In the

# Supreme Court of the United States

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| SALYER LAND COMPANY, Appellants, | ) | |
| vs. | ) | No. 71-1456 |
| TULARE LAKE BASIN WATER STORAGE DISTRICT, Appellees. | ) | |

Washington, D. C.
January 8, 1973

Pages 1 thru 47



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Washington, D. C.

Monday, January 8, 1973

The above-entitled matter came on for argument at 11:42 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS KEISTER GREER, ESQ., 110 Maple Avenue, Rocky Mount, Virginia 24151, for the Appellants

ROBERT M. NEWELL, ESQ., 650 South Grand Avenue, Suite 500, Los Angeles, California 90017 for the Appellee

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1456.

You may proceed whenever you are ready, Mr. Greer.

ORAL ARGUMENT OF THOMAS KEISTER GREER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GREER: Mr. Chief Justice and may it please the Court:

This case is here on appeal from the United States District Court for the Eastern District of California.

Like the case which the Court has just heard, this also involves the question of the franchise in a water district. Tulare Lake Basin Water Storage District comprehends approximately 193,000 acres, almost entirely in Kings County, California in the Southern San Joaquin Valley.

There are nine water storage districts in California. There is no magic in the word "storage" in the title. It functions like an ordinary water -- or an ordinary irrigation district. The thing which sets a water storage district apart and the reason that these Appellants are here today are two California statutes governing the suffrage in a water storage district.

The first is section 41,000 of the Water Code. It is very short and clear and to the point: "Only the holders of title to land are entitled to vote at a general election,"

and the statute immediately following, Section 41,001, "Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each $100 or fraction thereof worth of land."

The Appellants -- Plaintiffs below -- include a large landowner. The Salyer Land Company farms approximately 28,000 acres of land in the district and about another 28,000 immediately outside it.

It includes a small landowner; Harold Shawl has one-half interest in 65 acres in the district.

It includes a non-landowning resident, Lawrence Ellison, who, some 60-some years old, has resided, has worked in the district. It is stipulated in the record that he is actively interested in water matters. He subscribes to water publications -- interested in water, as is any normal human being in this part of California -- can't vote.

Q What is the high and the low of these two small voters that you mentioned.

MR. GREER: The J. G. BOswell Company, Mr. Chief Justice, owns 61,000 acres in the district. I think it leases an additional 8,000 or 10,000 acres. It farms approximately 40 percent of the district and has about 40 percent of its water.

There are some land holdings that are down to less than 20 acres. I think there are 189 landowners in the

district who own about 2.34 percent of the acreage. They own up to 80 acres apiece, so there is a pattern of a good many small landowners and four large landowners, one of which is the Appellant, Salyer Land Company.

Q What about the J. G. Boswell Company? What do they get in votes?

MR. GREER: The J. G. Boswell Company gets 37,825 votes. There is an exhibit in the record, the voting list of the last election which was held in the district, the only election which has been held in the district in 25 years, a special election called, in part, by my client, and that voting list is the source of that information, 37,825 votes, for that one company.

Now, these Appellants attacked these statutes in the court below and they were both sustained. The majority sustained each statute. Circuit Judge Browning concurred in the exclusion of residents. He didn't think there was enough governmental impact to justify giving the ballot to residents. But he dissented on the waiting of the franchise.

Circuit Judge Browning wrote a lengthy opinion. He couldn't go along with the notion of granting one vote for each $100.

Mr. Chief Justice and members of the Court, to gain a notion of what this country looks like, there is an aerial photograph which is exhibit one following page 66 in the

Appendix.

This district is divided into 11 divisions which brings up what is to me one of the most interesting facets of the case in its present posture. Each division is represented by a director. These directors are supposed to be chosen at these bi-annual elections which aren't held.

Now, the Plaintiffs below, when they filed their suit -- the complaint as set forth in the Appendix -- also attacked the manner in which the divisions had been created. The manner, I should say, in which they had been maintained, because the assessed valuation in one of the divisions was as low as $600,000 and the assessed valuation of one of my clients, Red Salyer, was $2 million and we said that among the other things we said, we said that at any rate, there ought to be some equity in the way that these are set up according to assessed valuation and we got a unanimous ruling of the court below on that. All three judges said that these divisions would have to be redrawn so that they represented the same number of dollars.

The decision may be considered unique to that extent. It would seem to enunciate a doctrine which I might call "One dollar, one vote." Now --

Q That issue is not here?

MR. GREER: No, sir, Mr. Justice Blackmun.

The district, while insisting in the court below,

vigorously insisted that it wasn't a governmental unit, and while continuing to insist that in the briefs before this court, did not file a cross appeal.

Now, I don't mean to belabor the point but the court below relied on the Equal Protection Clause and said that those unequal divisions didn't consist of equal protection. It had to find -- it was a necessary predicate of the decision that the district had to be a governmental unit for it to invoke the Equal Protection Clause, as in the other decisions of this court involving a disparity in size of districts, like the Hadley case or the first case in which this court met the local governmental issue, the Avery case, Midland County, Texas and we think that since the court did rule that way and since there has been no appeal, that the issue of the governmental nature of this district.

I can -- I can establish it to you without this but we respectfully submit that it may be the law of the case.

Q Well, isn't your opponent free to sustain the judgment below on any ground he wants to, even if it was rejected in the lower court?

MR. GREER: I think my point, Mr. Justice White, is that the court below had to say that this was a governmental district --

Q But he says it isn't. His position was

rejected below.

