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11

12 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**
13 **ADMINISTRATIVE HEARINGS OFFICE**

14

15 In the Matter of Applications of:

16 North Kern Water Storage District and City of
17 Shafter (Application 31673),

18 City of Bakersfield (Application 31674),

19 Buena Vista Water Storage District
20 (Application 31675),

21 Kern Water Bank Authority (Application
22 31676),

23 Kern County Water Agency (Application
24 31677), and

25 Rosedale-Rio Bravo Water Storage District
26 (Application 31819),

27 for permits to appropriate water from the Kern
28 River system.

**KERN WATER BANK AUTHORITY'S
MOTION TO REOPEN THE
EVIDENTIARY RECORD IN PHASE 1B**

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1 **I. INTRODUCTION**

2 Approximately one month after Phase 1B was submitted to the Hearing Officer for
 3 decision in late November 2022, the southern San Joaquin Valley began to experience a series of
 4 atmospheric rivers that resulted in one of the wettest years on record on the Kern River. For the
 5 first time since 2006, Kern River floodwater was diverted into the Intertie. If not for unseasonably
 6 cool weather in early June, flood control operations on the Kern River would likely have
 7 continued into early July. These conditions led the State Water Resources Control Board (“State
 8 Water Board”) to issue a temporary permit under Water Code section 1425 *et seq.* authorizing the
 9 Kern Water Bank Authority (“KWBA”) to divert up to 300,000 acre-feet (“AF”) of Kern River
 10 water this year. The issuance of that permit, in turn, saw the Kern River Watermaster
 11 (“Watermaster”) issue a Notice Order with a never-before-seen term designed to require KWBA
 12 to pay purported Kern River water right holders for water before KWBA could divert water under
 13 the temporary permit, as authorized by the State Water Board.

14 Evidence about the Kern River’s extremely wet hydrology, KWBA’s temporary permit,
 15 and Kern River operations during the current water year is highly relevant to the central question
 16 posed in Phase 1B: how much Kern River water is available for appropriation. Although KWBA
 17 presented overwhelming evidence that substantial quantities of water are available for
 18 appropriation on the Kern River in wet years during the Phase 1B hearing, Buena Vista Water
 19 Storage District (“Buena Vista”), Kern County Water Agency (“KCWA”), and North Kern Water
 20 Storage District (“North Kern”) contend that little to no water is available for appropriation even
 21 in the wettest of years. KCWA also argued in Phase 1B that the Watermaster’s Notice Order
 22 process should govern the amount of water available for appropriation in all future years.

23 The Hearing Officer clearly has authority to consider additional information from the
 24 current water year that can shed light on the truth and implications of these arguments, and there is
 25 ample good cause to do so. As discussed below, the proposed reopening of the Phase 1B hearing
 26 record will require, at most, 60 minutes of additional direct testimony by witnesses sponsored by
 27 KWBA, plus any attendant cross-examination time. KWBA respectfully requests that the Hearing
 28 Officer reopen the evidentiary record and allow the submission of limited evidence about Kern

1 River hydrology and operations in the current water year before issuing the Phase 1B decision.

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 **A. The Phase 1B Hearing**

4 In Water Rights Order 2010-0010 (“WRO 2010-0010”), the State Water Board found that
5 there “is some unappropriated water in the Kern River” and that water that reaches the Intertie is
6 “by definition” unappropriated. (North Kern-94 at p. 6.) This finding allowed the State Water
7 Board to consider whether to grant KWBA’s application to divert and store up to 500,000 AFY
8 from the Kern River.” (KWBA’s Request for Official Notice in Support of Opening Brief and
9 Oppositions to Motions in Limine (Apr. 25, 2022) (“RON”), Ex. D.)

10 On March 18, 2021, the State Water Board’s Executive Director assigned this matter to the
11 AHO for an adjudicative hearing. (Hearing Notice (Jan., 12, 2022) p. 3.) In doing so, the
12 Executive Director specifically tasked the AHO with deciding “how much unappropriated water is
13 available” and indicated that the AHO could consider “whether unauthorized diversions or
14 wasteful or unreasonable diversion or use of water are occurring, and whether claimed water rights
15 have been abandoned or forfeited.” (*Id.*) Pursuant to the Executive Director’s assignment, the
16 AHO held Phase 1A of the hearing on relatively narrow issues regarding the forfeiture of water
17 rights by Kern Delta Water District. (*Id.* at 4.)

