

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-00XX

In the Matter of Petition for Reconsideration of

**North Kern Water Storage District
City of Shafter
Buena Vista Water Storage District
Kern Water Bank Authority
Kern County Water Agency**

Regarding Order Amending Declaration of Fully Appropriate Streams
To Remove Designation of the Kern River as Fully Appropriated

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

On February 16, 2010, the State Water Resources Control Board (State Water Board or Board) issued State Water Board Order (Order) WR 2010-0010 amending the Declaration of Fully Appropriated Streams (FAS declaration) to remove the designation of the Kern River as fully appropriated. The FAS declaration was amended based on evidence showing unappropriated water in the Kern River. North Kern Water Storage District, City of Shafter, Buena Vista Water Storage District, Kern Water Bank Authority and Kern County Water Agency (Petitioners) jointly filed a petition for reconsideration on March 18, 2010 (Petition). Petitioners request that the State Water Board amend Order WR 2010-0010 to find that the petitioners requesting revision of the FAS declaration failed to demonstrate the existence of unappropriated water available for appropriation, and for that reason dismiss all petitions to revise the declaration. Petitioners also request that the Board amend Order WR 2010-0010 to “clearly state that occasional flood flows are not the basis for amending the FAS declaration absent an application” to place such waters to beneficial use, and for that reason dismiss all petitions to revise the declaration. In the alternative, Petitioners ask that the Board reopen the proceeding to receive further evidence regarding whether the Fifth District Court of Appeal’s (Court of Appeal) decision in *North Kern*

Water Storage District v. Kern Delta Water District (North Kern) (1997) 147 Cal.App.4th 555 resulted in additional water available for appropriation and definitively resolve that issue before accepting any water right applications on the Kern River.

2.0 GROUNDS FOR RECONSIDERATION

Any person interested in any application, permit or license affected by a State Water Board decision or order may petition for reconsideration of the decision or order. (Cal. Code Regs., tit. 23, § 768.)¹ The legal bases for reconsideration are: (a) irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing; (b) the decision or order is not supported by substantial evidence; (c) there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced; or (d) error in law.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 LEGAL AND FACTUAL BACKGROUND

The Kern River system was previously found to be fully appropriated throughout the year from the Buena Vista Sink upstream, including all tributaries where hydraulic continuity exists in Kern County, and, pursuant to Water Code section 1205, was included in the original FAS declaration. (Order WR 89-25.) That original FAS declaration cited State Water Rights Board Decision 1196 (D1196), issued on October 29, 1964, as the basis for including the Kern River in the declaration. (Order WR 89-25, pp. 13-14.)

¹ All further regulatory references are to the State Water Board’s regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

In 2007, five petitions were filed with the State Water Board's Division of Water Rights (Division), requesting revision of the Kern River's fully appropriated status as listed in the FAS Declaration. The five petitions were received from the North Kern Water Storage District (North Kern) and City of Shafter, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority and Kern County Water Agency. The petitions cited *North Kern* as the basis for filing the petitions. The Court of Appeal's ruling in *North Kern* found that there was a partial forfeiture of Kern Delta Water District's pre-1914 water rights on the Kern River, leaving it to the State Water Board to determine whether the Kern River is no longer fully appropriated. (*North Kern, supra*, 147 Cal.App.4th p. 583.)

Pursuant to section 871, subdivision (b), Victoria Whitney, the State Water Board Deputy Director for Water Rights, issued a memorandum dated October 8, 2008 (Whitney Memo), concluding that there is sufficient information to process the petitions and conduct a hearing on the question of whether the FAS declaration should be revised. The Whitney Memo identified two changes in circumstances since D1196 was issued in 1964 that provide bases for concluding that water may be available for appropriation. First, water has been diverted from the Kern River into the California Aqueduct on numerous occasions since the aqueduct's construction in 1977. (Whitney Memo, pp. 3-4.) Second, *North Kern* found that some of the rights that were considered in D1196 had been partially forfeited. (*Id.*, at pp. 3-5.)

