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STATE WATER RESOURCES CONTROL BOARD
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DIVISION OF WATER RIGHTS
SACRAMENTO

January 30, 2008

HAND-DELIVERED

Victoria A. Whitney, Chief
Division of Water Rights
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 Chief Whitney:

This letter is prepared in response to the November 30, 2007 notice from the State Water Resources Control Board ("State Board") inviting comments regarding the five (5) petitions¹ 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".) We hope that these comments will assist your determination of whether reasonable cause exists to conduct a hearing to revise the FAS Declaration for the Kern River System. As explained below, the public agencies represented² in this letter recommend that you determine that there is no reasonable cause for hearing and that all the petitions be dismissed and the State Board not process the applications.

I. OVERVIEW

All of the petitions suggest that the "change in circumstance" justifying a hearing is the Court of Appeal decision -- *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555. The term "change in circumstance" refers to a change in circumstances from those considered in previous water right decisions. (Cal. Code Regs., tit. 23, §871(b).) The question is does the *North Kern* decision establish a change in circumstances from those considered when the Kern River System was

1 North Kern Water Storage District and City of Shafter (A31673), City of Bakersfield (A31674), Buena Vista Water Storage District (A31775), Kern Water Bank Authority (A31676) and Kern County Water Agency (A31677).

2 Submitted by North Kern Water Storage District, City of Shafter, Buena Vista Water Storage District, Kern County Water Agency, and Kern Water Bank Authority.

determined fully appropriated and listed in the FAS Declaration?

Importantly, we agree with the State Board that the proper method of analysis for this matter is the one adopted in the FAS proceeding concerning the *American River*. Specifically, according to the *American River* methodology petitions must show that the water released by forfeiture under *North Kern* is “new water” that would not have reached the Kern River at the relevant time period, that is -- when D 1196³ was issued in support of the declaration that the Kern River System is fully appropriated. (*Draft Order Denying Petition to Revise The Declaration on Fully Appropriated Streams – American River* (2003), at p. 16.) Assuming for argument sake that the water released by forfeiture is “new water” resulting in a net water increase to the natural flow of Kern River, which has not been established, it must also be shown that circumstances have changed so that this water would have been available for appropriation by “new users” in 1964 without any interference, curtailment or injury to the prior right holders that existed when D 1196 was decided. (*Id.*)

For more than 100 years all the waters of the Kern River System have been administered according to long-established court decisions, decrees and agreements. In order to justify the significant time and public expense of a hearing it must be demonstrated that there is “new water” which is surplus to the unmet demands and deficiencies not previously satisfied under the prior existing rights. To require a hearing without these requisites causes a needless expenditure of limited time resources, public funds and creates uncertainty as to the finality of D 1196 contrary to the objectives of the FAS process. This is particularly important at this time as California now faces many significant water issues which urgently demand the commitment of the State Board’s limited resources.

Because the record makes no *prima facie* showing on these primary elements we have concluded that there is no reasonable cause for hearing based on a claimed “change in circumstance” arising from *North Kern*. No petition contains information demonstrating that the partial forfeiture created any “new water” that was not already considered in D 1196. Likewise, no petition includes information (hydrologic data, water usage data, or other relevant information) supporting a determination that there now is unappropriated water in the Kern River System (during the season applied for in the submitted applications) surplus to the existing rights determination by the State Board. Specifically, the five petitions fail to show that the water released by forfeiture is “new water” that was not considered at the time of D 1196 and that this water is not needed to meet the pre-

3 We request that the State Board take judicial notice pursuant to California Code of Evidence §452(c) and (d), and other provisions of law, of the entire administrative record maintained by the State Board with regard to D 1196, including but not limited to Applications 9446, 9447, 10941, 11071, 11148, 11351, 13403, 13709 and 15440 (including all protests or objections), Report of the Kern River Water Master, dated February 4, 1964 (with exhibits), Engineering Staff Analysis of Record, dated May 28, 1964 (with exhibits), Hearing Transcript, dated February 5, 1964 (with exhibits), and all other contents of the administrative record of D 1196.

existing but unsatisfied demands and deficiencies of the First Point, Second Point and Lower River diverters according to prior decisions, decrees and agreements recognized in D 1196. Instead, just as stated in D 1196, the Kern River System remains in shortage. In sum, as anticipated in the *North Kern* litigation, the Kern River is “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.*” (*North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th 555, 583.) (Italics added.)

