

1 COLIN L. PEARCE (State Bar No. 137252)  
HATCH AND PARENT  
2 21 East Camillo Street  
Santa Barbara, CA 93101-2782  
3 Telephone: (805) 963-7000  
Facsimile: (805) 965-4333  
4

5 ALAND. DANIEL (State Bar No. 81754)  
CITY ATTORNEYS OFFICE  
City of Bakersfield  
6 1501 Truxtun  
Bakersfield, California 93301  
7 Telephone: (805) 326-3721  
Facsimile: (805) 325-9162  
8

9 Attorneys for Cross-Defendant/Cross-Complainant  
CITY OF BAKERSFIELD

FILED  
TULARE COUNTY  
SUPERIOR COURT

MAY 26 1999

Clerk

By: \_\_\_\_\_

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 FOR THE COUNTY OF TULARE  
12

13 NORTH KERN WATER STORAGE  
14 DISTRICT, a California water storage  
district,

15 Plaintiff,

16 vs.

17 KERN DELTA WATER DISTRICT, a  
18 California water district,  
and DOES 1-3000,  
19

20 Defendants.

21 AND RELATED CROSS-ACTIONS.  
22

CASE NO. 96-172919

NOTICE OF ENTRY OF JUDGMENT

23  
24 TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

25 PLEASE TAKE NOTICE that judgment in the above entitled action was entered on  
26 May 13, 1999 in accordance with the attached Judgment and Statement of Decision.

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DATED: May 20, 1999

HATCH AND PARENT

*Colin Pearce*

By: COLIN L. PEARCE  
Attorneys for Cross-Defendant/  
Cross-Complainant CITY OF BAKERSFIELD

HATCH AND PARENT  
71 East Carrillo Street  
Santa Barbara, CA 93101

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is HATCH AND PARENT, 21 East Carrillo Street, Santa Barbara, California 93101. On April 7, 1999, I served the within document:  
**NOTICE OF ENTRY OF JUDGMENT**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Barbara, California addressed as set forth below.

by causing personal delivery by Federal Express of the document listed above to the person at the address set forth below.

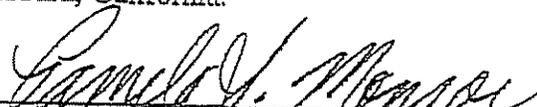
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SEE ATTACHED LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 7, 1999, at Santa Barbara, California.

  
Pamela S. Mouroe

HATCH AND PARENT  
21 East Carrillo Street  
Santa Barbara, CA 93101

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HATCH AND PARENT

21 East Camillo Street

Santa Barbara, CA 93101

- 1 Alan Daniel, Esq.  
City Attorneys Office  
City of Bakersfield  
1501 Truxtun  
Bakersfield, CA 93301
- 2
- 3
- 4 Gene McMurtrey, Esq.  
McMurtrey and Hartsock  
2001 22nd Street, Suite 100  
Bakersfield, CA 93301
- 5
- 6 William Smiland  
Theodore Chester  
Smiland & Khachigian  
601 West 5th Street  
Los Angeles, CA 90071
- 7
- 8
- 9 Lloyd Hinkelman  
Kronick, Moskovitz, Tiedemann & Girard  
400 Capitol Mall, 27th Floor  
Sacramento, CA 95814-4417
- 10
- 11
- 12 Ernest Conant, Esq.  
Scott Kuney, Esq.  
Young, Wooldridge  
1800 30th Street, 4th Floor  
Bakersfield, CA 93301
- 13
- 14
- 15 Daniel Dooley, Esq.  
Dooley & Herr  
100 Willow Plaza, Ste. 300  
Visalia, CA 93291
- 16
- 17 Gregory K. Wilkinson  
Arthur L. Littleworth  
Best, Best & Krieger  
P. O. Box 1028  
Riverside, CA 92502-1028
- 18
- 19
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FILED  
TULARE COUNTY  
SUPERIOR COURT

MAY 13 1999

By: *Cynthia Lynn*

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

NORTH KERN WATER STORAGE  
DISTRICT, a California water storage  
district,

Plaintiff,

vs.

KERN DELTA WATER DISTRICT, a  
California water district,  
and DOES 1-3000,

Defendants.

CASE NO. 96-172919

JUDGMENT

AND RELATED CROSS-ACTIONS

Phase One of the above captioned action came on regularly for trial on July 20, 1998 in Department 6 of the above entitled court, the Honorable Kenneth E. Conn, Judge Presiding, without a jury, and was tried from July 20, 1998 to November 25, 1998.

The court, having heard and considered testimony, documentary evidence and the arguments of counsel, the matter having been submitted for decision, and the court having issued its statement of decision:

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IT IS ORDERED, ADJUDGED AND DECREED that judgment on the amended complaint of plaintiff/cross-defendant/cross-complainant North Kern Water Storage District ("North Kern"), the cross-complaint of defendant/cross-complainant Kern Delta Water District ("Kern Delta"), the cross-complaint of cross-defendant/cross-complainant City of Bakersfield ("City"), the cross-complaint of North Kern and the affirmative defenses and answers of Kern Delta, City and North Kern is hereby rendered as set forth in the attached Statement of Decision, which Statement of Decision is incorporated herein by this reference and made a part of this Judgment.

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

DATED: May 15, 1999

  
THE HONORABLE KENNETH E. CONN  
JUDGE OF THE SUPERIOR COURT

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FILED  
TULARE COUNTY  
SUPERIOR COURT

MAR 31 1999

Stephen Konishi, Clerk  
By: *[Signature]*

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

North Kern Water Storage District,

Plaintiff,

v.

Kern Delta Water District, et al.

Defendant(s).

And Related Cross-Actions

CASE NO. 96-175919

STATEMENT OF DECISION

Phase One of the above entitled case came regularly on for trial on July 20, 1998 in Department 6 of the above entitled court, the Honorable Kenneth E. Conn, Judge Presiding, without a jury and was tried from July 20, 1998 to November 25, 1998.

