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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 FLORN R.**
21 **CORE IN SUPPORT OF PETITION OF**
22 **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, Florn R. Core, declare and state as follows:

2 **I. PERSONAL EDUCATION AND EXPERIENCE**

3 1. I am the Water Resources Manager for the City of Bakersfield, California (“City” or
4 “Bakersfield”). I have served the City over the last 29 years, holding various positions, including
5 Water Superintendent, Assistant Water Resources Director and Water Resources Director. I was
6 appointed the Water Resources Manager in January 2004.

7 2. I serve as a department head, reporting directly to the City Manager. I supervise 25
8 employees in the Water Resources Department. I advise and report to the City of Bakersfield Water
9 Board, a three person subcommittee of the City Council, and ultimately the seven person City
10 Council and Mayor.

11 3. My duties as the Water Resources Manager include the following: Managing the
12 operation, maintenance, and distribution of the Kern River and the associated canal distribution
13 systems; supervising the operation of the Kern River Central Records system, including the
14 measurement, verification, recording and distribution of such records to the various Kern River
15 interests; overseeing the preparation of the Kern River Hydrographic Annual Report; maintaining the
16 integrity of the City’s Kern River water rights ownership; managing the operations of a 40,000
17 service connection domestic water system; managing the operations and maintenance of over 10,000
18 fire hydrants in the City; managing the operations of a 5,000 acre municipal farm that recycles
19 wastewater for crop production; performing stormwater runoff management, including retention
20 programs for water supply benefit and water quality monitoring; responsibility for the operations and
21 maintenance of the Kern River Levee District; and planning and directing water resources
22 management within the City.

23 4. I hold a Bachelor of Science Degree in Earth Science, concentration in Geology and
24 Hydrology, from California State University, Bakersfield. My training has included “Concepts of
25 Groundwater Management”, UC Davis; “Water Management Workshop”, US Bureau of
26 Reclamation; “Managing California’s Liquid Gold”, UC Santa Barbara Extension; California
27 Cooperative Snow Surveys Workshops; “Water Well Logging Seminars”, Welenco &
28 Schlumberger; “Optimizing Water Utility Management & Operations”, American Water Works

1 Association. I hold professional affiliations with the American Water Works Association, American
2 Association of Professional Geologists, and the California Water Environment Association.

3 (Accompanying this testimony as Exhibit 2-2 is a copy of my resume.)

4 **II. HISTORY AND BACKGROUND OF THE KERN RIVER AND THE CITY OF**
5 **BAKERSFIELD'S KERN RIVER WATER RIGHTS**

6 5. The Kern River is a natural watercourse originating in the Sierra Nevada mountain
7 range in Central California. The river flows through the foothills and into the southern San Joaquin
8 Valley a few miles northeast of Bakersfield. The river then flows to the southwest through
9 Bakersfield to a point about 20 miles distant, where, historically, in wet years it would turn
10 northwest and flow toward Tulare Lake. The advent of local groundwater recharge projects and the
11 Kern River – California Aqueduct Intertie have lessened flood impacts to Tulare Lake.

12 6. The Kern River runs through the center of the City and serves as the primary water
13 source for the City. Since the initial settlement of the area, Bakersfield and its residents have relied
14 on water from the Kern River, either from direct diversions or from groundwater created by seepage
15 of the Kern River into the groundwater basin under Bakersfield.

16 7. The City provides Kern River water to its residents through direct diversions of
17 surface water, and through extractions from the local groundwater basin, which is replenished by the
18 Kern River. The City has historically used Kern River water for delivery to customers for domestic,
19 industrial, and municipal uses, for incidental use for parks and recreational activities, for water
20 storage and groundwater replenishment and recapture, for environmental and aesthetic purposes, for
21 creation and preservation of the wild life habitat and preserve in regions along the Kern River, and
22 for several other beneficial uses.

23 8. Bakersfield currently has 333,719 residents, with more than 496,300 residents in the
24 greater metropolitan Bakersfield area. Bakersfield is currently the 11th largest city in the State of
25 California and recently was recognized as one of the fastest growing cities in the state, if not the
26 entire country.

27 9. Bakersfield has experienced rapid population growth in recent years. Significant
28 growth in Bakersfield primarily commenced after World War II. By 1955, the population of

1 Bakersfield was approximately 50,000 people. By 1980, the population had doubled to over 100,000
2 people. In another fifteen years, the population doubled again, as the population exceeded 200,000
3 by 1995.

4 10. By 2040, the City's population is projected to have increased to 580,000 residents.
5 The City's continued ability to meet the demand for municipal and industrial water service is
6 entirely dependent upon the City's ability to utilize all of its available Kern River water rights, and is
7 dependent upon the City's ability to obtain new water sources and supplies, including available
8 water on the Kern River.

9 11. Although Bakersfield residents have used and relied on the Kern River for a water
10 supply since the original settlement of the region, the City did not hold or own any actual
11 appropriative Kern River water rights until 1976. Instead, until 1976 all of the Kern River water
12 rights connected to the "First Point" of measurement on the river were owned and controlled by a
13 private company, the Kern County Land Company ("KCLC"), and later Tenneco West, Inc.
14 ("Tenneco").

15 12. As explained in the accompanying testimony of Gene W. Bogart, KCLC historically
16 distributed water to consumers and land owners to the north and south of the Kern River through a
17 series of canals. The canals corresponded to separate pre-1914 appropriative water rights, which
18 were confirmed and quantified in a historic 1900 decision, identified as the "Shaw Decree." The
19 Kern River water rights were also distributed pursuant to an 1888 agreement, the Miller-Haggin
20 Agreement, which settled a long time dispute between upstream and downstream appropriators. As
21 a result of the Miller-Haggin Agreement, the Kern River was and still is divided during certain
22 months of the year between appropriators below the First Point of measurement on the river, near the
23 Sierra Nevada foothills ("First Point"), and lower river appropriators below the Second Point of
24 measurement, in the western portion of the southern San Joaquin Valley ("Second Point" or "Lower
25 River").

26 13. On April 12, 1976, Bakersfield entered into a written agreement (Agreement No. 76-
27 36) with Tenneco (the "Tenneco Agreement"), as successor to KCLC, whereby, among other things,
28 Bakersfield acquired all of the Kern River water rights and interests provided for in the Miller-

1 Haggin Agreement and the Shaw Decree that were held by Tenneco and the other parties to the
2 agreement. (A copy of the Tenneco Agreement accompanies this testimony as Exhibit 2-3.)

3 14. After execution of the Tenneco Agreement, Bakersfield sold the former public utility
4 canal companies located south of the Kern River and formerly owned by KCLC (the Kern Island,
5 Buena Vista, Stine and Farmers Canal companies), and associated Kern River water rights, to the
6 Kern Delta Water District ("Kern Delta") through a separate agreement.

7 15. As a result of these agreements, Bakersfield and Kern Delta currently hold all of the
8 pre-1914 water rights associated with the First Point of measurement on the Kern River. The North
9 Kern Water Storage District ("North Kern") also diverts and uses water from the First Point service
10 area pursuant to a water supply agreement between North Kern and Bakersfield, as successor in
11 interest to KCLC, as explained in more detail below.

12 16. As a result of the Tenneco Agreement, Bakersfield currently owns and diverts water
13 pursuant to pre-1914 appropriative rights that are identified on the flow and diversion record for the
14 river as the Kern River Conduit, the Castro, Beardsley (1st), Wilson and Beardsley (3rd) rights, and
15 portions of the South Fork, McCord, Calloway, and Railroad rights.