18 Between May and August of 2022, the AHO held the Phase 1B hearing to address the
19 amount of unappropriated water in the Kern River system. (*Id.*) The parties presented evidence
20 regarding the historical hydrology of the Kern River from the late 19th century through 2017.
21 (*See e.g.*, KWBA-200, KWBA-208, KWBA-001.) The parties also presented evidence about Kern
22 River operations, including the extent of Buena Vista’s historical diversions and the Notice Order
23 process by which certain Kern River Interests purport to make high flow water available to Kern
24 County water users that do not hold rights under the Miller-Haggin Agreement that currently
25 governs Kern River operations. (*See e.g.*, Buena Vista-500C, KCWA-023c.) The evidentiary
26 record for Phase 1B closed on September 2, 2022, and the matter was submitted to the Hearing
27 Officer for decision on November 22.

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1 **B. KWBA Obtains a Temporary Permit to Divert Kern River Water**

2 Shortly after Phase 1B was submitted for decision, a series of “atmospheric river” storm
3 events struck California, with particularly severe impacts on major streams in the southern San
4 Joaquin Valley such as the Kern and Kings River systems. The California Department of Water
5 Resources publishes forecasts of the volume of seasonal runoff from the state’s major watersheds
6 in Bulletin 120. The March 28, 2023 edition of Bulletin 120 forecasted that Kern River
7 unimpaired flows at Lake Isabella would total 2.470 million AF.¹ This forecasted runoff was
8 similar to Kern River flows in 1983, an extremely wet year that saw approximately 664,000 AF
9 enter the Kern River Intertie. (KWBA-208.)

10 KWBA filed an application for a temporary permit pursuant to Water Code section 1425 *et*
11 *seq.* on April 13, 2023, to take advantage of these anticipated conditions. The State Water Board
12 issued Temporary Permit 21444 on May 19, 2023. KWBA’s temporary permit authorized it to
13 divert up to 300,000 AF from the Kern River at a rate of 900 cubic feet per second (“cfs”).
14 (Declaration of Jonathan Parker (“Parker Dec.”), at ¶ 2, Ex. A at p. 17.)

15 While KWBA’s temporary permit application was pending, the Kern River Watermaster
16 (“Watermaster”) submitted a letter requesting that the State Water Board only authorize KWBA to
17 divert water under a temporary permit when the “Kern River Watermaster has initiated the ‘Notice
18 Order’ process.” (Parker Dec., at ¶ 3, Ex. B.) KWBA agreed to that condition, which was
19 incorporated into Temporary Permit 21444 as Condition 5(c). (*Id.* at Ex. A, p. 17.) Nothing in
20 Temporary Permit 21444 required KWBA to comply with any particular terms that the Kern River
21 Watermaster purported to impose in connection with any particular Notice Order.

22 **C. The Kern River Watermaster’s 2023 Notice Order**

23 Four days after KWBA received Temporary Permit 21444, the Watermaster issued a
24 Notice Order informing potential users of Kern River Water that North Kern, Buena Vista,
25 KCWA, Kern Delta Water District and the City of Bakersfield (“Kern River Interests”) had
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28 ¹ A true and correct copy of the March 28, 2023 B-120 Water Supply Forecast Summary is
available at <https://cdec.water.ca.gov/reportapp/javareports?name=B120DIST.20230328>

1 authorized him to make water available to third parties under specified conditions. (Parker Dec. at
2 Ex. C.) Condition 5 of the May 23 Notice Order provided that water would only be available
3 under the Notice Order process if it represented “a net increase” in the total diversion and use of
4 Kern River water in 2023 that “will not displace diversion and use of existing Kern River
5 supplies” available to the diverter. (*Id.* at Ex. C, p. 2.) Such a condition had never before been
6 imposed by the Watermaster in connection with the Notice Order process. (*Id.* at ¶ 3.) In a
7 subsequent letter responding to KWBA’s notification that it would begin diverting water under
8 Temporary Permit 21444, the Watermaster took the position that water available for diversion
9 under the temporary permit “is limited to floodwaters being diverted into or scheduled for delivery
10 into the Intertie.” (*Id.* at Ex. D, p. 3.) The Watermaster further asserted that KWBA’s diversion of
11 water under Temporary Permit 21444 would cause injury to existing Kern River entitlement
12 holders if it displaced water that had previously been diverted into the Kern Water Bank under the
13 Lower River Right. (*Id.*) On June 9, 2023, the Watermaster informed KWBA that Kern River
14 flood control operations had ended and water was no longer available under the May 2023 Notice
15 Order. (*Id.* at ¶ 6.) Ultimately, KWBA diverted 14,250 AF of water under its temporary permit
16 from May 26 through June 9. (*Id.*) The Intertie did not close until June 12, 2023. (*Id.*)

