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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

NORTH KERN WATER STORAGE
DISTRICT,

Plaintiff,

v.

KERN DELTA WATER DISTRICT, et al.,

Defendants.

Case No. 96-172919

JUDGMENT

And Related Cross-Actions

1 The above-entitled case came on for trial upon remand after appeal on August 30, 2004 in
2 Department One of the above-entitled court, the Honorable Melinda M. Reed presiding, without a
3 jury.

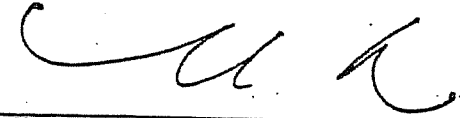
4 Scott K. Kuney and Steven M. Torigiani, of the Law Offices of Young, Wooldridge, and
5 Gene Tanaka and Jill N. Willis of Best, Best and Krieger appeared as counsel for plaintiff/cross-
6 defendant/cross-complainant North Kern Water Storage District ("North Kern"); Gene R.
7 McMurtrey, James A. Worth and Daniel N. Raytis of McMurtrey, Hartsock and Worth appeared as
8 counsel for defendant/cross-complainant Kern Delta Water District ("Kern Delta"); and Colin L.
9 Pearce and Matthew K. Kliszewski of Duane, Morris appeared as counsel for cross-defendant/cross-
10 complainant City of Bakersfield ("City").

11 Evidence, both oral and documentary, having been presented by all parties, the cause having
12 been argued and submitted for decision, and the court having caused to be made and filed herein its
13 written statement of decision.

14 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that judgment on the trial
15 upon remand of the above-entitled action is hereby rendered as set forth in the attached Statement
16 of Decision, which Statement of Decision is incorporated herein by this reference and made a part
17 of this Judgment.

18 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that no party to this action
19 is deemed a prevailing party for the purpose of awarding costs or attorneys' fees. Accordingly, each
20 party shall bear its own costs and attorneys' fees.

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22 Date: 2.9.05



Melinda M. Reed, Judge of the Superior Court

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FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 09 2005

LARAYNE CLEEK, CLERK
BY: _____

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

NORTH KERN WATER STORAGE
DISTRICT,

Plaintiff,

v.

KERN DELTA WATER DISTRICT, et al.,

Defendants.

Case No. 96-172919

STATEMENT OF DECISION

Dept.: 1

Judge: Hon. Melinda M. Reed

Trial Date: August 30, 2004

And Related Cross-Actions

1 The above-entitled case came on for trial upon remand after appeal on August 30, 2004 in
2 Department One of the above-entitled court, the Honorable Melinda M. Reed presiding, without a
3 jury.

4 Scott K. Kuney and Steven M. Torigiani, of the Law Offices of Young, Wooldridge, and
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7 McMurtrey, James A. Worth and Daniel N. Raytis of McMurtrey, Hartsock and Worth appeared as
8 counsel for defendant/cross-complainant/cross-defendant Kern Delta Water District ("Kern Delta");
9 and Colin L. Pearce and Matthew K. Kliszewski of Duane, Morris appeared as counsel for cross-
10 defendant/cross-complainant City of Bakersfield ("City").

11 The parties introduced oral and documentary evidence and the case was argued and submitted
12 for decision. The court, having considered the evidence and heard the arguments of counsel, and
13 being fully advised, issues the following statement of decision:

14 STATEMENT OF THE CASE

15 This action returned to this court upon remand after appeal. In the prior trial of this action,
16 the Honorable Kenneth E. Conn found that Kern Delta Water District ("Kern Delta") had forfeited
17 a portion of its Kern River entitlements for non-use during various five-year periods between 1932
18 to 1976. *See* Statement of Decision, March 31, 1999, at 9-10. Based upon Kern Delta's use during
19 that period, the court ruled that Kern Delta possessed a preserved entitlement to approximately
20 159,286 acre-feet per year on average. *See id.* at 10.

21 The Court of Appeal reversed the determination of forfeiture, finding that the trial court erred
22 in two respects: (1) by failing to identify a specific five-year period for determining forfeiture, and
23 (2) in measuring the amount of water it found to have been forfeited by Kern Delta. *See North Kern*
24 *Water Storage Dist. v. Kern Delta Water Dist.*, No. F033370 (5th Dist. Jan. 31, 2003, as modified
25 March 3, 2003) (unpublished opinion) ("*Op.*"), at 34.

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1 The Court of Appeal specifically directed a retrial of the question "whether Kern Delta
2 forfeited by nonuse any part of its paper entitlements, based upon a measurement (day, month,
3 season, etc.), a specific five-year period, and a consideration of all other relevant factors disclosed
4 by the evidence." See Order Modifying Opinion and Denying Rehearing, filed March 3, 2003, at I.

5 The Court of Appeal also directed a retrial of all other issues (1) expressly raised by the
6 parties on [the] appeal but (2) not resolved by [the] opinion and not found in [the] opinion to have
7 been waived or abandoned for purposes of [the] appeal, and (3) put in controversy by reason of the
8 trial court's determination [of the question whether Kern Delta forfeited any portion of its paper
9 entitlements]. Op. at 47, as modified by Order Modifying Op. at I., 4.

10 On remand, the parties filed a joint case management conference statement addressing the
11 need to determine the specific issues to be tried. Subsequently, each party filed a written brief in
12 support of its contentions regarding the specific issues to be tried on remand in accordance with the
13 Court of Appeal's Opinion.

14 After the issue was briefed and argued, this court ordered, on September 22, 2003, that the
15 following issues would be included in the retrial, in addition to Kern Delta's forfeiture:

16 1. North Kern's entitlement to any water found (1) forfeited by Kern
17 Delta's predecessors prior to 1914, (2) appropriated by North Kern's predecessors
18 prior to 1914, (3) perfected by North Kern's predecessors by putting the water to
19 beneficial use prior to 1914, and (4) not thereafter lost at any time by prescription,
20 abandonment or forfeiture; and

21 2. North Kern's tenth cause of action for damages against Kern Delta if
22 North Kern prevailed on its claim of entitlement to any forfeited water as described
23 above. See Order on Issues for Retrial Upon Remand After Appeal, September 22,
24 2003, at 6-7.

25 This court also ordered that several issues be excluded from the retrial, as follows:

- 26 1. North Kern's seventh cause of action for unreasonable use;
27 2. Any issue related to forfeiture except whether Kern Delta forfeited any
28 part of its entitlement based upon a particular appropriate measurement and a specific

1 five-year period. Thus, whether Kern Delta's release of water was proper and
2 authorized (1) as a beneficial use under Water Code section 1240, (2) as a sale or
3 transfer under Water Code section 1244, (3) as a change in diversion pursuant to
4 Water Code section 1706, (4) pursuant to lack of customer demand, (5) under the
5 MHA and the Shaw Decree, and (6) under principals of equitable estoppel and laches
6 will not be retried; and

7 3. Bakersfield's claim of right to any water found forfeited by Kern
8 Delta. *See id.* at 7.

9 **STATEMENT OF DECISION**

10 **I. Five-Year Period**

11 Water Code Section 1241 states, in part:

12 when a person entitled to the use of water fails to use beneficially all
13 or any part of the water claimed by him, for the purpose for which it
14 was appropriated or adjudicated, for a period of five years, such
unused water may revert to the public and shall be regarded as
unappropriated public water.

15 A review of case law shows that the five-year period preceding the lawsuit has historically
16 been used as the appropriate five-year period. However, in this case, the Court of Appeal chose not
17 to restrict the five-year period to the one immediately preceding the commencement of the lawsuit.
18 *See Op.* at 35. Instead, the court indicated the forfeiture period must bear a direct temporal
19 relationship to the time the contrary claim of right to water was made. *See id.*

20 The appellate court explained "the doctrines of forfeiture, adverse possession, abandonment
21 and prescription are all related" and cannot be "adjudicated in the abstract without the presence of
22 a competing claim" to the water in question. *See id.* The appellate court further indicated that,
23 historically, courts have looked to a clash of rights – where both sides are asserting competing claims
24 – to establish a point of reference for forfeiture. *See id.* at 35-37. The court specifically noted that
25 no court has allowed a claimant to perfect a current forfeiture by reaching back in time to a period
26 when there was no clash of rights, or to pluck a five-year period from any point during the period
27 of ownership, perhaps much before the assertion of the competing claim. *See Op.* at 36-37.

1 This court agrees with the City that it is important to note the factual context of this case at
2 the time the appellate court rendered its decision. During the first trial, the parties focused on facts
3 and events concerning their historical use of water rights that took place throughout and in excess
4 of an entire century. The original trial court selected a 45 year period as the forfeiture period. The
5 appellate court indicated that selection of a 45 year period was error and directed the retrial court to
6 select a specific five-year period. *See Op.* at 35, 47.

7 Further, the appellate court determined, based on the evidence before it, that there was no
8 competing claim to the water rights until 1976, when Kern Delta sought to expand its historical use,
9 which affected the amount of water available for the junior right holders. *See Op.* at 27. Thus, the
10 court specifically held that the five-year period must be no later than the five years immediately
11 preceding 1976. *See id.* at 36. However, because of the possibility of tolling agreements, earlier
12 suits and objections arising from a clash of rights, the court directed the retrial court to define the
13 exact period of measurement. *See id.* at 36, n.37.

14 This court finds the City's point stated in its written brief regarding clash of rights to be
15 persuasive regarding the appellate court's direction on this issue.¹ The City contends that, in light
16 of the appellate court's findings and directions, the appellate court essentially left it to this court to
17 determine when the present dispute arose. The City is correct in claiming that the clash of rights,
18 the competing claims, the dispute and the fight leading to a claim of forfeiture must have a
19 relationship to the issues, to the claims, and to the parties in this lawsuit.

20 As to when the present dispute arose and the elements that must be shown in order to
21 establish a clash of rights in this case, the court is bound to follow the law of the case and the
22 appellate court's findings concerning the law on forfeiture. Thus, this court finds that a dispute or
23 clash of rights between the parties must consist of: (1) a formal claim by a party to the lawsuit (or
24 its predecessor in interest) providing notice to a prior appropriator that the claimant has a right to the
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26
27 ¹During the retrial, the parties were directed to prepare written briefs regarding how the
28 concept of "clash of rights" should be applied in the instant case. All parties filed their "clash of
rights" briefs on October 18, 2004.

1 prior appropriator's entitlement based on nonuse by the prior appropriator and that the subsequent
2 appropriator's water rights have been interfered with, injured, or invaded by the original
3 appropriator, and (2) an objection by the original appropriator to the subsequent claim of right.

4 The court now turns to the individual historical events that North Kern contends establish
5 a clash of rights so as to bring about the five year forfeiture period.

6 **A. Farmers Canal Company vs. J.R. Simmons**

7 The first event is the Farmers Canal Company versus J.R. Simmons lawsuit, which was filed
8 in 1895.² This lawsuit resulted in the Shaw Decree that set forth the appropriative rights of the first
9 point holders and established an order of priority. The Shaw Decree also confirmed Kern Island's
10 right to the first 300 cubic feet per second of the river as previously stated in the Miller-Haggin
11 Agreement.³ The court specifically finds, as did the original trial court and the appellate court, that
12 the Shaw Decree conclusively established the actual and perfected appropriative rights of the
13 parties.⁴

14 The defendants in the *Farmers* case included a small number of parties who took water from
15 the South Fork of the Kern River. For the most part, the defendants had not signed the
16 Miller-Haggin Agreement and were not parties to it. The defendants had closed the head gate to the
17

18
19 ²*Farmers Canal Company, et. al. v. J. R. Simmons, et. al.* (Kern County Superior Court Case
20 No. 1901), complaint filed February 14, 1895. (Ex. No. 489).

21 ³The Miller-Haggin Agreement of 1888 ("MHA") is the settlement agreement reached
22 between the parties in the landmark case of *Lux v. Haggin* (1886) 69 Cal. 255. Among other things,
23 the MHA apportioned the rights to the flow of the Kern River between the upstream users
24 (appropriators) and the downstream users (riparians). Those holding upstream rights are the
predecessors in interest to the parties of this action and are sometimes referred to as the "first point
interests." (Ex. No. 46).

25 ⁴Kern Delta's Shaw Decree entitlements (and respective dates of priorities and rates of flow)
26 which are the subject of the retrial are as follows: Kern Island (1st), January 1, 1870, 300 cfs; Buena
27 Vista (1st), July 15, 1870, 80 cfs; Stine, December 15, 1872, 150 cfs; Farmers, April 20, 1873, 150
28 cfs. See *Farmers Canal Company, et al. v J.R. Simmons, et. al.* (Kern County Superior Court Case
No. 1901), "Shaw Decree" (August 6, 1900). (Ex. No. 48).

1 Beardsley Canal (which was owned by the Kern County Land Company⁵ ("Land Company")) and
2 began taking more water in the South Fork.

3 All of the individual subsidiary canal companies owned by the Land Company were plaintiffs
4 in the action.⁶ They were represented by one counsel. Plaintiffs contended that defendants were
5 exceeding their lawful taking of water and asked for a judicial decree establishing the exact rights
6 of the parties. Plaintiffs were obviously not directly challenging the rights of one another.

7 Plaintiff canal companies sought an amount of water that was more than what they were
8 ultimately adjudged to own. The court finds the reduction of plaintiffs' original claims by Judge
9 Shaw does not provide sufficient evidence of competing claims between them. Furthermore, any
10 clash of rights that did exist between the plaintiffs was indeed settled and extinguished when Judge
11 Shaw made his final order on entitlements, and any clash, if there was one between plaintiffs, did
12 not continue after the court's decision. Lastly, no first point water right holder contended that it had
13 a right to water due to nonuse of a prior appropriator. Thus, the necessary showing of a clash of
14 rights related to forfeiture from the *Farmers* case has not been made.

15 Furthermore, the appellate court made specific mention of the Shaw Decree in regard to this
16 issue when it stated:

17 We do ... offer some observations which may be relevant on remand. First, the
18 Miller-Haggin Agreement and the Shaw Decree, which quantify North Kern's and
19 Kern Delta's respective entitlements, do not appear to support a claim by North Kern
to any of Kern Delta's rights because neither document evidences a pre-1914
appropriative claim to an increased entitlement by North Kern. *See Op.* at 44.

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23 ⁵The parties to this action are the successors in interest of the original canal companies
24 holding appropriative rights on the Kern River. The original canal companies were all owned and
operated by the Kern County Canal and Water Company, which was a wholly owned subsidiary of
25 the Kern County Land Company (also referred to herein as "Land Company").

26 ⁶They are as follows: the Farmers, Pioneer, Buena Vista, Kern Island, James, Anderson,
27 Stine, Plunket, Meacham, James & Dixon, Joice, Kern River Canal and Irrigating and Central canal
companies.
28

1 **B. Hancock vs. East Side Canal Company**

2 The California Railroad Commission case of A. Hancock, et. al. v. East Side Canal
3 Company, Kern Island,*and the Kern County Canal and Water Company ("KCCWC"), was filed in
4 1918. In *Hancock*, plaintiffs were customers of the East Side Canal Company, which, in turn,
5 received its water from the Kern Island, both of which were subsidiaries of KCCWC. Water was
6 supplied to the East Side Canal Company pursuant to two contracts with the Kern Island. Plaintiffs
7 contended that they were entitled to more water than contracted for based on Kern Island's status as
8 a public utility, in that a public utility was not allowed to discriminate between customers.

9 The Commission's first ruling was that Kern Island must prorate its water between all of its
10 customers.⁷ At rehearing, the defendants claimed that the Land Company received water from its
11 subsidiary sixteen canal companies and further alleged their rights to use the water were stated in the
12 Miller-Haggin Agreement and Shaw Decree. Furthermore, Kern Island claimed that it had pre-
13 existing contracts with private customers.

14 During the rehearing, several intervenor consumers from individual canal companies with
15 rights junior to Kern Island provided testimony concerning their historical use of Kern Island water.
16 The Commission then ruled against plaintiffs.⁸ It stated that the junior canal companies who had
17 historically and continually used Kern Island water would continue to receive water historically used,
18 even though Kern Island was a public utility.

