
State Water Resources Control Board

May 3, 2022

Re: Kern River Applications (Phase 1B) – Ruling KBWA’s Evidentiary Motions

TO ALL PARTIES:

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

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

Kern Water Bank Authority (KWBA), Buena Vista Water Storage District (Buena Vista), Kern County Water Agency (KCWA), and North Kern Water Storage District (North Kern) and the City of Shafter submitted case-in-chief exhibits to the AHO by the deadline of April 4 set in the Amended Notice of Public Hearing. On April 18, the City of Bakersfield, Buena Vista, KCWA, and KWBA filed evidentiary motions objecting to or seeking to exclude case-in-chief exhibits filed by other parties. On April 25, KWBA, Buena Vista, and North Kern and the City of Shafter filed responses to these motions. On May 2, 2022, I issued a ruling letter that addressed the evidentiary motions by Buena Vista, KCWA, and North Kern and City of Shafter. This ruling letter addresses the evidentiary motions filed by KWBA.

Legal Background

This hearing is being conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The

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

rules governing the admission of evidence in adjudicative proceedings before the Board are found in California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) The State Water Board is not bound in its proceedings by other technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) “The [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time.” (*Id.*, § 11513, subd. (f).)

KWBA’s Motion

KWBA filed three motions in limine: Motion in Limine to Exclude Testimony on SGMA and SGMA Implementation (KWBA MIL No. 1); Motion in Limine to Exclude the Testimony of Terry Chicca (KWBA MIL No. 2); and Motion in Limine to Exclude Portions of the Testimony of Tim Ashlock and David Miller (KWBA MIL No. 3).

1. KWBA MIL No. 1

KWBA seeks to exclude evidence submitted by Buena Vista related to its efforts to comply with the Sustainable Groundwater Management Act (SGMA). KWBA identifies specific testimony and exhibits to which it objects in its motion. (KWBA MIL No. 1, p. 3.) KWBA argues this evidence is irrelevant to the Phase 1B hearing issue.

Buena Vista responds that this evidence and testimony is relevant to demonstrating beneficial use of water that it has diverted pursuant to its Second Point water rights and used conjunctively with its groundwater supplies. (Buena Vista’s Opposition, p. 2.) I agree with Buena Vista that evidence about its historical, current, and future diversion and use of water from the Kern River is potentially relevant to determining how much unappropriated water is available in the Kern River system.

The testimony objected to by KWBA on this basis is not extensive, and I do not believe its admission will result in an undue consumption of time. Buena Vista’s 594-page GSP (Buena Vista-403) and the Department of Water Resource’s (DWR) comments on the GSP (Buena Vista-404) likely include a good deal of information that is not directly relevant to this proceeding, but as a general matter, I conclude that the information in the plan and DWR’s comments contain relevant evidence about Buena Vista’s past and current operations, as well as planned future projects for conjunctive use. They also provide a context for water use (both surface and groundwater) within the basin.

Therefore, I deny KWBA’s MIL No. 1.

2. KWBA MIL No. 2

KWBA seeks to exclude the testimony of Terry Chicca (Buena Vista-100) in its entirety. KWBA argues that the testimony: (1) is not relevant to the Phase 1B hearing issue and includes inadmissible hearsay, (2) Mr. Chicca inappropriately offers unqualified expert opinion, and (3) the testimony is unnecessarily cumulative of other testimony.

Mr. Chicca is a landowner in the Buena Vista service area and is a member of Buena Vista's Board of Directors. According to his testimony, he has farmed within Buena Vista's service area for 48 years. (Buena Vista-100, ¶ 2.) Mr. Chicca's testimony includes hearsay, anecdotes, personal observations, personal feelings, opinion based on his experience as a farmer operating within the Buena Vista service area and elsewhere, and opinion that may step beyond the scope of his personal experience or expertise. Mr. Chicca's testimony appears to be based on his life experience, and as a result, portions of his testimony do not follow the formal rules of evidence applicable to testimony in court proceedings. We are not, however, bound by those rules here. I think it is important to the integrity of this proceeding that the formal rules of evidence not be applied in a manner that would effectively exclude testimony that is not offered by a trained expert with experience testifying in legal proceedings.

