STATE WATER RESOURCES CONTROL BOARD

PUBLIC WORKSHOP

REGARDING JOSEPH SAX'S REPORT ON THE

LEGAL CLASSIFICATION OF GROUNDWATER

THURSDAY, APRIL 11, 2002

10:30 A.M.

ONTARIO CONVENTION CENTER

ONTARIO, CALIFORNIA

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MEMBER SILVA: Good morning. Thank you for coming, and welcome to the State Board's workshop on Professor Sax's report on the legal classification of groundwater. As you know, we had one yesterday in Sacramento. I'll talk a little bit later about the results of that hearing.

The staff today with me are Paul Murphy, Associate Engineer and Geologist; Lewis Moeller, Senior Water Resource Control Engineer; and Erin Mahaney, Staff Counsel.

I do want to first start by thanking Dr. Sax. I'm assuming that all of you have read the report. Also I want to thank the people of the technical committee that helped out, see a couple committee members here, for their efforts in putting the report together. The purpose of today is to receive public comments on Professor Sax's report. This is an informal workshop. There is no sworn testimony or cross-examination of the participants. The Board will not take any action at this workshop, obviously, and we are not here to express an opinion on the report itself.

I will be the only Board Member today. Chairman Baggett had to stay in Sacramento, further pressing business, so I am it today. And I will be asking questions as we move along, and try to get as much different

information as we can. I'll go over what we talked about yesterday in Sacramento.

A court reporter is present, will make a transcript of the statements made at the workshop. If you want copies of the transcripts, please make arrangements directly with her.

And before you give your comments if you can state your name, address and affiliation so she can put that information into the transcripts. If you have business cards, it is a lot of easier for her to put that information in her record.

Also, yesterday we commented that if you have any written comments that you haven't submitted or you already have submitted, what we want to do is post them all on our website. So we are asking for anybody that has electronic formatted comments, if you can get them to us, it will be easier on our staff to post them on the Internet.

As you know, a little bit of the history, those of you may or may not know, we started this process way back more than two years ago when we had a little case called the Pauma Pala decision that we are trying to put out. It caused a lot of controversy. So the Board decided at that time to take a time-out, to look at if there was a way to better classify subterranean streams and to be able to give us a better handle on how to address those issues.

So the Board went out, and with the help of stakeholders we selected Dr. Sax to do a report on the legal classification of groundwater. At that time we felt there was a fairly focused request, although, I think, given the comments, I think probably went beyond the scope of what we thought was originally going to be contained in it. Besides that, I think it was a well-done report. We got a lot of good comments on it even though people don't like the recommendations. They say they like the content and the work that was done on it. That is where we are. That is how we got here today.

Yesterday we had a workshop in Sacramento. We probably had probably three times the number of people there. I think most of the law firms are up there, so we had a lot more people show up. I can tell you the vast majority of the people commented on the fact that even though it was a good report, they wanted the Board to do nothing with the report. They felt -- they definitely did not want the Board to adopt the recommendations. In fact, a couple commenters wanted us to take official action not to sanction the report or to say we were against the recommendations. That was most of the technical and legal aspects of it.

The legal aspects are very clear. The people are concerned about what they saw are potential for overreaching authority by the Board. On the technical side, being an

engineer, I was hoping that there was some way we could come up with at least some technical parameters for classification. Even in that, a lot of the commenters felt there was very little we could do to come up with some standards or measures that would give us coverage for all projects. Everybody felt it was better to continue on a case-by-case basis.

So, in essence, we got a resounding vote of confidence in our process, de facto I think.

Now there was some suggestions. A couple of people felt that perhaps we could tweak the process, not the legal frameworks, but perhaps the way that we receive petitions, the way that we review petitions and make decisions. Perhaps there was a way that we can tweak that process. Nobody had any specifics on it.

There was also only one person that came up and said perhaps there was a potential for coming up with some very broad parameters on classification of groundwater. Again, no information, but they felt perhaps we could structure something.

The environmental groups that showed up, obviously, wanted the Board to do something. They felt the Board was not doing enough. They felt that this report was a way to get started on that effort. They and Fish and Game, specifically, liked the idea of an impact test, as you can

imagine. And that was about it.

Again, it was resounding, I think, I'll take it on the positive side, a very resounding vote of confidence in our process. Nobody wants us to change it.

So, I will leave it at that. If you have any questions when you come up on what they said, you can ask me. But, again, that was all the overall consensus, I think. I personally was expecting the legal side of it although I was disappointed that we couldn't come up with some technical, at least some technical definitions for groundwater. But I understand the issues. It is very complex. I understand that that perhaps is left to case-by-case basis. But, anyway, those were the comments we received.

Again, I want to make it clear, we are, obviously, it is just taking comments at this point. We are not even sure what we are going to be doing down the road on this matter, but we will let you know. As I mentioned, we are going to post all the comments from everybody on the website to give you an opportunity to get a flavor of what everybody else said.

With that, why don't we get started with comments.

First, Mr. Steve Bachman and Tom Bunn from ACWA.

MR. BUNN: Thank you. I am Tom Bunn. I am an attorney with the law firm of Lagerlof, Senecal, Bradley, Gosney & Kruse in Pasadena, 301 North Lake Avenue. And I am

here speaking on behalf of ACWA. I am a member of ACWA's Groundwater Committee, and I have been involved since the Pauma Pala matter in formulating ACWA's response to the whole process.

