

State Water Resources Control Board

NOTICE OF PRE-HEARING CONFERENCE AND NOTICE OF PUBLIC HEARING

The State Water Resources Control Board
Administrative Hearings Office
will hold a Pre-Hearing Conference and a Public Hearing, **Phase 1B**,
on the applications of

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

for permits to appropriate water from the Kern River system.

**The Pre-Hearing Conference will begin on
February 1, 2022, at 9:00 am**
and will be held by Zoom teleconference.

**The Public Hearing, Phase 1B, will begin on
March 15, 2022, at 9:00 am**
and continue on March 16, 17, and 18 and April 5 and 6, at 9:00 am,
and additional days as necessary.
The Public Hearing will be held by Zoom teleconference.

Representatives of parties and other people who want to participate in this pre-hearing conference or this hearing may access these Zoom teleconferences by using the following link and call-in information:

Please access Zoom by using the link:
<https://waterboards.zoom.us/j/94898947896?pwd=SXNrZ3lQeFZwM2liaiBMakpHbGFTUT09>

With Meeting ID: 948 9894 7896 and Passcode: 609008

or by calling in at:
+16699009128,,94898947896#,,, *609008# US (San Jose)

Interested members of the public who would like to watch this hearing without participating may do so through the Administrative Hearings Office YouTube channel, accessible by clicking on “Watch AHO Hearings” at:
https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

PURPOSE OF HEARING

The purpose of Phase 1B of this hearing is to receive evidence that the Administrative Hearings Office (AHO) and the State Water Resources Control Board (State Water Board or Board) will consider when determining how much unappropriated water is available to supply the six applications for permits to appropriate water from the Kern River system, pursuant to Water Code section 1375, subdivision (d), that is in addition to any unappropriated water made available as a result of the decision in *North Kern Water Storage District v. Kern Delta Water District* (2007).

BACKGROUND

In 2007, the State Water Board Division of Water Rights (Division) received applications for permits to appropriate water from the Kern River system from 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 Kern County Water Agency (Application 31677). In 2010, the Division received a sixth application for a permit to appropriate water from the Kern River system from Rosedale-Rio Bravo Water Storage District (Application 31819).

Additional background information about the Kern River system, State Water Board Order WR 2010-0010 amending the Declaration of Fully Appropriated Stream Systems, and the proceedings by the Division on the six applications for permits to appropriate water from the Kings River system, is provided in the AHO’s Status Conference Ruling, Notice of Pre-Hearing Conference, and Notice of Public Hearing dated August 30, 2021.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing to the AHO.

On February 24, 2021, Erik Ekdahl, Deputy Director of the Division of Water Rights, transmitted a memorandum to Eileen Sobeck, Executive Director of the State Water Board, recommending that the State Water Board assign issues arising from the six Kern River water-right applications to the AHO for further proceedings and an adjudicative hearing.

On March 18, 2021, Ms. Sobeck transmitted a memorandum to Alan Lilly, Presiding Hearing Officer of the AHO, assigning to the AHO for an adjudicative hearing the following issues arising from the six Kern River water-right applications:

1. Is unappropriated water available to supply the applicants pursuant to Water Code section 1375, subdivision (d), and if so, how much unappropriated water is available? In determining whether unappropriated water is available, the AHO may consider whether unauthorized diversions or wasteful or unreasonable diversion or use of water are occurring, and whether claimed water rights have been abandoned or forfeited.
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?
3. May the City of Bakersfield appropriate water made available due to a partial forfeiture of water rights, as determined by the court in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555? Or, is water made available by a partial forfeiture subject to diversion and use by the next-most senior rights, in order of priority, such that only water remaining after all senior rights are satisfied is subject to new appropriations?

PROCEEDINGS BEFORE THE ADMINISTRATIVE HEARINGS OFFICE

The AHO held a status conference in this matter on August 17, 2021. The status conference addressed whether the hearing on the Kern River water-right applications should be conducted in phases and the hearing issues to be addressed in each phase.

On August 30, 2021, the AHO issued a Status Conference Ruling, Notice of Pre-Hearing Conference, and Notice of Public Hearing for Phase 1A (Phase 1A Hearing Notice). The Phase 1A Hearing Notice identified the following issue to be addressed in the Phase 1A hearing:

Did the partial forfeiture of water rights by Kern Delta Water District as determined by the court in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 result in unappropriated water in the Kern River system? If so, what is the amount of that unappropriated water?

To clarify the scope of Phase 1A and the legal standard that the AHO would apply to make this determination, the August 30 Ruling directed Bakersfield, North Kern Water Storage District, and the City of Shafter to submit written briefs that addressed 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?

On November 3, 2021, before the start of the evidentiary hearing in Phase 1A, the AHO issued a ruling (AHO November 3 Ruling) addressing the three legal issues that the hearing officer directed the parties to brief.

The AHO November 3 Ruling concluded that: (a) the forfeiture of a water right does not necessarily result in unappropriated water in the system because water that is not diverted and used due to the forfeiture of a senior right is available for diversion and use by other water-right holders, in the order of their priorities (AHO November 3 Ruling, p. 2); (b) whether surplus water remains for appropriation depends on the available supply and the extent of demands under existing rights (*ibid*); and (c) a determination of whether unappropriated water is available because of the forfeiture of a water right, and, if so, how much, is a factual determination that requires consideration of other rights to divert and use water in the system (*id.* at p. 3).

Additionally, the AHO November 3 Ruling confirmed that 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. The AHO concluded that it has discretion to decide at what point during any proceeding it should consider impacts to public trust resources. (*Id.* at pp. 5 & 7 [citing *Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446-447.]) For purposes of Phase 1A, the AHO decided to defer consideration of the instream flow needs to protect public trust resources to a later phase of the hearing, to facilitate conducting an orderly proceeding. (*Id.* at p. 7.)