Scott K. Kunej and Steven M. Torgiani of the Law Offices of Young Wooldridge and Gregory K. Wilkinson of Best, Best and Krieger appeared as counsel for plaintiff/cross-defendant/cross-complainant North Kern Water Storage District ("North Kern"); Paul A. Vortmann of Huributt, Clevenger, Long, Vortmann & Rauber, Lloyd Hinkelman of Kronick, Moskovitz, Tiedeman & Girard and James A. Worth of McMurtrey and Hartsock appeared as counsel for defendant/cross-complainant Kern Delta Water District ("Kern Delta"); Colin L. Pearce and Stephanie C. Osler of Hatch and Parent appeared as counsel for cross-defendant/cross-complainant City of Bakersfield ("City").

The parties introduced oral and documentary evidence and the case was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel, and

1 being fully advised, issues the following statement of decision pursuant to California Rule of  
2 Court 232.5:

3 INTRODUCTION

4 The Kern River is a natural watercourse originating in the Sierra Nevada range in Central  
5 California. It drains the second largest watershed in the state. The river emerges from the  
6 foothills and discharges into the southern San Joaquin Valley a few miles northeast of  
7 Bakersfield. It then flows to the southwest through the city to a point about 20 miles distant  
8 where in wet years it turns northwest and flows toward Tulare Lake.

9 Of all the major rivers of California, the Kern is the most variable from year to year  
10 ranging from less than 200,000 acre feet of water to more than 2,500,000 acre feet in the 103  
11 years since 1894. The average annual river flow is over 700,000 acre feet.

12 Beginning in the 1860's, water of the Kern River began to be diverted for agricultural and  
13 domestic uses. As competing demands for water increased, disputes over the right to use the  
14 river water ripened into litigation culminating in the notable decision of Lux v. Haggin in 1886.

15 In order to resolve disputes and avoid a retrial of certain issues as directed by the court,  
16 most of the disputants on the river entered into a contract, known thereafter as the Miller-Haggin  
17 Agreement which apportioned the rights to the flow of the river between the upstream users and  
18 the downstream users.

19 The agreement established two physical structures designed to implement and record the  
20 allocation of water: a measuring device located upstream about where the river left the bluffs,  
21 known as the first point of measurement, and a device about twenty miles downstream almost at  
22 the location where the river veers northeast, known as the second point of measurement.

23 Those who held the upstream rights became known as the first point interests and are the  
24 predecessors to the parties of this action.

25 Some few years after Lux v. Haggin, litigation commenced among the first point interests  
26 to determine their respective water rights, ending in the trial court decision in Farmers Canal Co.  
27 v. Simmons, forever after known as the "Shaw Decree."

28 The Shaw Decree of 1900 adjudicated the rights of the parties and established a priority of

1 rights in terms of feet per second of river flow.

2 The name, date of priority and maximum rate of diversion of the existing water rights  
3 administered by each of the parties as of the date of this statement is as follows:

4 CITY OF BAKERSFIELD:

5 Kern River Conduit

(As stated in the January 1, 1964  
6 amendment to the Miller-Haggin  
7 Agreement.)

8	Castro	About 1870	20Cfs
9	South Fork	January 1, 1870	10.5 Cfs
10	Beardsley (1 <sup>st</sup> ) (70%)	December 2, 1873	60 Cfs
11	Wilson	August 15, 1874	10 Cfs
12	McCord (49%)	March 20, 1875	100 Cfs
13	Calloway (20%)	May 4, 1875	850 Cfs
14	Railroad (20%)	August 7, 1876	200 Cfs
15	Beardsley (2 <sup>nd</sup> ) (70%)	1882	240 Cfs

16 KERN DELTA WATER DISTRICT:

17	Kern Island (1 <sup>st</sup> )	January 1, 1870	300 Cfs
18	Buena Vista (1 <sup>st</sup> )	July 15, 1870	80 Cfs
19	Stine	December 15, 1872	150 Cfs
20	Farmers	April 20, 1873	150 Cfs
21	Buena Vista (2 <sup>nd</sup> )	October 7, 1878	90 Cfs
22	Kern Island (2 <sup>nd</sup> )	1888	56 Cfs

23 NORTH KERN WATER STORAGE DISTRICT:

24	James (1 <sup>st</sup> )	October 15, 1871	120 Cfs
25	Anderson (1 <sup>st</sup> )	October 9, 1872	20 Cfs
26	Meacham	April 15, 1873	30 Cfs
27	Plunkett	June 1, 1873	40 Cfs
28	Joyce	June 2, 1873	40 Cfs

1	Johnson	June 2, 1873	40 Cfs
2	Pioneer (1 <sup>st</sup> )	August 1, 1873	130 Cfs
3	Beardsley (1 <sup>st</sup> ) (30%)	December 2, 1873	60 Cfs
4	Anderson (2 <sup>nd</sup> )	March 1874	10 Cfs
5	James & Dixon	June 1, 1874	40 Cfs
6	McCaffrey	October 31, 1874	26 Cfs
7	McCord (51%)	March 20, 1875	100 Cfs
8	Calloway (80%)	May 4, 1875	850 Cfs
9	Railroad (80%)	August 7, 1876	200 Cfs
10	James (2 <sup>nd</sup> )	October 7, 1878	180 Cfs
11	Pioneer (2 <sup>nd</sup> )	October 7, 1878	170 Cfs
12	Beardsley (2 <sup>nd</sup> ) (30%)	1882	240 Cfs

13 These water rights have come to be known as "theoretical" or "paper" entitlements.  
 14 Over the years a practice developed whereby the owner of a water right having no current  
 15 demand or desire to divert and use the full entitlement of water would permit the water not diverted  
 16 to remain in the river for diversion and use by junior rights. This water not diverted became known  
 17 as "release water" or water released to the river.

18 During the period from 1954-1976, the predecessors in interest to Kern Delta Water District  
 19 (Kern Delta) released on average 87,000 acre feet of water to the river each year. During the same  
 20 period, North Kern Water Storage District (North Kern) diverted and beneficially used on average  
 21 about 66,000 acre feet of release water per year of which about 63,000 acre feet had its source in  
 22 water released by Kern Delta's predecessors.

23 In 1976, Kern Delta acquired its current water rights by means of a purchase from the City  
 24 of Bakersfield (City) on an "as is" basis. Since that date, Kern Delta has consistently diverted and  
 25 used Kern River water in greater amounts than that diverted and used by its predecessors.

