

STATE WATER RESOURCES CONTROL BOARD

PUBLIC WORKSHOP

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SUBTERRANEAN STREAMS FLOWING
THROUGH KNOWN AND DEFINITE CHANNELS

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PAUL R. BONDERSON BUILDING
SACRAMENTO, CALIFORNIA

MONDAY, APRIL 24, 2000
10:00 A.M.

Reported by:

ESTHER F. WIATRE
CSR NO. 1564

CAPITOL REPORTERS (916) 923-5447

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APPEARANCES

BOARD MEMBERS:

ARTHUR BAGGET, HEARING OFFICER
JOHN BROWN
MARY JANE FORSTER

STAFF:

JULIE CHAN, Senior Engineer

COUNSEL:

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AUDIENCE:

STEVE HALL
GERALD D. SHOAF
STEVEN B. BACHMAN
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SACRAMENTO, CALIFORNIA

MONDAY, APRIL 24, 2000 10:00 A.M.

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HEARING OFFICER BAGGET: I'll call the workshop to order.

Good morning. Welcome to the State Water Resources Control Board workshop on subterranean streams flowing through known and definite channels.

I am Art Bagget, Acting Chair of State Water Resources Control Board.

To my right is Board Member John Brown.

MEMBER BROWN: Morning.

H.O. BAGGET: And Mary Jane Forster to my right.

MEMBER FORSTER: Morning.

H.O. BAGGET: And the Board's Acting Director Ed Anton is in the audience. I think Harry's somewhere around in the audience, too, Harry Schueller, Division of Water Rights.

Assisting today at the staff table is Julie Chan, Senior Engineer, geologist. Erin Mahaney, Staff Counsel. Other staff are present and may assist from time to time.

The purpose of this workshop is to gather information regarding the test of classifying subterranean streams flowing through known and definite channels. We also have, I should mention, a Court Reporter. Esther said she would appreciate cards when you come up to speak to help her

1 record the proceedings.

2 If you wish to speak today, please fill out blue
3 cards. A number of them here. If you are not sure that you
4 wish to speak, make an oral comment, please fill out a card
5 and write "If Necessary" if you think you might. This will
6 assist the Board in determining the amount of time needed
7 today. The Board will convene tomorrow only if there is
8 insufficient time today for all participants to speak.

9 A Court Reporter is present who will make a transcript
10 of the statements made at the workshop. If you wish to
11 obtain a copy of the transcript, please make arrangements
12 directly with the Court Reporter.

13 Before giving your comments, please state your name,
14 address and affiliation so the Court Reporter can record the
15 information in the transcripts. Please limit your
16 presentation to ten minutes so that everyone has an
17 opportunity to participate, although, judging from the
18 number of cards, we have quite a bit of flexibility today.

19 If a previous speaker has already covered an issue that
20 you would like to raise, you may so indicate in the interest
21 of time. If you have submitted written comments, please
22 limit your oral comments to a brief summary of your written
23 comments and help us clarify those.

24 This is an informal workshop. There will be no sworn
25 testimony or cross-examination of participants. The Board

1 and its staff may ask questions to fully understand your
2 comments.

3 The Board will not take any action at this workshop.
4 The Board will take comments received at this workshop under
5 advisement. The Board is aware of the concern about the
6 applicability of the test for clarifying subterranean
7 streams flowing through known and definite channels. While
8 the Board has statutory jurisdiction over subterranean
9 streams, the Board is obligated to exercise that
10 jurisdiction.

11 The Board and staff are here today to hear from you and
12 to gather information about this issue. With that, we will
13 hear from staff.

14 MS. MAHANEY: Good morning.

15 As you are aware, the Water Code provides the State
16 Board with permitting authority over surface water and
17 groundwater classified as subterranean streams flowing
18 through known definite channels. The Water Board does not
19 have permitting authority over percolating groundwater.
20 Accordingly, when the State Board receives an application to
21 appropriate groundwater or a complaint regarding the
22 diversion of groundwater, the State Board may have to
23 evaluate the legal classification of the groundwater and
24 determine whether it is a subterranean stream subject to
25 the State Board's jurisdiction.

1 In determining the legal classification of groundwater,
2 the State Board and its predecessors have relied on the
3 California Supreme Court 1899 decision in Los Angeles versus
4 Pomeroy which established the distinction between
5 subterranean streams and percolating groundwater. The State
6 Board has interpreted Pomeroy and other applicable
7 precedents to require that the following physical conditions
8 exist for groundwater to be classified as a subterranean
9 stream:

- 10 1. A subsurface channel must be present.
- 11 2. The channel must have relatively impermeable bed
12 and banks.
- 13 3. The course of the channel must be known or capable
14 of being determined by reasonable inference.
- 15 4. Groundwater must be flowing in the channel.

16 To facilitate the gathering of information regarding
17 the test for classifying subterranean streams, the workshop
18 notice identified the following issues:

19 One, what legal tests should the State Board apply in
20 determining whether subsurface waters should be classified
21 as part of a subterranean stream or percolating
22 groundwater?

23 Two, what information should the State Board consider
24 when determining whether subsurface waters are part of a
25 subterranean stream or percolating groundwater?

1 Three, should the State Board propose rules or guidance
2 for classification of which subsurface waters are subject to
3 the water right permitting and licensing system administered
4 by the Board? If so, should the State Board propose or
5 establish those rules or guidance through administrative
6 rule making as a proposal for legislation in a precedent
7 decision or through other means?

8 MS. CHAN: The case law that established the test for
9 subterranean streams dealt with property in the southeastern
10 end of the San Fernando Valley, as you can see from this
11 projected map, and the line of question is shown in purple.
12 This area is also called the Los Angeles River Narrows. We
13 anticipated that there might be some discussion of this case
14 or this area, so this map is provided for your use. And it
15 may be helpful when discussing geographic areas.

16 This is a geologic map of that same area, and this is a
17 blowup of the Los Angeles River Narrows area, also showing
18 the land and the important deposits, the bedrock, the
19 alluvium in yellow, older alluvium in orange-red and bedrock
20 in all those other colors.

21 Please feel free to refer to these maps if appropriate
22 to your discussion. We can bring them up easily. We'll be
23 happy to display any of these projections at your request.

24 H.O. BAGGET: Thank you.

25 With that, we begin.

1 Steve Hall, ACWA, had a number of speakers.

2 MR. HALL: Good morning, Members of the Board and
3 staff.

4 My name is Steve Hall. I am the Executive Director of
5 the Association of California Water Agencies.

6 I want to begin by thanking the Board for the workshop.
7 We requested it. And I can tell you that in the time
8 between February and today, we have tried to use the time
9 given by this interval and in preparation for this workshop
10 wisely. I think the result has been, although we don't have
11 definitive answers for you today, I think you will find a
12 number of speakers echoing the same themes, not only those
13 that are designated to speak on behalf of ACWA, but others
14 who will follow.

15 And I think while we don't have definitive answers to
16 the questions posed by the Board in its notice, I think we
17 can provide and have provided, both in our written response
18 and in what you will hear today, some input that the Board
19 will find valuable and useful as you deliberate.

20 It is our desire to continue to work with the Board and
21 the staff, because I think you will all agree having dealt
22 with this issue, it is hard enough to sort out the facts and
23 equities in surface waters where you can actually see the
24 water moving. Its order of magnitude is more difficult when
25 it is underground. You really don't know what you have.

1 Even the opening presentation by the staff indicates the
2 standard that is being used today is over a hundred years
3 old, based on case law, and it is imperfect, I think we
4 would all agree. However, there have been a number of
5 investments made over this 100-plus year period based upon
6 that legal standard.

7 So I think the Board is right to proceed cautiously as
8 you move forward in a way that would in any way
9 fundamentally or permanently change the standard.
10 Nevertheless, I think what you will find is that the experts
11 -- and I am going to try to get out of the way as quickly as
12 possible and let the experts address this. The experts do
13 agree that there are criteria that would be helpful to the
14 Board as you begin to wrestle with this definition of what
15 is under the Board's jurisdiction and what is not.

16 We tried to answer the questions that the Board posed
17 in its notice in a letter that we submitted dated April 18th
18 under our letterhead. I want to recommend to the Board that
19 you read this document. I think it is a very well
20 considered, well thought out piece of work. I can say that
21 freely because I had very little to do with it, though we
22 have some prominent experts who did work on it. And even as
23 a layperson, I found it extremely helpful and
24 understandable.

25 Now in summarizing our written response in response to

1 the first question, what legal test should the Board apply,
2 we believe that there needs to be somehow a melding of the
3 bed and banks test and some criteria that should be
4 developed by the Board. I will speak about this more in
5 just a few minutes as to how the Board should go about it,
6 addressing and utilizing this criteria. But basically the
7 criteria should be that whatever test is applied should be
8 workable and repeatable. That is, that a reasonable person
9 knowledgeable in the field could use this criteria time
10 after time and come up with fundamentally the same kinds of
11 answers, although, obviously, each case is different and so
12 the exact specifics might and probably will differ from case
13 to case.

14 Second, it should result in no major changes in the way
15 percolating versus underflow should be determined. And I go
16 back to what I spoke of earlier; that is, what we have all
17 used as a legal test should not be turned on its head by
18 whatever the Board does. Because it would, frankly, we
19 believe it would result in legal chaos in terms of how
20 people have expected the rules to be enforced and how they
21 might be enforced in the future.

22 And, finally, those criteria should result in
23 determinations that reflect as closely as possible real
24 conditions, i.e., what you actually find in the field.
25 Because we know it is going to be different in each and

1 every case. We also know that is hard to do, but worth the
2 effort.

3 Now, in response to the second question -- by the way,
4 I'm summarizing briefly. Others that will follow will go
5 into much greater detail in terms of their responses to the
6 questions.

7 What information should be considered by the Board?
8 There are four that we enumerated. One, a hydraulic
9 connection between surface and groundwater. Two, the age of
10 the water, knowing that the age of groundwater if it's much
11 different than the surface water is likely not to have come
12 from that source. Three, the water chemistry. If it is
13 much different, there has to be at least some way to explain
14 the difference in the chemical makeup of the water or it is
15 not likely from the same source. And, four, the hydraulic
16 gradient needs to be consistent between the surface and
17 groundwater.

18 In answer to your third question, should the Board
19 propose rules or guidance for the classification of what
20 subsurface waters are subject to the water right permitting
21 and licensing system by the Board, this is probably the most
22 difficult of the three questions to answer. And, in fact, I
23 don't think there is an answer, per se, that I can give you
24 today. Perhaps others will be willing and able to volunteer
25 a more definitive answer.

1 In ACWA's estimation the best way to approach this is
2 for the Board to convene a panel of experts to work together
3 to try to provide the guidance necessary both for the Board
4 and for the parties to ascertain what sort of guidance is
5 possible to do that meets the tests that we all need to have
6 met here, and I will get to those in just a few moments.

7 Start with a panel of technical experts and work toward
8 some consensus of view on what sort of guidance the Board
9 should provide. And then, assuming we get consensus among
10 those experts, I think it would be appropriate and
11 relatively easy to put that in the form of legislation.
12 Obviously, the Board staff and Board itself would have to be
13 satisfied with this consensus approach. Assuming that can
14 occur, we think it would be fairly easy to imbed in
15 legislative language those consents and get it passed
16 relatively easily by the State Legislature so that we can
17 all have the clarity and the consistency that we desire
18 while again reserving the precedent that has been set for
19 now over a hundred years.

20 Now, I think we all understand that consensus, while
21 possible to reach, may not be reachable within a matter of a
22 few weeks. I will tell you that ACWA has, being the rosy
23 optimist that we are, we have developed some place-holder
24 language and so that in the event we can all come together
25 in the fullness of time, and the fullness of time is brief

1 time, then we can actually pass legislation this year.

2 In the event that doesn't occur, we can always address
3 this issue legislatively next session. One way or another I
4 think my point is that ACWA is ready and willing to proceed
5 expeditiously if and when we can reach a consensus view and
6 try to get some legislative action on this so that we all
7 understand what the rules of the road will be.

8 In closing, let me just say there are four points we
9 believe that are imperative, four principles if you will,
10 that have to be preserved in whatever the Board does.
11 First, California's groundwater history has been
12 characterized by local control. We believe that needs to be
13 continued. There are, of course, concerns about that local
14 control and have been concerns for a number of years. That
15 is why AB 3030 was carried by then Assemblyman Jim Costa and
16 sponsored by ACWA and is today the pattern, the model if you
17 will, of how local groundwater management plans are to be
18 developed.

19 I have to say that in the years since AB 3030 passed,
20 we have seen a number of successful groundwater management
21 plans implemented based on that model. I think that can and
22 should continue as the pattern and practice of California
23 with respect to the groundwater management.

24 Second, I spoke of this before but it bears repeating,
25 that is whatever is done has to provide certainty and

1 consistency, so that all of the parties understand what
2 those criteria that the Board ultimately adopts will result
3 in. They can make a reasonable assumption about how their
4 groundwater basin will be addressed, if and when the matter
5 comes before the Board.

6 Third, and again this bears repeating, we have to
7 protect the investments and the legitimate rights that have
8 been established by people who are now pumping groundwater
9 under the existing law and guidance that case law provides.

10 And fourth, we have to settle this issue of where the
11 State Water Board's jurisdiction ends. That was my staff
12 telling me my time is up, I guess. Let me just repeat.
13 There has to be clarity in where the Board's jurisdiction
14 ends. What is that distinction between subsurface flow and
15 percolating groundwater? We frankly feel that, and I want
16 to be careful in how I say this, we feel that the staff
17 recommendation in the case that is before the Board now is
18 well-intentioned but does extend beyond what the Board's
19 jurisdiction is today, which is, frankly, why we are
20 interested in pursuing legislation so that the Board knows,
21 the Board staff knows and the parties know where that
22 jurisdiction line should be drawn.

23 And I can assure you that ACWA and its members will
24 continue to work with the Board to meet the principles, the
25 objectives, that I have outlined in those four objectives

1 that I just mentioned. With that, I will be happy to answer
2 questions. Following me will be Jerry Shoaf, an attorney
3 who is a member of our State Legislative Committee and Legal
4 Affairs Committee. He will be here in place of Bob Maddow,
5 our Legal Affairs Chairman.

6 MEMBER FORSTER: I have a question, Steve. When you
7 talk about and you mention the legislation, have you already
8 done a mock-up bill? And are you going to share that with
9 us so we don't go down a lot of convening and having --

10 MR. HALL: We do have some language that has been
11 drafted, and I wouldn't say that it is ready for sharing
12 with anybody outside of the family because I am not sure we
13 have agreement within the family about that language yet.
14 But the intent, Board Member Forster, is to, as quickly as
15 we can, get consensus around and approach. As soon as that
16 happens, we will be happy to share it with the Board and
17 staff. And, obviously, we would like to do that sooner
18 rather than later, in the event we can get consensus around
19 the technical, that needs to be addressed.

20 MEMBER FORSTER: So when you say short, what time frame
21 are you talking about to consider convening a panel of
22 experts and then you talked about perhaps getting a bill
23 this year? So what time frame are you talking about?

24 MR. HALL: I don't mean to cut be here, but I will
25 tell you that I go back and forth on that issue. I have

1 been in on just a fraction of the conference calls that have
2 been convened by ACWA and others to address this issue. We
3 were in a brief conversation before this workshop.

4 So it sort of depends on which day you ask me how long
5 I think it will take. There are times when I think we could
6 fairly easily come to some agreement among the technical
7 experts. And there are other times when I am not so sure.
8 And I do think that we can and actually have framed the
9 issue within -- the ACWA family has framed the issue. I
10 think you will hear enough about that framing to agree that
11 we have done a pretty good job of drawing the lines around
12 this issue. And I guess to some extent it depends on how
13 far the Board is interested in going in terms of providing
14 clarity. Everybody wants clarity until you get into
15 the messy work of providing it. Then what you find is the
16 cases are so different and the distinction between
17 percolating groundwater and underflow are so nebulous that
18 it really is -- it will require a balance between trying to
19 provide clarity and trying to preserve flexibility so you
20 can address each case as it comes.

21 There was one person -- and I guess I would argue for
22 this. That we need to somehow develop a system that
23 provides for adaptive management so you have rules of the
24 road, but then you have a robust sort of interactive system
25 that allows you to use those rules as flexibly as you can

1 and still preserve certainty.

2 There was one person in our discussion this morning
3 that suggested that if you can convene this expert panel,
4 which we strongly recommend you do, that you don't convene
5 it and then disband it when the immediate work is done,
6 that you use that panel as cases come before you as a
7 resource for you. And they obviously wouldn't and couldn't
8 take your place as a decision-making body, but I think the
9 Board and the public would be well served if you would use
10 them as an advisory group to help you sort through the
11 equities and facts in each case.

12 MEMBER FORSTER: Thanks.

13 H.O. BAGGET: Any other questions?

14 MR. HALL: Right now I'm pretty happy about that and I
15 will turn it over to Jerry. Jerry will be followed by Steve
16 Bachman who will also be speaking on behalf of ACWA.

17 MR. SHOAF: Morning.

18 As Steve mentioned, I am on the ACWA Legal Affairs and
19 Legislative Committees. I am standing in today for Bob
20 Maddow who unfortunately could not be here and sends his
21 regrets. He was principal draftsman of the position
22 statement that ACWA submitted.

23 So what I am going to try to do is to simply highlight
24 some of the legal points raised in the ACWA statement and
25 then Steve Bachman will address some of the technical

1 points. I am going to add a footnote because I submitted
2 some information on my own.

3 With regard to the first question: What legal test
4 should be used to classify groundwaters as either
5 percolating or part of a subsurface stream or underflow,
6 and whether the existing, venerable Pomeroy standard should
7 be junked or modified or retained? I think you can see from
8 the ACWA statement that ACWA has concluded that it should be
9 retained. But over the last hundred years or so technology
10 has changed. We now have the ability to look at a far
11 greater number of factors with reasonable certainty than
12 were available at the time the Pomeroy decision was
13 rendered.

14 As a result, ACWA has concluded it would be best
15 retained, the Pomeroy test, standard, the legal standard,
16 but take into account in its application the hydrogeologic
17 analyses that are now available to us in determining whether
18 and where a stream system has bed and banks and whether they
19 are involved in the subject application.

20 So retain the legal test, but modernizing it leads to
21 some other subissues, if you will. The first would be -- on
22 the first ACWA submits that it would be helpful if the State
23 Board would consider limiting its jurisdiction to underflow
24 There is a reason that we feel that. The first is that true
25 subterranean streams are a rare occurrence in California.

1 And it would be very helpful to not include those rare
2 exceptions as part of the general application. That would
3 narrow and simplify the problems following procedures.

4 Secondly, we think that when the term "subterranean
5 stream" was used in the Pomeroy case and in legislation it
6 was intended to refer to underflow. And lastly I guess I
7 covered the third. It would narrow and simplify the
8 approach to the problem solving.

9 Couple of other points to keep in mind. If the Pomeroy
10 standard is modified, the first is that the presumption that
11 underground water is percolating water should be retained.
12 We think that is very important.

13 Secondly, that the existing pumpers that would be
14 affected by a modification of the rules should be protected
15 somehow, perhaps by a grandfather clause. The reason being
16 that our statewide economy is based in very large part on
17 pumping of groundwater for domestic and agriculture
18 purposes. As Steve mentioned, turning the current rule on
19 its head would cause great economic disruption or at least
20 has potential for doing so.

21 Next point I would like to address is the
22 implementation on any change in the existing rule and how
23 that should be undertaken; that is, by administrative rule
24 making, by precedent decision, by legislation. And I think
25 as you heard Steve mention, it is ACWA consensus that it

1 should be undertaken by legislation, for the reason that
2 there is concern whether the State Board has the authority
3 to change a rule that was initially created by the
4 California Supreme Court and adopted by the Legislature in
5 Water Code Section 1200.

6 To eliminate any challenge or concern in that area we
7 think it would be best for the State Board to try to come up
8 with a consensus on modification, if you will, and then
9 formalize that change to the Pomeroy rule through
10 legislation.

11 The place holder that Steve has mentioned has been
12 considered by the Legislative Committee. And I agree with
13 Steve, we're not ready to share that one with the world
14 yet. I think the hope is to include in it -- for example,
15 currently it doesn't really answer the question where do you
16 draw the line. I am not sure that question is answerable.
17 It does not include any of the elements that we think we
18 might want to consider, including in that determinative
19 process should you use water chemistry, for example. Those
20 sorts of analyses hopefully could be agreed upon and then
21 included in a formula in legislation that might be more
22 directive and more specific. And the current placeholder
23 does not include any of that specific type of direction.

24 Lastly, I would like to talk very briefly about the
25 procedures. It would be, ACWA thinks, a good idea to hold

1 an initial hearing on the filing of an application to
2 appropriate groundwater to make sure that it is, in fact,
3 underflow or part of a subterranean stream system if you do
4 not restrict your jurisdiction to underflow by your own
5 initiative. The reason for that is as you saw in this case
6 -- well, what you saw, but as some of us believe happened,
7 the filing of the application virtually ended up with a de
8 facto ruling that you were looking at something within your
9 jurisdiction that was part of a stream system. And we think
10 that if that could be avoided in the future by automatically
11 having a hearing to make sure that it is either underflow or
12 part of a stream system so as to avoid that initial
13 assumption that it is something within your jurisdiction.

14 Lastly on that point, we think it would be good if the
15 State Board staff was not in the position of advocating a
16 position on the classification of groundwater.

17 On behalf of my clients in Southern California I
18 submitted a brief letter and memo that my partner Steve
19 Abbott had put together referring to the Arizona rules on
20 determining and maintaining the difference between
21 percolating groundwater and stream flow. And the point I
22 wanted to raise and I hope raised in that letter was
23 whatever criteria you come up with I hope that the practical
24 approach is not forgotten; that is, to use the term "bed and
25 banks" in the sense that they are ordinarily used by the

1 operating water world. That would be helpful to keep that
2 in mind.

3 Thank you for your time.

4 H.O. BAGGET: Any questions?

5 MR. SHOAF: Do I have to answer questions?

6 MEMBER BROWN: Jerry, in your suggestion, one of them
7 was that the State Board limit its jurisdiction to underflow?

8 MR. SHOAF: Yes, sir.

9 MEMBER BROWN: Could you give me your definition of
10 what you mean by underflow?

11 MR. SHOAF: Underflow would be connected to a surface
12 stream system if year-round or -- I have just frozen -- on
13 its seasonal work, whether or not it flows year-round that
14 has -- that is part of the bed and banks geographic geologic
15 system. My concern is that --

16 MEMBER BROWN: That there is a direct hydrologic
17 connection between the surface flow and the groundwater
18 underneath the stream?

19 MR. SHOAF: Yes, sir. You are dealing with a lawyer
20 here. I am actually going to refer that question to Steve
21 and the other experts. But basically that is my
22 understanding of the way ACWA would like to see it work.

23 MEMBER BROWN: All right.

24 Then the last suggestion that the State Board staff not
25 advocate a position. Can you elaborate on that a little

1 bit, Jerry?

