

HEARING
STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

IN THE MATTER OF:)
)
Proposed Revocation of)
Permit No. 20247 (Application)
28669 of Michael L. and Knox)
P. Miller)
)
)
_____)

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
1001 I STREET
SECOND FLOOR SIERRA HEARING ROOM
SACRAMENTO, CALIFORNIA

MONDAY, AUGUST 29, 2005

10:00 A.M.

JAMES F. PETERS, CSR, RPR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 10063

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

BOARD MEMBERS

Mr. Richard Katz, Co-Hearing Officer

Mr. Gerald Secundy, Co-Hearing Officer

STAFF

Ms. Barbara Katz, Counsel

Mr. Scott McFarland, Staff Engineer

Mr. Lewis Moeller, Chief, Hearings Unit

Ms. Katherine Mrowka, Supervisor, Division of Water Rights

Mr. Paul Murphey

Ms. Samantha Olson, Staff Counsel

PERMITTEE

Mr. Michael "Luke" Miller

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

INDEX

	PAGE
Opening remarks by Co-Hearing Officer Secundy	1
Opening statement by Staff Counsel Olson	9
Direct Examination of Mr. McFarland by Staff Counsel Olson	11
Direct Examination of Ms. Mrowka by Staff Counsel Olson	18
Cross Examination of Mr. McFarland and Ms. Mrowka by Mr. Miller	28
Redirect Examination of Mr. McFarland by Staff Counsel Olson	33
Direct Examination by Mr. Miller	33
Cross Examination of Mr Miller by Staff Counsel Olson	37
Closing Statement by Staff Counsel Olson	69
Closing Statement by Mr. Miller	71
Closing remarks by Co-Hearing Officer Secundy	72
Adjournment	73
Reporter's Certificate	74

1 PROCEEDINGS

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CO-HEARING OFFICER SECUNDY: Since everyone is present, we might as well start even though it's a minute or so early.

This is the time and place for the hearing on the proposed revocation of water right Permit 200247, (Application 28669) authorizing the permittees to divert water at 0.3 cubic feet per second from January 1 to December 31st of each year, not to exceed 216 acre-feet of water per year for stockwatering and irrigation from Powerhouse Canal, tributary to the East Fork of the Russian River in Mendocino County.

The permit requires that construction work be completed by December 31st, 1991, and that the water be applied to the authorized uses by December 31st, 1992.

This hearing is being held in accordance with the Notice of Hearing dated June 23rd, 2005.

I'm Gerald Secundy, a member of the State Water Resources Control Board. Member Richard Katz and I will provide as hearing officers for this hearing. I will be assisted today by staff members Barbara Katz -- no relation -- Senior Staff Counsel, and Paul Murphey, Engineering Geologist.

In this hearing we have two teams of Board staff acting in different capacities. And, Mr. Miller, this is

1 primarily for you so that you understand this, because
2 everyone else here is staff. In this hearing we have two
3 teams of Board staff acting in different capacities. And
4 the Board has observed and will continue to observe a
5 separation of functions during this proceeding.

6 We have Board staff that prepared and will put on
7 the case for revocation of the permit known as the
8 prosecution team. The prosecution team consists of
9 Samantha Olson -- please raise your hand so he can know
10 who's who -- Scott McFarland, Staff Engineer; and Kathy --
11 I don't know how you pronounce your last name.

12 Mrowka?

13 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: Yes.

14 CO-HEARING OFFICER SECUNDY: Thank you -- Mrowka,
15 Senior Engineer.

16 The prosecution team has been and will continue
17 to be treated like any other party. The prosecution team
18 is subject to the same rules governing participation in
19 the hearing and ex-parte contacts as apply to any other
20 party. The prosecution team has not received, and will
21 not receive, any special treatment, nor will there be any
22 bias in favor of their position due to their status as
23 Water Board employees. I personal I personally have not
24 talked with anyone on the prosecution team.

25 We have also present the Board staff that I

1 introduced earlier. They are a neutral hearing team
2 providing assistance to me and also to Mr. Katz.

3 Neither team is allowed to direct or advise the
4 other.

5 The purpose of this hearing is to afford the
6 permittee -- that's you, Mr. Miller -- and the prosecution
7 team an opportunity to present relevant oral testimony and
8 any other evidence which may assist the Board in
9 determining whether to revoke Permit 20247. The only
10 issue noticed for the hearing is: "Should permit 20247 be
11 revoked for failure to construct the project and to apply
12 the water to beneficial use as described in the permit?"

13 Testimony and exhibits that do not address the
14 issue noticed for hearing are not relevant and may be
15 excluded. Please limit your testimony and exhibits to the
16 issue that I just read to you. I also ask that policy
17 statements address the issue noticed for the hearing.

18 After the conclusion of this hearing the Board
19 will consider a draft order at a Board meeting. In other
20 words, we will not make a decision today. After the Board
21 adopts an order, any person who believes the order is in
22 error has 30 days within which to submit a written
23 petition for reconsideration to the Board. Petitions for
24 reconsideration must comply with sections 768 and 769 of
25 Title 23, California Code of Regulations.

1 At this time I would like to invite appearances
2 by the parties. Will those making appearances please
3 state your name, address, telephone number and who you
4 represent so that the court reporter can enter this
5 information into the record.

6 Who is representing Michael Miller?

7 MR. MILLER: I am, Mike Miller.

8 CO-HEARING OFFICER SECUNDY: All right. Mr.
9 Miller, there's a little push button there. If you push
10 that, then everyone in the room can hear you.

11 Please repeat.

12 MR. MILLER: I am, Michael Miller.

13 CO-HEARING OFFICER SECUNDY: Mr. Miller, I think
14 you were advised by the staff and urged by the staff to
15 obtain counsel. It does not appear that you have obtained
16 counsel.

17 MR. MILLER: No, I was unable to.

18 CO-HEARING OFFICER SECUNDY: All right. Well, we
19 will proceed.

20 Who is representing the prosecution team?

21 STAFF COUNSEL OLSON: Samantha Olson, 1001 I
22 Street, Sacramento 95812.

23 CO-HEARING OFFICER SECUNDY: I'm sorry. We
24 should go back to Mr. Miller, because you do need to give
25 your address and telephone.

1 MR. MILLER: Yes, sir; 14100 Powerhouse Road,
2 Potter Valley, California; 707 is the area code, 621-1833.

3 CO-HEARING OFFICER SECUNDY: Thank you.

4 All right. Back to the prosecution team.

5 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: My
6 name is Katherine Mrowka. And I work at 1001 I Street,
7 Sacramento California; 916-341-5363.

8 STAFF ENGINEER McFARLAND: Scott McFarland. I
9 also work at 1001 I Street, Sacramento, California, 95812;
10 phone number, 916-341-5352.

11 CO-HEARING OFFICER SECUNDY: Thank you.

12 Are there any persons who want to represent --
13 excuse me -- to present non-evidentiary policy statements?

14 Are there any persons who want to participate in
15 the hearing that I've missed?

16 Very well. We'll then --

17 COUNSEL KATZ: I was just going to say for the
18 record, no one wishes to present a policy statement and
19 there's no one that's been missed.

20 CO-HEARING OFFICER SECUNDY: Thank you.

21 The order in which the parties will present their
22 cases is as follows: First will be the prosecution team.
23 Second will be Michael Miller.

24 Since there's no one wanting to present a policy
25 statement, we will have an opening statement and testimony

1 from the prosecution team and its witnesses, followed by
2 cross-examination by the permittee, the hearing team and
3 the hearing officers. There will then be an opportunity
4 for redirect and recross. After completion of recross,
5 exhibits will be offered into evidence.

6 Following the prosecution team's case in chief
7 the permittee will put on its case in chief in the same
8 manner as I just described for the prosecution team.

9 After both of the parties have had their
10 witnesses testify and be cross-examined there will be an
11 opportunity for rebuttal and cross-examination.

12 Finally, closing statements will be allowed. I
13 will allow closing statements and/or filing of legal
14 briefs in this particular case.

15 Since written testimony has been submitted for
16 each witness, the oral testimony given today should be
17 limited to summarizing the important points in the written
18 testimony. Oral testimony that goes beyond the scope of
19 written testimony may be excluded. Please address only
20 the issue noticed for hearing.

21 Now, Mr. Miller, this is primarily for you that I
22 will say this. I'm going to frankly give great deference
23 and be fairly lax in terms of your testimony because you
24 are not represented by counsel, and I want to make certain
25 that you get a full and fair hearing. But please do try

1 to stick to the facts in the case and what is relevant for
2 the decision.

3 Since the prosecution team has more than one
4 witness, it will conduct cross-examination of its witness
5 as a panel. Each witness will give his or her direct
6 testimony before any witness is cross examined. The
7 prosecution team will then make both of its witnesses
8 available as a panel for cross-examination. When
9 cross-examining a panel, please identify the specific
10 witness to whom your question is directed. If you are
11 sure to whom to direct a question, you may ask the
12 question generally of the panel. You may also direct a
13 question to one of the witnesses.

14 All right. Let me just go on. Please note that
15 the time limit specified in the Notice of Hearing will be
16 strictly enforced. The policy limits are: Policy
17 statements -- and we don't have any; opening statements
18 will be limited to 20 minutes; direct testimony, 20
19 minutes per witness, not to exceed 2 hours for all
20 witnesses represented by a party; cross-examination, 1
21 hour per witness or panel of witnesses; and closing
22 statements, 10 minutes. Time limits may be extended at my
23 discretion upon a showing of good cause demonstrated in an
24 offer of proof. I honestly doubt that we will take as
25 long as what we have already outlined here.

1 Transcripts. This hearing will be transcribed by
2 Jim Peters. Persons who want a copy of the transcript
3 should order one directly from him. Sixty days after the
4 Board receives its copy of the transcript, the transcript
5 will be posted on a website at WWW.WATERRIGHTS.CA.GOV.

6 Mr. Peters, would you please identify yourself
7 for Mr. Miller.

8 THE REPORTER: I'm Jim Peters.

9 CO-HEARING OFFICER SECUNDY: The oath. I will
10 now administer the oath.

11 Will those persons who may testify during this
12 hearing please stand and raise your right hand.

13 Just one second.

14 I can't say "the truth, the whole truth, and
15 nothing but the truth"?

16 COUNSEL KATZ: You can say that if you'd like.

17 CO-HEARING OFFICER SECUNDY: Thank you.

18 All right. I guess -- I've always wanted to say
19 that. And since I'm a lawyer, I'm going to say that.

20 (Thereupon the witnesses were sworn, by
21 Co-Hearing Officer Secundy, to tell the truth,
22 the whole truth and nothing but the truth.)

