2/16/10 Bd. Mtg.
Kern River
Deadline: 2/9/10 by 12 noon

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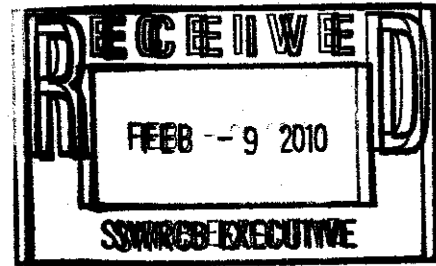


Via email to: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: **COMMENT LETTER - 02/16/10 BOARD MEETING ITEM: ORDER – KERN RIVER**

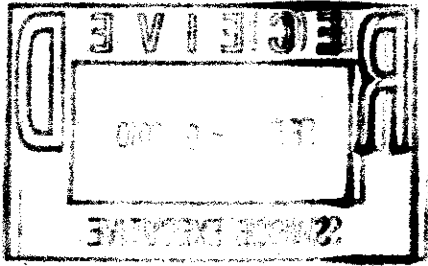
Dear Ms. Townsend:

This firm represents Kern County Water Agency (KCWA) in the hearing on petitions to revise the fully appropriated stream status of the Kern River. This letter provides KCWA's comments on the January 19, 2010 draft Order Amending Declaration Of Fully Appropriated Streams To Remove Designation Of The Kern River As Fully Appropriated (hereafter "Draft Order"). In response to these comments and the comments of other parties interested in this matter, KCWA respectfully requests that the State Water Resources Control Board (Board) amend its Draft Order to find that there is no water available for appropriation and dismiss the petitions/applications. In the alternative, KCWA requests that the final order include language clearly defining the water available for appropriation and the scope of matters to be considered during the second phase of these proceedings.

A. The Board Needs to Follow Its Own Regulations and First Determine Whether the Water Made Available by the *North Kern*[1] Decision is Available for Appropriation Before Accepting/Processing Applications

The Board's regulations provide for a two-phased approach to considering petitions to revise the fully appropriated status (FAS) of a stream and the accompanying water rights applications. In the first phase, the Board determines whether to revise the FAS declaration. (See 23 Cal. Code Regs., § 871(c)(3).) Prior to and during this phase of the proceedings, the Board "retains" the water rights applications that accompanied the petitions to revise the FAS declaration. (*Ibid.*) If the Board concludes the first phase of the proceedings by ruling "in a

[1] See *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555.



manner which would make the proposed application or registration acceptable," then "the proposed application or registration will, if otherwise complete pursuant to the law and the rules of the board, be accepted." (*Ibid.*) The "acceptance" and processing of the applications constitutes a second phase of the proceedings.

The phased approach to processing petitions to revise the FAS declaration and associated applications is logical and efficient. In the first phase, the Board identifies what, if any, water is available for appropriation. This determination provides crucial information to the parties pursuing water rights applications. Assuming the Board finds there is water available for appropriation, the details of this determination will help guide the applicants in the second phase of the proceedings. For instance, perhaps in the first phase of proceedings the Board identifies water available for appropriation, but this water is not available in the relevant season of use, or is not capable of diversion by an applicant. This information would be crucial to an applicant's decision on whether to proceed with processing the application. If the Board's earlier rulings regarding what/when/where water is available demonstrate that further pursuit of a particular application is fruitless, then the applicant can make a reasoned decision to withdraw its application. Proceeding in this manner conserves the time and resources of the Board, the applicant, and the other parties.

In contrast, where the Board does not clearly describe what water is deemed available for appropriation in the first phase of proceedings, then uncertainty and inefficiency will define the second phase during which applications are processed. The Draft Order fails to rule on the key issue of whether the water made available by the *North Kern* decision is available for appropriation. KCWA, along with the other cooperating petitioners in this matter (Joint Petitioners), submitted significant evidence demonstrating that the *North Kern* judgment did not make available water in excess of existing water entitlements. The City of Bakersfield produced no contradicting evidence. As such, the Draft Order should concur with the analysis and conclusions presented by the Joint Petitioners.

Regardless of whether the Board adopts the position of the Joint Petitioners, however, it is crucial that the Board make a decision regarding whether the *North Kern* decision resulted in water available for appropriation – and the details regarding when, where and how much of this water is available. Deferring a decision on whether the *North Kern* case resulted in water available for appropriation until the application-processing phase will create two immediate problems. First, it is unclear what additional evidence the Board wants to consider before making a decision on whether the *North Kern* decision resulted in water available for appropriation. The Joint Petitioners spent tens of thousands of dollars hiring consultants to run exhaustive diversion and use scenarios with/without the water made available by the *North Kern* decision, and going back to 1964 (a date that corresponds with D-1196, which found the Kern River fully appropriated). The parties have already presented their evidence and analysis in this regard, and so without direction from the Board, the Joint Petitioners are uncertain what additional sources of evidence/analysis are necessary for the Board to make its decision.