17 **III. ARGUMENT**

18 **A. The Hearing Officer Has Broad Authority to Reopen the Evidentiary Record.**

19 The Hearing Officer has broad authority to manage this proceeding including authority to
20 reopen the evidentiary record upon a showing of good cause. California courts will hear new
21 evidence after a case has been submitted when the moving party shows good cause, due diligence,
22 and that the evidence is not cumulative. (*Fry v. Sheedy* (1956) 143 Cal.App.2d 615, 623; *Ensher,*
23 *Alexander & Barsoom, Inc. v. Ensher* (1964) 225 Cal.App.2d 318, 326.) In certain instances,
24 failure to grant a motion to reopen the evidentiary record “will constitute an abuse of discretion”
25 where the evidence is material and might compel a decision one way on a certain issue. (*Fry,*
26 *supra*, 143 Cal.App.2d at 623-24.)

27 Nothing in the AHO’s enabling legislation, the State Water Board’s regulations governing
28 adjudicative proceedings, or the Administrative Procedures Act imposes different standards on the

1 Hearing Officer’s authority. (*See generally*, Water Code § 1110, *et seq.*; Gov. Code § 11400, *et*
 2 *seq.*; Cal. Code Regs., tit. 23, § 648, *et seq.*) As explained in detail below evidence regarding
 3 Kern River hydrology and operations during the current water year is so material to the question of
 4 how much water may be available for appropriation that it may be outcome-determinative. (*See*
 5 *Fry, supra*, 143 Cal.App.2d at 623-24.) The Hearing Officer should thus exercise her clear
 6 authority to reopen the record to hear limited additional evidence on these topics.

7 **B. The Hearing Officer Should Hear New Evidence About 2023’s Extremely Wet**
 8 **Hydrology.**

9 There is no dispute that hydrologic conditions on the Kern River in very wet years—
 10 particularly years in which the Kern River Intertie receives floodwater—is highly relevant to the
 11 Hearing Officer’s Phase 1B decision. (Hearing Notice, p. 5; North Kern-94, p. 5; North Kern-95,
 12 pp. 7-9.) Much of the testimony during the Phase 1B Hearing focused on the historical hydrology
 13 of the Kern River. (*See e.g.*, North Kern-125 at pdf pp. 38-50; KWBA-208; KCWA-032, ¶¶ 23-
 14 24; Buena Vista-500C.) Although the Intertie has operated nine times since it was constructed in
 15 1978, and there have been at least five additional years since 1906 when it would have operated,
 16 the other parties to the Phase 1B hearings have generally tried to suggest that unappropriated water
 17 is unlikely to be available as frequently in the future. (*See e.g.*, KCWA-032, ¶¶ 23-24 [describing
 18 1983 hydrology as a “clear outlier”]; Buena Vista-200, ¶¶ 46-59 [describing changes in demand
 19 for Kern River surface water and development of new recharge facilities].) By contrast, KWBA
 20 asserts that climate change will likely result in more extreme hydrology (wet and dry) in the
 21 future. (KWBA Phase 1B Closing Brief at 12; KWBA-423 [“Climate models indicate that we are
 22 likely to see larger and warmer storms, resulting in increased rainfall and flooding.”].)

23 The Kern River’s hydrology in 2023 is directly relevant to the determination of how much
 24 water is available for appropriation on the Kern River. According to the most recent edition of
 25 Bulletin 120, Kern River runoff is expected to exceed 2.3 million AF this year—substantially
 26 more than the 1.6 million AF threshold that KWBA’s engineering expert identified as the point at
 27 which one would expect significant volumes of water to reach the Intertie based on historical
 28

1 conditions. (KWBA-208.)² Indeed, Kern River flows were so high that, on May 19, 2023, the
2 State Water Board issued a temporary permit to KWBA authorizing the diversion of up to 300,000
3 AF of Kern River water a rate of 900 cfs. (Parker Dec., Ex. A.)

