State Water Resources Control Board

NOTICE OF ASSIGNMENT

The State Water Resources Control Board
Administrative Hearings Office
has been assigned
an adjudicative hearing on issues arising from the pending applications of

North Kern Water Storage District and City of Shafter (Application 31673),
City of Bakersfield (Application 31674),
Buena Vista Water Storage District (Application 31675),
Kern Water Bank Authority (Application 31676),
Kern County Water Agency (Application 31677), and
Rosedale-Rio Bravo Water Storage District (Application 31819)

for permits to appropriate water from the Kern River system.

APPLICATIONS

In 2007, the State Water Resources Control Board (State Water Board) Division of Water Rights (Division) received five applications for permits to appropriate water from the Kern River system. The applications were accompanied by petitions requesting the State Water Board to revoke or revise the Declaration of Fully Appropriated Stream Systems to allow the Division to accept applications for permits to appropriate water from the Kern River system. In 2010, Rosedale-Rio Bravo Water Storage District filed a sixth application for a permit to appropriate water from the Kern River system.

On February 16, 2010, the State Water Board issued Order WR 2010-0010, which amended the Declaration of Fully Appropriated Stream Systems to allow the Division to accept new applications to appropriate water from the Kern River system. After the State Water Board issued Order WR 2010-0010, the Division began processing the six Kern River water-right applications.

ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE

Water Code section 1110 established the Administrative Hearings Office (AHO) as an independent organizational unit within the State Water Board. Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing to the AHO. Water Code section 1114 provides that, after such a hearing is held and the

matter is submitted to the AHO, the AHO hearing officer shall prepare a proposed order and provide it to the Board for the Board's consideration.

On February 24, 2021, Erik Ekdahl, Deputy Director of the Division of Water Rights, transmitted a memorandum to Eileen Sobeck, Executive Director of the State Water Board, recommending that the State Water Board assign issues arising from the six Kern River water-right applications to the AHO for further proceedings and an adjudicative hearing (Attachment 1).

On March 18, 2021, Ms. Sobeck transmitted a memorandum to Alan Lilly, Presiding Hearing Officer of the AHO, assigning to the AHO for an adjudicative hearing the following issues arising from the six Kern River water-right applications: (Attachment 2)

1. Is unappropriated water available to supply the applicants pursuant to Water Code section 1375, subdivision (d), and if so, how much unappropriated water is available? In determining whether unappropriated water is available, the AHO may consider whether unauthorized diversions or wasteful or unreasonable diversion or use of water are occurring, and whether claimed water rights have been abandoned or forfeited.

2. If unappropriated water is available, in what order should the Division process the applications? How should unappropriated water be allocated among the competing applications to appropriate water?

3. May the City of Bakersfield appropriate water made available due to a partial forfeiture of water rights, as determined by the court in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555? Or, is water made available by a partial forfeiture subject to diversion and use by the next-most senior rights, in order of priority, such that only water remaining after all senior rights are satisfied is subject to new appropriations?

HEARING OFFICER AND HEARING TEAM; NOTICE OF STATUS CONFERENCE

A hearing officer from the State Water Board's Administrative Hearings Office will preside over the hearing in this matter. Other members of the AHO may be present and assist the hearing officer throughout these proceedings.

The AHO will be issuing a notice of status conference in this matter.

PROHIBITION ON EX PARTE COMMUNICATIONS

Parties and interested persons are prohibited from having any ex parte communications with any members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov.

Code, §§ 11430.10-11430.80.) For a discussion of ex parte communications regarding State Water Board members, see "Ex Parte Questions and Answers," available on the State Water Board's website at: http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

These rules regarding ex parte communications apply to all members of the AHO hearing team.

If any party or interested person wants to communicate with the AHO regarding a procedural or substantive issue related to this proceeding, the party or interested person shall make the communication in writing, shall serve all parties listed on the service list for this proceeding with copies of the communication, and include a proof of service demonstrating such service with the written communication to the AHO.

Any such communication shall be sent to the AHO by e-mail to:
AdminHrgOffice@waterboards.ca.gov
or by letter addressed to:

State Water Resources Control Board
Administrative Hearings Office
P.O. Box 100
Sacramento, CA 95814-0100

A party or interested person may provide the proof of service through a formal proof of service or by other verification. For e-mails, the verification shall be a list of the e-mail addresses of the parties or their representatives in an electronic mail "cc" (carbon copy) list. For letters, the verification shall be a list of the names and mailing addresses of the other parties or their representatives in the cc portion of the letter. Until the AHO issues an updated service list, parties should use the initial service list attached to this notice (Attachment 3).

