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Loss of Integrity May Mean Loss of the Farm: False Statements Made in Federal Water Subsidy Applications and the Doctrine of Judicial Estoppel

by

Shannon L. Chaffin, Esq.

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LOSS OF INTEGRITY MAY MEAN LOSS OF THE FARM: FALSE STATEMENTS MADE IN FEDERAL WATER SUBSIDY APPLICATIONS AND THE DOCTRINE OF JUDICIAL ESTOPPEL

Shannon L. Chaffin, Esq.[1]

I. INTRODUCTION

The benefits of exploiting the federal farm subsidy system can be very lucrative, especially given the amount of money available through the subsidy program. Between 1995 through 2003, USDA subsidies for farms in the United States totaled over 131 billion dollars.[2] During that nine year period, California alone received almost five billion dollars in

[1] Shannon L. Chaffin is a Deputy City Attorney for the City of Fresno, California. Mr. Chaffin earned his J.D. from J. Reuben Clark School of Law at Brigham Young University, where he graduated with honors in 2000. Following his graduation, Mr. Chaffin worked for the law firm of Dietrich, Glasrud, Mallek & Aune, where he practiced complex business litigation and civil litigation. Mr. Chaffin can be reached at shannon.chaffin@fresno.gov.

[2] Environmental Working Group, *Farm Subsidy Database: United States* (2005), *at* http://www.ewg.org/farm/regionsummary.php?fips=00000 (last visited Oct. 9, 2005).

USDA administered subsidies.[3] Subsidies almost tripled between 1997 and 1999, and billions of dollars a year in subsidies are currently available to qualifying agricultural enterprises.[4]

As with any large sum of money, there are those who will attempt to take advantage of the system and fraudulently procure funds for which they are not qualified. Recently, a Minnesota farming operation was charged with having received more than *four million dollars* in farm subsidies to which they were not entitled.[5] The complaint in the matter alleges that during a seven year period the defendants created a fraudulent scheme to avoid farm subsidy "caps" limiting the amount that a person can receive each year.[6] Defendants allegedly attempted to circumvent the subsidy caps by representing to the USDA that various farming entities were separate and distinct farming operations when they were not.[7] Furthermore, defendants claimed that certain persons affiliated with the farm entities were actively engaged in farming when they allegedly were not.[8]

Given the increased competition in the marketplace, in conjunction with the billions of dollars of federal monies at stake, the incentives for California agribusiness persons to "bend the truth" has never been higher.[9] For example, the California San Joaquin Valley area has been the subject of extensive federal development and water improvement plans. The Central Valley Project ("CVP") is a massive water reclamation project designed to transfer water from the Sacramento River from its northern tributaries to the water deficient areas of the San Joaquin Valley.[10] At Friant Dam, near Fresno, the San Joaquin River is diverted through the Friant-Kern Canal over 150 miles south to the southern

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[3] *Id.*

[4] Chris Edwards and Tad DeHaven, *Farm Reform Reversal,* The Cato Institute (2002), at http://www.cato.org/pubs/tbb/tbb-0203.html (last visited Oct. 9, 2005); Environmental Working Group, *supra* note 2.

[5] Risk Management Agency, U.S. Department of Agriculture, *2003 News Archive: $4 Million Farm Subsidy Fraud Alleged* (2003), at www.rma.usda.gov/news/2003/ (last visited October 10, 2005), linking to United States Attorney, District of Minnesota, *News Release* (December 1, 2003), at www.rma.usda.gov/news/pr/2003/12/1203peterson.pdf (last visited October 10, 2005).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See Farm Subsidy Database: United States, supra* note 2. For a general discussion regarding increased competition in the marketplace and its impact upon California agribusinesses, *see* Marianna R. Chaffin, *Stealing the Family Farm: Tortious Interference With Inheritance,* 14 S.J. AG. LAW REV. 1, 73 (2004).

[10] Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 669 (9th Cir. 1993); United States v. State Water Resources Control Board, 182 Cal. App. 3d 82, 98 (1986).

reaches of the San Joaquin Valley.[11] Likewise, at the Tracy Pumping Plant, water is lifted nearly 200 feet above sea level into the Delta Mendota canal, where it commences a journey of 117 miles to the south to the Mendota Pool.[12] Since construction of the CVP began in 1937, it has now become one of the world's most extensive water transport systems.[13]

With the development of these federal facilities and irrigation projects, qualifying San Joaquin Valley agribusinesses can receive federal irrigation waters at a substantially reduced rate. However, Federal Bureau of Reclamation regulations limit the amount of irrigation water that can be received by a qualified recipient to only 960 acres per landowner.[14] Any landholding in excess of the acreage limitation must either pay full price, or obtain water from other more expensive sources including pumping water from wells.[15] In order to receive water subsidies, landowners are required to submit applications to the water districts which set forth both ownership of the property, and the amount of land for which the subsidy is requested.[16] These applications must be signed and submitted under the penalty of perjury.

An obvious way to circumvent water subsidy acreage limitations is to "transfer" the excess non-qualifying acreage to third persons or entities. The non-qualifying acreage may then qualify for water subsidies under a different landowner. The "transfer," however, cannot be a sham transaction, especially if the original landowner is farming all the acreage and submitting the subsidy applications on behalf of the nominal owner. The penalty for submitting any intentional misstatements of truth can be stiff, resulting in the loss of all future subsidies, a fine, and imprisonment.[17] These penalties are often printed on the applications themselves, giving full notice of the consequences for submitting fraudulent statements.

While the penalties for lying on a subsidy application may be readily apparent, submitting knowingly false statements may have an unintended side effect in California: the complete loss of the agribusiness entity. If the original landowner is submitting statements under the penalty of perjury to federal agencies that he does *not* own the property, then the

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[11] United States v. State Water Resources Control Board, 182 Cal. App.3d 82, 99 (1986).

[12] *Id.*

[13] *Id.*

[14] 43 C.F.R. § 426.5(b) (2005).

[15] *See* 43 C.F.R. § 426.12 (2005) (regarding regulation and designation of "excess land").

[16] 43 C.F.R. § 426.18(b), (e) and (f) (2005); see also Bureau of Reclamation Forms 7-2190 EZ and 7-2191.

[17] *See* 43 C.F.R. § 426.18(n) (2005); 18 U.S.C. § 1001 (2005).

nominal third party landowner may raise the doctrine of judicial estoppel in a court proceeding to preclude the true landowner from taking a contrary position by claiming that he *does* own the land. Simply put, lying on a subsidy application in California can either result in the loss of subsidies and jail time, or the complete loss of the farm if the doctrine of judicial estoppel is applicable.

Currently, however, there is no California authority directly on point which addresses this issue. As such, this Article will address whether the doctrine of judicial estoppel may be applied in California judicial proceedings with regard to representations made by an agribusinessperson, under the penalty of perjury, on applications submitted in conjunction with federal water subsidy programs. To do so, the general background and process of the water subsidy process will be reviewed, and application of the hypothetical set forth. Next, the general principles of the doctrine will be established, including the purposes and policy of the doctrine, the elements of judicial estoppel, and whether the doctrine may be raised in state court as to statements made in federal proceedings. Furthermore, this Article will analyze whether the doctrine of judicial estoppel may be successfully raised in state court proceedings as statements made to the Bureau of Reclamation. Finally, the holding in *Singley v. Bentley* will be examined with regard to its impact upon the application of the judicial estoppel in California judicial proceedings. This Article will not examine the effect of either the doctrine of laches or estoppel.

II. SETTING THE SCENE: WATER SUBSIDIES AND HYPOTHETICAL APPLICATION

A. General Background Regarding the Bureau of Reclamation Subsidy Process

While submitting false statements to federal agencies can result in the loss of farm subsidies, the consequences can be much more severe within a civil context if the doctrine of judicial estoppel is applicable.

1. Water Service Providers for the Bureau of Reclamation

By way of background, 43 C.F.R. § 426 *et seq.* implements certain provisions of Federal Reclamation law that address the ownership and leasing of land on Federal Reclamation irrigation projects and the pricing of Federal Reclamation project irrigation water, as well as establishing terms and conditions for the delivery of Federal Reclamation project irrigation water. Pursuant to those provisions, the Federal Bureau of Reclamation is not required to directly administer the subsidy process as to each agricultural enterprise. Instead, various water districts may be

formed to be a water service provider for the Bureau of Reclamation.[18] In order to qualify, these water districts are required to be established under state law, and must have entered into a contract with the United States for irrigation water service through federally developed or improved water storage and/or distribution facilities.[19] With regard to the San Joaquin Valley, the Westland's Water District ("WWD") is an approved "district" established under California law that has entered into a contract with the United States for irrigation water services received from federally developed water distribution facilities comprising the CVP.[20]

2. The Application Process

Generally, all "landholders and other parties involved in the ownership or operation of nonexempt land must provide Reclamation, as required by these regulations or upon request, any records or information, in a form suitable to Reclamation, deemed reasonably necessary to implement the RRA or other provisions of the Federal reclamation law."[21] These forms and information must be submitted to each district in which the landholder "directly or indirectly hold[s] irrigation land."[22] Furthermore, "[t]he ultimate parent legal entity of a wholly owned subsidiary or of a series of wholly owned subsidiaries must file the required certification or reporting forms. The ultimate parent legal entity must disclose all direct and indirect landholdings of its subsidiaries as required on such forms."[23]

Agribusinesses who own qualifying land in the water district must submit the Bureau of Reclamation forms directly to the WWD, who will then submit the information to the Bureau of Reclamation.[24] WWD and other water districts must also file and retain landholder certification and reporting forms, and "withhold deliveries of irrigation water to any landholder not eligible to receive irrigation water under the certification or

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[18] *See* 43 C.F.R. § 426.2 (2005).

[19] *Id.*

[20] *See id.*; *see also* Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed.Cl. 246, 248 (Fed. Cl. 2003) (the Bureau of Reclamation is "the federal agency that operates both the Central Valley Project and the Delta Cross Channel gates"); Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 669 (9th Cir. 1993) (WWD is a water service provider for the Bureau of Reclamation).

[21] 43 C.F.R. § 426.18(b).

