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12
13 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
14 OF THE STATE OF CALIFORNIA

15
16 IN THE MATTER OF THE KERN RIVER
STREAM SYSTEM, REVIEW OF FULLY
17 APPROPRIATED STREAM STATUS

KERN COUNTY WATER AGENCY'S
CLOSING BRIEF

18
19 **I. INTRODUCTION**

20 Five petitions to revise the fully appropriated stream status of the Kern River were filed in
21 this matter. All five petitions were filed in response to the 2007 appellate court decision in *North*
22 *Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555 (*North Kern*).
23 In *North Kern*, the court held that the Kern Delta Water District (Kern Delta) forfeited certain
24 pre-1914 appropriative water rights due to nonuse. The *North Kern* opinion provides that some
25 parties to the *North Kern* case sought an order awarding to them, and to satisfy their existing
26 entitlements, the water made available by the forfeiture. (*North Kern* at p. 565.) Other parties
27 argued that this water should "revert to the public" and be available for appropriation pursuant to
28 the permit procedures of Water Code section 1241. (*Ibid.*)

1 The trial court in the *North Kern* matter held that the forfeited water was, in fact,
2 immediately available for appropriation pursuant to section 1241 of the Water Code. But the
3 *North Kern* appellate court held otherwise. Reversing the trial court, the *North Kern* appellate
4 court held that the State Water Resources Control Board (State Board) must decide whether the
5 Kern River is “so oversubscribed by pre-1914 common law rights that any water released to the
6 river by forfeiture of a senior rights holder will simply be used in full by existing junior rights
7 holders under their existing entitlements.” (*North Kern, supra*, 147 Cal.App.4th at p. 583.)

8 Responding to the direction from the *North Kern* court, the five Cooperating Petitioners in
9 this matter (Kern County Water Agency, North Kern Water Storage District, Buena Vista Water
10 Storage District, City of Shafter, and the Kern Water Bank Authority) retained a water resources
11 and engineering firm to analyze the official records of Kern River hydrology, diversion and use to
12 determine whether the water released by the Kern Delta forfeiture would be used by existing
13 junior rights holders or not. This engineering work carefully analyzed water availability and use
14 under existing entitlements in every month for the years 1964 through 2008. The period of 1964
15 through 2008 was chosen because in 1964 the State Board conducted a similar analysis of
16 whether there was Kern River water available for appropriation during prior periods, and found
17 no water was available. (See D-1196.) The Cooperating Petitioners presented this evidence in
18 both written and oral testimony from Dan Easton, a hydrologist and registered engineer with the
19 firm MBK Engineers.

20 The remaining petitioner, the City of Bakersfield, chose a different approach. In
21 contravention of the explicit rulings of the *North Kern* decision, Bakersfield failed to present the
22 State Board with any engineering analysis regarding whether the water that Kern Delta may no
23 longer divert because certain rights were forfeited would be used by junior rights holders under
24 existing entitlements. Instead, Bakersfield presented the State Board with only an annual average
25 amount of forfeited water, and then Bakersfield’s various witnesses proceeded to offer irrelevant
26 and erroneous opinions that the key issue in this matter is the State Board’s *legal* determination of
27 whether water available due to forfeited senior rights may be used under existing, junior pre-1914
28 appropriative rights, or whether such water should “revert to the public” and be available for

1 appropriation pursuant to the permit procedures of Water Code section 1241.

2 The legal issue of whether water made available by forfeiture of senior pre-1914 rights
3 may be diverted and used by junior pre-1914 right holders or whether such water “reverts to the
4 public” and is available for appropriation pursuant to the permit procedures of Water Code
5 section 1241, *is absolutely not before the State Board in this matter*. That issue was addressed
6 and decided in the *North Kern* case where, as set forth in the quoted language from the *North*
7 *Kern* opinion above, the appellate court reversed the ruling of the trial court and clearly explained
8 that the water made available by the Kern Delta forfeiture may be used by existing rights holders
9 and it is the province of the State Board to determine whether the “forfeiture creates an allocable
10 excess” to the use by junior right holders under their existing entitlements. (*North Kern, supra*,
11 147 Cal.App.4th at pp. 583-584.)

