

LAW OFFICES OF  
**PATRICK J. MALONEY**

2425 WEBB AVENUE, SUITE 100  
ALAMEDA, CALIFORNIA 94501-2922

PATRICK J. "MIKE" MALONEY

(510) 521-4575  
FAX (510) 521-4623  
e-mail: PJMLAW@pacbell.net

THOMAS S. VIRSIK

Via email [ChamblissWS@co.monterey.ca.us](mailto:ChamblissWS@co.monterey.ca.us) and U.S. Mail  
26 February 2016

David Hart, Chair Board of Directors  
c/o Winifred Chambliss, Clerk of the Board  
Monterey County Water Resources Agency  
893 Blanco Circle  
Salinas, CA 93901

Re: February 29, 2016 Board of Directors meeting  
Item 9B Raftelis Financial Consultant, Inc. (RFC) proposal re rate study

Chair Hart:

These comments are made on behalf of the Orradres, Delicato Family Vineyards, and similarly situated southern (Upper Valley and Forebay) landowners.

Raftelis proposal and contract

On 18 February 2016 this office submitted a letter to the Finance Committee, which met on 19 February 2016. The Committee acted to send the proposal to the full Board. However, during that Committee meeting, the members directed staff in several particulars about the proposal, some of which tracked the 18 February 2016 letter's suggestions. The agenda packet material suggests that the Finance Committee's input and direction is being ignored and is not before the full Board.

First, the Committee directed staff to inquire of RFC and bring to the Board a comparable rate study. The Committee had concerns that RFC's approach may be geared more towards a utility, given RFC's significant history with that industry, rather than to an entity such as the Agency. The materials in the Board packet lack any identified RFC example of a comparable rate study for the Board to consider.

The Committee also reminded staff that a study of current and future rates must include important known relationships and limitations, including: various settlements and judgments,

agreements related to Ft. Ord, and other potentially tricky realities. The 18 February 2016 letter raised other known limitations such as the environmental restrictions around fish species, which could affect, inter alia, hydroelectric revenue. The Board packet lacks any reflection of the Finance Committee's direction.

The letter to the Finance Committee also noted certain recent changes in the law that must be taken into account if the rate study is to have any value. Those include SGMA, the Agency's evolving role and change of focus or responsibility under it, and the now mandatory reporting of water use to the State. The newly released draft SGMA regulations require measuring, reporting, analyzing, modeling, and a host of other activity that this Agency already performs under its current authority. Any new GSA would either (1) duplicate the Agency's efforts in large part or (2) supersede or modify the Agency's role and responsibilities. In either instance, SGMA will create notable fiscal changes for the Agency, yet the proposed contract is silent on SGMA.

With respect to the reporting of water use to the State, SB 88 (including new or amended Water Code sections 1840, 1841, 1846, 5103, 5104 and the recent regulations implementing those statutes) now supersedes the local ordinance that requires well operators in the Zones to report extractions to the Agency. Reporting the same information twice – one local and allegedly confidential and the other State and expressly public – will obviously cease sooner or later, and reporting to the State will take the place of the local reports. That change affects a study of future rates in two ways: First, certain Agency efforts<sup>1</sup> around collecting and organizing the local reporting will no longer be necessary, so it affects the budget needed going forward. But more importantly, any study of benefits will be able to rely on much more detailed and public water use reporting on which to analyze who benefits by what project (existing or planned).

In fact, the "scope of work" document in the contract, at page 184, reflects none of the concerns or cautions (1) explicitly recognized by the Finance Committee or (2) raised in the prior letter. The ninth bullet point in the first list on that page should include additional language along the lines of: "and settlements, judgments, land-use agreements, regulatory restrictions on reservoir operations (the Biological Opinion), the Agency's evolving role under SGMA, [and potentially other documents and limitations] that restrict or control what rates and revenues may be derived from certain areas or interests." Without such specificity, the contract in its present form is capable of an interpretation allowing RFC to create a theoretical rate study reflecting little to no reality. If the contract remains silent on the additional considerations the Finance Committee recognized, RFC may be justified stakeholders with whom they may meet whom express those concerns. If the Agency intends to pay for a genuinely useful study, it must insist that RFC (or another consultant) take into account the full breadth of the legal and other reality that affects the Agency's current and future fiscal needs and restrictions. Without such specific inclusion in the scope of work, the Agency will be approving efforts of limited, if any, real-world value.