2 MR. SHOAF: Yes, sir. I think that when an application
3 is filed for an appropriative rights permit, that it is not
4 appropriate for the State Board staff to actively campaign
5 on that issue, that the application represents one for
6 something within the State Board's jurisdiction or is not.
7 As we saw in the Pauma and Pala cases, it, in our minds,
8 creates an inherent conflict, because State Board staff
9 should be advising you folks on the proper role for you to
10 play.

11 MEMBER BROWN: I understand now. You cleared that up.
12 Thanks.

13 That is all, Mr. Chairman.

14 H.O. BAGGET: Follow-up on that. Mary Jane has a
15 follow-up on John's.

16 I guess you would argue that when an application is
17 filed, and there would be a presumption that it is
18 percolating groundwater, we have a law and motion-type
19 hearing, much like a law and motion calendar where one
20 hearing officer makes a call? Would you propose then that
21 the entire Board go back and vote on that, have a formal --
22 like a formal water rights process? Or would you propose
23 that a hearing officer can actually hear the evidence on
24 that presumption, whichever way you want to write the law,
25 and then make a call right then it is in or out?

1 MR. SHOAF: I think that would be appropriate. I think
2 the concern is notice go out and anyone that is challenging
3 or wishes to challenge the application on the basis that is
4 not something within the Board's jurisdiction would have an
5 opportunity early on to raise that concern, a challenge, and
6 not be faced with an assumption that by accepting the
7 application, the filing of the application, that there is --

8 H.O. BAGGET: Much like law and motion. You have a
9 hearing officer. I guess the question is then would --
10 normally the way that it works or the way it works legally
11 is that it goes back to the full Board for another -- the
12 hearing officer make a recommendation with staff, then it
13 comes back to the whole Board to vote on that, which is
14 fairly -- we can talk three or four months here pretty
15 easily.

16 MR. SHOAF: Yes.

17 H.O. BAGGET: That is something to think about. If
18 anybody else --

19 MR. SHOAF: I appreciate that concern.

20 H.O. BAGGET: That would probably take a change in the
21 law, likely. How -- if that is an idea, how would you see
22 that flushed out a little more?

23 MR. SHOAF: I think that needs to be given more
24 thought, certainly by me. It may have been given more
25 thought, but I am not aware of the conclusions.

1 MEMBER BROWN: You are talking about the concern of
2 bifurcating our staff. It appears that we have staff set
3 aside, a position already developed, and advocating a
4 position one side or the other and opposed to the staff and
5 hearing officer which are the neutral party.

6 Is that what you're concerned with?

7 MR. SHOAF: Yes.

8 MEMBER BROWN: Thanks, Jerry.

9 H.O. BAGGET: Mary Jane.

10 MEMBER FORSTER: I think they have asked questions that
11 I was going to ask. I am pretty okay with that. I am still
12 intrigued by the request that all of the petitions for the
13 -- what do we call them -- applications. I am sorry, all of
14 the applications be heard by a Board Member. Maybe if
15 everybody was comfortable with the process and criteria and
16 the definitions and all of that, then we would be able to
17 streamline the application process. But I know what you are
18 asking -- I know what you are asking for. I know you want
19 to have due process and know when these things are happening
20 so you have input. And I am just trying to think of how
21 many of those come in and how much -- how that would work
22 out. But we will give that real serious thought.

23 MR. SHOAF: I didn't discuss that point with Bob Maddow on
24 the phone. It may be that that the concern was addressed
25 toward the present situation. If there is a change in the

1 standard, everyone will feel more comfortable. That could
2 be a law and motion-type brief hearing just to see if
3 anybody wanted to complain. We will discuss that among
4 ourselves.

5 H.O. BAGGET: Thank you.

6 MR. SHOAF: Thank you.

7 Steve Bachman is next.

8 DR. BACHMAN: I am Steve Bachman. I am chair of the
9 ACWA Groundwater Committee. I am also the groundwater
10 manager for the United Water Conservation District and work
11 also for the Calleguas Water District.

12 I have a Ph.D. in geological sciences so I represent
13 the more technical side of this. If you ask me a legal
14 question, I won't try to answer it.

15 We have been weighing some different possibilities
16 here, and I think -- let me just address the one fundamental
17 thing first. And by the way, I am going to be followed up
18 by three other groundwater professionals. And I think we
19 all are just doing something a little different from the
20 table from our different experiences here.

21 I think you are going to hear hopefully between the
22 four of us, we are going to fill in some blanks here that I
23 won't be able to fill in myself entirely.

24 One of the things, though, that I think bothered
25 everybody is the use, from technical side, is the use of

1 subterranean streams in the first place. Subterranean
2 streams is an 1800s' terminology. Nowadays when someone
3 uses subterranean streams, professionally they are looked at
4 somewhat askance. Basically it is dozers and people who are
5 trying to sell somebody on the underground streams that come
6 from wherever it is, the Sierra, the Great Lakes, wherever
7 it is, a recharge from those areas. You hear that. I
8 don't think most professionals use subterranean streams. I
9 think that we are on better footing when we talk about
10 underflow, and I will take on that particular question from
11 you.

12 Underflow as we see it is an underflow of a surface
13 body of water. In this case, primarily a stream. And what
14 we are talking about is the area of the under -- that is
15 under the influence of the surface water that is either
16 correctly beneath the stream or perhaps along its banks as
17 well.

18 Now the question that is the tricky one that we are
19 going -- we are not going to tell you we have the answers at
20 this point is where you draw the line where that underflow
21 stops and where the rest of the basin occurs, the
22 percolating groundwater part of the basin. That is really
23 the fundamental question.

24 Now, one of the things when we considered how to
25 potentially test that, there was the reaction at first was

1 just to throw bed and banks out entirely. Because many of
2 us felt that it was not a really appropriate technical way
3 to look at the situation. The problem, however, when you
4 throw bed and banks away completely, is you are probably
5 upsetting the apple cart entirely and there may be no water
6 rights left in California. We don't think that is
7 particularly good.

8 So what we are trying to do is look at a situation in
9 which we preserved bed and banks, but modify it or bring in
10 other information in addition that are equally as important
11 as bed and banks. The reason I said equally important is I
12 think what we said in our letter there was virtually
13 unanimous opinion that the Pauma and Pala basin basis was
14 incorrect.

15 From a technical side I think almost everybody that we
16 talked to -- in fact, everybody I talked to agrees with
17 that. The reason we think that that occurred was that the
18 bed and banks became the controlling geologic factor that
19 was applied. Other information that was brought in was
20 always subservient to bed and banks, and we do not believe
21 that that is a correct opinion. I won't cross the line here
22 -- I probably just crossed the line on talking about that.
23 It is the last time I will mention Pauma and Pala Valleys.
24 That is just the reason we are here because we all felt that
25 way.

1 MEMBER FORSTER: Just for those that weren't here, we
2 haven't finished the hearing that case yet and this isn't
3 the time hearing on it. That is why you have to be really
4 sensitive so that nobody is disenfranchised.

5 DR. BACHMAN: I won't mention it again.

6 MEMBER FORSTER: Thank you.

7 DR. BACHMAN: But coming back to the kind of test that
8 we have, we believe that we should not upset the apple cart
9 so that we should create something in which we are not
10 having major changes, but at the same time we are bringing
11 more geologic reality back into it. Frankly, in the 1800s,
12 as other people following me will say, we are in the Dark
13 Ages knowing of what happened in groundwater. There was
14 very little understanding of what went on in groundwater, so
15 you wouldn't expect these other tests to come in to play.
16 Probably the most difficult thing is to have a test that is
17 workable and repeatable. Something that isn't just if you
18 put ten groundwater professionals in a room that five of
19 them would agree with one, somebody else would have some
20 other idea and the rest of them would have some other idea.
21 You obviously don't want that. I think that is probably the
22 most difficult proposition is to decide, how to play some of
23 the other criteria.

24 We think, however, that it can be done. You will hear
25 this, seeing other people's advance testimony, you are going

1 to hear this until you are tired. We all believe that there
2 should be a technical panel that does look at this. Having
3 been through some of the discussions with ACWA, I do know
4 how important everybody's experience is in this. I think
5 you need to get several people in the same room that have
6 had experiences in different places so if they say, "Let's
7 have this be the test," and someone says, "But if you do
8 that here in this basin, it wouldn't work," so you go back
9 to the drawing boards again.

10 I think that institutional experience is very important
11 to bring in here so you know something is going to be
12 workable.

13 What kind of information should be applied, and we
14 supplied you with a list which is basically the list that we
15 supplied to you in February. And this was not meant to be
16 an exhaustive list. It also wasn't meant to be a list of
17 things that a single one would be determinative. We believe
18 that you have to bring all these different things in to
19 play. And Steve Hall mentioned some of them. A hydraulic
20 connection to the stream, to the underflow underneath the
21 stream or on the sides of the stream.

22 There should be some good connection there. We have
23 suggested a test, although it doesn't necessarily have to be
24 a definitive test. That is that you see something that
25 basically reflects the stage of the river when the river is

1 high. Maybe during one part of the day even that the
2 adjacent groundwater would show the same thing. Again, that
3 is just a suggestion.

4 Another one, age of waters which is a little trickier.
5 It is one of those things if the surface water is zero years
6 old and the groundwater is five days old that is underneath,
7 is that enough of a difference? Clearly not. I think
8 something like age of water would do, it would be something
9 that if the water that you are looking at is a hundred years
10 old or 50 years old, then the presumption of percolating
11 groundwater is very strong. So it wouldn't be something
12 that you could be just a fine line. Something that you see
13 a big extreme that would be, perhaps by itself, a definitive
14 criteria.

15 Another one would be water chemistry. As mentioned
16 before, you are going to hear this again. Water chemistry
17 you can also use as well. Again, the whole basin has the
18 same water chemistry as that river that is probably not
19 definitive because it may all have the same source. If,
20 however, an area of the basin or the majority of the basin
21 has water chemistry that is different from the river, then
22 the presumption would be that the source is different. It
23 has had some longer travel time down through the sediments
24 to pick up the minerals that make it different water
25 chemistry, and that would be enough time that you would not

1 have any direct connection to the river and would be
2 considered percolating groundwater.

3 Hydraulic gradients can also be brought in for a
4 number of wells, both well tests or looking at just static
5 water levels to determine whether or not what kind of
6 connection you might have. Again, rarely, I think, are
7 these single items going to be definitive. All these things
8 need to be brought in with the other criteria.

9 That brings up a point that Steve Hall mentioned to me
10 that he didn't mention, and I think this is really
11 important. And that is that I think we have to start in all
12 of our thinking with the presumption that whatever we are
13 looking at is percolating groundwater. Essentially, the
14 state law says that, and I think we all agree that is the
15 way to start, presumption of percolating groundwater and
16 then you look at whether or not it has surface water
17 connections.

18 Finally, I think that what is most important here is
19 that we do have a lot of tools that we did not -- didn't
20 have in the past. We have lots of experience. In bringing
21 the experience and tools together in a panel and consider
22 some of those criteria, I think, are definitely the best
23 paths, so we are looking at something that is closest to
24 technical reality without basically overturning water rights
25 that have been established for years.

1 Thank you.

2 H.O. BAGGET: Yes.

3 MEMBER BROWN: Steve, let's talk about the technical
4 panel for just a minute.

5 DR. BACHMAN: Okay.

6 MEMBER BROWN: Are you talking about establishing a
7 technical panel to help establish criteria for
8 determinations or a technical panel to review the evidence
9 for a decision?

10 DR. BACHMAN: I think there are two parts to that
11 question, obviously. The first one, I believe it is
12 important to have a technical panel to look at factors and
13 potentially how to use the factors. For your staff to do
14 that.

15 MEMBER BROWN: For a decision?

16 DR. BACHMAN: Recommendations for your staff and for
17 you.

18 Factors that would be used and potentially how they
19 would be weighted, what some of the criteria would be.

20 MEMBER BROWN: Establishing criteria?

21 DR. BACHMAN: Establish criteria. That would be the
22 first task I think we are talking about here.

23 MEMBER BROWN: That would be very helpful. What about
24 your technical committee to make determinations on rules of
25 evidence?

1 DR. BACHMAN: I think that, and that has been obviously
2 mentioned before. After this first -- after this initial
3 fact-finding or whatever we want to call it committee to
4 look at what criteria, what factors, might be used, then I
5 think it would be a shame to just walk away from that kind
6 of expertise when your staff and you are faced in the future
7 with tougher technical decisions. I think that it or a
8 committee like it could be used at a later time as a
9 technical committee to bounce some of these things off of.
10 Because I think it brings in not only people that are every
11 day working with these kinds of things, but also brings in a
12 wide expertise from across the state potentially looking at
13 different kinds of basins and realizing how things work in
14 one situation and what kind of test may be applicable to
15 this kind of basin. So I think perhaps an advisory role as
16 a second part of it. Maybe not the same committee.

17 MEMBER BROWN: Here is something interesting that I
18 have observed as a hearing officer for several of these
19 issues, is that officials which I have a great respect for
20 have given testimony for the record opposite to one another,
21 will have experts in engineering, geology and all of this,
22 they are representing their clients to the best of their
23 ability. And they provide evidence and it is supported by
24 years of being a professional. And interesting enough, we
25 can have another professional with the same credentials on

1 the other side of the dais giving evidence just the
2 opposite.

3 And we need somebody to help sort through this to see
4 where the preponderance of this evidence lies. If we bring
5 in outside experts, attorneys, engineers and geologists,
6 that normally work for a client how would that compare, do
7 you think, with staff that has no clients, in trying to make
8 a fair determination based upon the rules of evidence? See,
9 another problem I have observed is that regardless how much
10 one of us may have experience in a given area, and often we
11 do as Board Members, that is part of the criteria for being
12 selected, but that experience and knowledge that we have
13 cannot be used in making a determination if the parties
14 don't get it into evidence. Our decision is based upon what
15 is submitted by the parties.

16 So the question begs -- I can see where a technical
17 committee could be very valuable in helping to establish
18 criteria, and I for one would welcome that. I haven't yet
19 figured out how we can use that same sort of energy without
20 biasing one party or the other.

21 DR. BACHMAN: I understand what you are saying. Let me
22 answer -- there were several questions imbedded in those
23 comments.

24 The first one is we wouldn't be able to consider any
25 evidence that was not brought in during the hearing. Of

1 course, once you have established criteria that are
2 important, hopefully the consultants that are involved in
3 that will bring information to bear based on those different
4 criteria. So hopefully we'll have a better perspective of
5 what is happening, a wider range of evidence. Hopefully
6 that will answer that part of it.

7 Let me bring in a little personal experience here, and
8 being a consultant myself, I don't want to bad-mouth
9 consultants. Usually when you end up working for a single
10 party, you have a tendency to use your own knowledge,
11 obviously, and your own experience, and you start coming
12 down a path of interpretation. And there are not a lot of
13 checks and balances from the wide breadth of knowledge of
14 the field necessarily that you are doing that.

15 What I think we are looking for, we are looking at
16 something in which we can bring that wide breadth in
17 there. Let me bring an example. I worked for one party on
18 the adjudication of Santa Paula Basin which occurred four or
19 five years ago along the Santa Clara River in Ventura
20 County. Part of the court settlement of that was to put
21 together a technical committee to answer the questions that
22 came up during the adjudication. Basically, what was the
23 safe yield? What kind of operational mode can you have?
24 So, we put together a technical committee to answer that.
25 And the technical committee was made up of exactly the same

1 technical people who worked for the different three parties
2 in the adjudication who all disagreed about what the safe
3 yield was.

4 We are now on the same road, coming up with the same
5 conclusions because of all the interaction that we are
6 having along the way. One person says, "Well, you know, if
7 you make that interpretation, maybe that is not going to
8 work if you come down here." You try to convince -- bring
9 in your own experience to convince everybody of the other
10 parties of where to go. We are in lock step on this one
11 right now where we were not when we were all coming in from
12 a little different aspects with perhaps different
13 information and different viewpoints.

14 So I think that the committee looking at this is maybe
15 a little less worrisome. If you have two different parties
16 that are bringing this to you that are in disagreement, when
17 you have a larger group that can kind of start from scratch
18 and bring everything to bear, talk out the problems as they
19 come up with pieces of the interpretation, I think you are
20 more likely to get some resolution than if you have two
21 parties, obviously opposing ends, to start with. I think it
22 is a workable thing, if that is what you are worried about.

23 The rules of evidence, obviously, hopefully the party
24 will get that in as you know what the factors are that are
25 going to be considered. It is a long answer to your

1 question.

2 Did I cover everything that you asked?

3 What did I miss?

4 MEMBER BROWN: We have a long day.

5 MEMBER FORSTER: I was just going to make a comment. I
6 know what Mr. Brown is concerned about. There is a process
7 that we just can't abrogate to an advisory committee the way
8 the State Water Board works on making these kinds of
9 decisions. I wouldn't expect you to be a hundred percent
10 familiar with that. We have other models of what you are
11 asking for. That we have Tetrattech that helps with certain
12 permits in front of the Board, Water Reclamation summit that
13 meets quarterly. I am the Board liaison on that. They
14 bring up a lot of water reclamation issues. There is a
15 Storm Water Task Force that meets and really talks about the
16 storm water issues.

17 So we have other models that are helpful that don't
18 really get into the formal process that the Board has to go
19 through on applications and permits. But they assist in a
20 lot of different ways. So those are things we would have to
21 explore.

22 DR. BACHMAN: I think that is really the role we are
23 talking about here. We are not talking, at least I am not
24 personally talking, about a panel here that is going to make
25 a decision for the Board and the Board staff. I don't think

1 that is what we are talking about. I think we are talking
2 about bringing a perspective and advice.

3 H.O. BAGGET: Thank you.

4 Next we have Anne Schneider.

5 MS. SCHNEIDER: Thank you, Chairman Bagget and Members
6 of the Board. I am Anne Schneider with the firm of Ellison
7 & Schneider in Sacramento.

8 At your February 2nd workshop I shared my thoughts with
9 you about the need for a thorough modern analysis of
10 groundwater classification issues. I recommended at that
11 workshop that we have a discussion, such as the discussion
12 we are having today. In particular, I recommended that you
13 seek input from the very best experts in the field of
14 groundwater hydrology. And in my view, this panel here
15 today, which I will introduce in a moment, is exactly that.
16 It is the most stellar panel that could be convened on
17 groundwater hydrology in California today. These are three
18 of California's foremost experts.

19 I want to follow on your latest set of questions by
20 noting that I myself and none of these experts are here on
21 behalf of any client. That was sort of a rule of engagement
22 for participation in this panel. Because I was concerned
23 and these experts are concerned that you understand that
24 they are bringing to you their extensive expertise and
25 teaching experience as well and want to use that to make

1 that available to you to move forward on this issue.

2 I think Joe Scalmanini said in one of our preparatory
3 conference calls it is scary that so little attention has
4 been paid to this groundwater classification issue for a
5 century. It is time to bring a great deal of attention to
6 it. Joe Scalmanini is a registered civil engineer. He has
7 over 30 years of experience in groundwater hydrology. He
8 has a very well-respected firm in Woodland, California. It
9 is specializes in every aspect of water well drilling and
10 groundwater hydrology. Joe has taught and consulted
11 extensively.

12 Dr. Dennis Williams is a geologist, a certified
13 hydrogeologist and groundwater hydrologist. He also has
14 over 30 years of experience. He has a consulting firm in
15 Claremont, California, in Southern California, and he has
16 taught and consulted throughout the world.

17 And Dr. David Keith Todd is a registered civil
18 engineer. He has over 40 years of experience in the field
19 of groundwater hydrology. He has a very well respected firm
20 in Emeryville, California. He is Professor Emeritus of
21 civil engineering in the University of California at
22 Berkeley and he has taught and consulted throughout the
23 world as well.

24 All three of these experts have worked from time to
25 time, many times, on the issues of groundwater

1 classifications. They have worked on these issues in
2 California and throughout the world. I have asked that they
3 speak openly on the questions that are presented. They have
4 jointly prepared written comments which have been submitted
5 to you. But I also asked that they interrupt one another,
6 insert their thoughts and be as informal as possible to
7 stimulate and exchange for you.

8 I know, Mr. Bagget, that it is up to you, but it seems
9 appropriate that they may be interrupted by Board Members
10 who have questions at any time.

11 There are two main themes that echo in various respects
12 the statements made by the speakers on behalf of ACWA. This
13 is not an ACWA panel. This is a separate panel, and yet
14 there is extensive agreement. The first of these two themes
15 is that we all have come here because of a very deep concern
16 that recent Board analyses of groundwater classification
17 issues do not portend well for certainty in the water
18 industry.

19 There is a wider and wider potential application of the
20 Pomeroy case in ways that many of us believe were never
21 intended. So a huge uncertainty is threatened. And that is
22 why the room is filled again today, as it was in February
23 and as it will be probably every time you look at this
24 issue. So, therefore, a theme is: there needs to be
25 reassurance to the water industry on this question. It is

1 time. A hundred years of silence and ignoring the question
2 is enough.

3 The second theme is that we do need a more
4 science-based approach. But that, as we have talked over
5 the last two months, is not itself sufficient. There needs
6 to be as well a very clear understanding of what the Board's
7 intention as to jurisdiction is. The process by which the
8 Board addresses this neglected but critical issue is to be
9 an open process. It could be through rule making, it might
10 involve legislation, but the issue is so important that it
11 has to be based on a fully informed participating public,
12 including all the experts that you can muster.

13 And the Board should accept in whatever format is
14 appropriate for your processes the offers it has heard
15 already and that it will be hearing continually today to
16 participate in whatever process is set up. We on behalf of
17 this panel, we believe that the process should begin with
18 two separate panels, not one, but two separate panels. This
19 is extremely important. Maybe the work product of these
20 panels is a white paper; that is one of the reasons we
21 specifically requested a Court Reporter be here so that we
22 can help the process along, if a white paper or set of white
23 papers is what you decide would be helpful to you.

24 The first panel would address what is intended to be
25 jurisdictional to the Board, what is jurisdictional

1 groundwater. I call this the common sense panel. What kind
2 of solution do you want to have here? Do you want a very
3 narrow definition of what is jurisdictional or which we have
4 thought up until now we had? Or do you want a definition
5 which can go basinwide as jurisdictional groundwater? What
6 is the intention would be the common sense panel's key
7 focus.

8 The second panel would be the technical panel which I
9 admit was mostly what I had in mind when I started a few
10 months ago. That technical panel would define the
11 parameters that should be considered, addressing the
12 fundamental, geological and hydrological criteria that are
13 used to describe the occurrence, the physical occurrence, of
14 groundwater.

15 Then, maybe with two white papers in hand what you
16 would hopefully get to is a marriage of the common sense
17 understanding of what intended jurisdiction is and the
18 technical parameters that reflect the sciences of centuries
19 since Pomeroy was recited by the court.

20 The trouble is with just the technical parameters
21 alone, they can be misapplied. The marriage of the two, of
22 the intended jurisdiction and technical parameters is
23 crucial. Because no matter how your technical parameters
24 are defined, if one were so inclined, it could become a
25 definition that expands basinwide, if that is the

1 intention.