Some of Mr. Chicca's testimony relays personal experiences and observations that are directly relevant to the hearing issue presented in Phase 1B; other portions appear to be less relevant. To the extent that Mr. Chicca strays into irrelevant material, I will simply disregard it. I will also discount hearsay evidence and opinion from Mr. Chicca not based on personal observation, or special knowledge or expertise. I deny KWBA's MIL No.2 and I will consider KWBA's objections in determining the weight to be afforded Mr. Chicca's testimony rather than its admissibility.

3. KWBA MIL No. 3

KWBA seeks to exclude portions of testimony by Tim Ashlock (Buena Vista-200) and David Millar (Buena Vista-400) that address groundwater levels and hydrogeology of Semitropic Water Storage District (Semitropic), operations of the Kern Water Bank, and groundwater levels within the Buena Vista service area. KWBA argues that groundwater conditions within Semitropic and Kern Water Bank operations are not relevant to the Phase 1B hearing issue and "Buena Vista's perceived 'need' for Kern River water to address groundwater conditions is irrelevant to the scope of its Kern River water rights." (KWBA's MIL No. 3, p. 4.)

Buena Vista responds that the testimony concerns "groundwater conditions in Buena Vista and how Buena Vista is exercising, and may need to exercise, the Second Point Right in response to new threats from outside Buena Vista." (Buena Vista's Opposition to MIL No. 3, p. 2.) Buena Vista claims that declining groundwater levels within its service area may be caused by pumping within Semitropic and KWBA, resulting in

increased demands by Buena Vista for water to maintain groundwater storage levels. (Buena Vista Opening Brief, p. 19.)

I do not disagree with KWBA on its point that Buena Vista's need for water does not affect the scope of its valid existing rights, but the hearing issue in Phase 1B is broader. The amount of unappropriated water available for appropriation by applicants may depend, in part, on anticipated future uses by existing right-holders. The evidence offered by Buena Vista may also explain its current pattern of water use. Some of the specific technical details about groundwater decline in Buena Vista's service area are likely only tangentially related to the larger hearing issue. But evidence is admissible in administrative proceedings even if its probative value is limited, and I do not believe that admission of this evidence will result an undue consumption of time. Therefore, I deny KWBA's MIL No. 3.d

Sincerely,

SIGNATURE ON FILE

Nicole L. Kuenzi
Hearing Officer
Administrative Hearings Office

SERVICE LIST

Sent by e-mail only:

Adam Keats
Law Office of Adam Keats
303 Sacramento St., 2nd Floor
San Francisco, CA 94111
adam@keatslaw.org
*Attorney for Public Interest Groups
(Bring Back the Kern, Kern River
Parkway Foundation, Kern Audubon
Society, Kern-Kaweah Sierra Club,
Panorama Vista Preserve, Center for
Biological Diversity, and CalTrout)*

John Buse
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
jbuse@biologicaldiversity.org

Amanda Cooper
Walter "Redgie" Collins
California Trout, Inc.
701 South Mount Shasta Blvd.
Mount Shasta, CA 96067
acooper@caltrout.org
rcollins@caltrout.org

Nicholas Jacobs & Michelle Chester
Somach, Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
njacobs@somachlaw.com
mchester@somachlaw.com
*Attorneys for Kern County Water
Agency*

Amelia T. Minaberrigarai
3200 Rio Mirada Drive
Bakersfield, CA 93308
ameliam@kcwa.com
*Attorney for Kern County Water
Agency*

Kevin M. O'Brien
David E. Cameron
Holly E. Tokar
Sam Bivins
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
kobrien@downeybrand.com
dcameron@downeybrand.com
htokar@downeybrand.com
sbivins@downeybrand.com
jhughey@downeybrand.com
colmstead@downeybrand.com
*Attorneys for Kern Water Bank
Authority*

Eric L. Garner
Patrick D. Skahan
Sarah Foley
Best Best & Krieger LLP
300 South Grand Ave., 25th Floor
Los Angeles, CA 90071
eric.garner@bbklaw.com
patrick.skahan@bbklaw.com
Sarah.Foley@bbklaw.com
Attorneys for City of Shafter

Isaac St. Lawrence
McMurtrey, Hartsock & Worth
2001 22nd Street, Suite 100
Bakersfield, CA 93301
isaac@mhwlegal.com
*Attorney for Buena Vista Water
Storage District*