16 17. Bakersfield also owns and administers additional pre-1914 appropriative rights
17 identified as the James (1st and 2nd), Anderson (1st and 2nd), Meacham, Plunkett, Joyce, Johnson,
18 Pioneer (1st and 2nd), Beardsley (1st and 2nd), James & Dixon, McCaffrey, McCord, Calloway and
19 Railroad. North Kern has a "first priority" to divert and use water for irrigation of crops, accruing to
20 these rights pursuant to the 1952 agreement (hereinafter the "1952 Agreement") with KCLC and
21 various private canal companies, subject to various limitations. (A copy of the 1952 Agreement
22 accompanies this testimony as Exhibit 2-4.)

23 18. Since it obtained ownership of the Kern River rights in 1976, Bakersfield historically
24 has diverted an average of 192,252 acre feet of water per year accruing to its pre-1914 appropriative
25 Kern River water rights. This number does not include water diverted by North Kern under the 1952
26 Agreement. Bakersfield also pumps groundwater for delivery to its residents, which groundwater is
27 replenished by flows in the Kern River.

1 19. In addition to all of the Kern River water rights formerly held by KCLC pursuant to
2 the Tenneco Agreement, Bakersfield assumed all rights, duties, and obligations with regard to the
3 operation of the Kern River, the diversion of water into the headgates and canals off the river, and
4 the record keeping function for the river. (Ex. 2-3, Tenneco Agreement, ¶ 12.1, pp. 43-44.)

5 20. Bakersfield, as successor to KCLC, operates the Kern River diversion system for the
6 benefit of the other First Point interests. On a daily basis, employees of the City's Water Resources
7 Department receive orders for Kern River water from dispatchers at North Kern and Kern Delta.
8 Representatives of these districts ask the City to divert specified quantities of water into the canals
9 that deliver water to the districts from the Kern River. City employees thereafter physically divert
10 water out of the river into various canals, and operate and maintain the headgates, weirs, and other
11 physical facilities in and around the Kern River.

12 21. Although the City does not perform any legal or adjudicatory function in connection
13 with the Kern River, it relies on and is guided by the diversion rights and limits set forth in the
14 Miller-Haggin Agreement and the Shaw Decree. The City also determines whether there is
15 sufficient water flowing in the river to satisfy the orders and demands of the other districts, and
16 determines whether a specific canal right has sufficient "entitlement" to receive water to support a
17 request for water.

18 22. Bakersfield thereafter prepares the daily record of Kern River flows, diversions and
19 uses. Bakersfield compiles the daily records into monthly and annual summaries and prepares
20 detailed annual reports regarding such diversions. (Copies of the 2005, 2006, 2007, and 2008
21 Hydrographic Annual Reports are attached hereto as Exhibits 2-5, 2-6, 2-7 and 2-8.)

22 23. The City faithfully continues to keep the flow and diversion records in basically the
23 same format as by its predecessors, KCLC and Tenneco. The river flow and the diversions of water
24 accruing to each right are still recorded each day, albeit in a computerized format.

25 24. Bakersfield also acts as the protector and steward of the Kern River, as Bakersfield
26 consistently and historically has acted to protect the quantity, quality, reliability, and continued
27 viability of the local water supply, the Kern River, and the environment in and around the river.

1 25. Shortly after its acquisition of Kern River water rights in 1976, for example, the City
2 implemented a project known as the Kern River Parkway Plan to provide recreational opportunities
3 and habitat preservation along the Kern River on land through Metropolitan Bakersfield.
4 Bakersfield pursued and acquired privately held properties in and along the river channel to place the
5 entire river channel through Bakersfield in public ownership. The Parkway Plan called for the
6 dedication of additional recreational areas, green belts, and walking and riding trails along the river.
7 (Accompanying this testimony as Exhibit 2-9 is a copy of the Environmental Impact Report (EIR)
8 for the Kern River Parkway Plan.)

9 26. As a result of such projects, as well as later additions to the project, it is possible to
10 run or bike along the Kern River from the mouth of the Kern River Canyon, at the base of the Sierra
11 Nevada foothills, all the way to Interstate 5, in the western portion of the San Joaquin Valley. The
12 Kern River Parkway further includes a number of parks along the river, as well as land dedicated to
13 native habitat and vegetation preservation. The Kern River Parkway Plan resulted from extensive
14 input from the public, as a result of several years of public comment and hearings on the river.

15 27. Bakersfield has also developed and implemented water conservation and groundwater
16 recharge programs in connection with the Kern River. The Kern River is a unique resource in that it
17 is an excellent recharge facility. A groundwater mound lies directly under the Kern River. It is
18 important to maintain high groundwater levels by recharging as much Kern River water as possible
19 in the Kern River channel to provide a high quality source of groundwater for use by Bakersfield
20 residents, and other individuals and entities that pump from the local groundwater basin. High
21 groundwater levels in the vicinity of the river further protect and prevent the migration of
22 contaminants into the City's groundwater supply from oil production facilities and agricultural
23 properties to the north and south of the City. Specifically, maintaining high groundwater levels or a
24 mound in the Kern River prevents contaminants from migrating towards the City, so that the closer
25 you are to the river, the better quality of water you will have.

26 28. To protect the river, the local groundwater supply, and the environment in and around
27 the river, the City has a long range goal of maintaining a consistent and sustainable flow of water in
28 the Kern River. Since the 1960s, the City also has worked towards a goal of providing minimum

1 annual flows in the Kern River. Bakersfield also has utilized the Kern River channel and banks for
2 environmental purposes, by setting aside open space areas, trail systems, native vegetation habitats,
3 and greenbelts.

4 29. At the time it acquired its Kern River water rights in 1976, Bakersfield entered into
5 four 35-year long-term contracts to sell a portion of its Kern River water supply to four agricultural
6 districts. As a result of such contracts, Bakersfield has transferred an average of approximately
7 70,000 acre feet of water to these agricultural districts each year. These four contracts are set to
8 expire at the end of 2011. Bakersfield intends to take back a significant quantity of this water to
9 meet its increasing demand for water, and to enhance the environment in and around the Kern River
10 further. Bakersfield will be able to utilize the water formerly used under these contracts, in
11 connection with the water forfeited by Kern Delta, to create a constantly flowing, viable, and
12 sustainable "wet" Kern River throughout the entire year.

13 30. It is the City's policy that its Kern River water shall only be utilized within the
14 boundaries of the San Joaquin Valley portion of Kern County. This policy is important so that Kern
15 River water remains within and over the local groundwater basin. There is a tremendous demand
16 and competition for water throughout Southern California and particularly in areas south of
17 Bakersfield in the L.A. Basin. Entities in this area have the ability to pay a large amount of money
18 for a small amount of water. The City adopted and instituted its policy to prevent water from
19 leaving the area and to prevent someone from selling Kern River water out of the county.

20 **III. CHANGED CIRCUMSTANCES ON THE KERN RIVER REQUIRE REVISION OF**
21 **THE FULLY APPROPRIATED STATUS OF THE RIVER**

22 31. It is the City's position that there are "changed circumstances" on the Kern River as a
23 result of the recent finding and judgment that Kern Delta, the owner of the Kern Island, Buena Vista,
24 Stine and Farmers canal rights, forfeited a significant portion of its pre-1914 Kern River water
25 rights. As explained herein, the finding of forfeiture by itself constitutes changed circumstances that
26 require revision of the fully appropriated status of the river.

27 32. There are also changed circumstances based on the change in ownership and control
28 on the river in 1976, as a result of the transfer of Kern River water rights and related property from

1 KCLC's successor, Tenneco, to the City and the simultaneous transfer of the Kern Island, Buena
2 Vista, Stine and Farmers canal rights to Kern Delta by the City. After 1976, the Kern River water
3 rights were no longer managed and controlled by a single entity, but by three separate entities (the
4 City, Kern Delta, and North Kern, through its contract with the City's predecessor in interest).