2 I would like to start this panel by asking each of
3 these experts to address the fundamental geological and
4 hydrological principles that applied to looking at the
5 physical occurrences of groundwater. And then I think as
6 you have questions or they have questions of one another,
7 they should proceed. I have a board over here and markers,
8 color markers. If you wish to use that, it is important
9 that the Board Members see it. We can perhaps position it
10 in a way you can get to it. I think that at least one of
11 you may want to ask that the Pomeroy map be put on the
12 overhead projector. I will leave it to you. I will stand
13 here, because I haven't anywhere to go, but go ahead and
14 proceed in whichever order you wish.

15 DR. WILLIAMS: Would you mind putting the Pomeroy map
16 up?

17 MEMBER FORSTER: I was just going to ask, Anne, to help
18 us understand where we have been, what we have done and
19 where we might be going, are we going to -- will the panel
20 be able to say we don't want to use Pauma and Pala, but may
21 be.

22 MS. SCHNEIDER: These people have been instructed not
23 to utter the words Pauma and Pala.

24 MEMBER FORSTER: I knew you would know. What I'm
25 saying is, it will help me understand if the panel can say,

1 you know, previously you have done this. This is what we
2 recommend. Or is it just -- I will just let it go and ask.
3 I am trying to compare -- since I have been on this Board,
4 we haven't done a lot of this issue. You say it's been
5 neglected. It hasn't come to the Board. So, this is a good
6 classroom atmosphere to say whatever they have experienced
7 before and what they think would be better. We are looking
8 for what makes it better, to hear a lot of that today.

9 MS. SCHNEIDER: That is an excellent instruction.

10 Dr. Williams, would you like to --

11 DR. WILLIAMS: This was another map you had. I wanted
12 to just talk about this a little bit because this is the
13 foundation for a lot of thinking on this. I reviewed
14 extensively the legal description of the Los Angeles versus
15 Pomeroy, but also as a groundwater hydrologist with over 30
16 years' professional experience. But I also as a boy grew up
17 in this area and hiked and camped in the Big Tujunga Wash in
18 the Verdugo Hills and am very familiar.

19 So my interpretation as a professional and intimately
20 understanding this groundwater basin, is that in the late
21 1800s where the city of Los Angeles had 17,000 people and
22 covered only 30 square miles, they were desperately seeking
23 a water supply which would permit them growth. This water
24 supply was really based on the Los Angeles River which
25 flowed through here. These are pretty much bedrocks.

1 The San Fernando groundwater basin is fed by a number
2 of tributaries, the Big Tujunga, the Little Tujunga and the
3 Pacoima. Everything drains down, collects to the Los
4 Angeles River area. There is a Narrows here, Los Angeles
5 Narrows. It kind of forces everything up to the surface.
6 So if the intent by the engineers in those days was to have
7 about a 315-acre parcel of land, some two miles long, a
8 quarter mile wide, right along the Los Angeles River where
9 they would put a cutoff wall or submerged dam to prevent any
10 outflow, then they would go in with a long tunnel and some
11 lateral drains and use this to pipe into the distribution
12 system of the city. They were quite concerned not only of
13 the surface water because they made some estimates that
14 there was something like 17,000 acre-feet coming into this
15 two miles, but there was about twice that going out.

16 They realized in looking at how saturated the materials
17 were, that there was a lot of gaining; the stream was
18 gaining, that they wanted to preserve that. They recognized
19 that you couldn't just preserve the surface water, that you
20 had to preserve the porous media, the groundwater right
21 beneath it.

22 They also extended -- they also recognized that the
23 supply, one of the supplies to the Los Angeles River, was
24 tributary inflow from the Big Tujunga and Little Tujunga
25 Creeks. They deemed that as very essential to that. The

1 intent, as a hydrologist reading this, they were quite
2 concerned about anything that would interfere with the
3 hydraulic connection of what I will call the surface water,
4 groundwater stream system.

5 Now, considering that this was essential to the growth
6 of the city in those days, there was a lot of concern on
7 that. You know, when I hear the term "underground stream,"
8 "underground river," I get very nervous. There is a couple
9 of major theories that the Greeks had which persisted
10 through to the Middle Ages which they thought that the
11 springs were fed by the oceans going somehow through some
12 subterranean streams or channels and being purified. How
13 they got up to the springs, they didn't know. There was
14 another one where they felt these large caverns in the earth
15 somehow were purified and lifted to the level of the
16 springs. And probably because that was partially based on
17 the fact that they lived in limestone areas where they saw
18 this.

19 The true underground streams, we don't have those in
20 porous media. Underground streams as we will learn a little
21 later truly are solution channels and limestone or perhaps
22 in lava tubes.

23 So I agree with Steve Bachman that the underflow of the
24 river and the channels, the subterranean channels that were
25 referred to in this early decision are one in the same, and

1 they should be connected. The intent -- my feeling is the
2 intent was to be tied in with the river. I think as we talk
3 today and discuss among ourselves, I just want to lay that
4 foundation as to the overall setting.

5 This is an alluvial groundwater basin. There is no
6 underground streams or river. In my work I have come across
7 a lot of dozers. The first thing they say is, "Here is the
8 stream across." You know, by the way the number of times
9 the rod goes up and down tells you the water quality. I
10 think as a modern groundwater hydrologist we have to be very
11 careful when we keep perpetuating those types of terms.

12 DR. TODD: I would like to begin with a little
13 Hydrology 1A just to clarify what we are talking about.

14 Is that visible?

15 I apologize to the audience.

16 Typical streams that we are familiar with here in
17 California is something like this where we have water
18 flowing down here at the bottom of the channel and in a
19 typical river, such as the Russian and Sacramento, the
20 Salinas, the Kern, the Santa Ana, all these streams that
21 we're all familiar with in California, we are dealing with
22 alluvium. What we have as the river, as the low point,
23 under virgin conditions was the drain. So what we had was a
24 water table which would be sloping down.

25 H.O. BAGGET: Can you turn it a little bit -- I think

1 Mary Jane can see. Just twist it so more people can see.

2 You can twist it even more.

3 MEMBER FORSTER: We are so used to looking at this on
4 the side. We always want the audience to see it, too.

5 H.O. BAGGET: Can you see?

6 MEMBER FORSTER: You can move it back a little.

7 H.O. BAGGET: That is great, thank you.

8 DR. TODD: We now have 99 percent.

9 The point here is under these conditions water, of
10 course, comes in from rainfall, and it percolates vertically
11 downward through permeable soils and reaches the water
12 table. The water then flows from that location toward the
13 river and comes down and actually converges and flows upward
14 into the stream. So that you have a flow pattern that looks
15 schematically something like this, a three-dimensional
16 effect. So the water flowing not in the direction of the
17 stream, but toward the stream as a drain. And under those
18 conditions the water is moving in on some sort of an angle
19 so that it actually is moving in downstream but converging,
20 actually coming up into the bottom of the stream and forms a
21 part of it. The fact that we have a stream flowing is that
22 the groundwater is contributing part of it. That is one
23 situation.

24 Another situation, and we will take the same type of
25 valley down here, and again we have a stream flowing here,

1 is that if the water table is lower than what the river is.
2 That could be a combination of drought conditions; it can be
3 combination of pumping conditions, a combination of flood
4 conditions. What we have is a water table that might look
5 like something like this. And then what we have is water
6 flowing out and away from the stream.

7 So that we have then exactly the same type of geologic
8 conditions in terms of alluvium channel, the topography, but
9 the flow direction is completely separate.

10 Finally, the third condition we have, better go over to
11 another page, is again our stream channel but now we have
12 the water table down here. And we have this groundwater
13 flowing either toward wells or down towards the ocean or end
14 of the valley, whatever it may be. Hydraulically it is
15 completely separate and separated from the stream that
16 exists up here.

17 All three of these conditions can take place at any one
18 point in the state of California. As a result of that, what
19 we may call subterranean streams, which I agree with
20 everybody that has spoken before, we don't have underground
21 streams or subterranean streams. They don't exist here. We
22 are talking about a different condition.

23 So this brings up the problem of trying to maintain
24 this kind of concept where when we have dynamically changing
25 conditions under different hydrogeologic and climatic

1 situations.

2 It is very difficult to come in and try to make rules
3 or spell out exactly what is taking place. To me, an
4 underground stream, probably the best example I can think
5 of, is again limestone which is almost unknown here in
6 California in large areas. We do have the salts in the
7 north, but that is a limited area. And in that case what
8 you have, because limestone consists of calcium carbonate,
9 which is soluble, you get a fracture. It gradually opens up
10 into large openings in there, such as caves. You've all
11 heard of Mammoth Cave and many caves in the southeast where
12 water is moving in an actual tube, that is an actual
13 channel. An example that I remember very well was when I
14 was working after graduating from Berkeley, I was working in
15 the limestone areas in the Middle East near Lebanon. I was
16 told about the springs that came out of this area.

17 I went out on a small fishing boat, out into the
18 Mediterranean Sea a mile offshore. We came to a flat area
19 where the waves were not present. We dipped the water up.
20 It was fresh. We actually had a tube that came out and came
21 up under the sea and fresh water was there. That to me is a
22 subterranean stream. We don't find many of those here. And
23 from the standpoint in terms of water rights, it seems to me
24 that that is a case that has been set completely aside from
25 the kind of conditions we are talking about right here.

1 I will let others speak.

2 MR. SCALMANINI: A different and important point to
3 recognize in California is that it takes man almost
4 exclusively to create this condition or create this
5 condition where the table is removed from the surface. This
6 condition probably occurred in essentially every
7 alluvium-filled groundwater basin in the state of nature.
8 But nature can't lower the water table. It can only keep it
9 from filling and overflowing as much as it likes in wet
10 conditions.

11 But to build on the same subject that's just been said,
12 that if you look at this, ultimately there is this term "bed
13 and banks" that was up here at the start. The kind of
14 occurrence of subterranean stream as Dr. Todd just
15 illustrated, the solution channels and lava tubes, and they
16 look something like this, if they occur in an environment
17 like this as compared to that basin scale where they go out
18 to the full size of the face.

19 An underflow in the true sense of that component of
20 surface water which flows under the surface of that ground
21 but is contiguous with it, probably looks like it is
22 confined to something like that as compared to the scale of
23 the basin.

24 In our write-up we talked about the fact that from a
25 microscopic scale to a basinwide scale you can ultimately

1 find something that will use the criteria that at least is
2 written down in Pomeroy that will set a bed and banks that
3 is relatively impermeable. Some of the words we used --
4 sand is relatively impermeable to gravel. So you can find
5 someplace down river where you have bottom gravel, a little
6 mud and find something that is relatively impermeable to
7 that. There is a tremendous amount of subjectivity that
8 continues to develop as to where to draw lines.

9 But this largely goes back to Anne Schneider's
10 suggestion of a two-panel concept. That the first panel
11 really picks up on the things that Dr. Williams, Dr. Todd,
12 and I all are saying and follow on to what ACWA said, which
13 is this is a highly unusual and rare occurrence in
14 California. This is a fairly common occurrence, the
15 immediate underflow of the stream and then there is a
16 groundwater basin per se. And that as a result of listening
17 to all this, plus possibly convening some focused efforts
18 following this, is to come to a conclusion, whether it be a
19 white paper form or otherwise, form some direction that says
20 subterranean streams are things that ought to look something
21 like this, if that is how that group concludes. And that
22 underflow is something that looks something like that. And
23 percolated groundwater is all the rest of this that Dr. Todd
24 illustrated, that percolates down from the ground surface
25 and ultimately in a state of nature and under certain

1 hydrologic conditions today can feed a gaining stream or can
2 infiltrate and ultimately join this losing situation or
3 percolate all the way to the totally disconnected system.

4 I think as a way of stopping at this point is to
5 recognize that these three kinds of occurrences are
6 physically there, that the question in front of us is the
7 physical description of how groundwater occurs in one of
8 these and then to decide what is it that is intended to be
9 regulated. Is it this and this or is it all of this and out
10 then or from that it is not uniquely black and white
11 straightforward, but a lot easier and much more
12 straightforward to use technical parameters and technical
13 tools that we listed in our writeup that was suggested by
14 Dr. Bachman earlier, et cetera, that would allow definition
15 of the physical system that is there to be painted so it can
16 then be described as this or this or the whole system.

17 MEMBER FORSTER: While you are there, maybe you want to
18 talk about this later, but there was so much talk about bed
19 and banks. Are you going to talk a little bit about bed and
20 banks, where that would fit in one of those pictures?

21 MR. SCALMANINI: Sure. We can talk about that
22 collectively as we go along. We certainly in our discussion
23 of four categories of parameters, geology, hydrologic
24 parameters that include groundwater levels, well aquifer
25 characteristics, groundwater quality, surface water quality

1 and groundwater quality. We have discussed how all of those
2 can be used, and certainly as you went along you didn't say
3 it in these words, but Dr. Bachman touched on that.
4 Differentiation in water quality, for example, et cetera
5 would be indicative of things within some beds and banks as
6 away from it.

7 We talk in our write-up about how wells react when you
8 pump the groundwater basin, if you can detect boundaries,
9 whether they are positive or negative. Positive being that
10 they induce the water to come from the surface watercourse
11 or negative if they run into something that is relatively
12 permeable. I don't like the term "relatively." We can talk
13 about that. There are tools that allow you to define the
14 existence of such things in subsurface that you can't
15 physically see. We will probably touch on that one.

16 MEMBER FORSTER: One of the things that Anne said the
17 last time we were gathered on this topic was that we were
18 making bed and banks like an elastic band. I still remember
19 that mental picture. So, I think it would be helpful to
20 talk about that a little bit, like, how do you not make it
21 an elastic band?

22 MR. SCALMANINI: Okay.

23 MEMBER BROWN: Joe, would the bed and banks in the
24 legislation like it is, don't you think it clearly defines
25 which one of those conditions up there that the Board is

1 addressing?

2 MR. SCALMANINI: Well, my best answer back at you is
3 that the reason this room is so full is it may clearly
4 define that, and I think -- I agree a hundred percent with
5 the way Dennis expressed it earlier, which is that we would
6 read the intent of Pomeroy as being intending to be here as
7 compared to here.

8 MEMBER BROWN: The bed and banks, I am talking was the
9 pipeline like you have drawn up there.

10 MR. SCALMANINI: This here?

11 MEMBER BROWN: I am not sure that is an issue here.

12 MR. SCALMANINI: The only reason that I think we bring
13 it up is that I think it is fair to say, I know it is for me
14 personally going back to water law class quite a few decades
15 ago, that the illustrative example of a so-called
16 subterranean stream was the solution channel or the lava
17 tube. So, I have practiced ever since then with the
18 expectation that if jurisdiction of groundwater was in that
19 category that then the physical description of that
20 occurrence would look something like a solution channel or a
21 lava tube.

22 The bed banks concept, I think it is fair to say I am
23 probably the most committed person in this room who would
24 not use Pomeroy today. But if there is concern, it is with
25 the subject of permeability where and how do you define this

1 bed and banks.

2 And try to keep all of the description there in -- or
3 the parameter discussion in the description of tools that
4 can be used to describe geologically, hydrologically,
5 hydraulically, how something physically occurs in subsurface.

6 MEMBER BROWN: Do you think that is really an issue
7 before us today?

8 MR. SCALMANINI: I think it is largely that in that
9 there is a tremendous reaction to what has recently come
10 down. Try not to use that. But the draft decision that
11 precipitated the subsequent workshop that led to this one,
12 has been in interpreted almost unanimously if not
13 universally interpreted to say that there is this elastic
14 boundary that can grow to the scale of a basin. And that
15 will go from a -- light heartily said to Dennis this morning
16 outside before we came in, if you look at this little purple
17 area, you'd probably measure it in yards, maybe feet. And
18 if you work your way up to Carmel, the Palmas of the world,
19 you start utilizing miles. The question is where does the
20 miles stop.

21 So I think the strict answer back to your answer, yes,
22 it is important. That is largely why we landed on this
23 two-part approach, which is first for you collectively,
24 broad-based way, but the whole Board with whatever
25 assistance you are willing to take, staff and the outside

1 world volunteer to work with you, to first say I don't want
2 to talk about well tests or groundwater levels or diurnal
3 fluctuations. First I want to talk about what exactly do
4 the words mean, what does it mean when we talk about the bed
5 and banks and try to describe that. Then when you get past
6 that, it is fairly straightforward, not completely black and
7 white, a lot more straightforward to go to the next step.
8 How do we detect it and interpret physical conditions
9 somewhere in California? How does it fit within what is
10 intended to be the jurisdiction?

11 MS. MAHANEY: Mr. Bagget, perhaps it would be helpful
12 in discussing the bed and banks issue to set the stage in
13 Pomeroy, if the panel would like to address that. Has the
14 Pomeroy court looked at the bed and banks issue, if they are
15 willing to speak to that.

16 DR. WILLIAMS: I just want to draw to some simple bed
17 and banks. We can go on for a long time on different
18 geometry.

19 But they really didn't understand groundwater flow when
20 this decision was made. For example, if you read the
21 Pomeroy case, they estimated surface water was flowing at
22 one or three feet per second, but groundwater was flowing 14
23 to 17 miles per year. Well, if you translate that, that's
24 200 to 250 feet per day, which is totally two orders of
25 magnitude higher. Groundwater flows a few feet per day.

1 They really didn't understand what was going on. Consider
2 when this was done, in the early 1900s, Darcy invented his
3 famous relationship between flow per unit area is
4 proportional to the head loss per length in 1856. But it
5 wasn't verified until about 20 years after this by Oscar
6 Minzer [phonetic], U.S. Geological Survey. And most of the
7 modern groundwater hydraulics was done in the '40s and
8 subsequent to that.

9 Let's just draw a real simple bed and bank-type of deal
10 here. If this is impermeable granite, say, that has no
11 fractures or secondary porosity, and you could have maybe a
12 stream flowing like that. And then, like Dr. Todd said, you
13 could either have a losing stream like this. This would be
14 the groundwater. Well, certainly the stream has defined bed
15 and banks. This is fairly close proximity. This
16 groundwater would be flowing in the same direction and
17 pretty much under the same hydraulic gradient as the stream
18 channel.

19 The problem with this bed and banks is it is a matter
20 of scale. Obviously every groundwater basin in the world is
21 flowing between known and defined banks. It flows from
22 areas of recharge, high elevation, to areas of discharge. I
23 think the interpretation, at least based on this, is that
24 there has to be hydraulic connection between the surface
25 water flow of the stream and the groundwater that is

1 connected.

2 You know, you can take bed and banks, for example do
3 you consider that, say, a lot of the rivers, like the Santa
4 Ana, the San Gabriel, Los Angeles River on the way to the
5 ocean, incised notches through the older alluvium, which is
6 less permeable than the younger alluvium. Yet do we call
7 these formations bed and banks certainly this is --
8 groundwater flows in both.

9 Similarly, in old Paleozoic channels in alluvial planes
10 we don't know where they are. There are preferential paths.
11 We know probably there is groundwater flowing in old
12 alluvial channels which are buried, and they certainly have
13 defined bed and banks. But just because we don't know where
14 they are under the definition, it is percolating water. But
15 once we drill into it, does it make it jurisdictional? I
16 don't know. This is endless.

17 You could have -- in Southern California and a lot of
18 areas of the world, you have groundwater basins or alluvial
19 basins that are cut off by a series of alluvial faults. The
20 alluvial faults have a -- because of the gouge that is
21 produced and offset of different beds, they actually
22 compartmentalize groundwater flow. So you could have flow
23 between known and defined channels within these alluvial
24 faults.

25 So, I guess you could -- there is a number of issues

1 here. But I might want to point out that I think in the
2 intent, intent of what we mean by bed and banks, if you take
3 a surface stream that has -- let's say in this situation
4 here where it is a losing stream, then if you were to draw
5 the groundwater levels -- this would be a gaining stream.
6 Say this was 190, we will draw two alluvials here. So this
7 water could be flowing in here. So you could actually -- if
8 you had information on groundwater levels, you could
9 construct the flow lines into the river here. But somewhere
10 you'd have a limiting streamline which would certainly
11 define the limit of the underflow.

12 This case there really isn't any bed and banks. There
13 is a definite distance from the stream at which there is no
14 hydraulic interaction. You could do the same thing with the
15 other case, with the water table elevations. So I think the
16 bed and banks issue, we can get very, very complex. And it
17 is -- I keep going back. It is a matter of scale. I don't
18 think it is intended to be miles and miles wide.

19 What complicates this even further is that, like Dr.
20 Todd pointed out, you could have initially -- you could have
21 a losing stream here before man came on the scene, and then
22 come over with a series of deep wells and completely pull
23 down the groundwater level to where it is totally
24 disconnected with the stream.

25 What do you do in a case like that? Does it go from

1 having connection with the stream and being jurisdictional
2 and not, and when you get to higher recharge, sometime in
3 groundwater basins we have rises of 200 feet in a season.
4 So we always have this influent-effluent seepage condition
5 which varies on the hydrologies. So, it seems to be very
6 complex.

7 I think there are tests that we can do. And here again
8 we -- I don't think this panel or any other panel of
9 scientists can say you have to go 200 feet, 300 feet, a
10 quarter mile, that's it. You can't do that because it is
11 very complex. But there are tests and there are techniques
12 that we use as groundwater hydrologists to determine flow
13 systems and interactions between streams and aquifers.
14 Water quality was mentioned.

15 To define bed and banks, I am not sure that is a
16 criteria. In this case, to me, the underflow and the
17 subterranean stream, the defined bed and banks, I think,
18 were meant to imply a lot of the channels that they observed
19 that they wanted to make sure that weren't intercepted or
20 water taken out of that which would recharge the overall
21 system of the Los Angeles River.

22 So, I guess the bed and banks issue, it's just we can
23 all draw a lot of different cases where you could have bed
24 and banks, and in one case it would be jurisdictional under
25 the law, the current law, and in other cases it wouldn't. I

1 don't how much further to go on that.

2 H.O. BAGGET: As an undergrad at the University of
3 Cincinnati, I spent more than a few days studying clay
4 formations. Many times I wished it were so simple out there
5 as it was in northern Kentucky.

6 DR. TODD: A point that I would like to make to Board
7 Members is that what we are talking about, as the
8 groundwater component and surface component vary from place
9 to place. And in the situation that we have been working
10 with right here, all of the water that is coming down from
11 the Los Angeles River and all the water going through the
12 Narrows comes not only from the Valley, but also from all
13 the drainage up here. Actually more than two-thirds of the
14 water comes from up in the mountain areas. Much of it comes
15 down in surplus flows, goes into the ground. Today, of
16 course, we have all of these large recharge basins. Hence
17 this spreading grounds and so on where water is deliberately
18 put into the ground.

19 As a result of that you have a large groundwater flow
20 taking place here and then the Los Angeles River is
21 literally a little stream that runs right along the hills,
22 down here at the bottom. So you have a large amount of
23 groundwater flow and a little bit of surface water flow.
24 When you get into the Narrows, they are squeezed in here.

25 As a result, all of this groundwater pops up to the

1 surface, and it goes through this notch right here. Now you
2 come down right into the central and west basin in Los
3 Angeles and it opens up again. So what you had at
4 groundwater flowing out as percolating water then you
5 converge it as surface water, and you look at it as surface
6 water, and then it goes five or ten miles and it is suddenly
7 back the other way. You are dealing with something that is
8 moving in and out all the time.

