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10 STATE OF CALIFORNIA

11 STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of:

13 FISHERY RESOURCES AND WATER
 14 RIGHT ISSUES OF THE LOWER YUBA
 RIVER
 15

CLOSING BRIEF OF SYRCL *ET AL.*
 ON THE RECONSIDERATION OF
 WATER RIGHT DECISION 1644

16 Pursuant to the Board's direction after supplemental hearing on June 5 and June 6, 2003,
 17 SYRCL *et al.* hereby submit this closing brief on the Board's reconsideration of its Decision
 18 Regarding Protection of Fishery Resources and Other Issues Relating to Diversion and Use of
 19 Water From the Lower Yuba River (Decision 1644), adopted by the Board on March 1, 2001.

20 The recent supplemental hearing addressed four narrow, discrete issues: (1) whether the
 21 depositions of former or present Board staff members show that any party was denied a fair
 22 hearing or due process of law in the proceedings leading to Decision 1644 ("D-1644"); (2)
 23 whether D-1644 should be revised based on fishery issues evidence presented in the
 24 declarations of William Mitchell and Paul Bratovich; (3) whether D-1644 should be revised
 25 based on the evidence on water demand and usage presented in the declaration of Curt Aikens;
 26 and (4) whether D-1644 should be revised based on California Energy Commission evidence
 27 regarding present and projected electricity demand conditions.
 28

1 The answer to the first three questions is a resounding "NO." The Board, however,
2 must answer "YES" to the fourth question, and strike D-1644's interim instream flow regime
3 established in response to the state's energy crisis of 2000, because no such energy crisis
4 presently exists nor is forecasted to exist within the timeframe of the interim flow regime.
5 Because this fourth issue is the only Supplemental Hearing issue requiring the Board to revise
6 D-1644, we address it immediately below.

7 **ISSUE (4).** The Board should revise D-1644 to eliminate the interim flow regime and
8 institute forthwith the Decision's long-term instream flow requirements. The Board set D-
9 1644's interim flows for only one reason: "the critical electrical power situation in California at
10 the present time"—that is, the State of Emergency declared by the Governor due to the energy
11 shortage of year 2000. D-1644 at 127 & n. 45. That state of emergency has ended, and thus so
12 should the interim flow regime.

13 The California Energy Commission—this state's expert energy agency—and its
14 testifying expert witness David Ashuckian have made it clear that even using conservative
15 projections California will have ample energy supply through April 2006, the expiration date of
16 the interim flows. The Board should give great weight to the factual conclusions of this state's
17 expert energy forecasting entity and its expert staff member Mr. Ashuckian.

18 Moreover, the testimony of Yuba County Water Agency's witness Lon House did not
19 counter the fact that the energy shortage is over. Indeed, he conceded that California's energy
20 supply is better now than it was in 2000, that more power plants are coming on-line, that
21 government agencies are more aware of market manipulation, which greatly contributed to the
22 energy shortage of 2000, and he further conceded that at present energy supply is growing at a
23 faster rate than energy demand. In short, his testimony simply did not rebut the powerful
24 evidence that the 2000 state of emergency is over and that California's energy supply is more
25 than capable of satisfying demand through the end of the interim flow timeframe.

26 Therefore, because the sole basis for the interim flow regime no longer exists, the Board
27 should revise D-1644 to eliminate that regime and order immediate compliance with the
28

1 Decision's long-term flow requirements. The other issues addressed during the supplemental
2 hearing, however, warrant no revision to D-1644, as explained below.

3 **ISSUE (1).** The allegation that the hearings leading to D-1644 were unfair, or deprived any
4 party of due process, borders upon the frivolous. As regards biologists Mr. Meinz and Ms.
5 Low, nothing whatsoever in their respective depositions indicates any bias for or against any
6 party. More importantly, no evidence even remotely suggests that any such bias may have
7 tainted their professional judgments as biologists. Absent such evidence, the Board must reject
8 any inference, much less any conclusion, that the involvement of Mr. Meinz and/or Ms. Low
9 improperly affected the D-1644 proceedings or D-1644 itself.

10 Likewise, there is no evidence suggesting that any bias tainted the managerial oversight
11 functions or the legal judgments of Board attorney Mr. Sawyer. In his free time, Mr. Sawyer
12 performs a valuable civic service by volunteering for the Motherlode Chapter of the Sierra
13 Club. Mr. Sawyer's Sierra Club membership and volunteerism are the cause for the
14 consternation here. However, the evidence shows unequivocally that Mr. Sawyer scrupulously
15 recuses himself from any Sierra Club legal matters that have even a mere potential to come
16 before the Board. *See, e.g.,* Deposition of Andrew Sawyer ("Sawyer Depo.") at 119, lines 18-
17 20; *id.* at 71, lines 20-25; *and* Declaration of Andrew Sawyer ("Sawyer Decl."), attached as
18 Exhibit 18 to Sawyer Depo., at ¶ 9. In addition, Mr. Sawyer's volunteer activities for the
19 Motherlode Chapter had nothing to do with the decision of the Sierra Club's Sierra Nevada
20 Group to become involved in the D-1644 proceedings, nor was the matter even discussed
21 during Motherlode Chapter committee meetings at which Mr. Sawyer was present. *See* Sawyer
22 Decl. at ¶ 11; Sawyer Depo. at 118, lines 3-14.

