

Westlaw

Page 1

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

H

Court of Appeal, Fifth District, California.
NORTH KERN WATER STORAGE DISTRICT,
Plaintiff, Cross-complainant, Cross-defendant and Appellant,

v.
KERN DELTA WATER DISTRICT, Defendant, Cross-complainant, Cross-defendant and Appellant;
City of Bakersfield, Cross-complainant, Cross-defendant and Respondent.
No. F047706.

Feb. 5, 2007.
Rehearing Denied March 2, 2007.
Review Denied April 25, 2007.

Background: Owner of junior appropriative common law water rights to river sued to establish that owner of multiple appropriative rights, all of which were senior to that of plaintiff, had forfeited that portion of its appropriative rights exceeding its historical use of the water. The Court of Appeal reversed the first judgment in favor of plaintiff, and remanded with directions. On retrial, the Superior Court, Tulare County, No. 96-172919, Melinda M. Reed, J., declared a forfeiture of certain of defendant's previously appropriated river waters. Both parties appealed.

Holdings: The Court of Appeal, Vartabedian, Acting P.J., held that:

- (1) claimed forfeiture was properly measured during five-year period immediately preceding plaintiff's formal claim based on defendant's nonuse and defendant's formal objection to that claim;
- (2) in circumstances of this case defendant's claimed nonuse of water was properly measured in monthly, rather than seasonal, increments;
- (3) release water was properly considered in determining defendant's nonuse of its lesser appropriative water rights;
- (4) State Water Resources Control Board had to determine in first instance whether forfeiture created allocable excess that would be available for permitting; and

(5) defendant was properly precluded from asserting equitable estoppel defense to forfeiture action.

Affirmed as modified.

Opinion, 52 Cal.Rptr.3d 839, vacated.

West Headnotes

[1] Waters and Water Courses 405 ⇨ 153

405 Waters and Water Courses
405VII Conveyances and Contracts
405k153 k. Transfer of Property, Easements, or Rights in General. Most Cited Cases
Common law appropriative water rights are freely transferable, subject to the no-injury rule and to the reasonable and beneficial use requirement applicable to all water rights. West's Ann.Cal. Const. Art. 10, § 2; West's Ann.Cal. Water Code § 1706.

[2] Waters and Water Courses 405 ⇨ 127

405 Waters and Water Courses
405VI Appropriation and Prescription
405k127 k. Appropriation and Prescription in General. Most Cited Cases

Waters and Water Courses 405 ⇨ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases
Water rights are a form of property and, as such, are subject to establishment and loss pursuant to the doctrines of prescription, adverse possession, and abandonment.

[3] Waters and Water Courses 405 ⇨ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights. Most Cited Cases

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

Due to the scarcity of water generally in California, its societal importance, and the peculiar nature of common and multiple rights to water from the same watercourse, the courts have recognized that water rights may be forfeited through nonuse under certain circumstances.

[4] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights.
Most Cited Cases
A forfeiture may be of an entire water right, or the forfeiture may be limited to a portion of the water right or to a portion of the year, or both.

[5] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights.
Most Cited Cases
In order to establish a forfeiture of water rights, the plaintiff must prove that the defendant failed to use some portion of its water entitlement over a span of five years immediately prior to the plaintiff's assertion of its conflicting right to the water.

[6] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights.
Most Cited Cases
In determining whether there has been a forfeiture of all or some portion of water rights, the measurement period must be based on the nature of the original appropriation and the historical beneficial use, and the amount forfeited, if any, is the difference between the highest use in any period within the span and the overall entitlement to water established by the appropriation.

[7] Waters and Water Courses 405 ↪ 140

405 Waters and Water Courses
405VI Appropriation and Prescription
405k140 k. Priorities. Most Cited Cases

Under the common law, when the flow of the river is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water; in other words, there is no mandatory prororation of water among appropriators when, as is usually the case, river flow is insufficient to fully satisfy all appropriations.

[8] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights.
Most Cited Cases
Appropriate five-year period for measuring claimed forfeiture of portion of senior appropriative common law water rights to river based on nonuse was five years immediately preceding junior appropriator's formal claim of forfeiture based on nonuse and defendant's formal objection to that claim; prior to formal claim and objection, there was no "clash of rights" sufficient to permit establishment of forfeiture.
See Cal. Jur. 3d, Water, § 498 et seq.

[9] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses
405VI Appropriation and Prescription
405k151 k. Abandonment or Forfeiture of Rights.
Most Cited Cases
Where owners of appropriative common law water rights to river and their predecessors had always accepted water orders from their irrigation customers on daily basis, yet official records of use were maintained in monthly reports, junior appropriator's claim of forfeiture of certain of senior appropriator's water rights due to its historical nonuse of water was properly measured in monthly, rather than seasonal, increments; under those circumstances, daily measurement period would best protect senior appropriator's entitlement to volume of water sufficient to meet historical uses, and monthly measure provided closest available basis for evaluating actual daily use.

[10] Waters and Water Courses 405 ↪ 151

405 Waters and Water Courses

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

405VI Appropriation and Prescription

405k151 k. Abandonment or Forfeiture of Rights.

Most Cited Cases

In determining validity of junior appropriator's claim that owner of multiple senior common law appropriative water rights to river had forfeited that portion of its appropriative rights exceeding its historical beneficial use of the water, senior appropriator's use of water released back into the river that thereby became available to its lesser senior appropriative rights had to be considered; maximum amount of actual, beneficial use of water, including release water that was actually available to lesser appropriators, established base against which forfeiture had to be determined. West's Ann.Cal. Const. Art. 10, § 2; West's Ann.Cal. Water Code § 1241.