9 Another illustration which you may know is Victorville
10 out in the Mojave Desert. The Mojave River is coming out of
11 San Bernardino Mountains. It is a dry stream most of the
12 time. It comes down and simply disappears into the sand.
13 But you get to Victorville, you've got a geologic formation
14 that causes the water to rise up. Suddenly you have a wet
15 stream. Green grass growing along it. It flows a few miles
16 and it disappears again. That doesn't change the water. It
17 doesn't change color. It just happens to be in a unique
18 location which causes this change to take place.

19 The problem of criteria has been discussed off and on
20 here, how you make a decision on something like this. We've
21 talked about bed and banks as one. We've talked about water
22 leveling as another. We've talked about quality as a third
23 one. Each of these can be used indirectly. But my worry on
24 something like this is they all depend on so many different
25 factors. As Mr. Brown very carefully pointed out, two

1 different experts can come in with two diametrically opposed
2 opinions. That is one of the difficulties here.

3 Water quality isn't exactly the same in groundwater as
4 surface water because the paths haven't traveled the same
5 distance. The ages may or may not be near the same. If
6 they are close, how do you make a distinction between one or
7 the other, using radioisotopes, particularly tridium these
8 days when we talk about ages of five- and ten- and 15-year
9 old water in here to try to rank it. We don't know exactly
10 how much is groundwater and how much is surface water. So
11 we get into trouble with it.

12 The same thing with water levels. When a river rises
13 as we have indicated, the water moves into the area and
14 obviously the water's going to rise in the water table next
15 to it. When the stream falls, the water table is going to
16 go back down again. There are relationships that may or may
17 not indicate anything directly.

18 And we can't very well go out and say that you can only
19 go out 200 feet and call it bed and banks, or 2000 or
20 whatever number you want to use. So that anytime we begin
21 to try to legislate this in terms of putting real blinders
22 on it in terms of saying it has to be this difference or
23 that difference or this permeability or that permeability,
24 we run into problems.

25 I guess what I am ending up saying is simply that

1 common sense in terms of interpreting the hydrogeologic
2 condition is really the key factor on this. We have to be
3 open-minded about it and recognize clearly what it is. We
4 need the data. We need the knowledge to find out what it
5 is, and then we hope we use the best judgment in trying to
6 pin down what is and is not water that is part of the
7 surface stream.

8 DR. WILLIAMS: We also need direction. We need to
9 understand from the State Board what really is the
10 definition. Is it the intent to protect and regulate
11 groundwater in the vicinity of surface water? Or you can
12 certainly have known and defined channels with no surface
13 streams. So I think what Dr. Todd was saying, as scientists
14 we can come up with a set of reasonable criteria that
15 hopefully are reproducible by a number of other scientists,
16 given the same things. But we need some guidance from the
17 State Board as to this type of regulation.

18 MR. SCALMANINI: To follow on that, in terms of
19 guidance, I think a lot of it goes back again to the first
20 of our two recommended panels. But to wave his flag a
21 little bit, Dr. Williams has done some of the most
22 significant research in the design of wells and how they
23 hydraulically work and properly work. And I would like to
24 think that our firm has applied that pretty successfully.

25 We both have a lot of experience with working in the

1 subsurface to physically develop groundwater. And if there
2 is definition needed, and I try to put a phrase in what we
3 wrote up here, you will read it when you do, that says that
4 the level of specificity needs to be great enough that the
5 well owner or the well driller can figure out what it is he
6 is pumping. So imagine taking yourself out to that basin or
7 any other one and you are drilling into subsurface, and you
8 need to make a call. Am I going to pump work that is under
9 somebody else's jurisdiction or am I pumping water that is
10 percolating groundwater and I am just a pumper like
11 everybody else?

12 The clear definition is definitely needed in that
13 regard and the decisions that ultimately get made and need
14 to be made in that regard so that, again, the pumper, you
15 know, some people refer to him as the poor, dumb pumper or
16 the poor dumb engineer or hydrologist or well driller needs
17 to be able to figure out what he is getting into.

18 That is a tough line to draw, having been there a few
19 times in the field. So I don't propose to solve it right
20 now, but I suggest that what you have heard from others as
21 well as us is that it is possible to get more definitive.
22 First of all, in saying what it is intended to be
23 jurisdictional and then, such as we want to take some time
24 this morning and talk a little bit about the physical tools
25 to figure that out, but would drive you in the direction of

1 being very definitive about what is to be regulated.

2 One thought, it almost sets up a bias in one direction.
3 I have seen some of what's been written or what's been said,
4 and that is, particularly what you said, Mr. Bagget, about
5 Kentucky versus California, is that this cave-type formation
6 solution channel, lava tube, whatever it's geologically,
7 properly described as, is a very rare thing in California.
8 It is acknowledged in DWR's literature, et cetera, and it is
9 widely recognized by all of us in the practice. And so
10 maybe that is extracted as being the very, very rare and
11 unusual case that would be very specifically addressed
12 uniquely in California when it ever comes up. I can't think
13 of one right now that specifically comes up that way. It
14 has always been how the Pomeroy criteria pertain to porous
15 media.

16 So, that might be the way to go and then to focus on
17 underflow. I don't want to push in that direction, but it
18 is a way to simplify it and recognize the differences
19 between the two.

20 MEMBER BROWN: I have comments for the rest of the
21 speakers and this panel. The testimony that has been given
22 at least that I have been part of and listened to, the
23 professionals have not been reluctant to use current day
24 knowledge with water chemistry and hydraulic gradients and
25 such, knowledge that was gained since the Pomeroy decision

1 in order to try and make their point.

2 The Board has not had the lack of information such as
3 that to gauge our decisions with. That information is still
4 -- has been made available. The question that we are
5 pondering is how to use that information and how to adjust
6 criteria, if indeed, criteria should be adjusted.

7 DR. WILLIAMS: I think one of the questions that we
8 would like to see is the underflow and subterranean stream
9 concept consistent with each other. They seemed to be
10 separating. In other words, underflow is pretty clearly the
11 portion of groundwater flowing immediately adjacent and
12 beneath the stream. The subterranean stream, the bed and
13 banks, it seems to be almost separate.

14 And I think if I were to be tasked with helping to make
15 these decisions, I would need some clear guidance in that
16 because they are two separate things.

17 MEMBER BROWN: That is a good point. Perhaps some of
18 the legal minds in the audience can help us evaluate here
19 today whether or not that is part of the question. That is
20 a very good point.

21 Thank you very much. Good job.

22 H.O. BAGGET: You made it real clear that there are two
23 issues. That is where this has really been helpful for me.

24 MS. SCHNEIDER: I think Mr. Scalmanini has one more
25 comment and I have a few concluding comments.

1 MR. SCALMANINI: Before you conclude, Anne, Mr. Brown,
2 this goes in the direction of what people has used as
3 tools. I definitely would second what Dr. Williams has said
4 a minute ago about need definition, because you can use
5 tools to define where boundaries are. There are ways to
6 figure that out.

7 But as regards to the two or three times I have been
8 here, and not talking about anything specifically, but the
9 way people use information that, again, going back to the
10 fact that the Pomeroy is a kicking off point, and it is a
11 hundred plus years since then, and the science has
12 significantly developed over the last century. Similarly, I
13 will call it the database or the information base that has
14 developed significantly in the last century.

15 We didn't develop the deep well turbine pump until this
16 century. We didn't start pumping groundwater from any kind
17 of significant depths, or call it modern wells, till the
18 last few decades. Certainly, we didn't pump from any
19 significant depths until, say, the last two-thirds of this
20 past century, something like that.

21 Data and information that as you get your hands on it
22 is not in the form that we might hold today's groundwater
23 contamination-type investigations in terms of standards of
24 how we look at the data and what notes we made when we took
25 it, et cetera, et cetera. All the quality control or

1 quality assurance procedures to which we might subject them
2 to were not in play in the '60s, '50s, '40s and earlier.
3 Yet the information is valuable. Similarly, we may not log
4 with an educated professional every whole in the ground in
5 the '60s, '50s, '40s, et cetera. But there is a lot of
6 useful information in the overall base that again is useful
7 in defining the physical occurrence of groundwater as we
8 might apply it or subject it to whatever criteria we want to
9 subject it today.

10 I guess, a closing urge would be to say that should not
11 be dismissed because it doesn't meet today's data collection
12 standards. For example, you asked me questions about cable
13 tool wells in this room in the past. Some people might
14 dismiss those a lot. In today's environment they are rarely
15 constructed as compared to the rotary methods of well
16 construction and other parallel methods. Yet there's
17 priceless information attached to things like that that are
18 decades old. And so I urge that that kind of stuff not be
19 dismissed or ignored or discounted because it doesn't have
20 the same quality of information as might be developed today.

21 MEMBER BROWN: Thank you.

22 MS. SCHNEIDER: I greatly appreciate your giving us
23 the opportunity to participate, and I hope you give us an
24 opportunity to participate a great deal more. I think that
25 Dr. Todd, for example, put up on the sheets the -- Dr.

1 Williams and Mr. Scalmanini put up on these graphics the
2 complications that exist in deciding whether something is
3 affecting a stream or not. And this is a chance for me to
4 just give you a few sound bites from what you heard.

5 You have the most renown experts in California telling
6 you some very critical things that are hard to hear because
7 you and staff of the Board have been so focused on the beds
8 and banks description of Pomeroy. I had to use it
9 somewhere, but their combined experience is more than a
10 hundred years. Somehow that should win over a
11 hundred-year-old case that was decided by a court that seems
12 dispositive to me.

13 You have them telling you do not have underground
14 streams in porous media. You do not have subterranean
15 streams in California, except in those narrow examples of
16 lava tubes or solution tubes.

17 Every groundwater basin, every groundwater basin, in
18 the world is ultimately flowing through known bed and
19 banks. What this tells us, I believe, is that it would be a
20 very worthwhile exercise to engage whatever experts are
21 willing to give of their time to do the work and on these
22 two kind of panels to talk about intended jurisdiction and
23 the parameters, technical parameters, to use in asserting
24 this intended jurisdiction.

25 I don't for a moment personally believe that when the

1 Water Code was drafted that anyone -- Water Commission Act
2 was drafted that then became the Water Code, that anyone was
3 thinking about what a subterranean stream was in any way
4 that you have begun to think now. This is an expansion,
5 whether a rubber band or whatever analogy you want, is an
6 expansion and is extremely worrisome.

7 Finally has called the question and the fact that so
8 many people with such busy schedules and demands are willing
9 to make their time available, not on behalf of any client,
10 is a crucial factor. I understand that there have been many
11 arguments before the Board from time to time on these issues
12 where you seek consulting engineers on one side and the
13 consulting engineers and lawyers on the other. That is not
14 what we are offering. I do truly hope you take advantage of
15 their offer.

16 Thank you.

17 H.O. BAGGET: Thank you, Anne.

18 Any other questions?

19 Staff?

20 MEMBER BROWN: Thank you very much.

21 H.O. BAGGET: I'd really like to thank you, Anne, and
22 Mr. Scalmanini, Dr. Williams, Dr. Todd, for coming down and
23 I think clarifying at least the issues. I don't know that
24 we have any answers, but I am sure we will be talking again.

25

1 Thank you.

2 It is noon. We have about nine cards, an hour and 15,
3 20 minutes. I don't know. I hate to rush through this
4 since so many people have -- I think, why don't we come back
5 at 1:00. We definitely will be finished this afternoon and
6 that should be some consolation.

7 Thank you. Recess for lunch.

8 (Luncheon break taken.)

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1 AFTERNOON SESSION

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3 H.O. BAGGET: Let's reconvene the workshop.

4 We have eight cards if necessary. Some are "If
5 Necessary." We will just go down, and I think we have ample
6 time here. Unless somebody really takes a long time, we
7 should be out of here ahead of schedule this afternoon.

8 Again, feel free -- it's been real useful to me and my
9 colleagues would concur. Let's go back and start out with
10 the first card with Alan Lilly.

11 If you have a business card, Esther would like one.

12 MR. LILLY: Gave it to her during the break. Followed
13 your direction from this morning. She said she was going to
14 use it for kindling the next time she had a fire.

15 Mr. Bagget, Mr. Brown, Ms. Forster, my name is Alan
16 Lilly from the law firm of Bartkiewicz, Kronick and
17 Shanahan, 1011 22nd Street, here in Sacramento.

18 As most of you probably know, my firm does represent
19 the Yucima Municipal Water District, but I am not going to
20 be talking about them or that river down to San Diego County
21 today. My firm also represents numerous other clients who
22 have wells and pump underground water. And some of them
23 know what kind of groundwater they are pumping and some of
24 them probably don't and some of their classifications may
25 change as a result of the outcome of this workshop and

1 subsequent proceedings.

2 First of all, I would like to thank the three of you at
3 the outset for holding this workshop and for giving us the
4 opportunity to submit written and oral comments today. This
5 is clearly a very important issue that affects many water
6 users throughout California and it deserves a serious
7 consideration that the Board has indicated it is going to
8 give the issue.

9 My presentation, obviously, will be somewhat different
10 from the excellent technical presentation that was made this
11 morning because I don't have that technical background. I
12 will focus more on the legal and policy issues. I would
13 like to start out with the four-part test that is listed in
14 the Board's workshop and that staff summarized this morning
15 briefly. Unless this test is refined or limited, it has the
16 fundamental problem that it really has no bounds. I think
17 Dennis Williams summarized it better than I could this
18 morning when he said the problem is one of scale.

19 The State Board so far has only really applied this
20 test to subterranean streams in a few cases, but the same
21 reasoning could be used on just about any valley in
22 California. We use the example in the letter I submitted
23 last week of the Sacramento Valley. Obviously, it does have
24 relatively impermeable boundaries, with the coast range and
25 the Sierra Nevada and relatively more permeable alluvial

1 materials in the middle and there is generally a flow of the
2 groundwater from the north to the south. I don't think the
3 Board would ever in its wildest imagination consider
4 classifying groundwater in the Sacramento Valley as an
5 underground stream, but that is the logical extreme of where
6 the four-part test could go. There is certainly a very
7 strong argument that the Sacramento Valley would apply.

8 Smaller valleys like the Salinas Valley and parts of
9 the San Joaquin Valley or some tributaries to the San
10 Joaquin or Sacramento Valleys obviously could be closer to
11 satisfying that test. And we don't think that either the
12 Legislature or courts ever intended for such a broad
13 application of a definition of subterranean stream.

14 I guess one example, and I will ask for Julie to put up
15 the slide of the San Fernando Valley later on --

16 Actually, could you put up -- not the detailed one.

17 The San Fernando Valley has two critical legal
18 differences from most valleys in California that I think
19 have affected many of the court decisions involving that
20 valley. First of all, the city of Los Angeles is almost
21 unique in California in having pueblo water rights which
22 attached to those native waters in the San Fernando Valley,
23 and certainly affect the court's analysis in the Pomeroy
24 case and subsequent cases. The other critical difference of
25 the San Fernando Valley is the huge amounts of imported

1 water that come into there, and that, of course, affect the
2 subsequent decisions up to the city of San Fernando case.

3 The basic problem here, and I can't read all the
4 details, I assume the green area there, that the lime green
5 that covers most of the slide, is the unconsolidated
6 alluvium materials which, of course, form a relatively large
7 basin where all the water is flowing inexorably and slowly
8 toward the outlet. I think there is a very plausible
9 argument that the four-part test would lead to the
10 classification of all the groundwater in at least the major
11 part of that lime green area as a subterranean stream. And
12 this same analysis really can be applied to just about any
13 valley in California.

14 That is the basic problem we have with the four-part
15 test and why we think it needs some refinement or
16 limitation.

17 Of course, the problem -- you might say, "What's wrong
18 with that? We are a competent Board. We are in the water
19 business; we are supposed to regulate water. Why shouldn't
20 we take on groundwater? We do a good job with surface
21 water, and we can do a good job with groundwater."

22 The real problem with that is -- and I am not disputing
23 that you do a good job with surface water. The problem for
24 people who have been pumping groundwater for decades is
25 under the assumption that they do not need a permit. All of

1 a sudden they would need a permit, and that would create two
2 major problems.

3 First of all, a major administrative burden for both
4 the State Water Board having to process literally thousands
5 of new applications for water right permits. And, of
6 course, the burden is on all the groundwater water users to
7 have to go through the steps to prepare and process those
8 applications. But that's one problem.

9 The bigger problem would happen, assuming all those
10 applications could be filed, there would be a big
11 uncertainty as to what the Water Board would do. Some of
12 these people who have been pumping and relying on
13 groundwater for decades would not be able to get water right
14 permits, particularly in areas where there is fully
15 appropriated stream declarations already in effect. And the
16 Carmel Valley is a classic example of that. There is a
17 municipal water supply for approximately 100,000 people
18 dependent on that groundwater. They operate, I think since
19 the 1940s and '50s, under the assumption they do not need
20 permits. All of a sudden now five years ago they are faced
21 with a decision saying they need -- if they want to keep
22 pumping that groundwater, they need permits. But they can't
23 get them because the stream is fully appropriated.
24 That particular situation, the municipality did not contest
25 the Water Board's jurisdiction, so we didn't really get into

1 those issues there. It does represent in one case the
2 upheaval that can come from suddenly finding a subterranean
3 stream where there had previously been the assumption that
4 no permits were required.

5 In other areas, permits would be granted, but there
6 would be significant issues of priority. In theory, if
7 somebody, one person, has a permit and then someone who for
8 50 or 60 years has been pumping groundwater without a permit
9 suddenly needs to apply for a permit, they could very well
10 be given a priority as of the day they are filing their
11 application, which would be 2000, and suddenly become the
12 junior most water right holder in the basin.

13 I know the Board has some discretion in reordering
14 priorities, but there clearly would be significant upheaval
15 and uncertainty for numerous water groundwater users
16 throughout California.

17 So, as we lawyers say, we have spotted the issues. I
18 think the issues were very clearly defined this morning, the
19 question you are all probably asking yourself and want to
20 ask us is: What should we do? That is what the workshop is
21 for today. What are we going to do?

22 Well, I've listed in my letter two different proposals,
23 and I think they have been touched on this morning by other
24 commenters as well. One is for legislation. And,
25 obviously, if a consensus or majority decision can be

1 reached in this process and the State Board and a majority
2 of the parties can go to the Legislature with consensus, I
3 think there is a good chance that the Legislature would act
4 on that favorably.

5 What we have proposed is basically to clearly define
6 that the State Board's authority is limited to surface
7 waters and the underflows of certain streams. I will just
8 use one of Dr. Todd's overheads. I will just flip to
9 that. I think it was the first one.

10 Basically, I will leave aside the question of the lava
11 tube and limestone tube. That obviously is a very rare
12 occurrence in California. But basically in schematic terms
13 I think what Dr. Todd was talking about was the red there
14 that is near the surface stream and, of course, subject to
15 the criteria that it has some boundaries and that it be
16 flowing parallel to the surface stream. This would confirm
17 the State Board traditional authority over surface water
18 rights and certainly over groundwater where there is
19 hydraulic continuity with surface streams. And it would
20 eliminate the problem that we talked -- that you heard about
21 this morning about what are we going to do, how are we going
22 to try to define limits on this subterranean stream.

23 It was clear from all the experts this morning that it
24 is not a simple task. It is not just a question of plowing
25 through complex geology. There are real policy questions

1 that have to be made there. I don't know where you can draw
2 the line. If it really is a question of boundaries, do you
3 draw it at a hundred yards, a mile or ten miles or a hundred
4 miles? I think this way really eliminates that problem and
5 does preserve the Board's traditional jurisdiction over
6 almost all of the matters that the Board has acted upon.

7 The less preferable alternative, the other one that is
8 listed in my letter, is a new regulation. I realize I may
9 have gotten ahead of the pack here. I have been working on
10 these issues for so many years that I had some thoughts and
11 I put them down. My regulation, I certainly don't expect
12 you to just adopt it today and send it off to the Office of
13 Administrative Law.

14 I want to have a starting point so we have something to
15 talk about, but I am sure it will facilitate comments. What
16 I tried to do was state some objective criteria because I
17 think that the one theme that came out this morning is we
18 need objective criteria. People need to know what is going
19 to be classified as subterranean streams or subject to the
20 Board's jurisdiction and what is going to be classified as
21 percolating groundwater. Frankly, the Board needs that
22 too. Otherwise, you are going to be having these hearings
23 every time there is a dispute of groundwater application.
24 It won't be every single application, because obviously
25 there will be surface applications where there will be no

1 need for a hearing on this issue. But there will be a need
2 for a hearing on almost every groundwater case unless it is
3 just clearly sucking surface water out of a river.

4 So, objective criteria are needed. And what I tried to
5 do with my proposed regulation was make something. I tried
6 to build off the four-part test with one critical addition
7 and come up with some criteria that the Board could apply.

8 The first criterion is that there actually be a channel
9 of relatively constant dimensions, and I will point again to
10 the San Fernando Valley. I think in the lower right-hand
11 corner you can see where the Pomeroy lands are and kind of
12 working down to the middle of the page there, down to the
13 right. Jon is pointing that out.

14 You can see there the lime green formation, the
15 unconsolidated or alluvium formation is of relatively
16 constant width. That is what we all think of as a channel.
17 The rest of the basin where it is a good 10 to 20 times as
18 wide, if you call that a channel, too, I am not saying you
19 would, but that would be obliterating the distinction
20 between a basin and a channel. That is where I have put in
21 in my proposed regulations that there really be an actual
22 channel with relatively constant dimensions, and that if
23 there are tributaries that they have substantially narrow
24 widths. Otherwise, you could basically say, well, the big
25 basin is just a narrow channel with some great big

1 tributaries. That would kind of defeat the whole concept of
2 having a channel.

3 Relative impermeability is a tough one. On that one I
4 think you would want more input from the experts on. I
5 proposed that there be a difference of a hundred. You need
6 some objective criteria, that if the banks are only half as
7 impermeable as the channel, that doesn't sound like
8 relatively impermeable to me. There has to be some clear
9 quantitative difference between the rates at which water
10 flows through the channel and the rates at which water flows
11 through the banks.

12 That is what I have in the definition of channel that
13 kind of folds in the first two elements of the four-part
14 test that was in the workshop notice.

15 The second criterion, I think there is relatively
16 little controversy about this, the flow of the groundwater,
17 and that, of course, is ascertainable through groundwater
18 contours that have to be parallel to the channel. If the
19 groundwater is flowing toward a stream or away from the
20 stream and not along the stream, you really don't have flow
21 in the channel as well. So that would be the second
22 criterion.

23 And even if there is pumping, in my proposal there
24 would still have to be a flow along the stream. Because,
25 basically, the whole concept of the basin is in a state of

1 nature there would be flow out of the basin. Just as here
2 historically there was flow along the whole basin. But the
3 point is, even with pumping, if it really is truly a
4 subterranean stream, it still should be flowing along the
5 channel, even if there is groundwater pumping going on.

6 Now the third criterion in my proposal is new. And I
7 think this is really a critical point that has not been
8 touched upon but needs to be considered by the Board in this
9 process. And that is the multi-year trends. When people
10 talk about groundwater basins, there are things that go down
11 in level during droughts and go up during wet periods.
12 Whereas stream is something that it's going to go up and
13 down every year about the same amount. That is -- I know
14 that is tough to come up with a clear distinction between
15 the two. There obviously is a difference there that needs
16 to be considered.

