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3 Defendant, in propria persona
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8 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
9 SACRAMENTO DIVISION

<p>10 THE UNITED STATES OF AMERICA,) 11 Plaintiff,) 12 v.) 13 H. C. ANGLE, et al.,) 14 Defendants.)</p>	<p>Civil No. S-80-583-LKK [In Equity No. 30] DEFENDANT’S REPLY MEMORANDUM TO PLAINTIFF’S REPLY IN SUPPORT OF MOTION TO AMEND ANGLE DECREE RE: PLACE OF USE AND RESPONSE IN OPPOSITION TO DEFENDANT BARKLEY’S COUNTER-MOTION TO SET ASIDE ANGLE DECREE DATE: February 9, 2009 TIME: 10:00 a.m. COURT: Courtroom 4, 15th Floor</p>
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1 **AUTHORITIES**

2 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 21

3 California v. United States, 438 US 645 (1978) 14, 22

4 Dredd Scott, 60 U.S. 393 (1857) 21

5 Fresno v. California, 372 U.S. 627 (1963) 14

6 Plessey v. Ferguson, 163 U.S. 537 (1896) 21

7

8 Wackerman Dairy v. Wilson, 7 F.3d 891 (1993) 1

9

10 **State Water Rights Control Board Decisions:**

11 D-1042 <http://www.waterrights.ca.gov/hearings/decisions/WRD1042.PDF> 7

12 **D-1100** <http://www.waterrights.ca.gov/hearings/decisions/WRD1100.PDF> 7

13

14 The Reclamation Act of 1902 (P.L. 57-161, 32 Stat. 388), Section 8 13, 14, 19

15 Public Law 91-502, October 23, 1970 18

16

17 California Constitution Article 10 Section 2. 16, 20

18 California Public Resources Code Section 21000 et seq (California Environmental Quality Act) . 26

19 Section 21002 26

20 21083 subdivision (a)(3). 26

21 California Water Code

22 Section 106 14,18

23 Section 1200. 11

24

25 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States, 14, 15, 16

26 Robirda Lyon, "The County of Origin Doctrine: Insufficient as a Legal Water Right in California", 12 San

27 Joaquin Agricultural Law Review 133, 148 (2002) 20

1 COMES NOW Defendant MICHAEL J. BARKLEY and replies to "Plaintiff's reply memorandum in
2 support of motion to amend Angle decree re: place of use and response in opposition to defendant
3 Barkley's counter-motion to set aside Angle decree" of 12/22/08 (Reply) as follows:

4 Should plaintiff find anything herein that plaintiff feels warrants further comment, defendant
5 would welcome an additional round of memoranda. Similarly, defendant would welcome any
6 opportunity for further briefing on any issue the court might wish.

7 At p. 3 line 19 of Reply plaintiff suggests that it has a problem bringing up some of the web sites
8 defendant notes. Defendant would appreciate a telephone call or email reporting such problems so that
9 defendant may correct it. There are no obscure web sites - there are sites that come up, and sites that do
10 not.

11 1. THE ANGLE ARCHIVES - In Reply (p. 5) among other things, plaintiff complains that,

12 Mr. Barkley asserts that "surplus water has been building," based apparently on a 1990
13 Declaration filed in this case that refers to one individual's sales of "excess" water. Doc.
14 284-2 at 10:23-24. Mr. Barkley did not attach a copy of the 1990 Declaration that he
15 cited, and the United States does not have a copy, as the Clerk of the Court reported that
16 its file records from 1990 have been archived. In any event, the fact that one individual
referred to a sale of excess water back in 1990, even if true, is not probative of the current
status of water supplies and deliveries in the Orland Project in 2008, and that statement
has no bearing or relevance to the pending motion to update the boundary descriptions
for the project.

17 Defendant last saw that document in the fourth floor office of the court clerk in 2001. The clerk's office
18 was very courteous in retrieving records from the archives for review. Plaintiff's counsel's office seems
19 to be five floors up from there in the same building. Further, plaintiff's office participated in the
20 proceedings in the issues that included that document, proceedings that led to the case reported at
21 Wackerman Dairy v. Wilson, 7 F.3d 891 (1993) (cited by plaintiff at p. 2 of its 09/05/2008
22 Memorandum) and many years of legal combat, followed by settlement that essentially placed everyone
23 back in the position they were to begin with. Is there a problem with plaintiff looking at the archive in
24 this case, since it seems plaintiff's own files may have been purged? For that matter, plaintiff's arrogance
25 in its Reply and in the filings in the Angle archives suggests that even if asked, plaintiff would not admit
26 to there being excess, unapplied water or to anything else plaintiff or plaintiff's client agencies, Orland
27 Unit Water Users Association (OUWUA) or Tehama-Colusa Canal Authority (TCCA), have stated in
28 Defendant's Reply Memorandum

1 public (see for instance the OUWUA Grant Proposal in Paragraph 6.c. below). Defendant understands
2 that stonewalling is the nature of such proceedings as these--it doesn't make it right, it is just the way it
3 is. Nevertheless, defendant verifies his pleadings.

4 It should be axiomatic that the Angle archives are important to the Angle case. Defendant sifted
5 through them for several days in 1976 and several days in 2001 looking for understanding. Defendant
6 purchased quite a few photocopies from them in 1976, and made more copies in 2001. The archives are
7 not precisely indexed. Defendant knows of the following indexes:

8 - Incomplete, old typewritten list of filings, many typos (transcribed from the original?) 5/28/18 to
9 7/14/22, 4/23/28 - 5/3/54, ?

10 - Indexes of 5,000 pages or more of transcripts, volume by volume

11 - Docket book from the Court, 1980 - 1990

12 - Docket sheet from the Court since 1990

13 Should the court wish it, defendant would be happy to spend as many days or weeks as might be
14 necessary at the clerk's office helping to organize and index the full archive, or to do whatever else might
15 be needed to improve order and access.

16 Crucial to the Angle case:

17 The typeset and published decree book -- some 524+ pages, containing:

18 1) Plaintiff's Opening Brief (the Brief), - - 70+ pp

19 2) Findings of Fact and Conclusions of Law (the Findings) -- 273+ pp plus Plate (but see "Settlement of
20 Findings" below)

21 3) The Decree -- January 13, 1930, 178+ pp - There are 3 versions of the Decree:

22 --The 1928 printed version bound in the Decree Book, which has two page 165s and last page number
23 178, back cover of Court's copy inscribed "filed, April 19, 1928 George E. McCutcheon, Special
24 Master." This seems to be the version that appeared in various public libraries.

25 --The 1930 printed version , with print signature of Judge "Frank H. Kerrigan" and date of 13th day of
26 Jan., 1930, with last page number 179 fixing the duplicate page number problem in the previous version.

27 There are other minor changes from the 1928 version, mostly changing the treatment of a few of the

28 Defendant's Reply Memorandum

1 defendants, plus filling in some blanks left in the original.

2 --The 1930 printed version with inked corrections "corrected in accord with the order of April 14th,
3 1930", signed by Judge Frank N. [sic] Kerrigan [his H looks like an N ?].

4 Amendments to the decreer:

5 --The Settlement of The Findings - Amendments Made In Printed Findings of Fact and Conclusions of
6 Law and Suggested Decree, 09/18/29

7 --[Order correcting certain minor errors in Decree, included in Water Master Order], Apr. 15, 1930

8 According to the Brief, p. 5, numbered paragraph 6, what appears in the Decree book is as
9 plaintiff drafted it, unchanged. Defendant has been unable to find any other briefs in the record by
10 anyone, which is understandable since anyone preparing one would have had to have it printed and
11 served on some 700 parties, a prohibitive expense for most of the foothill farmers including according to
12 family legend defendant's mother's father (F. P. Masterson) and his wife who lived in a one room
13 shack out in those sere hills for the first few years after they married in 1915. The "Procedural
14 Stipulation" of October 4, 1919, allowed answering defendants to file abbreviated versions of the usual
15 responsive claims in Equity with the court only rather than serving all parties, but that did not seem to
16 extend to briefs. Perhaps such briefing was done orally and is buried in the transcripts but defendant has
17 not yet found it. Paragraph 7 on p. 6 of the Brief points out that such defendant responses must be made
18 in front of the special master or waived unless good cause be shown otherwise.

19 Plaintiff is adamant in its assertions, either now or in its Brief, Findings, and Decree, that all
20 defendants had ample notice and opportunity to be heard. That is a legal fiction. Plaintiff criticizes
21 defendant's pled relationship with his mother's mother's parents, George and Nora Clark on pp. 8 & 9 of
22 its Reply. Defendant and his brother found in their mother's sister's records a copy of a "Notice of
23 Appropriation of Water", prepared by W.A. Fish, Attorney at Law, Red Bluff, recorded Jun 9, 1916 in
24 liber 1 of Water Notices, page 64, Records of Tehama County, for 150 inches under a four inch pressure
25 for irrigation and domestic use. Defendant does not know why this claim was not pursued, although it is
26 moot now since the land in question is underneath Black Butte Lake. Perhaps it had to do with the
27 government billing answering defendants for half the costs, which half amounted to \$2,626.20 (Report

28 Defendant's Reply Memorandum

1 of Master *Pro Hac Vice*, filed Nov 7 1929), big money in those days. Perhaps it had something to do
2 with the 15 miles to Orland on horseback over dirt tracks (unpaved until the late 1950s), thence by train
3 to Willows or Sacramento or wherever the hearing was being held at that time, only to expect to be
4 denied anyway. That was fine bottom land, first reduced to dry farming by Reclamation, then taken by
5 the Corps of Engineers. These are sad tales. But the Mastersons were a bit more stubborn and saw it
6 through, which may be why that out of the scores of families on the North Fork and its tributaries, the
7 Mastersons were one of only two recognized as having some water right, however small. The other
8 family faced some serious hardball tactics by plaintiff as demonstrated by plaintiff's "Replication to the
9 answer of defendants A. Conklin, Wells Conklin and M.L. Conklin" filed Apr 29 1922.

