

**Summary of Oral Argument**  
***Planning and Conservation League v. Department of Water Resources***  
**3 Civil C024576, 17 July 2000**

Antonio Rossmann and Roger B. Moore appeared on behalf of appellants and cross-respondents Planning and Conservation League, Plumas County Flood Control and Water Conservation District, and Citizens Planning Association of Santa Barbara County. Robert Shulman appeared on behalf of appellants and cross-respondents Plumas County Flood Control and Water Conservation District. Marian Moe appeared on behalf of respondent and cross-appellant Department of Water Resources. Susan Petrovich appeared on behalf of respondent Central Coast Water Authority. The Third District's panel included Justices Blease, Raye, and Hull. The following summary paraphrases the main points raised during oral argument.

Antonio Rossmann focused on three points: the defective description of the project in the Monterey Agreement EIR, the remedy for the resulting CEQA infection, and the viability of the validation claim notwithstanding the Supreme Court decision on this issue and the naming of DWR as defendant rather than all of the Monterey contractors as defendants.

Mr. Rossmann stated that the salient fact in the EIR, noted on page one of the document, was the word "shortage." Despite 4.2 million acre-feet of water entitlements in the state water project, the DWR bulletin in the record shows a maximum of 2.8 million acre-feet in actual deliveries under existing conditions. That shortage motivated the Monterey contracts now under challenge. The record describes the Monterey negotiations as "article 18(b)" negotiations, referencing the permanent shortage provision of the pre-Monterey contracts. Agricultural problems and the prospect of threatened enforcement of article 18(b) led to DWR's willingness to negotiate. The Monterey amendments would eliminate the power in section 18(b)(1) of the existing contracts to bring entitlements in line with existing supplies. Appellants' focus on this provision is not simply their world view; it is the respondents' worldview that article 18(b)(1) has to go. The contracting parties anticipated the possibility—indeed, the strong and immediate probability—that DWR would be called on to enforce article 18(b). Beyond eliminating this provision, the Monterey amendments allow the public only retirement of 45,000 acre-feet in agricultural entitlements and transfer of 130,000 more acre-feet of paper water. That paper water stands for entitlement that has historically not been available.

Mr. Rossmann pointed to the first five pages of the Draft EIR as evidence of the faulty project description. With respect to project purpose and need, the EIR refers to shortages of water deliveries from the state water project, and the document also references the provisions relating to agricultural contractors under article 18(a). However, the EIR's purpose and program description never mentions article 18(b)(1). This key provision is buried in the euphemism that in the future, allocations shall be based upon entitlements rather than the previously used method.

According to Mr. Rossmann, the EIR's deficient disclosure of article 18(b) created a host of CEQA problems, whether viewed as an issue of project description, the no project alternative, as a project alternative, or as an assessment of the program. However viewed, the EIR never gives an adequate assessment of the enforcement of article 18(b).

As an illustration of the EIR's flaw, Mr. Rossmann pointed to EIR table 2.2-1, which recognizes a difference under CEQA between existing conditions and the no project alternative, since the no project alternative must include matters reasonably likely to exist in the foreseeable future. In dealing with the Kern Fan Element in this table, defendants acknowledge this difference, but not in the context of article 18(b). On the subject of the state water project's allocation method, table 2.2-1 indicates that "no change" implies continuation of the present agricultural deficiency clause, while change means a discontinuation of this clause and allocation based solely on entitlement. But change based on entitlement is what article 18(b) is all about. At bottom is the same EIR flaw found by the Court 24 years earlier in *Inyo III*: a faulty project description, with no findings on the key alternatives, failing to present choices of different values to the public and other agencies.

Mr. Rossmann urged the Court to look at the different findings made by CCWA and DWR. CCWA made findings on alternatives, but DWR made none except for paper mitigation measures. Contrary to Judge Bond's conclusion in the trial court, the EIR flaw led to real prejudice. The water contractors were afraid that DWR would have to assess the implications of enforcing article 18(b). They therefore needed to find an obscure water agency elsewhere in the state to prepare the EIR. But DWR was not a passive participant in this exercise. Plaintiffs agree with the respondents' brief (page 6) that the selection of the lead agency created "unique problems." The problem was how to avoid accountability for the issues before the State. Under Monterey, the State loses the safeguard of article 18(b), but is still expected to build out the state water project. The State has even let the Court know that the Monterey Amendments are now being carried out, and that other contracts are proceeding based upon their premise.

