



State Water Resources Control Board



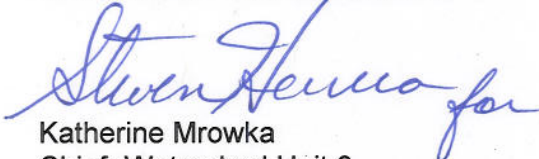
Linda S. Adams
Secretary for
Environmental Protection

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

MEMORANDUM

TO: Victoria A. Whitney, Chief
DIVISION OF WATER RIGHTS

FROM: 
Katherine Mrowka
Chief, Watershed Unit 3
DIVISION OF WATER RIGHTS

DATE: OCT - 2 2008

SUBJECT: PETITIONS TO REVISE STATUS OF KERN RIVER ON STATE WATER BOARD FULLY APPROPRIATED STREAMS LIST

In accordance with California Code of Regulations, title 23, section 871, five petitions have been filed with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), requesting revision of the Kern River's fully appropriated status as declared in Order 89-25 and subsequent orders, the Declaration of Fully Appropriated Streams (collectively "the Declaration"). The five petitions were received from: (1) North Kern Water Storage District (North Kern) and City of Shafter; (2) City of Bakersfield; (3) Buena Vista Water Storage District; (4) Kern Water Bank Authority; and (5) Kern County Water Agency (Petitioners). The Petitioners also filed applications to appropriate water.

The Petitioners cited the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* as the basis for filing the petitions. The Fifth District's ruling found that there was a partial forfeiture of Kern Delta Water District's (Kern Delta) pre-1914 water rights on the Kern River.

Background

Water Rights on Kern River

Water diversions from the Kern River for agricultural and domestic purposes date back to the 1860's. The historical administration of the water rights on the Kern is based on the concept of "the law of the river," which refers to the body of decrees, agreements, customs and practices that came into existence over the history of disputes on the river. Those court decisions and agreements of interest are:

- 1) Decision of the California Supreme Court in *Lux v. Haggin* (1886) 69 Cal. 255;
- 2) *Farmers Canal Company v. J.R. Simmons* (Super. Ct., Kern County, 1900, No. 1901), commonly known as the Shaw Decree
- 3) Miller-Haggin Agreement, 1888;

California Environmental Protection Agency

- 4) Amendment to the Miller-Haggin Agreement, 1930;
- 5) Amendment to the Miller-Haggin Agreement, 1955;
- 6) Kern River Water Rights and Storage Agreement, 1962;
- 7) Lake Isabella Recreation Pool Agreement, 1963; and
- 8) Other more recent court cases further discussed below

For the past 100 years, the major users of water from the Kern River have relied upon the original division of water in the various agreements and decrees and have been contracting and interchanging Kern River water among themselves. In most cases, water disputes have been settled out of court by agreement among the disputing parties.

A relatively small portion of water presently diverted from the Kern River and its tributaries is based on post-1914 water rights. The extent and validity of the pre-1914 water rights have been challenged in court, which led to the finding of partial forfeiture of Kern Delta's water rights. (*North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555.) The present distribution, use, and basis of water rights in the Kern River is complex and based on the various decrees and agreements. As of this date, a definitive quantification of the extent and validity of all water rights on the Kern River has not been undertaken.

Kern River's Fully Appropriated Stream Status

Pursuant to Water Code sections 1205 through 1207, the State Water Board has adopted and periodically revised the Declaration. The Declaration includes a list of stream systems that have been found to be fully appropriated for all or part of the year based on court decisions or decisions of the State Water Board. The Kern River stream system has been found to be fully appropriated throughout the year from the Buena Vista Sink upstream, including all tributaries where hydraulic continuity exists in Kern County. The Kern River system was included in the original Declaration adopted by State Water Board Order WR 89-25, and it remains listed on the most recent revised Declaration adopted with State Water Board Orders WR 91-07 and WR 98-08. Order 89-25 cited State Water Rights Board Decision 1196 (D1196), issued on October 29, 1964, to include the Kern River on the Declaration. Specifically, D1196 found that, "there was no showing that there is unappropriated water available" in the Kern River watershed. (D1196, p.5.)

Change in circumstances since issuance of D1196

Water Code section 1205(b) states that, "A declaration that a stream system is fully appropriated shall contain a finding that the supply of water in the stream system is being fully applied to beneficial uses where the board finds that previous water rights decisions have determined that no water remains available for appropriation." In substantiating the Kern River's status as fully appropriated, paragraph 7 of D1196 concluded that there was no water surplus to established uses in the Kern River, based on data included in the State Water Rights Board Engineering Staff Analysis of Record, dated May 28, 1964.

California Code of Regulations title 23, section 871, subdivision (b) states that the Division Chief may recommend a hearing to consider revision to the Declaration as follows: "The Chief's recommendation for revocation or revision may be based upon any relevant factor, including but not limited to a change in circumstances from those considered in a previous water right decision determining that no water remains available for appropriation, or upon reasonable cause derived from hydrologic data, water usage data, or other relevant information acquire by the Division of Water Rights in the course of any investigation conducted by it."

Following is staff's analysis regarding the change in circumstances from the information considered in D1196.

Kern River-California Aqueduct Intertie

The U.S. Army Corps of Engineers (Corps) constructed the Kern River-California Aqueduct Intertie (Intertie) as a flood control project in 1977. The Intertie diverts water from the lower Kern River near the City of Tupman, and its flood control function is intended to protect downstream agricultural lands on the Buena Vista Lake and Tulare Lake lakebeds. Absent the Intertie and upstream uses, Kern River flows would reach these areas and be used to irrigate crops, but as a result of upstream agricultural diversions and storage in Lake Isabella, these areas are usually dry, other than in years of very large runoff.

