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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

ADMINISTRATIVE HEARINGS OFFICE

In the matter of the Applications of North Kern Water Storage District and City of Shafter (Application 31673), City of Bakersfield (Application 31674), Buena Vista Water Storage District (Application 31675), Kern Water Bank Authority (Application 31676), Kern County Water Agency (Application 31677), and Rosedale-Rio Bravo Water Storage District (Application 31819)

**STATUS CONFERENCE  
STATEMENT OF CO-APPLICANTS  
NORTH KERN WATER STORAGE  
DISTRICT AND CITY OF SHAFTER  
(APPLICATION 31673)**

## **Introduction**

This Status Conference statement is prepared on behalf of Co-Applicants North Kern Water Storage District (North Kern) and the City of Shafter (City of Shafter) (Application No. 031673) as requested by the Administrative Hearings Office (AHO) Hearing Officer in its July 19, 2021 Notice of Status Conference (Notice). As detailed below, this statement separately addresses each of the status conference issues provided in the Notice and other issues that North Kern and City of Shafter believe are relevant to the authorized Kern River adjudicatory hearing.

When North Kern and City of Shafter first submitted their application on April 25, 2007, they explained that they “do not concede that forfeiture by Kern Delta’s pre-1914 rights or some other circumstance has resulted in unappropriated water that is available for appropriation . . . It may be, as the Court of Appeal indicated, that forfeiture does not result in unappropriated water because ‘water released to the river by forfeiture . . . will simply be used in full by existing junior rights holders under their existing entitlements.’ (*North Kern, supra*, 147 Cal.App.4th at p. 583.) Particularly this may be the case as unappropriated water does not include water being used pursuant to an existing right. (Cal. Code Regs., tit. 23, § 695.)”

North Kern and City of Shafter prepared Application No. A031673 to ensure the continued historic diversion and use of water under existing Kern River pre-1914 diversion rights essential to sustaining existing beneficial uses vital to the local agricultural communities, economy and associated groundwater resources within North Kern and region north of Kern River.

## **Background**

### **A. The State Water Board’s Orders Following 2009 FAS Proceedings**

In Order WR 2010-0016, the State Water Board explained its prior decision in Order WR 2010-0010 as follows,

“Order WR 2010-0010 concluded that there is unappropriated water on the Kern River, because water in excess of any proprietary water right to diversion from the Kern River has been diverted into the Kern River-California Aqueduct Intertie (Intertie). (*Id.*, pp. 4-5.) Having determined that there is some unappropriated water on the Kern River without regard to the forfeiture, Order WR 2010-0010 concluded that it was unnecessary to determine how much, if any, additional water was made available through forfeiture. (*Id.*, pp. 5-6.)” (Order WR 2010-16, pp. 3-4) “. . . Because the evidence in the record established that there is some unappropriated water in the Kern River even without regard to the forfeiture issue, it was unnecessary to determine whether the North Kern decision resulted in unappropriated water.” (Order WR 2010-16, p. 5.)

Further, in Order WR 2010-10 the State Water Board concluded following the 2009 hearing that,

“. . . the evidence presented by the parties did not clearly resolve whether the partial forfeiture of Kern Delta’s rights itself created any additional unappropriated water. Because, however, there is sufficient evidence [because of diversions of Kern River water into the Intertie], to justify the State Water Board revising the Declaration for the purpose of processing water right applications for the Kern River, the Board will not make a determination at this time regarding whether other pre-1914 rights claimants will use, in full, any water released to the Kern River by the forfeiture judgment. It will be up to the applicants to show when and how much available water there is for appropriation in the context of the Division’s processing of those applications.” (Order WR 2010-0010, p. 5.)

**B. The State Water Board’s October 1, 2018 Letter: Legal Matters**

On October 1, 2018, State Water Board staff transmitted a letter to each of the six Applicants requesting the submission of a Water Availability Analysis providing “information regarding the reasonable likelihood that unappropriated water is available for appropriation for the applications. (Wat. Code § 1260, subd. (k).)” As background, the State Water Board’s letter acknowledged that five applications were filed in 2007 in support of petitions requesting revision of the fully appropriated status for the Kern River, as declared in State Water Board Order 89-25 (which cited State Water Board Decision 1196 (State Water Board, 1989), as well as subsequent orders<sup>1</sup> comprising the Declaration of Fully Appropriated Streams System (FASS Declaration). In 2010, a sixth application to appropriate water from the Kern River discharged into the Kern River-California Aqueduct Intertie (Intertie) was filed with the State Water Board.<sup>2</sup> The State Water Board provided specific directions for preparation of a Water Availability Analysis for the Kern River including submission of separate legal and technical appendices.