[22] *Id.* at § 426.18(e).

[23] *Id.* at § 426.18(f).

[24] *Id.* at § 426.18(o).

reporting requirements or any other provision of Federal reclamation law and these regulations."[25]

3. Penalty for False Statements Made During the Application Process

The penalty for submitting knowingly false statements on the Bureau of Reclamation reporting forms can be quite stringent. "False statements submitted by the landholder ... will ... result in" the complete loss of subsidy eligibility, which can only be regained upon the approval of the Commissioner.[26] Furthermore, "[u]nder the provisions of 18 U.S.C. 1001, it is a crime punishable by 5 years imprisonment or a fine of up to $10,000, or both, for any person knowingly and willfully to submit[,] or cause to be submitted to[,] any agency of the United States any false or fraudulent statement(s) as to any matter within the agency's jurisdiction."[27] Simply put, lying to a federal agency can be a financial disaster and result in a felony conviction to the landholder.[28]

B. Application to the Hypothetical

In order to more fully examine the application of the doctrine of judicial estoppel in this matter, this Article will be based on the following hypothetical situation:

Suppose that a farmer ("Farmer") owns a large agribusiness comprising 4,000 acres of land throughout the San Joaquin Valley. Federal water subsidies are only available for no more than 960 acres of the Farmer's land.[29] Any amount of farm land in excess of 960 acres does not qualify for subsidized water at $8.00 an acre foot, and Farmer must pay $42.00 an acre foot for unsubsidized irrigation water.[30]

In order to receive more farm subsidies and reduce his irrigation costs by almost 80%, Farmer comes up with a plan to circumvent the federal acreage restrictions. After discussing the matter with his siblings, Farmer divides up his business into four tracts of land of approximately 1,000 acres each. Farmer then transfers ownership of the various tracts ("Farm entities") to his brothers and sister ("Nominal Owners"). Farmer retains the last tract in his own name.

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[25] *Id.* at § 426.19(h).

[26] *Id.* at § 426.18(n).

[27] *Id.*

[28] *See id.*

[29] *Id.* at 426.5(b).

[30] *See* 43 C.F.R. § 426.12 regarding regulation and designation of "excess land," *see also* Barcellos and Wolfsen, Inc. v. Westlands Water District, 899 F.2d 814, 819 (1990).

None of the Nominal Owners are farmers, nor do they even live in California. The first brother runs a vacuum cleaner business in Utah, the second brother is a mechanic in Colorado, and the Farmer's sister is an artist living in Oregon. Before "transferring" control of the land, however, Farmer has the Nominal Owners sign agreements to "hire" him to operate and manage the Farm entities. Farmer's "management fees" vary from year to year, but always are equal to the annual revenue generated by each Farming entity. Farmer plans to use the "management fees" to siphon off the profits from the Farm entities.

Farmer also has each of the Nominal Owners name him as their agent and provide him with a power of attorney to operate each of the Farm entities. As the agent for the Farm entities, Farmer does all of the accounting and paperwork, including preparation of the Bureau of Reclamation water subsidy applications. Farmer regularly prepares and submits applications on behalf of the Farm entities to the WWD. The information on the applications specifically states that only the Nominal Owners have an ownership interest in the Farm entities, and that the Nominal Owners are residents of California. Each application is made under the penalty of perjury and signed by Farmer on behalf of the Nominal Owners as their agent.

Farmer continues to submit the applications on behalf of the Farm entities on an annual basis, and each of the entities continue to receive federal subsidies every year. As a result, the profits from the each of the entities dramatically increase by a total of almost a half a million dollars per year. The profits from the Farm entities are funneled back to Farmer each year from the Nominal Owners through the "management fee" process.

This process is repeated on an annual basis for ten years, until Farmer has a falling out with the Nominal Owners during a family reunion.[31] The Nominal Owners then "fire" the Farmer as the manager of the Farm entities, and demand that Farmer immediately relinquish control of the land.

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[31] Ironically, the falling out did not involve either a dispute over money or a family heirloom. Instead, Farmer made a rather unfortunate comment to the effect that a portrait painted by his sister, which depicted his brother the mechanic, was both uninspiring and "sucked." Not only did this offend both the artist and her subject, but the remaining brother who ran a vacuum cleaner business interpreted the statement as an unforgivable insult against his profession. Amazingly, Farmer subsequently managed to make it safely away from the reunion in his rental car, whose artistically graffitied trunk had been filled with used vacuum cleaner bags, and suffered only mild injuries arising from an unusual malfunction with his brakes.

Farmer then sues the Nominal Owners in the California superior court, seeking declaratory relief and a judicial determination that he is the "true" owner of the Farm entities. The Nominal Owners bring a motion for summary judgment asserting that the doctrine of judicial estoppel precludes Farmer from taking a contrary position with regard to statements made to the Bureau of Reclamation regarding the ownership of the Farm entities. Farmer denies that the doctrine of judicial estoppel is applicable.

Given that there is no California law directly on point, this Article will examine whether the doctrine of judicial estoppel may be applied in California judicial proceedings with regard to representations made by Farmer under the penalty of perjury on applications submitted in conjunction with federal water and farm subsidy programs.

III. DOCTRINE OF JUDICIAL ESTOPPEL: GENERAL PRINCIPLES

A. Purpose and Policy of Doctrine

Judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding."[32] Furthermore, "[t]he doctrine serves a clear purpose: to protect the integrity of the judicial process."[33] By making a party choose one position irrevocably, the "doctrine of judicial estoppel raises the cost of lying."[34] "Judicial estoppel is also an issue of fact, to be decided according to the particular evidence and circumstances of each case."[35]

Judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings.[36] Indeed:

> The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process .... The policies underlying preclusion of inconsistent positions are general consideration(s) of the orderly administration of justice and regard for the dignity of judicial proceedings .... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.[37]

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[32] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997).

[33] *Id.*

[34] Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1428 (7th Cir. 1993).

[35] Bell v. Wells Fargo Bank, 62 Cal. App. 4th 1382, 1388 (1998).

[36] *See* Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997) (citing Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990)).

[37] *Id.*

In this regard, " 'It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' "[38] Inconsistent positions may be precluded whether or not those positions have been the subject of a final judgment.[39] Furthermore, the gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather "it is the intentional assertion of an inconsistent position that perverts the judicial machinery."[40] The doctrine ensures that parties will not " 'speak out of both sides of [their] mouth . . . before this court'."[41]

B. Elements of Judicial Estoppel

Although the doctrine of judicial estoppel has been recognized in California, courts have yet to establish a clear set of principles for applying it.[42] Indeed, it has been noted that "the precise parameters of the doctrines have not been clearly defined."[43] Given that "throughout its history, judicial estoppel has been a confusing . . . doctrine," it is openly recognized that "the proper application of this doctrine is at best uncertain."[44] One court even went so far as to conclude that "[t]his form of estoppel is of vague applications . . . ., and it is not our purpose to fix its boundaries."[45]

Notwithstanding that the parameters of the doctrine have not been clearly defined, California courts will generally apply the doctrine of judicial estoppel when five criteria have been met. First, the same party must have taken two positions. Second, the positions were taken in judicial or quasi-judicial administrative proceedings. Third, the party was successful in asserting the first position. Fourth, the two positions were

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[38] *Id.*

[39] *Id.* at 182.

[40] *Id.* at 183.

[41] *Id.* at 191 (citing Reigel v. Kaiser Foundation Health Plan of N.C., 859 F.Supp. 963, 970 (E.D. N.C. 1994)).

[42] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997).

[43] Thomas v. Gordan, 85 Cal. App.4th 113, 118 (2000).

[44] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997) (citing Eric A. Schreiber, *The Judiciary Says, You Can't Have It Both Ways; Judicial Estoppel - - A Doctrine Precluding Inconsistent Positions*, 30 LOY. L. A. L. REV. 323, 353 (1996)); Ng v. Hudson, 75 Cal.App.3d 250, 258 (1977).

[45] Associated Creditors' Agency v. Wong, 216 Cal. App. 2d 61, 67 (1963), cited with approval in Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997).

totally inconsistent. Finally, the first position must not have been taken as a result of ignorance, fraud or mistake.[46]

Note, however, that judicial estoppel is an equitable doctrine. "Consequently, [the court] cannot rule out the possibility that, in a future case, circumstances may warrant the application of the doctrine even if the earlier position was not adopted by the tribunal."[47]

C. California State Law Applies Even if Prior Statements Were Made in Federal Judicial or Quasi-judicial Administrative Proceedings

The doctrine of judicial estoppel applies to statements made in either state or federal judicial or quasi-judicial administrative proceedings. However, even if the statements were made in federal judicial or quasi-judicial administrative proceedings, California state courts will apply California's law of judicial estoppel to determine whether the doctrine applies.[48] Thus, the doctrine has been widely applied to a variety of statements, including prior statements made in bankruptcy proceedings, as well as prior statements made in application for state and federal disability benefits from insurance and Social Security.[49]

In *C. Prilliman v. United Airlines, Inc.*, 53 Cal. App. 4th 935 (1997), statements were made to the Social Security Administration regarding the extent of Prilliman's disability. The court noted that the tribunal in which the litigant made the statement could be interested in protecting itself from manipulation arising from a party's inconsistent statements, but was "not in a position to do anything about its interest."[50] The court then determined that it was the interests of the second tribunal, not the first, which were "uniquely implicated and treated by the taking of an incompatible position."[51] In this regard:

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[46] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997); Drain v. Betz Laboratories, Inc., 69 Cal.App.4th 950, 957 (1999); Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000).

[47] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997); Drain v. Betz Laboratories, Inc., 69 Cal. App. 4th 950, 957 (1999); Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000).

[48] *See* Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000); Bell v. Wells Fargo Bank, N.A., 62 Cal. App. 4th 1382, 1384-1385 (1998); *See* C. Prilliman v. United Airlines, Inc., 53 Cal. App. 4th 935, 956, 958, 960 (1997).

[49] Thomas v. Gordan, 85 Cal. App. 4th 113, 117-118 (2000) (prior statements made in federal court bankruptcy proceedings); Bell v. Wells Fargo Bank, N.A., 62 Cal. App. 4th 1382,1384-1385 (1998) (prior statements made in application for state and federal disability benefits from insurance and Social Security).

