

MKelly Depo

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

**PACIFIC COAST FEDERATION OF
FISHERMEN' S ASSOCIATIONS,
et al. ,**

Plaintiffs,

vs.

**No. C02-2006 SBA
Related Case C00-01955SBA**

**U. S. BUREAU OF RECLAMATION,
and NATIONAL MARINE FISHERIES
SERVICE,**

Defendants.

_____ /

**Deposition of
MICHAEL S. KELLY**

*** * ***

FRIDAY, MARCH 7, 2003

10:30 A.M

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1 **BE IT REMEMBERED THAT, pursuant to Notice and on**
2 **FRIDAY, MARCH 7, 2003, commencing at the hour of 10:30**
3 **a.m. at the law offices of GAYNOR & DIAMOND, 1160 G**
4 **Street, Arcata, California, before me, TANIA N. BRUNELL,**
5 **Certified Shorthand Reporter of the State of California,**
6 **personally appeared**

7

MICHAEL S. KELLY

8 **who, having been first duly sworn, was examined and**

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9 testified as follows.

10

11

12 EARTHJUSTICE, Attorneys at Law, represented by
13 KRISTEN L. BOYLES, appeared as counsel on behalf of
14 Plaintiffs;

15 U. S. DEPARTMENT OF JUSTICE, ENVIRONMENT &
16 NATURAL RESOURCES DIVISION, represented by S. JAY
17 GOVINDAN, and MARIA IIZUKA by telephonic appearance,
18 appeared as counsel on behalf of U. S. Bureau of
19 Reclamation and National Marine Fisheries Service;

20 NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION,
21 Office of General Counsel, represented by CHRISTOPHER A.
22 KEIFER, appeared as counsel on behalf of National Marine
23 Fisheries Service;

24 MORISSET, SCHLOSSER, HOMER, JOZWIAK & McGAW,
25 Attorneys at Law, represented by THOMAS P. SCHLOSSER,

1 appeared as counsel on behalf of Hoopa Valley Tribe;

2 ALEXANDER, BERKEY, WILLIAMS & WEATHERS, Attorneys
3 at Law, represented by SCOTT W. WILLIAMS and CURTIS
4 BERKEY by telephonic appearance, appeared as counsel on
5 behalf of Yurok Tribe; and

6 DAN MEYER, General Counsel, Public Employees for
7 Environmental Responsibility, by telephonic appearance,
8 appeared as counsel on behalf of Michael S. Kelly.

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A P P E A R A N C E S

1
2 For the Plaintiffs:

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10 By: S. JAY GOVINDAN
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MKelly Depo

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By: (Telephonic appearances) SCOTT W. WILLIAMS
25 and CURTIS G. BERKEY

1 For Michael S. Kelly:

2 PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
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3 Washington, D.C. 20009
By: (Telephonic appearance) DAN MEYER
4 General Counsel

5

6 Also present: Robert Franklin, Senior Hydrologist, Hoopa
Valley Tribal Fisheries Dept.

7

Tim McKay, Northcoast Environmental Center

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MICHAEL S. KELLY

2

having been duly sworn,

3

testified as follows:

4

5

EXAMINATION

6 BY MS. BOYLES:

7

Q. I'm Kristen.

8

A. Hi.

9

Q. And I represent the commercial fishing and

10 environmental groups that are plaintiffs in this case that

11 we're taking the deposition for today.

12

Can you state your name for the court reporter.

13

A. Michael Sidney Kelly.

14

Q. Have you ever given a deposition before?

15

A. No.

16

Q. Let me go through some of the particulars about

17 it, the strange things about depositions.

18

A. Good.

19

Q. First, do you understand that you're under oath

20 and that you're obligated to tell the truth under penalty

21 of perjury?

22

A. Yes.

23

Q. I will be asking you a series of questions --

24

A. Okay.

25

Q. -- and you hopefully will be answering them.

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1 A. Right.

2 Q. Or at least trying to answer. If my questions
3 are in any way unclear or vague or confusing, please stop
4 and ask me to restate the question so that you understand
5 what it is that I'm -- we're trying to talk about.

6 A. Okay.

7 Q. Your attorneys -- who, I believe, here are Mr.
8 Govindan and Mr. Meyer -- may be making objections for the
9 record as things go along. They have to do that in order
10 to preserve later arguments before the court, but even if
11 they object --

12 (Interruption in proceedings.)

13 (Off the record.)

14 BY MS. BOYLES:

15 Q. Where was I before I lost -- we lost our counsel.
16 Your attorneys, Mr. Govindan and Mr. Meyer, will
17 be making objections, and they have to do that for the
18 record, and they will be doing that, but even after the
19 objection you should answer the question that was asked,
20 unless, of course, you need clarification of the question,
21 like I said before.

22 A. Okay.

23 Q. And then it's possible that they may instruct you
24 not to answer, in which case you may choose not to answer
25 if that's the objection, but a formal objection doesn't

1 carry that kind of instruction, not to answer.

2 A. I can choose not to answer or I can choose to
3 answer.

4 Q. This deposition is up to you, what you want to
5 say.

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6 A. Okay.

7 Q. If at any point you're tired, you want to have a
8 drink of -- coffee, we have coffee here, water; there's a
9 bathroom through that door; or stretch your legs, go
10 outside, we'll take a break. We'll break around noon for
11 lunch unless it's looking like we're almost finished and
12 we all decide we want to push through, but we can decide
13 that as we go along. Is that alright?

14 A. Yep.

15 Q. The other thing about depositions: This is a
16 court reporter here, and she needs to take down everything
17 that we say, and so there's two important things to
18 remember about that. First of all, nodding, you know,
19 shrugging, those won't get onto her transcript, and so
20 everything needs to be verbal --

21 A. Okay.

22 Q. -- and affirmatively stated.

23 A. Right.

24 Q. The second thing is that she cannot take down two
25 people's voices at the same time, and so I will try not to

1 break into your questions -- your answers, and if we can
2 try to do that, it will help her and it will help the
3 transcript. It's awkward, because that's not how normal
4 conversations actually work, but it's worth keeping in
5 mind.

6 A. Okay.

7 Q. What did you do to prepare for this deposition?

8 A. Well, the last -- the last week or so, I've gone
9 back through and read all of the documents that I -- that
10 I felt were necessary to be familiar with to go over

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11 arguments that I -- I'd been making in other forums, and
12 in my mind, just to sort of cover all the bases. I took
13 some notes -- in fact, I've got some things here that
14 might help with following some of --

15 MS. IIZUKA: I can't hear Mr. Kelly at all, and
16 part of it is his voice isn't loud, but the other part is
17 the undertone is just a little bit much. Maybe I should
18 get off and leave this to Jay.

19 MR. GOVINDAN: That's fine.

20 THE WITNESS: I can speak up, too. I'm kind of
21 talking into the table.

22 MS. IIZUKA: Mr. Kelly, it isn't all your fault,
23 but if you would speak up, that would be extraordinarily
24 helpful.

25 THE WITNESS: Okay.

1 MS. IIZUKA: Thank you.

2 THE WITNESS: As I said, I prepared some notes so
3 that when I start to -- if I have a chance to talk about
4 things that are a little bit complicated, we'll be able to
5 follow some structure that's in biological opinions and
6 whatnot; I put all that together. Went through some of
7 the arguments with my wife to see that she would
8 understand, and hopefully that meant others would
9 understand. Lost some sleep thinking about things. I
10 guess that's about it.

11 MR. MEYER: I just wanted the record to clarify
12 the difference between -- well, Jay's role is Jay's role,
13 but to make sure that people understood my role as counsel
14 to Mike in this deposition, is primarily in the context of
15 5 CFR 2635, which are the regulations that govern the

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16 ethical actions of Federal employees; so I'm here as an
17 employment counsel, not as an environmental counsel. So
18 if you hear me object, it will be me advising my client in
19 the context of his employment with the federal government.

20 Now, this could just as easily have been done by,
21 say, the agency's ethics officer. That's not routinely
22 done by the federal government. So once in a while a PEER
23 member will come to us and say, "Hey, I've got to give a
24 deposition and I just don't know how my employment
25 interest is watched out for during that process; would you

1 sit in as my counsel." So some people are kind of
2 confused about why is there a PEER attorney here. It's
3 because I'm here to advise Mike on the proper stance an
4 employee takes as a member of the federal workforce in
5 these situations.

6 THE WITNESS: Let me add something to the last
7 question. I also did talk with Mr. Meyer and Jeff Ruch,
8 the executive director of PEER, on the phone. They just
9 basically explained what you explained about how a
10 deposition works, how things might be objected to and how
11 that works. And I spoke to Mr. Govindan, and I think we
12 were together with -- I think Chris was on the line, and
13 just same sort of thing.

14 BY MS. BOYLES:

15 Q. And when you say Chris was on the line, do you
16 refer to Mr. Keifer?

17 A. Mr. Keifer, yeah.

18 Q. Let's go back. You said you read some documents.
19 Do you remember which specific documents you read?

20 A. I went through the final biological opinion. I

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21 read that from cover to cover. Read the National Academy
22 of Sciences report again. Read through sections of the
23 draft biological opinions for comparisons of final. Read,
24 of course, the documents that I prepared as I was going
25 through things looking for appropriate documents.

1 Basically, that's probably it.

2 Q. Okay. Let's do some background first. I'm just
3 going to show you -- this is the notice of your
4 deposition, which I'm going to mark as Exhibit 1.

5 A. Okay.

6 [Second Notice of Deposition of Michael S. Kelly
7 marked Plaintiffs' Exhibit No. 1 for iden.]

8 MS. BOYLES: And I have copy for counsel.

9 MR. GOVINDAN: Thank you.

10 BY MS. BOYLES:

11 Q. Have you seen that document before?

12 A. Yes.

13 Q. Your appearance here is pursuant to that
14 deposition?

15 A. Okay.

16 Q. Is it?

17 A. Is it?

18 Q. Is it.

19 A. It is pursuant to -- meaning this told me what to
20 do, what I needed to do, and I did it?

21 Q. Yes.

22 A. Yes.

23 Q. And Mr. Meyer went through his role here. Are
24 you represented by counsel in another way at the same
25 time, or what is Mr. Govindan's representation of you at

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1 this deposition?

2 MR. GOVINDAN: I'll object, because that calls
3 for him to make a legal conclusion.

4 You can answer.

5 THE WITNESS: I guess I don't know. I would ask
6 Mr. Govindan.

7 BY MS. BOYLES:

8 Q. The subpoena -- or not the subpoena. The
9 deposition notice has some documents that you were asked
10 to produce, which I was given by Mr. Govindan earlier.
11 Are there any other documents that respond to that that I
12 have not been provided with?

13 A. I was a little unclear; number five is really
14 general and open, and it talks about subsequent
15 supplements to the administrative record. The index of
16 the administrative record that I had ended, I think, a
17 week after the final biological opinion was signed, and I
18 don't know that there have been any supplements to that,
19 and it wasn't really clear whether I'm supposed to
20 supplement it. There are some things that have been
21 talked about since then that I just didn't really think
22 were that important and I didn't think they applied.

23 What's the question again?

24 Q. That's fine. That answers my question.

25 Let's go through some of your personal and

1 professional background.

2 A. Okay.

3 Q. Where are you currently employed?

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4 A. National Marine Fisheries Service in Arcata, the
5 Arcata field office.

6 Q. What is your position there?

7 A. Fisheries biologist.

8 Q. And how long have you worked there?

9 A. It's been since August of 2000.

10 Q. And are you aware that the National Marine
11 Fisheries Service is a defendant in this case?

12 A. Yes.

13 Q. Could you just walk me through what your basic
14 educational background is, college, and beyond, if you
15 have other degrees.

16 A. Okay. I have a Bachelor of Science degree from
17 Humboldt State University in marine biology. I took a lot
18 of extra classes in fisheries and oceanography and things
19 like that. Eventually it added up to a marine biology
20 degree, but I did take a number of fisheries-type classes.
21 No degree beyond that.

22 Training -- in-service training, I guess you'd
23 call it. Various fisheries- and hydrology- and
24 geology-type courses, as well as Endangered Species Act
25 training, both basic and advanced training, to do

1 biological opinions, the basic things that relate to my
2 work.

3 Q. And have you worked on many biological opinions?

4 A. You know, I counted them in my head last night.
5 thinking this would be a question, and I think I've
6 written six or seven.

7 Q. And when you say you've written them, you are the
8 primary drafter?

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9 A. The primary drafter, yeah.