26 Central to any understanding of the administration of the Kern River is the concept of "the  
 27 law of the river." This refers to the body of decrees, agreements, customs and practices that came  
 28 into existence at a time in the late 1890's and early years of the 20th century when the water rights

1 of the first point interests were under the ownership or control of the Kern County Land Company  
2 or its subsidiaries.

3 An intricate system of daily, monthly and yearly records of river flow and diversions were  
4 diligently kept by the company. The records were continued to be faithfully kept in basically the  
5 same format by its successors, Tenneco West, and ultimately by the City. The river flow and the  
6 diversions of water accruing to each right is still recorded each day, albeit in a computerized format.

7 No party has challenged the accuracy of the river flow and diversion records.

8 Also important to note is the cooperation and consent among the first point holders of the  
9 various water rights as to the utilization of release water by the various rights according to their  
10 respective priorities, all without any formalized prior communication or acknowledgment or transfer  
11 agreements. It is entirely a permissive system administered under the law of the river.

12 The discussion that follows sets forth the court's more specific findings regarding the issues  
13 advanced by the parties.

14 1. The Nature of the Water Rights Held By Kern Delta and Other First Point Interests

15 The court is persuaded by the evidence that the water rights acquired by the predecessors of  
16 Kern Delta Water District were appropriative in nature. Although the South Fork of the Kern River  
17 was a primary water course of the river in the 1850's and early 1860s's, the floods of 1861-1862 and  
18 1867-1868 changed the natural flow of the river to the west, first into Old River and then into the  
19 present location of the Kern River.

20 The findings of Judge Lucian Shaw in Farmers Canal Company v. Simmons confirmed that  
21 by 1868 the South Fork had ceased to be a natural water course. The parties to the present action are  
22 collaterally estopped from contending otherwise. Even though South Fork was maintained as a  
23 means of diverting and carrying water to many of the Kern Island water users, this was by no means  
24 a riparian use because the lands were not abutting a natural water course.

25 The court does not find persuasive the theory that certain of the water rights of first point  
26 interests, chiefly the Kern Island right, acquired the status of "contractual water rights" either by  
27 reason of the 1870 agreement between Kern Island Irrigating Canal Company and the land holders  
28 in Swampland District 111, or the Miller-Haggin agreement of 1888.

1 First, it is questionable whether there is, in law, such a thing as a "contractual water right"  
2 Certainly a water right, whether appropriative, riparian, or prescriptive, may be the subject of a  
3 legally enforceable agreement like a myriad of other rights, obligations, goods, lands or services, but  
4 this does not adorn the water right with any special vestments other than those spelled out in the  
5 contract itself. Merely calling a water right a "contractual" water right does not mean it embodies  
6 superior qualities rendering it impervious to challenges based on lack of use, or unreasonable use.

7 Nothing in the contracts in question are persuasive that any of the first point rights referred  
8 to therein were other than appropriative rights either before or after the contracts were entered into  
9 and at all times subject to the laws of the State of California pertaining to appropriative water rights  
10 from time to time existing.

11 Specifically, the court is persuaded that the Miller-Haggin agreement by its plain and  
12 unambiguous language was intended to and did settle litigation between the two warring factions in  
13 the Lux v. Haggin case, the downstream riparian claimants (the second point interests) and the  
14 upstream appropriators (the first point interests). By its terms, the agreement specifically avoided  
15 any attempt to deal with the various first point water rights other than to confirm that, based on the  
16 then traditional recitation of consideration, all water rights or claims among and between the first  
17 point interests would remain just as they had been prior to the agreement.

18 Nothing in the agreement, or its amendments suggested that any water right was transformed  
19 into a guaranteed right having attributes of permanence or in any way was insulated from the  
20 application of the water law of the State of California.

21 Moreover, the concept of the guaranteed, paramount though dormant water right, even if  
22 intentionally created by the Miller-Haggin Agreement, would have doubtful validity today in view  
23 of the doctrine of unreasonable use discussed later in this Statement of Decision.

24 Later litigation endeavored to apportion the respective rights of the first point interests to the  
25 use of Kern River water as amongst themselves. This resulted in the "Shaw Decree" of 1900 in the  
26 case of Farmers Canal Company v. Simmons.

27 The Shaw Decree quantified the various water rights in terms of stream flow and ranked the  
28 various rights in order of priority based on the date of each appropriation - a classic method of

1 allocating appropriative rights. The first priority was given to the Kern Island right to divert and  
2 appropriate from the Kern River 300 cubic feet per second through the Kern Island Canal. The  
3 decree also provided that the distribution of Kern River water would be administered as provided  
4 in the Miller-Haggin agreement.

5         Although the subject of "release water" was not addressed in the Miller-Haggin Agreement  
6 and the Shaw Decree, it became the practice that if any prior right did not or could not use all the  
7 water it was entitled to, such remaining water became available to the right next in priority on down  
8 the list until the water was either entirely used up or all rights had their demands met and the  
9 remainder of the first point water was allowed to pass the second point for use by the downstream  
10 interests in accordance with the Miller-Haggin agreement.

11 **2.     The Rights Acquired by Kern Delta**

12         In 1976, Kern Delta acquired certain rights in Kern River water by entering into an  
13 agreement with the City of Bakersfield dated June 15, 1976, whereby the City transferred certain of  
14 the water rights it had obtained in a recent agreement with and quitclaim deed from Tenneco West,  
15 Inc., the preceding April.

16         The plain language of the June agreement made it clear that the City transferred to Kern Delta  
17 only such rights as it had received by the Tenneco Agreement, "whatever they may be." The court  
18 finds no ambiguity. The court is persuaded that the City made no guarantee of any measure or extent  
19 of entitlement and specifically provided that the rights transferred were "subject to the legal  
20 consequences, if any, of the actual administration of" the agreements, documents and decrees  
21 involving the City's predecessors, including the Shaw Decree.

22         Because Kern Delta could only have acquired what the City had to sell, it is necessary to  
23 determine whether and to what extent the paper or theoretical entitlement had been reduced by the  
24 time of the 1976 agreement by reason of prior agreements or by an historic failure to use the full  
25 extent of the water right.

