

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2001 - 08

In the Matter of
**FISHERY RESOURCES AND WATER RIGHT ISSUES
OF THE
LOWER YUBA RIVER**

Involving Water Right Permits 15026, 15027, and 15030 Issued on
Applications 5632, 15204, and 15574 of
Yuba County Water Agency,

Licenses 3984 and 3985 Issued on
Applications 9927 and 12371 of
Cordua Irrigation District

License 4443 Issued on
Application 9899 of
Hallwood Irrigation District, and

Other Water Diversions by Various Parties Under Claim of
Riparian Rights, Pre-1914 Appropriative Rights, and Contractual Rights.

SOURCES: Yuba River Tributary to Feather River

COUNTY: Yuba

**ORDER AMENDING DECISION 1644 AND
DISMISSING PETITIONS FOR RECONSIDERATION**

1.0 INTRODUCTION

The State Water Resources Control Board (SWRCB) adopted Water Right Decision 1644 on March 1, 2001. The decision amends several water right permits and licenses and requires other actions to protect fish in the reach of the Yuba River downstream of Englebright Reservoir (“the lower Yuba River”). Decision 1644 establishes interim and long-term instream flow requirements for protection of fall-run chinook salmon, spring- run chinook salmon, steelhead, and American shad. The decision also requires preparation of plans to reduce fish losses at two diversion facilities and requires actions to promote release of water from Englebright Dam at temperatures that benefit anadromous fish. Finally, the decision includes several requirements to

ensure that diversions of water from the lower Yuba River are made pursuant to valid water rights.

The SWRCB received 11 petitions for reconsideration of Decision 1644 within the statutory time period. The background to Decision 1644 and the issues raised in the petitions are discussed below. Based on the findings below, the SWRCB concludes that three minor modifications to Decision 1644 are appropriate, that the other issues raised in the petitions do not warrant reconsideration of the decision, and that the petitions for reconsideration should be dismissed

2.0 BACKGROUND

The proceedings that led to issuance of Decision 1644 were initiated by a complaint filed with the SWRCB in 1988 by a coalition of fishery groups.¹ Following investigation of the complaint, the SWRCB's Division of Water Rights deferred further action until after receiving a report from the California Department of Fish and Game (DFG) titled "Lower Yuba River Fisheries Management Plan" in 1991. In the letter accompanying the report, DFG requested that the SWRCB revise the existing streamflow and temperature requirements on the lower Yuba River.

The SWRCB held a 14-day evidentiary hearing in 1992, and another 13 days of hearing in 2000. The SWRCB heard testimony from numerous witnesses, including witnesses from state and federal fishery agencies, public interest groups, Yuba County water diverters, and others. Following distribution of a draft decision dated November 7, 2000, the SWRCB received extensive written comments and oral comments at public meetings on December 4, 2000, and January 11, 2001. The SWRCB adopted Decision 1644 at a public meeting on March 1, 2001. The decision includes 191 pages of text, several hundred citations to the evidentiary record, and 42 pages of appendices. Decision 1644 establishes a number of requirements to protect fish in the lower Yuba River as summarized above in Section 1.0.

¹ The complaint was filed by a coalition of fishery groups referred to as the United Groups. The complainants sought a variety of measures to protect fish in the lower Yuba River.

Several of the petitions for reconsideration focus on the fact that Decision 1644 includes changes from an earlier draft decision dated November 7, 2000. The first major change is the addition of a provision establishing interim flow requirements that will apply until April 21, 2006. The interim flow requirements are higher than the flows previously required under a 1965 agreement between Yuba County Water Agency (YCWA) and DFG, and similar to the flows recommended by YCWA.²

Decision 1644 discusses the effect of the new long-term flow requirements on power production at YCWA hydroelectric facilities and concludes that the effect of the new flow requirements on net electrical power production will be minimal. In the short term, however, California faces a critical electrical power problem. Based on the need to maintain flexibility in powerplant operations to avoid power shortages during this period, the decision defers the effective date of the new long-term flow requirements until April 21, 2006, and establishes interim flow requirements to apply until that time. (Decision 1644, pp. 125-127.)³ Thus, in view of the present energy situation, Decision 1644 adopted interim flow requirements as part of a phased approach to implementation of appropriate long-term minimum flow requirements.

Other changes in Decision 1644 from the November 7th draft include a slight reduction of the long-term flow requirements in some months of some years from what was proposed earlier, and addition of a provision by which YCWA can request a temporary modification of instream flows in any year in which deficiencies in water available for offstream uses would exceed 20 percent of demand. Decision 1644 also includes a number of other changes in the findings and requirements regarding the exercise of various water rights on the lower Yuba River from what

² For wet and above normal years, the interim flow requirements are the same as the long-term flow requirements. For below normal years, the interim and the long-term flows differ by a relatively small amount in late April. For dry and critically dry years, the interim flows established in Decision 1644 are considerably lower than the long-term flows that will apply beginning in 2006. (Decision 1644, pp. 173-175 and Appendix 5.) In all years, the interim flow requirements established by Decision 1644 are equal to or greater than the flow requirements in the 1965 YCWA/DFG agreement. In contrast, the flows proposed by YCWA are actually lower during some periods than what is specified in the 1965 agreement.

³ Tables B-3 and C-3 of Appendix 3 to Decision 1644 show simulated power supply impacts at New Bullards Bar Reservoir (Colgate Powerhouse) of: (1) operating to meet YCWA's flow recommendations, which are very similar to the interim flow requirements; and (2) operating to meet the long-term flow requirements. The simulated power generation impacts are shown for each month of the 71-year period of record under specified operational criteria.

was proposed in the November 7th draft decision. The decision concludes that there is sufficient water available to meet the revised instream flow requirements while continuing to meet demands for water for other reasonable and beneficial uses of water within Yuba County.⁴

3.0 GROUNDS FOR RECONSIDERATION

California Code of Regulations, title 23, section 768 provides that any interested person may petition for reconsideration based on any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Following review of the petitions and other relevant material, the SWRCB may refuse to reconsider the decision if the petitions fail to raise substantial issues related to the causes for reconsideration in section 768. The SWRCB may also deny the petitions upon a finding that the decision was appropriate, set aside or modify the decision, or take other appropriate action. (Cal. Code Regs., tit. 14, § 769.)

4.0 SUMMARY OF PETITIONS

The SWRCB received eleven petitions for reconsideration of Decision 1644. Seven of the petitions were filed by state and federal agencies and other parties who contend that the fishery protection measures established in Decision 1644 do not provide sufficient protection to anadromous fish in the Yuba River. The petitioners who request additional fishery protection

⁴ Decision 1644 includes an analysis of competing offstream water demands, both present and future, and findings regarding alternative water supplies and water conservation measures available to help meet the various demands for water in the YCWA service area. (Decision 1644, pp. 100-133, 169-171.)

requirements include DFG, the United States Department of Interior (DOI),⁵ the National Marine Fisheries Service (NMFS), the South Yuba River Citizens League (SYRCL),⁶ Walter Cook, the California Sportfishing Protection Alliance (CSPA), and the Northern California Council Federation of Fly Fishers (NCCFFF).

Four of the petitions were filed by water agencies or irrigation districts in Yuba County who contend, among other things, that the provisions in Decision 1644 are too restrictive and will impair YCWA's ability to provide water for other uses. Those petitioners include YCWA, Browns Valley Irrigation District (Browns Valley), South Yuba Water District (South Yuba) and Cordua Irrigation District (Cordua),⁷ and Brophy Water District (Brophy). The petitioners request a variety of relief ranging from modification of the Decision 1644 to vacating the decision and instituting new proceedings.

