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## State Water Resources Control Board

August 30, 2022

### **Re: Kern River Applications (Phase 1B) – Ruling on Surrebuttal Evidentiary Motions**

#### **TO ALL PARTIES:**

On January 12, 2022, the State Water Resources Control Board's (State Water Board or Board) Administrative Hearings Office (AHO) issued a Notice of Pre-Hearing Conference and Notice of Public Hearing, Phase 1B, in the matter of the Kern River Applications, on the pending applications of North Kern Water Storage District and City of Shafter (Application 31673), City of Bakersfield (Application 31674), Buena Vista Water Storage District (Application 31675), Kern Water Bank Authority (Application 31676), Kern County Water Agency (Application 31677), and Rosedale-Rio Bravo Water Storage District (Application 31819) for permits to appropriate water from the Kern River system. Phase 1B of the hearing addresses how much unappropriated water is available to the six applications for permits to appropriate water in addition to any unappropriated water made available as a result of the partial forfeiture of water rights by Kern Delta Water District (the issue addressed in Phase 1A).

The AHO held the case-in-chief portion of Hearing Phase 1B on May 2 through May 10, 2022, and the rebuttal portion of Hearing Phase 1B on June 20 through June 23, 2022. The AHO scheduled the surrebuttal portion of the hearing for August 31 and September 1, 2022. Buena Vista Water Storage District (Buena Vista) and Kern Water Bank Authority (KWBA) submitted surrebuttal exhibits. KWBA filed evidentiary objections to Buena Vista's surrebuttal exhibits, and Buena Vista and Tulare Lake Basin Water Storage District (TLBWSD) filed evidentiary objections to KWBA's surrebuttal exhibits. This ruling letter responds to KWBA's, Buena Vista's, and TLBWSD's motions to exclude evidence.

#### **Legal Background**

This hearing is being conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The rules governing the admission of evidence in adjudicative proceedings before the Board are found in California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) The State Water Board is not bound in its proceedings by other technical rules relating to evidence and witnesses that

would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) “The [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time.” (*Id.*, § 11513, subd. (f).)

### **Buena Vista’s Evidentiary Motion**

Buena Vista seeks to exclude KWBA’s surrebuttal testimony, and associated exhibits, by Dr. Scott Miltenberger and Dr. Jeffrey Davis. (KWBA-38 & KWBA-160.)

Buena Vista argues that portions of Dr. Miltenberger’s surrebuttal testimony about alfalfa yields is improper expert testimony on a subject matter in which Dr. Miltenberger is not an expert, is not within the scope of appropriate surrebuttal, and will necessitate an undue consumption of time. In particular, Buena Vista objects to paragraphs 18 through 25 because the information in the original historical documents discussed in these paragraphs are not specific to the geographic areas at issue in Phase 1B. (Buena Vista’s Evidentiary Motion, p. 2.) KWBA responds that the historical data “provides a useful tool for evaluating specific estimates of alfalfa yield during relevant time periods.” (KWBA’s Opposition to Buena Vista’s Evidentiary Motion, p. 3.) Because these paragraphs introduce new information in surrebuttal that was not previously in the record and that is not specific to the areas within Kern County at issue in this phase of the proceeding, I conclude that the probative value of this evidence is substantially outweighed by the probability that its admission would necessitate undue consumption of time. Therefore, I exclude paragraphs 18 through 25 of Dr. Miltenberger’s surrebuttal testimony (KWBA-38) and associated exhibits.

Buena Vista also objects specifically to paragraphs 30 through 42 of Dr. Miltenberger’s surrebuttal testimony. (Buena Vista’s Evidentiary Motion, pp. 2-3.) Buena Vista argues that these paragraphs discuss 1930s and 1940s crop reports from Kern County that Dr. Howes did not rely on in rebuttal, and the testimony attempts to rebut testimony evoked from Dr. Howes during cross-examination by KWBA concerning information that Dr. Howes did not rely on in his rebuttal testimony. (Buena Vista’s Evidentiary Motion, p. 2.) KWBA also argues that admission of this testimony and associated exhibits will necessitate an undue consumption of time. KWBA previously attempted to submit the same crop reports from the Kern County Agricultural Commissioners’ Office after the deadline for submission of rebuttal testimony as part of correction to Dr. Davids’ case-in-chief testimony. I excluded the corrected testimony and additional evidence in the June 17, 2022 Ruling on Evidentiary Motions because it was not timely submitted. (June 17, 2022 Ruling on Evidentiary Motions, p. 12.) I conclude now that regardless of whether the evidence properly responds to rebuttal evidence, at this point in the proceeding, the probative value of these portions of Dr. Miltenberger’s surrebuttal testimony and the associated underlying data is substantially outweighed by the

probability that its admission would necessitate undue consumption of time. Therefore, I exclude paragraphs 30 through 42 of Dr. Miltenberger's surrebuttal testimony (KWBA-38) and associated exhibits.