The AHO held Phase 1A of the hearing on December 9 and 10, 2021.

Phase 1B of this hearing will address the amount of unappropriated water in the Kern River system in addition to any unappropriated water made available as a result of the partial forfeiture of water rights by Kern Delta Water District. After conducting hearing Phases 1A and 1B, the AHO will conduct subsequent phases of the hearing as necessary to address remaining issues assigned to the AHO by the Executive Director in her March 18, 2021 memorandum.

HEARING ISSUES

The purpose of Phase 1B of this hearing is to receive evidence relevant to the following issue:

How much unappropriated water is available to supply the six applications for permits to appropriate water from the Kern River system, pursuant to Water Code section 1375, subdivision (d), in addition to any unappropriated water made available as a result of the decision in *North Kern Water Storage District v. Kern Delta Water District* (2007)?¹

Relevant sub-hearing issues may include the following:

- (1) What are the maximum amounts of diversion and use authorized by valid water rights in the Kern River system during each authorized season of diversion?
- (2) What are the historical amounts of diversion and use authorized by valid water rights in the Kern River system during each authorized season of diversion?
- (3) What are the likely future amounts of diversion and use authorized by valid existing water rights during each authorized season of diversion?
- (4) How much water is physically available in the Kern River system to supply existing valid water rights during each authorized season of diversion?
- (5) How much water is physically available in the Kern River system in excess of demands of valid water rights during each authorized season of diversion?
- (6) What is the appropriate time-step of analysis to consider when determining whether the supply of water in the Kern River system exceeds the amount of diversion and use authorized by valid rights: daily, monthly, yearly, or some other measure of time?

In Phase 1B, the AHO will consider evidence relevant to the validity and scope of claimed water rights in the Kern River system for the limited purpose of determining how much unappropriated water is available to supply the applicants pursuant to Water Code section 1375, subdivision (d). This proceeding will not be an adjudication of water rights and is distinct from the statutory adjudication process authorized by Water Code sections 2500-2900. (See State Water Board Decision 1642 (2001), pp. 10-11 [“A determination of whether water is available pursuant to [the application], including a determination of whether senior rights are harmed, can be accomplished without adjudicating water rights.”].) The purpose of the analysis under section 1375, subdivision (d), is to determine the amount of water in the Kern River system that is in excess of the amounts needed for diversions for beneficial uses authorized by valid water rights and that is available on a sufficiently reliable basis to support issuance of a

¹ This hearing issue does not include the amounts of water that may be required to remain instream to protect public trust resources and, when it is in the public interest, for recreation and the preservation and enhancement of fish and wildlife resources. These issues will be considered by the Board at an appropriate time, which is likely to be after the applications have been publicly noticed and the Board has received any protests.

permit to appropriate the water. A water availability analysis under section 1375, subdivision (d), is not required to be conducted at the level of detail that would be appropriate for an adjudication of water rights and does not typically include a detailed investigation of the validity of every claim of right in the system. (See State Water Board Order WR 2001-07, p. 9 [“[A] specific inquiry into the individual rights of protestants who claim rights senior to a water right applicant is not necessarily required, and is not necessary in this case.”].)

The State Water Board is required to protect public trust resources to the extent feasible and consistent with the public interest when making water allocation decisions, and the Board must take into account the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources, when it is in the public interest, in determining the amount of water available for appropriation. (*Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446-447; Wat. Code, § 1243, subd. (a).) The State Water Board, including the AHO, has discretion to decide at what point during any proceeding it should consider impacts to public trust resources and instream uses. The AHO will consider instream flow needs to protect public trust resources in this proceeding to the extent necessary to address the issues assigned to the AHO for hearing, but will do so in a subsequent hearing phase.

Any proposed preliminary finding about the amount of unappropriated water that may be available in the Kern River system issued by the AHO after Phase 1B but before the AHO or the State Water Board has fully considered potential impacts to public trust resources, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources, and the public interest, will be conditioned upon the Board’s future consideration of these issues. As stated in the AHO’s November 3 Ruling, it is typically neither practical nor efficient for the Board to engage in a detailed consideration of impacts to public trust resources before an application has been publicly noticed and before completion of environmental review under CEQA. It is likely that the Board will revisit public trust considerations with respect to the six Kern River Applications after the applications have been publicly noticed, the parties have attempted to resolve outstanding protests, and environmental review under CEQA is complete.

HEARING OFFICER AND HEARING TEAM

Hearing Officer Nicole Kuenzi will preside during the pre-hearing conference and the hearing. Other AHO staff members may be present and may assist the hearing officer during the pre-hearing conference and the hearing and throughout these proceedings. The hearing officer and other AHO staff members may consult with staff of the Division of Water Rights, staff of the Board’s Office of Chief Counsel, members of the executive

management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding.

PRE-HEARING CONFERENCE

The hearing officer will hold a pre-hearing conference on the date and at the time listed on the first page of this notice. To participate in the pre-hearing conference, please use the Zoom teleconference information provided on the first page of this notice. Because of the current COVID-19 pandemic, no in-person appearances will be allowed for this pre-hearing conference.

To facilitate a clear understanding of who is speaking, the hearing officer will ask each person to identify himself or herself as necessary during the conference. The pre-hearing conference will be electronically recorded by Zoom teleconference. The hearing officer will prepare a pre-hearing conference order after the conference.