10 Defendant has transcribed the Brief and Findings from the Decree book, and the April 14th, 1930
11 Decree, see <http://www.mjbarkl.com/brief2.htm>, <http://www.mjbarkl.com/find.htm>, and
12 <http://www.mjbarkl.com/decree.htm> respectively. Defendant has prefaced each of these with a table of
13 contents, and appended to the end of the Decree a list of irrigation seasons by page number within the
14 Decree. Defendant is still finding typographical errors in his transcription so caution is urged, yet these
15 versions are searchable with any web browser. The version of the Decree plaintiff submitted as Exhibit
16 1 to its 09/05/2008 Memorandum is the January 13, 1930 version, and for some reason it has appended
17 to it a January 1980 State Water Resources Control Board (SWRCB) schedule of Appropriation
18 Applications.

19 2. DEFENDANT'S STANDING - plaintiff goes on in length about whether or not defendant has
20 standing, which is surprising since plaintiff sent the notice to defendant's brother regarding plaintiff's
21 motion. Ignoring for a moment that most anyone with an interest in the California environment might
22 have standing to challenge plaintiff's actions on Stony Creek, yes, to confirm plaintiff's mailing,
23 defendant Michael J. Barkley is the owner in common with his brother Dennis J. Barkley and
24 one sister of water rights and land inherited from Mrs. D.H.Masterson via F.P. (Frank) Masterson as
25 shown on p. 133 of the Angle Decree and owner in common with his brother Dennis J. Barkley and both
26 sisters of water rights and land inherited from Mrs. D. H. Masterson via F.P. Masterson as shown on p.
27 134 of the Decree, although Frank sold a small portion of the p. 134 rights to his next door neighbors so

28 Defendant's Reply Memorandum

1 they could grow the vegetables they needed to survive.

2 Total lands owned in common in the North Fork Stony Creek Watershed by defendant and his
3 siblings are approximately 3,745 acres, down from the 6,000 to 7,000 accumulated by Frank and
4 Florence Masterson through a lifetime of hard work until the Corps of Engineers took the best of it, with
5 more lost to the need to provide funds for care of defendant's mother as her life waned. Still, with 3,745
6 acres and an average of 18" of rain per year on those lands (rainfall per U.S. Army Corps of Engineers,
7 Design Memorandum No. 1, Black Butte Project, Stony Creek, California, Hydrology, May 1957, Chart
8 #8, hereafter "Hydrology") some 5,600 acre-feet of water falls per year on defendant's lands and while
9 defendant does not know the ratio of soaking in versus runoff, the disparity between that 5,600 and the
10 90 acre-feet defendant was awarded on pp. 133 and 134 of the Angle Decree seems inequitable in the
11 extreme.

12 Of course, if the entirety of the North Fork of Stony Creek and all its tributaries suddenly
13 disappeared from the Angle Decree, defendant's standing would disappear with it (except for
14 environmental issues, of course) but with plaintiff's general arrogant and predatory attitude there seems
15 little chance of that happening.

16 3. LIMITS IN THE DECREE/OTHER PARTIES - Parts of the Decree are difficult to read and
17 decipher. Nevertheless, defendant finds that allocations of water within the Stony Creek Watershed
18 under the Decree seem to be limited to no more than the following, in acre-feet per year:

19 13,208 Tape of Appropriation Schedule, pp. 121-134, excluding GCID,
20 Scarce, Hall, & USA (adding machine tape)

21 14,501 Tape of Riparian Schedule, pp. 161-165, and decreasing per
22 pp. 166 - 168 (acres * per acre, extended, totalled)

23 20,315 Glenn-Colusa Irrigation District (GCID), p. 170

24 85,020 United States of America (Reclamation), p. 137, Para. VIII(1)
25 and p. 141 explaining (1) (3) (5) (6) and (7)

26 Up to 51,000 " - p. 137, Para VIII(2) and p. 142 para. (b)

27 Up to 133,650 " - p. 138, Para VIII(4) and p. 142 para. (b) - 250

28 Defendant's Reply Memorandum

1 cfs * 1.98 * 270 days maximum season (10/15 - 7/15)
2 Less (181,620) in excess of 4.05 per acre for 21,000 acres (p. 137),
3 although more may be allowed per p. 142 para. (b) if
4 beneficial use during reclamation, on the stated acreage,
5 etc.

6 -----
7 136,074 Total acre-feet awarded by the Decree
8 =====

9 From the Decree, p. 177:

10 XVII. That each and all of the parties to whom rights to water are decreed herein (and the
11 persons, estates interests and ownerships represented by such thereof as are sued in a
12 representative capacity herein), their assigns and successors in interest, servants, agents,
13 attorneys and all persons claiming by, through or under them and their successors, are
14 hereby forever enjoined and restrained from asserting or claiming-- [p.]178 as against any
15 of the parties herein, their assigns or successors, or their rights as decreed herein--any
16 right, title or interest in or to the waters of the Stony Creek or its tributaries, or any
17 thereof, except the rights specified, determined and allowed by this decree, and each and
18 all thereof are hereby perpetually restrained and enjoined from diverting, taking or
19 interfering in any way with the waters of the Stony Creek or its tributaries or any part
20 thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment
21 of said waters by the owners of prior or superior rights therein as defined and established
22 by this decree;....

23 The tally above, 136,074 acre-feet per year awarded all the parties leaves the question about what
24 happens with the rest. Stony Creek flows range between 30,000 and 1,000,000 acre-feet per year
25 (Actually, per Hydrology, above, Chart 11, 37,600 acre-feet in the 1923-24 season, 1,424,700 acre-feet
26 in the 1940-41 season). During years of maximum flood, who gets the other 834,000 acre-feet? Does
27 the State of California get the rest to do with as it chooses? If it was the intent of the Angle Decree to
28 award all the water in the watershed, is the State violating the Decree when it grants appropriations?
And here is plaintiff at p. 14 of its Reply quoting the Decree at pp. 117-118 which has language barring
defendant from making further claim on the waters of Stony Creek. Somehow plaintiff missed the
language at p. 177 barring all parties from it (not just defendants), which would include plaintiff.

Missing that language may be for good reason. While the case was being heard in Willows and plaintiff
was drafting that language at p. 177, plaintiff was applying for another 50,200 acre-feet to be stored in
Defendant's Reply Memorandum

1 the new Stony Gorge reservoir, per application No. 2212 on file with the SWRCB, amended permit
2 shown at <http://swrcb2.waterboards.ca.gov/ewrims/wrims-data/1002652%20a002212.pdf> . And in the
3 early 1960s Reclamation applied for and received a permit for 160,000 more acre-feet from Stony Creek
4 in connection with the construction of Black Butte Dam, see Board decision awarding it at
5 <http://www.waterrights.ca.gov/hearings/decisions/WRD1100.PDF> . 160,000 was about the capacity of
6 Black Butte, but since its construction Black Butte reservoir has silted in a surprising 25,000 acre-feet
7 (Stony Creek Quarterly, Spring 2006 p. 3,
8 [http://www.glenncountyrhd.org/nodes/educationoutreach/documents/StonyCreekQuarterlyVol.2Issue2.p](http://www.glenncountyrhd.org/nodes/educationoutreach/documents/StonyCreekQuarterlyVol.2Issue2.pdf)
9 [df](#)) which is close to the total awarded upstream appropriators and riparians noted above. Based on
10 plaintiff's history it's pretty clear plaintiff won't give up its 25,000 acre-feet so it's not hard to guess that
11 they'll take it out of stream flow. Apparently plaintiff is allowed to do whatever it wants despite the
12 language of the Angle Decree. Meanwhile, if the State is cooperating with plaintiff in violation of the
13 Decree, perhaps the State should be brought back into the case on that basis.

14 SWRCB Decision D1042 (<http://www.waterrights.ca.gov/hearings/decisions/WRD1042.PDF>)
15 is fairly typical of the governmental runaround applicants get when they go before the SWRCB. It
16 basically tells them that because of protests by GCID and OUWUA based on the Angle Decree there is
17 no water to allocate, and if they need to resurrect their riparian claims they need to find a court
18 somewhere to hear the issue, not the SWRCB. And of course then plaintiff would argue there are no
19 riparian right and no other court may hear the issue, all this while there is enough water for plaintiff to
20 do anything plaintiff wishes.

