STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

In the Matter of Application 29657

San Joaquin County

ORDER CANCELING APPLICATION

SOURCE: Sacramento River

COUNTY: Sacramento

WHEREAS:

1. San Joaquin County & Assignees (Applicant) filed a water right application with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division), on February 9, 1990, requesting the right to divert 620 cubic feet per second (cfs) and to divert 190,000 acre-feet per annum (afa), with an annual diversion limit of 322,000 afa. Two alternatives were proposed. In alternative A, water would be diverted from the American River and Laguna Creek. In alternative B, water would be diverted from Laguna Creek, South Fork American River and Deer Creek.

2. The American River is listed in the California Wild and Scenic River Act. Consequently, on February 11, 1994 the Division requested a determination from the Secretary of Resources whether the application conflicted with the California Wild and Scenic Rivers Act. On September 1, 1994, the Office of the Attorney General informed the Division that, in determining whether to approve the project, the State Water Board must fashion a physical solution that accommodates both water supply needs served by the diversions and preservation of the free-flowing character of the American River below Nimbus Dam.

3. On December 28, 1998, the Division requested a water availability analysis (WAA) pursuant to Water Code sections 1260, subdivision (k) and 1375, subdivision (d) and also requested that a detailed work plan be submitted by May 1, 1999. The WAA and work plan were not submitted.

4. On April 1, 1999, the Applicant requested an extension until April 1, 2000 to finalize the development of ways to meet the long-term water supply needs of the County considering the American River water supply. The Applicant was required to submit a status report by December 31, 1999.

5. On December 24, 1999, the Applicant advised the Division that a Countywide Groundwater Surface Water Management Plan would be completed in 2000 and requested an extension until the plan was completed.

6. On April 25, 2000, the Division granted an extension until January 1, 2001 to define a preferred alternative in meeting the County's long-term water needs.

7. On December 28, 2000, the Applicant documented its progress in developing a plan for meeting the County's future water supply needs. No specific actions were identified for pursuing Application 29657.

8. On January 25, 2001, the Division granted the Applicant's request to defer action on Application 29657 until June 1, 2001.

9. On June 5, 2001, the Applicant requested that further action in connection with Application 29657 be delayed until January 1, 2002. The Division granted the request by letter dated June 25, 2001.

10. On December 27, 2001, the Applicant requested to defer application processing until January 1, 2003. The Division responded on April 2, 2002, requiring submittal of a work plan by May 1, 2002 that details the actions necessary for the Applicant to select a preferred water supply project. The Division advised the Applicant that the request to delay processing would be granted, contingent on paying annual fees for the application pursuant to Water Code section 1535 and submittal of a work plan.

11. On April 30, 2002, the Applicant requested an additional 90 days to reply to the Division. The Division's May 10, 2002 letter stated that the Division had not yet received the annual fee and work plan. The additional 90 days to submit the work plan was approved contingent on submittal of the annual fee.

12. On June 14, 2002, the Division again requested the annual fee and work plan. The annual fee was submitted on August 6, 2002. The work plan was submitted on September 13, 2002. The work plan showed that: (a) the WAA would be completed in 2003; (b) the Final Environmental Impact Report (EIR) would be completed in 2005, and (c) the protests would be resolved in 2006.

13. On July 16, 2003, the Division informed the Applicant that application processing had already been deferred for 13 years. The Division had been unable to notice the application because the Applicant had indicated that the application would be revised, but the Division had not yet received the revisions. The required WAA had also not yet been received.

14. On August 31, 2003, an amended application was submitted which reduced the diversion rate to 350 cfs. The collection to storage quantity was set at 147,000 afa, and the combined annual diversion limit was reduced to 147,000 afa. The water source was changed to the Sacramento River. The application states that the American River, Laguna Creek, South Fork American River and Deer Creek points of diversion have been abandoned. It also states that the Applicant has agreed to prepare water availability studies necessary to assure that the diversions from the Sacramento River do not exceed the amounts of water that would otherwise be obtainable by it at the original point of diversion #3 on the South Fork American River. The projects prepared on Laguna and Deer Creeks are abandoned.

