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## State Water Resources Control Board

November 3, 2021

### **Re: Kern River Applications (Phase 1A) – Ruling on Legal Issues and Pre-Hearing Conference Ruling**

#### **TO ALL PARTIES:**

On August 30, 2021, the Administrative Hearings Office (AHO) of the State Water Resources Control Board (State Water Board or Board) issued a Status Conference Ruling, Notice of Pre-Hearing Conference, and Notice of Public Hearing Phase 1A (Phase 1A Ruling and Notice of Hearing) on the pending 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) for permits to appropriate water from the Kern River system.

The Phase 1A Ruling and Notice of Hearing directed the City of Bakersfield, North Kern Water Storage District, and the City of Shafter to submit written briefs that address the following legal issues:

- (1) Does the forfeiture of a portion of a water right necessarily result in unappropriated water on the stream system in the amount of the forfeited portion of the right?*
- (2) If not, should the State Water Board consider the available supply of water less the amount of water beneficially used pursuant to existing water rights on the stream system to determine the amount of unappropriated water, if any, that results from a forfeiture?*
- (3) Should the State Water Board consider the protection of public trust uses when determining the amount of unappropriated water, if any, that results from a forfeiture?*

Other parties were permitted but not required to submit written briefs addressing these legal issues.

The AHO received legal briefs from the City of Bakersfield (Bakersfield), Kern County Water Agency (KCWA), North Kern Water Storage District (North Kern) and the City of Shafter, Buena Vista Water Storage District (Buena Vista WSD), California Department

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E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

of Fish and Wildlife (CDFW), Kern Delta Water District (Kern Delta), and the Public Interest Groups<sup>1</sup>.

The AHO will not address in this ruling any issues raised by the parties in their briefs that are outside of the scope of the issues that the AHO directed the parties to brief in the Phase 1A Ruling and Notice of Hearing.

## **LEGAL ISSUES**

### **1. Does the forfeiture of a portion of a water right necessarily result in unappropriated water on the stream system in the amount of the forfeited portion of the right?**

Bakersfield asserts that the forfeiture of all or a portion of a water right necessarily results in unappropriated water on the stream system in the amount of the forfeited portion of the right. (Bakersfield Opening Brief, p. 1.) According to Bakersfield, this water does not automatically accrue for use under any other water right and no party can establish a right to it unless the State Water Board exercises its authority to issue a permit to appropriate the water or otherwise approves use of the water by another right holder. Bakersfield relies on Water Code sections 1202, 1241, and 1675, and cites several State Water Board orders for its argument that forfeited water is unappropriated water regardless of junior rights to water from the stream system. The Public Interest Groups concur with Bakersfield on this issue but do not offer supporting arguments in their brief.

KCWA, North Kern and City of Shafter, Buena Vista WD, and Kern Delta take the opposing position, that the forfeiture of a water right does not result in unappropriated water as a matter of law. Rather, they argue that the demands of other junior rights must be considered to determine whether unappropriated water is made available as a result of the forfeiture. These opposing parties argue that the court's decision in *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555 (*North Kern*), is determinative on this issue.

CDFW took no position on this issue.

As discussed in the court's decision in *North Kern*, the forfeiture of a water right does not necessarily result in unappropriated water in the system that is available for appropriation. Water that is not diverted and used because of the forfeiture of a senior right is available for diversion and use by the next right-holder in priority. Whether surplus water remains for appropriation depends on the available supply and the extent of demands under existing rights. "[F]orfeiture of an appropriative right may or may not result in unappropriated water that can be awarded to an applicant through the statutory permitting system administered by [the Board] .... [A] river may be so oversubscribed by

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<sup>1</sup> The Public Interest Groups includes the following parties: Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Kern-Kaweah Sierra Club, Panorama Vista Preserve, Center for Biological Diversity, and California Trout, Inc.

pre-1914 common law rights that any water released to the river by forfeiture of a senior rights holder will simply be used in full by existing junior rights holders under their existing entitlements.” (*North Kern, supra*, 147 Cal.App.4th at 583.) A determination of whether unappropriated water is available, and, if so, how much, because of the forfeiture of a water right is a factual determination that requires consideration of other rights to divert and use water in the system.

Bakersfield takes the position that forfeited water is a new supply of water over which the State Water Board is required to exercise its jurisdiction and allocate for use either by a new applicant or an existing right holder. This position fails to acknowledge the priority system of appropriative water rights in which the supply of water in a stream system is, by law, allocated to right holders in order of priority. “[W]ater right priority has long been the central principle in California water law.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243; see also Hutchins, *The California Law of Water Rights* (1956) p. 130 [“Priority of right is the essence of the appropriation doctrine.”].) The Board has the obligation to “recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream.” (*Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450.) A junior appropriator is entitled to have the quantity of water not diverted and used by a senior appropriator flow down the stream to satisfy its existing junior rights in order of priority. (See *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594-96; *Hufford v. Dye* (1912) 162 Cal. 147, 153-54.)

