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CITY OF BAKERSFIELD

**BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Kern River 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), and  
Rosedale-Rio Bravo Water Storage District  
(Application 31819)

**CITY OF BAKERSFIELD'S PETITION  
FOR RECONSIDERATION OF THE  
ADMINISTRATIVE HEARINGS  
OFFICE'S NOVEMBER 3, 2021  
RULING ON LEGAL ISSUES AND  
PRE-HEARING CONFERENCE  
RULING**

Pursuant to Water Code sections 1112(c)(2) and 1122, and title 23, sections 768 and 769 of the California Code of Regulations, the City of Bakersfield ("City" or "Bakersfield") hereby petitions the State Water Resources Control Board ("Board") for partial reconsideration of the Administrative Hearings Office's ("AHO") November 3, 2021 Kern River Applications Phase 1A – Ruling on Legal Issues and Pre-Hearing Conference Ruling ("Ruling"). A copy of the Ruling is attached hereto as Exhibit A.

## INTRODUCTION

Bakersfield brings this Petition for Reconsideration to challenge the Ruling to ensure that the Board follows its mandate and mission to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations. The Ruling would directly violate and interfere with that mandate by improperly depriving the Board of jurisdiction over a substantial supply of available unappropriated water on the Kern River, preventing the Board from protecting and preserving public trust resources, and ensuring that the Kern River will remain dry and will cease to function as a viable and functional river.

The AHO has indicated it will conduct a preliminary hearing in the above-referenced proceeding to:

“receive evidence that the Administrative Hearings Office (AHO) and State Water Resources Control Board (State Water Board or Board) will consider when determining whether the partial forfeiture of water rights by Kern Delta Water District as determined by the Fifth Circuit Court of Appeal in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 (*North Kern* decision) resulted in unappropriated water in the Kern River system and the amount of that unappropriated water.” (August 30, 2021 Status Conference Ruling, Notice of Pre-Hearing Conference and Notice of Public Hearing, p. 2.)

In the Ruling, the Hearing Officer for the AHO issued a preliminary ruling on certain legal issues which violates California law and which is contrary to the mandate and mission of the Board. In particular, the Hearing Officer erred by (1) improperly declining to consider the protection of public trust uses and resources while making a “water allocation decision” in the course of determining the above issue, and the existence and extent of unappropriated water in the Kern River created by the partial forfeiture of water rights by the Kern Delta Water District (“Kern Delta”), in direct violation of *National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, and (2) by making a preliminary determination that newly available water supplies created by and available as a result of the partial forfeiture of pre-1914 appropriative water rights is not considered unappropriated water if the water can be “absorbed” by junior rights, in direct contravention of well-established California authority, including Water Code sections 1202(b) and 1241.

1 Currently, the Kern River runs dry through the Bakersfield throughout most of the year due  
2 to the upstream diversion of the vast majority of flows for groundwater recharge and agricultural  
3 use. Since the 1960s, Bakersfield has worked towards a goal of restoring and increasing flows of  
4 water in the Kern River to promote and protect a number of reasonable and beneficial uses, a process  
5 that includes Bakersfield's pending application for unappropriated Kern River water.

6 Under the Ruling, and given the current phasing of the proceeding, however, the erroneous  
7 determination that the partial forfeiture of Kern Delta's water rights does not necessarily create a  
8 supply of unappropriated water subject to the Board's immediate jurisdiction, and the improper and  
9 unauthorized deferral of consideration of public trust resources virtually ensures that the status quo  
10 will persist. Parties with no adjudicated or determined rights to water resulting from the forfeiture of  
11 rights will continue to divert the majority of Kern River flows for recharge and agricultural purposes  
12 and will ensure that the Kern River remains completely dry for most of the year with little to no  
13 regard for the protection of public trust resources. The Ruling, and the perpetuation of the status  
14 quo, will also harm disadvantaged communities, the drinking water supplies of the citizens of  
15 Bakersfield, the Kern Subbasin, the environment in and around the Kern River, and other public  
16 resources and interests.

17 For the reasons set forth below and in the included memorandum of points and authorities,  
18 the AHO committed errors of law, particularly in concluding that it is not necessary at this critical  
19 stage of the proceeding to assess the needs of public trust resources in conjunction with its  
20 consideration of whether junior water rights are entitled to absorb all of the water supplies resulting  
21 from Kern Delta's partial forfeiture.

