

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**
15

16 In the Matter of State Water Resources Control
17 Board Hearing on Petitions to Revise the
18 Declaration of Fully Appropriated Stream System of
19 the Kern River in Kern and Tulare Counties

20 **DIRECT TESTIMONY OF GENE W.**
21 **BOGART IN SUPPORT OF PETITION**
22 **OF CITY OF BAKERSFIELD**

23 Date: October 26, 2009
24 Time: 9:00 a.m.
25 Dept: 1001 I Street, Second Floor,
26 Sierra Hearing Room
27 CAL-EPA Building
28 Sacramento, CA

Hearing Officer: Arthur Baggett, Jr.

1 I, Gene W. Bogart, declare and state as follows:

2 **I. PERSONAL BACKGROUND, EDUCATION AND EXPERIENCE**

3 1. I was the Water Resources Manager for the City of Bakersfield ("Bakersfield" or
4 "City") until my retirement in December 2003. My job duties as Water Resources Manager included
5 overseeing the operation of the agricultural and domestic water divisions of the City, which included
6 responsibility for operations and record keeping on the Kern River.

7 2. I am a lifetime resident of Bakersfield. I graduated from Bakersfield Junior College
8 in June 1968 with an Associate of Arts degree. I received a degree in Business Administration from
9 California State College at Bakersfield in 1973. During my employment with the City, and
10 previously, I took numerous courses on hydrology, forecasting, groundwater and related issues.

11 3. From 1969 to the end of 1976, I was the hydrographer for the Kern County Canal and
12 Water Company ("KCC&WC"). KCC&WC operated all of the canals in the "First Point" service
13 area. KCC&WC was a subsidiary of Tenneco West, Inc. ("Tenneco"), at the time I worked there.

14 4. As hydrographer, I was responsible for the measurement, recording, and record
15 keeping of the flow and diversion of water in the Kern River for the entire First Point service area.

16 5. In 1976, the City purchased KCC&WC and took over the operation and record
17 keeping responsibilities on the Kern River previously undertaken by KCC&WC. In December 1976,
18 I therefore began working for the City as a water superintendent, performing essentially the same
19 tasks involving the Kern River that I performed for KCC&WC.

20 6. After 1980, I became the Assistant Water Resources Director for the City. In 1985, I
21 became the Water Resources Director, and in May 1993, I became the Water Resources Manager.

22 7. As Water Resources Manager I was in charge of the agricultural and domestic water
23 departments of the City. I was also responsible for managing and overseeing the operations, record
24 keeping and management of the Kern River. My job duties involved overseeing budgeting,
25 forecasting of water supply, overseeing and operating the domestic water division of the City, and
26 supervising and overseeing record keeping, operations and maintenance of the Kern River, and the
27 diversion and use of water by other First Point interests.

1 **II. HISTORY AND BACKGROUND OF DIVERSION AND USE OF WATER FROM**
2 **KERN RIVER**

3 8. I first became familiar with the operation of and record keeping on the Kern River
4 when I began working for Tenneco in April 1969. At that time, Tenneco had recently purchased all
5 of the Kern River assets of the Kern County Land Company (“KCLC”).

6 9. I worked at Tenneco as a hydrographer until the time that the City acquired all of the
7 water rights, facilities and canal systems held by Tenneco, and formerly held by KCLC, in
8 December 1976.

9 10. Through my 35 years of employment with Tenneco and the City, I became very
10 experienced and knowledgeable with regard to the diversion and use of water on the river, and the
11 operation and record keeping for the river, both presently and historically. I also became
12 knowledgeable about and familiar with the history and background of the Kern River, and
13 specifically the historic diversion and use of water from the river, as well as with regard to the
14 former primary right holder on the river, KCLC.

15 **A. The History of the Kern River.**

16 11. In 2003, I worked with staff at the Bakersfield Water Department to develop a
17 brochure to explain and memorialize the City’s purchase of Kern River water rights, and to provide
18 some background and a brief history of the river. (A copy of this brochure accompanies this
19 testimony as Exhibit 1-2.) In the introduction, we explained that the brochure “provides some
20 insights to the colorful history of the Kern River (Chapter One); the events leading up to the election
21 and purchase of the Kern River (Chapter Two), and finally, describes the water rights, facilities and
22 properties that were acquired with the Kern River Purchase. (Chapter Three).”

