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April 27, 2010

VIA EMAIL AND FEDERAL EXPRESS

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**Re: COMMENT LETTER-05/04/10 BOARD MEETING ITEM: ORDER-WR
2010-0010 RECONSIDERATION**

**Comments of Petitioner City of Bakersfield to Draft Order Denying
Reconsideration to Amend State Water Resources Control Board Order WR
2010-0010-Kern River**

To the State Water Resources Control Board:

Petitioner City of Bakersfield (“Bakersfield” or “City”) respectfully submits the following comments to the State Water Resources Control Board’s (“SWRCB”) April 20, 2010 Draft Order Denying Reconsideration to Amend State Water Resources Control Board Order WR 2010-0010-Kern River (“Draft Order”).

Bakersfield commends the SWRCB, Board members, and SWRCB staff for the clear, detailed, and well-reasoned Draft Order addressing the petition for reconsideration challenging SWRCB Order WR 2010-0010 amending the declaration of fully appropriated streams to remove the designation of the Kern River as fully appropriated. We further commend the SWRCB for responding in such a strong, rational and judicious manner to the increasingly shrill and vitriolic attacks on the SWRCB and its staff by the North Kern parties (consisting of the North Kern Water Storage District, Buena Vista Water Storage District, Kern County Water Agency, City of Shafter, and Kern Water Bank Authority), as evidenced by the arguments and statements in the petition for reconsideration.

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As we have pointed out on numerous occasions, the North Kern parties are doing everything in their power to prevent the SWRCB from interrupting and impeding the North Kern parties' improper diversion of unappropriated Kern River water, without any valid right or claim to the water. We are pleased that the SWRCB has not been distracted, dissuaded or intimidated by the North Kern parties' constant attacks on the SWRCB's authority and jurisdiction. We further appreciate the SWRCB for providing extensive and persuasive authority and citations to actual evidence in response to the contentions of the North Kern parties.

In addition to these comments, Bakersfield refers to and incorporates herein the Objection and Response to the Petition for Reconsideration of the North Kern parties filed with the SWRCB by Bakersfield on April 13, 2010.

1. THE SWRCB SHOULD APPROVE THE DRAFT ORDER

The Draft Order is supported by evidence, testimony and applicable statutes, regulations and authority, and is not subject to any legitimate challenge or question.

As Bakersfield pointed out in its Objection and Response to the Petition for Reconsideration, the North Kern parties failed to satisfy any of the requirements for a petition for reconsideration, pursuant to Water Code Sections 1122-1124 and 23 Cal. Code Regs., Section 768. In the petition, the North Kern parties only repeated legal arguments which they already raised in this proceeding, and which arguments the SWRCB previously considered and rejected. The North Kern parties also improperly referred to and attempted to rely on evidence outside the record which was not previously submitted to the SWRCB, in express violation of 23 Cal. Code Regs., Section 768(c).

As the SWRCB recognizes in the Draft Order, the North Kern parties misstate or ignore the actual authority that applies to the revision of the Fully Appropriated Status ("FAS") of a stream system. The North Kern parties also ignore and fail to address the actual conclusions and findings in Order WR 2010-0010, and the evidence cited and relied on by the SWRCB in the Order. As the SWRCB recognizes, the petition is otherwise not supported by applicable authority or the evidence and testimony introduced at the October 2009 hearing in this proceeding.

In addition to the authority and evidence already cited by the SWRCB in the Draft Order, Bakersfield offers the following additional comments in support of the Draft Order.

Bakersfield agrees with the SWRCB's statement that the construction of the Intertie was equivalent to the construction of a dam or other physical facility, which type of construction has previously justified the revision of the FAS of stream systems. The SWRCB also correctly

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explained that the construction of the Intertie structure allowed parties to capture, store and put to beneficial use water which otherwise would have been lost or treated as flood water.

In the Draft Order, the SWRCB also provides a strong and clear response to the North Kern parties' argument that water diverted into the Intertie is not in excess of the needs of the parties claiming rights on the river. As Bakersfield pointed out in its Objection and Response to the Petition for Reconsideration, the North Kern parties' own witnesses admitted that water diverted into the Intertie was in excess of the rights of all of the interests on the Kern River. The SWRCB further explained that since the alleged Kern River right holders did not have a demand for the water going into the Intertie, they cannot claim or continue to hold rights to the water.

Bakersfield further provided uncontroverted data, including flow and diversion records and charts, to assist the SWRCB in its consideration of issues relating to the Intertie. (See e.g., Bakersfield Exhibit 2-18.) The evidence and testimony established that water diverted into the Intertie has been subject to control and capture, and diversion and use, and is therefore properly classified as unappropriated water.

