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September 21, 2009

VIA EMAIL AND U.S. MAIL

Arthur G. Baggett, Jr.
Board Member and Hearing Officer
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

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Re: Water Right Hearing Regarding Petitions to Revise the Declaration of Fully Appropriated Stream System of the Kern River-Scheduled to Commence on October 26, 2009

Dear Mr. Baggett:

Through this letter, Petitioner City of Bakersfield (“Bakersfield”) hereby objects and responds to the September 17, 2009 letter to you from North Kern Water Storage District (“North Kern”), City of Shafter (“Shafter”), Buena Vista Water Storage District (“Buena Vista”), Kern County Water Agency (“KCWA”), and Kern Water Bank Authority (“KWBA”) (hereinafter, where appropriate, the “North Kern Parties”), with regard to the above-referenced proceeding.

In the letter, counsel for the North Kern Parties present a number of legal arguments in advance of the September 24, 2009 pre-hearing conference with regard to the petitions to revise the Declaration of Fully Appropriated Stream Systems (“FAS Declaration”) for the Kern River.

Bakersfield objects to the North Kern Parties’ September 17, 2009 letter, and respectfully requests that you disregard and reject the letter, for the following reasons:

1. As explained in our January 23, 2009 letter to Victoria A. Whitney of the State Water Resources Control Board (“SWRCB”) (a copy of which letter is attached hereto for your reference as Exhibit A), the North Kern Parties are not actual or proper “petitioners” in this proceeding, as they openly oppose Bakersfield’s petition to revise the FAS Declaration for the Kern River. The North Kern Parties therefore have no standing or valid basis for presenting the legal arguments set forth in their letter to the SWRCB in advance of the pre-hearing conference,

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at the pre-hearing conference, or at the October 26, 2009 hearing. Bakersfield will additionally raise this objection at appropriate times and opportunities in this proceeding.

2. There is no authority, and there has been no request, for the presentation of legal arguments and briefs in advance of the pre-hearing conference. We assume that if the SWRCB believes that additional legal briefs or “position papers” are necessary in this proceeding, the hearing officer will provide appropriate notice to Bakersfield and the other parties.

3. In the alternative, we respectfully direct you and the SWRCB hearing staff to our January 31, 2008 and August 6, 2008 letters to Kathryn Gaffney of the SWRCB, in which letters we addressed a number of the issues raised in the September 17, 2009 letter from the North Kern Parties. (Copies of our prior letters, without exhibits, are attached hereto for your reference as Exhibits B and C.)

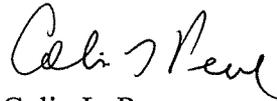
4. Bakersfield further points out that (a) the North Kern Parties urge the SWRCB to apply standards and procedures in this proceeding which are contradictory to and not supported by applicable authority regarding the FAS Declaration and the SWRCB hearing process, (b) the North Kern Parties’ concerns regarding evidence relating to “instream flows or public trust water supply requirements” are misguided and unfounded because such evidence is directly relevant to Bakersfield’s present and intended future use of Kern River water pursuant to its pre-1914 Kern River water rights, and the SWRCB must consider such reasonable and beneficial uses in determining the existence of surplus water on the Kern River. In assessing the existence and quantity of surplus water on the Kern River, for example, the SWRCB must consider the pre-existing demands and authorized reasonable and beneficial uses of water on the river, including Bakersfield’s use of Kern River water for recharge in the river, instream flows, and public trust purposes, and (c) the North Kern Parties’ contention that the SWRCB should not address “certain nonjurisdictional contractual disputes” is misleading and erroneous. Instead, as part of its review of the FAS Declaration for the Kern River, the SWRCB must, solely for the purpose of deciding whether water is available for appropriation, determine the existence and the extent of any claimed water rights of parties and petitioners in the proceeding, including the contract rights held by the North Kern Parties. (Order No. WR 89-8, April 20, 1989, at 18.)

5. Finally, Bakersfield points out that the North Kern Parties have repeatedly and consistently attempted to prevent the SWRCB from holding any hearings on the Kern River and the FAS Declaration for the river. In their September 17, 2009 letter, the North Kern Parties again request that the SWRCB delay the October 26, 2009 hearing on the Kern River. The letter therefore constitutes still another attempt by the North Kern Parties to delay and obstruct the hearing process, presumably so that they can divert and use the forfeited, surplus water on the Kern River without SWRCB review and oversight, and without any valid title, right or claim.

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If you would like additional information or authority with regard to these matters, please let us know. We also reserve the right to address the arguments and legal and factual errors in the North Kern Parties' letter in more detail in the future.¹ We thank you for your attention to this matter.

Sincerely,



Colin L. Pearce
For DUANE MORRIS

CLP/cwc
Enclosures

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

¹ For example, at page 3 of their letter, the North Kern Parties misstate the quantity of water the "Kern Island 1st right" was left with following forfeiture, as they reference the quantity of water forfeited in various months, and not the "preserved entitlement" of the rights after forfeiture in those months.

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**KERN RIVER FAS HEARING SERVICE LIST
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Arthur G. Baggett, Jr.
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EXHIBIT A

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January 23, 2009

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Re: Parties to Hearing on Petitions to Revise the Declaration of Fully Appropriated Streams Listing of the Kern River and Kern County (KMG: 31673, 31674, 31675, 31676, 31677)

Dear Ms. Whitney:

I represent Petitioner City of Bakersfield ("Bakersfield") in the above-referenced proceeding. In an October 30, 2008 letter, you indicated that the State Water Resources Control Board ("SWRCB") will, in the near future, conduct a hearing on whether the declaration of fully appropriated streams should be modified for the Kern River stream system. Bakersfield believes that it is appropriate and necessary to raise a procedural issue at this time regarding the status of the potential participants in the hearing involving the Kern River.

Bakersfield previously submitted a petition, pursuant to Section 1205(c) of the California Water Code and Section 871 of Title 23 of the California Code of Regulations, asking the SWRCB to revise the declaration that the Kern River is fully appropriated. Other parties, consisting of the North Kern Water Storage District ("North Kern") and the City of Shafter ("Shafter"), Buena Vista Water Storage District ("Buena Vista"), Kern County Water Agency ("KCWA"), and Kern Water Bank Authority ("KWBA"), also submitted petitions to revise the fully appropriated status of the Kern River (these entities are collectively referred to herein, where appropriate, as the "North Kern Parties").

In their original petitions, the North Kern Parties asked the SWRCB to revise the fully appropriated status of the Kern River and/or to hold a hearing on the status of the river. In a January 30, 2008 letter to the SWRCB, however, the North Kern Parties reversed course, without explanation. In that letter, the North Kern Parties collectively argued that the SWRCB should not revise the fully appropriated status of the Kern River, and should not hold a hearing regarding the status of the river, notwithstanding the recent judgment finding forfeiture of pre-

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1914 water rights on the Kern River. (See *North Kern v. Kern Delta* (2007) 147 Cal.App.4th 555.)

In light of the North Kern Parties' change in position, and current contention that the SWRCB should not hold a hearing on the status of Kern River, Bakersfield believes that the North Kern Parties are no longer actual or proper "petitioners" in this proceeding, and therefore should not be treated as or considered "parties" at the upcoming hearing on the fully appropriated status of the river.

Bakersfield is concerned that the North Kern Parties' submitted their petitions with the specific intent of gaining standing, specifically status as party, before the SWRCB, so that they could attempt to disrupt and undermine the hearing process, and so that they could claim, as "petitioners" and "parties," that there is actually no unappropriated water on the Kern River. Bakersfield maintains that the SWRCB should not condone or allow such procedural maneuvering.

There is no basis or justification for the North Kern Parties to participate in the hearing as parties, or petitioners, given their change in position, and their current contentions regarding the Kern River. The SWRCB should instead only allow the North Kern Parties to participate as "interested parties" at the hearing, pursuant to California Code of Regulations, Title 23, Section 761(a). This section provides that in addition to applicants, petitioners and protestants of record, the SWRCB, "in its discretion, and upon such terms as it may impose to avoid prejudice to the parties, may recognize as interested parties other persons appearing at a hearing." The "interested party" classification much more accurately and practically represents the North Kern Parties' actual position in this proceeding. Specifically, instead of "petitioning" to the SWRCB to consider or revise the fully appropriated status of the Kern River, the North Kern Parties will now apparently focus their efforts on responding to or commenting on Bakersfield's petition to revise the fully appropriated status of the river. The North Kern Parties are in the same position as other "interested parties" who might comment on Bakersfield's petition and the SWRCB's potential actions.

There is additionally no need for the North Kern Parties to participate in the upcoming hearing as parties because none of these entities hold any actual appropriative rights at the "First Point" of measurement on the Kern River, the location of the surplus, forfeited water. KWBA and Shafter admit in their petitions and applications that they do not hold any Kern River water rights. KCWA holds a limited, infrequent "lower river" high flow contract right, and Buena Vista is a "Second Point" Kern River right holder, both far removed from First Point water matters and considerations. North Kern does not hold any appropriative Kern River water rights, but only diverts and uses water accruing to certain Kern River rights owned by Bakersfield, subject to various limitations, pursuant to a 1952 "Agreement for Use of Water Rights."

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The North Kern Parties therefore do not qualify as “parties” to the proceeding pursuant to Section 648.1 of Title 23 of the California Code of Regulations, which states that “the party or parties to an adjudicative proceeding before the Board shall include the person or persons to whom the agency action is directed and any other person whom the Board determines should be designated as a party.” Since the potential revision of the fully appropriated status of the Kern River does not affect or impact any water rights of the North Kern Parties, the SWRCB’s action is not “directed against” the North Kern Parties. The North Kern Parties further do not qualify as parties pursuant to Section 648.1(b), as they are no longer actual “petitioners.” Pursuant to Section 648.1(d), instead of allowing the North Kern Parties to appear in the action as parties, the SWRCB can and should provide the North Kern Parties with “an opportunity for presentation of policies, statements or comment as interested parties.”

The North Kern Parties could still submit position statements, as interested parties, without consuming undue time. The North Kern Parties, moreover, all indicated that they submitted applications to appropriate the water found to be forfeited in the *North Kern v. Kern Delta* action just in case the SWRCB revises the fully appropriated status of the Kern River. The SWRCB can still accept and process these applications (along with Bakersfield’s priority application) following the hearing on the fully appropriated status of the river. At that time, the North Kern Parties could submit information, evidence and testimony, as necessary, and additional arguments and contentions, with regard to their respective claims to any forfeited, surplus water, as determined by the SWRCB.

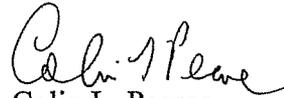
At the very least, to avoid duplication of effort and undue consumption of time, the SWRCB should closely limit and control the participation of the North Kern Parties in the upcoming hearing. Specifically, the SWRCB should limit the testimony and evidence submitted by these parties to avoid duplication, and to exclude irrelevant and unnecessary matters. The SWRCB could, for example, designate a single entity to serve as a representative of all of the similarly situated North Kern Parties. The North Kern Parties, moreover, should only be allowed to present testimony and evidence, assuming they are still allowed to participate as parties, in response to and relevant to Bakersfield’s testimony and evidence, as opposed to advancing their own positions through separate testimony and evidence.

Bakersfield understands that it may need to bring an appropriate motion before the hearing officer regarding this issue, or otherwise raise this issue in some manner with the hearing officer at a later time. We wanted to raise this issue at this time, however, so that the SWRCB was aware, in deciding on appropriate procedures for the hearing, that there is an issue as to the proper parties to the proceeding. If, for example, the North Kern Parties do not participate as parties to this proceeding, the length and scope of the hearing process could be much shorter. In addition, the SWRCB, in planning for the hearing, might want to set aside some time or consider the appropriate mechanism for addressing the status of the North Kern Parties.

Victoria A. Whitney
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If you would like to additional information or authority with regard to these matters, please let us know as soon as possible. We thank you for your courtesy and attention to this matter.

Sincerely,



Colin L. Pearce
For DUANE MORRIS

CLP/cwc

cc: Kathryn Gaffney, SWRCB (by e-mail)
Flore Core, City of Bakersfield (by mail)
Virginia Gennaro, City of Bakersfield (by mail)
Service List (see attached) (by mail)

Victoria A. Whitney
January 23, 2009
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EXHIBIT B

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January 31, 2008

VIA E-MAIL AND FEDEX

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Re: Comments of Petitioner City of Bakersfield in Support of Petition to Revise the Declaration of Fully Appropriated Stream Status of the Kern River, Matter No. KMG:A31674

Dear Ms. Gaffney:

The City of Bakersfield ("Bakersfield") previously submitted a petition, pursuant to Section 1205(c) of the California Water Code and Section 871 of Title 23 of the California Code of Regulations, asking the State Water Resources Control Board ("SWRCB") to revise its declaration that the Kern River is "fully appropriated." Bakersfield also submitted a proposed application to appropriate, and supporting materials.

Bakersfield submits the following comments and additional information in response to the SWRCB's November 30, 2007 "Notice of Petitions to Revise Declaration of Fully Appropriated Stream Systems." The notice indicated that the SWRCB will determine whether "reasonable cause" exists to conduct a hearing on the question of whether the declaration that the Kern River is fully appropriated should be changed. Comments are due to the SWRCB by January 31, 2008.

Bakersfield accordingly provides further information and explanation regarding the existence, quantity, and availability of "surplus" unappropriated water on the Kern River as a result of the finding that certain canal rights held by the Kern Delta Water District ("Kern Delta") forfeited a significant portion of their Kern River water rights. The additional information, including data compiled from the historic Kern River flow and diversion records, demonstrates that the water forfeited by Kern Delta is truly "surplus" water, both legally and practically. The substantial quantity of surplus water produced by Kern Delta's forfeiture necessitates a revision of the fully appropriated status of the Kern River.

Bakersfield also submits these comments to respond to contentions raised in petitions filed by other parties. Among other things, Bakersfield addresses and refutes the contention that water

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may not be available for appropriation because the forfeited water is needed to protect "prior rights" on the river.

1. ADDITIONAL FACTS AND INFORMATION IN SUPPORT OF REVISION OF FULLY APPROPRIATED STATUS OF THE KERN RIVER

A. Bakersfield has Maintained Detailed Flow and Diversion Records for the Kern River

The Kern River is one of the most important and valuable water resources in the state. It is a pristine, protected stream system that has provided high quality water to hundreds of thousands of individuals, families and businesses throughout the southern San Joaquin Valley.

The Kern River is unique because it is one of the largest streams or stream systems, if not the largest, not regulated by the SWRCB. Instead, the river was managed and controlled by a private entity, the Kern County Land Company ("KCLC"), for almost one hundred years. The KCLC operated the Kern River through a complex network of canals emanating to the north and south of the river. KCLC diverted the water primarily to serve lands owned and controlled by KCLC, which at one time held more than 300,000 acres in Kern County alone.

Since the 1890's, KCLC kept detailed and meticulous records of the flow of the river, and the daily diversion and use of Kern River water by separate water rights owned and controlled by KCLC. As explained in detail in *North Kern v. Kern Delta* (2007) 147 Cal.App.4th 555, and in prior judgments and opinions in that action, the Kern River "First Point" rights were allocated each day through a hierarchy of rights and priorities established in the 1900 "Shaw Decree." The decree set a maximum flow available for diversion by each First Point user, and established an order of priority.

On a daily basis, KCLC would determine the quantity of water flowing in the Kern River, and then allocate water to the individual rights on the river, based on the amount of water in the river. The separate rights were and still are measured and memorialized on a daily basis based on a cubic feet per second (cfs) flow. Attached hereto as Exhibit A is a daily diversion sheet reflecting the rights, in order of priority, and the maximum possible daily entitlement for each right.