The pre-hearing conference will address the following issues:

1. The deadlines for submitting exhibits and testimony, and the hearing dates, for hearing Phase 1B are listed in this notice. Should the hearing officer change any of these deadlines or hearing dates or make other changes to the Phase 1B hearing schedule?
2. Should the hearing officer require the submission of rebuttal evidence in advance of the Phase 1B hearing as indicated in this notice?
3. Should the hearing officer set deadlines for the submission of written evidentiary motions in advance of the Phase 1B hearing?
4. Should the AHO include all or some portion of the evidentiary record for Phase 1A in the evidentiary record for Phase 1B?
5. Are there any other procedural issues concerning the Phase 1B hearing that the participants want raise? If so, what are those issues?

Parties do not need to file pre-hearing conference statements. If any party wants to file a pre-hearing conference statement, then the party shall file the pre-hearing conference statement with the AHO, and serve copies of it on the other parties listed in the attached service list, by the deadline listed below. After the deadline to submit pre-hearing conference statements, the AHO will post the statements on the Water Board AHO FTP site (FTP site) in the folder for this matter.

NOTICES OF INTENT TO APPEAR

Any person or entity that wants to participate in hearing Phase 1B in this matter must file a Notice of Intent to Appear (NOI) with the AHO, using the form in this notice, before the deadline listed below. The AHO encourages parties to agree to accept electronic e-mail service of all documents regarding this hearing. If a party is not willing to do this, then the party may check the appropriate box on the NOI form. Parties not agreeing to accept electronic service of documents will experience delays as

paper copies of documents are transmitted by U.S. Mail. If this box is not checked, then the AHO will assume that the party agrees to accept electronic service. After the deadline to submit NOIs, the AHO will post the NOIs on the FTP site in the folder for this matter. Parties will have the opportunity to submit an amended NOI to update information provided in this initial NOI for Phase 1B.

HEARING SCHEDULE AND DEADLINES

Deadlines / Schedule	Date and Time
Deadline for any party who wants to participate in the Phase 1B hearing to file an NOI.	January 28, 2022, 12:00 p.m.
Deadline for filing optional pre-hearing conference statements.	January 28, 2022, 12:00 p.m.
Pre-hearing conference.	February 1, 2022, 9:00 a.m.
Deadline for all parties to file exhibits and exhibit identification indices with AHO. Deadline for all parties to file amended NOIs.	February 15, 2022, 12:00 p.m.
Deadline for all parties to file rebuttal exhibits and exhibit identification indices with AHO.	March 14, 2022, 12:00 p.m.
Phase 1B Hearing for presentation of cases-in-chief.	March 15, 16, 17, & 18, 2022, 9:00 a.m., and additional dates as necessary.
Phase 1B Hearing for presentation of rebuttal.	April 5 & 6, 2022, 9:00 a.m., and additional dates as necessary.

At this time, the AHO does not intend to begin the rebuttal portion of Phase 1B of the hearing until 9:00 a.m. on April 5, 2022.

SUBMITTALS OF DOCUMENTS TO AHO AND OTHER PARTIES

All documents submitted to the AHO, including NOIs and status conference statements, shall be addressed and submitted by one of the following methods (with proofs of service, as discussed below):

Method	Address
By e-mail (preferred method for documents other than exhibits):	AdminHrgOffice@waterboards.ca.gov With subject line “ Kern River Applications ”
By Uploading to FTP site (preferred method for exhibits):	The AHO will provide a unique username and password to each party that has filed an NOI which that party then may use to access the FTP site to upload exhibits and other documents.
By Mail:	State Water Resources Control Board

	Administrative Hearings Office P.O. Box 100 Sacramento, CA 95812-0100
By Hand-Delivery (see note below):	Joe Serna Jr. CalEPA Building Administrative Hearings Office 1001 I Street Sacramento, CA 95814

Service of documents by hand-delivery may be more difficult or delayed due to closures of the CalEPA Building during the COVID-19 pandemic. Please plan ahead if you wish to hand deliver documents and e-mail AHO staff in advance at AdminHrgOffice@waterboards.ca.gov to arrange for hand-delivery of documents.

Please see the part of this notice below titled “PROCEDURES FOR THIS WATER-RIGHT HEARING” for more information regarding hearing procedures and submittals of exhibits.

DIVISION OF WATER RIGHTS PUBLIC RECORDS

The AHO has copied documents from the public records the State Water Board’s Division of Water Rights Records Unit has maintained that may be relevant to this proceeding. The AHO has included these documents in the initial administrative record for this hearing. The AHO has posted files of these documents on the FTP site in the folder for this matter. Instructions on how to access the FTP site are listed in Section 8 below. The parties may review the Division of Water Rights Records Unit’s public files and may submit as exhibits copies of other relevant documents in these files.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for Internet website accessibility in Government Code section 11546.7, the AHO will post all of its notices and other documents regarding these proceedings on the AHO’s Internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

HEARING LIVE-STREAM AND RECORDING

The pre-hearing conference and hearing will be live streamed through the Administrative Hearings Office YouTube channel, accessible by clicking on the link provided below. The live stream will consist of a morning session and an afternoon session. Each session may be accessed through the appropriate link on the Administrative Hearings Office YouTube channel. To view the morning session, click the link identified as “morning.” The morning session will conclude at the lunch break. To view the afternoon session, click the link identified as “afternoon.” The afternoon session will begin after the lunch break.

After the conclusion of the hearing, a recording of the morning and afternoon YouTube live-stream sessions will be available on the Administrative Hearings Office YouTube channel. These recordings will include automatic captions for accessibility.

The live-stream and recordings may be accessed at the following link: <https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig/videos?view=57>

SEPARATION OF FUNCTIONS; PROHIBITION ON *EX PARTE* COMMUNICATIONS

All parties are prohibited from having any *ex parte* communications with any members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.) The AHO has posted a discussion of *ex parte* communications on the AHO's webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/2021-07-06_webpage_faq.pdf. (See response to FAQ 16.)