II. PHYSICAL & LEGAL SETTING

A. Kern River System

The Kern River System originates high in the Sierra Nevada. (D 1196, Engineering Analysis, at pp. 3-4.) The total drainage of the system is estimated to be 2075 square miles. (Id.) The eastern portion is drained by the South Fork Kern River and the western portion by the main stem of the Kern River. (Id.) Isabella Dam and Reservoir is located approximately 1.5 miles below the confluence of the North and South Forks of the Kern River. (Id.) Below Isabella Reservoir, the Kern River continues to flow through a canyon to the floor of the San Joaquin Valley easterly of the City of Bakersfield then beyond the First and Second Points of Measurement. (Id.)

The annual natural flow of the Kern River at the First Point of Measurement for the 70-year period (1894-1963) prior to D 1196 was presented to the State Board. (D 1196, Engineering Analysis, at p. 4.) Specifically, Table 2 of the engineer’s analysis stated the natural flow of the Kern River for each year ranged from a high of 1,991,600 acre-feet (1916) to low of 187,600 acre-feet (1924). (Id.) The average annual natural flow for the period was 680,600 acre-feet. (Id.)

B. Existing Kern River Water Rights

The entire natural flow of the Kern River has been apportioned between First Point, Second Point and Lower River diverters by court decisions, decrees and agreements for many years. (D 1196, at p. 5; WR 89-25, at p. 14.) With the exception of the City of Shafter and the Kern Water Bank Authority, all other parties are either parties, signatories or successors in interest to the Miller-Haggin Agreement (as amended), the Shaw Decree and 1962 Storage Agreement. The specific court decisions, decrees and agreements considered and relied upon as a basis for D 1196 are summarized below.

1. Miller-Haggin Agreement of 1888

In the historic decision of *Lux v. Haggin* (1886) 69 Cal. 255, the Supreme Court recognized riparian rights under California law and found them superior to appropriative rights unless an appropriative right predated the application for riparian property. That

litigation was finally settled when the upstream appropriators (known as First Point diverters) and the downstream riparians (known as Second Point diverters) entered into the Miller-Haggin Agreement of July 28, 1888. (D 1196, Exhibit 1.) In the original Miller-Haggin Agreement all Kern River natural flow was required to be measured at the First Point of Measurement and all flows above 300 cfs were divided 1/3 to the Second Point diverters (without losses) and 2/3 to the First Point diverters except during the period of September through February when all the flow over 300 cfs was allotted to the First Point diverters.⁴ (D 1196, Exhibits 1, 3 and 4.) The Miller-Haggin Agreement further provided that any water of the First Point diverters reaching the Second Point of Measurement was available for use by Second Point diverters. (Id.) Since 1894, detailed records of the entire Kern River natural flow and diversions have been maintained as required in the Miller-Haggin Agreement.

2. First Point Diverters

On August 6, 1900, certain individual appropriative rights of the First Point diverters were adjudicated by Judge Lucien Shaw, Kern County Superior Court. (D 1196, Exhibit 2.) The Shaw Decree reaffirmed the Miller-Haggin Agreement and set a maximum flow available for diversion and appropriation for fifteen separate rights. (Id., at pp. 10-11.) The Shaw Decree provides that when there is not sufficient water available for all of the rights, the order and priority stated in the decree shall be followed. (Id, at p. 10.) Since 1900, the individual appropriative rights of each First Point diverter has been allocated according to the rights and priority stated in the Shaw Decree and the First Point flow and diversion schedule. The current First Point diverters are North Kern Water Storage District, Kern Delta Water District and City of Bakersfield.

3. Second Point Diverters

Second Point entitlement is divided and apportioned according to the Miller-Haggin Agreement (as amended) together with any First Point entitlement reaching the Second Point of Measurement. (D 1196, Exhibits 1, 3, 4 and 5.) The current Second Point diverter is Buena Vista Water Storage District.