21 4. UNDERFLOW/STONY CREEK FAN/ADDITIONAL PARTIES - Plaintiff's Reply p. 12 suggests
22 that the Angle decree was a "comprehensive adjudication" of the water rights on Stony Creek. The tally
23 in 3(a) above from the Decree leaving 864,000 acre-feet (85% of surface flow) unallocated in maximum
24 flood years, the attempts of plaintiff to settle out GCID (Motion to dismiss GCID, et al., without
25 prejudice, overruled, June 24, 1922 in Order of same date), plaintiff's settling out other litigants who
26 raised the underflow issue (James Mills Orchard Company, Esperanza Land, same order, same date), and
27 the systematic failure to settle rights to underflows in the Decree show it was not in any way

28 Defendant's Reply Memorandum

1 comprehensive.

2 Mention of underground waters in the Decree Book and Decree:

3 - Brief, none

4 - Findings, pp. 127 (2 defendants), 153 (techniques to keep water from sinking into underground
5 channels), p. 235 (mentioning the point where any sub-channel flow at Grindstone Reservation rises to
6 the surface to flow over bedrock), 270 (twice) - p. 270 is regarding a right asserted by plaintiff to divert
7 from surface and underground flow of Stony Creek

8 - Decree, pp. 109 (2 defendants - 1 Schedule A, 1 Schedule E), pp. 171 & 172 - same right to divert.

9 It is as if the Decree scrupulously avoided adjudicating underflows except to make sure plaintiff could
10 divert from them.

11 In the various filings in the Angle archives, defendant recalls answers from James Mills Orchard
12 Corporation and its related defendant Esperanza Land were extensive in their concerns that the litigation
13 would impair the Stony Creek underflow they relied on for irrigation. Defendant has not located his
14 copies of those, but has a copy of plaintiff's replication to it, some 12 pages in great detail covering those
15 same underflows - unfortunately defendant did not photocopy the blue cover to the replication so no date
16 shows on what remains, and none of those answers and replications is listed in the poor quality docket
17 transcription defendant photocopied from the archives.

18 In the files at SWRCB on plaintiff's application #2212 (as noted above, for Stony Gorge
19 Reservoir) are protests dated Sep 30 1925 from James Mills Orchards Corporation and from Esperanza
20 Land Corporation that describe the Stony Creek underflow in some detail. Reclamation's application
21 itself acknowledges their protests. The Decree shows them both in its Schedule A, filing disclaimer.
22 Was there some sort of accord reached for the Angle Decree to avoid the underflow issues?

23 Colusa County ultimately was required to acknowledge the requirements of the Angle Decree,
24 accept the water master's jurisdiction, and accept a contract from Reclamation in its SWRCB application
25 27382 (<http://swrcb2.waterboards.ca.gov/ewrims/wrims-permits/p020308.pdf>) so that it could furnish
26 domestic water to the town of Stonyford from underflow. A SWRCB referee determined the wells were
27 furnished by the underflow, and apparently unaware that underflow was not included in the Decree, the
28 Defendant's Reply Memorandum

1 SWRCB refused to issue the permit without Reclamation permission and terms. Plaintiff (Reclamation)
2 filed a letter with SWRCB dated Mar 17 1983 with demands listing its Angle rights as the basis for these
3 demands, so plaintiff is behaving as if underflow was included in the Decree. It is pretty clear that
4 plaintiff has extracted every nickel from Upper Stony Creek Watershed underflow users, while
5 completely ignoring underflow users downstream from Black Butte. This is very inequitable.

6 In his 11/10/08 memorandum defendant urged the court to order Reclamation to develop the
7 water supplies in the Stony Creek Fan to support the costs of making the Upstream Stony Creek
8 Watershed whole again. With the reading he has done since then, defendant has come to understand
9 that the prospect is both simpler and more complex than he realized. The University of California
10 Agriculture & Natural Resources Extension newsletter, "Seeking an Understanding of the Groundwater
11 Aquifer Systems in the Northern Sacramento Valley" (
12 <http://colusagroundwater.ucdavis.edu/pdf/Series1Article1Seeking.pdf>) at pdf p. 2, shows a geologic
13 cross section of the Central Valley in the general vicinity of Orland and Willows. It shows three
14 fresh-water aquifers. The lowest one which declines from the Sierra foothills westward into Glenn
15 County, is made up of several thick layers of volcanic debris from volcanos that preceded Mount Lassen.
16 (see for instance [http://en.wikipedia.org/wiki/Mount Tehama](http://en.wikipedia.org/wiki/Mount_Tehama) and
17 [http://en.wikipedia.org/wiki/Lassen volcanic center](http://en.wikipedia.org/wiki/Lassen_volcanic_center)). The layers are very porous and hold millions of
18 acre-feet of water, recharged by rainfall and streams on the east side of the Valley. The middle one,
19 called the Tehama formation, is basically rock and clay, and not very porous, up to 1500 feet thick. It
20 declines from the west side of the valley and intertwines a bit with but mostly covers the Tuscan
21 Formation out to about the Glenn-Colusa Canal. It is unclear how much water is in it and how well it
22 recharges. A groundwater flow map at pdf p. 37 of the "Deer Creek Water Exchange Pilot Program"
23 application, February 2003 (http://wdl.water.ca.gov/gw/projects/docs/deer_creek/permit_application.pdf
24) shows a flow into a steep cone at the lower left corner of the diagram at a location defendant believes
25 contains wells that irrigate a very large eucalyptus grove planted for wood pulp production. The water
26 may be available in that aquifer, but defendant has seen a note recently (cite pending) that water in the
27 vicinity of that cone is up to 3,000 years old, making it possibly slow to recharge. The Tehama

28 Defendant's Reply Memorandum

1 formation is at the surface at the western foothills and pinches out at about Bedford Creek on
2 defendant's land North Fork Stony Creek. The bulk of defendant's lands are hills in this formation, a
3 gooey conglomeration of clay and amazingly diverse rock types (including jasper, marble, etc.) that
4 produces prodigious gravel streambeds as it erodes; some of those stream beds are on defendant's
5 property. The top aquifer is the Stony Creek Fan, made up of stream-rounded rock and gravel, an
6 average of 50 to 120 feet deep, covering about 135,189 acres ("Stony Creek Groundwater Recharge
7 Investigation, 2003, Glenn County, California ", prepared by the California Department of Water
8 Resources, http://www.glenncountywater.org/documents/stonycreek_gwrechr_g_final/full%20report.pdf,
9 pdf p. 25) . It is very porous, has high transmissivity, not prone to compression, and a high yield of
10 about 15%. One well monitored 350 feet from Stony Creek showed stream level changes are reflected in
11 the well in about 45 minutes which seems quite quick. ("Stony Creek Groundwater Recharge
12 Investigation, 2006, Glenn County, California", prepared by the California Department of Water
13 Resources)
14 http://www.glenncountywater.org/documents/stonycreek_gwrechr_g_final/StonyCreekRoughDraftReport
15 [7-12-06.pdf](http://www.glenncountywater.org/documents/stonycreek_gwrechr_g_final/StonyCreekRoughDraftReport) , pdf. p. 9). It is separated from the underlying Tehama Formation by a fairly impermeable
16 100-foot thick layer of clay. (Lee G. Bergfeld, Investigative Study of Conjunctive Use Opportunities
17 in the Stony Creek Fan Aquifer,
18 http://www.glenncountywater.org/documents/stonycreek_gwrechr_g_final/Bergfeld%20Thesis1.pdf , pdf
19 p. 18) Overall, at any given time the volume of water in the Fan seems to be about 1.5 million acre-feet.
20 "From Sue King, OAWD [Orland-Artois Water District] General Manager:...

21 '...we received grant funding to build three recharge basins and early indications looked
22 promising since the water filtered very quickly into the gravels. Unfortunately it also
23 migrated very quickly to the Sacramento River instead of percolating deeper into the
Tehama Formation, which is the primary aquifer where most of the existing groundwater
pumping occurs."

24 (University of California Agriculture & Natural Resources Extension , Water & Land Resource Manager
25 (newsletter), July, 2008 Vol. 9, No. 3 , "Proposed Groundwater Project: The Stony Creek Fan Aquifer
26 Performance Test"

27 [http://cete.hama.ucdavis.edu/newsletterfiles/Water & Land Resource Manager14650.pdf](http://cete.hama.ucdavis.edu/newsletterfiles/Water%20&%20Land%20Resource%20Manager14650.pdf) , pdf. p. 3).

28 Defendant's Reply Memorandum

1 The Fan is shallow enough that it could be pumped from deep sumps rather than wells, and thus pumped
 2 in very high volume. The fan recharges from several sources: 1) up to a million acre-feet per year from
 3 Stony Creek, less storage, 2) direct rainfall, $18" * 135189 / 12 = 202,783$ acre-feet per year in rainfall, 3)
 4 irrigation sources from OUWUA, Orland-Artois, GCID, and pumpers from lower formations, and 4) to
 5 whatever extent, septic tanks. It recharges so quickly that after the 1977 drought it surprised everyone by
 6 bouncing back the next spring. It's a known flow in a known and definite channel (although an
 7 unusually wide channel) over an impermeable layer, inextricably part of Stony Creek, flowing to the
 8 Sacramento River. It should meet the test for "subterranean streams flowing through known and definite
 9 channels" in California Water Code Section 1200. Because of all that the Fan is subject to the Court's
 10 jurisdiction under the Angle Decree, but the Tehama Formation is questionable, and the Tuscan
 11 Formation probably not subject.

12 The Decree should have included all the waters in the Fan as well as all the waters flowing above
 13 ground not specifically mentioned in the Decree. Instead the Decree went after the upstream
 14 hardscrabble farmers who didn't have the wealth to defend themselves. This was not equitable.

