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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NORTH KERN WATER STORAGE DISTRICT,

Plaintiff, Cross-defendant, Cross-complainant, Respondent and Appellant,

v.

KERN DELTA WATER DISTRICT,

Defendant, Cross-complainant, Cross-defendant and Appellant;

CITY OF BAKERSFIELD,

Cross-defendant, Cross-complainant and Respondent.

F033370

(Super. Ct. No. 172919)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Kenneth E. Conn, Judge.

Law Offices of Young Wooldridge, Ernest A. Conant, Scott K. Kuney and Steven M. Torigiani; Best, Best & Krieger, Gregory K. Wilkinson and Arthur L. Littleworth for Plaintiff, Cross-defendant, Cross-complainant, Respondent and Appellant North Kern Water Storage District.

McMurtrey & Hartsock, Gene R. McMurtrey and James Worth; Smiland & Khachagian, William M. Smiland and Theodore A. Chester, Jr. for Defendant, Cross-complainant, Cross-defendant and Appellant Kern Delta Water District.

Duane, Morris & Hecksscher, Thomas M. Berliner and Colin L. Pearce; Bart J. Thiltgen, Alan D. Daniel and Duane Morris, LLC, for Cross-defendant, Cross-complainant and Respondent City of Bakersfield.

STATEMENT OF THE CASE

Plaintiff and cross-appellant North Kern Water Storage District (North Kern) filed an action against defendant and appellant Kern Delta Water District (Kern Delta)[1] alleging, among other claims, that Kern Delta had lost some portion of the rights it held to Kern River water, which rights had passed to North Kern. The complaint relied upon a number of legal theories, including purchase, forfeiture for nonuse, forfeiture by unreasonable use, abandonment, intervening public use and prescription.

Kern Delta filed a cross-complaint, which named North Kern and respondent City of Bakersfield (Bakersfield) as cross-defendants. The cross-complaint, by a number of legal theories, sought a determination that Kern Delta had lost none of its Kern River water rights and, in the alternative, a determination that Bakersfield was obliged to indemnify Kern Delta to the extent such rights had been lost. Bakersfield filed its own cross-complaint which named Kern Delta and North Kern as cross-defendants and sought, on several legal grounds, a declaration that Kern Delta and North Kern had forfeited some of their Kern River rights. North Kern filed a cross-complaint against Bakersfield and Kern Delta.

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1 North Kern was formed and has operated as a water storage district pursuant to division 15 of the California Water Code, sections 39000 et. seq. Kern Delta is a public entity and political subdivision formed and existing under the authority of division 13 of the code, sections 34000 et. seq.

Prior to trial, Bakersfield moved for summary adjudication of the fourth, fifth and ninth causes of action (indemnification and breach of contract) of Kern Delta's cross-complaint. The motion was granted.[2]

After a lengthy trial without a jury, the trial court issued its statement of decision. In essence, the trial court found that Kern Delta had forfeited by nonuse a significant portion of its historic right to Kern River water and that the forfeited water had reverted to nonappropriated status subject to the jurisdiction of the State Water Resources Control Board (SWRCB). The trial court rejected all other claims raised by the parties in their respective pleadings, including North Kern's contention that the water lost by Kern Delta had passed to North Kern as a junior appropriator.

Both Kern Delta and North Kern have appealed, challenging the trial court's decision.

STATEMENT OF FACTS

A. Introduction

The Kern River is a natural watercourse, which originates in the Sierra Nevada mountain range and drains into the southern San Joaquin Valley through a series of forks and sloughs a few miles northeast of Bakersfield. The flow of the Kern River, like most rivers originating in the Sierra Nevada, varies widely from season to season and year to year, ranging from less than 200,000 acre feet of water to more than 2,500,000 acre feet per year (afy). The maximum seasonal flow, derived from melting snows of the Sierra Nevada, occurs in late spring or early summer. The water of the Kern River has been diverted for agricultural use since the early 1860's through a series of canals managed by a number of canal companies. Since the late 1800's, all of the natural flow of the Kern

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[2] This order is challenged on appeal by way of two footnotes, Nos. 15 and 48, in Kern Delta's opening brief.

River has been fully appropriated and beneficially used by the canal companies and area landowners. Not surprisingly given the ebb and flow of the river, disputes over water rights have arisen when the water supply runs short. Water shortage is the rule, rather than the exception, on the Kern River, especially during peak irrigation seasons.

The existing rights to Kern River water date back to the 1860's. Kern Delta's primary right was first established in 1870, when one of its predecessors, Kern Island Irrigation and Canal Company (Kern Island) filed a notice of appropriation.[3] The right is considered a pre-1914 appropriative right because it antedated the 1913 Water Commission Act (WCA), legislation that created a system of statutory appropriative water rights now administered by the SWRCB. Both North Kern and Bakersfield also hold rights to Kern River water which date back to the 1860's and thus also predate the WCA. The administration of these rights among the parties and their predecessors in interest has been accomplished by an intricate, careful system of measurement in effect since 1894 and principally governed by two documents, the Miller-Haggin Agreement (MHA) and the Shaw Decree, which together have formalized the practices and agreements of those who hold appropriative rights to Kern River water.

B. MHA

In the late 1800's, a dispute arose between upstream appropriative users of Kern River water (including the predecessors in interest to all three parties) and downstream riparian right holders. Ultimately at issue was whether the riparian rights were recognized by California law and, if so, whether they were paramount to the appropriative rights. In the historic decision of *Lux v. Haggin* (1886) 69 Cal. 255, the Supreme Court legitimized the riparian rights under California law and found them

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[3] Though in this opinion we may use only the name of a party to this appeal, we intend any such reference to include, whenever necessary for historical accuracy, the party's respective predecessor or predecessors in interest, as appropriate.

superior to the appropriative rights *unless* an appropriative right predated the acquisition of the riparian property. The matter was remanded for retrial to determine the age of the rights in question,[4] but, to settle the dispute, the upstream users (known as first point users) and the downstream landowners (known as second point users) entered into the MHA on July 28, 1888. All the current uses of Kern River water are subject to the MHA and are limited to those who hold a right specified in the agreement as either a first or second point user.

The MHA requires Kern River water to be measured on a regular basis at two locations, the first at an upstream point then known as the Beardsley Ditch and the second at a downstream point then known as the Joyce Canal.[5] The parties do not dispute that these measurements have been made continuously on a daily basis since the inception of the MHA and are accurate. The agreement also confirmed the apportionment of Kern River water between the first point users and the second point users in accordance with preexisting rights. The MHA thus did not convey or create any water rights; instead, it merely recognized the rights previously held by the parties and apportioned the water between the two groups of litigants. The agreement did, however, recognize that Kern Island had a first priority right to 300 cubic feet per second (cfs) daily and that only after this entitlement had been satisfied did the apportioned rights among the remaining holders, first and second point alike, begin. Specifically, the agreement provided:

> "When the amount of said waters flowing at said First Point of Measurement does not exceed three hundred (300) cubic feet flowing per second, the Kern Island Irrigating Canal Company, one of the parties of the

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4 It appears undisputed that Kern Island's appropriative filing predated the purchase dates of the riparian claimants. Thus, Kern Island's rights were paramount to those held by the riparian downstream users.

5 Currently, Bakersfield is responsible for the measurements.

second part [first point users], its successors and assigns, shall be entitled to all thereof.

"When the amount of said waters flowing at said First Point of Measurement during said months of *March, April, May, June, July and August [irrigation season or MHA season]* exceeds three hundred (300) cubic feet flowing per second, then of the amount thereof over and in excess of said first three hundred (300) cubic feet per second, the parties of the first part [second point users], their heirs, executors, administrators and assignees, shall be entitled to one-third (1/3), and the parties to the second part [first point users], their heirs, executors, administrators and assignees, shall be entitled to two-thirds (2/3) .... The water allotted to the [first point users], other than the three hundred (300) cubic feet flowing per second, above specifically allotted to the Kern Island Irrigating Canal Company, ... to be taken out, used and disposed of by them in any manner, at any place and for any purpose they may think proper, or arrange or agree upon among themselves. Said three hundred (300) cubic feet of water flowing per second, so specifically allotted to said Kern Island Irrigating Canal Company, to be by it taken out, used and disposed of in any manner, at any place and for any purpose it may think proper.

"During the months of *January, February, September, October, November and December [off season months]* of each and every year, the Kern Island Irrigation Canal Company, its successors and assigns, as to the first three hundred (300) cubic feet flowing per second, and the parties of the second part [first point users], their heirs, executors, administrators and assigns, as to all over and above said first three hundred (300) cubic feet flowing per second, shall be entitled to all the water flowing in said Kern River at any point above said Second Point of Measurement, and may intercept, divert, take out, use and consume the same in such manner, and at such points and places, and for such purposes, as they may desire. Any and all water to which the parties of the second part [first point users] are entitled hereunder, which shall not have been diverted by the parties of the second part [first point users], their heirs, executors, administrators or assigns, or some of them, before reaching said Second Point of Measurement, shall, upon and after passing said Second Point of Measurement, belong to the parties of the first part [second point users], their heirs, executors, administrators and assigns, to be used and enjoyed by them as the other waters which they shall receive as hereinabove provided." (Emphasis added.)

The agreement further required that the rights held by the parties shall be "diminished so as to make each contribute pro rata to the amount by this Instrument

allotted to the [second point users]; and to the said three hundred (300) cubic feet allotted to the Kern Island Irrigating Canal Company."

The MHA has been amended from time to time by the parties and their successors in interest, but the agreement has remained essentially the same.

C. Shaw Decree

A few years after execution of the MHA, again when the available water was not sufficient to meet all the demands of the claimants, a new dispute arose among the first point users concerning diversions. This dispute also ended in litigation. The first point users sought an injunction against diversions by Kern Island[6] which interfered with the remaining first point appropriative rights.[7]

In 1901, Judge Lucien Shaw issued a decision thereafter known as the "Shaw Decree." The decree reaffirmed the MHA, set a maximum flow available for diversion and appropriation by each first point user, and established an order of priority for diversions among them, including Kern Island. These conditions are sometimes referred to as "theoretical" or "paper" entitlements and apply whenever there is insufficient water to meet the claims of all right holders -- a frequent occurrence. The second point users were not impacted by the Shaw Decree.