If there was sufficient flow in the river, all of the rights in the Shaw Decree hierarchy would have an "entitlement" to water, up to their maximum right. The maximum total daily entitlement for all of the Kern River First Point rights is 3162.5 cfs. If the daily Kern River flow was less than 3162.5 cfs, some of the more "junior" Kern River rights would not have any entitlement to water on that day.

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Bakersfield, as the successor in interest to KCLC, maintains and prepares the daily record of Kern River flows, diversions and uses. Bakersfield compiles the daily records into monthly and annual summaries and prepares detailed annual reports regarding such diversions. (Copies of the 2005 and 2006 Hydrographic Annual Reports are attached hereto as Exhibits B and C, and the draft 2007 Hydrographic Annual Report is attached hereto as Exhibit D.)

Bakersfield is ready and willing to work with the SWRCB to assist staff in interpreting and understanding such records. Bakersfield will also make changes and adjustments to the record to reflect any action taken by the SWRCB with regard to the forfeited, unappropriated water.

The SWRCB can readily determine that surplus water exists on the Kern River, and decide on the appropriate disposition of the forfeited, surplus water, based on the extensive flow and diversion records. There is no need to prepare new records regarding the river or to recreate historic flows and diversions. In addition, no one has every questioned the accuracy and reliability of the flow and diversion records.

The flow and diversion records conclusively demonstrate that there is "surplus" water on the Kern River available for diversion and use. These records will make the SWRCB's task much easier in revising the FAS status of the river, and in later determining rights to the forfeited, unappropriated water.

B. The Prior Fully Appropriated Declarations are not Controlling or Determinative

Prior declarations that the Kern River was fully appropriated were a reflection of the shared ownership and control of the river by KCLC, and not any actual lack of "surplus" water on the river. In fact, the historic record demonstrates that there has always been surplus water on the river in excess of the demand of Kern Delta and others.

Until 1976, the Kern River First Point rights were owned and controlled by KCLC, and its successor in interest, Tenneco West, Inc. At that time, Tenneco sold all of its Kern River rights and assets to Bakersfield. Bakersfield immediately passed on certain "Shaw Decree" rights to Kern Delta.

Bakersfield, as successor to KCLC, operates the Kern River diversion system for the benefit of the other First Point interests. Instead of being owned and controlled by a single entity, the Kern River rights are now divided between Kern Delta and Bakersfield. The North Kern Water Storage District ("North Kern") also uses water accruing to certain rights held by Bakersfield pursuant to a 1952 Agreement with KCLC. Bakersfield is the successor in interest to KCLC in that agreement.

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The cooperative, shared system of diversion and use of Kern River water ended shortly after 1976, based on a dispute between Kern Delta, North Kern and to a lesser extent, Bakersfield, regarding Kern Delta's intentions and efforts to increase diversions of Kern River water above historic levels. That dispute led to the recently concluded litigation that resulted in the forfeiture of a portion of Kern Delta's rights.

As explained in Bakersfield's petition, the shared, private practices and policies that have determined and guided the diversion and use of Kern River water since the 1890's have necessarily changed, and can no longer be maintained, based on the recent finding of forfeiture. The availability of forfeited, unappropriated water, and uncertainty over the actual ownership and disposition of the forfeited water, has necessarily ended the "closed," unregulated operation of the river. The SWRCB has no choice but to assume jurisdiction over the forfeited, unappropriated water so that it can determine the disposition, and potential beneficial uses, of the water.

The common, shared ownership of the First Point Kern River rights also explains how the Kern River achieved fully appropriated status. Since all of the First Point Kern River water rights were formerly held and controlled by KCLC, it made sense that KCLC would seek to preserve the status quo and allow it to operate the river without any regulatory oversight or diversions by third parties. The First Point parties did not challenge the fully appropriated status of the river, and the parties did not raise any disputed issues or challenges to the diversion and use of water. Of course, since KCLC was the record keeper on the river, it had the ability to control and manage information regarding the existence and availability of any "unappropriated water."

The most recent declaration of the fully appropriated status of the river occurred in 1989, after the Kern River water rights were divided between Kern Delta and Bakersfield, and still used by North Kern. The First Point parties did not contest the fully appropriated status of the river. Instead, they presented a unified front to the SWRCB, with the intent of preserving the status quo and avoiding third party claims and regulatory oversight.

In fact, as the court in the *North Kern v. Kern Delta, supra*, action concluded, there was and always has been unappropriated, surplus water beyond the demand of various first point right holders. As the court in the recently concluded litigation recognized, Kern Delta historically did not divert and use a significant quantity of its pre-1914 Kern River water rights. The water was therefore surplus to the needs and demands of Kern Delta. The parties, however, historically did not call the SWRCB's attention to the excess, surplus water or challenge the fully appropriated status of the river. Instead, the First Point parties diverted and used the surplus water on their own, with no SWRCB oversight, and with no claim of right to the water. This voluntary sharing of excess water (commonly referred to as "release water" or the "release water program") still

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resulted in a determination that Kern Delta forfeited rights to water which it did not historically divert and use.

C. The Positions of the Other Parties are Misleading and Unclear

Four parties other than Bakersfield also filed petitions asking the SWRCB to conduct a hearing on the fully appropriated status of the Kern River. The positions of the parties with regard to the fully appropriated status of the river, however, are not clear and are confusing. Bakersfield believes this is intentional, as the other entities actually seek to use or obtain rights to the forfeited water without SWRCB involvement.

North Kern, for example, does not directly ask the SWRCB to revise the fully appropriated status of the river. Instead, North Kern indicates it submitted its petition so that the SWRCB can "consider" whether it is "proper" to revoke and/or revise the fully appropriated status of the river. In the petition, North Kern states that it does "not concede that forfeiture of Kern Delta's pre-1914 rights or some other circumstance has resulted in unappropriated water that is available for appropriation." North Kern explains that it "may be" the case that water available due to forfeiture will be used by "an existing right."

The Buena Vista Water Storage District ("Buena Vista") states that it submitted its petition and application only in response to the petitions and applications submitted by Bakersfield and North Kern. Buena Vista also states that it "agrees with the position" taken by North Kern in its application. Buena Vista also states that "we do not concede" that Kern Delta's forfeiture has resulted in unappropriated water available for appropriation. Buena Vista still suggests that "reasonable cause exists to conduct a hearing on the question of whether the fully appropriated status of the Kern River should be revoked or revised."

The Kern Water Bank Authority ("KWBA") explains that it submitted its petition and application because the recent finding of forfeiture "has created substantial uncertainty as to whether the Kern River continues to be fully appropriated." KWBA does state that the forfeiture decision "constitutes a 'change in circumstances' and 'reasonable cause' to hold a hearing on whether to revoke or revise the fully appropriated status of the Kern River stream system."

Finally, the Kern County Water Agency ("KCWA") also states that the forfeiture decision "has created substantial uncertainty as to whether the Kern River continues to be fully appropriated and, if not, the extent to which there may be unappropriated water that could be appropriated and put to reasonable and beneficial use." KCWA also states that Kern Delta's forfeiture of water rights "constitutes a change in circumstances warranting consideration of revocation or revision of the Kern River fully appropriated stream declaration." KCWA does request that the SWRCB

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“revoke or revise the fully appropriated status of the Kern River stream system,” and accept its application to appropriate.

With the exception of KCWA, the other parties therefore do not directly state that the SWRCB should revise and revoke the fully appropriated status of the Kern River. They instead only explain that forfeiture has created “uncertainty,” and indicated that the SWRCB “may” revise the fully appropriated status of the river. The other parties ask the SWRCB to conduct a hearing on this issue, and/or to “consider” the issue, but not to actually alter or revoke the fully appropriated status of the river.

Bakersfield maintains that the real motive of the other parties is to convince the SWRCB to determine that there is no surplus water on the Kern River, and that the fully appropriated status of the river should not be altered or revised. These entities, in particular North Kern, would then take the forfeited, unappropriated water without any oversight, limitations or supervision by the SWRCB. These entities clearly seek to avoid having the SWRCB assume control or jurisdiction over the forfeited water, so that none of the forfeited, unappropriated water is preserved or set aside to provide for environmental or instream uses.

2. THERE IS SURPLUS WATER ON THE KERN RIVER

A. The Quantity and Extent of the Forfeited Water

The summary and supporting charts attached hereto as Exhibit E demonstrate that as a result of Kern Delta’s forfeiture, there has been, or would have been, unappropriated “surplus” water each year on the Kern River in amounts ranging from 15,648 acre feet (af) (in one of the driest years on record) to 123,363 af, with an average of 50,962 af. The forfeiture specifically resulted in an average of 40,603 af of surplus water for Kern Delta’s Kern Island (1st) right, 5,175 af for the Buena Vista (1st) right, 3,308 for the Stine right, and 1,876 for the Farmers right. Of course, the amount of surplus water on the river could be larger in future years.

The summary and charts were prepared by Bakersfield’s Water Resources Department, based on the undisputed historic record of diversion and use on the Kern River. Bakersfield compiled flow and diversion information from 1954, when the Lake Isabella dam was constructed and first began to affect Kern River flows, to the present. Bakersfield analyzed all of the separate Kern Delta rights in the specific months where forfeiture occurred.

In the attachments, the “gross entitlement” represents the maximum quantity of water available to a given right, based on the flow of the river, and the maximum entitlement for the right, in a particular month. For example, prior to forfeiture, the Kern Island (1st) right had the right to

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divert up to 300 cfs each day, pursuant to the Shaw Decree. That translates into a total maximum entitlement in the month of January for the Kern Island (1st) right of 18,446 af.

If the total Kern River flow for a given January was less than 18,446, however, such as 15,000 af, then the gross entitlement for the Kern Island (1st) right that month would have been 15,000 af. That represents the maximum quantity of water the Kern Island (1st) right could have actually diverted in that month, based on the flow in the river.

In the *North Kern v. Kern Delta* decision, the court described these same concepts, in slightly different terms: The court characterized the maximum amount of water a separate Kern River right could take as its "paper entitlement," and the maximum amount of water actually available to a Kern River right, based on the flow in the river, as the "theoretical entitlement." The court further described and gave an example of these concepts: "the [Shaw] decree established that at each particular stage of the river (that is, the flow of the river in its natural channel), measured daily at a fixed point, each junior appropriator was entitled to all, some, or none of the water for which it had appropriative rights, a figure referred to as an appropriator's theoretical entitlement. Thus, under the Shaw Decree, an appropriator with, for example, a 100 cfs paper entitlement might have only an 85 cfs theoretical entitlement when the river stage is 512 cfs, but a 100 cfs theoretical entitlement if the river stage 527 cfs or greater." (147 Cal.App.4th 555, 561-562.)

Bakersfield also determined the "preserved entitlement" for the canal rights owned by Kern Delta in the months where the court found forfeiture. Specifically, during the months where the court found forfeiture, Kern Delta's Kern Island (1st) right had a new maximum limit, or preserved entitlement, of 8,493 af in January, 6,989 af in October, 3,375 af in November, and 2,050 af in December. (147 Cal.App.4th at 563.)

The court also found that Kern Delta had forfeited rights to some of its "junior" water rights (i.e., the Buena Vista (1st), Stine and Farmers) in various months, in the amounts set forth in a chart at page 585 of the decision.

The preserved entitlement acts as a "cap," or upper limit, on Kern Delta's diversions, based on Kern Delta's forfeiture within certain months. The preserved entitlement remains constant in each month where the court found forfeiture.

The difference between the amount available to each Kern Delta right for diversion, the gross entitlement, and the preserved entitlement, the new limit on diversions, represents water in excess of, or surplus to, Kern Delta's demands, and surplus to its Kern River rights. That water therefore constitutes unappropriated "surplus" water available for appropriation.

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For example, in January 1986, the “gross entitlement” (or, according to the court of appeal, the theoretical entitlement) for the Kern Island (1st) right was 18,446 af. That is equivalent to the “paper entitlement” for the Kern Island (1st) right in that month, which is the maximum amount of water accruing to the Kern Island (1st) right, assuming sufficient flow in the river. In January, as a result of the ruling on forfeiture, the Kern Island (1st) right now has a preserved entitlement of 8,493 af. The chart therefore demonstrates that in January 1986, based on the forfeiture ruling, the Kern Island (1st) right would not have been allowed to divert 9,953 af of water accruing to its rights in that month (shown in the chart as “surplus entitlement”), or 9,953 af of its gross, or theoretical, entitlement. Bakersfield calculated that amount by subtracting the preserved entitlement from the gross entitlement, or the amount of water that was available to the Kern Island (1st) right. That amount would have been surplus to Kern Delta’ rights, and would constitute unappropriated water, as it would not have attached to or belonged to any other rights on the river.

In years when the flow in the river was reduced, the gross, or theoretical, entitlement for the Kern Island (1st) right was less than the maximum paper entitlement of 18,446 af. For example, in January 2000 the gross entitlement for the Kern Island (1st) right was 15,346 af, which indicates there was not sufficient water in the river to satisfy the maximum entitlement of the Kern Island (1st) right of 18,446 af. In that month the chart indicates that the Kern Island (1st) right still had a surplus of 6,853 af, which is the difference between the gross entitlement of 15,346 af and the preserved entitlement of 8,493 af.

Bakersfield has undertaken a similar analysis of the quantity of surplus water resulting from the finding of forfeiture for the junior Kern Delta rights in various months. In January 1986, for example, the Buena Vista (1st) right had a gross, or theoretical, entitlement of 4,725 af. That indicates that there was sufficient flow in the river to satisfy that quantity of the junior Buena Vista (1st) right. The water rights chart for flow and diversions (Ex. A) indicates that on a daily basis, the Buena Vista (1st) right can take some portion of its “paper entitlement” of 80 cfs when the daily flow in the river exceeds 330.5 cfs, and can take all of its 80 cfs right when the river flow exceeds 410.5 cfs. In January 1986, the Buena Vista (1st) right would have had a new preserved entitlement of 347 af. Accordingly, the right would have produced 4,378 af of surplus, unappropriated water, which represents the difference between the preserved entitlement and the gross entitlement, or the water that would have been available to the Buena Vista (1st) right, absent forfeiture.

The attached charts demonstrate that in every month where there is forfeiture, from 1954 to the present, the Buena Vista (1st) right produced a maximum quantity of surplus, unappropriated water of 13,402 af, for an average of 5,175 af; the Stine right produced a maximum quantity of surplus, unappropriated water of 32,937 af, for an average of 3,308 af; and the Farmers right produced a maximum quantity of surplus, unappropriated water of 20,996 af, for an average of

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1,876 af. These averages, when combined with the average quantity of surplus Kern Island (1st) water of 40,603 af, produces a total average of surplus, unappropriated Kern River water of 50,962 af. The chart also demonstrates that every year on the Kern River, as a result of Kern Delta's forfeiture, there has been and presumably will be a minimum of 15,648 af of surplus water, up to a maximum of 123,363 af of surplus water (which, again, could be greater in future years).

Bakersfield notes that other parties did not submit this type of information, and did not try to demonstrate the existence and quantity of surplus, unappropriated water as a result of Kern Delta's forfeiture. That is another example, as explained above, of the intention and goal of the other entities to prevent or discourage the SWRCB from revising the fully appropriated status of the river, so that the parties can take forfeited, surplus water without any SWRCB or other regulatory oversight.

B. The Forfeited Water is Surplus to the Demands of Kern Delta

In its role of issuing appropriation permits, "the Board has two primary duties: 1) to determine if surplus water is available and 2) to protect the public interest." (*United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102) As explained in Bakersfield's petition, as a matter of law and as a practical matter, Kern Delta's forfeiture has resulted in "surplus" water on the Kern River. The SWRCB must necessarily revise the fully appropriated status of the river, accept Bakersfield's application to appropriate, and allocate rights to the forfeited, unappropriated water.

As indicated above, North Kern and other entities will likely argue that the forfeited, surplus water should be diverted out of the river to meet the demands of "prior rights," and is therefore not available for appropriation. They will argue that there is therefore no need to revise the fully appropriated status of the river because Kern Delta's forfeiture has not created surplus water.