10 Q. What was your position within the National Marine
11 Fisheries Service with respect to the Endangered Species
12 Act consultation that we're talking about for the Klamath
13 project?

14 A. I was referred to as the "technical lead." When
15 I was offered the chance to work on this, that's how my
16 supervisor described it to me, that I would be the
17 technical lead.

18 Q. What does that entail? What does it mean to be a
19 technical lead?

20 A. Well, I guess that's different from the policy
21 lead. I would be looking at the science, looking at the
22 biology, formulating the effects, determinations, and
23 helping to formulate the conclusion.

24 Q. And, then, does that include drafting the
25 biological opinion?

1 A. Yes.

2 Q. So you were the technical lead on this team. How
3 many were on the team?

4 A. Originally, there were - well, I'd say there were
5 three. The other biologist, who's no longer with NMFS; a
6 woman named Irma Lagomarsino, my supervisor. On April 5th
7 or 6th the other biologist left for another position. And
8 then shortly after that, after the April 1st biological
9 opinion was rejected, then Jim Lecky, the assistant
10 regional administrator, joined the team. So at that point
11 it was Mr. Lecky, Irma Lagomarsino, and myself at that
12 time.

13 Q. And what was the name of the other biologist who

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14 left?

15 A. Don Reck.

16 Q. I want to show you and mark as Exhibit 2 --

17 [Narrative Statement of Michael S. Kelly, Fishery
18 Biologist, National Marine Fisheries Service,
19 marked Plaintiffs' Exhibit No. 2 for iden.]

20 This is your narrative statement, which is up on
21 the PEER website, and because I'm going to be talking
22 about things that are talked about in here --

23 Are you familiar with this document?

24 A. Yes.

25 Q. What is it?

1 A. Well, this was prepared as part of my
2 whistleblower disclosure, and it's just the story of what
3 happened, as I saw it, leading up to my disclosure.

4 Q. Okay. I'm going to use that as sort of a
5 template as we move through some of the biological opinion
6 drafts.

7 A. Okay.

8 Q. Which leads me to the next exhibit.

9 MR. WILLIAMS: This is Scott Williams.

10 Kristen, could we mark the statement as an
11 exhibit so we don't get confused here as we go along?

12 MS. BOYLES: It is. This is Exhibit 2.

13 MR. WILLIAMS: I'm sorry; I missed that.

14 MS. BOYLES: I'm marking as Exhibit 3 --

15 [Predecisional Draft, Biological Opinion, Klamath
16 Project Operations, 4-1-02, NMFS Southwest
17 Region, marked Plaintiffs' Exhibit No. 3 for
18 iden.]

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19 BY MS. BOYLES:

20 Q. This is a draft biological opinion from April 1st
21 of 2001. It is in the administrative record for this case
22 at 187. I'll give that to you.

23 Are you familiar with that draft?

24 A. Yes.

25 Q. Can you explain how that draft is important to

1 understanding the process that was involved with this
2 biological opinion?

3 A. Sections of this biological opinion -- and it's
4 either in the Effects section or the Reasonable and
5 Prudent Alternative, discuss -- one, they discuss the
6 effects to populations over time, sort of how time is in
7 itself a risk factor, depending on the status of the
8 population.

9 Q. I'm sorry.

10 A. The population of coho salmon, in this case.

11 So that information, I thought, was critical to
12 why I argued with the opinion, biological opinion. It had
13 some holes in it.

14 This also has a little bit of, I believe -- yeah,
15 right here, page 28 and 29, some language that was taken
16 from our critique of the National Academy of Sciences
17 report, and as I provided in a separate document to
18 augment the administrative record, this is just a part of
19 that. But here -- here it is.

20 Q. Let me stop you there for just a second. I want
21 to make sure I know what document you're talking about.
22 That is -- that is this document right here?

23 A. Yes.

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24 MS. BOYLES: I want to mark this, as well. This
25 is Kelly Exhibit 4.

1 [Document written by Don Reck marked Plaintiffs'
2 Exhibit No. 4 for iden.]

3 Can you explain what this document is.

4 A. This is a document that was primarily written by
5 Don Reck, the other biologist on the original team, and it
6 goes through the National Academy of Sciences reports and
7 critiques it in light of our responsibilities under the
8 Endangered Species Act. This is -- it's the opinion of
9 the biologist, and I edited this, to some degree, and
10 agree with it completely.

11 Q. I'm sorry; continue.

12 A. Another reason I think the April 1st opinion is
13 important is because the reasonable and prudent
14 alternative in this -- in this document provides an
15 analysis -- it provides a separate analysis to determine
16 that the reasonable and prudent alternative avoids
17 jeopardy, which, as I say, the final opinion doesn't do.
18 So it shows at least at some point we did do, in a
19 separate reasonable and prudent alternative, an actual
20 analysis of that alternative.

21 Q. The document that is marked Exhibit 4, is that
22 information in the April 1st draft that is Exhibit 3?

23 A. Just the -- just parts of it, not the whole
24 thing. Perhaps -- was it on page 28? Under 8.1 on 28,
25 under "National Academy of Sciences Report," I believe, up

1 to 8.2. This is excerpted from Exhibit 4.

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2 Q. And that -- when, in your statement -- again
3 that's Exhibit 2 at page six -- you say there was
4 information left out of the draft about the National
5 Research Council report, is that the information you were
6 referring to?

7 A. Yes.

8 Q. Why is that information important to a sound
9 scientific decision?

10 MR. GOVINDAN: When you say "that information" --

11 BY MS. BOYLES:

12 Q. Why is the information that is marked Kelly
13 Exhibit 4 important to a sound scientific decision?

14 A. A couple reasons. It does point out some
15 disagreements with some of the basic biological
16 conclusions of the National Academy of Sciences report;
17 and, like I said, it also analyses, in light of our
18 Endangered Species Act, responsibilities and demonstrates
19 that the National Academy of Sciences report doesn't
20 really consider what our responsibilities are, at least we
21 felt, under the Endangered Species Act.

22 Q. And when you say "we," who do you refer to?

23 A. I guess the two biologists on the team: myself
24 and Don Reck.

25 Q. Why isn't that information in the April 1st

1 draft?

2 A. It was -- I guess it was considered not to be
3 appropriate. To be honest, I had marked it as something
4 that the supervisors should look at.

5 MS. IIZUKA: Mr. Kelly, could you speak up? I
6 am listening to another conversation and it's very, very

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7 difficult. I'm really sorry to interrupt you.

8 THE WITNESS: Okay.

9 The question was -- well, what was the question?

10 MS. BOYLES: Can you read back the question. I'm
11 sorry.

12 (Off the record.)

13 (Previous question and answer read.)

14 THE WITNESS: I could speculate why I think it
15 was taken out --

16 MR. GOVINDAN: Object.

17 THE WITNESS: -- but that's somebody else's
18 decision.

19 BY MS. BOYLES:

20 Q. Did you object to it being taken out?

21 A. I don't think I did verbally. I don't think I
22 did directly, no.

23 MS. IIZUKA: Kristen, I didn't hear Mr. Kelly's
24 answer to your question. Did he object, I think was your
25 question.

1 THE WITNESS: Not directly to the supervisors.

2 Not -- other than perhaps in my own mind.

3 MS. IIZUKA: Your own mind?

4 THE WITNESS: Um-hmm.

5 MS. IIZUKA: Okay. I just need to hear. I'm
6 very sorry. Go ahead.

7 BY MS. BOYLES:

8 Q. Could you look at page 50 and 51 of the April
9 1st, which is Kelly Exhibit 3.

10 In your statement you talk about this is a
11 discussion of scientific principles. Can you explain

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12 that?

13 A. What is?

14 Q. I'm sorry. In your statement, on page five of
15 your statement, you discuss the information on page 50 and
16 51 as a discussion of scientific principles, and I just
17 wanted you to explain that further, if possible.

18 A. Let me see exactly what I said in my statement.

19 MR. GOVINDAN: Ms. Boyles, can you identify where
20 exactly you're referring to?

21 MS. BOYLES: Page five of Mr. Kelly's
22 declaration.

23 MS. IIZUKA: I really can't hear. I'm just going
24 to have to get off and let Jay handle this, because I
25 cannot hear a thing --

1 MR. GOVINDAN: Don't worry about it, Maria.

2 MS. IIZUKA: -- what Mr. Kelly is saying.

3 MR. GOVINDAN: I'll cover it from my end, Maria.
4 Don't worry about it.

5 MS. IIZUKA: I'll just hang up. I'll talk to you
6 later, Jay.

7 MR. GOVINDAN: Okay.

8 MS. IIZUKA: Thank you.

9 BY MS. BOYLES:

10 Q. I am referring to page five of your statement,
11 which says that "there are scientific principles that
12 demonstrate risks to populations of animals," bottom of
13 page five, and refers to page 50 and 51 of the April 1st
14 draft.

15 A. Actually, I think it begins on page 49, beginning
16 under "In developing this RPA, NMFS relied on the

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17 following principles." It talks about the sort of
18 conservation biology written with a language to population
19 of animals when they are at a low population level, what
20 vulnerabilities of that species as compared to animals
21 that are not at a reduced population level.

22 And then it goes on to illustrate that, in fact,
23 this population of coho is at that -- at that low level of
24 concern. Then it talks about over time what sorts of
25 things that are -- that are not under your control:

1 random catastrophic events and how they need to be
2 accounted for when you're thinking of the resiliency of a
3 population over time.

4 Q. When people use the term "precautionary
5 principle," are these elements of what they're talking
6 about?

7 A. You would certainly think of these things under
8 the precautionary principle. The precautionary principle
9 is more sort of "we don't really know but we need to be
10 careful." This is not specifically the precautionary
11 principle, though --

12 (Interruption in proceedings.)

13 (Off the record.)

14 BY MS. BOYLES:

15 Q. Can you go back; I think that you were talking
16 about --

17 MS. IIZUKA: We were talking about the -- last I
18 heard, page 50 to 51 of Exhibit 3. If I'm wrong, please
19 correct me.

20 MR. GOVINDAN: We'll let Ms. Boyles conduct her
21 deposition.

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22 THE WITNESS: It's actually pages 49 and 50 on my
23 pages here.

24 MS. IIZUKA: Okay.

25 BY MS. BOYLES:

1 Q. That's right; we were talking about those
2 scientific principles.

3 A. Um-hmm.

4 Q. How important -- why are those scientific
5 principles important to a biological opinion?

6 A. Since this was a -- this was a ten-year project,
7 which meant, of course, time is something we should be
8 considering, and being as this -- all the documents and
9 science that otherwise went into this agree that the
10 population is severely depressed and even in a precarious
11 state -- I think we even mentioned that in the final
12 biological opinion -- so, over time, we need to consider
13 what's going to happen to that population. If they don't
14 have conditions that are adequate enough to help them
15 build resiliency, meaning that they could build their
16 population enough so that if some unforeseen catastrophic
17 perturbation happened, that they might be able to
18 withstand that. So if you're you going to provide
19 conditions over a ten-year period, you need to make sure
20 that they're at least enough to maintain and actually,
21 preferably, to help the population build resiliency.

22 Q. If you could turn to page 61 of that draft and
23 explain what that chart is. This is the April 1st draft.

24 A. Right.

25 I believe we have the -- this would be the draft

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1 flow recommendation, beginning during the first year of
2 the proposed action, the ten-year action.

3 Q. What was that first year?

4 A. The first year would have been 2002.

5 Q. Thank you.

6 A. I believe it would have started April 1st, 2002.
7 The draft recommendation said that these flows would be
8 implemented immediately. Depending on the water year
9 time, you would have a flow recommendation of releases
10 from Iron Gate Dam. And these were designed to avoid
11 jeopardy of the species.

12 Q. So let me go over those points a little slower.

13 A. Okay.

14 Q. Those flows are required to be met when? Were
15 required to be met when?

16 A. Beginning April -- well, beginning -- it would
17 have been at the beginning of the irrigation season. We
18 didn't finish the final biological opinion until some
19 months after. But immediately, as soon as the opinion was
20 signed, these flows would go into effect.

21 Q. And they were to be met every year?

22 A. For ten years, yeah, depending on the water year
23 time.

24 Q. And can you explain the "water year time"?

25 A. You get a forecast -- the Bureau of Reclamation

1 uses a forecast they get from another federal agency that
2 tells them how much inflow there will be into Upper
3 Klamath Lake, and that dictates the water year time. And
4 if it's less flow going into Upper Klamath Lake, it's a

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5 drier year; more flow is a wetter year. And that's a
6 continuum here.