23 MR. MILLER: I do.

24 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: I
25 do.

1 STAFF ENGINEER McFARLAND: I do.

2 CO-HEARING OFFICER SECUNDY: Thank you very much.

3 You may now be seated.

4 Let's see.

5 All right. Ms. Olson, you're up.

6 Ms. Olson, did you raise your hand?

7 STAFF COUNSEL OLSON: I will not be testifying.

8 CO-HEARING OFFICER SECUNDY: All right. You're

9 just giving the opening statement?

10 STAFF COUNSEL OLSON: But I try to tell the

11 truth.

12 CO-HEARING OFFICER SECUNDY: I'm sorry?

13 STAFF COUNSEL OLSON: Nonetheless I try to tell

14 the truth.

15 CO-HEARING OFFICER SECUNDY: I would hope so.

16 (Laughter.)

17 STAFF COUNSEL OLSON: Well, good morning, Hearing

18 Officer Secundy, Board Member Katz, members of the hearing

19 staff. My name's Samantha Olson and I appear today on

20 behalf of the Division of Water Rights Enforcement Team in

21 the matter of the proposed revocation of Permit 20247.

22 Our objective is to recommend that this Board

23 revoke the permit because permittee has not diligently

24 proceeded with the project and applied water to beneficial

25 use, and good cause does not exist to grant an extension

1 of time.

2 This case is complicated because the permit has
3 transferred ownership twice, and Mr. Miller is now
4 responsible for the past inaction of previous permittees.
5 Nonetheless, the revocation's appropriate, as our
6 testimony and evidence will show.

7 The enforcement team has two witnesses to present
8 testimony today. First, Scott McFarland will testify
9 about the Division of Water Rights' 2001 inspection,
10 including his observations and conclusions based on these
11 observations.

12 The evidence will show that by 2001 the point of
13 diversion authorized by the permit was not constructed and
14 the property was instead being served by water purchased
15 from Potter Valley Irrigation District.

16 Next, Kathy Mrowka will testify about why the
17 revocation's appropriate in this case. It's a fairly
18 simple revocation based on the failure to commence a
19 project that authorized back in 1988. The permit expired
20 in 1992. And the owners who bought the property in 1997
21 did not receive authorization from the Water Board to go
22 ahead with the project.

23 Similarly, today this Board should not allow Mr.
24 Miller to proceed with the project for which authorization
25 has lapsed for over ten years.

1 The new purchase of a property cannot reset the
2 clock on a permit subject to revocation for nonuse. To
3 allow such a policy would wreak havoc on the
4 administration of water rights, as every action the
5 Division took could be nullified by the simple transfer of
6 ownership.

7 There's heavy competition for water in the
8 Russian River watershed. So approving the proposed
9 revocation in this case is appropriate and consistent with
10 State Board policy that requires due diligence in
11 perfecting water rights and the policy that requires that
12 water be applied to beneficial use to the fullest extent
13 possible.

14 Thanks very much. And I'd like to start with the
15 direct examination of Scott McFarland.

16 And then also if we could get one microphone on
17 this side of the table for cross examination, that would
18 be helpful.

19 DIRECT EXAMINATION

20 BY MS. SAMANTHA OLSON, STAFF COUNSEL, representing the
21 Division of Water Rights:

22 Q Good morning.

23 A Good morning.

24 Q Please state and spell your name for the record?

25 A My name is Scott McFarland, spelled M-c-F-a-r-l-a-n-d.

1 Q And what is your title and occupation?

2 A I am a water resource control engineer. I work for
3 the License Unit in the Division of Water Rights.

4 Q What are your job duties as they relate to the matter
5 before the Board?

6 A Within the License Unit one of the primary tasks was
7 that we would go out and inspect projects for completion
8 and issue a license if deemed necessary or appropriate.

9 Q Prior to this hearing enforcement team submitted
10 written testimony prepared by you and attached as Exhibit
11 WR-21.

12 Is that a true correct copy of your written
13 testimony?

14 A Yes.

15 Q So you mentioned that your job duties include
16 pre-license inspection of permits.

17 What are the options that Division staff may
18 recommend after inspection and what specific conditions
19 found at the inspection will lead to a given
20 recommendation?

21 A Well, we go out and conduct these pre-license
22 inspections once the complete-use state has lapsed on a
23 permit to determine if construction and how much of a
24 project has been completed.

25 I'd like to correct one thing. I conducted the

1 inspection in July 12th, 2000, not 2001. The report was
2 in fact written in 2001, but the inspection was in 2000.

3 Once we conduct a site inspection, we write up
4 the report. And there are basically three options
5 available. One is to issue -- recommend and issue a
6 license for the project as it stands on the inspection
7 date. The other option is that no work has been completed
8 and revocation of the right or a time extension could be
9 requested by the permittee to further develop the project.

10 Q Are you familiar with Permit 20247?

11 A Yes, I am.

12 Q And is that attached as Water Right Exhibit 3?

13 A Yes, it is.

14 Q And it's on the screen. Can you see it?

15 Can you tell us what project is authorized under
16 that permit?

17 A Well, as you can see up on the screen on Permit 20247,
18 Application 28669, it was originally issued to Walter and
19 Dorothy Hammeken. As Board Member Secundy mentioned, it
20 was -- the source is Powerhouse Canal, tributary to the
21 East Fork Russian River and then to Russian River. It has
22 a complete-use date of December 31st, 1992, which is on
23 the following date. It authorizes irrigation and stock
24 watering; the irrigation of up to 20 acres; maximum flow
25 rate of .3 cubic foot per second, which is about 135

1 gallons per minute. Year-round, that equates to 216
2 acre-feet per year.

3 You can see by item 9 that the complete-use date
4 is December 31st, 1992. And following on there are some
5 specific conditions that must be met by the permittee in
6 order to use that right.

7 Q Are there any additional terms worth mentioning on the
8 permit?

9 A Let's see. If you'll scroll down to -- let's see,
10 complete use -- continue on to the next page, if you
11 would.

12 Yeah, on term 16 it shows various bypass
13 requirements that must be met by the permittee. I believe
14 further down, 18 has -- 17 -- 18 has flow measurement
15 requirements; 19 is a fish screening requirement and so
16 forth. So these are conditions that must be met before
17 diversions can be made under this right.

18 Q Thank you.

19 And is frost protection an authorized purpose of
20 use under the permit?

21 A The only authorized uses were stockwatering and
22 irrigation. No frost protection.

23 Q Thank you.

24 Can you please tell us -- tell us about your
25 inspection of Permit 20247.

1 A Sure.

2 CO-HEARING OFFICER SECUNDY: Mr. McFarland,
3 before you do that, I'm just curious. Since the
4 construction needed to be completed by December of '92, if
5 I'm reading that correctly --

6 THE WITNESS: Correct.

7 CO-HEARING OFFICER SECUNDY: You did not go out
8 until July of 2000?

9 THE WITNESS: That's absolutely correct.

10 CO-HEARING OFFICER SECUNDY: So that's almost
11 eight years later?

12 THE WITNESS: Um-hmm.

13 CO-HEARING OFFICER SECUNDY: Okay. Was there a
14 particular reason we waited eight years?

15 THE WITNESS: Unfortunately we are running quite
16 a bit behind in our inspections. Beyond that I can't
17 really speak to it. But it would be better if we went out
18 in a more timely fashion. But sometimes there is a lapse
19 between the date of complete use and when we actually go
20 out to inspect.

21 CO-HEARING OFFICER SECUNDY: But this also means
22 that if indeed the owner at that point in time had
23 completed the project in '95, '96, '97, '98, your
24 inspection would have showed a completed project at that
25 point in time?

1 THE WITNESS: That is quite possible, yes.

2 CO-HEARING OFFICER SECUNDY: All right. Thank
3 you.

4 STAFF COUNSEL OLSON: Q Can you please tell us
5 about your inspection when we did get out there?

6 A Sure. As I said, I scheduled the inspection on July
7 12th, 2000. At the time the owner of the property was
8 Jack Air. I met him on the property and conducted the
9 inspection, which involved measuring the acreage that was
10 established there, looking for points of diversion, water
11 use and so forth.

12 What was determined quite quickly is there was no
13 point of diversion, there was no diversion work, so to
14 speak, on Powerhouse Canal. Further discussions with the
15 permittee, Jack Air, at the time revealed that he had in
16 fact been purchasing water all that time. As such, we
17 weren't able to offer him a license at that time.

18 I informed him his two options are either revoke
19 the right or request an extension of time -- petition for
20 extension of time. He indicated he did not want to revoke
21 the right; so in my write-up, I indicated that and sent
22 him the paperwork to request a petition of an extension of
23 time.

24 CO-HEARING OFFICER SECUNDY: Mr. McFarland -- and
25 reading through the record I must admit I could not

1 ascertain exactly what physical attributes had been done
2 when you made the inspection. Was there anything at all?
3 Had it been commenced? Was there a pipe, was there a
4 pump, was there a ditch, was there anything?

5 THE WITNESS: I located an old diesel pump that
6 had been out of use for quite sometime. I couldn't tell
7 if it actually belonged to that particular parcel or not.
8 It may have. But it obviously had been in disrepair for
9 quite sometime. There was no physical pipe laid from the
10 canal to the reservoir and then the irrigation system. So
11 there was -- there was no physical connection at the time.
12 And that made it impossible to offer any license at all if
13 there's no diversion work, so to speak.

14 CO-HEARING OFFICER SECUNDY: Thank you.

15 STAFF COUNSEL OLSON: Q And when you sent to him
16 a form for a time extension petition, do you go through
17 the record to determine whether that petition would be
18 successful or not?

19 A No. We send the paperwork -- at least my job -- at
20 that point there it more or less gets taken over by what
21 was then the Petition Unit. And they carry on the process
22 from there.

23 Q So in other words, when you sent out the form for a
24 petition for a time extension, you did not make a
25 determination that good cause existed at that time to

1 grant a time extension?

