

2/16/10 Bd. Mtg.  
Kern River  
Deadline: 2/9/10 by 12 noon

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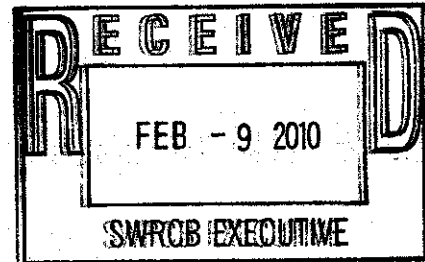
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February 9, 2010

Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100  
Email Only: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



**Re: 02/16/10 Board Meeting  
Comments on Agenda Item 4: Consideration of a Proposed Order to  
Revise the Fully Appropriated Stream Status of the Kern River in  
Kern and Tulare Counties**

Dear Ms. Townsend:

Buena Vista Water Storage District ("Buena Vista") has joined in comments submitted by certain Joint Petitioners (namely: North Kern Water Storage District and City of Shafter (A31673); Kern County Water Agency (A31677), Kern Water Bank Authority (A31676), and Buena Vista (A31675)). In addition to the comments and requests presented by the Joint Petitioners, Buena Vista raises the following objection to the Draft Order Amending the Declaration of Fully Appropriated Streams to Remove the Designation of The Kern River as Fully Appropriated, dated January 19, 2010 ("Proposed Draft Order" or "PDO").

As stated in the Proposed Draft Order, a public evidentiary hearing was held on October 26-27, 2009 ("FAS Hearing"). The sole purpose of the FAS Hearing was "...to determine if there has been a change in circumstances since the Kern River was included in the Declaration sufficient to justify the State Water Board revising the Declaration for the purpose of processing water right applications for the Kern River." [PDO, p. 2.] The Proposed Draft Order suggests that a change in circumstances has occurred warranting revision of the fully appropriated status of the Kern River. [PDO, pp. 6-7.] The only change in circumstances cited in support of this determination is infrequent and intermittent deliveries of Kern River water into the California Aqueduct via the Kern River/California Aqueduct Intertie ("Intertie"). The Proposed Draft Order states:

- (1) Exhibit 2-18 shows that Kern River water has been diverted into the Intertie in nine separate years since 1978 [PDO, p. 4];
- (2) These diversions represent flows that "exceed recognized rights" in the Kern River [*Id.*];

- (3) Diversion of this water into the Intertie was without "a valid basis of right" [PDO, p.5]; and
- (4) This water is, by definition, unappropriated water [*Id.*].

Buena Vista disputes that the Kern River water diverted into the Intertie since 1978 exceeds recognized rights in the Kern River. Buena Vista disputes that Intertie diversions were without a valid basis of right. Wherefore, Buena Vista disputes that Intertie diversions represent "unappropriated" water in any amount or at all.

1. **Intertie Diversions Do Not Represent Flows Exceeding Recognized Rights**

In 1964 the State Water Resources Control Board ("State Water Board") examined the Kern River for any unappropriated water in "The Matter of Applications 9446, 9447, 10941, 11071, 11148, 11351, 13403, 13709, 15440 of Buena Vista Water Storage District and Others to Appropriate from the Kern River and Various Tributaries in Kern County." Evidence was taken with respect to this issue at a public hearing held February 5, 1964. [JE 8]. The uncontroverted evidence showed that:

- Studies by C. E. Grunsky, as reported in Bulletin 100, Irrigation Investigations of the Department of Agriculture, and subsequent records of the U. S. Geological Survey and others, indicate that the **ENTIRE** Kern River runoff has been absorbed within the Kern River service area since 1878. [JE 8, 32/2-11].
- **ALL** Kern river water was absorbed within the service areas of the First Point diverters, the Second Point diverters, and the Lower River diverters during the 70 year period of record prior to the Hearing (i.e., 1894 through 1963). [JE 8, 25/4-8].
- 1906 was an extremely high runoff year (1,899,900 AF) yet **ALL** water was absorbed in the service areas of the First Point diverters, the Second Point diverters, and the Lower River diverters, i.e., no water escaped the Kern River system into the San Joaquin River and/or flowed to the ocean. [JE 8, 34/5-17].
- In 1952 there was a measured flow of 1,501,000 AF at First Point, 707,200 AF at Second Point, and 210,200 AF at Highway 46, **ALL** of which water was used within the respective service areas of the First Point diverters, Second Point diverters, and Lower River diverters. [JE 8, 35/20-26].

In light of this uncontroverted evidence, the Engineering Staff Analysis, dated May 28, 1964, determined, among other things, that "[t]he entire flow of the Kern River has been beneficially

used since 1894.”<sup>1</sup> [JE 7, p. 10]. Similarly, Decision 1196 concludes:

“A comparison of the quantities of water used in the First Point, Second Point, and Lower River Service Areas for the period 1894-1963, with the quantities of water flowing past the first point of measurement, adjusted to eliminate the effect of Isabella Reservoir, shows that there is no water surplus to the established uses of the applicants, protestants, and other users in these areas.” [JE 21, p. 5].

