

# *Kern Delta Water District*

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October 19, 2009

### **Public Policy Statement of Kern Delta Water District Before the Division of Water Rights State Water Resources Control Board**

**Re: Public Hearing on Petition to Revise the Declaration of Fully Appropriated Steam System of the Kern River, October 26th, 2009**

Kern Delta Water District ("Kern Delta") is a California Water District formed and existing pursuant to Division 13 of the California Water Code, sections 34000, et seq. Kern Delta's boundaries encompass approximately 125,000 acres, of which approximately 90,000 acres are developed to irrigated agriculture. Kern Delta provides water service to these lands from a combination of water sources, principally Kern River water diverted pursuant to vested, pre-1914 appropriative water rights and State Water Project ("SWP") water obtained from the California Aqueduct pursuant to a Water Supply Contract with the Kern County Water Agency. This water is used for the irrigation of a wide variety of agricultural commodities.

Kern Delta's Kern River water rights were acquired in 1976 by purchase from the City of Bakersfield. Kern Delta is successor-in-interest to those Kern River water rights held by certain canal companies which were signatories to the Miller-Haggin Agreement of 1888 and which were adjudicated in the Shaw Decree of 1900. Kern Delta's Kern River water rights are commonly referred to as the Kern Island 1<sup>st</sup>, Kern Island 2<sup>nd</sup>, Buena Vista 1<sup>st</sup>, Buena Vista 2<sup>nd</sup>, Stine and Farmers. These Kern River water rights are part of what is sometimes referred to as "First Point" water rights and Kern Delta is considered to be a "First Point diverter". Kern

Delta's Kern River water rights are, by far, the primary source of supply for Kern Delta lands and landowners. The continued availability and use of such Kern River water rights is absolutely essential to the agricultural operations within Kern Delta.

Kern Delta was a participant in the case of *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555.<sup>1</sup> In that litigation the court examined the utilization of Kern River water by Kern Delta's predecessors-in-interest during the five years immediately preceding Kern Delta's 1976 acquisition. It was determined that, during the period from 1972 to 1976, certain rights had suffered partial forfeiture as a result of non-use of available supplies. The Kern Delta Kern River water rights have always been subject to a cap, i.e., a maximum monthly volume which could not be exceeded. The *North Kern* judgment effects a cap reduction for certain rights in certain months. The new caps are shown in the table below.<sup>2</sup>

Kern Delta Water District				
Monthly Preserved Entitlements				
	Kern Island (1 <sup>st</sup> ) (AF)	Buena Vista (1 <sup>st</sup> ) (AF)	Stine (AF)	Farmers (AF)
January	8,493	347	--	--
August	--	--	--	610
September	--	--	583	268
October	6,989	--	1,380	--
November	3,375	236	22	--
December	2,050	191	12	207

Note: Months identifying "--" were not limited by forfeiture.

<sup>1</sup> Please see, previously submitted, Joint Exhibit 2 for a copy of the trial court's decision; and Joint Exhibit 3 for a copy of the Appellate Court opinion.

<sup>2</sup> Please see Joint Exhibit 4 for a similar table with the same information.

It is important to note that the *North Kern* litigation involved an examination of the Kern Delta Kern River water rights for possible forfeiture from the mid-1800s to the present day. While limited partial forfeiture was found as stated above, the court also determined that the majority of Kern Delta's Kern River water rights had been and are preserved as of this date through actual use. These "preserved entitlements" continue to be owned and exercised by Kern Delta and continue to be vitally necessary to the agricultural economy of the Kern Delta area.

Kern Delta does not believe that the limited, partial forfeiture found to exist in *North Kern* results in the availability of "new water" sufficient to warrant disturbing the several previous declarations by the State Water Resources Control Board to the effect that the Kern River is a fully appropriated stream. All water released to the Kern River by Kern Delta's predecessors-in-interest during the forfeiture period was fully absorbed and utilized by existing junior right holders. All water released to the Kern River following the entry of judgment in *North Kern* has been fully absorbed and utilized by existing junior right holders.

However, should the Board disagree – i.e., should the Board set aside the previous declarations that the Kern River is a fully appropriated stream and accept applications to appropriate water therefrom – then, and in such event, it is essential that any permit issued by the Board for the appropriation of Kern River water expressly recognize and be subject to all vested rights, including the vested rights of Kern Delta as measured by its preserved entitlements. As expressed above, Kern Delta not only uses but needs all of its preserved entitlements in order to meet the demands of the lands and landowners within its boundaries. Kern Delta's preserved entitlements have been judicially determined and declared and should be protected by the Board.