If any party wants to communicate with the AHO at any time regarding any procedural or substantive issue regarding these proceedings, including any issue regarding the pre-hearing conference, hearing procedures or filing of documents, then that party shall make such communication to the AHO in writing (by e-mail or letter) and serve all other parties with copies of the communication and include a proof of service demonstrating such service of the written communication to the AHO. A party may provide this proof of service through a formal proof of service or by other verification. For e-mails, the verification shall be a list of the e-mail addresses of the parties or their representatives in an electronic mail "cc" (carbon copy) list. For letters, the verification shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter.

Any party submitting any document to the AHO shall transmit copies of the document to all of the other parties on the NOI list. This transmittal may be by e-mail to parties for whom e-mail addresses are listed in the service list. For other parties, this transmittal shall be by U.S. Mail. Whenever any party files any document with the AHO for this proceeding, the party shall include a proof of service using one of the methods described above that confirms that the party has transmitted copies of the document to all other parties and that describes the method of service.

Please do not attempt to communicate by telephone or in person with any AHO hearing team member regarding any procedural or substantive issue concerning this hearing, because other parties would not be able to participate in such communications. If oral communications with any members of the AHO hearing team are necessary to discuss any procedural or substantive issue, then the AHO will set up a conference call in which representatives of all parties may participate. Any party may request such a conference call at any time using the written communications protocols described above.

PROCEDURES FOR THIS WATER-RIGHT HEARING

The following procedures apply to this hearing. The hearing officer may amend these procedures before, during or after the hearing as he or she deems appropriate.

- 1. HEARING PROCEDURES:** The Administrative Hearings Office (AHO) will conduct this hearing according to the procedures for hearings set forth in California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. Copies of these regulations are posted on the State Water Resources Control Board's website: http://www.waterboards.ca.gov/laws_regulations. If there is any conflict between any provision of this notice and any provision of these regulations or any applicable statute, then the provision of the regulation or statute shall apply to this proceeding.

Consistent with California Code of Regulations, title 23, section 648.5, unless the hearing officer determines otherwise before or during the hearing, each party may make an opening statement, present witnesses and exhibits, cross-examine opposing parties' witnesses, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if that witness were under cross-examination. The hearing officer will allow parties to submit closing briefs. These procedures are described in more detail in section 10. The hearing officer may issue rulings regarding these procedures before or during the hearing.

The AHO encourages parties with common interests to work together to make unified presentations and to take other actions to make the hearing process more efficient.

Parties may file any requests for exceptions to these hearing procedures in writing with the AHO and must serve any such requests on the other parties. To provide time for parties to respond, the hearing officer normally will not rule on procedural requests filed in writing until at least five days after receiving the request, unless the hearing schedule requires an earlier ruling.

- 2. SETTLEMENTS:** In water-right permitting matters, the parties normally include the applicant and protestants. The applicants and protestants may engage in private settlement discussions, and may, or may not, include any other persons in those discussions. No representative of the AHO will participate in such settlement discussions. If the parties or their representatives sign a written settlement agreement, then they shall promptly file a copy of the signed agreement with the AHO. Although the AHO may authorize other persons to participate in the hearing as parties, such authorizations do not necessarily allow those persons to participate in any settlement discussions between the applicant and protestants in water-right permitting matters.

The State Water Board, or the Executive Director under State Water Board Resolution No. 2012-0061, may issue an order approving a settlement agreement between the applicant and some or all of the protestants in water-right permitting matters even if other parties to the proceeding have not approved the settlement agreement. The hearing officer normally will give all parties opportunities to

comment on any settlement agreement submitted to the AHO before the AHO transmits a proposed order approving the settlement agreement to State Water Board or Executive Director, unless all parties to the hearing or their representatives have signed the settlement agreement.

3. **PARTIES:** As provided in California Code of Regulations, title 23, section 648.1, subdivisions (a) and (b), **North Kern Water Storage District, City of Shafter, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority, Kern County Water Agency, Rosedale-Rio Bravo Water Storage District, Kern Delta Water District, Tulare Lake Basin Water Storage District, California Trout, Center for Biological Diversity, California Department of Fish and Wildlife, and “the Public Interest Groups” (Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Kern-Kaweah Sierra Club, and Panorama Vista Preserve)** are parties to this proceeding.

The hearing officer may allow any other person or entity that timely files a Notice of Intent to Appear to participate in the hearing as a party. (See Cal. Code Regs., tit. 23, § 648.1, subd. (a) & (b).) A person or entity that has not been identified as a party in this notice that wants to participate as a party in this hearing shall file a Notice of Intent to Appear with the AHO before the deadline specified in this notice. The person or entity shall include an attachment to the Notice of Intent to Appear form demonstrating good cause as to why the hearing officer should allow the person or entity to participate in the hearing as a party rather than as an interested person presenting a policy statement.

The hearing officer may impose limitations on any party's participation in the hearing. (See Gov. Code, § 11440.50, subd. (c).) The hearing officer also may designate persons or entities that do not file timely Notices of Intent to Appear as parties, for good cause shown and subject to appropriate conditions. Except as specifically provided in this notice or by ruling of the hearing officer, the hearing office will allow only parties to present evidence, make objections, and examine witnesses.

4. **POLICY STATEMENTS BY INTERESTED PERSONS:** As provided in California Code of Regulations, title 23, section 648.1, subdivision (d), the hearing officer normally will allow interested persons who are not designated as parties to present or submit non-evidentiary policy statements. Interested persons may submit policy statements in writing before the hearing or present or summarize them orally during the hearing. The hearing officer will not permit a person or entity that appears and presents only a policy statement to make objections, offer evidence, conduct cross-examination, make legal arguments, or otherwise participate in the evidentiary hearing. The AHO will not add such persons or entities to the service list.

Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons who want to make oral policy statements during the hearing should file Notices of Intent to Appear indicating an intent to make

only a policy statement. The hearing officer may impose time limits on presentations of oral policy statements or oral summaries of written policy statements.

The AHO requests that interested persons and entities who file written policy statements with the AHO serve copies of their statements on all parties before the person or entity presents such statements or summaries of them during the hearing. See section 8 for details regarding electronic submittals of documents.

- 5. NOTICES OF INTENT TO APPEAR:** As provided in California Code of Regulations, title 23, section 648.4, all people and entities that want to participate in the hearing as parties must file either an electronic copy or a paper copy of a Notice of Intent to Appear with the AHO before the deadline specified in this notice. The AHO may interpret a failure to file a Notice of Intent to Appear by this deadline as a decision not to appear. In matters regarding water-right applications, the requirement to file a Notice of Intent to Appear by the deadline is a request for additional information pursuant to Water Code section 1334. The Board may cancel an application if the applicant does not file an NOI by the deadline.

As discussed in the preceding section, the AHO requests that any interested person who will not be participating as a party, but will be presenting only a non-evidentiary policy statement, file a Notice of Intent to Appear before the deadline and specify in the notice that the person only will be presenting a policy statement.

As provided in California Code of Regulations section 648.4, subdivision (b), the Notice of Intent to Appear for parties (but not for people only presenting policy statements) must state the name and address of the participant. For parties, the Notice of Intent to Appear also must state: (1) the name of each witness whom the party intends to call at the hearing; (2) a brief description of the subject of each witness's proposed testimony; and (3) an estimate of the time that the party requests for each of its witnesses to present an oral summary of his or her written testimony. (See section 6 for requirements that apply to written testimony.) The total time requested for summaries of all of each party's witnesses shall not to exceed the total time limit for oral summaries of written testimony described in section 10, part b.ii.

If a party intends to call any expert witnesses, the party shall designate each expert witness as an expert witness in the party's Notice of Intent to Appear.

Parties that do not intend to present cases-in-chief but want to cross-examine witnesses or present rebuttal testimony should so indicate on their Notices of Intent to Appear.² A party that decides not to present a case-in-chief after having

² A party is not required to present evidence as part of a case-in-chief. The hearing officer will allow parties not presenting evidence as cases-in-chief to participate through opening statements, cross-examination, and rebuttal, and to present closing statements or briefs, if the hearing officer allows other parties to present such closing statements or briefs.

submitted a Notice of Intent to Appear should notify the AHO and the other parties as soon as possible.

Parties that are not willing to accept electronic service of hearing documents must check the appropriate box on the Notice of Intent to Appear. Because service of documents to such parties normally will be by U.S. Mail, such parties will experience delays in receiving hearing documents.

The AHO will e-mail or mail an updated service list with the names of parties and their contact information to each person or entity that has submitted a Notice of Intent to Appear or asked to be on the updated service list. The service list will indicate if any party is not willing to accept electronic service. If there is any change in the hearing schedule, the hearing officer will send a notice of such change to the parties on the service list and interested persons who have filed Notices of Intent to Appear expressing their intentions to present policy statements.

6. WRITTEN TESTIMONY AND OTHER EXHIBITS: Exhibits include all written testimony, statements of qualifications of expert witnesses, and other documents to be submitted as evidence. As provided in California Code of Regulations, title 23, section 648.4, subdivision (c), each party that wants to offer testimony into evidence shall submit written proposed direct testimony of each witness by the deadline for filing exhibits. The hearing officer will not permit a witness to give oral testimony that goes beyond the scope of the witness's written proposed testimony absent good cause. Each party shall designate each of its witness's written proposed testimony as a separate exhibit. Each party must submit all of its witnesses' written proposed testimony with the party's other exhibits before the exhibit filing deadline. A party who offers expert testimony must submit an exhibit containing a statement of each expert witness's qualifications, in addition to a separate exhibit with the expert witness's written proposed testimony.

The AHO encourages all parties to prepare and submit as a separate exhibit for each witness a set of slides that summarize each witness's testimony. During the hearing, the party may use the exhibit with the slides to facilitate each of the party's witness's oral summary of his or her written proposed testimony. The parties must label the slides for each witness as a separate exhibit and submit it by the exhibit submittal deadline.

The AHO's normal practice is to prepare and circulate an Excel spreadsheet containing a list of the documents in the administrative record that the hearing officer expects to move into the evidentiary record during the hearing. These documents are "AHO exhibits." The AHO will post this list to the State Water Board's FTP site and notify the parties of the posting of this list at the time the AHO moves the parties' uploaded exhibits into the downloads folder (see section 8).

7. EXHIBIT FORMATTING AND ORGANIZATION: A party submitting evidence must file with the AHO both the exhibits and an Exhibit Identification Index. The Exhibit Identification Index is a list of exhibits in Excel format.

Each party should label exhibits with a short version of the party's name and sequential numbers. For example, the City of Bakersfield's exhibits should be numbered Bakersfield-1, Bakersfield-2, etc., and North Kern Water Storage District's exhibits should be numbered North Kern-1, North Kern-2, etc. Do not use any sub-letters like 1a, 1b, etc. for exhibit numbers.

Each party should number each paragraph of each witness's written testimony sequentially, 1, 2, 3, etc. (This paragraph numbering will make it easier for the hearing officer and representatives of other parties to ask each witness questions about his or her written testimony.) Witnesses should not use any sub-paragraph letters like 1a, 1b, etc. in their written testimony. A witness may include headings like "Background," "Introduction," etc. for different sections of the witness's proposed written testimony, but should not number or letter these headings and should not re-start the paragraph numbering in each section.

