
State Water Resources Control Board

May 2, 2022

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

TO ALL PARTIES:

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

The AHO held a pre-hearing conference on February 1 and issued a Pre-Hearing Conference Order and Amended Notice of Public Hearing and Pre-Hearing Conferences on February 9, 2022. The AHO held a pre-hearing conference on March 1, issued a pre-hearing conference ruling on March 18, and held a third pre-hearing conference on April 21.

Kern Water Bank Authority (KWBA), Buena Vista Water Storage District (Buena Vista), Kern County Water Agency (KCWA), and North Kern Water Storage District (North Kern) and the City of Shafter submitted case-in-chief exhibits to the AHO by the deadline of April 4 set in the Amended Notice of Public Hearing. On April 18, the City of Bakersfield, Buena Vista, KCWA, and KWBA filed evidentiary motions objecting to or seeking to exclude case-in-chief exhibits filed by other parties. On April 25, KWBA, Buena Vista, and North Kern and the City of Shafter filed responses to these motions.

Legal Background

This hearing is being conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The rules governing the admission of evidence in adjudicative proceedings before the Board are found in California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) The State Water Board is not bound in its proceedings by other technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) “The [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time.” (*Id.*, § 11513, subd. (f).)

Evidentiary Motions

1. City of Bakersfield's Motion

The City of Bakersfield filed a Motion to Strike and Objections to North Kern's Phase 1B Testimony and Exhibits (Bakersfield's Motion). The motion seeks to exclude from the evidentiary record for Phase 1B, the following exhibits in their entirety: North Kern-122, -123, -124, -125, -127, and -128 through -159. North Kern-122 is a technical analysis of the Kern River-California Aqueduct Intertie Operations prepared by GEI Consultants and MBK Engineers to address the hearing issue for Phase 1B. North Kern-123 and -124 are the written testimony and slide presentation of Ronald J. Eid, a registered civil engineer employed by GEI Consultants. North Kern-124 and -127 are the written testimony and slide presentation of Marc Van Camp, a registered civil engineer employed by MBK Engineers. Mr. Eid and Mr. Van Camp prepared the technical analysis identified as North Kern-122. North Kern-128 through -159 appear to be tables and figures excerpted from North Kern-122.

Bakersfield's Motion seeks to exclude this evidence and testimony on the grounds that (1) the exhibits and testimony contain improper legal conclusions and opinions; (2) the witnesses lack sufficient experience, expertise, or personal knowledge about the matters addressed in their testimony; (3) the exhibits and testimony are not relevant to the Phase 1B hearing issues; (4) the issues addressed by the exhibits and testimony are outside of the scope of the Phase 1B hearing issues and instead relate to issues considered in Phase 1A; and (5) the exhibits and testimony are duplicative and cumulative.

North Kern-122 and the written testimony of Mr. Eid and Mr. Van Camp conclude that there is no unappropriated water in the Kern River because “Kern River water right holders” have “authorized valid rights to divert and use the entire natural flow of the Kern River.” (North Kern-122, p. 2.) Bakersfield objects to this and similar statements, as well as statements about the “law of the river,” in North Kern's exhibits. Bakersfield argues that these statements are improper legal conclusions and opinions and are grounds for the AHO to exclude North Kern's exhibits from the evidentiary record.

Bakersfield's objections are relevant to the weight that the AHO and the State Water Board should afford North Kern's evidence, not the admissibility of the evidence. Strict rules governing the admissibility of evidence do not apply to the Board's administrative proceedings. "[I]n an agency proceeding the gate keeping function to evaluate evidence occurs when the evidence is considered in decision-making rather than when the evidence is admitted. Even though it arises later in the administrative process than it does in jury trials, the [hearing officer's] duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity." (*U.S. Steel Min. Co., Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor* (4th Cir. 1999) 187 F.3d 384, 389.) I therefore deny Bakersfield's motion.

