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**SUPPLEMENTAL HEARING ON
LOWER YUBA RIVER**

June 5, 2003

**CLOSING STATEMENT OF
WESTERN WATER COMPANY**

Closing Statement of Western Water Company

I. Introduction

A. Procedural Setting of this Hearing

The instant hearing was necessitated because the SWRCB's approval of D-1644 was vacated upon judicial review. The matter has been remanded to the Board for reconsideration of D-1644 in light of new evidence. However, the court specifically contemplated that the Board would be permitted "to consider any other evidence it deems to be relevant and material to its reconsideration of Decision 1644." Order at 3. Unfortunately, the Board's hearing notice was unduly narrow, and was written so that only specific declarations on fisheries and future water use projects could be considered. This narrow interpretation of the court's ruling kept out information regarding how the additional evidence considered by the Board could actually result in lower flow releases by YCWA during the spring months.

More important than the scope of the hearing, however, is the burden of proof required to justify the unprecedented curtailment of vested water rights contemplated by D-1644. Nowhere in the dozen years of this record is there adequate evidentiary or scientific support for the Spring flow regime mandated by D-1644. It is procedurally and legally inappropriate for the hearing to be conducted as though the YCWA and other legal water right holders should bear the burden of defending its vested water rights. Rather, the Board must find clear and compelling evidence in the record if it is to reinstate this substantial undermining of those rights.

The law of this case is that the Board's decision cannot stand in the face of "empirical experience occurring after the conclusion of the administrative hearing [which] demonstrates the falsity or unreliability of the factual assumptions or projections upon which the administrative decision rested in whole or in part..." Order at 2.

B. Focus on Fishery and Demand Issues

In the context of this hearing, Western Water Company chooses to focus its attention where its interests are most clearly threatened: Issues 2 (fishery) and 3 (demand).

II. Fishery Issues

A. YCWA's Established Water Rights

YCWA has vested water rights established through historic action by and before the Board, coupled with the Agency's diligence in putting the water arising under those rights to beneficial use.

B. Environmental and Public Trust Limitations

It is well settled that water rights in California are subject to limitations for the protection of the environment and for the service of public trust values, including fish and wildlife. Further, established on-stream storage rights require that the operator of a dam exercise such rights so as to keep the fishery below the dam "in good condition."

However, in asserting environmental or public trust bases for curtailing a water right, the weight of the evidence must demonstrate that the exercise of the right is harming the environment or damaging the public trust. The dozen-year hearing record in this case is devoid of such evidence. While all parties to the process concur that study of the Yuba River fishery should continue, there is simply no support for the conclusion that operation of the Yuba River Project has caused any damage to the fishery. Instead, the weight of the evidence in the record shows that the fishery has actually improved since the advent of the Project (most likely because of the Agency's flow and temperature management capabilities).

C. Factual Inaccuracy of Decision Assumptions

Evidence presented to the court and in the instant hearing demonstrates that the articulated basis for the Spring flow regime—that it is necessary for protection of out-migrating juvenile salmonids—does not support the decision, because in the last three years (constituting all the reported empirical experience) nearly all of the juveniles (98-99%) had passed the Hallwood measuring station by the time the flow regime would have taken effect.

In the course of the hearing, DFG attempted to show that the evidence presented by the Agency is not conclusive, because of potential sampling or other measurement errors. However, it was uncontroverted that the best evidence available to the Board today fails to support the assumptions on which the Spring flow regime is based.

D. Rebuttal: "No difference in the fishery"

In their rebuttal, the DFG witnesses presented testimony that questioned the reliability of the evidence presented by YCWA, complaining that efficiency testing of the traps was needed to confirm the evidence that the juvenile salmonids cannot be helped by D-1644 because the migration appears to be at least 98% complete by the time the Spring flow requirement takes effect. Further, DFG witnesses indicated that "a multi-year" series of tests under a variety of flow conditions would be required to determine whether the flow requirements could be effective for improving fish populations. While all parties to this proceeding would like to have more and more reliable data, there is no evidence in the record that suggests that the D-1644 Spring flow regime will have any impact on fish populations in the Yuba River. Lack of data is no excuse for imposing this curtailment of vested water rights by changing the existing release requirements.

Most revealingly, DFG witnesses reached the following conclusion: "There remains no significant difference between pre- and post-New Bullards Bar Chinook salmon populations." Nelson/Drury Testimony at 3. Thus, even accepting DFG's testimony in its most favorable light, there is no support for concluding that YCWA's exercise of its vested water rights has caused any harm to the fishery. In fact, there is ample evidence in the record that the fishery has improved during the period of YCWA's regulated flows and temperature management.

E. Burden of Proof Has Not Been Carried

In order to justify an unprecedented storage release order such as embodied in the vacated D-1644, the SWRCB must find (i) that the exercise of the YCWA water rights has caused harm and (ii) that the curtailment will remedy the harm. No petitioning party to the proceeding has sustained the required burden of showing harm, causality or projected

effectiveness of the remedy. Without such evidence, the SWRCB would be acting arbitrarily in re-imposing the D-1644 Spring flow requirements.

F. Attempt to Shift the Burden

In an apparent attempt to shift the burden of proof, SWRCB staff questioned YCWA witnesses for evidence that would support an alternate flow requirement. However, presenting such evidence is neither the responsibility of YCWA nor within the permitted scope of the hearing. Even DFG admits, in any case, that more study is required "before an accurate estimate of how many juvenile salmon are outmigrating at different times of the year could be determined." In the absence of such an "accurate estimate," the assumptions cited in D-1644 for imposing the Spring storage release flows are without evidentiary support.