26         At the outset, it has been contended that Kern Delta's predecessors never perfected the full  
27 amount of its appropriative entitlement by reason of their historic failure to put to beneficial use the  
28 water attributed to their rights.

1 It is the law that an appropriative right cannot be established until it is perfected by  
2 beneficially using the water which is the subject of the appropriation.

3 It appears to be conceded that the full entitlements of Kern Delta's rights were never  
4 historically used in the more than half a century prior to Kern Delta's acquisition. The enumeration  
5 and prioritization of the various first point rights in the Shaw Decree, however, would seem to  
6 obviate a further need to perfect any of the appropriative rights. Any reduction of Kern Delta's  
7 rights by reason of non-use are covered by later discussion.

8 **3. Purchase By North Kern**

9 It is contended by North Kern that its January 1, 1952, agreement with Kern County Land  
10 Company and certain of its subsidiary canal companies transferred to North Kern the right to use,  
11 in perpetuity, all water accruing to the water rights described in the agreement. North Kern contends  
12 that the agreement should be interpreted to mean that 208,000 acre feet per year, on average accrued  
13 to such rights during the 53 year period from 1894-1946, and that it included 67,500 acre-feet of  
14 release water. Based on North Kern's 66,100 acre-feet of actual annual use of release water from  
15 1954 to the date of Kern Delta's acquisition in 1976, North Kern contends that the rights acquired  
16 by Kern Delta were thus reduced by the amount of release water that Kern Delta's predecessors  
17 failed to divert and use.

18 The evidence fails to persuade the court that North Kern purchased any of the Kern Delta's  
19 water rights.

20 A fair reading of the 1952 agreement discloses no guarantee of any specific quantity of water  
21 to North Kern and no identification of any specific amount of release water which might be available  
22 to North Kern in future years. It is likewise significant that none of the public utility canal  
23 companies that were Kern Delta's predecessors signed the agreement.

24 Even if it were necessary to go beyond the plain and unambiguous language of the  
25 agreement, the surrounding circumstances do not support North Kern's purchase theory. The 1950  
26 Report does not identify any proposed acquisition of any portion of the rights now claimed by Kern  
27 Delta. At most it notes that water belonging to other canal companies but not diverted will be  
28 available to augment the water supply available to North Kern. Thus, the projected amount of

1 release water was an expectancy - more of a hope than a guarantee.

2 Lastly, despite the contention that the public utility canal companies had long since lost their  
3 rights to the release water through non-user, it is significant that North kern sought no approval from  
4 the Public Utilities Commission for a transfer of the release water as required by Section 851 of the  
5 Public Utilities Code. In the court's opinion any purported transfer of a water right claimed by a  
6 public utility would be invalid under the terms of that statute.

7 4. Forfeiture

8 Kern Delta's predecessors held pre-1914 appropriative water rights which were subject to  
9 the rule that a failure to make beneficial use of water for a continuous period of five years or more  
10 results in a loss, or forfeiture, of those rights not beneficially used. (Smith v. Hawkins (1895) 110  
11 Cal. 122). This rule also existed in rudimentary form in Section 1411 of the Civil Code enacted in  
12 1872 and is now codified in Sections 1240 and 1241 of the Water Code. It appears that the five year  
13 period may be any historic period of non-use that is continuous, and not necessarily the period  
14 immediately preceding the commencement of the legal action seeking to assert a forfeiture. (Hufford  
15 v. Dye (1912) 162 Cal. 147).

16 A unique aspect of this lawsuit is the undisputed fact that careful river flow and diversion  
17 records have been diligently maintained and preserved for more than a century. No party to this  
18 lawsuit disputes the accuracy or validity of these records. The interpretation of the data and the legal  
19 effect of the records are matters of acute controversy, however.

20 The evidence is persuasive that Kern Delta's predecessors failed to use beneficially the full  
21 extent of their theoretical or paper rights during various periods of five continuous years prior to the  
22 1976 acquisition by Kern Delta.

23 The fact that the water that was not so used may have been put to beneficial use by holders  
24 of other rights does not relieve the forfeiture. Each appropriative right to use of Kern River water  
25 has been historically treated as a separate and distinct right, from the Miller-Haggin agreement,  
26 through the Shaw Decree, and for a century of recording river flow and diversion records pursuant  
27 to the "law of the river." The concept of "a use by one is a use by all" has no basis in law, or  
28 historical fact.

1           The evidence is persuasive that the extent of the forfeiture, considering a 45 year period  
2 commencing in 1932, results in a preserved entitlement to Kern Delta of approximately 159,286 acre  
3 feet per year on average. The court is further persuaded that the evaluation of preserved entitlement  
4 set forth in Exhibit 5142 is an accurate portrayal of water use during the period in question as  
5 attributed to each of the rights acquired by Kern Delta. (Attachment A to this Statement of  
6 Decision).

7           How and to which entity the forfeited water right passes is a subject discussed later.

8       5.       Abandonment

9           The court is persuaded that North Kern has failed to prove that Kern Delta or its predecessors  
10 abandoned a water right for failure to prove the element of intent.

11           As previously noted it has been established that from time to time and for various periods  
12 Kern Delta and its predecessors failed to use its full paper entitlement. Unlike the law of forfeiture,  
13 however, abandonment requires not only non-use of water but also a corresponding intent or purpose  
14 that such water be abandoned or given up forever. Such intent may be express or implied. It would  
15 be rare indeed for a litigated dispute to have evidence of an express intent to abandon. Instead,  
16 almost all cases involved a question of fact whether non-use for a period of time, coupled with other  
17 facts and circumstances, establish an implied intent to abandon all or part of a water right.

18           In the present case, the court finds that the evidence of non-use might well be sufficient to  
19 establish abandonment were it not for the presence of other significant circumstances.

20           Most persuasive is the historical practice, that apparently is unique to the Kern River, of  
21 releasing water to the river whenever on any given day the use of such water is surplus to the  
22 demand of the entity holding the water right. Such release is accomplished with the full intent that  
23 the water so released may be used by the next junior right having a demand for water on that day,  
24 but with the acknowledged understanding that the next day is "a new day on the river" when the full  
25 right may be taken if there is a demand therefor.

26           Also persuasive is the volume of evidence showing that Kern Delta and its predecessors on  
27 a consistent basis over the years have asserted the Kern Island right to the first 300 cfs of the flow  
28 of the Kern River.