The SWRCB also properly rejected the North Kern parties' contention that they "controlled" water diverted into the Intertie pursuant to some unnamed Kern River rights, and that such water was therefore not unappropriated, surplus water. The SWRCB instead properly focused on the fact that water diverted into the Intertie, according to the undisputed evidence and testimony, was outside of and in excess of any actual demand for the water, and is therefore unappropriated water. (Draft Order, pp. 8-9.) The SWRCB further properly found that there was no evidence in the record that any of the water diverted into the Intertie "was delivered pursuant to a voluntary transfer under pre-1914 water rights." (Id., at p. 9.)

In the Draft Order, the SWRCB further explained, "all water rights are limited to amounts reasonably necessary for beneficial use...and even if water could be put to beneficial use, it is unappropriated water if no water right holder intends to use it." (Draft Order, p. 7, citations omitted.) Bakersfield appreciates this clarification and further direction from the SWRCB. Pursuant to such authority, Bakersfield understands that the SWRCB will in the future review and determine the actual, established water rights in place on the Kern River, and the quantity of water associated with those rights, based on actual use. Through this process the SWRCB should readily determine that the North Kern parties do not hold any actual, quantifiable rights to the forfeited water, or any pre-1914 appropriative rights to "First Point" Kern River water. The SWRCB will also be able to determine that the rights of other claimants on the river, such as the Kern Delta Water District, are actually less than various claimed but unused "entitlements" to water.

The SWRCB further correctly explained that its decision to determine the quantity of unappropriated water on the river in the course of processing applications to appropriate, as

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opposed to at the outset of the proceedings, is supported by long-standing authority. As the SWRCB recognized, that procedure is also supported by and consistent with the holding of the court of appeal in the final "*North Kern*" decision, contrary to the arguments of the North Kern parties.

The SWRCB also correctly dismisses the North Kern parties' contention that the witnesses at the October 2009 hearing were not qualified or competent to testify about the diversion and use of water and the nature of water rights on the Kern River. Although the North Kern parties explicitly attacked the qualifications and testimony of Bakersfield's witnesses, Florn Core and Gene Bogart, they also attempted to distance themselves from the testimony and admissions of their own witnesses. The North Kern parties specifically attempted to dispute the testimony of Daniel Easton, an expert retained by the North Kern parties, that water diverted into the Intertie was in excess of the rights of all parties on the Kern River. The SWRCB recognized that the witnesses generally testified as to hydrologic conditions and water demands on the Kern River, and therefore were "competent to testify" on the issues before the SWRCB. Bakersfield appreciates the SWRCB's recognition of the competence and qualifications of its witnesses, and its refusal to allow the North Kern parties to avoid the admissions and contradictory testimony of their own witnesses.

Bakersfield also agrees with the SWRCB's rejection of the North Kern parties' contention that they were not properly put on notice that the SWRCB would consider water diverted into the Intertie in this proceeding, and that the SWRCB erred because the applications to appropriate did not request or take into account the "Intertie water." The SWRCB points out that "the procedures for revising the FAS declaration do not limit the Board's consideration to water sought to be appropriated in an application filed by a petitioner, or even require that an application be filed." (Draft Order, p. 9.) In addition, the SWRCB points out that all the applicants are free to amend their applications to account for the Intertie water.

At the end of the Draft Order, the SWRCB indicates that if the North Kern parties' arguments are correct, and it turns out that there is no unappropriated water on the Kern River, the SWRCB could always amend the FAS declaration at a later time. The SWRCB, significantly, states that it would not do this, i.e., would not revise the declaration of the FAS of the river, without "taking into account waters reasonably necessary for the protection of instream beneficial uses under those seasons or conditions." (Draft Order, p. 13.) Bakersfield appreciates that clarification and direction with regard to the need to set aside water for instream beneficial uses, no matter the outcome of the proceedings involving the applications to appropriate on the Kern River.

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2. ADDITIONAL COMMENTS REGARDING THE KERN RIVER PROCEEDING

In Order WR 2010-0010 the SWRCB ordered staff of the Water Rights Division of the SWRCB to accept and process the pending water rights applications filed on the Kern River. We understand the filing of the petition for reconsideration has delayed that process. Following the anticipated approval of the Draft Order at the SWRCB's May 4, 2010 meeting, we understand that SWRCB staff will start to process the applications to appropriate on the Kern River.

