



State Water Resources Control Board

FROM: ADMINISTRATIVE HEARINGS OFFICE
Nicole Kuenzi, Hearing Officer
Kyle Wooldridge, Senior Water Resource Control Engineer

DATE: November 30, 2020

SUBJECT: PUBLIC HEARING ON PETITIONS TO REVISE THE DECLARATION OF FULLY APPROPRIATED STREAM SYSTEMS WITH RESPECT TO THE KINGS RIVER SYSTEM; RELATED SEMITROPIC COMPLAINT

The Administrative Hearings Office (AHO) of the State Water Resources Control Board (State Water Board or Board) will conduct a public hearing on two petitions to revise the Board's Declaration of Fully Appropriated Stream Systems (Fully Appropriated Streams Declaration) with respect to the Kings River System and a related complaint filed by one of the petitioners. This memorandum summarizes the pending petitions and complaint and provides relevant background information.

SUMMARY OF THE MATTERS ASSIGNED TO THE AHO

On May 9, 2017, Consolidated Irrigation District, Alta Irrigation District, and Fresno Irrigation District (collectively, Kings River Irrigation Districts), filed a joint water-right application (Joint Kings River Application) and a petition (Joint Kings River Petition) with the State Water Board. The Kings River Irrigation Districts request that the Board consider and approve their application if the Board revises the Fully Appropriated Streams Declaration to allow the Division of Water Rights (Division) to accept and process applications for permits to appropriate water from the Kings River System.

On May 25, 2017, Semitropic Improvement District of Semitropic Water Storage District (Semitropic) filed a water-right application (Semitropic Application) and a petition (Semitropic Petition). The petition requests that the State Water Board revoke or revise

the Fully Appropriated Streams Declaration to allow the Division to accept and process the Semitropic Application.

On July 2, 2018, Semitropic filed a complaint (Semitropic Complaint) in support of the Semitropic Petition and Application. The complaint alleges that water is available for appropriation in the Kings River System because the Kings River Water Association (KRWA) and its members have abandoned or forfeited, or never perfected, some of their water rights, and that KRWA users have been diverting water without authorization under any valid right. In addition to other requested relief, Semitropic asks that the State Water Board issue a cease and desist order prohibiting future diversions under Licenses 11517 and 11521 and any claimed pre-1914 water rights that cover the same diversions, purposes of use, and places of use described in the licenses, and an order revoking the licenses.

HISTORICAL BACKGROUND

Kings River Watershed

The Kings River originates on the western side of the Sierra Nevada in Kings Canyon National Park and has the largest runoff of the rivers in the Tulare Lake region. The watershed can be split conceptually into an upper area upstream of Pine Flat Reservoir and a lower area downstream of the reservoir. The upper area consists generally of rugged terrain with deep canyons and little arable land. The principal use of water in the upper area is for hydroelectric power generation. The forks and tributaries of the river flow through several small reservoirs and eventually into Pine Flat Reservoir.

Pine Flat Reservoir has a total storage capacity of approximately 1 million acre-feet and began full operations in 1954. The U.S. Army Corps of Engineers (Corps) operates the reservoir in accordance with a reservoir regulation manual to provide both flood control and conservation storage of water for scheduled releases. A 1963 agreement between the U.S. Department of the Interior, Bureau of Reclamation, and KRWA member entities, provides details regarding the management of the Kings River and Pine Flat Reservoir. The agreement provides for use of the available conservation space, re-regulation of irrigation water, and release of stored waters pursuant to operating instructions from KRWA, consistent with flood control operations by the Corps. (Decision 1290, p. 20.)

The Kings River below Pine Flat Reservoir flows in a southwesterly direction to the San Joaquin Valley floor. Flows of the river in the lower area are controlled and diverted by an extensive system of canals and control structures for irrigation within KRWA's service area. The main channel of the river continues in a southwesterly direction until

it splits near the City of Lemoore in an area known as the bifurcation area. Flows from the river can leave the bifurcation area either to the north to Fresno Slough or to the south to the Tulare Lake Basin. Under certain conditions, Kings River water flows through the Fresno Slough into the San Joaquin River near the City of Mendota. Flows south from the bifurcation area terminate at the Tulare Lake Basin in a series of canals that distribute the water for irrigation and into a storage system when flows exceed total irrigation demand. The operations of Pine Flat Reservoir provide storage and regulation of flood flows that historically flowed through the Fresno Slough into the San Joaquin River and southerly into Tulare Lake Basin.