[11] Waters and Water Courses 405 ⇐ 151

405 Waters and Water Courses

405VI Appropriation and Prescription

405k151 k. Abandonment or Forfeiture of Rights.

Most Cited Cases

Forfeiture of portion of senior appropriator's common law water rights to river based on nonuse did not automatically create surplus of unappropriated water subject to appropriation through State Water Resources Control Board's permitting process; given existing rights of owners of junior common law appropriative rights, initial determination whether forfeiture created allocable excess was reserved in first instance to Board. West's Ann.Cal. Water Code § 1241.

[12] Waters and Water Courses 405 ⇐ 151

405 Waters and Water Courses

405VI Appropriation and Prescription

405k151 k. Abandonment or Forfeiture of Rights.

Most Cited Cases

Owner of senior appropriative common law water rights to river was properly precluded from asserting equitable estoppel defense to junior appropriator's claim that senior appropriator forfeited portion of its rights due to its historical failure to make beneficial use of that portion; equitable estoppel could not be invoked to contravene constitutional and statutory mandates that water be used reasonably and for beneficial purposes, defense was

precluded by law of the case doctrine, since similar "implied promise" defense had been found to lack merit during prior appeal, and senior appropriator failed to show that it had relied to its detriment on any words or conduct of junior appropriator, which showing was required in support of defense. West's Ann.Cal. Const. Art. 10, § 2; West's Ann.Cal. Water Code § 1241.

**580 Young Wooldridge, Ernest A. Conant, Scott K. Kuney, Steven M. Torigiani, Bakersfield; Best Best & Krieger, Arthur L. Littleworth, Gregory K. Wilkinson and Jill N. Willis, Riverside, for Plaintiff, Cross-complainant, Cross-defendant and Appellant.

McMurtrey, Hartsock & Worth, Gene R. McMurtrey, Bakersfield, Daniel N. Raytis, James A. Worth, Bakersfield; Smiland Khachigian Chester, William M. Smiland and Theodore A. Chester, Los Angeles, for Defendant, Cross-complainant, Cross-defendant and Appellant.

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

*558 OPINION AFTER REHEARING

VARTABEDIAN, Acting P.J.

North Kern Water Storage District (North Kern) appeals and Kern Delta Water District (Delta) cross-appeals from a judgment entered on retrial, after we reversed a prior judgment. The present judgment declared a forfeiture of certain previously appropriated waters of the Kern River. Plaintiff and appellant North Kern contends that the trial court erred in selecting the timeframes against which to measure nonuse of the water, that the court should have measured differently the nonuse of water by junior water rights holders, that the court erroneously precluded North Kern from asserting that senior rights holders' use of water was unreasonable, and that the court should have awarded the forfeited water to North Kern instead of declaring it available for appropriation through the statutory permit procedure. Defendant and appellant Delta contends the court erred in pre-

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

cluding its defense of estoppel and in measuring the forfeiture against Delta's full appropriation even when the river had insufficient water to provide the full appropriation. Respondent City of Bakersfield (Bakersfield), holder of rights *559 junior to some of Delta's rights and senior to some of North Kern's rights, generally supports the judgment entered on retrial.

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

I. Facts and Procedural History

This matter was before us in *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 2003 WL 215821 (Jan. 31, 2003, F033370) (*North Kern Water Storage Dist.*), and a complete statement of the facts is contained in the unpublished opinion in that case, filed January 31, 2003. We will not repeat the facts here in that level of detail.

**581 A. Summary of Legal Principles from Prior Opinion

[1] The parties use water from the Kern River pursuant to rights originally established in the late 19th century. As with all water rights in California, exercise of the right is conditioned on reasonable use of the water for a beneficial purpose. (See Cal. Const., art. X, § 2.) In other words, the owner of the right to a quantity of water or to the flow of water (for example, for power generation) is not entitled to waste water or to use it unreasonably. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-1242, 99 Cal.Rptr.2d 294, 5 P.3d 853.) The owner of a common law right ^{FN1} to appropriate water from a natural watercourse, such as the Kern River, has the right to change the purpose and place of use of the water, so long as any change does not injure others with rights in the watercourse. (See Wat.Code, § 1706.) (We refer to this as the no-injury rule. (See Slater, Cal. Water Law and Policy (1995) § 10.02, p. 10-8.)) Common law appropriative rights are freely transferable, subject to the no-injury rule and to the reasonable and beneficial use requirement applicable to all water rights. (*Id.* at § 2.18, p. 2-77.)

^{FN1}. A procedure for establishment and regulation of rights to appropriate water was adopted in the Water Commission Act (now incorporated, as amended, in the Water Code), which became effective in 1914. (See Wat.Code, § 1225.) Our discussion in the present case concerns only pre-1914 water rights. (See generally Hutchins, *The California Law of Water Rights* (1956) p. 86 et seq.)

[2][3] Water rights are a form of property and, as such, are subject to establishment and loss pursuant to the doctrines of prescription, adverse possession, and abandonment. (See *Smith v. Hawkins* (1895) 110 Cal. 122, 126, 42 P. 453.) In addition, however, due to the scarcity of water generally in California, its societal importance, and the peculiar nature of common and multiple rights to water from the same watercourse, the courts have recognized that water rights may be forfeited through nonuse under certain circumstances. (*Id.* at p. 127, 42 P. 453.)

