

September 17, 2009

Arthur G. Baggett, Jr.
Board Member and Hearing Officer
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: Petitions to Revise Declaration of Fully Appropriated Stream Systems; Kern River, WR 89-25, dated November 16, 1989

Dear Mr. Baggett:

This letter is provided on behalf of four (4) of the petitioners¹ (referred to as "Petitioners") to assist the Hearing Officer in considering certain procedural issues that will be discussed at the September 24, 2009 Pre-Hearing Conference with regard to hearings concerning a possible revision to the Declaration of Fully Appropriated Stream Systems for the Kern River System, WR 89-25, dated November 16, 1989. ("FAS Declaration".)

The Petitioners suggest that the FAS Hearing be structured in the following manner:

1. That the parties address the three issues raised in the Notice of Public Hearing and Pre-Hearing Conference ("Notice") by presenting evidence and legal argument regarding whether the *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App. 4th 555 ("*North Kern*") forfeiture judgment is a change in circumstance that supports revision of the FAS Declaration²;
2. That the FAS Hearing be conducted according to the analysis and procedures adopted by the State Board in its prior decisions considering modification of the FAS Declaration, specifically, *American River* (Draft WRO May 12, 2003), *Santa Ana River* (WR 2001-12, WR 2002-0006), *Kern* (WR 94-1), and applicable principles of appropriative water rights law;

¹ North Kern and City of Shafter (A31673), Buena Vista Water Storage District (A31775), Kern Water Bank Authority (A31676) and Kern County Water Agency (A31677.)

² The Petitioners understand that the State Board's omission of any reference to the Kern River Intertie Canal and California Aqueduct in the list of Key Issues set forth in the Notice indicates that the State Board no longer believes this issue is relevant to these proceedings (a position with which Petitioners agree).

3. That the FAS Hearing not address issues relating to instream flows or public trust water supply requirements. Such an approach is entirely consistent with procedures recently followed by the State Water Board in proceedings relating to the appropriation of water from the Santa Ana River. In that proceeding the Board strictly limited the scope of the FAS hearing to water availability and related hydrologic issues and only considered public trust and instream flow issues in later proceedings on applications to appropriate, following its decision that the FAS Declaration for the Santa Ana River should be modified. (See, Order WR 2000-12; Draft Decision dated August 27, 2009 on Applications to Appropriate of San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County). An early determination by the Hearing Officer that the FAS Hearing will not address instream flow and public trust issues will promote efficiency as it would eliminate the need for Petitioners to develop expert testimony and other evidence relevant to such issues.
4. That the FAS Hearing not address certain non-jurisdictional contractual disputes raised by the City of Bakersfield in its recent submittals with the State Board; and
5. That the FAS Hearing dates be rescheduled after the Hearing Officer has determined the scope of the FAS Hearing and other procedural issues to be addressed at the Pre-Hearing Conference. The revised hearing schedule should provide sufficient time for all parties to prepare and present evidence on the specific issues identified by the Hearing Officer in an orderly and efficient manner.

CHANGE IN CIRCUMSTANCES

Immediately following conclusion of the *North Kern* litigation, Petitioners along with the City of Bakersfield filed five (5) petitions (with applications for appropriation) with the State Board suggesting that the forfeiture judgment was a "change in circumstance" justifying a hearing by the State Board regarding a possible revision to the FAS Declaration regarding the Kern River.

In response to the notice from Chief Whitney, the Petitioners advised in their January 30, 2009 letter that based on a review of the entire record, State Board decisions, and governing points of appropriative law that the *North Kern* matter did not support reasonable cause for hearing and that all the petitions should be dismissed and not processed.

On October 30, 2008 Chief Whitney recommended to the State Board that there was reasonable cause to conduct a hearing on the question of whether the FAS Declaration should be modified for the Kern River stream system. According to the internal Staff Memorandum, dated October 2, 2008 (at p. 4), the Division recommendation was based on two grounds: 1) The courts have confirmed that water rights have been partially forfeited by Kern Delta Water District in *North Kern*. More specifically, it was explained that the forfeiture can be considered a change in circumstance because if those forfeitures are applied historically, it could be concluded that

water in the Kern River would not have been fully applied to beneficial use as described in D1196; and 2) The diversion of Kern River water into the California Aqueduct via the Intertie Canal on numerous occasions since its construction in 1977. Only the Staff Memorandum mentions operation of the Intertie Canal, and this issue is not raised in the three (3) Key Issues set forth in the Notice.