5 **A. The Kern River Water Rights Are No Longer Under Common Ownership And**
6 **Control**

7 33. Prior to 1976, the common ownership and control ensured that there was "peace" on
8 the Kern River, with no disputes or competing claims to the water. Instead, as a result of the
9 common ownership and control, and lack of State Water Resources Control Board ("SWRCB")
10 regulation or involvement in the river, excess and surplus flows of Kern River water were
11 redistributed to junior canal rights informally on an ad hoc, daily basis, with no concern or
12 consideration for right, title, and ownership of the water.

13 34. The common ownership and control explains and illuminates how the SWRCB could
14 declare the Kern River fully appropriated, notwithstanding the obvious existence of surplus water in
15 excess of the actual demand and reasonable and beneficial use of water by Kern Delta. Even after
16 1976, when disputes arose among the three entities using First Point Kern River water, the three
17 parties continued to declare and represent that there was no surplus or unappropriated water on the
18 Kern River, even though they acknowledged and claimed internally that the opposite was true, based
19 on Kern Delta's continual release of surplus water.

20 35. The record of diversion and use, in fact, conclusively demonstrated that the canal
21 rights acquired by Kern Delta from the City in 1976 historically never diverted and used all of the
22 water that accrued to such rights. The water rights would yield, "on paper," up to approximately
23 250,000 acre-feet per year (afy) of water. However, primarily based on a lack of demand, such
24 rights typically diverted only an average of 160,000 afy of water. The remainder of the water
25 accruing to the rights remained in the river for diversion and use by other more junior Kern River
26 water rights. Water not diverted by higher priority rights was deemed to have been "released" to
27 junior water rights, including the rights now held by the City. The water not diverted by Kern
28 Delta's rights has been referred to commonly as "release water."

1 36. As the court in the Kern River litigation concluded, each day there was water that was
2 surplus to the needs and demands of the historic right holders on the river. Accordingly, the court
3 ultimately found that one right holder, Kern Delta, had forfeited a significant quantity of water
4 because it had no demand for the water. The water by definition was surplus to the daily and
5 monthly demands of the rights now held by Kern Delta.

6 37. Since all of the First Point Kern River water rights formerly were held and controlled
7 by KCLC, it made sense that KCLC would seek to preserve the status quo that would allow it to
8 operate the river without any regulatory oversight or diversions by third parties. The First Point
9 parties did not challenge the fully appropriated status of the river, and the parties did not raise any
10 disputed issues or challenges to the diversion and use of water. Of course, since KCLC was the
11 record keeper on the river, it had the ability to control and manage information regarding the
12 existence and availability of any “unappropriated water.”

13 38. In 1964, for example, the long time attorney for KCLC advised the company that
14 despite the recent decision by the predecessor to the SWRCB finding that the Kern River was fully
15 appropriated, the SWRCB might still in the future accept applications to appropriate on the river if
16 there was “a change in circumstances which might justify showing of abandonment of presently
17 existing water rights.” (A copy of the letter accompanies this testimony as Exhibit 2-10.) Mr.
18 Enersen further advised that KCLC should continue to keep records of stream flow and diversions
19 on the Kern River because KCLC’s water rights could still be “lost through nonuse.” Mr. Enersen
20 therefore urged that KCLC should maintain the diversion records “so as to be available at any time,”
21 if KCLC was “called upon to defend your water rights against claims of abandonment.”

22 **B. First Point Litigation**

23 39. After 1976, the First Point Kern River water rights were used for the first time by
24 three separate entities (Kern Delta, the City, and North Kern) with competing interests,
25 constituencies, and demands. Not surprisingly, disputes over the release water program first arose
26 after 1976, after Kern Delta acquired its Kern River water rights.

27 40. After the acquisition, Kern Delta began to increase diversions, primarily using the
28 Kern Island canal right, of Kern River water over and above amounts previously diverted by its

1 predecessors in title. North Kern and the City objected to Kern Delta's increased diversions, as such
2 diversion deprived the City and North Kern of the surplus water that they typically and historically
3 diverted and used. Also, for the first time, Kern Delta challenged and voiced objection to the release
4 water program, and attempted to retain surplus water that historically had been released to more
5 junior rights.

6 41. From 1976 through the mid 1990s, North Kern, Kern Delta, and the City engaged in a
7 series of discussions, negotiations, and meetings in an attempt to resolve the dispute over Kern
8 Delta's actual and threatened increased diversion of water. The parties put aside their differences in
9 the 1980s to collectively defeat claims by third parties to the Kern River. The parties also entered
10 into a series of agreements and stipulations to toll any applicable statutes of limitation with regard to
11 the parties' water rights, and to allow the parties sufficient time to attempt to resolve the dispute.

12 42. In that regard, the First Point parties continued to claim that the Kern River was fully
13 appropriated, notwithstanding the significant quantity of surplus water resulting from Kern Delta's
14 consistent failure to divert and use its full entitlement on the river.

15 43. For example, in 1989, the parties collaborated to obtain the most recent declaration of
16 the fully appropriated status of the Kern River. At that time the First Point parties presented a
17 unified front to the SWRCB, with the idea of preserving the status quo and avoiding third party
18 claims and regulatory oversight. The parties did not disclose to the SWRCB that they were
19 continuing to negotiate over the ownership and use of the water that was surplus to Kern Delta's
20 demands, or that they each had asserted some type of claim of right to the excess, surplus water.

21 44. In 1995, however, after negotiations broke down, North Kern filed a lawsuit against
22 Kern Delta to obtain rights to the disputed surplus water. (*North Kern Water Storage District v.*
23 *Kern Delta Water District*, Tulare County Superior Court Case No. 96-172919, hereinafter "Kern
24 River lawsuit").

25 45. In the Kern River lawsuit, North Kern alleged that Kern Delta had forfeited a
26 significant portion of its Kern River water rights based on its failure to divert and use such water.
27 North Kern also alleged, under a number of causes of action and legal theories, that it had acquired
28 permanent rights to the water that Kern Delta forfeited, through causes of action for forfeiture,

1 “purchase” under the 1952 Agreement, abandonment, intervening public use, prescription, and
2 equitable apportionment.

3 46. In response to North Kern’s complaint, Kern Delta asserted a cross-complaint against
4 the City, as well as North Kern. The City thereafter filed its own cross-complaint against Kern Delta
5 and North Kern. The City alleged that the release water forfeited by Kern Delta could not and did
6 belong to North Kern, but constituted unappropriated water that reverted to the State for subsequent
7 allocation and appropriation. The City argued that only the SWRCB had authority to determine
8 rights to the forfeited, unappropriated Kern River water.

9 47. Shortly after it filed its cross-complaint, the City filed a petition and application with
10 the SWRCB to appropriate all Kern River water forfeited by Kern Delta. (A copy of the petition and
11 application, and a transmittal letter, accompanies this testimony as Exhibit 2-11.) North Kern and
12 Kern Delta later filed with the SWRCB similar applications to appropriate. A number of other
13 entities not involved in the Kern River litigation later filed applications to appropriate the forfeited,
14 unappropriated Kern River water.

15 48. The SWRCB, in an April 23, 1997 letter, recognized that the City had filed the initial
16 application to appropriate, and that the City would have a priority based on the timing of its filing.
17 (A copy of the letter accompanies this testimony as Exhibit 2-12.) The SWRCB also stated that “In
18 the event that competing applications are submitted, the SWRCB would likely give priority to
19 municipal use, in accordance with Sections 106 and 1460 et seq. of the Water Code,” and the
20 SWRCB further informed the City that it would “retain your petition and unaccepted application
21 pending the outcome of the trial.”

22 49. The Kern River litigation proceeded to trial from July 20, 1998 through November
23 25, 1998 in front of the Honorable Kenneth E. Conn of the Tulare County Superior Court. On May
24 13, 1999, the court entered judgment pursuant to a detailed statement of decision. (A copy of the
25 judgment and statement of decision accompanies this testimony as Exhibit 2-13.)