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

[4][5] A forfeiture may be of an entire water right, or the forfeiture may be limited to a portion of the water right or to a portion of the year, or both. (See *Smith v. Hawkins* (1898) 120 Cal. 86, 88, 52 P. 139.) In order to establish a forfeiture, the plaintiff must prove that the defendant failed to use some portion of its water entitlement continuously over a span of five years immediately prior to the plaintiff's assertion of its conflicting right to the water. A portion of our remand in this case directed the trial court to determine the beginning and ending dates of this five-year period. (We will refer to the relevant five-year period as the forfeiture period.)

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

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

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

[6] In our prior opinion we held that the measurement period must be based on the nature of the original appropriation and the historical beneficial use. (*North Kern Water Storage Dist.*, *supra*, F033370.) Use during each measurement period, whether a month, day, growing season, or otherwise, is then to be compared across the forfeiture period. The amount forfeited, if any, is the difference between the highest use in any period within the span and the overall entitlement to water established by the appropriation, subject to certain refinements and limitations we will discuss in detail below. (*Ibid.*) For example, if the trial court selected a monthly period of measurement and the defendant's highest use of water in any February during the five-year span was 85 units of an initial appropriation of 100 units, a forfeiture of the right to divert 15 units of February water would be required. (*Ibid.*)^{FN2}

FN2. Our prior opinion sometimes describes forfeiture in terms of the appropriative right lost, as in our example in the text, and sometimes in terms of forfeiture of all rights in excess of the amount beneficially used. (*North Kern Water Storage Dist.*, *supra*, F033370.) For reasons we will discuss, *post*, we believe this latter description is more useful and less confusing. Thus, in the example in the text, forfeiture would be of any right to divert more than 85 units.

*561 In the last part of the 19th century, there were many users with claims on the waters of the Kern River. Delta, Bakersfield, and North Kern each has purchased several of the separate appropriative rights. The individual rights owned by, for example, Delta have not merged into one another but continue to be measured separately, and each right has a distinct set of customers

to whom Delta sells water. When we refer to water use or exercise of a right by one of the parties, we include its predecessor in interest at that particular point in time.

[7] Pursuant to common law, appropriative rights are afforded priority based on the date of their establishment. The appropriation that was first in time therefore had first priority to that quantity of water, and the priority of subsequent appropriators was similarly established. When the flow of the river is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water; in other words, there is no mandatory proration of water among appropriators when, as is often the case, river flow is insufficient to fully satisfy all appropriations. (See *City of Barstow v. Mojave Water Agency*, *supra*, 23 Cal.4th at p. 1241, 99 Cal.Rptr.2d 294, 5 P.3d 853.)

Delta is the owner of four separate appropriative rights that are involved in the present appeal. Delta's primary appropriation, known as Kern Island 1st (hereafter, Kern Island), is the most senior appropriative right on the Kern River and consists of a right to divert 300 cubic feet per second (cfs) of river water.^{FN3} Kern Island **583 is senior to Bakersfield's appropriative rights and to those owned by North Kern.

FN3. For purposes of this litigation, Delta has the right to the first 300 cfs of the river—that is, until the flow exceeds 300 cfs, no other appropriator has the right to divert water. In reality, however, there are other rights and claims to the Kern River that modify this right. For example, there is mention in the testimony that certain power generators have claims to the flow of the river and that in some circumstances this right to power their turbines impacts and reduces Delta's right to divert 300 cfs even when the natural flow exceeds that amount. Similarly, there appear to be evaporation and seepage amounts that must be satisfied before Delta is entitled to its full 300 cfs. Our recitation of facts is not intended to describe the parties' relationships with nonparty river

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

users.

C. "Paper" and "Theoretical" Entitlements

As a result of litigation among certain Kern River water users, a declaratory judgment was entered in 1901, known as the Shaw Decree, which formalized the existing common law rights. (See *North Kern Water Storage Dist.*, *supra*, F033370.) That decree memorialized each appropriator's right in terms of cubic feet per second, a figure referred to as the appropriator's "paper entitlement." In addition, the decree established that at each particular stage of the river (that *562 is, the flow of the river in its natural channel), measured daily at a fixed point, each junior appropriator was entitled to all, some, or none of the water for which it had appropriative rights, a figure referred to as an appropriator's "theoretical entitlement." Thus, under the Shaw Decree, an appropriator with, for example, a 100 cubic feet per second (cfs) paper entitlement might have only an 85 cfs theoretical entitlement when the river stage is 512 cfs, but a 100 cfs theoretical entitlement if the river stage is 527 cfs or greater.

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

D. The Judgment of the Trial Court

1. Introduction.

This appeal primarily involves North Kern's claim that Delta has forfeited all or a portion of its appropriative

rights through nonuse. After the original trial to the court, judgment was entered in favor of North Kern. We reversed the initial judgment and remanded the matter for retrial pursuant to guidelines established in our unpublished opinion.

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

On the primary issue of forfeiture, the focus of the case changed somewhat at the retrial. In addition to its challenge to Delta's Kern Island right, which *563 had been the primary focus of the initial trial and our prior opinion, North Kern also asserted a new theory of the measure of forfeiture directed to Delta's junior rights. North Kern, in essence, contended release **584 water was to be treated as ordinary river water subject to forfeiture by Delta's junior rights if not used by Delta when such release water became available to it ^{FN4}. Delta argued that this forfeiture methodology would be unfair because in most instances a senior rights holder would have already forfeited the release water and North Kern's methodology would result in the "same water" being forfeited repeatedly and cumulatively, resulting in forfeiture of water that did not exist. Delta contended forfeiture could occur only from nonuse of a holder's theoretical entitlement, regardless of the water actually available to that rights holder.

