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**HAND-DELIVERED**

March 18, 2010

Division of Water Rights
State Water Resources Control Board
**Attention: Paul Murphey**
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: Petitions to Revise the Declaration of Fully Appropriated Stream System of the Kern River – Petition for Reconsideration of Order WR-2010-0010

Dear Mr. Murphey:

Enclosed for filing related to the above-referenced proceeding please find a Petition for Reconsideration, jointly filed on behalf of North Kern Water Storage District, City of Shafter, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency.

Please contact our office should you have any questions, and thank you for your attention to this matter.

Very truly yours,

DOWNEY BRAND LLP

Kevin M. O'Brien

KMO:tdk

Enclosure as noted

1065107.1

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The Law Offices of Young Wooldridge, LLP
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Bakersfield, CA 93301

Attorneys for Petitioner
NORTH KERN WATER STORAGE DISTRICT

[JOINTLY FILED ON BEHALF OF THE PARTIES LISTED ON THE SIGNATURE PAGE]



BEFORE THE

STATE WATER RESOURCES CONTROL BOARD

**IN THE MATTER OF:**

**Petitions to Revise the Declaration of Fully Appropriated Streams to Allow Processing of Applications to Appropriate Water from the Kern River**

**Order WR-2010-0010**

**PETITION FOR RECONSIDERATION; POINTS AND AUTHORITIES IN SUPPORT OF PETITION**

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## OTHER AUTHORITY

## I. PETITION FOR RECONSIDERATION

Petitioners North Kern Water Storage District (NKWSD), City of Shafter (Shafter), Buena Vista Water Storage District (BVWSD), Kern Water Bank Authority (KWBA) and Kern County Water Agency (KCWA), in accordance with Water Code Section 1122 et seq., hereby petition for reconsideration of Order WR-2010-0010 (the Order). The issues in the petition, a summary of the bases for the petition, and a statement of points and authorities are listed below as required by Title 23, California Code of Regulations, section 769.

## II. GENERAL INFORMATION PER 23 C.C.R., § 769

### A. Names of Petitioners and Their Attorneys (23 C.C.R., § 769(a)(1)).

1. North Kern Water Storage District
c/o Scott K. Kuney
Young Wooldridge, LLP
1800 30th Street, Fourth Floor
Bakersfield, CA 93301
skuney@youngwooldridge.com

2. City of Shafter
c/o Jason M. Ackerman
Best, Best & Krieger LLP
3750 University Ave., Suite 400
Riverside, CA 92501
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3. Buena Vista Water Storage District
c/o Gene R. McMurtrey
McMurtrey, Hartsock & Worth
2001 22nd Street, Suite 100
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4. Kern Water Bank Authority
c/o Kevin M. O'Brien
Downey Brand LLP
621 Capitol Mall, 18th Floor
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kobrien@downeybrand.com
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5. Kern County Water Agency
c/o Nicholas A. Jacobs
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
njacobs@somachlaw.com
ameliam@kcwa.com

**B. State Board Action for Which Reconsideration Is Sought (23 C.C.R., § 769(a)(2)).**

Petitioners seek reconsideration of the Order, which was approved in final form at the February 16, 2010 meeting of the State Water Resources Control Board (State Board).

**C. Date of State Board Action for Which Reconsideration Is Sought (23 C.C.R., § 769(a)(3)).**

February 16, 2010.

**D. Reasons That Order WR-2010-0010 Is Inappropriate and Improper (23 C.C.R., § 769(a)(4)).**

1. The evidentiary record failed to prove that the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* (2007) (147 Cal.App. 4th 555 [54 Cal.Rptr. 3d 587]) (*North Kern* Decision) constituted a change in circumstances that created any unappropriated water;

2. The Order failed to resolve whether the *North Kern* Decision resulted in unappropriated water; instead, the State Board improperly deferred this decision for resolution during the processing of certain water rights applications;

3. The Order lacks an evidentiary basis for its ruling that water discharged into the Kern River-California Aqueduct Intertie (Intertie) constitutes unappropriated water available for appropriation or that such flows are within the jurisdiction of the State Board;

4. The Order is legally erroneous in relying on occasional flood flows discharged into the Intertie as a basis to revise the Kern River Fully Appropriated Stream (FAS Declaration) because no Petitioner submitted a petition asking the State Board to process an application proposing to put such water to beneficial use, the State Board granted no such petition, and the State Board did not raise this matter on its own motion or include this matter in the Notice of

Hearing.

5. The Order is legally erroneous in revising the FAS Declaration based on the availability of occasional flood flows because, absent granting a petition to process an application filed by Petitioners to place such waters to beneficial use, Water Code Sections 1206(c) and 1425 et seq. dictate that such waters should be permitted for diversion and use pursuant to the temporary urgency permitting provisions of Water Code Sections 1425 et seq.;

6. The Order is unlawfully broad and uncertain in that it revises the fully appropriated stream designation of the Kern River based on occasional flood flows entering the Intertie, but fails to provide that the only Kern River applications to be accepted by the State Board will be those seeking flood flows that would enter the Intertie unless diverted upstream.

**E. Actions Sought (23 C.C.R., § 769(a)(5)).**

1. Amend the Order to find that Petitioners failed to demonstrate the existence of unappropriated water available for appropriation and, therefore, all petitions are dismissed; and

2. Amend the Order to clearly state that occasional flood flows are not the basis for amending the FAS Declaration absent an application filed by Petitioners to place such waters to beneficial use and, therefore, all petitions are dismissed; and

3. In the alternative to the action described in paragraph 1, the State Board should re-open the first phase of these proceedings and make specific requests for whatever evidence the State Board deems necessary to rule on the issue of whether the *North Kern* judgment resulted in water available for appropriation, and the State Board should definitively resolve the *North Kern* issue before accepting any water right applications.

**F. Statement of Service to "All Interested Parties" (23 C.C.R., § 769(a)(6)).**

This petition for reconsideration is being served on all parties identified on the State Board's official service list.

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## III. POINTS AND AUTHORITIES

### A. Because the Evidentiary Record Is Insufficient to Conclude That the *North Kern* Decision Constituted a Change in Circumstances Creating Unappropriated Water, the Petitions Must Be Denied and the FAS Declaration Should Not Be Revised.

#### 1. The State Board Should Revise the Order to Conform with Prior FAS Procedures for Determining Whether New Water Exists That Is Available for Appropriation.

To ensure the Kern River FAS Hearing would be conducted fairly, efficiently, and within known parameters, the Joint Petitioners requested that the State Board use "the procedures adopted in prior FAS Hearings regarding the *American* (State Board Draft WRO May 12, 2003), *Santa Ana* (State Board WR-2000-12, State Board WR-2002-0006), and *Kern Rivers* (State Board WR-94-1)." (Joint Petitioners letter, dated September 17, 2009). The State Board, however, arbitrarily failed to follow its prior FAS procedures, including the key requirement that a petition be dismissed unless the petitioner proves the existence of "new water." Despite the fact that no Petitioner demonstrated the existence of "new water," the Order allows processing of the pending applications. In revising the Order, the State Board should apply its longstanding FAS precedents and dismiss the petitions for lack of sufficient evidence.