26 50. In the decision (hereinafter the “Conn Decision”), the court ruled that Kern Delta
27 forfeited a significant portion of its Kern River water rights based on historic nonuse. The trial
28 court, however, also rejected all of North Kern’s claims to the forfeited surplus water. The trial

1 court concluded that although North Kern from time to time used a portion of the forfeited “release”
2 water, North Kern had no cognizable right or claim to the water.

3 51. Among other things, the evidence presented at trial failed to persuade the court that
4 North Kern had purchased any of Kern Delta’s water rights in 1952. The court found that the 1952
5 Agreement simply did not address the release water and did not guarantee North Kern receipt of any
6 portion of the release water.

7 52. Judge Conn instead ruled: “Because this court has determined that certain of Kern
8 Delta’s water rights have been forfeited, this court further finds that the Kern River is no longer fully
9 appropriated and such water is subject to appropriation.” (Ex. 2-13, Conn Decision, p. 16.) The
10 court further stated: “It is therefore the decision of this court that the portion of water rights of Kern
11 Delta found to be forfeited shall be deemed unappropriated water and become subject to
12 appropriation pursuant to applicable procedures before the State Water Resources Control Board.”
13 (Ex. 2-13, Conn Decision, pp. 16-17.)

14 53. Kern Delta appealed the Conn Decision, and North Kern filed a cross appeal to
15 challenge the court’s rejection of its claim to the water through the forfeiture cause of action. North
16 Kern, however, did not challenge or appeal the trial court’s rulings on its other claims to the forfeited
17 water, including its claim that it had purchased some right to the water released by Kern Delta’s
18 rights through the 1952 Agreement.

19 54. The California Court of Appeal for the Fifth Appellate District later issued an opinion
20 reversing in part the Conn Decision, and remanding the action for retrial of certain issues. (*North*
21 *Kern Water Storage Dist. v. Kern Delta Water Dist., et al.*, No. F033370, 5th Dist. Jan. 31, 2003, as
22 modified March 3, 2003 (unpublished opinion), a copy of which opinion accompanies this testimony
23 as Exhibit 2-14.)

24 55. The Court of Appeal found that the trial court had erred by failing to identify a
25 specific five year period for determining forfeiture, and in measuring and calculating the amount of
26 water forfeited by the canal rights held by Kern Delta. The action was remanded back to the Tulare
27 County Superior Court to the Honorable Melinda M. Reed for retrial of the question “whether Kern
28 Delta forfeited by nonuse any part of its paper entitlements, based upon a measurement (day, month,

1 season, etc.), a specific five-year period, and a consideration of all other relevant factors disclosed by
2 the evidence.”

3 56. The Court of Appeal still endorsed significant portions of the Conn Decision. The
4 Court stated, for example, that the trial court had properly rejected all of Kern Delta’s defenses to
5 forfeiture. (Ex. 2-14, Opinion, pp. 22-32.) The Court also confirmed that “the amount unused by
6 Kern Delta was forfeited.” (Ex. 2-14, Opinion, p. 32, n. 33.)

7 57. The Court of Appeal also rejected North Kern’s challenge to the trial court’s finding
8 that the forfeited water reverted to the public, or the State, for subsequent appropriation. The Court
9 explained that “the pre-1914 nature of Kern Delta’s rights does not preclude application of the
10 [Water Code] if that right is found to have been lost after 1914.” (Ex. 2-14, Opinion, p. 45.) The
11 Court confirmed that the “SWRCB has exclusive jurisdiction over appropriative claims made after
12 1914,” and “water forfeited reverts to the public and becomes available for appropriation by others
13 through the permit procedures.” (Ex. 2-14, Opinion, p. 46, citations omitted.)

14 58. Retrial of the remanded issues commenced in Tulare County Superior Court on
15 August 30, 2004, and concluded on November 10, 2004. Judge Reed issued a statement of decision
16 on February 9, 2005 and entered judgment consistent with the statement of decision on that date. (A
17 copy of the judgment and statement of decision (hereinafter “Reed Decision”) accompanies this
18 testimony as Exhibit 2-15.)

19 59. In the Reed Decision, the court again concluded that Kern Delta forfeited a portion of
20 its Kern River water rights based on nonuse. As directed by the Court of Appeal, the court identified
21 one specific time period for Kern Delta’s forfeiture; finding that “the proper five-year period for
22 measuring Kern Delta’s forfeiture is January 1, 1972 through December 31, 1976.” (Ex. 2-15, Reed
23 Decision, p. 19.)

24 60. The court held that Kern Delta forfeited significant quantities of Kern River water
25 accruing to its Kern Island water right in the months of January, October, November, and December,
26 as well as water accruing to its Farmers canal right in August. (Ex. 2-15, Reed Decision, p. 29.) The
27 trial court therefore found that Kern Delta forfeited a total of 60,895 acre-feet (af) of water accruing
28 to certain of its pre-1914 appropriative Kern River rights.

1 61. North Kern and Kern Delta appealed the Reed Decision. On May 26, 2005, while the
2 appeals were pending, the SWRCB indicated in a letter to the City and the 10 other agencies that had
3 filed applications to appropriate water from the Kern River, that based on the significant passage of
4 time and the duration of the Kern River litigation, the SWRCB would “reject the submitted
5 applications and petitions without prejudice.” (A copy of the May 26, 2005 letter accompanies this
6 testimony as Exhibit 2-16.) The SWRCB stated that the parties could refile their applications upon
7 the conclusion of the Kern River litigation.

8 62. On January 2, 2007, the Court of Appeal issued its opinion in the appeal of the
9 remanded proceedings before Judge Reed. The Court of Appeal later amended the opinion in
10 response to petitions for rehearing filed by the City and Kern Delta. The Court issued its final
11 amended opinion on February 5, 2007, in a reported decision. (*North Kern Water Storage District v.*
12 *Kern Delta Water District* (2007) 147 Cal.App.4th 555, a copy of which accompanies this testimony
13 as Exhibit 2-17.)

14 63. Through the new opinion, the Court of Appeal affirmed the Reed Decision, with
15 modifications. The Court once again upheld the finding that Kern Delta forfeited a significant
16 portion of its pre-1914 water rights by non-use. The Court also upheld Judge Reed’s use of the
17 1972-1976 time period, and a “monthly time step,” to determine forfeiture. The Court of Appeal
18 also upheld the use of a monthly diversion cap, or “preserved entitlement,” to reflect Kern Delta’s
19 forfeiture of water in various months.

20 64. The Court still modified the Reed Decision to increase the quantity of water forfeited
21 by Kern Delta. The Court of Appeal found Kern Delta additionally had forfeited portions of its
22 Buena Vista (1st) right in January, November and December; a portion of its Stine right in
23 September, October, November and December; and a portion of its Farmers right, in addition to
24 August, for September and December.

25 65. These modifications resulted in the forfeiture of rights to an additional 65,799 af of
26 Kern River water. Combined with the 60,895 af forfeited as a result of the Reed Decision, as a result
27 of the Kern River litigation Kern Delta has forfeited rights to up to 126,694 af of pre-1914
28 appropriative rights.

1 66. The Court of Appeal also acknowledged, as did the prior courts, that it could not and
2 would not rule on the disposition of the forfeited water. Instead, the Court noted that pursuant to
3 Water Code Section 1241, only the SWRCB could make such a determination. (147 Cal.App.4th at
4 566, n. 5; 583-584.) However, the Court did confirm and hold that the forfeited water did not pass to
5 other water users, in particular North Kern: “However, the trial court was correct that the forfeited
6 rights are not awarded to North Kern, so our conclusion does not result in reversal of the judgment.”
7 (147 Cal.App.4th at 584.)