It is clear that the “recognized rights” of the First Point diverters, Second Point diverters and Lower River diverters extend to the entire flow of the Kern River. All water flowing in the Kern River, including that portion offered from time to time for diversion into the Intertie, falls within the recognized, pre-1914 water rights of one or more of the First Point diverters, Second Point diverters, or Lower River diverters.

## 2. Intertie Diversions Are Not Without A Valid Basis of Right

Historically, high flow Kern River water was stored in Buena Vista Lake (Second Point service area) or Tulare Lake (Lower River service area). [JE 7, p. 6]. This water was stored in cells created by constructing levees. [*Id.*]. The stored water was later rediverted from these cells for use on irrigated lands within the service areas. [*Id.*]. No water was allowed to escape the Kern River system. All water was put to beneficial use.

With the construction of the Intertie in 1975 the Kern River diverters were afforded the option of diverting some high flow Kern River water into the California Aqueduct rather than storing the same in Buena Vista and/or Tulare Lakes. Exercising such option has been, from time to time, considered a best management practice because it (i) reduces flooding of prime agricultural farm lands in the Buena Vista and Tulare Lake service areas; (ii) comports with the policy of this State that “... the water resources of the State be put to beneficial use to the fullest extent of which they are capable...” [e.g., Cal. Water Code §100]; and (iii) comports with the policy of this State encouraging voluntary transfers to ensure efficient use of water within the State [e.g., Cal. Water Code §109(a)]<sup>2</sup>.

<sup>1</sup> “A comparison of Table 2 [annual runoff] and 4 [actual use] clearly indicates that all of the water within the stream system has been applied to beneficial use. This is supported by the fact that no water has flowed out of Tulare Lake since 1878.” [JE 7, p. 10].

<sup>2</sup> Note that Cal. Water Code §109(b) “...directs the...State Water Resources Control Board...to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer.” The Proposed Draft Order does the opposite, i.e., it discourages voluntary transfers by putting vested water rights in jeopardy as a result thereof.

Deliveries of high flow Kern River water into the California Aqueduct via the Intertie are accomplished by agreement between the Kern River diverters and the Department of Water Resources. These deliveries constitute a transfer of water pursuant to Cal. Water Code §1706 which provides:

The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

Such diversions do not constitute an abandonment of water or water rights. Such diversions do not fall within the jurisdiction of the State Water Board. Such diversions do not require a permit issued by the State Water Board.

3. **Diversions Into The Intertie Are Not Unappropriated Water**

Cal. Water Code §1201 defines unappropriated water as follows:

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

Diversions of high flow Kern River water into the Intertie by Kern River diverters from time to time constitute valid transfers of water that is "otherwise appropriated". Such diversions do not constitute a "change of circumstances" resulting in the creation of unappropriated water.

Buena Vista appreciates your consideration of its objection to the Proposed Draft Order stated above and respectfully requests that the State Water Board amend its Proposed Draft Order consistent with the views expressed herein.

Respectfully submitted

McMURTREY, HARTSOCK & WORTH

By: 

Isaac L. St. Lawrence

Attorneys for Buena Vista Water Storage District

February 9, 2010

Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**Re: Comment Letter - 02/16/10 Board Meeting Item: Order – Kern River**

Dear Ms. Townsend:

This letter is provided on behalf of four (4) of the petitioners<sup>1</sup> (referred to as “Joint Petitioners”) to provide written comments and recommended corrections to the “Draft Order Amending the Declaration of Fully Appropriated Streams to Remove the Designation of The Kern River as Fully Appropriated” (“Draft Order”) prepared by the State Water Resources Control Board (“State Water Board”), based on the record in the evidentiary hearing held October 26-27, 2009. The Joint Petitioners request that the State Water Board consider these comments to correct the Draft Order prior to adopting a final order in this proceeding.

The fundamental legal and policy issues triggered by this proceeding have State-wide importance governing matters of jurisdiction between sister State agencies, the consistent management of the fully appropriated stream system law (“FAS”), as well as vital local interests regarding the water resources of the Kern River Basin. Embarking on a course of extensive State Water Board proceedings as suggested in the Draft Order will have substantial impacts on public and private finances, the existing water rights of the parties, and the interests of the public in the management of Kern River resources. Before the State Water Board commits itself to yet another comprehensive multi-year project, it is appropriate that the State agencies, parties, and other interested members of the public attempt to discuss the issues in an alternative dispute resolution process to determine if this matter can be otherwise resolved.