As such, we recommend that the hearing be limited to whether the *North Kern* forfeiture judgment is a change in circumstance supporting revision to the FAS Declaration, and Petitioners suggest consideration of the following procedural issues at the Pre-Hearing Conference.

A. Judgment of Forfeiture –

In *North Kern* four of Kern Delta Water District's pre-1914 appropriations adjudicated in the 1900 Shaw Decree (D1196, Exhibit 2, at p. 10) were held to be partially forfeited because of five years of nonuse during the period 1972-1976. (*Id.*, at 563-564, 585.) The Court of Appeal explained, “[f]orfeiture, then, is not forfeiture of water itself . . . [i]nstead, what is forfeited is the right to appropriate water in excess of historical beneficial use as reflected in the forfeiture period.” (*Id.*, at 580.) “What is forfeited is the unexercised portion of the historical paper entitlement; what is left to the rightholder is a new paper entitlement established in a more recent historical period.” (*Id.*) Specifically, *North Kern* provides that these four appropriations can no longer exceed the following amounts for certain months of the year:

- Kern Island 1st right to 300cfs (January 9,953 acre-feet; October 11,457 acre-feet; November 14,476 acre-feet; December 16,396 acre-feet);
- Buena Vista 1st right to 80cfs (January 347 acre-feet; November 236 acre-feet; December 191 acre-feet);
- Stine right to 150cfs (September 583 acre-feet; October 1,380 acre-feet; November 22 acre-feet; December 12 acre-feet); and
- Farmers right to 150cfs (August 610 acre-feet; September 268 acre-feet; December 207 acre-feet.)

In months where no forfeiture was determined, the paper entitlement remains as specified in the Shaw Decree. (*Id.*, at 582.)

Significantly, the *North Kern* litigation confirmed that water shortage is the rule rather than the exception on the Kern River finding that it is a frequent occurrence that there is insufficient water to satisfy the claims of all right holders; rarely is there sufficient water to satisfy all First Point diverters. (*Unpublished North Kern Opinion* at pp. 6-7.) Thus, the Court of Appeal stated, “[w]hen the flow of the river is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water; in other words, there is no mandatory proration of water among appropriators when, *as is often the case, river flow is insufficient to fully satisfy all appropriations.*” (Citation omitted) (*North Kern*, at p.561.) (Italics added.)

More specifically the Court explained that “[i]n addition to paper and theoretical entitlement, an appropriator [on the Kern River] is entitled to divert water if a senior appropriator does not claim its entire allocation that day. When an appropriator has not diverted its entire theoretical entitlement on a given day, the excess water is ‘released to the river.’ In that case, the next most senior appropriator is entitled to divert released water to, in effect, augment the stage or natural flow of the river; the junior appropriator then may divert water for which it has no theoretical entitlement, up to the full paper entitlement of that user. Any release water not claimed by a more senior user becomes available to the next junior user in the same manner until the water supply is “exhausted.” (*Id.*, at 562.) . . . While junior users have no right to demand that senior users release water to the river but, once the water is released by senior users, *each successive junior user has the right to released water up to its maximum paper entitlement.*” (*Id.*, at p. 575) (Italics added.)

Ultimately, the Court of Appeal concluded that the Kern River may be “so oversubscribed by pre-1914 common law rights [and other decreed 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 entitlements.* . . . [H]owever, the cumulative effect *could be* that the river is no longer oversubscribed. That is a determination not for the courts in the first instance, but for the SWRCB. If those resulting limitations on appropriation might result in a determination that the Kern River is no longer fully appropriated, that determination will be made by the SWRCB on the petition of a potential appropriator of the excess. *Any new permit for such an appropriation, however, will be ‘last in time’ and will neither reduce nor augment existing pre-1914 rights of other appropriators.*” (*Id.*, 583-584.) (Italics added.)

SCOPE OF REASONABLE CAUSE HEARING

The State Board, Notice of Hearing, has identified the following Key Issues for consideration at the FAS Hearing:

1. Should the State Water Board revise the Declaration to all the Division of Water Rights to accept and process water right applications to appropriate water from the Kern River?
2. Has adequate information been provided to demonstrate that there is a change in circumstances since the Kern River was included in the Declaration?
3. Have the petitioners provided sufficient hydrologic data, water usage data, or other relevant information to support a determination that there is unappropriated water in the Kern River system during the season applied for to justify revising the Declaration for the purpose of accepting and processing water right applications for the Kern River?

