

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO-2010-00XX

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

SOURCE: Kern River

COUNTIES: Kern and Tulare

**ORDER AMENDING DECLARATION OF FULLY APPROPRIATED STREAMS
TO REMOVE DESIGNATION OF THE KERN RIVER AS FULLY APPROPRIATED**

BY THE BOARD:

1.0 INTRODUCTION

Pursuant to Water Code sections 1205 through 1207, the State Water Resources Control Board (State Water Board or Board) has adopted and periodically revised the Declaration of Fully Appropriated Streams (Declaration). The Declaration includes a list of streams that have been found to be fully appropriated for all or part of the year based on court decisions or decisions by the State Water Board. The Kern River system has been found to be fully appropriated throughout the year from Buena Vista Sink upstream, including all tributaries where hydraulic continuity exists in Kern County. The Kern River system was included in the original Declaration adopted by State Water Board Order WR 89-25, and it remains listed on the most recent revised Declaration adopted by State Water Board Orders WR 91-07 and WR 98-08. Order 89-25 cited State Water Rights Board Decision 1196 (D-1196), issued on October 29, 1964, as the basis for including the Kern River on the Declaration. D-1196 was based on the fact that “there was no showing that there is unappropriated water available” in the Kern River watershed. (D-1196, p.5.)

In 2007, in accordance with California Code of Regulations, title 23, section 871, five petitions were filed with the State Water Board, Division of Water Rights (Division), requesting revision of the Kern River’s fully appropriated status as listed in the Declaration. The five petitions were

received from: North Kern Water Storage District and City of Shafter, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority and Kern County Water Agency (Petitioners). Petitioners also filed applications to appropriate water. Petitioners cited the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* (1997) (147 Cal.App.4th 555 [54 Cal.Rptr.3d 578]) (North Kern Decision) as the basis for filing the petitions. The Fifth District's ruling found that there was a partial forfeiture of Kern Delta Water District's (Kern Delta) pre-1914 water rights on the Kern River.

2.0 BACKGROUND

California Code of Regulations, title 23, section 871 provides that the State Water Board may revoke or revise the Declaration upon its own motion or upon petition of any interested person. In this instance, the Board received the petitions from the above-named entities to revise the Declaration. In a memorandum dated October 8, 2008, the State Water Board Deputy Director for Water Rights concluded that there was sufficient information to process the petitions and conduct a hearing on the question of whether the Declaration should be revised. The Board held a pre-hearing Conference on September 24, 2009. The purpose of the pre-hearing conference was to receive comments from the parties and other participants on the scope of the hearing, the status of any negotiations to resolve protests, and any other appropriate procedural issues. Representatives of the following parties participated in the pre-hearing conference: Kern County Water Authority, Buena Vista Water Storage District, North Kern Water Storage District, Kern County Water Agency, City of Shafter¹ and the City of Bakersfield.

The primary concern of the parties raised at the pre-hearing conference was the scope of evidence that would be considered in this proceeding. In his letter of September 25, 2009, Board Member Arthur Baggett, Jr., the hearing officer for this proceeding, stated that, as expressed in the Notice of Public Hearing, the purpose of this proceeding is to determine if there has been a change in circumstances 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. Therefore, the parties were requested to limit evidence and testimony to whether additional information, based on court decisions or Board

¹ At the pre-hearing conference, these five parties, collectively called the North Kern Petitioners, agreed to consolidate testimony and file most exhibits jointly. The North Kern Petitioners likewise agreed to conduct direct and cross-examination of witnesses jointly. Each participant was allowed to give a separate opening statement and closing statement.

orders, or hydrological data showing periods of flows exceeding recognized rights, has become available since the Board listed the Kern River as fully appropriated.

A question was also asked regarding whether the State Water Board would accept evidence pertaining to contractual disputes over water in the Kern River. Board Member Baggett's September 25, 2009 letter to the service list stated that to the extent that these disputes are relevant to whether additional information has become available to justify the Board revising the Declaration, then such evidence may be considered.

The final issue raised at the pre-hearing conference was the extent to which instream flows and public trust matters would be addressed in this hearing. In his September 25, 2009 letter, the Hearing Officer stated public trust issues did not appear to be relevant to this proceeding. This issue is addressed more fully in Section 5.0 of this order.

The Board held a public evidentiary hearing on October 26-27, 2009. The hearing provided an opportunity for the petitioners and all interested parties to present evidence and argument in support of their positions. Following the hearing, the Board received legal briefs from the City of Bakersfield; the North Kern Petitioners, jointly; and the Kern County Water Agency, separately.

3.0 DESCRIPTION OF PENDING PETITIONS AND APPLICATIONS

Each petitioner submitted an application to appropriate the water identified in the petitions as follows:

- 1) Buena Vista Water Storage District's petition and application request a right to collect a maximum of 520,000 acre-feet/annum (afa) in surface and underground storage, and to directly divert a maximum amount of 180,000 afa for the purpose of irrigation.
- 2) City of Bakersfield's petition and application propose combined direct diversion and surface and underground storage of 90,000 afa. The purpose of use is for irrigation, domestic, municipal, recreation, industrial, fish and wildlife enhancement, and water quality uses.

- 3) Kern County Water Agency's petition and application propose combined direct diversion and surface and underground storage of 2,279,000 afa. The purpose of use is for municipal, irrigation, and aquifer storage.
- 4) Kern Water Bank Authority's petition and application propose to directly divert at a rate of 10 cubic feet per second (cfs) for 5,000 afa for municipal use, 1,500 cfs for 490,000 afa for irrigation use, and 15 cfs for 5,000 afa for industrial use. The total combined amount taken by direct diversion and underground storage will be 500,000 afa.
- 5) North Kern Water Storage District and City of Shafter's petition and application request to directly divert at a rate of 1,850 cfs. The maximum combined amount of direct use and surface and underground storage is 500,000 afa. The application by North Kern Water Storage District and City of Shafter lists irrigation, groundwater replenishment, municipal, industrial, domestic and other uses, of the water.