MR. GREER: To that extent, yes, sir.

Q Yes. But can't he sustain?

MR. GREER: I wouldn't want to foreclose him from any argument he might wish to make. I just say that it occurs to me that the governmental nature of the district below may have been adjudicated without appeal.

Mr. Chief Justice and members of the Court, there are 77 residents. Unless they be landowners, they can't vote.

I mentioned Lawrence Ellison. I have said a little bit about the landowners. There are 307 of them altogether. I have mentioned that there are 11 divisions. Six of those 11 divisions are controlled by the J. G. Boswell Company, with those 37,825 votes. Two of the divisions are controlled by the Appellants, Salyer Land Company. Two are controlled by another corporation, Westlake Farms and one by South Lake Farms.

Now, the rigidy of that control is made very express in this record. The President in the district, the president in 1967 -- president, I guess, 25 years. He is still president today -- Mr. Louis T. Robinson, told the California District Securities Commission in 1967, "I know you shouldn't forecast elections, and that causes me a little hesitancy to say what I am going to say."

"The 11 divisions in this large farming operation are completely controlled. You are going to have the same 11 directors on Tuesday that you have got today, with one exeception, one of the directors is having some health trouble and he is going to be replaced, but other than that they are going to be the same 11 directors," and he continued, he said, "Well, I have no concern about the election. Suddenly, if a new board of directors would come in, why, then I would have nothing but opinion. But I have no concern about the election. The 11 divisions are controlled by people with enough votes to put back the same directors they have now, including the two Salyers who are dissenting at this time, the other nine will be returned."

Now, what Mr. Robinson says about an election requires some explanation and I ought to say, in response to a question asked by Mr. Justice Marshall in the preceding argument that the California Water Code provides that these elections shall be conducted in all respects as are elections governed by the Elections Code. That is Section 41367 of the Water Code. These were supposed to be bona fide public elections with a curtain and a secret ballot and a polling booth and everything else and the legislature intended that there would be one every other year. Section 41300 of the Water Code says, "An election, known as the general water storage district election, shall be held in each district on the first Tuesday

in February in each odd-numbered year at which a successor shall be chosen to each officer whose term expires in March next thereafter."

Mr. Chief Justice, the last election, the last general election in this district was in 1947.

Q Isn't there a state law that takes care of that?

MR. GREER: Well, there is a provision that 15 percent of the landowners can call a special election. That is the election which we called in 1967.

Q Did Salyer have that 15 percent?

MR. GREER: No, well, I beg your pardon, yes, just 15.9 percent. But we were joined in -- a lot of the people out there joined with us. Westlake Farms I think joined with us and that is the only election and this is made manifest in the record -- that is the only election which has taken place since 1947. There is no motive for an election. The votes have already been counted. An election is --

Q Are you telling us that that is the reason the vote has been held or that anyone knowing all the facts will know the outcome of the election?

MR. GREER: I suspect, Mr. Chief Justice, that is true. I read my good friend and learned opponent's brief in this case and he said -- in defending the system he said, and I am quoting from him on page 27, "One good test," he said,

"of an electoral system is whether it works in actual operation." And the way this one works in actual operation is there hasn't been a general election for a quarter of a century."

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

MR. GREER: Thank you, sir.

(Thereupon, at 12:00 noon a recess was taken for lunch.)

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Burgess -- Mr. Greer, excuse me.

MR. GREER: Mr. Chief Justice and may it please the Court:

This case and the case which the Court just heard deal with special districts and the view of these Appellants is that in determining whether or not the voting rights cases should apply to a special district, the crucial question is, with what is the district concerned?

Tulare Lake Basin Water Storage District is concerned with water and the control of the water in an agricultural area is the control of everything. I seem to recall that the ancient Greeks spoke of the four basic elements of, among others, earth, water and fire. This one is water.

Now, there are a myriad of special districts in California, I suppose in most states. For example, California has mosquito abatement districts. We wouldn't have brought this case here from California to determine the questions of franchise in a mosquito abatement district. But to show the enormous impact of this district, the enormous governmental impact, consider first at the very beginning, Section 43158 of the California Water Code.

Now, a question was asked in the preceding

argument, does this district -- the district then involved -- acquire any rights just by the virtue of being formed?

This one does and I quote the statute: "All waters and water rights belonging to this state within the district are given, dedicated and set apart for the uses and purposes of the district." The --

Q What specific water rights would belong to the state in a district such as this so they would come within that definition?

MR. GREER: There would probably be a number of filings so the director of finance on the four streams going into Tulare Lake, the Kings, the Kern, the Tule and the Kaweah Rivers, some of them might be in court, a number of them might be vested rights. There would be a large number of potential prescriptive, appropriative and riparian rights.

Q And the state in effect says that the district takes over for the state in that instance?

MR. GREER: Yes, the language is "given, dedicated and set apart for the uses of the district."

Now, the Attorney General of California was asked in 1969 what the nature was of this particular district. The district had had a major flood and was getting ready to apply for some federal funds and it requested an official Attorney General opinion to submit to the Federal Government on the nature of the district.

The opinion of the California Attorney General is set forth on pages 17 and 18 of the Appendix and it is referred to again on page 61 and the crucial part is this, "This is an answer to your request for an opinion, for our opinion, on the status of the Tulare Lake Basin Water Storage District as a political subdivision of the State of California. I have concluded that water storage districts are considered political subdivisions of the state."

