

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2022-0087

In the Matter of The Petition of

City of Bakersfield

For Reconsideration of The Administrative Hearings Office's November 3, 2021
Ruling on Legal Issues and Pre-Hearing Conference Ruling

In the Matter of 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.

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

This matter came to the State Water Resources Control Board (State Water Board or Board) on the petition of the City of Bakersfield (Bakersfield) for reconsideration of the Administrative Hearings Office's (AHO) November 3, 2021 Ruling on Legal Issues and Pre-Hearing Conference Ruling (AHO November 3 Ruling) in the matter of 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.

We conclude that the AHO November 3 Ruling is not a decision or order subject to reconsideration pursuant to Water Code section 1122. Therefore, we deny Bakersfield's petition.

2.0 BACKGROUND

2.1 Division of Water Rights and AHO Proceedings

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, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency. 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. 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 the six water-right applications.

On February 24, 2021, Erik Ekdahl, Deputy Director of the Division, 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 these issues to the AHO for an adjudicative hearing:

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 AHO held a status conference on August 17, 2021, and issued a Status Conference Ruling and Notice of Hearing on August 30, 2021 (August 30 Ruling). The August 30 Ruling defined the scope of Phase 1A of the hearing to address whether Kern Delta Water District's partial forfeiture of its water rights in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 resulted in unappropriated water in the Kern River system and 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?

The AHO received legal briefs from Bakersfield, North Kern Water Storage District and the City of Shafter, and several other parties.

2.2 AHO November 3 Ruling and Petition for Reconsideration

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

The AHO November 3 Ruling concludes 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 the next right-holder in priority (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 of the hearing in this matter, 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.)

On December 3, 2021, Bakersfield filed a petition for reconsideration of the AHO November 3 Ruling. Bakersfield's petition states that the petition is made pursuant to Water Code section 1122 and California Code of Regulations title 23, sections 768 and 769. Bakersfield's petition challenges the AHO November 3 Ruling on the grounds that

the AHO erred in “deferring consideration of public trust uses and interests” and in “determining that the forfeiture of water rights does not result in unappropriated water as a matter of law.” (2021-12-03 City of Bakersfield Petition for Reconsideration of AHO’s November 3 Ruling, p. 4.¹) On December 7, 2021, North Kern Water Storage District and City of Shafter filed an opposition to Bakersfield’s petition for reconsideration. (2021-12-07 Opposition to Bakersfield’s Petition for Reconsideration.)

3.0 APPLICABLE LAW

Any interested person may petition the State Water Board for reconsideration of “all or part of a decision or order” within 30 days after the date on which the Board adopted the order. (Wat. Code, § 1122.) The applicable Board regulation (Cal. Code Regs., tit. 23, § 768) provides that a petition may seek reconsideration on any of the following grounds:

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

Water Code section 1122 provides that the State Water Board shall order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order.

¹ Documents in the administrative record are available for review on the State Water Board’s AHO-FTP site in the file folder for this matter.

4.0 DISCUSSION

The AHO November 3 Ruling was not a final decision or order by the Board and therefore is not subject to reconsideration pursuant to Water Code section 1122. To the extent that the Board has the authority to review an AHO decision on its own motion, policy reasons weigh against doing so here.

a. Only final orders or decisions adopted by the Board are subject to petitions for reconsideration under Water Code section 1122.

The language and context of Water Code section 1122 support our conclusion that “a decision or order” as used in this statutory section and associated regulations (Cal. Code Regs., tit. 23, §§ 768 & 769) is a final Board decision or order adopted after the Board’s decision-making process is complete.

Water Code section 1123 provides that a decision or order may be reconsidered by the Board “on all the pertinent parts of the record” and that a “further hearing may be held” by the Board, if warranted, to receive additional evidence. This language underscores the point that reconsideration occurs after the original hearing is complete and a record formed. In addition, Water Code section 1122 requires that a petition for reconsideration be filed within thirty days of issuance of the decision or order. If every procedural or preliminary ruling were subject to review immediately after it is issued by the hearing officer, then the time to seek review of that ruling would likely expire before the State Water Board issued its decision or order in the proceeding. The result would be serial disruption of adjudicative proceedings by petitions for reconsideration while the hearing process is pending and before any final action by the Board.

In addition, the Water Code provisions governing judicial review of State Water Board decisions, which apply only to final decisions or orders by the Board, parallel the language of section 1122. Section 1126, subdivisions (b) and (c) provide that any party aggrieved by “any decision or order” may file a petition for writ of mandate for review of the decision or order pursuant to section 1094.5 of the Code of Civil Procedure. Section 1094.5 of the Code of Civil Procedure

explicitly provides for judicial review of only a “final” decision or order issued “as the result” of an administrative proceeding. We conclude that the phrase “decision or order” in section 1122, governing petitions for reconsideration, and in section 1126, governing petitions for writ of mandate, has the same meaning and includes only final decisions and orders issued by the Board.

b. Preliminary or procedural decisions issued by the AHO are not subject to petitions for reconsideration.

Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing, in whole or in part, to the AHO. Pursuant to Water Code section 1114, after holding an adjudicative hearing, the AHO hearing officer shall prepare a proposed order on the issues assigned to the AHO for hearing in a form that may be adopted by the Board as a final order, and provide it to the Board for the Board’s consideration. With the limited exception of proceedings presided over by an AHO hearing officer pursuant to Water Code section 1114, subdivision (b), which provision is not applicable here, the AHO has no authority to issue a final order that affects the substantive rights of any party and that would be subject to a petition for reconsideration under Water Code section 1122.

In this matter, the Executive Director of the Water Board assigned three issues related to the Kern River water-right applications to the AHO for hearing. The AHO issued the AHO November 3 Ruling as a preliminary step in the process leading to formulation and issuance of a proposed order on these three issues, which the AHO will transmit to the Board after the AHO completes its hearing process. The November 3 Ruling does not determine the rights of Bakersfield or any other party, nor is the AHO November 3 Ruling binding on the Board. At the time the AHO issued the ruling, the AHO had not yet held an evidentiary hearing or considered the law as applied to the particular facts in this proceeding. The AHO will apply the law as articulated in the AHO November 3 Ruling to the evidence received during the Phase 1A hearing and, at an appropriate phase in the proceeding, present a proposed order to the Board. Only after the Board has

adopted a final order in this matter will there be a decision or order of the Board subject to a petition for reconsideration under Water Code section 1122.

c. Policy considerations weigh against allowing “interlocutory” petitions for reconsideration.

Allowing petitions for reconsideration of decisions by AHO hearing officers would raise significant policy concerns and would unnecessarily frustrate the purposes for which the AHO was established.

A petition for reconsideration of preliminary or procedural rulings made by the hearing officer in an administrative proceeding is analogous to an interlocutory appeal of a trial court’s decision. In the California judicial system, the “final judgment rule” prevents an appeal from a judgment that does not dispose of all the causes of action between the parties. (*Morehart v. County of Santa Barbara* (1995) 7 Cal.4th 725, 743.) Many of the policy reasons for limiting interlocutory appeals of trial court decisions also apply to petitions for reconsideration of decisions by an AHO hearing officer.

Interlocutory appeals would burden the appellate courts by clogging their dockets with multiple appeals, while producing delays and uncertainty in the trial courts. (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966-67.) Likewise, petitions for reconsideration of AHO rulings made during the pendency of a proceeding, before any proposed order has been issued by the AHO or any final order issued by the Board, tend to delay and frustrate the AHO’s adjudicatory hearing process. The legislature established the AHO to provide “a neutral, fair, and efficient forum for adjudications.” (Wat. Code, § 1110, subd. (a).) Efficiency of the AHO hearing process would be significantly hindered if preliminary and procedural rulings of the AHO were subject to petitions by “any interested person or entity” for reconsideration by the Board. (Wat. Code, § 1122.) The conduct and timing of AHO hearings would be interrupted, possibly repeatedly, pending Board review of these petitions. The Board, in turn, would be burdened with having to address such requests for review, which could occur serially in the same pending matter.

Another policy reason for disallowing interlocutory appeals in court cases is that later actions by the trial court may render the interlocutory appeals moot. (*Kinoshita v. Horio, supra*, 186 Cal.App.3d at p. 967.) In addition, information in a complete administrative record may establish whether any alleged error was harmless. (*Ibid.*) Similarly, reserving petitions for reconsideration until after the Board issues a final order avoids unnecessary review by the Board of preliminary and procedural decisions that do not impact the substantive outcome of the proceeding. By allowing the AHO to complete its process, the Board can focus its attention on those issues that are determinative. Because the AHO does not issue final orders, the Board has an opportunity to correct any substantive errors when considering whether to adopt the proposed order presented by the AHO. Thereafter, the Board may address additional matters when it acts on any timely filed petition for reconsideration of its final order.

All of these policy considerations weigh against reconsideration of the AHO November 3 Ruling. The ruling articulates the hearing officer's understanding of relevant law but refrains from application of the law to the particular facts in this matter. The AHO hearing officer will apply the law to the facts in a proposed order, prepared after holding a hearing, and will transmit the proposed order with a complete evidentiary record to the Board for its consideration. Review of the AHO hearing officer's ruling at this time would only disrupt the AHO's process and ultimately may have no impact on the substantive outcome of the proceeding. It is also unclear what we are being asked to reconsider, given that the AHO November 3 ruling is a non-final and non-binding statement of the law that the AHO has not yet applied to any particular facts. In contrast, if we allow the AHO to complete its process, the parties will have the opportunity to present arguments both to the AHO and to the Board about the principles of law that the Board should apply. The Board then will have the opportunity to consider whether to adopt the AHO's proposed order or to remand the matter back to the AHO for further consideration.

d. Denial of the petition for reconsideration is consistent with State Water Board practice.

We have previously denied petitions for reconsideration of a hearing officer's ruling as premature and doing so in this instance is consistent with past practice. (State Water Board [Order WR 2015-0001](#); see also 2017-03-16 California WaterFix Hearing Officer Ruling; 2018-02-21 California WaterFix Hearing Officer Ruling [citing *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489 (a party must proceed through the full administrative process to a final decision on the merits before seeking judicial review of an intermediate or interlocutory action)].)²

In 2015, a writ of mandate issued by the court prompted the Board to re-open the hearing on a draft cease and desist order against Woods Irrigation Company to allow customers of the company to participate as parties. Some of these parties sought reconsideration of the hearing officers'³ decision to re-open the hearing rather than begin a new hearing with a new evidentiary record. The Board denied the petition and concluded that "petitions for reconsideration before the final disposition of a matter before the Board are not allowed." (State Water Board Order WR 2015-0001, p. 9.)

We held in Order WR 2015-0001 that a procedural ruling is "not a decision or order within the meaning of Water Code section 1122, but is a ruling made as part of the process leading to the formulation and issuance of a decision or order." (*Id.* at p. 6.) "As in the case of other procedural rulings that do not finally determine the rights of the parties or impose penalties or sanctions, the hearing officers' ruling may be challenged as part of a petition for reconsideration when the State Water Board issues a final decision or order after the close of the hearing...." (*Ibid.*) In our order, we described the multiple opportunities for the

² 2017-03-16 California WaterFix Hearing Officer Ruling and 2018-02-21 California WaterFix Hearing Officer Ruling are included in the administrative record available for review on the State Water Board's AHO-FTP site in the file folder for this matter.

³ The hearing was conducted by two State Water Board members serving as hearing officers pursuant to Water Code section 183.

parties to raise their due process concerns during the hearing process, including the pre-hearing conference, consideration of a decision by the Board, and by petition for reconsideration after the Board issued a final order. (*Id.* at p. 9.)

We are aware of only one occasion when the State Water Board elected to review a request for reconsideration of a procedural ruling or other preliminary ruling by a hearing officer. In a proceeding to consider the revocation of a water right license held by the Morongo Band of Mission Indians, the State Water Board reviewed and upheld the hearing officer's ruling denying the Morongo Band's petition to disqualify the enforcement team on the grounds that the attorney representing the enforcement team had served as an advisor to the State Water Board in an unrelated proceeding. (State Water Board [Order WR 2004-0034](#), pp. 5-6.) In that matter, the hearing officer stayed the proceeding and asked the State Water Board to review his ruling because the procedural issue raised by the Morongo Band had significant implications for the abilities of both the State Water Board and all nine Regional Water Quality Control Boards to conduct enforcement proceedings using existing staff resources. (*Ibid.*) The State Water Board recognized the potential disruption to adjudicative proceedings that would stem from routine challenges to procedural rulings and expressly declined to hold that parties are entitled to interlocutory review of procedural rulings. (*Id.* at p. 6.) Since then, the State Water Board reaffirmed in Order WR 2015-0001 that petitions for reconsideration of procedural or preliminary rulings by the hearing officer in a water-right hearing are not allowed.

5.0 CONCLUSION

Petitions for reconsideration of a preliminary or procedural ruling by an AHO hearing officer are not authorized by Water Code section 1122. For the numerous policy reasons discussed in this order, we decline to consider on our own motion the issues raised by Bakersfield in its petition. The Board can address any issues that remain of concern to Bakersfield during its consideration of the proposed order in this matter after the AHO has completed its hearing process and presented a proposed order to the

Board. Therefore, we deny the City of Bakersfield's petition for reconsideration of the AHO November 3 Ruling as premature.

ORDER

IT IS HEREBY ORDERED that:

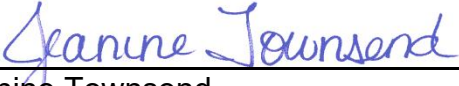
the Board denies the City of Bakersfield's petition for reconsideration of the AHO November 3 Ruling.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 19, 2022.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Sean Maguire
Board Member Laurel Firestone
Board Member Nichole Morgan

NAY: None
ABSENT: None
ABSTAIN: None



Jeanine Townsend
Clerk to the Board