Due to the number of petitions and the similarity of issues raised in different petitions, the petitioners' contentions are summarized and addressed by topic. The issues raised in the petitions filed by those who contend that Decision 1644 does not provide sufficient protections to fish are addressed in Sections 5.0 through 5.12 below. Issues raised by those who contend that Decision 1644 is overly restrictive are addressed in Sections 6.0 through 6.5.

5.0 ANALYSIS OF ISSUES RAISED IN PETITIONS FILED BY FISHERY AGENCIES AND PARTIES REQUESTING MORE STRINGENT FISHERY PROTECTION REQUIREMENTS

Many of the parties who seek increased fishery protection requirements generally supported the flow requirements in the draft decision dated November 7, 2000, but oppose later revisions that were included in Decision 1644 as adopted on March 1, 2001.⁸ The grounds for seeking

⁵ The Department of Interior presented testimony at the hearing by witnesses from the U.S. Fish and Wildlife Service.

⁶ The SYRCL petition was filed jointly on behalf of SYRCL, Friends of the River, California Trout, Trout Unlimited, and the Bay Institute.

⁷ South Yuba and Cordua filed a joint petition for reconsideration.

⁸ The parties who supported the flow requirements in the November 7, 2000, draft decision generally continued to advocate higher flows, but viewed the draft decision flows as being an improvement over the flow in a 1965 DFG/YCWA agreement.

reconsideration alleged in the petitions include allegations that there were irregularities in the proceedings, that portions of the decision are not supported by substantial evidence, that additional relevant evidence became available after the hearing, and that Decision 1644 is contrary to law. The issues raised by the petitioners seeking more stringent fishery protections are addressed below.

5.1 The SWRCB Properly Considered Comments on the Draft Decision Prior to Adoption of Decision 1644

Several petitioners allege that it was an improper irregularity of the proceedings for the SWRCB to consider oral and written comments on the November 7, 2000, draft decision in developing revisions that were included in Decision 1644. The petitioners allege that the SWRCB considered the comments on the draft decision as evidence without requiring the statements to be under oath or allowing an opportunity for cross-examination or rebuttal of the comments. As discussed below, the SWRCB considered the issues addressed in the public comments, but did not consider those statements to be evidence and did not base revisions to the draft decision on factual information outside of the evidentiary record.

As a public agency, the SWRCB is subject to the provisions of the Bagley-Keene Open meeting Act. (Gov. Code § 11120 et seq.) Government Code section 11125.7 provides that, except as otherwise provided, state agencies subject to that act must provide an opportunity for the public to directly address the state body on each agenda item before or during the agency's discussion or consideration of the item. The statute includes several exceptions, but none of the specified exceptions apply to the public meetings at which the SWRCB considered Decision 1644 or earlier draft decisions.⁹ Thus, the SWRCB is required to allow members of the public to address the Board on the proposed water right decisions.¹⁰ Although the SWRCB Chairman instructed speakers that the hearing record was closed and not to use their statements to attempt to

⁹ The exception for administrative adjudication proceedings applies to proceedings held pursuant to the formal hearing provisions in Government Code section 11500 et seq. The exception does not apply to water right hearings that are governed by the more general requirements set forth in Government Code sections 11400 through 11470.50.

¹⁰ Due to the number of people wanting to speak, the SWRCB scheduled a second meeting at which people could express their concerns. In the alternative, interested parties and members of the public were told they could submit their comments in writing.

introduce new evidence, the SWRCB cannot ensure that all speakers at a public meeting restrict their statements to legal or policy arguments or factual evidence already in the record.¹¹

The SWRCB is well aware of the distinction between statements given under oath that are subject to cross-examination and less formal statements of the type presented in a public meeting. The SWRCB based its findings solely on evidence properly admitted into the record or properly subject to official notice. Decision 1644 states that it includes substantial revisions based on the SWRCB's "consideration of the issues raised in the oral and written comments on the draft decision dated November 7, 2000." (Decision 1644, p. 3, emphasis added.) The decision is not based on and does not rely on any new factual evidence or factual allegations presented by those who commented at the Board meetings. The fact that the SWRCB provided an opportunity for public comment on the proposed decision is in compliance with applicable statutes and provides no basis for reconsideration of Decision 1644.

5.2 The SWRCB Properly Took Official Notice of the Current Electrical Energy Situation and Established Interim Flow Requirements Accordingly

Several parties contend that the SWRCB improperly took official notice of the ongoing electrical energy situation and the Governor's executive orders on energy that are cited in the decision. DFG, for example, argues that although the SWRCB may take official notice of the fact that specific executive orders exist, it may not take official notice of the truth of the statements within those orders. The petitioners who object to the interim flow requirements established in Decision 1644 argue that the evidentiary hearing record does not support establishment of the interim requirements.

The SWRCB agrees that the evidence presented at the hearing that ended on May 17, 2000, does not, in itself, support establishment of interim flow requirements. Although any change in reservoir releases can affect power production, the record establishes that the new long-term flows will have little effect on net power production, that the long-term flow requirements will

¹¹ Although factual allegations of some speakers went beyond the evidentiary record and could not be considered by the SWRCB, many of the comments addressed evidentiary issues based on the hearing record or policy issues that were properly before the SWRCB. For example, speakers with differing perspectives addressed the balancing of competing demands that must be considered by the SWRCB in the exercise of its authority under the public trust doctrine, article X, section 2 of the California Constitution, and Water Code section 174.

not interfere with use of Colgate Powerhouse for peaking purposes, and that YCWA's existing Power Purchase Contract with PG&E does not provide for maximizing power production during peak demand months. (Decision 1644, pp. 125-127.) In the absence of the current power shortage situation, the SWRCB would not have established interim instream flow requirements.

Following release of the November 7, 2000, draft decision, however, the state has been experiencing a serious electrical energy shortage for several months. It remains uncertain how long the current problems will continue. The effect of the new long-term instream flow requirements on power production is limited. In the short-term, before completion of new powerplants, implementation of additional energy conservation measures, and implementation of other likely actions to respond to the current power shortage, even small changes in power production at certain times could adversely affect the public interest. Rather than ignore a present reality of which the entire state is aware, it was proper for the SWRCB to take official notice of the fact that the current electrical energy market in California is in a state of turmoil, and that Governor Davis has proclaimed a state of emergency to exist due to the electrical energy situation. (See Decision 1644, pp.18 and 127, citing Cal. Code Regs., tit 23, § 648.2 and Evidence Code § 451(f).) The SWRCB took official notice of several other executive orders, not for the truth of the matter asserted in those orders, but simply as additional evidence that the present electrical energy situation is a serious problem receiving immediate governmental attention. (Decision 1644, p. 127, footnote 45.)

California's experience over the last few months demonstrates that no one can predict the energy supply situation in the near future with any certainty. This situation is unprecedented, but it is reasonable to expect that it will be resolved within the next few years. To ignore California's current electrical energy problems would run a risk, however small, of aggravating a serious problem or of placing a cloud over the entire water right decision. Under the circumstances, it was entirely reasonable, and in accord with applicable law on official notice, to take official notice of the current electrical energy shortage and to establish interim flow standards in recognition of that problem.

5.3 The Deficiency Clause Provision of Decision 1644 Provides a Reasonable Balancing of Competing Demands

Decision 1644 includes a provision that allows for a temporary reduction of the instream flow requirements in some years. The deficiency clause provision allows for temporary flow reductions following consultation with DFG and approval of the Chief of the SWRCB Division of Water Rights, in years in which predicted deficiencies in the amount of surface water available for offstream use in Yuba County exceed 20 percent of predicted demand. (Decision 1644, pp. 180-182.)

