is one of the issues the Court  
 3 has to grapple with.  
 4 If -- what's at stake here? If those costs  
 5 cannot -- if no State Water Project -- no costs  
 6 attributed to that portion of the blend can be charged  
 7 to San Diego, that means they get free State Water  
 8 Project water or highly subsidized State Water Project  
 9 water, subsidized by all the other member agencies.  
 10 They get that water, which is higher quality  
 11 and which is more expensive to get there than the  
 12 Colorado River water. They get it for essentially  
 13 nothing if we can't charge them for some of that.  
 14 That is what I think the Court has to grapple  
 15 with. Now I realize I am running right up against the  
 16 Court's -- the views, the ruling in the Phase I, that  
 17 none of the State Water Project costs are Met's costs.  
 18 And on that I would say, your Honor, a couple of things.  
 19 Again, the record is more fully developed than  
 20 it was before. We built the Ford factory. We were  
 21 required -- our costs. There is a case, it's the  
 22 Goodman versus County of Riverside case, which is  
 23 140 Cal.App.3d 900, where the Court went through this  
 24 issue about whose costs, whose obligations are these and  
 25 there was a challenge by taxpayers about whether this is

2029

1 debt that had been assumed at the appropriate level.  
 2 And the Court says the entire cost of the project, the  
 3 State Water Project, was to be met by the proceeds of  
 4 these contracts, the contracts between the various  
 5 members, the agencies and the State. The State's  
 6 general fund was clearly nothing more than a conduit.  
 7 Yeah, we're going to issue bonds; we are going to issue  
 8 bonds but we're a conduit. You are going to pay off  
 9 these bonds. We are doing nothing. We are a conduit.  
 10 And by the way, we are not guaranteeing you a car. If  
 11 we produce a car, you have a claim on a car. We are not  
 12 guaranteeing you a car.  
 13 The Court goes on to say, "We conclude when the  
 14 State's voters approved the fact that they approved an  
 15 indebtedness in the amount necessary for building,  
 16 operating, maintaining and replacing the project and  
 17 that they intended that the costs were to be met by  
 18 payments from the local agencies with these water  
 19 contracts."  
 20 In a very real sense, those are our costs. I  
 21 am not arguing at this point for the strong case that we  
 22 should get 100 percent. What I'm saying here is there  
 23 should be daylight for the Court to look at the blend,  
 24 recognizing we had to deliver a blend, and they get it  
 25 for free or almost free if they don't pay any State

2030

1 Water Project costs.  
 2 And an alternative theory, which they could  
 3 have presented, would tie those costs on some per-unit  
 4 basis based on the blend. That wouldn't be that hard to  
 5 do. You just decide what it was, and you could review  
 6 what the blend was periodically and there would be a  
 7 billing for that. In other words, it's a rate for State  
 8 Water Project water.  
 9 The evidence is in the record as to what the  
 10 that would be, what it would come out to for each of  
 11 those elements. It's all in the record. They didn't do  
 12 that. That is one scenario that could have been  
 13 presented, and I submit would be a defensible way of  
 14 looking at this. There are other ways.  
 15 We have this postage stamp parade.  
 16 THE COURT: The other way is one of the ways  
 17 you suggested, which is don't award damages now and  
 18 wait. Do you want to walk me through how long that  
 19 would take? Wait for this case to go to the Court of  
 20 Appeal, get that resolved, figure out what the Court of  
 21 Appeal thinks ought to happen and maybe remand it to me,  
 22 get a final decision, have San Diego -- have Met come up  
 23 with a new rate, at that point the lawful rates, which,  
 24 by the way, would probably be challenged.  
 25 MR. QUINN: Right.

2031

1 THE COURT: Right. We are talking about ten  
 2 years down the road or something before we know what the  
 3 damages are in this case.  
 4 MR. QUINN: I think the fastest way and the  
 5 most expeditious way to deal with this is to rule  
 6 that -- to dismiss their contract claim for failure of  
 7 proof. And that then the rest of it, the rate issue  
 8 goes up.  
 9 THE COURT: Right. Gets resolved.  
 10 MR. QUINN: And then we'll get some answers.  
 11 THE COURT: You are endorsing this. You are  
 12 saying let's dismiss this now because we can't figure it  
 13 out until we know what the lawful rate is. Once the  
 14 Court of Appeals figures out the Phase I issue, and I  
 15 may have to try the case again and maybe not, then have  
 16 San Diego refile its claim and then we'll figure out  
 17 what the damages are.  
 18 My question is, aside from the obvious question  
 19 which is really, how long will that take, in part I'm  
 20 also looking at this trying to figure out what the  
 21 parties may have had in mind when the parties signed the  
 22 contract.  
 23 Do you think this is what the parties thought  
 24 would happen when the parties say it has to be a lawful  
 25 rate in Sections 5.1 or 5.2 holding Met to some sort of

2032

1 a standard? I understand there is a disagreement as to  
 2 what that standard is but holding Met to some sort of  
 3 standard.  
 4 Assuming Met violated that standard, that they  
 5 violated the standard, so the rate was not lawful, do  
 6 you think that is what the parties had in mind, that it  
 7 would be sort of a period of 10 to 15 years, or whatever  
 8 it is, before they got their damages?  
 9 MR. QUINN: I doubt if they thought about it,  
 10 your Honor.  
 11 THE COURT: Yeah.  
 12 MR. QUINN: But I want to address that but -- I  
 13 want to Respond to the preliminary comment your Honor  
 14 made.  
 15 We're saying that it's not -- we are saying the  
 16 contract claim should be dismissed for failure of proof  
 17 on a basic element. That's our position. I'm not here  
 18 saying we are waiving statute of limitations about  
 19 refiling or anything like that.  
 20 THE COURT: Right.  
 21 MR. QUINN: I am saying they had a burden and  
 22 they didn't meet it.  
 23 There is evidence in the record that the  
 24 parties did contemplate that if the Court invalidated  
 25 the rates, it would then go back to Met to look at that

2033

1 and arrive at different rates. There is such evidence.  
 2 Mr. Keker told you that in his -- I can't  
 3 remember if it is his opening statement or closing  
 4 argument. I could point the Court to the passage.  
 5 Mr. Cushman also said he thought that's what is  
 6 going to happen. I can't tell you that he thought that  
 7 at the time of contract was entered into or his  
 8 prediction about what would happen.  
 9 I don't think -- trying to divine what the  
 10 intent of the parties are in a contract case is always a  
 11 useful thing, but I think we are kind of beyond that.  
 12 THE COURT: Okay.  
 13 MR. QUINN: In terms of the State Water  
 14 Project, what else could they have done in the State  
 15 Water Project water? I'm not putting all my eggs in the  
 16 basket of this is a blend, they get it for free or  
 17 substantially free if you back out all these costs.  
 18 Because there is this issue, which I know has come up  
 19 time and again in the Phase I, about Met does, under its  
 20 contract with the State, does have the ability to wheel  
 21 water in State facilities. There was testimony in the  
 22 Phase I about some occasions when that's happened.  
 23 Why does that matter? It's, in effect, a  
 24 paid-up license, a property interest that Met has in the  
 25 State Water Project system. I know there was attention

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1 to the fact it only happened once or twice or three  
 2 times or how often it happened. I submit the issue is  
 3 not how often it happened, but the fact we have a  
 4 paid-up right to do that whenever there is space  
 5 available, what is that worth?  
 6 THE COURT: Go ahead.  
 7 MR. QUINN: There is a paid-up license, a  
 8 property interest in the State system where, subject to  
 9 certain conditions, if it is available, we can always  
 10 use that.  
 11 THE COURT: We kind of went through this in  
 12 Phase I.  
 13 MR. QUINN: I know.  
 14 THE COURT: The whole idea of a property  
 15 interest is one of those marvelous concepts. Anything  
 16 can be a property interest, a license. I don't know how  
 17 much time you want to spend. Your position is Phase I  
 18 is dicta as far as the issues that have to be decided  
 19 today.  
 20 MR. QUINN: Not all of it. What I'm saying,  
 21 your Honor, is one could have said that paid-up license,  
 22 the right to use the State system at any time -- set  
 23 aside how often we've done it -- the right to do it at  
 24 any time, what's that worth? And done some sort of  
 25 proration about State Water Project costs based upon

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1 that acknowledged property right.  
 2 THE COURT: San Diego has always had the  
 3 position that isn't something we should be doing.  
 4 MR. QUINN: Of course, they've had that  
 5 position. I understand that.  
 6 THE COURT: Yes. I seem to have agreed with  
 7 them at least to that extent in Phase I.  
 8 MR. QUINN: I think I began by signaling that  
 9 there are some issues that I think on this fuller record  
 10 the Court now has --  
 11 THE COURT: Okay.  
 12 MR. QUINN: -- that the Court has the  
 13 ability -- the Court could do it on a new trial motion.  
 14 Clearly, that lays in the future. Maybe there are some  
 15 things we can address now. We have this right. It's  
 16 worth something. That is another way you could have  
 17 valued this and prorated State Water Project costs. You  
 18 say maybe that's worth the ability to use the State  
 19 Water Project system at any time, pick a number out of  
 20 the air. An expert could testify and say that's worth  
 21 ten percent of those costs. Ten percent of those costs  
 22 we could then allocate. Again, not our burden of proof.  
 23 It was their burden of proof.  
 24 Another infirmity in Mr. Denham's analysis,  
 25 which is all you have, which is all they gave you, is

2036

1 the power, the power to move water.  
 2 A lot of the facts here are undisputed. We  
 3 have a variety of different rates. We have a unitary  
 4 systemwide rate. And Mr. Denham simply assumed let's  
 5 just back out the State power costs, which are the more  
 6 expensive ones, and we'll just use that all our water,  
 7 no matter what the volume is, will be moved at the  
 8 essentially free or very low cost Colorado River rates.  
 9 Where did that come from? There was no expert  
 10 analysis on it. None. It was just an assumption they  
 11 were given. The Court knows that wheelers, to the  
 12 extent they are wheelers and to the extent an analogy to  
 13 the wheeling relationships is relevant, under our code  
 14 wheelers must supply their own power, market rate.  
 15 If we have subsidized or essentially free or  
 16 low-cost power, why would you assume that we would give  
 17 that to them rather than us. There was no analysis. We  
 18 are going to assume the lower cost rate. I think the  
 19 Court has the point on that.  
 20 On preferential rights, the Court raised the  
 21 question: Do the parties agree that in pure wheeling  
 22 transaction Met should give the purchasing party  
 23 preferential rights credit? And we don't agree with  
 24 that.  
 25 THE COURT: You do not?

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1 MR. QUINN: We do not.  
 2 Under the Met law, member agencies, only Met  
 3 agencies, have preferential rights. Met cannot give,  
 4 lawfully give preferential rights to a third party that  
 5 wheels.  
 6 And you have to ask yourself, would it make any  
 7 sense to give an increased right to buy Metropolitan  
 8 water to a third party that can't buy Metropolitan water  
 9 in the first place?  
 10 As to member agencies, of course, San Diego is  
 11 a member agency. Would it make any sense to give an  
 12 agency the right to purchase more Metropolitan water for  
 13 using the Met system to move non-Met water? That  
 14 doesn't make sense either. So in a pure wheeling  
 15 transaction, addressing the Court's question about a  
 16 pure wheeling transaction, that would not give them  
 17 preferential rights credit.  
 18 Does the parties' dispute come down to whether  
 19 the exchange agreement is for water purchase or  
 20 conveyance? Respectfully, no. San Diego is not  
 21 entitled to preferential rights; however, the agreement  
 22 is characterized. Either way, San Diego is paying a  
 23 volumetric water rate, and the Court of Appeal has  
 24 excluded those payments. That's the case, San Diego  
 25 versus Metropolitan, where the Court upheld the

2038

1 exclusion of all payments for water, even though those  
 2 payments included charges for conveyance. You couldn't  
 3 say this is for conveyance.  
 4 THE COURT: You can't break it apart.  
 5 MR. QUINN: You can't break it apart. If that  
 6 were true, if you could -- if they could get  
 7 preferential rights credit for this, they would be the  
 8 only agency getting credit for paying conveyance  
 9 charges, even though every single agency does pay  
 10 conveyance charges. San Diego would be the only one  
 11 getting credit for it, if they were right.  
 12 THE COURT: What's the overall policy? What's  
 13 the overall reason that preferential rights are granted?  
 14 What I'm getting at is this: In your brief you've gone  
 15 and I think argued there's this big difference between  
 16 exchange water and wheeled water. See if I'm getting  
 17 this correct. And there are five reasons why in the  
 18 brief you suggest that preferential rights don't attach.  
 19 I'm trying to get a sense of what is it that  
 20 preferential rights are supposed to do. My  
 21 understanding is that basically they are there so that  
 22 people -- that people who are using and contributing to  
 23 the ongoing expenses and to the capital costs of  
 24 maintaining the structure that Met has are to that  
 25 extent entitled to their preferential rights.

2039

1 And so the question comes, and I'm saying this  
 2 so you will contradict me if I'm wrong, the issue comes  
 3 down to the extent to which the exchange water is water  
 4 that the payments for it are in any way payments that go  
 5 to the ongoing costs or capital expenditures of  
 6 maintaining the Met system.  
 7 Is it your position that, A, that's true; and,  
 8 B, this is all payment for water, so that's why there  
 9 are no preferential rights, that what San Diego is  
 10 paying under the exchange agreement is simply for water  
 11 and it doesn't go to capital costs and the ongoing  
 12 costs?  
 13 Or is your position that, yes, maybe it does go  
 14 to ongoing costs and capital costs but, just as in the  
 15 San Diego case you just cited, you can't split them  
 16 apart, so the default is it is going to be treated just  
 17 as a water purchase?  
 18 MR. QUINN: This goes back to it's a function  
 19 of a State law.  
 20 THE COURT: Right.  
 21 MR. QUINN: Legislation act back in 1931, which  
 22 Met has interpreted as preferential rights for certain  
 23 classes of things, not anything that is volumetric.  
 24 Anything that is volumetric does not get you  
 25 preferential rights. It is based on volumes of water.

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1 So real estate taxes, property taxes, fixed  
 2 charges, capital -- I'm getting some help --  
 3 readiness-to-serve and anything that is volumetric,  
 4 based on quantities of water delivered does not get you  
 5 preferential rights.  
 6 And that is the way Met has always applied this  
 7 and their interpretation of the State law. I think the  
 8 agency's interpretation of the law -- they administer  
 9 it. They have the history and the expertise -- is  
 10 entitled to some deference.  
 11 In terms of the Court's question about  
 12 Metropolitan water, that the contract goes out of the  
 13 way to say it's Metropolitan water, and Mr. Kecker read  
 14 you that passage that said it's local water except in  
 15 4.2 and 5.2, wow. That's what it is all about, 4.2 and  
 16 5.2. That's the section that describes the payments.  
 17 That's the basis for our contention this is Metropolitan  
 18 water. They were paying volumetric rates for  
 19 Metropolitan water and they can't get credit for  
 20 preferential rights for that. The passage he read to  
 21 you is really the whole point.  
 22 I think this is an area where the Court at  
 23 least ought to think about this is how this agency  
 24 has -- who administers this law, has interpreted it for  
 25 a long time, isn't that entitled to some deference?

2041

1 I think that's all I have except with respect  
 2 to the affirmative defenses.  
 3 THE COURT: Do you want to say anything about  
 4 that now? It is already a quarter to 4:00.  
 5 MR. QUINN: I can, sure.  
 6 By the way, your Honor, I don't want to waste  
 7 anybody's time.  
 8 THE COURT: You're not.  
 9 MR. QUINN: I would say I'm not going to go  
 10 through the affirmative defenses and the evidence. The  
 11 Court heard it and a lot of it was repetitive.  
 12 The Court's tentative did not address mistake  
 13 of law, which we went to the trouble of amending our  
 14 Answer to include here. And indisputably, everybody  
 15 agrees there was a mistake of law here because the  
 16 testimony from San Diego was that, in fact, Met did  
 17 believe they thought that Met believed the rates were  
 18 lawful. Court has held they are unlawful. So there's a  
 19 mistake here, no question. We're over that hurdle.  
 20 THE COURT: Suppose you're right on illegality  
 21 and mistake of law. Typically that, I think, results in  
 22 rescission. What happens? You have to give San Diego  
 23 the water back?  
 24 MR. QUINN: That's a really good question.  
 25 THE COURT: We go to sort of a trial on quantum

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1 meruit.  
 2 MR. QUINN: Can I think about this?  
 3 THE COURT: We may not have an answer in the  
 4 next four or five minutes, but that is one of my  
 5 concerns about some of these defenses.  
 6 MR. QUINN: Right. The answer may be  
 7 different. If it was illegal, the contract may have  
 8 been void. If there was a mistake of law, it may be  
 9 rescission. That is what my gut is telling me.  
 10 But if there was a mistake of law as to any one  
 11 of these rates, the Court invalidated four rates, then  
 12 each one -- any one of them is immaterial. They involve  
 13 tens of millions of dollars. So if there was a mistake  
 14 of law, for example, as to water stewardship charges,  
 15 whether a mutual or universal, I think the evidence on  
 16 that was there was a mistake of law on that one.  
 17 There's no evidence in the record that San Diego  
 18 understood that the inclusion of the water stewardship  
 19 rate and conveyance charges was unlawful at the time of  
 20 the contract.  
 21 In fact, Mr. Slater, their person most  
 22 knowledgeable designated, testified that San Diego saw  
 23 no violation of the pertinent laws in 2003. We have a  
 24 slide, slide 49, where he testified at the time he saw  
 25 no violation.

2043

1 Ms. Stapleton's letter to the MWD in February  
 2 of 2008, DTX 794, further proves the point. She  
 3 actually supported the water stewardship rate. That's  
 4 slide 30.  
 5 So we don't think there's any evidence as to  
 6 this rate, they thought it was unlawful at the time the  
 7 contract was entered into.  
 8 If they did think that the inclusion of the  
 9 water stewardship rate was illegal, then we get to the  
 10 question, is this an issue of unilateral mistake? Did  
 11 they tell anybody at Met? They know it's illegal. They  
 12 don't tell anybody at Met. That is unilateral mistake.  
 13 They kind of in their brief kind of ridiculed the idea,  
 14 magic word, when did you say it was illegal. Unilateral  
 15 mistake of law, that magic word is magic. It doesn't --  
 16 you are not putting somebody else on notice that it's  
 17 illegal if you just say we really oppose that and we  
 18 think that's completely wrong. That doesn't discharge  
 19 your obligation. If you think it's illegal and you want  
 20 to get out of unilateral mistake of law, you know the  
 21 other guy thinks it's legal, you have to tell him, "It's  
 22 illegal." You do, indeed, have to use the magic word.  
 23 Cushman confirmed that there was no written or  
 24 oral statement that the water stewardship was unlawful  
 25 before 2010. And that's slide 31.

