

**Testimony of United States Bureau of Reclamation
Before
State Water Resources Control Board
At
Hearing on Proposed Revocation of Auburn Dam Project Permits 16209, 16210,
16211, 16212, United States Bureau of Reclamation
July 21-22, 2008**

My name is Ray Sahlberg. I am the Regional Water Rights Officer for the Mid-Pacific Region of the Bureau of Reclamation (Reclamation). My testimony will address the primary issues that the State Water Resources Control Board (State Board) identified in its notice for this hearing:

Should Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637) be revoked in accordance with Water Code section 1410? Did Reclamation prosecute with due diligence and complete construction of the project and apply the water to beneficial use as contemplated by the permits and in accordance with the Water Code and the rules and regulations of the State Water Board?

Reclamation does not believe that the permits should be revoked at this time.

Reclamation has proceeded with due diligence within the limitations on construction of the project imposed by Congress. Furthermore, regardless of whether the evidence shows that Reclamation has exercised due diligence, the State Board should exercise the discretion provided by section 1410 and not revoke these permits at this time in order to allow Congress time to make to a final decision on the future of Auburn Dam, and to preserve the national, state, and local water supply and hydroelectric power benefits provided by this project.

I. History of Auburn Dam

Auburn Dam is part of the Auburn-Folsom South Unit of the Central Valley Project, which was authorized by Public Law 89-161 on September 2, 1965 (1965 Act). The State Board adopted Decision 1356 (D-1356), which granted Reclamation four water

right permits for Auburn Dam. Reclamation is permitted to divert a maximum of 2.5 million acre-feet per year to storage, for irrigation, municipal, industrial, domestic, recreational, fish and wildlife enhancement and water quality control purposes. (Reclamation also has rights to store 2 million acre-feet of water per year for the generation of hydroelectricity.) Decision 1400, issued on April 11, 1972, amended the Auburn Dam permits to include instream flow requirements on the American River once Auburn Dam was completed.

Reclamation commenced construction on Auburn Dam in 1972. In 1975, a magnitude 5.7 earthquake occurred near Oroville Dam, about 50 miles northwest of the Auburn site. This earthquake raised concerns about the safety of dams like the thin arch concrete dam proposed for the Auburn site, and construction was halted in 1976. Reclamation determined in 1979 that a design change would result in a dam that could withstand earthquakes – however, the required changes, when combined with inflation, increased the cost of the dam to an amount in excess of the Congressionally authorized construction cost ceiling. Construction has not resumed as of this date - the cofferdam at the dam site washed out in early 1986, and the diversion tunnel at the dam site was temporarily closed in September 2007 in order to allow rafters to avoid a portage around the dam site.

Since construction was halted, there have been several studies conducted on Auburn Dam that considered various alternative dam designs. The Army Corps of Engineers conducted studies in 1992 and 1996, which led to the introduction of bills in Congress seeking to reauthorize Auburn Dam as a flood control project, with later expansion of the dam into a multi-purpose water storage and hydroelectric power project. Reclamation

submitted a “Least-Cost CVP Yield Increase Plan” to Congress in 1995 pursuant to section 3408(j) of the Central Valley Project Improvement Act (CVPIA; Title 34 of P.L. 102-575).

(A copy of this plan is available at

http://www.usbr.gov/mp/cvpia/docs_reports/docs/least_cost_cvp_yield_increase_plan.pdf.)

This report identified alternatives to replace the 800,000 acre-feet of water dedicated to fish and wildlife restoration by section 3406(b)(2) of the CVPIA, and included Auburn Dam as a potential source of additional water. In 2005, Congress commissioned an updated report on the costs and benefits of Auburn Dam, which was completed by Reclamation in December 2006. As of this date, Congress has not passed legislation that to amend the project authorization and raise the construction cost ceiling – debates over cost sharing, configuration of the project as a flood control only project versus a multi-purpose project, environmental impacts, etc. have delayed a final decision by Congress on Auburn Dam. Appropriations have not been requested to resume construction of Auburn Dam because the increase in cost over the originally authorized construction cost ceiling requires an amendment to the project authorization.

A detailed history of the water rights for Auburn Dam is contained in the Stipulation of Facts entered into between the State Board, Division of Water Rights, and Reclamation, and need not be repeated here.

II. Due Diligence

California Water Code section 1410 provides that

- (a) There shall be cause for revocation of a permit if the work is not commenced, 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.
- (b) A permit may be revoked under either of the following procedures:

- (1) If, after a hearing on a petition, for extension of time, to complete a project and apply water to beneficial use, the board finds that cause exists to revoke the permit, the board may revoke the permit.
- (2) ... After a hearing, when a hearing is requested by the permittee pursuant to Section 1401.1., the board may, upon a finding that cause exists, revoke the permit and declare the water subject to appropriation. (Emphasis added.)