Several petitioners claim that there is no substantial evidence that justifies establishment of the deficiency clause. NMFS and DOI argue that the deficiency clause is based on projected demands, including a “highly speculative demand for surface water deliveries to Dry Creek Mutual Water Company and to Wheatland Water District and Wheatland Water District Detachments.” (DOI Petition, p. 6; NMFS Petition, p. 6.)

Decision 1644 recognizes that the record shows some elements of YCWA’s projected future water demands for offstream uses are speculative, and that past demand predictions have not proved accurate. (Decision 1644, pp. 104-107.) The deficiency clause allows for a temporary flow reduction only upon a showing of the expected demand for surface water in Yuba County for the year in which YCWA requests a temporary reduction in instream flow requirements. That showing must include information on water deliveries in the preceding years to the Wheatland and Dry Creek areas. If the reduction is approved, YCWA will be required to report what actual deliveries were during the year in which the reduction was in effect. Thus, the deficiency clause is structured to provide relief only in years when there would be an actual deficiency in excess of 20 percent of the amount of surface water available for offstream use in Yuba County.

The extent and manner in which the deficiency clause may be invoked in future years will depend upon future water demands in Yuba County, water management decisions of water suppliers and water users, future hydrologic conditions and fishery needs in a particular year.

The clause allows for a temporary reduction in instream flows, but only to the level of the interim flow requirements that apply until April of 2006.

As discussed in Decision 1644, the public trust doctrine requires the SWRCB to protect public trust resources where feasible. The doctrine allows for a balancing of competing uses and recognizes that, in some cases, the public interest served by water diversions may outweigh harm to public trust resources. (*National Audubon Society v. Superior Court*, 33 Cal.3d 419, 427 [189 Cal.Rptr. 346, 349] cert. denied, 464 U.S. 977.) The SWRCB concludes that the deficiency clause provisions of Decision 1644 represent a proper balancing of competing uses as allowed under the public trust doctrine.

SYRCL and other petitioners also contend that the deficiency clause is an improper delegation of authority to the Chief of the Division of Water Rights. Water Code section 1253 directs the SWRCB to allow for appropriation of water under such terms and conditions as in its judgement will best develop, conserve and utilize in the public interest the water involved. In order to maximize the reasonable and beneficial use of water as mandated by the California Constitution, there are instances in which decisions must be made quickly, and action at a noticed SWRCB Board meeting may not be practical. The deficiency clause permit condition established in Decision 1644 authorizes the Chief of the Division of Water Rights to approve a temporary reduction in instream flows, within a prescribed range, upon a showing of specified facts. Any action by the Division Chief is subject to reconsideration by the SWRCB. In this instance, the deficiency clause provision is a reasonable approach toward meeting competing water demands and is an appropriate delegation of authority.

5.4 The Instream Flow Requirements Specified in Decision 1644 are Supported By Substantial Evidence in the Record

The fishery agencies and several other petitioners contend that there is not substantial evidence in the record for the instream flow requirements established in Decision 1644, and that the SWRCB should have adopted the higher flow recommendations in the Fisheries Management Plan or, at a minimum, the flow requirements proposed in the November 7, 2000, draft decision.

Decision 1644 includes a lengthy analysis of the flow needs of various lifestages of different species of anadromous fish in the lower Yuba River. (Decision 1644, pp. 35-78.) In some instances, the evidentiary record does not support the flow recommendations in the Fisheries Management Plan and Decision 1644 includes findings for why the flows established in the decision are less than were recommended by DFG.¹² In addition, in some years, there would be insufficient water available to meet the DFG recommendations without severely curtailing other uses. Based on the information from the Instream Flow Incremental Methodology (IFIM) study used in developing DFG's recommendations, the long-term flow requirements established in Decision 1644 will provide a very high percentage of potential available habitat for most lifestages of anadromous fish present in the river at a particular time.

The interim flow requirements established in Decision 1644 are the same as the long-term requirements for wet and above normal years, but in spring and summer of dry and critical years, the interim flows are substantially lower.¹³ As discussed in Section 5.2 above, the interim flow requirements were established to avoid the possibility of aggravating the present electrical power supply situation. Decision 1644 does not conclude that the interim flow requirements would be sufficient to maintain lower Yuba River fisheries in good condition on a long-term basis. The interim flow requirements are for a limited period, however, and they represent an increase over the currently applicable minimum flows specified in the 1965 DFG/YCWA agreement. In addition, results of the computer modeling simulations shown in Table B-6 of Appendix 3 of Decision 1644 indicate that, at the present level of demand, the interim flow requirements specified in Decision 1644 would be exceeded in many months, even in dry and critical years.¹⁴

¹² For example, DFG recommended minimum winter flows of 700 cubic feet per second (cfs) throughout the lower Yuba River, but the IFIM study shows that maximum spawning habitat for chinook salmon during that period is provided at a lower flow in the reach of the river below Daguerre Point Dam. Therefore, Decision 1644 establishes 500 cfs as the minimum flow requirement for the reach of the river between Daguerre Point Dam and Marysville. (Decision 1644, pp. 50, 59.)

¹³ Years that are classified as "critical" for purposes of the interim flow requirements are divided into the categories of "critical" and "extreme critical" for purposes of the long-term flow requirements.

¹⁴ Adoption of the interim flow requirements on a long-term basis would not be appropriate for the reasons discussed in Decision 1644 and because gradually increasing water diversions in Yuba County would mean that actual flows remaining in the river would approach the specified minimums with increasing frequency.

Under these circumstances, the SWRCB's adoption of a phased approach to implementation of the long-term flow requirements was reasonable and consistent with the evidentiary record.

5.5 Decision 1644 Represents an Appropriate Balancing of Competing Demands

Several petitioners cite the limited effects that the instream flow requirements established in Decision 1644 will have on the amount of water available for consumptive uses and argue that the decision does not represent an appropriate balancing of competing demands as required under the public trust doctrine.

The results of the computer modeling simulations included in Table C-5 of Appendix 3 indicate that in 58 years of the 71-year period of record, YCWA could meet the new long-term instream flow requirements without incurring any deficiencies in water available for meeting the present level of offstream demand for surface water from the Yuba River. In most other years, the modeling analysis indicates that deficiencies for meeting the present level of offstream demands will be relatively small. In 3 years of the 71-year period of record, predicted deficiencies would be over the 20 percent threshold that would trigger possible reductions in the instream flow requirements.

In view of the options available for offsetting potential surface water deficiencies through use of groundwater or additional water conservation as discussed in Decision 1644, the SWRCB agrees that the impacts of the flow requirements on water users in YCWA are relatively minor at the present level of development. If a significant portion of the additional water demand predicted by YCWA develops, the long-term flow requirements would be likely to have a larger effect on future operations, requiring either additional water conservation or a more highly developed conjunctive use program using groundwater to meet a portion of future demands in some years.

The long-term flow requirements established in Decision 1644 provide a very high percentage of available fish habitat in the lower Yuba River. Even under the occasional reductions in flows that may occur under the deficiency clause, the flow requirements in Decision 1644 will provide more fish habitat than would exist at the minimum flow levels required under the 1965 agreement with DFG. Neither the Legislature nor the courts have established a set formula governing the balancing of competing water demands under the public trust doctrine, nor do we

believe that such a formula is feasible. Based on the record in this proceeding, we believe that the flow requirements established in Decision 1644 represent an appropriate balancing of competing demands.