I certainly agree that a vote of confidence is in order, not only for the State Board's existing process but for the process that you went through in coming here today.

CHAIRMAN BAGGETT: Thank you.

MR. BUNN: In selecting Professor Sax and in determining that this required a little bit more of a global look than just looking at the Pauma and Pala Basins. I also think, as did many apparently yesterday, that Professor Sax did a terrific job of gathering the information that which is relevant and summarizing it. And it is a very well written piece. You are right that we disagree with his recommendations at the end. But the document is, nevertheless, very useful in evaluating both where he wants to go with it and where we want to go with it.

MEMBER SILVA: Right.

MR. BUNN: I know that you did hear from ACWA yesterday. I imagine that I am going to be duplicating a little bit and I apologize for that, but I'm pretty sure that you are going to get a different flavor from me and Dr. Bachman today.

I want to start out by addressing something that you

said in your opening remarks that people said there was very little that the State Board could do in terms of quantifying recommendations to improve the standard. I don't believe that is the case. That is not our feeling.

Our feeling is there is a lot that the State Board can do in order to make more precise within the framework of a subterranean stream, which as you know, we proposed that you keep. There is a lot that you can do in terms of modern groundwater hydrology to make that test more precise and use that additional information in determining whether there is a known and definite channel. And Dr. Bachman, I'm going to let him speak mostly to that, because he wrote the appendix to our written comments, in which he outlines how those factors can be brought to bear.

ACWA is very interested in this whole process for two reasons. One is that we are very interested in groundwater management, and we want to make sure that the groundwater management efforts, the local groundwater management efforts that are going on, are allowed to continue to go on.

The other one is that our members, many of ACWA members, do get their source of supply from groundwater and many of them are pumping groundwater without having obtained a permit from the State Board, and we were concerned about the investment that had been made in that process and not upsetting the apple cart there.

In that regard we, and I personally, appeared at the hearings on the Pauma Pala case and argued that that draft decision was an extension of the bed and banks test, the subterranean stream test that was not warranted by the facts of those cases. We have appeared at the Board workshops since then, including the first one about subterranean streams. And in that one we acknowledged that there were two different approaches that can be taken. We talked about an impact test and we also talked about bed and banks.

And at the time we indicated that from a policy standpoint that both of those had things to recommend them. But we ended up concluding that the bed and banks test should be retained but that it should be supplemented by modern science.

Since that time and reading the Sax report, we have concluded, and as much from a legal standpoint as a policy standpoint now, that the impact test alone would be an unwarranted change in a system that does work for the most part now.

The statute talks about subterranean streams. Professor Sax's report demonstrates that the Legislature at the time that it enacted that statute was aware of the connection between groundwater and surface water. And that they nevertheless determined to put in a very narrow scope of state permitting over underground water, such that hardly

any groundwater would come under the state's permitting jurisdiction. But they did that by incorporating this subterranean stream language.

Despite Professor Sax's research about what the intent of some of the drafters may have been, the fact is that they started out with some language that could have more easily denoted impact test and they went away from that and they wound up with subterranean stream type of language. We think that that was not an accident. We think that you can recognize that groundwater and surface water are an interconnected resource, which we do, without jumping from that to the conclusion that any groundwater, the pumping of which effects surface water, is necessarily within the State Board's jurisdiction.

This is basically where at least I feel that Professor Sax went wrong. In the very beginning of his introduction he concludes that the notion of a subterranean stream channel is not in accordance with modern science and that a test based on that is meaningless. Uses the word, I believe, meaningless. That is not how we view it.

We take the same premise that groundwater and surface water are connected. We don't argue with that. But we nevertheless feel that the bed and banks test has an application in what we are doing now, what the State Board is doing now.

And I am going to let Dr. Bachman amplify how modern science can be used in that test. The only other thing that I wanted to mention is that ACWA feels very strongly that the presumption should be retained, that water from under the ground is percolating groundwater and that it not be determined to be subject to State Board jurisdiction unless it is proven to be so by clear and convincing evidence

MEMBER SILVA: Can I ask you something about that? Yesterday, I forgot to say, one commenter also made the point that with respect to process also that whoever is the applicant or the petitioner should bear the burden of proof. And they suggested that we look at where the burden of proof goes and, obviously, that is where the cost is going to be. It was something you might think about. As far as process, perhaps we want to tweak the process, how we can look at that issue.

MR. BUNN: Yes, and I agree with that. I think that that is not a change from existing law. That at least in theory the person contending there is an underground stream has always had that burden of proof. As to cost, I will let Dr. Bachman give his impression of how much it would cost to prove that one way or the other. And I am sure it differs in various cases.

MEMBER SILVA: I am sure it does. That is why it is a big deal.

MR. BUNN: So I want to conclude by emphasizing, again, that we do think it is possible for the State Board to give direction, interpretive direction, to how to determine whether there is a subterranean stream or not.

I am not going to say right now what form that direction should take, whether that is regulations or some kind of interpretive direction to staff or how that should work. But I do think it is not just an open ended standard. At the same time I support that it should be done on a case-by-case basis because it is not numerical directions that you want to give.

MEMBER SILVA: One thing we got into yesterday a little bit was the common sense test. And my only concern with that is I told them that somebody's common sense could be different from somebody else's.

MR. BUNN: I don't personally go along with ACWA in using a common sense test. I think that is too vague, and I think that, frankly, we've set forth some better ways to do it than just using common sense.

MEMBER SILVA: To be clear, so what you're saying is the bed and bank test is okay; it is just that we have to implement better technology now?