Justice Raye inquired whether on the lead agency issue, the Court should adopt a "structural error" analysis rather than Judge Bond's "harmless error" approach. Mr. Rossmann stated that under these facts, the selection of the wrong lead agency was an inherent infection in the EIR, but that this had also produced real prejudice. Justice Raye wondered whether the Court should look at the outcome of the lead agency choice. Mr. Rossmann noted that plaintiffs did not appeal the trial court's decision that the wrong lead agency acted—DWR did. Plaintiffs supported DWR's relief from default on the cross-appeal, so that this Court could state a rule binding in the future. Mr. Rossmann acknowledged that in a vacuum, there might be a case where the wrong lead agency would produce only harmless error. In this case, the infection was egregious, since CCWA is not even a state water contractor. As a matter of law, there is an inherent CEQA defect, but there is also real prejudice.

On the issue of whether the no project alternative adequately accounted for article 18(b), Justice Raye asked Mr. Rossmann to address the apparent position of the trial court that the article 18(b) was not a factor because its enforcement was speculative. According to Mr. Rossmann, the trial court took the position that enforcement of this provision was "far from automatic," and this was not the correct legal standard.

Justice Raye asked whether Mr. Rossmann's position was that the disparity between entitlements and supplies meant that we were in a permanent shortage. Mr. Rossmann responded that the historical record supports this point, as did DWR's own data from the record (Bulletin 132-93, table 6-80). However, Mr. Rossmann said, plaintiffs do not ask the Court to step into DWR's shoes and determine whether article 18(b)'s permanent shortage provision now applies. Rather, plaintiffs ask the Court to enforce CEQA and provide for a proper analysis, so that the people of California through DWR can make a decision. Although no one is now expecting a full build-out of the project, the Monterey Amendments allow the transfers of paper water to occur.

Justice Raye asked, if the state water project is never sufficient to satisfy entitlements, was Judge Bond not correct in concluding that the enforcement of article 18(b) was far from automatic. Mr. Rossmann stated that this was the wrong legal standard, and that the record showed that apprehension about article 18(b)'s enforcement triggered the Monterey negotiations.

Justice Blease focused on what would trigger enforcement of article 18(b) in the event of a long shortage. Mr. Rossmann referred to historical patterns showing an inability to meet system demands. Justice Blease then asked him to reconcile this position with the position plaintiffs took on "requests" in their appellate briefs. Mr. Rossmann stated that requests were an inaccurate gauge because requests are tailored to conform to supplies available under shortage conditions. DWR's own data referenced in the appellants' opening brief (page 28 and footnote 36) provide evidence of a long-term permanent shortage lasting at least through 2010. However, DWR did not act as the lead agency and therefor never confronted this issue in the Monterey environmental review, whether the problem is viewed as a description of existing conditions, as the no project alternative, or as implementation of article 18(b) as an alternative.

On the issue of remedies, Mr. Rossmann noted the resemblance of this case to the EIR invalidated in the *San Joaquin Raptor* case. The consequence of doing nothing would be severe. Rather than making a mere technical error (such as assessing the levels at Castaic Lake), the EIR's errors were such that the program itself cannot be trusted. Plaintiffs have struggled with what specific remedy could be proposed to the Court, but can't propose one short of vacating the Monterey Amendment decisions. As in *Inyo VI*, other agencies and members of the public must have their say once an adequate EIR is prepared. Plaintiffs need a remedy that sets aside the present decision approving the Monterey Amendments and EIR. There is some risk in this remedy, but the risk of doing nothing is more severe. Defendants' furtive removal of their self-imposed stay during this litigation provides an example of why this relief is needed. The Kern Fan Element deal itself is conditioned on future environmental compliance. The Caulfied declaration

introduced in connection with the supersedeas motion shows that the Mojave transfer did not necessitate a stay, because it was a transfer between project contractors. Under the present facts, with Monterey implementation proceeding, the recent *Woodward Park* case in Fresno applies. That car wash case rejects the "Captain Kirk" approach to foolishly going forward, and demonstrates that it is never too late to comply with CEQA. The respondents' brief tellingly requests the opportunity to "proceed with their business." In this case, the business is more than a car wash—it is the commitment made in the state water project. If Justice Cardozo was correct that the fiduciary owes more than the morals of the marketplace, so does DWR in its trusteeship of water.