The Shaw Decree rested upon the existing historical rights identified in the MHA and confirmed Kern Island's priority to the first 300 cfs of flow.[8] The decree listed each right holder and the specific quantity of water to which the holder was entitled when

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6 Kern Delta now administers the appropriations of Kern Island, Buena Vista, Stine and Farmers. However, it is clear the parties are primarily fighting over the Kern Island rights, which have first priority and provide the measure for all other first point rights.

7 There are 31 historic first point rights or entitlements, which are now held by three entities; all are parties to this action.

8 Kern Island was also awarded an additional 56 cfs entitlement, which had a much later priority, fifteenth of fifteen.

there is sufficient water to be apportioned.[9] The decree also confirmed that the rights of the first point users are subordinate to Kern Island's 300 cfs priority and to the second point priorities, which had been set by the MHA.

The Shaw Decree noted that the custom on the river had always been to divert only that amount of water required for use by a particular appropriator and to allow the unused water to flow back to the river for use by holders of junior rights, a practice which continued after the decree.[10] The unused water has been traditionally termed "release water," although neither the MHA nor the Shaw Decree contains these words.

Land ownership along the Kern River has changed through the years, but the rights and the obligations identified in the MHA and the Shaw Decree run with the land. The MHA and the Shaw Decree together have governed the river's use for more than a hundred years. The entitlements recorded in the documents are measured daily and the extent of the actual uses vary significantly from day to day, month to month and year to year.[11] The parties have consistently referred to the two documents in light of historical

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9 The decree states in relevant part: "... the right of each of said plaintiffs to divert and appropriate said waters includes the right to use the same and furnish the same to others to be used ..., but not to suffer the same to be wasted, and that as between themselves, when there is not sufficient water available for all of said plaintiffs, the order of right and priority shall be as follows: [Fifteen separate priorities then follow, including Kern Island's 300 cfs daily (approximately 210,000 afy) and those held by North Kern's predecessors.]"

10 The decree states that the water in dispute (that of the Kern River) was necessary for irrigation, domestic and mechanical purposes, had been used for these purposes when diverted and had not been wasted. Both the Shaw Decree and the MHA appear to accept that the parties who hold rights to water from the Kern River have perfected those rights by reasonable and beneficial use of the water claimed. Both documents frame the issue decided as a dispute upon holders of a perfected right when water is unavailable to satisfy all existing water rights.

11 A "normal" year for the Kern River occurs when flows are between 74 percent and 125 percent of "average." Less than one third of the years are "normal" under this standard.

demand, historical use and historical practices when setting policy for administering the river. All river users share the costs of the facilities and operations required to move the water along the system. The first point users also share amongst themselves the costs of measuring and reporting.[12]

D. North Kern

North Kern was formed in 1935. In 1950, it undertook to develop its water supply system. As part of this project, North Kern acquired water rights in 1952 from several holders of pre-1914 appropriative rights, some of which were and remain subject to the MHA and the Shaw Decree.[13] North Kern assessed its water supplies based on its paper entitlements as well as upon the historic availability of release water. North Kern then made substantial investments in its water storage and delivery systems. Since 1968, the land within the North Kern district has been fully developed for agricultural purposes.

From 1954 to 1996, North Kern used an average of 167,000 afy of Kern River water, of which 92,000 came from its own paper entitlement[14] and the rest, an average of 66,000 acre feet, from release water of which, 95 percent, or an average of 63,000 acre

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12 Currently, half the cost of operations and facilities is borne by the first point users and half is borne by the second point users. Reporting costs are divided in thirds -- one-third paid by Kern Delta, one-third by North Kern and one-third by Bakersfield.

13 North Kern holds the following paper entitlements to water under the MHA/Shaw Decree: James (1st), Anderson (1st), Meacham, Plunkett, Joyce, Johnson, Pioneer (1st), Beardsley (1st) (30 percent), Anderson (2d), James & Dixon, McCaffrey, McCord (51 percent), Calloway (80 percent), Railroad (80 percent), James (2d), Pioneer (2d), Beardsley (2d) (30 percent).

14 North Kern has used its full entitlement every year but one. North Kern's use of release water has not caused any problem for Bakersfield, which has sufficient water to meet its current needs.

feet, was from Kern Delta or its predecessors.[15] Obviously, the amount of release water used by North Kern varied substantially from month to month and season to season.

E. Bakersfield

In April of 1976, Bakersfield acquired, from Tenneco West, several of the appropriated water rights identified in the MHA and the Shaw Decree.[16] The Kern River is an important water source for the city. Bakersfield works in close cooperation with the other MHA parties in managing the entitlements, especially in its present role as river administrator.

In June 1976, Bakersfield[17] sold to Kern Delta certain of the Tenneco water rights and canal facilities. The rights conveyed included the Kern Island 300 cfs priority, were transferred by quitclaim deed, and were described as "whatever they may be." Both parties were aware of the history of the river, the historical practices and the governing agreements. Both parties were also aware that the entitlement acquired by Kern Delta historically had not been put to full use. The purchase agreement was made subject to the MHA and Shaw Decree, as well as to other agreements governing the river. The rights

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15 The experts testifying at trial each selected their own time period for purposes of calculating annual averages, excluding or including wet years or dry years or taking other factors into account. Their respective numbers diverged accordingly.

16 The contract between Bakersfield and Tenneco described the Kern Island rights and their relationship to the MHA and the Shaw Decree as follows: "said rights are known and identified by the names used herein, and have certain priority dates, priorities and quantities. Said priority dates, priorities and quantities are more particularly described in the [MHA] of 1888, ... and subsequent amendments thereto and were interpreted in the Shaw decree of 1900 ..., and the acquisition herein of said water rights is intended to include said priority dates, priorities and quantities enumerated in said documents."

17 Bakersfield holds paper entitlements to the following rights: Kern River Conduit, Castro, South Fork, Beardsley (1st) (70 percent), Wilson, McCord (49 percent), Calloway (20 percent), Railroad (20 percent), and Beardsley (2d) (70 percent).

were conveyed "subject to the legal consequences, if any, of the actual administration of said agreements, documents and decrees ...." At the time of the sale, Bakersfield knew that North Kern took a substantial portion of the water released by Kern Island and its successors.

F. Release Water

As both the MHA and the Shaw Decree reflect, each day the use of the river water begins with the Kern Delta, which now holds the former Kern Island entitlement. Kern Delta's decision to either use or release some or all of its entitlement sets the amount available each day for use by junior right holders. The daily amount released by all first point users is governed by the amount of water available in the river[18] and the amount of water requested by more senior right holders, beginning with Kern Delta. Each subsequent user either uses or releases water based on the amount of water available to it and its particular needs for the day. Thus, each subsequent right holder makes its own decisions based on the daily decisions of more senior right holders, subject always to the amount of water provided by the river itself, in accordance with the historical practices.

Release water is not recorded or treated as a transfer or sale to junior right holders. Release water is not ordered and cannot be used until it is relinquished each day by a more senior right holder. Most of Kern Delta's release water is generated during the winter when Kern Delta historically has not had a use for all the available water by reason of low crop demands, the lack of spreading[19] facilities, the significant use of ground water instead of river water for irrigation by farmers in the district, or other

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18 For example, even though Kern Delta's paper entitlement is 300 cfs, the river's natural flow might be less on any given day in any given year.

19 Spreading consists of flooding fallow land with excess water for the purpose of recharging the underlying ground water basin.

factors. Both Kern Delta and North Kern have lesser irrigation needs in the winter, but North Kern has an established spreading practice.

During the period from 1954 to 1976, the predecessors in interest to Kern Delta released an average of 87,000 acre feet of water to the river each year, primarily during the winter months. This use was less than the full MHA entitlement. Ninety percent of all the release water in the river originated with Kern Delta. Although that figure has increased since 1976, Kern Delta currently does not have a demand for more then 200,000 afy on average; this number would be higher if Kern Delta constructed spreading facilities.

After acquiring the water rights from Bakersfield, Kern Delta made public its intention to increase diversions in excess of its historical use. Both Bakersfield and North Kern objected to any diversion beyond Kern Delta's historical use. Despite these objections, and since 1981, Kern Delta has consistently diverted and used more Kern River water than did its predecessors. Kern Delta's expert compared Kern Delta's use with that of its predecessors as follows:

Year	Actual Entitlement	Use	Release
1968-1976 Pre-Kern Delta	250,277 afy	163,370 afy	87,000 afy
1981-1994 Post-Kern Delta	250,498 afy	182,175 afy	68,000 afy

The increase in use necessarily has reduced the amount of release water available to junior right holders. From 1977 to 1996, the period following Kern Delta's acquisition of the rights, approximately 52,000 acre feet of release water was available to North Kern, an amount less than what was available both before 1977 and historically.

G. SWRCB

The SWRCB declared in 1964 that the waters of the Kern River were fully appropriated. (SWRCB decision No. 1196.) As a result, the SWRCB will not consider

application for an appropriative right to the waters of the Kern River unless the application is accompanied by a study showing unappropriated waters are available. The decision was reaffirmed in 1989. Anticipating that the trial court might find that some of Kern Delta's rights had been forfeited, the parties petitioned for the appropriation of any such forfeited water. These applications are currently pending before the SWRCB, which has deferred any action until the conclusion of this litigation.[20]

H. Key Findings of the Trial Court

The trial court made numerous findings in its statement of decision. Many are not challenged by any party on this appeal, such as the trial court's decision that North Kern failed to prove its contentions that Kern Delta had abandoned its rights and that North Kern had acquired a portion of Kern Delta's water right by prescription, inverse condemnation or an intervening public use. Bakersfield has not appealed from the trial court's adverse ruling on Bakersfield's cross-complaint for damages against Kern Delta for breach of contract.

In defining the water rights held by the parties, the trial court found:

> 1. The water rights in question are appropriative rights, not contractual rights. The MHA did not create water rights, but merely confirmed the rights held at the time of the agreement. The agreement also was never intended to and did not remove any right held outside the purview of California water law.
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> 2. The Shaw Decree also did not create any rights, but merely confirmed and allocated the rights already obtained by appropriation. The Shaw Decree eliminated any need to perfect the appropriative rights because it confirmed a given quantity to each right holder.

