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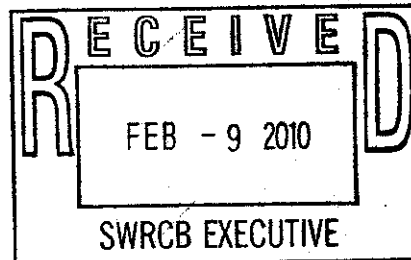
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February 9, 2010

VIA EMAIL AND U.S. MAIL

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Re: **COMMENT LETTER-02/16/10 BOARD MEETING ITEM: ORDER-KERN RIVER**

**Comments of Petitioner City of Bakersfield to Draft Order Amending the Declaration of Fully Appropriated Streams to Remove the Designation of the Kern River as Fully Appropriated**

To the State Water Resources Control Board:

Petitioner City of Bakersfield ("Bakersfield" or "City") respectfully submits the following comments to the State Water Resources Control Board's ("SWRCB") January 19, 2010 Draft Order Amending the Declaration of Fully Appropriated Streams to Remove the Designation of the Kern River as Fully Appropriated ("Draft Order").

Bakersfield commends the SWRCB, the Hearing Officer, and SWRCB staff for their consideration of the issues addressed in the Draft Order, and for the clear, concise and well-reasoned Draft Order addressing the petitions to revise the Fully Appropriated Status ("FAS") of the Kern River.

Through these comments Bakersfield offers support for the Draft Order, and provides suggestions and guidance for the next phase of this proceeding, involving the review and processing of various applications to appropriate.

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**1. THE SWRCB SHOULD APPROVE THE DRAFT ORDER**

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

The SWRCB issued the Draft Order following a contested hearing on October 26 and 27, 2009. During the hearing, the SWRCB received and considered a substantial amount of evidence and testimony. Bakersfield and other petitioners submitted detailed closing briefs to the SWRCB following the hearing. The SWRCB also received comments, correspondence and information from Bakersfield and others in advance of the hearing, as well as numerous comments and letters from residents of Bakersfield and Kern County regarding the revision of the FAS of the Kern River.

Through the Draft Order, the SWRCB properly and necessarily found that "there is some unappropriated water in the Kern River," and accordingly, the Declaration of Fully Appropriated Streams "should be revised to allow for processing the applications to appropriate water from the Kern River in accordance with the provisions of the Water Code and other applicable law." (Draft Order, pp 6-7.)

The SWRCB also appropriately rejected the unfounded and unsupported claim of the "North Kern parties" that all water in the Kern River has been diverted and used pursuant to valid, recognized prior rights. As explained in the Draft Order, the North Kern parties admitted that Kern River water had historically been diverted into the Kern River/California Aqueduct Intertie ("Intertie"), which water was in excess of "traditionally held and exercised rights and claims of right to Kern River water." Such water was therefore "by definition, unappropriated water." (Draft Order, p. 5.)

The Draft Order also properly recognizes that the North Kern parties failed to establish that water forfeited by the Kern Delta Water District ("Kern Delta") had previously been diverted and used by the North Kern parties pursuant to actual, valid pre-1914 water rights. The SWRCB instead found that the evidence presented by the parties "did not clearly resolve" this issue, and the issue instead will be determined and resolved in the context of the SWRCB's processing of the applications to appropriate the unappropriated water on the Kern River. (Draft Order, p. 5.)

The Draft Order further correctly states that the SWRCB will, in the context of processing the water right applications submitted by Bakersfield and others, comply with its obligation to consider environmental and public trust issues under the Water Code and the public trust doctrine. (Draft Order, p. 6.) That statement is supported by established authority. Determining the availability of water for appropriation by competing applicants "requires examining the quantity of flow in a river or stream, the source of the flow, the diversion and use

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of water under prior rights, and the amount of water needed for protection of instream and other public trust uses." (*In the Matter of Water Right Application 29408 and Waste Water Change Petition WW-6*, D. 1638, September 18, 1997, at 21-22, see also Water Code §§ 1243 and 1243.5.)

The SWRCB's statements on that issue are consistent with the public trust doctrine, as articulated in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. "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." (*Id.*, at 425.) 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." (*Id.*, at 426.)

The North Kern parties cannot validly complain that the Draft Order does not set forth a specific quantity of water available for appropriation on the Kern River. An order to revise the FAS of a river need only determine that there is unappropriated water available, and need not determine the exact or specific quantity of unappropriated water.