The Attorney General cited the leading case, Glenn-Colusa Irrigation District against Ohrt 31 California Appellate 2d 619, and that case contains a very explicit statement of the governmental nature of these districts and also sets forth a very clear distinction between this district and the kind of district that was involved in the case which the court just heard.

As I read the decision of the Wyoming Supreme Court in the Toltec case, the case went off only on the proprietary nature of the district. The court used the term "proprietary." It said that that was a proprietary-type district.

The Glenn-Colusa case, cited, as I say, by the Attorney General of California and the leading case, says this, "State agencies, such as irrigation districts or reclamation districts, are agencies of the state whose functions are considered exclusively governmental. Their

property is state-owned, held only for governmental purposes. They own no land in the proprietary sense."

Now, this district has the problem in domain. It has it and it exercises it. Its assessments are liens on all land in the district. It is covered by the special statutes in California governing the immunity of governmental agencies. There is a special system in California whereby a governmental agency can validate its actions and file a suit to validate a contract or to validate anything else it does, get an interim judgment against the world and when it is final, its transactions can never be questioned, a very useful procedure and one that is a great deal used.

This district has the privilege of using that procedure, Section 860 on the following sections of the California Code of Civil Procedure.

This district in a law suit filed in Federal Court in Fresno, the same court that we are here today from, the Eastern District of California, intervened parens patriae in a case which was brought on the issue of acreage limitations and said that it had the right to appear parens patriae in behalf of the entire Tulare Lake Basin.

We submit that if there is anything which is of a governmental nature, it is appearing parens patriae.

Mr. Justice Douglas, in the case of George against Pennsylvania Railroad back in 1945 quoted Mr. Justice Holmes

in the case of George against Tennessee Copper Company as saying that that was quasi-sovereign. This district, on its application to the Federal Government, in closing that opinion from the Attorney General, got $234,000 in federal funds.

We are told in the briefs of these gentlemen opposing us and the Amici Curiae have insisted on this, that all the bills are paid by the landowners.

The landowners didn't pay that bill. The -- every citizen in that district had an equal interest in that federal money, $234,000 and the residents, nevertheless, were denied the right to vote.

Q Well, counsel in the last case observed that Lockheed has gotten a lot of federal money, too, and presumably that didn't give the right of every resident in the Lockheed area to vote in the Lockheed board of directors. Are you saying that receipt of federal money is a determinative in this case?

MR. GREER: No, I say, Mr. Justice Rehnquist, that it indicates the governmental nature of the district and it also refutes the notion that all the financing comes from the landowners. That is all I say.

Q Well, but the Federal Government does give out money on occasion or loan money to nongovernmental entities, doesn't it?

MR. GREER: Well, in this particular instance the

statute under which it proceeded was a statute limiting grants to governmental agencies for road repair, dam repair and that sort of thing following a disaster. This was under the Office of Emergency Preparedness for relief of governmental agencies which had suffered disasters.

Now, the power of this district that I think is the most important is flood control. The gentleman opposing me and the Amici have said, well, this district concerns property. It doesn't concern people at all. They exist to serve property. It doesn't do anything of interest to people and one of the briefs said none of the residents are interested in or affected by anything that this district does.

Second, the -- this matter of flood control jurisdiction is the immediate reason why the Appellant, Salyer Land Company, determined to attack the weighted voting system and I would like to speak very briefly about the legal history of flood control in water storage districts.

The Act was passed in 1921. The declarations of policy are in Section 58 of the Act, Staats 1921 chapter 914 at page 1766. The expression, "the prevention of floods" is found twice in the paragraph and is spoken of as a purpose necessary to the accomplishment of a purpose that is indispensable to the public interest..

Now,the Water Storage District Law was codified in

1951, placed in the Water Code and those declarations of policy were omitted as superfluous but flood control is still specifically referred to in Section 44001 in telling the purposes for which the district may operate, that they cooperate in contract with other districts in the State of California, with the Federal Government. It says, "For the following purposes, construction, acquisition, purchase, extension, operational maintenance of works for irrigation, drainage, storage, flood control."

The leading case in California on water storage districts is Tarpey against McClure. The statute was passed in 1921. A suit was immediately filed to try to get the legislation declared invalid. The California Supreme Court in Tarpey -- which was decided two years later, in '23 -- held that the Act was valid.

One of the reasons urged for its invalidity was that contrary to the California Constitution, it embraced more than one subject. In the California Supreme Court which deals with water all the time, we are told that it has decided over 3,000 cases dealing with water law, said this -- well, what they said was, they said that flood control and irrigation are two sides of the same coin. They said that that is all one subject. The actual language of the court is as follows: "The conservation of water by means of flood control works to restrain flood waters which otherwise would

overflow the land and go to waste and incident thereto the reclaiming of the lands which otherwise would be overflowed and rendered useless, the storage and distribution of such water for purposes of irrigation, all seems to us to be so legitimately and intimately connected one with another as not to constitute different subjects within the purview of the Constitution. It may be said that in these respects, the Act has but a single object, to wit, the better control and utilization of water."

Now, this district has throughout its career until one time carried out extensive flood control jurisdiction.

Exhibit five is a 1953 report from the president of the district that goes on for 20 or 30 pages on all the flood-control things that it has done and I have excerpted and printed in a printed trial brief filed below, all the matters that pertain to flood control. They are not in the Appendix but they are in a readily accessible form should the Court wish to see it.