On August 24, 2009, the Board issued a Notice of Public Hearing and Pre-Hearing Conference (Hearing Notice), stating that any action on the petitions would be for purposes of determining whether the Declaration should be revised, and no determination regarding approval of the pending applications will be made until after the Board makes a determination on whether the stream system is fully appropriated. (Hearing Notice, p. 2.) Pursuant to the Hearing Notice, the State Water Board held a pre-hearing conference on September 24, 2009 and a public hearing on October 26 and 27, 2009. After receiving all evidence, the Board accepted closing arguments, and on February 16, 2010, issued Order WR 2010-0010 amending the FAS Declaration to remove the designation of the Kern River as fully appropriated. Order WR 2010-0010 concluded that there is unappropriated water on the Kern River, because water in excess of any proprietary water right to diversion from the Kern River has been diverted into the Kern River-California Aqueduct Intertie (Intertie). (*Id.*, pp. 4-5.) Having determined that there is some unappropriated water on the Kern River without regard to the forfeiture, Order

WR 2010-0010 concluded that it was unnecessary to determine how much, if any, additional water was made available through forfeiture. (*Id.*, pp. 5-6.)

4.0 DISCUSSION

Petitioners offer six reasons why they believe Order WR 2010-0010 is inappropriate and improper. In summary, these arguments claim that it has not been established that any additional water has been made available for appropriation as a result of forfeiture, and that it was inappropriate to consider other changes in circumstances indicating that water is available for appropriation.

4.1 **It is not necessary for the evidentiary record to prove that the *North Kern* decision created “new water.”**

In Order WR 2010-0010, the Board concluded that even without regard to the *North Kern* decision, the evidentiary record established that there is some unappropriated water in the Kern River. Petitioners contend that “a petition [must] be dismissed unless the petitioner proves the existence of ‘new water’.” (Petition, p. 4.) Petitioners equate “new water” with a demonstration that the *Kern River* decision made additional water supplies available in excess of that needed to satisfy existing rights. (See *id.*, pp. 7-8.)

The Water Code does not set any specific limitation on the factors that may be considered in determining whether to revise the FAS declaration. (Wat. Code, § 1205, subd. (c).) State Water Board regulations indicate that the FAS declaration may be revised based on “any relevant factor, including but not limited to a change in circumstances” (§ 871, subd. (b).) The diversion of water into the California Aqueduct through the Intertie in amounts in excess of those needed to meet the demands of proprietary water right holders on the Kern River is a relevant factor because it constitutes a change in circumstance and demonstrates that there is unappropriated water on the Kern River.

In support of their argument that the existence of “new water” must be established, Petitioners rely on Order WR 2000-12.² However, Order WR 2000-12 does not specify such a requirement. As Petitioners recognize, Order WR 2000-12 determined that there was a basis for revising the FAS declaration because “water previously lost as flood flows can now be stored or regulated by the new Seven Oaks Dam flood control project.” (Order WR 2000-12 at p. 1, see *id.* at pp. 13-14.) One of the circumstances justifying a revision of the FAS declaration here – the construction of a major water development project making it possible to capture what were previously considered to be flood flows that could not practicably be appropriated – is essentially the same as identified as a basis for modifying the FAS declaration in Order WR 2000-12.³

4.2 The Board was not required to determine whether the North Kern decision resulted in unappropriated water.

Petitioners contend that the Board improperly deferred a decision whether the *North Kern* decision resulted in appropriated water. Because the evidence in the record established that there is some unappropriated water in the Kern River even without regard to the forfeiture issue, it was unnecessary to determine whether the *North Kern* decision resulted in unappropriated water. It is not necessary to determine how much unappropriated water is available, and therefore is not necessary, at this stage, to determine whether there are additional reasons unappropriated water may be available beyond that identified as a basis for deciding that at least some unappropriated water is available. Once it is determined that there is adequate cause to revise the FAS declaration, the determination whether sufficient unappropriated water is available for the diversion and use proposed under an application can best be decided in proceedings to issue or deny a permit on that application. As stated in Order WR 2010-0010:

[P]rocessing water right applications will require consideration of numerous issues not addressed in this order, including ... the specific amounts of water available for appropriation under the applications, the season of water

² Petitioners also rely on an unpublished draft Board order concerning the American River. Because a draft order has not been adopted by the Board, it does not constitute “longstanding FAS precedent,” and Petitioners’ reliance on it is misplaced.

