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5 [JOINTLY FILED ON BEHALF OF THE PARTIES
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7
8 BEFORE THE
9 STATE WATER RESOURCES CONTROL BOARD

10
11 **IN THE MATTER OF:**

12 **Petitions to Revise Declaration of Fully**
13 **Appropriated Stream System of the**
14 **Kern River in Kern and Tulare**
Counties, WR 89-25, dated November
16, 1989

JOINT CLOSING BRIEF OF NORTH
KERN WATER STORAGE DISTRICT,
BUENA VISTA WATER STORAGE
DISTRICT, KERN WATER BANK
AUTHORITY AND CITY OF SHAFTER

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15
16
17
18 **I. INTRODUCTION**

19 Forty-five years ago, the State Water Resources Control Board (“State Board”) issued
20 Decision D 1196 determining the Kern River stream system to be fully appropriated. This
21 determination was based on an extensive analysis by State Board staff of a seventy-year
22 hydrologic record and a comprehensive review of the water rights, decrees and contracts that
23 collectively constitute the “Law of the River.” The fully appropriated status of the Kern River
24 was reaffirmed by the State Board in a series of decisions following Decision D 1196.

25 The present proceeding arises principally as a result of the forfeiture determination of the
26 Fifth District Court of Appeal in *North Kern Water Storage District v. Kern Delta Water District*
27 (2007) 147 Cal.App.4th 555 (“*North Kern*”). Following entry of judgment in *North Kern*, five
28 petitions to modify the fully appropriated stream declaration for the Kern River (“FAS

1 Declaration”) and associated water right applications were filed with the State Board.¹

2 North Kern Water Storage District, Buena Vista Water Storage District, Kern County
3 Water Agency, Kern Water Bank Authority and City of Shafter (collectively “Joint Parties”) filed
4 petitions and associated water right applications pending completion of a comprehensive analysis
5 of the effect of the *North Kern* judgment on Kern River water rights. The Joint Parties thereafter
6 retained MBK Engineers to conduct such an analysis and the results were presented at the October
7 26-27, 2009 hearing. The MBK analysis demonstrates that the FAS Declaration should not be
8 revised because, as anticipated in the *North Kern* litigation, the Kern River is so oversubscribed
9 that any water released to the Kern River due to forfeiture will simply be used in full by junior
10 right holders under their existing entitlements.

11 Petitioner City of Bakersfield (“Bakersfield”) contends that *North Kern* created surplus
12 water that is now available for appropriation. Bakersfield strives mightily to assert that the water
13 forfeited under *North Kern* is somehow “new” water to the Kern River system, immune from the
14 call of prior right holders. But Bakersfield cites no authority in support of this novel legal theory
15 and has presented no competent evidence in support of its petition.

16 It has been suggested that the FAS Declaration should be modified so that diversions of
17 floodwater into the California Aqueduct via the Kern River-California Aqueduct Intertie
18 (“Intertie”) will be subject to the State Board’s water right permitting authority. The Joint Parties
19 have two responses to this suggestion. First, Intertie flows are extremely erratic and
20 unpredictable. Rather than modifying the FAS Declaration, the State Board should utilize existing
21 procedures for the issuance of temporary permits to address any future diversions of water via the
22 Intertie. Second, even if the State Board determines that it is necessary to revise the FAS
23 Declaration in order to allow appropriation of floodwaters discharged into the Intertie, the
24 conditions under which the State Board will accept water right applications should be narrow and
25 explicit. Specifying narrow procedures for processing floodwater applications is important

26
27 ¹ North Kern and Shafter (Application 31673), Bakersfield (Application 31674), Buena Vista (31675), Water
28 Bank (31676) and the Agency (Application 31677). (JE71-74; Bakersfield Petition; Bakersfield Application 31674.)
Processing of the applications was held in abeyance pending the State Board’s decision on the FAS petitions.

1 because every stream system on the FAS Declaration is subject to occasional flood flows. A
2 broad opening of the FAS Declaration for the Kern River would undermine the policies
3 underlying the fully appropriated stream statutes and would significantly weaken the State
4 Board's ability to maintain the fully appropriated status of any stream system.

5 II. SUMMARY OF RECORD

6 A. Existing Kern River Water Right Entitlements

7 1. Miller-Haggin Agreement

8 Diversion and use of Kern River water began in the late 1860s and, by the 1870s,
9 substantially all of the flow was applied to various beneficial uses. (B1-1, ¶13.) Following the
10 *Lux v. Haggin* litigation a permanent settlement (the Miller-Haggin Agreement of 1888) was
11 reached between the upstream appropriative interests (First Point diverters) and downstream
12 riparian interests (Second Point diverters). (JE7, p. 7; 8, pp. 12-13; 14, pp. 6-8; 69, ¶8.) Each day,
13 the Miller-Haggin Agreement divides all Kern River flows between the First Point and Second
14 Point diverters. (JE14, p. 10-11 ¶3; JE 20, pp. 1-2; B1-1, ¶19.)²

15 2. First Point Diverters

16 The Shaw Decree reaffirmed and decreed the rights of the First Point diverters under the
17 Miller-Haggin Agreement, determining the date of priority and maximum rate of diversion for
18 specified water rights as of August 6, 1900. (JE15, pp. 10-11 ¶14, 19-20 ¶21; B 1-1, ¶20.) The
19 Shaw Decree's order of priority must be followed when there is insufficient water to satisfy all
20 rights. (JE15, p. 10 ¶14.) Since 1900 the First Point diverters have maintained a daily, monthly
21 and annual record of diversions for essentially each separate right in the Shaw Decree, in order of
22 priority. (B1-1, ¶21.) In rare, exceptionally high flow events, the First Point entitlement under the
23

24 ² More specifically, the Agreement provides that all Kern River flow is required to be measured at the First Point
25 of Measurement. (JE14, p. 8-9.) It further provides that, during the months of March through August (the "Miller-
26 Haggin season") all flows above 300 cubic feet per second are divided each day 1/3 to the Second Point diverters
27 (without losses) and 2/3 to the First Point diverters. (JE7, p. 7; JE14, p. 10.) During the months of September
28 through February (the "Non-Miller-Haggin season") all the flow is allotted each day to the First Point diverters. (JE7,
p. 7; JE 14, p. 10-11.) The 1955 Amendment allocates Kern River entitlement to the Second Point diverters during
the Non-Miller-Haggin season whenever the computed natural flow at First Point of Measurement exceeds 1,500 cfs.
(JE7, p. 8; 17, pp. 6-7.) Any water allocated to First Point diverters which is allowed to reach the Second Point of
Measurement becomes the property of Second Point diverters. (JE14, p. 11.)