17 In the Pomeroy case that was not particularly relevant
18 because clearly there was a stream there. It was the outlet
19 of the basin where the water was flowing all the time. If
20 you looked up in the San Fernando Valley itself, I haven't
21 looked at the data, but I am fairly confident that you would
22 see, at least before the L.A. Aqueduct imports occurred,
23 there would be groundwater tables going down over years
24 during drought periods and recharging during wet year
25 periods. So I think that is another criterion that needs to

1 be factored into the elements that are considered by the
2 Board.

3 I did put in requirement that the Board make findings
4 on these criteria. That, of course, is just basic
5 administrative law. And then another thing that I think is
6 important, but not forgotten in all of this, if there is a
7 case where the Board concludes that there is a subterranean
8 stream, I think that the Board order needs to define quite
9 clearly what the boundaries are. So that then people
10 developing new wells or even using their existing wells will
11 know: Is my well pumping from the stream or is it not. So
12 I would propose that the level of specificity that the order
13 have a map with a line and some criterion to show the
14 different formations so that people will know if my well is
15 down in the fractured bank materials, I am pumping
16 percolating groundwater and I don't need a permit. If I am
17 within the channel, pumping groundwater out of the channel,
18 I do need a permit. Otherwise, the Board hasn't done as
19 complete a job if people aren't left with information on
20 what the Board's final decision is.

21 Couple of points came up this morning I want to mention
22 real quickly. The separation of functions where the Board
23 staff has had a Team A advocacy team and Team B advising
24 the Board member or Hearing Officer on decision making. I
25 have been through a couple hearings with that, and it really

1 transcends the groundwater classification issue. And I can
2 understand why the Board wants that sometimes to get a full
3 record.

4 But the problem we have with that is that it really
5 undermines the Board's credibility as a neutral decision
6 maker. And I am not accusing any staff of doing anything
7 wrong. I think you have fine staff and that they discharge
8 their duties very well, and I am not accusing them of bias
9 or impartiality or anything improper. But the basic
10 problem is when you have Team A and Team B, and the team
11 members have their offices or their cubicals right next door
12 to one another, no one on the outside world really knows
13 whether or not there is conferring going on back and forth.
14 You can say it as much as you want, and I have never been
15 one to accuse Board staff of anything wrong, and I know
16 other lawyers have, and I never have, but there is just
17 always that question: What is really going on upstairs in
18 this building in the decision making process?

19 I think the Board Members need to be real sensitive to
20 that, and it should really be the rare case when the Board
21 has separate teams just because of the devastating effect it
22 can have on the real appearance of impartiality.

23 Finally, Mr. Bagget asked questions this morning,
24 assuming we get some criteria, how did we have a procedure
25 to deal with this thing. That is a very good question.

1 I think the answer is if there are objective criteria,
2 first of all, there won't be that many disputes. You can
3 look at a well, look at the geology. It will be pretty
4 clear, and you look at the other data. It will be pretty
5 clear, either I am subject to needing a permit or I am not.
6 Just by having the criteria you significantly narrow the
7 number of cases you will have. There clearly will still be
8 some; there are always some disputes in the water area.

9 I think very simply there has to be a hearing with a
10 hearing officer, and I think, you're right, it needs to be a
11 preliminary hearing before you have a hearing on the merits
12 of the application. I don't think there is any procedure in
13 current law that authorizes the hearing officer's decision
14 to be final. I think the Water Code is pretty clear right
15 now that the majority of the Board has to act. I am not
16 sure that this is the place to make a change in that. I
17 think the better approach is have objective criteria so
18 there aren't that many of these disputes left, but then the
19 ones that are should be resolved through the Board's normal
20 process with a hearing officer and then the decision
21 actually adopted by Board Members.

22 With that, again, I do appreciate the opportunity for
23 comments, and I will be glad to answer any questions.

24 H.O. BAGGET: Mary Jane.

25 MEMBER FORSTER: Alan, are you familiar with the

1 Garrapata case?

2 MR. LILLY: I have read the decision. I am not
3 otherwise familiar with it.

4 MEMBER FORSTER: I was wondering if you were familiar
5 with it enough to answer a question, if what we did in
6 Garrapata was different from what we have done in other
7 groundwater cases.

8 MR. LILLY: I will take a stab at it, but it is a very
9 qualified stab. I don't know the facts nearly as well as
10 you do. My understanding of Garrapata, and this gets back
11 to Dennis Williams' comment about it is a question of
12 scale. My understanding there is that there was a very
13 relatively narrow, on the order of few hundred feet. Julie
14 will correct me if I have the wrong numbers. The relatively
15 impermeable banks were not very far from each other. So the
16 panel was relatively narrow, and I don't know whether there
17 was any widenings that looked like a basin or not.

18 From reading the decision, it appears it looks like it
19 was a relatively narrow channel and the banks were truly
20 relatively impermeable. It was granite for sure. I don't
21 know any evidence of any significant fracturing or not in
22 that. So I am not criticizing that decision. The one thing
23 I don't know is what the hydraulic continuity was between
24 the actual flow and the surface flow in the creek and the
25 flow of the groundwater. I just don't remember about that

1 decision, about where that fit into the decision.

2 I would suspect under my proposed regulation, again not
3 knowing the details or the facts, that that would be
4 classified as a subterranean stream.

5 MEMBER FORSTER: Do you have any opinion -- in another
6 venue that we had on this issue people raised the concern
7 that if we did anything new, everybody would be running to
8 the pump house to file. And then this morning I heard
9 people say, well, we think that you should grandfather in
10 all those who went before the time you are looking at this
11 today. And so, how would you deal with that?

12 MR. LILLY: It would be very difficult for you to deal
13 with, not me. Here is the problem. If you had a simple
14 case where one well had been pumping for 50 years at a
15 hundred gallons per minute and some new guy developed a well
16 at 50 gallons per minute and came to Sacramento and filed
17 his application and said that I ought to have priority, I
18 think that would be fairly simple for the Board to say just
19 in the consideration of the public interest, which, of
20 course, the Board has the authority to impose conditions on
21 applications. We can give the historical pumper a priority
22 even though he filed his application later.

23 Usually it is a lot more complicated than that.
24 Usually there are not just two wells. There are hundreds,
25 and also they have each been developing over time. They

1 have started out with a small community and then started
2 serving a larger community, and there may not be good
3 records if we are going back in time. The other area where
4 you may have problems is if you've already issued some
5 permits and then the historical pumper comes and says I want
6 a permit. I want it senior to the permit you issued three
7 years ago. If you haven't reserved jurisdiction, whether or
8 not you can go back and do that.

9 So, I think the short answer is the Board has authority
10 because the Water Code says that you may impose conditions
11 on any permit to further the public interests. Clearly you
12 have authority there to address the grandfathering issues.
13 There is going to be significant limitations and really a
14 risk of inequities even if you tried to exercise that
15 authority.

16 Then there is the other question getting back to the
17 question how do you impose conditions if you don't have any
18 objective criteria to decide who really should get the
19 priority. You can imagine each one is going to come in and
20 have a good argument why he should have priority over the
21 other one. That is just the nature of processes here.

22 MEMBER FORSTER: My final thing is you brought in
23 public interest. Nobody talked about this yet.

24 Do you foresee any public trust issues if we narrow our
25 definition of this groundwater?

1 MR. LILLY: There definitely could be. However, I am
2 not sure how great they will be. The most common time the
3 public trust issues will come up in the context of
4 groundwater is if the pumping of the groundwater is truly
5 the underflow of the surface stream, and the pumping of that
6 groundwater from that underflow reduces the surface flow and
7 then there are effects to the fish and wildlife and that is
8 where the public trust would come up.

9 What we are talking about, though, and I will shift
10 over to the next one of Dr. Todd's overheads. We are
11 talking about scenario three where the water table is
12 significantly below the surface flow of the stream, then the
13 public trust -- that is where we are saying that the Board
14 should not be requiring permits. Then that public trust
15 issue will be significantly smaller. By definition, and
16 some expert can correct me if I am wrong, but I am pretty
17 confident this is right, that at this point if you're
18 pumping from the water table, you are not going to affect
19 the surface flow, no hydraulic continuity between the two.

20 The answer is there will be some times, but I think most
21 of the times when there are public trust issues those would
22 be the underflow-type of groundwater where just about
23 everyone is agreeing that the Board should continue to
24 maintain its jurisdiction.

25 MEMBER FORSTER: Do you like ACWA's idea on the

1 technical and common sense panels?

2 MR. LILLY: Well, I have to say I was quite impressed
3 with the experts, because I have been thinking all along if
4 you just send a bunch of groundwater experts in a room, we
5 are going to get what we got this morning. They are going
6 to tell you how the groundwater all works, but they are
7 basically going to say, "We need some policy guidance before
8 we can tell you what we should do."

9 I think Anne Schneider was correct when she said, I
10 hate to just add to the process because I know this Board
11 has so many things going on right now, but you really do
12 need a committee, not of technical experiments, but more of
13 the policy and legal types to figure out what are the
14 objective criteria that the Board wants, and then you can
15 give those to the technical experts to refine the actual
16 rules to apply them. Unless you have some policy first,
17 they don't know what to do with the technical expertise.

18 MEMBER BROWN: Thanks, Alan. You have given us a lot
19 to think about. As usual, if I might add.

20 MR. LILLY: Thank you. I guess that was a compliment.

21 MEMBER BROWN: It was meant as a compliment.

22 MR. LILLY: Thank you.

23 MEMBER BROWN: From your discussion it appears clear
24 that you do think that the State Board should have control
25 and authority over subterranean streams or underflow or

1 whatever you may wish to call it. We can discuss what is
2 meant by subterranean stream, whether underflow or something
3 different. But, nevertheless, it does appear from your
4 presentation you think that the State Board definitely has
5 responsibility and authority in this area.

6 MR. LILLY: I said for underflow. Subterranean stream
7 may be something different. I would agree with underflow.

8 MEMBER BROWN: For what it is worth, Team A and Team B
9 concept, the State Board has had a lot of concern over that
10 ourselves, particularly the hearing officer. We have those
11 issues that come before us.

12 I think to the extent that we can, we are going to try
13 to make that go away. We still have the problem when
14 someone like yourself puts in a complaint. We have to send
15 staff down there to see if it is a viable complaint. Then
16 we still have in a sense people that are maybe tainted to
17 that side of Team A or Team B issue. We haven't come up
18 with a clearer way of how to get out of that and still
19 answer the complaint from the neighborhood.

20 That is an issue that is really front and center before
21 us. It causes us as much consternation that it probably
22 does you to have our team bifurcated to where we have a
23 limited number of experts in our staff. And when we see
24 some of our top quality people not being accessible to the
25 Hearing Officer in that team, it causes us a lot of

1 concern. We are aware of that. We haven't figured out how
2 to circumvent it yet. Because of responsibilities of
3 answering complaints and trying to determine what our
4 involvement should be.

5 Is what you are concerned with, is it that it appears
6 that what we are doing conceivably has no bounds? To use
7 your example, like the San Joaquin and that in our wildest
8 imagination never came into play as you so stated. And it's
9 still nowhere near consideration as far as, certainly, I am
10 concerned and others. But that is an example that you used
11 to exaggerate the extreme.

12 So, is your concern that it appears that we go from
13 Garrapata to San Luis Rey to the Carmel or whatever and then
14 on towards unknown streams? Or is your concern with the
15 test itself, as what constitutes a subterranean stream?

16 MR. LILLY: That is a very good question.

17 MEMBER BROWN: If your concern is with the test, then
18 it would appear that we could better utilize our time and
19 your knowledge and experience in trying to refine the test,
20 where we can go ahead and put some bounds on it that would
21 raise the comfort level of the public? And that is a much
22 easier thing to do, I believe, in trying to redo the whole
23 scenario.

24 MR. LILLY: I would have to agree. I think if you said
25 we have a problem here, we don't want the pumpers in the San

1 Joaquin or Sacramento Valley to be concerned. And the last
2 thing is you would want them to start filing applications
3 here. Your applications unit would go crazy. So you could
4 deal with that. You could say if it is more than ten miles
5 wide, we are not touching it. But that clearly doesn't --
6 that is not the right way to go.

7 Somebody is going to say, "Well, why didn't you make it
8 five miles?" Someone else is going to say, "It should have
9 been 15 miles."

10 But I think your other comment is, if we are really
11 refining the test itself, I think the problem of Sac Valley,
12 of San Joaquin Valley will take care of itself. Any
13 reasonable test, and that is almost a quality control check,
14 you can make on your test. When you are done with your
15 test, you can ask yourself, "Will this apply to the Sac
16 Valley?" If the answer is yes, then probably there is
17 something wrong with the test. By if the answer is no, at
18 least you have passed that quality control. I think you are
19 on the right track.

20 MEMBER BROWN: The statement that I really appreciate
21 is that the current task has no bounds. And I think that is
22 probably pretty much on target, as far as the concerns that
23 we've heard. It may be that there are things that we can do
24 to put some bounds on the current test. Because the current
25 test went through the Legislature and has some pretty

1 stringent criteria.

2 There is another issue that I wanted to talk to you
3 about and the continuity concept. If a stream has
4 continuity with the subsurface flow and the surface flow,
5 then it meets part of the test. We have streams in
6 California that I am aware of that have all of that. Some
7 have continuity; they are gaining in certain areas and
8 losing in other areas in the same stream. There is probably
9 some testimony later on that comes forward on that.

10 All of these refinements -- I guess the point I am
11 making is that they are very dynamic. And for us to limit
12 ourselves to streams that have just continuity of surface
13 water that came from ACWA this morning and others that I
14 heard here, I see some experts out in the audience that may
15 wish to give some more information on this later on, but if
16 we limit ourselves to just hydraulic continuity, it seems
17 like that there are lots of circumstances within the state
18 then we would not be part of. Maybe that is all right.

19 But if that is what the public wants then you probably
20 should tell us.

21 MR. LILLY: And some people are. I think you are right
22 on all counts. Obviously, that is what we are advocating.
23 Of course, just because the Board doesn't have jurisdiction
24 over that type of groundwater, just as it does not have
25 jurisdiction over percolating groundwater, doesn't mean it

1 is totally unregulated. The numerous adjudicated basins in
2 Southern California show that it is -- no offense -- that it
3 is possible for the courts to regulate groundwater and come
4 up with adequate systems that are operating well. And the
5 Board certainly has a very important role in water in
6 California. There is just -- the Board doesn't have to do
7 it all.

8 MEMBER BROWN: I agree. The courts is fine. And as
9 far as the State Board is concerned, at least one member,
10 any of them they wish to take on is fine.

11 MR. LILLY: Of course, if I can just make one more
12 follow-up on that, following up on Mary Jane Forster's --

13 MEMBER BROWN: Wait a minute.

14 MR. LILLY: Go ahead. Excuse me.

15 MEMBER BROWN: But when you do that, then all of you
16 out there cut out one venue for an appeals process, and that
17 is what the State Board does. The State Board for those
18 kinds of issues, on any of the hearings that we have, allows
19 any of you out there to come in and voice your opinion or to
20 give testimony and that is sometimes hard to do in a court.
21 If you go directly to the courts, you may not have that
22 opportunity. They may not be quite as open as what we hope
23 the State Board is.

24 MR. LILLY: I would agree your hearing process and your
25 whole deliberation process is more open than is the court

1 process, and that is a real benefit. But on the other hand,
2 I don't think the Board has to do it all. And as I was
3 going to comment, the courts also have authority to enforce
4 the public trust doctrine. If there is a case where we have
5 something that you might or might arguably be a subterranean
6 stream but is not connected to the underflow of the surface
7 stream, but it still does have an impact on public trust
8 values, the California Supreme Court has made it very clear
9 the courts do have the authority to deal with that and to
10 impose appropriate conditions.

11 I think the other problem, though, the flip side of
12 your open process and the benefits of all that, there are
13 some limitations on how this Board can operate and
14 particularly this issue of priorities and if you issue some
15 permits and five years later a city that has been supplying
16 water to 10,000 people comes back and says, "We really
17 should have gotten a permit. We'd like to have priority
18 over the newcomer." There is some limitations on what you
19 can do. Some of those circumstances a court ruling might be
20 a better circumstance.

21 H.O. BAGGET: I just have one quick question on your
22 proposed legislation. I assume part would be grandfathering
23 in existing prior decisions. Or if your underflow criteria
24 went in, I think as you pointed out, there would be some
25 conflict with some prior decisions.

1 MR. LILLY: I am not sure. I guess -- I am not sure
2 which prior decisions. Are you thinking there might be
3 things where the legislation would say the Board really
4 should not have asserted jurisdiction in the past and it did?

5 H.O. BAGGET: I am not sure.

6 MR. LILLY: If it is the case where, under the new
7 legislation, a permit that the Board previously issued no
8 longer is within the Board's jurisdiction, I am not sure
9 that is a big problem. Because at that point, under
10 groundwater law, the user of that water would have a
11 groundwater right that would relate back to its date of
12 use.

13 The problem is going the other way; you can't get the
14 priority. We didn't see any problem with grandfathering
15 here; it may be. I have a feeling this may not be the last
16 workshop we have on this issue.

17 I just want to reiterate by saying I really appreciate
18 your willingness to take the time on this. This is a tough
19 one. It's come to a head, and it's going to go away. I
20 think that it is really good that you decided to grapple
21 with this issue and give us the chance for comment. I
22 appreciate that.

23 H.O. BAGGET: Thank you.

24 MR. LILLY: Thank you.

25 H.O. BAGGET: I will try and read this. Lynne

1 Planpeck. We will find out.

2 MS. PLANPECK: Thank you for letting me speak. I am
3 here representing Santa Clara Organization for Planning and
4 Environment and Friends of the Santa Clara River.

5 I also hold an elected position on the water district,
6 Newhall County Water District; that I am a minority position
7 on that Board and it has been taken over by developers.
8 They would have my hide if they knew I was up here about to
9 say the things I am going to say to you.

10 THE COURT REPORTER: I do need your name.

11 MS. PLANPECK: Lynne Planpeck, P-l-a-n-p-e-c-k.

12 You're probably familiar with our river in Northern Los
13 Angeles County. We have the last unchannelized river. We
14 have water agencies and other folks that are developing
15 along the river that have been arguing with you for a long
16 time that they do not want you to have control of the river,
17 and they don't want appropriative rights to be granted and
18 it is not bed and banks and not an underground stream.

19 I was sent here by these two organizations, and I am
20 sure the local Sierra Club would support what I am going to
21 say as well.

22 H.O. BAGGET: Is this a pending application?

23 MS. PLANPECK: No.

24 H.O. BAGGET: Julie, are there --

25 MS. CHAN: There are pending applications on the Santa

1 Clara River. I believe Newhall County Water District is a
2 protestant that we don't have jurisdiction to issue permits
3 to the groundwater. It is not for appropriation. It is
4 percolating groundwater.

5 So we will have to grapple with the Santa Clara River
6 at some point down the line.

7 MS. PLANPECK: Am I not supposed --

8 H.O. BAGGET: That is what I want to clarify.

9 MS. CHAN: There is no notice of a hearing.

10 MS. MAHANEY: Any possible hearing has not been noticed
11 yet. Perhaps we can just address your comments generally,
12 that way.

13 H.O. BAGGET: Generally, maybe --

14 MS. PLANPECK: I was just giving a little
15 background. I guess what I am trying to say is that the
16 river is now being overdrafted. The overdraft is becoming
17 extreme. I agree with the gentleman that just previously
18 spoke to you about where there is surface flow and surface
19 flow disappears, obviously the surface flow is connected to
20 the underground and that that would be an appropriate place
21 for you to have jurisdiction.

22 I guess what I wanted to say to you is that we are all
23 desperate on the Santa Clara River; the public and the
24 environmental organizations are desperate for the question
25 about public trust rights are ones that we intend to bring

1 and will be brought in shortly if a resolution to this issue
2 can't be found. We need some kind of control. We need some
3 kind of consensus to manage that water properly. The water
4 agencies are not going to do it. The developers in the area
5 are not going to do it.

6 We had state legislation passed in 1987 to put the
7 water purveyors and the state water wholesaler so that they
8 would develop a water management plan. It is now the year
9 2000. No water management plan has developed. My own water
10 district when I was on the board tried to do a 3030 plan and
11 bring some kind of consensus. The private holders of our
12 water company in the valley would not buy into it. They
13 spent \$40,000 getting this all off the Water Code.

14 H.O. BAGGET: If you -- we are here looking at broader,
15 not specific issues.

16 MS. PLANPECK: I understand. I guess what I am saying
17 is --

18 H.O. BAGGET: Frankly, one of us could become the
19 hearing officer.

20 MS. PLANPECK: I guess what I wanted to say to you is
21 there are rivers that are facing similar problems, and we
22 need you to -- we need to have your help in controlling
23 these.

24 H.O. BAGGET: Public trust.

25 MS. PLANPECK: In public trust issues. And I didn't

1 bring a lot of diagrams, but if you want to make five -- if
2 you want to define it and say it has to be five miles wide,
3 that is fine. But when there is a connection to surface
4 flow --

5 H.O. BAGGET: Affects surface flow.

6 MS. PLANPECK: -- it ought to be considered, a river,
7 and we need your help to start taking control. We support
8 the Board taking control.

9 H.O. BAGGET: Got it. Thank you.

10 Any questions?

11 Robert Neufeld.

12 MR. NEUFELD: Morning -- good afternoon now, Mr.
13 Chairman and Members of the Board. It is a pleasure to be
14 here again.

15 My name is Robert Neufeld. I am an elected director
16 for the Cucamonga County Water District.

17 In that regard I serve as an appointed officer of that
18 Board representing their interests with the Chino Basin
19 Water Master, where I serve as the chairman of the board.
20 That role as water master, I serve on the Board of Directors
21 of AGWA, the Association of Groundwater Agencies. Today I
22 am here speaking on behalf of that organization, AGWA.

23 AGWA is a nonprofit, public benefit corporation formed
24 in 1955. The members of AGWA include more than 15 public
25 agencies which either by court judgment or statute are

1 charged with responsibility for the management of
2 groundwater basin resources within an area stretching from
3 Kern County to southern Orange County.

4 Within the area managed by AGWA members are
5 approximately 50 separate and distinct groundwater basins,
6 which are a critical part of the water needs of well over
7 20,000,000 people in the southern portion of this state.
8 AGWA has great concerns over the direction this Board is
9 heading regarding the classification and definition of
10 subterranean streams.

11 The preliminary indications coming from the Board
12 governing its jurisdiction over groundwater is so expansive
13 that could potentially subject all unadjudicated groundwater
14 basins in the state, including groundwater that has
15 generally been understood to be percolating groundwater to
16 State Board regulation. This Board seems to be suggesting
17 that a basin or aquifer may be deemed a subterranean channel
18 subject to this Board's jurisdiction regardless of its width
19 or depth to the bedrock and indeed water deemed to flow in a
20 direction roughly perpendicular to the bed of the channel
21 would be within this Board's jurisdiction.