12 Bakersfield’s legal strategy is a thinly veiled and cynical effort to obtain a legal ruling
13 from the State Board that is directly in contravention to the opinion in the *North Kern* case.
14 Bakersfield is attempting to confuse the State Board regarding the legal rulings in the *North Kern*
15 matter. This strategy runs throughout the testimony of all Bakersfield’s witnesses, and
16 Bakersfield even went so far as to unsuccessfully attempt to introduce totally irrelevant testimony
17 from a hydrologist regarding purported benefits to the environment if the forfeited water were to
18 remain undiverted in the Kern River channel. What Bakersfield did not do, however, was present
19 any evidence regarding whether or not the water made available by Kern Delta’s forfeiture would
20 be used by existing, junior rights holders.

21 As set forth in more detail below, the analysis performed by Mr. Easton demonstrates that
22 the water made available by the forfeiture of certain Kern Delta water rights will be used by Kern
23 River rights holders under their existing entitlements. Mr. Easton found that the only time when
24 all of the forfeited water would not be used by existing Kern River rights holders was during 8 of
25 the 270 months that comprise the 1964-2008 time period – and those eight months correspond
26 with significant flood conditions. The only reasonable conclusion from these findings is that the
27 Kern River remains fully appropriated.

28 Kern County Water Agency (KCWA) joins in and supports the closing brief filed by the

1 four other Cooperating Petitioners. That closing brief takes a more comprehensive and specific
2 approach to describing the evidence and issues presented. To avoid repetition, KCWA's closing
3 brief focuses on discrete issues – in particular clarifying for the State Board exactly what the
4 *North Kern* opinion holds and how Bakersfield has gambled its entire case on misleading the
5 State Board regarding the ruling in *North Kern*.

6 **II. BURDEN OF PROOF**

7 “Except as otherwise provided by law, a party has the burden of proof as to each fact the
8 existence or nonexistence of which is essential to the claim for relief or defense that he is
9 asserting.” (Evid. Code, § 500; see also § 550(b) [“The burden of producing evidence as to a
10 particular fact is initially on the party with the burden of proof as to that fact.”].) Where there is
11 conflicting evidence submitted, the parties’ burden of proof in this administrative proceeding is
12 by a “preponderance of the evidence.” (Evid. Code, § 115; see *San Benito Foods v. Veneman*
13 (1996) 50 Cal.App.4th 1889, 1892-1893.) “The term simply means what it says, viz., that the
14 evidence on one side outweighs, preponderates over, is more than, the evidence on the other side,
15 not necessarily in number of witnesses or quantity, but in its effect on those to whom it is
16 addressed.” (*People v. Miller* (1916) 171 Cal. 649, 652 (*Miller*).) There is only a weighing of
17 evidence, however, where conflicting evidence has been submitted:

18 The party on whom rests the burden to prove an alleged fact must produce
19 evidence sufficient in quantity and character to warrant a jury in finding the fact
20 to exist, in the absence of opposing evidence. The question what that evidence
21 must amount to in order to legally support a conclusion by the jury has nothing at
22 all to do with the question what is meant by the term “preponderance of the
23 evidence.” The party on whom rests such burden having produced sufficient
24 evidence to support a conclusion in his favor, opposing evidence may also have
25 been introduced, and then only does the question of preponderance of evidence
26 arise. The situation may then be that in view of the opposing evidence, the jury is
27 in doubt, and not at all satisfied or convinced. In such a situation the decision
28 must be based on the preponderance rule. (*Miller* at pp. 653-654.)

24 **III. KEY ISSUES AND EVIDENCE**

25 A. The *North Kern* Decision Did Not Create “New Water;” It Merely Restricted the
26 Water Rights of a Single Kern River Appropriator and Directed the Parties to Seek
27 a Ruling from the State Board Regarding Whether the Other Existing Pre-1914
28 Right Holders Would Use, in Full, the Released Water

Bakersfield’s entire case rests on a single, deceptive, legal sleight-of-hand, namely the

1 contention that there is an unresolved legal issue regarding whether the water released by Kern
2 Delta's forfeiture is available for use by Kern River rights holders under existing entitlements or
3 whether this water is necessarily "surplus" and subject to diversion and use only through the State
4 Board's water right permitting process. The trickery involves what can only be described as
5 Bakersfield's deliberate misrepresentations to the State Board regarding the holding in the *North*
6 *Kern* decision.¹ Throughout these proceedings, Bakersfield has pretended that the *North Kern*
7 decision left unclear, or undecided, what is the legal significance of the Kern Delta forfeiture.
8 Bakersfield's petition, various letters, and certain testimony at the FAS hearing all falsely suggest
9 that the *North Kern* decision leaves the issue for resolution by the State Board. The *North Kern*
10 decision does no such thing – the issue was addressed and decided, and the *North Kern* decision
11 is the controlling law.