The KRWA was formed in 1927 and consists of 28 member entities. KRWA holds the water-right licenses listed in Table 1 in trust for its members. The face values of these licenses include amounts KRWA members also claim under riparian and pre-1914 appropriative rights. KRWA has a service area of approximately 1.1 million net irrigated acres within 1.3 million acres in Kings, Fresno, and Tulare Counties.

State Water Board Decision 1290

On November 30, 1967, the State Water Rights Board (predecessor of the State Water Board) issued State Water Board Decision 1290 (Decision 1290), which approved eight applications filed by KRWA members for permits to appropriate water from the Kings River System.

To evaluate the quantity of unappropriated water available under these applications, the Board first considered the historic annual discharge of the Kings River at Piedra, located just downstream from Pine Flat Dam. Based on data from the USGS gage at Piedra, between 1896 and 1966, the average annual runoff at this location was 1,626,256 afa, the maximum runoff was 3,958,300 acre-feet, and the minimum runoff was 399,500 acre-feet. (Decision 1290, p. 16.) The Board then considered the amounts of water that flowed out of the KRWA service area before the construction of Pine Flat Reservoir. Between 1932 and 1953, the annual flows of water out of KRWA's service area ranged from 0 to more than 800,000 acre-feet per annum (afa) and averaged 170,350 afa. (Decision 1290, p. 33.) Of this average annual amount, KRWA members claimed pre-1914 appropriative rights to 141,450 afa. To avoid the need to quantify the amounts of water to which KRWA members already had valid rights and the need to distinguish between these rights and the amounts of unappropriated water, the Board conditioned the permits to account for overlap. The amount of consumptive water use authorized by the permits include all diversions for consumptive use claimed under pre-1914 appropriative and riparian water rights held by KRWA or its member units. (Decision 1290, p. 35.)

The Board concluded that, with approval of the applications, KRWA and its members “will appropriate essentially all of the available unappropriated water of the Kings River.” (Decision 1290, pp. 37-38.) Although KRWA and its member units might not be able to divert the full flow of the river in years of very high flows, the Board concluded that approval of these permit amounts was appropriate because KRWA and its member units planned to take advantage of all storage facilities available to them, including recharge of groundwater, groundwater storage, and storage of flood water in the Tulare Lake Basin. (Decision 1290, pp. 35-36.)

Approved Water-Right Applications

On October 8, 1968, the State Water Board’s Division of Water Rights issued eight water-right permits on the water-right applications approved in Decision 1290. The permits authorized diversions of water to storage of up to 3,670,500 afa, and direct diversion amounts,¹ which, when combined with the authorized diversions to storage, exceeded the maximum recorded annual runoff of 3,958,300 acre-feet.

On May 18, 1984, the State Water Board issued water-right licenses² that replaced six of these permits, and the State Water Board revoked the remaining two permits.³ The Board limited the maximum rate of direct diversion, annual amount of diversion to storage, and season of diversion authorized in each license to the amounts and seasons reported by the permittee during the development period. The six water-right licenses authorize a combined maximum annual diversion amount of 4,201,700 afa.

The Division of Water Rights documented its determination of the maximum rate, volume, and season of diversion in a License Inspection Report for each water right. The approved applications, permits, and licenses are summarized in Table 1, on the following page.

¹ The Board did not explicitly quantify or limit the annual volume of water authorized by direct diversion in Decision 1290. (Decision 1290, p. 37.)

² The Licenses were issued to Fresno Irrigation District, trustee, and subsequently assigned to KRWA as trustee on behalf of its 28 member entities.

³ The Division of Water Rights did not retain application files for Permits 15717 and 15718 (Applications A011023 and A011075) after the permits were revoked.