23 12. In addition to the information in the attached brochure, as a result of my 35 years of
24 experience with the operation and record keeping on the Kern River, I provide the following brief
25 summary of the history and operation of the river.

26 13. Diversion and use of water flowing in the Kern River began in the late 1860s, as
27 various individuals began to develop the southern San Joaquin Valley for agriculture. Individuals
28 such as James B. Haggin and others constructed a network of canals, both north and south of the

1 Kern River, which diverted and applied Kern River water for use on various lands within Kern
2 County. By the 1870s, substantially all of the flow of the Kern River had been applied to various
3 agricultural, domestic and municipal uses.

4 14. The Kern River water rights held by Bakersfield initially were established through the
5 filing of notices of appropriation around the time of the early settlement of the Bakersfield area in
6 the 1870s and 1880s.

7 15. In the late 1800s, James B. Haggin acquired ownership of many of the water rights,
8 canal companies, and diversion facilities along the Kern River, as well as significant land holdings in
9 the southern San Joaquin Valley. Mr. Haggin eventually acquired more than 400,000 acres in the
10 region. In 1890, Mr. Haggin, along with W.B. Carr and Lloyd Tevis, formed KCLC to consolidate
11 and control all of their Kern River water rights and land holdings.

12 16. KCLC maintained a very large farming and ranching operation in the Bakersfield
13 area. The brochure describing the Kern River purchase states that an 1890s article in the publication
14 "Irrigation Age" described the irrigation system of KCLC, started by Mr. Haggin, "as the greatest
15 irrigated farm in the world." (Ex. 1-2, at p. 19.) KCLC essentially utilized all of the First Point
16 water rights to benefit its lands north and south of the Kern River.

17 17. The water rights now held by Bakersfield were recognized in an 1888 agreement,
18 entitled "Contract and Agreement Between Henry Miller and Others, of the First Part, and James B.
19 Haggin and Others, of the Second Part" ("Miller-Haggin Agreement"). (A copy of the agreement
20 accompanies this testimony as Exhibit 1-3.) The Miller-Haggin Agreement followed a protracted
21 and highly publicized dispute between "upstream" appropriators on the Kern River, headed by Mr.
22 Haggin, and downstream appropriators, represented by Mr. Miller.

23 18. The Miller-Haggin Agreement memorialized a compromise between the river
24 interests to end years of litigation and controversy on the river. As explained in the attached
25 brochure, "According to the agreement, Kern River water would be jointly measured above
26 Gordon's Ferry at a site to be known as First Point of Measurement. One third of the water, during
27 the six spring and summer months, would belong to downstream lands owned by Miller and Lux.
28 The one third water allocation would be delivered to the west side in undiminished quantities to a

1 site known as Second Point of Measurement. Haggin and Tevis and the upstream canal companies
2 would get the rest.” (Ex. 1-2, p. 7.)

3 19. Water on the Kern River is still divided pursuant to the Miller-Haggin Agreement.
4 The Buena Vista Water Storage District (“Buena Vista”) now holds essentially all of the Second
5 Point rights. Bakersfield and the Kern Delta Water District (“Kern Delta”) hold all of the First Point
6 rights. Other entities, such as the North Kern Water Storage District (“North Kern”), divert and use
7 First Point water pursuant to contracts with the primary right holder, the City.

8 20. A later dispute among the First Point interests resulted in a judgment, rendered on
9 August 6, 1900 by the Honorable Lucien Shaw and commonly referred to as the “Shaw Decree,”
10 which established a priority for the use of water between parties within the First Point of diversion.
11 (A copy of the Shaw Decree accompanies this testimony as Exhibit 1-4.) Among other things, the
12 “Shaw Decree” determined the existence, date of priority (hierarchy) and maximum rate of diversion
13 for each of the specified First Point canal companies and water rights as of August 6, 1900.