³ Petitioners characterize the water made available by the Seven Oaks flood control project as “new water.” (Petition, p. 6.) Applying Petitioners’ definition of “new water,” water made available through flood control facilities that divert water through the Intertie would also constitute “new water.” Because the Water Code, Board regulations and Board precedents do not establish any requirement for “new water,” we see no need to define the term.

availability, the public interest in approval or denial of the applications, and any conditions to be included in any permits that may be issued on the applications.

(Order WR 2010-0010, p. 6.)

The Board has been consistently clear that these issues would not be decided during this particular portion of the proceeding, and that “[a]s indicated in the hearing notice, the focus of the Board’s inquiry in this proceeding was on the relatively narrow task of determining if the evidentiary record supports revising the fully appropriated status of the Kern River.” (*Ibid.*)

This approach is consistent with the Board’s approach in previous Board orders. As part of an order revising the FAS declaration as applied to the Santa Ana River, the Board stated:

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... will be resolved in further proceedings on each application pursuant to applicable provisions of the Water Code.

(Order WR 2000-12, p. 2.)

In Order WR 94-1, the Board denied a request for modification of the declaration for the Kern River because there had been no “showing that hydrologic conditions in the Kern River have changed or that other circumstances exist which justify the continued processing of Application 27554.” (Order WR 94-1, p. 9.) The Board did not suggest that the petitioner was required to show exactly how much water had been made available in order for the Board to revise the declaration. The Board merely required a sufficient showing of the availability of at least some unappropriated water as to justify the processing of an application.

Contrary to Petitioners’ contentions, this approach is not in conflict with the *North Kern* decision. The Court of Appeal held that “the initial determination whether the forfeiture creates an allocable excess is reserved in the first instance to [the State Water Board].” (*North Kern, supra*, 147 Cal.App.4th p. 584.) The *North Kern* decision did not dictate that the Board would make its determination as part of its processing of a petition for revising the FAS declaration. If the FAS declaration is revised based on a determination that at least some water is available for appropriation, the Board may determine how much, if any, water is made available as a result of forfeiture as part of its subsequent review of an application to appropriate the water alleged to

have been forfeited. The approach followed by the Board in Order WR 2010-0010, where the Board determines to what extent unappropriated water is available as a result of the forfeiture in the context of a request by a party seeking to appropriate that water, is fully consistent with the *North Kern* decision. (See *id.*, p. 583 [the “determination will be made” by the State Water Board in reviewing “a petition of a potential appropriator of the excess.”].)⁴

4.3 The evidence in the record supports the conclusion that water diverted into the Intertie is unappropriated water.

The Whitney Memo directly raises the issue of water diverted into the Intertie, stating that “the agreement [between the Department of Water Resources (DWR), the Kern County Water Agency and other water districts asserting water rights on the Kern River] limits Intertie diversions to flood flows *in excess of the needs of the districts claiming water rights on the Kern River.*” (Whitney Memo, p. 3, italics in original.) Evidence presented at the hearing, as described in Order WR 2010-0010, directly supports this conclusion. Petitioners contend that the evidence supporting this conclusion cannot be relied upon.

