

STATE WATER RESOURCES CONTROL BOARD

PREHEARING STATUS CONFERENCE

ON A PETITION FOR LONG-TERM TRANSFER INVOLVING A CHANGE IN
THE PLACE AND PURPOSE OF USE OF
LICENSES 2685, 6047 AND 11395
(APPLICATIONS 1224, 10572 AND 16186)
OF MERCED IRRIGATION DISTRICT AND
LICENSES 5417 AND 11058 (APPLICATIONS 1233 AND 14127)
OF MODESTO AND TURLOCK IRRIGATION DISTRICTS

WEDNESDAY, DECEMBER 4, 2002
9:00 A.M.

JOE SERNA CAL/EPA BUILDING
SIERRA HEARING ROOM
SACRAMENTO, CALIFORNIA

COPY

REPORTED BY:

ESTHER F. SCHWARTZ
CSR NO. 1564

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APPEARANCES

STATE WATER RESOURCES CONTROL BOARD:

ARTHUR G. BAGGETT, JR., CHAIR

STAFF:

DIANE LAWSON
ERNIE MONA

COUNSEL:

BARBARA LEIDIGH

INTERESTED PERSONS:

JOHN HERRICK
TIMOTHY O'LAUGHLIN
KARNA HARRIGFELD

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1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, DECEMBER 4, 2002, 9:00 A.M.

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4 CHAIRMAN BAGGETT: Good morning and welcome to
5 the prehearing conference regarding the petition for
6 long-term transfer filed by Merced, Modesto and Turlock
7 Irrigation Districts in a request for the State Water
8 Resources Control Board to approve their petition filed on
9 March 19th, 2001, pursuant to Water Code Section 1707, 1735,
10 et seq. Approval of this petition would allow for changes
11 in place and purpose of use of up to 47,000 acre-feet of
12 water that would be dedicated to conducting the Vernalis
13 Adaptive Management Plan experiments.

14 I am Art Baggett, Chair of the State Board. Also
15 present today are Barbara Leidigh, staff counsel; Diane
16 Lawson and Ernie Mona, engineer.

17 This prehearing conference is being held in accordance
18 with the public notice dated November 7, 2002. If you
19 intend to speak -- you all know the drill. The purpose of
20 this prehearing conference is to receive comments from the
21 parties and participants on the scope of the hearing and
22 other appropriate procedural issues. The goal of this
23 prehearing is to ensure hearing proceeds in an orderly and
24 expeditious manner. If you have any opinions regarding
25 procedural matters that would further this goal, such as

1 time limits, cross-examination, rebuttal or any
2 stipulations, and any facts the party may be willing to
3 enter into, we would be interested in hearing that at this
4 time.

5 Because this is not a hearing, there is no
6 cross-examination. Participants should not attempt to
7 discuss the merits of issues raised by the petitions at
8 this time. As set forth in the November 7th notice, the
9 Board has scheduled a hearing on the petition on January
10 28th, although I understand that is one of the issues we
11 will be talking about shortly, all the parties will have an
12 opportunity to present their evidence, cross-examine
13 opposing witnesses during the hearing.

14 As indicated in my letter of November 21st, protestants
15 of the petition, South Delta Water Agency, Alex Hildebrand
16 and Lafayette Ranch request a delay in the hearing. If you
17 have comments on whether the delay should or should not be
18 granted, we welcome those.

19 Before the close of our meeting, I will indicate
20 whether the delay will be granted following this prehearing
21 conference. The Board may, if necessary, issue a revised
22 hearing notice or may issue further instructions. We ask
23 the participants to limit the time. We will just try to be
24 expeditious with that. In the interest of time,
25 participants should avoid repeating details presented by

1 other participants. Alternatively, participants with the
2 same interest are encourage to make a joint presentation. A
3 Court Reporter is present and will prepare a transcript. If
4 you have a business card, Esther always appreciates those.

5 Everyone who intends to speak -- we have all the cards.

6 Just three parties?

7 Anyone else intend to speak.

8 At this time -- how do we want to begin. Let me go off
9 the script here. A couple -- some of the issues -- I guess
10 first is the issue of request for delay.

