

10 **2. Fraud on the Court compels further review - defendant has attached an affidavit**
11 **outlining sufficient specifics on how plaintiff has committed Fraud on the Court of the sort**
12 **condemned by the United States Supreme Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co.,**
13 **322 U.S. 238 (1944) and provided for in Federal Rules of Civil Procedure Rule 60(d)(3). As**
14 **Moore's Federal Practice points out at pp. 60-57 Hazel is the leading fraud on the court case, yet**
15 **what occurred in Angle is even more blatant a deception than that, especially considering the**
16 **Hazel dissent - it was right under Judge Kerrigan's nose and he didn't spot it or comment on it.**
17 **Unlike perjury or other intrinsic fraud, it was a lie reduced to printing outside the court and then**
18 **brought into court; still, the analysis in footnote 18 of the Hazel dissent leaves some question as to**
19 **extrinsic or intrinsic fraud. No doubt plaintiff will vote for intrinsic shortly after they admit to it.**

20 **For proven fraud on the court, the usual remedy is to set aside the Angle Decree and**
21 **dismiss the case forever (Wright, Federal Practice and Procedure, Civil 2d, v. II, 2005, Section**
22 **2870 p. 413). Yet, defendant does not need all that. Defendant would be quite satisfied with his**
23 **riparian rights restored to what they were just before the Angle Decree was signed, and thereafter**
24 **defendant could irrigate his expanding crop of elderberry bushes using drip irrigation or**
25 **microsprinklers from the underflow of North Fork Stony Creek and its tributaries, while plaintiff**
26 **would find its share of the Stony Creek waters relatively undiminished, yet plaintiff would be**
27 **left free to obtain by eminent domain the rights of any upstream users who infringe on plaintiff's**

1 **appropriations should it be necessary which is what plaintiff should have done in 1918 instead of**
2 **bringing this Draconian confiscatory suit.**

3 **Upon exiting the hearing on February 9 defendant handed plaintiff's counsel an earlier**
4 **version of his fraud on the court Declaration attached hereto, and several hours later emailed him**
5 **the demand in Exhibit A attached, since it appears the Department of Justice has some obligations**
6 **where actions may fall subject to Title 18, Section 245, for instance. Counsel's response has been**
7 **silence, which is not a surprise.**

From: "Mike Barkley" <mjbarkl@comcast.net>
To: "Shockey, Charles \ (ENRD\)" <Charles.Shockey@usdoj.gov>
Cc: "Andrew Hitchings" <ahitchings@somachlaw.com>,
"D Barkley" <dbarkley@astound.net>,
"Jodi Barkley" <jodibarkley@hotmail.com>
Subject: Angle
Date: Mon, 9 Feb 2009 13:08:43 -0800

Dear Mr. Shockey,

As we left the courtroom today I handed you two copies of my Declaration outlining misconduct by DOJ attorneys in the Angle case, one copy for you, one for Mr. Hitchings. As an officer of the court you are obligated to investigate my comments and determine whether or not they are valid, and if they are you must take appropriate action to restore our riparian rights - our lands are heavily gullied so every quarter-quartet [sic] section has at least one stream tributary to North Fork so riparian rights were lost to the Angle Decree on every parcel we own.

If you find that my comments are not valid I would appreciate hearing why they are not.

Thank you in advance,

--Mike Barkley, 161 N. Sheridan Ave. #1, Manteca, CA 95336
209/823-4817 mjbarkl@inreach.com

Exhibit A

1 MICHAEL J. BARKLEY, CA SBN 122433
161 N. Sheridan Ave. #1
2 Manteca, CA 95336
209/823-4817 mjbarkl@inreach.com

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

10	_____)	Civil No. S-80-583-LKK [In Equity No. 30]
11	THE UNITED STATES OF AMERICA,)	
12	Plaintiff,)	DEFENDANT MICHAEL J. BARKLEY'S
13	v.)	DECLARATION IN SUPPORT OF
14	H. C. ANGLE, et al.,)	APPLICATION/MOTION
15	Defendants.)	TO RECONSIDER ORDER,
16	_____)	Federal Rule of Civil Procedure 60(d)(3)
		DATE: April 20, 2009
		TIME: 10:00 a.m.
		COURT: Courtroom 4, 15 th Floor