4. Lower River Diverters

On December 31, 1962, the First Point diverters, Second Point diverters, and Lower River diverters entered into a permanent agreement regarding apportionment of Kern River water and storage in Isabella Reservoir. (D 1196, Exhibit 5.) The parties agreed that all waters of the Kern River shall thereafter be divided and apportioned between the First Point

⁴ The Miller-Haggin Agreement has been amended in 1930, 1955 and 1964. In the 1964 Amendment, Second Point diverters were allocated by First Point diverters an increased Kern River supply when the flow at the First Point of Measurement is at specific higher stages of natural flow. For all months of the year all the waters of the Kern River are divided and apportioned each day between First Point and Second Point diverters.

and Second Point diverters (referred to as the “Upstream Group”) and certain Lower River diverters (referred to as the “Downstream Group”) according to a detailed schedule based on the calculated natural flow of the Kern River at First Point of Measurement. (Id., at pp. 2-3; Engineering Analysis, Table 3, at p. 9.) The Storage Agreement further provides that any water of the First Point and Second Point diverters which is not stored or diverted and that passes State Highway 46 shall belong to the Lower River diverters. (D 1196, Exhibit 5 at p. 7.) The current Lower River diverter is the Kern County Water Agency.

To address the pending applications considered in D 1196, the First Point, Second Point and Lower River diverters also agreed in the Storage Agreement as follows:

“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 the Kern River, and each party hereby covenants and agrees with the others that it will never make or assert against the other party or parties hereto any claim to any of the waters of the Kern River except the waters herein expressly apportioned to it. Each party agrees *all waters* of the 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 its respective rights and allocations of the parties hereto in accordance with the provisions of this contract.*” (D 1196, Exhibit 5, at p. 7.) (Italics added.)

D 1196 resulted in the denial of all pending applications to appropriate water from the Kern River System. (D 1196, at p. 5.)

III. PROCEDURAL HISTORY OF THE FAS DECLARATION

A. Decision 1196

1. Engineering Staff Report

Following the February 1964 hearing, the engineering staff of the State Board prepared an analysis which reviewed and summarized the D 1196 administrative record including the specific court decisions, decrees and agreements which apportioned the flow of the Kern River among the First Point, Second Point and Lower River diverters. (D 1196, Engineering Analysis, at pp. 6-10.) Additionally, the entire natural flow of the Kern River at the First Point of Measurement for a 70-year period (1894-1963)⁵ was tabulated annually based on records submitted by the Kern River Watermaster. (Id., Table 2, at p. 5.) Similarly, review was made of the record of beneficial use within the First Point, Second

⁵ The years 1954-1963 were adjusted to eliminate the effect of Isabella Reservoir.

Point and Lower River service areas for the 70-year period (1894-1963). (Id, Table 4, at pp. 10-11.) A comparison was made between the total natural flow (Table 2) and the total quantities of water beneficially used (Table 4) to determine “that *all of the water within the stream system* has been applied to beneficial use.” (Id.) (Italics added.) The Staff Engineer found that “in fact, there is a shortage of water within the service areas.”⁶

2. Decision 1196

Decision 1196 found that all the Kern River natural flow had been diverted from the Kern River for use on lands for irrigation use within the First Point, Second Point, and Lower River Service Areas by ditches and canals since prior to 1894. (D 1196 at pp. 4-5) Additionally, the State Board found that water had been “spread for percolation into the ground water basin for storage and later use on lands within the service areas, which provide cyclic storage for extended periods of drought.” (Id.) Decision 1196 concludes by stating,

“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 effect of Isabella Reservoir, shows that there is no water surplus to the established uses of the applicants, protestants, and other users in these areas.” (Id. at 5.)

B. Water Rights Order 89-25

Prior to issuing the FAS Declaration the State Board reviewed the administrative record supporting D 1196. Specifically, the State Board found:

“That record contains ample substantial evidence to support the finding that no water remains available for appropriation. The record also contains engineering staff analysis prepared by a senior staff engineer [of the State Board]. After reviewing the record of the hearing on the applications with which Decision 1196 was concerned, the engineer 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.” (WR 89-25, at p. 14.)

C. Subsequent State Board Orders

⁶ The Staff Engineer report explained that “this is supported by the fact that the water levels within the service areas are constantly declining, and that various agencies, which supply water to the service areas, have entered into or are negotiating for contracts to purchase additional water through the Friant-Kern Canal or the State Water Facilities.” (Id.)

