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## N. Kern Water Storage Dist. V. Kern Delta Dist., 54 Cal. Rptr. 3d 578 (Cal. Ct. App. 2007)

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Finally, Divers' argued that *industrial* storm water discharges were different than ordinary storm water discharges and permitting should require numeric WQBELs. The court again disagreed and held that the statute gave no indication that the use of BMPs was limited to municipalities and other non-industrial storm water discharge permittees.

The court affirmed the trial court's denial of Divers' petition for administrative mandate challenging the storm water discharge permit issued by the Board to the Navy.

*Kathleen Ott*

**N. Kern Water Storage Dist. v. Kern Delta Water Dist., 54 Cal. Rptr. 3d 578 (Cal Ct. App. 2007)** (holding that California properly measured the forfeiture of appropriated water rights using the five-year period preceding a clash of water rights; that the court properly measured an appropriator's nonuse of water in monthly, rather than seasonal, increments; that the court is to consider all water, including released water, in determining an appropriator's nonuse of appropriative water rights; and that forfeiture of water does not necessarily create allocable excess to be used - rather when a river is oversubscribed, junior rights holders may use in full the forfeited water under their existing entitlements).

North Kern Water Storage District ("North Kern"), the owner of junior appropriative water rights, and Kern Delta Water District ("Delta"), the owner of senior appropriative rights, both appealed to the California Court of Appeals a decision of the Superior Court of Tulare County, California, which declared a forfeiture of certain previously appropriated water rights to a river. North Kern contended that the trial court erred in selecting an appropriate forfeiture period as well as a time frame against which to measure nonuse of water by junior water right holders; that the court should have considered all water available to each junior appropriator as its actual entitlement, not just appropriated water; and that the court should have awarded Delta's forfeited water to North Kern rather than making it available through the permit process. Delta contended that the court erred in measuring the forfeiture against its full appropriation even when there was insufficient water to meet the full appropriation.

First, North Kern contended that the trial court erred in selecting an appropriate forfeiture period. To determine a forfeiture period, California measures water use in the five consecutive years prior to the occurrence of a clash of rights. North Kern contended that the trial court should have used a five-year period beginning in 1971 and continuing through 1975 rather than beginning in 1972 and continuing through 1976. The Court of Appeals held that, while there was a clash between the parties in 1975, this clash was not a clash of rights because Delta had no rights at that time. Therefore, the court held the trial

court correctly included 1976 in the measurement, and correctly established the five-year period as 1972 through 1976.

Second, North Kern contended that the trial court erred in selecting the timeframe against which to measure nonuse of the water. North Kern contended that seasonal timeframe was the correct choice because the initial need for water, pattern of use of the water, and historical beneficial use of the water was for seasonal irrigation. The trial court, however, held that the relevant measurement was monthly, as measurement across an entire season would result in greater forfeiture than measurement across a shorter period of time. The court affirmed the trial court, and held that the law generally disfavors forfeiture, and the law should err in the direction of preserving the senior appropriator's water entitlement. The court further affirmed the trial court's holding that daily measurements would be the most accurate; however, accurate daily records did not exist for the forfeiture period.

Next, the court addressed the issue of junior appropriator's rights. North Kern contended that the trial court should have considered all water available to each junior appropriator as its actual entitlement, including released water actually available to it. The court agreed with North Kern's position, and held that the trial court erred in its position. The court gave four reasons for its holding. First, junior rights do not depend upon predictability of availability of water, but instead the beneficial use was as supplemental water that was useful despite its unpredictability. Second, the uncertainty of the availability did not prevent junior appropriators from using all the water they beneficially could since they did not have to fill customer orders on the same day, thus the maximum amount of actual use during a measurement period establishes a base against which forfeiture is determined. Third, the court held that during the entire forfeiture period, significant quantities of release water were available, and Delta filled all orders from its junior rights customers whenever it had them. Finally, the court held that if released water was not the basis for measurement of actual entitlement, Delta could divert its junior appropriation rights to the extent released water was available, increasing use of junior rights over historical levels. The court held that this decision permitted a windfall for Delta's junior rights, and it failed to maximize quantity beneficially used during the forfeiture period.

North Kern's final contention was that the trial court erred in holding that the water forfeited by Delta reverted to the public and was available for appropriation through the permit process. This court agreed with North Kern and held that forfeiture of an appropriative right may or may not result in unappropriated water that the State Water Resource Control Board ("Board") could award to an applicant through the permit process. The Board had the right to determine whether forfeiture created allocable excess that would be available for permitting. In this situation, the river was so oversubscribed - existing

junior right holders would use all water forfeited by senior-rights holders in full under existing junior entitlements.

Delta's appeal contended that the trial court erred in measuring the forfeiture against its full appropriation even when there was insufficient water to meet the full appropriation. The court addressed this issue in Kern's appeal, but held that what was forfeited was the right to appropriate in excess of Delta's greatest use as determined by the forfeiture period and the measurement period. Thus, Delta's claim that it forfeited water it never had an opportunity to use was meritless.

The court affirmed the judgment as modified to declare the extent of forfeiture of senior and junior appropriative rights.

*Carrie Stanley*

## COLORADO

**Gallegos v. Colo. Ground Water Comm'n, 147 P.3d 20 (Colo. 2006)** (holding if an owner of surface water rights within the boundaries of a designated ground water basin can show hydrologic connection between the surface water rights and water within the designated ground water basin, and show injury from that connection, the Colorado Ground Water Commission will have jurisdiction over the surface water rights only for the purpose of altering the basin's boundaries. Jurisdiction over the surface water rights will then vest in the water courts and the State Engineer).

In 1987, the Colorado Ground Water Commission ("Commission") established the Upper Crow Creek Designated Ground Water Basin ("Basin") in Weld County, Colorado. Reinaldo, Marianne, Harold, Ellen, and Gene Gallegos ("Gallegos Family") possessed surface water rights that predated the Basin's designation but were located within the Basin's boundaries.

In 2002 and 2003, the Gallegos Family sent letters to the State Engineer, claiming diversions and pumping within the Basin interfered with the family's surface water rights, and asked that either the State Engineer or Commission curtail junior well pumping. The State Engineer denied the Gallegos Family's request. The Gallegos Family appealed the decision to the Commission. The Commission held that through the designation process, the Commission determined that all water within the basin is designated groundwater and only has a *de minimus* effect on surface water when it is withdrawn. In addition, the Commission held it only has jurisdiction over designated ground water and not surface water. The Gallegos Family appealed to the District Court for Weld County. The district court held the Commission has jurisdiction over surface water rights when withdrawals of designated ground water impact surface water rights. The district court also held that when the Commission has jurisdiction, it must apply modified prior appropriation and administer junior designated ground water