The rule against admission of testimony containing legal conclusions is primarily intended to protect a jury from improper influence and preserve the judge's role in instructing the jury on the appropriate legal standard. (See *Torres v. County of Oakland* (6th Cir. 1985) 758 F.2d 147; *Hygh v. Jacob* (2nd Cir. 1992) 961 F.2d 359 (cited in *People v. Brown* (2016) 245 Cal.App.4th 140, 162); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1182.) The rule serves little purpose when the decisionmaker has legal expertise and makes findings of both law and fact. Hearing officers in the State Water Board's AHO are required to have "knowledge and experience in water law" and the hearing officers make both the legal and factual determinations when drafting a proposed order to submit to the Board. (Wat. Code, § 1111, subd. (a).) AHO hearing officers are capable of distinguishing, and discounting or disregarding as appropriate, portions of testimony that is essentially legal opinion.

Bakersfield also argues that Mr. Eid and Mr. Van Camp "fail to demonstrate expertise with or personal knowledge of the subject matter of their testimony" and that the witnesses "simply compiled and repackaged and regurgitated the historical diversion records maintained and prepared by Bakersfield in an attempt to 'spin' the records and information to support North Kern's legal theories." (Bakersfield's Motion, pp. 8 & 9.) North Kern responds that Mr. Eid and Mr. Van Camp are "engineering experts ... [with] decades of water resources experience and are eminently qualified to apply their expertise in evaluating the issues presented by the AHO in the Phase 1B hearing." (North Kern's Response, p. 4.) As I understand Bakersfield's argument, Bakersfield is not challenging the witnesses' qualifications to offer technical opinions about water resources engineering. Rather, Bakersfield objects to the witnesses' offering opinions that Bakersfield characterizes as legal conclusions.

In my experience, the mixed questions of law and fact presented in water rights proceeding are fundamentally and inherently mixed. Phase 1B of this hearing addresses whether unappropriated water is available in the Kern River for appropriation. The answer depends on both physical supply and demand on the system and the legal status of those supplies and demands. To offer expert opinion on the technical aspects of this question, Mr. Eid and Mr. Van Camp may have had to make assumptions about certain legal elements. As a result, Mr. Eid's and Mr. Van Camp's technical conclusions may incorporate legal opinions. This does not necessarily render their technical conclusions irrelevant or otherwise inadmissible. As

the hearing officer in this matter, I am confident in my ability to identify and appropriately discount any testimony of North Kern's witnesses on matters of law that are not within their area of expertise. Bakersfield will also have the opportunity to cross-examine North Kern's witnesses and uncover the underlying bases for their opinions before I make any determination as to the persuasiveness of their testimony. Therefore, I deny Bakersfield's objections to North Kern's exhibits on this basis.

Finally, Bakersfield objects to North Kern's exhibits as irrelevant, outside of the scope of Phase 1B, and duplicative and cumulative. Bakersfield argues that evidence that "pre-date[s] the removal of the Kern River from the list of fully appropriated streams is not helpful or relevant." (Bakersfield's Motion, p. 9.) As discussed further in section 4.2 of this ruling, I disagree that the Board's determinations in Decision 1196, Order WR 89-25, or Order WR 2010-010, should cut off consideration of evidence in this proceeding that may be relevant to determining the supply available on the Kern River and the amount of demand pursuant to existing valid rights. The technical analysis in North Kern-122 addresses the Phase 1B issue by "evaluating the historical operation and use of the Intertie since its completion in June 1977..." and concludes that no water is available for appropriation. (North Kern-122, p. 15.) Bakersfield may disagree with this approach to the Phase 1B hearing issue, but North Kern's arguments and evidence are relevant to Phase 1B and therefore are admissible. I disagree with Bakersfield's characterization of North Kern's arguments as an attempt to "re-argue" its Phase 1A claim because North Kern's evidence submitted in Phase 1B is not limited to water made available as the result of forfeiture of water rights by Kern Delta. This ruling on Bakersfield's evidentiary motion is **without prejudice** to Bakersfield raising these substantive arguments later in this proceeding. To the extent that Bakersfield is making substantive arguments about the proper scope of this proceeding, I will address these in any final proposed order submitted to the Board.