California Code of Regulations Title 23, Division 3, section 850 provides that

“When it appears to the board that a permittee may have failed to commence or complete construction work or beneficial use of water with due diligence in accordance with terms of the permit, the regulations of the board and the law, or that a permittee or licensee may have failed to observe any of the terms or conditions of the permit or license, the board may consider revocation of the permit or license...” (emphasis added).

Condition 7 of D-1356 provides that

“7. Actual construction work shall begin on or before December 1, 1970, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.” (Emphasis added.)

Reclamation interprets the above provisions to mean: (1) the State Board must take into consideration the ultimate control of Congress over all Reclamation projects in making a full assessment of what the State Board had contemplated at the time of issuing the permit regarding timelines for construction and application of the appropriated water to beneficial use when it considers revoking the permits; (2) the State Board must determine whether these activities were prosecuted with reasonable diligence; but (3), even upon a finding of cause, revocation is still within the discretion of the State Board and is not mandatory.

The Supplements to Applications 18721, 18723, 21636, and 21637, upon which Permit 16209, 16210, 16211, and 16212, respectively, were each, in part, issued, begins with the following prominent provision:

“The United States of America, pursuant to the provisions of the Act of June 17, 1902, (32 Stat. 388) and acts amendatory thereof or supplementary thereto, known as the Federal Reclamation laws, and R.J. Pafford, Jr., Regional Director, Bureau of Reclamation, Region 2, P.O. Box 15011, Sacramento 95813, County of Sacramento, State of California, acting for this purpose by delegation of authority from the Secretary of the Interior through the Commissioner of the Bureau of Reclamation, pursuant to the Act of Congress of December 19, 1941, c.595 (55 Stat. 842).”

The 1965 Act , an act supplementary to the 1902 Act, states in Section 1 that the Secretary “is authorized to construct, operate and maintain ... the Auburn-Folsom South unit, American River Division. The principal works of the unit shall consist of (1) the Auburn Dam and Reservoir ...”. Section 6 of the 1965 Act authorized \$425,000,000 to be appropriated for the Auburn-Folsom South unit.

Reclamation is a bureau of the Department of the Interior, an executive agency of the Federal Government. As such, Reclamation must act in accordance with the laws of the United States that authorize it to act. In addition, Congress retains control over the purse for federal government expenditures, and, coupled with authorizing power, Congress retains considerable leverage over implementation of the 1965 Act, including construction of Auburn Dam. The above cited provisions of the 1965 Act make these points abundantly clear.

The State Board issued Permits 16209, 16210, 16211, and 16212 on April 13, 1971 pursuant to Applications 18721, 18723, 21636, and 21637, respectively, each of which includes the language in the Supplements to the Applications quoted above. In issuing these permits pursuant to the language of the Supplements to Applications, it would appear that the State Board was aware of and took into consideration the fact that the actual date for completion of construction of the Auburn Dam Project and the actual

date by which the appropriated water would be put to beneficial use would be subject to the power of Congress and not within the unlimited control of Reclamation. Therefore, when the State Board considers whether Reclamation has prosecuted the permits with reasonable diligence, it must recognize Congress's ultimate control over Reclamation's implementation of all federal reclamation projects.

This qualification on determining Reclamation's exercise of reasonable diligence finds application in the State Board's regulations (found in Division 3 of Title 23 of the California Code of Regulations). For example, the regulations for granting or denying petitions for extension of time, although not directly involved in this matter, are instructive on the factors to be considered in determining whether due diligence can be demonstrated. Section 844 provides that

“An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. The board may, in its discretion, require a hearing upon notice to the permittee and such other parties as the board may prescribe.”

Cal. Code Regulations, Title 23, Div. 3, § 844 (emphasis added).

As noted above, only Congress can authorize a Reclamation project or amend that authorization, and only Congress can appropriate funds for construction of a project. Thus, since Congress retains ultimate authority over the Auburn Dam (or any other Reclamation) project, any “lack of finances” due to a lack of appropriations by Congress, as well as Reclamation's inability to proceed with the project absent an amendment of the

project authorization, should be considered as conditions “incident to the ... enterprise”, beyond the control of Reclamation, and not reasonably avoidable. Consequently, Reclamation has reasonably proceeded with reasonable diligence within the boundaries set for it by Congress, because under the State Board’s own regulations, the delays in amendment of the project authorization and funding by Congress are “obstacles which could not reasonably be avoided” by Reclamation, and should not serve as grounds for revocation of Reclamation’s permits for Auburn Dam.