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<sup>1</sup> The Agency or a new GSA may nevertheless incur expense in using that (State) data.

Conclusion

An honest and comprehensive analysis of the Agency's likely fiscal needs, opportunities, and limitations may be useful, but such an inquiry needs to take into account far more – past and anticipated – than the current proposal for the RFC contract appears to contemplate.

Very truly yours,

*Thomas S. Virsik*

Thomas S. Virsik

- c. Dave Chardavoyne, General Manager via email [ChardavoyneDE@co.monterey.ca.us](mailto:ChardavoyneDE@co.monterey.ca.us)  
Jesse Avila, Deputy General Counsel via email [AvilaJJ@co.monterey.ca.us](mailto:AvilaJJ@co.monterey.ca.us)

Encl.

18 February 2016 letter to Finance Committee

LAW OFFICES OF  
**PATRICK J. MALONEY**

2425 WEBB AVENUE, SUITE 100  
ALAMEDA, CALIFORNIA 94501-2922

PATRICK J. "MIKE" MALONEY

(510) 521-4575  
FAX (510) 521-4623  
e-mail: PJMLAW@pacbell.net

THOMAS S. VIRSIK

Via email [ChamblissWS@co.monterey.ca.us](mailto:ChamblissWS@co.monterey.ca.us) and U.S. Mail  
18 February 2016

Claude Hoover, Chair Board of Directors  
c/o Winifred Chambliss, Clerk of the Board  
Monterey County Water Resources Agency  
893 Blanco Circle  
Salinas, CA 93901

Re: February 19, 2016 Finance Committee, Agenda Item 9  
Raftelis Financial Consultant, Inc. (RFC) proposal re rate study

Chair Hoover:

These comments are made on behalf of the Orradres, Delicato Family Vineyards, and similarly situated southern (Upper Valley and Forebay) landowners. The RFP as presently structured suffers from several flaws or omissions, identified below.

The so-called Orradre settlement is improperly omitted

Neither the staff memo, the RFP, the proposal, nor the addendum reflect that either the Agency or the consultant will consider the so-called Orradre settlement when analyzing either (1) past benefits or (2) potential future rates based on anticipated future benefits. Orradre and others have brought to the Agency's specific attention the settlement since at least October 2015.

As stated in our recent letter in connection with the on-going SGMA process, the 2003 and 2004<sup>1</sup> validation judgments were the product of substantial long-term negotiations and compromises looking both backwards and to the future.

In addition to the hydrological reality, there is also a separate legal reality for the Upper Valley and Forebay stemming from a broad validation judgment from 2003 and 2004. This judgment reflects a settlement reached after over a decade of hard-fought litigation that, at its core, turned the traditional Gloria Road line of

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<sup>1</sup> There is but one agreement, but there were two hearings some months apart and two Court approvals of the stipulated judgments in the half-dozen validation lawsuits then outstanding. The Monterey County Superior Court Case numbers are: 115777, 115431, M55891, M46013 (in 2004), M45589 and one appeal. See also the November 11, 2015 letter from Thomas Virsik to Consortium Members on SGMA Facilitation and Comprehensive Adjudication Act (AB1390 and SB226).

division between the southern and northern parts of the Monterey County portion of the Salinas Valley into a legal boundary. . . . The settlement process established that the reservoirs had little, if any, impact on water availability in the southern sub basins. The settlement places limits on the southern valley's relationship to the seawater intrusion issues at the coast, which was the result of substantial settlement efforts by Hon. Richard Silver.

As a validation judgment, approved by a court in the context of multiple validation actions that over the course of some years obtained jurisdiction over all agricultural lands in the Monterey County part of the Salinas Valley, no single party or even collection of parties has the legal ability to undo or modify the settlement. Unlike a lawsuit between landowners and a government agency that those specific parties can control, waive the benefits of, or modify via consensus, a validation judgment binds the relevant "world" forever (unless a court is asked to make changes, but only through a similar comprehensive process bereft of objection by an affected party).

February 5, 2016 letter from Patrick Maloney to Gina Bartlett, Senior Mediator at CBI on Monterey County Sustainable Groundwater Management Act (SGMA) process. The settlement is akin to a partial adjudication – of various purposes and responsibility for long-term water projects rather than individual water use -- which any analysis of benefits past or future must take into account. The validation judgments protect to a notable degree lands south of Gloria Road from paying towards further projects for addressing seawater intrusion, aka supplying alternate water to the northern areas. As the RFP addendum put it: "As we move forward with *projects that expand the CSIP and SVWP*, our constituents would like an analysis performed on the existing Zones before moving forward with *future projects that may require a Proposition 218* process that may overlap the existing Zones 2C, 2B 2Y and 2Z." Agenda packet at 74 (emphasis added).

