

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 08/18/2016

TIME: 08:38:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Hellmi McIntyre

REPORTER/ERM:

CASE NO: **56-2011-00408712-CU-CO-VTA**

CASE TITLE: **North Kern Water Storage District vs City of Bakersfield**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the North Kern Water Storage District's motion to enforce the judgment under submission, now rules as follows:

The Court finds that City has violated the Final Judgment filed on 12-1-14 (affirmed by Court of Appeal effective 7-25-16) by denying North Kern its right to delivery and purchase from City of its 2016 Extension Quantity supply equal to 20,000 acre-feet of Kern River water; City is to deliver by instantaneous transfer of title 20,000 acre-feet of Kern River water in storage in Lake Isabella to North Kern's storage in Lake Isabella within 10 week days following notice of entry of Court order; North Kern to make payment to the City the price of \$1,640,000.00 (\$82 per acre foot) within 60 days of delivery of the water.

Background:

Action for declaratory relief commenced 10-21-11 regarding the meaning of Agreement 76-89 between Plaintiff and Defendant and whether or not Defendant could terminate the Agreement by sending letters that it expected it would need all of the Kern River water it owned and therefore there would be no further provision of water after December 2011 under the terms of the Agreement. The Court found, after a lengthy court trial, that the City of Bakersfield could not terminate the Agreement by showing a need or that it had a project that would use water. The only circumstance upon which the City could terminate the Agreement was if the Plaintiff was in default on its payments pursuant to the Agreement in the amount of \$400, 000. (Final Statement of Decision filed 7-29-14, p. 16.) The Final Judgment filed 12-1-14 found that the Agreement was valid and enforceable, the Extension Term was in full force and effect since January 1, 2012 and North Kern was entitled to entry of judgment in its favor. The City was ordered to comply with the terms and provisions of the Agreement consistent with the Final Statement of Decision. The Court denied the City any relief on its cross complaint. The final judgment named North Kern as the prevailing party and awarded it fees and costs pursuant to paragraph 12.3 of the Agreement. Appeals were filed by both sides. The Court of Appeal decision affirming the judgment in favor of North Kern became final on 7-20-16 (Remittitur filed 7-25-16.)

Basis for the Motion:

North Kern moves for the Court to find that the City has violated the Judgment by denying North Kern its right to delivery and purchase from the City its 2016 Extension quantity supply equal to 20,000 acre-feet of Kern River water; City is to deliver by instantaneous transfer of title 20,000 acre-feet of Kern River water in storage in Lake Isabella to North Kern's storage in Lake Isabella within 10 weeks following notice of entry of Court order; North Kern to make payment to City the price of 1.640 million dollars (\$82

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per acre foot) within 60 days of delivery of water and North Kern to be awarded such other and further relief as the Court may deem proper.

Discussion:

The Court reserved jurisdiction as set forth in item 12 as follows:

"This Court retains jurisdiction for the purpose of a party returning to this Court to obtain relief from violations of this Judgment."

North Kern's motion seeks to establish a violation of the judgment and relief regarding the same and therefore comes within the parameters of the jurisdiction retained by this court. Moreover, the decision of the Court of Appeal found that the Agreement (76-89) between North Kern and the City was valid and enforceable; the Extension Term was in force and had been since 1-1-12; and found in favor of North Kern on its declaratory relief and specific performance causes of action. The City was permanently enjoined from taking any action inconsistent with Agreement 76-89 and the Final Statement of Decision. As summarized by the decision of the Court of Appeal:

"Section 6.1 of Agreement 76-89 gives North Kern first priority to the City's nonutility Kern River water after the City meets the pre-existing obligations it assumed upon its purchase from Tenneco. Section 6.2 continues that priority during the Extension Term "subject only to City's showing a need to and the implementation of a project to divert all or any portion of said Extension Quantity of water for City's uses on City-owned property or the use of said water or portion thereof within City's boundaries. In this connection, all other water available to City for its needs shall be first applied to City for its requirements before the Extension Quantity or portion thereof shall be denied to [North Kern]."

(*N. Kern Water Storage Dist. v. City of Bakersfield*, 2016 Cal. App. Unpub. LEXIS 2828, 5-6 (California Unpublished Opinions 2016).)

The City argues that upon showing of a "need" North Kern can be denied water under the agreement, and that "needed" water can include stored water. The City's interpretation is inconsistent with this court's prior decision and the decision of the Court of Appeal:

"Thus, under section 3.3b, the City is required to supply North Kern with the Basic Quantity of 20,000 acre-feet of Kern River water each year during the Extension Term "until City shows a need to and the implementation of a Project to divert all or any portion of the Basic Quantity" As in Section 3.1b, the word "until" references the subject of this sentence, which is the City's annual obligation to supply North Kern with Kern River water under its first priority rights.

The trial court explained that if, on the one hand, the City can show both a need and the implementation of a project to divert a "portion" of the available Kern River supply, then the quantity sold to North Kern is "modified" to the portion not needed by the City. In other words, if 5,000 acre-feet is needed and diverted by a project, then the remaining 15,000 acre-feet is available for North Kern. If, on the other hand, the City shows a need and the implementation of a project to divert and use all of the Kern River supply available in a given year, then the quantity available for North Kern for that year is "terminated." Before an assessment of that quantity can be made, however, the City must first apply all other water available for its needs."

(*N. Kern Water Storage Dist. v. City of Bakersfield*, 2016 Cal. App. Unpub. LEXIS 2828, 11-12 (California Unpublished Opinions 2016).)

Simply declaring a need or claiming that stored water should be considered allocated to an entity ahead of North Kern is insufficient. As noted by the Court of Appeal, "the City must do more than simply declare a need for the water. Before modifying or terminating the quantity of water sold to North Kern in any given year, the City must show (1) a need to divert water from the Kern River, (2) an implemented project to divert water from the Kern River for use within its boundaries or on City-owned property and (3) that all other water available to the City has first been utilized for the project." (Ibid.) The City has not made this showing.

The clerk is directed to give notice.