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12
13 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
14 OF THE STATE OF CALIFORNIA

15
16 IN THE MATTER OF THE KERN RIVER
17 STREAM SYSTEM, REVIEW OF FULLY
18 APPROPRIATED STREAM STATUS

**KERN COUNTY WATER AGENCY'S
PETITION TO REVOKE OR REVISE
FULLY APPROPRIATED STATUS OF
KERN RIVER STREAM SYSTEM**

19
20 Pursuant to Cal. Water Code § 1205(c) and title 23, Cal. Code Regs. § 871(c), the Kern
21 County Water Agency ("KCWA") hereby petitions the State Water Resources Control Board
22 (State Board) for an order to revoke or revise the fully appropriated status of the Kern River
23 stream system, and accept for filing KCWA's proposed application to appropriate water from the
24 Kern River, submitted concurrently with this Petition.

25 **The Kern County Water Agency**

26 1. KCWA was created by an act of the California Legislature in July 1961 and
27 ratified by the electorate of Kern County in September 1961. KCWA was granted the primary
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1 power to acquire and contract for water supplies for Kern County, with additional powers to
2 control flood and storm waters, to drain and reclaim land, to store and reclaim water, to protect
3 the quality of underground waters and to conduct investigations relative to water resources. The
4 primary focus of KCWA, working with other water entities, is to coordinate management of the
5 water supplies of Kern County, with particular emphasis on State Water Project (SWP) supplies,
6 in order to enhance the local economy.

7 2. KCWA was primarily created to have a single entity in Kern County to negotiate
8 and administer a water supply contract with the State of California's SWP. Additional firm
9 surface water supplies were necessary to supplement the safe yield of the groundwater basin. In
10 1963, the agency contracted with the State of California Department of Water Resources for a
11 water supply of up to 998,750 acre-feet of SWP table A water annually.

12 3. The agency is a wholesaler of SWP water for both agricultural and municipal and
13 industrial uses. The agency contracts with 13 individual water districts (member units) in Kern
14 County who supply the SWP water directly to water users for agricultural use. The agency also
15 contracts for the delivery of treated water supplies with our water purveyors who supply water
16 directly to residents of the City of Bakersfield and surrounding areas. The service area for these
17 member units and purveyors encompasses all the territory within the San Joaquin Valley portion
18 of Kern County. The agency provides a portion of, and in some cases the entire, water supply for
19 approximately 719,000 acres of prime farmland, of which approximately 240,000 acres are
20 permanent crops, and for some 500,000 residents of Kern County.

21 4. Approximately 98% of the agency's water is imported by the SWP. The balance
22 of the Agency's water supply is from high flow Kern River water rights. The Agency also
23 augments its supplies by contracting for surplus water from the Friant Division of the WP when
24 available.

25 **The Kern River's Fully Appropriated Status**

26 5. The State Board's predecessor first declared the Kern River to be fully
27 appropriated in Decision No. 1196 (1964). Decision No. 1196 notes that the natural flow of the
28 Kern River has been apportioned among various parties for decades, and pursuant to court

1 decisions and agreements. The key decisions and agreements include the Miller-Haggin
2 Agreement of 1888 (and amendments), the Shaw Decree of 1900, and the Kern River Water
3 Rights and Storage Agreement of 1962. Subsequently, Water Right Order Nos. 89-25, 91-07, 94-
4 1 and 98-08 each confirmed the Kern River's fully appropriated status. Consistently, the State
5 Board has found that "the entire flow of the Kern River has been beneficially used since 1894."

6 6. The various decisions and agreements apportioning Kern River water rights are
7 commonly referred to as the "Law of the Kern River." The Buena Vista Water District (BVWD)
8 accurately summarizes the Law of the Kern River on page 3 of BVWD's August 20, 2007 letter
9 petitioning the State Board for revocation or revision of the declaration that the Kern River
10 System is fully appropriated. Through the Law of the Kern River, rights to the natural flow of the
11 river have long been established.

12 **North Kern Water Storage Dist. v. Kern Delta Water Dist.**

13 7. In a recent opinion the Court of Appeal held that Kern Delta Water District
14 forfeited a substantial amount of its Kern River water rights. (*North Kern Water Storage Dist. v.*
15 *Kern Delta Water Dist.* ("North Kern") (2007) 147 Cal.App.4th 555.) The court further held that
16 only the State Board may determine whether the forfeiture creates unappropriated water. (*Id.*,
17 *supra*, at pp. 583-84.) The Court of Appeal's decision has created substantial uncertainty as to
18 whether the Kern River continues to be fully appropriated and, if not, the extent to which there
19 may be unappropriated water that could be appropriated and put to reasonable and beneficial use.

20 8. KCWA is informed and believes and thereon alleges that, on or about April 25,
21 2007, North Kern Water Storage District and the City of Shafter filed with the State Board a
22 petition to revoke and/or revise the declaration that the Kern River is a fully appropriated stream;
23 and that similar petitions have been filed by the City of Bakersfield, Buena Vista Water Storage
24 District and Kern Water Bank Authority.

25 **Legal Standards For Revocation Or Revision Of Fully Appropriated Status**

26 9. The SWRCB may revise the declaration of fully appropriated status for any river
27 system upon receipt of a petition for such revision from any person. (Water Code, § 1205(c);
28 23 C.C.R., § 871(c).)

1 The SWRCB may revise the declaration:

2 based upon any relevant factor, including but not limited to a
3 change in circumstances from those considered in a previous water
4 right decision determining that no water remains available for
5 appropriation, or upon reasonable cause derived from hydrologic
6 data, water usage data, or other relevant information. (23 C.C.R.,
7 §871(b).)

8 10. A decision to revise a fully appropriated stream declaration does not reach the
9 merits of any applications for the unappropriated water that may be lodged with the State Board,
10 the nature of any conditions, or whether the unappropriated water must be made available for
11 environmental purposes. (*In Re Fully Appropriated Stream Petition for the Santa Ana River*
12 (2000) WR 2000-12, at p. 14.) As the State Board stated in the Santa Ana River proceeding:

13 All questions regarding the specific amount of water available for
14 appropriation under the applications, the season of water
15 availability, approval or denial of the applications, and the
16 conditions to be included in any permit(s) that may be issued on
17 the applications will be resolved in further proceedings on each
18 application pursuant to applicable provisions of the Water Code.
19 (*Id.*, *supra*, at p. 2.)

20 11. The Kern Delta Water District's forfeiture of water rights determined in the *North*
21 *Kern* decision constitutes a change in circumstances warranting consideration of revocation or
22 revision of the Kern River fully appropriated stream declaration.

23 Scope of Revocation or Revision Proceedings

24 12. KCWA offers no opinion at this time regarding whether, in fact, the water
25 forfeiture results in Kern River water available for appropriation. This inquiry must be resolved
26 by the State Board. If water is available for appropriation, however, KCWA joins the Buena
27 Vista Water Storage District in advocating that the State Board's revocation or revision
28 proceedings should be limited in scope. The inquiry should solely focus on determining the
amount, if any, available for appropriation and the allocation of this quantity to an applicant or
applicants. The inquiry should not expand to long-settled matters regarding the Law of the Kern
River.

REQUEST FOR RELIEF

For the reasons stated, KCWA respectfully requests that the State Board revoke or revise

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the fully appropriated status of the Kern River stream system, and accept for filing KCWA's proposed application to appropriate water from the Kern River, submitted concurrently with this Petition.

Dated: September 27, 2007

SOMACH, SIMMONS & DUNN
A Professional Corporation

By 

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KERN COUNTY WATER AGENCY