
State Water Resources Control Board

NOTICE OF STATUS CONFERENCE

The State Water Resources Control Board
Administrative Hearings Office
will hold a Status Conference
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 Status Conference will begin on
August 17, 2021, at 9:00 am**

And will be held by Zoom teleconference.

You may participate in the Zoom teleconference by using the link:
<https://waterboards.zoom.us/j/99129930390?pwd=VStJeVNIYmZqKzIHTVRTZWs2WDZmQT09> with Meeting ID: 991 2993 0390 and Passcode: 356842
or by calling in at:
+16699009128,,99129930390#,,,,*356842# 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/

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

BACKGROUND

In 2007, the State Water Resources Control Board (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).

The Kern River System

The Kern River originates in the Sierra Nevada mountain range and drains into the southern San Joaquin Valley. The flow of the Kern River is highly variable from year to year, depending on hydrologic conditions. The river is regulated by Isabella Dam and Reservoir, which were completed by the Army Corps of Engineers in 1954. Below Isabella Reservoir, the Kern River flows to the floor of the San Joaquin Valley and continues towards the City of Bakersfield.

The “Law of the River” consists of court decrees and agreements that govern the storage and allocation of water on the Kern River system. The 1888 Miller-Haggin Agreement provides that Kern River water shall be divided pursuant to its terms and measured at two locations entitled First Point of Measurement (First Point), located to the northeast of the City of Bakersfield approximately 45 miles downstream of Lake Isabella, and Second Point of Measurement (Second Point), located approximately 23 miles downstream of First Point. The Miller-Haggin Agreement was amended in 1930, 1955, and 1964. The “Shaw Decree,” issued by Judge Lucien Shaw on August 6, 1900, adjudicated individual appropriative rights held by First Point diverters. Other agreements, including the December 31, 1962, Kern River Water Rights and Storage Agreement, also control the storage and allocation of Kern River water.

The State Water Board determined in Decision 1196, adopted on October 29, 1964, that all Kern River natural flow had been diverted and beneficially used by First Point diverters, Second Point diverters, and diverters located downstream of Second Point diverters (Lower River diverters) “since prior to 1894.” In 1989, the State Water Board declared that the Kern River was a fully appropriated stream system. (Order WR-89-25.) The Board adopted updated and revised orders modifying the Fully Appropriated Streams Declaration in 1991 and 1998, which did not change the fully appropriated status of the Kern River. (Order WR 91-07; Order WR 98-08.)

In 2007, the Court of Appeal for the Fifth Appellate District issued a decision in *North Kern Water Storage District v. Kern Delta Water District*, 147 Cal.App.4th 555 (*North*

Kern decision), which determined that four pre-1914 appropriative water rights held by Kern Delta Water District, a First Point diverter, had been partially forfeited because of five years of non-use. The Court of Appeal did not determine whether unappropriated water was available for appropriation as a result of its decision, stating that “the initial determination whether the forfeiture creates an allocable excess is reserved in the first instance to [the State Water Board].” (*Id.*, at 584.)

After the court issued the *North Kern* decision, North Kern Water Storage District and City of Shafter, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency filed petitions with the State Water Board to revoke or revise the Fully Appropriated Streams Declaration with respect to the Kern River to allow the Division to accept applications for permits to appropriate water from the Kern River system. Each petition was accompanied by an application for a water-right permit. In 2010, Rosedale-Rio Bravo Water Storage District filed a sixth application for a permit to appropriate water from the Kern River system.

State Water Board Order WR 2010-0010

On February 16, 2010, the State Water Board issued Order WR 2010-0010, which amended the Declaration of Fully Appropriated Stream Systems to allow the Division to accept new applications to appropriate water from the Kern River system. The Board concluded that there is unappropriated water on the Kern River system because water in excess of the amounts necessary to satisfy water-right holders on the Kern River had been diverted into the Kern River-California Aqueduct Intertie. The Board did not determine in Order WR 2010-0010 whether the *North Kern* decision resulted in unappropriated water, or how much or under what conditions water is available for appropriation from the Kern River.

The Board denied the petition for reconsideration of Order WR 2010-0010 filed by North Kern Water Storage District, City of Shafter, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency. In the Order Denying Reconsideration, the Board stated that processing of the pending applications would be the appropriate mechanism to determine the specific amounts of water available for appropriation, the season of water availability, and other issues relevant to determining whether the Board should issue the requested water-right permits. (Order WR 2010-0016.)

After the State Water Board issued Order WR 2010-0010 and Order WR 2010-0016, the Division began processing the six Kern River water-right applications. Table 1 provides a summary of the six applications.

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

Application information summarized from Division of Water Rights Application Files

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

Proceedings before Assignment to the Administrative Hearings Office

By letter dated October 1, 2018, the Division requested that the six applicants submit water availability analyses (WAAs) to demonstrate that water is available in the Kern River system for appropriation, and encouraged the applicants to submit a single coordinated WAA. Water Code section 1260, subdivision (k), requires that an applicant for a permit to appropriate water establish that there is a “reasonable likelihood” that water is available for appropriation.

The applicants submitted three separate WAAs in response to the Division’s request. Despite the use of diverse methodologies for the estimates of watershed demand, the WAAs all indicate that there is some unappropriated water in the Kern River system under extremely wet conditions. The methodology used in each analysis for estimating “face values” of pre-1914 rights within the watershed is a significant factor affecting the calculation of the amounts of water that may be available for appropriation. Despite the apparent consensus that Kern River flows exceeded water use at least some of the time during the analyzed period, the applicants did not agree on a specific amount of water, if any, that might be available for appropriation.

On August 9, 2019, the Kern Water Bank Authority (Authority) submitted a water-right complaint (Complaint) to the Division in which the Authority requests that the State Water Board hold an adjudicatory hearing to determine the scope, nature, and extent of the pre-1914 appropriative water rights of the Buena Vista Water Storage District (Buena Vista). Buena Vista is the successor in interest to pre-1914 appropriative water rights established by Miller & Lux, Inc., to divert and use water from the Kern River and is a Second Point diverter under the Miller-Haggin Agreement. The Authority’s complaint seeks a determination that Buena Vista has diverted water in excess of its Kern River water rights, forfeited or abandoned a portion of its Kern River water rights, and violated Article X, section 2 of the California Constitution and California Water Code section 100 by diverting and using Kern River water in a wasteful or unreasonable manner. The Authority requests that the Board issue a cease and desist order prohibiting Buena Vista from further diversion and use of Kern River water in excess of its water rights, and prohibiting Buena Vista from using, or employing methods of diversion of, Kern River water in a wasteful or unreasonable manner. Buena Vista responded to the Complaint by letter to the Division dated November 26, 2019.

The Division dismissed the Complaint in a letter dated December 21, 2020, stating that the Division had notified the AHO “regarding your concerns about Kern River entitlements at the second point of diversion... The Division expects that the AHO hearing will clarify factual issues related to second point entitlements....” (Letter from R. Cervantes to K. O’Brien, December 21, 2020.) On December 23, 2020, the Authority sent a letter to the AHO requesting that the AHO include all issues raised in the Complaint within the scope of any future public hearing relating to water rights on the Kern River.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1110 established the Administrative Hearings Office (AHO) as an independent organizational unit within the State Water Board. 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. The memorandum states that the Division is processing the applications in accordance with Water Code section 1250 et seq., but the applicants have not settled on an acceptable method for determining the amount of unappropriated water available, and the cumulative total sought to be appropriated far exceeds any potentially available unappropriated water.

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?

The March 18 memorandum authorizes the AHO to notice an adjudicative hearing that includes consideration of whether unauthorized diversions or misuses of water have occurred or are occurring and whether claimed water rights have been abandoned or

forfeited.¹ This notice may include notice that the Board will consider a cease and desist order pursuant to Water Code section 1834 and may include notice pursuant to California Code of Regulations, title 23, section 857, that the Board will consider whether a misuse of water has occurred or continues to occur.

HEARING OFFICER AND HEARING TEAM

A hearing officer from the AHO will preside during the status conference. Other AHO staff members may be present and assist the hearing officer during the status conference.

PROPOSED HEARING ISSUES

The AHO proposes to address the following hearing issues in Phase 1 of a public hearing in this matter:

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?
 - a. What are the maximum amounts of diversion and use authorized by existing water rights in the Kern River system?
 - b. Are unauthorized diversions or wasteful or unreasonable diversion or use of water occurring in the Kern River system?
 - c. Has any of the water appropriated from the Kern River system not been put to, or ceased to be put to, some useful or beneficial purpose?
 - d. How much water is physically available in the Kern River system to supply existing water rights?
 - e. Is all or some portion of the water made available by the decision in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 (*North Kern* decision) unappropriated water?
2. If there is unappropriated water in the Kern River system:
 - a. In what order should the Division process the applications?
 - b. How should unappropriated water be allocated among the competing applications?

¹ “Misuse of water” or “misuse” is defined by California Code of Regulations, title 23, section 855, as any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

The AHO may determine after Phase 1 of the hearing that the evidence supports giving notice of a Phase 2 to consider additional hearing issues. Any such Phase 2 notice may include notice issued pursuant to Water Code section 1834, with a statement of facts and information, for the Board to consider a proposed cease-and-desist order, or California Code of Regulations, title 23, section 857, for the Board to consider whether misuse of water has occurred or is continuing to occur.

STATUS CONFERENCE

The AHO hearing officer will hold a status conference on the date and at the time specified on the first page of this notice by Zoom teleconference. No in-person appearances will be allowed. The hearing officer will prepare a status conference order or hearing notice after the conference. The AHO will not retain a court reporter for the status conference. Any party may arrange for a court reporter at his, her, or its own expense.

The AHO will address the following issues during the status conference:

- (1) Does each of the applicants still want to pursue its application for a permit to appropriate water from the Kern River system?
- (2) Should the notice of public hearing issued by the AHO include any hearing issues in addition to the hearing issues listed in the “Proposed Hearing Issues” section above, or should the AHO modify any of these issues before issuing the notice?
- (3) Should the public hearing before the AHO be conducted in phases as proposed in the “Proposed Hearing Issues” section above? If so, what hearing issues should be addressed in each phase?
- (4) Do the participants think that the AHO should consider any other procedural or hearing issues? If so, what issues?

NOTICES OF INTENT TO APPEAR; UPDATED SERVICE LIST

Any person or entity who wants to participate in this status conference must file a Notice of Intent to Appear (NOI), using the form in this notice, with the AHO before the deadline listed below.

If the AHO does not receive an NOI from an applicant indicating the applicant’s intent to participate in the status conference before the deadline specified below, the AHO may transmit a proposed order to the Board that would cancel the applicant’s application without a hearing.

After the status conference, the AHO will issue a status conference order or hearing notice and an updated service list, which the AHO will use for future notices in this

proceeding. The AHO will include in this updated service list only the people and entities that have filed NOI or otherwise have advised the AHO that they want to be on the service list for this matter. If you want to continue to receive AHO notices regarding this proceeding and are not filing an NOI, then you must advise the AHO in writing, using one of the methods listed below, that you want to continue to receive AHO notices regarding this proceeding. You do not need to send copies of your request to the other parties.

The AHO encourages parties to agree to accept electronic service (by e-mail) of all documents regarding this proceeding. If a party is not willing to do this, then the party may check the appropriate box on the NOI form. If this box is not checked, then the AHO will assume that the party agrees to accept electronic service. Parties that do not agree to accept electronic service will experience delays in receiving documents by U.S. Mail from the AHO and other parties.

STATUS CONFERENCE STATEMENTS

On or before the deadline listed below, each participant shall submit and serve a status conference statement that separately addresses each of the status conference issues listed above that the participant wants to address. The participants also may include in their status conference statements discussions of any other issues they believe are relevant. Parties with common interests may file joint status conference statements.

NOI and Status Conference Deadlines and Schedule

Deadline for filing NOIs and status conference statements.	August 10, 2021, 12:00 pm
Status conference date and time.	August 17, 2021, 9:00 am

After the filing deadline for status conference statements, the AHO will post the parties’ status conference statements in the AHO-FTP folder described below.

SUBMITTAL 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 above):

By Email:	AdminHrgOffice@waterboards.ca.gov With Subject Line “ Kern River Applications ”
By Mail:	State Water Resources Control Board Administrative Hearings Office P. O. Box 100 Sacramento, CA 95812-0100

<p>By Hand Delivery (see instructions below):</p>	<p>Joe Serna Jr. CalEPA Building Administrative Hearings Office c/o Water Rights Records Unit 1001 I Street, 2nd Floor, Room 114 Sacramento, CA 95814</p>
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Service of documents by hand-delivery may be more difficult or delayed due to building or office closures during the COVID-19 pandemic. Please plan ahead if you wish to hand deliver documents. Any hand-delivered submittals must be date-and-time stamped by the Division of Water Rights Records Unit personnel before the submittal deadline. Persons delivering submittals to the Records Unit must first check in with CalEPA Building lobby security personnel on the first floor of the CalEPA Building and obtain authorization to go to the Water Rights Records Unit on the second floor.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO has posted and will post all AHO notices and other AHO documents regarding these proceedings on the AHO's internet webpage at

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person or entity may sign up to receive all AHO notices at

https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html

STATUS CONFERENCE LIVE-STREAM AND RECORDING

The status conference will be live-streamed through the Administrative Hearings Office YouTube channel, accessible by clicking on the link provided below. After the conclusion of the hearing, a recording of the 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?view_as=subscriber

ADMINISTRATIVE RECORD

The AHO has copied documents from the public records maintained by the State Water Board's Division of Water Rights Records Unit relevant to this proceeding and has included them in the initial administrative record. The AHO has posted files of these documents to the State Water Board's FTP site. Instructions regarding how to access the AHO folder on this FTP site are on the AHO's webpage at:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2020_05_05_notice_ftp2.pdf

In addition to the YouTube live recording, the AHO will make a Zoom recording of the status conference and will include this recording in the administrative record.

Any interested person or party may contact the Division of Water Rights Records Unit by e-mail at DWR@waterboards.ca.gov or by telephone at (916) 341-5300 to make arrangements to review and copy documents in the Division's public files relevant to this proceeding. If the AHO holds a hearing in this matter, then interested parties may submit as hearing exhibits copies of documents in these files.

PROHIBITION ON EX PARTE COMMUNICATIONS

As discussed in the AHO's June 17, 2021 Notice of Assignment, all parties are prohibited from having any ex parte communications with any members of the AHO hearing team. (See Wat. Code, §§ 1110, subd. (c), 1113; Gov. Code, §§ 11430.10-11430.80.) For a discussion of ex parte communications regarding AHO hearing officers and staff, see the response to FAQ 18 of the AHO FAQs, which are posted at: [Webpage FAQs \(ca.gov\)](#).

If any party or interested person wants to communicate with the AHO regarding a procedural or substantive issue related to this proceeding, then the party or interested person shall make the communication in writing, and, except as otherwise stated in this notice, shall serve all parties listed on the service list for this proceeding with copies of the communication, and shall include a proof of service demonstrating such service with the written communication to the AHO.

Any such communication shall be sent to the AHO by e-mail to AdminHrgOffice@waterboards.ca.gov, or by letter addressed to:

State Water Resources Control Board
Administrative Hearings Office
P.O. Box 100
Sacramento, CA 95814-0100

A party or interested person may provide the 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 listed on the service list in the cc portion of the letter. Until the AHO issues an updated service list, parties should use the service list attached to this notice.

Please do not attempt to communicate by telephone or in person with AHO staff or any AHO hearing team member regarding these proceedings, because other parties would not be able to participate in such communications. If oral communications with members of the AHO hearing team are necessary to discuss a procedural or substantive issue, 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.

Dated: July 19, 2021

SIGNATURE ON FILE

Nicole L. Kuenzi
Hearing Officer

Enclosures:

- Notice of Intent to Appear Form
- Service List

NOTICE OF INTENT TO APPEAR FORM

_____ (name of participant) plans to participate in the status conference regarding 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.

which is scheduled to begin on August 17, 2021

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: _____

SERVICE LIST

updated May 3, 2021

Sent by U.S. Mail and e-mail:

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