15. On September 4, 2003, the Applicant submitted a WAA.

16. On December 30, 2003, the Division advised the Applicant that the Division intended to cancel the application for lack of access to the proposed amended point of diversion on the Sacramento River.

17. On April 28, 2005, the application was amended for the second time. The proposed diversion rate is 350 cfs from the Sacramento River at the Freeport Regional Water Authority facility at Freeport. The Applicant also seeks to divert 147,000 afa from the Sacramento River for offstream storage in (a) the proposed Duck Creek Reservoir on Duck Creek, tributary to Calaveras River and (b) underground storage in the groundwater basin underlying the place of use boundary of

Application 29657. The Division's September 8, 2005 letter states that because of the change in water sources, the April 28, 2005 amendment is in fact the initiation of a new right. If it were treated as an amendment it would give the applicant a priority on the Sacramento River senior to all applicants on the Sacramento River who have filed since February 9, 1990. The Division advised the Applicant that a new application must be filed for the new source. The amendment was not accepted.

The letter also described a number of application deficiencies: (a) the underground storage supplement was deficient, (b) the plan of diversion was unclear, (c) it was unclear whether the Applicant had access to the 27 points of re-diversion, (d) it was unclear whether the Applicant had access to the irrigation canal systems to be supplied with water, and (e) the Applicant cannot claim control of water lost through canal seepage.

18. The Applicant's response, dated March 1, 2006, explained that there was no intention to initiate a new water right for water originating in the Sacramento River. The Applicant intended to adhere to the requirement that no more water would be diverted from the Sacramento River than would be available and obtainable at the original point(s) of diversion.

19. On January 23, 2007, the Applicant re-assured the Division that it would not take more water at the new point of diversion than would have been available at the original point of diversion.

20. On August 24, 2007, representatives of both the Division and the Applicant met to discuss application processing. At the meeting, the Division agreed to notice the amended application although the issue of changing sources had not been addressed. The unresolved issues include the amendment of the application and the failure to document water availability. The deficiencies in the WAA and its unacceptability were discussed at the meeting and are listed in the August 24, 2007 Memorandum to Files.

21. On October 10, 2007, the Applicant submitted a third amended application.

22. The application was noticed on January 25, 2008. The Applicant failed to publish notice of the application. Therefore, the application was re-noticed on March 12, 2008. Protests were filed by California Salmon and Steelhead Association, Freeport Regional Water Authority, Sacramento County Water Agency, U.S. Bureau of Reclamation, Friends of the River, California Department of Water Resources, Save the American River Association, Inc., California Sportfishing Protection Alliance, El Dorado Water and Power Authority, Sacramento Municipal Utility District, Glenn-Colusa Irrigation District, Defenders of Wildlife, San Luis & Delta-Mendota Water Authority, Westlands Water District, State Water Contractors, Kern County Water Agency, Contra Costa Water District, and the Department of Fish and Game. None of the protests have been resolved.

23. On November 5, 2008, the Division requested a demonstration that the Applicant has, or will in the reasonable future be granted, access and use of the Freeport facility. (See Wat. Code § 1775, et seq.) The Applicant was advised that the application may be rejected if access could not be secured.

24. On April 13, 2009, the Division informed the Applicant that the September 4, 2003 WAA was not acceptable and listed the reasons that it could not be accepted. The Division also concluded that the Applicant had not documented the availability of unappropriated water for Application 29657. The Division advised that any analysis of water availability is limited to unappropriated water at the original point of diversion on the South Fork American River, which is 147 cfs. Therefore, evaluation of water available at an enlarged facility was not acceptable. The Division requested a

diligence showing by October 10, 2009 including: (1) the dates of all field reconnaissance activities conducted for inclusion in a project EIR within the one-year period ending on May 1, 2009 and a list of each type of survey conducted on those dates, (2) preliminary survey results, (3) a list of all access agreements obtained for the Freeport facility, (4) a list of all biological modeling conducted to date and preliminary model results, (5) an acceptable WAA, including bypass flows and the scientific basis for the bypasses. The WAA must comply with Water Code section 1375, subdivision (d). The information was requested pursuant to Water Code section 1275. The Applicant was advised that failure to timely submit the requested material and document diligence may be cause for cancellation without further notice. (Wat. Code, § 1276.)

