

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

---oOo---

IN THE MATTER OF WATER RIGHT APPLICATION 30532 BY THE  
MONTEREY COUNTY WATER AGENCY TO APPROPRIATE WATER TO STORAGE  
FROM THE NACIMIENTO RIVER IN SAN LUIS OBISPO.

HEARING ON MOTION TO QUASH SUBPOENA  
OF CLIENTS OF MR. MALONEY

---oOo---

HELD AT

BONDERSON BUILDING  
901 P Street  
SACRAMENTO, CALIFORNIA

WEDNESDAY, JUNE 28, 2000  
11:00 A.M.

---oOo---

Reported by:

ESTHER F. WIATRE  
CSR NO. 1564

CAPITOL REPORTERS (916) 923-5447

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

HEARING OFFICER:

JOHN BROWN

STAFF MEMBERS:

BARBARA KATZ, STAFF COUNSEL  
KEVIN LONG, WRC ENGINEER

FOR MONTEREY COUNTY WATER RESOURCES AGENCY:

DOWNEY, BRAND, SEYMOUR & ROHWER  
555 Capitol Mall, 10th Floor  
Sacramento, California 95814  
BY: KEVIN M. O'BRIEN, ESQ.

FOR SALINAS VALLEY PROTESTANTS:

PATRICK J. MALONEY, ESQ.  
2425 Webb Avenue, Suite 100  
Alameda, California 94501

FOR TANIMURA & ANTLE, INC.:

ELLISON & SCHNEIDER  
2015 H Street  
Sacramento, California 95814  
BY: ROBERT E. DONLAN, ESQ.

FOR EAST SIDE WATER ALLIANCE:

LENNIHAN LAW  
2311 Capitol Avenue  
Sacramento, California 95816  
BY: MARTHA H. LENNIHAN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SACRAMENTO, CALIFORNIA

WEDNESDAY, JUNE 28, 2000, 11:00 A.M.

---oOo---

HEARING OFFICER BROWN: Good morning.

This is the time and place for the hearing on the motion to quash subpoena of clients of Mr. Maloney filed by the Monterey County Water Resources Agency.

This hearing is being held in accordance with the motion dated June 14th, 2000, filed by Scott Shapiro on behalf of the agency and the Notice of Hearing dated June 15th, 2000, signed by Barbara Katz. Both notices were served on all persons on the list of persons to exchange information regarding the hearing on the agency's Application 30532 to divert water to storage in Nacimiento Reservoir.

I am John Brown, a member of the State Water Resources Control Board. I will be assisted today by staff attorney Barbara Katz and staff engineer Kevin Long.

The purpose of this hearing is to afford the parties an opportunity to present oral argument regarding the motion to quash subpoena of clients of Mr. Maloney which may assist me in determining whether to quash the subpoena entirely, modify it or direct compliance with it under whatever terms or conditions may be necessary.

Our hearing today has a narrow focus. The sole issue

1 is how to resolve the motion to quash the subpoena of  
2 clients of Mr. Maloney. It is not a water rights hearing to  
3 determine whether there is unappropriated water to supply  
4 the applicant or to determine terms and conditions under  
5 which the applicant may appropriate water.

6 The order in which the parties will present arguments  
7 is as follows:

8 First will be the agency as moving party.

9 Second will be the Salinas Valley Protestants, which  
10 are clients of Mr. Maloney.

11 Third will be Tanimura & Antle, Incorporated.

12 Fourth will be East Side Water Alliance.

13 To ensure that we finish the hearing today, please  
14 limit your arguments to 20 minutes for each party and your  
15 response to 10 minutes. I have read the briefs that were  
16 submitted, so you may summarize them in your arguments.

17 At this time I would like to invite appearances by the  
18 parties. Will those making appearances, please state your  
19 name, address and who you represent so the Court Reporter  
20 can enter this information into the record.

21 Who is representing Monterey County Water Resource  
22 Agency?

23 MR. O'BRIEN: Morning, Mr. Brown.

24 Kevin O'Brien of Downey, Brand, Seymour & Rohwer, 555  
25 Capitol Mall, Tenth Floor, Sacramento, 95814.

1 H.O. BROWN: Morning, Mr. O'Brien and welcome.

2 Who is representing the Salinas Valley Protestants?

3 MR. MALONEY: Patrick Maloney, 2425 Webb Avenue,  
4 Alameda 94501.

5 In connection with that, your Honor, we reasonably and  
6 -- excuse me, Salinas Valley Protestants because I think it  
7 is the name that the State Board used to refer to us. There  
8 was a suggestion that possibly there are other protestants.  
9 We have not seen other protestants, other than Fish and  
10 Game.

11 Are there any -- can we find out if there are other  
12 protestants?

13 H.O. BROWN: Certainly.

14 MR. MALONEY: Secondly, this Tanimura & Antle Company,  
15 we have no idea what lands they represent or who they are.  
16 And this East Side Water Alliance, we have no idea who they  
17 are and what lands they represent.

18 On May 10th, 2000, we sent a letter to everybody who  
19 appears asking them to describe the lands they own and who  
20 they represent. And we've never received a response from  
21 that, who these people are or what lands that they  
22 represent. We are not sure that anybody who isn't  
23 officially participating in this proceeding as a protestant  
24 or has filed an answer could actually participate in the  
25 discovery proceeding. We don't know. We are raising the

1 issue for your ruling, your Honor.

2 H.O. BROWN: Thank you, Mr. Maloney. Welcome, also.

3 MR. MALONEY: Thank you.

4 H.O. BROWN: Perhaps the other parties in an opening  
5 statement can give a brief overview of the lands and who  
6 they represent. That would no subtract from your time  
7 allowed.

8 Is that all right?

9 MR. MALONEY: We are raising a second issue; and that  
10 is, can they participate in the hearing when basically they  
11 are making policy statements. They haven't filed a protest  
12 and/or an answer.

13 MS. KATZ: They filed notice to appear at the Board's  
14 hearing. It's at the Hearing Officer's discretion whether  
15 to let them participate.

16 MR. MALONEY: Thank you.

17 H.O. BROWN: Who is representing Tanimura & Antle?

18 MR. DONLAN: Good morning, Mr. Brown.

19 Robert Donlan from Ellison and Schneider, 2015 H  
20 Street, Sacramento 95814.

21 We did file a notice of intent to appear. We are an  
22 interested party. We are not protestants. I am not sure  
23 that was specified in the hearing notice. I am not aware of  
24 any regulations that require all participating parties to be  
25 protestant or applicant.

1 H.O. BROWN: All right.

2 Thank you, Mr. Donlan, and welcome.

3 MR. DONLAN: Thank you.

4 H.O. BROWN: Who is representing East Side Water  
5 Alliance?

6 MS. LENNIHAN: Good morning, Mr. Brown.

7 Martha Lennihan form Lennihan Law at 2311 Capitol  
8 Avenue, Sacramento, California, 95816.

9 The East Side Water Alliance is a group of landowners  
10 in the east side, not surprising, of Salinas Valley. We did  
11 file a notice of intent to appear. More importantly my  
12 group of clients are many of the folks who have submitted  
13 data to the agency under the promise of the confidentiality,  
14 which is one of the topics of this hearing.

15 H.O. BROWN: Morning, Ms. Lennihan. And welcome.

16 The hearing will be transcribed by Esther Wiatre.  
17 Persons who want a copy of the transcript should order one  
18 directly from her. However, 60 days after the Board  
19 receives its own copy of the transcript, the transcript will  
20 be posted on our website. That website is [www.swrcb.ca.gov](http://www.swrcb.ca.gov).  
21 If you want that more specifically you can see Ms. Katz or  
22 myself later and we can make sure you've got the right  
23 description of our website.

24 We are going to oral arguments now, and we will start  
25 with the Monterey County Resources Agency, Mr. O'Brien.

1           MR. O'BRIEN: Thank you, Mr. Brown.

2           The motion to quash goes to two specific categories of  
3 documents. I want to just highlight that point at the  
4 outset. Because the agency has indicated a willingness to  
5 produce the other documents pursuant to the subpoena. In  
6 fact, I think it is important for this Board to understand  
7 that over the last several years the agency has literally  
8 been bombarded by Public Act requests by Mr. Maloney and his  
9 clients and have produced literally thousands of pages of  
10 documents to him and have, in fact, produced the SVIGSM  
11 model which is the model used to develop our hydrology  
12 testimony in this case.

13           What we are objecting to the production of is two  
14 specific categories: One is the water extraction reports  
15 that landowners within the Salinas Valley have filed over  
16 the past several years with the Agency pursuant to Ordinance  
17 3717. And the second category is certain water conservation  
18 reports also produced pursuant to that ordinance.