FN4. There is no issue of forfeiture of rights

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

owned by Bakersfield or North Kern. Accordingly, for the purposes of our discussion, we will disregard release water from rights owned by those parties.

2. Determination of Forfeiture Period and Measurement Period.

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

3. Resolution of Kern Island Issues.

With respect to the Kern Island appropriation, the trial

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

The trial court then determined the maximum amount of entitlement for each month based on Delta's right to 300 cfs (for example, 18,446 acre-feet *564 per month for the 31-day months of January, October, and December). Finally, the court subtracted the greatest amount diverted in any of the five Januaries, for example, in the forfeiture period, from the monthly entitlement. The result

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

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

court found a forfeiture in four months, applying the following reasoning: The Kern Island appropriation had a paper entitlement to any flow of the river up to 300 cfs per month. (For a month with 31 days, for example, this is equivalent to 18,446 acre-feet for the month.) The trial court reviewed the parties' compilations of diversion data to first exclude any month during the forfeiture period in which Delta used all of the Kern Island water available to it, on the basis that forfeiture can arise only from nonuse of available water. Then the court determined that during the forfeiture period Delta's greatest diversion of water (in those months in which it did not use all water available to it) was as follows:

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

4. Resolution of Junior Appropriation Issues.

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

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

the trial court and the parties were required to apply that general guidance to factual issues not fully discussed in the first appeal.

There were two critical differences between the Kern Island right and the junior rights. These differences arose from the fact that for most relevant months the flow of the river was such that the Kern Island paper entitlement equaled its theoretical entitlement, and both entitlements were the same as the volume of physical water actually available to Delta for diversion. Thus, for the Kern Island right, the concept of nonuse involved a straightforward comparison between Delta's actual diversion of water and the maximum entitlement reflected in the Shaw Decree.

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

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

After trial and extensive argument by counsel, the court

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

5. Disposition of "Forfeited Water."

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

E. This Appeal

North Kern filed a timely appeal and Delta cross-appealed.

**586 II. Discussion

A. North Kern's Appeal

1. The Forfeiture Period.

[8] North Kern contends the trial court selected an inappropriate forfeiture period. In our earlier opinion, we stated that "the period selected must bear a *566 direct temporal relationship to the time [North Kern's] contrary claim [to the water] was made." (*North Kern Water Storage Dist.*, *supra*, F033370.) We stated: "[T]he appropriate five-year period must be no later than the five years immediately preceding 1976...." (*Ibid.*) By

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

footnote, we added: "We do not define the exact period of measurement but leave that for the trial court because we recognize there are other issues and evidence relevant to selecting the appropriate time period. Both parties represent that there were tolling agreements and earlier suits and objections arising from the clash of rights. These may well play a role in selecting the appropriate [forfeiture period]." (*Ibid.*)

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

The trial court's requirements follow logically from our prior opinion: Until there is a formal claim to the water, use is permissive. (*Ibid.*) After such a claim to the water, a failure to object by the senior appropriator may well work an abandonment or commence a period of adverse possession but, in the absence of an objection (whether verbal or by the act of using the disputed water), there is no clash of rights sufficient to permit establishment of a forfeiture.^{FN5}

FN5. In addition to its contention discussed in the text, North Kern also contends by means of footnote in its brief that the trial court erred in using the forfeiture standards of Water Code section 1241 instead of the more general requirement of Water Code section 1240 that an "appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases." The issue of the applicability of Water Code section 1241

was conclusively resolved against North Kern in our prior opinion and is not now open to a different resolution. (See *North Kern Water Storage Dist.*, *supra*, F033370. ["The controlling law of forfeiture, for both pre-and post-191[4] rights, is section 1241 and the interpretive case law".])

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

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

We conclude the trial court properly interpreted our holding in light of the evidence presented in the retrial. Although there was preliminary sparring between the parties as early as May of 1975 (when North Kern objected to Delta's proposal to increase its usage), at that time Delta did not own the water rights in question and was merely negotiating and preparing for purchase of

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

those rights. It is clear that there was a "clash" between the parties in 1975, but it was not a clash of rights, since Delta had no rights at that time: Delta did not buy its water rights until December of 1976. At that time, but not before, the clash became a "clash of rights."

North Kern suggests no reason why we would have, or the trial court should have, ignored the final year before there was a clash of rights, namely, January through December of 1976. Our directive, in essence, was to measure water use in the five consecutive years prior to the occurrence of the clash of rights or, as we phrased the matter elsewhere in the opinion, "the five-year span before the 1976 claim...." We did not determine precisely when that clash of rights occurred, but we agree with the trial court that it occurred on December 23, 1976, when Delta's purchase of the water rights became final. It was, therefore, reasonable and correct to include 1976 in the five-year measurement period. Accordingly, the forfeiture period for all of Delta's rights, senior and junior, was correctly established as 1972 through 1976.

2. The Measurement Period.

a. Why the measurement period matters.

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

Yet, as Delta argues, if a monthly measurement is used, there is a greater likelihood that the need on a particular May 1 will exceed the average daily use in the May of highest overall use during the five-year period. And if a

seasonal measurement is used, it is virtually certain that daily usage during the hottest weeks of the season will exceed the average usage for the whole season. (See *North Kern Water Storage Dist.*, *supra*, F033370.)