22 A final determination based upon this logic would be
23 clearly inconsistent with numerous judicial decisions
24 restricting State Board jurisdiction the flows within a
25 known and defined subterranean channel contrary to the

1 intention of the Legislature in their definition of
2 subterranean streams.

3 Additionally, the view of this Board's jurisdiction
4 appears to be contrary to clear legislative and judicial
5 policy establishing a framework for local management over
6 groundwater resources. Years of substantial effort and
7 significant expense have been devoted by groundwater
8 agencies throughout the state to develop and establish those
9 resources necessary to effectively manage groundwater at the
10 local level. Under the assumption that groundwater was not
11 located in a subterranean stream, those efforts could well
12 have been in vain if this Board decides to exercise its
13 jurisdiction in that area.

14 This workshop should result in a State Board policy
15 that is clear in its jurisdiction over groundwater resources
16 and not be disruptive of legislatively mandated programs.
17 To address the specifics of the hearing today that we are
18 here for, you would ask what legal test should this Board
19 review. We believe that there are a number of adjudicated
20 groundwater basins throughout Southern California where the
21 legal definition of groundwater has been litigated and
22 determined by the courts.

23 We are asking this Board to consider reviewing those
24 cases that we will enumerate to follow in their findings.
25 Because we know full well that when decisions are made at

1 this level, sooner or later somebody will challenge or use
2 that decision as a basis for further litigation down the
3 road.

4 While AGWA recognizes that this Board possesses
5 concurrent jurisdiction with the trial courts, and that was
6 decided in the National Audubon Society versus The Supreme
7 Court in 1981, once the trial court assumes jurisdiction
8 over a controversy, it takes exclusive jurisdiction, and
9 another tribunal is prohibited from later entering into a
10 determination over that subject matter.

11 In Halpin versus the Supreme Court in 1971 and in Myers
12 versus the Superior Court in 1946 that was upheld. Thus,
13 any attempt by the State Board to relitigate classification
14 of groundwater already adjudicated by the trial court would
15 violate the doctrines of concurrent jurisdiction and
16 collateral estoppel.

17 That was upheld in DeWeese versus Unick in 1980.
18 Subsequent litigation over previously tried and finalized
19 issues would result in vexatious, constantly recurring
20 litigation and threatens to undermine previously settled
21 classifications of groundwater that has served as the basis
22 for comprehensive planning and management of groundwater
23 resources in Southern California.

24 AGWA sincerely hopes that this Board will consider
25 those cases so that there will be a consistent determination

1 of what constitutes a groundwater basin, be it adjudicated
2 or unadjudicated. In order to remove the cloud of
3 uncertainty that appears to be surfacing from this Board
4 here, we are asking that a task force of water experts,
5 legal experts and policy makers be convened to assist this
6 Board and to help complete the study on this matter. This
7 team of experts would provide this Board with a factual and
8 unbiased opinion of what constitutes a subterranean stream.

9 AGWA also feels that if this process continues to
10 proceed in the current direction as proposed by staff, it
11 will predictably embroil the Board in a court battle of
12 wasteful follow-on litigation and will disrupt groundwater
13 efforts throughout the state.

14 We thank you very much for the opportunity to appear
15 before you today.

16 Any questions?

17 MEMBER BROWN: No question. But I really have a
18 concern here in that it appears that what you believe the
19 State Board is intending to do is far from what I at least
20 perceive and the other Board Members that we are doing.

21 So the perception here is concerning in that the State
22 Board to my knowledge has no interest in trying to expand
23 any authority over groundwater. In fact, one major issue
24 that has come before us, I am sure you are aware of it, is
25 the Salinas groundwater basin. The Salinas groundwater

1 basin has tremendous influx of seawater on an annual basis
2 going in it because of the mining that has taken place
3 there. We estimate that there is about 300 surface acres, I
4 think, per year into the Salinas groundwater basin and
5 completely destroyed the 180-foot aquifer and they are
6 working on the 400-foot aquifer.

7 The State Board has been involved in that in trying to
8 bring resolution to the concerns, and they keep pointing
9 fingers at each other as to who is responsible. But this is
10 important for you in your organization to understand, is
11 that we have cut an awful lot of slack for those folks over
12 there. We have given them money and technical support with
13 a hope and belief that they will eventually solve the
14 problem themselves. That is where they should be solved.

15 Those problems, to the extent possible and practical,
16 should be solved by the people who live and work there.
17 This Board has demonstrated its resolve in that direction
18 by putting money and talent and cutting as much slack as we
19 can to help them do that.

20 On the other hand, we have the responsibility that if
21 they can't resolve it themselves, this State Board has the
22 legal responsibility and right to step in and do something.
23 And if we don't, the federal agency surely will. We are not
24 about to let the federal agency do that as long as we have
25 the capability ourselves.

1 MR. NEUFELD: We share that same concern, Mr. Brown.

2 MEMBER BROWN: Let me finish. I would hope that your
3 organization would understand that the Board's philosophy in
4 this business itself is to the extent that if we can help
5 those with concerns and arguments between themselves that
6 are very valid, to help you resolve it with the ones that
7 live and work there.

8 What is concerning is in your presentation here it
9 doesn't recognize that philosophy that has been
10 demonstrated. I would hope that could change. The purpose
11 of our workshop here is to do exactly that. And one of the
12 things that this Board I think does so well, this
13 legislation that we have, that we work under, the
14 Porter-Cologne Act, is the involvement of the public
15 process, people come in and voice their concerns.

16 Now if we have done something that is contrary to that
17 that has been interpreted by your organization, that is
18 wrong because that is not our philosophy or not our stated
19 business.

20 So my question to you is, in any of our recent
21 decisions from Garrapata to Carmel or whatever, what
22 specifically in those decisions that has been made that has
23 occurred that brings this kind of consternation? Do you
24 know?

25 MR. NEUFELD: Yes, I do. It has nothing to do with

1 those previous decisions. It has to do with the direction
2 that in the case that we are not supposed to be talking
3 about here today came from the Board where it appears, at
4 least through the information we received in Southern
5 California, that staff took a position in support of one of
6 the applicants rather than taking a neutral position. And,
7 obviously, in the position that we are in, we recognize that
8 as a significant input to the Board. And my own agency,
9 when staff makes recommendation to us, this carries a
10 tremendous amount of weight.

11 MEMBER BROWN: The concern you are addressing is the A
12 and B Team that you heard Mr. Lilly speak of.

13 MR. NEUFELD: Correct.

14 MEMBER BROWN: That put us in the difficult position of
15 having a team that was a party. But the other team in the
16 hearing team had to treat them in this case as a party. But
17 the hearing team that came up with the decision is certainly
18 different than the team that was acting as an interested
19 party. That may help you.

20 MR. NEUFELD: It helps me a great deal. Let me say,
21 Mr. Brown, that we are very appreciative through our
22 organization of this workshop. When we were here in
23 February, we were one of the groups that supported having
24 this type of workshop. The direction and comments that I am
25 hearing from you, I'll be more than happy to take back and

1 relay to our organization.

2 I believe very firmly in this process as do all of the
3 people that I work with down there, some of whom are in the
4 audience, that we want this to be an open and fair process.
5 But based upon the information that we had available to us,
6 it appeared that you were being pushed in a direction that
7 was contrary to what might be in the best interest of the
8 other parties.

9 MEMBER BROWN: I hope that has been cleared up.

10 MR. NEUFELD: I believe it has.

11 Thank you very much.

12 H.O. BAGGET: Mary Jane.

13 MEMBER FORSTER: One thing, Bob, is I would like to get
14 a copy of this. I don't think we have one.

15 MR. NEUFELD: What has happened, Ms. Forster, is the
16 comments that were sent up last week addressed that other
17 case, and they were revised late Friday afternoon to remove
18 any reference to that particular issue. I talked to Mr.
19 Mills on the phone this morning. We are having a new copy
20 prepared as we speak, and it will be forwarded to this Board
21 posthaste for it to be included in the record.

22 MEMBER FORSTER: Just from what you heard so far today,
23 I am hoping that you realize that it is not our intention to
24 take away local control of groundwater, in all of the
25 efforts you have gone through over all these years with your

1 own adjudications and your own court cases and all that.

2 So, we are, in my opinion, we are just taking this
3 opportunity to look at what is the appropriate test. And,
4 you know, if everything is and things are so old and
5 antiquated and somehow we have not followed Pomeroy to the T
6 or Pomeroy isn't any good anymore. That is what this is all
7 about. Believe you me, it is not about trying to get
8 jurisdiction over local groundwater.

9 MR. NEUFELD: I think that message is loud and clear.
10 And I think that speaks well on behalf of this Board.

11 H.O. BAGGET: Thank you.

12 Fran Farina.

13 MEMBER FORSTER: I hope the audience understands the
14 reasons, when we decided to have this workshop, I am going
15 to say it again, we didn't want the example to be a water
16 rights or an issue before us that we haven't finished with
17 yet because it isn't fair. And some of the people that were
18 involved in the decision were very small entities that
19 couldn't really afford to have their attorneys keep coming
20 up to Sacramento on issues that were global and not exactly
21 pointed at their applications. So if you haven't followed
22 that, that is the reason we don't want to talk about it. It
23 is unfinished business, and it is unfair to the parties who
24 can't afford to be here that are the subject of that issue.

25 So, I keep repeating that so you understand we are not

1 being gnarly up here. We are trying to protect the --

2 MEMBER BROWN: The technical term is hard-nosed.

3 MEMBER FORSTER: We are trying to protect those
4 parties who couldn't come today.

5 MS. FARINA: Thank you, Mr. Chairman. My name is Fran
6 Farina. I am here today representing Save Our Carmel
7 River. Last time I appeared before the Board was almost
8 five years ago on July the 6th, 1995, when I represented the
9 Monterey Peninsula Water Management District in Order 95-10,
10 when the order on the Carmel River became final.

11 I've passed out to you this morning something that's in
12 our archives. It actually was an exhibit at the Carmel
13 River hearings, and it is a letter dated April of 1981 from
14 then Chairwoman Carla Bard. And what I want to speak about
15 briefly today was process. I know you've heard the
16 expression the State Board moves with glacial speed. I want
17 to talk about a 20-year scenario that we've had on the
18 Carmel River and what it is you may be moving into with what
19 is under consideration today.

20 In this letter there is reference to the staff, that
21 our staff, our professional staff, found a great deal of
22 hydrogeologic data currently available. This is 1981 on the
23 Carmel Valley groundwater basin. Even with such an
24 information, it is difficult to determine conclusively that
25 the underground water is or is not supporting underflow of

1 the Carmel River. It is possible that the question could
2 never be answered to the satisfaction of all.

3 And then she goes on to say the basin has been yielding
4 water for beneficial uses for many years under the
5 presumption that the water bearing alluvium is a groundwater
6 basin. Since there is no clear evidence to show that such
7 is not the case, the Board will take no further action at
8 this time to investigate the Lower Carmel River groundwater
9 basin.

10 My first comment to you is a letter like that never
11 should have been sent from this Board. Here you indicate
12 you have a lot of hydrogeologic data; it's not conclusive at
13 this point, but if someone had spent the time and energy as
14 you ultimately did, you would have found out something to
15 the contrary. And what you did was allow a continuation of
16 status quo, and this letter continues to come back to haunt
17 us because some people don't recognize Order 95-10.

18 In this 20-year period, 19-year period, we have had a
19 situation where, again, because of lack of adequate staffing
20 and budget you were not able to move forward on the Carmel
21 River. Complaints had to be filed over a period of years
22 beginning in 1987 through 1991 by four different
23 organizations. You finally commenced hearings in 1992, but
24 you couldn't conclude them then. You had more hearings in
25 1994 and it took until July of 1995 when the decision

1 ultimately came out.

2 Here we are five years past that period of time, in the
3 year 2000, and what relief has the Carmel River seen? It
4 has been determined what is being pumped by the local
5 utility company is underflow, subterranean stream, is
6 underflow of the Carmel River. It is doing great damage to
7 the public trust resources. And yet what relief have we
8 received from the State Water Board?

9 I think the point that I am trying to make is if you
10 want to become more expansive in determining whether what
11 you have previously determined to be as groundwater basins
12 are really underflow, then you need to make sure that you
13 have adequate staff and funding so that your follow through
14 can be more swift and the results more prompt than what we
15 have experienced in our area.

16 There were some comments that I would like to pick up
17 on from this morning. I concur with Board Member Brown when
18 he was talking about his concern with technical experts. I
19 sat here and on the panel of three, I have seen two of them
20 as hired guns in our area. And this is such a highly
21 specialized area. You really have a limited pool of people
22 to pull from. While I agree that you do need technical
23 expertise to assist you, you really have to make sure that
24 it is fair and impartial coming to. Because if they are
25 sitting at the table, and in the back of their minds they

1 are recalling who have they represented in the past and who
2 would they like to represent in the future, that is a
3 dilemma for you to have to deal with.

4 I hate the word "consensus," because it means
5 unanimous. And the reality is you will never get unanimous
6 determination on anything. So we should strike that from
7 our vocabulary.

8 On the water chemistry, I have concerns about how this
9 particular issue is manipulated. I can tell the surface
10 water of the Carmel River, depending on where you are
11 extracting, you can have water without iron and manganese
12 and you can have water with iron and manganese. So, you
13 need to be very, very careful.

14 In the Cal Am case they wanted to pump the upper
15 reaches of the river because they didn't have to then filter
16 and process the water because it was so clear.
17 Unfortunately, they now have to pump from the lower reaches
18 of the river so that we can keep the upper area more
19 pristine.

20 I have to say with absolute disheartenment that in the
21 last five years we have seen a gross proliferation of wells
22 being drilled primarily in the Carmel Valley. That was
23 raised as a concern, that the people might not be filing
24 with you but drilling new wells, trying to secure new water
25 rights. The reality is that is exactly what we have seen.

1 And even though you've determined that one needs an
2 appropriative right in the Carmel Valley alluvium, most
3 people aren't applying for them but they sure are drilling
4 more wells.

5 So I wish you well with your new challenge. I realize
6 that you have a lot of work that needs to be done. And I
7 hope that some of your experiences that you have seen that
8 have come out of the Carmel River case over the last 20
9 years may be instructive to you.

10 Thank you.

11 MEMBER BROWN: Thank you, Fran.

12 H.O. BAGGET: Molly Erickson.

13 MS. ERICKSON: Good afternoon, Mr. Chair, Members of
14 the Board. I am Molly Erickson. I am chair of the Board of
15 Directors of the Monterey Peninsula Water Management
16 District. With me here today are our general manager, Darby
17 Fuerst; district engineer, Andy Bell; and our general
18 counsel, David Laredo. And you have heard from our past
19 Board chair. My comments today will be brief.

20 First, the Board wishes to direct its thanks to this
21 Board. My Board wishes to direct its thanks to your Board
22 for holding today's workshop. We are here to observe. We
23 are here to listen.

24 Our Board is interested in presentations and in the
25 dialogue because we are very concerned about this issue,

1 and we would like to participate in the process going
2 forward. We appreciate the opportunity to meet you all
3 today, and we look forward to being part of the discussion
4 going forward.

5 Thank you.

6 H.O. BAGGET: Thank you.

7 MEMBER FORSTER: I have one question. Probably not a
8 fair question for you, but maybe your manager or engineer
9 could answer it.

10 If there are all these wells being drilled, who has the
11 authority over that? The county? Somebody has to give
12 permits for those wells.

13 MS. ERICKSON: Good question. Up until two months ago
14 the past Board had not taken any significant action to take
15 any authority over regulating those wells, which have
16 proliferated. Certainly our general manager and general
17 counsel and district engineer can speak to this issue. But
18 as a Board member, I can tell you that last November there
19 were three new Board directors elected, myself as one of
20 them, and the new Board has taken distinct action to try and
21 get some control over understanding what the impacts are and
22 in regulating the proliferation of wells.

23 And on our meeting this coming Thursday we do have an
24 agenda item specifically to expand our regulation to
25 individual wells.

1 MEMBER FORSTER: I think I recall the chairman of the
2 Board of Supervisors coming before us one time and saying
3 she didn't have any control. I couldn't understand. In
4 today's age there is over proliferation of people who
5 control this.

6 MS. ERICKSON: The county does have a permitting
7 process.

8 H.O. BAGGET: County Health Department, I assume.

9 MS. ERICKSON: County Health Department, they have a
10 standard permitting process. But as far as it passes --

11 H.O. BAGGET: Water rights to us.

12 MS. ERICKSON: Yes. Our general counsel, David Laredo,
13 can address that more specifically.

14 MR. LAREDO: My name is David Laredo, general counsel
15 to the Monterey Peninsula Water Management District. As you
16 may recall, the Water Management District is a Special Act
17 district and has unique authority as the manager of
18 integrated water resource, both surface and groundwater
19 resources. That legislative authority does specifically
20 enable our district as opposed to other entities to permit
21 and regulate water distribution systems.

22 As Ms. Erickson had indicated, that authority has
23 previously been interpreted to mean only larger systems, not
24 single-source systems, single wells. Upon review of that,
25 the Board has asked to have that authority reinterpreted.

1 And that is what is before our board on this coming
2 Thursday, is an ordinance that will reinterpret the
3 statutory authority that had been enacted in 1977. It is
4 not a statewide statute. I don't know that it will apply to
5 any other or present any other analog to that elsewhere in
6 the state.

7 From our perspective, our district does have the
8 authority to regulate single wells and if enacted by the
9 Board, it would have that regulatory authority.

10 H.O. BAGGET: I assume you have to get a permit from
11 the county or health department to drill a well in any
12 case?

13 MR. LAREDO: That's correct.

14 H.O. BAGGET: If it is an adjudicated basin, you have
15 to have a water right permit.

16 MR. LAREDO: The water rights question aside, I don't
17 believe the county has any inquiries as to what the water
18 right basis is.

19 H.O. BAGGET: That is probably right. Doesn't surprise
20 me at all.

21 MR. LAREDO: They are only looking at the land use.

22 MEMBER FORSTER: Not adjudicated, is it?

23 MR. LAREDO: No. It has been declared to be fully
24 appropriated.

25 MEMBER FORSTER: I remember that. I was there.

1 H.O. BAGGET: That is probably true. In most rural
2 counties I am familiar with you can build a dam without a
3 water rights permit. In Mariposa where I am from, we have
4 an ordinance that requires proof of water rights before you
5 start the dam.

6 MS. ERICKSON: Thank you.

7 Ms. Forster, in response to your question, speaking as
8 an individual director, the new Board is very much trying to
9 grapple with many of the environmental impacts on the
10 Carmel, and as a result of 95-10. Responses that we have
11 not seen before, as Ms. Farina referenced.

12 Thank you.

13 H.O. BAGGET: William Baber.

14 MR. BABER: Chairman Bagget, Member Brown and Ms.
15 Forster. Thank you for the opportunity to speak before you
16 today. I am with the Minasian law firm, 1681 Bird Street,
17 Oroville.

18 I am representing today 18 public agencies, water
19 districts and authorities in the Sacramento Valley,
20 primarily in the west side of the San Joaquin Valley. We
21 are submitting these comments to you in response to your
22 March 15th notice, and we are going to take them in the
23 order of issues that you presented in your notice. So I'll
24 go over each issue and briefly respond as we are responding
25 on behalf of our clients.

1 So, issue one is what legal test should the State Board
2 apply in determining whether subsurface waters should be
3 classified as part of a subterranean stream or percolating
4 groundwater? Before I give you our answer, I will say our
5 18 water districts and entities are in our written comments,
6 listed in our written comments.

7 Our answer to that first issue is, of course, the
8 Pomeroy decision. That decision sets forth California case
9 law on the subject of whether the State Board can exercise
10 jurisdiction over groundwater pursuant to Water Code Section
11 1200. The State Board has no jurisdiction over groundwater
12 as opposed to surface water unless groundwater flows in
13 subterranean streams and known and definite channels. The
14 Pomeroy decision, that 1899 decision gives the test which
15 distinguishes between a subterranean stream and percolating
16 groundwater.

17 We found interesting instruction number 12 given the
18 jury by the Pomeroy trial court. That case must have been
19 tried in 1898 or 1899. I am going to read you that
20 particular jury instruction, at least part of it. It is
21 rather short. To accent, I think the difference between
22 percolating groundwaters and subterranean stream.

23 The decision given by the judge reads as follows:

24 In addition to these rights and benefits
25 arising from the flow of the river through

1 this land, the defendants are the absolute
2 owners of all such water as may be present in
3 the soil of this land and which does not
4 constitute a part of the water of the river.
5 This is usually called percolating
6 water. There is, however, no magic in the
7 word percolating. The fact that any witness
8 may apply that word or refuse to apply it to
9 any particular class of waters to which he
10 may speak is not conclusive of the question
11 whether or not such water does or does not
12 form part of the river. That question is to
13 be determined by you from a consideration of
14 the facts proven. The right and ownership of
15 the defendants in this class of waters is
16 distinct from and much greater than their
17 right to the use of waters of the stream. As
18 to the waters of the stream, they have a
19 right only to the use of it on this land, and
20 they do not own its corpus or its body for
21 the very water itself. They have no right to
22 take it away from the land and use it on
23 other lands or sell or dispose of it for use
24 on other lands or at other places. But as to
25 this other water, if any there be in this

1 land, not a part of the stream, they are the
2 absolute owners of it to the same extent and
3 as fully as they own the soil or the rocks or
4 timber on the land. (Reading.)

5 Back to the regular paragraph, back to the letter. As
6 demonstrated by the Supreme Court's apparent affirmation by
7 the jury instruction given in 1898, 1899. I say apparent
8 affirmation of jury instruction because if you read the
9 Pomeroy decision it is pretty much unintelligible by me,
10 anyway, to determine whether or not, you know, the Supreme
11 Court actually supported the jury's determination or opposed
12 it. I think the Chief Justice opposed it and another
13 justice supported it. And there really was no answer in the
14 court decision that I can see.

15 The critical issue of whether subsurface waters are
16 subject to State Board jurisdiction is a factual question to
17 be determined by either a local trial court or jury or the
18 State Board. The legal test, however, remains the same, as
19 expressed in Water Code Section 1200 in Pomeroy.

20 I recite the definition of 1200. I know you've had
21 that read to you a zillion times. So you know that a
22 subterranean stream is subject to your jurisdiction
23 statutorily and unfortunately. So what you got to do is
24 figure out a way to limit that test so that you don't just
25 take upon yourself so much stuff that you have, I will tell

1 you, a lot of applications for well permits in the Butte
2 basin alone. In the Sacramento Valley from pre-1914 right
3 holders, you would just be inundated.

4 Certainly, the San Luis Rey decision of the State Board
5 should be strictly limited by the facts presented; it should
6 not be liberally interpreted or expanded beyond existing
7 statutory and case law, which limits the State Board
8 jurisdiction to groundwater flowing through subterranean
9 streams in known and definite channels. And also there is
10 the Arroyo Baldwin case and I cite that.