2 A No, no.

3 STAFF COUNSEL OLSON: Thank you very much.

4 DIRECT EXAMINATION

5 BY MS. SAMANTHA OLSON, STAFF COUNSEL, representing the

6 Division of Water Rights:

7 Q Katherine Mrowka, please state and spell your name for
8 the record.

9 A My name is Katherine Mrowka. That's M-r-o-w-k-a.

10 Q What is your title and occupation?

11 A I'm a senior water resource control engineer. And I'm
12 the supervisor in charge of Watershed Unit No. 3.

13 As it relates to this matter, I process petitions
14 for a time extension and make recommendations whether or
15 not time extensions should be approved.

16 Q Prior to this hearing, the enforcement team submitted
17 written testimony prepared by you and attached as Exhibit
18 WR-1.

19 Is that a true and correct copy of your written
20 testimony?

21 A Yes, it is.

22 Q How many times, Kathy, has Permit 20247 changed owners
23 according to the Division of Water Rights file?

24 A It has had three different owners, the original owner
25 and two transfers of ownership since.

1 Q What was the status of the permit when Jack Air
2 acquired the property in 1997?

3 A At that time the permit had already lapsed as to time
4 to beneficially use the water by five years. So at that
5 time this permit was not in good condition.

6 Q And was the Division aware of that fact at that time?

7 A No. What we did not know was the fact that the
8 permittee was not making use of this water. That did not
9 become obvious until our inspection. The progress reports
10 by permittee showed continual water use. So we thought
11 that this was a case where a permit holder was continually
12 maintaining their water right.

13 CO-HEARING OFFICER SECUNDY: I'm sorry. What
14 did -- would you repeat that. You're saying the progress
15 reports showed continual water use?

16 THE WITNESS: They did. Every three -- every
17 year a permit holder has to submit records of their water
18 use to the Division of Water Rights. And -- those are
19 called the progress reports by permittee. And they showed
20 continual water use.

21 CO-HEARING OFFICER SECUNDY: Did it show the
22 origin of the water?

23 THE WITNESS: No, it did not. And based on the
24 2000 inspection, I personally conclude that that was
25 purchased water that they're buying from Potter Valley

1 Irrigation District and reporting on our forms.

2 STAFF COUNSEL OLSON: Q In your experience how
3 accurate are the progress reports filled out by water
4 users?

5 A In my experience they're very inaccurate. We receive
6 quite a large number of the reports that -- where people
7 have multiple water rights, they report water use or
8 there's some other right on the form that's before you
9 right then. Or they'll report and say, "I'm irrigating
10 more acreage than I'm allowed." Or they'll just fill in
11 all kinds of interesting information, but it's not
12 reflective of what they can do under that specific right.

13 Q And isn't it true that on some of these progress
14 reports for this permit the permittee had reported use
15 under a different right?

16 A It's my estimation that they did so, because there was
17 no diversion works. So I don't believe that there's
18 diversion under this right.

19 Q And just to clarify, did the previous permittee also
20 have a power right -- water right?

21 A Yes, he did. And, in fact, there have been times that
22 these progress reports reported diversion for power
23 purposes for this irrigation water right. So obviously
24 we've had some crossing over of the information from one
25 water right to another for this permit holder.

1 Q And would water use reported that is actually
2 purchased from Potter Valley Irrigation District be
3 sufficient to establish beneficial use under this permit?

4 A No, It would not.

5 In order to establish beneficial use under this
6 permit you would have to take the water from the
7 authorized source, Powerhouse Canal at the authorized
8 location for use on the irrigated area that was identified
9 in the water right itself. You can't use water from
10 another source.

11 The irrigation district has its own water rights,
12 and it's using that water to firm up and report on their
13 use under their right. It's not the same as use under
14 this right.

15 Q And is the point of diversion different then from
16 water obtained by Potter Valley Irrigation District?

17 A Yes, it is. Their canal system originates upstream of
18 this location.

19 Q Thank you.

20 And what did you conclude about the permit after
21 reading the inspection report of 2000?

22 A I concluded that there had not been water diversion
23 and use under this particular permit, and that the permit
24 should be revoked for nonuse.

25 Q What showing is required for the Division to grant a

1 time extension to allow a permittee more time to develop a
2 project?

3 A Well, there are three findings. We have to show due
4 diligence was exercised, that failure to comply with prior
5 time requirements was occasioned by obstacles which could
6 not be reasonably avoided, and also that satisfactory
7 progress will be made if an extension is granted.

8 Q And so those three elements that you just described
9 have to be met in order for good cause to exist?

10 A That is correct.

11 Q What happened when Mr. Air filed a petition for time
12 extension in 2001?

13 A Well, the Division was unable to process the petition.
14 Because Mr. Air did submit the \$50 petition fee for time
15 extension petition and the \$100 fee for the change
16 petition; but there's an associated \$850 Department of
17 Fish and Game fee, and that was not submitted, although
18 the Division wrote two letters requesting that the fee be
19 submitted. So we could not process this.

20 Q Had the Division processed the petition, after your
21 review of the facts in the file, could he have shown good
22 cause to grant the time extension?

23 A No, I don't believe he could have shown good cause to
24 grant the time extension. This is a -- this case, there's
25 been no due diligence, there's no apparent obstacles that

1 could not be reasonably avoided.

2 Q Okay. Let's walk through the three elements of a time
3 extension for Mr. Air.

4 Had he shown that due diligence had been
5 exercised?

6 A No, in this instance the 2000 inspection report shows
7 no water use.

8 Q What are some examples of actions he could have taken
9 to establish due diligence?

10 A He could have submitted plans and specifications for
11 the diversion works. He could have submitted the required
12 streambed alteration agreement with Department of Fish and
13 Game. That is a permit condition. He could have provided
14 plans for installation of fish screens or a gravel rock
15 filter at the diversion intake, another permit condition.

16 Q Okay. Thank you.

17 And is there any evidence that -- I'm sorry.
18 Start again.

19 Was failure to comply with previous time
20 requirements caused by obstacles that he could not have
21 reasonably avoided?

22 A The record here does not indicate that that's the
23 case. It simply indicates that the permittee was buying
24 cheap irrigation water, paying \$4.50 an acre-foot for the
25 water. And I see nothing other than that to indicate why

1 he didn't proceed with this project.

2 Q What was Mr. Air's excuse when -- in the petition when
3 he was trying to establish that previous time requirements
4 were occasioned by obstacles that couldn't be avoided?

5 A Well, once again he indicated that he was a new
6 purchaser and that he hadn't had an opportunity yet to
7 develop the project.

8 Q Do you think that the fact that he was a new purchaser
9 is a valid excuse for not complying with previous time
10 requirements?

11 A No. The property is transferred as it exists before
12 the transaction, and it comes with all the incumbrances
13 attendant on that property. So I don't believe that
14 that's the case.

15 Q And on to the third element of good cause.

16 Was Mr. Air able to show that satisfactory
17 progress would be made if the time extension would be
18 granted?

19 A Well, I'd like to return to Mr. Miller first, because
20 he was our petitioner for that 2001 petition.

21 No? Mr. Air. That's right. I'm sorry. My
22 mistake.

23 Well, he was not able to show us that he had any
24 plans to develop any project works. He has never
25 indicated so. In fact, the only information we've ever

1 had from him on the progress reports was that the
2 diversion works were under repair. We've never seen
3 anything to indicate that he had a facility up and
4 running.

5 Q Now --

6 CO-HEARING OFFICER SECUNDY: If I could ask a
7 question, just so that I have my timeframe in the back of
8 my mind correctly.

9 Give me the dates of change of ownership. The
10 application should have been completed by December of '92.
11 Who was the owner at that point in time?

12 THE WITNESS: The original owner, the Hammekens,
13 owned it till 1997.

14 CO-HEARING OFFICER SECUNDY: And that's when Mr.
15 Air purchased the property?

16 THE WITNESS: That's correct.

17 CO-HEARING OFFICER SECUNDY: So regardless of
18 what Mr. Air did or did not do, the time had lapsed at
19 that point in time; is that correct?

20 THE WITNESS: That is correct.

21 CO-HEARING OFFICER SECUNDY: Okay.

22 CO-HEARING OFFICER KATZ: So one other thing for
23 all three of the witnesses was -- I'm not going to
24 substitute myself for Mr. Miller's attorney for a number
25 of reasons, not the least of which I'm not an attorney.

1 But I would also appreciate if you guys would keep down
2 the speculation. I mean I'm sure if he had had an
3 attorney here, he would have been objecting to a bunch of
4 that. That's not our role. But please let's limit the
5 speculation as to what decision makers or other people
6 might have said or might have done. Let's limit it to
7 what you guys know and don't know. Okay?

8 Thank you.

9 STAFF COUNSEL OLSON: If I could just say
10 something as counsel for the enforcement team. One of our
11 problems here is that we are dealing with facts that have
12 occurred already. And so in preparing for this case, we
13 thought we needed to address whether there was good cause
14 for a time extension. And that doesn't involve the facts
15 today. It involves what happened in the last 10, 15
16 years. And so that's why we -- that's why we --

17 CO-HEARING OFFICER SECUNDY: I understand what
18 you're saying. But if I understand the facts correctly,
19 the time had lapsed dramatically before Mr. Air acquired
20 the property.

21 STAFF COUNSEL OLSON: Yes.

22 CO-HEARING OFFICER SECUNDY: So what he did or
23 did not do, I'm not quite certain how I see the relevance
24 in that.

25 STAFF COUNSEL OLSON: Yes. And I certainly

1 appreciate that comment, and that is the most important
2 point to get here. So thank you.

3 Q Ms. Mrowka, could you tell -- we've already talked
4 about progress reports and how they indicated some water
5 use; is that correct?

6 A That's true.

7 Q We've already explained that, so I'm going to move on.

8 If Mr. Miller today can show that he's now
9 diverting water from the source under the permit, how
10 would you characterize that diversion?

11 A As unauthorized. The time has lapsed to complete
12 beneficial use.

13 Q Okay. Thank you.

14 What sort of demand is there on this reach of the
15 Russian River?

16 A There is very significant demand. There's 212 pending
17 applications out here, plus a reduction in available water
18 supply from the Eel River as a result of certain federal
19 decisions. And so there's significant demand.