The SWRCB should reject any such contentions, and should instead conduct a hearing to revoke the fully appropriated status of the river, because:

- (1) Pursuant to SWRCB decisions, and other applicable authority, the forfeited water constitutes surplus water once it no longer attaches to Kern Delta's pre-1914 rights;
- (2) The other parties do not have a right to divert the forfeited water, and to allow them to do so without SWRCB involvement would be contrary to California law and would lead to uncertainty, confusion and waste; and

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(3) At the very least, the SWRCB should allocate a portion of the water to environmental, in-stream and other public trust purposes, and/or reserve a quantity of the water for use by Bakersfield pursuant to the city's municipal priority and preference to the forfeited water, instead of allowing the agricultural district petitioners to divert the "new water" with no allowance for environmental protection and other "public trust" purposes.

(1) Relevant authority regarding surplus water.

The forfeited water must be considered unappropriated, surplus water because it was formerly held by Kern Delta, under pre-1914 appropriative rights. The water was not and is not subject to any other claims, licenses, permits or appropriative rights. Because ownership of the water has been lost, the water, by definition, is "unappropriated water." The SWRCB must revise the fully appropriated status of the river to determine the appropriate disposition and diversion and use of the forfeited water.

By definition, water is surplus if "there are no prior vested rights" to the water. (*Rank v. Krug*, 142 F.Supp. 1 (N.D. Cal. 1956).) The California courts have already determined that Kern Delta has no right to the forfeited water, and also determined that the forfeited water does not pass to North Kern, or increase the contractual rights held by North Kern. Since no party holds rights to the forfeited water, the water must be considered surplus, instead of being available for diversion and use with no valid right or claim to the water.

This is not a situation where a claim is made to "new" unappropriated water created by conservation or changes in the efficiency of water diversion and use, or by hydrologic changes, nor is it "new" water not previously diverted and used pursuant to existing rights. In those situations, it makes sense for the SWRCB to determine whether the newly available water can or should satisfy existing, prior rights.

In contrast, in this situation we have water which formerly attached to pre-1914 rights. The superior court and California courts of appeal necessarily found that the forfeited water was "surplus" to the demands of Kern Delta. The SWRCB can not practically or legally allow this forfeited, surplus water to be diverted out of the river to satisfy the demands of others that have no right to the water. The forfeiture can not create new rights or increase other rights on the river, absent SWRCB involvement.

As explained in Bakersfield's petition, water which is lost through non-use reverts to the public and becomes "open" to appropriation. (*Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595.) In *Southside Improvement Co. v. Burson* (1905) 147 Cal. 401, the court held that "surplus water" of a stream above the needs of the original appropriator was "subject to diversion and

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appropriation by others.” The court also indicated that the water rights automatically did not attach to other parties, based on their use of the water.

In *In the Matter of the Declaration of Fully Appropriated Stream Systems*, Order WR 98-08, at 22, the SWRCB stated: “Water Code Section 1205 provides for revision of the declaration [for fully appropriated stream systems] under appropriate conditions. In the event that water becomes available for appropriation due to the revocation of a previously issued permit or a license, the declaration should be revised accordingly.” That is effectively what has happened on the Kern River. A significant portion of the pre-1914 appropriative water rights of Kern Delta have been “revoked,” or lost, as a result of the finding of forfeiture. Because the water no longer accrues to Kern Delta’s rights, by definition the water has become available for appropriation.

In *In the Matter of Application 21758 to appropriate from Lower Blue Lake in Lake County* (D 1277, July 6, 1967), the SWRCB stated that water released from a lake for the purpose of complying with a judgment to maintain water levels was “surplus to the needs of the company” and was “subject to appropriation by the applicants.” A separate water company also stored water in the lake pursuant to claimed pre-14 rights. The SWRCB did not consider prior claims to the water or allow other claimants simply to use the released water, without a formal proceeding.

The SWRCB has also indicated that Water Code Sections 1202(b) and (c) “require diligent use of water or else others may appropriate the water.” (*In the Matter of Application 25144 North Canyon Lake Association Applicant Richard E. Winkelman, et al.*, Decision No. 1578, Sept. 17, 1981.) In these situations, the SWRCB did not consider or restrict availability of unappropriated water because of prior rights. It did not consider whether other right holders “could have” taken the water. Instead, it found that water lost by prior rights, or water rights which were “revoked,” created unappropriated water, both as a matter of law and practically.

(2) The forfeited water must be subject to SWRCB oversight and regulation

The forfeited water can not be absorbed or used by existing rights, absent a SWRCB permit. To find otherwise would negate the entire permit system, would create confusion, uncertainty and waste, and would create a new separate category of water rights, in contravention of California law.

The SWRCB can not simply assume that forfeited, available water will feed or be diverted by existing rights. Instead, the SWRCB must determine whether other prior rights have the legal and practical ability to take the water. As explained in Bakersfield’s petition, it is particularly necessary for the SWRCB to assume jurisdiction over the forfeited, unappropriated water,

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instead of allowing parties to divert and use the water, because one of the claimants to water on the river, North Kern, has no legal right to the additional, forfeited water.

North Kern does not hold any licenses or permits to divert Kern River water, and does not hold any right, entitlement or ability to divert Kern River water other than pursuant to the 1952 agreement with Bakersfield's predecessor, KCLC. Under the 1952 agreement, North Kern only has a right to divert water accruing to certain water rights now held by Bakersfield, subject to various limitations on the use of the water. North Kern has no right to divert Kern River water that does not accrue to the specific water rights identified in the agreement. The agreement does not authorize North Kern to divert any water accruing to the rights held by Kern Delta.

The court of appeal in *North Kern v. Kern Delta* also held that North Kern did not have and had not obtained any rights to water not diverted and used by Kern Delta. The court concluded that the forfeited water was not awarded to North Kern, and that the finding of forfeiture did not result in the increase or enhancement of the rights utilized by North Kern pursuant to the 1952 agreement. The trial court in that action previously ruled that North Kern had not purchased any right to water accruing to the Kern Delta rights through the 1952 agreement.

In determining whether water is available for appropriation, the SWRCB must decide "whether diversion and use of water under the requested appropriation would impair the rights of any protestant who claims to be a senior right holder. This determination requires that the Board, solely for the purpose of deciding whether water is available for appropriation, determine the existence and extent of the water rights of any alleged water right holder who protests the application or change petition." (*In the Matter of Certain Petitions and Applications to Appropriate Water from the Watersheds of the Sacramento River and the San Joaquin River*, Order No. WR 89-8, April 20, 1989.) A protestant has the burden of establishing "the likelihood of harm to their prior rights." (*Id.*)

North Kern can not meet this burden and show harm to "prior rights," as it has no right to the forfeited water. A finding that the forfeited Kern River water is available for diversion and use would not "impair" any other rights, because no one has any right to divert the water.

North Kern, moreover, would still be able to divert all the water to which it is entitled under its agreement with Bakersfield as a result of the revision of the fully appropriated status of the river and the reallocation of the forfeited, surplus water. There specifically would be no "impairment" of North Kern's contractual right to receive some of Bakersfield's water. If "gross entitlement," or water flowing in the river, is available to satisfy the rights used by North Kern, then North Kern could still divert and use that water, irrespective of the forfeiture of Kern Delta's rights and the revision of the fully appropriated status of the river.

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For example, according to the 2005 Hydrographic Annual Report (Exhibit B), the December 2005 gross entitlement for all of Bakersfield's rights under which North Kern receives Kern River water was 5,925 af. That means that in December, 2005 there was enough flow in the river to allocate 5,925 af of water to the rights owned by Bakersfield and used by North Kern.

In December 2005 the rights held and used by Bakersfield had a gross entitlement of 1,177 af. The Kern Delta rights would have had a combined preserved entitlement of 2,460 af (based on the preserved entitlement for the Kern Island (1st) right of 2,050 af, 191 af for the Buena Vista (1st) right, 12 af for the Stine right, and 207 af for the Farmers right).

The 2005 Hydrographic Annual Report indicates that the gross entitlement for all of the Kern Delta rights, without taking forfeiture into account, in December was 25,080 af. Since Kern Delta's diversions would have been capped, or limited to the total preserved entitlement of 2,460 af, the remaining water above that amount, 21,620 af, would be "surplus" to Kern Delta's rights.

According to the annual report, the total Kern River flow at First Point for December 2005 was 33,614 af. Subtracting from that amount the total Kern Delta preserved entitlement of 2,460 af, and the surplus water not diverted by Kern Delta of 21,620 af (which Bakersfield maintains is subject to SWRCB jurisdiction and not subject to diversion and use without any prior right to the water) would leave 9,534 af remaining, and subject to diversion and use to satisfy "prior rights."

That 9,534 af would be more than sufficient to satisfy the gross entitlements of both North Kern (5,925 af) and Bakersfield (1,177 af). North Kern's "rights" would therefore not be impaired or negatively affected by a finding that the water above Kern Delta's rights is forfeited, unappropriated water which does not simply "feed" the prior rights. North Kern would be able to divert the same amount of water it would have been entitled to without forfeiture and SWRCB reallocation of the surplus, unappropriated water. North Kern specifically could still divert its gross entitlement of 5,925, and its contractual right to receive water would not be prejudiced or compromised.

The fact that North Kern previously diverted some of the water not used by Kern Delta does not create any right or entitlement to the water, nor does it authorize North Kern to continue to divert the water. (See *Richardson v. Railroad Commission* (1923) 191 Cal. 716, holding that use of surplus water, or water above needs of prior appropriator, by others does not give the other parties any right to continue to use the surplus water.) In *People v. Shirokow* (1980) 26 Cal.3d 301, 304, the court stated that a "defendant's diversion of water without first obtaining a permit from the board constituted a trespass within the meaning of [Water Code] section 1052, and the state was authorized to seek an injunction against such trespass."

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Finally, if North Kern complains that it is losing water which it formerly diverted without any right or authorization, the SWRCB can determine whether conservation, increased efficiencies in diversion and use, and alternate water sources can alleviate and address North Kern's concerns. For example, in determining whether there is water surplus to existing rights, the SWRCB can determine whether more efficient diversion systems would create more water for protestants, and thus alleviate their protests. (*In the Matter of Application 23317 of W. Clifford and Wilford B. Olson to Appropriate from Macks Creek in Siskiyou County*, Decision No. 1385, October 13, 1971)

(3) The SWRCB must revise the fully appropriated status of the river to protect environmental, public trust and municipal interests and uses

The water forfeited by Kern Delta additionally, and alternatively, has to be considered surplus, unappropriated water, or at least justify revision of the fully appropriated status of the river, because the SWRCB must set aside and utilize some or all of the water to satisfy environmental, in-stream and other public trust purposes. The SWRCB can not allow the new, forfeited water to be diverted out of the river by "prior right holders" and third parties without any allowance for environmental, in-stream, and public trust protection.

No water is currently reserved or set aside for environmental, stream flow, or fish and wildlife purposes on the Kern River. The river instead runs dry most months of the year, without any consideration of timing or impacts on the environment. The forfeited, surplus water therefore creates an opportunity for the SWRCB to assume jurisdiction over flows on the river to ensure that there is at least some protection for the local environment, fish and wildlife, and other non-consumptive purposes and beneficial uses. Specifically, the SWRCB should act to ensure that some portion of the up to 123,363 af of new, surplus water created by Kern Delta's forfeiture is reserved or dedicated for in-stream, environmental and public trust purposes.

In determining whether there is surplus water, the SWRCB must take into account beneficial uses to protect the "public interest," including in-stream uses, and "for recreation and preservation and enhancement of fish and wildlife resources." (*United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 103-104.) In determining whether water is available for appropriation, the SWRCB must take into consideration impacts to "public trust resources," and determine the "quantity of water needed to protect public trust resources." (*Garrapata Creek Water Company*, Decision No. 99-01, September 24, 1999.)

"The core of the public trust doctrine is the state's authority as sovereign to exercise continuous supervision and control over the navigable waters of the state and the lands underlying those waters." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 425.) The SWRCB has authority to adjust and ignore water right priorities to ensure the protection of the

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environment and the public trust. In *Audubon*, the California Supreme Court noted that the state, “as administrator of the public trust,” has powers “which extend[] to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.” (33 Cal.3d at 440.) For example, although the courts have not authorized the SWRCB to appropriate water solely for in-stream uses, courts have also recognized that the SWRCB “has the power and duty to protect such uses by withholding water from appropriation.” (33 Cal.3d at 444.) The court in *Audubon* further stated, “before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.” (33 Cal.3d at 426.)

The SWRCB therefore should not and need not simply allow the surplus, forfeited water to be diverted out of the river by alleged “prior rights,” without any consideration or allowance for environmental uses and purposes. Even if the SWRCB determines that some of the water can be diverted by prior, junior rights, it must reserve and keep in the river bed water for environmental purposes.

For example, out of the up to 123,363 af of surplus water created by Kern Delta’s forfeiture, the SWRCB could easily elect to set aside at least 25,000 to 40,000 af of the water to remain in the river for environmental, habitat, and stream flow preservation purposes. This water would not be subject to appropriation by other right holders on the river.

In addition, or in the alternative, the SWRCB must set aside water, following a revision of the fully appropriated status of the Kern River, to protect municipal demands in the region, as evidenced by Bakersfield’s application.

The City’s application is designed, in part, to protect and preserve a valuable source of drinking water for present and future citizens of Bakersfield. Reasonable cause exists for the SWRCB to implement and effectuate the statutes recognizing, prioritizing and protecting the City’s domestic use of Kern River water. (See e.g., Water Code §§ 106, 106.5, 1254, and 1460.)

Bakersfield is the only entity that has submitted a valid application for domestic and municipal uses. Although the City of Shafter has asserted a claim to some portion of the forfeited water, Shafter has no current right or ability to receive Kern River water. Shafter specifically has no “access,” to the Kern River, and no point of diversion anywhere near the Kern River. North Kern, moreover, has no right or ability to pass on Kern River water to Shafter because such transfer would be barred by the 1952 agreement under which North Kern diverts some of Bakersfield’s water.

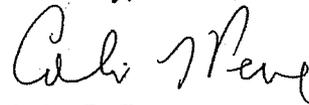
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3. CONCLUSION

For the foregoing reasons, and as stated in Bakersfield's petition and supporting materials, Bakersfield again urges the SWRCB to revise the fully appropriated status of the Kern River, and find and determine that there is up to 123,363 af of surplus, unappropriated water on the river available for appropriation, and thereafter accept and approve Bakersfield's application to appropriate such water. In addition, or in the alternative, the SWRCB should allocate and set aside some portion of the surplus, unappropriated water for environmental, in-stream and other public trust purposes, and to protect Bakersfield's municipal priority and preference.

Bakersfield thanks the SWRCB and its staff for their attention to this matter, and for their efforts with regard to the Kern River. Counsel, representatives and staff for Bakersfield remain ready and willing to meet with and talk to the SWRCB to answer questions, to provide additional information, and to assist and work with the SWRCB on these matters. Questions and inquiries can initially be directed to me, at 415-957-3015, and/or to Florn Core, the Bakersfield Water Resources Manager, at 661-326-3715.

Sincerely,



Colin L. Pearce
For DUANE MORRIS

CLP/cwc

Enclosures

cc: Florn Core, City of Bakersfield (without enclosures)
Virginia Gennaro, City of Bakersfield (without enclosures)
Alan Tandy, City of Bakersfield (without enclosures)
City of Bakersfield Water Board (without enclosures)

EXHIBIT C

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August 6, 2008

VIA E-MAIL AND FEDEX

Kathryn Gaffney
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Re: Further Comments of Petitioner City of Bakersfield in Support of Petition to Revise the Declaration of Fully Appropriated Stream Status of the Kern River, Matter No. KMG:A31674

Dear Ms. Gaffney:

Petitioner City of Bakersfield ("Bakersfield") submits the following comments in further support of its petition that the State Water Resources Control Board ("SWRCB") revise its declaration that the Kern River is "fully appropriated." Bakersfield also responds to the January 30, 2008 comment letter of the North Kern Water Storage District ("North Kern"), City of Shafter ("Shafter"), Buena Vista Water Storage District ("Buena Vista"), Kern County Water Agency ("KCWA"), and Kern Water Bank Authority ("KWBA") (these entities are collectively referred to herein, where appropriate, as the "North Kern parties").