Finally, my learned friend, opposing counsel, Mr. Newell, stated in his trial brief -- a printed trial brief filed in the court below -- that this district he represents is "An agency authorized by the law of California to engage in the reclamation of water through flood protection drainage and irrigation works," and I therefore take it that the flood control jurisdiction of this district is no longer

a matter that is open to question.

That brings me to the major floods of the last 20 years which led to this litigation.

Tulare Lake Basin Water Storage District occupies a dry lake bed. It is dry in normal years. There are dams on all four of the streams, the Kings, the Kern, the Tule and the Kaweah but in an extraordinary year, in a flood year, water comes into the district. Water overflows this rich farm land and in 1906, 1917, 1938, -- 1937-1938, 1952 and 1969, some or greater portions of the district were flooded. 1906 was a legendary year and so was 1969. 88,000 acres of the district's land was flooded in 1969.

Well, now, they can tell when it is going to be a flood year. You can see the snow packed up in the mountains and the engineers say that the water content is very high and the snow pack is much heavier than usual. We are going to have a flood.

Buena Vista Lake has a capacity of 235,000 acre feet. It is in Kern County on the Kern River south of Tulare Lake. The relation between them is shown on exhibit four which is printed in the Appendix. Always, when it is evident that there is going to be a flood on the Kern River, the people at Tulare Lake and the people in this district have notified the governing powers at Buena Vista Lake, "Take your flood water before you turn it down on us." The record

is clearly made on that in the Appendix. There is an excerpt from the minutes showing that in 1952 --

Q What page is this on?

MR. GREER: Oh, in the beginning of page 41, Mr. Chief Justice.

Q Thank you.

MR. GREER: There is a reference to consulting engineer Harding, who was a professor, a very eminent professor and his eminence is stipulated to in the record, a leading authority on water matters in the San Joaquin Valley, who told this district, in effect, "You are about to have a major flood."

Now, Buena Vista Lake should fill with the flood water of the Kern River before it comes down here to Tulare Lake. Tulare Lake is still going to take flood water from three rivers.

And so, in 1952, they passed a resolution, and it carried unanimously. It says, right here in the minutes, which are here in the Appendix, to put those people on notice in the name of this district and the president was authorized to write a letter in the name of the Tulare Lake Basin Water Storage District to tell Buena Vista Lake to take that Kern River flood water before they turned it down on us, take 235,000 acre feet of it.

The notice was given in 1952. Incidentally, that

was another example of the district exercising its flood control jurisdiction.

Well, now, the notice was given in 1952 and it was acquiesced in. They couldn't have done anything else. The geology of the San Joaquin Valley is such that no one would claim that Kern River water should go anywhere other than into Buena Vista Lake first. It is higher up on the river.

Well, 17 years went by. Another major flood was on its way in 1969; this same situation exactly obtained except with one difference, one crucial difference. In that 17-year period, to wit, from the year 1956, the J.G. Boswell Company had leased all of Buena Vista Lake.

Well, now, that wasn't a legal difference. That wasn't a geological difference. That wasn't any difference at all as far as the law was concerned but it made an enormous difference in the 1969 flood and that is why I am here today.

The Appendix gives the whole story, three reclamation districts, smaller units which are shown on the exhibit three, printed in the Appendix, petitioned this district, "Please put Buena Vista Lake on notice again." A million, a hundred-thousand acre feet of water was on its way to Tulare Lake. A million, a hundred-thousand feet of water, I think actually another 69,000, came to Tulare Lake in the year 1969 and the district was formally petitioned by

resolutions drawn by other public bodies to notify Buena Vista Lake as you did before because those 1952 notices had been effective and they had not been ignored.

There was a meeting of this district on March 4, 1969. The entire minutes are in evidence as exhibit six and portions of the minutes are excerpted in the Appendix.

There were 10 directors present, normally 11, but one of them had just died and there hadn't been time enough yet to fill his vacancy. Six of them were associated with the J.G. Boswell Company. A motion was made, fully set forth in the Appendix, to again give Buena Vista Lake interest notice. That motion was made and it was immediately moved that that be tabled.

One Boswell director moved that it be tabled and another seconded it and at that point, counsel appeared for the Boswell Company and what he said is in the minutes. It is -- the excerpt is given on page 48 of the Appendix, and it is a remarkable statement.

The able counsel for the Boswell Company was Mr. Kloster and the minutes state as follows: "Attorney Kloster at this point made disclosure for the record as to the association of six of the directors of the J. G. Boswell Company, indicating in some detail their stock ownerships and employee affiliations," and then he gives the six directors and he stated further, "he had advised these directors they

were not disqualified to vote on the Buena Vista matter."

The motion to table carried six to four. Buena Vista Lake was given no notice in 1969. One-fifth of the water that came into Tulare Lake in 1969 should have been in Buena Vista. The crest of the water was at 192.5. The residences, most of them, you could see from a topographical map which is -- exhibits two and three are both topographical maps -- are at around 177. The level of that water was 15.5 feet over the homes. Had a levee broken, those homes would have been flooded.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: If this is important to flesh that out, do so, and we will enlarge your friend's time.

MR. GREER: Thank you, sir. The level of the water was 15 and a half feet higher than the homes in the district. Had a levee broken, and it was just a nip or tuck matter as to whether the North Central Levee would have been held, there are 60-some persons who would have been in imminent danger of dying from a wall of water 15 and a half feet over their heads and these Appellants respectfully submit that those persons would have been interested in and affected by such a development.

Q Now that you have mentioned it in emergent terms, was it a wall that would have come suddenly or a

gradual rising of the water?