I also reject Bakersfield's argument that North Kern's exhibits are duplicative and cumulative and therefore should be excluded. Hearing officers have the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f).) I do not find that North Kern-122 or the testimony of North Kern's witnesses meet this standard. Bakersfield objects that the testimony of both witnesses, which incorporate North Kern-122 by reference, and their power point presentations are "nearly identical." (Bakersfield's Motion, p. 11.) I do not find this overlap in testimony to justify excluding either witnesses' testimony, but I do encourage North Kern to present the testimony without unnecessary repetition. Based on the conduct of all of the parties during Phase 1A of this hearing, I have every reason to believe that North Kern's representatives will follow this instruction and likely have already considered how to present the testimony of North Kern's witnesses in an efficient manner.

2. KCWA's Motion

KCWA filed a Motion to Exclude Evidence and Testimony. The motion seeks to exclude from the evidentiary record the entirety of KWBA-001 (Testimony of Scott A. Miltenberger, Ph.D.) and associated exhibits KWBA-002 through KWBA-024, on the

grounds that the testimony is irrelevant to the Phase 1B hearing issue, includes improper legal conclusions, and rests on inadmissible hearsay. The motion also seeks to exclude from the evidentiary record for Phase 1B paragraph 11 and footnote 15 of KWBA-300 (Testimony of Jonathan Parker) and associated exhibit KWBA-308 as evidence based on inadmissible hearsay that is irrelevant, lacking foundation, speculative, and improperly characterizes the “Lower River Rights” on the Kern River.

Dr. Miltenberger is a professional historian. His testimony (KWBA-001) addresses historical land and water use within the current service area of Buena Vista Water District from the late-nineteenth century through the late-twentieth century. KCWA argues that the portion of Dr. Miltenberger’s testimony that addresses land and water use that occurred before the State Water Board issued Decision 1196 is irrelevant because the State Water Board reviewed and confirmed Kern River water rights in that decision. (KCWA’s Motion, pp. 3-4.) As addressed further in section 4.b. of this ruling in response to Buena Vista’s motion, I conclude that this historical evidence may be relevant to this proceeding. I therefore deny this portion of KCWA’s evidentiary motion but do so **without prejudice** to KCWA raise substantially similar substantive arguments in this proceeding.

KCWA also argues that Dr. Miltenberger’s testimony includes improper legal conclusions and therefore should be excluded. (KCWA’s Motion, pp. 4-5.) KCWA helpfully lists in its motion the specific paragraphs in Dr. Miltenberger’s testimony that it seeks to exclude on this basis. The testimony in these paragraphs address Dr. Miltenberger’s understanding of legal documents as they relate to the history of land and water use within the service area of the Buena Vista Water District. As already discussed in this ruling, the inclusion of legal opinion in the testimony of a witness in an administrative proceeding before the AHO is not typically a basis to exclude the testimony but, rather, goes to the weight of the evidence. Dr. Miltenberger’s understanding of these documents and the legal context surrounding the historical facts that make up the bulk of his testimony may help me understand his testimony. As the hearing officer, I will consider any legal conclusions or interpretation offered by Dr. Miltenberger with his particular qualifications in mind.

KCWA’s objection that Dr. Miltenberger’s testimony relies on hearsay is not a proper basis to exclude his testimony, and instead, goes to the weight to be afforded the testimony. (KCWA’s motion, pp. 5-8.) Hearsay evidence is admissible in State Water Board proceedings as long as it is sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) Hearsay evidence may be used to supplement or explain other evidence, although, over timely objection, it is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) In addition, even following the more strict rules of admissibility applicable in court, hearsay evidence may be relied upon by an expert witness to form an expert opinion.

