SWRCB Water Right Hearing Regarding Proposed Revocation of Auburn Dam Project Permits

Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637)

Closing Statement

of Friends of the River, Save the American River Association, Defenders of Wildlife

September 2, 2008

The evidence before the Board establishes that there is cause to revoke Reclamation's Auburn dam permits and that it is in the public interest to do so.

Cause for Revocation:

The Water Code (§1410) states:

> "There shall be cause for revocation of a permit if the work is not…prosecuted with due diligence and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the board."

The record is clear (notice of proposed revocation, Division of Water Rights files, stipulations of facts, and our testimony and exhibits) that Reclamation has neither completed nor prosecuted this project with diligence for several decades nor has it applied any water to beneficial use. Neither has Reclamation complied with Board orders concerning Reclamation's request for an extension of its permits. Furthermore, it has informed the Board that, absent Congressional action directing it to do so, it will not comply with Board orders necessary for a permit extension, in effect preventing the Board from undertaking a permit-extension hearing and decision-making process.

No party provided evidence for the record supporting the notion that the United States of America (the holder of the permits) has diligently prosecuted its work under the Auburn-Folsom South Unit permits. No party placed any evidence in the record that the United States of America has any plans to diligently prosecute its work in the definite and certain (or even foreseeable) future. In fact, for the last decade it has been the official position of Reclamation, the bureau within the Department of the Interior charged with managing the construction and operation of the Auburn-Folsom South Unit, that there is no longer any role for the Federal government in this project. *(X-28)* Consequently,

Reclamation has officially told the Congress for a decade that "the project is on indefinite hold." *(X-30)*

In these circumstances, the Board's responsibility under the Water Code should be to revoke the permits, as the Division of Water Rights has proposed to do. The precedents of both the Board and the courts are clear: water rights permits such as those held by the United States of America are

> "not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future,"[1] or "It is not the purpose of the Water Code to provide a means whereby a reservation of water may be made by one who has no immediate plan or purpose to proceed promptly and diligently with construction of necessary diversion works and beneficial use of the water."[2]

Reclamation's Response:

Reclamation does not offer evidence that the project has been prosecuted diligently, rather, it makes two broad legal arguments: 1) The United States should be treated differently and should be exempt from the water-code requirements of due diligence and should be allowed to place these water rights on indefinite hold,[3] and 2) The United States of America should be allowed to keep the permits because Congress has not provided Reclamation with either the authority or funds to construct and operate the project. Seemingly, in Reclamation's eyes, the Board is "prosecuting" the wrong defendant and Reclamation should not be penalized for failure to prosecute the permits.

These arguments fail on both legal and factual grounds.

Claim of special status for putting permits in cold storage: There is no basis in the water code for the United States to place these permits in "cold storage."[4] Reclamation makes

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[1] D. 893, p. 54. (quoted in X-1 corrected2, pp. 3–4)

[2] Cal Trout v. Board, 1989, 207 Cal App 3rd 585 [255 Cal Rpt 184]. (quoted in CSPA Exhibit 1, pp. 2–3)

[3] Hearing transcript, pp. 92–92

[4] Division staff testified that there are not "more than one set of rules for an applicant depending on whether or not the applicant is the United States." (Hearing transcript p. 60) This principle has been reviewed in Federal courts as well. "The United States…cannot acquire appropriative water rights to California water without following the same

no attempt to cite any section in the water code supporting its alleged special status, presumably because provisions for such status do not exist.[5] In actuality, the Board in its administration of the water-rights system has a clear responsibility to act when Reclamation has not diligently prosecuted work required of it, a duty made especially clear when Reclamation has no definite or certain plans to proceed. Indeed, the record shows that there is little ambiguity about Reclamation's plans: it is the position of Reclamation that there is no Federal role in this project, there are no plans to change that position, and a change in direction from the United States is speculative at best.