11 Any party want to address that first?

12 I said we will make that decision. Let's get that one
13 out of the way.

14 MR. HERRICK: Thank you, Mr. Chairman. John Herrick
15 representing South Delta Water Agency. Central Delta wasn't
16 going to be here today, so they asked me to represent them,
17 too.

18 CHAIRMAN BAGGETT: That's fine.

19 MR. HERRICK: You know, it always looks bad when you
20 ask for a delay. It has a been a busy time with D-1641
21 lawsuit as well as the CALFED lawsuit. Again, I don't want
22 to sound too stupid, but gathering the evidence and
23 presenting it a month before is almost impossible for me,
24 and it was my understanding that counsel for the other side
25 wanted to take a deposition or two. I would still like to

1 do that. We are running out of time. But if we can get
2 some delay to do some limited additional discovery, it would
3 be much easier if we didn't have to present the evidence
4 until some time in January. And that would necessitate the
5 hearing itself being put over, too.

6 I am pleading, you know.

7 CHAIRMAN BAGGETT: Is there an objection?

8 I will propose a date if there is agreement.

9 MR. O'LAUGHLIN: We are in agreement. I don't want to
10 show up here -- as you know, one of the issues will be a
11 legal user of water.

12 CHAIRMAN BAGGETT: Right.

13 MR. O'LAUGHLIN: I am assuming that South Delta and
14 Central Delta will proffer some person or persons who will
15 be legal users of water. I would like to take their
16 deposition and find out whether they own the property, and
17 it is better to get that done ahead of time rather than
18 spend time here in front of you having me do two hours of
19 cross-examination.

20 And we just went through D-1641 and the RCRC cases as
21 well. We would prefer some time bumping it to late February
22 or March, whatever fits. That way I can find out from Mr.
23 Herrick who his witnesses are, the NOIs was just filed, get
24 subpoenas from Barbara, take some depositions. I have my
25 witness list; he might want to take some depositions of

1 some of my people. Get that done ahead of time and submit
2 the testimony some time in late January, early February.

3 CHAIRMAN BAGGETT: How is the 24th for exhibits, of
4 January? Does that give enough time? And the hearing is
5 going to be -- for me I am going to have to sit down and do
6 some serious looking at a calendar. I am saying the end of
7 March earliest for me, maybe April for the actual hearing.

8 MR. O'LAUGHLIN: If it is the end of March, what is the
9 rush to get in the testimony by January 24th? Because
10 normally we'd go 30 days prior to the hearing. If you're
11 thinking -- I have no problem --

12 Can I explain something, if you don't mind?

13 This isn't going to be a problem this year. Based on
14 the way that the VAMP is structured, this will not be a
15 double bump year. Well, the probability that it will be a
16 double bump is about .05 percent. It is not going to
17 happen. So we are -- there is no rush to try to get this
18 done by April 1st so that we can meet an event that will
19 happen this year. So if you want to schedule something late
20 in March, that is perfectly agreeable to us. That gives us
21 two and a half months to get our testimony together, get it
22 in front of you by late February, start a hearing in
23 March, and move through the matter.

24 MR. HERRICK: That sounds very good to us too. If they
25 don't need the transfer this year, there is plenty of time.

1 I certainly don't want to take too long.

2 CHAIRMAN BAGGETT: Just one thing that I at least have
3 been particularly sensitive to is being -- we do not want to
4 be the result of any delay because of actions of this Board.
5 We want to do our job expeditiously. We could put this off
6 another year, but you have the petition in. I feel it is
7 our obligation to try to move things.

8 MR. O'LAUGHLIN: We want to get it done, but the timing.

9 CHAIRMAN BAGGETT: By the end of February, is that --
10 exhibits end of February?

11 MR. O'LAUGHLIN: Sure.

12 You got a calendar.

13 CHAIRMAN BAGGETT: Like the last Friday in February.

14 MS. HARRIGFELD: February 28th.

15 MR. O'LAUGHLIN: That is February 28.

16 CHAIRMAN BAGGETT: Then we will send out a notice of
17 actual hearing date, so we will be February 28 and I am
18 hoping a month from then.

