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6 **BEFORE THE**
7 **ADMINISTRATIVE HEARINGS OFFICE OF THE**
8 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 HEARING IN THE MATTER OF THE
10 PENDING APPLICATION (A029657) OF
11 THE COUNTY OF SAN JOAQUIN TO
12 APPROPRIATE WATER FROM THE
13 SOUTH FORK AMERICAN RIVER

**CLOSING BRIEF OF CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE**

14
15 **I. INTRODUCTION**

16 The California Sportfishing Protection Alliance (CSPA) respectfully submits this closing
17 brief for the hearing in the matter of the pending application (A029657) of the County of San
18 Joaquin to appropriate water from the South Fork of the American River.

19 The key hearing issues for this matter as stated in the Notice of Public Hearing and Pre-
20 Hearing Conference issued by the State Water Resources Control Board's (State Board)
21 Office of Administrative Hearings (AHO) on June 10, 2021 are as follows:

22
23 **1. Should the Board cancel Application 29657 under Water Code section 1276?**

- 24 a. Has the Applicant failed to provide information requested by the Board to
25 demonstrate that unappropriated water is available for appropriation?
26 b. Has the Applicant failed to provide information requested by the Board to
27 demonstrate compliance with all applicable requirements of the Fish and Game Code
and the federal Endangered Species Act of 1973?

- 1 c. Has the Applicant failed to provide information requested by the Board to comply
2 with Division 13 (commencing with Section 21000) of the Public Resources Code?
3 d. Has the Applicant failed to provide other information requested by the Board that is
4 reasonably necessary to clarify, amplify, correct, or otherwise supplement information
5 required to be submitted under Article 2 (commencing with section 1260) or Article 3
6 (commencing with section 1270)?
7 e. Has the Applicant shown good cause for the Board to allow additional time in which
8 to submit the requested information?

9 **2. Should the Board cancel Application 29657 under Water Code section 1335?**

- 10 a. Has the Applicant failed to provide information requested by the Board that the
11 Board determined is reasonably necessary to attempt to resolve a protest?
12 b. Has the Applicant shown good cause for the Board to allow additional time in which
13 to submit the requested information?

14 **3. Should the Board deny Application 29657 under California Code of Regulations,
15 title 23, section 840?**

- 16 a. Does the Applicant intend to initiate construction of the works required for the
17 contemplated use of water within a reasonable time and thereafter diligently prosecute
18 the construction and use of water to completion?
19 b. Will the Applicant be unable to proceed within a reasonable time because of
20 absence of a feasible plan, lack of required financial resources, or other cause?

21 **4. Should the Board establish a time schedule for the Applicant to submit
22 information necessary for the Division to process Application 29657?**

23 The hearing record demonstrates that the AHO should recommend that the State Board
24 cancel Application 29657 under Water Code §§ 1276 and 1335, and under CCR title 23, § 840.
25 The facts of this case present the State Board with no other reasonable option. This case isn't
26 even close.

27 **II. BACKGROUND**

28 San Joaquin County (the County or Applicant) filed Application 29657 in 1990. Since
1990, the County has amended the application four times.

On September 9, 2010, the Division of Water Rights canceled Application 29657 for
lack of diligence. (AHO-129). The Order Cancelling Application cited:

- The lack of progress in prosecuting the application between 2002-2009.

- 1 • The absence of field reconnaissance in support of the application.
- 2 • The inadequacy of the water availability analysis.
- 3 • Failure to resolve any of the 18 protests filed in 2008.
- 4 • Failure to provide adequate information to the State Water Board under
- 5 “Government Code Sections 65943 through 65944.” (*Id.* at 4-7).

6 On June 10, 2011, the State Board’s Executive Director granted reconsideration,
7 reinstating Application 29657 and remanding the Application to the Division of Water Rights to
8 resolve several factual disputes and to establish timelines for the Application. (AHO-146).

9 On October 3, 2011, Water Rights staff laid out a series of timelines and requirements
10 for the County relative to the Application. (AHO-148).