Bakersfield does not intend to repeat prior statements from its petition, its January 31, 2008 comment letter, or any other previous filings, except where absolutely necessary. Due to the importance of the Kern River and the issues created by the forfeiture by the Kern Delta Water District ("Kern Delta") of a significant quantity of Kern River water, however, Bakersfield is compelled, as the only entity holding pre-1914 appropriative "First Point" water rights on the Kern River other than Kern Delta, to respond to the January 30, 2008 comments of the North Kern parties. Bakersfield residents, moreover, are extremely concerned about the Kern River

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and the use and disposition of the water forfeited by Kern Delta, as evidenced by the hundreds of comments received by the SWRCB from concerned citizens in the Bakersfield area.

The petitioners have submitted a significant amount of information to the SWRCB with regard to the Kern River. The history, background, customs and practices involved in the diversion of water from the Kern River can appear complex and confusing without years of experience with the river. Bakersfield believes the SWRCB's consideration of these matters, however, has been further hampered by contradictory, confusing and inaccurate information and statements from the North Kern parties. As explained herein, some of the North Kern parties have mischaracterized their own water rights, and omitted and obscured critical information regarding the Kern River and the impact of Kern Delta's forfeiture of rights on the Kern River.

Bakersfield intends to clarify and explain the actual Kern River water rights of the parties to this proceeding, and to present the issues which the SWRCB must consider as a result of Kern Delta's forfeiture, in a clear and accurate manner. In fact, despite the volume and complexity of the information provided to the SWRCB regarding the Kern River, and the complicated history and nature of the Kern River water rights structure, the issues and questions before the SWRCB can be boiled down to several basic principles.

First, it is undisputed that as a result of the recently concluded litigation which resulted in the forfeiture of a significant portion of Kern Delta's rights (hereinafter "forfeiture action") (see *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555), there has been a change in circumstances which requires revision of the fully appropriated status of the Kern River. The forfeiture has necessarily created up to 120,000 acre feet per year (afy), and on average 50,000 afy, of unappropriated water. Only the SWRCB can determine or confirm the ownership of such rights, and the proper diversion and use of such water.

Second, there are really only two possible courses of action for the SWRCB as a result of Kern Delta's forfeiture, and in response to the petitions and applications filed as a result of the forfeiture:

(A) If the SWRCB determines that the water forfeited by Kern Delta is not unappropriated, or surplus, water, based on the demands of existing prior rights on the Kern River, then the SWRCB must confirm that Bakersfield, and not any other petitioner or party, including the North Kern parties, is the only entity entitled to divert and use the newly available, forfeited water. The other parties either do not own or hold any pre-1914 appropriative Kern River rights (North Kern, Shafter and KWBA), or do not have rights to Kern River water during the months in which there has been forfeiture (Buena Vista and KCWA). As explained herein, Bakersfield is the only party with pre-1914 rights at the "First Point" of measurement on the

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Kern River with the right to divert and use the forfeited water, and with a priority and a present and future demand for the water.

(B) Alternatively, if the SWRCB determines that the forfeited water is “new water” that does not simply stay in the river for use by prior rights, the SWRCB must recognize Bakersfield’s right and priority to the water, accept Bakersfield’s application to appropriate, and award rights to the water to Bakersfield, pursuant to Water Code Sections 106, 106.5, 1254 and 1460. The SWRCB should also consider allocation of some portion of the water, either separately or through Bakersfield’s right to the forfeited water, to public trust, in stream and environmental uses, pursuant to Water Code Sections 104, 105, 1253, and 1257.5, and other applicable authority.

1. THE ACTUAL RIGHTS OF THE PARTIES

Bakersfield believes it is important to clarify and explain the actual Kern River water rights held by all the petitioners. An accurate and complete description of such rights will expose the inconsistencies, omissions and errors in the prior filings and contentions of the North Kern parties. An accurate description of the rights will also help make clear the SWRCB’s duties and responsibilities in this proceeding, and will help ensure that the forfeited water is not wasted or illegally diverted. In contrast, the North Kern parties apparently are attempting to obscure the actual water rights on the Kern River, as well as the actual effect of the forfeiture of Kern Delta’s rights, as part of a strategy to divert and use the forfeited water without any valid rights, and without SWRCB oversight and regulation.

The SWRCB can review and assess the rights of the petitioners at this time in determining whether water is available for appropriation. Specifically, the SWRCB “must, solely for the purpose of deciding whether water is available for appropriation, determine the existence and extent of the water rights of any alleged water right holder who protests the application or change petition.” (*In the Matter of Certain Petitions and Applications to Appropriate Water from the Watersheds of the Sacramento River and the San Joaquin River*, Order No: WR 89-8, April 20, 1989, at 18.)

In reviewing a permit application, and in determining whether surplus water is available for appropriation, the SWRCB must “examine” prior riparian and appropriative rights. (*United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102.) In undertaking this task, the SWRCB does not make or render any “adjudication” of water rights, but only reviews existing rights so that it can make an estimate of “the amount of surplus water available for appropriation.” (182 Cal.App.3d, at 104.)

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North Kern Water Storage District

North Kern does not hold any pre-1914 appropriative rights on the Kern River. Instead, North Kern can only divert and use water accruing to certain specific water rights owned by Bakersfield, subject to various limitations, pursuant to the 1952 "Agreement for Use of Water Rights" (hereinafter "1952 Agreement") between North Kern and Bakersfield's predecessor in title, the Kern County Land Company ("KCLC"). (Copy attached hereto as Exhibit A, copy also attached to North Kern's petition as Exhibit 2). North Kern holds no Kern River rights outside of or in addition to its contract with Bakersfield.

Pursuant to the 1952 Agreement, KCLC and its subsidiaries, the Kern County Canal and Water Company ("KCCWC"), James Canal, Inc., Anderson Canal, Inc., Plunket Canal, Inc., Joyce Canal, Inc., Pioneer Canal, Inc., Lerdo Canal Company, James and Dixon Canal, Inc., and Central Canal Company, granted to North Kern the right to use specified amounts of water accruing to pre-1914 Kern River water rights held by KCLC through the above canal companies. All of the canal companies listed in the 1952 Agreement were subsidiaries of KCLC and were private companies owned by KCLC, through KCCWC.

The 1952 Agreement did not transfer the pre-1914 water rights listed in the agreement to North Kern. KCLC instead only granted North Kern the right to divert and use the water accruing to the water rights described in the agreement, up to maximum diversion amounts per month for the combined water rights. The agreement did not transfer to North Kern title to or ownership of the water rights, any claim to or interest in the pre-1914 appropriations that established the rights, the "paper" entitlement of the rights, or any other entitlements or rights described in the Shaw Decree, the Miller-Haggin Agreement, or any other operative document.

KCLC expressly reserved, retained and continued to own and hold title to the water rights described in the agreement. The 1952 Agreement is not a deed and can not be considered equivalent to a deed. The title to the agreement, "Agreement for Use of Water Rights," could not be any clearer as to the intent and effect of the agreement. (Emphasis added.) In contrast, KCLC transferred certain physical assets to North Kern in 1952, but such property was transferred through a separate agreement, entitled "Agreement for Sale of Canals and Other Assets and for Transportation of Water." (Emphasis added.)

In the 1952 Agreement, North Kern agreed that it would not divert from the Kern River any more than the maximum quantity of water to which it was entitled under the agreement. The agreement further states that any excess diversions by North Kern would not have the result or effect of enlarging the rights of North Kern. (1952 Agreement, ¶ 4.) The agreement further stated that KCLC, and consequently Bakersfield, would "continue to own the right to divert and

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use all such water except water actually diverted by [North Kern] pursuant to this agreement.” (1952 Agreement, ¶ 2.)

In its application to appropriate, North Kern acknowledges, at Section 8.3, that its right to divert and use Kern River water arises entirely out of and is based on the 1952 Agreement. At Section 8.6 of the application, North Kern indicates that its water rights consist of “1952 Agreement Rights,” “groundwater” rights, additional water accruing to Bakersfield’s rights under a separate contract set to expire in 2012, and “miscellaneous water” which becomes available to or is purchased by North Kern from time-to-time. North Kern does not indicate that it holds any pre-1914 appropriative Kern River water rights, or any Kern River water rights outside the 1952 Agreement.

The 1952 Agreement does not authorize North Kern to divert any water accruing to the rights held by Kern Delta, or any water released or forfeited by Kern Delta. North Kern’s agreement does not entitle it to divert or use any Kern River water outside the agreement, including forfeited water, release water, or any other water that presently or formerly accrued or attached to Kern Delta’s rights.

North Kern does not hold any licenses or permits to divert Kern River water, and does not hold any right or entitlement to Kern River water other than pursuant to the 1952 Agreement. Certainly nothing in the record or the arguments presented by North Kern demonstrate that it has any pre-1914 appropriative rights on the river, or any other right to water flowing in the river.

As explained in more detail below, the court in the forfeiture action also rejected all of North Kern’s claims to the water forfeited by Kern Delta, and held that North Kern had no right to such water. The court also ruled that the finding of forfeiture did not result in the increase or enhancement of the rights utilized by North Kern pursuant to the 1952 Agreement.

North Kern’s rights and remedies regarding the forfeited water are therefore defined and limited by its agreement with Bakersfield. If North Kern believes it is entitled to some portion of the forfeited water, or if it believes it is not receiving Kern River water to which it is entitled, it must assert an appropriate claim against Bakersfield, pursuant to the agreement. Such claim must be brought in a superior court, and not before the SWRCB, as the SWRCB does not have jurisdiction to make any determinations with regard to contracts and contract rights. (*In the Matter of Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, Order No. WR 2000-2, March 15, 1999, at 20, stating that the “existence and content” of a contract is “outside the control of the SWRCB, and the SWRCB is not in a position to amend its terms or to settle disputes between the water right holder and its customer.”)

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In its petition to revise the declaration that the Kern River system is fully appropriated, North Kern attempts to create confusion, or at least the impression that it actually holds pre-1914 Kern River water rights. North Kern first states that "on January 1, 1952, North Kern acquired rights to divert Kern River water under certain pre-1914 appropriations listed in the 1952 Agreement." (North Kern Petition, p. 2.) At footnote 1 on page 2, however, North Kern lists all of the pre-1914 rights from the agreement, and states that such pre-1914 rights are "held by North Kern, as provided in the 1952 Agreement."

That statement is not accurate, as North Kern did not acquire and does not own or "hold" the rights listed in the agreement. Instead, such rights continue to be owned and "held" exclusively by Bakersfield, not North Kern. Again, the KCLC did not transfer the actual water rights to North Kern.

The court in the forfeiture action sometimes indicated that North Kern "held" or owned pre-1914 water rights, but such references were not accurate and are not binding or determinative. North Kern's rights were not at issue in the case, and the court made no binding rulings as to the 1952 Agreement or any water rights used by North Kern. North Kern also indicated, in its complaint against Kern Delta, that only the water historically released by Kern Delta, and not diverted and reasonably and beneficially used by Kern Delta was in dispute or at issue in the forfeiture action. (North Kern's Second Amended Complaint, ¶ 22, p. 11, a true and correct copy of which is attached hereto as Exhibit B.) North Kern stated that "any and all other Kern River water rights . . . are not alleged to be in dispute." (Id.)

City of Shafter

Shafter has no rights to Kern River water, no access to the Kern River, and no means of diverting water from the Kern River. In the petition and application filed jointly by North Kern and Shafter, there is no indication or claim that Shafter holds Kern River water rights of any nature. The petition also indicates that Shafter will not utilize Kern River water through direct diversions, and has not used Kern River water in the past, but instead will use stored or "banked" Kern River water from the basin underlying North Kern for urban development.

There is presently no development, construction or residences within the boundaries of North Kern which intersect with the boundaries and sphere of influence of Shafter. Shafter therefore has no demand for Kern River water within this service area.

Buena Vista Water Storage District

In its petition to consider revocation or revision of the declaration that the Kern River system is a fully appropriated stream system, Buena Vista explains that "by agreement," the natural flow of the Kern River is divided among three sets of users "First Point, Second Point and Lower River."

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(Buena Vista Petition, p. 3.) The petition further indicates that “Second Point water is diverted and used exclusively by Buena Vista Water Storage District. Lower River water is diverted and used exclusively by the Kern County Water Agency.” (Id.)

If water allocated to First Point users is not used by them, “i.e., if such water is allowed to escape to Second Point,” then the water becomes the “property of Second Point and is diverted and used by [Buena Vista].” (Buena Vista Petition, p. 3.) Water only “escapes” from First Point for delivery to Second Point, however, during very rare flood or high flow conditions on the Kern River. The petition further states that “if water allocated or escaping to Second Point is not diverted and used by [Buena Vista] . . . then, by agreement, such water becomes the property of Lower River and is diverted and used by the Kern County Water Agency.” (Id.)

In its petition and related filings, Buena Vista fails to demonstrate that it has any right or ability to divert any portion of the forfeited water through its Second Point rights. In fact, as explained below, Buena Vista has no right to divert and use Kern River water through its Second Point rights in the months when forfeited, surplus water is available. Instead, the First Point parties receive the entire flow of the river during the period of September through February, when there has been forfeiture.

Kern County Water Agency

KCWA holds very limited, infrequent “Lower River” Kern River rights. As indicated above, KCWA has a right to divert and use Kern River that escapes from Second Point or which is not otherwise diverted by Buena Vista, the Second Point right holder. In fact, KCWA holds an infrequent “floodwater” right to divert Kern River water in rare years of flooding and high flows.

In its petition, KCWA states that it was created to “negotiate and administer a water supply contract with the State of California’s [State Water Plan].” (KCWA Petition, p. 2.) The petition further indicates that KCWA is a “wholesaler of SWP water” and that “approximately 98% of the agency’s water is imported by the SWP. The balance of the Agency’s water supply is from high flow Kern River water rights.” (Id.)

As with Buena Vista, KCWA has no right or ability to divert and use Kern River water in the months when forfeited, surplus water is available.

Kern Water Bank Authority

In its petition, KWBA explains that it is a “joint exercise of powers of authority” consisting of various Kern County water districts, and its primary purpose is to “recharge, store and recover water to improve water supply for KWBA member entities.” (KWBA Petition, pp. 2-3.) In its application to appropriate, KWBA indicates, at Section 5, that it holds only riparian water rights.

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KWBA does not claim that it holds any pre-1914 water rights, or any other Kern River water rights.

Kern Delta Water District

Kern Delta holds First Point Kern River appropriative water rights, including the highest priority Kern Island right, and the more junior Buena Vista, Stine, and Farmers rights. Kern Delta has not filed a petition or application with regard to the forfeited water. Kern Delta presumably has no right to take back or divert and use the water it has forfeited.

City of Bakersfield

Bakersfield holds all Kern River First Point rights not held by Kern Delta, pursuant to a 1976 Agreement with Tenneco West, Inc. ("Tenneco"), the successor in interest to KCLC. As explained herein, Bakersfield is therefore the only entity entitled to divert and use the forfeited water.

On April 12, 1976, Bakersfield entered into a written agreement (Agreement No. 76-36, hereinafter "Tenneco Agreement"), entitled "Agreement By and Between City of Bakersfield, City of Bakersfield Water Facilities Corporation, Tenneco West, Inc., Kern Island Water Company and Kern River Canal and Irrigating Company," whereby, among other things, Bakersfield acquired all of the Kern River water rights and interests provided for in the Miller-Haggin Agreement and the Shaw Decree and held by Tenneco and the other parties to the agreement, who were successors-in-interest to KCLC and the parties to the Miller-Haggin Agreement and the Shaw Decree. (A copy of the Tenneco Agreement is attached hereto as Exhibit C.)