Petitioners concede that substantial amounts of water have been diverted into the California Aqueduct, with diversions occurring on several occasions. (See Order WR 2010-0010, pp. 4-5.) They claim, however, that the testimony that these diversions were in excess of the needs of water right holders should be disregarded because the witnesses did not have the expertise necessary to conduct a legal analysis for the water rights of parties claiming rights on the Kern River. (Petition, pp. 13-14.) Petitioners’ argument mischaracterizes the nature of the testimony, which was based on the demands of those claiming entitlements, not the amounts to which the claimants might be entitled if they both intended to divert and reasonably needed the water for beneficial use. All water rights are limited to amounts reasonably necessary for beneficial use (Wat. Code, §§ 100, 101), and even if water could be put to beneficial use, it is unappropriated water if no water right holder intends to use it. (See *id.*, § 1201.) The witnesses were familiar

⁴ We do not read the Court of Appeal’s use of the word “petition” as intended to exclude the State Water Board’s consideration of the issue as part of its processing of a water right application. There is no indication that the court had any intent to limit the discretion vested in the Board, including the discretion to decide which procedures the Board should employ in making its determination.

with hydrologic conditions and water demands on the Kern River, and were competent to testify on those issues. (See Joint Exhibit (JE) 46 and Bakersfield Exhibit 2-1.) Their testimony was more than adequate to support the conclusion that the waters diverted into the Intertie are taken from flows in excess of the amounts reasonably necessary to meet the demands of those with entitlements to divert water for beneficial use from the Kern River.

Based on previous determinations that the Kern River is fully appropriated, Petitioners also contend that the record indicates that diversions through the Intertie were not in excess of proprietary rights. (Petition, pp. 15-17.) But these determinations were based on conditions as they were understood to be prior to construction of the Intertie. (See, e.g., D1196; see also Order WR 89-25 [basing determination on the record before the Board when it issued D1196].) Moreover, these determinations and testimony cited by Petitioners are addressed to the general issue of whether unappropriated water is available under most conditions, and does not specifically address the relatively infrequently occurring conditions prevailing at times when water is diverted through the Intertie. Far from establishing that there is never any unappropriated water on the Kern River, Petitioners' reliance on previous determinations underscores the point that the evidence concerning diversions through the Intertie amounts to changed conditions.

Petitioners contend that there is "no evidence" that the water diverted through the Intertie has been "anything other" than water voluntarily transferred pursuant to pre-1914 appropriative rights. (See Petition, p. 18, citing Wat. Code, § 1706.)⁵ But a voluntary transfer would be made pursuant to the entitlements and demands of Kern River users, contrary to the testimony that diversions through the Intertie are based on water in excess of those demands. (See JE 46 and Bakersfield Exhibit 2-1; see also Whitney Memo, p. 3 ["the agreement [between DWR, the Kern County Water Agency and other water districts asserting water rights on the Kern River] limits

⁵ In the alternative, Petitioners contend that if the water diverted into the Aqueduct is being diverted solely for flood control purposes, and not for beneficial use, then the diversions are not subject to the Board's water right authority. (Petition, p. 18-19; see generally State Water Board Decision 100, p. 61 [flood control is not a beneficial use].) The purpose of these proceedings is not to determine whether water diverted through the Intertie is subsequently put to beneficial use for which a water right permit is required, but merely to determine whether the FAS declaration should be revised. Evidence that water is being diverted through the Intertie and exported from the Kern River watershed during periods when the diversion does not injure any water right holder on the Kern River, where there is no permit authorizing appropriation of water diverted through the Intertie, establishes the availability of unappropriated water whether or not a permit is required for those diversions.

Intertie diversions to flood flows *in excess of the needs of the districts claiming water rights on the Kern River.*”].) The testimony also indicated that diversions were made for flood control purposes. (Reporter’s Transcript, pp. 263-265.) There is no evidence in the record that any, let alone all, of the water diverted through the Intertie was delivered pursuant to a voluntary transfer under pre-1914 water rights.

4.4 In determining whether to revise the FAS declaration, the Board is not limited to consideration of sources of unappropriated water sought to be appropriated by a party petitioning for revision of the FAS declaration.