The sources on which Dr. Miltenberger relies appear to be of the type reasonably relied upon by historians to form an opinion. (See Evid. Code, § 801, subd. (b).) KCWA will also have the opportunity to challenge Dr. Miltenberger’s testimony and the sources on

which he relies through cross-examination and the presentation of rebuttal evidence. Both KCWA and Buena Vista object that some of the sources relied upon by Dr. Miltenberger in his testimony have not been submitted by KWBA as exhibits. KWBA responds that all of Dr. Miltenberger's sources have either been submitted as exhibits or identified in a manner that would allow another professional historian to identify and access the sources. At this time, I will not rule on this portion of KCWA and Buena Vista's motion and will reconsider the issue after the parties have had the opportunity to cross-examine Dr. Miltenberger about his sources and his reliance on those sources. The remainder of KCWA's motion seeking to exclude Dr. Miltenberger's testimony and associated exhibits is overruled.

KCWA also objects to paragraph 11 and footnote 15 of Jonathan Parker's testimony (KWBA-300) and KWBA-308 as hearsay, and hearsay on hearsay. Mr. Parker is the current general manager of the Kern Water Bank Authority. Most of his testimony in paragraph 11 quotes KWBA-308, which is a document entitled "Buena Vista Water Storage District, Summaries of Miller-Haggin & Related Agreements," by H.K. Russell, dated April 1996. For the same reasons discussed about the admissibility of hearsay in administrative proceedings, I overrule KCWA's objection to paragraph 11 and footnote 15, and KWBA-308. KWBA also argues that KWBA-308 is subject to exceptions to the hearsay rule recognized in the Evidence Code for official records and "ancient writings" (although, according to my calculations, KWBA-308 is less than 30 years old), and as the statement of a party opponent. I will not make a ruling at this time as to whether KWBA-308 falls within one of the exceptions to the hearsay rule. I will address whether a hearsay exception applies to KWBA-308, which may affect whether KWBA-308 can be relied upon in itself to support a finding, when KWBA offers its exhibits into evidence.

3. KWBA's Motions

KWBA filed three evidentiary motions: Motion in Limine to Exclude Testimony on SGMA and SGMA Implementation, Motion in Limine to Exclude the Testimony of Terry Chicca, and Motion in Limine to Exclude Portions of the Testimony of Tim Ashlock and David Miller. I will address these motions in a separate written ruling.

4. Buena Vista's Motions

Buena Vista filed three evidentiary motions: Motion to Exclude Testimony and Evidence (Buena Vista's Motion No. 1), Motion to Exclude Evidence Offered to Attempt to Quantify the Second Point Right at Less Than 516,400 Acre-Feet per Year (Buena Vista's Motion No. 2), and Motion to Preclude Attack on Second Point Right Based on Judicial Estoppel and Equitable Servitudes (Buena Vista's Motion No. 3).

a. Buena Vista's Motion No. 1

Buena Vista objects to portions of Dr. Miltenberger's testimony and associated exhibits, KWBA-001 through KWBA-024, that address water use within Buena Vista's service district. Buena Vista argues that these portions of the testimony and the exhibits violate the Hearing Notice's instructions about technical analyses and technical studies and recite improper hearsay opinions that are beyond Dr. Miltenberger's expertise.

The purpose of the Hearing Notice's instructions about technical analyses and technical studies is to require parties to provide sufficient information about their experts' sources and methodology to allow other parties to investigate the results or ask an independent expert to repeat the analysis and develop his or her own conclusions. Submission of all sources into the evidentiary record is not required – making the information available to other parties may be sufficient. I will not rule on this aspect of Buena Vista's challenge to Dr. Miltenberger's testimony at this time and will invite the parties to address this issue after the close of Dr. Miltenberger's testimony, including cross-examination.

