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VIA E-MAIL

Mr. Dan Bartel
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Re: Onyx Ranch South Fork Valley Water Project Final Environmental Impact Report (SCH No. 2018021061) – Comments on Behalf of Kern Delta Water District

Dear Mr. Bartel:

On behalf of Kern Delta Water District, we submit the following comments on the Final Environmental Impact Report (“Final EIR”) for the Onyx Ranch South Fork Valley Water Project (“Project”), prepared by the Rosedale-Rio Bravo Water Storage District (“RRB”) pursuant to the California Environmental Quality Act. These comments incorporate by reference Kern Delta’s July 27, 2020 and October 15, 2020 comment letters on the Draft EIR.

The Project proposes to change the points of diversion and place of use for the water rights associated with several parcels of land along the South Fork of the Kern River in the Kern River Valley. RRB proposes to deliver this water to the RRB service area, located on the San Joaquin Valley floor, for irrigation use and groundwater recharge. According to the Final EIR, the diverted surface water would remain in the South Fork of the Kern River and flow downstream, resulting in a net increase in flows in the South Fork that enter the Isabella Reservoir. The increased flows would be released through the Isabella Dam and flow downstream in the Lower Kern River until the water is diverted at the RRB diversion points. RRB would then deliver the water to recharge basins and channels within and near its service area west of the City of Bakersfield.

As we explained in our previous comments, the Draft EIR (i) failed to comply with CEQA’s requirements for an accurate, stable, and finite project description and did not provide the public or decisionmakers with the requisite information to analyze the Project’s environmental impacts; (ii) failed to provide adequate evidence to support the Project’s water rights and RRB’s ability to transfer and convey the water and water rights downstream; (iii)

improperly narrowed the Project purpose, thereby limiting the analysis of the Project and possible project alternatives; and (iv) failed to describe or analyze various downstream impacts.

The Final EIR has not corrected any of these flaws and does not adequately respond to Kern Delta's comments. Responses to comments are an integral part of a Final EIR's substantive analysis of environmental issues. CEQA therefore requires that RRB evaluate and prepare detailed written responses to Kern Delta's comments. Yet RRB only provides conclusory statements unsupported by factual information and has not meaningfully attempted to address the shortfalls of the Draft EIR. Its failure to do so renders the Final EIR legally inadequate.

The most critical issues that are not fully or sufficiently addressed by RRB are whether and to what extent RRB has the water rights and legal right to transfer and convey Kern River water downstream, and whether and to what extent the proposed changes in water diversions will harm Kern Delta and other Kern River water rights holders. Without sufficient information to evaluate these issues, the actual operation and feasibility of the proposed Project remains wholly speculative and the Project's environmental impacts cannot be meaningfully evaluated. Accordingly, the Final EIR cannot be certified in its current form. Rather, RRB must substantially revise the EIR and circulate a new draft EIR that fully and accurately describes the Project and analyzes its environmental impacts.

I. The Final EIR Fails to Fully and Adequately Respond to Comments

CEQA requires that RRB respond in detail to comments raising significant environmental issues. (CEQA Guidelines § 15088.) RRB must provide a good faith, reasoned analysis in responding to comments; conclusory statements unsupported by factual information will not suffice. (*Id.*; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1125; *People v. County of Kern* (1976) 62 Cal.App.3d 761, 769-74.)

In its comment letters on the Draft EIR, Kern Delta raised significant environmental issues concerning the inadequacy of the Project Description, the lack of information regarding the extent of RRB's water rights, the improperly narrow Project purpose and the failure to analyze a reasonable range of alternatives, and the omission of any analysis of downstream impacts. None of these issues has been addressed in the Final EIR.

A. The Project Description Remains Incomplete and Legally Inadequate

RRB has not corrected the deficiencies in the Draft EIR's Project Description, which remains incomplete and legally inadequate. The Final EIR still does not adequately describe important components of the Project, but rather lists several incomplete and hollow "Project Elements." Nowhere has RRB explained the process or agreements and approvals that will control how and the extent to which RRB may store, regulate or pass water through Isabella Reservoir, the timing and amount of release and conveyance of that water downstream, or the timing and amount of ultimate diversion to RRB's service area in the San Joaquin Valley. Nor has RRB provided any details about how it will "coordinate" the conveyance of water through

the Lower Kern River channel without harming other Kern River water rights holders and their priority diversions of Kern River water. Indeed, the Final EIR's "Project Location" remains limited to the Onyx Ranch and Smith Ranch sites where points of surface water diversion would change as a result of the Project. Consequently, it fails to describe and analyze any significant impacts that may occur in Isabella Reservoir, the Lower Kern River channel, or RRB's service area as a result of the Project.

