

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

		Civil No. S-80-583-LKK [In Equity No. 30]
THE UNITED STATES OF AMERICA,)	
Plaintiff,)	DEFENDANT MICHAEL J. BARKLEY'S
)	BRIEF ON REMEDIES
v.)	
)	
H. C. ANGLE, et al.,)	
Defendants.)	
)	

15
16 I. INTRODUCTION - On 12/21/2009 Defendant Michael J. Barkley ("Defendant") brought a motion
17 before this Court, Doc #307, under the complaint procedure of the Angle Decree to require changes in
18 practices of the water master, all components of which complaint were based on prior statements in word
19 or deed of the current Water Master or his long-term predecessor, Mr. Garland. Comments by USA and
20 the Water Master that some of the Water Master's positions should be ruled on by the Court rather than
21 the Water Master are an improvement. On 04/27/2010 the Court ordered:

- 22 1) Reaffirmed that activities of the United States of America and all other parties, heirs & assigns are
- 23 bound by the Angle Decree with respect to the waters of Stony Creek and its tributaries;
- 24 2) Defendant is to try harder on his own to gain access to the water master's records;
- 25 3) Defendant and USA are to brief remedies, no more than 10 pages, within 28 days of 04/27/2010;
- 26 4) Defendant may file a counterclaim for declaratory judgment: (a) regarding storage rights, at any
- 27 time, and (b) regarding underflow, only after SWRCB proceedings are complete. (Presumably,

1 “proceedings” includes any state level State Water Resources Control Board (SWRCB) litigation).

2 5) All other issues are denied without prejudice. This brief discusses remedies.

3 II. TEXT OF THE ORDER

4 There are two parts of the order requiring this brief: (a) p. 14: "2. Barkley and the United States SHALL
5 file briefs not to exceed ten (10) pages addressing the manner in which parties may bring actions seeking
6 to enforce the limits imposed by the Decree.”, and (B) p. 11, "...the court directs the parties to submit
7 briefing regarding the proper procedure for use in an action to enforce the Decree." These do not
8 appear to be the same, the second being much narrower than the first.

9 III. REMEDIES WITHIN THE DECREE:

10 There is only one remedy within the Decree,

11 " that any person, feeling aggrieved [sic] by any action or order of the Water Master, may
12 in writing and under oath complain to the court, after service of a copy of such complaint
13 on the Water Master, and the court shall promptly review such action or order and make
such order as may be proper in the premises;"

14 Decree, Section XVI p. 176 (re-transcription of the decree at <http://www.mjbarkl.com/decree.htm>).

15 This is the remedy Defendant used with his motion filed 12/21/2009, and, as Defendant understands it, is
16 the only "proper procedure for use in an action to enforce the Decree", satisfying the quoted text from p.
17 11 of the Court's Order.

18 Defendant is aware of one other use of this procedure, the Wackerman & Reimers complaint and
19 subsequent proceedings at, roughly, Angle Docs 103 through 245 plus United States Court of Appeal
20 Record, see Defendant's growing case "index" at <http://www.mjbarkl.com/Aindex.htm> . Doc. #110 from
21 Attorney Somach mentions comment from this Court that the complaint procedure within the Decree is
22 the appropriate way to proceed rather than complaint outside the Decree. For some reason this
23 instruction was not followed by Glenn-Colusa Irrigation District (GCID) in case 91-1128 leading to
24 the apparently inconsistent ruling by Judge Levi on storage of Decreed water.

25 The rest of this brief covers the possible, not the appropriate.

26 IV. REMEDIES USED IN THE PAST:

27 A. CONTEMPT - Defendant is aware of 6 contempt proceedings in the record, one went to conviction

1 and probation and the other 5 dismissed, see more details at <http://www.mjbarkl.com/may.pdf>.

2 B. BY THE WATER MASTER ON HIS OWN INITIATIVE;

3 1. Again, from para. XVI, p. 176 of the Decree:

4 “...if any proper orders, rules or directions of such Water Master, made in accordance
5 with and for the enforcement of this decree, are disobeyed or disregarded he is hereby
6 empowered and authorized to cut off the water from the ditch then being used by the
7 person so disobeying or disregarding such proper orders, rules or directions; that the
8 Water Master shall promptly report to the court his said action in such case and the
9 circumstances connected therewith and leading thereto;”

10 There are a number of examples of these reports to the court in the archives.

11 2. Correspondence and annual reports of the various Water Masters show that in most instances it is
12 enough for the Water Master to issue notices for infractions or raise the prospect of a contempt of court
13 proceeding, etc.