The evidence showed that the parties to this litigation, and their predecessors, have always accepted orders from their irrigation customers on a daily basis. To know **588 how much water it can sell each day from its right to 300 cfs, Delta must know how many acre-feet per day its right will produce.^{FN6} (It turns out this is about 595 acre-feet per day and, based on a 365-day year, 217,191 acre-feet per year. See http://www.western-water.com/CFS_formulas.htm, accessed Sept. 28, 2006.) This amount, 595 acre feet, is the maximum amount of water available to Delta each day pursuant to its primary right.

FN6. The water right that became Delta's primary and senior right was originally established in the amount of 300 cfs. At some later point, the common measurement for water became acre-feet, that is, the volume of water required to cover one acre in one foot of water. This measurement is of a fixed volume of water, with no element of entitlement through time from a flowing or recurring source. Therefore, in order to quantify in acre-feet a right to 300 cfs, one must first assign a time period, whether a second, an hour, a day, or longer, for which to measure the flow.

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

Irrigation water suppliers usually receive orders from agricultural customers a day in advance, although they will sometimes accept orders covering a two- or three-day period. The supplier must then look at its total of daily orders and determine which orders can be filled, based on the water likely to *569 be available the next day.^{FN7} In the case of Delta's primary right, if the total

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

of daily orders is less than 595 acre-feet, assuming the flow of the Kern River is at least 300 cfs on that day, Delta is able to fill all orders. If current orders total less than 595 acre-feet, Delta, historically, has released any surplus water for use by junior appropriators.

FN7. The stage of the river varies from day to day and throughout each night and day based on such factors as storms in the watershed or the temperature changes during the period. River stage is measured and recorded in real time, but flow for the next day or for a longer period is only an estimate.

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

The parties recognize, and we demonstrated by use of various examples in our prior opinion, that as the period of measurement increases, there is likely to be less fluctuation over the five-year forfeiture period. Thus, Delta's use at 11:37 a.m. on each May 1 is likely to vary more from year to year because the gate operators got to work early or late, had an extra meeting, or had a cup of coffee before they went out to open a gate—one year they may have opened a particular gate at 11:39 or 11:15, thereby affecting the total use of water at 11:37.

By contrast, these considerations become less important if use is measured for an entire day, since changes in routine are subsumed by getting the day's work done, even if one May 1 is hotter or cooler than another. Similarly, measured by month, daily temperature fluctuations are tempered**589 through averaging. Measuring season-to-season, even the effects of a cooler than

usual month will be moderated. Annual measurement would further temper the effects of an early start to a particular growing season or of a late harvest in a particular year. As noted above, if the amount of water right forfeited is determined on a monthly average, there is a greater likelihood the need on any particular day in the month will be above the amount of the unforfeited average. If nonuse is determined on a daily basis, however, a hypothetical year will be composed only of high-use days and will preserve a volume of water use that is much greater than the amount actually used in any real year.

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

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

Accordingly, in terms of the law of water rights, water use was not averaged. An appropriator entitled to 300 cfs could take no more than that at any instant in time; it could not take 600 cfs for half as long on a particular day, because junior appropriators and other downstream users are entitled at any given moment to any flow over 300 cfs. However, because of variations in natural flow over the course of a day, releases are not precise. Notwithstanding the structure of water use prescribed by legal doctrines, as a practical matter appropriators make up lost use or overuse within informal limits; use by each appropriator is reconciled by the watermaster over the course of several days, so that shortages or overages from one day will be made up within a few days. Thus, practical necessity results in some averaging of meas-

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

ured use, but not to a sufficient extent to consistently make up for subaverage use on, e.g., May 5, with higher than average use on May 25. The selection of a measurement period therefore continues to affect the resulting finding of forfeiture.

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

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

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

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

b. *“Initial need and historical beneficial use.”*

As we have already stated, it appears from the record

that, as a historical practice, the parties have used a daily measurement of entitlement. However, it also appears from the evidence that, at least during the forfeiture period, the parties did not retain the records of use for each day but, instead, consolidated those daily records into monthly reports, which were preserved as the official records of the parties.

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

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

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

c. *Examination of the trial court’s “monthly measurement” reasoning.*

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

Forfeiture, as the trial court observed, is generally dis-

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

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

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

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

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

parties' actual daily use of water. That determination, too, is supported by the evidence.

d. *North Kern's objections.*

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

One primary reason this court did not itself select a measurement period in our earlier opinion is that such concepts as "pattern of initial need" and "historical beneficial use" are concepts with broader and narrower meanings, more than one of which is valid. For example, the pattern of initial need could validly be viewed as the seasonal use necessary to bring a crop to maturity. But the pattern of initial need could equally validly be viewed as the daily need for water to sustain the growth of the crop until the next water becomes available. In this case, the evidence showed that irrigators determined need on a daily basis, even though that resulted in seasonal patterns of use. Ample evidence supports the trial court's conclusion that daily measurement reflected the historical pattern of beneficial use of Kern River water.^{FN8}

FN8. North Kern also contends the seasonal measurement period would have been "appropriate" and would "more accurately" reflect historical usage. Even if this were true, and for reasons in the text we do not believe it to be true, our task on a substantial evidence review is to determine whether the finder of fact's conclusion is supported by the evidence, not to determine whether a different conclusion also would be supported by the evidence. "When two or more inferences can be reasonably deduced from the facts, the reviewing

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, 45 P.2d 183.)