20 Q Does Mr. Miller have a way to irrigate his vineyard if
21 this permit is revoked?

22 A Yes, he can purchase water from the Potter Valley
23 Irrigation District.

24 Q Thank you.

25 And what is your recommendation to the Board?

1 A That the water right be revoked.

2 STAFF COUNSEL OLSON: That concludes our direct
3 examination.

4 CO-HEARING OFFICER SECUNDY: All right. Mr.
5 Miller, are you a lawyer?

6 MR. MILLER: No, sir.

7 CO-HEARING OFFICER SECUNDY: All right. Again,
8 I'm going to be fairly lax with our rules. But this is
9 your opportunity to cross-examine both witnesses
10 individually or collectively. And just proceed at this
11 point.

12 MR. MILLER: I'm obviously caught in a bad
13 position here of having to argue a case for somebody who's
14 not here and has proven himself to not follow through with
15 what he's listed on these progress reports and what, you
16 know, the inspection showed. But --

17 CO-HEARING OFFICER SECUNDY: To whom are you
18 referring, Mr. Miller?

19 MR. MILLER: I'm just explaining the difficulty I
20 have here.

21 But a question of Mr. McFarland.

22 CROSS EXAMINATION

23 BY MR. LUKE MILLER, in pro per:

24 Did you inspect the area around -- you've seen the photos
25 that I've turned in?

1 SENIOR ENGINEER McFARLAND: Yes, I have.

2 MR. MILLER: And did you inspect the area around
3 the hydro system that -- the hydroelectric system for this
4 installation.

5 I just want to clarify whether -- I'm in a bad
6 spot where there is an installed system. I did not
7 install it. It is a diversion. And it falls within the
8 water right, although the time has lapsed. I just want to
9 get an idea of whether that was there at the time.

10 SENIOR ENGINEER McFARLAND: On the day of my
11 inspection there was no pump in the canal, to put as
12 simple -- at least irrigating that particular parcel. So,
13 no, there wasn't.

14 MR. MILLER: And just so I understand it a little
15 more clearly: Why was every effort made to provide Jack
16 Air this extension of time? You know, if this lapsed in
17 '92, it sounds to me like a system was installed by Jack
18 Air and he was in the process -- although he failed to
19 turn in an \$850 check, he was in the process of completing
20 paperwork for a time extension. Why was this offered to
21 him time and time again?

22 SENIOR ENGINEER McFARLAND: I'm not really clear
23 that it was offered to him time and time again. As I
24 explained, he was -- he didn't want to revoke the right.
25 So as the field engineer, I gave the options. I don't

1 make the determination on the extension. I did note the
2 place he used was expanded beyond what was allowed in the
3 permit. So I said, "If you want to irrigate this under
4 this right if you ever establish it, you're going to have
5 either get another right or do a change petition as well."
6 So I sent that paperwork as well. But to be honest with
7 you, I'm not the one once it's turned in to determine
8 whether it's valid, if it should be processed or go.
9 So -- I know I'm not really answering your question, but
10 I'm not sure that I can.

11 MR. MILLER: I'm confused by it also.

12 SENIOR ENGINEER McFARLAND: So he was interested
13 in pursuing time extensions, and I sent him the paperwork.
14 But I didn't -- you know, I'm not there to ensure that
15 it's a valid request that he'd make.

16 CO-HEARING OFFICER SECUNDY: Mr. Miller, maybe I
17 can clear that up. And I want to make certain that I
18 understand exactly what the prosecution team is saying.

19 But basically when you went out and made the
20 inspection in 2000 and you talked to Mr. Air, you gave him
21 the opportunity to file for an extension; you simply
22 showed him what he would have to do in terms of the
23 paperwork; you did not in any way, shape or form guaranty
24 that he would get such an extension, and that was not your
25 decision; is that correct?

1 STAFF ENGINEER McFARLAND: That's correct. His
2 only two options was revocation or extension at that time.
3 And I explained that to him. And since he was not
4 interested in going down the revocation path, I didn't
5 even send that paperwork to him.

6 CO-HEARING OFFICER SECUNDY: All right. Mr.
7 Miller, again just for your edification, revocation can be
8 done by the permittee holder, in which case the permittee
9 holder simply submits the revocation and we don't go
10 through a formal hearing. If the permittee doesn't do
11 that, then we have to go through a formal hearing, it's
12 time and expense. So obviously we encourage people to do
13 that. Mr. Air did not want to do that, which is why the
14 paperwork was submitted. But with certainly no guarantee,
15 I don't believe, on the part of the staff that that indeed
16 would be accepted.

17 MR. MILLER: I have no further questions.

18 COUNSEL KATZ: I just have a question for Kathy
19 Mrowka.

20 Would you clarify, yes or no, is this reach on
21 the fully appropriated streams list?

22 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: Yes,
23 it is.

24 COUNSEL KATZ: It is?

25 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: I'm

1 sorry. I'm speaking off the cuff, and I have not looked
2 at the reach. What I do know is that there is a specific
3 quantity of water set aside for development in the upper
4 counties. And until that quantity is extinguished you can
5 get a new water right. However, we have a significant
6 number of filings pending, and there is an issue as to
7 whether the quantity is already fully allocated based on
8 the already pending applications cases we have. Once the
9 quantity is extinguished that was set aside and reserved
10 for these counties, then we won't be able to accept new
11 filings.

12 COUNSEL KATZ: So the answer to my question is
13 you don't know if it's fully appropriated?

14 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: I do
15 not know. I do know there's significant restrictions.

16 COUNSEL KATZ: Okay. Mr. McFarland, do you know?

17 STAFF ENGINEER McFARLAND: No, I don't, but --
18 okay, I'll just leave it at that.

19 CO-HEARING OFFICER SECUNDY: All right. Would
20 the prosecution team like to redirect?

21 STAFF COUNSEL OLSON: Yes. And I know I didn't
22 take the oath, but the East Fork Russian River's on the
23 FAS list subject to Decision 1610 and all of those
24 qualifications that go along with that very intricate and
25 complicated decision. So like FAS listing, there is

1 exceptions and ways to file an application.

2 CO-HEARING OFFICER SECUNDY: I don't think --

3 COUNSEL KATZ: For the record, FAS is Fully
4 Appropriated Streams Declaration.

5 STAFF COUNSEL OLSON: Pardon me.

6 Just one question for Mr. McFarland.

7 REDIRECT EXAMINATION

8 BY MS. SAMANTHA OLSON, STAFF COUNSEL, representing the

9 Division of Water Rights:

10 Q How many times did you send the paperwork for a time
11 extension to Mr. Air?

12 A Just once.

13 CO-HEARING OFFICER SECUNDY: Mr. Miller, any
14 recross?

15 MR. MILLER: No, sir.

16 CO-HEARING OFFICER SECUNDY: All right. Then,
17 Mr. Miller, I believe it's your opening statement.

18 MR. MILLER: I just want to thank the Board for
19 letting me come in here today and at least plead my case.
20 I realize it's an uphill battle and that most likely a
21 difficult one to win.

22 I've been put in the bad position of having to
23 clean up after Mr. Air, and have only his progress reports
24 and an installed system to go by. And the system fits
25 well within what is allowed by the permit. And the

1 progress reports so that he has been sending paperwork to
2 the State Water Board that says he is using that water.
3 He did not file the extensions in the proper way. He did
4 not provide the money for those extensions. It is my
5 belief -- of course this is hearsay -- that this was all
6 done right as the property was sold to me, or he was in
7 the process of doing these things when the property was
8 sold to me.

9 This information wasn't transferred -- or passed
10 on to me that any of these things were pending.

11 CO-HEARING OFFICER SECUNDY: Mr. Miller, When
12 exactly did you acquire the property? What date?

13 MR. MILLER: It was on basically New Years 2003.

14 CO-HEARING OFFICER SECUNDY: Okay. Thank you.

15 MR. MILLER: Yes.

16 And when I received this -- the letter, my
17 Exhibit 4 dated September 14th, 2004, that was my first
18 indication that the water right was in question at all. I
19 had been transferred only the progress reports, that are
20 my Exhibit 2. And in those progress reports Jack Air
21 listed both an increased acreage and frost protection as
22 to the use of the water.

23 I incorrectly assumed that those progress reports
24 are taken in the record and are -- the information is
25 assessed, and when -- for example, when a 2001 progress

1 report is filled out and a 2001 is then sent -- or 2002 is
2 sent out the next year, that there is -- that that is the
3 check and balance process of this water right. I
4 incorrectly assumed that. So when we took over the
5 property with this paper trail and our installed system, I
6 assumed wrongly that this right was not in jeopardy. And
7 this letter dated September 14th was my first indication.

8 I quickly responded to this and basically request
9 all information necessary to resolve the issue. I have
10 every intention of doing the right thing here and going
11 through the proper channels and attempting to save the
12 water right that is extremely important to this property.
13 Mr. Air has squandered, but could really turn our property
14 around.

15 It is true that there is a system on the property
16 to divert water from the Potter Valley Irrigation Canal.
17 That water is pulled directly from the Russian River. It
18 requires only a phone call. Water is diverted from just
19 upstream of our point of diversion, at significant water
20 loss and inefficiency, and then pumped to our reservoir.

21 It is, you know, my hope that we can use this
22 water more efficiently by continuing this permit. They're
23 very right in pointing out that the water is very cheap.
24 It is, for the most part, unlimited. But it is not the
25 most efficient use of the water. It is -- our property is

1 set up in a way that this point of diversion was chosen
2 because it is in a central location to all the vineyards
3 installed and for frost protection -- not -- you know,
4 it's likely not many people know how it works. But
5 basically a large amount of water is used for a very short
6 amount of time and in a period when water is at full flow,
7 at 310 CFS in the Russian River.

8 I have no intention of using this water for
9 irrigation. And I'm simply trying to figure out a way to
10 maximize our efficient use of the water.

11 The alternatives -- the direction in which Jack
12 Air headed is water storage, very common out in Potter
13 Valley. Typically water storage is used on properties
14 that do not have frontage to the Russian River or a point
15 of diversion central. Ours does. Water storage is an
16 easy solution in most cases, but would require us to hold
17 water year-round in a fairly large volume and purchase it
18 and divert it directly from the Powerhouse Canal through
19 the Potter Valley Irrigation District Canals.

20 I'm maybe a little bit simple minded in thinking
21 that the water is essentially the same. But I can't help
22 but see it as that. And it is that reason that I'm here
23 today to do my best to fight for this water right and
24 improve the efficient use of the water on the property.

