

1 Colin L. Pearce (SBN 137252)
2 **DUANE MORRIS LLP**
3 Spear Tower
4 One Market Plaza, Suite 2200
5 San Francisco, CA 94105-1127
6 Telephone: 415.957.3000
7 Facsimile: 415.957.3001
8 E-mail: CLPearce@DuaneMorris.com

9 Attorneys for Petitioner
10 CITY OF BAKERSFIELD

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13 **STATE WATER RESOURCES CONTROL BOARD**
14 **OF THE STATE OF CALIFORNIA**
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In the Matter of the Petitions to Revise the
Declaration of Fully Appropriated Streams to Allow
the Processing of Applications to Appropriate Water
from the Kern River

ORDER WR-2010-0010

**PETITIONER CITY OF
BAKERSFIELD'S OBJECTION AND
RESPONSE TO PETITION FOR
RECONSIDERATION FILED BY THE
NORTH KERN PARTIES**

Hearing Officer: Arthur Baggett, Jr.

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1 Petitioner City of Bakersfield (“Bakersfield” or “City”) respectfully submits the following
2 Objection and Response to the Petition for Reconsideration (“Petition”) filed on March 18, 2010 by
3 the North Kern parties (North Kern Water Storage District (“North Kern”), Buena Vista Water
4 Storage District (“Buena Vista”), Kern County Water Agency (“KCWA”), City of Shafter
5 (“Shafter”), and Kern Water Bank Authority (“KWBA”)) with regard to Order WR 2010-0010,
6 specifically the February 16, 2010 Order of the State Water Resources Control Board (“SWRCB”)
7 Amending the Declaration of Fully Appropriated Streams to Remove the Designation of the Kern
8 River as Fully Appropriated (“Order”).

9 Bakersfield submits this Objection and Response to point out that the SWRCB should not
10 waste its time considering the frivolous, repetitive and improper Petition. The SWRCB should
11 instead quickly and summarily deny the Petition, based on the North Kern parties’ failure to comply
12 with applicable authority governing petitions for reconsideration, including Water Code Sections
13 1122-1124 and 23 Cal. Code Regs., Section 768. The SWRCB should also reject and deny the
14 Petition, with no further proceedings, hearings or revisions, because the North Kern parties have
15 otherwise failed to demonstrate that there is any basis or need to “reconsider” the Order.

16 In the Petition, the North Kern parties only repeat legal arguments which they already raised
17 in this proceeding, and which arguments the SWRCB has already considered and rejected. The
18 North Kern parties also improperly refer to and attempt to rely on evidence outside the record which
19 was not previously submitted to the SWRCB, in express violation of 23 Cal Code Regs., Section
20 768(c).

21 Bakersfield does not believe it necessary to respond to all of the repetitive arguments in the
22 Petition, in light of the procedural and legal deficiencies with the Petition. Bakersfield still reserves
23 the right to respond to such repetitive arguments in more detail in the future, if necessary.

24 **1. THE SWRCB MUST REJECT THE PROCEDURALLY AND LEGALLY**
25 **IMPROPER PETITION FOR RECONSIDERATION**

26 The California Code of Regulations, at Title 23, Section 768, states that any interested person
27 may petition the SWRCB for reconsideration of a decision or order on any of the following grounds:

28 “(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the

- 1 person was prevented from having a fair hearing;
- 2 (b) The decision or order is not supported by substantial evidence;
- 3 (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have
- 4 been produced;
- 5 (d) Error in law.”

6 The SWRCB may refuse to reconsider a decision or order if the petition for reconsideration
7 fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the
8 regulations. (23 Cal Code Regs., § 770(a)(1).) Alternatively, after review of the record, the
9 SWRCB may deny the petition if it finds that the decision or order in question was appropriate and
10 proper, set aside or modify the decision or order, or take other appropriate action. (23 Cal Code
11 Regs., § 770(a)(2).)

12 **A. The North Kern Parties Have Not Complied With the Legal Requirements for**
13 **Reconsideration of a SWRCB Order**

14 The North Kern parties have failed to demonstrate that the SWRCB committed any error of
15 law, or that the Order was not supported by substantial evidence. The North Kern parties further do
16 not and cannot argue that there have been any irregularities in these proceedings which have
17 prevented them or anyone else from having a fair hearing.