1 Under these circumstances, the court finds that there was no intent to abandon any water right  
2 that can be inferred from the evidence of non-use.

3 **6. Prescription**

4 The Court is persuaded that North Kern has failed to prove that it has acquired any of the  
5 water rights of Kern Delta or its predecessors by prescription for failure to prove the element of  
6 adversity.

7 It has been suggested that the decision in People v. Shirokow (1980) 26 Cal.3d 301,  
8 precludes the acquisition of a common law prescriptive right by adverse user after 1913, the date of  
9 our present statutes governing appropriation of water rights. Although the language of the opinion  
10 would provide persuasive support for such a conclusion, the decision expressly limits the prohibition  
11 against asserting post-1913 prescriptive rights to claims against the state. Whether such prescription  
12 right could be perfected against a private party was specifically left open.

13 Numerous decisions allowing post-1913 acquisition of prescriptive rights are thus left in  
14 force, e.g. Moore v. Cal. Oregon Power Co. (1943) 22 Cal. 2d 725, and are binding upon this court.

15 In order to establish a prescriptive right, the claimant must prove a use of the water for a  
16 continuous and uninterrupted period of at least five years, such use being open, notorious, adverse  
17 and hostile to the owner, and under a claim of right.

18 The court finds no evidence of adversity in the present case.

19 The use of release water under the customary procedures of diversion on the Kern River was  
20 at all times permissive, as described above. A permissive use, such as that enjoyed by North Kern,  
21 could never ripen into a prescriptive right because its use did not substantially interfere with the  
22 property right of Kern Delta.

23 By definition, water "released" by Kern Delta was water in excess of its demand on any  
24 given day, and thus considered surplus water.

25 The adversity element cannot be supplied by reference to Kern Delta's pleadings alleging that  
26 release water "was and is within the needs and water demands" of land owners and water users  
27 within the boundaries and service areas of Kern Delta. This is, first of all, only an allegation that  
28 does not attain the status of a judicial admission, and, second, appears to be supported by evidence

1 that at least some of the release water could have been put to beneficial use in the area in question  
2 had water users not chosen to meet their demands from other sources.

3 The element of adversity not having been proved, the claim of North Kern for acquisition of  
4 a water right by prescription fails.

5 7. Inverse Condemnation

6 North Kern asserts liability on the part of Kern Delta on a theory of inverse condemnation  
7 in that Kern Delta has diverted waters it was not entitled to divert in which North Kern held a  
8 paramount right to divert.

9 Inverse condemnation is a loss or injury by an owner of property resulting from an invasion  
10 of a property right by a public entity without payment of just compensation. Property of a public  
11 agency can be taken by inverse condemnation. (Marin Mun. Water Dist. v. City of Mill Valley  
12 (1988) 202 Cal. App. 3d 1161.

13 There has been evidence presented tending to show that Kern Delta has since its acquisition  
14 of Kern River water rights in 1976 diverted more water on average than its predecessors diverted  
15 historically. The quantification of such over diversion attempts to balance a number of variables  
16 including the annual fluctuation in the flow of the river, the substantially different irrigation water  
17 uses in the different seasons and historical differences in water use practices. The average annual  
18 over diversions or under diversion were highly variable.

19 The evidence is persuasive that Kern Delta diverted an aggregate amount of up to 350,000  
20 of acre feet more water from 1977 through 1996 compared to 1966 through 1976.

21 Where the inverse condemnation analysis breaks down is the failure of the evidence to prove  
22 that such over diversion constituted a "taking" of property owned by North Kern.

23 The court is not persuaded that the evidence supports a conclusion that any over diversion  
24 in a given period was at the expense of North Kern in the sense that is actually deprived North Kern  
25 of a particular diversion of water that would have been used but for the taking thereof by Kern Delta.

26 Additionally, to the extent it is contended by North Kern that all or part of the water taken  
27 was release water acquired by North Kern through forfeiture, that issue is addressed later in this  
28 decision.

1 For these reasons the court finds that the inverse condemnation claim asserted by North Kern  
2 has not been proved.

3 8. Intervening Public Use

4 North Kern asserts that it is an intervening public user of the release water in question, thus  
5 preserving for itself the right to future use of such water to the exclusion of any claim by Kern Delta.

6 The doctrine of intervening public use is most often applied as a shield protecting a public  
7 entity under certain circumstances from an injunction prohibiting further use of a water right. The  
8 doctrine is explained in Miller & Lux v. Enterprise Canal and Land Co. (1915) 169 Cal. 415, as  
9 follows:

10 "...That where a person has suffered property  
11 belonging to him and under his control to be taken  
12 and devoted to a public use by one engaged in  
13 administering such use, and the matter has gone on so  
14 far that the beneficiaries thereof rely on its  
15 continuance and adjust their affairs accordingly, such  
16 owner having knowledge thereof and making no  
17 objection or protest, this conduct will be regarded by  
18 the courts as a dedication by such owner of the  
19 property to the particular public use, and he cannot  
20 thereafter interrupt nor prevent the same, his only  
21 remedy being to seek compensation for the property  
22 he has thus allowed to be taken..."

23 Id at 429.

24 To the extent that Kern Delta may seek to enjoin North Kern from further use of release  
25 water taken from Kern Delta and put to public use by North Kern, North Kern could foil the claim  
26 for injunctive relief and limit Kern Delta to the remedy of compensatory damages.

27 Here, however, North Kern attempts to use the doctrine as a sword, asserting that its taking  
28 of the release water for public use entitles it to continue the use free from any claim by Kern Delta.  
This application of the doctrine of intervening public use must fail for several reasons.

First, it is tantamount to the assertion of a prescriptive right and suffers from the same defects  
as noted above in regard to prescriptive use.

Further, the doctrine does not apply to property already dedicated to public use. (See Wright  
v. Goleta Water District (1985) 174 Cal. App. 3d 74, 90; Civil Code section 1007).

Here, Kern Delta's predecessors were public utilities and their water rights were dedicated

1 to a public use long before North Kern came upon the scene.

2 For these reasons, the court finds that the intervening public use claim asserted by North  
3 Kern has not been proved.