In previous proceedings, the State Board has resolved petitions seeking revision to the FAS Declaration according to specific procedures. The Petitioners request that this FAS Hearing be

conducted consistent with the procedures adopted in prior FAS Hearings regarding the *American* (Draft WRO May 12, 2003), *Santa Ana* (WR 2000-12, WR 2002-0006), and *Kern Rivers* (WR 94-1).

A. Burden to Present Evidence

A party petitioning the State Board to revise the FAS Declaration has the burden of showing that there is unappropriated water available to supply a proposed application. (Water Code §§ 1260(k), 1375(d); *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 413.) In the context of a petition seeking revision to the FAS Declaration, “the focus of inquiry . . . is only the relatively narrow task of determining *if the evidentiary record supports revising the fully appropriated stream status.*” (*In Matter of Petitions to Revise Declaration (Santa Ana River) WR 2000-12* at p. 15.) (Italics added.)

The parties are required to produce at the FAS Hearing “hydrologic data, water usage data, or other relevant information” to support revision of the FAS Declaration. (CCR § 871(c)(1).) Significantly, the showing must address the whole stream system as distinguished from a single right or grouping of rights on the stream system. (*Id.*) In particular, two key foundational facts must be established before the FAS Declaration can be revised: First, that the water released by forfeiture is “new water” which would not have reached the Kern River when D1196 was issued in 1964. (*Draft Order Denying Petition to Revise The Declaration on Fully Appropriated Streams – American River* (2003), at p. 16.); Second, that circumstances have changed so that the water released by forfeiture would be available for appropriation by “new users” (or those issued a “new” water right) in 1964 without any interference, curtailment or injury to the prior right holders that existed at the time of D1196 -- including the unmet demands and deficiencies not satisfied under the prior existing rights of the First Point, Second Point and Lower River diverters. (*Id.* at pp. 22 and 29.)³

B. Foundational Facts

1. Relevant Time Period

The FAS Declaration regarding the Kern River identifies D1196 for the determination that the Kern River is a fully appropriated stream system. (WR 89-25, at pp. 13-14.) Even though the FAS Declaration was adopted in 1989, the relevant time period for this FAS Hearing is when D1196 was adopted in 1964. (*American River*, Draft WRO May 12, 2003, at p. 5.) Specifically, the change in circumstance referenced in section 871(b) is limited to a change in circumstances from those considered in D1196 determining that no Kern River water remains available for appropriation. (*American River*, Draft WRO May 12, 2003, at pp. 15-16; Cal. Code Regs., tit. 23, §871(b).)

2. Finding of “New Water”

³ Previously, the State Board has ordered that unappropriated water should be determined by (1) quantifying the water physically available and (2) subtracting the needs of riparian users and the claims of the holders of prior rights. (*In the Matter of Application 27253*, Order: WR 86-1 (1986) [1986 WL 25499, 2 (Cal.St.Wat.Res.Bd.)].)

To satisfy the “change in circumstance” requirement it must be shown that the water released due to the *North Kern* forfeiture judgment is “new water”, that is, water that would not have reached the Kern River at the time D1196 determined the stream system to be fully appropriated. (*American River*, Draft WRO May 12, 2003, at p. 16.) Thus, the change must result in an actual physical increase in the total flow discharged into the Kern River and such water must not have been tributary to the Kern River during the relevant period – 1964. (*Id.*)

The release of water directed by the forfeiture judgment is unlike prior State Board decisions where physical changes to the natural flow supply were found to create “new water.” For instance, in the *Santa Ana River* proceedings “new water” existed in the stream due to “increased releases of treated wastewater, increased runoff due to urbanization, and increased availability of water during wet years . . . [and] the possibility of using Seven Oaks Reservoir . . . to further increase the quantity of water potentially available for appropriation.” (*Santa Ana*, WR 2002-0006 at pp. 2-3.) Likewise, in the *American River* proceedings “pumped groundwater [that] would not otherwise reach the [American River] now *and* would not have reached the [American River] during the relevant time period” was found to exist. (*American River*, Draft WRO May 12, 2003, at p. 16.)

