

2/17/09 Bd Mtg Item 7
Auburn Dam Project
Deadline: 2/10/09 by 12 noon

P. O. Box 255516
Sacramento, California 95865
Tuesday
February 10, 2009

Ms. Tam Doduc, Chair
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, California 95814-2828

Subject: Comment Letter - 2/17/2009 Board Meeting.
Petition Draft Order re Permits 16209 - 16212.

Dear Ms. Doduc:

Receipt is acknowledged of Mr. Larry Lindsay's January 29, 2009 letter, accompanied by a copy of the revised Service List, and Draft Order 2009-00XX, denying Petition for Reconsideration (Petition) of Board Order 2008-0045. I would like to thank the State Water Resources Control Board (Board or SWRCB) for reviewing the Petition I submitted and then preparing a Draft Order in response. That a private citizen's Petition would receive such a level of consideration re-affirms one's faith in state government here in California, especially during these challenging times.

Mr. Lindsay's letter states that if parties wish the Board to consider any comments on, or changes to, the proposed Order, those comments or changes must be submitted in writing and must be received at the Board's office by noon on Tuesday, February 10. The purpose of this letter, therefore, is to comment on said Draft Order and to also request that certain changes be made. The points I discuss are presented sequentially, as they appear in the Draft Order. I greatly appreciate being given this opportunity to respond to the Draft Order and to have the Board consider my comments.

Points for Discussion and/or Change

1. Misplaced Emphasis.

In this entire proceeding, the Board should have placed most of its emphasis on the four water rights permits issued to the U. S. Bureau of Reclamation (Reclamation) in 1971. These permits, nos. 16209 through 16212, allowed Reclamation to begin construction of a project that later became referred to as the Auburn Dam Project. The Board, however, gave as much or even more attention to the project than to the permits. It also gave the impression the fate of these four permits was inextricably tied to the Auburn Dam Project.

As a result of these approaches, the Board never discussed the permits as the incredibly valuable resource they are, in and by themselves. And as a further result, the Board seems not to have asked itself a number of critical questions. The following are just two examples: If we allow Reclamation to retain these permits, are there any important benefits such an action would have for Californians, especially in light of the many troubling scenarios

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scientists tell us climate change may bring to our state? If so, do these benefits warrant our excusing Reclamation's shortcomings on the due diligence provision and allowing them to retain these four permits?

In the Draft Order, one example of this misplaced emphasis appears on the first page. There, the Board has included in the heading, in large letters and bold type, the words, Auburn Dam Project. These three words were included in the title of Board Order 2008-0045 as well, but the size of the letters used in the Draft Order are even larger.

What does history tell us regarding such matters? Let's take a look, for example, at Decision 1356, in which the Board approved the applications that formed the basis for the four subject permits, which, in turn, allowed Reclamation to build the water project in question. In the heading on page 1 of that February 5, 1970 document (copy enclosed), the Board did not include the name of the project. And what about the Board Order granting a Petition for Reconsideration that had been filed shortly after Decision 1356 had been issued? The title on page 1 of that April 2, 1970 document also did not include the name of the project (copy enclosed).

The practice used in the titles of these two earlier documents (i.e., not including the name of the project), is what should have been used in both the Draft Order and also in Board Order 2008-0045. Why is this important? It's important because it will keep our "eyes on the prize," so to speak, and that prize is the four water rights permits. Of course, the project needs to be briefly discussed in the document's text, but the Board gave it far more attention than it should have received in a proceeding of this kind.

Request: Given the above discussion, Petitioner would like to respectfully request that, in the title on page 1 of Draft Order 2009-00XX, the words, Auburn Dam Project, please be removed. If the Board feels something absolutely has to be on that line, then Petitioner requests you please use: Auburn Dam-Folsom South Canal Unit of the Federal Central Valley Project. (See next paragraph).

A. Related Comment

Before moving on to the next point, Petitioner would like to return for a moment to that April 2, 1970 Board Order mentioned above. The very first sentence in that Order illustrates the wording used at that time, and it bears repeating here:

"On February 5, 1970, the Board adopted Decision 1356 approving in part applications of the United States Bureau of Reclamation in connection with the Auburn Dam-Folsom South Canal Unit of the Federal Central Valley Project,..." (page 1).

That wording -- "in connection with the Auburn Dam-Folsom South Canal Unit of the Federal Central Valley Project" -- is still accurate and should have been

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used in the text, especially in Board Order 2008-0045, to help describe the purpose for which the four permits were issued. Yet, the Board chose not to (it came close on page 1) and instead, used the abbreviated version, Auburn Dam Project. While admittedly shorter, it is not quite as accurate. In addition, the words 'Auburn Dam Project,' have become an anathema to some groups.

2. Revisiting 'Cold Storage.'

On page 4 under Section 4.1, a sentence in the Draft Order begins:

"Petitioner's primary argument is that the definition of 'cold storage' contained in Order WR 2008-0045 is factually incorrect..."