MR. BUNN: There are technical ways for determining whether there are bed and banks in a subterranean channel and whether it meets the test that is set forth in the

statute.

I have another thought. I've forgotten it.

Thanks.

MEMBER SILVA: We are going to be informal today. There is not that many people.

DR. BACHMAN: Hi, I'm Steve Bachman. I'm also representing the Association of California Water Agencies. I am the chair of the groundwater committee for ACWA. This has, obviously, been one of the big uses that the groundwater committee has been looking at. I am also on or was on, I am not sure if we are still active or not, the State Board's technical advisory committee to Professor Sax.

MEMBER SILVA: That is a good question. I have to look into that.

DR. BACHMAN: We haven't had a meeting since it came out.

MEMBER SILVA: By the way, we do appreciate your efforts in that. Appreciate it.

DR. BACHMAN: This was a difficult proposition, I think, for technical people. And I think we've gone down several roads looking at this one. One of the things that we started with, I think, was that bed and banks were pretty obvious. The geometry of bed and banks are pretty obvious when you're in a narrow canyon or in some situations where

you could have the stream has been insized into older rock. At that point I think we all felt fairly comfortable.

What we looked at first in the technical advisory committee then was what happens when that channel that is a pretty known channel in, say, the entrance or exit to a basin, what happens when the stream then flows into the main part of the basin. And I think that we pretty much all agreed with work that was done by the Arizona Department of Water Resources. Arizona's gone through the very same kind of discussions that we have done, that we have been going through here in California. And it was pretty much agreed that bed and banks pretty much disappear when you get into the basin. And the reason for that is most basins that have a stream flowing over the top of them, the sediments in the basin can be largely constructed of the older parts, deposits from the older portions of that stream.

And so you start getting this thing where you don't have any kind of known bed and banks engines anymore. And we thought that was a problem at first. I see it now as an advantage. The advantage being that when you follow what the attorneys are telling us, that if you don't have a known and definite channel, then legally it doesn't exist. I think from the standpoint of science we can tell in probably 90 percent or more of the cases when we do have a known and definite channel.

Now how do we go about doing it? And I am not going to bore you with the details, but the Appendix B portion that I wrote that is in the report has a number of factors that need to be looked at. You know, when I first took this task on I suggested to Professor Sax that we could potentially have a series of tests. I tried to make it something as much as a cookbook as possible, and it became very difficult. This is geology, and it is very difficult in the real world to have a cookbook that is going to work in every place.

I've really evolved to the point of thinking that you really need to do it the same way we look at science, and that is that you look at a number of factors and you determine which ones give you the strongest evidence. And some of this evidence is information that is readily available in a basin. Some of it is not as readily available. Obviously, some basins have lots and lots of information and some don't. Carl Hauge, chief hydrogeologist for the Department of Water Resources, when I worked on this problem, he was also on the advisory panel; and what we did was we looked at several basins in California with kind of these things in mind to try to see whether we had the available information, whether the available information was enough to tell. And we found that in many cases you could eliminate large areas of a basin of

having anything associated with known bed and banks. Some of the criteria just knocked it out. We usually were left then with a smaller area. I don't think, even when there isn't all the data you want, you can still eliminate most areas. Then you are left with a smaller area.

And at that point probably the most definitive tests are ones in which you can actually detect the bed and banks in some way. Detecting it either by drilling directly through the bank and seeing that you have very impermeable material that would make up the bank while inside the channel you have very permeable material. You can tell it directly potentially from drilling. Whether or not you have a well there, preexisting well there, of course, is the data that you may or may not have.

Once you have wells, besides actually being able to tell from the type of sediment or type of material that you encounter, you can also then do some tests by pumping the well, commonly known as aquifer tests for geologists. And we think that that would be, given the fact that you isolated a particular area and you are trying to test for bed and banks, there are some direct tests you can do with these pumping tests, these aquifer tests. And they have to do mostly with once you start pumping the well, and you have a drawdown starts to reach out, if you are inside the channel itself and the drawdown reaches out and hits one of

the banks and these are impermeable banks, you are going to have a definite effect that you can see in the pumping test. Conversely, if you are on the bank itself, you should have very low yield out of that. It should be quite different than what is in the well. And if you -- and the low yield is probably the main indicator of that.

So, we think that even when you get into or when you get into the actual bed and banks, there are specific tests. There are also other ones we suggested, the ones you use first. Obviously, if the groundwater and surface water are not directly connected, you would have no effect on doing any kind of pumping. In fact, the channel itself, you couldn't have a channel that was connected to surface water if, in fact, what you think may be a channel doesn't have hydraulic continuity. I have gone through that in detail in this. We do believe that there are criteria.

I think the most important thing is that after you have done all the analysis, it should be clear to a reasonable technical person that you can see something that is related to bed and banks. If you don't see it, then I think legally you have to say it is not there. I think that is what makes it easy. It is either something that you can get technical people to agree that there is, in fact, evidence there. Or if they do not agree, then it is not known and definite. Known to me means that people, technical people have seen

it. If you don't see known and definite, then the channel doesn't exist.

In some ways if you keep to a relatively restricted definition that way, then I think it keeps you definitely out of trouble.

The last point I would like to make is that there is quite a bit of technical information that can go into this, and we would be more than willing to sit down with staff and talk about some of this and go through some of it and have some give and takes, and whatever. I think it might be useful to everybody.

