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September 3, 2008

Jean McCue
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

**Re: Auburn Dam Proposed Revocation Hearing
Applications 18721, 18723, 21636 and 21637**

Dear Ms. McCue:

Please find enclosed the following documents on behalf of the County of San Joaquin and San Joaquin Flood Control and Water Conservation District:

1. Five copies of Closing Brief; and
2. Proof of Service by e-mail to Revised Service List dated June 18, 2008.

Very truly yours,

DeeAnne Gillick
Attorney at Law

DMG/cmp
Enclosures

**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.)

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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*)

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BEFORE THE
STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In the matter of)
PROPOSED REVOCATION OF PERMITS)
16209, 16210, 16211 and 16212) **COUNTY OF SAN JOAQUIN CLOSING**
(APPLICATIONS 18721, 18723, 21636 and) **BRIEF**
21637))
UNITED STATES BUREAU OF)
RECLAMATION AUBURN DAM PROJECT)
)
)
)
_____)

The County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively, hereinafter “County”) hereby submits this closing brief in support of the testimony and exhibits submitted on behalf of the County in the State Water Resources Control Board (“State Water Board”) hearing regarding revocation of the permits issued to United States Bureau of Reclamation (“Bureau”) Permits 16209, 26210, 26211 and 16212 for the Auburn Dam Project.

I. INTRODUCTION

The County maintains there is sufficient good cause to support a decision by the State Water Board to not revoke the Bureau of Reclamation's water right permits 16209 and 16212 for the direct diversion of American River water in connection with the Auburn-Folsom South Unit of the Central Valley Project. The substantial public interest supports allowing the County, an original intended beneficiary of the Bureau permits, the opportunity to develop its own project to put this priority water to beneficial use.

There is neither good cause nor is it in the public interest for the State Water Board to revoke these permits as the public interest strongly favors the development of this water supply and the delivery of the contemplated American River water to San Joaquin County for the following reasons: There is a great need for supplemental surface water supplies within the County due in part to the necessity to address the condition of the critically overdrafted groundwater basin in San Joaquin County; There is an extensive history of State Water Board and Bureau decisions expressly directing the County to obtain surface water supplies from the American River and at the same time precluding the County from developing surface water supplies from other sources; and the County has already worked diligently and made substantial efforts to develop an American River Water supply with a diversion at Freeport, which can be utilized to divert the American River Water at issue, thereby giving the County priority water as historically intended by the Congress, the Bureau and the State Water Board.

As presented at the hearing, the County requests that the Bureau's permits not be revoked, and that the County be allowed to put the water to beneficial use as an original intended beneficiary of those permits, with two important factors to be observed: First,

the County does not propose to build the Auburn Dam. Second, the County does not propose to reduce the amount of American River water which flows at any given time through the Lower American River through the County and City of Sacramento. Rather, the County requests a reasonable period of time to develop a proposal to utilize this priority water by continuing to develop its existing American River project which will divert water at Freeport, utilizing the facilities currently being constructed by the Freeport Regional Water Authority (“FRWA”) and East Bay Municipal Utility District (“EBMUD”) to deliver water to San Joaquin County.

II. ARGUMENT

A. **GOOD CAUSE DOES NOT EXIST TO SUPPORT A REVOCATION OF THE PERMITS BECAUSE THE BUREAU HAS DEMONSTRATED DILIGENCE UNDER THE CIRCUMSTANCES, AND THE COUNTY CAN DILIGENTLY PURSUE PUTTING THE WATER TO BENEFICIAL USE**

The State Water Board may revoke water rights permits upon a finding of good cause (Wat. Code. § 1410.) The County asserts and maintains that the public interest strongly supports that the Bureau’s water rights permits not be revoked, and remain intact. The Bureau has presented evidence that it has been diligent in pursuing the permits, in light of the facts and circumstances associated with the development of these permits. Although the Bureau is currently limited in its ability to construct a modern Auburn Dam due to the lack of Congressional authorization, the County, an original intended beneficiary of the American River Water under those permits, can work diligently to put that water to beneficial use and principals of equity dictate that the County be allowed to do so.

**B. THE STATE WATER BOARD AND CONGRESS INTENDED FOR
SAN JOAQUIN TO RECEIVE AMERICAN RIVER WATER**

For the past fifty years, state and federal decisions have instructed the County to seek water from the American River to meet its water supply needs. Due to subsequent decisions and unforeseen circumstances which were no fault of the County, American River water has never been made available to the County as intended. The County hereby requests a reasonable time period of three years in order to develop a plan to put to beneficial use the American River water originally slated for the County under the Bureau's permits.

