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10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD  
 11 STATE OF CALIFORNIA

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 DIR. OF STATE RIGHTS  
 SACRAMENTO  
 STATE WATER RESOURCES  
 CONTROL BOARD

12 In the Matter of Petition to Revise the  
 13 Declaration that the Kern River is Fully  
 14 Appropriated

PETITION OF THE CITY OF  
 BAKERSFIELD TO REVISE THE  
 DECLARATION THAT THE KERN  
 RIVER IS FULLY APPROPRIATED

16 Pursuant to Section 1205(c) of the California Water Code and Section 871 of Title 23 of the  
 17 California Code of Regulations ("C.C.R."), the City of Bakersfield ("City") petitions the State Water  
 18 Resources Control Board ("SWRCB") to revise its declaration that the Kern River is "fully  
 19 appropriated." The SWRCB should also reinstate the City's October 10, 1996 application to  
 20 appropriate, accept the City's concurrently filed new, additional application to appropriate, and  
 21 recognize priorities attaching to the City's original and subsequent applications.

22 BACKGROUND AND FACTUAL SUMMARY

23 On October 29, 1964, the State Water Rights Board, in Decision 1196, denied several  
 24 applications to appropriate from the Kern River. The SWRCB subsequently declared the Kern River  
 25 to be fully appropriated. (*In the Matter of Declaration of Fully Appropriated Stream Systems in*  
 26 *California*, Order No. WR 89-25.)

27 On October 10, 1996, the City filed an application to appropriate 100,000 acre-feet per year  
 28 (afy) of water from the Kern River, and petitioned the SWRCB, pursuant to Water Code Section

PETITION OF THE CITY OF BAKERSFIELD TO REVISE THE DECLARATION THAT THE KERN RIVER IS FULLY  
 APPROPRIATED

1 1205, to revise its declaration that the Kern River is fully appropriated. (A true and correct copy of  
2 the application, along with a supporting letter containing the petition, is attached hereto as Exhibit  
3 A.)

4 The City filed its petition and application based on a recently filed lawsuit (*North Kern*  
5 *Water Storage District v. Kern Delta Water District*, Tulare County Superior Court Case No. 96-  
6 172919, hereinafter "Kern River lawsuit") involving the City, the Kern Delta Water District ("Kern  
7 Delta"), and the North Kern Water Storage District ("North Kern").

8 Since 1976, the City, and Kern Delta have owned and held essentially all of the rights to  
9 divert water from the Kern River at the "First Point" of diversion on the river pursuant to pre-1914  
10 appropriative rights. North Kern is entitled to divert additional water from the Kern River accruing  
11 to certain pre-1914 rights held by the City pursuant to an agreement with the City's predecessor in  
12 title.

13 The City filed the petition and application to appropriate in anticipation that the Court in the  
14 Kern River litigation would find that significant quantities of Kern River water had been forfeited to  
15 the State and was thus available for appropriation. In an October 10, 1996 letter accompanying the  
16 application, the City explained: "It is possible that the court will rule that a significant quantity of  
17 water has been forfeited back to the State because of nonuse. As one of the major appropriators on  
18 the Kern River, and the only municipal user pursuant to Water Code Sections 106, 106.5 and 1460,  
19 the City submits this petition and application to appropriate in anticipation that there will be  
20 unappropriated water available on the Kern River."

21 In a letter dated April 23, 1997, the SWRCB informed the City that it would "retain your  
22 petition and unaccepted application pending the outcome of the trial."

23 The Kern River litigation proceeded to trial from July 20, 1998 through November 25, 1998  
24 in front of the Honorable Kenneth E. Conn of the Tulare County Superior Court. On May 13, 1999,  
25 the Court entered judgment pursuant to a detailed statement of decision. (A true and correct copy of  
26 the judgment and statement of decision is attached hereto as Exhibit B.)  
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1 In the decision (hereinafter the "Conn Decision"), the Court ruled that Kern Delta forfeited a  
2 significant portion of its Kern River water rights based on historic nonuse. The Court further stated:  
3 "The evidence is persuasive that Kern Delta's predecessors failed to use beneficially the full extent  
4 of their theoretical or paper rights during various periods of five continuous years prior to the 1976  
5 acquisition by Kern Delta." (Conn Decision, p. 9.)