4 9. Unreasonable Use

5 North Kern asserts that Kern Delta's increased diversions of Kern River water in excess of  
6 the historic diversions of its predecessors and its claim to continue such use constitute an  
7 unreasonable use of water prohibited by Article X, Section 2 of the California Constitution. North  
8 Kern's contention has merit.

9 Kern Delta's claim to such excess diversions is based upon the theory that its predecessors'  
10 water rights set forth in the Miller-Haggin agreement are contractual and are therefore guaranteed  
11 and inviolate. Such rights, according to Kern Delta, even though dormant and unused, have absolute  
12 priority and are paramount to active appropriate rights of a lower priority such as those held by North  
13 Kern.

14 This stance is contrary to the doctrine of unreasonable use as set forth in the case of In re  
15 Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339. The court in Long Valley  
16 upheld the State Board's determination that an unexercised riparian right may well be given a lower  
17 priority than existing appropriative rights. The decision was based upon Article X, Section 2. One  
18 of the reasons advanced was a belief that water users suffered too much from the uncertainty created  
19 by granting a dormant and unexercised riparian right a higher priority than active appropriations.

20 The court finds that Article X, Section 2, would likewise foreclose Kern Delta's use of water  
21 rights, unexercised for almost a century, under a claim of absolute priority. The uncertainty that rises  
22 from such a claim has plagued other water rights holders such as North Kern in the past and would,  
23 if upheld, continue to cloud future endeavors.

24 For these reasons, Kern Delta's use of its water rights to divert Kern River water in excess  
25 of historic amounts is precluded.

26 10. Disposition of Water Rights

27 The court now turns to the issue of what disposition should be made of the water rights lost  
28 by Kern Delta or its predecessors because of forfeiture or unreasonable use.

1 The issue of whether pre-1914 water rights revert to the state upon forfeiture or revert to  
2 junior appropriators appears to be a matter of first impression in California.

3 In Erickson v. Queen Valley Ranch Co. (1971) 22 Cal. App. 3d 578 the court considered  
4 whether a plaintiff had put its pre-1914 appropriative water right to reasonable and beneficial use  
5 for a period of five years. In reviewing the law of forfeiture, the court stated:

6 Generally, an appropriative water right is forfeited by  
7 force of statute and reverts to the public if the  
8 appropriator fails to put it to beneficial use during a  
9 three-year period. (Wat. Code, section 1240-1241.)  
10 Since [plaintiff's] appropriative right had been  
11 established before 1914, forfeiture required nonuse for  
12 five rather than three years. (Wright v. Best, 19 Cal.  
13 2d 368, 380; 1 Rogers & Nichols, Water for  
14 California, pp. 515-516; Hutchins, The California  
15 Law of Water Rights, pp. 293-296).

16 Moreover, the revision of forfeited water back to the public reconciles squarely with the  
17 administrative policy of the State Water Resources Control Board (SWRCB):

18 Since enactment of the Water Commission Act  
19 (effective December 14, 1914), a right to appropriate  
20 or use water (other than as a riparian or overlying  
21 owner, or appropriator of percolating ground water),  
22 cannot be acquired without issuance of a permit (see  
23 Water Code section 1225 and Crane v. Stevinson 5  
24 Cal. 2d 387, 54 P. 2d 1100) ...it is the policy of the  
25 Division of Water to disregard a claim to water  
26 subject to the permit procedure which is based only  
27 upon use initiated subsequent to 1914 unless it is  
28 supported by a permit.

(California State Water Resources Control Board, Information Pertaining to Appropriation  
of Water in California 5 (1990).)

Water Code section 1202(b) and 1201, early California decisions, and SWRCB policy  
directives, when read in conjunction with the judicial forfeiture doctrine as described in Erickson  
and Water Code section 1241, establish that pre-1914 appropriative rights which have been forfeited  
by nonuse revert to the public, and are available for subsequent appropriation only through those  
procedures set forth in the Water Code for the appropriation of unappropriated water after 1914.  
(See also People v. Shirokow (1980) 26 Cal. 3d 301; Water Code section 1225.)

After 1914, the statutory procedures set forth at Water Code sections 1200 *et seq.* "became

1 the exclusive means of acquiring appropriative rights." (Shirokow, 26 Cal. 3d at 308; Wat. Code  
2 sections 1201, 1225.) As a result, no party today who wishes to appropriate unappropriated water  
3 from surface water sources of the state, such as the Kern River, may do so without filing an  
4 "application to appropriate" with the SWRCB. This requires application to the board for a permit  
5 to put unappropriated water to beneficial use. (Wat. Code section 1252.)

6 The SWRCB is the administrative body charged by the legislature with exercising the  
7 "adjudicatory and regulatory functions of the state in the field of water resources." (Wat Code section  
8 184.) As such, the SWRCB is responsible for the allocation of appropriative rights in the state.  
9 (Littleworth, California Water 43 (1995).) The SWRCB must "consider and act upon all applications  
10 for permits to appropriate water," and is authorized to do all things required or proper to act on such  
11 applications. (Wat. Code section 1250.) After due consideration of the application, the SWRCB may  
12 grant, condition, or deny an application for appropriative use. (United States v SWRCB (1986) 182  
13 Cal. App. 3d 82, 102).

14 Presently, the waters of the Kern River are "fully appropriated," as that term is defined and  
15 has been declared by the SWRCB. (See SWRCB, Declaration of Fully Appropriated Stream Systems,  
16 Water Rights Order 89-25 app. A, at 15 (1991).) Until declared to be otherwise by a court or the  
17 SWRCB, Kern Delta, and all other Kern River interests, collectively hold all rights in and to the  
18 waters of the Kern River.

19 Because this court has determined that certain of Kern Delta's water rights have been  
20 forfeited, this court further finds that the Kern River is no longer fully appropriated and such water  
21 is subject to appropriation.

22 North Kern has cited authority, however, for the proposition that water forfeited by a senior  
23 appropriator automatically passes to the next most senior appropriator to the extent necessary to  
24 satisfy its needs. The only case authority cited is the Utah decision in Wellsville East Field Irr. Co.  
25 v. Lindsay Land & Livestock Co. (1943) 104 Utah 448, 137 P.2d 634. The scenario in that case  
26 appears to involve adverse possession. The suggestion that forfeiture does not necessarily require  
27 a reversion to the state is dicta and not persuasive authority in the present case.