I. Summary

The Draft Order is generally unacceptable and requires correction in order to conform to the evidentiary record, State Water Board FAS precedent, and Federal and State flood control law, to ensure the implementation of sound and consistent water policy in the State. Specifically, the Draft Order should be revised in three (3) respects:

First, as acknowledged in the Draft Order, the evidentiary record failed to prove that the Fifth District Court of Appeal’s decision in *North Kern Water Storage District v. Kern Delta Water District* (2007) (147 Cal.App. 4<sup>th</sup> 555 [54 Cal.Rptr. 3d 587]) (“North Kern Decision”) constituted a change in circumstance which created any unappropriated water. The State Water Board should reject the Draft Order proposal to defer ruling on the petitions until further

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<sup>1</sup> North Kern Water Storage District and City of Shafter (A31673), Buena Vista Water Storage District (A31775), Kern Water Bank Authority (A31676), and Kern County Water Agency (A31677.)

evidence is presented in the application phase because it will require senior water right holders to participate in a lengthy application process as protestants incurring significant public expense notwithstanding the undisputed record that there is no evidence proving that the North Kern Decision creates any unappropriated water. Furthermore, deferral suggests the State Water Board may impermissibly retain hundreds of thousands of dollars in application fees which otherwise are required to be refunded. The Draft Order should be revised to direct that the petitions and applications seeking revision of the FAS Declaration based on the North Kern Decision are denied for a failure of proof.

Second, the Kern River-California Aqueduct Intertie ("Intertie") referenced in the Draft Order (at p. 4) is a Federal flood control facility authorized by Congress and the Legislature, and is operated by local agencies in coordination with the California Department of Water Resources ("DWR"). All floodwaters discharged into the California Aqueduct received by DWR result exclusively under the independent governmental authority and power granted under the Federal Small Flood Control Project Act (under Section 205 Flood Control Act of 1948), and associated Federal flood control authorities, and the Small Flood Control Project under Article 4, Chapter 2, Part 6 of Division 6 of the Water Code and not pursuant to a water right claim under Division 2 of the Water Code. The evidentiary record completely fails to address and establish that the State Water Board has jurisdiction to process any applications to appropriate floodwaters discharged into the Intertie. Therefore the Draft Order should be revised to omit the discharge of floodwaters into the Intertie as the basis to amend the FAS Declaration because the record contains neither facts nor legal authority establishing that the State Water Board can legally process applications to appropriate floodwaters discharged into this flood control facility.

Third, assuming that the State Water Board can establish that it has jurisdiction over floodwaters discharged into the Intertie, the Draft Order's proposal regarding the proposed revision of the FAS Declaration to allow processing of applications to appropriate Kern River floodwaters is incorrect in several respects:

- a) The State Water Board should reject the new low standard mandating that any fully appropriated stream system be removed from the FAS Declaration if in "some years" there are flood flows in excess of traditionally held and exercised rights. The undisputed record is that no petitioner has ever sought appropriation of floodwaters discharged into the Intertie. Significantly, the City of Bakersfield's ("Bakersfield") petition and application do not attempt to claim that any instream environmental, public trust or other beneficial use can be accomplished by an appropriation of floodwaters discharged into the Intertie. Rather, the record is undisputed that Intertie flows occurring in abnormally wet years are extremely erratic and unpredictable. Therefore, instead of modifying the FAS Declaration the State Water Board should exercise existing authorities consistent with its prior orders and require the issuance of temporary permits to address discharges into the Intertie if, and when, someone ever seeks to appropriate these floodwaters;

- b) Even if the State Water Board determines it is necessary to revise the FAS Declaration (which the Joint Petitioners dispute) in order to allow appropriation of floodwaters discharged into the Intertie, this act should be in coordination with DWR based on its role in effecting the flood control functions of the Intertie operations;
- c) The State Water Board should clarify the Draft Order to precisely define the context for considering environmental and public interest issues. Specifically, the environmental and public interest review should be limited to the specific water supply potentially available for appropriation, the floodwaters discharged to the Intertie, and not broadly expanded to include prior existing water rights. Importantly, during the flood control operations that require discharge into the Intertie, the Kern River channel is already flowing at the limit of its safe conveyance capacity.

## II. North Kern Decision

### A. Bakersfield Had The Burden to Prove That The North Kern Decision Was a Change in Circumstance Which Creates Water Available for Appropriation

An applicant always has the burden of showing that there is unappropriated water available to the supply the application. (Water Code §§ 1260(k), 1375(d); *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 413.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500; see also § 550(b) ["The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."].) Where there is conflicting evidence submitted, the parties' burden of proof in this administrative proceeding is by a "preponderance of the evidence." (Evid. Code, § 115; see *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-1893.) "The term simply means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller ("Miller")* (1916) 171 Cal. 649, 652.)

None of the five petitions and applications seek appropriation of any Kern River waters discharged into the Intertie. (See petitions & applications.) The record confirms that no person has previously sought appropriation of floodwaters discharged into the Intertie. Instead, as acknowledged in the Draft Order each petition and application is limited to whether the partial forfeiture of Kern Delta Water District's pre-1914 water rights caused a change in circumstances resulting in surplus water. (Draft Order, p. 2.) Importantly, only Bakersfield claimed at the October 26-27 hearing that the North Kern Decision was a change in circumstance creating surplus water, "an allocable excess." (*North Kern, supra*, at p. 583.) The Joint Petitioners informed the State Water Board in its January 30, 2009 correspondence as well as at the evidentiary hearing, that based on a review of the record and engineering analysis completed by MBK Engineers, Inc., State Water Board decisions, and governing points of appropriative law



that the North Kern Decision did not constitute a change in circumstance supporting a revision of the FAS Declaration.