6 The Trial Court also rejected various claims by North Kern to obtain rights to the water  
7 forfeited by Kern Delta, primarily through causes of action for purchase, abandonment, prescription  
8 and intervening public use. The Trial Court concluded that although North Kern from time to time  
9 used a portion of the forfeited "release" water, North Kern had no cognizable right to the water and  
10 had not taken any steps to perfect or acquire rights to such water.

11 Judge Conn instead ruled: "Because this court has determined that certain of Kern Delta's  
12 water rights have been forfeited, this court further finds that the Kern River is no longer fully  
13 appropriated and such water is subject to appropriation." (Conn Decision, p. 16.) The Court further  
14 stated: "It is therefore the decision of this court that the portion of water rights of Kern Delta found  
15 to be forfeited shall be deemed unappropriated water and become subject to appropriation pursuant  
16 to applicable procedures before the State Water Resources Control Board." (Conn Decision, pp. 16-  
17 17.)

18 As a result of the Conn Decision, in March, 1999 Kern Delta and North Kern submitted  
19 separate applications to appropriate water from the Kern River. The SWRCB ultimately received 10  
20 applications to appropriate forfeited Kern River water, including the City's original application.

21 North Kern and Kern Delta appealed the Conn Decision. The California Court of Appeal for  
22 the Fifth Appellate District later issued an opinion reversing in part the Conn Decision, and  
23 remanding the action for retrial of certain issues. (*North Kern Water Storage Dist. v. Kern Delta*  
24 *Water Dist., et. al*, No. F033370, 5th Dist. Jan. 31, 2003, as modified March 3, 2003 (unpublished  
25 opinion), a true and correct copy of which opinion is attached hereto as Exhibit C.)

26 The Court of Appeal found that the Trial Court had erred by failing to identify a specific five  
27 year period for determining forfeiture, and in measuring and calculating the amount of water  
28 forfeited by Kern Delta. The action was remanded back to the Tulare County Superior Court to the

1 Honorable Melinda M. Reed for retrial of the question “whether Kern Delta forfeited by nonuse any  
2 part of its paper entitlements, based upon a measurement (day, month, season, etc.), a specific five-  
3 year period, and a consideration of all other relevant factors disclosed by the evidence.”

4 The Court of Appeal still endorsed significant portions of the Conn Decision. The Court  
5 stated, for example, that the Trial Court had properly rejected all of Kern Delta’s defenses to  
6 forfeiture. (Opinion, pp. 22-32.) The Court noted that “the amount unused by Kern Delta was  
7 forfeited.” (Opinion, p. 32, n. 33.) The Court further stated: “Thus, the released water which  
8 exceeded the quantity Kern Delta actually required to satisfy its needs was *nonuse* by Kern Delta and  
9 subject to competing claims by junior appropriators.” (Opinion, p. 31, emphasis in original.)

10 The Court of Appeal also rejected North Kern’s challenge to the Trial Court’s finding that  
11 the forfeited water reverted to the public, or the State, for subsequent appropriation. The Court  
12 explained that “the pre-1914 nature of Kern Delta’s rights does not preclude application of the  
13 [Water Code] if that right is found to have been lost *after* 1914. (Opinion, p. 45, emphasis in  
14 original.) The Court confirmed that the “SWRCB has exclusive jurisdiction over appropriative  
15 claims made after 1914,” and “water forfeited reverts to the public and becomes available for  
16 appropriation by others through the permit procedures.” (Opinion, p. 46, citations omitted.)

17 Retrial of the remanded issues commenced in Tulare County Superior Court on August 30,  
18 2004, and concluded on November 10, 2004. Judge Reed issued a statement of decision on  
19 February 9, 2005 and entered judgment consistent with the statement of decision on that date. (A  
20 true and correct copy of the judgment and statement of decision (hereinafter “Reed Decision”) is  
21 attached hereto as Exhibit D.)

22 In the Reed Decision, the Court again concluded that Kern Delta forfeited a portion of its  
23 Kern River water rights based on nonuse. As directed by the Court of Appeal, the Court identified  
24 one specific time period for Kern Delta’s forfeiture; finding that “the proper five-year period for  
25 measuring Kern Delta’s forfeiture is January 1, 1972 through December 31, 1976.” (Reed Decision,  
26 p. 19.) The Court thereafter held that Kern Delta forfeited 9,953 acre-feet (af) of Kern River water  
27 accruing to its Kern Island water right in January, 11,457 af of Kern Island water in October, 14,476  
28

1 af of Kern Island water in November, 16,396 af of Kern Island water in December and 8,613 af of  
2 Farmers water in August. (Reed Decision, p. 29.)

