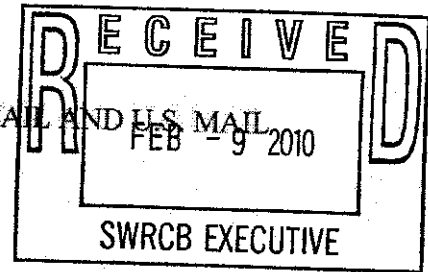




February 8, 2010

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

VIA EMAIL AND U.S. MAIL



Re: Comment Letter - 02/16/10 Board Meeting Item: Order - Kern River
Our File No. 51435.001

Dear Ms. Townsend:

These comments are provided in response to the Board's January 19, 2010 Draft Order Amending Declaration of Fully Appropriated Streams to Remove Designation of the Kern River as Fully Appropriated (the "Draft Order"). Please include this letter in the record for the proceedings relating to the Draft Order.

These comments are not presented on behalf of any particular client of our office. Instead, we provide them as water law practitioners concerned about the potential impacts of the Board position embodied in the Draft Order on stream systems throughout the State. Because the Draft Order would implement policies that would do serious damage to the Declaration of Fully Appropriated Streams (the "Declaration") if adopted statewide, we urge the Board to reconsider and revise the Draft Order.

The Declaration was adopted to reduce unnecessary workload and expense for the Board and water rights holders created by water rights applications on streams on which no unappropriated water exists. By adopting the Declaration, the Board recognized that processing applications on systems that have no water available for appropriation was a waste of resources for all parties concerned, and implemented a sensible policy that an applicant on such a system should be required to make a definitive showing of unappropriated water before an application would be accepted or processed. By so doing, the Board created an orderly and efficient process to ensure that limited staff and hearing time would not be consumed by futile applications, and that existing water rights holders would not be put to unnecessary and potentially substantial expense in contesting applications on fully appropriated streams. Unfortunately, the Draft Order would turn the Declaration on its head.

Simply stated, the Draft Order finds that there is unappropriated water on the Kern River because evidence was introduced that damaging flood flows from the Kern River were discharged into Kern River/California Aqueduct Intertie (a flood control facility) in nine separate years since 1978. Water discharged into the Intertie is floodwater. Therefore, the Draft Order finds that unappropriated water exists on the Kern River solely because, in roughly one out of four years on average, floods occur on the Kern River.

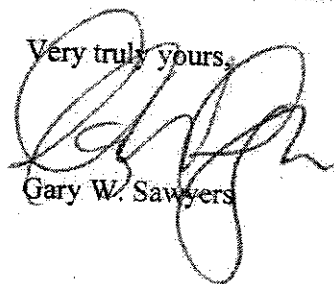
If the existence of occasional and anticipated floodwater in "some years" is conclusive evidence of the existence of unappropriated water mandating the removal of the stream from the Declaration, then essentially every river system in the State has unappropriated water and the Declaration is rendered meaningless because every river will experience floods from time to time. The Draft Order makes clear that no other definitive evidence of the existence of unappropriated water on the Kern River was presented at the hearing that resulted in the Draft Order; therefore, the Draft Order declines to require any level of rigor in the evidence needed to support a finding of unappropriated water and finds that unappropriated water exists on the Kern River due to circumstances that exist on every river.

Compounding the mischief that would be done by the Draft Order is the conclusion that the amount and availability of unappropriated water on the Kern River should be decided during the prosecution of new applications rather than in advance. As noted above, the Declaration was intended to eliminate unnecessary processing and expense, yet the Draft Order will do the opposite by encouraging applications on any river that ever floods and deferring a determination on the availability of water until the hearing on each such application. If that becomes the Board's statewide policy, the amount of time and money that could be wasted on unnecessary hearings, environmental documentation and other processing is enormous. Equally concerning is the term in the Draft Order directing that the "Division shall process any water right applications" [emphasis added] to appropriate Kern River water instead of clearly and precisely conditioning the Draft Order to only allow processing of applications to appropriate the unappropriated water supply that was proven, namely, potentially intermittent floodwaters.

We understand that floodwater may under some circumstances be a useable resource, and we do not mean by these comments to suggest that applications for floodwater in excess of existing rights on a river system should be automatically rejected. However, the Board should remain true to the policy underlying the Declaration and hold a focused hearing in advance of accepting or processing any application on a fully appropriated stream to determine whether, when and how much unappropriated water exists on the system. The Board should then reach a finding of availability only on the basis of definitive evidence that such water is available over and above existing rights on the river, and it should quantify at that point (not later in the hearings on the application itself) both the amount of water available and the season/conditions of availability. By so doing, substantial resources (including Board time) would be conserved while allowing applicants every opportunity to pursue water that is truly unappropriated.

We urge you to modify the Draft Order in accordance with the foregoing principles.

Very truly yours,


Gary W. Sawyers