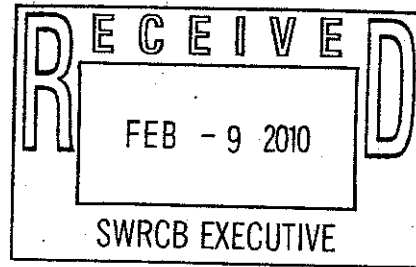


State of California

Memorandum

Date: February 9, 2010

To: Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814-2828



Via electronic mail to: commentletters@waterboards.ca.gov

From: Department of Water Resources

Subject: COMMENT LETTER - 02/16/10 BOARD MEETING ITEM: ORDER - KERN RIVER

The Department of Water Resources (Department) has reviewed the draft order amending the declaration of fully appropriated streams to remove the designation of the Kern River as fully appropriated (Draft Order). The Department requests that you submit these comments on the above Draft Order to the members of the State Water Resources Control Board (State Water Board) before the Board's February 16 meeting. As requested in the Notice, the Department also will be delivering a hard copy of this letter with an original signature.

The Draft Order brings up the physical diversion of water by the Kern River Intertie, which, on occasion, puts extraordinarily high flows into the California Aqueduct to prevent property damage downstream where the Kern River naturally drains. The purpose of the Intertie operation is not to divert water for beneficial use but to direct it out of the river for flood protection purposes. The statement on page 5 of the Draft Order that the Intertie diversions are "without a valid basis of right" is both unnecessary and misleading and should be deleted.

The flood operations of the Intertie are not made under claim or requirement of proprietary right to divert water from the Kern River for beneficial use purposes (i.e., a water right) but rather under the governmental authority and power to direct damaging flows out of the Kern River for flood control and safety purposes granted under Division 6 of the Water Code and under federal flood control law. Under these separate, independent authorities and responsibilities, the Department and local responsible agencies cooperate with the federal government in authorized flood control projects like the Kern River Intertie, including the operation and maintenance of the facility pursuant to federal law as directed by State law. Flood control projects frequently require the physical diversion of potentially damaging high water. The Board has traditionally and properly recognized that flood control diversions fall outside its water rights authority.

The key point, however, is that it is not necessary to raise or resolve the basis of right in this proceeding. The question before the Board is whether the Kern River is fully appropriated or whether the Board should entertain water right applications because there is unappropriated water in the system. The Intertie operation simply does not

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affect that determination. The very purpose of the Intertie is only to take flows that will otherwise remain in the stream and cause damage at the bottom of the system. And, if those flows are diverted out of the stream under a water right—reducing or perhaps even eliminating the need for the Intertie to intercept them—so much the better from the flood perspective. It is the Department's view that from a flood control perspective, there is no inconsistency or objection to others taking water from the Kern under water rights that would otherwise be removed by Intertie flood operations. It is therefore not necessary for the Board to characterize or even raise Intertie operations in this proceeding. Moreover, the Intertie has been in operations since the 1970's. The Board has never made a determination that the Intertie was operating without a valid right and it should not do so now in the proceeding.

For the benefit of the Board's further understanding of the Department's position, our view is that the fact that the water that is physically diverted by the Intertie and received into the California Aqueduct is later put to beneficial use does not change the central fact that the *purpose* for which the water is being diverted is not beneficial use but flood safety purposes which are outside the Board's statutory purview.

We are concerned that this decision could have impact Department's flood operations in the Sacramento and San Joaquin River Flood Systems. The disposition of the water after it is diverted for the purpose of preventing flood damage does not create jurisdiction in the Board over the original diversion into the Intertie for State and federal flood protection purposes any more than does the fate of water on the Sacramento and San Joaquin systems confer Board authority over the diversion of water to project flood storage or into project flood bypasses. Subsequent beneficial use occurs incident to the disposition of the diverted flood waters in the Aqueduct, but it is neither a criterion nor a purpose—even a secondary purpose—of the project or of the diversion it. The fact of beneficial use changes neither the purpose nor the nature of the physical diversion, and that diversion, made pursuant to State and flood control federal authority and directives, would be exactly the same if the water were instead disposed of to the ocean.