12 In *North Kern*, the court clearly held that Kern Delta forfeited *water rights*, not water.
13 (*North Kern, supra*, 147 Cal.App.4th at pp. 583-584.) As the court explained:

14 Accordingly, the parties misconceive the relevant legal relationships to the extent
15 that they picture Delta as forfeiting "water" that could, for example, be awarded
16 to North Kern, loaded into tanker trucks, and delivered to its recharge fields. Or in
17 the alternative, awarded to a permitted appropriator by the SWRCB and delivered
18 to the new appropriator. These misconceptions arise from conceiving of what is
19 forfeited as "water" and not as "water rights." In reality, water rights, and not
20 water, are forfeited. (*Id.* at p. 583.)

21 The opinion explained the significance of forfeited water rights, in the context of the fully
22 appropriated Kern River:

23 When a natural watercourse is fully appropriated, as the Kern River is, forfeiture
24 of an appropriative right may or may not result in unappropriated water that can
25 be awarded to an applicant through the statutory permitting system administered
26 by the SWRCB. That is, a river may be so oversubscribed by pre-1914 common
27 law rights that any water released to the river by forfeiture of a senior rights
28 holder will simply be used in full by existing junior rights holders under their
existing entitlements. (*North Kern, supra*, 147 Cal.App.4th at p. 583.)

Finally, the court held that it could not award the forfeited rights to any other party
because first the State Board must make the determination regarding whether the other pre-1914

¹ The misrepresentation can only be understood as deliberate because Bakersfield was directly and intensively involved in the *North Kern* litigation for over a decade, and is well versed in the rulings set forth in *North Kern*.

1 rights holders will use, in full, the water released to the Kern River by the forfeiture judgment. In
2 this regard, the *North Kern* opinion states:

3 If water rights are forfeited, however, the cumulative effect could be that the river
4 is no longer oversubscribed. That is a determination not for the courts in the first
5 instance, but for the SWRCB. If those resulting limitations on appropriation
6 might result in a determination that the Kern River is no longer fully appropriated,
7 that determination will be made by the SWRCB on the petition of a potential
8 appropriator of the excess. (*North Kern, supra*, 147 Cal.App.4th at p. 583.)

9 Thus, the *North Kern* case clearly directed the State Board to determine whether the water
10 released by Kern Delta's forfeiture will be completely used by other, existing pre-1914 rights
11 holders or if there is an "allocable excess." If the released water will be fully used, then the Kern
12 River remains fully appropriated. If not, then the excess water may be available for appropriation
13 pursuant to the State Board's permitting process. Regardless, "[a]ny new permit for such an
14 appropriation, however, will be 'last in time' and will neither reduce nor augment existing pre-
15 1914 rights of other appropriators." (*North Kern, supra*, 147 Cal.App.4th at pp. 583-584.) As
16 summarized in section C, below, the five Cooperating Petitioners presented ample evidence that
17 the released water will be used, in full, by existing rights holders – except in rare circumstances
18 when the entire Kern River system is experiencing flood conditions.

19 **B. Bakersfield, Which Is the Only Party Seeking to Revise the FAS Declaration,**
20 **Failed to Produce Any Evidence Regarding Whether Existing, Junior Right**
21 **Holders Will Use the Forfeited Water**

22 The State Board determines whether to revise an FAS determination based on either a
23 relevant "change in circumstances," and/or "upon reasonable cause derived from hydrologic data,
24 water usage data, or other relevant information acquired by the Division of Water Rights in the
25 course of any investigation..." (Cal. Code Regs., tit. 23, § 871(b).) Petitions seeking an FAS
26 revision "shall include hydrologic data, water usage data, or other relevant information..." (*Id.*
27 at § 871(c)(1).) Thus, where the FAS proceeding is initiated by petition, section 871 sets the
28 burden of proving "change in circumstances" or other "reasonable cause" on the petitioner. (See
Evid. Code, §§ 500 and 550(b).) If a petitioner produces such evidence, then any opposing party
would have a burden to produce conflicting evidence, and the State Board would apply the
"preponderance of the evidence" test to resolve the dispute. (*Miller, supra*, 171 Cal. at pp. 653-

1 654.) But, where a petitioner produces no evidence on the relevant standards for revising an FAS
2 declaration, then that petitioner has failed to meet its initial burden of proof. (*Ibid.*; see also Evid.
3 Code, §§ 500 and 550(b).)