Parties may use pleading paper with line numbers in the left margins for their witnesses' written proposed testimony.

Each party must submit to the AHO the exhibits and exhibit identification indices for this hearing before the deadline specified in the Hearing Notice. The AHO may treat a party's failure to submit exhibits before this deadline as a waiver of the party's right to submit exhibits for the hearing and a waiver of the party's status as a party.

- a. Parties submitting exhibits based on complex technical analyses also must submit sufficient information so that a qualified independent expert could reproduce the results.

Parties submitting exhibits based on models or technical studies (such as reports, recommendations, or requirements) also must submit sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the models or studies, so that a qualified independent expert could reproduce the model or technical study and use it to obtain the same results.

- b. Consistent with California Code of Regulations, title 23, section 648.3, the hearing officer has discretion to decide whether to receive into evidence by reference any relevant, otherwise admissible, public records of the State Water Board and any documents or other evidence that a public agency has prepared or published, provided that the original or a copy was in the possession of the State Water Board before the hearing officer issued this notice. A party offering such an exhibit by reference shall advise the other parties and the AHO of the

title of the document, the particular portions of the document, including page and paragraph numbers, that the party will ask the hearing officer to consider, the purpose for which the party will use the portions of the exhibit if it is accepted into evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.

- c. The hearing officer normally will exclude exhibits that rely on unpublished technical documents unless the hearing office has admitted the unpublished technical documents into evidence.
- d. Parties submitting large-format exhibits such as maps, charts, and other graphics shall provide the originals for the hearing record in a form that can be folded to 8 ½ x 11 inches. Parties also shall file, for the hearing record, a reduced copy of a large-format original exhibit. The hearing officer will determine whether the large-format version or the reduced copy, or both, will be admitted into evidence.

8. SUBMISSIONS OF DOCUMENTS: To expedite the exchange of documents, reduce paper use, and lower the cost of participating in the hearing, all participants must submit hearing documents by uploading them to the State Water Board's FTP site in electronic form (in addition to filing two paper copies of each exhibit with the AHO) unless the hearing officer authorizes submission of exhibits in different formats.

The State Water Board's FTP site may be accessed at <https://ftp.waterboards.ca.gov/>. All parties may use the shared account on this site to access and download documents in the administrative record for this hearing. This shared account is referred to in this notice as the "AHO-FTP Download Folders". The AHO will provide each party a unique account to upload the party's documents for this hearing. These accounts are referred to in this hearing notice as the "Parties' Upload Folders".

a. AHO-FTP Download Folders:

The AHO will create a folder for each proceeding on the State Water Board's FTP site. The folder for each proceeding will contain all administrative record documents related to that proceeding and may contain various subfolders, including subfolders for background documents and hearing documents. Only AHO personnel may upload files to this folder. The AHO will post each party's hearing exhibits, exhibit identification indices and closing briefs to this folder promptly after each filing deadline. The AHO may add other administrative record documents to this folder during this proceeding (including recordings of hearings). The documents in this folder will be the AHO's administrative record for this proceeding. Anyone may download documents from the AHO-FTP download folder for any proceeding at any time.

If any party believes that the AHO should add documents to, or remove any documents from, this folder for this proceeding, then the party may file a request to the hearing officer for such action (by e-mailing the request to the AHO e-mail inbox), and shall transmit copies of the request to all other parties on the service list. The hearing officer will issue rulings or take other actions on such requests as the hearing officer deems appropriate.

b. Parties' Upload Folders:

The AHO will create a separate upload account for each party that files an NOI as a party for this hearing, so that the party may upload the party's exhibits and other documents to the folder for that account. In most cases, these accounts will be specific for each party and each hearing and the AHO will close the accounts for each hearing after the hearing and related proceedings have been completed.

Any party to this proceeding may upload documents for this proceeding (primarily exhibits and exhibit identification indices and closing briefs) using the party's upload account. Only the party may upload files to the party's folder, and only the AHO may view, transfer and download files from this folder. After the applicable filing deadline, AHO staff will move documents uploaded by each party to the administrative record in the AHO-FTP download folder for the proceeding, so all other parties may view and download the documents.

Documents uploaded by the parties normally must be in Adobe Portable Document Format (PDF), except that spreadsheets may be submitted in Microsoft Excel format, slide presentations may be submitted in Microsoft PowerPoint format, and exhibit identification indices must be submitted in Microsoft Excel format.

If a party wants to submit an exhibit in any other format, then the party shall submit a written request to the hearing officer, and serve copies of the request on all other parties on the service list, at least 14 days before the deadline for submitting exhibits. The request shall describe the other format, explain what software is necessary for the hearing officer and other parties to be able to review the exhibit in that format, and explain why the party believes it is appropriate for the party to submit the exhibit in that format. The hearing officer normally will rule on such requests before the exhibit submittal deadline.