19           Ordinance 3717 was adopted to assist the Agency in  
20 gathering information about the general hydrology of the  
21 Salinas Valley. As this Board is well aware, the Salinas  
22 Valley has some very unique water supply and water quality  
23 problems, including the problem of seawater intrusion.

24           In order to encourage the landowners in that valley to  
25 participate in this voluntary data production program, the



1 Agency needed to make some very strong assurances, and these  
2 are contained in the ordinance, that the Agency would do  
3 everything in its power to maintain the confidentiality of  
4 this information. That is really why we are here today.

5 This information related to the pumping that goes on in  
6 the valley is in the nature of trade secret data. And Mr.  
7 Donlan and Ms. Lennihan have submitted papers in this  
8 proceeding, you will be hearing from later, underscoring the  
9 fact that this data in the context of a very competitive  
10 agricultural economy of the Salinas Valley is trade secret  
11 data. It's important and competitive data. It's not data  
12 that the farmers in that valley want to have their  
13 competitors have.

14 It is also important from the standpoint of the Agency.  
15 The Agency, as you know, is in the process of attempting to  
16 address some of these water supply issues. And the Agency  
17 views the cooperation of its landowners in being able to go  
18 out and obtain data of various nature to be critical to its  
19 ultimate success. And if the Agency represents to its  
20 landowners, its constituents, that it is asking for data,  
21 but it can't in effect make good on its promise that that  
22 data will be kept confidential, then the likely outcome, and  
23 I think the Superior Court in Monterey County understood  
24 this, no one would produce the data. That is what is really  
25 at stake here ultimately.

1           In the context of these privacy and trade secret  
2           considerations, Mr. Maloney, I think, has a very heavy  
3           burden to establish a need for this data and relevance of  
4           this data to this proceeding. And in the papers that have  
5           been submitted, Mr. Maloney has not met that burden. In  
6           fact, he has not even come close.

7           The key, I think, assumption if you cut through all of  
8           this, is on Page 3 of Mr. Maloney's response brief where he  
9           makes the following assumption, and I think this is the  
10          assumption that really pervades his presentation. He says  
11          on Page 3 at Line 11:

12                   It follows that in order for the Agency to  
13                   respond to the Board's inquiry about the  
14                   satisfaction of downstream water rights (see  
15                   March 26, 1999 letter) the Agency will rely  
16                   upon its database of downstream extractions,  
17                   i.e., the water extraction reports. In order  
18                   to opine on whether such extractions are  
19                   reasonable, thus do not exceed a  
20                   corresponding right to water, the Agency will  
21                   of necessity need to correlate the  
22                   extractions with the type of use, i.e., the  
23                   water conservation reports which detail the  
24                   type of crop and irrigation system used.  
25                   (Reading.)

1           Mr. Maloney is just flatly wrong on that assumption.  
2           There is nothing in the record in the way of evidence that  
3           supports his assumption as to what the Agency will or won't  
4           use.

5           The fact of the matter is the Agency in its modeling  
6           has not used the water extraction data, either in the  
7           development or calibration of the SVIGSM model. We  
8           submitted here within the last couple days a declaration  
9           from Mr. Melton which was the same declaration that was  
10          submitted to the court in Monterey County, which lays out  
11          the history of the development of the SVIGSM which is the  
12          numerical flow model we will use for the hydrologic  
13          analysis.

14          Mr. Melton makes it quite clear in developing that  
15          model they did not use the extraction data. Instead they  
16          used a very standard technique, which I know you, Mr. Brown,  
17          are familiar with, where pumping is estimated based on  
18          cropping patterns. They obtained that data from the  
19          Department of Water Resources relating to cropping patterns  
20          within the valley, attached to the water duty to the  
21          different crops in the valley, and they from that estimated  
22          total pumping in the valley for the purposes of modeling.  
23          They certainly didn't have an adequate database within this  
24          SVIGSM system of the model to be able to use that with  
25          accuracy. And a consumptive use method is a perfectly

1       accepted approach to estimating pumpage.

2               Now, I think a lot of Mr. Maloney's arguments in this  
3       proceeding amounts to the argument that, well, the Agency  
4       should have used the data.  If that is the argument he is  
5       making, then that is a perfectly acceptable argument for him  
6       to make at the hearing.  That goes to the weight of the  
7       evidence that the Agency is going to be submitting.  We  
8       don't think that is correct.  We think our testimony will  
9       demonstrate that the use of the consumptive use methodology  
10      is perfectly adequate.

11              We are not here today, I don't think, to argue the  
12      weight of the evidence for the appropriateness of the  
13      hydrologic analysis that the Agency conducted.  We are  
14      simply here to determine whether he has met his burden of  
15      demonstrating need for this pumping data in the context of  
16      proceeding.

17              Now, the papers contain a lengthy discussion of a  
18      couple points that I want to briefly touch on.  One is this  
19      question of water availability analysis.  Mr. Maloney  
20      apparently has the view that when one comes to the Board to  
21      submit a water right application, one needs to submit in  
22      connection with that application a full-blown hydrologic  
23      analysis that includes detailed analyses of water extraction  
24      pumping throughout the area in question.

25              The Board did not require that in this case.  The

1 Board, I think, looked at this application as a fairly  
2 unique situation in which we have a facility that has been  
3 operated for over 30 years, and we are now coming back  
4 because of a measurement error in the reservoir capacity and  
5 trying to confirm water rights for that full capacity. This  
6 is not a situation like this Board sometimes faces where you  
7 have a new reservoir project going in and there are other  
8 issues related to impacts. In fact, the Board in this case,  
9 at least tentatively has indicated, a willingness to proceed  
10 on an exemption on this case.

11 The issues involved in this proceeding are much more  
12 narrow and much different from the issues involved in other  
13 types of water right applications, and the Board made a  
14 decision to accept this application, to notice this  
15 application, and to proceed to a hearing. That is where we  
16 are now. The notion that we now have to go back and prepare  
17 some kind of a water availability analysis is simply not  
18 consistent with this Board's practice. The water  
19 availability analysis is contained in the evidence we  
20 submitted.

21 And on July 18th and 19th we will be presenting that  
22 evidence. Mr. Maloney will have an opportunity to  
23 cross-examine in an attempt to rebut that evidence. He has  
24 made absolutely no showing that in order to do that he needs  
25 to have this confidential pumping data.

1           Finally, there is an argument made in the papers  
2 relating to conjunctive use. I must confess, Mr. Brown, I  
3 have read that argument at least three times. And I am not  
4 sure I fully understand that. I do want to reserve some  
5 time to respond to Mr. Maloney on this issue. But, as best  
6 I understand it, the argument is that this confidential  
7 pumping data is needed to somehow establish the protestants'  
8 proper conjunctive use under certain statutes that Mr.  
9 Maloney cites.

10           Well, I guess I have a couple responses to that. One  
11 is if the issue is his own clients' pumping, why can't he go  
12 to his own clients and get that pumping data? Why does he  
13 have to go to the Agency for that part of pumping data? If  
14 the issue is pumping in conjunctive use by others in the  
15 valley, what does that have to do with the issues that have  
16 been noticed for this proceeding?

17           I don't think Mr. Maloney has answered those questions.  
18 I would like to hear him answer them and I would like to  
19 have him respond to that.

20           Thank you.

21           H.O. BROWN: Thank you, Mr. O'Brien.

22           Mr. Maloney, you are up.

23           MR. MALONEY: Chairman, Ms. Katz, Mr. Long.

24           First thing, a couple preliminary comments. They did  
25 not include in their filings for the hearing on July 18th

1 and 19th, they did not include a water availability  
2 analysis. Excuse me, the Agency did not include a water  
3 availability analysis. That was required pursuant to a  
4 letter from the State Board on March 26, 1999, from  
5 Mr. Satkowski, chief of the special watershed application  
6 team to our office, with a copy to Kevin O'Brien.

7 In that letter a water availability analysis, they were  
8 supposed to determine the hydrology for different types of  
9 water years, wet, average and dry, needed to satisfy  
10 downstream prior rights. Three, the instream flows needed  
11 to protect fishery resources. The water availability  
12 analysis should be an integral component of the California  
13 Environmental Quality Act.

14 That was not filed in connection with the documents  
15 that we have to date, and we do not know that there is any  
16 waiver of that requirement.

17 Secondly, to our knowledge, we have set forth in detail  
18 what we perceive to be our vested rights, and nobody who has  
19 filed any protest to those vested rights in any of the  
20 answers or anything like that. So we assume for the  
21 purposes of this hearing that our vested rights are going to  
22 be accepted by all parties.