14 21. Since 1900, and continuing through the present day, the Kern River First Point
15 interests have diverted water from the Kern River pursuant to the priorities and maximum diversion
16 rates established in the Shaw Decree. The parties have treated each Kern River water right as
17 separate and distinct, and the historic record of diversion and use on the river has reflected and
18 recorded the daily, monthly and annual diversions for each separate right. The daily record of
19 diversion and use of water on the Kern River still contains essentially all of the Shaw Decree rights,
20 in order of priority.

21 22. The First Point parties have therefore maintained an intricate system of daily,
22 monthly, and annual record of Kern River flows and diversions with regard to the separate Kern
23 River water rights.

24 23. Accompanying this testimony as Exhibit 1-5 is a blank example of the daily diversion
25 sheet used previously by KCC&WC and now Bakersfield, with an order of priority and maximum
26 flow rate taken primarily from the Shaw Decree. The daily record of diversion and use of water on
27 the Kern River is compiled into monthly and annual reports summarizing and compiling the record
28 of diversion and use of water for the First Point rights.

1 24. KCLC, through its subsidiary KCC&WC, previously operated and maintained the
2 First Point canal system and administered the stream flow of the Kern River in accordance with the
3 Miller-Haggin Agreement and the Shaw Decree, and maintained the daily, monthly, and annual flow
4 and diversion record for the river.

5 25. By the 1920s, KCLC held a nearly one hundred percent or majority interest in all of
6 the First Point canal companies, and consequently held virtually all of the First Point water rights.
7 KCLC, through its subsidiary KCC&WC, operated and controlled all of the canals, headgates,
8 diversion facilities and works of improvement for the First Point water rights, prepared and
9 maintained the record of diversion and use on the Kern River, and controlled deliveries and
10 diversions of Kern River water for all the First Point canal company water rights.

11 26. In 1967, Tenneco acquired all of the Kern County properties and assets of KCLC,
12 including all of KCLC's Kern River water rights and assets, including KCC&WC and all of the
13 canal companies owned and controlled by KCLC. At the time I began to work for Tenneco, it had
14 acquired essentially the entire Kern River First Point water system from KCLC.

15 27. In 1970, Bakersfield instituted litigation against Tenneco to obtain, protect, and
16 secure rights and interests in the Kern River, and to obtain a reliable, high quality, future supply of
17 Kern River water. This litigation eventually led to a settlement whereby Bakersfield acquired all of
18 the Kern River water rights and interests held by Tenneco, and formerly held by KCLC.

19 28. On April 12, 1976, Bakersfield entered into a written agreement (Exhibit 2-3) with
20 Tenneco whereby, among other things, Bakersfield acquired all of the Kern River water rights held
21 by Tenneco and formerly held by KCLC, including rights and interests provided for in the Miller-
22 Haggin Agreement and the Shaw Decree. These rights, and the facts and circumstances surrounding
23 the City's acquisition of the rights, are also explained in detail in the City's 1975 Environmental
24 Impact Report for the acquisition of the water rights and system, a copy of which accompanies this
25 testimony as Exhibit 1-6.)

26 29. After execution of the 1976 agreement with Tenneco, Bakersfield sold the former
27 Kern Island Water Company public utility canal companies located south of the Kern River and
28

1 formerly owned by KCLC, and the associated Kern River water rights, to Kern Delta through a
2 separate agreement (Agreement No. 76-70).

3 30. In addition to all of the Kern River water rights formerly held by KCLC, pursuant to
4 the agreement with Tenneco, Bakersfield assumed all rights, duties and obligations with regard to
5 the operation of the Kern River, the diversion of water into the headgates and canals off the river,
6 and the recordkeeping function for the river.

7 31. Since 1976, Bakersfield has therefore operated, managed, and controlled the
8 diversion of water from the Kern River, kept the flow and diversion record for the river, and diverted
9 and used Kern River water pursuant to its own rights.

10 32. In 1976, following the purchase and sale of Kern River assets, the Kern River First
11 Point operations now had three separate operating units-the City, Kern Delta, and North Kern, that
12 were involved in the operation of the river. Each of these separate entities had its own staff, canal
13 operators, operators, and governing agencies. The separate entities still had to work together on a
14 daily basis to divert water from the Kern River. In effect, the river was and is run by committee, as
15 the First Point entities provided major input and information with regard to the operation of the river.