18 The North Kern parties have not even attempted to satisfy the requirements for
19 reconsideration of an order of the SWRCB. The North Kern parties instead devote the entire petition
20 to a repeat and rehash of arguments which they previously raised on numerous occasions with the
21 SWRCB, including during and after the October 26 and 27, 2009 hearing in this matter. The
22 SWRCB has already considered and rejected all of the contentions and arguments in the Petition.
23 There is no need or justification for a further review or consideration of such outdated, invalid
24 arguments.

25 “The SWRCB requires strict adherence to the statute and regulations governing a petition for
26 reconsideration.” (*In the Matter of the Petitions for Reconsideration of the California Farm Bureau*
27 *Federation, et al, Regarding Water Right Fee Regulations*, Order No. WRO 2004-0010, April 6,
28 2004.) There is no justification or support for reconsideration of a SWRCB order based on

1 arguments already considered and rejected by the SWRCB, and after the SWRCB has already
2 considered the same evidence and testimony in a contested hearing.

3 The SWRCB has consistently denied petitions for reconsideration which merely repeat
4 arguments already considered and rejected by the SWRCB. In *In the Matter of the Petition for*
5 *Reconsideration of Decision to not Accept the Protest of Defenders of Wildlife filed against*
6 *Templeton Community Services District Regarding Petition for Change of License 4829*, Order No.
7 WR 2009-0028-EXEC, April 24, 2009, for example, the SWRCB rejected a petition for
8 reconsideration which supplied no new information and repeated claims already raised in a protest,
9 as the petition therefore “fail[ed] to raise substantial issues related to the causes for reconsideration.”
10 (See also *In the Matter of the Petition for Reconsideration of The California Farm Bureau*
11 *Federation, Various County Farm Bureaus, and Individual Petitioners Regarding Annual Water*
12 *Right Fee Determinations*, Order No. WR 2009-0005-EXEC, February 5, 2009, in which the
13 SWRCB rejected a petition for reconsideration because: “Petitioners have not provided any new
14 arguments, new information, or supporting authorities that materially change any of the issues raised
15 in the earlier petitions.”) (And also see *Order Denying Reconsideration in Re Permit 12720*
16 *(Application 5625) and Other Permits of U.S. Bureau of Reclamation for the Federal Central Valley*
17 *Project and of California Department of Water Resources for the State Water Project*, Order No.
18 WR 78-17, October 13, 1978, in which the SWRCB denied several petitions for reconsideration
19 where “the Board was presented with nothing fundamentally new which would cause it to amend or
20 reopen the decision reached on August 16, 1978.”)

21 Rejection of the Petition is particularly appropriate in this case, where the Order followed a
22 contested SWRCB hearing on October 26 and 27, 2009. Prior to and during the hearing the North
23 Kern parties submitted a substantial amount of evidence, testimony and legal authority in support of
24 their position. After the hearing the North Kern parties submitted a lengthy closing brief which
25 contained basically the identical arguments set forth in the present Petition. The North Kern parties
26 also submitted lengthy comments to the Draft Order, which comments are again repeated in the
27 Petition.

28 The SWRCB also received detailed arguments, authority and evidence opposing the North

1 Kern parties' contentions from Bakersfield prior to, during and after the hearing. The SWRCB also
2 received almost 4,000 written comments from the public supporting the Draft Order.

3 Based on the extensive and detailed debate on the status of the Kern River, and the
4 substantial amount of evidence, testimony, arguments and comments received by the SWRCB, it
5 clearly would not be appropriate to subvert the entire hearing and comment process by amending or
6 altering the Order. The North Kern parties cannot get "another bite of the apple" after already
7 having their chance to present all of their evidence and arguments in opposition to the decision to
8 revise the Fully Appropriated Status ("FAS") of the Kern River.

9 **B. The North Kern Parties Cannot Rely on New Evidence and Information Which**
10 **They Elected to Not Produce Previously**

11 Throughout the Petition the North Kern parties improperly refer to alleged evidence outside
12 of the record, and which was not presented to the SWRCB during the October 26 and 27, 2009
13 hearing in this proceeding. The North Kern parties additionally make unfounded and unsupported
14 factual statements, with no citation to the record, or to the evidence previously submitted to the
15 SWRCB. For example, at pages 17 through 19 of the Petition, the North Kern parties refer to a
16 number of new allegations and purported facts regarding "deliveries" of surplus water into the
17 California Aqueduct's intertie with the Kern River channel, without any citation to evidence or the
18 record.

19 The North Kern parties did not present these new facts to the SWRCB during the prior
20 hearing on the Kern River. The North Kern parties offer no justification or explanation for their
21 attempted reliance on alleged new information outside the record. The North Kern parties do not
22 explain why they did not present this alleged evidence and information to the SWRCB during the
23 hearing in this proceeding. They further do not and cannot state that the evidence could not have
24 previously been produced at the prior hearing, in the exercise of reasonable diligence.