On the issue of validation, Mr. Rossmann pointed out that the Supreme Court had requested additional briefing on the subject of whether its decision should apply prospectively only. The Supreme Court declined to do so on the expectation that plaintiffs' appeal of summary judgment against validation could still keep that claim alive. The key issue still remains before this Court on appeal of summary judgment: under the validation statute, is it necessary to name as a defendant more than the public agency whose action is questioned in the proceeding. DWR concedes that the issues are technical under this statute, and not rooted in constitutional insufficiency of the validation notice. DWR's position on validation, however, would require the conclusion that the *Ivanhoe* decision was decided out of jurisdiction because no contractor was named as a defendant. Mr. Rossmann wondered whether DWR would want every contractor required for naming in its own state validation actions. Notwithstanding the validation issue in this case, DWR stipulated that a judgment setting aside approvals under CEQA would bind DWR and other responsible agencies. Plaintiffs literally complied with the validation statute, and to require more would run into the difficulties described by Justice Mosk in the *City of Ontario* case.

Marian Moe, speaking for DWR, indicated that she would address the CEQA merits, while Susan Petrovich would address validation and remedies. Justice Blease observed that the order seemed scrambled on the lead agency issue, asking Ms. Moe, "you appealed this issue, right?"

Ms. Moe stated that Justice Raye had "hit the nail on the head" by focusing on the standards relating to the selection of the lead agency. In this case, the facts produced no clear answer on the issue of which agency should lead. The Monterey amendments were a series of negotiated bilateral contracts between co-equal partners.

Justice Raye then said "I'm not sure that was the nail I hit on the head." Ms. Moe stated that what was important was the context, which supported DWR's position on the lead agency issue.

Justice Blease noted, and Ms. Moe concurred, that DWR is the agency that has contracted with all of the Monterey contractors. Justice Blease then asked, "Isn't the lead agency supposed to be the agency with the central political responsibility?" He also inquired whether a core principle of CEQA was not that the agency with principal responsibility prepares the EIR, or else it escapes its duty. Ms. Moe provided two

answers. First, the lead agency is the one with primary responsibility to approve and implement the project, and here there was no single one. Second, DWR has reviewed and considered the Monterey EIR as a responsible agency.

Ms. Moe then discussed the context of Judge Bond's trial court ruling on the no project alternative issue. The trial court found that the plaintiffs had not shown that enforcement of article 18(b) was foreseeable or even likely. In that context, the court found that enforcement of the article was far from automatic, and not reasonably foreseeable. Ms. Moe stated that there was no clear definition of what would constitute a permanent shortage under article 18(b).

Justice Raye asked Ms. Moe to focus further on article 18(b), because her description sounded like an excessively narrow view of the provision. He asked whether local land use planning decisions would change with article 18(b) still on the books. Ms. Moe said that she was not aware of any such planning issues, although the article could affect the amounts of allocations to specific contractors. Justice Raye asked again whether the possibility of drastic changes under article 18(b) would affect planning decisions. Ms. Moe answered that this was speculative. Justice Raye wondered, even if it was speculative how the changes would occur, wasn't it clear that there would be such changes. Ms. Moe said that the amounts of water available would not change. After another exchange involving this line of questions, Justice Raye said to Ms. Moe, "Maybe I don't like your answer."

Justice Blease questioned Ms. Moe's characterization of changes under article 18(b) as speculative, and charged that her answer rang "essentially hollow." He asked: if implementation of article 18(b) was not reasonably foreseeable, then why are you here? He surmised that the contractors were trying to change article 18(b) because they foresaw its implementation. Ms. Moe acknowledged there was a possibility of change. Justice Blease wondered whether there was a danger relating to article 18(b) enforcement that DWR did not want to confront in the EIR.

