

## **Witness Testimony**

**Chris Shutes, California Sportfishing Protection Alliance**

### **Water Right Hearing Regarding Proposed Revocation of Auburn Dam Project Permits**

**July 21 and 22, 2008**

#### **Before the State Water Resources Control Board**

Forty days short of ten years ago, the California Sportfishing Protection Alliance (CSPA) filed a protest against an extension of time for the water rights whose revocation is under consideration in this proceeding. In that crafting that protest, CSPA was incredulous that the Board would allow a set of permits to languish for 27 years with no apparent prospect whatever that the water permitted would be put to beneficial use as proposed.

Ten years later, we are at exactly the same point we were then, with one exception: the SWRCB Prosecution Team has found the courage to move to revoke these permits.

The largest issue now as then remains diligence. It has now been 37 years since the water rights permits for Auburn Dam and its associated projects were issued. And at its simplest, the question of diligence boils down to that two digit number: 37. It is, fittingly, a prime number, divisible only by one and itself. Much as the Bureau of Reclamation and its defenders may try to parse it up, embellish on its nuances, and mellifluously recount extenuating circumstances, it is there, on its own, in all its simplicity: 37.

After 37 years, there is no project, no prospect of a project, no Congressional interest in a project, no federal funding for a project, no funding partners for a project, and no environmental documentation for a project.

#### **Diligence**

In the July 31, 1998 CSPA protest of the Bureau petition for an extension of time, citation was made to one of the Mono Lake cases. A second Mono Lake case goes to the heart of diligence:

The so-called "extensions" of permits 5555 and 5556 violated applicable Water Board regulations. The first regulations of the Water Board, addressed to the requirement of reasonable diligence, were promulgated in 1945. They provide a pithy statement of the reasonable diligence requirement. "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 the necessary diversion works and beneficial use of the water. The [Water Board] is disposed to be liberal in its allowances of time both

for completing an application and for making full beneficial use of the water where progress is being made, or where a serious effort is being made to overcome obstacles which prevent progress, but 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." (Former Cal. Admin. Code, tit. 23, § 778, as promulgated in 1945.) The gist of this rule has remained a part of Water Board regulations, albeit the precise wording and regulation numbers have changed. (See, e.g., § 778, Reg. 29, No. 2, 7/12/52; Cal. Code Regs., tit. 23, § 840.) Despite this regulatory recognition that the statutory requirement of diligence does not allow the Water Board to countenance a scheme placing water rights in "cold storage" for future use, that is precisely how L.A. Water and Power seeks to use the various acts purporting to grant extensions to permits 5555 and 5556. /1.

Diligence must also necessarily mean not only moving along a party's construction critical path, but also moving to carry out the regulatory duties that may pertain. Such duties were prescribed by the Board. Beginning in 2001, the Board issued a series of requests of the Bureau, as outlined in the Stipulation to Facts. In each case, the Bureau refused to meet the timetables and benchmarks laid out by the Board, maintaining consistently that the prerequisite for diligent pursuit of its project was authorization of the funding by Congress. This was in spite of the fact that some of the Board's requests entailed preliminary approval (stemming back to 1984) by the Board before a project was introduced before Congress /2.

The Bureau effectively attempted to define diligence for the Board, and this definition was extremely narrow. Diligence as defined by the Bureau did not even go so far as aggressively seeking funding from Congress. Rather, the Bureau claims diligence by periodically checking in to see if perchance Congress, in its role as prospective banker, had changed its mind. The Bureau waited. Congress is not interested.

The Bureau is an arm of the federal government. If the funding legs of that government choose in their wisdom not to fund a Bureau project, the Bureau cannot simply claim externality or indefinite force majeure. The arm cannot blame the legs without acknowledging the pain.

To put it in terms used previously by the Board: "lack of finances and other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay" 3/.

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1. Cal Trout v Board, 1989, 207 cal App 3rd 585 [255 Cal Rptr 184].

2. Stipulation To Facts, Numbers 8b and 8c, pages 2-3.

3. Cal Code Regs, tit. 23, § 844, as quoted in Water Rights Order 2006-0018-DWR, *In the Matter of Permit 10477 (Application 12842) Regarding Diversion by North San Joaquin Water Conservation District*, §4.1, page 6.

In Water Rights Order 2006-15, the Board makes explicitly clear that a component of diligence is the completion of environmental documentation. /4. In 2001, The Board asked the Bureau to provide environmental documentation as a pre-requisite to addressing CSPA's July 31, 1998 protest. The Board informed the Bureau that the Board was required to hold a hearing on the protest, and could not address the protest on its merits in the absence of such documentation. The Bureau stalled a response for an additional seven years, claiming, again, that the whole matter was out of its hands. The Bureau did not even attempt to comply with the Board's requirements; rather, it told the Board in so many words that it would take an act of Congress to motivate the Bureau to prepare the documents.