22 **1. Name and Address of the Petitioner (23 Cal. Code Regs. § 769(a)(1).)**

23 The City of Bakersfield  
24 c/o Virginia A. Gennaro, City Attorney's Office  
25 1600 Truxton Ave., 4th Floor  
26 Bakersfield, CA 93301  
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1 All communications to the Petitioner should also be directed to its attorneys:

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13 **2. The Specific Board Action of which Petitioner Requests Reconsideration (23 Cal. Code Regs. § 769(a)(2).)**

14 Bakersfield requests that the Board grant partial reconsideration of the November 3, 2021  
15 Ruling.

16 **3. The Date on Which the Order or Decision was Made by the Board (23 Cal. Code Regs. § 769(a)(3).)**

17 The AHO issued the Ruling on November 3, 2021.

18 **4. The Reason the Action Was Inappropriate or Improper. (23 Cal. Code Regs. § 769(a)(4).)**

19 As explained in the following Statement of Points and Authorities, the Ruling was erroneous  
20 and improper under title 23, section 768(d), of the California Code of Regulations because:

- 21 • The AHO erred in deferring consideration of public trust uses and interests while making a water allocation decision involving the existence and extent of unappropriated water on the Kern River, and the validity of claimed rights to such unappropriated water supplies. The AHO must instead consider public trusts uses and interests during the present stage of the proceeding, when deciding whether to assume jurisdiction over water resulting from forfeiture as unappropriated water.
- 22 • The AHO erred in determining that the forfeiture of water rights does not result in unappropriated water as a matter of law.

23 **5. The Specific Action which the Petitioner Requests. (23 Cal. Code Regs. § 769(a)(5).)**

24 Bakersfield requests that the Board grant reconsideration and partially set aside the Ruling on  
25 the two points contested by Bakersfield. Bakersfield also requests a formal hearing on this matter  
26 before the Board.  
27  
28

1 Bakersfield does not contest or challenge the Ruling on the second issue considered by the  
2 Board in the Ruling, as stated at page 5 of the Ruling, in which the AHO indicated it would at least  
3 consider the validity of claimed rights to water supplies created by Kern Delta's partial forfeiture.

4 **6. A Statement that Copies of the Petition and any Accompanying Materials have**  
5 **been sent to all Interested Parties. (23 Cal. Code Regs. § 769(a)(6).)**

6 Bakersfield served this Petition via email to the AHO at  
7 AdminHrgOffice@waterboards.ca.gov, as well as to the service list for the above-referenced Kern  
8 River Applications proceeding. Bakersfield does not know the identity of any other interested  
9 parties with respect to the Ruling.

10  
11 **STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF**  
12 **PETITION FOR RECONSIDERATION**

13 **I. BACKGROUND AND STATEMENT OF FACTS**

14 This proceeding arises from the prior litigation involving the Kern River, which resulted in a  
15 final decision, in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147  
16 Cal.App.4th 555 ("North Kern litigation") in which the Fifth Circuit Court of Appeal ultimately  
17 ruled that one of the senior pre-1914 water right holders on the Kern River, Kern Delta, partially  
18 forfeited some of its water rights due to extended non-use. (Exhibit Bakersfield-29.)<sup>1</sup> In that  
19 decision, the court established monthly diversion caps on certain partially-forfeited rights held by  
20 Kern Delta in certain months. The court of appeal also acknowledged, as did prior courts in the  
21 North Kern litigation, that it could not and would not rule on the disposition of forfeited water  
22 supplies. Instead, the court noted that pursuant to Water Code section 1241, only the Board could  
23 make a determination as to the status and disposition of the water supplies that would result from the  
24 forfeiture. (147 Cal.App.4th at 566, n. 5, 583-584.)

25 Thereafter, a number of parties to the current proceeding, including Bakersfield, refiled five  
26 applications to appropriate, as well as petitions to revoke or revise the Declaration of Fully

27 <sup>1</sup> References are to submitted exhibits in the AHO proceeding.  
28

1 Appropriated Stream Systems with respect to the Kern River. Later, a sixth application was filed by  
2 the Rosedale-Rio Bravo Water Storage District.