23 The importance of that is, if you read what we filed to  
24 date, plus the filings we made yesterday, there is another  
25 110,000 acres of land to be developed in what we call the

1 vested rights area. This is using the 15-percent slope,  
2 basically the same slope that you have in the city in -- you  
3 have in Napa County for development. We will be having  
4 testimony that indicates that there is another a hundred to  
5 110,000 acres to be developed.

6 What is important here is that this Board, representing  
7 the public, has to think in terms of how to optimize the  
8 water resources of the state. We feel that you are going to  
9 have to, when you deal with this application, come up with a  
10 methodology in which to optimize the water resources of the  
11 state. We fully expect you to come up with an idea of  
12 pumping data, pumping restrictions. We fully expect you to  
13 come up with release patterns during drought conditions to  
14 take care of downstream vested water right owners and to  
15 basically optimize the water resources.

16 This was done very successfully 30 years ago in the  
17 Napa Valley by this very Board. Here we are going to be  
18 asking you to do exactly the same thing.

19 One of the things we are going to propose is a  
20 methodology by which you can better manage the water  
21 resources so all the various water interests are protected.  
22 For what it is worth, the Agency is speaking -- I think the  
23 record shows that we represent 5 percent of the row crop  
24 growers. We represent 40 percent of the vineyard growers.  
25 We represent 20,000 acres of undeveloped land. We represent



1 another 20,000 acres of cattle land. We are not taking any  
2 water away from anybody. We are not interested in hurting  
3 anybody. What we are interested in doing is optimizing the  
4 water resources of the state. We think this is an  
5 appropriate place in which the Board can do it. The data we  
6 are asking for has to be carefully analyzed so you will know  
7 exactly how much pumping each person is allowed to do and  
8 not do.

9 A great deal of discussion is made about the validity  
10 of this data and so on. We need the data to impeach the  
11 plaintiff's, the applicant's case in chief. This is a  
12 standard procedure under litigation. What's so disturbing  
13 to me on a professional basis is that we actually have  
14 declarations, and I can submit copies of these, filed in the  
15 other action which say they relied on this data to validate  
16 their model. Here are the declarations. I have five copies  
17 of them. Counsel is fully aware of them.

18 These declarations say that they looked at the  
19 extraction data to validate the model. We've done a lot of  
20 analysis of the extraction data and the --

21 Who shall I give these to? There are five separate  
22 copies.

23 We have done a lot of the analysis of the assumptions  
24 in the model, and we are finding a lot of errors in a lot of  
25 the data that has been given to us in summary forms and a

1 lot of errors given to us that are the assumptions of the  
2 model. We have been arguing about these errors for the last  
3 three or four years. We are not sure that any of these  
4 errors have really been dealt with in the model.

5 You have a document here or an electronic black box.  
6 We have never been able to investigate the assumptions  
7 against the reality that are in that -- the reality in the  
8 valley against the assumptions that are in the model. It is  
9 a classic case of garbage in and garbage out.

10 One of the things that we constantly hear about is this  
11 decision in Monterey County. The decision in Monterey  
12 County is very important for a couple of reasons. It is a  
13 very limited decision. We were not the plaintiffs -- we  
14 are the plaintiffs in that case. We are taxpayers  
15 challenging the operating assumptions of the taxing behavior  
16 of the Agency.

17 We are -- in this particular case the Agency is the  
18 plaintiff. What the Agency is basically deciding is that  
19 they are the Pope. They get to tell everybody what the  
20 water data is in Monterey County. They get to tell you what  
21 the water usage is. We are saying, "Let's look at the  
22 actual data." We submit under that under this recent Steny  
23 case we should be entitled to look at the data and to  
24 cross-examine them on the data. We believe in what we have  
25 seen in the stuff that they have given us that there is a

1 lot of errors in the data that they've given us to date. It  
2 doesn't match up with the written documents that we have in  
3 our clients' files and it's showing wrong water usage all  
4 over the place.

5 We can't put a declaration into that effect because we  
6 don't have the client data that the Agency has. We can't  
7 compare our client data against what is in our client's  
8 file. We are assuming that there are some types of error  
9 somewhere. We have to look at the raw data in order to get  
10 to the bottom.

11 Let's look very carefully. Let's go to Page 4 of the  
12 points and authorities on this whole issue of what that case  
13 said. If you look at Page 4 --

14 H.O. BROWN: This is on your --

15 MR. MALONEY: This is on the points and authorities of  
16 the Agency asking for a protective order. Let's look at  
17 Lines 24 and 25. It says:

18 Plaintiffs have failed to demonstrate in the  
19 context of the present litigation.

20 (Reading.)

21 In other words the judge weighed a bunch of public  
22 policy issues and concluded that when you are talking about  
23 a tax case it is not necessary for us to see the data.

24 Page 4, notice of motion and notice of motion to quash  
25 subpoena issued by Mr. Maloney, Lines 24 and 25.

1 H.O. BROWN: I am not sure we are on the same page.

2 Page 24, 25?

3 MR. MALONEY: No. It's Page 4, lines -- it's -- the  
4 document's -- it's called Notice of Motion and Motion to  
5 Quash Subpoena, our clients' memoranda of points and  
6 authorities. I don't have a file date on it. I am looking  
7 at Page 4, Line 25

8 MS. KATZ: Okay.

9 H.O. BROWN: Okay, I've got it.

10 MR. MALONEY: There it is, in the context of the  
11 present litigation. The judge made a very limited ruling  
12 in the context of that particular litigation, which is tax  
13 litigation. We can bring in five volumes about the issues  
14 of the tax litigation. But the tax litigation is absolutely  
15 different from a water rights application. And this is a  
16 plaintiff or an applicant who is coming in here and saying,  
17 "We are the only ones that are going to control the data  
18 even though we have better data than what we are offering.  
19 This clearly under Steny is what the court, Appellate Court,  
20 was talking about.

21 Now, there is just this general assumption that there  
22 is water to be appropriated and things like this. We  
23 constantly hear about the saltwater intrusion issue.  
24 Saltwater intrusion issue is a simple issue. There is 3,000  
25 acres or 4,000 acres that are overpumping. All you have to

1 do is look at the historical record. Those people should  
2 stop pumping. Let's deal with the issue.

3 To the extent they don't want to stop pumping, let's  
4 deal with how we can deal with the issue. You shouldn't be  
5 looking at -- I would request the Board not to look at the  
6 whole Salinas Valley. We are talking about billions of  
7 dollars that are going to be invested in the wine industry  
8 over the 30 years to take care of 3,000 acres of people who  
9 are pumping water in marginal land. If we can get the data  
10 we can identify exactly who should stop pumping and how much  
11 they should pump.

12 Everybody is making this story about these are trade  
13 secrets. Keep in mind that we represent 5 percent of the  
14 row croppers in the Salinas Valley and 40 percent of the  
15 wine industry. We don't consider it trade secrets. If you  
16 look at the Napa settlement, we disclosed everything in Napa  
17 in terms of our pumping practices. The water belongs to the  
18 people of the state of California. It doesn't belong to  
19 some big corporation that grows lettuce; it belongs to  
20 everybody. That water resource has to be managed in an  
21 efficient manner to optimize that water resource for the  
22 benefit of everybody.

23 They do use -- they're claiming -- this is one of the  
24 most incredible -- they did use the GEMS data. That is  
25 covered in the declarations. They also used the GEMS data

1 to verify the DWR data. In fact, we got extensive  
2 correspondence on that issue. But the DWR data is  
3 incorrect, and the Agency is admitting it is incorrect.

4 This is one of the more incredible things. This  
5 Tanimura, I have no idea who they are and what acreages they  
6 represent. They have a big building. We've asked them who  
7 they are. They won't tell us. We have a whole bunch of  
8 parcels. I think we have a hundred acres of Tanimura &  
9 Antle parcels, period. Tanimura & Antle in their own  
10 witness, who we assume is really the Agency's witness as  
11 well, relies on the extraction data, and then we are not  
12 allowed to see the extraction data. It just boggles our  
13 mind.

14 Now, let's talk about alternate relief. If you are  
15 going to -- we are more than willing to keep all this data  
16 confidential. We don't care how the 95 percent of the rest  
17 of the valley uses the water, uses their water. It doesn't  
18 make any difference to us. We want to know how much water  
19 is coming out of each well all over the valley and how much  
20 acreage is developed all over the valley. We are more than  
21 willing to keep it confidential. We've made it clear.  
22 We've always said we will make it confidential.

