

1 Colin L. Pearce (SBN 137252)
Jolie-Anne S. Ansley (SBN 221526)
2 B. Alexandra Jones (1520394)
DUANE MORRIS LLP
3 One Market Plaza, Spear Tower, Suite 2200
San Francisco, CA 94105-1127
4 Tele: +1 415 957 3000 / Fax: +1 415 957 3001
E-mail: clpearce@duanemorris.com
5 jsansley@duanemorris.com
bajones@duanemorris.com
6

7 Virginia A. Gennaro (SB #138877)
CITY ATTORNEY'S OFFICE
8 City of Bakersfield
1600 Truxtun Avenue, Fourth Floor
9 Bakersfield, CA 93301
Tele: (661) 326-3721 / Fax: (661) 852-2020
10 E-mail: vgennaro@bakersfieldcity.us

11 Attorneys for Applicant
CITY OF BAKERSFIELD
12

13 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
14 OF THE STATE OF CALIFORNIA

15 In the Matter of Kern River Applications of North
Kern Water Storage District and City of Shafter
16 (Application 31673), City of Bakersfield
(Application 31674), Buena Vista Water Storage
17 District (Application 31675), Kern Water Bank
Authority (Application 31676), and
18 Rosedale-Rio Bravo Water Storage District
(Application 31819)
19

**STATUS CONFERENCE STATEMENT
OF APPLICANT CITY OF
BAKERSFIELD**

20 Date: August 17, 2021
21 Time: 9:00 a.m.
Hearing Officer: Nicole L. Kuenzi
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1 Applicant City of Bakersfield (“City” or “Bakersfield”) submits the following Status
2 Conference Statement in advance of the August 17, 2021 Status Conference in this proceeding. The
3 City submits this Statement in response to the State Water Resources Control Board’s (“SWRCB” or
4 “Board”) Administrative Hearing Office’s (“AHO”) July 19, 2021 Notice of Status Conference
5 (“Notice”).

6 In the Notice, assigned AHO Hearing Officer Nicole L. Kuenzi invited the parties to this
7 proceeding to submit and serve a status conference statement that separately addresses each of the
8 status conference issues listed in the Notice “that the participant wants to address.” The AHO also
9 invited the parties to “include in their status conference statements discussions of any other issues
10 they believe are relevant.”

11 Bakersfield therefore responds to the four questions raised by the AHO in the Notice, as
12 follows:

13 **1. Does each of the applicants still want to pursue its application for a permit to**
14 **appropriate water from the Kern River system?**

15 **Yes.** Bakersfield intends to continue to pursue its application for a permit to appropriate
16 water, and, Bakersfield intends to continue to seek rights to the quantity of water partially forfeited
17 by the Kern Delta Water District (“Kern Delta”). Counsel for Bakersfield, Colin L. Pearce and
18 Jolie-Anne Ansley of Duane Morris, LLP, previously submitted Notices of Intent to Appear to
19 confirm their intent to appear on behalf of Bakersfield at the August 17, 2021 Status Conference in
20 this proceeding.

21 **2. Should the notice of public hearing issued by the AHO include any hearing issues in**
22 **addition to the hearing issues listed in the “Proposed Hearing Issues” section above, or**
23 **should the AHO modify any of these issues before issuing the notice?**

24 **Yes.** The AHO should modify the hearing issues as follows:

25 The Notice indicated that the AHO proposes to address the following hearing issues in Phase
26 1 of a public hearing in this matter:

27 1. Is unappropriated water available to supply the applicants pursuant to Water Code
28 section 1375, subdivision (d), and if so, how much unappropriated water is available?

a. What are the maximum amounts of diversion and use authorized by existing
water rights in the Kern River system?

1 b. Are unauthorized diversions or wasteful or unreasonable diversion or use of
2 water occurring in the Kern River system?

3 c. Has any of the water appropriated from the Kern River system not been put
4 to, or eased to be put to, some useful or beneficial purpose?

5 d. How much water is physically available in the Kern River system to supply
6 existing water rights?