1 Miller-Haggin Agreement exceeds the combined 3,162.5 cfs rate of flow in the diversion schedule
2 and the remainder is prorated among First Point diverters. (JE14, pp. 10-11 ¶3; 15, pp. 19-20 ¶21;
3 RT 104:1-11, 152:5-19.) Any additional First Point entitlement not diverted is released to Second
4 Point and Lower-River diverters for their use in accordance with the Miller-Haggin Agreement
5 and the 1962 Agreement. (JE14, p. 11 ¶3; 18, p. 7 ¶5; RT 183:10-25 to 184:1-17.) The current
6 First Point diverters are North Kern, Kern Delta Water District and Bakersfield. (JE29; 32; 41 pp.
7 34, 51, 83.)

8 As a First Point diverter, North Kern has the perpetual first priority³ right to divert and use
9 all the water accruing to certain pre-1914 appropriative water rights identified in the 1952
10 Agreement. (B2-4, p. 2-4; JE 32.) The 1952 Agreement sets forth the maximum quantity for
11 diversion for each month of the year providing a maximum monthly diversion. (B2-4, p. 4.)
12 North Kern is entitled to divert and use the total maximum yield accruing to these pre-1914
13 appropriative water rights up to 500,000 acre-feet in a single year. (B2-4, p. 4.) Every daily,
14 monthly and annual Kern River flow and diversion record shows the actual diversion and use of
15 Kern River water accruing (both gross entitlement and distributed releases) to the pre-1914
16 appropriative rights identified in the 1952 Agreement. (JE32; 33-39; 41 p. 83; 75-78; B1-7, 1-8,
17 1-9; 2-5 pp. 95; 2-6, p. 93; 2-7, p. 89; RT 125:6-15.)

18 3. Second Point Diverters

19 Second Point entitlement is divided and apportioned each day according to the Miller-
20 Haggin Agreement together with any First Point entitlement which reaches the Second Point of
21 Measurement. (JE69, ¶12; 14, pp. 10-11; RT 256:14-25.) The current Second Point diverter is
22 Buena Vista. (JE69, ¶22.)

23
24 ³ Bakersfield's legal arguments as to the nature and extent of North Kern rights to divert and use the pre-1914
25 rights identified in the 1952 Agreement are not germane to this proceeding as it is not the province of the State Board
26 to determine the existence or content of a contract or to directly adjudicate or otherwise resolve disputes over the
27 validity, nature or extent of pre-1914 water rights. (In the Matter of Implementation of Water Quality Objectives for
28 the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, Order No. WR 2000-2, March 15, 1999 at p. 20,
[holding "existence and content" of a contract is "outside the control of the SWRCB, and the SWRCB is not in
position to amend its terms or to settle disputes between the water right holder and the customer."]; *Natural
Resources Defense Council v. Kempthorne* (2009) 621 F.Supp.2d 954, 963, citing SWRCB, *Information Pertaining
to Water Rights in California – 1990* at p. 8.)

1 agreements⁴ that apportioned the entire natural flow of the Kern River among the First Point,
2 Second Point and Lower-River diverters. (JE7, pp. 6-10.) Specifically, the entire natural flow for
3 a 70-year period (1894-1963) was considered. (JE7 p. 4, Table 2) The analysis also reviewed the
4 beneficial use within the First Point, Second Point and Lower-River areas for the period. (JE7,
5 pp. 8-11, Table 4.) The conclusion was that the “entire flow the Kern River has been beneficially
6 used since 1894.” (JE7, p. 10.)

7 More particularly, Decision D 1196 found that all Kern River natural flow throughout the
8 year has been diverted for irrigation within the First Point, Second Point and Lower-River areas
9 by ditches and canals since prior to 1894. (JE7, p. 6; 8, p. 41; 21, p. 4.) Additionally, Kern River
10 water is spread for percolation into the groundwater basin for storage and later use, which
11 provides cyclic storage for extended periods of drought. (JE7, p. 6; 8, p. 42; 21, pp. 4-5.)
12 Notably, the Staff Engineer concluded that there is a shortage of water within the First Point,
13 Second Point and Lower-River areas based on the fact that groundwater levels within those areas
14 were constantly declining, and that various agencies which supply water to the area, had entered
15 into or were negotiating agreements to purchase additional water.⁵ (JE7, pp. 10-11, Table 4; 8,
16 pp. 42-44.) Ultimately, the State Board determined that a “comparison of the quantities of water
17 used in the First Point, Second Point and Lower-River Service Areas for the period 1894-1963,
18 with the quantities of water flowing past the First Point of Measurement, adjusted to eliminate the
19 effect of Isabella Reservoir, shows that that there is no water surplus.” (JE21, p. 5.)

20 C. The Declaration & Subsequent Orders of the State Board

21 In the 1989 FAS hearings the State Board concluded that Decision D 1196 contains
22 “ample substantial evidence to support the finding that no water remains available for
23 appropriation.” (JE22, p. 14.) The State Board has confirmed listing the Kern River on three (3)

24
25 ⁴ Specifically, the State Board based its decision (JE21, p. 3) on the testimony provided at hearing (JE8) and the
26 Miller-Haggin Agreement (JE13, 14), the 1930 and 1955 Amendments to the Miller-Haggin Agreement (JE16; 17),
27 the 1962 Water Rights and Storage Agreement (JE18), the Agreement for Establishment and Maintenance of
28 Minimum Recreation Pool (JE19), the Shaw Decree (JE15), along with the report of the Kern River Watermaster
(JE20).

⁵ These supplemental imported supplies obtained by First Point, Second Point and Lower-River diverters have
been severely restricted for a variety of reasons. (JE69, ¶29.)

1 subsequent occasions. (JE23-25.)

2 Significantly, in 1994 the State Board denied a petition to modify the Declaration
3 predicated on abnormally high Kern River flows. (JE24.) In that matter the petitioner submitted
4 new flow records including those from 1983 – the second highest flood year recorded on the Kern
5 River system – which included discharges of floodwaters into the Intertie. (JE24, p. 7; 46, ¶20;
6 48; 51; 54; 57; 61; 64; B2-18.) In its 1994 decision, the State Board noted that the new flows
7 (including 1983) were far less than the maximum flows during the period of 1894 through 1963
8 referenced in Decision D 1196. (JE24, p. 9) The State Board dismissed the petition concluding
9 that there had not been a showing that hydrologic conditions in the Kern River have changed or
10 that other circumstances existed which justified the continued processing of the application.
11 (JE24, pp. 9-10.)⁶

12 D. *North Kern* Litigation

13 The *North Kern* judgment provides that four (4) of Kern Delta Water District’s pre-1914
14 appropriative rights were partially forfeited because of five years of nonuse during the period of
15 1972-1976. (*North Kern, supra*, at pp. 563-64, 585.) Each of these pre-1914 appropriations was
16 listed in the 1900 Shaw Decree. (JE15, p. 10.) According to the *North Kern* judgment, these four
17 (4) appropriative rights are now limited to the Preserved Entitlements set forth for six (6) specified
18 months of the year. (JE4.) The limitations on these water rights, set forth in the *North Kern*
19 judgment, results in water being released to the Kern River once a Preserved Entitlement limit is
20 reached. (*North Kern, supra*, at p. 583.)

