

STATE WATER RESOURCES CONTROL BOARD

**In the matter of Revocation of
Permits 16209, 16210, 16211, 16212
(Auburn Dam)**

POLICY STATEMENT OF THE WESTERN STATES ENDURANCE RUN FOUNDATION

Pursuant to the Board's notice of public hearing and prehearing conference, paragraph 6, the Western States Endurance Run Foundation ("Western States") submits the following policy statement for consideration at the public hearing of 24 July 2008.

Interest of Western States

Western States is a charitable, non-profit corporation whose purpose is to promote the preservation and enhancement of the Western States Trail between Squaw Valley and Auburn, California, and its surrounding environment; and to conduct along that trail the annual Western States 100-Mile Endurance Run. The trail and run follow the Middle Fork American River from its origin at the Sierra crest and Granite Chief Wilderness, into the town of Auburn below the confluence of the North and Middle Forks.

The Western States Trail has been designated by the Secretaries of Interior and Agriculture as a National Recreational Trail. Portions of the trail are listed in the National Register of Historic Places: the segment between Michigan Bluff and Last Chance, and No Hands Bridge below the confluence of the North and Middle Forks American River. A bill (S.2909, Boxer and Feinstein) is presently pending in Congress to authorize the study of the trail for designation as a National Historic and Scenic Trail.

The Western States Run was established in 1973 when a sole runner participated on foot and completed the Western States Trail Ride (Tevis Cup); Western States was separately incorporated in 1977. In the 34 years in which the

run has been presented, it has come to be known as the world's premiere (or in the words of The New York Times, crown jewel) trail ultramarathon event. The run draws participants from throughout the United States and many other nations.

As the run evolved, its governing Western States corporation expanded its activity to include the charitable ones of trail preservation, medical research, athletic education, and community support. In recent years Western States in collaboration with other public and private partners has contributed to the National Register listing of the trail and of No Hands Bridge, to the State Parks acquisition of the Pointed Rocks Ranch that lies between the canyon and the settlement of Cool, and to trail repair and enhancement (approximately 1,850 person hours in the preceding 12 months).

Were the Auburn Dam to have been constructed, the project would have resulted in periodic inundation of most of the last 35 miles of the Western States Trail, the portion west and downhill of Foresthill toward Auburn. This portion of the trail, while closest to the finish of the 100-mile run, actually forms some of the most remote and challenging sections of the trail; the steepness of the canyon walls dictate that once runners leave Foresthill, they do not encounter another paved road for 16 miles, and access by any means is even more restricted than in the high country. Were the dam to have been built, the Western States Run would cease to exist in the challenging form that distinguishes it.

For these reasons, Western States has for most of the past twenty years become an active advocate in favor of this project's elimination. We did not come lightly to that role, preferring not to enter a dispute that two decades ago sharply divided the communities that host Western States. In the end our runners questioned our neutrality and convinced our trustees to take an active role necessitated by the dam's threat to the Western States Trail

Argument in Favor of Revoking the Permits

California Water Law and Policy Require that Waters of the River Be Dedicated to the Public Values of Environmental, Cultural, and Recreational Quality.

“Ich llied’ und besitz’: lasst mich schlafen.” (“I have and I hold; let me sleep”
– Fafner in Siegfried, Act II.)

The saga of the Auburn Dam and the saga of Wagner's *Ring des Niebelungen* have much in common. Past proceedings under the subject permits have taken as long as some productions of the *Ring*. Indeed, it has taken even longer to resolve Auburn Dam as it took Wagner to compose it.

Now comes the State Board staff, brave as Siegfried, to wrest the water rights from the sleeping dragon and restore the treasure to its river of origin. California law and policy, embedded in the Constitution, the public trust doctrine, and sections 1390 and 1410 of the Water Code, not merely support but compel this heroic effort. Western States supports it.

The Board's duty to revoke, embedded in section 1410 ("There shall be cause for revocation of a permit if ... the water is [not] applied to beneficial use ...") enforces section 1390, which provides that a permit is effective only so long as the water is actually appropriated "for a useful and beneficial purpose." Indeed the very first reported California water law case terminated the rights of those who sought to take back water they had left for others to make productive use of. (*Eddy v. Simpson* (1853) 3 Cal.249; see W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* (1956) p. 287.) At common law, failure to place a water right to beneficial use for five years would be deemed an abandonment of that right, in order to encourage the prompt beneficial use of that water by others.

This result is compelled by both article X, section 2 of the Constitution, and the public trust doctrine. The Constitution requires that the waters of the state be not wasted but put to the highest use of which they are capable; these uses include preservation of the natural environment. (*Environmental Defense Fund v. East Bay Municipal Water Dist.* (1980) 26 Cal.3d 183.) The public trust doctrine requires that all agents of the State reconsider past actions that harm the values of navigability, ecological quality, cultural preservation, and recreation; and affirmatively preserve those values whenever feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; see J. SAX, *PLAYING DARTS WITH A REMBRANDT* (1999).) Both mandates apply to this, as all other, Board proceedings.

The Lingering Permits Have Frustrated Development of the American River to its Fullest and Recognized Public Trust Uses.