16 33. The City's goal and purpose in performing the dispatch and record keeping function
17 on the Kern River is to try to prevent disruptions in the delivery of Kern River water. Specifically,
18 the City's goal is to provide for the orderly regulation and distribution of the water on the river each
19 and every day into the complex series of historic canals which divert water from the river.

20 **III. DAILY OPERATION AND DIVERSION AND USE OF WATER ON THE KERN**
21 **RIVER**

22 **A. Flow and Diversion Record.**

23 34. During my employment with Tenneco and the City, I became very familiar with the
24 "law of the river." That refers to the accumulation of agreements, historic practices, customs,
25 traditions and record keeping functions involving and surrounding the operation of the river, and the
26 diversion and use of water from the river. In the recently concluded Kern River litigation the court
27 described the "law of the river" as "the body of decrees, agreements, customs and practices that
28 came into existence at a time in the late 1890's and early years of the 20th Century when the water

1 rights of the first point interests were under the ownership or control of the [KCLC] or its
2 subsidiaries.” (Ex. 2-13, pp 4-5.)

3 35. Central to the concept of the “law of the river” is the recording of the diversion and
4 use of water on the Kern River. Since the 1890s, KCLC kept detailed and meticulous records of the
5 flow of the river, and the daily diversion and use of Kern River water by separate water rights owned
6 and controlled by KCLC.

7 36. The Kern River First Point rights are allocated each day through the hierarchy of
8 rights and priorities established in the Shaw Decree. The decree set a maximum flow available for
9 diversion by each First Point user, and established an order of priority. The practices and procedures
10 related to the allocation of water to separate canals based on the Shaw Decree has not changed
11 significantly since the early 1900s.

12 37. During the time I worked for Tenneco, a dispatcher employed by Tenneco received
13 orders from individual farmers and water users within the separate historic canal service areas. Each
14 day the dispatcher would tally the total requests for water from farmers within the canal service
15 areas. The dispatcher would summarize the water orders given by farmers to the canal
16 superintendent or the operations foreman.

17 38. During my employment with Tenneco, I was responsible for overseeing measuring
18 stations along the Kern River and canal headgates, taking daily and weekly measurements along the
19 river and canals, and thereafter recording and summarizing the information on the Kern River flow
20 and diversion sheets, and compiling the flow and diversion sheets into weekly and monthly
21 summaries. At the end of each year, I would compile the summaries into an annual report reflecting
22 the entitlement, diversion and use of the water from the Kern River.

23 39. I understood that KCLC and later Tenneco believed it was very important to keep
24 detailed records of the diversion and use of water on the Kern River in order to protect and preserve
25 its Kern River water rights, such as to protect the water rights from claims by third parties. For that
26 reason KCLC and Tenneco maintained detailed and consistent, daily, weekly, and monthly records
27 of diversion and use on the Kern River beginning in the 1890s.

1 40. Since the City acquired the water rights and operating responsibilities associated with
2 KCC&WC, it has operated the Kern River in accordance with the law of the river. The City
3 maintains the record of flow and diversion of water from the Kern River in essentially the same
4 format that was first established in the 1890s. The City still uses the same single page spreadsheet to
5 record the diversion of Kern River water by each separate canal right on a daily basis that has been
6 used historically since the 1890s by KCLC and later Tenneco.

7 **B. The Entitlement Is The Proper Measure And Representation Of The Water**
8 **Rights.**

9 41. Each canal on the Kern River is served by a separate, independent right, pursuant to
10 the Shaw Decree or other operative document. Each canal is administered independently in terms of
11 supply, water rights, and diversions. The focus in the operation and record keeping on the river is on
12 the separate canal right, and not the collective rights held by Kern Delta and Bakersfield.

13 42. The “entitlement” represents the amount of water available to a canal each day,
14 measured in cubic feet per second (cfs), based on the flow of the river. The Kern River entitlement
15 is also referred to as the “base” entitlement or “computed” entitlement. Historically, KCC&WC
16 used the term “base entitlement” to represent the entitlement set by the natural flow of the river each
17 day, or the quantity actually available to each separate canal right.