25 The North Kern parties have therefore failed to demonstrate that there is any basis for
26 reconsideration of the Order pursuant to Section 768(c), as they fail to demonstrate that there is new
27 evidence or information to support reconsideration which could not have otherwise been produced
28 prior to or during the hearing on the Kern River.

1 In *In the Matter of the Petition for Reconsideration of Semitropic Water Storage District,*
2 *Permit 17538 (Application 25117), Regarding Order Denying Petition for Extension of Time,* Order
3 No. WR 2008-0039-EXEC, October 7, 2008, the SWRCB similarly denied a petition for
4 reconsideration because the regulations “dictate that the State Water Board will only consider new
5 evidence on petition for reconsideration where such evidence, ‘in the exercise of reasonable
6 diligence, could not have been produced’” and the petitioner acknowledged that “reasonable
7 diligence could have timely produced the evidence at issue.”

8 In *In the Matter of Fishery Protection and Water Right Issues of Lagunitas Creek,* Order No.
9 WR 96-1, January 18, 1996, the SWRCB further explained that “SWRCB regulations do not
10 contemplate that a party unsatisfied with a water right order may obtain reconsideration simply by
11 gathering additional data or commissioning additional scientific reports. The SWRCB has discretion
12 whether to grant reconsideration. The circumstances under which the SWRCB is required to hear
13 and consider new evidence are narrow.” In that proceeding the SWRCB further explained, “If the
14 hearing had to be reopened every time a party who is unhappy with a decision or order produced a
15 new study, data, or scientific interpretation, the hearing process could go on indefinitely.”

16 The North Kern parties are in direct violation of this authority and logic. They are clearly
17 unhappy with the outcome of the hearing on the FAS of the Kern River, and they have apparently
18 tried to create and compile new facts and information in an attempt to alter the outcome of the
19 hearing. As indicated, the attempted reliance on alleged new evidence which could have been
20 produced at the hearing does not support reconsideration of the Order. This tactic instead further
21 highlights the North Kern parties’ continuing efforts to impede and obstruct the SWRCB’s
22 consideration of relevant evidence, and the SWRCB’s necessary assumption of jurisdiction over
23 unappropriated waters of the State.

24 Section 769(b) of title 23 of the California Code of Regulations further requires that if
25 reconsideration is requested based on an argument that there is relevant evidence that is not in the
26 record, the petition must include an affidavit or declaration under penalty of perjury which states that
27 new evidence is available that could not have been presented, and the reason it was not presented.
28 The North Kern parties have not submitted any declaration or affidavit along with the Petition, and

1 have failed to otherwise state, under penalty of perjury, that the new evidence and information
2 referred to in the petition could not have been previously presented prior to or during the hearing in
3 this proceeding. (See *In the Matter of the Petition for Reconsideration of Division of Water Rights*
4 *Decision 99-01*, Order No. WR 99-010, November 18, 1999, finding that a petition for
5 reconsideration based on alleged new evidence was “defective” for failure to include such an
6 affidavit.)

7 Similarly, in Order No. WR 78-17, *supra*, at p. 3, the SWRCB explained that “a petition
8 requesting reconsideration on the basis of new evidence must contain a general statement of the
9 nature of the evidence as well as the facts to be proved and must be made on affidavit.” The SWRCB
10 further explained that even a “new” analysis does not justify reconsideration of a SWRCB order
11 where the analysis is based on data available during the hearing-its development cannot be accepted
12 as cause for reconsideration since the information on which it is based could have been obtained at
13 the time of the hearing.

14 **2. IN THE ALTERNATIVE, THE PETITION HAS NO FACTUAL OR LEGAL MERIT**

15 Bakersfield maintains that the SWRCB should summarily reject the North Kern parties’
16 improper and repetitive Petition. Bakersfield therefore does not believe it is necessary to respond to
17 all of the substantive arguments and contentions in the Petition. Bakersfield, moreover, has already
18 responded to such arguments in prior pleadings and at the hearing in this matter. Bakersfield still
19 offers the following comments to highlight the utter lack of merit and legal and factual basis for the
20 Petition. Bakersfield further reserves the right to respond in more detail to the Petition, if necessary,
21 in the future.