The SWRCB has stated that in considering a FAS petition:

"All questions regarding the specific amount of water available for appropriation under the applications, the season of water availability, approval or denial of the applications, and the conditions to be included in any permit(s) that may be issued on the applications will be resolved in further proceedings on each application pursuant to applicable provisions of the Water Code." (*In Re Fully Appropriated Stream Petition for the Santa Ana River* (2000) WR 2000-12, at 2.)

In the next phase of this proceeding the North Kern parties and other applicants will have the opportunity to establish what rights, if any, they hold to divert water from the Kern River, and how those alleged rights impact the quantity of water available for appropriation. "The quantity of water surplus to the needs of riparian users and the claims of the holders of prior rights is available for appropriation." (*In the Matter of Application 27253*, Order No. WR 86-1, 1986.) In *In the Matter of Application 29047 of John and Mayla Clark*, Decision No. 1628, June 3, 1992, the SWRCB explained, in considering an application to appropriate, that "how much unclaimed water exists" in a stream depends in large part on the existence of prior water rights, "assuming that [protestants] have valid senior appropriative or riparian rights."

It is therefore proper for the SWRCB to consider the validity and extent of any claimed rights in considering applications to appropriate, and in determining the quantity of water available for appropriation. In *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 96, the California Supreme Court stated that the predecessor to the SWRCB, in

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determining whether water was subject to appropriation, "was authorized to investigate the water source to which a claim was made, to take testimony with regard to the rights existing in it, and 'to ascertain whether or not such water...is appropriated under the laws of this state.'" (Quoting from *Tulare Water Co. v. State Water Comm.* (1921) 187 Cal. 533.)

The North Kern parties also can not complain that the Draft Order and the amendment of the FAS of the Kern River prejudices or harms their "rights" on the Kern River. These entities failed to establish or prove what rights, if any, they hold on the Kern River, and therefore failed to establish that any of their rights would be impacted by these proceedings.

The North Kern parties' witnesses, Martin Milobar and Daniel Easton, for example, provided no specific facts or information with regard to any actual water rights held by the North Kern parties. The witnesses instead only made vague references to "entitlements" held by these entities, or made unsupported "assumptions" with regard to the alleged water rights of the North Kern parties.

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."

The North Kern parties also can not legitimately complain that the water diverted into the Intertie is too infrequent or unreliable to be classified as unappropriated water. California courts, and the SWRCB, have previously found that such "infrequent" or "excess" flows can and should be classified as surplus water, subject to appropriation. (See *Allen v. California Water & Tel. Co* (1946) 29 Cal.2d 466, finding that high, surplus flows could be appropriated even if "subject to interruption or cessation.")

The undisputed and unchallenged evidence established that since 1964, more than 1.4 million acre feet of unappropriated, unclaimed Kern River water has been diverted into the Intertie. (See Bakersfield Exhibit 2-18.) The evidence and testimony established that this water has been subject to control and capture, and diversion and use, and is therefore properly classified as unappropriated water. Given the SWRCB's mandate to protect, preserve and regulate the waters of the state, it is more than logical and appropriate for the SWRCB to assume jurisdiction over such water, to prevent further waste or unauthorized use of such water.

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Finally, the SWRCB should disregard or discount any critical comments from the North Kern parties regarding the Draft Order because those parties changed their positions with regard to the FAS of the river, without any valid explanation. North Kern and the other parties previously submitted petitions asking the SWRCB to revise the FAS of the Kern River, along with proposed applications to appropriate the forfeited, surplus water.

The Kern County Water Agency ("KCWA"), for example, stated in its petition that Kern Delta's partial 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.

The North Kern parties are estopped from now claiming that there is no surplus water in the river, or that the SWRCB should not revise or amend the FAS of the river, based on the fact that they took contrary positions in their petitions filed with the SWRCB.

## **2. RECOMMENDED PROCEDURES AND PROCESS FOR NEXT PHASE OF KERN RIVER PROCEEDING**

In the Draft Order the SWRCB ordered staff of the Water Rights Division of the SWRCB to accept and process the pending water rights applications filed on the Kern River. Bakersfield's application to appropriate must be considered and accounted for first, as its application has both a practical and legal priority. Bakersfield is also prepared to work with the SWRCB and its staff to assist in the processing of the applications to appropriate, to determine the quantity of unappropriated water available for diversion and use, to consider and account for environmental, in stream and public trust requirements and policies, and to arrive at a disposition of the unappropriated water which best serves the policies, goals and standards that apply to the waters of the state.

Bakersfield will explore these issues with the SWRCB in more detail at the appropriate time and place, but for now offers the following information to help guide the SWRCB in the next steps in the administrative proceeding involving the Kern River.