**C. Historical Administration of Kern River Rights**

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<sup>1</sup> WR 91-07 (State Water Board, 1991) and WR 98-08 (State Water Board, 1998).

<sup>2</sup> The six applications identified are: North Kern Water Storage District and City of Shafter (Application 031673), City of Bakersfield (Application 031674), Buena Vista Water Storage District (Application 031675), Kern Water Bank Authority (Application 031676), Kern County Water Agency (Application 031677) and Rosedale-Rio Bravo Water Storage District (Application 031819).

The entire natural flow of the Kern River has been measured, apportioned and beneficially used each day by First Point, Second Point and Lower-River diverters<sup>3</sup> by court decisions, decrees and agreements, the “*Law of the River*”, for well over one-hundred years. (State Water Board, Decision 1196; State Water Board, Order WR 89-25.) In response to the California Supreme Court’s historic decision in *Lux v. Haggin* (1886) 69 Cal. 255, the upstream diverters (known as First Point diverters -- currently the City of Bakersfield (Bakersfield), North Kern and Kern Delta Water District and the downstream diverters (known as the Second Point diverters -- currently Buena Vista Water Storage District) entered into a comprehensive settlement agreement (Miller-Haggin Agreement of 1888) implementing a physical solution which finally resolved and settled that long-standing litigation among all the parties. (Miller-Haggin Agreement of 1888.) Since 1894, detailed records of the entire Kern River natural flow and diversions have been maintained as required in the Miller-Haggin Agreement, as amended.

On August 6, 1900, individual appropriative rights of the First Point diverters were adjudicated by Judge Lucien Shaw (the Shaw Decree). The Shaw Decree reaffirmed and decreed the rights stated in the Miller-Haggin Agreement and set a maximum flow available for diversion and appropriation of fifteen separate rights as stated in the Shaw Decree and Findings in the matter of *Farmers Canal Company, et. al. v. J.R. Simmons, Henry Miller, et. al*, Kern County Superior Court, Case No. 1901. (Shaw Decree and Findings.) The Shaw Decree provides that when there is not sufficient water available for all of the rights, the order of right and priority stated in the decree shall be followed. (Shaw Decree, p. 10.) Since 1900, the individual appropriative rights of each First Point diversion right have been allocated in the order of right and priority stated in the Shaw Decree and Miller-Haggin Agreement (and related agreements) as listed on the Kern River First Point Flow and Diversion schedule.

Beginning in the 1870’s, landowners in the region which today includes North Kern, diverted and beneficially used large quantities of Kern River water conveyed by the Beardsley and Calloway Canals under pre-1914 appropriations adjudicated in the 1900 Shaw Decree and those administrated in the order of right and priority of rights listed on the Kern River First Point Flow and Diversion schedule. North Kern comprises approximately 60,000 acres with about 55,000

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<sup>3</sup> First Point diverters are (Kern Delta Water District, City of Bakersfield and North Kern Water Storage District), Second Point diverters are (Buena Vista Water Storage District) and Lower-River diverters are (the Kern County Water Agency.)

developed to permanent crops (nuts and vineyards) with the remaining lands dedicated to annual crops (vegetables, grains, pasture). Owing to the highly variable Kern River, North Kern manages its available Kern River surface water supply in conjunction with its groundwater replenishment facilities to sustain the underlying groundwater resources in the region. The City of Shafter is located both adjacent to and over-lapping a portion of the District. Incorporated in January 11, 1938, the City of Shafter has a population of approximately 20,441. Much of the City of Shafter's economy is based on the surrounding agricultural and related industry.