1. Fifty years of decisions direct the County to Pursue American River as a Source of Water Supply.

The extensive history of State Water Board and Bureau decisions directing the County to pursue the American River and, precluding the County from obtaining a reliable water supply from other sources can be summarized as follows:

- (1) **Bulletin 11 San Joaquin County Investigation (1955):** The Department of Water Resources' report indicates the probable ultimate supplemental water requirements of San Joaquin County would be served by the Folsom South Canal with American River water. (SJC-10, p. 3, 4; SJC-12.)
- (2) **Decision 858 (1956):** State Water Board denied North San Joaquin a permanent right to Mokelumne River water and directed the County to seek water from the American River. (SJC-10, p. 4-6; SJC-13.)
- (3) **Decision 893 (1958):** State Water Board denied four County entities water right permits from the American River in favor of the Bureau, and directed the

Bureau and the County entities to contract for water service from the Bureau for American River water at Folsom. (SJC-10, p. 6, 7; SJC-14.)

- (4) **Bureau Folsom South Unit Report (1960):** A Bureau report on the feasibility of water supply development for the Auburn Unit identifies the needs of supplemental water in San Joaquin County and service to the County through the Folsom South Canal. (SJC-10, p.8; SJC-15.).
- (5) **Congressional Authorization of Auburn Dam (1965):** Congress authorized Auburn-Folsom South unit to divert American River water at Auburn Dam and the Folsom South Canal “to best serve the needs of Sacramento and San Joaquin Counties.” (SJC-10., p. 8; SJC-16, Public Law 89-161)
- (6) **Decision 1356 (1970):** State Water Board granted American River water rights to the Bureau at Auburn and included discussion and conclusion of the application of the watershed protection priorities of San Joaquin County and the Bureau’s intent to provide water service contracts with County entities. (SJC-10, p.9, 10; SJC 16; SJC 17.)
- (7) **Decision 1422(1973):** State Water Board decision regarding Bureau permits for the New Melones Project on the Stanislaus River in which Bureau witnesses testified that the County’s water supply needs would ultimately be served from the American River. (SJC-10, p. 11-13.)

The unmistakable intent of the State Water Board, Congress and the Bureau was for San Joaquin County to receive American River water through the Folsom South Canal. However, the Folsom South Canal has never been extended to San Joaquin County, and American River water does not currently serve the County.

2. The Bureau's Auburn Project Water Right Permits Were Intended to Serve San Joaquin County with American River Water

The State Water Board in 1956, 1958 and 1970, concluded that San Joaquin County would be served by the American River water, and in 1970 determined that the County was clearly an intended beneficiary of American River water under the Bureau's Auburn project permits.

Beginning with State Board Decision 858 ("D 858") in 1956, the State Board directed the County to seek its water supply from the American River. (SJC-10, p. 5; SJC-13, p. 73). Additionally, D893 in 1958 with respect to the American River Folsom Dam and Reservoir, placed restrictions on the delivery of water to areas outside Placer, Sacramento, and San Joaquin counties (SJC-10, p. 6; SJC-14, p. 53).

In reviewing the intent of D 893, the State Water Board concluded in 1970 that such condition "reflected a determination by the State Water Rights Board, based upon the evidence in the proceeding, that giving to the three counties a preferential right to contract with the United States within a limited period of time for sufficient water to meet their future requirements was in the public interest and was an exercise of the Board's authority." (SJC-18, p. 3.)

In 1970, the State Water Board, in Decision 1356 ("D 1356"), and its subsequent decision amending and affirming D 1356, clearly discusses the intended beneficiaries of American River water from the Bureau's Auburn Dam project. Again, Placer, Sacramento and San Joaquin Counties were identified as the intended beneficiaries of American River Water from the Auburn Dam project. In reviewing the priorities of these counties, the State Water Board stated:

“The counties referred to in the condition [Placer, Sacramento, and San Joaquin Counties] are clearly within the area entitled to benefits of the Watershed Protection law and, if necessary, can assert their rights independently of any terms in the Bureau’s permits. Furthermore, the federal law which authorized the Auburn Project includes the three counties as beneficiaries of the project which are to receive water from the project facilities (P.L. 89-161).”

(SJC-18, p.6.)

This makes it clear that San Joaquin County remains an intended beneficiary of the Bureau’s water rights permits, and that the delivery of American River water to San Joaquin County is entitled to protection afforded under the watershed protection statute of Water Code section 11460.

