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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

NO. CIV. S-80-583 LKK

Plaintiff,

v.

O R D E R

H.C. ANGLE, et al.,

Defendants.

_____ /

In 1918, the United States commenced a water rights adjudication to settle the rights to the flows of Stony Creek and its tributaries in Northern California. This culminated in the Angle Decree of January 13, 1930. The Angle Decree has since been overseen by a court appointed Water Master.

Michael Barkley is an inheritor of rights adjudicated by this decree and therefore a defendant in this action. Barkley began actively participating in this litigation in 2008, when he opposed an amendment to the decree and moved to vacate the decree in its entirety. The court ruled against Barkley and denied his subsequent motion for reconsideration. Orders of February 11 and

1 May 5, 2009. Barkley now brings a motion under Article XVI of the
2 Decree, styled a "Motion to Require Changes in Practices of The
3 Water Master." In part, this motion seeks to change or clarify the
4 administration of the Water Master's office. For example, Barkley
5 seeks increased access to the Water Master's records. The bulk of
6 the motion, however, seeks to compel the Water Master "to accept
7 the interpretations described in defendant Barkley's Memorandum .
8 . . . or else defend his positions to the contrary with specific
9 quotes of the page, paragraph, and exact text from the Decree."
10 Def.'s Proposed Order, at 2. These interpretations pertain to
11 "underflow," accounting for parties' diversions, and storage of
12 Decree water.

13 The court resolves the motion on the papers and after oral
14 argument. For the reasons stated below, the motion is denied.

15 I. Background

16 A. The Angle Decree

17 The court recently summarized the history of the Angle Decree
18 as follows:

19 The Reclamation Act of 1902, 43 U.S.C. § 391
20 et seq., empowers the federal government to
21 acquire water rights for the reclamation and
22 irrigation of land. Pursuant to this
23 authority, the United States Bureau of
24 Reclamation sought to . . . acquire water from
25 Stony Creek to serve the Orland Reclamation
26 Project.

27 In an action commenced in 1918, the United
28 States, as plaintiff, brought suit against
29 several hundred defendants within the Stony
30 Creek watershed, seeking an adjudication of
31 all parties' respective water rights. The
32 United States District Court, sitting in

1 equity, issued its decision in 1930, in what
2 is commonly referred to as the Angle Decree.
3 Pursuant to this decree, the Bureau of
4 Reclamation owns specific rights to water
5 which it uses in operating the Orland Project,
6 serving the members of the Orland Unit Water
7 Users Association. The decree sets a variety
8 of limits on how this and other water can be
9 used, including the which lands may be
10 irrigated (the Project Lands Schedule).

11 Order of Feb. 11, 2009, 2009 WL 347749, *1-2, 2009 U.S. Dist. LEXIS
12 14083, *2-3. See also United States v. Angle, 760 F. Supp. 1366
13 (E.D. Cal. 1991), rev'd sub nom Wackerman Dairy, Inc. v. Wilson,
14 7 F.3d 891 (9th Cir. 1993).

15 As the Ninth Circuit has observed, "[t]he Angle Decree is
16 structured compartmentally." Wackerman Dairy, 7 F.3d at 894.
17 Notably, different Articles pertain to different types of water
18 rights recognized under California law. Article VII concerns
19 rights by appropriation, setting forth the rights of 117
20 appropriators, specifying their amount and rate of water to be
21 diverted and the land on which the water may be used. Articles XII
22 and XIII determine the rights of riparian owners. Beyond these
23 general categories, the Decree recognizes the rights of the federal
24 government (Article VIII), the Grindstone Indian Reservation
25 (Article X), and the Glenn-Colusa Irrigation District (Article
26 XIV). Articles I through VI dispose of the rights of various
defendants, and Articles XV through XVII set forth general
provisions.

27 **B. The Water Master**

28 Under Article XVI of the Angle Decree, a Water Master is

1 appointed to carry out and enforce the provisions of the decree.
2 Decree at 176. The Water Master may issue orders, rules and
3 directions in connection with these duties, and if these are
4 disobeyed, he may cut off the violator's access to Decree water as
5 a sanction, reporting the violation and the sanction to the court.
6 Id. The Decree authorizes the Water Master to hire a support
7 staff. Id. Grievances against the Water Master may be filed with
8 this court after service on the Water Master. Id.

9 Barkley states that he intends this motion to be a complaint
10 against the Water Master under Article XVI of the Decree, and he
11 declares that he served the Water Master prior to filing the
12 instant motion. Memo at 4, section I.F-G

13 **C. Procedural History**

14 The recent round of Angle litigation began on September 5,
15 2008, when the United States filed a motion to amend the decree.
16 Barkley opposed this motion and filed a concurrent "cross-motion"
17 seeking to vacate the entire Decree. Barkley argued "that the
18 original decree misapplied applicable California law, contained
19 numerous factual errors, was marred by an unjust and coercive
20 process that precluded meaningful participation by many defendants,
21 and was otherwise inequitable." Order of February 11, 2009 at 8.
22 The court denied Barkley's motion and granted the United States'
23 motion to amend.