The ruling in WR 89-25 has been confirmed on two occasions. (WR 91-07 and WR 94-1.) Directly related to the issues raised in this proceeding, the State Board denied a previous petition to modify the FAS Declaration based on alleged changed hydrologic conditions.⁷ (WR 94-1, pp. 7, 11) In that matter, the State Board confirmed that the Engineering Analysis supporting D 1196 “concluded that the entire flow of the Kern River has been beneficially used since 1894 . . . [and that the Decision] . . . states that there is no water surplus to the established uses within the First Point, Second Point, and Lower River Service Areas.” (Id. p. 6.) Further, the State Board confirmed that “Decision 1196 denied Applications 9446, 9447, 10941, 11071, 11148, 11351, 13709 and 154440, which requested a combined total of 6,600 cfs for direct diversion and 2,514,800 afa for storage, due to lack of unappropriated water.” (Id.)⁸

Importantly, the State Board ruled that the petitioner had the burden to “show that hydrologic conditions on the Kern River have changed since Decision 1196 was adopted or other circumstances exist that would justify the continued processing of [the] Application.” (Id., p. 7.) In the end, the State Board concluded “that the flow record which was submitted . . . is not adequate to make a *prima facie* showing that hydrologic conditions in the Kern River have changed.” (Id. p. 9.) (Italics added.) As a result, the request to modify the FAS Declaration was denied and the pending application was cancelled. (Id. p. 11.)

IV. CHANGE IN CIRCUMSTANCE – JUDGMENT OF FORFEITURE

All five petitions cite as the “change in circumstance” justifying revision to the Kern River aspect of the FAS Declaration, *North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th 555. Significantly, that litigation confirmed that water shortage is the rule rather than the exception on the Kern River. (North Kern Petition, Other Relevant Information (Exhibit 4) at p. 3) In fact, insufficient water to satisfy the claims of all right holders is a frequent occurrence; rarely is there sufficient water to satisfy all First Point diverters. (Id. at p. 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 appropriators.*” (citation

⁷ Petitioner, Lost Hills Water District, provided hydrologic data for six high flow years not considered in D-1196 (1966, 1967, 1969, 1978, 1980 and 1983). However, each of these years was of lesser natural flow than those previously relied upon by the State Board. (WR 94-1, p. 4.)

⁸ Two of the current petitioners, North Kern and Buena Vista, were co-applicants under the earliest filed application, Application No. 9446, filed on November 1, 1938 seeking the largest single amount of direct diversion (3,800cfs) and surface storage at Isabella Reservoir or other locations (800,000 afa.) Their application was denied.

omitted) (*North Kern*, 147 Cal.App.4th 555, 561.⁹) (Italics added.)

In *North Kern* four of Kern Delta's pre-1914 appropriations adjudicated in the Shaw Decree¹⁰ were held to be partially forfeited because of five years of nonuse (1972-1976.) (*Id.*, at 563-564, 585.) According to the Court of Appeal "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.*, at p. 580.) In months where no forfeiture was determined the paper entitlement remains as specified in the Shaw Decree. (*Id.*, at 582.) Specifically, *North Kern* provides that these appropriations can no longer exceed the specified amounts for certain months of the year.¹¹

V. BURDEN OF PROOF AND SCOPE OF THE REASONABLE CAUSE REVIEW

A. Burden to Present Evidence of Reasonable Cause

An applicant always has the burden of showing that there is unappropriated water available to supply the 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 revocation or revision to a FAS Declaration, "the focus of [the Chief of the Division of Water Rights] 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.)

Petitioners are required to produce, as part of the petition, "hydrologic data, water usage data, or other relevant information" upon which the Chief of the Division can base a determination of reasonable cause. (CCR § 871(c)(1).) Significantly, the showing must

⁹ More specifically the Court of Appeal 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 [], 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.)

¹⁰ The Shaw Decree rights partially forfeited are the first, second, fifth and sixth rights. (D 1196, Exhibit 2, at p. 10.)