3 On February 16, 2010, the Board issued Order WR 2010-0010 amending the Declaration of  
4 Fully Appropriated Stream Systems to allow new applications to appropriate Kern River water.  
5 While the Board determined that unappropriated water existed on the Kern River, it did not  
6 determine at that time whether the partial forfeiture of Kern Delta's water rights resulted in  
7 unappropriated water, or how much or under what conditions water was available for appropriation  
8 from the Kern River. The Board thereafter denied the petition for reconsideration of Order WR  
9 2010-0010 filed by the North Kern Water Storage District ("North Kern"), the City of Shafter,  
10 Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency in  
11 Order WR 2010-0016. After the Board issued Order WR 2010-0010, the Division of Water Rights  
12 began processing the six Kern River water-right applications.

13 On March 18, 2021, Eileen Sobeck, Executive Director of the Board, assigned to the AHO  
14 for an adjudicative hearing several issues arising from the Kern River applications:

- 15 1. Is unappropriated water available to supply the applicants pursuant to Water Code  
16 section 1375, subdivision (d), and if so, how much unappropriated water is available?  
17 In determining whether unappropriated water is available, the AHO may consider  
18 whether unauthorized diversions or wasteful or unreasonable diversion or use of  
19 water are occurring, and whether claimed water rights have been abandoned or  
20 forfeited.
- 21 2. If unappropriated water is available, in what order should the Division process the  
22 applications? How should unappropriated water be allocated among the competing  
23 applications to appropriate water?
- 24 3. May the City of Bakersfield appropriate water made available due to a partial  
25 forfeiture of water rights, as determined by the court in North Kern Water Storage  
26 District v. Kern Delta Water District (2007) 147 Cal.App.4th 555? Or, is water made  
27 available by a partial forfeiture subject to diversion and use by the next-most senior  
28 rights, in order of priority, such that only water remaining after all senior rights are  
satisfied is subject to new appropriations?

(April 1, 2021 Notice of Assignment.)

25 The AHO issued a Notice of Status Conference on July 19, 2021 scheduling the status  
26 conference for August 17, 2021. At the status conference, the parties agreed that Phase 1A of the  
27 hearing would address whether Kern Delta's partial forfeiture of its water rights resulted in

unappropriated water in the Kern River system, and the amount of that unappropriated water. (August 30, 2021 Status Conference Ruling, Notice of Pre-hearing Conference and Notice of Public Hearing). In its Status Conference Ruling issued on August 30, 2021, the AHO Hearing Officer requested briefing to clarify the scope of Phase 1A and the legal standard that the AHO will apply to determine whether there is any unappropriated water and the amount of any unappropriated water resulting from the forfeiture of Kern Delta water rights. (*Id.*, p. 9.) Specifically, briefing was requested on the following 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?

(*Id.*)

The August 30, 2021 Status Conference Ruling, Notice of Pre-hearing Conference and Notice of Public Hearing also set a pre-hearing conference for October 28, 2021 and noticed the public hearing of Phase 1A for December 9-10, 2021.

Bakersfield, North Kern, and other parties, including the California Department of Fish and Wildlife and a coalition of public interest groups (“Public Interest Groups”),<sup>2</sup> subsequently submitted legal briefs on the issues requested by the AHO.

On November 3, 2021, the AHO issued the Ruling on the legal issues, which gave rise to this Petition. In the Ruling, the AHO determined that the forfeiture of a portion of a water right does not result in unappropriated water on the stream system in the amount of the forfeited portion of the right and that, in determining the amount of unappropriated water, the Board should consider the available supply of water on the stream system, including water available due to forfeiture, less the amount of water beneficially used pursuant to existing rights. (Ruling, pp. 2-5.) The AHO did agree

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<sup>2</sup> 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.

1 with Bakersfield’s assertion, however, that in considering existing water rights, the Board has the  
2 authority to examine the validity of claimed water rights, including pre-1914 appropriative rights.  
3 (Id., p. 5.) The Ruling stated: “Although such an investigation in to the validity of existing rights  
4 may not be justified or necessary in all contexts, the Board can and should consider the validity of  
5 claimed rights when the validity of those rights is challenged by an applicant who seeks to  
6 demonstrate that unappropriated water is available for appropriation.” (Id.)