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

3. Forfeiture of Junior Appropriative Rights.

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

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

Kern Delta and North Kern each owns multiple, separate water rights. Each right has, apparently for historical reasons, different customers for water taken *574 pursuant to that right. Records for both allocation and actual use are maintained for each right separately. In our prior opinion, we stated that "it is clear the parties are primarily fighting over the Kern Island rights, which have first priority and provide the measure for all [relevant]

rights." (*North Kern Water Storage Dist., supra*, F033370.) Accordingly, our prior opinion discussed the issues arising from claims that Delta had forfeited Kern Island rights.

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

b. Entitlements of Junior Appropriators.

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

TABLE ONE

| Rights in order of seniority | Paper entitlement | Theoretical entitlement at river flow of 350 cfs | Theoretical entitlement at river flow of 550 cfs | Theoretical entitlement at river flow of 850 cfs |
|------------------------------|-------------------|--|--|--|
| Right A | 300 cfs | 300 cfs | 300 cfs | 300 cfs |
| Right B | 80 cfs | 50 cfs | 80 cfs | 80 cfs |

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

| | | | | |
|----------------------|---------|---------|---------|---------|
| Right C | 120 cfs | 0 | 120 cfs | 120 cfs |
| Right D | 20 cfs | 0 | 20 cfs | 20 cfs |
| Right E | 150 cfs | 0 | 30 cfs | 150 cfs |
| Right F | 150 cfs | 0 | 0 | 150 cfs |
| Total for all rights | 820 cfs | 350 cfs | 550 cfs | 820 cfs |

****593 *575 c.** *The additional problems presented by junior rights.*

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

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

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

available to it at the 350 cfs stage, even though it does not have any theoretical entitlement until the river stage reaches 671 cfs.

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

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

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

[10] North Kern contends the trial court should have considered all water available to each junior appropriator as its "actual entitlement," up to the amount of its paper entitlement. Thus, it contends the trial court should have included an appropriator's theoretical entitlement at a particular daily stage of flow as well as any ****594** water released by a senior appropriator that is available to the junior appropriator. It bases this contention on the simple proposition that the junior appropriator was "actually entitled" to water in the combined amount, and if the appropriator is actually entitled to the water, it is fair to measure its "actual entitlement" on the basis of the water actually available to it. It asserts this methodology is in accord with our directive that "what is forfeited is what is actually not used for the entire statutory five-year period..." (Slip opn. at p. 38.)

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

The trial court concluded, and Delta contends on appeal, that release water cannot form the basis for measurement of actual entitlement because the amount of such release cannot be known in advance of the day of use. The trial court concluded: “[B]asic principles of due process demand that prior to the loss of a right, knowledge of the right is essential.”^{FN9}

FN9. Kern Delta also contends release water should not be subject to forfeiture because the watermaster accounts for this water separately, designating the theoretical entitlement as “entitlement” water and any order in excess of that as “release” water. We reject this contention: Even though separately designated, all water diverted is subject to a particular right’s paper entitlement. Thus, a right holder is not entitled to take unlimited water just because it is designated “release” water. For purposes of the right to take water, release water is simply a part of the current flow of the river.

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

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

The fundamental consideration is the nature of ownership of water rights under article X, section 2, of the California Constitution. Pursuant to that section, the extent of a water right is the reasonable and beneficial use of water diverted. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241, 99 Cal.Rptr.2d 294, 5 P.3d 853.)

The section provides that it is self-executing but “the Legislature may also enact laws in the furtherance of

the policy in this section contained.” (Cal. *577 Const., art. X, § 2.) Section 1241 of the Water Code constitutes one way in which the Legislature has implemented the constitutional requirement that the extent of a water right is the reasonable and beneficial use of water pursuant to the right.^{FN10} In essence, section 1241 provides that the extent of reasonable and beneficial use, when there is another claimant to the water, is the maximum use during the five-year period immediately prior to the assertion of the rival claim.

FN10. In the context of forfeiture claims, section 1241 provides express delimitation of the extent of reasonable and beneficial use. Accordingly, we reject North Kern’s contention that the trial court erred in prohibiting North Kern from litigating reasonable and beneficial use in the abstract as a separate ground for forfeiture. North Kern contends it was entitled to prove that Delta’s use of water in excess of its historical maximum use was unreasonable under the constitutional provision. As we discuss more fully, *infra*, the inquiry in a forfeiture proceeding is exactly the same as that proposed by North Kern, except that the statute limits the concept of “historical maximum use” to use in the five years prior to the clash of rights between rival water claimants.

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

(ii.) *The evidence in this case.*

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

First, unlike the full-season availability of water under the Kern Island right, “the other rights are at best a partial supply and are highly variable, and in no circumstance or very rarely would they have supply available

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

during an entire growing season," according to Marvin Dan Schmidt, Delta's designated expert on usage of Kern River water rights. As a result, he testified, farmers served by the junior rights do not primarily rely on river water for irrigation: these farmers own their own wells and "more or less" supplement that irrigation water with river water. We conclude, therefore, that for the junior rights the "beneficial use for which the water was appropriated" (*North Kern Water Storage Dist., supra*, F033370) did not depend upon predictable availability of water but, instead, the beneficial use was as supplemental water, useful despite its unpredictability.

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

Third, during the entire forfeiture period, significant quantities of release water were regularly available. Therefore, there was an element of predictability not only from year to year, but also from day to day, that release water was likely to be available for use by the junior appropriators. Given the historical record, it is not correct to assert that junior appropriators and their customers did not know they had water available: both had access to a reasonable estimate of water available for several days in advance and, based on historical trends, had available an estimate of availability for the season that, if not precise, was far more than a blind guess. Further, according to the testimony at trial, Delta filled all orders from its junior rights customers whenever it had them, even if the theoretical entitlement was zero.