2044

1 Ms. Stapleton's testimony was she did discuss  
 2 the legality of the water stewardship rate with  
 3 Mr. Underwood, who passed away. For reasons we  
 4 indicated in our brief, we have some issues with the  
 5 credibility of his testimony -- of her testimony. In  
 6 any event, she said that was based on the Katz wheeling  
 7 law which San Diego admitted did not apply to the  
 8 exchange agreement.  
 9 That testimony by Ms. Stapleton, if she  
 10 discussed it with Underwood, was contradicted by  
 11 Mr. Slater -- slide 32 -- where he says, and this is  
 12 specifically about Underwood and he said, "I don't  
 13 believe she used that phrase."  
 14 THE COURT: The evidence seems to be consistent  
 15 with the following sort of a picture, that at the time  
 16 the agreement was signed that San Diego may have had  
 17 some very deep reservations about the legality of these  
 18 rates and, in fact, hoped, fervently hoped, that some  
 19 day a Court would declare them to be illegal.  
 20 Some of the people, perhaps, Mr. Slater and  
 21 perhaps others on their own had their own personal view,  
 22 not as judges but perhaps not as lawyers but their own  
 23 personal view, that the rates were illegal and that they  
 24 hoped some day this would all get resolved in their  
 25 favor.

2045

1 There is an ambiguity when we say whether  
 2 something is legal or illegal. Sometimes things are  
 3 very clear. People can sit around and tell each other  
 4 we know murder is illegal. In this area of water law  
 5 there is evidence at the time there were developing  
 6 cases, lawsuits going on, and there seemed to be a lot  
 7 of uncertainty as to where the law would end up. It may  
 8 well be that when people -- people didn't know if it was  
 9 going to be illegal or not and maybe we still don't know  
 10 today. Right?  
 11 MR. QUINN: We are learning in realtime, your  
 12 Honor.  
 13 THE COURT: We don't know. The Court of Appeal  
 14 will rule in this case, and we'll find some things out  
 15 at that point. Maybe the Supreme Court will take the  
 16 case and we'll find things out. Given all of that and  
 17 given the apparent mental state of the people who  
 18 entered into this agreement, that some people are hoping  
 19 it's legal, some people are hoping it is not legal and  
 20 some people are hoping a Court will ultimately shift the  
 21 rates around, why would an illegality be a basis to void  
 22 this or to do something that -- or to agree that the  
 23 affirmative defense works, just to put it in neutral  
 24 terms?  
 25 MR. QUINN: I think we have to talk about the

2046

1 two separately: The mistake of law versus illegality.  
 2 I take it that the law is that in the state of  
 3 affairs the Court describes, if it is uncertainty  
 4 whether a contract term is illegal, and then you have a  
 5 Court that decides, wow, that was illegal, that contract  
 6 is void. It is not -- the law isn't that it's only the  
 7 next contract after that decision where the Court says  
 8 it's illegal that that one is void.  
 9 No. I think the law is pretty clear, and we  
 10 can cite the Court Metropolitan Water District of  
 11 Southern California versus Superior Court, 23 Cal.Rptr.  
 12 491, basically, uncertainty in the law at the time does  
 13 not get you out from a contract being void if a Court  
 14 later decides that was illegal.  
 15 I think the analysis on mistake of the law is  
 16 different. We have testimony from Mr. Slater. I didn't  
 17 see any legal issues under the pertinent laws at the  
 18 time. We certainly acknowledged we thought it was  
 19 legal. I think that supports a mutual mistake defense,  
 20 at least as to the large stewardship rate.  
 21 I think you have to look at the evidence of  
 22 each of them separately. These are each  
 23 multimillion-dollar components of these rates, any one  
 24 of them. You have to deal with whether the contract is  
 25 void ab initio.

2047

1 Then we have the testimony of other people at  
 2 San Diego that said I absolutely thought it was illegal  
 3 from the very beginning; except for the man who passed  
 4 away, I never told anybody at Met that.  
 5 So I think there is a tension in San Diego's  
 6 position in that they are trying to have it both ways:  
 7 No, we weren't mistaken, or we were mistaken but you  
 8 weren't, or we were mistaken and we told you, or we  
 9 weren't mistaken and we told you. I think there is a  
 10 tension there.  
 11 As to the water stewardship rate, I don't think  
 12 there is evidence that San Diego understood the  
 13 inclusion of the water stewardship rate in the  
 14 conveyance charges to be unlawful at the time of the  
 15 contract. We certainly didn't think it was illegal.  
 16 THE COURT: Right.  
 17 MR. QUINN: I could talk about other issues  
 18 here. If the Court has any questions about any of the  
 19 other affirmative defenses, the Court raised some other  
 20 issues in the questions, and I am happy to address  
 21 those.  
 22 THE COURT: I am satisfied. I appreciate your  
 23 help. Let's just take a pause off the record.  
 24 Let's continue.  
 25 MR. KEKER: Brief response, your Honor.

2048

1 THE COURT: Please, I appreciate it.  
 2 MR. KEKER: I am going to concentrate on the  
 3 damages portion. First of all, the fact of damages,  
 4 that we don't know what the conveyance rate means, I  
 5 won't put up 5.2.  
 6 They don't talk about the conveyance rate.  
 7 They talk about the lawful rate applicable to the  
 8 conveyance of water.  
 9 Met's brief, in their trial brief in this case,  
 10 they say on page 11, "First, San Diego board was clearly  
 11 informed of the differences in price and the price term  
 12 in Option-2" -- remember that is where we ended up --  
 13 "Was the conveyance rate, and the conveyance rate  
 14 consisted of System Power Rate, Water Stewardship Water  
 15 Rate and System Access Rate."  
 16 This idea that we don't know what conveyance --  
 17 that there is some ambiguity about it is wrong. The  
 18 difference, what they say the proof should be -- We have  
 19 shown what we were charged. We have shown what we were  
 20 charged illegally. We have shown what would happen if  
 21 you took the illegal portion of the rates out of those  
 22 charges. They say that it is our burden to show what we  
 23 could have been charged. We have shown a lawful rate  
 24 which is what Denham has put in, and we have shown that  
 25 is consistent with other lawful rates that Kennedy and

2049

1 other people -- we have shown that.  
 2 And what they are complaining about is we  
 3 haven't shown the highest possible rate that we could  
 4 somehow think of. You know from the history of this  
 5 case that they could charge -- they had a lot of ways to  
 6 deal with the State Water Project. They could charge  
 7 membership fees. They could charge property taxes.  
 8 They don't have to charge volumetric rates.  
 9 The whole premise of Phase I is that if you are  
 10 going to charge volumetric rates, they have to be based  
 11 on cost causation and so on. So the idea that somehow  
 12 there is some burden on somebody to figure out the  
 13 highest possible thing you can charge is just plain  
 14 wrong.  
 15 It's also wrong that, having shown that you  
 16 were charged an improper rate, you send the fox back to  
 17 the henhouse to eat some more chickens. That's the  
 18 Shapell case which we cited in our earlier briefs,  
 19 1 Cal.App.4th 218 at page 244, California Court of  
 20 Appeals. That's the teaching of the MCI case which we  
 21 cited again and again on tax rebates, illegal taxes.  
 22 That's the point of the Oneida case, which we have cited  
 23 in our briefs. That it's an illegal rate, and it is a  
 24 violation of the contract.  
 25 The other thing, if I could find it, that we

2050

1 cited in our post-trial brief in Phase II, we have  
 2 pointed out all the cases that talk about unlawful fees  
 3 are a breach of contract. This is on page 23 of our  
 4 brief. The Marella Boxer case versus Superior Court,  
 5 which is cited at 23 and 24, you have a right not to be  
 6 subjected to unlawful billing practices.  
 7 So, the fact of damages is established. And we  
 8 were subject to unlawful billing practices, and now we  
 9 go on to the next stage.  
 10 These arguments about all the things that we  
 11 ignored, we did not ignore an increase in the supply  
 12 cost. What we did was accept testimony that was uniform  
 13 that nobody knows whether or if or what any increase in  
 14 the supply costs might have been. They say you've got  
 15 to shift the money from -- if you are not going to  
 16 charge it here, you have to shift it to the supply  
 17 costs. You don't have to do it. You can collect it  
 18 many different ways. Ten different experts, ten  
 19 solutions. That's what the evidence is.  
 20 Elasticity is a quibble. If they've got  
 21 something that they wanted to prove about elasticity,  
 22 they could. But it certainly does not undermine. Since  
 23 we don't know if supply rates are going to go up, we  
 24 don't know what the elasticity might change.  
 25 This denominator issue, just flat out wrong.

2051

1 What they're saying -- they mischaracterize what  
 2 Mr. Denham is doing. Mr. Denham is looking -- he does  
 3 not -- they say he is trying to present evidence on the  
 4 cost per acre-foot of conveying Colorado River water.  
 5 That's not what he did.  
 6 He said that he was calculating costs. He  
 7 wasn't calculating them specific to the Colorado River.  
 8 He was correcting wheeling rates by, what I said,  
 9 removing State Water Project and water stewardship  
 10 rates, and then spreading those costs over the remaining  
 11 non State Water Project transportation costs, the ones  
 12 that San Diego doesn't challenge, that part of the  
 13 system access rate and system power rate, across all the  
 14 water in the Met system. Because that's the way it is  
 15 done.  
 16 That's what the denominator should be, all  
 17 Metropolitan water, not -- otherwise, it wouldn't be a  
 18 systemwide rate. It wouldn't be a rate that is  
 19 generally applicable to everybody.  
 20 So further, what you can see is that it is  
 21 simply a stalking horse. This denominator argument is a  
 22 stalking horse for what became very clear during Met's  
 23 argument, which is you got Phase I wrong; you missed it;  
 24 you didn't understand; you shouldn't have said that the  
 25 State owns the State Water Project; you shouldn't have

2052

1 said that for them to treat the State Water Project as  
 2 their project and their transportation and their power  
 3 costs, that they shouldn't have done that and it's  
 4 wrong.  
 5 They have said they couldn't have been more  
 6 clear. And that's what this whole denominator issue,  
 7 this blending issue is about.  
 8 And by the way, they have proved absolutely  
 9 nothing in terms of quantification about the blending  
 10 issue. There's no data for you to do anything with.  
 11 They are just making this argument that because of  
 12 blending, you should ignore what you said in the Phase I  
 13 decision. You should go back on what you said and you  
 14 should recognize that the State Water Project really is  
 15 Met's State Water Project. And you were right in Phase  
 16 I. I am not going to argue it again but that's clearly  
 17 what their whole case is based on.  
 18 I would point out that PTX 31 is the 1998  
 19 exchange agreement. Can we put Section 5.4 up for a  
 20 minute?  
 21 Let me set the stage. In 1998 the rates have  
 22 not been unbundled yet. So they talk about what is  
 23 going to happen in the 20th contract year. In the 20th  
 24 contract year, Met is going to be able to adjust because  
 25 of its costs, but the one thing it can't do is include

2053

1 State Water Project water. Everybody got it then. This  
 2 is when Kennedy was working. This is when the  
 3 legislature had told Kennedy to come up with a rate. No  
 4 cost shifting. That's what it meant back in 1998.  
 5 Exclude State Water Project costs.  
 6 It completely refutes -- everybody understood  
 7 that until the rates were unbundled and until Ms.  
 8 Skillman got involved and until the 2003 rate structure  
 9 was in place, the State Water Project was considered  
 10 supply. And it wasn't until San Diego wanted to start  
 11 moving water through the system they began to break it  
 12 up. This notion of blending is not even a stalking  
 13 horse. It is an explicit attack on your Phase I  
 14 decision where you got it right.  
 15 Very brief -- excuse me. Very briefly on this  
 16 mistake of law business, we dealt with that on page 22  
 17 of our brief in the footnote. And Footnote 8 says, the  
 18 exchange agreement were illegal, which it is not, San  
 19 Diego would be entitled to a full refund of all  
 20 consideration; whereas, Met would be barred as a matter  
 21 of law from seeking any offset. And we cited two cases  
 22 there. I won't repeat them for the record. They are in  
 23 Footnote 8. Their argument is both nonsensical and  
 24 self-defeating. It would be bad for Met.  
 25 When they cited the Met versus Superior Court

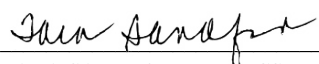
2054

1 case to you just now, that's from the dissent. Their  
 2 arguments on the contract give pettifoggery a bad name.  
 3 I'll just leave it there.  
 4 THE COURT: Okay.  
 5 MR. KEKER: Thanks for your patience.  
 6 THE COURT: Mr. Quinn, you have your glasses on  
 7 in a very determined way.  
 8 MR. QUINN: Two things I forgot to say.  
 9 THE COURT: Sure.  
 10 MR. QUINN: One, in the Court's questions we  
 11 got yesterday, with respect to the illegality, the Court  
 12 wrote it appears the parties simply agreed to legal  
 13 rates.  
 14 And that is true except for the first year.  
 15 The Court will remember it was a dollar amount.  
 16 THE COURT: It was a dollar number.  
 17 MR. QUINN: It was a dollar number.  
 18 THE COURT: Right. I do recall that. You are  
 19 not contending the dollar number was illegal.  
 20 MR. QUINN: I am contending it had the very  
 21 same component in it which everybody knew which the  
 22 Court said it was illegal. Everybody knew where that  
 23 came from, from San Diego.  
 24 THE COURT: I will tell you, I am not persuaded  
 25 by that argument.

2055

1 MR. QUINN: All right.  
 2 THE COURT: They came up with that number.  
 3 They could have a thousand reasons to come up with that  
 4 number. They could have dreamed it in their heads, but  
 5 we are not going to attack it on the basis it was a  
 6 function of a dream. We look at the number. And people  
 7 come up with funny ways for numbers. They came up with  
 8 this way and good enough for the first year.  
 9 Is your contention that first number is an  
 10 agreement to an illegal rate?  
 11 MR. QUINN: That's San Diego's contention.  
 12 THE COURT: The first --  
 13 MR. QUINN: I think it's absolutely clear in  
 14 the evidence that they knew --  
 15 THE COURT: I don't think they are challenging  
 16 that first year.  
 17 MR. QUINN: That \$253, you built that from the  
 18 system access rate, the system power rate, their own  
 19 document. Their own internal documents and  
 20 presentations say that's what that was.  
 21 THE COURT: I think you're probably right.  
 22 MR. QUINN: At least the first year. It wasn't  
 23 a question of agreeing to an illegal rate.  
 24 If that's illegal, that goes to the core of the  
 25 contract, and that is part of our affirmative defense.

2056

1 REPORTER'S CERTIFICATE  
 2  
 3 STATE OF CALIFORNIA, )  
 4 ) ss  
 5 COUNTY OF SANTA BARBARA. )  
 6  
 7  
 8 I, TARA ANN SANDFORD, CSR #3374, Certified Shorthand  
 9 Reporter, in the County of Santa Barbara, State of  
 10 California, hereby certify:  
 11 That the court proceedings were taken down by me in  
 12 stenotype at the time and place herein named and  
 13 thereafter reduced to typewriting by computer-aided  
 14 transcription under my direction.  
 15 I further certify that I am not interested in the  
 16 event of the action.  
 17 WITNESS my hand this 6th day of June,  
 18 2015, at Santa Barbara, California.  
 19  
 20  
 21   
 22 TARA SANDFORD, RPR, CSR No. 3374  
 23 Certified Shorthand Reporter  
 24 State of California  
 25

2058

1 The second thing, and last thing I'll say, is  
 2 Mr. Kecker said we have given the Court in Mr. Denham a  
 3 lawful rate schedule or lawful way to do this. Well,  
 4 with all respect, the Court has no way of knowing  
 5 whether that would be lawful. It would be equally  
 6 unlawful to overcharge other member agencies and have  
 7 them subsidize San Diego's exchange activity. That  
 8 would be illegal, too. And the Court just has no  
 9 evidence on that issue.  
 10 They assert, just back out those costs and we  
 11 have given you a lawful rate, your Honor.  
 12 I don't think they've shown that. I think that  
 13 results in real issues about the legality of the  
 14 consequences and the treatment of other member agencies  
 15 if you do what they suggest.  
 16 Thanks, your Honor.  
 17 THE COURT: I appreciate everybody so much.  
 18 Thank you so much.  
 19 MR. KEKER: Thank you, your Honor.  
 20 MR. QUINN: Thank you, your Honor.  
 21 MR. KEKER: Thanks for your patience.  
 22 (Arguments concluded at 4:10 p.m.)  
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2057