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[20] Kern Delta has asked this court to take judicial notice of a letter from the SWRCB dated October 8, 1999, which expresses SWRCB's decision to defer action on the petitions while this case is pending. We grant the request.

3. The rights held by the parties are appropriative and not riparian because the South Fork of the Kern River, the watercourse involved in Kern Delta's riparian claim, ceased to be a natural waterway in 1868.

4. North Kern did not purchase any release water in 1952. A fair reading of the 1952 purchase agreement discloses no guarantee of any specific quantity of water.

5. The 1976 Bakersfield/Kern Delta agreement for the sale of water rights was not ambiguous -- Bakersfield only sold the water rights it had "whatever they may be" and the sale was subject to the actual administration of the water under the MHA and the Shaw Decree.

As to the administration of the river, particularly the practice of releasing water to junior appropriators, the trial court found:

1. Kern Delta holds the first priority right, through its predecessor Kern Island, to divert and appropriate from the Kern River 300 cfs daily. The entitlements established by the Shaw Decree are calculated on a daily basis.

2. The historical practice was to release water to the river whenever there was, on any given day, a surplus above the actual demand of the particular right holder, which water was available for use by junior right holders having a demand for the water on that day. All parties understood that the release of any quantity of water on a given day was available on that day only and that each day on the river is a "new" one for purpose of calculating release water.

3. Use of release water was at all times permissive, without formalization, prior communication, acknowledgement or transfer agreement. There existed historically "cooperation and consent" among the first point users with respect to the practice of releasing water and the use of released water.

4. Release water is not addressed directly in either the Shaw Decree or the MHA.

5. The existing system of diversion and distribution works well and results in a predicable distribution system and full beneficial use of all the water available, a state of affairs which should be preserved insofar as possible.

6. During the period 1954-1976, Kern Delta released on average 87,000 afy of water per year. During the same period, North Kern diverted and beneficially used on average 66,000 afy of water, of which 63,000 afy was water released by Kern Delta.

Finally, with respect to forfeiture, the trial court found:

1. Kern Delta's pre-1914 rights were subject to the rule of statutory forfeiture. The five-year period may be any period of continuous historic nonuse and need not be the five-year period immediately preceding the commencement of the legal action seeking to prove forfeiture.

2. Kern Delta has forfeited a portion of its appropriative rights by nonuse for a continuous five-year period based on annual averages over 45 years. Kern Delta has used on average approximately 159,286 afy, which is the extent of its preserved entitlement. The remaining portion of Kern Delta's entitlement has been forfeited through nonuse.

3. Article X, section 2 of the California Constitution (article X, section 2) precludes Kern Delta's use of water rights in excess of historic amounts; to do so would be an unreasonable use because it would harm other water right holders.

4. When an appropriative right is forfeited under the statute, the right reverts to public use. Because a portion of the water rights formerly held by Kern Delta has been forfeited, the Kern River is no longer fully appropriated. That portion of the water, which has become unappropriated, is now subject to appropriation under the applicable procedures and the jurisdiction of the SWRCB.

DISCUSSION

Kern Delta Appeal

I.

Although the record is complex, as are the arguments of the parties, this case for the most part involves competing legal principles, and the critical facts are generally not disputed by the parties. The trial court's statement of decision is detailed and well organized, and separates the court's findings and analysis by the various theories raised by the parties, and the parties in large part do not challenge the trial court's factual findings. North Kern lost all its claims against Kern Delta except for two -- forfeiture for nonuse and a contention under article X, section 2, which prohibits unreasonable use of water resources. Essentially, the trial court found that Kern Delta had not used its full entitlement under the MHA and therefore had forfeited a portion of its rights. Kern Delta

contests this determination and disputes the method used by the trial court to measure nonuse.

North Kern and Bakersfield, while agreeing with the trial court that a portion of Kern Delta's rights were forfeited for nonuse, disagree that the forfeited water reverted to public use. They assert instead that the forfeited water rights reverted to the holders of junior appropriative rights.

II.

A.

It goes without saying that water is one of the most, if not the most, important of this state's natural resources. The history of California water law commenced with the pueblo rights held by owners of the early Spanish land grants.[21] Although all water within the state is the property of the people (Wat. Code, § 102[22]), the right to use water may be acquired and held in a variety of forms, including riparian and appropriative. The right to use water, once acquired, is a vested property right, although it is usufructuary and subject to the limitations established by law. (*United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d 82.) Article X, section 2[23] (adopted in 1928 as

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21 There are excellent summaries of the history of California water law in two published cases, *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, and *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742.

22 All further references are to the Water Code unless otherwise noted.

23 Article X, section 2 (1976 version) provides: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method

former art. 14, § 3) sets the primary limitations upon water rights in the state, as follows: 1) the right to use water is restricted to that amount of water reasonably required for a beneficial use; 2) the right does not extend to the waste of water; and 3) the right does not extend to unreasonable use or unreasonable methods of use or diversion. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367.) These principles hold whether the rights are riparian or appropriative. (*Ibid.*, see also *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240.) The courts have consistently found that article X, section 2 is intended to insure the water resources of the state are put to a reasonable use and are made available for the constantly increasing and changing needs of all the state's citizens. (*City of Barstow v. Mojave Water Agency, supra,* at p. 1240; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 751-752.)

By virtue of the constitutional provision, water rights are quantified by the amount of water devoted to a beneficial use and water rights are restricted or reduced by the amount of water not so used. No title or right can be acquired to any amount of water which exceeds that which can be put to a reasonable beneficial use. (*Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 22.) Being usufructuary, water rights cannot be obtained by diversion, by deed, by title, or by contract, nor can they be sustained simply by possession of a license from the SWRCB. Instead, the legal right to use particular water exists only so long as the water is put to a reasonable beneficial use. (*Joslin v.*

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of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Marin Mun. Water Dist. (1967) 67 Cal.2d 132, 141 [wasteful use is not beneficial use and thus no legal right to waste water exists]; *Joerger v. Pacific Gas & Electric Co., supra,* at p. 22 [diversion not sufficient to preserve right]; *Southside Imp. Co. v. Burson* (1905) 147 Cal. 401 [contract right to water limited to amount put to beneficial use]; *United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 97 [if license holder fails to put water to beneficial use, license is revoked]; *Big Rock M.W. Co. v. Valyermo Ranch Co.* (1926) 78 Cal.App. 266, 275 [diversion without use confers no right]; *Witherill v. Brehm* (1925) 74 Cal.App. 286, 294 [extent of the user's right is limited, not by the quantity of water diverted or by capacity of the ditch but by the quantity applied for beneficial purposes]; *Simons v. Inyo Cerro Gordo Co.* (1920) 48 Cal.App. 524 [discovery of springs does not convey ownership if not used].) Water rights carry no specific property right in the corpus of the water itself. (*Big Rock M.W. Co. v. Valyermo Ranch Co., supra,* at p. 275.)

B.

The trial court found that Kern Delta's predecessors in interest held appropriative water rights to the first 300 cfs of Kern River water. This finding is supported by the evidence and is not seriously challenged by the parties.[24] The overwhelming weight of

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[24] Kern Delta argues, as it did -- with considerably more conviction -- in the trial court, that its rights are also riparian in nature and thus cannot be lost through nonuse. (See *Fresno Canal & Irrigation Co. v. People's Ditch Co.* (1917) 174 Cal. 441, 450; *Mt. Shasta Power Corp. v. McArthur* (1930) 109 Cal.App. 171, 191.) Even if this was a correct statement of present law, and we are not certain it is (see *Joslin v. Marin Mun. Water Dist. supra,* 67 Cal.2d at p. 134 [riparian rights attach only insofar as the amount of water which can be used consistent with article X, § 2]; *Fell v. M. & T., Incorporated* (1946) 73 Cal.App.2d 692 [constitutional mandate of beneficial use applies to all water "under whatever right the use may be enjoyed"]; *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 184 [riparian users may not lose right by nonuse, but amount not used becomes available for appropriation which becomes a legitimate claim against the riparian right]), the trial court found that any such riparian right had been extinguished prior to Kern Delta ownership because of a change in the watercourse

the evidence established that Kern Delta and its predecessors always considered the rights appropriative and acted consistently. The parties' historical use of water and the administration of the watercourse is the best evidence of their relative water rights. (*Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th 742.) The Kern Island rights can be directly traced to the notice of appropriation filed on December 1, 1889. Both the MHA and the Shaw Decree refer to the rights as appropriative.

An appropriative right is the right to use an identified quantity of water, to the exclusion of subsequent right holders, provided the entire quantity is necessary for the beneficial purposes for which it was appropriated; the right holder is entitled to meet all its water needs up to the amount appropriated before any subsequent right holder may take any water from the subject watercourse. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926; *Senior v. Anderson* (1900) 130 Cal. 290, 297; *Hoffman v. Stone* (1857) 7 Cal. 46, 49; *Ortman v. Dixon* (1859) 13 Cal. 33, 38; *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, 153-154; Hutchins, The California Law of Water Rights (1956) pp. 154-157.)

Since 1914, the statutory scheme created by the WCA is the exclusive method of acquiring appropriated rights to water. To secure such a right, an application must be filed with the SWRCB for a permit authorizing construction of the necessary water works and the taking and use of a specified quantity of water. (*United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 102.) If the appropriation is not

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of the South Fork of the Kern River (the watercourse from which Kern Island would have held riparian rights) which occurred in the mid-1800's. When a waterway changes its channel through natural causes, riparian rights are contemporaneously altered. (See *McKissick Cattle Co. v. Alsaga* (1919) 41 Cal.App. 380, 388-389.) Having changed its flow, the Kern River no longer runs contiguous to the former Kern Island land. Only land which borders a natural watercourse is endowed with riparian rights. (*Gallatin v. Corning Irr. Co.* (1912) 163 Cal. 405, 416; *Lux v. Haggin, supra,* 69 Cal. at pp. 424-425.)

secured by such a permit, the claimant must prove the appropriation was accomplished prior to 1913 and not since lost by prescription, abandonment or forfeiture. (See *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398.)