In contrast, the State Board has determined that in order to revise the FAS Declaration regarding the Kern River it must be shown that “hydrologic conditions in the Kern River have changed since D1196.” (*Kern River*, WR 94-1, at p. 7.) Mere records of Kern River natural flow that are less than the maximum flows reported in the Engineering Staff Analysis which form the basis of D1196 are insufficient ground to revise the FAS Declaration. (*Id.*, at p. 9.)

3. Finding of Surplus Water

In addition to establishing that “new water” is being discharged into the Kern River natural flow considered in D1196, it must also be demonstrated that the releases directed by the *North Kern* forfeiture judgment are sufficient to both make up for the flow deficiencies that existed at the time D1196 was adopted and provide significant additional flow that may be available for appropriation. (*American River*, Draft WRO May 12, 2003, at pp. 19-20, 25.) If it is determined that “new water”, if any, released to the Kern River by virtue of the forfeiture judgment during the relevant time period – 1964 – would have been dedicated to satisfying unmet demands of the First, Second and Lower River diverters with a higher priority than any permit that could be issued by the State Board, there is no showing of a change in circumstance justifying revision to the FAS Declaration. (*American River*, Draft WRO May 12, 2003, at pp. 22, 25.) Ultimately, it must be proven that the “new water” would have been available for appropriation by new users (those under a “new” water right) during the relevant time period. (*Id.*, at p. 16.)

C. The FAS Hearing is Distinct From Permit Processing

The FAS Hearing is limited to determining whether the FAS Declaration should be revised to allow the State Board to accept and process water right applications in accordance with applicable provisions of the Water Code Section 1200, et. seq. (*American River*, Draft WRO May 12, 2003, at p. 2.) The purpose of the FAS Hearing is not to reach the merits of any applications. (*Id.*; *Santa Ana*, WR 2000-12, at pp. 2, 13.) Should the State Board determine that the FAS

Declaration requires revision, such an order would simply allow the State Board to accept for filing the applications submitted and to begin processing the applications. (*Santa Ana*, WR 2000-12, at p. 4.) The approval of the petitions does not constitute approval of the applications, nor does it imply the SWRCB believes the applications should be approved.” (*Id.*) As explained in the *Santa Ana River* matter:

All questions regarding the specific amount of water available for appropriation under the applications, the season of water availability, approval or denial of the applications, and the conditions to be included in any permit(s) that may be issued on the applications *will be resolved in further proceedings* on each application pursuant to applicable provisions of the Water Code. (*In Matter of Petitions to Revise Declaration (Santa Ana River)* WR 2000-12 at p. 14) (Italics added.)

The Petitioners request that the FAS Hearing exclude any argument or evidence addressing the relative merits or potential terms and conditions of any future permit. Should the State Board revise the FAS Declaration regarding the Kern River, such matters can be properly addressed in subsequent noticed proceedings according to applicable provisions of the Water Code.

D. Potential Instream or Environmental Considerations

The State Board has twice determined that when “instream or environmental considerations were not relied upon as a basis for classifying a watercourse as fully appropriated a decision to revise the fully appropriated designation to allow for processing of new water right applications need not involve consideration and analysis of instream or other environmental uses of the water sought to be appropriated.” (*Santa Ana*, WR 2000-12 at p. 14, fn. 12; *Santa Ana*, WR 2002-0006 at p. 6, fn. 7.) Similarly, in *American River* “the parties were instructed not to present evidence on these decisions⁴ [those requiring instream considerations issued after the decisions supporting the FAS Declaration] because the decisions did not serve as a basis for the Declaration and are not considered in this proceeding.” (*American River*, Draft WRO May 12, 2003, at p. 6.)

In D1196 and WR 89-25 there was no reliance on either instream or environmental considerations when the Kern River system was classified as fully appropriated.⁵ (D1196, WR 89-25, at pp. 13-14.) Consistent with prior decisions of the State Board, the Phase One FAS Hearing should not involve consideration of any instream or environmental considerations not

⁴ In contrast, the fish flow requirements specified in D893 (a decision that was supporting of the FAS Declaration for the American River) was determined by the State Board to be appropriate testimony at the FAS Hearing because they were part of the limitations on water right holders that *existed at the relevant time period*. (*American River*, Draft WRO May 12, 2003, at p. 5.) (Italics added.)