15 5. REVISIONIST HISTORY - At p. 10 of plaintiff's Reply (and other locations), plaintiff labels
 16 defendant's narrative as a "revisionist version of history." Defendant understands that is meant as an
 17 insult, but would point out that in recent years, plaintiff has faced an avalanche of revisionist history. In
 18 response to plaintiff's single-minded "dam and divert" policies, its revisionists are legion: a public tired
 19 of Reclamation misadventure, other Federal and State agencies trying to cope with the aftermath of
 20 Reclamations actions, environmental organizations, Judges, Justices, State Legislators, and even
 21 Congress tired of repeated Reclamation mistakes, failures, evasions, and excuses. A list of a few of
 22 plaintiff's mistakes demonstrates how plaintiff's damage inflicted on the Upper Stony Creek Watershed is
 23 not an isolated incident:

24 - Teton Dam - failed upon filling, 1976 (http://en.wikipedia.org/wiki/Teton_Dam) - Reclamation
 25 ignored warnings about the dam site

26 - Lake Powell - massive absorption of water by sandstone strata (
 27 <http://www2.kenyon.edu/projects/Dams/glp04smi.html>)

28 Defendant's Reply Memorandum

- 1 - Lakes Powell & Meade - exceed ability of watershed to replenish
2 - Colorado - oversold supply
3 - death of fisheries in the north end of the Gulf of California
4 - Friant Dam - deterioration in the concrete (<http://www.usbr.gov/dataweb/html/friant1.html>)
5 - San Joaquin River - rendered dry, destroyed salmon runs - ordered to restore, but after 2 decades of
6 litigation, still no salmon
7 - inadequate environmental reviews on diversions - ordered to set aside contracts, re-do reviews
8 - open sewer to Delta - Central Valley Project Improvement Act (CVPIA) passed, New Melones
9 800,000 acre-feet of water dedicated to improving River & Delta?
10 - Sacramento/San Joaquin Delta - destroyed salmon runs, Delta Smelt habitat - ordered to reduce
11 pumping
12 - deteriorated quality from San Joaquin plus saltwater intrusion - ordered to reduce pumping
13 - Tracy pumping plant - fish entrained - ordered to reduce pumping
14 - Trinity - destroyed salmon runs - ordered to reduce diversion - 2 decades of litigation and still the
15 fisheries are not restored
16 - multiple mistakes/misadventures on restoration activities (Dane J. Durham, J.D., "How the Trinity
17 River Lost Its Water", http://www.fotr.org/news_items/HTTLIW.pdf , "Irrigation Interests Threaten
18 Precious Hoopa Tribal Fisheries", apparently by Tom Schlosser, attorney for the Hoopa Tribe at
19 <http://www.schlosserlawfiles.com/TrinityRiver/CVInterests071204.htm>)
20 - Reclamation has a habit of ignoring court orders. . . .
21 - Klamath - destroyed the Lost River and shortnose suckers & coho salmon habitat - ordered to supply
22 habitat and cut contractors
23 - Folsom South Canal - The Canal to Nowhere, sitting mostly idle (see generally comments by Stuart L.
24 Somach before Congress,
25 <http://republicans.resourcescommittee.house.gov/archives/ii00/archives/109/testimony/2006/stuartsomach>
26 [h.pdf](#))
27 - Westlands/San Luis Drain
28 Defendant's Reply Memorandum

- 1 - per-owner acreage irrigation limits violated, limits expanded by CVPIA, limits still not enforced
- 2 - irrigation rendered 1/3 of District unfarmable
- 3 - San Luis Drain never completed - ordered to complete, but wants alternative with price tag \$2.5
- 4 billion? alternative environmentally questionable?
- 5 - spent \$50,000,000 studying the Drain by year 2,000, no resolution, angered the court
- 6 - selenium contamination of Kesterson Wildlife Refuge - Kesterson closed, filled in
- 7 - hydrocompaction (http://www.cig.ensmp.fr/~iahs/redbooks/a151/iahs_151_0537.pdf)
- 8 - Over-contracted CVP yields - cannot supply what promised, continuous fights over water-right
- 9 priorities
- 10 - Westland's share cut - Westlands moved on Area-of-Origin arguments - settlements with other
- 11 recipients holds claim at bay
- 12 - Auburn Dam - inadequate seismic studies
- 13 - Red Bluff Diversion Dam - damaged salmon run - ordered to reduce diversion?
- 14 - Orland Project - evaded Reclamation Act Section 8 & State Law
- 15 - used wrong rainfall statistics
- 16 - overestimated average watershed yields
- 17 - ruthlessly plundered the watershed

18 Something is clearly not working. Defendant suggests that it is plaintiff's attitude.

19 6. SECTION 8 OF THE RECLAMATION ACT OF 1902, AND STATE LAW - Section 8 of
20 The Reclamation Act of 1902 (P.L. 57-161, 32 Stat. 388), Section 8, states

21 SEC 8. That nothing in this Act shall be construed as affecting or intended to affect or to
22 in any way interfere with the laws of any State or Territory relating to the control,
23 appropriation, use, or distribution of water used in irrigation, or any vested right acquired
24 thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act,
25 shall proceed in conformity with such laws, and nothing herein shall in any way affect
26 any right of any State or of the Federal Government or of any landowner, appropriator, or
27 user of water in, to, or from any interstate stream or the waters thereof: Provided, That the
28 right of the use of water acquired under the provisions of this Act shall be appurtenant to
the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the
right.

27 Plaintiff discussed complying with Section 8 at p. 45 and elsewhere in the Brief and p. 186 and

28 Defendant's Reply Memorandum

1 elsewhere in the Findings. As law is wont to ebb and flow, interpretation of Section 8's requirements
 2 seemed to hit a low point with Fresno v. California, 372 U.S. 627 (1963) wherein the Supreme Court
 3 found the domestic use priority over irrigation of California water law (now Section 106 of the
 4 California Water Code) was pretty much irrelevant, and similarly rendered useless the California county
 5 and watershed of origin preferences - the way the Court cast aside the preferences was unfortunate in
 6 that they pointed at the map at 142 F.Supp., at 40 and opined in as many words that Bakersfield can be
 7 conveniently supplied with water from Fresno since they are adjacent, thus ignoring 3 river watersheds
 8 in between (Kings, Kaweah, and Tule) and the 111 mile distance. They could have easily have said
 9 by looking at a map of similar scale that Fairfield could be conveniently supplied with water from Reno.

10 Fortunately, the tide shifted along about California v. United States, 438 US 645 (1978) which
 11 did a thorough job of reinstating the requirements of Section 8, and while not specifically setting aside
 12 the Court's ruling on watershed protections and domestic preference, at least made the issues arguable
 13 again. It has done the same for riparian rights.

14 a. RIPARIAN RIGHTS - An adequate (or maybe the definitive?) discussion of water rights by the
 15 SWRCB, tasked with managing and apportioning water rights in California, the discussion including
 16 riparian rights and their relation of appropriated or prescriptive rights, appears at
 17 <http://www.waterrights.ca.gov/application/forms/infobook.htm> (SWRCB on Rights). During the
 18 pendency of the Angle action, riparian rights were in a state of flux, as described in Hutchins (
 19 Water Rights Laws in the Nineteen Western States, By Wells A. Hutchins, The Lawbook Exchange,
 20 Ltd., 2004, see for instance at

21 [http://books.google.com/books?id=WoKa8ZffE1gC&pg=PR5&lpg=PR5&dq=hutchins+](http://books.google.com/books?id=WoKa8ZffE1gC&pg=PR5&lpg=PR5&dq=hutchins+water+law&source=web&ots=BVI8X3wkME&sig=t14oYcdeDOejanUvgp8xnkGiCME&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PRA1-PA289,M1)
 22 [water+law&source=web&ots=BVI8X3wkME&sig=t14oYcdeDOejanUvgp8xnkGiCME&](http://books.google.com/books?id=WoKa8ZffE1gC&pg=PR5&lpg=PR5&dq=hutchins+water+law&source=web&ots=BVI8X3wkME&sig=t14oYcdeDOejanUvgp8xnkGiCME&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PRA1-PA289,M1)
 23 [hl=en&sa=X&oi=book_result&resnum=1&ct=result#PRA1-PA289,M1](http://books.google.com/books?id=WoKa8ZffE1gC&pg=PR5&lpg=PR5&dq=hutchins+water+law&source=web&ots=BVI8X3wkME&sig=t14oYcdeDOejanUvgp8xnkGiCME&hl=en&sa=X&oi=book_result&resnum=1&ct=result#PRA1-PA289,M1))

24 [p. 289] (5) California. The California courts frowned upon the legislature's one
 25 attempt to subject the riparian right to forfeiture for failure to exercise the right, and
 expressed it in several decisions. Eventually the legislature discarded the judicially
 objectionable provision.