11 On December 14, 2011, Water Rights staff extended several of those timelines. (AHO-
12 151).

13 On April 2, 2012, a consultant to the County transmitted to the State Water Board a
14 cover letter (AHO-152), a revised water availability analysis (AHO-161), and a set of
15 correspondence relating to that analysis between the Applicant and eight protestants or groups
16 of protestants (AHO-153 through AHO-160). While Exhibits AHO-153 through AHO-160
17 demonstrate responses to protestants, the record does not demonstrate resolution between
18 any protestant and the Applicant relating to the 2012 water availability analysis (AHO-161).

19 Between July 2012 and September 2013, there is correspondence in the record among
20 various parties relating to legal and technical aspects of the water availability analysis. (AHO-
21 162 through AHO-167). This correspondence equally does not demonstrate resolution of
22 issues relating to the water availability analysis.

23 On August 21, 2013, Ms. Kathy Mrowka of Division of Water Rights staff wrote to Mr.
24 Thomas Shepherd, counsel for the applicant, reporting on the status of the Applicant’s
25 responses to deadlines established by the Division. (AHO-165). Staff reported no progress on
26 the following issues:

- 1 • Production of a NEPA document.
- 2 • Agreement with Sacramento County on use of the Freeport diversion facility (one
- 3 meeting reported).
- 4 • Agreements with private property owners.
- 5 • Access to the point of diversion.
- 6 • Consultation under Section 7 of the Endangered Species Act.
- 7 • Oak woodlands mitigation plan.
- 8 • Wetlands delineation for all project elements.
- 9 • Special-status plant studies and mitigation plan.
- 10 • Draft and final environmental impact report under CEQA.
- 11 • Protest resolution.

12 In November 2013, Water Rights staff wrote to counsel for the Applicant calling out a
13 decision announced in the press to abandon the storage component of the Application, and
14 suggesting the need for a revision of the application. (AHO-168). In a letter dated December
15 18, 2013, Counsel for the Applicant announced the need to revise Application 29657 and the
16 need to reconsider previously established timelines in light of such revision (AHO-170).

17 On June 27, 2014, the Applicant submitted the fourth amended Application 29657 to the
18 State Board. (AHO-171). This document is the final document in the administrative record for
19 the application until 2020.

20 As described in the Notice of Hearing and Status Conference issued by the AHO on
21 January 5, 2021: "On June 24, 2020, Erik Ekdahl, Deputy Director of the State Water Board's
22 Division of Water Rights (Division), sent a memorandum to Eileen Sobeck, the State Water
23 Board's Executive Director, proposing to transfer Application A029657 to the AHO. On June
24 24, 2020, Ms. Sobeck issued a memorandum assigning the application to the AHO."

1 **III. ARGUMENT**

2 **A. The Applicant Has Not Defined a Project.**

3 After 30 years, San Joaquin County has not defined a project that would implement the
4 application. This failure creates most of the legal deficiencies under the sections of the Water
5 Code and Government Code called out in the Hearing Notice.

6 The Hearing Notice asks whether the State Board should cancel Application 29657
7 under Water Code § 1276, which requires an applicant to provide additional information to the
8 State Board to “clarify, amplify, correct, or otherwise supplement the information required to be
9 submitted” under Water Code §§ 1260-1266 and 1270-1271.

10 Notably Water Code § 1260 requires an application to include:

- 11 (c) The nature and amount of the proposed use.
- 12 (d) The location and description of the proposed headworks, ditch canal, and other
13 works.
- 14 (e) The proposed place of diversion.
- 15 (f) The place where it is intended to use the water.
- 16 (g) The time within which it is proposed to begin construction.
- 17 (h) The time required for completion of the construction.
- 18 (i) The time for the complete application of the water to the proposed use.
- 19 (j) All data and information reasonably available to applicant or that can be obtained
20 from the Department of Fish and Wildlife concerning the extent, if any, to which fish and
21 wildlife would be affected by the appropriation, and a statement of any measures
22 proposed to be taken for the protection of fish and wildlife in connection with the
23 appropriation.
- 24 (k) Sufficient information to demonstrate a reasonable likelihood that unappropriated
25 water is available for the proposed appropriation.