Each party shall upload its exhibits and exhibit identification index to the party's folder on the State Water Board's FTP site before the exhibit filing deadline specified in this notice. A party that uploads hearing documents to the FTP site does not need to serve copies of the documents on the other parties, except that, if another party has not agreed to accept electronic service of documents, then the party uploading hearing documents to the Board's FTP site also shall serve paper copies of all such documents on that other party and shall file a proof of this service with the AHO. **When a party has uploaded all of the party's exhibits to the Board's FTP site, the party or party's representative shall send an email the AHO at AdminHrgOffice@Waterboards.ca.gov, with copies to the other parties on the service list, notifying the AHO that the party has uploaded the documents.**

Each party also shall mail or hand-deliver two paper copies of all its exhibits, except exhibits that exceed 100 pages in length, and exhibit identification index to one of the AHO's two addresses listed below, with a proof of service of these paper copies. A party may but is not required to submit paper copies of exhibits that exceed 100 pages in length to the AHO. A party may provide proof of service of these paper copies by sending an e-mail or letter to the AHO, with the transmittal of copies of the e-mail or letter to the other parties shown in the e-mail "cc" (carbon copy) list or the cc portion of the letter. The party shall make this mailing of the paper copies of the party's exhibits by the exhibit filing deadline, but the AHO does not need to receive the mailed paper copies of the exhibits by this deadline.

After the exhibit filing deadline, the AHO will move all filed exhibits and Exhibit Identification Indices from the parties' upload folders to the administrative record folder and advise the parties that these documents are available for downloading from that folder. The AHO may rename or renumber exhibits that do not have proper exhibit names or numbers. If the AHO does this, then the AHO may create an electronic folder of documents that the party has submitted and a separate electronic folder of any documents the AHO has renamed or renumbered, in the administrative record folder.

If a party cannot upload exhibits to the FTP site, then the party may mail two paper copies of all its exhibits to the AHO at:

State Water Resources Control Board
Administrative Hearings Office
P. O. Box 100
Sacramento, CA 95812-0100

Alternatively, a party may send paper copies of its exhibits to the AHO by overnight delivery to:

Joe Serna Jr. CalEPA Building
State Water Resources Control Board
Administrative Hearings Office
1001 I Street
Sacramento, CA 95814

If a party uses either of these alternative means of filing paper copies of its exhibits with the AHO in lieu of electronically filing the exhibits, then the party shall complete the filing of the paper copies by the exhibit filing deadline specified in this notice.

9. PRE-HEARING CONFERENCE: The hearing officer will conduct a pre-hearing conference before the hearing to discuss any procedural issues. This notice states the date and time of the pre-hearing conference. The hearing officer may issue notices of subsequent pre-hearing conferences. The hearing officer may issue a pre-hearing conference order after each pre-hearing conference.

10. ORDER OF PROCEEDING: The hearing officer will follow the order of proceedings specified in California Code of Regulations, title 23, section 648.5, unless the hearing officer decides to modify the order of proceeding before or during the hearing. The hearing officer will set time limits for each element of the proceeding specified below before or during the hearing.

- a. **Policy Statements:** The hearing officer will allow interested persons to present policy statements at the start of the hearing before the presentations of cases-in-chief. **Oral policy statements and oral summaries of written policy statements will be limited to 5 minutes.**
- b. **Presentation of Cases-In-Chief:** Each party that so indicates in its Notice of Intent to Appear may present a case-in-chief addressing the key issues in the hearing notice. Each case-in-chief will consist of an opening statement, if the party decides to make one, and oral summaries of the witnesses' written testimony. The hearing officer then will allow other parties to cross-examine the witnesses who have presented written testimony or oral summaries of their written testimony. The hearing officer may allow re-direct examination and re-cross examination. The hearing officer will decide whether to accept the party's exhibits into evidence upon the party's request or motion after completion of all examinations of the party's witnesses.

Unless otherwise specified, documents such as written testimony, motions, written comments, and briefs shall be submitted to the AHO on pleading paper (with each line numbered in the left margin) using 12-point font and one-inch margins. If pleading paper is not available, the documents described above shall be double-spaced. For either format, the party shall sequentially number the paragraphs in the written testimony.

- i. **Opening Statements:** At the beginning of each party's case-in-chief, the party or the party's attorney or other representative may make an opening statement that briefly and concisely states the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. **Oral opening statements will be limited to 5 minutes per party.** A party may submit a written opening statement before the hearing or during the hearing before the party's case-in-chief and then, if desired, may provide an oral summary of the written opening statement. A party should include any policy-oriented statements in the party's opening statement.
- ii. **Oral Summaries of Written Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, all witnesses shall swear or affirm that the written and oral testimony they will present will be true and correct. A witness shall not read written testimony into the record, but instead shall just provide a summary. A witness provides his or her direct testimony when he or she confirms that a designated exhibit or exhibits is or are his or her written testimony. The hearing officer may impose time limits for each party to present oral summaries of the written testimony of their witnesses.
- iii. **Cross-Examination:** The hearing officer will permit other parties to cross-examine a party's witnesses on the witnesses' written submittals, oral summaries and clarifying testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) If a party presents multiple witnesses, the hearing officer will decide whether the party's witnesses will be cross-examined individually or as a panel or panels. Ordinarily, only a party or the party's representative will be permitted to cross-examine a witness, but the hearing officer may allow a party to designate a person technically qualified in the subject being considered to cross-examine a witness.
- iv. **Re-Direct and Re-Cross Examination:** The hearing officer may allow re-direct and re-cross examination of each party's witnesses. Any re-direct examination and re-cross examination permitted may not exceed the scope of the cross-examination and the re-direct examination, respectively. The hearing officer may establish time limits for any permitted re-direct and re-cross examination.

- v. **Hearing Officer's Questions:** Consistent with California Code of Regulations, title 23, section 648.5, subdivision (b), the hearing officer may ask any witness questions and may cross-examine any witness at any time.
- c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer may allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence another party has presented in its case-in-chief.

Written rebuttal testimony and exhibits must be submitted by the deadline set by the hearing officer. Each party shall list, in each part of the party's rebuttal testimony, the evidence presented in another party's case-in-chief to which that part of the rebuttal testimony is responsive. Cross-examination of witnesses offering rebuttal evidence normally will be limited to the scope of the rebuttal evidence.