#### New mandatory water reporting is not addressed

Another factor in the rate study, unrelated to the settlement, is that under recent law, all water diverters in excess of 10 AF are required to publically report their water use. The Bill that imposes this new requirement is SB 88. While the timing of the diverters subject to specific deadlines and details of reporting methodology varies, there is no room left to argue that agriculture in the Salinas Valley is entitled to keep its water use private. Notably, certain interests north and south have publically reported their water use for years – now the rest must catch up.

Because of the major changes in State law, while the "looking to the past" analysis may not be particularly affected, any analysis of future benefits and projects will be based on more detailed and public arrays of data than in the past. In addition, a portion of the Agency's responsibilities may be decreased if the State reporting will obviate the need for some parts of the local water use reporting.

SGMA reality not addressed

The Sustainable Groundwater Management Act is nowhere to be found in any discussion of the “forward looking” analysis. While no one can predict with certainty what role(s) and duties the Agency may play in the end, the fair assumption is that the Agency will play a major role in applying SGMA locally. The Agency’s entire purpose and role may be redefined before the SGMA process is over, not to mention the relevant interests (by geography or otherwise) that will be paying for SGMA management and tasks. Will the results of a RFC “looking forward” study remain applicable once the (formation part of the) SGMA process concludes?

Separate from any change to the Agency’s role under SGMA, a Groundwater Plan may contemplate different reservoir operations and potentially a change to existing or planned projects, resulting in a different set of benefits flowing to potentially different sets of interest. Will the analysis allow for such flexibility in this uncertain state of things?

Environmental reality may not be sufficiently addressed

The RFP and associated documents may not sufficiently reflect project operation for environmental purposes. The broad impact of the federal National Marine Fisheries (NMFS) on California’s water law is described in the recent Light case. Light v. SWRCB (2014) 226 Cal.App.4<sup>th</sup> 1463, 1474, 1496-97 (NMFS urged SWRCB to enact regulation). For example, NMFS plays a key role in managing the local reservoirs for fish purposes under the Biological Opinion for the SVWP. Those parameters may affect Agency hydroelectric revenue. If the reservoirs must be operated in a certain fashion for fish purposes, then the benefits of any reservoir project may likewise change. Will the analysis take into consideration both for (1) revenue and (2) benefits the likely environmental restrictions on operations?

Conclusion

An honest and comprehensive analysis of the Agency’s likely fiscal needs, opportunities, and limitations may be useful, but such an inquiry needs to take into account far more – past and anticipated – than the current proposal appears to contemplate.

Very truly yours,

*Thomas S. Virsik*

Thomas S. Virsik

- c. Dave Chardavoyne, General Manager via email [ChardavoyneDE@co.monterey.ca.us](mailto:ChardavoyneDE@co.monterey.ca.us)  
Jesse Avila, Deputy General Counsel via email [AvilaJJ@co.monterey.ca.us](mailto:AvilaJJ@co.monterey.ca.us)

Encl.

February 5, 2016 letter from Patrick Maloney to Gina Bartlett, Senior Mediator at CBI on Monterey County Sustainable Groundwater Management Act (SGMA) process (w/o attachments)

November 11, 2015 letter from Thomas Virsik to Consortium Member on SGMA facilitation and Comprehensive Adjudication act (AB1390 and SB226) (w/o attachments)

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**PATRICK J. MALONEY**

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ALAMEDA ISLAND, CALIFORNIA 94501-2922

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(510) 521-4575  
FAX (510) 521-4623  
e-mail: [PJMLAW@pacbell.net](mailto:PJMLAW@pacbell.net)

THOMAS S. VIRSIK

Via email [gina@cbuilding.org](mailto:gina@cbuilding.org)  
February 5, 2016

Gina Bartlett  
Senior Mediator  
Consensus Building Institute

Re: Monterey County Sustainable Groundwater Management Act (SGMA) process

Dear Ms. Bartlett:

This letter is in response to your request for comments on clarifications and omissions in the materials provided on January 21, 2016 (and later posted). The document referenced below is the DRAFT Salinas Valley Groundwater Stakeholder Issue Assessment report dated January 18, 2016. Page references will be to that document unless otherwise indicated. The common acronym "SGMA" is used, which includes the statutes enacted through the past legislative session, e.g., the Comprehensive Adjudication Act. Other common SGMA acronyms are also used. These comments follow up on earlier comments contained in a November 11, 2015 letter sent to the so-called "consortium," which initiated the SGMA facilitation process.