G. Conclusion: No Evidence Supports the Unprecedented Curtailment of an Established Water Right with a Long History of Exercise in Accord with Environmental Stewardship

III. Demand Issues

A. D-1644 Spring Flow Requirements Reduce the Right to Water Arising Under YCWA Water Rights and Make Less Water Available for Local Beneficial Use.

The Spring flow requirements in D-1644 will unavoidably reduce the water available to the YCWA to meet its operating objectives as summarized by its GM: (i) flood control, (ii) in-stream flow, (iii) power production, and (iv) deliveries to users. As noted by Mr. Aikens during cross-examination, taking into account the demands of the Wheatland Water District, imposition of the D-1644 Spring flow requirements will create more frequent water shortages within Yuba County. Aikens Testimony, 6/5/03.

B. WWTR is Particularly Concerned Because the Wheatland Water District is Targeted for Supply Reduction.

The potential for shortages under the Spring flow regime imposed by D-1644 is of particular concern to Western Water Company, because the Company owns nearly 1200 acres of farmland within the WWD. Time and again, DFG, Interior and Board staff suggested through their questions that shortages could be averted by not extending service to WWD. (See questions in the transcript related to (i) the unfinished service contract negotiations between YCWA and WWD, (ii) whether YCWA has an "obligation" to serve WWD, and (iii) timing of completion of delivery facilities.)

However, as Mr. Aikens testified, the WWD delivery facilities were part of the original Yuba River Project design and were deferred merely for economic reasons. Further, Mr. Aikens noted that WWD contributed its water rights applications before this Board in order to participate in the Project, and that those applications, as later perfected by YCWA, make up a portion of the Project's current water rights and storage rights that would be affected by D-1644's unsupported Spring release requirements.

D-1644 itself suggests that shortages up to 20% could be made up through use of local groundwater¹ or through local conservation efforts.² Only in the event that the local shortage would exceed 20% did vacated D-1644 permit a cumbersome flow adjustment process that would have likely come too late for practical benefit to Yuba County, even when those conditions occur. Thus, YCWA's service area—and particularly the WWD—will be seriously and adversely affected if the D-1644 Spring flow regime is re-imposed after having been vacated by the court.

C. SWRCB Must Consider the Ancillary Effects of the D-1644 Spring Flow Regime.

Not only would the re-imposition of the D-1644 Spring flow requirement create unjustified periodic water delivery shortages within Yuba County, it would also create an important ancillary—and unjust—impact. The SWRCB must recognize that the release of excess water by YCWA has the currently unavoidable secondary effect of reallocating the water, not just to the Yuba River fishery, but to the State and Federal export projects. Based on the export projects' junior appropriation rights, the water released from storage in the Yuba River Project that cannot be put to a beneficial use within the YCWA service area, is available for downstream appropriation and export from the Delta. That is, once the water is released for fish that may not even be in the River to benefit, the excess flows will be captured by or credited to the export projects. In effect, D-1644's Spring flow requirements would operate as a direct reallocation of water from its area of origin to the export areas.³

IV. Summary and Conclusion

- A. There is Long-recognized Value in Certainty and Predictability of the Responsible Exercise of Vested Water Rights.**
- B. D-1644's Unprecedented Reduction in the Sanctity of Vested Water Rights Must be Supported by Substantial Evidence of Harm, Causation and Effectiveness of the Remedial Approach.**
- C. No Evidence in the Record Supports Critical Findings (i) that the Yuba River Project Has Damaged the Fishery, or (ii) that the Spring Flow Requirement Will Remedy any Theoretical Damage.**
- D. Assumptions on which the D-1644 Spring Flow Requirements are Based are Speculative and Unsupported by Substantial Evidence.**

¹ D-1644's recitation of this "remedy" for the shortages caused by the Spring flow regime raises serious questions as to whether the SWRCB has exceeded its jurisdiction by, essentially, backfilling a perfected surface water right through appropriation of local groundwater. In addition, this "remedy" begs the question whether the SWRCB complied with CEQA, since it produced no EIR that studied the impact of this remedy.

² Under Water code §1011, conservation savings do not diminish the underlying water rights, as D-1644 attempts.

³ Reallocation of water is also a *de facto* reallocation of wealth from Yuba County to the areas served by the export projects. Unless the SWRCB protects YCWA's right to maintain control and dominion over the excess releases for exchange or transfer to a downstream user, subject to fair compensation, the D-1644 requirements should be reversed on substantive appeal.

- E. D-1644 is an Outdated "Command & Control" Approach Lacking Adaptability to the Needs of the Fishery, Much Less the Needs of the Yuba River Project and YCWA's Vested Water Rights.**
- F. The Secondary Effects of D-1644 Are Unacceptable in that they Act as an Unjustified and Inappropriate Transfer of Wealth from Yuba County to the Export Communities.**
- G. The Better Way: Negotiation and Adaptive Management**

The SWRCB has it within its power to foster a settlement process that will result in a more flexible flow regime that will be based upon experience, good science and cooperative stewardship of YCWA's vested water rights. To re-impose the D-1644 Spring flow requirements would, instead, usher in another decade of litigation, bitterness and frustration.

Date: June 13, 2003

**WESTERN WATER COMPANY
MICHAEL PATRICK GEORGE
PRESIDENT AND CHIEF EXECUTIVE OFFICER**

PROOF OF SERVICE

I, Margaret McBride, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On June 13, 2003, I served the following documents:

CLOSING STATEMENT OF WESTERN WATER COMPANY

- by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- by causing personal delivery by **MESSENGER** of the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed **FEDERAL EXPRESS** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Please see attached Service List

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on June 13, 2003, at Sacramento, California.



 Margaret McBride

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