19 The Commission stated, at page 224 of the rehearing decision: "the problem is one with so
20 many varying factors and so complicated it is difficult to arrive at an equitable solution." The
21 Commission further determined, at page 224: "clearly we cannot in justice direct Kern Island to
22 deliver water to plaintiffs as this would mean depriving other consumers of a large part of the water
23

24 *Kern Island Irrigating and Canal Company ("Kern Island")

25 ⁷*A. Hancock, et. al. v East Side Canal Company*, (CRC Case No. 1250), Decision No. 6383
26 (June 3, 1919). (Ex. No. 720)

27 ⁸*A. Hancock, et. al. v East Side Canal Company*, (CRC Case No. 1250), Decision No. 9195
28 (June 30, 1921). (Ex. No. 721)

1 now utilized by them." Kern Island was ultimately ordered to deliver water to its customers pursuant
2 to historical use and the contracts it held with customers.

3 *Hancock* presents no clash of rights related to this case justifying enactment of the forfeiture
4 period. First, plaintiffs were not first point water right holders and were not predecessors in interest
5 to any party in this case. Plaintiffs were simply consumers or customers of Kern Island and East
6 Side Canal Companies. Further, the plaintiffs' claim was not based on forfeiture or loss of right due
7 to nonuse, nor did it involve a claim of right to Kern Island's Shaw Decree entitlements. Plaintiffs
8 simply sought an increase in delivery of water based upon their claim that Kern Island was a public
9 utility and had no authority to prefer one customer over another.

10 Second, as to the intervenor consumers from junior canal companies, they too were not first
11 point water right holders. Furthermore, they made no claim that their right to historical use of the
12 water was interfered with, injured or invaded by Kern Island, the original appropriator. Nor did Kern
13 Island object to the intervenor consumers' claim for contracted water historically used by them.
14 Thus, even though it could be argued that the consumers from the junior canal companies were
15 asserting a right to Kern Island water based on nonuse by Kern Island, there was no claim by the
16 junior consumers that their rights had been harmed.

17 Additionally, there was no dispute between the junior consumers and Kern Island. The junior
18 consumers plainly were not fighting the original appropriator and there is no showing that Kern
19 Island objected to the junior intervenor consumers' claim for historical and contractual water rights.
20 Indeed, the Commission specifically found that the defendants were not concerned with whom they
21 delivered water to, provided the defendants assumed no liability. Simply put, the intervenor
22 consumers wanted Kern Island's sale of release water to them to continue.

23 C. Kern River Water Storage District

24 The Kern River Water Storage District was formed in 1923. In 1923, the Land Company
25 owned virtually all of the first point canal companies. The Land Company also owned much land
26 north of the river, but the individual canal companies (including Kern Island) holding senior rights
27 to the river were located south of the river. Thus, the Land Company favored a plan for development
28 of a water storage district that could provide river water to northern lands by merging the individual

1 canal companies' paper entitlements, treating the entitlements as though they did not exist, or
2 "pooling" the water rights.

3 Despite the Land Company's desires, the State was hesitant to approve the plan for the Kern
4 River Water Storage District because of the California Railroad Commission's decision in *Hancock*.
5 In that regard, state engineers were concerned that the available water supply from the southern canal
6 companies holding senior rights would be based on historical use instead of the Shaw Decree
7 entitlements. Also, there was substantial opposition to the formation of this district by southern land
8 owner consumers because they feared the Land Company would detrimentally take water they were
9 entitled to under the Shaw Decree.

10 The evidence shows that the Land Company took the consumer's objections into
11 consideration and modified the plan for the river district so that the southern consumers would
12 continue with a supply of unregulated surface water in accord with their Shaw Decree entitlements
13 and diversion priorities. Indeed, the new district's Board of Directors indicated in its modified plan
14 of development, as shown in Exhibit 2465, that past entitlements would remain attached and
15 available even though an entitlement was greatly in excess of past diversions.⁹ However, ultimately
16 the Land Company withdrew support for the river district because of public sentiment opposing the
17 plan and the district was dissolved.

18 The court finds that this event does not demonstrate a clash of rights so as to initiate a
19 forfeiture period. There was no claim by a party or party predecessor for water rights based on
20 nonuse or forfeiture. The objections to the river district came from southern consumers and the
21 district plan was adjusted to eliminate any disturbance of Shaw Decree entitlements. Further, the
22 concerns stated by the state engineers regarding the formation of the district clearly related to future
23 possible claims of right by junior canal companies.

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27 ⁹*Kern River Water Storage District - Digest on Report of Modified Plan of Development*
28 *Recommended by Board of Directors*, (December 1, 1928), (Ex. No. 2465).

1 **D. 1930's Rate Cases**

2 The public utility individual canal companies' sought to raise water rates in 1931. Here,
3 eight canal companies¹⁰ owned and operated by KCCWC made application to the California Railroad
4 Commission to raise water rates.¹¹ Significantly, the applications represented that no actions
5 questioning the water rights were pending and that division of river flow between canals was unified.
6 The applications further stated that senior right holders routinely released water for use by others
7 without reduction of the senior right. Lastly, the canal companies' entitlements were shown as stated
8 in the Shaw Decree and used as a basis for determining the value of the companies.¹²

9 The court finds no dispute, objection or clash of rights regarding this event. There plainly
10 is no evidence that a party or party predecessor claimed it was entitled to an increase in entitlement
11 based on nonuse of a prior appropriator.

12 **E. Tehachapi Cattle Company vs. Kern Island Canal Company**

13 The California Railroad Commission case of Tehachapi Cattle Company v. Kern Island
14 Canal Company was decided November 13, 1933.¹³ In *Tehachapi*, the complainants were customers
15 of Kern Island. Complainants' land was not owned by the Land Company. Complainants
16 complained that Kern Island's extension of water service to land owned by the Land Company
17 within Kern Island's service area was unauthorized due to Kern Island's failure to obtain a certificate
18 of necessity permitting extension of water service.

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21 ¹⁰They are as follows: the East Side, Buena Vista, Stine, Farmers, Central, Kern River Canal
22 & Irrigation, Pioneer and Kern Island canal companies.

23 ¹¹*In the Matter of Applications of East Side Canal Company, et. al., for Authority to Increase*
24 *its Rates for Water Service*, Applications Nos. 16610-16617, Decision 23345 (February 2, 1931) (Ex.
25 No. 724).

26 ¹²*General Report on Considerations, and to Above Utilities, Kern County Canal and Water*
27 *Company*, General Report, Rate Cases, 1930-1931 (May 25, 1931) (Ex No. 2277).

28 ¹³*Tehachapi Cattle Company, et. al. v Kern Island Canal Company*, (CRC Case No. 2711
& 2755), Decision No. 26529 (November 13, 1933) (Ex. No. 727).

1 The defendant canal company claimed that the certificate was not necessary because it had
2 been servicing the additional area for some time. During the proceedings, the Farmers Protective
3 Association (a group representing southern area farmers) filed a petition with the Commission
4 seeking a declaration that the water rights of the individual canal companies belonged to the farmer
5 customers of the canal companies. The Land Company's attorney opposed the Association's
6 position and informed the Land Company that, since the Shaw Decree fixed title to the water rights
7 in the canal companies, the landowners only had a right of service.¹⁴

8 The *Tehachapi* case fails to disclose a clash of rights in that the claim presented was by a
9 customer of a party predecessor and not a senior right holder. Furthermore, the claim was not for
10 increased entitlement due to forfeiture based on lack of use. It is apparent that this was a dispute
11 concerning one landowner's dissatisfaction with Kern Island's delivery of water to another customer
12 within the same service area.

13 **F. Formation of North Kern Water Storage District**

14 North Kern Water Storage District was formed in 1935. This district was developed by the
15 Land Company for the purpose of providing an increased level of water service to areas north of the
16 river. Documents show that river water provided through canals, groundwater, and water from the
17 Central Valley Project formed the expected basis of the district's water supply.

18 Exhibit 509 is a transcript of a lively public hearing on the project.¹⁵ Land Company officials
19 represented that they assumed the district would acquire rights to river water not presently serving
20 any public utility in order to build upon the approximately 60,000 acre-feet of water per year that had
21 historically been used by the northern area lands. The Land Company's attorney clearly stated that
22 the district would not claim a right to any water from utility canals south of the river and would not
23 interfere with southern senior entitlements. Despite vocal skepticism from the Land Company's
24

25 ¹⁴ McCutchen, Olney, Mannon & Greene letter to the Kern County Land Company, Attn: Mr.
26 Whitaker (July 17, 1929) (Ex. No. 2480).

27 ¹⁵ *Before the State Engineer of the State of California In the Matter of the Formation of the*
28 *North Kern Water Storage District*, Transcript of Proceedings (July 17, 1935) (Ex. No. 509).

1 south-side consumers, the state hearing officer concluded that the district would not deprive anyone
2 of what they owned and, if that did' occur, the consumers could have their day in court.

3 Here, there is no evidence of a dispute that gives rise to a forfeiture claim. No first point
4 water right holder claimed an increased entitlement due to lack of use by a senior right holder.
5 Indeed, to the contrary, the evidence shows that the new district was not to interfere with southern
6 entitlements and would look to other sources for its water supply. Furthermore, there is no evidence
7 indicating that any party (or even a customer) sought redress in court, as suggested by the hearing
8 officer, due to interference with a subsequent appropriator's water rights.

9 Shortly after North Kern was formed, it appears the district sought allocation of water from
10 the Bureau of Reclamation. The State responded by discussing the potential of exchanging water
11 from the Friant canal with a large percentage of unused water from Kern Island's entitlement.
12 However, the State's proposal was clearly rejected by H.A. Haehl, the Land Company's engineer,
13 as shown in Exhibit 461. This exhibit indicates Mr. Haehl's belief that Kern Island's unused water
14 was not available because junior right holders to Kern Island had recognized rights to that water.¹⁶

15 The court does not find that this exchange demonstrates a claim sufficient to show the basis
16 for forfeiture in this case. While the response by Mr. Haehl in Exhibit 461 indicates that junior
17 holders have what he believes to be "well recognized rights" to Kern Island's release water, he does
18 not contend that Kern Island's entitlement of 300 cubic feet per second had actually been reduced.
19 In other words, there is no claim that Kern Island had lost its full Shaw Decree entitlement. Instead,
20 Mr. Haehl simply acknowledged the long established rule and practice that any water released by
21 Kern Island became available to junior right holders in order of their priority.

22 More importantly, this exchange does not rise to the level of a formal claim of right by a
23 party or party predecessor to this lawsuit. Nor is there any indication that a subsequent
24 appropriator's rights had actually been interfered with, injured, or invaded by an original
25 appropriator. In sum, this is simply a letter from the district or Land Company's representative
26

27 ¹⁶H. A. Haehl letter to A. D. Edmonston (November 19, 1936) (Ex. No. 461). H.A. Haehl
28 was at this time a consulting engineer to the Kern County Land Company.

1 indicating that Kern Island's unused water was not available for exchange with water from the Friant
2 canal.

3 **G. North Kern's 1950 Project**

4 The next event is the North Kern project of 1950. The purpose of the 1950 project was to
5 develop a water supply of 200,000 acre-feet of water per year for North Kern by using North Kern
6 water, water from private canal companies, and approximately 65,000 acre-feet of release water from
7 southern canals.¹⁷

8 Although the project was to leave sufficient water for growth of southern areas, the feasibility
9 report from the State concluded that the project overstated North Kern's need for the supply and
10 understated the needs of the lands south of the river. The project acknowledged Kern Delta's Shaw
11 Decree entitlements, and the order approving the project does not include an increased Shaw Decree
12 entitlement for North Kern or any claim of right by North Kern to southern Shaw Decree
13 entitlements.

14 Thus, this project cannot serve as the basis for finding a claim, dispute or fight that gives rise
15 to a forfeiture period. Here, no party or party predecessor claimed a right to water based on nonuse
16 of a prior appropriator. The project report makes clear that the plan involves using excess flow from
17 other rights.

18 **H. 1952 Transfer of Rights to North Kern**

19 In 1952, the Land Company transferred water rights to North Kern. Here, the Land Company
20 sold certain private water rights to North Kern, however, the sale included a reservation of right to
21 water not used by North Kern.¹⁸ North Kern did not acquire southern water rights or rights to release
22 water as previously determined by the original trial judge, whose ruling remains undisturbed by
23 appeal.

24 ///

25 _____
26 ¹⁷*North Kern Water Storage District Report to the State Engineer on Feasibility of Project*
27 (August 15, 1950) (Ex. No. 57).

28 ¹⁸*Agreement for Use of Water Rights* (January 1, 1952) (Ex. No. 59).

1 Furthermore, North Kern's expert historian, Rand Herbert, acknowledged that this event does
2 not involve a claim or clash of rights and there is no evidence of any objection by any right holder
3 to this sale or of any ensuing dispute arising from the transfer.

4 I. Release Practice (1900 - 1952)

5 With respect to the time period from 1900 to 1952, the court makes the following further
6 findings:

7 In 1900 the Shaw Decree set forth an order of priority regarding the water rights of first point
8 holders when there is not sufficient water available for all. In accord with established law, Judge
9 Shaw ruled that the water was not to be wasted. Thus, the senior right holders engaged in a practice
10 and custom of releasing unused water for use by junior right holders. This practice included the
11 junior's use of the release water without exerting a formal claim of right to the water.

12 Water Code Section 1241 and its predecessor statute providing for forfeiture of water not
13 beneficially used have been in existence since prior to the turn of the century. It is abundantly clear
14 that throughout the river's history the pertinent parties were well aware of the law involving
15 forfeiture. This knowledge extended to the officials, engineers, directors, and attorneys of the Land
16 Company, its subsidiaries, the KCCWC, the individual canal companies, as well as the separate
17 public districts such as North Kern. Furthermore, state engineers and attorneys continually noted
18 the potential for conflict over water rights between original appropriators who failed to use the water
19 beneficially and junior holders who put the water to good use.

20 Despite this awareness, the parties' historical practice of depending on release water without
21 exercising a formal claim of right to the water continued until events that led to the initiation of this
22 lawsuit. Indeed, over and over again, the evidence shows that, from the turn of the century up to and
23 including recent times, the actual Shaw Decree entitlements of the canal companies were confirmed.
24 The court finds that this practice of depending on release water without exercise of a formal claim
25 of right is inescapably related to the common ownership of the individual canal companies over the
26 course of Kern River history.

1 Exhibit 881 is a letter dated July 11, 1929 from an engineer to an attorney.¹⁹ The author
2 focuses on the voluntary release and exchange custom when he states:

3
4 As long as the various canals are all under one head perhaps such a family
5 arrangement is harmless. On the other hand, unless there is specific agreement to the
6 contrary, it would seem that should at any time any of the canals come under separate
ownership, antagonistic to the Kern Island Canal Company claims could be set up by
the canals that had received water inside the Kern Island entitlement, that might
result in a curtailment of the Kern Island right.

7 In sum, the individual canal companies' historic practice of voluntary participation in a
8 program of release and exchange without loss of entitlement precludes a finding that any of the
9 events described so far are related to the clash of rights that arose between the parties in 1976, when
10 Kern Delta sought to expand its historical use after purchase of Kern Island's entitlement from the
11 Land Company's successor in interest.

12 J. 1970's Litigation

13 In September 1970, the City filed suit against the Land Company, its subsidiary canal
14 companies, and North Kern, seeking an adjudication and declaration of Kern River water rights. The
15 complaint alleged nonuse of water rights by original appropriators and sought orders providing the
16 City with ownership of the rights.²⁰

17 Although co-defendants Land Company and North Kern initially opposed the lawsuit, the
18 claim was dissolved when the City dismissed its complaint in 1975 after the parties reached an
19 agreement for the sale of Kern Island rights to Kern Delta and the Land Company's remaining rights
20 to the City.²¹ When the City dismissed the suit, it ceased to exist and does not serve as the basis for
21 a clash of rights in this case. Furthermore, the City did not possess any Kern River water rights at
22

23
24 ¹⁹Harry Barnes letter to Mr. H.T. Farmer (July 11, 1929).

25 ²⁰*Complaint for Adjudication and Declaration of Water Rights; Declaratory Relief, Quiet*
26 *Title, Injunction and Damages* (Kern County Superior Court Case No. 111404) (September 29,
1970) (Ex. No. 8139).

27 ²¹*Request for Dismissal* (Kern County Superior Court Case No. 111404) (February 3, 1975)
28 (Ex. No. 8144).

1 the time the lawsuit was filed and the first point water right holder co-defendants, who are the
2 parties' predecessors, clearly were not engaged in any type of clash over their respective rights.