California law recognizes only a few limited exceptions to the rule of priority. Such exceptions include measures necessary to protect public trust resources and to implement the constitutional prohibition against the wasteful or unreasonable diversion or use of water. (*El Dorado Irrigation Dist. v. State Water Contractors* (2006) 142 Cal.App.4th 937, 965-66.) Unless there is a compelling justification under one or more of these exceptions, the Board has no authority to contravene the rule of priority by allocating water made available because of the forfeiture of a water right to a new applicant or any right holder other than the next most senior in priority. (*Id.* at 944.)

The Water Code sections cited by Bakersfield (Water Code sections 1202, 1241, and 1675) do not advance its position. Each of these provisions can and should be interpreted to be consistent with the rule of priority. The definition of unappropriated water in Water Code section 1202 does not include water that is being used pursuant to an existing right. The preceding Water Code section explicitly excludes water that is “otherwise appropriated” from its description of water that is available for appropriation under Part 2 of the Water Code. (Wat. Code, § 1201; see also Cal. Code Regs., tit. 23, § 695 [“Unappropriated water does not include water being used pursuant to an existing right ...”].) Water that is no longer subject to use pursuant to a forfeited or revoked right under Water Code sections 1241 and 1675 is not unappropriated water if it is needed to satisfy a valid junior right. As explained by Wells Hutchins in his treatise on western water law:

A statement in the statute that the water to which a forfeited right formerly attached reverts to the public neither strengthens nor weakens the practical result of forfeiture – that this formerly appropriated water becomes, both

*ipso facto* and *ipso jure*, either unappropriated water or water needed to satisfy the lawful requirements of existing junior appropriators.

(2 Hutchins, Water Rights Laws in the Nineteen Western States (1974) p. 314.)

Water Code section 1675 explicitly states that water that is no longer being put to a useful or beneficial purpose under a license may be declared by the Board “subject to appropriation in accordance with this part.” Part 2 of the Water Code, in section 1201 and elsewhere, is clear that water subject to appropriation does not include water that is already subject to diversion and beneficial use pursuant to an existing right.

The State Water Board orders that Bakersfield cited in its brief also do not support Bakersfield’s position. In State Water Board Order WR 97-06, the State Water Board revoked water-right Permit 15012 and acknowledged that water may become available for appropriation from the Calaveras River as a result. Contrary to Bakersfield’s claim that the Board declared the water to be newly unappropriated regardless of existing right holders, the order stated that new water-right permits based on new applications would be able to take water only after the United States Bureau of Reclamation, an existing right holder, had fully satisfied its rights. (State Water Board Order WR 97-06, p. 11.)

Bakersfield similarly misapplies State Water Board Order WR 2011-0016, which addressed the question of whether a competing claim was necessary for the Board to find that a pre-1914 water right had been forfeited and not whether other water rights must be considered to determine whether a forfeiture resulted in unappropriated water. In addition, Order WR 2011-0016 supports the very sentence quoted by Bakersfield in its brief by citing *United States v. State Water Resources Control Board* for the principle that the Board must examine riparian and prior appropriative rights to determine whether water is available for appropriation. (State Water Board Order WR 2011-0016, p. 32 [citing *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102-103].)

Bakersfield also conflates the concept of a water right and the concept of the supply of water that is subject to diversion and use under the right. Bakersfield correctly notes that the courts and the Board have never held that “forfeited water rights automatically pass to a junior right holder....” (Bakersfield Opening Brief, p. 4.) A forfeited or revoked water right is extinguished and no longer exists. As a result, it cannot “pass” to any other water user, whether automatically or by approval of the Board. The water that would have been subject to use pursuant to a newly forfeited or revoked water right continues to be part of the supply of water that is available to valid right-holders, pursuant to their own water rights, in order of priority. “The net result of a holding that forfeiture resulted ... would be to have the water revert to the junior appropriators to feed their rights.” (2 Hutchins, Water Rights Laws in the Nineteen Western States (1974) pp. 314-315 [quoting *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.* (1943) 137 P.2d 634, 640].)