In addition to recognizing the preserved entitlements owned by Kern Delta, it is further requested that any permit issued by the Board acknowledge and enforce the duties and obligations of parties (and their successors) signatory to the 1962 Kern River Water Rights and Storage Agreement ("1962 Agreement").<sup>3</sup> More specifically, the obligation that:

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<sup>3</sup> See Joint Exhibit 18.

Each party hereby accepts the water apportionment provisions hereof as a final and permanent settlement of all of its rights and claims in and to the waters of Kern River, and each party hereby covenants and agrees with the others that it will never make or assert against any other party or parties hereto any claim to any of the waters of Kern River except the water herein expressly apportioned to it. Each party agrees that all waters of Kern River to which it may become entitled under any application now pending or hereafter filed before the State Water Rights Board, or under any permit or license issued pursuant to any such application, shall serve and be used only to feed and support the respective rights and allocations of the parties hereto in accordance with the provisions of this contract. [1962 Agreement, Page 7, Paragraph 4]

As the 1962 Agreement remains in full force and effect, any permit to a party or successor-in-interest in the 1962 Agreement should only be issued subject to the provisions and obligations therein.

In conclusion, Kern Delta requests that this Board (1) deny all petitions seeking to set aside previous Board determinations that the Kern River is a fully appropriated stream; or, alternatively, (2) preserve and protect Kern Delta's vested Kern River water rights by making any permit to appropriate Kern River water expressly subject to Kern Delta's Kern River water rights as measured by the court-approved preserved entitlements; and (3) enforce the 1962 Agreement with respect to any permit issued to a signatory thereof and/or a successor-in-interest to such signatory.

Respectfully submitted,

KERN DELTA WATER DISTRICT

By:

  
L. Mark Mulkey  
General Manager

1 **PROOF OF SERVICE**

2  
3 **STATE OF CALIFORNIA, COUNTY OF KERN**

4 I, GUADALUPE GONZALEZ, declare: I am and was at the time of the service hereunder  
5 mentioned, over the age of eighteen (18) years and not a party to the within cause. My business  
6 address is 2001 22nd Street, Suite 100, Bakersfield, California 93301.

7 On October 19, 2009, I served the document(s) titled:

8 **KERN RIVER FAS PETITION HEARING [PUBLIC  
9 POLICY STATEMENT OF KERN DELTA WATER  
10 DISTRICT]**

11 on the interested parties in this action, as listed below:

12 **SEE ATTACHED SERVICE LIST**

13 \_\_\_\_\_ **(BY MAIL)** I am readily familiar with the firm's practice of collection and processing of documents  
14 for mailing. Under that practice, it would be deposited with the United States Postal Service on that  
15 same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of  
16 business.

17 \_\_\_\_\_ **(BY FACSIMILE TRANSMISSION)** A transmission report was properly issued by the sending  
18 facsimile machine, and the transmission was reported as completed and without error.

19 \_\_\_\_\_ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the  
20 addressee(s).

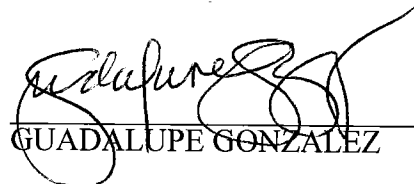
21 \_\_\_\_\_ **(BY OVERNIGHT COURIER)** I caused such envelope with delivery fees fully prepaid to be sent  
22 by overnight courier.

23 **XXX** **(BY ELECTRONIC MAIL)** I served the foregoing document(s) by transmitting a copy of the  
24 document(s) by electronic mail to the email address shown above or on the attached list.

25 Executed on October 19, 2009, at Bakersfield, California.

26 **XXX** **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is  
27 true and correct.

28 \_\_\_\_\_ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this Court at whose  
direction the service was made.

29   
30 \_\_\_\_\_  
31 **GUADALUPE GONZALEZ**

## SERVICE LIST

<p><b>DIVISION OF WATER RIGHTS STATE WATER RESOURCES CONTROL BOARD</b> Attn.: Paul Murphey P. O. Box 2000 Sacramento, CA 95812-2000 <a href="mailto:wrhearing@waterboards.ca.gov">wrhearing@waterboards.ca.gov</a> [Electronic and Original by U.S. Mail]</p>	<p><b>NORTH KERN WATER STORAGE DISTRICT</b> c/o Scott K. Kuney, Esq. Young Wooldridge, LLP 1800 30<sup>th</sup> Street, Fourth Floor Bakersfield, CA 93301 <a href="mailto:skuney@youngwooldridge.com">skuney@youngwooldridge.com</a></p>
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