

**QUESTIONS FOR ORAL ARGUMENT**  
**PHASE 7 ISSUES: PLACE AND PURPOSES OF USE; PLACE OF USE EIR**

No. JC 4118, *State Water Resources Control Board Cases*

Oral Argument: 9:00 a.m., Monday, August 5, 2002

Judge Roland Candee, *Presiding*

The following questions have occurred to the Court in reviewing the briefs in advance of oral arguments. The Court does not expect counsel to address all these issues nor to significantly modify the oral arguments they plan to present. Counsel are encouraged to address these questions if and when they may be conveniently be discussed as part of the oral arguments counsel desires to make.

Standard of Review

0. Each petitioner participating in oral arguments on this issue should briefing summarize (1-2 minutes) the standard(s) of review they believe apply to the issues being argued.
0. Is there California judicial precedent supporting the application of the independent judgment standard, based on fundamental vested rights, in the specific context of change of use, change of purposes petitions under the California Water Code?

Proceedings before the SWRCB

0. Why wasn't the Bureau of Reclamation's change petition acted upon soon after it was filed with the Board in 1985? To what extent is the reason for delay reflected in the administrative record? For what reasons and upon what legal authority may the Board rely to extend or postpone action upon a change petition?
0. Do any petitioners argue that the Board's extended period for considering the Bureau of Reclamation's change petition violated law or was unreasonable?
0. If the Board's extended consideration of the Bureau of Reclamation's change petition was unreasonable, would that change the appropriate date for examining environmental consequences and necessary mitigation?

Purposes of Use

0. The State argues that Westlands, as a federal reclamation contractor, has a legal right to water but is not the legal owner of the water right and, therefore, has no standing to claim injury as the result of the change of use petition. Does the State also argue that all reclamation contractors in this proceeding have only standing as public members?
0. What were the original purposes of use for the Bureau of Reclamation permits at issue in the change of use proceeding? Did these permits originally include municipal and industrial purposes?

Place of Use

0. When the Board typically considers an application for municipal use (as an analogy to the expansion lands at issue here), what type of description is required for the future service area? If the municipal water permit is granted, how is the future service area described? Does the Board have any written rules or policies on this issue? Would a programmatic EIR be employed in this municipal situation since future uses would involve "speculation?"

0. The State's brief indicates that the DEIR "introduced" the concept of "encroachment" and "expansion" lands. Was this decision to characterize lands in this fashion made by the application, Board, staff, or a contractor? Is there any documentation in the administrative record of the legal basis for characterizing the lands in this fashion?
0. Of necessity, aren't place of use descriptions in applications and permits imprecise due to economic, engineering, soils, and other uncertainties of water development? Doesn't the "perfection" stage of the water right acquisition process (when a certificate or license is issued) allow the permittee and state agency to agree formally on the water and lands beneficially developed? Is this essentially what the Bureau's petition seeks to accomplish?
0. If environmental impacts were not a concern, would the SWRCB still argue it has discretion to deny the Bureau of Reclamation's change petition, given the provisions and apparent intent of the Merger Statute? Or would approval of the petition be required as a ministerial act?
0. Summarize the alleged instances of state acquiescence in water service to the encroachment lands. Do these appear in the administrative record? Are any of these instances chargeable against the SWRCB?
0. *Barcellos* litigation: Was the State a party to this litigation in any capacity? Did the SWRCB have authority to ask the court to intervene? Is a stipulated judgment entitled to preclusive effect under California law?
0. Estoppel: Is there persuasive California authority indicating that estoppel cannot apply against state government or, at least, state government when it acts in a regulatory capacity? Doesn't the *Barcellos* litigation indicate that landowners had longstanding knowledge of disputes as to the place of use boundaries?
0. D-1641 appears to allow the Bureau of Reclamation to demonstrate in further proceedings before the SWRCB that certain encroachment lands were not subject to CEQA or the environmental effects of water service to these lands has been mitigated. Has this process been followed? Was this procedure available to landowners? If this procedure was not followed, have administrative remedies been exhausted?
0. "Water spreading" (the application of Reclamation project water to new lands within project boundaries) has been an issue in other Reclamation states. How have state engineers, departments of water resources, or water courts in these states addressed changes or expansion of the place of use under the state-law rights used in these projects? Any published authority?
0. Upon what factual circumstances or legal authority does the SWRCB reply for not acting on that portion of the Bureau of Reclamation's petition concerning the "expansion" lands? Does the Board argue that it continues to have jurisdiction over this aspect of the Bureau's petition? Does the Board anticipate any future action on this aspect of the Bureau's petition?
0. What evidence is there in the administrative record of instances of landowners' reasonable belief and reliance on a place of use definition including the encroachment lands? When applying estoppel principles in this situation, does the Court look to the understanding and reliance of the Bureau of Reclamation, the permittee, or to the belief and reliance of landowners?
0. For petitioners and respondents alike, what is the meaning and purpose of the Merger Statute, based on the text? Assuming the text to be ambiguous, what does is the meaning and purpose of the Merger Statute based on legislative history?

0. Does the administrative record document any instances of SWRCB enforcement efforts to curtail water deliveries to encroachment lands?
0. What is the legal basis for the SWRCB's argument that service area maps, attached to water permit applications, should prevail over textual descriptions of the place of use in the application itself?

CEQA & Mitigation

0. In ordering mitigation, did the Board reply on its authority under the Water Code, CEQA, or both?
0. What evidence is there in the administrative record that environmental mitigation would cause serious economic hardship, and perhaps business failure, to landowners?
0. Is there evidence in the administrative record that mitigation costs will be paid or borne by landowners?
0. Did not the majority of environmental impacts of water deliveries to encroachment lands precede the enactment of CEQA in 1972? What environmental impacts would directly result *now* from the approval of the Bureau of Reclamation's change of place of use petition?