After execution of the Tenneco agreement, Bakersfield sold the former public utility canal companies located south of the Kern River and formerly owned by KCLC (the Kern Island, Buena Vista, Stine and Farmers Canal companies), and associated Kern River water rights, to Kern Delta through a separate agreement.

In addition to all of the Kern River water rights formerly held by KCLC, pursuant to the Tenneco agreement, Bakersfield assumed all rights, duties and obligations with regard to the operation of the Kern River, the diversion of water into the headgates and canals off the river, and the record keeping function for the river. (Tenneco Agreement, ¶ 12.1, pp. 43-44.)

Through the Tenneco agreement, Bakersfield acquired all of the water rights described in the 1952 Agreement. (Tenneco Agreement, ¶ 2.2(a), p. 12.) Bakersfield is the successor to KCLC and all of its subsidiary companies under the 1952 Agreement, and through the Tenneco agreement Bakersfield expressly assumed all rights, duties and obligations of KCLC, KCCWC,

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and their subsidiary canal companies, including pursuant to the 1952 Agreement. (Tenneco Agreement, ¶¶ 2.1, 2.2, and 12.1.)

2. ONLY BAKERSFIELD, AND NOT THE NORTH KERN PARTIES, HAS ANY RIGHT TO DIVERT AND USE THE FORFEITED WATER

The North Kern parties base their contention that the SWRCB should not revise the fully appropriated status of the Kern River on the premise that they, as prior right holders, can divert and use, or “absorb,” the forfeited water, and accordingly there is no surplus water available for appropriation.

That contention is fatally flawed, however, because the North Kern parties, including North Kern, do not have any valid, cognizable right to divert the forfeited water, or any other water “released” by Kern Delta’s rights in the months where there has been forfeiture. These parties have failed to present evidence or information that establishes that they have a right to divert and use the forfeited water, or, in the case of North Kern, that they even hold actual appropriative Kern River rights. The North Kern parties therefore have no right to insist that the surplus, forfeited water stay in the river for diversion and use by the North Kern parties.

No matter how the SWRCB responds to the petitions regarding the fully appropriated status of the river, the SWRCB must not take any action or issue any orders that authorize, even implicitly, the diversion of the forfeited water by the North Kern parties. Instead, the SWRCB must either confirm and recognize Bakersfield’s right to all the forfeited water under its First Point rights, or determine that the water is unappropriated and accept Bakersfield’s application to appropriate with the highest priority, for domestic use, and first in time legally and practically.

A. North Kern Has No Right to the Forfeited Water Under Its Agreement with Bakersfield

The 1952 Agreement does not authorize or allow North Kern to divert water accruing to any rights not listed in the agreement, including rights currently or formerly held by Kern Delta, any new, forfeited water, or any “increased flows” attributable to or created by other water rights.

Pursuant to the 1952 Agreement, North Kern agreed to only divert water accruing to the water rights now owned by Bakersfield and described in the agreement, and North Kern agreed that it would not divert any Kern River water other than water it was entitled to divert under the 1952 Agreement. Under the Kern River water rights structure, the water released by Kern Delta’s rights, and the water forfeited by Kern Delta, has not been listed or accounted for in the daily diversion sheets as water accruing to the rights listed in the 1952 Agreement. The water instead is and always has been recorded and recognized as water accruing to Kern Delta’s rights.

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In the forfeiture action, North Kern still asked the court to award it rights to the water which Kern Delta failed to use through a cause of action for "purchase," based on the allegation that it purchased rights to the "release" water through the 1952 Agreement. (May 13, 1999 Judgment of the Tulare County Superior Court, hereinafter "Conn Decision," Exhibit B to Bakersfield's petition, pp. 8-9.) The trial court rejected North Kern's "purchase" cause of action, as the evidence presented at trial failed to persuade the court that North Kern had purchased any of Kern Delta's water rights in 1952. (Id.) The court specifically stated that "the evidence fails to persuade the court that North Kern purchased any of the Kern Delta's water rights." (Id.) The court found the 1952 Agreement simply did not address the release water and did not guarantee North Kern receipt of any portion of the release water. (Id.) The court further stated that, in addition to the plain language of the contract, "the surrounding circumstances do not support North Kern's purchase theory. The 1950 Report does not identify any proposed acquisition of any portion of the rights now claimed by Kern Delta." (Id.)

Through its appeal of the initial judgment in the forfeiture action, North Kern did not challenge the trial court's rejection of the causes of action under which it sought rights to the forfeited water, including the claim for "purchase." Such rulings are therefore binding and final.

Relevant California authority supports the fact that pursuant to the 1952 Agreement, North Kern has no right to the forfeited water, and otherwise has no right to the water. "Water rights which are acquired by contract are governed by the terms of the agreement solely, and may not be enlarged or changed except by mutual consent." (*Hand v. El Dorado Irrigation District* (1929) 97 Cal.App. 740, 745.)

In *Fresno Canal and Irrigation Co. v. People's Ditch Co.* (1917) 174 Cal. 441, 446-447, the court observed that defendants, including a water company, with a contractual right to share the waters of a stream did not have a right to take "excess waters" because the agreement "contains no word or clause which gives the defendants the right to appropriate [the excess waters]." (174 Cal. at 446-447.) The court further noted that even though the waters "become a part of the natural stream," the defendants had no right to such waters because they were not included in the agreement. (174 Cal. at 447.)

In *City of Coronado v. City of San Diego* (1943) 60 Cal.App.2d 395, the court held that a 1912 contract between two water companies for the supply and delivery of water was limited to the water and water rights in existence as of 1912, and not subsequently developed water. The court explained, "If the parties had intended the contract to cover not only the water system as it then existed but also future installations and developments it would have been a simple matter to have so stated. Not only was such an intention not expressed in the contract but we think it does not inferentially appear therein." (60 Cal.App.2d at 400.) The court further explained that "the parties contracted with reference to a definite water system which then existed." (60 Cal.App.2d at 401.) The court stated that "other waters, subsequently developed," will not become subject to

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the contract merely because they were part of the water system which had been "affected by the contract." (60 Cal.App.2d at 402.) The court concluded that the "only reasonable interpretation of this contract," was that "it was limited to this water system as it then existed and that it was not intended to, and did not, cover any future additions by which new water was developed." (*Id.*)

In *Mayberry v. Alhambra Addition Water Co.* (1899) 125 Cal. 444, the California Supreme Court similarly held that a party with the right to take water in a stream pursuant to a contract did not have a right to take additional foreign and surplus waters flowing in the stream. In *Mayberry*, the plaintiff had a contractual right to divert and use all water flowing in a stream on Friday and Saturday of each week. The defendant water company eventually increased the flow of water in the stream by drilling a number of wells and diverting the well water in the stream. Plaintiff claimed that he had a right to the water added to the stream "in the same manner that he uses the natural flow," under his contract with the water company. (125 Cal. at 449.) The Supreme Court rejected plaintiff's claim, based on the terms of the contract. The court explained that "the right to the artificial increment is quite distinct from the title to the natural flow," and the contract did not contain any reference to an extension or increase of plaintiff's right to water flowing in the stream. (*Id.*)

Courts have expressly upheld Bakersfield's right and ability to enter into contracts for the supply of water and to impose restrictions on the use of the water through the contract. In *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), a federal court upheld transfer limitations and restrictions on Kern River water owned by Bakersfield and used by an agricultural district pursuant to a contract with Bakersfield. The court explained that such limitations were appropriate because the California legislature had contemplated that cities "might act by contract to preserve access to water for existing and future uses." (828 F.2d at 520.) The court further explained that Bakersfield's transfer restrictions were based on policies intended to "protect its right as guaranteed not only by contract but as embodied in the policy stated in § 106.5" (*Id.*) The restriction on North Kern's diversion and use of Kern River water owned by Bakersfield, including the exclusion of the right to the additional, forfeited surplus water, is similarly enforceable, valid and consistent with the law of contracts, as well as state policy expressing a preference for municipal uses, as set forth in Water Code Section 106.5.

Bakersfield does not contend that North Kern has no right to divert water from the Kern River, and Bakersfield also recognizes that a "right to use" water is a type of water right. (*United States of America v Superior Court of Riverside County* (2000) 78 Cal.App.4th 1019) In *North Kern Water Storage District v. County of Kern* (1960) 179 Cal.App.2d 260, a court, for example, explained that North Kern's rights under the 1952 Agreement were subject to taxation by Kern County. As confirmed by the court in the forfeiture action, however, the 1952 Agreement does not entitle or authorize North Kern to divert any release water, or forfeited water, no matter how its "right to use" Bakersfield's water rights is characterized. The court in *North Kern v. County*

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of Kern, moreover, explained that the 1952 Agreement did not transfer the water rights mentioned in the agreement to North Kern, but only transferred a partial right to use water accruing to the rights.

Bakersfield's retention of the actual pre-1914 rights referenced in the 1952 Agreement has considerable legal and practical significance. A water right is classified as a property right. (*United States of America v Superior Court of Riverside County* 78 Cal.App.4th at 1025.) As holder of the actual property right, only Bakersfield, and not North Kern, has standing to assert any claim to the forfeited water as an appropriator. Conversely, North Kern has no property rights or appropriative rights at the First Point of measurement on the Kern River. It only has rights under its agreement with Bakersfield.

The SWRCB has previously determined that a water contractor such as North Kern does not have rights and privileges enjoyed by the actual holder of the water right, including the right to protest a change of use of water that may cause injury. In *In the Matter of Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, D. 1641, December 29, 1999, the SWRCB held that "water service contractors" are not entitled to protection under Water Code Section 1702, involving temporary changes in the point of diversion of water, but that only the actual water right holders were entitled to such protection. In reviewing the rights of contractors under the Central Valley Project and State Water Project, the SWRCB noted that the water rights described in the various contracts were still held by the United States Bureau of Reclamation ("USBR"). (*Id.*, at 128.) Accordingly, the SWRCB determined that for purposes of Water Code Section 1702, the water service contractors were not "legal users of water." (*Id.*, at 130.)

In Order WR 2000-02, which denied reconsideration of and amended D. 1641, the SWRCB confirmed that the USBR, and not a contracting party "is the water right holder of the CVP water rights involved." (*In the Matter of Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, Order No. WR 2000-02, March 15, 2000, at 18.) The SWRCB further explained that the Westlands Water District's "contractual right to use water appropriated by the USBR is dependent on the contract and on the rights of the USBR, and therefore does not provide a basis for finding a violation of the 'no injury' rule in section 1702." (*Id.*, at 19-20.)

The SWRCB further explained that "a water supply contract does not give the water supply contractor a legal interest in the water independent of the rights of the water right holder. Indeed, unlike persons who appropriate return flows from imported water, water supply contractors do not themselves hold any water rights. Water supply contractors have a right to use water only by virtue of their contracts with their water suppliers." (*Id.*, at 20, emphasis added.) "The contract does not create a right to divert or use water, except in accordance with the rights of the water right holder, and does not define or alter those water rights." (*Id.*)

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Finally, the fact that the water released by Kern Delta has now been found to be forfeited does not give North Kern some new right or claim to the water under the 1952 Agreement. The agreement still does not authorize North Kern to divert water which presently or formerly accrued to Kern Delta's rights. The agreement further does not authorize North Kern to divert "new" water or increased flows which became available in the future on the river.

B. North Kern Holds No Other Rights to Kern River Water, and No Right to Divert the Forfeited Water

North Kern brought the forfeiture action to acquire water which it alleged Kern Delta had forfeited, or otherwise lost, pursuant to several different theories. In addition to the claim for purchase, North Kern asserted claims to the water forfeited by Kern Delta under causes of action for abandonment, intervening public use, prescription, equitable apportionment and injunction. (See Ex. B.) The assertion of all of these claims to the forfeited water, along with North Kern's recent filing of an application to appropriate the water, demonstrates and confirms that North Kern has no rights to Kern River water outside the 1952 Agreement, and no valid right or claim to the forfeited, surplus release water.

Following the initial trial of the forfeiture action, the trial court rejected all of North Kern's claims to the forfeited water, specifically the claims for abandonment, prescription, inverse condemnation and intervening public use. Although North Kern from time to time used a portion of the release water, the trial court found that North Kern had no permanent, binding right to the water and did not otherwise take steps to acquire rights to such water.

Although it appealed the initial judgment and decision, North Kern did not challenge the trial court's rejection of the causes of action under which it sought rights to the forfeited water. North Kern specifically did not appeal the court's denial of its causes of action for purchase, abandonment, intervening public use, and prescription. Such rulings are therefore binding and final.

The court of appeal in the forfeiture action confirmed that as a result of the trial court's rejection of North Kern's claims, North Kern had no right to the forfeited water, as a junior appropriator or otherwise. The court instead noted that the only remaining possibility under which North Kern could acquire rights to the forfeited release water "is that Kern Delta's predecessors in interest forfeited a portion of their rights prior to 1914, which were to some extent subsequently appropriated by North Kern's predecessors prior to 1914." (*North Kern Water Storage District v. Kern Delta Water District, et al.*, No. F033370, 5th Dist., Jan. 31, 2003, as modified March 3, 2003 (unpublished opinion), (hereinafter "Opinion"), p. 45, a copy of which is attached to Bakersfield's petition as Exhibit C.) On remand, North Kern was unable to prove a pre-1914

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appropriation, and consequently could not establish any right or entitlement to the forfeited release water.

The court of appeal in the forfeiture action provided specific principles of law that applied to North Kern's claims to the forfeited water. The court stated that "a finding on remand that Kern Delta has forfeited some portion of its entitlement will not necessarily result in enhancement, by an equivalent amount, of North Kern's rights." (Opinion, p. 44.) The court also held that "if North Kern is unable to prove a pre-1914 appropriation, its claim, like any other post-1914 claim, will be subject to the statutory mandates . . ." of the California Water Code. (Opinion, p. 45.)

The court of appeal accordingly rejected North Kern's claim that it had some right, claim or entitlement to the forfeited water under "existing entitlements," or that it held a "prior existing right" to the forfeited water. The court further rejected contentions that the forfeited water should "feed existing rights" on the Kern River.

The court of appeal instead stated: "Water forfeited reverts to the public and becomes available for appropriation by others through the permit procedures." (Opinion, p. 46, citing Water Code § 1241.) The rulings of the court of appeal, including this statement, remain binding on all parties, as well as the SWRCB, and was not and can not be contradicted by the subsequent reported decision. The court of appeal in the forfeiture action instead recognized that the prior holdings and rulings of the court of appeal were binding on the parties as "law of the case." (147 Cal.App.4th at 567.)

The court of appeal's observations, in the published decision, regarding the possibility of water being "available" to North Kern and therefore not unappropriated water, constitute mere dicta, and are not binding on the parties. The statements are certainly not binding or determinative on the SWRCB, since the court recognized that only the SWRCB can determine whether the forfeited water is unappropriated, surplus water. (147 Cal.App.4th at 583.) As indicated above, the court in the forfeiture action did not review or determine the rights of North Kern, or the rights of the parties pursuant to the 1952 Agreement. Courts are also not bound by dicta, and statements of dicta "have no force as precedent." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301.)

The court of appeal, in both the prior opinion and in the subsequent reported decision, conclusively held that the water forfeited and released by Kern Delta had not been appropriated by North Kern, and that North Kern therefore had no right to the water. Accordingly, all of North Kern's contentions with regard to alleged injury to its rights as a result of the SWRCB's disposition of the surplus water, protection of rights to such water, or any right or claim to such water, have already been rejected by the court of appeal, and thus are invalid.