19 MR. O'LAUGHLIN: That would be bad because that is a
20 Friday.

21 CHAIRMAN BAGGETT: That might not work.

22 MR. O'LAUGHLIN: You can go April 1, 2 or 3, or go
23 February 21st and start the hearing March 24th, 25th, 26th.

24 CHAIRMAN BAGGETT: As long as before April 8th, is that
25 the operative date here?

1 MR. O'LAUGHLIN: There is no operative date.

2 CHAIRMAN BAGGETT: I want to make sure all of our staff
3 are here.

4 MR. O'LAUGHLIN: How about if we got our exhibits in
5 on either February, either the 14th or 21st, and you can
6 schedule a hearing then, the weeks of either March 17th or
7 March 24th.

8 CHAIRMAN BAGGETT: February 14th, middle of the month?

9 MR. O'LAUGHLIN: The 14th.

10 CHAIRMAN BAGGETT: Let's do that, February 14th.

11 MR. O'LAUGHLIN: That gives you two weeks.

12 CHAIRMAN BAGGETT: We will try to schedule at the end
13 of March. Mid March is kind of what I am thinking, a month
14 later.

15 MR. O'LAUGHLIN: The 17th you can start.

16 MR. HERRICK: That's very helpful, thank you.

17 CHAIRMAN BAGGETT: That works.

18 A number of other issues I thought. I guess let's jump
19 to the issues to be considered. You have the list. Does
20 anybody have any discussion on -- I guess procedurally we've
21 got -- you have all seen the notice.

22 Any other comments on the notice?

23 If not, let's move to hearing itself. Some of you may
24 be aware I am trying to tighten up the hearing process a
25 little bit and getting parties to agree up front to some of

1 the ground rules. And I have looked at the witnesses listed
2 here. San Joaquin have 11. You plan on two hours a panel
3 limit.

4 How do we -- I want to deal with how much time for the
5 direct and for the presentation of witnesses, and then on
6 cross, I guess, what I would -- I would like to see if we
7 can come to resolution on how much time parties think we
8 really need, and just agree to that up front. Likewise on
9 the cross, either try to limit -- puts some time limits on
10 how much cross each party gets and you just use it within
11 that time or -- and limit of that cross time also.

12 On direct what kind of time do people think you really
13 need?

14 You have the most witnesses. We'll let you go first.

15 MR. O'LAUGHLIN: And adding more as we speak.

16 This is a hard one. We've been through this dog and
17 pony show already. And it's already been in front of the
18 Board in the D-1641 hearings. Granted it was in a slightly
19 different shape and form, but basically the witnesses are
20 the same.

21 CHAIRMAN BAGGETT: More of --

22 MR. O'LAUGHLIN: We are all aware of that.

23 CHAIRMAN BAGGETT: And it is all going to be written,
24 anyway. You are going to submit written testimony.

25 How lengthy does the oral --

1 MR. O'LAUGHLIN: I don't want to say anything. My view
2 on this is that if I take some depositions of some of his
3 people, I will have very little on cross-examination. And
4 my direction testimony is a rehash of what we previously
5 submitted. And my witnesses aren't going to say anything.
6 They will be available if staff has questions or if Mr.
7 Herrick has cross-examination.

8 You've been through this before. Staff has been
9 through it before. They've been --

10 CHAIRMAN BAGGETT: The parties have all.

11 MR. O'LAUGHLIN: And we have been through two or three
12 other times on different transfers. I don't have a whole
13 lot of direct testimony that I am going to be presenting. I
14 will have a lot of witnesses and written testimony, but that
15 is about it.

16 CHAIRMAN BAGGETT: An hour a panel, give each party an
17 hour to present the witnesses. Does that work for you?

18 MR. O'LAUGHLIN: I'd reserve probably an hour to maybe
19 two in case. We're doing some additional modeling. If
20 something pops up in the modeling that we haven't seen
21 before, based on what we've done over the last three years,
22 we might want to explain that. So probably an hour, hour
23 and a half.

