

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

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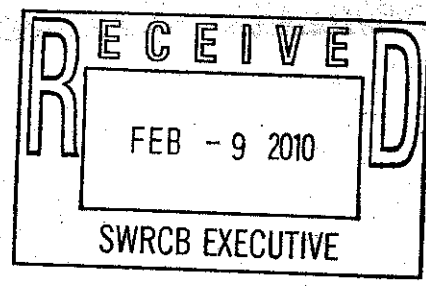
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February 9, 2010

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Via email to: commentletters@waterboards.ca.gov

Re: *Comment letter on Draft Order, In the Matter of the Petitions to Revise the Declaration of Fully Appropriated Streams to Allow Processing of Applications to Appropriate Water from the Kern River*

This letter is submitted on behalf of the Association of California Water Agencies (ACWA) in response to the Draft Order Amending Declaration of Fully Appropriated Streams to Remove Designation of the Kern River as Fully Appropriated (Draft Order). ACWA is an organization representing hundreds of public water agencies across the State. ACWA's mission includes assisting its member agencies in the protection and orderly administration of water rights. To this end, ACWA will occasionally appear before the State Water Resources Control Board (State Water Board) to express its support or concern with State Water Board decisions, orders and policies that have the potential to set precedent affecting ACWA's members. In the present proceeding, ACWA is concerned that the Draft Order does not properly apply applicable standards for revising Fully Appropriated Stream System (FASS) Declarations, and inappropriately defers FASS determinations to later proceedings on the water right applications.

For streams that the State Water Board (or some other authority) has already determined to be fully appropriated, the fundamental purpose of the FASS revision process is to resolve basic water availability issues at the outset of the water right application process, thereby eliminating the need for subsequent water right proceedings or, in some cases, to make such proceedings more orderly, time efficient and cost effective for the parties and the State Water Board. The Draft Order would substantially erode the functionality of this important water availability screening process, and would set a dysfunctional precedent of deferring threshold water availability determinations to the application process. The Draft Order finds unappropriated intermittent flood waters as the only source of unappropriated water – which no party proposes to develop or apply for – and on that basis rescinds the Kern River FASS Declaration to accept

any application without regard to the source and timing of the unappropriated water. ACWA respectfully requests that the State Water Board amend the Draft Order to conform to the record (i.e., no pending applications for flood water) and to the State Water Board's findings (i.e., insufficient evidence to determine unappropriated water available due to forfeiture of water rights). These clarifications are consistent with prior practice in these types of proceedings.

To be clear, ACWA supports revisions to FASS Declarations in appropriate circumstances. The FASS revision process serves the important function of allowing processing of new water right applications on stream systems declared to be fully appropriated when changed circumstances indicate that new water permits can feasibly be developed. Such circumstances may include, for example, FASS petitions and applications to appropriate storm and flood waters, and instances where water rights have been found abandoned or forfeited such that unappropriated water becomes available for new appropriations.

ACWA submits, however, that the Draft Order is lacking the essential connection between (a) the source of water the State Water Board finds available for appropriation, and (b) a pending water right application and proposed project to develop that water. In other words, a revision to a FASS Declaration must lead to a finding of water availability to supply a proposed project. FASS revisions should not be made merely for the sake of determining availability of some unappropriated water. Otherwise, what should be a narrow exception to the FASS Declaration effectively becomes the rule, as most stream systems in California – even significantly oversubscribed systems like the Kern River – have at least some unappropriated water in some periods or years. It makes no sense, however, and is inconsistent with the essential purpose of the FASS Declaration, for the State Water Board, applicants and existing water right holders to endure time consuming and expensive water right application proceedings without at least some certainty that there is a proposed project (supported by water right applications) to develop the water determined to be unappropriated. The Draft Order fails to establish that key connection.

FASS Process and Background

The State Water Board may declare a stream system fully appropriated, and may revise or revoke a fully appropriated declaration, pursuant to Water Code sections 1205 through 1207 and State Water Board regulations (23 C.C.R. sect. 870, *et seq.*). The State Water Board found the Kern River to be fully appropriated in 1964 in Decision 1196, and placed the Kern River on the State Water Board's FASS Declaration list in 1989. See State Water Board Orders WR 89-25, WR 91-07, and WR 98-08. In 2007, five agencies filed applications and petitions with the State Water Board to revise the Kern River FASS Declaration in light of the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App. 4th 555 (*North Kern Decision*). The *North Kern Decision* found a partial forfeiture of Kern Delta's pre-1914 appropriative rights on the Kern River, and the petitioners/applicants sought to protect their existing water rights by applying for whatever water was found to be made available as a result of the *North Kern Decision*.