In this proceeding, Bakersfield was required to prove at the October hearing that the partial forfeiture in the North Kern Decision creates surplus water available for appropriation or else face denial of its petition.

**B. It is Undisputed That Bakersfield Failed to Meet its Burden of Proof**

Bakersfield completely failed to produce any evidence on the issue of whether the existing pre-1914 common law rights holders on the Kern River will use, in full, the water released as a consequence of Kern Delta's forfeiture. (See *North Kern, supra*, at pp. 583-584.) Instead, Bakersfield's Water Resources Manager testified that there was not a single Kern River record (1964-2008) that he could identify which supports his "surplus water" calculations. (RT 148:1-24; 149:12-22.) In contrast, the Joint Petitioners presented substantial evidence demonstrating that circumstances had not changed due to the North Kern Decision. (See JE 46-70.) In fact, it is undisputed that the entire flow of the Kern River is fully appropriated and the record establishes that the Kern River is oversubscribed by pre-1914 common law rights and other decreed rights. (JE 33-39; 46 ¶¶ 8, 12, 16, 18, 21; 28, 30, 32; B1-7, 1-8, 1-9, 2-21.) As demonstrated by Mr. Easton's analysis, water released due to the North Kern Decision is diverted and used in full to satisfy the prior existing water right entitlements according to the court judgments, decrees and agreements recognized by the State Water Board in Decision D1196. (JE 33-39, 48-65.) The Draft Order makes clear that no evidence was presented proving that "the partial forfeiture of Kern Delta's rights itself created any additional [beyond Intertie floodwaters] unappropriated water." (Draft Order, p. 5.) The Draft Order expressly recites that the evidence "did not clearly resolve" whether the North Kern Decision was a change in circumstance resulting in water being available for appropriation. (*Id.* (Emphasis added).) In the end, the Draft Order declares that its proposed revision of the FAS Declaration is not based on the North Kern Decision and concludes "even without regard to the North Kern Decision, there is some unappropriated water in the Kern River." (Draft Order, p. 6, Emphasis added).

Because the Draft Order confirms that the evidentiary record fails to prove that the North Kern Decision was a change in circumstance which created any unappropriated water the State Water Board should immediately deny the petitions and dismiss the applications. Specifically, the Draft Order should be corrected to include the following additional provision addressing the North Kern Decision:

**ORDER**

**IT IS HEREBY ORDERED THAT**, based on the foregoing findings:

- 1) The petitions to revise the Declaration of Fully Appropriated Streams, as adopted by the State Water Board in Orders WR 89-25, WR 91-07 and WR 98-08 ("FAS Declaration")



with regard to the Kern River, based on the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* (2007) (147 Cal.App. 4<sup>th</sup> 555 [54 Cal.Rptr. 3d 587]), are denied for a failure of proof;

C. Deferral of a Ruling on The Petitions Unreasonably Subjects Existing Water Right Holders to Protracted And Expensive State Water Board Proceedings

The North Kern Decision implements a fundamental principle of appropriation law that a junior appropriator is entitled to have the quantity of water not diverted and used by a senior appropriator flow down the stream for satisfaction of its existing junior rights in order of priority. (*Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594-595; *Senior v. Anderson* (1900) 130 Cal. 290, 297; *Duckworth v. Watsonville, Etc. Co.* (1907) 150 Cal. 520, 533; Hutchins, *The California Law of Water Rights* (1956), at 139, 156-157; Slater, *Cal. Water Law & Policy* (1999), § 2.29 at 2-87; see also, *State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1028.) As between appropriators, "the one first in time is first in right" and the next most senior appropriator is entitled to take what "he has in the past before a subsequent appropriator may take any." (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, citing *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 26-28; Hutchins, *The California Law of Water Rights*, pp. 154-155.)

To allow the FAS Declaration to be revised -- notwithstanding a failure of proof on this point -- is inconsistent with established law and State Water Board decisions. For example, the Draft Order inaccurately states that D-1196 "was based on the fact that 'there was no showing that there is unappropriated water available' in the Kern River watershed." (Draft Order, p. 1.) To the contrary, the State Board in WR 89-25 (at pp. 13-14) explicitly addressed that passage in D-1196 and concluded "that records contain ample substantial evidence to support a finding that no water remains available for appropriation. . . . Accordingly, the Board finds that Decision 1196 does determine that no water remains available for appropriation in the Kern River System." (WR 89-25, p. 14, Emphasis added). Specifically, in Decision D1196 the State Water Board found that all Kern River natural flow throughout the year has been diverted for irrigation within the First Point, Second Point and Lower-River areas by ditches and canals since prior to 1894. (JE 7, p. 6; 8, p. 41; 21, p. 4.) The State Water Board has confirmed listing the Kern River as a fully appropriated stream system on three (3) subsequent occasions. (JE 23-25.)