28 It is therefore the decision of this court that the portion of water rights of Kern Delta found

1 to be forfeited shall be deemed unappropriated water and become subject to appropriation pursuant  
2 to applicable procedures before the State Water Resources Control Board.

3 If it is ultimately determined on appeal, however, that this decision is in error on this point,  
4 then it is the finding of this court that the water rights so forfeited pass automatically to the next  
5 junior water right holder, which in this case is North Kern, and in that event it is the decision of this  
6 court that such water rights have vested in North Kern on the effective dates of the forfeitures.

7 The court has considered other alternative dispositions as discussed below.

8 11. Equitable Apportionment

9 The doctrine of equitable apportionment permits a court to largely disregard the strict rules  
10 of priority in favor of an allocation that will be fair to all water users. This usually involves a  
11 reduction in water rights to fairly distribute the burden of scarcity. (See City of Pasadena v.  
12 Alhambra et al. (1949) 33 Cal. 2d 908).

13 A physical solution on the other hand is a practical approach seeking to meet the basic needs  
14 of competing water users through a mechanical restructuring of the water supply or distribution  
15 system. (See City of Lodi v. East Bay Municipal Utility District (1936) 7 Cal. 2d 316).

16 This court is persuaded that neither of these doctrines are appropriate dispositions in this  
17 case. The evidence has shown that no party to this lawsuit is threatened with dire injury or loss  
18 regardless of the outcome of this case. It is apparent that the disposition of the disputed water rights  
19 herein will have an economic impact, either favorable or unfavorable, upon the various parties  
20 hereto, but not to the extent that any party will face drastic consequences. The longstanding practice  
21 of diversion and distribution of Kern River water is marked by its acceptance and its utility.  
22 Basically, the existing system works well and results in available water being distributed in an  
23 orderly and predicable manner and being beneficially used where demands exist.

24 This court deems it important that the existing system be preserved so far as possible and  
25 declines to attempt an equitable apportionment or a physical restructuring of the method of  
26 distribution on the Kern River.

27 12. Public Policy

28 This court has considered the City's assertion that public policy favors the municipal use of

1 water over that of agricultural or industrial and that the City has a priority to any forfeited,  
2 unappropriated water under Water Code section 106 and 106.5 and based on its future demand for  
3 additional water. As persuasive as those arguments may be, this court notes that the City's use of  
4 water and its projects have not yet been threatened by the competing claims or uses of the release  
5 water herein in dispute and that City's projected reasonable water demands will be met for many  
6 decades to come under its existing water rights.

7 This court is of the opinion that the City's quest for priority upon reappropriation of the  
8 forfeited water rights is more properly addressed by the State Water Resources Control Board.

9 13. Injunctive Relief

10 The court is not persuaded that injunctive relief is appropriate at this time for several reasons.  
11 First, it remains to be determined which party or parties will become entitled to the water subject to  
12 the forfeited water rights. Second, no party is threatened with such dire losses or unjust  
13 consequences that equitable relief is required. Third, under the circumstances of this case, any party  
14 ultimately determined to have been deprived of water by reason of an unlawful diversion can be  
15 made whole by the remedy at law of money damages.

16 The court declines to impose injunctive relief as to any party hereto.

17 However, the court also understands the parties' concerns regarding the future day to day  
18 administration of the Kern River. Accordingly, the court anticipates that the administration of the  
19 Kern River will continue as it has in the past, in accordance with "the law of the river." The court  
20 further anticipates that the Kern River flow and diversion records will continue to be maintained as  
21 they have in the past. As indicated previously in this statement of decision, this court finds that  
22 under the doctrine of forfeiture Kern Delta has a preserved entitlement of approximately 159,286  
23 acre feet per year, on average. Kern Delta is entitled to take its preserved entitlement by exercising  
24 its rights on a daily basis up to the full amount of its "paper" or "theoretical" entitlement on that day,  
25 provided that its total utilization does not exceed 159,286 acre feet per year, on average, using the  
26 45 year period of 1932 through 1976 (the time period for calculation of the preserved entitlements).  
27 The preserved entitlement represents an average, and not an absolute, rigid cap or ceiling. The court  
28 therefore recognizes that Kern Delta may take more or less than 159,286 acre feet of Kern River

1 water in future years, and that Kern Delta's running average annual diversion amount may fluctuate  
2 over the years.

3 14. City's Eighth Cause of Action

4 City asserts in its Eighth Cause of Action in its cross-complaint against Kern Delta a claim  
5 for damages for breach of contract, asserting that Section 3.2 of the 1976 agreement between those  
6 parties was violated. The provisions of that paragraph purport to prohibit the institution of any  
7 action or claim regarding water rights against the other party unless necessary for the protection,  
8 preservation or defense of the water rights claimed by the instigating party. City contends that Kern  
9 Delta's cross-complaint against City breaches this provision.

10 The Court finds this contention to be without merit for two reasons. First, City has offered  
11 no evidence to show that it was not necessary for Kern Delta to make its cross-complaint for the  
12 protection of its water rights. Second, the Court finds that the state of the evidence is persuasive that  
13 it was necessary to Kern Delta to file a cross-complaint against City in order to protect, preserve and  
14 defend its water rights and property interests. City's Eighth Cause of Action of its cross-complaint  
15 against Kern Delta has not been proved.

16 15. Disposition of Causes of Action

17 The court decides the following surviving causes of action and defenses based on the findings  
18 and conclusions above set forth as follows:

19 Amended Complaint of North Kern

20	First (Purchase):	Not proved.
21	Second (Forfeiture):	Proved.
22	Third (Abandonment):	Not proved.
23	Fourth (Intervening Public Use):	Not proved.
24	Fifth (Prescription):	Not proved.
25	Sixth (Equitable Apportionment):	Not proved.
26	Seventh (Unreasonable Use):	Proved.
27	Eighth (Injunction):	Not proved.
28	Ninth (Declaratory Relief):	Proved.