26 The California Water Commission Act of 1913 [fn 191 - Cal.Stat. 1913, ch. 586,
 27 [Section] 11][this on-line copy is difficult to read and transcribe; hopefully this
 transcription is precise]--with amendments and deletions, reenacted in 1943 as a part of

1 the present Water Code--contained a provision to the effect that nonapplication of water
 2 to riparian land for any continuous period of 10 years after passage of the act should be
 3 conclusive presumption that the water was not needed thereon for any useful or beneficial
 4 purpose, such water thereupon being subject to appropriation. After twice deciding that
 5 the provision had no application to the riparian rights in litigation, which had been
 6 exercised for many years, [fn 192 - Herminghaus v. Southern Cal. Edison Co., 200 Cal
 7 81, 115-116, 252 Pac. 607 (1926); Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 54,
 8 258 Pac. 1095 (1927),] the California Supreme court stated that the legislature was not
 9 justified in taking any portion of a vested property right from one person and investing it
 10 in another; and that while not saying that riparian rights might not under proper
 11 circumstances yield to the police power, this legislation did not purport to be an exercise
 12 of such power for any purpose. [fn 193 - Fall River Valley Irr. Dist. v. Mt. Shasta Power
 13 Corp., 202 Cal. 56, 67-69, 259 Pac. 444 (1927).]

14 Shortly thereafter, in 1928, the voters added a section to the California
 15 constitution declaring, among other things, that "Riparian rights in a stream or water
 16 course attach to, but to no more than so much of the flow thereof as may be required or
 17 used consistently with this section, for the purposes for which such lands are, or may be
 18 made adaptable, in view of such reasonable and beneficial uses * * *,"[fn 194 - Cal.
 19 Const. art. XIV, [Section] 3.] In one of the early major decisions construing and applying
 20 the constitutional amendment, the California Supreme Court held the legislative provision
 21 contrary to the letter and spirit of the constitutional amendment, which "expressly protects
 22 the riparian not only as to his present needs, but also as to future or prospective
 23 reasonable beneficial needs." [fn 195 - Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3
 24 Cal. (2d) 489, 530-531, 45 Pac. (2d) 972 (1935). The California Supreme Court
 25 discussed the history of the cases under the amendment in Joslin v. Marin Mun. Water
 26 Dist., 67 Cal. (2d) 132, 429 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).] Thus after having,
 27 on three occasions, expressed at least by *dicta* its belief that the provision was invalid, the
 28 supreme court now expressly held the provision unconstitutional. This portion of the
 section was omitted from the Water Code when enacted in 1943.

Plaintiff's Brief, pp. 49 - 69 seems to be a 20 page rant against the evils of riparian law:

p.52 "...saddled, like California, with the incongruous and unhappy union of appropriation and riparian
 claims and uses....",

p.63 "...the menacing shadow of the unused riparian blanket which lowers over the stream systems of
 California...."

p. 64 "...began to assume a threatening aspect...."

p. 64 "...hedged on every side by the recurring and reactionary adherence of the same court to so-called
 fundamental doctrine...."

p. 64 "...the throttling influence of the archaic riparian conception...."

p. 66 "...rid these states of the riparian incubus;..."

pp. 68-69 "...reactionary character of the Herminghaus decision....",

Defendant's Reply Memorandum

1 and so on.

2 Throughout plaintiff's Reply are criticisms of defendant's writing, yet, plaintiff's Brief and Reply
 3 illustrate that as a writer of "vigorous -- and, at time, a virulent, vindictive, and vituperative -- exegesis"
 4 (Reply, p. 3), defendant is an amateur compared to plaintiff. The Brief includes a prediction or hope that
 5 riparian rights would disappear in Brief p. 62, and paragraphs 57 and 58, pp. 67-69 and in anticipation of
 6 which plaintiff drafted its Brief. This anticipation of the demise of riparian rights was carried forward
 7 into the Findings, pp. 241- 261 , and the Decree, pp. 157 - 168, all drafted by plaintiff (Brief, p. 6)
 8 and carried forward substantively unchanged into the final amended Decree of April 14th, 1930. Instead
 9 of disappearing, riparian rights were resurrected by case law even before the Special Master forwarded
 10 Plaintiff's Brief, Findings, and Decree to the court: Plaintiff's antipathy seems based, Brief p. 54, on an
 11 understanding that riparian rights at the time had no "beneficial use" limit. As Hutchins discusses,
 12 above, that problem disappeared on November 6, 1928 when the voters adopted a beneficial use
 13 limitation in what is now California Constitution Article 10 Section 2. Hutchins also points out that
 14 even before the Master submitted the Brief, Findings and Decree draft to the Court on April 19, 1928 ,
 15 the California Supreme Court had repeatedly rejected the riparian right sunset clause recited at Brief p.
 16 60 and thus plaintiff's reliance on it was no more than wishful anticipation, not settled law. With the
 17 requirement mentioned at Brief p. 6 Paragraph 7 that defendant responses must be made in front of the
 18 special master or waived unless good cause be shown otherwise, and without further examination of the
 19 transcripts in the archives (which defendant would like to do), it is difficult to tell whether the issue ever
 20 came up before the master or before the court, but nevertheless the heart of plaintiff's case, that is, the
 21 destruction of riparian rights on Stony Creek, was based on mistake.

22 As is the Decree: the Decree is based on a mistaken representation of riparian law.

23 P. 144 of the Findings state in part,

24 ...in all years by or before the 15th of July; that the natural flow in the main stream
 25 thereafter and up to the time of the partial rise of the water in the late fall averages from
 26 year to year not more than 25 to 30 cubic feet per second; with flows in frequent years
 very considerably below that amount; that some of the tributaries have no appreciable
 flow during this period....

27 In the Angle archive, filed May 16 (?), 1922 is the "Answer of Defendants, Mrs. D.H. Masterson, J. K.

28 Defendant's Reply Memorandum

1 Masterson and F. P. Masterson, for themselves individually and as successors to L. R. Frisbie and to D.
2 H. Masterson, Deceased, et al." pp. 2-3, paragraph 5, asserts,

3 "Defendants have used water, when available, from Little Stony Creek [an alias for North
4 Fork until more recent generations] for more than fifteen years, as to small tracts
5 hereinabove described, and for a briefer time as to other tracts. The stream flows in the
6 late fall, winter, and early spring, and occasionally as late as the first of June, then
7 becoming dry without any flow, except as to pools in places which are maintained during
8 the whole of the summer.

9 "Defendants use said stream and pools for watering cattle continuously, and for
10 irrigating gardens, continuously, and for more general irrigation use as to some sections
11 of the land, during the period when there is sufficient water in the creek."

12 This pattern of flow is exactly correct in defendant's own experience, including the lands of
13 George and Nora Clark just west of the confluence of North Fork and Big Stony. What this means is,
14 except for underflow, is that for the bulk of the irrigation season North Fork flow was severed from Big
15 Stony, and as pointed out above, the Decree as drafted by plaintiff ignored underflow. With that, there
16 was no excuse for including North Fork in the Decree's prohibition past the end of June.

17 Further, per SWRCB on Rights, "A well-established rule is that a prescriptive water right
18 ordinarily cannot be acquired against an upstream user." The entirety of the North Fork Watershed and
19 all of its tributaries is upstream from any of plaintiff's works or water conveyed from its storage to its
20 works on Big Stony. No waters from North Fork were correctly appropriated by plaintiff. The case
21 never should have been brought against North Fork riparians or appropriators, especially for waters during
22 times when North Fork lost its flow to Big Stony, and the Decree never should have included any lands
23 or waters from North Fork Stony Creek.

24 Understanding that plaintiff brought its suit because plaintiff co-mingled its conveyance waters
25 with waters owned by irrigators on Big Stony and tributaries that enter Big Stony at locations far
26 removed from North Fork and then sued because those other irrigators used that comingled water, it was
27 physically impossible for anyone on North Fork to engage in such comingling or use. There was
28 absolutely no lawful purpose for including any North Fork lands and waters in the suit.

Not only is the Decree based on erroneous interpretation of California riparian law, the portions
that placed any limitation on North Fork waters and lands and rights of any kind were erroneous in both
law and fact.

Defendant's Reply Memorandum

1 b. DOMESTIC USE - Because of the Angle Decree, Colusa County jumped through hoops for decades
2 to try to furnish domestic water to the community of Stonyford. There is extensive record of that within
3 the Angle archives, as well as at the SWRCB and Colusa County Superior Court, and ultimately to
4 ensure the water they had to sign an onerous 41 page contract with Reclamation (
5 http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/2005_exec_cts_water_serv/05_watersvc_county_colu
6 [sa_stonyford.pdf](http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/2005_exec_cts_water_serv/05_watersvc_county_colu)). This is for water that should be theirs to begin with, under priority of California
7 Water Code Section 106. Century Ranch, a subdivision just south of Stonyford, is in a perpetual state of
8 drought because of interpretations of the Angle Decree interfering with their use of ground water.

9 Punishing E.A. Wright in 1947 for domestic uses of his irrigation water would have been improper but
10 for the Angle Decree. The Decree interferes with the intended priority of domestic uses in the Upper
11 Stony Creek Watershed. It doesn't similarly interfere with it in the Lower Stony Creek Watershed
12 because the Decree did not adjudicate all of the water in the Watershed. This is inequitable.