8 67. North Kern and Kern Delta filed petitions requesting the California Supreme Court
9 review the second opinion. On April 25, 2007 the Supreme Court rejected the petitions. On April
10 30, 2007, the Court of Appeal issued a Remittitur certifying that the most recent opinion in the Kern
11 River litigation had become final. Bakersfield immediately thereafter filed its revised petition and
12 application to appropriate with the SWRCB.

13 **C. There Is Surplus Water In High Flow Years**

14 68. The City also maintains that the SWRCB should revise the fully appropriated status
15 of the Kern River because there are changed circumstances involving the existence of very high flow
16 quantities of Kern River water in certain years.

17 69. In high flow years, the amount of water in the Kern River has far exceeded the
18 entitlement and demand at First Point and Second Point. In very wet years, such as 1969 and 1983,
19 there has been an extreme amount of water flowing past First Point and Second Point. The water
20 that flows past Second Point has gone into the Kern River – California Aqueduct Intertie facility.

21 70. The Intertie has been opened for six periods, in seven different years, and one
22 “incident” started in 1982 and flowed into 1983. The accompanying Exhibit 2-18 demonstrates and
23 accounts for the existence and extent of the high Kern River flows diverted into the Kern River
24 Intertie. Exhibit 2-18 indicates that diversions into the California Aqueduct Intertie have ranged
25 from as little as 1,793 af to as much as 664,036 af in one particularly wet year.

26 **IV. QUANTIFICATION AND ACCOUNTING OF SURPLUS WATER**

27 **A. Experience with Records and Record Keeping**

1 71. The City continued in the Central Records role on the Kern River, being passed on as
2 a function of the Kern County Canal and Water Company ("KCC&WC") (under Tenneco and its
3 predecessor, KCLC) and the City has been the sole keeper of the Kern River records since January
4 1977.

5 72. As Judge Conn wrote in his Statement of Decision, "An intricate system of daily,
6 monthly and yearly records of river flow and diversions were diligently kept by the company (Kern
7 County Land Company). The records were continued to be faithfully kept in basically the same
8 format by its successors, Tenneco West, and ultimately by the City. The river flow and the
9 diversions of water accruing to each right is still recorded each day, albeit in a computerized
10 format." (Ex. 2-13, Conn Decision, p. 5.) Judge Conn goes on to write, "No party has challenged
11 the accuracy of the river flow and diversion records." (Id.)

12 73. I have been associated with and in-charge of the City's Kern River recordkeeping
13 function since 1980, the year I began employment with the City. The daily, monthly and yearly
14 measurements and recordings of Kern River flow have been continuous and uninterrupted under my
15 direction.

16 **B. New Diversion Caps on Kern Delta's Rights**

17 74. The court in the Kern River litigation found that in each month where there was
18 forfeiture, Kern Delta's separate canal rights would be capped and limited to a set cumulative total
19 amount, measured in acre feet.

20 75. The court ultimately established preserved entitlements, or diversion caps, on some of
21 the rights held by Kern Delta, in the following amounts:

22 **Kern Island (1st) Right:**

23 January: 8,493 af
24 October: 6,989 af
25 November: 3,375 af
December: 2,050 af

26 **Buena Vista (1st) Right**

27 January: 347 af
28 November: 236 af

1 December: 191 af

2 **Stine Right**

3 September: 583 af
4 October: 1,380 af
5 November: 22 af
6 December 12 af

7 **Farmers Right**

8 August: 610 af
9 September: 268 af
10 December: 207 af

11 76. The preserved entitlement acts as a “cap,” or upper limit, on Kern Delta’s diversions,
12 based on Kern Delta’s forfeiture within certain months. The preserved entitlement remains constant
13 in each month where the court found forfeiture.

14 **C. Available Surplus, Forfeited Water**

15 77. As a practical result of the finding of forfeiture and the implementation of the
16 diversion caps, the rights held by Kern Delta can continue to divert up to their full entitlement, so
17 long as the diversion caps are not triggered. That means, for example, that each day in December,
18 the Kern Island 1st canal right can divert all water accruing to its rights, at a flow of 300 cfs,
19 provided there is sufficient water flowing in the river. The right and ability of the Kern Island 1st to
20 divert water, however, would be cut off after that right had diverted enough water each day at 300
21 cfs to reach the 2,050 af diversion cap for December, or “preserved entitlement.”

22 78. The court otherwise did not change the water rights of Kern Delta, and the court did
23 not alter or order any change to the record of diversion and use on the river. Therefore, even though
24 a portion of the Kern Island 1st in various months was forfeited, the flow and diversion record
25 continues to indicate that the Kern Island 1st right has the right each day to divert up to 300 cfs of
26 water.

27 79. The trial court in the Kern River litigation considered but rejected making further
28 changes to the water rights and flow and diversion record on the river. The court considered
reducing or altering the daily diversion quantities, or entitlements, as set forth in the Shaw Decree,

1 for the rights that forfeited water. The court, for example, considered reducing the 300 cfs daily
2 entitlement of the Kern Island 1st right in months where there was forfeiture to some lesser number
3 to reflect the forfeiture of all but 2,050 acre feet in December. The court ultimately rejected that idea
4 as unwieldy, and as not reflective of the monthly determination and measurement of forfeiture.

5 80. After the Kern Island 1st reaches its monthly cap, or preserved entitlement, any water
6 accumulating to that right constitutes forfeited, surplus water. For example, if the Kern Island 1st
7 right diverts water up to its full 300 cfs Shaw Decree right each day at the start of December, after
8 approximately four days it would reach the 2,050 acre feet diversion cap (a diversion at 300 cfs for 24
9 hours would result in a diversion of approximately 600 acre feet each day).

10 81. After four days, water would still accrue to (or technically be available to) the Kern
11 Island 1st right, assuming there was at least 300 cfs of water flowing in the Kern River. The Kern
12 Island 1st right, however, would not be able to divert or use that water, based on the judgment of
13 forfeiture. The water clearly no longer belongs to the Kern Island 1st right, once the monthly cap is
14 reached, but at this time no one else presently holds rights to such water. We assume and expect that
15 the ownership and proper diversion and use of the water will be determined by the SWRCB.

16 82. Any water accruing to the Kern Island 1st right after it reaches its monthly cap, or
17 preserved entitlement, necessarily would constitute forfeited, surplus water.

18 83. Following the issuance of the final judgment in the Kern River litigation, the City did
19 not alter or amend the record of diversion and use on the river to reflect forfeiture. The City thought
20 that it would be premature to alter the record to reflect forfeiture until the SWRCB determined the
21 appropriate disposition, ownership and use of the forfeited water.

22 84. It would be relatively easy, however, to change the record of diversion and use to
23 account for and reflect the forfeiture of Kern Delta's rights. The quantity of forfeited water available
24 each day could be recorded in a new column, next to the right that forfeited the water, just after the
25 columns for "Gross Diversions" and "Gross Entitlement." For example, in December, after the Kern
26 Island 1st reaches its diversion cap of 2,050 acre feet, assuming there is sufficient flow in the river,
27 the 300 cfs of water still accruing to that right would be entered in the "Forfeiture Entitlement"
28 column instead of the "Gross Entitlement" column.

1 85. The accompanying Exhibit 2-19 is an example of a blank flow and diversion sheet
2 reflecting this proposed change to the record, with the new column for Forfeiture Entitlement. Also
3 accompanying this testimony are two sheets from December 5, 2005, one showing the actual
4 diversion of water on that day (Exhibit 2-20), and another sheet (Exhibit 2-21) showing how the
5 diversion record would have appeared after the judgment of forfeiture in the Kern River litigation,
6 with the new column for the Forfeiture Entitlement.