Petitioners suggest that because there are no applications for water diverted into the Intertie, the Board cannot amend the FAS declaration based on the availability of that water. (Petition, pp. 19-21.) However, the procedures for revising the FAS declaration do not limit the Board’s consideration to water sought to be appropriated in an application filed by a petitioner, or even require that an application be filed. Board regulations establish that the Board may revise the declaration based either on the recommendation of the Deputy Director for Water Rights, as provided by section 871, subdivision (b), or based on a petition of a person seeking revision of the fully appropriated status of a stream system, as provided by section 871, subdivision (c). Subdivision (b) does not include any requirement for the filing of an application, and under subdivision (c), a petitioner “may,” but is not required to, file an application accompanying the petition. (§ 871, subd. (c)(2).) The proceedings leading to adoption of Order WR 2010-0010 were based both on the recommendations of the Deputy Director for Water Rights and the petitions that had been filed.

Petitioners claim that they did not have proper notice that the availability of water diverted into the Intertie was relevant to whether the FAS declaration should be revised. This contention is without merit. The Whitney Memo, which was sent to the parties under cover of letter dated October 30, 2008, directly raises the issue of water diverted into the Intertie and unambiguously specifies that construction and use of the Intertie constitute changed circumstances since 1964. (Whitney Memo, p. 4.) The hearing notice clearly identified this memo as part of its discussion of the bases for the proceedings, and included a link to the Whitney Memo. (Hearing Notice, p. 2.) The Hearing Notice recited the conclusion that “there is sufficient information to process the petitions *and conduct a hearing on the question of whether the Declaration should be*

revised pursuant to California Code of Regulations, title 23, section 871, subdivision (b).” (Ibid.)

Thus, the parties were on notice that the hearing would include consideration of the recommendations of the Deputy Director for Water Rights, as provided by section 871, subdivision (b), including the Deputy Director’s recommendation that the FAS declaration be revised due to changed circumstances involving diversions into the Intertie, and not based solely on the petitions, pursuant to section 871, subdivision (c).

4.5 The potential for issuance of temporary permits does not preclude revision of the FAS declaration.

Petitioners claim it was legal error to revise the FAS declaration based on evidence indicating unappropriated water is available intermittently, during periods of high flows. (Petition, pp. 21-23.) Petitioners point out that these flows could be appropriated based on temporary permits, even if a stream system is listed as fully appropriated in the FAS declaration. (See Wat. Code, §§ 1206, subd. (c), 1425 et seq.) The temporary permit procedure is not intended as a substitute for approval of appropriations pursuant to the ordinary permitting process. (See *id.*, § 1425, subds. (a) [authorizing temporary permits based on “urgent need”] & (c) [the Board ordinarily should not issue a temporary permit if the applicant has not exercised due diligence to obtain a permit pursuant to the ordinary permitting process].) The desirability of authorizing appropriations through the ordinary permitting process, instead of through repeated issuance of temporary permits, is underscored by the statement in the Whitney Memo that “DWR has informed the State Water Board that it intends to use the Intertie more frequently over the next several years.” (Whitney Memo, p. 3.)

While Petitioners are correct that temporary permits could be issued to authorize appropriations of flood flows, it does not follow that a temporary permit is the best or only method for authorizing such appropriation, as the circumstances where a temporary permit may be issued include almost any other circumstance that might support amendment of the FAS declaration to remove a fully appropriated listing. A temporary permit may be issued if unappropriated water is available on a stream system listed as fully appropriated, and permitting the appropriation would further the state policy that waters should be put to beneficial use to the fullest extent to which they are capable. (Wat. Code, § 1425, subd. (c).) If the FAS declaration could not be amended under circumstances where a temporary permit could be issued, the FAS declaration could not

be amended based on changed circumstances indicating that unappropriated water is available. The Water Code provides the Board with broad authority to revoke or revise a declaration that a stream system is fully appropriated, without any reference to whether unappropriated waters are available only occasionally or could be appropriated pursuant to temporary permits. (*Id.*, § 1205, subd. (c).) Adopting Petitioners' argument would eliminate that discretion, leaving the Board with little or no ability to revise a declaration that a stream system is fully appropriated.