25. On October 8, 2009, the Applicant documented that no field reconnaissance activities had been conducted. Consequently, there are no preliminary survey results. The Applicant did not identify any measures, such as bypass flows, necessary for protection of biological resources. The Applicant's response to item (4) was to state that biological modeling is incorporated in the WAA. The CalSim II model used to prepare the WAA includes biological constraints. The June 2009 Salmon Biological Opinion and 2008 Delta Smelt Biological Opinion are mentioned, but the Applicant's submittal does not state whether these requirements were incorporated in the 2007 CalSim II model run used to prepare the WAA.

26. On October 8, 2009, the Applicant submitted a revised WAA (2009 WAA) and a new work plan (2009 work plan) since none of the target dates from the 2002 work plan had been met. To determine whether the 2009 WAA and revised work plan are acceptable, Division staff evaluated the application file, including Applicant's compliance with past commitments.

a. WAA

Application 29657 originally requested a point of diversion on the American River, but Applicant twice submitted amended applications that ultimately eliminated the original point of diversion #3 on the South Fork American River and changed the point of diversion to the Freeport facility on the Sacramento River. The Division's April 13, 2009 letter states that diversion is limited to unappropriated water at the original point of diversion on the South Fork American River.

The attachment to the second amended application states that "in moving the point of diversion from the American River to the Sacramento River, the applicant has agreed to prepare water availability studies to assure that the diversions from the Sacramento River do not exceed the amounts of water that would otherwise be obtainable by it at the original Point of Diversion #3 on the South Fork American River." The 2003 WAA found that 147 cfs is available at the original point of diversion on the South Fork American River.

The 2009 WAA states that a diversion rate of 198 cfs, with an average annual limit of 54,000 af is available for diversion. The increased water supply is attributable to Applicant changing its position on diversion of American River flows. The 2009 WAA contends that since the Applicant's ultimate point of diversion is downstream of the lower American River, Applicant's flows contribute to meeting the American River flow standards and are not constrained by them.

The WAA does not provide numeric data on available water supply when term 91 is in effect. Instead, the analysis estimates that inclusion of term 91 will reduce water supply by about 2 percent. The Division and Applicant received comments on the adequacy of the WAA from nine protestants during June and July of 2010. The comments have not been addressed. The following is a partial list of comments received on the WAA.

- Applicant is seeking to divert water released from Central Valley Project storage facilities and that water is not available under Application 29657.

- The modeling used for the 2009 WAA does not take into consideration the 2008 OCAP and associated 2008 Delta Smelt and NOAA Fisheries Salmon Biological Opinions, which may affect the Term 91 restrictions.

- The monthly lower American River minimum flow requirements at Nimbus Dam in every one of the 12 studies provided by San Joaquin County on the CALSIM II CD are **not** the American River Water Forum flow requirements. Also, the WAA does not clearly identify which actual studies were used in the analysis.

- There is no acknowledgment of water rights that may be senior to Application 29657, including the El Dorado Irrigation District rights and El Dorado Water and Power Authority's request to appropriate 40,000 afa under State filed Applications 5644X02 and 5645X12.

- San Joaquin County is not entitled to area of origin protection. Term 91 is required for this filing.

- The WAA assumes Applicant can divert 100 percent of the unimpaired flow; however, it is likely that a portion of the flow must remain instream for protection of resources.

- Instream conveyance loss is not quantified.

- The data in Table 3, Page 16 of the WAA monthly flow estimates are off by one year. This results in erroneous conclusions when compared to Table 8, the pipeline capacity availability on a yearly basis.