3 In September 1970, the City also filed suit in eminent domain seeking water rights for public
4 interests, necessity and convenience.²² This is not a claim of entitlement based on nonuse by a party
5 or party predecessor and, therefore, does not provide for a dispute involving forfeiture. Furthermore,
6 the City dismissed its appeal of the court's entry of judgment against it causing that claim to also
7 cease to exist.²³

8 After the City and Tenneco West, Inc. ("Tenneco")²⁴ entered into a Memorandum of
9 Understanding for the sale of Tenneco's water rights to the City in July 1973, Kern Delta filed a
10 lawsuit in eminent domain²⁵ alleging that public interest and necessity required that it obtain Kern
11 Island rights.²⁶ As with the City's eminent domain lawsuit, this action did not center on a claim of
12 right based on nonuse. Also, the claim ceased to exist when Kern Delta dismissed the complaint in
13 1976.²⁷

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17

18 ²²*Complaint for Eminent Domain* (Kern County Superior Court Case No. 111405)
19 (September 29, 1970) (Ex. No. 8140).

20 ²³*Remittitur* (Court of Appeal, Fifth Appellate District Case No. 5 Civil No. 1632; Kern
21 County Superior Court Case No. 111405) (June 4, 1973) (Ex. No. 5059).

22 ²⁴Tenneco is a predecessor to the parties through its purchase of Kern River water rights and
23 facilities from the Kern County Land Company in 1967.

24 ²⁵*Complaint in Eminent Domain* (KCSC Case No. 125566) (Ex. No. 8150).

25 ²⁶The rights and facilities of the Kern Island, Buena Vista, Stine and Farmers canal
26 companies (including Kern Delta's entitlements which are the subject of the retrial) were merged to
27 form the Kern Island Water Company in 1967. These merged rights are collectively referred to as
28 the "Kern Island rights" throughout the remainder of this Statement of Decision.

²⁷*Request for Dismissal* (Ventura County Superior Case No. 58140, KCSC Case No. 125566)
(November 29, 1976) (Ex. No. 8155).

1 In April and May of 1976, the City filed several suits having to do with confirmation of the
2 Tenneco sale²⁸ and validation of the City's sale of certain rights to North Kern.²⁹ The claims in these
3 suits did not involve a claim of right based on nonuse and do not give rise to a forfeiture period.

4 **K. Clash of Rights**

5 In 1974 and 1975 the foundation for the clash of rights involved in this lawsuit was laid as
6 follows:

7 (1) North Kern made a formal claim of right to water historically unused by Kern Delta in
8 a letter dated May 7, 1975.³⁰ The letter, Exhibit 212, was sent to Kern Delta and indicated that North
9 Kern would resist any attempt by Kern Delta to increase past use, thus demonstrating a formal claim
10 of interference, injury or invasion by North Kern. North Kern additionally sent formal notice of its
11 claim of right and objection to interference to the City, as reflected in Exhibit 397.³¹

12 (2) Kern Delta made a formal objection to North Kern's claim by publishing its final
13 environmental impact report concerning sale of Kern Island rights to Kern Delta in November,
14 1975.³² The court recognizes that Exhibit 77, the environmental impact report, states that Kern Delta
15 planned on maintaining current river operations and diversions. However, the report also reflects
16 Kern Delta's intent to increase its use of the Kern Island entitlements (contrary to North Kern's
17

18 ²⁸*Complaint in Rem to Determine the Legality and Validity of That Certain Contract Between*
19 *the City of Bakersfield, City of Bakersfield Water Facilities Corporation, Tenneco West Inc., Kern*
20 *Island Water Company, and Kern River Canal and Irrigating Company* (Kern County Superior
21 Court Case No. 141050) (May 11, 1976) (Ex. No. 629).

22 ²⁹*Complaint in Rem to Determine the Legality and Validity of That Certain Contract Between*
23 *the City of Bakersfield and North Kern Water Storage District Dated May 28, 1976, Entitled*
24 *"Agreement for the Sale of Kern River Water and Canals"* (Kern County Superior Court Case No.
25 141362) (May 28, 1976) (Ex. No. 8145).

26 ³⁰Letter to Kern Delta Board of Directors, from Lee Froman, President of North Kern (May
27 7, 1975).

28 ³¹Letter to Harold Bergen, City Manager, from Lee Froman, President of North Kern (January
9, 1974).

³²*Kern Delta Water District's Final Environmental Impact Report for Acquisition of Kern*
Island Water Company (November 1975) (Ex. No. 77).

1 claim) by stating that an irrevocable environmental change would result from acquiring the Kern
2 Island rights in that the water would not be available to other canals. Thus, when the Kern Island
3 rights were sold to Kern Delta in December 1976, the fight began and the stage was set for the
4 forfeiture period.

5 There is also much evidence from this time period indicating Kern Delta's intent to increase
6 historic use of the Kern Island water rights once acquired, as reflected in the testimony of Kern
7 Delta's engineer Thomas Maddock and Director Howard Frick, and in Exhibits 194,³³ 202,³⁴ 214³⁵
8 and 218.³⁶ Exhibit 76,³⁷ an October 1975 engineering report in support of Kern Delta's application
9 to the state treasurer's office for acquisition of the Kern Island rights, also reflects Kern Delta's
10 intent to increase use. Furthermore, Kern Delta was well aware of North Kern's claim that Kern
11 Delta's rights were limited to historic use, as is shown in several memos by Mr. Maddock, including
12 Exhibits 235³⁸ and 197.³⁹ The testimony of Kern Delta's engineer Dan Schmidt, Mr. Frick and the
13 City's prior Water Director, Mr. Gene Bogart, substantiate Kern Delta's subsequent increase in use
14 of Kern Island water rights as planned and over the objection of North Kern and the City.

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17 _____
18 ³³Boyle Engineering Corporation ("Boyle") Memorandum to Bill Curtis and Lonnie Schardt
19 from Tom Maddock (July 16, 1974).

20 ³⁴Boyle memorandum to Bill Curtis and Lonnie Schardt from Tom Maddock (October 14,
21 1974).

22 ³⁵Boyle memorandum to Lonnie Schardt from Tom Maddock (July 9, 1975).

23 ³⁶Boyle memorandum to Tom Maddock from Lonnie Schardt (July 3, 1975).

24 ³⁷*Kern Delta Water District Engineering and Economic Report in Support of Application to*
25 *District's Securities Division of California State Treasurer's Office for Approval of Acquisition of*
Kern Island Water Company (October 1975).

26 ³⁸Letter to Stan Willis, President of Kern Delta, from Tom Maddock (June 20, 1974).

27 ³⁹Boyle memorandum to Bill Curtis and Lonnie Schardt from Tom Maddock (August 8,
28 1974).

1 In July 1982, North Kern prepared a CEQA petition for writ of mandamus and injunctive
2 relief restraining Kern Delta from the alleged wrongful diversion of river water.⁴⁰ North Kern sought
3 to enjoin Kern Delta's increased use of river water because it caused detriment to North Kern and
4 because Kern Delta failed to comply with CEQA project requirements. The action was never filed,
5 but was served upon Kern Delta. Subsequently, the parties entered into a series of agreements to toll
6 the lawsuit until approximately 1994.⁴¹ Thereafter, North Kern filed its complaint underlying this
7 action.

8 To conclude, the clash of rights between the parties concerning historic nonuse of the Kern
9 Island water rights did not occur until December 1976, when the water rights at issue were sold to
10 the parties in this case. Thus, the forfeiture period commences five years preceding that date.
11 Specifically, the proper five-year period for measuring Kern Delta's forfeiture is January 1, 1972
12 through December 31, 1976.

13 As a result of the ruling on the timing of the initial clash of rights, there is no need for this
14 court to consider the additional issues identified for retrial in the September 22, 2003 Order,
15 specifically:

16 "1. North Kern's entitlement to any water found (1) forfeited by Kern
17 Delta's predecessors prior to 1914, (2) appropriated by North Kern's predecessors
18 prior to 1914, (3) perfected by North Kern's predecessors by putting the water to
19 beneficial use prior to 1914, and (4) not thereafter lost at any time by prescription,
20 abandonment or forfeiture; and

21 2. North Kern's tenth cause of action for damages against Kern Delta if
22 North Kern prevailed on its claim of entitlement to any forfeited water as described
23 above."

24

25 ⁴⁰*Petition for Writ of Mandamus and Injunctive Relief Restraining Wrongful Diversion of*
26 *Water* (dated July 2, 1982) (Ex. No. 94).

27 ⁴¹The parties entered into various agreements commencing July 28, 1982 (Ex. Nos. 99, 100,
28 and 101) and continuing until June 30, 1994 (Ex. No. 131).

1 The Court of Appeal stated, at pages 43-44 of its opinion, that “in order to secure the right
2 to any water forfeited by Kern Delta, North Kern was required to prove that its claim was perfected
3 before 1914.” Because the Court of Appeal did not determine the exact period for forfeiture, it
4 instead stated that “the issue must therefore be addressed on remand, if necessary.”

5 Since this court has determined that the initial clash of rights between the parties concerning
6 the historic nonuse of the Kern Island water rights did not occur until December, 1976, Kern Delta’s
7 predecessors did not forfeit any water prior to 1914. North Kern therefore could not and did not
8 appropriate or perfect any rights to water forfeited by Kern Delta’s predecessors. Any and all claims
9 to water forfeited by Kern Delta instead “will be subject to the statutory mandates” of the California
10 Water Code (*Op.*, p.45), and must be directed to the State Water Resources Control Board
11 (“SWRBC”). *See Op.* at 43-47.

12 **II. Time-Step & Methodology**

13 This court’s decision as to time-step and forfeiture methodology must begin with the
14 appellate court’s recognition of a primary principal of forfeiture law as stated on page 32, footnote
15 34 of its opinion, “the law abhors a forfeiture and when a statute calls for the forfeiture of a
16 recognized property interest, it must be given a fair, reasonable construction in order to avoid harsh
17 results.” *See Op.* at 32, n.34.

18 **A. Time-Step**

19 In examining the doctrine of forfeiture, the appellate court held “the determination about
20 whether there has been a continuous nonuse for purposes of forfeiture (or for related doctrines of
21 abandonment and adverse possession) requires an assessment of the beneficial use for which the
22 water was appropriated. [Citations].” *See Op.* at 37. It also noted “with appropriative right[s], use
23 and nonuse are the tests of the right and must be decided upon the facts of the case.” *See id.* at 38
24 (citing *Davis v. Gale* (1867) 32 Cal. 26, 27). With respect to the present case, the court stated,
25 “[t]he record suggests the evidence would support a finding based on daily use, the actual
26 measurement under the MHA, or some other larger period of time if it can be linked to the initial
27 need and historical beneficial use.” *See id.* at 41.

1 Thus, the appellate court clearly instructed this court to determine the appropriate time step
2 based on Kern Delta's predecessors' initial need for the water and their historical beneficial use of
3 the water. However, it qualified its direction by indicating that this court could consider any factor
4 beyond the control of Kern Delta and not related to demand, such as climate and water supply. *See*
5 *Op.* at 41-42. Significantly, the appellate court held "there were many instances when Kern Delta's
6 predecessors used the full entitlement during certain months of a particular year," and "a finding of
7 forfeiture for those months in any five-year period that included one of the noted years would be
8 improper." *See Op.* at 39. The appellate court continued, "[w]hen the nature of the initial beneficial
9 use is linked to a particular time of day, a certain month, or a particular season of the year, the
10 finding of forfeiture must also be linked." *See id.* The court also stated that "[t]he MHA anticipates
11 that water use will vary from month to month and season to season. The parties concede as much
12 when they distinguish between the MHA season and the non-MHA season." *See id.* at 39, n.41.
13 "Consequently, it is possible to forfeit a right to use water for a portion of the year or a certain hour
14 of the day but not for other such periods. [Citations]." *See id.* at 39.

15 The evidence here plainly shows that Kern Delta's predecessors' initial need for water and
16 historical beneficial use was primarily for irrigation of crops. A subordinate need and use developed
17 years later involving storage of water in Lake Isabella, but ultimately the stored water was used for
18 irrigation. This court gives little weight to the fact that some of the original notices of appropriation
19 and other historical documents mention uses other than for irrigation of crops. Plainly, the
20 overwhelming evidence shows the water was to be used mainly for irrigation.

21 The testimony of Gene Bogart, past employee of KCCWC and previous supervisor of the
22 flow and diversion records, provides detail on how Kern Delta's predecessors made known their
23 need for water, the manner in which the water was delivered to them, and the procedure used for
24 recording the amount of water they used. Mr. Bogart indicated the KCCWC, a subsidiary of
25 Tenneco West, was responsible for the entire operation of providing water to first point right holders,
26 including Kern Delta's predecessors.

1 Mr. Bogart described the post-Lake Isabella procedure for order and delivery of water. First,
2 an individual consumer farmer within an individual canal service area would place an order with
3 KCCWC for a certain amount of water based on the farmer's need for the water. The farmer ordered
4 the water daily and, as stated by Mr. Bogart, "the demands of the farmers change each day."
5 Although a farmer could place a water order for up to seven days, it was not the usual practice and
6 if it did happen the canal company would confirm the farmer's need for water daily after the first two
7 or three days.

8 The KCCWC dispatcher would then total up the demands of the farmers and request release
9 of water from officials at Lake Isabella in a corresponding amount for the following day. The water
10 was released in the night and would reach the first point several hours later, where a KCCWC
11 employee measured the river flow. A ditch tender operated the canal head gates and individual
12 farmers were provided water based upon the requests they had made the previous day. The ditch
13 tender recorded the amount of water delivered and the farmer was billed accordingly.

14 On the day following the release, Isabella officials advised KCCWC how much water it had
15 actually released. At the same time, Lake Isabella officials provided information regarding inflow
16 concerning that day's estimated available supply.

17 In the event farmers ordered more water than was available, the KCCWC would evaluate the
18 orders and determine who would receive the available supply that day. Mr. Bogart indicated that the
19 farmers within the system cooperated with each other in order to make the practice work each day.
20 The KCCWC also decided when a particular canal company would place water into storage.

21 William Balch, past chief engineer-manager of the Kern County Canal and Water Company
22 indicated that, prior to construction of the Isabella Dam and Reservoir, river water was distributed
23 to the farmers on a rotation system at the direction of the KCCWC and based on the location of the
24 consumer. Essentially, each farmer would receive water one to two days a month if available and
25 if needed.

26 From 1972 to 1976, the forfeiture period, the KCCWC did not keep daily flow and diversion
27 records because KCCWC considered it busy work and not worth the effort. However, the total
28 supply available each day and the actual daily use of water by each canal company was recorded on

1 daily work sheets. In turn, this information was used to generate the monthly flow and diversion
2 records. As to documentation of water delivered, it was first allocated to a canal company's
3 entitlement, next as release water used if there was insufficient entitlement, and lastly, as a
4 withdrawal from storage if there was insufficient available release water.

5 Based on clear direction from the appellate court and the totality of the circumstances in this
6 case, the appropriate time-step is monthly for the following reasons:

7 (1) There are no daily flow and diversion records available so as to accurately
8 calculate the amount of water forfeited daily. If there were, the court would likely
9 choose a daily time step because it is persuaded that Kern Delta's predecessors initial
10 need for and beneficial use of the water is linked to particular days.

11 (2) The water was primarily used to irrigate crops. The crops were irrigated
12 (or not) on a daily basis. A farmer within a predecessor individual canal company's
13 service area placed an order for water each day the water was needed. The water was
14 delivered to the farmer on a daily basis. Even though crops were generally grown
15 seasonally, the demand for water to irrigate varied daily depending on the type of
16 crop grown, the available water supply, and the climate. North Kern's expert
17 engineer, Mr. Robert Beeby, acknowledged that the flow and diversion records
18 demonstrate that Kern Delta's release of water fluctuated over the years, through the
19 years, and between the seasons. Kern Delta's expert engineer, Mr. Dan Schmidt,
20 provided further proof that Kern Delta's use varied substantially month to month and
21 over the course of years because of hydrology, cropping, weather and snowmelt.

22 (3) The Miller-Haggin Agreement requires the water to be measured on a
23 regular basis and, as noted by the appellate court, "the parties do not dispute that
24 these measurements have been made continuously on a daily basis since the inception
25 of the MHA and are accurate." *See Op.* at 5. New information is recorded each day
26 as to the river's supply and a right holder's use. Indeed, every day is a new day on
27 the river.

1 (4) A monthly time step is the most reasonable in this case because it
2 provides for the fairest construction of the forfeiture statute and avoids harsh results.
3 Selection of a time step that encompasses more than a month will cause forfeiture of
4 water on days, months, and even seasons that Kern Delta predecessors did not fail to
5 use their full entitlement.

