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May 25, 2017

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**VIA HAND DELIVERY**

State Water Resources Control Board  
Division of Water Rights  
Records Unit  
1001 I Street, 2ND Floor  
Sacramento, CA 95814  
Attn: Les Grober, Deputy Director

Re: Alta, Fresno, and Consolidated Irrigation Districts' Petition for Reconsideration of Fully Appropriated Stream Declaration for Kings River and Application to Appropriate Water

Dear Mr. Grober:

This firm represents the Semitropic Improvement District of Semitropic Water Storage District ("Semitropic"). On May 17, 2017, the Fresno, Alta, and Consolidated Irrigation Districts (the "Districts") filed a petition ("FID Petition") seeking "reconsideration" of the State Water Resources Control Board's declaration that the Kings River is a fully appropriated stream ("FAS Declaration") and a corresponding application to appropriate 4,500 cfs of floodwater from the Kings River ("FID Application"). The FID Petition fails to comply with State Water Resources Control Board ("Board") regulations governing revocation or revision of FAS Declarations. Accordingly, the FID Petition and the FID Application are legally invalid and should be summarily dismissed.

**ARGUMENT**

Water Code section 1205(a) grants the State Water Resources Control Board ("Board") authority to declare that a stream system is fully appropriated. Once the Board has issued such a declaration, it cannot accept any new applications to appropriate water unless the application meets conditions specified in the declaration. (Water Code § 1206.)

In 1967, the Board's predecessor, the State Water Rights Board, approved various applications to appropriate Kings River water filed by Fresno Irrigation District, as trustee, in Decision 1290 (D-1290), and subsequently issued License Nos. 11517, 11518, 11519, 11520, 11521 and 11522. Based on D-1290, the State Water Board later declared the Kings River System to be a fully

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appropriated stream system in Order WR 89-25 and Order WR 98-08 adopting a Declaration of Fully Appropriated Stream Systems ("FAS Declaration").

The Board also has the authority to "revoke or revise a declaration that a stream system is fully appropriated." (Water Code § 1205(c).) The Board's authority to "revise" such a declaration is limited to revision of "any condition specified in a declaration upon which applications to appropriate unappropriated water will be accepted for filing and registrations of small domestic use appropriations will be accepted." (Cal. Code Regs., tit. 23, § 871(b).) Any interested person may file a petition seeking revocation or revision of a fully appropriated stream declaration with the Division. No order revoking or revising such a declaration may be issued by the Board without a hearing. (*Id.*) The Board may only hold such a hearing based on a finding that "the petition shows reasonable cause to conduct a hearing on the question whether the declaration should be changed[.]" (*Id.* at subd. (c)(3).) "Reasonable cause" includes "a change in circumstances from those considered in a previous water right decision determining that no water remains available for appropriation, or . . . hydrologic data, water usage data, or other relevant information acquired by the Division of Water Rights in the course of any investigation conducted by it." (*Id.* at subd. (b).)

A petition seeking revocation or revision of a fully appropriated stream declaration may be accompanied by a proposed application to appropriate unappropriated water. (*Id.* at subd. (c)(2).) The proposed application may not be accepted unless the Board changes the declaration in a manner that makes the proposed application acceptable in response to a valid petition. (*Id.* at (c)(3).) When there are competing proposed applications and petitions, the first proposed application accepted "shall be assigned a priority superior to that assigned to any subsequently retained or accepted application . . . proposing to appropriate from a source included in the earlier proposed application . . . ." (*Id.*)

The FID Petition fails to comply with the Board's regulations governing revocation or revision of FAS Declarations. Specifically, the FID Petition states:

Because Kings River water is periodically discharged to the San Joaquin River during above average water years, *it could be argued* that some Kings River water is available for appropriation. *To the extent that the [Board] ever changes its previous and still current determination* that the Kings River is a fully appropriated stream, and considers any Kings River waters to be unappropriated or not beneficially used under current licenses, then this Petition is submitted along with the application filed by Consolidated Irrigation District, Fresno Irrigation District and Alta Irrigation District to appropriate any waters of the Kings River deemed unappropriated or not beneficially used for use within the Counties of Fresno, Kings, and Tulare[.]

(FID Petition at p. 1 [emphasis added].)



The FID Petition contravenes the Board's regulations regarding fully appropriated stream petitions for two reasons. First, the FID Petition seeks neither revocation nor revision of the FAS Declaration. "Reconsideration" of the FAS Declaration is not contemplated by section 871 of the Board's regulations regarding fully appropriated stream systems. Section 871 only permits revision of any conditions specified in the FAS Declaration upon which applications to appropriate water will be accepted for filing, or the outright revocation of the FAS Declaration (*See* Cal. Code Regs., tit. 23, § 871(b).) The Kings River FAS Declaration, however, contains no conditions upon which the FID Application could be accepted for filing. (*See generally* Order WR 89-25; Order WR 98-08.)

More significantly, the FID Petition does not seek revocation or revision of the Kings River FAS Declaration. Indeed, the FID Petition does not ask the Board to take *any* action at this time. Instead, it seeks only to establish the highest priority for the FID Application *in the event* that the Board changes its determination that the Kings River is a fully appropriated stream. Contingent requests for "reconsideration" are simply not contemplated by the Board's regulations governing revocation or revision of fully appropriated stream declarations.

Contrary to Board regulations, the FID Petition fails to demonstrate reasonable cause to revoke or revise the FAS Declaration. In fact, the Districts expressly admit their belief that the Kings River remains a fully appropriated stream system. (*See* Letter from Districts to Division of Water Rights dated May 9, 2017, regarding Application to Appropriate Water, at p. 1 ["The co-applicants are of the opinion that the Kings River is a fully appropriated stream system . . .".]) Any action by the Board on the FID Petition would thus exceed the Board's authority.

The FID Petition was filed in the midst of extensive discussions regarding future use of Kings River flood flows between Semitropic and representatives of the Kings River Water Association ("KRWA"), of which the Districts are members. The filing of the FID Petition and the FID Application constitutes a transparent and inappropriate attempt to establish a high priority right to Kings River flood flows, to the detriment of Semitropic's Tulare Lake Storage and Floodwater Protection Project. The Division should reject the the Districts' attempt to utilize the FAS modification process in this manner.

Accordingly, Semitropic respectfully requests that the Division reject and dismiss the FID Petition and Application.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien

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Cc: Michael Lauffer  
Chief Counsel  
State Water Resources Control Board