7 Q. And down the left-hand side, the months, how is
8 that time period set forth?

9 A. Month by month or, in some cases here, a week or
10 biweekly recommendations would change on that date. So,
11 for instance, when you finished the April flow
12 recommendation of 1600 cubic feet per second in a drier
13 year, you would then go to the May recommendation and, for
14 the first week of May, May 1st through 8, you would supply
15 this, and then each time step would change the flow.

16 Q. And how are those time steps chosen?

17 A. We went around and around about how they should
18 be broken up, and originally we broke them up, especially
19 in the spring, into -- into smaller pieces to better
20 enable us to mimic the shape of the natural hydrograph.
21 You wouldn't get exactly 1600 cubic feet per second for a
22 flow for an entire month and then have the drop-off at the
23 beginning of the month under natural conditions. So we're
24 trying to shape this to a natural hydrograph, the type of
25 thing the fish would have experienced in natural

1 conditions.

2 Q. What happened to this draft?

3 A. Well, we prepared it -- I think I've said there
4 were sort of two April 1st drafts, one I referred to as
5 the early April 1st draft, or the preliminary draft, that
6 was the one that had the full critique of the National
7 Academy of Sciences report in it. Then, of course, that
8 was edited, and the April 1st, this version, was sent for
9 legal review. To whoever that goes; I'm not really sure.

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10 Sometime later, a few days, a week, I really don't recall,
11 I was told that the Department of Justice had said --

12 MR. GOVINDAN: Objection. I'll instruct the
13 witness not to answer as to communications with the
14 Department of Justice or their attorneys.

15 THE WITNESS: This was told to me by my
16 supervisor, so -- anyway, someone had rejected this as
17 being -- I believe they just said it was indefensible, or
18 they wouldn't want to defend it.

19 BY MS. BOYLES:

20 Q. Was there an internal biological review of this
21 draft?

22 A. I guess I would assume so, but I don't know.
23 After the -- certainly the early drafts were looked at by
24 the biologists on the team. I don't know. I don't know.

25 MS BOYLES: I want to mark as Exhibit 5 -- this

1 is the April 17th draft, the biological opinion.

2 [Predecisional Draft, Biological Opinion, Klamath
3 Project Operations, 4-17-02, NMFS, Southwest
4 Region, marked Plaintiffs' Exhibit No. 5 for
5 iden.]

6 MS. IIZUKA: What was Exhibit 4?

7 MR. SCHLOSSER: Exhibit 4 is the draft biological
8 opinion we've been discussing.

9 MS. BOYLES: No, I believe that's not right.

10 MR. GOVINDAN: Exhibit 4 are documents that Mr.
11 Kelly provided on Wednesday, which I have provided Ms.
12 Boyles.

13 MS. IIZUKA: Okay. All right. Go ahead.

14 BY MS. BOYLES:

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15 Q. Let me show you Exhibit 5. That is the April
16 17th draft, which is in the administrative record at 201.

17 Are you familiar with that draft?

18 A. Yes.

19 Q. Can you -- how did this draft come about to be
20 written?

21 A. After the April 1st opinion was rejected, we, of
22 course, had to start over again, and that was when Jim
23 Lecky joined the team of myself and Irma Lagomarsino, to
24 produce this draft.

25 Q. What are the key differences between this draft,

1 which is the April 17th draft, Kelly Exhibit 5, and the
2 April 1st draft, which is Exhibit 3?

3 A. Well, the rationale that I used, or the team
4 used, to develop the reasonable and prudent alternative in
5 the April 1st draft -- we understood it to be
6 indefensible, so we had to sort of find another way to
7 analyze the effects of the project and to develop an
8 alternative. So it's just a different -- a different
9 rationale.

10 Q. Can you explain that a little bit? I don't
11 understand the "different rationale."

12 A. Let me think about the difference between the two
13 here.

14 Q. Let me help you in this way. Again, there's a
15 discussion of what you called in your statement
16 "scientific principles," which is a discussion of the
17 underlying science, and, I believe, the Hardy Phase II
18 report. That's on page 53 and 54 of this draft. Are
19 those pages -- is that one of the key rationale

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20 differences that you're referring to?

21 A. Can you repeat that?

22 Q. If you look at page 53 and 54, that seems to be
23 -- can you compare those pages to the pages in the April
24 1st draft.

25 A. Right. Okay. The effects analysis of the April

1 17th biological opinion focuses on flows that we think
2 need to be provided for the smolt life stage. Those are
3 the fish that are outmigrating to the ocean. They've
4 survived a year in fresh water and they're headed out. We
5 decided that, well, because we couldn't use this rationale
6 in the April 1st opinion and there were people on the team
7 felt that it was -- that the smolt flows were able to be
8 used consistent with the interpretation of the National
9 Academy of Sciences report, we focused -- we focus on that
10 smolt period. So we developed a rationale, saying the
11 smolts will increase their survival with more water. And
12 then we go on to try to figure out how much water that
13 should be, based on data in the Hardy report.

14 So the original analysis that was in the April
15 1st opinion talks about more sort of natural conditions
16 that the fish would experience, compared flows to the
17 frequency that you would experience those flows under
18 certain drought conditions, arguing that you needed to
19 provide favorable conditions, not something less than
20 favorable conditions. But the April 17th then focuses
21 just then on that life stage for development of the spring
22 flows, and then the rest of the flows throughout the year
23 are based on, I believe, similar rationale --

24 Q. Okay.

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25 A. -- as the April 1st.

1 Q. If you could look at page 61 of that draft, of
2 the April 17th draft, do those flow requirements have to
3 be met in the same way as we discussed with the April 1st
4 draft?

5 A. Yes.

6 MR. GOVINDAN: I'll ask counsel to clarify: They
7 were proposed, not that they had to be?

8 MS. BOYLES: Indeed, this is a draft, so this was
9 the draft proposal.

10 THE WITNESS: Is that what you mean?

11 MR. GOVINDAN: It's fine.

12 THE WITNESS: Okay.

13 BY MS. BOYLES:

14 Q. How are these flow requirements different? Or
15 are these flow requirements different than the April 1st
16 draft?

17 A. Let me look. I think they're a little bit less,
18 a little bit lower flow. (Examining.)

19 Yeah, in general they're lower. I don't know
20 about every time step for every dry year, but, in general,
21 across the board, they're a little bit lower.

22 Excuse me. I would say that's for the spring
23 flows. The rest of the year they're the same. For the
24 October through February period and the July through
25 September period, they're the same. We were really

1 focusing on the spring flows here.

2 Q. And those flow requirements were proposed to be

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3 met upon adoption of the biological opinion?

4 A. Right.

5 Q. Did you think these flow requirements -- let me
6 restate that.

7 These flow requirements were through the
8 suggestion from National Marine Fisheries Service of the
9 proposals minimally necessary to help the coho survival
10 and recovery?

11 A. Yes. To avoid jeopardy. It's a little bit
12 different analysis, probably a little bit different
13 numbers. They're a little bit lower, but I felt the
14 analysis was valid. I felt it was valid that these flows
15 were biologically adequate to avoid jeopardy.

16 Q. Both the April 1st draft and the April 17th
17 draft used the Hardy Phase II study?

18 A. Um-hmm.

19 Yes. Sorry.

20 Q. What happened to this draft, the April 17th
21 draft?

22 A. This was provided to the Bureau of Reclamation.
23 They decided that they couldn't operate the project under
24 these -- these flows, I believe.

25 Q. Let's walk through step by step.

1 You talk about, in your statement, a meeting with
2 the Bureau of Reclamation on April 29th and April 30th. I
3 want to talk about that meeting.

4 A. Okay.

5 MS. BOYLES: If it will help, I will provide you
6 and mark as Kelly Exhibit 6 -- these are your notes from
7 the meeting --

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8 [Handwritten meeting notes, 4-29-02, by Kelly
9 marked Plaintiffs' Exhibit No. 6 for iden.]
10 -- which are at the administrative record 206.
11 It's only one page.

12 THE WITNESS: Yeah, I don't take a lot of notes;
13 I listen.

14 BY MS. BOYLES:

15 Q. What happened at the first -- actually, who
16 attended that meeting?

17 A. From National Marine Fisheries Service, it was
18 Jim Lecky, Irma Lagomarsino, and myself.

19 From the Bureau of Reclamation, I believe there
20 were eight individuals. I can try to name a few of them,
21 if you'd like.

22 Q. If you can remember them, yes, please.

23 A. Okay. Kirk Rogers. The regional director for
24 the Bureau of Reclamation. What's his name? Mike. I
25 can't remember his last name. Red-haired fellow. Ryan.

1 He was there. The two biologists: Ron Sutton was there;
2 the other biologist, Mark Buetner, he was there. There
3 was a flow modeler person. I don't know remember her
4 name, but she was working on the computer with modeling
5 questions. Dave Sabot was there. Bob Davis was there.
6 Another gentleman, whose name I don't remember, was there.

7 Is that eight? I believe it was eight people.

8 Q. What happened on the first day of that meeting,
9 on April 29th?

10 A. The three of us showed up. I think we showed up
11 together late in the morning, came in with these -- to
12 these -- this room of eight people, and they had a bunch

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13 of, I mentioned, flip-chart papers up, that kind of are
14 their proposed reasonable and prudent alternative, laid
15 out, and they tried to explain to us what it was. And so
16 we basically just listened to their proposal.

17 Q. And that proposal -- that proposed reasonable and
18 prudent alternative was different than the proposed
19 reasonable and prudent alternative that's in the April
20 17th draft?

21 A. It's different in that there would be a period of
22 time before these flows would be met. There's a lot of
23 detail there.

24 Q. What happened on -- let's go into that detail.
25 What were the differences -- what were the key differences

1 between that proposed reasonable and prudent alternative
2 and the National Marine Fisheries Service April 17th
3 draft?

4 A. Well, they said, of course, that they couldn't
5 operate their project under the proposed flows in our
6 draft reasonable and prudent alternative; and, of course,
7 one of the conditions of a reasonable and prudent
8 alternative is to meet the goals of the project. They
9 said they couldn't meet the objectives of their project,
10 which is delivery of irrigation water under these flows.
11 So they made a calculation based on the area of irrigated
12 agriculture that was their proportion above the base of
13 the Iron Gate Dam, above Iron Gate or above Link River.
14 Anyway, above the project and including their project,
15 they said we're responsible for 57 percent of the
16 irrigated-agriculture acreage up there. So we feel that
17 our fair share of this is -- of these proposed flows is 57

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18 percent of these flows. However, they wouldn't be able to
19 get to 57 percent, I think it's until the year 2006. They
20 would have to build water resources to get to that point.
21 And then once they got to the 57 percent that was their
22 share, that's what they were willing to put towards the
23 flow they say were required to avoid jeopardy.

24 Q. Let me take those one at a time so I'm clear
25 about them.

1 A. Okay.

2 Q. The 57-percent figure, where did that number come
3 from?

4 A. That's their proportion of the irrigated
5 agriculture that is in the upper basin. I'm not sure
6 exactly what point of diversion, but --

7 Q. Was there a factual analysis done to support that
8 number?

9 A. Yeah. In fact, that's provided in the final
10 biological opinion. It tells how they calculated that
11 number.

12 Q. Did the National Marine Fisheries Service, to
13 your knowledge, do anything with that number or try to
14 calculate that number?

15 A. We asked for them to verify it, and I think in
16 the meeting they produced the acreage numbers and did the
17 calculation and said it's about 57 percent.

18 Q. And you mentioned that they wouldn't meet the 57
19 percent until the year 2006. Would you explain that.

20 A. Right. They said that they didn't have enough
21 water resources to get to that yet, that they would build
22 those water resources through this water bank, and

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23 incrementally increasing water banks, starting last year,
24 of 50,000 acre feet, stepping up to 2006, which would
25 allow them then to meet their 57 percent.

1 Q. Then, if it's 57 percent by 2006, how did their
2 proposal propose to get the other 43 percent?

3 A. They proposed that an interagency public forum
4 would identify other sources outside of their irrigation
5 project that could potentially provide the additional 43
6 percent.

7 Q. And when would that be provided?

8 A. I believe that eventually was decided that would
9 happen by 2009.

10 Q. Was there any scientific analysis suggested by
11 the Bureau of Reclamation for this proposal?

12 A. In order to show that 57 percent was relevant to
13 the fishing survival, no.

14 The one thing that Dave Sabo said was that fish
15 survive droughts all the time. You know, 57 percent may
16 be low-water conditions, but fish survive droughts, which,
17 of course, is contrary to my arguments in the April 1st
18 opinion.