21 **III. THE NORTH KERN JUDGMENT PROVIDES NO BASIS TO REVISE THE**
22 **DECLARATION.**

23 A. The Baseline Condition of the Kern River Stream System Is “Deficit.”

24 Mr. Easton determined the baseline hydrologic conditions on the Kern River (without
25 consideration of the *North Kern* judgment) after analyzing the historical flow and diversion
26 records for the forfeiture months (January, August-December) for the years 1964-2008. (JE46,

27
28 ⁶ In the Decision D 1196, the Kern River Watermaster concluded that as of 1963 water deficiencies were normal for the Kern River. (JE46, ¶9; 20, p. 3, Plate 3; 8, pp. 39-41.)

1 ¶28.) This forty-five (45) year period was selected because it follows the hydrologic period
2 reviewed in D 1196 (1894-1963). (JE46, ¶28.) Just as in D 1196 , Mr. Easton concluded that “the
3 records of Kern River hydrology [JE46, ¶¶21; 42-45] indicated that in nearly two-thirds of the
4 years, the total annual natural flow at the First Point of Measurement is below average and there
5 exists an overall water deficiency in meeting existing water rights and water demands on the Kern
6 River stream system.” (JE46, ¶21; RT 210:5-13.)

7 Furthermore, based on recent records (1964-2008) Mr. Easton determined⁷ the entire
8 “computed” natural flow was diverted and used by First Point, Second Point, and Lower-River
9 diverters with only 8 exceptions. Those exceptions related principally to 1983 flood control
10 operations. (JE46, ¶20; 79.) For example, for the month of December the Kern River records
11 establish that the entire “computed” natural flow is fully used in each and every year except 1982
12 and 1983. (JE63.) Mr. Easton concluded that the historical state of the Kern River stream system
13 was “deficit” during 262 months out of the 270 months that comprise the 1964-2008 period.
14 (JE46, ¶28; RT 199:14-18, 210:22-25 to 211:1-4.) The “deficit” was defined as the “state when
15 the First Point, Second Point and Lower-River diverters’ cumulative diversion and storage
16 capacity exceeds the computed natural flow of the Kern River and the diverters would divert and
17 store the entire computed natural flow for beneficial use.” (JE46, ¶25(c).)

18 Only during flood control operations was there evidence of an “Undistributed Release”⁸
19 (e.g., 10,340 acre-feet [1982] and 31,061 acre-feet [1983]) of floodwaters being discharged to the
20 Intertie in December. (JE46, ¶25(i); 63.) Likewise, the detailed analysis confirms that the entire
21 natural flow is used in every other forfeiture month for the entire 45-year period with the
22 exception of 1983 flood control operations. (JE48, 51, 54, 57, and 60.) It is from this baseline
23 condition that the effects of the *North Kern* judgment can be properly analyzed. (JE46, ¶28.)

24 ///

25 ///

26 ⁷ Summarized in Table 1 (JE48, 51, 54, 57, 60, 63.)

27 ⁸ An “Undistributed Release” is defined as “water that is not diverted and used by any First Point, Second Point,
28 Lower-River diverters. By definition, an “Undistributed Release” is water discharged into the Intertie during flood
control operations.” (JE46, ¶25 (i).)

1 B. The *North Kern* Judgment Does Not Change “Deficit” Conditions on Kern
2 River Stream System And Does Not Create “New Water” That Is Available
3 for Appropriation by New Users.

4 In Mr. Easton’s Table 2 analysis he determined the actual “computed” natural flow, gross
5 entitlement and actual use of each Restricted Right (the Kern Island 1st, Buena Vista 1st, Stine
6 and Farmers rights). (JE33, 49, 52, 55, 58, 61, 64.) Applying the Preserved Entitlement monthly
7 limits from the *North Kern* judgment, without any other change to the historic administration of
8 the Kern River, Mr. Easton determined the projected use by each Restricted Right, the forfeiture
9 release and finally the decreased use by each of the Restricted Rights. (JE33, 49, 52, 55, 58, 61,
10 64; RT 205:13-22.) Importantly, Mr. Easton concluded that the change from historical baseline
11 conditions resulting from the *North Kern* judgment was not the total “forfeiture release” (the
12 difference between a Restricted Rights Gross Entitlement and the new Preserved Entitlement
13 determined in *North Kern*). (RT:200:23-25 to 201:1-10, 202:3-6, 9-13, 234:7-9, 236:23-25 to
14 237:1-6.) Instead, he concluded that it was the decreased use of Kern River water by the
15 Restricted Rights which resulted in increased releases to junior rights holders, that was the actual
16 “change” from the baseline hydrologic condition. (*Id.*) This conclusion was based on the fact that
17 the Restricted Rights were historically releasing water wholly independent of the *North Kern*
18 judgment. (JE33-39.) Using this analysis, Mr. Easton determined, for each forfeiture month for
19 each year (1964-2008) the total increase in release available to other rights due to the *North Kern*
20 judgment. (JE49, 52, 55, 58, 61, 64.) As explained by Mr. Easton, there were a number of years
21 with no increase in releases. (JE67.) The single largest increase in release was 10,081 acre-feet in
22 December 2001. (JE64.) A summary of the Table 2 analysis is presented in Joint Exhibit 67,
23 columns 2-5. (JE46, ¶29.)

24 Significantly, Mr. Easton’s Table 2 analysis included two conservative assumptions
25 regarding the application of the *North Kern* judgment regarding the future use by the Restricted
26 Rights. (JE46, ¶29(a) and (b).) Specifically, he assumed that the Restricted Rights would divert
27 the lesser of the historical actual use or the Preserved Entitlement even though they may be
28 entitled to divert up to the Preserved Entitlement. (JE46, ¶29 (a) and (b).) These conservative
 assumptions reinforce the validity of Mr. Easton’s conclusion that Kern River flows are fully

1 diverted and used. (JE46, ¶29 (a) and (b); RT 244:19-25 to 245:1-4.)