##### *a. A Petitioner Must Prove the Existence of "New Water" That Is Surplus to Existing Rights.*

In a FAS proceeding, the "change in circumstances" refers to a change in circumstances from those considered in prior water right decisions determining that no water remains available for appropriation. (Cal. Code Regs., tit. 23, § 871(b).) The State Board has determined that a "change in circumstances" has two elements:

> First, the petitioner must show whether the water at issue is "new water" – water that would not have reached the stream at the time the orders were made that support the declaration that the [Kern River] is fully appropriated. This includes not only showing that there is new discharge to the River, but also requires evidence that the [water] being discharged would not have been tributary to the River during the relevant time period. Second, the petitioner must show that if the water is new water, circumstances have changed so that it would have been available for appropriation by new users during the relevant time period.

(*American River*, Draft Order WRO 2003 –XXX at 15-16 (emphasis added). The "new water"

must be "sufficient to both make up for the flow deficiencies that existed at the time the prior decisions were adopted and provide significant additional flow that may be available for appropriation." (*Id.* at 19.) If the "new water" would have been "dedicated to satisfying unmet demands with a higher priority than any permit . . . the petitioner has not established that circumstances have changed." (*Id.* at 22 (emphasis added).)

The petitioner seeking a modification to the FAS Declaration has the burden of proving the change in circumstances. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code § 500; *see also id.* § 550(b) ("The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.").) Where there is conflicting evidence submitted, the parties' burden of proof in this administrative proceeding is by a "preponderance of the evidence." (Evid. Code § 115; *see also San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-1893.) "The term simply means what it says, viz., that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller* (1916) 171 Cal. 649, 652 *(Miller).*) There is only a weighing of evidence, however, where conflicting evidence has been submitted. If there is no evidence of "new water submitted," then the petitioner has failed to meet its initial burden of proof and the petition should be dismissed.[1] (*See id.* at 653-654.)

Following these basic evidentiary procedures, State Board precedents have emphasized that the petitioner seeking a modification to the FAS Declaration has the burden of proving the

[1] "The party on whom rests the burden to prove an alleged fact must produce evidence sufficient in quantity and character to warrant a jury in finding the fact to exist, in the absence of opposing evidence. The question what that evidence must amount to in order to legally support a conclusion by the jury has nothing at all to do with the question what is meant by the term "preponderance of the evidence." The party on whom rests such burden having produced sufficient evidence to support a conclusion in his favor, opposing evidence may also have been introduced, and then only does the question of preponderance of evidence arise. The situation may then be that in view of the opposing evidence, the jury is in doubt, and not at all satisfied or convinced. In such a situation the decision must be based on the preponderance rule." (*Miller* at 653-654.)

change in circumstances. (*American River*, Draft Order WRO 2003 –XXX at 15–16; *see also* WR-2002-0006 at 1 n.1 (noting petitions were "accompanied with hydrologic data demonstrating that new water exists since the Santa Ana stream system was designated as fully appropriated").) In prior FAS proceedings the State Board required the petitioner to prove that there were physical changes which created "new water." In the *Santa Ana* proceeding, the petitions filed by San Bernardino Valley Municipal Water District ("Muni") and Western Municipal Water District ("Western") were filed along with hydrologic data "to demonstrate that water previously lost as flood flows can now be stored or regulated by the new Seven Oaks Dam flood control project." (WR-2000-12 at 1.) The petition filed by Orange County Water District was accompanied by hydrologic information "to demonstrate that flows in the lower reach of the Santa Ana River watershed have changed due to upstream urbanization and increased release of treated wastewater into the stream system." (*Id.* at 2.) In granting the petitions to revise the FAS Declaration, the State Board concluded that the parties had provided evidence specifically showing a change in conditions that affected the availability of water for appropriation in the Santa Ana River as well as "the potential ability of the petitioners to divert the water" available for appropriation. (*Id.* at 10.) The State Board specifically noted that "[i]n addition to the possibility of seasonal storage at Seven Oaks Dam, Muni and Western emphasize that the regulatory effects of the Seven Oaks Dam on high flows due to storm events represents a significant change in circumstances. By regulating the release of water downstream of the dam, the petitioners contend that the dam makes water available for appropriation that could not have feasibly been diverted previously." (*Id.* at 11.) Thus, it was unquestionable that the revision of the FAS in the *Santa Ana* proceeding hinged on the finding that circumstances had changed such that new water was available for appropriation. In a later Order allowing additional applications to be processed based on the findings of WR-2000-12, the State Board noted that "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." (WR-2002-0006 at 2-3.)

Likewise, in the *American River* proceedings the petitioner was required to prove that "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. (*American River*, Draft Order WRO 2003 –XXX at 16 (emphasis added).) 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 the prior decisions were adopted and provide significant additional flow that may be available for appropriation." (*Id.* at 19.) Finally, in a prior FAS hearing on the Kern River, the State Board concluded a petition seeking appropriation of intermittent wet year flows must be dismissed because the petitioner failed to present sufficient evidence to show that hydrologic conditions in the Kern River had changed from those considered in D 1196, or that other circumstances existed justifying processing applications for appropriation. (JE 46 at 8 ¶ 20; JE 24 at 9-10.)

*b. Bakersfield Failed to Prove Forfeiture Created "New Water" Surplus to Existing Rights.*

Applying fundamental evidentiary procedure and State Board precedent in this instance, the City of Bakersfield (Bakersfield) had the burden to prove, first, that there is "new water" which would not have reached the Kern River when D 1196 was issued (*American River*, Draft Order WRO 2003 –XXX at 16); and second, that circumstances have changed so that the "new water" would be available for appropriation by "new users" since 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 22 and 28).[2] Bakersfield completely failed to demonstrate the existence of such "new water."

Bakersfield's petition identified a single source of potential "new water": the *North Kern* Decision. (*See generally* Petition of the City of Bakersfield to Revise the Declaration That the

[2] 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.)].)

Kern River Is Fully Appropriated (May 4, 2007).) But throughout this FAS proceeding, Bakersfield has presented no competent evidence that the *North Kern* Decision created 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 Kern River Water Rights and Storage Agreement previously considered in D 1196. (JE 14, 15, 18.) Similarly, Bakersfield presented no evidence proving that existing pre-1914 appropriative and riparian common law rights holders on the Kern River will fail to use, in full, the water released as a consequence of Kern Delta's forfeiture. (*See North Kern, supra,* 147 Cal.App.4th 555, 583-584.) Instead, Bakersfield's Water Resources Manager testified that there was not a single Kern River record (1964-2008) which he could identify which supports his "surplus water" calculations. (Hearing Transcript (RT) 148:1-24; 149:12-22.)