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C. North Kern's Use of the Forfeited Water Gives it No Right to the Water

The fact that North Kern has historically diverted some of the water forfeited and released by Kern Delta does not have any effect on North Kern's rights, its continued ability to divert the forfeited water, or the existence of surplus water on the river.

The 1952 Agreement states that if North Kern ever diverted from the Kern River more water than it was entitled to divert under the agreement, "then the amount of excess so diverted shall be deducted and withheld from the first water which [North Kern] otherwise would be entitled under this agreement to divert thereafter." (1952 Agreement, ¶ 4.) The 1952 Agreement further provides that "excess diversions" by North Kern, no matter how often repeated or how long continued, shall not have the result or effect of "enlarging the rights" of North Kern, and North Kern agreed never to make any claim, contention or assertion against the other parties to the agreement to that effect. (Id.)

The court of appeal made clear that North Kern's prior use of some of the forfeited release water did not create any right or entitlement to the water. The court held that North Kern's rights were not increased or "enhanced" by its diversion and use of water released and forfeited by Kern Delta. (Opinion, p. 44.) The court stated, "After 1914, a claimant may not establish an appropriative right merely by use." (Opinion, p. 46, citing Water Code §§ 1201, 1225 and *People of State of California v. United States*, 235 F.2d 647 (9th Cir. 1956).) The court further explained that although North Kern had used water not diverted by Kern Delta, "North Kern will gain an increase in its entitlement only if it proves a pre-1914 appropriation." (Opinion, p. 44.) The court later stated that "An appropriation can not be expanded except by a new appropriation." (Id., n. 46.)

The use of a certain flow of water, even on a regular basis, does not, by itself, give rise to any property right to the water or to a right to the continued use of the water. (*Stevens v. Oakdale Irr. Dist.* (1939) 13 Cal.2d 343, 350.) In *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 596-97, the court similarly stated that a party's use of water would "raise no presumption of a grant" of a water right, and a user of such water does not, without more, "secure or acquire the right to the continuous flow of such water."

Similarly, the improper or unpermitted diversion of water does not establish or create any right to the water. In *In the Matter of Draft Cease and Desist Order No. 262.31-18 and Administrative Civil Liability Complaint No. 262.5-40 against the Lake Arrowhead Community Services District*, Order No. WR 2006-0001, January 13, 2006, the SWRCB ordered a community services district to stop diverting water in excess of its established pre-1914 rights based on this principle. The SWRCB explained that "for the part of the water supply it withdraws in excess of the pre-1914 water right for consumptive uses, it is an ongoing illegal diverter and user of water." (Id., at 16.) The SWRCB further explained that to increase its diversions, the

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community services district would have to obtain a new appropriative water right through the Water Code procedures. The SWRCB concluded that "since [community services district] has no water right to divert and use the excess water, it can not argue that it has acquired the right to continue its use of water in excess of its right." (*Id.*)

At the very least, if North Kern believes that it has a right to divert and use the water forfeited by Kern Delta, its rights and remedies are limited to its contract with Bakersfield, and North Kern must assert any claims in the proper forum. As indicated previously, such contractual matters, including North Kern's contentions with regard to its rights to the forfeited water, are not appropriate for consideration by the SWRCB in this proceeding.

The SWRCB has no jurisdiction to determine the amount of any party's right to use water under a contract. (*In the Matter of Application to Appropriate Water from Sacramento River, Rock Slough, Old River and Channels of the Sacramento-San Joaquin Delta*, D. 990, February 9, 1961, at 69.) "The existence and content of the contract is outside the control of the SWRCB, and the SWRCB is not in a position to amend its terms or to settle disputes between the water right holder and its customer." (Order No. WR 2000-02, *supra*, at 20.)

D. Buena Vista and KCWA Have No Right to the Forfeited Water Under Their Second Point and Lower River Rights

The Miller-Haggin Agreement called for a division of water between the First Point and Second Point, with 1/3 of the flow of the river to the Second Point diverters and 2/3 to the First Point diverters. (Opinion, p. 6.) The division of water between First Point and Second Point, however, does not occur during the months of September through February, when all Kern River water is allocated to the First Point parties. (*Id.*) Accordingly, the Second Point and Lower River parties have no right to receive Kern River water, including any forfeited water, from September through February.

The trial court and court of appeal in the forfeiture action found that the bulk of the forfeiture of Kern Delta's rights occurred when Kern Delta's primary right, the Kern Island right, forfeited water in the months of January, October, November and December. (147 Cal.App.4th at 564.) The court of appeal also found that Kern Delta forfeited portions of its "junior" rights in those same months. (147 Cal.App.4th at 565, 585.)

Accordingly, during the months of September through February, Buena Vista and KCWA have no right to receive Kern River water, and have no right to claim any Kern River water, as junior appropriators, contractors, or otherwise. Instead, Bakersfield and Kern Delta are the only pre-1914 appropriators on the Kern River entitled to receive water during those months.

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Buena Vista and KCWA have failed to explain how they could divert water forfeited by Kern Delta in the months in which they are not entitled to receive water under the Miller-Haggin Agreement. These parties have failed to explain how they could divert and use the forfeited water, and how they have standing to file comments, petitions and applications to appropriate with regard to the water. The water forfeited by Kern Delta also does not practically increase the flow of the Kern River. The amount of water divided between First Point and Second Point will not change as a result of the forfeiture of Kern Delta's rights. In addition, the forfeited water either must be considered new water outside the water rights structure and subject to diversion, or, in the alternative, the water must flow exclusively to Bakersfield, as the sole remaining First Point diverter, without any water flowing past First Point, or "escaping" to Buena Vista or KCWA.

Because the Second Point and Lower River Kern River interests, Buena Vista and KCWA, have no right to receive any Kern River water from September through February, the SWRCB also does not need to consider whether such parties would be "injured" as a result of the revision or revocation of the fully appropriated status of the Kern River. In addition, the SWRCB need not consider whether the rights and demands of such parties would have any impact on the existence of "surplus" water on the Kern River as a result of Kern Delta's forfeiture.

E. Bakersfield is the Only Party with Rights to the Forfeited Water

Bakersfield is the only actual appropriative right holder at the First Point of measurement, other than Kern Delta. If the SWRCB determines that the forfeited water should stay in the river so that it is available to existing appropriative rights, the water can only be diverted and used by Bakersfield.

In addition to the rights listed in the 1952 Agreement, Bakersfield can divert and use the forfeited water pursuant to the additional First Point rights it acquired in 1976 from Tenneco. Those rights are listed in Agreement 76-36 and are also identified on the daily diversion sheet for the Kern River, attached to Bakersfield's January 31, 2008 comments as Exhibit A, and include the full ownership of the rights listed as the "Kern River Conduit, the Castro, Beardsley (1st), Wilson and Beardsley (3rd) rights, and portions of the South Fork, McCord, Calloway, and Railroad rights.

Bakersfield, as a city, additionally has superior and primary rights to the forfeited water pursuant to Water Code Sections 106, 106.5, 1254 and 1460. Cities have "preferential rights" to use and store surplus water in advance of entities with prior appropriative or riparian rights, at least until the water is needed by the prior right holders. (*Meridian, LTD v. City and County of San Francisco* (1939) 13 Cal.2d 424, 459.) Together, these statutes evidence an explicit legislative preference for municipal uses of water. In addition, unlike other entities on the Kern River,

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Bakersfield can hold rights to Kern River water, even without a present demand for such water, for future municipal and urban uses. (Water Code § 106.5.)

As indicated in its petition and related comments, Bakersfield would prefer not to simply divert the forfeited water without any SWRCB oversight and regulation, and without consideration of public trust purposes. (Although Bakersfield will certainly exercise its right to divert the forfeited water to the fullest extent possible under its appropriative rights if the SWRCB declines to revise the fully appropriated status of the river or to otherwise determine rights and claims to the forfeited water.)

Bakersfield believes that the SWRCB's assumption of jurisdiction over the forfeited surplus water will avoid uncertainty, and potential disputes and further litigation over the water. The SWRCB's revision of the fully appropriated status of the Kern River and assumption of jurisdiction over the forfeited water is also necessary to prevent unauthorized and unpermitted diversion of surplus, new water, or additional flows created by Kern Delta's forfeiture.

As a public entity, with the interests of its residents in mind, Bakersfield also believes that SWRCB involvement will best ensure that the water will be put to sufficient multiple reasonable and beneficial uses, instead of simply diverted improperly by North Kern or other parties for a single purpose; private agricultural irrigation.

If, however, the SWRCB finds that the forfeited water should stay in the river or be available for diversion by existing appropriative rights, the SWRCB must confirm that Bakersfield is the only party with the right to divert and use such water. The SWRCB should confirm Bakersfield's rights, and/or issue an order confirming Bakersfield's right and ability to divert the water pursuant to its pre-1914 appropriative water rights.

Although the SWRCB does not issue permits for pre-1914 appropriations of water, "the SWRCB has authority to supervise the exercise of pre-1914 water rights under the public trust doctrine and under Water Code section 275, which implements California Constitution Article X, section 2." (*In the Matter of the Diversion and Use of Water from Big Bear Lake and Bear Creek in San Bernardino County*, Order No. WR 95-4; February 16, 1995, at 14, citing *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448.) The SWRCB has a responsibility of "oversight and regulation" of pre-1914 water rights, to protect the rights of permits and license holders to prevent unauthorized diversions, and to help "spread the burden of public trust, water quality or other environmental requirements." (*In the Matter of the Petition for Reconsideration of the California Farm Bureau*, Order No. WRO 2005-0002, at 34.) Pursuant to this authority, the SWRCB has the ability to issue an order confirming and protecting Bakersfield's right to divert the forfeited water pursuant to its pre-1914 appropriative rights, and preventing the North Kern parties from making unauthorized diversions.

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3. FORFEITURE ALONE CREATES UNAPPROPRIATED WATER

The comments of the North Kern parties ignore and fail to address the statutory authority, including from the Water Code, court decisions and SWRCB orders and rulings, which establishes that Kern Delta's forfeiture, by itself, creates unappropriated water which requires revision of the fully appropriated status of the Kern River. North Kern instead seeks to impose requirements and standards for the revision of the fully appropriated status of stream systems which are not supported by, and instead contrary to, applicable legal authority.

As explained in Bakersfield's petition and its January 31, 2008 comments, Pre-1914 rights which are forfeited, by definition, become or create unappropriated water. (See Water Code § 1202.) Water is surplus if "there are no prior vested rights" to the water. (*Rank v. Krug*, 142 F.Supp. 1 (N.D. Cal. 1956).) In the forfeiture action the court already determined that Kern Delta has no right to the forfeited water, and also determined that the forfeited water does not pass to North Kern, or increase the contractual rights held by North Kern. Since no party holds rights to the forfeited water, the water must be considered surplus, instead of being available for diversion and use with no valid right or claim to the water.

The forfeited water must be considered unappropriated, surplus water because it is surplus to the demands of the original right holder, Kern Delta, under pre-1914 appropriative rights. The trial court in the forfeiture action stated, "by definition, water 'released' by Kern Delta was water in excess of its demand on any given day, and thus considered surplus water." (Conn Decision, p. 11.) (See also Opinion, p. 27, noting that "the released water was surplus as to Kern Delta.")

Forfeiture practically and legally can not simply increase the flow in the river, or the supply of water "available" for diversion, as the North Kern parties argue. The North Kern parties can not use the water without any valid right or claim. In the first court of appeal opinion, the court explained that if North Kern is unable to prove a pre-1914 forfeiture and subsequent appropriation, its claim to the water must be adjudicated before the SWRCB, and not the trial court. (Opinion, p. 45.) The court also confirmed that the "SWRCB has exclusive jurisdiction over appropriative claims made after 1914," and "water forfeited reverts to the public and becomes available for appropriation by others through the permit procedures." (Opinion, p. 46, citations omitted.) Given this direction, the SWRCB must assume jurisdiction over the forfeited water.

"All water flowing in any natural channel not otherwise appropriated is subject to appropriation in accordance with the provisions of the Water Code." (*Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 413, emphasis added.) In *Eaton*, the court explained that upon revocation of a water rights permit, the water specified in the permit is subject to further appropriation. (171 Cal.App.2d at 415, quoting from Water Code § 1410.) That holding is directly applicable to the present situation, as the water forfeited and released by Kern Delta was

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not and has not been "otherwise appropriated" by anyone. The water may have been used by other parties, but the court of appeal in the forfeiture action held that such use did not create or give rise to any rights, or evidence any new or proper appropriation of water.

The forfeited water is also practically "new water" because it will always be released, and can no longer be diverted by Kern Delta. Prior to the forfeiture finding, Kern Delta had the right and the ability to divert all of the water accruing to its pre-1914 rights. Although Kern Delta historically did not divert and use all of the water accruing to its rights, there was no guarantee that release water would be available. The other parties on the Kern River had no ability to request or order the excess, "release" water, and had no control over the timing or quantity of water available. The other Kern River parties had no expectation or assurance that they would receive a specific quantity of release water each year.

In contrast, the forfeited water will now always be available for diversion and use. The forfeited water is truly a separate, significant block of "new water" not otherwise part of the Kern River rights structure. It is more than simply an augmented or increased flow.

In *In the Matter of Permit 15012 on Application 11792A of Calaveras County Water District*, Order No. WR 97-06, September 18, 1997, the SWRCB issued an order revoking a water right permit because the right holder had not constructed any authorized diversion facilities, or diverted and put to beneficial use water under the permit. The SWRCB explained that water previously accruing to the revoked water right was "newly unappropriated water," despite the presence of junior right holders and claimants. (*Id.*, at 7.) The SWRCB further explained that upon a revocation of the permit, water "may become available for appropriation." (*Id.*) The SWRCB also cautioned that water might not always be available, however, not because of prior or junior rights, but because the water may be needed "during a drought or if additional water is needed for endangered species or other public trust uses." (*Id.*)

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

In *In the Matter of Application 19919 of Norval and Letha Miles*, D. 1145, August 26, 1963, at 2, the SWRCB, in approving an application to appropriate, rejected a protest by a water right holder on an unnamed river, explaining that "any pre-1914 appropriative right the protestant may have is measured by his past use, and there is water surplus to his past use which is subject to appropriation." Similarly, water surplus to Kern Delta's demands and use is subject to appropriation. In *In the Matter of Application 8156 of Fallbrook Public Utility District, et al.*, D.

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432, October 7, 1938, at 9, the SWRCB stated "water which is not in use under some valid claim of right is subject to appropriation."

In contrast, the authority cited by the North Kern parties is not applicable or comparable, as none of the cited proceedings dealt with or even remotely discussed the effect of forfeiture of a significant quantity of pre-1914 water rights on a stream system. This is a unique situation, and one that has not apparently been addressed in prior SWRCB or court proceedings.

Contrary to the contentions of the North Kern parties, a finding by the SWRCB that unappropriated water exists is not limited to situations where "physical changes" create new water. The Water Code does not contain such a requirement or limitation. Similarly, the contention that Bakersfield would have to prove that the forfeited water is new water that "would have been available for appropriation in 1964" is not an accurate statement of law. Under this theory, the SWRCB could never revise the fully appropriated status of a river due to changed circumstances, contrary to Water Code Section 1205(c).

The North Kern parties' contention, at page 13 of their comment letter, that the definition of unappropriated water "does not include water being used pursuant to an existing right," is also not applicable here, because the forfeited water is not and has not been used pursuant to any existing or prior rights. As evidenced by the decisions in the forfeiture action, North Kern has no right to the forfeited water, and certainly can not complain of any injury or interference with the diversion or use of such water, absent a right to the water.

It is also not inevitable, as North Kern argues, that the forfeited water will simply be "available" for junior rights. The SWRCB has many options available for the use and disposition of the forfeited water, based on the finding of forfeiture. Even if the forfeited water were to stay in the river for later diversion and use, only the SWRCB can make such determination after a full hearing and consideration of all issues necessary for determination of rights and claims to the water.