5.6 The Criteria for Determining Compliance With the Minimum Flow Requirements Specified in Decision 1644 are Reasonable and Supported by the Record

DFG and several other petitioners object to the revised flow measurement criteria specified in Decision 1644 for determining compliance with minimum flow requirements. The flow measurement criteria proposed in the November 7, 2000, draft decision referred to “average daily flows.” In contrast, Decision 1644 provides that “minimum flow requirements shall be maintained as measured by a 5-day running average of average daily streamflows with instantaneous flows never less than 90 percent of the specified minimum flow requirements.” (Decision 1644, p. 173.)

The requirement that instantaneous flows never be less than 90 percent of the specified minimum flows provides greater assurance that the instantaneous flow at any time will be very close to (or above) the specified minimum. Thus, the revised flow measurement criteria in Decision 1644 are more protective of fish habitat than the measurement criteria in the November 7, 2000, draft decision to which DFG did not object.

Flow measurement in a river or stream is not an exact science and flows in the lower Yuba River can be affected by a variety of diversions and sources of inflow. Requiring that instantaneous flow never be below the specified minimum flows would require release of a substantial amount of additional water to establish an operational buffer in order to avoid violation of permit requirements. The use of water for an operational buffer could reduce the water available for meeting future demands, including future compliance with instream flow requirements. Although different measurement criteria may be appropriate in other situations, the flow measurement criteria in Decision 1644 are a reasonable approach that is consistent with the record in this proceeding.

5.7 The Water Temperature Provisions in Decision 1644 Are Appropriate and Supported by the Record

Several petitioners request reconsideration of Decision 1644 based on evidence regarding water temperature needs of anadromous fish in the lower Yuba River and the contention that the SWRCB is legally obligated to require that water temperatures be maintained at levels meeting those needs. Decision 1644 includes substantial discussion and findings regarding water temperature needs of various lifestages of the fish present in the lower Yuba River. The decision concludes, however, that with existing facilities, YCWA does not always have the ability to provide water at the temperatures recommended by the fishery agencies. (Decision 1644, pp. 78-87, 171.)

In order to increase the ability of YCWA to maintain desirable water temperatures, Decision 1644 directs YCWA to diligently pursue development of the Narrows II Powerhouse Extension Project at Englebright Dam for which it has previously submitted a grant application. The decision also requires a number of other actions directed at maintaining water of suitable temperatures for fish in the lower Yuba River. (Decision 1644, pp. 175-177.) In view of present limitations on YCWA's ability to maintain desired water temperatures, the petitioners' request for maximum water temperature requirements is not supported by the record. The water temperature provisions of Decision 1644 are consistent with the record and with legal requirements to protect public trust resources where feasible.

5.8 Decision 1644 Does Not Violate the State or Federal Endangered Species Acts

The lower Yuba River provides habitat for spring-run chinook salmon, which are listed as threatened under the California Endangered Species Act and the federal Endangered Species Act, and for steelhead trout, which are listed as threatened under the federal act. Several petitioners contend that Decision 1644 violates the state and federal endangered species acts because it could have required additional measures that would benefit threatened species. For example, SYRCL and other petitioners argue that Decision 1644 violates the federal Endangered Species Act because flows required in the decision do not fully protect the habitat of listed species.

Similarly, the SYRCL petition cites Fish and Game Code section 2055, which provides that the State's policy is to seek to conserve endangered and threatened species and which directs state

agencies to utilize their authority in furtherance of the purposes of the California Endangered Species Act. SYRCL cites the language in Fish and Game Code section 2061 that defines “conserve” as meaning the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point where the measures provided in the act are no longer necessary. SYRCL then reasons that the California Endangered Species Act requires the SWRCB to “use all methods and procedures” to help the recovery of listed species.

Section 2055 of the Fish and Game Code is a policy statement, not a statutory mandate establishing a level of protection that must be provided whenever the SWRCB adopts a water right decision. Although the policy statement should be taken into consideration as part of the balancing employed in applying the public trust doctrine, it does not compel that the balance be struck in favor of the endangered or threatened species whenever additional flows or other requirements would benefit those species.

The flow requirements in Decision 1644 will avoid the loss of habitat for spring-run chinook salmon and steelhead that would occur if flows were reduced to the level allowed by the 1965 agreement between YCWA and DFG. In addition, Decision 1644 directs YCWA and other water diverters to consult with state and federal fishery agencies and develop plans to reduce fish losses at specified diversion facilities. Decision 1644 further provides that the plans are to be developed so that compliance with the conditions of the plans shall result in compliance with applicable requirements of the state and federal endangered species acts. In addition, the decision provides that if any act under YCWA’s water right permits will result in a “take” of a threatened or endangered species, then YCWA must obtain authorization for any incidental take pursuant to applicable law.

Rather than authorizing a new project that could result in harm to a threatened or endangered species, Decision 1644 requires YCWA and other water distributors to modify operations at an existing project in a manner that will protect threatened species in the Yuba River. The fact that Decision 1644 could conceivably have required further actions to aid in the recovery of threatened species does not mean that the decision violates either the state or federal endangered species act.

5.9 The Absence of a Requirement to Measure Flow Below Daguerre Point Dam Does Not Violate Fish and Game Code Section 5937

Petitioner Walter Cook cites evidence in the record about the small amount of flow immediately below Daguerre Point Dam and argues that the absence of a specific flow requirement at that location constitutes non-compliance with Fish and Game Code section 5937. Decision 1644 refers to maintaining specified flows in the lower Yuba River “as measured at the USGS gaging installations at Marysville and Smartville.” (Decision 1644, pp. 173-175.) The finding on page 75 of the decision also states “the SWRCB’s intent is that the flows specified [in the table] also be maintained immediately downstream of Daguerre Point Dam.”

Condition 4 on page 178 of Decision 1644 requires YCWA to submit a report for approval by the Chief of the Division of Water Rights showing the types and locations of gages capable of continuously measuring required flows and temperatures. The problem raised by Mr. Cook of the possibility of insufficient flows immediately below Daguerre Point Dam, even when the Smartville and Marysville flow requirements are being met, should be addressed in YCWA’s report on gages needed to comply with Decision 1644. In the event that future evidence indicates that there is a continuing problem with insufficient flows immediately below Daguerre Point Dam, the SWRCB may take appropriate action under its continuing authority.

5.10 Decision 1644 Was Not Required to Establish Flow Requirements For Protection of Other Public Trust Resources in the Lower Yuba River

The petition filed by NCCFFF alleges that Decision 1644 violates the public trust doctrine because the decision does not evaluate water requirements necessary for protecting other public trust resources in the lower Yuba River. In addition to the needs of anadromous fish that are addressed at length in Decision 1644, the NCCFFF petition lists a variety of other public trust uses and resources in the lower Yuba River including small craft navigation, water contact recreation, and warm water fish. The NCCFFF petition does not explain how those other resources are adversely affected by the water diversions at issue in Decision 1644, nor does the petition specify what specific changes the petitioner requests in order to better protect other public trust resources.

Although the evidentiary record includes some references to various other public trust resources in the lower Yuba River, the record is not sufficient to determine what additional measures, beyond the flows already required to protect anadromous fish, may be appropriate to protect those resources. In the absence of substantial evidence supporting additional measures for protection of other public trust resources in the lower Yuba River, the fact that such resources exist provides no basis for reconsideration of Decision 1644.