7 With respect to the public trust, the AHO acknowledge the duty of the Board to protect  
8 public trust resources whenever feasible, but determined that it had the procedural discretion (as the  
9 delegate of the Board) to defer consideration of public trust resources until later in the proceeding,  
10 instead of at every stage of the proceeding as advocated by the Public Interest Groups. (Id., p. 6.)  
11 Ultimately, the AHO ruled that it would defer consideration of the instream flow needs to protect  
12 public trust resources in the interest of conducting an orderly proceeding until a later phase. (Id., p.  
13 7.)

## 14 **II. LEGAL RIGHT TO PETITION FOR RECONSIDERATION**

15 Pursuant to Water Code section 1112(c)(2), the Board may assign an adjudicative hearing  
16 that it would otherwise conduct to the AHO.

17 Water Code section 1114(c)(2) provides very limited remedies before the Board regarding a  
18 proposed final AHO order. In light of the importance of these issues and the need to protect  
19 valuable water supplies and public trust resources, Bakersfield seeks immediate review of the Ruling  
20 by the Board at this time, as it would be infeasible and inefficient to wait until the AHO has issued a  
21 final order in this proceeding before raising these objections.

22 On the filing of a petition of any interested person or entity, the Board may order  
23 reconsideration of all or part of a decision or order. (Water Code § 1122; see also 23 Cal. Code  
24 Regs. § 768.) “The petition shall be filed not later than 30 days from the date the board adopts a  
25 decision or order.” (Id.) “The board shall order or deny reconsideration on a petition therefor not  
26 later than 90 days from the date the board adopts the decision or order.” (Water Code § 1122.)

27 A petition for reconsideration may be based on the following grounds:  
28



- 1 (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person  
2 was prevented from having a fair hearing;  
3 (b) The decision or order is not supported by substantial evidence;  
4 (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have  
5 been produced;  
6 (d) Error in law.

7 (23 Cal. Code Regs. § 768.)

### 8 **III. BASIS FOR RECONSIDERATION**

9 The AHO committed errors of law in ruling that (1) protection of public trust resources  
10 should not be considered while it makes a water allocation decision in the Phase 1A hearing; and (2)  
11 the forfeiture of a portion of Kern Delta’s water rights did not create unappropriated water subject to  
12 the immediate authority of the Board to determine its disposition.

#### 13 **A. The AHO Committed an Error of Law in Ruling that it will not Consider Public 14 Trust Resources. (23 Cal. Code Regs. § 768(d).)**

15 The AHO erred in declining to consider public trust uses and resources until a later point in  
16 this proceeding, **after** it makes a water allocation decision involving the status of water supplies on  
17 the Kern River, in direct contravention of California law. (See *Audubon, supra.*) The ruling would  
18 result in the Kern River remaining dry through Bakersfield for most of the year, which will continue  
19 to have detrimental impacts on the Kern River and its wide range of public trust uses and interests.

20 A failure to consider public trust resources at this stage in the proceeding is contrary to  
21 California law and will result in the ongoing deterioration of water resources and public trust  
22 resources in the region. The Board has the authority and, importantly, the affirmative duty, to  
23 consider its public trust obligations at every stage of these proceedings, and specifically when  
24 making water allocation decisions affecting the Kern River. As the Ruling acknowledged:

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

In addition, “Any action which will adversely affect traditional public rights in trust lands is a matter

1 of general public interest and should therefore be made only if there has been full consideration of  
2 the state’s public interest in the matter.” (*San Francisco Baykeeper, Inc. v California State Lands*  
3 *Comm.* (2015) 242 Cal.App.4th 202, 234.)

4 No water is currently reserved or set aside for public trust, environmental, stream flow, or  
5 fish and wildlife purposes on the Kern River. The Kern River channel instead is dry most months of  
6 the year, without any consideration of timing or impacts on the environment. The Board is required  
7 and obligated to consider whether and to what extent any new supplies of water created by and  
8 resulting from forfeiture should be utilized and allocated to protect the public interest and public  
9 trust resources, including in-stream uses, and policies and uses involving and supporting  
10 environmental justice, the human right to water, water quality, climate change, recreation,  
11 preservation and enhancement of the environment and fish and wildlife resources, SGMA, and  
12 related policies.