Here, Kern Delta proved, by its notice of appropriation and by the MHA and the Shaw Decree, that it holds superior appropriative rights to 300 cfs daily of the Kern River water. The core dispute in this case thus focuses upon the second element of the necessary proof -- whether Kern Delta forfeited all or a portion of this right through nonuse.

III.

A.

An appropriative right is neither infinite nor indefinite. An appropriative right cannot be held in perpetuity if the water is not put to a beneficial use. (*Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 617; *Duckworth v. Watsonville Etc. Co.* (1907) 150 Cal. 520, 531-534.) "[An] appropriator [can] hold, as against one subsequent in right, 'only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser.' (*Smith v. Hawkins* (1898) 120 Cal. 86.)" (*Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 455.)

A water right is forfeited when the holder fails to put the water right to full beneficial use for a period of five consecutive years. (§ 1241, formerly Civ. Code, § 1411 (1872 enactment).) This statute codifies common law. (*Wright v. Best* (1942) 19 Cal.2d 368, 380; *Smith v. Hawkins* (1895) 110 Cal. 86, 122; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582; Hutchins, The California Law of Water Rights, *supra*, pp. 295-296.) Pre-1914 appropriative rights may be lost by nonuse in the same manner as post-1914 appropriative rights. (*Pleasant Valley v. Borror, supra,* 61 Cal.App.4th at p. 754.) The party asserting such a forfeiture bears the burden of proof. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 820.)

The trial court decided that, although Kern Delta initially held the first priority right to divert and appropriate 300 cfs per day from the Kern River, Kern Delta lost a portion of its right through nonuse because "[t]he evidence is persuasive that Kern Delta's predecessors failed to use beneficially the full extent of their theoretical or paper rights during various periods of five continuous years prior to the 1976 acquisition by Kern Delta." The trial court found that Kern Delta used, on average, only about 159,286 afy, and released, on average, 87,000 afy during several continuous five-year periods between 1954 and 1976, the timeframe selected for measurement. Ultimately, the trial court concluded that Kern Delta forfeited all its right in excess of 159,286 afy.

Kern Delta challenges the trial court's decision on several grounds, including the following:

1. Because the law abhors a forfeiture, the MHA and the Shaw Decree must be read expansively so as to avoid forfeiture, and when so read, both documents preclude North Kern and Bakersfield from asserting any claim to the water released by Kern Delta.

2. North Kern and Bakersfield are estopped from asserting any claim to such water because they failed to raise it in a timely fashion and their predecessors in interest agreed to Kern Delta's release practices.

3. Releasing water under the agreements to other first point users was a beneficial use of Kern Delta's entitlement.

4. The amount of water found to have been forfeited is excessive because the trial court used the wrong period of measurement and the increased diversions after 1976 were not unreasonable.

B.

1. The MHA and The Shaw Decree

Kern Delta does not dispute that, during the 45-year evaluation period, it released on average 87,000 afy for use by junior appropriators.[25] It argues, however, that, by virtue of the MHA and the Shaw Decree, North Kern and Bakersfield, through their predecessors, waived all future claims to released water and, alternatively, are estopped to deny Kern Delta's right to its full MHA entitlement -- 300 cfs daily.

The trial court concluded there was nothing in the MHA which transformed the existing water rights into a "guaranteed right having attributes of permanence" or a right "insulated from the application of the water law of the State of California." The court also questioned whether a guaranteed or paramount, but dormant, water right would be valid under current law, and implicitly found that the Shaw Decree did nothing to foreclose a later claim of forfeiture by North Kern or Bakersfield.

As Kern Delta sees it, its right to 300 cfs daily is inviolate because the MHA established the right for any purpose selected by Kern Delta. Under this theory, Kern Delta is free to waste water or entirely abandon the right for decades and then reassert it to the full extent of the MHA entitlement -- 300 cfs daily. In other words, according to the Kern Delta, the MHA and the Shaw Decree invalidated the legal doctrines of prescription, forfeiture, and abandonment, all of which exist and have always existed to ensure that the limited water resources of this state are fully put to beneficial use.

In the absence of disputed extraneous evidence, which is the case here, the interpretation of a document is a question of law subject to de novo appellate review. (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906.) In our

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25 It does maintain that this is not an appropriate measurement, a claim we discuss later in this opinion.

estimation, the construction of the MHA and the Shaw Decree advanced by Kern Delta violates public policy and would require this court to declare it null and void. (See *Safeway Stores v. Retail Clerks etc. Assn.* (1953) 41 Cal.2d 567, 574-575 [contracts may be declared violative of public policy when policy is declared in statute or Constitution]; *Kreamer v. Earl* (1891) 91 Cal. 112, 117 [California courts are loathe to enforce contract provisions offensive to public policy]; *Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1073 [same]; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 381 [same].) When the public policy of this state outweighs the interest in the enforcement of a contract, the courts will not give effect to the offending agreement. (*Cariveau v. Halferty* (2000) 83 Cal.App.4th 126, 133-134.)

We are hard pressed to identify any physical resource in this state more worthy of protection as a matter of enlightened public policy than water; it is simply too precious a commodity to be allowed to be wasted under the auspices of a private contract or otherwise. (See *Joslin v. Marin Mun. Water Dist., supra,* 67 Cal.2d at p. 141; *Joerger v. Pacific Gas & Electric Co., supra.,* 207 Cal. at p. 22 [for this reason, water rights in California are defined and quantified by beneficial use].)

In any event, whether Kern Delta's construction of the documents would conflict with an overriding public policy is an issue we need not get into, because we do not find anything in the MHA or the subsequent Shaw Decree which, expressly or impliedly, evinces an intent to insulate the covered rights from the operation of the laws of water then (or now) in effect in this state. In an absence of such an intent, we must read the documents in conjunction with the water law at the time the contract was made. (See *Miracle Auto Center v. Superior Court* (1998) 68 Cal.App.4th 818, 821 [existing laws become part of an agreement.])

The law in 1888 and 1900, before the Constitution was amended to include the precursor to article X, section 2, defined water rights by reference to beneficial use, as the law does today. Thus, though the documents created a contractual right to assert, among

the disputing claimants, a priority appropriative right to water put to beneficial use, they neither insulated such rights from the operation of general California water law nor gave them eternal life. Accordingly, even though the MHA and the Shaw Decree "confirmed" Kern Delta's 300 cfs daily, the right was at all times thereafter subject to forfeiture through nonuse under the applicable principles of general California water law. (See *Fell v. M. & T., Incorporated, supra,* 73 Cal.App.2d 692.)

The documents also do not reflect a waiver by North Kern or Bakersfield of the right to challenge Kern Delta's retention of its appropriative right.[26] The waiver of a legal right comes about only by the holder's intentional act with knowledge of the facts. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.) Though the Shaw Decree and the MHA may have subsumed the competing claims underlying the lawsuits settled by the documents (see *Wackerman Dairy, Inc. v. Wilson, supra,* 7 F.3d 891, 897), neither instrument is susceptible of being read as an intentional relinquishment in perpetuity by North Kern or Bakersfield of the ability to question Kern Delta's beneficial use of its entitlement.

For the same reasons, neither document operates to estop North Kern or Bakersfield. The doctrine of contractual estoppel is based on the notion that parties who have expressed their mutual assent are bound by the contents of the instrument they have signed and may not later claim that its provisions do not express their intentions or understanding. (See Evid. Code, § 622; *Estate of Wilson* (1976) 64 Cal.App.3d 786, 801-802; *City of Santa Cruz v. Pacific Gas & Electric Co.* (2000) 82 Cal.App.4th 1167, 1176.) North Kern and Bakersfield here do not question the contents of the documents, do not contend the agreements did not express the intentions of the parties at the time,

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26 A water right may be relinquished by contract. (See *Southside Imp. Co. v. Burson, supra,* 147 Cal. at pp. 407-408; *Wackerman Dairy, Inc. v. Wilson* (9th Cir. 1993) 7 F.3d 891, 896-897.)

and do not take positions inconsistent with those taken by their predecessors in interest when the documents were created. North Kern and Bakersfield instead maintain that, under well accepted principles of water law, Kern Delta has, over time, lost all or part of its acknowledged MHA entitlement because it has, for at least one five-year period, failed to put all of its allocation to beneficial use. And, even if there was something in either of the two documents which might be read to preclude any party from challenging another's beneficial use of the contractually confirmed right -- and there is nothing -- we would be reluctant to enforce such a provision for the public policy reasons expressed earlier.

None of the opinions relied upon by Kern Delta are apposite. Each deals with either a contract for the sale of water rights or a deeded transfer of land to which water rights attached and a claim by one party to the sale or transfer that certain additional rights were intended to be included in the deal, situations far from the issues here. (See *Copeland v. Fairview Land Etc. Co.* (1913) 165 Cal. 148; *Duckworth v. Watsonville Etc. Co.*, *supra*, 150 Cal. 520; *Williams v. Laras* (1955) 131 Cal.App.2d 217; *City of Coronado v. City of San Diego* (1941) 48 Cal.App.2d 160; *Crane v. East Side Canal Etc. Co.* (1935) 6 Cal.App.2d 361; *Wackerman Dairy Inc, v. Wilson, supra,* 7 F.3d 891.) A case on point, however, is *Allen v. California Water & Tel. Co.* (1946) 29 Cal.2d 466. In *Allen*, the defendant claimed that the city plaintiff was estopped from objecting to the defendant's pumping and exporting of water from a river basin because the city had entered into an earlier contract, which obligated the defendant's predecessor to develop an independent supply of water for the pumping operation. The court rejected this argument, finding that the recital in the contract between the city and the defendant's predecessor did not contain any representation, express or implied, that the city would not raise available legal objections to the defendant's future activities. (*Id.* at p. 490.) Analytically, this is also the case here.

To conclude, the MHA and the Shaw Decree did not transfer any rights between the parties, and instead resolved existing disputes over acknowledged, preexisting,

competing water rights. Neither document included any explicit or implicit representations about the future actions of any party, nor did either purport to forever insulate the rights from the application of established California law.[27] The trial court therefore did not err when it found that neither the MHA nor the Shaw Decree precluded the current claims of North Kern and Bakersfield.

