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## State Water Resources Control Board

June 17, 2022

### **Re: Kern River Applications (Phase 1B) – Ruling on 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 addresses 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. The AHO held the case-in-chief portion of Hearing Phase 1B on May 2 through May 10, 2022.

Kern Water Bank Authority (KWBA), Buena Vista Water Storage District (Buena Vista), Kern County Water Agency (KCWA), North Kern Water Storage District, and Tulare Lake Basin Water Storage District (TLBWSD) submitted rebuttal exhibits. KWBA and Buena Vista filed evidentiary motions seeking to exclude some of the rebuttal testimony and exhibits. Buena Vista also filed a motion to exclude "corrected" testimony submitted by KWBA. This ruling addresses those motions.

For reasons explained in this ruling, I also plan to schedule a surrebuttal portion of this hearing which will allow the parties to present evidence in response to the rebuttal evidence admitted into evidence.

## **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 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 in Limine**

KWBA filed a motion to exclude rebuttal testimony of Mark Unruh (TLBWSD-100), Greg Young (KCWA-032), and portions of rebuttal testimony of Daniel Howes (Buena Vista-1100). KWBA objects that TLBWSD and KCWA should have submitted Mr. Unruh and Mr. Young’s testimony critiquing Ms. Polly Boissevain’s Supplemental Water Availability Analysis (Supplemental WAA) (KCWA-32 & TLBWSD-100) and Dr. Howe’s technical memorandum and associated testimony addressing pre-1914 water use in Buena Vista’s service area (Buena Vista-1105 & Buena Vista-1100) during the case-in-chief portion of the hearing and not on rebuttal. Buena Vista, KCWA, and TLBWSD filed responses to KWBA’s motion.

“[R]ebuttal evidence is new evidence used to rebut evidence another party has presented in its case-in-chief.” (2022-01-12 Notice of Pre-Hearing Conference and Notice of Public Hearing, p. 21.) “It is the policy of the State [Water Board] to discourage the introduction of surprise testimony and exhibits” in adjudicatory proceedings. (Cal. Code Regs., tit. 23, § 648.4, subd. (a).) The rebuttal phase of a hearing is not the appropriate time for a party to present data and information that directly supports the party’s primary contentions and was readily available when the party submitted its case-in-chief. (See Order WR 2016-0015, p. 15.) Rebuttal may not be used to delay submission of evidence that is properly part of a party’s case-in-chief, regardless of whether the delay is due to oversight or strategy. The hearing officer may exclude evidence offered in rebuttal that a party should have submitted as part of its case-in-chief to discourage gamesmanship and to ensure that the parties have a full and fair opportunity to respond to opposing evidence.

Mr. Young's rebuttal testimony responds to the Supplemental WAA prepared by Ms. Boissevain. Mr. Unruh's rebuttal testimony purports to respond to the other parties' water availability analyses, including Ms. Boissevain's Supplemental WAA, and questions by the hearing officer about TLBWSD's legal position regarding consideration of its water-right license in the parties' water availability analyses. KWBA argues that the Supplemental WAA has been available to the parties since August 2019, and TLBWSD and KCWA should have submitted their witnesses' testimony responding to that analysis with their cases-in-chief. KWBA alleges that the opposing parties' "strategic decisions" to respond to the Supplemental WAA by submitting testimony in rebuttal "appear to be designed to prevent Ms. Boissevain from defending her work." (KWBA Motion in Limine to Exclude Rebuttal Testimony (June 3, 2022), p. 4.)

I agree that Buena Vista, TLBWSD, and KCWA might have anticipated some of KWBA's claims and arguments in Hearing Phase 1B, but, ultimately, the burden is on KWBA to demonstrate that water is available for appropriation on the Kern River system to support its application for a water-right permit. Although the Board discourages surprise testimony and exhibits, parties are not required to guess at an opposing parties' legal strategy and specific factual allegations. Evidence that directly challenges another party's testimony or evidence is proper rebuttal testimony. In this instance, although the parties were on notice that KWBA might rely on the supplemental WAA prepared by Ms. Boissevain to make its case, the parties were not required to respond to the analysis before KWBA had offered it into evidence. KWBA could have decided to abandon Ms. Boissevain's analysis and take an entirely different approach to demonstrating that water is available for appropriation on the Kern River System (and KWBA did take a different approach with Dr. Davids' testimony and analysis). Therefore, I will not exclude the testimony of Mr. Young or Mr. Unruh as improper rebuttal testimony insofar as they respond to the Supplemental WAA.