4 In this matter, the “changed circumstance” upon which all petitioners were required to
5 submit evidence is the *North Kern* decision that resulted in a forfeiture of certain Kern Delta
6 water rights. All petitions submitted in this matter identify the issue as such. And, as previously
7 described, the *North Kern* opinion gives clear direction to the parties and the State Board
8 regarding what analysis should be performed in the instant proceedings to determine whether
9 these changed circumstances result in water available for appropriation.

10 Bakersfield simply failed to produce any evidence on the key issue of whether the existing
11 pre-1914 common law rights holders on the Kern River will use the water released as a
12 consequence of Kern Delta’s forfeiture. (See *North Kern, supra*, 147 Cal.App.4th at pp. 583-584.)
13 Bakersfield’s witnesses carefully explained the history of Kern River water rights, and the
14 detailed record keeping of those rights. Then these witnesses produced an annual average
15 quantity of water released by the Kern Delta forfeiture, and repeatedly suggested to the State
16 Board that Bakersfield is unsure how this water should be legally characterized and requested
17 clarity on the issue from the State Board. (See, e.g., Hearing Transcript, October 26 & 27, 2009
18 at pp. 62-64.) Bakersfield’s witnesses referred to the released water as “surplus water,” and
19 claimed that they have *no idea* how it should be allocated to the existing rights – despite earlier
20 testimony regarding the 100+ years of daily administration of Kern River water rights. But
21 Bakersfield provided no analysis on the key issue of whether right holders will use the water
22 released by Kern Delta’s forfeiture under their existing entitlements.

23 Bakersfield has failed to meet its initial burden of proof on the issue of whether existing
24 pre-1914 water rights will use the water released as a result of the Kern Delta forfeiture. (*Miller,*
25 *supra*, 171 Cal. at pp. 653-654; see also Evid. Code, §§ 500 and 550(b).) The Cooperating
26 Petitioners presented significant evidence on this issue. (See Joint Exhibits (JE) 46-70.) If
27 Bakersfield had produced evidence purporting to demonstrate that existing water rights holders
28 would not use the water released to the Kern River by forfeiture, then the State Board could

1 weigh the conflicting evidence under the “preponderance of the evidence standard.” (*Miller* at
2 pp. 653-654.) But where, as here, one party has wholly failed to produce evidence on an issue for
3 which it bears the initial burden of proof, there is no weighing of the evidence and the issue must
4 be determined adverse to the party who failed to meet its initial burden. (*Ibid.*) As Bakersfield is
5 the only petitioner seeking to revise the FAS declaration, Bakersfield’s failure to meet even its
6 initial burden of proof should be the basis for the State Board declining to revise the FAS
7 declaration.

8 C. The Five Cooperating Petitioners Produced Ample Evidence That the Forfeited
9 Water Will Be Used by Existing Rights Holders

10 Heeding the explicit direction from the *North Kern* court, the Cooperating Petitioners
11 presented significant and unopposed evidence demonstrating that the Kern River remains fully
12 appropriated because existing water rights users will use the Kern Delta released water. Civil
13 engineer Dan Easton performed this analysis, which focused on the six months during the year
14 when water released by Kern Delta’s forfeiture may be diverted and used by junior water rights
15 holders under their existing entitlements. As set forth below, Mr. Easton’s analysis was thorough,
16 well documented, and supports his conclusion that the Kern River remains fully appropriated.

17 Mr. Easton began his task by understanding the various Kern River water rights that have
18 existed since the 19th century (commonly referred to as the “Law of the River”). (JE 46, pp. 5-8.)
19 His understanding was greatly aided by the fact that the State Board conducted a similar inquiry
20 during the D-1196 proceedings, the results of which are set forth in a staff report presented as
21 Joint Exhibit 7. Moreover, for the six months during which Kern Delta forfeited certain water
22 rights, the vast majority of water entitlements are held by “First Point” diverters, and these rights
23 were adjudicated in the August 6, 1900 Superior Court judgment commonly referred to as the
24 “Shaw Decree.” There have been a series of subsequent agreements and revisions to agreements
25 that modify certain rights, but the core rights to divert water from the Kern River remain, more
26 than 100 years after their initial confirmation.

27 Based on the Law of the River and extensive records regarding Kern River flows and
28 diversions, which are maintained by Bakersfield, Mr. Easton then embarked on determining what

1 additional quantities of water *would have been available* to junior rights holders during the 1964-
2 2008 period by virtue of the Kern Delta forfeiture. Joint Exhibits 48 through 65 demonstrate this
3 analysis.