2 In Mr. Easton's Table 3 analysis he evaluated whether the increased releases determined in
3 the Table 2 analysis (JE49, 52, 55, 58, 61, 64) could be utilized under the existing water right
4 entitlements. Specifically, Mr. Easton determined that the proven use of the First Point diverters
5 (reduced due to the *North Kern* judgment), was significantly in excess of the increase in release
6 due to the *North Kern* judgment. (JE50, 53, 56, 59, 62 and 65.) He concluded that there was
7 ample capacity to fully absorb the entire increased releases. (RT 206:9-25 to 207:1-14.) For
8 example, in 1966 the Kern River records establish that in December the First Point diverters
9 actually diverted and used 220,806 acre-feet, which is an amount many multiples greater than the
10 largest increase in release for the month of December of 10,081 (2001) acre-feet due to the *North*
11 *Kern* judgment. (JE65, column 6.)⁹

12 Mr. Easton explained that the partial forfeiture of water rights as provided in the *North*
13 *Kern* judgment "does result in additional Kern River water's being available for diversion and use
14 by the First Point, Second Point and Lower-River diverters under existing water right
15 entitlements." (JE46, ¶30.) However, Mr. Easton also concluded that the "water released due to
16 the *North Kern* judgment will, in all but flood control operations, be fully used by the First Point,
17 Second Point and Lower-River diverters under existing water right entitlements." (JE46, ¶30.)
18 The end result is that "the projected state of the Kern River stream system remains in a "deficit"
19 condition during 262 months out of the 270 months that comprise the 1964-2008 forfeiture
20 months. (JE50, 53, 56, 59, 62, 65.)" (JE46, ¶32; T:211:5-13.) Mr. Easton's ultimate conclusion is
21 "that the *North Kern* judgment does not support a finding that there is water available for
22 appropriation from the Kern River." (JE46, ¶32.)

23 In summary, the analysis performed by Mr. Easton conclusively establishes that the water
24

25 ⁹ Likewise in January the proven use is 197,100 acre-feet (1997) while the largest increase in release due to the
26 *North Kern* judgment is 5,496 acre-feet (1982). (JE50, column 6.); August the proven use is 105,654 acre-feet
27 (1983), the largest increase in release is 1,519 acre-feet (1995). (JE53, column 6.); September the proven use is
28 54,318 acre-feet (1983), the largest increase in release is 3,459 acre-feet (1982). (JE56, column 6.); October the
proven use is 46,286 acre-feet (1982), the largest increase in release is 5,636 acre-feet (1970). (JE59, column 6); and
November the proven use is 58,652 acre-feet (2002), the largest increase in release is 4,846 acre-feet (2002). (JE62,
column 6.)

1 releases mandated by the *North Kern* judgment did not create “new water” available for
2 appropriation by new users because any increase in release water caused by the *North Kern*
3 judgment would have been (and will continue to be) utilized to satisfy existing junior water rights
4 holders entitlements under the long-established “Law of the River.”

5 **IV. UNDER CALIFORNIA WATER LAW AND THE “LAW OF THE RIVER,”**
6 **JUNIOR RIGHTS HOLDERS ARE ENTITLED TO USE “RELEASE”**
7 **WATER TO SATISFY EXISTING RIGHTS**

8 A. Water Released Due to The *North Kern* Judgment Is Available to, and Is
9 Fully Utilized by, Junior Rights Holders Under Their Existing Water Right
10 Entitlements.

11 Bakersfield’s persistent claim that there is “forfeited water” (B2-1, ¶¶80, 82, 84 and 87)
12 runs counter to one of the basic rulings in *North Kern*. The “right to appropriate water is what is
13 forfeited” not water. (*North Kern, supra*, 147 Cal.App.4th 555, 583, 586, citing *State of*
14 *California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1023-1033.) Furthermore,
15 Bakersfield’s insistence that forfeiture “necessarily would constitute forfeited, surplus water” (B2-
16 1, ¶82) is misplaced as the court held it was incorrect to assume that a finding of partial forfeiture
17 of pre-1914 appropriative rights created unappropriated water subject to appropriation. (*North*
18 *Kern* at 584.) Instead, the court explained:

19 When a natural watercourse is fully appropriated, as the Kern River is, forfeiture
20 of an appropriative right may or may not result in appropriated water that can be
21 awarded to an applicant through the statutory permitting system administered by
22 the SWRCB. That is, a river may be so oversubscribed by pre-1914 common law
23 rights that any water released to the river by forfeiture of a senior rights holder will
24 simply be used in full by existing junior rights holders under their junior
25 entitlements. (*Id.*) (Emphasis added.)

26 In the end, the *North Kern* decision directed that the State Board determine “whether the forfeiture
27 creates an allocable excess.”¹⁰ (*Id.* at 583.) (Emphasis added.)

28 This ruling is consistent with prior authorities. Specifically, water rights expert Wells A.
Hutchins addressed the effect of a finding of forfeiture in Volume II of his work entitled *Water*
Rights Laws in the Nineteen Western States (1974). After reviewing the forfeiture statutes of 11

¹⁰ The State Board acknowledged this requisite when it denied Bakersfield’s request to reconsider dismissal of its original application explaining that water released due to forfeiture may not be available for appropriation because it is needed to protect prior rights. (JE26, p. 5.)

1 states, Hutchins observed that each contains varying provisions providing for reversion and
2 subsequent appropriation. (*Id.*, Vol. II, at 314.) However, recognizing that waters of a stream –
3 regardless of who owns them – may be subject to other private water rights validly acquired,
4 Hutchins explained that:

5 ... upon cessation and extinction of an appropriative right to divert and use water
6 of a stream as a result of forfeiture, the quantity of water thereby left flowing in the
7 stream instantaneously either (1) ceases to be appropriated water and instead
8 becomes unappropriated water available for reappropriation, or else (2) becomes
9 part of the supply to which existing junior rights theretofore not fully satisfied
10 immediately attached to the extent of their lawful requirements that this
11 formerly appropriated water becomes, both *ipso facto* and *ipso jure*, either
12 unappropriated water or water needed to satisfy the lawful requirements of existing
13 junior appropriators. (*Id.* at 314. (Underlining added; italics in original.)