24 CHAIRMAN BAGGETT: What about the other parties?

25 MR. HERRICK: I think that is absolutely right. It

1 shouldn't take anywhere near as long for the topics as we've
2 had before. The only caveat would be if there is
3 additional modeling, sometimes it just takes a little longer
4 to work through that on a cross-examination. Not that we
5 want to take hours and hours on it. But sometimes just
6 going through what they've done and how they got there, if
7 it is new information, might take a little longer.

8 Yes, I would say, as Mr. O'Laughlin said, hour, hour
9 and a half on the panel and cross, that could be limited to
10 an hour for the panel.

11 CHAIRMAN BAGGETT: I would propose on the cross, if we
12 just limit the cross to whatever is said orally on the
13 direct and whatever is submitted in writing. I know our
14 cross rules are very flexible. I would like to limit that
15 to what testimony was given, either by a witness orally or
16 what was submitted by a witness. If there is a new model,
17 you will have a chance to cross on that because that will be
18 submitted as evidence. We just narrow that. That should
19 keep our cross down.

20 MR. O'LAUGHLIN: In that regards, it is not going to be
21 a new model. Basically all we've done is taken the last
22 three years of the actual historical operations, plugged
23 them into a computer and run it. So it is not a new model.
24 It is not anything. It's just basically historical data
25 that is based on flow chart, and we just plotted it and

1 stuff. It is not a new model. It's nothing new or
2 different.

3 MR. HERRICK: Just new runs.

4 MR. O'LAUGHLIN: Well, they're not even runs. They're
5 not forecasting anything. They're are just basically a
6 compilation of historical data that was fed into a computer.
7 That is the best way to explain it.

8 MS. HARRIGFELD: Good morning. My name is Karna
9 Harrigfeld, attorney for Stockton's water district. Our
10 notice of intent we filed for two witnesses, Kevin Kaufman,
11 who is the general manager of Stockton, and potentially a
12 Bureau witness. I don't envision our testimony will be
13 really more than 20 minutes each for both of them.

14 Our main concern, we have filed a protest and we
15 dismissed it with a caveat the refill criteria that is
16 contained in D-1641 is also imposed in any order adopted.
17 And over the course of the past couple years since D-1641
18 has been adopted we are not really sure how the refill
19 criteria work. So we would also want to participate on
20 cross-examination on the hydrology and modeling and the
21 runs. I can't envision that our cross would exceed the time
22 limits we are talking about here.

23 CHAIRMAN BAGGETT: What I would propose is we give each
24 party an hour for their case in chief and witnesses, make
25 that presentation, and an hour on cross. If somebody needs

1 more time, we can make that -- make a case for it at the
2 time. That way we can get an idea that this should be two
3 days.

4 MR. O'LAUGHLIN: Max.

5 MR. HERRICK: Correct.

6 CHAIRMAN BAGGETT: We'll limit an hour on direct and an
7 hour on cross. And then if there is rebuttal witnesses just
8 to -- I guess the way I prefer to do it and have done it in
9 the last three hearings is at least assuming we get through
10 all the case in chief and cross the first day, then the
11 second day would be rebuttal if there is any. I would just
12 like to have notice of who those witnesses are the night
13 before. I think in fairness of myself and staff and to all
14 the parties who the witnesses are and a rough outline or
15 oral on something this short on what you intend to show on
16 rebuttal so we have some idea so, I think, we can all be
17 prepared for that.

18 And then I assume we will do some type of closing. We
19 can deal with that at the time. I think with this few
20 parties -- not like the last hearing, 14 parties. It was a
21 whole -- management was much tighter.

22 MR. O'LAUGHLIN: I would like to talk about the
23 closing if we could for a little bit.

24 I don't envision making -- I prefer not to have
25 closing. I'd rather write a closing brief. As you have

1 seen in the hearing notice that was sent out, most of the
2 issues are -- some are factually based. I think a lot of
3 the questions that have to be answered and responded to are
4 legal issues here. So --

5 CHAIRMAN BAGGETT: I agree.

6 MR. O'LAUGHLIN: It is not really helpful for me to sit
7 here and cite case laws and things to you if you are trying
8 to absorb cases and stuff. I would prefer that, if we
9 finish, that the parties be given 15 or 20 days, set a page
10 limit of 15 or 20 pages and submit a closing brief. That
11 way you have it in your hand. Your staff has it in hand,
12 and then we can set out more --

