State Water Resources Control Board

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

Linda S. Adams
Secretary for
Environmental Protection

Arnold Schwarzenegger
Governor

OCT - 9 2008

ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST

WATER RIGHT HEARING REGARDING PROPOSED REVOCATION OF AUBURN DAM PROJECT PERMITS: EX-PARTE COMMUNICATION

Enclosed is a letter from Sandra K. Dunn, representing Sacramento County Water Agency (SCWA), to Victoria Whitney, Chief of the Division of Water Rights, regarding San Joaquin County's response to SCWA's protest of the county's pending water right application, Application 29867. Although the letter was submitted in connection with Application 29867, the letter contains a discussion of substantive issues related to the Auburn Dam hearing. This letter was not sent to the service list.

As required by Government Code section 11430.50, this letter will be made a part of the record in this proceeding. The letter is attached to this e-mail and will be posted on the web page for this hearing at http://www.waterrights.ca.gov/Hearings/auburn_dam.html.

Please remember that ex-parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited.

Please be sure to copy the service list on any correspondence to the hearing officer, the other Board Members, the hearing team, or anyone else in the decision-making chain-of-command, including Ms. Whitney. If you have any non-controversial, procedural questions, please contact Dana Heinrich at 916-341-5188 or dheinrich@waterboards.ca.gov or me at 916-341-5351 or jmccue@waterboards.ca.gov.

Sincerely,

Jean McCue

Jean McCue
Water Resource Control Engineer

Enclosures

cc: See next page.

OCT - 9 2008

cc: Gary Wolff, Ph.D.
Hearing Officer and Board Vice Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Vicky Whitney, Chief
Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

WATER RIGHT HEARING REGARDING PROPOSED REVOCATION OF AUBURN DAM PROJECT PERMITS, SCHEDULED TO COMMENCE ON JULY 21, 2008

REVISED SERVICE LIST
(June 18, 2008)

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Bureau of Reclamation, U.S. Dept of the Interior
James E. Turner, Assistant Regional Solicitor
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95825
rsahlberg@mp.usbr.gov

SWRCB/DWR Prosecution
c/o David Rose
State Water Resources Control Board
Office of Chief Counsel
P.O. Box 100
Sacramento, CA 95812
DRose@waterboards.ca.gov

Auburn Dam Council
c/o Michael R. Schaefer
7050 Walnut Avenue
Orangevale, CA 95662
Mikeret_99@yahoo.com

American River Authority
c/o Christopher D. Williams, Esq.
P.O. Box 667
San Andreas, CA 95249
cwilliam@goldrush.com

California Sportfishing Protection Alliance
c/o Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
mjatty@sbcglobal.net

Friends of the North Fork
c/o Michael Garabedian
7143 Gardenvine Avenue
Citrus Heights, CA 95621
mikeg@gvn.net

Sacramento County/Sacramento County Water Agency
c/o Sandra K. Dunn
Somach, Simmons & Dunn
813 Sixth Street, 3rd Floor
Sacramento, CA 95814
sdunn@somachlaw.com

[Address through July 13, 2008]
Friends of the River, Save the American River Association, and Defenders of Wildlife
c/o Ronald M. Stork
915 20th Street
Sacramento, CA 95811
rstork@friendsoftheriver.org

San Luis & Delta-Mendota Water Authority
c/o Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
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[Address effective July 14, 2008]
Friends of the River, Save the American River Association, and Defenders of Wildlife
c/o Ronald M. Stork
1418 20th Street, Suite 100
Sacramento, CA 95811
rstork@friendsoftheriver.org

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The participants listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.) (*Continued*)

South Delta Water Agency
c/o John Herrick
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Jherrlaw@aol.com

Stockton East Water District
c/o Karna E. Harrigfeld, Esq.
2291 W. March Lane, Suite B100
Stockton, CA 95207
kharrigfeld@herumcrabtree.com

Westlands Water District
c/o Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
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County of San Joaquin and San Joaquin County Flood Control and Water Conservation District
c/o Thomas J. Shephard, Sr.
Neumiller & Beardslee
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Stockton, CA 95201-3020
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SACRAMENTO

September 23, 2008

Victoria Whitney, Chief
State Water Resources Control Board
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

Lauren Dailey, Environmental Scientist
State Water Resources Control Board
Watershed Unit 3
Division of Water Rights
1001 I Street, 14th Floor
Sacramento, CA 95814

Re: San Joaquin County Response to Sacramento Water Agency's Protest of Application 29867

Dear Ms. Whitney and Ms. Dailey:

This letter is written on behalf of the Sacramento County Water Agency (SCWA) for the purpose of notifying the State Water Resources Control Board (SWRCB) that it takes issue with a number of the statements made by San Joaquin County in response to SCWA's protest, particularly in light of San Joaquin County's recent testimony and closing brief in the matter of the proposed revocation of permits 16209, 16210, 16211, and 16212 for the Auburn Dam Project. San Joaquin County states in its letter to SCWA, dated May 23, 2008, that it will work with the Freeport Regional Water Authority (FRWA) to resolve potential issues associated with its Application 29657. Representatives of San Joaquin County in testimony made similar statements to the SWRCB in the Auburn Dam Proceeding. It should be made absolutely clear, without ambiguity, FRWA has no authority whatsoever to resolve or negotiate a resolution of SCWA's water right protest or SCWA and EBMUD's joint protest of Application 29867.