¹¹ The 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); Farmers right to 150cfs (August 610 acre-feet; September 268 acre-feet; December 207 acre-feet.)

address the whole stream system as distinguished from a single right or grouping of rights on the stream system. (*Id.*) In particular, two key facts must be established: First, that the water released by forfeiture is “new water” which would not have reached the Kern River when D 1196 was issued. (*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” in 1964 without any interference, curtailment or injury to the prior right holders that existed at the time of D 1196 -- including the unmet demands and deficiencies not satisfied under prior existing rights. (*Id.* at pp. 22 and 28.)¹²

The release of existing natural flow due to a legal finding of forfeiture is unlike prior State Board decisions where physical changes 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.” (*In Matter of Petitions to Revise Declaration (Santa Ana River) 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. (*Draft Order Denying Petition to Revise The Declaration on Fully Appropriated Streams – American River* (2003), at p. 16.) Furthermore, even if “new water” is found to be added to the stream system it must also be proven that it is “sufficient to both make up for the flow deficiencies that existed at the time of the prior decisions were adopted and provide significant additional flow that may be available for appropriation.” (*Id.*, at p. 19.)

Significantly, none of the petitions demonstrate that the partial forfeiture creates “new water” not included in the natural flow considered in D 1196 or that the water released by forfeiture is surplus to the existing rights allocating all natural flow of the Kern River according to the Miller-Haggin Agreement (as amended), the Shaw Decree, and the 1962 Storage Agreement previously considered in D 1196. Specifically, no petition includes information showing that the next junior claimants under the Shaw Decree have not fully used all the waters released by Kern Delta’s forfeiture. Likewise, no petition contains information establishing that the waters released by forfeiture are not fully allocated under the Miller-Haggin Agreement which divides and apportions the entire Kern River flow between First and Second Point diverters. Similarly, no petition establishes that waters released due to Kern Delta’s forfeiture can bypass the prior rights of First Point, Second Point and Lower River diverters acknowledged in the 1962 Storage Agreement.

12 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.)].)

Until it is shown that it is necessary to revoke or revise the FAS Declaration, the State Board should not accept an application to appropriate waters of a stream system declared to be fully appropriated. (Water Code § 1206(a); *In Matter of Petitions to Revise Declaration* WR 2000-12 at p. 3.) Furthermore, unless a petitioner establishes that there is “unappropriated water” the State Board should not process an application. (Water Code § 1375(d); Cal. Code Regs., tit. 23, § 695; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102-103.)

B. Instream, Environmental & Permitting Considerations Are Excluded

The State Board has twice declared 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.” (*In Matter of Petitions to Revise Declaration* (Santa Ana River) WR 2000-12 at p. 14, fn. 12; *In Matter of Petitions to Revise Declaration* (Santa Ana River) WR 2002-0006 at p. 6, fn. 7.) In D 1196 and WR 89-25 there was no consideration or reliance on either instream or environmental considerations when the Kern River System was classified as fully appropriated.¹³ Consistent with prior orders of the State Board, the reasonable cause determination as well as any future proceeding determining whether to revoke or revise the FAS Declaration need not involve consideration and analysis of either instream or environmental considerations not previously relied upon in D 1196.

Additionally, at this stage of proceedings, other questions regarding a “new” appropriation under the applications should not be addressed. 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. 2.)

The State Board has correctly explained that after reasonable cause is established, “[t]he purpose of the water availability analysis [at a subsequently noticed public hearing] . . . is not to determine the specific amount of water available for appropriation by the petitioners after satisfying prior rights and providing appropriate protection for instream

¹³ The same is true for the subsequent orders of the State Board confirming that the Kern River System was fully appropriated. (See, WR Orders No. 91-97, 94-1 and 98-08.)

uses and the environment. Rather, the purpose is to determine whether the record establishes that there is *sufficient water available for appropriation to justify revision* of the fully appropriated stream status . . . to allow for acceptance of the petitioner's water right applications for processing." (*In Matter of Petitions to Revise Declaration (Santa Ana River)* WR 2000-12 at p. 13.) (Italics added.) Furthermore, "[t]he approval of the petitions does not constitute approval of the applications, nor does it imply the SWRCB believes the applications should be approved." (*Id.*, at p. 4.) "The approval of petitions simply allows the SWRCB to accept the petitioner's applications for processing in accordance with the normally applicable procedures." (*Id.*)

VI. GOVERNING POINTS OF APPROPRIATION LAW

A. Prior Rights

California law requires that the State Board recognize and protect prior existing rights before making an unappropriated water finding. (*United States*, *supra*, 182 Cal.App.3d at 102-103; *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450; Water Code § 1375(d).) Existing water rights of appropriators may not be interfered with or curtailed. (*State of California v. Superior Court* (2000) 78 Cal.App.4th 1019, 1026; *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.)