Table 1: Summary of Water-Right Permits Approved in Decision 1290

Application Number	Permit Number	License Number	Priority Date	Permit ⁴				License ⁵					
				Direct Diversion (cfs)	Direct Diversion Season	Storage (afa)	Storage Collection Season	Direct Diversion (cfs)	Direct Diversion Season	Storage (afa)	Storage Collection Season	Maximum Amount of Water from Source (afa)	
A000353	15713	11517	1916	2,000	Jan 1 to Jul 15	300,000	Jan 1 to Jul 15	613	Jun 1 to Jun 30	188,000	Jan 1 to Jun 30	224,500	
A000360	15714	11518	1916	5,000	Jan 1 to Dec 31	600,000	Jan 1 to Dec 31	5,000	Jan 1 to Dec 31	600,000	Sep 1 to Jul 31	2,786,000	
A005640	15715	11519	1927	5,000	Jan 1 to Dec 31	1,540,000	Jan 1 to Dec 31	3,059	May 1 to Jul 31	355,200	Sep 1 to Jul 31		
A010979	15716	11520	1945	-	-	128,000	Jan 1 to Dec 31	-	-	128,000	Jan 1 to Dec 31	128,000	
A011023	15717	-	-	10,000	Jan 1 to Dec 31	-	-	Permits Revoked					
A011075	15718	-	-	2,000	Jan 1 to Dec 31	-	-						
A015231	15719	11521	1953	2,500	Jan 1 to Dec 31	1,000,000	Jan 1 to Dec 31	1,096	Jan 1 to Dec 31	796,000	Jan 1 to Jun 30	960,700	
A016469	15720	11522	1955	-	-	102,500	Jan 1 to Dec 31	-	-	102,500	Sep 1 to Jul 31	102,500	
						Total	3,670,500					Total	4,201,700

⁴ Data summarized from Decision 1290, pages 44-46.

⁵ Data summarized from Licenses 11517, 11518, 11519, 11520, 11521, and 11522.

PROCEDURAL BACKGROUND

Declaration of Fully Appropriated Stream Systems

Water Code sections 1205 through 1207 establish a procedure for the State Water Board, acting on its own motion or a petition filed by any interested person, to adopt a declaration designating stream systems that the Board determines are fully appropriated, either year-round or during specified months. On November 16, 1989, the State Water Board adopted a Declaration of Fully Appropriated Stream Systems based on previous water right decisions and orders that had determined that no water remained available for appropriation from the specified sources during the particular months. (Order WR 89-25.) The Board adopted updated and revised orders modifying the Fully Appropriated Streams Declaration in 1991 and 1998. (Order WR 91-07; Order WR 98-08.) Under Water Code section 1206, the Board may not accept any application for a permit to appropriate water that would conflict with the declaration.

Order WR 89-25 concluded, based on Decision 1290, that the Kings River System and Fresno Slough should be declared to be fully appropriated year-round. (Order WR 89-25, pp. 11-12; see Decision 1290, pp. 37-38.) Order WR 91-07 and Order 98-08 did not change this conclusion. (See Order WR 98-08, exh. A, p. 11.) The inclusion of the Kings River System in the Fully Appropriated Streams Declaration prohibits the Board, subject to some limited exceptions, from accepting applications for permits to appropriate water from the Kings River. (See Wat. Code, § 1206; Order WR 98-08, pp. 23-26.)

The Board may revoke or revise a declaration that a stream system is fully appropriated on its own motion or on a petition of any interested person. (Wat. Code, § 1205, subd. (c).) A petition may be accompanied by a proposed application to appropriate unappropriated water from the stream system. The Board retains such a proposed application while the Board acts on the petition. If the Board revises or revokes the declaration in a manner that authorizes acceptance of the proposed application, then the Board may accept the application if it is complete and otherwise in accordance with law. (Cal. Code Regs., tit. 23, § 871, subd. (c).)