3 The Trial Court therefore found that Kern Delta forfeited a total of 60,895 af of water  
4 accruing to certain of its pre-1914 appropriative Kern River rights.

5 The Court further stated: "Consistent with the appellate court opinion, all water forfeited by  
6 Kern Delta reverts to the 'public' and is available for appropriation through the 'permit procedures'  
7 of the California Water Code, specifically Section 1241." (Reed Decision, p. 29.) Earlier in the  
8 decision the Court stated that any and all claims to water forfeited by Kern Delta would be subject to  
9 the "statutory mandates" of the California Water Code and "must be directed to the State Water  
10 Resources Control Board." (Reed Decision, p. 20.)

11 North Kern and Kern Delta appealed the Reed Decision. On May 26, 2005, while the  
12 appeals were pending, the SWRCB indicated in a letter to the City, and the 10 other agencies that  
13 had filed applications to appropriate water from the Kern River, that based on the significant passage  
14 of time and the duration of the Kern River litigation, the SWRCB would "reject the submitted  
15 applications and petitions without prejudice." (A true and correct copy of the May 26, 2005 letter is  
16 attached hereto as Exhibit E.) The SWRCB stated that the parties could refile their applications  
17 upon the conclusion of the Kern River litigation.

18 On January 2, 2007, the Court of Appeal issued its opinion in the appeal of the remanded  
19 proceedings before Judge Reed. The Court of Appeal later amended the opinion in response to  
20 petitions for rehearing filed by the City and Kern Delta. The Court issued its final amended opinion  
21 on February 5, 2007, in a reported decision. (*North Kern Water Storage District v. Kern Delta*  
22 *Water District* (2007) 147 Cal.App.4th 555, a true and correct copy of which is attached hereto as  
23 Exhibit F.)

24 Through the new opinion the Court of Appeal affirmed the Reed Decision, with  
25 modifications. The Court once again upheld the finding that Kern Delta forfeited a significant  
26 portion of its pre-1914 water rights by non-use. The Court also upheld Judge Reed's use of the  
27 1972-1976 time period, and a "monthly time step," to determine forfeiture.

1 The Court primarily modified the Reed Decision to increase the quantity of water forfeited  
2 by Kern Delta. The Court of Appeal found Kern Delta had additionally forfeited portions of its  
3 Buena Vista (1st) right in January, November and December; a portion of its Stine right in  
4 September, October, November and December; and a portion of its Farmers right, in addition to  
5 August, for September and December.

6 These modifications resulted in the forfeiture of rights to an additional 65,799 af of Kern  
7 River water. Combined with the 60,895 af forfeited as a result of the Reed Decision, as a result of  
8 the Kern River litigation Kern Delta has forfeited rights to up to 126,694 af of pre-1914  
9 appropriative rights.

10 The Court also noted that the Trial Court went too far in stating that Kern Delta's forfeiture  
11 created unappropriated water that reverted to the State. Instead, the Court noted that pursuant to  
12 Water Code Section 1241, only the SWRCB could make such a determination. (147 Cal.App.4th at  
13 566, n. 5; 583-584) The Court specifically stated: "The initial determination whether the forfeiture  
14 creates an allowable excess is reserved in the first instance to the SWRCB." (147 Cal.App.4th at  
15 584.)

16 The Court of Appeal therefore acknowledged that it could not and would not actually rule on  
17 the disposition of the forfeited water. The Court did confirm and hold that the forfeited water did  
18 not pass to other water users, in particular North Kern: "However, the trial court was correct that the  
19 forfeited rights are not awarded to North Kern, so our conclusion does not result in reversal of the  
20 judgment." (147 Cal.App.4th at 584.)

21 North Kern and Kern Delta filed petitions requesting the California Supreme Court review  
22 the second opinion. On April 25, 2007 the Supreme Court rejected the petitions.

23 On April 30, 2007, the Court of Appeal issued a Remittitur certifying that the most recent  
24 opinion in the Kern River litigation had become final. (A true and correct copy of the Remittitur is  
25 attached hereto as Exhibit G.)  
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1           **POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES IN THE PETITION**

2           As a result of the recently concluded Kern River litigation, there is currently up to 126,694 af  
3 of unappropriated water available for diversion and use on the Kern River.