13 c. AREA OF ORIGIN - As noted above, California's protections for area of origin took a hit from the
14 U.S. Supreme Court. They also only apply to CVP or SWP (State Water Project) waters. Public Law
15 91-502, October 23, 1970 added the Black Butte project to the Central Valley Project. The
16 Tehama-Colusa Canal is also part of the CVP (<http://www.usbr.gov/dataweb/html/sacramento.html>) .
17 Reply p. 6 takes issue with defendant citing a reference that discusses extending Orland Project canals to
18 connect with the Tehama-Colusa Canal, asserting that it is the State's document, not theirs or OUWUA's.
19 The "2004 Water Use Efficiency Grant Proposal for the Orland Project Regulating Reservoir Feasibility
20 Investigation" (<http://www.owue.water.ca.gov/docs/2004Apps/2004-022.pdf>), "Submitted by the
21 Orland Unit Water Users Association To the California Department of Water Resources" seems to be
22 an OUWUA document. At p. 11 it states,

23 It is anticipated that any water transferred by the OUWUA will be made available in the
24 Sacramento River at Red Bluff by exchange for Tehama-Colusa Canal (TCC) water.
25 Transferred water would be released from Black Butte Dam for direct (via Orland Project
26 canals) or indirect (via Stony Creek) delivery into the TCC, thereby reducing the TCC
27 diversion requirement at Red Bluff.

28 Whether the canals have been linked up, or transfer is indirect by Stony Creek, there seems to be
considerably more than mere "wheeling" going on. CVP water is being transferred to various agencies

1 up and down and outside the watershed, CVP storage has been impaired by 25,000 acre-feet at Black
 2 Butte because of silting and defendant can only guess where plaintiff is making up the shortfall,
 3 comingling of CVP and Orland Project water is occurring from East Park clear to the Sacramento River
 4 and maybe through Project canals into the TCC if that link has been completed, plaintiff is stonewalling
 5 as to whether or not sales of excess water to OUWUA members is continuing, plaintiff is being a bit
 6 unclear as to whether the Project Canals have linked with the TCC, the TCC Authority is marketing its
 7 distribution as far away as Woodland and Davis (
 8 http://www.watershedportals.org/cv/news/news_html?ID=642), and here is plaintiff before this court
 9 asking to redirect irrigation water henceforth without notice to the court and thus without notice to the
 10 public. Defendant has no quarrel with the distribution of water to other Reclamation client agencies
 11 provided Reclamation also returns to the upstream users waters no longer needed by the Orland Project,
 12 and it should be without charge because the project has been paid off since 1954.

13 Within the SWRCB, there seems to be an evolving "common-law" style area of origin
 14 preference: "Term 13 is consistent with policy evident in a number of SWRCB decisions to the effect
 15 that water originating in a watershed or county should first be available for use within its county or
 16 watershed of origin."
 17 (http://www.waterboards.ca.gov/board_info/agendas/1999/august/0804-06.htm) This preference would
 18 not be limited to CVP and SWP projects, and thus, would apply to the Orland Project under Section 8 of
 19 the Reclamation Act. Similarly, Water Transfer Issues in California, Final Report to the California
 20 State Water Resources Control Board by the Water Transfer Workgroup, June 2002, p. 7, footnote 5
 21 mentions

22 "5 The California Water Code and the common law's "no injury" rule prevents transfers
 23 of water that would cause injury to other legal users of water. Legal users of water include
 24 those possessing riparian/overlying and perfected appropriative rights. The "no injury"
 25 rule generally does not consider impacts to third-party beneficiaries, such as effects on
 26 local agricultural economies. However, if a transfer involves the wheeling of water
 27 through a state or local water conveyance system, Water Code section 1810 prohibits the
 use of such facilities if the transfer would unreasonably affect the overall economy or the
 environment of the county from which the water is being transferred. Moreover, the
California Environmental Quality Act requires that a public agency consider the
 reasonably foreseeable direct and indirect environmental consequences of transfers when
 a public agency is involved in the transfer, such as in the case of a change order from the

1 SWRCB."

2 (http://www.waterboards.ca.gov/publications_forms/publications/general/docs/watertransfers.pdf).

3 "Injury" certainly describes what plaintiff has been doing to the Upper Stony Creek Watershed.

4 d. WASTE - Defendant asserts that the application of water to a client agency, OUWUA with steadily
5 decreasing parcel size, constitutes a diminishing beneficial use and a growing waste in violation of
6 California Constitution Article 10, Section 2. Plaintiff's response is deny deny deny, Reply pp. 3 - 5.

7 Trinity County complained to the SWRCB that use of its water at Westlands produced increasing
8 toxicity in the ground and runoff, and as a result it was a waste, not a beneficial use (Robirda Lyon,
9 "The County of Origin Doctrine: Insufficient as a Legal Water Right in California", 12 San Joaquin
10 Agricultural Law Review 133, 148 (2002)) and (Dane J. Durham, J.D., "How the Trinity River Lost Its
11 Water", http://www.fotr.org/news_items/HTTLIW.pdf , pdf p. 65) (defendant has not found the
12 application cited in Lyon; representative is SWRCB Decision D-1641 mentioning the allegations at pdf
13 pp. 109 &119 and discarding them, <http://www.waterrights.ca.gov/Decisions/D1641rev.pdf>).

14 SWRCB seems to have ignored these comments which continue through this decade (for instance,
15 <http://www.indybay.org/newsitems/2008/04/05/18490760.php>). Even so, if plaintiff wants to change
16 the decree, then the price should be to make the Decree equitable and compliant with California law, else
17 the Project should be allowed to wane to extinction and the Angle Decree with it, followed by the other
18 watershed claimants interceding to halt the waste.

19 7. *RES JUDICATA/STARE DECISIS* /WHY NOW AND NOT BEFORE NOW? - On pp. 11 and 12 of
20 Reply plaintiff claims the shield of *res judicata*. Yet plaintiff is before this court seeking a modification
21 of the Decree, however small. Is it wrong to ask that in exchange the Decree should be made equitable
22 and any errors within it be repaired? Plaintiff's urges (Reply, p. 12): "Mr. Barkley is barred as a matter
23 of law from seeking to reopen or relitigate claims that this court definitively resolved in 1930." That
24 may well be, but if the court should perceive the Decree as being inequitable and based on cumulative
25 errors, upon plaintiff's reopening the case (however small) would the court be justified in requiring
26 correction of the errors and balancing of the equities as a condition of granting the relief plaintiff seeks?
27 Or is the court's only alternative a rejection of plaintiff's motion, and thereby pave the way for the

28 Defendant's Reply Memorandum

1 eventual extinction of the project as a beneficial use, followed by action by the State of California or
2 other claimants to set aside all of plaintiff's claims to Stony Creek waters for the project? But for
3 plaintiff's "I've got mine" attitude, the choice would seem to be fairly easy. Were plaintiff arguing *stare*
4 *decisis* instead of *res judicata*, defendant would point out other instances in which the court's ultimately
5 tired of an onerous decision and overturned it: Dredd Scott, 60 U.S. 393 (1857), "indirectly overruled in
6 the Slaughter-House Cases, 83 U.S. 36 (1873) which noted that Dred Scott's holding was superseded by
7 the passage of the Thirteenth Amendment to the United States Constitution in 1865, which abolished
8 slavery, and the Fourteenth Amendment in 1868" (http://en.wikipedia.org/wiki/Dred_Scott_v._Sandford
9); Plessey v. Ferguson, 163 U.S. 537 (1896) and its progeny overturned by Brown v. Board of Education
10 of Topeka, 347 U.S. 483 (1954), etc. Some decisions are so outrageous the test of time compels their
11 reversal. While Angle does not descend to the moral depths of those decisions, it is more blatant in
12 ignoring current law at the time it was handed down, let alone fitting poorly with current law in 2009.

13 On p. 15 plaintiff suggests that anyone aggrieved by the Angle Decree should seek some sort of
14 legislative redress. If the people of Owens Valley have been unable to gain justice legislatively, what
15 hope do the people of the Upper Stony Creek Watershed have? But to some extent, the legislative
16 solution is already in place: with the growth of Federal and Sate environmental, and specific fish and
17 wildlife protections in recent decades, it's doubtful that either the Owens River project or the Orland
18 Project could have been implemented in their current form if proposed now. Now that plaintiff has
19 reopened the Angle case, however small the opening may be, it would seem to be time to assess the
20 cumulative impacts of plaintiff's activities on the Upper Stony Creek Watershed and mitigate them, see
21 environmental issues below.