17 **My name is Michael J. Barkley. I am a defendant in this proceeding and I researched,**
18 **compiled and wrote this Declaration. I believe that during the years leading up to the issuance of**
19 **the Angle Decree plaintiff's attorneys engaged in an "unconscionable plan or scheme" to mislead**
20 **the court. I sought to present this declaration in court today (February 9, 2009, enlarged since**
21 **then) but before I could introduce it Judge Karlton cut me off and refused to hear any comment**
22 **during today's hearing.**

23 **Moore's Federal Practice mentions that the court has jurisdiction to bring up these issues on**
24 **its own motion (p. 60-69) at any time (p. 60-66). Wright's Federal Practice and Procedure. Civil**
25 **2d, 2005, at p. 413 indicates that if these facts are valid the "judgment should be vacated and the**
26 **guilty party denied all relief".**

27 **For some 30 years I've wondered how it was possible that the court could have allowed**

1 plaintiff to take without compensation our riparian rights on North Fork Stony Creek and its
 2 tributaries, and of course not just ours but the riparian rights of thousands of people (most of the
 3 defendants had a family) and 732 square miles of watershed out of the 772 total and give them to
 4 one little private irrigation company of 20,000 acres. As of January 30, 2009 the answer has become
 5 obvious to me: I have come to believe plaintiff's attorneys suckered Judge Kerrigan, or rather more
 6 specifically, committed a fraud on the court as would fall under Federal Rules of Civil Procedure
 7 60(d)(3) and the centuries of Equity practice that led to that rule. The bulk of what I present here
 8 comes from the Angle record on its face - there may be other explanations for what happened, but
 9 they would have to come from presumptions, from guessing, or from evidence I've not yet found.

10 At pp. 14-15 in my January 19, 2009 reply memorandum that I filed with this court in this
 11 case I included the following from Hutchins:

12 During the pendency of the Angle action, riparian rights were in a state of flux, as
 13 described in Hutchins (Water Rights Laws in the Nineteen Western States, By Wells A. Hutchins, The Lawbook
 14 Exchange, Ltd., 2004, see for instance at 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)

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

18 “The California Water Commission Act of 1913 [fn 191 - Cal.Stat. 1913, ch. 586,
 19 [Section] 11][this on-line copy is difficult to read and transcribe; hopefully this
 20 transcription is precise]--with amendments and deletions, reenacted in 1943 as a part of the
 21 present Water Code--contained a provision to the effect that nonapplication of water to
 22 riparian land for any continuous period of 10 years after passage of the act should be
 23 conclusive presumption that the water was not needed thereon for any useful or beneficial
 24 purpose, such water thereupon being subject to appropriation. After twice deciding that the
 25 provision had no application to the riparian rights in litigation, which had been exercised
 for many years, [fn 192 - Herminghaus v. Southern Cal. Edison Co., 200 Cal 81, 115-116,
 252 Pac. 607 (1926); Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 54, 258 Pac. 1095
 (1927),] the California Supreme court stated that the legislature was not justified in taking
 any portion of a vested property right from one person and investing it in another; and that
 while not saying that riparian rights might not under proper circumstances yield to the
 police power, this legislation did not purport to be an exercise of such power for any
 purpose. [fn 193 - Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56,
 67-69, 259 Pac. 444 (1927).]