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<p style="text-align: center;"><b>A</b></p> <p><b>ab</b> 1996:1 2047:25</p> <p><b>ability</b> 2026:4 2027:4 2034:20 2036:13,18</p> <p><b>able</b> 1985:14 2053:24</p> <p><b>absolute</b> 1999:6</p> <p><b>absolutely</b> 1979:3 1992:9 1993:10 1997:21 2024:22 2048:2 2053:8 2056:13</p> <p><b>absurd</b> 1982:3</p> <p><b>absurdity</b> 1982:13</p> <p><b>accept</b> 2014:8 2020:6 2023:8 2051:12</p> <p><b>access</b> 1979:22 1984:22 1985:4,10,11,14,23 2004:3,6 2023:13 2049:15 2052:13 2056:18</p> <p><b>accommodate</b> 2001:17</p> <p><b>account</b> 1982:6,10 1983:15,18 1996:8 2002:2 2016:19,22 2019:18 2022:7 2023:4</p> <p><b>acknowledged</b> 2021:2 2022:24 2036:1 2047:18</p> <p><b>acre-foot</b> 1996:12 1998:6,8 2052:4</p> <p><b>act</b> 1983:7 2040:21</p> <p><b>action</b> 2019:22 2024:15 2058:16</p> <p><b>activity</b> 2057:7</p> <p><b>acts</b> 1979:7 1997:19</p> <p><b>actual</b> 1981:5 1997:3</p> <p><b>Add</b> 2005:5</p> <p><b>added</b> 1980:23</p> <p><b>additional</b> 1987:17</p> <p><b>address</b> 2016:2,15,20 2016:20 2033:12 2036:15 2042:12 2048:20</p> <p><b>addressed</b> 2000:22 2003:4</p> <p><b>addressing</b> 2023:6 2024:1 2038:15</p> <p><b>adjudicating</b> 1977:8</p> <p><b>adjust</b> 2002:11 2053:24</p> <p><b>adjusted</b> 2001:17,25 2005:14</p> <p><b>administer</b> 2041:8</p> <p><b>administers</b> 2041:24</p> <p><b>administrative</b> 2024:16</p> <p><b>admission</b> 1991:24 1992:17</p> <p><b>admit</b> 1988:23</p>	<p><b>admitted</b> 1989:25 1992:1 1999:1 2045:7</p> <p><b>ADOPTED</b> 1972:10</p> <p><b>affairs</b> 2047:3</p> <p><b>affect</b> 2022:23 2026:4</p> <p><b>affirmative</b> 2010:8 2042:2,10 2046:23 2048:19 2056:25</p> <p><b>afternoon</b> 1975:5 2010:19,20</p> <p><b>age</b> 2016:1</p> <p><b>agencies</b> 1991:17 1999:4 2000:24 2001:8,16,20,24 2009:17 2029:9 2030:5,18 2038:2,3 2038:10 2057:6,14</p> <p><b>agency</b> 1989:2 1990:6 2005:19 2022:1,3 2038:11,12 2039:8,9 2041:23</p> <p><b>agency's</b> 2041:8</p> <p><b>agree</b> 1984:21 1991:12 2006:25 2007:8 2010:7 2026:10 2037:21,23 2046:22</p> <p><b>agreed</b> 1977:6 2002:6 2005:3 2008:14 2011:11 2013:4 2036:6 2055:12</p> <p><b>agreeing</b> 2056:23</p> <p><b>agreement</b> 1982:4,4 1983:6 1987:16 1990:24 1991:1,8,9 1991:18,19 1992:3 1996:14,19,23 2002:21 2003:22 2004:15 2007:19 2008:1,4,8 2010:2 2011:13,15,23 2012:4 2020:15,25 2021:7,14 2021:20 2022:1 2024:6,11,11 2028:19 2028:24 2038:19,21 2040:10 2045:8,16 2046:18 2053:19 2054:18 2056:10</p> <p><b>agreements</b> 1987:8 2003:21 2004:18 2020:14,17,21</p> <p><b>agrees</b> 2002:10 2042:15</p> <p><b>ahadlock@kvn.com</b> 1973:7</p> <p><b>ahead</b> 2006:24 2035:6 air 2036:20</p> <p><b>Alameda</b> 1973:18</p> <p><b>Alaska</b> 2025:12</p> <p><b>albeit</b> 2021:25</p>	<p><b>allocate</b> 2036:22</p> <p><b>allocated</b> 1999:4</p> <p><b>allow</b> 2010:12</p> <p><b>alternative</b> 1987:25 2027:7 2031:2</p> <p><b>alternatives</b> 2013:24</p> <p><b>ambiguity</b> 2019:9 2046:1 2049:17</p> <p><b>amending</b> 2042:13</p> <p><b>amount</b> 1978:14 1979:2,10,11 1980:24 1980:25 1981:2,8,16 1988:22 1995:4 1999:20,21 2000:2 2003:14 2005:6 2013:21 2015:22 2028:20 2030:15 2055:15</p> <p><b>amounts</b> 2000:23</p> <p><b>analogy</b> 2037:12</p> <p><b>analysis</b> 1978:6 1998:22 2002:20,21 2003:15 2036:24 2037:10,17 2047:15</p> <p><b>Angeles</b> 1973:15,19 2009:22</p> <p><b>ANN</b> 2058:8</p> <p><b>answer</b> 1976:7,14 1984:20 1985:2 1986:3,5 2007:8 2022:16 2042:14 2043:3,6</p> <p><b>answers</b> 1976:8 1977:11 2032:10</p> <p><b>anticipated</b> 1981:19 1984:17</p> <p><b>anticipating</b> 2004:20</p> <p><b>anybody</b> 1983:23 1994:20 2025:23 2027:13,22 2044:11 2044:12 2048:4</p> <p><b>anybody's</b> 2042:7</p> <p><b>apart</b> 2014:8 2039:4,5 2040:16</p> <p><b>apparent</b> 2046:17</p> <p><b>Appeal</b> 2031:20,21 2038:23 2046:13</p> <p><b>Appeals</b> 1983:14 2002:10 2032:14 2050:20</p> <p><b>appear</b> 2008:14</p> <p><b>APPEARANCES</b> 1973:1</p> <p><b>appears</b> 1986:17 2055:12</p> <p><b>applicable</b> 1983:1,12 1991:2,15,16 2049:7 2052:19</p>	<p><b>applied</b> 2011:24 2041:6 2033:4</p> <p><b>applies</b> 1991:7</p> <p><b>apply</b> 2045:7</p> <p><b>appreciate</b> 2048:22 2049:1 2057:17</p> <p><b>approaching</b> 1981:23 1982:2</p> <p><b>appropriate</b> 2030:1</p> <p><b>approve</b> 1983:24</p> <p><b>approved</b> 2030:14,14</p> <p><b>approximation</b> 1979:6 1981:3,7 1994:6,7</p> <p><b>APRIL</b> 1972:11</p> <p><b>aqueduct</b> 2008:21 2009:2 2025:21</p> <p><b>aqueducts</b> 2025:1</p> <p><b>area</b> 2041:22 2046:4</p> <p><b>arguably</b> 2021:15,16</p> <p><b>argue</b> 1988:25 1989:19 2053:16</p> <p><b>argued</b> 2001:1 2005:17 2039:15</p> <p><b>arguing</b> 1988:3 1994:19 2030:21</p> <p><b>argument</b> 1980:3 1987:10 1989:4,13 2000:21,25 2013:13 2014:2 2017:4 2034:4 2052:21,23 2053:11 2054:23 2055:25</p> <p><b>arguments</b> 1974:4 1988:13 2005:13 2008:23 2051:10 2055:2 2057:22</p> <p><b>arrangements</b> 2021:21</p> <p><b>arrive</b> 2034:1</p> <p><b>arrived</b> 2020:4</p> <p><b>aside</b> 1982:5 1983:13 1984:18 2032:18 2035:23</p> <p><b>asked</b> 1976:6 1990:5 1997:24 2016:16,17 2021:2</p> <p><b>asking</b> 1983:3 1993:18 1999:18 2003:17 2004:21 2007:21,22</p> <p><b>aspect</b> 1988:5</p> <p><b>assemblage</b> 2021:13</p> <p><b>assert</b> 2057:10</p> <p><b>assigned</b> 1981:9 1997:22</p> <p><b>associated</b> 1989:7</p> <p><b>ASSOCIATES</b> 1972:22</p> <p><b>assume</b> 2019:12 2023:7 2037:16,18</p> <p><b>assumed</b> 2030:1 2037:4</p> <p><b>Assuming</b> 1985:2</p>	<p><b>assumption</b> 2004:12 2016:17,18 2037:10</p> <p><b>assumptions</b> 2016:8 2017:8</p> <p><b>attach</b> 2039:18</p> <p><b>attack</b> 2054:13 2056:5</p> <p><b>attempt</b> 1978:23</p> <p><b>attempted</b> 1989:22</p> <p><b>attention</b> 2002:8 2012:15 2019:24 2020:10 2034:25</p> <p><b>attributable</b> 1979:22 1984:23 2028:25</p> <p><b>attributed</b> 2029:6</p> <p><b>AUDREY</b> 1973:4</p> <p><b>authority</b> 1972:6 1977:12 2013:20</p> <p><b>Authority's</b> 1975:7</p> <p><b>available</b> 2035:5,9</p> <p><b>avoid</b> 1988:9</p> <p><b>avoided</b> 1989:8,16</p> <p><b>award</b> 2005:18 2031:17</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>B</b> 1973:13 1993:12 2040:8</p> <p><b>back</b> 1980:20 1981:24 1984:5 1990:19 1992:20 1993:11 1994:17 1995:21 1998:13 2000:17 2001:12 2002:20 2005:3 2016:8 2033:25 2034:17 2037:5 2040:18,21 2042:23 2050:16 2053:13 2054:4 2057:10</p> <p><b>backing</b> 2023:12</p> <p><b>backwards</b> 1984:6</p> <p><b>bad</b> 2027:9 2054:24 2055:2</p> <p><b>Barbara</b> 2058:5,9,18</p> <p><b>barred</b> 2054:20</p> <p><b>based</b> 1976:21 1980:6 1994:23 2005:18 2006:4 2031:4 2035:25 2040:25 2041:4 2045:6 2050:10 2053:17</p> <p><b>basic</b> 2033:17</p> <p><b>basically</b> 1980:3 2007:20 2039:21 2047:12</p> <p><b>basis</b> 1984:24 1986:17 1986:22,22 1992:2,10</p>
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<p>1996:13,13 2022:13 2023:14 2031:4 2041:17 2046:21 2056:5 <b>basket</b> 2034:16 <b>Battery</b> 1972:24 1973:6 <b>bear</b> 2019:9 <b>BEATTY</b> 1973:17 <b>began</b> 2036:8 2054:11 <b>beginning</b> 1994:15,20 2048:3 <b>believe</b> 1976:7 1979:8 1980:10 1983:7 1986:7 1988:2 1992:17 1994:4 2042:17 2045:13 <b>believed</b> 2042:17 <b>Ben</b> 1978:20 <b>beneficial</b> 1988:25 <b>benefit</b> 1981:2,5 1987:7 1998:5,5 1999:4,8 2024:20 2028:13 <b>benefits</b> 1990:21 1996:5,9 <b>best</b> 1994:6 <b>better</b> 2019:15 <b>beyond</b> 1994:22 2011:4 2034:11 <b>big</b> 1979:18 1998:7 2007:25 2023:20 2039:15 <b>bigger</b> 2023:21 <b>billing</b> 2031:7 2051:6,8 <b>bind</b> 2024:8 <b>bit</b> 2000:22 2011:4 2012:22 2023:24 <b>blend</b> 1987:6,6,21 2024:18,23,24,25 2025:5,6 2026:9,12 2026:22,23 2027:1 2028:20 2029:2,6 2030:23,24 2031:4,6 2034:16 <b>blended</b> 1986:9 2027:19,22 2028:5 <b>blending</b> 1987:13,24 2012:23 2053:7,9,12 2054:12 <b>bless</b> 2026:1 <b>Blow</b> 1999:12 <b>board</b> 2018:14 2021:13 2025:16 2049:10 <b>bonds</b> 2030:7,8,9 <b>bottom</b> 1985:9 1990:20 1995:2 1999:24 2008:24 <b>Boxer</b> 2051:4</p>	<p><b>BRAUNIG</b> 1973:5 <b>breach</b> 2002:14 2021:7 2051:3 <b>breached</b> 2021:16 <b>break</b> 2010:12 2039:4 2039:5 2054:11 <b>brief</b> 1975:7,12 1977:3 1977:11 1978:25 1987:20 1988:6,10 1989:3 1993:19 1995:2 1996:3 2000:20 2009:5 2019:3 2026:7,8 2027:20 2039:14,18 2044:13 2045:4 2048:25 2049:9,9 2051:1,4 2054:15,17 <b>briefly</b> 2054:15 <b>briefs</b> 1994:15,24 2000:7 2005:17 2050:18,23 <b>bring</b> 2025:3 <b>bringing</b> 1996:9 <b>broader</b> 1987:10 2007:21 <b>broken</b> 1994:24 <b>brought</b> 1980:19 2011:12 <b>BROWN</b> 1972:22 <b>build</b> 1984:13 2025:21 <b>building</b> 2030:15 <b>built</b> 2029:20 2056:17 <b>burden</b> 1978:16 1980:3 1980:11,15 1981:6,17 1988:15 1992:20 1993:2 1994:14,18 2000:9 2005:15 2013:16,18 2014:2,7 2016:25 2017:4,6,20 2019:9 2033:21 2036:22,23 2049:22 2050:12 <b>burdens</b> 1996:4 <b>business</b> 1980:5,7 1987:12 1988:7 2054:16 <b>buy</b> 2038:7,8 <b>bypass</b> 2025:22</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 1993:14 <b>CA</b> 1972:24 <b>Cal.App.3d</b> 2029:23 <b>Cal.App.4th</b> 2050:19 <b>Cal.Rptr</b> 2047:11 <b>calculate</b> 2005:5 2023:14 <b>calculated</b> 1979:3</p>	<p>1998:6 2000:23 2003:8 2006:3 <b>calculating</b> 1981:9 2052:6,7 <b>calculation</b> 1999:19 2002:4 2003:18 2009:15 2023:11,11 <b>calculations</b> 1982:22 2004:9,21 <b>calculator</b> 2016:7 2017:8 <b>California</b> 1972:1,9,11 1972:17 1973:6,11,15 1973:19 1975:1 2047:11 2050:19 2058:3,10,18,25 <b>call</b> 2007:13 2008:8,10 2016:4,7 2017:14 <b>called</b> 2008:4,15,18 2014:25 <b>candidly</b> 2024:1 <b>capable</b> 1994:5 <b>capacity</b> 1990:22 1991:9 1998:1,3 <b>capital</b> 2039:23 2040:5 2040:11,14 2041:2 <b>car</b> 2030:10,11,11,12 <b>care</b> 1983:15 1984:19 <b>cares</b> 2028:8 <b>Carmel</b> 2001:5 <b>case</b> 1975:16 1978:21 1980:7,21 1981:12,13 1990:23 1994:5,17 1996:25 2000:19 2001:4,11 2006:6 2012:13 2017:9,23 2018:10,12 2019:15 2019:22 2029:21,22 2030:21 2031:19 2032:3,15 2034:10 2038:24 2040:15 2046:14,16 2049:9 2050:5,18,20,22 2051:4 2053:17 2055:1 <b>cases</b> 1980:5 1981:11 2000:6 2013:23 2014:7 2046:6 2051:2 2054:21 <b>category</b> 2006:8 <b>causal</b> 1988:25 1989:22 <b>causation</b> 1976:22 1987:16 1992:2 2050:11 <b>cause</b> 1978:15 1987:17 1989:25 1990:9,14 2019:22 2024:15 2027:3</p>	<p><b>caused</b> 1979:8 1980:14 <b>cents</b> 1977:18 <b>certain</b> 1978:8 1979:2 2011:17 2016:8 2017:8 2035:9 2040:22 <b>certainly</b> 1988:12 2000:13 2001:18 2007:8 2020:5 2047:18 2048:15 2051:22 <b>certainty</b> 1979:3 <b>CERTIFICATE</b> 2058:1 <b>Certified</b> 2058:8,24 <b>certify</b> 2058:10,15 <b>challenge</b> 2029:25 2052:12 <b>challenged</b> 2031:24 <b>challenging</b> 1985:20 2056:15 <b>change</b> 2022:3 2051:24 <b>changed</b> 1986:18,18,24 1988:3,4 <b>characterized</b> 2009:10 2013:16 2038:22 <b>charge</b> 1976:19 1983:23 1984:24 1986:9,19 1988:12,22 1988:23 1995:5 1998:3,7 2001:5,5 2009:15 2013:12,22 2028:24 2029:13 2050:5,6,7,8,10,13 2051:16 <b>charged</b> 1978:9 1983:16,22 1988:8,9 1988:15 1992:22 1994:3 1995:12 1997:4,15 2002:13,22 2006:8 2009:25 2014:13,14 2015:12 2015:19 2016:16 2029:6 2049:19,20,23 2050:16 <b>charges</b> 1979:11,21 1982:16 1985:10 2000:4 2004:2 2039:2 2039:9,10 2041:2 2043:14,19 2048:14 2049:22 <b>charging</b> 1986:19 1992:2 2004:23 <b>chart</b> 1985:6 <b>chastise</b> 1995:3 <b>cheap</b> 2008:24 <b>chickens</b> 2050:17 <b>choice</b> 2024:24 2028:12</p>	<p>2028:17 <b>chooses</b> 1990:7 <b>cite</b> 2047:10 <b>cited</b> 1977:2 1978:24 1980:5 1981:11 2000:6,20 2013:20 2017:13 2040:15 2050:18,21,22 2051:1 2051:5 2054:21,25 <b>citing</b> 1978:21 <b>claim</b> 2030:11 2032:6 2032:16 2033:16 <b>claimed</b> 2002:16 <b>clarify</b> 1990:12 <b>classes</b> 2006:1 2040:23 <b>clause</b> 1999:10,17 <b>clear</b> 1980:13 1985:1 1986:16,23 1995:2 2011:10 2015:6 2024:22 2026:11,14 2046:3 2047:9 2052:22 2053:6 2056:13 <b>cleared</b> 1977:5 <b>clearly</b> 2026:5 2030:6 2036:14 2049:10 2053:16 <b>close</b> 2021:24 <b>closed</b> 1989:21 2022:20 <b>closing</b> 1974:4 2034:3 <b>CMC</b> 1978:19 <b>code</b> 2005:24 2037:13 <b>collect</b> 2051:17 <b>collections</b> 1998:24 <b>Colorado</b> 2008:21 2023:15 2025:3,18,25 2029:12 2037:8 2052:4,7 <b>come</b> 1975:19,25 1976:1 1977:1,10 1981:24,24 1986:6 1993:14 2001:15 2003:3 2018:15 2022:19 2031:10,22 2034:18 2037:9 2038:18 2054:3 2056:3,7 <b>comes</b> 1976:10 1995:6 2001:10,11 2004:16 2007:18 2009:19,20 2025:12,19 2040:1,2 <b>comfortable</b> 2014:11 <b>coming</b> 1977:1 2025:2 2026:6 <b>comment</b> 2033:13 <b>comments</b> 1976:8 <b>Compare</b> 1999:18 <b>comparison</b> 2002:20</p>
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<p><b>complaining</b> 2050:2  <b>completed</b> 2014:18  <b>completely</b> 1987:20  1988:1 1992:16,18  2000:22 2002:2,19  2019:23 2020:14  2026:10 2044:18  2054:6  <b>component</b> 2055:21  <b>components</b> 2047:23  <b>computation</b> 1979:4  <b>computed</b> 1979:5  <b>computer</b> 2016:7  <b>computer-aided</b>  2058:13  <b>concedes</b> 2007:23  <b>conceivably</b> 2020:11  <b>concentrate</b> 2049:2  <b>concepts</b> 2035:15  <b>concerned</b> 2019:6  <b>concerns</b> 2043:5  <b>conclude</b> 2030:13  <b>concluded</b> 1996:11  2057:22  <b>conclusion</b> 1986:17  2012:20  <b>conclusions</b> 2010:8  <b>conditions</b> 2035:9  <b>conduit</b> 2030:6,8,9  <b>confine</b> 2021:18  <b>confirmed</b> 1986:25  1987:14 2044:23  <b>connection</b> 1991:23  1992:13  <b>consequence</b> 2020:16  2021:1,2,10,25  2022:23  <b>consequences</b> 2021:8  2057:14  <b>conservative</b> 1997:16  2000:2,5  <b>consider</b> 2020:19  <b>consideration</b> 2054:20  <b>considered</b> 2054:9  <b>consisted</b> 2049:14  <b>consistent</b> 2018:2  2045:14 2049:25  <b>contemplate</b> 2033:24  <b>contemplates</b> 2025:21  <b>contending</b> 2055:19,20  <b>contention</b> 2041:17  2056:9,11  <b>context</b> 2004:20  2013:17 2015:15  2017:16  <b>continue</b> 2048:24  <b>continues</b> 1989:18  <b>contract</b> 1979:10,10</p>	<p>1983:8,10 1986:15  2002:14 2008:15  2011:25 2012:6  2020:25 2025:20  2026:2,21,25 2027:6  2032:6,22 2033:16  2034:7,10,20 2041:12  2043:7,20 2044:7  2047:4,5,7,13,24  2048:15 2050:24  2051:3 2053:23,24  2055:2 2056:25  <b>contracts</b> 2003:24  2030:4,4,19  <b>contractual</b> 2020:14  2025:10  <b>contradict</b> 2040:2  <b>contradicted</b> 2045:10  <b>contradicts</b> 1989:13  <b>contributes</b> 1999:22  <b>contributing</b> 2039:22  <b>contribution</b> 1980:16  <b>control</b> 2010:23  <b>convenience</b> 1987:13  2025:9  <b>conveyance</b> 1991:2,16  2003:1 2007:10,19,22  2008:3 2012:8,9,11  2012:14 2021:5  2038:20 2039:2,3,8  2039:10 2043:19  2048:14 2049:4,6,8  2049:13,13,16  <b>conveying</b> 2052:4  <b>convinced</b> 2027:17,20  <b>core</b> 2056:24  <b>correct</b> 2003:23  2004:12 2007:20  2027:20 2039:17  <b>corrected</b> 1997:1  <b>correcting</b> 2052:8  <b>cost</b> 1976:21 1981:4  1987:16 1989:6,15,23  1992:1 1996:3,5  1997:23 2001:2  2022:4 2030:2 2037:8  2037:18 2050:11  2051:12 2052:4  2054:4  <b>cost-of-service</b> 1998:15  <b>costs</b> 1976:17,18,23,24  1979:14,15,23,25  1984:10,13 1985:5,23  1986:2,10 1987:1,2  1987:18 1989:7,9,16  1995:14,15 