23 One of the problems with the Public Records Act request  
24 was that nobody was sure you could keep documents  
25 confidential if you had a public records request. There has

1       been an absolute refusal to consider confidentiality of the  
2       data, which, again, makes no sense to us. We have no  
3       problems disclosing our pumping data.

4               Now, I think the really important thing here -- and I  
5       assume that we are no longer talking about the deficiencies  
6       in the subpoena. We think if there are deficiencies in the  
7       subpoena, so be it. We don't think there are deficiencies  
8       in the subpoena.

9               This Board has to think in terms of developing a  
10       rational solution to the water in the Salinas Valley. We  
11       think if you have this data, we look at all pumping, we can  
12       come up with a methodology that will make everybody happy.  
13       Until you get that methodology in place, we are very  
14       concerned you are never going to have a solution to any of  
15       the water problems in the Salinas Valley. We are more than  
16       willing to work on the methodology, but we have to be  
17       dealing with the same deck of cards. That is part of the  
18       reasons that we think the data is so important.

19               If you decide that you are not going to give us the  
20       data, we would very much like you to limit the Agency's  
21       representation or presentation to data which is based on the  
22       data we have so we can cross-examine on that. They will be  
23       bringing in data talking about east side, west side, all  
24       around the town side. The problem is the data is given to  
25       us in townships. The Agency has refused to tell us what

1 township is in the east side, west side, all around the town  
2 side. We have to have the data tied back to the  
3 presentation. We can't cross-examine on this issue unless  
4 we have the data specifically tied back to the presentation  
5 and to the model. It has ESUs and all kinds of things. But  
6 the data they've given us has no relationship at all to any  
7 ESUs or east side, west side or all around the town side.

8 H.O. BROWN: ESU being what?

9 MR. MALONEY: ESUs are types of political boundaries  
10 covered in engineering methodology, where they define --  
11 they break the valley up into 11 different economic study  
12 units. The problem we are having with these ESUs, and they  
13 talk about how much you can pump in these areas and the  
14 impacts to water rights and on and on and on, is our  
15 engineers have three different sets of ESUs when you look at  
16 the model. We can't figure out what ESU they are talking  
17 about. When we try to compare -- there is three different  
18 sets with the same ESU number. We're absolutely at a loss  
19 to what is going on.

20 Now, Mr. O'Brien makes some comments about these code  
21 sections we are citing. It is pretty clear to us that if we  
22 have a -- we have been trying to get defined for years down  
23 there what is a reasonable water usage for a given area of  
24 the valley and when can you pump it. These are essentially  
25 analyses we went through in the Napa Valley when we built



1 the whole frost protection system in the Napa Valley. Once  
2 you find out what the reasonable water usage is then we will  
3 know how much water is available to each landowner.

4 Why that becomes important, and this is covered in our  
5 protest, is if we are using less than the reasonable water  
6 usage, do we get to transport the water to someplace,  
7 particularly I think in the protest we say to the area of  
8 use under the existing license. That is all we are saying,  
9 define the reasonable water use for each part of the valley.  
10 Then we can decide whether we can transport that water to  
11 other parts of the license. For instance, should we be able  
12 to transport the water to San Luis Obispo County because we  
13 are using less? Or should the Agency be able to transport  
14 the water?

15 This is just nothing, just hogwash. We have clients  
16 who have reduced -- just my clients alone have reduced their  
17 water consumption over the last five years somewhere between  
18 10- and 20,000 acre-feet because of the fact that we are  
19 using drip, all sorts of things to conserve water.  
20 Basically, we were doing it because the wine industry does  
21 not allow us to use as much water. If we saved 20,000  
22 acre-feet of water because of our reduction in pumping,  
23 should we not be able to take advantage of that savings and  
24 transport that water to someplace else?

25 We all know what is going on here. It was mentioned at

1 a public meeting yesterday. Essentially, what everybody  
2 wants is to regulate the reservoirs so they can fight  
3 saltwater intrusion with the reservoir and, this is the  
4 important part, divert water out of the area in Salinas so  
5 that they can replace the water that was developed pursuant  
6 to the CSIP so they can sell that to golf courses in the  
7 Monterey Peninsula. This came out by a supervisor in a  
8 meeting yesterday.

9 H.O. BROWN: Tell me what again, what is going on.

10 MR. MALONEY: Essentially there is a real cash  
11 shortage on CSIP, this project, this saltwater intrusion  
12 project. To reduce the cost, they want to sell the  
13 processed water to the golf courses in the Peninsula to  
14 reduce water needs. And then they want to replace that  
15 water with --

16 H.O. BROWN: Let me make sure I, if I may, understand.  
17 What you are saying is that there is a group that wants to  
18 sell Salinas groundwater to?

19 MR. MALONEY: The Peninsula.

20 H.O. BROWN: To the Monterey Peninsula?

21 MR. MALONEY: No. They want to sell the processed  
22 water to Monterey Peninsula.

23 H.O. BROWN: Which processed water?

24 MR. MALONEY: The processed water that comes out of the  
25 CSIP. I guess they call it the Seawater Intrusion Project.

1 They want to replace this water with the water they get out  
2 of the reservoir through manipulating the reservoir.

3 H.O. BROWN: CSIP is an acronym for what?

4 MR. MALONEY: Castroville Seawater Intrusion Project.  
5 I think they call it the Seawater Intrusion Project. This  
6 is replacement water we are really talking about. This is  
7 what the T&A proposal is all about, to take water out of the  
8 river, replace the CSIP water and move the CSIP water over  
9 to the Peninsula and sell that water, and that reduces the  
10 cost, the burden on the land and CSIP. All fine. You can  
11 do whatever you please.

12 Our concern is you've got to manage the water resource  
13 so that we can have enough water for frost protection  
14 season, and then we project a hundred to 150,000 acres of  
15 grapes in the next 50 years. If you look at the Napa  
16 numbers, that is not an unreasonable projection.

17 H.O. BROWN: You say that there is 150,000 acres  
18 undeveloped?

19 MR. MALONEY: 15 percent, 110,000.

20 H.O. BROWN: 15 percent slope?

21 MR. MALONEY: Yeah.

22 H.O. BROWN: So you are looking at developing an  
23 additional 110,000 acres of land?

24 MR. MALONEY: We think -- who knows. That is the  
25 market. You understand, that is the market. We did the

1 Napa thing 30 years ago. There is 10,000 acres of  
2 developed land in Napa. Now there is 50,000 acres of  
3 developed land.

4 H.O. BROWN: How do you address the water shortages  
5 that appear to be evident today in saltwater intrusion for  
6 the valley?

7 MR. MALONEY: If they manage the water resources right.  
8 This is our opinion. We have done this before very  
9 successfully. We did it in Napa. We can take care of all  
10 the problems. Some people are going to have to modify  
11 crops. Some people are going to have to put in reservoirs.  
12 It is very simple to do. You just have to decide when a  
13 person can pump water that doesn't cause seawater intrusion  
14 and how much land he is going to have to give over to  
15 reservoirs. Go back and read People versus Forney. It is  
16 absolutely clear that this Board has the power to do that.  
17 It did it very successfully.

18 The saltwater intrusion thing, it is basically -- you  
19 get the chairman of the water agency standing right here,  
20 and you ask him if he didn't flatly state to me -- just ask  
21 him this question when he gets here if he shows up, that  
22 basically they've got marginal land that they've reclaimed.  
23 That is where you've got the saltwater intrusion. They've  
24 reclaimed marginal land.

25 MR. O'BRIEN: Mr. Brown, I am going to interpose an

1 objection. We are getting into closing argument here.

2 H.O. BROWN: Go ahead, Mr. O'Brien.

3 MR. O'BRIEN: We're getting into legal argument here.  
4 We are here to address a motion to quash. Mr. Maloney can  
5 make all these arguments when we come back on the 18th.

6 H.O. BROWN: Mr. Maloney, the response to the  
7 objection.

8 MR. MALONEY: My only reason in bringing this issue up  
9 is that what we would like is we would like you, the Board,  
10 in its wisdom to become the leader in developing a water  
11 management program for the Salinas Valley. In order to  
12 develop a water management program for the Salinas Valley I  
13 think you almost have to look at San Luis Obispo as well.  
14 You have to look at the extraction --

15 H.O. BROWN: I need to rule on the objection.

16 MR. MALONEY: You have to look at the extraction, the  
17 current extraction and land use data because of the fact  
18 that all of the stuff that is out there is not going to  
19 stand up under close scrutiny based on our review of the  
20 data. That is all I want to say. I don't have any more to  
21 say.

22 H.O. BROWN: Mr. O'Brien is right. We are proceeding  
23 off the track of what we are here to do today. We do have a  
24 narrow focus on the issue.