### **Public Interest**

In no small measure, CSPA has represented the public interest in this proceeding in the Board's stead, not in making disposition, but in insisting on good process. This is consistent with a role CSPA has played vis-a-vis the Board on many issues on many occasions. It is flatly unacceptable that it took the Board ten years to act on a simple protest to extend the time to put to use. It's worse than staring at a dead car in front of your house for a decade because your neighbor's big brother might come home with the key one day and decide to use it.

Recently, the Board has begun to act to put an end to allowing permittees to indefinitely extend their permits. For CSPA, this cannot happen soon enough.

The draft *California Water Boards' Strategic Plan Update 2008-2012* states:

Goal 6. Enhance consistency across the Water Boards on an ongoing basis, to ensure our processes are effective, efficient and predictable, and to promote fair and equitable application of the laws, regulations, policies and procedures.

What goes across the various boards goes within the State Board.

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4. Water Rights Order 2006-0015-EXEC, *In the matter of the Petition for Reconsideration of Irish Beach Water District (Permit 16622 Pursuant to Application 24364) Regarding Order Denying Petition for Extension of Time*, §4.2.2, final paragraph, page 7.

5. *California Water Boards' Strategic Plan Update 2008-2012*, May 30, 2008 draft, page 36.

It is not in the public interest that the Bureau be treated differently. On the contrary: it appears that the Bureau controls paper to about 1½ times the average runoff in the state (see Strategic Plan Pie Chart, Appendix 3). /6. If the Bureau cannot be asked to take off the books millions of acre-feet per year that it uses to the detriment of the fisheries of this state, then clearly it should be required to take off the books the water that it has not used, does not use, and will never use. Failing that, any attempt to make any kind of real accounting of the State's water resources becomes meaningless. And that, above all, is not in the public interest.

### **No Reasonable Possibility of Progress**

Water Rights Decision 1356 (Auburn Dam), 1970, states on page 6:

“A permit will be issued for a prospective or intended use if there is a reasonable possibility that the permittee will proceed with diversion and use of water as proposed. The Board concludes that there is reasonable possibility that the water will be used as proposed by the Bureau for the East Side Diversion ...” /7.

If the Board's conclusion that a reasonable possibility existed in 1970, no reasonable possibility remains today.

In 2008, San Joaquin County re-filed application 29657 to appropriate water from the Sacramento River, though in an attachment to its amended application it cites the South Fork American River as the natal source of the water proposed to be diverted. San Joaquin County by this very action has answered the question as to whether “there is a reasonable possibility that the water will be used as proposed by the Bureau for the East Side Diversion.” San Joaquin County has, as a practical matter, moved on. It proposes now to make a diversion for American River water at Freeport on the Sacramento River, following the footsteps of East Bay MUD and the Sacramento Water Forum. It is notable that San Joaquin proposes to appropriate South Fork water, rather than water from the Middle or North Forks of the American. /8.

East Bay MUD, equally, was given special dispensation in WRD 1356. After many years of legal battling and negotiations, it too has moved on, and has begun work on the Freeport Diversion. It will never use the East Side Canal.

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6. *California Water Boards' Strategic Plan Update 2008-2012*, May 30, 2008 draft, Appendix 3.

7. D1356, Finding 5, page 6.

8. See Application 29657, especially page 4 of 7, section 3a, regarding a contemplated new pipeline and canal from Freeport to place of storage/use, and section 4 regarding use of Freeport. See also Attachment to 3<sup>rd</sup> 29657 Application, October 2007, first (unnumbered) page, which at section 5a announces the intention to forego previously planned diversion on the American in favor of Freeport.

Much of the stated “public interest” in the East Side Canal in 1970, as given in D1356, was to provide water for East Side rivers to restore anadromous fish runs in those streams. Thirty-seven years later, it is in the public interest to revisit that debate, asking whether a speculative benefit to fisheries in San Joaquin River watershed streams is worth reduction of instream flows in a known but struggling anadromous fishery in the Lower American. /9.

We not only have under consideration a speculative project based on what has become a speculative water right, we have that speculative water right justified on the basis of 37-year-old speculation about the possible or hypothetical environmental benefits of the proposed project. Now, if we had a document that analyzed the environmental consequences of building and using an East Side Canal, it might get to this issue, and all sorts of other interesting issues, like the flow in the Lower American, and cold water pool management in Folsom Reservoir. But the Bureau has declared that it doesn’t need to do that.

Perhaps, one might maintain, that the East Side Canal portion of the water right could be modified, with the Auburn Dam component left intact. To make such a major change in a water right would indicate that the appropriate course would be, as the Prosecution team has maintained, to revoke the present permit and then re-file for a project one actually proposes to carry out. In our opinion, you don’t do surgery on a corpse. It is not in the public interest to modify a water right decision that has occasioned no construction for thirty years.