Please do not attempt to communicate by telephone or in person with AHO staff or any AHO hearing team member regarding these proceedings, because other parties would not be able to participate in such communications. If oral communications with members of the AHO hearing team are necessary to discuss a procedural or substantive issue, the AHO will set up a conference call in which representatives of all parties may participate. Any party may request such a conference call at any time using the written communications protocols described above.

UPDATES TO SERVICE LIST

The AHO prepared the attached service list using information in the Division of Water Rights files for the 2010 Kern River Fully Appropriated Stream System hearing and

Applications 31673, 31674, 31675, 31676, 31677, and 31819, and current information available to the AHO. The AHO requests that all parties listed on the service list provide the AHO with the names, mailing addresses and e-mail addresses of the people who currently are representing the parties and whom the parties want to have on the updated service list. Parties should submit this information to the AHO by e-mail at adminhrgoffice@waterboards.ca.gov on or before **May 3, 2021**. Parties do not need to send copies of these e-mails to representatives of the other parties.

After May 3, the AHO will prepare an updated service list and circulate it to the parties' representatives with the AHO's notice of status conference.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for internet website accessibility in Government Code section 11546.7, the AHO has posted and will post all notices and other documents regarding these proceedings on the AHO's internet webpage at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

Any interested person may sign up to receive all AHO notices at https://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.html.

Date: April 1, 2021

SIGNATURE ON FILE
Nicole Kuenzi, Hearing Officer

Attachments:

-Attachment 1 - February 24, 2021 Memo from the Deputy Director
-Attachment 2 - March 18, 2021 Memo from the Executive Director
-Attachment 3 - Service List

CALIFORNIA Water Boards

GAVIN NEWSOM GOVERNOR

JARED BLUMENFELD SECRETARY FOR ENVIRONMENTAL PROTECTION

State Water Resources Control Board

TO: Eileen Sobeck
Executive Director
State Water Resources Control Board

FROM: Erik Ekdahl
Deputy Director
DIVISION OF WATER RIGHTS

DATE: February 24, 2021

SUBJECT: WATER RIGHT APPLICATIONS IN THE KERN RIVER WATERSHED

The State Water Resources Control Board (State Water Board) Division of Water Rights (Division) has received six applications for permits to appropriate water from the Kern River. Five of the applications were filed in 2007 with petitions requesting revision of the Kern River's Fully Appropriated Stream status as declared in State Water Board Order WR 89-25, and subsequent Orders WR 91-07 and WR 98-08 (collectively "the FASS Declaration"). A sixth application was filed in 2010. On February 16, 2010, the State Water Board issued Order WR 2010-10, providing that the FASS Declaration be amended to allow new applications to appropriate water from the Kern River System.

The Division is currently processing the applications in accordance with Water Code section 1250 et seq. However, the applicants have not settled on an acceptable method for determining the amount of unappropriated water available. In addition, the cumulative total sought to be appropriated by the six applications far exceeds any potentially available unappropriated water, as do the amounts requested by several individual applications.

The State Water Board determined in Order WR 2010-0010 that "there is some unappropriated water in the Kern River [and] that processing water right applications will require consideration of numerous issues not addressed in [that] order, including ... the specific amounts of water available for appropriation under the applications, the season of water availability, the public interest in approval or denial of the applications, and any conditions to be included in any permits that may be issued on the applications." (Order WR 2010-0010 at p. 6.) At this stage, it is appropriate for the State Water Board to determine the specific amount of water available for appropriation. The State Water Board must also determine which application or applications should be processed first and how available water should be distributed among the applications.

Given the complexity of this watershed and high level of public interest, this matter would be aided by the Administrative Hearing Office's (AHO) expertise in conducting adjudicative hearings and ensuring water rights disputes are resolved in a timely manner. Therefore, the Division proposes to assign the matter to the AHO to receive evidence and legal argument relevant to the issues identified below. After holding an adjudicative hearing, the AHO will draft a proposed order pursuant to Water Code, section 1114, subdivision (c), for consideration by the State Water Board or the Executive Director under existing delegated authority.

The Division specifically requests that the AHO conduct an adjudicative hearing to address:

1) The quantity of unappropriated water available for appropriation from the Kern River System;
2) Whether the applications should be processed in an order other than an order based on the date each application was submitted to the Division;
3) How any unappropriated water available for appropriation should be allocated among the six applicants.