The Corps acknowledged that the Intertie was designed with the understanding that water would be diverted into the California Aqueduct and would be put to beneficial use via the State Water Project (SWP). The Department of Water Resources (DWR) operates the facility in accordance with an agreement among DWR, the Kern County Water Agency, and other water districts asserting water rights on the Kern River. The agreement limits Intertie diversions to flood flows *in excess of the needs of the districts claiming water rights on the Kern River*.

DWR diverted water through the Intertie in six different years between 1978 and 1988, in 1997 and 1998, and again in 2006. DWR has informed the State Water Board that it intends to use the Intertie more frequently over the next several years. The State Water Board has notified DWR of the necessity for it to obtain water rights for the Intertie diversions. However, DWR has questioned its need to obtain water rights.

In 1996, North Kern filed an action with the Tulare County Superior Court that sought a judgment that pre-1914 water rights acquired by Kern Delta in 1976 were partially forfeited by nonuse. (*North Kern Water Storage District v. Kern Delta Water District* (Super. Ct. Tulare County, 1999, No. 96-172919) hereinafter "the Conn Judgment.")

The Conn Judgment found that Kern Delta's pre-1914 water rights had been partially forfeited. The Conn Judgment also declared that Kern Delta's forfeiture resulted in an unspecified quantity of unappropriated water in the Kern River. In response to the finding of unappropriated water in the Conn Judgment, North Kern, the City of Bakersfield (Bakersfield), Kern Delta and others submitted petitions to the Division to request modification of the Declaration and accompanying applications to appropriate water from the Kern River.

The Fifth District Court of Appeal later reversed the Conn Judgment and remanded the case back to the Tulare County Superior Court. After a second trial, a second judgment was rendered. (*North Kern Water Storage District v. Kern Delta Water District* (Super. Ct. Tulare County, 2004, No. 96-172919) hereinafter "the Reed Judgment.") The Reed Judgment determined that as much as 60,895 acre-feet annually of Kern Delta's rights were forfeited.

On May 26, 2005, after the Reed Judgment but before the second appeal, the Division Chief issued a notice to North Kern, Kern Delta, Bakersfield and the other petitioners that their petitions and applications submitted in response to the Conn Judgment were rejected without prejudice. The notice indicated that new petitions and applications could be presented upon final resolution of the ongoing litigation. Bakersfield filed a petition for reconsideration that was rejected by the State Water Board with Order WR 2005-0017-EXEC. That order stated in

section 3.2, "Until the litigation determining the amount of water forfeited by Kern Delta is concluded with a final judgment, it is premature for the State Water Board to conduct a hearing on whether to revise the Declaration concerning the Kern River."

Ultimately, on April 25, 2007, the California Supreme Court denied petition for review. Therefore the Fifth District Court of Appeal's February 5, 2007 decision, is final. The Appellate Court judgment concluded that there was a partial forfeiture of Kern Delta's pre-1914 water rights. (*North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555.) The Court of Appeal further ruled that although the court determined water had been forfeited by Kern Delta's predecessors, the State Water Board was the proper body to determine whether the forfeiture would affect the status of the Kern River as fully appropriated pursuant to the Declaration.

Further, the Appellate Court judgment found that North Kern's argument that Kern Delta forfeited "water" was incorrect. Instead, the Court found that Kern Delta had actually forfeited "water rights" and stated,

If water rights are forfeited, however, the cumulative effect could be that the river is no longer oversubscribed. That is a determination not for the courts, but for the SWRCB. If those resulting limitations on appropriation might result in a determination that the Kern River is no longer fully appropriated, that determination will be made by the SWRCB on petition of a potential appropriator of the excess.

(*Id.*, at 583.)

Conclusion

Paragraph 7 of D1196 states, in part:

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.

Diversion of water to the California Aqueduct via the Intertie on numerous occasions since its construction in 1977 confirms that there has been a change in circumstances since D1196. Kern River flows in excess of the established uses of historical water right holders have been available, and excess water has been put to beneficial use through the SWP.

Further, the underlying basis upon which the petitions for revision of the Declaration were filed is that the courts have confirmed that water rights have been forfeited by Kern Delta. This also can be considered a change in circumstances since approval of D1196, because if those forfeitures are applied historically, it could be concluded that the water in the Kern River would not have been fully applied to beneficial use as described in D1196.

Because water rights have been forfeited subsequent to the determination under D1196 which in part was based on the pre-1914 water rights, it follows that the "established uses" referred to may have diminished as evidenced by the forfeiture. Further, Section 3.3 of WR Order 98-08 states in part,

OCT - 2 2008

Water Code section 1205 provides for revision of the Declaration under appropriate conditions. In the event that water becomes available for appropriation due to the revocation of a previously issued permit or license, the Declaration could be revised accordingly.

The information above shows there may have been a change in circumstances since D1196 was issued. Therefore I conclude 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 title 23, California Code of Regulations, section 871, subdivision (b). Any action on the petitions would be for purposes of determining whether the Declaration should be revised, and no determinations on whether to approve the pending applications would be made until after the hearing resulted in a determination on whether the stream is fully appropriated.

Concur:


Victoria A. Whitney
Division Chief

Date:

OCT 10 2008