14 Hutchins explained further that, whether the water lost by forfeiture becomes
15 unappropriated or not depends on whether the waters of the stream are adequate for the lawful
16 requirements of all water users who hold rights to the use thereof. If not, the water is first
17 available for diversion and use by those holding junior appropriations to the extent of their
18 existing rights. In this regard, after reviewing the case law on the subject, Hutchins states:

19 ... in a situation [of] ... overappropriated streams,¹¹ ... part or all of the water
20 released by consummation of forfeiture does not become unappropriated, because
21 the stream is already overappropriated. Therefore, part or all of such released
22 water, as the case may be, instantly and automatically, with no lapse of time,
23 inures to the benefit of junior appropriators who have first claim upon the
24 increment for the purpose of ‘feeding’ their rights up to the maximum to which
25 they are entitled when water is available therefore. *Id.* at 315. (Underling added,
26 italics original.)

27 On this record, it is uncontroverted that the entire flow of the Kern River was fully
28 appropriated by 1894. (JE7, p. 10; 21, pp.4-5.) Further, the record establishes that the Kern River

¹¹ Hutchins was reviewing the 1943 Utah Supreme Court opinion which stated:

“Even though title [to the water] were to revert to the public, it is unlikely that it would be available
for appropriation ... for on practically every stream in this State there are junior appropriators
whose applications have been approved by the State Engineer for a total of more water than
ordinarily is available in the stream. The reversion of this water would then go to feed these rights
of the junior appropriators.” (*Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*
(1943) 104 Utah 448, 462, 137 P.2d 634.)

In the first (unpublished appellate opinion) in the *North Kern* litigation, the court recognized and cited with approval
the *Wellsville* case. (JE1, p. 44.) Furthermore, the court explained that there is a significant legal distinction between
the satisfaction or “feeding” of existing entitlements of junior appropriators where water is scarce, as compared to the
creation of new rights or an expansion of existing entitlements. (*Id.*)

1 is oversubscribed by pre-1914 common law rights and other decreed rights. (JE33-39; 46 ¶¶8, 12,
2 16, 18, 21; 14; 15; 32; B1-7, 1-8, 1-9, 2-21.) As demonstrated by Mr. Easton’s analysis water
3 released due to the *North Kern* judgment is diverted and used in full to satisfy the prior existing
4 water right entitlements according to the court judgments, decrees and agreements recognized by
5 the State Board in Decision D1196 (except for certain intermittent flood control operations).
6 (JE33-39, 48-65.)

7 B. Each Successive Junior Right Includes the Right to “Release Water” Up to
8 the Maximum Paper Entitlement

9 In *North Kern* it was determined that a junior appropriator has an “actual entitlement” to
10 available release water. (*North Kern, supra*, 147 Cal.App.4th 555, 575.) Significantly, the court
11 expressly rejected the contention, now advanced by Bakersfield (B1-1, ¶¶52-54), that because the
12 Watermaster accounts for “theoretical entitlement” (referred to on the flow and diversion records
13 as “Gross Entitlement,” also called “Base Entitlement”) separately from “release water,” that the
14 release water resulting from the *North Kern* judgment is not subject to an appropriator’s paper
15 entitlement. (*Id.*) Specifically, the court explained:

16 In addition to paper and theoretical entitlement, an appropriator is entitled to divert
17 water if a senior appropriator does not claim its entire allocation that day. When
18 an appropriator has not diverted its entire theoretical entitlement on a given day,
19 the excess water is ‘released to the river’. In that case, the next most senior
20 appropriator is entitled to divert released water to, in effect, augment the stage or
natural flow of the river; the junior appropriator then may divert water for which it
has no theoretical entitlement, up to the full paper entitlement of that user. Any
release water not claimed by a more senior user becomes available to the next
junior user in the same manner until the water supply is exhausted. (*Id.* at 562.)

21 Thus, in *North Kern* “[w]hen the flow of the river is insufficient to satisfy all appropriative
22 claims, each claim is entitled to its full appropriation before the next junior claimant becomes
23 entitled to any water; in other words, there is no mandatory proration of water among
24 appropriators when, as is often the case, river flow is insufficient to fully satisfy all
25 appropriators.” (*Id.* at 561.) (Italics added.) Based on this record, the *North Kern* court
26 concluded, as a matter of law, that the actual entitlement of a junior appropriator must include
27 release water actually available when determining the forfeiture of the junior appropriations
28 (Buena Vista 1st, Stine and Farmers). (*Id.* at 595-596.)

1 The *North Kern* decision implements a fundamental principle of appropriation law that a
2 junior appropriator is entitled to have the quantity of water not diverted and used by a senior
3 appropriator flow down the stream for satisfaction of its existing junior rights in order of priority.
4 (*Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594-595; *Senior v. Anderson* (1900) 130 Cal.
5 290, 297; *Duckworth v. Watsonville, Etc. Co.* (1907) 150 Cal. 520, 533; Hutchins, *The California*
6 *Law of Water Rights* (1956), at 139, 156-157; Slater, *Cal. Water Law & Policy* (1999), § 2.29 at
7 2-87; see also, *State of California v. Superior Court, supra*, 78 Cal.App.4th 1019, 1028.¹²) As
8 between appropriators, “the one first in time is first in right” and the next most senior appropriator
9 is entitled to take what “he has in the past before a subsequent appropriator may take any.” (*City*
10 *of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, citing *City of San Bernardino v. City*
11 *of Riverside* (1921) 186 Cal. 7, 26-28; Hutchins, *The California Law of Water Rights, supra*, at
12 154-155.)

13 C. Bakersfield’s Claim of “Surplus Entitlement” Is Contrary to Kern River
14 Records and the Historic Administration of Existing Water Right
 Entitlements

15 Bakersfield’s claim that “released water” due to the *North Kern* judgment necessarily
16 constitutes “unappropriated, ‘surplus’ water” is directly contrary to the express holding of *North*
17 *Kern*. (*North Kern, supra*, 147 Cal.App.4th 555, 584.) Furthermore, it violates over one hundred
18 years of consistent administration of the “Law of the River.” (JE33-39; B1-1, ¶¶21-22, 34-36, 40,
19 48-49; B1-7, 1-8, 1-9, 2-21.) The State Board should determine that Bakersfield has failed to
20 prove that the *North Kern* judgment creates any surplus water in excess of the existing water right
21 entitlements of the First Point, Second Point and Lower-River diverters recognized in Decision
22 D1196.

23 Bakersfield claims that all Kern River water in excess of the monthly cap Preserved
24 Entitlement determined in the *North Kern* judgment “necessarily would constitute forfeited,
25 surplus water.” (B2-1, ¶82.) Specifically, Bakersfield requests the State Board to prohibit the
26

27 ¹² “[W]here a thing is subject to rights which limit the owner’s rights the quintessential element of ownership is
28 that the owner’s right’s increase as those of the other decrease or are extinguished. (Rest. Property, § 10.)” *State of California v. Superior Court* at 1028.

