

**Water Right Hearing Regarding Proposed Cancellation or
Establishment of Information Schedule of San Joaquin
County’s Application to Appropriate Water from the South
Fork American River**

Application 29657

Opening Statement and Witness Testimony for

Friends of the River

by Ronald Stork

Before the State Water Resources Control Board Administrative Hearings Office

September 29, 2021

Introduction

¶1. In an answer to my question about the hearing officer’s written summary of the March 16, 2021,¹ status conference regarding whether the pending application could be considered to include a Lake Natoma diversion, the hearing officer suggested that she was interested in this subject and might consider hearing information on this.

¶2. It will be up to hearing officer to decide whether a reversion to the 1990 diversion proposals is being seriously contemplated, with the consequent delays for application amendments at some time in the definite or indefinite future — and whether they should have a bearing on diligence on this three-decade-old application.

¶3. I recognize that the purpose of this hearing is not the substance of the application (whether morphed or not), but diligence. Still, the fact remains that a proposed Lake Natoma or Salmon Falls consumptive diversion from the American River has occupied a significant part of my work in my long thirty-four-year career at Friends of the River, and thus I believe that I can provide some information that might satisfy the hearing officer’s interest in this significant potential reversion to the original water rights application.

¹ “2021-3-09 Notice of Public Hearing and Pre-hearing Conference,” SWRCB Administrative Hearings Office, June 10, 2021, p. 5. “The County also confirmed that it had not obtained a right of access to the Freeport Diversion Facility as a point of diversion for the project and that it intends to further investigate the feasibility of using the head of the Folsom South Canal at Lake Natoma as an alternative point of diversion.”

¶4. The County, itself, has broached the issue of a return to a Lake Natoma diversion using the Folsom South Canal, a feature of the original water rights application:

“It is our intention to further investigate use of the South Folsom Canal as the original and cheaper alternative for taking the American River water right under Application 29657; and determine if this lower cost alternative is feasible given the changing nature of project operations providing water to the Delta.”²

¶5. The Lake Natoma diversion was Alternative A in the original 1990 Application 29657. If that alternative proved to be infeasible, Alternative B would be carried forward.

In the event that the County is unable to obtain water or access to the Folsom South Canal, it proposes to divert from the South Fork American River. Under Alternative B water will be stored in County-line Reservoir located on Deer Creek and Clay Station Reservoir located on Laguna Creek.³

¶6. Therefore, the purpose of my testimony is to sketch out the rich history behind Reclamation’s failure to construct key elements of the Auburn-Folsom South Project and Congress’s unwillingness or inability to reauthorize the Auburn-Folsom South Project to resume construction. These circumstances resulted in Reclamation’s failure to comply with Board orders concerning Reclamation’s permits — ultimately resulting in the revocation of Reclamation’s Auburn-Folsom South project water rights permits (Order WR 2008–0045). The history will also touch on the long history of San Joaquin County parties’ attempts to benefit from deliveries from the Folsom South Canal or from the South Fork American River — and the formidable obstacles to doing so that they have encountered and will encounter in the future.

¶7. I provide this testimony by dusting off, revising, and updating the expert witness testimony that I presented at the Auburn dam water rights revocation Board proceeding in 2008. It will use exhibits from both my 2008 testimony still on the Board’s FTP site and new exhibits to be placed in this hearing record. (FOR 2008 x- exhibits are being placed on this hearing’s Administrative Hearing Office FTP site and can also be found at the hot links/urls in this statement. The FOR 2021 x- exhibits referenced in this statement will be found on this hearing’s FTP site.)

² “San Joaquin County and City of Stockton Joint Status Conference Statement,” March 9, 2021, p. 15. 2021-03-09 San Joaquin County + City of Stockton joint Status Conference Statement.pdf. <https://ftp.waterboards.ca.gov/Water-Right%20Permitting/San%20Joaquin%20County%20%28A029657%29/Hearing%20Documents/2021-03-09%20San%20Joaquin%20County%20+%20City%20of%20Stockton%20joint%20Status%20Conference%20Statement.PDF>.

³ Attachment to the Application, p. 1. Application 29657, County of San Joaquin, 1990.

Folsom Dam

¶8. No doubt that the history of the Folsom South Canal can stretch back more than seventy years, but the major decision of the Board, Decision 893 (D-893), that sorted out the 1940s/1950s gold rush of proposed and actual projects on the American River is a good place to start.

¶9. Folsom Dam was first authorized in 1944⁴ and reauthorized at its present capacity in 1949.⁵ The 1949 authorization added Nimbus Dam/Lake Natoma to the 1944-authorized project.⁶ Construction began in 1951 and was finished in 1956 and included Lake Natoma,⁷ impounded by the 87-foot high Nimbus Dam completed in 1955.⁸ The reservoir was originally envisioned as an afterbay to facilitate electrical demand load-following for Folsom Dam’s power production operations.⁹ Lake Natoma is approximately seven miles long and is immediately upstream of the lower American River (LAR). These facilities are under the jurisdiction of the United States Department of the Interior, Bureau of Reclamation (Bureau, USBR, Reclamation) and are part of Reclamation’s Central Valley Project (CVP).

¶10. Reclamation’s water rights for the operation of Folsom Dam and competing applications were sorted out by the Board in D-893 on March 18, 1958.

⁴ §10 of the Flood Control Act of 1944, P.L. 78-534 (FOR 2021 x-2). It was also authorized in Chapter 1514, California Statutes of 1945. See *Senate Document 113, Eighty-First Congress, First Session, Our Rivers: Total Use for Greater Wealth, Central Valley Basin, A Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Comments from the State of California and Federal Agencies,*” USDO, USBR, August 1949, (1949 USBR CVP total use report) p. 360.

⁵ American River Basin Development Act of 1949, P.L. 81-356 (FOR 2021 x-3). The expansion from 355,000 acre-feet to 1,024,000 acre feet came about as a result of the *Conference on Size of Proposed Folsom Reservoir on American River called by Governor Earl Warren, Sacramento, California, May 19–22, 1947*. The latter document is referenced but not included in the *Amendment to the Final Environmental Statement and Supplement on Auburn-Folsom South Unit*, American River Division, Central Valley Project-California, Prepared by Department of the Interior, Bureau of Reclamation, (USBR 1974 Auburn-Folsom South EIS), Volume 1, September 20, 1974, p. 38.

⁶ “The Central Valley Project, the American River Division, the Folsom and Sly Park Units, the Auburn-Folsom South Unit,” Wm. Joe Simonds, Bureau of Reclamation History Program, Denver, Colorado, 1994, Reformatted, Edited, and Reprinted: January 2010 by Brit Storey, (2010 USBR history of the Folsom & Auburn-Folsom South Units) p 8. (FOR 2021 x-4)

⁷ USBR history of the Folsom & Auburn-Folsom South Units, pp. 9–13, (FOR 2021 x-4). The “Lake” in Lake Natoma is, of course, a euphemism; the “lake” is actually a reservoir, although the reservoir area of the previous gorge section of the American River by the City of Folsom was enlarged to provide for very large flood flows to avoid backflow conditions at the Folsom Dam facilities.

⁸ 2010 USBR history of the Folsom & Auburn-Folsom South Units, p. 14. (FOR 2021 x-4)

⁹ 2010 USBR history of the Folsom & Auburn-Folsom South Units, p. 8. (FOR 2021 x-4)

¶11. Among other claimants, the North San Joaquin Water Conservation District had sought a permit to divert water at Folsom and Nimbus Dams for use within the District in San Joaquin County.¹⁰ Stockton and East San Joaquin Water Conservation District, also in San Joaquin County, sought permits to divert water from Folsom and Nimbus Dams for use within their boundaries.¹¹

¶12. The Board denied the San Joaquin County applications for two stated reasons: (1) The sought points of diversions at Folsom and Nimbus Dams are inappropriate because no “right of access has ... been acquired by the applicants” and (2)

“The applicants have no immediate plan or purpose to proceed promptly with construction In such cases the Board has little choice in the action to be taken since it is a settled principle that an application to appropriate is not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future.”¹²

¶13. These CVP permits were “subject to reduction by future appropriation of water for reasonable, beneficial use with the American River watershed tributary to Folsom Reservoir, provided that releases past Nimbus Dam are sufficient at all times to satisfy demands under downstream rights and requirements for fish conservation and salinity control.”¹³ San Joaquin County contains no land tributary to the watershed of Folsom Reservoir.

¶14. Contract deliveries for two of Reclamation’s new Folsom permits would be limited to Placer, Sacramento, and San Joaquin Counties, provided that the contracts are executed before July 1968.¹⁴ Contracts with San Joaquin County and Sacramento County agricultural districts were not executed, freeing Reclamation of delivery constraints under this provision.

The Folsom-South Canal and the Rise of the CVP East-Side Division Idea

¶15. The December 1955 high water on the American River and flooding on nearby rivers is said to have provided the inspiration for the Auburn dam to be located above Folsom Reservoir on the

¹⁰ D-893, pp. 9–10.

¹¹ *Id.* at p. 20.

¹² *Id.* at p. 54.

¹³ *Id.* at p. 52.

¹⁴ *Id.* at p. 72

North Fork of the American River¹⁵ (Inundating 48 miles of the North and Middle Forks of the American River under a fluctuating reservoir with large bathtub rings).

¶16. This inspiration had not come unprompted. Three large Auburn reservoirs had been discussed in comments by the State of California on Interior’s 1949 major postwar planning report.¹⁶ The American River Basin Development Act of 1949 had directed Reclamation to conduct “a study of the water resources of the entire American River watershed” and a canal from the Folsom project southerly to serve El Dorado and Sacramento Counties.

¶17. Reclamation issued a feasibility report for the then proposed Auburn-Folsom South project in 1960 (Eisenhower Administration).¹⁷ The Auburn dam, the Folsom South Canal, and its related features (including a County Line Reservoir on Dry Creek fed by a Mormon Island pumping plant from Folsom Reservoir)¹⁸ were first officially recommended by the Federal Administration (John Fitzgerald Kennedy’s) for authorization to the Congress in 1961. Vigorously championed by the Department of the Interior, and with the support or coordination with the State of California, Corps of Engineers, and the Bureau of the Budget, the multipurpose dam project was envisioned to produce electricity, recreation, and flood-control benefits, as well as irrigating more than 400,000 acres of land in Sacramento and San Joaquin Counties to be served by a 3,500 cfs Folsom South Canal diverting waters from the American River at Lake Natoma, which would also serve as the forebay for the Folsom South Canal.¹⁹

¶18. As conceived at the time, the proposed Folsom South Canal could also be extended. Then Lake Natoma would also be the “headwaters” for out-of-basin water deliveries to the potential East Side Division of the CVP. The canal serving this service area could also gather available “surplus” waters from rivers flowing from the Sierra Nevada into the San Joaquin River or

¹⁵ Auburn Journal, Section C, Thursday, August 26, 1965, p. 1. (FOR 2008 x-6) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_6.pdf. See also *Auburn Dam, Auburn Folsom Unit, American River Division, Central Valley Project*, Historic Reclamation Projects, Bureau of Reclamation, Jedediah S. Rogers, Reformatted, reedited, reprinted by Andrew H. Gahan, June 2013, (*2013 USBR Auburn Folsom Units history*) p. 8. (FOR 2021 x-5)

¹⁶ The Auburn Reservoir sizes described by the State of California were 734,000, 831,000, and 1,096,000 acre-feet. (*1949 USBR CVP total use report*, pp. 363–364). Interestingly, Reclamation remarked, “Formerly a third reservoir on North Fork near Auburn was considered but recent geological explorations have indicated that its cost would be very high.” p. 127.

