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STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

September 26, 2007

By Hand Delivery

State Water Resources Control Board
Division of Water Rights
1001 I Street
Sacramento, California 95814
Attn: Victoria Whitney, Deputy Director

Re: Petition to Revise Declaration of Fully Appropriated Stream Systems for the Kern River
& Application to Appropriate Water

Dear Ms. Whitney:

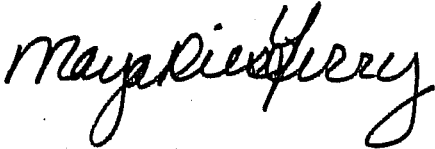
Enclosed for filing please find a Petition to Revise the Declaration of Fully Appropriated Stream Systems for the Kern River, an Application to Appropriate Water, an Underground Storage Supplement form, and a check payable to the California Department of Fish and Game in the amount of \$850.00. These documents are submitted on behalf of the Kern Water Bank Authority.

We have determined that the State Water Resources Control Board's fees for this Petition and Application amount to \$420,000, pursuant to 23 Cal. Code Regs. § 1062. Kern Water Bank Authority will handle the payment of this fee electronically. We understand that if the State Water Resources Control Board does not grant the Petition to Revise the Declaration of Fully Appropriated Stream Systems, and as a result the Application is not accepted for filing, this fee will be refunded minus the non-refundable \$250 fee for initial review. See 23 Cal. Code Regs. §§ 871(c), 1062(c); Division of Water Rights Application Instruction Booklet, p. 3.

Thank you in advance for your attention to this matter. Please feel free to contact me if you have any questions.

Very truly yours,

DOWNEY BRAND LLP



for Kevin M. O'Brien

cc: Jon Parker, General Manager, Kern Water Bank Authority

Enclosures

854081.1

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7
8 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
9 **STATE OF CALIFORNIA**

10
11
12 **In the Matter of the Kern River Stream**
13 **System**

KERN WATER BANK AUTHORITY'S
PETITION FOR HEARING TO
DETERMINE WHETHER THE FULLY
APPROPRIATED STATUS OF THE KERN
RIVER STREAM SYSTEM SHOULD BE
REVOKED OR REVISED

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16 Pursuant to Cal. Water Code § 1205(c) and title 23, Cal. Code Calif. Regs. § 871(c), the
17 Kern Water Bank Authority ("KWBA") hereby petitions the State Water Resources Control
18 Board ("State Board") and the Chief, Division of Water Rights, for a hearing to determine
19 whether the fully appropriated status of the Kern River stream system should be revoked or
20 revised. In the event the State Board determines, following notice and hearing, that the fully
21 appropriated status of the Kern River stream system should be revoked or revised, KWBA
22 requests leave to file the attached application to appropriate water from the Kern River
23 ("Application"). KWBA respectfully submits this Petition and the Application on behalf of the
24 following member entities of KWBA: Dudley Ridge Water District, Semitropic Water Storage
25 District, Tejon-Castac Water District, Westside Mutual Water Company, LLC and Wheeler
26 Ridge-Maricopa Water Storage District.
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INTRODUCTION

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2 1. In Decision 1196 (1964), the State Board's predecessor denied several applications
3 to appropriate water from the Kern River based on the finding that "[t]here has been no showing
4 that there is unappropriated water available to supply the applicants." (Decision 1196 at 5).
5 Subsequently, Water Right Order Nos. 89-25, 91-07, 94-1 and 98-08 each confirmed the Kern
6 River's fully appropriated status. Consistently, the State Board has found that "the entire flow of
7 the Kern River has been beneficially used since 1894."

8 2. In *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 147 Cal. App. 4th
9 555, 564, 585 (2007) (hereinafter "*North Kern*"), the court held that Kern Delta Water District
10 had forfeited a substantial amount of its Kern River water rights. The court further held that only
11 the State Board can determine whether the forfeiture creates unappropriated water. (*Id.* at 583-
12 84.) The *North Kern* decision has created substantial uncertainty as to whether the Kern River
13 continues to be fully appropriated.

14 3. KWBA is informed and believes and thereon alleges that on or about April 25,
15 2007 the North Kern Water Storage District and the City of Shafter jointly filed with the State
16 Board a petition to revoke and/or revise the declaration that the Kern River is a fully appropriated
17 stream; and that similar petitions have been filed by the City of Bakersfield and the Buena Vista
18 Water Storage District.

19 4. KWBA files this Petition for the limited purpose of seeking a determination that
20 reasonable cause exists to conduct a hearing on the question whether the fully appropriated status
21 of the Kern River stream system should be revoked or revised, in order to resolve the current
22 uncertainty as to whether the Kern River continues to be fully appropriated.

THE KERN WATER BANK

23
24 5. KWBA is a joint exercise of powers authority organized and existing pursuant to
25 Cal. Government Code § 6500 *et seq.* The member entities of KWBA are: Dudley Ridge Water
26 District, Kern County Water Agency, Semitropic Water Storage District, Tejon-Castac Water
27 District, Westside Mutual Water Company, LLC and Wheeler Ridge-Maricopa Water Storage
28 District. The rights and responsibilities of the member entities of KWBA are set forth in that

1 certain "Joint Powers Agreement for Kern Water Bank Authority" dated October 16, 1995, as
2 amended. The primary purpose of the Kern Water Bank is to recharge, store and recover water to
3 improve water supply for KWBA member entities. The Kern Water Bank also provides
4 significant environmental benefits, including the enhancement of habitat for threatened and
5 endangered species, waterfowl and other wildlife.