5.11 The New Evidence Referred to by the South Yuba River Citizens League Does Not Justify Reconsideration of Decision 1644

The petition filed by SYRCL asks for reconsideration on the grounds that relevant new evidence is available that could not have been produced in the exercise of reasonable diligence at the time of the hearing. The new evidence cited by SYRCL is a report titled “Draft Environmental Evaluation Report, Yuba County Water Agency, Yuba River Development Project (FERC No. 2246),” dated December, 2000.¹⁵ The portion of the report referred to in the SYRCL petition is a statistical analysis of fall-run chinook salmon escapement in the lower Yuba River before and after construction of New Bullards Bar Reservoir. The YCWA report states in relevant part:

Although the average annual spawning escapement of fall-run chinook salmon since the operation of New Bullards Bar Reservoir has been higher than the pre-New Bullards Bar Reservoir period, the differences between the two periods are not statistically significant. However for the entire sampling period (1953-1999), annual fall-run chinook salmon spawning escapement exhibits a weak . . . but statistically significant . . . increase over time.” (Exhibit 2 to SYRCL Petition, p. 14.)

The hearing record contains conflicting statements about the effect of New Bullards Bar Reservoir on the downstream fishery. Therefore, the report referred to by SYRCL is relevant. The report was not published until after the hearing so it could not have been introduced into evidence at the time of the hearing. The availability of relevant evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing is grounds for seeking reconsideration under the applicable regulations. (Cal. Code Regs., tit. 14, § 768.) However, the availability of such evidence, in and of itself, does not require reconsideration. Decision 1644 cites evidence from YCWA and DFG which, taken together, is consistent with the information in

¹⁵ The YCWA report referred to by SYRCL is attached as Exhibit 2 to the SYRCL petition.

the December 2000 YCWA report cited by SYRCL. (Decision 1644, pp. 43 and 44.) On page 46 of Decision 1644, the SWRCB concluded that “overall populations of fall-run chinook salmon have not changed significantly since construction of New Bullards Bar Reservoir.” SYRCL’s discovery of additional supporting evidence for a conclusion reached in Decision 1644 does not justify reconsideration of the decision.

5.12 The Record Shows All Parties Were Accorded Due Process and Provides No Basis for Reconsideration of Decision 1644 Based on Petitioners’ Allegations of Procedural Deficiencies

Petitioners Cook, NCCFFF, and CSPA allege that there were a variety of procedural deficiencies in the proceedings that led to adoption of Decision 1644 and urge that the decision be reconsidered for that reason. The petitioners’ concerns include the delay in adopting a decision, the limited time to comment on the draft decision dated February 16, 2001, and the fact the parties did not receive the final printed version of Decision 1644 until nearly three weeks after it was adopted.

The issue of appropriate fish flows on the lower Yuba River has been before the SWRCB for many years. The remedy for past delay in establishing appropriate instream flow requirements, however, is not to further extend the proceedings through reconsideration of issues and evidence that have already received an extraordinary amount of attention from the SWRCB and the parties.

The time to file comments on the February 16, 2001, revised draft decision was limited, but the February 16th draft was the third draft decision distributed by the SWRCB in the course of the proceedings. The few significant revisions from the preceding draft were identified in the cover letter that accompanied distribution of the February 16th draft decision. A correction sheet was distributed at the March 1, 2001, Board meeting showing additional minor revisions and corrections that were to be included in Decision 1644. Prior to adoption of Decision 1644, the SWRCB once again provided an opportunity for interested parties to comment on the most recent draft decision.

The only additional revisions included in Decision 1644 related to a request of several parties for a 60-day delay in adopting the decision to allow further opportunity for negotiations. Rather than approving an additional delay, the SWRCB announced that it would include a provision in Decision 1644 under which parties to any negotiations could report back to the Board by May 3, 2001. The provision also stated that, in the exercise of its continuing authority, the Board would consider revisions to the decision based on any proposed settlement among some or all of the parties. (Decision 1644, pp. 172 and 191.)¹⁶

The record shows that throughout the process leading to adoption of Decision 1644, the SWRCB has provided an abundance of due process to all parties. The petitioners' allegations of denial of due process are not supported by the record and provide no basis for reconsideration of the decision.

6.0 ANALYSIS OF ISSUES RAISED IN PETITIONS FILED BY YUBA COUNTY WATER AGENCY AND OTHER WATER DIVERTERS

As in the case of the petitioners who seek additional fishery protection, YCWA and several other water diverters request reconsideration of Decision 1644 under each of the grounds specified in California Code of Regulations, title 23, section 768. Most of the subjects addressed in the water diverters' petitions were raised earlier in the proceedings and are discussed extensively in Decision 1644. The sections below provide additional analysis of issues raised in the petitions filed by YCWA and other Yuba County water diverters.

6.1 YCWA and Other Water Diverters Were Provided a Fair Hearing

The petitions submitted by YCWA and Browns Valley allege that YCWA and Browns Valley were denied a fair hearing due to the SWRCB staff who were assigned to assist in the hearing and due to the role of the California Attorney General's Office in the proceedings. As discussed below, these contentions are without merit.

¹⁶ At the SWRCB meeting on May 3, 2001, the few parties who attended stated that, although there had been some meetings among some of the parties, they had not reached a settlement proposal to bring before the SWRCB for consideration.

6.1.1 SWRCB Staff

YCWA and Browns Valley first allege they were denied a fair hearing because the staff biologist who assisted the SWRCB in the 1992 hearing had previously worked for DFG and is listed in the acknowledgments of DFG's Fisheries Management Plan. YCWA raised the same issue at the beginning of the hearing in 1992. (R.T. I, 22:22-33:23.)

In response to questions from YCWA's counsel in 1992, the SWRCB staff biologist stated that he had finished working for DFG approximately three years before the hearing. In his prior job at DFG, the biologist had reviewed a request for proposals that was sent to fish consultants asking for bids to do technical work for an IFIM study on the Yuba River. He left employment with DFG shortly thereafter.¹⁷ Later, as an employee of the SWRCB, the biologist was asked to do a technical review of the DFG Plan.¹⁸ The critical tone of his written comments indicates a lack of bias in favor of the DFG Draft plan or those who prepared it.¹⁹ After listening to YCWA's argument at the hearing in 1992, the Hearing Officer ruled that the staff biologist would continue to assist with the proceeding. (R.T. I, 29:15-33:23.)²⁰ Despite the absence of any evidence of bias, the petitions submitted on behalf of YCWA and Browns Valley renew YCWA's previous claims.

YCWA and Browns Valley next allege that the SWRCB biologist assigned to the 2000 hearing is also biased. No one objected to the second biologist during the hearing. After the hearing, counsel for South Yuba and Cordua wrote to the SWRCB and inquired about the biologist's role with respect to a 1993 DFG Report titled "Restoring Central Valley Streams: A Plan For

¹⁷ The IFIM study developed information that was used in identifying the amount of fish habitat in the Yuba River that is available at different rates of flows. That information was used by witnesses from YCWA as well as DFG in developing widely different flow recommendations. Therefore, involvement in selecting a contractor or reviewing early work on the IFIM study provides no indication of prejudice to any party to this proceeding.

¹⁸ The record shows that the witness did not do any work on the draft DFG Plan. (R.T. I, 24:24-25:2.)

¹⁹ YCWA submitted the biologist's comments on the draft plan as Attachment 1 to its petition. The fact that a staff member has experience or specialized knowledge, or has expressed a view on an issue related to the proceeding, is not in itself grounds for disqualification. (See Gov. Code § 11425.40, subd. (a)(2) [specifying that these factors are not grounds for disqualification of the presiding officer in the absence of further bias, prejudice or conflict].)