Even if the State Board insists on proceeding under a narrow interpretation of the permits (strictly utilizing construction and water application dates only), the State Board could reasonably determine, in its discretion, that, as a minimum, deference should be granted to Congress, as the authorizing branch of the Federal Government for construction of Auburn Dam. That is, the State Board could reasonably determine that Reclamation, as an executive agency of the Federal Government, acted with reasonable diligence under the powers granted it by Congress. The State Board could reasonably recognize the difficult position in which Reclamation finds itself, in that it could not even request an appropriation for an Auburn Dam Project without an amendment to the project authorization to increase the construction cost ceiling (it would make no sense to request appropriations under the existing ceiling, as this would result in a partially-completed project). Given the legislative and fiscal oversight dictating what action Reclamation can take toward completion of the Auburn Dam Project, including reliance upon amendment to the project authorization to increase the construction cost ceiling directly incident to the Auburn Dam Project (and not to Reclamation), as well as the history, size, and complexity of the project, the State Board could reasonably determine that Reclamation

has proceeded with reasonable due diligence notwithstanding unavoidable obstacles beyond its control.

III. Other Related Matters

As stated above, the State Board has discretion whether to revoke Reclamation's permits for Auburn Dam. It is Reclamation's position that it is neither in the interest of comity or the future of California's water supply to revoke the permits for Auburn Dam.

A. Congressional Interest

Despite the delays in construction of Auburn Dam, it remains a project of interest to Congress (*see* letter to Gov. Schwarzenegger from House of Representatives Republican delegation from California, dated May 16, 2008, attached as Exhibit A). Bills were introduced in the 100th, 101st, 102nd, 104th, and 105th Congresses related to the construction of Auburn Dam. H.R. 1605 (known as the Auburn Dam Revival Act of 1987) was introduced in the 100th Congress. The bill would have amended the 1965 Act and the Flood Control Act of 1970, and included changes to minimum flow requirements for the Lower American River, and requirements for non-Federal cost sharing in the project. Two bills were introduced in the 101st Congress – H.R. 2429 would have amended the 1965 Act that authorized construction of Auburn Dam, established instream flow requirements, and sought to finance the project via securities issued by the American River Authority. H.R. 3034 would have deauthorized Auburn Dam as a Reclamation project, and reauthorized it as a “flow through, flood control only” project to be constructed by the Corps of Engineers. This project was to have the option of expansion into a water supply and hydroelectric project financed by non-Federal parties. Reclamation did not provide testimony on these three bills, as hearings were apparently never held.

Two more bills were introduced in the in the 102nd Congress. H.R. 5414 sought to have Auburn Dam authorized only for flood control and recreation purposes, with further authorization required to convert it into a multi-purpose project, while H.R. 5584 would have authorized Auburn Dam as a flood control project to be constructed by the Corps of Engineers, with a provision that this project allow for future expansion to a multi-purpose water storage and hydroelectric power project. Reclamation provided testimony on both bills, and expressed its concern on the flood control aspects of H.R. 5414. H.R. 3270 in the 104th Congress sought to transfer the Auburn Dam Project to the Corps of Engineers for construction of a so-called “detention dam”, with a provision for future expansion to a multi-purpose water storage and hydroelectric power project. Conversely, H.R. 2951 in the same Congress would have prohibited the use of any Federal funds for the construction of Auburn Dam. H.R. 4111 in the 105th Congress sought to reconstruct the cofferdam at the Auburn Dam site that washed out in 1986, and to transfer title of the Auburn Dam project to the State of California. Reclamation did not provide testimony on these bills either, since no hearings were held.

In 2005, Congress authorized the Secretary of the Interior to

“complete a special report to update the analysis of costs and associated benefits of the Auburn-Folsom South Unit, Central Valley Project, California authorized under Federal reclamation laws and the Act of September 2, 1965, Public Law 89-161, 79 Stat. 615 in order to--

- (1) identify those project features that are still relevant;
- (2) identify changes in benefit values from previous analyses and update to current levels;
- (3) identify design standard changes from the 1978 Reclamation design which require updated project engineering;
- (4) assess risks and uncertainties associated with the 1978 Reclamation design;
- (5) update design and reconnaissance-level cost estimate for features identified under paragraph (1); and

(6) perform other analyses that the Secretary deems appropriate to assist in the determination of whether a full feasibility study is warranted.”

