
State Water Resources Control Board

September 19, 2022

Re: Kern River Applications (Phase 1B) – Ruling on Motion for Reconsideration

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 (Buena Vista) (Application 31675), Kern Water Bank Authority (KWBA) (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 addressed 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).

Procedural Background

On April 18, 2022, after the parties had submitted their case-in-chief exhibits, Buena Vista filed a Motion to Exclude Testimony and Evidence, which included objections to the testimony of Dr. Davids and associated exhibits submitted by KWBA. Among other objections, Buena Vista objected to Dr. Davids' testimony because he relied in his testimony and analysis on statements by Nick Torres, a former employee of Buena Vista whose testimony KWBA did not submit as case-in-chief evidence, about seepage from Buena Vista's water distribution system. Although I issued a partial written ruling on the parties' evidentiary motion on May 2, 2022, I did not rule on this portion of Buena Vista's evidentiary motion. I allowed the parties to cross-examine Dr. Davids about his data sources, methodologies, and reliance on statements or other information obtained from Mr. Torres, before ruling on the motion.

On May 5, 2022, during the case-in-chief portion of Hearing Phase 1B, I issued an oral ruling that addressed Buena Vista's hearsay objection to Dr. Davids' testimony. I concluded that Mr. Torres' statements about seepage losses and related matters on which Dr. Davids relied in his expert testimony were case-specific hearsay. I did not exclude Dr. Davids' testimony that relied on Mr. Torres' hearsay statements because hearsay is admissible in administrative proceedings and Mr. Torres' statements were the type of information on which an expert might reasonably rely in forming an opinion.

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

I concluded, however, that because Mr. Torres' statements were case-specific hearsay, the portions of Dr. Davids' opinions that relied on these statements would not be sufficient, over objection, to independently support an ultimate finding by the Board.

On May 23, 2022, KWBA submitted written testimony by Mr. Torres as rebuttal evidence, which included statements by Mr. Torres that were relied upon by Dr. Davids in his case-in-chief testimony. On June 3, 2022, Buena Vista filed an evidentiary motion that sought to exclude, among other evidence, the portions of Mr. Torres' written rebuttal evidence that addressed his estimates of canal seepage and past operations by Buena Vista. I denied Buena Vista's motion in a written ruling on June 17, 2022.

Also on June 3, 2022, KWBA filed a motion for reconsideration of my oral ruling that the portions of Dr. Davids' opinions about seepage within Buena Vista's service area are not sufficient in themselves to support an ultimate finding by the State Water Board. On June 10, 2022, Buena Vista filed an opposition to KWBA's motion for reconsideration.

The AHO held the rebuttal portion of Hearing Phase 1B on June 20 through June 23, 2022. During this portion of the hearing, Mr. Torres summarized his written rebuttal testimony and the parties had the opportunity to cross-examine Mr. Torres. I accepted Mr. Torres' written rebuttal testimony and related exhibits (KWBA-600, -601, & -602) into the evidentiary record on June 21, 2022.

KWBA's Motion for Reconsideration

KWBA argues in support of its motion for reconsideration of the hearing officer's May 5 ruling that: (1) the hearing officer erred in determining that Dr. Davids' account of statements made by Mr. Torres was case-specific hearsay, and, in the alternative, (2) KWBA cured any limitations on Dr. Davids' opinion testimony through submission of written rebuttal testimony by Mr. Torres and by making Mr. Torres available for deposition and cross-examination. I conclude that the submission of written rebuttal testimony by Mr. Torres and the opportunity for the parties to cross-examine Mr. Torres (or depose Mr. Torres) about this testimony cures any limitations on the State Water Board's reliance on Dr. Davids' opinions that are supported by Mr. Torres' testimony. Therefore, I do not also address KWBA's first argument in this ruling.

Discussion

An expert witnesses may rely on hearsay for the purpose of forming their expert opinions (Evid. Code, § 801, subd. (b)), but there are limitations on the extent to which an expert may convey hearsay on which the expert relies unless the hearsay is general knowledge among those in the expert's field or independently provable by admissible evidence. (See *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796, 817 [citing *People v. Sanchez* (2016) 63 Cal.4th 664, 676-77].) In administrative proceedings, hearsay evidence is admissible, 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).) In my oral ruling on May 5, I concluded that when

considered together, these principles limited the extent to which the State Water Board might rely on Dr. Davids' opinions that, in turn, relied on statements by Mr. Torres about canal seepage losses, when making findings of fact in this proceeding.

KWBA's submission of written testimony by Mr. Torres and the availability of Mr. Torres during the rebuttal portion of the Phase 1B hearing converted the statements about canal seepage losses on which Dr. Davids relied in forming his opinions from hearsay to testimony admitted in this proceeding. Buena Vista raised the objection that the submission of testimony by Mr. Torres was untimely, and that the testimony should have been submitted by KWBA with its case-in-chief. I concluded in my June 17 written ruling denying Buena Vista's motion to exclude Mr. Torres' written rebuttal testimony as untimely:

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.

KWBA offered to make Mr. Torres available to testify, or available for deposition, before the rebuttal portion of the Phase 1B hearing. I also identified Mr. Torres' written rebuttal testimony as an appropriate topic for presentation of responsive surrebuttal testimony. (July 18, 2022 Notice of Additional Hearing Dates and Status Conference Ruling, p. 2.) Although, ideally, KWBA would have identified Mr. Torres as a witness in the case-in-chief portion of the proceeding, as I described in my June 17 ruling, I conclude that KWBA's omission was not an attempt to prevent other parties from having an adequate opportunity to explore the bases for Mr. Torres' statements or respond to his testimony.

As the hearing officer in this proceeding, I have the discretion to reconsider or otherwise amend prior procedural rulings. This reconsideration of my May 5, 2022 oral ruling is based on changed circumstances; the submission by KWBA of rebuttal testimony by Mr. Torres converted what were previously hearsay statements into admissible non-hearsay testimony that I accepted into the evidentiary record for Phase 1B. Because of this change, I find that it is appropriate to amend my May 5, 2022 oral ruling to eliminate the limitations that I described on the reliance by the State Water Board, when making findings of fact in this proceeding, on portions of Dr. Davids' opinions that relied on Mr. Torres' statements.

Sincerely,

/s/ Nicole L. Kuenzi

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