**D. Prior Kern River State Water Board Proceedings**

Beginning in 1964, the State Water Board held extensive hearings after which its engineering staff prepared an analysis of the pertinent court decisions, decrees and agreements regarding the use of Kern River water among the First Point, Second Point and Lower River diverters for a seventy-year period (1894-1963). In Decision 1196, the State Water Board reviewed applications filed by all the First Point, Second Point and Lower-River diverters seeking a permit both for direct diversion and storage in Isabella Reservoir and found that all Kern River natural flow had been diverted from the Kern River and used on lands for irrigation within the First Point, Second Point, and Lower River Service Areas by ditches and canals since prior to 1894. (State Water Board, Decision 1196 -- (Decision Denying Applications), pp. 4-5.) Additionally, the State Water Board found that Kern River water had been "spread for percolation into the ground water basin for storage and later use on lands within the service areas, which provide cyclic storage for extended periods of drought." (*Id.*) Decision 1196 concluded by stating,

"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 the areas. This conclusion is further supported by the fact that ground water levels within the service area are declining. . . From the foregoing findings, the Board concludes that Applications 9446 (others) . . . should be denied." (*Id.*)

In 1989, the State Water Board listed the Kern River as a fully appropriated stream system (FASS). (State Water Board, Order WR-89-25.) In those hearings, the State Water Board reviewed the administrative record supporting Decision 1196, and found that the "record contains ample substantial evidence to support the finding that no water remains available for appropriation." In particular, the State Water Board reaffirmed the earlier State Water Board staff

engineer findings that “[t]he water of the Kern River is fully appropriated and apportioned under existing agreements and court decrees and no unappropriated water is available for use under the applications being considered.” (State Water Board, Order WR-89-25, p. 14.) Following its ruling in WR-89-25, the State Water Board on two separate occasions confirmed that the Kern River is a fully appropriated stream system. (State Water Board, Order WR 91-07; State Water Board, Order WR 94-1.)

Soon after the 2007 Forfeiture Judgment, the State Water Board received five petitions citing the Fifth District Court of Appeal’s decision in *North Kern* as support. North Kern and City of Shafter’s application to the State Water Board explained that they “do not concede that forfeiture by Kern Delta’s pre-1914 rights or some other circumstance has resulted in unappropriated water that is available for appropriation . . . It may be, as the Court of Appeal indicated, that forfeiture does not result in unappropriated water because ‘water released to the river by forfeiture . . . will simply be used in full by existing junior rights holders under their existing entitlements.’ (*North Kern, supra*, 147 Cal.App.4th at p. 583.) Particularly this may be the case as unappropriated water does not include water being used pursuant to an existing right. (Cal. Code Regs., tit. 23, § 695.)”

**E. The State Board AHO Assignment and AHO Notice of Status Conference**

On April 1, 2021, the State Water Board issued a Notice of Assignment (Assignment) advising North Kern and City of Shafter that the AHO has been assigned an adjudicative hearing “*on issues arising from the pending applications.*”

The Assignment recites that “the Board’s decision to amend the Kern River’s fully appropriated status was based on the undisputed evidence that water has historically been diverted via the Intertie since its construction in 1977, and that those diversions are in excess of any water rights for the diversion and use of Kern River water. The State Water Board found that the evidence presented at the hearing did not clearly resolve whether the partial forfeiture of water rights declared in the *North Kern Decision* created any additional unappropriated water. Instead, the State Water Board amended the FASS Declaration for the Kern River to allow for processing of new applications and indicated that it would be up to the applicants to show how much unappropriated water is available for appropriation, and in what season, in the context of the Division’s processing those applications.” (Assignment Attachment 1, pp. 2-3.)

Based on the recommendation of the Deputy Director of the Division of Water Rights, approved by the State Board's Executive Director, three issues arising from the six Kern River water right applications have been assigned to AHO for an adjudicative hearing. (Assignment Attachment 2, pp. 1-2.) The State Water Board has confirmed that the "Division has not accepted the applications due to the open question of water availability." (Assignment Attachment 1, p. 4.)

On July 19, 2021, the AHO provided its Notice scheduling a Status Conference for August 17, 2021 at 9am. The Notice restates portions of the Assignment information and proposes two groupings of issues to be discussed in the Status Conference and following issuance of an AHO order addressed by the Applicant Parties in a proposed public hearing to be conducted in phases. (Notice, p. 7.)