19 Q. Did the National Marine Fisheries Service do any
20 additional scientific analysis on the Bureau's proposed
21 reasonable and prudent alternative?

22 A. The final opinion has, in its effects analysis,
23 consideration of the perceived recommendation of the
24 National Academy of Sciences report, which says that
25 incremental -- something like incremental depletions below

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1 that which was provided during the previous ten years
2 would at some point lead to increased risk to the
3 population. So the apparent conclusion of the effects
4 analysis is that as long as you don't incrementally
5 decrease the average flows from that which were provided
6 during the previous ten years, presumably you would avoid
7 jeopardy.

8 So we took the water bank that was proposed by
9 the Bureau of Reclamation to incrementally get to this 57
10 percent to demonstrate that the average flows during the
11 year would now not have this incremental depletion of the
12 previous ten years' flows.

13 Q. Is a -- not being a fish biologist, is that an
14 additional analysis or is that a decision?

15 A. I believe it's a decision based on what the
16 National Academy of Sciences said. If you can call that
17 an analysis. That was our jeopardy --

18 I guess I should back up and say that it's
19 confusing, if you read the final biological opinion on
20 effects section, because it talks about in various places
21 what we're comparing the proposed action to.

22 We start out -- and I can quote from the opinion,
23 if you like. We start out saying that -- these are notes
24 that I have for myself.

25 MR. GOVINDAN: Why don't you wait until Miss

1 Boyles asks you a specific question.

2 BY MS. BOYLES:

3 Q. So if we just -- without talking about what the
4 final biological opinion did, in this -- well, ultimately
5 we'll get there; but for this proposed reasonable and

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6 prudent alternative from the Bureau, there was -- was
7 there additional analysis done on how that proposal would
8 affect or harm the coho?

9 MR. GOVINDAN: And just so the record's clear,
10 you're talking about the April 29th or 30th?

11 BY MS. BOYLES:

12 Q. I'm talking about the proposed RPA that came out
13 at the meeting that we've been discussing.

14 A. Was there any analysis done in the meeting or --

15 Q. We'll take it in a step. Was there any analysis
16 done at the meeting?

17 A. No.

18 Q. Was there any analysis done later, back at --

19 A. It was justified by demonstrating that the
20 incremental depletions that we felt would happen in the
21 proposed action that are detailed in the effects analysis,
22 that we had eliminated the threat of those incremental
23 depletions. And that, of course, as it said in the
24 effects determination, that smolts would benefit from
25 higher flows. However, there was no analysis of what

1 those flows would be and/or anything to do with how they
2 would actually affect smolts on the ground. It's just an
3 increase rather than a decrease.

4 Q. That actually is my next question. What was the
5 analysis that should have been done on the effects of
6 that proposal, the Bureau's proposed reasonable and
7 prudent alternative, on the ground and in the river?

8 A. Okay. Well, at a minimum, you would want to look
9 at what the resulting flows could possibly be once you use
10 the water bank. Now, the water bank is what's being used

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11 to prevent these incremental depletions in average flows
12 over the year. The water bank can be used to help out
13 when you think it needs to be used, it would help the
14 most. You should at least calculate what you could
15 possibly do with 50,000 acre feet this year, 75,000 acre
16 feet the next year, 100,000 feet the next year, to look at
17 those flows and decide if they make sense in light of the
18 other analyses that you've done.

19 To my knowledge, we didn't do that. But I've
20 done it here in case you'd like to see.

21 Q. And with respect to the 57-percent requirement,
22 was there additional analysis that should have been done
23 on that? And when that percentage would be met.

24 A. Right; and this is when you're starting to talk
25 about the time period.

1 Q. Yes, please.

2 A. You've determined that these flows are necessary
3 -- that the ten-year long-term recommended flows are
4 necessary for the fish to avoid jeopardy, based on what
5 you know. And, granted, there's not a lot of -- a lot of
6 real certainty in the real information, but you had enough
7 to develop those flows. So you need to look at whether
8 the species is able to withstand not experiencing those
9 flows for that time period. And as I mentioned in the
10 whistleblower disclosure, there are ways to look at that,
11 and part of that was certainly provided in the April 1st
12 biological opinion. What does the population experience
13 over time when it's not provided with flows that will help
14 increase its resiliency. That should have been done.

15 Q. What did you personally do next after this

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16 proposal that came out of the April 29th meeting?

17 A. So the night of April 29th, the three of us went
18 and had dinner and we discussed what does this mean, how
19 does it fit into an Endangered Species context.

20 You have to understand that this idea of
21 partitioning the requirement -- not the requirements but
22 the proposed RPA flows, being divided between the federal
23 agency and some other unidentified entity seemed novel to
24 us, and so we spent some time discussing what does that
25 mean in an Endangered Species context. Is this something

1 we can really do. We talked about that.

2 I don't recall how much real biology we talked
3 about, but I think mostly we talked about this, the unique
4 57-percent proposal.

5 Q. And then you continued the meeting on April 30th?

6 A. Right.

7 Q. And what happened on April 30th?

8 A. The morning of April 30th, Jim Lecky had received
9 a phone call from somebody -- I don't know who -- and Jim
10 told Irma and I that whoever this person was had said that
11 we were being accused of stonewalling. And that first day
12 we were just trying to understand what this all meant and
13 fit it into an Endangered Species context.

14 So we went to the meeting, I think we talked
15 about it some more, and, like I mention in the disclosure,
16 at some point Jim Lecky and Kirk Rogers left the room. I
17 think they were gone for perhaps, about 45 minutes. I
18 think it was less than an hour. And when they came back
19 Kirk Rogers asked Jim Lecky to explain the reasonable and
20 prudent alternative.

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21 Q. Now, I want to be clear. Which reasonable and
22 prudent alternative is this now?

23 A. The proposed Bureau of Reclamation 57-percent
24 alternative.

25 And Jim explained it, I guess to demonstrate that

1 he understood it and to say this is where we're going with
2 it, as long as it's legal, and we will forward this for
3 legal review.

4 Q. And was that the conclusion of that meeting?

5 A. No. We spent quite a bit of time after that
6 talking about a variety of things, including the fact that
7 there was 30,000 acre feet available to be used at some
8 point this year to benefit the fish. And we talked quite
9 a bit about how that best could be used. We consulted --
10 I think we consulted with the tribes and determined
11 strategy for the use of that 30,000 acre feet.

12 Q. But with respect to the proposed reasonable and
13 prudent alternative by the Bureau, what was the final
14 decision out of that meeting from NMFS?

15 A. That we would forward this as a reasonable and
16 prudent alternative for legal review.

17 Q. What happened next, after the meeting?

18 A. On the ride home -- I had ridden with Irma, and
19 on the ride home mostly we just talked about a variety of
20 things, but I did mention to her that I have felt that if
21 we were indeed going to accept this reasonable and prudent
22 alternative and develop it without being able to argue its
23 value any longer, I didn't think I was going to be able to
24 support it. I did mention that to her on the ride home.

25 Q. Okay. And did you continue to work on the

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1 biological opinion?

2 A. Yeah; we were still compiling some background
3 information for the habitat requirements of the smolt life
4 stage to sort of strengthen that part of the argument that
5 would justify the flows, be they implemented ten years
6 from now or immediately. So we were continuing to work on
7 that.

8 And it was sometime later, I don't know the
9 actual day -- maybe a week later -- when we got the word
10 that, yes, this passed legal muster and we were going to
11 develop this RPA.

12 MR. GOVINDAN: Just to clarify, Ms. Boyles, when
13 you said "you," did you mean "you" or "Mr. Kelly"?

14 MS. BOYLES: I actually meant Mr. Kelly.

15 MR. GOVINDAN: Thank you.

16 BY MS. BOYLES:

17 Q. Yeah. Was there another analysis being done by
18 NMFS at the same time, between the meeting and between the
19 final word, that this was the reasonable and prudent
20 alternative to go with?

21 A. The only analysis that I recall was the analysis
22 that was provided to further support the long-term flow
23 recommendation, the needs of the smolt life stage.

24 Q. And that's the long-term flow recommendations in
25 the April 17th draft?

1 A. No, in the -- they weren't long-term
2 recommendations in the April 17th draft. In the final
3 they became long-term. I'm just referring to that flow

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4 regime.

5 Q. Who did you hear from that the agency was to
6 continue with their reasonable and prudent alternative?

7 A. I think it was from Jim Lecky in a call with Irma
8 and I.

9 Q. What did that mean to you?

10 A. That meant that we weren't going to be able to do
11 any more analysis on what it would be mean to wait before
12 they got the flows that we had recommended or what the
13 incremental increases or the intervening flows would mean
14 to the fish.

15 Q. So what did you do then?

16 A. I told them that if this was the reasonable and
17 prudent alternative that we were going to forward without
18 any additional analysis, that I couldn't continue to work
19 on it.

20 Q. And then what happened?

21 A. I think specifically I asked not to be the
22 technical lead on this anymore, and Jim Lecky said that he
23 would fill that role, and I -- I continued after that to
24 provide more information about the needs of smolts as a
25 staff biologist to support the flows, long-term flows, but

1 nothing that would address the time between now and when
2 they received those flows.

3 MS. BOYLES: Okay. I want to mark as Exhibit 7
4 -- this is the May 16th draft of the biological opinion.

5 THE WITNESS: Okay.

6 [Predecisional Draft, Biological Opinion, Klamath
7 Project Operations, 5-16-02, NMFS, Southwest
8 Region, marked Plaintiffs' Exhibit No. 7 for

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9 iden.]

10 MS. BOYLES: This is at administrative record
11 224.

12 MR. GOVINDAN: Miss Boyles, what was the
13 administrative record cite for Kelly Exhibit six?

14 MS. BOYLES: I believe it is -- 206.

15 MR. GOVINDAN: Thank you.

16 BY MS. BOYLES:

17 Q. Are you familiar with that document, the -- this
18 was the May 16th draft that was released for public
19 review.

20 A. I'm familiar with it, yes.

21 Q. Does that document embody the reasonable and
22 prudent alternative that was proposed by the Bureau at the
23 April 29th and 30th meeting?

24 A. Yes.

25 Q. Could you please look at page 69. These are the

1 specific flows.

2 Are those the same flows, regardless now of when
3 they are to be met, that are in the April 17th draft at
4 page 61?

5 A. Let's see. (Examining.)

6 They appear to be. (Examining.)

7 Oh, yeah. Okay. This is the May 16th draft.

8 Yeah, they're the same.

9 Q. What -- I'm sorry if this sounds repetitive, but
10 what, then, is the key difference between the May 16th
11 draft and the April 17th draft with respect to these
12 flows?

13 A. That they would not be implemented immediately.

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14 Q. Would the Bureau of Reclamation be meeting these
15 flows in the long-term?

16 A. In the long-term, theoretically these flows would
17 be met with a 57-percent contribution from the Bureau of
18 Reclamation.

19 Q. So these flows are the amount that the 57 percent
20 is based on now --

21 A. Yes.

22 Q. -- in the draft?

23 A. In the draft.

24 Q. In the May 16th draft?

25 A. Um-hmm.

1 MS. BOYLES: This is Kelly Exhibit 8. This is
2 the final biological opinion, dated May 31st, 2002. It's
3 administrative record 248.

4 [Biological Opinion, Klamath Project Operations,
5 5-31-02, NMFS, Southwest, marked Plaintiffs'
6 Exhibit No. 8 for iden.]

7 BY MS. BOYLES:

8 Q. Are you familiar with that document?

9 A. Yes.

10 Q. Could you please look at the flows on page 70,
11 and compare those to either the May 16th or the April 17th
12 draft, since those are the same.

13 A. Okay. They are the same for the July through
14 September period and the October through February period.
15 However, during the spring flows, from March through the
16 end of June, they are different. In most cases, they are
17 lower, although, in some instances, they may be a little
18 bit higher; but in general they are lower.

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19 Q. Do you know of any additional analysis that was
20 done between May 16th and May 31st on those flow
21 requirements?

22 A. Let me also add that they are -- the time steps
23 are different, of course, during the spring flows. In the
24 draft, we had broken it up into weekly or biweekly time
25 periods and varied the flow from week to week. In the

1 final, they are just monthly flows.