13 While determining the status of and future disposition of water supplies, the Board must  
14 consider beneficial uses to protect the public interest, including in-stream uses, and “for recreation  
15 and preservation and enhancement of fish and wildlife resources.” (*United States v. State Water*  
16 *Resources Control Board* (1986) 182 Cal.App.3d 82, 103-104.) The Board must specifically take  
17 into consideration impacts to public trust resources, to determine the “quantity of water needed to  
18 protect public trust resources.” (*Garrapata Creek Water Company*, Decision No. 99-01, September  
19 24, 1999.) In *Millview County Water District v. State Water Resources Control Board* (2014) 229  
20 Cal.App.4th 879, 904 n. 22, the court stated: “The public trust doctrine requires the Board to take  
21 certain public uses, such as navigation, recreation, and the preservation of wildlife habitat, into  
22 account when allocating water use. (*Nat. Audubon v. Superior Court*, 33 Cal.3d at 434, 446– 447.)  
23 In *Audubon*, the Supreme Court held that the Board was not statutorily required to issue permits for  
24 the appropriation and beneficial use of all available water. By allowing some water to remain  
25 unappropriated, the Board could effectively allocate the water for public trust uses.”

26 The Board must also set aside water to protect municipal demands in the region, as evidenced  
27 by Bakersfield’s application to appropriate. Reasonable cause exists for the Board to implement and  
28

1 effectuate the statutes recognizing, prioritizing and protecting the City’s domestic use of Kern River  
2 water. (See e.g., Water Code §§ 106, 106.5, 1254, and 1460.) Further, as argued by the Public  
3 Interest Groups, “[t]he lack of a flowing river in the final miles of the Kern River forces residents of  
4 Bakersfield and Kern County to bear the cost of a dead and dry river, while private interests benefit  
5 from the water diversions.” (Public Interest Groups Opening Brief, p. 8.)

6 In the Ruling, the AHO acknowledged that “California law recognizes only a few limited  
7 exceptions to the rule of priority. Such exceptions include measures necessary to protect public trust  
8 resources and to implement the constitutional prohibition against the wasteful or unreasonable  
9 diversion or use of water. (*El Dorado Irrigation Dist. v. State Water Contractors* (2006) 142  
10 Cal.App.4th 937, 965-66.)” (Ruling, p. 3.) The Board cannot allow the new supply of forfeited  
11 water to be diverted out of the river by “prior right holders” and third parties without any  
12 consideration of and allowance for environmental, in-stream, and other public trust uses and  
13 interests, and without any Board oversight, supervision or authorization.

14 For this reason, it is improper for the AHO to have deferred any consideration of the public  
15 trust until after Phase 1A, potentially entirely negating the Board’s ability to consider and protect  
16 public trust resources before allocating the water created by the forfeiture to prior existing water  
17 rights. The Board has the authority *and* the affirmative duty to consider the public trust when  
18 making water allocation decisions, to protect public trust resources that are affected by its decisions,  
19 and to ensure that its decisions are consistent with the public interest. (*Audubon*, 33 Cal.3d at 426,  
20 446.) In considering the existence and extent of unappropriated water on the Kern River, and in  
21 potentially allowing junior right holders to divert and use water resulting from Kern Delta’s partial  
22 forfeiture, the AHO is **necessarily making a water allocation decision**. The AHO will make  
23 decisions and rulings in the Phase 1A hearing which will necessarily affect and determine the  
24 diversion and use of more than 40,000 acre-feet of water per year, on average, on the Kern River.  
25 The Board’s decision will determine whether a substantial new water supply will be available for  
26 diversion and use for a broad range of uses and needs, including public trust needs and interests, or  
27 whether the water will disappear from public review and consideration through secret back room  
28

1 deals and arrangements among North Kern and its allies.