Justice Hull returned to the issue of article 18(b)'s implications for land use and planning decisions. Noting that land use decisions go on for years, he observed that with article 18(b) out of the contracts, planning agencies might well be inclined to accept the premise of full [4.2 million acre-foot] buildout of the state water project. With article 18(b) still in the contracts, we would know that this is subject to question.

Ms. Moe stated that article 18(b) would not change the amount of deliveries or the certainty of deliveries when needed. The focus should be on actual deliveries. Ms. Moe referred to the discussion in the respondents' joint brief (page 23) suggesting that five or six small agencies had sometimes received their full entitlement levels. Justice Raye then wondered whether at least for those agencies, article 18(b) would affect planning decisions. Ms. Moe allowed that some agencies would have to scramble. Justice Raye noted that some changes in allocation would occur—some would get more and some would get less.

Ms. Moe stated that the agencies rely on table A entitlements, and not actual deliveries.

Justice Blease suggested that removal of the article 18(b) would have to affect deliveries. Ms. Moe opined that the Monterey Amendments attempted to create a fairer system of allocation between the contractors. Justice Blease responded, "that's not why we are here," and said that the issue was whether the EIR had adequately addressed this issue, including the prospect of significant impacts. Ms. Moe returned to the position that there was no reasonable foreseeability that article 18(b) would be invoked.

Justice Raye again raised the subject of planning, asking whether some planning decisions were not based upon assumptions about the allocation of water that would change with the elimination of article 18(b). He wondered whether Ms. Moe believed that the notion of "paper water" was a fiction. She indicated that what some termed "paper water" referred to the contractors' opportunity to request additional supplies. In effect, contractors pay for the opportunity to request that water, regardless of actual deliveries.

Ms. Moe also responded to inquiries relating to the effect of reductions in table A entitlements on payment of state water project costs, noting that payment of those costs would continue and that she could shed further light on this issue later if needed.

Addressing the issue of validation, Ms. Petrovich stated that the Court had no discretion to let the issue go forward due to lack of jurisdiction. Justice Raye responded that this rested on the assumption that the exercise of jurisdiction depended on personal service to the contractors. If the Court disagrees, and the validation statute simply requires notice and publication to these entities, the Court would have jurisdiction. Ms. Petrovich said that the Court had no ability to do this, since the trial court concluded that the statute applied to any public agency. Justice Blease then said that is what the Court is reviewing here.

Ms. Petrovich stated that the law of the case prevented the Court from reaching this claim. Quoting Justice Mosk's dissent from the Supreme Court's ruling on validation, she referred to his prediction that plaintiffs could not find much "solace" in the pendency of the judgment.

Justice Blease stated that the very notion of an "indispensable party" in an in rem action did not "compute" with him. The point of having an in rem procedure was to avoid that problem.

Ms. Petrovich stated that Code of Civil Procedure section 863 governed the correct procedure. Justice Blease wondered whether section 863 is the mirror image of section 860, considering that section 863 cross-indexes section 860. The other public agencies were only interested parties. There are no plural "public agencies" referenced under section 863. Ms. Petrovich responded that both contracting public agencies are parties to the contract.

Justice Blease stated that the action of DWR was the matter at issue (namely, the transfer of the Kern Fan Element). The Court can only get to Code of Civil Procedure section 860 because of Government Code 17700, which affords a state agency the opportunity to determine the validity of its contracts. DWR's actions are the subject of the validation action in this case. Ms. Petrovich stated that the revised summons was broader, contesting the validity of the Monterey Amendments (including the Kern Fan Element). Justice Blease noted that in an in rem action, everyone is bound regardless of whether a specific entity chooses to participate or not. Justice Blease raised the concern that the respondents' position implied *sub silentio* that an in rem proceeding cannot apply to bind contractors. Ms. Petrovich noted that there are two parties to a contract.

Justice Blease asked Ms. Petrovich whether, if DWR had initiated a validation proceeding on the Monterey Amendments, all the other contractors would need to be served as defendants. Ms. Petrovich said no, because section 860 rather than 863 would govern. She concurred with Justice Blease that if DWR had initiated the proceeding, others could be subject only to notice by publication and could be bound in rem.