The Joint Kings River Petition and Application

On May 9, 2017, the Kings River Irrigation Districts filed the Joint Kings River Petition and Application. The Kings River Irrigation Districts assert that the Kings River is a fully appropriated stream and maintain that KRWA intends to utilize all the runoff of the river as authorized by its current water-right licenses. The Kings River Irrigation Districts acknowledge, however, that in years of high flows when the Corps releases water from

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Pine Flat Reservoir for flood-control purposes, KRWA member units have been unable to fully utilize all of the river's flow, and that some high-flow waters are discharged through the James Bypass and Fresno Slough into the San Joaquin River. The Kings River Irrigation Districts request that, if the Board revises the Fully Appropriated Streams Declaration to allow the Division to accept and process water-right applications to appropriate water from the Kings River System, then the Board consider and approve the Districts' application for a permit to appropriate the water in these high flows.

The Joint Kings River Application describes several proposed projects that would divert water from the Kings River System during periods of high flows for irrigation and municipal purposes, and to groundwater storage for later use. The application requests a permit with a maximum authorized direct diversion rate of 4,500 cfs between January 1 and December 31 of each year, and maximum authorized annual diversions to storage of 1,000,000 afa, to be used within approximately 3,303,000 acres in Fresno, Kings, and Tulare Counties.

Semitropic objected to the Joint Kings River Petition and Application by letter dated May 25, 2017, on the basis that the Kings River Irrigation Districts had not complied with applicable regulations governing petitions to revise the Fully Appropriated Streams Declaration. Semitropic asserted that the Joint Kings River Petition failed to demonstrate reasonable cause to revoke or revise the Fully Appropriated Streams Declaration and did not claim that unappropriated water is available for appropriation. Semitropic requested that the Division reject the Joint Kings River Petition and Application.

On June 8, 2017, the Division notified the Kings River Irrigation Districts that the Division would retain the Joint Kings River Application pending Board action on the petitions, as provided by California Code of Regulations, title 23, section 871, subdivision (c)(3), and assigned it application number A032810.

Semitropic's Petition, Application, and Complaint

Semitropic Water Storage District is located in north-central Kern County in the San Joaquin Valley, about 20 miles northwest of the City of Bakersfield. The District was organized in 1958 to supply supplemental water within its boundaries. The total land area within the District is approximately 222,700 acres, of which approximately 135,000 to 145,000 acres are irrigated. The Semitropic Improvement District was formed in 1991 and manages water projects within the District including the Semitropic Groundwater Bank.

On May 25, 2017, Semitropic filed the Semitropic Petition and Application. Semitropic submitted hydrologic data and other information with its petition, including a technical memorandum dated May 18, 2018 (Semitropic WAA Memo). This technical memorandum contains an analysis of the amounts of water available for appropriation in the Kings River System. Semitropic proposes to divert water from the Kings River System for irrigation purposes and to underground storage for later use within the Semitropic service area and other areas in Kern County. The application initially requested a water-right permit with a maximum authorized direct diversion rate of 2,200 cfs between January 1 and December 31 of each year, and an unspecified maximum authorized rate for diversions to storage, with a maximum total combined annual diversion amount of 1,600,000 afa. On June 8, 2017, the Division notified Semitropic that its application would be retained pending Board action on the petitions, as provided by California Code of Regulations, title 23, section 871, subdivision (c)(3), and assigned it application number A032815. In July 2019, Semitropic revised its application to reduce the requested maximum authorized rate of diversion to 1,200 cfs and the requested maximum authorized combined annual diversion rate to 880,000 afa.

On July 2, 2018, Semitropic filed the Semitropic Complaint. The complaint alleges that KRWA or its member units: 1) have forfeited, abandoned, or failed to perfect water rights covered by Licenses 11517 and 11521 and claimed pre-1914 water rights that cover the same diversions, purposes of use, and places of use described in those licenses; 2) are violating or threatening to violate terms and conditions of Licenses 11517 and 11521; and 3) are violating, or threatening to violate, the prohibition in Water Code section 1052, subdivision (a) against the unauthorized diversion or use of water subject to Division 2 of the Water Code. Among other requested relief, Semitropic asks that the State Water Board issue a cease and desist order to KRWA and other water users to prevent the unauthorized diversion of water, and an order revoking Licenses 11517 and 11521.

