
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: May 26, 2020

SUBJECT: PETITIONS TO REVISE STATUS OF KINGS RIVER ON STATE WATER BOARD FULLY APPROPRIATED STREAM SYSTEMS LIST

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) has received two petitions requesting a revision of the Kings River's fully appropriated stream status in accordance with California Code of Regulations, title 23, section 871, as declared in Order 89-25 and most recently updated in Order 98-08 adopting a Declaration of Fully Appropriated Stream Systems (collectively "the Declaration").

I have determined that the petitions show reasonable cause to conduct a hearing on whether the fully appropriated stream status of the Kings River should be changed. The Division of Water Rights (Division) proposes to transfer the pending petitions to the Administrative Hearings Office for resolution. Given the complexity of this watershed and high level of public interest, this matter would be aided by the Administrative Hearing Officer's role in ensuring water rights matters are handled in a timely manner.

The State Water Board has also received applications for new water rights from the two petitioners. After notice and completion of the hearing, if the State Water Board acts to modify the fully appropriated stream status of the Kings River, the Division of Water Rights will review the applications to determine whether they are consistent with the modified Declaration. If consistent with the revised Declaration, the applications will be accepted only if they are complete pursuant to the law and the rules of the State Water Board. Should the applications be accepted, the State Water Board will implement all provisions of law, legal precedent, and the rules of the State Water Board governing the processing of the applications. These include, but are not limited to, a review of water availability, consideration of protests, environmental review in accordance with the California Environmental Quality Act, and consideration of effects on public trust resources and the public interest.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

Background

Water Rights on the Kings River

The Kings River originates on the western side of the Sierra Nevada Mountains in Kings Canyon National Park and has the largest runoff of all the rivers in the Tulare Lake Region. Water diversions from the Kings River for agricultural and domestic purposes date back to Mexican land grants issued before California became a state.

Construction of Pine Flat Dam on the Kings River was completed in 1954. The dam is operated by the U.S. Army Corps of Engineers (Corps) in accordance with a 1952 agreement between the Corps and the Kings River Water Association (Association) to provide both flood control and conservation storage of water for scheduled release. A 1963 agreement between the U.S. Bureau of Reclamation and individual Association member entities provides details regarding how Kings River water is managed.

Water diversion activities on the Kings River are dependent on operations at Pine Flat Dam. The dam is operated by the Corps primarily to minimize flood risk but also to manage water releases to meet water entitlements. Entitlements within the Kings River are managed by a watermaster based on natural flow calculations at the historical gaging station that was used before construction of the dam. During periods of higher flood risk when large amounts of water are available, releases from the dam are dominated by Corps flood control operations and are informed by the capacity available in Pine Flat Lake and the various weirs, channels, and bypasses located downstream.

Downstream of Pine Flat Dam, the Kings River flows in a southwesterly direction and is characterized by a system of canals and ditches. The river flows in a single channel until it reaches a location commonly known as the “bifurcation”. At this point, the river bifurcates into southern and northern forks. Flow into the southern fork is controlled by Army Weir and flow into the northern fork is controlled by Island Weir. Water in the South Fork Kings River eventually reaches the Tulare Lake Basin, which is a closed basin consisting of irrigated lands reclaimed from a dry lakebed. Water in the North Fork Kings River can flow to the Tulare Lake Basin or northwesterly to the Fresno Slough and the San Joaquin River.

Several applications for water right permits were filed in the Kings River system between 1916 and 1955. The State Water Board’s predecessor, the State Water Rights Board, issued Decision 1290 in 1967, approving some of the applications and issuing permits. The water rights were later assigned to the Association to be administered on behalf of its 28 member entities within its service area in the Kings River watershed within Fresno, Kings, and Tulare counties. The Association’s water right applications subject to Decision 1290 are listed in the table below:

Water Right License	License Short Name	Amount (acre-feet per year)
License 11517 (Application A000353)	Tulare Lake	224,500
License 11518 (Application A000360)*	Pine Flat Dam 1	2,786,123
License 11519 (Application A005640)*	Pine Flat Dam 2	913,412
License 11520 (Application A010979)	Wishon Reservoir	128,000
License 11521 (Application A015231)	Tulare Lake and Upper Tulare	960,700
License 11522 (Application A016469)	Courtright Reservoir	102,500

*Licenses 11518 and 11519 have a combined cap of 2,786,000 acre-feet per year

In addition to the above licenses, many water diverters in the Kings River watershed and surrounding areas also exercise riparian rights, pre-1914 appropriative rights, and contractual arrangements related to such rights as a basis to divert and use surface water.

In Decision 1290, the State Water Board determined that the Association's applications would appropriate "essentially all of the available unappropriated water of the Kings River," though it also noted that the Association would not be able to utilize the full runoff of the Kings River in years of extreme flood.

