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9 STATE OF CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD

11
 12 In the Matter of :

13 LOWER YUBA RIVER
 14 WATER RIGHT HEARING

CALIFORNIA DEPARTMENT OF
 FISH AND GAME SUPPLEMENTAL
 CLOSING BRIEF

15 INTRODUCTION

16 The following arguments, provided by the State of California Department of Fish
 17 and Game ("DFG"), are intended to augment the written materials, oral testimony, and oral
 18 arguments presented by the DFG at the June 5th and 6th supplemental hearing in this matter.

19 The stated purpose of this most recent hearing has been to receive and consider
 20 the additional evidence promoted by both the Yuba County Water Agency ("YCWA") and the
 21 South Yuba River Citizens League ("SYRCL") in their motions to augment the record in the
 22 consolidated superior court matter titled *Browns Valley Irrigation District v. State Water*
 23 *Resources Control Board* (Yuba County Superior Court Case No. CV PT 01-0000224.) At the
 24 hearing, cross examination and rebuttal was to be provided on four key issues as identified in the
 25 Board's Notice of Hearing dated May 23, 2003. At the close of the hearing an opportunity was
 26 provided to all parties to present a closing oral argument and a limited written argument. While
 27 the DFG did provide an oral argument this written argument is intended to provide some
 28 additional discussion on key issue number two.

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ARGUMENT

SHOULD DECISION 1644 ["D-1644"] BE REVISED BASED ON THE EVIDENCE ON FISHERY ISSUES PRESENTED IN THE DECLARATION OF WILLIAM MITCHELL DATED MARCH 11, 2003 AND THE DECLARATION OF PAUL BRATOVICH DATED MARCH 13, 2003^{1/2}?

The answer is most definitely, NO. Following presentation of the declaration, testimony and cross examination at the hearing several conclusions can be reasonably and responsibly reached. First, the declaration and testimony of Mr. Mitchell regarding the fall-run chinook salmon adult escapement survey brings little new information to the record already before the Board. The testimony adds two additional years of fall spawning surveys (carcass counts) to the years of data already in the record but provides no visible evidence that the fall spawning activity is better or worse. At best, the data suggests spawning returns are simply remaining similar to prior years returns. The raw data provided, just like the earlier data, reflects no attempts to correlate or correct the spawning estimates for water flows, water year types, or any changes in environmental conditions or fishery regulations. The limited statistical analysis of this information made by the DFG continues to suggest that post-project spawning escapement is increasing, but at a rate slower than pre-project spawning escapement. Neither Mr. Mitchell or YCWA provided any statistical analysis of the data at all. Clearly no conclusion to change the present flows of D-1644 can be drawn from this information.

Second, the declaration and testimony of Mr. Bratovich reflects only very limited new information on the out migration of juvenile chinook salmonids. As the rebuttal testimony of Msrs. John Nelson and Ian Drury of the Department of Fish and Game pointed out, the rotary screw trap on the Yuba River near Hallwood Boulevard has never been calibrated for numerical sampling. While the trap is fully functional and capable of catching a variety of fish species and fish sizes no marked fish, of any species, or of any size, have been released above the trap to evaluate how effectively the trap itself captures any species or size of fish. When the DFG installed the trap in 1999, the stated purpose was to obtain qualitative information about

1. Key issue number two (2) in the Notice of Hearing dated May 23, 2003.

1 salmonid presence in the Yuba River – information about size and information about when
2 juvenile salmonid were potentially present. Of specific concern were potential juvenile fish
3 losses through unscreened diversions on the Yuba River or through diversions that operate
4 screens during only a portion of the year. The DFG was, and is, fully aware of the limitations on
5 data collected from uncalibrated traps and has attached a specific warning to the raw data from
6 the Hallwood trap cautioning against use of the data for numerical assessments. (See Exhibit
7 2003-DFG-3.)

8 A variety of well developed studies document the efficacy problems of un-
9 calibrated rotary screw traps. Such traps are most successful at catching fish of smaller sizes,
10 those incapable of avoiding the traps. Rotary screw traps may also operate in a manner that fails
11 to accurately collect a representative sample of all fish passing the trap. This error is common
12 and is associated with the fact, attested to by Mr. Nelson, that most sizes and species of fish do
13 not uniformly travel within all of a river or stream's water column. Instead such fish travel in
14 preferred corridors - adjacent to the bank, adjacent to the bottom, within certain water velocities.