In Order WR 2000-12, the Board revised the declaration that the Santa Ana River is fully appropriated based on occasional flood flows. Petitioners do not contend that Order WR 2000-12 was incorrectly decided, but instead argue that the Board's authority to revise the FAS declaration based on intermittently or occasionally available flows is limited to cases where an application is filed to appropriate those flows. (Petition, pp. 22-23.) As discussed above, however, the Board's authority to revise the FAS declaration is not limited to those issues that must be decided in addressing an application accompanying a petition to revise the FAS declaration.

As in the case of Order WR 2000-12, revising the FAS declaration here is consistent with the constitutional policy of putting waters to beneficial use to the fullest extent to which they are capable. (Cal. Const., art. X, § 2.) Revising the FAS declaration allows for the filing of applications to obtain rights to put to beneficial use high flows initially diverted for flood control purposes pursuant to the statutory appropriative rights procedures, and these statutory procedures are in furtherance of the constitutional policy. (See Wat. Code, § 1050.)⁶

⁶ Order WR 2010-0010 and this order do not specifically address the issue of whether a permit is required for current operations of the Intertie. It is unnecessary to address that issue in order to determine that the FAS declaration should be revised, and the Department of Water Resources has requested that we not make a determination on the issue at this time. The Board's decision not to address the issue should not be construed as a determination that no permit is required or that the Board has any misgivings about the opinions expressed by the Chief Counsel in a memo dated January 22, 2007. Allowing parties to obtain water rights for beneficial use of waters diverted through the Intertie helps promote the constitutional policy of putting water to full beneficial use, and the Legislative determination that this policy should be implemented through the statutory permitting and licensing system, whether or not a permit is required for diversions through the Intertie.

4.6 Order WR 2010-0010 is not unlawfully broad or uncertain.

Petitioners observe that the Board has discretion to impose conditions and limitations when it revises the FAS declaration to remove the designation of a stream system as fully appropriated, but cite no authority requiring the Board to impose conditions and limitations. In this case, the Board has determined that at least some unappropriated water is available, but has not determined how much. While some water rights on the Kern River have been partially forfeited under the *North Kern* decision, and some water may be available for appropriation as a result, it has not been determined how much, if any, unappropriated water has become available, or under what conditions it may have become available due to forfeiture. In addition, while water has been diverted through the Intertie only occasionally, it appears that the Intertie will be used more frequently in the future. In these circumstances, it would be difficult, if not impossible, to craft conditions or limitations that would meaningfully limit the types of applications that could be filed without having the undesirable effect of precluding applications seeking to appropriate water that is in fact unappropriated.

In these circumstances, Order WR 2010-0010 reasonably concluded that issues concerning the specific amounts of water available for appropriation, the season of water availability, and other issues relevant to determining whether water rights permits may be issued are best determined as part of the processing of water right applications. (Order WR 2010-0010, p. 6.) As part of its evaluation of a water right application, the Board may require the applicant to prepare and submit a water availability analysis. (See Wat. Code, §§ 1260, subd. (k), 1275, subd. (a).) The Board may also require of those who protest the application based on claims that the appropriation would divert water to which they are entitled, that they provide information supporting their protests. (*Id.*, § 1335, subd. (c)(3).) These procedures allow the Board to address availability of unappropriated water as part of application processing in greater detail than in a FAS declaration proceeding. Application processing procedures also serve to address other relevant issues, including environmental and public trust issues. (Order WR 2010-0010, p. 6.)

While the Board has discretion to impose conditions and limitations on the applications it will consider, imposing conditions like those suggested by Petitioners is neither necessary nor

desirable at this time. If, as part of its consideration of an application, the Board issues an order or decision determining that no water is available for appropriation under particular seasons or conditions, including but not limited to a determination that no water is available for appropriation taking into account waters reasonably necessary for the protection of instream beneficial uses under those seasons or conditions, the Board may amend the FAS declaration at that time. (See Wat. Code, §§ 1205, subd. (b), 1243.)

ORDER

IT IS HEREBY ORDERED THAT, for the foregoing reasons, Petitioners' petition for reconsideration is denied.

CERTIFICATION

The undersigned Clerk of the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 4, 2010.

AYE:

NAY:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend

Clerk to the Board