18 43. On a daily basis, KCC&WC would determine the quantity of water flowing in the
19 Kern River. This is really a reconstructed flow that determines the amount of flow that would have
20 occurred absent the presence of Isabella Reservoir. The dispatcher would then allocate water to the
21 individual rights on the river, based on the amount of water in the river.

22 44. A single dispatcher formerly served all of the First Point Kern River rights held and
23 controlled by KCLC. Since 1976 representatives of the City have acted as the dispatcher for the
24 First Point Kern River rights.

25 45. The dispatcher typically would not allocate water to a canal unless there was
26 sufficient water flowing in the Kern River to satisfy the rights of that canal. Specifically, if a canal
27 did not have sufficient “entitlement” to Kern River water, based on the flow of the river, the
28

1 dispatcher could not authorize the delivery of water to that canal, unless there was additional surplus,
2 or "release" water available for diversion.

3 46. The entitlement is therefore the best measure, or representation, of the Kern River
4 water rights. The base or actual entitlement for each right essentially determines whether there was
5 sufficient water flowing in the river to satisfy a specific canal right, based on the order of priority
6 and flow rate established through the Shaw Decree.

7 **C. Surplus Release Water on the Kern River.**

8 47. Historically, the separate canal rights did not always divert and use all water that
9 accrued to or was available to the rights. The "Kern Island 1st" right, for example, on many days did
10 not request delivery of water at a flow of 300 cfs because it did not have a demand for the water.
11 This occurred most often in winter months, when there was more water flowing in the Kern River,
12 but less demand for water by farmers.

13 48. If a canal right did not take all of the water which was available to that right, up to the
14 entitlement, historically the excess, surplus water would be available for diversion and use by junior
15 right holders as "release" water. Practically, all of the surplus, release water not used by the canal
16 rights would accumulate in a single "pot" of water which would then be available for redistribution
17 to junior rights. For example, if the Kern Island 1st right did not have a demand for water, it would
18 "release" all or some portion of its 300 cfs flow to which it was entitled under the Shaw Decree.

19 49. The surplus water would be released to next junior right with demand that day. The
20 Kern River dispatcher would "fill and go" each lower right by allocating water to those rights, where
21 there was demand, up to their full Shaw Decree, or "paper," right. A canal right with zero
22 entitlement that day, for example, might be able to divert up to its full legal or paper entitlement if
23 surplus, release water was available in the river.

24 50. This was not a permanent transfer, and the transfer did not expand or change the
25 rights. Every day is a new day on the river, and the Kern River operated and still operates as a daily
26 system. Accordingly, each day KCLC would again determine the flow in the river, the entitlement
27 of each right, and then start distributing water, where there was a demand, up to the canal right's full
28 entitlement.

1 51. The excess or surplus water delivered to the canal would not be considered part of the
2 canal's entitlement, but would be recorded as "release water," which was only used by the canal
3 right that day. The junior canal rights did not assert any claim or right to the surplus release water.
4 The junior rights did not have any expectation or assurance of receiving release water, or any
5 specific quantity of release water. Release water was never ordered by the junior canals. The
6 existence and extent of the release water was entirely dependent on the daily demand of the senior
7 rights.

8 52. In the daily, monthly, and annual flow and diversion records, release water, or water
9 accruing to more senior rights but not used by those rights, is always treated as a separate category
10 of water, and not as part of the base or computed entitlement for the junior rights.

11 53. Accordingly, water released by the Kern Delta rights historically has been reflected in
12 the record of diversion and use as still belonging to and accruing to the Kern Delta rights, even if the
13 water was used by other, junior rights.

14 54. In the historic Kern River records, release water would not be added to the base or
15 overall entitlement for each right. Instead, release water taken or not taken by a given canal right
16 would be reflected in the "entitlement plus or minus release" column. That amount would reflect the
17 quantity of water actually taken by a canal right on a given day from any source.