25 I have taken up some of your time. It's been helpful

1 to me to get a little background here. Let's not distract  
2 from you 20 minutes available. You may proceed.

3 MR. MALONEY: The bottom line, and all this stuff I  
4 think is reasonably done in the briefs, we have responded to  
5 the stuff that he's raised. We are interested in optimizing  
6 the water resource of the Salinas Valley, and that may  
7 include San Luis Obispo. We think if it is properly  
8 managed, and we don't have people who have economic  
9 motivations that have nothing to do with water, want to cut  
10 down the debt service on their land and things of that  
11 nature, we can take the available water resources and have a  
12 very prosperous agricultural and residential industry over  
13 the next 150 years down there. The areas we represent are  
14 the basic original agriculture of the state of California.  
15 This is where the wine industry started in the area we  
16 represent, and we are coming home.

17 But you did this in the Napa Valley. It was  
18 successful. And every sophisticated grower on the Napa  
19 Valley says you are one of the most wonderful people that  
20 came along, for what it is worth. You can do the same thing  
21 in the Salinas Valley, if you choose to do it.

22 Part of the key to doing it is to get all the data, not  
23 sanitized or as one of our engineers says manufactured, out,  
24 honest discussion about the data. That is why we think it  
25 is so important to be out here.

1           And the second part of this is the reliance on the  
2 Superior Court of Monterey is misplaced. And if there is  
3 any problems of confidentiality, we are more than willing to  
4 keep it confidential. That is not an issue from our point  
5 of view.

6           Thank you very much.

7           H.O. BROWN: Thank you, Mr. Maloney.

8           Mr. Donlan.

9           MR. DONLAN: Thank you, Mr. Brown.

10           I don't have much to say. I was hoping I wouldn't have  
11 to say anything. I guess to preface my comments, I am  
12 concerned based on what you just heard, based on all the  
13 documentation they filed on Mr. Maloney's clients, about the  
14 direction of this hearing. As Mr. O'Brien said at the  
15 outset, the hearing is to determine whether there is surplus  
16 water available for appropriations, not to adjudicate the  
17 rights of other pumpers in the valley.

18           Apparently Mr. Maloney thinks this proceeding can be  
19 used to do that. He put in insurmountable amount of  
20 evidence of water rights or purported water rights, but not  
21 once have we seen any information as to the hydrologic  
22 impact of this additional storage. That is what the hearing  
23 is about.

24           I am concerned, as he stated at the very beginning of  
25 his comments, that he is going to unload all of this

1 information into the record. There is not a party here, as  
2 far as I know, and I am not going to speak for other  
3 parties, that is prepared to contest his water rights  
4 information that he is submitting. I am concerned about how  
5 that might be used later.

6 So I guess what I am requesting is that something be  
7 done in the way that this hearing is -- that the procedure  
8 for this hearing is to make sure that there is no  
9 determination of water rights whatsoever, other than whether  
10 or not the Agency had met its burden of showing that there  
11 is water available for this application. I hate to see  
12 something that is similar to what happened in the Carmel  
13 Valley where some people put on water rights and some people  
14 didn't, and those people are stuck with the consequences.  
15 That appears to be the direction that Mr. Maloney is taking.

16 H.O. BROWN: Your words in the record will help to  
17 ensure we keep this decision based on the narrow focus that  
18 it was intended to.

19 MR. DONLAN: Thank you, Mr. Brown.

20 H.O. BROWN: We'll have another comment for the record  
21 by Ms. Katz.

22 MS. KATZ: Regarding Mr. Donlan's concern, the Notice  
23 of Hearing specified several issues. They deal with the  
24 County's application, Monterey County Water Resources --

25 H.O. BROWN: Turn on your mike.



1 Can you hear in the back of the room?

2 Start over again, please.

3 MS. KATZ: The Notice of Hearing for Application 30532  
4 specified several issues. None of them include an  
5 adjudication of the water rights in the basin, and there is  
6 no plan to do that. That is not the purpose of the  
7 hearing.

8 So, I wanted to make that clear on the record. This is  
9 not an adjudication of water rights. And to the extent  
10 people have protests claiming injury to prior rights, we  
11 have to determine that there is a reasonable likelihood that  
12 they got a right. We cannot pass on a judgment on whether  
13 they have a right. But if there is no evidence that someone  
14 even has a water right then the issue of protecting a prior  
15 right claim by that individual is moot. So I don't know if  
16 that resolves your concern.

17 MR. DONLAN: That addresses it, thank you.

18 H.O. BROWN: It certainly addresses it.

19 Thank you, Ms. Katz.

20 Ms. Lennihan.

21 MS. LENNIHAN: Thank you, Mr. Brown.

22 Martha Lennihan for the East Side Water Alliance. I  
23 appreciate the comments of Counsel Katz with respect to the  
24 scope of the hearing. My clients are very concerned about  
25 both of the issues we are now discussing.

1           One is the scope of the hearing which I would like to  
2 recognize is not really the topic of today's motion  
3 proceeding, and the second is whether the Board orders the  
4 Agency to disclose data which my clients and others gave to  
5 the Agency under expressed promise of confidentiality. So,  
6 let me go in reverse order. Let me first address --  
7 actually, let me address first the scope issue.

8           Mr. Maloney in his presentation went through a wide  
9 variety of issues which are totally, entirely outside the  
10 scope of this proceeding. Without wanting to belabor it, I  
11 want to emphasize the concerns of people at least in my  
12 client group that the Board be extremely careful not to go  
13 beyond the bounds of what Ms. Katz has described. If the  
14 Board wants to notice an adjudication, then the Board needs  
15 to notice an adjudication. Many entities and individuals in  
16 the valley have chosen to not submit evidence of their water  
17 rights in this proceeding based on the representations of  
18 the Board that this is not the proper proceeding for that.  
19 We need to be absolutely clear that that is what is going to  
20 happen in this proceeding and not something broader. You  
21 can see the ramifications of that, where Mr. Maloney is  
22 going, and that is something of great concern to us.

23           Let me just specify for example, Mr. Maloney said since  
24 they had set forth their vested rights and there were no  
25 protests thereto, that they're assuming their vested rights

1 have been accepted by all parties. Not true. We expressly  
2 deny that.

3 Secondly, Mr. Maloney's argument has to do with the  
4 Board's needing to optimize water use and water resources in  
5 the Salinas Valley. That is not the topic of this hearing.  
6 The Board has not, as far as I am aware, decided to exercise  
7 jurisdiction and take jurisdiction away from the local  
8 agencies and specifically the applicant who will be before  
9 the Board in this proceeding. So that is not within the  
10 scope of the proceeding.

11 Mr. Maloney says that he needs this data, the  
12 individualized data of landowners in the valley. Again,  
13 provided to the Agency only and expressly on confidentiality  
14 to know how much pumping each is allowed to do. Needless to  
15 say, it is that kind of talk that makes people very, very  
16 concerned about what kind of use would be made of the data  
17 should it be released by the Agency.

18 The issue largely, Mr. Brown, in today's motion to  
19 quash proceeding has to do with whether or not it is clear,  
20 and Mr. Maloney and his clients have met their burden to  
21 show that that data is absolutely necessary to determine the  
22 question before the Board. And the question before the  
23 Board in the proceeding will be whether or not there is  
24 water available for appropriation for the Agency's  
25 application with a very limited season of use and other

1 features set forth in the application.

2 And secondly, whether or not there is any injury to  
3 senior vested water rights. As Ms. Katz had said, that  
4 would not necessarily involve a determination of those water  
5 rights. That is not the issue. The issue is whether or not  
6 the Board will have sufficient evidence to know whether  
7 there is injury, and hence whether it can grant or grant  
8 with conditions the application before it.

9 Mr. Maloney said that his clients are willing to keep  
10 the data confidential. With all due respect to Mr. Maloney,  
11 I am sure he is sincere in that representation. That is  
12 less than no assurance to my clients who are in likelihood,  
13 at least in part, competitors with Mr. Maloney's clients.

14 We would emphasize to you, Mr. Brown, if the data is  
15 released beyond the Agency, it is going to become public  
16 data and the adverse consequences, which we greatly fear  
17 will immediately be visited. They include not just the  
18 adverse competitive features as described in Mr. Jensen's  
19 declaration attached to our papers, but also the concerns  
20 expressed by Agency Counsel, i.e., that landowners that live  
21 within the valley who also want a solution to the saltwater  
22 intrusion problem will be heavily, heavily deterred from  
23 cooperating with the Agency because the Agency has not been  
24 able to make good on its promises. That is a very important  
25 feature of this whole transaction, and I want to emphasize

1 to you that that data was released only based on the promise  
2 of confidentiality.

