

Buena Vista Water Storage District

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August 20, 2007

HAND-DELIVERED

Ms. Vicky Whitney, Division Chief
Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: Petition of Buena Vista Water Storage District for Hearing to Consider Revocation or Revision of the Declaration that the Kern River System is a Fully Appropriated Stream System and, if not, Application to Appropriate Unappropriated Water Therefrom [Water Code § 1205; Title 23, California Code of Regulations (“CCR”) § 871]

Dear Ms. Whitney:

Introduction

On October 29, 1964 the State Water Rights Board (predecessor to the State Water Resources Control Board) adopted Decision D 1196. In said Decision, the following findings are made:

- The Kern River Water Rights and Storage Agreement (dated December 31, 1962) “... divides the [Kern River] water supply among three general service areas designated as First Point Service Area, Second Point Service Area, and Lower River Service Area.” (D 1196, pp. 3-4).
- “Water is diverted directly from the Kern River for use on lands within these service areas by ditches and canals which have been in existence since prior to 1894. The water is also spread for percolation into the ground water basin for

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[Signature]

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storage and later use on lands within the service areas, which provides cyclic storage for extended periods of drought.” (D 1196, pp. 4-5).

- “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 affect of Isabella Reservoir, shows that there is no water surplus to the established uses of the applicants, protestants, and other users in these areas. This conclusion is further supported by the fact that ground water levels within the service areas are declining, and agencies within the area have entered into or are negotiating contracts to purchase additional water from the U. S. Bureau of Reclamation and from water facilities now under construction by the State of California.” (D 1196, p. 5).

Based on these findings the State Board concluded that there had been no showing that unappropriated water is available to supply the applicants. Pending applications were denied, including Application 9446 filed by Buena Vista Water Storage District, *et al.*¹ (D 1196, p. 5).

The determination made in D 1196 has been confirmed in subsequent Water Right Orders. In WR 89-25 (adopted November 16, 1989) the State Board reaffirmed D 1196 while quoting with approval the report of a senior staff engineer which concluded: “The water of the Kern River is fully appropriated and apportioned under existing agreements and court decrees and no unappropriated water is available for use under the applications being considered.” See also, WR 91-07 (adopted August 22, 1991), WR 94-01 (adopted January 19, 1994), and WR 98-08 (adopted November 19, 1998).

Notwithstanding the foregoing, on or about April 25, 2007, North Kern Water Storage District and the City of Shafter filed a petition to revoke and/or revise the declaration that the Kern River is a fully appropriated stream. A similar request was filed by the City of Bakersfield on or about May 4, 2007. Petitioners each submitted applications to appropriate any water found to be unappropriated.

¹ Buena Vista Water Storage District *et al.* had applied for storage of up to 800,000 acre feet, with a maximum diversion rate of 3,800 cfs, over a season extending from January 1 of each year to December 31 of the same year. (D 1196, p. 2). Due to lack of unappropriated water, D 1196 denied this and other applications which, taken together, requested a combined total of 6,600 cfs for direct diversion and 2,514,800 acre feet for storage. (WR 94-1, p. 6).

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Existing Rights

In D 1196 the State Board noted that the natural flow of Kern River reaching the floor of the San Joaquin Valley has been apportioned among the various users for many years by court decisions and agreements.² (D 1196, p. 3). This apportionment occurs on a daily basis. Detailed daily records of flow, allocation, diversion and use are maintained through a cooperative effort, are accumulated in monthly summaries, and are published in annual reports.

By agreement, the full natural flow of the Kern River is allocated on a daily basis among three sets of users: First Point, Second Point and Lower River. First Point users consist of the City of Bakersfield, North Kern Water Storage District and Kern Delta Water District. Second Point water is diverted and used exclusively by Buena Vista Water Storage District. Lower River water is diverted and used exclusively by the Kern County Water Agency. Water allocated to one First Point user which is not actually diverted by that user, generally, will be diverted by another First Point user. However, if water allocated to the First Point users is not actually diverted by one or more of them (i.e., if such water is allowed to escape to Second Point) then, by agreement, such water becomes the property of Second Point and is diverted and used by Buena Vista Water Storage District. Further, if water allocated or escaping to Second Point is not diverted and used by Buena Vista Water Storage District (i.e., if such water is allowed to escape past Buena Vista's northern boundary at Highway 46) then, by agreement, such water becomes the property of Lower River and is diverted and used by the Kern County Water Agency. In this manner, the full natural flow of the Kern River is diverted and used each and every day by one or more of five (5) public entities, namely:

First Point Users	Kern Delta Water District North Kern Water Storage District City of Bakersfield
Second Point User	Buena Vista Water Storage District
Lower River User	Kern County Water Agency

² Several of these decisions and agreements are listed in the Decision including, without limitation, the Miller-Haggin Agreement of 1888 (as amended) and the Kern River Water Rights and Storage Agreement of 1962. Copies of these agreements are attached, marked Exhibits A and B respectively, and incorporated herein by this reference.

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Pending Petitions

In 1995 litigation was commenced by and among the First Point Users. (See *North Kern Water Storage District v. Kern Delta Water District*, Tulare County Superior Court Case No. 96-172919). The thrust of the litigation was and is to determine how Kern River water apportioned to First Point Users should be allocated among them. No issue was raised in said litigation involving the diversion and use of Kern River water by Buena Vista Water Storage District (Second Point User) and/or the Kern County Water Agency (Lower River User) and/or their respective predecessors-in-interest. Buena Vista Water Storage District was not named in the above-referenced litigation and did not participate therein. The Kern County Water Agency was not named in the above-referenced litigation and did not participate therein. No challenge has been made then or since to the Kern River water and water rights owned, held and/or administered by either Buena Vista Water Storage District or the Kern County Water Agency.

The above-referenced litigation resulted in a determination of partial forfeiture by the predecessors-in-interest of one of the First Point Users, i.e., Kern Delta Water District. [See *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555]. The petitions and applications filed by North Kern Water Storage District (with the City of Shafter) and the City of Bakersfield arise out of and are based upon, *inter alia*, such determination of partial forfeiture.

Buena Vista Water Storage District agrees with the position taken by North Kern Water Storage District and the City of Shafter in their joint Petition, to wit: (1) we do not concede that forfeiture of Kern Delta's pre-1914 rights or some other circumstance has resulted in "unappropriated" water that is available for appropriation; but (2) suggest that reasonable cause exists to conduct a hearing on the question of whether the fully appropriated status of the Kern River should be revoked or revised. Buena Vista Water Storage District further submits that the only "change of circumstances" giving rise to the need for such hearing is the effect, if any, on the availability of Kern River water for appropriation resulting from the partial forfeiture of First Point water rights by one of the First Point Users. The hearing should be limited accordingly. In support of this position, Buena Vista adopts, and incorporates by this reference, the Hydrologic Data, Water Usage Data and Other Relevant Information submitted with the Petition filed by North Kern Water Storage District and the City of Shafter.

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Application to Appropriate

Should it be determined that unappropriated water is available for appropriation, Buena Vista Water Storage District submits the enclosed application to appropriate the same for the beneficial uses and purposes therein stated. Any permit issued to an applicant (including, without limitation, North Kern Water Storage District, City of Bakersfield, and/or Buena Vista Water Storage District) should be made expressly subject to the "Covenant Against Claims" contained in the 1962 Kern River Water Rights and Storage Agreement which reads:

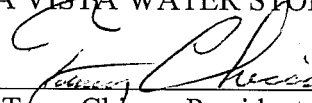
Each party hereby accepts the water apportionment provisions hereof as a final and permanent settlement of all of its rights and claims in and to the waters of Kern River, and each party hereby covenants and agrees with the others that it will never make or assert against any other party or parties hereto any claim to any of the waters of Kern River except the waters herein expressly apportioned to it. Each party agrees that all waters of Kern River to which it may become entitled under any application now pending or hereafter filed before the State Water Rights Board, or under any permit or license issued pursuant to any such application, shall serve and be used only to feed and support the respective rights and allocations of the parties hereto in accordance with the provisions of this contract. (Emphasis added).

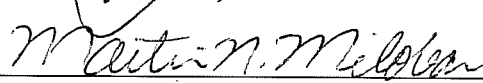
Conclusion

If you have any questions or comments with respect to this petition and/or the enclosed application, or if you require any additional information, please advise.

Very truly yours,

BUENA VISTA WATER STORAGE DISTRICT

By: 
Terry Chicca, President

By: 
Martin N. Milobar, Engineer-Manager