Fully Appropriated Stream Status of the Kings River

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 State Water Board added the Kings River to the Declaration with Order WR 89-25 on November 16, 1989. In that order, the State Water Board noted that:

*Staff has pointed out that Decision 1290 determined that Kings River and Fresno Slough are fully appropriated year-round. Accordingly, the Declaration should include these stream systems.
(SWRCB Order WR 89-25, pp. 11-12.)*

The inclusion of both the Kings River and the Fresno Slough continued in two subsequent reviews of the Declaration in 1991 and 1998. This inclusion precludes the State Water Board from accepting any application to appropriate water from these stream systems, including areas where hydraulic continuity exists, except where the proposed appropriation is consistent with conditions contained in the Declaration.

Revocation or Revision of the Declaration, and Requirement for Hearing

The Declaration may be revoked or revised by the State Water Board. (Wat. Code, § 1205, subd. (c).) The State Water Board may choose to take such action upon its own motion or upon the petition of any interested person as provided in the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 871, subd. (a).)

Pursuant to the State Water Board's regulation, upon receipt of a petition to revise or revoke a fully-appropriated stream declaration, the Chief of the Division of Water Rights (currently referred to as the Deputy Director) determines whether the petition shows reasonable cause to conduct a hearing on the question of whether the declaration should be changed. (Cal. Code Regs., tit. 23, § 871, subd. (c).) If the Chief determines that a petition does show reasonable cause, the Chief is directed to notice a hearing on the issue. (Cal. Code Regs., tit. 23, § 871, subd. (c)(4).) If the Chief determines that a petition does not show reasonable cause to conduct a hearing, the petitioner may request that that State Water Board review the Chief's determination. Following review, the State Water Board may affirm the Chief's determination, direct the Chief to reconsider the determination, or direct the Chief to notice a hearing. (Cal. Code Regs., tit. 23, § 871, subd. (c)(5).)

In addition, the Chief may recommend that the State Water Board revoke or revise a fully-appropriated stream determination based on 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 acquired by the Division of Water Rights in the course of any investigation conducted by it. (Cal. Code Regs., tit. 23, § 871, subd. (b).)

Following a noticed hearing, the State Water Board may adopt an order revoking or revising the declaration of the subject stream's fully appropriated status. (Cal. Code Regs., tit. 23, §§ 871, subds. (b), (c)(4).)

Petitions to Revise the Kings River's Fully Appropriated Stream Status

The State Water Board received two petitions to revise the Kings River's fully appropriated stream status on May 9, 2017 and on May 25, 2017. Both petitions were accompanied by applications for water right permits to be accepted and processed upon a determination from the State Water Board to revise the Declaration.

Petition and Application from Consolidated Irrigation District

Consolidated Irrigation District (Consolidated) filed a petition and application on May 9, 2017, with Fresno Irrigation District and Alta Irrigation District joining Consolidated as co-petitioners. The Association, which holds significant water rights in the Kings River and of which each of the three districts are members, has also expressed support for Consolidated's petition.

Consolidated's petition requests that the State Water Board consider its application in the event the State Water Board ever revises the status of the Kings River in the Declaration and considers any Kings River waters unappropriated or otherwise not beneficially used under current licenses.

Consolidated's application requests the right to divert and use water from the Kings River for the purpose of compliance with the Sustainable Groundwater Management Act (SGMA) and for uses within the Kings River watershed within Fresno, Kings, and Tulare counties.

Petition and Application from Semitropic Water Storage District

Semitropic Water Storage District (Semitropic) filed a petition and application on May 25, 2017. Semitropic's petition requests that the State Water Board determine whether it is proper to revoke and/or revise the Kings River's fully appropriated stream status in the Declaration. Semitropic's application requests the right to divert and use water from the Kings River for the purposes of irrigation, and groundwater replenishment in the support of its proposed Tulare Lake Floodwater and Storage Project and in furtherance of the goals of SGMA.

On July 2, 2018, Semitropic filed a complaint in support of its petition alleging, among other things, abandonment and forfeiture of the Association's water right licenses 11517 and 11521 for Tulare Lake.

Notice of Petitions and Comments

On August 1, 2018, the Division issued a notice of the petitions in accordance with the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 871, subd. (c).) In the notice, the Division solicited comments regarding the petitions. Comments were received from 34 entities.

The majority of the comments were filed by entities that exist within the Kings River stream system watershed or rely on water originating from the Kings River stream system. These commenters expressed opposition to any revision of the Kings River stream system and the Semitropic petition and application. In general, comments included allegations of potential harm to local disadvantaged communities, raised concerns regarding the potential for increased flood risk in the South Fork Kings River, raised concerns regarding the potential unlawful export of water outside the watershed of origin, and raised concerns regarding the potential aggravation of the overdraft of groundwater basins within Kings County. These commenters included three counties, five cities, seven groundwater sustainability agencies, and eleven districts organized to provide or manage water service.

Other comments summarized here included:

- The California Department of Fish and Wildlife opposed revising the Declaration and expressed public trust resource concerns including lack of adequate instream flows.
- The Tule River Association raised concerns regarding use of Tule River water.
- Comments were received from the U.S. Bureau of Reclamation and the James Irrigation District, both of whom divert water from the James Bypass and/or Fresno Slough. The James Irrigation District raised concerns that any revision of the Declaration may injure the riparian and pre-1914 rights of its members. The U.S. Bureau of Reclamation raised the need to consider the relevant Reclamation settlements and supply obligations to the Fresno Slough.
- The Association submitted comments against the Semitropic petition and application, against any potential decision by the State Water Board to consider revising or revoking the fully appropriated stream system status of the Kings River and provided information about Pine Flat Dam flood control operations.