2. Laches

Kern Delta contends the trial court erred by rejecting Kern Delta's affirmative defense of laches (Civ. Code, § 3527). According to Kern Delta, North Kern and Bakersfield unreasonably waited until 1995, more than 100 years after Kern Delta commenced surplus releases, to bring their actions for forfeiture. North Kern replies that the equitable defense of laches is not available in this action in law and that, in any event, Kern Delta did not prove the elements of the defense. Because we agree with this latter proposition, we will ignore the former.

"The affirmative defense of laches requires unreasonable delay in bringing suit and resulting prejudice to the defendant. [Citation.] Whether laches has occurred in a particular case is primarily a question of fact for the trial court and an appellate court will not interfere with the trial court's decision unless it is obvious a manifest injustice has occurred or the decision lacks substantial support in the evidence. [Citation.]"

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27 The notion of beneficial use embodied in article X, section 2 anticipates exactly this scenario; increased need and changed circumstances often require a readjustment of historically held water rights. (See *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348 [prospective riparian right can be limited by beneficial use doctrine]; *Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 106 [judicial determination of existing appropriative rights rests on present use which may be quite different at later time]; *Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal.App.2d 719 [owner of recognized superior right cannot prevent use by another of water not needed by holder of superior right]; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673 [constitutional amendment's intent is to preserve present and future well-being of state by full beneficial use of water resources].)

(*Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 506; see also *County of Orange v. Smith* (2002) 96 Cal.App.4th 955, 963; *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1046 ["The defense of laches is derived from the maxim that '[t]he law helps the vigilant, before those who sleep on their rights.' (Civ. Code, § 3527.)"].)

The trial court made no express findings on the subject. However, implicit in the trial court's judgment is a determination that laches was not proved. Unlike the cases relied upon by Kern Delta,[28] this case does not involve the failure of a party to protect its legal rights or to object to threatening action by another. Prior to 1976, North Kern's and Bakersfield's predecessors in interest, consistent with the practice and agreement of the parties, used whatever release water was made available to them by Kern Delta for nearly a century. This use was permissive, and, because the released water was surplus as to Kern Delta, the use of it by North Kern and Bakersfield did not adversely affect Kern Delta's water needs.

The use also did not pose a threat to North Kern's or Bakersfield's rights until 1976, at the earliest, when Kern Delta sought to increase its own use beyond historical amounts[29] and thereby reduce the release water available downstream.[30] In effect, there

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28 *Miller & Lux v. James* (1919) 180 Cal. 38; *Conaway v. Yolo Water & Power Co.* (1928) 204 Cal. 125, 135; and *Empire West Side Irr. Dist. v. Straford Irrigation Dist.* (1937) 10 Cal.2d 376.

29 When Kern Delta purchased its interests in 1976, the parties believed the first priority entitlement was limited to historical usage. Kern Delta acquired the rights knowing full well the issue would someday have to be resolved, if not consensually then by resort to the courts.

30 There is no evidence that, prior to 1976, Kern Delta's predecessors ever curtailed the release of surplus water normally made available to North Kern. Had there been such evidence, the failure to make an earlier claim might well have supported a laches defense. The claim simply did not exist until 1976 when there was a clash in the rights of the competing right holders. This date becomes important in determining the designation of

was nothing for North Kern or Bakersfield to fight about, and thus nothing for North Kern or Bakersfield to "acquiesce" in, so long as Kern Delta confined its usage within historical patterns. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351 [defendant asserting laches must show that plaintiff has *acquiesced* in defendant's wrongful acts and has unduly delayed seeking equitable relief to defendant's prejudice].)

After 1976, North Kern and Bakersfield objected to any use by Kern Delta beyond the historical. At first, it appeared that Kern Delta had been convinced not to exceed past usage, but later, when it became apparent that Kern Delta intended to and in fact had increased diversions[31] and decreased release waters, North Kern and Bakersfield commenced negotiations with Kern Delta to attempt to resolve the brewing dispute short of litigation. This action followed immediately upon the breakdown of the settlement talks. The record does not support a conclusion that the lengthy negotiations in this complex matter were unreasonable as a matter of law. (*Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th at pp. 521-522.)

The record amply supports the trial court's implicit conclusion that laches was not proved by Kern Delta.

3. Practice of Releasing Water

Kern Delta argues that its historical practice of releasing surplus water to junior appropriators itself precluded forfeiture. Kern Delta's position has several distinct but related components, to wit: 1) the MHA and Shaw Decree addressed the release practice

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the five-year statutory forfeiture period of measurement, as we will discuss in section III., *post.*

31 The point at which North Kern and Bakersfield acquired actual knowledge of Kern Delta's increased use cannot be pegged by simply identifying the particular date when increased diversions began. The amount of water available for release depends upon the flow of the river, which varies considerably from year to year, and increased upstream diversions will be detected only after sufficient time has passed to establish a pattern.

and, therefore, Kern Delta's participation in the practice waived the right to claim a forfeiture; 2) participation in the practice created an implied promise not to claim a forfeiture; 3) the release to junior appropriators who used the water for beneficial purposes[32] must be found to be a "beneficial use" precluding forfeiture because the MHA and Shaw Decrees provided for the practice and constituted a transfer or sale by Kern Delta of the release waters; and 4) the lack of demand for the water, a condition beyond Kern Delta's control, determined the amount of surplus water available for release. The trial court rejected all these theories and concluded that the release of water was equivalent to nonuse, which ultimately amounted to a forfeiture.

The terms of the MHA and the Shaw Decree do not support the implied contract or waiver contentions advanced by Kern Delta. We have been unable to locate any reference, either direct or indirect, to the concept of release water in either document. Instead, the documents merely note the practice as the custom of the parties, but do nothing to establish any independent right or duty with respect to any released water.

Moreover, for the entire time the MHA and the Shaw Decree have existed, the release of surplus water to downstream appropriators has been *required* by the doctrine of beneficial use, and an appropriative user has not been able to retain more than necessary to supply its own requirements. (See *City of Barstow v. Mojave Water Agency, supra,* 23 Cal.4th at p. 1240 [where there is surplus, holder of prior rights may not enjoin its appropriation by others]; *Duckworth v. Watsonville Etc. Co., supra,* 150 Cal. 522 [a prior appropriator may not prevent appropriation or use by others of surplus waters]; *Smith v. O'Hara* (1872) 43 Cal. 371, 375.) Indeed, the principles of prescription, appropriation, forfeiture and abandonment would have little reason to exist in the absence of a demand

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32 There is no dispute that the released water diverted by North Kern and Bakersfield was put to legitimate beneficial uses.

that water be released if not beneficially used, and, by applying these principles in a variety of contexts, the California courts have, for more than a century, confirmed the perfection or loss of rights by reference to beneficial use and to the expectation that surplus water *must* be released to junior claimants. (*Erickson v. Queen Valley Ranch Co., supra*, 22 Cal.App.3d 578 [nonuse may result in forfeiture]; *Thorne v. McKinley Bros.* (1936) 5 Cal.2d 704 [nonuse during certain period of day defines appropriative right]; *Akin v. Spencer* (1937) 21 Cal.App.2d 325 [actual use, not amount diverted, defines right]; *Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th 742; *Miller & Lux, Inc. v. Bank of America, supra,* 212 Cal.App.2d 719 [the requirement that surplus water be released assumes that the water cannot be put to beneficial use by the priority right holder]; *Lindblom v. Round Valley Water Co., supra*, 178 Cal. 450 [plaintiff claimed right to water not used by defendant].) Kern Delta's practice of releasing water it could not use therefore cannot be deemed a "beneficial use" by them or others, and we have found no authority to the contrary.

Likewise, we have found no authority which remotely suggests lack of demand as a reason for the alleged nonuse is of any moment in determining whether there has been a forfeiture. The Supreme Court has held exactly the opposite, and decided that a water company's appropriative right was subject to forfeiture despite a declining demand from its customers. (See *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450.) This result makes eminent sense under the rule of "use it or lose it" in a state such as California, where water is scarce and a lessened demand by one user is invariably matched with an increased demand by another.

Finally, as the trial court correctly found, the MHA and the Shaw Decree do not treat release water as a sale or transfer to junior appropriators and instead treat each water entitlement as a separate right in descending order of more senior rights. Consistently, the parties meticulously maintained each entitlement as a separate right, even when ownership interests merged, and each entitlement was traced to an independent notice of

appropriation. Each day the watermaster has individually calculated the entitlements and has never categorized or identified the use of release water as a transfer or sale of water to a junior appropriator, temporary or otherwise.

The practices of the parties and the watermaster have been in accord with the law, which mandates that surplus water be released by the senior appropriator. Such releases have never been regarded as a sale, a transfer or a beneficial use. (See *Smith v O'Hara, supra,* 43 Cal. at p. 375; *Hewitt v. Story* (9th Cir. 1894) 64 Fed. 510, 515.) Thus, the released water which exceeded the quantity Kern Delta actually required to satisfy its needs was *nonuse* by Kern Delta and subject to competing claims by junior appropriators. (See *Lindblom v. Round Valley Water Co., supra,* 178 Cal. 450, 455.)

The cases cited by Kern Delta to support the proposition that its release practice constitutes a beneficial use are not persuasive. In *Calkins v. Sorosis Fruit Co.* (1907) 150 Cal. 426, Calkins sold the surplus water to a neighbor and the court found, in the absence of an express contract provision to the contrary, that the competing appropriator could not assert that the sale was not a beneficial use because the appropriation *included* a right to sell surplus water. Neither the MHA nor the Shaw Decree included any equivalent or comparable provision. In addition, in *Calkins,* the court found that the sale did not affect the defendant's appropriation, not the case here.

In *Davis v. Gale* (1867) 32 Cal. 26, the plaintiff failed to fend off the defendant's adverse claim even though the defendant had released water to downstream miners "from time to time." The issue in *Davis* did not involve a claimed forfeiture for nonuse by the defendant, but rather involved the plaintiff's loss of its priority appropriation by virtue of the defendant's prescriptive use. The court's opinion did not address whether a continuous release for the statutory period would have resulted in forfeiture.