22 **A. The Evidentiary Record Establishes That There Are Changed Circumstances**
23 **and Unappropriated Water on the Kern River**

24 The North Kern parties argue, as they did prior to, during and after the hearing on the Kern
25 River, that the “North Kern Decision” and the diversion of surplus water into the California
26 Aqueduct intertie do not constitute “changed circumstances” which justify revision of the FAS of the
27 Kern River. They also argue that there is no need to revise the FAS of the Kern River because all of
28 the forfeited, unappropriated water has historically been diverted and used by various parties,

1 including the North Kern parties.

2 These arguments are flawed and invalid because they are contrary to the actual evidence,
3 testimony and record at the hearing. In making these arguments, the North Kern parties also ignore
4 and fail to address the actual conclusions and findings of the Order, and the evidence cited and relied
5 on by the SWRCB in the Order. The SWRCB, moreover, has already considered and necessarily
6 rejected these contentions.

7 The North Kern parties misstate or ignore the actual authority which applies to the revision
8 of the FAS of a stream system. Contrary to the North Kern parties' contentions, a decision to revise
9 the FAS of a stream system does not reach the merits of any applications for the unappropriated
10 water, the nature of any conditions, or whether the unappropriated water must first be made available
11 for senior water right holders or for environmental purposes. (*In Re Petitions to Revise Declaration*
12 *of Fully Appropriated Streams to Allow Processing Specified Applications to Appropriate Water*
13 *From the Santa Ana River*, Order No. WR 2000-12, September 21, 2000.) There is therefore no
14 need to reconsider or amend the Order to address these issues, as the North Kern parties argue.

15 The Petition is also flawed because the North Kern parties still cannot establish that all of the
16 waters of the Kern River, and specifically water subject to forfeiture as a result of the recent
17 litigation involving the Kern Delta Water District ("Kern Delta"), was used pursuant to actual, valid
18 water rights. The North Kern parties still fail to explain what rights, if any, they hold on the Kern
19 River, what right they have to divert water from the Kern River, and what right, if any, they have to
20 the water forfeited by Kern Delta.

21 The North Kern parties' continued failure to present evidence of any valid water rights, and
22 failure to present any evidence of any rights to the water forfeited by Kern Delta is understandable in
23 light of the North Kern parties' complete failure of proof on those issues in this proceeding. At the
24 hearing, the North Kern parties' witnesses, Martin Milobar and Daniel Easton, provided no specific
25 facts or information with regard to any actual water rights held by North Kern, Buena Vista, KCWA,
26 KWBA or Shafter. The North Kern parties failed to provide evidence that they had any right or
27 ability to divert any of the water forfeited by Kern Delta. Other than North Kern, none of the parties
28 provided any evidence that they had previously ever diverted and used any water accruing to First

1 Point right holders within the First Point service area, or that they had actually ever diverted any
2 water released by or otherwise accruing to Kern Delta’s water rights. (Reporter’s Transcript (“RT”),
3 at 174-175.)

4 It is still apparent that North Kern does not hold any license or permit to divert Kern River
5 water, and does not hold any right, entitlement or ability to divert Kern River water other than
6 pursuant to the 1952 Agreement with Bakersfield’s predecessor, the Kern County Land Company.
7 (Exhibit 2-4.) The 1952 Agreement does not authorize or allow North Kern to divert water accruing
8 to any rights not listed in the agreement, including rights currently or formerly held by Kern Delta,
9 any new, forfeited water, or any “increased flows” attributable to or created by other water rights.
10 (Id.)

11 The trial court in the Kern River litigation rejected all of North Kern’s claims to the forfeited
12 water, including claims for abandonment, prescription, inverse condemnation, and intervening public
13 use. Although North Kern from time to time used a portion of the water accruing to Kern Delta’s
14 rights, the trial court found that North Kern had no permanent, binding right to the water and did not
15 otherwise take steps to acquire rights to such water. Through its appeal of the initial judgment in the
16 forfeiture action, North Kern did not challenge the trial court’s rejection of the causes of action
17 under which it sought rights to the forfeited water, including the claim for “purchase.”

18 The North Kern parties also mischaracterize the actual holding and relevant language from
19 the final “North Kern decision.” They seize on dicta language, in which the court only mentioned
20 the possibility that the SWRCB might find that there was no surplus water on the Kern River as a
21 result of forfeiture. That brief, passing comment is not determinative or binding, and certainly does
22 not establish that the forfeited water is actually subject to use by valid, existing rights.