24 Barkley filed a motion for reconsideration, which this court
25 denied on May 4, 2009. In the motion for reconsideration, Barkley
26 requested that the court modify the Decree "by inserting language

1 confirming defendant's riparian rights to certain underflow."
2 Order of May 4, 2009 at 6, 2009 U.S. Dist. LEXIS 41320, *8, 2009
3 WL 1212240, *3. Without reaching the merits of the underflow
4 issue, the court held this issue was not raised in the prior
5 motions, and the court therefore declined to address it for the
6 first time in a motion for reconsideration.

7 Barkley's next filing was before the California State Water
8 Resources Control Board ("SWRCB"). On October 1, 2009, Barkley
9 filed a "protest" to an application for a permit extension filed
10 by the Bureau of Reclamation. See Exhibit filed Dec. 22, 2009,
11 Dkt. No. 307-3. In this protest, Barkley repeated many of the
12 arguments he previously made to this court, including his arguments
13 concerning fraud on the court during the initial proceedings.
14 Barkley's protest also argues that SWRCB lacks jurisdiction over
15 surface waters adjudicated by the decree, but that SWRCB retains
16 jurisdiction of subsurface and non-Decree waters. Id. at CM/ECF
17 page 15-17. The protest then makes several arguments relating to
18 underflow, including arguing that underflow is outside the scope
19 of the Angle Decree.

20 **II. Discussion**

21 As noted, Barkley seeks two types of relief: changes in the
22 administration of the Water Master's office and substantive
23 interpretation of the Decree. Because some of the administrative
24 changes are argued to be necessary to implement Barkley's
25 interpretation of the Decree, the court begins with the questions
26 pertaining to interpretation.

1 **A. Barkley's Request to Compel Interpretation of The Decree**

2 Barkley asks the court to order the Water Master to adopt or
3 rebut Barkley's interpretation of the Decree as it pertains to
4 "Interpretation of Underflow," "Coverage of All Parties," and
5 "Storage of Diversion Water." Def.'s Mem., §§ IV, V, and VI.
6 Although the United States vigorously opposes Barkley's motion, the
7 United States has not addressed the substance of Barkley's
8 interpretations. As explained below, at this point, the court can
9 do no more than attempt to understand the nature of Barkley's
10 claims and identify procedures for their resolution.

11 **1. Underflow**

12 Barkley contends that "the Angle Decree covers surface flows
13 only." The United States and Water Master do not take a position
14 as to whether this contention is correct. Instead, both argue that
15 the Water Master is not the party who should answer the question.
16 Although the government appears to be correct in this regard,
17 Barkley has a right to an answer from someone. For the reasons
18 explained below, at this stage, the court will wait for the SWRCB
19 process to be completed. If Barkley wishes to proceed further
20 here, he may do so through a declaratory judgment action.

21 The government first argues that the court should abstain
22 under the doctrine of primary jurisdiction in order to let the
23 SWRCB take the first crack at interpreting the Decree in this
24 regard.

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1 The primary jurisdiction doctrine provides:
2 When there is a basis for judicial action,
3 independent of agency proceedings, courts may
4 route the threshold decision as to certain
5 issues to the agency charged with primary
6 responsibility for governmental supervision or
7 control of the particular industry or activity
8 involved.

9 Rhoades v. Avon Prods., 504 F.3d 1151, 1162 (9th Cir. 2007)
10 (quoting United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir.
11 2003)). Before the court may "route" the question to SWRCB, the
12 court must determine that the SWRCB is better positioned to answer
13 it. Id. at 1164 ("Allowing the district court to decline a
14 declaratory relief action on a primary jurisdiction rationale is
15 sensible only if the agency is better equipped to handle the
16 action."). The government has not addressed this issue.

17 The water rights adjudicated by the Decree are created under
18 and governed by California law. Wackerman Dairy, 7 F.3d at 896.
19 The Decree recognizes riparian, appropriative, and contractual
20 water rights. Id. The Decree does not explicitly discuss rights
21 to groundwater. Underflow, the subject of Barkley's motion, is
22 subsurface water flowing in association with a surface stream.
23 Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 663 (1908)
24 (underflow includes the water flowing through the "soil, sand, and
25 gravel, composing the bed" of the surface channel); Vineland
26 Irrigation Dist. v. Azusa Irrigating Co., 126 Cal. 486, 494-95
(1899) ("underflow . . . is the broad and deep subterranean
volume of water which slowly flows through the sand and gravel
underlying" surface streams) (quotation omitted), see also San

1 Bernardino v. Riverside, 186 Cal. 7, 14 (1921). Such water is
2 generally subject to the same rules as surface flows, and as such,
3 it is subject to SWRCB's jurisdiction. See, e.g., Verdugo Canon
4 Water Co., 152 Cal. at 663. Insofar as Barkley's question is
5 whether the types of surface water rights recognized by the Decree
6 carry with them a right to underflow, the SWRCB is "better
7 equipped" than this court to interpret the scope of California
8 water rights.