2 **B. The AHO Erred in Ruling that the Forfeiture of a Portion of the Kern Delta**  
3 **Water Rights did not Create Unappropriated Water Subject to Board**  
4 **Authority. (23 Cal. Code Regs. § 768(d).)**

5 The AHO also erred in ruling that the forfeiture of a portion of the Kern Delta water rights  
6 did not necessarily and automatically create unappropriated water subject to Board authority to  
7 determine its disposition. California law establishes that the forfeiture of a portion of a water right  
8 necessarily results in unappropriated water on the stream system in the amount of the forfeited  
9 portion of the right. The Board is required to exercise its mandatory authority over all waters of the  
10 State and assume jurisdiction over the forfeited water as unappropriated water, pursuant to Water  
11 Code sections 1202(b) and 1241.

12 As a direct result of the finding of forfeiture in the North Kern litigation, the forfeited water  
13 accruing to the rights above the “forfeiture caps” no longer belongs to Kern Delta, and cannot be  
14 diverted and used pursuant to Kern Delta’s pre-1914 appropriative water rights. The water which  
15 accrues above the forfeiture caps does not belong to any other party or accrue to any other water  
16 rights, as no other party has a prior established right to divert and use the water, and no party can  
17 hold a new permit or license to divert the water until the Board exercises its authority. Upon the  
18 finding of forfeiture, the Board should have assumed jurisdiction over the forfeited water, as  
19 unappropriated water, with the full authority to determine its disposition.

20 The AHO erred and violated the principles, policies and mission of the Board by ruling that  
21 water supplies that result from and which are created by the forfeiture of pre-1914 appropriate rights  
22 can simply pass to junior right holders without proper review and approval. The Board cannot allow  
23 alleged junior right holders to divert and use newly available water supplies outside of the State  
24 permit system, without public review and involvement, and without proper consideration of public  
25 trust and environmental impacts, and without going through the appropriative right system.

26 The AHO erred by concluding that the presence of a demand for water by junior  
27 appropriators, by itself, determines the existence, and extent of unappropriated water that is available  
28 in a stream system.

Water Code section 1202(b) defines unappropriated water as:

“All water appropriated prior to December 19, 1914, which **has not been in process, from the date of the initial act of appropriation, of being put**, with due diligence in proportion to the magnitude of the work necessary properly to utilize it **for the purpose of the appropriation, or** which has not been put, or which has ceased to be put to some useful or beneficial purpose.” (Emphasis added.)

Section 1202(b) therefore addresses two different situations where unappropriated water exists: (1) where the original appropriator ceases to put water to use for the purpose of the original appropriation, **or** (2) where water has never been put or has ceased to be put to any useful or beneficial purpose by anyone.

Section 1241 of the Water Code expressly provides, in part: “If the person **entitled to the use of water** fails to use beneficially all or any part of the water claimed by him or her, **for which a right of use has vested**, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water.” (Emphasis added.) Water Code section 1675(a) states that if the Board revokes a water rights license based on a failure to put water to use for beneficial purposes, or for failure to observe any of the terms and conditions of the license, the water will thereafter “be subject to appropriation.”

These statutes therefore focus on the actions, or lack of action, of the **original appropriator** in failing to use water pursuant to the original appropriation, irrespective of how the unappropriated water is eventually diverted and used. It is undisputed that the court in the North Kern litigation found that Kern Delta had ceased to put certain quantities of water accruing to its pre-1914 rights to some useful or beneficial purpose in certain months. The finding of forfeiture by the original appropriator, Kern Delta, is entirely consistent with the definition of unappropriated water.

The definition and existence of unappropriated water is not affected by or dependent on the eventual disposition and use of the unappropriated water, or whether there are pre-existing demands for the unappropriated water. The statutes defining unappropriated water instead focus on the loss of a right or a failure to use water by an original appropriator, independent of the eventual disposition and use of the unappropriated water. Water Code section 1202(b) does not state, for example, that

1 unappropriated water is only water in excess of all other demands on a river, or only water in excess  
2 of alleged junior rights and claimants. The AHO erred by adding those conditions to the definition  
3 of unappropriated water.

4 The AHO confused and improperly merged the rules of priority with the definition and  
5 existence of unappropriated water. The rule of priority, and the existence of prior demands for water  
6 supplies, may impact the eventual disposition of unappropriated water, but does not negate the  
7 existence of unappropriated water, or deprive the Board of jurisdiction over unappropriated water.