11 Now we get into issue two. What information should the
12 State Board consider when determining whether subsurface
13 waters are part of a subterranean stream or are percolating
14 groundwater? The answer, our thoughts in this particular
15 issue are rather simple. That is, we encourage the State
16 Board to use a conservative application of the Pomeroy legal
17 standard in determining the facts of each individual case
18 presented to you to determine your jurisdiction, whether the
19 existence of subsurface bed and banks are impermeable or
20 flowing groundwater is a factual issue that must be
21 constrained and limited to the Pala and Pauma Basins. The
22 decision should not be treated as precedence for future
23 State Board determinations of whether or not subsurface
24 waters constitute a subterranean stream.

25 H.O. BAGGET: You are definitely in --

1 MR. BABER: My line of thought? I know your thinking.

2 H.O. BAGGET: Stay away from this, please.

3 MR. BABER: Okay.

4 H.O. BAGGET: I don't know --

5 MR. BABER: I'm almost -- I am at issue three, which
6 is where I am going to get into, I think, hydraulic
7 continuity that Alan Lilly brought up as maybe a way of
8 trying to limit subterranean stream to surface water streams
9 which are identifiable subsurface.

10 So, issue three, should the State Board propose rules
11 or guidance for the classification of which subsurface
12 waters are subject to the water right permitting and
13 licensing system administered by the State Board. If so,
14 should the Board propose or establish those rules or
15 guidance through administrative rule making as a proposal
16 for legislation in a precedent decision or through other
17 means?

18 We suggest the State Board should not propose guidance
19 for how to factually classify subsurface waters as either
20 being part of the subterranean stream or percolating
21 groundwater. We make this comment because the extraction
22 and use of groundwater in California is increasingly subject
23 to local control. For example, in the Butte Basin area in
24 Northern California within Sac Valley groundwater is subject
25 to local control by the County of Butte as well as Glenn

1 County in Sac Valley. Other counties are proposing local
2 ordinances and local control in the Sac Valley.

3 Local water and irrigation districts have adopted 3030
4 plans from the Costa bill adopted by the Legislature in
5 '92. Many local water districts and water agencies have
6 taken over control of their own groundwater supplies with
7 these 3030 plans. They have even proposed plans for
8 extraction and monitor that.

9 Similarly, counties have the Baldwin case, and in the
10 Baldwin case the counties can exercise police power. And
11 this can be done by all 58 counties in California. We are
12 aware of no case that limits the authority of the Baldwin
13 decision right now. Many of these counties have adopted
14 ordinances which control the extraction of and distribution
15 of groundwater. And we mention Measure G which was adopted
16 by electorate in Butte County in 1996, imposes severe
17 limitations on any groundwater which is attempted to be
18 extracted and delivered outside the boundaries of the
19 county. It also limits and controls groundwater substitute
20 pumping, which, of course, exchanges surface rights for
21 groundwater which is pumped and used on overlying land.

22 In each one of those situations you must apply for and
23 obtain a permit from the county. Since that particular
24 measure was adopted in Butte County in 1996, there has been
25 no application for a permit. That is because we have had

1 good water years for four or five years. So, when that
2 happens, then we will be able to give you the history of
3 what happens when someone applies for a permit. As we are
4 sure will happen in Butte County because, as you can see
5 from Bulletin 118, Butte County groundwater basin is
6 prolific, has a yield of at least 600,000 acre-feet. The
7 county has adopted a groundwater hydrologic model, which it
8 uses to monitor the extraction and the yield of groundwater
9 in the county. It's currently used by the Butte County
10 Water Commission and also the Butte Basin Water Users
11 Association which is a group of public and private agencies,
12 including the County of Butte which meets once a month and
13 watches groundwater extraction and monitors groundwater
14 within the county.

15 Again, the San Luis Rey decision should make clear that
16 the decision is limited to those particular facts
17 specifically in the --

18 H.O. BAGGET: Stay away from the decision, please.
19 This isn't a hearing on that decision.

20 MR. BABER: I understand. I am just saying that we are
21 asking that when you do make the decision that you
22 specifically limit --

23 H.O. BAGGET: That is testimony, anyway. I don't want
24 to get into an argument. Stop.

25 MR. BABER: Legally --

1 H.O. BAGGET: Abstain.

2 MR. BABER: Finally, we appreciate the opportunity to
3 make our comments today. I think I could -- I think I could
4 give you an example of how the San Luis Rey decision
5 frightens many of our clients.

6 H.O. BAGGET: We had a hearing on that. This is not a
7 hearing on the San Luis Rey.

8 MR. BABER: I am just telling you how the proposed
9 decision frightens us because of the definition or proposed
10 expansion of the word "channel."

11 H.O. BAGGET: I know. I don't even want to discuss it.
12 Stop.

13 MR. BABER: I am not discussing the San Luis Rey
14 decision.

15 H.O. BAGGET: I think you are indirectly.

16 THE COURT REPORTER: I have to take one person at a
17 time.

18 MS. MAHANEY: Perhaps you can speak to the test as --

19 H.O. BAGGET: Speak to the test.

20 MS. MAHANEY: -- as identified in the workshop notice
21 without getting into the San Luis Rey decision.

22 MR. BABER: What we are concerned about, Mr. Bagget,
23 is the Butte Basin in Sacramento Valley, because of its
24 prolific groundwater yield annually through recharge of
25 surface waters, could be interpreted as being a channel

1 subject to State Board control and jurisdiction. And I know
2 that is not your intent. We're suggesting --

3 H.O. BAGGET: Very good.

4 MR. BABER: -- from what Board Member Brown and Board
5 Member Forster has been telling us, if that is your intent,
6 one really good way to limit that power is to simply, when
7 you do issue the decision, and I won't name the decision,
8 when you do issue it you just limit it to its facts
9 specifically. That is it.

10 Any questions?

11 Thank you.

12 H.O. BAGGET: Let's take a ten-minute break. We will
13 come back and we have four more cards.

14 (Break taken.)

15 H.O. BAGGET: We have two cards that say "If
16 Necessary." So we might start with the easy ones, see if
17 they are necessary or not.

18 Virginia Cahill.

19 MS. CAHILL: It is not strictly necessary, but it will
20 be brief at least. Good afternoon, Mr. Bagget, and Board
21 Members Forster and Brown. I am Virginia Cahill. I do
22 represent one of the parties in the San Luis Rey matter,
23 which I won't mention again.

24 H.O. BAGGET: Thank you.

25 MS. CAHILL: I do also represent other clients, though,

1 throughout the state. So I have been watching this issue
2 for some time. I realize this is a very important issue for
3 the Board. I think you are wise to grapple with it. I am
4 always amazed in practicing law how little we know, how we
5 can have a law that was passed in 1914 and we still don't
6 know what it means. This seems to happen with some
7 frequency.

8 I am not going to wade in particularly into the tests
9 because I am not a hydrologist. I would just note in
10 passing, though, that the test is consistent with the
11 Board's earlier decisions, both in Carmel and with the
12 Garrapata decision, even with the earlier decision on the
13 San Luis Rey River.

14 What I really want to look at mostly is your third
15 issue. If you are going to propose rules or guidance to
16 clarify to those of us that are practicing in this area how
17 should we do it. And laid out are three options; and many
18 people today have picked up on the legislation option. I
19 think what we have to recognize, if we are talking about
20 legislation, we are talking about changing a law as opposed
21 to interpreting a law that we have now. That is not to say
22 that you can't do it. But I think you need to recognize
23 that that is a somewhat different animal than interpreting
24 what we have now in Water Code Section 1200.

25 If you are wanting to interpret the existing law, then

1 I think the best way is going to be by a regulation that
2 clarifies it. I don't think I would look to the Legislature
3 to try to clarify technical matters in great detail, and I
4 don't think individual decisions are probably the best way
5 to do it either. I think a development of general criteria
6 through a rule making proceeding would be a good one.

7 The one thing I do want to -- one point I would like to
8 make, though, is if you do come up with criteria, you are
9 also talking about what is the procedure for applying it.
10 Every time someone files an application, do you first of all
11 have a hearing on the classification of the water? The one
12 thing I do think is important for you, whatever you do
13 there, is that you don't end up with the possibility of
14 inconsistent decisions in the same basins. Once you
15 determine whether a basin is or isn't groundwater, that
16 should be the decision for everybody in that basin so that
17 you don't have one set of people having groundwater and for
18 another set of people in the same basin not have it to be
19 groundwater. It could be if you go to a new test. If you
20 are in the bed and banks test, it is going to have to be the
21 same for everybody in a basin.

22 I just have only one technical thing, and it is more of
23 a question and hopefully somebody technical follow me and
24 answer it. The one part of ACWA's test was the flow
25 parallel to the river. And it seems to me that both in the

1 gaining stream and the losing stream that water wasn't
2 necessarily flowing parallel to the river. It might well be
3 coming into the river perpendicularly. I am not technical.
4 I don't know the answer to that, but I raise it as something
5 for your consideration.

6 And those are really all the comments I have.

7 Thank you. I didn't submit written comments.

8 MEMBER BROWN: Thank you, Ms. Cahill.

9 H.O. BAGGET: Thank you.

10 Paeter Garcia.

11 MR. GARCIA: Thank you. Mr. Bagget, Members of the
12 Board, members of Board staff, good afternoon. My name is
13 Paeter Garcia. I am an associate attorney with the law firm
14 of McCormick, Kidman & Behrens from Costa Mesa.

15 I want to start by extending the regret of Mr. Robert
16 Kidman who couldn't make it here today due to a conflict in
17 the schedule. He is devoted to issues presented here, but
18 due to this conflict, he couldn't make the trip up here to
19 Sacramento.

20 I also want to mention that although Mr. Kidman
21 represented Pauma Valley Water Company in the blank blankity
22 blank proceeding, we are not being paid by any client in
23 particular to be here today. Really our purpose is to
24 insure that the State Board uses the proper criterion when
25 making a legal distinction between percolating groundwater

1 and subterranean stream. A lot of the information that I
2 have prepared for today has been talked about by some of the
3 experts that are renown in this industry and legal
4 representatives of ACWA and other learned participants here.

5 Today I do want to underline and bold, if you will, a
6 couple of the points that have been made particularly as
7 they relate to legal distinctions between the two bodies of
8 water that are at issue.

9 We believe the State Board should premise any
10 application of the Pomeroy factors on an understanding that
11 Pomeroy, and, therefore, Section 1200 jurisdiction, is
12 limited to underflow of surface streams. The State Board
13 has demonstrated a willingness to rely on the legal
14 authority articulated in Pomeroy. But unavoidably the legal
15 standards set forth in that case are predicated on a
16 subterranean stream that absolutely flowed in connection
17 with and as part of the surface stream; that is, Pomeroy
18 decided that the groundwater at issue was the underflow of
19 the Los Angeles River, and that unity and connectiveness
20 between the two bodies of water as a legal standard should
21 be overlooked, particularly given all the valleys in
22 California that may have surface streams meandering through
23 them.

24 When the State Board finds that groundwater is
25 channelized by bed and banks and flows therein in a

1 particularized direction, it necessarily holds under Pomeroy
2 that that water is connected to some identified surface
3 stream. We had the map up before about the location of the
4 Pomeroy decision. We had that big yellow sort of area that
5 indicated some lost alluvium. And there was some concern
6 that a decision could extend to all of that area. If it
7 did, the State Board did decide that water was connected to
8 the surface stream and all that area, it would necessarily
9 hold that all of that water flows as part of the surface
10 stream that goes down.

11 What, I guess, I am trying to say is that any
12 application of permitting jurisdiction under Pomeroy is
13 limited to the underflow of an identifiable surface stream.
14 So, as a legal precedent, it should be limited in that
15 fashion.

16 The second sort of legal point that I want to make
17 clear, that we believe the State Board should place a
18 practical limitation. We've heard a bit about this earlier
19 today on the concept of the factor of hydraulic continuity
20 in classifying groundwater. Now, what I found interesting
21 and learned today is that, I suppose arguably, all
22 groundwater can be identified as being connected in some way
23 to all the other groundwater, even if it takes maybe
24 hundreds of years for one body of water to communicate with
25 another. But that is not a legal standard, it's

1 connectiveness.

2 We urge that -- I should back up a step. Pomeroy
3 didn't even use the term "hydraulic continuity." But it did
4 reference substantial continuity impliedly in reference to
5 hydrology when it talked about or when it defined the
6 connectedness between a surface stream and groundwater.

7 So, the State Board should not use, as we believe,
8 hydraulic continuity as a factor that would allow the State
9 Board to expand its jurisdiction. In that if there is
10 hydraulic continuity between groundwaters, the State Board
11 shouldn't use that as a factor to go down to bedrock in
12 search of an identifiable bed and banks. That would
13 effectively devastate the legal presumption of percolating
14 groundwater. So, we feel that the factor of hydraulic
15 continuity shouldn't be used as an expansion of State Board
16 jurisdiction and request for bedrock. But rather we feel
17 that hydraulic continuity should be used as a limiting
18 factor under Pomeroy and substantial hydraulic continuity
19 must exist between the channelized groundwater and the
20 surface stream in order to make a determination that the
21 groundwater at issue is jurisdictional underflow.

22 I believe those are the two legal sort of distinctive
23 points I wanted to bring to the State Board's attention with
24 respect to what we have heard all day today.

25 I want to say in closing that the law firm I am here

1 representing, McCormick, Kidman & Behrens, wholly and
2 unequivocally supports the position forwarded by ACWA in the
3 interests of groundwater producers throughout the state. We
4 urge the State Board to exercise caution in permitting
5 jurisdiction under the Pomeroy decision.

6 Thank you.

7 MEMBER FORSTER: I have a question. My question is --
8 first I will tell you what I thought I was going to hear,
9 and maybe then you will understand my question.

10 I thought I was going to hear more of concern or
11 criticism on how we have been doing this process in other
12 situations like Garrapata and maybe other ones that I don't
13 know about, and how we should move forward and do it
14 differently. And I don't hear too much about that.

15 And so my assumption at the end of the day, and I know
16 I have a couple more speakers, but my assumption is that we
17 haven't done anything terribly wrong so far, but there is a
18 concern that we are on the verge. And so --

19 MR. GARCIA: Are you trying to lead me in to getting
20 myself in trouble?

21 MEMBER FORSTER: No. I haven't heard any outrage that
22 we have done anything -- what I hear is this overwhelming
23 concern of the present and future. You know, I think your
24 particular law firm has been instrumental in creating the
25 awareness in how we are handling these issues.

1 Am I right in my assumption, is there nothing that you
2 can point to that is like the test case, like you shouldn't
3 have done it that way and this is the way you should do
4 it? I don't hear that.

5 MR. GARCIA: I can whisper about San Luis Rey.

6 MEMBER FORSTER: No, you can't. I didn't want to use
7 that one. But Garrapata is done with. This is not a whole
8 lot different between the Garrapata. It was a pretty good
9 case. So maybe that was one. I'm not struggling; I am
10 just trying to see if I am on track, that you are looking at
11 the present and you are concerned about the future. But we
12 haven't done anything outrageous on how we have been going
13 along so far.

14 MR. GARCIA: I would concur with you that outrageous
15 isn't a word that could adequately or describes what the
16 State Board -- how they have implemented their own policies
17 for Section 1200. I have to admit to you it is a privilege
18 for me to be here. I am young in my career as a water
19 attorney. But I think we are all here and we know we are
20 here not because of Garrapata and what the State Board held
21 for Garrapata or how they characterized subterranean streams
22 or the distinction therein.

23 But I think it is the more recent sort of positions
24 that the Board has given indication that it may follow that
25 has really engendered most of the concern that you are

1 hearing today. So, I hope I am not being unresponsive to
2 your question. I can say from my experience and how I have
3 been and how I wound up right here in front of you is my
4 education on how Pomeroy was decided, the factors on which
5 it was decided, legal standards set forth therein, the
6 limitations that that case presents, the limitations that
7 are presented in Section 1200 and how the State Board has
8 most recently sort of approached these issues.

9 H.O. BAGGET: Maybe clarify. I think what we are
10 looking at is a lot of issues down the road, too. And I
11 think as you see the use of groundwater and reclamation
12 recharge in this case, a lot of issues that have come before
13 this Board recently and coming in the future, a lot of
14 people recognize there is potential room to move all over
15 within this test. That is why we have the workshop, to try
16 and get ahead of the curve. There is a lot of things going
17 on and a lot of changes going on in California water. Water
18 banking with other issues which are going to be happening
19 which all deal with what is percolating groundwater, what is
20 subterranean flow. That is what -- it has been useful for
21 me so far. I think we are getting a lot of information.

22 This is one of those vague areas that's never been put
23 through the total test. It's about to be for a lot of
24 reasons.

25 MR. GARCIA: Thank you.

1 H.O. BAGGET: Thank you.

2 Tom Haslebacher. If necessary.

3 MR. HASLEBACHER: Tom Haslebacher. I am the geologist
4 for the Kern County Water Agency in Bakersfield. I want to
5 thank the Board for having this workshop. I feel very
6 honored to be here. I will make this extremely brief.

7 The Kern County Water Agency Board of Directors wanted
8 me to state that we support the position given by Steve Hall
9 of ACWA this morning. And without further ado, that's about
10 it.

11 Thank you.

12 H.O. BAGGET: Any questions?

13 Thank you.

14 Carl Hauge, Department of Water Resources.

15 MR. HAUGE: Good afternoon, Mr. Chairman, Members of
16 the Board.

17 If I could, I would like to address Ms. Forster's
18 question of Mr. Garcia. I think one thing that would be
19 very helpful, if you would go back through the records and
20 compile a list of those streams that were determined to be
21 subterranean flow and those cases where percolating waters
22 would have been the decision, and see what some of the
23 differences and similarities were. I am not aware of any
24 publication that does that. I think that would be very
25 instructive before we take the next step, whatever the next

1 step is going to be.

2 H.O. BAGGET: You are suggesting all staff
3 determinations not necessarily come to hearings before this
4 Board?

5 MR. HAUGE: Correct.

6 H.O. BAGGET: Which is -- because very few have got to
7 the Board's level.

8 MR. HAUGE: That's right. Those decisions, as I
9 understand it, a subterranean stream designation. I think
10 that would be very interesting.

11 MEMBER FORSTER: Aren't you doing a study on

12 groundwater? MR. HAUGE: We are always studying
13 groundwater. I don't have quite a hundred years as the
14 panel.

15 I think Joe Scalmanini this morning was very
16 interesting about how scary it is that we haven't revisited
17 this in a hundred years. I was talking to Bill DuBois a few
18 minutes ago and one of the reasons are, obviously, because
19 water is becoming a lot more scarce or demand on water is
20 becoming a lot higher. So we are now having to look very
21 closely at how we manage our groundwater resources.

22 I would like to thank you for this opportunity to speak
23 to you today. We all know what the issue is now. I have a
24 couple of publications I would like to make you aware of,
25 make you and the audience aware of. One is the booklet by

1 U.S. Geological Survey Circular. One is Groundwater and
2 Surface Water, a Single Resource. It is USGS Circular
3 1139. The other one is Sustainability of Groundwater
4 Resources. It is USGS Circular 1186. This one is available
5 on the webpage. You can download it. They are both
6 excellent publications for anybody who would like to learn
7 more about how groundwater and surface water interact.

8 I use the word "interact" because it means they affect
9 each other. We have interconnectiveness. They are
10 interconnected. I think interaction is the key. Take out
11 groundwater here, you decrease the supply downstream.

12 We feel like we have some comment to make on this
13 pursuant to our mission promoting efficient water in the
14 state and because we do provide a lot of local assistance, a
15 lot of local advice. I get a lot of questions on
16 groundwater management. I am going down to speak to two
17 areas this week about groundwater management.

18 We had a statement that I turned in. My wife read it
19 this weekend, and she is not a groundwater specialist at
20 all. She says you are saying two different things here. I
21 knew we had succeeded. On the one hand we have Pomeroy,
22 which has been lambasted today. I was really happy to hear
23 that even a lawyer finds it difficult reading. I read as
24 much as I can stomach. I thought that was something that
25 they liked.

1 We talked about the legal test. I don't think there's
2 anything to add to that. It has been defined. I won't bore
3 you a repeat of what has been said. Again, I want to
4 mention the committee to review past cases. It would be
5 important because I think a lot of cases where staff
6 determined that it is percolated water has not received
7 public attention. The law remains the same as it was more
8 than a hundred years ago.

9 Our technology has advanced as was discussed this
10 morning. A hundred years ago water was viewed as unknown,
11 unknown and separate. One state that actually called or
12 said something about how groundwater is a cold unknowable
13 that we cannot regulate. Michigan had a statute that was
14 just amended in the mid '80s. As Dr. Williams pointed out
15 this morning, Henri Darcy developed his law in 1856, and it
16 wasn't improved until many years after that. It was in the
17 '20s, '30s and '40s that groundwater really became studied
18 by the U.S. Geological Survey. They published a lot of
19 papers about groundwater, how it flows and so on.

20 However, with a hundred years of Pomeroy we can't upset
21 what's been called the apple cart today. That is the water
22 rights apple cart. We are concerned about that as a
23 department, but we do think that physical reality ought to
24 be included in whatever action the Board takes, whatever
25 physical reality means. The fact that there is no unanimity

1 among the ACWA group was very enlightening, I think. They
2 were unanimous in the fact they don't like what is
3 happening, as you say, about to make an outrageous decision.
4 They don't like that, and they don't know what the cure is.
5 I think that indicates that nobody has an agenda here.

6 We urge a continuing dialogue and investment of
7 technical resources, a greater understanding of groundwater,
8 surface water interaction. Up to 40 percent of all stream
9 flow in the U.S. is contributed by groundwater in smaller
10 basins, and that percentage goes even higher. So there is
11 clearly something to worry about here.

12 If you develop a water budget, and I have an overhead,
13 if I can put that overhead up. If you are developing a
14 water budget, you want to show what the inflow, outflow and
15 storage or change in storage is in a delineated basin. You
16 have to define the basin, what you are talking about. When
17 there is no pumpage from the basin, the inflow equals the
18 outflow, and there is no change in storage.

19 This diagram at the top shows recharge and discharge
20 are equal and there is no change in the groundwater system.
21 If expansion of water begins, as in this illustration, you
22 have pumpage, taking water out of storage, either recharge
23 must increase, discharge must decrease or there is water
24 removed from storage or some combination of these three
25 events takes place. The water has to come from somewhere.

1 Some of these effects may be observed soon after
2 pumping and consumptive use begins. Most effects will not
3 be seen for some years if the time has passed, even in some
4 cases for many years. Where there is groundwater or surface
5 water taken out of the system, the entire system was
6 affected eventually. Or groundwater development takes place
7 over many years, the long-term effects may take place so
8 gradually that no one notices the changes in water flow if
9 monitoring is inadequate.

10 The effects of groundwater pumping are manifested only
11 slightly over time. So the full effects on surface
12 resources may not be evident for many years after pumping
13 begins. I point out to you that there are two different
14 cases we are talking about. If you look at the diagrams
15 here that were drawn this morning -- I think Dr. Todd did
16 these -- this is the case of California before European
17 people began to extract groundwater. You can take a little
18 water out, but not affect the gradient and flow into the
19 stream. If you took enough groundwater out then you change
20 the gradient. Now you've got a change in water rights.
21 These surface water rights wherever held are now being
22 transferred to the overlying groundwater use, a certain
23 portion of that surface water.