Finally, Delta's expert testified that, using the no-release-water methodology, the minimal level of forfeit-

ure calculated for Delta's junior appropriations would permit those junior rights to divert, in essence, their entire paper entitlements, to the extent natural flow or release water was available. The witness testified he was aware of plans Delta had made for future use of additional river water for groundwater recharge purposes, thereby increasing use of the junior rights over historical levels.

For these reasons, we conclude as a matter of law that the actual entitlement of a junior appropriator must include all water in the river to which it has a right of access, including release water actually **596 available to it.^{FN11} The next question, given this conclusion, is: What is the amount forfeited? On this the parties also disagree.

FN11. As noted above, "storage" water is not considered part of the flow of the river for forfeiture purposes.

e. The amount forfeited from junior appropriative rights.

Delta argues that North Kern's proposed methodology not only forfeits water that did not exist, but that it also forfeits the same water repeatedly. A further example will help clarify Delta's claim that North Kern's methodology would result in multiple forfeiture of the same water. We will assume all the rights in Table One are owned by the same entity and assume a river stage of 300 cfs. If the owner takes 200 cfs pursuant to Right A, it would forfeit the 100 cfs of Right A's release. If the owner then takes 25 cfs pursuant to *579 Right B, it would forfeit 55 cfs of the same water when it releases Right B surplus to the river, according to Delta's interpretation of North Kern's position. Then Right C would forfeit any of the physically present 75 cfs that it failed to use, even though that is the "same" water already forfeited by Rights A and B. One hundred cfs of actual, unused water would, in this view, produce a forfeiture of up to 230 cfs (assuming Right C diverted no water). Delta contends this methodology must be wrong, because it cannot forfeit water that is not actually in the river.

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

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

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

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

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

*580 The highest level of beneficial use, historically, established the limit of an appropriator's original claim, memorialized in this case as the Shaw Decree paper entitlement. In circumstances like those in the foregoing examples, however, the paper entitlement has ceased to function as the limit on the right holder's use of water; the paper entitlement is merely a historical artifact. Instead, the right holder's need for and ability to beneficially use water during the forfeiture period has resulted in a new level of maximum use. In effect, the law of forfeiture serves to *redefine* a paper entitlement based on the same measure that established the right in the first instance, namely, the "historical beneficial use." (*North Kern Water Storage Dist.*, *supra*, F033370.) But under the law of forfeiture, the "historical beneficial use" becomes the highest use during the five-year history encompassed in the forfeiture period when, as in our examples, such use was not constrained by the actual availability of water to divert.^{FN12} What is forfeited is the unexercised portion of the historical paper entitlement; what is left to the right holder is a new paper entitlement established in a more recent historical period.^{FN13} In this sense, it does not matter whether an appropriative right was initially established at 200 cfs or 20 cfs; what matters is how much the right holder beneficially used during the historical period specified by the forfeiture statute.

FN12. As pointed out in our prior opinion, this availability constraint may arise from climatic conditions (causing senior appropriators to use more, and release less, water) or from drought conditions that reduce the volume of water released by senior appropriators.

FN13. That is why there is no forfeiture when an appropriator has used its full paper entitlement at any time during the forfeiture period: the appropriator's original "historical beneficial use" is the same as the beneficial use established in the statutory "historical" period and its paper entitlement therefore remains the same. (*North Kern Water Storage Dist.*, *supra*, F033370.)

Forfeiture, then, is not forfeiture of water itself, as Delta

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

suggests; as a result, there is neither double forfeiture of the same water nor forfeiture of water that does not exist, as Delta contends. Instead, what is forfeited is the right to appropriate water in excess of historical beneficial use as reflected in the forfeiture period.^{FN14}

FN14. For clarity, when redetermining forfeiture in accordance with the principles we have set out, the judgment should express the resulting forfeiture, if any, in terms of forfeiture of "all right to divert water in excess of X cfs," and not forfeiture of "the right to divert [paper entitlement minus X]." Thus, the conclusion in the trial court's statement of decision that Delta forfeited 9,953 acre-feet of water for each January from the Kern Island right does not clearly state the court's underlying, and correct, conclusion that Delta has forfeited the right to divert water in excess of 8,493 acre-feet in any January under the Kern Island right.

f. *The forfeiture of junior appropriative rights.*

As noted above, and as extensively discussed in the prior opinion, the basis for forfeiture of a water right is the failure, in whole or in part, to exercise that right over the course of the forfeiture period. Thus, with respect to the *581 Kern Island right, we stated that in months in which the right was fully exercised—that is, actual use equaled theoretical entitlement—**598 there could be no forfeiture of rights for that month. (*North Kern Water Storage Dist.*, *supra*, F033370.)^{FN15}

FN15. In the case of the Kern Island right, the consequences of this limitation were not particularly dramatic. In months in which the determination of nonforfeiture was based on use of the full theoretical entitlement (not the paper entitlement) the net result of the declaration of nonforfeiture was that the full paper entitlement was preserved to Delta, even though it had never used the full paper entitlement (nor, based on water supply, had it had the opportunity to do so). But in seven of the eight months in which there was no forfeiture, highest use-

that is, the fully used theoretical entitlement—was either equal to the paper entitlement or within 95 percent of the paper entitlement.