26 “Shortly thereafter, in 1928, the voters added a section to the California constitution
 27 declaring, among other things, that "Riparian rights in a stream or water course attach to,
 but to no more than so much of the flow thereof as may be required or used consistently
 with this section, for the purposes for which such lands are, or may be made adaptable, in

1 view of such reasonable and beneficial uses * * *,"[fn 194 - Cal. Const. art. XIV, [Section
2 3.] In one of the early major decisions construing and applying the constitutional
3 amendment, the California Supreme Court held the legislative provision contrary to the
4 letter and spirit of the constitutional amendment, which "expressly protects the riparian not
5 only as to his present needs, but also as to future or prospective reasonable beneficial
6 needs." [fn 195 - Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. (2d) 489,
7 530-531, 45 Pac. (2d) 972 (1935). The California Supreme Court discussed the history of
8 the cases under the amendment in Joslin v. Marin Mun. Water Dist., 67 Cal. (2d) 132, 429
9 Pac. (2d) 889, 60 Cal. Rptr. 377 (1967).] Thus after having, on three occasions, expressed
10 at least by *dicta* its belief that the provision was invalid, the supreme court now expressly
11 held the provision unconstitutional. This portion of the section was omitted from the
12 Water Code when enacted in 1943."

13 **As he states, California riparian law was in a state of flux during the 1920s. Examining the cases he**
14 **cites it appears he understates it. He mentions (and plaintiff's case relied upon it to destroy the**
15 **bulk of upstream water rights) that the California Water Commission Act of 1913 added a sunset**
16 **clause for unused riparian rights in its Section 11, but that the California Supreme Court**
17 **repeatedly rejected it, asserting that if the state wanted to take those rights it had to pay for them;**
18 **ultimately the California Supreme Court declared Section 11 unconstitutional, although the**
19 **language in the court's previous case, Fall River (September 1, 1927) seemed to do the same despite**
20 **plaintiff's assertions to the contrary in its 1928 brief at pages 60 & 65 (see transcription of the brief**
21 **at <http://www.mjbarkl.com/brief2.htm> or the original in the Angle Archives). In addition to the**
22 **cases Hutchins quotes is San Bernardino v. Riverside, 186 Cal. 7, June 3, 1921, p, 30 referring to a**
23 **similar confiscatory 1911 provision in state law: "The water that pertained to or was contained in**
24 **the lands of the state was already the property of the people when this amendment was adopted.**
25 **The statute was without effect on any other property." Fall River was most emphatic at p. 67,**

26 **"We need here only say that the legislative department of the state may not take any**
27 **portion of a vested property right from one person and invest another with it and be**
28 **justified in so doing in view of the provisions of sections 13 and 14 of article I of the**
29 **state constitution and the fourteenth amendment to the constitution of the United**
30 **States."**

31 **On p. 66 the court made it clear that if the state wanted to take these rights, it had to do so "by the**
32 **use of the power of eminent domain" (quoting its opinion in Miller & Lux v. Madera etc. Co., 155**
33 **Cal. 59, 65 (1909)). Justice Shenk dissented from Herminghaus (December 24, 1926), and criticized**
34 **in a concurrence in Fall River: "The opinion . . . invalidates section 11 and 42 of the Water**

1 **commission Act" (Herminghaus, p. 123). His understanding of the consequences of the**
2 **majority decision seems quite clear. As Hutchins suggests, there was some public consternation**
3 **over all this at the time because the voters removed the primary objection to riparian rights on**
4 **November 6, 1928 when they amended the California Constitution to add that riparian uses must be**
5 **reasonable and beneficial, which also seemed to remove plaintiff's primary objection in their 1928**
6 **brief. Plaintiff was well aware of the Herminghaus case and the Section 11 issues - according to the**
7 **listing at the head of the reported case they filed an amicus brief with Richard J. Coffey appearing**
8 **for the United States Bureau of Reclamation, and his actual signature, "Of Counsel: . . ., Richard J.**
9 **Coffey, District Counsel, U.S. Bureau of Reclamation, is on p. 70 of plaintiff's 1928 brief. I have**
10 **purchased a copy of Mr. Coffey's Herminghaus brief and it is being prepared for me by the**
11 **California State Archives about 8 blocks southeast of this U.S. District Court.**