I also will not exclude Dr. Howe's rebuttal testimony submitted by Buena Vista in response to Dr. David's testimony and technical analysis. Dr. Howe's rebuttal testimony and associated technical analysis applies Dr. Davids' analytical methodology in KWBA-100 but corrects alleged errors to develop a "corrected" analysis that provides a "rough range of 1914-era appropriations under the Second Point Right." (Buena Vista-1105, p. 1.) Although the modified analysis developed by Dr. Howes is based on Dr. Davids' methodology, KWBA points out that the data used by Dr. Howes was "readily available," and argues that Dr. Howes' estimate of appropriations under the Second Point Right could have been submitted by Buena Vista in its case-in-chief. As I understand the argument, KWBA characterizes Dr. Howe's rebuttal testimony using Dr. Davids' methodology as a sort of trojan horse for Buena Vista to submit, on rebuttal, its own theory about the scope of its pre-1914 appropriative water rights. It is appropriate for Buena Vista to challenge Dr. Davids' methodology and inputs to that methodology on rebuttal. Dr. Howes' rebuttal testimony goes a step further to include "corrected" input and revisions to the methodology to present a revised analysis, but Dr. Howe's testimony is still based on and directly responds to Dr. Davids' testimony. In addition, unlike the Supplemental WAA, Dr. Davids' analysis was not available before the deadline for submission of case-in-chief evidence so rebuttal is the first opportunity for

Buena Vista's witnesses to respond to Dr. Davids' approach to estimating Buena Vista's pre-1914 water rights.

KWBA also argues that (1) Mr. Unruh lacks the qualifications necessary to offer an opinion about the adequacy of the other parties' water availability analyses and (2) the probative value of Mr. Unruh's testimony is substantially outweighed by the probability that its admission will require the undue consumption of time (see Gov. Code, § 11513, subd. (f)). I am also aware that Mr. Unruh's testimony responds, in significant part, to my questions directed to counsel for TLBWSD during the hearing on May 9, about its interest in this proceeding and the relevance of its water-right license that authorizes diversions from Tulare Lake. None of the parties, including TLBWSD, raised water-right License 11521 in their cases-in-chief and TLBWSD may not have submitted any rebuttal testimony absent my questions about the issue.

Regardless of the reasons for TLBWSD's decision to submit Mr. Unruh's testimony on rebuttal, water-right License 11521 is an apparently valid water right that authorizes diversion of water from Tulare Lake, of which the Kern River is a tributary. This fact raises the unavoidable question as to how this license should be considered in any analysis to determine the amount of unappropriated water that is available in the Kern River system. Even if KWBA is correct in its claim that extensive cross-examination and surrebuttal will be necessary to fully explain the relevance of TLBWSD's License 11521, TLBWSD's interest (or former interest) in the Lower River Rights, and Mr. Unruh's testimony about TLBWSD's operations, TLBWSD's claims to Kern River water will likely need to be addressed in some way in any proposed order issued by the AHO. Therefore, I deny KWBA's motion to exclude Mr. Unruh's testimony based on undue consumption of time and will allow the parties to address these issues on rebuttal and during surrebuttal.

Finally, I deny in part and sustain in part KWBA's motion to exclude Mr. Unruh's testimony as improper expert opinion. KWBA cites Evidence Code section 720, which requires a court to qualify an expert witness prior to allowing him or her to testify, to challenge Mr. Unruh's qualifications to offer expert testimony. Adjudicative proceedings before the AHO are not strictly bound by Evidence Code section 720. Instead, the hearing officer may consider each witness' qualifications in determining what weight to afford the witness' testimony. In addition, TLBWSD did not attempt to designate Mr. Unruh as an expert witness and the rules governing adjudicative proceedings before the State Water Board do not prohibit lay person opinion. Lay opinion that is based on a witness' personal perceptions and experience may have probative value, even if the witness does not qualify or has not been designated as an expert. The hearing officer will consider the experience, expertise, skill, and training of the lay person in considering the weight to be afforded any opinion offered by the witness.

KWBA specifically objects to Mr. Unruh's testimony about the sufficiency of the water availability analyses submitted by the parties. Mr. Unruh states that he "believe[s] that the Lakebed Junior Sump License [License 11521] should have been included in the water availability analyses because it should be recognized as an active water right in the Kern River watershed that is senior to the pending applications." (TLBWSD-100, p.