A FASS Declaration may be revoked or revised as follows:

Upon recommendation of the Chief, Division of Water Rights, and following notice and hearing, the board may adopt an order revoking the fully-appropriated status of a stream system which has previously been declared fully appropriated, or revising 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. The Chief's recommendation for revocation or revision may be based upon any relevant factor, including but not limited to a change in circumstances from those considered in a previous water right decision determining that no water remains available for appropriation, or upon reasonable cause derived from 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. 23 C.C.R. sect. 871(b).

Pursuant to this regulation, Division of Water Rights staff prepared a memorandum, dated October 8, 2008, wherein staff concluded that changed circumstances warranted revision to the Kern River FASS Declaration. Division staff pointed specifically to two "changed circumstances." First, Division staff identified the Kern River-California Aqueduct Intertie (Intertie), a federal flood control facility constructed by the United States Army Corps of Engineers in 1977. The Intertie is capable of taking flood waters, defined as water in excess of all water rights, and diverting that flood flow to the California Aqueduct operated by the Department of Water Resources (DWR) as part of the State Water Project. It is critical to note that not one of the FASS petitions and water right applications at issue in this proceeding sought to divert flood water from the Intertie or to otherwise develop the intermittent flood waters of the Kern River. It is also important to note that DWR has not filed a petition to revise the FASS Declaration for purpose of appropriating flood waters at the Intertie.¹

The second changed circumstance identified in the Division's 2008 memorandum was the *North Kern* Decision. The 2008 memorandum observed that the forfeiture of water could result in unappropriated water in the Kern River, an issue that the Appellate Court in the *North Kern* Decision left for the State Water Board to determine and quantify. As noted above, all of the 2007 FASS petitions and applications are directed at the water that potentially would be available as a result of North Kern's partial forfeiture.

The 2008 memorandum concluded that the construction and operation of the Intertie and the *North Kern* Decision, together, constituted changed circumstances that warranted a hearing before the State Water Board on the question of whether and under what conditions the Kern River FASS Declaration should be revised. In a letter to the parties dated September 25, 2009,

¹ There is a disagreement between DWR and Division of Water Rights staff regarding the need for a permit to divert flood waters at the Intertie. The State Water Board does not need to resolve that disagreement in order to amend or narrow the scope of the Draft Order.

Hearing Officer Baggett framed the purpose of the FASS hearing as follows: "to determine if there has been a change in circumstance 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." (Draft Order, p. 2, emphasis added). Proceedings were conducted before the State Water Board in September and October, 2009, and the Draft Order posted and served on January 19, 2010.

A FASS Revision Should be Justified by the Specific Circumstances, and Should Be Made only to the Extent Unappropriated Water is Found Available For Proposed Projects and Applications

The Draft Order loses sight of the purpose and policy behind the FASS Declaration, which is to create an efficient process for the State Water Board and affected parties to determine if there is unappropriated water available that justify the time and expense of processing water right applications. See Bill Report, SWRCB, Sept. 4, 1987 (describing the State Water Board's rationale for supporting enactment of Water Code sect. 1205, et seq.); *see also*, Draft Order, p. 2 (scoping directive of Hearing Officer Baggett). Decisions to revise or revoke a FASS Declaration for a particular stream system should not be based solely on the question of whether unappropriated water exists in a stream at some moment in time, as most (if not all) streams in California at times contain water in excess of the maximum amounts diverted under lawful water rights. Rather, to justify the time and expense of opening a FASS Declaration to process applications on a fully appropriated stream, particularly substantially oversubscribed streams, the State Water Board must find that an actual project is proposed to utilize the water sought to be appropriated if the FASS Declaration is revised. This requirement is consistent with prior State Water Board practice in these cases. See Order WR 2002-12 (Santa Ana River FASS), and Order WR 98-08 (Mokelumne River FASS).