Groundwater, surface water, or underflow? (page 6)

The water diverted in the Upper Valley portion of the Salinas Valley may not be groundwater at all, and thus not necessarily within the ambit of SGMA (recognizing that SGMA contemplates the inclusion of surface waters under certain circumstances where groundwater planning is not possible in their absence). In litigation presently occurring among various private landowners and a collection of water agencies in San Luis Obispo County, some of those water entities seek a court ruling about certain aspects of the Atascadero sub basin. The argument and analysis proffered advances a view that the waters of the Upper Valley are "underflow" of the Salinas River, not groundwater. *Steinbeck Vineyards #1, LLC, et al. v County of San Luis Obispo, et al.*, Phase 2 Trial Brief of Atascadero Mutual Water Company and Templeton Community Services District, Santa Clara County Case No. 1-14-CV-265039 consolidated with Case No. 1-14-CV-269212 (the *Steinbeck* lawsuit was transferred to Santa Clara County from San Luis Obispo County). The hydrogeology of the Forebay is similar to that of the Upper Valley, i.e., shallow wells drawing underflow.

The attorneys involved in the Atascadero sub basin controversy (all sides) are well known and reputable. While a judgment in the *Steinbeck* lawsuit may not be binding on landowners in

Monterey County, the analyses and factual predicates of the Atascadero sub basin controversy suggest that the Upper Valley (and presumably the Forebay) may require separate hydrogeological analysis and possibly a GSP that conforms to its different water management reality. Accordingly, a single GSA or a GSA that does not recognize the hydrological differences between the southern and northern ends of the Monterey County portion of the Salinas Valley may not be feasible.

Not a tabula rasa – consensus ineffective to change certain default realities (pages 5 and 10)

In addition to the hydrological reality, there is also a separate legal reality for the Upper Valley and Forebay stemming from a broad validation judgment from 2003 and 2004. This judgment reflects a settlement reached after over a decade of hard-fought litigation that, at its core, turned the traditional Gloria Road line of division between the southern and northern parts of the Monterey County portion of the Salinas Valley into a legal boundary. The south-of-Gloria Road sub basins per Bulletin 118 are not “critically overdrafted.” The settlement process established that the reservoirs had little, if any, impact on water availability in the southern sub basins. The settlement places limits on the southern valley’s relationship to the seawater intrusion issues at the coast, which was the result of substantial settlement efforts by Hon. Richard Silver.

As a validation judgment, approved by a court in the context of multiple validation actions that over the course of some years obtained jurisdiction over all agricultural lands in the Monterey County part of the Salinas Valley, no single party or even collection of parties has the legal ability to undo or modify the settlement. Unlike a lawsuit between landowners and a government agency that those specific parties can control, waive the benefits of, or modify via consensus, a validation judgment binds the relevant “world” forever (unless a court is asked to make changes, but only through a similar comprehensive process bereft of objection by an affected party). The recent SGMA additions (the Comprehensive Adjudication Act) closely track the broad scope and procedural posture of the lawsuits that led to the settlement binding the Valley’s agricultural lands. See November 11, 2105 letter to the Consortium. It would be counter-productive to pursue a procedure that would undermine the efforts made in response to Judge Silver’s process.

Bluntly stated, no “consensus” can change any part of the settlement and judgment(s). Negotiation and consensus within the existing stricture of the settlement are feasible, but any path that ignores or seeks to change the settlement is counterproductive from the outset. A process under the Comprehensive Adjudication Act is the only SGMA path to change the settlement, which has its own risks and advantages.

Data disclosure necessary both as policy and now as a matter of law (page 5)

Transparency and hiding water use cannot coexist. The Monterey County Water Resources Agency collects a great deal of water use data by ordinance, which it makes available in summary form in its annual reports. Certain landowners and farmers (both north and south) have filed statements of water diversion with the State for years, which makes those interests’ individual water data already public. Recently, SB 88 was enacted, which will soon require nearly all diversions – surface water and ground if it is in lieu of surface – to be reported



publically. See December 14, 2015 comment letter from Thomas Virsik to Felicia Marcus, SWRCB Chair on the Emergency Regulation for Measuring and Reporting the Diversion of Water. Policy and legal arguments about a “right” to hide how a public resource is used can no longer be taken seriously and any recalcitrance may justifiably be viewed as an absence of good faith.