In response, RRB merely states that issues related to RRB's right to transfer and store water in Isabella Reservoir and to move water through the Kern River channel are "legal issues that are outside of the scope of a CEQA document." (*See* Master Response B.) While it is correct that an EIR is not a document or process that can establish or adjudicate water rights or resolve issues of contested water rights, an EIR must still provide sufficient factual and operational information to provide meaningful assessment of the impacts of a project. Without sufficient information on RRB's right to transfer, store, and move water, it is impossible to determine whether the Project will have sufficient water supply or will have a substantial effect on water supplies available for nearby land uses and communities and associated water suppliers. As discussed further below, RRB's new diversions on the Lower Kern River would represent a major departure from the status quo. RRB must disclose and describe how these diversions would take place and how RRB's Project would affect existing water demands of prior Kern River water right holders, including Kern Delta.

Accordingly, RRB must revise the EIR to include the following:

- Information on the agreements and approvals needed to move water into Isabella Reservoir, store and regulate water in Isabella Reservoir, and release water from Isabella Reservoir;
- Information on the agreements and approvals needed to coordinate the conveyance of water through the Lower Kern River channel to RRB's service area;
- Information on how RRB will convey water downstream without it being diverted by other Kern River water right holders;
- Information on how RRB will convey and divert water at downstream facilities without impacting or injuring other Kern River water rights or reducing or displacing existing water entitlements; and
- Information on RRB's diversion facilities and the agreements and approvals needed to divert water to its service area.

This information plainly is part of the Project's technical, economic, and environmental characteristics, yet it is entirely absent from the Final EIR. Unless and until RRB provides this information, its EIR fails to meet CEQA's requirements for an accurate, stable, and finite project

description and does not provide the public or decisionmakers with the requisite information to review and analyze the Project's anticipated environmental impacts. (*See Sierra Club v City of Orange* (2008) 163 Cal.App.4th 523, 533; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.)

B. The Final EIR Provides Insufficient Information Regarding the Extent of RRB's Claimed Water Rights

RRB has not provided sufficient additional information in its Final EIR to support its claimed water rights and its legal right to transfer and convey water to and through Isabella Reservoir and the Lower Kern River. The Final EIR provides no additional historical information regarding RRB's claimed pre-1914 appropriative rights resulting from the 1902 Arbitration Decree. Rather, RRB's responses to comments state that its claimed water rights "raise potential legal questions and/or challenges ... that are outside of the scope of analysis of potential environmental impacts consistent with the requirements of CEQA." (*See* Master Response E.) However, the validity and scope of RRB's claimed water rights is critical information—without it, the Project's water supply remains wholly speculative and the Final EIR cannot properly review the impacts of the Project on other Kern River water rights holders. (*See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.) As noted in one prominent CEQA decision on water issues, the existence of legal issues or legal uncertainty "is not a reason to ignore" water rights issues in assessing impacts. (*Planning & Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 913.) "CEQA does not require scientific certainty before an issue requires study." (*Id.* at 915.)

Nor does the Final EIR provide any information on whether RRB's claimed water rights still exist in full today, or whether they have been lost or reduced by abandonment, prescription, non-use, transfer, forfeiture, or subsequent legal challenges. Instead, the Final EIR provides diversion information for only short window of time, which does not represent the actual historic use of the claimed water rights or the actual amount of water available for use by RRB. Without any discussion or evidence of prior historic use, RRB has not and cannot adequately explain the extent, quantity, or viability of the claimed water rights.

RRB also has failed to meaningfully discuss and analyze the impact of the Project on other Kern River water rights holders. The Final EIR provides that "the purpose of including [the no-injury factor] ... is to ensure that the RRBWSD in the implementation of the proposed project recognizes and does not injure the Kern River Interests by limiting the amount of water taken by the RRBWSD downstream of the Isabella Reservoir." (*See* Master Response E.) The no-injury factor, however, only conceptually addresses the amount of water (a) lost due to evapotranspiration between Onyx Ranch and Isabella Reservoir; and (b) reaching Isabella Reservoir as return flow under a no-project scenario. It says nothing about the accounting for or process by which water would be passed through, stored or regulated in Isabella, the relationship of the proposed transfer water with other inflows and storage in Isabella, or how and when the proposed transfer water would be diverted below Isabella Reservoir. As such, the Final EIR's no-