In contrast, the Joint Petitioners presented conclusive evidence demonstrating that circumstances had not changed due to the *North Kern* Decision. (*See* JE 46-70.) First, the evidence was that the "North Kern judgment cannot create any new supply of water for existing right holders not previously measured and considered in D 1196." (JE 46 at 11 ¶ 26; JE 68.) Further, it is undisputed that the entire flow of the Kern River is fully appropriated and the record establishes that the Kern River is oversubscribed by pre-1914 appropriative and riparian common law rights and other decreed rights. (JE 33-39; 46 ¶¶ 8, 12, 16, 18, 21, 28, 30, 32; B1-7, 1-8, 1-9, 2-21.) In fact, "water deficiencies are normal on the Kern River system." (JE 8 at 39-41; 20 at 3, Plate 3; 46 at 4 ¶ 9, 8 ¶ 21.) Finally, as demonstrated by Mr. Easton's analysis, water released due to the *North Kern* Decision is diverted and used in full to satisfy the prior existing water right entitlements according to the court judgments, decrees and agreements recognized by the State Board in D 1196. (JE 33-39, 48-65.)

A consistent application of the State Board's prior FAS decisions requires the dismissal of the petitions and rejection of the pending applications.

2. The Order Should Be Revised to Reflect the *North Kern* Decision.

The *North Kern* Decision set the stage for this FAS Hearing to result in a definitive ruling

on whether the forfeiture resulted in the availability of water for appropriation. The Court of Appeal stated the controlling legal principle (that junior right holders have the legal entitlement to divert water released into the River as the result of a senior's forfeiture of water rights) and declared that the State Board would decide on petition whether any excess water remains for appropriation. Without clear explanation, however, the Order exits the stage without acknowledging the legal principle, much less applying it as the Court of Appeal expressly contemplated. The Order should be revised to acknowledge this important legal principle and reject Bakersfield's assertions that the *North Kern* Decision left unclear, or undecided, what is the legal significance of the Kern Delta forfeiture.

*a. The* North Kern *Decision Declares that the State Board, in Acting on Petition, Will Make a Determination of Whether the Forfeiture Has Resulted in an Allocable Excess.*

In the *North Kern* Decision, the Court of Appeal instructed that "[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 the 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 senior rights holder will simply be used in full by existing junior rights holders under their existing entitlements." (*North Kern, supra,* 147 Cal.App.4th 555, 583 (emphasis added).) More specifically, the Court of Appeal declared that while the "resulting limitations on appropriation [Kern Delta partial forfeiture] might result in a determination that the Kern River is no longer fully appropriated that determination will be made by SWRCB on the petition of a potential appropriator of the excess." (*Id.* (emphasis added).)

The *North Kern* Decision is the culmination of years of litigation concerning the seminal event leading to the FAS Hearing: the forfeiture of senior Kern River water rights by the Kern Delta Water District. The State Board should respect the Court of Appeal's judgment in the *North Kern* Decision and revise the Order to determine, based on the petitions, "whether the forfeiture creates an allocable excess." (*Id.* at 584 (emphasis added).)

/ / /

*b. Junior Appropriators Have a Right to Release Water.*

Bakersfield's claim that the *North Kern* Decision created new water available for appropriation appears to be based solely on the legal misunderstanding that downstream junior right holders may not divert water released into the River due to the forfeiture of an upstream senior water right. (RT 28:1 to 29:11; *see also* RT 62:21 to 64:21.) This issue was clearly resolved in the *North Kern* Decision where the opinion stated, without reservation, that a junior appropriator has an "actual entitlement" to available release water. (*North Kern, supra,* 147 Cal.App.4th 555, 575.) Specifically the court explained:

> In addition to paper and theoretical entitlement, an appropriator 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 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.)[3] Thus:

> When the flow of the [Kern 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, [Kern River] flow is insufficient to fully satisfy all appropriators.

(*Id.* at 561 (emphasis added).)

The *North Kern* Decision's statements are a reflection of more than century's worth of established law. (*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

[3] Importantly, the *North Kern* court concluded, as a matter of law, that the actual entitlement of a junior appropriator must include water actually available when determining the forfeiture of junior appropriations. (*Id.* at 595-596.)

Cal.App.4th 1019, 1028[4].) 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* (1921) 186 Cal. 7, 26-28; Hutchins, *The California Law of Water Rights, supra,* at 154-155.)

**B. After Failing to Resolve Whether the *North Kern* Decision Resulted In Unappropriated Water, the Order Improperly Defers This Decision for Resolution During the Processing of Certain Water Rights Applications.**

Instead of determining whether the *North Kern* forfeiture resulted in an allocable quantity of water for appropriation , the Order declares "the evidence presented by the parties did not clearly resolve whether the partial forfeiture of Kern Delta's rights itself created any additional unappropriated water." (Order at 5 (emphasis added).) Notwithstanding the acknowledgment that the record contains insufficient evidence to find that forfeiture created any unappropriated water, the Order nonetheless provides that "the Board will not make a determination at this time regarding whether the other pre-1914 rights claimants will use, in full, any water released to the Kern River by the forfeiture judgment. It will be up to the applicants to show when and how much available water there is for appropriation in the context of the Division's processing of those applications." (*Id.*)

This approach deviates from State Board precedent and general administrative law principles by essentially eliminating the burden of proof and, as a result, creates absurd consequences. First, having failed to prove (as a petitioner) the lesser burden that any quantity of unappropriated water exists as the result of forfeiture, Bakersfield will almost certainly fail (as an applicant) in the greater burden of proving that specified quantities of forfeited water will exist at its specific points of diversion, at specific times, and without injury to existing right holders. As in the petition process, Bakersfield will of course bear the burden of showing unappropriated

[4] "[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.)" (*State of California v. Superior Court, supra,* 78 Cal.App.4th 1019, 1028.)

water is available to supply its water right application. (Water Code §§ 1260(k), 1375(d); *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409,413.) "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code § 500; *see also id.* § 550(b) ("The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact.").)

Second, deferral of the water availability issue to the application phase will require the Joint Petitioners—along with Division of Water Rights (Division) staff—to participate in further lengthy, expensive and complicated application proceedings to resolve issues that should have been decided during this proceeding. Avoiding such avoidable proceedings, by ensuring water availability determinations are made beforehand during the petition process, is the very purpose of the FAS Declaration.

**C. The Order Lacks an Evidentiary Basis for Its Ruling That Water Discharged into the Kern Intertie Constitutes Unappropriated Water Available for Appropriation or That Such Flows Are Within the Jurisdiction of the State Board.**

In the Order, the State Board notes that Kern River water has, from time to time, been discharged into the California Aqueduct via the Intertie. (Order at 4.) The State Board opines that these flows are "...in excess of any proprietary water rights to the diversion and use of Kern River water"; that "[t]his water is, by definition, unappropriated water; and concludes that "[i]t is clear from the evidence and testimony submitted by the parties to this hearing that, even without regard to the *North Kern* Decision, there is some unappropriated water in the Kern River." (Order at 5-6.) Reconsideration of the Order is requested on the basis that the foregoing conclusion is not supported by substantial evidence and constitutes an error of law and fact.