26 As described in Background, *supra*, Ms. Mrowka’s letter of 8-21-13 (AHO-165)
27 describes the absence of such information in Application 29657, with the exception of a Water
28 Availability Analysis (WAA). As also described in Background, *supra*, several protestants
disputed the adequacy of this WAA within several months of its release.

 The missing information is not a mere matter of details or refinements; it is basic
information, the necessary nuts and bolts of the application that 30 years after initial submittal
and 7 years after the fourth revised application are still lacking.

1 The requested total diversions per year under Application 29657 is 147,000 acre-feet.
2 (Fourth Amended Application, AHO-171). However, at the stated 155 cfs maximum rate of
3 diversion through East Bay Municipal Utility District's (EBMUD) portion of the Freeport
4 diversion facilities (SJC-16, ¶ 9) with a season of diversion of December 1 through June 30,
5 San Joaquin County would be limited to less than half the stated annual amount. Mr.
6 Buchman on cross examination by CSPA admitted that the Freeport limitation would make the
7 maximum annual diversion "much less than a hundred forty-seven [thousand acre-feet per
8 year]." (HT, p. 214:10-22; Video 2:10:58-2:12:32).

9 The gross approximation of the requested diversion amount, far in excess of the
10 capacity of key proposed diversion works, further demonstrates the placeholder nature of
11 Application 29657.

12 **B. The Applicant Has Not Made Progress on the Application.**

13 The lacking information is in substantial part is the same information that was lacking
14 when the Division of Water Rights issued an Order Canceling Application 29657 on September
15 20, 2010. (AHO-129; "Order").

16 For example, the Order states at ¶ 7: "On December 28, 2000, the Applicant
17 documented its progress in developing a plan for meeting the County's future water supply
18 needs. No specific actions were identified for pursuing Application 29657." In 2021, the
19 Applicant still has not documented any specific actions in pursuing Application 29657.

20 The Order states at ¶ 22: "None of the protests have been resolved." In 2021, one
21 protest, that of East Bay Municipal Utility District is resolved, at EBMUD's initiative.

22 The Order states at ¶ 23: "On November 5, 2008, the Division requested a
23 demonstration that the Applicant has, or will in the reasonable future be granted, access and
24 use of the Freeport facility. (See Wat. Code § 1775, et seq.) The Applicant was advised that
25 the application may be rejected if access could not be secured." In 2021, there is no access.

1 The Order states at ¶ 25: “On October 8, 2009, the Applicant documented that no field
2 reconnaissance activities had been conducted.” In 2021, there have been no such activities.

3 The Order also states at ¶ 25: “The Applicant did not identify any measures, such as
4 bypass flows, necessary for protection of biological resources.” In 2021, the Applicant still has
5 proposed no such measures.

6 In summary, in 2000, the Applicant had made no progress on any actions to advance
7 Application 29657. In 2010, the Applicant had not made progress specific to the application
8 since 2000. In 2014, the only progress the Applicant had made since 2010 was the production
9 of a contested WAA. 2021, seven years after the fourth amended application and three
10 decades since the initial application, begins the fourth decade of lack of progress in
11 prosecuting Application 29657.

12 **C. The Applicant Consistently Conflates the Preconditions for Progress on the**
13 **Application with Progress on the Application Itself.**

14 Applicant’s witness Mr. Zidar (SJC-1) at ¶ 3 introduces his testimony by saying: “My
15 testimony details (1) the background and foundational planning efforts to put the water that is
16 the subject of Application 29657 to beneficial use...; and (2) the considerable work that has
17 been undertaken since 2014 to further design both intra- and inter- regional physical facilities
18 and to further test and implement operational concepts....” The actions and documents he
19 discusses in the remainder of his testimony is consistent with this introductory description: it is
20 background and foundational material and planning efforts antecedent to prosecution of
21 Application 29657, not prosecution of Application 29657 itself. It might be arguable that failure
22 to complete such antecedent actions would demonstrate lack of diligence. However, they do
23 not initiate, or even commit to, construction of works or use of a single drop of water under a
24 water rights application.