### **A. Bakersfield's Application Has Priority**

Bakersfield filed the first application to appropriate on the Kern River, in 1997, based on the change in circumstances recognized in the Draft Order. The SWRCB later dismissed the application, along with all other pending applications, but stated that Bakersfield and others could refile their applications to appropriate following the conclusion of the litigation which resulted in the partial forfeiture of Kern Delta's rights. Bakersfield maintained in correspondence to the SWRCB that it would still be entitled to a priority tied to its original filing

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of the application to appropriate at the conclusion of the litigation, and no entity has challenged or validly disputed that position.

Bakersfield's application is also entitled to a priority and preference based on its status as a municipality, and based on its proposed use of some of the Kern River water for domestic purposes. (See Water Code §§ 106, 106.5, 1254 and 1460.) The other applicants are not municipalities, and have not proposed any valid or practical domestic use for the water in their applications.

Bakersfield was also the first entity to properly file its application after the final conclusion of the Kern River litigation in 2007. North Kern filed an application prior to Bakersfield's filing, but as Bakersfield will establish at the appropriate time, North Kern filed its application before the Kern River litigation had finally and effectively concluded.

For these reasons, Bakersfield's application has a priority over all other applications to appropriate water from the Kern River.

**B. Bakersfield Will Propose a Superior Plan for Diversion and Disposition of the Unappropriated Water**

In addition to the information in and accompanying its application to appropriate, Bakersfield will in the near future submit a plan for the operation of the Kern River which accounts for the unappropriated water available on the river, proposes a disposition and use for the water which preserves existing water rights on the river, and the practical and legal priorities involving the use of water in California, including environmental, public trust and instream flow requirements.

Bakersfield reminds the SWRCB that 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 through the City, without any consideration of timing or impacts on the environment. The revision of the FAS of the river creates an opportunity for the SWRCB to assume jurisdiction over flows on the river to ensure that there is protection for the local environment, fish and wildlife, and other non-consumptive purposes and beneficial uses.

The public interest standard requires the SWRCB to "weigh . . . the comparative virtues" of competing applications and projects, and determine which application or project best serves the public interest. (*Johnson Rancho County Water District v. State Water Rights Board* (1965) 235 Cal.App.2d 863, 877.) Pursuant to Water Code Sections 1243 and 1243.5, the SWRCB must also notify the Department of Fish and Game of all applications to appropriate water, and the Department must recommend the amounts of water required for preservation of fish and wildlife resources. Pursuant to Water Code Section 1257, the SWRCB must consider the

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preservation and enhancement of fish and wildlife in acting upon any application to appropriate water.

Bakersfield's application would allow for multiple reasonable and beneficial uses, including in stream, environmental, recreational, water quality, water supply, and fish and wildlife preservation and enhancement. (23 C.C.R. § 659.) Such uses would benefit the public at large, and not just one diverter, as well as the local environment.

Bakersfield's application is also 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 the unappropriated Kern River water. (See e.g. Water Code §§ 106, 106.5, 1254, and 1460.)

Bakersfield looks forward to working with SWRCB staff, members of the community and representatives of other state and local agencies to enhance and protect the environment, and the flow of water in the Kern River, in the processing of the applications to appropriate.

**C. Bakersfield is Ready to Assist SWRCB Staff in the Investigation of the Kern River**

In processing the applications to appropriate, the SWRCB will be aided by the fact that Bakersfield and its predecessors in title have prepared and maintained detailed records of the diversion and use of water on the Kern River from the 1890s to the present. These records are held in storage and archived at Bakersfield's facilities. The accuracy and completeness of these flow and diversion records have never been questioned or subject to dispute.

Bakersfield is ready and willing to work with the SWRCB to assist staff in interpreting and understanding the Kern River flow and diversion records. Representatives of the City are also prepared to assist the SWRCB in its study and assessment of the physical condition of the river, the operation of the river, environmental and public trust issues, including the quantity of water necessary to satisfy fish and wildlife and other in stream flow requirements, and other issues raised by the various applications to appropriate.

Bakersfield is also prepared to make changes and adjustments to the Kern River flow and diversion records to reflect action taken by the SWRCB with regard to the unappropriated water.

It will not be difficult or unduly time consuming for the SWRCB to determine and confirm the quantity of unappropriated water available for diversion in the Kern River. The historic record and evidence will establish that Bakersfield and Kern Delta are the only valid pre-1914 water right holders within the Kern River "First Point" service area. North Kern only uses specified quantities of water accruing to rights held by Bakersfield pursuant to an agreement with

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Bakersfield's predecessor in title, and does not independently or separately hold any pre-1914 water rights. The evidence is not in dispute, and will clearly demonstrate that there is unappropriated water above the established and adjudicated rights of Kern Delta and Bakersfield, as a result of the partial forfeiture of Kern Delta's Kern River water rights.