1. The Record Contains No Competent Evidence Showing That Water Entering the Intertie Is in Excess of Proprietary Water Rights.

The State Board's determination that water entering the Intertie is in excess of proprietary water rights rests on the following evidence: (a) written testimony of Flom Core; (b) written and oral testimony of Dan Easton; and (c) Bakersfield Exhibit 2-18. This evidence is insufficient to support the determination.

*a. Florn Core Written Testimony*

Florn Core's written testimony includes a statement that, in some years, Kern River flows exceed the "entitlement and demand" of First Point users and Second Point users. (B 2-1 at 15 ¶ 69.) The State Board is not entitled to rely upon this testimony because the evidence is neither competent nor conclusive. As to competence: the statement is nothing more than a legal conclusion without foundation (i.e., Mr. Core admitted that he is not an attorney (RT 134:23-24) and had never conducted a study of riparian rights and/or appropriative rights held by any particular parcels of land (RT 133:19-23, 134:8-12)).[5] As to conclusiveness: Mr. Core only suggests that the high flow water was in excess of the entitlement and demand of First Point users and Second Point users; no mention is made of the Lower-River diverters that historically used all Kern River water remaining after the entitlement and demands of First Point diverters and Second Point diverters had been met. Thus, Mr. Core's written testimony provides no support for the proposition that Kern River flows ever exceeded the proprietary rights of the existing Kern River water right holders.

*b. Dan Easton Written and Oral Testimony*

Mr. Easton's written testimony includes the following: "...there are only three (3) years (1982, 1983, and 1984) out of the 45 years in the historical analysis (JE 48-65, and 67) where water released due to the *North Kern* judgment[6] is not fully distributed to First Point, Second Point and Lower-River diverters, and those years were when these releases coincided with flood control operations." (JE 46 at 2-3 ¶ 4.) Mr. Easton referred to these voluntary discharges into the Intertie during flood control operations as "undistributed releases" (JE 46 at 12 ¶ 28) or "release

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[5] At the beginning of the FAS hearings the Joint Petitioners objected to the written testimony of Florn Core because it contained legal conclusions and opinions. Mr. Baggett declined to rule on the specific objections but stated: "... when it's non-attorneys or when one is making a legal argument as evidence, that's inappropriate. I think the attorneys in the room know that, and I think we can decipher that on a case-by-case basis.... So again, I guess I would advise the parties that legal opinions from non-attorneys or during evidentiary issues is not appropriate." (RT 24:24 to 25:2; 25:24 to 26:1.)

[6] The flood control operations were only in eight (8) months for these years: December 1982, August, September, November and December 1983, and January 1984. (JE 67.)

undistributed to existing entitlements" (JE 67). On this subject, Mr. Easton's oral testimony includes the following exchange:

> Q. (By Mr. Murphy) When water flows into the Intertie, all of those First Point, Second Point, lower river entitlements have been satisfied?
>
> A. Yes. It is my understanding when water is discharged to the California Aqueduct, the existing entitlement holders are not diverting that water.

(RT 264:18-23.) The interpretation placed on this testimony by the State Board is as follows: "Mr. Easton testified that water diverted into the Intertie is in excess of traditionally held and exercised rights and claims of right to Kern River water, and that whenever water has been released into the Intertie in the past, all Kern River water right claims had already been satisfied." (Order at 5 (emphasis added).) This is an improper use of Mr. Easton's testimony, as it was not within the scope of his testimony to provide a legal analysis or conclusion regarding the "right" of any party to divert or take Kern River water under any circumstances. (RT 214:16-19; 223:19-25.) Hearing Officer Baggett acknowledged this fact when he observed: "I think the witness made it clear that he wasn't opining on whether they had a legal right to use water or not use water. It was just the fact that those were the assumptions he made with his engineering analysis." (RT 267:24 to 268:3.) It is inappropriate for the State Board to now utilize Mr. Easton's engineering analysis as the basis upon which to draw a legal conclusion regarding the scope and extent of the legal rights of Kern River diverters.

Further, the State Board's characterization of Mr. Easton's testimony is inaccurate. Mr. Easton's testimony reflects the fact that Kern River water is sometimes permitted to flow into the Intertie as part of voluntary flood control operations primarily to protect property. (RT 263:23 to 264:1.) Mr. Easton categorized this water as not being diverted within historical service areas and, therefore, being "undistributed" to existing entitlements. However, Mr. Easton never opined that the water delivered into the Intertie was in excess of the "traditionally held and exercised rights and claims of right" of existing Kern River water right holders, or whether water diverted into the Intertie was an exercise of those existing rights pursuant to Water Code Section 1706. To the contrary, he testified that, in the absence of such voluntary flood control operations,

all of the Kern River water diverted into the Intertie would have been diverted by Second Point or Lower-River diverters because the Kern River is a closed system. (RT 255:23 to 256:8.)

*c. Exhibit 2-18*

Exhibit 2-18 is a table showing historical use of the Intertie. In the Order, it is noted that Exhibit 2-18 shows Kern River water being diverted into the Intertie in nine separate years since 1978. (Order at 4.) Exhibit 2-18 also demonstrates that Intertie operations are (1) infrequent – principally occurring in very wet years or other "high flow" conditions; (2) highly variable in volume; and (3) of relatively short duration, with the exception of 1983 – a record-setting flood year.[7] Exhibit 2-18 lends no support to the proposition that water delivered into the Intertie is in excess of proprietary water rights.

2. Overwhelming and Uncontested Evidence Shows That Water Delivered into the Intertie Is Not in Excess of Proprietary Water Rights.

In 1964 the State Board examined the Kern River for any unappropriated water in "The Matter of Applications 9446, 9447, 10941, 11071, 11148, 11351, 13403, 13709, 15440 of Buena Vista Water Storage District and Others to appropriate from the Kern River and Various Distributaries in Kern County." Evidence was taken with respect to this issue at a public hearing held February 5, 1964. (JE 8.) The uncontroverted evidence showed that:

- The **ENTIRE** natural flow of the Kern River had long been allocated among the First Point, Second Point and Lower-River diverters pursuant to the Miller-Haggin Agreement of 1888 (JE 13, 14), the Shaw Decree of 1900 (JE 15), the 1930 and 1955 Amendments to the Miller-Haggin Agreement (JE 16, 17), the 1962 Kern River Water Rights and Storage Agreement (JE 18), and the Agreement for Establishment and Maintenance of Minimum Recreation Pool (JE 19).
- Studies by C.E. Grunsky, as reported in Bulletin 100, Irrigation Investigations of the Department of Agriculture, and subsequent records of the U.S. Geological Survey and others, indicate that the **ENTIRE** Kern River runoff has been absorbed within the Kern River service area since 1878. (JE 8 at 32:2-11.)