4 Kern River hydrology this year and the issuance of Temporary Permit 21444 to KWBA
5 both support KWBA’s ultimate position in Phase 1B that significant quantities of unappropriated
6 water are available in high flow years. (See KWBA-208_001; KWBA Closing Brief (Nov. 1,
7 2022) at 12:22-13:13.) KWBA’s Temporary Permit No. 21444, and its diversions under that
8 permit, serve as confirmation by the Division of Water Rights that in a high-flow year like 2023,
9 significant quantities of “unappropriated floodwater [is] anticipated to enter the Kern River-
10 California Aqueduct Intertie.” (Parker Dec., Ex. A at pp 8-9.) The Division of Water Rights
11 recognized that this water is “in excess of recognized rights in the Kern River” pursuant to Water
12 Right Orders 2010-0010 and 2010-0016. (*Id.* at p. 8.) Because the Hearing Officer’s Phase 1B
13 decision must ultimately determine how much Kern River water is available for appropriation,
14 there is clearly good cause to consider the most recent hydrology in which substantial quantities of
15 water could be diverted by KWBA. (Hearing Notice, at p. 5; *Ensher, supra*, 225 Cal.App.2d at
16 326.)

17 Evidence about Kern River hydrology in the current water year is not cumulative because
18 it provides critical information about the conditions under which water may be available in similar
19 years. (*Ensher, supra*, 225 Cal.App.2d at 326.) The last year in which Kern River flows exceeded
20 1.6 million AF was 2017. (KWBA-208.) During the Phase 1B hearing, Buena Vista argued that
21 no water would be available for appropriation under conditions similar to those that occurred in
22 2017 because (1) Buena Vista’s need and capacity to divert Kern River water for recharge had
23 increased; and (2) Buena Vista’s demand for Kern River water under the Second Point Entitlement
24 would be higher following multiple consecutive dry years. (See Buena Vista-200, ¶ 71; Buena
25 Vista’s Phase 1B Closing Brief at pdf pp. 25-27.) But under similar conditions this year, the State
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28 ² The June 29, 2023 Bulletin 120 Water Supply Forecast Summary is available at
<https://cdec.water.ca.gov/reportapp/javareports?name=B120DIST>.

1 Water Board found that substantial amounts of water could be available for appropriation. (Parker
2 Dec., Ex. A.) Thus, the Hearing Officer should re-open the evidentiary record to ensure that her
3 forthcoming Phase 1B decision benefits from new and highly relevant information about Kern
4 River hydrology in an extraordinarily wet year.

5 **C. The Hearing Officer Should Consider New Evidence About the Notice Order**
6 **Process.**

7 The Hearing Officer should also reopen the evidentiary record to admit new evidence
8 about Kern River operations in 2023. There are at least two issues that are of critical importance
9 to the Hearing Officer’s Phase 1B decision.

10 First, the Hearing Officer should consider new evidence about operations under the Notice
11 Order process during the current water year. The Notice Order process is an informal arrangement
12 among the Kern River Interests in which they purport to make flood water available for diversion
13 by anyone in Kern County when such water would otherwise flow to the Kern River Intertie. (*See*
14 *KCWA-023c*, ¶¶ 24-26, 35.) During the Phase 1B hearings, KCWA argued that the Notice Order
15 process could and should continue to govern the diversion of high-flow Kern River water by
16 KWBA. (*See* *KCWA Phase 1B Closing Brief*, at pp. 14-15 [arguing that pending applications
17 should “confirm the Notice Order process” and process pending applications “to allow diversions”
18 under the Notice Order process].) KWBA explained that conditioning new water rights on the
19 Notice Order process would not only prevent the State Water Board from performing its statutory
20 duties, but would also allow the Kern River Interests to control Kern River operations with no
21 transparency or oversight. (*KWBA Response to Phase 1B Closing Briefs*, at pdf pp. 1-2, 23-24.)

22 The Kern River Interests’ management of the Notice Order process in 2023 supports
23 KWBA’s position and should be considered by the Hearing Officer. On May 19, 2023, the State
24 Water Board issued Temporary Permit 21444 to KWBA. To resolve the Kern River
25 Watermaster’s protest to KWBA’s temporary permit application, KWBA agreed to divert water
26 under its temporary permit only when the Watermaster had initiated the Notice Order process.
27 (*Parker Dec.*, Ex. A at pp. 6, 17.) KWBA’s acceptance of the Watermaster’s proposed language is
28 reflected in Condition 5 of Temporary Permit 21444. (*Id.*) Importantly, Condition 5 does not

1 require KWBA to comply with the terms of any particular notice order; it only requires that the
2 Watermaster have initiated that process before diversions under the temporary permit can occur.