The Semitropic Petition and Complaint raise common and interrelated factual and legal issues. Resolution of Semitropic's allegation that KRWA or its member units have forfeited, abandoned, or failed to perfect their water rights under Licenses 11517 and 11521 or under claimed pre-1914 water rights may affect whether water in the Kings River System is available for appropriation. Additionally, resolution of Semitropic's allegation that KRWA or its member units have been diverting water in violation of Water Code section 1052 and the terms and conditions of Licenses 11517 and 11521, and any remedy imposed by the Board based on its determination, may affect whether water is available for appropriation. Numerous factual issues are common to the petitions and the complaint including, but not limited to, historical water availability, water diversions, beneficial use, and operations for flood control on the Kings River System.

Proceedings Before Assignment to AHO

On August 1, 2018, the Deputy Director of the Division provided notice of receipt of the petitions and solicited comments. On October 22, 2018, the Kings River Irrigation Districts and Semitropic jointly requested that the Board suspend action on the two petitions until May 15, 2019, to facilitate negotiations between the Kings River Irrigation Districts, KRWA, and Semitropic. Their request included a request to suspend the deadline for comments on the petitions. The Division granted the request and extended the comment deadline to May 31, 2019. The Division received 35 comment letters regarding the petitions. The comments received included a letter and supporting technical memorandum from KRWA and the Kings River Irrigation Districts in response to the Semitropic WAA Memo (KRWA Technical Memo).

KRWA and the Kings River Irrigation Districts responded to the Semitropic Complaint by letter dated May 31, 2019. Among other factual and legal arguments, their response asserts that the Kings River System is fully appropriated and that KRWA and its member units have been diverting and using water to the fullest extent possible with the Corps' operations of Pine Flat Reservoir for flood-control purposes. In addition, the response alleges that Semitropic lacks standing to bring the complaint.

Semitropic responded to the comments received on its petition and complaint by letter dated July 12, 2019. The response reiterates Semitropic's request for a hearing on the issues raised by the Semitropic Petition and Complaint. The response also includes a technical memorandum with a revised water availability analysis in support of the Semitropic Petition and Application (Semitropic Revised WAA Memo). The response and revised memo incorporated changes to Semitropic's proposed project that include the reductions in the proposed maximum authorized direct diversion rate and maximum authorized total annual diversion rate discussed above.

On July 30, 2019, KRWA and the Kings River Irrigation Districts requested a further stay of proceedings by the Board until at least January 31, 2022, based on the claim that any action by the Board would significantly disrupt local efforts to comply with the Sustainable Groundwater Management Act. The time period requested for the stay reflects the time allowed by the Act for the Department of Water Resources to complete its review of groundwater sustainability plans for the Kings and Tulare-Lake subbasins. Semitropic objected to the request for a stay by letter dated August 6, 2019. On October 24, 2019, the Deputy Director for the Division rejected the request for a stay.

On January 30, 2020, the Enforcement Unit of the Division sent a letter to Semitropic requesting additional information and amendment of the Semitropic Complaint.

Semitropic responded by letter dated February 28, 2020, reiterating its request for a hearing and declining to amend its complaint.

On March 4, 2020, KRWA and the Kings River Irrigation Districts responded to the Semitropic Revised WAA Memo by letter with a revised technical memorandum (KRWA Revised Technical Memo). The KRWA Revised Technical Memo analyzes the methodology and conclusions in the Semitropic Revised WAA Memo.

Assignment to AHO for Hearing

The Board's regulations provide that, if the Deputy Director for the Division (referred to in the regulation as the "Chief, Division of Water Rights") determines that a petition to revise the Fully Appropriated Streams Declaration shows reasonable cause to conduct a hearing on whether the declaration should be changed, the Deputy Director shall notice a hearing on the issue. (Cal. Code Regs., tit. 23, § 871, subd. (c)(4).) The Board may thereafter adopt an order changing the declaration or declining to do so. (*Ibid.*)

Water Code section 1110 established the AHO within the State Water Board. Water Code section 1112, subdivision (c)(2), provides that the Board may assign an adjudicative hearing, in whole or in part, to the AHO.