7 e. Is all or some portion of the water made available by the decision in *North
8 Kern Water Storage District v. Kern Delta Water District* (2007) 147
9 Cal.App.4th 555 (*North Kern* decision) unappropriated water?

10 2. If there is unappropriated water in the Kern River system:

11 a. In what order should the Division process the applications?

12 b. How should unappropriated water be allocated among the competing
13 applications?

14 Bakersfield believes that the Board should modify the above referenced list of issues by
15 separating out issue 1(e), and separately, and in advance of consideration of any other issue, first
16 determine whether “all or some portion of the water made available by the decision in *North Kern
17 Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 (*North Kern
18 decision*)” is unappropriated water, and thus subject to the jurisdiction of the Board, and also
19 determine the amount of unappropriated water created and made available for appropriation through
20 Kern Delta’s forfeiture of a portion of its pre-1914 appropriative water rights.

21 Consideration and resolution of issue 1(e), and a determination whether the water forfeited
22 by Kern Delta constitutes unappropriated water, is necessary and advisable because this is a unique,
23 separate issue which does not and will not impact the other proposed hearing issues, and the more
24 general determination regarding the availability of unappropriated water on the Kern River.
25 Consideration of this issue separate from and in advance of any other issues would promote
26 efficiency and convenience for the Board, and all parties to this proceeding. Bakersfield and the
27 North Kern Water Storage District (“North Kern”) are the only applicants who seek rights to the
28 forfeited, unappropriated water. The other parties would not need to submit evidence or testimony
regarding the classification and consideration of the forfeited water.

Bakersfield maintains that (1) the water forfeited by Kern Delta as a result of the *North Kern*
decision and prior proceedings constitutes unappropriated water which is automatically and

1 necessarily subject to Board jurisdiction and authority, and (2) the forfeited water cannot simply be
2 “absorbed” by more junior rights without Board supervision and authorization, as the Board must
3 instead assume jurisdiction over the forfeited water and issue a new permit or license for the use of
4 the water through the California water right permitting process, after consideration of appropriate
5 principles, policies and authority.

6 Resolution of this issue is not dependent or based on consideration of broader, more general
7 issues involving diversions and flows of water in the Kern River. Resolution of this issue does not
8 require a traditional or common water availability analysis. The forfeiture issue instead raises legal
9 and practical issues involving Board jurisdiction and authority, and consideration and protection of
10 beneficial uses to protect the “public interest” and “public trust resources,” including in-stream uses,
11 and policies and uses involving and supporting environmental justice, the human right to water,
12 water quality, climate change, recreation, preservation and enhancement of the environment and fish
13 and wildlife resources, the Sustainable Groundwater Management Act (“SGMA”), and related
14 policies.

15 California courts, including courts in the forfeiture litigation, and the Board, have uniformly
16 held that water forfeited, abandoned or lost by a prior or senior right holder becomes unappropriated
17 water, automatically and necessarily. Pre-1914 rights which are forfeited, by definition, become or
18 create unappropriated water. (See Water Code § 1202.) Water which is lost through non-use reverts
19 to the public and becomes “open” to appropriation. (*Dannenbrink v. Burger* (1913) 23 Cal.App.
20 587, 595.) In *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 404, the
21 court recognized that the Board’s authority extended to all unappropriated water in the State,
22 including water formerly diverted pursuant to pre-1914 appropriative rights, and “all water not
23 otherwise properly diverted or used under a riparian or pre-1914 right.”

24 Courts and the Board have also uniformly held that the loss of a water right creates
25 unappropriated water, without consideration of prior or junior demands for the water.
26 Unappropriated water exists at the point at which Kern Delta forfeited water. Rights to surplus
27 water not diverted and used by Kern Delta therefore do not simply pass to more junior rights,
28 without Board regulation, supervision and permitting. Courts and the Board have not held that

1 forfeited water automatically passes to junior right holders without review and consideration of the
2 appropriate disposition and use of the water by the Board, and without the Board’s consideration of
3 policies and authority that govern the use of water in California, including the public trust doctrine.