3. County Relied on Direction from the State Water Board and Attempted to Secure Water from American River

Having received instruction from the State Board to do so, the County focused on obtaining its water supply from the American River. The County and other entities within the County negotiated with the Bureau for American River water for many years. In 1967 and 1971, draft water supply contracts were presented to various county districts by the Bureau. (See 1971 draft contract Between the United States of America and the San Joaquin County Flood Control and Water Conservation District, SJC-19.) Negotiations regarding these contracts resulted in the Stockton East Water District, the Central San Joaquin Water Conservation District and the North San Joaquin Water Conservation District all approving separate contracts for execution. (SJC-10, p. 11; SEWD-2.) Each of the contracts was approved by the regional office of the Bureau of Reclamation; however, none were approved by the United States in Washington D.C. (SJC-10, p. 11.) The contracts were not executed by the Bureau at the executive level due

to a combination of unforeseen circumstances and changing internal and environmental policies, not because San Joaquin County did not need the water, nor because County entities did not diligently pursue the contracts.

C. THIS STATE WATER BOARD DETERMINED IT WAS APPROPRIATE TO PROVIDE PRIORITY WATER TO SERVE SAN JOAQUIN COUNTY

1. Priority water of Bureau Auburn Project American River Permits.

In D 1356 in 1970, the State Water Board determined the public interest supported granting the Bureau water right permits priority over the State Filed Applications, which are intended to benefit the future needs of counties of origin. (SJC-17, p. 7, 10). In doing so, the State Water Board provided preferential water rights to the Bureau and the Bureau's intended beneficiaries. The Bureau's permits have a priority date of 1959 and 1964 and are not subject to subsequent development of a water supply by a county of origin pursuant to the State Filed Applications. Staff Exhibit 4 identifies all existing water right permits and applications which are junior to these Bureau permits. In addition, these permits are not subject to any future-filed permits which seek assignment of the State Filed Applications. Thus, the water subject to the Bureau permits is vested with significant water rights priority.

2. The County, as an Original Intended Beneficiary of the Bureau's Permits, is entitled to the Priority Dates of Those Permits

The County, after receiving direction to seek out an American River Water supply, and after entering negotiations with the Bureau, was slated to receive contract water from the Auburn Folsom South Project with permit priority dates of 1959 and 1964. In the years after negotiating with the Bureau for American River Water, it

became evident that the Auburn Dam and Folsom South Canal were unlikely to deliver water to the County as promised.

As a last-ditch effort to follow direction from the State Water Board and obtain water from the American River, the County applied for its own water right on the American River -- Application 29657, which carries a priority date of February 9, 1990. In the period between the Bureau's priority dates of 1959 and 1964, and the County's eventual filing of February 9, 1990, thirty (30) water rights permits have been granted on the American River (Staff Exhibit 4) -- thirty permits representing over 265,000 acre feet of water annually that would trump the priority of the County if the County's priority rights under the Bureau's permits were ignored.

Additionally, El Dorado County has a pending application for 413,610 acre feet of water, which relies on the state filed county of origin applications.

If developed, the El Dorado water supply would be junior to the Bureau permits but potentially senior to the County's application due to the priority of the State Filings. As indicated above, the State Water Board previously concluded that it would be appropriate for San Joaquin County to receive this priority water of the Bureau's to supply the critical needs within San Joaquin County. This opportunity should not be precluded by the State Water Board, which would occur if the Board revokes the Bureau's Auburn Project permits.

3. The Watershed Protection Statue Does Not Provide Sufficient Protections or Priorities to the County in this Situation.

The County is a strong advocate and proponent of the Watershed Protection Statutes (Wat. Code §11460.) Any water supply developed by the County from the

American River will be in reliance on the application of the protection statute to the County. In 1970, the State Water Board clearly determined that as to the American River, San Joaquin County is "...clearly within the area entitled to the benefits of the Watershed Protection Law." (SJC-18, p. 6.) However, the Watershed Protection Statute has several shortcomings that can be avoided by properly recognizing the County's priority afforded under the Bureau's Auburn Dam Project permits.

The shortcomings are as follows: First, the Watershed Protection Statute (Water Code section 11460 et seq.) only provides priority against the export of water by the State Water Project operated by the Department of Water Resources and the Central Valley Project operated by the Bureau of Reclamation. Judge Ronald Robie clearly concluded that "Although on its face section 11460 applies only to the Department, section 11128 makes the statute applicable to the Bureau as well." (*State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674, 754). However, the statute only applies to these specified projects and not to projects developed by other public entities or private parties.