25 CO-HEARING OFFICER SECUNDY: Thank you.

1 Cross?

2 STAFF COUNSEL OLSON: Yes. I just feel really
3 far away here. I'm going to...

4 CROSS EXAMINATION

5 BY MS. SAMANTHA OLSON, STAFF COUNSEL, representing the
6 Division of Water Rights:

7 Q Mr. Miller, you testified that you purchased a
8 property New Year's Day 2003; is that correct?

9 A Basically it closed at the end of 2003; I think on the
10 29th actually.

11 Q What was your understanding about the water supply for
12 the vineyard on the property at that time?

13 A I was aware that there were -- there's a primary
14 system. And then I believe the second -- the one that I
15 turned in, Exhibit 1, to be a secondary system. The rate
16 of flow is not high enough on the permit to use it as a
17 primary.

18 Q Can you describe the primary system for us?

19 A It's basically a diesel pump -- well, a diesel motor,
20 a driving pump that diverts water directly from the
21 power -- or from the Potter Valley Irrigation District
22 Canal up to our reservoir.

23 Q Did you have a discussion with the previous owners
24 about the status of the water right permit?

25 A He provided me his files. No, I did not. He just

1 gave me a paper trail to follow. The property was a bit
2 of a fire sale and required -- allowed me 30 days to do
3 all the research possible. And there were much -- there
4 was a lot to figure out in 30 days.

5 And by --

6 Q You said he -- I'm sorry. Go ahead.

7 A I was just going to say, and by the progress reports
8 that he provided me, it appeared that all was fine.

9 Q You said that he gave you a file on the water right
10 permit?

11 A Yes.

12 Q What was in the file?

13 A For the most part, just his progress reports as best
14 he could fill them out.

15 Q Did you notice in the file a petition for an extension
16 of time?

17 A That, I didn't have.

18 Q Was there anything in the file that had the Division
19 of Water Rights' phone number on it?

20 A Yes.

21 Q Can you please describe the secondary system on the
22 property?

23 A There is an installed electric motor driving a pump
24 that recharges our reservoir also. And it does have a
25 flow meter on it. Although I have no records from Jack

1 Air as to usage.

2 Q You describe in your testimony a low water frost
3 protection system and drip system, correct?

4 A Yes.

5 Q Is this the primary or secondary system?

6 A When I am talking about primary and secondary systems,
7 they are just to fill our reservoir. There is an
8 installed irrigation system. These are just the means of
9 transporting the water.

10 Q Thank you.

11 You indicated on the progress reports that the
12 diversion works were under repair, correct?

13 A Yes.

14 Q What system are you referring to?

15 A The one that is directly at the point of diversion,
16 the second -- the smaller.

17 Q Was the system broken?

18 A No.

19 Q Was the system there?

20 A When we bought the property the system was there.

21 Q So that when you stated that the system was under
22 repair in the progress report, was that false?

23 A It was not false in my thinking, because it does not
24 provide enough water, and I realized that there's a lot
25 more water in the permit that could be used efficiently.

1 It is undersized in my thinking and, therefore, under
2 repair. We have intentions of -- with approval, of
3 building a proper system.

4 Q Have you increased the capacity of that system since
5 you purchased the property?

6 A No.

7 Q You submitted some photos for this hearing marked as
8 Exhibit 1, correct?

9 A Yes, ma'am.

10 STAFF COUNSEL OLSON: I wonder if we can bring up
11 the photos on the screen.

12 Q Okay. And these photos show a structure next to a
13 water body, right?

14 A Yes.

15 STAFF COUNSEL OLSON: Can you also bring up Water
16 Right Exhibit 20 please.

17 HEARINGS UNIT CHIEF MOELLER: Two different
18 disks.

19 STAFF COUNSEL OLSON: Oh. Is there any way you
20 can save the picture?

21 HEARINGS UNIT CHIEF MOELLER: Yeah, let me see if
22 I can. Give me a second.

23 STAFF COUNSEL OLSON: For the record let's call
24 the five photos A through -- A, B, C, D, E in the order as
25 they were submitted under Exhibit 1.

1 HEARINGS UNIT CHIEF MOELLER: Is this the Exhibit
2 20?

3 STAFF COUNSEL OLSON: Yes.

4 HEARINGS UNIT CHIEF MOELLER: This exhibit --

5 STAFF COUNSEL OLSON: That's it. Thank you.

6 Okay. And hopefully my photos are in order, but
7 let's start with Exhibit 1A.

8 Q And that shows a structure next to what looks like a
9 reservoir; is that correct?

10 A Yes, ma'am.

11 Q Can you point out on Water Right Exhibit 20 where that
12 structure is located?

13 HEARINGS UNIT CHIEF MOELLER: You're talking
14 about this photograph then?

15 STAFF COUNSEL OLSON: No.

16 HEARINGS UNIT CHIEF MOELLER: I'm not sure which
17 one we're talking about.

18 STAFF COUNSEL OLSON: Keep going.

19 There it is.

20 You know, and I wonder -- I don't know if these
21 are in order. So that -- the JPEG number ends with 68,
22 for the record.

23 And I guess we're going to have to add an exhibit
24 here where he points out the structure's located. And
25 we'll mark it as the next in order on our exhibit list, if

1 that's all right.

2 COUNSEL KATZ: That would be Exhibit 21?

3 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA: Yes,
4 21.

5 STAFF COUNSEL OLSON: Q Can you tell us where
6 the structure is located?

7 A This is the outlet for that secondary system I
8 described. And it is at the -- at the reservoir on top of
9 the hill. There's a 4.9 acre-foot reservoir on the east
10 side of it.

11 Q It's on the east side of the reservoir?

12 A Yes, ma'am.

13 STAFF COUNSEL OLSON: Can we bring up the first
14 picture that you had up.

15 COUNSEL KATZ: For the record, this will be
16 Exhibit 24.

17 HEARINGS UNIT CHIEF MOELLER: Are you talking
18 about this one here?

19 STAFF COUNSEL OLSON: No.

20 HEARINGS UNIT CHIEF MOELLER: The first picture.
21 Let me look.

22 COUNSEL KATZ: Oh, never mind. Exhibit -- it's
23 Exhibit 24?

24 STAFF COUNSEL OLSON: 21.

25 HEARINGS UNIT CHIEF MOELLER: This one?

1 CO-HEARING OFFICER SECUNDY: The map that you are
2 bringing up is already Exhibit 20. Exhibit 21, we already
3 have an exhibit for that. We have exhibits through 23.

4 STAFF COUNSEL OLSON: So I'm going to have Mr.
5 Miller indicate a point on this map. And we'll introduce
6 it as Exhibit 24.

7 CO-HEARING OFFICER SECUNDY: Okay.

8 STAFF COUNSEL OLSON: And, for the record, we
9 have the JPEG file up. It ends in 65.

10 Q Can you tell us, Mr. Miller, where this structure is
11 located?

12 A Just below the bridge. It's the intake right on the
13 Russian River.

14 Q What bridge?

15 A Our property -- on our property. There's a
16 hydroelectric station that sits just below the bridge. We
17 also have a water permit for power generation.

18 Q Is it above or below the hydro facility?

19 A It is just below, on a downhill fall.

20 Q Can you mark with a pen on this map where that is?

21 DIVISION OF WATER RIGHTS SUPERVISOR MROWKA:

22 Here's a color pen.

23 STAFF COUNSEL OLSON: And we'll mark this as
24 Exhibit 24.

25 CO-HEARING OFFICER SECUNDY: You want to tell

1 us -- would you like to tell us where it is?

2 Ms. Olson, it's not clear on the map.

3 COUNSEL KATZ: Did he just color in the --

4 STAFF COUNSEL OLSON: He indicated the location
5 with a blue pen.

6 CO-HEARING OFFICER SECUNDY: Very well.

7 Hearing Officer Katz, are your eyes better than
8 mine?

9 CO-HEARING OFFICER KATZ: No.

10 CO-HEARING OFFICER SECUNDY: No.

11 Okay. Ms. Olson, let's try a red pen, an orange
12 pen, a yellow pen.

13 STAFF COUNSEL OLSON: Let me try this
14 differently.

15 Q Did you indicate on the map where the authorized point
16 of diversion is is where this structure's located?

17 A Yes, it's basically at the waistline where the two
18 properties come together, the 24-acre block and the 12.2
19 acre.

20 CO-HEARING OFFICER SECUNDY: Where the hand is?

21 COUNSEL KATZ: Move the hand where the circle is.

22 MR. MILLER: Right there. Basically that is the
23 location.

24 CO-HEARING OFFICER SECUNDY: So between the two
25 properties?

1 THE WITNESS: Yes, sir.

2 CO-HEARING OFFICER SECUNDY: Thank you.

3 STAFF COUNSEL OLSON: Could we bring that
4 photograph back up.

5 HEARINGS UNIT CHIEF MOELLER: Sure.

6 STAFF COUNSEL OLSON: Sixty-five JPEG.

7 CO-HEARING OFFICER SECUNDY: Ms. Olson, I'm
8 afraid you're confusing the hearing officers, at least
9 this hearing officer.

10 STAFF COUNSEL OLSON: I apologize.

11 CO-HEARING OFFICER SECUNDY: Where are you going
12 with this? What are you trying --

13 STAFF COUNSEL OLSON: I'm confusing myself.

14 My problem is I couldn't figure out from these
15 pictures what we were looking at. And so I'm trying to
16 get a sense since we don't have an idea of what's out
17 there. And that wasn't particularly effective, so I
18 apologize.

19 CO-HEARING OFFICER SECUNDY: All right. But what
20 you're saying is, this is where this 4.9 acre reservoir is
21 located?

22 THE WITNESS: The outlet is.

23 CO-HEARING OFFICER SECUNDY: The outlet.

24 THE WITNESS: This is the inlet -- or the intake
25 that we're looking at here. And it is at the waistline of

1 the property, where the Russian River flows under our
2 bridge and through our hydroelectric station.