SCWA and EBMUD, in their joint protest of Application 29867, expressly stated that FRWA has no legal authority under its joint powers agreement to negotiate use of excess capacity in the Freeport Regional Water Project. Such an agreement may only be negotiated with either the East Bay Municipal Utility District (EBMUD) or SCWA. Furthermore,

neither EBMUD nor SCWA may make dedicated capacity available to a third party if the use of such capacity will interfere with any water right or contract entitlement of the other. Thus, EBMUD may not independently negotiate an agreement with San Joaquin County for use of excess capacity in the Freeport Regional Water Project if doing so will interfere with SCWA's ability to fully utilize its water rights or its contractual rights to water. Therefore, SCWA has a direct interest in any negotiations regarding the use of excess capacity in the Freeport Regional Water Project.

Regardless of statements made by San Joaquin County to the contrary, FRWA *is not* an appropriate entity to determine a settlement of any protest to Application 29867 and any attempt by San Joaquin County to ignore SCWA's direct interests by engaging FRWA in any settlement discussions will be viewed as an act of bad faith on the part of San Joaquin County and will be appropriately challenged.

While San Joaquin County acknowledges that SCWA is a user of Sacramento River water, it denies that its application is within an area given protection pursuant to Water Code section 1215.5. San Joaquin County's position is based on its contention that section 1215.5 does not apply to the American River. Such a position ignores the fact that the Sacramento River was noticed as the source of water for San Joaquin County's application. Moreover, even if the water San Joaquin County seeks to divert only from the American River, there is no legal support for its argument.

The American River is a tributary to the Sacramento River and is within the Sacramento River hydrologic unit. Water Code section 1215.5 defines the "protected area" to mean all the lands which normally drain to the ocean within the Sacramento River system. The American River is part of the Sacramento River system that drains to the ocean. To interpret Water Code section 1215.5 so narrowly, as San Joaquin County is inclined to do, deprives American River water users, such as Sacramento County, of important protections granted to them by the State Legislature.

In its closing brief in the Auburn Dam revocation hearing, San Joaquin County states it should be allowed to utilize Reclamation's early priority water rights "as an original intended beneficiary of those permits" instead of its Application 29867. It cites to a number of SWRCB decisions and the congressional authorization for the Auburn-Folsom South Unit as support. While these documents evidence that water from the American River may be available to San Joaquin County, they do not constitute an allocation of water to San Joaquin County and they clearly do not give San Joaquin County a preferential right to water over other users, including Sacramento County, within the county and area of origin.

In Section 6 of Public Law 89-161, authorizing the construction of the Auburn-Folsom South unit, Congress names a number of entities potentially benefitting from the construction of facilities authorized, including Sacramento County, Placer County, El Dorado County, as well as San Joaquin County. Furthermore, Section 5 expressly states that this Act "shall not

be construed by implication or otherwise as an allocation of water" and thus directs the Secretary of the Interior to make a recommendation regarding the use of water in accordance with State water law, giving priority to the counties and areas of origin.

Based on its assumption that it is the intended beneficiary of the Auburn Dam permits, San Joaquin County asserts that it should be entitled to the priority of Reclamation's Auburn Dam permits. San Joaquin County thus seeks a super preferential right over water users within the county of origin and within the watershed, arguing further that Reclamation's permits are not subject to subsequent development of a water supply by a county of origin or any future-filed permits seeking an assignment of a State-Filed Application. Not only do San Joaquin County's statements ignore the fact that Sacramento County was likewise intended to benefit from Reclamation's Auburn Dam permits, San Joaquin County's interpretation of Decision 1356 is simply incorrect.

Although the SWRCB did conclude in Decision 1356 that a release of priority of State Applications 7936 and 7937 would not deprive the counties of origin of water necessary for future development, the SWRCB expressly stated that the permits in favor of which the releases are requested would contain provisions adequately protecting future use in the counties of origin. Condition 20 of the permit states that the rights acquired remain subject to reduction by future appropriations of water within the watershed tributary to Folsom and Auburn Reservoir. (D1356 at p. 17.)

As noted in its protest, SCWA has diligently pursued the necessary water rights and has invested millions of dollars in developing the necessary infrastructure to supply water to the central county area. It is not in the best interest of the public to permit San Joaquin County a preferential right to water thereby depriving SCWA the full benefit of its prior right to water consistent with Water Code section 1215 et seq.

San Joaquin County has done nothing to address the issues raised by SCWA in its water right protest. To the contrary, it has hardened SCWA's opposition to the proposed diversion.

Very truly yours,

Sandra K. Dunn

cc: T.R. Flinn, Director, Public Works, San Joaquin County
Keith DeVore
Jim Hanson
Alex Coate

SKD:sb