²⁰ Similarly, the Hearing Officer also denied a request by CSPA to strike the testimony of a YCWA witness based on an alleged conflict of interest. (R.T. I, 33:24-34:16.)

Action.”²¹ By letter dated February 15, 2001, the Chief of the SWRCB’s Division of Water Rights advised all counsel to this proceeding that the SWRCB biologist’s work on the 1993 report was limited to the San Joaquin River Basin and the eastside streams (i.e., the Mokelumne, Cosumnes, and Calaveras rivers). The letter also stated that the biologist had not done any work on the Yuba River prior to being assigned to assist in the SWRCB hearing. Despite that clarification, counsel for YCWA and Browns Valley now contend that her assignment to assist in the SWRCB hearing prevented their clients from having a fair hearing.

The record shows that the YCWA/Browns Valley allegations of bias by SWRCB staff are without merit. The first biologist did not participate in making DFG’s recommendations in the Fisheries Management Plan and his written comments on that plan reflect no bias in favor of DFG or the plan.²² Similarly, the second SWRCB staff biologist contributed to a DFG report on Central Valley fisheries, but was not involved in the portion of that report dealing with the Yuba River or other parts of the Sacramento Valley. Prior employment with DFG is insufficient to disqualify staff from assisting the SWRCB in a water right hearing. There is no evidence that either biologist had any financial interest in the outcome of the proceeding, nor have YCWA or Browns Valley cited any legal authority for their contention that the SWRCB staff assigned to this proceeding caused a denial of due process.

6.1.2. Involvement of Different Deputy Attorneys General

In addition to criticism of the role of SWRCB staff, YCWA also argues that it was denied due process due to the role of different deputies from the Office of the Attorney General in the course of the proceedings that led to Decision 1644. Beginning in 1991, when YCWA filed suit in federal court to enjoin the SWRCB from holding a hearing, the SWRCB has consulted with and been represented by a deputy from the San Francisco Office of the Attorney General. Although the court denied YCWA’s request for a preliminary injunction, further proceedings in the matter

²¹ Not surprisingly, that plan includes a number of recommendations for restoring fisheries on various rivers, including recommendations for the Yuba River.

²² In addition, SWRCB files show that, in an action seeking an injunction against a temporary transfer of water by YCWA that had been approved by the SWRCB in 1991, the first SWRCB biologist filed a declaration dated December 11, 1991, opposing issuance of a preliminary injunction against YCWA. (*California Sportfishing Protection Alliance v. State Water Resources Control Board*, Sacramento County, Superior Court No. 368341.) The effect of the declaration was to support a temporary transfer of water by YCWA.

were stayed pending issuance of Decision 1644. YCWA has not made any motion to disqualify the Office of the Attorney General from representing the SWRCB in the federal court litigation. At the water right hearings in 1992 and 2000, DFG was represented by two deputies from the Sacramento Office of the California Attorney General. YCWA did not raise any objection to having DFG represented by deputies from the Office of the Attorney General. Despite the fact that different deputy attorneys general located in different cities represented the SWRCB and DFG, YCWA argues that it was “prevented from having a fair hearing” because the deputy who represented the SWRCB in the YCWA litigation consulted with the SWRCB before adoption of Decision 1644.

Government Code section 11157 provides that “the Attorney General is the legal adviser of each department in all matters relating to the department and to the powers and duties of its officers.” Similarly, Government Code section 11040(b) declares that the Legislature intends for overall efficiency and economy in state government to be enhanced by employment of the Attorney General as counsel for state agencies in judicial and other proceedings. In this instance, it was reasonable for the SWRCB to consult with its counsel in ongoing litigation prior to entering a decision that was already put in issue by that litigation.²³

YCWA’s objection to the legal counsel assisting the SWRCB and DFG was not raised until after adoption of Decision 1644, despite YCWA’s knowledge that: (1) the Attorney General provided counsel to SWRCB in the ongoing suit filed by YCWA; and (2) the Attorney General provided separate counsel, from a separate office, to DFG in the water right hearings before the SWRCB. If YCWA was concerned that it was prevented from having a fair hearing, it would be reasonable to expect it to state its concerns at the outset of the proceeding, rather than to attempt to undermine the proceeding some 9 years later following 27 days of hearing and adoption of a decision to which it objects.

The deputies who represented DFG and the deputy who represented the SWRCB in the litigation filed by YCWA have maintained a proper separation of functions. The deputy who represents

²³ The SWRCB has in-house counsel who assist during the hearing and in preparation of a proposed decision.

the SWRCB in the pending litigation has not assisted in any way in the preparation of DFG's presentation in these proceedings, and the deputies who represent DFG have not assisted in any way in the representation of the SWRCB in the pending litigation. They had no contact that resulted in any ex parte communication between DFG and the SWRCB as described in Government Code section 11430.10. The different deputies worked out of different offices, in different cities, representing and consulting with different clients. YCWA and other parties were provided a fair hearing in all respects.

6.2 Decision 1644 is Supported By Substantial Evidence in the Record

YCWA and other water diverters contend that various provisions of Decision 1644 are not supported by the evidence in the administrative record. The petitioners' contentions include arguments that the decision did not properly evaluate the effect of the long-term flow requirements on YCWA water users, that there is no quantitative evidence that the long-term flows established in Decision 1644 will provide significant benefits to fish, and that the requirement to submit plans to reduce fish losses at major diversion facilities are not supported by the record.

6.2.1 Decision 1644 Includes a Detailed Evaluation of the Effects of Revised Instream Flow Requirements on Other Uses of Water Based on Evidence in the Record

Decision 1644 includes extensive evaluation of both present and future demands for water from the Yuba River for offstream uses in Yuba County. (Decision 1644, pp. 100-114.) In view of yearly fluctuations in irrigation diversions, the present level of demand for irrigation established in Decision 1644 was estimated by averaging the highest five years of past annual water deliveries as reported in data from YCWA. (Decision 1644, pp. 108-114.) Based in part on testimony of the only waterfowl expert who testified at the hearing, Decision 1644 used a figure of 35,516 acre-feet per year as the present demand for water for waterfowl habitat, an amount which is slightly greater than the 34,000 acre-feet used by the YCWA consultants in their estimate of present demand. (Decision 1644, pp. 104, 110-112.)

Most of the data for calculating water demand was provided by YCWA and the citations to the record for that data are provided in the decision. The potential effects of the revised flow requirements on the availability of water for other uses were evaluated, using the same operations model used by YCWA. (Sections 8.0 through 8.5 and Appendices 1-4 of

Decision 1644.) The existence of other evidence from which some parties argue that the present level of demand is higher than it was determined to be in Decision 1644 does not establish that there is a lack of substantial evidence to support the present water demand figures used in the decision.²⁴

Due to uncertainty about future hydrology, future cropping patterns, future development in Yuba County, and YCWA's future operations, the findings in Decision 1644 are not based on results of computer modeling simulations of the long-term flow standards at an assumed future level of demand. However, the decision addresses the subject of future water demands in Yuba County and potential ways of meeting increased demands in years when surface water supplies are insufficient to fully meet all competing demands. For example, the decision cites the potential for additional water conservation based on evidence from the YCWA consultants' report that irrigation efficiency for rice was substantially greater when irrigators relied on groundwater than it was after they switched to lower cost surface water. (Decision 1644, p. 108.) The decision also recognizes the availability of local groundwater to supplement surface water supplies, as evidenced by past use of groundwater for meeting local demands in years when surface water was conserved for meeting other demands. (Decision 1644, pp. 124-125.)²⁵

Browns Valley contends that Decision 1644 should be reconsidered because "there is no evidentiary basis for its assumption that all Yuba County farmers have sufficient groundwater pumping capacity to allow them to implement conjunctive use in order to compensate for surface water deficiencies." (Browns Valley Petition, p. 8.) The simple answer to Browns Valley's argument is that Decision 1644 made no such assumption. The record establishes the presence

²⁴ Following release of the SWRCB's initial draft decision in early 1999, for example, the reported deliveries of water for "waterfowl habitat" increased from an average of 41,790 acre-feet to a record high of 62,543 acre-feet, or approximately 84 percent more than the 34,000 acre-feet that was assumed to be a reasonable number in the water demand estimates prepared by YCWA consultants, and 76 percent more than the waterfowl demand figure used in Decision 1644. (Decision 1644, p. 110.)