MEMBER SILVA: That is really the next step. To be honest with you, the Board hasn't really decided how we are going to proceed. First to get the comments and then see what makes sense.

I appreciate your work so far and your offers.

DR. BACHMAN: Thank you.

MR. BUNN: Thank you.

MEMBER SILVA: Art Kidman.

MR. KIDMAN: Good morning.

MEMBER SILVA: Morning.

MR. KIDMAN: I got here this morning and realized that I left my reading glasses at the computer where I wrote what I wanted to say today last night. Fortunately, I had a pair in the car. That is why I slipped out while Mr. Bunn was

speaking.

My name is Art Kidman. I am with the law firm of McCormick, Kidman & Behrens. We are in Costa Mesa.

I want to thank the Board for the opportunity to present views in regard to this very important subject. I have worked in the field of water resources for nearly 30 years and have been involved in subterranean stream issues in a variety of contexts throughout my career. I did represent one of the parties in the Pauma Pala case, which, as you have already alluded to, lead directly to where we are here now today. However, I am not representing that party or any other client before you today. My comments are submitted as a member of the public and hopefully one who has some informed views on the subject. And I hope to be able to influence the Board in the proper administration of its jurisdiction and of justice.

I believe that Mr. Sax's efforts are to be commended and his final report is a substantial contribution to scholarship in this difficult subject area. I prefer Mr. Sax's formulation of guidelines for the exercise of the Board's groundwater jurisdiction to the formulation that is set forth in the Board's draft opinion in the Pauma Pala case. In other words --

MEMBER SILVA: I am not sure that is good or bad.

MR. KIDMAN: Whatever we think about Sax, it is better

than where we were in Pauma Pala. However, neither approach is supported in law. And the Board's adoption of either one of them will almost certainly engender legal conflict and confusion.

Mr. Sax's approach, while laudable for its practical and analytical simplicity, is not supported in statute or Board precedent. His approach would very likely merely shift the focus and locus of the inquiry from the traditional bed and banks inquiry to his new impacts inquiry without reducing the number of depth or breadth of conflicts. There is no authority in Water Code Section 1200 or any other California statute for the formulation suggested by Mr. Sax.

Of equal importance in my view to the question of what the Board does on this subject is how the Board chooses to go about doing it. Having come this far with a relatively open and public discourse following the controversy created in the draft Pauma Pala decision, the Board should choose now either, one, to abandon the expansive vision of its jurisdiction formulated in either the draft Pauma Pala decision or in Mr. Sax's final report and return to the confines of the Board's prior precedent as has been articulated in the comments of the Association of California Water Agencies, the written comments that are dated April 10 and 11.

So either abandon an expansive approach or, two, embark on a formal rule making procedure subject to the requirements prerequisite to the adoption of formal regulations. The Board most not depart from current understandings of its jurisdictional limits within the confines of determining the Pauma Pala case or any other case. The process should be more open, public, participatory and iterative if there is going to be a new rule established.

As we know, once a case is pending, the ex parte rules come into effect and only those parties that offer a notice of intent to appear really have standing to speak to the issues in the particular case that is before the Board. On an issue that has such broad impact to many, many individuals, water right holders and areas of California, the context should not be within a narrow case or controversy. The context needs to be quasi legislative, not quasi judicial.

In the interest of honoring the Board's request to avoid redundancy, I incorporate and endorse the comments of the Association of California Water Agencies dated April 10 and 11. I incorporate them, endorse them in my comments and commend those views along with those that I have expressed to the Board's consideration.

MEMBER SILVA: Can I ask you just a --

MR. KIDMAN: Sure.

MEMBER SILVA: Thanks for your comments. I don't think right now the Board is leaning anywhere near towards adoption of regulations. I think, given the comments we've gotten, I guess what we were looking at also, beginning with the comments we got, the things we are looking at perhaps may be tweaking the system. I don't know if you have any comments just on process. We got some minor comments about maybe possibly looking at improving the process of adjudicating those subterranean streams. I don't know if you have thoughts on that. If you do, either if you can get them to us later. Have any thoughts now?

MR. KIDMAN: The comment was made earlier about common sense for not necessarily being common sense for another. I suspect that one person's tweak is another person's major overhaul. I would say that the idea of going go out to the bedrock confines of a valley, going out to the hills that form the boundaries of an alluvial valley and seeing that that bedrock forms a bed and banks, is of a sufficient departure that I would hate to see that happen simply within the confines of the Pauma Pala case or any other.

That particular rule has caused or the proposed rule or formulation of the Board's jurisdictional limits has caused great controversy as you have seen. Most of us have a hard time understanding how any groundwater basin will exist

outside of the Board's jurisdiction if that rule is adopted. I think that may be the sky is falling kind of comment, but still it's real hard to figure out where you draw the line. The whole of the Sacramento Valley, the whole of San Joaquin Valley, all of the big alluvial valleys in California would seem to fall within that kind of definition of groundwater jurisdiction for the Board.

I think Mr. Sax is quite clear that whether or not the idea of bed and banks and subterranean stream mean anything in today's scientific world, regardless of that, the Legislature intended it to mean something at the time that it was adopted. And one of the things that it seems very clear from Professor Sax's report is that it was intended that broadly speaking groundwater in California would be outside of the jurisdiction of the State Water Resources Control Board or its predecessors. And there have been several rather serious attempts, as he points out over the years to change that, to bring -- to make groundwater subject to the jurisdiction, regulation, management of the State of California to a greater extent than it might be today. And the Legislature has rejected every one of those attempts.