⁵ The same is true for the subsequent orders of the State Board confirming that the Kern River stream system is fully appropriated. (See, WR Orders No. 91-97, 94-1 and 98-08.)

previously relied upon in D1196. Adopting such a procedure would be consistent with the State Board decisions on the *Santa Ana* and *American Rivers* and promote efficiency in the FAS Hearing process.

The Petitioners request that the FAS Hearing exclude any argument or evidence addressing potential instream or environmental considerations not addressed and previously relied upon in support of D1196. Should the State Board revise the FAS Declaration regarding the Kern River, such matters can be properly addressed in subsequent noticed proceedings according to applicable provisions of the Water Code.

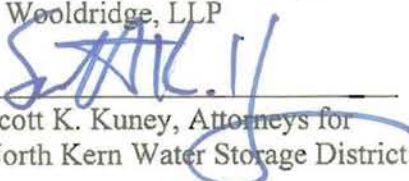
E. The State Board Does Not Have Jurisdiction in The FAS Hearing to Adjudicate The Contractual Disputes Raised by the City of Bakersfield

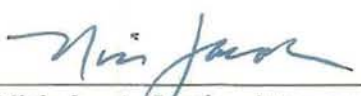
In prior submittals with the State Board, the City of Bakersfield has outlined a series of contractual disputes it has with petitioners North Kern Water Storage District, Buena Vista Water Storage District and the Kern County Water Agency with regard to the use of Kern River water. (August 8, 2008 letter, pages 5-7.) Importantly, the City of Bakersfield also acknowledges that the State Board does not have jurisdiction to make any determinations with regard to the party's contracts or contract rights. (*Id.*, at pp. 5, 16.) In determining whether surplus water is available for appropriation the State Board does not conduct an adjudication of the rights of water right holders. (*United States v. State Water Resources Control Bd.* (1986) 182, Cal.App. 3d 82, 103.) Specifically, the City of Bakersfield concludes that '[t]he existence and content of the contract is outside the control of the SWRCB, and the SWRCB is not in a position to amend its terms or to settle disputes between the water right holder.' (Order No. WR 2000-02, *supra*, at 20.)" (*Id.* at p. 16.) On this point Petitioners agree with the City of Bakersfield.

Petitioners request that the FAS Hearing exclude any argument or evidence addressing any of the contractual disputes raised by the City of Bakersfield in its August 8, 2008 letter.

CONCLUSION

We look forward to the opportunity to discuss with the Hearing Officer, State Board Staff, and the other parties these various procedural matters before the hearing is scheduled to commence.

The Law Offices of Young
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Arthur G. Baggett, Jr.
State Water Resources Control Board
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Page 9


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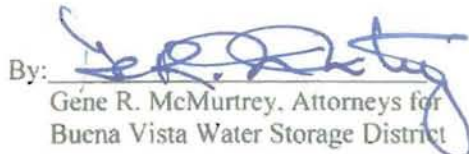
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cc: Mr. Paul Murphy, Hearings Unit
FAS Hearing Service List

WATER RIGHT HEARING REGARDING PETITIONS TO REVISE THE DECLARATION
OF FULLY APPROPRIATED STREAM SYSTEM OF THE KERN RIVER – SCHEDULED
TO COMMENCE ON OCTOBER 26, 2009

PROOF OF SERVICE LIST

STATE OF CALIFORNIA, COUNTY OF KERN

I, LEANN BANDUCCI, declare: I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

On September 17, 2009, I caused to be served the below listed document(s) entitled as: Correspondence from Scott Kuney to Arthur G. Baggett, Jr., Hearing Officer, on the parties and participants in this action, as listed below.

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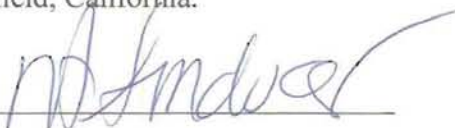
CITY OF SHAFTER

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 X (BY ELECTRONIC MAIL) on September 17, 2009, at Bakersfield, California, pursuant to Pursuant to the State Water Resources Control Board letter dated September 16, 2009, for this hearing all participants have agreed to accept electronic service of hearing-related materials.

 X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 17, 2009, at Bakersfield, California.

A handwritten signature in black ink, appearing to read "Leann Banducci", is written over a horizontal line.

LEANN BANDUCCI