In addition, there is no dispute as to the quantity of water forfeited by Kern Delta, as determined by the Court of Appeal in the Kern River litigation. The North Kern parties did not challenge the methodology and calculations used to quantify the forfeited water. In fact, the North Kern parties' expert, Mr. Easton, calculated and came up with the same numbers to represent "new water" which was created by the finding of forfeiture. The North Kern parties identified the water forfeited by Kern Delta as "forfeiture release," while Bakersfield characterized that same water as "forfeiture entitlement." (Reporters Transcript (RT), at 232.) Mr. Easton indicated that "forfeiture release is the gross entitlement minus the preserved entitlement." (RT, at 232.) That is the same methodology used by Bakersfield to calculate the "forfeiture entitlement."

Although Bakersfield certainly expects the SWRCB will eventually hold a hearing to consider issues raised by the competing applications to appropriate, for the reasons stated herein Bakersfield does not think it is necessary for the SWRCB to hold preliminary hearings or to consider preliminary issues or claims regarding the river. Information, facts and data necessary to establish or determine issues relative to the applications have already been developed in the Kern River litigation, or is contained in the historic Kern River records in the possession of Bakersfield. Bakersfield's application and proposal for the river will also account for, support and create a foundation for the consideration of all of the issues related to the Draft Order and applications to appropriate, as well as for the disposition of the unappropriated water in a later hearing or proceeding.

#### **D. Investigation and Hearings in Bakersfield**

In connection with its processing of the applications to appropriate, and its investigation of the Kern River, Bakersfield urges SWRCB staff and board members to visit the Kern River and the Bakersfield area as soon as it is feasible. A visit to the Kern River, and to the canals and diversion facilities along the river, is essential for a complete and accurate understanding of the issues involved in this proceeding. Given the importance of the Kern River and the issues involved in this proceeding to the residents of Bakersfield, and to the citizens of the region, it is imperative that the SWRCB have sufficient familiarity with the environment, geography and facilities in and around the river.

Personal observations of the current physical and practical operations of the river, as carried out through the "law of the river," is critical to an understanding and appreciation of such



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history and details. A tour of the Kern River therefore is a necessary and important component of the SWRCB's review and consideration of Bakersfield's application to appropriate.

As we have explained previously, the revision of the FAS of the Kern River, and the determination of rights to up to 123,363 acre-feet of water forfeited through nonuse, and the additional water flowing into the Intertie, is an issue of tremendous importance and interest to the residents of Bakersfield, and to individuals and entities throughout the region. The Kern River, which physically bisects through the middle of Bakersfield, is the primary source of water in the area, and it provides multiple benefits to residents of the region. The revision of the FAS of the river, and the SWRCB's consideration and disposition of the unappropriated water in the river, will have a tremendous impact on the water supply, economy, and environment in the Bakersfield area.

Residents of Bakersfield and the region have submitted hundreds of written comments and statements to the SWRCB with regard to this proceeding and the issues raised by Bakersfield's application to appropriate. It is imperative that members of the public be able to observe and participate in proceedings involving the Kern River, and to provide comments and evidence directly to the members of the board, and SWRCB staff, throughout this process.

### 3. CONCLUSION

Bakersfield respectfully urges the SWRCB to approve and execute the Draft Order in its present form during the February 16, 2010 meeting of the SWRCB.

In addition, following the approval of the Order, Bakersfield urges the SWRCB to:

(1) Recognize that Bakersfield's application has a priority and preference with regard to the unappropriated water,

(2) Travel to Bakersfield to investigate the Kern River and the flow and diversion records on the river prepared and maintained by Bakersfield,

(3) Work with Bakersfield staff and representatives to confirm and determine the quantity of unappropriated water, and

(4) Work with Bakersfield staff and representatives to arrive at a plan of use for the unappropriated water which best protects and preserves the environment, the river, fish and wildlife, and multiple reasonable and beneficial uses, including Bakersfield's present and future demand for water for environmental and domestic uses.

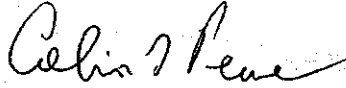
Bakersfield thanks the SWRCB and its staff for their time and attention to this matter and for their consideration of the evidence, testimony and briefs submitted in this proceeding.

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Bakersfield further thanks the SWRCB for this opportunity to comment on the resulting Draft Order.

Sincerely,



Colin L. Pearce  
For DUANE MORRIS

CLP/cwc

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

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