## **Status Conference Issues**

The Notice identifies four issues for the Applicant Parties to address during the Status Conference. The following is North Kern and City of Shafter's initial response to these issues pending review of the Status Conference statements filed by other Applicant Parties and further discussion with the Hearing Officer, AHO Staff and other Applicants.

North Kern and City of Shafter reserve their right to recommend further revisions to any proposed Status Conference order during the conference after having the opportunity to review the Status Conference statements and recommendations of other participating Applicant Parties.

### **1. Intention to Pursue Application No. A031673**

As detailed below, North Kern and City of Shafter intend to pursue Application No. A031673.

#### **a. North Kern Forfeiture Judgment**

Based on the updated Kern River Water Availability Analysis, Forfeiture Judgment Technical Analysis and Legal Appendix, North Kern and City of Shafter respectfully requests that the AHO determine that the *North Kern* Forfeiture Judgment does not create unappropriated water available for appropriation from the Kern River.

North Kern and City of Shafter filed Application No. A031673 in order to ensure continued historic diversion and use of Kern River water essential to sustaining existing beneficial uses vital to the local agricultural communities, economy and associated groundwater resources within North

Kern. In the event the AHO were to determine that additional Kern River water is available for appropriation as a result of the enforcement of the Forfeiture Judgment, which North Kern and City of Shafter dispute, then these two public bodies respectfully request that the AHO determine that all such unappropriated Kern River water be awarded and permitted for beneficial use by North Kern and Shafter as described in their pending Application No. 031673.

“Any new permit for such an appropriation, however, will be ‘last in time’ and will neither reduce nor augment existing pre-1914 rights of other appropriators.” (*North Kern Water Storage District* (2007) 147 Cal.App. 4th 555, 583-584 [“Even if the forfeiture results in the existence of unappropriated water that can be awarded by SWRCB, the fundamental first-in-time, first-in-right nature of appropriative rights means that a newly permitted SWRCB appropriative right will be junior to all existing pre-1914 rights.”].)

**b. Kern River High Flow Intertie Operations**

In the event AHO determines, following hearings regarding the pending applications for appropriation of the Kern River, that there is unappropriated water available for appropriation due to the routing of Kern River water into the Intertie, then North Kern and Shafter intend to appropriate such water for direct diversion for beneficial use and diversion to underground storage for the purposes of groundwater replenishment and subsequent withdrawal for beneficial use within North Kern including the overlapping areas of the City of Shafter as stated in Application No. 031673 and North Kern and City of Shafter’s March 20, 2018 file update.

More particularly, any permit for appropriation of Kern River water would be subject to certain hydrologic and legal conditions:

1. During a period when Kern River water is being routed through the Intertie in accordance with the existing Intertie agreements governing the operation of the Intertie with approval of the Kern River Watermaster;
2. During a period when First Point Kern River flow is passing the Second Point of Measurement; and
3. Consistent with the administration of the Kern River as provided in the court decisions, decrees, agreements, and customs and practices, which together comprise the “Law of the River”.



### **c. AHO Table 1 Correction**

A review of the AHO Table 1 in the Notice providing a summary of the six applications requires revision to correct the summary with regard to Application No. A031673 filed by North Kern and City of Shafter. (see revised Table 1 attached.)

## **Recommendation for Hearing Issues**

At present, other than as explained elsewhere in North Kern and City of Shafter's recommendations for modification of Hearing Phases and Other Procedural or Hearing Issues below, no additional issues or modifications are suggested at this time.

## **Recommendation for Hearing Phases**

Similar to what the AHO implemented with regard to the Kings River system, a clearly-defined and incremental phasing of this adjudicative hearing is recommended to best ensure that the hearings are conducted efficiently and methodically to address the Kern River issues arising from the pending applications. The following is North Kern and City of Shafter's recommended revisions to the phasing of issues described by the AHO in its Notice.

### **1. Phase 1 Issues – Determination of the existence, amount, and season of unappropriated water.**

Wat. Code, §1260(k) – “An application for a permit to appropriate water shall set forth . . . (k) Sufficient information to demonstrate a reasonable likelihood that unappropriated water is available . . .”