Attachment 3

Ryan Bezerra
Holly Jacobson
Bartkiewicz, Kronick & Shanahan
1011 22nd Street
Sacramento, CA 95816
rsb@bkslawfirm.com
hjj@bkslawfirm.com
*Attorneys for Buena Vista Water
Storage District*

Colin L. Pearce
Jolie-Anne Ansley
B. Alexandra Jones
Duane Morris LLP
Spear Tower, One Market Plaza, Suite
2200
San Francisco, CA 94105-1127
clpearce@duanemorris.com
jsansley@duanemorris.com
bajones@duanemorris.com
Attorneys for City of Bakersfield

Virginia A. Gennaro
City Attorney's Office
City of Bakersfield
1600 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
vgennaro@bakersfieldcity.us

Scott K. Kuney
Young Wooldridge, LLP
1800 30th Street, Fourth Floor
Bakersfield, CA 93301
skuney@youngwooldridge.com
kmoen@youngwooldridge.com
bstroud@youngwooldridge.com
mbasharaheel@youngwooldridge.com
*Attorney for North Kern Water Storage
District*

Richard Diamond
General Manager
North Kern Water Storage District
P.O. Box 81435
Bakersfield, CA 93380
rdiamond@northkernwsd.com

Jennifer Spaletta
Spaletta Law PC
P.O. Box 2660
Lodi, CA 95241
jennifer@spalettalaw.com
diana@spalettalaw.com
*Attorney for Rosedale Rio-Bravo
Water Storage District*

Gail Delihant
Western Growers Association
1415 L Street, Suite 1060
Sacramento, CA 95814
gdelihant@wga.com

Robert E. Donlan
Craig A. Carnes, Jr.
Ellison Schneider Harris & Donlan LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
red@eslawfirm.com
cac@eslawfirm.com
Attorneys for Kern Delta Water District

Richard Iger
Steven L. Teglia, General Manager
L. Mark Mulkay, Water Resources
Manager
Kern Delta Water District
501 Taft Highway
Bakersfield, CA 93307
richard@kerndelta.org
steven@kerndelta.org
mulkay@kerndelta.org

Jack Pandol
900 Mohawk Street, Suite 220
Bakersfield, CA 93309
jpandolsr@grapery.biz

Attachment 3

Tim Ashlock
Engineer-Manager
Buena Vista Water Storage District
P.O. Box 756
Buttonwillow, CA 93206
tim@bvh2o.com

Jonathan Parker
General Manager
Kern Water Bank Authority
5500 Ming Avenue, Suite 490
Bakersfield, CA 93309
jparker@kwb.org

Thomas Nassif
Western Growers Association
17620 Fitch Street
Irvine, CA 92614
tnassif@wga.com

Gabriel Gonzalez
City Manager
City of Shafter
336 Pacific Ave.
Shafter, CA
ggonzalez@shafter.com

Michael James
Director of Public Works
City of Shafter
336 Pacific Avenue
Shafter, CA 93263
mjames@shafter.com

Dan Bartel
Rosedale-Rio Bravo Water Storage
District
P.O. Box 867
Bakersfield, CA 93302
dbartel@rrbwsd.com

Nancee Murray
Annette Tenneboe
Kathleen Miller
California Department of Fish and
Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090
nancee.murray@wildlife.ca.gov
annette.tenneboe@wildlife.ca.gov
kathleen.miller@wildlife.ca.gov

Art Chianello
Kristina Budak
City of Bakersfield
Water Resources Department
1000 Buena Vista Road
Bakersfield, CA 93311
achianel@bakersfieldcity.us
kbudak@bakersfieldcity.us
Peter Kiel
Law Office of Peter Kiel
P.O. Box 422
Petaluma, CA 95953-422
pkiel@cawaterlaw.com
*Attorney for Tulare Lake Basin Water
Storage District*

Aubrey Mauritson
Ruddell Stanton Bixler & Evans LLP
1102 N. Chinowth St.
Visalia, CA 93291-4113
amauritson@visalialaw.com
*Attorney for Tulare Lake Basin Water
Storage District*

David Rose
Office of the Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828
DRose@waterboards.ca.gov