1	Tenth (Damages):	Deferred.
2	<u>Cross-Complaint and Answer of Kern Delta</u>	
3	First (Quiet Title):	Not proved.
4	Second (Declaratory Relief):	Proved.
5	Third (Injunction):	Not proved.
6	Seventh (Specific Performance):	Not proved.
7	First through Seventh Affirmative Defenses:	Not proved.
8	Eighth Affirmative Defense:	Moot.
9	Ninth through Nineteenth Affirmative Defenses:	Not proved.
10	<u>Cross-Complaint and Answer of City to Kern Delta's Cross-Complaint</u>	
11	First (Forfeiture):	Proved.
12	Third (Quiet Title):	Not proved.
13	Eighth (Breach of Contract)	Not proved.
14	Eleventh (Injunction):	Not proved.
15	Twelfth (Injunction):	Not proved.
16	First through Thirty-Fifth Affirmative Defenses:	Not proved.
17	<u>Cross-Complaint of North Kern</u>	
18	First (Declaratory Relief/City)	Not proved.
19	Second (Declaratory Relief/City)	Not proved.
20	Third (Breach of Contract/Kern Delta)	Not proved.
21	Fourth (Injunction/City)	Not proved.
22	Fifth (Inverse Condemnation/Kern Delta)	Not proved.
23	<u>Affirmative Defenses of Kern Delta to North Kern Cross-Complaint</u>	
24	First thru Forty-Fifth Affirmative Defense:	Not proved.
25	<u>Affirmative Defenses of City to North Kern Cross-Complaint</u>	
26	First thru Twenty Sixth Affirmative Defense:	Not proved.
27	<u>Affirmative Defenses of North Kern to City's Cross-Complaint</u>	
28	First and Second:	Not proved.

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Third: Proved as heretofore discussed.

Fourth through Twenty-third Affirmative Defenses: Not proved.

16. Damages

The court finds that no party has established a right to damages against any other party to this action. A further phase of this trial dealing with damages is moot, and a final judgment can appropriately be entered.

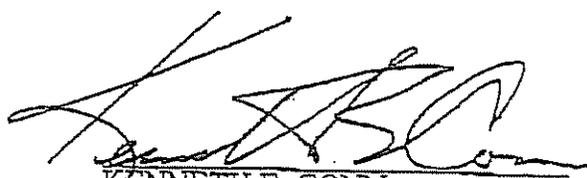
17. Costs and Attorney Fees

The Court further finds that no party to this action can be deemed a prevailing party for the purpose of awarding costs or attorney fees. Each of the parties has been successful in establishing one or more causes of action or affirmative defenses; each has been unsuccessful in establishing others. No clear benefit to any party has yet emerged in this action that would make an award of costs or attorney fees required as a matter of right or appropriate as being fair, just and equitable. Accordingly, each party shall bear its own costs and attorney fees.

18. Conclusion

A final judgment shall be entered in accordance with the provisions of this Statement of Decision. Counsel for City is directed to prepare, notice, and submit a proposed judgment in accordance with rules of court.

Dated: March 31, 1999.

  
KENNETH E. CONN  
Judge of the Superior Court

Preservation of Entitlements and Average Actual Use  
of Kern Delta Diversion Rights  
Based on 45-Year Evaluation Period  
Extending from 1932 through 1976  
(values in acre-feet)

Diversion Right	Kern Island (1st)	Buena Vista (1st)	Stine Farmers	Buena Vista (2nd)	Kern Island (2nd)	Total	
January	15,276	813	1,753				
February	5,609	884	405	28	17	4,291	
March	5,862	570	779	5	0	8,006	
April	21,872	1,600	2,128	1	4	20,737	
May	10,521	818	1,818	148	33	18,389	
June	2,591	1,138	2,455	243	95	16,989	
July	8,272	314	2,312	31	346	19,956	
August	6,020	2,012	2,360	57	405	27,009	
September	9,451	716	555	0	48	19,069	
October	6,980	673	329	0	0	10,732	
November	3,122	852	176	0	0	8,024	
December	562	669	152	4	0	4,389	
<b>Total</b>	<b>112,769</b>	<b>17,025</b>	<b>15,582</b>	<b>12,418</b>	<b>535</b>	<b>957</b>	<b>159,286</b>

Notes:

- 1) Monthly values in shaded area determined by forfeiture analysis.
- 2) All other monthly values determined as average actual use for period 1932 through 1976.

NO. 172919 EX. NO. 5142

PLTF(s)  ID  EVID  
 DEFT(s)  ID  EVID

OTHER \_\_\_\_\_  ID  EVID

Date: \_\_\_\_\_

CLERK OF THE SUPERIOR COURT

By J.B. Deputy

# 5142

I declare that I am employed in the County of Tulare, California. I am over 18 years of age, and not a party to the within entitled action. I am employed at, and my business address is : Room 303, County Civic Center, Visalia, CA 93291. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and in the ordinary course of business, mail is deposited in the United States Postal Service on the same day it is picked up from my office. On this date I served the attached \_\_\_\_\_

STATEMENT OF DECISION

\_\_\_\_\_ on the parties listed below by placing true copies thereof enclosed in a sealed envelope in the receptacle designated for collection in the office and subsequent mailing, following ordinary business practices, at Visalia, California and addressed as shown below:

Executed this 31st day of March, 1999, at Visalia, California. I

declare under penalty of perjury that the foregoing is true and correct.

Clerk of the Superior Court

By: Alexise Williams

Lloyd Hinkelman  
Kronick Moskovitz Tiedemann & Girard  
400 Capitol Mall 27th Floor  
Sacramento, CA 95814-4417

Daniel Dooley  
Dooley & Herr  
100 Willow Plaza Ste 300  
Visalia, CA 93291

Young Woodridge  
Scott K. Kuney  
1800 30th St., Fourth Floor  
Bakersfield, CA 93301-5298

Hatch & Parent  
Scott S. Slater  
21 East Carrillo St  
Santa Barbara, CA 93101-2782

McMurtrey & Hartsock  
Gene R. McMurtrey  
2001 22nd St., Ste. 100  
Bakersfield, CA 93301

Hurlbutt Clevenger Long Rauber & Nelson  
P O Box 1471  
Visalia, CA 93279-1471

Gregory K. Wilkinson  
Arthur L. Littleworth  
Best Best & Krieger  
P.O. Box 1028  
Riverside, CA 92502-1028