So what I continue to request here is that if we are going to go anywhere like that, that that is not a judicial function, not a quasi judicial or administrative function.

That is a rule making function, and one which really needs to have that kind of open process and the review of the Office of Administrative Law.

MEMBER SILVA: That we have. We got it loud and clear.

Thank you.

Michael Fife.

MR. FIFE: My name is Michael Fife. I am with the law firm of Hatch & Parent in Santa Barbara. I will actually be presenting comments today on behalf of three separate entities: the Chino Basin Water Master, the Southern California Water Company and Great Spring Waters of America.

Each of those entities has submitted a letter to the State Water Resources Control Board, and our comments, though distinct, are similar enough that they can be presented in one coherent presentation. So that is what I am doing though I do want to emphasize that each entity has provided their own set of comments and the comments I am presenting are those --

MEMBER SILVA: I don't remember seeing those. Did we get those?

MS. MAHANEY: We have two, but I remember seeing Great Spring.

MR. FIFE: We submitted those in the last day or so. I

do have copies that I will provide.

MEMBER SILVA: I do remember seeing Chino Basin.

MS. MAHANEY: I haven't seen the others.

MR. FIFE: Late yesterday, early this morning.

MEMBER SILVA: Go ahead.

MR. FIFE: I'd like to say first, welcome to the Chino Basin. You are in the Chino Basin right now. We provided an aerial map just in case for your own edification.

MEMBER SILVA: I've actually gotten two tours in the last six months, so I've been out here fairly frequently actually.

MR. FIFE: Well, I want to emphasize the physical layout of the Chino Basin because, first, none of the groundwater in the Chino Basin flows in what would be traditionally identified as a known and defined channel, though the general gradient of the basin does produce a gradual movement of basin water from San Gabriel mountains at the northern end of the basin down to Prado Reservoir which is at the southern end of the basin.

Under the State Water Resources Control Board's historical application of the known and defined channel standards as the underflow of the surface stream, none of the Chino Basin would fall within the jurisdiction of the Board. However, the many municipalities, special districts and private water users in the basin are concerned about a

possible trend by the Board to expand the traditional reach of its authority in a way that would encompass basins such as the Chino basin.

The Chino Basin watermaster is here today to present this concern by all the entities. The Chino Basin watermaster is a collaborative entity who was created in 1978 by the judgment in the Chino Basin Municipal Water District versus the City of Chino to administer the terms of the Chino Basin Judgment and to assist the court in exercising its continuing jurisdiction.

The 1978 judgment created a comprehensive governing structure to manage the water resources in the basin in a manner that is protective of rights of the individual parties who use the water in the basin as well in a manner that is protective of the public trust resources of the basin. The adjudication of the Chino Basin was, in fact, one of the adjudicated basins which was highlighted in William Bloomquist's book which was cited with approval in Professor Sax's report and, in fact, the watermaster's comments today, I guess, are slight departure from the tenure of the comments that you received yesterday as you described them earlier. Because we are quite happy with at least recommendation number three from Professor Sax's report, where he says that comprehensive basin adjudications, such as the Chino Basin adjudication, are

perhaps the best way to manage groundwater resource.

MEMBER SILVA: First one I've gotten right?

Go ahead. Sorry.

MR. FIFE: Our only comment then is to emphasize this recommendation and to provide a further recommendation for how this recommendation should be implemented.

The watermaster in its 23 years of existence has undergone a gradual evolution and change which has involved the expenditure of time and resources by all parties in the Chino Basin. As you can see from this map, that is quite a few parties. It includes several large cities, such as Ontario, Pomona, Upland, Chino, Chino Hills, Fontana. There also includes water districts like the Cucamonga County Water District, Monte Vista Water District, other special districts through community services district, and then all the agricultural users, non agricultural users.

MEMBER SILVA: I know we spent quite a bit of money down there, too, on Prop 13.

MR. FIFE: Right. And Proposition 13 is assisting the implementation of what is called the Optimum Basin Management Plan, which is basically the physical solution which was mandated under the 1978 judgment.

The parties over this 23 years have -- one of the things that he worked so hard to do is to develop a proper institutional government structure. Many agreements are in

place, such as an agreement known as the Peach Agreement, which we spent many months negotiating in order to make possible the implementation of the OBMP. We have rules and regulations which govern how the watermaster will function. The parties are divided into pools which works into an overall decision-making structure where any management decision must go through what is called a pool process where all three pools must approve the decision, send it to an advisory committee which must then send it on to a Board which is the ultimate decision-making authority. It is a very complex structure in subtle institutional structure that has grown up over the past 25 years.

And it is impossible to determine what affect an assertion of Board jurisdiction would have on this process. So the Chino Basin -- we would hate to see this process disrupted at this late date when it is moving forward, implementation of the OBMP is going. As you said, Proposition 13 funding has been dedicated to moving this forward. We would hate to see an assertion of Board jurisdiction really in any way upset this process.

MEMBER SILVA: I don't see any danger of that happening. Take your comment.

MR. FIFE: So that moves to a broader comment which I guess I will move straight to Southern California Water Company's comments because they tie into this.

The Southern California Water Company is publicly a public utility commission regulated entity which is responsible for meeting the water supply needs for more than 240,000 customers accounts, or one out of 30 Californians. To satisfy these water supplies demands in a reliable efficient manner, Southern California Water Company has worked in coordination with state, regional and local agencies across California.