1996:8  1997:9 2001:5  2002:25 2003:9,9,19</p>	<p>2004:23 2019:18  2020:12,18,20 2021:5  2022:1 2023:14  2028:25 2029:4,5,17  2029:17,21,24  2030:17,20 2031:1,3  2034:17 2035:25  2036:17,21,21 2037:5  2039:23 2040:5,11,12  2040:14,14 2051:14  2051:17 2052:6,10,11  2053:3,25 2054:5  2057:10  <b>COUNSEL</b> 1973:17  <b>count</b> 2007:24  <b>counterclaim</b> 2019:22  <b>County</b> 1972:2 1975:7  2009:23 2029:22  2058:5,9  <b>couple</b> 2012:18 2015:9  2029:18  <b>course</b> 1986:3 2023:17  2026:2 2027:21  2036:4 2038:10  <b>court</b> 1972:1 1975:5,11  1977:14 1978:23  1981:18,22 1983:14  1984:3 1985:3 1988:7  1990:23 1991:5  1992:4 1993:4,15,17  1995:1,25 1997:18  2001:10 2002:10  2003:19,24 2004:4,11  2006:24 2008:4  2010:11,15,17,20,23  2011:2,8,14,22,25  2012:3,6 2013:2,6,7,9  2013:24 2014:3,15,24  2015:2,4,14,21,23  2016:12,13,18  2017:19,23,24 2018:3  2018:5,8,9,10,17,25  2019:24 2020:2,5,9  2021:3,11,23 2022:11  2022:15,17,25 2024:5  2024:7,9,12,14,15,16  2025:7,9,15 2026:10  2026:14,16,18,19  2027:17 2028:1,3,4,9  2028:10,11,15,18  2029:2,14,23 2030:2  2030:13,23 2031:16  2031:19,20 2032:1,9  2032:11,14 2033:11  2033:20,24 2034:4,12  2035:6,11,14 2036:2  2036:6,10,11,12,13  2037:11,19,20,25</p>	<p>2038:23,25 2039:4,12  2040:20 2041:22  2042:3,8,11,18,20,25  2043:3,11 2045:14,19  2046:13,13,15,20  2047:3,5,7,10,11,13  2048:16,18,19,22  2049:1 2050:19  2051:4 2054:25  2055:4,6,9,11,15,16  2055:18,22,24 2056:2  2056:12,15,21 2057:2  2057:4,8,17 2058:11  <b>Court's</b> 1980:8 1998:21  2011:1,18 2023:6,22  2029:16 2038:15  2041:11 2042:12  2055:10  <b>courtroom</b> 1994:21  <b>covers</b> 2010:4  <b>CPF-10-510830</b> 1972:8  <b>CPF-12-512466</b> 1972:8  <b>created</b> 2017:5  <b>credibility</b> 2045:5  <b>credit</b> 1998:4,8 2007:2  2037:23 2038:17  2039:7,8,11 2041:19  <b>credits</b> 2007:10  <b>criticized</b> 2023:2  <b>cross</b> 2003:5  <b>cross-check</b> 1997:19  <b>crucial</b> 1989:18  <b>CSR</b> 1972:20 2058:8  2058:23  <b>current</b> 1975:17  <b>CURTIS</b> 1972:3  <b>Cushman</b> 1977:2,4  1982:18,22 2004:14  2020:3 2022:9 2034:5  2044:23  <b>Cushman's</b> 2002:25  2003:6 2019:25  <b>customers</b> 2001:1  <b>cuts</b> 2023:11</p>	<p>1985:8 1987:24  1993:7,25 1994:3,11  1994:12 1997:14,20  1999:22 2002:14,16  2003:2,17 2005:11,20  2006:3 2011:7  2013:10,25 2014:4,10  2014:12,21 2016:9  2017:9,12,22 2018:19  2018:22 2019:15  2020:16,21 2021:10  2021:16,17 2023:7,21  2031:17 2032:3,17  2033:8 2049:3,3  2051:7  <b>DAN</b> 1973:4  <b>data</b> 2053:10  <b>day</b> 1982:6 2016:1  2021:6 2026:11  2045:19,24 2058:17  <b>daylight</b> 2030:23  <b>deal</b> 1994:25 2032:5  2047:24 2050:6  <b>dealing</b> 1981:11  1983:12  <b>dealt</b> 1986:11,11  2054:16  <b>debt</b> 2030:1  <b>decades</b> 2025:14  <b>decent</b> 2019:15  <b>decide</b> 1982:11,14  1983:3 2018:14  2031:5  <b>decided</b> 1979:10  2017:20 2035:18  <b>decides</b> 1983:14,14  2047:5,14  <b>deciding</b> 1993:15  <b>decision</b> 1975:19,25  1976:3 1986:12,13  1988:1,2,5 1989:5,11  1989:12 1990:19  1992:5,9,21 1994:2,4  1994:8,23 1995:9  2001:6 2024:19,21  2031:22 2047:7  2053:13 2054:14  <b>declare</b> 2045:19  <b>deduce</b> 2026:24  <b>deductions</b> 1981:4  <b>deep</b> 2045:17  <b>default</b> 2040:16  <b>defendant</b> 1973:11  1979:7 1980:12,13  1981:3,5 2000:12,14  <b>Defendant's</b> 1980:25  <b>Defendants</b> 1972:14  <b>defense</b> 2046:23</p>
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<p>2047:19 2056:25  <b>defenses</b> 2010:8 2042:2                  2042:10 2043:5                  2048:19  <b>defensible</b> 2031:13  <b>deference</b> 2041:10,25  <b>deficit</b> 1999:16,25  <b>definitely</b> 2007:25  <b>definition</b> 2021:9                  2027:6  <b>deliver</b> 1991:10 2025:4                  2025:24 2026:5,9,22                  2026:23 2027:2                  2030:24  <b>delivered</b> 2026:12                  2041:4  <b>delivers</b> 1987:5,21  <b>delta</b> 2014:1 2015:11                  2016:15 2023:20  <b>demand</b> 1989:1 1990:1                  1990:10,15 2022:22  <b>Denham</b> 1978:7                  1980:19 1985:22                  1992:19 1995:17                  1997:15 2000:23                  2003:7 2004:21                  2005:2 2016:5,17                  2020:1,6 2021:24                  2022:9,19 2023:3,12                  2037:4 2049:24                  2052:2,2 2057:2  <b>Denham's</b> 1978:6                  1979:13 1982:22                  1985:6 1995:10                  1997:1,6 2004:8                  2022:8 2036:24  <b>denominator</b> 2023:10                  2023:15,19 2051:25                  2052:16,21 2053:6  <b>deny</b> 1999:7  <b>DEPARTMENT</b>                  1972:4  <b>depends</b> 1993:4  <b>deposition</b> 1972:23                  2003:6  <b>Dept</b> 1974:2  <b>describes</b> 2041:16                  2047:3  <b>design</b> 2017:18  <b>designated</b> 2003:7                  2043:22  <b>despite</b> 1981:18,19  <b>details</b> 1997:23  <b>determine</b> 1978:22  <b>determined</b> 1982:10                  2013:10 2055:7  <b>detracts</b> 1980:8  <b>developed</b> 2029:19</p>	<p><b>developing</b> 2046:5  <b>dicta</b> 2024:2,8,14                  2028:1,11 2035:18  <b>Diego</b> 1972:6 1975:7                  1976:4,7 1982:20                  1983:4,4,21 1984:4                  1984:25 1985:8                  1986:23 1996:9                  1998:4 1999:7,15                  2000:3 2002:17                  2003:13,14,20 2004:8                  2005:8 2006:3 2008:9                  2008:20 2013:4,4,7                  2013:16 2014:17,21                  2015:15 2019:5,5                  2020:10 2021:11,11                  2021:12,21 2023:17                  2024:17,20 2027:14                  2027:22 2028:7,7                  2029:7 2031:22                  2032:16 2036:2                  2038:10,20,22,24                  2039:10 2040:9,15                  2042:16,22 2043:17                  2043:22 2045:7,16                  2048:2,12 2049:10                  2052:12 2054:10,19                  2055:23  <b>Diego's</b> 2004:22 2048:5                  2056:11 2057:7  <b>difference</b> 1997:14                  2000:16 2006:15                  2014:12 2016:9                  2020:23 2039:15                  2049:18  <b>differences</b> 2049:11  <b>different</b> 1983:16                  1985:16 1988:16                  1992:25 1993:13,14                  2002:2 2005:4,4,7                  2006:9 2012:18,18                  2013:1,24 2015:10,12                  2017:3,3,15 2020:14                  2024:12,16 2034:1                  2037:3 2043:7                  2047:16 2051:18,18  <b>difficult</b> 1978:22  <b>directed</b> 1996:1  <b>direction</b> 2058:14  <b>disagree</b> 2018:17  <b>disagreement</b> 2033:1  <b>discharge</b> 2044:18  <b>discrimination</b> 2006:11  <b>discuss</b> 2045:1  <b>discussed</b> 2045:10  <b>discussion</b> 1975:18                  1989:10 1992:1                  2012:16</p>	<p><b>disgorgement</b> 1981:6  <b>dismiss</b> 2032:6,12  <b>dismissed</b> 2033:16  <b>dispositive</b> 1987:19  <b>dispute</b> 1979:9 1982:5                  1983:11 2007:18                  2027:13 2038:18  <b>disregard</b> 2006:17  <b>dissent</b> 2055:1  <b>distinguishable</b>                  2004:18  <b>distinguished</b> 2010:1  <b>district</b> 1972:9,11                  1973:11 2006:2                  2047:10  <b>divide</b> 1992:7 2005:5  <b>divine</b> 2034:9  <b>document</b> 2056:19  <b>documents</b> 2056:19  <b>doing</b> 1993:16,22                  1997:9 1998:14                  2005:1 2021:2 2030:9                  2036:3 2052:2  <b>dollar</b> 2012:5 2055:15                  2055:16,17,19  <b>dollars</b> 2043:13  <b>door</b> 2001:23  <b>doubt</b> 2033:9  <b>downstream</b> 1989:1  <b>dpurcell@kvn.com</b>                  1973:8  <b>draw</b> 2001:9  <b>dream</b> 2056:6  <b>dreamed</b> 2056:4  <b>drought</b> 2009:14  <b>DTX</b> 2044:2</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 1972:3  <b>earlier</b> 2015:7 2050:18  <b>ears</b> 2021:24  <b>easily</b> 1995:10  <b>easy</b> 1991:23 2025:10  <b>eat</b> 2050:17  <b>eats</b> 2014:10  <b>editable</b> 1975:11  <b>effect</b> 1989:1 1999:9                  2008:13 2034:23  <b>effective</b> 1972:12                  2009:14  <b>effects</b> 2020:19 2022:21  <b>effort</b> 1977:9 1988:21                  1999:2 2016:4,6,14  <b>eggs</b> 2034:15  <b>either</b> 2027:2 2038:14                  2038:22  <b>elasticity</b> 2022:22                  2051:20,21,24</p>	<p><b>electronic</b> 1975:6,9  <b>element</b> 2033:17  <b>elements</b> 2031:11  <b>EMANUEL</b> 1973:12  <b>EMANUEL,ESQ</b>                  1973:13  <b>embrace</b> 2020:1  <b>emphasis</b> 1979:18  <b>emphasize</b> 1980:20  <b>empty</b> 2025:1,1  <b>endeavor</b> 2015:16  <b>ended</b> 2049:12  <b>endorsing</b> 2032:11  <b>engage</b> 2017:24  <b>enlarge</b> 1989:20  <b>enrichment</b> 1980:22                  1981:1  <b>entered</b> 2027:5 2034:7                  2044:7 2046:18  <b>entire</b> 1980:17 1986:8                  1989:11 2030:2  <b>entirety</b> 1986:1  <b>entitled</b> 2038:21                  2039:25 2041:10,25                  2054:19  <b>entity</b> 2000:8  <b>equal</b> 2003:16  <b>equally</b> 2057:5  <b>equivalent</b> 1991:16                  2017:25  <b>ERIC</b> 1973:13  <b>escrow</b> 1982:6,10                  1983:15,18 2001:9,12                  2001:13  <b>especially</b> 1979:6  <b>ESQ</b> 1973:3,4,4,5,5,14                  1973:17,18  <b>essentially</b> 2015:16                  2029:12 2037:8,15  <b>establish</b> 1987:3                  1988:21 1999:2                  2011:6 2013:9,19                  2014:21  <b>established</b> 1981:15                  1993:7,20,25 1994:4                  2013:14,14 2014:3,9                  2014:19,20 2015:18                  2015:25 2018:20,23                  2051:7  <b>estate</b> 2041:1  <b>event</b> 2045:6 2058:16  <b>everybody</b> 1977:6                  1982:19 1983:1                  1984:6 1991:17                  2003:12,20 2004:10                  2012:4 2025:17                  2027:4,11,18,23                  2042:14 2052:19</p>	<p>2054:1,6 2055:21,22                  2057:17  <b>evidence</b> 1976:19,20                  1977:13 1978:4                  1981:1,4,7,20                  1987:11 1991:13,23                  1992:11,18 1996:20                  1997:5,11,16 1998:11                  1998:16 2006:18                  2013:18 2020:5                  2022:13 2024:14,22                  2025:24 2031:9                  2033:23 2034:1                  2042:10 2043:15,17                  2044:5 2045:14                  2046:5 2047:21                  2048:12 2051:19                  2052:3 2056:14                  2057:9  <b>exact</b> 1994:5 2024:18  <b>exactly</b> 1995:19  <b>example</b> 1982:15                  1991:8 2043:14  <b>exchange</b> 1983:6                  1984:25 1986:9                  1987:16 1990:24,25                  1991:7,8,11,18                  1992:3 1996:14,19,23                  1997:1 2002:21                  2003:10,21 2004:15                  2007:6,18 2008:1,13                  2009:10 2010:1,3                  2011:13,14,19,23                  2012:17 2020:15,21                  2021:14,19 2023:18                  2024:6,11 2028:19,23                  2038:19 2039:16                  2040:3,10 2045:8                  2053:19 2054:18                  2057:7  <b>Exclude</b> 2054:5  <b>excluded</b> 2038:24  <b>exclusion</b> 2039:1  <b>excuse</b> 2000:13                  2054:15  <b>Exhibit</b> 1996:16,17,23                  1999:11  <b>expected</b> 2024:23                  2027:8  <b>expeditious</b> 2032:5  <b>expenditures</b> 2040:5  <b>expense</b> 2001:19  <b>expenses</b> 1981:4                  1983:17 2039:23  <b>expensive</b> 2009:1                  2029:11 2037:6  <b>expert</b> 1993:13 2014:25                  2015:1,4,9 2016:2,5,6</p>
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<p>2016:11 2017:2 2036:20 2037:9 <b>expert's</b> 1997:19 <b>expertise</b> 2041:9 <b>experts</b> 2051:18 <b>explain</b> 1982:17 <b>explained</b> 1994:11 <b>explanation</b> 2020:7 <b>explicit</b> 2054:13 <b>explored</b> 2012:13 <b>extant</b> 1990:22 <b>extent</b> 1980:16 2011:22 2020:18 2036:7 2037:12,12 2039:25 2040:3 <b>extraneous</b> 2004:18 <b>extremely</b> 2000:5 <b>eyes</b> 2022:20</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>F.3d</b> 2006:7 <b>facilities</b> 2034:21 <b>fact</b> 1979:1,18 1982:3 1990:8 1994:3 2001:12 2007:12 2008:12 2011:6 2013:1,3,4,10,13 2014:3,5,21 2016:23 2017:11,20 2018:19 2018:22 2019:13 2022:2 2023:7 2028:5 2030:14 2035:1,3 2042:16 2043:21 2045:18 2049:3 2051:7 <b>factors</b> 2016:19,21 <b>factory</b> 2029:20 <b>facts</b> 2037:2 <b>failed</b> 2014:21 <b>failure</b> 1999:6 2019:17 2032:6 2033:16 <b>fair</b> 1985:1 1986:6 1996:22 2022:17 2028:23 <b>falls</b> 2001:22 2014:8 <b>Fantastic</b> 2014:22,22 <b>far</b> 1976:12 2000:2 2002:8 2011:20 2019:5 2035:18 <b>fashion</b> 2001:17 <b>fastest</b> 2032:4 <b>fault</b> 1980:14 <b>favor</b> 2045:25 <b>February</b> 2044:1 <b>fees</b> 2050:7 2051:2 <b>fervently</b> 2045:18 <b>fight</b> 1982:9 1983:13 <b>fighting</b> 1995:20,23</p>	<p><b>Figueroa</b> 1973:14 <b>figure</b> 1981:25 1991:4 1996:3,4,21 1997:24 2014:6 2020:20 2021:17 2031:20 2032:12,16,20 2050:12 <b>figured</b> 1978:8 <b>figures</b> 2032:14 <b>figuring</b> 1977:6 <b>final</b> 1976:2 2007:16 2031:22 <b>find</b> 1988:7 1995:10 2012:12 2013:7,9 2016:2 2046:14,16 2050:25 <b>finding</b> 1980:10 1987:19 <b>fine</b> 2011:3 <b>firm</b> 2011:9 <b>firming</b> 2019:2 <b>first</b> 1976:4,12 1986:11 1987:11 1998:13 2006:25 2007:3 2008:7 2012:1,2 2014:9,15 2018:18,19 2024:25 2028:1,1 2038:9 2049:3,10 2055:14 2056:8,9,12 2056:16,22 <b>fit</b> 1998:25 <b>five</b> 2008:5 2039:17 2043:4 <b>five-minute</b> 2010:15 <b>fixed</b> 2041:1 <b>flat</b> 2051:25 <b>Floor</b> 1972:24 1973:14 <b>focus</b> 1989:14 2011:11 <b>focused</b> 2011:16 2024:3 <b>fold</b> 1975:18 <b>follow</b> 2013:4 <b>followed</b> 1976:2 <b>following</b> 2045:15 <b>footnote</b> 1987:9 2054:17,17,23 <b>Ford</b> 2029:20 <b>forget</b> 1988:13 2004:25 <b>forgot</b> 2055:8 <b>forth</b> 2004:17 <b>forward</b> 2019:14 <b>found</b> 1976:16 1986:15 1987:1 1988:14 2006:18 2013:2,6 <b>foundation</b> 1987:15 <b>four</b> 2043:4,11 <b>four-year</b> 2002:5 <b>fox</b> 2050:16 <b>fraction</b> 1978:1</p>	<p>2023:20 <b>Francisco</b> 1972:2,17,17 1972:24 1973:6 1975:1 2000:19 <b>frankly</b> 2020:22 <b>free</b> 2029:7 2030:25,25 2034:16,17 2037:8,15 <b>Friday</b> 1972:18 1974:2 1975:2 <b>front</b> 2001:23 <b>frustrated</b> 1996:1 <b>fulfill</b> 2025:10 <b>full</b> 1981:16 1998:4 2001:1 2017:9 2054:19 <b>fuller</b> 2036:9 <b>fully</b> 2029:19 <b>function</b> 1989:6,8,16 2003:24 2004:1,14,16 2040:18 2056:6 <b>fund</b> 2030:6 <b>fundamental</b> 1980:8 <b>funny</b> 2056:7 <b>further</b> 2044:2 2052:20 2058:15 <b>future</b> 1983:21 1984:15 2001:25 2002:1,5,9 2006:16 2036:14</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gain</b> 1981:8 <b>GANS</b> 1973:14 <b>GARY</b> 1973:14 <b>general</b> 1973:17 1975:16 1998:24 2000:18 2030:6 <b>generally</b> 2023:25 2052:19 <b>generates</b> 1976:13 1977:18 <b>getting</b> 1999:16 2039:8 2039:11,14,16 2041:2 <b>give</b> 1982:10,11 1998:4 1998:8 2007:1,9 2016:7 2018:18 2027:14 2037:16,22 2038:3,4,7,11,16 2042:22 2055:2 <b>given</b> 1982:3 1992:17 1995:12 2013:17 2014:5,20 2017:8 2018:9,10 2027:8 2037:11 2046:16,17 2057:2,11 <b>giving</b> 2020:7 <b>glasses</b> 2055:6 <b>go</b> 1976:9 1980:20 1982:10 1984:5</p>	<p>1985:13 1992:20 1993:10 1994:17 1996:3 1998:24 2001:8 2006:24 2010:25 2011:22 2020:18 2021:5,6 2022:2,22 2023:24 2027:24 2031:19 2033:25 2035:6 2040:4,11,13 2042:9 2042:25 2051:9,23 2053:13 <b>goals</b> 2006:11 <b>goes</b> 1986:25 1992:15 1992:15 2001:12 2022:4 2030:13 2032:8 2040:18 2041:12 2056:24 <b>going</b> 1975:15 1976:9 1981:12 1982:5 1983:2,20,21,23,25 1984:6 1988:19 1995:7,14,15 1996:18 2001:15,17,19,20,24 2001:25 2002:1,6,7 2008:15 2011:15 2012:1,7 2023:24,25 2025:21 2026:21,22 2026:25 2027:19,22 2030:7,7,8 2034:6 2037:18 2040:16 2042:9 2046:6,9 2049:2 2050:10 2051:15,23 2053:16 2053:23,24 2056:5 <b>GOLDBERG</b> 1973:5 <b>good</b> 1975:5 2009:23 2010:18,20,24 2013:13 2042:24 2056:8 <b>Goodman</b> 2029:22 <b>gotten</b> 2012:15 2017:1 <b>granted</b> 2039:13 <b>grapple</b> 2029:3,14 <b>grappling</b> 2026:20 <b>gratuitous</b> 1987:7 2028:13 <b>gratuitously</b> 2024:18 <b>Great</b> 2010:14 <b>greater</b> 1983:2 <b>grew</b> 1995:25 <b>gross</b> 1980:6 1981:2 1992:14 1994:12 <b>groundwater</b> 2009:24 <b>guaranteeing</b> 2030:10 2030:12 <b>guess</b> 2002:17 <b>gut</b> 2043:9</p>	<p><b>guy</b> 2044:21</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>HADLOCK</b> 1973:4 <b>hand</b> 2058:17 <b>happen</b> 2005:22 2031:21 2032:24 2034:6,8 2049:20 2053:23 <b>happened</b> 1995:20 2005:21 2006:14 2034:22 2035:1,2,3 <b>happening</b> 2008:11 <b>happens</b> 2021:9 2027:10 2042:22 <b>happy</b> 2048:20 <b>hard</b> 2005:4 2014:6 2031:4 <b>harm</b> 2014:6 <b>head</b> 1996:2 2026:8 <b>heads</b> 2056:4 <b>hear</b> 2027:13 <b>heard</b> 1987:10,11 1998:12 2042:11 <b>hearing</b> 1975:20 1993:23 <b>heart</b> 2026:1 <b>HEATHER</b> 1973:17 <b>held</b> 2001:3 2042:18 <b>help</b> 2041:2 2048:23 <b>henhouse</b> 2050:17 <b>hide</b> 2001:15 <b>higher</b> 1982:21 1997:2 2004:6,9 2005:7 2029:10 <b>highest</b> 2050:3,13 <b>highly</b> 2029:8 <b>history</b> 1992:6 2041:9 2050:4 <b>hit</b> 2020:11 <b>holding</b> 2032:25 2033:2 <b>Honor</b> 1997:12 2010:18,25 2011:8 2014:23 2016:3 2018:1 2020:23 2023:22,25 2027:16 2029:18 2033:10,13 2035:21 2042:6 2046:12 2048:25 2057:11,16,19,20 <b>HONORABLE</b> 1972:3 <b>hope</b> 2021:23 <b>hoped</b> 2045:18,18,24 <b>hoping</b> 2046:18,19,20 <b>horse</b> 2052:21,22 2054:13 <b>hurdle</b> 2042:19</p>
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<p style="text-align: center;"><b>I</b></p> <p><b>idea</b> 1983:19 2035:14 2044:13 2049:16 2050:11</p> <p><b>ignore</b> 1988:4 2051:11 2053:12</p> <p><b>ignored</b> 1988:1 2051:11</p> <p><b>ignores</b> 1987:20 1989:18</p> <p><b>ignoring</b> 2019:23</p> <p><b>II</b> 1990:4 1999:1 2011:15 2051:1</p> <p><b>illegal</b> 1978:8,9 1985:18,19 1992:22 1994:8 2000:8,10,18 2043:7 2044:9,11,14 2044:17,19,22 2045:19,23 2046:2,4 2046:9 2047:4,5,8,14 2048:2,15 2049:21 2050:21,23 2054:18 2055:19,22 2056:10 2056:23,24 2057:8</p> <p><b>illegality</b> 2042:20 2046:21 2047:1 2055:11</p> <p><b>illegally</b> 2049:20</p> <p><b>illogic</b> 2007:14</p> <p><b>imaginable</b> 1976:19</p> <p><b>immaterial</b> 2043:12</p> <p><b>important</b> 1981:12 2009:4 2022:25 2023:2,3</p> <p><b>imposed</b> 2003:10</p> <p><b>imposes</b> 2000:8</p> <p><b>impossible</b> 1993:10,11 1994:20 2017:13</p> <p><b>improper</b> 2050:16</p> <p><b>inappropriately</b> 1978:2</p> <p><b>include</b> 1976:22 2019:17 2042:14 2053:25</p> <p><b>included</b> 1979:11 2003:11 2029:1 2039:2</p> <p><b>includes</b> 2028:20</p> <p><b>including</b> 2003:13 2009:13</p> <p><b>inclusion</b> 2043:18 2044:8 2048:13</p> <p><b>inconsistent</b> 2006:10</p> <p><b>increase</b> 2003:15 2019:18 2051:11,13</p> <p><b>increased</b> 2005:18 2038:7</p> <p><b>incur</b> 1987:17</p> <p><b>incurred</b> 2003:20</p>	<p><b>incurs</b> 2001:19</p> <p><b>indebtedness</b> 2030:15</p> <p><b>INDEX</b> 1974:1</p> <p><b>indicated</b> 2045:4</p> <p><b>indifference</b> 2026:2 2028:7</p> <p><b>indisputably</b> 2042:14</p> <p><b>inevitable</b> 2021:1</p> <p><b>inference</b> 2008:10</p> <p><b>infirmity</b> 2036:24</p> <p><b>informed</b> 2049:11</p> <p><b>infrastructure</b> 1989:2</p> <p><b>initio</b> 2047:25</p> <p><b>insisted</b> 2006:13</p> <p><b>intend</b> 1976:7</p> <p><b>intended</b> 2030:17</p> <p><b>intent</b> 2034:10</p> <p><b>intentionally</b> 1999:7</p> <p><b>interest</b> 2034:24 2035:8 2035:15,16</p> <p><b>interested</b> 1972:10 2058:15</p> <p><b>interestingly</b> 2012:11</p> <p><b>internal</b> 2056:19</p> <p><b>interpretation</b> 2041:7,8</p> <p><b>interpreted</b> 2040:22 2041:24</p> <p><b>interruptions</b> 2010:21 2026:4</p> <p><b>invalidated</b> 2033:24 2043:11</p> <p><b>invest</b> 1989:19</p> <p><b>involve</b> 2043:12</p> <p><b>involved</b> 1986:5 2011:9 2019:10 2054:8</p> <p><b>issue</b> 1977:17 1995:5 2012:13 2013:16 2016:15 2017:17 2018:18,19 2020:24 2022:5,18 2023:6,10 2029:24 2030:7,7 2032:7,14 2034:18 2035:2 2040:2 2044:10 2051:25 2053:6,7,10 2057:9</p> <p><b>issues</b> 2012:13 2018:24 2024:1 2029:2 2035:18 2036:9 2045:4 2047:17 2048:17,20 2057:13</p> <p><b>item</b> 2007:25</p> <p><b>items</b> 1977:24 2019:4</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>JAN</b> 1972:22</p> <p><b>JANUARY</b> 1972:12,12</p> <p><b>jkeker@kvn.com</b> 1973:8</p>	<p><b>job</b> 1997:23</p> <p><b>JOHN</b> 1973:3,13</p> <p><b>johnquinn@quinne...</b> 1973:16</p> <p><b>judge</b> 1974:2 1983:14</p> <p><b>judges</b> 2045:22</p> <p><b>judgment</b> 1975:15</p> <p><b>jump</b> 1991:6,22,22 2012:20</p> <p><b>June</b> 1972:18 1974:2 1975:2 1998:12,13 2058:17</p> <p><b>jurisdiction</b> 1993:15 1994:22 2017:24 2018:11</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Karnow</b> 1972:3 1974:2</p> <p><b>Katz</b> 2045:6</p> <p><b>Keker</b> 1973:3,3 1974:5 1974:7 1976:6 1978:3 1982:1 1984:8 1990:25 1991:12 1993:8 1994:1 1995:7 1997:21 2001:18 2003:23 2004:1,5,19 2006:25 2008:18 2010:14 2020:13 2034:2 2041:13 2048:25 2049:2 2055:5 2057:2,19,21</p> <p><b>Kennedy</b> 1995:22 1996:2,7,21 1997:18 2002:20 2049:25 2054:2,3</p> <p><b>Kennedy's</b> 1997:7</p> <p><b>kick</b> 2008:6</p> <p><b>kind</b> 1975:9 1992:12 2008:22 2012:19 2018:21 2019:23 2027:2 2034:11 2035:11 2044:13,13</p> <p><b>knew</b> 2026:5,25 2027:12,18,23 2055:21,22 2056:14</p> <p><b>know</b> 1976:12 1977:21 1982:6 1992:11 1993:21 1994:21 2003:6 2004:1 2005:14 2006:21 2012:24 2020:2,4 2021:4 2022:6,19,20 2025:17 2027:3,24 2032:2,13 2034:18,25 2035:13,16 2044:11 2044:20 2046:4,8,9 2046:13 2049:4,16 2050:4 2051:23,24</p>	<p><b>knowing</b> 2057:4</p> <p><b>knowledgeable</b> 2043:22</p> <p><b>knows</b> 2006:14,16 2025:17 2027:4 2037:11 2051:13</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>language</b> 2028:10</p> <p><b>large</b> 2047:20</p> <p><b>law</b> 1979:3 1983:12 1991:15 2002:12 2018:10 2019:20 2038:2 2040:19 2041:7,8,24 2042:13 2042:15,21 2043:8,10 2043:14,16 2044:15 2044:20 2045:7 2046:4,7 2047:1,2,6,9 2047:12,15 2054:16 2054:21</p> <p><b>lawful</b> 1976:13,18,21 1977:7,17 1981:24 1991:1,20 1993:6,12 1993:14,20 1994:19 1994:21 1995:5,8,10 1995:18,24 1996:12 1996:18 1997:1,6,12 1997:15,17 2000:14 2000:15 2002:13,22 2013:5,8,19 2031:23 2032:13,24 2033:5 2042:18 2049:7,23,25 2057:3,3,5,11</p> <p><b>lawfully</b> 1988:11 2013:12,21 2038:4</p> <p><b>laws</b> 2043:23 2047:17</p> <p><b>lawsuit</b> 2001:22,23</p> <p><b>lawsuits</b> 2046:6</p> <p><b>lawyers</b> 2045:22</p> <p><b>lay</b> 2015:9</p> <p><b>lays</b> 2036:14</p> <p><b>learned</b> 1994:2</p> <p><b>learning</b> 2046:11</p> <p><b>leave</b> 2055:3</p> <p><b>leaving</b> 1975:23</p> <p><b>legal</b> 1998:1 2000:10 2000:11 2001:21 2044:21 2046:2,19,19 2047:17,19 2055:12</p> <p><b>legality</b> 2011:16 2045:2 2045:17 2057:13</p> <p><b>Legislation</b> 2040:21</p> <p><b>legislature</b> 1995:25 1996:21 1997:22 2054:3</p> <p><b>let's</b> 1977:17 1990:2 2014:18 2019:12</p>	<p>2021:12 2032:12 2037:4 2048:23,24</p> <p><b>letter</b> 2044:1</p> <p><b>level</b> 2030:1</p> <p><b>liability</b> 1978:24</p> <p><b>liable</b> 1980:17</p> <p><b>license</b> 2034:24 2035:7 2035:16,21</p> <p><b>limitations</b> 2033:18</p> <p><b>limited</b> 2002:3,5 2024:14,15</p> <p><b>line</b> 1990:4,4 1992:5 1997:3</p> <p><b>Listen</b> 2026:20</p> <p><b>litigation</b> 2007:4</p> <p><b>little</b> 2000:22 2002:3,5 2004:6 2011:4 2012:22 2023:24</p> <p><b>local</b> 1989:19 2009:16 2009:22,25 2010:4 2030:18 2041:14</p> <p><b>logic</b> 1991:7 2007:14</p> <p><b>long</b> 2001:20 2031:18 2032:19 2041:25</p> <p><b>look</b> 1978:3 1992:13,14 1992:21 1999:24 2000:6 2012:10,11 2017:16 2021:6,10,20 2030:23 2033:25 2047:21 2056:6</p> <p><b>looking</b> 1995:13 2031:14 2032:20 2052:2</p> <p><b>loosely</b> 2012:19</p> <p><b>Los</b> 1973:15,19 2009:22</p> <p><b>lose</b> 2001:22,23</p> <p><b>losing</b> 1999:15</p> <p><b>loss</b> 1980:18</p> <p><b>lost</b> 1983:21</p> <p><b>lot</b> 1976:11 1989:10 1997:11 2012:12,15 2012:16 2018:24 2024:7 2037:2 2042:11 2046:6 2050:5</p> <p><b>low</b> 2037:8</p> <p><b>low-cost</b> 2037:16</p> <p><b>lower</b> 1999:13 2037:18</p> <p><b>lowest</b> 2013:25 2014:1 2014:1</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>magic</b> 2044:14,15,15 2044:22</p> <p><b>maintaining</b> 2030:16 2039:24 2040:6</p> <p><b>making</b> 1989:13</p>
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2008:23 2027:16 2053:11 <b>man</b> 2016:7 2017:7 2048:3 <b>management</b> 1990:1,10 1990:16 1994:17 2009:14 <b>manner</b> 1999:3 2009:16 <b>MARCIA</b> 1973:18 <b>Marella</b> 2051:4 <b>marker</b> 2015:9 <b>market</b> 2037:14 <b>marvelous</b> 2035:15 <b>math</b> 1979:13 1986:5 <b>matter</b> 1987:5,21 1991:10 2002:2 2026:1 2027:21 2028:6,17 2034:23 2037:7 2054:20 <b>matters</b> 1987:25 2028:14 <b>maximum</b> 2013:21 <b>MCI</b> 1981:12,13 2006:6 2050:20 <b>mean</b> 2001:11 2012:18 2019:17 2023:8 <b>means</b> 2029:7 2049:4 <b>meant</b> 2054:4 <b>measure</b> 1981:16 1982:7 1986:10 1991:21 2000:16 2013:24 2014:12 <b>measurement</b> 1994:6 <b>measuring</b> 1980:23,25 <b>mechanism</b> 2009:9 <b>Medical</b> 2000:19 <b>meet</b> 1984:10 1993:3 2033:22 <b>meets</b> 1983:12 <b>Meister</b> 1978:21,24,25 1980:5,21,22 1993:11 1994:5 <b>member</b> 1989:1 1990:6 1991:17 2000:23 2001:8,16,20,23 2004:16 2005:19 2009:17 2021:12,13 2022:3 2029:9 2038:2 2038:10,11 2057:6,14 <b>members</b> 1984:4 1991:2 2030:5 <b>membership</b> 2050:7 <b>Mensingher</b> 1978:24 <b>mental</b> 2046:17 <b>mentioned</b> 1992:4,6,8 2001:7 <b>mentioning</b> 1988:10	<b>merits</b> 1975:16 <b>meruit</b> 2043:1 <b>met</b> 1976:5 1977:11 1978:17 1979:16 1983:7 1984:5 1987:5 1987:17,20,21 1989:13,18,25 1990:9 1992:12 1998:7,25 2000:25 2001:3,19 2004:2,3,17,22,25 2007:1,8,23 2008:5,5 2008:20 2010:3,3,12 2013:12 2018:14 2021:12,13,22 2026:20 2027:9 2028:24 2030:3,17 2031:22 2032:25 2033:2,4,25 2034:19 2034:24 2037:22 2038:2,2,3,13 2039:24 2040:6,22 2041:6 2042:16,17 2044:11,12 2048:4 2052:14 2053:24 2054:20,24,25 <b>Met's</b> 1975:14 1977:15 1977:16 1983:17 1986:15 1987:2,13 1989:24 1993:5 1995:2 1998:24 1999:6 2009:20 2012:10 2014:8 2029:17 2049:9 2052:22 2053:15 <b>Metropolitan</b> 1972:9 1972:11 1973:11 1975:8 1989:17 1990:14 2008:9,15,22 2009:2,8,16,18 2010:1,6 2038:7,8,12 2038:25 2041:12,13 2041:17,19 2047:10 2052:17 <b>Metropolitan's</b> 2009:11 <b>mid-July</b> 1975:24 <b>million</b> 1982:23 1985:7 1985:9,20 1994:9 1999:12,17,19,21,23 1999:25 2005:9,11 <b>millions</b> 2043:13 <b>mind</b> 2032:21 2033:6 <b>minds</b> 2018:13 <b>minute</b> 1980:1 1995:19 2053:20 <b>minutes</b> 2043:4 <b>mischaracterize</b> 2052:1 <b>missed</b> 2052:23	<b>mistake</b> 2042:12,15,19 2042:21 2043:8,10,13 2043:16 2044:10,12 2044:15,20 2047:1,15 2047:19 2054:16 <b>mistaken</b> 2048:7,7,8,9 <b>mitigate</b> 1983:25 <b>mitigated</b> 1994:13 <b>model</b> 2023:6 <b>models</b> 2015:10 <b>Modesto</b> 2000:19 <b>modified</b> 2020:17 <b>molecules</b> 2008:12 <b>money</b> 1978:14 1982:5 1982:8,11 1983:13 1984:18 1990:1,10,15 1999:16,20,21 2000:17 2001:10,13 2001:14 2015:22 2051:15 <b>motion</b> 1975:14 1982:7 2036:13 <b>Motors</b> 2000:18 <b>mouth</b> 2022:8 <b>move</b> 2021:5 2037:1 2038:13 <b>moved</b> 2003:1,1 2037:7 <b>moving</b> 1991:6 2009:25 2054:11 <b>multimillion-dollar</b> 2047:23 <b>murder</b> 2046:4 <b>mutual</b> 2043:15 2047:19 <b>MWD</b> 2044:1	1994:16 1995:4 2005:16,21,21 2017:12 2018:13,15 2021:12,13 2048:4 <b>nevertheless</b> 1978:23 2001:3 <b>new</b> 2025:21 2031:23 2036:13 <b>nexus</b> 1989:22 <b>ngoldberg@kvn.com</b> 1973:9 <b>nice</b> 2009:24 <b>NICHOLAS</b> 1973:5 <b>night</b> 2021:6 <b>nine</b> 2005:9 <b>non</b> 2025:4 2052:11 <b>non-Met</b> 1989:24 2038:13 <b>nonmember</b> 2022:1 <b>nonsensical</b> 2054:23 <b>nonspeculative</b> 1978:4 1979:12,14 1994:10 2006:20 <b>North</b> 1973:18 <b>noted</b> 1987:2 <b>notice</b> 2044:16 <b>noting</b> 1990:20 <b>notion</b> 2007:3 2013:21 2014:2 2054:12 <b>notwithstanding</b> 2025:25 <b>November</b> 1978:20 <b>number</b> 1979:17 1988:16 1994:10,10 1997:19 1999:13 2000:1 2003:16 2005:8 2012:5 2013:25 2019:2 2020:4 2023:20,21 2036:19 2055:16,17 2055:19 2056:2,4,6,9 <b>numbers</b> 1980:19,21 1984:6 2022:11 2056:7	<b>OFFICE</b> 1973:17 <b>offset</b> 1978:14 1994:13 2005:18 2019:19,20 2054:21 <b>offsetting</b> 2006:8 <b>okay</b> 1993:8 1994:6 2014:5 2018:8 2022:15 2034:12 2036:11 2055:4 <b>once</b> 1980:8 1981:14 2009:1 2032:13 2035:1 <b>Oneida</b> 2050:22 <b>ones</b> 2037:6 2052:11 <b>ongoing</b> 2039:23 2040:5,11,14 <b>open</b> 2026:16 <b>opening</b> 2034:3 <b>operate</b> 1986:16 <b>operating</b> 1983:17 2030:16 <b>opinion</b> 1985:1 1986:7 1987:12 2002:2,3,4,9 2011:6,18 2019:6 2024:8,13 2028:2 <b>opportunities</b> 1981:18 <b>oppose</b> 2044:17 <b>option</b> 1997:8 <b>Option-2</b> 2049:12 <b>oral</b> 2044:24 <b>Orange</b> 2009:23 <b>order</b> 1978:19 <b>ordered</b> 1996:21 <b>ordinances</b> 2009:11,21 <b>original</b> 1996:19 <b>ought</b> 1997:20 1998:20 2005:12 2014:17 2031:21 2041:23 <b>outside</b> 1991:20 <b>overall</b> 2039:12,13 <b>overcharge</b> 1981:11 2011:20 2057:6 <b>overcharged</b> 2017:21 <b>overcharging</b> 2011:19 <b>overstated</b> 2002:17,23 <b>owns</b> 2052:25
<b>N</b>			<b>O</b>	
<b>name</b> 2055:2 <b>named</b> 2058:12 <b>National</b> 2000:19 <b>nature</b> 2021:9 <b>necessarily</b> 2013:3 2024:8 2028:19 2029:1 <b>necessary</b> 1987:4,4 2021:1,1 2030:15 <b>need</b> 1979:2 1981:18 1990:9 <b>needed</b> 2018:7 <b>Needless</b> 2010:7 <b>negative</b> 2000:11 <b>negotiating</b> 1991:14 <b>NEST</b> 1973:3 <b>net</b> 1980:6 1981:5,9 1996:9 2021:10 <b>neutral</b> 2046:23 <b>never</b> 1978:17 1980:4 1981:19 1989:22			<b>P</b>	
			<b>p.m</b> 1975:3 2057:22 <b>page</b> 1974:4 1986:13 1987:18 1988:11 1990:4,20 1995:3 2049:10 2050:19 2051:3 2054:16 <b>Pages</b> 1972:13 1974:3 <b>paid</b> 1982:20,21 1985:12 1995:4 2000:2,3,17 2001:19	