23 The North Kern parties also overlook and fail to mention the actual, binding holding of the
24 court in the Kern River litigation, in which it acknowledged that it could not and would not make
25 any rulings on the disposition of the forfeited water. Instead, the court ruled that pursuant to Water
26 Code Section 1241, only the SWRCB could make a determination as to the appropriate disposition
27 of the forfeited water. (*North Kern Water Storage District v. Kern Delta Water District* (2007) 147
28 Cal.App.4th 555, 566, n. 5; 583-584.) The North Kern parties also selectively overlook the

1 statement by the court that the forfeited water did not belong to or pass to other entities claiming or
2 using the water, including North Kern, as the court instead stated: “the trial court was correct that the
3 forfeited rights are not awarded to North Kern.” (*Id.*, at 584.)

4 As indicated above, the forfeiture judgment by itself constitutes changed circumstances
5 which requires revision of the FAS of the Kern River. The City additionally introduced evidence
6 and testimony that the forfeiture judgment had materially changed the operation and status of the
7 river, which further constitutes changed circumstances.

8 The North Kern parties, in fact, recognized and admitted that the forfeiture judgment created
9 changed circumstances on the river. Mr. Easton, in his testimony and calculations, used the term
10 “forfeiture release” to describe the water forfeited by Kern Delta. (Joint Ex. 46, p. 10, ¶ 25 (d).)
11 That term referred to the quantity of water accruing to the Kern Delta rights above the “preserved
12 entitlement,” but below the base entitlement for the rights, or the water otherwise available to the
13 Kern Delta rights in months when there is forfeiture. (RT, at 232-233.)

14 Mr. Easton conceded on cross examination that the term “forfeiture release” is not found in
15 the First Point flow and diversion records, which go back almost 115 years. (RT, at 235.) Mr.
16 Easton created and used additional terms, such as “deficit,” “other rights,” restricted rights,” and
17 “undistributed release,” to describe and reflect the forfeiture judgment. (RT, at 235.) These are all
18 new terms, not found in the flow and diversion records, which the North Kern parties believed were
19 necessary to describe the impact of the forfeiture judgment on the Kern River. (RT, at 235-236.)

20 Mr. Easton also conceded that the “prohibition on diversion” which formed the basis for the
21 “forfeiture releases” was not in place prior to 2007, the date of the final forfeiture judgment. (RT, at
22 238.) Mr. Easton further admitted that there was a “change in historical operations” as a result of the
23 forfeiture judgment based on “decreased use” of Kern River water by the Kern Delta rights
24 following the finding of forfeiture. (RT, at 234.) On cross examination, Mr. Easton conceded that
25 “forfeiture release” water was different from release water, as unlike release water, which would
26 vary depending on the demand of the right holder, the “forfeited water would always be released
27 once the rights reached their diversions “caps.” (RT, at 242-243.) Mr. Easton further admitted that
28 there was a difference between historical releases and the forfeited water because with the forfeited

1 water, “now it’s a forced release; whereas before, it was – they had [other] reasons for releasing it.”
2 (RT, at 243.)

3 As a result of the forfeiture, new “caps” or diversion limits have been placed on the separate
4 canal rights held by Kern Delta, primarily the Kern Island right but also the Buena Vista, Stine, and
5 Farmers rights, which caps or limits were not in place previously. (RT at 59.) That is a “huge
6 change” because there is now a binding judgment that there is surplus, excess water above Kern
7 Delta’s demand and rights, which it can never again divert and use. (RT at 60.)

8 **B. The Order Does Not Improperly Defer Consideration of the Quantity of**
9 **Unappropriated Water Available in the Kern River**

10 In the Petition, the North Kern parties again complain, as they did in their comments to the
11 Draft Order, that the Order improperly “defers” a determination as to the actual quantity of
12 unappropriated water on the river. This argument is directly contrary to well established authority,
13 and the SWRCB has already considered and rejected the North Kern parties’ contentions on this
14 issue, and should again reject the invalid, repetitive contention.

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

19 The SWRCB has stated that in considering a FAS petition:

20 “All questions regarding the specific amount of water available for appropriation under the
21 applications, the season of water availability, approval or denial of the applications, and the
22 conditions to be included in any permit(s) that may be issued on the applications will be resolved in
23 further proceedings on each application pursuant to applicable provisions of the Water Code.”
24 (Order No. WR 2000-12, *supra*, at p. 7.) Consideration by the SWRCB of claims to the forfeited
25 water, either through alleged prior, existing rights or through new applications to appropriate, has to
26 wait until after the SWRCB revises the FAS of a stream system. (*Id.*)

27 In the next phase of this proceeding the North Kern parties and other applicants will have the
28 opportunity to establish what rights, if any, they hold to divert water from the Kern River, and how

1 those alleged rights impact the quantity of water available for appropriation. “The quantity of water
2 surplus to the needs of riparian users and the claims of the holders of prior rights is available for
3 appropriation.” (*In the Matter of Application 27253*, Order No. WR 86-1, January 8, 1986, citing
4 Decision 1607.) In *In the Matter of Application 29047 of John and Mayla Clark*, Decision No.
5 1628, June 3, 1992, the SWRCB explained, in considering an application to appropriate, that “how
6 much unclaimed water exists” in a stream depends in large part on the existence of prior water
7 rights, “assuming that [protestants] have valid senior appropriative or riparian rights.”