1 historical distribution of releases to the Kern River due to the *North Kern* judgment to any
2 existing junior pre-1914 appropriative rights identified on the First Point Flow and Diversion
3 Record, or Second Point or Lower-River diverters. (B2-1, ¶¶85; 2-19, 2-20, 2-21.) Even bolder,
4 Bakersfield asks the State Board to carve out from the Kern River natural flow a new block of
5 water which Bakersfield calls “Forfeiture Entitlement.” (B2-1, ¶¶85; 2-19, 2-21.) As demonstrated
6 by Bakersfield’s own exhibits,¹³ if the State Board were to accept Bakersfield’s argument it would
7 fundamentally revise the administration of water rights on the Kern River contrary to the “Law of
8 the River” that has governed, without significant change, since the Shaw Decree. (B1-1, ¶¶21-22,
9 34-36, 40, 48-49.)

10 Bakersfield contends that the *North Kern* judgment creates an average of 50,646 acre-feet
11 of surplus entitlement. (B2-1, ¶¶89, 92-93; 2-22.) Importantly, Bakersfield’s “surplus water”
12 calculations do not consider historic releases by the Kern Delta rights nor does it allow any
13 diversion and use of release water by other prior existing water right entitlements. (B2-22; RT
14 181:14-25 to 182:1-5.)

15 Most significantly, Kern River records show that all the Kern River supply which
16 Bakersfield labels as “surplus water” has both before and after the *North Kern* judgment been
17 fully diverted and used according to existing water right entitlements consistent with the “Law of
18 the River.” (JE33-39; B 1-1, ¶¶21-22, 34-36, 40, 48-49.) For example, in December 2007, after
19 the *North Kern* judgment was finalized, Bakersfield claims that the Kern Island 1st right created
20 9,960 acre-feet of “surplus water.” (B2-22, Kern Island Canal Table.) However, the “City of
21 Bakersfield Kern River First Point Flow and Diversion Record (December 2007 Recap)” reports
22 that the entire 9,960 acre-feet released by the Kern Island 1st was actually distributed to the other
23 existing water right entitlements. (JE33 December Tab; 38, December Tab.) Similarly, the daily
24 records for December 2007 records indicate that once the Kern Island 1st diverted up to its 2,050

25 _____
26 ¹³ For example, Bakersfield’s Exhibit 2-20 shows that the releases by the Kern Island 1st right on December 5,
27 2005 were actually distributed to several diversion rights in priority order up to limit of their respective maximum
28 amounts (e.g., James 1st, Anderson 1st, Meacham, Plunket, Joyce, Johnson and Pioneer) or until the entire Kern
River supply was exhausted consistent with the “Law of the River”. (B1-1, ¶¶21-22, 34-36, 40, 48-49; 2-20.)
Bakersfield proposes that the State Board direct that the entire Kern Island 1st gross entitlement (300cfs) be
redistributed into a new block of water called “Forfeiture Entitlement.” (B1-1, ¶¶83-84; 2-1, ¶85.)

1 Preserved Entitlement limit between December 1-7, that beginning on December 8 and continuing
2 to the end of the month all gross entitlement released due to the *North Kern* judgment was actually
3 distributed to and used by the other pre-1914 appropriative rights in accordance with the historic
4 administration of the Kern River. (JE38, December Tab; RT 143:13-17, 144:1-15, 146:2-24.)

5 Mr. Easton made the same observation when he determined that “the City of Bakersfield’s
6 Kern River First Point Flow and Diversion Records for 2007 and 2008 substantiate [his]
7 conclusion that water released to the Kern River due to the *North Kern* judgment will be fully
8 used by First Point, Second Point and Lower-River diverters under existing water right
9 entitlements.” (JE46, ¶ 31; RT 218:4-8.) All the other flow and diversion records entered into
10 evidence spanning from 1963 to 2008 support the same conclusion. (JE33-39; 41 p. 83; 75-78;
11 B1-7, 1-8, 1-9; 2-5 p. 95; 2-6, p. 93; 2-7, p. 89; 2-21.)

12 In the end, Mr. Core acknowledged that there was not a single Kern River record (1964-
13 2008) which he could identify which supports his “surplus water” calculations. (RT 148:1-24;
14 149:12-22.)

15 **V. INFREQUENT AND ERRATIC DISCHARGES OF FLOODWATER INTO**
16 **THE INTERTIE DO NOT JUSTIFY REVISING THE FAS**
17 **DECLARATION.**

18 Intertie diversions are rare and unpredictable. They can be addressed through the
19 temporary permit process, which the Water Code expressly exempts from the FAS Declaration.
20 Utilization of temporary permit procedures would preserve State Board staff resources, protect
21 environmental resources and avoid disruption of longstanding Kern River diversions. Moreover,
22 there is no benefit to modifying the FAS Declaration to authorize filing such applications for
23 Intertie floodwater. To the Joint Parties’ knowledge, no party has ever filed an application to
24 appropriate Intertie discharges or ever requested the FAS Declaration be revised to authorize such
25 a filing. Indeed, the occasional diversion of floodwater into the Intertie was barely mentioned at
26 the Hearing.

27 **A. Erratic and Intermittent Intertie Operations**

28 The record highlights certain characteristics of the floodwaters discharged into the Intertie:
(1) infrequent – principally occurring in very wet years or other “high flow” conditions; (2) highly

1 variable in volume; and (3) of relatively short duration, with the exception of 1983 -- a record-
2 setting flood year.

3 More particularly, the floodwaters discharged into the Intertie have ranged from as little as
4 1,793 acre-feet (1997) to up to 664,036 acre-feet (1983). One year, 1983, accounts for over 40
5 percent of the total number of days of Intertie flow (i.e., 283 days out of 662 days) and more than
6 50 percent of the total flow (i.e., 664,036 out of 1,216,027 acre-feet). (B2-18; RT 129:17-25 to
7 131:1-12.) The 1983 floods actually started in December of the prior year and continued into
8 January of the following year. (JE79; B2-18; RT 209:4-10.) In 1983 a majority of the discharges
9 occurred during mandatory flood control. (JE79, p 6.) Notably, the 1983 flood set 43 records on
10 the Kern River. (JE79 pp. 6-7.) The average annual Kern River natural flow at the First Point of
11 Measurement for the 115-year period extending from 1894 to 2008 was 726,376 acre-feet, and the
12 annual total for 1983 was 2,489,128 acre-feet, which was 343 percent of the 115-year average.¹⁴
13 (JE42.) Practically,¹⁵ there has been no discharge into the Intertie for more than ten years.