It is an unreasonable burden for the State Water Board to subject existing water right holders to participate in a lengthy application process as protestants thereby incurring significant public expense notwithstanding the undisputed record that supports immediate denial of the petitions. The proposed deferral and continuation of State Water Board proceedings will generate substantial uncertainty throughout the Kern River water rights system adversely impacting the entire Kern County water community. Additionally, each Joint Petitioner was required to deposit with the State Water Board an excess of \$400,000.00 to address the potential

processing of applications to appropriate water resulting from the North Kern Decision.<sup>2</sup> Given that the Draft Order states that there is no evidence proving that the North Kern Decision creates any unappropriated water it is improper for the State Water Board to retain application fees and continue to process the applications now pending.

### III. Kern River-California Aqueduct Intertie

#### A. The Record Fails to Support That The State Water Board Has Established Jurisdiction to Process Applications to Appropriate Floodwaters Discharged Into The Intertie

The Intertie is a Federal flood control facility whose sole purposes is to avoid or minimize flood damages from the Kern River and other stream systems in the southern San Joaquin Valley by allowing floodwaters to be discharged from the Kern River Basin into the California Aqueduct west of Bakersfield. These floodwaters would otherwise cause flooding and significant damages in the vicinity of Tulare Lake and Buena Vista Lake to valuable agricultural lands that were reclaimed from the lake in the last century.

The Intertie was constructed as a Small Flood Control Project authorized by Congress under the Section 205 of the Flood Control Act of 1948 and was also authorized by the State of California as a Small Flood Control Project under Article 4, Chapter 2, Part 6 of Division 6 of the Water Code. The United States Army Corps of Engineers planned, designed, and constructed the Intertie as a flood control project and prescribes its operation and maintenance through the Intertie operation manual pursuant to Federal flood control laws that preempt the California law of water rights.<sup>3</sup> Local public agencies (Kern County Water Agency, Buena Vista Water Storage District, and others) along with the DWR have entered into agreements specifying the discharge of floodwaters from the Intertie into the Aqueduct. DWR has no authority to demand or initiate the discharge of water into the Aqueduct but receives the discharge of floodwaters provided it can protect the physical integrity of the Aqueduct and the operational integrity of the State Water Project. The Intertie is operated to implement Federal and State flood control laws and policy. Even if Federal flood control law did not preempt the entire field of California water rights law as pertains to facilities such as the Intertie that are operated exclusively for flood control purposes, the conditions in a water right permit would have the obvious potential to disturb and conflict with these flood control operations, further affirming the preemption of the governing Federal flood control laws.

The evidentiary record wholly fails to address and support that the State Water Board has established the jurisdiction to process applications relating to the discharge of floodwaters into the Intertie. Furthermore, even assuming the State Water Board can establish jurisdiction, unless

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<sup>2</sup> Separate payments were made to the State Water Board for the expense of the October hearing.

<sup>3</sup> Unlike with Section 8 of the Reclamation Law of 1902, the Federal flood control laws do not include a savings clause applicable to State water rights law.

and until someone submits an application to appropriate floodwaters there is nothing for the State Water Board to process and no ground to revise the FAS Declaration.

#### B. The Draft Order is Contrary to The Purposes of The FAS Law

The California Legislature enacted the FAS law in 1987. (SB 1485; Water Code Section 1205 et seq.) The State Water Board itself sponsored the bill out of sheer practicality: to avoid wasting the time and resources of both applicants and State Water Board staff in preparing and processing water right applications for stream systems, such as the Kern River, where a prior water rights decision had found all water to be previously appropriated.<sup>4</sup>

The State Water Board has explicit and clear direction from the Legislature to issue temporary water right permits on fully appropriated stream systems (Water Code §1206(c); *see also id.* § 1425 set seq.) The temporary permit exemption recognizes that abnormally high flows will, albeit rarely, be available for appropriation even on fully appropriated streams. In recommending the governor sign the bill, the State Board emphasized:

"The Board, however, would be authorized to accept applications for temporary diversions of surplus water when hydrologic conditions are such that more water is present than is needed for existing beneficial uses."<sup>5</sup>

The State Board's FAS Declaration has consistently recognized this exemption. (See Orders WR 89-25 § 10 and WR 98-08 § 4.12.) (Emphasis added.) Significantly, prior to the Draft Order the State Water Board previously considered and rejected the claim that occasional discharge of Kern River floodwaters into the Intertie in "some years" were grounds to revise the FAS Declaration. Instead, in WR 94-1 the State Board ordered that if someone "believes there is unappropriated water available during abnormally wet water years, it may seek temporary authorization to appropriate the water by filing an Application for a Temporary Permit. The temporary permit process is exempt from the Declaration." (WR 94-1, p. 10.) Those physical and regulatory circumstances have not changed since the State Water Board adopted WR 94-1 and no person has previously applied for a temporary permit. Unfortunately, without any evidentiary basis, the Draft Order inexplicably contradicts its own prior decisions regarding occasional Kern River floodwaters as well as the State Board's uniform administration of the FAS Declaration since the FAS law in 1987.

The Draft Order should be revised to implement the authorities conferred on the State Water Board by the Legislature. Specifically, prior to issuing a temporary permit, the State Water Board is required to make four findings to ensure the protection of both the environment and existing water right holders: (1) urgent need, (2) no injury to water right holders; (3) no

<sup>4</sup> Bill Report, State Water Resources Control Board (Sept. 4, 1987).