A fundamental principle of appropriation law is that a junior appropriator is entitled to have the quantity of water not diverted and used by a senior appropriator flow down the stream for satisfaction of its existing junior rights in order of priority. (*Dannenbrink v. Burger* (1913) 23 Cal.App. 587, 594-595; *Senior v. Anderson* (1900) 130 Cal. 290, 297; *Duckworth v. Watsonville, Etc. Co.* (1907) 150 Cal. 520, 533; Hutchins, *The California Law of Water Rights* (1956), at 139, 156-157; Slater, *Cal. Water Law & Policy* (1999), § 2.29 at 2-87; *See also, State of California v. Superior Court*, *supra*, 78 Cal.App.4th 1019, 1028¹⁴.) Likewise, as between appropriators, "the one first in time is first in right" and the next most senior appropriator is entitled to take what "he has in the past before a subsequent appropriator may take any." (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926, citing *City of San Bernardino v. City of Riverside* 186 Cal. 7, 26-28; Hutchins, *The California Law of Water Rights*, *supra*, at 154-155.)

Any appropriation permit issued by the State Board is subject to vested rights and prior existing appropriative rights remain unaffected by its issuance. (*United States v. State Water Resources Control Bd.*, *supra*, at 103; Water Code § 1228.6(a)(1); *In the Matter of Application 5625, et al.*, Decision 1379 (1971) [1971 WL 15197, 3 (Cal.St.Wat.Res.Bd.)].) As the California Supreme Court stated in *Meridian, Ltd. v. San Francisco*, *supra*, 13 Cal.2d 424:

14 "[W]here a thing is subject to rights which limit the owner's rights the quintessential element of ownership is that the owner's right's *increase* as those of the other *decrease* or are *extinguished*. (Rest. Property, § 10.)" *Id.* at 1028.

“It should be the *first concern of the court in any case* pending before it and of the department [now the State Board] in the exercise of its powers under the act to *recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream.*” *Id.*, at 450. (Italics added.)

Thus, a newly permitted appropriation cannot impair an existing appropriative right, and the priority of the right acquired under the permit will be the date of filing of the application – the priority will not relate back to the time of the first use under a former claim. (See, State Water Resources Control Board, *Information Pertaining to Water Rights in California* (1990) at 6.) “[W]ater right priority has long been the central principle in California water law” and priorities of existing water rights may not be disregarded or ignored.¹⁵ (*City of Barstow v. Mojave Water Agency, supra*, at pp. 1243, 1247-1251.) The State Board “has no power to grant a permit unless there is unappropriated water,” i.e., water in excess of what could be used under existing rights. (*Modesto Properties Co. v. State Water Rights Board* (1960) 179 Cal.App.2d 856, 862.) Indeed, a “permit of the board only affects unappropriated water and *cannot ... affect prior or vested rights.*” *Id.* (Italics added.)

The Court of Appeal in *North Kern* reached the same conclusion stating,

“Even if the forfeiture [of Kern Delta rights] results in the existence of unappropriated water that can be awarded by the SWRCB, the fundamental first-in-time, first-in-right nature of appropriative rights means that a newly permitted SWRCB appropriative right will be junior to all existing pre-1914 rights. . . Any new permit for such an appropriation, however, will be ‘last in time’ and will neither reduce nor augment pre-1914 rights of other appropriators.” (*North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th at pp. 583-584.)

B. Surplus Water

According to Water Code Section 1202(b), water appropriated prior to December 19, 1914 does not become “unappropriated water” unless it “... has ceased to be put to some useful or beneficial purpose.” (See also, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442.) In other words, as stated by one commentator, only water that:

“has *not* been previously put to beneficial use by another lawful user, *including a prior appropriator ...*, is subject to appropriation in accordance with the Water Code.” (Slater, *California Water Law and*

15 “As between appropriators ... the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any.” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241.)

Policy, § 2.14 at 2-31, italics added.)