[50] C. Prilliman v. United Airlines, Inc., 53 Cal. App. 4th 935, 959 (1997) (citing Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 603-604 (9th Cir. 1996)).

[51] *Id.*

> In light of the foregoing, we reject [employer's] assertion that federal law governs the issue of judicial estoppel in this case, brought in state court. We conclude that state law governs the issue.[52]

Subsequently, however, the Second District Appellate Court went on to note that "although the doctrine of judicial estoppel has been recognized in California, our courts have not established a clear set of principles for applying it," recognizing that it is a "confusing doctrine."[53] In formulating its five prong test, *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171(1997), relied upon one California case, an Illinois case, two law review articles, and three federal cases from various circuits - including *Rissetto v. Plumbers and Steamfitters Local* 343, 94 F.3d 597 (9th Cir. 1996), in the Ninth Circuit. Proceeding to cite to both *Rissetto* and *C. Prilliman* for authority, the *Jackson* court concluded that although the ADA was a federal statute, state law governs the issue of judicial estoppel.[54] Notwithstanding the application of state law, the *Jackson* court immediately went on to state that "federal decisions may provide guidance on the subject" of judicial estoppel.[55] As such, federal decisions addressing the issue of the application of judicial estoppel in judicial proceedings, such as *Rissetto*, may be influential in guiding California courts with regard to this matter.

Thus, California state law of judicial estoppel will apply to statements made by Farmer to federal agencies such as the Bureau of Reclamation.

IV. APPLICATION OF DOCTRINE TO STATEMENTS MADE BY AN AGRIBUSINESSMAN TO FEDERAL ADMINISTRATIVE AGENCIES

A. Same Party Has Taken Two Positions

For judicial estoppel to apply, a party must have taken two positions.[56] Here, Farmer has (1) previously taken the position in the administrative proceeding(s) that certain Farm entities are the owners of various grounds, and (2) now asserts in the current litigation that those entities are not the owners of those properties. This prong has clearly been met as to Farmer.

It should be noted that the doctrine of judicial estoppel may also apply to persons other than Farmer, such as other persons or entities in the Farmer's name who may be claiming an ownership interest in the proper-

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[52] *Id.* at 960.
[53] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181-182 (1997).
[54] *Id.* at 184.
[55] *Id.*
[56] *Id.* at 183.

ties. This depends on whether the entity was a "party" to the Bureau of Reclamation proceeding regarding the applications submitted by Farmer.[57] In essence, if it can be shown that Farmer was acting as the agent on behalf of those entities and/or persons in connection with the agency proceedings, then the doctrine of judicial estoppel may apply to those parties as well.[58] Of course, the Farmer will not want to attempt to avail himself of the doctrine as to the Nominal Owners, as they are neither taking an inconsistent position in the proceedings, nor are they denying their ownership of the Farm Entities in either proceeding.

B. Positions were Taken in Judicial or Quasi-judicial Proceedings

Next, a party must have asserted the two positions in judicial or quasi-judicial administrative proceedings.[59] While this prong probably poses the most difficulties in connection with the sworn statements made by Farmer, it is highly probable that a court is likely to determine that the Bureau of Reclamation decisions were rendered as the result of "quasi-judicial" proceedings.

1. Judicial Estoppel Regarding Statements Made in Administrative Proceedings

The prior inconsistent statement need not be made to a court of law. "Statements to administrative agencies may also give rise to judicial estoppel."[60] Indeed, "[a]scertaining the truth is as important in an administrative inquiry as in judicial proceedings."[61] As such, "the doctrine has been applied, rightly in our view, to proceedings in which a party to an

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[57] *See id.*

[58] *See* Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181-182 (1997); *see also* CAL. CIV. CODE § 2334 (2005) ("A principal is bound by the acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof"); New v. New, 148 Cal. App. 2d 372, 381 (1957) ("An agent acts for his principal in a representative capacity so that the principal . . . is ordinarily bound by a contract entered into by the agent on behalf of the principal").

[59] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997).

[60] People ex rel. Sneddon v. Torch Energy Services, Inc., 102 Cal. App. 4th 181, 189 (2002) (citing Mitchell v. Washingtonville Cent. School Dist., 190 F.3d 1, 6 (2d Cir. 1999)); *See also* WEIL & BROWN, CAL. PRAC. GUIDE CIV. PRO. BEFORE TRIAL, Ch. 6-C, 6:456.1 (2005) (statements to administrative agencies or in arbitration proceedings may also give rise to judicial estoppel).

[61] Mitchell v. Washingtonville Cent. School Dist., 190 F.3d 1, 6 (2d Cir. 1999).

administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding."[62]

In *People ex rel. Sneddon v. Torch Energy Services, Inc.*, 102 Cal.App.4th 18 (2002), an oil company applied to the County of Santa Barbara for permits to construct an oil pumping plant and onshore pipelines. The County's approval of the project was based in part on the oil company's compliance with the numerous conditions attached to the permits and subsequent permit applications. Upon violation by the oil company, the County filed an action to enforce compliance with the permit conditions. The oil company then maintained that the County had no authority to impose the conditions in the first place, as oil pipeline safety regulation is preempted by federal law. The court applied the doctrine of judicial estoppel to prevent the oil company from taking a different position than that taken before the County in the administrative proceedings. "To do otherwise," the court noted, would "reward inequitable conduct and 'cynical gamesmanship.' "[63]

Likewise, in *C. Prilliman*, the court addressed the issue as to whether the doctrine barred an employee's subsequent disability discrimination claims based on representations made in application by the employee in his application for disability benefits. Although the court eventually concluded that the representations were not mutually exclusive, and thereby precluded summary judgment, the court stated that:

> The court in *Rissetto* also noted that judicial estoppel 'is sometimes said to apply to 'preclude parties from taking inconsistent positions in the same litigation,' but our cases as well as those from other circuits have applied the doctrine in disregard of this supposed limitation.'... Thus the doctrine is not confined to inconsistent positions taken in the same litigations ..., and though called judicial estoppel, *the doctrine has been applied to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding.*[64]

Note that the *C. Prilliman* court went on to state that it rejected "respondents' assertion that federal law governs the issue of judicial estoppel in this case," and that application of the judicial estoppel doctrine in the state court was governed by state law.[65] In any event, it is evident that

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[62] Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (citing Smith v. Pinner, 891 F.2d 784, 787 n. 4 (10th Cir. 1989)).

[63] People ex rel. Sneddon v. Torch Energy Services, Inc., 102 Cal. App. 4th 181, 190 (2002).

[64] C. Prilliman v. United Airlines, Inc., 53 Cal. App. 4th 935, 960 (1997), citing Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 604-605 (9th Cir. 1996) (emphasis added).

[65] *Id.* at 956, 960.

judicial estoppel applies to inconsistent positions taken in administrative proceedings.

2. Distinction between Quasi-judicial v. Quasi-legislative Administrative Proceedings

i. No Substantive California Case Authority as to What Constitutes a "Quasi-judicial" Administrative Proceeding in the Judicial Estoppel Context

There is a dearth of California authority which specifically examines the distinction between quasi-judicial and quasi-legislative proceedings in connection with the application of the doctrine of judicial estoppel. Indeed, although judicial estoppel is applicable in connection with "quasi-judicial" administrative proceedings, no real guidance is given with regard as to what constitutes a "quasi-judicial" proceeding.[66] This is consistent with the doctrine of judicial estoppel in general, as "the precise parameters of the doctrines have not been clearly defined."[67]

ii. Distinction between "Quasi-judicial" and "Quasi-legislative" Acts by an Administrative Body Has Been Implied by Statute, and Clearly Defined by California Courts in Reviewing Agency Decisions

Notwithstanding the relative lack of specific judicial treatment in the judicial estoppel context, "California has consistently differentiated 'legislative' and 'adjudicatory' actions and the manner in which they are reviewed" in mandamus proceedings.[68] California courts have clearly defined whether an administrative proceeding is "quasi-judicial" or "quasi-legislative," as such a determination is necessary to determine the standard of review for decisions reached by an administrative body. In addition, California Government Code section 11440.60(a)(1) provides a substantially identical definition for "quasi-judicial proceeding" in connection with administrative agency decisions.[69] Finally, no California authority was located which contradicts these definitions.

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[66] *See e.g.*, Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 177, 183 (1997) (stipulation made in worker's compensation proceeding).

[67] Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000).

[68] Bollengier v. Superior Court, 222 Cal. App. 3d 1115, 1124 (1990) (citing Saleeby v. State Bar, 39 Cal.3d 547, 560 (1985)).

[69] Note, however, that by its own terms the definition of "quasi-judicial proceeding" in California Government Code section 11440.60 is specifically for the "purposes of this section," and as such may be merely persuasive and not universally applicable.

Given that "quasi-judicial" has (a) not been defined in the judicial estoppel context, but has (b) been specifically defined by courts in connection with mandamus proceedings, (c) the definition used by courts in mandamus proceedings is entirely consistent with the use of "quasi-judicial" by the California legislature, and (d) no other contrary definition for "quasi-judicial" has been given, this term of art should be applicable to all contexts unless otherwise specified.[70]

iii. Determination as a Question of Law

Whether an administrative action is quasi-legislative or quasi-adjudicative is a question of law.[71] It is true that it may be possible for the administrative hearing to involve both legislative and adjudicative functions.[72] In most cases, however, "there should be no factual dispute whether the administrative agency is creating a new rule for future application or is applying an existing rule to existing facts."[73]

iv. Quasi-legislative Proceedings

As a general matter, an "administrative action is quasi-legislative" when the "administrative agency is creating a new rule for future application...."[74] Stated differently, a quasi-legislative action is one of formu-

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[70] *See* Creutz v. Superior Court, 49 Cal. App. 4th 822, 833 (1996) ("a term of art must be construed according to its accepted usage"); *see also* Plotitsa v. Superior Court, 140 Cal.App.3d 755, 762 (1983) ("where a word or phrase has a well-known and definite legal meaning it will be construed to have the same meaning when used in a statute"); *See also* CAL. CIV. CODE § 13 ("words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such other as may have acquire a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition"), § 3511 ("where the reason is the same, the rule should be the same"), and § 3542 ("interpretation must be reasonable").