²⁵ The SWRCB recognizes that, in addition to pumping costs, there is a standby cost for maintaining groundwater pumping facilities. However, the past use of groundwater to replace surface water and sale of the conserved surface water to other areas shows that Yuba County water users have had a financial incentive to maintain their groundwater pumping capabilities even without the revised instream flow requirements. The record does not establish the extent to which groundwater pumping facilities would be removed if the flow requirements proposed by YCWA were adopted.

of significant groundwater supplies and pumping capability both in areas presently served by surface water under YCWA's rights and in areas that presently rely upon groundwater.

Decision 1644 made no findings regarding the groundwater pumping situation of each individual farmer or landowner in YCWA's service area. The record demonstrates, however, that YCWA has been able to coordinate in the past with landowners having groundwater pumping capability in order to reduce use of surface water for irrigation in the YCWA service area.

In addition to the availability of groundwater and additional water made available through conservation, the Deficiency Clause provision of Decision 1644 provides a means of meeting potential water supply deficiencies in dry and critical years. As discussed in Section 5.3 above, the Deficiency Clause provides a reasonable means of balancing instream flow demands against potential deficiencies that may occur in serving YCWA's present service area plus projected new uses in the Dry Creek and Wheatland areas. (Decision 1644, pp. 180-182.) Contrary to the statement on page 17 of YCWA's petition, Decision 1644 is not based on the assumption that the Deficiency Clause would always limit deficiencies in YCWA's water deliveries to 20 percent or less under future demand conditions. There are too many variables to make such a prediction. In combination with water conservation and conjunctive use of groundwater, however, the Deficiency Clause provides a reasonable tool to reduce potential surface water deficiencies and balance competing demands in the future.

6.2.2 The Flows Proposed by YCWA Would Not Comply With Legal Requirements to Release Sufficient Water to Maintain Fish in Good Condition and to Protect Public Trust Resources Where Feasible

YCWA and other water diverters contend that Decision 1644 did not give adequate consideration to the instream flows proposed by YCWA and that there is no quantitative evidence that the long-term flows established in Decision 1644 will provide any significant benefits to fish. The evidentiary record on which the flows established in Decision 1644 are based is discussed at length in the decision. Although the SWRCB did not adopt all of YCWA's recommendations, Decision 1644 adopted aspects of YCWA's proposal where supported by the evidentiary record.²⁶

²⁶ For example, contrary to the approach in the Fisheries Management Plan, Decision 1644 established separate flow requirements at Smartville and Marysville during the winter months based on YCWA's analysis showing that [footnote continues on next page]

A comparison of the long-term flow requirements in Decision 1644 with the flows proposed by YCWA shows that the flow regimes are identical for wet and above normal years and that YCWA's recommendations are very similar to the Decision 1644 minimum flow requirements for below normal years. In addition, for October 15 through April 21 of all water year types, the YCWA flow proposals are also the same as the flow requirements in Decision 1644. Thus, YCWA apparently does not dispute the evidentiary basis for the long-term flow requirements in Decision 1644 during periods when there is sufficient water available to meet both instream needs and offstream demands.

YCWA's dispute with the long-term flow requirements in Decision 1644 appears to focus on years classified as dry, critical, and extreme critical under the water year classification criteria specified in the decision. On an annual basis, the long-term flows established by Decision 1644 for the years in which less water is available reflect reductions of over 30 percent from the desired minimum instream flows, i.e., the requirements that apply during wet and above normal years.²⁷ The flow reductions for drier years are not based on a finding that fish prefer less water in dry years. Rather the flow reductions for dry, critical and extreme critical years are based on the SWRCB's recognition that when insufficient water is available to meet all demands, instream flow needs must be balanced against competing water demands.

Due to the relative abundance of water in the Yuba River Basin relative to local demands, computer modeling simulations show that the present offstream water use demands and the long-term flow requirements in Decision 1644 can be fully met in most years. For the relatively few years in which projected deficiencies in surface water available for meeting offstream uses would exceed 20 percent, Decision 1644 provides a procedure by which the SWRCB may approve a temporary reduction in instream flow requirements. (Decision 1644, pp. 114-133.)

establishing a lower flow requirement for the reach of the river below Daguerre Point Dam than for the reach above Daguerre Point could benefit fish habitat conditions. (Decision 1644, pp. 52 and 53.) Similarly, the establishment of different flow requirements for different water year types as determined under the Yuba River Index was based on YCWA's recommendations with a minor modification.

²⁷ The actual flows in the river in wet years would far exceed the minimum instream flow requirements. Therefore, the difference in actual flows in wet years and extreme critical years would be much more than 30 percent.

Thus, Decision 1644 establishes long-term instream flow requirements that reflect a balancing of competing demands, and it provides a mechanism for temporarily reducing flow requirements if needed to avoid large deficiencies in surface water available for offstream uses.

In contrast, the YCWA flow proposal for dry and critical years would establish minimum flow requirements well below the minimum flows specified in Decision 1644 without requiring any reduction in diversions for consumptive uses. For example, for the period of July 3 through September 14 of critical years, the YCWA proposal would reduce minimum instream flows by 60 percent from the 250 cfs required under Decision 1644 to 100 cfs as proposed by YCWA. (Decision 1644, p. 57.) The period of July through September is used for steelhead rearing in the lower Yuba River. Habitat data from the IFIM study show the critical year flows proposed by YCWA would provide 23 percent less habitat for juvenile steelhead in the Daguerre Point Dam reach. (DFG 26, p. 152.)

Moreover, as explained in Decision 1644, the record shows that a minimum flow of 175 cfs is required for adequate passage of adult chinook salmon over the riffles in the lower Yuba River during this period. (Decision 1644, pp. 66-67, citing testimony and exhibits from DFG.) Thus, the summer flows proposed by YCWA for critical years (and extreme critical years as classified under Decision 1644) would reduce minimum flows by 60 percent, substantially reduce rearing habitat for one threatened species (steelhead), and impede upstream migration of another threatened species (spring run chinook salmon).

Examination of YCWA's flow recommendations for June of critical years also reveals problems. In contrast to the 800 and 500 cfs flow requirements specified in Decision 1644 for June of critical and extreme critical years respectively, YCWA proposes a flow of 100 cfs for June of critical years (including years classified as extreme critical under Decision 1644). Thus, YCWA's proposed flow for critical years is roughly 13 percent of the 800 cfs that YCWA has identified as being desirable for the same period in years when sufficient water is available. (Decision 1644, p. 57.)