In the present case, the Bureau of Reclamation ceased its efforts to build the works of diversion and storage in 1976. That period is six times the common-law prescriptive period of five years. Other potential water consumers would have long been entitled, were the river otherwise not "fully appropriated" for both consumptive and public trust needs, to claim the water back of the subject permits for human development elsewhere. Western States here asserts that at least as much as prospective appropriators, public values and potential in the American River Canyon have also been prejudiced by the permits now of record. As a corollary, as will be shown in the next part, release of the permits will enhance the natural, cultural, and recreational values in the American River Canyon, and thereby promote reasonable, beneficial and public trust use.

In 1992 the Bureau of Reclamation published the AUBURN STATE RECREATION AREA INTERIM RESOURCES MANAGEMENT PLAN, which had been prepared by the

American River District of the California Department of Parks and Recreation. That plan noted “the diversity of both the resources and recreational uses within the Auburn SRA,” (*op. cit.*, p. i), including “the Western States Trail, a federally designated national trail ... This historic trail ... is heavily used by hikers, runners, and equestrians.... [and] is now the route of two world-famous 100-mile endurance races ...” (*op. cit.*, p. 35).

Reclamation’s plan cautioned, however,

As the future of the Auburn project lands is not clear, it is Reclamation’s intent to not encourage additional public use during this interim period or to construct permanent facilities which would be inundated or could be affected should a dam and reservoir project be built.

(AUBURN SRA PLAN, pp. iv, 93.) Thus, Reclamation as holder of the subject permits recognized 16 years ago that these unexercised permits deprived the American River canyons of their fullest development as a public resource.

Notwithstanding Official Bureau Policy to Discourage Public Trust Uses, Federal and State Initiatives, Ratified by the Public’s Use, Promote the Public Trust as the Preferred Sequel to the Obsolete Permits.

Other agencies, the Bureau itself, and the public, however, were fortunately not deterred *de facto* what Reclamation initially sought to protect *de jure*. In 1991, the Bureau of Land Management, recognizing that construction of Auburn Dam would inundate the Western States Trail and replace endurance challenges with use that is “short and relaxed,” concluded that the corridors of all three forks of the American River “definitely qualify as an NRA.” BUREAU OF LAND MANAGEMENT, AMERICAN RIVER NATIONAL RECREATIONAL AREA FEASIBILITY STUDY (Final, 1990) pp. 33, 67.) The NRA

would result in a significant recreational resource that includes a major U.S. river, with its diverse environmental associations.... This NRA would make available to the public, in a single recreational area, the total progression of a river, i.e., the varying stages of the water as it flows downward through the elevational stair-steps of the various ecosystems.

(*Ibid*, p. 67.)

Two years later Reclamation, as part of the ARWRI, concluded that three segments of the American River held “outstandingly remarkable values” that qualified them for eligibility as National Wild and Scenic: the Middle Fork from Oxbow Dam to the confluence, the North Fork from Colfax-Iowa Hill to the confluence, and the merged river from the confluence to the then-existing Auburn Dam diversion tunnel. (Bureau of Reclamation Mid-Pacific Regional Office Determination (Feb. 23, 1993). In the Middle Fork segment, the Western States

Trail is identified as one of the “outstanding remarkable values” contributing to the river’s wild and scenic eligibility. (*Id.* at p. 6.)

Of equal import, the public voted with its feet. In response to a Congressional authorization to update the cost-benefit analysis of the Auburn-Folsom South Unit, the Bureau of Reclamation concluded

Existing visitation at ASRA, without Auburn Dam, is much greater than originally forecasted in the 1965 authorization. *It is possible that construction of Auburn Dam may lead to a reduction in recreational benefits ...* Based upon applicable assumptions the analysis indicates a change in recreational benefits anywhere from a reduction in benefits of \$22.0 to a gain in benefits of \$6.0 million.

(BUREAU OF RECLAMATION MID-PACIFIC REGION, AUBURN-FOLSOM SOUTH UNIT: SPECIAL REPORT: BENEFITS AND COST UPDATE (2006), p. ES-4 (emphasis added).) Based on contemporary without-project recreational use that has vastly exceeded 1963 expectations, the report concluded for the Auburn SRA that *not building the dam* would result in net *benefit increase* of \$5 million. (*Id.* at p. III-33.)

And finally, to the credit of Congressman John Doolittle, the Bureau, and State Parks, substantial federal and state investments *have* been made in the use of the American River canyon in its natural state. When the 1986 floods impaired the stability of the historic No Hands Bridge on the Western States Trail, Congress under Mr. Doolittle’s leadership invested approximately \$800,000 to restore the bridge, and the Bureau then secured its National Register listing. When the Pointed Rocks Ranch became available for purchase, State Parks in 2007 invested in this, its first ownership, in the Auburn SRA. Reclamation and the Placer County Water Authority have invested in removal of the cofferdam and diversion tunnel at the former dam site, re-establishing the public trust in the river’s natural flow.

Conclusion

The Board’s revocation of the permits will remove a major obstacle to establishment of an American River National Recreation Area. The Board has not hesitated in the past to revoke permits that frustrated the full development of a stream system. For the development of public trust values, placing American River waters “to beneficial use to the fullest extent of which they are capable,” the subject permits should also be revoked.

Dated: 15 July 2008

Respectfully submitted,

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