MR. GREER: It would have depended on whether the levee breached.

Now, typically when a levee goes, the pressure behind it is so great that there is no -- it happens all at once.

Q Nothing gradual about it.

MR. GREER: Sir?

Q Nothing gradual about it?

MR. GREER: No, sir, no, sir, not at all. The water is there and it is at a very high level.

Q Is the district sueable in tort under California law?

MR. GREER: There is a very complex system relating to governmental immunity in California. We filed an action which there is an exhibit dealing with it to remove the six responsible directors. We wanted to get some relief that way and I am -- I have to say to the Court that I did not have much success with that case. It has been pending on demur since October of 1969 and has become moot by virtue of the election of these directors over again. That is the reason that we filed the present proceedings.

Q Supposing any of these homes had been washed out as the result of claimed negligence or misconduct on the part of the directors? Would the district have been liable

for a suit in court?

MR. GREER: I think -- yes, I think a tort cause of action could have been stated. I mention it, though, to show the interest of the residents in the affairs of the district because that water -- that water was higher than otherwise it would have been because of the Boswell interests preventing us from giving notice from Buena Vista Lake.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greer.

Mr. Newell, we'll enlarge your time.

ORAL ARGUMENT OF ROBERT M. NEWELL, ESQ.,

ON BEHALF OF THE APPELLEE

MR. NEWELL: Thank you. May it please the Court:

Let me take the last point up first because that seems to be the motivating force behind this litigation.

The fact that the Buena Vista Lake is subject to a flood servitude is disputed. That is not a fact that this Court can take for granted. Indeed, the most learned treatise I have ever read on this subject was written by Mr. Greer when he represented the interest who preceded the J. G. Boswell Company in leasing Buena Vista Lake, which concludes there is no flood servitude.

That is not a matter that this Court can take for granted. It can take for granted, however, what is in the record and in the brief -- it is just a footnote, but the

Court should know that at this famous meeting in 1969, as indicated on page 28 of the Appellant's reply brief, the General Counsel of the district advised the district it did not have the power to bring the law suit.

The request was not to put Buena Vista Lake on notice. It was a request to bring an action for injunction, which would represent a potential liability to this district of several million dollars if they lost.

Now, this district can function only through the device of a district project. It is important to understand its limited capacity. It isn't a public district that can wheel and deal in governmental matters any time it wants to. It can only act through the device of a district project. There is no district project that would warrant the expenditure of that much money and the General Counsel of the district advised the district of that fact on that day. Both Mr. Greer and I were present at the meeting.

Maybe that can be disputed. But the matter of the flood servitude in Buena Vista Lake is not something that involves a constitutional question in this Court, in my judgment.

We are dealing here with a district that operates through district projects, four of which have been enacted in its history. That is the important election and to enact a district project requires a majority of the value of the

land and a majority of the landowners voting. And in the Appendix we have put for the Court -- placed for the Court -- Defendant's Exhibit R and S which are the ballots for the election on Project four, which was a project to construct two laterals from the state acqueduct to the west of Tulare Lake to the lake at a cost of $2 million,500,000 and you vote twice, ballot A and ballot B and to answer Justice Harlan's questions to the prior case, these are formal elections conducted by a board of election judges, a secret ballot with all the formalities of any California election and the ballots are two-fold. You cast one for the number of votes you have in relation to assessed values and one as a landowner so that Thomas J. Amos, whose land is assessed at $10 value for project four has just as many votes on the second ballot as does the J. G. Boswell Company.

It is not 38,715 to one. It is one to one in that regard. So the California legislature has provided adequate protection for the small landowner.

Now, that does not answer the matter of lessees and residents. We will get to that in a moment. But I object and ask the Court to examine the simplistic and philogistic reasoning by which counsel for the Appellants would suggest this case be reversed as this: A, in Avery versus Midland County, Justice White's opinion, it stated in effect that any time a state exercises power through the

local instrumentality of government and where there are popular elections, the one man-one vote rule applies.

B, the Tulare Lake Basin Water Storage District is a governmental entity, whatever that is. Therefore, the one man-one vote rule applies. And that is just not the case.

In the one man-one vote cases this Court has decided involving local elections, the elections have concerned matters of interest to all of the populace, schools, sewers, police stations, libraries -- in Kolodziejski versus Phoenix, matters of general interest to the populace, to the electorate and the court has emphasized that.

I don't know why I am lecturing this court on its decisions, but that does obtain and then secondly there is a statement that where the lien maybe is only on land but in fact the obligation is going to be paid by all of the citizens.

Now, the Tulare Lake Basin Water Storage is not that kind of an entity. It is an entity created by a petition of landowners who can conduct projects for the benefit of the landowners and they pay for it exclusively.

Q Would you think the district could validly hold an election under a law that said that half the landowners may vote and half may not?

MR. NEWELL: No, I would not think so.

Q Why not?

MR. NEWELL: That would be an invidious discrimination against landowners.

Q That hasn't got anything to do with the reapportionment cases, has it?

MR. NEWELL: I don't think so.

Q Or one man-one vote?

MR. NEWELL: I do not --

Q It is a question whether somebody is invidiously precluded from voting.

MR. NEWELL: No, I think there is the preliminary question.

Q Well, then, how about my example?

MR. NEWELL: Well, can I ask you the first question? I would suggest this, that -- the question is, is it a satisfactory classification to say that landowners can vote?

Q That is a perfectly good question. So it really isn't a question of one man-one vote, is it?