In fact, Southern California Water Company is the retail service arm for 75 California cities. Southern California Water Company has invested literally tens of millions of dollars in groundwater production facilities that represent the primary and in some cases the sole water supply for its customers. The company recognizes that ability to continue to beneficially use its water resources is dependent upon the success of the management institutions administer the use of water to reduce conflicts. Accordingly, as there has not been any state agency so far with comprehensive permitting or regulatory authority over groundwater the company has invested millions of dollars in developing consensus-based groundwater management efforts. Where it has not been possible to achieve such consensus, the company has pressed forward to protect the interests of its customer and ensure reliable water supplies that can be managed on a sustainable basis. That is why this dovetail

to the question Chino Basin adjudication because the company has participated in many adjudications throughout California and is, in fact, currently pressing forward to develop an adjudicated solution to groundwater problems in the Santa Maria Basin.

Given the company's historic reliance on groundwater and its participation in regional and local groundwater management efforts, it should come as no surprise that it has a strong interest in question of whether groundwater is within the jurisdiction of the Board. If the Board by interpretation or administrative regulation should conclude that existing groundwater production facilities are subject to the Board's permitting authority, the cost to reliability of the company's water supplies can be severely jeopardized. Moreover, its efforts over the past several decades to participate in comprehensive management efforts such as adjudications or by other special agency administrative solutions, such as, for example, the Ojai Basin Management Act could be frustrated.

The company has produced percolating groundwater for more than a hundred years. Its groundwater supplies have laid the foundation for local agency land use approvals, for regulatory decisions of the Public Utilities Commission and for court determinations regarding relative rights of producers.

As I said, in many cases the company now produces water under the administration of watermaster adjudicated basins. In other areas it has participated in the development and special legislation designed to provide added regulatory power over groundwater, for example the Ojai Basin Management Agency. It has also participated in consensual programs through Water Code Section 10750 and in Orange County has supported the successful management of the Orange County Water District. Because of this, the company would like to emphasize again recommendation number three of Professor Sax, but it would like to highlight to the Board that adjudicated basins are not the only way that groundwater is being successfully managed in the state. There are also these other methods that I mentioned, such as special legislation, Water Code Section 10750 and others. Southern California Water Company participates in all of these.

And so, in commending Professor Sax for his recommendation number three we would also like to recommend to the Board that if they go ahead with implementation of this that they not only provide an exception for adjudicated basins but also an exception for these other management efforts, what we might call qualifying management efforts, and to provide an across the board exception for groundwater production within these areas.

However, because Southern California Company also has water production facilities that are not in such qualifying management areas, the company would also like to recommend that however the Board decides to move forward with Professor Sax's report, if it does so at all, would be to recommend that the Board adopt a grandfathering-type structure which was adopted when the Water Code was first adopted in 1914, creating permitting authority over surface water streams. And that is to grandfather all previous uses of surface water and only made the permitting authority applicable on a going forward basis.

MEMBER SILVA: I think that far end rests on this one.

MR. FIFE: However, the Board continues to move forward those two recommendations are very important to the Southern California Water Company. But as you move forward, we know that there will need to -- again, if you move forward, there will need to be a continuing stakeholder process to develop applicable procedures, technical criteria and such things. And Southern California Water Company as a major water provider in California would like to be involved in that process and would willingly volunteer its resources in order to assist that process in going forward.

MEMBER SILVA: Thank you.

MR. FIFE: My third set of -- you thought I was done.

I'm also providing comments by the Great Spring Waters

Company of America. This is a parent company for bottled waters supply company such as Arrowhead and Perrier. Great Spring Waters of America produces springwater from groundwater resources throughout California for the purpose of bottling the water and making it available for literally millions of Californians.

The spring waters are routinely withdrawn form bore holes that must satisfy the standards of California Department of Health Services and the United States Food and Drug Administration in order to qualify as springwater. That is the water extracted must be deemed not to be under the influence of surface water before Great Springs may make use of that supply.

The majority of our springwater supply requirements are met through groundwater bore holes. Virtually our entire California operation depends on the ability to continue extracting springwater from existing sources. Hopefully, you can appreciate then that we have a great interest in the Professor Sax's report and why the company is very concerned about the development of a new rule or test for classifying groundwater that might apply to these existing facilities.

None of the existing bore holes are located within or draw water from known and defined channels, nor do they produce springwater from depths that would be subject to surface water influence. Nevertheless, the company is

concerned that the adoption of a practical impact test proposed by Professor Sax would create added risk and add unnecessary regulatory burden for the company by casting a net over some of our existing operations and investments.

If the new impact tests proposed by Professor Sax were applied retroactively by the State Board, it could serve to materially damage the company business' interests and it could do so without any demonstration of a need to adopt different regulatory standards. The historical legal presumption in California, as in most states, is that groundwater is presumed to be percolating groundwater. As the company understands it, despite the presumption, the objective test proposed by Professor Sax will shift the burden to existing users to prove that the water they would draw through the bore holes is percolating.

As a result, the company could be required to assume added legal engineering expenses. Its delivery of drinking water to millions of Californians could be impaired or disrupted. Most importantly decades of reliance and millions of dollars could be placed at risk by the Board imposing new or different requirements than those that already exist.

So again, Great Spring Waters of America would like to emphasize to the Board that any test or any new standard that they adopt should only be applied on a going forward

basis and all existing uses should be grandfathered the way they were grandfathered with the 1914 Water Code. Again, Great Springs would like to offer its support for any technical process moving forward and would like to volunteer whatever resources it can add to that process.