In addition, Judge Robie concluded "As between competing uses within the area of origin, however, section 11460 grants no priority." (*Id. at 758*). Judge Robie agreed with the State Water board's conclusion in D 1641 that "section 11460 does not establish a preference for any particular use within the area of origin, such as irrigation or municipal use, over other uses within the area of origin, such as protection and enhancement of water quality." (*Ibid*). Thus, according to this legal interpretation, the watershed protection statute provides no guidance as to distributing water to competing users within the watershed. In such a situation, *priorities* would be relied upon to

distribute the water to users within the watershed. Therefore, if the State Water Board revokes the Bureau's permits, it would strip the County of its 1959 and 1964 priority dates thereunder priority -- dates which were intended to benefit the County, which cannot be replaced by application of the Watershed Protection statutes, and to which the County is entitled.

D. PUBLIC POLICY SUPPORTS A STATE WATER BOARD DECISION TO LEAVE PERMITS 16209 AND 16212 INTACT AND ALLOW THE COUNTY, AN ORIGINAL INTENDED RECIPIENT OF WATER UNDER THOSE PERMITS, TO CONTINUE TO DEVELOP THE AMERICAN RIVER WATER SUPPLY

San Joaquin County currently has a population of over 660,000 people, which is expected to increase by 77% to a population of 1.1 million by the year 2030, making it the third fastest growing county in California (SJC-1, p.1).

The County encompasses 1,423 square miles, approximately 85% of which are in agricultural production, resulting in an agricultural economy worth \$1.34 billion annually (SJC-1, p.1). Water demand for the County is 1,600,000 acre-feet per year, with 60% of that demand met by pumped groundwater (SJC-1, p. 2).

Well aware that groundwater is not an infinite resource, the County has attempted since the 1950's to develop sources of surface water to reduce groundwater pumping and avoid depleting the groundwater basin. Those efforts, which were described and discussed at length previously in this brief, have been largely unsuccessful due to circumstances beyond the County's control.

Forced reliance on groundwater has taken its inevitable toll. By 1980, the Eastern San Joaquin Groundwater Basin (Basin) which underlies San Joaquin County entered a state of critical overdraft, a fact declared by the California Department of Water Resources in Bulletin 118-80 (SJC-1, p. 4). In addition, this state of critical overdraft has

caused saline deposits underlying the Delta to migrate eastward toward the City of Stockton at a rate of 150 to 250 feet per year, which has the potential to make groundwater in the western portion of the County unsuitable for municipal or agricultural uses (SJC-1, p. 5). Currently, the County's water demands result in an overdraft of 150,000 acre-feet annually and if nothing is done to correct the saline intrusion problem, the deficit is expected to increase to an annual rate of 175,000(SJC-1, p.5,; Hearing Transcript (HT), p. 170).

The State Water Board has recently acknowledged that it is a matter of public interest to address and attempt to solve the critical overdraft condition in the Eastern San Joaquin groundwater basin. In March 2008, the State Water Board issued WR 2008-0016, in which the Board found good cause to grant a time extension to the North San Joaquin Water Conservation District (North San Joaquin) to allow it to put its allocation of up to 20,000 Mokelumne River water to beneficial use (SJC-3, p. 10). In so doing, the State Water Board found that the public interest was served by the granting of a time extension of North San Joaquin's 1956 permit because the public interest would be served by addressing the critical overdraft condition in the Basin. (WR 2008-0016, SJC-3, p.10.)

The fundamental underpinnings that supported the State Water Board's findings in WR 2008-0016 are directly applicable in the present case. The facts relating to surface water supply promised to San Joaquin County and the overdrafted groundwater basin acknowledged by the State Board in WR 2008-0016 remain unchanged, and support a present decision by the Board to leave the Bureau's Auburn Dam direct diversion permits in place to allow the County to obtain its American River Water supply in order to serve the public interest.