14 3. Other papers here and there point to other enforcement activities of the Water Master, such as,

15 1. Deposition and Declaration in 91-1128 which seemed to be the filings most heavily relied upon by
16 Judge Levi in deciding that GCID was not allowed by the Decree to store its entitlement

17 2. In the SWRCB Application A027382 files for Colusa County's Stonyford Service Area is a
18 09/01/1978 memo from a Mr. Phillips, Geologist of Reclamation's Geology Branch, entitled "Stony
19 Creek Underflow", wherein he relays reports that Water Master Garland had consulted on litigation
20 involving one or more wells in the Stonyford area and had determined that they were from underflow
21 and those wells were stopped because of that. Defendant has not yet found that case or its files.

22 3. Presumably the Water Master files will show other instances, but Mr. Garland's files are apparently
23 lost, and Defendant has not yet looked at Mr. Wilson's files.

24 C. AS INSTIGATED BY RECLAMATION OR ORLAND UNIT WATER USERS ASSOCIATION (OUWUA):

25 a. On 09/03/1948, a year or two after he stopped submitting annual reports to the Court (unless they
26 just disappeared), Water Master Garland held a hearing in Willows to hear complaints by Reclamation
27 on the way in which he was administering the Decree. A court reporter transcribed the hearing but the
28 transcription is not in the record so it is difficult to ascertain whether or not any changes in practices
followed. Presumably the Attorney General's Office or Downey, Brand (Stephen W. Downey

1 represented Mr. Garland at the hearing) have transcript copies; both have refused to share them.

2 b. Following protests against Reclamation's Black Butte SWRCB application (18115, the one against
3 which Defendant protested 10/01/2009 and that led to the current state litigation), on 09/11/1961
4 Reclamation sent a letter to the Water Master (transcription at <http://www.mjbarkl.com/steal.htm>)
5 asserting that the development of stock ponds in the Stony Creek watershed violated the Decree and
6 insisting that he put a stop to it, see box 6 file 4M/12M, the 3 filings with "stockpond" Post-It notes.
7 Defendant does not know what happened as a result of this demand, or whether or not any other
8 demands to the Water Master have yielded results. However, if Reclamation can demand that all other
9 persons conform to the Decree, then that remedy should be open to any defendant; the first step is to
10 realign the Water Master with the Decree since it appears he has wandered away from it in places.

11 D. BY DEFENDANTS (OTHER THAN 91-1128 AND 80-583 DOC #307):

12 The Water Master's annual report of 07/24/2002 Doc 258 [and subsequent annual reports] noted a
13 complaint to the "Inspector General's Office" about Reclamation delivering water to lands outside the
14 Orland Project boundaries, and that the Water Master was lax on project water uses. Defendant has not
15 yet learned what Inspector General that was or who complained. The complaint apparently led to USA's
16 09/05/2008 Doc 277 filing to expand the Project footprint; instead of "fixing it", the outcome excused it .

17 V. SWRCB

18 A. COMPLAINTS

19 1. Plaintiff or Plaintiff's Agent - SWRCB has a complaint procedure for wrongful diversions, 23
20 California Code of Regulations §820 . There are 4 complaints in their Stony Creek file, see
21 <http://www.mjbarkl.com/swrcompl.htm> . Their results are wrong as often as they are right. On
22 07/15/1977 Mr.Freeman of OUWUA wrote the SWRCB Division of Water Rights,

23 "We would like at this time to make a protest of Stockponds being built in the Stonyford
24 area without water right applications. Some of these people are: Leroy Walkup , Ed
25 Pendell , Mr. Moody , Mr. Buckley , Mr. Garland [presumably the previous Water Master
26 whose name was dropped from subsequent correspondence] , Mr. Beck . We feel that
there are many more Stockponds in this area, and we also feel that it is infringing on our
water rights in the Mendocino National Forest. We would appreciate action being taken
by removal of these ponds...."

27 This went on for a year, including arranging for aerial photographic surveys and so on, until 09/19/1978

1 when a SWRCB letter went out to Mr. Beck asking where his state permit was, and thereafter, nothing.
2 Was it just dropped?

3 2. Defendants - Results were not much better for defendants.

4 1) A complaint by 2 landowners west of Orland that a 3rd was pumping from a sump supplied from
5 underflow. The ultimate response seemed to be "So?"

6 2) A complaint by two Glenn County "area of origin" irrigation districts regarding Stony Creek water
7 being sent out of the area, matter went to SWRCB Legal which sent a letter, which isn't in the file.