Second, the Board currently has on deposit over two million dollars in fees that were submitted along with the various petitions/applications in this matter. With the exception of the $10,000 fee associated with processing petitions and the $250 non-refundable application fee, the remainder of these fees would be returned to the applicants if they chose not to pursue their applications after the initial determination on whether or not to revise the FAS petition. (See 23 Cal. Code Regs., §§ 676 and 871.) It is very likely that if the Board initially determined, in accordance with the evidence/analysis presented by the Joint Petitioners, that the *North Kern* case did not result in water available for appropriation, then most if not all of the petitions/applications in this matter would be canceled by the applicants. But, allowing the crucial determination on the *North Kern* water to drag into the phase where applications are processed may improperly encourage the Board to keep the application fees before determining the *North Kern* issue.[2] In accordance with the process described in 23 California Code of Regulations, section 871, the applicants must be afforded the opportunity to understand and consider what water is available for appropriation before deciding whether to pursue their applications in the second phase of the proceedings.

B. The Kern River FAS Declaration Should Not Be Amended Simply Because There is Occasional Flooding

The Draft Order revises the Kern River FAS status solely because the Kern River occasionally floods. (See Draft Order, pp. 4-5.) Oddly, the word "flood" is never used in the Draft Order. Instead, the Draft Order focuses on the term "undistributed water" that was used in Mr. Easton's testimony on behalf of the Joint Petitioners. The order totally fails to acknowledge, however, that these waters are "undistributed" because they occur in flooding conditions when all parties have more water than they can handle and *no entity in the Kern River basin* wants this water. (See Joint Exhibit 46, ¶ 25(i) [where "undistributed release" is defined as "water discharged into the Intertie during flood control operations"].)

While generally flood waters may be appropriated, there is no party in this matter specifically seeking to appropriate the Kern River flood flows. All petitioners are focused on the *North Kern* judgment and any water made available thereby. As such, it simply makes no sense to process the applications submitted in this matter based solely on a finding of available flood waters.[3]

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[2] Just to be clear: KCWA does not admit nor believe that the Board may lawfully retain the application fees by blending the first and second phases of the FAS revisions process, or that the Board could retain fees in excess of the services actually provided to the applicant if the application were canceled early in the processing phase. (See *Sinclair Paint Co. v. St. Bd. of Equalization* (1997) 15 Cal.4th 866, 878.)

[3] As described in more detail in the brief submitted by the Joint Petitioners, the most appropriate means of handling applications for flood waters on streams designated as fully appropriated is through the temporary permit process of Water Code section 1425 et seq. (See Wat. Code, §§ 1206(c) and 1425 et seq.)

It appears that the true intent of the Board is to seek some action by the California Department of Water Resources (DWR) related to its use of waters discharged into the California Aqueduct by Intertie operations. KCWA supports DWR's position on this matter, as described in DWR's accompanying comment letter. The Board's apparent interest in DWR's use of the Intertie flows is not properly part of these proceedings, and DWR's operation of the Intertie in conjunction with KCWA and other Kern River parties is a clearly designated flood control function beyond the jurisdiction of the Board. (See U.S. Const., art. 6, cl. 2; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); Board Decision 935, p. 64 [where Board notes that it would be improper for it to designate a purpose of use for flood control in a permit sought by the federal government because "[u]nder applicable case law such a permit would add nothing to the present statutory power of federal authority, and to the extent it were to purport to limit such power it would clearly be invalid as an invasion of federal power."].)

Operation of the Intertie provides significant flood control benefits. In particular, prior to construction of the Intertie, agricultural operations in the Tulare Lake basin were subjected to significant damages during occasional flooding events. None of the petitioners in this matter, however, or any other entity of which KCWA is aware, seeks to divert and use the flood waters that would otherwise enter the California Aqueduct via the Intertie. Processing the applications filed in this matter for purposes of allocating these flood flows is a pointless (yet expensive) exercise.

Finally, most if not all rivers in California occasionally flood. If the logic of the Draft Order were carried forth as general Board policy, it suggests any stream or river where occasional flooding occurs could have its FAS designation removed – even where no potential water user seeks to appropriate the flood flows. This policy would completely undermine the FAS system especially where, as here, the Draft Order lifts the FAS status based on flood flows but then provides no limit on the scope of applications to be processed (e.g. a condition that only applications seeking to appropriate flood flows will be processed). Revising the Kern River FAS designation because of occasional flooding makes no sense, and if carried forth as general Board policy to the other streams and rivers of California could create significant uncertainty in California's water rights system and cause unnecessary expenses to long-established rights holders.

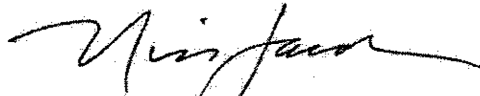
C. Summary and Request for Revisions to the Draft Order

The Board's work in the first phase of these proceedings is not yet done. Before any applications may be accepted, the Board should make a decision – based on the record presented – regarding whether there is water available for appropriation as a result of the forfeiture of certain water rights pursuant to the *North Kern* decision. Based on the overwhelming and uncontroverted evidence submitted by the Joint Petitioners, the Board should find that the *North Kern* decision makes no water available for appropriation. On that basis, the petitions/applications should be dismissed. Regardless of how the Board decides this issue, however, the decision should be made prior to processing any applications. If there

is no water made available by the *North Kern* decision, it is likely that some or all of the petitions/applications may be withdrawn.

The Board should also revise the Draft Order to omit any reference to Intertie operations as demonstrating the existence of unappropriated water. No party seeks to appropriate these flood flows. The Board's apparent intent to engage DWR on obtaining a permit to divert the Intertie flows is legally unsupportable and not an issue that is directly relevant to the instant proceedings.

Very truly yours,



Nicholas A. Jacobs

NAJ:jm
cc: Kern River Proceedings Service List