[71] Dominey v. Department of Personnel Administration, 205 Cal. App. 3d 729, 737, n. 4 (1998).

[72] *See id.* at 738 (addressing the "phenomenon"); Lowe v. California Resources Agency, 1 Cal. App. 4th 1140, 1149 (1991) ("an administrative hearing may involve both legislative and adjudicative functions, depending on the questions the administrative agency is asked to resolve").

[73] Dominey, 205 Cal. App. 3d at 737, n. 4.

[74] *Id.*; McGill v. Regents of the University of California, 44 Cal. App. 4th 1776, 1785 (1996) (citing Strumsky v. San Diego County Employees Retirement Assn, 11 Cal.3d 28, 35 n. 2 (1974)) ("[g]enerally speaking, a legislative action is the formulation of a rule to be applied to all future cases"); Lowe, 1 Cal. App. 4th 1140, 1149 (1991) ("rule making, or 'quasi-legislative' action, involves the formulation of rules to be applied to all future cases"); Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App. 2d 271, 280 (1967)

lation of a law which applies only to future cases arising under it.[75] The adoption of regulations by an administrative agency is an action that is, in nature, quasi-legislative rather than quasi-adjudicative.[76]

v. Quasi-judicial Proceedings

By contrast, an "administrative action is ... quasi-adjudicative" when the "administrative agency ... is applying an existing rule to existing facts."[77] A quasi-judicial action determines what the law is, and what the rights of parties are, with reference to transactions already had.[78] Quasi-judicial functions may include the exercise of agency discretion in granting or denying a wide variety of "license[s], permit[s] or other type[s] of application[s]," including applications to agencies such as the San Joaquin Valley Cotton Board and the Department of Agriculture.[79] Quasi-judicial functions also include functions related to irrigations and water districts.[80]

("quasi-legislative action ... 'prescribes what the law shall be in future cases arising under it'").

[75] *See* Dominey, 205 Cal. App. 3d at 737; *See* McGill v. Regents of the University of California, 44 Cal. App. 4th 1776, 1785 (1996); *See* Lowe, 1 Cal. App. 4th 1140, 1149 (1991); *See* Wilson v. Hidden Valley Mun. Water Dist., 256 Cal. App. 2d 271, 280 (1967).

[76] 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 275 (1994), *as modified on denial of rehearing,* citing CAL. GOV. CODE, § 11346 (2005) (implying that the "adoption ... of ... regulations" is an "exercise of quasi-legislative power") and § 11342(b) (2005) (defining "regulation" in pertinent part as "every rule, regulation, order, or standard of general application").

[77] 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 275 (1994); Dominey v. Department of Personnel Administration, 205 Cal. App. 3d at p. 737, n. 4; McGill, 44 Cal. App. 4th at 1785 (citing Strumsky v. San Diego County Employees Retirement Assn., 11 Cal.3d at 35, n. 2) ("[g]enerally speaking, ... an adjudicatory act involves the actual application of ... a rule to a specific set of existing facts"); Lowe, 1 Cal. App. 4th at 1149 ("adjudicative, or 'quasi-judicial,' acts involve the actual application of such rules to a specific set of existing facts"); Wilson, 256 Cal. App. 2d at 279-280, ("quasi-judicial ... action ... 'determines what the law is, and what the rights of parties are, with reference to transactions already had' ").

[78] *See* Dominey v. Department of Personnel Administration, 205 Cal. App. 3d at p. 737.

[79] B.C. Cotton, Inc. v. Voss, 33 Cal. App. 4th 929, 953-954 (1995) (application to San Joaquin Valley Cotton Board and Department of Agriculture to develop "non-approved" cotton varieties); Sommerfield v. Helmick, 57 Cal. App. 4th 315, 320 (1997) (permit to carry a concealed weapon); City of Fairfield v. Superior Court, 14 Cal.3d 768, 773, n. 1 (1975) (development permit); Grumbach v. Lelande, 154 Cal. 679, 683 (1908) (liquor license); Pacifica Corp v. City of Camarillo, 149 Cal. App. 3d 168, 175-176 (1983) (building permit).

[80] 2 CAL. JUR. 3D ADMINISTRATIVE LAW § 363 (2003), citing Dumbarton Land & Imp. Co. v. Murphy, 32 Cal.App. 626 (1917) (whether lands received benefits from operation

This definition of "quasi-judicial"[81] is entirely consistent with California Government Code section 11440.60(a)(1), which sets forth that a "quasi-judicial proceeding" means any of the following:

> (A) A proceeding to determine the rights or duties of a person under existing laws, regulations or policies.
>
> (B) A proceeding involving the issuance, amendment, or revocation of a permit or license.
>
> (C) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.
>
> (D) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency.
>
> (E) A proceeding at which an action is taken awarding a grant or contract.[82]

Given the foregoing, a "quasi-judicial proceeding" is one in which an administrative agency applies an existing rule to existing facts to determine the rights or duties of a person under the law, but which does not create a new rule for future application.

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of water district); *See* Chambers v. Board of Supervisors of Tehama County, 57 Cal.App. 401, 403-404 (1922) (sufficiency of petition for organization of irrigation district); *See* Security-First Nat. Bank v. Board of Supervisors of Riverside County, 135 Cal.App. 208, 211 (1933) (organization of irrigation district).

[81] Note that the use of the phrase "quasi-judicial" has not been universally accepted by all California courts. In *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 42 fn. 14 (1974) (citing Jackson, J. in *Fed Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487-488 (1952), the court stated:

> We have in this opinion avoided the use of the term 'quasi-judicial' – an adjective used in some opinions and by some commentators to indicate the peculiar adjudicatory powers possessed by administrative agencies. As we have indicated the question [being addressed by the court] is the extent to which true judicial powers are and can be vested in 'local agencies.' 'The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

Notwithstanding the *Strumsky* court's apparent disfavor of the use of "quasi," the vast majority of courts, including most courts in California, freely make use of the term "quasi-judicial" or "quasi-adjudicatory" to indicate the peculiar adjudicatory powers possessed by administrative agencies. Rather than reject the almost total consensus of the courts and learned scholars, this Article will make use of the term "quasi-judicial" in reference to adjudicatory powers exercised by administrative agencies to distinguish it from the true judicial power exercised by the courts under the Constitution, unless otherwise indicated.

[82] CAL. GOV. CODE § 11440.60(a)(1) (2005).

vi. Distinguishing Quasi-legislative and Quasi-judicial Administrative Proceedings

The issue then arises as to how to distinguish between quasi-legislative and quasi-judicial administrative proceedings.

This distinction between legislative and judicial acts is common in mandamus proceedings, and has been closely examined in that context. Indeed, "California has consistently differentiated 'legislative' and 'adjudicatory' actions and the manner in which they are reviewed."[83] In this regard:

> Adjudicatory matters are those in which the government's action affecting an individual is determined by facts peculiar to the individual case, whereas legislative decisions involve the adoption of a 'broad, generally applicable rule of conduct on the basis of general public policy.' [Citation] [Code of Civil Procedure section 1094.5], administrative mandamus, is used to review adjudicatory determinations and is not available to review quasi-legislative actions of administrative agencies. [Citation] Quasi-legislative acts are reviewable by traditional mandamus.[84]

In *Smith v. Strother*,[85] the court specifically addressed the question as to "what constitute[d] the distinction between a legislative and judicial act."[86] The court stated that:

> The former establishes a rule regulating and governing the matters or transactions occurring after its passage. The other determines rights or obligations of any kind, whether in regard of persons or property concerning matters or transactions which already exist and have transpired ere the judicial power is invoked to pass on them....[87]

The court went on to conclude that:

> We have found no more accurate statement of the difference between a legislative and a judicial act than that expressed by Justice Field in his opinion in the Sinking Fund Cases. 'The distinction,' says the learned Justice, 'between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other provides what the law shall be in future cases arising under it. *Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is to*

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[83] Bollengier v. Superior Court, 222 Cal. App. 3d 1115, 1124 (1990) (citing Saleeby v. State Bar, 39 Cal.3d 547, 560 (1985)).

[84] *Id.*

[85] Smith v. Strother, 68 Cal. 194, 196-198 (1885), *overruled* on another ground in Millholen v. Riley, 211 Cal. 29, 35-36 (1930).

[86] *Id.*

[87] *Id.*

> *that extent a judicial one*, and not the proper exercise of legislative functions.'[88]

Although Justice Field states that the difference between a legislative act and a judicial act may be "well defined," other cases have characterized the distinction between quasi-legislative and quasi-judicial functions as being "anything but clear."[89] Notwithstanding this lack of consensus, courts nevertheless agree that "a legislative act generally predetermines what the rules shall be for the regulation of future cases falling under its provisions, while an adjudicatory act applies law to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing."[90] Stated another way, legislative action is based upon "facts which help the tribunal determine the *content of the law* and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take," while adjudicative decisions generally rest on "*facts concerning the immediate parties* - who did what, where, when, how, and with what motive or intent."[91]

vii. Function of Proceeding Determinative

"The cases also hold that the classification of an administrative decision as adjudicatory or legislative does not depend on the nature of the decision-making body [citation], the procedural characteristics of the administrative process [citations], or the breadth or narrowness of the administrative agency's discretion [citation]."[92] Instead, the classification of administrative action as quasi-legislative or quasi-adjudicative "contemplates the function performed...."[93] Indeed, "[t]he distinction between the quasi-legislative and quasi-judicial decision contemplates the function performed rather than the area of performance; the breadth or narrowness of the discretion cannot control."[94] The function per-

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[88] *Id.* (citing Central Pac. R. Co. v. Gallatin, 99 U.S. 700, 761 (1879)); cited with approval by Dominey v. Department of Personnel Administration, 205 Cal. App. 3d 729, 737 (1998) (emphasis added).

[89] Joint Council of Interns & Residents v. Board of Supervisors, 210 Cal. App. 3d 1202, 1209 (1989).