2 Okay. Then what was the question?

3 Q. Let me hold the question for just a second, since
4 you're on that thought.

5 The draft -- the May 16th draft has smaller time
6 periods?

7 A. Yes.

8 Q. And those do not appear in the --

9 A. Right.

10 Q. -- final biological opinion?

11 A. Um-hmm.

12 Q. Why is that important?

13 A. Well, like we had argued before, we felt that we
14 wanted to mimic, as much as possible, the shape of the
15 hydrograph, which would include flows going up and flows
16 going down, depending on flow events, rainfall, snow melt.
17 It wouldn't hold steady at a flat line for a month. So we
18 attempted to break that up, acknowledging that that
19 variation in flow was ecologically important, and
20 important to the fish. In the final, I think they just
21 determined that that wasn't necessary, but I'm not sure
22 that any additional analysis went into that.

23 Q. Okay. And that was my other question, was: Do

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24 you know of any analysis between the May 16th draft and
25 the final on May 31st that supported the change in the

1 long-term proposed flows?

2 A. The time-step question, the breaking it up into
3 months instead of biweekly or weekly in the spring, no, I
4 don't know.

5 The other difference is, of course, the flows are
6 lower. The way we developed the draft recommendations had
7 to do with considering what the unimpaired flows would be.
8 Those are the flows that are the closest guess, the
9 closest analysis we have as to what the flows would be if
10 the project wasn't there, the flows that the fish would
11 experience under natural conditions. We used those flows
12 as a basis for developing these.

13 In dry months -- or excuse me -- in dry years we
14 had essentially decided that a ten-percent drop from the
15 unimpaired flows was acceptable. In the two driest water
16 year times. In the wetter water year times, we felt that
17 that 20-percent reduction was acceptable.

18 Q. Let me interrupt you there. When you say
19 "acceptable," can you explain what acceptable would be or
20 would mean?

21 A. Necessary to avoid jeopardy. Okay. To decrease
22 the risks efficiently, to avoid jeopardy. In the final,
23 it was decided that 20-percent reduction during the two
24 dry years would be adequate. Or would still be risk
25 averse. We had set a ten-percent reduction, and then it

1 was changed to a 20-percent reduction with, I don't

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2 believe any additional analysis.

3 Q. That was going to be my question. Do you know of
4 any analysis?

5 A. It was a different interpretation of the needs of
6 the fish. No -- nothing that would lead you to say that
7 20-percent reduction is somehow acceptable and a ten-
8 percent reduction isn't. We felt that the ten-percent
9 reduction was necessary, because during dry years, when
10 things are critical, it was really as low as we felt
11 comfortable reducing the flows from unimpaired flows.

12 Q. Earlier you were going to talk about some of the
13 final biological opinion issues and I stopped you. Is
14 there anything else, now that we're on the final
15 biological opinion, that you wanted to add?

16 A. A lot. I mean, I -- I would be willing to step
17 through this biological opinion section by section, if
18 that would be helpful. It's difficult to just pick a
19 single thing that I would like to talk about without sort
20 of putting it in the context of the entire opinion.

21 Q. Okay.

22 MR. GOVINDAN: Why don't you wait for her to ask
23 specific questions.

24 MS. BOYLES: I'd like to go off the record for a
25 second.

1 (Off the record.)

2 BY MS. BOYLES:

3 Q. With respect to the final biological opinion, May
4 31st, I would like to talk about three specific areas, if
5 that's okay.

6 A. Okay.

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7 Q. And the first is the 57-percent requirement from
8 the Bureau -- of the Bureau of Reclamation. And I was
9 hoping you could explain what you see as the inadequacies
10 of that.

11 A. The first thing I would say is that taking 57
12 percent of a number that we had generated, number that had
13 scientific support, and taking 57 percent of that, results
14 in an arbitrary amount of water.

15 Q. Why is that?

16 A. Well, it's based on the acreage of irrigated
17 agriculture in the upper basin, which has nothing to do
18 with what the fish are required -- what the fish would
19 require to avoid jeopardy. You end up with an arbitrary
20 number. That's the first thing.

21 Okay. That's the answer.

22 Q. Is there anything else about the 57-percent
23 requirement that you think is scientifically inadequate?

24 A. That it would be -- that it would not meet the
25 flows that we had used the existing science to justify as

1 necessary for the -- to avoid jeopardy to the species.

2 Q. Do you know of any analysis that could be done to
3 justify the 57-percent requirement?

4 A. The 57-percent requirement, you could, as I have
5 done here -- this is a separate document that I've brought
6 just as notes; you could at least look at --

7 Q. Let me look at -- can I look at it first?

8 (Examining.)

9 A. That's actually not specifically the 57 percent;
10 that's the first couple of years under which Table 5.9 of
11 the Reclamation's -- of the Reclamation's original

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12 proposed action would be in effect, plus the water bank.
13 It's less than 57 percent as a base, in most cases.

14 MR. GOVINDAN: Why don't you wait until she asks
15 a question.

16 MR. KEIFER: Could we clarify for the record
17 exactly what that document is and when it was created,
18 please.

19 MS. BOYLES: Michael, hang on a second, please.

20 MR. GOVINDAN: You want to go off the record for
21 a second?

22 MS. BOYLES: Yeah, can we go off the record.

23 (Off the record.)

24 BY MS. BOYLES:

25 Q. Let me ask you about the water-bank requirement.

1 A. Okay.

2 Q. What did you find to be the inadequacies of the
3 water-bank requirement?

4 A. Again, it's an arbitrary amount of water. It's
5 what the Bureau of Reclamation felt that they could
6 provide by various mechanisms. It would be used to
7 provide additional water to help fish at the time that the
8 technical people felt would be most helpful, and typically
9 that would be in the spring, to help the smolt
10 outmigration and the new emerging fry, the small fish that
11 rear.

12 Q. Does the final biological opinion, the May 31st
13 document, require that amount of water to be used at a
14 particular time?

15 A. It requires the amount of water but not to be
16 used at a particular time. It suggests times that the

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17 water might be used.

18 Q. How is that decision to be made?

19 A. The appropriate technical specialist, I think,
20 from the agencies and from the tribes, and whoever else
21 would contribute to that discussion.

22 To continue with the previous -- the question was
23 what do I -- what was the question again?

24 Q. The question was, what were your concerns about
25 the water-bank requirement.

1 A. Okay. The water bank was perceived in the final
2 biological opinion, in the justification for the
3 reasonable and prudent alternative, as addressing the
4 National Academy of Sciences' concern that operation of
5 the project should not incrementally decrease or should
6 not decrease below that which occurred during the previous
7 ten years. So, as I've stated, and in some of the
8 documents I provided, that flow that occurred during the
9 previous ten years was largely an arbitrary flow; it
10 wasn't until the last couple of years, '96, '97, where the
11 needs of the fish were considered as part of the flows.
12 The flows for most of that ten-year period were
13 essentially the water that was left over after other uses.
14 That would be the needs of the suckers in the upper lake,
15 the needs of agriculture, and whatever else. It was a
16 rash, arbitrary level to begin with.

17 The water bank, again being an arbitrary amount
18 of water that the Bureau said was available to them or
19 would be available to them, was then added to this
20 arbitrary level of flow that had occurred over the last
21 ten years and used to justify the rationale that therefore

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22 jeopardy would be avoided. The flows were only sufficient
23 to be used at a discrete period during the year. Like I
24 said, typically we would probably recommend that that flow
25 be used in the spring. The amount of water that's

1 actually available is under 30,000 acre feet, which
2 happened last year, that would give you 500 cubic feet per
3 second for a month, which is a significant amount of water
4 for a month, but it only is available for one month out of
5 the entire year. And in our effects analysis, we describe
6 various effects to the fish that they will experience
7 throughout the year. So --

8 Q. Let me -- the effects analysis where?

9 A. The effects analysis in the final biological
10 opinion.

11 So you're able to use this flow to increase the
12 -- or to avoid decreasing the average flows that would --
13 that would be provided under Reclamation's proposed
14 action. Again, those are average flows over the entire
15 year, and in reality you're only able to use it during a
16 discrete part of the year, so the remainder of the year
17 you still have low flows that don't meet the needs of fish
18 that we say are necessary to provide in the effects
19 analysis. Well, to avoid the adverse effects that we
20 described in the effects analysis.

21 Q. Was there a scientific analysis that could have
22 been done to investigate the effects that you're talking
23 about, with the water bank only supplying a certain amount
24 of water for a certain limited period of time?

25 A. For the period that the water would be available,

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1 you could determine how much water you likely could get.
2 You could look at the expected period of the smolt
3 outmigration and decide, well, we probably want to cover
4 that whole period; so, for two months, in order to make
5 sure that we address the peak of the smolt outmigration,
6 we could calculate how much water would be available.

7 Q. Was that done?

8 A. Not to my knowledge. And it's not in the
9 biological opinion.

10 And then you could take that information and
11 determine whether you really felt that was adequate, and
12 there is information that you could use that would tell
13 you how -- how more quickly the water would get from point
14 A to point B below the dam under the particular flow
15 release.

16 Q. And was that done?

17 A. Not to my knowledge.

18 Q. You provided me this morning a document that I'm
19 going to mark as Kelly Exhibit 9.

20 [Briefing document by Don Reck marked Plaintiffs'
21 Exhibit No. 9 for iden.]

22 BY MS. BOYLES:

23 Q. Can you first tell me what that is?

24 A. This is a document prepared by Don Reck, the
25 other biologist on the original team. It's a briefing,

1 and I don't know whose briefing it was made to, but it
2 just discusses -- it discusses the needs of the fish in
3 the Klamath River and some of the things that might
4 happen, to the habitat and to the fish.

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5 Q. Does -- I'm trying to connect this document to
6 your answer about the final biological opinion --

7 A. Okay.

8 Q. -- because from my brief look at this document,
9 it looked as if this document discussed the base period
10 that you were talking about.

11 A. It does. And the sentence here says: "Simply
12 put, the flows were arbitrary"; that is, the flows that
13 occurred in the previous ten years, they were not
14 "designed to provide for the biological requirements of
15 declining populations of coho salmon." That's sort of the
16 key point that I felt was addressed here.

17 Q. What does that mean?

18 A. What does that mean? Okay. The flows that were
19 provided below Iron Gate Dam from 1990 to 1999 -- it says
20 2000 here, but I think it's actually the period 1990 to
21 1999 -- were flows that, as I said, were essentially water
22 that was left over after other uses, over required uses
23 that were met above Iron Gate Dam, and were not designed
24 to address the needs of fish.

25 Now, he does refer to the FERC minimum flows.

1 Q. If I can interrupt you there --

2 A. Okay.

3 Q. Why, then, is that time period discussed at all,
4 1990 to 2000?

5 A. That's the reference period that National Academy
6 of Sciences chose to use, for some reason.

7 Q. And what is the reference period that National
8 Marine Fisheries Service used?

9 MR. GOVINDAN: At what point?

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10 BY MS. BOYLES:

11 Q. In the April 17th draft.

12 A. In the April 17th draft. Let's see. The April
13 17th draft --

14 Q. Well, let me strike that question for a second.
15 Let's go in order.

16 In the April 1st draft, what was the reference
17 period used?

18 A. Not necessarily -- it wasn't -- maybe I should
19 say what this level would be used for. You would pick a
20 level that was something you could use as point of
21 departure for analyzing the effects to the species. In
22 the April 1st opinion, we used the unimpaired flow
23 estimates, the natural conditions, to the best of our
24 knowledge, that the fish would have experienced under
25 natural conditions. That was our point of departure for

1 making effects analysis.

2 In the April 17th opinion, it was -- it was
3 actually three different things, and it's difficult, if
4 you go through the effects analysis, to determine what the
5 reference period is. We say at one point that we feel the
6 unimpaired flows are appropriate level to use as a point
7 of comparison for analyzing effects. At another point
8 during the effects analysis, we use what the Bureau of
9 Reclamation, in their biological assessment, called the
10 baseline flows, and those are impaired flows that consider
11 depletions upstream of Iron Gate Dam. We used that in
12 part of the effects analysis. And in the conclusion of
13 the effects analysis we use -- was it in the April 17th?
14 Yeah, I think it was in the April 17th. Then we used the

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15 National Academy of Sciences ten-year period. It's really
16 difficult, if you read that effects analysis, to determine
17 what the effects relate to. However, if you go back to
18 the April 1st opinion, all of the conclusions -- I won't
19 say all -- most of the conclusions are the same,
20 regardless of which reference period or which point of
21 departure you use.

22 Q. Okay. And what was the reference period or point
23 of departure used in the final biological opinion?

24 A. The National Academy of Sciences' ten-year -- ten
25 previous years.

1 Q. And this document that's been marked as Kelly
2 Exhibit 9, is this part of any -- where did this come
3 from? Where did this analysis come from?