6 The court does not find persuasive the argument that a monthly time step is improper because
7 the total amount of water used for each of the twelve months having the highest use in the forfeiture
8 period will exceed the amount of water actually used during the single calendar year having the
9 highest actual use in the forfeiture period. While this point may be true, it is of little weight given
10 the direction of the appellate court that a finding of forfeiture for months in the five-year period when
11 the full entitlement was used would be improper.

12 Furthermore, given the wide fluctuation of the monthly supply of Kern River water, even as
13 to years having similar total average supply, it is unreasonable to expect that Kern Delta could
14 manage its entitlement based on a time step larger than monthly without experiencing harsh results,
15 such as insufficient supply for months of peak demand.

16 To conclude on this issue, the question whether Kern Delta forfeited by nonuse any part of
17 its Shaw Decree entitlements will be based upon a monthly time-step.

18 B. Methodology

19 The parties disagree on the proper method to determine forfeiture. The first dispute centers
20 on whether the forfeiture period must consist of months where supply was available. The second
21 issue concerns the definition of available water supply. The last dispute relates to the calculation of
22 the amount forfeited and Kern Delta's preserved entitlements.

23 1. Adjustment of the Five-Year Period

24 With respect to available supply and adjustment of the five-year period, the appellate court
25 stated: "therefore we believe the appropriate five-year period must be no later than the five years
26 immediately preceding 1976, although the period of measurement can be adjusted for drought years,
27 if there were any, where the nonuse is not the result of a voluntary act of the appropriator but rather
28 the result of a lack of supply." *See Op.* at 36.

1 Despite this clear direction, Kern Delta claims that the five-year period should not be
2 adjusted to include five months in which supply was available. Additionally, Kern Delta argues that
3 the Shaw Decree entitlement should remain if any month during the five-year period did not have
4 available supply because under both sides' method for determining forfeiture, the Shaw Decree
5 entitlement remains at times when it has not been fully used.

6 The court finds Kern Delta's argument unpersuasive since Kern Delta's Shaw Decree
7 entitlement remains unaffected when it has not been fully used only when the theoretical
8 entitlement,⁴² or entitlement based on available supply, has been fully used.

9 Therefore, the five-year period will be extended incrementally back in time from 1972 until
10 the period contains five months in which there was a supply of water greater than zero.

11 2. Definition of Available Water Supply

12 The second issue concerns the definition of "available water supply." The available water
13 supply is used to determine whether forfeiture is indicated based on five years of nonuse. North
14 Kern and the City contend that available water supply must be defined to include not only the
15 theoretical entitlement but also the amount of release water available for the right holders's use.
16 Kern Delta believes this definition is inaccurate and improperly generates more water available for
17 forfeiture.

18 This issue is complex and a decision is not easy as there are compelling points on both sides
19 of the argument. However, after due consideration, the court finds the weight of the evidence
20 establishes that nonuse must be considered without regard to release water for the following reasons:

21 (1) The Miller-Haggin Agreement and the Shaw Decree, which quantify the
22 parties respective entitlements, do not impose a specific obligation to use available
23 release water. As stated above, the Shaw Decree states an order of priority when
24 there is not sufficient water for all and an order that water is not to be wasted. Thus,
25

26 ⁴²ⁱ"Theoretical entitlement," as used herein, refers to the amount of water recorded for a given
27 diversion right under the "Entitlement" or "Gross Entitlement" column of the Kern River First Point
28 Flow and Diversion record. This is to be distinguished from the "Shaw Decree entitlement," which
refers to the amount of water of a given diversion right assuming its maximum flow rate is
continuously available at its specific river stage.

1 the senior right holders engaged in a historic custom and practice, as required by law,
2 of releasing unused water for use by juniors. This practice included a junior's use of
3 release water without exerting a formal claim of right to the senior's entitlement
4 when supply was insufficient to satisfy the junior's entitlement and the junior desired
5 water. Likewise, if a junior had no demand for excess water and chose not to use the
6 release water, the water became available for the next junior, as required by the Shaw
7 Decree. And, the record evidence shows that use by the subsequent junior was
8 without formal claim of right to the prior junior's Shaw Decree entitlement.

9 (2) The flow and diversion records that document available daily supply and
10 use, and used continuously by the parties since the Miller-Haggin Agreement, do not
11 record release water as a part of a right holder's entitlement. Release water is
12 categorized separately from entitlement and shown as water given to or taken from
13 the river. Actual use of water is reflected as entitlement plus or minus release.

14 (3) At the time a junior right holder orders water, the amount of release water
15 available, if any, is unknown. Whether or not release water even exists depends
16 entirely on the use of a senior holders's rights.

17 In this regard, as previously noted, until December 1976 the majority of the
18 individual canal companies were under one head, the KCCWC, and even though
19 North Kern was a separate entity, the KCCWC was under contract to provide
20 essential services to North Kern. Historically, all of the consumer farmers of the
21 various canal companies requested water for any given day at about the same time
22 by placing an order with KCCWC. At the time the order was placed, the availability
23 of release water was wholly dependent on the subsequent water consumption of a
24 senior right holder and a junior only became aware of the extent of available release
25 water after delivery. It is this aspect that troubles the court most, as basic principles
26 of due process demand that prior to the loss of a right, knowledge of the right is
27 essential.

1 (4) In this case using release water to determine whether forfeiture is
2 indicated could cause the same body of water to be forfeited more than once.

3 (5) If release water is used to determine available water supply, a right
4 holder's Shaw Decree entitlement is subject to forfeiture despite the fact the holder
5 may have used all of its theoretical entitlement or had no theoretical entitlement and
6 chose not to use available release water.

7 In sum, the decision to include release water as available water supply must be examined in
8 light of the mandate that the forfeiture statute be given a fair and reasonable construction in order
9 to avoid harsh results. Based upon the law of the Kern River and the complex, intertwined
10 circumstances of this case, the weight of the evidence supports a finding that release water will not
11 be used to determine forfeiture.

12 3. Amount Forfeited & Preserved Entitlements

13 The final dispute concerns calculation of the amount forfeited.

14 All parties agree that the preserved entitlement is Kern Delta's highest use during the
15 forfeiture period.

16 Kern Delta introduced evidence, through Exhibit 10015, demonstrating the highest use of the
17 Kern Delta rights in the January 1, 1972 through December 31, 1976 time period for the months
18 where there is forfeiture. This evidence establishes that Kern Delta forfeited a portion of its Kern
19 Island 1st right in the months of January, October, November and December. North Kern introduced
20 additional evidence, consistent with the above findings, that established forfeiture also occurred for
21 Kern Delta's Farmers right in the month of August.

22 In each month where Kern Delta has forfeited a portion of its entitlement, the amount
23 forfeited is the difference between Kern Delta's preserved entitlement and the Shaw Decree
24 entitlement.

25 Although this methodology arguably would lead to forfeiture of water that was not always
26 available to Kern Delta, it is consistent with a finding that no forfeiture occurs where Kern Delta has
27 used all of the theoretical entitlement, but less than the Shaw Decree entitlement. Furthermore, it
28 is axiomatic that the preserved entitlement and the amount forfeited must equal the Shaw Decree

1 entitlement. Thus, if available supply during the forfeiture period is taken into consideration and the
2 amount forfeited is calculated by utilizing the percentage of the theoretical entitlement not used and
3 applying that percentage to the Shaw Decree entitlement, the preserved entitlement will inevitably
4 be greater than Kern Delta's highest use of the water. This would be contrary to the appellate court's
5 holding that forfeiture "represents the difference between the highest use in the five-year period and
6 the full entitlement. [Citations]." *See Op.* at 38.

7 **III. Conclusion**

8 Based upon the five-year period of January 1, 1972 through December 31, 1976, and further
9 based upon a monthly measurement (time-step), the evidence shows that Kern Delta's preserved
10 entitlements are as indicated in Exhibit 10015. As set forth in Exhibit 10015, for the Kern Island
11 1st right, the preserved entitlement for the month of January is 8,493 acre feet (af), for October is
12 6,989 af, for November is 3,375 af, and for December is 2,050 af. In addition, as demonstrated
13 through evidence submitted by North Kern, the preserved entitlement for the Farmers right for the
14 month of August is 610 af.

15 The preserved entitlements are monthly caps imposed upon Kern Delta's Shaw Decree
16 entitlements. In other words, Kern Delta's rights will continue to be allocated on a daily basis, in
17 accordance with the dates of priority and flow rates found in the Shaw Decree, but Kern Delta's total
18 diversions for a given month in which forfeiture is indicated may not exceed the quantities listed
19 above as the preserved entitlement for such month.

20 In each month where a preserved entitlement is shown, the amount forfeited is the difference
21 between the preserved entitlement and the Shaw Decree entitlement. In all instances where no
22 preserved entitlement is shown, the amount forfeited is zero.

23 ///

24 ///

1 As demonstrated through Exhibit 10015, Kern Delta has forfeited rights in the amounts listed
2 below. This represents the total quantity of water above Kern Delta's preserved entitlements in the
3 months where forfeiture is indicated, and the maximum Shaw Decree entitlement, as indicated:

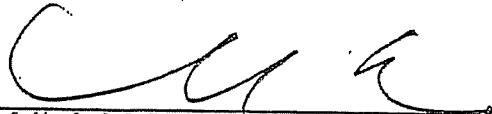
	Preserved Entitlement (af)	Shaw Decree Entitlement (af)	Quantity Forfeited (af)
4 Kern Island 1st, January	8,493	18,446	9,953
5 Kern Island 1st, October	6,989	18,446	11,457
6 Kern Island 1st, November	3,375	17,851	14,476
7 Kern Island 1st, December	2,050	18,446	16,396
8 Farmers, August	610	9,223	8,613

9 Consistent with the appellate court opinion, all water forfeited by Kern Delta reverts to the
10 "public" and is available for appropriation through the "permit procedures" of the California Water
11 Code, specifically Section 1241. *See Op.* at 46.

12 Because North Kern has failed to prove its entitlement to the forfeited water, North Kern's
13 tenth cause of action for damages is moot.

14 Date

2.9.05

15 
16
17 Melinda M. Reed, Judge of the Superior Court

CLERK'S CERTIFICATE OF MAILING (CCP SECTION 1013a(4))

I certify that I am not a party to this action.

The Judgment and Statement of Decision, filed February 9, 2005
Exact Title of Document

was mailed first class, in a sealed envelope, postage prepaid, to the parties at the addresses shown. The mailing and this certification occurred at the place and on the date shown.

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Dated: February 9, 2005 at Visalia, California.

LARAYNE CLEEK, CLERK OF THE
SUPERIOR COURT, COUNTY OF TULARE

By Lisa Harmon
Deputy Clerk



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Alan C. Lloyd, Ph.D.
 Agency Secretary

Arnold Schwarzenegger
 Governor

MAY 26 2005

To: Enclosed Mailing List

APPLICATIONS AND PETITION FOR PARTIAL ASSIGNMENT OF STATE FILING TO APPROPRIATE WATER FROM THE KERN RIVER IN KERN COUNTY

The State Water Resources Control Board's (State Water Board) Division of Water Rights (Division) records show that the following applications to appropriate water from the Kern River and a petition for partial assignment of State Filed Application 005642 under section 10500 et. seq. of the California Water Code were filed with the State Water Board.

Application No.	Applicant	Amount (afa)	Date Filed
X000264a	City of Bakersfield	100,000	10/10/96
X0002903a	Kern Delta Water District	280,000	03/29/99
X002907a	North Kern Water Storage District	90,000+	03/31/99
X002915	West Kern Water District	10,000	04/15/99
X002946	Buena Vista Water Storage District	90,000	05/17/99
X002957a	Kern Water Bank Authority	87,000	06/09/99
X002981	Kern-Tulare Water District	10,000	07/19/99
X002982	Rag Gulch Water District	10,000	07/19/99
X002996	Arvin Edison Water Storage District	100,000	08/05/99
X002999	Berrenda Mesa Water District	45,000	08/23/99
SFA005642aa	Arvin Edison Water Storage District	100,000	08/05/99
^a Petition filed requesting a change to the Declaration of Fully Appropriated Stream designation for the Kern River ^{aa} Petition to revise the Declaration of Fully Appropriated Stream designation for the Kern River not required.			

On October 8, 1999, the Division advised the applicants that because the State Water Board had declared the Kern River System to be fully appropriated, the subject applications could not be accepted for processing. The Division also advised the applicants that prior to accepting and processing the subject applications, a hearing must be held to revise the State Water Board's Declaration of Fully Appropriated Streams (declaration) in response to petitions submitted to modify the declaration.

MAY 26 2005

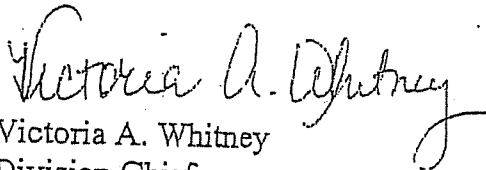
The applications and petitions listed above were submitted as a result of pending litigation relating to water rights on the Kern River. (*North Kern Water Storage District v. Kern Delta Water District et al.* Case 96-172919.) The parties who submitted the applications relied on the Superior Court's action as the basis for revising the State Water Board's declaration. Accordingly, because the Superior Court's decision was subsequently appealed by several of the parties, the Division finally advised the parties in 1999 that the State Water Board would defer any action on all subject applications and the petition for partial assignment of SFA005642 until resolution of the ongoing litigation.

Approximately six years have passed since the subject applications and petitions were filed with the State Water Board. Information made available to the Division regarding the current status of the ongoing litigation indicates that on January 31, 2003, the Fifth Appellate Court issued an opinion reversing the Superior Court's judgment and remanding this litigation for retrial. The retrial commenced on August 30, 2004. Further, on February 9, 2005, the Tulare County Superior Court entered a new judgment that has since been appealed by North Kern Water Storage District, with other parties possibly cross-appealing. At this time, there are no estimates as to when this new appellate process will be completed and whether a further retrial will be ordered.

Consequently, because no grounds currently exist for revising the State Water Board's Declaration of Fully Appropriated Streams related to the Kern River System, the Division will reject the submitted applications and petitions without prejudice. The parties may re-file their applications and petitions upon resolution of the ongoing litigation, and if the Superior Court's initial decision regarding the availability of unappropriated water is ultimately upheld.

If you have any questions, please contact Ernest Mona of my staff at (916) 341-5359 or at emona@waterboards.ca.gov.

Sincerely,



Victoria A. Whitney
Division Chief

Enclosure

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DUANE MORRIS

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LEXSEE 147 CALAPP4TH 555

NORTH KERN WATER STORAGE DISTRICT, Plaintiff, Cross-defendant and Appellant, v. KERN DELTA WATER DISTRICT, Defendant, Cross-complainant, and Appellant; CITY OF BAKERSFIELD, Cross-complainant, Cross-defendant and Respondent.

F047706

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

147 Cal. App. 4th 555; 54 Cal. Rptr. 3d 578; 2007 Cal. App. LEXIS 156; 2007 Daily Journal DAR 1694

February 5, 2007, Filed

SUBSEQUENT HISTORY: Review denied by *N. Kern Water Storage Dist. v. Kern*, 2007 Cal. LEXIS 4227 (Cal., Apr. 25, 2007)

PRIOR HISTORY: [***1] Superior Court of Tulare County, No. 96-172919, Melinda Myrle Reed, Judge.

North Kern Water Storage Dist. v. Kern Delta Water Dist., 146 Cal. App. 4th 424, 52 Cal. Rptr. 3d 839, 2007 Cal. App. LEXIS 2 (Cal. App. 5th Dist., 2007)

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

On retrial of a dispute among two water districts and a city, the trial court declared a forfeiture of certain previously appropriated waters of a river. The trial court, in establishing the forfeiture period, determined that the relevant measurement period would be monthly. (Superior Court of Tulare County, No. 96-172919, Melinda Myrle Reed, Judge.)