And what about the parties that more directly sought to partake of the waters from Auburn Reservoir? Placer County just built and christened an intake at the “old Auburn Dam site.” In addition to increasing capacity, it has also applied within the last 6 months for its own extension of time to put to use water that it proposes to divert by means of its new intake pumps. /10. The river channel at the old Auburn Dam site has been reconstructed, with a snappy whitewater feature, though with little thought given by the Bureau to access. Placer, moreover, is prepared to claim any water that might be freed up by the release of the paper water tied up in the water rights before us today, though the amount of wet water that might involve will surely be brought into question. Placer, in short, has also moved on.

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9. See D1356, Condition 22, page 17. See also Shutes/CSPA Exhibit 1A, *The American River’s Hidden Fish Kill; 181,000 Salmon Die Before Spawning*, The Fishsniffer, August 13, 2004.

10. See Permit(s) for Extension of Time, Placer County Water Agency, Permits 13856 and 13858, March, 2008. Esp. Attachment 1, Supplement for each petition, page 2, first full paragraph: “In the absence of an Auburn Dam, PCWA has recently constructed a new American River Pump Station with current capacity to divert 35,500 acre-feet per year from the N.F. American River.”

Finally, we come to my good friends in El Dorado County, with whom I've personally been engaged for well over ten years. El Dorado, in its various entities, has always, aptly, sought to find its streets paved with liquid gold from Auburn Dam. Its leaders were always among the strongest supporters of Congressman Doolittle and his repeated attempts to authorize the Auburn Dam against the will of Congress. El Dorado lobbied long and hard, because its appetite for water never came near to being matched by its pocketbook. For lack of financing, the SOFAR project in the 80's never happened. El Dorado has long hoped that a federal project would help pay for water it couldn't afford. However, El Dorado has recently applied to the Board to gain rights to some of the water currently permitted to the City of Sacramento. Part of that application includes a prospective takeout at the new Auburn pumps. /11. Though probably the most reluctant of all, El Dorado too has moved on.

Recalling again the public interest, we must highlight that it is not in the public interest to have conflicting and multiple applications, let alone permits, for the same water.

### **A Final Issue Relating to Public Interest**

D1356 initially assigned priority to Auburn Dam water to San Joaquin, as well as to Placer and El Dorado counties, based on watershed of origin statutes. A Modification to D1356 specifically stated that "the counties referred to in the condition [Condition 19, which includes San Joaquin] are clearly within the area entitled to the benefits of the Watershed Protection Law and, if necessary, can assert their rights independently of any terms in the Bureau's permits." /12.

It is not in the public interest to allow that decision, based in large part on the finding that there then appeared to be plenty of water available for appropriation to stand today without consideration of all Watershed of Origin Beneficial Uses, including those protecting water quality and fish and wildlife. /13.

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11. See Shutes/CSPA Exhibit 1B, Application to Appropriate Water filed by the El Dorado Water & Power Authority, April, 2008. Not yet noticed by the Board. See esp. Attachment 1, page 16, Section B.2, third paragraph: "GDPUD ... might subsequently complete a water exchange with ... PCWA. GDPUD has a right to a portion of PCWA's recently constructed North Folsom Pumping Plant, but will need to construct a pipeline for conveyance of water from the pumping plant to its intended service area."

12. See Modification to D1356, page 6, first full paragraph.

13. See D1356, Finding 2, page 3, and also Finding 10, page 10. See also Shutes/CSPA Exhibit 1C, *Fish Die as Folsom's Flow Is Cut*, Sacramento Bee, March 5, 2003, esp. quote from the Bureau's Jeff McCracken: "You fix one thing and, whoops, something happens somewhere else."

The parties from San Joaquin will surely come forward in this proceeding to defend this prior decision in favor of the area of origin, but, as the Modification to D1356 says, they can do so independently of any terms in under the Bureau's permits for Auburn Dam.

It is in the public interest to revisit this critical issue, at a time when the state's water resources are widely seen to be over-appropriated, and we are about to see a gold rush of county, area and watershed of origin applications.

As CSPA stated on page 5 of its protest of the Bureau's request for extension of time ten years ago, "Since the SWRCB issued the water rights, there is a host of new environmental information which should be reviewed and considered by the Board."

June 23, 2008

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California Sportfishing Protection Alliance

### **Certificate of Service**

I hereby certify that I have this day, June 23, 2008, served upon each member of the service list for the July 21, 2008, and if necessary July 22, 2008, hearing, before the State Water Resources Control Board, regarding the revocation of the water rights for Auburn Dam, a true and correct copy of this testimony and of each exhibit pertaining thereto.

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