Wat. Code, §1375(d) – “As a prerequisite to the issuance of a permit to appropriate water the following facts must exist: . . . (d) There must be unappropriated water available to supply the applicant.”

An applicant has the burden to establish that there is unappropriated water available to supply the application. (Wat. Code, §§ 1260(k), 1375(d); *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 413.)

### **A. Phase 1A – North Kern Forfeiture Judgment -- AHO Issue 1(e) -- as stated in the Notice.**

**1(e)** Whether water required to be released according to *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App. 4th 555 (*North Kern Decision*) creates unappropriated water?

Primary issue to be determined – Whether the *North Kern Decision* creates unappropriated water; if so, in what amount and during what season.

Reasons for distinct hearing phase:

- This Kern River water supply is hydrologically distinct and limited to only six months of the year as specified in the *North Kern Decision* (January, August, September, October, November and December) relating to flow and operation conditions only within the First Point Service area.
- The issue raised is a discreet, predominately legal matter, for the AHO to determine which is wholly distinct from Intertie operations. Specifically, as confirmed by the City of Bakersfield “[s]ince the City and North Kern have now identified and generally agreed on the quantity of water available on the Kern River as a result of the imposition of forfeiture caps, the only remaining issue for the State Board to determine is the appropriate disposition and use of the forfeited water.” (City of Bakersfield, Kern River Supplement to Water Availability Analysis (August 2019), p.4.)
- Resolution of the Phase 1A issue will provide the AHO with significant foundational background on Kern River hydrology, “Law of the River,” and the daily administration of Kern River operations.
- Resolution will address the issue arising from the six applications within the First Point Service area which was the original and sole issue to be resolved by the State Water Board when applications were filed in 2007.
- Resolution could substantially narrow issues, parties, and future AHO proceedings. For example, the City of Bakersfield has advised that its Application No. 031674 “does not seek to obtain rights to the high flow flood water (water that has historically been diverted into the Intertie). The City instead seeks to obtain rights to unappropriated water above the ‘forfeiture caps’ imposed on certain rights held by Kern Delta Water District . . . in certain months of the year as a result of the . . . (*North Kern Decision*) . . . The only other applicant that seeks rights to that same forfeited water supply is . . . North Kern.” (City of Bakersfield, Kern River Supplement to Water Availability Analysis (August 2019), p.3.)
- For the foregoing reasons, the proposed Phase 1A can be promptly prepared and presented for hearing to the AHO Hearing Officer in advance of other phases.

**B. Phase 1B** – Intertie operations in the Kern River system -- AHO Issues 1(a), (b), (c) and (d)  
– as stated in the Notice.

**1(d)** How much water is physically available in the Kern River system to supply existing water rights?

**1(a)** What are the maximum amounts of diversion and use authorized by existing rights in the Kern River system?

**1(b)** Are unauthorized diversions or wasteful or unreasonable diversion or use of water occurring in the Kern River system?

**1(c)** Has any of the water appropriated from the Kern River system not been put to, or ceased to be put to, some useful or beneficial purpose?

Primary issue to be determined – Whether Intertie operations in the Kern River system create unappropriated water; if so, in what amount and during what season.

- However, as detailed in Issue 4 below (Additional Phase Proceedings and Procedure), AHO issues 1(b) and 1(c) must be clearly defined and limited to a specific party(s), claim or contention with prior notice before an adjudicatory hearing for Phase 1B can be commenced by AHO.

Reasons for distinct hearing phase:

- This Kern River water supply is hydrologically distinct based on months of the year, year-type, flow and operation conditions.
- These issues raise discreet, mixed factual and legal matters wholly distinct from the Forfeiture Judgment issue.
- Resolution will address the issues arising from the six applications within the Second Point and Lower-River service areas, including Intertie operations.
- Resolution could substantially narrow issues, parties, and future proceedings.

**2. Phase 2 Issues** – Following a determination by AHO that unappropriated water is available for appropriation, the order of administration and allocation of unappropriated water, if any.

Primary issues to be determined – The order for processing of applications and the allocation of available supply among competing applications.