8 It is therefore proper for the SWRCB to consider the validity and extent of any claimed rights
9 in considering applications to appropriate, and in determining the quantity of water available for
10 appropriation. In *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 96, the
11 California Supreme Court stated that the predecessor to the SWRCB, in determining whether water
12 was subject to appropriation, “was authorized to investigate the water source to which a claim was
13 made, to take testimony with regard to the rights existing in it, and ‘to ascertain whether or not such
14 water...is appropriated under the laws of this state.’” (Quoting from *Tulare Water Co. v. State*
15 *Water Comm.* (1921) 187 Cal. 533.)

16 **C. The Evidence Supports the SWRCB’s Finding That Water Diverted Into the**
17 **Intertie Is Unappropriated Water**

18 In the Petition, the North Kern parties repeat their prior attack on the SWRCB’s finding that
19 water diverted into the Kern River-California Aqueduct intertie is unappropriated water. The North
20 Kern parties once again ignore the actual evidence considered by the SWRCB during the hearing,
21 including the testimony and admissions of their own witnesses.

22 The North Kern parties instead improperly refer to matters outside the record, with little or
23 no citation to any actual evidence or testimony. As indicated above, the SWRCB cannot consider
24 such new matters in a petition for reconsideration absent an affidavit explaining what new evidence
25 the North Kern parties intend to rely on, and why such evidence could not have previously been
26 presented at the hearing.

27 The alleged new facts referred to by the North Kern parties further do not contradict or
28 challenge the findings in the Order, and the actual evidence and testimony considered by the

1 SWRCB on this issue. The North Kern parties, for example, ignore the fact that their own witness,
2 Mr. Easton, confirmed repeatedly at the hearing that Kern River water diverted into the intertie was
3 in excess of and outside of any rights on the river, and therefore constituted surplus, unappropriated
4 water. As the SWRCB explained in the Order:

5 “Mr. Easton testified that water diverted into the Intertie is in excess of traditionally held and
6 exercised rights and claims of right to Kern River water, and that whenever water has been released
7 into the Intertie in the past, all Kern River water right claims had already been satisfied. (R.T. p.
8 264.) This water is, by definition, unappropriated water. (Order, p. 5.)

9 The North Kern parties’ attempts to explain and downplay Mr. Easton’s testimony is not
10 supported by the actual record, and is simply not credible. Under the North Kern parties’ logic, any
11 party that loses or obtains an adverse result in a SWRCB hearing could withdraw or disavow the
12 testimony of their witnesses, and try to change an adverse result by submitting new and different
13 testimony. That clearly is not proper under California law, and in SWRCB proceedings.

14 The North Kern parties’ attempts to reconfigure and alter Mr. Easton’s testimony on the
15 water diverted into the intertie are unconvincing, and contrary to the actual evidence and testimony.
16 Contrary to North Kern’s contention, Mr. Easton did not actually testify that any Kern River water
17 right holders “permitted” water accruing to their rights to flow into the intertie. Instead, in response
18 to a direct question from SWRCB staff, Mr. Easton confirmed that when water flowed into the
19 intertie, all existing entitlements on the river had been satisfied. (RT, p. 264:18 to 264:23.) There is
20 additionally no evidence to support the North Kern parties’ contention, at page 16 of the Petition,
21 that all of the water flowing into the intertie “falls within the recognized, pre-1914 water rights of
22 one or more of the First Point, Second Point or Lower-River diverters. That statement is highly
23 suspect because Bakersfield was the only entity that established that it holds actual pre-1914
24 appropriative rights on the Kern River.