The remainder of Buena Vista's motion seeking to exclude Dr. Miltenberger's testimony and associated exhibits is overruled. Buena Vista objects to Dr. Miltenberger's testimony as merely "repeat[ing] historical hearsay opinions and statements." (Buena Vista's Motion No. 1, p. 6.) My understanding of the role of historian is that it is somewhat analogous to the role of a judge. The historian considers original sources and determines based on professional judgment and expertise whether the source is sufficiently credible when considered in the context of information from other sources to be relied upon in the development of a historical account. The historian gathers and reviews these sources, applies his or her expertise, and summarizes or extracts information from the sources to describe the past. Historical documents will often constitute hearsay; the skill of a historian is determining what types of hearsay is sufficiently reliable to inform an accurate understanding of historical events. Buena Vista and the other parties will have the opportunity to cross-examine Dr. Miltenberger about his sources, his opinions, and how he developed those opinions. Buena Vista and the other parties will also have the opportunity to present rebuttal evidence to challenge Dr. Miltenberger's account of the history of land and water use within Buena Vista's service district. Therefore, I overrule Buena Vista's hearsay objections.

I appreciate and understand Buena Vista's objection that Dr. Miltenberger's area of expertise does not include water resource engineering or any related scientific field. His summary of or quotation from historical documents about technical engineering opinions and conclusions cannot be a technical endorsement of these conclusions. I will consider this and Buena Vista's other objections when determining the weight to be afforded to Dr. Miltenberger's testimony.

Buena Vista objects to the entirety of KWBA-100, -104, and -148, which consist of Dr. Jeffrey Davids' testimony, technical memorandum, and slide presentation, and "supporting exhibits." (Buena Vista's Motion No. 1, pp. 7-8.) Dr. Jeffrey Davids is a water resources engineer with Davids Engineering, Inc. His testimony focuses on the historical amounts of Kern River water used within Buena Vista's service area.

Buena Vista raises several objections to Dr. Davids' testimony and associated exhibits. First, Buena Vista objects that Dr. Davids' testimony and exhibits rely on information and sources that have not been produced by KWBA. Buena Vista specifically objects that parties may not be able to obtain access to ITRC-METRIC data relied on by Dr. Davids, although it admits that its own expert, Dr. Daniel Howe, has access to the data. KWBA responds that all of the information relied upon by Dr. Davids is publicly available

and that KWBA has offered to share computer files used by Dr. Davids in his analyses with the other parties on request. (KWBA Response to Buena Vista's Motions in Limine, p. 10; Ltr. from K. O'Brien to Hearing Officer Re Kern Water Bank Authority's Case-in-Chief Exhibits (Apr. 4, 2022).) KWBA states that no party has requested this access. (*Id.*, at p. 11.) Buena Vista also does not assert that it was unable to replicate any of Dr. Davids' analyses because of lack of access to any of the underlying data.

Buena Vista further objects to Dr. Davids' testimony because he relies in part on statements made by Nick Torres, an employee of KWBA and former hydrographer for Buena Vista. Mr. Torres was not identified as a witness by KWBA or any other party in Phase 1B of this hearing. As already discussed in this order, the Board's evidentiary rules allow admission of hearsay evidence, and expert testimony may be based on hearsay if it is the type of information reasonably relied upon by an expert in the subject area.

With the possible exception of Mr. Torres, it appears to me that the information and tools necessary to replicate Dr. Davids' analyses have either been made available by KWBA or have been identified by KWBA and are publicly available. I will not rule on this portion of Buena Vista's motion, however, until after Dr. Davids has testified and the parties have had the opportunity to cross-examine him about data sources, methodologies, and reliance on statements or other information obtained from Mr. Torres. I suspect that cross-examination may answer at least some of Buena Vista's questions about his data sources and analyses. Buena Vista will then have the opportunity in rebuttal to submit testimony or other evidence challenging Dr. Davids' conclusions. I would also like to understand from KWBA whether Mr. Torres could be made available for questioning by the parties about the sources of the information that he provided to Dr. Davids which will help me to determine whether this information is of the type reasonably relied upon by an expert.