25 The sole document specific to Application 29657 on which the Applicant relies to
26 demonstrate progress is a ten-year old general feasibility study it produced in 2011 (“Phase 1
27

1 Freeport Element of the American River Use Strategy, Final Draft Feasibility Study.” (SJC-3
2 and SJC-4).

3 Otherwise, the documents and activities the Applicant relies on to demonstrate progress
4 are not specific to Application 29657. As Mr. Zidar stated on cross-examination by CSPA, it is
5 the County’s contention that programmatic analysis is “in part” a demonstration of diligence.
6 (HT, pp. 80:22-25, 81:1; AM Video 1:37:04-1:38:04). When asked, “Are there any bounds on
7 the amount of time that programmatic analysis should suffice as diligence?” Mr. Zidar declined
8 to specify an appropriate length of time. (HT, p. 81:2-17; AM Video 1:38:05-1:38:06).

9 **1. With No Follow-Up in Ten Years, the Applicant’s 2011 Feasibility Study**
10 **(SJC-3 and SJC-4) Does Not Demonstrate Progress.**

11 The best specific technical information about a project to implement Application 29657
12 is contained in a planning document from August 2011 entitled “Freeport Element of the
13 American River Strategy, Phase 1: Final Draft Feasibility Study. (SJC-3, SJC-4; “Feasibility
14 Study”). On cross-examination by Mr. Ferguson, Mr. Zidar stated that the County had
15 developed no operational plan for use of the Freeport facilities subsequent its 2011 Feasibility
16 Study. (HT, p. 190:10-19; PM Video 1:37:00-1:37:34). On cross-examination by CSPA,
17 County witness Mr. Zidar referred to this study for his best estimates of costs per acre-foot of
18 water delivered under the application. (HT, pp. 82:22-25, 83:1-2; AM Video 1:40:27-1:40:43).

19 The Feasibility Study is simply that. It outlines a series of preliminary project
20 alternatives, including conceptual and hypothetical features for treatment, conveyance, end
21 use, recharge, and so forth. It makes no decisions, and only vaguely, in the executive
22 summary, narrows the range of alternatives. While it includes technical information, it is high
23 level. It is effectively a plan to make a plan, including a conceptual framework for executing
24 NEPA and CEQA review.

1 The fact that the County relies on this ten-year-old Feasibility Study as the best source
2 of technical information for project-specific information demonstrates the County's lack of
3 progress in prosecuting its application.

4 **2. Programmatic Documents and Actions from Parallel or Related**
5 **Processes Do Not Demonstrate Progress on the Application.**

6 Mr. Zidar's testimony is largely a recitation of actions and documents that the County
7 has completed with little regard or reference to Application 29657. These include integrated
8 regional conjunctive use (ICUP) planning, integrated regional water management (IRWM)
9 planning, programmatic environmental review for various potential conjunctive use programs,
10 and a pilot groundwater banking project in cooperation with East Bay Municipal Utility District
11 (the Demonstration Recharge, Extraction and Aquifer Management or "DREAM" Project).
12 None of these planning activities and documents is dependent on Application 29657 or
13 features it as more than one contingent element. All of them could and likely will proceed
14 without Application 29657, and the success or failure of none hinges on the application.

15 Mr. Buchman's testimony deals with County's actions in response to the 2014
16 Sustainable Groundwater Management Act (SGMA), which the County must complete
17 pursuant to regulatory requirements completely independent of Application 29657.

18 Not one of these processes has reached a point that has placed Application 29657 in or
19 even within sight of its critical path. Mr. Zidar cites these various processes and documents in
20 anticipation of still further planning and action on these antecedent activities: "Additional time is
21 needed for further planning, engineering, and review to permit projects currently in the IRWMP
22 and SGMA Groundwater Sustainability Plan; and to gain consensus, pass needed
23 assessments, and further develop the necessary partnerships." (SJC-1, ¶ 13). It is notable
24 that this description, which introduces the bulk of Mr. Zidar's testimony, anticipates not the
25 prosecution of Application 29657, but rather a further suite of antecedent actions. The
26
27

1 sentence that concludes ¶ 13 seems a non-sequitur: “The County has not stopped planning
2 and continues to rely on and pursue Application 29657.” (*Id.*).