[90] *Id.*

[91] *Id.* at 1209-1210 (citing 2 DAVIS ADMINISTRATIVE LAW TREATISE § 15.03 (1958)) (emphasis added).

[92] Dominey v. Department of Personnel Administration, 205 Cal. App. 3d 729, 737-738 (1998) (citing Pacifica Corp. v. City of Camarillo, 149 Cal. App. 3d 168, 176 (1983)).

[93] Pitts v. Perluss, 58 Cal. 2d 824, 834 (1962); Joint Council of Interns & Residents v. Board of Supervisors, 210 Cal. App. 3d 1202, 1210 (1989); 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 275 (1994).

[94] Pitts v. Perluss, 58 Cal.2d 824, 834 (1962).

formed is likely the *only* relevant criteria as to whether an administrative act is quasi-adjudicative or legislative in nature.[95]

viii. Administrative Hearings Regarding the "Quasi-judicial" and Quasi-legislative" Distinction

a. Hearings Generally Not Determinative

Some commentators believe that the presence of power to hear and determine, in the sense of the power and duty to receive evidence and to exercise judgment and discretion in reaching a decision on such evidence, is also an important element in determining whether a particular act is judicial or quasi-judicial for procedural and other purposes.[96] However, many of these powers appear to be inherent in both quasi-legislative and quasi-judicial proceedings.[97]

Indeed, fact-finding is often intertwined with both judicial and legislative decisions. As discussed above, a California court has noted that facts may occur in both contexts, with legislative facts being those "which help the tribunal determine the content of law and of policy and help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take," whereas adjudicative facts are "facts concerning the immediate parties – who did what, where, when, how, and with what motive or intent."[98] Note, however, that while fact-finding is a characteristic shared by both legislative and judicial administrative acts, "[t]here is no constitutional requirement for any hearing in a quasi-legislative proceeding."[99] Thus, while hearings may occur in both types of proceedings, by implication the complete absence of such a requirement in the

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[95] 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 275 (1994).

[96] *See* 2 CAL. JUR.3D ADMINISTRATIVE LAW § 364 (2004) (citing English v. City of Long Beach, 35 Cal.2d 155 (1950)); *see also* Chambers v. Board of Supervisors of Tehama County, 57 Cal.App. 401, 404 (1922) (board decision denying formation of water district "presents all the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment").

[97] *See* Lowe v. California Resources Agency, 1 Cal. App. 4th 1140, 1146 (1991) (California Department of Personnel Administration authority to "hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matter relating to (its) jurisdiction" authorized under California Government Code section 19815(e), apparently applied to *both* quasi-legislative and quasi-judicial acts by administrative agency).

[98] Dominey v. Department of Personnel Administration, *supra*, 205 Cal. App. 3d at p. 737; *see also* Joint Council of Interns & Residents v. Board of Supervisors, 210 Cal. App. 3d 1202, 1209-1210 (1989).

[99] Joint Council of Interns & Residents v. Bd. of Supervisors, 210 Cal. App. 3d 1202, 1211-1212 (1989).

process indicates that the act is legislative in nature. Indeed, "[t]he fact that a public agent exercises judgment and discretion in the performance of his duties does not make its action or powers judicial in their character."[100] As such, the ability of the administrative body to conduct hearings is *not* conclusive as to whether the act is quasi-judicial, and the function performed is the only relevant criteria as to whether an administrative act is quasi-adjudicative or legislative in nature.[101] Likewise, the presence of certain elements, usually characteristic of the judicial process, does not change quasi-legislative proceedings into a quasi-adjudicatory action, and vice versa.[102]

b. Statute or Rule Requiring Hearing, Evidence, and Discretionary Determination of Facts upon an Administrative Appeal of the Decision as "Quasi-judicial"

In mandate proceedings, administrative mandate is the appropriate review mechanism for adjudicatory acts taken by an agency.[103] In this setting, administrative mandate is only available "if the decision resulted from a 'proceeding in which by law: 1) a hearing is required to be given, 2) evidence is required to be taken, and 3) discretion in the determination of facts is vested in the agency.' "[104] A statute, rule, charter provision or other appropriate rule must be shown which requires these three elements on an administrative appeal of a decision.[105] If there is no such statute or rule, the decision may have a "loud quasi-legislative ring to it," and the standard regarding traditional mandamus applies.[106]

ix. Conclusion Regarding What is a "Quasi-judicial" Proceeding

To summarize, an administrative proceeding is "quasi-judicial" as a matter of law if the following criteria are met. First, the decision must involve an administrative agency application of an *existing rule* to *existing facts* to determine the rights or duties of a person under the law, and does not create a new rule for future application. Second, classification

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[100] *Id.* at 1211; *see also* Harris v. Civil Serv. Com., 65 Cal. App. 4th 1356, 1364, n. 2 (1998).

[101] *See* 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 275 (1994).

[102] *See* Joint Council of Interns & Residents v. Bd. of Supervisors, 210 Cal. App. 3d 1202, 1211 (1989).

[103] *See* McGill v. Regents of the Univ. of Cal., 44 Cal. App. 4th 1776, 1785 (1996) (judicial review of denial of tenure).

[104] *Id.* (citing Weary v. Civil Serv. Com., 140 Cal.App. 3d 189, 195 (1983) and Mahdavi v. Fair Employment Practice Com., 67 Cal. App. 3d 326, 333 (1977)).

[105] Harris v. Civil Serv. Com., 65 Cal. App. 4th 1356, 1363-1364 (1998).

[106] *See id.*

of administrative action as quasi-legislative or quasi-adjudicative depends solely upon the *function* being performed by the agency, not the *procedural characteristics* of the administrative process, or the breadth or narrowness of the administrative agency's discretion. Finally, a statute, rule, charter provision or other appropriate rule may need to be shown which requires, on an administrative appeal of an adverse decision, 1) a hearing, 2) the taking of evidence, and 3) the vesting of discretion in the agency to determine the facts. It appears that each of these elements has been met with regard to statements made by Farmer to the Bureau of Reclamation.

3. WWD/Bureau of Reclamation Decisions as "Quasi-judicial" Administrative Proceedings

i. Farmer's Statements Were Made to Federal Administrative Agency

The Bureau of Reclamation is a federal agency.[107] Thus, any statements submitted by Farmer to these Bureau would have been made to a federal administrative agency.

ii. Administrative Decisions Were Not the Result of "Quasi-legislative" Proceedings

Given the hypothetical scenario set forth above, it is evident that the Bureau of Reclamation did not render decisions with regard to water rights and farm subsidies as a result of a quasi-legislative proceeding. The reason is simple: the agency did not create a new rule for future application to all future cases, nor did the agency adopt new regulations.[108]

Instead, the decisions essentially involve the application of specific facts (who owned what property, etc.) to existing regulations (which had already been adopted by the agency) regarding qualifications for subsi-

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[107] *See* 43 C.F.R. §§ 426.1 (regulations for "Federal reclamation law" and "Federal Reclamation irrigation projects") and 426.2 ("Reclamation" defined as the "Bureau of Reclamation, U.S. of the Interior"); *see also* Tulare Lake Basin Water Storage Dist. v. U.S., 59 Fed.Cl. 246, 248 (Fed. Cl. 2003) (the Bureau of Reclamation is "the federal agency that operates both the Central Valley Project and the Delta Cross Channel gates").

[108] Dominey v. Department of Personnel Administration, 205 Cal. App. 3d 729, 737, n. 4, (1998); McGill v. Regents of the University of California, 44 Cal. App. 4th 1776, 1785 (1996) (citing Strumsky v. San Diego County Employees Retirement Assn, 11 Cal. 3d 28, 35 n. 2 (1974)) ("[g]enerally speaking, a legislative action is the formulation of a rule to be applied to all future cases"); Lowe v. California Resources Agency, 1 Cal. App. 4th 1140, 1149 (1991) ("rule making, or 'quasi-legislative' action, involves the formulation of rules to be applied to all future cases").

dies and federal water.[109] Indeed, Farmer would be hard pressed to show that the decisions of the Bureau resulted in a "formulation of a new rule," nor could he make a legitimate argument as to what this "new rule" might be. Furthermore, the decisions by the Bureau to approve the applications do not, even under an unnaturally constricted application of the rule, apply to *all* future cases involving just the Farm properties, as determinations regarding farm subsidies and rights to receive federal water are determined on a yearly basis and not permanently. Thus, the administrative proceedings in which Farmer's statements were made under the penalty of perjury were not "quasi-legislative" in any manner. As such, the only other option is that the proceedings were quasi-judicial.

iii. Administrative Proceedings Were "Quasi-judicial"

There are several factors giving rise to the conclusion that the Bureau of Reclamation decisions regarding federal water use and farm subsidies were the results of "quasi-judicial" proceedings.

First, a "quasi-judicial" proceeding involves an administrative agency application of an existing rule to existing facts to determine the rights or duties of a person under the law, and does not create a new rule for future application.

Here, the Bureau of Reclamation is an administrative agency.[110] The agency's proceedings and determinations involved the application of existing rules regarding eligibility and rights to farm subsidies and federal water. The existing rules were applied by the agency to existing facts regarding, *inter alia*, the ownership of various land by Farm entities. These facts were established through the process of the taking of sworn evidence, under the penalty of perjury, from Farmer.[111] The decisions rendered by the agency involved the rights of Farm entities to receive farm subsidies and federal water.[112] The decisions by the agency were not universally applicable to non-Farm entities not involved in the

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[109] *See* 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 275 (1994) (application of existing rules to existing facts is an exercise of "quasi-adjudicatory power").

[110] *See* 43 C.F.R. §§ 426.1 (regulations for "Federal reclamation law" and "Federal Reclamation irrigation projects") and 426.2 ("Reclamation" defined as the "Bureau of Reclamation, U.S. Department of the Interior"); *see also* Tulare Lake Basin Water Storage Dist. v. U.S., 59 Fed.Cl. 246, 248 (Fed.Cl. 2003) (the Bureau of Reclamation is "the federal agency that operates both the Central Valley Project and the Delta Cross Channel gates").