[7] The floodwaters discharged into the Intertie have ranged from as little as 1,793 acre-feet (1997) to up to 664,036 acre-feet (1983). One year, 1983, accounts for over 40 percent of the total number of days of Intertie flow (i.e., 283 days out of 662 days) and more than 50 percent of the total flow (i.e., 664,036 out of 1,216,027 acre-feet). (B 2-18; RT 129:17-25 to 131:1-12.) Taking into account the shoulder months of this single flood, December 1982 (10,339 acre-feet) and January 1984 (26,720 acre-feet), this one event constitutes 58 percent of all Kern River floodwaters discharged into the Intertie. (B 2-18).

- **ALL** Kern river water was absorbed within the service areas of the First Point, Second Point, and Lower-River diverters during the 70-year period of record prior to the 1964 hearing (i.e., 1894 through 1963). (JE 8 at 25:4-8.)

- 1906 was an extremely high runoff year (1,899,900 AF) yet **ALL** water was absorbed in the service areas of the First Point, Second Point, and Lower-River diverters, i.e., no water escaped the Kern River system into the San Joaquin River and/or flowed to the ocean. (JE 8 at 34:5-17.)

- In 1952 there was a measured flow of 1,501,000 AF at First Point, 707,200 AF at Second Point, and 210,200 AF at Highway 46, **ALL** of which water was used within the respective service areas of First Point, Second Point, and Lower-River diverters. (JE 8 at 35:20-26.)

In light of this evidence, the Engineering Staff Analysis, dated May 28, 1964, determined, among other things, that "[t]he entire flow of the Kern River has been beneficially used since 1894."[8] (JE 7 at 10.) Similarly, D 1196 concludes:

> 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.

(JE 21 at 5.)

Further, in State Board WR-89-25, the State Board concluded that "the administrative record on which the decision [D 1196] is based . . . contains ample substantial evidence to support a finding that no water remains available for appropriation . . . . Accordingly, the Board finds that Decision 1196 does determine no water remains available for appropriation in the Kern River System." (WR-89-25 at 14 (emphasis added).)

Thus, the uncontroverted evidence establishes that the "proprietary rights" of the First Point, Second Point, and Lower-River diverters extend to the entire flow of the Kern River. The uncontroverted evidence shows conclusively that all water flowing in the Kern River, including that portion offered from time to time for diversion into the Intertie, falls within the recognized, pre-1914 water rights of one or more of the First Point, Second Point, or Lower-River diverters.

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[8] "A comparison of Table 2 [annual runoff] and 4 [actual use] clearly indicates that all of the water within the stream system has been applied to beneficial use. This is supported by the fact that no water has flowed out of Tulare Lake since 1878." (JE 7 at 10).

Even Bakersfield's own witness, Gene Bogart, confirmed this fact when he testified as follows:

> Q. (By Mr. McMurtrey) Right. And virtually all the water that Kern River was being put to some beneficial use even in the 1870s; is that right?
>
> A. That's correct.
>
> Q. It's still the same today is it not?
>
> A. That's correct.

(RT 88:23 to 89:3.)

3. Intertie Deliveries Are Outside the Jurisdiction of the State Board.

Historically, high flow Kern River water beyond the immediate needs of the water right holders was stored in Buena Vista Lake (Second Point service area) or Tulare Lake (Lower-River service area) for later beneficial use. (JE 7 at 6; JE 8 at 58.) This water was stored in cells created by constructing levees. (*Id.*) The stored water was later rediverted from these cells for use on irrigated lands within the service areas. (*Id.*) Additionally, such water was spread for percolation into the groundwater basin for underground storage and later use providing "cyclic storage for extended periods of drought." (JE 7 at 6; 8 at 42; 21 at 4-5.) No water was allowed to escape the Kern River system; all water was put to beneficial use. (JE 7 at 10; RT 88:23 to 89:3.)

With the construction of the Intertie in the mid-1970s, the Kern River diverters were afforded the option of permitting some high flow Kern River water to enter the California Aqueduct rather than storing the same in Buena Vista and/or Tulare Lakes. Exercising such option has been, from time to time, considered a best management practice because it (i) reduces flooding of prime agricultural farmlands in the Buena Vista and Tulare Lake service areas; (ii) comports with the policy of this State that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable" (e.g., Water Code § 100); and (iii) comports with the policy of this State encouraging voluntary transfers to ensure efficient use of water within the State (e.g., Water Code § 109(a)).[9]

[9] Note that Cal. Water Code §109(b) "directs the…State Water Resources Control Board…to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer." The Order does the opposite: i.e., it discourages voluntary transfers by putting vested water rights in jeopardy as a result thereof.

Deliveries of high flow Kern River water into the California Aqueduct via the Intertie are accomplished by agreement between the Kern River diverters and the Department of Water Resources (Department). When and how much water is offered to the Intertie is completely within the discretion and judgment of the Kern River interests, acting by and through the Kern River Watermaster. As explained by the Department in its comment letter dated January 9, 2010, 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.

There is no evidence in the record before the State Board proving that the infrequent and intermittent Intertie flows occurring since 1978 during voluntary flood control operations have been anything other than diversions by the Kern River interests falling within the purview of Water Code § 1706, which provides:

> The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

Such diversions do not create, constitute or demonstrate the availability of "unappropriated water."[10] The State Board's attempt to assert jurisdiction over such diversions constitutes an error of law.

Assuming, *arguendo*, that deliveries into the Intertie do not fall within the purview of Water Code Section 1706, such deliveries are still outside the jurisdiction of the State Board for the reasons stated by the Department of Water Resources in its comment letter dated January 9, 2010. More particularly, as the Department points out, the purpose of Intertie operations during

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[10] Water Code § 1201 defines unappropriated water as follows: "All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code" (emphasis added).

flood events is not to divert water for beneficial use but for flood protection purposes. These operations are conducted under the governmental authority and power to divert 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. The Department correctly notes that "[t]he Board has traditionally and properly recognized that flood control diversions fall outside its water rights authority." Again, any attempt to assert jurisdiction over such flood control diversions constitutes an error of law.

In summary, there is no evidence to support the State Board's determination that intermittent and infrequent Intertie deliveries are in excess of "traditionally held and exercised rights and claims" of existing Kern River water right holders. The overwhelming and uncontroverted evidence in the record before the State Board is to the contrary, i.e., ALL Kern River water was allocated to and has been historically diverted and used by one or more of the Kern River Interests. Intermittent and infrequent diversions of Kern River floodwaters into the Intertie are controlled and directed by the Kern River Interests, are completely voluntary, and constitute nothing more than a change of point of diversion, place of use and/or purpose of use to protect prime agricultural farm lands from flooding. Such diversions do not create, constitute or demonstrate the availability of "unappropriated water" for the reason that these diversions fall within the purview either of Water Code Section 1706 or of flood control and safety operations outside the jurisdiction of the State Board. For these reasons, reconsideration of the Order is requested on the bases that it is not supported by substantial evidence and constitutes an error of law.