<sup>5</sup> *Id.*

injury to instream resources; and (4) public interest. (Water Code §1425(b).) The temporary permit procedures injury review includes consultation with the Department of Fish and Game. (Id. §§ 1427, 1428.)

Because temporary urgency applications are exempt from the FAS Declaration no amendment is necessary or proper. The Draft Order should be corrected to conform to prior State Water Board orders and the FAS law, as follows:

### ORDER

**IT IS HEREBY ORDERED THAT**, based on the foregoing findings:

- 1) (See, North Kern Decision above.)
- 2) The FAS Declaration, is affirmed, without modification;
- 3) If a party believes that there is unappropriated water available from the Kern River during abnormally wet water years, it may seek temporary authorization to appropriate the water by filing an Application for a Temporary Permit. The temporary permit process is exempt from the FAS Declaration.”

**C. The Draft Order Improperly Broadens The Scope of The FAS Amendment Contrary to The Evidentiary Record, State Water Board Orders And California Appropriation Law**

The Draft Order recites that the evidence indicated “that in some years there are periods of flows exceeding recognized rights in the Kern River.” (Draft Order, p. 4.) More precisely, the only evidence of potential supply was limited exclusively to Kern River floodwaters discharged into the Intertie in “some years.” (Draft Order, pp. 4-6; specifically referencing exhibits Bakersfield 2-1, p. 15, ¶ 69 & 70; Joint Exhibit (JE)-46, pp. 2-3, ¶4 and p. 12, ¶28, and Reporter’s Transcript, pp. 208-209.) Furthermore, the evidence confirms that floodwaters discharged into the Intertie have certain characteristics that the State Water Board should carefully consider prior to adopting its final order. Intertie discharges: (1) occur out of a necessity to avoid or minimize flood damage in extreme flood years; (2) are infrequent and unpredictable – principally occurring in very wet years or other “high flow” conditions; (3) are highly variable in volume; and (4) are of relatively short duration, with the exception of 1983 -- a record setting flood year.

The Draft Order incorrectly concludes that the permissive release and discharge of Kern River floodwaters into the Intertie necessary to avoid or minimize flood damage is “unappropriated water.”<sup>6</sup> (Draft Order, p. 5.) The Draft Order only references excerpts of Mr.

<sup>6</sup> California Water Code § 1201 defines unappropriated water as: “All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is



Easton's testimony regarding "undistributed releases" but fails to acknowledge that this term is defined as water "discharged into the Intertie during flood control operations." (JE 46: p. 11, ¶25(i).) Compounding the error, the Draft Order misstates Mr. Easton's testimony regarding Intertie discharges claiming he testified that Intertie discharges were in "excess of traditionally held and exercised rights and claims."<sup>7</sup> In fact, Mr. Easton merely stated that when water flows into the Intertie, First Point, Second Point and Lower-River entitlements have been satisfied.<sup>8</sup> The discharges occur "primarily to protect property". (RT 263:23-25 to 264:1.)

Significantly, the Draft Order fails to recognize that the water entering the Intertie has consistently been put to beneficial use under existing rights. Prior to the Intertie's coming online, the water was fully used within the Kern River watershed. In recent decades, water has been directed into the Intertie only when the instantaneous capacity of local water storage, conveyance and distribution facilities has been exceeded.<sup>9</sup> The discharge into the Intertie also reflects a deliberate determination by local right holders that it is critical to avoid damage to certain lands within the historical storage areas of Tulare and Buena Vista Lakes<sup>10</sup> and that the water should, therefore, instead be made available for use in other watersheds pursuant to the Constitution and other water laws. On balance, the record before the State Water Board is insufficient to support the conclusory argument that the discharge of damaging floodwaters into a flood control facility like the Intertie is "unappropriated water" under California law.

In addition, the record confirms that Intertie discharges are erratic and highly variable. Specifically, the undisputed record confirms that the floodwaters discharged into the Intertie have ranged from as little as 1,793 acre-feet (1997) to up to 664,036 acre-feet (1983). One year, 1983, accounts for over 40 percent of the total number of days of Intertie flow (i.e., 283 days out of 662 days) and more than 50 percent of the total flow (i.e., 664,036 out of 1,216,027 acre-feet). (B2-18; RT 129:17-25 to 131:1-2.) The 1983 floods actually started in December of the prior year and continued into January of the following year. (JE 79; B2-18; RT 209:4-10) In 1983, a

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hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."

<sup>7</sup> The Draft Order states that "Mr. Easton testified that water diverted into the Intertie is in excess of traditionally held and exercised rights and claims of right to Kern River water, and that whenever water has been released into the Intertie in the past, all Kern River water right claims had already been satisfied. (R.T. p. 264.)" (Draft Order, p. 5.)

<sup>8</sup> Mr. Easton actually testified as follows: "Q. When water flows into the intertie, all of those First Point, Second Point, lower river entitlements have been satisfied? A. Yes. It's my understanding when water is discharged to the California Aqueduct, the existing entitlement holders are not diverting that water." (RT p. 264: 18-23.)