Full-scale disclosure is not only necessary, it is beneficial to the process and outcome. Real world data will assist in model calibration, for example. The more and better the data, the more likely the technical studies will fit the ground reality. More, rather than less, data should be collected and verified publically so that all parties can better understand how basin water levels, reservoir operations, environmental values, and so on, are affected under various circumstances. Given that the purpose of SGMA is to plan for multiple decades, the stakeholders need reliable engineering and modeling, which reliability can only increase with greater and more detailed real-world data, i.e., individualized water data.

Part of suggested approach may be unlawfully conflicted (page 9)

The present suggested DRAFT approach appears to ignore the conflict of interest laws such as Government Code section 1090. (In contrast, the Fair Political Practices Act is more concerned with disclosure rather than the prohibition of conflicts. Section 1090 allows the public to “invalidate” results achieved where conflict is legally present and a violation of section 1090 may be subject to criminal liability, not just fines or corrective action.)

In the public presentation at the January 21, 2016 workshop, the facilitator discussed the work that will be required by the members of the committees. The danger is that the work of “committee members” may creep towards that of an advisory committee or similar and thereby qualify such citizen member as a “public official” for purposes of conflict analysis. If those standards apply, the test is for conflict is liberal.

“[W]here public officials on behalf of a public entity participate in making a contract with a second entity for which they work, the scenario poses at least the risk that the official will be compromised by serving ‘two masters.’ ” (Lexin, supra, 47 Cal.4th at p. 1075, 103 Cal.Rptr.3d 767, 222 P.3d 214.) Because “the making of a contract ‘[encompasses] the planning, preliminary discussion [and] compromises ... that le[a]d up to the formal making of [a] contract,’ ” (Quantification Settlement Agreement Cases, supra, 201 Cal.App.4th at p. 819, 134 Cal.Rptr.3d 274, quoting Honig, supra, 48 Cal.App.4th at p. 315, 55 Cal.Rptr.2d 555 )

Santa Clarita Organization for Planning and the Environment v. Abercrombie (2015) 240 Cal.App.4th 300, 311. Unlike the Santa Clarita case, there is no exemption in SGMA to section 1090 to protect these committee members from potential liability.

The best path to avoid those dangers is to prophylactically treat committees as subject to section 1090 and the Political Reform Act at the outset and require full disclosures. In addition, keeping

the committees open and public so that stakeholders can attend, provide input, analysis, advocacy and suggestion as a stakeholder rather than as a “member” of anything allows a fuller and more transparent process.

Federal agencies stakeholders are seemingly absent (page 6)

It does not appear that the “fish” regulators or other federal agencies were included among the stakeholders, so far. Specifically, NMFS plays a key role in managing the local reservoirs for fish purposes, which reservoir management must be a major focus of any GSP. While NMFS is not entitled to any special “veto” of any GSP selection, its “buy in” of the nature or identity of the GSA would be useful, if not highly desired. The impact of NMFS on California’s water law is described in the recent Light case. Light v. SWRCB (2014) 226 Cal.App.4<sup>th</sup> 1463, 1474, 1496-97 (NMFS urged SWRCB to enact regulation).

USGS and BOR are actively involved in examining the modeling efforts as they relate to water issues in Monterey and San Luis Obispo Counties, and with respect to SGMA. The description of its plan at a recent public meeting is attached. See Salinas River Groundwater Basin Investigation and Model Development – Stakeholder Meeting Agenda December 16, 2015 and the Salinas and Carmel River Carmel Basins Study Proposal (April 2015, Bureau of Reclamation). This USGS and other modeling work has to be incorporated into any planning for a GSP.

We were informed that the mediators had requested input from the federal agencies but had not received cooperation. Until there is cooperation and involvement by those key players, any work towards a GSP – such as choosing one or more GSA’s – will be of questionable value.

Water Resources Agency must be given proper role (page 3)

The Monterey County Water Resources Agency appears to have been placed in a diminishing role, whether by happenstance or design. While the WRA may not be ideal as the sole entity comprising a or the GSA, it should be allowed a major role and responsibility. The rationale is simple: the WRA includes capable engineers and others with hydrologic and hydrogeological training and substantial local experience. That knowledge and experience should be used and respected, in addition to whatever other consultants or professionals may be employed by stakeholders.