4.0 EVIDENCE SUPPORTING REVISION OF FULLY APPROPRIATED STREAM DECLARATION

As described above, the purpose of the hearing was to receive evidence and testimony regarding whether additional information has become available since the Board listed the Kern River as fully appropriated to justify the State Water Board revising the Declaration for the purpose of processing water right applications for the Kern River. The information could be based on court decisions or Board orders, or hydrological data showing periods of flows exceeding recognized rights. To this end, both Bakersfield and the North Kern Petitioners presented evidence that in some years there are periods of flows exceeding recognized rights in the Kern River, even without regard to any additional water that may be available due to the Kern Delta's partial forfeiture of its pre-1914 water rights. (Bakersfield 2-1, p. 15 ¶ 69 & 70; Joint Exhibit (JE)-46, pp. 2-3, ¶ 4.)

Specifically, Bakersfield submitted exhibit 2-18, which is a table of water diversions via the Kern River/California Aqueduct Intertie (Intertie). This table shows Kern River water being diverted into the Intertie in nine separate years since 1978.

Likewise, the North Kern Petitioners presented a graph; exhibit JE 67, showing Kern River water “undistributed to existing entitlements” in several years. Daniel Easton, witness for the North Kern Petitioners, explained in his written and oral testimony that there was what he calls “undistributed release” water in at least eight months since 1964. (JE-46, p. 12, ¶ 28; Reporter’s Transcript (R.T.) pp. 208-209.) Mr. Easton testified that water diverted into the Intertie is in excess of traditionally held and exercised rights and claims of right to Kern River water, and that whenever water has been released into the Intertie in the past, all Kern River water right claims had already been satisfied. (R.T. p. 264.) This water is, by definition, unappropriated water.

When asked about this “undistributed” water, Mr. Easton expressed his belief that the North Kern Decision would not have changed the availability of water in years of high flows; that water would have been available in those years anyway. (R.T. pp. 210-211.) Because the purpose of this hearing was to determine whether there is unappropriated water in the Kern River, not limited to whether the North Kern Decision made additional water available for appropriation, Mr. Easton’s point merely reinforces the fact that in some years there is unappropriated water. Mr. Easton’s point that water would have been available in those years regardless of the North Kern Decision further supports the conclusion that unappropriated water exists in the Kern River in some years.

In addition to the undisputed evidence presented regarding unappropriated water that has historically been diverted into the Intertie without a valid basis of right, 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. Because, however, there is sufficient evidence, as discussed above, to justify the State Water Board revising the Declaration for the purpose of processing water right applications for the Kern River, the Board will not make a determination at this time regarding whether the other pre-1914 rights claimants will use, in full, the water released to the Kern River by the forfeiture judgment in the context of processing those applications. It will be up to the applicants to show when and how much available water there is for appropriation in the context of the Division’s processing of those applications.

5.0 ENVIRONMENTAL ISSUES/PUBLIC TRUST

Several parties raised the issue of the extent to which instream flows and public trust matters would be addressed in this hearing. In his September 25, 2009 letter to the service list, the Hearing Officer stated that based on the key issues identified in the August 24, 2009 Notice of Public Hearing, public trust issues did not appear to be relevant to this proceeding. As specified in the Notice of Public Hearing, no determination regarding approval of the pending applications for appropriation of water will be made until after the State Water Board makes a determination on whether the stream system is fully appropriated.

The environmental issues associated with the North Kern Petitioners' and City of Bakersfield's water right applications will be addressed by the State Water Board in the context of processing Petitioners' applications. Prior to any potential approval or decision to proceed with a proposed project, these entities and the State Water Board must fulfill their obligations under the California Environmental Quality Act (CEQA). (Pub. Res. Code, § 21000 et seq.) In addition to meeting statutory responsibilities under CEQA, the State Water Board will comply with its obligation to consider environmental and public interest issues under the Water Code and the public trust doctrine in the context of processing the water right applications submitted by Petitioners. As such, those issues are not relevant to this order.

6.0 CONCLUSION

It is clear from the evidence and testimony submitted by the parties to this hearing that, even without regard to the North Kern Decision, there is some unappropriated water in the Kern River. The State Water Board recognizes that processing water right applications will require consideration of numerous issues not addressed in this order, including those discussed above, the specific amounts of water available for appropriation under the applications, the season of water availability, the public interest in approval or denial of the applications, and any conditions to be included in any permits that may be issued on the applications. As indicated in the hearing notice, the focus of the Board's inquiry in this proceeding was on the relatively narrow task of determining if the evidentiary record supports revising the fully appropriated status of the Kern River. Based on our review of the record and the findings above, we conclude that the Declaration of Fully Appropriated Streams, as adopted by State Water Board Orders WR 89-25, WR 91-07 and WR 98-08, should be revised to allow for processing the applications to

appropriate water from the Kern River in accordance with the provisions of the Water Code and other applicable law.

ORDER

IT IS HEREBY ORDERED THAT, based upon the foregoing findings:

- 1) The Declaration of Fully Appropriated Streams, as adopted by the State Water Board in Orders WR 89-25, WR 91-07 and WR 98-08, is amended to allow for processing applications to appropriate water from the Kern River.²
- 2) The Division shall process any water right applications accepted as a result of this order in accordance with applicable law.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 16, 2010.

AYE:

NAY:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board

² This order does not affect the separate designations of the North Fork Kern River or the unnamed spring tributary to Cuddy Creek as fully appropriated.