Contrary to the North Kern parties' argument, at page 14, courts in other states have reached similar conclusions. As "water rights expert Wells A. Hutchins" recognizes, holdings in other states go in both directions. Clearly there is a line of authority that holds that upon forfeiture, water "ceases to be appropriated water and instead becomes unappropriated water available for appropriation." The North Kern parties conveniently only focus on the line of cases which appear to support their position, while ignoring the equally compelling line of cases from other states which support Bakersfield's position.

The court of appeal also did not, as the North Kern parties argue, rely on *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.* (1943) 104 Utah 448 [137 P.2d 634] for the proposition that North Kern gained some right or entitlement to the release water it historically used. The

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court referred to *Wellsville*, but did not hold or state that it was bound by the holding in *Wellsville*, or any other out of state case. The court certainly did not hold that North Kern had acquired some right or interest to the forfeited water, pursuant to *Wellsville* or otherwise.

In *Wellsville*, moreover, a Utah court only stated that water rights acquired by adverse possession need not revert to the state. A statement, which is arguably dicta, made by the court of another state is not precedent in California, especially when California law has already spoken to the issue. (See *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578; *Smith v. Hawkins* (1895) 110 Cal. 122, and Water Code §§ 1201 and 1202.)

4. CHANGED CIRCUMSTANCES REQUIRE REVOCATION OF THE FULLY APPROPRIATED STATUS OF THE KERN RIVER

The North Kern parties primarily rely on prior orders and findings of the SWRCB regarding the Kern River, and the fully appropriated status of the river. All of those proceedings took place and were resolved before the judgment of forfeiture involving Kern Delta's rights, and are therefore not binding or determinative.

The North Kern parties, moreover, ignore the statutory authority of the SWRCB to revise the fully appropriated status of the Kern River based on "changed circumstances." As Bakersfield explained in its petition, the SWRCB has the authority to revise a declaration that a stream system is fully appropriated based on "changed circumstances." (Water Code § 1205(c); 23 C.C.R. § 871(c).)

Bakersfield's petition is based on the recent judgment and rulings by California courts that Kern Delta forfeited a significant quantity of water that was surplus to its rights. The binding determination that there is now surplus, unappropriated water on the river negates and supersedes previous findings, statements and rulings regarding the river. The decisions, and findings therein regarding forfeiture, constitute changed circumstances which were not considered by the SWRCB in any of the prior proceedings involving the Kern River and its fully appropriated status.

The 1964 decision repeatedly cited by the North Kern parties (D. 1196), and the 1989 order (WR 89-25) are therefore not binding or determinative, as the SWRCB in those proceedings did not consider the loss of a significant quantity of water by one of the First Point parties through forfeiture, or the effect of such forfeiture. The facts and circumstances considered by the SWRCB in the prior proceedings have changed as a result of Kern Delta's forfeiture. The prior finding in D. 1196 that there is no surplus water, most significantly, is in direct conflict with the judgment in the forfeiture action, and therefore can no longer be binding or valid.

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In the forfeiture action, the trial court and court of appeal contradicted and necessarily invalidated the SWRCB's previous decisions and orders on the Kern River, including the fully appropriated determinations, by explicitly finding that there was surplus water on the river, based on Kern Delta's failure to use all of the water accruing to its rights. The decisions and findings of the court in the forfeiture action must take precedence over the SWRCB's prior rulings because matters involving property rights are not within the jurisdiction of the SWRCB. (*In the Matter of Application 23965 to Appropriate from Woodruff Creek*, D. 1554, March 20, 1980, at 7.) "It is clearly not the function of the Board to determine and declare existing rights of parties who appear before it, either as applicants or protestants. These are judicial functions which can be exercised only by the courts." (*In the Matter of Application 20 732 by Western Municipal Water District of Riverside*, D. 1121, April 4, 1963, at 11-12.)

As explained in prior comments, in 1964 the First Point parties were correct in claiming that they all were using water. In reality, however, they were not all using the water pursuant to valid rights. North Kern's use of release water was not authorized under its agreement with Bakersfield. In addition, Kern Delta clearly was not using all of its available water, so water was surplus to its rights.

The earlier rulings, including the declarations that the Kern River was fully appropriated, were also a reflection of the common ownership and control of the river by KCLC, and not any actual absence of "surplus" water on the river. In fact, the historic record demonstrates that there has always been surplus water on the river in excess of the demands of Kern Delta.

The prior engineering reports repeatedly referred to by the North Kern parties in their comments are not binding, determinative or relevant, as they do not consider or take into account forfeiture of Kern Delta's rights, and the fact that a significant quantity of water was surplus to Kern Delta's rights and demands. The reports also did not look at forfeiture months, or the effect of forfeiture on flows and diversions in the river.

North Kern extensively relies on the SWRCB's *Draft Order Denying Petition to Revise the Declaration on Fully Appropriated Streams-American River* (2003) in support of its contention that the SWRCB should not revise the fully appropriated status of the Kern River. That decision is not applicable or controlling, however, as it did not involve a finding of forfeiture of water surplus to the needs of a prior appropriator.

Instead, the present status of the Kern River more closely resembles the situation described in *In the Matter of the Petitions to Revise Declaration of Fully Appropriated Streams*, Order No. WR 2000-12, September 21, 2000, in which the SWRCB did revise the declaration of a fully appropriated stream system, based on a finding of changed circumstances. In Order WR 2000-12, the SWRCB found that even though the San Ana River had been designated as fully appropriated, the SWRCB could accept and approve petitions for revision of the fully

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appropriated status pursuant to Water Code Section 1205(c). The SWRCB explained that, among other things, the construction of a new dam “is a significant change in conditions that will affect the pattern of flows below the dam following storm events and make it feasible to divert more water.” (*Id.*, at 13.) Similarly, a finding of forfeiture is a significant event and change of conditions which requires revision of the fully appropriated status of the Kern River.

5. THE FORFEITED WATER IS SURPLUS WATER, AND CAN NOT SIMPLY BE “AVAILABLE” FOR USE BY JUNIOR RIGHTS WITHOUT SWRCB OVERSIGHT AND REGULATION

Bakersfield does not believe that the forfeited water should simply remain in the river for diversion and use by others without SWRCB confirmation or involvement, as the North Kern parties contend. SWRCB and court decisions instead establish that the forfeited surplus water can not simply increase diversions by prior right holders, with no determination or review by the SWRCB as to the proper disposition of the water, determination of rights to the water, or protection of public trust interests.

That theory would undercut a significant portion of the Water Code, and would negate, restrict and limit the SWRCB’s ability to regulate and manage water resources whenever there is some claim to a supply of water. The North Kern parties can not prevent the SWRCB from fulfilling its statutory mandate to review claims to unappropriated water, determine if such claims are valid, and then determine whether surplus water is available for diversion. These contentions would also lead to waste, improper and unregulated diversions, and damage to environmental and public trust interests. A deferral of action on the river by the SWRCB would also inevitably lead to disputes and litigation among the various parties over the diversion and use of the forfeited water.

Although the forfeited water could be absorbed by Bakersfield’s rights, to avoid further disputes and to protect and memorialize its rights following Kern Delta’s forfeiture, Bakersfield believes the SWRCB must still assume jurisdiction over the unappropriated, forfeited water.

A. The Forfeited Water is “New” Water Not Otherwise Part of the Kern River Water Rights Structure

The final judgment of forfeiture, as well as the prior binding rulings in the forfeiture action, has altered and amended the Shaw Decree entitlements. As a result of the forfeiture action, the flow levels and quantities in the Shaw Decree associated with Kern Delta’s rights have been altered and reduced. The forfeiture action therefore modifies, supersedes and takes precedence over the rights hierarchy in the Shaw Decree.

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The forfeited water can not simply fall into the Shaw Decree water allocation formula, or automatically pass to other Shaw Decree rights, as North Kern argues. The court of appeal in the forfeiture action expressly rejected such contentions. Absent an express, binding ruling on the disposition of the forfeited water, or a further modification of the Shaw Decree to account for the forfeited water, the North Kern parties can not assume that the water will be absorbed by alleged prior Kern River rights. Instead, the SWRCB must review the appropriate disposition, diversion and use of the specific quantity of water created and made available as a result of forfeiture.

North Kern's contentions are also logically flawed because if the forfeited water is simply added to the flow of the river, Kern Delta, the party that forfeited the water, could presumably retake and divert a significant portion of the forfeited water through its own junior appropriative rights. The North Kern parties, however, seem to assume that junior Kern Delta rights can not or will not take the forfeited water. These parties therefore seem to recognize that the forfeited water is "new" water which has some special character, and which is not just part of the regular flow of the river. At the very least, the question of Kern Delta's right to divert and use "increased flows" in the river resulting from forfeiture highlights the need for SWRCB involvement in and review of these issues.

The forfeited water is practically indistinguishable from "developed" or "foreign" water added to a stream system. The water forfeited by Kern Delta was not previously part of the regular flow of the Kern River. Instead, the water was surplus and excess to Kern Delta's rights, and was "released" to the river without any rights attaching to the water. The SWRCB must therefore consider the appropriate disposition of this separate, "developed" supply of water which formerly attached to Kern Delta's rights, but now belongs to no one on the river.

The SWRCB has previously issued permits for unappropriated, surplus water despite the presence and potential claims of junior claimants or right holders on a stream system. The SWRCB has focused on whether unappropriated surplus water is actually available or has been created, without deciding whether prior right holders can or should take the water. The SWRCB has also typically allowed claimants and applicants to take and obtain rights to surplus, unappropriated water ahead of junior right holders, so long as such right holders are not injured.

California courts have consistently held that a downstream appropriator is not entitled to any portion of new water developed by an upstream appropriator so long as he otherwise receives "all the water he is entitled to receive." (See *Creighton v. Kaweah Canal and Irrigation Co.* (1885) 67 Cal. 221 and *Wiggins v. Muscupiabe Land and Water Co.* (1896) 113 Cal. 182, 196.) An appropriator or a riparian has a right to retake from the channel of a stream any water developed by them which would not constitute the natural flow of the stream. (*L. Mini Estate Co. v. Walsh* (1935) 4 Cal.2d 249, 254.)

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The forfeited water also augments the water flowing in the river, and is newly available water which was not previously diverted by anyone with a valid claim or right to the water. The water forfeited by Kern Delta would not be flowing in the river "but for" Kern Delta's forfeiture, and thus is "new" water which must be considered separate and apart from the water normally flowing in the river.

The present situation is analogous to *Pomona Land and Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618, in which the plaintiffs and defendants had an agreement to divide all of the waters in a stream accumulating behind a dam. The defendants later installed a pipeline above the dam to reduce losses in the flow of the river caused by seepage and evaporation, and defendants claimed that the water saved was "salvage water, rescued water, or developed water," which belonged to it exclusively and which was not subject to the agreement to divide the waters of the stream. Defendants also explained that the plaintiffs were still receiving "all of their proportion of the natural flow to which alone they are entitled," and accordingly could not complain about the defendants taking all of the "developed water." (152 Cal. at 621-622.)

The court agreed with the defendants, and found the developed water was "essentially new waters, the right to use and distribute which belonged to defendant." (152 Cal. at 623.) The court further explained "where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quality or quantity to which he is entitled; and, upon the other hand, he may not lay claim to any excess of water over the amount to which he is entitled, however it may be produced." (*Id.*)

In *In the Matter of Application 28883, Ernest Righetti and Sons*, Order No. WR 91-02, February 21, 1991, the SWRCB confirmed that newly available water could be awarded to an applicant provided that downstream water users still received the same quantity of water which they had previously diverted and used. In that proceeding the SWRCB required an applicant to release a specific amount of water each year to satisfy downstream, junior rights. The SWRCB explained that it had "analyzed the effects of the proposed appropriation on downstream surface and groundwater users in order to determine the availability of water for appropriation," and thus determined how much water should be released to protect prior right holders. (*Id.*, at 4.) The SWRCB did not find, as the North Kern parties urge in this proceeding, that junior or downstream right holders were entitled to all new water available for appropriation, up to the full extent of their rights.

In *In the Matter of Application 18475 of the City and County of San Francisco to appropriate from La Costa Creek in Alameda County*, D. 988, December 20, 1960, the SWRCB rejected a protest by the Alameda County Water District to an application to appropriate water from a tributary to Alameda Creek because it determined that approval of the application would still leave the protestant with water to which it was entitled under various judgments and contracts, despite the fact that the protestant could have presumably also taken such new, unappropriated

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water. The SWRCB noted that the rights of the district were limited by a 1920 judgment which was still in effect and binding, and that the district could not compel the applicant city "to make additional releases of water downstream without further court action." (*Id.*, at 6.) Accordingly, the district's right and claim to the water was "junior" to the city's application for new water. The SWRCB further observed that the 1920 judgment represented "the total downstream obligation of the City to the District and its landowners," and, so long as such obligation was satisfied, water above that amount remained subject to appropriation. (*Id.*, at 10.)

In *Natoma Water and Mining Co. v. Hancock* (1894) 101 Cal. 42, the California Supreme Court expressly held that if a prior appropriator on a river could divert surplus water which increases the flow of a stream, the prior right holder has a right to take the surplus water, and is not compelled to release the excess or surplus water to satisfy the rights of more senior appropriators. The court noted that the defendant junior appropriators, with regard to the surplus water, "stand upon the same footing as other citizens, and may, like others, appropriate it by any lawful means." (101 Cal. at 47.) The court did not, as the North Kern parties claim, hold that more senior appropriators had an exclusive right to the surplus water, irrespective of their demand for the water. The court instead explained that "there can be no question as to the right of any lawful appropriator to divert the surplus either above or below the plaintiff." (101 Cal. at 49.) Similarly, the SWRCB can allow Bakersfield to appropriate the surplus water created by Kern Delta's forfeiture, irrespective of competing claims by third parties and other alleged right holders on the river.

Bakersfield's position is further supported by the SWRCB's decision in *In the Matter of Application 14723 by Marcus Dykstra to Appropriate Water*, D. 809, December 3, 1954. In that proceeding, the applicants sought to appropriate 0.05 cubic feet per second of water from a spring in San Bernardino County. Several water districts protested the application on the grounds that the water proposed for diversion flowed into the San Ana River, and the river was fully appropriated. The SWRCB rejected the protests because it found that the water subject to diversion would not have otherwise reached the San Ana River or been capable of appropriation by the downstream protestants and appropriators. The SWRCB explained that to the extent that the new water "can be captured and utilized beneficially by parties upstream without diminishing the flow that carries through to the holders of vested rights, they are subject to appropriation." (*Id.*, at 21.) The SWRCB further explained that there was insufficient evidence to establish that the diversion of the water by the applicant would have "diminished the flow available" to the protestants, or would have caused them many injury, as "it appears highly probable that the diversion of .005 cubic feet per second as proposed by the applicant, so far upstream, will have no appreciable or material effect upon the supply available to the down-river protestants." (*Id.*, at 22.) Accordingly, unappropriated water existed at the point proposed by the applicant for diversion, and the SWRCB approved the application and issued a permit for diversion.

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In D. 809 the SWRCB stated that "it is of the opinion of this office that unappropriated water exists at the point at which the applicant seeks to appropriate." (*Id.*, at 22.) The forfeiture of water by the first, highest priority water holder on the Kern River, Kern Delta, has similarly created unappropriated water, surplus to Kern Delta's demands, which is "upstream" from the appropriative rights of Bakersfield and the contract rights of North Kern. Unappropriated water exists at the point at which Kern Delta forfeited water, and at which point Bakersfield proposes to appropriate the forfeited water or allow the water to be utilized for environmental, in-stream and public trust purposes.

B. Revocation of the FAS Status of the Kern River Will Not Cause any Injury or Harm to the North Kern Parties.

The SWRCB has stated that a determination that there is surplus water available for appropriation, and the issuance of a permit for any new diversion, should be conditioned upon the "protection" of prior rights, and must avoid "injury" to prior rights. Therefore, in addition to, or as part of, its review of prior rights and claims on the river, the SWRCB must determine whether a finding that there is unappropriated, surplus water on a river will cause injury or harm to any prior or junior rights on the river.