4 A. This was -- when Don Reck left, he provided me a
5 disk with his files regarding the consultation. So I
6 looked through those files here the other day when I was
7 asked to provide anything in my possession that addressed
8 this consultation, just to see that -- see whether there
9 was anything in Don's files that pertained. And then I
10 compared Don's files to the index of the administrative
11 record, and I saw that this was not, as far as I could
12 tell, in the administrative record. And I also mention
13 that I don't know if this was provided physically to NMFS
14 or whether Don just wrote it up for some other purpose and
15 never used it. But I thought it was relevant, so I
16 included it.

17 Q. Okay. I want to go back to your statement for a
18 second, which is Exhibit 3.

19 MS. BOYLES: Someone correct me if that's wrong.

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20 MR. GOVINDAN: It's 2.

21 MS. BOYLES: Exhibit 2.

22 BY MS. BOYLES:

23 Q. I just want to make sure I'm clear on some of the
24 things that you say here.

25 A. Okay.

1 Q. On page seven, in the first full paragraph there
2 which is not italicized, the sentence that begins
3 "However, the notion that incremental depletions" -- that
4 sentence.

5 A. Um-hmm.

6 Q. Can you explain what you mean by that sentence.

7 MR. GOVINDAN: For the benefit of the --

8 BY MS. BOYLES:

9 Q. Can you read the sentence and then please explain
10 what you mean by that sentence.

11 A. "However, the notion that incremental depletions
12 in average flows over the past ten years is
13 somehow biologically relevant was disputed both
14 verbally and in written documents provided by
15 both fishery biologists on the original NOAA
16 Fisheries team."

17 MR. GOVINDAN: What's the question?

18 BY MS. BOYLES:

19 Q. Is that discussion, is that reference -- does
20 that sentence talk about what we've just been talking
21 about, with respect to the baseline point-of-departure
22 period?

23 A. Yes.

24 Q. How is the notion that incremental depletions in

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25 average flows over the past ten years not relevant?

1 A. The flows that occurred over the previous ten
2 years were largely arbitrary. Didn't consider the needs
3 of the fish. The National Academy of Sciences does say
4 that if at some point incremental depletions below that
5 would -- would be an additional risk to the species,
6 which, of course, it's -- any depletion eventually is
7 going to end up being zero, so it would be -- would be
8 relevant to the fish at some point. But the departure
9 point was arbitrary, so it's didn't seem -- is not
10 relevant.

11 Q. In your statement, in various places you make
12 allegations of political pressure. How did you feel this
13 pressure?

14 MR. GOVINDAN: When you say "you," you mean Mr.
15 Kelly?

16 BY MS. BOYLES:

17 Q. How did you personally feel this pressure?

18 A. Well, the best example is, we had this analysis,
19 this critique of the National Academy of Sciences report,
20 that we felt demonstrated that it was inappropriate to use
21 that perceived recommended level of not -- I forgot
22 exactly how it's worded in the National Academy of
23 Sciences report, but it says that "we find no
24 justification to operate the project differently than it
25 has been done in the previous ten years." To perceive

1 that as a recommendation from the National Academy of
2 Sciences as the, say, level to avoid jeopardizing the

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3 population, we felt -- and we felt we clearly explained,
4 that it was an arbitrary determination that had no
5 business being used in an Endangered Species context. And
6 we ended up continually being told that, "Oh, the National
7 Academy of Sciences' recommendation is that."

8 Q. Who told you that?

9 A. I don't know where that came from. I mean, it
10 kept coming to us from wherever, and it was just what the
11 team was expected to do, was to use that as a meaningful
12 point of departure for analyzing the effects of the
13 action.

14 Q. How, then -- how was that communicated to you
15 personally, the need to use this interpretation?

16 A. Ultimately, when the April 1st opinion was
17 rejected and we started to work on what would become the
18 April 17th opinion, we needed another way to look at it,
19 and Jim Lecky actually, in order to do the jeopardy
20 analysis, he used that perceived recommendation to
21 determine that the average flows that were provided over
22 that ten-year period, based on the way the Reclamation was
23 going to operate the -- the project for the next ten
24 years, would incrementally lower -- would decrease from
25 that point. And since the National Academy of Sciences

1 had said any additional depletions from that level would
2 eventually present additional risk to the species, that
3 was how he demonstrated that there would be jeopardy. And
4 even though we had been over it, you know, in documents
5 and verbally and in meetings many times, saying that, you
6 know, this is arbitrary, it doesn't make sense, we still
7 did it. We wouldn't have -- I don't think we would have

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8 done it otherwise. We wouldn't have used that as a point
9 of departure otherwise. But I can't really speak for what
10 Jim Lecky was thinking, but it was clear that we were
11 being made to use that as our point of departure for our
12 comparison.

13 Q. Compared to other biological opinions and the
14 process for developing biological opinions you've worked
15 on, how was this one different?

16 A. It was mainly different --

17 MR. GOVINDAN: Hang on. I'll object insofar as
18 that exceeds the scope of what the court has defined as
19 the parameters of this deposition.

20 So, counsel, if you want to --

21 BY MS. BOYLES:

22 Q. You can answer the question.

23 A. Okay. Well, it was different, first of all, in
24 that a defined team was working on it. Typically, each
25 biologist has an assignment and then works on the

1 biological opinion and then brings in other people with
2 relevant technical expertise to help make decisions and do
3 analyses, but it's one person writing the opinion. That's
4 the key difference.

5 Q. In other biological opinions, the process, did
6 you ever feel -- did you ever receive a similar
7 instruction, to view the matter a particular way, as
8 you've been describing here?

9 MR. GOVINDAN: Same objection.

10 THE WITNESS: Not that I recall.

11 BY MS. BOYLES:

12 Q. On page eight of your statement, in the

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13 conclusion you state that you believe the National Marine
14 Fisheries Service failed to apply the best available
15 science.

16 A. Um-hmm.

17 Q. Could you explain what that science would be.

18 MR. GOVINDAN: "In your opinion," in Mr. Kelly's
19 opinion?

20 MS. BOYLES: In Mr. Kelly's opinion.

21 THE WITNESS: The -- some of the best available
22 science is explained in the effects analysis of the final
23 biological opinion. For example, we say that the expected
24 adverse effects to the population due to flows from
25 October through February would be such that the

1 population's distribution numbers and reproduction would
2 be adversely affected. There would actually be a
3 population response to those, to those effects, which --
4 which I agree with.

5 When you then take the reasonable and prudent
6 alternative and look at what mechanism's in place during
7 the time period from now until the final long-term flow
8 target is in place, there is nothing that will enable you
9 to provide flows using water bank or other sources to
10 address effects during all seasons. There's simply not
11 enough water in this amount that's provided in the water
12 bank to address effects from all these seasons. The
13 suggestions in the reasonable and prudent alternative say
14 that these flows could perhaps be used to augment flows
15 for smolt outmigration, that they could be used to help
16 with the flows during the summer, they could be used to
17 provide necessary flows for experiments that you would do.

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18 There was no way that you could use this small amount of
19 water in the water bank to address the effects throughout
20 the year. And, in fact, we never mentioned, as far as I'm
21 aware, in the final biological opinion, that these flows
22 should be used in the wintertime. However, we have said
23 that the effects that we would expect are likely to reduce
24 the distribution, the population and the reproduction of
25 the species, which in every biological opinion I've worked

1 on before is what we use as the jeopardy standard. If you
2 analyze an effect and you conclude from that analysis that
3 the population is likely to experience the loss in
4 reproduction and distribution and numbers, that's --
5 that's the -- the key to determining whether or not it's
6 jeopardy.

7 So here we've said, clearly said using the best
8 available science in the effects analysis, that this risk
9 to the population essentially amounted to, potentially,
10 jeopardy all by itself, independent of the effects during
11 the other seasons. And then we don't address that, and we
12 don't provide a mechanism to address those effects, for
13 example, in the final reasonable and prudent alternative.

14 BY MS. BOYLES:

15 Q. What is your greatest scientific concern about
16 the final biological opinions providing for the long-term
17 flows at the end of the time period that this biological
18 opinion covers, 2009, 2010? What is your biggest
19 scientific concern about that time lag?

20 A. Well, this is another example of available
21 science that you could use, is, you've determined that the
22 fish need to avoid these certain adverse effects that, you

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23 know, that you've determined are going to come from the
24 proposed action. Well, now you're saying that they don't
25 need to experience flows that would avoid those adverse

1 effects for a period of time. So there's information that
2 I mention in our viable-salmonid-population documents that
3 allows you to look at whatever data you have about the
4 viability of the population and then to determine whether
5 they will remain viable under these adverse conditions for
6 a period of time. We don't make that analysis in the
7 reasonable and prudent alternative, and, you know, the
8 fish are going to continue to experience adverse effects,
9 and it's a population that we say in the final biological
10 opinion is at a precarious level.

11 Q. Is that your largest concern about the final
12 biological opinion -- is that your primary concern about
13 the final biological opinion?

14 MR. GOVINDAN: Objection. Asked and answered.

15 THE WITNESS: Excuse me?

16 MR. GOVINDAN: Objection. Asked and answered.

17 You can answer.

18 BY MS. BOYLES:

19 Q. You can answer.

20 A. Okay. Biologically, yes.

21 MS. BOYLES: I have nothing further right now.

22 It's 12:30. I don't know how we want to proceed,

23 Tom or --

24 MR. GOVINDAN: Why don't we take five minutes.

25 MS. BOYLES: Can we take a break.

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1 You on the phone, don't hang up. We're off the
2 record.

3 (Recess taken.)

4 MS. BOYLES: Scott, do you want to -- Tom, do you
5 want to go next?

6 MR. SCHLOSSER: It's fine with me.
7 Scott, go ahead.

8 MR. WILLIAMS: Okay. Are we on the record?

9 MS. BOYLES: We are. And, again, at least when
10 you start talking, if you can identify yourself for the
11 court reporter.

12 MR. WILLIAMS: This is Scott Williams. I'm an
13 attorney, Mr. Kelly; I represent the Yurok tribe.

14 There are a few things that you stated in your
15 earlier testimony that I would like to make sure I
16 understand.

17 THE WITNESS: Okay.

18

19 EXAMINATION

20 BY MR. WILLIAMS:

21 Q. Can you hear me all right?

22 A. Yes.

23 Q. First, you testified about the April 1st draft of
24 the biological opinion. Do you recall that?

25 A. Yes.

1 Q. As I understand it, you said that the April 1st
2 draft had been rejected; is that right?

3 A. Yes.

4 Q. How was that rejection communicated to you?

5 A. Over the phone, I think it was by Jim Lecky to

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6 Irma and I, just saying that the Justice Department --

7 MR. GOVINDAN: Objection.

8 A. -- rejected the opinion, with no additional
9 explanation as to exactly why other than it was
10 indefensible. That's what I recall.

11 Q. You may have answered this question already, and
12 forgive me, but did Mr. Lecky say anything to you beyond
13 the fact that it had been deemed indefensible?

14 A. I don't recall anything other than that.

15 Q. Did you have any conversations with anyone other
16 than Mr. Lecky about the rejection of that April 1st
17 draft?

18 A. As to why it was rejected? No. Certainly
19 informal conversations with people speculating what the
20 heck was going on.

21 Q. How did you know or what information did you have
22 as to what direction you would take in this second draft?
23 How did you know what to fix?

24 A. I didn't. I just knew we needed to do something
25 differently.

1 Q. And could you summarize for me, then, what it was
2 that you initially thought you would do differently with
3 this next draft.

4 A. Like I said, at that point Jim Lecky joined the
5 team, and I primarily worked on the needs of smolts, what
6 their biological requirements were, and he worked on a
7 reworking of the effects analysis. So --

8 Q. Go ahead. I'm sorry.

9 A. So, like I said, I can't really say what Jim
10 Lecky was thinking, but I know that he had developed this

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11 alternative strategy for analyzing the effects, and that
12 was based on his realization that there would be this
13 incremental depletion over the next ten years from what
14 had occurred the previous ten years by the proposed
15 operation of the project. He picked up on that and kind
16 of made that the cornerstone of the new effects and
17 jeopardy analysis. I -- I didn't come up with anything
18 new on my own.

19 Q. Did Mr. Lecky ever explain to you why it was that
20 he focused on that incremental analysis?

21 A. Because it was consistent with the National
22 Academy of Sciences reports.

23 Q. Did Mr. Lecky ever say anything to you to the
24 effect that he had instructions to make this biological
25 opinion be consistent with the NAS report?