The Court of Appeal affirmed the judgment as modified to declare the extent of forfeiture of certain appropriative rights. The court noted that daily records did not exist for the relevant period. The trial court's choice of a monthly measurement period for forfeiture of a primary right was reasonable and did not prejudice the junior appropriator because each increase in the measurement period resulted in greater forfeiture through the effects of averaging. Regarding forfeiture of junior rights, the court stated that the actual entitlement of a junior appropriator had to include all water in the river to which it had a right of access, including release water actually available to it. The trial court erred by failing to include release water in calculating the maximum quantity beneficially used within the meaning of *Cal. Const., art. X, § 2*, and

Wat. Code, § 1241. The trial court also erred in finding that the forfeiture created unappropriated water subject to appropriation. Equitable estoppel was not available as a defense because it would contravene the important public policy of beneficial use and because an assertion of detrimental reliance was precluded by the law of the case. (Opinion by Vartabedian, Acting P. J., with Gomes and Hill, JJ., concurring.) [*556]

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) **Waters § 74--Loss and Condemnation of Rights--Nonuse and Forfeiture--Claim to Water.**--Until there is a formal claim to water, use is permissive. After such a claim to the water, a failure to object by the senior appropriator may well work an abandonment or commence a period of adverse possession but, in the absence of an objection (whether verbal or by the act of using the disputed water), there is no clash of rights sufficient to permit establishment of a forfeiture.

(2) **Waters § 74--Loss and Condemnation of Rights--Nonuse and Forfeiture--Measurement Period.**--If water storage were limitless and costless, seasonal measurement might provide the fairest structure for determining forfeiture. However, under actual conditions, measurement across an entire season will inevitably result in a greater forfeiture than measurement across a shorter period. Forfeiture is generally disfavored in the law. In particular, in the water rights context, forfeiture is neither punitive (such as civil forfeiture arising from criminal conduct) nor does it reflect any breach or default by a party to a contract. In the water rights context, the rights holder is subject to forfeiture for not using water, a prac-

tice generally thought to be socially responsible and usually called conservation. Thus, forfeiture occurs not because the rights holder is misusing the resource but, instead, so the state can assign the water right to someone who will use it. As a result of these considerations, since no measure of forfeiture is exact, minimization of forfeiture is preferable to maximization: if there must be an error, it should occur in the direction of preserving to the senior appropriator a sufficient water entitlement to accomplish the purpose for which the appropriator continues to beneficially use the water.

(3) Waters § 74--Loss and Condemnation of Rights--Nonuse and Forfeiture--Measurement Period.--Daily records of water use did not exist for the relevant period to determine whether a forfeiture of water rights had occurred. As a result, the trial court was forced to substitute the next-shortest measurement period for which there were records, namely, calendar months. Not only was this choice reasonable, it did not prejudice a junior appropriator because an increase in the measurement period resulted in greater forfeiture through the effects of averaging. Because selection of a daily period was fully supported by the evidence, [*557] the junior appropriator was not prejudiced by substitution of a longer period that worked to its advantage.

[12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 954; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191.]

(4) Waters § 37--Appropriation--Scope and Extent of Right--Reasonable and Beneficial Use.--The fundamental consideration as to the nature of ownership of water rights is set forth in *Cal. Const., art. X, § 2*. Pursuant to that section, the extent of a water right is the reasonable and beneficial use of water diverted. The section provides that it is self-executing but the Legislature may also enact laws in the furtherance of the policy in this section contained. *Wat. Code, § 1241*, constitutes one way in which the Legislature has implemented the constitutional requirement that the extent of a water right is the reasonable and beneficial use of water pursuant to the right. In essence, § 1241 provides that the extent of reasonable and beneficial use, when there is another claimant to the water, is the maximum use during the five-year period immediately prior to the assertion of the rival claim. Thus, the California Constitution and the California Water Code mandate a forfeiture analysis that reflects the actual, historical use of water.

(5) Waters § 38--Appropriation--Priorities Between Appropriators--Actual Entitlement of Junior Appropriator.--As a matter of law, the actual entitlement of a junior appropriator must include all water in the river to

which it has a right of access, including release water actually available to it.

(6) Waters § 74--Loss and Condemnation of Rights--Nonuse and Forfeiture--Unexercised Portion of Historical Paper Entitlement.--In circumstances where the historical beneficial use was not constrained by the actual availability of water to divert, a paper entitlement has ceased to function as the limit on the rightholder's use of water; the paper entitlement is merely a historical artifact. Instead, the rightholder's need for and ability to beneficially use water during the forfeiture period has resulted in a new level of maximum use. In effect, the law of forfeiture serves to redefine a paper entitlement based on the same measure that established the right in the first instance, namely, the historical beneficial use. But under the law of forfeiture, the historical beneficial use becomes the highest use during the five-year history encompassed in the forfeiture period when such use was not constrained by the actual availability of water to divert. What is forfeited is the unexercised portion of the historical paper entitlement; what is left to the rightholder is a new paper entitlement established in a more recent historical period.

[*558]

(7) Estoppel and Waiver § 6--Estoppel--Equitable Estoppel--Against Governmental Entity.--As a general matter, equitable estoppel will not be invoked against a governmental entity to contravene specific constitutional or statutory limitations.

(8) Estoppel and Waiver § 7--Equitable Estoppel--Elements--Detrimental Reliance.--Any version of equitable estoppel requires the party asserting the defense to show that it acted to its detriment in reliance on the words or conduct of the opposing party.

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Virginia A. Gennaro, City Attorney; Duane Morris, Colin L. Pearce and Matthew K. Kliszewski for Cross-complainant, Cross-defendant and Respondent.

JUDGES: Vartabedian, Acting P. J., with Gomes and Hill, JJ., concurring.

OPINION BY: Vartabedian

OPINION:

[**580] **VARTABEDIAN, Acting P. J.**—North Kern Water Storage District (North Kern) appeals and Kern Delta Water District (Delta) cross-appeals from a judgment entered on retrial, after we reversed a prior judgment. The present judgment declared a forfeiture of certain previously appropriated waters of the Kern River. Plaintiff and appellant North Kern contends that the trial court erred in selecting the timeframes [***2] against which to measure nonuse of the water, that the court should have measured differently the nonuse of water by junior water rights holders, that the court erroneously precluded North Kern from asserting that senior rights holders' use of water was unreasonable, and that the court should have awarded the forfeited water to North Kern instead of declaring it available for appropriation through the statutory permit procedure. Defendant and appellant Delta contends the court erred in precluding its defense of estoppel and in measuring the forfeiture against Delta's full appropriation even when the river had insufficient water to provide the full appropriation. Respondent City of Bakersfield (Bakersfield), holder of rights [*559] junior to some of Delta's rights and senior to some of North Kern's rights, generally supports the judgment entered on retrial.

As we will explain, we modify the judgment and affirm the judgment as modified.

I. Facts and Procedural History

This matter was before us in *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (Jan. 31, 2003, F033370) (*North Kern Water Storage Dist.*) and a complete statement of the facts is contained in the unpublished opinion in that case, filed January 31, 2003. We will not repeat the facts here in that level of [***3] detail. [**581]

A. Summary of Legal Principles from Prior Opinion

The parties use water from the Kern River pursuant to rights originally established in the late 19th century. As with all water rights in California, exercise of the right is conditioned on reasonable use of the water for a beneficial purpose. (See *Cal. Const., art. X, § 2.*) In other words, the owner of the right to a quantity of water or to the flow of water (for example, for power generation) is not entitled to waste water or to use it unreasonably. (*City of Barstow v. Mojave Water Agency* (2000) 23

Cal.4th 1224, 1241-1242 [99 Cal. Rptr. 2d 294, 5 P.3d 853].) The owner of a common law right n1 to appropriate water from a natural watercourse, such as the Kern River, has the right to change the purpose and place of use of the water, so long as any change does not injure others with rights in the watercourse. (See *Wat. Code, § 1706.*) (We refer to this as the no-injury rule. (See Slater, *Cal. Water Law and Policy* (1995) § 10.02, p. 10-8.)) Common law appropriative rights are freely transferable, subject to the no-injury rule and to the reasonable and beneficial use requirement applicable to all water rights. [***4] (*Id.*, § 2.18, p. 2-77.)

n1 A procedure for establishment and regulation of rights to appropriate water was adopted in the Water Commission Act (now incorporated, as amended, in the Water Code), which became effective in 1914. (See *Wat. Code, § 1225.*) Our discussion in the present case concerns only pre-1914 water rights. (See generally Hutchins, *The California Law of Water Rights* (1956) p. 86 et seq.)

Water rights are a form of property and, as such, are subject to establishment and loss pursuant to the doctrines of prescription, adverse possession, and abandonment. (See *Smith v. Hawkins* (1895) 110 Cal. 122, 126 [42 P. 453].) In addition, however, due to the scarcity of water generally in California, its societal importance, and the peculiar nature of common and multiple rights to water from the same watercourse, the courts have recognized that water rights may be forfeited through nonuse under certain circumstances. (*Id. at p. 127.*) [**560]

Forfeiture of the right [***5] to appropriate water from a natural watercourse can be established through a quiet title or declaratory judgment action brought by one with a conflicting claim to the unused water, such as the owner of a junior right to use water from the same watercourse. In the present case, as relevant here, North Kern sued to establish that Delta had forfeited the portion of its appropriative right that exceeded Delta's historical use of the water.

A forfeiture may be of an entire water right, or the forfeiture may be limited to a portion of the water right or to a portion of the year, or both. (See *Smith v. Hawkins* (1898) 120 Cal. 86, 88 [52 P. 139].) In order to establish a forfeiture, the plaintiff must prove that the defendant failed to use some portion of its water entitlement continuously over a span of five years immediately prior to the plaintiff's assertion of its conflicting right to the water. A portion of our remand in this case directed the trial court to determine the beginning and ending

dates of this five-year period. (We will refer to the relevant five-year period as the forfeiture period.)

B. *The Forfeiture Methodology Established in the Prior Opinion*

Once it determined [***6] the forfeiture period, the trial court was directed to select the relevant increment of time in which to measure use and nonuse. (We will refer to the relevant period as the measurement [**582] period; the parties refer to this period as the "time-step.")

In our prior opinion we held that the measurement period must be based on the nature of the original appropriation and the historical beneficial use. (*North Kern Water Storage Dist.*, *supra*, F033370.) Use during each measurement period, whether a month, day, growing season, or otherwise, is then to be compared across the forfeiture period. The amount forfeited, if any, is the difference between the highest use in any period within the span and the overall entitlement to water established by the appropriation, subject to certain refinements and limitations we will discuss in detail below. (*Ibid.*) For example, if the trial court selected a monthly period of measurement and the defendant's highest use of water in any February during the five-year span was 85 units of an initial appropriation of 100 units, a forfeiture of the right to divert 15 units of February water would be required. (*Ibid.*) n2

n2 Our prior opinion sometimes describes forfeiture in terms of the appropriative right lost, as in our example in the text, and sometimes in terms of forfeiture of all rights in excess of the amount beneficially used. (*North Kern Water Storage Dist.*, *supra*, F033370.) For reasons we will discuss, *post*, we believe this latter description is more useful and less confusing. Thus, in the example in the text, forfeiture would be of any right to divert more than 85 units.

[***7] [*561]

In the last part of the 19th century, there were many users with claims on the waters of the Kern River. Delta, Bakersfield, and North Kern each has purchased several of the separate appropriative rights. The individual rights owned by, for example, Delta have not merged into one another but continue to be measured separately, and each right has a distinct set of customers to whom Delta sells water. When we refer to water use or exercise of a right by one of the parties, we include its predecessor in interest at that particular point in time.

Pursuant to common law, appropriative rights are afforded priority based on the date of their establishment. The appropriation that was first in time therefore had first priority to that quantity of water, and the priority of subsequent appropriators was similarly established. When the flow of the river is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water; in other words, there is no mandatory proration of water among appropriators when, as is often the case, river flow is insufficient to fully satisfy all appropriations. (See *City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at p. 1241.) [***8]

Delta is the owner of four separate appropriative rights that are involved in the present appeal. Delta's primary appropriation, known as Kern Island 1st (hereafter, Kern Island), is the most senior appropriative right on the Kern River and consists of a right to divert 300 cubic feet per second (cfs) of river water. n3 Kern Island [**583] is senior to Bakersfield's appropriative rights and to those owned by North Kern.

n3 For purposes of this litigation, Delta has the right to the first 300 cfs of the river--that is, until the flow exceeds 300 cfs, no other appropriator has the right to divert water. In reality, however, there are other rights and claims to the Kern River that modify this right. For example, there is mention in the testimony that certain power generators have claims to the flow of the river and that in some circumstances this right to power their turbines impacts and reduces Delta's right to divert 300 cfs even when the natural flow exceeds that amount. Similarly, there appear to be evaporation and seepage amounts that must be satisfied before Delta is entitled to its full 300 cfs. Our recitation of facts is not intended to describe the parties' relationships with nonparty river users.

[***9] C. *"Paper" and "Theoretical" Entitlements*

As a result of litigation among certain Kern River water users, a declaratory judgment was entered in 1901, known as the Shaw Decree, which formalized the existing common law rights. (See *North Kern Water Storage Dist.*, *supra*, F033370.) That decree memorialized each appropriator's right in terms of cfs, a figure referred to as the appropriator's "paper entitlement." In addition, the decree established that at each particular stage of the river (that [*562] is, the flow of the river in its natural channel), measured daily at a fixed point, each junior

appropriator was entitled to all, some, or none of the water for which it had appropriative rights, a figure referred to as an appropriator's "theoretical entitlement." Thus, under the Shaw Decree, an appropriator with, for example, a 100 cfs paper entitlement might have only an 85 cfs theoretical entitlement when the river stage is 512 cfs, but a 100 cfs theoretical entitlement if the river stage is 527 cfs or greater.

In addition to paper and theoretical entitlements, an appropriator is entitled to divert water if a senior appropriator does not claim its entire allocation that [***10] day. When an appropriator has not diverted its entire theoretical entitlement on a given day, the excess water is "released to the river." In that case, the next most senior appropriator is entitled to divert released water to, in effect, augment the stage or natural flow of the river; the junior appropriator then may divert water for which it has no theoretical entitlement, up to the full paper entitlement of that user. Any release water not claimed by a more senior user becomes available to the next junior user in the same manner until the water supply is exhausted.

D. *The Judgment of the Trial Court*

1. *Introduction.*

This appeal primarily involves North Kern's claim that Delta has forfeited all or a portion of its appropriative rights through nonuse. After the original trial to the court, judgment was entered in favor of North Kern. We reversed the initial judgment and remanded the matter for retrial pursuant to guidelines established in our unpublished opinion.

After preliminary hearings and briefing, the trial court entered an extensive order designating issues for retrial and excluding other issues from the retrial. The court designated as the primary issues [***11] whether Delta forfeited any part of its entitlement, based on an appropriate methodology adopted pursuant to the guidelines in the prior opinion; North Kern's entitlement to any such water forfeited; and North Kern's claim for damages if Delta had been using forfeited water that belonged to North Kern. The trial court precluded retrial of all defenses to forfeiture except actual use pursuant to an appropriate methodology and, in particular, precluded Delta's proffered defense of equitable estoppel. The court precluded retrial of North Kern's constitutionally based cause of action for "unreasonable use" of water by Delta. Finally, the court precluded Bakersfield from asserting any claim to water found to have been forfeited.

On the primary issue of forfeiture, the focus of the case changed somewhat at the retrial. In addition to its challenge to Delta's Kern Island right, which [*563] had been the primary focus of the initial trial and our prior opinion, North Kern also asserted a new theory of the measure of forfeiture directed to Delta's junior rights. North Kern, in essence, contended release [**584] water was to be treated as ordinary river water subject to forfeiture by Delta's junior rights [***12] if not used by Delta when such release water became available to it. n4 Delta argued that this forfeiture methodology would be unfair because in most instances a senior rights holder would have already forfeited the release water and North Kern's methodology would result in the "same water" being forfeited repeatedly and cumulatively, resulting in forfeiture of water that did not exist. Delta contended forfeiture could occur only from nonuse of a holder's theoretical entitlement, regardless of the water actually available to that rights holder.

n4 There is no issue of forfeiture of rights owned by Bakersfield or North Kern. Accordingly, for the purposes of our discussion, we will disregard release water from rights owned by those parties.

2. *Determination of Forfeiture Period and Measurement Period.*

After a lengthy trial, the trial court issued a statement of decision establishing the forfeiture period. It determined that the period would comprise the years 1972 through and including 1976. The court [***13] also determined that the relevant measurement period would be monthly.