SGMA boundary request is a late-addition unknown variable

It appears that the WRA will be addressing several potential boundary requests per the latest postings on its website (a BMP subcommittee meeting set for February 10, 2016 includes an agenda item on a SGMA boundary adjustment request for the Paso Robles basin, among others). The nature of the contemplated adjustment to the Paso Robles basin is not stated, but whatever its goal, it is not a product of the current mediated or consensus process. Accordingly, one can only speculate whether any adjustment will honor or undermine the operations of the reservoirs, the settlement agreement noted above, and/or the overall management of water in the (Monterey County portion of the) Salinas Valley.

Conclusion

Our clients hope that the mediation process can work and work well, as quickly as possible. But efforts on a process that is unlikely to result in a quality long-term outcome may be better spent on other avenues towards a GSP.

Sincerely,

*/s/ Patrick J. Maloney*

Patrick J. Maloney

c.

Bennett Brooks, (bbrooks@cbuilding.org)

Simon Salinas, Chair Monterey County Board of Supervisors

David Chardavoyne, General Manager MCWRA (ChardavoyneDE@co.monterey.ca.us)

Norm Groot, Executive Director Monterey County Farm Bureau (norm@montereycfb.com)

Nancy Isakson, Govt Affairs Consultant Salinas Valley Water Coalition (nisakson@mbay.net)

Ray E. Corpuz, Jr., City Manager City of Salinas

Grower-Shipper Association (darlene@growershipper.com)

Les Girard, Monterey County Counsel (girardlj@co.monterey.ca.us)

Enclosures.

Settlement and Release Agreement dated February 18, 2013

Steinbeck Vineyards #1, LLC, et al. v County of San Luis Obispo, et al., Phase 2 Trial Brief of Atascadero Mutual Water Company and Templeton Community Services District, Santa Clara County Case No. 1-14-CV-265039 consolidated with Case No. 1-14-CV-269212

November 11, 2015 letter from Thomas Virsik to Consortium Member on SGMA facilitation and Comprehensive Adjudication act (AB1390 and SB226)

December 14, 2015 comment letter from Thomas Virsik to Felicia Marcus, SWRCB Chair on the Emergency Regulation for Measuring and Reporting the Diversion of Water

Salinas River Groundwater Basin Investigation and Model Development – Stakeholder Meeting Agenda December 16, 2015

Salinas and Carmel River Carmel Basins Study Proposal, April 2015, Bureau of Reclamation

LAW OFFICES OF  
**PATRICK J. MALONEY**

2425 WEBB AVENUE, SUITE 100  
ALAMEDA ISLAND, CALIFORNIA 94501-2922

PATRICK J. "MIKE" MALONEY

(510) 521-4575  
FAX (510) 521-4623  
e-mail: [PJMLAW@pacbell.net](mailto:PJMLAW@pacbell.net)

THOMAS S. VIRSIK

November 11, 2015

Simon Salinas, Chair  
Monterey County Board of Supervisors  
168 W. Alisal, 3rd Floor  
Salinas, CA 93901

David Chardavoyne, General Manager  
Monterey County Water Resources Agency  
893 Blanco Circle, Board Room  
Salinas, CA 93901

Norm Groot, Executive Director  
Monterey County Farm Bureau  
1140 Abbott Street, Suite C  
Salinas, CA 93901

Nancy Isakson, Government Affairs Consultant  
Salinas Valley Water Coalition  
P.O. Drawer 2670  
Greenfield, CA 93927

Ray E. Corpuz, Jr., City Manager  
City of Salinas  
200 Lincoln Avenue  
Salinas, CA 93901

Grower-Shipper Association  
512 Pajaro Street  
Salinas, CA 93901

Re: SGMA facilitation and Comprehensive Adjudication act (AB1390 and SB226)

Dear Consortium members:

This letter is directed to the so-called Consortium that selected a facilitator for crafting an appropriate Groundwater Sustainability Agency or GSA under the Sustainable Groundwater Management Act (SGMA). We are aware that the Consensus Building Institute (CBI) was chosen and as our comments of October 5, 2015 to the Board of Supervisors stated, no objection is made to the selection. While this letter specifically concerns Salinas Valley water issues, the interaction between the voluntary and newly enacted judicial forms of SGMA is of potential statewide importance and for that reason copies have been sent to the responsible state agencies as reflected below.