14 B. The State Board Should Use Existing Procedures for Temporary Urgency
15 Petitions to Address the Intertie.

16 The California Legislature enacted the FAS law in 1987. (Senate Bill 1485 (1987); Water
17 Code § 1205 et seq.) The State Board itself sponsored the bill out of practical necessity; the fully
18 appropriated stream procedure was necessary to avoid wasting the time and resources of both
19 applicants and State Board staff in preparing and processing water right applications on stream
20 systems, such as the Kern River, where a prior water rights decision had found all water to be
21 previously appropriated.¹⁶

22 ¹⁴ There are only three years in the entire history of the Kern River that have an annual runoff volume which
23 exceeds two-million acre-feet: 1916, 1969 and 1983. (JE44) These three years stand well above the rest when the
24 annual Kern River natural flow is plotted in ascending order of magnitude. (JE45) Each of these three years exceeds
the highest runoff volume by more than one-half million acre-feet. (JE44.)

25 ¹⁵ The floodwaters discharged into the Intertie in 2006 were caused by extraordinary circumstances initiated by the
26 United State Army Corps of Engineers when it ordered in April a quick increase in outflow to a rate of 4,500 cubic
feet per second due to a concern over an apparent increase in seepage at the base of the Isabella Auxiliary Dam. (B2-
6, p. 21.)

27 ¹⁶ Bill Report, State Water Resources Control Board (Sept. 4, 1987). The Joint Parties request that the State Board
28 take official notice of the Bill Report, a copy of which is attached hereto as Exh. A. The State Board may take
official notice of official acts of agencies, including bill recommendations made by the State Board itself. (Cal. Code
Regs., tit. 23, § 648.2; Evid. Code § 452(c).)

1 The State Board has clear authority to issue temporary water right permits on fully
2 appropriated stream systems. (Water Code § 1206(c); *see also id.* § 1425 et seq.) The temporary
3 permit exemption recognizes that abnormally high flows will, albeit rarely, be available for
4 appropriation even on fully appropriated streams. In recommending the governor sign the bill, the
5 State Board emphasized: “The Board, however, would be authorized to accept applications for
6 temporary diversions of surplus water when hydrologic conditions are such that more water is
7 present than is needed for existing beneficial uses.”¹⁷ The State Board’s FAS Declarations have
8 consistently recognized this exemption. (See Orders WR 89-25 § 10 and WR 98-08 § 4.12.)
9 Significantly, the State Board has previously determined that the temporary permit process is to be
10 used to handle excess flows available during abnormally wet years on the Kern River. (JE24, p.
11 10.)

12 Prior to issuing a temporary permit, the State Board must make four findings: (1) urgent
13 need, (2) no injury to water right holders, (3) no injury to instream resources, and (4) public
14 interest. (Water Code § 1425(b).) The temporary permit procedures ensure that the interests of
15 water right holders and the environment will be carefully considered. The State Board’s injury
16 review includes consultation with the Department of Fish and Game. (*Id.* §§ 1427, 1428.)

17 C. Any Revision of the Declaration Must Clearly Identify the Conditions and
18 Limitations for Accepting Applications to Appropriate Intertie Floodwater.

19 The record in this proceeding confirms that the Kern River remains fully appropriated.
20 However, even if the State Board were to determine that the FAS Declaration should be modified
21 to allow appropriation of floodwaters discharged into the Intertie, the conditions under which the
22 State Board accepts applications should be narrow and explicit. The Legislature has granted the
23 State Board clear authority in this regard:

24 [T]he board may provide, in any declaration that a stream system is fully
25 appropriated, for acceptance for filing of applications to appropriate water under
26 specific conditions. Any provision to that effect shall specify the conditions and
27 may contain application limitations, including but not limited to, limitations on the
28 purpose of use, on the instantaneous rate of diversion, [and] on the season of

¹⁷ *Id.*

1 diversion [. . .]. The board may make those limitations applicable to individual
2 applications to appropriate water, or to the aggregate of the applications, or both.

3 (Water Code, §1206(b), emphasis added.)

4 The State Board has wisely utilized this authority in other contexts. For example, the State
5 Board limited the acceptance of applications in In the Matter of the Petitions to Revise the
6 Declaration of Fully Appropriated Streams to Allow Processing of Specified Applications to
7 Appropriate Water from the Santa Ana River (“Santa Ana”), (Order WR 2002-12).¹⁸ There, the
8 petitioners sought to revise the Declaration in order to process applications predicated on “new
9 water” which changed the hydrology on the stream system and which gave rise to changed
10 circumstances. The State Board determined that the Declaration should be revised but specifically
11 limited the revision to allow for the processing of only certain applications on file with the Board.

12 Consistent with the Santa Ana proceedings, if the State Board determines that the
13 Declaration should be revised (the Joint Parties do not concede that it should), it should limit the
14 revision to applications specifically seeking appropriation of floodwaters discharged into the
15 California Aqueduct during flood control operations. In *North Kern* the court made clear that
16 “[e]ven if the forfeiture results in the existence of unappropriated water that can be awarded by
17 the SWRCB, the fundamental first-in-time, first-in-right nature of appropriative rights means that
18 a newly permitted SWRCB appropriative right will be junior to all existing pre-1914 rights . . .
19 Any new permit for such an appropriation, however, will be ‘last in time’ and will neither reduce
20 nor augment existing pre-1914 rights of other appropriators.” (*North Kern, supra*, at p. 584.)
21 Here, the priorities of water rights of the First Point, Second Point and Lower-River diverters
22 under the Miller-Haggin Agreement, Shaw Decree and other agreements are vested property
23 rights which may not be changed or re-prioritized by the State Board’s issuance of a subsequent
24 permit. Accordingly, the State Board should explicitly condition the acceptance of any new
25 application so as to prevent interference, curtailment or injury to the prior existing water right

26 _____
27 ¹⁸ Another example is Order WR 98-08 p. 10, n.5 (“Due to the occasional availability of unappropriated water in the
28 Mokelumne River during the months of March through June, the SWRCB also finds that the Declaration should not
apply to proposed conjunctive use projects which are not dependent upon unappropriated water being available in
most years but which could utilize unappropriated water in years when it is available.”).

1 entitlements recognized by the State Board in Decision D 1196.