3. *Resolution of Kern Island Issues.*

With respect to the Kern Island appropriation, the trial court found a forfeiture in four months, applying the following reasoning: The Kern Island appropriation had a paper entitlement to any flow of the river up to 300 cfs per month. (For a month with 31 days, for example, this is equivalent to 18,446 acre-feet for the month.) The trial court reviewed the parties' compilations of diversion data to first exclude any month during the forfeiture period in which Delta used all of the Kern Island water available to it, on the basis that forfeiture can arise only from nonuse of available water. Then the court determined that during the forfeiture period Delta's greatest diversion of

water (in those months in which it did not use all water available to it) was as follows:

January	8,493 acre-feet
October	6,989 acre-feet
November	3,375 acre-feet
December	2,050 acre-feet

The trial court then determined the maximum amount of entitlement for each month based on Delta's right to 300 cfs (for example, 18,446 acre-feet [*564] per month for the 31-day months [***14] of Jan., Oct., & Dec.). Finally, the court subtracted the greatest amount diverted in any of the five Januaries, for example, in the

forfeiture period, from the monthly entitlement. The result was the amount forfeited from Delta's Kern Island right for all future Januaries. The trial court concluded Delta had forfeited from its Kern Island right the following amounts for the designated months:

January	9,953 acre-feet
October	11,457 acre-feet
November	14,476 acre-feet
December	16,396 acre-feet

Thus, the court concluded Delta had not forfeited any of its primary water rights for the months of February through September, but had suffered substantial forfeiture in January and October through December of each year. In reaching this result, the trial court resolved issues identified and discussed in our prior opinion, and there were only a few matters about which the parties disagreed.

4. Resolution of Junior Appropriation Issues.

When the court turned to possible forfeiture of rights from Delta's junior appropriations, it became apparent to the parties and to the court that there were serious [**585] methodological issues as to the junior rights [***15] that had not been fully resolved in the prior appeal. Our earlier opinion provided general guidance about the law of forfeiture but, with respect to the junior rights issues, the trial court and the parties were required to apply that general guidance to factual issues not fully discussed in the first appeal.

There were two critical differences between the Kern Island right and the junior rights. These differences arose from the fact that for most relevant months the flow of the river was such that the Kern Island paper entitlement equaled its theoretical entitlement, and both entitlements were the same as the volume of physical water actually available to Delta for diversion. Thus, for

the Kern Island right, the concept of nonuse involved a straightforward comparison between Delta's actual diversion of water and the maximum entitlement reflected in the Shaw Decree.

The first critical difference for the junior rights is that for virtually every relevant month the theoretical entitlement for Delta's junior rights was less (and usually far less) than the paper entitlement for that right. (Stated differently, the river usually was at a stage insufficient to satisfy all appropriated [***16] claims.) As a result, the question arose as to the entitlement against which actual use is measured to determine nonuse. [*565]

The second critical difference for the junior rights concerns the availability of release water. It will be recalled that for each stage (that is, level of measured flow), each rights holder has a theoretical entitlement. The theoretical entitlement at a given stage of flow does not change, regardless of what senior appropriators divert or do not divert. The amount of water available to a junior appropriator on a given day, however, may be greater than its theoretical entitlement if senior appropriators do not divert all water available to them. As we have seen, for Kern Island the issue is simply whether Delta did or did not use the full paper entitlement, which is almost always available to it. For junior rights, the paper entitlement is seldom available, and the theoretical entitlement is often zero, but water released by senior rights holders is frequently available, often in significant quantities. As a result, the question arose on remand

whether the nonuse of available "release" water constitutes nonuse for forfeiture purposes.

After trial and extensive [***17] argument by counsel, the court determined there would be no nonuse (and, therefore, no forfeiture) where a particular junior right had a theoretical entitlement of zero for a given month. Further, where release water was actually taken under a junior right and that right had a zero theoretical entitlement, available release water not actually claimed under the junior right (that is, released to the river by the junior right holder) would not be considered unused water subject to forfeiture by the junior right holder. Employing this methodology, the trial court determined there was no forfeiture from any of the junior appropriative rights owned by Delta, with one exception: the court found a forfeiture of 8,613 acre-feet for the month of August from the Farmers Canal Company right.

5. Disposition of "Forfeited Water."

North Kern claimed that forfeited water should be awarded to it. Instead, the trial court declared that all of the forfeited water "reverts to the 'public' and is available for appropriation through the 'permit procedures' of the California Water Code, specifically *Section 1241*."

E. This Appeal

North Kern filed a timely appeal and Delta cross-appealed. [***18] [**586]

II. Discussion

A. North Kern's Appeal

1. The Forfeiture Period.

North Kern contends the trial court selected an inappropriate forfeiture period. In our earlier opinion, we stated that "the period selected must bear a [*566] direct temporal relationship to the time [North Kern's] contrary claim [to the water] was made." (*North Kern Water Storage Dist., supra*, F033337.) We stated: "[T]he appropriate five-year period must be no later than the five years immediately preceding 1976" (*Ibid.*) By footnote, we added: "We do not define the exact period of measure-

ment but leave that for the trial court because we recognize there are other issues and evidence relevant to selecting the appropriate time period. Both parties represent that there were tolling agreements and earlier suits and objections arising from the clash of rights. These may well play a role in selecting the appropriate [forfeiture period]." (*Ibid.*)

In resolving this issue at the new trial, the court gleaned from our earlier opinion a requirement that the "contrary claim" (also referred to as a "clash of rights") "must consist of: (1) a formal claim by a party to the lawsuit (or its [***19] predecessor in interest) providing notice to a prior appropriator that the claimant has a right to the prior appropriator's entitlement based on nonuse by the prior appropriator and that the subsequent appropriator's water rights have been interfered with, injured, or invaded by the original appropriator, and (2) an objection by the original appropriator to the subsequent claim of right." North Kern objects to imposition of these requirements, contending that "the trial court was unable to cite any statute, case law or ruling from the Opinion directing it to apply this 'test.' "

(1) The trial court's requirements follow logically from our prior opinion: Until there is a formal claim to the water, use is permissive. (*North Kern Water Storage Dist., supra*, F033370.) After such a claim to the water, a failure to object by the senior appropriator may well work an abandonment or commence a period of adverse possession but, in the absence of an objection (whether verbal or by the act of using the disputed water), there is no clash of rights sufficient to permit establishment of a forfeiture. n5

n5 In addition to its contention discussed in the text, North Kern also contends by means of footnote in its brief that the trial court erred in using the forfeiture standards of *Water Code section 1241* instead of the more general requirement of *Water Code section 1240* that an "appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases." The issue of the applicability of *Water Code section 1241* was conclusively resolved against North Kern in our prior opinion and is not now open to a different resolution. (See *North Kern Water Storage Dist., supra*, F033370 ["The controlling law of forfeiture, for both pre- and post-191[4] rights, is *section 1241* and the interpretive case law".])

[***20]

North Kern contends, however, that we acknowledged the apparent "ambiguity of the existing authorities on the subject" of the starting date for measuring the five-year period of nonuse and, accordingly, we could not have directed the trial court to use a formal claim-and-objection requirement. North Kern relies on an Idaho decision recognizing that mere use by a junior [*567] appropriator can begin the period of measurement for forfeiture purposes. (See *Sagewillow v. Idaho Dept. of Water Res.* (2003) 138 Idaho 831, 839 [70 P.3d 669, 677].) The rule adopted by the *Sagewillow* court, that mere beneficial use of water by a junior appropriator constitutes a "claim of right" to the water, directly conflicts with this court's prior holding that such use is permissive and [**587] does not constitute a claim of right. (See *North Kern Water Storage Dist.*, *supra*, F033370.) Accordingly, North Kern's present argument is barred by the doctrine of law of the case. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491 [20 Cal. Rptr. 3d 890, 100 P.3d 433].)

North Kern next contends the trial court should have used a five-year measurement period beginning with 1971 and continuing through 1975. Instead, the court used [***21] a period beginning in 1972 and continuing through 1976. North Kern's position is based on language in our previous opinion that stated: "Therefore, we believe the appropriate five-year period must be no later than the five years immediately preceding 1976." (*North Kern Water Storage Dist.*, *supra*, F033370.)

We conclude the trial court properly interpreted our holding in light of the evidence presented in the retrial. Although there was preliminary sparring between the parties as early as May of 1975 (when North Kern objected to Delta's proposal to increase its usage), at that time Delta did not own the water rights in question and was merely negotiating and preparing for purchase of those rights. It is clear that there was a "clash" between the parties in 1975, but it was not a clash of rights, since Delta had no rights at that time: Delta did not buy its water rights until December of 1976. At that time, but not before, the clash became a "clash of rights."

North Kern suggests no reason why we would have, or the trial court should have, ignored the final year before there was a clash of rights, namely, January through December of 1976. Our directive, in essence, was to measure water use in the five consecutive [***22] years prior to the occurrence of the clash of rights or, as we phrased the matter elsewhere in the opinion, "the five-year span before the 1976 claim" We did not determine precisely when that clash of rights occurred, but we agree with the trial court that it occurred on December 23, 1976, when Delta's purchase of the water rights became final. It was, therefore, reasonable and correct to include 1976 in the five-year measurement period. Ac-

cordingly, the forfeiture period for all of Delta's rights, senior and junior, was correctly established as 1972 through 1976.

2. The Measurement Period.

a. *Why the measurement period matters.*

North Kern contends the trial court should have used two measurement periods per year, the irrigation season and the nonirrigation season. As our [*568] prior opinion showed, and as the trial court noted, the choice of a measurement period affects the overall level of forfeiture since the amount of forfeiture is the appropriator's entitlement less the highest actual use in any of the five years. If a daily measurement is used, as North Kern points out, forfeiture is based on a worst-case scenario for each May 1, for each May 2, and so forth, [***23] even though the hottest May 1 is in 1974 and the hottest May 2 is in 1972. The result is a preserved entitlement higher than the amount Delta actually used in any given May.

Yet, as Delta argues, if a monthly measurement is used, there is a greater likelihood that the need on a particular May 1 will exceed the average daily use in the May of highest overall use during the five-year period. And if a seasonal measurement is used, it is virtually certain that daily usage during the hottest weeks of the season will exceed the average usage for the whole season. (See *North Kern Water Storage Dist.*, *supra*, F033370.)

The evidence showed that the parties to this litigation, and their predecessors, have always accepted orders from their irrigation customers on a daily basis. To know [**588] how much water it can sell each day from its right to 300 cfs, Delta must know how many acre-feet per day its right will produce. n6 (It turns out this is about 595 acre-feet per day and, based on a 365-day year, 217,191 acre-feet per year. See <http://www.western-water.com/CFS_formulas.htm> [as of Feb. 5, 2007].) This amount, 595 acre-feet, is the maximum amount of water available to Delta each day pursuant to its primary right.

n6 The water right that became Delta's primary and senior right was originally established in the amount of 300 cfs. At some later point, the common measurement for water became acre-feet, that is, the volume of water required to cover one acre in one foot of water. This measurement

is of a fixed volume of water, with no element of entitlement through time from a flowing or recurring source. Therefore, in order to quantify in acre-feet a right to 300 cfs, one must first assign a time period, whether a second, an hour, a day, or longer, for which to measure the flow.

[***24]

Water need on a given day for an agricultural irrigation customer is based on a number of factors. Based on such factors as temperature, rainfall, and type of crop and stage of growth, the farmer can estimate irrigation needs for the next day and place an order with the irrigation district.

Irrigation water suppliers usually receive orders from agricultural customers a day in advance, although they will sometimes accept orders covering a two- or three-day period. The supplier must then look at its total of daily orders and determine which orders can be filled, based on the water likely to [*569] be available the next day. n7 In the case of Delta's primary right, if the total of daily orders is less than 595 acre-feet, assuming the flow of the Kern River is at least 300 cfs on that day, Delta is able to fill all orders. If current orders total less than 595 acre-feet, Delta, historically, has released any surplus water for use by junior appropriators.

n7 The stage of the river varies from day to day and throughout each night and day based on such factors as storms in the watershed or the temperature changes during the period. River stage is measured and recorded in real time, but flow for the next day or for a longer period is only an estimate.

[***25]

The composite of the needs of each company's customers is likely to be different on, e.g., the first day of May in each of the five years in which forfeiture is to be measured. Similarly, the average of such need for water for each separate month of May in the forfeiture period is likely to differ from each other month, since each May will be warmer or colder and wetter or dryer than any other May in the period. And customer demand for the growing season is likely to differ from year to year across the forfeiture period, based not only on weather for each season, but upon crop choices informed by market factors and the district's forecast for availability of water that year.

The parties recognize, and we demonstrated by use of various examples in our prior opinion, that as the period of measurement increases, there is likely to be less fluctuation over the five-year forfeiture period. Thus,

Delta's use at 11:37 a.m. on each May 1 is likely to vary more from year to year because the gate operators got to work early or late, had an extra meeting, or had a cup of coffee before they went out to open a gate--one year they may have opened a particular gate at 11:39 or 11:15 a.m., thereby affecting [***26] the total use of water at 11:37 a.m.

By contrast, these considerations become less important if use is measured for an entire day, since changes in routine are subsumed by getting the day's work done, even if one May 1 is hotter or cooler than another. Similarly, measured by month, daily temperature fluctuations are tempered [**589] through averaging. Measuring season to season, even the effects of a cooler than usual month will be moderated. Annual measurement would further temper the effects of an early start to a particular growing season or of a late harvest in a particular year. As noted above, if the amount of water right forfeited is determined on a monthly average, there is a greater likelihood the need on any particular day in the month will be above the amount of the unforfeited average. If nonuse is determined on a daily basis, however, a hypothetical year will be composed only of high-use days and will preserve a volume of water use that is much greater than the amount actually used in any real year. [*570]

The negative effects arising from any measurement period, of course, reflect the simple fact that the river is not a mathematical abstraction that can be averaged; the river is a specific [***27] depth at each particular moment and water not used at the moment it reaches a canal gate is never available for use there again.

In the early days of irrigation in California, there was no significant ability to store large volumes of water as it flowed down from the Sierra Nevada. An appropriator whose needs were reduced on a particularly cool or rainy May 1 had no ability to save the water for use on a hot day in June. An appropriator had no right to roll-over its allocation or otherwise defer exercise of today's right of appropriation until tomorrow's need for water; the unused water was "released to the river" for immediate use by junior appropriators.

Accordingly, in terms of the law of water rights, water use was not averaged. An appropriator entitled to 300 cfs could take no more than that at any instant in time; it could not take 600 cfs for half as long on a particular day, because junior appropriators and other downstream users are entitled at any given moment to any flow over 300 cfs. However, because of variations in natural flow over the course of a day, releases are not precise. Notwithstanding the structure of water use prescribed by legal doctrines, as a practical [***28] matter appropriators make up lost use or overuse within informal limits;

use by each appropriator is reconciled by the watermaster over the course of several days, so that shortages or overages from one day will be made up within a few days. Thus, practical necessity results in some averaging of measured use, but not to a sufficient extent to consistently make up for subaverage use on, e.g., May 5, with higher than average use on May 25. The selection of a measurement period therefore continues to affect the resulting finding of forfeiture.

After the construction of storage reservoirs in the first half of the 20th century--in the present case, the Lake Isabella reservoir--appropriators had an increased ability to defer use of water. Depending on its available capacity in a reservoir, an appropriator could "release to storage" some or all of its unused, e.g., May 1 entitlement for later sale to its customers when demand exceeded its entitlement on that hypothetical hot day in June. (When the stored water is released to customers, it is not part of the river's natural flow and does not count toward the appropriator's current allocation of river water.)

If storage capacity were [***29] limitless and free of cost, the problem with averaging use over the measurement period largely would disappear. An "average" year's volume of water could be distributed over the warmer and cooler months as needed, and water not needed in cooler, wetter years could be preserved. [*571]

Appropriators are required to pay for storage of water in Lake Isabella, and Delta's storage capability is relatively [**590] small. Consequently, it would not serve Delta's interest to attempt to store water that is not likely to be used relatively soon. The evidence in this case shows that Delta continued to release water to the river even after the construction of Lake Isabella.

The ability to store water lessens the effects of the choice of the period for measurement of use. However, to the extent appropriators continue to release water to the river, which the evidence shows to still be an extensive practice, the selection of a measurement period continues to affect the resulting finding of forfeiture for the same reasons existing before storage reservoirs became available.

b. "Initial need and historical beneficial use."

As we have already stated, it appears from the record that, as a historical practice, [***30] the parties have used a daily measurement of entitlement. However, it also appears from the evidence that, at least during the forfeiture period, the parties did not retain the records of use for each day but, instead, consolidated those daily

records into monthly reports, which were preserved as the official records of the parties.