Our purpose is to steer the facilitation process towards one or more outcomes that take into account the newly enacted above SGMA statutes, in light of (at least) two factors affecting long-term groundwater management in the Salinas Valley: (1) a certain settlement agreement

addressing especially southern Valley lands and (2) the Paso Robles Groundwater Basin partially within Monterey County.

#### The Comprehensive Adjudication Act

In October the Governor signed the Comprehensive Adjudication act. Those bills (now statutes) are noted above. Instead of summarizing those provisions ourselves, we have enclosed an entry from the “Official blog of the State of California's [Sustainable Groundwater Management Act website](#).” (Ms. Bartlett of CBI posted to that same blog a month or two ago.) The Monterey Herald recently published an article that noted the bills’ enactment, along with comments by several Consortium members.

As the enclosed State explanation reflects, the new adjudication<sup>1</sup> statutes are in not designed to thwart, slow down, or undermine SGMA. In fact, the Comprehensive Adjudication statutes are supposed to work with and either create an equivalent or supplement to the ultimate SGMA plans. With the new statutes, an adjudication procedure may become a viable option for long-term water management in the Salinas Valley consistent with SGMA. In some respects, adjudication may have advantages over a facilitated process, e.g., adjudication requires early and comprehensive factual disclosures while voluntary facilitation does not and a judgment may have finer “resolution” of water entitlements (e.g., up to a parcel by parcel basis) than a SGMA plan based on sub-basin boundaries. Adjudication is no longer expected to be a multi-decades process. As for public agency (civic, county, or otherwise) involvement, both paths provide for participation.

Monterey County (through its water resources agency or WRA) is in a unique and advantageous position should adjudication arise. Before the Salinas Valley Water Project and its larger financing Zone was approved in a Proposition 218 election, the WRA and many stakeholders cooperated in a complex study and negotiation process that centered on so-called “economic study units” or ESU’s. While the analysis did not cover the entire groundwater basin, it reached all of what became Zone 2C, and could be expanded to cover the rest of the basin. The detailed analysis by ESU’s would assist the WRA in its role in an adjudication, which generally results in a finer water entitlement or water budget than a sub-basin approach. Given the 50-year outlook SGMA requires, a comprehensive understanding of water entitlements (legal, physical, historical, etc.) for all acres through an ESU matrix can aid a public agency considering if and which new projects may solve basin imbalances before it commits to a project.

#### Comprehensive Adjudication as Competition to Facilitation

An obvious challenge for facilitating a GSA formation process is reaching a result that matches or exceeds what may be seen as the strengths of the competing adjudication process (e.g., a “finer” outcome up to an acre-by-acre determination, factual disclosures at the outset, and more delineated rights and obligations for landowners, public agencies, and public interests when balancing the basin). There is a genuine danger that the facilitation process may proceed for months and make significant progress, yet come to naught should any interest avail itself of the

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<sup>1</sup> While legally precise, the term “adjudication” may be causing confusion and concern, given its history. Perhaps a more neutral term – like “judicially supervised SGMA alternative” -- would have been better.

new statutes<sup>2</sup>. There is no “drop dead” statutory deadline for filing a Comprehensive Adjudication, so a party may commence the process at nearly any point in time, e.g., even after interests both public and private have invested substantial time and money in GSA facilitation. Thus, the GSA facilitation process should work towards a structure for groundwater management that includes the strongest aspects of the adjudication option, so that if an interest concludes genuine benefit lies in the adjudication process, the substantial investments (knowledge, work-products, disclosures, etc.) in the facilitation process will be available for informing the adjudication.

Other factors that militate strongly in favor of immediately grappling in the facilitation process with the strengths found in the adjudication path include the hydrological, politically, and legal realities of the Paso Robles basin. Hydrologically, it is connected to the Salinas River watershed. Politically, it partially lies within southern Monterey County. Legally, certain San Luis Obispo County landowners in that basin have already commenced a “quiet title” adjudication (known as the Steinbeck action) of their claimed water rights ahead of the SGMA deadlines.