4 The courts in the forfeiture litigation ruled that the finding of forfeiture did not result in the
5 increase or enhancement of the rights utilized by North Kern pursuant to its 1952 Agreement with
6 Bakersfield. The courts all expressly rejected North Kern’s claim to the forfeited water under a
7 number of different theories, and confirmed that North Kern did not obtain and has not obtained any
8 right to the forfeited water under its 1952 agreement with the City, or pursuant to any other theory or
9 claim. Surplus water does not automatically expand the entitlement or yield of more junior Kern
10 River rights without Board authority, supervision or involvement. Instead, water that no longer
11 accrues to established water rights becomes “available” for appropriation, which means the water is
12 subject to the jurisdiction and authority of the Board.

13 No water is currently reserved or set aside for public trust, environmental, stream flow, or
14 fish and wildlife purposes on the Kern River. The Kern River channel instead is dry most months of
15 the year, without any consideration of timing or impacts on the environment. The Board is required
16 and obligated to assume jurisdiction over the forfeited water so that the Board can consider whether
17 and to what extent this new supply of water should be utilized and allocated to protect the “public
18 interest” and “public trust resources,” including in-stream uses, and policies and uses involving and
19 supporting environmental justice, the human right to water, water quality, climate change,
20 recreation, preservation and enhancement of the environment and fish and wildlife resources,
21 SGMA, and related policies.

22 Bakersfield has consistently advocated for an increase of water flowing in the Kern River
23 channel. Bakersfield has adopted policies calling for increased Kern River flows, and has
24 implemented a number of projects intended to increase Kern River flows and to protect and enhance
25 the environment in and around the Kern River channel. The residents of Bakersfield have also
26 consistently advocated for increased flows of Kern River water. A group of citizens recently
27 circulated a petition calling for the Board to allocate all of the forfeited, unappropriated water to
28 instream uses and to increase Kern River flows.

1 **3. Should the public hearing before the AHO be conducted in phases as proposed in the**
2 **“Proposed Hearing Issues” section above? If so, what hearing issues should be**
3 **addressed in each phase?**

4 **No.** Bakersfield maintains that the Board should adjust the Proposed Hearing Issues so that
5 the hearings on the Kern River and the competing applications to appropriate are conducted in the
6 following phases:

7 **Phase 1:** Determine whether Kern Delta’s forfeiture created unappropriated water, and the
8 quantity of unappropriated water created by the forfeiture (Issue 1(e) in the Notice of Status
9 Conference). In this phase of the proceeding, the Board should also consider whether North Kern
10 has made unauthorized diversions of the forfeited water and misused the water forfeited by Kern
11 Delta.

12 **Phase 2:** Is any additional unappropriated “high –flow” or “flood” water available on the
13 Kern River? This phase of the proceeding could address proposed hearing issues 1(a) through 1(d),
14 as referenced in the Notice of Status Conference.

15 **Phase 3:** How should the State Board allocate and award unappropriated water resulting
16 from (1) Kern Delta’s forfeiture, and (2) any other sources or supplies? This phase of the proceeding
17 could address proposed hearing issues 2(a) and (b) in the Notice of Status Conference.

18 **Phase 4:** Whether North Kern has violated and is in violation of Article X, section 2 of the
19 California Constitution and Water Code Section 100 by diverting and using the forfeited Kern River
20 water without a valid right or claim to the water, and by using Kern River water delivered by the
21 City to North Kern pursuant to prior agreements with the City, including Agreement 76-89, in a
22 wasteful and unreasonable manner, in violation of Water Code Section 1052 and other applicable
23 authority, including *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th
24 976.

25 **4. Do the participants think that the AHO should consider any other procedural or**
26 **hearing issues? If so, what issues?**

27 **Yes.** Bakersfield maintains that the Board and the AHO should also consider the following
28 additional issues during the phased hearing process:

(a) During the proposed **Phase 1** hearing, in determining whether water forfeited by Kern

1 Delta constitutes unappropriated water, the AHO and Board should also consider and
2 take into account beneficial uses to protect the “public interest” and “public trust
3 resources,” including in-stream uses, and policies and uses involving and supporting
4 environmental justice, the human right to water, water quality, climate change, recreation,
5 preservation and enhancement of the environment and fish and wildlife resources,
6 SGMA, and related policies.