23 Finally, there is not a scintilla of evidence—nothing—suggesting that Mr. Sawyer's
24 status as a Sierra Club member and volunteer at all affected his supervisory oversight of D-
25 1644 hearing attorney Dan Frink, or affected his counsel to the Board and its staff on matters of
26 law. Put simply, Mr. Sawyer's personal free time is just that: personal and free. Absent some
27 suggestion based upon evidence—and here, there simply is none—that Mr. Sawyer's lawyering
28 for the Board was somehow tainted by his Sierra Club involvement, the Board has no option

1 but to reject the spurious allegation that the D-1644 hearings were unfair or that any party was
2 deprived of due process of law.

3 **ISSUE (2).** The fisheries evidence presented by Messrs. Mitchell and Bratovich provides no
4 cause whatsoever to revise D-1644. Mr. Mitchell's evidence of the Yuba River's fall-run
5 Chinook salmon population included only two years' data, which given the natural variability of
6 Chinook salmon populations from year to year say very little about the Yuba River's fall-run
7 Chinook salmon. Moreover, Mr. Mitchell conceded that those data say absolutely nothing
8 about the Yuba River's steelhead and spring-run Chinook salmon populations. In light of the
9 fact that Central Valley steelhead and Central Valley spring-run (but not fall-run) Chinook
10 salmon are both listed as "threatened" with extinction under the Endangered Species Act, as
11 well as being invaluable public trust resources, the evidence presented by Mr. Mitchell—if
12 relevant at all to this proceeding—is certainly no cause to revise D-1644.

13 Likewise, the evidence presented by Mr. Bratovich warrants no revision of D-1644.
14 The rotary screw trap ("RST") data that he presented suffer from incurable sample biases
15 rendering them virtually useless for determining the proper timing and proper volume of
16 instream flows needed to support outmigration of juvenile salmon from the lower Yuba River.
17 On cross-examination, Mr. Bratovich conceded the points, which were demonstrated forcefully
18 by the rebuttal evidence presented by expert state and federal fisheries agencies, that: (1) RSTs
19 catch a disproportionate number of fry and other small juveniles, relative to larger, more mature
20 juveniles; (2) larger, more mature juveniles tend to outmigrate later in the springtime than do
21 fry and other small juveniles; (3) larger, more mature juveniles have greater survival rates
22 during outmigration than do fry and other small juveniles; and (4) the RST data, which were
23 gathered from RSTs near Hallwood Boulevard, tell us nothing at all about population sizes or
24 survival of outmigrating fry or other juvenile salmon in the six to seven miles downstream of
25 Hallwood Boulevard, upstream of the Yuba River's confluence with the Feather River.
26 Finally—and crucially—Mr. Bratovich further conceded that his analysis of the RST data
27 included no consideration whatsoever of the instream flow needs for Yuba River fish in life
28 stages other than that of outmigrating juveniles. In short, the evidence presented by Mr.

1 Bratovich offers no cause for the Board to revise the springtime minimum instream flow
2 requirements established by D-1644.

3 **ISSUE (3).** Mr. Aikens' evidence regarding water usage and projected demand also provides
4 no cause to revise D-1644. During D-1644 hearings in 2000, Yuba County Water Agency
5 ("YCWA") presented projections that water usage and demand within YCWA's service area
6 would increase. According to Mr. Aikens, water usage and demand have (not surprisingly)
7 increased since the 2000 hearings. However, as the Board recognized in D-1644, long-term
8 projections of water demand are, by definition, uncertain and speculative. *See, e.g.*, D-1644 at
9 § 7.2 and § 7.5. The Board in D-1644 has already struck a balance between using lower Yuba
10 River water to protect and restore public trust resources on the one hand, and using it to satisfy
11 consumptive demands on the other. Nothing in the evidence offered by Mr. Aikens suggests
12 that the Board should revise D-1644 to tilt that balance further in favor of consumptive uses.

13
14 **CONCLUSION.** For the foregoing reasons, the Board should revise D-1644 to eliminate
15 the interim flow regime and order immediate compliance with the Decision's long-term flow
16 requirements, but the Board should not revise D-1644 in response to the evidence presented in
17 connection with Issues (1) through (3).

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19 Dated: June 13, 2003

Respectfully submitted,



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