Claim that Reclamation is not responsible for the lack of diligence: This argument (and its relevance), again, fails on legal and factual grounds. Reclamation argues that its failure to prosecute the project is because Congress has failed to finance the project, which, it argues, in a permit-extension hearing under the Board's regulations, could justify an extension because financing delays are "incident to the enterprise." *(USBR Exhibit 1, p. 7)*

Of course, this proceeding is not a permit-extension hearing, but a revocation proceeding. But even in the hypothetical case of a permit-extension hearing, this argument would fail. The holder of the permits, the United States of America (including Reclamation) has chosen not to prosecute and finance the project authorized by the permits for many decades — and has no plans to do so in the future. This is a lack of diligence that is "incident to the person": the holder of the water right (the person) has chosen not to finance the project.[6]

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requirements as any other person." Westlands Water Dist. v. United States (E.D. Ca. 2001) 153 F.Supp.2d 1133, 1173, aff'd 337 F.2d 1092 (9th Cir. 2003).

[5] Interestingly, the underlying state filings that an earlier Board released from priority in favor of the permits awarded to the Bureau are exempt from diligence requirements. Among their purposes, these filings were intended to reserve water rights that might be used by the Central Valley Project (and, subsequently, the State Water Project). If the present permits held by the United States were revoked, these state filings would continue to be available to the United States if it ever intended to construct an addition to the CVP here, apply for water rights, and comply with the Water Code. A future Board, of course, would then have to find that water was available for appropriation in the affected watershed and that the proposed project was consistent with applicable law and the public interest.

[6] Reclamation's permit-extension argument fails on other grounds as well. Division of Water Rights staff testified that it could neither process Reclamation's permit-extension request nor provide an extension of time because of Reclamation's refusal to prepare a CEQA document (Hearing transcript, p. 51). Reclamation has no revised project description in front of the Board (Hearing transcript, pp. 57–60), a revised project that, at one time, it

Another flavor of Reclamation's argument is that Reclamation should not be penalized with a loss of water rights because "Reclamation is a bureau of the Department of the Interior, an executive agency of the Federal Government"[7] and it should not be held responsible for the inaction of the Congress. Under this line of reasoning, if a water right permit was held by a City Department of Public Works and a City Council (or City voters) chose to withhold construction funding for several decades, the water rights held by the Department should not be revoked because the City Council, not the Department, was responsible for the lack of diligence in prosecuting the project. But this is surely a mockery of the due-diligence provisions of the water code; if a project has not been financed and has little prospect of being financed, then it should matter little whether the decision came from the Public Works Department, the City Council, or the electorate.

But Reclamation's argument also fails because its analogy is not representative of the facts. The water right is held by the United States of America, and it is the United States of America that has failed to finance the project. But Reclamation's blame-Congress argument is disingenuous in another way. A review of the record will show that, aside from Acts of God (well, reservoir-induced seismicity from the Oroville Dam that stopped Auburn dam construction and initiated the redesign period through 1979), the principal reason for the failure to prosecute this project with diligence has been the Executive Branch's (and therefore Reclamation's) laudable but then ground-breaking policy that it receive adequate non-Federal cost-sharing along with the Federal investment,[8] something

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intended to develop and submit to Congress, (X-10, p. 3) but now does not intend to develop (X-28, and see the reluctance of the Commissioner of Reclamation in X-51 to embark on studies to support projects that do not emerge as Reclamation's preferred ARWRI alternative). The Board's regulations require a determination of public interest, a showing of due diligence, and determinations that the failure to comply with previous deadlines was from obstacles that could not be reasonably avoided and that satisfactory progress will be made if an extension of time is granted (Cal. Code Regs., title 23, § 844). California Department of Fish and Game presented a policy statement that revocation (not permit extension) is in the public interest (Hearing transcript p. 26), Reclamation has not been diligent, and Reclamation cannot assure the Board that it will make satisfactory progress. Thus the question of whether the failure to comply with previous deadlines could have been reasonably avoided (and the related "person" versus "enterprise" issue) loses relevance to a permit-extension decision. Under the Board's regulations, it could not issue a permit extension in either present circumstances or the foreseeable future.