7 (b) During the proposed **Phase 1** hearing, the AHO and Board should consider the impact of
8 Bakersfield’s municipal and domestic use of Kern River water on the existence and
9 extent of unappropriated water made available by Kern Delta’s forfeiture.

10 (c) During the proposed **Phase 3** hearing, the AHO and Board should consider the timing
11 and priority of the applications to appropriate the water forfeited by Kern Delta, and why
12 Bakersfield’s application must take priority over North Kern’s application.

13 (d) During the proposed **Phase 3** hearing, the AHO and Board should consider the impact
14 and effect of the “public interest” and “public trust resources,” including in-stream uses,
15 and policies and uses involving and supporting environmental justice, the human right to
16 water, water quality, climate change, recreation, preservation and enhancement of the
17 environment and fish and wildlife resources, SGMA, and related policies, on the Board’s
18 eventual award, allocation and assignment of unappropriated water made available by
19 Kern Delta’s partial forfeiture of water rights, and any other unappropriated water.

20 (e) During the proposed **Phase 4** hearing, the AHO and Board should consider whether
21 North Kern has violated and is in violation of Article X, section 2 of the California
22 Constitution and Water Code Section 100 by diverting and using the forfeited Kern
23 River water without a valid right or claim to the water and in a wasteful and unreasonable
24 manner, and by diverting the forfeited water outside of and in excess of its contractual
25 right to divert water, in violation of Water Code Section 1052 and other applicable
26 authority, including *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50
27 Cal.App.5th 976.

28 (f) During the proposed **Phase 4** hearing, the AHO and Board should consider whether

1 North Kern has violated and is in violation of Article X, section 2 of the California
2 Constitution and Water Code Section 100 by diverting and using Kern River water
3 delivered by Bakersfield to North Kern pursuant to prior agreements with the City,
4 including Agreement 76-89, in a wasteful and unreasonable manner, in violation of Water
5 Code Section 1052 and other applicable authority, including *Stanford Vina Ranch*
6 *Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

7 Dated: August 10, 2021

DUANE MORRIS LLP

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9 By: 

10 _____
11 Colin L. Pearce
12 Jolie-Anne S. Ansley
13 B. Alexandra Jones

14 Attorneys for Applicant CITY OF BAKERSFIELD
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1 **PROOF OF SERVICE**

2 I am a citizen of the United States, over the age of 18 years, and not a party to interested in
3 the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear
4 Tower, Suite 2200, San Francisco, California 94105. I am readily familiar with this firm’s practices
5 for collecting and processing correspondence for mailing with the United States Postal Service and
6 for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated
7 below, I served the following documents:

8 **STATUS CONFERENCE STATEMENT OF APPLICANT CITY OF BAKERSFIELD**

9 **BY ELECTRONIC SERVICE:** I caused the document(s) to be sent to the person(s)
10 at the e-mail addresses listed below. I did not receive, within a reasonable time after
11 the transmission, any electronic message or other indication that the transmission was
12 unsuccessful.

13 **SEE ATTACHED SERVICE LIST**

14 I declare under penalty of perjury under the laws of the State of California that the foregoing
15 is true and correct. Executed on August 10, 2021, at San Francisco, California.

16 

17 _____
18 Blanca A. Herrera

SERVICE LIST
Updated May 3, 2021

SENT BY EMAIL:

Adam Keats Aruna Prabhala Center for Biological Diversity 351 California Street, Suite 600 San Francisco, CA 94104 akeats@biologicaldiversity.org aprabhala@biologicaldiversity.org	Isaac St. Lawrence McMurtrey, Hartsock & Worth 2001 22nd Street, Suite 100 Bakersfield, CA 93301 isaac@mhwlegal.com <i>Attorney for Buena Vista Water Storage District</i>
Nicholas Jacobs Somach, Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 njacobs@somachlaw.com <i>Attorney for Kern County Water Agency</i>	Ryan Bezerra Bartkiewicz, Kronick & Shanahan 1011 22nd Street Sacramento, CA 95816 rsb@bkslawfirm.com <i>Attorney for Buena Vista Water Storage District</i>
Kevin M. O'Brien David E. Cameron Jessica Hughey Nicole Bigley Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 kobrien@downeybrand.com dcameron@downeybrand.com jhughey@downeybrand.com nbigley@downeybrand.com <i>Attorneys for Kern Water Bank Authority</i>	Colin L. Pearce Jolie-Anne Ansley B. Alexandra Jones Duane Morris LLP One Market, Spear Tower, Suite 2200 San Francisco, CA 94105-1127 clpearce@duanemorris.com jsansley@duanemorris.com bajones@duanemorris.com <i>Attorneys for City of Bakersfield</i>
Eric Garner Patrick D. Skahan Best Best & Krieger LLP 300 South Grande Ave., 25th Floor Los Angeles, CA 90071 eric.garner@bbklaw.com patrick.skahan@bbklaw.com <i>Attorneys for City of Shafter</i>	Scott K. Kuney Young Wooldridge, LLP 1800 30th Street, Fourth Floor Bakersfield, CA 93301 skuney@youngwooldridge.com <i>Attorney for North Kern Water Storage District</i>
Richard Diamond General Manager North Kern Water Storage District P.O. Box 81435 Bakersfield, CA 93380 rdiamond@northkernwsd.com	Robert Donlan Craig Carnes Ellison Schneider Harris & Donlan LLP 2600 Capitol Ave., Suite 400 Sacramento, CA 95816 red@eslawfirm.com <i>Attorneys for Kern Delta Water District</i>

1	Jennifer Spaletta Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com <i>Attorney for Rosedale-Rio Bravo Water Storage District</i>	Jack Pandol 900 Mohawk Street, Suite 220 Bakersfield, CA 93309 jpandolsr@grapery.biz
5	Mike Young Kern County Farm Bureau 19000 Wildwood Road Buttonwillow, CA 93206 michaelcyoung@sbcglobal.net	Amelia T. Minaberrigarai General Counsel Kern County Water Agency 3200 Rio Mirada Drive Bakersfield, CA 93308 ameliam@kcwa.com
9	Thomas Nassif Western Growers Association 17620 Fitch Street Irvine, CA 92614 tnassif@wga.com	Tim Ashlock Engineer-Manager Buena Vista Water Storage District P.O. Box 756 Buttonwillow, CA 93206 tim@bvh2o.com
12	Gail Delihant Western Growers Association 1415 L Street, Suite 1060 Sacramento, CA 95814 gdelihant@wga.com	Jonathan Parker General Manager Kern Water Bank Authority 5500 Ming Avenue, Suite 490 Bakersfield, CA 93309 jparker@kwb.org
16	Steven L. Teglia General Manager L Mark Mulkay Water Resources Manager Richard Iger General Counsel Kern Delta Water District 501 Taft Highway Bakersfield, CA 93307 steven@kerndelta.org mulkay@kerndelta.org richard@kerndelta.org	Gabriel Gonzalez City Manager City of Shafter 336 Pacific Ave. Shafter, CA 93263 ggonzalez@shafter.com
23	Eric Averett General Manager Dan Bartel Assistant General Manager Rosedale-Rio Bravo Water Storage District P.O. Box 867 Bakersfield, CA 93302 eaverett@rrbwsd.com dbartel@rrbwsd.com	Art Chianello Kristina Budak City of Bakersfield Water Resources Department 1000 Buena Vista Road Bakersfield, CA 93311 achianel@bakersfieldcity.us kbudak@bakersfieldcity.us

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<p>Michael James Director of Public Works City of Shafter 336 Pacific Avenue Shafter, CA 93263 mjames@shafter.com</p>	<p>Nancee Murray P.O. Box 944209 Sacramento CA 94244-2090 nancee.murray@wildlife.ca.gov <i>Attorney for California Department of Fish and Wildlife</i></p>
<p>Annette Tenneboe 1234 East Shaw Avenue Fresno CA 93710 Annette.tenneboe@wildlife.ca.gov <i>Attorney for California Department of Fish and Wildlife</i></p>	

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