5, ¶ 18.) Mr. Unruh does not purport, however, to “have the expertise to suggest how it should be considered.” (*Id.* at p. 7, ¶ 28.) I conclude that Mr. Unruh’s qualifications and experience described in his testimony are not directly connected to his opinion about consideration of License 11521 in the parties’ water availability analyses for the Kern River system, so the opinion offers little probative value while introducing the need for undue consumption of time to explore its foundations. Therefore, I will exclude the following portions Mr. Unruh’s testimony (TLBWSD-100):

- Page 5, ¶ 18, lines 14-17, sentence starting “As to the second question ....”
- Pages 7-8, ¶¶ 26-29.

### **Buena Vista’s Motion to Exclude KWBA’s Rebuttal Testimony and Exhibits**

Buena Vista filed a motion to exclude testimony and exhibits submitted by KWBA on rebuttal. Buena Vista raises the following objections to rebuttal testimony by KWBA’s witnesses: (1) paragraphs 5 and 6 of Dr. Miltenberger’s rebuttal testimony rely on inadmissible hearsay, (2) paragraphs 2 through 24 and paragraphs 32 and 33 of Dr. Davids’ testimony include improper rebuttal evidence and lack probative value, (3) paragraphs 3 through 11 of Mr. Boissevain’s Testimony contain improper rebuttal evidence and are irrelevant, (4) portions of Mr. Parker’s testimony contain improper rebuttal evidence and inadmissible hearsay, and Mr. Parker relies on modeling results without providing sufficient information so that other parties could reproduce these results, and (5) paragraphs 11, and 13 through 15 of Mr. Torres’ testimony includes improper rebuttal evidence, is irrelevant, and would necessitate and undue consumption of time.

#### **1. Objection to Dr. Miltenberger’s Rebuttal Testimony (KWBA-025)**

Buena Vista objects to paragraphs 5 and 6 of Dr. Miltenberger’s rebuttal testimony and associated exhibits KWBA-027 and -028 because Dr. Miltenberger relies on conclusions presented by two other authors of historical texts, Catherine Miller and David Iglar, about Miller & Lux’s intentions and livestock operations.

Buena Vista’s objection that Dr. Miltenberger’s testimony relies on hearsay is not a proper basis to exclude his testimony, and instead, goes to the weight to be afforded the testimony. Hearsay evidence is admissible in State Water Board proceedings as long as it is sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) Hearsay evidence may be used to supplement or explain other evidence, although, over timely objection, it 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).) In addition, hearsay evidence may be relied upon by an expert witness to form an expert opinion. The books authored by Catherine Miller and David Iglar appear to be of the type reasonably relied upon by historians to form an opinion. (See Evid. Code, § 801, subd. (b).) As pointed out by KWBA, Buena Vista’s own expert historian, Dr. Littlefield, cites the same sources in his own expert testimony. (Buena Vista-600, p. 21, ¶ 61.) Buena Vista will also have the

opportunity to examine Dr. Miltenberger's testimony and the sources on which he relies through cross-examination.

KWBA raises the further defense that Dr. Miltenberger discusses Miller's and Iglar's conclusions in part to demonstrate that the sources on which Dr. Littlefield relies reached different conclusions than he did about historical conditions. In this respect, Miller's and Iglar's conclusions are not being offered for the truth of the matter but to challenge Dr. Littlefield's use of the sources in his historical analysis. I also deny Buena Vista's motion to exclude KWBA-027 and KWBA-028 and related testimony by Dr. Miltenberger insofar as they are offered to challenge the methods used by Dr. Littlefield to reach opinions expressed in his case-in-chief testimony.

2. *Objections to Dr. Davids' Rebuttal Testimony (KWBA-151)*

Buena Vista seeks to exclude portions of Dr. Davids' rebuttal testimony that address "dead storage" in Buena Vista Lake, and associated exhibits KWBA-154 and -155, as irrelevant evidence that does not add probative value. Buena Vista argues that all reservoirs have some component of dead storage and this is a necessary component of every water-right for storage in a reservoir. This argument seems to raise the legal question of the status of water held in "dead storage" and its treatment for purposes of perfecting and maintaining an appropriative right. Depending on the answer to this question, evidence about the quantity of dead storage in a reservoir may have more or less relevance when determining the amount of water authorized under the storage right. I will not decide this legal issue here, and so I will not exclude KWBA's evidence about dead storage in Buena Vista Lake because the evidence appears to be relevant to KWBA's theory of the case.

