



Second District Upholds EIR for Kern Water Bank Recharge Project Involving Diversion of Unappropriated Kern River Water In Certain Wet Years; Rejects CEQA Claims Alleging Inconsistent Project Description, Inaccurate Environmental Setting, And Inadequate Water Supply Impacts Analysis

By [Arthur F. Coon](#) on March 24, 2022

In an opinion originally filed on February 23, and later modified and ordered published on March 22, 2022, the Second District Court of Appeal reversed the trial court's judgment invalidating the Kern Water Bank Authority's ("KWBA") EIR and approval of its own project to divert unappropriated Kern River waters in certain wet years to recharge its Kern Water Bank ("KWB"). *Buena Vista Water Storage District v. Kern Water Bank Authority* (2022) __ Cal.App.5th ____. In upholding KWBA's EIR and reinstating its project approval, the Court addressed CEQA project description, baseline, and impact analysis issues in the context of a water diversion and recharge project involving excess flood waters from the not-fully-appropriated Kern River.

The Project And Its Background

KWBA, a Joint Powers Authority comprised of five water districts and one mutual water company, operates, and diverts water from various sources (including the Kern River) into, the KWB. In dry years, KWBA recovers water from the KWB. The Kern River originates in the southern Sierra Nevada. It flows southwest to the San Joaquin Valley floor, with its upper segment flowing into the Lake Isabella Reservoir and Dam. That reservoir is managed by the Kern River Watermaster, who directs releases from it for water control purposes or to satisfy Kern River water rights holders' needs. Below the dam, a series of weirs and canals are used to divert water and control river flows. Features in the river's lower segment include: the First Point of measurement (30 miles downstream from the Lake and used to measure river flows before major diversions to facilitate proper apportionment among water rights holders); the Second Point of measurement (several miles downstream from the First and used to document deliveries to rights

holders); and the Kern River-California Aqueduct Intertie (Intertie), a physical structure through which flood waters are diverted to the California Aqueduct.

Normally the Kern River is dry when it reaches Bakersfield. In some wet years – about 18% of the time – it flows through Bakersfield before reaching the Intertie. Water levels in such years trigger “mandatory release” flood conditions under which the U.S. Army Corps orders water releases (flood flows) from Lake Isabella, and the Department of Water Resources catches excess flows and diverts them through the Intertie to the California Aqueduct to alleviate downstream flooding.

While KWBA does not hold Kern River water rights except for rights purchased from others, about 24% of its diversions into the KWB come from Kern River water, either through such purchases or through diversion of floodwaters in accordance with a longstanding flood policy implemented by the Watermaster pursuant to an agreement of Kern River rights holders. The flood policy applies in wet years when flood flows released under mandatory release conditions reach the Intertie and provides that any person in Kern County can divert such flows by executing an “Order” including certain information. The Intertie only diverts Kern River flows to the aqueduct when they are in excess of water claimed by rights holders, and such a condition has occurred in wet years nine (9) times since the Intertie’s 1977 construction.

In 2010, the State Board ordered the Kern River’s previous “fully appropriated stream” (FAS) designation to be removed based on evidence that some unappropriated water in excess of rights holders’ claims existed in certain wet years, and it thus allowed appropriation applications to be processed.

KWBA proposed the “Kern Water Bank Authority Conservation and Storage Project” (the “Project”) to divert up to 500,000 acre-feet-per-year (AFY) from the Kern River for recharge, storage, and later recovery within the KWB and/or direct delivery to its members’ service areas, all via existing physical facilities. Further, as described and analyzed in KWBA’s EIR, all such Project diversions would be limited to high flow wet years when all senior rights holders’ rights have been satisfied and the water diverted would otherwise have flowed to the Intertie, flooded farmlands, or left the County.