8 3) Mr. Retzloff, who is an heir to an Angle right (although purportedly abandoned on 03/09/1932 in a
9 filing by USA's representative Oliver Perry Morton box 5 file 25/39, though there is no provision in the
10 Decree for abandonment) had gotten concerned about all the problems upstream users were having with
11 USA moving against their water rights as part of the Black Butte Project, and applied for a SWRCB
12 permit & license for his right for further protection (his point-of-use doesn't match with the location in
13 the Decree for some reason). He had been pumping from a sump that his father dug, which sump was
14 supplied by Stony Creek underflow so his SWRCB right showed underflow. USA built Black Butte and
15 severed the underflow. He complained, and SWRCB ruled against him, saying USA had prior rights.
16 At the time he complained, USA was diverting water around him through the Orland South Canal and
17 back into the Tehama-Colusa Canal via Lateral 40, so he should have been entitled at least to that much
18 water. That's two errors in that SWRCB decision..

19 B. PROTESTS - starting about the time of USA's Black Butte project, USA began vigorously protesting
20 stock pond and irrigation efforts upstream. These efforts were very successful in dampening agricultural
21 water usage in the Upper Stony Creek watershed. In at least one instance, Andreotti, SWRCB Ap.

22 24758 (<http://www.mjbarkl.com/24758.htm>), USA backed it up with suits in this court (80-900) and
23 Superior Court . Andreotti eventually lost the property, and his successors eventually lost the permit.

24 VI. DECLARATORY RELIEF - As the Court pointed out in its 04/27/2010 Order Doc #316 p. 14 and other
25 places, a complaint or "a counterclaim for declaratory judgment" may be used to clarify obligations and
26 rights under the Decree. Defendant assumes this meets the limits on what are called pleadings within
27 FRCP Rule 7(a) and Rule 57 on pleadings to comply with the Declaratory Relief Act at 28 USC 2201

1 even though the language in Rule 7(a) seems puzzling until clarified by Rule 8.

2 VII. THE COURT'S POWER TO PUNISH - This aspect has been obscured by the apparent lack of an
3 accessible treatise collecting all the usual and extraordinary powers the Court has to see that justice is
4 done. This brief probably understates those powers. Presumably the Court may be petitioned to
5 exercise any power it has, and thus it points to a remedy.

6 A. SANCTIONS - some of the rules

7 FRCP Rule 11(c) - a power to sanction related to filings, with laches being the only time limit? limited
8 to deterrence, not punishment, but can be non-monetary; as long as a showing of deterrence is made, is
9 this sufficient to force compliance with the Decree?

10 Rule 16(f) - failure to adequately cooperate in the court's processes

11 Local Rule 110 - failure to comply with rules

12 B. CONTEMPT

13 Rule 70 - failure to comply with judgment for specific performance - Appears to cover failures to
14 comply with the Angle Decree; other parties may apply for "a writ of attachment or sequestration against
15 the property of the disobedient party to compel obedience to the judgment. The court may also in proper
16 cases adjudge the party in contempt." The writ provision may not apply; the contempt provision does.

17 LR 184(a) - criminal contempt against an attorney, 18 USC §401 or Fed. R. Crim. P. 42

18 18 USC §401 -

19 "§ 401. Power of court - A court of the United States shall have power to punish by fine
20 or imprisonment, or both, at its discretion, such contempt of its authority, and none other,
as--

21 (1) Misbehavior of any person in its presence or so near thereto as to obstruct the
administration of justice;

22 (2) Misbehavior of any of its officers in their official transactions;

23 (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or
command."

24 Unlike Local Rule 184(a), this does not seem limited to attorney conduct although attorneys are
25 included under para. (2) as officers of the court. §402 seems to exclude the prescribed punishment for
26 cases where USA is the plaintiff, if that's what "prosecuted in the name of, or on behalf of, the United
27 States" means but seems to allow punishments not enumerated for such cases in the language "but the

1 same, and all other cases of contempt not specifically embraced in this section may be punished in
2 conformity to the prevailing usages at law ", whatever those uses might be.

3 C. INVOLUNTARY DISMISSAL - Rule 41(b)

4 "(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to
5 prosecute or to comply with these rules or any order of court, a defendant may move for
6 dismissal of an action or of any claim against the defendant. Unless the court in its order
7 for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not
provided for in this rule, other than a dismissal for lack of jurisdiction, for improper
venue, or for failure to join a party under Rule 19, operates as an adjudication upon the
merits."