[7] USBR Exhibit 1, p. 5. Reclamation discusses its lack of control of Congress at length in this exhibit and its Hearing testimony.

[8] The record also shows that a Federal District Court has asserted continuing jurisdiction over any extension of the Folsom South Canal authorized as part of the

that its contractors and aspiring contractors (including participants in this proceeding) have been unable to provide.[9] And a decade ago, Reclamation itself concluded that there was no longer any proper role for the federal government in this project.[10]

Auburn-Folsom South Unit (X-1 corrected2, p. 4 & X-10, p. 2). In the 34 years since this action was taken, Reclamation has not recommended extension of the canal, nor made any serious effort to prosecute this part of the Auburn-Folsom South Project, and it has certainly not finalized any project-specific feasibility-level EISs supporting an extension of the canal. (EBMUD is no longer a Folsom-South Canal contractor, X-33). In the absence of any project-specific feasibility-level EISs or support from Reclamation, Congress has neither reauthorized the Folsom-South Canal extension nor Reclamation's Auburn dam. And consistent with long-standing Office of Management and Budget direction not to embark on funding construction starts for which full funding authority to complete the project is lacking, the Congress has not provided construction funding for Reclamation's 1979-redesigned Auburn dam. The last Congressional bill proposing to reauthorize Reclamation's project was in 1989. Introduced in the same year that the CVP Contractors Association withdrew their support for Auburn dam, the bill died in Committee. (X-19 & X-47)

[9] Reclamation is not alone in its failure to remember the long history of this project. In his policy statement at the Hearing, a prominent candidate for Congress in the 4th Congressional District stated:

> "But all of the legal arguments on both sides won't alter what we all know. This dam has been stalled for nearly 40 years by inexhaustible waves of litigation, political wrangling, and changing regulations. It's not a lack of diligence that prevents completion of the Auburn Dam. It is rather a super-abundance of delay and dilatory tactics that your Board can either cut through or add to." (Hearing transcript, p. 10)

Although the rhetoric was well delivered, the candidate would do well to review the record, including materials provided by Friends of the River, et. al., and even the hearing testimony of the Auburn Dam Council. "Guns versus butter" financial limitations in the Vietnam War era slowed the project early on according to expert testimony provided by the Council. The last litigation on this project was in the early 1970s. The cost-sharing policies championed by fiscal conservative Ronald Reagan were put in place in the early 1980s. No Federal Administration since has sought to change them. This project has not proceeded because under now long-standing policies established by President Ronald Reagan it hasn't "penciled out" on anyone's balance sheets for decades.

[10] Interestingly, there is no record that Reclamation ever informed the Board of key decisions by CVP contractors not to participate in this project, nor the "no Federal role" conclusions of Reclamation's ARWRI ROD, nor the resulting "indefinite hold" status of the project for which it has characterized the project to the Congress for a decade. Forums for this information to be introduced should have been the timely processing of the permit-extension request — a process stalled for at least two decades by the Bureau's

Reclamation then makes what is hopefully a policy, not legal, argument that the Board should defer undertaking its water-rights administration responsibilities until some time in the indefinite and uncertain future when (and if) Congress formally deauthorizes the Auburn-Folsom South Unit. But the unconstructed portions of the Auburn-Folsom South Project are already defacto deauthorized. These projects have required reauthorization for decades (because they have exceeded their authorized cost-ceiling and for other reasons), a fact well known to the Congress.[11] Reclamation also implies that Congress is actively considering reauthorization of the project. However, there are no cost-sharing partners who have stepped forward prepared to help finance the project on terms acceptable to Reclamation, no feasibility-level EIS has been prepared to support the 1979-redesigned project (nor are any planned or underway), and Reclamation's position is that there is no Federal role in this project anymore.[12] As a consequence, no bill to reauthorize Reclamation's Auburn dam has even been introduced in nineteen years, and no reauthorization bill has ever cleared a Congressional committee. Neither of California's U.S. Senators supports the dam, and no Committee chair nor member of the leadership of the House or Senate supports the dam or intends to hold the hearings necessary to support its reauthorization. Its principal champion, Rep. John Doolittle, is retiring, and, ironically, he never introduced a bill to reauthorize Reclamation's project, even when he was chair of Reclamation's authorizing subcommittee. *(X-46 & 47)* To call this active consideration strains credulity. And Reclamation fails to note that Congress has made the CVP subject to the form and substance of state water law, something that includes the diligence requirement and deadlines for performance.[13]