6 6. KWBA owns approximately 20,500 acres of land located southwest of Bakersfield
7 in Kern County, on which Kern Water Bank operations occur. The Water Bank is uniquely
8 situated for groundwater banking operations due to its geology and proximity to water supply and
9 delivery systems. The Water Bank is located on the Kern River alluvial fan, an area consisting of
10 vast alluvial deposits that provide a highly effective mechanism for direct groundwater recharge.
11 The Water Bank can receive water from three sources: the Kern River, the California Aqueduct
12 and the Friant-Kern Canal. To date, approximately 1.3 million acre-feet of water have been
13 stored in the Kern Water Bank. The Water Bank has the capability of extracting approximately
14 240,000 acre-feet per year.

15 WATER RIGHTS ADMINISTRATION ON THE KERN RIVER

16 7. The natural flow of the Kern River has been apportioned among various water
17 users pursuant to a series of court decisions and agreements including but not limited to the
18 following: (a) decision of the California Supreme Court in *Lux v. Haggin* (1886) 69 Cal. 255; (b)
19 1888 Miller-Haggin Agreement; (c) 1900 decree of the Kern County Superior Court in *Farmers*
20 *Canal Company, et al. v. J.R. Simmons, et al.*, Case No. 1901 (hereinafter "Shaw Decree"); (d)
21 1930 amendment to the Miller-Haggin Agreement; (e) 1955 amendment to the Miller-Haggin
22 Agreement; (f) 1964 Amendment to the Miller-Haggin Agreement; (g) 1962 Kern River Water
23 Rights and Storage Agreement; and (h) Lake Isabella Recreation Pool Agreement. These
24 decisions and agreements are collectively referred to in this Petition as the "Law of the River."
25 The Law of the River is administered by the Kern River Watermaster.

26 8. Pursuant to the 1962 Kern River Water Rights and Storage Agreement, the Kern
27 River Watermaster prepares records of Kern River flows, storage and releases from Isabella
28 Reservoir. Since at least 1986, the Kern River Watermaster has implemented a "Policy Re

1 Utilization of Isabella Reservoir Flood Releases" (hereinafter "Flood Policy"). The Flood Policy
2 has been implemented pursuant to the agreement and consent of other water right holders on the
3 Kern River. The Flood Policy provides that during periods of time in which (1) abnormal flow is
4 being released from Isabella Reservoir by order of the Corps of Engineers, and (2) such flow is
5 entering into the California Aqueduct through the Kern River Intertie:

6 "[w]ater will be made available to any person, interest or group in
7 Kern County who wish to divert that water, up to the amount of
8 water flowing into the Intertie, provided such interest, person or
9 group acknowledges their desire to divert said water by executing
10 an "Order" which shall include, among other things, a description
11 of the point they wish to divert such flow, the rate of flow they wish
to divert and provide a schedule such that the request may be
honored by the operating Kern River entity. This policy is without
prejudice to the rights of any of the Parties."

12 9. In recent years, KWBA has diverted and utilized Kern River flood flows for
13 groundwater recharge purposes in accordance with the Flood Policy. KWBA's diversion and use
14 of Kern River flood flows has been under the direction and control of the Kern River
15 Watermaster, and in accordance with the Law of the River.

16 10. The SWRCB may revise the declaration of fully appropriated status for any stream
17 system upon receipt of a petition for such revision from any person. Water Code § 1205(c); 23
18 Cal. Code Regs. § 871(c). The SWRCB may revise the declaration:

19 based upon any relevant factor, including but not limited to a change in
20 circumstances from those considered in a previous water right decision
21 determining that no water remains available for appropriation, or upon
reasonable cause derived from hydrologic data, water usage data, or other
relevant information. 23 Code Calif. Regs. § 871(b)

22 11. A decision to revise the declaration does not reach the merits of any applications
23 for the unappropriated water that may be lodged with the SWRCB, the nature of any conditions,
24 or whether the unappropriated water must be made available for environmental purposes. In Re
25 Fully Appropriated Stream Petition for the Santa Ana River, WR 2000-12 at 14 (2000). As the
26 State Board stated in the Santa Ana River proceeding:

27 All questions regarding the specific amount of water available for
28 appropriation under the applications, the season of water availability,
approval or denial of the applications, and the conditions to be included in

1 any permit(s) that may be issued on the applications will be resolved in
2 further proceedings on each application pursuant to applicable provisions
of the Water Code. (*Id.* at 2.)

3 12. The Court of Appeal decision in *North Kern* constitutes a "change in
4 circumstances" and "reasonable cause," within the meaning of 23 Cal. Code Regs. § 871(c), for
5 the State Board to hold a hearing on whether to revoke or revise the fully appropriated status of
6 the Kern River stream system.

7 **REQUEST FOR RELIEF**

8 For the reasons stated, KWBA respectfully requests that the State Board and the Chief,
9 Division of Water Rights, order a hearing to determine whether the fully appropriated status of
10 the Kern River stream system should be revoked or revised.

11
12 DATED: September 24 2007

DOWNEY BRAND LLP

13
14 By: Maya Rishory
15 for KEVIN M. O'BRIEN
16 Attorney for Petitioner
Kern Water Bank Authority