E. IT IS FEASIBLE FOR THE COUNTY TO PUT THE CONTEMPLATED AMERICAN RIVER WATER TO REASONABLE, BENEFICIAL USE WITHIN A REASONABLE TIME

In WR 2008-0016, the State Water Board stated that it “. . . supports the coordinated use of surface water and groundwater supplies as a logical vehicle for meeting the Constitutional requirements that the waters of the State be put to their fullest beneficial use and not be wasted or unreasonably used (Cal. Const., Art.X, § 2.)” (SJC-4, WR 2008-0016 p. 10.) The County requests that the Bureau permits not be revoked in this proceeding, in order to provide the County an opportunity to coordinate the use of this American River water with the County’s groundwater supplies relying on the County’s proposed and pending conjunctive use project which would utilize American River surface water supplies. The Notice of Preparation for the County’s Integrated Conjunctive Use Program, which includes an American River Freeport Diversion Project, was published on October 17, 2007 and the public comment period closed November 15, 2007, pursuant to the California Environmental Quality Act, and the Programmatic Environmental Impact Report is currently being prepared (SJC-1, p. 14). The Phase I Feasibility Study to develop and evaluate project alternatives to use Freeport Regional Water Project facilities and pipeline and EBMUD pipeline to deliver American River water to San Joaquin County commenced in December of 2007 and is anticipated to be completed by late 2008 or early 2009, at a cost of \$715,000 to the County. (SJC-1, p.16, HT p.136.)

While the County’s proposed conjunctive use program contemplates the use of American River water under the County’s Application 29657, it is equally feasible and

more beneficial to utilize the American River water intended for the County's use under the Bureau's permits.

In 1998, in WR 98-08, the State Water Board determined the American River to be fully appropriated as follows: (1) year-round on the Lower American River, from Nimbus Dam to the junction with the Sacramento River; and (2) from July 1 to October 31 from the confluence with the Sacramento River.

San Joaquin County's pending American River Application 29657 is to appropriate water during the periods of December 1 through June 30 each year. (SJC-1 p. 18.) The diversion periods for the Bureau permits at issue is from November 1 to July 1 of each year. Therefore, if the County were able to receive its water under the Bureau permits as originally intended, the County would be able to utilize an additional month for diversion, which would allow the County to spread its diversion over a longer period of time and increase the amount of water available to the County.

The County's conjunctive use program contemplates the diversion of American River at Freeport, utilizing the point of diversion of the Freeport Regional Diversion Project ("Freeport Project") and pipeline (SJC-1, p. 15). Currently, the County's anticipated delivery of American River water pursuant to Application 29657 is limited due to the capacity of the EBMUD Freeport Project pipeline and the period in which EBMUD will utilize the pipeline (SJC-1, p. 15). EBMUD will only be utilizing the pipeline for delivery of dry and critically dry year water. (SJC-7, p.2.) The County has an opportunity to use the pipeline and facilities in normal, above normal and wet years. (SJC-7, p.2.)

If the County were able to utilize its water contemplated under the Bureau permits, it is anticipated that more water would be made available to the County. Due to the increased priority of the Bureau permits the County would be entitled to water more often during the normal, above normal and wet years than would currently be available to the County pursuant to its pending application 29657 which has a priority date of 1990. In addition the Bureau permits allow an additional month of diversion as compared to the County's pending application 29657.

Because the County's contemplated conjunctive use project anticipates the use of American River surface water diverted at Freeport, and because American River water intended for the County's use under the Bureau's permits can be diverted in the same manner and put to the same use as American River diverted under the County's Application 29657, there are no additional obstacles in putting the water at issue to use as part of the conjunctive use project which is currently in progress. Because it is feasible for the County to put the water to use in the conjunctive use project, and because such use is deemed to be "beneficial" use for the purposes of current California water law, the facts support a State Water Board decision to leave the Bureau's permits in place to allow the County to pursue the development of the water to which it is entitled.

III. CONCLUSION

In an effort to address the critically overdrafted groundwater basin, the County has undertaken significant efforts to work collaboratively on a regional basis on the many plans and projects identified above --- this includes use of American River water. The County and water interests within the county continue to diligently pursue surface water supplies for our area. The American River is a critical component of this effort.

The County, the Bureau, and the State Board have made over fifty years of decisions directing the County to the American River to meet its water supply needs -- decisions which have precluded the County from other sources. The County respectfully requests that the State Water Board leave intact the Bureau's American River Auburn permits for direct diversion, and grant the County a reasonable time period of three years to develop a tangible plan to utilize the American River water it was intended to receive under those permits without disturbing the flow expectations for the Lower American River.

The previous actions by the Bureau in developing an American River water supply pursuant to these permits have not been within the control of the County of San Joaquin. The County has demonstrated, with the development of its own American River water supply project that it can and will diligently move forward with a water supply project to serve the County from the American River as was historically intended by the State Water Board, the Bureau of Reclamation, and the United States Congress.

Respectfully submitted,

NEUMILLER & BEARDSLEE

Dated: September 3, 2008

By 
DeeAnne Gillick

Attorneys for County of San Joaquin and the
San Joaquin County Flood Control and
Water Conservation District