MR. NEWELL: I don't think this case is.

Q Well, no, it isn't. But it is a question of whether somebody is validly or invidiously excluded from voting.

MR. NEWELL: No.

Q Well, you just asked me that question.

MR. NEWELL: I -- I --

Q Is it a valid classification?

MR. NEWELL: I think it --

Q That is the same question, isn't it?

MR. NEWELL: Well, there are two answers to the question, and let me put to you, the simple answer is, you look at the legislation to see if the classification is reasonable, if anybody is invidiously excluded.

Q All right, and if it isn't reasonable, he is invidiously excluded?

MR. NEWELL: It is a tautology if you say that, sure.

Q And so your question is, which is here, is whether the vote may be limited to landowners.

MR. NEWELL: That's -- yes, right, but I think there is a preliminary question on the Equal Protections laws and it is this, where the State of California or any state permits a group of people -- any segment of the population -- to band together to accomplish a purpose that will concern them alone, does the Federal Constitution and the Equal Protection Clause reach that kind of a determination.

Q Well, what if the vote here were limited to -- every other landowner could vote?

MR. NEWELL: I would think -- you -- you wouldn't have the other landowners joining in the petition to form the district. They are not going to be in it. This was the State of California, Justice White, that has taken this

device to induce landowners to form these districts. A large landowner wouldn't join in the petition unless he could be in it.

Q Well, I suppose the -- I suppose the district could be set up in a way that didn't accumulate votes based on acreage, could it?

MR. NEWELL: I don't think it could. There is a -- they petitioned to have their land formed and be in the district. It is a fairly complex procedure and you can petition to have your land excluded. I would think one of the easiest ways to be excluded was, you weren't going to vote.

Q Can you automatically get out if you wanted to?

MR. NEWELL: Well, I would assume -- you would have petitioned to be in, in the first instance. You would have joined with your neighbors to form the district.

Q Are you suggesting a practical type of obligation?

MR. NEWELL: No, but they band together under the statute to try to accomplish improving their water system. But it is a voluntary thing. The state doesn't thrust this classification on them. The landowners choose to do this.

Q But an individual landowner can be involuntarily included within the district, can't he?

MR. NEWELL: I don't think so.

Q Well, then, the case should go away, then.

MR. NEWELL: It -- it's not a matter -- that's a matter of state law, I think.

Q You mean if somebody -- if somebody petitions for a water improvement district to cover a certain area, that everybody within that area is not included if there is the right kind of a vote in an election?

MR. NEWELL: Everyone could be included but there is a procedure to have the land excluded.

Q Well, yes, there is a procedure --

Q That is discretionary with the board of directors of the district, isn't it?

MR. NEWELL: Well, actually, I think it is heard by others than the board of directors of the district.

Q But you don't have a -- you can't be excluded as a matter of right. The reason I feel fairly confident is Arizona, where I practiced, adopted California's system in this and, at least under our law, you could petition for exclusion, but it was discretionary with the people who passed on that petition whether or not you would be excluded.

MR. NEWELL: I am sure that is true, but I think it would be unusual if some -- some dissident landowner would -- would be included in and certainly, as every other landowner, that they wouldn't form the district, I don't think. But you

must understand that California's motivation in passing this law is to induce landowners, large landowners, to form these kinds of districts.

Q But if it is just voluntary landowners, you don't need a district. You could do it by contracts.

MR. NEWELL: No, you wouldn't have the power of eminent domain. For example, they had to condemn the land for the laterals to the state acqueduct. I mean, they have certain rights that are important in that regard.

But the district's function is limited to projects that are going to benefit the people in the district. It would be --

Q You mean the landowners?

MR. NEWELL: The landowners, yes.

Q Not the people.

MR. NEWELL: That was a Freudian slip. The landowners. Any time I say anything about landowners it is wrong. Landowners in the district benefit the land.

Uh -- it doesn't engage in activities that are of general concern to the populace, to the voting public, to the electorate or whatever term you want to use for the public in a --

Q How about the lessees?

MR. NEWELL: The lessees? Of course they are interested in it. But the State of California has the right

to determine how much of a unit of land will carry a vote and the relationship of the lessee to the land is contractual with the lessor. If he is at the negotiating power, he can get a proxy. If he doesn't, he can't. But that is for the State of California to determine. There is nothing invidious about excluding them because the state may conclude in its wisdom that a lessee's interest is not enough.

Q Oh, I agree. You certainly have solved the case if you can start from the premise that you can tie the power to the land.

MR. NEWELL: That's right.

Q Of course, the case is over then.

MR. NEWELL: I thought it was over in the court below.

No, that is right. You can -- I think that is a matter of state court determination. If you concede -- in other words, when you say the lessee should be able to vote, you are conceding the validity of landowner voting and if that concession is made, I think it is up to the state legislature, if it exercises sound discretion to say, well, no, we will tie a vote to $100 of assessed valuation of land. However,that land may be divided up between different people.

Q What is at issue here as to who -- voting rights are at issue here? Is that it?

MR. NEWELL: The challenge is that lessees and residents, non-landowning residents.

Q Both are at issue here?

MR. NEWELL: Yes, lessees and residents, non-landowning residents, qualified voters who reside in the district.

Now, let's talk about that. There are 77 people that live in this district, men, women and children. Maybe -- I don't know how many of them, if they are citizens. We know Lawrence Ellison is registered to vote. He is the only one, the Plaintiff, Lawrence Ellison, that as a matter of record is a registered voter.