12 **Would Judge Kerrigan have been aware of this controversy? I have not yet found any**
13 **indication that he was or was not. Later, as Hutchins pointed out, in Tulare Irr. Dist. in 1935 the**
14 **California Supreme Court repeated what it said in Fall River and declared Section 11 of the Water**
15 **Commission Act unconstitutional, a bit like saying "this time we really mean it". Thus, under**
16 **California case law, there was no sunset clause for riparian rights at least from San Bernardino**
17 **(1921) onward which includes the time plaintiff drafted the decree, and under Section 8 of the**
18 **Reclamation Act of 1902 plaintiff was bound by that case law. Plaintiff's reliance on Section 11**
19 **allowed it to shift the burden: instead of plaintiff having to identify rights parcel-by-parcel and**
20 **condemning them, defendants had to assert their rights and withstand plaintiff's harsh replications**
21 **(see numerous replications in the Angle Archives), etc., in order to have them acknowledged in an**
22 **expensive and purpose-less exercise in view of the asserted sunset clause.**

23 **When the Angle case was first filed it was assigned to Judge Van Fleet. Over the first few**
24 **years there were several amendments, motions, and stipulations, and a flurry of filings. On June**
25 **24, 1922 hearings and proceedings were assigned to a Special Master in Willows, George E.**
26 **McCutchen who was 28 at the time. On September 3, 1923 Judge Van Fleet died. In January**
27 **1924 Judge Kerrigan was appointed by President Coolidge and confirmed 7 days later. I am as**

1 yet unaware of any involvement in the case by Judge Kerrigan before the Special Master
2 forwarded the results of the proceedings in Willows to the Court with the “Report of Master Pro
3 Hac Vice” (see transcription at <http://www.mjbarkl.com/report.htm> or the filed copy in the Angle
4 Archives) filed Nov 7 1929 along with Plaintiff's Brief (the only brief I've seen from the pendency
5 of the litigation, see transcription at <http://www.mjbarkl.com/brief2.htm> - one I have not seen,
6 that of “Brief for Defendant J. E. Ayer” is mentioned dismissively on p. 6 of that Report), Findings
7 of Fact and Conclusions of Law (transcription at <http://www.mjbarkl.com/find.htm>) and
8 proposed Decree (transcription of final at <http://www.mjbarkl.com/decreed.htm> , or the filed
9 versions of all these in the Angle Archives), all drafted by plaintiff as plaintiff states at p. 6 of its
10 Brief. Of concern is the comment on p. 7 of the Special Master's Report: “A discussion of
11 outstanding points of legal consequence will be found in plaintiff's opening brief. No other
12 presentation of points and authorities has been made by the parties.” As noted in the Special
13 Master's Report, a group of Stonyford neighbors plus L. Huffmaster a few miles downstream filed
14 last minute efforts to protect their riparian rights which were accepted by plaintiff (see
15 transcription of “The Settlement of The Findings - Amendments Made In Printed Findings of Fact
16 and Conclusions of Law and Suggested Decree”, 09/18/29 , at
17 <http://www.mjbarkl.com/settlem.htm> or in the Angle Archives). The Report is addressed “To the
18 Honorable Judges of the United States District Court for the Northern District of California:” - I
19 do not know whether that indicates no judge was assigned to the case at the time the Report was
20 filed, or that was just the style of filings at that time.” At some time after Nov 7 1929 the final
21 Decree appears to have been typeset with Judge Kerrigan's name at the bottom (although it could
22 be a high-quality rubber stamp) which would make his affiliation with the case obvious at that
23 point. A few weeks later Judge Kerrigan signed the Decree on January 13, 1930 without any other
24 changes from the Decree proposed by plaintiff in 1928; the 1930 printed version in the Archive
25 bears inked corrections, "corrected in accord with the order of April 14th, 1930", signed by Judge
26 Frank N. [sic] Kerrigan [his H looked like an N ?]. The only changes to plaintiff's draft decree
27 and the final decree are filling in the empty blanks indicated in his April 14th order, and adding

1 those few claims in that "Settlement of The Findings". That he had signed a decree with empty
2 blanks in it suggests that he didn't read the Decree or any of the rest of it, and with that
3 inattention set the Decree between us and our Riparian rights. Further, I can only ponder the
4 effect the Crash of October 1929 and the opening days of the Great Depression may have had on
5 the business of the Court at that time.