Background

Since the 1860's, the administration of pre-1914 water rights on the Kern River has been based on various decrees, agreements, customs, and practices which together are generally referred to as the "law of the river." The Kern River Watermaster currently allocates water under claimed rights pursuant to a priority schedule that reflects the law of the river. Following 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 (*North Kern Decision*), in which the court found that there was a partial forfeiture of Kern Delta Water District's (Kern Delta) pre-1914 water rights on the Kern River, the State Water Board received five water-right applications to appropriate water from the Kern River. The applications were accompanied by petitions to revise the State Water Board's FASS Declaration, which had declared the Kern River to be fully appropriated from January 1 to December 31.

State Water Board Order WR 2010-0010

In 2008, the State Water Board determined that there was reasonable cause to conduct a hearing on whether the FASS Declaration should be revised with respect to the Kern River System. This determination was based on diversions of Kern River water into the California Aqueduct via the Kern River-California Aqueduct Intertie (Intertie) on certain occasions and the *North Kern Decision*.

Following a hearing in 2009, the State Water Board issued Order WR 2010-0010, amending the FASS Declaration to remove the designation of the Kern River as fully appropriated. The Board's decision to amend the Kern River's fully appropriated status was based on the undisputed evidence that water has historically been diverted via the Intertie since its construction in 1977, and that those diversions are in excess of any water rights for the diversion and use of Kern River water. The State Water Board

found that the evidence presented at the hearing did not clearly resolve whether the partial forfeiture of water rights declared in the *North Kern Decision* created any additional unappropriated water. Instead, the State Water Board amended the FASS Declaration for the Kern River to allow for processing of new applications and indicated that it would be up to the applicants to show how much unappropriated water is available for appropriation, and in what season, in the context of the Division's processing those applications.

Applications

The six pending Kern River applications are:

- North Kern Water Storage District (A031673)
- City of Bakersfield (A031674)
- Buena Vista Water Storage District (A031675)
- Kern Water Bank (A031676)
- Kern County Water Agency (A031677)
- Rosedale-Rio Bravo (A031819)

Except for the City of Bakersfield (City), all applicants seek to appropriate infrequent flows that may reach the Intertie in extremely wet years. The City seeks water rights resulting from the forfeiture of Kern Delta's "first point" water rights, as discussed below, to enhance flows of the reach of the Kern River located within the City's limits, after which the water would be diverted to recharge the underlying groundwater basins. All applicants except the Kern Water Bank Authority (Authority) and Rosedale-Rio Bravo Water Storage District (Rosedale-Rio Bravo) claim existing pre-1914 rights as set forth in the "law of the river." Some applicants have acknowledged that the amounts requested under their applications are intended both to appropriate available water and to obtain appropriative rights to "wrap around" their existing claimed pre-1914 rights.

Sustainable Groundwater Management Act

Since Order WR 2010-0010 was issued, and even more so since passage of the Sustainable Groundwater Management Act (SGMA), there has been considerable interest in capturing flows that occur only infrequently for groundwater storage and/or recharge. Groundwater basins in counties within the service areas of the filed applications are now mandated by SGMA to achieve groundwater sustainability. Due to this obligation, infrequently occurring flows that could not be previously appropriated are now being sought to bring overdrafted groundwater basins into sustainable balance. SGMA has empowered local agencies to adopt groundwater sustainability plans that are tailored to the resources and needs of their communities. Many of the groundwater basins within the counties proposed to be served under the pending applications are designated as critically overdrafted under SGMA. All of the pending Kern River applications seek to enhance groundwater recharge for later beneficial use in furtherance of the sustainability goals of SGMA.

Application of the North Kern Decision and Disposition of Forfeited Water

The City and Kern Delta currently hold all of the appropriative Kern River water rights within the "first point" service area under the "law of the river." The *North Kern Decision* held that as much as 60,895 acre-feet annually of Kern Delta's "first point" water rights were forfeited, and concluded that the State Water Board was the proper entity to determine whether the forfeiture would affect the status of the Kern River as fully appropriated pursuant to the FASS Declaration.

Application 31674, submitted by the City, expressly seeks to obtain rights to the "first point" pre-1914 rights forfeited for nonuse by Kern Delta in the *North Kern Decision*. The City contends that the forfeited water should not be available to the next appropriator in order of priority (as reflected in the "law of the river" and the priority schedule used by the Kern River Watermaster) and that a new appropriator can take over the rights to the forfeited water. The other applicants have expressed the contrary view, that the water freed up based on the forfeiture becomes available to the next-most senior water right holders, in order of priority, to the extent those rights authorize diversion of that water.

Request for Water Availability Information

The Division has not accepted the applications due to the open question of water availability. Recently, the Division has initiated more substantial efforts in coordination with the applicants to process the pending applications. Division staff have conducted a series of meetings with the applicants to discuss their proposed projects and application materials and identify any needed revisions to the applications.