18 55. The construction of the Lake Isabella Reservoir in the early 1950s created another
19 location for the release water, or the water outside the demand of the individual canal rights. After
20 the construction of Lake Isabella, instead of releasing all water over the demand of each canal right,
21 the canal rights could now place a portion of such surplus water in storage in Lake Isabella for later
22 diversion and use.

23 56. Historically, North Kern would try to take as much surplus, release water as possible.
24 North Kern was able to do this because it maintained spreading ponds and recharge facilities to take
25 the surplus water. North Kern did not typically divert or use the surplus release water based on
26 actual farmer demands. Instead, North Kern would take as much release water as possible to bank
27 for later use during summer months. North Kern would still not specifically order release water,
28 however, and would not know how much water would be available from releases each day.

1 57. Accordingly, even though the release water was not part of or included in the 1952
2 North Kern –KCLC agreement, KCC&WC continued to divert release water to North Kern after
3 1952. Under KCLC and Tenneco, the dispatcher still typically diverted surplus, release water to
4 North Kern KCLC wanted to keep as much water as possible in the first point service area, to avoid
5 forfeiture and claims by third parties.

6 **D. Application of Law of River to Daily Diversion Records.**

7 58. To explain and illustrate the daily diversion of water from the Kern River,
8 accompanying this testimony as Exhibit 1-7 is the flow and diversion record for January 23, 1996.
9 This document was used and referred to in the trial in the Kern River litigation.

10 59. The January 23, 1996 diversion sheet lists the First Point Kern River canal rights, in
11 order of priority, along with their maximum “paper” entitlement, stated in cfs. Those amounts,
12 primarily taken from the Shaw Decree, reflect the highest possible quantity of water the rights could
13 divert, assuming there was sufficient water flowing in the Kern River.

14 60. The top of the diversion sheet indicates that on January 23, 1996, the “computed
15 natural flow” of water at the First Point of measurement was 571 cfs. The Kern River 1st right,
16 which has the first priority on the river, had a gross, or base, entitlement of 300 cfs that day, since
17 the flow in the river exceeded 300 cfs. January is outside of the Miller-Haggin season, so there
18 would be no division or distribution of water to the Second Point interests.

19 61. The diversion sheet indicates that although the Kern Island 1st right had a maximum,
20 or paper, entitlement of 300 cfs, it only diverted 137 cfs on that date. That figure is reflected in the
21 “gross diversion” column on the diversion sheet. The diversion record further indicates that the
22 Kern Island 1st right released 167 cfs of its entitlement on that day. That figure represents the 163
23 cfs of gross entitlement not diverted by the Kern Island 1st (300 cfs less the 137 cfs of flow actually
24 diverted) plus an additional of 4 cfs of water from another source released to the river.

25 62. Some of the canal rights below the Kern Island 1st also had some entitlement on that
26 day, but did not divert all of their entitlement. Those rights also released some portion of their base
27 entitlement to the river. The Buena Vista right, for example, had a gross entitlement of 77 cfs on
28 that day, but only diverted 9 cfs (reflected in the gross diversion column). The record indicates that

1 the Buena Vista right released 67 cfs to the river. Similarly, the Stine Canal right, also held by Kern
2 Delta, had a gross entitlement of 20 cfs; but only diverted 12 cfs and released 7 cfs to the river.

3 63. The January 23, 1996, flow and diversion record also indicates that on that day the
4 Lerdo right did not have any entitlement, but still diverted 296 cfs of water (as indicated in the gross
5 diversion column). That diversion consisted of and included virtually all of the water released by the
6 more senior Kern Delta rights. The Lerdo water right is held by Bakersfield, but water diverted
7 pursuant to that right, based on the 1952 Agreement (Exhibit 2-4), is primarily taken by North Kern.

8 64. Also accompanying this testimony as Exhibit 1-8 is the daily flow and diversion sheet
9 for May 12, 1995 (which chart was additionally referred to in the Kern River litigation). That day
10 was outside the forfeiture period now in place as a result of the Kern River litigation, at a time when
11 there was a significant flow of water in the Kern River. May 12, 1995 was also during the "Miller-
12 Haggin season" when the First Point interests were required to divide and distribute one-third of the
13 water flowing in the Kern River to the Second Point interests.