Finally, in *East Side Canal & Irrigation Co. v. U. S.* (Ct.Cl. 1948) 76 F. Supp. 836, the trial court found that the plaintiff's custom of holding water as a reserve in the upper reaches of a canal system was a beneficial use precluding forfeiture. The case

obviously did not concern water released to junior users. Interestingly, the opinion supports the trial court's decision here, because the *East Side Canal & Irrigation Co.* court also concluded that any amount not used or held in reserve was lost by forfeiture, despite a contract provision establishing the right in the plaintiff to a given quantity of water.

The trial court did not err in determining that Kern Delta's practice of releasing surplus water, however consistent, did not constitute a beneficial use which precluded its forfeiture.

C.

The controlling law of forfeiture, for both pre- and post-1913 rights, is section 1241 and the interpretive case law. (§ 1241; *Smith v. Hawkins, supra,* 120 Cal. at p. 88; *Erikson v. Queen Val. Ranch Co., supra,* 22 Cal.App.3d 578.)[33] The statute provides:

> "When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, *for a period of five years*, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water ...." (§ 1241, emphasis added.)[34]

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[33] Kern Delta's challenge to the trial court's finding that Kern Delta's use in excess of historical levels would constitute unreasonable use under article X, section 2, is moot. The trial court's decision rested on its conclusion that article X, section 2 precluded Kern Delta from claiming water rights which had been unexercised for almost a century. There was never any contention made that Kern Delta misused or wasted water, issues found in more conventional challenges to alleged unreasonable uses. Because we will conclude the amount unused by Kern Delta was forfeited, we need not address the constitutional question directly. We have already noted the strong public policy that water in this state be beneficially used.

[34] The law abhors a forfeiture and when a statute calls for the forfeiture of a recognized property interest, it must be given a fair, reasonable construction in order to avoid harsh results. (*Contra Costa Water Co. v. Breed* (1932) 139 Cal. 432, 441, overruled in part on other grounds in *Miller v. McKinnon* (1942) 20 Cal.2d 83, 90.)

The five-year period under section 1241 means five continuous years of nonuse for the purpose for which the water was appropriated. (*Erickson v. Queen Valley Ranch Co., supra,* 22 Cal.App.3d 578.) The amount lost by forfeiture is measured by the amount not continuously used during the statutory period. (See *Smith v. Hawkins, supra,* 120 Cal. at p. 88 [the amount not lost is the *maximum* quantity put to use during statutory period]; *Lindblom v. Round Valley Water Co., supra,* 178 Cal. 450; *Northern California Power Co., Consolidated v. Flood* (1921) 186 Cal. 301.) However, the case law makes clear that the "continuous use" necessary to defeat an alleged forfeiture does not necessarily mean "constant use" (*Irrigated Valleys L. Co. v. Altman* (1922) 57 Cal.App. 413), and the concept of continuous use is directly related to the nature of the initial appropriative use. (*Id.* at p. 429, citing *Hesperia Land & Water Co. v. Rogers* (1890) 83 Cal. 10, 11; see also § 1241.)

The determination of the amount of water required to satisfy an appropriative use is a question of fact to be determined by the trial court (*Gray v. Magee* (1930) 108 Cal.App. 570), as is the determination of the time of use and nonuse and the quantity of use and nonuse (*Erickson v. Queen Valley Ranch Co., supra,* 22 Cal.App.3d at p. 582; *Joerger v. Pacific Gas & Electric Co., supra,* 207 Cal. 8; *Pabst v. Finmand* (1922) 190 Cal. 124; *Mt. Shasta Power Corp. v. McArthur* (1930) 109 Cal.App. 171, 179). The appellate courts review such findings under the substantial evidence rule. (See *Erickson v. Queen Valley Ranch Co., supra,* at p. 582, citing *Chowchilla Farms, Inc. v. Marin* (1933) 219 Cal. 1, 9-10; *Pabst v. Finmand, supra,* 190 Cal. 124, 135.)

The trial court here examined the period from 1942 to 1976 during which Kern Delta did not use its full MHA entitlement. However, the court did not identify any specific five-year timeframe upon which to base its ruling, and rather relied upon, and quantified Kern Delta's annual use during, a 45-year "evaluation" period. The court then decided that Kern Delta retained a "preserved entitlement to ... approximately 159,286

acre feet per year on average," a figure apparently derived from exhibit 5142,[35] which derives its figures from the 45-year "evaluation" period.[36]

We think the trial court erred in two respects. First, we believe it failed to identify an appropriate period for measuring whether there was a statutory forfeiture. Second, we believe the court erred when it measured the amount of water forfeited by Kern Delta using an annual average or annual figure without restricting its decision to more accurately reflect historical use patterns.

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35 Although the parties at oral argument claimed that exhibit 5142 is "incorporated into the judgment by reference," and that it is not based on averages but actual use, we do not find this apparent from the judgment itself or the court's statement of decision. The court does refer to exhibit 5142, but it does not expressly or implicitly incorporate the exhibit into the judgment. It states that "the evaluation of preserved entitlement set forth in Exhibit 5142 is an accurate portrayal of water use during the period in question as attributed to each of the rights acquired by Kern Delta." The exhibit itself is entitled "Preserved Entitlement and Average Actual Use of Kern Delta Diversion Rights Based on 45-Year Evaluation Period." This is a statement pointing to the evidence which supports the court's findings. The exhibit itself uses the words "Average Actual Use." As it currently stands, the judgment identifies the amount of water forfeited as an annual average without regard to daily, monthly or seasonal usage and we find this to be error. If the parties' representation at argument is correct, and this is not the way the 159,286 afy figure was obtained, the error is not so much how the figure was calculated but rather how the judgment is constructed. Either way, remand is required. Furthermore, the figure is unacceptable because it was not extracted from an appropriate five-year period. (See discussion, *post*.)

36 We asked the parties for additional briefing on the issues of measurement and time. We have the discretion to propose and consider questions of law on appeal, especially where all due process considerations have been satisfied. (See, e.g., *Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 611.) "We are at liberty to consider, and even to decide, a case upon any points that its proper disposition may seem to require, whether taken by counsel or not." (*Noguera v. North Monterey County Unified Sch. Dist.* (1980) 106 Cal.App.3d 64, 72, fn. 5.)

1. The Five-Year Period

We hold that the trial court erred in not selecting a specific five-year period, but choosing instead to rely on the 45-year evaluation period. Because section 1241 requires the showing of nonuse for a continuous five years, due process concerns mandate that the relevant period be expressly identified by the trial court, and the failure to do so precludes meaningful review in violation of the 14th Amendment of the United States Constitution. (See *Rupf v. Yan* (2000) 85 Cal.App.4th 411, 419 [due process requires meaningful review]; *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 986 [forfeiture statutes must afford due process of law and provide both notice and meaningful hearing].)

In addition, although we disagree with Kern Delta that the law limits the five-year period to the exact five years immediately preceding the lawsuit (see *Hufford v. Dye* (1912) 162 Cal. 147; *Witherill v. Brehm, supra,* 74 Cal.App. 286), we do believe the period selected must bear a direct temporal relationship to the time the contrary claim was made. The doctrines of forfeiture, adverse possession, abandonment and prescription are all related (see *Smith v. Hawkins, supra,* 110 Cal. 122) and, without exception, are all evaluated in the context of competing claims of the right to use water. They are not doctrines which are adjudicated in the abstract without the presence of a competing claim. (See *Orange County Water Dist. v. City of Riverside, supra,* 173 Cal.App.2d at p. 184 [although riparian users do not lose their right by nonuse, the amount not used is subject to appropriation which becomes *a legitimate claim* against the rights of the riparian]; *Pabst v. Finmand, supra,* 190 Cal. at pp. 128-129 [prescriptive rights must be obtained *by actual clash of rights*]; *Lindblom v. Round Valley Water Co., supra,* 178 Cal. at p. 452 [doctrine of forfeiture prevents appropriator from diverting and storing amounts over its legitimate needs and *thereby prevent use by others;* appropriator cannot hold amount forfeited *against claim by one subsequent in right*]; *Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th at pp. 784-785 [party cannot complain of unlawful

diversion *unless he is injured thereby*].) In this case, for reasons we have already identified in our discussion of the laches doctrine, *ante*, there was no competing claim until 1976 when Kern Delta sought to expand its historical use, which in turn impacted the amount of water it released each day to junior appropriators. Therefore, we believe the appropriate five-year period must be no later than the five years immediately preceding 1976,[37] although the period of measurement can be adjusted for drought years, if there were any, where the nonuse is not the result of a voluntary act of the appropriator but rather the result of a lack of supply. (See *Irrigated Valleys L. Co. v. Altman, supra,* 57 Cal.App. 413.)

Although the cases cited by North Kern in support of their position, *Hufford v. Dye, supra,* 162 Cal. 147, *Erickson v. Queen Valley Ranch, supra,* 22 Cal.App.3d 578 and *Witherill v. Brehm, supra,* 74 Cal.App. 286, base their analysis on more than a five-year historical pattern of use, none of the cases stand for the proposition that the statutory five-year period can be plucked from any point during the period of ownership, even decades prior to the assertion of any adverse claim. *Witherill* is an adverse possession case in which the claimant was seeking to defend a claim previously perfected under the rules of adverse possession. *Hufford* involves a claimant seeking to define a prior claim established by prescription. *Erickson* was a quiet title action looking to define the claim existing at the time a competing claim was made. All three cases looked to the historical patterns of use in order to define the nature of the right held subject to a later claim. This approach represents a proper assessment of the relevant historical evidence. However, none of these cases used historical patterns over an extended period of time to establish

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37 We do not define the exact period of measurement 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 period of measurement.

forfeiture in the absence of a claim. In other words, in each, the court looked back to the prior clash of rights, when both parties were asserting competing claims. It did not allow a current claimant to define and perfect a current claim by means of a reach back to a period when there was no clash of rights. We note the seminal Supreme Court forfeiture case of *Smith v. Hawkins, supra,* 120 Cal. 86, used the five years preceding the action as the appropriate period of measurement.[38]

2. Nonuse

It also appears that the trial court premised its finding upon Kern Delta's *use* (i.e., "approximately 159,286 acre feet per year on average") rather than upon Kern Delta's *nonuse*. In other words, the court turned the fundamental principle of forfeiture on its head. (*Gray v. Magee, supra,* 108 Cal.App. 570; *Orange County Water Dist. v. City of Riverside, supra,* 173 Cal.App.2d at pp. 196-197 [loss of right by nonuse measured by how much is appropriated by others].)[39] The determination about whether there has been a continuous nonuse for purposes of forfeiture (or for the related doctrines of abandonment and adverse possession) requires an assessment of the beneficial use for which the water was appropriated. (See *Montgomery & Mullen L. Co. v. Quimby* (1912) 164 Cal. 250; *Hesperia Land etc. v. Rogers, supra,* 83 Cal. at p. 11; *Witherill v. Brehm,*

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38 The question about when the statutory five-year period commences would appear to be an appropriate issue for the Supreme Court to address, given the ambiguity of the existing authorities on the subject.