3 Mr. Buchman’s testimony (SJC-2) is even more explicit on how far off Application 29657
4 is on the planning horizon. At ¶ 7, he describes three types of projects for achieving
5 groundwater sustainability:

- 6 Planned Projects – Projects in this category are planned to be completed and
7 online prior to 2040 and the projected supply is considered as offsetting the
8 projected 2040 supply imbalance.
- 9 Potential Projects – Projects in this category are currently in the planning
10 stages and may move forward if funding becomes available. Potential Projects
11 represent a “menu of options” for the Subbasin to achieve long-term
12 sustainability and offset the remaining imbalance above and beyond
13 implementation of the Planned Projects.
- 14 Longer-term or Conceptual Projects

15 On cross-examination by CSPA on this section of his testimony, Mr. Buchman
16 acknowledged that Application 29657 did not belong among “Planned Projects” (HT, p. 114:6-
17 12; AM Video 2:21:26-2:21:47), those that, as cited *supra*, “are planned to be completed and
18 online prior to 2040.” On the contrary, Mr. Buchman acknowledged that Application 29657
19 would more likely be categorized under “Potential Projects,” projects among a “menu of
20 options” that “may move forward if funding becomes available;” or even as “Conceptual
21 Projects.” (HT, pp. 114:16-25, 115:1-12; AM Video 2:21:26-2:22:59).

22 Like his colleague, Mr. Buchman depicts a long suite of intermediate steps prior to
23 project-specific action on Application 29657.

24 **D. The Applicant Has Not Shown Good Cause Why the Application Should Not
25 Be Canceled.**

26 The Applicant, through its witness testimony and through the opening statement of its
27 counsel, maintains that it has shown good cause for which the State Water Board should not
28 cancel Application 29657. None of the reasoning or arguments of the County to support this
contention pass muster.

1 The Applicant represents that its production of programmatic documents under CEQA
2 constitutes progress in prosecuting its application. We have discussed this reliance on
3 programmatic actions, with no evident movement to project-level analysis, *supra*.

4 The Applicant represents the extent of the need of San Joaquin County for additional
5 water supplies constitutes in part good cause for why the State Water Board should not cancel
6 Application 29657.

7 The Applicant represents that selective passages in various water rights decisions and
8 a water rights orders constitute good cause for why the State Water Board should not cancel
9 Application 29657.

10 The Applicant represents that cancelation of the Application will irreparably harm the
11 County's effort to obtain water supplies from the South Fork American River under watershed
12 of origin protections, and that this constitutes good cause for not canceling Application 29657.

13 We address below the representations we have not previously discussed.

14 **1. The Applicant's Need for Water Does Not and Cannot Constitute Good**
15 **Cause for Thirty Years of Delay.**

16 In his testimony at ¶ 55, Mr. Zidar states: "Surface water available to the County under
17 Application 29657 is needed to address overdraft conditions. This chronic and systemic
18 overdraft provides good cause for the Board to allow the County additional time to develop the
19 information needed to process the Application." On cross-examination by CSPA, Mr. Zidar
20 reaffirmed this position. CSPA asked: "Does the extent of the need justify delay in pursuit of a
21 water rights application?" Mr. Zidar replied: "I believe that's what I'm saying in the testimony."
22 (HT, p. 90:21-24; AM Video 1:51:49-1:51:58).

23 As a matter of law and of policy precedent, the AHO and the State Board cannot affirm
24 the extent of need as a justification for unbounded delay in prosecution of a water rights
25 application. Given the costs and the administrative and regulatory effort that application for a
26 water right initiates, it is fair to say that no entity applies for a water right without believing that

1 it needs the water for which it applies. The rationale that unbounded delay is warranted by
2 need is an open door for permanent inaction on every water right application.

3 Perhaps more importantly, the AHO and the State Board cannot valorize irresponsible
4 behavior that is admitted in acknowledging a condition of “chronic and systemic overdraft” by
5 casting aside the rules governing diligent prosecution of a water rights application. Such
6 condition did not come to pass by *force majeure*. It is the product of decades of choices and
7 default operations.