14 65. The computed natural flow on May 12, 1995 in the Kern River was 3,990 cfs. After
15 subtracting 300 cfs for the Kern Island 1st (under the Miller-Haggin Agreement the Kern Island 1st
16 does not "contribute" to the water divided between First Point and Second Point), the remaining
17 3,690 cfs was divided, with two-thirds (2,445 cfs) distributed to the First Point rights, and the
18 remaining one-third (1,245 cfs) allocated for delivery to Second Point.

19 66. In this flow and diversion record, the Kern Island 1st again has a gross entitlement of
20 300 cfs, but only actually diverted 165 cfs on that date. The Kern Island 1st, however, did not
21 "release" the remaining 135 cfs to the river. Instead, the flow and diversion record indicates, on the
22 far right, that the Kern Island 1st placed the 135 cfs of entitlement into "storage" in the Lake Isabella
23 Reservoir.

24 67. Also accompanying this testimony as Exhibit 1-9 is a copy of the flow and diversion
25 record for the Kern River from January 9, 1965. On that date, the computed natural flow at First
26 Point was 794 af. Again, this was outside the Miller-Haggin season. On that date, the Kern Island
27 1st had a gross, or base, entitlement of 300 cfs, and released the entire amount to the river.
28 Additional rights now held by Kern Delta, such as the Stine and Buena Vista, also had entitlement

1 on that day, but released the vast majority of their entitlement to the river. The Lerdo right again
2 diverted most of the release water for distribution into other canals within North Kern.

3 **E. Additional High Flow Surplus Water.**

4 68. In very wet years, Kern River flows can exceed the maximum river entitlement of
5 3,162 cfs. All of the entitlement or rights are filled up when the river is running over 3,162 cfs, so
6 any flow over that amount would also necessarily be surplus, excess water. That is not a common
7 occurrence, however, but it still occurs during high flow and storm periods.

8 69. In "high flow" years with significant stream flow, the First Point canal rights
9 historically have not been able to take all water available in the river. Such water historically flowed
10 "past" First Point to Second Point and Lower River users, and more recently, into the California
11 aqueduct through the Kern River Intertie.

12 70. As part of KCLC's intent to maintain and preserve as much Kern River water as
13 possible within the First Point service area, KCLC typically spread and recharged excess water to
14 prevent it from going to the Second Point parties, or to other third parties.

15 71. The City continued and expanded these practices by developing dedicated spreading
16 facilities for Kern River water. Most significantly, the City developed a large recharge facility,
17 known as the "2800 acre recharge facility," in the early 1980s, as described in the EIR for the
18 facility. (A copy of the EIR accompanies this testimony as Exhibit 1-10.)

19 72. The City's 2800 acre recharge facility is located to the west of the City. This area
20 historically has been used for groundwater recharge. The City merely formalized that process by
21 specifically setting aside land along the Kern River for recharge of Kern River water accruing to the
22 City's water rights, as well as additional surplus, excess Kern River water.

23 73. The 2,800 acre recharge facility is located just above the Second Point of
24 measurement. This area therefore is practically the last opportunity to capture and store water within
25 the First Point service area. The 2,800 acre recharge facility acts as an additional storage facility,
26 along with Lake Isabella, for the City's water supply.

27 74. The City's 2,800 acre recharge facility is a much more formalized process than the
28 spreading operations formerly maintained by KCLC and Tenneco. KCLC and Tenneco spread and

1 recharged surplus water less frequently and without specifically dedicated recharge facilities, as
2 necessary.

3 75. Through the 2,800 acre recharge facility, as well as the City's use of the Kern River
4 channel itself, the City has been able to capture and store a substantial quantity of excess, surplus
5 Kern River water. Such stored water is available for later extraction and use by all overlying owners
6 within the First Point service area, including other water districts which divert and use Kern River
7 water.