The topic of 'cold storage' was the Petitioner's first argument, but it was not her "primary argument."

Request: Thus, Petitioner would like to respectfully request that the word "primary" be deleted and replaced with "first," so that the sentence on page 4 reads as follows:

"Petitioner's first argument is that the definition of 'cold storage' contained in Order WR 2008-0045 is factually incorrect..."

Moving on, the next paragraph in the Draft Order begins with the following statement:

"As explained below, it is unclear from the record in this proceeding whether the water that was subject to appropriation under Reclamation's permits was unused, or whether it was needed to satisfy the demands of junior water right holders or to protect instream beneficial uses, as Petitioner claims." (page 4).

If such basic information on water availability is "unclear," then one must question the Board's decision to unequivocally state in its manufactured definition of 'cold storage,' that when water rights are allegedly placed in 'cold storage,' the appropriated water "remains unused" (page 2 of Board Order 2008-0045 and page 2 of Draft Order). The water appropriated by way of Reclamation's four subject permits was not unused but, rather, was put to use over and over as it flowed from the North Fork and from Knickerbocker Creek down to the Delta.

Still on page 4, the Draft Order then goes on to say:

(Please see next page).

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"In Order WR 2008-0045, we discussed the concept of cold storage for purposes of explaining why revocation of Reclamation's permits was in the public interest." (page 4).

With all due respect, what the Board either hasn't recognized or doesn't wish to acknowledge is that this strategy had the opposite effect. That is to say, by creating a manufactured definition of cold storage and applying it to this water rights issue, the Board demonstrated that the revocation of the four permits in question was not in the public interest.

3. Permit Revocation and Water Availability.

Note: Petitioner begins this discussion with a quotation from the California Water Code. This is found under Article 5, Revocation of Permit, Section 1410(b)(2), where the last sentence reads as follows:

"After a hearing, when a hearing is requested by the permittee pursuant to Section 1410.1, the board may, upon a finding that cause exists, revoke the permit and declare the water subject to appropriation." (page 53).

Particularly relevant are the words, "...the board may,...revoke the permit and declare the water subject to appropriation." This statement makes clear the law assumes that revoking a permit will release from its appropriated status the water which was appropriated when the permit was issued. It also makes clear the corollary assumption that the freed-up water will then be declared available for appropriation by others. These two basic assumptions, but especially the first one, provide a useful backdrop for the discussion of the Draft Order presented in the paragraphs that follow here.

The most defining page in the Draft Order is page 5. It's the most defining because it makes clear a decision was made to revoke these four permits in the complete absence of even a modest understanding of the water availability situation in the subject drainage basin. The SWRCB defends its proceeding in this manner by saying:

"...the Board was not legally required to determine whether revocation made water available for appropriation." (page 5 of Draft Order).

Some things should be done, however, not because they are legally required but because doing them is good common sense. Petitioner suggests this is such a case.

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Part of the first sentence in the first paragraph on page 5 of the Draft Order reads as follows:

"...our finding that revocation would be in the public interest was not predicated on the assumption that all of the water subject to appropriation under Reclamation's permits was unused." (page 5).

While that finding may not have been "predicated" on that particular assumption, Board Order 2008-0045 certainly gave the very strong impression that, yes, the water subject to appropriation under Reclamation's permits was not being used and had not been used for many years. Moreover, the argument then continued that, if the Board revoked those four permits, all that unused water would once again be made available for appropriation by other entities and, we as a society, would be better off as a result. Again, this is the unmistakable impression Board Order 2008-0045 conveys to its readers.

A little further along in that same first paragraph on page 5, the Draft Order states:

"But we did not find that revocation necessarily would make surplus water available for appropriation."

Again, while the Board may not have found that revocation would make surplus water available, Board Order 2008-0045 certainly leads people to believe that that is the case. On page 19 of Board Order 2008-0045, for example, is the following statement:

"...revocation may redistribute the available supply by making water available to junior right holders and applicants for new water rights."

Then, in the next paragraph, Board Order 2008-0045 tells us:

"...there are 28 permits and licenses with priority dates junior to the Auburn Dam Project permits..."

and these are both upstream and downstream of where the Auburn Dam Project would have been located. The Order continues:

"The holders of these permits and licenses may benefit from revocation of the Auburn Dam Project permits..." (page 19).

And in the very next paragraph, Board Order 2008-0045 informs us about:

"...three pending applications to appropriate a total of 587,810 afa from locations above and below the project..."

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along with other applications that are also described in this same paragraph. Several of these, we are told, are state-filed. That paragraph, which appears on page 20 of Board Order 2008-0045, then ends with the following statement:

"The revocation of the Auburn Dam Project permits would therefore make more water potentially available for appropriation under the state-filed applications." (page 20).