This court directed the trial court on remand to determine a measurement period based on evidence of "the initial need and historical beneficial use" of Delta's primary appropriative right. (*North Kern Water Storage Dist.*, *supra*, F033370.) Further, "[w]hen the nature of the initial beneficial use is linked to a particular time of day, a certain month, or a particular season of the year, the finding of forfeiture must also be thus linked." (*Ibid.*)

It is undisputed that the initial need and historical beneficial use of water from the Kern River was agricultural. And it is not disputed that agricultural use in the areas served by the parties is primarily seasonal. Finally, it is agreed that, since at least 1888, water was allocated among the various appropriators pursuant to a different formula during the growing season, as defined to include specified months each year, [***31] and during the nongrowing season, through a mechanism known as the Miller-Haggin agreement.

North Kern asserts that all of these considerations require as a matter of law the selection of a seasonal measurement period. It contends the trial court erred in adopting a monthly measurement period.

c. Examination of the trial court's "monthly measurement" reasoning.

(2) If water storage were limitless and costless, seasonal measurement might provide the fairest structure for determining forfeiture. As we have [*572] explained at some length, however, under actual conditions, measurement across an entire season will inevitably result in a greater forfeiture than measurement across a shorter period.

Forfeiture, as the trial court observed, is generally disfavored in the law. In particular, in the present context, forfeiture is neither punitive (such as civil forfeiture arising from criminal conduct) nor does it reflect any breach or default by a party to a contract.

In the water rights context, the rights holder is subject to forfeiture for *not using* water, a practice generally thought to be socially responsible and usually called "conservation." Thus, forfeiture occurs not because the [***32] rights holder is misusing the resource but, instead, so the state can assign the water right to someone who will use it. As a result of these considerations, we agree with the trial court's conclusion that, since no measure of forfeiture is exact, minimization of forfeiture is preferable [**591] to maximization. If there must be an error, it should occur in the direction of preserving to

the senior appropriator a sufficient water entitlement to accomplish the purpose for which the appropriator continues to beneficially use the water.

The trial court weighed the evidence concerning the historical and beneficial use of Delta's water right and determined that a daily measurement period would best protect Delta's entitlement to a volume of water sufficient to meet historical uses. That is, the court impliedly concluded daily measurement would preserve an entitlement to enough water to fulfill orders for, e.g., the highest-use May 1 in the five-year forfeiture period and, thus, it was less likely the orders for water on any future May 1 would exceed that demand. Impliedly (but clearly, nonetheless), the trial court concluded that the fact that many, or even most, years the requirements on May [***33] 1 would be less than the peak demand, was sufficiently counterbalanced by the need to deem forfeited only the amount of water Delta had not ever used. This determination is supported by the evidence.

The trial court also found, however, that accurate daily records did not exist for the forfeiture period. It found as a fact that the parties maintained monthly records as part of their historical beneficial use of water for irrigation. Accordingly, the court weighed the parties' historical practice as a consideration in determining the measurement period that fairly measured the potential forfeiture. The court adopted the monthly measure as providing the closest available basis for evaluating the parties' actual daily use of water. That determination, too, is supported by the evidence.

d. North Kern's objections.

North Kern contends the court erred in selecting a daily use measurement as theoretically most appropriate (that is, appropriate except for the absence [*573] of records sufficient to implement that choice) because the initial need for water, pattern of use of the water, and historical beneficial use of the water was for seasonal irrigation. According to North Kern, evidence [***34] of "the current mechanics and frequency of water ordering and record keeping ... is irrelevant to the *pattern* of *initial need* and *beneficial use*" of the water.

One primary reason this court did not itself select a measurement period in our earlier opinion is that such concepts as "pattern of initial need" and "historical beneficial use" are concepts with broader and narrower meanings, more than one of which is valid. For example, the pattern of initial need could validly be viewed as the seasonal use necessary to bring a crop to maturity. But the pattern of initial need could equally validly be viewed as the daily need for water to sustain the growth of the crop

until the next water becomes available. In this case, the evidence showed that irrigators determined need on a daily basis, even though that resulted in seasonal patterns of use. Ample evidence supports the trial court's conclusion that daily measurement reflected the historical pattern of beneficial use of Kern River water. n8

n8 North Kern also contends the seasonal measurement period would have been "appropriate" and would "more accurately" reflect historical usage. Even if this were true, and for reasons in the text we do not believe it to be true, our task on substantial evidence review is to determine whether the finder of fact's conclusion is supported by the evidence, not to determine whether a different conclusion also would be supported by the evidence. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)

[***35]

[**592] (3) It is true that daily records do not exist for the relevant period. As a result, the trial court was forced to substitute the next shortest measurement period for which there are records, namely, calendar months. Not only was this choice reasonable, it did not prejudice North Kern; as shown above, each increase in the measurement period results in greater forfeiture through the effects of averaging. Because selection of a daily period was fully supported by the evidence, North Kern is not prejudiced by substitution of a longer period that works to its advantage.

3. Forfeiture of Junior Appropriative Rights.

The next issue presented by North Kern involves a calculation that was not overtly addressed in our previous opinion. Once again, it will be useful to pause for additional practical background before addressing, or even setting forth, North Kern's legal claim.

a. Junior rights were not discussed in the prior opinion.

Delta and North Kern each owns multiple, separate water rights. Each right has, apparently for historical reasons, different customers for water taken [*574] pursuant to that right. Records for both allocation and actual use are maintained for each [***36] right separately. In

our prior opinion, we stated that "it is clear the parties are primarily fighting over the Kern Island rights, which have first priority and provide the measure for all [relevant] rights." (*North Kern Water Dist., supra*, F033370.) Accordingly, our prior opinion discussed the issues arising from claims that Delta had forfeited Kern Island rights.

Nevertheless, we noted in a modification of the opinion that the discussion was applicable to junior rights as well. The opinion recognized that Delta had an entitlement to more water than was available under the Kern Island right. That right resulted in a paper entitlement to 217,187 acre-feet per year. Our prior opinion reported Delta's average consolidated entitlement as 250,277 acre-feet per year. Therefore, Delta had an average of about 33,000 acre-feet per year as a result of its junior appropriations, the equivalent of 45.5 cfs. On remand, the nature and use of this water from junior ap-

propriations became an issue. Accordingly, we will need to describe the manner in which the junior appropriations are allocated water on a daily basis.

b. Entitlements of Junior Appropriators.

In addition to the paper entitlement, the [***37] appropriative rights also have a "theoretical entitlement" at each stage of river flow. To calculate Delta's theoretical entitlement for a given day for the Kern Island right and each of Delta's junior rights, one must determine the daily flow of the river, then allocate that flow down the chain of junior rights until the flow is exhausted or until all claims are filled. A hypothetical example will demonstrate this concept and provide a basis for our further discussion.

Rights in order of seniority	Paper entitlement	TABLE 1		
		Theoretical entitlement at river flow of 350 cfs	Theoretical entitlement at river flow of 550 cfs	Theoretical entitlement at river flow of 850 cfs
Right A	300 cfs	300 cfs	300 cfs	300 cfs
Right B	80 cfs	50 cfs	80 cfs	80 cfs
Right C	120 cfs	0	120 cfs	120 cfs
Right D	20 cfs	0	20 cfs	20 cfs
Right E	150 cfs	0	30 cfs	150 cfs
Right F	150 cfs	0	0	150 cfs
Total for all rights	820 cfs	350 cfs	550 cfs	820 cfs

[*575] [**593]

c. The additional problems presented by junior rights.

The primary focus of the parties' dispute about forfeiture of the junior rights arises from the substantial [***38] difference between the theoretical entitlement of a junior user and the volume of water actually available to that user on a given day. To continue with our example based on the foregoing table, assume that in a year of 350 cfs average flow, an owner used 200 cfs of its Right A entitlement. Right B has a theoretical entitlement to 50 cfs at that stage of river flow. But because Right A has released to the river 100 cfs of its entitlement, there is sufficient water physically in the river from which Right B could satisfy and, as the next most senior right, is entitled to satisfy its full claim of 80 cfs.

That much is relatively straightforward. But the matter becomes more complicated with each successive junior right. Right C, as shown in the table, had a theoretical entitlement of zero at the 350 cfs stage of river flow. Nevertheless, Right C is entitled to all water left over from Rights A and B, up to its full paper entitlement. If we assume for purposes of this example that Right B used only 25 cfs and released the remainder to the river, there would be 125 cfs (Right A's 100 cfs and Right B's unused 25 cfs) of unclaimed water in the river. Right C would have an actual entitlement [***39] to its full 120 cfs, even though its theoretical entitlement at this river stage is zero.

Right D, also with a theoretical entitlement of zero at the 350 cfs stage, would have at least 5 cfs available to it, and more if Right C did not use its entire paper entitlement of 120 cfs. We could continue our examples through all of the junior rights, but it is clear that if more

senior rights do not claim the available release water, then even Right F could have water actually available to it at the 350 cfs stage, even though it does not have any theoretical entitlement until the river stage reaches 671 cfs.

In our example, and in actuality, junior users have no right to demand that senior users release water to the river but, once the water is released by senior users, each successive junior user has the right to released water up to its maximum paper entitlement.

The point of the foregoing discussion is that in the prior appeal we did not establish a specific methodology for forfeiture of *junior* appropriations. As can be seen from the foregoing discussion, the fact patterns are varied and complex; the legal issues have not been decided by any cases we or the parties have discovered. [***40] Those issues are the subject of North Kern's next contentions on appeal. [*576]

d. *Junior appropriators have an "actual entitlement" to available release water.*

North Kern contends the trial court should have considered all water available to each junior appropriator as its "actual entitlement," up to the amount of its paper entitlement. Thus, it contends the trial court should have included an appropriator's theoretical entitlement at a particular daily stage of flow as well as any [**594] water released by a senior appropriator that is available to the junior appropriator. It bases this contention on the simple proposition that the junior appropriator was "actually entitled" to water in the combined amount, and if the appropriator is actually entitled to the water, it is fair to measure its "actual entitlement" on the basis of the water actually available to it. It asserts this methodology is in accord with our directive that "what is forfeited is what is actually not used for the entire statutory five-year period" (*North Kern Water Storage Dist., supra*, F033370.)

The trial court concluded, and Delta contends on appeal, that release water cannot form the basis for measurement of actual entitlement because [***41] the amount of such release cannot be known in advance of the day of use. The trial court concluded: "[B]asic principles of due process demand that prior to the loss of a right, knowledge of the right is essential." n9

n9 Kern Delta also contends release water should not be subject to forfeiture because the watermaster accounts for this water separately, designating the theoretical entitlement as "entitlement" water and any order in excess of that as

"release" water. We reject this contention: even though separately designated, all water diverted is subject to a particular right's paper entitlement. Thus, a rightholder is not entitled to take unlimited water just because it is designated "release" water. For purposes of the right to take water, release water is simply a part of the current flow of the river.

We agree with North Kern's position and conclude the trial court erred in this regard. The trial court's conclusion would permit a windfall for Delta's junior rights; its conclusion fails the essential requirement [***42] that water rights forfeited through nonuse "must be calculated by reference to the maximum quantity beneficially used" during the forfeiture period. (*North Kern Water Storage Dist., supra*, F033370.) Several considerations inform our decision.

i. *Constitutional limitations on ownership of water rights.*

(4) The fundamental consideration is the nature of ownership of water rights under *article X, section 2, of the California Constitution*. Pursuant to that section, the extent of a water right is the reasonable and beneficial use of water diverted. (*City of Barstow v. Mojave Water Agency, supra*, 23 Cal.4th at p. 1241.)

The section provides that it is self-executing but "the Legislature may also enact laws in the furtherance of the policy in this section contained." (*Cal. [*577] Const., art. X, § 2.*) *Section 1241 of the Water Code* constitutes one way in which the Legislature has implemented the constitutional requirement that the extent of a water right is the reasonable and beneficial use of water pursuant to the right. n10 In essence, *section 1241* provides that the extent of reasonable and beneficial use, when there is another claimant to the water, is the maximum use during [***43] the five-year period immediately prior to the assertion of the rival claim.

n10 In the context of forfeiture claims, *section 1241 of the Water Code* provides express delimitation of the extent of reasonable and beneficial use. Accordingly, we reject North Kern's contention that the trial court erred in prohibiting North Kern from litigating reasonable and beneficial use in the abstract as a separate ground for forfeiture. North Kern contends it was entitled to prove that Delta's use of water in excess of its historical maximum use was unreasonable under the constitutional provision. As we discuss more

fully, *post*, the inquiry in a forfeiture proceeding is exactly the same as that proposed by North Kern, except that the statute limits the concept of "historical maximum use" to use in the five years prior to the clash of rights between rival water claimants.

[**595] Thus, the California Constitution and the Water Code mandate a forfeiture analysis that reflects the actual, historical use of water.

ii. *The evidence in this case.* [***44]

The general considerations set out in the previous part are reflected in four specific aspects of the evidence; all four lead us to the conclusion that Delta's use of available release water must be considered in determining the issue of forfeiture.

First, unlike the full-season availability of water under the Kern Island right, "the other rights are at best a partial supply and are highly variable, and in no circumstance or very rarely would they have supply available during an entire growing season," according to Marvin Dan Schmidt, Delta's designated expert on usage of Kern River water rights. As a result, he testified, farmers served by the junior rights do not primarily rely on river water for irrigation; these farmers own their own wells and "more or less" supplement that irrigation water with river water. We conclude, therefore, that for the junior rights the "beneficial use for which the water was appropriated" (*North Kern Water Dist., supra*, F033370) did not depend upon predictable availability of water but, instead, the beneficial use was as supplemental water, useful despite its unpredictability.

Second, the testimony established that, when customers of a particular right ordered more [***45] water than was available on a given day, those orders were filled the next day or were filled from supplies of stored water. As a result, the uncertainty of the exact amount of release water available on a given day did not present a structural obstacle to use of release water to fully satisfy the [*578] beneficial needs of the customers of the junior appropriators. In other words, over the course of the forfeiture period, nothing prevented the junior appropriators from using all the water they beneficially could, and the maximum amount of actual use during a measurement period establishes the base against which forfeiture is to be determined.

Third, during the entire forfeiture period, significant quantities of release water were regularly available. Therefore, there was an element of predictability not only from year to year, but also from day to day, that

release water was likely to be available for use by the junior appropriators. Given the historical record, it is not correct to assert that junior appropriators and their customers did not know they had water available; both had access to a reasonable estimate of water available for several days in advance and, based on historical trends, [***46] had available an estimate of availability for the season that, if not precise, was far more than a blind guess. Further, according to the testimony at trial, Delta filled all orders from its junior rights customers whenever it had them, even if the theoretical entitlement was zero.

Finally, Delta's expert testified that, using the no-release-water methodology, the minimal level of forfeiture calculated for Delta's junior appropriations would permit those junior rights to divert, in essence, their entire paper entitlements, to the extent natural flow *or release water* was available. The witness testified he was aware of plans Delta had made for future use of additional river water for groundwater recharge purposes, thereby increasing use of the junior rights over historical levels.

(5) For these reasons, we conclude as a matter of law that the actual entitlement of a junior appropriator must include all water in the river to which it has a right of access, including release water actually [**596] available to it. n11 The next question, given this conclusion, is: what is the amount forfeited? On this the parties also disagree.

n11 As noted above, "storage" water is not considered part of the flow of the river for forfeiture purposes.

[***47]

e. *The amount forfeited from junior appropriative rights.*

Delta argues that North Kern's proposed methodology not only forfeits water that did not exist, but that it also forfeits the same water repeatedly. A further example will help clarify Delta's claim that North Kern's methodology would result in multiple forfeiture of the same water. We will assume all the rights in Table 1 are owned by the same entity and assume a river stage of 300 cfs. If the owner takes 200 cfs pursuant to Right A, it would forfeit the 100 cfs of Right A's release. If the owner then takes 25 cfs pursuant to [*579] Right B, it would forfeit 55 cfs of the same water when it releases Right B surplus to the river, according to Delta's interpretation of North Kern's position. Then Right C would forfeit any of the physically present 75 cfs that it failed to

use, even though that is the "same" water already forfeited by Rights A and B. One hundred cfs of actual, unused water would, in this view, produce a forfeiture of up to 230 cfs (assuming Right C diverted no water). Delta contends this methodology must be wrong, because it cannot forfeit water that is not actually in the river.

North Kern, by contrast, [***48] views the forfeiture as being not of water itself but of the right to divert water. Thus, in our example of a 300 cfs river flow, the owner (by using 200 cfs) can forfeit the right to divert 100 cfs under Right A, 55 cfs under Right B (by using 25 cfs of the release water), and 70 cfs under Right C (if it diverted 5 cfs under this right), but these are three separate and not cumulative forfeitures. Thus, each right forfeits its right to use water from the same 100 cfs flow of the river, but the forfeitures are sequential; each right is exercised in turn with respect to water actually available to it, and it is the failure to fully exercise each right to the available water that is the cause of forfeiture.