As our comments around SGMA to the Monterey County Water Resources Agency (its staff, Directors, Supervisors) have emphasized, our focus has been and remains on the overall solutions and long-term outlook. To that end, decades before SGMA, our office advocated for what could today be called a GSP. In 2003 our office succeeded in obtaining a settlement with the WRA on behalf of a number of major southern Salinas Valley interests (e.g., Orradre, Delicato Family Vineyards, Margaret Duflock and others, which interests include Monterey County lands arguably within the Paso Robles Groundwater Basin) arising out of a suite of litigation that was procedurally as close<sup>3</sup> to the current Comprehensive Adjudication statutes as possible at that time, i.e., using the validation statutes with specific notice provided to all discoverable water users. Several coalitions, associations, and agricultural interests chose to participate in the litigations to varying degrees (including through the judicial approval of the settlement agreement). The compromises in the settlement agreement do not include lump-sum payments of money nor is all benefit for only specific client interests. Rather, they address a series of basin management issues around existing and new projects, limits on financial contributions from southern Valley lands, and water entitlements. Like SGMA and the present Comprehensive Adjudication statutes, the judicially accepted settlement agreement is binding on all interests and has no “expiration” date. The settlement agreement is – in current terminology – the rudiments of a GSP as to certain basin management facets.

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<sup>2</sup> While the new statutes allow a court to stay an adjudication to allow parties to develop technical information and studies or adopt a plan that resolves the issues in the adjudication, the statutes provide no authority for a stay simply to pursue further GSA formation efforts.

<sup>3</sup> SGMA and the recent Comprehensive Adjudication statutes follow this office’s consistent suggestions and experience fairly well, e.g., due process modeled on the validation statutes, relying on hydrogeological (not legal) boundaries for planning, greater public disclosures, a 50 year outlook, etc. Whether the Legislature was (1) aware of this office’s advocacy and experiences or (2) came to similar conclusions via independent analyses, is not critical.

That the settlement agreement addresses basin management is no happenstance. Our office has – well before SGMA and the current adjudication statutes – sought out and/or developed tools that may assist with a long-term determination of water entitlement on an acre-by-acre basis in the Salinas Valley. Some of those efforts are described in a certain letter dated April 2, 2002, to Paul Murphey, Division of Water Rights, SWRCB. With respect to the Salinas Valley, this office had many productive conversations on various occasions with the late Bob Antle of the Salinas Valley based Tanimura & Antle companies about a more rigorous (and less “political”) approach to water entitlements. We assume that other like-minded agriculture and other interests took a similar long-term approach and (1) developed resources to aid in reaching an acre-by-acre water entitlement outcome for the Valley and (2) protected their legal bases for such entitlements, e.g., filings statements of water diversion under the Water Code or through litigation outcomes. The GSA selected must have the ability and duty to adhere to the terms of the 2003 settlement agreement about basin management (including Monterey County lands within the Paso Robles Groundwater Basin<sup>4</sup>), as well as the other SGMA factors such as safe and reliable water for residents and environmental purposes.<sup>5</sup> If the GSA(s) selected do not have the ability and duty to so adhere, then adjudication becomes necessary.

#### Conclusion

In the words of the State (via its blog): “The [adjudication] legislation gives parties incentives to align the outcome of an adjudication with SGMA.” The facilitation process in the Salinas Valley (as well as elsewhere) should do the same: align the to-be-negotiated GSA qualities with the qualities available in adjudication so the outcomes of both paths align as the Legislature intended.

Sincerely,

*Thomas S. Virsik*

Thomas S. Virsik

cc: Gina Bartlett (via email [Gina@cbuilding.org](mailto:Gina@cbuilding.org))  
Felecia Marcus, Chair SWRCB  
Mark Nordberg, GSA Project Manager (DWR)  
Wade Horton, Director San Luis Obispo County Public Works Department  
Alecia Van Atta, Acting Assistant Regional Administrator, NOAA, NMFS

Encl. GAB - The Groundwater Act Blog 10-12-15  
Alejo touts record legislation, work on Salinas Valley water Monterey Herald 10-13-15  
PJM comments to Paul Murphey, SWRCB Workshop Professor Sax’s Report 4-2-2002

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<sup>4</sup> Accordingly, a copy of this letter is being sent to San Luis Obispo County, given the SGMA requirement of intra-basin coordination (albeit no regulations have yet been promulgated on that aspect of SGMA).

<sup>5</sup> We note that on October 22, 2015 NOAA wrote to Monterey County as a stakeholder in SGMA because it has concerns with reservoir operations and releases for certain fish purposes. A copy of this letter is being provided to NOAA.