6 I feel an obligation to attempt to refute any possibility of fraud on the court before raising
7 it as an issue, and in pursuit of that I used Westlaw to attempt to gauge Judge Kerrigan's
8 familiarity with riparian rights. During the years he served on California state courts (First
9 Appellate District 1906 - 1922; Supreme Court 1923-1924, per
10 <http://www.fjc.gov/public/home.nsf/hisj>) Westlaw shows 25 reported cases of Kerrigan AND
11 "water rights" and 9 of Kerrigan AND riparian, of which 3 are duplicates and one is somebody
12 else. No instances of Kerrigan AND "Water Commission Act" come up. For United States Courts
13 within the 9th Circuit from 1924 - 1930 three instances of Kerrigan AND "water rights" and none
14 of Kerrigan and riparian come up; no instances of just "Water Commission Act" come up. None
15 of these cases involve the specific loss of riparian rights to any authority with the power of eminent
16 domain within California with the possible exception of Holmes (below); his service with the First
17 appellate District may not have exposed him to any instances wherein such issues would have
18 come up considering the geographic area District One covers, and his service with the California
19 Supreme Court (January 1923, http://cschs.org/02_history/02_c.html) followed the San
20 Bernardino case by 18 months. He may have been similarly unfamiliar with the California
21 Supreme Court's opinions on Section 11. Plaintiff did bring up both Herminghaus and Fall River
22 in its 1928 brief but belittled any constitutional implications One of the cases mentioned to
23 explain away the riparian issues was Holmes v. Snow Mountain Water & Power Co., 36 Cal. App.
24 394 (1918) (Brief, p. 60 & p. 65) in which Justice Kerrigan concurred, but that case does not even
25 contain the word "riparian" - it seemed to be more a disposition of a vexatious litigant. I have no
26 way of knowing whether or not Judge Kerrigan even read plaintiff's 1928 brief, considering that
27 the package brought to him by the special master seemed quite tidy and he missed the blanks in

1 the Decree.

2 Unless the court interferes, I intend to review once again, but more thoroughly this time,
3 the entirety of the Angle archives including reading all the testimony and indexing all the filings
4 and other papers, to ascertain whether or not there is anything therein that might refute my belief
5 that this fraud on the court occurred. The Wackerman controversy (7 F.3d 891, 1992) shows that
6 Stuart Somach was Holly Reimer's counsel and quotes within the opinion such as in footnote 4
7 suggest Mr. Somach has examined the transcripts more closely than I have and might be able to
8 point to anything that would refute my beliefs. Judge Karlton's phrase at p. 1372 of the court's
9 1991 Angle Order, 360 F.Supp. 1366, "hearing on the arguments of counsel" suggests that he
10 might also know of arguments in the record that would show this was merely a mistake in law
11 applied rather than deception by plaintiff's counsel. And if perchance Judge Kerrigan kept notes
12 that are still available, they might also shed light.

13 Having said all this, still, Reclamation was obligated under Section 8 of the Reclamation
14 Act of 1902 to respect California law throughout the years of the litigation and all years since. As
15 such, it was an affirmative duty of Reclamation and their counsel in court to present California
16 law fairly. Does the Angle Decree shield Reclamation from these obligations? If not, then the
17 obligations remain, and while under the Decree defendants may not use their riparian rights those
18 rights remain and Reclamation cannot take advantage of the court's impairment of them.
19 Further, if Reclamation's obligations continued, then what Reclamation has done since San
20 Bernardino (1921) is to take under color of law riparian rights from all the upstream Stony Creek
21 defendants, in violation (with their client agencies) of Title 42 Section 1983 and 1985, and Title 18,
22 Sections 241, 242, 371, 1341, 1343, and 1961 through 1968. Reclamation should not be rewarded
23 for this behavior.

24 I declare under penalty of perjury under the laws of the United States of America that the
25 allegations and factual contentions in this declaration are true and correct, except for those
26 submitted on information and belief and as for those I believe them to be true and correct.

27 Executed on February 9, 2009 and February 17, 2009,

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/s/ Michael J. Barkley

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