Water is subject to appropriation only when the waters of a stream are “surplus” to the reasonable and beneficial requirements of existing rights. (*Stevinson Water Dist. v. Roduner* (1950) 36 Cal.2d 264, 270; Slater, *California Water Law and Policy*, § 2.14 at 2-33 [“Only surplus water is subject to appropriation. Surplus water is generally construed to mean water that is not presently being beneficially used by another appropriator or riparian user”]; *Rank v. Krug*, 142 F. Supp. 1, 110 (1956) [“A proper appropriation may be made *only of excess or surplus* waters which are defined as ‘any water not needed for the reasonable beneficial uses of those having prior rights.’”].)

This principle was recognized by the California Supreme Court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351:

“... where all the waters of a stream are put to reasonable beneficial uses under reasonable methods of use and reasonable methods of diversion and there is no unusual waste or surplus water to be captured, there is nothing left for appropriation. This is self-evident.” *Id.* at 369. (Emphasis added.)

Later, in *Meridian, Ltd., v. San Francisco, supra*, 13 Cal.2d 424, the Court defined “surplus” waters as:

“... waters of the stream subject to appropriation for beneficial use over and above what may reasonably be subjected to a beneficial use ... by prior appropriation[s].” *Id.* at 458. (Emphasis added.)

The partial forfeiture of Kern Delta’s pre-1914 appropriations, can only result in “unappropriated water” to the extent it results in a quantity of “new water” that is in excess of or surplus to the beneficial uses of all prior existing rights. (Water Code §§ 1201, 1202, 1225; Cal. Code. Regs., tit. 23 § 695; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442; *Stevinson Water Dist. v. Roduner, supra*, 36 Cal.2d 264, 270; Slater, *California Water Law and Policy*, § 2.14, at 2-33; other authorities *supra*.) This conclusion squares with regulations adopted by the State Board:

“A permit can be issued only for unappropriated water. Unappropriated water does not include water being used pursuant to an existing right, whether the right is owned by the applicant, or by another person.” Cal. Code. Regs., tit. 23, § 695. (Emphasis added.)

Likewise, this result conforms to standard permit conditions utilized by the State Board:

“Rights under this permit are, and shall be, specifically subject to existing rights determined by the Adjudication . . .” (Standard Permit Term, 23)

“The issuance of this permit shall not be construed as placing a limitation on any riparian right or decreed right to the waters of . . . held by the permittee.” (Standard Permit Term 115)

“This permit is specifically subject to the prior right . . . under appropriation issued . . .” (Standard Permit Term T)

C. Disposition of Forfeited Water Rights

Water rights expert Wells A. Hutchins, addressed the subject of disposition of water lost by forfeiture in Volume II of his work entitled *Water Rights Laws in the Nineteen Western States* (1974). After reviewing the forfeiture statutes of 11 states, Hutchins observed that each contains varying provisions providing for reversion and subsequent appropriation. (*Id.*, Vol. II, at 314.) However, recognizing that waters of a stream – regardless of who owns them – may be subject to other private water rights validly acquired, Hutchins explained that:

“... upon cessation and extinction of an appropriative right to divert and use water of a stream as a result of forfeiture, the quantity of water thereby left flowing in the stream instantaneously either (1) ceases to be appropriated water and instead becomes unappropriated water available for reappropriation, or else (2) becomes part of the supply to which existing junior rights theretofore not fully satisfied immediately attached to the extent of their lawful requirements. . . . A statement in the statute that the water to which a forfeited right formerly attached reverts to the public neither strengthens nor weakens the practical result of forfeiture – that this formerly appropriated water becomes, both *ipso facto* and *ipso jure*, either unappropriated water or water needed to satisfy the lawful requirements of existing junior appropriators.” (*Id.* at 314. (Underling added, italics original.)

Hutchins explained further that, whether the water lost by forfeiture becomes unappropriated or not depends on whether the waters of the stream are adequate for the lawful requirements of all water users who hold rights to the use thereof. If not, the water is first available for diversion and use by those holding junior appropriations¹⁶ to the extent of their existing rights. In this regard, after reviewing the case law on the subject, Hutchins states:

“... in a situation [of] ... overappropriated streams¹⁷, ... part or all of the

16 Hutchins, *Water Rights Laws in the Nineteen Western States*, *supra*, at 314, citing *Hufford v. Dye* (1912) 162 Cal. 147, 154-155.