Buena Vista seeks to exclude paragraphs 18 through 20 of Dr. Davids' rebuttal testimony as "improper rebuttal because it seeks to make a mountain out of a 22-second molehill." (Buena Vista's Evidentiary Motion, p. 4.) I will not exclude Dr. Davids' testimony responding to Dr. Howe's 22-second statement as irrelevant because it may be relevant to estimating the amount of water diverted into Buena Vista Lake and whether diversion of water into Buena Vista Lake is direct diversion or diversion to storage. If the issue is truly insignificant, then Buena Vista need not spend any additional time cross-examining Dr. Davids on the issue.

Buena Vista also seeks to exclude paragraph 32 of Dr. Davids' rebuttal testimony which concerns groundwater pumping within Buena Vista's service area circa 1914 as improper rebuttal evidence. Dr. Davids' testimony is in direct response to case-in-chief evidence put on by Buena Vista about groundwater use by Miller & Lux during the early 20<sup>th</sup> century. Buena Vista may disagree with Dr. Davids' engineering opinion about the effect of groundwater use on Miller & Lux's use of water under the Second Point rights, but this is not a proper basis to exclude Dr. Davids' testimony. Buena Vista can respond to the testimony through cross-examination and presentation of surrebuttal evidence.

Finally, Buena Vista seeks to exclude paragraph 33 of Dr. Davids' rebuttal testimony concerning storage in Lake Isabella as improper rebuttal in violation of the rules of due process and fair hearings. In particular, Buena Vista seeks to exclude Dr. Davids' statement that "[u]nfortunately, Dr. Howes' testimony is silent regarding the nature and extent of Kern River diversions for irrigation during the entirety of the Miller & Lux operations, including circa 1914." (KWBA-151, p. 16, ¶ 33.) I will not exclude Dr. Davids' testimony because it directly responds to Dr. Howes' testimony. Buena Vista has made its point by way of its evidentiary motion that Buena Vista and Dr. Howes were not on notice of the specific allegations that KWBA would raise when challenging the scope of Buena Vista's water rights. Now that KWBA has presented its case-in-chief, Buena Vista has an opportunity to respond to the factual allegations raised by KWBA about Buena Vista's Second Point rights, and Buena Vista will have a further opportunity to respond during surrebuttal.

Dr. Davids' testimony in the remainder of paragraph 33 about losses from Lake Isabella references Dr. Howe's testimony examining "Buena Vista's appropriation of Kern River water under the Second Point Right in historical wet years," (*Id.*, at p. 1, ¶ 4) including 1969. Dr. Howes corrected his case-in-chief testimony to include losses from Lake Isabella in his calculation of "appropriations" by Buena Vista in 1969. Dr. Davids discusses his own calculation of losses from Lake Isabella in paragraph 33, although it is not clear to me whether he agrees with or disputes Dr. Howe's estimate of losses. Because I intend to allow surrebuttal evidence and Buena Vista will have a chance to respond to Dr. Davids' testimony on this point, I will not exclude this testimony or further examine whether it is proper rebuttal evidence. I do not believe KWBA intentionally withheld this analysis from its case-in-chief so I believe the best approach to understanding these complex issues is to allow the evidence into the record and give the parties an opportunity to examine and respond to it.

### 3. Objection to Ms. Boissevain's Rebuttal Testimony (KWBA-249)

Buena Vista objects to portions of Ms. Boissevain's rebuttal testimony because the conclusions are based on "improper legal theories and conclusions" and provide "improper legal interpretation or opinion." (Buena Vista's Evidentiary Motion, p. 5.) Buena Vista argues that paragraphs 3 through 11 of Ms. Boissevain's testimony appear to be premised on the legal theory that diversions by Buena Vista are only within the scope of its water right if the diversions occurred within Buena Vista's district boundaries. Again, Buena Vista's arguments turn on disputed questions of law. How these questions of law are resolved may affect the relevance of the testimony that the parties are offering. Gathering the evidence first and then deciding both the disputed questions of law and fact based on that evidence does raise the possibility that some parts of the evidentiary record may ultimately be irrelevant, and some efficiency might be gained by attempting to resolve questions of law in advance. On the other hand, the hearing officer does not have the authority to issue binding determinations of law. Therefore, at this time, I decline to attempt to issue any determination regarding this disputed question of law and deny Buena Vista's motion to exclude Ms. Boissevain's rebuttal testimony on this basis.

4. Objections to Portions of Mr. Parker's Rebuttal Testimony (KWBA-328)

Buena Vista seeks to exclude portions of Mr. Parker's rebuttal testimony and associated exhibits that address modeling results produced by the Department of Water Resources (DWR) because KWBA did not include sufficient information about the model for an independent expert to reproduce those results. Buena Vista also seeks to exclude these portions of Mr. Parker's rebuttal testimony as relying on improper and inadmissible hearsay.