<sup>9</sup> (JE 79; B2-18; RT 264:16-23)

<sup>10</sup> In Decision 1196, the State Water Board confirmed that "water entering Tulare Lake, the terminus of the River, is stored in cells created by levees and rediverted for irrigation." (JE 21, p. 5.) Additionally, Decision 1196 confirmed that Kern River water is spread for percolation into the groundwater basin for storage and later use, which provides cyclic storage for extended periods of drought. (JE 7, p. 6; 8, p. 41; 21, p. 4.)

majority of the discharges occurred during mandatory flood control releases. (JE 79, p. 6.) Notably, the 1983 flood set 43 records on the Kern River. (JE 79 pp. 6-7.) The average annual Kern River natural flow at the First Point of Measurement for the 115-year period extending from 1894-2008 was 726,376 acre-feet, and the annual total for 1983 was 2,489,128 acre-feet, which was 343 percent of the 115-year average.<sup>11</sup> (JE 42.) Practically<sup>12</sup>, there has been no discharge of floodwaters into the Intertie for more than ten years.

Even if the State Water Board were to determine that the FAS Declaration requires modification (which the Joint Petitioners dispute) to allow appropriation of floodwaters discharged into the Intertie, then the conditions under which the State Water Board accepts applications should be narrow, explicit and consistent with the evidentiary record. The Legislature has granted the State Water Board clear authority in this regard:

[T]he board may provide, in any declaration that a stream system is fully appropriated, for acceptance for filing of applications to appropriate water under specific conditions. Any provision to that effect shall specify the conditions and may contain application limitations, including but not limited to, limitations on the purpose of use, on the instantaneous rate of diversion, [and] on the season of diversion [ . . . ]. The board may make those limitations applicable to individual applications to appropriate water, or to the aggregate of the applications, or both.” (Water Code, §1206(b), emphasis added.)

The record in this proceeding is particularly well-suited to the State Water Board conditioning the application process because the record of the potentially available water supply is strictly limited to temporary discharges of floodwaters into the Intertie. In prior FAS proceedings the State Water Board has conditioned acceptance of applications to a specific water supply. For example, in the Matter of the Petitions to Revise the Declaration of Fully Appropriated Streams to Allow Processing of Specified Applications to Appropriate Water from the Santa Ana River (“Santa Ana”), (Order WR 2002-12). Likewise in WR 98-08, the State Water Board concluded that “due to the occasional availability of unappropriated water in the Mokelumne River during the months of March through June, the SWRCB also finds that the Declaration should not apply to proposed conjunctive use projects which are not dependent upon unappropriated water being available in most years but which could utilize unappropriated water in years when it is available.” (Id., p. 10, n. 5)

<sup>11</sup> In context, there are only three years in the entire history of the Kern River records that have an annual runoff volume which exceeds two-million acre-feet: 1916, 1969 and 1983. (JE 44) These three years stand well above the rest when the annual Kern River natural flow is plotted in ascending order of magnitude. (JE 45) Each of these three years exceeds the highest runoff volume by more than one-half million acre-feet. (JE 44.)

<sup>12</sup> The floodwaters discharged into the Intertie in 2006 were caused by extraordinary circumstances initiated by the United States Army Corps of Engineers when it ordered in April a quick increase in outflow to a rate of 4,500 cubic feet per second due to a concern over an apparent increase in seepage in the base of the Isabella Auxiliary Dam. (B2- 6, p. 21.)

Just as the State Water Board conditioned the scope of the FAS modification for the Santa Ana and Mokelumne rivers, so too it should adopt limiting conditions regarding the Kern River. Because the Draft Order is overly broad and allows the "processing of [any] applications to appropriate water from the Kern River," (Draft Order, p. 7 ("The Division shall process any water right applications.")) the existing Kern River water right holders will need to protest all new water right applications, retain experts and counsel, provide evidence of the scope of their prior existing water rights, prove the nature and extent of harm that a new appropriation may cause to their existing water rights, and ultimately may need to participate in multiple full evidentiary hearings and legal proceedings in order to defend their rights. This is precisely the unreasonable burden and unnecessary financial expense that the State Water Board sought to avoid when it proposed adoption of the FAS Declaration.

Specifying narrow procedures for processing floodwater applications consistent with existing statutes and regulations is important as every stream on the FAS Declaration is subject to occasional flood flows, "some years." A broad opening of the FAS Declaration to the entire stream system -- because of occasional flood flows -- unnecessarily exposes existing water rights to great uncertainty, significant public expense, and multiple protracted State Water Board hearings and related litigations. Importantly, the broad scope of the Draft Order would severely undermine the policies underlying the fully appropriated stream statutes and would fundamentally weaken the State Water Board's ability to maintain the fully appropriated status of any stream system. The State Water Board should correct the Draft Order to avoid implementing a radical change in FAS policy.