3 In the other photos, the other equipment you see
4 there is related to our hydroelectric station.

5 CO-HEARING OFFICER SECUNDY: Thank you.

6 THE WITNESS: Yes, sir.

7 COUNSEL KATZ: Wait. I want to make sure I get
8 this.

9 The water here is the Russian River?

10 THE WITNESS: Yes, ma'am.

11 COUNSEL KATZ: Or Powerhouse Canal?

12 THE WITNESS: Well, it is not the irrigation
13 district canal. It is the free flow of the river.

14 CO-HEARING OFFICER SECUNDY: Mr. McFarland, since
15 you have visited the property, you want to jump in.

16 STAFF ENGINEER MCFARLAND: That is in fact
17 Powerhouse Canal.

18 THE WITNESS: I'm misnaming the river then. I'm
19 sorry.

20 STAFF COUNSEL OLSON: And I'd just like to lodge
21 an objection on the record that these photos lack
22 foundation. There's nothing in this photo that indicates
23 where this is. And so if the Board were to make a
24 decision based on the existence of this facility, I don't
25 think this evidence gets you there. And I just want to

1 state the objection for the record.

2 CO-HEARING OFFICER KATZ: The whole confusing
3 presentation around the photos was yours.

4 STAFF COUNSEL OLSON: Right.

5 CO-HEARING OFFICER KATZ: So the objection you
6 stated on the record is an objection to a confusion that
7 you created.

8 STAFF COUNSEL OLSON: I don't -- I disagree. I
9 think the photo is confusing because there's nothing there
10 authenticating where it's located. And I was trying to
11 figure out whether that was the point of diversion
12 specified under the permit.

13 CO-HEARING OFFICER SECUNDY: Let me ask the two
14 prosecution witnesses.

15 Mr. McFarland, the five photographs that we see,
16 are they evidence of any infrastructure that is taking
17 water from the point that the permit allowed water to be
18 diverted?

19 STAFF ENGINEER MCFARLAND: Possibly. By looking
20 at this photo, I can tell you it's not the regulatory
21 reservoir. It's quite possibly Powerhouse Canal. All I
22 can say is when I was there, that structure wasn't there.
23 I can't really speak --

24 CO-HEARING OFFICER SECUNDY: And you don't know
25 when that structure was put in?

1 STAFF ENGINEER McFARLAND: No, I don't.

2 CO-HEARING OFFICER SECUNDY: And, Mr. Miller, do
3 you know when that structure was created?

4 MR. MILLER: Unfortunately I can only speculate.

5 CO-HEARING OFFICER SECUNDY: Well, since the
6 prosecution team has done a little speculation, I'll allow
7 you to do a little speculation.

8 MR. MILLER: It's obviously after Mr. McFarland's
9 inspection. There was some work done on the hydro unit in
10 2001. This actually serves a dual purpose, this pump
11 system. And I believe it was installed at that point in
12 2001, when the upgrade was made to the hydro unit.

13 And the records of Jack Air's purchase of water
14 through the Potter Valley Irrigation District, in my
15 opinion, show a marked decline after that period, where I
16 believe he became -- began using this as a secondary fill
17 method.

18 CO-HEARING OFFICER SECUNDY: In other words, I
19 guess to put it in my language, the previous owner started
20 to take water from the irrigation district that was not
21 being paid for; i.e., assuming that he had the permit, he
22 started to divert some of the water, is that what I'm
23 hearing?

24 STAFF ENGINEER McFARLAND: To clarify, from
25 Powerhouse Canal, not -- I guess when you say irrigation

1 district --

2 CO-HEARING OFFICER SECUNDY: I'm sorry.

3 STAFF ENGINEER McFARLAND: But it sounds that way
4 to me as well. In fact, there may have -- the original
5 owner may in fact have had diversion works in there. But
6 I can only base a license recommendation if there's an
7 existing system when I go out there. So --

8 CO-HEARING OFFICER SECUNDY: In 2000 there was
9 not an existing system?

10 STAFF ENGINEER McFARLAND: Correct.

11 CO-HEARING OFFICER SECUNDY: And that you're
12 certain of?

13 STAFF ENGINEER McFARLAND: Yes.

14 CO-HEARING OFFICER SECUNDY: Okay. Sometime
15 between 2000 and the current date something was put in
16 that diverted some of the water to your vineyards?

17 STAFF ENGINEER McFARLAND: It appears so based on
18 these photos.

19 CO-HEARING OFFICER SECUNDY: And it appears so
20 based upon the fact that the purchased water was starting
21 to decline?

22 MR. MILLER: In my opinion.

23 And I'd like to clarify that. It was installed
24 from his inspection to the time of my purchase. It was
25 not installed after.

1 CO-HEARING OFFICER SECUNDY: Understood.

2 MR. MILLER: Not until the present time.

3 CO-HEARING OFFICER SECUNDY: In other words you
4 didn't do it?

5 MR. MILLER: I did not.

6 CO-HEARING OFFICER SECUNDY: Back to you, Ms.
7 Olson.

8 STAFF COUNSEL OLSON: Thank you.

9 Q Do you have any electricity records that can establish
10 pumping from this point of diversion allegedly constructed
11 in 2001?

12 A I have to admit that we have the luxury of using the
13 power from the hydroelectric facility. So I do not
14 receive a bill for running that electric motor.

15 Q You stated that the motor had a meter on it, did you
16 not?

17 A It does have a flow rate.

18 Q Could you have obtained pumping records from the hydro
19 plant?

20 A As far as I know, Jack Air did not keep any records of
21 his water use using this system.

22 Q Since you acquired the property in 2003 have you been
23 using this system?

24 A We have as a supplement.

25 CO-HEARING OFFICER SECUNDY: Mr. Miller,

1 approximately how much water has come out of what I'll
2 call the "permitted system" -- and I use that in quotes
3 obviously -- as a percent of the total water that you're
4 utilizing?

5 CO-HEARING OFFICER KATZ: There's no permitted
6 system.

7 CO-HEARING OFFICER SECUNDY: No, I said it in
8 quotes. The one that you thought was permitted.

9 CO-HEARING OFFICER KATZ: How much water are you
10 buying?

11 MR. MILLER: Our water purchase has been -- well,
12 let me see if I have those records.

13 STAFF COUNSEL OLSON: While he's looking for
14 that, I just want to interject a disclaimer here. I mean
15 I feel sort of bad for Mr. Miller because he's testifying
16 on the record as to unauthorized water use. I think that
17 he could be incriminating himself for a future
18 administrative civil liability. And since I wasn't clear
19 whether this project was in fact constructed and whether
20 it was illegal, I didn't know about that. And I just want
21 to issue a warning it's possible that he has an
22 unauthorized diversion, he's testifying against himself at
23 this time.

24 MR. MILLER: I'd also like to say that my
25 progress reports already testify to that also. I've

1 already turned in progress reports that -- to State Water
2 Control Board that say I have been using the system.

3 STAFF COUNSEL OLSON: That is true.

4 CO-HEARING OFFICER KATZ: I'm assuming you were
5 using the system because you thought that the guys you
6 bought this from had already completed all the process and
7 that was what you were operating under; is that how we get
8 here?

9 THE WITNESS: I did not realize that it was an
10 illegal system.

11 CO-HEARING OFFICER KATZ: Let me go back to Mr.
12 Secundy's question for a second.

13 Just in rough terms, what percentage of your
14 water, without the specific acre-feet, you know, at what
15 percent are you purchasing and -- I mean the water you're
16 purchasing, give me just a general idea of what that
17 represents in terms of your total use. Is it 10 percent,
18 20 percent, 90 percent?

19 THE WITNESS: I would guess that it is under 50
20 percent, because of the limitations of this system.
21 Typically recharge for -- we use it solely for frost
22 protection in the spring, or for the most part. And
23 recharge of that system cannot be done fast enough with
24 this. If I have the luxury of time, we use this. If I
25 need to fill immediately, we have a bigger system.

1 CO-HEARING OFFICER KATZ: Which is the one that
2 you purchase?

3 Which is the one that you purchase?

4 THE WITNESS: Yes.

5 CO-HEARING OFFICER KATZ: Has your percent of
6 purchased water been going -- staying the same, going up,
7 going down?

8 THE WITNESS: I have records only for 2004. Ours
9 is considerably less than Jack Air had posted in his
10 purchase.

11 CO-HEARING OFFICER KATZ: All right. I'll wait
12 till --

13 THE WITNESS: Until preparing for this case I
14 didn't realize that. I assumed that he was using much
15 more water with this system.

16 CO-HEARING OFFICER KATZ: Okay. I guess I'll
17 wait till prosecution finishes.

18 CO-HEARING OFFICER SECUNDY: He's going to
19 redirect, so --

20 CO-HEARING OFFICER KATZ: Yeah, yeah.

21 CO-HEARING OFFICER SECUNDY: Ms. Olson, you want
22 to wrap it up?

23 STAFF COUNSEL OLSON: Yeah.

24 Q Even if this permit was active, is frost protection
25 authorized under the permit?

1 A The permit still has wording from the original
2 stockwatering and irrigation. It does not list frost
3 protection.

4 Q Is it possible to serve your entire project with
5 Potter Valley Irrigation water?

6 A I believe it to be not as efficient, but it is
7 possible. And it is also possible to service my entire
8 vineyard operation underneath this permit within -- well
9 within the 216 acre-feet.

10 Q How much is --

11 CO-HEARING OFFICER KATZ: Ms. Olson, hold it.

12 The first half of your question was, is it --
13 what was first half of your question?

14 STAFF COUNSEL OLSON: If it was possible to serve
15 his project using Potter Valley Irrigation water.

16 CO-HEARING OFFICER KATZ: And you said -- and I
17 heard the second. But you said yes to the first part
18 also?

19 THE WITNESS: As I understand it, there is really
20 not that much of a restriction on Potter Valley Irrigation
21 District water.

22 CO-HEARING OFFICER KATZ: Have you tried to
23 purchase 100 percent of your needs from Potter?

24 THE WITNESS: There would be no problem.

25 CO-HEARING OFFICER KATZ: Okay.

1 STAFF COUNSEL OLSON: Q And how much is the
2 water purchased from Potter Valley Irrigation District?

3 A You mean how expensive is it?

4 Q Correct. How much per acre-foot?

5 A It is very inexpensive. I don't know exactly what it
6 is this year. Let's see.

7 Q Would you agree that it's approximately \$4 an
8 acre-foot?

9 A Approximately, yes.

10 STAFF COUNSEL OLSON: That completes my
11 cross-exam.

12 Oh, I lied. I'm sorry.

13 Q Are you aware of the other permit terms and
14 conditions?

15 A I have tried to make myself as aware as I can be.

16 Q Are you aware that there's a bypass flow that you
17 would have to require if the permit was active?

18 A I'm not sure I understand.

19 STAFF COUNSEL OLSON: Can we bring up Water Right
20 Exhibit 3.

21 HEARINGS UNIT CHIEF MOELLER: What is that?

22 This is 20.

23 STAFF COUNSEL OLSON: Permit Term No. 16, has a
24 two-stage bypass requirement depending on a dry or
25 critical -- critically dry water year.