4           The SWRCB must therefore conduct a hearing into the fully appropriated stream system  
5 (“FAS”) status of the Kern River, pursuant to 23 C.C.R. § 871(c), and revise its declaration that the  
6 Kern River is fully appropriated. The SWRCB should also reinstate the City’s October 10, 1996  
7 application to appropriate, accept the City’s concurrently filed new application to appropriate, and  
8 recognize priorities attaching to the City’s original and new applications.

9           The recently concluded Kern River litigation, through the opinions of the court of appeal and  
10 the prior trial court judgments, constitutes hydrologic data, water usage data or other relevant  
11 information to revise the FAS status of the Kern River. The information, findings and rulings from  
12 the Kern River litigation constitute changed circumstances which supports the revision of the FAS  
13 status of the river. There are certainly compelling circumstances, public policy considerations and  
14 reasonable cause for the SWRCB to revise the FAS status of the Kern River.

15       **1.     A Change in Circumstances and Reasonable Cause Necessitates Revision of the**  
16       **FAS Status of the Kern River**

17           The SWRCB has the authority to revise a declaration that a stream system is fully  
18 appropriated upon receipt of a petition for revision from any person. (Water Code § 1205(c); 23  
19 C.C.R. § 871(c).) Title 23, Section 871(b) of the C.C.R. provides that revocation or revision of a  
20 declaration of fully appropriated stream status:

21           “. . . may be based upon any relevant factor, including but not limited to a change in  
22 circumstances from those considered in a previous water right decision determining  
23 that no water remains available for appropriation, or upon reasonable cause derived  
24 from hydrologic data, water usage data, or other relevant information . . .”

25           (23 C.C.R. § 871(b).)

26           The SWRCB’s standard for revising a FAS status is whether there is “reasonable cause” to  
27 believe that there is water present in the stream system that may be available for appropriation. (23  
28 C.C.R. § 871(c)(1).) This is a deliberately low standard, because a decision to revise the FAS status  
does not reach the merits of any applications for the unappropriated water, the nature of any

1 conditions, or whether the unappropriated water must be made available for environmental purposes.  
2 (*In Re Fully Appropriated Stream Petition for the Santa Ana River* (2000) WR 2000-12, at 14.)

3 Thus, in acknowledging the narrow focus of a FAS petition, the SWRCB has stated:

4 “All questions regarding the specific amount of water available for appropriation  
5 under the applications, the season of water availability, approval or denial of the  
6 applications, and the conditions to be included in any permit(s) that may be issued on  
7 the applications will be resolved in further proceedings on each application pursuant  
8 to applicable provisions of the Water Code.” (*Id.* at 2.)

9 The City has presented substantial evidence of a change in circumstance, as well as  
10 reasonable cause, for granting the City’s petition and revising the FAS status of the Kern River.

11 **2. The City Has Presented Substantial Evidence of Changed Circumstances**

12 **A. There is Unappropriated Water on the Kern River**

13 The Tulare County Superior Court has, on two occasions, and following two lengthy trials,  
14 found and adjudged that Kern Delta forfeited a significant portion of its pre-1914 appropriative Kern  
15 River water rights. The Court of Appeal has, in two detailed opinions, agreed with and upheld the  
16 finding of forfeiture with regard to Kern Delta’s rights.

17 The evidence, testimony, trial court judgments and court of appeal opinions in the Kern River  
18 litigation conclusively establish that (1) the forfeiture of a portion of Kern Delta’s pre-1914 water  
19 rights subjects the water to the mandates of the California Water Code and the jurisdiction of the  
20 SWRCB, and (2) the water forfeited by Kern Delta is surplus to the demands of Kern Delta, and  
21 pursuant to California law is unappropriated water.

22 **(1) The forfeited water is subject to SWRCB jurisdiction and procedures**

23 The courts in the Kern River litigation have consistently and conclusively held that upon the  
24 forfeiture of water accruing to Kern Delta’s pre-1914 Kern River rights, the water becomes subject  
25 to the provisions of the Water Code defining and regulating unappropriated water, and becomes  
26 subject to the jurisdiction of the SWRCB . (See e.g., 147 Cal.App.4th at 566, n. 5; 583-584.) Those  
27 holdings are supported by long standing California authority.

28 After 1914 the statutory procedures set forth at Water Code Sections 1200 et seq. became the  
“exclusive means of acquiring appropriative rights.” (*People v Shirokow* (1980) 26 Cal.3d 301, 308



1 [162 Cal.Rptr. 30]; Water Code §§ 1201, 1225.) California law does not provide or recognize any  
2 exception to the jurisdiction of the SWRCB over unappropriated water merely because a party at one  
3 time obtained title to the water or used the water under pre-1914 rights.