MEMBER SILVA: Thank you.

Wes Strickland, U.S. Marine Corps.

MR. STRICKLAND: Thank you. My name is Wes Strickland. I am here today representing the U.S. States Marine Corps.

The Marine Corps has a number of facilities located in California, all of which use local water. Almost all of which use local water. Most notably, Camp Pendelton located on the coast between L.A. and San Diego County, which is the only amphibious Marine Corps training base on the West Coast. Also bases at Twenty-Nine Palms, warfare training center in Bridgeport, California, and several other bases which do not use local sources of water.

Our comments today are mostly defensive in nature, should say. Started reading Professor Sax's report more as an intellectual exercise than thinking it was going to apply to us in any particular way. But we were interested to see that, in fact, Professor Sax's report cites one of the cases involving the United States several different times. That is the United States versus Fallbrook Public Utility District case. And we were concerned with one of the

citations which Professor Sax made to that report and its use in supporting one of his propositions.

The test that Professor Sax proposed is point number six, was that the foregoing presumptions should not be applied in cases of longstanding hydrologic disconnection. And in support of that he cited factually places where groundwater pumping over long periods of time had caused such hydrologic disconnection. Add the citation which he gave was to our case and to the Murietta area groundwater area, which is the upper basin of the Santa Margarita river in Riverside County at that point.

The concern that the base has with this is several different prongs to it. First of all, we would note that when you look at the citation, the citation which he makes to the U.S. District Court opinion case, talks about a testimony of one expert in the case who had determined that there was reverse gradient existing at the place of pumping in the upper basin in the Murietta area.

And the Marine Corps took a look at that to determine exactly what was going on there. And turns out that according to all the records that we have, and even though in the district court case it appears that the testimony came from our own expert witness, we have been unable to determine exactly what the source of that testimony was. And certainly according to review all of the data

which we have currently, there has not been a reversal of gradient in that area. Now, there has been a reduction in the gradient, certainly, and the traditional groundwater gradient, but not an actual reversal.

So we would suggest that the use of that example as an example of a place where such a rule should be applied is inappropriate. In fact, there is no hydrologic disconnection. We have a memo from Stetson Engineers attached to the letter which -- a commented letter which we provided earlier which supports that.

The second issue we have with that citation is that it took place -- the surrounding discussion of the District Court was about what changed circumstances justified not enforcing an earlier stipulated judgment between parties to a state lawsuit which was actually the settlement in the Superior Court between the parties and the case ended up going earlier to California Supreme Court, Rancho Santa Margarita versus Vale. And it would be important to note in that case the 1940 stipulated judgment between the parties the District Court eventually held that the stipulated judgment should not be enforced because of these changed circumstances, such as long-standing hydrologic disconnection. But it should be noted that that holding was reversed by the Ninth Circuit in 1965, a couple years after the District Court opinion that Professor Sax noted.

So there is no support in the legal precedent, certainly not in that case in particular, for the notion that a longstanding hydrological disconnection, if objected to, should be allowed to go forward. We would not think that it would be appropriate for the State Board to relinquish its jurisdiction in such a case, if it otherwise would be appropriate.

As a matter of fact, just one further example of this is that only about two weeks ago the United States and Rancho California Water District, who was another major party to the U.S, versus Fallbrook Public Utility District litigation, signed a new cooperative water resource management agreement which implemented the terms of the 1940 stipulated judgment for modern times. So, certainly, Professor Sax's note that any kind of longstanding disconnection should cut off the jurisdiction of the Board because it would be making preexisting conditions inapplicable, would not apply.

The other independent comment we would have on the report is just that in part five Professor Sax noted or he discussed the fact that if the State Board's jurisdiction was expanded in its scope beyond the traditional precedence that the Board has made earlier, then there would be any pumper of the new groundwater which used it for an overlying parcel could be considered to be a riparian and making

riparian use of that water, and, therefore, still not be subject to the appropriative rights permitting system of the State Board. And we would like to just provide a comment that we would believe that that notion would be correct. There is some comments in the technical appendices, I believe, to his report to indicate there was some debate as to whether or not such a overlier would actually have riparian rights. We believe that out extension of riparian rights to those waters, even though they may fall within a new expanded definition of State Board jurisdiction over appropriate withdrawals of surface water. We would argue if the Board decides to expand its jurisdiction that any such decision would include a statement that any groundwater or pumper of that water which used it for an overlying parcel would, in fact, be a riparian.

Thank you.

MEMBER SILVA: Thank you.

Ray Wellington, San Antonio water.

MR. WELLINGTON: Thank you, Mr. Chairman, members of the State Board staff. My name is Ray Wellington. I am general manager of the San Antonio Water Company. And it is a company that has been in business of delivering and managing water 120 years. So we have a slight history and experience with that particular subject.

After reading Mr. Sax's report I think the State Board

is to be commended for following this procedure because I think it has been very beneficial in disclosing a number of pertinent facts to this issue. It was compiled and described or has described many issues involved, not all of which are real simple, not all of which do we confer with as a company.

It recognizes the complexity and responsibilities of water management. Good system with the state constitution. It provides a guidance framework for improved administration under existing authority, and even though some people have questioned whether the guidance is there clear enough or whether it needs to be more definitive, it still seems to present some framework for areas that could provide refinements to the practices and policies followed by the State Board.