KWBA separately applied for a water right permit from the State Board to divert the 500,000 AFY during years when water was available, and its EIR analyzed the impacts of the State Board’s approval of that permit. The EIR evaluated the Project’s potential environmental impacts, including on hydrology and groundwater resources, and used environmental setting baselines from 1995 (when the KWB began operating) to February 2012 (when the Project NOD was issued). The EIR’s appendix included a Water Availability Analysis (WAA) conducted by KWBA that included as a “key objective” determining if floodwater is available for appropriation. Based on KWBA’s historical diversions of floodwaters in the three high flow years occurring during the baseline period under the Flood Policy, and measurements of Kern River water diverted to the Intertie, the WAA found that surplus water would be available in the quantity requested by the Project in high flow years.

The EIR found that because the Project would only divert surplus waters in wet years which could not otherwise be used or stored by existing water right holders, it would not have a significant impact on available water supply and thus no mitigation would be required. It also determined there would be a less-than-significant impact on groundwater levels since it would only increase recharge and storage, but would not change the historical levels of recovery operations from the KWB.

The Trial Court Litigation

Buena Vista Water Storage District (“Buena Vista”), a Kern River “Second Point” water rights holder, sued KWBA and the trial court granted its petition for writ of mandate, finding that the Project EIR was

inadequate under CEQA for three stated reasons: (1) the definitions of Project water and existing water rights are “inaccurate, unstable, and indefinite”; (2) the baseline analysis is inadequate and incomplete for failure to analyze and quantify competing existing Kern River water rights; and (3) the impact analysis is inadequate for failure to analyze significant environmental impacts on senior rights holders, and on groundwater from long-term KWB recovery operations. The trial court ordered KWBA to set aside its resolution certifying the EIR, to prepare a legally adequate EIR, and to suspend activities related to project approval. KWBA appealed and the Court of Appeal reversed.

The Court of Appeal’s Opinion

Project Description Issue

Reviewing KWBA’s actions de novo applying the same standards of review as the trial court, the Court of Appeal analyzed Buena Vista’s claim that the EIR failed to contain “an accurate, stable, and finite project description” as an alleged “failure to proceed in a manner required by law.” Disagreeing with the trial court’s conclusion, the Court of Appeal held that the EIR’s Project Description chapter consistently described Project water as “high flow Kern River water, only available under certain hydrologic conditions and after the rights of senior Kern River water rights holders have been met, that otherwise would have (1) been diverted to the Intertie, (2) flooded farmlands, or (3) left Kern County.” In the same and other chapters, the EIR consistently described the relevant “hydrologic conditions” and defined the above-enumerated qualifying conditions. The Court rejected Buena Vista’s contention that the EIR’s descriptions of Project water – using phrases such as “water that would ‘trigger mandatory release conditions...’,” “flood flows,” “water that was historically offered to the Intertie” or “historically diverted by KWBA,” and “unappropriated” or “surplus” water – were inconsistent; rather, it held such descriptions merely “describe[d] in different words the same conditions under which Project water has historically flowed.” The EIR explained that “the Project would result in a State Water Board permit for the continuance of a pre-existing activity through use of existing facilities[.]” that Project water existed “only to the extent unappropriated Kern River flows” are available, and would not necessarily represent an increase in historical diversions of such waters. Per the Court: “In essence, the Project seeks to establish a right to the same water that KWBA has historically diverted under the Flood Policy.”

The Court rejected Buena Vista’s attempt to analogize the EIR’s Project description to that found fatally “indefinite” in the case of *Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1 (my 8/29/19 post on which can be found [here](#)). In distinguishing that case, the Court held: “Here, a precise amount of water for the Project cannot be determined because water availability will fluctuate from year to year. Nevertheless, the Project proposes a finite maximum amount of water for diversion and provides estimates of the amount of water that could have been diverted based on historical hydrological conditions. A project description may use a flexible parameter when the project is subject to future changing conditions. [citations].”

The Court further rejected the trial court’s finding that the EIR’s Project description was inadequate because it failed to include a “complete quantification of existing Kern River water rights.” The EIR satisfied all of CEQA Guidelines § 15124’s required elements for a project description, including “a *general* description of the Project’s technical and environmental characteristics, including information about the process of obtaining a water right permit/license from the State Board, the methods and locations of water diversion, the water operations process, and monitoring the groundwater. Nothing in the CEQA guidelines required KWBA to provide a specific quantification of the existing water rights within its Project description.”