Finally, Buena Vista argues that Dr. Davids' testimony should be excluded because he assumes an "incorrect legal theory." (Buena Vista Motion No. 1, p. 11.) As previously discussed, water rights proceedings tend to raise mixed questions of law and fact that are not easily disentangled. The issue raised by Buena Vista is no exception, as it appears to be a substantive disagreement about how storage in Buena Vista Lake should be accounted for in Dr. Davids' analysis. (Buena Vista Motion No. 1, pp. 11-13.) This type of substantive disagreement is not grounds to exclude the testimony. The parties will have the opportunity to cross-examine Dr. Davids and present opposing evidence on rebuttal and I will consider this competing evidence in determining the weight to be afforded Dr. Davids' testimony. Therefore, I deny this portion of Buena Vista's motion.

Buena Vista also objected to citation by Dr. Davids in his testimony to KWBA-147. On April 22, KWBA submitted a list of errata correcting citations in Dr. Davids' testimony and withdrawing KWBA-147.

b. Buena Vista's Motion No. 2

In its Motion to Exclude Evidence Offered to Attempt to Quantify the Second Point Right at Less Than 516,400 Acre-Feet per Year, Buena Vista argues that the State Water Board determined the volume of water in the Kern River that is subject to diversion and use pursuant to valid water rights in Decision 1196 (1964). Buena Vista claims that for Second Point diverters, the amount of water authorized by valid rights was found by the State Water Board to be up to 516,400 acre-feet per year. According to Buena Vista's argument, the Board is now precluded from reconsidering this determination. If so, then the issue would be outside of the scope of the Phase 1B hearing and evidence about the quantity of water that Second Point diverters are authorized to divert pursuant to valid water rights should be excluded from the evidentiary record.

Based on Buena Vista's motion, KWBA's response, and my own review of Decision 1196 and Order WR 89-25, I do not believe that the Board has ever determined the "maximum amounts of diversion and use authorized by valid water rights in the Kern River system during each authorized season of diversion." (January 12, 2022 Hearing Notice, Phase 1B (Kern River Applications), p. 5.)

In Decision 1196, the Board rejected applications to appropriate water from the Kern River filed by Buena Vista and other entities because the applicants made no showing that there was unappropriated water available. (Decision 1196, p. 5.) The Board concluded that "there is no water surplus to the established uses of the applicants, protestants and other users" in the First Point, Second Point, and Lower River Service Areas. (*Ibid.*) The decision does not include any specific findings about the amount of water diverted from the Kern River and beneficially use during any particular time period or any findings about the validity of the underlying claims of right of the Kern River users to divert and use this water. Buena Vista points to information in the administrative record for Decision 1196 about the annual amounts of water used by Second Point diverters from the Kern River, to support its claim that the matter was resolved in Decision 1196 and the Board should not further consider the validity and scope of rights held by Second Point diverters. (North Kern-47 & -48.) But Buena Vista does not identify any evidence in the record for Decision 1196 that suggests that the Board looked beyond the volume of water diverted and used to consider whether those diversions were made pursuant to a valid basis of right.

In the Board's order adopting the Declaration of Fully-Appropriated Stream Systems (FASS Declaration), the Board concluded that the administrative record for Decision 1196 "contains ample substantial evidence to support a finding that no water remains available for appropriation." (Order WR 89-25, p. 14.) The Board does not further explain its cross-walk from a finding in Decision 1196 that there is no water available in excess of established uses on the system to a conclusion in Order WR 89-25 that no water is available for appropriation. There is no indication in the record of which I am aware that the Board considered the validity and scope of rights to water in the Kern River System when reaching its conclusion that no unappropriated water was available. The Board appears to have concluded that evidence of use in excess of available

supplies was sufficient to establish that the stream system was fully-appropriated without investigating the validity of the underlying claims of right.