Finally, Bakersfield's position, that all forfeited water rights result in unappropriated water notwithstanding any claims by entities with junior water rights, is untenable because it directly conflicts with the court's decision in *North Kern*. The appellate court directly addressed this issue and did so with respect to the particular water rights involved in this proceeding. (*North Kern, supra*, 147 Cal.App.4th at pp. 583-84.) The AHO concurs with the court's decision and finds it to be consistent with California law. The court declined to determine the amount of unappropriated water that may have been made available as a result of the Kern Delta forfeiture, leaving the determination for the State Water Board in the first instance. A determination of the amount of unappropriated water that is available in the Kern River system as a result of the forfeiture of senior water rights by Kern Delta is, in part, the subject of this proceeding before the AHO and will require consideration of other rights on the system.

**2. Should the State Water Board consider the available supply of water less the amount of water beneficially used pursuant to existing water rights on the stream system to determine the amount of unappropriated water, if any, that results from a forfeiture?**

KCWA, North Kern and City of Shafter, Buena Vista WD, and Kern Delta assert that the State Water Board should consider the available supply of water on the stream system, including any water that has become available due to forfeiture of a water right, less the amount of water beneficially used pursuant to existing rights to determine the amount of unappropriated water, if any, that is available. The AHO agrees.

The AHO also agrees, however, with Bakersfield's contention that in conducting an analysis comparing water supply and demands under existing rights, the Board has the authority to examine the validity of claimed water rights including pre-1914 appropriative rights. (See *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879; *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397.) Although such an investigation into the validity of existing rights may not be justified or necessary in all contexts, the Board can and should consider the validity of claimed rights when the validity of those rights is challenged by an applicant who seeks to demonstrate that unappropriated water is available for appropriation.

**3. Should the State Water Board consider the protection of public trust uses when determining the amount of unappropriated water, if any, that results from a forfeiture?**

The State Water Board has a duty of continuing supervision over the appropriation and use of water to protect public trust resources to the extent feasible and consistent with the public interest. (*Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446-447.) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*Id.* at p. 446.)

Bakersfield asserts that the Board must consider the public interest, including impacts to public trust resources, when deciding "whether to assume jurisdiction over [] forfeited

water as unappropriated water.” (Bakersfield Response Brief, p. 10.) CDFW and the Public Interest Groups make similar arguments about the Board’s ongoing duty to consider public trust resources. North Kern and the City of Shafter recognize the Board’s obligation to protect public trust resources but argue that consideration of potential impacts to public trust resources should be deferred until after the Board has determined that there is unappropriated water and the amount of unappropriated water in the stream system.

The positions of the parties on this issue are not incompatible. All of the parties agree that the Board must consider impacts to public trust resources when acting on an application for a permit to appropriate water. The matter in dispute is at what stage in the processing of a water-right application the Board must or should consider impacts to public trust resources.

The Water Code and other relevant statutes set the procedures by which water-right applications are processed by the Division of Water Rights (Division). After the Division accepts a water-right application, the Division must issue a public notice. (Wat. Code, §§ 1300-1324.) Any person may file a protest to the application and the applicant and protestants are responsible for making a good faith effort to resolve the protest. (Wat. Code, §§ 1330 & 1333.) These negotiations may result in an agreement on terms and conditions to be included in any water-right permit the Division issues on the application. If the protestants and applicant cannot reach resolution, then the Board will hold a hearing to resolve the matters remaining in dispute. (Wat. Code, § 1350.) Before the Board may approve an application and issue a water-right permit, any necessary environmental documentation required by the California Environmental Quality Act (CEQA) must be complete. (Pub. Res. Code, § 21000 et seq.) The environmental review process often provides important information about impacts to public trust resources that the Board may rely on when deciding how to act on the application and developing terms and conditions to include in any water-right permit.

The Board’s consideration of impacts to public trust resources before an application has been publicly noticed and before completion of environmental review under CEQA is typically neither practical nor efficient. First, if the Board were to attempt to resolve public trust impacts before noticing the application or before the environmental documentation is complete, the Board may be required to revisit its determinations based on new information raised by protestants or developed through the environmental review process. Second, the protest and environmental review process often have the practical effect of narrowing the issues in dispute to be resolved by the Board. Because analyses of impacts to public trust resources are often complex and controversial, these questions may be best deferred until later in a proceeding after preliminary questions have been resolved. North Kern and the City of Shafter cite several examples in which the Board deferred consideration of impacts to public trust resources until the Board was prepared to act on a particular water-right application.

The Public Interest Groups argue that the Board has an obligation to consider impacts to public trust resources at “every step of these proceedings” and “not just in the event it rules that there is unappropriated water available in the system.” (Public Interest

Groups Reply Brief, p. 2.) To the contrary, the Board has significant discretion to allocate and prioritize the use of its resources to fulfill its many statutory duties and functions. The Board is not required to conduct a public trust analysis in every phase of every proceeding. Such a requirement would demand an extraordinary amount of resources at the expense of the Board's other functions, and would result in piecemeal, inefficient, and possibly conflicting, determinations. It is also unclear what remedy the Public Interest Groups envision the Board should order, if it were to consider impacts to public trust resources in the absence of a finding that there is unappropriated water available to supply the applications. This particular adjudicative proceeding, as defined in the assignment by the Executive Director to the AHO, is limited to consideration of the pending applications and is not a comprehensive proceeding to allocate the waters of the Kern River system.