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unwillingness to comply with Board orders to undertake the actions necessary for a permit-extension hearing — or a timely revocation proceeding.

[11] In 1982, Reclamation officials publicly discussed the need for reauthorization in X-10. Former Representative Shumway's reauthorization bills are described in X-47. The first of these bills was introduced on March 21, 1983. The House Interior Committee's action was "Executive Comment Requested from Interior" and it was not taken up again, presumably because Interior had been unable to find cost-sharing partners for the project. Reclamation informed the Board on January 17, 1984 that "federal reauthorization of the project was required in order to raise the cost ceiling, authorize minimum flow releases, and approve additional facilities." (Stipulation of Facts, p. 2)

[12] Interior's assessment of the status of the project, as noted in the preceding footnote, is an important determinant of potential Congressional action. Reclamation reached its "no Federal role" conclusion as a result of a programmatic EIS (the American River Water Resources Investigation, ARWRI) that included Auburn dam as a project alternative to meeting water needs in the Auburn-Folsom South Project service area.

[13] In 1978 the U.S. Supreme Court ruled in *California v. United States*, 438 U.S. 645, 674, 57 L. Ed. 2d 1018, 98 S. Ct. 2985 (1978), that under Section 8 of the 1902 Reclamation

Reclamation also argues that the Board should put these water rights into cold storage because "no additional supply of water should be ruled out given the ongoing crisis with California's water supplies." *(USBR, Exhibit 1, p. 13)* Again, Reclamation does not attempt to reconcile this request with the Board's responsibilities to administer water-rights permits under the water code (including diligence and permit terms). Instead it appears to believe that the Board should "bank" old paper water rights in case they might be needed in a crisis rather than relying on the present and future Boards' abilities to process water-rights permit applications — deliberations that would involve a more contemporary and meaningful record in front of the relevant Board than those of the "banked" rights.

Finally, Reclamation argues that, in the event that the present permits are revoked, "there is no guarantee the State Board would grant Reclamation the water right permits needed for Auburn Dam." They argue that "[t]he uncertainty on whether water would be available…would act as a significant impediment on possible legislative actions by Congress, would have the effect of infringing on the prerogatives of Congress, and would inject undue influence upon the Congressional debate on the future of this project." *(USBR Exhibit 1, p.12)*

While we appreciate Reclamation's perspective, other perspectives also have merit. Indeed, it is our hope that a future State Board would ***not*** grant any permits to construct and operate the Auburn dam and Folsom-South Canal extension. And we would hope that such uncertainty, if warranted, should influence any hypothetical reauthorization deliberations of a future Congress. After all, the Board has, and should have, broad public trust responsibilities over the waters of the State of California,[14] rights recognized by the Congress and the Federal courts. However, setting aside any speculation about how a future Board or Congress might act, the record clearly shows that in 1965 Congress authorized the Auburn-Folsom South Unit while Reclamation received its permits in 1970–71. Apparently the 89th Congress was not "unduly" influenced by the

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Act, Federal reclamation projects must be operated in accordance with state water law, when not inconsistent with Congressional directives. Given Friends of the River's history, it is fitting that this case concerned the New Melones Dam, a unit of the Central Valley Project. Congressional requirements to comply with state water law are also embodied in the 1992 CVPIA. In a 1999 letter to Secretary of the Interior Bruce Babbitt, California Attorney General Bill Lockyer stated, "Federal reclamation law, including the Central Valley Project Improvement Act, requires the United States to comply with state water law in the construction and operation of the [Auburn-Folsom South] project." (X-45)