13 CHAIRMAN BAGGETT: I agree. I like closing written
14 briefs; that is helpful to me. What we did on the IID
15 hearing is I had those briefs and a week later had oral
16 closings. So I had a chance to read the briefs. I don't
17 know that this is going to be --

18 MR. O'LAUGHLIN: This doesn't warrant that.

19 CHAIRMAN BAGGETT: So we will dispense with closing if
20 everybody agrees up front. We will not have that discussion
21 again, and we will have a closing written brief. Let's wait
22 and at the end of the hearing we can determine what evidence
23 and how long people want. I would like page limits also.

24 MR. O'LAUGHLIN: Absolutely.

25 CHAIRMAN BAGGETT: I think since there isn't a rush, we

1 can allow at least a month to write those so you can be
2 succinct in those 15 or 20 pages. It helps everybody to
3 have more time to write. Not to whip it out in one week or
4 two weeks.

5 Anything else?

6 MS. HARRIGFELD: I just have one procedural question
7 for Ms. Leidigh. We are intending to call someone from the
8 Bureau through a subpoena. During the Bay-Delta hearings
9 the Bureau didn't require us to issue a subpoena. But if
10 they do, what sort of time frame do we need to request that
11 of you?

12 MS. LEIDIGH: The standard amount of time for notice of
13 a subpoena is set out in the Civil Code, basically
14 reasonable period of time. The issue with the Bureau, of
15 course, is that sometimes they assert sovereign immunity
16 when someone tries to subpoena them.

17 MS. HARRIGFELD: They would never do that.

18 MR. O'LAUGHLIN: Yeah, they will. We got a special
19 dispensation on D-1641.

20 MS. LEIDIGH: In 1641 they did decide to appear. Of
21 course, they are required to appear before this Board in
22 administrative hearings. And I suppose that the alternative
23 would have been to go beyond the scope of direct on
24 cross-examination and examining on those issues during the
25 hearing which, of course, takes a lot of time. It might be

1 wiser simply to go ahead and submit some subpoenas.

2 MR. O'LAUGHLIN: You are not going to get Peggy.
3 Because the Board -- we've been through this. We went
4 through this in D-1641. I don't want -- if we set a hearing
5 date, we are not going to get delayed by a procedural matter
6 like this because the Board has no jurisdiction over
7 independent Bureau employees on nonrelated matters.

8 They are going to assert their sovereign immunity.
9 I've already talked to their counsel about this. They are
10 going to assert sovereign immunity, and they are not going
11 to make the witness available. The hearing will have to go
12 forward without that witness being present.

13 MS. HARRIGFELD: We'll work through it.

14 CHAIRMAN BAGGETT: We will get the notice.

15 MR. O'LAUGHLIN: You can get the notice and serve them
16 and everything. Absolutely. Go right ahead.

17 CHAIRMAN BAGGETT: It sounds like the answer is as soon
18 as you know who you want. Next week. That gives us plenty
19 of time.

20 MR. O'LAUGHLIN: When are the notices of intent to
21 appear going to be mailed out to the parties?

22 MS. HARRIGFELD: By December 9th.

23 MS. LEIDIGH: They should have been mailed already. I
24 think they have been mailed.

25 MR. O'LAUGHLIN: Is the State Board going to put on any

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witnesses?

MS. LEIDIGH: In this case?

MR. O'LAUGHLIN: Yes.

MS. LEIDIGH: No.

CHAIRMAN BAGGETT: No.

MS. LAWSON: The letter is dated November 21st, 2002.

CHAIRMAN BAGGETT: Any other issues?

If not, we will see you in March. Somebody before that
this afternoon.

(Prehearing conference concluded at 9:25 a.m.)

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REPORTER'S CERTIFICATE


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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

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

That I thereafter caused my shorthand writing to be reduced to printed format, and the pages numbered 3 through 18 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 13th day of December 2002.



ESTHER F. SCHWARTZ
CSR NO. 1564