The AHO concludes that question (3) posed by the AHO to the parties cannot be answered in the abstract. Ultimately, the Board may decide what time is best for it to consider impacts to public trust resources before making a final decision on any matter. Depending on the circumstances, the Board may decide to address the instream needs of public trust resources early in a particular process. In other instances, the Board may decide that a detailed public trust analysis is best reserved until later in the proceeding, after environmental documents are complete and other more-preliminary issues have been addressed. Whether the State Water Board should consider the protection of public trust uses when determining the amount of unappropriated water, if any, that results from a forfeiture but before considering other elements of particular applications to appropriate water, will depend on the nature of the proceeding. This procedural decision is within the Board's discretion.

For purposes of Phase 1A of the hearing in this matter, the AHO will defer consideration of the instream flow needs to protect public trust resources in the interest of conducting an orderly proceeding. The hearing issue presented in Phase 1A is narrow in scope and is limited to consideration of water availability as a result of the forfeiture of water rights by Kern Delta. At this time, the AHO anticipates that it will consider impacts to public trust resources during a later phase of this proceeding, when receiving evidence about the following second issue assigned to the AHO by the Executive Director:

2. If unappropriated water is available, in what order should the Division process the applications? How should unappropriated water be allocated among the competing applications to appropriate water?

Although the State Water Board very likely will need to consider impacts to public trust resources a second time when it acts on the pending applications, the preliminary questions assigned to the AHO of how these applications should be processed and how water should be allocated among them appear to raise public trust considerations that should be addressed even though the applications have yet to be publicly noticed and are not yet ripe for action by the Board.

**PRE-HEARING CONFERENCE RULING**

The AHO held a pre-hearing conference in Phase 1A of this matter on October 28, 2021. The hearing officer issued the following rulings during the pre-hearing conference:

- Tulare Lake Basin Water Storage District is designated as a party to Phase 1A and subsequent phases of this hearing.
- The hearing officer modified the deadline for filing case-in-chief exhibits with the AHO and set deadlines for filing written evidentiary motions and responses to those motions, as reflected in the Hearing Schedule below.
- Parties are required to submit objections to the written testimony of case-in-chief witnesses in writing, by the deadline in the table below. Parties have the option to submit objections to other case-in-chief evidence or rebuttal evidence in writing or parties may make such objections orally during the hearing. However, any objections submitted in writing must be submitted to the AHO by the applicable deadline in the table below.
- Each party is limited to 2 ½ hours to present all oral summaries of their witnesses' written case-in-chief testimony.
- Parties may submit written testimony either on pleading paper or with numbered paragraphs, for ease of reference.
- Parties are not required to submit oversize exhibits exceeding 150 pages to the AHO in hard copy. Similarly, parties are not required to submit spreadsheets or other data files that cannot be easily reproduced and sent to the AHO in hard copy. Parties may submit these exhibits by uploading a digital copy to the party's FTP upload account.

**HEARING SCHEDULE AND DEADLINES**

<b>Deadlines / Schedule</b>	<b>Date and Time</b>
Deadline for all parties to file case-in-chief exhibits and exhibit identification indices with AHO.	<b>November 10, 2021, 12:00 p.m. (noon)</b>
Deadline for all parties to file amended NOIs.	<b>November 10, 2021, 12:00 p.m.</b>
Deadline for parties to file written evidentiary motions addressing case-in-chief evidence.	<b>November 22, 2021, 12:00 p.m.</b>
Deadline for all parties to file rebuttal exhibits and exhibit identification indices with AHO.	<b>December 2, 2021, 12:00 p.m.</b>
Deadline for parties to file responses to written evidentiary motions addressing case-in-chief evidence.	<b>December 3, 2021, 12:00 p.m.</b>
Deadline for parties to file written evidentiary motions addressing rebuttal evidence.	<b>December 7, 2021, 12:00 p.m.</b>
Phase 1A Hearing begins.	<b>December 9, 2021, 9:00 a.m.</b>



Deadline for parties to file responses to written evidentiary motions addressing rebuttal evidence.	<b>December 9, 2021, 12:00 p.m.</b>
Additional hearing days (as necessary)	<b>December 10, 2021, 9:00 a.m., and additional dates as necessary.</b>

Sincerely,

SIGNATURE ON FILE

Nicole L. Kuenzi  
Hearing Officer  
Administrative Hearings Office

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