<p>2002:8 2003:13,14 2004:9 2005:8,10,19 2005:22 2006:5,9 2013:5,7 2015:22,25 <b>paid-up</b> 2034:24 2035:4,7,21 <b>painted</b> 2017:3 <b>parade</b> 2031:15 <b>part</b> 1980:14,22 1983:17 1984:14 1988:18 1992:2 1999:5,6 2000:10 2014:16 2032:19 2052:12 2056:25 <b>partial</b> 1975:14 <b>particular</b> 1991:6 2017:17 <b>parties</b> 1995:23 2006:25 2007:9,17 2008:7,14 2024:5 2026:5 2032:21,21,23 2032:24 2033:6,24 2034:10 2037:21 2055:12 <b>parties'</b> 2038:18 <b>parts</b> 1985:19 1994:7 <b>party</b> 1981:6 2007:2 2037:22 2038:4,8 <b>passage</b> 2034:4 2041:14,20 <b>passed</b> 1996:1 2045:3 2048:3 <b>patience</b> 2055:5 2057:21 <b>pause</b> 2048:23 <b>pay</b> 1983:2,4 1984:13 1984:19,19 1997:13 2001:24 2002:11 2004:13 2009:1 2019:24 2020:10 2030:8,25 2039:9 <b>paying</b> 1983:5 2007:10 2038:22 2039:8 2040:10 2041:18 <b>payment</b> 1978:16 2040:8 <b>payments</b> 2007:23 2030:18 2038:24 2039:1,2 2040:4,4 2041:16 <b>pays</b> 1983:18 <b>people</b> 1977:10 1984:17 1993:13 1998:10 2002:13 2004:2 2017:15,15 2018:14 2026:25 2039:22,22 2045:20 2046:3,8,8,17,18,19</p>	<p>2046:20 2048:1 2050:1 2056:6 <b>per-acre</b> 2023:14 <b>per-unit</b> 2031:3 <b>percent</b> 1976:17 1977:23 1979:20,21 1982:18,24 1983:2 1988:6,8,9,12,14,22 1988:23 2003:3,3,16 2006:17 2019:4,7,25 2022:12 2030:22 2036:21,21 <b>percentage</b> 1988:11 <b>perfectly</b> 2021:4 <b>perform</b> 2027:4,6 <b>period</b> 2002:5,22 2017:8 2033:7 <b>periodically</b> 2031:6 <b>permit</b> 2001:3 <b>person</b> 2043:21 <b>personal</b> 2045:21,23 <b>PERSONS</b> 1972:10 <b>persuaded</b> 2055:24 <b>pertinent</b> 2043:23 2047:17 <b>Petitioner</b> 1972:7 1973:2 <b>pettifoggery</b> 2055:2 <b>phase</b> 1976:16 1977:9 1978:7 1986:12 1987:11,20 1988:5 1989:10 1990:3,4 1999:1,1 2000:25 2001:3 2011:9,15 2013:2,7,10,14 2014:4,18,19,20 2015:14 2019:6 2024:2,6,13 2029:16 2032:14 2034:19,22 2035:12,17 2036:7 2050:9 2051:1 2052:23 2053:12,15 2054:13 <b>phrase</b> 1993:4 2045:13 <b>phrased</b> 2011:18 <b>physical</b> 2025:22 <b>physically</b> 2027:14 <b>pick</b> 2036:19 <b>picture</b> 2017:3 2045:15 <b>pitching</b> 2014:3 <b>place</b> 1995:5 2038:9 2054:9 2058:12 <b>places</b> 2009:17 <b>plain</b> 1983:7 2009:9 2050:13 <b>plaintiff</b> 1972:7 1973:2 1980:9 1981:1 1993:5 2000:9,13,15 2016:25</p>	<p>2023:23 <b>plaintiff's</b> 1980:15 <b>Plaintiffs'</b> 1996:17 1999:11 <b>plan</b> 1975:17 2009:14 <b>planning</b> 2001:9 <b>plans</b> 2009:11,21 <b>played</b> 1996:24 <b>please</b> 2006:24 2049:1 <b>plus</b> 2005:9 <b>point</b> 1980:8 1981:14 1981:25 1989:18 1992:11 1994:25 1995:25 2007:3 2009:19 2011:22 2028:16 2030:21 2031:23 2034:4 2037:19 2041:21 2044:2 2046:15 2050:22 2053:18 <b>pointed</b> 2051:2 <b>pointing</b> 2019:8 <b>policy</b> 2039:12 <b>portion</b> 1984:22 2029:6 2049:3,21 <b>position</b> 1977:15,16,22 1977:23,25 1978:6,7 1982:2,13,14 1985:17 1990:25 1991:12 1993:5,8,16,18,23 1994:1 1998:19 2004:22 2007:14 2018:15 2033:17 2035:17 2036:3,5 2040:7,13 2048:6 <b>possible</b> 2016:1 2050:3 2050:13 <b>post-trial</b> 2000:7 2005:17 2051:1 <b>postage</b> 2031:15 <b>pot</b> 1982:8 <b>potential</b> 2021:20 2022:21 <b>power</b> 1979:22 1984:22 1985:4,12,15 2008:24 2009:1 2023:12 2037:1,1,5,14,16 2049:14 2052:13 2053:2 2056:18 <b>practices</b> 2051:6,8 <b>pre-</b> 2000:7 2005:17 <b>precisely</b> 1979:8 <b>prediction</b> 2034:8 <b>preexisting</b> 2004:17 <b>preferential</b> 2006:23 2007:2,9,14,17,24 2008:6 2009:12,13,20 2010:5 2037:20,23</p>	<p>2038:3,4,17,21 2039:7,13,18,20,25 2040:9,22,25 2041:5 2041:20 <b>preliminary</b> 2033:13 <b>premise</b> 2050:9 <b>present</b> 1981:1,3 2052:3 <b>presentations</b> 2056:20 <b>presented</b> 1978:5 1981:20,22 2031:3,13 <b>presto</b> 2016:9 <b>pretty</b> 1986:23 1991:23 2011:10 2013:13 2019:16 2047:9 <b>preventing</b> 2006:11 <b>previously</b> 1977:20 1993:21 <b>price</b> 1983:10,12 1991:14,19 1992:3 1996:15,16 1997:2 2008:2 2009:9 2010:5 2049:11,11 <b>prices</b> 1991:15 2022:22 <b>pricing</b> 2009:3 2022:21 <b>prior</b> 1986:7 <b>probably</b> 2002:17 2010:11 2028:15 2031:24 2056:21 <b>problem</b> 1977:15,16,16 1982:25 2017:5 2019:19 2021:19 2022:14 2023:5,9,10 2023:22,23,23 2026:23 <b>problematical</b> 2015:20 <b>problems</b> 2019:16 2027:3 <b>procedure</b> 2017:25 <b>proceed</b> 2011:2 <b>proceeding</b> 2011:16 <b>proceedings</b> 1972:16 2058:11 <b>proceeds</b> 2030:3 <b>produce</b> 2030:11 <b>producing</b> 1981:6 <b>profit</b> 1981:9 <b>profits</b> 1980:6 <b>programs</b> 1990:11 2009:12,21 <b>progress</b> 2027:16 <b>project</b> 1976:17,23 1979:23 1985:5,10,22 1985:24 1986:2,10 1987:3,17 1988:18,18 1992:13 1995:14 1998:16 2002:25 2003:9 2023:17</p>	<p>2024:25 2025:2 2026:3,6 2028:21,25 2029:1,5,8,8,17 2030:2,3,16 2031:1,8 2034:14,15,25 2035:25 2036:17,19 2050:6 2052:9,11,25 2053:1,2,14,15 2054:1,5,9 <b>projected</b> 1997:7 2002:21 <b>projects</b> 1992:14 <b>proof</b> 1978:4 1980:9,15 1995:8 2006:12 2013:16 2014:2 2016:25 2023:23 2032:7 2033:16 2036:22,23 2049:18 <b>Prop</b> 1998:21 <b>proper</b> 1984:24 1985:22 1987:15 1988:16 1992:18 1996:22 <b>properly</b> 1985:12 1988:15 1989:6 <b>property</b> 2034:24 2035:8,14,16 2036:1 2041:1 2050:7 <b>proportional</b> 1999:8 <b>proposed</b> 1975:19,22 1975:24 2010:25 <b>proposition</b> 1980:5 2000:8 2014:9 <b>prorated</b> 2036:17 <b>proration</b> 2035:25 <b>prove</b> 1993:6,11 1994:18 1995:4 2000:9,11,12,14 2006:13 2016:23 2017:21 2051:21 <b>proved</b> 1985:15 2017:11 2018:11,12 2019:12 2053:8 <b>proves</b> 2044:2 <b>provide</b> 2024:23,24,24 <b>provided</b> 2009:17 2024:18 2027:15 <b>proving</b> 1980:11 <b>provision</b> 2010:4 <b>PTX</b> 1985:5 1999:24 2053:18 <b>PURCELL</b> 1973:4 <b>purchase</b> 2007:11,19 2008:1,3,16,17 2038:12,19 2040:17 <b>purchased</b> 1989:9 <b>purchases</b> 2022:23 <b>purchasing</b> 2007:2</p>
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<p>2037:22  <b>pure</b> 1976:20 1977:9                  2005:20 2007:1,3,7                  2007:13 2025:25                  2037:21 2038:14,16  <b>purely</b> 1987:13  <b>purported</b> 2023:13  <b>purposes</b> 2008:17                  2009:2,8,11  <b>pursuant</b> 2003:21                  2019:6  <b>push</b> 2008:24  <b>put</b> 1976:16 1977:4,24                  1978:2,20 1979:18                  1982:5,16 1985:5                  1987:23 1990:2                  1995:14,15,21 1997:9                  1997:17 1998:15                  2001:13 2009:7                  2013:20 2017:2                  2019:10 2046:23                  2049:5,24 2053:19  <b>putting</b> 2019:14                  2034:15 2044:16</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>quality</b> 2029:10  <b>quantification</b> 2053:9  <b>quantities</b> 2041:4  <b>quantum</b> 2042:25  <b>quarter</b> 2042:4  <b>question</b> 1976:12                  1977:1,14 1980:2                  1984:21 1985:21                  1986:4,6 1988:19                  1990:12 1995:17                  1996:25 2002:16,24                  2007:16 2013:15,17                  2014:22,23 2015:24                  2020:9,24 2028:23                  2032:18,18 2037:21                  2038:15 2040:1                  2041:11 2042:19,24                  2044:10 2056:23  <b>questioning</b> 1977:2  <b>questions</b> 1976:6,8,11                  1988:17 2001:18                  2006:22 2011:1                  2048:18,20 2055:10  <b>quibble</b> 1986:21                  2051:20  <b>Quinn</b> 1973:12 1974:6                  1974:8 1975:10                  2010:17,18,21,25                  2011:4 2012:2,5,8                  2014:22,25 2015:3,5                  2015:17,22,24                  2016:14 2018:1,4,6,9</p>	<p>2018:24 2019:12                  2020:22 2021:23                  2022:14,16,18 2025:8                  2025:13,16 2026:13                  2026:16,19 2027:25                  2028:9,16 2031:25                  2032:4,10 2033:9,12                  2033:21 2034:13                  2035:7,13,20 2036:4                  2036:8,12 2038:1                  2039:5 2040:18,21                  2042:5,9,24 2043:2,6                  2046:11,25 2048:17                  2055:6,8,10,17,20                  2056:1,11,13,17,22                  2057:20  <b>QUINN,ESQ</b> 1973:13  <b>quote</b> 1980:13 1989:19                  1989:21</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>radically</b> 2012:25                  2024:12  <b>Raftelis</b> 1992:5                  1998:14  <b>rainfall</b> 2009:23  <b>raised</b> 2037:20 2048:19  <b>range</b> 2019:11  <b>ratchet</b> 1996:18  <b>rate</b> 1976:13,18,18,21                  1977:7,7,17,21,24                  1979:22,22,24                  1981:15,24 1982:14                  1982:16,17,19,20,21                  1983:2,4,22,24                  1984:22,22,23 1985:4                  1985:4,10,11,12,14                  1985:15,23 1988:20                  1989:23 1991:1,3,4                  1991:18,21,25                  1992:21 1993:6,12,14                  1993:20 1994:19,21                  1995:8,10,11,15,16                  1995:18,21,24 1996:5                  1996:12,19,22,25                  1997:1,3,6,6,7,12,15                  1998:1,4,7,12,17,18                  1998:24 1999:8,20,22                  2000:3 2001:21                  2002:13,23 2003:8,11                  2003:12 2004:3,5,6,9                  2004:13 2005:3,7                  2006:4,4,9,12                  2012:10,14,17,17,21                  2013:5,8,19 2031:7                  2031:23 2032:7,13,25                  2033:5 2037:4,14,18                  2038:23 2043:19</p>	<p>2044:3,6,9 2045:2                  2047:20 2048:11,13                  2049:4,6,7,13,13,14                  2049:15,15,23 2050:3                  2050:16,23 2052:13                  2052:13,18,18 2054:3                  2054:8 2056:10,18,18                  2056:23 2057:3,11  <b>rate-making</b> 2015:1                  2017:25  <b>ratemaking</b> 1987:15                  2015:4 2024:3  <b>rates</b> 1972:10 1977:19                  1978:8,9 1979:15                  1981:11 1982:12,25                  1983:16 1984:7,11,14                  1984:15 1992:23                  1994:2,8,9 1997:17                  2001:16 2002:1,9,11                  2004:7 2005:14,18,19                  2005:25 2011:17,19                  2011:20,23 2012:1,7                  2012:9,9,11 2013:2,6                  2013:11 2015:18,19                  2017:18 2019:5                  2020:17 2031:23                  2033:25 2034:1                  2037:3,8 2041:18                  2042:17 2043:11,11                  2045:18,23 2046:21                  2047:23 2049:21,25                  2050:8,10 2051:23                  2052:8,10 2053:21                  2054:7 2055:13  <b>rationale</b> 1995:12  <b>reached</b> 1979:6                  1989:11  <b>read</b> 1981:13 1994:1                  2011:9 2041:13,20  <b>readiness-to-serve</b>                  2009:15 2041:3  <b>reading</b> 1985:1 1986:6  <b>real</b> 2008:11 2023:5,5                  2030:20 2041:1                  2057:13  <b>realize</b> 2022:5 2029:15  <b>really</b> 1977:15 1991:25                  1993:9,9,9 2009:19                  2020:1 2022:7                  2027:12 2032:19                  2041:21 2042:24                  2044:17 2053:14  <b>realtime</b> 2046:11  <b>reason</b> 1985:19                  1997:25 2001:14                  2008:7,18,19 2009:3                  2039:13  <b>reasonable</b> 1979:4</p>	<p>1980:9 1981:2,7,20                  1982:1,2 1985:17                  1986:17,22 1999:2  <b>reasoned</b> 1992:13  <b>reasons</b> 2008:5 2026:9                  2039:17 2045:3                  2056:3  <b>rebates</b> 2050:21  <b>rebuttal</b> 2010:13  <b>recall</b> 1977:6 1996:14                  2017:12 2028:9                  2055:18  <b>receive</b> 1999:4  <b>received</b> 1981:5  <b>receiving</b> 2008:9  <b>recess</b> 2010:15,16  <b>recognize</b> 1983:11                  1988:6 2053:14  <b>recognizing</b> 2030:24  <b>record</b> 1978:3 1979:21                  1979:24 1986:17,22                  1987:3 1992:16                  1994:25 1995:1,8                  1996:16 1997:11                  2006:19 2011:10                  2013:18 2024:4,4,16                  2029:19 2031:9,11                  2033:23 2036:9                  2043:17 2048:23                  2054:22  <b>records</b> 2028:11  <b>recovered</b> 2001:21  <b>redo</b> 1984:5  <b>reduce</b> 1981:16 2003:2                  2005:20 2006:18  <b>reduced</b> 1977:20                  1978:15 1982:23                  1994:13 2005:11                  2006:4,21 2058:13  <b>reducing</b> 1980:11                  1989:1  <b>reduction</b> 1981:20                  1982:18  <b>reference</b> 1991:15,20                  2006:6  <b>refile</b> 2032:16  <b>refiling</b> 2033:19  <b>reflects</b> 2024:4,5  <b>refund</b> 2000:6 2054:19  <b>refutes</b> 2054:6  <b>regardless</b> 2008:10  <b>regional</b> 1998:5,5  <b>regulations</b> 2009:13,21  <b>regulatory</b> 2006:11  <b>reinforced</b> 2002:19  <b>rejected</b> 1989:3                  2000:25  <b>related</b> 1980:2</p>	<p><b>relationship</b> 1999:2  <b>relationships</b> 2037:13  <b>relevant</b> 2037:13  <b>relies</b> 2024:17  <b>relieves</b> 2019:13  <b>rely</b> 1980:21  <b>remaining</b> 2052:10  <b>remains</b> 1985:12  <b>remand</b> 2031:21  <b>remember</b> 1979:13                  1985:6 1990:3 1997:7                  2001:4 2004:2,19                  2024:17 2026:7                  2034:3 2049:12                  2055:15  <b>remind</b> 1979:1 1981:18                  1986:4 1992:4  <b>reminded</b> 1978:12,19  <b>remove</b> 1985:22                  1992:19  <b>removed</b> 2019:4  <b>removing</b> 2052:9  <b>repeat</b> 1994:24 2054:22  <b>repetitive</b> 2042:11  <b>replacing</b> 2030:16  <b>report</b> 1997:8,8                  1998:14 2017:14  <b>Reported</b> 1972:19  <b>Reporter</b> 2058:9,24  <b>REPORTER'S</b>                  1972:16 2058:1  <b>required</b> 1987:8                  1992:12 2000:13,15                  2029:21  <b>requirement</b> 2005:25  <b>requires</b> 1979:4                  2028:20  <b>rescission</b> 2042:22                  2043:9  <b>reservations</b> 2045:17  <b>reserves</b> 1998:25  <b>reservoirs</b> 2025:1  <b>reset</b> 1984:7  <b>residual</b> 1981:8  <b>resolved</b> 2031:20                  2032:9 2045:24  <b>resources</b> 1988:18                  1996:2  <b>respect</b> 1975:14,21                  1977:23 1984:4                  2018:1 2042:1                  2055:11 2057:4  <b>Respectfully</b> 2038:20  <b>respond</b> 1994:16                  2033:13  <b>responded</b> 1978:17                  1980:4  <b>Respondent</b> 1973:11</p>