- d. **Closing Briefs:** The hearing officer will set a schedule for the parties to file written closing briefs. The parties shall follow the procedures described above for uploading exhibits to the parties' folders on the State Water Board's FTP site when they upload their closing briefs. Each party shall mail a paper copy of its closing brief to any party that has not agreed to accept electronic service of documents and shall indicate this service in a proof of service filed with the AHO. No party may attach any documents of an evidentiary nature to the party's closing brief unless the hearing officer already has admitted the document into evidence, or the document is the subject of an offer of proof made during the hearing. After the deadline for filing closing briefs, the AHO will post all closing briefs to the FTP site.

11. RULES OF EVIDENCE: Government Code section 11513 shall apply to all evidence offered during the hearing. Consistent with Government Code section 11513, subdivision (d), a party may use hearsay evidence to supplement or explain other evidence, but over timely objection such evidence will not be sufficient by itself to support a finding unless the evidence would be admissible over objection in a civil action.

12. TELECONFERENCE HEARING: Due to the on-going COVID-19 pandemic and the associated closure of the Joe Serna Jr. CalEPA Building to the public, the AHO currently is conducting all hearings and conferences by Zoom teleconference. New users of Zoom may want to review Zoom's support guide:
<https://support.zoom.us/hc/en-us/categories/200101697>.

The AHO may continue to conduct some or all of its hearings by Zoom teleconference after this pandemic and associated closure end. The hearing notice specifies the method by which this hearing will be conducted.

Before the hearing, the AHO will provide a Zoom meeting link for people who want to participate in the hearing or pre-hearing conference to all parties and interested persons who have filed NOIs. To facilitate a clear understanding of who is speaking, the hearing officer will ask each person to identify himself or herself as necessary during the teleconference hearing. The hearing officer prefers that parties participate by both audio and video through the Zoom meeting link. If this is not possible, then the hearing officer will accept audio-only participations.

The AHO will not order a court reporter for videoconference pre-hearing conferences or hearings. Any interested party may order a court reporter at the party's own expense. The AHO will record the teleconference pre-hearing conference and hearing and will post an audio-plus-video file and a Zoom-generated transcript of the hearing on the AHO-FTP site as part of the administrative record for this matter.

Parties should test their devices' video and audio functions before the start of the hearing or pre-hearing conference. At the lower left-hand side of the Zoom window is a microphone and a video camera symbol. If there is a red line across the symbols, your microphone is on mute and video camera is off.

Please plan to call into the video conference at least 10 minutes before the scheduled hearing or pre-hearing conference time to ensure you can resolve any technical issues before the hearing or pre-hearing conference begins. You will initially be in a virtual waiting room and will be admitted to the hearing by a member of the AHO office. When you speak, please turn your video on and unmute your microphone by clicking on the symbols in the lower left-hand side of the Zoom window. During the hearing, please be respectful and patient, raising your hand on-screen to get the hearing officer's attention. To reduce acoustic background noise, please remain on mute if you are not speaking. If you have other devices that are tuned into the meeting, please turn off the speaker volume of those devices. Other participants will be able to see your name, depending on your Zoom account settings. Other participants may also see the last three digits of your phone number unless you have called in anonymously. During the hearing, AHO staff may add designations of participants' names to the Zoom display.

If the device you are using freezes, please notify staff at AdminHrgOffice@Waterboards.ca.gov or by calling (916) 341-6940 and leaving a voicemail message and restart the device. AHO staff will be monitoring the e-mail inbox and voicemail and will notify the hearing officer. If restarting the device does not work, try calling into the hearing using the phone number provided to you with the Zoom meeting information.

In lieu of participating in the Zoom hearing, anyone may watch past or present AHO hearings by clicking "Watch AHO Hearings" on https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office. People watching AHO hearings by this method will not be able to participate in the hearing, and will not be identified to anyone else.

Date: January 12, 2022

SIGNATURE ON FILE
Nicole Kuenzi, Hearing Officer

Attachments:

- Notice of Intent to Appear Form
- Exhibit Identification Index
- Service List

NOTICE OF INTENT TO APPEAR

(Name of Participant or Party) _____ plans to participate in the water right hearing regarding Kern River Applications Hearing Phase 1B.

Scheduled to begin on March 15, 2022

1) Check only one of the following boxes:

☐ **Option 1:** I/we intend to present a policy statement only and, therefore, not to participate as a party in this hearing.

☐ **Option 2:** I/we intend to participate as a party by presenting any of the following: an opening statement, direct testimony, cross-examination or rebuttal, and intend to participate as a party in this hearing.

Reason for Requesting Party Status. If you are not identified as a party in the Hearing Notice, describe why you should be allowed to participate as a party:

2) If you selected Option 2 above and intend to provide direct testimony, complete the witness table below. If not, skip to item 3 below.

Witness Name	Expert Witness?		Subject of Proposed Testimony	Estimated Length of Oral Direct Testimony (minutes)
	Yes	No		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		
	<input type="checkbox"/>	<input type="checkbox"/>		

(If more space is required, please add additional pages.)

3) Fill in the following information of the participant, party, attorney, or other representative:

Name (type or print):

Represented party (if applicable):

Mailing Address:

Telephone Number:

E-mail Address:

Optional:

☐ I/we decline electronic service of hearing-related materials.

Signature: _____

Date: _____

EXHIBIT IDENTIFICATION INDEX

Kern River Applications Hearing Phase 1B

The Public Hearing will begin on
March 15, 2022

PARTICIPANT: _____

Exhibit Identification Number	Exhibit Description	Status of Evidence (for AHO use only)		
		<i>Introduced</i>	<i>Accepted</i>	<i>By Official Notice</i>

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Attachment 3

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