**D. The Order Is Legally Erroneous in Relying on Occasional Flood Flows Discharged into the Intertie As a Basis to Revise FAS Declaration Because No Petitioner Submitted an Application Proposing to Put Such Water to Beneficial Use, and the State Board Did Not Raise This Matter on Its Own Motion or Include This Matter in the Notice of Hearing.**

The Order is legally improper because its key finding—the potential availability of Intertie water—was not raised pursuant to the applicable statutory procedures, and the parties to the proceeding did not have proper notice of it. The Water Code provides that a FAS Declaration may be revised upon petition by any interested person, or "upon [the State Board's] own motion."

(Water Code § 1205(c).) In this matter, the State Board considered revising the Kern River FAS based on five petitions filed by interested parties. The State Board did not bring its own motion to revise the Kern River. Notably, the matter of the Intertie was not explicitly raised in the Notice of Hearing.

The five petitions cited only the *North Kern* Decision as a "changed circumstance" potentially justifying revision to the Kern River FAS Declaration. No petitioner identified the flood control operations of the Intertie as a "changed circumstance," and no petitioner sought to appropriate those flood flows. None of the exhibits or testimony in these proceedings indicate the intent of any party to divert floodwaters that otherwise would flow into the Intertie and away from lands in the Buena Vista and Tulare Lake service areas.

Although the petitions filed in this matter focused only on water potentially made available by the *North Kern* judgment, the Order revises the Kern River FAS Declaration on the sole ground that floodwaters occasionally enter the Intertie. (Order at 5.) This is an improper ground for revising the FAS Declaration, however, because no petitioner raised the floodwater issue, and the State Board failed to raise it via noticed motion and failed to include it as a key issue in the Notice of Hearing. (*See* Water Code § 1205(c); Notice of Hearing at 3.) The noticed motion procedure mandated in Water Code Section 1206(c) protects the parties' due process rights by allowing fair notice of the legal arguments and evidentiary support thereof. The paucity of evidence even mentioning the Intertie shows no party understood Intertie water to be within the scope of the hearing notice; the single substantive question on the Intertie came after the parties had completed their direct and cross-examinations, and was asked by a member of the hearing team. (RT 264:18-23.)

Reconsideration of the Order is warranted on this ground because the State Board's failure to raise the Intertie floodwaters issue via noticed motion significantly prejudiced the parties' ability to present rebuttal law and facts. The ultimate result of the State Board's failure to properly notice the Intertie floodwater issue is that the record does not fully address the Intertie and the parties must now invest significant resources to defend their longstanding, vested water rights during the application process. Unless corrected, this lack of due process not only violates

Water Code section 1206, but also the due process provisions of the U.S. and California Constitutions.

**E. The Order Is Legally Erroneous In Revising the FAS Declaration Based on the Availability of Occasional Flood Flows Because, Absent an Application to Place Such Waters to Beneficial Use, Water Code Sections 1206(C) and 1425 et seq. Dictate That Such Waters Should Be Permitted for Diversion and Use Pursuant to the Temporary Urgency Permitting Provisions of Water Code Sections 1425 et seq.**

The California Legislature enacted the FAS law in 1987. (SB 1485; Water Code § 1205 et seq.) The State Board itself sponsored the bill out of sheer practicality: to avoid wasting the time and resources of both applicants and State Board staff in preparing and processing water right applications for stream systems, such as the Kern River, where a prior water rights decision had found all water to be previously appropriated.[11]

A key component of the FAS law is that once a stream system is declared fully appropriated, the State Board will not accept new water rights applications (unless there is first an approved petition to revise the FAS Declaration). (Water Code § 1206(a).) In this instance the State Board has not granted any of the petitions. There is an exception to this rule, however, that allows processing of "temporary urgency permits." In this regard, the State Board has explicit and clear direction from the Legislature to issue temporary water right permits on fully appropriated stream systems. (Water Code §§ 1206(c), 1425 et seq.) The use of the temporary urgency permitting process to allow diversion and use of occasional flood flows on otherwise fully appropriated stream systems was explicitly recognized by the State Board when it made the following recommendation to the governor as he considered enacting the FAS law:

> The Board, however, would be authorized to accept applications for temporary diversions of surplus water when hydrologic conditions are such that more water is present than is needed for existing beneficial uses."[12]

The State Board's FAS Declaration has consistently recognized this exemption. (*See* Orders WR-89-25 § 10 and WR-98-08 § 4.12 (emphasis added).) Significantly, prior to adoption

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[11] Bill Report, State Water Resources Control Board (Sept. 4, 1987).

[12] *Id.* (emphasis added).

of the Order, the State Board considered and rejected the claim that occasional discharge of Kern River floodwaters into the Intertie in "some years" were grounds to revise the FAS Declaration. Instead, in WR-94-1 the State Board ordered that if someone "believes there is unappropriated water available during abnormally wet water years, it may seek temporary authorization to appropriate the water by filing an Application for a Temporary Permit. The temporary permit process is exempt from the Declaration." (WR-94-1 at 10.)

Those physical and regulatory circumstances have not changed since the State Board adopted WR-94-1. The law remains that Water Code Section 1425 is the method by which occasional flood flows should be permitted on fully appropriated stream systems absent a petition being granted to allow processing of an application to appropriate such waters for reasonable and beneficial use. Yet the Order ignores this law and inexplicably contradicts the State Board's own prior decisions regarding the significance of occasional Kern River floodwaters. To the extent the State Board finds that certain occasional Kern River flood flows are available for appropriation, the proper method to obtain a water right to those flows is through the temporary urgency permitting process of section 1425.

Notably, the Order represents a significant departure from the State Board's established method for addressing the appropriation of occasional flood flows on other river systems such as the Santa Ana. In the *Santa Ana* proceedings, the State Board granted a petition to revise the FAS Declaration based, in part, on the availability of flood flows that would have been lost prior to the completion of Seven Oaks Dam. (*See generally* WR-2000-12.) However, the *Santa Ana* proceedings are distinguishable because in that case, the applications filed by Western Municipal Water District and San Bernardino Valley Municipal Water District were filed for the specific purpose of appropriating the flows identified in the petition and placing them to reasonable and beneficial use. (*See* WR-2000-12 at 1 ("The petition and accompanying hydrologic data were filed to demonstrate that water previously lost as flood flows can now be stored or regulated by the new Seven Oaks Dam flood control project."), 9 (providing descriptions of proposed projects submitted by Western and Muni that would allow them to divert and store water from Seven Oaks Dam).)

