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6 STATE OF CALIFORNIA
 7 STATE WATER RESOURCES CONTROL BOARD
 8

9) Case No.: Decision 1644
)
 10 Further Proceedings Regarding) Post-Hearing Brief
)
 11 SWRCB Decision 1644,)
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 12)

13 The United States Department of the Interior (Interior) hereby presents its post-hearing
 14 brief addressing the Key Issues identified by the State Water Resources Control Board
 15 (SWRCB) in its May 23, 2003, Notice of Public Hearing, relating to Yuba County Water
 16 Agency's (YCWA) challenge to SWRCB Decision 1644 (D-1644).

17 Two days of evidentiary hearings produced very little that would warrant any substantial
 18 revision to D-1644. Information regarding SWRCB staff does not present a conflict of interest
 19 for those who approved D-1644, the SWRCB members. While the biologists presented some
 20 new data, such data does not support their sweeping conclusions or revision to D-1644. The
 21 updates on YCWA's projects and contract negotiations add nothing new, and YCWA has
 22 factored D-1644 into those negotiations. Finally, the conflicting testimony on electrical energy
 23 needs and supplies provide further confirmation that the electrical power industry is in constant
 24 flux, but the crisis cited in the 2001 decision is over. None of this information, however,
 25 achieves what the parties in the State court litigation sought – fundamental revision of D-1644.

1 The SWRCB may be required to vacate D-1644, but the current administrative record supports
2 adoption of a D-1644 duplicate – in substance, if not in name.
3

4 **I. Key Issue #1: Conflict of Interest**

5 In order to resolve complex water issues in California, the SWRCB necessarily relies on
6 staff with the best expertise. The staff with such expertise may bring particular perspectives and
7 experience to their work, which some may allege as bias. Any purported or theoretical bias of
8 staff cannot be attributed to the SWRCB members who make the decision, as the Sacramento
9 County Superior Court recently held in its review of SWRCB Decision 1641. Coordinated
10 Special Proceeding Special Title: State Water Resources Control Board Cases, May 5, 2003
11 Statement of Decision, p. 3, *citing* Kenneally v. Lungren, 967 F.2d 329 (9th Cir. 1992), *cert.*
12 *denied*, 506 U.S. 1054 (1993). The evidence presented therefore provides no basis for any party
13 to claim it was denied a fair hearing or due process of law in the D-1644 proceedings.
14

15 **II. Key Issue #2: Fishery Issues**

16 The fishery biologists' representing YCWA presented new data that Interior does not
17 dispute, but such data do not support their sweeping conclusions or recommendations. William
18 Mitchell's new data on escapement trends do not support his conclusion that salmon are in better
19 condition after New Bullard's Bar Dam. He looked only at escapement, and admitted that he had
20 not considered actual hydrologic conditions in the Yuba River or ocean conditions. Mitchell
21 failed to prove any causal link between fishery conditions and New Bullard's Bar. Moreover,
22 Mitchell's analysis of escapement trends related only to fall-run Chinook salmon, not the spring-
23 run Chinook or steelhead, which are listed as threatened under both the federal and state
24 Endangered Species Acts. Mitchell admitted that he could not distinguish fall-run from spring-
25 run and that he could reach no conclusions as to the health of spring-run salmon.

1 Paul Bratovich provided recent Rotary Screw Trap (RST) data, but his conclusions
2 overreached the data. He concluded that 98% of all the Chinook salmon leave the Yuba River
3 prior to April 21, but admitted that his data is limited. Bratovich admitted that his conclusions
4 depended on the assumption that the RST caught the same proportion of fish as reflected across
5 the entire water column of the Yuba River, regardless of flow rate, depth or size of fish. He also
6 acknowledged that larger fish are more likely to evade the RST, and he conceded that seven
7 miles of flatter, slower river lies beyond the RST before the fish actually leave the Yuba River.
8 The testimony from the Department of Fish and Game witnesses and the Fish and Wildlife
9 Service's RST study demonstrated the flaws in using RST data to make sweeping conclusions
10 about fish behavior in an entire river.

11 In short, YCWA's fishery biologists proved very little. Their new data was limited and
12 their sweeping conclusions were unsupported. There is nothing here that warrants revision of the
13 SWRCB's D-1644.
14

15 **III. Key Issue #3: YCWA Water Demand and Usage**

16 Curt Aikens presented nothing surprising in his testimony on YCWA's progress on
17 increasing usage of its water supplies. YCWA provided previous evidence of intent to continue
18 promoting greater local demands on its system. Aikens confirmed that YCWA is making
19 progress. The most critical admission is that YCWA is proceeding with the Wheatland contract
20 negotiation regardless whether D-1644 remains in place. YCWA has enough water, even under
21 D-1644, to negotiate new water contracts for additional water demands. While there may not be
22 enough water in all types of water years, California's continued growth will impose shortages on
23 all water users in some drought years. When YCWA chooses to continue growing its internal
24 water demands, the SWRCB needs to continue to carry out its responsibilities to protect the
25 public trust.

1 **IV. Key Issue #4: The 2001 Energy Crisis**

2 The energy crisis that existed in 2001, when the SWRCB issued D-1644, is over. While
3 the competing energy witnesses debated predictions about future energy supplies, neither
4 suggested that California suffers from the same electric energy crisis that existed in 2001. In
5 trying to prophesy the future of California's energy supplies, both energy witnesses confirmed
6 the existence of substantial uncertainty, particularly in predicting the more distant future. The
7 testimony of the California Energy Commission witness, however, reflected the formal position
8 of the State of California as to the energy forecast in the years ahead. The deference due to such
9 official State forecasts would justify the SWRCB's elimination of the interim flows standards
10 imposed in D-1644 and immediate implementation of the long-term flow standards.

11
12 **CONCLUSION**

13 With very little new information arising out of last week's hearing, the SWRCB's current
14 administrative record supports retention of the substance of D-1644, including immediate
15 adoption of the long-term flow standards.

16
17 Dated this 13th day of June, 2003

18
19 DANIEL G. SHILLITO
20 REGIONAL SOLICITOR

21
22 By: 

23 Alf W. Brandt
24 Assistant Regional Solicitor
25

CERTIFICATE OF SERVICE

I, the undersigned, declare that:

I am a citizen of the United States, over the age of eighteen.

On June 13, 2003, a copy of the "Post-Hearing Brief, Case No. Decision 1644," was sent via facsimile and U.S. First Class mail to:

Ernest Mona
State Water Resources Control Board

and via U.S. First Class mail to the distribution list attached.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 13, 2003.


Dorothy C. Hernandez
Secretary

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