KWBA asserts that DWR's model and a copy of the modeling report underlying the results discussed in Mr. Parker's testimony are publicly available, and KWBA included a 152-page excerpt from the report with Mr. Parker's testimony documenting modeling parameters, inputs, and results of the modeling scenarios. (See KWBA-328, pp. 8-9, ¶¶ 21-15, fn. 9; KWBA-332.) Buena Vista offers no evidence that its own expert could not understand and replicate the results obtained by DWR through the use of the model with the publicly available technical report which KWBA clearly referenced and from which KWBA submitted a substantial excerpt. Therefore, I will not exclude on this basis the portions of Mr. Parker's testimony that reference DWR modeling results. If cross-examination by Buena Vista elicits additional information about the model results relevant to whether the testimony should be accepted into evidence, I will consider a renewed motion to exclude the testimony during the hearing.

I also deny Buena Vista's objection based on Mr. Parker's reliance on hearsay evidence in the form of DWR's model results. As repeated ad nauseum at this point, hearsay evidence is admissible in State Water Board proceedings as long as it is sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Furthermore, expert witnesses may rely on hearsay to form expert opinions if the hearsay evidence may reasonably be relied upon by an expert in the field. (Evid. Code, § 801, subd. (b).)

Buena Vista seeks to exclude other portions of Mr. Parker's rebuttal testimony on the basis that the testimony violates legal covenants that bind lands owned by KWBA. Buena Vista argued in a previous evidentiary motion that the 1888 Miler-Haggin Agreement and deed restrictions attached to KWBA's lands preclude KWBA from presenting evidence about the scope of Buena Vista's claimed water rights. I denied Buena Vista's motion to exclude evidence that it alleged violated these agreements for several reasons: (1) Buena Vista raised the complex claim in the form of an evidentiary motion, which does not allow a detailed evidentiary process and motion practice that would likely be necessary to determine whether estoppel should apply, (2) the AHO may not have jurisdiction to determine with any binding effect the merits of Buena Vista's claim, and (3), the courts may provide an alternate and likely more appropriate venue for Buena Vista to seek a remedy. For the same reasons, I deny Buena Vista's motion to exclude Mr. Parker's testimony on this basis.

Buena Vista also argues that these same portions of Mr. Parker's rebuttal testimony express legal opinions that are improper expert opinion. As discussed in my prior evidentiary rulings, the rule against admission of testimony containing legal conclusions

is primarily intended to protect a jury from improper influence and preserve the judge's role in instructing the jury on the appropriate legal standard. (See *Torres v. County of Oakland* (6th Cir. 1985) 758 F.2d 147; *Hygh v. Jacob* (2nd Cir. 1992) 961 F.2d 359 (cited in *People v. Brown* (2016) 245 Cal.App.4th 140, 162); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1182.) The rule serves little purpose when the decisionmaker has legal expertise and makes findings of both law and fact. Hearing officers in the State Water Board's AHO are required to have "knowledge and experience in water law" and the hearing officers make both the legal and factual determinations when drafting a proposed order to submit to the Board. (Wat. Code, § 1111, subd. (a).) AHO hearing officers are capable of distinguishing, and discounting or disregarding as appropriate, portions of testimony that is essentially legal opinion. Therefore, I will not exclude Mr. Parker's testimony on this basis but will consider the legal nature of any of the opinions expressed by Mr. Parker when considering the weight to be afforded to his testimony.

5. *Objections to Mr. Torres' Rebuttal Testimony (KWBA-600)*

Buena Vista asks the hearing officer to strike paragraph 11 of Mr. Torres' rebuttal testimony as improper rebuttal testimony because it does not rebut evidence presented by other parties but attempts to provide a foundation for expert opinions expressed by KWBA's case-in-chief witnesses that were based, in part, on conversations with Mr. Torres. Because the ultimate purpose of this hearing is to determine the truth of the matter, I will not exclude Mr. Torres' testimony about canal seepage as improper rebuttal testimony. I believe that KWBA's failure to present Mr. Torres as a witness to support its expert's opinions was either oversight or, when considered with the benefit of hindsight, a strategic error, and not an intentional effort to sandbag the opposing parties. To ensure that the fairness of this proceeding is preserved while allowing the hearing officer, and ultimately the Board, to consider evidence that appears directly relevant to the hearing issues, I will not exclude paragraph 11 of Mr. Torres' rebuttal testimony but I will allow Buena Vista the opportunity to present surrebuttal evidence in response to Mr. Torres' testimony. Buena Vista will also have the opportunity to cross-examine Mr. Torres about his rebuttal testimony.