Buena Vista also argues that paragraphs 45 through 59 of Dr. Miltenberger's testimony about the 1927 Hammatt Report (KWBA-016 and Buena Vista-663) is beyond the scope of his expertise and is improper surrebuttal. (Buena Vista's Evidentiary Motion, p. 3.) Dr. Miltenberger's testimony in these paragraphs purport to respond to Dr. Howes' criticisms of Dr. Davids' testimony. Although the 1927 Hammatt Report was accepted into evidence during the case-in-chief portion of this proceeding, and KWBA likely could have submitted additional discussion of this report at that time or on rebuttal, I will not exclude Dr. Miltenberger's surrebuttal testimony about the report on that basis. Paragraphs 45 through 59 appear to provide additional historical context for the contents of the report by providing a synthesis of available historical information in the evidentiary record. Although I am capable of reading and assessing the contents of the report for myself, this additional context may assist me in understanding and weighing the evidentiary significance of its contents. Therefore, I overrule the portion of Buena Vista's Motion to Exclude Evidence with respect to paragraphs 45 through 59 of Dr. Miltenberger's testimony.

Finally, Buena Vista argues that paragraphs 11 through 30 of Dr. Davids' surrebuttal testimony and associated exhibits about historical alfalfa yields is not within the scope of appropriate surrebuttal. (Buena Vista's Evidentiary Motion, pp. 4-5.) Again, I conclude at this point in the proceeding, the probative value of hearing additional testimony and considering extensive associated underlying data about alfalfa yields is substantially outweighed by the probability that its admission would necessitate undue consumption of time. The topic of historical alfalfa yields has already been addressed in the case-in-chief and rebuttal portions of this proceeding. In the context of the hearing issues identified in the January 12, 2022 Hearing Notice for Phase 1B, this topic and the relation to crop water consumption is only one subtopic among many relevant to the Phase 1B hearing issues and extensive additional discussion during surrebuttal is unlikely to add significant value. Therefore, I exclude paragraphs 11 through 30 of Dr. Davids' surrebuttal testimony (KWBA-160) and associated exhibits.

In summary, I exclude the following portions of surrebuttal testimony submitted by KWBA:

1. Exhibit KWBA-038, ¶ 2, lines 10-14; ¶ 3, lines 20-25; ¶¶ 18-25; and ¶¶ 30-42.
2. Exhibit KWBA-160, ¶¶ 11-30.

I will ask Buena Vista to identify, during the hearing, the surrebuttal exhibits and portions of the powerpoint presentations associated with this excluded testimony that should also be excluded from the evidentiary record.

### **TLBWSD's Objections**

TLBWSD seeks to exclude all or portions of paragraph 4 of Ms. Polly Boissevain's surrebuttal testimony submitted by KWBA (KWBA-254). TLBWSD argues that portions of Ms. Boissevain's testimony are inaccurate, contain improper legal opinion, or consist of conflicting statements.

TLBWSD seeks to exclude surrebuttal testimony by Polly Boissevain in which she states: "On cross-examination, Mr. Unruh admitted that to the extent TLBWSD ever held rights to divert Kern River water, those rights are now held by the Kern County Water Agency." (TLBWSD's Objections to Written Surrebuttal, p. 1; KWBA-254, p. 4, lines 7-9.) TLBWSD argues that the statement is inaccurate, and TLBWSD attaches the relevant portion of rebuttal testimony by Mr. Unruh to its motion. I will not exclude this statement from Ms. Boissevain's testimony but rather will consider the substance of TLBWSD's objection when considering the weight to be afforded the testimony.

TLBWSD also seeks to exclude portions of Ms. Boissevain's testimony as containing improper legal conclusion. As I have ruled many times previously in this proceeding, I will not exclude Ms. Boissevain's testimony on this basis because the inclusion of legal opinion in the testimony of a witness in an administrative proceeding before the AHO is not typically a basis to exclude the testimony but, rather, goes to the weight of the evidence.

Finally, TLBWSD objects to paragraph 4 of Ms. Boissevain's surrebuttal testimony because the testimony in paragraph 4 allegedly conflicts with her testimony in paragraph 3. I will not exclude any portion of Ms. Boissevain's testimony on this basis. The testimony in the two paragraphs do not necessarily conflict as paragraph 3 addresses deliveries of water to the Tulare Lakebed without discussing the particular water right, if any, under which those deliveries were made. Furthermore, if there is any inherent conflict in the testimony, those issues may be addressed through closing briefs submitted by the parties.

Accordingly, I deny the entirety of TLBWSD's Objections to the Written Surrebuttal Testimony of Polly Boissevain.

### **KWBA's Motion in Limine**

KWBA seeks to exclude portions of Dr. Daniel Howes' surrebuttal testimony and associated exhibits submitted by Buena Vista. KWBA argues that Dr. Howes failed to submit sufficient information about his methodology and underlying assumptions for a qualified independent expert to apply the methodology and reproduce similar results, and includes a declaration by Dr. Jeffrey Davids in support of its motion.

As I have done in other instances, I will not rule on KWBA's motion at this time but will defer a final ruling until after the parties have an opportunity to cross-examine Dr. Howes about the methodology applied in his testimony. I will then hear any final arguments from KWBA and Buena Vista before ruling on KWBA's Motion in Limine.

Sincerely,

*/s/ Nicole L. Kuenzi*

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updated August 18, 2022

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