1 A. I don't think so.

2 Q. You think that that was his intention?

3 MR. GOVINDAN: Objection. Asked and answered.
4 Go ahead.

5 THE WITNESS: Yeah, it's clearly stated in the --
6 in the final biological opinion that the conclusions are
7 consistent with the National Academy of Sciences report.

8 BY MR. WILLIAMS:

9 Q. For our record here, Mr. Kelly, please describe
10 Mr. Lecky's qualification.

11 A. That's -- that's difficult for me to do, but --

12 MR. GOVINDAN: Don't answer if you don't know.

13 THE WITNESS: I think I'll choose not to answer.

14 BY MR. WILLIAMS:

15 Q. All right. By whom was Mr. Lecky employed?

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16 A. National Marine Fisheries Service.

17 Q. What's his job title?

18 A. He's the assistant regional administrator for the
19 Protected Resources Division.

20 Q. Does he have a degree in biology, to your
21 knowledge?

22 A. I think he's got a -- I think he has a degree in
23 marine biology. I know he's worked quite a bit with
24 marine-mammal issues. I think that's his specialty and
25 his background.

1 Q. To your knowledge, had he ever worked before on
2 issues pertaining to Klamath fish, or the Klamath
3 fisheries?

4 A. I don't know. I'm sure he was involved in plenty
5 of discussions over the years. Of course, including the
6 2001 biological opinion. I'm sure he was involved -- in
7 his position as assistant regional administrator for the
8 Protected Resources Division, he would certainly be
9 involved in a high-profile thing like that.

10 Q. To your knowledge, did Mr. Reck's decision to
11 leave the National Marine Fisheries Service have anything
12 to do with this biological opinion?

13 A. Not directly, no. Meaning that his decision, I
14 don't believe, was directly related to this specific
15 biological opinion.

16 Q. I'm going to switch topics here now briefly, Mr.
17 Kelly.

18 You described the meeting which -- the meetings
19 which occurred on April 29th and April 30th, shortly after
20 you had come up with the second draft of the biological

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21 opinion. Do you recall those meetings?

22 A. Yes, I do.

23 Q. You stated that at some point Mr. Lecky and Mr.
24 Rogers left the room and they came back about 45 minutes
25 later. Does that sound about right?

1 A. Yes.

2 Q. And then when they came back, Mr. Lecky explained
3 the burden of proof of Reclamation's RPA's; is that right?

4 A. Yes.

5 Q. At any point following that event on the morning
6 of April 30th, did Mr. Lecky ever tell you what he and Mr.
7 Rogers talked about when they were out of the room?

8 A. No.

9 Q. Did Mr. Rogers ever tell you what he and Mr.
10 Lecky talked about when they were out of the room?

11 A. No.

12 Q. Do you have any information from any source, Mr.
13 Kelly, as to what they discussed when they were out of the
14 room?

15 A. No, I don't.

16 Q. I'm going to switch topics again. This is
17 probably the last area that I'll want to talk about.

18 A. Okay.

19 Q. In the -- in your earlier testimony about the
20 final biological opinion, you addressed concerns that you
21 had in three areas: the lower flows, the 57-percent
22 requirement, and the water-bank requirements. Do you
23 generally remember talking about those three areas?

24 A. Yes.

25 Q. I'm going to take them one at a time.

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1 With respect to the lower flows, you said that in
2 the final biop, it was said that there would be -- a
3 20-percent reduction of the two driest years was
4 acceptable. Do you generally recall that?

5 A. Yes.

6 Q. And what was your opinion about whether or not
7 that provision of the final was scientifically justified?

8 A. The justification that I -- actually, we had
9 originally used, for only using a ten-percent reduction
10 from unimpaired flows during the two driest water years
11 was simply that it was more risk averse, that we felt that
12 during those periods, during dry water years in the
13 spring, the conditions were -- were -- would be
14 potentially pretty bad, even under unimpaired flows. So
15 we didn't want to go too much below unimpaired flows. And
16 based on sort of general things that are done in making
17 flow recommendations, we decided that ten percent was the
18 most risk averse and necessary, the most reduction you
19 would want to make. Now, going with 20 percent, you know,
20 I don't know what -- let me step back.

21 We had some help from an instream flow specialist
22 in a different office, and he talked about making instream
23 flow recommendations, and the 20-percent reductions from
24 unimpaired flows were pretty standard for flow
25 recommendations, but because of the precarious nature of

1 -- the precarious state of the species and the dry
2 conditions that could be experienced during dry years, we
3 felt that it was too risky to go as low as 20 percent, and

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4 so we decided ten percent.

5 Q. When you say "we," to whom do you refer?

6 A. Well, the entire team, because that was the
7 recommendation that was forwarded in the April 17th draft.

8 Q. Do you have any knowledge, Mr. Kelly, as to --
9 well, let me back up a step.

10 Were you consulted, between April 17th and then
11 -- and the final draft biop, as to whether or not 20
12 percent reduction was acceptable?

13 A. No. I was eventually asked to calculate what it
14 would be if it was a -- what the flows would be if it was
15 a 20-percent reduction as opposed to a ten-percent
16 reduction, so I actually did those calculations and told
17 Jim Lecky what the numbers would be. But as to any
18 opinion of what -- you know, additional opinion of what 20
19 percent during ten years would be, no, I wasn't asked
20 during that period.

21 Q. Did you ever communicate to Mr. Lecky or anyone
22 else what your opinions were about that 20-percent
23 reduction in the two driest years?

24 A. Oh, yeah. In the early development of the
25 biological opinions, I was adamant that it was too risky

1 to go lower than 20 percent, or lower -- to 20 percent,
2 and I argued for the two driest years being ten percent,
3 and argued successfully, and that was the recommendation
4 we put forth in the draft opinions.

5 Q. Do you know who it was that was responsible for
6 determining the 20 percent was a justifiable risk?

7 A. That would be Bill Hearne, instream flow
8 specialist down in our Santa Rosa office. We had a number

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9 of discussions with Bill early on about instream flow
10 methodologies.

11 Q. Would you describe for our record here what Mr.
12 Hearne's job title and background is, please.

13 A. I don't know, other than that he's an instream
14 flow specialist. I don't know if he's a fisheries
15 biologist or hydrologist or what.

16 Q. Let's move to the next one, please, Mr. Kelly.

17 You mentioned the Bureau of Reclamation's 57-
18 percent requirement, and you were asked to describe its
19 inadequacies. I don't want you to repeat that. What I'd
20 like you to tell me though, please, is whether you were --
21 whether you communicated your concern about the 57-percent
22 requirement and to whom you may have communicated those
23 concerns, prior to today, anyway.

24 A. Right.

25 I certainly communicated my concerns when it was

1 initially proposed, and, in fact, in the final biological
2 opinion there's a statement that NMFS mentions to
3 Reclamation the provision of 57 percent of the flows for
4 the period of ten years might not avoid jeopardy, and so
5 we did discuss, you know, what are you going to do about
6 that. You might think it's a fair amount to be
7 responsible for, but it may not avoid jeopardy.

8 I also, of course, later that night at dinner
9 with Jim and Irma -- we talked about what the 57 percent
10 meant; and then, of course, after we had determined that
11 we were going to go with that reasonable and prudent
12 alternative, I certainly mentioned it to Irma on the way
13 home. And then when we found out that the reasonable and

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14 prudent alternative would indeed be developed, by --
15 obviously by refusing to develop it, that communicated my
16 concerns, I'm sure.

17 Q. Thank you.

18 The last issue for me is with respect to the
19 water-bank requirement. You were also asked questions
20 about the scientific inadequacies of that, and, again, I
21 don't want you to repeat it, but I have the same question
22 there as well.

23 Did you ever communicate, prior to your testimony
24 today, your concerns about the scientific inadequacies of
25 the water bank, and to whom did you make those

1 communications?

2 A. That specifically as a concern. I may not have
3 discussed that specifically. However, on two occasions, I
4 attempted to have discussions with Irma Lagomarsino about
5 details of my concerns, and on both occasions I was told
6 that -- she told me that "I know what you think and we
7 don't need to discuss it any further."

8 MR. WILLIAMS: Thank you, Mr. Kelly.

9 This is Scott Williams for the Yurok tribe. I
10 have no further questions.

11

12 EXAMINATION

13 BY MR. SCHLOSSER:

14 Q. Mr. Kelly, I'm Tom Schlosser. I'm an attorney
15 for the Hoopa Valley Tribe, and I want to ask you a few
16 questions.

17 First, in developing -- when you were working on
18 this biological opinion, did your office have a formal

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19 process for consulting with the tribes of the Klamath
20 basin?

21 A. We certainly had a process and we did consult and
22 we did provide parts of draft opinions for review and
23 comments, yes. We had government-to-government meetings
24 with the tribes.

25 Q. And is that process described in a manual or

1 regulations or --

2 A. I don't know. I don't know. We have tribal-
3 trust responsibilities, so we would, I would think, want
4 to naturally discuss these things with the tribes.

5 Q. Do you know a biologist named Paul Zedonis?

6 A. Yes.

7 Q. Are you familiar with a report he prepared on the
8 effect of boat dance flows in the Trinity River on
9 temperatures in the Klamath?

10 A. You know, I think I have heard of that report,
11 but I don't think I have ever read the report. I don't
12 know any details about it.

13 MR. GOVINDAN: I'm going to object, same
14 objection as I raised before, insofar as these questions
15 exceed the scope of what this deposition is supposed to be
16 about. But you can proceed.

17 BY MR. SCHLOSSER:

18 Q. Are you familiar with a report done by the
19 California Department of Fish and Game on the fish kill
20 last fall?

21 A. Yes. Yes, I am.

22 Q. Do you have any observations about the strengths
23 or weaknesses of that report?

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24 MR. GOVINDAN: Objection.

25 MS. BOYLES: Repeating the same objection?

1 MR. GOVINDAN: Yes.

2 THE WITNESS: Do I have observations? Yeah.
3 Strengths and weaknesses of the report? I think -- I'm
4 trying to think; I know there was a specific weakness that
5 I felt might be evident, and that had to do with the role
6 of tributary flows on the Klamath, including the Scott and
7 Shasta River. As to what importance those might have in
8 downstream flows, this came out of a discussion that --
9 with some other biologists; I can't recall who. But they
10 felt that -- that perhaps the Scott and Shasta flows that
11 were analyzed in the state report perhaps weren't
12 appropriate, and I really don't have the details; but
13 that's a concern I'm aware that biologists have.

14 The strengths are that it -- it makes a
15 conclusion which, of course, isn't one-hundred percent.
16 You can't know with certainty that their conclusion is
17 correct, but I felt like with all the evidence that was
18 presented, that it was -- it was appropriate conclusion,
19 and I felt like it was conclusion that I was glad they
20 made, because I didn't think that that would be as easy of
21 a conclusion for the federal agencies to make.

22 Q. Do you know if Cal Fish and Game amended the
23 report to deal with the tributary flow?

24 A. I don't know.

25 MR. GOVINDAN: Same objection.

1 BY MR. SCHLOSSER:

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2 Q. I'd like to talk a little bit about Exhibit 2,
3 the document that's called "Narrative Statement of Michael
4 S. Kelly."

5 How did this -- what is this document? How did
6 this come to exist?

7 A. This was provided as part of my whistleblower
8 disclosure. It just provides the basis for my disclosure,
9 why I felt like an illegal activity had taken place.

10 Q. Is there anything you would change in this
11 statement?

12 A. Well, that's a good question. Without reading
13 through it again, difficult to be sure.

14 I would -- I suppose having thought about this
15 for several months since I wrote this, I've -- you know,
16 and having gone through the final biological opinion very
17 carefully, I would probably augment some of my arguments
18 with more specific biological arguments that have occurred
19 to me since then. So I would add strength to it, I think.

20 Q. Do you feel --

21 A. Otherwise, I don't think so.

22 Q. Do you feel that this statement is correct, as
23 far as it goes?

24 A. Certainly.

25 Q. I'd like to turn to the final biological opinion,

1 Exhibit -- I guess it's Exhibit 8, at page 55. And I'd
2 like to draw your attention to the third paragraph, the
3 second sentence. That says:

4 "This problem was resolved when Reclamation
5 agreed that it would use its authorities to
6 establish a multi-dash-agency task force, slash,

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7 working group, comprising federal, state, tribal,
8 and, where possible, local agencies and
9 interests, to develop the other 43 percent of the
10 flows identified in the RPA."