9 Barkley's argument extends beyond the mere scope of California
10 water rights, because he argues that with one exception "[t]he
11 Angle Decree specifically excludes any coverage of underflow or
12 supporting flow of underground streams." Protest at 11. The
13 court, rather than SWRCB, is better equipped to interpret the
14 Decree in this regard. The "threshold decision" to such
15 interpretation will, however, be the ordinary scope of California
16 water rights. Accordingly, it is appropriate to allow SWRCB to
17 answer that preliminary question first.

18 Pragmatically, although the government asks this court to
19 decline jurisdiction pending completion of SWRCB proceedings, it
20 appears that those proceedings are drawing to a close. The SWRCB
21 has already denied Barkley's protest, but Barkley has filed a
22 petition for reconsideration. The state administrative process is
23 therefore nearly exhausted. Thus, a stay rather than a dismissal
24 would be more appropriate in these circumstances. Davel
25 Communications, Inc. v. Qwest Corp., 460 F.3d 1075 (9th Cir. 2006)
26 (court may stay or a dismiss a case under the primary jurisdiction

1 doctrine).

2 Barkley's motion faces a further defect, however, in that it
3 seeks relief from the wrong party. The instant motion seeks to
4 compel the Water Master to adopt or defend an interpretation of the
5 Decree. The government argues, without citation to authority, that
6 the Water Master's duties do not extend to such interpretation.
7 Accord Wilson Decl. ¶ 8. Insofar as the Water Master has authority
8 to "carry out and enforce" the Decree and to issue "orders, rules
9 [and] directions," this authority must carry with it some power to
10 interpret the Decree. Decree Article XVI. Nonetheless, the court
11 agrees that the primary responsibility for interpretation of the
12 Decree rests in the court. Barkley's request would therefore be
13 better treated as a claim for a declaratory judgment.

14 The combined effect of these two concerns is that the court
15 denies the present motion insofar as it pertains to underflow, but
16 denial is without prejudice to renewal as a declaratory judgment
17 action once the SWRCB process is complete.

18 Two of the government's arguments remain. The government
19 incorrectly asserts that the court has previously rejected
20 Barkley's underflow arguments. Barkley's motion for
21 reconsideration did ask the court to hold that the Decree did not
22 include underflow. The court held that the issue was not properly
23 before the court because the underlying motion made no mention of
24 underflow. The court therefore has not addressed the merits of
25 this argument. In a separate argument, the government implies that
26 after the SWRCB proceedings, Barkley should turn to state court.

1 If the court has properly understood Barkley's argument, that
2 argument should be presented here.¹

3 **2. Excess Diversions**

4 Barkley's second request is that the court order the Water
5 Master to interpret the Decree as "cover[ing] all parties,"
6 specifically the United States and the Orland Unit Water Users
7 Association. This request is a red herring, because Barkley, the
8 government, the Water Master, and this court all agree that the
9 government and OUWUA are subject to the Decree.

10 Barkley's actual argument is that the United States and OUWUA
11 have violated the Decree by diverting water in excess of the
12 Bureau's allotment and by using water in ways not permitted. From
13 this premise, Barkley concludes that the Water Master is aware of
14 these actions, but that the Water Master has permitted them because
15 he has somehow concluded that the United States and OUWUA are not
16 subject to the Decree. Barkley requests that the Water Master be
17 ordered to tabulate these "excess" diversions throughout the
18 history of the decree

19 Putting aside this strange posture, it is clear that parties
20 must be able to bring actions to enforce the terms of the Decree.
21 Although Barkley's briefing is difficult to follow, it appears that

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23 ¹ The court notes that it is not clear whether there is any
24 dispute as to whether the Decree covers underflow. As noted above,
25 the government and Water Master have explicitly avoided stating a
26 position on the matter. Both assert, however, that neither the
United States nor the Orland Unit Water Users Association are
diverting underflow. Wilson Decl. ¶ 8, Pl.'s Opp'n at 6. Although
SWRCB denied Barkley's protest, no party has indicated whether
SWRCB took a position on the underflow issue.

1 he intends to bring such an action.² Insofar as the federally
2 appointed Water Master has authority and responsibility to enforce
3 the Decree, it is unclear what role, if any, SWRCB plays in this
4 enforcement. Accordingly, the government's primary jurisdiction
5 argument is inapplicable here.