1 Q Do you know who to contact to get this information?

2 A If that is referring to the cubic feet of available at
3 any time in the river, is that -- in the Powerhouse Canal,
4 is that what it refers to? I'm kept up to date as the
5 manager of the hydroelectric facility about exactly how
6 much water is in the river at any time.

7 Q And so sub 1 says, "Dry water year conditions are
8 defined to exist when the actual cumulative inflow to Lake
9 Pillsbury for the water year is less than or equal to" --
10 and it has a series of numbers.

11 Are you familiar where to acquire this
12 information?

13 A No.

14 Q Have you been complying with this permit term?

15 CO-HEARING OFFICER SECUNDY: Mr. Miller, before
16 you answer, if you simply don't know the answer to that,
17 you can say you do not know. You don't have to say yes or
18 no.

19 THE WITNESS: For the most part, our usage of
20 that secondary system is from the period of March through
21 May. Typically released from Pillsbury is at its maximum
22 at that time. And we do not use this secondary system for
23 any irrigation. So it is not during this critical period.

24 CO-HEARING OFFICER KATZ: Mr. Miller, you just
25 made a comment about being the manager of the hydro

1 system.

2 THE WITNESS: Yes.

3 CO-HEARING OFFICER KATZ: Which hydro -- what are
4 you referring to?

5 THE WITNESS: There is a hydroelectric station on
6 the property also that we have a second water right for to
7 operate.

8 CO-HEARING OFFICER KATZ: So this is one that you
9 own and operate?

10 THE WITNESS: Yes, sir.

11 CO-HEARING OFFICER KATZ: Okay. Thanks.

12 STAFF COUNSEL OLSON: Q You just testified that
13 you only use a secondary system from March through May.
14 Doesn't sub B of term 16 require 35 CFS bypass during that
15 time?

16 A Yes.

17 Q And are you complying with that bypass requirement?

18 A I'm not sure I understand the bypass requirement.

19 Q Okay. Would you agree that if you had an active
20 permit it would be your responsibility to read the terms
21 and comply with them?

22 CO-HEARING OFFICER SECUNDY: Ms. Olson, that's
23 not what he asked. He said he simply doesn't understand
24 what the bypass requirement is. Perhaps you could explain
25 to him what the bypass requirement is.

1 STAFF COUNSEL OLSON: Sixteen sub B specifies
2 that from September 16th through May 14th, the permittee
3 bypass 35 CFS in a normal year for the protection of fish
4 and wildlife.

5 CO-HEARING OFFICER SECUNDY: What precisely do
6 you mean by bypass 35 CFS?

7 STAFF COUNSEL OLSON: That means that at least 35
8 CFS remain in the stream.

9 CO-HEARING OFFICER SECUNDY: Okay. I think Mr.
10 Miller would understand that.

11 THE WITNESS: Well, there's typically 310 CFS.

12 CO-HEARING OFFICER SECUNDY: Therefore, you are
13 complying with that bypass requirement?

14 THE WITNESS: Yes.

15 CO-HEARING OFFICER SECUNDY: Basically, you can't
16 suck the stream dry, okay? That's what it's saying.

17 THE WITNESS: Yeah, I understand that.

18 STAFF COUNSEL OLSON: Q Permit Term 19 requires
19 a fish screen for your intake.

20 Is there a fish screen on that intake of the
21 secondary system?

22 CO-HEARING OFFICER SECUNDY: Ms. Olson, I'm going
23 to stop you.

24 Basically I think what the prosecution team is
25 trying to prove is that indeed the permit has not been

1 perfected because the construction was not done in a
2 timely manner. To go through the requirements of the
3 permit, which in your opinion don't exist, I'm not sure
4 adds to your case at this point. So I think you made your
5 case.

6 STAFF COUNSEL OLSON: Thank you.

7 CO-HEARING OFFICER SECUNDY: Mr. Miller, it's
8 your turn to redirect. Any questions you might have to
9 the prosecution team?

10 MR. MILLER: No, I have no further questions.

11 CO-HEARING OFFICER SECUNDY: All right. Does the
12 prosecution -- one second. And does the prosecution team
13 have any recross to Mr. Miller? If not, we're going to
14 have a few questions ourselves. Okay?

15 CO-HEARING OFFICER KATZ: Go ahead.

16 CO-HEARING OFFICER SECUNDY: No, go ahead, Mr.
17 Katz.

18 CO-HEARING OFFICER KATZ: Mr. Miller, help me out
19 here a little bit.

20 You bought this property two years ago?

21 THE WITNESS: Yes, sir.

22 CO-HEARING OFFICER KATZ: And what were you
23 doing -- what were you doing before that?

24 THE WITNESS: I worked for the farm next door.
25 Or I was working for the farm next door and continue to.

1 CO-HEARING OFFICER KATZ: Okay. And so this
2 property came on the market and it seemed like a good
3 idea?

4 THE WITNESS: Yes, sir.

5 CO-HEARING OFFICER KATZ: How well did you know
6 the people that you bought it from?

7 THE WITNESS: I at that time didn't know them at
8 all.

9 CO-HEARING OFFICER KATZ: Go on. I'm sorry.

10 THE WITNESS: My only history is the farm that I
11 do work for, the vineyard that I work for next door helped
12 Mr. Air with a lot of the vineyard installation and with
13 some labor. So they had been working closely, but not on
14 issues like this.

15 CO-HEARING OFFICER KATZ: Okay. And the vineyard
16 that you work for is?

17 THE WITNESS: McFadden Farm.

18 CO-HEARING OFFICER KATZ: Is the McFadden Farm a
19 similar kind of operation to this or --

20 THE WITNESS: Much larger.

21 CO-HEARING OFFICER KATZ: Much larger.

22 And their water comes from Potter?

23 THE WITNESS: No, they actually pump directly
24 from the river.

25 CO-HEARING OFFICER KATZ: They pump directly.

1 Okay.

2 THE WITNESS: For frost protection.

3 CO-HEARING OFFICER KATZ: In your dealings
4 with -- was it Mr. Air, is that -- Mr. Air, did he ever
5 indicate to you that the permits were not completed?

6 THE WITNESS: No.

7 CO-HEARING OFFICER KATZ: Did he ever indicate
8 they were complete, in that sense?

9 THE WITNESS: No, he provided me only a paper
10 trail. And I have to be honest, that we had so many other
11 things we were working through, these permits never became
12 an issue.

13 CO-HEARING OFFICER SECUNDY: But, Mr. Miller, if
14 I could -- and I'm not trying to put words in your mouth.
15 But just from your previous testimony, it appears that
16 once you did go through the paperwork, you were under the
17 assumption that indeed the permit was a valid permit.

18 THE WITNESS: Yes. I had his progress reports.

19 CO-HEARING OFFICER SECUNDY: And now his progress
20 reports led you to believe that there was a permit in
21 existence at that time giving you a right to divert water?

22 THE WITNESS: Yes, sir. There were progress
23 reports year after year. Most of them had been corrected
24 from 20 acres to 40, listed frost protection specifically
25 on them. And I believed these to be the check and balance

1 for the State Water board. So I assumed they were being
2 reviewed and that there was a continuous process -- or a
3 continuous --

4 CO-HEARING OFFICER SECUNDY: Mr. Miller, I will
5 again urge you to hire counsel. Having nothing to do with
6 this particular hearing. But you might want to hire
7 counsel and look to see whether or not you have a cause of
8 action against the previous owner.

9 CO-HEARING OFFICER KATZ: We're talking roughly
10 about -- if you were to continue -- if you were to buy the
11 water from Potter, we're talking about a thousand bucks a
12 year roughly for water? Two hundred eighty acre-feet,
13 four bucks an acre-foot roughly. Right?

14 THE WITNESS: Yes.

15 CO-HEARING OFFICER KATZ: Now, the permit -- as I
16 understand, there's only an approved permit to irrigate 20
17 acres of land, is that correct?

18 STAFF ENGINEER McFARLAND: That's correct.
19 Twenty acres of irrigation is what's --

20 CO-HEARING OFFICER KATZ: Twenty's approved.
21 Forty -- the other twenty's never been applied for. It's
22 a forty acre parcel.

23 CO-HEARING OFFICER SECUNDY: It's -- you're --

24 CO-HEARING OFFICER KATZ: And twenty's approved?
25 Twenty was --

1 CO-HEARING OFFICER SECUNDY: Twenty was applied
2 for. The permit was never granted.

3 STAFF ENGINEER McFARLAND: Within the permit he's
4 authorized to irrigate 20 acres. I think that's
5 succinctly --

6 CO-HEARING OFFICER SECUNDY: Within the permit?

7 STAFF ENGINEER McFARLAND: Correct.

8 CO-HEARING OFFICER SECUNDY: The permit that we
9 say does not exist according to the prosecution team.

10 CO-HEARING OFFICER KATZ: Okay. So according to
11 the prosecution team, is there a right to irrigate any of
12 the 40 acres?

13 STAFF COUNSEL OLSON: If this Board found good
14 cause to grant a time extension to somehow reactivate this
15 permit, which is not what I'm arguing -- I think that
16 would be contrary to law. But if this Board found that,
17 the permit would authorize 20 acre-feet of the 40 that's
18 out there today.

19 STAFF ENGINEER McFARLAND: Twenty acres.

20 STAFF COUNSEL OLSON: Sorry. Twenty acres.

21 COUNSEL KATZ: You would need to file a petition
22 to change to add 20 acres in place of use.

23 STAFF ENGINEER McFARLAND: If he wished to
24 irrigate the entire vineyard or develop under this right,
25 there are other -- if you could prove you're irrigating

1 only 20 acres under this right and then show where the
2 other -- you'd have to show how you could separate it in
3 order to do it under this right.

4 CO-HEARING OFFICER KATZ: Okay. I mean the --
5 Okay, I understand that.

6 And on the other hand -- and the alternative to
7 that is to contract with Potter Valley for the necessary
8 acre-foot to irrigate the 40 acres?