3 There have been some allegations made with respect to  
4 what kind of data the Agency is going to rely upon in making  
5 its presentation as the hearing goes forward. I will leave  
6 the response to Agency's Counsel. I think it is very  
7 important for the Board to know what the Agency is and is  
8 not going to rely on so there is not a concern of unfair  
9 treatment or prejudice. We also don't want to have that, in  
10 other words, no prejudice or disadvantage to the  
11 protestants, this particular group of protestants, or any  
12 others for that matter. We do not see that there is any  
13 risk of that in this proceeding, based on the  
14 representations that the Agency has made to the Board.

15 So we do not see at this point any reason for the Board  
16 to require the release of that data and our emphasizing to  
17 you the downsides and risk of so doing.

18 Mr. Maloney went into some detail about a variety of  
19 background information, and I understand that it is  
20 interesting, certainly the CSIP and issues about what  
21 happens with the processed water and so forth. It is  
22 complex and interesting, but frankly irrelevant. Again, not  
23 only to this motion to quash but to the proceeding. If it  
24 is relevant, that is the type of information that Mr.  
25 Maloney could introduce or attempt to introduce in the

1 water rights hearing itself. It is not relevant to this  
2 motion to quash proceeding.

3 If Mr. Maloney wants the Board to take over the Salinas  
4 Valley, then he should make an appropriate motion to do so,  
5 rather than raising that argument in the context of an  
6 evidentiary issue, such as a motion to quash.

7 Let me close briefly just by saying, in our pleadings  
8 my group of clients emphasized to us the importance to them  
9 of keeping the data confidential for all the reasons we set  
10 forth. From the perspective of the Board it seems to me  
11 that the major issue is whether this data is truly necessary  
12 in order to make the kind of findings and answer the type of  
13 questions that will be before the Board in the water rights  
14 hearing to come. In both instances the answer is  
15 emphatically no.

16 There has been no demonstration made by the plaintiffs  
17 that this data is necessary for the Board to make the type  
18 of determinations on water available for appropriation and  
19 on the possibility of injury to senior vested rights that  
20 are the questions presented to the Board with respect to the  
21 application. In fact, if you go through much of Mr.  
22 Maloney's documentation, there is no evidence of injuries.  
23 We have not be able to find any. We trust in the hearing  
24 process that will be elucidated, but, again, Mr. Maloney's  
25 arguments are not focused on the Agency's application. They

1 are not focused on the determination that this Board needs  
2 to make. They are focused on some far broader agenda which  
3 is not within the scope of the notice as issued.

4 Thank you.

5 H.O. BROWN: Thank you, Ms. Lennihan.

6 MR. MALONEY: Can we respond?

7 H.O. BROWN: We are going to have responses now. We  
8 will start with Mr. O'Brien.

9 MR. O'BRIEN: Ms. Lennihan and Mr. Donlan, I think,  
10 very well stated our concerns about Mr. Maloney's intent to  
11 expand the scope of this proceeding. And I think as  
12 indicating by Ms. Katz's statement, I think the Board is  
13 aware of this issue.

14 This notion that we can somehow in this limited  
15 proceeding deal with the question of optimization of  
16 resources in the Salinas Valley is simply ludicrous. I  
17 think the rest of this hearing can go on for weeks and  
18 weeks, we are probably going to have to deal with that issue  
19 when it come to some evidentiary results at the hearing. We  
20 don't need to address that today.

21 I would just like to respond specifically to a couple  
22 of Mr. Maloney's points. First of all, he made the  
23 statement at the outset that because no one made any  
24 comments about the submissions regarding his clients' water  
25 rights, he would simply assume that everyone agrees that his

1 clients have extensive water rights that they claim. I just  
2 want to state very clearly on the record on behalf of the  
3 Agency that we do not accept that statement. We reserve all  
4 of our rights to examine, evaluate and, if necessary,  
5 contest his clients' water rights.

6 Again, we don't think that is an issue that is right  
7 for determination at this proceeding.

8 He made a statement regarding the declarations that  
9 were submitted, and I'd just like to go back and read from  
10 those declarations. Mr. Maloney seems to think that they  
11 indicate that this water extraction data was used in the  
12 development of the model and the various hydrologic analyses  
13 that the Agency has conducted over the years. I think it is  
14 important just to take a close look at the declarations. I  
15 am talking about the declaration of Lyndel Melton. This is  
16 the supplemental declaration of Lyndel Melton dated April  
17 20, 2000. This is the declaration that was submitted to  
18 Judge Silver in the Superior Court proceeding in Monterey  
19 County. Mr. Melton goes on at some length to discuss  
20 how this water extraction data was used and how it wasn't  
21 used. In particular, starting at Paragraph 6 on Page 2, he  
22 states:

23 The groundwater extraction data that is  
24 reported to MCWRA annually, pursuant to  
25 Ordinance 3717 (the GEMS data) was not used



1           in connection with the development of the  
2           SVIGSM, rather than utilizing the GEMS data,  
3           which in some instances was incomplete during  
4           the period of development of the SVIGSM. The  
5           SVIGSM estimates total agricultural  
6           groundwater pumping in the Salinas Valley  
7           based on a standard analytical technique  
8           commonly referred to as the consumptive use  
9           methodology.                   (Reading.)

10           He goes on and describes that methodology. In the next  
11          paragraph, Paragraph 7, he states that the GEMS data was  
12          also not used in the calibration of the SVIGSM. Calibration  
13          is a process by which the accuracy of the numerical flow  
14          model was tested by comparing the results of model  
15          simulations to known real world conditions. In the case of  
16          SVIGSM, model simulations were compared for calibration  
17          purposes not to groundwater pumping data but to groundwater  
18          levels, depth to groundwater for certain well locations  
19          throughout the Salinas Valley and to stream gauge data  
20          available from the United States Geological Survey.

21           Finally, in Paragraph 8 Mr. Melton describes the one  
22          very limited instance in which a very small subset of the  
23          data was used. He says:

24                   The entire process of development of the  
25                   SVIGSM, the GEMS data for individual

1 groundwater pumpers is utilized in only one  
2 limited instance as follows: In order to  
3 confirm the reasonableness of the consumptive  
4 use methodology, a small sample of  
5 groundwater extraction data recorded pursuant  
6 to Ordinance 3717 for the 1994, 1995 and 1996  
7 reporting years was obtained from Gene  
8 Taylor, MCWRA principal hydrologist.

9 (Reading.)

10 And he goes on to describe that data was then confirmed  
11 with the results obtained from the consumptive use  
12 methodology to make sure the methodology was reasonable.  
13 That is the only use that was ever made of any of this  
14 data. Judge Silver determined in the context of the  
15 Monterey County litigation that was not adequate to justify  
16 disclosure of this data. And I think the same analysis  
17 applies here. It was not used in the development of the  
18 model and not used for the calibration of the model.

19 It was used in a separate evaluation of the consumptive  
20 use methodology, and in that instance a very small subset of  
21 the data was used.

22 Mr. Maloney makes some statements about the data that  
23 has been produced. The Agency has produced to him all of  
24 the water extraction data in its possession other than  
25 current year data which is still in the process of being

1 correlated. But it has aggregated that data by township.  
2 That was the order entered by the Superior Court.

3       Apparently he's having trouble correlating that data  
4 with specific geographic locations in the valley. I must  
5 confess I don't understand what the problem is. We  
6 identified specific townships and range quadrants within the  
7 valley and produced the data in accordance with those  
8 townships. If there is a problem in identifying the  
9 geographic location of the townships, I would be more than  
10 happy to meet with Mr. Maloney to try to straighten that  
11 problem out.

12       H.O. BROWN: Is the data presented with ranges also?

13       MR. O'BRIEN: Yes.

14       Finally, on this conjunctive use issue, I am still not  
15 sure I understand how it relates to this proceeding. He  
16 stated if we're losing less than a reasonable water use  
17 requirement, can we transport the water somewhere else.  
18 And he mentioned San Luis Obispo County. Simply a wrong  
19 proceeding for, Mr. Brown, for that issue to be coming up.

20       As you know, I have recently been involved in a  
21 proceeding before this Board relating to transfers involving  
22 conserved water, and it is an interesting and important  
23 issue. But I think it is an issue that best would be  
24 handled in a proceeding with Mr. Maloney. And if his  
25 clients want to come forward with a petition for change

1 based on their water conservation, the Agency would consider  
2 that and might even go along with it. Who knows? It is not  
3 appropriate for this proceeding.

