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April 25, 2007

HAND-DELIVERED

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

2007 APR 25 PM 3:23
DIVISION OF WATER RIGHTS
STATE WATER RESOURCES CONTROL BOARD

Re: Petition of North Kern Water Storage District and City of Shafter to Revoke and/or Revise the Declaration that the Kern River System is a Fully Appropriated Stream System, and Proposed Application to Appropriate Unappropriated Water (Water Code § 1205; Title 23, California Code of Regulations ("CCR"), § 871)

Dear Ms. Whitney:

Introduction

The State Water Resources Control Board's (State Board) predecessor first declared the Kern River to be fully appropriated in Decision No. 1196 in 1964. The State Board's Water Right Order Nos. 89-25, 91-07, 94-1 and 98-08 each affirmed the Kern River's status as a fully appropriated stream system. Consistently, the State Board has found that "the entire flow of the Kern River has been beneficially used since 1894."

Notwithstanding these prior decisions and orders, enclosed please find the above-referenced petition and application (and other associated enclosures) submitted on behalf of North Kern Water Storage District ("North Kern") and the City of Shafter ("Shafter") (collectively, "Petitioners".) This petition is submitted to the State Board for two purposes: (a) considering whether it is proper to revoke and/or revise the Fully Appropriated Steam System Declaration for the Kern River System in light of the forfeiture of pre-1914 appropriative Kern River rights, including the recent forfeiture determination in *North Kern Water Storage District v. Kern Delta Water District*, Tulare County Superior Court, Case No. 96-172919, article X, section 2 of the California Constitution, and all other legal grounds and relevant information enclosed and later submitted by Petitioners, including any unauthorized post-1914 diversions; and (b) appropriating all Kern River water that the State Board determines is unappropriated and subject to appropriation, if any.

Background

Since the 1870's, North Kern's predecessors in interest diverted and beneficially used large quantities of Kern River water under pre-1914 appropriations, which rights were either adjudicated in Farmers Canal Company, et al. v. J.R. Simmons, as stated in the "Shaw Decree" of 1900 (Exhibit 1), or administered in accordance with the Shaw Decree for over 100 years.

On January 1, 1952, North Kern acquired rights to divert Kern River water under certain pre-1914 appropriations listed in the 1952 Agreement (Exhibit 2), to carry out the purposes and objects of its 1950 Project approved by the State Engineer.¹ From 1954-1996, for example, North Kern carried out its public project by diverting and beneficially using an annual average of approximately 167,000 acre-feet per year (afy) of Kern River water, under the priorities and rates of flow that apply to these pre-1914 rights, principally for irrigation and the replenishment of the groundwater supplies underlying North Kern. During that time, about 63,000 afy of the 167,000 afy, on average, was water which Kern Delta predecessors failed to divert and beneficial use.

In 1976, Kern Delta acquired its pre-1914 appropriations, namely the Kern Island (1st) and (2nd), Buena Vista (1st) and (2nd), Farmers and Stine rights. Notwithstanding their predecessors' historic non-use, Kern Delta claimed the right to substantially increase the use of Kern River water under its pre-1914 appropriative rights. As a result, North Kern filed an action, *North Kern Water Storage District v. Kern Delta Water District*, Tulare County Superior Court, Case No. 96-172919, that sought, among other things, a judgment that the pre-1914 rights Kern Delta had acquired were partially forfeited by nonuse.

The first judgment, (Exhibit 3, Conn Judgment), declared, among other things, that Kern Delta's pre-1914 water rights had been partially forfeited and that increased use of water by Kern Delta above its predecessors' historic amounts violated article X, section 2 of the California Constitution. The Conn Judgment also declared that Kern Delta's forfeiture resulted in an unspecified quantity of unappropriated water.

In response to the finding of unappropriated water in the Conn Judgment, North Kern, Bakersfield, Kern Delta and others submitted petitions and applications to appropriate all unappropriated water.

¹ The pre-1914 rights held by North Kern, as provided in the 1952 Agreement, include the: James (1st), Anderson (1st), Meacham, Plunkett, Joyce, Johnson, Pioneer (1st), Beardsley (1st) (30 percent), Anderson (2d), James & Dixon, McCaffrey, McCord (51 percent), Calloway (80 percent), Railroad (80 percent), James (2d), Pioneer (2d), Beardsley (2d) (30 percent). (1952 Agreement, Exhibit 2, at p. 2.)