Of the total comments submitted, nine of them addressed the issue of reasonable cause and whether a hearing to revise or revoke the Declaration should be held. Eight of these comments requested a hearing be denied based on insufficient facts to show changed circumstances or reasonable cause, while one comment requested a hearing on water availability.

After the close of the comment period, Semitropic provided a letter to the State Water Board in response to the comments that the State Water Board received during the comment period. The Association submitted a letter, which in addition to disputing the methodology used in Semitropic's amended water availability analysis, asserted that it failed to consider both the restrictions on channel capacity in the South Fork Kings River and the federally-mandated flood control operations that divert water away from Semitropic's proposed point of diversion. The letter also cited a recent University of California Berkeley study to allege that the project's conveyance of water outside of the Kings River watershed, coupled with groundwater pumping restrictions imposed by SGMA, would impose severe economic impacts that would disproportionately affect disadvantaged communities in the Kings River watershed.

Comments regarding the petitions raise substantial public interest issues. If the State Water Board decides to change or modify the Declaration, these and subsequent comments submitted by interested parties will be considered in its decision on whether to approve the pending applications.

Water Availability in the Kings River Stream System

In Decision 1290, the State Water Board noted that there may be times of exceptionally high runoff when water may be redirected out of the Kings River system without being diverted and beneficially used under any of the Association's appropriative rights. Instead of diverting the water for beneficial use, the water is instead redirected through Fresno Slough towards the San Joaquin River. Despite this practice, the Board determined that the Kings River and Fresno Slough systems were fully appropriated.

Semitropic prepared an initial water availability analysis in support of its petition. In response, the Association submitted a technical memorandum reviewing Semitropic's analysis, which challenged the methodology used and identified errors. Semitropic subsequently submitted a revised analysis which concluded that there is water available for appropriation from the Kings River after accounting for the face value of existing appropriative water rights and excluding the pending application of Consolidated.

The report concluded that water was available for Semitropic's application in 5 of the 62 years analyzed, or 8% of the years. The Semitropic analysis of fifteen water years considered all existing licensed demand and found that there would have been ten years with no available water to supply the proposed project, and five years with availability ranging from 22,000 to 305,000 af/year depending on the proposed project's rate of diversion.

Semitropic has also filed a complaint alleging that the Association's water rights have been forfeited and abandoned, citing annual reports of licensee filed with the Division that indicate minimal historical usage under licenses 11517 and 11521.¹ Semitropic's water availability analysis considered the potential revocation of some or all of the amount of water authorized under these water rights. This additional analysis determined that water would be available for Semitropic's application in 15 of the 62 years analyzed, or 24% of the years.

Factors Supporting Reasonable Cause for a Hearing

Decision 1290 recognized the existence of unappropriated water

The hydrology of the Kings River system is highly variable. Average annual runoff is about 1,700,000 acre-feet, with a high of 4,500,000 acre-feet in water year 1983 and a low of 324,000 acre-feet in water year 1924. Decision 1290 considered several water right applications for large volumes of water, however the facilities in the area did not have the capacity to divert all of the available water during extraordinarily high runoff years. Thus, the decision noted that there were times when water needed to be

¹See Semitropic Water Storage District "Complaint in Support of Petition to Revise and/or Revoke Declaration of Fully Appropriated Stream System for the Kings River", dated July 2, 2018.

redirected out of the Kings River watershed for flood control, and that the redirected water was not diverted and used for beneficial purposes. Documentation submitted by Consolidated and Semitropic confirms that this practice continues as part of flood control operations in the Kings River watershed.

There is now considerable interest in capturing infrequent, high-volume flows. SGMA requires that groundwater basins underlying the Kings River must become sustainable in the next 20 years. As a consequence of this significant legislation, flows that could not be previously appropriated are now being sought in order to bring overdrafted groundwater basins into sustainable balance. SGMA has empowered local agencies to adopt groundwater management 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 petitions are designated as critically overdrafted under SGMA. Both the Consolidated and Semitropic petitions state an intention to enhance groundwater recharge for later beneficial use in furtherance of the sustainability goals of SGMA.

Conclusion and Recommendation

The parties have presented sufficient information for the State Water Board to process the FAS petitions to examine the Kings River's fully appropriated designation in the Declaration. Hydrologic and water usage data submitted by petitioners and other information contained in the record present a possibility that Kings River water may be available for appropriation.

Therefore, pursuant to title 23, California Code of Regulations, section 871, subdivision (c)(4), I conclude that there is reasonable cause to conduct a hearing on the question of whether the Declaration with respect to the Kings River should be revoked or revised. Relatedly, I am recommending transfer to the Administrative Hearings Office to proceed with notice of a hearing on the issue.