8 **IV. THERE ARE "CHANGED CIRCUMSTANCES" AS A RESULT OF KERN DELTA'S**
9 **FORFEITURE**

10 76. The cooperative, shared system of diversion and use of Kern River water changed
11 significantly after 1976, based on disputes between Kern Delta, North Kern, and to a lesser extent,
12 Bakersfield, regarding Kern Delta's intentions and efforts to increase diversions of Kern River water
13 above historic levels. That dispute led to the recently concluded Kern River litigation that resulted
14 in the forfeiture of a portion of Kern Delta's rights.

15 77. As the court in the Kern River litigation concluded, there was and always has been
16 unappropriated, surplus water on the Kern River beyond the demand of various First Point right
17 holders. The court in the Kern River litigation recognized that Kern Delta historically did not divert
18 and use a significant quantity of its pre-1914 Kern River water rights. Release water was by
19 definition water that was surplus or in excess of the demand of the separate canal right that had
20 entitlement to the water. The release water was thereafter redistributed according to demand through
21 the internal closed KCLC system.

22 78. The parties, however, historically did not call the SWRCB's attention to the excess,
23 surplus water, or challenge the fully appropriated status of the river. Instead, the First Point parties
24 diverted and used the surplus water on their own, with no SWRCB oversight, and with no claim of
25 right to the water.

26 79. The internal, unregulated and informal distribution of surplus, excess water to other
27 First Point rights was a central component of the Kern River operations and the law of the river.
28 This release practice worked practically without challenge or interference so long as all the First

1 Point Kern River rights were held and controlled by a single entity; KCLC, and later Tenneco. After
2 1976 the common ownership and control ended, and there were immediate and ongoing disputes and
3 disagreements about the diversion and use of the surplus release water.

4 80. The declarations and representations to the SWRCB that the Kern River was fully
5 appropriated and that there was no surplus water, was part of KCLC's strategy to maintain control of
6 all of the water at First Point, to keep third parties away from the Kern River, and to avoid further
7 regulatory oversight.

8 81. The recent finding that Kern Delta has forfeited a portion of its pre-1914 water rights
9 represents a significant and radical change to the operations and customs and practices on the Kern
10 River. The finding of forfeiture practically ends and seriously questions the release water program
11 and practice. The court in the Kern River litigation found that the release water program still
12 constituted non-use of a right which directly resulted in forfeiture of a portion of those rights. I
13 understand that Kern Delta has announced it will no longer release any water to the river (beyond the
14 forfeiture water which formerly accrued to its rights). The informal, shared use of Kern River
15 therefore seems to be coming to an end, and the forfeited water similarly should be allocated or
16 assigned by the SWRCB to a permanent right holder and use.

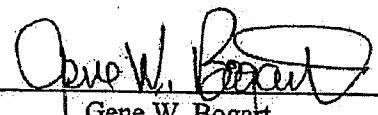
17 82. The finding of forfeiture has at the very least created significant uncertainty and
18 confusion with regard to the Kern River water rights structure. In particular there is considerable
19 uncertainty and confusion on the river because it is not clear which entity owns or can divert and use
20 the water forfeited by Kern Delta, which previously accrued to Kern Delta's rights. It does not
21 appear that North Kern or Kern Delta have any right to take the forfeited water. Such forfeited water
22 is clearly outside of and not listed in the Kern River water rights structure and daily flow and
23 diversion sheet. Such forfeited water is also outside of the 1952 Agreement between North Kern and
24 KCLC, and North Kern has no right to divert and use this newly available water.

25 83. Despite this uncertainty, it would be relatively easy to account for and record the
26 forfeited, surplus water in the daily, monthly, and annual record of diversion and use on the river.
27 The City could record any available forfeited, surplus water in a separate column. For example,
28 after the Kern Island 1st right has reached its preserved entitlement in a month where there

1 is forfeiture; the 300 cfs of Kern River flow which would have otherwise been available to and
2 distributed to that right would be listed in the "Forfeiture Entitlement" column.

3 84. I understand the City has not yet officially added a column for the Forfeiture
4 Entitlement because it is waiting for the SWRCB to determine rights and claims to the water.

5 Executed under the penalty of perjury under the laws of the State of California at Bakersfield,
6 California on October 15, 2009.

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8 Gene W. Bogart

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