I am skeptical that the Board can, or should, be precluded from considering the validity of underlying claims of right that are implicated in a water-right permitting matter when the issue is raised by an opposing party and the Board has never before considered the arguments or evidence. Such a rule would potentially frustrate the Board's mandate to administer the state's system of water rights. In *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, the court concluded that the Board did not have jurisdiction to revoke water-right permits in a water-right application proceeding in which the Board was determining whether unappropriated water was available to supply the application. But water-right permits issued by the Board remain valid unless revoked by the Board in accordance with the specific procedures described in the Water Code. When considering whether unappropriated water is available to supply an application, the Board must consider a water-right permit to be a valid right to divert water up to the amount authorized by the permit, unless or until the permit is revoked or revised by the Board. In contrast, this proceeding involves claims of riparian or pre-1914 water rights. The Second Point diverter's claims of right have never been adjudicated or otherwise quantified by a court or the Board. To determine how much water is potentially available for appropriation by the applicants, it is appropriate for the Board to consider the amounts authorized for diversion under valid existing rights.

As I have already stated on several occasions, this proceeding is not an adjudication of water rights. We will not be engaging in a comprehensive examination of all of the rights to divert and use water on the Kern River system in accordance with the statutory procedures specified Water Code sections 2500-2868. The outcome will not foreclose future claims and challenges to water rights on the system. This proceeding will only address, and is limited to, the amount of water that is available for appropriation pursuant to the pending applications.

Buena Vista also argues that the regulatory history of the Board's regulations governing the process for revisions or revocation of the FAS Declaration, demonstrates that Order WR 2010-0010 could not have authorized the Board, or the AHO, to "reinterpret" Decision 1196 or Order WR 89-25. First, as I discuss above, I do not believe that consideration of the scope of the Second Point diverters' valid existing rights for purposes of determining the amount of unappropriated water available would be a reinterpretation of either Decision 1196 or Order WR 89-25. Neither decision addressed the issue. Although the Board concluded in Order WR 89-25 that the Kern River system was fully-appropriated, it did so as part of an en masse determination that significant portions of the stream systems in California were fully-appropriated (see the 70-page Exhibit A to Order WR 89-25). I am not persuaded that in so doing, the Board intended its decision to preclude it from **ever** considering the scope and validity of the rights to divert and use water in any of these systems in any future water-right permitting proceeding – though this is the result that would seem to follow from Buena Vista's arguments. I am also not convinced that the Board could grant away such a vast swath of its responsibilities even if it intended to do so.

In addition to the reasons stated above, I conclude as an independent basis for denying Buena Vista's motion, that Buena Vista's arguments raise substantive issues that are more appropriately addressed through the evidentiary hearing process. Decision 1196 and Order WR 89-25 say nothing about the amount of water to which Kern River water users' have a right to divert and use. Even if the Board were bound in this proceeding by those decisions as Buena Vista argues, why is 516,400 acre-feet the amount of water that the Board must accept as the minimum amount authorized for diversion and use by Second Point diverters?

For all of these reasons, I will not at this time exclude otherwise admissible evidence that is relevant to considering the maximum amounts of diversion and use authorized by valid water rights of Second Point diverters in the Kern River system. My ruling is made **without prejudice** to Buena Vista making substantive arguments similar to those presented in its evidentiary motion at a later time in this proceeding, when I will have the benefit of considering any such argument in the context of the evidentiary record. I also do not consider the initial conclusions expressed in this ruling to be binding on any future decision addressing similar arguments later in this proceeding.

Buena Vista's argument that its due process rights will be violated if evidence relevant to the validity and scope of water rights held by Second Point diverters are allowed into the record, is premature. Phase 1B of this hearing has not even begun. There will be many opportunities for process both in this hearing and in the proceedings that will occur when the Board considers any proposed order submitted by the AHO. Again, my ruling is **without prejudice** to Buena Vista raising these substantive arguments at a later time.