The Kern River does not drain to the sea but to low-lying land. Unlike most flood protection projects where the objective is to *contain* high water *in the channel*, in the case of the Intertie, the objective is to physically *remove* potentially damaging high flows *from the channel*. The Intertie is thus a relief valve—like the weirs and flood relief structures that control river stage on the Sacramento and San Joaquin systems—and the California Aqueduct simply provides a needed place to put the water taken from the

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Kern River for flood relief purposes. The Department does not request this water but accepts it when there is capacity in the California Aqueduct and when the physical and operational integrity of the aqueduct will not be jeopardized. Historically, when the need for use of the Intertie arose, DWR curtailed its diversions in the Delta to the degree necessary to create capacity to accept the flood relief water into the aqueduct and to thereby accommodate the additional public flood safety purpose.

Water rights are individual property rights conferred under the authority of Division 2 of the Water Code which entitle their holders to divert water from watercourses for beneficial use. The Kern River Intertie Project, on the other hand, diverts high flows for flood protection purposes under the authority conferred by different and independent State and federal statutory flood control schemes. The Department believes that the matter of Intertie operations is not in issue and need not be raised in these proceedings. But we are of the firm view that Intertie operations have always been conducted in accordance with law. For both reasons, we request that the referenced language on page 5 be deleted.

The Department appreciates the opportunity to review and comment on the Draft Order. If the State Water Board or its staff wishes to discuss these comments further, please contact me at (916) 653-7084 or you may also contact Erick Soderlund of my staff at (916) 653-8826.

Sincerely,



David Sandino
Chief Counsel

cc: Service List and Interested Parties (see attached)

HEARING REGARDING PETITION TO REVISE THE DECLARATION OF FULLY
APPROPRIATED STREAM SYSTEM OF THE KERN

SERVICE LIST AND INTERESTED PARTIES
(January 20, 2010)

<p>CENTER FOR BIOLOGICAL DIVERSITY c/o Adam Keats 351 California Street, Suite 600 San Francisco, CA 94104 akeats@biologicaldiversity.org</p>	<p>KERN COUNTY WATER AGENCY c/o Nicholas Jacobs Somach, Simon & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 njacobs@somachlaw.com</p>
<p>KERN WATER BANK AUTHORITY c/o Kevin M. O'Brien Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 kobrien@downeybrand.com jschofield@downeybrand.com tkuntz@downeybrand.com</p>	<p>CITY OF SHAFTER c/o Jason M. Ackerman Best, Best & Krieger LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 jason.ackerman@bbklaw.com jill.willis@bbklaw.com</p>
<p>BUENA VISTA WATER STORAGE DISTRICT c/o Gene R. McMurtrey McMurtrey, Hartsock & Worth 2001 22nd Street, Suite 100 Bakersfield, CA 93301 gene@mcmurtreyhartsock.com</p>	<p>CITY OF BAKERSFIELD c/o Colin L. Pearce Duane Morris LLP One Market, Spear Tower, Suite 2200 San Francisco, CA 94105-1127 clpearce@duanemorris.com</p>
<p>NORTH KERN WATER STORAGE DISTRICT c/o Scott K. Kuney Young Wooldridge, LLP 1800 30th Street, Fourth Floor Bakersfield, CA 93301 skuney@youngwooldridge.com</p>	
<p>KERN COUNTY FARM BUREAU c/o Mike Young 19000 Wildwood Road Buttonwillow, CA 93206 michaelcyoung@sbcglobal.net</p>	<p>WESTERN GROWERS ASSOCIATION c/o Thomas Nassif 17620 Fitch Street Irvine, CA 92614 tnassif@wga.com</p>

<p>KERN DELTA WATER AGENCY c/o L Mark Mulkay 501 Taft Highway Bakersfield, CA 93307 mulkay@kerndelta.org</p>	<p>WESTERN GROWERS ASSOCIATION c/o Gail Delihant 1415 L Street, Suite 1060 Sacramento, CA 95814 gdelihant@wga.com</p>
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