22 On p. 12 of Reply, plaintiff points out "Neither Mr. Barkley nor, to the United States' knowledge,
23 any other defendant or person has seen fit to object to or protest the basic provisions and workings of the
24 Decree in an appropriate judicial forum for over 78 years." In the same set of paragraphs plaintiff argues
25 that there was no appropriate judicial forum since the Decree was set in stone. Setting aside the obvious,
26 that plaintiff has not recently reviewed the many complaints in the Angle archives, there are many other
27 reasons, cumulative reasons, why the appropriate time is now to bring these protests before the court

1 of which the last one in the following list is most important:

2 - The demise of the riparian right predicted by plaintiff in its Brief at p. 62 and in paragraphs 57 and 58,
3 pp. 67-69 and in anticipation of which plaintiff drafted its brief, findings, and decree, ultimately did not
4 happen and instead the tide of the law flowed the other way

5 - The Court's jurisdiction continues, however limited it may be

6 - Defendant was born 10/27/1945, and it took many years to get to where these matters could be
7 discussed, however inadequate defendant may be as plaintiff points out at lines 15 and 16 of Reply p. 11

8 - End of the "great cost" of the project as a factor, now that it was paid off in 1954

9 - Development of photocopiers in the 1960s

10 - Growth in the general realization of the presence and size of the Stony Creek Fan and other
11 fresh-water aquifers under lower Stony Creek

12 - Growth of the internet in the 1990s and growth in content from research sources in the 21st century,
13 making available, among other things, a plethora of statements by plaintiff outside of court that
14 contradicts plaintiff's contentions in court

15 - growth in California watershed protection & management statutes; clarification of the relationship
16 between federal and state water law and management by California v. United States, 438 US 645 (1978),
17 followed by 9th Circuit applying those principles

18 - Growth of the SWRCB as an aggressive manager of California Water Resources, especially after
19 California v. United States (supra)

20 - Growth in the Upper Stony Creek Watershed diaspora (some 10,000 people by now?), including many
21 professionals and at least 5 lawyers although no water lawyers

22 - Waning of the Orland Project as a beneficial use

23 - Silting of Black Butte much more rapidly than anticipated to the point where plaintiff's Central Valley
24 Project (CVP) allocation from Black Butte is 20% larger than the capacity of the reservoir

25 - Growth in sprinkler & drip irrigation technologies making feasible a much wider definition of irrigable
26 riparian lands than in 1918-1930, and in a way far more efficient and less wasteful than plaintiff's project

27 - The court's adoption of CM/ECF makes service on 700 defendants (or 20,000 defendants, if the Fan is

28 Defendant's Reply Memorandum

1 included) and processing their responses financially feasible

2 - Reclamation's interference with orderly administration of California water law continues on the Stony
3 Creek Watershed

4 - Decree, Section VII, p. 177-178 forbids suit, requiring defendants to wait for this current motion by
5 Reclamation to expand the Decree in any manner however slight; The current motion filed by U.S.

6 clarifying who the true adversary is, clarifying scope of service of filings, opening an opportunity for
7 raising these issues and defining the format for it, extending the scope of the decree and proposing

8 diversion of and concealment going forward of application of waters, revealing of plaintiff's plan to link
9 up Project canals with the Tehama-Colusa Canal and funneling off excess waters in a manner and

10 quantity plaintiff intends to be outside the view of the public and control of the court forever, all making
11 this both the first and the last opportunity to object.

12 Thus, because of the Decree this is the first opportunity to bring this challenge, and because of
13 plaintiff's stated plans to spirit surplus waters away from now on this is also the last opportunity. Rather
14 than this being a "second bite at the apple", plaintiff is absconding with the apple.

15 Awesomely steep hurdles stand between the people in the Upper Stony Creek Watershed and this
16 court: money, time, skill, sense of loss to downstream users, suspicion of outsiders, suspicion that the
17 deck is stacked, and so on. Even so, if anyone is interested, as defendant proposed at lines 3 - 14 of his
18 11/10/08 memorandum (so ably criticized by plaintiff at Reply p. 5), it is quite easy to find out how the
19 public feels about this Decree or OUWUA through a direct census by mail or door to door with
20 postage-paid return postcards, for instance. Plaintiff's characterization of the OUWUA subscriber's
21 complaint suggests that it has no credibility. Defendant would be delighted for the opportunity to prove
22 it otherwise.

23 8. DEFENDANT'S PLEA - At pp. 1 & 2 of plaintiff's Reply , plaintiff heaps derision on defendant's
24 plea. Yet, that laundry list of requests is what it would take to make the Upper Stony Creek Watershed
25 whole from what plaintiff did to it.

26 9. MISSING CITES - In his 11/10/08 memorandum, defendant left the following missing cites:

27 a. At times there is as much as 25,000 cubic feet per second (cite pending) flowing past the

28 Defendant's Reply Memorandum

1 family's North Fork Stony Creek ranches.

2 Paskenta-Newville Unit, Central Valley Project California, Status Report, August 1973, (hereafter CVP
3 Newville) p. ii, maximum runoff at damsite 60,000 acre-feet estimated per year; recorded flow
4 maximum 12,800 cfs; damsite is upstream from North Fork confluence with Kendrick, Bedford, and
5 Burris Creek, Masterson Hollow, and many unnamed washes. (other cites still pending)

6 b. Reclamation had used erroneous rainfall statistics for their first Orland reservoir (mountain
7 rainfall statistics instead of much-lower, foothill statistics) (cite pending), and then oversold the Orland
8 Project in good years.

9 Letter from E.G. Hopson, United States Reclamation Service, Portland, Ore July 9, 1913 to Supervising
10 Engineer to the Director,

11 "The water supply of the project has proved to be defective, and apparently the only
12 effective way of supplementing it is by building the feed canal to Stonyford, at a cost,
13 including incidentals, of approximately \$200,000. It appears to be the almost
unavoidable duty of the United States to build this feed canal...." , letter in the Angle
archives.

14 Letter from Board of Engineers to Chief Engineer, United States Reclamation Service, Portland, Ore.,
15 August 16, 1913. Quoting therein from an October 23, 1908 letter wherein Supervising Engineers
16 Henny and Hopson reported to the Directors....

17 "'Data of rainfall and run-off cover but a short period of time and some uncertainty must
18 exist regarding the area safely irrigable from the natural stream flow... It has been the
19 intention to supplement it by pumping, the conditions for which are exceedingly
favorable and the probability being that from 1,000 to 3,000 acres can thus receive its late
summer supply.'....

20 "3. The above is here quoted to indicate opinions held at a time when run-off data were
21 far more incomplete than those at present available. It will be noted that pumping was
22 considered an essential feature of the project if it was to include much land in excess of
10,000 acres....

23 "10. ...it was found that the flow from Briscoe Creek on which much of the argument
24 was based was in error...." (compare with Reply p. 10 line 25, but note that Briscoe Creek
flows into Big Stony just below Stony Gorge Dam)." Copy in Angle archives.

25 (Dr. Gene H. Russell, Stony Creek (Calendar), The Orland Historical & Cultural Society, 1983, p. 6)

26 Had the government engineers erred in their estimates of the water supply from
27 the drainage basin that feeds East Park Reservoir? Many thought that the 'ideal dam site'
impounded a dry creek.

28 Defendant's Reply Memorandum

1 In August of 1913, The Orland Register reported that no such error had been
2 made. 'At the time of the forming of the local irrigation unit, the data for rainfall over any
3 lengthy period was extremely scarce. The storage back of the dam was estimated entirely
4 on the figures available, those of Fruto on the east and those of Fouts Springs on the west
5 side of the watershed. It soon developed that the actual rainfall within the watershed was
6 less than either of the two points mentioned.'

7 Defendant has not yet located the source of the balance of this comment in his 10 file boxes of
8 water related papers, but recalls that it came from conversation with an Engineer at SWRCB in 2001.
9 Until defendant finds the reference, it may be disregarded.

10 c. When shortages developed in bad years they sought a succession of increased storages and stream
11 appropriations to cover up their mistakes, protect their jobs, and keep Reclamation from being disbanded
12 for having fumbled the Orland Project, their first project (cite pending).

13 That should read, "their first project in Northern California", balance pending.

14 d. At one time the town of Newville was the largest town in Colusi County (later split to form Tehama,
15 Colusa and Glenn Counties) (cites pending).

16 (L. W. Wigmore, The Story of the Land of Orland, Orland Register, 1955, p. 1; "Newville" (from the
17 Glenn County Sketch Book by Thelma White), Colusi County Historical Society Wagon Wheels, 1973,
18 p. 12; Justus H. Rogers, Colusa County, Its History Traced from a State of Nature Through the Early
19 Period of Settlement and Development, to the Present Day", Orland, 1891 (publisher unknown), hard
20 copy and
21 http://books.google.com/books?id=65MO4ggaIMC&pg=PA474&lpg=PA474&dq=%22Justus+H.+Rogers%22&source=web&ots=ORHhy4N_9-&sig=ckPBbC4InQAjytnojGX4qDZp_Vo&hl=en&sa=X&oi=book_result&resnum=10&ct=result#PPA3,M1 , at numerous pages therein).

22 e. With thousands of irrigable acres, and a highly seasonal stream flow of up to 56,100 acre-feet (see
23 for instance, California Department of Water Resources, Thomes-Newville and Glenn Reservoir Plans
24 Engineering Feasibility, November 1980, p. 2-7, flow of 55,000 acre-feet in 1969 at an Army Corps of
25 Engineers guage 2 miles upstream from the west end of Black Butte Reservoir northern arm, other cites
26 pending),
27 (still pending)

28 Defendant's Reply Memorandum

1 10. ENVIRONMENTAL ISSUES - Defendant has seen no mention of any environmental review in
2 plaintiff's plans. Granted that the proposal in plaintiff's motion seems modest, yet, it comes as part of a
3 continuing program that has had widespread cumulative devastating economic impact on the Upper
4 Stony Creek Watershed. Back when plaintiff first started this project, reviews were not required. But
5 now they are, in some form or other.