4 Thank you.

5 H.O. BROWN: Mr. Maloney.

6 MR. MALONEY: There is a couple things that are very  
7 important here. I am going to try to concentrate on the  
8 different responses. We take at face value the notice of  
9 the application. The notice of application suggest S  
10 resolution of the protest. And the protest includes a  
11 description of any measures that could be taken to resolve  
12 the protest, including modification of the application.  
13 This is very important, i.e., an amount of season diversion  
14 or conditions: fish bypass, flows, measuring device, et  
15 cetera, that could be included in the water right permit.

16 What is important to understand, and we are going to  
17 bring the testimony out to this effect, is that of this  
18 20,000 acres of vineyards that I represent, about half are  
19 in frost protection. I don't know the numbers of the rest  
20 of the valley. But our need for water is during February,  
21 March, April and May. This is the exact time when there is  
22 the most water available in the Napa River to store. We  
23 will offer testimony that because of the --

24 H.O. BROWN: Salinas River?

25 MR. MALONEY: Excuse me, Salinas River. I should not

1 have brought Napa to the meeting.

2 H.O. BROWN: You just did that to see if we are paying  
3 attention.

4 MR. MALONEY: I know.

5 Anyway, what I'm driving at is that you look at this  
6 hundred thousand acres. Everybody says it is going to be  
7 vineyards. I have lived in California all my life and I  
8 have seen land change five different times. I don't know it  
9 is going to be vineyards. But I do know this, if we do get  
10 into frost protection, the time that we are going to need  
11 the water is going to be February through June. I can't  
12 tell you how much frost protection. We are saying what we  
13 need is to look at the overall picture. We can't waste all  
14 of our time in Monterey County looking at 3,000 acres of  
15 marginal land that these guys are trying to make some money  
16 on.

17 The bottom line of this thing is, if you go back and  
18 look at decision 1064, which we brought to Ms. Katz's  
19 attention yesterday, I am not positive, but this is the Napa  
20 decision. I may have the number wrong. None of these  
21 things were brought up in the protest or application. But  
22 the Board using its power decided that they had to manage  
23 the resource in such a manner so that they could optimize  
24 the water resource. We are just saying, do that, take your  
25 power and use it and make it possible for us to have

1 prosperity for the next hundred years in the Salinas  
2 Valley.

3           You did it 30 years ago, and we are thankful for it in  
4 the Napa Valley, and that became the model for the rest of  
5 the varietal wine industry. Use your power this time. You  
6 have that power available to you to modify these  
7 applications, and you can solve a lot of the problems if you  
8 are willing to use the power.

9           Now, very disturbed about something Ms. Katz said.  
10 Maybe I should get a clarification; maybe I am displaying my  
11 ignorance. Ms. Katz said we will only look at interference  
12 with the exercise of water rights in the past. Does that  
13 mean we will not look at the exercise of water rights in the  
14 future? I don't know the answer to that. If you can answer  
15 the question, I'd appreciate it, when you are considering  
16 our protest. We are assuming that your obligation is to  
17 look both in the past and in the future. We will offer  
18 evidence of how badly we have done in the past. We think in  
19 the future should be looked at as well if you are really  
20 interested in optimizing the water resources of the state.

21           Now, there is criticism about no hydrological input.  
22 Of course, we don't have our hydrologic input in. The  
23 extent of that will be based on what happens today. That is  
24 part of your rebuttal testimony which we don't think we are  
25 obligated to put on till we hear the Agency's testimony. I

1 think we have letters to that effect with Ms. Katz. We have  
2 a whole hydrological study that shows major mismanagement of  
3 that reservoir. That will be put on in our rebuttal  
4 testimony.

5 I am just sort of -- are we talking about water rights  
6 or are we not talking about water rights? We told the world  
7 what your position is. I guess Mr. O'Brien is saying, "We  
8 disagree with your position." Okay. So we will be filing  
9 -- when they stand up and say they disagree, we have no  
10 water rights, we have our rebuttal testimony. We will put  
11 on chains of title. We will put on grants from the King to  
12 the missions and the King and the missions' full scale  
13 development. We will have all of that stuff.

14 We don't think it is necessary to get into that. We do  
15 think it is important to talk about the optimization of the  
16 water resources. That is where we think we should be. Now,  
17 this -- one of the things that I am finding really  
18 interesting, we have all kinds of letters with Mr. O'Brien's  
19 office trying to straighten out where these townships fit in  
20 relationship to the ESUs and to the upper valley, east side,  
21 and all around the valley stuff. They refuse to identify  
22 what township is in each ESU. They refused to identify  
23 where this information is. We can't -- we are going to  
24 bring all this out. That is one of the reasons we want the  
25 data. We will bring out these letters. He is saying that

1 they will sit down and cooperate. They refuse to cooperate  
2 with us.

3 In order to further the water rights analysis we asked  
4 them to identify the townships by the Mexican land grants or  
5 -- excuse me, the assessor role based on the Mexican land  
6 grants. We are asking a perfectly legitimate question: Are  
7 the townships on ranges, Mr. Chairman? But the problem is  
8 in the township water rights data is based on Mexican land  
9 grants and the whole assessment procedure -- and the whole  
10 assessment procedure and the water rights data is based on  
11 the assessor's role which are based on Mexican land grants.  
12 If we can get some cooperation on this issue, we can zip  
13 through this water rights thing in 15 minutes, once you  
14 understand how the assessment role works. There is data  
15 going back a hundred -- basically we have data going back  
16 200 -- I guess a hundred -- what is 1720? What is that?

17 225 years that you can trace the water usage all the  
18 way back and you can trace the grants and trace the grants  
19 to the viceroy in Mexico to Father Serra. Then you can show  
20 how the Mexicans split up the grants from Father Serra.  
21 These huge successful ranches that were basically in the  
22 upper valley. There was nothing in the marginal land.  
23 Father Serra wasn't that dumb to have agriculture in the  
24 CSIP where we have all the problems in Monterey County. But  
25 you've got to get the data so you can tie it down back to



1 all the original stuff. We will bring all this out at the  
2 hearing. But if we have this data, it will become a lot  
3 easier. You will see how all the water fits together.

4 H.O. BROWN: Mr. Maloney, a question for you. This  
5 doesn't subtract from your time.

6 If you had that data, township and ranges, and could  
7 identify it -- I hear you say you are having a problem being  
8 able to identify the information that they are giving you  
9 where you can overlay it on township and ranges, if you have  
10 that cleared up --

11 MR. MALONEY: Just the opposite. We have township and  
12 ranges, we can't put it on the ESUs, east side, west side,  
13 all around the town sides.

14 H.O. BROWN: If you could locate the township and  
15 ranges, would that satisfy your concern?

16 MR. MALONEY: Let me tell you one of the problems with  
17 it.

18 H.O. BROWN: Are you asking for something more than  
19 that?

20 MR. MALONEY: Let me tell you two of the problems --  
21 three of the problems we have.

22 The first thing is we run comparisons on our 75,000  
23 acres against the data that they've given us, and we have  
24 looked at data that we know our clients filed, filed with  
25 the Agency. If you project it out, that data doesn't match

1 up with our filings. Now, we don't know if our clients have  
2 made mistakes in filings, and not made copies right. We  
3 have asked for the original filings by our clients. That is  
4 the first part.

5 So we can't cross-examine on the data. It would be  
6 really helpful if they would just give us our clients' data.  
7 They refused to give us that. They refused to give us the  
8 data that was filed with the Agency by our clients. They  
9 are the protestants here. They refuse to give us that data.

10 H.O. BROWN: I understand that. Answer the question.

11 MR. MALONEY: Would that help us? We can't  
12 cross-examine on the data. There is a game going on in data  
13 because the data that they are giving them, that is saying  
14 we can't process it. We can't process it. They are taking  
15 old data that is not making any sense. They are showing a  
16 30 percent increase in water usage in the upper valley  
17 between 1995 and 1998. We are showing declines in water  
18 usage. That means 20- or 30,000 acre-feet of water. More  
19 water is being used down there. Nothing is matching up.

20 H.O. BROWN: Hold up.

21 Mr. O'Brien, you started to rise.

22 MR. O'BRIEN: As your questions pointed out, Mr. Brown,  
23 we have produced the data identified by township and range.  
24 They can go to a quad map that can identify the geographic  
25 areas that a specific set of data relates to. What Mr.

1 Maloney's problem is that he wants to correlate the data  
2 with the economic study units that the Agency has developed  
3 within the valley. We declined to do that. We don't think  
4 economics is an issue in this proceeding.