[14] "The State Board's mission is to preserve, enhance and restore the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations." (www.waterboards.ca.gov/about_us/water_board_structure/mission/shtml)

absence of water rights for the project at the time of the authorization nor did it appear to feel that the State was "infringing on the prerogatives of Congress."[15]

But more significantly (and implausibly), Reclamation's argument assumes that it is in the public interest to leave a paper water right in the hands of the United States whose terms were developed in the early 1970s (with roots into the 1950s and 1960s) — a water right where diversions and contracts are contemplated that significantly exceed both historical and current estimates of the yield of Auburn dam, a water right where aspiring CVP contractors hope that Reclamation can award major water-service contracts from project "yield" without, in fact, building the dam necessary for developing the envisioned project yield. Moreover, this argument assumes that it is in the public interest to honor a nearly half century-old idea to construct and operate a dam that would inundate the lands of the current Auburn State Recreation Area managed by the California Department of Parks and Recreation, extend a canal whose envisioned operation would threaten fisheries and recreation in the subsequently designated state and federal wild and scenic river downstream, and diminish inflows to the delta.[16]

In fact, there is no such public interest. Major portions of this project were never constructed, and no diversions have been made. Public decisions on the future of the Auburn project lands, the lower American River, and the fate of the delta ecosystem should not be made on the assessment of conditions that are nearly half century old. Fortunately, under the water code, this Board has the ability and responsibility to sweep away this old decision. Here, the past need not constrain the abilities of the Board to grapple with 21st century problems.

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[15] See X-1 corrected2 discussion on water rights and referenced exhibits (pp. 3–4) including the legislative history regarding Section 5 "use of water in accord with state water laws" in the 1965 authorizing statute. See X-3, X-4, & X-5.

[16] The Hodge Decision, a recreation- and anadromous-fishery public-trust and state wild-and-scenic-river decision referenced in "X-1 corrected 2, p. 12, so limited EBMUD diversions into the Folsom-South Canal that EBMUD eventually chose to divert elsewhere. The designation and management of the lower American River as components to the state and federal wild and scenic river systems is described in Sacramento County Exhibit 3, pp. 87–90. In a recent amendment to the state wild and scenic rivers act, the Board's responsibility to protect the extraordinary fishery and recreation values of the lower American River in the course of their duties was sharpened. "All departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the freeflowing state of each component of the system and the extraordinary values for which each component was included in the system." (California Public Resources Code §5093.50)

San Joaquin County Response:

A number of San Joaquin County parties participated actively in this proceeding. In essence, they argue that San Joaquin County desires more water and chronicle a 1956 to 1970 history that they had been led to believe that the American River was to be their source of supplemental water.

We have no doubt that San Joaquin parties feel this deeply. However, the 60's-era conception of an east-side canal to bring "surplus" waters from east-slope rivers to make the arid lands to the south bloom even further never bore fruit. Environmental problems, costs, user-pay policies, and too little real yield have doomed this plan, although adherents do remain, forever seeking public subsidies to actualize their dreams.

The San Joaquin County interests request that the Board hold off on revocation for three years so they can execute contracts with Reclamation for all or part of the 1,000 cfs of Auburn-Folsom South Unit water that County interests believe Reclamation has available to contract for under these permits. They believe that such contracts are available under these permits even without construction of the Auburn dam.

There is little merit in this request. Indeed, the testimony suggests a lack of diligence on San Joaquin County interests' part. We learn from them that they sent a contract offer to Reclamation in 1972. They haven't heard back from Reclamation so they ask the Board give them another three years to negotiate a contract!