- Phase 2A** – AHO Issue 2(a) – Determine the order for processing the then-pending applications.
- Phase 2B** – *New Issue* – Applicant Parties identify and discuss procedures for resolution of competing applications.
- Phase 2C** – AHO Issue 2(b) – Determine how unappropriated water should be allocated among the competing applications.

Reasons for distinct hearing phases:

- Issues are discreet, mixed factual and legal matters.
- Provides notice and opportunity for Applicant Parties to identify and discuss procedures for resolution among competing applications.

**3. Phase 3 Issues** – Division processing of any accepted application(s).

Reasons for distinct hearing phase:

- Narrows scope for the Division’s processing of applications to the extent possible.
- Provides notice and opportunity for Applicant Party(s) to complete CEQA compliance, as appropriate.

## **Other Procedural or Hearing Issues**

To facilitate the efficiency, scope and clarity of evidence presented to the Hearing Officer in the Phase 1A hearing (and subsequent hearings) North Kern and City of Shafter recommend and request that the Hearing Officer include in any Status Conference order a schedule and procedure for determining the following legal and evidentiary issues prior to commencement of Phase 1A of the Hearing.

1. Confirmation of legal issues according to *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App. 4th 555 (*North Kern Decision*).

North Kern and City of Shafter request that the Hearing Officer determine and confirm in a written pre-Hearing order that the AHO will be complying with the following legal rulings determined in the *North Kern Decision* in the Kern River adjudicatory Hearing(s):

a. Entitlement of junior appropriators-

“When an appropriator has not diverted its entire theoretical entitlement on a given day, the excess is ‘released to the river.’ In that case, the next most senior appropriator is entitled to divert released water to, in effect, augment the stage or natural flow of the river; the junior appropriator then may divert water for which it has no theoretical entitlement, up to the full paper entitlement of that user. Any release water not claimed by a more senior user becomes available to the next junior user in the same manner until the water supply is exhausted.” (*North Kern*, p. 562.) . . . “[O]nce the water is released by senior users, each successive junior user **has the right to release water** up to its maximum paper entitlement.” (*North Kern*, p. 575, emphasis added.) . . . “Junior appropriators have an ‘actual entitlement’ to available release water.” (*North Kern*, p. 576, emphasis added.)

“[W]e **conclude as a matter of law** that the actual entitlement of a junior appropriator must include all water in the river to which it has a right of access, including release water actually available to it.” (*North Kern*, pp. 595-96, emphasis added.)

b. Creation of unappropriated water-

“When a natural watercourse is fully appropriated, as the Kern River is, forfeiture of an appropriative right [such as Kern Delta’s] **may or may not result in**

**unappropriated water** that can be awarded to an applicant through the statutory permitting system administered by the SWRCB. That is, a river may be so oversubscribed by pre-1914 common law rights that any water releases to the river by forfeiture of a senior rights holder **will simply be used in full by existing junior right holders under their existing entitlements.**” (*North Kern*, p. 583, emphasis added.)

“If water rights are forfeited, however, the cumulative effect could be that the river is no longer oversubscribed. That is a determination not for the courts in the first instance, but for the SWRCB. If those resulting limitations on appropriation might result in a determination that the Kern River is no longer fully appropriated, that determination will be made by the SWRCB on the petition of a potential appropriator of the excess.” (*Id.*) (See also, State Water Board “Statutory Water Rights Law (January 2018) stating that the *North Kern Decision* determined that “[F]orfeiture of a senior water right **does not necessarily make unappropriated water available**, because junior appropriators may be able to make use of the forfeited water, during periods when there otherwise would not have been sufficient water available to fully satisfy those junior rights.”)(emphasis added.)

c. Priority of subsequently issued appropriative permits from the State Water Board-

“Any new permit for such an appropriation, however, will be ‘**last in time**’ and will neither reduce nor augment existing pre-1914 rights of other appropriators.” (*North Kern*, pp., 583-584 [“Even if the forfeiture results in the existence of unappropriated water that can be awarded by SWRCB, the fundamental first-in-time, first-in-right nature of appropriative rights means that a newly permitted SWRCB appropriative right **will be junior to all existing pre-1914 rights.**”], emphasis added.)