4 When an appropriator holding pre-1914 appropriative water rights fails to make beneficial  
5 use of water for a period in excess of five years, such water rights revert to the public for subsequent  
6 appropriation. (*Smith v. Hawkins* (1895) 110 Cal. 122, 126-28 [42 P. 453], in which the court held  
7 that the Civil Code requires appropriations to be for some beneficial use, and a failure to use water  
8 for a beneficial purpose for a period of five years constitutes forfeiture.)

9 Water Code Sections 1201, 1202(b) and 1225, numerous California decisions, and SWRCB  
10 policy directives, conclusively establish that pre-1914 appropriative rights which have been forfeited  
11 due to non-use are available for subsequent appropriation only through the procedures set forth in  
12 the Water Code. (See *People v. Shirokow* 26 Cal.3d at 309.)

13 Water Code Section 1201 expressly states: “[A]ll water flowing in any natural channel”  
14 which is not otherwise appropriated “is hereby declared to be public water of the State and subject to  
15 appropriation in accordance with the provisions of this code.” (Emphasis added.) The statute does  
16 not differentiate between pre and post 1914 water rights.

17 Water Code Section 1225 provides “[N]o right to appropriate or use water subject to  
18 appropriation shall be initiated or acquired except under compliance with the provisions of this  
19 division.” The statute does not differentiate or distinguish between different classes of water based  
20 on the date of original appropriation.

21 Water Code Section 1241 further provides:

22 “When the person entitled to the use of water fails to use beneficially all or any  
23 part of the water claimed by him, for which a right of use has vested, for the  
24 purpose for which it was appropriated or adjudicated, for a period of five years,  
25 such unused water may revert to the public and shall, if reverted, be regarded as  
26 unappropriated public water. Such reversion shall occur upon a finding by the  
27 board following notice to the permittee and a public hearing if requested by the  
28 permittee.”

As indicated above, the Court in both appeals in the Kern River litigation determined that the  
“controlling law of forfeiture, for both pre- and post-191[4]. rights is section 1241 and the

1 interpretive case law.” (147 Cal.App.4th at 566, n. 5.)

2 Pursuant to this authority, the SWRCB must revise the FAS status of the Kern River and  
3 determine rights and claims to the water forfeited by Kern Delta. Only the SWRCB can determine  
4 rights and claims to the water forfeited by Kern Delta. (*Johnson Rancho County Water Dist. v. State*  
5 *Water Rights Bd.* (1965) 235 Cal.App.2d 863, 876 [45 Cal.Rptr. 589], in which the court stated  
6 “[T]he Legislature has entrusted the allocation of the state’s uncommitted water resources to the  
7 Water Rights Board, not to the courts.”) (See also *Bank of America v. State Water Resources*  
8 *Control Board* (1974) 42 Cal.App.3d 198, 214 [116 Cal.Rptr. 770], in which the court stated “the  
9 duty of allocating the State’s water is vested in the Board.”)

10 **(2) The forfeited water is surplus to Kern Delta’s demands and is therefore**  
11 **unappropriated water.**

12 Water Code Section 1202 sets forth a clear, explicit definition of “unappropriated water” in  
13 the State of California. “The following are hereby declared to constitute unappropriated water: . . .  
14 (b) all water appropriated prior to December 19, 1914 . . . which has not been put, or which has  
15 ceased to be put to some useful or beneficial purpose . . . “ (Water Code § 1202(b), emphasis  
16 added.) The water which Kern Delta failed to put to beneficial use falls within the Section 1202(b)  
17 definition of unappropriated water.

18 Pursuant to Water Code Section 1202(b), the water which has “ceased to be put to some  
19 useful or beneficial purpose” by Kern Delta constitutes unappropriated water. At this point the water  
20 no longer accrues or attaches to Kern Delta’s pre-1914 rights.

21 In *Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 595 [138 P. 751], the court stated that  
22 waters which were forfeited “became publici juris and were, therefore, open to appropriation,  
23 diversion and a beneficial use by others.” Accordingly, even before the passage of the Water  
24 Commission Act, water which was lost through non-use reverted to the public and became “open” to  
25 appropriation by others.