Buena Vista also objects that in paragraphs 13 and 15 of his testimony, Mr. Torres references alleged internal discussions with Buena Vista's "management," and does so without identifying the people involved in those discussion. Buena Vista asserts that this testimony is inadmissible hearsay. Hearsay evidence is admissible in State Water Board hearings as long as it is sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) I will not exclude Mr. Torres' testimony on this basis but will consider the lack of specific details about the discussions recalled by Mr. Torres, lack of identification of the individuals involved in those discussion, and the out-of-hearing context of those conversations (as well as the span of time that has elapsed since the alleged conversations took place), when considering the weight to be afforded to Mr. Torres' testimony. Buena Vista will have an opportunity to cross-examine Mr. Torres about these discussions to further examine Mr. Torres' memory of the details surrounding the discussions and the context of the discussions.

### **Buena Vista’s Motion to Exclude KWBA’s Evidence Concerning Buena Vista’s Use of Cells 1, 2, and 2R in 2017**

Buena Vista filed a motion to exclude evidence submitted by KWBA regarding Buena Vista’s use of cells 1, 2, and 2R in 2017 as necessitating undue consumption of time under Government Code section 11513, subdivision (f). Buena Vista argues that the issue is at best only tangentially related to the hearing issues if, and only if, Buena Vista’s water use in 2017 is taken as an approximation of the measure of its Second Point Rights. KWBA opposed the motion.

Buena Vista states in its opening brief in Hearing Phase 1B that “[i]f the Hearing Officer were to decide that it is necessary to assign a maximum value to the Second Point Right to facilitate identifying unappropriated water, that maximum should be the approximately 568,000 AF that Buena Vista appropriated in 2017.” (Buena Vista’s Phase 1B Opening Brief (April 25, 2022), p. 18.) In so doing, Buena Vista identifies its appropriations, diversion, and use of water in 2017 as a central issue in this proceeding. Buena Vista cannot also argue that its appropriations, diversions, and use of water in 2017 are irrelevant to the hearing issues and therefore the evidence offered by KWBA on this topic are irrelevant: “Buena Vista’s use of Cells 1, 2, and 2R is at best tangentially relevant to the four sub-hearing issues concerning the scope of ‘valid water rights’ and then only if 2017 is taken as the predominant measure of those rights.” (Buena Vista’s Motion to Exclude KWBA’s Evidence Concerning Cells 1, 2, and 2R (June 3, 2022), p. 3.) If Buena Vista is willing to clarify its legal position and stipulate that its appropriations, diversions, or use of water in 2017 are not relevant to determining the scope of its Second Point Water rights, then I will re-consider whether testimony and evidence in the record or offered into the record on the issue should be stricken or excluded.

Buena Vista also points out the relatively small proportion of water that is at issue and discussed in the testimony and evidence offered by KWBA about evaporation from Buena Vista Lake in 2017. To support its argument that the issue is insignificant, Buena Vista claims that KWBA’s operations result in similar amounts of evaporation. Although the amount of water at issue may appear insignificant relevant to the quantity of water available annually within the Kern River system or Buena Vista’s diversions in 2017, 12,000 acre-feet of water per year is not an insignificant amount of water (approximately enough water to supply 24,000 urban households in California for a year).<sup>1</sup> I will allow the parties to spend the necessary time in this proceeding to examine evidence that is relevant to the hearing issues, including evidence that may concern 12,000 acre-feet or less of water annually.

For these reasons, I overrule Buena Vista’s objections to KWBA’s rebuttal evidence concerning Buena Vista’s use of cells 1, 2, and 2R in Buena Vista Lake in 2017.

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<sup>1</sup> See <https://www.watereducation.org/western-water/water-stressed-california-and-southwest-acre-foot-water-goes-lot-further-it-used> (visited June 17, 2022).

## **Surrebuttal**

The factual issues and analyses presented in this proceeding are complex and the hearing issues are of substantial importance to many Californians. I have decided to allow some surrebuttal in Hearing Phase 1B of this proceeding to allow the parties a full and fair opportunity to present their own evidence and challenge opposing parties' evidence, and to further the objective of making accurate findings of fact. I believe that an opportunity for parties to present surrebuttal evidence on certain topics will likely be productive and assist in my understanding of the issues. I have found the testimony and responding testimony of the expert witnesses to be helpful to improve my understanding and to clarify the issues in dispute. In addition, Mr. Unruh's testimony about TLBWSD's rights to water from the Kern River raises additional questions that were not explicitly raised in any party's case-in-chief and I want to ensure that the parties have an adequate opportunity to respond (noting that License 11521 is a matter of public record and all of the parties had constructive notice of its potential relevance).