8 This rule seems to pertain to pending actions, not one with a Decree. If so, should the Court decide
9 under its powers (including on its own motion) to set aside a Decree obtained by fraud on the court (as
10 laid out by Defendant from the Court's Angle Record in Doc. 307-3 Doc pages 17 - 20, Paragraph II-N
11 of the Protest Supplement) , at that point presumably the case is again pending, and for "failure...to
12 comply with these rules", as in diverting in excess of the Decree, thereafter dismissal under Rule 41(b) is
13 within the Court's power. Defendant suspects that before reaching that resolution, the Court might urge
14 USA to search both its Attorney General and Reclamation Angle files, or at least the portions related to
15 activities of Oliver Perry Morton, for the purposes of proving or disproving that a fraud on the court
16 actually did or did not occur and present its findings to the Court, *in camera* if appropriate..

17 In Rule 60, "This rule does not limit the power of a court to . . . set aside a judgment for fraud upon the
18 court." Presumably that power is the one reinforced in the leading case *Hazel-Atlas Glass Co. v.*
19 *Hartford-Empire Co.*, 322 U.S. 238 (1944).

20 D. OTHER:

21 1. A doctrine of "inherent power" is discussed in Moore's Federal Practice 3d, para. 60App.-64 -
22 60App.-66, which seems to have been curbed by amended Rule 60(b) but among other things the
23 inherent power to set aside a judgment for fraud on the court remains.

24 2. In its discussion of Rule 70 at p. 70-4, Moore's comments

25 "Mimicking the historical heavy-handedness of the chancellor to administer justice with
26 fairness, however, a district court might be moved by the equities to order such onerous
27 relief under Rule 70 that a party may be pressured to perform acts that are beyond the
power of the court to order directly. Thus, there is a great deal of leverage under the
Rule."

1 Thus, a power to make a party wish it had performed. p. 70-6 - 70-7 asserts "The equitable authority
2 granted by Rule 70 applies...to a judgment entered ... against the United States government."

3 VIII. OTHER REMEDIES OUTSIDE THE DECREE:

4 A PLAINTIFF USA AND PLAINTIFF'S AGENT OUWUA - self help/intimidation:

5 1. With USA and OUWUA controlling the canals above them, it was easy for USA and OUWUA to
6 cut off the water to Wackerman & Reimers whenever they chose. It was outrageous that they chose to
7 do it after Ms. Reimers won her case in the Court of Appeals, thereby apparently forcing her to walk
8 away from legal fees of well over \$100,000 (Doc #238) and accept terms imposed by OUWUA
9 replacing those received from Stony Creek Irrigation Company (and subsequently Reclamation) in
10 exchange for giving up their diversion points on Stony Creek.

11 2. Although it may not be relevant now, there were instances before the Decree was handed down
12 when USA did the same sort of thing, see more details at <http://www.mjbarkl.com/may.pdf>.

13 B. DEFENDANTS

14 1. None of the following remedies are a precise fit, some require a stretch to demonstrate all the
15 elements of the cause, and some just do not fit at all. Even so, for much of this, especially the various
16 conspiracy statutes, there are several particularly relevant occurrences:

17 a. The agreement of 08/16/1954 between Reclamation and OUWUA turned over to OUWUA
18 management of the Orland Project facilities. OUWUA is a private corporation, not an Irrigation District.
19 Before that agreement, decisions and actions to divert amounts to OUWUA in excess of what the decree
20 allowed appeared to have been fully within the Bureau of Reclamation. Thereafter, simply by executing
21 that agreement, if in fact there was any conspiracy under the multitude of federal and state provisions,
22 multiple private persons could be examined as possible co-conspirators: The OUWUA board, OUWUA
23 itself, various OUWUA employees and agents.

24 b. With construction of Black Butte Dam, OUWUA's control over releases for diversion to South and
25 North canals ceased. Thereafter, they had to arrange for such releases, presumably by wire [although
26 presumably not interstate] for specific releases and by mail for the general back and forth
27

1 correspondence documenting the general procedures.

2 c. As noted in defendant's Doc 307-2, pp. 5 & 6, Judge Halbert's Order of 03/10/1983, Doc. #28,
3 especially line 18 of p. 6, Doc. #307-2, the Water Master Agreement provides that the Water Master is
4 an independent contractor. Defendant suspects there is a considerable difference in the culpability and
5 liability of the Water Master under these remedies if he is an independent contractor fully responsible for
6 his own acts, or is an employee of the Court with certain immunities and protections, or somewhere
7 in between those two extremes. Thus it would help to be certain of the Water Master's status.