7 86. If the preserved entitlements had been in place on December 5, 2005, the record
8 demonstrates that the Kern Island 1st would still have had an entitlement of 300 cfs. The Kern
9 Island 1st however, could not divert any portion of that water, and would not release it to the river.
10 Instead, the 300 cfs would be placed in the column for the Forfeiture Entitlement. Less release water
11 would be available to the junior rights, but otherwise there would be no practical change in the
12 operation of the river. These changes make the most sense legally and practically, since in non-
13 forfeiture months, and on days when the Kern Delta rights have not reached their monthly preserved
14 entitlement, or diversion caps, the Kern Island 1st right would still have the right and ability to divert
15 its full 300 cfs entitlement. It also seems more accurate and proper to list the Forfeiture Entitlement
16 in a column connected to the right that forfeited the water, because the forfeiture amount, timing and
17 duration is still directly tied to the right that forfeited the water.

18 87. The accompanying example does not reflect anyone diverting or otherwise using the
19 water, as that will have to wait until the SWRCB determines the appropriate use and disposition of
20 the forfeited water. We will necessarily have to make these changes to the record, however, if the
21 SWRCB does not take action to determine rights to the forfeited water.

22 **D. Monthly Forfeiture Totals**

23 88. I have reviewed the diversion records for canal rights on the Kern River subject to
24 the forfeiture determination: The Kern Island 1st, the Buena Vista, the Stine canal, and Farmers
25 canal. I have prepared a summary and analysis, based on the flow and diversion record for the Kern
26 River, to show how much surplus, forfeited water would have accrued or been created for these
27 rights if the forfeiture caps, or preserved entitlement, had been in place historically.
28

1 89. The table accompanying this testimony as Exhibit 2-22 indicates a cumulative
2 average annual total forfeiture entitlement from 1954-2008 period would yield 50,646 acre-feet of
3 forfeited water to the river. The exhibit also depicts a range of water available from a low of 15,648
4 acre-feet to as much as 123,363 acre-feet.

5 90. Using these diversion caps, I, along with staff from Bakersfield's Water Resources
6 Department, reviewed the historic flow and diversion record to determine how much water would
7 have been produced or available for diversion and use if the preserved entitlements or diversion caps
8 had been in place historically.

9 91. We prepared the accompanying summary and charts based on the undisputed historic
10 record of diversion and use on the Kern River. We compiled flow and diversion information from
11 1954, when the Lake Isabella dam was constructed and first began to affect Kern River flows,
12 through 2008. We analyzed all of the separate Kern Delta rights in the specific months when
13 forfeiture occurred.

14 92. We calculated the quantity of forfeited water, or the "Forfeiture Entitlement," by
15 determining the actual base entitlement, or gross entitlement, available to Kern Delta's rights in each
16 month (*i.e.*, the total quantity of water actually available to those rights in a month, based on the flow
17 in the river), and then subtracted the diversion cap from that amount. The result equals the quantity
18 of forfeited water which would have been produced each year from 1954 to the present if the
19 diversion caps had been in place historically.

20 93. The difference between the amount available to each Kern Delta right for diversion,
21 the gross entitlement, and the preserved entitlement, the new limit on diversions, represents water in
22 excess of, or surplus to, Kern Delta's demands, and surplus to its Kern River rights. That water
23 therefore constitutes unappropriated, "surplus" water.

24 94. In January 2005, for example, the Kern Island 1st right had a base or gross
25 entitlement of 18,611 af of Kern River water. That means that there were 18,611 af of water
26 available to that right based on the flow in the river, or that if the Kern Island 1st had diverted up to
27 its full Shaw Decree entitlement of 300 cfs whenever more than 300 cfs of water was flowing in the
28 Kern River, it would have diverted 18,611 af of water. By subtracting the diversion cap, or

1 preserved entitlement, of 8,493 from the base, or gross, entitlement of 18,611, we determined that
2 the Forfeiture Entitlement, or total quantity of water forfeited by the Kern Island 1st right and
3 available for diversion and use in January 2005, would have been 10,188 acre feet.

4 95. We undertook that same exercise and calculation for all of the Kern Delta rights in
5 the months when there was forfeiture. In January 1986, for example, the Buena Vista (1st) right had
6 a gross (or base) entitlement of 4,725 af. That indicates that there was sufficient flow in the river to
7 allow Kern Delta to divert that quantity of water pursuant to the right, assuming it had a demand for
8 the water. For every January, however, the Buena Vista (1st) right had a new preserved entitlement
9 of 347 af. Accordingly, the right would have produced 4,378 af of surplus, unappropriated water,
10 which represents the difference between the preserved entitlement and the gross entitlement, or the
11 water that would have been available to the Buena Vista (1st) right, absent forfeiture.

12 96. The charts accompanying this testimony at Exhibit 2-22 demonstrate that in every
13 month when there is forfeiture, from 1954 through 2008, the Buena Vista (1st) right produced a
14 maximum quantity of surplus, unappropriated water of 13,402 af, for an average of 5,102 af; the
15 Stine right produced a maximum quantity of surplus, unappropriated water of 32,937 af, for an
16 average of 3,253 af; and the Farmers right produced a maximum quantity of surplus, unappropriated
17 water of 20,996 af, for an average of 1,842 af. These averages, when combined with the average
18 quantity of surplus Kern Island (1st) water of 40,449 af, produces a total average of surplus,
19 unappropriated Kern River water of 50,646 af. The chart also demonstrates that every year on the
20 Kern River, as a result of Kern Delta's forfeiture, there has been and presumably will be a minimum
21 of 15,648 af of surplus water, up to a maximum of 123,363 af of surplus water (which, again, could
22 be greater in future years), with an average of 50,646 af.

23 **V. AS A RESULT OF THE KERN RIVER LITIGATION, THERE IS SURPLUS**
24 **WATER ON THE KERN RIVER**

25 97. As explained above, as a result of Kern Delta's forfeiture, there is now an average of
26 50,646 af of water and up to a maximum (to date) total of 123,363 af of surplus, forfeited water that
27 is not accounted for in the Shaw Decree, and that is "new water," outside the historic water rights
28

1 structure on the Kern River. This new water is and should be subject to the SWRCB's jurisdiction
2 and eventual diversion and use under a new water rights permit.

3 98. It is the City's position that the judgment of forfeiture automatically and necessarily
4 results in unappropriated water that is subject to SWRCB jurisdiction. The trial courts and Courts of
5 Appeal in the Kern River litigation repeatedly found and ruled that the forfeited water was surplus to
6 the demand of the prior right holder, Kern Delta. Those rulings establish the existence and extent of
7 surplus water, in amounts tied to Kern Delta's preserved entitlement, or diversion cap. On that basis
8 alone the SWRCB should revise the fully appropriated status of the river.

9 99. The forfeited, surplus water can not simply remain in the Kern River, or be "added to
10 the flow of the river" to feed existing rights because any prior Kern River rights, other than
11 Bakersfield's per-1914 rights, have no right or practical ability to divert the forfeited water. In
12 addition, if the SWRCB does not revise the fully appropriated status of the river and determine rights
13 to the forfeited water, there would be uncertainty, confusion and disputes on the Kern River over the
14 proper ownership, diversion and use of the forfeited water.

15 **A. No One Has The Right To Divert And Use The Forfeited Surplus Water.**

16 100. No other water right holders, petitioners, or parties have any right to take the forfeited
17 water, other than Bakersfield. The forfeited water is excess to or outside the rights of any other
18 parties or water users on the Kern River.

