

Fax

DATE Sunday, April 03, 1994
TIME 10:36:00 PM
PAGES 3

TO ROGER JOHNSON
COMPANY Division of Water Rights, SWRCB
VOICE NUMBER 657-1985
FAX NUMBER 657-1485
NOTE Roger --

Don't know what you know about the subject of the attached memo to Kramer, i.e., proposed Stampede drawdown. Would be interested in your thoughts on para (4) on second page of my memo to Kramer. I will be going to Truckee Monday afternoon.

Jim Markle, Attorney **FROM**

COMPANY

(916) 652-5388 **VOICE NUMBER**

(916) 652-5388 **FAX NUMBER**

EXHIBIT

TC10-139

tabbles

A 15673

MEMORANDUM

Date: April 3, 1994

From: Jim Markle

To: John Kramer

Subject: Truckee River: United States F&WS Directive to USBR to Drawdown Stampede Reservoir to Support Potential Cui-Ui Spawning: Contact with Assemblyman Bernie Richter

Assemblyman Bernie Richter called me shortly after 2:00 p.m., Friday, April 1. He was acquiring background on the USF&WS Stampede drawdown directive, a decision which he referred to as an effort to enhance "the sucker fish" in Pyramid Lake -- terminology similar to that used by Congressman Wally Herger in his March 17 letter to the USF&WS. Richter had spoken earlier with someone at Cal Fish & Game. We chatted for about 25 minutes.

As expected, Richter's questions were litigation oriented. He asked why the USF&WS decision isn't subject to environmental review requirements of CEQA. I told him that, as a federal agency, USF&WS wasn't subject to CEQA. I also told him that, while federal agencies were subject to NEPA, my preliminary view was that the federal agency could make a winning case for exemption from environmental review under NEPA on the grounds that the action was taken to preserve a species listed as endangered under the federal Endangered Species Act. (I said that I would have a firmer view on this question by the time of Herger's Monday meeting.)

Richter said he could understand that the federal agency's action isn't subject to California's environmental review laws but had trouble accepting that an operation which was iffy as to whether it would do anything for the sucker fish, but which would most certainly harm valuable fish in California's streams, such as brown trout, could escape review under NEPA. (I believe that he picked up these points from his earlier discussion with Cal F&G.) Richter also made the prudent water supply point, i.e., that this is a dry year and next year may also be, so why this drawdown in pursuit of a problematic sucker fish enhancement scheme.

Richter asked how long it would take the Department's lawyers to go into court for an order preventing the drawdown. I responded that it would not be the Department's lawyers who took any such action but the California Attorney General. He replied that the Attorney General would do it if the Department requested it. I said that while the Department supported the concern of the locals and of Cal F&G over this operation, I did not believe that the Department thought it appropriate that it take the lead in opposing it. I said I thought that Cal F&G would be the appropriate agency. Richter said, "They don't have the balls to do it." I asked how he knew this and he replied that the Cal F&G person with whom he had spoken earlier had said as much, although he was not sure whether that person had said "guts" or "balls".

At this point I explained to Richter the nature of the Department's involvement in this matter. I told him that the Department's effort has, since enactment of the federal settlement act, been directed at negotiating the operating agreement contemplated by that act. I said that the operating agreement could contain provisions to prevent this sort of unilateral, non-consultive action from recurring. Of course, this does not do anything for the situation facing Richter's constituency right now.

Richter said he planned to attend the Herger meeting.

Position at Herger's April 4 Meeting in Truckee

At this time, the general points I plan to advocate at the Herger meeting are these:

- (1) The Department supports the concern of the California fish and recreational interests over the proposed drawdown.
- (2) The Department is especially concerned that this project is going forward without broad, timely notice to, or any effort to consult with, affected California interests, including State Government agencies known by the USF&WS to be interested.
- (3) The Department does not, however, believe that it is the appropriate agency to lead a litigation effort to stop the project.
- (4) There is something else. . . . I question whether the water right entitlement for Stampede reservoir can be construed to authorize use of water appropriated at Stampede for the purpose contemplated by the USF&WS project. Such use may therefore violate California water rights law, since the U.S. has not bothered to petition for changes in purpose or place of use of water under the entitlement.