Delta also contends North Kern's methodology, in addition to forfeiting the same water repeatedly, results in forfeiture of water that was never actually available to the rightholder. As an example of Delta's argument, assume Right A took 250 cfs when the river flow is at 350 cfs; then Right B took 25 cfs from the remaining 100 cfs, leaving 75 cfs of physical water; and then Right C took 5 cfs of this water, leaving 70 cfs for junior appropriators. In Delta's view, North Kern's methodology [***49] would result in a forfeiture of 115 cfs from Right C (that is, its paper entitlement of 120 cfs less the 5 cfs it used). Delta argues that this is the equivalent of forfeiting 40 cfs of water that never existed, since Right C forfeits 115 cfs when only 75 cfs were ever available to it. North Kern, by contrast, explains that even though Right C never had available to it the full 120 cfs of its paper entitlement, it never used even the lesser quantity that was physically available. Because supply was not the limiting factor, in its view, Right C must forfeit its entire right in excess of what it actually used during the forfeiture period.

North Kern's methodology, in our view, correctly applies the law of water rights forfeiture, even though, at first glance, that methodology seems harsh and counter-intuitive. [**597] Upon close examination, it is neither.

The problem with Delta's approach to this issue is that it views the forfeiture as being of physical water, which it is not. The forfeiture is of the right to divert water in excess of each appropriator's highest beneficial use during the forfeiture period. [*580]

(6) The highest level of beneficial use, historically, established the limit of an appropriator's [***50] original claim, memorialized in this case as the Shaw Decree

paper entitlement. In circumstances like those in the foregoing examples, however, the paper entitlement has ceased to function as the limit on the right holder's use of water; the paper entitlement is merely a historical artifact. Instead, the right holder's need for and ability to beneficially use water during the forfeiture period has resulted in a new level of maximum use. In effect, the law of forfeiture serves to *redefine* a paper entitlement based on the same measure that established the right in the first instance, namely, the "historical beneficial use." (*North Kern Water Storage Dist.*, *supra*, F033370.) But under the law of forfeiture, the "historical beneficial use" becomes the highest use during the five-year history encompassed in the forfeiture period when, as in our examples, such use was not constrained by the actual availability of water to divert. n12 What is forfeited is the unexercised portion of the historical paper entitlement; what is left to the rightholder is a new paper entitlement established in a more recent historical period. n13 In this sense, it does not matter whether an appropriative right was initially established [***51] at 200 cfs or 20 cfs; what matters is how much the rightholder beneficially used during the historical period specified by the forfeiture statute.

n12 As pointed out in our prior opinion, this availability constraint may arise from climatic conditions (causing senior appropriators to use more, and release less, water) or from drought conditions that reduce the volume of water released by senior appropriators.

n13 That is why there is no forfeiture when an appropriator has used its full paper entitlement at any time during the forfeiture period: the appropriator's original "historical beneficial use" is the same as the beneficial use established in the statutory "historical" period and its paper entitlement therefore remains the same. (*North Kern Water Storage Dist.*, *supra*, F033370.)

Forfeiture, then, is not forfeiture of water itself, as Delta suggests; as a result, there is neither double forfeiture of the same water nor forfeiture of water that does not exist, as Delta contends. Instead, what is forfeited is the right to appropriate [***52] water in excess of historical beneficial use as reflected in the forfeiture period. n14

n14 For clarity, when redetermining forfeiture in accordance with the principles we have set out, the judgment should express the resulting forfeiture, if any, in terms of forfeiture of "all

right to divert water in excess of X cfs," and not forfeiture of "the right to divert [paper entitlement minus X]." Thus, the conclusion in the trial court's statement of decision that Delta forfeited 9,953 acre-feet of water for each January from the Kern Island right does not clearly state the court's underlying, and correct, conclusion that Delta has forfeited the right to divert water in excess of 8,493 acre-feet in any January under the Kern Island right.

10,681 acre-feet. Arguably, this was the type of anomaly we identified in the prior opinion (*North Kern Water Storage Dist.*, *supra*, F033370) that would have permitted the trial court to select a different five-year forfeiture period that did not include what was, apparently, a drought year. In the totality of the forfeiture analysis for the Kern Island right, however, this one anomalous month was not highly significant, since Delta had, when water was available, used at least 13,465 acre-feet in September.

[***54]

f. *The forfeiture of junior appropriative rights.*

As noted above, and as extensively discussed in the prior opinion, the basis for forfeiture of a water right is the failure, in whole or in part, to exercise that right over the course of the forfeiture period. Thus, with [***53] respect to the [*581] Kern Island right, we stated that in months in which the right was fully exercised--that is, actual use equaled theoretical entitlement-- [***598] there could be no forfeiture of rights for that month. (*North Kern Water Storage Dist.*, *supra*, F033370.) n15

The same limitation on forfeiture applies to the junior rights: if Delta used all water available to a particular junior right in any of the five years of the forfeiture period, there is no forfeiture for that month. Because in many months the amount of water available to a junior right was quite small in relationship to that right's paper entitlement, use of even a small quantity of water in a month could result in a determination of nonforfeiture for that right for that month. North Kern submitted evidence, the correctness of which Delta and Bakersfield acknowledge on appeal, that established there was no forfeiture for the nine months of the year for the Buena Vista (1st) and Farmers rights, and for eight months of the year for the Stine right.

n15 In the case of the Kern Island right, the consequences of this limitation were not particularly dramatic. In months in which the determination of nonforfeiture was based on use of the full theoretical entitlement (not the paper entitlement) the net result of the declaration of nonforfeiture was that the full paper entitlement was preserved to Delta, even though it had never used the full paper entitlement (nor, based on water supply, had it had the opportunity to do so). But in seven of the eight months in which there was no forfeiture, highest use--that is, the fully used theoretical entitlement--was either equal to the paper entitlement or within 95 percent of the paper entitlement.

We adopt this determination of nonforfeiture because it seems inexorably to follow from the present state of the law and the law of the case, but we do so with significant reservations. We demonstrate the basis for our reservations with an example. According to the evidence, the Stine right has a paper entitlement of 9,223 acre-feet for January. In widely scattered years, the flow of the river has been sufficient to provide Stine with a [***55] theoretical entitlement of over 6,000 acre-feet and release water in some years has provided up to 1,600 acre-feet. Between 1961 and 1982, the greatest amount of water used by the Stine right was in the years 1982 (1,913 acre-feet), 1978 (2,350 [*582] acre-feet), and 1967 (1,753 acre-feet). Those usages constituted 61, 66, and 20 percent, respectively, of the water available to the Stine right for those months.

In one nonforfeiture month, September, there was an anomaly: even though Delta used significantly less than the theoretical entitlement in four years of the forfeiture period (which otherwise would have resulted in forfeiture), there was a very dry year in 1972. Instead of the approximately 17,000 acre-feet available to the Kern Island right in the other four years (of which it had used, at most, 13,465 acre-feet), in September of 1972 the Kern Island theoretical entitlement was only 10,681 acre-feet. Delta used that entire entitlement. As a result, however, the entire September paper entitlement of 17,851 acre-feet was retained by Delta based on the actual use of only

In the Januaries of 1972 through 1975, the Stine right used no more than .2 percent of the water available to it. But in 1976, when Stine had zero theoretical entitlement, it used the entire 16 acre-feet of release water available to it. Had it not been for 1976, Stine would have forfeited the right to use anything more than nine acre-feet. Phrased in the terms used by our prior opinion, Delta would have forfeited 9,214 acre-feet from the Stine right for January. As a result of its use of 16 acre-feet, however, it preserves not just its highest historical use of 2,350 acre-feet but, instead, its entire paper entitlement

of 9,223 acre-feet. That, nevertheless, seems [**599] to us to be the state of the law: forfeiture can only arise from continued nonuse of available water across the five-year [***56] forfeiture period. And if there is no forfeiture there is no basis for reducing the paper entitlement.

North Kern also introduced evidence that calculated the forfeiture for the remaining months for those rights pursuant to the same methodology we have adopted, *ante*. Delta and Bakersfield also acknowledge that those calculations are correct under the methodology we have adopted, and both urge us to modify the judgment in accordance with that evidence instead of remanding the matter for further proceedings. We will do so and, hopefully, bring this 30-year disagreement among the parties to a close.

North Kern's evidence, which will be the basis of the modified judgment, shows the following forfeitures:

Buena Vista (1st): For the month of January, entitlement is limited to 347 acre-feet; for November, entitlement is limited to 236 acre-feet; and for December, entitlement is limited to 191 acre-feet. For the months February through October, there is no forfeiture and the paper entitlement remains as specified in the Shaw Decree.

Stine: For the month of September, entitlement is limited to 583 acre-feet; for October, entitlement is limited to 1,380 acre-feet; for November, entitlement [***57] is limited to 22 acre-feet; and for December, entitlement is limited to 12 acre-feet. For the months of January through August, there is no forfeiture and the paper entitlement remains as specified in the Shaw Decree.

Farmers: For the month of August, entitlement is limited to 610 acre-feet; for September, entitlement is limited to 268 acre-feet; and for December, entitlement is limited to 207 acre-feet. For the months of January through July, October, and November, there is no forfeiture and the paper entitlement remains as specified in the Shaw Decree. [*583]

4. What Happens to the "Forfeited Water"?

North Kern's final contention on appeal is that the trial court erred in concluding that "all water forfeited by Kern Delta reverts to the 'public' and is available for appropriation through the 'permit procedures' of the California Water Code, specifically *Section 1241*." Once again, we largely agree with North Kern's position; once again, the problem seems to arise from viewing "water" as being forfeited when, in reality, the right to appropriate water is what is forfeited. (See *State of California v.*

*Superior Court (2000) 78 Cal.App.4th 1019, 1023-1033 [93 Cal. Rptr. 2d 276] [extensive [***58] discussion of physical "ownership" of water versus "ownership" of right to use and regulate use of water].) n16*

n16 In the present case, we reemphasize, all of the contending water rights are pre-1914 common law appropriative rights. The discussion that follows in the text is limited to such rights. We express no opinion concerning the ability of the State Water Resources Control Board (SWRCB) to reorder seniority of entitlements after forfeiture of statutory (i.e., post-1914) appropriative rights. (Cf. Slater, *Cal. Water Law and Policy*, *supra*, § 2.14, p. 255.)

When a natural watercourse is fully appropriated, as the Kern River is, forfeiture of an appropriative right may or may not result in unappropriated water that can be awarded to an applicant through the statutory permitting system administered by the SWRCB. That is, a river may be so oversubscribed by pre-1914 common law rights that any water released to the river by forfeiture of a senior rights holder will simply be used in full by existing junior [**600] rights holders under [***59] their existing entitlements. Even if the forfeiture results in the existence of unappropriated water that can be awarded by the SWRCB, the fundamental first-in-time, first-in-right nature of appropriative rights means that a newly permitted SWRCB appropriative right will be junior to all existing pre-1914 rights.

Accordingly, the parties misconceive the relevant legal relationships to the extent that they picture Delta as forfeiting "water" that could, for example, be awarded to North Kern, loaded into tanker trucks, and delivered to its recharge fields. Or in the alternative, awarded to a permitted appropriator by the SWRCB and delivered to the new appropriator. These misconceptions arise from conceiving of what is forfeited as "water" and not at "water rights." In reality, water rights, and not water, are forfeited.

If water rights are forfeited, however, the cumulative effect could be that the river is no longer oversubscribed. That is a determination not for the courts in the first instance, but for the SWRCB. If those resulting limitations on appropriation might result in a determination that the Kern River is no longer fully appropriated, that determination will be made by the SWRCB on the [***60] petition of a potential appropriator of the excess. Any new permit for such [*584] an appropriation, however, will be "last in time" and will neither reduce nor augment existing pre-1914 rights of other appropriators.

In summary, the trial court was incorrect in its finding that the forfeiture created unappropriated water subject to appropriation through the SWRCB process; instead, the initial determination whether the forfeiture creates an allocable excess is reserved in the first instance to the SWRCB. However, the trial court was correct that the forfeited rights are not awarded to North Kern, so our conclusion does not result in reversal of the judgment.

B. Delta's Appeal

Delta raises two issues, both of which largely have been dealt with in the previous discussion of North Kern's appeal. First, Delta contends the trial court erred in precluding it from defending the forfeiture action with an equitable estoppel defense at the retrial. Second, Delta contends the trial court declared Delta had forfeited water that was never available to it for use.

1. Equitable Estoppel.

Because of the constitutional requirement that water be used reasonably and for beneficial purposes, [***61] and the reflection of that requirement in the forfeiture provisions of *Water Code section 1241*, we hold that on the facts of this case equitable estoppel is not available to Delta as a defense.

(7) As a general matter, equitable estoppel will not be invoked against a governmental entity to contravene specific constitutional or statutory limitations. (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28-29 [157 Cal. Rptr. 706, 598 P.2d 866].) Here, even if the facts supported the contention, permitting the parties to freeze entitlement to appropriated water, regardless of nonuse by one of the parties, would directly contravene the important public policy embodied in *Water Code section 1241* and *California Constitution, article X, section 2*, namely, that all water shall be used reasonably and for beneficial purposes.

(8) Further, in the present case, assertion of a defense of equitable estoppel is precluded by the law of the case. First, Delta has not convincingly distinguished a defense of equitable estoppel (which was not, [**601] in those terms, rejected in the prior opinion) from the

defense we described as "[creation of] an implied promise not [***62] to claim a forfeiture," which we expressly found to be an unmeritorious defense. (*North Kern Water Dist.*, *supra*, F033370.) Second, in the prior proceedings before this court, and in testimony during retrial, Delta established that *lack of demand* was the cause of its failure to use all available water, not the purported assurance from North Kern that it would [*585] not assert a forfeiture. Any version of equitable estoppel requires the party asserting the defense to show that it acted to its detriment in reliance on the words or conduct of the opposing party. (See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, p. 527.) On the present record, Delta properly was prevented from attempting to show such reliance.

2. Forfeiture of "Unavailable Water."

Delta contends the trial court erred in determining it had forfeited the amount of water between actual use and paper entitlement, even where there was insufficient water to supply the paper entitlement. As we have discussed above, this argument is based on a misconception of the nature of forfeiture in this context. What is forfeited is the right to appropriate water in excess of the greatest use, as determined in the measurement period [***63] and the forfeiture period. Thus, it is a right to appropriate water, not water itself, that is forfeited, and the amount *not* forfeited is the greatest amount Delta has used under a given appropriative right at any time in the forfeiture period. Accordingly, Delta's claim that it has forfeited that which it never had an opportunity to use is without merit.

III. Disposition

The judgment is modified to declare that Kern Delta Water District has forfeited certain appropriative rights for the following rights and for the following months: Buena Vista (1st): January, November, and December; Stine: September, October, November, and December; Farmers: August, September, and December. For those months in which there has been a forfeiture, Kern Delta Water District shall retain the following appropriative rights, stated in acre-feet per month:

Buena Vista (1st):	January	347
	November	236
	December	191

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Stine:	September	583
	October	1,380
	November	22
	December	12
Farmers:	August	610
	September	268
	December	207

[*586]

Gomes, J., and Hill, J., [***64] concurred.

As modified, the judgment is affirmed. Each party shall bear its own costs on appeal.

IN THE
Court of Appeal of the State of California

IN AND FOR THE
Fifth Appellate District

NORTH KERN WATER STORAGE DISTRICT,
Plaintiff, Cross-complainant, Cross-defendant and Appellant,

v.

KERN DELTA WATER DISTRICT,
Defendant, Cross-complainant, Cross-defendant and Appellant;
CITY OF BAKERSFIELD,
Cross-complainant, Cross-defendant and Respondent.

F047706

Tulare County No. 172919

* * * REMITTITUR * * *

I, LEISA V. BIGGERS, Clerk/Administrator of the Court of Appeal of the State of California for the Fifth Appellate District, do hereby certify that the original opinion or decision entered in the above-entitled cause on February 05, 2007 has now become final.

Appellant(s) Respondent(s) to recover costs
 Each party to bear own costs
 Costs are not awarded in this proceeding

WITNESS my hand and the seal of the Court
affixed at my office on April 30, 2007

LEISA V. BIGGERS, Clerk/Administrator

JOE G. LOPEZ

Deputy Clerk