Additionally, “the trial court erred in requiring a quantification of existing rights because ... there has never been a stream-wide adjudication” quantifying such rights, and such an “adjudication is a complex proceeding conducted by the State Board or [a] court and could take several years or even decades to complete. [citations].” While CEQA requires a good faith effort at full disclosure, an EIR need not be perfect or exhaustive in nature. The EIR here disclosed all it reasonably could and its project description satisfied CEQA.

Baseline/Environmental Setting Issue

The Court of Appeal held that the trial court similarly erred in finding the EIR’s detailed description of the environmental settings was inadequate for failure to include quantified measurements of amounts of water that existing Kern River water rights holders have rights to divert. Per the Court: “Here, a quantification of existing water rights was not necessary to an accurate and complete description of the environmental setting. Historical use may determine the quantitative limits on the amount of water that a pre-1914 water appropriator may divert” and “KWBA had the discretion to rely upon historical measurements of water to determine ‘how the existing physical conditions without the project can most realistically be measured . . .’” (Citations omitted.) The EIR provided a detailed description of existing allocations and historical measurements of water from the First Point, Second Point and Intertie during the baseline period, and also measurements of water historically diverted to the KWB. From this information, the EIR demonstrated the availability of unappropriated water and provided estimates of amounts that could have been diverted into the KWB under baseline conditions; a complete quantification of existing water rights was unnecessary to conduct this analysis, and the Court held “[t]he EIR’s environmental settings analysis complied with CEQA requirements.”

Environmental Impacts Analysis Issue

Finally, the Court held the trial court erred in finding that the EIR did not adequately analyze the Project’s impacts on existing water rights and on groundwater levels. Regarding the former, the Project by its very definition would use only unappropriated water and would therefore not adversely impact existing appropriative water rights. The EIR’s conclusions that there would be no significant impact and no mitigation required in this regard were supported by substantial evidence in that: (1) the Water Board cannot issue new permits to divert water already subject to existing rights; (2) the State Board has expressly allowed new applications after finding water diverted to the Intertie was unappropriated water in excess of existing water rights; and (3) the EIR’s analysis of historical measurements showed KWBA would only divert surplus water that would be available “approximately 18% of the time.”

With regard to groundwater impacts, the EIR made clear that even maximum recovery volumes during a 3-year drought would not change substantially because no new recovery facilities would be built; further, even extended recovery periods would be ensured not to exceed banked water quantifies or result in changes to ground water levels adversely impacting nearby wells or land uses, as a result of KWBA’s numerous preexisting operational commitments and monitoring programs. Rejecting Buena Vista’s argument that it was error for the EIR to rely on such preexisting commitments and programs to avoid analysis of impacts, the Court observed: “Preexisting operations are not mitigation measures designed to reduce a project’s impact. Rather they are part of the ongoing baseline operations.” (Citing *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 570-571, my 11/30/15 post on which can be found [here](#).) Substantial evidence thus supported the EIR’s conclusion there would be no significant impact on groundwater levels since “the Project will not increase long-term recovery beyond historical (baseline) operations.”

Conclusion and Implications

This case proves the famous adage that, at least in the arid West, “Whiskey is for drinking; water is for fighting over.” And as with so many land use law disputes, CEQA was weaponized here – albeit ultimately unsuccessfully – to do the “fighting.” But as the Court of Appeal correctly held, perfection and exhaustive analysis aren’t required in an EIR, only adequacy and a good faith effort to disclose all that reasonably can be disclosed. To put a finer point on it, in order to have adequate project and baseline descriptions, the EIR for a water diversion project of the nature proposed here – i.e., seeking only to use water documented to be surplus and unappropriated – didn’t need to provide an extraneous and detailed quantification of existing water rights that would have required a complex, years-long adjudicatory process to produce.

Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. “The Book” is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.mslegal.com.