Such an unnecessarily broad order is contrary to the State Water Board's primary duty to recognize and protect prior existing rights before making an unappropriated water finding. (*United States, supra*, 182 Cal.App.3d at 102-103; *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450; Water Code § 1375(d).) Existing water rights of appropriators may not be interfered with or curtailed. (*State of California v. Superior Court* (2000) 78 Cal.App.4<sup>th</sup> 1019, 1026; *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.) Any appropriation permit issued by the State Board is subject to vested rights and prior existing appropriative rights are to remain unaffected. (*United States v. State Water Resources Control Bd., supra*, at 103; Water Code § 1228.6(a)(1); *In the Matter of Application 5625, et al., Decision 1379* (1971) [1971 WL 15197, 3 (Cal.St.Wat.Res.Bd.)].) The California Supreme Court made clear in *Meridian, Ltd. v. San Francisco, supra*, 13 Cal.2d 424, the importance of protecting prior rights:

"It should be the first concern of the . . . department [now the State Water Board] in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream." *Id.*, at 450. (Emphasis added.)

Most recently in the North Kern Decision, the Court of Appeal stated with regard to the Kern River:

". . . the fundamental first-in-time, first-in-right nature of appropriative rights means that a newly permitted SWRCB appropriative right will be junior to all existing pre-1914 rights. .



. Any new permit for such an appropriation, however, will be 'last in time' and will neither reduce nor augment pre-1914 rights of other appropriators." (*North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th at pp. 583-584.)

Consistent with the evidentiary record, prior State Water Board orders and California appropriation law, the Draft Order should be corrected to limit processing to only applications to appropriate Kern River floodwaters discharged into the Intertie during flood control operations, as follows:

"Based on our review of the record and the findings above, we conclude that the Declaration of Fully Appropriated Streams, as adopted by the State Water Board Orders WR 89-25, WR 91-07 and WR 98-08, should be revised to allow for processing the applications to appropriate water from the Kern River *discharged into the Kern River-California Aqueduct Intertie* in accordance with the provisions of the Water Code and other applicable law".

#### ORDER

**IT IS HEREBY ORDERED THAT**, based on the foregoing findings:

- 1) (See, North Kern Decision above.)
- 2) The *EAS Declaration*, is amended for processing applications to appropriate water from the Kern River *discharged into the Kern River-California Aqueduct Intertie in accordance with the provisions of the Water Code and other applicable law.*<sup>13</sup>
- 3) The Division shall process any water right applications to appropriate Kern River *floodwaters discharged into the Kern River-California Aqueduct Intertie* which are accepted as a result of this order in accordance with applicable law."

#### IV. The Draft Order Improperly Expands Environmental Issues/Public Trust Issues

The Draft Order acknowledges that it was not relevant at the evidentiary hearing to consider public trust or other public interest environmental issues until after the State Water Board makes a determination on whether the Kern River remains a fully appropriated stream system. (Draft Order, p. 6.) The Draft Order then proposes that the State Water Board will comply with its obligations to consider environmental and public interest issues "in the context of processing the water right applications submitted by the Petitioners." (*Id.* (Emphasis added).) However, although the only water supply arguably available for appropriation is floodwater, none of the applications submitted by the Petitioners seek appropriation of floodwaters. In the absence of an actual application to appropriate floodwaters discharged into the Intertie there is no context for the State Water Board to consider environmental and public interest issues.

<sup>13</sup> This order does not affect the separate designations of the North Fork Kern River or the unnamed spring tributary to Cuddy Creek as fully appropriated.

Furthermore, the State Water Board should recognize that the factual context and legal requirements of environmental and public interest issues are significantly distinct as between claims to appropriate Kern River water resulting from the North Kern Decision (which was not proven to exist) and floodwaters discharged into the Intertie. Importantly, the discharge of floodwaters into the Intertie only occurs during abnormally high flows when the instream conditions within the channel are already at the limit of the channel's safe conveyance capacity. (JE 79.)

The Draft Order should be corrected to clarify that the State Water Board's consideration of environmental and public interest issues is limited to the actual water supply potentially available for appropriation, floodwaters discharged into the Intertie, and should not be expanded to consider water subject to prior existing rights and thus not available for appropriation. Specifically, the Draft Order (at p. 6) should be revised consistent with the record as follows:

*"In addition to meeting statutory responsibilities under CEQA, the State Water Board will comply with its obligation to consider environmental and public interest issues under the Water Code and the public trust doctrine in the context of processing the water right applications submitted to appropriate Kern River water discharged into the Kern River-California Aqueduct Intertie."*

#### V. Conclusion

The Draft Order proposes a radical departure from established Federal and State flood control laws and policies as well as a reversal in the purpose and administration of the FAS law, which together will result in great uncertainty, significant public expense, and multiple protracted State Water Board hearings and related litigations for those holding existing water rights on the Kern River and other FAS streams.

We respectfully request that the State Water Board not proceed down this path and instead request that the Draft Order be corrected as detailed in this letter. Preliminarily, the State Water Board should defer any further action on a final order until the affected State agencies, parties and interested members of the public have an opportunity to participate in an alternative dispute resolution process to determine if these fundamental matters of law, policy and water resources can be otherwise resolved.

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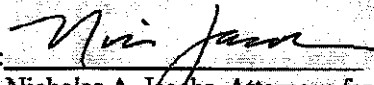
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