



BUENA VISTA WATER STORAGE DISTRICT

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November 26, 2019

Mr. Brian Coats
Division of Water Rights, Enforcement Unit
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812-0100

VIA E-MAIL AND U.S. MAIL
Brian.Coats@WaterBoards.ca.gov

RE: Buena Vista Water Storage District's Preliminary Response to Kern
Water Bank Authority's Complaint

Dear Mr. Coats:

We represent the Buena Vista Water Storage District (Buena Vista). On August 9, 2019, the Kern Water Bank Authority (KWBA) filed a water-right complaint (Complaint) against Buena Vista as Exhibit C to its response to the Division of Water Rights' October 1, 2018 Request for Information regarding water availability on the Kern River. This letter preliminarily responds to a few of the most obvious factual and legal defects set forth in the Complaint. Because of these defects, the State Water Resources Control Board (SWRCB) should dismiss the Complaint promptly.

The Complaint reflects basic misconceptions about the Kern River's hydrology, the water management this hydrology requires, California water law, the decades-old rights of Buena Vista and the Law of the Kern River. The Complaint effectively seeks to overturn the Law of the River as the State Water Rights Board recognized it 55 years ago in 1964's Decision 1196. That decision recognized that Buena Vista's rights to water had been settled for decades – even 55 years ago. The SWRCB should not reopen those rights and the Law of the River now.

1. Background

A. Buena Vista Holds A Longstanding Pre-1914 Appropriative Right For Second Point Diversions From the Kern River And Storage of Kern River Water

Buena Vista is the primary successor in interest to the Miller and Lux water rights that were the subject of the California Supreme Court decision in *Lux v. Haggin* (1886) 69 Cal. 255, and which were defined in the 1888 Miller-Haggin Agreement and its amendments. Intended to recognize the then-existing rights of the parties to all Kern River flows, and to settle all disputes concerning the respective rights to such flows, the 1888 Miller-Haggin Agreement established the First and Second Points of Measurement on the Kern River and seasonally allocated river flows between First Point and Second Point users.

The crux of the settlement reflected in the 1888 Miller-Haggin Agreement was that the parties would cooperate to create storage for the use of the Second Point rightholders, with the storage at the time being created through the use and improvement of Buena Vista Lake. KWBA's Complaint itself recognizes this point. (Complaint, ¶ 23.) The incorporation of storage as part of the Second Point right meant that, under California water law at the time, that right became an appropriative right, as the Complaint admits. (Complaint, ¶¶ 4, 9; see *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 335 (seasonal storage involves an appropriation).)

B. Buena Vista's Second Point Right Evolved With Changes In Kern River Management, As Decision 1196 Recognized

Under Water Code section 1706, holders of pre-1914 appropriative rights can change how they use those rights if other legal users of water are not injured. Buena Vista, along with others, made a substantial investment to construct Lake Isabella and create surface storage rights to, among other things, reduce evaporation associated with surface storage. With the construction of Lake Isabella on the Kern River, Buena Vista accordingly transitioned a portion of the storage element of its pre-1914 right to the more efficient Lake Isabella, while also reserving its right to store high flow Kern River water in Cells 1 and 2 of Buena Vista Lake. This transition was one of many revised elements of Kern River management reflected in several agreements signed in the 1960s. The State Water Rights Board recognized the effect of Lake Isabella's storage capacity on Kern River water rights generally, and on Buena Vista's Second Point right specifically, in Decision 1196. Decision 1196 states, at pages three to five, the following:

4. The natural flow of Kern River reaching the floor of the San Joaquin Valley has been apportioned among the various users for many years by court decisions and agreements. Those of interest are (a) 1886 - Decision of the California Supreme Court in *Lux vs. Haggin*; (b) 1888 - Miller-Haggin Agreement . . . (c) 1900 - Decree of Kern County Superior Court No. 1901 "*Farmers Canal Company, et al. vs. J. R. Simmons, et al.*" commonly known as the Shaw Decree . . . (d) 1930 - Amendment to Miller-Haggin Agreement . . . (e) 1955 - Amendment to the Miller-Haggin Agreement . . . (f) 1962 - Kern River Water Rights and Storage Agreement . . . and (g) Lake Isabella Recreation Pool Agreement.

After the completion of Isabella Dam and Reservoir which then allowed the flow of Kern River to be regulated and controlled, the users approved on December 31, 1962, the "Kern River Water Rights and Storage Agreement". This agreement, filed of record on April 5, 1963, with the Kern County Recorder's Office, divides the water supply among three general service areas designated as First Point Service Area, Second Point Service Area, and Lower River Service Area. The division is based upon the water which would have entered the First Point Service Area in the absence of Isabella Dam . . .

5. . . . The applicants, Buena Vista Water Storage District, Buena Vista Associates, Inc., and Miller and Lux, Inc., are within the Second Point Service Area . . .

6. Water is diverted directly from the Kern River for use on lands within these service areas by ditches and canals which have been in existence since prior to 1894. The water is also spread for percolation into the ground water basin for storage and later use on lands within the service areas, which provides cyclic storage for extended periods of drought . . .