In the Appendix is a list of where these people live. 66 of them are employed by one corporate farm, Westlake Farms. You have got 11 people spread over what you might say are 165,000 acres. I mean, having residents vote, it would accomplish nothing unless you are going to tell the J.G. Boswell Company, well, now, look, don't worry, we'll let this fellow up here in the corner cast a vote as much as yours and if it costs you $817,000, well, that is the democratic way.

That doesn't make sense. If you are going to accomplish the objectives that the California legislature has in mind and I think I can't emphasize that too much, that the legislature wants to encourage this type of arrangement

to finance water improvements and it has done it. It has done it successfully in Tulare Lake Basin, but they have only had four projects in its whole history, which is 50 years now.

Q Mr. Newell, I'm not sure, if I were to ask this hypothetical question -- if you had no such law as this at all, how would the authority be exercised? Would it be up to the private individuals to form a cooperative --

MR. NEWELL: Yes.

Q -- on the one hand or up to the state to move in and do it as a public works?

MR. NEWELL: It would have to be the -- the individuals would just have to agree to do it as a matter of private contract but, uh --

Q And the state as a whole doesn't have that much interest?

MR. NEWELL: Well, the state has an interest in the improvement of the availability of water for irrigation purposes in California and has used lots of devices to do this. Now, this is one way of encouraging people to -- to -- band together to take certain steps for this type of thing. The concept storage, by way of explanation, the Water Storage Distract Act was really passed for Tulare Lake in the first instance and the original project one which is in the Appendix was to -- part of it was to acquire 18 sections

of land and store this water that routinely flooded.

Q What was it? It was a flood control project, wasn't it?

MR. NEWELL: No -- well, in part but it was also thought that that would create a reservoir for the water to be used on the land.

Q Fine.

Q But if it was --

Q But it was partly flood control?

MR. NEWELL: Yes.

Q Which was of interest to a good many people, I suppose? Other than landowners?

MR. NEWELL: Well, there is nobody there but landowners, Justice White.

Q Well, there are 77 people.

MR. NEWELL: But 66 of them live on the high ground to the west. They don't get flooded. Eleven of them live down in the bottom and they get out. They all live in --

Q I know, but how about in the decisions as to whether to form a flood control project, what about people, just ordinary people, non-landowners, who might get flooded?

MR. NEWELL: I repeat, there are no people like that in the district. The 11 people who are not the 66 are

all employed by corporate farmers and live in corporately-owned houses. Those corporations run a calculated risk --

Q I know, but I suppose their life is their own, at least.

MR. NEWELL: Well, the floods aren't quite as --

Q If they lose their house, this --

MR. NEWELL: This isn't like the Johnson flood. These floods are, as Mr. Greer indicated, they know when they are going to happen. Usually, the levees are cut, rationally cut in certain given areas, cut and it takes -- a 15 foot wall of water doesn't come dashing like the side, like it starts and spreads gradually and builds up but, usually, the levees are cut.

Now, it gets competitive. In the picture you will notice Plaintiff's Exhibit -- I mean, Defendant's Exhibit R S in the Appendix shows the 88,000 acres of flood -- Exhibit Q, pardon me -- and you will notice there is a sharp line on the east and the west. Well, the north and south levee held. The El Rico levee held in part to the east and if either -- if there were going to be more flooding, the people that are east of El Rico levee would hope that it held and that the other one went but there are no people involved, really in this type of flood activity. It is dramatic but it just doesn't exist as a matter of fact. It is mainly a district designed for the development of water

sources which has amounted to, really, three things.

The project one was aborted. They didn't buy the 18 sections. The Depression came. There was a lot of dry years. So it just went by the boards.

The next projects involved buying storage space behind a reservoir on the flood control dams built after the war. And another one involved participating in flood control concerned with the dams and then there is project four to get the laterals to the district.

But the point about it, I think the best analogy would be, if you took the analogy of the school district case where the school was built solely for the use of the landowners. No one else could use it and they used it and paid for it in proportion to their land.

It occurred to me in reading that decision that the court might have reached a different conclusion were those the facts, which is the fact in a water storage district.

I repeat that when the state takes a group of people and says, now you may voluntarily band together to accomplish this specific purpose, which the state legislature deems in the interest of that objective, in this case of agricultural water development, I don't think that that gets to the point where there is an equal protection problem. I don't think it is a classification. It is imposed by the state. It gives a group of people an opportunity to do

something, much as you could form a private corporation.

Q What if the law said a flood control district may be formed by a vote of the registered voters of this district? And didn't permit landowners to vote as landowners. It's just if they were registered voters, they got to vote and if not, not. Would you think that there would be an equal protection problem posed?

MR. NEWELL: I think that that would be an unrealistic approach to it by a governmental -- by the legislature to solve a governmental problem. There aren't enough registered voters in the district to make any difference. There aren't anybody. There is nobody there. I mean, you are not going to get people banding together to form a cooperative venture if you have registered voters vote. There aren't enough. Five or six people?

You take, if you have each landowner cast one ballot and you do away with a weighted ballot. As the Appendix points out, there was an oil venture some years ago in what is called "the homeland district," which is the southeastern quadrant of the basin storage district and they sold a lot of participating interests in an oil well and they have got small acreages there, two acres, ten acres. Only from an oil speculating deal, that group of people, if you have one vote per landowner would have effectively controlled the election.

Q Well, if that is the -- if that had been the scheme of the statute, would there be an equal protection problem?