[111] *See* Bureau of Reclamation Forms 7-2190 EZ and 7-2191, which require Farmer to provide the agencies with information concerning Farmer's agricultural operations, and to sign the statements under the penalty of perjury.

[112] *See id.*

application process, as unrelated third parties would not be in any way affected by the grant or denial of the Farm applications. Finally, as discussed above, the agency decisions did not create a new rule for future application.

Second, Farmer may argue that even though the agency decisions may appear to have been made pursuant to quasi-judicial proceedings, merely submitting an application for a decision for agency review is insufficient in itself to make the matter a quasi-judicial proceeding as there is no judicial review board, public hearing, etc. However, classification of administrative action as quasi-legislative or quasi-adjudicative depends solely upon the *function* being performed by the agency, not the *procedural characteristics* of the administrative process, or the breadth or narrowness of the administrative agency's discretion.[113] Thus, it is *irrelevant* that the agency's discretion may have been severely limited by regulations concerning the approval of applications, or that there was (at least at that stage) no formal hearing in connection with Farmer's applications.[114] Indeed, quasi-judicial functions include agency decisions in granting or denying licenses, permits or other type of applications.[115] Bureau of Reclamation decisions involve some discretion in approving or denying applications for farm subsidies and water permits, and are likewise quasi-judicial decisions.[116] Indeed, federal water applications involve a decision by the Bureau of Reclamation which applies the *existing* and individual *facts* of the applicant to *existing regulations*. In this regard, the Code of Federal Regulations sets forth that "the appropriate regional director makes any final determination that these regulations require or authorize."[117] In the event that Farmer's application had been denied by the regional director, the determination would have been based on existing regulations.[118] No provision is made that authorizes the re-

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[113] Dominey v. Department of Personnel Administration, 205 Cal.App.3d 729, 737-738 (1998); 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 275 (1994).

[114] Dominey v. Department of Personnel Administration, 205 Cal.App.3d 729, 737-738 (1998); *see* 20th Century Ins. Co. v. Garamendi, 8 Cal.4th 216, 275 (1994).

[115] B.C. Cotton, Inc. v. Voss, 33 Cal. App. 4th 929, 953-954 (1995) (application to San Joaquin Valley Cotton Board and Department of Agriculture to develop "non-approved" cotton varieties); Sommerfield v. Helmick, 57 Cal. App. 4th 315, 320 (1997) (permit to carry a concealed weapon); City of Fairfield v. Superior Court, 14 Cal.3d 768, 773, n. 1 (1975) (development permit); Grumbach v. Lelande, 154 Cal. 679, 683 (1908) (liquor license); Pacifica Corp v. City of Camarillo, 149 Cal. App. 3d 168, 175-176 (1983) (building permit).

[116] *See* CAL. CIV. CODE § 3511 (2005), which states "where the reason is the same, the rule should be the same."

[117] 43 C.F.R. § 426.24(a)(1) (2005).

[118] *See id.* at § 426.24(f).

gional director to create new rules or regulations during Farmer's application process which would be applicable to all future cases.[119] Furthermore, an administrative agency is justified in assuming that the statements made by Farmer under the penalty of perjury were sufficient to establish which Farm entity owned which lands.[120]

Finally, a formal hearing, the taking of evidence and vesting of discretion need not be utilized at all levels of decision making, but there may need to be some statute, rule, charter provision or other appropriate rule which requires these procedures take place on an administrative *appeal* of an adverse decision.[121] Here, appeals of Bureau of Reclamation decisions require both a hearing, taking of evidence and vesting of discretion by the agency upon appeal by an applicant.[122] Indeed, if the Bureau of

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[119] *See* 43 C.F.R. § 426 (2005) *et seq.*

[120] *See* Chambers v. Board of Supervisors of Tehama County, 57 Cal.App. 401, 406 (1922) (board of supervisors regarding the issue as to who were the owners or holders of title, "acting as a judicial tribunal, would be justified, at least where no proof was offered to the contrary, in assuming that . . . they were owners of lands susceptible of irrigation from a common source").

[121] *See* Harris v. Civil Service Commission, 65 Cal. App. 4th 1356, 1363-1364 (1998).

[122] See 43 C.F.R. §§ 4.24, 4.25 and 4.26 (2005).

If a landholder makes a false statement on the reporting forms, the Bureau of Reclamation can prosecute the landholder pursuant as follows:

> "Under the provisions of 18 U.S.C. 1001, it is a crime punishable by 5 years imprisonment or a fine of up to $10,000, or both, for any person knowingly and willfully to submit or cause to be submitted to any agency of the United States any false or fraudulent statement(s) as to any matter within the agency's jurisdiction. False statements by the landholder or lessee will also result in loss of eligibility. Eligibility can only be regained upon the approval of the Commissioner."

43 C.F.R. § 426.18(n) (2005).

In the hypothetical set forth above, Farmer's statements were made on such Bureau of Reclamation forms, and those forms specifically set forth the penalty for making false statements. Completion of these forms is required to obtain the benefit of irrigation water, must be submitted to the WWD, who will then submit the information to the Bureau of Reclamation. 43 C.F.R. § 426.18(o). WWD and other water districts must also must file and retain landholder certification and reporting forms, and "withhold deliveries of irrigation water to any landholder not eligible to receive irrigation water under the certification or reporting requirements or any other provision of Federal reclamation law and these regulations." 43 C.F.R. § 426.19(h) (2005).

Appeal of an adverse decision by the regional director of the Bureau of Reclamation may be made by the landholder to the Commissioner of Reclamation. *See* 43 C.F.R. § 426.24(b) (2005). Subsequently, the landholder may then appeal the Commissioner's decision to the Secretary of the Interior by filing an appeal with the Office of Hearings and Appeals (OHA), U.S. Department of the Interior. *Id.* at § 426.24(c)(1) (2005). Appeals to OHA are governed by 43 C.F.R. part 4, Subpart G and other parts of 43 C.F.R. part 4. *Id.* at § 426.24(c)(2) (2005). The process is presided over by an administrative law judge who is authorized to conduct hearings, review the record and testimony (*Id.* at § 4.24), grant an opportunity for oral argument (*Id.* at § 4.25), issue subpoenas to compel

Reclamation had improperly denied Farmer's application, and he appealed, the *same* sworn application would be included as part of the administrative record upon appeal. It would be inconsistent for that same document and the statements contained therein to be, on one hand, considered "quasi-legislative" (and not subject to judicial estoppel) in the original proceeding, and on the other hand, be considered "quasi-judicial" upon appeal and subject to judicial estoppel. This inconsistent result can be easily avoided by the simple expedient of classifying decisions regarding *existing facts* to *existing rules*, and examining the *function* of the proceedings, rather than improperly examining the procedural characteristics used by the agency in reaching a decision.[123]

The very function and nature of the decisions rendered by the agency lead to the conclusion that (a) the proceedings were not "quasi-legislative," and instead (b) were "quasi-judicial" in nature. This same conclusion appears to have been implicitly reached by the courts concerning both the Bureau of Reclamation and the FSA.[124] Indeed, with regard to the Bureau of Reclamation and federal water contractors (including WWD), this is so evident that it prompted one court to summarily conclude that "Of course, a water rights decision is a quasi-judicial act...."[125] Given the foregoing, a California court would almost certainly

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the attendance of witnesses (*Id.* § 4.26), impose sanctions (*Id.* at § 4.27), dismiss or deny a claim (*Id.* at 4.27), disqualify him or herself (*Id.* at § 4.27(c).) and cannot engage in ex parte communications with any party (*Id.* at § 4.27). The landholder may be represented by counsel (*Id.* at § 4.22), is entitled to service of all documents filed in the proceeding (*Id.*, § 4.22). Finally, all hearings must be recorded verbatim, and transcripts of the proceedings must be made at the request of any party. *Id.*

[123] *See* 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 275 (1994); Dominey v. Department of Personnel Administration, 205 Cal. App.3d 729, 737-738.

[124] *See* United States v. State Water Resources Control, 182 Cal. App. 3d 82, 150 (1986) (State Water Resource Board decision to modify and allocate specific rights of the Bureau of Reclamation and federal water contractors in the Central Valley Project was "quasi-judicial"); Branstad v. Veneman, 212 F.Supp.2d 976, 1003 (N.D. Iowa 2002) (decision of USDA regarding an appeal from FSA decision was improper as "no judicial or quasi-judicial body ... is allowed to keep secret its reasons for making a decision"); Singley v. Bentley, 782 So.2d 799, 803 (2000) (application to FSA/ASCS by Alabama farmer for disaster relief is "a quasi-judicial proceeding"). Note that the *Singley v. Bentley* court eventually refused to apply the doctrine of judicial estoppel to prevent the farmer from taking a position at a subsequent trial that was inconsistent with statements made in the FSA/ASCS application. However, this case is distinguishable from the topic of this article, as Alabama uses a different test than that applied by California. See discussion, *infra*, at section IV, "Application of *Singely v. Bentley*."

[125] United States v. State Water Resources Control, 182 Cal. App. 3d 82, 150 (1986) (State Water Resource Board decision to modify and allocate specific rights of the Bureau of Reclamation and federal water contractors in the Central Valley Project) (citing Temescal Water Co. v. Dept. Public Works, 44 Cal.2d 90, 100-106 (1955) (review of

conclude that the sworn statements by Farmer in the applications to the Bureau of Reclamation were made in quasi-judicial proceedings.

C. Position Successfully Asserted in Prior Matter

1. "Success" as "Adopted or Accepted as True"

In order for judicial estoppel to apply, the party generally must have been successful in asserting the first position. A party is "successful" in asserting the position when the position was "adopted . . . or accepted . . . as true."[126]

Here, Farmer made sworn representations to the Bureau of Reclamation to the effect that certain grounds were the property of various Farm entities. These representations were made for the purpose of obtaining federal water and farm subsidies. Federal water subsidies were actually received by the Farm entities, including subsidies to which those entities would not have otherwise been entitled. As such, Farmer was successful in asserting that the Farm entities owned the properties in question, and Farmer's position was adopted or accepted as true by the Bureau of Reclamation.[127] It appears that this prong of the judicial estoppel test has been met.