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<p><b>Respondents</b> 1972:14  <b>response</b> 2048:25  <b>responsibility</b> 2019:2  <b>responsible</b> 2019:8  <b>rest</b> 1980:15 2023:13                  2032:7  <b>resting</b> 1980:12  <b>result</b> 1979:5 2000:3                  2003:14,15 2005:9                  2020:24 2022:3                  2023:19  <b>results</b> 2042:21                  2057:13  <b>retaliation</b> 1999:9  <b>revenues</b> 1980:6  <b>review</b> 2031:5  <b>rich</b> 1979:11  <b>ridiculed</b> 2044:13  <b>right</b> 1977:19 1979:13                  1988:2 1990:17,24                  1992:9 1999:13                  2002:14 2003:22                  2004:4 2015:21,23                  2018:5 2026:13                  2027:18 2028:4,5                  2029:15 2031:25                  2032:1,9 2033:20                  2035:4,22,23 2036:1                  2036:15 2038:7,12                  2039:11 2040:20                  2042:20 2043:6                  2046:10 2048:16                  2051:5 2053:15                  2054:14 2055:18                  2056:1,21  <b>rights</b> 2006:23 2007:2                  2007:9,15,18,24                  2008:6 2009:12,13,20                  2010:5 2037:20,23                  2038:3,4,17,21                  2039:7,13,18,20,25                  2040:9,22,25 2041:5                  2041:20  <b>risk</b> 1981:8  <b>River</b> 2008:21 2023:15                  2025:3,18,25 2029:12                  2037:8 2052:4,7  <b>Riverside</b> 2029:22  <b>RMI</b> 1997:8,8 2002:20  <b>road</b> 2032:2  <b>RPR</b> 1972:20 2058:23  <b>RSI</b> 1999:9,17  <b>rule</b> 2032:5 2046:14  <b>rules</b> 2009:12,21  <b>ruling</b> 1998:21 2007:21                  2015:7 2024:2                  2029:16  <b>rulings</b> 1976:10</p>	<p><b>running</b> 1998:2                  2008:21 2029:15</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 1973:5  <b>sad</b> 2027:9  <b>salinity</b> 1987:9  <b>San</b> 1972:2,6,17,17,24                  1973:6 1975:1,7                  1976:4,7 1982:20                  1983:4,4,21 1984:4                  1984:24 1985:8                  1986:23 1996:9                  1998:4 1999:7,15                  2000:3,18 2002:17                  2003:13,14,20 2004:8                  2004:22 2005:7                  2006:3 2008:9,19                  2013:4,4,7,16                  2014:17,20 2015:15                  2019:5,5 2020:10                  2021:11,11,12,21                  2023:17 2024:17,20                  2027:13,22 2028:7,7                  2029:7 2031:22                  2032:16 2036:2                  2038:10,20,22,24                  2039:10 2040:9,15                  2042:16,22 2043:17                  2043:22 2045:7,16                  2048:2,5,12 2049:10                  2052:12 2054:10,18                  2055:23 2056:11                  2057:7  <b>SANDFORD</b> 1972:20                  2058:8,23  <b>Santa</b> 2058:5,9,18  <b>SAR</b> 1985:25  <b>satisfied</b> 2048:22  <b>save</b> 2010:13  <b>saw</b> 1999:12 2043:22                  2043:24  <b>saying</b> 1997:13,22                  2015:5 2018:13                  2019:1 2030:22                  2032:12 2033:15,15                  2033:18,21 2035:20                  2040:1 2052:1  <b>says</b> 1986:4 1989:15                  1994:5 2010:6 2012:6                  2013:23 2026:1,2                  2027:2 2030:2                  2045:11 2047:7                  2054:17  <b>scenario</b> 2017:4                  2027:12 2031:12  <b>scenarios</b> 2015:13  <b>schedule</b> 2012:10</p>	<p>2057:3  <b>scratch</b> 2015:16  <b>screen</b> 1990:3  <b>SCULLY</b> 1973:18  <b>se</b> 2011:13 2024:6  <b>second</b> 1978:5,11                  1984:21 1988:19                  2057:1  <b>secret</b> 2025:23  <b>section</b> 1989:12 1995:1                  2009:4 2041:16                  2053:19  <b>Sections</b> 2005:24                  2032:25  <b>secure</b> 1990:21  <b>see</b> 1978:3,24 1986:13                  1989:5 1999:11                  2010:24 2039:16                  2047:17 2052:20  <b>seeking</b> 1981:6 1985:8                  2000:1,2 2054:21  <b>sees</b> 1998:25  <b>self-defeating</b> 2054:24  <b>send</b> 2050:16  <b>sense</b> 1983:20 1984:2                  1992:25 2007:7                  2018:16 2030:20                  2038:7,11,14 2039:19  <b>sensing</b> 2026:19  <b>sent</b> 1998:13  <b>sentence</b> 1988:10                  1989:14 1991:6  <b>separate</b> 2004:17                  2019:22 2021:25  <b>separately</b> 2047:1,22  <b>series</b> 2021:21  <b>service</b> 2001:1 2006:1,8                  2006:10  <b>SERVICES</b> 1972:23  <b>set</b> 1977:20 1982:5,25                  1983:13 1984:14,17                  1984:18 1991:19                  1993:2 1994:22                  2002:1 2008:19                  2020:14 2025:5,7,11                  2025:13,17,18                  2035:22 2053:21  <b>setting</b> 1984:11 2002:9  <b>seven</b> 1990:4  <b>shamelessly</b> 1975:12  <b>shaped</b> 1983:8  <b>Shapell</b> 2050:18  <b>share</b> 2005:8 2009:15  <b>shift</b> 2000:9 2046:20                  2051:15,16  <b>shifting</b> 1996:4,5                  1997:23 2054:4  <b>shifts</b> 2014:7 2017:5</p>	<p><b>short</b> 1998:10 2010:11  <b>shortfall</b> 2000:24  <b>Shorthand</b> 2058:8,24  <b>show</b> 1980:16 1981:4                  1988:15 1995:19,21                  2000:15 2005:16                  2016:25 2027:25                  2049:22  <b>showing</b> 1995:3  <b>shown</b> 1979:12 2014:18                  2049:19,19,20,23,24                  2050:1,3,15 2057:12  <b>shows</b> 1985:6 2007:13  <b>shut</b> 2024:25 2025:1  <b>side</b> 2019:1  <b>sides</b> 2011:11,13  <b>signaling</b> 2036:8  <b>signed</b> 2026:20 2032:21                  2045:16  <b>significance</b> 2012:23  <b>significant</b> 2012:22  <b>simply</b> 1976:19 2037:4                  2040:10 2052:21                  2055:12  <b>single</b> 2023:11 2039:9  <b>sir</b> 1997:21 2004:19                  2010:14,20  <b>sit</b> 2046:3  <b>sitting</b> 1982:8  <b>situation</b> 1979:9 1996:7                  2018:22 2019:1                  2021:15,18 2027:11  <b>six</b> 2026:9  <b>Skillman</b> 1998:12,13                  2054:8  <b>Slater</b> 2043:21 2045:11                  2045:20 2047:16  <b>slide</b> 1995:22 2043:24                  2043:24 2044:4,25                  2045:11  <b>slips</b> 2001:22  <b>smaller</b> 2023:20  <b>sold</b> 2005:6  <b>solutions</b> 2051:19  <b>somebody</b> 1978:13                  1981:15 2001:22                  2044:16 2050:12  <b>someplace</b> 1992:6                  2001:10  <b>sort</b> 1998:8 2014:10                  2019:21,23 2020:3                  2022:5 2023:25                  2032:25 2033:2,7                  2035:24 2042:25                  2045:15  <b>south</b> 1973:14 2025:3  <b>Southern</b> 1972:9,11                  1973:11 2047:11</p>	<p><b>space</b> 2035:4  <b>spades</b> 1981:14  <b>specific</b> 2052:7  <b>specifically</b> 2045:12  <b>spectrum</b> 1977:22  <b>speculation</b> 1976:20                  1977:9 1992:10                  1993:12 2005:13,20                  2018:25 2019:9  <b>speculative</b> 1993:1                  2002:6 2006:19                  2017:13 2018:16  <b>speculatively</b> 2020:11  <b>spend</b> 1989:25 1990:9                  1990:14 2035:17  <b>split</b> 2040:15  <b>SPR</b> 1985:25  <b>spreading</b> 2052:10  <b>ss</b> 2058:4  <b>stage</b> 2051:9 2053:21  <b>stake</b> 2029:4  <b>stalking</b> 2052:21,22                  2054:12  <b>stamp</b> 1983:25 2031:15  <b>stand</b> 1987:11 1994:18                  2000:7 2020:6  <b>standard</b> 2014:11                  2033:1,2,3,4,5  <b>Stapleton</b> 2012:25                  2026:1 2045:9  <b>Stapleton's</b> 2044:1                  2045:1  <b>start</b> 1976:9 1996:17                  2054:10  <b>started</b> 1975:6 1996:14  <b>starting</b> 2015:16  <b>state</b> 1972:1 1976:17                  1976:23 1979:14,22                  1985:4,10,22,24                  1986:2,10,15 1987:3                  1987:17 1988:17,18                  1991:15 1995:14                  1998:16 2002:25                  2003:9 2013:18                  2023:17 2024:25                  2025:2 2026:3,5                  2028:20,24,25 2029:5                  2029:7,8,17 2030:3,5                  2030:25 2031:7                  2034:13,14,20,21,25                  2035:8,22,25 2036:17                  2036:18 2037:5                  2040:19 2041:7                  2046:17 2047:2                  2050:6 2052:9,11,25                  2052:25 2053:1,14,15                  2054:1,5,9 2058:3,9                  2058:25</p>
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<p><b>State's</b> 1987:1 2030:5 2030:14 <b>statement</b> 1975:19,22 1975:24 1976:3 1986:13 1988:1,2 1989:5,12 1990:19 1992:4,8 2034:3 2044:24 <b>statute</b> 2033:18 <b>statutory</b> 2005:25 2006:10 2014:12 <b>steal</b> 1975:12 <b>stenotype</b> 2058:12 <b>stewardship</b> 1976:18 1976:23 1979:15,24 1984:23 1985:25 1988:20 1989:23 1991:25 1992:3,21 1995:15 1998:18,24 1999:3,8,16,20,22 2000:3 2043:14,18 2044:3,9,24 2045:2 2047:20 2048:11,13 2049:14 2052:9 <b>stop</b> 2017:9 <b>straight</b> 2003:17 <b>Street</b> 1972:24 1973:6 1973:14,18 <b>strikes</b> 2020:12 <b>strong</b> 2030:21 <b>structure</b> 1976:21 1977:7,8,25 2001:21 2025:23 2027:5 2039:24 2054:8 <b>studied</b> 1996:7 <b>study</b> 1998:15 <b>stuff</b> 2009:22 <b>subject</b> 2019:16,21 2035:8 2051:8 <b>subjected</b> 2051:6 <b>submit</b> 2011:8 2014:1 2014:11 2016:5,23 2024:22 2031:13 2035:2 <b>subset</b> 1984:25 <b>subsidize</b> 2057:7 <b>subsidized</b> 2029:8,9 2037:15 <b>subsidizing</b> 2001:2 <b>substantial</b> 1976:22 <b>substantially</b> 2034:17 <b>subsumed</b> 1975:15 <b>suggest</b> 2039:18 2057:15 <b>suggested</b> 2031:17 <b>suggesting</b> 1991:5,7 1997:18 2020:13 <b>suggestion</b> 2022:13</p>	<p><b>suggestions</b> 2026:16 <b>SULLIVAN</b> 1973:12 <b>sum</b> 2016:4,6 <b>summary</b> 1995:22 <b>Superior</b> 1972:1,17 2047:11 2051:4 2054:25 <b>supplies</b> 1989:19 <b>supply</b> 1982:16,16,19 1982:20,21 1983:2 1986:19 1992:7 1996:10 2003:2,8,11 2003:12,15,19 2004:3 2004:5,9,13,24 2005:3,7,18,23 2006:4,4 2019:18 2020:12,17,20 2021:5 2021:5 2022:1,4,21 2037:14 2051:11,14 2051:16,23 2054:10 <b>supported</b> 2044:3 <b>supports</b> 1987:12 1991:23 2013:20 2047:19 <b>suppose</b> 1985:13 2002:10 2018:17 2042:20 <b>supposed</b> 1991:21 1996:8 1998:14 2021:17 2026:15 2039:20 <b>Supreme</b> 2046:15 <b>sure</b> 1977:6 2004:12 2008:20 2025:15 2042:5 2055:9 <b>surprise</b> 2025:16 <b>suspect</b> 2016:1 <b>sustain</b> 1980:17 <b>SWP</b> 1987:1 <b>system</b> 1979:21,22 1984:18,22,22 1985:3 1985:4,9,11,11,14,15 1985:23 1989:20 1990:22 2004:3,6 2005:21 2007:6 2023:13 2025:5,7,11 2025:13,17,18 2027:5 2027:10 2034:25 2035:8,22 2036:19 2038:13 2040:6 2049:14,15 2052:13 2052:13,14 2054:11 2056:18,18 <b>system-wide</b> 1989:7,8 1989:16 <b>systemwide</b> 2037:4 2052:18</p>	<p style="text-align: center;"><b>T</b></p> <p><b>take</b> 1985:10 1992:22 1994:7 2001:12 2002:1 2003:13 2006:17 2010:11,15 2019:17 2021:4 2022:7 2023:4 2024:10 2025:4 2031:19 2032:19 2046:15 2047:2 2048:23 <b>taken</b> 2016:21 2058:11 <b>takes</b> 1983:15 1984:19 <b>talk</b> 1975:15 1985:3 1993:18 2010:9,12 2012:22 2046:25 2048:17 2049:6,7 2051:2 2053:22 <b>talked</b> 1978:25 1993:22 2006:7 2009:5 2010:7 <b>talking</b> 1985:3,23 1992:10 1994:14 1995:2 2004:14 2011:14,23 2017:17 2020:13 2032:1 <b>talks</b> 1991:1 2005:25 2012:8,9 <b>TARA</b> 1972:20 2058:8 2058:23 <b>tax</b> 1998:19,22 1999:5 2000:9,10,12,14,15 2000:18 2050:21 <b>taxes</b> 2041:1,1 2050:7 2050:21 <b>taxpayers</b> 2029:25 <b>teaching</b> 2050:20 <b>tell</b> 2001:14 2016:8 2027:25 2034:6 2044:11,12,21 2046:3 2055:24 <b>telling</b> 2022:6 2043:9 <b>ten</b> 1987:18 1993:13 2032:1 