25 There is additionally no evidence, and no evidence was cited, to support the contention that
26 “Kern River diverters were afforded the option of permitting some high flow Kern River water to
27 enter the California Aqueduct rather than storing the same in Buena Vista or Tulare Lake.”
28 (Petition, p. 17.) There is also no evidence that “the Kern River interests” (a term that is not

1 defined) exercise “discretion and judgment,” through the “Kern River Watermaster,” to decide how
2 much water to “offer” to the intertie. (Petition, p. 18.) Even if these allegations were true, they do
3 not change the fact that the evidence established that any water flowing into the intertie is in excess
4 of any and all rights on the river, and therefore, by definition, is unappropriated water. (Order, p. 5).

5 Bakersfield also introduced uncontroverted evidence and testimony which established that in
6 high flow years, the amount of water in the Kern River far exceeded the entitlement and demand at
7 First Point and Second Point, and substantial quantities of water flowed into the intertie. (Ex. 2-1, p.
8 15, ¶ 69) (See also Ex. 1-1, p. 13, ¶¶ 68, 69.)

9 Bakersfield’s Exhibit 2-18 demonstrated that the intertie has taken excess Kern River six
10 times, in seven different years (one “incident” started in 1982 and flowed into 1983). Exhibit 2-18
11 indicates that diversions into the intertie have ranged from as little as 1,793 af to as much as 664,036
12 af in one particularly wet year. (Ex. 2-1, p. 15, ¶ 70.)

13 The North Kern parties also cannot legitimately complain that the water diverted into the
14 intertie is too infrequent or unreliable to be classified as unappropriated water. California courts,
15 and the SWRCB, have previously found that such “infrequent” or “excess” flows can and should be
16 classified as surplus water, subject to appropriation. (See *Allen v. California Water & Tel. Co* (1946)
17 29 Cal.2d 466, 486, finding that high, surplus flows could be appropriated even if “subject to
18 interruption or cessation.”)

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

26 **D. The Intertie Flows Are Contemplated and Accounted For In the Applications to**
27 **Appropriate and Prior Notices of the Hearing**

28 The North Kern parties make the ludicrous argument that they were not aware of or on notice

1 that the SWRCB would consider, in deciding whether to revise the FAS of the Kern River, whether
2 water diverted into the intertie was unappropriated. The North Kern parties conveniently overlook
3 the fact that the SWRCB made it expressly clear at the outset of this proceeding that it would
4 consider whether water diverted into the intertie was unappropriated.

5 The October 10, 2008 memorandum of the SWRCB which supported the decision to hold a
6 hearing on the FAS of the Kern River, in fact, explained that “Diversion of water to the California
7 Aqueduct via the intertie on numerous occasions since its construction in 1977 confirms that there
8 has been a change in circumstances” regarding the status of the Kern River, and further made it clear
9 that issues regarding the intertie would be considered and addressed at a later hearing involving the
10 Kern River. As the North Kern parties acknowledge, all parties, including North Kern, submitted
11 evidence and testimony regarding this issue at the October 26 and 27, 2009 hearing on the Kern
12 River.

13 The North Kern parties also claim that the Order is somehow in error because none of the
14 applications to appropriate filed on the Kern River seek to appropriate water flowing into the intertie.
15 That argument is simply not correct. All of the applications sought to divert and use significant
16 quantities of unappropriated water, without limitation or distinction. Bakersfield’s application, for
17 example, seeks to appropriate up to 90,000 af of unappropriated Kern River water. Bakersfield did
18 not limit its request to unappropriated water created by the forfeiture of a portion of the Kern Delta
19 rights. The excess flows of water into the intertie instead would and will necessarily be part of the
20 unappropriated water considered by the SWRCB in its processing of the applications to appropriate.

21 **3. CONCLUSION**

22 It is readily apparent that the North Kern parties have improperly diverted and used
23 substantial quantities of unappropriated Kern River water for years, without any valid right, permit
24 or claim. Throughout this process the North Kern parties have strenuously, vigorously and at times
25 angrily fought to impede the SWRCB’s statutory obligation to assert jurisdiction over the waters of
26 the State, and in particular the unappropriated, unregulated waters of the Kern River. Of course, the
27 North Kern parties’ increasingly shrill and strident efforts to challenge the SWRCB’s jurisdiction is
28 motivated entirely by their desire to prevent the SWRCB or anyone else from interfering with their

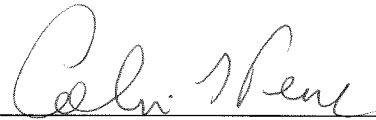
1 unauthorized, improper diversion of unappropriated Kern River water.