39 The measurement must include both quantity and time, since the evidence here suggests both are variables which govern the "law of the river." The task of measuring water use and nonuse for irrigation purposes is complicated because it involves factors not subject to precise human control. (*Pabst v. Finmand, supra,* 190 Cal. 124; *Mt. Shasta Power Corp. v. McArthur, supra,* 109 Cal.App. at p. 179 [quantity of water required for irrigating is governed by the nature of the soil, climatic conditions, and circumstances surrounding the land and crop].) For this reason, there is no uniform rule of usage or nonusage applicable to all cases. (*Joerger v. Pacific Gas & Electric Co., supra,* 207 Cal. 8.)

supra, 74 Cal.App. 286, 294; *Davis v. Gale, supra,* 32 Cal. 27 [with appropriative right, use and nonuse are the tests of the right and must be decided upon facts of case]; see also *City of Barstow v. Mojave Water Agency, supra,* 23 Cal.4th at pp. 1254-1256 [actual measurement of use defines right].) The historical beneficial use is the best evidence of the parties' characterization of the base appropriative right. (See *Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th 742.) However, forfeiture is based on nonuse. (§ 1241; see *Gray v. Magee, supra,* 108 Cal.App. 570 [court rejected minimum use finding and instead looked to see what was lost by nonuse].)

The law is unambiguous that what is forfeited is what is actually not used for the entire statutory five-year period, not what exceeds the average use for that period.[40] The distinction is not meaningless pedantry, as the following hypothetical demonstrates. Consider the following fictional average annual usages for a prior appropriator with a 160,000 afy entitlement:

1970 145,000 afy
1971 135,000 afy
1972 125,000 afy
1973 150,000 afy
1974 140,000 afy

The average of these averages is 139,000 afy. Under the "use" approach applied by the trial court, the appropriator would have a "preserved entitlement" in this amount, and thus would have forfeited 21,000 afy (160,000 minus 139,000 afy). Under the "nonuse" approach required by the laws of forfeiture, however, the party has lost only 10,000 afy, which represents the difference between the highest use in the five-year period and the full entitlement. (See *Smith v. Hawkins, supra,* 120 Cal. at p. 88.) The

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40 This analysis is based on our assumption that the judgment means what it says. See footnote 35.

result of this latter, correct approach carries out section 1241's mandate that the amount forfeited is only that part of the right which has not been continuously used for the particular five-year period (§ 1241). In the hypothetical, that amount is 10,000 afy.

The record evidence does not support a conclusion that Kern Delta's predecessors failed to use the entire entitlement during every part of every year within the 45-year evaluation period, even if we agreed this was an appropriate period for measurement, which we do not. To the contrary, there were many instances when Kern Delta's predecessors used the full entitlement *during* certain months of a particular year. For example, in 1959-1961, 1964, 1966, 1968, 1970-1972, 1976, 1979, 1981-1982, Kern Delta's predecessors did not release any surplus water during one or more of the months of June, July and August and a finding of forfeiture for these months in any five-year period that included one of the noted years would be improper. When 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.[41] (*Armstrong v. Payne* (1922) 188 Cal. 585, 600; *Orange County Water District v. City of Riverside, supra,* 173 Cal.App.2d 137, 197.) Consequently, it is possible to forfeit a right to use water for a portion of the year or a certain hour of the day but not for other such periods.[42] (See *Santa Paula Waterworks v. Peralta* (1896) 113 Cal. 38, 44 [forfeiture six

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41 The MHA anticipates that water use will vary from month to month and season to season. The parties concede as much when they distinguish between the "MHA season" and the "non MHA season."

42 This is not to say that North Kern may extract the most favorable portions of a year over a 45-year period to establish forfeiture. At argument North Kern asserted that exhibit 5142 represented the lowest amount of use for January over a five-year period, and the lowest amount of use for February over what may well be a different five-year period. The statute requires that forfeiture be measured during a continuous five-year period. (§ 1240.) And, although forfeiture can be for the entire year or only a part of the year (a designated day, month or time), the period of measure is a single continuous five-

out of seven days a week]; *Scott v. Henry* (1925) 196 Cal. 666 [continuous use for irrigation season]; *Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607 [winter/summer]; *Gray v. Magee* (1930) 108 Cal.App.570 [same]; *Garbarino v. Noce* (1919) 181 Cal. 125 [one day in three]; *Haight v. Costanich* (1920) 184 Cal. 426 [two months out of four].)

The amount released by Kern Delta each day is directly dependent on the amount of water available and the demand for irrigation deliveries. An annual average is entirely too simplistic as a measurement of the loss of Kern Delta's vested right. (See *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.3d 489, 569-570.) We will illustrate, with another hypothetical, the law's demand that the amount forfeited be linked to actual need and actual use and that the right lost be quantified by concrete references to actual historical use. Consider the following yearly use pattern for five continuous years by a fictional right holder with a 15,000 acre feet *per month* entitlement:

January through March - 5,000 acre feet per month
April through May - 10,000 acre feet per month
June through August - 15,000 acre feet per month
September through December - 5,000 acre feet per month

In this scenario, the average monthly use is 8,333 acre feet, far below what was put to beneficial use during April through August of each hypothetical year. If forfeiture is determined by mathematical averages unrelated to this actual use, the party would have its right reduced to 8,333 acre feet per month for every month of every year, even though in reality it used its full entitlement from June through August in every examined year, when it obviously had and satisfied beneficial needs.

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year period. There is no authority for the pick and choose method advanced by North Kern.

While the evidence here may support a finding of continuous nonuse based upon a defined season, month or day,[43] no such finding was made by the trial court, which precludes further meaningful appellate review and, if the judgment was intended to limit the forfeiture to a defined season, month or day, creates an unacceptable ambiguity.[44]

The record suggests the evidence would support a finding based on daily use (the actual measurement under the MHA) or some other larger period of time if it can be linked to the initial need and historical beneficial use. In this connection, many of the reports generated for the parties used monthly averages, which allow for some segregation between on and off-season periods. We are in no position, nor is it our function, to make these determinations of fact, which may require the taking of additional evidence. We simply hold that, because the judgment measures the forfeiture using an annual average it is erroneous as a matter of law, and reversal and remand is required for further appropriate proceedings.

We reiterate that, whatever base measurement period (i.e., day, month, season, etc.) the trial court selects, the choice must have evidentiary support and the nonuse, if any, must be calculated by reference to the maximum quantity beneficially used by Kern Delta for each such period during the five-year span before the 1976 claim by North Kern selected by the trial court as the appropriate period for evaluating whether a forfeiture occurred. (See *Smith v. Hawkins, supra*, 120 Cal. at p. 88; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra,* 3 Cal.2d 489, 569-570.) The court may consider the effect

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43 The actual calculation of the water ordered, used, and released by right holders is calculated on a daily basis. However, day, month and season measurements are found in the MHA. What is not found is an annual measurement or the use of averages.

44 See *Pabst v. Finmand, supra,* 190 Cal. 124 (failure to limit finding to particular time or season requires inference that finding is based on continuous use for five-year period).

(or lack of effect) of any other factor or variable, beyond the control of Kern Delta and not related to demand, suggested by the record as having some potential relevance to nonuse, such as climate and water supply. (See *Irrigated Valleys Land Co. of Cal. v. Altman, supra,* 57 Cal.App. 413.)

IV.

In two footnotes, Kern Delta challenges the trial court's order, dated June 10, 1998, granting summary adjudication in favor of Bakersfield on the fourth, fifth and ninth causes of action (indemnification and breach of contract claims) of Kern Delta's cross-complaint. Kern Delta's argument on these issues is set out in its footnote 48, which asserts that the court's ruling "denied [Kern Delta] its day in court with respect to the damage issue raised in the fourth, fifth and ninth causes of action of its cross complaint" and was not reduced to a proper, formal order.

First, Kern Delta has waived any objection to the form of the order by failing to raise the issue at the trial court and conceding that the minute order, made in open court, finally disposed of the three causes of action. (*Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1422.) Secondly, Kern Delta has waived the points for purposes of appeal by its conclusory presentation. An appellate court may treat as waived an issue which, although raised in the brief, is not supported by pertinent or cognizable legal argument or proper citation to authority. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [issue abandoned where supported only by assertion of general legal principles without argument or application to facts on appeal].) It is the appellant's duty to demonstrate affirmatively trial error. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Kern Delta's general assertion of error, unsupported by specific argument or authority, that it was "denied its day in court" is patently insufficient to raise the issue on this appeal.

Third, Kern Delta has waived the issue for purposes of appeal by its abbreviated footnote treatment. (See Cal. Rules of Court, rule 15(a) [each argument must be stated under separate headings in the briefs]; *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7 ["We interpret this casual treatment as reflecting [the appellant's] lack of reliance on this argument"].)

North Kern Cross-Appeal

The trial court determined that the portion of the rights forfeited by Kern Delta had reverted to the public. Alternatively, the trial court found that the forfeited rights passed to North Kern, a junior appropriator. Not surprisingly, North Kern now challenges the trial court's first conclusion and contends the court's alternate conclusion is the correct one.