2036:21,21 2051:18,18 <b>tens</b> 2043:13 <b>tension</b> 2048:5,10 <b>tentative</b> 1975:25 1976:10 2010:8 2042:12 <b>term</b> 1991:14 1996:15 1996:16 2010:5 2012:11 2047:4 2049:11 <b>terms</b> 2011:18 2012:8,9 2012:17 2018:25 2021:7 2034:13 2041:11 2046:24 2053:9</p>	<p><b>testified</b> 1982:22 1987:15 1998:23 2020:3 2043:22,24 <b>testify</b> 2036:20 <b>testimony</b> 1990:2 1991:3 1999:14 2002:25 2003:4 2015:9 2016:6,11 2019:25 2021:24 2022:8,9 2023:1 2034:21 2042:16 2045:1,5,5,9 2047:16 2048:1 2051:12 <b>thank</b> 2010:18 2014:24 2057:18,19,20 <b>thanks</b> 1984:16 2055:5 2057:16,21 <b>theory</b> 1986:8 1987:24 2023:8 2027:14 2031:2 <b>thereof</b> 1981:3 <b>thing</b> 1979:20,23 1980:4 1986:21 1998:9 2007:5 2014:10 2019:21 2022:20 2026:24 2028:1 2034:11 2050:13,25 2053:25 2057:1,1 <b>things</b> 1995:17 1997:25 2005:5,15 2012:18 2017:15 2024:7 2029:18 2036:15 2040:23 2046:2,14,16 2051:10 2055:8 <b>think</b> 1975:12,17 1976:25 1980:3 1984:1,3,5,8,9 1990:18 1991:13,22 1991:24 1993:5,9 1995:16 1998:11,20 2000:21 2001:14 2002:19,23 2003:4 2005:12,23 2006:16 2007:20 2008:7 2010:3 2012:16,20,21 2013:20 2015:8,17 2017:11,17,19 2018:5 2019:13,19 2021:23 2022:11 2023:5 2024:7,13 2026:24 2028:14,16 2029:2,14 2032:4,23 2033:6 2034:9,11 2036:8,9 2037:18 2039:15 2041:7,22,23 2042:1 2042:21 2043:2,15 2044:5,8,18,19</p>	<p>2046:25 2047:9,15,19 2047:21 2048:5,9,11 2048:15 2050:4 2056:13,15,21 2057:12,12 <b>thinks</b> 1978:13 2031:21 2044:21 <b>third</b> 2038:4,8 <b>thought</b> 2018:18 2032:23 2033:9 2034:5,6 2042:17 2044:6 2047:18 2048:2 <b>thoughts</b> 2018:21 <b>thousand</b> 2056:3 <b>three</b> 1995:3 1997:8 2035:1 <b>throw-away</b> 1992:5 <b>ticket</b> 2007:25 <b>tie</b> 2031:3 <b>time</b> 1976:1 1984:6 1986:11 2007:5 2009:6 2034:7,19 2035:17,22,24 2036:19 2041:25 2042:7 2043:19,24 2044:6 2045:15 2046:5 2047:12,18 2048:14 2058:12 <b>times</b> 1984:10 2011:12 2011:13 2012:18 2035:2 <b>timing</b> 1975:21 <b>tiny</b> 1978:1 <b>today</b> 1975:16 1993:23 2021:15 2035:19 2046:10 <b>today's</b> 1975:20 <b>told</b> 1984:10 1998:15 2012:10,25 2020:1,4 2022:9,10 2023:1 2034:2 2048:4,8,9 2054:3 <b>top</b> 1986:14 1990:20 2008:25 2026:8 <b>total</b> 1981:1 1999:14 2016:4,6 2023:20 <b>track</b> 2027:21 <b>transaction</b> 1997:10 2001:2 2007:1,4 2012:24 2013:1 2020:25 2037:22 2038:15,16 <b>transactions</b> 2007:13 <b>transcript</b> 1972:16 2003:5 <b>transcription</b> 2058:14 <b>transportation</b> 1984:24</p>
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<p>1986:20 1987:2 1989:7,20 1990:22 1992:8 2004:23 2052:11 2053:2 <b>transporting</b> 1989:9 <b>treat</b> 1988:14 2010:3 2053:1 <b>treated</b> 2008:17,20 2009:18 2010:6 2040:16 <b>treatment</b> 2057:14 <b>trench</b> 2023:25 <b>trial</b> 1978:21,22 1998:13 2036:13 2042:25 2049:9 <b>trip</b> 1975:23 <b>trotted</b> 2023:9 <b>trouble</b> 2042:13 <b>true</b> 1979:6 1993:17 2004:19 2014:5 2018:4 2039:6 2040:7 2055:14 <b>trust</b> 2016:11 <b>try</b> 1975:21 1997:24 2010:23 2032:15 <b>trying</b> 1991:3 1995:4 2004:12 2019:10 2020:20 2032:20 2034:9 2039:19 2048:6 2052:3 <b>turn</b> 1976:4,5 1979:16 1988:19 <b>twice</b> 2035:1 <b>two</b> 1975:5,22 2001:18 2006:22 2010:2 2047:1 2054:21 2055:8 <b>type</b> 2020:5 <b>typewriting</b> 2058:13 <b>Typically</b> 2042:21</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>ultimately</b> 2046:20 <b>unblended</b> 2027:8,9,15 <b>unbundled</b> 2053:22 2054:7 <b>uncertainty</b> 1981:9 2017:2 2046:7 2047:3 2047:12 <b>undercut</b> 2002:13 <b>undermine</b> 2051:22 <b>understand</b> 1976:25 1991:22 1993:23 2004:11 2016:13 2019:20 2020:22 2024:2 2033:1 2036:5 2052:24 <b>understanding</b> 2039:21</p>	<p><b>understands</b> 2016:12 <b>understood</b> 1991:17 2024:5 2043:18 2048:12 2054:6 <b>Underwood</b> 2045:3,10 2045:12 <b>undisputed</b> 2024:10 2025:24 2037:2 <b>unexpected</b> 1984:13 <b>uniform</b> 2006:1 2051:12 <b>uniformly</b> 1991:13 <b>unilateral</b> 2044:10,12 2044:14,20 <b>unitary</b> 2037:3 <b>universal</b> 2043:15 <b>unjust</b> 1980:22,25 <b>unlawful</b> 1981:15 1983:5,6,7 1994:3 1998:19 2000:12 2011:20 2013:2,3,6 2013:11 2042:18 2043:19 2044:6,24 2048:14 2051:2,6,8 2057:6 <b>unlawfulness</b> 1982:14 <b>unqualified</b> 1976:14 <b>unused</b> 1990:22 1991:9 1998:1,3 <b>Upadhyah</b> 1990:5 1992:18 1998:23 <b>Upadhyah's</b> 1990:2 1991:24 <b>upheld</b> 2038:25 <b>URQUHART</b> 1973:12 <b>use</b> 2002:24 2007:6 2008:24 2013:24 2023:15 2035:10,22 2036:18 2037:6 2044:22 <b>useful</b> 1975:13 1987:6 2034:11 <b>utility</b> 2015:15</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>VALIDITY</b> 1972:10 <b>valued</b> 2036:17 <b>VAN</b> 1973:3 <b>variety</b> 2037:3 <b>various</b> 2004:21 2030:4 <b>version</b> 1975:7 <b>versus</b> 1977:25 1978:24 2000:18,19 2029:22 2038:25 2047:1,11 2051:4 2054:25 <b>VIDEOGRAPHY</b> 1972:23 <b>view</b> 1997:19 2002:15</p>	<p>2017:23 2018:2,6 2019:6,7 2027:7 2045:21,23 <b>views</b> 2029:16 <b>violated</b> 2033:4,5 <b>violates</b> 1998:21 2005:23,24 <b>violation</b> 2043:23,25 2050:24 <b>virtue</b> 1998:21 <b>void</b> 2043:8 2046:21 2047:6,8,13,25 <b>volume</b> 1972:10 1974:3 2037:7 <b>volumes</b> 2040:25 <b>volumetric</b> 2038:23 2040:23,24 2041:3,18 2050:8,10 <b>voters</b> 2030:14 <b>vs</b> 1972:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> 1981:23 1982:11 1983:19 2031:18,19 <b>waiving</b> 2033:18 <b>walk</b> 1986:14 2014:15 2031:18 <b>wander</b> 2011:4 <b>want</b> 1977:4 1992:23 1996:4 2009:24 2010:9 2019:14 2031:18 2033:12,13 2035:17 2042:3,6 2044:19 <b>wanted</b> 1985:13 2008:20 2051:21 2054:10 <b>wanting</b> 1986:23 <b>wants</b> 1981:15 <b>WARREN</b> 1973:5 <b>wasn't</b> 2005:4 2013:14 2015:24 2016:11 2018:12 2024:4 2028:17 2052:7 2054:10 2056:22 <b>waste</b> 2042:6 <b>water</b> 1972:6,9,11 1973:11 1975:7 1976:17,17,23,23 1979:14,15,23,24 1984:23,25 1985:5,10 1985:22,24,24 1986:2 1986:9,10,23 1987:3 1987:6,17,21 1988:18 1988:18,19 1989:9,17 1989:23,24 1990:7 1991:2,11,16,25 1992:2,21 1995:14,15</p>	<p>1996:2,9 1998:2,16 1998:18,23 1999:3,8 1999:15,20,21 2000:3 2002:25 2003:9,10 2004:3 2005:6,24 2007:6,10,11,19 2008:1,3,3,5,9,9,11 2008:14,16,16,17,20 2008:22,23,24,25,25 2009:2,8,10,16,18,22 2009:25 2010:1,3,4,6 2023:15,16,17,18,18 2024:25 2025:2,2,4 2025:12,18,25 2026:3 2026:5,5,6 2027:8,9 2027:15,19,21,23 2028:5,21,21,25 2029:1,1,5,7,8,8,9,10 2029:12,17 2030:3,18 2031:1,8,8 2034:13 2034:15,15,21,25 2035:25 2036:17,19 2037:1,6 2038:8,8,12 2038:13,19,23 2039:1 2039:16,16 2040:3,3 2040:8,10,17,25 2041:4,12,13,14,18 2041:19 2042:23 2043:14,18 2044:3,9 2044:24 2045:2 2046:4 2047:10 2048:11,13 2049:8,14 2049:14 2050:6 2052:4,9,9,11,14,17 2052:25 2053:1,14,15 2054:1,1,5,9,11 <b>way</b> 1979:12,14 1981:22 1982:2 1983:8,12,16 1984:1 1991:21 1992:15,15 1994:15 1998:11,20 2001:16 2003:10 2004:13 2008:8 2010:22 2019:18 2025:5,7 2026:3,11 2027:23 2028:6 2030:10 2031:13,16 2031:24 2032:4,5 2036:16 2038:22 2040:4 2041:6,13 2042:6 2052:14 2053:8 2055:7 2056:8 2057:3,4 <b>ways</b> 2006:15 2010:2 2031:14,16 2048:6 2050:5 2051:18 2056:7 <b>wbraunig@kvn.com</b></p>	<p>1973:9 <b>we'll</b> 1976:11 2032:10 2032:16 2037:6 2046:14,16 <b>we're</b> 1997:13,21 1999:18 2003:16 2004:25 2011:14 2016:24 2025:21 2030:7,8 2033:15 2042:19 <b>we've</b> 1983:21 2002:6 2010:6 2013:20 2035:23 <b>weeks</b> 1975:22 <b>welcome</b> 2010:21 <b>went</b> 1996:7 2029:23 2035:11 2042:13 <b>weren't</b> 2011:9 2048:7 2048:8,9 <b>wheel</b> 1986:23 1990:7 2034:20 <b>wheeled</b> 2039:16 <b>wheelers</b> 1987:6,7,22 1990:21 2011:19,21 2037:11,12,14 <b>wheeling</b> 1976:18 1987:4,5,8 1989:6,15 1989:24,25 1990:8,13 1991:3,4,18,19,20 1995:13,14,16,18,20 1995:24 1996:5,12,19 1996:22 1997:1,6,12 1997:15,17 1998:12 2001:2,6 2002:23 2007:1,4,9,13,23 2008:12 2012:17,21 2012:24 2013:1 2024:11 2037:13,21 2038:14,16 2045:6 2052:8 <b>wheelings</b> 2001:4 <b>wheels</b> 2038:5 <b>wild</b> 1985:13 <b>win</b> 2001:11 <b>witness</b> 2016:2 2058:17 <b>witnesses</b> 1989:24 <b>Woodcock</b> 1977:10 1979:13 1986:4 1987:14 2023:1 <b>Woodcock's</b> 2017:14 <b>word</b> 2019:15 2024:18 2044:14,15,22 <b>words</b> 1975:6 1989:16 2026:25 2031:7 <b>work</b> 1984:16 1992:12 1997:2 2014:19 <b>worked</b> 1998:8 <b>working</b> 2054:2</p>
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<p><b>works</b> 2046:23  <b>world</b> 2008:11 2016:24  <b>WORLDWIDE</b>                  1972:23  <b>worth</b> 1990:20 2035:5                  2035:24 2036:16,18                  2036:20  <b>wouldn't</b> 2016:1                  2021:20 2031:4                  2052:17,18  <b>wow</b> 2041:15 2047:5  <b>written</b> 1976:2 2044:23  <b>wrong</b> 1984:1 1993:9                  1994:23 2000:22                  2005:23,24 2015:19                  2015:20 2040:2                  2044:18 2049:17                  2050:14,15 2051:25                  2052:23 2053:4  <b>wrongdoer</b> 1981:10                  2014:6 2017:5  <b>wrongful</b> 1979:7                  1981:8  <b>wrote</b> 2055:12  <b>WSR</b> 2003:9</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>XIII</b> 1972:10 1974:3</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Yeah</b> 2030:7 2033:11  <b>year</b> 2009:24 2012:1,2                  2012:3 2053:23,24                  2055:14 2056:8,16,22  <b>years</b> 1996:18,24                  2002:9 2032:2 2033:7  <b>yesterday</b> 2055:11  <b>yield</b> 2013:25  <b>yields</b> 2023:21</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zero</b> 1976:13 1977:18                  1979:19 1984:20                  2016:5 2019:4,7</p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 1972:12,12 2050:19  <b>1-10</b> 1972:13  <b>10</b> 1972:12 2017:14                  2033:7  <b>100</b> 1976:17 1977:23                  1979:20,21 1985:9,20                  1988:6,8,12,14,22,23                  1997:9 2019:4,7                  2030:22  <b>1063</b> 2003:5</p>	<p><b>1082</b> 1996:1  <b>109</b> 1996:25 2005:24  <b>10th</b> 1973:14  <b>11</b> 2049:10  <b>115</b> 1996:25  <b>12</b> 1977:10,10 1988:11                  1989:3 2017:15  <b>12.4</b> 2001:8  <b>12.4(c)</b> 1982:3,4                  1984:17  <b>13</b> 1989:3  <b>134</b> 2005:25  <b>136</b> 1997:2  <b>140</b> 2029:23  <b>1414</b> 1981:13  <b>1415</b> 1981:13  <b>1419</b> 2006:7  <b>1428</b> 1990:4  <b>1429</b> 1990:4  <b>15</b> 1982:18,24 1983:2                  2003:3,3,16 2006:17                  2019:25 2022:12                  2033:7  <b>164</b> 1997:3  <b>18</b> 2005:9  <b>188</b> 1982:23 1985:7                  1994:9 1999:23  <b>188-</b> 2006:17,20  <b>1931</b> 2040:21  <b>1933</b> 1987:18  <b>1972</b> 1972:13 1974:3  <b>1976</b> 1974:5  <b>1997</b> 1995:21,23  <b>1998</b> 1996:13,23                  2002:21 2053:18,21                  2054:4</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>2:05</b> 1975:3  <b>2003</b> 2043:23 2054:8  <b>2008</b> 2044:2  <b>2010</b> 1974:6 2044:25  <b>2011</b> 1983:22  <b>2012</b> 1972:12  <b>2013</b> 1972:12  <b>2014</b> 1972:12 1978:20  <b>2015</b> 1972:18 1974:2                  1975:2 1983:22                  2058:18  <b>2016</b> 1984:11,19  <b>2049</b> 1974:7  <b>2055</b> 1974:8  <b>2058</b> 1972:13 1974:3  <b>20th</b> 2053:23,23  <b>213.217.6000</b> 1973:19  <b>213.443.3000</b> 1973:15  <b>218</b> 2050:19  <b>22</b> 2054:16</p>	<p><b>23</b> 2047:11 2051:3,5  <b>24</b> 2051:5  <b>244</b> 2050:19  <b>25</b> 1977:18 1990:4  <b>250</b> 1998:6,8  <b>253</b> 2056:17  <b>26</b> 1998:21  <b>27</b> 2005:9,11  <b>27-</b> 2006:18  <b>28</b> 1999:19,21  <b>28-</b> 1999:19,25</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>30</b> 2044:4  <b>304</b> 1972:4 1974:2  <b>31</b> 1996:16,17,23                  2044:25 2053:18  <b>32</b> 2045:11  <b>3374</b> 1972:20 2058:8                  2058:23  <b>396</b> 1979:1  <b>397</b> 1979:1  <b>3rd</b> 1972:24</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p><b>4.1</b> 2009:6,7,9  <b>4.2</b> 2009:9,18 2041:15                  2041:15  <b>4:00</b> 2042:4  <b>4:10</b> 2057:22  <b>415</b> 1972:25  <b>415.391.5400</b> 1973:7  <b>471</b> 1999:24  <b>49</b> 2043:24  <b>491</b> 2047:12</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>5</b> 1972:18 1974:2                  1975:2  <b>5.1</b> 2032:25  <b>5.2</b> 2008:2,19 2009:9                  2009:18 2010:6                  2032:25 2041:15,16                  2049:5  <b>5.4</b> 2053:19  <b>50-50</b> 1992:7  <b>506</b> 1999:11  <b>512</b> 1985:5  <b>522-7096</b> 1972:25  <b>53</b> 1986:13  <b>54</b> 1999:12,17,25  <b>55</b> 2001:6  <b>58</b> 1989:12 2001:6  <b>59</b> 2006:7</p> <hr/> <p style="text-align: center;"><b>6</b></p> <hr/> <p><b>60</b> 1990:20  <b>60,000-dollar</b> 2013:17</p>	<p><b>61</b> 1989:5,12 1990:20  <b>633</b> 1973:6  <b>6th</b> 2058:17</p> <hr/> <p style="text-align: center;"><b>7</b></p> <hr/> <p><b>700</b> 1973:18  <b>701</b> 1972:24  <b>794</b> 2044:2</p> <hr/> <p style="text-align: center;"><b>8</b></p> <hr/> <p><b>8</b> 2054:17,23  <b>80</b> 1996:17,22,24  <b>80-dollar</b> 1996:12  <b>800</b> 1972:25  <b>865</b> 1973:14</p> <hr/> <p style="text-align: center;"><b>9</b></p> <hr/> <p><b>90</b> 1996:14  <b>900</b> 2029:23  <b>90012</b> 1973:19  <b>90017-2543</b> 1973:15  <b>94111</b> 1972:24  <b>981-3498</b> 1972:25</p>
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