Later, the Fifth District Court of Appeal reversed the Conn Judgment in an unpublished decision (subsequently modified on rehearing) (Exhibits 4 and 6), and remanded the case back to the Tulare County Superior Court for further determination of Kern Delta's forfeiture and other matters.

After a second trial, on remand, a second judgment was rendered (Exhibit 5, Reed Judgment.) The Reed Judgment adjudged that Kern Delta's rights were partially forfeited and that such forfeiture amounted to as much as 60,895 afy of forfeited water.

After the Reed Judgment but before the second appeal, the Division Chief issued a notice to North Kern, Kern Delta, Bakersfield and the other applicants that their petitions and applications submitted in response to the Conn Judgment were rejected without prejudice. The notice indicated that new petitions and applications could be presented upon final resolution of the ongoing litigation. Bakersfield filed a petition for reconsideration, which was rejected by the State Board.

In response to Bakersfield's petition, the State Board determined by executive order that "[e]ven though all or some of a water right is or may be forfeited, water may not be available for appropriation because it is needed to protect ... prior rights. Only the State Water Board has jurisdiction to determine whether water is available for appropriation post-1914 appropriative rights and to issue permits and licenses; the courts do not have that jurisdiction (Wat. Code, § 1225.)" (State Board, Order WR 2005-0017-EXEC, *In the Matter of the Petition for Reconsideration of the City of Bakersfield, etc.* (July 7, 2005), at p. 5.)

In a second appeal, the Fifth District Court of Appeal issued its "Opinion After Rehearing," filed on February 2, 2007. (*North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555, Exhibit 6.) The decision modified the Reed Judgment to declare additional partial forfeiture of Kern Delta's pre-1914 rights. (*Id.* at pp. 581-582, 585.) The record of nonuse supporting the determination of partial forfeiture of Kern Delta's rights for the period 1972-1976 is enclosed. (Exhibit 7.)

The Court of Appeal also ruled that "the trial court was incorrect in its finding that forfeiture created unappropriated water subject to appropriation through the SWRCB process," instead, any determination of whether the Kern River is no longer fully appropriated must be made by the State Board in the first instance. (*North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th at 583-584.) The California Supreme Court recently denied all petitions for review and the judgment, as modified, is now final.

Grounds For Petition

The State Board generally cannot accept an application for a permit to appropriate water of a stream system declared to be fully appropriated (Water Code § 1206(a).) However, upon recommendation of the Chief, Division of Water Rights, the State Board may, following notice and hearing, revoke or revise a fully appropriated stream declaration (FAS Declaration) upon its own motion or the petition of any interested person (Water Code § 1205(c), CCR § 871.) Section 871(b) provides that revocation may be based upon any relevant factor, including but not limited to,

“a change in circumstances from those considered in a previous water right determination that no water remains available for appropriation, or upon reasonable cause derived from hydrologic data, water usage data, or other relevant information” (Title 23, CCR, § 871(b).) (Emphasis added.)

Title 23, Section 871(c)(2) provides further that such petition may also be accompanied by a proposed application to appropriate any unappropriated water.

In light of the final judgment in *North Kern Water Storage District v. Kern Delta Water District*, Tulare County Superior Court, Case No. 96-172919, as modified by the Court of Appeal, Kern River hydrologic and water usage data, and all other legal authorities and relevant information, this letter is presented and should be accepted as a petition to consider whether it is appropriate to revoke and/or revise the FAS Declaration pursuant to Water Code section 1205(c) and Section 871 of Title 23 of the California Code of Regulations.

There is a reasonable likelihood that additional forfeiture of Kern Delta’s pre-1914 rights will be found upon consideration of five-year periods of non-use both before 1972 and/or after 1977 up to the present. Continuous nonuse of Kern River water by Kern Delta and its predecessors in interest is well known and documented. (See, Exhibit 7.) Data relating to other five-year periods of non-use exists and is available for State Board review upon request.

Furthermore, the City of Bakersfield has repeatedly argued that Kern Delta’s forfeiture “must” result in unappropriated water that is subject to appropriation. The Court of Appeal ultimately disagreed, stating that “may” or “may not” occur:

“When a natural watercourse is fully appropriated, as the Kern River is, forfeiture of an appropriative right may or may not result in unappropriated water than can be awarded to an applicant through the statutory permitting system administered by SWRCB. That is, a river may be so oversubscribed by pre-1914 common law rights that any water released to the river by forfeiture of a senior rights holder will simply be used in full by existing junior right holders under their existing

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entitlements.” (*North Kern Water Storage District v. Kern Delta Water District*, *supra*, 147 Cal.App.4th at p. 583.)