26 In *In the Matter of Petition of River Pines Public Utility District*, D. 1634, at 11-12, the  
27 SWRCB determined that the average daily stream flow in the south fork of the Cosumnes River  
28 “exceeds the proposed additional demand. Accordingly, there is unappropriated water available on

1 the river.” Similarly, the flow of water in the Kern River accruing to Kern Delta’s rights exceeds the  
2 actual and legal demand of Kern Delta. Accordingly, the forfeiture creates and evidences  
3 unappropriated water available above and beyond Kern Delta’s rights.

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

13 Prior unpermitted diversion and use by North Kern and other parties of the water forfeited by  
14 Kern Delta does not alter or negate the fact that the forfeited water is surplus, unappropriated water.  
15 So long as the water is surplus to the rights of Kern Delta, the prior right holder, the water is surplus  
16 and unappropriated. No rights can otherwise attach or accrue to the water outside the procedures of  
17 the Water Code and the jurisdiction of the SWRCB.

18 A finding that the forfeited water can merely continue to be used by or automatically pass to  
19 “junior appropriators” without any further proceedings or determinations would be directly contrary  
20 to the California Water Code and related authority. The Court of Appeal already determined that  
21 North Kern did not hold any rights to the water, and had not obtained any rights to the water through  
22 the Kern River litigation. (147 Cal. App.4th at 584.) As may be explained in future proceedings, the  
23 agreement which gives North Kern the ability to divert water through various Kern River rights now  
24 owned and held by the City does not authorize or entitle North Kern to divert any water that accrues,  
25 or formerly accrued, to Kern Delta’s rights.

26 The forfeited water can not accrue or attach to any other rights outside the provisions of the  
27 Water Code, and without SWRCB involvement, review and consideration. As explained below,  
28

1 among other things, the SWRCB must consider competing applications to the water, the public  
2 interest, municipal priorities, environmental and in stream uses, and other factors and interests. (See  
3 e.g. Water Code §§ 1243, 1243.5, 1254, and 1460.)

4 The SWRCB also would not and could not award rights to the forfeited water based solely on  
5 the priority of claimants or existing right holders. Instead, the SWRCB is authorized and required to  
6 consider and balance a number of values and interests, including, most significantly, the “public  
7 interest.” (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.)

8 Finally, the Court of Appeal’s observation, in the most recent opinion, that the finding of  
9 forfeiture “may or may not result in unappropriated water” is merely dicta and not binding on the  
10 parties or in any future proceedings. The statement is certainly not binding or determinative in  
11 proceedings before the SWRCB, since the Court itself recognized that only the SWRCB can  
12 determine rights and claims to the water. The Court conceded that “this is a determination not for  
13 the courts in the first instance, but for the SWRCB.” (147 Cal.App.4th at 583.)

14 **B. The Kern River Litigation Requires a Revision of the FAS Status of the Kern**  
15 **River**

16 **(1) The Kern River litigation constitutes a change in circumstances**

17 The Kern River litigation constitutes a “change in circumstances” that supports and  
18 necessitates revision of the FAS status of the Kern River. (23 C.C.R. § 871(b).)

19 The SWRCB has not previously considered the holdings, findings, and effect of the Kern  
20 River litigation. The SWRCB certainly did not and could not have considered the evidence in  
21 connection with its prior decisions declaring the Kern River fully appropriated.

22 The evidence and testimony produced through the Kern River litigation, as reflected and  
23 explained in the trial court judgments and court of appeal opinions, is precisely the type of evidence  
24 which the SWRCB can and should consider in revising its determination that the Kern River is fully  
25 appropriated. The findings and holdings with regard to forfeiture based on non-use followed lengthy  
26 trials involving the presentation of substantial evidence and testimony regarding the diversion and  
27 use of Kern River water. The opinions of the Court of Appeal are based on the extensive record  
28 developed at trial. The courts have already reviewed, compiled, analyzed and synthesized the

1 evidence that the SWRCB should consider in first revising the FAS status of the Kern River, and  
2 later determining claims and rights to the forfeited, unappropriated water.

3 In Decision 1196, the SWRCB based the conclusion that the Kern River was fully  
4 appropriated on a finding that “the quantities of water flowing past the first point of measurement,  
5 adjusted to eliminate the effect of Isabella Reservoir, shows that there is no water surplus to the  
6 established uses of the applicants, protestants, and other users in the area.” The recent decisions and  
7 opinions in the Kern River litigation contradict and supersede this finding, and constitute new  
8 information. The courts in the Kern River litigation specifically found that a significant portion of  
9 Kern River water was “surplus” to the demands, rights and established uses of Kern Delta, and Kern  
10 Delta’s predecessors in title.