2. Proposed stipulations of fact, exhibit(s) and law.

At a reasonable time prior to each phase of the Hearing and the filing of proposed written testimony of witnesses and exhibit(s) by Applicant Parties, those Applicant Parties participating in the Hearing will meet and confer to determine and file with the AHO any proposed written stipulations of fact, exhibit(s) and law relating to the Hearing phase.

3. Motions in Limine/Evidence objections.

At a reasonable time prior to each phase of the Hearing and the filing of proposed written testimony and exhibits by Applicant Parties, those Applicant Parties participating in the Hearing shall be given the opportunity to file legal objections and obtain a ruling from the Hearing Officer regarding the admissibility of a proffer of evidence prior to the commencement of the respective Hearing Phase.

#### 4. Additional Phase Proceedings and Procedures.

These Kern River proceedings have been authorized according to WR Order 2010-0010 following amendment of the Declaration of Fully Appropriated Streams System orders (SWRCB Orders WR 89-25, WR 91-07 and WR 98-08) to “allow for processing applications to appropriate water from the Kern River.” (WR Order 2010-0010). Specifically, the State Water Board determined that “Order WR 2010-0010 concluded there is unappropriated water on the Kern River, because water in excess of any proprietary water right to diversion from the Kern River has been diverted into the Intertie. (*Id.*, pp. 4-5.) Having determined that there is some unappropriated water on the Kern River without regard to the forfeiture, Order WR 2010-0010 concluded it was unnecessary to determine how much, if any, additional water was made available through forfeiture. (*Id.*, pp. 5-6.)” (WR Order 2010-0016, pp. 3-4.)

These Kern River proceedings are not authorized nor have they been commenced in compliance with the requirements for a comprehensive statutory adjudication of the Kern River system (Water Code §§2500, et. seq.) nor the State Water Board’s statutory and procedural requirements for adjudicating and enforcing a complaint under cease-and-desist authorities. (Water Code §§ 1825-1851). The scope of the proceedings must be defined according to the Executive Director’s memorandum dated March 18, 2021, assigning certain matters to the AHO for consideration. That assignment was expressly made under Water Code section 1112(c)(2), which allows the Executive Director to assign to the AHO all or part of “an adjudicative hearing presided over by the board or a board member.” (*Id.*, p. 1.) Adjudicating whether water sought by an applicant is available when another party denies such availability of water is a matter for such an adjudicative hearing. (See *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 106.) Therefore, Bakersfield’s burden of proving that unappropriated water is created and made available because of the *North Kern* Forfeiture Judgment, which North Kern, the City of Shafter and others deny, is properly part of these proceedings.

However, while the State Water Board April 1, 2021 Assignment and the AHO July 19, 2021 Notice make reference to Water Code section 1834 and California Code of Regulations, title 23, section 855 (defining “misuse of water” as any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water”) they do so without any mention of any specific claim or complaint, party, fact or physical condition. A notice under Water Code section 1834 must, among other things, “contain a statement of facts and information that would tend to

show the proscribed action.” State Water Board regulations likewise require advance notice of an alleged misuse of water, which is to be given only *after* an “investigation indicates that a misuse of water has occurred.” (Cal. Code Regs., tit. 23, § 857(a).) A mere reference to a statute or regulation without specification of the factual context and identification of a specific party(s), claim or contention does not provide notice of a potential claim sufficient to commence an adjudicatory hearing relating to the Kern River system. These statutory and regulatory authorities, due process, and other requirements of law all require advance public notice and opportunity to the Applicant Parties so that each is fully advised of the nature and extent of such a claim(s) before an adjudicatory hearing can be lawfully commenced by AHO. Therefore, North Kern and City of Shafter request that AHO issues 1(b) and 1(c) be clearly defined and limited to a specific party(s), claim or contention with prior notice before an adjudicatory hearing is commenced by AHO to consider such matters.

Equally important, in order to ensure an efficient administration of the Hearing and clear presentation of evidence for consideration by the Hearing Officer consistent with law, North Kern and City of Shafter recommend and request that following completion of the Phase 1A Hearing that the Hearing Officer and Applicant Parties schedule a further Status Conference to review and update procedures for the identification of the specific issue(s) to be presented by the participating Applicant Parties to the Hearing Officer in Phase 1B, and any subsequent phase, of the Kern River adjudicatory Hearing.