I invited Buena Vista during the pre-hearing conference held on April 21, 2022, to brief the issue of collateral estoppel, which I thought might be a helpful framework for me to consider whether and the extent to which the Board may be bound in this proceeding by its prior decisions. I appreciate Buena Vista's consideration of this issue and KWBA's response, and I will likely re-consult the parties' briefings on the matter when preparing any proposed order in this proceeding.

c. Buena Vista's Motion No. 3

Buena Vista argues in its Motion to Preclude Attack on Second Point Right Based on Judicial Estoppel and Equitable Servitudes that the doctrines of judicial estoppel and equitable servitudes bind KWBA and limit the types of arguments and evidence that KWBA may present in this proceeding.

Buena Vista argues that judicial estoppel should prevent KWBA from presenting evidence challenging the validity and scope of Second Point diverters' water rights based on KWBA's position in a recent judicial proceeding in the California Court of Appeals. (*Buena Vista Water Storage Dist. v. Kern Water Bank Authority* (2022) 291 Cal. Repr.3d 438.) In that proceeding, Buena Vista challenged KWBA's EIR for its pending application to appropriate water from the Kern River based, in part, on inadequacy of the EIR because it did not include a quantification of existing water rights

on the Kern River. KWBA appealed the trial court's decision and the court of appeals agreed that quantification of existing rights to water was not a necessary component of the water availability analysis presented in the EIR.

In general, the elements required of judicial estoppel are: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are completely inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 34, 61 Cal.Rptr.3d 145.) Arguing in the alternative, in and of itself, does not invoke judicial estoppel. (*In re Exxon Valdez* (9th Cir. 2007) 484 F.3d 1098, 1102.) "Judicial estoppel does not apply when a party merely advocates inconsistent provisions; rather, it applies when a party successfully asserts one position and later attempts to benefit from asserting an inconsistent position." (*RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, 748.) The doctrine is designed primarily to protect the integrity of the judicial process. (*In re V.B.* (2006) 141 Cal.App.4th 899, 906.)

Here, I do not see a complete inconsistency between KWBA's position in the litigation challenging the adequacy of the agency's EIR and its position in this proceeding, nor do I see any evidence of bad faith by KWBA. There may be legitimate reason for KWBA to take distinct positions with respect to its EIR, and litigation challenging the adequacy of its EIR, and this proceeding before the Board. The purpose of an EIR is to identify potentially significant environmental impacts from a proposed project. The purpose of this proceeding is to determine whether there is in fact unappropriated water available for appropriation. These different purposes may prompt a party to adopt differing or even alternate positions. Doing so, in and of itself, is not necessarily grounds for judicial estoppel. And I see no reason that the State Water Board should be limited in its consideration of evidence about the amount of unappropriated water available to satisfy the pending applications to appropriate water from the Kern River by a position taken by KWBA in litigation in which the Board had no involvement. If the outcome of this proceeding suggests that KWBA should re-examine any of the assumptions in its EIR, because the Board's determination conflicts with those assumptions, then there are processes for KWBA to make those amendments.

Secondly, Buena Vista argues that the 1888 Miler-Haggin Agreement and deed restrictions attached to KWBA's lands preclude KWBA from presenting evidence about the scope of Buena Vista's claimed water rights. At least on its face, this argument could have some merit. However, Buena Vista does not provide detailed factual or legal argument on the issue and points only to the Miller-Haggin Agreement as the basis for its claim. Buena Vista also raises this complex claim in the form of an evidentiary motion, which does not lend itself to the detailed evidentiary process and motion practice that would likely be necessary to determine whether estoppel should apply. Furthermore, the AHO may not have jurisdiction to determine with any binding effect the merits of Buena Vista's claim. Therefore, I deny Buena Vista's evidentiary motion, recognizing that the courts may provide an alternate and likely more appropriate venue for Buena Vista to seek a remedy.

Sincerely,

SIGNATURE ON FILE

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