6 Defendant is somewhat unfamiliar with federal environmental law, but under California's
7 California Environmental Quality Act (CEQA), generally California Public Resources Code Section
8 21000 et seq.), where a project in itself or cumulatively has a substantial adverse impact on human
9 beings for which feasible mitigations exist those mitigations must be adopted (California Public
10 Resources Code Section 21083 subdivision (a)(3) and Section 21002) . Where an agency is
11 piecemealing a project, as plaintiff is here, an examination of the cumulative impacts is especially
12 warranted. Presumably, at least as far as OUWUA is concerned and with plaintiff being OUWUA's
13 partner and provider of free legal representation in perpetuity, in the instant case the impacts of plaintiff's
14 Orland Project have been devastating on the upstream economy, see for instance the comment in the EIS
15 quoted by defendant at p. 6 of his 11/10/08 memorandum. (See also, Reclamation, CVP Newville "With
16 a firm irrigation supply, livestock, orchard, and field crop enterprises would be considerably enhanced,
17 providing a stable agricultural economy for the area." p. i) The mitigations are easy: recognize the
18 riparian rights of upstream users according to state law, use means other than the absolute prohibition
19 within the Angle Decree to ensure upstream users do not use water stored by plaintiff for the Orland
20 Project, tap the million or so acre-feet in the Stony Creek Fan or the 5,000,000 or 10,000,000 million or
21 so acre-feet in the Tehama or Tuscan Formations to make up for any modest shortfall such relaxation of
22 upstream prohibitions might cause, and allow the Upper Stony Creek Watershed to begin the long slow
23 economic recovery to which it is entitled.

24 Beyond that, with enthusiastic support from all 17 other living descendants of Frank Masterson
25 including spouses, defendant and his family have started a small nursery of seedlings and cuttings for
26 elderberry bushes, a plant that grows well unattended in the climate on defendant's land in dozens of
27 locations. The ultimate goal would be to develop the world's largest organic elderberry plantation

28 Defendant's Reply Memorandum

1 blended into but not supplanting existing native trees and shrubs, including factory, research, and sales,
2 using family recipes plus recipes from enthusiastic elderberry web sites such as
3 <http://www.elderberries.com>. There is one Kansas company that ships elderberry pies as a sideline at
4 \$35 each. (cite misplaced, pending) Defendant believes he can do better than that. There are models for
5 such development, such as the Moana Loa Macadamia Nut company on the big island of Hawaii, which
6 took a plant product that no one wanted and created a worldwide market. Defendant has enough water
7 to start this project but not enough to go beyond that. Defendant and his family would hope to be able to
8 pump enough water from the North Fork Stony Creek underflow (see testimony of F. P. Masterson,
9 Angle archives, transcripts pp. 1499 - 1509 and testimony of E. T. Eriksen pp. 4123 - 4127) through pipe
10 to drip and microsprinklers (without the 28% conveyance waste committed by plaintiff as allowed on p.
11 141 of the Decree, for instance), an underflow that is quite deep and extensive at the quarter quarter
12 section described as defendant's at p. 133 of the Decree, but from what defendant has read in the Angle
13 archives and the SWRCB records, defendant believes he would not be allowed to use that water in the
14 requisite quantity even though the Angle Decree scrupulously avoided adjudicating underflows.

15 The most recent 5-year review for the Valley Elderberry Longhorn Beetle (
16 http://ecos.fws.gov/docs/five_year_review/doc779.pdf) recommends de-listing the beetle, currently
17 "Threatened", based apparently on the planting of some 135,000 seedlings in and around the Central
18 Valley by United States Fish & Wildlife Service (USF&W) and other cooperating agencies and groups.
19 Telephone conversations with the USF&W involved in preparing that report suggest that the delisting
20 will occur this year. Nevertheless it is not delisted yet, and the number of bushes defendant plans to
21 plant and water are several multiples of the entire previous USF&W program, and recognizing that
22 elderberry is a riparian plant, starting with selected gullies in the vicinity of that Decree page 133 land.
23 In the process defendant believes there is also an opportunity to create continuous circulating flows in
24 these gullies sufficient to support California Red Legged Frogs and California Tiger Salamanders as a
25 side-benefit. Defendant is threading his way through the USF&W and other bureaucracies looking for
26 cooperative funding opportunities and a "safe harbor" designation, but within defendant's family there
27 are sufficient resources to carry this project out to its limits without such help if it's done gradually.

28 Defendant's Reply Memorandum

1 All this will not happen without water, water that the Angle Decree seems to prohibit defendant
2 from using, water that would eventually be freed up through the gradual cessation of the Orland Project
3 as a beneficial use but for plaintiff's current motion to extend the life of the Orland Project. An
4 environmental review taking into account this very real habitat restoration project as an alternative
5 should be required of plaintiff.

6 11. CONCLUSION - Defendant prays that he has at least raised sufficient questions to cause all persons
7 interested in the Upper Stony Creek Watershed to suspect that there has been a century of behavior by
8 plaintiff and plaintiff's clients that should be modified, and that this honorable court will insist on
9 such modifications.

10 Tomorrow this country will swear in a new President and plaintiff will acquire a new
11 boss. On p. 54 of Time Magazine dated December 29, 2008 - January 5, 2009, President-Elect
12 Obama is quoted:

13 "And: 'Outside of specific policy measures, two years from now, I want the American
14 people to be able to say, "Government's not perfect; there are some things Obama does
15 that get on my nerves. But you know what? I feel like the government's working for me.
16 I feel like it's accountable. I feel like it's transparent. I feel that I am well informed about
17 what government actions are being taken. I feel that this is a President and an
18 Administration that admits when it makes mistakes and adapts itself to new
19 information.'"

17 Should plaintiff somehow share in the vision of plaintiffs new leader, should plaintiff suddenly
18 develop a conscience, should plaintiff somehow begin to admit mistakes and adapt itself, salmon will
19 return to the San Joaquin, fisheries will be restored on the Trinity, water will return to the parched land
20 and the people of the Upper Stony Creek Watershed will be able to proclaim "Free at last! free at last!
21 thank God Almighty, we are free at last."

22 Defendant prays that this honorable Court will grant his Counter-Motion and deny Plaintiff's
23 Motion.

24 ///

25 ///

26 ///

27 ///

28 Defendant's Reply Memorandum

1 Respectfully submitted,

2
3 /s/ Michael J. Barkley

4 Michael J. Barkley, Defendant, in propria persona
5 California SBN 122433
6 161 N. Sheridan Ave. #1
7 Manteca, CA 95336
8 (209)823-4817 (no fax) mjbarl@inreach.com

9
10
11
12
13 Dated: January 19, 2009

14 VERIFICATION

15 I am a defendant in this proceeding and I researched, compiled and wrote this Memorandum. I
16 declare under penalty of perjury that the allegations and factual contentions in this Memorandum and in
17 the accompanying Defendant's First Amended Notice of Opposition to Plaintiff's Motion, and
18 Defendant's Counter-Motion are true and correct, except for those submitted on information and belief
19 and as for those I believe them to be true and correct.

20 /s/ Michael J. Barkley

21 Michael J. Barkley

22 Dated: January 19, 2009

1 George Wilson
2 Water Master
3 Orland Water Users Association
4 828 Eighth Street
5 Orland, CA 95963

6 I declare under penalty of perjury that this is true and correct.

7 /s/ Michael J. Barkley

8 Michael J. Barkley, Defendant, in propria persona
9 California SBN 122433
10 161 N. Sheridan Ave. #1
11 Manteca, CA 95336
12 (209)823-4817 (no fax) mjbarcl@inreach.com

13 Dated: January 19, 2009

1 MICHAEL J. BARKLEY, CA SBN 122433
161 N. Sheridan Ave. #1
2 Manteca, CA 95336
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3 Defendant, in propria persona
4
5
6
7

8 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
9 SACRAMENTO DIVISION

10	THE UNITED STATES OF AMERICA,)	Civil No. S-80-583-LKK [In Equity No. 30]
11	Plaintiff,)	DEFENDANT'S DECLARATION
12	v.)	OF SERVICE
13	H. C. ANGLE, et al.,)	
14	Defendants.)	DATE: December 8, 2008
15)	TIME: 10:00 a.m.
16)	COURT: Courtroom 4, 15 th Floor

17 I Declare that: I am a defendant in the action entitled above. Upon filing the following using the Court's
18 CM/ECF electronic filing system,

19
20 DEFENDANT'S FIRST AMENDED OPPOSITION TO PLAINTIFF'S MOTION TO AMEND ANGLE
DECREE, AND DEFENDANT'S COUNTER-MOTION, CM/ECF Document 284

21 DEFENDANT'S FIRST AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT'S
22 OPPOSITION TO PLAINTIFF'S MOTION TO AMEND ANGLE DECREE, AND IN SUPPORT OF
DEFENDANT'S COUNTER-MOTION, CM/ECF Document 284-2

23 ORDER DENYING PLAINTIFF'S MOTION TO AMEND ANGLE DECREE AND GRANTING
24 DEFENDANT'S COUNTER-MOTION TO RESTRUCTURE THE ANGLE DECREE [PROPOSED]
CM/ECF Document 284-3

25 I received the expected email from the court informing me that the Court's CM/ECF system will serve
26 this filing electronically upon all interested counsel in this case, and directing me to serve the filings
27 conventionally on the Court's water master which I have done so this day by placing a true copy in the

1 United States Mail with appropriate postage affixed to the envelope addressed to:

2 George Wilson
3 Water Master
Orland Water Users Association
4 828 Eighth Street
Orland, CA 95963

5
6 I declare under penalty of perjury that this is true and correct.

7
8 /s/ Michael J. Barkley

9
10 Michael J. Barkley, Defendant, in propria persona
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13 Dated: November 10, 2008