It also, as has been mentioned by others, acknowledges that their existing models of groundwater management, particularly those in Southern California that have proven successful in the management of water resource within their respective areas. Recognizing the information that has been brought to light and the significance of the history of water management and water law in the State of California, I have basically two encouragements to offer the State Board.

One, please continue operating under existing authorities and work to include those refinements derived

from this beneficial review. And, yes, there is no doubt that the water industry as a whole can be a helpful ally in doing so.

Secondly, to avoid injecting the Board's authorities into existing or future water management programs. Those could be adjudications. They could be some form of a contractor or other agreement whereby parties have gotten together and adopted structures for the proper management of the local water resources particularly where those accomplishments are resulting in responsible resource management. We concur that there should not be waste or negligence exercised in the water resource management and we believe there is some key incentives in place to see that that does not happen. Maybe some incentives or some locations or situations may require some additional encouragement. But, frankly, my experience here in the Southern California area in various locations is that local producers do have both the liabilities and responsibilities to perform under many other areas of statute and case law.

We also have one heck of an incentive. If we deliver contaminated water or if we hurt our own water supply, we lose.

Secondly, the local producers offer the opportunity to timely identification and reaction to local issues. Many times simply going through higher level of government can

defer, delay the responsible reaction.

And with that, thank you for the opportunity to be heard on the issue.

MEMBER SILVA: Thank you.

Stacey Aldstadt.

MS. ALDSTADT: He is a hard act to follow. I would have to agree with everything he said. My name is Stacey Aldstadt. I'm the City of San Bernardino Water Department. I am the Deputy General Manager. We are located at 300 North D Street, San Bernardino, California.

I have to say my comments will be very brief because I think you have already indicated fairly clearly the direction the State Board is going to go, and I don't want to belabor the point.

MEMBER SILVA: You don't want to change our mind?

MS. ALDSTADT: Yes. I should say that I think probably echoing what a couple of people have said so far. I came to California ten years ago. It's taken me almost ten years to figure out your water law. And all I can say as a personal plea, please don't change it because I'd have to start all over again.

MEMBER SILVA: I'm in the same boat.

MS. ALDSTADT: I think you may have heard from our counsel up in Northern California.

MEMBER SILVA: Yes.

MS. ALDSTADT: I think he was probably a fairly memorable presentation. But I did want to give a face to the City of San Bernardino Water Department and let you know that we are concerned about some of the recommendations that Professor Sax made in his report. We do feel that, as the gentleman preceded me very eloquently said, is a matter of local concern. I think that even at the federal level the federal government has been recognizing that watershed management is one of local concern, and adding an additional bureaucratic government layer to the decision making process when you are trying to deal with local resources will, in fact, delay and slow the process, and I don't think you are going to get the best results.

Our city's 100 percent reliant on groundwater. We do not have surface water rights whatsoever. We do have a small amount. And so if you take the system to its logical conclusion, the one that is recommended in Professor Sax's report, what you do is you stand basically almost 200 years of water law on its head, and it does throw the system into a state of chaos, and we can't afford that.

San Bernardino's, I think, pretty well known for struggling for recovery. And one of the things that we have that many people don't have is a lot of groundwater. And if we lose the economic benefits of that groundwater, it is going to be catastrophic. We are not merely talking about

capital costs. We are not talking about the cost of putting wells in, putting pipelines in and those things. We are talking about the growth, the potential for growth in our area. And so when you take a look at Professor Sax's recommendations, keep in mind that once again you do have the fate of growth in your hands for many cities and regions.

I'm going to address the process which is what you, I think, are trying to focus in on at this point. I think that I can also say that I think this has shown you very clearly that what you do now works pretty well. I think that it's clear to me that the burden of proof should be on the party that is coming forward. Because of what I have heard from the scientific community, it doesn't sound as clear to me as perhaps it is to them. And if somebody is going to be a proponent, then they should bear the cost and burden of going forward and you, your staff, should not be in a position of having to do the leg work for them. That is -- one other part of my comment is that I know that procedurally if your staff is involved in the investigative part of these petitions, then they lose their ability to be objective. I think that is important that you maintain your objectivity and your ability to make a fair assessment. I think when you place your staff in a position as going forward as investigators that they lose some credibility.

And that is not casting aspersions.

MEMBER SILVA: Actually, we did get a couple of comments on that point yesterday.

MS. ALDSTADT: I just think it puts staff in an uncomfortable place.

Finally, in terms of formal rule making, all I can say is that if I thought that California water law was obtuse, the formal rule making process in the state of California is more so, in my opinion. But I'm glad that you agree with me, that you don't want to go through a formal rule making process on this. Your process works well. I think what you've heard over the last couple of days is that your process does work well, and people want to keep it the way it is, and that you have the power to destroy and disrupt an awful lot of business and community interests.

I thank you for listening to me.

MEMBER SILVA: Thank you.

That is all the cards I have.

Anybody else that didn't put a card in want to say anything?

If not, I thank you very much. Again, we at the Board have really not decided how we are going to proceed. Although it is obvious we have to come back with some recommendations on all the comments we've gotten.

But, again, at this point, given the comments, it looks

fairly straightforward. So once we decide we'll let you know. Obviously, it will be in a public forum.

Again, thank you very much for your comments.

Good afternoon.

(Hearing adjourned at 11:50 a.m.)

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 3 through 47 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 22ndh day of April 2002.

_____
ESTHER F. SCHWARTZ
CSR NO. 1564