MR. NEWELL: Uh -- you mean, if landowners could vote one for one? You wouldn't have had the district formed. The large landowners would not join in that. They wouldn't participate.

Q They might get voted in.

MR. NEWELL: Well, just speak --

Q They might get voted in and somebody might refuse to let them through?

MR. NEWELL: Well, you see, it is hypothetical in this instance, but the California state legislature protected them from that by arranging this very rational scheme. They didn't place that power in the handful of small landowners.

In other words, we stand here stating, frankly, take a look at project four. The question is posed in the brief. They talk about Thomas J. Amos. He only got one vote on ballot A. The J. G. Boswell Company got something over 38,000 votes on ballot A on project four.

Both Thomas J. Amos and the J. G. Boswell Company had one vote on ballot B. They give the small landowner that negative protection, but the assessment that the J. G. Boswell Company will pay for project four is $817,000 and

Thomas J. Amos pays $3.32. I mean it -- it's -- we are dealing with a practical situation where the statutory scheme is designed to encourage landowners to expend substantial sums of money to improve their water rights, their water for agricultural purposes and it seems to me that it is obvious, as an original proposition, that the state legislature could encourage this type of participation only with an electoral scheme such as the type they have here. It is a limited purpose district. It doesn't affect the public. It affects these landowners and that is all, and the fact that someone might be a resident out there, or an employee, has very little to do with his participation in these complex projects.

All of this has been stated before and, unless there are some questions, I have nothing further.

Q Would it be fair to analogize this to a cooperative which has been given by the legislature a special status for public funding purposes?

MR. NEWELL: I think so. I think it could be analogized also to a -- a private corporation in terms of voting responsibility. It is like that.

These people pay for it all themselves for the devices that are limited. They alone use them. I again repeat. If only the -- suppose only this segment of the population used the schools -- a school -- would it be

constitutional to limit voting on that particular device?

Q But it does have eminent domain power?

MR. NEWELL: Yes, but so does a privately-owned public utility in California, Justice Marshall. That is not any great indicio status. It does have eminent domain but it cannot exercise that right of eminent domain except through the implementing power of the district project. The directors' failure to have routine elections -- which is a matter of some comment here -- exercise no significant governmental power. They can't do anything.

Now, there should have been an election in 1969 but, as the transcript shows, the Appendix shows, three of the divisions were wholly flooded, a 100 percent flooded. One was 56 percent under water and one was 28 percent under water and I can assure the court at this perilous time, these people were not interested in the niceties of taking a polling booth on a scow out there to have an election. They have a polling booth in each precinct, each division. But it couldn't be. It was too serious.

Now, there is supposed to be an election in 1973. There has been no petition filed by anybody seeking one of these directorships. No doubt, because as Mr. Greer has indicated, you don't have campaigning in the political sense. It is different. But there is no petition filed to have any election this year so the incumbent directors will

continue on in accordance with the statute, the California statute on the subject.

Q In what respect could it be said that the 66 people on the one high-ground farm area and the 11 people in the lowlands pay or contribute to this?

MR. NEWELL: Well, they don't pay at all.

At all.

Q Only landowners are assessed costs?

MR. NEWELL: Only landowners, that's all. And they are assessed in accordance with the benefit conferred by a project . It so happens that the projects that have been enacted have had -- the board of assessment -- I forget what they call them -- the commissioners -- have judged that it applied uniformly throughout the districts so the assessment was equal for each acre of land. There were no differentials, but it is possible that there could be. But only landowners.

Q On each acre. On the value of each acre.

MR. NEWELL: No. No.

Q Is this one straight geographical?

MR. NEWELL: For example, uh, yes, project four was $2 million 500,000 and it was determined that there are 188,000-plus acres that were benefitted by their project and it was assessed $13.32 per acre, irrespective of the assessed value of a particular acre. You have variations in the assessed value of acres, as indicated, but this

particular project was assessed uniformly.

Q So if a man has a good many acres that are simply piles of rocks with nothing growing on them, he is still paying for it?

MR. NEWELL: If that had been the case. It so happens that the land in the district, however, most of it is --

Q Valuable land?

MR. NEWELL: Except land that is for roads or dikes or things of that kind.

Q But the man with a pile of rocks being obligated to pay would be dependent upon a finding by the assessors that though that land did in fact benefit?

MR. NEWELL: That is correct. That would be that and we assume that on that hypothesis, the board of commissioners -- by the way, none of them can own land in the district. They are appointed. They cannot own land in the district at all and I think one must be an engineer. I forget what the statute requires -- but they would make that determination and there is a right of sort of an appeal in that where if there is a dispute one of the commissioners appoints two outside people and they sit as a sort of a board of assessment review; presumably a fair-minded assessment board would determine that there was no benefit to the pile of rock, and he would pay nothing.

Q If the piles of rocks were scattered about in the midst of a rich, arable land, I take it that the assessors would downgrade the value -- downgrade that benefit, rather?

MR. NEWELL: Yes. Yes.

Q In that sense it would reflect the value.

MR. NEWELL: Right. And you will notice that in the Appendix, we refer to the -- or in the brief -- we refer to the fact that, like, one acre has got a $60 -- eight-tenths of an acre is assessed at $60 and I think one acre is assessed at $10. There are differentials in the assessment, depending on the worth of the land. But that would be different for the project. The benefit is fixed there, determined.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Thereupon, at 1:49 o'clock p.m., the case was submitted.)