Petitioners 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 pursuant to the enclosed application. It may be, as the Court of Appeal indicated, that forfeiture does not result in unappropriated water because “water released to the river by forfeiture ... will simply be used in full by existing junior right holders under their existing entitlements.” (*North Kern Water Storage District v. Kern Delta Water District*, *supra*, 147 Cal.App.4th at p. 583.) Particularly this may be the case as unappropriated water does not include water being used pursuant to an existing right. (23 CCR § 695.) However, in light of the fact the Court of Appeal has indicated that forfeiture of Kern Delta’s pre-1914 rights – even when limited to evaluation of non-use during a single five-period (1972-1976) – “may” result in unappropriated water, State Board consideration of this petition is appropriate.

Additionally, consideration of whether future increased uses by Kern Delta under its remaining pre-1914 appropriative rights is reasonable under article X, section 2 of the California constitution (e.g., *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339) or is otherwise lawful may affect the availability of water. Furthermore, as mentioned above there may be other grounds, such as unauthorized diversions, for determining that the Kern River FAS Declaration should be revoked and/or revised.

Based on the foregoing, Petitioners suggest 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 (23 CCR § 871.) Assuming the State Board finds there is Kern River water subject to appropriation, Petitioners submit the enclosed application to appropriate all unappropriated Kern River water for municipal and industrial, domestic, irrigation, groundwater replenishment, recreational, water quality and other beneficial uses by North Kern and Shafter, a municipality, as more specifically provided in the application.

In the recent past, the City of Shafter has grown and expanded its boundaries and sphere of influence to include farm lands within North Kern. As farm lands urbanize in Shafter and North Kern, landowners and other purveyors will utilize groundwater in the basin underlying North Kern for municipal, domestic, industrial and other uses related to urban development. To the extent North Kern’s existing rights to use Kern River water are not sufficient to satisfy the water demands of Petitioners; they seek to appropriate all unappropriated water necessary to fully satisfy their existing and future demands.²

² This petition and application are filed without prejudice to North Kern’s and Shafter’s existing water rights. Nothing in this petition or application should be considered as an admission, concession or

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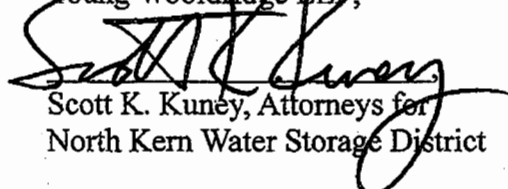
Enclosed please find the applicable filing fees for the petition and application.³

Conclusion

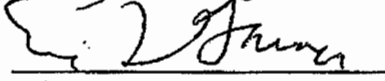
Petitioners respectfully request that you determine this petition constitutes reasonable cause to conduct a hearing to consider whether the Kern River FAS Declaration should be revoked or revised. Please call the undersigned if you have any questions about this petition or accompanying application. In the event you conclude additional data or information is needed before you make your determination regarding reasonable cause for revision of the FAS Declaration, please contact us so that additional information can be provided. We look forward to working with you and your staff in connection with this matter.

Very truly yours,

The Law Offices of
Young Wooldridge LLP,


Scott K. Kuney, Attorneys for
North Kern Water Storage District

Best, Best & Krieger LLP,


Eric L. Garner, Attorneys for
City of Shafter

Encl: Hydrologic data; Water usage data; Other relevant information (Exhibits 1-7); Application to Appropriate Water; Attachment to Application; Underground Storage Supplement to Application with attached Table 1; Maps 1 and 2; and Three (3) checks (petition fee, application fee, and environmental review fee) .

cc: State Water Resources Control Board

agreement that the claims, contentions, allegations of Bakersfield, or others, against or contrary to the interests of North Kern or Shafter have any merit whatsoever.

³ In accordance with Section D of the application, the enclosed fee amounts are based the "Fee Schedule Summary: Fiscal Year 2006-07" viewed at the Division of Water Rights' website (www.waterrights.ca.gov) immediately prior to filing this petition.