8 The AHO also erred by relying on general language in outdated and nonbinding legal  
9 treatises to deny and suppress the existence of unappropriated water, and in particular by citing “2  
10 Hutchins, *Water Rights Laws in the Nineteen Western States* (1974).” The AHO should have instead  
11 followed current California law, and current Board procedures and policies.

12 Forfeited water does not and cannot automatically pass to junior right holders outside the  
13 authority and jurisdiction of the Board. Junior right holders cannot bypass the Board’s authority and  
14 obligation to “provide for the orderly and efficient administration of the water resources of the  
15 state.” (Water Code § 174.) Water which is lost through non-use instead becomes “open” to  
16 appropriation. (*Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595.) In *Temescal Water Co. v.*  
17 *Department of Public Works* (1955) 44 Cal.2d 90, 106, the California Supreme Court explained that  
18 what is unappropriated water is a “constantly fluctuating question, depending upon the seasonal flow  
19 of the stream, the annual rainfall, the **forfeiture of prior appropriations** and default in the use of  
20 riparian rights.” (Emphasis added.)

21 Instead, pursuant to Water Code section 1202, water that no longer accrues to established  
22 water rights becomes “available” for appropriation, subject to the jurisdiction and authority of the  
23 Board, as unappropriated water. Prior or junior claims to forfeited, abandoned, or revoked water  
24 rights may affect the potential allocation or disposition of the forfeited water, but such prior claims  
25 do not affect the Board’s authority and jurisdiction over the forfeited water as unappropriated water.

26 The finding of forfeiture in the North Kern litigation created a supply of water that can and  
27 has been separately identified, quantified, measured and distributed as a new supply of water. No  
28

1 court or Board decision supports the claim that forfeited water should not be considered  
2 unappropriated water, but instead should be divided up and diverted by alleged junior rights with no  
3 Board review, approval, or supervision. That would be tantamount to allowing water right holders to  
4 make secret, private “back room deals” to apportion water resources without any involvement or  
5 knowledge by the Board, or the public.

6 Contrary to the claim in the Ruling, the courts in the North Kern litigation did not determine  
7 the status of the forfeited water. In fact, every court that considered the disposition of the water  
8 forfeited by Kern Delta held that only the Board can decide whether the forfeited water constitutes or  
9 becomes unappropriated water, and is available for appropriation through a new permit or license.  
10 The court of appeal confirmed in 2007 that whether and to what extent Kern Delta’s partial forfeiture  
11 of water rights created unappropriated water **“is a determination not for the courts in the first  
12 instance, but for the SWRCB.”** (147 Cal.App.4th at 583 [emphasis added].) The court of appeal  
13 further noted that it was not appropriate for the trial court to have ruled that Kern Delta’s forfeiture  
14 created unappropriated water. The court stated: “Instead, the initial determination whether the  
15 forfeiture creates an allocable excess is reserved in the first instance to the SWRCB.” (*Id.*, p. 584.)  
16 The court of appeal further held: **“However, the trial court was correct that the forfeited rights  
17 are not awarded to North Kern.”** (*Id.* [emphasis added].)

#### 18 IV. CONCLUSION

19 Based on the foregoing, the City respectfully requests that the Board grant its Petition for  
20 Partial Reconsideration of the AHO’s Ruling and reverse the first and third portions of the Ruling.

21 Dated: December 3, 2021

DUANE MORRIS LLP

22  
23  
24 By: 

25 Colin L. Pearce  
26 Jolie-Anne S. Ansley  
27 B. Alexandra Jones

28 Attorneys for Petitioner  
CITY OF BAKERSFIELD

# **EXHIBIT A**



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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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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 **CITY OF BAKERSFIELD'S PETITION FOR RECONSIDERATION OF THE**  
9 **ADMINISTRATIVE HEARINGS OFFICE'S NOVEMBER 3, 2021 RULING ON LEGAL**  
10 **ISSUES AND PRE-HEARING CONFERENCE RULING**

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

15 **SEE ATTACHED SERVICE LIST**

16 I declare under penalty of perjury under the laws of the State of California that the foregoing  
17 is true and correct. Executed on December 3, 2021, at San Francisco, California.

18 

19 \_\_\_\_\_  
20 Michelle Sangalang  
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27  
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**SERVICE LIST**

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