## **Conclusion**

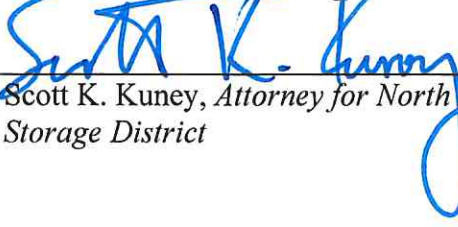
For all the reasons explained above, North Kern and City of Shafter request that the Hearing Officer adopt a status conference order providing that the first issue in this Kern River proceeding be a determination of whether water required to be released according to the *North Kern Decision* creates unappropriated water. Further, we request that the additional recommendations we have proposed for modification of additional Hearing phases and procedures be adopted, and that AHO issues 1(b) and 1(c) be clearly defined and limited to a specific party(s), claim or contention with prior notice before an adjudicatory hearing is commenced by AHO to consider such matters.

We reserve the right to make further recommendations on the issues and the proposed AHO order at the status conference in this proceeding.

Respectfully submitted,

Date: 8/10 2021

The Law Offices of Young Wooldridge, LLP

  
\_\_\_\_\_  
Scott K. Kuney, *Attorney for North Kern Water Storage District*

Date: August 9, 2021

Best Best & Krieger

  
\_\_\_\_\_  
Patrick D. Skahan, *Attorney for City of Shafter*



**Table 1 - Applications to Appropriate Water From the Kern River System**

Application information summarized from Division of Water Rights Application Files

Application	Applicant	Source	Purpose of Use	Direct Diversion				Storage		
				Rate (cfs)	Acre-Foot (af) per year	Season		Amount (af) per year	Season	
<b>A031673</b>	North Kern Water Storage District, City of Shafter	Isabella Lake, Beardsley Canal, Calloway Canal, CVC-to-Calloway Intertie	Irrigation, Groundwater Replenishment, Municipal and Industrial, Domestic, Other	1,850	500,000	1-Jan	31-Dec	500,000	1-Jan	31-Dec
<b>A031674</b>	City of Bakersfield	Lake Isabella, Kern River Canal, 2800 Acre Recharge and Groundwater Facility, City of Bakersfield City Limits	Municipal, Domestic, Constructed Wetlands, Fish and Wildlife Restoration, Recreation, Water Quality, Groundwater Recharge, Groundwater Storage, Irrigation	450	104,541	1-Jan	31-Dec	104,541	1-Jan	31-Dec
<b>A031675</b>	Buena Vista Water Storage District	Lake Isabella, Kern Fan Project, Alejandro Canal, Kern River Flood Channel	Irrigation, Storage	–	180,000	1-Jan	31-Dec	520,000	1-Jan	31-Dec
<b>A031676</b>	Kern Water Bank Authority	Kern River, CA Aqueduct	Municipal, Industrial, Irrigation, and Groundwater Storage for Municipal, Industrial, and Irrigation Uses	1,525	500,000	1-Oct	30-Sep	500,000	1-Oct	30-Sep
<b>A031677</b>	Kern County Water Agency	Lake Isabella	Municipal, Industrial, and Irrigation	3,212	940,000	1-Jan	31-Dec	1,339,000	1-Jan	31-Dec
<b>A031819</b>	Rosedale-Rio Bravo Water Storage District	Kern River	Domestic	–	65,750	1-Jan	31-Dec	–	–	–

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF KERN**

I, KRISTEN L. MOEN, declare: I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

On August 10, 2021, I caused to be served the below listed document entitled as **STATUS CONFERENCE STATEMENT OF CO-APPLICANTS NORTH KERN WATER STORAGE DISTRICT AND CITY OF SHAFTER (APPLICATION 31673)** on the interested parties in this action, as listed below.

**SEE ATTACHED SERVICE LIST**

**(BY E-MAIL OR ELECTRONIC SUBMISSION)** I caused a copy of the document(s) to be sent from e-mail address kmoen@youngwooldridge.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 10, 2021, at Bakersfield, California.

  
KRISTEN L. MOEN

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