¹⁷ *2013 USBR Auburn Folsom Units history*, p. 11. (FOR 2021 x-5)

¹⁸ Map of the Auburn-Folsom South CVP project area as conceived in 1962 in *House Document # 305*. (FOR 2021 x-6)

¹⁹ *House Document #305*, 87th Congress, 2nd Session, letters from the Secretary of the Interior, Deputy Director of the Bureau of the Budget, Acting Commissioner, Bureau of Reclamation, pp. III–XIII. (January 18, 1962). (FOR 2008 x-2) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_2.pdf.

Tulare Basin and shunt them south, along the proposed East Side Canal. This canal was envisioned to end a little west and south of Tulare, California.²⁰

¶19. Authorization for a redesigned and larger project would have to wait until the Administration of Lyndon Baines Johnson in 1965.²¹ By then, Reclamation had redesigned the project, now envisioning a 2,500,000 acre-foot reservoir and a powerhouse generating 613 million kilowatt hours of energy annually. The project still envisioned water supply contracts within Placer and El Dorado counties and a Folsom South Canal delivering 852,000 acre-feet by contract annually (390,000 acre feet from Auburn dam) to farms and cities south of the American River in Sacramento and San Joaquin Counties.²² The initial 3,500 cfs Folsom South Canal capacity would rise to 7,000 cfs via the proposed “Hood Clay Connector” to carry the combined flows of the American River and Sacramento River diversions for the potential East Side Division of the Central Valley Project as well as for the Auburn-Folsom South Unit. With a calculated benefit-to-cost ratio of 3.6 to 1, the project was expected to deliver irrigation water at \$2.75 per acre foot, consistent with then current policies and Reclamation law that irrigation water-service contracts should be based on an irrigator’s ability to pay.

¶20. Praise was effusive for the passage of the Auburn-Folsom South legislation. Governor Edmund G. “Pat” Brown called the Congressional approval a milestone in California’s development and a monument to interstate cooperation.²³ California Department of Water Resources (DWR) Director William E. Warne stated:

Its adoption today is a great victory for the conservationists and all those interested in the long range development of our state. Governor Brown has placed Auburn Dam-

²⁰ The proposed East Side Canal from the Stanislaus River to Tulare is depicted in the “Plans for Water Development Under the California Water Plan,” in sheets 11 & 14, Sheets of *Bulletin No. 3, The California Water Plan*, State of California, Department of Water Resources, Division of Resources Planning, 1957 (*Bulletin 3*). A canal from the Stanislaus River was then conceived to hook up to the completed Folsom South Canal to link up to Tulare or operate by exchange. (FOR 2021 x-7)

²¹ P.L. 89-161. (FOR 2008 x-5)

²² The Folsom South deliveries contemplated in the 1962 *House Document # 305* was for 852,000 acre-feet. The annual yield of the then proposed 1,000,000 acre-foot Auburn dam was contemplated to be 265,000 acre-feet. p. XIX. (FOR 2008 x-2)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_2.pdf.
 The 1965 House and Senate reports for the larger Auburn dam ultimately authorized include statements from the Secretary of the Interior repeating the Folsom South Canal service area delivery estimate. (FOR 2008 x-3)
 (FOR 2008 x-4)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_3.pdf.
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_4.pdf.

²³ *Auburn Journal*, Section C, Thursday, August 26, 1965, p. 2. (FOR 2008 x-6)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_6.pdf.
 Governor Pat Brown’s grandson would help lead the opposition to the late 1980s/1990s-era proposed Auburn dams. Generations move on.

Folsom South Canal at the top of every priority list. His negotiations on the Colorado river helped clear away the last block. All the water leaders of the state rejoice that this achievement has been realized.²⁴

¶21. And from Visalia, James F. Sorenson, manager of the Central Valley East Side Project Association, noted:

The authorization of Auburn Folsom South, with its additional capacity someday to serve the east side of the great San Joaquin Valley, is a great source of satisfaction and gratification to all of us. You can be sure we will recommend a sizable appropriation for fiscal year 1966–67 to start this great project.²⁵

¶22. Construction work for the Auburn Dam began in 1968. Construction of the Folsom South Canal began in 1970, and the headworks and reaches 1 and 2 were completed by 1973. Construction of the remaining 34 miles was never begun. Construction of the Auburn-Foresthill Bridge began in 1969 and was completed by 1973. Construction of the Sugar Pine Dam began in 1979, and it and its appurtenant works were finished by 1983.²⁶

Water Rights for the Auburn-Folsom South Unit

¶23. Reclamation applied for storage and diversion rights for the Auburn unit in 1959²⁷ and received its permits for the Auburn-Folsom South Unit in 1971 following the 1970 SWRCB Decision 1356. (*2008 Auburn Dam water right revocation proceeding, stipulation to facts*)

¶24. By this time, the CVP deliveries from Reclamation’s authorized American River Division projects were seen “as a source of additional surface water supplies in Sacramento and San Joaquin Counties and elsewhere in the Central Valley Project service area.”²⁸ The list of other claimants or competitors included the inchoate but potentially extensive East Side Division of the CVP; the very large San Luis Unit of the CVP authorized in 1960;²⁹ the East Bay Municipal

²⁴ *Auburn Journal*, Section C, Thursday, August 26, 1965, p. 3. (FOR 2008 x-6)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_6.pdf.

²⁵ *Auburn Journal*, Section C, Thursday, August 26, 1965, p. 4. (FOR 2008 x-6)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_6.pdf.

²⁶ *USBR history of the Folsom & Auburn-Folsom South Units*, pp. 17–20. (FOR 2021 x-4)

²⁷ *House Document #305*, 87th Congress, 2nd Session, January 18, 1962, p. 18. (FOR 2008 x-7)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_7.pdf.

²⁸ *Auburn Dam Report, Auburn Dam Alternative Study*, Department of the Interior, USBR, Mid-Pacific Region, Sacramento CA, July 1987, p. IX. (FOR 2008 x-15)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_15.pdf.

²⁹ The San Luis Unit, West San Joaquin Division, was authorized as a part of the Central Valley Project on June 3, 1960, Public Law 86-488 (74 Stat. 156). “About the Central Valley Project,” USBR,

Utility District, which entered into a contract in 1970 for 150,000 acre-feet of CVP water from Lake Natoma,³⁰ and the San Felipe Division of the CVP authorized in 1967.³¹ More competition for these consumptive uses from riparian users in the Delta and requirements for salinity control and environmental uses of these waters was also recognized by the Board and others.

¶25. By the standards of the time (1974), Reclamation believed that Folsom Dam had an annual yield of 1,373,000 acre-feet.³² Reclamation’s 1963 Supplemental Report estimate of the average annual yield of the Auburn Dam was 390,000 acre-feet.³³

¶26. Apparently, by 1974, Reclamation’s planned use of the Folsom South Canal would be 874,000 acre-feet annually, 318,000 acre-feet from Auburn Dam, and 557,000 acre-feet from Folsom Dam.³⁴

State Board Auburn Folsom-South Unit water rights decisions

¶27. – *D-1356*: The State Board attempted to referee the conflict for CVP deliveries from the American River in Decision 1356 (D-1356) in 1970 and tried to make everyone as happy as possible:

<https://www.usbr.gov/mp/cvp/about-cvp.html> (accessed August 18, 2021). Reclamation describes “[t]he principal purpose of the San Luis Unit is irrigation water supply for almost 1 million acres of prime farmland in central California.” It also notes that “clay layers beneath the agricultural lands prevent excess irrigation water from draining deeper into the soil and away from crop roots, negatively impacting agricultural productivity.” <https://www.usbr.gov/projects/index.php?id=427> (accessed August 18, 2021).

³⁰ “Permits issued to the Bureau by the State Water Rights Board in 1958 for appropriation of American River water at Folsom contemplated some service within the East Bay area, and Service area maps presented to the State Water Resources Control Board in connection with the Bureau’s Auburn Reservoir applications include the East Bay Municipal Utility District.” USBR Response to Comments on Draft Amendment to the Final Environmental Statement and Supplement, Auburn-Folsom South Unit, CVP, California (Int Des 74-75). *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, pp. 271-272.

³¹ <https://www.usbr.gov/mp/cvp/about-cvp.html> (accessed August 18, 2021)

³² “Judgement of U.S. District Court Judge Thomas McBride,” *NRDC, Save the American River Association, and the Environmental Defense Fund vs. Gilbert Stamm*, et al. April 26, 1974, p. 12, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, p. A-30. No doubt other estimates have been made over the preceding and subsequent decades.

³³ *Auburn-Folsom South Unit Special Report, Benefits and Cost Update*, Central Valley Project California, U.S. Department of Interior, Bureau of Reclamation, Mid-Pacific Region, December 2006. The current estimate is 208,000 acre-feet average annual yield, pp. TS-3–4.

³⁴ This estimate can be found in page 2 of the Sierra Club, Mother Lode Chapter’s comments in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, p. 379. They are in response to the earlier draft *USBR Amendment to the Final Environmental Statement and Supplement, Auburn-Folsom South Unit*.

¶28. (1) In 1968 EBMUD had reached an agreement with Reclamation, the Central Valley East-Side Association, and the Sacramento and Delta Water Users Association that it could enter into a 150,000 acre-feet per year CVP contract. D-1356 explicitly did not preclude such a contract.³⁵ The contract, based on Reclamation's authorized Folsom South Canal/Lake Natoma-based delivery facilities, was executed in late December 1970.³⁶

¶29. (2) Deliveries from the Auburn-Folsom South Unit before 1976 outside of Placer, Sacramento, and San Joaquin counties were not permitted. This was to allow Reclamation and these counties to enter into water-service contracts before other aspiring and potentially competing water districts in other counties. However, there was what amounted to a diligence or at least feasibility requirement: this prohibition sunsetted if parties within these priority areas were unable execute contracts with Reclamation before December 31, 1975.³⁷ Sacramento and San Joaquin agricultural districts, which were envisioned to have the great majority of potential demand along the canal, did not meet this deadline. In fact, no such contracts have been issued. In part because of objections from at least one downstream CVP contractor, this preferential delivery condition and, therefore, deadline in the Auburn-Folsom South water right was quickly deleted.³⁸ Over the subsequent decades, these waters would, in practice, meet the demand of other CVP contractors and other Reclamation purposes and not aspiring water service contractors in San Joaquin County and agricultural water service contractors in Sacramento County.

¶30. (3) The inchoate CVP East Side Division also may have achieved some success in D-1356, although it would not prove to be meaningful, after encountering important opposition in the Board proceedings. I can only speculate on the motivations of the time, but the Department of Water Resources, which may have been concerned about water availability in the Delta for State Water Project diversions and the success of its shared San Luis Division CVP facilities, requested that Reclamation's sought Auburn-Folsom South water right "would restrict the appropriation authorized to water which could be used by presently authorized projects" and reserve jurisdiction if the East Side Division is subsequently authorized.³⁹ The Board declined

³⁵ D-1356 p. 16.

³⁶ *It's Name was M.U.D.*, Book Two, East Bay Municipal Utilities District, 1999, p. 189. For an extensive history of this contract and much more, see the Statement of Decision, Richard Hodge, Judge of the Alameda Superior Court, Environmental Defense Fund et al, v. East Bay MUD et al., Sacramento County Intervenor, No. 425955, January 2, 1990. (*1990 Hodge decision*) (FOR 2021 x-8)

³⁷ D-1356, p. 16.

³⁸ Decision Amending and Affirming, as Amended, SWRCB Decision 1356, December 17, 1970.

³⁹ D-1356, pp. 6–7. D-1356 does not discuss the place of use for Reclamation's Auburn-Folsom South permits. However, the resulting permits apparently do so. According to the subsequent D-1400, "The permits issued pursuant to Decision 1356 allow the use of water in the Folsom South and proposed East Side Project service areas, as well as areas to be served by release of American River to Sacramento River." (D-1400 p. 7) However, the Board would subsequently revoke Reclamation's Auburn dam permits. Eventually the New Melones Dam and related canal works serving, in part, portions of San Joaquin County would subsequently revive a limited version of the CVP East Side Division water supply, although not using Reclamation's

DWR's request because the Board concluded that "there is a reasonable possibility that the water will be used as proposed by the Bureau for the East Side Division..."⁴⁰ However, the Federal Water Pollution Control Administration, the U.S. Bureau of Sport Fisheries and Wildlife, and the California Department of Fish and Game had written the Board that the East Side Canal could augment flows in East Side tributaries and the San Joaquin River below Friant Dam. The Board responded favorably and reserved continuing jurisdiction over "release of water from the proposed East Side Canal into the natural stream channels crossed by said East Side Canal ... for the maintenance and enhancement of fish and wildlife and to carry out water quality control plans"⁴¹

¶31. *D-1400*: The Board deferred establishment of required minimum flows for fish and wildlife and recreation in *D-1356*.⁴² That deferral was not long unaddressed. Taking up the reservation of jurisdiction in *D-1356*, in 1972 the Board adopted *D-1400* to establish minimum flows for a wide range of purposes in the American River below Auburn dam. *D-1400* described the consumptive uses approved in *D-1356* as for storage of 2,500,000 acre feet annually between November 1 and July 1 and direct diversion during the same period of 1,000 cfs to be used in the Folsom South and proposed East Side Project service areas, as well as CVP service areas (such as the San Luis Unit) that could be served by releases into the Sacramento River.⁴³ *D-1400* is only applicable to the operation of the Auburn-Folsom South Unit water rights, not the less river-protective 1958 Folsom Dam water rights. In light of subsequent events, *D-1400* flow requirements never went into effect.⁴⁴

Auburn dam permits, but Stanislaus River water.

⁴⁰ *D-1356*, p. 6.

⁴¹ *D-1356*, pp. 17–18. Reclamation's East Side Canal connection to the Folsom South Canal paralleling the Delta-Mendota Canal along the east side of the Central Valley was never constructed. The New Melones Unit was the only major part of the East Side Division of the CVP that was constructed. According to Reclamation's history posted on its website, "the battle over construction of New Melones Dam was a signal at the end of the era of large dam construction." (FOR 2008 x-8)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_8.pdf.

⁴² *D-1356*, pp. 5–6.

⁴³ *D-1400*, pp. 4 & 7.

⁴⁴ "Compliance with *D-1400* would require 981,000 acre-feet ... in normal water years, and somewhat less in critically dry water years. *D-1400* is not applicable to water rights granted to the Bureau of Reclamation in connection with Folsom Dam, but is a condition appended by the SWRCB to the Bureau's permits to appropriate water from Auburn Dam." At least at the time of its adoption, Reclamation "announced its intention not to comply with *D-1400*." See "Judgement of U.S. District Court Judge Thomas McBride," *NRDC, Save the American River Association, and the Environmental Defense Fund vs. Gilbert Stamm, et al.* April 26, 1974. p. 12, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, pp. A-28–29. Reclamation would adapt, however. By the time of its American River Water Resources Investigation in 1996, it noted, "The State Water Resources Control Board (SWRCB) issued *D1400* in 1972. This decision identifies American River flow requirements based on the assumption that a 2.3 million acre-foot reservoir would be built at Auburn. Since the reservoir was never built, the decision is not legally binding.

Construction Experience and Unexpected Problems

¶32. Construction of the Auburn dam was initiated in 1967 and major construction halted in 1975 after a 5.7 magnitude earthquake occurred near Oroville Dam, an earthquake thought to have been induced by seasonal filling and unfilling of the reservoir.⁴⁵ Seismic investigations at the Auburn site followed and parameters for seismic safety design were adopted by outgoing Secretary of the Interior Cecil Andrus in July 1979 — criteria that were felt to underestimate seismic risks at the site by some of the participants in the evaluation.⁴⁶ Secretary Andrus selected a concrete gravity dam to replace the previous double-curvature thin-arch design that was considered to be vulnerable to seismic failure, although the thin-arch design saved considerable material cost.

¶33. Construction of the Folsom South Canal was initiated in 1970. A post-construction-start environmental impact statement on the Auburn-Folsom South Unit in November 1972 and a supplement in July 1974 with an amendment in September 1974 were prepared by Reclamation. In response to a lawsuit (*NRDC v. Stamm*) filed on December 15, 1972, by the Natural Resources Defense Council, Save the American River Association, and the Environmental Defense Fund, a ruling from the Federal District Court that the 1972 EIS was inadequate was obtained on April 15, 1974.⁴⁷ Briefly, there was a resulting potential injunction on the construction and planning for Auburn dam.⁴⁸ However, with the completion of the amendment to the supplemental EIS, plaintiffs withdrew their objection to the adequacy of the EIS as it concerned Auburn dam. Litigation against the dam ended and did not resume.⁴⁹ The court decision abstained from deciding on the plaintiffs’ complaint relating to the partially completed Folsom South Canal, and

Reclamation, however, does operate Folsom Reservoir such that the D1400 flows are met when possible, measuring American River flows immediately upstream of the City of Sacramento’s diversion near H Street. This operation is known as ‘Modified D1400’ and formed the basis of instream flow requirements for the lower American River in this study.” *American River Water Resources Investigation, Planning Report and Draft EIS/EIR*, January 1996, p. ES-17.

⁴⁵ “Earthquakes and Lake Levels at Oroville, California,” Toppazada and Morrison, *California Geology*, June 1982. (FOR 2008 x-9)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_9.pdf.

⁴⁶ One of the many histories of Auburn seismicity controversies is the 62-page “Earthquake Safety at Auburn Dam, Seismic Safety at Auburn Dam, An Evaluation of Geotechnical Studies,” Anthony A. Finnerty, Ph.D., Department of Geology, University of California at Davis, January 29, 1990.

⁴⁷ “Findings of Fact of U.S. District Court Judge Thomas McBride,” *NRDC, Save the American River Association, and the Environmental Defense Fund vs. Gilbert Stamm, et al.* April 26, 1974, pp. 6–7, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, in particular pp. A-24–25.

⁴⁸ “Opinion Read from the Bench, U.S. District Court Judge Thomas McBride,” *NRDC, Save the American River Association, and the Environmental Defense Fund vs. Gilbert Stamm, et al.* April 15, 1974, p. 10, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, p. A-14.

⁴⁹ This lack of litigation was remarkable considering the controversies of the ensuing decades. The disposition of the project was to prove to be in other venues.

the court retained jurisdiction over this matter. The court ordered Reclamation to notify the court and litigants if a decision is made to extend the canal beyond Reach 2 (the completed 27-mile reach to Rancho Seco Nuclear Power Plant and south of Twin Cities Road between Clay and Herald). Reclamation was also required to provide the plaintiffs 60-days notice before acquiring any land or entering into American River Division water service contracts.⁵⁰

¶34. The deliberations over D-1400 and the EIS challenges to the Folsom South Canal created political shifts within Sacramento County. It began as early as 1962 with the creation of the American River Parkway. By 1972 it could be seen at the Sacramento Board of Supervisors in the Sacramento County Board of Supervisors resolution number 72-031. Here are some key excerpts:

Whereas, the Board of Supervisors of Sacramento County adopted Resolution No. 62160 creating the American River Parkway, which plan has been nationally recognized for its recreational value; and ...

Whereas, the American River Parkway is unique in its concept of providing a large recreation area in a densely urbanized portion of Sacramento County; and

Whereas, adequate flows in the lower American River are essential to the realization of the full potential of the American River Parkway and the Federal, State, and local funds already invested therein; ...

Be it further resolved that the Board of Supervisor of Sacramento County opposes the execution of all permanent Folsom South Canal water service contracts by the United States Bureau of Reclamation and the Secretary of the Interior, and further opposes the funding of Reaches 3 and 4 of the Folsom South Canal until a firm plan for implementation of the requirements of D-1400 relative to minimum flows in the lower American River has been prepared by the United States Bureau of Reclamation for submittal to Congress; ...⁵¹

¶35. Sacramento County also intervened on behalf of the plaintiffs in *Environmental Defense Fund et al. v. East Bay Municipal Utility District*.⁵² Sacramento County, a planned beneficiary of Reclamation irrigation water from the Folsom South Canal, was becoming a defender of the American River Parkway against diversions that might threaten its integrity.

⁵⁰ “Court Order Abstaining and Retaining Continuing Jurisdiction,” Chief United States District Judge Thomas J. MacBride, United States District Court for the Eastern District of California, *NRDC et al. v. Stamm*, March 20, 1974, pp. 3–4, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, Volume 2, pp. A-3–4.

⁵¹ “Sacramento County Board of Supervisors Resolution 72-031,” June 21, 1972, pp. 1 & 2, reprinted in *USBR 1974 Auburn-Folsom South EIS*, Volume 2, September 20, 1974, pp. 284–285.

⁵² 1990 Hodge decision. p. 1. (FOR 2021 x-8)

¶36. Reclamation never made a decision to resume construction or real estate acquisition for the Folsom South Canal. According to Reclamation in 2006, “Work on Folsom South Canal has not been reinitiated primarily due to unresolved issues regarding upstream storage capacity and available water for diversion at Nimbus Dam.”⁵³ Thus, by the middle of the 1970s, the Folsom South Canal construction was at a standstill. The Canal had reached the Rancho Seco Nuclear Power Plant but not San Joaquin County. The Auburn Dam construction stop would not be far behind.

White House Attention to Federal Water Projects

¶37. The principle of meaningful repayment and cost-sharing policies in Reclamation projects dates back to the Reclamation Act itself. And the tug and pull between those policies and the desire of project beneficiaries to reduce their financial burdens helped to shape much of the history of the Reclamation program and the CVP itself. But during the Carter and Reagan administrations, these issues became a major part of the national debate.

The Hit List:

¶38. President Carter started off the discussion with a campaign paper maintaining that the “federal government’s dam building era is coming to an end. Most beneficial projects have been built.” In February 1977, Carter informed Congress of his plans to delete a number of projects from the appropriations bill because of environmental, economic, or safety problems. Auburn dam was on his final, April 18, 1977, list. The following year, Carter announced a policy reform initiative to ensure that projects were better environmentally and that non-federal interests assumed greater responsibility for construction costs of federal water projects. Congressional opposition to the hit list was intense, and Carter’s efforts to influence appropriations bills through most of his Presidency were mostly unsuccessful, but given the construction halt at the Auburn-Folsom South Unit, of little immediate consequence to Reclamation’s Auburn program. But the tumult caused by Carter did have another effect: federal water project authorizations were becoming increasingly difficult to authorize and fund — and the regular authorizing vehicle for Corps of Engineers projects, the Water Resources Development Acts (the WRDAs), were no longer getting through Congress.⁵⁴

⁵³ *Auburn-Folsom South Unit Special Report, Benefits and Cost Update*, Central Valley Project California, U.S. Department of Interior, Bureau of Reclamation, Mid-Pacific Region, December 2006, p. TS-2.

⁵⁴ A federal agency perspective on the Reagan reform years is the 216-page *Reshaping National Water Politics: The Emergence of the Water Resources Development Act of 1986*, IWR, Policy Study 91-PS-1, U.S. Army Corps of Engineers Institute for Water Resources, Martin Reuss, Office of History, Headquarters, USACE, October 1991.

The Reagan Budget Reformers:

¶39. By the time that Ronald Reagan arrived in office in January 1981, Reclamation believed that it had a design for Auburn dam that it could build.⁵⁵ But Reagan’s people were in many ways more disciplined and effective with Congress than Carter had ever been, and soon Reclamation’s efforts to resume construction of Auburn dam became enmeshed in the new realities of Federal water-project financing reforms being implemented by the Reagan team, as well as changing environmental priorities of the country.⁵⁶

¶40. Reclamation’s regional staff began to implement the new policy direction. On April 8, 1982, Reclamation Mid-Pacific Regional Director Mike Catino chaired an important meeting on non-federal financial participation in the Auburn-Folsom South Unit. His remarks hint at the significance of the Reagan reforms — and his public optimism that Reclamation and its partners could rise to the challenge:

I am pleased that you have taken the time to meet with us today to explore this clearly non-traditional concept. To my best knowledge, this is the first such public meeting to address this subject on a project of this magnitude. If, by working together, we can come up with a positive, workable proposal, I am optimistic that we will overcome one of the last major obstacles to construction of this needed project.

...As you know, this Administration is advocating partnership arrangements in water projects both as a device to incorporate more local control over governmental activities and as a means to reduce Federal expenditures.

...Let me set the stage by saying that the present Administration is seeking the participation of non-Federal interests in projects such as the Auburn-Folsom South Unit. At the present time, we have no established guidelines as to format or extent of possible partnership.

...In summary, the reauthorization proposal will be timed to coincide with finalization of the supplemental environmental impact statement and our current Lower American River alternatives study. These documents will contain our proposal to meet the water needs of the Folsom South Canal service area and the flow regimen of the Lower American River. With all of these requirements in place, we should be in an excellent

⁵⁵ “Remarks by Michael A. Catino, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation to Meeting on Non-Federal Financial participation Auburn-Folsom South Unit, CVP Auburn,” California, April 8, 1982. p. 7. (FOR 2008 x-10)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_10.pdf.

⁵⁶ “Non-Federal Funding Urged for Auburn Dam,” Thorne Gray, *Sacramento Bee*, January 19, 1982. (FOR 2008 x-11)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_11.pdf.

position to move to the new Congress for hearings on reauthorization some time after January 1983.

...And now it's your turn. Who wants to be first?⁵⁷

¶41. Michael received some statements of interest, but nothing substantive ever materialized from Reclamation's efforts.⁵⁸ Reclamation was not prepared to request reauthorization in January 1983, nor was Congress prepared to reauthorize the project. Three years later, Secretary of the Interior Donald Hodel was telling the Congress that he saw little future for Auburn dam.⁵⁹

¶42. Congressman Vic Fazio's May 19, 1986, letter to the American River Authority's Robert Dorr contained an insightful analysis of Reclamation's failure to bring the project back. Fazio, who would go on to spend the next decade championing an Auburn dam that could be converted or expanded to multipurpose uses, was a veteran Congressman in the House leadership (he would retire as minority whip). His analysis is wide-ranging and multifaceted, but he believed that in the final analysis, "there are no longer buyers [for Auburn dam] on the terms that the government would demand." Fazio also noted Hodel's remarks, " 'Given disinterest on the part of potential beneficiaries,' he said, 'there was little need for the Bureau to drag itself through another bitter environmental and economic controversy.' "⁶⁰

Who's on First — Which Auburn Dam Are You Talking About?

¶43. In February of 1986, Reclamation's 190-foot-high Auburn dam coffer dam was washed away by floodwaters, Folsom Reservoir surcharged, and Sacramento endured nerve-wracking

⁵⁷ "Remarks by Michael A. Catino, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation to Meeting on Non-Federal Financial participation Auburn-Folsom South Unit, CVP Auburn, California," April 8, 1982. (FOR 2008 x-10)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_10.pdf.

⁵⁸ "Auburn Dam Project Experiences Rebirth," Reed Fujii, *Auburn Journal*, April 9, 1982; "Utilities Willing to Help Pay for Auburn Dam," Paul Barnes, *Sacramento Union*, April 9, 1982; "Department of the Interior News Release," August 6, 1982. (FOR 2008 x-11)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_11.pdf;

FOIA cover letter from Reclamation to Friends of the River, February 9, 1983. (FOR 2008 x-12)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_12.pdf.

⁵⁹ Letter from Representative Vic Fazio, 4th District, California, to Robert E. Dorr, Chairman, American River Authority, May 19, 1986. (FOR 2008 x-13)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_13.pdf.

The American River Authority was the joint powers authority then composed of Placer and El Dorado County Counties and the El Dorado County and Placer County Water Agencies. It had been formed in 1982 to be the non-federal sponsor for Reclamation's multipurpose dam.

⁶⁰ Letter from Representative Vic Fazio, 4th District, California, to Robert E. Dorr, Chairman, American River Authority, May 19, 1986. (FOR 2008 x-13)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_13.pdf.

high water along the American River. Later that year, Congress and the Reagan administration finally reached agreement on cost-sharing procedures and formulas for the Corps of Engineers civil-works program, establishing greater certainty and financial resources for the Corps of Engineers floodwater management programs. But the reforms still offered a substantial Federal subsidy for the flood-control components of Corps projects, 75%, still leaving the Corps with a product to market.⁶¹ These two events, one natural and one political, brought a different focus to the efforts to construct a new Auburn dam, and put Reclamation in competition with a new Federal player for its dam site.

¶44. In Congressional testimony in November 1987, DWR Director Dave Kennedy summed up the new realities facing the Bureau:

The Corps' studies show that 200-year or higher levels of protection can be achieved in a practical manner only by construction of an Auburn. In his May visit to Sacramento, Secretary of the Interior Hodel cited the unlikelihood of early federal financing of the authorized Auburn Dam project. That fact, plus the redirection of the Bureau of Reclamation announced last month, make it clear that the prospects for completion of Auburn Dam under the original plan are growing exceedingly dim. The emphasis on Auburn Dam has now shifted primarily to its potential to provide flood protection. The principal question is whether a single-purpose flood control project or a multipurpose project should be developed.⁶²

¶45. Reclamation recognized this reality, and by July 20, 1987, it had prepared an Auburn Dam Alternative Study for its State/Federal Auburn Dam Task Force.⁶³ The study was accompanied by the following remarks from Reclamation's Mid-Pacific Regional Director, Dave Houston:

Ensuring adequate flood protection for the Sacramento metropolitan area is a critical issue facing the city's residents and civic leaders. The alternatives considered in this report are skewed toward providing that protection, as well as the locally desired instream flows in the Lower American River. (p. 1)

⁶¹ Water and power features of Corps projects had to be paid for by non-Federal beneficiaries (and, for Reclamation projects, fully incorporated in rates), features that were unappealing to traditional Federal water and power project beneficiaries. In WRDA 1996, the flood-control cost share for flood-control features was changed once again, to 65% Federal, 35 non-Federal, diminishing market demand for Federal flood-control projects slightly.

⁶² "Statement of the California Department of Water Resources Before Congressman Vic Fazio's Fact Finding Hearing on Flood Threats Along the Lower American River," p. 2, November 6, 1987. (FOR 2008 x-14) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_14.pdf.

⁶³ *Auburn Dam Report, Auburn Dam Alternative Study*, excerpts, Bureau of Reclamation, July 20, 1987. (FOR 2008 x-15) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_15.pdf.

¶46. But the new realities of cost-sharing continued to threaten the prospects for the dam. Dave Houston concluded his cover letter with the following warning:

Completion of an Auburn Dam depends in large measure on the willingness of non-Federal entities to share in the project costs. If the benefits commonly associated with preserving the flows in the Lower American River are accepted and cost-sharing participants come forward, then a financially feasible multipurpose project could be built. Otherwise, the costs of providing municipal and industrial water supplies and instream flows could make the project too costly for project beneficiaries, and the scope of the project reduced accordingly. (p. 2)

¶47. By February of 1988, Reclamation was losing ground. A Statement of Principles was developed and signed by Sacramento area elected officials (Congressional, legislative, and local government Democrats) to approach the area's floodwater management needs. They favored 1) a single-purpose flood-control dam built by the Army Corps of Engineers, enlargeable *if* water and power beneficiaries could be identified to pay the extra cost to make the dam suitable for retrofit, 2) sunk costs in Reclamation's dam to be assigned to costs of potential conversion to a multipurpose facility, if ever, 3) the extension of the Folsom South Canal deauthorized, and 4) a National Recreation Area created from Reclamation's proposed Auburn dam reservoir lands.⁶⁴

¶48. It would not be easy to turn a dam authorized with such conditions into a Reclamation multipurpose dam, and Reclamation officials knew it. They needed to offer a viable multipurpose alternative to the approach being advanced by much of Sacramento's political leadership.

¶49. But in 1989, after an intense effort to sign up cost-sharing partners for the water and power features of the Auburn dam, Reclamation's efforts (centered on the proposals of their aspiring non-federal co-sponsor, the American River Authority) effectively collapsed.⁶⁵ The year began with the withdrawal of the Sacramento Municipal Utility District from serious negotiations, included an EPA veto of a major western dam, and concluded with the withdrawal of Central

⁶⁴ "Statement of Principles." (FOR 2008 x-16)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_16.pdf.

⁶⁵ "Federal Officials Eyeing ARA Plan Closely," Emily Darby, *Auburn Journal*, January 29, 1989; "Auburn Dam Decision Won't be Soon, U.S. Says," Laura Mecoy, Michael Doyle, *Sacramento Bee*, February 23, 1989; "ARA to Take Dam Plans Back to Washington," Gus Thomsen, *Auburn Journal*, April 4, 1989; "Auburn Dam Puzzle Starting to Come Together," Rod Boyce, *Sacramento Union*, April 30, 1989. (FOR 2008 x-17)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_17.pdf; "Auburn Dam Project Briefing before Sacramento City and County Representatives," Larry Hancock, Acting Regional Director, Bureau of Reclamation, January 29, 1989. (FOR 2008 x-18)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_18.pdf.

Valley Project Contractors Association from support for Reclamation's dam project.⁶⁶ The Sacramento Bee reported the CVP Contractors Association decision in dramatic fashion:

The latest effort to complete a large Auburn Dam suffered a severe blow Friday when the most likely customers for the water said they didn't want a drop from the expensive and controversial project.

The Central Valley Project Water Association, in a short letter to the U.S. Bureau of Reclamation, said it could not support a plan to build the long-stalled multipurpose dam.

One water official requesting anonymity said the rejection amounts to 'a bullet in the head' of the plan by Placer and El Dorado counties [the American River Authority] to resurrect the project.⁶⁷

¶50. Earlier that summer, Reclamation's regional director, Larry Hancock, discussed the situation facing Reclamation with the *Sacramento Union* and was cautious about Reclamation's prospects for reviving the Auburn dam. When asked about the absence of Auburn dam from his list of priorities as the new regional director, he replied:

'We would build a multipurpose facility if that's what's wanted. We are not promoting it or demoting it,' he said. 'From my perspective, the bureau should not be taking, and we are not taking, any position in terms of whether to build a multipurpose large dam.'

'The way we see the Auburn Dam issue now is that the local interests have to come to some type of agreement on what it is they want,' he said.

'...They really have to come to agreement and say...whether they want a project that will provide flood protection only or whether they want a project that will provide a water supply and generate energy and provide additional recreation.

⁶⁶ "SMUD Directors Snub Dam Deals," Anne Heller, *Sacramento Union*, January 20, 1989; "Environment Offsets Interest in Dam Water," Rod Boyce, *Sacramento Union*, March 23, 1989; "EPA Ruling Puts Cloud in Auburn Dam's Future," Rod Boyce, *Sacramento Union*, April 4, 1989; "Big Setback for Auburn Dam Plan," Jim Mayer, *Sacramento Bee*, December 9, 1989; "Announcement Jolts Dam Proponents," *The Press Tribune*, December 10, 1989. (FOR 2008 x-19) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_19.pdf.

⁶⁷ "Big Setback for Auburn Dam Plan," Jim Mayer, *Sacramento Bee*, December 9, 1989. (FOR 2008 x-19) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_19.pdf.

‘Without that consensus from the counties, there’s not very much for the Bureau to do.’⁶⁸

¶51. The following year, the Bureau of Land Management completed its National Recreation Area study of Reclamation’s Auburn dam lands, concluding:

The upper three segments [including the Auburn project lands] are sufficiently spacious, have an abundance of outstanding natural and cultural features, and offer a wide variety of recreational opportunities. They lie with and are adjacent to a fast growing metropolitan area of more than a million people and with a short drive of many more millions. They provide the types of recreation most in demand by local residents, while at the same time offering qualities to attract visitors from a distance. They have the potential to provide even more public benefits under an NRA designation.

Following the established NRA criteria, the combination of these three segments possesses all the qualities envisioned by the federal government in the NRA concept, perhaps conforming even more closely than many established NRAs.⁶⁹

¶52. By 1992 the Corps of Engineers had developed, recommended, and taken to Congress a flood-control expandable dam proposal with the support of the Reclamation Board, the Department of Water Resources, and the Sacramento Flood Control Agency (SAFCA).⁷⁰ In its testimony before the Congress, Reclamation did not offer an opinion on the Corps of Engineers Auburn dam project. The proposed Corps dam was not a multipurpose project, although it might someday become one. Seventeen years after construction had stopped, and twelve years after it had told the Board that reauthorization of the Auburn-Folsom South Unit was required,⁷¹ Reclamation was still not in position to propose a reauthorization of its 1965 multipurpose dam project.

¶53. Reclamation’s multipurpose-dam supporters generally opposed the Corps’ proposal, as did environmental groups (an unusual confluence of interests). However, in his testimony and oral remarks before the House Interior Committee hearing in July of 1992, DWR Director Dave

⁶⁸ “Meters, Big Dam Needed Someday, Water Head Says,” Rod Boyce, *Sacramento Union*, August 21, 1989. (FOR 2008 x-20)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_20.pdf.

⁶⁹ “American River National Recreation Area Feasibility Study,” US Department of the Interior, Bureau of Land Management, California, final, September 1990, pp. ii, iii. (FOR 2008 x-21)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_21.pdf.
 (Exhibit 21)

⁷⁰ *American River Watershed Investigation (ARWI) Feasibility Report FEIR/FEIS*, U.S. Army Corps of Engineers, South Pacific Division, The Reclamation Board, December 1991.

⁷¹ SWRCB 2008 Auburn dam revocation proceeding Stipulation, page 2, paragraph 6.

Kennedy sought to assure multipurpose dam supporters that the Corps dam could be feasibly converted to multipurpose uses as envisioned by Reclamation.⁷²

¶54. But the Corps was not finding the Administration or Congressional political environment easy either. The Corps failed to win the support of the George Herbert Walker Bush administration, which had been unable to reconcile the Corps of Engineers with the critical voices of the U.S. Fish and Wildlife Service and the EPA.⁷³ The Auburn dam authorization bill was not marked up in the House Interior Committee, and it was briefly withdrawn from consideration in the WRDA by the House Public Works Committee by a voice vote.

¶55. The day after California’s senior Senator, Alan Cranston, announced his opposition to the dam (because of Director Kennedy’s assurances to Rep. Doolittle that the dam could be converted to multipurpose uses), the House of Representatives considered an amendment from the ranking member of the Water Resources Subcommittee of the Public Works Committee, Thomas Petri, a Republican from Wisconsin to remove the Auburn dam authorization (the Corps Auburn dam provision had been inserted into the bill by the Rules Committee in a “Chairman’s mark”). Multipurpose dam supporters led by California Representatives John Doolittle, also opposed the Corps dam. The Sacramento Congressional delegation, Representatives Matsui and Fazio, both Democrats, championed the dam. In the end, Rep. Petri’s amendment to remove the Corps Auburn dam authorization from the Water Resources Development Act (WRDA 92) was approved by a vote of 271 to 140. Among those voting with Mr. Petri was Representative Nancy Pelosi (D. San Francisco).⁷⁴

¶56. In 1992, Congress passed the Central Valley Project Improvement Act, enhancing the purposes of the Central Valley Project (providing for a more obvious environmental mission), requiring an anadromous fish doubling plan for CVP streams, and reinforcing Reclamation’s responsibilities to comply with state water law.

⁷² “Statement of Douglas P. Wheeler, Secretary of Resources, and David N. Kennedy, Director, Department of Water Resources, State of California,” Final, Before the House Committee on the Interior, July 23, 1992. (FOR 2008 x-22)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_22.pdf.

⁷³ Department of the Army, “Statement of Morgan R. Rees, Deputy Assistant Secretary of the Army, (Planning Policy and Legislation) Before the Subcommittee on Water, Power, and Offshore Energy Resources, Committee on the Interior and Insular Affairs,” July 23, 1992. (FOR 2008 x-23)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_23.pdf.
 “Federal Agency Comments, Corps of Engineers Auburn Dam, Excerpt from the testimony of Friends of the River before the House Interior Committee,” July 23, 1992. (FOR 2008 x-24)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_24.pdf.

⁷⁴ Congressional Record, Volume 138, Washington, Wednesday, September 23, 1992, No. 131. (FOR 2008 x-25)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_25.pdf.

¶57. The following year, SAFCA formed the Lower American River Task Force, which began the consideration of flood control alternatives not involving Auburn dam. At the same time, the City County Office of Metropolitan Water Planning initiated stakeholder meetings of the Sacramento Water Forum, to explore meeting the Sacramento area’s water supply needs while protecting the Lower American River.

¶58. In January of 1993, Reclamation finalized its finding that most of the river canyon in its Auburn project area was eligible for inclusion in the national wild and scenic river system. This was not the first wild-and-scenic river action on the American River.⁷⁵ In 1972, the state of California added the lower American River below Nimbus Dam to the state wild and scenic river system. In 1978, the Congress added the North Fork of the American River upstream of the Auburn project lands to the national wild and scenic river system. In 1981, responding to a petition from Governor Jerry Brown, Secretary of the Interior Cecil Andrus added the lower American River to the national wild and scenic river system under section 2(a)(ii) of the Federal act.⁷⁶ The American River Parkway Plan is the state wild & scenic river management plan for the lower American River. Its latest iteration, 2008, contains the following provision:

New surface water diversions that deplete flows in the lower American River, whether by execution of a new contract or new water right, to serve entities in counties outside the American River Watershed are inconsistent with this American River Parkway Plan.⁷⁷

¶59. A few years earlier, in 1990, and after seventeen years of litigation, Judge Richard Hodge of the Alameda Superior Court issued a public-trust ruling establishing conditions on potential diversions by the East Bay Municipal Utility District (EBMUD) for receiving 150,000 acre-feet annually of CVP water-service contract deliveries from the Folsom South Canal.⁷⁸ (EBMUD and SMUD held the only significant Reclamation water-service contracts on the Folsom South

⁷⁵ “Determination of Wild and Scenic Eligibility of Segments of the American River, (General Investigation Program),” May 23, 1993, U.S. Bureau of Reclamation. (FOR 2008 x-26) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_26.pdf.

⁷⁶ For a history, background, and some of the consequences of wild & scenic river designations, see “The California Wild & Scenic Rivers Act, With National Wild & Scenic Rivers in California Included in the Chronology,” Friends of the River, 2005–2021. See page 5 for relevant Public Resources Code sections that will apply to San Joaquin County and state departments and agencies, including the Board, in water right applications for potential diversions upstream of the lower American River. Construction of facilities and making institutional arrangements to divert additional water that may affect protected conditions on the lower American River may run afoul of this statute. Acquiring new Federal permits may also run into similar difficulties with various sections of the National Wild & Scenic Rivers Act. (FOR 2021 x-9)

⁷⁷ *Sacramento County American River Parkway Plan*, 2008. Water Flow Policies, #4.3, p. 79. AB 889, adopting this plan by action of the legislature, was signed into law on October 15, 2009. See section 6 of AB 889 for legislative adoption language. (FOR 2021 x-10).

⁷⁸ 1990 Hodge Decision. (FOR 2021 x-8)

Canal.) No party, including plaintiffs Environmental Defense Fund and Save the American River Association and intervenor Sacramento County, appealed the decision. Neither did EBMUD. The ruling’s restriction on dry-year diversions from the American River at Lake Natoma would have consequences. EBMUD does not now divert from Lake Natoma.

¶60. Reclamation effectively remained under the jurisdiction of the U.S. District Court for the Eastern District of California concerning issuance of new water-service contracts in the Folsom South Canal service area under *NRDC v. Stamm* — and Reclamation did not seem to judge the undertaking feasible or worthwhile.

¶61. Change was in the Air.

WRDA 1996, A Republican Congress

¶62. In the 1994 general election, the GOP captured control of both the U.S. House of Representatives and the U.S. Senate — the first time since 1952.

¶63. San Joaquin County joined the American River Authority on November 14, 1995.⁷⁹

¶64. With the shift to Republican leadership in the Congress in 1995, Rep. John Doolittle (R-Rocklin) assumed chairmanship of the Water and Power Subcommittee of the House Resources Committee, Reclamation’s authorizing subcommittee, announcing the beginning of a great new dam-building era for the country. Shortly after that, Rep. Doolittle’s office informed the SAFCA board that he would block any Sacramento area flood-control project unless it was Auburn dam.

¶65. In response, SAFCA, the Reclamation Board, and the Corps developed three different flood-control approaches for the Sacramento area, 1) modification of Folsom Dam’s outlets, 2) adding levee improvements to dam modifications, 3) and a larger, more expensive version of the Auburn expandable flood-control dam than had been carried forward to defeat in 1992.⁸⁰

¶66. Sacramento leaders also invited Placer and El Dorado County water managers to join the Sacramento Area Water Forum, an invitation that was accepted in 1995.

¶67. In spite of Rep. Doolittle’s chairmanship of Reclamation’s authorizing subcommittee, the action stayed with the Corps and its authorizing committee, the freshly renamed House Transportation and Infrastructure Committee. The Sacramento District and South Pacific Division of the Corps of Engineers, the Department of Water Resources, the Reclamation Board,

⁷⁹ “Amendment No. 3, Joint Powers Authority, American River Authority.” (FOR 2021 x-11)

⁸⁰ *American River Watershed Project, California, (ARWP), Supplemental Report and EIS/EIR*, U.S. Army Corps of Engineers, Sacramento District, The Reclamation Board, March 1996.

and SAFCA (by a 7 to 6 vote) supported the Corps Auburn dam proposal. But this time the Chief of the Corps of Engineers, as well as the Department of the Army, did not concur with the proposal. The Corps itself was in disarray, and the lowest echelons of the Corps were out of step with both Corps Headquarters and the Administration. In an interview with President Clinton, local radio listeners learned that the President himself did not think it wise to proceed with the controversial Auburn dam. The Sacramento District's Auburn dam proposal did not make it out of committee.

¶68. Rep Oberstar (D-MN), the ranking member of the full committee, then offered a package of flood-control elements common to the various Corps alternatives, elements recommended by the Chief of the Corps of Engineers, as well as variable storage operations at Folsom Dam. Oberstar's amendment was passed by the Committee and became law with the passage of WRDA 1996.⁸¹

Reclamation's American River Water Resources Investigation (ARWRI)

¶69. In 1991, after the collapse of Reclamation's efforts to make cost-sharing arrangements for Reclamation's Auburn dam, a joint power authority (JPA) of some agencies in Sacramento, with agreements with the American River Authority and the San Joaquin County Flood Control and Water Conservation District, agreed to cost share a Reclamation study on regional water supply options for the Auburn-Folsom Unit of the CVP service area.⁸² The JPA (the Sacramento Metropolitan Water Agency (SMWA)) and Reclamation prepared a planning report with accompanying environmental impact report/statement. The report examined, at a program level, a conjunctive-use option, similar to the emerging Water Forum agreement, and three Auburn dam options. The 1997 final Reclamation/SMWA American River Water Resources Investigation (ARWRI) report concluded that per acre-foot costs of meeting the study area needs were similar (\$400 to \$450 per acre foot), and that the conjunctive use option is the environmentally superior alternative.⁸³

¶70. More significantly, the 1998 ROD and memo from Reclamation Regional Director Roger Patterson⁸⁴ did not propose further Federal actions:

⁸¹ 1996 WRDA press clip excerpts. (FOR 2008 x-27)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_27.pdf.

⁸² *American River Water Resources Investigation, Planning Report and Draft EIS/EIR*, January 1996, p. 1-5.

⁸³ *American River Water Resources Investigation, Planning Report and Draft EIS/EIR*, January 1996, and *Final EIR/EIS, Prepublication Draft*, January 1997, Sacramento Metropolitan Water Authority, U.S. Department of the Interior Bureau of Reclamation.

⁸⁴ ARWRI cover letter and ROD, 1997 and 1998. (FOR 2008 x-28)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_28.pdf.

Reclamation is not proposing to initiate any Federal action to meet the area's needs. Reclamation will, as appropriate, cooperate with local agencies... (Patterson memo, p. 1)

Reclamation has not identified a Federal role for meeting the future water needs of the ARWRI study area; therefore, a Federal program has not been selected. While no Federal action will be initiated to meet the needs of the local area, Reclamation will, as appropriate, cooperate with local agencies as specific water management activities are proposed and implemented. (ARWRI ROD, p. 1)

¶71. SMWA never certified the EIR and no longer exists. Its Sacramento and Placer County members are now members of the Regional Water Authority, which does not work on Auburn dam issues.

¶72. Since 1999, Reclamation budget justification documents submitted to Congress have carried the following words:

Construction of Auburn Dam has been indefinitely deferred.⁸⁵

¶73. In addition, Reclamation, consistent with its 1984 letter to the Board, has also noted in its budget justification documents that the authorization ceiling exceeds the estimated cost of completion and that “[a]ppropriate congressional committees will be advised of the ceiling status of the project. Legislation to provide additional appropriation ceiling would be needed to complete the project as authorized.”⁸⁶

1998 & 1999, WRDA Aspirations

¶74. In 1998, SAFCA embarked on an effort to authorize and construct a package of improved outlet works for Folsom dam and levee improvements, this time with the support of the Department of the Army. Supported by Senator Boxer and Representatives Matsui and Fazio, it was opposed by the Rep. Doolittle and the House leadership, as well as the Reclamation Board. As a result of the impasse, no biennial Corps of Engineers water resources bill (WRDA) passed in 1998. Representative Doolittle introduced legislation to construct a 180,000 acre-foot dam of uncertain design or purpose at the Auburn site and transfer it and the surrounding lands to the State of California. Congressional hearings were held, the bill was marked up by the House

⁸⁵ Bureau Budget Justifications, Auburn-Folsom South Unit, 1999 to 2009, first pages. (FOR 2008 x-30) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_30.pdf.

⁸⁶ 2009 Bureau Budget Justifications, Auburn-Folsom South Unit (complete with cover). I have not reviewed post Auburn Dam water right revocation Budget Justifications for this language. (FOR 2008 x-29) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_29.pdf.

Resources Committee, but was never taken up by the full House.⁸⁷ Reclamation’s involvement in the Congressional deliberations on the dam was to testify that the Administration supported the SAFCA proposal and to note that the transfer of the Auburn dam site to the state of California had “merit and should be considered.”⁸⁸

¶75. In 1999, Representatives Doolittle, Matsui, Herger, and Pombo pushed for a requirement for Reclamation to execute CVP water-service contracts in the upper American River watershed over the objections of Reps. Tauscher, Miller, Dooley, and other members of the San Joaquin Valley Congressional delegation. The House Rules Committee stripped out these provisions, as well as the ambitious levee improvements sought by SAFCA, bringing to the floor modifications to Folsom Dam’s outlet works and more limited downstream levee improvements (proposed by the Reclamation Board) to permit emergency outflows consistent with Folsom Dam’s emergency release diagram to be made with greater reliability. The measure was adopted, the Senate concurred, and the bill was signed into law.⁸⁹ Modeling by MBK Engineers, SAFCA’s consulting engineers, showed the design flood of the WRDA 99 authorized facilities (including the early releases provisions of the project) would equal or exceed the modeled design flood of Reclamation’s Auburn dam authorized in 1965.⁹⁰

¶76. In 2000, the Sacramento Water Forum Agreement was completed and signed by nearly all of its member bodies. The Agreement had two coequal objectives:

Provide a reliable and safe water supply for the region’s economic health and planned development to the year 2030; and preserve the fishery, wildlife, recreational, and aesthetic values of the Lower American River.

¶77. The agreement was a more specific and detailed version of Reclamation and SMWA’s ARWRI conjunctive-use alternative. It involved seven elements: 1) increased surface water diversions, 2) actions to meet customers’ needs while reducing diversion impacts in drier years, 3) an improved pattern of fishery flow releases from Folsom reservoir to be proposed to the SWRCB, 4) a lower American River habitat management element, which also addresses recreation in the lower American River, 5) a water conservation element, 6) a groundwater management element, 7) a Water Forum Successor effort.

⁸⁷ WRDA 1998 press clip excerpts. (FOR 2008 x-31)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_31.pdf.

⁸⁸ “Statement of Roger Patterson, Regional Director, Mid-Pacific Region, Bureau of Reclamation, Department of the Interior, Transcript of the Witness Statement, American River Flood Protection Hearings,” May 1998, Sacramento California.

⁸⁹ WRDA 1999 press clip excerpts. (FOR 2008 x-32)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_32.pdf.

⁹⁰ House Document #305, 87th Congress, 2nd Session, pp. 14–18. (January 18, 1962). (FOR 2008 x-7)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_7.pdf.

¶78. The Water Forum Agreement also called for a revision of Reclamation’s American River water rights permits and a revised declaration of full appropriation on the American River. The Water Forum executed a Memorandum of Understanding with Reclamation in 2006 for a number of flow management actions, including a revision of Reclamation’s American River permits. The Water Forum has developed a number of refinements since 2006, often calling them the “flow management standard” with appellations such as “new,” “revised,” “updated,” or with a year attached. These proposals attempt to optimize storage, releases, and temperature management with the water available. Temperature targets for anadromous fisheries are often not achieved. Upstream depletions from water to made available for release into the lower American River are treated as a drier hydrology, increasing temperature objectives and thus making conditions less suitable for anadromous fisheries.

¶79. The Water Forum did not include San Joaquin County or Reclamation, but there were negotiations with East Bay Municipal Utility District (EBMUD) and El Dorado County water managers. Reclamation, EBMUD, and El Dorado County interests were and are regular attendees of Water Forum meetings. El Dorado Irrigation District holds a procedural agreement with the Water Forum.

¶80. In 2000, the CalFed Record of Decision was signed. Auburn dam is not one of the water storage projects proposed for feasibility investigations.⁹¹

¶81. After months (well, really, years) of meetings among the Department of the Interior, Reclamation, EBMUD, Sacramento County, Friends of the River, Save the American River Association, and Senator Dianne Feinstein, on January 23, 2001, the EBMUD board voted to revise its water-service contract from the Lake Natoma and receive deliveries from Freeport along the Sacramento River.⁹² Reclamation amended EBMUD’s CVP water-service contract consistent with the agreement between the parties. Currently, Sacramento County and EBMUD jointly constructed and operate that diversion to supply Sacramento County Water Agency’s Zone 40 with water right or CVP contract water and EBMUD with CVP contract or other contract water. Consistent with SMUD’s Water Forum purveyor-specific agreement, some of SMUD’s water-service contract deliveries from the Folsom South Canal will be subject to dry-year reductions or cut off when diverted from the Folsom-South Canal.

¶82. In 2001, Friends of the River received a letter from California’s senior senator, Dianne Feinstein, opposing Auburn dam.⁹³

⁹¹ Auburn dam has not appeared in water bond proposals considered by the legislature for more than a decade.

⁹² “EBMUD Pursues Sacramento River Water Supply,” *EBMUD Reports*, March 2001. (FOR 2008 x-33)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_33.pdf.

⁹³ Feinstein Auburn dam opposition. (FOR 2021 x-12)

¶83. In 2002, the Corps of Engineers, the Reclamation Board, and SAFCA proposed the “Long Term Study,” recommending a 7.5-foot flood-control raise of Folsom Dam and initial operations approaches for the project.⁹⁴ The study was conducted under the direction of Section 566 of WRDA 99, consistent with the intent of the Chief of the Corps of Engineers in the 1996 ARWP Chief’s report:

Upon clarification of the cost-sharing policy, and better understanding of the availability of Federal resources, I will make further recommendations concerning implementation for a more comprehensive plan for the American River which would provide a substantially higher degree of flood hazard reduction.⁹⁵

¶84. The project was authorized with the support of Representatives Matsui and Doolittle and Senator Barbara Boxer in the Omnibus Appropriations bill of 2004.⁹⁶

¶85. After the Corps encountered major design and contracting problems in 2005,⁹⁷ Reclamation led a joint Federal effort with the Corps of Engineers to redesign the Corps’ project to consolidate Reclamation’s dam-safety objectives with Corps floodwater-management projects. The Corps, Reclamation, The Reclamation Board, SAFCA, and the Department of Water Resources issued a Project Alternatives Solutions Study (PASS) II report in June of 2006 and an FEIS/EIR in March of 2007 for a joint Folsom Dam Safety and Flood Damage Reduction Project.⁹⁸ The project was authorized in WRDA 2007. The groundbreaking was in January 2008, an event attended by many dignitaries, including the Secretary of the Interior and the Governor of California.⁹⁹ Construction of the new spillway gates and auxiliary spillway was completed in

⁹⁴ *Final Supplemental Plan Formulation, EIS/EIR, Long-Term Study, American River Watershed, California*, U.S.A.C.E, SAFCA, Reclamation Board, February 2002; “Chief’s Report, Long Term Study, 2002.” (FOR 2008 x-34)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_34.pdf.

⁹⁵ “Chief’s Report, American River Watershed,” 1996. (FOR 2008 x-35)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_35.pdf.

⁹⁶ Dam raise deal authorization press. (FOR 2008 x-36)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_36.pdf.

⁹⁷ Folsom Dam outlet works cost overrun. (FOR 2008 x-37)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_37.pdf.

⁹⁸ *Folsom Dam Raise & Auxiliary Spillway Alternative Project Alternatives Solutions Study (PASS II), Final Report*, Bureau of Reclamation, DWR, the Reclamation Board, SAFCA, U.S. Army Corps of Engineers, June 2006; *Folsom Dam Safety and Flood Damage Reduction, Final EIS/EIR, Folsom, California, Mid-Pacific Region*, Bureau of Reclamation, U.S. Army Corps of Engineers, Sacramento District, DWR, The Reclamation Board, SAFCA, March 2007.

⁹⁹ “Finally No Flood Fight,” *Sacramento Bee* Editorial, March 22, 2007; “Folsom Dam Flood Control Project,” Kathy Locke, *Sacramento Bee*, January 12, 2008. (FOR 2021 x-13)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_38.pdf.

2017 and a new water regulation manual adopted in 2019.¹⁰⁰ Once completed with the three-foot flood-control raise of Folsom Dam,¹⁰¹ the inflow design flood for the modified Folsom Dam should exceed 500,000 cfs and the corresponding inflow design flood of the federally authorized 1965 Auburn dam.¹⁰²

¶86. Interior Secretary Kempthorne remarks delivered several days after Rep. John Doolittle announced his retirement, contained the following admission:

Short of building an ark, this is the best protection we can offer the citizens of Sacramento if it happens to rain for 40 days and 40 nights.¹⁰³

¶87. However, the Corps of Engineers has proven that it is interested in doing somewhat better than Secretary Kempthorne promised. The Corps of Engineers would eventually go on to receive appropriations in the Emergency Supplemental Appropriations bill for Puerto Rico hurricane relief sufficient to enlarge the Sacramento Weir and Bypass and improve the reliability of the American floodway so that it can sustain 45,000 cfs in excess of the 115,000 cfs objective release for Folsom Dam.¹⁰⁴

¶88. In 2006, Reclamation completed a report to update the potential costs to construct relevant components of the Auburn-Folsom South Project. Reclamation estimates long-term average annual project yield increases at 208,000 acre feet annually and the cost of the dam to be between

¹⁰⁰

<https://www.spk.usace.army.mil/Media/News-Releases/Article/1874765/updated-folsom-water-control-manual-signed-by-usace-reclamation/> (accessed August 24, 2021). The 2019 Folsom Dam Water Control Manual is considered to be innovative, adopting a broader and more sophisticated forecast-influenced operation than in the control manuals in effect from 1955 to 1986.

¹⁰¹ The 7.5-foot authorized flood-control raise of Folsom Dam was downsized by the Army Corps of Engineers and Reclamation to a 3-foot raise during Corps pre-construction engineering and design on the basis of the marginal costs of going higher than three feet versus the marginal benefits.

¹⁰² “Reference Guide to Flood Control Performance on the American River,” Friends of the River, January 7, 2008. (FOR 2008 x-39) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_39.pdf. “AR Flood Performance Chart, brief, 061206,” Friends of the River, June 12, 2006. (FOR 2008 x-40) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_40.pdf.

¹⁰³ “Remarks as Prepared for Delivery by The Honorable Dirk Kempthorne Secretary of the Interior Groundbreaking of Joint Federal Project Folsom Dam and Reservoir Sacramento, California,” Department of the Interior, January 11, 2008. (FOR 2008 x-41) https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_41.pdf.

¹⁰⁴ The Central Valley Flood Protection Board’s *Central Valley Flood Protection Plan* of 2012 and its 2017 Update also include expansion of the capacity of the Yolo Bypass, the receiving waterway of the American and Feather Rivers during major flood operations. SAFCA is also in discussion with upstream reservoir operators regarding investments in their physical works and operational plans that may allow them to conduct flood-control operations of their reservoirs.

\$6 and 10 billion.¹⁰⁵ According to the *Sacramento Bee* reporter's interview with Reclamation Folsom Area Manager Mike Finnegan:

For now there is no plan to resume additional construction on Auburn dam; doing so would require Congressional legislation.

'We are simply delivering the report as we were required to do, and that's pretty much the end of the story,' Finnegan said.¹⁰⁶

Buttoning Up the Project

¶89. Reclamation had been demobilizing the Auburn Dam construction effort since the 1980s.¹⁰⁷ Its project facilities are now used by others.¹⁰⁸ And on May 29, 2008, Rep. Doolittle presided over the dedication of a restored river with the closure of the Auburn dam diversion tunnel and a new, permanent pump station to allow the Placer County Water Agency to deliver Middle Fork Project water to its service area — without Auburn dam. Citing Reclamation law and California law requiring that diversions have a beneficial use, California's Attorney General had made a request to Reclamation that the river be restored, and this project was how Reclamation responded.¹⁰⁹ The retiring Rep. Doolittle made an impassioned speech for Reclamation's Auburn dam and its water right while the restored river gurgled past the assembled dignitaries and invited guests.¹¹⁰

¹⁰⁵ *Auburn-Folsom South Unit Special Report, Benefits and Cost Update*, Central Valley Project California, U.S. Department of Interior, Bureau of Reclamation, Mid-Pacific Region, December 2006, pp. TS-3, TS-10–12.

¹⁰⁶ "Dam Cost Skyrocket," Gus Thomson, *Auburn Journal*, January 30, 2007; "Auburn Dam Price Tag Soars," Matt Weiser, *Sacramento Bee*, January 31, 2007; "Spending More Now to Study Auburn Dam Would be Wasteful," *Auburn Journal* Editorial, January 30, 2008; "Forget an Auburn Dam," *Sacramento Bee* Editorial, February 1, 2008. (FOR 2008 x-42)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_42.pdf.

¹⁰⁷ "Right Now, Just a Giant Idle Hole, Dam: Weeds Grow Amid Site," Rod Boyce, *Sacramento Union*, January 22, 1989; "4 Hold Jobs and Hope at Auburn Dam Site," Patrick Hoge, *Sacramento Bee*, July 24, 1989. (FOR 2008 x-43)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_43.pdf.

¹⁰⁸ "Gary Estes Demobilization of Auburn Dam Construction memo." (FOR 2008 x-44)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_44.pdf.

¹⁰⁹ "California Attorney General memo to Reclamation on restoring the American River," Bill Lockyer, September 29, 1999. (FOR 2008 x-38)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_38.pdf.

¹¹⁰ "Doolittle, Restored River Get Star Treatment at Pump Plant Dedication," Gus Thomson, *Auburn Journal*, May 29, 2008. (FOR 2008 x-46)

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_46.pdf.

Retrospective on Due Diligence

¶90. Since construction of Auburn dam was halted in 1975, no Administration has submitted a recommendation to Congress to authorize or reauthorize an Auburn dam — of any kind. Thirteen bills have been introduced by members to do so. None have passed even one House of Congress; one (HR 4211) formally cleared a committee, but it was not taken up on the floor of the House, another was defeated by a large vote on the floor. The U.S. Supreme Court, (the New Melones decision) has affirmed the requirement of Reclamation facilities to comply with state water law, a provision of Reclamation law reaffirmed by the Congress in 1992 in the Central Valley Improvement Act.¹¹¹

¶91. On December 3, 2008, the State Water Resources Control Board, over the objections of Reclamation and San Joaquin County and county entities, revoked Reclamation’s Auburn dam permits 16209, 16210, 16211 and 16212 for lack of diligence (WR Order 2008-0045). The revocation drew comments.¹¹²

¶92. Nearly ten years later, and nearly thirteen years after San Joaquin County joined the American River Authority, on June 25, 2018, the American River Authority voted to dissolve.¹¹³

Postwar plans to divert the South Fork American River (Coloma to Folsom Reservoir)

¶93. The postwar World War 2 planning discussion for the major South Fork American River storage and diversion projects in the reach that presumably forms the basis of, or at least inspiration for, San Joaquin County’s Application No. 29657, could be said to be given its most authoritative federal voice in *Senate Document 113, Eighty-First Congress, First Session, Our Rivers: Total Use for Greater Wealth, Central Valley Basin*, “A Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Comments from the State of California and Federal Agencies,” USDOJ, USBR, August 1949. (1949 USBR CVP total use report)

¶94. In Reclamation’s “Plan for Basin Development” chapter, Reclamation notes the following:

On American River two principal reservoirs are contemplated: Folsom Reservoir on the main stem and Coloma Reservoir on the South Fork. The respective capacities would be 1,000,000 and 800,000 acre-feet. (p. 126)

¹¹¹ “Summary of Legislation to Authorize or Reauthorize Auburn Dam.” (FOR 2008 x-47)
https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/exhibits/x_47.pdf.

¹¹² Auburn dam revocation press clips. (FOR 2021 x-14)

¹¹³ Item D, Minutes of the American River Authority, June 25, 2018. (FOR 2021 x-15)

¶95. The State California’s comments incorporated into the “1949 USBR CVP total use report” provide a little more definition to the South Fork American River project:

Coloma Reservoir: The report under review does not give the definite location of Coloma Dam site. However, it is believed to be at the same site as that for the Coloma Dam of the State water plan, which is on the South Fork of the American River about 9 miles downstream from the settlement of Coloma.

The reservoir capacity proposed in the report under review is 800,000 acre-feet, of which 86,000 acre-feet would be dead storage The bulk of the land that would have to be acquired is steep, rocky slopes covered with brush and small trees The principal improvements flooded are the settlements of Coloma and Lotus, several miles of State highway and a county road. The dam proposed would be of the gravity-concrete type with a height of 363 feet above stream bed. Coloma power plant proposed in the report under review would have an installed capacity of 40,000 kilowatts and an estimated average annual electric-energy production of 130,000,000 kilowatt-hours.

Salmon Falls Afterbay: Salmon Falls afterbay below Coloma Dam as proposed in the report under review would develop the head between Coloma and Folsom Reservoirs for power production The Salmon Falls afterbay power plant would have an installed capacity of 12,000 kilowatts and an estimated average annual electric energy production of 55,000,000 kilowatt-hours. (pp. 362–363.)

¶96. Bulletin No. 3, the 1957 California Water Plan, discusses this site as one reservoir:

The basic plan also contemplates that major conservation of waters of the South fork would be accomplished in a large Salmon Falls Reservoir, a feature of the California Aqueduct System, with dam and power plant located at the head of the South Fork Arm of Folsom Reservoir. In its local function, Salmon Falls Reservoir would afford excellent opportunity for fishing and recreational development as well as increase the degree of flood protection made available to downstream areas. However, this important reservoir, would, unfortunately, inundate the site of gold discovery in California; and as a consequence thereof the Legislature had directed that “In no event shall a permit to appropriate water be issued by the state for the purpose of a project which would flood any portion of the Gold Discovery Site State Park at Coloma unless such issuance is specifically authorized by law.” Studies indicate that there are no feasible alternative storage sites for a large reservoir on the South Fork. (p. 115)

¶97. The Gold Discovery Site State Park notwithstanding, the proposed Coloma/Salmon Falls Reservoir for many decades has also been the site of the actual “Coloma-to-Lotus” and “Gorge” whitewater boating runs on the South Fork of the American River, the most popular whitewater river in California.

¶98. Inspection of the provided maps in *Bulletin 3* (sheets 8 & 8a) and the 1945 *1949 USBR CVP total use report* map, show similar reservoir location impacts.¹¹⁴

San Joaquin County Lake Natoma or Salmon Falls Diversions

¶99. In the applications decided in the Board’s 1958 D-893, San Joaquin County parties sought rights for Lake Natoma diversions, all denied because they had no right of access to Reclamation’s facilities there. The South Fork American River diversions that involved the proposed Coloma/Salmon Falls reservoirs were denied because they relied on projects with proposed reservoirs that would inundate the California gold discovery site. (Water Code 1001.5)

¶100. Presumably, San Joaquin County could reduce the size of the reservoir to avoid the gold discovery site and state park. However, it is unclear what the size of the South Fork American diversion facility that San Joaquin County’s 1990 diversion Application 29657 contemplated, or may contemplate in the future, if it is unable to make arrangements for use of, or afford to use, others’ facilities. But a diversion dam of even modest significance at Salmon Falls would have an obvious adverse impact on South Fork American River whitewater recreation.¹¹⁵ It is not clear if San Joaquin County has contemplated this complication — or the costs of mitigating this impact. According to its original 1990 Application 29657, the Salmon Falls point of diversion was the secondary point of diversion if contracts with Reclamation could not be arranged to use Reclamation’s Lake Natoma and Folsom South Canal facilities.

Another Retrospective on Diligence

¶101. San Joaquin County’s 1990 Application 29657 has been amended four times. This year, the County and the City of Stockton have told the hearing officer that they are contemplating returning to the County’s original application and attempting to resurrect a 1950s-era water project or projects just upstream of a state and federal wild & scenic river with significant and challenged public trust resources. The 1950s-era projects here have failed many times. The proposed annual diversion amount, 147,000 acre-feet, is essentially the diversion amount that EBMUD proposed. EBMUD moved its diversion downstream.

¹¹⁴ *Bulletin 3* sheet 8 and sheet 8a are pretty detailed, and portions of it have been made into FOR 2021 x-16. The DWR map depicts a single “Salmon Falls dam” with a toe generator for the “California Aqueduct System” purposes (sheet 8). The SMUD-recommended map show a large Coloma reservoir and powerhouse with a Salmon Falls afterbay and powerhouse (sheet 8a) but built for local use. They both occupy similar landscapes. The corresponding map in Reclamation’s *1949 USBR CVP total use report*, is a statewide foldout, fragile, awkward to produce into an exhibit, and is not included in FOR 20201 x-16.

¹¹⁵ The modern Salmon Falls Bridge is adjacent to the take out for the South Fork American River “Gorge” whitewater rafting run. The average “fall” of the “Gorge” is 23 feet per mile. The take out is managed by the California Department of Parks and Recreation.

¶102. The hearing officer would do well to determine whether San Joaquin County is proposing to resurrect this at this time. Whether it does or not, does San Joaquin County, after a three-decade-long application, really have a project to propose and construct at his time? If not, then perhaps the hearing officer, too, as I described earlier, may find herself in the same circumstance that a previous Board, also in the 1950s, found itself in. They expeditiously reached an inevitable conclusion:

“The applicants have no immediate plan or purpose to proceed promptly with construction In such cases the Board has little choice in the action to be taken since it is a settled principle that an application to appropriate is not a proper instrument to make a reservation of water for a development at an indefinite and uncertain time in the future.” (D-893, p. 54)

Area of Origin Claim

¶103. The County and the City of Stockton make a curious argument in their March 19, 2021 Joint Conference Statement in the hearing record for this proceeding. I realize that we all can be pressed for time, and the fashioning of our arguments can sometimes suffer because of that. With the principle of charity in mind, I believe that I can clarify the argument being made by the County and offer some real-world context. I first quote the County’s and Stockton’s Joint Conference Statement, then I offer my commentary.

The Application, which includes the County’s movement of its point of diversion to Freeport on the Sacramento River, is made under the Watershed Protection Act. (Wat. Code, §11460 et seq.) The County’s use of the American River water meets the definition of a water right in a protected area since it is immediately adjacent and can be conveniently served from the American River Watershed. The Watershed Protection Act provides that the County, as a new inbasin water user, first priority to natural flows for all County in-basin water use, first priority to natural flows for all County’s in-basin purposes, and would give the County a higher relative priority than the water right of the Central Valley Project (“CVP”) and State Water Project (“SWP”) exporters. The protection of the County’s rights under the Watershed Protection Act is specifically included in SWRCB Decision 1356 (“SWRCB Decision 1356”). SWRCB Decision 1356 requires that the rights established through that decision are “subject to reduction by future appropriation of water for reasonable beneficial use within the watershed tributary to Folsom and Auburn Reservoirs.” (pp. 3–2)

Reply

¶104. The County is a potential beneficiary of the Watershed Protection Act. But that would clearly be because it is in the watersheds of Reclamation’s facilities on the San Joaquin and Stanislaus Rivers. San Joaquin County might wish to make the case that all or part of the County

is also in the Sacramento River watershed. Whether it wishes to or needs to or not, the County could make a more powerful argument that it, or at least portions of it, are in an immediately adjacent watershed (the Sacramento River watershed) from which the County could be conveniently supplied. However, the County is proposing to divert water from the Sacramento River but with water rights being sought from the South Fork of the American River and contemplating moving its diversion back to Lake Natoma on the former main stem of the American River. I would offer that this makes for an unnecessarily complicated and limited proposed water right. The County should reconsider whether this is the water right it should be seeking.

¶105. More than half a century of experience has amply demonstrated that San Joaquin County can not be *conveniently* served by Lake Natoma or by the South Fork American River as a point of diversion or diversions.

¶106. The next part of San Joaquin County and Stockton's Joint Conference Statement probably needs a rewrite. It is true that it cannot claim the right to more than the natural flows of the American River, presumably since it may not be contemplating storage facilities on the South Fork American. Natural flows on the American River can get pretty low — and the trend may be getting worse. This suggests that the water right application may be misconceived. If permitted, it may not be as bountiful as a water right from the Sacramento River, for example, for which the South Fork of the American is, in comparison, but a small tributary.

¶107. It is not true that the Watershed Protection statutes give it first priority to the American River. There are other diverters and public trust uses in the watershed. If the County were to receive a water right to divert on the American River or its South Fork, its rights would be junior to other non-federal water right holders and its prospective right would be subject to the limitations of the public trust.

¶108. The County uses shorthand when it says that its proposed Watershed Protection statute right would be senior to the CVP and State Water Project. The Water Code provision (§11460 et seq.) that it is relying on is, of course, somewhat more nuanced.

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

¶109. It is true that the statute is construed to apply to Reclamation, not just the Department (DWR). However, as I noted earlier, of all the CVP watersheds that San Joaquin County is actually in or immediately adjacent to, the one watershed that it is unarguably only adjacent to is the one with a demonstrated lack of convenience in supplying.

¶110. The next part of San Joaquin County and Stockton’s Joint Conference Statement assertion of first priority brings up another nuance of the statute. The statute is generally interpreted that areas of origin “shall not be deprived by the department” (now including Reclamation) directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.” (1) Note this also imposes a duty on Reclamation (and the Board enforcing state law) not to deprive the beneficial needs of *the watershed*, not just consumptive uses in an adjacent watershed. In the modern understanding, watersheds include watershed rivers and their consequent public trust resources (2) The duty not to deprive is “to all the water that is *reasonably required* for an *adequate supply*” This requires an exercise of judgement by the Board, which may come to conclusions different than the County. (3) An award of water rights to an adjacent watershed from a watershed with existing diverters and public trust challenges may not be the only or best way for Reclamation not to deprive the County of water

¶ 111. Finally, the discussion of the provisions in D-1356 is misdirected. Reclamation’s water rights affected by D-1356 were revoked in 2008. However, as I noted earlier in this witness statement, the earlier Board decision on the Folsom Dam water rights (D-893, p. 52) contains essentially the same language, although not applicable to San Joaquin County. When applicable, the second clause is just as important as the first. From earlier in my statement about D-893:

These CVP permits were “subject to reduction by future appropriation of water for reasonable, beneficial use with the American River watershed tributary to Folsom Reservoir, provided that releases past Nimbus Dam are sufficient at all times to satisfy demands under downstream rights and requirements for fish conservation and salinity control.”

¶ 112. It should be inescapable that no part of San Joaquin County contains land tributary to Folsom Dam. This language only makes sense in the context of the other part of the “Area of Origin” statutes, the so-called “County of Origin” law. (Water Code Section 10505)

No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.

¶113. This statute guides the Board in its administration of the use and holding of state filings. These filings have no diligence requirements and were made by the state for purposes “required in the development and completion ... of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.”¹¹⁶ State filings are also used, as in the preceding paragraph, in various ways to reserve water for counties of origin, in this case for Placer and El Dorado Counties and secondarily Sacramento County. San Joaquin

¹¹⁶ Cal. Water Code §10500.

County is not a county of origin in the American River watershed. Neither does its application involve assignment or release from priority of a state filing.

Conclusion

¶114. The major diversion proposals on the American River have disappeared over the intervening half century. Proposals to use the Lake Natoma diversion for deliveries into the Folsom South Canal have withered in favor of more downstream diversions. Existing and prospective American River diverters have made agreements to use (or more heavily use) downstream diversions or groundwater in order to protect desired lower American River resources. These trends are real. It is not clear how San Joaquin County intends to succeed where others have adapted to the currents of history. It is not even clear that they have the intent to succeed in the near-term sense.

¶115. San Joaquin County has had well more than half a century to pursue the idea of an American River diversion from Lake Natoma or the South Fork American River. It has had more than three decades to pursue Application 29657 with little apparent forward progress or activity in the sense of the Board's administration of diligence requirements. As the County has informed the Board many times, it has not met with success with either contracts from Reclamation from Reclamation's project or the County's water rights application. The status of the proposed project appears to be in flux (if the County has a proposed project). It has no immediate plans to proceed. In the view of this circumstance, the Board may have little choice but to cancel the application.