I will consider during the rebuttal portion of the hearing that begins on June 20 the issues about which I will allow surrebuttal evidence, when to hold additional hearing days for surrebuttal, and the deadline for submission of surrebuttal evidence in advance of those hearing days.

## **Buena Vista's Motion to Strike Corrections to Testimony of Dr. Davids and Ms. Boissevain**

On June 10, KWBA filed a notice of errata and intention to correct the case-in-chief testimony of Dr. Davids and Ms. Boissevain. KWBA filed the notice and corrected testimony 2 ½ weeks after the deadline for submission of rebuttal testimony and exhibits on May 23, and only ten days in advance of the start of the rebuttal portion of the Phase 1B hearing. On June 13, Buena Vista filed a motion to strike these changes to the witnesses' rebuttal testimony. KWBA filed an opposition to that motion on June 15. Buena Vista's motion is overruled in part and granted in part.

Buena Vista argues that the "corrections" to Dr. Davids and Ms. Boissevain's testimony violate the deadline for submission of rebuttal evidence by seeking to make late changes to their case-in-chief testimony and attempting to add substantial new evidence to the record. KWBA responds that the corrections are intended to ensure an accurate and complete hearing record.

Ms. Boissevain's declaration states that her case-in-chief testimony incorrectly stated that the regression analysis in her Supplemental WAA relied on four years of data when the regression in fact relied on five years. (KWBA-252.) Ms. Boissevain submitted a graphic depiction of the linear regression with data points and the underlying data, to demonstrate that the regression uses the same data points used in her Supplemental WAA. (KWBA-253.) If Ms. Boissevain's correction only corrects a statement about the methodology used in her Supplemental WAA to clarify the record in this proceeding, I will not exclude the correction as untimely. I will, however, allow the opposing parties

an opportunity to cross-examine Ms. Boissevain about the correction to explore whether there are substantive impacts on her testimony or underlying analyses before I make a final ruling.

Dr. Davids' declaration correcting his case-in-chief testimony states that his testimony: (1) failed to include precipitation as an inflow to Buena Vista Lake and seeks to correct his testimony to include estimates of precipitation; and (2) failed to include additional available data about alfalfa yield from the Kern County Agricultural Commissioners' Office and seeks to submit this additional data into the record and revise the linear regression included in his testimony to include this additional data. Dr. Davids' corrections to his testimony seek to change his case-in-chief testimony based on substantial additional data submitted by KWBA after the deadline for both case-in-chief and rebuttal evidence. I will not accept these "corrections" to testimony and additional evidence at this time, over the objection of Buena Vista.

### **Outstanding Motion**

The AHO also received KWBA's motion for reconsideration of the hearing officer's evidentiary ruling during the case-in-chief portion of Phase 1B regarding Dr. Jeffrey Davids' purported reliance on case-specific hearsay. The hearing officer will address this motion in a subsequent procedural ruling.

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., 2<sup>nd</sup> Floor  
San Francisco, CA 94111  
[adam@keatslaw.org](mailto: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](mailto:jbuse@biologicaldiversity.org)

Amanda Cooper  
Walter "Redgie" Collins  
California Trout, Inc.  
701 South Mount Shasta Blvd.  
Mount Shasta, CA 96067  
[acooper@caltrout.org](mailto:acooper@caltrout.org)  
[rcollins@caltrout.org](mailto:rcollins@caltrout.org)

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

Amelia T. Minaberrigarai  
3200 Rio Mirada Drive  
Bakersfield, CA 93308  
[ameliam@kcwa.com](mailto: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, 18<sup>th</sup> Floor  
Sacramento, CA 95814  
[kobrien@downeybrand.com](mailto:kobrien@downeybrand.com)  
[dcameron@downeybrand.com](mailto:dcameron@downeybrand.com)  
[htokar@downeybrand.com](mailto:htokar@downeybrand.com)  
[sbivins@downeybrand.com](mailto:sbivins@downeybrand.com)  
[jhughey@downeybrand.com](mailto:jhughey@downeybrand.com)  
[colmstead@downeybrand.com](mailto: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., 25<sup>th</sup> Floor  
Los Angeles, CA 90071  
[eric.garner@bbklaw.com](mailto:eric.garner@bbklaw.com)  
[patrick.skahan@bbklaw.com](mailto:patrick.skahan@bbklaw.com)  
[Sarah.Foley@bbklaw.com](mailto:Sarah.Foley@bbklaw.com)  
*Attorneys for City of Shafter*