They offer no evidence that an additional three-year period is sufficient to either build the permitted facilities or enter into a Reclamation contract to secure Auburn Folsom-South Project water, either with or without Auburn dam or a canal extension. The hearing record suggests that San Joaquin County interests have not inquired whether Reclamation is willing to enter into contract negotiations, not asked whether Reclamation is willing to contract for or deliver Auburn-Folsom South Unit water without constructing the dam or canal extension, not inquired whether Reclamation would be willing or able to contract with the County interests for CVP yield outside of the Folsom-South Unit, not asked whether Reclamation can contract for any water-service contract given Reclamation's current statutory, legal, and policy contracting constraints, not determined whether the Auburn-Folsom South Unit paper water they envision buying is not, in fact, the same water that they are applying for in their own water rights filing, and not determined whether the Board believes that Auburn-Folsom South Unit water could be lawfully contracted for in the absence of much of the facilities.

Indeed, San Joaquin County's request highlights the importance of the Board promptly revoking Reclamation's permits. San Joaquin County interests are proposing, in effect, to

resurrect and extend the permit term of a water right that Division of Water Rights staff believe no longer supports construction and operation of a project. San Joaquin County interests do this in the context of a revocation hearing, not in the context of a permit-extension hearing, a proceeding that the permittee (with the presumed tacit support of aspiring contractors) has made impossible to hold. They envision the possibility of diverting large amounts of water from waters tributary to the delta under the assumption that Reclamation's permits would allow Reclamation to do so, even in the absence of the dam. They would prefer to receive this water from the Folsom-South Canal if it could be constructed, bypassing the lower American River. Finally, they would put this contract decision in the hands of Reclamation, not the SWRCB.

Miscellaneous Hearing Threads:

A number of participants and policy statements argue that Auburn dam should be constructed for its water, power, flood-control, and environmental benefits. It is difficult to see how these arguments are germane to the diligence issues that form the Board's decision-making criteria in a revocation proceeding. They more properly belong in a permit-extension proceeding (although, as noted earlier, such a proceeding cannot be held nor a permit-extension issued). Nevertheless, much testimony on this subject was offered.

The insights gained are pretty easy to summerize. Expected project yield is a small fraction of current CVP deliveries and costs can be expected to be many multiples of current repayment obligations of CVP contractors. Estimated costs of the project have increased greatly, and are now three to four times the authorized cost ceiling. (X-29 & X-42) There are no realistic customers for Auburn dam water-service contracts. Similarly, power customers dropped out of the project two decades ago and have not returned. Congress has authorized and funded major flood-control projects at Folsom Dam and the downstream levees that will, when completed, exceed the performance of the Reclamation's 1965 Auburn dam, as well as meet the performance recommendations of the recent DWR Independent Review Panel on Central Valley Flooding chaired by General Gerald Galloway.[17] CDFG presented the Board a policy statement that revocation is in the public interest.

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[17] Policy statements from the 3rd Congressional District, the 1st Senate District, and the 5th Assembly District concerned the flood-water-management implications of revocation. We were pleased to include X-38 through X-41 in our exhibits, as well as discuss this matter in our testimony and response to questions. We were pleased that the Hearing Officer was also pleased with attention to this subject. (Hearing transcript, p. 205) Regrettably, the elected officials or their representatives who expressed concerns did not take the opportunity at the time to avail themselves of the information thus provided. Perhaps they will do so sometime. It would have answered their concerns.

Reclamation, the Hearing Officer, and others expressed concerns that revocation of Reclamation's permits might somehow disadvantage Reclamation, potential contractors, or holders or aspiring holders of other water rights. It is, again, unclear how such concerns are meaningfully relevant to the diligence focus of a revocation proceeding. Nevertheless it is unclear how Reclamation, with its decade-old "no Federal role" conclusion is disadvantaged since it does not intend to construct and operate the project. In these circumstances, potential Reclamation contractors are not being disadvantaged except being freed from the hypothetical future option of purchasing some very expensive water — an option that Reclamation does not intend to provide, and for which the CVP contractors, in general, have been unwilling to assume as a repayment obligation. Given the state's area of origin and county of origin statutes, it is unclear how revocation would have much impact on other water-rights holders or aspirants, other than reducing some of the standing that Reclamation might have to protest their water-right applications.[18]