7. A comparison of the quantities of water used in the First Point, Second Point, and Lower River Service Areas for the period 1894-1963, with the quantities of water flowing past the first point of measurement, adjusted to eliminate the effect of Isabella Reservoir, shows that there is no water surplus to the established uses of the applicants, protestants, and other users in these areas. This conclusion is further supported by the fact that ground water levels within the service areas are declining

Of course, after issuing Decision 1196, the SWRCB decided that there may be unappropriated water available in the Kern River at times because of forfeitures by Kern Delta Water District and wet-year flows into the intertie with the California Aqueduct. (Orders WR 2010-0010 and WR 2010-0016.) Buena Vista and KWBA, among others, have filed related water-right applications and the SWRCB is considering them. The SWRCB, however, has provided no indication that its proceeding concerning those water sources that became available after Decision 1196 also involves reopening the water rights – including Buena Vista’s Second Point right – that the State Water Rights Board described in Decision 1196. Considering that issue would represent a dramatic expansion of the proceeding and involve reopening the long-settled Law of the River.

As the above quote from Decision 1196 indicates, the hydrology of the Kern River demands that high flow Kern River water be stored for later use, a practice Buena Vista, and its predecessors in interest, have implemented for over a century. Notwithstanding this practice, groundwater levels in Kern County have declined for many years. With the enactment and implementation of the Sustainable Groundwater Management Act, the management of Kern River water by Buena Vista and others may be evolving again to involve and utilize more groundwater storage. Unlike KWBA and others, however, Buena Vista would not need to acquire new water rights to implement such revised management, but instead would simply continue the evolution of its Second Point right that began in 1888, and continued through the construction of Lake Isabella.

2. Discussion

All of KWBA’s claims in its Complaint are based on a theory that Buena Vista’s Second Point right should be defined – as a water right and not a contract right – as an undefined volume of water necessary to serve 50,000 acres of irrigated agriculture and that Buena Vista is exceeding this ill-defined limit. There is no factual or legal support for this theory. It ignores the Kern River’s hydrology, California water law and the Law of the Kern River as the State Water Rights Board recognized it in Decision 1196. The State Water Board should dismiss the Complaint promptly.

A. The Complaint's Proposed Cap On Buena Vista's Second Point Right Lacks Any Factual Basis Because It Misconstrues the Kern River's Highly Variable Hydrology

The fundamental theory of KWBA's Complaint is that Buena Vista's Second Point right is limited to a volume of water sufficient to serve 50,000 acres of irrigated land, suggesting that this volume is some easily defined, annually constant volume of water. KWBA's own materials, however, demonstrate that this theory bears no relationship to the reality of Kern River flows. The Complaint concedes that Kern River flows are "highly variable from year to year . . . ranging from a maximum of nearly 2.5 million acre-feet in 1983, to a minimum of approximately 139,000 in 2015." (Complaint, ¶ 3.)

Consistent with that hydrology, information that KWBA submitted concerning Buena Vista's diversions under its Second Point right shows that those diversions vary significantly from wet years to dry years. Table B-3 in the August 8, 2019 technical memorandum that KWBA submitted as Exhibit B with the Complaint shows that, based on Buena Vista's statements of water diversion and use, Buena Vista's diversion varied between zero acre-feet in both 2014 and 2015 to 563,384 acre-feet in 2017, with wide variation within a data set between 1984 and 2017.

It is certainly true that Buena Vista diverted unusually high volumes of water in 2017 and other recent wet years. That is simply a function of the availability of water in the river and to Buena Vista's Second Point right, as explicitly demonstrated by KWBA's own materials. The fact that Buena Vista's 2017 diversions were historically high simply reflects that 2017 was the third wettest year on the Kern River since records have been kept and followed a historic period of drought. In fact, based on KWBA's own materials, Buena Vista's average annual Kern River diversion for the six-year period leading up to and including 2017 was only 108,915 acre-feet. It is necessary for Buena Vista to operate this way so that its farmers can have adequate supplies in the frequent much drier years – just as it has been necessary for the Second Point right to be exercised this way since at least 1888. Decision 1196 acknowledged this necessity. (Decision 1196, p. 5 (discussing operations to provide supplies "for extended periods of drought").)

In contrast to its own recognition of these realities of the Kern River, the Complaint mischaracterizes the river's recent hydrology in a vain attempt to cast a shadow on Buena Vista's recent diversions. The Complaint's paragraph 38 states, in part:

In the 2016-2017 water year – before Governor Brown declared an end to California's recent drought emergency – Buena Vista utilized Buena Vista Lake to cause the waste and unreasonable use of water. (Emphasis added.)

KWBA apparently intends for this statement to suggest that Buena Vista's high volume of diversion in 2017 occurred during a "drought emergency," but the statement highlights the Complaint's lack of merit. The above-referenced Exhibit B's Table B-2 demonstrates that unimpaired runoff for 2017 was 2,000,790 acre-feet, which Table B-2 demonstrates was the third wettest year on record in the Kern River. Far from occurring during "California's recent drought emergency" as KWBA's Complaint suggests, Buena Vista's 2017 diversions were *exactly* the sort of wet-year operation that the Law of the Kern River long has authorized for Buena Vista, as Decision 1196 recognized 55 years ago.