3 Four days after KWBA received its temporary permit, the Watermaster issued a Notice
4 Order. That Notice Order contained a new term that appeared to be directly aimed at KWBA's
5 ability to divert water under its temporary permit:

6 The Water User agrees that the water made available under this agreement will
7 only be water that is a net increase in Water User's total diversion and use of Kern
8 River water in 2023 and will not displace diversion and use of existing Kern River
supplies available to the Water User. (Parker Dec., Ex. C. at p. 2.)

9 In other words, Term 5 of the 2023 Notice Order indicates that KWBA must pay for water
10 available to it under purported "Law of the River" entitlements—which are based on percentages
11 and have no defined upper limits—before it can divert water available under a right granted by the
12 State Water Board. A subsequent letter from the Watermaster to KWBA confirms this reading of
13 Term 5 of the 2023 Notice Order. (Parker Dec., Ex. D at p. 3 [asserting that KWBA cannot divert
14 water under Temporary Permit 21444 if doing so displaces the "ongoing scheduling, diversion,
15 and use of Kern River water by existing right holders" and that water available for diversion under
16 the temporary permit "is limited to floodwaters being diverted into or scheduled for delivery into
17 the Intertie."]) Importantly, nothing like Term 5 has ever been included in a previous Notice
18 Order, and it is not clear how the Kern River Interests developed and decided to include that term
19 in the 2023 Notice Order. (Parker Dec. at ¶ 4.)

20 The 2023 Notice Order and subsequent communications from the Watermaster reveal that
21 the Kern River Interests are willing to use the Notice Order process to their financial gain without
22 any transparency, public input, or mechanism to ensure compliance with the law. The Hearing
23 Officer should reopen the evidentiary record to consider this evidence, additional testimony
24 regarding the process by which the 2023 Notice Order was developed, and the implications of
25 outsourcing the State Water Board's duty to administer the water rights system to existing Kern
26 River entitlement holders. There is ample good cause to do so given KCWA's argument that the
27 Notice Order process should govern the diversion of water under State Water Board-issued
28 permits. (See *Ensher, supra*, 225 Cal.App.2d at 326.) Limited additional evidence on the

1 development and implementation of the 2023 Notice Order would not be cumulative because this
2 is the first time the Notice Order Process has ever attempted to account for water rights permits.

3 Second, the Hearing Officer should reopen the evidentiary record to consider Buena
4 Vista’s operations and water management practices affected Kern River water availability this
5 year. In doing so, the Hearing Officer need not and should not permit the parties to relitigate the
6 issue of the scope of Buena Vista’s underlying water right. (See e.g., KWBA Phase 1B Closing
7 Brief at pdf pp. 28-38.) Admitting limited evidence about the scope and nature of Buena Vista’s
8 diversions in 2023, however, will help ensure a complete understanding of how the Kern River
9 operated under recent, extremely wet hydrologic conditions. (See Ensher, supra, 225 Cal.App.2d
10 at 326.)

11 **IV. CONCLUSION**

12 The Hearing Officer has authority to hear further evidence in Phase 1B upon a showing of
13 good cause. As explained above, there is ample good cause for the Hearing Officer to admit
14 limited additional evidence regarding Kern River hydrology, operations and the Notice Order
15 process in 2023 because information on those topics is directly relevant to the question of how
16 much water is available for appropriation and could not have been presented during the Phase 1B
17 hearings. Accordingly, KWBA respectfully requests that the Hearing Officer reopen the
18 evidentiary record for Phase 1B, and expeditiously hold a scheduling conference to consider the
19 parties’ views about how and when such evidence should be submitted.

20 DATED: July 21, 2023

DOWNEY BRAND LLP

21 By: 

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23 Attorneys for Kern Water Bank Authority
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.


On July 21, 2023, I served true copies of the following document(s) described as **KERN WATER BANK AUTHORITY’S MOTION TO REOPEN THE EVIDENTIARY RECORD IN PHASE 1B and DECLARATION OF JONATHAN PARKER IN SUPPORT THEREOF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address lruiz@downeybrand.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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2023, at Sacramento, California.



Lucia Ruiz

SERVICE LIST

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