In this case, unlike *Santa Ana*, no petition was granted and none of the applications on file sought to appropriate the occasional flood flows that are ultimately discharged into the Intertie. Further, as noted above, the State Board has previously rejected the idea that such flows could form the basis for revising the FAS Declaration as to the Kern River. This makes sense in a closed river system such as the Kern River System, where the uncontroverted evidence establishes that the "proprietary rights" of the First Point, Second Point and Lower-River diverters extend to the entire flow of the Kern River. Notably, it was undisputed in the *Santa Ana* proceedings that the floodwaters sought to be appropriated were waters that, prior to the construction of Seven Oaks Dam, were lost to the ocean; thus, the water captured behind Seven Oaks Dam was new water that had not previously been present in the system. (WR-2000-12 at 10-11.)

**F. The Order Is Unlawfully Broad and Uncertain.**

The Order is overly broad and uncertain as to the scope of water right applications it mandates the Division accept and process regarding the Kern River. First, the Order provides that the FAS orders (WR-89-25, WR-91-07 and WR-98-08) are amended to "allow for processing applications to appropriate water from the Kern River." (Order at 7.) This term of the Order appears to authorize processing of any applications seeking to appropriate any water from the Kern River. Second, the Order directs that the Division "process any water right applications accepted as a result of this order." (*Id.*) Once again, the Order seems to require processing of "any" applications resulting from it. However, the phrase "accepted as a result of this order" is vague and completely incomprehensible because the Order does not provide a clear definition of what water has been determined to be unappropriated and hence available for appropriation.

For example, presumably, although not stated in the Order, the State Board has required the processing of the five (5) pending applications (Applications 31673 to 31677) even though none of the petitions has been granted and the State Board acknowledged that the evidence failed to establish that the *North Kern* forfeiture created any unappropriated water. (Order at 5.) Compounding the confusion is the provision of the Order that leaves to future evidentiary hearings (which may occur over the course of the next several years) the presentation of evidence

necessary to establish whether there may be any unappropriated water created by the forfeiture judgment.[13] In the end, the Order is completely uncertain as to whether the Division is now required to process "any," that is all, applications to appropriate Kern River water, without limitation.

Such a broad and unconditional order is plainly not supported by the record. First, as recited in the Order, albeit erroneously, the only Kern River water arguably unappropriated and therefore subject to the State Board's jurisdiction is floodwater discharged into the Intertie during flood control operations. (Order at p. 5.) Second, because the Order fails to provide a clear definition, with narrow and explicit parameters as to what applications the Division is required to process, prior existing Kern River rights holders are unnecessarily subjected to significant uncertainty and potentially lengthy, complicated and expensive proceedings before the State Board.

1. The State Board Should Clearly Identify the Conditions and Limit Processing Only to Applications to Appropriate Intertie Floodwaters

As stated above, the record confirms that the Kern River remains fully appropriated. Further, there is no legal basis to process applications to appropriate water related to the *North Kern* Decision. However, if the State Board refuses to completely reverse its decision, it should nonetheless provide clear, narrow and explicit conditions under which the Division will be permitted to accept applications regarding the discharge of floodwaters into the Intertie. Specifying narrow procedures for processing floodwater applications is particularly important because every stream system listed in the FAS Declaration is subject to periodic flooding and a broad revision would undermine the entire FAS process, subjecting all stream systems and vested prior rights holders to numerous petitions and burdensome hearings.

*a. The State Board Has the Statutory Authority to Impose Conditions and Limitations Under Which Applications Are Accepted for Filing*

The general rule is that after the adoption of a FAS Declaration, the State Board shall not

[13] As established above, the record established that the *North Kern* Decision created no unappropriated water.

accept any applications to appropriate water from the stream system. (Water Code § 1206(a).) An exception to the rule is as follows:

> [T]he board may provide, in any declaration that a stream system is fully appropriated, for acceptance for filing of applications to appropriate water under specific conditions. Any provision to that effect shall specify the conditions and may contain application limitations, including but not limited to, limitations on the purpose of use, on the instantaneous rate of diversion, [and] on the season of diversion [ . . . ]. The board may make those limitations applicable to individual applications to appropriate water, or to the aggregate of the applications, or both."

(Water Code § 1206(b), emphasis added.)

The State Board should treat the Kern River in the same manner it has other streams in California. In the *Santa Ana* proceeding, for example, the State Board lifted the FAS Declaration only as to applications that were on file: "[T]he focus of our inquiry in this proceeding is on the relatively narrow task of determining if the evidentiary record supports revising the fully appropriated stream status of the Santa Ana River for the limited purpose of processing the water rights applications submitted by the petitioners." (WR-2000-12 at 15; *see also id.* at 16 (ordering the Division to "process the specified water right applications in accordance with applicable law").) In 2002, after the State Board processed additional water right permits on the *Santa Ana*, the State Board held another FAS hearing and again amended the order only to allow for the processing of the specified water right applications that were on file with the State Board. (WR-2002-0006 at 7.) Notably, these applications were processed only after they proved that their applications were predicated on "new water" which was proven to change the hydrology on the stream system and gave rise to changed circumstances. The State Board's failure to provide narrow and explicit parameters as to the applications the Division will process is inconsistent with the manner in which it has addressed this issue in other proceedings such as the *Santa Ana* proceeding.

Consistent with the *Santa Ana* proceedings, the State Board should limit the revision of the FAS to applications specifically seeking appropriation of floodwaters discharged into the Intertie during flood control operations.

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*b. Applications Should Be Limited to Kern River Water in Excess of the Diversion and Use of First Point, Second Point and Lower-River Diverters Existing Water Right Entitlements Recognized in D 1196*

The priority of water rights of the First Point, Second Point and Lower-River diverters—as implemented under the Miller-Haggin Agreement, Shaw Decree and other agreements—are vested property rights which may not be changed or re-prioritized by the State Board's issuance of a subsequent permit. The Order must be revised to explicitly condition the acceptance of any new application so as to prevent interference, curtailment or injury to the prior existing water right entitlements recognized by the State Board in D 1196.

California law requires that the State Board recognize and protect prior existing rights before making an unappropriated water finding. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102-103 ("*United States*"); *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.)

Further, it is well settled that valid riparian and appropriative rights are vested property rights. (*United States, supra.* 182 Cal.App.3d 82, 101 ("once rights to use water are acquired, they become vested property rights"); Hutchins, *The California Law of Water Rights, supra,* at 173.) Thus, "they cannot be infringed by others or taken by governmental action without due process and just compensation." (*United States* at 101; Hutchins at 174.) A "court may neither change priorities among the water rights holders nor eliminate vested rights." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243, 1251; *Smith v. O'Hara* (1872) 43 Cal. 371, 375 ("It is not to be doubted, that the person who first appropriates for mining or other purposes the waters of a stream running upon the public lands, is entitled to the same, to the exclusion of all subsequent appropriations by other persons for the same or other purposes.").)

Most recently, in *North Kern* the Court of Appeal made clear that "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 existing pre-1914 rights of other appropriators." (*North Kern, supra,* 147 Cal.App.4th 555, 584.)