Isaac St. Lawrence  
McMurtrey, Hartsock & Worth  
2001 22<sup>nd</sup> Street, Suite 100  
Bakersfield, CA 93301  
[isaac@mhwlegal.com](mailto:isaac@mhwlegal.com)  
*Attorney for Buena Vista Water  
Storage District*

Attachment 3

Ryan Bezerra  
Holly Jacobson  
Bartkiewicz, Kronick & Shanahan  
1011 22<sup>nd</sup> Street  
Sacramento, CA 95816  
[rsb@bkslawfirm.com](mailto:rsb@bkslawfirm.com)  
[hjj@bkslawfirm.com](mailto: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](mailto:clpearce@duanemorris.com)  
[jsansley@duanemorris.com](mailto:jsansley@duanemorris.com)  
[bajones@duanemorris.com](mailto: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](mailto:vgennaro@bakersfieldcity.us)

Scott K. Kuney  
Young Wooldridge, LLP  
1800 30<sup>th</sup> Street, Fourth Floor  
Bakersfield, CA 93301  
[skuney@youngwooldridge.com](mailto:skuney@youngwooldridge.com)  
[kmoen@youngwooldridge.com](mailto:kmoen@youngwooldridge.com)  
[bstroud@youngwooldridge.com](mailto:bstroud@youngwooldridge.com)  
[mbasharaheel@youngwooldridge.com](mailto: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](mailto:rdiamond@northkernwsd.com)

Jennifer Spaletta  
Spaletta Law PC  
P.O. Box 2660  
Lodi, CA 95241  
[jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)  
[diana@spalettalaw.com](mailto: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](mailto: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](mailto:red@eslawfirm.com)  
[cac@eslawfirm.com](mailto: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](mailto:richard@kerndelta.org)  
[steven@kerndelta.org](mailto:steven@kerndelta.org)  
[mulkay@kerndelta.org](mailto:mulkay@kerndelta.org)

Jack Pandol  
900 Mohawk Street, Suite 220  
Bakersfield, CA 93309  
[jpandolsr@grapery.biz](mailto:jpandolsr@grapery.biz)

Attachment 3

Tim Ashlock  
Engineer-Manager  
Buena Vista Water Storage District  
P.O. Box 756  
Buttonwillow, CA 93206  
[tim@bvh2o.com](mailto:tim@bvh2o.com)

Jonathan Parker  
General Manager  
Kern Water Bank Authority  
5500 Ming Avenue, Suite 490  
Bakersfield, CA 93309  
[jparker@kwb.org](mailto:jparker@kwb.org)

Thomas Nassif  
Western Growers Association  
17620 Fitch Street  
Irvine, CA 92614  
[tnassif@wga.com](mailto:tnassif@wga.com)

Gabriel Gonzalez  
City Manager  
City of Shafter  
336 Pacific Ave.  
Shafter, CA  
[ggonzalez@shafter.com](mailto:ggonzalez@shafter.com)

Michael James  
Director of Public Works  
City of Shafter  
336 Pacific Avenue  
Shafter, CA 93263  
[mjames@shafter.com](mailto:mjames@shafter.com)

Dan Bartel  
Rosedale-Rio Bravo Water Storage  
District  
P.O. Box 867  
Bakersfield, CA 93302  
[dbartel@rrbwsd.com](mailto: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](mailto:nancee.murray@wildlife.ca.gov)  
[annette.tenneboe@wildlife.ca.gov](mailto:annette.tenneboe@wildlife.ca.gov)  
[kathleen.miller@wildlife.ca.gov](mailto: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](mailto:achianel@bakersfieldcity.us)  
[kbudak@bakersfieldcity.us](mailto:kbudak@bakersfieldcity.us)  
Peter Kiel  
Law Office of Peter Kiel  
P.O. Box 422  
Petaluma, CA 95953-422  
[pkiel@cawaterlaw.com](mailto:pkiel@cawaterlaw.com)  
*Attorney for Tulare Lake Basin Water  
Storage District*

Aubrey Mauritsen  
Ruddell Stanton Bixler & Evans LLP  
1102 N. Chinowth St.  
Visalia, CA 93291-4113  
[amauritsen@visaliaalaw.com](mailto:amauritsen@visaliaalaw.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](mailto:DRose@waterboards.ca.gov)