2. Receipt of "Benefit" from Previous Proceeding as "Success"

i. Potential Split of Authority: "Success" as Whether Party "Benefitted" from Position, Not Whether It Was Accepted by the Court or Jury in a Prior Proceeding

There may be another argument available for the application of the doctrine under this prong. California courts have acknowledged that "there is no hard and fast rule which limits application of the doctrine to those situations where the litigant was successful in asserting the contradictory position."[128] Notwithstanding the fact that there are "no hard and fast" rules with regard to the application of the doctrine, there appears to be a split of authority between the "majority" and "minority" of courts. Although there is some question as to which view constitutes the true

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Department of Public Works granting water permit)); *See* Westlands Water District v. Firebaugh Canal, 10 F.3d 667, 669 (9th Cir. 1993) (WWD is a water service provider for the Bureau of Reclamation).

[126] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997).

[127] *See id.*

[128] Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000) (citing C. Prilliman v. United Airlines, Inc., 53 Cal. App. 4th 935, 957-958 (1997) and Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996)).

majority, generally the "majority" view requires that the inconsistent statement was actually adopted by the court in the earlier litigation, whereas the "minority" view permits the application of judicial estoppel "even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he was playing 'fast and loose' with the court."[129]

Indeed, the *Rissetto* court noted stated that "This Circuit has not yet had occasion to decide whether to follow the 'majority' view or the 'minority view.' "[130] Likewise, other courts have determined that judicial estoppel is applicable whether or not the party was actually successful in the prior proceeding. In this regard,

> '[T]he critical issue is what the [party] contended in the underlying proceeding, rather than what the jury found.' [Citation] Whether the party sought to be estopped *benefitted* from its earlier position or was motivated to seek such a benefit may be relevant insofar as it evidences an intent to play fast and loose with the courts. It is not, however, an independent requirement for application of the doctrine of judicial estoppel.[131]

Thus, the issue of whether a party actually benefitted from its previous position may be relevant as to evidence to play "fast and loose" in judicial or quasi-judicial administrative proceedings, notwithstanding the fact that the position was not actually adopted by the court or the jury.[132] Note, however, that it is generally "more appropriate" to apply the doctrine of judicial estoppel where the party was successful in the earlier litigation.[133]

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[129] Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600-601 (9th Cir. 1996); C. Prilliman v. United Airlines, Inc., 53 Cal.App.4th 935, 957 (1997); *see also* AFN, Inc. v. Schlott, Inc., 798 F.Supp. 219, 225, n. 7 (D. N.J. 1992) (questioning the Ninth Circuit's characterization of the "majority" and "minority" positions, as only a few cases had held categorically that prior judicial adoption is required for application of judicial estoppel, with the Third Circuit in Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d. Cir. 1996), recently adopting the "minority" view.).

[130] Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600-601 (9th Cir. 1996).

[131] Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d. Cir. 1996), cited with approval in Thomas v. Gordan, 85 Cal. App. 4th 113, 119 (2000) (emphasis added).

[132] *Id.*

[133] Thomas v. Gordan, 85 Cal. App. 4th 113, 119 (2000) (citing Allen v. Zurich Ins. Co,. 667 F.2d 1162, 1167 (4th Cir. 1982)).

ii. Farmer "Benefitted" from His Position Taken in the Bureau of Reclamation Proceedings

Here, application of the law leads to the inevitable conclusion that the Farmer "benefitted" from his position. Based on Farmer's sworn testimony as regarding the ownership of Farm entities made in applications to the federal agency, decisions were made in proceedings by the Bureau of Reclamation to grant federal water subsidies to the Farm entities. The Farm entities would not have qualified for these subsidies had Farmer openly owned the Farm entities in his own name. Simply stated, if Farmer was the true owner of the properties, then he benefitted from the receipt of the subsidies.

If subsequently sued in state court by the Nominal Owners of the Farm entities, however, Farmer would be asserting a contrary position with regard to his ownership interests. As Farmer benefitted from his opposite position in the previous proceedings, this is evidence of an intent by Farmer to play "fast and loose" with the courts.[134] Since "judicial estoppel is intended to protect against a litigant playing fast and loose with the courts," application of the doctrine of judicial estoppel regarding ownership is appropriate.[135]

3. *Thomas v. Gordan* and the "Adoption" of Farmer's Sworn Statements

Although a party generally must have been successful in asserting the first position, in *Thomas*, the doctrine applied despite the absence of the third factor. In *Thomas*, the plaintiff sued the accountant for two corporations for defendant's failure to keep plaintiff apprised of the corporations' financial affairs. In earlier bankruptcy petitions, plaintiff had repeatedly failed to list any assets in the corporations. The bankruptcy petitions had been dismissed. The trial court in the present action granted defendant's motions for summary judgment on the grounds that plaintiff's claims were predicated on some interest in the corporations, and the doctrine of judicial estoppel precluded her from alleging that she had such an interest. The appellate court affirmed that the doctrine of judicial estoppel applied even in absence of proof of success in the earlier bankruptcy litigation. Plaintiff had "brazenly admitted" that she transferred her income stream to the corporations, which were owned

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[134] *See* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d. Cir. 1996), *cited with approval* in Thomas v. Gordan, 85 Cal. App. 4th 113, 119 (2000).

[135] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 181 (1997) (citing Russell v. Rolfs 893 F.2d 1033, 1037 (9th Cir. 1990)).

wholly by her paramour, in order to keep it out of the hands of her creditors. She then filed for bankruptcy, expecting to reclaim her funds after all of her lawful debts were discharged. She repeatedly signed documents under oath that failed to report any interest in the corporations. "Assuming that the doctrine of judicial estoppel should be applied to an unsuccessful litigant only in the rare situation where the litigant has made an egregious attempt to manipulate the legal system, we agree with the trial court that 'this is as egregious as it gets....' "[136]

Here, even if Farmer argues that his first position was not "adopted" in the administrative proceedings, this prong of judicial estoppel may still be met by showing that, Farmer (a) repeatedly made representations in the administrative proceedings that Farm entities owned various properties, (b) these representations were signed in writing under the penalty of perjury, (c) Farmer subsequently "brazenly admits" that these representations made under the penalty of perjury were nothing more than an attempt to get farm subsidies and cheap federal waters, and (d) even if Farmer was unsuccessful in his repeated representations to the Bureau of Reclamation (which he was not, as he actually obtained the benefits), Farmer's current position would be nothing more than an egregious attempt to manipulate the legal system of both the administrative and current judicial proceedings.[137]

Although this application of *Thomas* does not directly address the issue of "adoption" of the position in a prior proceeding, it arguably is supported by *Jackson.* The *Jackson* court was one of the first courts to set forth a more clear and concise "test" for judicial estoppel in California. While more accurately defining the scope and application of the doctrine, however, the *Jackson* court acknowledged that a strict application of the "adoption" prong might not be applicable under certain circumstances. In this regard, the court stated that "judicial estoppel is an equitable doctrine . . . consequently, [the court] cannot rule out the possibility that, in a future case, circumstances may warrant the application of the doctrine *even if the earlier position was not adopted* by the tribunal."[138]

Farmer can attempt to contest application of the "adoption" prong by arguing that his positions in the prior federal agency proceedings have no meaningful relevance to the issues in the state court action, as the agency proceedings did not determine actual *ownership* of the various properties,

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[136] Thomas v. Gordan, 85 Cal. App. 4th at 119.

[137] *See id.*

[138] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183, n.8 (1997) (emphasis added).

but whether those grounds were *qualified* to receive federal water subsidies.[139] Given the circumstances, however, a court is likely to reject this argument since (a) Farmer was successful in the first proceeding, and (b) implicit in the decisions in agency proceedings is the determination that the Farm entities were entitled to federal water subsidies *by reason of their ownership of the properties*, which determination of ownership is meaningfully relevant to the same issue currently before the court. As such, the third element has been met, and application of the doctrine would be appropriate as to this prong.

D. The Two Positions Are Totally Inconsistent

Next, the doctrine of judicial estoppel is only applicable if the two positions are totally inconsistent.[140]

1. Farmer's Positions Regarding Ownership of the Properties are Totally Inconsistent

In his statements to the Bureau of Reclamation, Farmer represented that the Nominal Owners *owned* the Farm entities. In litigation in state court, Farmer subsequently asserts that the Nominal Owners do *not own* those same properties. These two positions are mutually exclusive, and both statements simultaneously cannot be true. Simply put, Farmer's statements would be inconsistent.

2. Counter-argument by Farmer that the Positions are Not "Totally Inconsistent"

Farmer, however, may attempt to argue that these positions are not "totally inconsistent." The focus of the argument is strongest if it focuses on the underlying *purpose* of the statements. Specifically, Farmer can contend that the statements made in the administrative proceedings were for the limited purpose of water allotment and farm subsidy determinations, and not actual ownership of the properties. In essence, the Nominal Owners were not the "true" owners of record, but only "nominal" owners for the limited purpose of determining water allotments and farm subsidies. Furthermore, Farmer can argue that the subsequent litigation has nothing to do with water rights and farm subsidy issues, since

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[139] *See* Tuchscher Dev. Enterprises v. San Diego Unified Port Dist., 106 Cal. App. 4th 1219, 1244-1246 (2003) (doctrine did not apply where defendant's allegedly inconsistent position in the first action was unsuccessful and where the first position had no meaningful relevance to issues in the second action).

[140] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997).

the lawsuit deals almost exclusively with "real" ownership interest issues regarding the various properties. As such, the purpose for which the statements were made are not "totally inconsistent," and the "real owner" of the Farm entities should not be judicially estopped from denying his ownership interest by reason of his prior statements.

Given that judicial estoppel is typically applied where a party takes totally inconsistent positions for different purposes, it is unlikely that this argument will be adopted by a California court. For example, in *Thomas*, plaintiff's denial of corporate ownership interest in bankruptcy proceeding was for the stated purposes of hiding assets from creditors, but the court applied judicial estoppel to bar subsequent attempts by plaintiff to compel an accounting for the purpose of asserting ownership interest in the corporations. By doing so, the court also implicitly rejected the "real" and "nominal" ownership distinction as well. As such, Farmer's "purpose" argument will likely be to no avail, and this element of the judicial estoppel doctrine will be met.