injury factor does not adequately describe or protect against the harms that will result to Kern River waters rights holders as a result of the Project. A “general statement that [Kern River water rights holders] will be unaffected is insufficient under CEQA”; rather, RRB must thoroughly analyze how existing water rights holders will be impacted by the Project. (*See Buena Vista Water Storage District v. Kern Water Bank Authority*, Ruling on Petition for Writ of Mandate, at p. 38 (Ventura County Superior Court, Case No. 59-2019-00528316-CU-WM-VTA).)

The Final EIR fails to recognize that the Kern River is highly regulated, and it provides no information on the countless judgments, agreements, policies, and other procedures (i.e., the “Law of the River”) that govern the diversion and use of Kern River water. Without this information, the Final EIR cannot properly review the impact of the Project on other water rights holders, particularly those below Isabella Reservoir. That the diversion and use of water under RRB’s *South Fork* water rights historically has impacted the amount of water flowing to Isabella Reservoir does not mean that a change in points of diversion to the *Lower Kern River* will not result in injury to other legal Kern River rights holders. Indeed, the proposed change in points of diversion likely would result in significant modifications to the hydrology of the Kern River above and into Isabella Reservoir, and likely would affect and disrupt existing Lower Kern River water rights. A full, complete, and accurate description of existing Kern River water rights is essential to form an accurate, stable, and finite description for the Project, and to adequately analyze the effect that RRB’s proposed diversions would have on those rights. (*See Buena Vista Water Storage District*, Ruling on Petition for Writ of Mandate, at pp. 19, 38-39.)

Attached as **Exhibit A** is a figure depicting the process by which Kern River water is diverted by priority rights holders below Isabella Reservoir. Exhibit A shows the complexity of the Kern River water allocation process, which is based on precise river flow monitoring and calculations and a hierarchy of diversions based on long-standing water rights. First-point diverters hold a priority right to diversion and use of the natural flow of the River, after which second-point and lower-river diverters may divert their allotments to the extent river flows are sufficient to cover those diversions. RRB currently is not entitled to Lower Kern River water, except as otherwise allowed through contractual agreements with the City of Bakersfield and other entities. Accordingly, RRB’s proposed change in point of diversion of the claimed Onyx and Smith Ranch rights would represent a *significant* departure from the current state-of-affairs on the Lower Kern River. However, RRB has entirely failed to acknowledge, much less discuss, how the addition of a new water diverter on the Lower Kern River would affect the rights and interests of existing diverters below Isabella Reservoir. Instead, the Final EIR concludes, without any explanation, that RRB will coordinate with Lower Kern River water rights holders to address scheduling releases and will not impact water supplies available to serve existing water rights. This is plainly inadequate. RRB must thoroughly analyze how existing water rights and River operations will be impacted by the Project, particularly where, as here, these consequences are reasonably foreseeable. (*Cf. Planning & Conservation League*, 83 Cal.App.4th at 915.)

Until RRB provides additional information regarding its claimed water rights and a detailed discussion of those rights in relation to the Law of the River, the Project’s water supply

remains wholly speculative and does not provide a sufficient basis for analyzing the Project's reasonably foreseeable environmental impacts. (*See Vineyard Area Citizens*, 40 Cal.4th at 430-32.) Indeed, without this information it is impossible for RRB, Kern Delta, other Kern River water rights holders, or any other member of the public to fully and completely evaluate and analyze the extent to which a water supply is legally and/or physically available to RRB for this Project, and how the Project may impact Kern River hydrology and the water supply and water rights of others.

C. The Final EIR Fails to Describe or Analyze Downstream Impacts

The Final EIR dismisses out of hand any analysis of downstream impacts based on the conclusory statement that “no changes to the environment ... would occur” as a result of the Project. (*See* Final EIR, at 9.2.14 [Responses to Kern Delta comments].) However, RRB also asserts that it will move and divert up to 12,000 acre-feet of water per year as a result of the Project and that this water is intended to *increase* water supplies in the RRB service area.