By letter dated October 1, 2018, the Division requested that the six applicants submit water availability analyses (WAA) needed to demonstrate that water is available for appropriation, and encouraged the submission of a single coordinated WAA. The purpose of the request was to enable the Division to determine whether the Kern River applications met the acceptance criteria set forth in Water Code section 1260, subdivision (k), requiring that there be a "reasonable likelihood" that water is available for appropriation, and establish one single set of assumptions on which the applications would be processed. The Division encouraged coordination among the applicants to develop a common approach to accounting of demands by senior diverters so that the Division could evaluate the results from a consistent base-case scenario.

The Division's letter recommended a methodology for quantifying demands pursuant to pre-1914 rights within the watershed. The "law of the river" approach used to manage rights in the Kern River has quantified rights solely in terms of specific flow rates set forth in a schedule of diversion. It does not assign annual "face value" amounts that would indicate the maximum annual amount that could be diverted under each right. Without such estimated face values, a party cannot accurately quantify total watershed demand under existing rights, and therefore cannot accurately estimate water availability. Thus, for the sole purpose of preparing the WAA, staff asked the applicants to estimate the historical maximum annual usage under each right. The historical maximum, in this context, would serve as a proxy face value for the pre-1914 rights, which is the Division's traditional approach to water availability used statewide.

The Division requested that the WAA(s) examine demand during both the wettest single year and the non-contiguous total of the wettest months of all years during the period of record. The applicants submitted the following three separate analyses in response to the Division's request:

- MBK Engineers submitted a collaborative analysis on behalf of North Kern Water Storage District, Kern County Water Agency (Kern County), Rosedale-Rio Bravo, and Buena Vista Water Storage District (Buena Vista) (MBK Analysis).

- The Authority prepared its own analysis that did not consider the wettest months scenario. Attached to that analysis was a complaint dated August 8, 2019 (as Exhibit C), alleging Buena Vista had abandoned and forfeited its water rights and requesting that the State Water Board hold an adjudicative hearing before making any determinations regarding water availability on the Kern River. On December 21, 2020, the Division's Enforcement Section dismissed the complaint.

- The City prepared an alternative analysis based on the forfeiture of water rights declared in the *North Kern Decision* and the City's legal theory regarding the forfeited water.

Results

Each applicant responded with analyses indicating the following amounts of water are available for appropriation under each scenario. The amount requested in each application is included for ease of reference.

Applicant	Amount Requested (afy)	Amount of Water Available (afy) Scenario 1 Wettest Single Year (af)	Amount of Water Available (afy) Scenario 2: Total of Wettest Individual Months (af)
North Kern Water Storage District (A031673)	500,000	135,705	687,126
Kern County Water Agency (A031677)	2,279,000	135,705	687,126
Rosedale-Rio Bravo Water Storage District (A031819)	65,750	135,705	687,126
Buena Vista Water Storage District (A031675)	700,000	135,705	687,126
Kern Water Bank Authority (A031676)	500,000	679,000	***
City of Bakersfield (A031674)	254,777	121,743	153,229

Despite the use of diverse methodologies for the estimates of watershed demand, the results all indicate that there is at least some water available for appropriation under extremely wet conditions. The particular methodology used in each analysis for estimating "face values" of pre-1914 rights within the watershed is a significant factor affecting the calculation of the amounts of water that may be available for appropriation.

Comments

Comments on the WAAs submitted to the Division suggested that more water could be available for appropriation than was calculated in the MBK analysis. A letter from Rosedale-Rio Bravo generally concurred with the MBK analysis, while challenging its methodology with respect to the calculation of watershed demand. It suggested that the usage amounts identified in the analysis were not consistent with the pre-14 rights with which they were associated such that demand was overestimated, and that more water is available than the MBK Analysis concluded.

Kern County concurred with the findings of the MBK analysis and submitted an appendix asserting that the City's methodology was based on a rejected legal theory. The County also suggested that Rosedale-Rio Bravo and other parties may be seeking to challenge the longstanding rights that comprise the "law of the river" in the Kern River. Citing the MBK analysis' finding that monthly Kern River flows exceeded the combined water use during only 11 of the 125 years of record, Kern County requested that the State Water Board find that no water is available for appropriation.

The Authority's submission suggested that the methodology proposed in the Division's October 1, 2018 letter was fundamentally flawed because, among other things, it is inconsistent with the hydrology of the Kern River. The Authority also claimed that the State Water Board has already concluded, based on evidence presented during the adjudicative hearing for the Kern River FASS petitions, that Kern River water is available for appropriation.