11 And my question, first of all, is the pagination
12 the same? Is that the third paragraph?

13 A. Yes.

14 MR. GOVINDAN: The second full paragraph.

15 THE WITNESS: Yes.

16 MR. SCHLOSSER: Evidently.

17 BY MR. SCHLOSSER:

18 Q. My question is: Do you know whether this task
19 force has been developed?

20 A. I don't believe that it has. There have been --
21 there's been a scientific technical task force developed
22 to help design studies that are called for, but I don't
23 think this specific task force has been formed.

24 Q. The last sentence in that paragraph talks about
25 the "approach anticipates that the states of California

1 and Oregon will participate in the process, step up
2 enforcement of existing water rights" and so on.

3 Do you know whether the states have stepped up
4 enforcement?

5 MR. GOVINDAN: I'm going to object again, as far
6 as the question asks for a response that exceeds the
7 boundary of the scope of this deposition.

8 You can answer.

9 THE WITNESS: I'm pretty sure they haven't. In
10 fact, I'm aware that Fish and Game wardens on the Scott
11 and/or Shasta River have been told to -- essentially to

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12 lay off trying to enforce illegal or inappropriate water
13 withdrawals on those tributaries, and I don't think that's
14 changed.

15 BY MR. SCHLOSSER:

16 Q. Now, at the bottom of page 55, carrying over to
17 page 56, could you just read that last sentence, the
18 carry-over sentence.

19 A. Starting with "in water year 2009," the whole
20 paragraph, or just the last sentence in the paragraph?

21 Q. I'm afraid the pagination may be different.

22 MR. GOVINDAN: I think he's referring to page 55,
23 the sentence beginning "initially"; correct?

24 MR. SCHLOSSER: Yes.

25 THE WITNESS: "Initially this process would focus

1 on refinement of the science to determine what
2 the best main-stem flow should be for the purpose
3 of providing main-stem habitat conditions for
4 coho salmon, additional non-flow measure to
5 improve the baseline for coho habitat and then
6 develop and implement programs to increase
7 instream flow in the tributaries that would also
8 augment instream flows in the main stem."

9 BY MR. SCHLOSSER:

10 Q. Do you know whether there has been any refinement
11 of the science on this subject since the -- since this was
12 written?

13 MR. GOVINDAN: Same objection.

14 THE WITNESS: This past summer there was some
15 initial work done to look at how the thermal refugia,
16 where tributaries enter the main stem, behaved. I don't

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17 know that they were actually answering any questions about
18 the value of those refugia to fish. I think they were
19 trying to refine the techniques that they could use to
20 determine the dynamics of the thermal refugia.

21 Beyond that, I don't think anything else has been
22 done, other than to talk about what might be done to study
23 the effects on smolts. And I've actually been left out of
24 these meetings recently, so there have been some meetings
25 that I'm not sure what took place.

1 BY MR. SCHLOSSER:

2 Q. If you would, turn over to page 60 of the
3 biological opinion. In the paragraph at the top, the
4 second to the last -- I guess it's the third to the last
5 sentence, refers to a Conservation Implementation
6 Committee, and goes on to describe an MOU to be completed
7 by the end of 2002. Do you know whether the MOU has been
8 completed?

9 MR. GOVINDAN: Same objection.

10 THE WITNESS: I don't know.

11 BY MR. SCHLOSSER:

12 Q. Now, page 61 lists some of the duties of the
13 committee and studies to be performed. Do you know if
14 NMFS is monitoring the performance of these studies?

15 MR. GOVINDAN: Counsel, I'm going to object
16 again. It seems that these questions and your previous
17 questions --

18 MR. SCHLOSSER: This is a scope objection, isn't
19 it?

20 MR. GOVINDAN: Yes.

21 -- relate to the agency's compliance with the

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22 terms of the biological opinion. That is not what the
23 magistrate has ordered this deposition to --

24 MR. SCHLOSSER: Your objection is noted. Come
25 on; maybe give it a number.

1 MR. GOVINDAN: That's fine. This deposition has
2 a limited scope.

3 You may proceed.

4 BY MR. SCHLOSSER:

5 Q. Page 69.

6 A. Page 69?

7 Q. The second full paragraph, indicates that "as
8 part of this RPA, in below and" -- I'm sorry -- "in below-
9 average and dry water years, Reclamation will convene a
10 group." Was 2002 a below-average or dry water year?

11 A. It actually turned out to be both. It started
12 out as a below-average water year, and then reconverted to
13 a dry water year at some point during the summer when it
14 was obvious the instream flow to Upper Klamath Lake wasn't
15 consistent with a below-average water year.

16 Q. Do you know if the group described here was
17 convened?

18 MR. GOVINDAN: Same objection.

19 THE WITNESS: Let's see. (Examining.)

20 I don't think it was. I certainly wasn't part of
21 any discussions, but I can't be sure.

22 BY MR. SCHLOSSER:

23 Q. I want to turn now to page 74, the last sentence.

24 It says:

25 "Finally, if any of the provisions of the RPA are

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1 not implemented as anticipated, NMFS will request
2 Reclamation to reinitiate consultation. "

3 Do you know if NFMS has requested reinitiation?

4 MR. GOVINDAN: Same objection.

5 THE WITNESS: I am sure that they haven't.

6 BY MR. SCHLOSSER:

7 Q. Backing up to page 71, page 71, the beginning of
8 the "Incidental Take Statement." And I guess my question
9 is, did the events of last fall -- let me rephrase that.

10 Was what happened last fall within the scope of
11 the incidental take statement?

12 MR. GOVINDAN: Objection. Form

13 Proceed, with that objection.

14 THE WITNESS: Let me look at this for a second.

15 (Examining.)

16 Well, as you can see, it says adverse effects are
17 largely unquantifiable. The best data is not sufficient
18 to enable NMFS to estimate a specific amount of incidental
19 take of Klamath River coho salmon. So I think essentially
20 it would be best professional judgment to determine
21 whether some take that did take place was more than is
22 authorized by the incidental take statement.

23 Q. Well, in the second paragraph of that third --
24 fourth sentence, I guess, it starts out: "The NMFS
25 anticipates that water quality and habitat conditions";

1 Why don't you just read that sentence to yourself and then
2 let me ask you a question.

3 A. Okay. (Examining.)

4 Okay.

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5 Q. Did the events of last summer constitute jeopardy
6 to coho?

7 MR. GOVINDAN: Objection. Same objection as
8 before.

9 THE WITNESS: Well, that's one discrete event
10 that happened in the first year of the nine years before
11 the -- the recommended flows, long-term target flows,
12 would be implemented. Based on the data that I've seen
13 from the Fish and Wildlife Service's draft report, I'd
14 estimated, using their expansion numbers, that at least
15 27 adult, naturally produced coho salmon were killed in
16 that event. You know, I guess there are various ways you
17 could look at that in terms of what you think the overall
18 population is.

19 My professional judgment would be that that
20 happening once, it has happened only to one of the
21 three-year classes in the population, I couldn't be
22 confident and say that that single event constitutes
23 jeopardy. However, a trend -- if this were to occur
24 multiple times over that course, I would -- I would say
25 that it's further jeopardy to the species; that it would

1 be jeopardy to the species. That's professional judgment.

2 Q. Changing the subject now, one final question:
3 Are you familiar with the term "water burden"?

4 A. No.

5 Q. Well, for the purposes of our discussion, let's
6 say that water burden is the amount of water that you
7 would put on irrigated lands.

8 A. Okay.

9 MR. SCHLOSSER: Never mind. I'll withdraw the

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10 question.

11 I don't think I have any further questions.

12 MR. GOVINDAN: Do you have any follow-up?

13 MS. BOYLES: I have a couple of questions.

14 MR. GOVINDAN: Why don't you do it.

15 MS. BOYLES: These are just -- I want to clarify
16 just a few things.

17

18 EXAMINATION

19 BY MS. BOYLES:

20 Q. What is a coho year class? You just mentioned it
21 in response to Mr. Schlosser's question.

22 A. Right. Coho salmon essentially have a three-year
23 life cycle, so in any one year, one of the year classes
24 will be the adults that return to the stream, for example.
25 The next year, when the adults return to the stream, the

1 second year, that will be a different group of fish that
2 were born and reared in fresh water in a separate year.
3 And then, of course, the third year would be the third
4 group. By the time you got to the fourth year, you'd be
5 back around again to that first group.

6 Q. So the fourth year would be the progeny of the
7 first year?

8 A. Yes.

9 Q. When did you start working on this biological
10 opinion? What was the date?

11 A. If you recall, the 2001 biological opinion was
12 actually only addressing a six-month period, from April
13 through September, and, of course, the National Academy of
14 Sciences report, also analyzing that, made their

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15 recommendations, of course, based on that six-month
16 period. Once the end of September came, the Bureau of
17 Reclamation would no longer have incidental take.

18 So I know Don Reck was working on a biological
19 opinion to serve as an interim Endangered Species take
20 coverage document for the Bureau of Reclamation until we
21 had the new consultation take place, and we worked --
22 after Don had produced a draft, that was when I was
23 drafted onto this team -- I think that would probably have
24 been October of 2001 -- working on the supplemental
25 opinion. I don't think we ever finished that supplemental

1 opinion. We provided letters to Reclamation that
2 essentially provided them coverage for periods until the
3 new biological opinion came out. We started working on
4 this actual biological opinion when we got the final
5 biological analysis from Reclamation, and I think that was
6 February 24th of 2002.

7 Q. The April 1st and April 17th drafts we were
8 discussing, did those come from the team as a whole?

9 A. Yes.

10 Q. The recommended flows in both of those drafts,
11 proposed flows for avoiding jeopardy, were those
12 recommended by the team as a whole?

13 A. Yes.

14 Q. Do you believe those flows are scientifically
15 supported?

16 A. Yes.

17 MR. GOVINDAN: Objection.

18 BY MS. BOYLES:

19 Q. Do you believe those flows are based on the best

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20 scientific evidence available?

21 MR. GOVINDAN: Objection.

22 THE WITNESS: At the time, during development of
23 the April 1st opinion, I certainly was using the best
24 available science. And then once, of course, we found out
25 we couldn't use that anymore, I felt that the April 17th

1 was not based on the best available science; however, it
2 still had rationale that made me believe it could indeed
3 avoid jeopardy.

4 MR. GOVINDAN: Scott, did you have anything else?

5 MR. WILLIAMS: No. Thank you.

6

7

EXAMINATION

8 BY MR. GOVINDAN:

9 Q. Mr. Kelly, my name is Jay Govindan. I have just
10 a couple questions for you.

11 I want to turn your attention to what's
12 previously been marked Kelly Exhibit 4. And I believe you
13 said -- well, who wrote this document?

14 A. Don Reck drafted it and I provided some editing.

15 Q. Do you know when he wrote it?

16 A. I didn't -- I guess I didn't provide the file
17 date. It would have been -- it was inserted into the
18 April 1st draft sometime probably towards the end of
19 March.

20 Q. And I want to turn your attention to what's been
21 previously marked Kelly Exhibit 9.

22 Who wrote that?

23 A. Don Reck. It was on his file. I assume it was
24 him.

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25 Q. Do you know when he wrote this?

1 A. I know that it was -- the file date was April --
2 I believe it was April 5th or 6th.

3 Is it on here? (Examining.)

4 Yeah, April 5th. I guess that would have been
5 the last time it was modified.

6 Q. Do you know if he transmitted it to anyone?

7 A. I don't.

8 MR. GOVINDAN: That's all I have.

9 MS. BOYLES: I have nothing further.

10 MR. SCHLOSSER: I have nothing further.

11 MS. BOYLES: Because of the timing of this and
12 the need to get it quickly, can we waive signature and
13 certification and all that, to get it done?

14 MR. GOVINDAN: (Counsel nods head in the
15 affirmative.)

16 MR. SCHLOSSER: That's fine.

17 MS. BOYLES: We're done.

18 / / /

19 [Deposition proceedings concluded 1:25 p.m.]

20 [Witness signature waived.]

21

22

23

24

25

1

REPORTER'S CERTIFICATE

2

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3 I, TANIA N. BRUNELL, CSR No. 4277, Certified
4 Shorthand Reporter, State of California, certify:

5 That the foregoing proceedings were taken
6 before me at the time and place therein set forth, at
7 which time the witness was put under oath by me;

8 That the testimony of the witness and all
9 objections made at the time of the examination were
10 recorded stenographically by me and were thereafter
11 transcribed;

12 That the foregoing is a true and correct
13 transcript of my shorthand notes so taken.

14 I further certify that I am not a relative or
15 employee of any attorney or any of the parties, nor
16 financially interested in the action.

17

18 DATED this _____ day of _____,
19 2003.

20

21

22

23

TANIA N. BRUNELL, CSR No. 4277

24

25