2 There is simply no reason, and certainly no legal or factual basis, for the SWRCB to alter or
3 fail to implement the Order revising the FAS of the Kern River. The North Kern parties' Petition is
4 contrary to relevant authority with regard to petitions for reconsideration, as well as the authority,
5 evidence and testimony relevant to the revision of the FAS of the Kern River. The Petition is also
6 contrary to relevant policies of the state, including the policies that all water of the state should be
7 put to multiple reasonable and beneficial uses, for the benefit of the public, including uses which
8 benefit the environment and the "public trust."

9 The Petition further is contrary to the will of the people who use and are affected by the Kern
10 River, for whose benefit the river must be protected and preserved. Almost 4,000 citizens submitted
11 comments to the SWRCB in support of the Order and the SWRCB's preservation and protection of
12 the Kern River. In addition to following the law applicable to fully appropriated stream systems and
13 the unappropriated waters of the state, the SWRCB cannot overlook or ignore such strong public
14 sentiment, and must therefore deny the Petition.

15
16 Dated: April 13, 2010

DUANE MORRIS LLP

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18 

19 Colin L. Pearce

20 Attorneys for Petitioner City of Bakersfield
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28

1 **PROOF OF SERVICE**

2 *In the Matter of State Water Resources Control Board Hearing on Petitions to Revise the*
3 *Declaration of Fully Appropriated Stream System of the Kern River in Kern and Tulare Counties*

4 I am a citizen of the United States, over the age of 18 years, and not a party to interested in
5 the cause. I am an employee of Duane Morris LLP and my business address is One Market, Spear
6 Tower, Suite 2200, San Francisco, California 94105-1127. I am readily familiar with this firm’s
practices for collecting and processing correspondence for mailing with the United States Postal
Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the
date stated below, I served the following documents:

7 **PETITIONER CITY OF BAKERSFIELD’S OBJECTION AND RESPONSE TO PETITION**
8 **FOR RECONSIDERATION FILED BY THE NORTH KERN PARTIES**

9 — BY U.S. MAIL: I enclosed the documents in a sealed envelope or package
10 addressed to the person(s) set forth below, and placed the envelope for collection and
11 mailing following our ordinary business practices, which are that on the same day
12 correspondence is placed for collection and mailing, it is deposited in the ordinary
13 course of business with the United States Postal Service in San Francisco, California,
in a sealed envelope with postage fully prepaid. OR
 I enclosed the documents in a sealed envelope or package addressed to the
person(s) set forth below, and deposited the sealed envelope with the United States
Postal Service, with the postage fully prepaid.

14 X BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties
15 to accept service by e-mail or electronic transmission, I caused the documents to be
16 sent to the person(s) at the e-mail addresses listed below. I did not receive, within a
reasonable time after the transmission, any electronic message or other indication that
the transmission was unsuccessful.

17 **KERN RIVER FAS HEARING SERVICE LIST**
18 **(LIST OF PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS**
19 **AND OTHER DOCUMENTS)**

20 KERN WATER BANK AUTHORITY
c/o Kevin M. O’Brien
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
21 Email: kobrien@downeybrand.com
22 jschofield@downeybrand.com
23 tkuntz@downeybrand.com

KERN COUNTY WATER AGENCY
c/o Nicholas Jacobs
Somach, Simon & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
24 Email: njacobs@somachlaw.com

25 NORTH KERN WATER STORAGE
DISTRICT
c/o Scott K. Kuney, Esq.
Young Wooldridge LLP
1800 30th Street, Fourth Floor
26 Bakersfield, CA 93301
27 Email: skuney@youngwooldridge.com

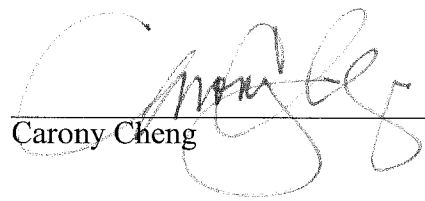
CITY OF SHAFTER
c/o Jason M. Ackerman, Esq.
Best, Best & Krieger, LLP
3750 University Avenue, Suite 400
Riverside, CA 92501
28 Email: jason.ackerman@bbklaw.com

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BUENA VISTA WATER STORAGE
DISTRICT
c/o Gene R. McMurtrey
McMurtrey, Hartsock & Worth
2001 22nd Street, Suite 100
Bakersfield CA 93301-3831
Email: gene@mcmurtreyhartsock.com

CENTER FOR BIOLOGICAL
DIVERSITY
c/o Adam Keats
351 California Street, Suite 600
San Francisco, CA 94104
Email: akeats@biologicaldiversity.org

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 13, 2010, San Francisco, California.


Carony Cheng

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