19 101. Specifically, North Kern has no right to take the new, forfeited water under its water
20 supply agreement with Bakersfield's predecessor. Petitioner Buena Vista Water Storage District
21 ("Buena Vista") holds "Second Point" Kern River rights, and the Kern County Water Agency
22 ("KCWA") has a contract to what is called "Hacienda" or "Lower River" water that accrues below
23 Second Point, and neither have any right or ability to take Kern River water in the months when
24 there is forfeiture. Finally, the City of Shafter ("Shafter") and the Kern Water Bank Authority
25 ("KWBA") have no Kern River water rights, and no ability to take the new, forfeited water.
26 Additionally, none of these parties can claim they would be damaged or deprived of any water
27 accruing to their rights if the SWRCB revises the fully appropriated status of the Kern River.
28

1 **(1) North Kern Water Storage District**

2 102. North Kern does not hold any pre-1914 appropriative rights on the Kern River.
3 Instead, North Kern can only divert and use water accruing to certain specific water rights owned by
4 Bakersfield, subject to various limitations, pursuant to the 1952 Agreement between North Kern and
5 Bakersfield's predecessor in title, KCLC. (See Exhibit 2-4.)

6 103. Pursuant to the 1952 Agreement, KCLC and its subsidiaries, KCC&WC, James
7 Canal, Inc., Anderson Canal, Inc., Plunket Canal, Inc., Joyce Canal, Inc., Pioneer Canal, Inc., Lerdo
8 Canal Company, James and Dixon Canal, Inc., and Central Canal Company, granted to North Kern
9 the right to use specified amounts of water accruing to pre-1914 Kern River water rights held by
10 KCLC through the above canal companies. All of the canal companies listed in the 1952 Agreement
11 were subsidiaries of KCLC and were private companies owned by KCLC, through KCC&WC.

12 104. The 1952 Agreement states that North Kern shall have the "first priority" to water
13 accruing to the water rights described in the agreement, up to maximum diversion amounts, but
14 KCLC expressly reserved, retained, and continued to own and hold title to the water rights described
15 in the agreement, and the right to divert and use all such water except water actually diverted by
16 North Kern pursuant to the agreement. KCLC retained title and ownership to all water above the
17 maximum diversion limits by month, and took possession of water not used under the maximum
18 limits, including water that flowed back to the Kern River "either over the surface or through the
19 ground," and "waste, seepage and return flow water . . . escaping or discharged beyond the present
20 boundaries of [North Kern]." (1952 Agreement, ¶ 5.)

21 105. In the 1952 Agreement, North Kern further agreed that it would not divert from the
22 Kern River any more than the maximum quantity of water to which it was entitled under the
23 agreement, and the 1952 Agreement states that any excess diversions by North Kern would not have
24 the result or effect of enlarging the rights of North Kern. (1952 Agreement, ¶ 4.)

25 106. Through the Tenneco Agreement, Bakersfield acquired all of the water rights
26 described in the 1952 Agreement. (Ex. 2-3, Tenneco Agreement, ¶ 2.2(a), p. 12.) Bakersfield is the
27 successor to KCLC and all of its subsidiary companies under the 1952 Agreement, and through the
28 Tenneco Agreement Bakersfield expressly assumed all rights, duties, and obligations of KCLC,

1 KCC&WC, and their subsidiary canal companies, including the rights referred to in the 1952
2 Agreement. (Ex. 2-3, Tenneco Agreement, ¶¶ 2.1, 2.2, and 12.1.)

3 107. The 1952 Agreement therefore did not transfer the pre-1914 water rights listed in the
4 agreement to North Kern. KCLC instead only granted North Kern the right to divert and use the
5 water accruing to the water rights described in the agreement, up to maximum diversion amounts per
6 month for the combined water rights. The agreement did not transfer to North Kern the title to or
7 ownership of the water rights, any claim to or interest in the pre-1914 appropriations that established
8 the rights, the “paper” entitlement of the rights, or any other entitlements or rights described in the
9 Shaw Decree, the Miller-Haggin Agreement, or any other operative document.

10 108. The 1952 Agreement is not a deed and can not be considered equivalent to a deed.
11 The title to the agreement, “Agreement for Use of Water Rights,” could not be any clearer as to the
12 intent and effect of the agreement. (Emphasis added.) In contrast, KCLC transferred certain
13 physical assets to North Kern in 1952, but such property was transferred through a separate
14 agreement, entitled “Agreement for Sale of Canals and Other Assets and for Transportation of
15 Water.” (Emphasis added.)

16 109. Since 1952 and continuing to the present, North Kern only had a right and title to take
17 water that accrued to the rights listed in the 1952 Agreement. North Kern otherwise does not hold
18 any licenses or permits to divert Kern River water, and does not hold any right, entitlement, or
19 ability to divert Kern River water other than pursuant to the 1952 Agreement.

20 110. The 1952 Agreement does not authorize or allow North Kern to divert water accruing
21 to any rights not listed in the agreement, including rights currently or formerly held by Kern Delta,
22 any new, forfeited water, or any “increased flows” attributable to or created by other water rights.
23 The 1952 Agreement does not authorize North Kern to divert any water accruing to the rights held
24 by Kern Delta, or any water released or forfeited by Kern Delta.

25 111. Under the Kern River water rights structure, the water released by Kern Delta’s
26 rights, and the water forfeited by Kern Delta, has not been listed or accounted for in the daily
27 diversion sheets as water accruing to the rights listed in the 1952 Agreement. The water instead is –
28 and always has been – recorded and recognized as water accruing to Kern Delta’s rights.

1 112. In addition, the court in the Kern River litigation held that North Kern did not
2 “purchase” any right to the release water through the 1952 Agreement. The trial court specifically
3 rejected North Kern’s “purchase” cause of action, as the court stated that “the evidence fails to
4 persuade the court that North Kern purchased any of the Kern Delta’s water rights.” (Ex. 2-13, Conn
5 Decision, pp. 8-9.) The court found the 1952 Agreement simply did not address the release water
6 and did not guarantee North Kern receipt of any portion of the release water. (Id.)

7 113. The trial court rejected all of North Kern’s other claims to the forfeited water,
8 including claims for abandonment, prescription, inverse condemnation, and intervening public use.
9 Although North Kern from time to time used a portion of the release water, the trial court found that
10 North Kern had no permanent, binding right to the water and did not otherwise take steps to acquire
11 rights to such water.

12 114. Through its appeal of the initial judgment in the forfeiture action, North Kern did not
13 challenge the trial court’s rejection of the causes of action under which it sought rights to the
14 forfeited water, including the claim for “purchase.”

15 115. Therefore, to the extent that forfeited water, or “release water” (in forfeiture months),
16 is “available” for diversion and use by the rights utilized by North Kern, such water actually belongs
17 to Bakersfield, and not to North Kern. Pursuant to the 1952 Agreement and the holdings in the Kern
18 River litigation, North Kern has no right to divert any water accruing to Kern Delta’s rights, any new
19 water outside of the rights listed in the agreement, or any forfeited, surplus water. Such water
20 clearly was not part of the 1952 Agreement or contemplated by the agreement.

21 116. North Kern would still be able to divert all the water to which it is entitled under the
22 1952 Agreement as a result of the revision of the fully appropriated status of the river and the
23 reallocation of the forfeited, surplus water. Specifically, there would be no “impairment” of North
24 Kern’s contractual right to receive some of Bakersfield’s water. If “gross entitlement,” or water
25 flowing in the river, is available to satisfy the rights used by North Kern, then North Kern could still
26 divert and use that water, irrespective of the forfeiture of Kern Delta’s rights and the revision of the
27 fully appropriated status of the river.
28

1 117. For example, according to the 2005 Hydrographic Annual Report (Exhibit 2-5), the
2 December 2005 gross entitlement for all of Bakersfield's rights under which North Kern receives
3 Kern River water was 5,925 af. That means that in December 2005 there was enough flow in the
4 river to allocate 5,925 af of water to the rights owned by Bakersfield and used by North Kern.

5 118. In December 2005 the rights held and used by Bakersfield had a gross entitlement of
6 1,177 af. The Kern Delta rights would have had a combined preserved entitlement of 2,460 af
7 (based on the preserved entitlement for the Kern Island (1st) right of 2,050 af, 191 af for the Buena
8 Vista (1st) right, 12 af for the Stine right, and 207 af for the Farmers right).