8 2. FEDERAL CIVIL - various of these include the element of affecting interstate commerce; Glenn County
9 agricultural products, much of which use Stony Creek water, are exported interstate and around the
10 world. Most enforcement probably requires action by the very fox that is guarding the hen house (USA).

11 a. Violation (with their client agencies) of Title 42 Section 1983 and 1985, - These sections are
12 generally not available against Federal defendants, but since the case *Bivens v. Six Unknown Federal*
13 *Agents*, 403 U.S. 388 (1971), there has been a system of remedies for constitutional violations roughly
14 parallel to §1983. As to equal protection, *Bolling v. Sharpe*, 347 U.S. 497 (1954) found Federal equal
15 protection within the due process clause of the Fifth Amendment. While this is a long way from making
16 out the elements, still, USA taking water away from upstream users and giving more than the Decree
17 provided for to OUWUA and its members raises equal protection flags.

18 b. False Claims Act 31 USC 3729-3733 - Is water property? Whose? USA's? The State's? Is a
19 request by OUWUA to U.S. Army Corps of Engineers (USACE) to release more water to Orland Project
20 than it was entitled to, a claim for "property" under §3729(d), and thus a "false claim"? Does
21 §3730(d)(3) bar a *qui tam* suit because of the ongoing Angle or SWRCB litigation?

22 3 FEDERAL CRIMINAL

23 a. False Claims 18 USC §287, conspiracy §286; If the False Claims Act applies, do these criminal
24 provisions also apply?

25 b. Title 18, Sections 241, 242, 371, 1001, 1341, 1343, 1509, and 1961 through 1968.

26 18 U.S.C. 241 & 242 - Conspiracy against rights, state only?

27 18 U.S.C. § 371 - Conspiracy to commit offense or to defraud United States ; if False Claims

1 Act, and criminal false claims, then §371?

2 18 U.S.C. §§ 1001, 1002, 1018 - Fraud and False Statements ; If civil & criminal False Claims,
3 then §§1001, 1002, 1018?

4 18 U.S.C. §1341 - Mail Fraud? If false claims arranged by mail? is water property?

5 18 U.S.C. §1341 - Wire Fraud? If false claims arranged by wire or broadcast? any routing out of
6 state, even without knowledge of the person making the calls? arrangements by wire with Reclamation
7 in Washington, D.C.?

8 18 U.S.C. §1509 - Obstruction of court orders; cutting off water to Reimers after she won at the
9 Court of Appeals?

10 18 U.S.C. 1961 through 1968 - RICO, based on mail or wire fraud? For some 80 years?

11 4. STATE-LEVEL

12 California False Claims Act, Gov't Code §§12650 et seq - as with the Federal, above, except that
13 the water taken by diversions in excess of what the Decree allows was the property of the State of
14 California? Some discussion in Witkins Summary of California Law, Tenth Edition, 2009, Agency and
15 Employment §[288] and Torts §[767]

16 California Water Code §1052. "(a) The diversion or use of water subject to this division other
17 than as authorized in this division is a trespass."; presumably civil?

18 California civil conspiracy - Witkins, supra, Torts, §45, no separate tort for civil conspiracy, but
19 each member of the conspiracy "may be held responsible as a joint tortfeasor, regardless of whether that
20 member directly participated in the act."

21 California criminal conspiracy - Witkins, California Criminal Law, Third Edition, updated to
22 2010, California Penal Code § 182, the basic conspiracy statute. If a Federal crime, is there a state
23 conspiracy?

24 Was there any other State crime? Defendant is still looking.

25 Respectfully submitted this 25th Day of May, 2010,

26 /s/ Michael J. Barkley

27 Michael J. Barkley, Defendant, in propria persona

CERTIFICATE OF SERVICE

I certify that my residence address is 161 N. Sheridan Ave. #1, Manteca, CA 95336, and that I am a person of such age and discretion to be competent to serve papers, and that on May 25, 2010 I served copies of the attached:

Defendant's Brief on Remedies on all counsel of record through the court's CM/ECF system and, in addition, by placing a copy in a prepaid envelope addressed to the following person as required by the listing of persons on the court's CM/ECF system and depositing that envelope and contents in the United States Mail in Manteca, California:

Mr. George Wilson,
Water Master
Orland Water Users Associaton
828 Eighth Street
Orland, CA 95963

/s/ Michael J. Barkley

Michael J. Barkley, Defendant, in propria persona