8 **2. In Water Rights Decisions 858, 893, 1356, and 1422, and Water Rights**
9 **Order 2008-0045, the State Board and its Predecessors Made No**
10 **Assurances to San Joaquin County Regarding Water Sourced in the**
11 **American River.**

12 Mr. Zidar’s testimony states: “It has long been presumed that the American River water
13 would be available to the County.” (SJC-1, ¶ 15). Mr. Zidar cites several water rights
14 decisions and a water rights order to support his contention. Those documents from the State
15 Board do not support the County’s presumption.

16 First, Mr. Zidar cites to D-858, stating: “This decision directed the County to the
17 American River as the source of supply for the County to meet current and future demands.”
18 (*Id.*, ¶ 18). However, a reading of D-858 indicates no such “direction.” D-858 states at p. 51:
19 “[F]rom the physical and engineering standpoints, there are no obstacles to prevent water from
20 other sources being made available within the next few years to areas within the Mokelumne
21 River Basin.” The factual presentation of water supplies alternative to the Mokelumne River
22 does not confer regulatory or other “direction” of any kind. In fact, D-858 at p. 52 also notes
23 that North San Joaquin Water Conservation District could be served by water from the Feather
24 River. However, the County has not asserted that this observation constitutes “direction.” The
25 conclusion that Mr. Zidar draws on behalf of the County that D-858 “directed” the County to the
26 American River is unsupported.

1 Mr. Zidar at ¶ 19 next cites to D-893. He correctly cites the acknowledgment in D-893
2 (at p. 53) of the County’s need for additional water. He also summarizes the requirement in D-
3 893 that the County be allowed time (now long past) to negotiate a contract with Reclamation
4 for CVP water. (D-893, p. 53). However, anything “directed” in D-893 relative to the County
5 stops there. D-893 denied the water rights applications of the County and various entities
6 therein because Reclamation was uniquely suited to construct works for delivery of American
7 River water to the County. Additionally:

8 The point or points of diversion under each of those applications [by County
9 entities] is Folsom Dam and/or Nimbus Dam to which right of access has not
10 been acquired by the applicants. Accordingly, issuance of permits to those
11 applicants would be meaningless in view of the obvious necessity of contracting
12 with the United States for a supply of water from the Federal facilities. ...

12 The record is also abundantly clear in regard to the applications by California
13 Water Service Company, City of Stockton, North San Joaquin Water
14 Conservation District, and Stockton and East San Joaquin Water Conservation
15 District that the applicants have no immediate plan or purpose to proceed
16 promptly with construction and/or with the application to beneficial use of the
17 water sought. In such cases the Board has little choice in the action to be taken
18 since it is a settled principle that an application to appropriate is not a proper
19 instrument to make a reservation of water for a development at an indefinite and
20 uncertain time in the future.

21 (D-893 at pp. 54-55)

22 Nor does Mr. Zidar’s citation to D-1356 avail. Mr. Zidar states: “SWRCB Decision 1356
23 reiterated that San Joaquin County would be assured access to the American River.” This
24 summarization is inaccurate. D-1356 at ¶ 19 assured that the American River Division of the
25 Central Valley Project, including the newly authorized Auburn Dam, would prioritize San
26 Joaquin County, along with Sacramento and Placer counties, for CVP water contracts before
27 granting contracts from the American River Division to entities more remote. It did not,
28 however, compel Reclamation to deliver any water to San Joaquin County at all.¹

¹ The State Water Rights Board subsequently deleted ¶ 19 following on reconsideration after

1 Mr. Zidar's citation to D-1422 is inapposite. D-1422 allows Reclamation to deliver water
2 captured in New Melones Reservoir anywhere in San Joaquin County. Decisions to limit such
3 deliveries, as stated by Mr. Zidar, attach to decisions by Reclamation, not to D-1422.

4 Finally, Mr. Zidar's cites Water Rights Order 2008-0045 to affirm that Reclamation is not
5 likely to provide contract water to the County. He then quotes a statement in the Order
6 affirming a general public interest in a reliable water supply for San Joaquin County. This
7 general statement is even more vague than the statements in earlier water rights orders that
8 the County alleges have "directed" the County to the American River.

9 In sum, the County has constructed two intertwined narratives over the last three
10 decades. The first narrative is that the State Board has "directed" the County to appropriate
11 water from the American River watershed. The second is that the State Board would be
12 unfairly breaching its alleged direction and partial ownership by applying the rules regarding a
13 water right application and its prosecution and canceling Application 29657. (Mr. Zidar, SJC-1
14 at ¶ 61: "[I]n the interest of equity and fairness, the American River should remain accessible
15 to the County to meet long term demand..."). Neither of these narratives stands up to
16 scrutiny. Both omit key facts regarding the County's prior failures to meet the requirements for
17 water rights applications and their prosecution.

18 In the absence of any other clear explanation in the State Board's June 10, 2011 Order
19 (AHO-146) reconsidering and reversing its September 30, 2010 cancelation of Application
20 29657, it appears to us that the State Board in 2011 accorded some weight to the County's
21 self-portrayal as victim. The AHO and the State Board must now recognize that the last ten
22 years of deference has not yielded a satisfactory outcome.

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24
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26 _____
27 Contra Costa Water District argued that any entity within the watershed of origin should be
28 accorded the same priority to Auburn Dam water as San Joaquin, Sacramento and Placer
counties.

1 “Significant progress has been made in planning, permitting and design of related facilities. For
2 example, the NSJWCD, with the support of the GWA, submitted for Proposition 68 monies in
3 2020 for the North Systems Improvements but the funds were not awarded.” (Id. at ¶ 63.) The
4 County’s testimony refers to funding primarily in terms of grants and outside sources.

5 Applicant’s witnesses confirmed the lack of dedicated funding on cross-examination.
6 When asked by CSPA whether the County had funding available to implement Application
7 29657, Mr. Buchman replied: “We do have planning money available through the County Flood
8 Control District Zone Two. We have limited resources currently available there.” (HT, p.
9 115:17-21; AM Video 2:23:20-2:23:40). He added that a County also has a “letter of intent
10 signed by the County and other contractors.” (Id.). When asked to clarify, Mr. Buchman
11 affirmed that money “currently” on hand was for planning. (HT, p. 116:7-9; AM Video 2:24:04-
12 2:24:11).

13 The County presents no evidence that it has raised, or even that it could raise, the
14 money needed to prosecute Application 29657.

15 **IV. THE AHO SHOULD RECOMMEND, AND THE STATE BOARD SHOULD CARRY**
16 **OUT, CANCELATION OF APPLICATION 29657.**

17 For the reasons described above, the AHO should recommend cancelation of
18 Application 29657, and the State Board should carry out such cancelation.

19 There are ample legal grounds for this course of action.

20 The Applicant has failed to provide information relative to compliance with the Fish and
21 Game Code. No project-level CEQA document is foreseeable. Basic nuts-and-bolts
22 information about project works, places of use, and time to put water to use is absent.

23 The Applicant has not provided responsive information to the State Board under Water
24 Code § 1275, and this warrants cancelation under Water Code § 1276. The Applicant has not
25 provided information that is adequate for protest resolution, and this warrants cancelation
26 under Water Code § 1335. The Applicant lacks a feasible plan and has deployed no evident
27

1 financial resources to prosecuting Application 29657, and this warrants cancelation under 23
2 CCR § 840. The Applicant has not shown good cause for why the AHO and Division of Water
3 Rights should grant additional time before canceling the application, particularly in
4 consideration that this application has entered its fourth decade of pendency.

5 The State Board has been generous in its indulgence of San Joaquin County's delay in
6 the prosecution of Application 29657. The lack of evident progress, the lack of prospects for
7 progress, and the compelling need to uphold the integrity of the water rights permitting
8 process, require this indulgence to come to an end.

9
10 Executed this 28th day of October, 2021.

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12 _____
13 Chris Shutes
14 Water Rights Advocate
15 Consultant to
16 California Sportfishing Protection Alliance
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