2 Moreover, the amount of water diverted and used by First Point, Second Point and Lower-
3 River diverters is determined pursuant to valid and vested water right entitlements. (*See e.g.*, JE7,
4 pp. 6-12; 14-20; 21, pp. 3-5.) From time to time, during erratic, high-flow flooding events the
5 flows of the Kern River have exceeded the instantaneous capacity of local water storage,
6 conveyance and distribution facilities. (JE79; B2-18; RT 264:16-23.) However, the timing,
7 duration and volume of discharge into the Intertie is determined by the First Point, Second Point
8 and Lower-River diverters in accordance with their existing water right entitlements. Should the
9 State Board decide to accept applications, the amount of water available for appropriation should
10 be limited to the quantity actually discharged into the Intertie as determined by the First Point,
11 Second Point and Lower-River diverters.

12 Finally, the State Board should condition acceptance of any application on the
13 requirement that the applicant comply with the terms and conditions of the Intertie operations
14 agreements. Since 1975, the State of California (acting through the Department of Water
15 Resources) and the several local public agencies exercising Kern River water right entitlements
16 have coordinated the procedures for safe operation of the Intertie flood control facility. In
17 implementing the Intertie operations, the parties contractually bound themselves to notification
18 requirements, operational criteria and quality standards. In order to ensure protection of the
19 California Aqueduct, the Intertie facilities and the several public agencies responsible for
20 operation of the Intertie during flood control conditions, the State Board should require that the
21 applicants comply with all Intertie operational agreements.

22 In any event, unless and until there is an application to appropriate Intertie floodwaters
23 there is nothing for the State Board to process.

24 **VI. CONCLUSION**

25 For the reasons stated, the petitions to modify the FAS declaration for the Kern River
26 should be denied.


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Dated: November 20, 2009

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SB 1485, as amended July 6, would authorize the State Water Board, following notice and public hearing, to declare that a stream system is fully appropriated. Once such a declaration is made, the Board would be prevented from accepting applications to divert water from the named system, except under specified circumstances. SB 1485 is sponsored by the State Water Board (Proposal EA# 87-1).

BACKGROUND

The State Board frequently receives water right applications to appropriate water from sources which are already put to full beneficial use during all or a portion of each year. In some instances, no additional water can be appropriated without harm to an existing user. Individuals who are unaware that a particular stream system is fully appropriated may file applications which are not consistent with past Board findings regarding water availability. This is a waste to the applicant and to the Board, since the application must be amended to conform to previous Board decisions or disapproved.

ANALYSIS

SB 1485 would allow the State Water Board to adopt a declaration that a stream, lake, or other body of water, and any tributaries, is fully appropriated. Such finding would be made only after notice and public hearing, and only when previous water right decisions have determined that no water remains available for appropriation.

SB 1485 would permit the Board, upon its own motion, or upon petition of any interested party, to revoke or revise any such declaration. Once a declaration is adopted, the Board would not accept any applications for appropriation and could cancel any pending applications. The Board, however, would be authorized to accept applications for temporary diversions of surplus water when hydrologic conditions are such that more water is present than is needed for existing beneficial uses. In addition, when issuing the fully appropriated stream declaration, the Board could provide that applications would be accepted under limited specified circumstances.

Under existing Water Code provisions, the State Board must accept applications to appropriate water in stream systems which are already put to full beneficial uses. The Board must give the applicant an opportunity to show that water is available for use. The Board has attempted to address this potential lack of water by requiring new applicants for water from partially or wholly used sources to provide special information. This procedure, however, does not provide notice to the public. SB 1485 would allow the Board to alert interested parties and other public agencies to unavailability of water in specific stream systems.

RECOMMENDATION

Sign

DEPARTMENT HEAD

Walt Peltt for WWRB

DATE

4/2/87

AGENCY HEAD

James R. Bergeson

DATE

9/4/87

EXHIBIT "A"

1 **STATEMENT OF SERVICE**

2 I, Terri D. Kuntz, am a resident of the State of California, over the age of eighteen years,
3 and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol
4 Mall, 18th Floor, Sacramento, California, 95814-4731. On November 24, 2009, I served the
5 within document(s):

6 **Joint Closing Brief of North Kern Water Storage District,
7 Buena Vista Water Storage District, Kern Water Bank
8 Authority and City of Shafter**

- 9 **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax
10 number(s) set forth below on this date before 5:00 p.m.
- 11 **BY HAND:** by personally delivering the document(s) listed above to the person(s)
12 at the address(es) set forth below.
- 13 **BY MAIL:** by placing the document(s) listed above in a sealed envelope with
14 postage thereon fully prepaid, in the United States mail at Sacramento, California
15 as set forth below.
- 16 **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an
17 overnight delivery service company for delivery to the addressee(s) on the next
18 business day.
- 19 **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of
20 the document(s) listed above to the person(s) at the address(es) set forth below.
- 21 **BY ELECTRONIC MAIL:** by transmitting the document(s) listed above via
22 electronic mail to all parties listed to receive electronic service at the electronic
23 mail address set forth on the Service List.

24 *See Attached Service List*

25 I am readily familiar with the firm's practice of collection and processing correspondence
26 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
27 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
28 motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on November 24, 2009, at Sacramento, California.



Terri D. Kuntz

**HEARING REGARDING PETITION TO REVISE THE DECLARATION OF FULLY
APPROPRIATED STREAM SYSTEM OF THE KERN RIVER - SCHEDULED TO COMMENCE
ON OCTOBER 26, 2009**

**SERVICE LIST
(September 16, 2009)**

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

<p>CENTER FOR BIOLOGICAL DIVERSITY c/o Adam Keats 351 California Street, Suite 600 San Francisco, CA 94104 akeats@biologicaldiversity.org</p>	<p>KERN COUNTY WATER AGENCY c/o Nicholas Jacobs Somach, Simon & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 njacobs@somachlaw.com</p>
<p>KERN WATER BANK AUTHORITY c/o Kevin M. O'Brien Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 kobrien@downeybrand.com jschofield@downeybrand.com tkuntz@downeybrand.com</p>	<p>CITY OF SHAFTER c/o Jason M. Ackerman Best, Best & Krieger LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 jason.ackerman@bbklaw.com</p>
<p>BUENA VISTA WATER STORAGE DISTRICT c/o Gene R. McMurtrey McMurtrey, Hartsoe & Worth 2001 22nd Street, Suite 100 Bakersfield, CA 93301 gene@mcmurtreyhartsock.com</p>	<p>CITY OF BAKERSFIELD c/o Colin L. Pearce Duane Morris LLP One Market, Spear Tower, Suite 2200 San Francisco, CA 94105-1127 cpearce@duanemorris.com</p>
<p>NORTH KERN WATER STORAGE DISTRICT c/o Scott K. Kuney Young Wooldridge, LLP 1800 30th Street, Fourth Floor Bakersfield, CA 93301 skuney@youngwooldridge.com</p>	