Specifically, the SWRCB will approve a permit for the appropriation of water, despite protests from downstream water users, if unappropriated water can be taken and used "without substantial injury to the protestant." (*In the Matter of Applications 12628 and 12680 to Appropriate Water*, D. 674, August 31, 1950.) Water is available for appropriation within the meaning of Water Code Sections 1201 and 1202 if a proposed appropriation "would not adversely affect the downstream water users." (D. 1627, *supra*, at 17.)

The North Kern parties can not demonstrate any injury, harm or prejudice to their rights. Instead, North Kern and the other parties will receive the same quantity of water to which they are entitled, with or without revision of the fully appropriated status of the river. North Kern would still receive all the water it would have otherwise received and is entitled to receive under its agreement with Bakersfield. Diversion of the forfeited water also would not reduce the flow available to other appropriators because the water otherwise could have been diverted by Kern Delta under its rights.

The 1952 Agreement does not guarantee North Kern any specific quantity of water. Instead, the receipt of water is tied to the flow in the river, and the amount of water accruing to the rights described in the agreement, based on the flow in the river. That contract right is still satisfied, irrespective of what happens to the excess, increased flows of water created by forfeiture. If the increased flows created by forfeiture are diverted by another entity, or devoted to environmental, instream, or other public trust purposes, North Kern would still receive its full contractual entitlement. Accordingly, so long as North Kern is taking water to which it is entitled under the

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contract, and is taking the same amount of water which it was previously diverting under its contractual rights, it can not complain of any harm or prejudice.

A finding that the forfeited Kern River water is available for diversion and use would not "impair" any other rights, because there is no evidence that any one has a right to divert the water. The discussion at page 3 of the North Kern parties' comments with regard to the alleged rights of the First Point, Second Point and Lower River right holders is incomplete and misleading, because, as explained above, other than Bakersfield, no party has any right or ability to divert the forfeited water. Therefore, there is no need or obligation to satisfy purported "prior rights" with the forfeited water in determining whether there is unappropriated water.

The court in the forfeiture action, moreover, already rejected a similar argument by North Kern involving injury to North Kern's alleged "right" to water released or forfeited by Kern Delta. In rejecting North Kern's cause of action for inverse condemnation, the court found that North Kern had failed to produce evidence showing that Kern Delta's increased diversion of release water in recent years "constituted a 'taking' of property owned by North Kern." (Conn Decision, p. 12.) The court further explained, "The court is not persuaded that the evidence supports a conclusion that any over diversion in a given period was at the expense of North Kern in the sense that it actually deprived North Kern of a particular diversion of water that would have been used but for the taking thereof by Kern Delta." (Id.) North Kern did not appeal this portion of the trial court decision, and the holding and language thus remain binding on North Kern and the SWRCB.

The SWRCB can not and should not blindly accept North Kern's claim to the forfeited surplus water, and increased flows in the river, pursuant to its 1952 Agreement. In *Southside Improvement Co. v. Burson* (1905) 147 Cal. 401 the court expressly held that a party diverting water from a stream pursuant to a contract had no right to any surplus or excess water in the stream in excess of the quantity of water which it had previously used. Instead, "the surplus water of the stream was, so far as he was concerned, subject to diversion and appropriation by others." (147 Cal. at 407.)

C. There is Surplus Water on the Kern River

Bakersfield submitted evidence and information which establishes that Kern Delta's forfeiture created unappropriated water, in addition to the legal authority discussed in the prior comments and above, because the forfeiture resulted in an actual, practical surplus of water on the Kern River.

In its January 31, 2008 comment letter, Bakersfield submitted detailed information regarding the quantity of water forfeited by Kern Delta, and the extent of the surplus, unappropriated water. Specifically, the summary and supporting charts (attached to the comments as Exhibit E) demonstrated that as a result of Kern Delta's forfeiture, there has been, or would have been,

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unappropriated "surplus" water each year on the Kern River in amounts ranging from 15,648 acre feet (af) (in one of the driest years on record) to 123,363 af, with an average of 50,962 af. The forfeiture specifically resulted in an average of 40,603 af of surplus water for Kern Delta's Kern Island (1st) right, 5,175 af for the Buena Vista (1st) right, 3,308 for the Stine right, and 1,876 for the Farmers right. Of course, the amount of surplus water on the river could be larger in future years.

In contrast, the North Kern parties present no credible evidence or authority in their petitions, or their January 30, 2008 comment letter, in support of their contentions. The North Kern parties specifically provide no actual evidence to support the contention that there is no surplus water on the river because the forfeited water can and should be "absorbed" by junior rights. The North Kern parties also provide no evidence to establish that such alleged junior rights have the right or ability to divert the forfeited water.

Bakersfield recognizes that it has the initial burden of establishing that excess water exists on the Kern River. (*Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 535.) The court in *Tulare Irrigation District*, however, stated that "this rule, placing the burden on the appropriator who seeks to take water from a particular water field to show that there is a surplus, does not relieve the riparians and appropriators who are already in the field, from the burden of proving the quantity of water that they have been using, and that such amount is necessary for their reasonable beneficial purposes." (*Id.*)

As explained above, the other parties submitting comments, petitions or applications on the fully appropriated status of the river have failed to meet their burden of demonstrating that they have any right to the forfeited water, or to alleged "increased flows" in the river resulting from Kern Delta's forfeiture.

6. THE POSITIONS OF THE NORTH KERN PARTIES ARE DECEPTIVE AND CONTRADICTORY

The SWRCB should disregard the comments of the North Kern parties because all of the parties have changed their positions with regard to the fully appropriated status of the river, without any valid explanation. These parties are estopped from now claiming that there is no surplus water in the river, or that SWRCB should not conduct a hearing on the fully appropriated status of the river, based on the fact that the parties took contrary positions in their initial filings with the SWRCB. At the very least, the drastic change in position casts significant doubt on the credibility and accuracy of the comments, as well as the intent and motivations of the North Kern parties.

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North Kern and the other parties previously submitted separate petitions asking the SWRCB to revise the fully appropriated status of the Kern River, and/or to hold a hearing on the status of the river, along with proposed applications to appropriate the forfeited, surplus water.

North Kern, for example, indicated it submitted its petition so that the SWRCB could "consider" whether it is "proper" to revoke and/or revise the fully appropriated status of the river. Buena Vista stated in its petition that "reasonable cause exists to conduct a hearing on the question of whether the fully appropriated status of the Kern River should be revoked or revised."

KWBA explained that it submitted its petition and application because the finding of forfeiture on the Kern River "has created substantial uncertainty as to whether the Kern River continues to be fully appropriated." KWBA further stated that the forfeiture action "constitutes a 'change in circumstances' and 'reasonable cause' to hold a hearing on whether to revoke or revise the fully appropriated status of the Kern River stream system."

In its petition, KCWA stated that Kern Delta's forfeiture of Kern River water rights "constitutes a change in circumstances warranting consideration of revocation or revision of the Kern River fully appropriated stream declaration." KCWA also requested that the SWRCB "revoke or revise the fully appropriated status of the Kern River stream system," and accept its application to appropriate. KCWA also stated that the forfeiture decision "has created substantial uncertainty as to whether the Kern River continues to be fully appropriated and, if not, the extent to which there may be unappropriated water that could be appropriated and put to reasonable and beneficial use."

In their January 30, 2008 comments, all of these parties abruptly reverse course, without explanation. The North Kern parties now collectively claim that the SWRCB should not revise the fully appropriated status of the river, and should not hold a hearing regarding the status of the river and the effect of the judgment of forfeiture.

The SWRCB should view with great suspicion the strategy and gamesmanship of the North Kern parties. Bakersfield maintains that North Kern and the other parties originally submitted petitions and applications with the specific intent of gaining standing before the SWRCB, so that they could attempt to disrupt and sabotage the process by claiming that there is no unappropriated water on the river. The change in position, without explanation, only establishes that the North Kern parties are not proper petitioners, and do not have any standing to challenge or oppose Bakersfield's petition at this time. The North Kern parties instead should have submitted their comments and objections to the revision of the fully appropriated status of the river either at a hearing on the status of the river, or through a proper, timely protest to Bakersfield's petition and/or application to appropriate.

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The maneuvering and gamesmanship is evidence of a concerted effort on the part of the North Kern parties to keep the SWRCB away from the Kern River, and to prevent it from studying, regulating and monitoring the river, so they can divert water without any right, limitations or regulatory oversight, and without any valid right or claim to the forfeited water, and with no consideration for environmental and in stream uses, and other public trust purposes.

The North Kern parties are estopped from changing their position, particularly without any valid explanation. The SWRCB should therefore disregard the January 31, 2008 comments and instead, as KCWA and other parties previously urged, hold a hearing on the fully appropriated status of the river based on "changed circumstances" involving the forfeiture of a substantial portion of Kern Delta's rights.

7. REVISION OF THE FULLY APPROPRIATED STATUS OF THE RIVER IS NECESSARY TO PREVENT WASTE AND UNCERTAINTY, AND TO PROTECT THE ENVIRONMENT AND THE "PUBLIC TRUST"

A. SWRCB Involvement is in the Public Interest and is Necessary to Prevent Waste, Confusion and Uncertainty

The North Kern parties' comments ignore and fail to account for the fact that as a result of the forfeiture action, and specifically the reported decision in that case, the public and water users throughout the state have been informed that there is a substantial amount of forfeited, unappropriated water available for diversion and use on the Kern River.

A lack of SWRCB regulation and oversight over the river and the forfeited water, and a failure to regulate or manage the forfeited water, would create significant problems and threats. During a time when water in California is becoming increasingly scarce, and valuable (selling for well over \$3,000 an acre foot in some instances), it is likely, if not a certainty, that outside interests, including urban interests from other parts of the state, will attempt to divert and take the water. Absent SWRCB involvement and oversight, entities such as North Kern could attempt to divert and sell the excess, surplus water outside the region. Kern Delta additionally could presumably, through its junior rights, attempt to retake the water it forfeited, in direct contravention of the holding and intent of the forfeiture action.

Forfeiture without revision or at least consideration of the revision of the fully appropriated status of the Kern River would also create considerable uncertainty. Since the judgment of forfeiture has modified the Shaw Decree, there is a real, practical need for discussion, clarification and confirmation of rights to the forfeited water by the SWRCB.

A major objective of the statutory provisions of the Water Code is to "reduce uncertainty." (*People v. Shirokow* (1980) 26 Cal.3d 301, 310; see also *In the Matter of the Petition for*

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Reconsideration of the Colusa Drain Mutual Water Company, Order No. WR 2004-0027, June 1, 2004, at 17, in which the SWRCB stated that uncertainty as to how much water may ultimately be claimed under a water right “imposes a substantial burden on the SWRCB in determining how much water was actually available for appropriation.”)

B. The SWRCB Must Protect Public Trust and Environmental Interests

The North Kern parties can not dispute the fact that there will be additional water flowing in the Kern River and/or available for diversion and use as a result of Kern Delta’s forfeiture. At least some of that water should, as a matter of law and policy, be considered for in stream and public trust purposes. Since the North Kern parties have no valid right or claim to the forfeited water, they can not complain or object if the SWRCB devotes some portion of the forfeited water to public trust purposes.

California courts have explained that the “public interest” is “the primary statutory standard guiding the [SWRCB] in acting upon applications to appropriate water.” (*Johnson Rancho County Water District v. Yuba County Water Agency* (1965) 235 Cal.App.2d 863, 874, also finding that unappropriated water was available because it could be diverted “without causing substantial injury to any lawful user of water.”) California statutes have provided the SWRCB “with maximum flexibility to consider the competing demands of flows for piscatorial purposes and diversions for agricultural, domestic, municipal or other uses.” (*Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 603.)

“In its role of issuing appropriation permits, the board has two primary duties: (1) to determine if surplus water is available and (2) to protect the public interest.” (*United States of America v. State Water Resources Control Board*, 182 Cal.App.3d at 102.) Protection of the public interest is therefore a separate and distinct duty from determining if surplus water is available. The SWRCB accordingly must determine whether it should revise the fully appropriated status of the Kern River to protect the public interest, as a result of Kern Delta’s forfeiture, independent and irrespective of any finding or determination with regard to the availability of surplus water.

The SWRCB has stated that “regardless of any responsibility the city or others may have under CEQA, the SWRCB has an independent obligation to consider the effect of proposed water diversions on public trust resources and to protect those resources where feasible.” (*In the Matter of Water Right Application 29408 and Wastewater Change Petition WW-6, City of Thousand Oaks*, D. 1638, September 18, 1997, at 64, citing *National Audubon Society v. Superior Court* (1993) 33 Cal.3d 419.) (See also Water Code § 1253 and Fish and Game Code § 2780.) In *In the Matter of Application 20245 and Petition etc. of Contra Costa Water District*, D. 1629, June 2, 1994, at 20, the SWRCB stated that in considering whether unappropriated water is available, “the SWRCB also is required to consider the public interest, stream flow

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requirements, the relative benefit to be derived from the various beneficial uses to which the water may be put, existing water quality control plans, and other matters.”

The North Kern parties' contention, at page 10, that in stream and environmental considerations are excluded is therefore not legally or practically correct. Those arguments only provide further justification for the SWRCB's involvement in the river, as it is apparent that the North Kern parties hope to prevent the SWRCB from protecting the environment, and instead seek to divert water without any protections or considerations for the environment.

No water is currently reserved or set aside for environmental, stream flow, or fish and wildlife purposes on the Kern River. The river instead runs dry most months of the year, without any consideration of timing or impacts on the environment. The forfeited, surplus water therefore has created an opportunity for the SWRCB to assume jurisdiction over a portion of the flows on the river to ensure that there is at least some protection for the local environment, water quality, fish and wildlife, and other non-consumptive purposes and beneficial uses.

8. CONCLUSION

Pursuant to California law, including the Water Code and prior court and SWRCB decisions, the forfeited water has to be and clearly is “unappropriated water.” The SWRCB should therefore revise and revoke the fully appropriated status of the Kern River. The SWRCB must thereafter either (1) recognize and confirm that Bakersfield, as the only First Point appropriative right holder other than Kern Delta, has the right and ability to divert the forfeited water pursuant to its pre-1914 Kern River rights, or (2) to the extent the forfeited, unappropriated water is considered “surplus” water, available for appropriation, the SWRCB should accept Bakersfield's application to appropriate and award Bakersfield rights to the forfeited water, in addition to or in connection with devotion of a portion of the water to environmental, in stream and other public trust purposes.

Those are the only possible outcomes for this proceeding, as a matter of fact and law. There is certainly no legal, factual or practical support for the North Kern parties' argument that the SWRCB should allow the water to stay in the river so that it can be divided up by North Kern and other parties with no valid right or claim to the water, and without any SWRCB regulation or oversight.

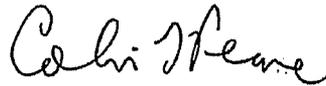
Bakersfield again thanks the SWRCB and its staff for their attention to this matter, and for their efforts with regard to the Kern River. Counsel, representatives and staff for Bakersfield remain ready and willing to meet with and talk to the SWRCB to answer questions, to provide additional information, and to assist and work with the SWRCB on these matters.

Duane Morris

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In the meantime, questions and inquiries can be directed to me, at 415-957-3015, and/or to Florn Core, the Bakersfield Water Resources Manager, at 661-326-3715.

Sincerely,



Colin L. Pearce
For DUANE MORRIS

CLP/cwc

Enclosures

cc: Florn Core, City of Bakersfield (without enclosures)
Virginia Gennaro, City of Bakersfield (without enclosures)
Alan Tandy, City of Bakersfield (without enclosures)
City of Bakersfield Water Board (without enclosures)

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