*c. The Quantity of Water Subject to Appropriation Must Be Limited to the Kern River Water Actually Discharged into the Intertie*

As previously recognized by the State Board in D 1196, the First Point, Second Point and Lower-River diverters have valid and vested water right entitlements to the entire flow of the Kern River. (*See e.g.*, JE7 at 6-12; 14; 20; 21 at 3-4.) From time to time, during erratic, high-flow flooding events the flows of the Kern River have exceeded the instantaneous demand of water users to locally store, convey and distribute water without some incidental damage to agricultural fields. (JE79; B2-18; RT 264:16-23; *see also* RT 263:23-25 to 264:1 ("Primarily to protect property" certain of these floodwaters have been discharged into the Intertie).) The timing, duration and volume of discharge into the Intertie is determined by the First Point, Second Point and Lower-River diverters in accordance with the court judgments, decrees and agreements,[14] and such authorizations may be made subject to a Water Code Section 1706 transfer or withheld altogether. The State Board should therefore only accept applications to appropriate the quantity of Kern River water actually discharged into the Intertie as determined by the First Point, Second Point and Lower-River diverters, and only to the extent that such waters are not discharged pursuant to a Section 1706 transfer. Such a clear condition necessarily protects the prior existing rights on the Kern River consistent with Federal and State flood control laws while allowing intermittent floodwaters to be applied to beneficial use to the fullest extent possible. (Cal. Const. Art. X, § 2.)

*d. Applications Should Be Subject to the Procedures, Terms and Conditions of the Intertie Operations Agreements.*

The State Board should condition the Division's acceptance of any application with a

[14] Specifically, the State Board based its decision (JE21, p. 3) on the testimony provided at hearing (JE8) and the Miller-Haggin Agreement (JE13, 14), the 1930 and 1955 Amendments to the Miller-Haggin Agreement (JE16; 17), the 1962 Water Rights and Storage Agreement (JE18), and the Agreement for Establishment and Maintenance of Minimum Recreation Pool (JE19), the Shaw Decree (JE15), along with the report of the Kern River Watermaster (JE20).

requirement that the applicant comply with the procedures, terms and conditions of the Intertie operations agreements. Since 1975, the Department of Water Resources and the several local public agencies exercising Kern River water right entitlements have coordinated the procedure for the safe operation of the Intertie. In operating the Intertie the parties contractually bound themselves to notification requirements, operational criteria and quality standards. To ensure protection of the California Aqueduct, the Intertie, and the facilities of the several other public agencies responsible for operation of the Intertie during flood control conditions, the State Board should require that any party seeking appropriation of Kern River floodwater discharged into the Intertie comply with the Intertie operational agreements.

G. **Conclusion**

For the reasons set forth herein, the Joint Petitioners respectfully request that the State Board amend Order WR-2010-0010 to find that no petition submitted in this matter demonstrated evidence of unappropriated Kern River water and, as such, the Kern River FAS Declaration remains unchanged. In the alternative, the Joint Petitioners request that the State Board re-open the first phase of these proceedings to receive any additional evidence necessary to resolve whether the *North Kern* Decision resulted in unappropriated water. If further proceedings are necessary, the Joint Petitioners request that the order thereon either clearly hold that no water is available for appropriation or specify the quantities available for appropriation and when that water is available for diversion.

DATED: March 3, 2010

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McMURTREY, HARTSOCK & WORTH

By: _____
GENE R. McMURTREY
Attorney for Buena Vista Water Storage District

DATED: March 12, 2010

BEST BEST & KRIEGER LLP

By: _____
JILL N. WILLIS
Attorney for City of Shafter

DATED: March __, 2010

SOMACH SIMMONS & DUNN

By: _____
NICHOLAS A. JACOBS
Attorney for Kern County Water Agency

DATED: March __, 2010

DOWNEY BRAND LLP

By: _____
KEVIN M. O'BRIEN
Attorney for Kern Water Bank Authority

DATED: March __, 2010

McMURTREY, HARTSOCK & WORTH

By: _____
GENE R. McMURTREY
Attorney for Buena Vista Water Storage District

DATED: March __, 2010

BEST BEST & KRIEGER LLP

By: _____
JILL N. WILLIS
Attorney for City of Shafter

DATED: March 18, 2010

SOMACH SIMMONS & DUNN

By: _____
NICHOLAS A. JACOBS
Attorney for Kern County Water Agency

## STATEMENT OF SERVICE

I, Terri D. Kuntz, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On March 18, 2010, I served the within document(s):

**Petition for Reconsideration; Points and Authorities in Support of Petition**

**(jointly filed on behalf of North Kern Water Storage District, City of Shafter, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency)**

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ **BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY ELECTRONIC MAIL:** by transmitting the document(s) listed above via electronic mail to all parties listed to receive electronic service at the electronic mail address set forth on the Service List.

***See Attached Service List***

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 18, 2010, at Sacramento, California.

Terri D. Kuntz

1042939.2

**HEARING REGARDING PETITION TO REVISE THE DECLARATION OF FULLY APPROPRIATED STREAM SYSTEM OF THE KERN RIVER**
**OCTOBER 26, 2009**

**SERVICE LIST**

**PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)**

| | |
|---|---|
| CENTER FOR BIOLOGICAL DIVERSITY<br>c/o Adam Keats<br>351 California Street, Suite 600<br>San Francisco, CA 94104<br>akeats@biologicaldiversity.org | KERN COUNTY WATER AGENCY<br>c/o Nicholas Jacobs<br>Somach, Simmons & Dunn<br>500 Capitol Mall, Suite 1000<br>Sacramento, CA 95814<br>njacobs@somachlaw.com |
| KERN WATER BANK AUTHORITY<br>c/o Kevin M. Obrien<br>Downey Brand LLP<br>621 Capitol Mall, 18th Floor<br>Sacramento, CA 95814<br>kobrien@downeybrand.com<br>jschofield@downeybrand.com<br>tkuntz@downeybrand.com | CITY OF SHAFTER<br>c/o Jason M. Ackerman<br>Best, Best & Krieger LLP<br>3750 University Avenue, Suite 400<br>Riverside, CA 92501<br>jason.ackerman@bbklaw.com<br>jill.willis@bbklaw.com |
| BUENA VISTA WATER STORAGE DISTRICT<br>c/o Gene R. McMurtrey<br>McMurtrey, Hartsock & Worth<br>2001 22nd Street. Suite 100<br>Bakersfield, CA 93301<br>gene@mcmurtreyhartsock.com | CITY OF BAKERSFIELD<br>c/o Colin L. Pearce<br>Duane Morris LLP<br>One Market, Spear Tower, Suite 2200<br>San Francisco, CA 94105-1127<br>clpearce@duanemorris.com |
| NORTH KERN WATER STORAGE DISTRICT<br>c/o Scott K. Kuney<br>Young Wooldridge, LLP<br>1800 30th Street, Fourth Floor<br>Bakersfield, CA 93301<br>skuney@youngwooldridge.com | |