17 In a 1943 case reviewed by Hutchins, the Utah Supreme Court stated:

water released by consummation of forfeiture does not become unappropriated, because the stream is already *overappropriated*. Therefore, part or all of such released water, as the case may be, instantly and automatically, with no lapse of time, inures to the benefit of junior appropriators who have first claim upon the increment for the purpose of 'feeding' their rights up to the maximum to which they are entitled when water is available therefore." *Id.* at 315. (Underling added, italics original.)

To similar effect, the *North Kern* court determined,

"[w]hen a natural watercourse is fully appropriated, as the Kern River is, forfeiture of an appropriative right may or may not result in unappropriated water that 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 entitlements.*" (*North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th 555, 583.)¹⁸ (Italics added.)

VII. A LIMITED SCOPE OF INQUIRY SHOULD BOUND ANY HEARING ON THE FAS PETITIONS

In the event you conclude that reasonable cause does exist, the inquiry at hearing is necessarily very narrow. Specifically, the scope of hearing is properly limited to: (1) whether water released by Kern Delta's forfeiture is "new water" which would not have reached the Kern River when D 1196 was issued; and (2) whether circumstances have changed so that the "new water" released by forfeiture would be available for appropriation without any interference, curtailment or injury to the prior right holders that existed at the time of D 1196 -- including the unmet demands and deficiencies of First Point, Second

"Even though title [to the water] were to revert to the public, it is unlikely that it would be available for appropriation ... for on practically every stream in this State there are junior appropriators whose applications have been approved by the State Engineer for a total of more water than ordinarily is available in the stream. The reversion of this water would then go to feed these rights of the junior appropriators." (*Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 462, 137 P.2d 634 (1943).)

18 Previously, the Court of Appeal had cited with approval, *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, *supra*, 104 Utah 448, 462, for the principle that "forfeited water will actually feed the *existing* entitlements of junior appropriators, a practical result not the equivalent to the expansion of existing junior entitlements." (North Kern Petition, Other Relevant Information, Exhibit 4, p. 44.)

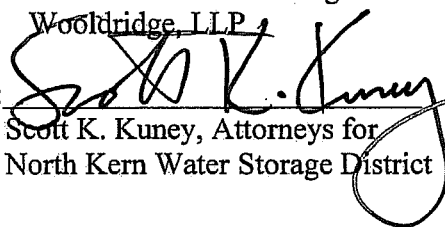
Point, and Lower River diverters. (See, *Draft Order Denying Petition to Revise The Declaration on Fully Appropriated Streams – American River* (2003), at pp. 16, 22 and 28.) Importantly, the hearing properly excludes issues involving instream or environmental considerations not relied upon in D 1196, as well as issues regarding the specific amount of water available for appropriation, the season of water availability, approval or denial of the applications, and the conditions to be included in any permit(s) that could possibly be issued in the future. In this regard, further proceedings are required to recognize and protect prior existing rights before making an unappropriated water finding.

VIII. CONCLUSION

For the forgoing reasons, the undersigned public agencies respectfully request that you determine that no reasonable cause exists to conduct a hearing on the question of whether the FAS Declaration regarding the Kern River System should be changed based on *North Kern Water Storage District v. Kern Delta Water District, supra*, 147 Cal.App.4th 555.

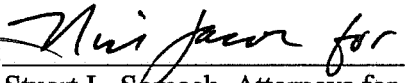
The Law Offices of Young
Woodbridge, LLP

By:


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

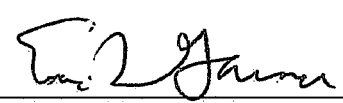
Somach, Simmons & Dunn

By:


Stuart L. Somach, Attorneys for
Kern County Water Agency

Best, Best & Krieger LLP,

By:


Eric L. Garner, Attorneys for
City of Shafter

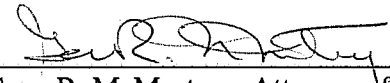
Downy Brand LLP

By:


Kevin M. O'Brien, Attorneys for
Kern Water Bank Authority

McMurtrey, Hartsock & Worth

By:


Gene R. McMurtrey, Attorneys for
Buena Vista Water Storage District