11 At the time the SWRCB previously declared the Kern River fully appropriated, Kern Delta  
12 still held rights, on paper, to a significant amount of Kern River water. The courts in the Kern River  
13 litigation have now determined that Kern Delta does not and can not hold rights to that portion of its  
14 water rights which it did not divert and put to a reasonable and beneficial use during the applicable  
15 forfeiture period. The record of historic use of water on the Kern River established that the release  
16 water was surplus to the actual needs of the primary right holder, Kern Delta. The existence of this  
17 surplus water necessitates a revision of the Kern River’s fully appropriated status.

18 The finding of forfeiture also negates and invalidates the prior representations of Kern Delta  
19 that it was fully and beneficially using all of its pre-1914 water rights. The courts have effectively  
20 concluded that Kern Delta’s prior representations were not accurate, as the courts have determined  
21 that Kern Delta was, in fact, not diverting and using all of its Kern River water rights.

22 **(2) The SWRCB should consider a wide range of “relevant information”  
from the Kern River litigation**

23 Title 23, Section 871(c)(1), of the C.C.R. provides that a petition to revoke or revise the FAS  
24 status of a river or stream system “shall include hydrologic data, water usage data, or other relevant  
25 information upon which the Chief, Division of Water Rights, may determine that reasonable cause  
26 exists to conduct a hearing on the question whether the fully appropriated status of the stream system  
27 should be revoked or revised.”

28 The SWRCB has authority to consider a broad range of information in reviewing a FAS

1 petition. In revising the declaration of the FAS status of the Kern River and determining claims to  
2 the unappropriated water, the SWRCB can and should therefore consider evidence, testimony and  
3 other information from all of the Kern River litigation proceedings and decisions. The SWRCB  
4 should specifically consider findings, statements and holdings from the two trial court judgments,  
5 and the original court of appeal opinion.

6 The SWRCB's review of the Kern River litigation is not limited to the most recent reported  
7 court of appeal decision. The reported decision may have more precedential value in separate,  
8 unrelated proceedings, but the judgments, prior opinions, rulings and holdings in the Kern River  
9 litigation are certainly binding on the parties to the Kern River litigation. These judgments and  
10 rulings will be recorded against the property interests of the parties and will therefore affect and alter  
11 the rights of these entities. The

12 Substantial parts of the prior trial court judgments are unchanged and still valid. As the  
13 Court of Appeal recognized in the reported decision, the prior rulings and orders in the Kern River  
14 litigation are binding on the parties to the action as "law of the case." (147 Cal.App.4th 566, n. 5.)  
15 Pursuant to California Rule of Court 8.1115(a), parties to an action may rely on and refer to  
16 unpublished decisions (such as the original court of appeal opinion in the Kern River litigation) from  
17 that action in later proceedings.

18 During the course of the Kern River litigation, the trial courts and courts of appeal considered  
19 and rejected a wide range of arguments and contentions that Kern Delta's forfeiture of Kern River  
20 water did not result in unappropriated water. Although this decision is ultimately up to the SWRCB,  
21 the rejection of numerous claims to the forfeited water in the Kern River litigation, as well as  
22 applicable authority, leave the SWRCB with no choice but to determine that the forfeited water is  
23 unappropriated.

24 **2. Reasonable Cause Exists for the SWRCB to Revise the FAS Status of the Kern River**

25 There is more than "reasonable cause" for the SWRCB to revise the declaration that the Kern  
26 River is fully appropriated.

27 **A. The SWRCB Should Assume Jurisdiction Over the Forfeited Water to Prevent  
28 Waste and the Illegal Diversion of Water**

The up to 126,694 af of Kern River water found to be forfeited is no longer owned by Kern

1 Delta, and does not belong to any other entity. If the SWRCB does not act on the City's application  
2 and petition at this time, there is a significant risk that the up to 126,694 af of Kern unappropriated  
3 water will be wasted or will be diverted and used by parties without rights to the water.

4 The SWRCB should not condone the potential waste of such a valuable resource. The  
5 SWRCB specifically can not allow the unauthorized, unpermitted diversion and use of the forfeited  
6 Kern River water. (See e.g. Water Code § 1052(a); "The diversion or use of water subject to this  
7 division other than as authorized in this division is a trespass.")