The 2009 WAA is not acceptable because: (a) the WAA does not show that the quantities requested in the amended application are available for diversion; (b) the term 91 analysis does not provide monthly and annual numeric data; (c) the WAA is based on diverting water not available at the original point of diversion on the South Fork American River; and (d) protestants have identified other elements of the WAA that are not acceptable as listed above and these concerns have not been addressed.

b. 2009 Work Plan

Implementation of the 2009 work plan requires approval of a time extension. To be acceptable, the time extension request must meet the requirements of California Code of Regulation, title 23, section 844. Per the regulation, an extension of time within which to complete an application will be granted only upon such conditions as the board determines to be in the public interest and only upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted.

Due Diligence:

From April 1, 1998 through January 1, 2003, Applicant sought time extensions for Application 29657, in lieu of completing project specific tasks such as the EIR. Applicant did not complete the tasks in its 2002 work plan, as described in the Division's April 13, 2009 letter. Per the 2002 work plan, Applicant was scheduled to complete a project-level EIR in 2005, resolve the protests in 2006 and a permit would be issued in 2006. Also, the Applicant was scheduled to obtain access to the point of diversion.

Obstacles Which Could Not Reasonably Be Avoided:

Applicant has previously indicated a need to prepare the Eastern San Joaquin Basin Integrated Conjunctive Use Program Draft EIR before proceeding with a project-level EIR. The Applicant is in control of its EIR preparation schedule. Consequently, the Applicant could have prepared the program and project-level EIRs in compliance with the 2002 work plan. The environmental review and appropriate mitigation measures associated with the EIR are needed to address environmental protests. Absent an EIR, Applicant has not made any progress on addressing the environmental protests.

Applicant has not made any progress on addressing protests related to lack of access to the revised point of diversion at the Freeport facility, which is owned by East Bay Municipal Utilities District and Sacramento County. The access issue could have been avoided, had the Applicant elected to retain its original point of diversion on the American River.

The prior right protests are unresolved because the Applicant has not yet documented the availability of sufficient unappropriated water to serve its project. This obstacle could have been avoided if the Applicant downsized its project.

Satisfactory Progress:

The application has been reviewed to determine whether satisfactory progress will be made if an extension of time is granted. Applicant's 2009 work plan indicates that the permitting process should be concluded by 2015, which is 25 years after the application was filed. Applicant did not provide an explanation how it would avoid its past failure to comply with its 2002 work plan. Applicant is faced with the same issues in the 2009 work plan that it had in the 2002 work plan – lack of a project-level EIR, lack of access to the point of diversion, lack of unappropriated water and unresolved protests. Since there was no change in the status of the application from 2002 through 2009, there is no information to support a finding that satisfactory progress will be made. The requested time extension is denied. Therefore, the 2009 work plan is not accepted.

Since there is no further time to pursue the application, a determination must be made whether the application can be approved as currently drafted and based on existing supporting materials. The application cannot be approved because: (a) there has not been an adequate showing of the availability of unappropriated water; (b) the protests are unresolved, and (c) the project-level EIR has not been completed.

27. Moving the point of diversion from the American River at the Folsom South Canal to the Sacramento River at Freeport may constitute initiation of a new right if more water is available at the new point of diversion than at the original point of diversion. The October 8, 2009 letter documents that the Applicant intends to divert water at its proposed new point of diversion on the Sacramento River that would otherwise have been required to bypass the original point of

diversion on the South Fork American River to maintain public trust resources. There are no other points of diversion in the third amended application.

28. The proposed project will require a permit, license, or approval from another public agency or officer, and it has become evident that regardless of the action taken by the State Water Board, such permit, license, or approval cannot be secured from the proper agency. (Cal. Code Regs., tit. 23, § 1776.) The Applicant's October 8, 2009 letter documents that the Applicant has not obtained access to the point of diversion.

29. The Applicant has failed to submit complete or adequate information pursuant to Government Code sections 65943 through 65944. (Gov. Code, § 65956; Cal. Code Regs., tit. 23, § 683, subd. (b).) The project-level EIR has not been completed.

THEREFORE, IT IS ORDERED THAT APPLICATION 29657 IS HEREBY CANCELED.

STATE WATER RESOURCES CONTROL BOARD

Victoria A. Whitney

Victoria A. Whitney
Deputy Director for Water Rights

Dated: SEP 30 2010