24 It is a very important issue to keep in mind.

25 The third scenario is where the hydraulic continuity

1 between the stream and the groundwater table has been
2 severed completely. We have all of these instances here in
3 California. And it may be necessary to interpret some of
4 the details from each instance differently when you are
5 devising how to define bed and banks.

6 MEMBER BROWN: Carl, you are the one I was looking at
7 as the expert to discuss this. That can happen on any
8 single stream, all three of those conditions at the same
9 time.

10 MR. HAUGE: That's right.

11 MEMBER BROWN: At some time or another.

12 Therein lies the difficulty of -- go ahead.

13 MR. HAUGE: Let me just answer Ms. Cahill's question
14 about parallel flow. These diagrams are all cartoons, so
15 they are drawn for simplicity. This flow is never really at
16 right angles to the stream or could be. Usually it is not.
17 But this is just a cross-section showing it is flowing into
18 the stream. It is probably flowing subparallel to the
19 stream. And I would guess that probably underflow in most
20 streams is never exactly parallel very far from the live
21 stream, from the surface water channel.

22 The third -- I had these organized by one, two, three.
23 The third rule is guidance. Our view is that there is no
24 immediate need for formal regulations or changes in the law
25 that has been used to allocate water rights for more than a

1 hundred years.

2 We encourage a continuation of the technical dialogue
3 that has been started toward a goal of common understanding
4 of the physical realities of good groundwater management.
5 We think AB 3030 has been a good start. There have been
6 other groundwater management techniques that some districts
7 have been using for a long time. A lot of them are within
8 district boundaries and do not take into account the entire
9 basin.

10 In one basin I am aware that there are 19 entities that
11 are trying to manage their groundwater within their district
12 boundaries. The goal is to someday integrate those so that
13 they have one basin management plan.

14 We, like everybody else, suggest a formation of a
15 technical committee to review the hydrologic and legal
16 issues to explore methods of managing the state's water
17 resources that more closely approaches physical realities.
18 Some talk this morning about having a committee set out
19 priorities that you might want to consider as to where does
20 the Board want to go, what do you want to control, what do
21 you not want to control.

22 I would suggest that that kind of a committee ought to
23 proceed forward at the same time or in conjunction with a
24 technical committee so everybody understands the technical
25 issues that we are trying to address with legal remedies.

1 One issue is the timing of changes in where water appears.
2 When you start removing groundwater, the timing may take
3 quite a long time. That is the important issue that nobody
4 has a real handle on. We need to get spatial data and
5 temporal data so that we know what is happening in space as
6 well as what is happening over a period of time before we
7 can make justifiable or manageable rules.

8 Finally, if the Board determines that the formal
9 regulations or Legislature changes are indicated, we, the
10 Department, would like to be involved both on the technical
11 committee, whatever the committee is called, and in the
12 final formulation of rules, guidance regulations or
13 legislation.

14 Thank you.

15 H.O. BAGGET: Any questions?

16 MEMBER BROWN: Kind of a question and statement.

17 Again, you have been very helpful, Carl.

18 MR. HAUGE: Thank you, Mr. Brown.

19 MEMBER BROWN: The suggestions or maybe recommendations
20 of hydraulic continuity, if I understand, you correct me
21 here, probably in itself, by itself, would not be a good
22 test.

23 MR. HAUGE: I would recommend using it as well as other
24 inputs, right.

25 MEMBER BROWN: In that any singular stream at one time

1 or another can have all of those conditions occur?

2 MR. HAUGE: Right.

3 MEMBER BROWN: Then you support the idea of putting
4 together some type of a committee or committees?

5 MR. HAUGE: I think your question of Dr. Bachman this
6 morning was a good one, where people have agendas they are
7 pushing. There have been some groups as Dr. Bachman pointed
8 out, his particular group, they had three opposing or three
9 different opinions. What they found when they got together
10 and began to discuss them together was that they could reach
11 some other agreement. I think that is what may, I hope,
12 take place in this instance.

13 MEMBER BROWN: Is probably in a better form than in a
14 hearing?

15 MR. HAUGE: Yes.

16 H.O. BAGGET: Sounds like a task force to me.

17 Do you have any comments on the -- we had a lot of
18 discussion on underflow versus subterranean stream.

19 MR. HAUGE: I am with the group; there is no such
20 thing as subterranean stream except in carbonate terrain or
21 lava tubes. That is unequivocal.

22 H.O. BAGGET: Obviously, that would take a legislative
23 change in the code.

24 MR. HAUGE: Yes.

25 H.O. BAGGET: To clearly define that as underflows as

1 opposed to subterranean.

2 MR. HAUGE: Yes.

3 H.O. BAGGET: Thank you.

4 MR. HAUGE: Thank you.

5 H.O. BAGGET: John Williams.

6 MR. WILLIAMS: Board staff, my name is John Williams,
7 875 Linden Lane, Davis, California.

8 I also am a former member of the Monterey Peninsula
9 Water Management District. I was on the staff of that
10 agency for a while. In follow-up to the letter that Fran
11 Farina passed out, the underflow issue in the Carmel River
12 was brought to the Board around 1980, and the Board staff
13 looked at it and said go away.

14 Fish and Game did not like that answer, and they hired
15 a former engineer from the State Board, Al Frank, who wrote
16 the letter and carried back to meetings, to the State Board,
17 and the upshot was funding for the watershed management for
18 Carmel River to look into the underflow. I got hired to do
19 that study, and that is the background for my interest in
20 this and my testimony here today and my written comments.

21 So when I began looking at the question of what was the
22 legal status of the groundwater in the Carmel Valley, at the
23 time it was the sensible thing, I got Hutchins on California
24 water rights and I read what he had to say. And there was
25 language in that about a case, Los Angeles versus Hunter,

1 which has expanded relative rights to a large basin filled
2 with water seeping slowly toward the outlet. But because I
3 am a bit of a crank, I didn't take Hutchins' word and went
4 and looked at the decision. I found out when I read the
5 decision that Hutchins had it backwards, that the California
6 Supreme Court in 1909 in that case had determined, in fact,
7 that the groundwater in the San Fernando Valley constituted
8 a large underground lake and the wells in 8,000 acres, I
9 believe, of land upstream in the Pomeroy territory was
10 diverting water from that lake which was part of the Los
11 Angeles River, and they had to stop it.

12 And so if you want to find out what people thought,
13 this idea of subterranean stream, in 1914 when the law was
14 passed, one of the things to do is to look at the case of
15 Los Angeles versus Hunter and go across next door as I did
16 and look at the appellate record for that case, and you can
17 find a very clear description of what people thought was
18 going on.

19 One of the interesting things about that is that they
20 couldn't make any sense of the instructions of Pomeroy
21 either. I think because they didn't talk about it. There
22 was very little mentioned of Pomeroy on briefs on either
23 side in that case. The arguments were more about whether
24 the area in question was like the Cats versus Walkenshaw
25 [phonetic] area which was percolating groundwater or whether

1 it was like the San Jose Creek from the McClinic [phonetic]
2 case where the Board had found in passing that it was
3 flowing in two different channels.

4 But what the court said in Hunter which got Hutchins
5 and others off in the wrong direction was that it didn't
6 matter whether the groundwater in San Fernando Valley were a
7 part of Los Angeles River or not; Los Angeles would win in
8 either case. I would urge people -- there was a gentleman
9 here this morning who wanted guidance about what was meant
10 at the time -- should do what I did and look at Hunter and
11 go back and look at the appellate record.

12 I also want to defend the hydrologists of the time.
13 When you look at the appellate record in Hunter and Pomeroy
14 and some of the other cases, you find, indeed, there were
15 cranks and charlatans who were hired by the defendants in
16 those cases who had various crazy theories about what was
17 going on. There were also the cases that there were people
18 -- Mulholland was one of them -- who knew quite well what
19 was going on and understood the system remarkably well.
20 There were also a number of studies by USGS in the area in
21 the early part of the century, that give a very clear
22 description, an interesting description, of the nature of
23 the water situation in California. What a remarkable place
24 it was.

25 There has been an issue about do underground streams

1 exist or not. If you understand what the words mean, it was
2 very clear that when people were talking about underground
3 streams at that time that they were talking about the
4 alluvial basins filled with granular mineral resources. If
5 you look at the impressions of Pomeroy, they say that
6 explicitly. So get out of your mind the suggestion that
7 people back then were very confused and were thinking of
8 something like lava tubes or underground rivers and
9 limestone terrain. They had a very good idea of what they
10 were talking about. They were at least as intelligent as we
11 are now.

12 What was very clear in the record and in the geological
13 report was that the water indeed came from the mountains for
14 the most part, came down the washes. Depending on how much
15 there was, either flowed all the way across to the Los
16 Angeles River or else into the gravel which was the more
17 usual case and flowed underground to the river and turned
18 and came back up to the surface here where this flow got
19 water movement constricted and, therefore, forced up.

20 And that is, it went on down here. It was actually in
21 the pre-European condition. It was a very steady flow of a
22 hundred cfs down the Los Angeles River which supplied the
23 Pueblo Los Angeles originally. And so this operated as kind
24 of a giant reservoir that did a very good job of regulating
25 seasonally and between years, highly variable rainfall in

1 the mountains, and produced very steady outflow from Los
2 Angeles. Some of the water went into artesian gravel
3 deposits. When people arrived and started building
4 orchards, they could just dig a well, and the water would
5 burble up out of the ground and into their irrigation
6 ditches. It was easy to see why people liked Southern
7 California when they first got there. Unfortunately, too
8 many people came and no longer quite so pleasant.

9 The other point I wanted to make is that the public
10 trust issue is very important here. The public trust issue
11 is why the Carmel River case ever came to your attention.
12 There has been very significant benefit for public trust
13 from 95-10, but I don't think you have done as much as you
14 should with that. But extractions from the river have been
15 reduced somewhat, and there is much more control now over
16 the water company that diverts the water than there was
17 before. There are, as we heard earlier, quite a number of
18 other cases in which similar public trust cases occur; that
19 is, when you pump the water out from underneath the river
20 they dry up and this is hard on the surface stream.

21 There is another aspect of this which is becoming
22 understood more recently, and that has to do with the
23 groundwater biota itself. People have been, particularly in
24 the last decade, there is longer history in Europe, turning
25 to understand how much life there is in groundwater. There

1 is a couple of books that I mentioned in my comments. One
2 of them is Groundwater Ecology, published in 1995 I think.
3 More recent and better book, Streams and Groundwater
4 published just the end of last year. I can give you --
5 particularly the last chapter on streams and groundwater
6 which is Academic Press Book, Jeremy Jones and Patrick
7 Mulholland are the editors. That gives a pretty good review
8 of the rapid development of understanding groundwater
9 ecology and how that is connected to the ecology of the
10 surface stream as well.

11 So there is this other aspect of it that you are going
12 to have to deal with as you deal with these complicated
13 groundwater issues.

14 I wanted to make the point also that I don't think that
15 we could have afforded to bring the Carmel River issue up
16 through the courts. For environmentalists, having a State
17 Board process which is relatively inexpensive, in which
18 people like myself who are not lawyers, can come and argue
19 with people who are, is a tremendous asset to the typically
20 not very well-funded environmental groups. And I don't
21 think we could have raised the money to hire a lawyer to
22 carry that case through the courts. I tried. But I think
23 it is very important that this process stay open and
24 available to people who simply cannot afford to hire water
25 attorneys, which usually are not cheap.

1 Thank you.

2 MEMBER BROWN: Thank you, John.

3 H.O. BAGGET: Your comments, I received them this
4 morning. They look fairly extensive. Look forward to
5 reading them.

6 Any questions?

7 MEMBER FORSTER: Thank you. Enjoyed the history.

8 H.O. BAGGET: Michael Jackson.

9 MR. JACKSON: Michael Jackson. I am here today
10 representing the Regional Council of Rural Counties.

11 It is a group of 28 counties most days that has become
12 interested in water for precisely this reason, this and a
13 number of others. We have reached the point where there is
14 not enough water available. Consequently, every land use
15 decision we make depends on water. We are as nervous as the
16 rest of the folks in California water about how far you
17 might go in asserting jurisdiction over water under the
18 surface of the ground. One of the problems that we have, of
19 course, is that we can't always determine its nature, either
20 as an underflow or as percolating groundwater according to
21 the standards. So we look to this Board to establish those
22 standards under which we all can rely.

23 Now basically we have been talking about this
24 jurisdiction as if the State Board didn't do anything there
25 would be no jurisdiction. And as we see it, as you decide

1 the size of your envelope, you're also determining the size
2 of ours. Because whatever jurisdiction you assert, we
3 lose. Whatever jurisdiction you decide to take, will be
4 decided in Sacramento under this form of hearing process
5 and not in the 28 county courthouses of the area that I am
6 here representing.

7 So for us, we are extremely interested in how far you
8 want to push your jurisdiction. Now, clearly, we recognize
9 from our experiences that there is connection between
10 surface water and groundwater. Anyone who looked at the
11 water transfers during the drought water bank in Butte
12 County and other places realizes there was a connection
13 between the water exported and the surface flow. It is that
14 connection that is actually critical to us in many areas in
15 which the state and federal government are asserting
16 jurisdiction.

17 As an example: If there is no jurisdiction over the
18 underflow on the Sacramento River or on the Feather River
19 and as exports take place for a drought water bank or a
20 water transfer, it is going to be extraordinarily hard to
21 build the riparian forest that everyone in Cal/Fed tells us
22 we have to have in order to filter out our land use
23 activities to help us with our TMDL program. So basically
24 as we look at this, every decision which you make is going
25 to come back to us in some fashion. And the criteria that

1 you establish is going to be the baseline under which we
2 determine what we have to do to meet the other obligations
3 that the state and federal government give us. Now,
4 to give another example: Almost every little town and
5 little city in the 40 percent of California that I am
6 speaking about right now is on groundwater. If, in fact, it
7 turns out that that is some sort of subterranean flow, we
8 have been relying since 1906 on the distinction between
9 groundwater and surface water, and we are in a circumstance
10 in which we would like to claim a 1906 date if you are going
11 to change the rules. Now, obviously, that might be very
12 useful for us, but it would probably knock out all exports
13 from the Sacramento Valley, because that priority would be
14 well before either of the state or federal projects, a sort
15 of underground area of origin, if you might.

16 The present choice that we would like to make is that
17 you develop criteria under which you limit your own
18 authority over what we have all relied on in California as
19 groundwater. I have been here on both sides of this issue,
20 depending on where we were, in the ways that I understood it
21 because I thought there were different factual situations.
22 In one case that I remember it was clearly underflow and
23 your decision was correct. In the other case that I
24 remember it was clearly percolating groundwater, and your
25 decision was correct. So, I guess I am here to tell you I

1 am not sure it is broken. I am not sure your staff is off
2 on any sort of assertion of jurisdiction for the 21st
3 Century, a change from California to Arizona in terms of the
4 law.

5 Please don't do that, and I don't think you intend to
6 do it, and I have been reassured a lot by what I have heard
7 here today. Uncertainty in California law right now is the
8 reason we are not being able to go forward in terms of
9 solving some of these problems, legal uncertainty, physical
10 uncertainty, just uncertainty, uncertainty, because people
11 are so worried that they are somehow going to lose or be
12 left out. This is no time to open up another can of worms.

13 So I do agree with ACWA, I think, and that doesn't
14 happen very often. I do think that you should set up first
15 a technical team to try to deal with what would be useful to
16 you in your issue-by-issue, stream-by-stream view of
17 things. The Santa Clara River, in my mind, when I looked
18 was clearly underflow. The Salinas River I am not so sure.
19 The Carmel River I was sure. I thought it was underflow.
20 The Sacramento River, according to these standards, if the
21 people in Pomeroy didn't know that the Central Valley
22 existed, and if that is not what they were talking about
23 when they were talking about percolating groundwater, then
24 we don't have any anywhere.

25 So, clearly, when you set down what it is you intend to

1 do, I would like you to also think what it is you are doing
2 in terms of the jurisdiction that you are not taking.
3 Because if these counties which were told by the court
4 system in Tehama v. Baldwin they had police power authority,
5 -- the flip side of that is that they have police
6 responsibility. So whatever responsibility you don't take,
7 we will have to over time. So we are as interested as you
8 are at where you place the line between us. If you do not
9 draw a bright line, we will operate on our fears. And if
10 you draw a line that is wide, yet bright, we will know our
11 fears have come true. And in that case we will then begin
12 to use the authority so that commingled water does not leave
13 our jurisdictions, so that groundwater does not leave our
14 jurisdictions, so that substituted surface water groundwater
15 operations do not happen in our jurisdictions because we are
16 looking at our future the same way everyone else is looking
17 at theirs.

18 Some people were blessed with beautiful weather, and
19 some people were blessed with being next to large cities.
20 And so Southern California's economy and Silicon Valley's
21 economy developed because of their native advantages. To us
22 our native advantage is water. And so we will attempt to
23 protect it as best we can without interfering with the needs
24 of others until it becomes clear that -- and it is not the
25 State Board we all fear. It is the DWR. And as DWR begins

1 to mingle water, we begin to fear a state takeover. So in
2 the northern part of the state, it is not the State Board
3 and these decisions that require us to hold onto this
4 percolating groundwater, this archaic system, one that may
5 not even fit anymore the real technical knowledge, but as
6 long as DWR exists we will remain ever vigilant.

7 MR. HAUGE: As well you should.

8 H.O. BAGGET: Are there any other blue cards? I have
9 no more.

10 Anyone else wish to make a comment?

11 MS. RUIZ: Thank you, Mr. Chairman, Members of the
12 Board. Darlene Ruiz, 1130 K Street, Suite 350, Sacramento.

13 Thank you for the opportunity to address you today. I
14 am here like the proponents that brought this issue to you,
15 only out of the common good. I am not representing
16 anyone. I never heard so many pro bono lawyers and
17 scientists.

18 MEMBER FORSTER: Hard to believe.

19 MS. RUIZ: Almost unbelievable. I heard a great many
20 things in the course of today as you have, and a lot of it
21 is tied to the fear. It is the fear of the unknown. It is
22 the uncertainty with any change that happens in
23 government, and I think that is what is reflected in the
24 proceedings. I think it is important that you have these
25 proceedings, because apparently you're being

1 misinterpreted. A great many of the fears are arising out
2 of what I would refer to as the chicken little method of
3 lobbying. You take a scenario and you make it worse and
4 make it worse. And pretty soon we fear DWR, we fear
5 everybody about us, we fear what you are not going to do and
6 what you are going to do.

7 So, I think my message to you would be that you keep
8 the course. That this Board has, regardless of the
9 administration in the past, has always done a very good job
10 at doing what makes common sense, in taking the hysteria and
11 balancing it out. And I have no concern whatsoever that
12 that is exactly what is going to happen as a result of this
13 hearing.

14 But I would like to get a little more specific in
15 response to something Mr. Lilly said. He would have you set
16 up new criteria. That sounds like you can't make
17 determinations about underground flow or subterranean
18 streams or however you want to characterize it until you
19 wait for multi-year hydrologies. If I heard his comments
20 correctly as well, he would have you wait for a full mapping
21 and understanding of the hard data, that you need to
22 understand all the dynamics that are necessary to know
23 exactly what is going on.

24 Does that suggest that Mr. Lilly is looking to a full
25 opening and public disclosure of well logs through the

1 Department of Water Resources? Are we going to have only
2 some data and not other data as we explore these issues? I
3 am kind of curious. Because I think if we are going to
4 truly be opening this up and finding out what the impacts to
5 groundwater basins are whether or not they are groundwater
6 basins or subterranean streams or underflow, that we need
7 hard data. The science is obviously there, but the hard
8 data has to come from the real world.

9 So it is going to be interesting to see how far those
10 arguments take you and if you do choose to go in the
11 direction of the criteria suggested by Mr. Lilly.

12 There was also some regard to wanting to have greater
13 certainty. That if you set some hard criteria with bright
14 lines or whatever somehow this was going to take the
15 uncertainty factor out of it. Obviously, Mr. Lilly
16 practices in a different world than I do. Because lawyers
17 make very good business out of making uncertainty out of all
18 kinds of thing, particularly more specific statutes. I've
19 lived through a number of reiterations of the changes to the
20 Hazardous Waste Code, for example. If you want specificity
21 or examples of criteria, they're amply provided in the
22 Health and Safety Code. But what you also have is a little
23 of litigation and a lot of lawyers.

24 I am not so sure that having precise bright lines
25 necessarily brings the clarity that everyone so seeks. Many

1 times it does call for the exercise of good judgment and
2 common sense. I am not clear that stringent criteria are
3 necessarily going to give you that.

4 What I have also heard here today is a cloud of
5 uncertainty, the cloud of uncertainty raised by those who
6 are questioning where you are going and why you are going
7 there. I think changed circumstances is driving the Board
8 in large part and that again a great deal of it will turn on
9 the faith and common sense of the people on this Board and
10 serving on this Board and I also think a good part turns on
11 a trust factor to the staff. There has been some discussion
12 here about the A and B Teams. I am familiar with that.
13 That is not a new issue. That has been long-standing for
14 many, many years. I don't know how you can solve that one.
15 I have not seen a solution that's been proposed in this
16 hearing or elsewhere that gives an answer to that. But it
17 has also been my personal experience that the staff has
18 worked to try to keep the separation and to do the work of
19 the Board in a fair and balanced manner. And I think that
20 whether by innuendo or otherwise really does a disservice to
21 the process and to what has been over time a system that
22 works.

23 So I would again urge that if somebody comes up with a
24 solution to that, that you weigh it when it's presented,
25 that for the most part you folks have a very good system

1 that does work and serves you well and allows for you to
2 exercise good judgment.

3 Thank you.

4 MEMBER BROWN: Thank you, Darlene.

5 MEMBER FORSTER: I am going to make a comment. I am
6 glad that you brought that up. You well know from being an
7 esteemed former Board Member that the perception of an A and
8 B Team, the way it plays out, is difficult but not as
9 problematic as it's portrayed. It's always been my
10 experience that it is not problematic as perception has gone
11 around on today.

12 I don't know how you do it. I was sitting here
13 thinking how to do that. It would be fun if anybody has a
14 good idea on how to change that. I was trying to figure out
15 what do we do. Do we hire independent contractors for each
16 particular issue to go out and do it? How do you keep an
17 isolated staff? So it is very challenging and anybody who
18 has good ideas send them on over.

19 H.O. BAGGET: Any other members?

20 Anyone else, comments?

21 MEMBER BROWN: I appreciate Darlene's comments. She
22 has tenure on this Board and experience in these matters.
23 And I think, too, she may be correct to some extent that
24 there is -- I think the term was -- chicken little and the
25 sky is falling. And how those get started sometimes is

1 quite interesting, but that is the process in itself. And
2 you were saying what probably some people were thinking.

3 But all the comments I felt were interesting and time
4 well spent and appreciate your time and your help.

5 And, thank you, Mr. Chairman, for setting this up.

6 H.O. BAGGET: If there is no other comments, I
7 certainly would like to echo my appreciation for all those
8 pro bono and otherwise who took time today, and it was
9 certainly, I think, worthwhile in my perspective and that of
10 my colleagues.

11 We are adjourned.

12 (Public workshop adjourned at 3:45 p.m.)

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