8 If the SWRCB does not revise the FAS status of the Kern River and consider claims to the  
9 forfeited water, the Kern River litigation would have created a new category of water rights. Such  
10 rights would be independent of pre-1914 rights and rights permitted through the SWRCB, and  
11 outside the regulation and control of the courts and the SWRCB.

12 The water forfeited by Kern Delta, for example, can not simply remain in the river for use by  
13 junior rights, without any SWRCB permit and without any rights or ownership interests attaching to  
14 the water. This would create confusion and uncertainty, and could lead to potential anarchy on the  
15 Kern River, as parties fought over unclaimed, unregulated water in the river. The forfeited water can  
16 not remain in some sort of "purgatory" after forfeiture, outside of SWRCB jurisdiction and without  
17 any formal rights attaching to the water.

18 In the prior opinion, the Court recognized the need to avoid this result, stating: "We find no  
19 authority to support North Kern's position that, once established, a pre-1914 appropriation is subject  
20 to future management outside the statutory scheme." (Opinion, p. 45.)

21 **B. The SWRCB Should Revise the FAS Status of the Kern River to Protect the  
22 Public Interest**

23 The first point right holders either hold pre-1914 appropriative rights (the City and Kern  
24 Delta), or hold a contractual right to divert water accruing to some of the City's pre-1914  
25 appropriative rights (North Kern). Pursuant to such rights, and based on the consistent diversion and  
26 use of such pre-1914 rights, the SWRCB and its predecessors have not exercised jurisdiction over  
27 the waters of the Kern River.

28 The Kern River has therefore remained outside the regulatory authority of the SWRCB. The  
SWRCB has never had a chance to determine whether and to what extent public trust, statutory and

1 state interests and goals, including policies relating to area of origin, the environment, wildlife  
2 habitat, and in stream uses, are exercised or accounted for on the river.

3 As a result of the findings of forfeiture in the Kern River litigation, and, pursuant to Water  
4 Code Section 1241, the SWRCB should now become involved in the Kern River.

5 As indicated above, the SWRCB does not need to determine rights, interests and priorities  
6 involving the forfeited, unappropriated water at this time. The granting of a FAS petition is a purely  
7 procedural measure, and approval of a petition does not authorize the appropriation of water by the  
8 petitioner. (*In Re Fully Appropriated Stream System for Santa Ana River* (2000) WR 2000-12.)

9 The City still points out that additional "reasonable cause" exists for the SWRCB to grant the  
10 City's petition to revise the FAS status of the Kern River because the SWRCB should act to protect  
11 and preserve the public trust, the environment, and other important public policy goals. The City's  
12 petition and proposed application to appropriate, in fact, are designed to protect and preserve these  
13 same interests and considerations.

14 The City's application would allow for multiple reasonable and beneficial uses, including in  
15 stream, environmental, recreational, water quality, and fish and wildlife preservation and  
16 enhancement. (23 C.C.R. § 659.) Such uses are appropriate because they would benefit the public  
17 at large, and not just one diverter, as well as the local environment. "When determining the amount  
18 of water available for appropriation and when it is in the public interest, the SWRCB must take into  
19 account the water required for preservation and enhancement of fish and wildlife resources and  
20 protection of water quality." (Water Code §§ 1243 and 1243.5; *In the Matter of Petition for Partial  
Assignment Of Application 5646*, D. 1634.)

21 SWRCB involvement in the Kern River through revision of the FAS status of the river would  
22 also help protect and implement state policies regarding municipal use. The City's application is  
23 designed, in part, to protect and preserve a valuable source of drinking water for present and future  
24 citizens of Bakersfield. Reasonable cause exists for the SWRCB to implement and effectuate the  
25 statutes recognizing, prioritizing and protecting the City's domestic use of Kern River water. (See  
26 e.g. Water Code §§ 106, 106.5, 1254, and 1460.)

27 At the very least, the priority and preference of the City is just one of the many factors which  
28 the SWRCB must consider in determining rights to the substantial amount of water which is



1 available for appropriation on the Kern River.

2 **3. Conclusion**

3 For the foregoing reasons, the City respectfully requests that the SWRCB revise its  
4 declaration that the Kern River is fully appropriated. The SWRCB should also reinstate the City's  
5 October 10, 1996 application, accept the City's concurrently filed new, additional application to  
6 appropriate, and recognize priorities attaching to the City's original and revised applications.

7 The City additionally reserves the right to file a supplemental briefs or present additional  
8 evidence in support of this petition, and with regard to the Kern River in general.

9 Dated: May 4, 2007

Respectfully submitted,

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