9 119. The 2005 Hydrographic Annual Report indicates that the gross entitlement for all of
10 the Kern Delta rights, without taking forfeiture into account, in December 2005 was 25,080 af.
11 Since Kern Delta's diversions would have been capped, or limited to the total preserved entitlement
12 of 2,460 af, the remaining water above that amount, 21,620 af, would be "surplus" to Kern Delta's
13 rights.

14 120. According to the annual report, the total Kern River flow at First Point for December
15 2005 was 33,614 af. Subtracting from that amount the total Kern Delta preserved entitlement of
16 2,460 af, and the surplus water not diverted by Kern Delta of 21,620 af (which Bakersfield maintains
17 is subject to SWRCB jurisdiction and not subject to diversion and use without any prior right to the
18 water) would leave 9,534 af remaining, and subject to diversion and use to satisfy "prior rights."

19 121. That 9,534 af would be more than sufficient to satisfy the gross entitlements of both
20 North Kern (5,925 af) and Bakersfield (1,177 af). North Kern's "rights" therefore would not be
21 impaired or negatively affected by a finding that the water above Kern Delta's rights is forfeited,
22 unappropriated water that does not simply "feed" the prior rights. North Kern would be able to
23 divert the same amount of water it would have been entitled to without forfeiture and SWRCB
24 reallocation of the surplus, unappropriated water. North Kern specifically could still divert its gross
25 entitlement of 5,925, and its contractual right to receive water would not be prejudiced or
26 compromised.

27 **(2) Other Kern River Entities and Parties to this Proceeding**
28

1 122. The other petitioners also have no legal or practical right to divert water from the
2 Kern River during the months when there is forfeiture. These right holders therefore can not claim
3 that the forfeited water should remain in the river to feed their rights, or that they will be injured as a
4 result of any finding that the Kern River is no longer fully appropriated.

5 123. Shafter has no rights to Kern River water, no access to the Kern River, and no means
6 of diverting water from the Kern River. In the petition and application filed jointly by North Kern
7 and Shafter, there is no indication or claim that Shafter holds Kern River water rights of any nature.

8 124. KWBA additionally does not claim that it holds any pre-1914 water rights, or any
9 other Kern River water rights.

10 125. KCWA holds very limited, infrequent Lower River Kern River rights. As indicated
11 above, KCWA has a right to divert and use Kern River that escapes from Second Point or that is not
12 otherwise diverted by Buena Vista, the Second Point right holder. In fact, KCWA holds an
13 infrequent "floodwater" right to divert Kern River water in rare years of flooding and high flows.

14 126. Buena Vista and KCWA admit in their petitions that they only hold Second Point or
15 Lower River rights, and they do not claim to hold any First Point rights.

16 127. The Miller-Haggin Agreement called for a division of water between the First Point
17 and Second Point, with 1/3 of the flow of the river to the Second Point diverters and 2/3 to the First
18 Point diverters. The division of water between First Point and Second Point, however, does not
19 occur during the months of September through February, when all Kern River water is allocated to
20 the First Point parties. Accordingly, the Second Point and Lower River parties, Buena Vista and
21 KCWA, have no right to receive Kern River water, including any forfeited water, from September
22 through February.

23 128. During the months of September through February, Buena Vista and KCWA
24 therefore have no right or ability to claim any Kern River water, including forfeited water, as junior
25 appropriators, contractors, or otherwise. Instead, Bakersfield and Kern Delta are the only pre-1914
26 appropriators on the Kern River entitled to receive water during those months.

27 129. Kern Delta has not filed a petition or application with regard to the forfeited water.
28 Kern Delta presumably has no right to take back or divert and use the water it has forfeited.

1 **B. Failure To Revise The Fully Appropriated Status Of The Kern River Would**
2 **Lead To Confusion, Chaos, And Uncertainty.**

3 130. Bakersfield believes that the SWRCB's assumption of jurisdiction over the forfeited
4 surplus water will avoid uncertainty, and potential disputes and further litigation over the water. The
5 SWRCB's revision of the fully appropriated status of the Kern River and assumption of jurisdiction
6 over the forfeited water is also necessary to prevent unauthorized and unpermitted diversion of
7 surplus, new water, or additional flows created by Kern Delta's forfeiture. Revision of the fully
8 appropriated status of the river is also necessary to avoid waste, uncertainty, and future conflicts
9 over diversion and ownership of the forfeited water.

10 131. As a public entity, with the interests of its residents in mind, Bakersfield also believes
11 that SWRCB involvement will best ensure that the water will be put to sufficient multiple reasonable
12 and beneficial uses, instead of diverted improperly by North Kern or other parties for a single
13 purpose; private agricultural irrigation.

14 132. During a time when water in California is becoming increasingly scarce, and valuable
15 (selling for well over \$3,000 an acre foot in some instances), it is likely, if not a certainty, that
16 outside interests, including urban interests from other parts of the state, will attempt to divert and
17 take the forfeited water. Absent SWRCB involvement and oversight, entities such as North Kern
18 could attempt to divert and sell the excess, surplus water outside the region. Furthermore, through
19 its junior rights, Kern Delta presumably could attempt to retake the same water it forfeited, in direct
20 contravention of the holding and intent of the forfeiture action.

21 133. Forfeiture without revision of the fully appropriated status of the Kern River would
22 also create considerable uncertainty. Since the judgment of forfeiture has modified the Shaw
23 Decree, there is a real, practical need for discussion, clarification, and confirmation of rights to the
24 forfeited water by the SWRCB.

25 134. The potential revision of the fully appropriated status of the Kern River and the future
26 disposition of the significant quantity of water forfeited by Kern Delta has generated significant
27 public interest in the Bakersfield area. A number of individuals and groups have approached the
28 City to express concern over the future diversion and use of the water forfeited by Kern Delta, and to

1 express support for the City's efforts to protect and preserve the forfeited water for multiple
2 beneficial uses. Such individuals and groups specifically have expressed support and interest in the
3 City's plan to use the forfeited water to increase and restore flows in the Kern River. I understand
4 that a number of individuals and groups also have written to the SWRCB directly to support the
5 City's position and to encourage the SWRCB to assume jurisdiction over the forfeited water to
6 protect and preserve the water and the future status of the Kern River.

7 **VI. CONCLUSION**

8 135. The City urges the SWRCB to revise the fully appropriated status of the Kern River
9 because it is apparent that there is surplus water available on the Kern River above and beyond the
10 demand of the prior right holder, Kern Delta.

11 136. In addition, Bakersfield is the only actual appropriative right holder at the First Point
12 of measurement with any right to divert and use the forfeited, surplus water. If the SWRCB
13 determines that the forfeited water should stay in the river so that it is available to existing
14 appropriative rights, the water can be diverted and used only by Bakersfield.

15 137. The forfeited water constitutes and represents "new water" on the river that was not
16 previously available for diversion and use. The water previously accrued to the rights held by Kern
17 Delta, and no one else had any right or claim to the water. The forfeited water no longer accrues to
18 any rights on the river. By definition that constitutes changed circumstances. The water is also
19 "new" in that it is now available for diversion and use by any party, as opposed to accruing to and
20 belonging to Kern Delta's rights.

21 138. If, however, the SWRCB finds that the forfeited water should stay in the river or be
22 available for diversion by existing appropriative rights, the SWRCB must confirm that Bakersfield is
23 the only party with the right to divert and use such water. The SWRCB should confirm
24 Bakersfield's rights, and/or issue an order confirming Bakersfield's right and ability to divert the
25 water pursuant to its pre-1914 appropriative water rights.

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Executed under the penalty of perjury under the laws of the State of California at Bakersfield,
California on October 16 2009.



Florn R. Core