Justice Hull wondered whether Ms. Petrovich's position would impose difficulties for private parties in inverse validation proceedings, creating complication due to the need to deal with the ongoing addition of parties as defendants. Ms. Petrovich recognized the possibility, but opined that this was the way the validation statute was supposed to operate. When Justice Hull wondered whether this would produce the prospect of multiple separate validation actions, Ms. Petrovich suggested that the suits could be brought together. She also said that in this case, plaintiffs knew about the contractors and could have always amended their complaint. On the latter point, Justice Hull pointed out that contractors had moved to quash service of summons, rather than staying in the case and allowing for amended pleadings.

Justice Blease asked whether Ms. Petrovich's position was that section 863 proceedings were not in rem. She responded that they were quasi-in-rem.

On the issue of remedies, Ms. Petrovich returned to the discussion of foreseeability in the implementation of article 18(b), taking the position that the facts refuted that prospect. Mr. Rossmann misquoted 18(b) when he said that permanent shortages were related to entitlements, not supplies. Respondents properly characterized the no project alternative and were entitled to deference. Article 18(b) has never been invoked.

Ms. Petrovich urged that if the Court were to find a violation of law, it should remand the matter to the trial court. The Fresno car wash case, *Woodward Park*, is distinguishable from the present one because there no EIR had been prepared. The present case bears closer resemblance to cases such as *City of Santee* and *Laurel Heights I*, where the courts allowed more flexibility to defendants. Plaintiffs here did not prevail on supersedeas, and the matter has been pending for five years.

Justice Raye questioned Ms. Petrovich's characterization of the equities, wondering whether Ms. Petrovich thought that the case was "over" because of what has happened after the Court denied the motion for supersedeas. Justice Raye also wondered whether Ms. Petrovich or the Court could speculate on what the trial court is supposed to do for remedy on remand. While conceding that the case was not over, Ms. Petrovich suggested that the public benefits from continued implementation of the Monterey Amendments.

Mr. Rossmann made several points in rebuttal. Responding to Justice Raye's question about the connection between article 18(b) and planning, he pointed out that one of the plaintiff citizen groups had raised this very question in public comments on the EIR (Final EIR, page 23-8, comment 13). The EIR's response (10-4) simply offered "glittering generalities" about growth, ones already answered by this Court in the *Amador v. Eldorado County* case. Mr. Rossmann also opined that elimination of article 18(b) in the Monterey Amendments would likely increase political pressure to build out the state water project. Moreover, the growth that citizens feared was already occurring, with new developments made possible in places such as Contra Costa County.

Mr. Rossmann recognized that article 18(b) of the pre-Monterey contracts used the word "supplies" and not entitlement, but also noted that article 6(b) keys payments to entitlements. The MWD prototype contract in the record clarifies these points.

On the continued viability of the validation action, Mr. Rossmann noted that when this Court dismissed the appeal of the order quashing service of summons, it made clear that this determination did not affect the appeal of the judgment itself. For reasons anticipated by Justice Mosk in his Supreme Court dissent, respondents are attempting to use the decision relating to service of summons to undercut the appeal of the judgment. Plaintiffs consciously chose to pursue validation so that obtaining a binding judgment would not have to proceed against a moving target. Ms. Petrovich's claims that validation proceeds quasi-in-rem are belied by section 870 of the validation statute, which makes clear that the in rem validation judgment is binding on everyone. Respondents are clearly aware of section 870, which they used against plaintiffs on the issue that went to Supreme Court.

On the issue of remedies, Mr. Rossmann urged the Court to allow the administrative process and CEQA to take their course in the manner anticipated by *Inyo VI*. No injunction was present in the *Woodward Park* case either; instead, the developer and the city there moved forward with implementing a project still under CEQA challenge. On the question of the public interest, respondents have not shown any compelling reason resembling cases where courts have allowed more leeway to agencies (for instance, AIDS research in *Laurel Heights I*). In this matter, the Court need not decide who is right about the enforcement of article 18(b). What it needs to decide is that DWR is the one that must be accountable for making that decision. The 1960 contract was signed for the State by Governor Edmund Brown and DWR Director Harvey Banks, and for MWD by an assistant general manager; these are not co-equal parties.