4 Based on this analysis, Mr. Easton found that, except in the three years (a total of eight
5 months during those three years) when flood flows were released to the Intertie, the Kern Delta
6 forfeiture releases would have been used by junior rights holders under their existing
7 entitlements. (JE 46, ¶ 24.) A helpful summary of his analysis and conclusions is set forth in
8 Joint Exhibit 67. Performing the water rights analysis directed by the *North Kern* opinion,
9 Mr. Easton ultimately concluded that “the North Kern judgment does not support a finding that
10 there is water available for appropriation from the Kern River.” (JE 46, ¶ 32.)

11 D. The Infrequent Flood Releases into the Intertie Do Not Merit Revising the FAS
12 Declaration

13 No petitioner in this matter raised the infrequent operation of the Kern River-California
14 Aqueduct Intertie (Intertie) as a reason to revise the FAS declaration. It appears, however, that
15 the State Board staff may consider the releases of water through the Intertie as a basis for revising
16 the FAS declaration. State Board precedent suggests otherwise, and KCWA and the other
17 Cooperating Petitioners believe there are other procedural mechanisms to address diversion and
18 use of Intertie flows that are more appropriate than revising the FAS declaration.

19 In D-1018, which was adopted by the State Board on June 30, 1961, several water rights
20 applicants sought to appropriate water from the Tule River. (D-1018, p. 4.) Protestants presented
21 evidence demonstrating their rights (pre-1914, riparian, and decreed) to the full natural flow of
22 the Tule River, and the applicants responded by claiming a right to excess flood flows stored in
23 the recently constructed Success Reservoir. The State Board found that flood flows would be
24 stored in the reservoir, but only occasionally and “in most years such new water will be
25 nonexistent.” (*Id.* at p. 13.) The State Board further found that there were only two prior years
26 when all Tule River water under claim of prior rights was not used due to flood conditions. (*Id.* at
27 p. 14.) Describing these occurrences as being “too irregularly and infrequently to be of any value
28 to the applicants,” the State Board found the Tule River to be fully appropriated and denied the

1 applications. (*Id.* at p. 15.)

2 In this case, the Intertie released flood flows during only eight years and releases during
3 the forfeiture months occurred in only three of those years. (JE 68; Bakersfield Exhibit 2-18.)
4 No party filed an application seeking to appropriate these flows. Due to the irregularity and
5 infrequency of these flows, and the fact that no petitioner has demonstrated the intent or means to
6 use this water, the operations of the Intertie similarly do not support revising the FAS declaration.

7 Finally, the "temporary urgency petition" procedures set forth in Water Code section 1425
8 are the most appropriate procedural mechanism for claiming flood water released to the Intertie.
9 The State Board's FAS declarations have consistently recognized this approach. (See Orders WR
10 89-25 § 10 and WR 98-08, § 4.12.) KCWA joins the four other Cooperating Petitioners in
11 advocating that the State Board maintain the Kern River FAS declaration, and address individual
12 claims to water released from the Intertie through the temporary urgency process.

13 **IV. CONCLUSION**

14 KCWA fully expects a closing brief from Bakersfield that attacks Mr. Easton's analysis
15 and feigns ignorance regarding the legal significance of the Kern Delta forfeiture. The fact
16 remains that Bakersfield produced no evidence or analysis regarding whether water released by
17 the Kern Delta forfeiture would or would not be used by existing, junior rights holders. As the
18 only petitioner seeking to revise the FAS declaration, Bakersfield has failed to meet its initial
19 burden of proving that "hydrologic data, water usage data, or other relevant information" compels
20 a change in the FAS declaration status. The evidence and analysis produced by the Cooperating
21 Petitioners demonstrates that the Kern River remains fully appropriated and all petitions should
22 be dismissed.

23 Dated: November 24, 2009

SOMACH, SIMMONS & DUNN
A Professional Corporation

24
25 By 
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Nicholas A. Jacobs

27 Attorneys for Petitioner
28 KERN COUNTY WATER AGENCY

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On November 24, 2009, I served a true and correct copy of

KERN COUNTY WATER AGENCY'S CLOSING BRIEF

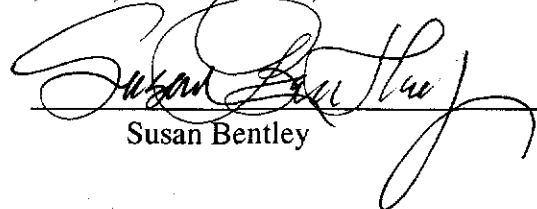
X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

AND

X (by electronic service) I hereby certify that a true and correct copy of the foregoing will be e-served as listed below:

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I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on November 24, 2009, at Sacramento, California.



Susan Bentley