P.L. 109-103, Sec. 209(a) (119 Stat. 2269).

This report (titled *Auburn-Folsom South Unit Special Report – Benefits and Cost Update* [2006 Update]) was completed by Reclamation in December 2006. (A copy of this report is available at http://www.usbr.gov/mp/cao/docs/auburn_rpt/index.html.) In addition, Congress consistently appropriates funds for the operation and maintenance of the dam site and associated lands. While Congress has yet to amend the authorization for construction of Auburn Dam, Congress has not deauthorized it, and the legislative efforts listed above are evidence of Congress’s continuing interest in this project. Revocation of the water rights for this project would present Congress with a decision on whether to amend the authorization for a water project that currently has no water rights, and for which obtaining the necessary water rights could prove problematic. It is Reclamation’s position that the State Board should preserve the existing water rights for this project in order to allow Congress, including representatives from the other 49 states, to continue to fully and freely deliberate the future of this Federal project.

B. Need For Additional Water Supplies, Hydroelectric Power, and Flood Control

California faces an ongoing water supply crisis. The Governor recently declared a state-wide drought after two years of below-normal precipitation, and issued an Executive Order proclaiming a State of Emergency for nine Central Valley counties due to current drought conditions. There are at least four separate efforts focused on addressing California’s water supply crisis, and finding solutions for the problems of the Bay-Delta (Bay-Delta Conservation Plan, CALFED Bay-Delta Program, Delta Vision, and the State Board’s Strategic Workplan for the Bay-Delta). The CALFED Bay-Delta

Program and the Delta Vision initiative both include the need for additional and/or expanded storage facilities to improve California's water supplies, increase flexibility, and provide more certainty to water users, couples with improved conveyance systems.

Auburn Dam, while not an alternative currently under consideration by the CALFED Bay-Delta Program and the Delta Vision initiative, remains an option that could provide important water supply, hydroelectric power, and flood control benefits. According to the 2006 Update, this project could provide an additional 343,000 acre-feet of water in dry and critically dry years, with a long-term average annual increase in deliveries of approximately 208,000 acre-feet. 2006 Update, at TS-3. During the winter and spring of 2006, Reclamation released many thousands of acre-feet of water from Folsom Dam for flood control operations - Auburn Dam would allow more water to be retained for future delivery while increasing protection from floods. This additional supply of water would reduce the severity of future droughts, as well as enhance the supply of cold water currently available in Folsom and Shasta Reservoirs needed to protect salmon and steelhead in the Lower American and Sacramento Rivers. Auburn Dam would also provide 800 megawatts of hydroelectric power, and provide up to 500-year flood protection (the exact level of flood protection depends on modifications to Folsom Dam, among other factors). *Id.*, at TS-4-6. Given the ongoing shortages of water in this state, the State Board should not be taking action to rule out a potential additional supply of water at this critical juncture.

It could be argued that revocation of the water right permits for Auburn Dam would not preclude an amendment by Congress to the project authorization, as Reclamation can always reapply for the water rights necessary for the project. This

argument overlooks the fact that: (1) any new water right permits granted by the State Board would carry a current priority date; (2) there may be less unappropriated water available, since several entities have expressed interest in applying for rights to appropriate water made available by the revocation of Reclamation's permits; and (3) there is no guarantee that the State Board would grant Reclamation the water right permits needed for Auburn Dam. The uncertainty on whether water would be available in sufficient quantity should the present permits be revoked 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.

IV. Conclusion

Reclamation takes the position that it has reasonably prosecuted the completion of Auburn Dam, and the application of water to full beneficial use under Permits 16209, 16210, 16211, and 16212 (Applications 18721, 18723, 21636, and 21637), to the extent possible given the authority granted by Congress. Reclamation, as an executive branch agency, can only take those actions that are authorized by Congress. Furthermore, under the State Board's regulations regarding extensions of time, lack of funds to complete construction due to a dearth of appropriations do not constitute "conditions incident to the person and not to the enterprise", and similarly are not grounds for revocation.

Even if the State Board finds that Reclamation has not proceeded with due diligence to complete construction of the project and apply the water to beneficial use as contemplated by the permits, the State Board still retains discretion under Water Code § 1410 to not revoke these permits. Reclamation believes that this discretion should be

exercised in favor of retention of these permits by Reclamation, as: (1) Auburn Dam remains a Congressionally authorized project; (2) Congress is still engaged in the process of deliberating in order to determine this project's future, and (3) no potential additional supply of water should be ruled out given the ongoing crisis with California's water supplies.

This concludes my written testimony.