This policy also is clearly reflected in the State Water Board's own regulations, which contemplate the filing of "otherwise complete applications" along with petitions to revise the FASS Declaration. See, e.g., 23 C.C.R. sect. 871(c)(2) and (3); *see also* Water Code sect. 1206(b) (which discusses the interconnection between water right application and the FASS Declaration for purpose of filing and accepting water right applications on fully appropriated streams). Among other things, a complete water application must identify the amount and timing of water sought for appropriation, the proposed points of diversion, the place of use, and other information to allow the State Water Board to assess the applicant's project. Thus, in most cases, the applications accompanying a FASS Petition will be critical to the State Water Board's assessment of whether the FASS Declaration should be revised and, if so, the conditions upon which the revision should occur. It is not enough for the State Water Board to find an intermittent source of unappropriated water; there also must be, in addition to the unappropriated water, a proposed project to develop that source of water.

The Draft Order analyzes the two "changed circumstances" described in the 2008 staff memorandum, and the testimony and evidence provided by the parties as to those issues. The Draft Order first discusses the flood waters diverted at the Intertie, which is referred to as

"undistributed" waters. Draft Order, pp. 4-5. The State Water Board found, and the parties do not dispute, that in some years during peak storm events, "undistributed" water in excess of all existing Kern River water rights is diverted to the Intertie. The Draft Order thus finds unappropriated water available in the Kern River during these times where diversions to the Intertie occur.

The Draft Order next analyzes whether unappropriated water is made available as a result of forfeiture found in the *North Kern* Decision. As to this circumstance, however, the Draft Order concludes that "... the evidence presented by the parties did not clearly resolve whether the partial forfeiture of Kern Delta's rights itself created any additional unappropriated water." Draft Order, p. 5. Thus, the Draft Order does not find unappropriated water available as a result of the *North Kern* Order.

The ordering paragraphs of the Draft Order do not conform to the record and the State Water Board's findings regarding the availability of unappropriated water to justify revising the Kern River FASS Declaration for purposes of accepting and processing the pending water right applications. The Draft Order finds only intermittent flood water at the Intertie to be unappropriated. There are no pending applications or proposed projects to develop the flood water at the Intertie at this time. Conversely, there are five pending applications to appropriate water made available as a result of the forfeiture found in the *North Kern* Decision. The Draft Order concludes, however, that the parties failed to establish the availability of unappropriated water as a result of that forfeiture. Thus, the Draft Order does not state findings to support unconditioned rescission or revocation of the Kern River FASS Declaration.

The State Water Board has several options to correct the Draft Order. One option would be to amend the Draft Order to deny the petitions requesting revision or revocation of the FASS Declaration. This result would be justified on the grounds that, although circumstances have changed since the FASS Declaration, the changes do not justify modifying the FASS Declaration unless and until there is a project proposed and application(s) filed to develop the Intertie water.

Alternatively, the State Water Board could amend the ordering paragraph to clarify that only applications for permits to appropriate the water diverted at the Intertie will be accepted and processed. The State Water Board also may consider other appropriate conditions to ensure that any application process is narrowly tailored to appropriation of the Intertie waters. At a minimum, the Draft Order must be amended to clarify that the Kern River FASS Declaration has not been rescinded or revoked as a result of the Draft Order. As currently drafted, the Draft Order would allow unqualified filing of applications. The record clearly does not support such a wholesale revision to the FASS Declaration for the Kern River.


Conclusion

The Draft Order misapplies the applicable standards for revising FASS Declarations. Revisions to FASS Declarations must be based on changed circumstances that justify the time and expense

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of accepting and processing water right applications for proposed projects to develop the water found to be unappropriated. Without a clear nexus between the FASS revision and pending or proposed water right applications, the FASS revision will lead to unnecessary and chaotic application processes without any certainty that water is available to supply the application or that water right permits will be issued. The FASS statutes and regulations were enacted and promulgated specifically to avoid these situations. ACWA respectfully requests that the State Water Board amend the Draft Order to deny the petitions or to clarify the narrow circumstances in which new applications will be accepted.

Very truly yours,


Robert E. Donlan
ELLISON, SCHNEIDER & HARRIS
on behalf of the Association of California
Water Agencies

cc: Tim Quinn
Whitnie Henderson