15 To the extent Mr. Bratovich now uses the two additional years of trapping data
16 (data not itself provided by Mr. Bratovich or YCWA) to conclude that essentially all juvenile
17 salmonid out migration on the South Yuba River is completed before April 21, Mr. Bratovich
18 seriously misuses the available data. Cross examination of Mr. Bratovich revealed that he has no
19 idea whether the trap is catching an accurate representative sample of all sizes of salmonid
20 juveniles passing the trap. Arguing, simplistically, that multiple sizes of fish were caught in the
21 trap in no way addresses this omission. Evidence suggests that smolt size salmonids and pre-
22 adult steelhead trout are fully capable of avoiding the trap in disproportionate numbers. Mr.
23 Bratovich also does not know whether the trap is located in a manner to catch an accurate
24 representative sample of all passing salmonids within the entire river. Mr. Bratovich doesn't
25 even know whether the fish passing the trap, or caught within the trap, will continue to migrate
26 out of the Yuba River below the trap. The trap is almost seven river miles above the mouth of
27 the river and all evidence indicates that the river flows and structure change substantially below
28 the trap's Hallwood location. Whether juvenile salmonids that pass the trap take a day, a week,

1 or a month to finally enter the Feather River and continue their downstream journey is
 2 completely unknown to Mr. Bratovich. The DFG respectfully suggests that Mr. Bratovich's
 3 conclusion is wholly unsupported by Mr. Bratovich's facts. Perhaps Mr. Bratovich said it best
 4 when, perhaps unwittingly, he referred to his own results as "conclusionary" - they surely are
 5 speculative and unfounded.

6 YCWA's use of Mr. Bratovich's testimony to argue for a change in spring release
 7 flows goes far beyond even the most generous reading of the declaration and testimony. Page 61
 8 of D-1644 identifies **four** areas of fishery management concern for the period "mid-April
 9 through June", not just the out migration of juvenile salmonids as YCWA constantly misstates.
 10 In 2002, the Board found that "[the] minimum flow requirements established in this decision [D-
 11 1644] for April through June are expected to provide adequate conditions for upstream migrating
 12 adult spring-run chinook salmon."^{2/} (D-1644, p. 62.) "[A] minimum flow of 1,500 cfs in May . .
 13 . would also provide adequate attraction and spawning flows for American shad in the lower
 14 river." (D-1644, p.63.) And "[s]teelhead egg incubation, juvenile rearing and emigration" are
 15 additional fishery activities recognized during the mid-April through June period.^{2/}

16 Nothing provided in the new declaration of Mr. Bratovich suggests a need to
 17 change any of these Board findings or a need to change the Spring-time flow requirements of
 18 D-1644.

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 26 2. Two more years have now passed and the Spring-Run Chinook Salmon are still listed
 27 as threatened under the California Endangered Species Act and the federal Endangered Species
 28 Act and the "Central Valley" Steelhead Trout remains listed as threatened under that same
 federal Act.

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CONCLUSION

While the DFG continues to have reservations about some of the terms of Decision 1644, nothing in the new materials submitted to the Board by YCWA support any change to the Decision's flow requirements. Immediate readoption and implementation of D-1644's permanent terms is clearly appropriate.

Dated: June 13, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General

By: 
WILLIAM D. CUMMINGHAM
Deputy Attorney General

Attorneys for the California
Department of Fish and Game

DECLARATION OF SERVICE

Case Name: *Lower Yuba River Water Right Hearing*

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is 1300 I Street, Sacramento, California 95814. I am readily familiar with the business practice, at my place of business, for the collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the postal service in the ordinary course of business on the same day on which it is placed for mailing.

On June 13, 2003, I served the following document:

**CALIFORNIA DEPARTMENT OF FISH AND GAME
SUPPLEMENTAL CLOSING BRIEF**

on the parties in said action as follows:

_____ **PERSONAL SERVICE through ATTORNEYS DIVERSIFIED SERVICE**
by placing a true copy thereof enclosed in a sealed envelope, addressed as shown below.

_____ **(OVERNIGHT MAIL through GOLDEN STATE COURIER)** by
placing a true copy thereof enclosed in a sealed envelope, addressed as shown below:

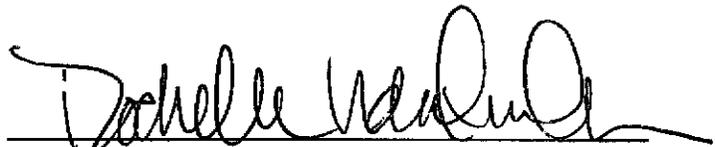
_____ **(FACSIMILE)** by facsimile, as shown below:

XX **(REGULAR MAIL)** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system, addressed as shown below:

SEE ATTACHED LIST

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on June 13, 2003, at Sacramento, California.

ROCHELLE UDA-QUILLEN
Typed Name


Signature

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