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

NORTH KERN WATER STORAGE
DISTRICT,

Plaintiff,

v.

KERN DELTA WATER DISTRICT, et al.,

Defendants.

Case No. 96-172919

JUDGMENT

And Related Cross-Actions

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


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

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

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

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

21
22 Date: 2.9.05



Melinda M. Reed, Judge of the Superior Court

FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION

FEB 09 2005

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FOR THE COUNTY OF TULARE

NORTH KERN WATER STORAGE
DISTRICT,

Plaintiff,

v.

KERN DELTA WATER DISTRICT, et al.,

Defendants.

Case No. 96-172919

STATEMENT OF DECISION

Dept.: 1
Judge: Hon. Melinda M. Reed

Trial Date: August 30, 2004

And Related Cross-Actions

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2 Department One of the above-entitled court, the Honorable Melinda M. Reed presiding, without a
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4 Scott K. Kuney and Steven M. Torigiani, of the Law Offices of Young, Wooldridge, and
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7 McMurtrey, James A. Worth and Daniel N. Raytis of McMurtrey, Hartsock and Worth appeared as
8 counsel for defendant/cross-complainant/cross-defendant Kern Delta Water District ("Kern Delta");
9 and Colin L. Pearce and Matthew K. Kliszewski of Duane, Morris appeared as counsel for cross-
10 defendant/cross-complainant City of Bakersfield ("City").

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

14 STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

9 STATEMENT OF DECISION

10 I. Five-Year Period

11 Water Code Section 1241 states, in part:

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

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

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

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

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

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

20 As to when the present dispute arose and the elements that must be shown in order to
21 establish a clash of rights in this case, the court is bound to follow the law of the case and the
22 appellate court's findings concerning the law on forfeiture. Thus, this court finds that a dispute or
23 clash of rights between the parties must consist of: (1) a formal claim by a party to the lawsuit (or
24 its predecessor in interest) providing notice to a prior appropriator that the claimant has a right to the
25

26 ¹During the retrial, the parties were directed to prepare written briefs regarding how the
27 concept of "clash of rights" should be applied in the instant case. All parties filed their "clash of
28 rights" briefs on October 18, 2004.

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

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

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

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

14 The defendants in the *Farmers* case included a small number of parties who took water from
15 the South Fork of the Kern River. For the most part, the defendants had not signed the
16 Miller-Haggin Agreement and were not parties to it. The defendants had closed the head gate to the
17
18

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

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

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

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

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

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

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

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

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

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

1 B. Hancock vs. East Side Canal Company

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

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

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

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

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

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

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

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

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

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

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

23 **C. Kern River Water Storage District**

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

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

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

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

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

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

1 D. 1930's Rate Cases

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

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

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

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

19 ///

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

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

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

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

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

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

13 F. Formation of North Kern Water Storage District

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 I. Release Practice (1900 - 1952)

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

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

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

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

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

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

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

12 J. 1970's Litigation

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

17 Although co-defendants Land Company and North Kern initially opposed the lawsuit, the
18 claim was dissolved when the City dismissed its complaint in 1975 after the parties reached an
19 agreement for the sale of Kern Island rights to Kern Delta and the Land Company's remaining rights
20 to the City.²¹ When the City dismissed the suit, it ceased to exist and does not serve as the basis for
21 a clash of rights in this case. Furthermore, the City did not possess any Kern River water rights at
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23
24 ¹⁹Harry Barnes letter to Mr. H.T. Farmer (July 11, 1929).

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

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

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

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

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

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

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

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

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

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

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

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

4 K. Clash of Rights

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

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

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

17
18 ²⁸*Complaint in Rem to Determine the Legality and Validity of That Certain Contract Between*
19 *the City of Bakersfield, City of Bakersfield Water Facilities Corporation, Tenneco West Inc., Kern*
20 *Island Water Company, and Kern River Canal and Irrigating Company* (Kern County Superior
Court Case No. 141050) (May 11, 1976) (Ex. No. 629).

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

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

25 ³¹Letter to Harold Bergen, City Manager, from Lee Froman, President of North Kern (January
26 9, 1974).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 2. North Kern's tenth cause of action for damages against Kern Delta if
22 North Kern prevailed on its claim of entitlement to any forfeited water as described
23 above."
24

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

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



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

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

12 II. Time-Step & Methodology

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

18 A. Time-Step

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

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

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

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

27
28

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

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

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

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

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

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

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

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

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

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

22 (3) The Miller-Haggin Agreement requires the water to be measured on a
23 regular basis and, as noted by the appellate court, "the parties do not dispute that
24 these measurements have been made continuously on a daily basis since the inception
25 of the MHA and are accurate." *See Op.* at 5. New information is recorded each day
26 as to the river's supply and a right holder's use. Indeed, every day is a new day on
27 the river.
28

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

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

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

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

18 B. Methodology

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

23 1. Adjustment of the Five-Year Period

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

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

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

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

11 2. Definition of Available Water Supply

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

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

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

25
26 ^{42:}Theoretical entitlement," as used herein, refers to the amount of water recorded for a given
27 diversion right under the "Entitlement" or "Gross Entitlement" column of the Kern River First Point
28 Flow and Diversion record. This is to be distinguished from the "Shaw Decree entitlement," which
refers to the amount of water of a given diversion right assuming its maximum flow rate is
continuously available at its specific river stage.

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

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

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

17 In this regard, as previously noted, until December 1976 the majority of the
18 individual canal companies were under one head, the KCCWC, and even though
19 North Kern was a separate entity, the KCCWC was under contract to provide
20 essential services to North Kern. Historically, all of the consumer farmers of the
21 various canal companies requested water for any given day at about the same time
22 by placing an order with KCCWC. At the time the order was placed, the availability
23 of release water was wholly dependent on the subsequent water consumption of a
24 senior right holder and a junior only became aware of the extent of available release
25 water after delivery. It is this aspect that troubles the court most, as basic principles
26 of due process demand that prior to the loss of a right, knowledge of the right is
27 essential.
28

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

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

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

12 3. Amount Forfeited & Preserved Entitlements

13 The final dispute concerns calculation of the amount forfeited.

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

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

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

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

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

7 III. Conclusion

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

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

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

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

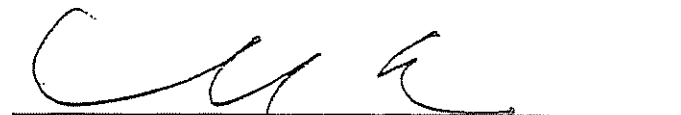
	Preserved Entitlement (ac-ft)	Shaw Decree Entitlement (ac-ft)	Quantity Forfeited (ac-ft)
Kern Island 1st, January	8,493	18,446	9,953
Kern Island 1st, October	6,989	18,446	11,457
Kern Island 1st, November	3,375	17,851	14,476
Kern Island 1st, December	2,050	18,446	16,396
Farmers, August	610	9,223	8,613

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

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

16
 17 Date

2.9.05



Melinda M. Reed, Judge of the Superior Court

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

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

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

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

McMurtrey, Hartsock & Worth
2001 22nd Street, Suite 100
Bakersfield, CA 93301

Colin L. Pearce, Esq.
DUANE MORRI, LLP
One Market, Spear Tower, Suite 2000
San Francisco, CA 94105-1104

Scott Kuney, Esq.
YOUNG WOOLDRIDGE
1800 30th Street, 4th floor
Bakersfield, CA 93301

Dated: February 9, 2005 at Visalia, California.

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

By Gina Baunton
Deputy Clerk