We appreciate that in the Draft Order the SWRCB provided more guidance and direction with regard to the future processing of the applications to appropriate, and the related determination of the actual quantity of unappropriated water on the Kern River, and the need to set aside or reserve water for environmental, public trust and instream uses. The SWRCB explained that once it has determined that there is unappropriated water on a formerly fully appropriated stream system, "the determination whether sufficient unappropriated water is available for the diversion and use proposed under an application can best be decided in proceedings to issue or deny a permit on that application." (Draft Order, p. 5.) The SWRCB also referred to various procedures which would allow the SWRCB "to address availability of unappropriated water as part of application processing in greater detail than in a FAS declaration proceeding." (Id., at p. 12.)

Bakersfield has already started to prepare and compile detailed information and data regarding the quantity of unappropriated water available on the Kern River. We expect to provide this information to the SWRCB in the near future and to thereafter work closely with SWRCB staff to interpret and apply such information. We are also ready and willing to work with the SWRCB to set aside and allocate sufficient quantities of unappropriated, surplus water for environmental, public trust and instream flow purposes.

As indicated in prior comments to the SWRCB, Bakersfield also remains ready and willing to work with the SWRCB to assist in the determination of the quantity of unappropriated water on the Kern River by, among other things, providing a tour of the Kern River and its facilities, providing copies of the flow and diversion records to the SWRCB, making the historic Kern River records available for SWRCB staff, and sharing other documents and information, such as maps, photographs, charts, summaries, and other materials regarding the river. Bakersfield also believes it would be beneficial to meet with the SWRCB to explain the practical operation of the river.

Bakersfield notes that the North Kern parties appear reluctant or unable to provide the same assistance and information to the SWRCB. These parties do not maintain any comparable records with regard to the Kern River, as Bakersfield is responsible for the physical operation of the river and for preparing and maintaining the historic flow and diversion records. Bakersfield assumes the North Kern parties are unable and unwilling to provide information that reveals that

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they do not hold any right to "First Point" Kern River water, or, in the case of the North Kern Water Storage District, that they do not hold any actual, valid pre-1914 appropriative water rights on the Kern River.

Finally, as the SWRCB is certainly aware, the North Kern parties have threatened, or have impliedly threatened, to file a petition for writ of mandate or other type of legal challenge against the SWRCB in the near future, in a further attempt to prevent the SWRCB from assuming jurisdiction over the forfeited, unappropriated water on the Kern River.

If the North Kern parties assert further challenges to the Order amending the FAS of the Kern River, Bakersfield urges the SWRCB to not delay the processing of applications to appropriate, or the determination of the quantity of forfeited, unappropriated water available on the Kern River. We do not believe that any further challenge to the SWRCB's jurisdiction and authority by the North Kern parties would be successful. In addition, given the expected lengthy review process for applications to appropriate, the anticipated protests to the applications, and the anticipated further attacks on the SWRCB's actions and jurisdiction by the North Kern parties, we urge the SWRCB to avoid any delay of the application review process and the proceedings involving the Kern River.

3. CONCLUSION

We remind the SWRCB that residents of Bakersfield and the region submitted almost 4,000 written comments and statements in support of Bakersfield's application to appropriate and the SWRCB's decision to revise the FAS of the river. We appreciate that the SWRCB has not allowed the North Kern parties' attacks on the SWRCB's authority and jurisdiction to impede or disrupt its obligation to assume jurisdiction over unappropriated water on the Kern River. Bakersfield urges the SWRCB to continue to follow California law and policy and to honor the strong public sentiment in support of Bakersfield's application to appropriate and the SWRCB's protection of environmental, instream and public trust interests with regard to the river.

Bakersfield therefore respectfully urges the SWRCB to approve and execute the Draft Order in its present form during the May 4, 2010 meeting of the SWRCB.

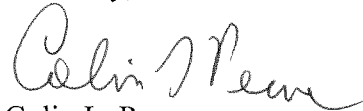
In addition, following the approval of the Draft Order, Bakersfield again urges the SWRCB to not delay in any way the processing of applications to appropriate water from the Kern River, and the necessary determination of the quantity of unappropriated water available for diversion and use, and the quantity of water necessary to meet and protect environmental, public trust and instream policies and demands on the river.

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We again urge the SWRCB staff to travel to Bakersfield to investigate the Kern River and the flow and diversion records on the river prepared and maintained by Bakersfield. The SWRCB should also work with Bakersfield staff and representatives to confirm and determine the quantity of unappropriated water, and to arrive at a plan of use for the unappropriated water which best protects and preserves the environment, the river, fish and wildlife, and multiple reasonable and beneficial uses, including Bakersfield's present and future demand for water for environmental and domestic uses.

Bakersfield thanks the SWRCB and its staff for their time and attention to this matter, and further thanks the SWRCB for the opportunity to comment on the Draft Order.

Sincerely,



Colin L. Pearce
For DUANE MORRIS

CLP/cwc

cc: Virginia Gennaro, City of Bakersfield
Service List (see attached)

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