E. The First Position Was Not Taken as a Result of Ignorance, Fraud or Mistake

Finally, judicial estoppel may be applicable only if the first position was not taken as a result of ignorance, fraud or mistake.[141]

1. Position was Not Taken as a Result of Fraud or Mistake as to the "True" Owners of the Properties

Here, there is nothing in the hypothetical facts to indicate (a) that any person fraudulently misled Farmer into the "false" belief that the Nominal Owners of the Farm entities were the "true" owners, (b) that Farmer was mistaken of the "true" fact that the Nominal Owners did not own the properties in question, or (c) that Farmer did not know that he was representing to the Bureau of Reclamation that the Nominal Owners owned the Farm entities. Given the foregoing, the court is likely to find that there is no applicable exception to the application of the doctrine.

2. Rejection of "Ignorance" as a Defense to the application of Judicial Estoppel

Farmer's claims of ignorance may not be used to defeat application of the doctrine of judicial estoppel. For example, suppose that Farmer were to argue that he never reads applications, documents, contracts, etc., be-

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[141] *Id.*

fore signing them or otherwise acting. Likewise, he may claim that he was not aware of the content of the statements he made under the penalty of perjury to the Bureau of Reclamation. As such, he should not be bound by the statements contained therein, nor should he be judicially estopped from taking an inconsistent position as to the ownership of the Farm entities in the state court proceeding.

This argument is not a persuasive defense to the application of the doctrine of judicial estoppel. In *Thomas*, plaintiff repeatedly submitted statements under the penalty of perjury in her bankruptcy petitions and schedules, which omitted her alleged interest in two corporations, for the admitted purpose of concealing assets from creditors. Subsequently, plaintiff then sued to establish her ownership interest in the corporations, claiming ignorance of the content of the documents as a basis for rejecting application of the doctrine of judicial estoppel. The *Thomas* court noted that:

> [Plaintiff] stated in her declaration that she did not read the bankruptcy petitions or schedules before signing them, and relied on the advice of professionals concerning which assets to list, but did not specifically discuss with anyone whether her alleged interest in [the corporation] should have been included in the bankruptcy petitions or schedules. This is not the type of ignorance which permits a party to avoid the impact of signing a legal document.[142]

The *Thomas* court concluded that "We see no reason to encourage willful blindness to the content of documents signed under the penalty of perjury by allowing a party to use the excuse of failure to read as a basis for rejecting application of the doctrine of judicial estoppel."[143]

Given the foregoing, any arguments by Farmer that judicial estoppel should not apply to his prior statements made under the penalty of perjury, on the basis that he did not know what the documents said or he had not read them, will likely be rejected by California courts.

V. APPLICATION OF *SINGLEY V. BENTLEY*

The application of the doctrine of judicial estoppel was not applied in *Singley v. Bentley,* 782 So.2d 799 (2000), an Alabama farming case with facts similar to those being examined by this Article. In *Singley*, an Ala-

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[142] Thomas v. Gordan, 85 Cal. App. 4th 113, 121 (2000) (citing Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 339 (1985)) ("It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it").

[143] *Id.*

bama farmer made application to the FSA/ASCS seeking federal crop-disaster benefits. In his application, the farmer underrepresented the number of bushels that his crop had produced, claiming that he only produced *15,000* bushels. As a result of the representation made in his application, the ASCS provided $26,916.00 in disaster relief benefits. Subsequently, the farmer brought a breach of contract action against the purchaser, who had contracted to purchase the entire crop. The farmer claimed that based on purchaser's failure to provide a government inspector to grade the produce, failure to pay according to the terms of the contract, and by producer providing defecting defective transplants, the farmer had been underpaid for the *27,000* total bushels produced. Producer brought a motion for summary judgment, arguing that the farmer was judicially estopped from taking a production position inconsistent from that made to the ASCS. The trial court granted the motion, and the Court of Civil Appeals of Alabama reversed and remanded.

The *Singley* court set forth the requirements for the application of the doctrine of judicial estoppel in Alabama. First, the inconsistent statement must have been successfully maintained in the prior proceeding.[144] Second, judgment must have been rendered in the prior proceeding.[145] Third, the positions taken in the two proceedings must be clearly inconsistent.[146] Fourth, the parties and questions must be the same.[147] Fifth, the party claiming estoppel was misled and changed his positions.[148] Finally, it would be unjust to one party to permit the other to change his position in the subsequent proceeding.[149]

The *Singley* court then determined that the doctrine was inapplicable for several reasons. The court found that:

> [purchaser] did not present evidence indicating that [farmer] had asserted a position in a prior *judicial or quasi-judicial* proceeding that is inconsistent with a position he now asserts. An application for federal crop-disaster benefits filed with the Department of Agriculture is, at best, a quasi-judicial proceeding; however, [purchaser] presented no evidence regarding the nature of the process by which a farmer obtains disaster benefits from the Department of Agriculture. Counsel for [purchaser] explained in a letter brief to the trial court that applications for crop-disaster relief must be approved by the board of supervisors for the Farm Service Administration, which is an agency of the Department of Agriculture, and the board of supervisors is an elected committee, which is compensated from the Department of Agriculture's budget.

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[144] Singley v. Bentley, 782 So.2d 799, 803 (2000).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*

> Counsel concluded that the function of providing crop-disaster relief is an agency proceeding and, therefore, quasi-judicial in nature.[150]

The court then concluded that since purchaser failed to "establish by competent evidence the nature of the proceeding in which the alleged inconsistent position was previously asserted" as "unsworn statements are not considered evidence."[151]

Second, the *Singley* court found that the parties and the questions presented were not the same in both proceedings, as purchaser presented no evidence that he was a party to the farmer's application for disaster relief. Finally, the court noted that purchaser presented no evidence that he was misled by the farmer's representations to the Department of Agriculture.[152] Given the lack of evidence regarding those matters, the *Singley* court found that judicial estoppel could not be used by purchaser to bar statements contrary to those previously made by the farmer.

As applied to this matter, Farmer may argue that since the *Singley* court found that judicial estoppel was inapplicable under a similar fact pattern, then judicial estoppel should likewise be inapplicable with regard to prior statements concerning ownership of the Farm entities.

Farmer's *Singley* argument faces a long and uphill battle to be adopted by California courts.

First, *Singley* does not stand for the premise that the FSA decision as to the farmer's application was made other than in a quasi-judicial proceeding. Instead, the *Singley* court concluded that "unsworn statements of counsel," standing alone, were insufficient to establish the nature of the proceeding as to whether it was "quasi-judicial," and on that basis purchaser failed to carry his evidentiary burden necessary to support a decision for summary judgment.[153] Indeed, the court even implied that the application process might be a quasi-judicial proceeding, but that the purchaser presented no competent evidence as to that matter.[154] Thus, assuming that admissible evidence is given to the court which establishes the nature of the Bureau of Reclamation or FSA proceedings, *Singley* would be inapplicable to the Farm entity matter.

Second, California state law governs the issue of judicial estoppel, not the law of the previous tribunal or another jurisdiction.[155] Thus, California's test for judicial estoppel applies, not Alabama's.

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[150] *Id.* (emphasis in original).
[151] *Id.*
[152] *Id.* at 803-804.
[153] *Id.* at 803.
[154] *See id.*
[155] *See* C. Prilliman v. United Airlines, Inc., 53 Cal. App. 4th 935, 960 (1997) ("We conclude that state law governs the issue").

In California there is no requirement that all the parties were involved in the prior proceeding, only that the person to be estopped was a party.[156] In fact, *Thomas* clearly shows that judicial estoppel was applicable to prevent a plaintiff from asserting an ownership interest in two corporations, as the plaintiff had previously represented to a bankruptcy court that she did not own the corporations, even though the corporations were not involved or "parties" in the bankruptcy proceeding.[157] As such, even assuming the Nominal Owners were not really "parties" to the applications made to the Bureau of Reclamation, any argument that the doctrine is not applicable on this ground is without any basis in California law.[158]

Finally, even if the Nominal Owners were somehow "misled" by Farmer's statements such that they changed their positions, this is not an element considered by California courts in reaching the decision as to whether to apply judicial estoppel.[159]

While the fact pattern of *Singley* is similar in some regards to those examined by this Article, any argument by Farmer based on *Singley* would be unavailing. California courts apply a different test for the application of the doctrine of judicial estoppel, and as such, should reach a much different result.

VI. CONCLUSION

This Article has addressed whether the doctrine of judicial estoppel may be applied in California judicial proceedings with regard to representations made by an agribusinessperson, under the penalty of perjury, on applications submitted in conjunction with federal water subsidy programs. The general background and process of the water subsidy process was reviewed, and application of the hypothetical set forth. Next, the general principles of the doctrine were established, including the purposes and policy of the doctrine, the elements of judicial estoppel, and whether the doctrine may be raised in state court as to statements made in federal proceedings. Furthermore, this Article analyzed whether the doctrine of judicial estoppel may be successfully raised in state court proceedings as statements made to the Bureau of Reclamation. Finally, the holding in *Singley v. Bentley* was examined with regard to its impact

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[156] Jackson v. County of Los Angeles, 60 Cal. App. 4th 171, 183 (1997) (gravamen of judicial estoppel is not privity, reliance or prejudice); Drain v. Betz Laboratories, Inc., 69 Cal. App. 4th 950, 957 (1999); Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000).

[157] *See* Thomas v. Gordan, 85 Cal. App. 4th 113, 118 (2000).

[158] Jackson, 60 Cal. App. 4th at 183 (setting forth elements for application of judicial estoppel).

[159] *See id.*

upon the application of the judicial estoppel in California judicial proceedings.

Although the exact parameters of judicial estoppel have yet to be defined in California, application of the doctrine of judicial estoppel is applicable with regard to statements submitted by Farmer to the Bureau of Reclamation. Application of the doctrine would bar Farmer from taking an inconsistent position in a California judicial proceeding from that asserted in the Bureau of Reclamation applications with regard to the ownership of the Farm entities. The price of avarice and greed has been raised in California. Loss of integrity may mean loss of the farm.