On May 26, 2020, the Deputy Director of the Division transmitted a memorandum to the State Water Board's Executive Director, which concluded that the hydrologic and water usage data submitted by the petitioners and other information contained in the record presented a possibility that Kings River water may be available for appropriation. The Deputy Director of the Division determined that there was reasonable cause to conduct a hearing on the question whether the fully appropriated status of the Kings River System should be revoked or revised, and recommended that the Board assign the matter to the AHO for hearing. On May 29, 2020, the Board's Executive Director assigned the petitions to the AHO. The AHO issued a Notice of Assignment of the petitions on September 11, 2020.

On October 29, 2020, the Deputy Director of the Division recommended that the Board assign the Semitropic Complaint to the AHO for further proceedings, based on the common and interrelated factual and legal issues raised by the petitions and the complaint. By memorandum dated October 29, 2020, the Board's Executive Director assigned the Semitropic Complaint to the AHO for further proceedings in coordination with the AHO's proceedings on the pending petitions.

SCOPE OF HEARING

The Joint Kings River Petition, the Semitropic Petition, and the Semitropic Complaint present the following issues for hearing:

1. Should the State Water Board revoke Licenses 11517 or 11521 under Water Code sections 1241 and 1675, and California Code of Regulations, title 23, sections 850 to 852?

- a. Has the licensee ceased to put the water authorized to be diverted and used under the licenses to useful or beneficial purposes?
- b. Has the licensee failed to observe any of the terms or conditions of the licenses?
- c. What were the historical diversions and use under each of these licenses during any relevant period?
- d. During any period when no water was diverted or used under these licenses, was there any competing or conflicting claim to the water that could have been diverted and used under these licenses?
- e. Are there any other bases for revocation of the licenses that the Board should consider?

2. Should the State Water Board issue a cease and desist order against KRWA or any of its member units under Water Code section 1831 to prevent the unauthorized diversion, or threat of an unauthorized diversion, of water as alleged in the Semitropic Complaint?

- a. Is KRWA or any of its member units violating, or threatening to violate, the prohibition in Water Code section 1052, subdivision (a), against the unauthorized diversion or use of water subject to Division 2 of the Water Code?
- b. Is KRWA or any of its member units violating, or threatening to violate, any term or condition of Licenses 11517 or 11521?
- c. If any such violations or threatened violations are occurring, should the State Water Board issue a cease and desist order against KRWA or any of its member units under Water Code section 1831?
- d. If the State Water Board issues a cease and desist order against KRWA or any of its member units under Water Code section 1831, what provisions should be in the order?

3. Should the State Water Board revise or revoke the Declaration of Fully Appropriated Streams under Water Code section 1205, subdivision (c), and

California Code of Regulations, title 23, section 871, to allow the Division of Water Rights to accept applications to appropriate water from the Kings River System?

- a. Is water available for appropriation in the Kings River System? Is the supply of water in the Kings River System being fully applied to beneficial uses?
- b. How would revocation of Licenses 11517 or 11521 or issuance of a cease and desist order against KRWA or its member units affect whether water is available for appropriation in the Kings River System?
- c. Should the State Water Board revise the Fully Appropriated Streams Declaration to allow the Division of Water Rights to accept applications to appropriate water from the Kings River System?
- d. If so, what revisions should the Board make to the Declaration?

After the AHO holds a hearing on these issues, the AHO will prepare a proposed order and transmit it to the State Water Board under Water Code section 1114, subdivision (c)(1). The Board then may take any of the actions specified in Water Code section 1114, subdivision (c)(2).

The Kings River Irrigation District Application A032810 and the Semitropic Application A032815 have not been assigned to the AHO. The Division has retained these applications pending Board action on the petitions, as provided by California Code of Regulations, title 23, section 871, subdivision (c)(3). The AHO will not be taking any actions on these applications during the proceeding described here.