All parties agree that none of the water of the Kern River is subject to an appropriative SWRCB permit. Therefore, in order to secure the right to any water forfeited by Kern Delta, North Kern was required to prove that its claim was perfected before 1914.[45] However, our resolution of Kern Delta's appeal effectively moots the issue because the lack of a sustainable finding that Kern Delta forfeited any of its rights means, obviously, that there are yet no forfeited rights to which North Kern may have succeeded. (See *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594 [once the amount

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45 As we said earlier, one who lacks a permit and who claims a right to appropriative water in this state must prove the appropriation was made prior to 1913 and not thereafter lost by prescription, abandonment or forfeiture. (See *Crane v. Stevinson, supra,* 5 Cal.2d at p. 398.) Since 1914, all appropriations of water in California must be approved by the SWRCB. (§§ 1201, 1225, 1252.) The claimant for a permit must submit an application to the SWRCB which sets forth, among other items, "[t]he nature and amount of the proposed use" (§ 1260, subd. (c)) and "[t]he place where it is intended to use the water." (*Id.*, subd. (f); *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 976.)

forfeited has been quantified, the claimant may prove up a subsequent appropriation of the same].) The issue must therefor be addressed on remand, if necessary.

We do, however, offer some observations which may be relevant on remand. First, the MHA and the Shaw Decree, which quantify North Kern's and 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. Though under the documents North Kern's entitlements are "junior" to Kern Delta's when there is insufficient water in the river to satisfy both parties' entitlements, a finding on remand that Kern Delta has forfeited some portion of its entitlement will not necessarily result in the enhancement, by an equivalent amount, of North Kern's rights. It only will mean that, when water is scarce, there is an increased likelihood that North Kern's entitlement will be satisfied because Kern Delta's claim will have been reduced. North Kern will gain an increase in its entitlement only if it proves a pre-1914 appropriation. (See *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.* (1943) 104 Utah 448, 462, 137 P.2d 634 [where water is scarce and existing junior appropriators, whether under permit or common law, claim more water than is ordinarily available, the forfeited water will actually feed the *existing* entitlements of the junior appropriators, a practical result not equivalent to the expansion of the existing junior entitlements].) Any pre-1914 appropriation by North Kern must be defined by the actual quantity of water forfeited and the actual quantity of water subsequently put to beneficial use.[46] (*City of Barstow v. Mojave Water Agency, supra,* 23 Cal.4th at p. 1241.)

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46 It would appear from the position taken by North Kern at trial, and the records of water use before us, that a pre-1914 appropriation of any water forfeited would be less

Second, the trial court determined there was no prescriptive use by North Kern or abandonment by Kern Delta, findings which have not been challenged on this appeal. (See *Dogherty v. Creary* (1866) 30 Cal. 290 [abandoned water right subject to subsequent appropriation]; *Gallagher v. Montecito Valley Water Co.* (1894) 101 Cal. 242 [right acquired by prescription]; *Lindblom v. Round Valley Water Co.* (1918) 178 Cal.450 [nonuser forfeits water rights which become available to subsequent appropriator].) Thus, the only remaining possibility is that Kern Delta's predecessors in interest forfeited a portion of their rights prior to 1914, which were to some extent subsequently appropriated by North Kern's predecessors prior to 1914. (See *Smith v. O'Hara* (1872) 43 Cal. 371.)

Third, if North Kern is unable to prove a pre-1914 appropriation, its claim, like any other post-1914 claim, will be subject to the statutory mandates because the clear intent of the WCA is to provide for the uniform administration of California's water resources. (Art. X, § 2; § 1201; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367-368.) Thus, the pre-1914 nature of Kern Delta's right does not preclude application of the WCA if that right is found to have been lost *after* 1914. We find no authority to support North Kern's position that, once established, a pre-1914 appropriation is subject to future management outside the statutory scheme. Though certain constitutional provisions restrict a state from altering or extinguishing an existing property interest,

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than the amount of water now claimed by North Kern. North Kern's predecessors, like those of Kern Delta, did not practice winter ground water recharge. Therefore, the increased need for water for this purpose, occurring in the middle of the 20th century, could not be part of any pre-1914 appropriation. (*Armstrong v. Payne, supra,* 188 Cal. at p. 600 [an appropriation of water has always been defined by the amount used].) An appropriation cannot be *expanded* except by a new appropriation. (*Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th at p. 753.)

such as a preexisting water right (see *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp* (1927) 202 Cal. 56, 68), there appears to be no barrier to the application of a statutory scheme if the preexisting right is legitimately extinguished by operation of common law principles. This result is particularly compelling when strong public policy considerations make a strong case for statewide uniform management of an essential resource such as California water.

On this subject, there is no doubt about the public policy of the state. The SWRCB has exclusive jurisdiction over appropriative claims made after 1914. (§§ 1201, 1202, 1225, 1250; *Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th at p. 754; *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102.) After 1914, a claimant may not establish an appropriative right merely by use. (§§ 1225, 1201, see *People of State of Cal. v. United States* (9th Cir. 1956) 235 F.2d. 647.) Water forfeited reverts to the public and becomes available for appropriation by others[47] through the permit procedures. (§ 1241.) This furthers the Legislature's aim of "foster[ing] the most reasonable and beneficial uses of the state's scarce water resources. [Citation]." (*Pleasant Valley Canal Co. v. Borror, supra,* 61 Cal.App.4th at p. 754; see also *National Audubon Soc. v. Superior Court* (1983) 33 Cal.3d 419, 447 [legislative intent is to grant SWRCB broad expansive authority to undertake comprehensive planning and allocation of water resources].)

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47 The language of the statute which requires a finding of the SWRCB and notice to the parties, is intended to provide procedural guidelines to be followed before forfeiture when the SWRCB is the agency determining whether forfeiture has occurred. (See 12 Pacific L.J. 526, 527.) In this case, the competing rights of the parties were fully litigated and full procedural protection was afforded.

Fourth, while we have been unable to uncover any authority for the proposition that a forfeited pre-1914 entitlement reverts to the public, this subject is not now before us. The irreducible issue raised by North Kern's appeal is whether any amount forfeited by Kern Delta *has been appropriated as a matter of law by North Kern*, but this issue is not ripe for decision given our disposition of Kern Delta's appeal. On the other hand, if on remand North Kern cannot prove its entitlement to any water found to have been forfeited by Kern Delta, whether the water has instead become a part of the public domain would seem to be irrelevant to the interests of North Kern, at least in this action.

Other Issues

The remaining issues raised by the parties, whether on the appeal or on the cross-appeal, are moot. Resolution of all such issues first requires the resolution of the issue whether Kern Delta forfeited some portion of its rights by nonuse and if so the quantification of the amount forfeited.

DISPOSITION

The judgment is reversed. The case is remanded for retrial of:

(1) the question whether Kern Delta forfeited by nonuse any part of its MHA entitlement of 300 cfs per day, based upon a measurement (day, month, season, etc.), a specific five-year period, and a consideration of all other relevant factors disclosed by the evidence; and

(2) all other issues (1) expressly raised by the parties on this appeal but (2) not resolved by this opinion and not found in this opinion to have been waived or abandoned for purposes of this appeal, and (3) put in controversy by reason of the trial court's determination of the issues described in (1) above.

The parties are not limited on retrial under this remand to the evidence introduced during the previous proceeding, and may offer whatever additional evidence they desire to have admitted, subject to the trial court's rulings on the admissibility of such evidence.

Each party shall bear its own costs on this appeal.

Dibiaso, J.

WE CONCUR:

Ardaiz, P.J.

Levy, J.

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED
MAR 3 - 2003
Eve Sproule Court Administrator/Clerk
By _____ Deputy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NORTH KERN WATER STORAGE DISTRICT,

Plaintiff, Cross-defendant, Cross-complainant, Respondent and Appellant,

v.

KERN DELTA WATER DISTRICT,

Defendant, Cross-complainant, Cross-defendant and Appellant;

CITY OF BAKERSFIELD,

Cross-defendant, Cross-complainant and Respondent.

F033370

(Super. Ct. No. 172919)

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING [NO CHANGE IN JUDGMENT]

I.

The opinion filed in the above entitled action on January 31, 2003, is modified as follows:

1. The following sentence is added to footnote 6 on page 7:

"Nonetheless, by limiting our discussion to the Kern Island rights, we do not mean that any amount forfeited is correspondingly limited to Kern Island rights. Any amount forfeited may well include portions of Kern Delta's other appropriations."

2. The following sentence is added to footnote 33 on page 32, after the sentence which ends with the words "alleged unreasonable uses," and before the sentence that begins with the words "Because we will:"

"On these facts, article X, section 2 does not provide an independent ground for affirming the judgment."

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3. The last paragraph of page 33 of the opinion is modified to read "1932 to 1976" in place of "1942 to 1976."

4. On page 47, in paragraph (1) of the disposition, the words "MHA entitlement of 300 cfs per day" are deleted and the words "paper entitlements" are put in their place so that the paragraph reads as follows:

> "(1) the question whether Kern Delta forfeited by nonuse any part of its paper entitlements, based upon a measurement (day, month, season, etc.), a specific five-year period, and a consideration of all other relevant factors disclosed by the evidence; and"

5. There is no change in judgment.

II.

North Kern's petition for rehearing is denied.

Other than the few matters addressed by the modifications described above in section I of this Order, North Kern's petition for rehearing is nothing more than the expression of North Kern's obvious indignation that this court had the chutzpah to disagree with most of the contentions raised by North Kern on this appeal. We also point out that California Rules of Court, rule 25 [Rehearing], is not an invitation to edit the opinions of the Courts of Appeal. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263 ["[A]n opinion is not a brief in reply to counsel's arguments. . . . In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions"]; *People v. Garcia* (2002) 97 Cal.App.4th 847, 853-854.)

III.

Kern Delta's petition for rehearing is denied.

The court did not decide this case on public policy grounds. The opinion states only that, even if the Miller-Haggin Agreement and the Shaw Decree supported Kern

Delta's contention that its rights were not subject to California law governing forfeiture and unreasonable use, the court would be compelled to reject this argument on public policy grounds. Moreover, the parties extensively briefed the public policies of this state with respect to water and water rights.

Dibiaso, P.J.

WE CONCUR:

Ardaiz, P.J.

Levy, J.