6 Enforcement of the decree requires a determination of what the
7 Decree permits parties to do and a determination of what the
8 parties are actually doing. Both issues appear to be in dispute.
9 The court is not capable of resolving the dispute at this juncture
10 and on the briefing presently submitted. Barkley requests that the
11 Water Master be ordered to tabulate "a schedule of excess
12 diversions year by year by" the United States, OUWUA, Glen-Colusa
13 Irrigation District, and downstream underflow pumpers, together
14 with a list of the uses to which the diverted water has been put.
15 The court declines to so order at this time. Instead, the court
16 directs the parties to submit briefing regarding the proper
17 procedure for use in an action to enforce the Decree.

18 **3. Storage of Water**

19 Finally, Barkley seeks an order stating that parties to the
20 Decree may store their diverted water. This question appears to
21 turn entirely on interpretation of the Decree and the limits to
22 water use specified therein, rather than on general principles of

23
24 ² The government argues that the instant motion is merely a
25 further attempt to "reopen and relitigate elements of the Angle
26 Decree that have been fully adjudicated." Pl.'s Opp'n, 6:11-12.
Although the SWRCB protest repeats many of the challenges to the
Decree, these portions of the protest are generally not
incorporated into the instant motion.

1 California water law. Accordingly, the court need not wait for
2 SWRCB to consider the issue.

3 As with the other issues, while the Water Master implicitly
4 has some power and responsibility to interpret the Decree in this
5 regard, interpretation of the Decree is ultimately a matter for the
6 court. The United States has not weighed in on the substance of
7 the storage question, instead challenging the propriety of this
8 claim as it is brought against the Water Master. Rather than
9 attempting to answer the question in its current posture, the court
10 directs Barkley to file a cross-complaint for a declaratory
11 judgment in this regard. If the United States has an opinion on
12 the substance of the question, the government can present it then.

13 **B. Administration of The Office of The Water Master**

14 The remainder of Barkley's motion concerns administration of
15 the Water Master's office. Among the contentions raised on this
16 subject, the most serious is that Barkley has been denied access
17 to the Water Master's records. Barkley has not, however, made a
18 sufficient showing of such a denial. Apparently, Barkley's brother
19 Dennis Barkley stopped by the Water Master's office on March 27,
20 2009 in an attempt to access records, and the Water Master was out.
21 See Decl. of George G. Wilson, ¶ 6. Dennis Barkley left a message
22 stating "that he would return and pick up the material in one to
23 three weeks. He has never returned." Id. Defendant Michael
24 Barkley claims that the Water Master's failure to affirmatively
25 contact Barkley to confirm a convenient time to meet has denied
26 Barkley access to the records. In light of Barkley's limited

1 efforts the court declines to order the Water Master to take
2 additional steps. It appears that Barkley and the Water Master can
3 resolve this issue without the court's aid.

4 Barkley predicts that when he receives access to the records
5 he will nonetheless be prevented from copying them. The Water
6 Master's office is located within the OUWUA office, and makes use
7 of some OUWUA facilities, although the Water Master is a distinct
8 entity. Barkley fears that OUWUA, out of hostility to Barkley,
9 will not permit Barkley to use the shared facilities to make copies
10 of Water Master records. Barkley has not tested this theory.
11 Again, Barkley has not shown an injury sufficient to warrant
12 judicial intervention.

13 Barkley's remaining contentions concern the Water Master's
14 salary, staff, and office space. Barkley contends that all of
15 these must be increased. Because Barkley has not shown that the
16 Water Master is performing his duties inadequately, the court
17 declines to order any increase. While Barkley contends that
18 increases are necessary to allow the Water Master to perform the
19 tabulations Barkley requests, the court does not order the Water
20 Master to perform any such additional work at this time.

21 **III. Conclusion**

22 For the reasons stated above, the court ORDERS as follows:

- 23 1. Defendant Barkley's motion to require changes in the
24 practices of the Water Master, Dkt. No. 307, is DENIED
25 WITHOUT PREJUDICE, as explained above.


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2. Barkley and the United States SHALL file briefs not to exceed ten (10) pages addressing the manner in which parties may bring actions seeking to enforce the limits imposed by the Decree. Such briefing SHALL be filed within twenty-eight days of the date of this order.
3. Barkley MAY file a counterclaim for declaratory judgment as to whether parties to the Decree may store Decree water.
4. Barkley MAY file a counterclaim for declaratory judgment as to whether the Decree adjudicates underflow. Such counterclaim SHALL NOT be filed until Barkley's proceedings before the SWRCB in connection with this issue are complete.

IT IS SO ORDERED.

DATED: April 27, 2010.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT