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

In the Matter of State Water Resources Control
Board Hearing on Petitions to Revise the
Declaration of Fully Appropriated Stream System of
the Kern River in Kern and Tulare Counties

**PETITIONER CITY OF
BAKERSFIELD'S CLOSING BRIEF
REGARDING REVISION OF THE
FULLY APPROPRIATED STATUS OF
THE KERN RIVER**

Hearing Officer: Arthur Baggett, Jr.

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1 Petitioner City of Bakersfield (“City” or “Bakersfield”) submits the following closing brief,
2 as directed by the State Water Resources Control Board (“SWRCB”) at the conclusion of the
3 October 26-27 hearing regarding the Fully Appropriated Status (“FAS”) of the Kern River. The City
4 also incorporates herein and refers to the petition, correspondence and supporting documents it
5 previously submitted to the SWRCB.

6 **1. INTRODUCTION**

7 The City presented uncontroverted evidence that as a result of the recent judgment of
8 forfeiture there is an additional 50,000 acre feet of water per year (afy) in the Kern River which
9 formerly belonged to the Kern Delta Water District (“Kern Delta”), but which now does not belong
10 to or accrue to any water rights. The forfeiture of high priority Kern River rights, and the addition of
11 this new supply of 50,000 afy of water in the Kern River, necessarily and as a matter of law
12 constitutes “changed circumstances” which requires revision of the FAS of the Kern River. The
13 forfeiture has resulted in a new water supply which is surplus to the demands of the original
14 appropriator, Kern Delta, and which is therefore unappropriated. The SWRCB must revise the FAS
15 of the river so that it can determine the appropriate disposition and use of the forfeited water.

16 The North Kern parties (North Kern Water Storage District (“North Kern”), Buena Vista
17 Water Storage District (“Buena Vista”), Kern County Water Agency (“KCWA”), City of Shafter
18 (“Shafter”), and Kern Water Bank Authority (“KWBA”)), oppose the revision of the FAS of the
19 river because they claim that the forfeited water must be absorbed by junior rights. The SWRCB can
20 and should readily dismiss such contentions, however, and revise the FAS of the river, because the
21 North Kern parties failed to meet their burden of proof of establishing they have a right to divert the
22 forfeited water. The evidence instead revealed that the North Kern parties either do not hold any
23 Kern River rights, or have very limited access to Kern River water. The SWRCB can and should
24 therefore determine that the water is surplus to all prior, existing rights on the river.

25 At the very least, any claims or contentions raised by the North Kern parties with regard to
26 the ownership of and future diversion and use of the forfeited water must be addressed in the next
27 phase of this proceeding, after the SWRCB revises the FAS of the river and starts to process various
28 claims and applications to appropriate the water.

1 **2. THERE IS A CHANGE IN CIRCUMSTANCES AS A RESULT OF THE**
2 **FORFEITURE JUDGMENT**

3 The SWRCB has the authority to revise a declaration that a stream system is fully
4 appropriated upon receipt of a petition for revision from any person. (Water Code § 1205(c); 23
5 C.C.R. § 871(c).) Title 23, section 871(b) of the California Code of Regulations provides that
6 revocation or revision of a declaration of fully appropriated stream status:

7 “. . . may be based upon *any relevant factor*, including but not limited to a change in
8 circumstances from those considered in a previous water right decision determining that no
9 water remains available for appropriation, or *upon reasonable cause* derived from hydrologic
10 data, water usage data, or other relevant information . . .”
11 (C.C. R. § 871(b), emphasis added.)

12 This is a deliberately low standard, because a decision to revise the FAS does not reach the
13 merits of any applications for the unappropriated water, the nature of any conditions, or whether the
14 unappropriated water must be made available for senior water right holders or for environmental
15 purposes. (*In Re Fully Appropriated Stream Petition for the Santa Ana River*, Order No. WR 2000-
16 12, September 21, 2000, at 14.)

17 The recent finding of forfeiture directly contradicts and invalidates the prior findings that the
18 Kern River was fully appropriated. The forfeiture judgment specifically negates the SWRCB’s prior
19 findings that all water in the Kern River was being beneficially used pursuant to existing rights. In
20 the Kern River litigation, the court repeatedly ruled that all water in the Kern River had *not* been
21 used pursuant to existing rights. The court instead found that Kern Delta had failed to divert and use
22 a significant quantity of water accruing to its rights. The evidence presented to the SWRCB
23 additionally demonstrated that there has been and will be a significant and material change in the
24 practical operation of the river, and the supply of water from the river, as a result of the forfeiture
25 judgment.

26 **A. California Law Establishes Forfeited Water Is Surplus And Unappropriated**

27 California courts and the SWRCB have consistently stated that water rights which are lost,
28 forfeited, revoked or abandoned (and the water which accrues to those rights) are subject to
appropriation, and therefore necessarily results in unappropriated water. There is therefore no need
for any further proceedings or considerations regarding the presence of unappropriated water,
following the judgment of forfeiture. Consideration by the SWRCB of claims to the forfeited water,

1 either through alleged prior, existing rights or through new applications to appropriate, has to wait
2 until *after* the SWRCB revises the FAS of a stream system. (See *In Re Fully Appropriated Stream*
3 *Petition for the Santa Ana River*, Order No. WR 2000-12, September 21, 2000, at 14.)

4 There is also no need for the SWRCB to consider or determine whether there is surplus water
5 on the river. The judgment of forfeiture has already addressed and resolved that issue, as the finding
6 of forfeiture conclusively establishes that there is water that has not been used by a prior right
7 holder, which necessarily results in surplus, unappropriated water.

8 In *In the Matter of the Declaration of Fully Appropriated Stream Systems*, Order WR 98-08,
9 November 19, 1998, at 22, the SWRCB stated: “Water Code Section 1205 provides for revision of
10 the declaration [for fully appropriated stream systems] under appropriate conditions. In the event
11 that water becomes available for appropriation due to the *revocation of a previously issued permit or*
12 *a license*, the declaration should be revised accordingly.” (Emphasis added.) Similarly, in *In the*
13 *Matter of Permit 15012 on Application 11792A of Calaveras County Water District*, Order No. WR
14 97-06, September 18, 1997, the SWRCB issued an order revoking a water right permit because the
15 right holder had not constructed any authorized diversion facilities, or diverted and put to beneficial
16 use water under the permit. The SWRCB explained that water previously accruing to the revoked
17 water right was “newly unappropriated water,” despite the presence of junior right holders and
18 claimants. (*Id.*, at 7.)

19 In *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 106, the court
20 explained that what is unappropriated water is a “constantly fluctuating question, depending upon
21 the seasonal flow of the stream, the annual rainfall, *the forfeiture of prior appropriations* and default
22 in the use of riparian rights.” (Quoting from *Tulare Water Co. v. State Water Commission* (1921)
23 187 Cal. 533, 537, emphasis added.)

24 The SWRCB has also indicated that Water Code Sections 1202(b) and (c) “require diligent
25 use of water or else others may appropriate the water.” (*In the Matter of Application 25144 North*
26 *Canyon Lake Association Applicant Richard E. Winkelman, et al.*, Decision No. 1578, Sept. 17,
27 1981.) In these situations, the SWRCB did not consider or restrict the availability of unappropriated
28 water because of claimed prior rights. It did not consider whether other right holders “could have”

1 taken the water. Instead, the SWRCB found that water lost by prior rights, through forfeiture,
2 revocation or some other theory, created unappropriated water, both as a matter of law and
3 practically.

4 “All water flowing in any natural channel not otherwise appropriated is subject to
5 appropriation in accordance with the provisions of the Water Code.” (*Eaton v. State Water Rights*
6 *Board* (1959) 171 Cal.App.2d 409, 413, emphasis added.) In *Eaton*, the court explained that upon
7 revocation of a water rights permit, the water specified in the permit is “subject to further
8 appropriation.” (*Id.*, quoting from Water Code § 1410.) That holding is directly applicable to the
9 present situation, as the water forfeited by Kern Delta was not and has not been “otherwise
10 appropriated” by anyone. The water may have been used by other parties, but the court of appeal in
11 the forfeiture action held that such use did not create or give rise to any rights, or evidence any new
12 or proper appropriation of water. (See also *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595,
13 stating that water which is lost through non-use reverts to the public and becomes “open” to
14 appropriation.)

15 Contrary to the prior contentions of the North Kern parties, a finding by the SWRCB that
16 unappropriated water exists is not limited to situations where “physical changes” create new water.
17 The Water Code does not contain such a requirement or limitation. Similarly, the contention that the
18 City would have to prove that the forfeited water is new water that “would have been available for
19 appropriation in 1964,” the time of the original FAS declaration regarding the Kern River, is not an
20 accurate statement of law. Any discussion of those factors and issues by the SWRCB in prior
21 proceedings involving fully appropriated stream systems was only a reflection of the claims and
22 issues in those proceedings, and not a binding or authoritative statement of law. Those factors are
23 not relevant or applicable in a situation such as the present, where there has been a forfeiture of the
24 rights which previously supported a declaration of the FAS of a stream system.

25 **B. The Evidence and Testimony Establishes that the Operation and Status of the**
26 **River Has Materially Changed.**

27 As indicated above, the forfeiture judgment by itself constitutes changed circumstances
28 which requires revision of the FAS of the Kern River. The City additionally introduced evidence
and testimony that the forfeiture judgment had materially changed the operation and status of the

1 river, which further constitutes changed circumstances.

2 As a result of the forfeiture, new “caps” or diversion limits have been placed on the separate
3 canal rights held by Kern Delta’s rights, primarily the Kern Island right but also the Buena Vista,
4 Stine, Farmers, which caps or limits were not in place previously. (See Reporter’s Transcript (“RT”)
5 at 59.) That is a “huge change” because there is now a binding judgment that there is surplus, excess
6 water above Kern Delta’s demand and rights, which it can never again divert and use. (RT at 60.)

7 The rights held by Kern Delta had high priorities to some of the first flows of water in the
8 Kern River. The Kern Island 1st right, for example, has the highest priority on the Kern River, and
9 prior to the finding of forfeiture could divert the first 300 cubic feet per second (cfs) of water
10 flowing in the Kern River each and every day of the year. As a result of Kern Delta’s forfeiture,
11 however, the court in the Kern River litigation placed a diversion cap, or limit on diversions, on the
12 Kern Island 1st right in the months of October, November, December and January.

13 The forfeiture judgment bars the Kern Island 1st from taking any water after it had diverted
14 enough water to meet its diversion cap. In the month of December, for example, the diversion cap
15 on the Kern Island 1st right is 2,050 acre feet. After the Kern Island 1st reaches its monthly cap, or
16 preserved entitlement, any water accumulating to that right would represent and constitute forfeited,
17 surplus water. For example, if the Kern Island 1st right diverts water up to its full 300 cfs Shaw
18 Decree right each day beginning in December, after approximately four days it would reach the
19 2,050 af diversion cap (a diversion at 300 cfs for 24 hours would result in a diversion of
20 approximately 600 acre feet each day). (Ex. 2-1, p. 18, ¶ 80.)

21 After four days, water would still accrue to (or technically be available to) the Kern Island
22 1st right, assuming there was at least 300 cfs of water flowing in the Kern River. The Kern Island
23 1st right, however, would not be able to divert or use that water, based on the judgment of forfeiture.
24 The first 300 cfs flowing in the Kern River would no longer be available to the Kern Island 1st right,
25 until the end of the month. Presently no other entity holds rights to the forfeiture entitlement created
26 by the forfeiture judgment, or specifically the first 300 cfs of water in the river. Hence, the water is
27 unappropriated.

1 The water still accruing to the Kern Delta rights after a right reaches the diversion cap would
2 not simply increase the flow of the river, but would necessarily have to be considered and treated as
3 a distinct, separate, and new block of water on the river. That water would be dependent on
4 diversions by Kern Delta, and would only occur under specific circumstances tied to Kern Delta's
5 diversions in a given month. Use of water would also be restricted, as the Kern Delta rights which
6 forfeited the water, as well as junior Kern Delta rights, could not take back or redivert the forfeited
7 water. To allow such a result would violate and invalidate the judgment of forfeiture. The water
8 accruing to the forfeiture entitlement has all the indicia and components of a new water right, and is
9 not simply an increase in the flow of water in the river.

10 Contrary to the contentions of the North Kern parties, the forfeited water is not equivalent to
11 release water and does not and cannot add to the supply of release water that is diverted by junior
12 right holders. As Gene Bogart explained in his testimony, the Kern Island 1st right formerly made a
13 decision each day whether or not to use its full entitlement. (RT, at 105, 107-08.) Although Kern
14 Delta historically did not divert and use all of the water accruing to its rights, there was no guarantee
15 that release water would be available on a given day. The other parties on the Kern River had no
16 ability to request or order the excess, "release" water, and had no control over the timing or quantity
17 of water available. The other parties had no expectation or assurance that they would receive a
18 specific quantity of release water each year. In contrast, the forfeited water is always available, and
19 quantifiable, once the Kern Delta rights reach their diversion caps. (RT, at 105, 107-08.)

20 The North Kern parties also recognized and admitted that the forfeiture judgment had created
21 changed circumstances on the river. Daniel Easton, in his testimony and calculations, used the term
22 "forfeiture release" to describe the water forfeited by Kern Delta. (Joint Ex. 46, p. 10, ¶ 25 (d).)
23 That term referred to the quantity of water accruing to the Kern Delta rights above the "preserved
24 entitlement," but below the base entitlement for the rights, or the water otherwise available to the
25 Kern Delta rights in months when there is forfeiture. (RT, at 232-233.)

26 Mr. Easton conceded on cross examination that the term "forfeiture release" is not found in
27 the First Point flow and diversion records. (RT, at 235.) Mr. Easton created and used additional
28 terms, such as "deficit," "other rights," "restricted rights," and "undistributed release," to describe and

1 reflect the forfeiture judgment. (RT, at 235.) These are all new terms, not found in the flow and
2 diversion records, which the North Kern parties believed were necessary to describe the impact of
3 the forfeiture judgment on the Kern River. (RT, at 235-236.)

4 Mr. Easton also conceded that the “prohibition on diversion” which formed the basis for the
5 “forfeiture releases” was not in place prior to 2007, the date of the forfeiture judgment. (RT, at 238.)
6 Mr. Easton further admitted that there was a “change in historical operations” as a result of the
7 forfeiture judgment based on “decreased use” of Kern River water by the Kern Delta rights
8 following the finding of forfeiture. (RT, at 234.) On cross examination, Mr. Easton conceded that
9 “forfeiture release” water was different from release water, as unlike release water, which would
10 vary depending on the demand of the right holder, the “forfeited water would always be released
11 once the rights reached their diversions “caps.” (RT, at 242-243.) Mr. Easton further admitted that
12 there was a difference between historical releases and the forfeited water because with the forfeited
13 water, “now it’s a forced release; whereas before, it was – they had [other] reasons for releasing it.”
14 (RT, at 243.)

15 **C. The Prior Declarations of FAS are No Longer Binding or Valid**

16 The prior declarations by the SWRCB regarding the FAS of the Kern River are not binding
17 or determinative because all of the rulings and findings came before the finding of forfeiture. The
18 forfeiture finding negates and invalidates the prior finding that all of the waters of the Kern River
19 were being diverted and beneficially used pursuant to prior rights.

20 North Kern’s witnesses admitted the forfeiture judgment came after the original 1964 finding
21 that the Kern River was fully appropriated. Mr. Easton testified that he relied on the Kern River
22 water rights as they existed in 1964, at the time the SWRCB declared the Kern River fully
23 appropriated. (RT, at 217-218.) He conceded, however, that the rights described in the 1964
24 SWRCB decision regarding the FAS of the Kern River (D. 1196) had changed as a result of the 2007
25 forfeiture judgment. (RT, at 219.)

26 The City also established that the prior declarations that the Kern River was fully
27 appropriated were a reflection of the shared ownership and control of the river, and not any actual
28 lack of “surplus” water on the river. (Ex. 1-1, p. 3, ¶ 16, and p. 5, ¶ 25.) “The declarations and

1 representations to the SWRCB that the Kern River was fully appropriated and that there was no
2 surplus water, was part of KCLC's strategy to maintain control of all of the water at First Point, to
3 keep third parties away from the Kern River, and to avoid further regulatory oversight." (Ex. 1-1, p.
4 15, ¶ 80.) Of course, since KCLC was the record keeper on the river, it had the ability to control and
5 manage information regarding the existence and availability of any "unappropriated water."¹ (Ex.
6 2-1, p. 9, ¶ 37.)

7 **3. FORFEITURE HAS CREATED AND CONFIRMED THE PRESENCE OF SURPLUS**
8 **WATER ON THE RIVER**

9 **A. The City Provided Undisputed Evidence of the Quantity of Surplus Water**
10 **Available for Appropriation**

11 As required for a revision of the FAS of a river, the City provided "hydrologic data, water
12 usage data," and "other relevant information" to demonstrate the specific quantity of unappropriated,
13 surplus water available for diversion on the Kern River. (23 C.C.R. § 871(c)(1).) Specifically,
14 through Exhibit 2-22, the City calculated and quantified the amount of water which Kern Delta
15 would have forfeited if the diversion caps had been in place historically. That amount (50,646 acre
16 feet per year on average) provides the best approximation of the quantity of surplus water which is
17 available for future diversion and use as a result of the forfeiture judgment.

18 As explained by Mr. Core, the current head of the City's water department, City staff placed
19 the diversion caps (preserved entitlement) on the rights held by Kern Delta in each month where the
20 court found forfeiture, going back to 1954. The City then subtracted the diversion cap from the
21 "base entitlement" for the separate Kern Delta rights, or the amount of water which was actually
22 available to the Kern Delta rights for diversion and use in one of the months where there was
23 forfeiture. The difference between those two numbers represents the quantity of water that would
24 have been forfeited by Kern Delta had the diversion caps been in place since 1954. (RT, at 62.)
25 Exhibit 2-22 also depicts a range of water available from a low of 15,648 acre-feet to as much as

26 ¹ The evidence further established that KCLC was concerned that the Kern River might not be actually fully
27 appropriated, based on the presence of surplus water which was "released" to junior canal rights on the river. In 1964,
28 for example, the long time attorney for KCLC advised the company that despite the recent decision by the predecessor to
the SWRCB finding that the Kern River was fully appropriated, the SWRCB might still in the future accept applications
to appropriate on the river if there was "a change in circumstances which might justify showing of abandonment of
presently existing water rights." (Ex. 2-10, Ex. 2-1, p. 9, ¶ 38.)

1 123,363 acre-feet, for all of the combined Kern Delta rights in a particular year.² (Ex. 2-1, p. 20,
2 ¶¶89-93.)

3 There was no dispute as to the quantity of water forfeited by Kern Delta, as North Kern did
4 not challenge the methodology and calculations used to quantify the forfeited water. In fact, North
5 Kern's expert, Mr. Easton, calculated and came up with the same numbers to represent the "new
6 water" which was created by the finding of forfeiture.³ The North Kern parties identified the water
7 forfeited by Kern Delta as "forfeiture release," while the City characterized that same water as
8 "forfeiture entitlement." (RT, at 232.) Mr. Easton indicated that "forfeiture release is the gross
9 entitlement minus the preserved entitlement." (RT, at 232.) That is the same methodology used by
10 the City to calculate the "forfeiture entitlement."

11 Mr. Easton calculated the forfeiture release for every month where there was forfeiture,
12 going back to 1964. (RT, at 233.) Although Mr. Easton did not average or accumulate the forfeiture
13 release, a comparison of the City's evidence and the North Kern parties' evidence reveals that the
14 parties came up with the same numbers to represent and reflect the quantity of water which Kern
15 Delta would have forfeited, had the diversion caps been in place historically. For example, the
16 North Kern parties' Exhibit 49 lists the "forfeiture release" for the Kern Island right in the month of
17 January, from 1964 to the present. Those quantities, which range from 1,762 af in 1991 to 13,946 af
18 in 1997, are identical to the quantities listed in the City's Exhibit 2-22 for the Kern Island 1st right
19 in January.

20 **B. There Has Always Been Surplus Water on the Kern River**

21 The forfeiture judgment confirms and evidences that there was and always has been
22 unappropriated, surplus water on the Kern River, beyond the demand of various First Point right
23 holders. The court in the Kern River litigation explained that the water forfeited by Kern Delta was
24 "by definition" surplus to the needs and demands of the original right holder, Kern Delta, under pre-

25 _____
26 ² The City did not purport to demonstrate what had actually happened on the Kern River historically, as the North Kern
27 parties appeared to argue. The City instead only demonstrated how much new, unappropriated water would have been
28 produced if Kern Delta's diversion caps had been in place beginning in 1954.

³ The North Kern parties' other witness, Mr. Milobar, stated he "had no reason to dispute" the City's calculation of the
quantity of water forfeited by Kern Delta, as reflected in exhibit 2-22. (RT, at 180.)

1 1914 appropriative rights. The trial court in the forfeiture action stated, “by definition, water
2 ‘released’ by Kern Delta was water in excess of its demand on any given day, and thus considered
3 surplus water.” (Ex. 2-13, p. 11.) (See also Ex. 2-14, p. 27, in which the noting that “the released
4 water was surplus as to Kern Delta.”)

5 The City’s witnesses further confirmed that the forfeited water was surplus to Kern Delta’s
6 demands. Mr. Bogart, for example, explained, that the Kern Island 1st right on many days did not
7 request delivery of water up to its full entitlement of 300 cfs because it did not have a demand for the
8 water. This occurred most often in winter months, when there was more water flowing in the Kern
9 River, but less demand for water by farmers within Kern Delta. (Ex. 1-1, p. 9, ¶ 47.)

10 If a canal right did not take all of the water which was available to that right, up to the
11 entitlement, historically the excess, surplus water would be available for diversion and use by junior
12 right holders as “release” water. (RT, at 42, 44.). The release water was redistributed according to
13 demand through the internal, closed KCLC system. (Ex. 1-1, p. 14, ¶ 77.) The fact that the water
14 was used by other junior rights does not negate the fact that the water was surplus to the demand of
15 the original right holder.

16 The release water program represented a concentrated and elaborate strategy to find a place
17 of use or a place to put the surplus water within the First Point service area, to avoid forfeiture or
18 loss of water to other interests, such as Second Point and Lower River interests. KCLC would send
19 release water to other rights “to maintain order on the Kern River and make sure water got to where
20 its—where the demand was that day based on a priority system.” (RT, at 47.)

21 California courts have consistently held that water “released” by those with senior rights,
22 based on a lack of demand, is surplus water which is subject to appropriation. In *Kirman v.*

23 *Hunnewill* (1892) 93 Cal. 519, the California Supreme Court stated:

24 [t]he taking up of the waters of a stream for a special limited purpose is an
25 appropriation of only so much of the water as is necessary for that particular purpose.
26 The surplus may be the subject of a new appropriation, which will give to the second
27 locator a paramount right to the use of all the waters of the stream not required for the
28 specific purpose of the first appropriation; and the extent of the first appropriator’s
right depends upon the nature and uses of his appropriation.

“Any water not needed for the reasonable beneficial use of those having prior rights is excess

1 or surplus water and may rightly be appropriated...” (*California Water Service Co. v. Sidebotham &*
2 *Son, Inc.* (1964) 224 Cal.App.2d 715, 725.) In *Stevinson Water District v. Roduner* (1950) 36 Cal.2d
3 264, 270, the California Supreme Court held that water which “is not reasonably required for
4 beneficial use by the owners of paramount rights,... must be regarded as surplus water subject to
5 appropriation by those who can beneficially use it.” (See also, *Rank v. United States of America*,
6 142 F.Supp. 1, 113, (S.D. Cal. 1956), in which the court stated “all water above that presently
7 needed by the riparian and overlying owner is excess or surplus water, and may be appropriated.”)

8 The SWRCB has reached a similar conclusion in a number of decisions. In *In the Matter of*
9 *Application 21478 of James E. and Orma K. Albaugh to Appropriate from Willow Creek in Lassen*
10 *County*, Decision D 1237, 1965, for example, the SWRCB found that there was an unappropriated
11 water available for diversion because “the holders of the decreed rights have not been using their full
12 entitlements from March 1 to March 15, and surplus water is available to the applicants during this
13 period.” In *In the Matter of Application 21758 to Appropriate from Lower Blue Lake in Lake*
14 *County*, Decision D 1277, July 6, 1967, the SWRCB stated that water released from a lake for the
15 purpose of complying with a judgment to maintain water levels was “surplus to the needs of the
16 company” and was “subject to appropriation by the applicants.”

17 **C. There is Currently Surplus Water in the Kern River Since No One Else has a**
18 **Right to Divert and Use the Forfeited Water.**

19 The North Kern parties claim that the SWRCB should not revise the FAS of the Kern River
20 because the forfeited water can be used, or “absorbed,” by alleged junior right holders on the river,
21 and therefore there is no surplus water on the river. The City disputes the legal basis for this
22 contention because, as explained previously, the forfeiture of Kern Delta’s rights, by itself,
23 constitutes “changed circumstances” and creates surplus, unappropriated water. Any claimed right
24 or interest in the forfeited water will have to be addressed in later proceedings involving the
25 applications to appropriate the forfeited water.

26 Even if the SWRCB were to consider the North Kern parties’ contentions, it would readily
27 recognize that the North Kern parties failed to submit credible or valid evidence that they or any
28 other party has a right to divert and use the forfeited water. The evidence and testimony instead

1 established that the North Kern parties either did not have any First Point Kern River rights, or have
2 no right or ability to divert the forfeited water.

3 **(1) The North Kern parties failed to establish any right or claim to the forfeited**
4 **water**

5 The North Kern parties failed to introduce evidence or testimony as to what type of water
6 rights they or other parties actually hold on the Kern River, and failed to introduce any evidence that
7 establishes they have any right to divert the forfeited water. The North Kern parties' witnesses,
8 Martin Milobar and Mr. Easton, in fact, provided no specific facts or information with regard to any
9 actual water rights held by North Kern, Buena Vista, KCWA, KWBA or Shafter. The witnesses
10 instead only made vague references to "entitlements" held by these entities, or made unsupported
11 "assumptions" with regard to the alleged water rights of the North Kern parties.

12 The North Kern parties failed to provide evidence that they had any right or ability to divert
13 any of the water forfeited by Kern Delta. Other than North Kern, none of the parties provided any
14 evidence that they had previously ever diverted and used any water within the First Point service
15 area, or that they had actually ever diverted any water released by or otherwise accruing to Kern
16 Delta's water rights. (RT, at 174-175.)

17 Mr. Milobar, for example, indicated he was only testifying on behalf of Buena Vista, and he
18 stated that he was not prepared to provide any testimony with regard to water rights held by any of
19 the other North Kern parties. (RT, at 168-169, 174.) The North Kern parties other witness, Mr.
20 Easton, admitted to having no knowledge of any Kern River water rights, and no specific experience
21 with regard to the Kern River. (RT, at 213.) Mr. Easton only made assumptions as to various
22 "entitlements" held by the North Kern parties, but admitted he was not familiar with the "details of
23 their entitlements." (RT, at 220.) Mr. Easton conceded, however, that he did not know if North
24 Kern actually had a right to take the forfeited water. (RT, at 223.) He was not familiar with water
25 rights held by any other entity and could not provide any testimony with regard to the specific rights
26 held by the parties, or their ability, if any, to divert and use the forfeited water. (RT, at 228-230.)
27 Mr. Easton did not know any of details regarding water rights held or claimed by North Kern, and
28 was not aware of details regarding North Kern's ability to use Kern River, as specified in the 1952

1 Agreement. (RT, at 221, 253.)

2 The North Kern parties' reluctance and inability to introduce evidence regarding their actual
3 water rights is understandable, because the City has already demonstrated that the North Kern parties
4 either do not hold any valid Kern River rights within the First Point service area, or do not have any
5 right to divert the forfeited water. The North Kern parties are apparently attempting to prevent the
6 SWRCB from reviewing the actual water rights of the parties in this proceeding, to avoid exposing
7 their inability to divert and use the forfeited water.

8 Despite this strategy, it is still apparent that North Kern does not hold any licenses or permits
9 to divert Kern River water, and does not hold any right, entitlement or ability to divert Kern River
10 water other than pursuant to the 1952 Agreement with Bakersfield's predecessor, KCLC. (Exhibit 2-
11 4.) The 1952 Agreement does not authorize or allow North Kern to divert water accruing to any
12 rights not listed in the agreement, including rights currently or formerly held by Kern Delta, any
13 new, forfeited water, or any "increased flows" attributable to or created by other water rights. (Id.)
14 The 1952 Agreement does not authorize North Kern to divert any water accruing to the rights held
15 by Kern Delta, or any water released or forfeited by Kern Delta. (Id.)

16 The court in the Kern River litigation also held that North Kern did not have and had not
17 obtained any rights to water not diverted and used by Kern Delta. The court concluded that the
18 forfeited water was not awarded to North Kern, and that the finding of forfeiture did not result in the
19 increase or enhancement of the rights utilized by North Kern pursuant to the 1952 agreement. The
20 court in the Kern River litigation also held that North Kern did not "purchase" any right to the
21 release water through the 1952 Agreement. (Ex. 2-13, pp. 8-9.)

22 The trial court rejected all of North Kern's other claims to the forfeited water, including
23 claims for abandonment, prescription, inverse condemnation, and intervening public use. Although
24 North Kern from time to time used a portion of the release water, the trial court found that North
25 Kern had no permanent, binding right to the water and did not otherwise take steps to acquire rights
26 to such water. Through its appeal of the initial judgment in the forfeiture action, North Kern did not
27 challenge the trial court's rejection of the causes of action under which it sought rights to the
28 forfeited water, including the claim for "purchase."

1 Therefore, to the extent that forfeited water, or “release water” (in forfeiture months), is
2 “available” for diversion and use by the rights utilized by North Kern, such water actually belongs to
3 Bakersfield, and not to North Kern. Pursuant to the 1952 Agreement and the holdings in the Kern
4 River litigation, North Kern has no right to divert any water accruing to Kern Delta’s rights, any new
5 water outside of the rights listed in the agreement, or any forfeited, surplus water. Such water
6 clearly was not part of the 1952 Agreement or contemplated by the agreement.

7 The evidence and testimony also established that the forfeited water is only available for
8 diversion and use within the First Point service area because the forfeiture primarily occurred in the
9 winter months, when all Kern River water typically stays within First Point, and is not distributed to
10 Second Point or Lower River interests. (RT, at 184-185.) None of the other parties established that
11 they have any right or ability to divert the forfeited water, or that they can divert any Kern River
12 water available within the First Point service area. Buena Vista and KCWA do not hold any First
13 Point water rights, and have no right or ability to divert the forfeited water. Their rights are not
14 affected or influenced by the existence of surplus, forfeited water within the First Point service area.
15 (RT, at 171-172.) The evidence also established that Shafter and KWBA have no Kern River water
16 rights, and therefore have no ability to divert and use, or “absorb,” the forfeited water. (RT, at 157-
17 159.)

18 **(2) The SWRCB can and should determine that the North Kern parties have no**
19 **right or claim to the water in considering whether there is surplus water on**
20 **the river.**

21 The SWRCB is authorized, when appropriate, to review and examine water rights to
22 determine if there is surplus water on a river or stream system. The SWRCB should also consider
23 the binding decisions of California courts regarding the forfeiture of Kern Delta’s rights, and
24 various claims to the forfeited water, which decisions were admitted into evidence in this
25 proceeding. Through such information the SWRCB can readily determine that the North Kern
26 parties do not have any valid right or claim to the forfeited water, and that there is therefore surplus
27 water available in the river above and beyond any actual rights on the river.

28 The SWRCB has explained that “in general, unappropriated water is determined by (1)
quantifying the water physically available in the watershed and (2) subtracting the needs of riparian

1 users and the claims of the holders of prior rights. The quantity of water surplus to the needs of
2 riparian users and the claims of the holders of prior rights is available for appropriation.” (*In the*
3 *Matter of Application 27253*, Order No. WR 86-1, 1986.) Similarly, the SWRCB has consistently
4 stated that the existence of unappropriated water “depends on whether or not there is water surplus to
5 the amounts necessary to satisfy holders of prior rights” to the flows of the river. (*In the Matter of*
6 *Application 18025 of City of Yuba City to Appropriate from the Feather River in Sutter County*,
7 Decision D 1135, May 22, 1963.) In *In the Matter of Application 29047 of John and Mayla Clark*,
8 Decision No. 1628, June 3, 1992, the SWRCB explained, in considering an application to
9 appropriate, that “how much unclaimed water exists” in a stream depends in large part on the
10 existence of prior water rights, “assuming that [protestants] have valid senior appropriative or
11 riparian rights.”

12 In *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 96, the
13 California Supreme Court stated that the predecessor to the SWRCB, in determining whether water
14 was subject to appropriation, “was authorized to investigate the water source to which a claim was
15 made, to take testimony with regard to the rights existing in it, and ‘to ascertain whether or not such
16 water...is appropriated under the laws of this state.’” (Quoting from *Tulare Water Co. v. State*
17 *Water Comm.* (1921) 187 Cal. 533.) In determining whether surplus water is available, the SWRCB
18 must make “an examination of prior riparian and appropriative rights.” (*United States of America v.*
19 *State Water Resources Control Board* (1996) 182 Cal.App.3d 82, 102, quoting *Temescal., supra.*)

20 The SWRCB has explained on numerous occasions that although it does not “adjudicate”
21 water rights, it still has the authority and ability to review, consider, “determine” and examine prior
22 water rights. In *In the Matter of Application 12152 by Santa Margarita Mutual Water Company and*
23 *Applications 12178 and 12179 by Fallbrook Public Utility District*, Decision No. D 897, April 10,
24 1958, for example, the SWRCB explained “There is a vast difference between the jurisdiction of the
25 Board in considering and acting upon applications to appropriate unappropriated water of the State
26 of California and the jurisdiction of a court in determining conflicting claims to established rights to
27 the use of water. The Board exercises purely administrative powers and duties; it has no judicial
28 authority.”

1 The SWRCB has additionally reviewed and interpreted contracts to determine the basis and
2 extent of a claimed water right. In *In the Matter of Application 28888*, Order No. WR 90-4, April
3 19, 1990, for example, the SWRCB found that an agreement with the United States Bureau of
4 Reclamation (Bureau) did not give a water right applicant the right to use Bureau facilities to divert
5 water under a new water right. The SWRCB explained, “There is nothing in the contract to support
6 the contention that the contract grants a right to utilize Bureau facilities to deliver water otherwise
7 available to the District rather than delivering water purchased from the Bureau pursuant to the
8 contract.” Similarly, the SWRCB can and should review the 1952 Agreement to determine that
9 there is nothing in the agreement to support the contention that North Kern has any right or claim to
10 the forfeited water, the “release water,” or any other water previously held by Kern Delta.

11 In *In The Matter Of Implementation Of Water Quality Objectives*, Order No. WR 2000-02,
12 March 15, 1999, the SWRCB stated that although “the existence and content of the contract is
13 outside the control of SWRCB,” it is still authorized to determine that “the contract does not create a
14 right to divert or use water, except in accordance with the rights of the water right holder, and does
15 not define or alter those water rights.” The North Kern parties similarly cannot simply “claim” that
16 they hold a valid water right on the Kern River. The North Kern parties instead have at least an
17 initial burden to establish the extent, nature and existence of any claimed water right.

18 In *In the Matter of Water Right Permit 20864 (Application 26780)*, Order No. WR 96-05,
19 October 17, 1996, the SWRCB approved an application to appropriate based, in part, on the fact that
20 the parties that protested the application did not demonstrate that they had prior rights to the water
21 subject to appropriation. The SWRCB rejected arguments that granting the application to
22 appropriate would impact unasserted water right claims or future water rights, stating “to deny a
23 pending water right application based on the possible future assertion by a third party to and
24 ‘inchoate’ right to divert water would be analogous to denying an application based on the
25 possibility of an unquantified future increase in riparian diversions.” The SWRCB has also
26 frequently stated that the “unauthorized diversion of water is considered a trespass,” and pursuant to
27 this authority, the SWRCB has frequently reviewed or considered evidence “supporting an existing
28 basis of rights.” (*In the Matter of Unauthorized Diversion and Uses of Water by Carreras Ranch*,

1 *LLC*, Order No. WR2009-0035, June 4, 2009.)

2 In *In the Matter of Permits 16209, 16210, 16211, 16212 (Applications 18721, 18723, 21636*
3 *and 21637) of the United States Bureau of Reclamation*, Order No. WR 2008-0045, December 2,
4 2008, the SWRCB explained, in an order revoking various water rights permits held by the U.S.
5 Bureau of Reclamation (Reclamation), that “it is important to recognize, however, that revocation of
6 the permits will not reduce available water supplies. Rather, revocation may redistribute the
7 available supply by making water available to junior right holders and applicants for new water
8 rights.” The SWRCB further noted that there were 28 permits and licenses with priority dates junior
9 to the permits which were subject to revocation, and that the holders of these permits and licenses
10 might benefit from the revocation of the permits. In contrast, there were no permits or licenses on
11 the Kern River of any kind, and the North Kern parties have failed to establish or demonstrate that
12 they have any right, claim or ability to divert and use the forfeited water as junior right holders or
13 otherwise. Accordingly, as explained in WR 2008-0045, the forfeiture of Kern Delta’s water rights
14 must result in “redistribution” of available water supply to “applicants for new water rights.”

15 **D. North Kern’s Diversion of the Forfeited Water is Not Determinative**

16 During the course of the hearing the North Kern parties claimed that the fact that the City had
17 not changed the record of diversion and use to reflect the final 2007 forfeiture judgment indicated
18 that there were not changed circumstances on the Kern River. North Kern also alleged that it has
19 diverted and used forfeited water following the 2007 forfeiture judgment.

20 During the hearing the City explained that it had not changed the record to preserve the status
21 quo and avoid fights pending SWRCB action on the water. The City’s witnesses explained that
22 Bakersfield has not changed the flow and diversion records on the river following the judgment of
23 forfeiture because “We’re waiting for somebody to tell-tell us how to administer surplus water-how
24 to show it on the record.” (RT, at 63.) The City thought that it would be premature to alter the
25 record to reflect forfeiture until the SWRCB determined the appropriate disposition, ownership and
26 use of the forfeited water. (RT, at 18, ¶ 83.) The City delayed changing the record of diversion and
27 use of water to avoid disputes and disagreements, and to “maintain order” before it got some sort of
28 direction on how to handle that water.” (RT, at 156-157.) The City should not be prejudiced or

1 penalized for trying to keep peace on the river and to avoid controversy and further litigation
2 pending final SWRCB action on the forfeited water. The City, moreover, explained that it could
3 easily change the record to reflect diversion, as explained by Mr. Core, and will do that if the
4 SWRCB decides not to take action on the forfeited water. (RT, at 64.)

5 The fact that North Kern previously diverted some of the water not used by Kern Delta, as
6 well as some of the forfeited water, does not create any right or entitlement to the water, nor does it
7 authorize North Kern to continue to divert the water. (*See Richardson v. Railroad Commission*
8 (1923) 191 Cal. 716, holding that use of surplus water, or water above needs of a prior appropriator,
9 by others does not give the other parties any right to continue to use the surplus water.) (See also *In*
10 *the Matter of Draft Cease and Desist Order 262.31-18*, Order No. WR 2006-0001, January 13, 2006,
11 in which the SWRCB similarly held that a community service district holding pre-1914 rights could
12 be enjoined and subject to a cease and desist order from the SWRCB based on its long time
13 diversion of water above its established water rights.)

14 **E. There is Uncontroverted Evidence of Surplus Water in “High flow” Years**

15 The SWRCB should also revise the FAS of the Kern River because there are changed
16 circumstances involving the existence of very high flow quantities of Kern River water in certain
17 years. (Ex. 2-1, p. 15, ¶ 68.) The City introduced uncontroverted evidence and testimony which
18 established that in high flow years, the amount of water in the Kern River far exceeded the
19 entitlement and demand at First Point and Second Point, and substantial quantities of water flowed
20 into the Kern River – California Aqueduct Intertie facility. (Ex. 2-1, p. 15, ¶ 69) (See also Ex. 1-1,
21 p. 13, ¶¶ 68, 69.)

22 The City’s Exhibit 2-18 demonstrated that the Intertie has taken excess Kern River six times,
23 in seven different years (one “incident” started in 1982 and flowed into 1983). Exhibit 2-18
24 indicates that diversions into the California Aqueduct Intertie have ranged from as little as 1,793 af
25 to as much as 664,036 af in one particularly wet year. (Ex. 2-1, p. 15, ¶ 70.)

26 California courts, and the SWRCB, have previously found that such “infrequent” or “excess”
27 flows can and should be classified as surplus water, subject to appropriation. (*See Allen v.*
28 *California Water & Tel. Co* (1946) 29 Cal.2d 466, finding that high, surplus flows could be

1 appropriated even if “subject to interruption or cessation.”)

2 **4. THE SWRCB CAN NOT ALLOW THE WATER TO REMAIN IN THE RIVER**
3 **WITHOUT ANY REVIEW OR OVERSIGHT**

4 Finally, as a matter of law and policy, it is imperative that the SWRCB revise the FAS status
5 of the Kern River to avoid uncertainty, confusion and potential “anarchy” on the river. Since the
6 court in the Kern River litigation consistently declined to adjudicate rights to the forfeited water, the
7 SWRCB must necessarily revise the FAS of the river and process the applications to appropriate. In
8 *Johnson Rancho County Water District v. Yuba County Water Agency* (1965) 335 Cal.App.2d 863,
9 876, the court explained “The legislature has entrusted the allocation of the state’s uncommitted
10 water resources to the Water Rights Board, not to the courts.”

11 The City’s witnesses also explained that the finding of forfeiture has created significant
12 uncertainty and confusion with regard to the Kern River water rights structure. It is imperative that
13 the SWRCB therefore revise the FAS of the river to address and resolve such uncertainty. (See
14 *People v. Shirokow* (1990) 26 Cal.3d 301, 310, stating “the board is hindered in its task by any
15 uncertainty as to the availability of water for appropriation.”)

16 The SWRCB should revise the declaration of FAS for the Kern River so that it can sort out
17 all of these issues in the proper forum. The granting of a FAS petition is a purely procedural matter.
18 An approval does not authorize the appropriation of water by any petitioner. (*In Re Fully*
19 *Appropriated Stream System for Santa Ana River*, Order No. WR 2000-12, September 21, 2000.)
20 Even if, as the North Kern parties argue, the forfeited water should stay in the river for use by junior
21 rights, the SWRCB has to make that determination after considering all of the applications to
22 appropriate the forfeited water. It cannot simply allow water to stay in the river to feed existing
23 rights without considering all claims to that additional block of water, to determine whether the
24 alleged junior right holders actually hold valid rights, whether they can take the water under those
25 rights, whether they have a demand for the water, and whether they can put the water to reasonable
26 and beneficial uses.

27 The SWRCB must also revise the FAS of the river to address “public trust” issues. The
28 SWRCB has indicated on numerous occasions that it must take the public trust into account in

1 determining the availability of water available for appropriation, or the existence of surplus water.
2 The SWRCB must specifically examine the quantity of flow in a stream, “the sources of the flow,
3 the diversion and use of water under prior rights, and the amount of water needed for protection of
4 instream uses and other public trust uses.” (*In the Matter of Water Right Application 29408*,
5 Decision No. 1683, September 18, 1997.)

6 In Order No. WR 2008-0045, the SWRCB further explained that water rights previously
7 accruing to permits subject to revocation did not “automatically” pass to junior water right permit
8 holders. Instead, the SWRCB explained

9 “sound public policy strongly supports allowing current and potential future
10 applicants to appropriate any surplus water that is made available by revoking the
11 Auburn Dam Project permits, provided that the applicants’ projects are in the public
12 interest and will be developed with due diligence, instead of allowing Reclamation to
13 reserve its water rights in ‘cold storage’ indefinitely.”

14 Similarly, even if the North Kern parties did hold a right to divert and use the forfeited water,
15 they would still have to demonstrate, following the revocation of the FAS, that their proposed
16 diversion and use of the forfeited water under existing rights was “in the public interest.”

17 Finally, as recognized by the North Kern parties expert, Mr. Easton, if the SWRCB does not
18 revise the FAS of the river Kern Delta could avoid the impact of the forfeiture judgment by diverting
19 forfeited water for use within Kern Delta through their junior rights (the Stine, Buena Vista and
20 Farmers rights). Specifically, absent SWRCB assumption of jurisdiction over the forfeited water,
21 the junior Kern Delta rights could divert forfeited water formerly accruing to the more senior Kern
22 Island right, and then transfer the water back to the Kern Island service area through lateral canals.
23 Mr. Easton did not dispute or question the possibility of this scenario. (RT, at 250-251.) That result
24 further demonstrates that the forfeited water cannot merely increase the flow of water in the river,
25 but must be considered and legally and practically treated as a new, separate block of unappropriated
26 water.

27 Dated: November 24, 2009

DUANE MORRIS LLP

28 
Colin L. Pearce
Attorneys for Petitioner City of Bakersfield

1 **PROOF OF SERVICE**

2 *In the Matter of State Water Resources Control Board Hearing on Petitions to Revise the*
3 *Declaration of Fully Appropriated Stream System of the Kern River in Kern and Tulare Counties*

4 I am a citizen of the United States, over the age of 18 years, and not a party to interested in
5 the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear
6 Tower, Suite 2000, San Francisco, California 94105. I am readily familiar with this firm's practices
7 for collecting and processing correspondence for mailing with the United States Postal Service and
8 for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated
9 below, I served the following documents:

7 **PETITIONER CITY OF BAKERSFIELD'S CLOSING BRIEF REGARDING REVISION OF**
8 **THE FULLY APPROPRIATED STATUS OF THE KERN RIVER**

9 X BY U.S. MAIL: I enclosed the documents in a sealed envelope or package
10 addressed to the person(s) set forth below, and placed the envelope for collection and
11 mailing following our ordinary business practices, which are that on the same day
12 correspondence is placed for collection and mailing, it is deposited in the ordinary
13 course of business with the United States Postal Service in San Francisco, California,
14 in a sealed envelope with postage fully prepaid. OR
15 I enclosed the documents in a sealed envelope or package addressed to the
16 person(s) set forth below, and deposited the sealed envelope with the United States
17 Postal Service, with the postage fully prepaid.

18 BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties
19 to accept service by e-mail or electronic transmission, I caused the documents to be
20 sent to the person(s) at the e-mail addresses listed below. I did not receive, within a
21 reasonable time after the transmission, any electronic message or other indication that
22 the transmission was unsuccessful.

17 Kevin M. O'Brien
18 c/o Kern Water Bank Authority
19 Downey Brand LLP
20 621 Capitol Mall, 18th Floor
21 Sacramento, CA 95814

Nicholas Jacobs
c/o Kern County Water Agency
Somach, Simon & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

21 Scott K. Kuney, Esq.
22 c/o North Kern Water Storage District
23 Young Wooldridge LLP
24 1800 30th Street, Fourth Floor
25 Bakersfield, CA 93301

Jason M. Ackerman, Esq.
c/o City Of Shafter
Best, Best & Krieger, LLP
3750 University Avenue, Suite 400
Riverside, CA 92501

24 Gene R. McMurtrey
25 c/o Buena Vista Water Storage District
26 McMurtrey, Hartsock & Worth
27 2001 22nd Street, Suite 100
28 Bakersfield CA 93301-3831

Adam Keats
c/o Center For Biological Diversity
351 California Street, Suite 600
San Francisco, CA 94104

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

3 Dated: November 24, 2009


4 Mireya Zamora Nelson
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