5 H.O. BROWN: I understand where you are apart now,  
6 thank you.

7 MR. MALONEY: We are apart on something else.

8 H.O. BROWN: You still have five minutes.

9 MR. MALONEY: We'd also like it by assessor parcel  
10 book. It can identify all the water rights in the valley.

11 There is a really key thing here. We don't know who  
12 this Mr. Jensen is. Keep in mind we represent 6- to 8,000  
13 acres of row crops. He is talking about the row crop  
14 industry. We know exactly what we represent. We don't know  
15 who this guy is. He is saying it is a big competitive  
16 thing. We don't see any competitive problem on this data.  
17 If Mr. Jensen will come in here and say what acreages he  
18 represents, what he owns. We don't know if it is farms.

19 If you look at People versus Forney, the guy was trying  
20 to say the whole State Board was wrong on 25 acres of the  
21 Napa Valley. Do you realize that if Forney had prevailed  
22 what would have happened? No Napa Valley. If the State  
23 Board had lost that case, we never would have had a Napa  
24 Valley. We can't let the public interest be controlled by  
25 somebody who won't even tell you what land he owns. I don't

1 think you can. Maybe people do think that can be done. We  
2 think the public interest is bigger.

3 This idea of confidentiality on the public water of the  
4 state of California, the State just lets us use the water.  
5 We don't own the water. The Napa people had no problem  
6 disclosing all their pumping under the People versus Forney  
7 settlement. They do it on a daily basis during frost  
8 protection season. That is the type of stuff you are going  
9 to have to do in Salinas Valley to take care of the  
10 problems.

11 The final thing is we are assuming when you look at  
12 this you've got to look at Steny. They could have avoided  
13 this problem. Real simple. The Agency could have avoided  
14 the problem but not making the application. Once they made  
15 the application, they exposed themselves to the problems of  
16 Steny. Steny held that we can cross-examine on the  
17 underlying data. Part of the reasons that the decisions  
18 were made the way they were in Monterey County is that the  
19 Judge was concerned that we were plaintiffs in this  
20 validation action.

21 Here we are trying to defend. We are trying to protect  
22 our right to develop our land over the next hundred years.  
23 These guys are trying to hold back the data by which we can  
24 cross-examine a lot of their assumption. We think you are  
25 going to have to strike under Steny virtually all their

1 presentation.

2 Thank you. I apologize for being so loud and so long.

3 H.O. BROWN: It is all right, Mr. Maloney.

4 Thank you.

5 Mr. Donlan.

6 MR. DONLAN: I don't really have anything to add other  
7 than something I should have probably said the last time I  
8 spoke. Mr. Maloney made a comment about Tanimura & Antle  
9 having access to the GEMS data that was described by Mr.  
10 O'Brien earlier. That is not true. The Agency published a  
11 report. That report was attached as an exhibit and the  
12 information that was included in Mr. Scalamini's testimony  
13 comes straight out of the report. It is public information.

14 H.O. BROWN: Ms. Lennihan.

15 MS. LENNIHAN: Just briefly, Mr. Brown. Thank you for  
16 the opportunity to again speak.

17 I think that Mr. Maloney's presentation has emphasized  
18 the confusion that at least he has over the scope of the  
19 proceeding. I think it is very important to keep in mind  
20 that the Agency has represented that it is not relying on  
21 the GEMS data for purposes of the information it will be  
22 using in order to support its application when the hearing  
23 comes around. You, of course, have the opportunity to  
24 evaluate that and make your determination during the hearing  
25 process.

1           Our concern remains basically that the individualized  
2 data produced to the Agency was produced based on a promise  
3 of confidentiality. To breach that promise would be a very  
4 serious and adverse event, not just with respect to this  
5 proceeding, but frankly with respect to the far broader  
6 scope of issues pending in the Salinas Valley with which you  
7 are familiar. Those issues are not part of this  
8 proceeding. There is no need for that data in this  
9 proceeding, and we ask that you grant the Agency's motion to  
10 quash.

11           Thank you.

12           H.O. BROWN: Thank you, Mrs. Lennihan.

13           Questions by staff?

14           I have a question of you, Mr. O'Brien. From our  
15 discussion here today, is there something that comes to your  
16 mind that can assist these folks in better comprehending and  
17 understanding the data on the township and range proviso  
18 that you have been ordered to do?

19           MR. O'BRIEN: I think the real difficulty, Mr. Brown,  
20 is that Mr. Maloney wants us to do a fair amount of what I  
21 would consider title work for him to correlate those  
22 township and range locations with locations that he has in  
23 some of these land grants and other title documents, to  
24 basically match them up. I recognize that that can be a  
25 difficult task. Again, I am not sure that it is really

1 relevant to this proceeding.

2 The one commitment I am willing to make is to sit down  
3 with Mr. Maloney with whatever experts from the Agency I  
4 need to obtain and help him identify on a quad map the  
5 townships that that data relates to. I don't think I have  
6 authority to do more than that at this point.

7 H.O. BROWN: Thank you, Mr. O'Brien.

8 Mr. Maloney, you may respond to that if that would help  
9 you.

10 MR. MALONEY: There's -- we have already done this in  
11 deposition. Nobody knows the answers to where these -- to  
12 what ESU is covered -- what ESU is covered by what township  
13 and range or any of that stuff. And you ask for the most  
14 knowledgeable person. They claim they don't know the answer  
15 of the Agency experts.

16 We ask the ESU and the township and range. It is not a  
17 title issue. We already know the title of all the problems.  
18 It is a water issue. How much water is being pumped from  
19 that particular location? We just want to tie the water  
20 pumping back to the particular location. We figured a way  
21 of doing that. They don't want that spread around. We know  
22 exactly who owns the land and all the rest of the stuff.  
23 What they don't want is the identification of who is  
24 overpumping in a given location. That is what the issue is  
25 all about.

1           H.O. BROWN: Here is my concern: If there is some type  
2 of closure that can be brought between these two differences  
3 that we are talking about here. I hear Mr. O'Brien offers  
4 some additional assistance. If that would help you in your  
5 endeavors, that might answer the problem. If it doesn't,  
6 then the Board will go ahead, and I will go ahead and take  
7 this under advisement and make a decision. I would prefer  
8 if there is some kind of closure that could be brought here  
9 that might assist you in your endeavors and that would also  
10 provide the concerns that I hear expressed by the other  
11 parties of confidentiality and such, that we would have  
12 contributed something toward resolution of the problem.  
13 Setting that aside, it becomes a sole decision by myself and  
14 staff.

15           MR. MALONEY: Could I respond to that?

16           H.O. BROWN: I will give you both a chance to respond.

17           Mr. O'Brien, you may go first.

18           MR. O'BRIEN: Well, first of all, I want to state that  
19 I don't want anything I said to imply that we are willing to  
20 sit down and match up the economic study units.

21           H.O. BROWN: That is quite clear.

22           MR. O'BRIEN: Thank you.

23           To be honest, Mr. Brown, Mr. Maloney and I  
24 respectfully, we have been around this block a lot of times  
25 over the last couple of years. I just simply don't think it



1 is likely that we are going to be able to reach  
2 accommodation on this.

3 H.O. BROWN: Thank you, Mr. O'Brien.  
4 Mr. Maloney.

5 MR. MALONEY: My thinking is in all discovery matters  
6 you should make accommodations, just as a general principal.  
7 I think we can go a long way in terms of this identification  
8 if we just go back to what Ms. Lennihan's client agreed to  
9 two years ago, which was to give it by section. Then we  
10 really will be able to know who is overpumping, by section  
11 instead of township. This is the position that the County  
12 took two years ago, publicly. I think that now that we are  
13 into water rights, it is pretty good if we would get into  
14 sections. We'd be much better off than township.

15 We have no concern about confidentiality. I have been  
16 in garbage cases where guys get killed if they disclose  
17 routes and things like that. We know how to keep records  
18 from our clients to be confidential. Any public filing we  
19 can call in camera. This is not a big issue from our point  
20 of view, to keep records confidential.

21 H.O. BROWN: Thank you, Mr. Maloney.

22 All right. I thank you, all of you for your  
23 participation. I will take this matter under submission.  
24 All persons on the list of persons exchanging information  
25 will be served with a copy of my order resolving this motion

1 prior to the hearing on Application 30532.

2 I thank you all very much for attending this hearing.

3 MR. MALONEY: Thank you, your Honor.

4 MR. O'BRIEN: Thank you.

5 MR. DONLAN: Thank you.

6 ----oOo----

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 REPORTER'S CERTIFICATE

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

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF SACRAMENTO )

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

That I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 3 through 58 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 5th day of June 2000.

\_\_\_\_\_  
ESTHER F. WIATRE  
CSR NO. 1564

\*\*\*\*\*