Final Thoughts:

The cause for revocation under the water code is clear. The holder of the permits has not diligently complied with the terms of its permits to construct the project and put the water to beneficial use. Neither does it have any plans to do so in the future. Rather, it requests that the board put its water rights into cold storage, for twenty-five years or as long as it takes, in the words of Auburn Dam Council witness and former chief of the Construction Division that oversaw the Auburn Construction office, Michael Schaefer. A revocation hearing has been held. The remaining question is whether the Board will choose to revoke the permits consistent with the intent of its Division of Water rights — the Hearing Officer's "whether we should or should not revoke the permits" concluding question.

The advantage of clearing a water right from the books that parties might use to support entering into contracts that might result in large new diversions from the American River or waters in or just upstream of the delta should be clear to the Board, particularly given its special responsibilities for the lower American River under the Public Resources Code and the manifest problems of delta fisheries described by the California Sportfishing Protection Alliance in this proceeding.

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[18] Under the state's area of origin statutes, a "senior" CVP water right cannot deprive areas of origin of water necessary for their development — which makes CVP export deliveries subject to potential reductions regardless of the priority dates of CVP permits. Since all or nearly all of the water-rights applications introduced into the record that might become senior to Reclamation — if the United States chose to apply for permits again — assert that they are within the area of origin, it does not seem credible that a hypothetical future Reclamation would be meaningfully disadvantaged by a later priority date.

We also heard public-interest testimony and policy statements about the importance of beginning to respond to Reclamation's decade old "no Federal role," and Interior's even older NRA and wild and scenic river eligibility findings in the management of the Auburn State Recreation Area[19] — something that a Board action could help begin to clarify, particularly for state agencies.

The Board has an additional responsibility and purpose to pursue this revocation with diligence. Its mission, set out in Water Code Section 174, is at stake:

> [T]hat in order to provide for the *orderly and efficient* administration of the water resources of the state it is necessary to establish a control board which shall exercise the adjudicatory and regulatory functions of the state in the field of water resources. (*emphasis added*)

Reclamation has made it abundantly clear that the Board should, in the special circumstances of permits held by the United States, abandon the long-standing understanding that "the Water Code does not allow the [Water Board] to countenance any attempt to place rights in cold storage where there is no intent to proceed promptly with development."[20] Yet there is no basis for Reclamation's claim in the water code and Congress has explicitly made the Auburn-Folsom South Unit and the CVP subject to the state water law.

Failure to timely revoke these permits given the record before it sends the signal that the Board is not capable of basic "orderly and efficient" administration of the water resources of the state. Given the challenges facing the state and the Board, including the overallocation of the waters of the state discussed in CSPA's and our testimony, we believe that Board should and will not find it in the public interest to delay revocation of these permits any longer.

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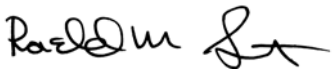
[19] Statement of Theresa Simsiman (Hearing Transcript, pp. 32–36), Policy Statement of Western States Endurance Run Foundation by Antonio Rossmann, and testimony from Mr. Michael Garabedian, Friends of the North Fork (Hearing Transcript pp. 261,262).

[20] Cal Trout v. Board, 1989, 207 Cal App 3rd 585 [255 Cal Rpt 184]. (quoted in CSPA Exhibit 1, pp. 2–3)

Sincerely yours,



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Statement of Service

September 2, 2008

Closing Statement, Friends of the River, Save the American River Association, Defenders of Wildlife.

Auburn dam water rights revocation hearing

I have sent an electronic copy of this document to wrhearing@waterboards.ca.gov. I have also hand delivered five paper copies to the offices of the State Water Resources Control Board in Sacramento. I have served electronic copies to the parties on the June 18, 2008, revised service list and paper copies by first-class mail to any members of the service list that reject electronic service.

Sincerely,

Claire Jennings-Bledsoe

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