The conclusion that an increase in 12,000 acre-feet of water per year will have no impact on Isabella Reservoir, the environment in and around the Kern River, RRB's diversion and recharge facilities, or the local groundwater basin is irrational and illogical. The same is true of any conclusion that the Project will not impact urban development or irrigation and agricultural operations in the San Joaquin Valley. The Project will significantly affect Kern River hydrology and the Kern River water allocation system and, as a result, materially affect the rights and interests of existing Kern River diverters. The Project will shift a significant quantity of water away from existing Kern River water rights holders, water which is used for a variety of purposes. This shift could result in significant impacts to aesthetics, agricultural resources, air quality, biological resources, cultural and tribal cultural resources, geology and soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, and utilities, service systems and energy. RRB's decision to ignore these impacts results in an inadequate EIR that must be substantially revised and recirculated.

II. The Project Purpose and Objectives Remain Too Narrowly Defined, and RRB thus Has Not Evaluated a Reasonable Range of Alternatives

The Final EIR maintains the narrow Project Purpose of “enabl[ing] the RRBWSD to change the points of diversion and place of use of the surface water on the Onyx and Smith Ranches in order to move the water downstream for diversion and use in the RRBWSD's service area.” The primary Project Objective similarly is narrowly defined, seeking to “maximize the beneficial use of water rights associated with the Onyx Ranch and Smith Ranch in Kern County.”

Given the impermissibly narrow purpose and objectives of the Project, it is unsurprising that RRB rejected and failed to analyze a variety of reasonable alternatives that called for alternative locations, alternative sources of water, transfers or exchanges of water with other local districts, increased water conservation, or expanded groundwater banking. None of these

alternatives involves the Onyx and Smith Ranches, so RRB was free to (improperly) reject them for failing to meet the Project's basic objectives. (*See* Master Response G.)

In rejecting these alternatives, RRB ignores and obscures the true purposes of the Project: to "increase water supplies to the RRBWSD's service area to mitigate the shortages in the RRBWSD's contracted SWP water supply from the State of California [and to] assist the RRBWSD in meeting its sustainability goals under the Sustainable Groundwater Management Act (SGMA)." (*See* Draft EIR, at ES.2.) The above alternatives, alone or in combination, certainly would help RRB achieve these purposes and would do so with fewer environmental impacts and without harming other Kern River water rights holders.

Similarly, RRB appears to have improperly committed itself to the Project, in violation of CEQA. (*See* *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.) The narrow Project purpose and objectives confirm that RRB has already committed to a specific course of action, foreclosing any meaningful analysis of feasible alternatives. In fact, RRB all but admits that pursuing the Project as proposed is the only real path forward, as the current lease income from the ranches is significantly less than total operating expenses. (*See* Draft EIR, at ES.6). In other words, RRB has already determined that the ranches have little or no value except for the water rights, barring any analysis of alternatives that do not materially involve those rights, including the alternative of not moving forward with the Project.

Accordingly, the Final EIR fails to thoroughly analyze a reasonable range of alternatives that would feasibly attain most of the basic objectives of the Project. (14 Cal Code Regs § 15126.6(a).) This renders the Final EIR legally inadequate. (*See* *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 668-70.)

III. A Corrected EIR Must Be Recirculated

The Final EIR fails to adequately address the comments raised by Kern Delta and other interested parties. The Final EIR also fails to analyze a variety of significant environmental impacts, as discussed above. Thus, RRB may not legally certify the Final EIR for the Project, but rather must prepare specific responses and substantial additional analysis for a revised EIR. Given the scope of the comments on the Draft and Final EIRs, and the amount of information required to address these comments, the revised EIR certainly will include significant new information not previously reviewed by the public. Accordingly, CEQA requires that the revised EIR be recirculated for additional public review and comment. (Pub. Res. Code § 21092.1; 14 CCR § 15088.5; *Laurel Heights Improvement Ass'n v. Regents* (1993) 6 Cal.4th 1112; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120).

Here, based on the number of analytical gaps and instances of missing information, including a revised project description and new significant environmental impacts, mitigation measures, and project alternatives, we ask that the entire EIR be recirculated so that the public and all stakeholders can evaluate a more complete analysis of the proposed Project and its environmental impacts and potential mitigation measures and alternatives.

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IV. Conclusion

On behalf of Kern Delta Water District, we appreciate your consideration of these comments and look forward to reviewing a substantially revised EIR. Please provide the undersigned with any notices relating to the EIR and the proposed Project.

Sincerely,



Michael H. Zischke

cc: Steven L. Teglia, General Manager
Richard Iger, General Counsel
L. Mark Mulkay, Water Resources Manager
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Kern River Diverters