Issues to be Considered by the Administrative Hearings Office

Resolution of the following issues by the AHO would benefit the Division's processing of the applications:

I. Is unappropriated water available to supply the applicants pursuant to Water Code section 1375, subdivision (d), and if so, how much unappropriated water is available? In determining whether unappropriated water is available, the AHO may consider whether unauthorized diversions or wasteful or unreasonable diversion or use of water are occurring, and whether claimed water rights have been abandoned or forfeited.

II. If unappropriated water is available, in what order should the Division process the applications? How should unappropriated water be allocated among the competing applications to appropriate water?

III. May the City appropriate water made available due to partial forfeiture of Kern Delta water rights determined by the court in the *North Kern Decision*? Or, is water

made available by a partial forfeiture subject to diversion and use by the next-most senior rights, in order of priority, such that only water remaining after all senior rights are satisfied is subject to new appropriation?

After the conclusion of the AHO's proceeding, the Division will continue processing the applications in accordance with all applicable rules and regulations related to permitting and any order adopted by the Board or the Executive Director as a result of the AHO's proceeding.

Conclusion and Recommendation

I have determined that further processing of the Kern River applications by the Division requires resolution of the issues identified above. Given the complexity and controversial nature of the applications, along with the interplay of long-standing pre-1914 rights, resolution of these issues would be most effectively achieved through an adjudicative hearing held by the AHO. Therefore, I am recommending assignment of this matter to the AHO to conduct a hearing and prepare a proposed order addressing the issues identified in this memo.

CALIFORNIA Water Boards

GAVIN NEWSOM GOVERNOR

JARED BLUMENFELD SECRETARY FOR ENVIRONMENTAL PROTECTION

State Water Resources Control Board

TO: Alan Lilly
Presiding Hearing Officer
Administrative Hearing Office

FROM: Eileen Sobeck
Executive Officer
State Water Resources Control Board

DATE: March 18, 2021

SUBJECT: ASSIGNMENT TO THE ADMINISTRATIVE HEARINGS OFFICE OF PROCEEDINGS ON ISSUES ARISING FROM KERN RIVER WATER RIGHT APPLICATIONS

The State Water Resources Control Board (State Water Board or Board) Division of Water Rights (Division) has recommended that the Board assign to the Administrative Hearings Office (AHO) for further proceedings and an adjudicative hearing, issues arising from six Kern River water-right applications. I have attached the Division's memorandum which summarizes the applications and recommends assignment to the AHO.

Based on the Division's recommendation, I am assigning in whole to the AHO for further proceedings and an adjudicative hearing the following issues arising from the six Kern River water-right applications, pursuant to Water Code section 1112, subdivision (c)(2):

1. Is unappropriated water available to supply the applicants pursuant to Water Code section 1375, subdivision (d), and if so, how much unappropriated water is available? In determining whether unappropriated water is available, the AHO may consider whether unauthorized diversions or wasteful or unreasonable diversion or use of water are occurring, and whether claimed water rights have been abandoned or forfeited.

2. If unappropriated water is available, in what order should the Division process the applications? How should unappropriated water be allocated among the competing applications to appropriate water?

3. May the City of Bakersfield appropriate water made available due to a partial forfeiture of water rights, as determined by the court in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555? Or, is water made available by a partial forfeiture subject to diversion and use by the next-most senior rights, in order of priority, such that only water remaining after all senior rights are satisfied is subject to new appropriations?

In determining whether unappropriated water is available to supply the applicants, the Board may consider whether unauthorized diversions or misuses of water[1] are occurring, and whether claimed water rights have been abandoned or forfeited. The AHO may notice its proceeding as needed to adequately address all applicable questions presented to it, including notice pursuant to Water Code section 1834 with a statement of facts and information, and may hold a hearing to consider all appropriate responses, including a proposed cease-and-desist order addressing these issues. The AHO may also issue a notice and hold a hearing pursuant to California Code of Regulations, title 23, section 857, to consider whether misuse of water has occurred or continues to occur.

If you have any questions regarding this memo, please contact Amanda Montgomery, Manager of the Division's Permitting Section at 916-341-5438 or by email at Amanda.Montgomery@waterboards.ca.gov.

cc: Erik Ekdahl, Deputy Director, Division of Water Rights
Jule Rizzardo, Assistant Deputy Director, Permitting and Enforcement Branch
Michael Lauffer, Chief Counsel
Conny Mitterhofer, Hearings Section Chief, Division of Water Rights

Enclosure: Memorandum Regarding Water Right Applications in the Kern River Watershed

[1] "Misuse of water" or "misuse" is defined by California Code of Regulations, title 23, section 855, as any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

Attachment 3

SERVICE LIST

March 30, 2021

Sent by e-mail only:

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