Thus, over and over and over, readers of Board Order 2008-0045 are given the unmistakable impression that revocation of Reclamation's four permits will make water available to other appropriators and, as a result, revoking the permits is in the public interest. That the Board, in its Draft Order 2009-00XX, is now hedging on this crucial point is very significant. This development thus gives credence to Petitioner's earlier suggestions--in the 'real water vs. paper water' section of her Petition--that (a) the Board has over-appropriated the waters of this drainage basin and that (b) revoking the subject permits of Reclamation was going to have the unintentional effect of at least helping to address this looming problem (pages 8-10).

4. Revisiting Due Diligence.

Petitioner stated, in her Petition, that the Board contributed to Reclamation's due diligence shortcomings. This was the result, she wrote, of the Board failing to be diligent in the handling of its own responsibilities in regard to Reclamation's four permits.

On page 6 of the Draft Order, the Board wrote that "the record does not support" this suggestion made by Petitioner (it was more than a suggestion). It's not clear to Petitioner exactly what the Board means by "the record." Presumably, they mean there is no written record of their never having initiated any enforcement action. That's not too surprising. Doing nothing tends to leave no paper trail. Yet, it's also not too surprising that lack of enforcement on the part of one party may well encourage inattention on the part of the other party. If such a situation is allowed to continue for a long time, as happened here, enforcement over-reaction is likely to occur, and that is also what happened here.

(Please see next page for conclusion).

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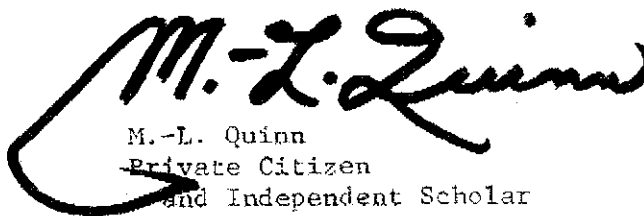
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Conclusion

Preparing and finalizing a document of this kind on a typewriter is a very slow process. Thus, if Petitioner is to have this response to the Draft Order in the Board's hands by noon today, Tuesday, February 10, she must now conclude her comments.

Once again, thank you for the opportunity to comment on the Draft Order.

Yours very truly,



M.-L. Quinn
Private Citizen
and Independent Scholar

Faxed to 916/341-5620
Attention: Jeanine Townsend.

Hard copy being sent via U.S. Mail.

cc: Service List via U.S. Mail.

Enclosures - 2, as stated.

Enclosure 1.

*Amended by
order attached
date 12/17/70*

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 18721,
18722, 18723, 21636, and 21637 by
UNITED STATES BUREAU OF RECLAMATION,

Applicant

M. V. and W. E. HOLTHOUSE, et al.,

Protestants

and

Decision 1356

In the Matter of the Request of
UNITED STATES BUREAU OF RECLAMATION
for Release from Priority of Appli-
cation 7936 in Favor of Applications
18723 and 21636 and of Application
7937 in Favor of Applications 18721,
18722, and 21637

DECISION APPROVING APPLICATIONS IN PART
AND GRANTING RELEASE FROM PRIORITY

United States Bureau of Reclamation having filed Applications
18721, 18722, 18723, 21636, and 21637 for permits to appropriate water
and a request for release from priority of Application 7936 in favor of
Applications 18723 and 21636 and of Application 7937 in favor of Appli-
cations 18721, 18722, and 21637; protests having been received; a con-
solidated public hearing of the two matters having been held before the
State Water Rights Board on January 10, 11, 12, 18, and 19, 1967; appli-
cant and protestants having appeared and presented evidence; the evidence
received at the hearing having been duly considered, the Board finds as
follows:

*Enclosure 2.*STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

4-2-70

In the Matter of Applications 18721,
18722, 18723, 21636 and 21637 by
UNITED STATES BUREAU OF RECLAMATION

Applicant

M. V. and W. E. HOLTHOUSE, et al.

Protestants

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In the Matter of the Request of
UNITED STATES BUREAU OF RECLAMATION
for Release from Priority of Appli-
cation 7936 in Favor of Applications
18723 and 21636 and of Application
7937 in Favor of Applications 18721,
18722 and 21637

ORDER GRANTING PETITION FOR RECONSIDERATION

On February 5, 1970, the Board adopted Decision 1356 approving in part applications of the United States Bureau of Reclamation in connection with the Auburn Dam-Folsom South Canal Unit of the Federal Central Valley Project, and releasing the priority of certain state applications in favor of those of the bureau.

The Contra Costa County Water District (hereinafter referred to as the "district"), an interested party, filed a petition on March 6, 1970, for reconsideration of the decision. The portions of the decision on which the petitioner seeks reconsideration are paragraphs 7 on page 7, and 19 on page 16, which accord a prior right, until December 31, 1975, to the counties of Placer, Sacramento, and San Joaquin to contract for project water before it is committed, except on a temporary basis,