In one nonforfeiture month, September, there was an anomaly: even though Delta used significantly less than the theoretical entitlement in four years of the forfeiture period (which otherwise would have resulted in forfeiture), there was a very dry year in 1972. Instead of the approximately 17,000 acre-feet available to the Kern Island right in the other four years (of which it had used, at most, 13,465 acre-feet), in September of 1972 the Kern Island theoretical entitlement was only 10,681 acre-feet. Delta used that entire entitlement. As a result, however, the entire September paper entitlement of 17,851 acre-feet was retained by Delta based on the actual use of only 10,681 acre-feet. Arguably, this was the type of anomaly we identified in the prior opinion (*North Kern Water Storage Dist.*, *supra*, F033370.) that would have permitted the trial court to select a different five-year forfeiture period that did not include what was, apparently, a drought year. In the totality of the forfeiture analysis for the Kern Island right, however, this one anomalous month was not highly significant, since Delta had, when water was available, used at least 13,465 acre-feet in September.

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

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

eight months of the year for the Stine right.

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

In the Januaries of 1972 through 1975, the Stine right used no more than .2 percent of the water available to it. But in 1976, when Stine had zero theoretical entitlement, it used the entire 16 acre-feet of release water available to it. Had it not been for 1976, Stine would have forfeited the right to use anything more than nine acre-feet. Phrased in the terms used by our prior opinion, Delta would have forfeited 9,214 acre-feet from the Stine right for January. As a result of its use of 16 acre-feet, however, it preserves not just its highest historical use of 2,350 acre-feet but, instead, its entire paper entitlement of 9,223 acre-feet. That, nevertheless, seems **599 to us to be the state of the law: Forfeiture can only arise from continued nonuse of available water across the five-year forfeiture period. And if there is no forfeiture there is no basis for reducing the paper entitlement.

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

to a close.

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

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

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

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

**583 4. What Happens to the "Forfeited Water"?*

[11] North Kern's final contention on appeal is that the trial court erred in concluding that "all water forfeited by Kern Delta reverts to the 'public' and is available for appropriation through the 'permit procedures' of the California Water Code, specifically Section 1241." Once again, we largely agree with North Kern's position; once again, the problem seems to arise from viewing "water" as being forfeited when, in reality, the right to appropriate water is what is forfeited. (See *State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1023-1033, 93 Cal.Rptr.2d 276 [extensive discussion of physical "ownership" of water vs. "ownership" of right to use and regulate use of water].) FN16

FN16. In the present case, we reemphasize, all

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

of the contending water rights are pre-1914 common law appropriative rights. The discussion that follows in the text is limited to such rights. We express no opinion concerning the ability of the State Water Resources Control Board (SWRCB) to reorder seniority of entitlements after forfeiture of statutory (i.e., post-1914) appropriative rights. (Cf. Slater, *op. cit. supra*, § 2.14, at 2.55.)

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

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

If water rights are forfeited, however, the cumulative effect could be that the river is no longer oversubscribed. That is a determination not for the courts in the first instance, but for SWRCB. If those resulting limitations on appropriation might result in a determination that the Kern River is no longer fully appropriated, that determination will be made by SWRCB on the petition of a potential appropriator of the excess. Any new permit for such *584 an appropriation, however, will be "last in

time" and will neither reduce nor augment existing pre-1914 rights of other appropriators.

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

B. Delta's Appeal

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

1. Equitable Estoppel.

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

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

Further, in the present case, assertion of a defense of

147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily Op. Serv. 1365
(Cite as: 147 Cal.App.4th 555, 54 Cal.Rptr.3d 578)

equitable estoppel is precluded by the law of the case. First, Delta has not convincingly distinguished a defense of equitable estoppel (which was not, **601 in those terms, rejected in the prior opinion) from the defense we described as “[creation of] an implied promise not to claim a forfeiture,” which we expressly found to be an unmeritorious defense. (*North Kern Water Storage Dist.*, *supra*, F033370.) Second, in the prior proceedings before this court, and in testimony during retrial, Delta established that *lack of demand* was the cause of its failure to use all available water, not the purported assurance from North Kern that it would *585 not assert a forfeiture. Any version of equitable estoppel requires the party asserting the defense to show that it acted to its detriment in reliance on the words or conduct of the opposing party. (See 13 Witkin, Summary of Cal. Law (10th ed.2005) Equity, § 191, p. 527.) On the present record, Delta properly was prevented from attempting to show such reliance.

2. Forfeiture of “Unavailable Water.”

Delta contends the trial court erred in determining it had forfeited the amount of water between actual use and paper entitlement, even where there was insufficient water to supply the paper entitlement. As we have dis-

Buena Vista (1st):

Stine:

Farmers:

cussed above, this argument is based on a misconception of the nature of forfeiture in this context. What is forfeited is the right to appropriate water in excess of the greatest use, as determined in the measurement period and the forfeiture period. Thus, it is a right to appropriate water, not water itself, that is forfeited, and the amount *not* forfeited is the greatest amount Delta has used under a given appropriative right at any time in the forfeiture period. Accordingly, Delta's claim that it has forfeited that which it never had an opportunity to use is without merit.

III. Disposition

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

| | |
|-----------|-------|
| January | 347 |
| November | 236 |
| December | 191 |
| September | 583 |
| October | 1,380 |
| November | 22 |
| December | 12 |
| August | 610 |
| September | 268 |
| December | 207 |

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

WE CONCUR: GOMES and HILL, JJ.
Cal.App. 5 Dist., 2007.

North Kern Water Storage Dist. v. Kern Delta Water Dist.
147 Cal.App.4th 555, 54 Cal.Rptr.3d 578, 07 Cal. Daily
Op. Serv. 1365

END OF DOCUMENT