9 STAFF ENGINEER McFARLAND: Or some other source
10 as a well, but yes.

11 CO-HEARING OFFICER KATZ: Some other source as a
12 well.

13 Because I do -- without getting ahead of
14 ourselves, I mean I do understand the -- I don't know how
15 you extend the permit, the application time, particularly
16 in light of the fact that we are in the process of doing a
17 variety of actions against water -- cleaning up water
18 rights on the Russian River in particular. I mean as in
19 most cases -- and most times when you get something like
20 this, you have somebody at least -- and I may be way out
21 of line here. So the Chair will whack me if I'm...

22 You have a very sympathetic case with somebody
23 who -- I think I'd agree with the Chair. I think the
24 legal term was "got screwed by the previous owner" --

25 (Laughter.)

1 CO-HEARING OFFICER KATZ: -- my opinion. But
2 that's why I flunked out of law school.

3 No, but I think you're right in terms of where
4 the action is. And as sympathetic as I am to Mr. Miller's
5 situation, particularly with everything else that's going
6 on on the Russian, I don't think you can throw all the
7 rules out and make -- come up with some way to make an
8 exception here that doesn't undermine every single other
9 thing we're trying to do to get the Russian, which is
10 seriously oversubscribed in some areas, you know, messed
11 up in a lot of ways -- just not make that incredibly more
12 difficult. I mean that's sort of the rock and the hard
13 place in this.

14 And you have a situation here where I think, you
15 know, Mr. Miller, you know, relying to some extent on good
16 will and a handshake got burned.

17 CO-HEARING OFFICER SECUNDY: I can't disagree
18 with the summation. I would probably use different
19 terminology, but --

20 CO-HEARING OFFICER KATZ: That's because you got
21 the degree and I didn't.

22 (Laughter.)

23 CO-HEARING OFFICER SECUNDY: Let's see if we
24 can't wrap this up.

25 Is there any rebuttal from either side at this

1 point?

2 STAFF COUNSEL OLSON: I have two exhibits. And
3 I'll have Kathy Mrowka testify to them.

4 Q Ms. Mrowka, you have in front of you two documents
5 that describe the purchase price, and they are two water
6 purveyors in the area; is that correct?

7 A That is correct.

8 Q Can you describe the first document, that we'll mark
9 as Exhibit 25?

10 A Yes, this is a document that talks about the purchase
11 price of \$23 per acre-foot. It's obtained from a water
12 conservation plan that was submitted to the Division.

13 Q And can you tell from that paper who the water
14 purveyor is?

15 A It does not say the name on this paper.

16 Q Okay. We will amend that so that it's obvious that
17 it's a water use agreement from Mendocino Russian River
18 Flood Control District.

19 And how much do they charge per acre-foot?

20 A Twenty-three dollars per acre-foot?

21 Q And the next document in front of you marked as
22 Exhibit WR-26, can you tell who the water purveyor is for
23 that document?

24 A Yes, it's the Redwood Valley County Water District.

25 Q And how much were they charging per acre-foot for

1 irrigation water?

2 A For irrigation water, it's -- for the first three
3 acre-feet it's \$120 for the year, and each additional
4 acre-foot is \$120 dollars for the year.

5 Q And one last question.

6 How much does Potter Valley Irrigation District
7 charge per acre-foot?

8 A Four dollars and fifty cents.

9 STAFF COUNSEL OLSON: That's all I have.

10 CO-HEARING OFFICER SECUNDY: Ms. Olson, I'm
11 afraid you've lost me.

12 What is the purpose of the last two exhibits?
13 What are we trying to prove?

14 STAFF COUNSEL OLSON: The purpose of the last two
15 exhibits is to show what a great deal Potter Valley is for
16 Mr. Miller. Water is indeed quite valuable on the Russian
17 river. It's getting more valuable. And to be able to
18 purchase for \$4 an acre-foot is not the worst outcome in
19 this case.

20 CO-HEARING OFFICER SECUNDY: All right. Thank
21 you.

22 Is the prosecution team through?

23 STAFF COUNSEL OLSON: Yes.

24 CO-HEARING OFFICER SECUNDY: Mr. Miller, is there
25 anything you would like to add before we go to closing

1 statements?

2 MR. MILLER: I would like to make a final
3 statement. And it is --

4 CO-HEARING OFFICER SECUNDY: Let me interject,
5 sir. This is really for rebuttals. You're going to have
6 an opportunity to make a closing statement.

7 MR. MILLER: The statement is in rebuttal to that
8 then.

9 CO-HEARING OFFICER SECUNDY: Please.

10 MR. MILLER: It isn't the price per acre-foot of
11 the water -- it's not what's driving my fight here. It is
12 the use of the water. And to buy it from the irrigation
13 district, as easy as that is, it is not the most efficient
14 way to provide water to our vineyards.

15 CO-HEARING OFFICER SECUNDY: All right. Thank
16 you.

17 All right. Closing statements.

18 But before we get to closing statements, just let
19 me ask. I do not see a need for briefs here. But, Mr.
20 Miller, are you preparing a brief written testimony of any
21 kind for this?

22 MR. MILLER: No, sir.

23 CO-HEARING OFFICER SECUNDY: Does the prosecution
24 team see a need for a brief?

25 STAFF COUNSEL OLSON: We do not.

1 CO-HEARING OFFICER SECUNDY: All right. Then we
2 will probably close the hearing after the closing
3 statements.

4 So let's have the closing statements first from
5 the prosecution team.

6 STAFF COUNSEL OLSON: And before we get there, I
7 need to ask that you put my exhibits into the record. So
8 I move --

9 CO-HEARING OFFICER SECUNDY: I'm a little
10 hesitant on the first exhibit if you were simply penciling
11 in who it's from as opposed to having an original document
12 that shows the origin.

13 STAFF COUNSEL OLSON: On the last two, you
14 mean --

15 CO-HEARING OFFICER SECUNDY: Yes.

16 STAFF COUNSEL OLSON: Introduced on rebuttal?

17 CO-HEARING OFFICER SECUNDY: Okay. So if indeed
18 they do contain the name of a water purveyor, that's fine.
19 If you're simply writing it in, that's not fine.

20 STAFF COUNSEL OLSON: I ask leave to amend
21 Exhibit 25 to include more of the contract so that it's
22 clear that it's a water use agreement from Mendocino
23 County.

24 CO-HEARING OFFICER SECUNDY: If you can show us
25 an original document, that would be fine.

1 STAFF COUNSEL OLSON: And we'll get that over the
2 lunch break.

3 CO-HEARING OFFICER SECUNDY: Okay. Thank you.

4 STAFF COUNSEL OLSON: Thank you.

5 CO-HEARING OFFICER SECUNDY: All right. Closing
6 statements, prosecution team.

7 STAFF COUNSEL OLSON: The most efficient way to
8 use water cannot be illegal. And I would argue that the
9 illegal use of water, no matter how efficient, is not a
10 very good argument here. And we sort of had trouble as a
11 prosecution team because we like Mr. Miller, and we
12 weren't sure whether this thing was built or not. And
13 it's become clear in this hearing that it is built. And
14 it puts us in sort of an awkward situation because it's an
15 unauthorized diversion.

16 And I ask that the Board really apply the law in
17 this case. The Division of Water Rights needs the
18 precedent that a new purchaser can't reset the clock on a
19 permit, no matter how nice he is or well intentioned. It
20 would wreak havoc on the administration of water rights
21 and it would be not consistent with the policy that we
22 apply to other water right permit holders to proceed with
23 due diligence.

24 So we recommend that you approve the proposed
25 revocation. And thank you for your time.

1 CO-HEARING OFFICER SECUNDY: Mr. Miller.

2 MR. MILLER: I would just like to emphasize what
3 I already have and, that is, that I am here not to fight
4 for cheap water and fight for a permit to increase
5 property value or anything of that nature. I'm solely
6 here to fight for a permit that exists on the property in
7 a central location, chosen in a central location to
8 provide water in a very efficient manner. And I'm trying
9 to avoid having to either reapply and get in what I'm told
10 is a 13- to 15-year waiting list for a second permit -- or
11 a second application; or do what most folks in Potter
12 Valley have done, which is go to the Potter Valley
13 Irrigation District.

14 Use of their water, sure, it is cheap. But it
15 will require me with frontage on the river to divert water
16 from the Powerhouse Canal through their canals, lose a
17 considerable amount of water in the inefficiency of
18 transferring that water now to a secondary reservoir, and
19 then having to store that year-round for a frost
20 protection system that is a three-months process --
21 three-month window during high flow.

22 We are -- because of liners and protection of
23 liners, we'll be required to hold 20 to 25 acre-feet
24 year-round on our property. And, you know, that water
25 will be open for evaporation and general loss, and it is

1 not something that we need. What we need is water
2 conveyed directly from the canal in that's central
3 location in the amount that's prescribed under this
4 permit.

5 And that is why I'm here. I know it's a long
6 shot. But it was worth an attempt if fight for.

7 And thank you.

8 CO-HEARING OFFICER SECUNDY: Thank you, Mr.
9 Miller.

10 Before I wind this up, the exhibits. We will
11 admit into evidence Prosecution Exhibits 1 through 26 and
12 the Permittee's Exhibits 1 through 6. We need to add
13 Exhibit 25 by 5 p.m. today. So if it is in by 5 p.m.
14 today, we will add it; if not, we will be closing this
15 record at 5 p.m. today and no further exhibits will be
16 allowed.

17 Mr. Miller, for your benefit, we will now take
18 this matter under submission. All persons who
19 participated in this hearing will be sent a notice of the
20 Board's decision on this matter and any forthcoming Board
21 meeting during which this matter will be considered.

22 I thank all of you for your interest, cooperation
23 and participation in this hearing.

24 This hearing is adjourned and the record is
25 closed, with the exception of the exhibits coming in by 5

1 o'clock today.

2 Thank you all very much.

3 (Thereupon the hearing of the Water Resources

4 Control Board, Division of Water Rights,

5 adjourned at 11:30 a.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing California State Water Resources Control Board,
7 Division of Water Rights hearing was reported in shorthand
8 by me, James F. Peters, a Certified Shorthand Reporter of
9 the State of California, and thereafter transcribed into
10 typewriting.

11 I further certify that I am not of counsel or
12 attorney for any of the parties to said hearing nor in any
13 way interested in the outcome of said hearing.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 2nd day of September, 2005.

16

17

18

19

20

21

22

23

JAMES F. PETERS, CSR, RPR

24

Certified Shorthand Reporter

25

License No. 10063