B. The Complaint's Theory That Buena Vista's Second Point Right Is Limited To An Undefined Amount Of Water Lacks Any Legal Basis Because It Ignores California Water Law, The Law Of The River And Decision 1196

The legal sleight of hand on which the Complaint is based is best demonstrated in its paragraph 22. In that paragraph, after acknowledging the 1888 Miller-Haggin Agreement and amendments to it, the Complaint states the following:

Buena Vista holds rights solely to that portion of water that reaches Second Point that is within the scope of its pre-1914 appropriative rights, as established and maintained in accordance with California water law. *Stated differently, neither the Miller-Haggin Agreement nor any other contract can create a water right under California law.* (Complaint, ¶ 22 (emphasis added).)

The problem with this statement – and therefore with the entire Complaint – is that it simply ignores the effect of *implementation of the 1888 Miller-Haggin Agreement* and later agreements within the Law of the Kern River by Buena Vista and its predecessors. Before 1914, it was not necessary for a water user to obtain a permit, post a notice or do anything other than start using water to initiate an appropriative water right. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 890-891.) Buena Vista and its predecessors satisfied the applicable requirements – and in a very public way – when they implemented the 1888 Miller-Haggin Agreement through, among other things, the storage of water in the improved Buena Vista Lake. It is indicative of the Complaint's lack of merit that some of its key allegations about Buena Vista's 2017 operations are about diversions into the Buena Vista Lake bed, which were just like what the 1888 Miller-Haggin Agreement contemplated. (Complaint, ¶ 45.)

Because of these problems, KWBA's Complaint can only be taken as an effort to reopen the Law of the Kern River that the State Water Rights Board explicitly recognized in Decision 1196. As quoted above, Decision 1196 recognized how the Law of the River – including the agreements concerning Buena Vista's Second Point right – resulted in the full appropriation of the river based on its condition at that time. KWBA does not allege that Buena Vista has somehow violated any of the agreements within the Law of the River that concern Buena Vista's rights, so the Complaint has no legal basis to claim that Buena Vista has engaged in unauthorized use.

KWBA claims – without providing any evidence – that Buena Vista “recently asserted” the right to all water that reaches Second Point (see, e.g., Complaint, ¶¶ 5, 33). KWBA, however, fails to allege that Buena Vista has violated the applicable agreements that provide water to lower priority rights lower on the river or otherwise injured a legal user of water. For example, the Complaint acknowledges the existence of the Lower River Rights, but contains no allegation that Buena Vista's supposed assertion of a right to all water that reaches Second Point somehow violated the downstream Lower River Rights. Moreover, the Complaint fails to discuss at all the fact that, in recent years, diversions from the Kern River itself have been higher than they might otherwise have been because storage in Lake Isabella has been constrained due to seismic issues that are being

addressed. Based on the agreements within the Law of the River, Decision 1196 stated, “The natural flow of Kern River reaching the floor of the San Joaquin Valley has been apportioned among the various users for many years by court decisions and agreements.” (Decision 1196, p. 3.) Nothing in the Complaint suggests that Buena Vista’s operations are somehow outside of these apportionments.

KWBA’s materials suggest that the SWRCB should consolidate its consideration of the pending applications for new permits with any consideration it gives KWBA’s Complaint. (See August 9, 2019 letter from Kevin O’Brien to SWRCB, p. 3 (“The State Water Board must consider the allegations of the Complaint, and hold an evidentiary hearing thereon, before making any determinations regarding water availability on the Kern River”).) Contrary to that suggestion, however, the fact that the SWRCB has decided that *new* sources of water might be available for appropriation from the river does not subject *longstanding* rights in the river to the sort of wholesale reopening that the Complaint seeks, particularly where the State Water Rights Board explicitly recognized those longstanding rights 55 years ago. The Complaint’s facile argument that the contracts within the Law of the River do not define Buena Vista’s water rights cannot provide any basis for reopening Buena Vista’s 131-year-old Second Point right.

3. Conclusion

KWBA’s Complaint lacks any factual or legal basis. It ignores and mischaracterizes the Kern River’s hydrology, going so far as to characterize the third wettest year on record on the Kern River as part of “California’s recent drought emergency.” The Complaint misconstrues California water law, suggesting that the Law of the Kern River on which the State Water Rights Board explicitly relied in Decision 1196 does not actually define Kern River water rights. It effectively seeks to leverage the SWRCB’s proceeding about applications for new rights in new water sources to reopen longstanding rights recognized Decision 1196. The SWRCB therefore should dismiss that complaint promptly. If necessary, Buena Vista will present substantial factual information and more detailed legal argument to address the Complaint, but the SWRCB should conserve its resources and those of Buena Vista and even KWBA itself by dismissing the Complaint now.

If you or the SWRCB require additional information or clarification, please do not hesitate to contact Buena Vista’s General Manager Tim Ashlock at (661) 324-1101 or Buena Vista’s special counsel Ryan Bezerra at (916) 446-4254.

Very truly yours,

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