YCWA's flow proposal for June of critical years not only would reduce fish habitat from what is available at the long-term flow levels specified in Decision 1644, it would also result in reducing flows by over 40 percent from the lowest flow currently allowed under the 1965 agreement between YCWA and DFG. (Decision 1644, p. 19.) In view of the threatened status of steelhead and spring-run chinook salmon in the lower Yuba River, YCWA's proposal to reduce flows from the presently specified minimum requirements clearly does not reflect a defensible balance between the needs of threatened species and consumptive uses.

In contrast to the balancing of competing demands reflected in Decision 1644, computer modeling simulations for the 71-year period of record show that, at the present level of demand, under YCWA's flow proposal, there would be no deficiencies in the amount of surface water available for offstream uses in Yuba County in any water year type. (Decision 1644, Appendix 3, Table B-5.) Moreover, if YCWA were to increase its diversions to the levels it proposes, the frequency with which instream flows would be reduced to levels that approach the specified minimums discussed above would increase.

The SWRCB recognizes that the record is insufficient to accurately predict the effect of the revised flow requirements on population numbers of specific species of fish in the lower Yuba River. Regardless of other factors that may affect fish populations, however, it is essential to maintain flows that will protect fish habitat and fish migration in the lower Yuba River on a long-term basis. The need for appropriate habitat is particularly compelling where two of the affected species of fish have been listed as threatened under the federal Endangered Species Act. DFG's Fisheries Management Plan includes detailed information on the quantity of habitat for different lifestages of different species of fish available at different flow regimes. Thus, the relationships between flow and fish habitat in the Yuba River are better defined than on most other watercourses in California. Contrary to YCWA's assertion, the record shows the long-term instream flow requirements established in Decision 1644 will be substantially better for fish than the lower flows proposed by YCWA.

6.2.3 The Requirements to Submit Plans to Reduce Fish Losses at Major Diversion Facilities Are Supported by the Record

Decision 1644 requires that YCWA, Brophy Water District and South Yuba Water District consult with state and federal fishery agencies and develop a plan for reduction of fish losses at the South Canal for submission to the SWRCB by March 31, 2002.²⁸ The petition submitted by Brophy contends that the rock gabion fish screen at the South Canal has been effective in preventing fish from being diverted into the canal, and therefore, there is no substantial evidence for requiring a plan to reduce fish losses. Brophy and South Yuba also contend that the SWRCB is precluded from requiring development of the plan due to a 1984 agreement between DFG and South Yuba.

The South Canal diversion facility is addressed on pages 92 through 96 of Decision 1644. The findings in the decision establish that the SWRCB's concern is not limited to the possibility of fish passing through or over the rock gabion fish screen. Rather, the decision discusses several problems caused by diversion of water from the Yuba River at the South Canal diversion facility, of which the rock gabion is a part. The decision cites evidence that the wide deep pond in front of the rock gabion reduces water velocity, results in increased water temperatures, disorients juvenile salmon and delays their downstream migration. The decision also discusses evidence about problems with the return channel which has been subject to recurring blockage problems and which follows a meandering alignment rather than the more straight path shown on the design plans included in the 1984 agreement between South Yuba and DFG.

Decision 1644 directs YCWA, Brophy, and South Yuba to consult with state and federal fishery agencies and to prepare a plan for reducing fish losses at the South Canal diversion facilities that will result in compliance with state and federal law.²⁹ This is a reasonable requirement that is supported by the evidentiary record and is consistent with the SWRCB's responsibilities under the public trust doctrine and article X, section 2 of the California Constitution. The 1984

²⁸ Decision 1644 includes a similar requirement for submission of a plan to reduce fish losses by YCWA and parties diverting water through the North Canal (Hallwood-Cordua Canal).

²⁹ The decision does not make a finding with respect to whether the rock gabion structure could serve as a part of a satisfactory water diversion facility. Based on the record before the SWRCB, that question is properly left to consideration by the fishery agencies and those who supply or divert water at the South Canal.

agreement between South Yuba and DFG does not preclude the SWRCB from requiring additional measures to protect fish under different circumstances over 15 years later.³⁰

In reviewing the provisions of the decision regarding water diversions at the South Canal, the SWRCB notes that page 188 of Decision 1644 mistakenly states that Brophy Water District is to submit a plan to reduce fish losses at the South Canal by December 31, 2001. That date should be revised to be consistent with the March 31, 2002, date that is specified elsewhere in the decision for submission of the plans to reduce fish losses at the South Canal and at the Hallwood-Cordua Canal (North Canal).

6.3 The Additional Declarations and Reports Submitted by Petitioners Do Not Warrant Reconsideration of Decision 1644

YCWA and Browns Valley contend that Decision 1644 should be reconsidered due to relevant new evidence that became available after the hearing. The new evidence cited by the petitioners includes a declaration by a consultant to YCWA regarding effects of the new flow requirements on water availability for other uses and a declaration by a fisheries biologist interpreting the results of data from a rotary screw trap operated by DFG in 2000. Following submission of its petition, YCWA later submitted a draft report on the Yuba River Development Project prepared by the Federal Energy Regulatory Commission (FERC) dated April 2000. The new evidence cited by petitioners is discussed below.

6.3.1 Declaration Regarding Effects of Flow Requirements on Water Availability

The consultant who analyzed potential water supply effects of Decision 1644 conducted a series of additional computer simulations of the effects of revised instream flow standards on operations of the Yuba River Development Project under a number of different assumptions, including different levels of demand.³¹ YCWA's estimates of its present and future levels of demand are both excessive for the reasons discussed on pages 100 through 114 of Decision 1644. Therefore, the modeling simulations based on what is labeled as the YCWA present level of

³⁰ Among the changes to be considered in the development of the plans to reduce fish losses is the fact that steelhead and spring-run chinook salmon are now listed as threatened species. Even in the absence of changed circumstances, an agreement by DFG would not bind the SWRCB in the exercise of the SWRCB's independent authority to prevent unreasonable methods of diversion and to protect public trust uses.

³¹ The assumptions are summarized in Table 1 of the declaration submitted as Attachment 6 to the YCWA petition.

demand or the YCWA future level of demand do not represent a reasonable analysis of either condition.

The modeling scenario that is based on what is labeled as “SWRCB Future” level of demand is a misnomer because Decision 1644 does not conclude that the demand levels predicted by YCWA for the Dry Creek and Wheatland areas will or should occur.³² Rather, the decision simply allows actual future demands for those areas to be included in the calculation of predicted demand for a given year for purposes of the Deficiency Clause. The projected water demand figure for a particular year, however, is to be based upon the actual projected demand for that year and is to be accompanied by data showing the surface water deliveries for each of the past three years. (See Decision 1644, pp. 180-182.) The demand figures for the Dry Creek and Wheatland areas referred to in Decision 1644 are specified as a maximum level of demand for purposes of application of the Deficiency Clause, not as the SWRCB’s prediction of actual or future surface water demands in those areas.

Finally, the modeling scenarios that are based on the assumption that YCWA will schedule future releases pursuant to the terms of the 1966 YCWA/PG&E Power Purchase Contract are based on a set of conditions that has not occurred since the mid-1980s and would not be in the interests of either YCWA or PG&E. Therefore, modeling results based on the water release criteria specified in that contract are of little relevance.

In summary, most of the additional modeling analyses referred to in the declaration are of little or no relevance to present conditions or to future conditions that are likely to occur. YCWA also argues that Decision 1644 should be reconsidered because it was based on the assumption that the Deficiency Clause would be sufficient to limit any future deficiencies to 20 percent or less, but that the additional modeling simulations show surface water deficiencies would occasionally exceed 20 percent. As stated in Section 6.2.1 above, the SWRCB made no such assumption. The extent of any future surface water supply deficiencies will be a function of numerous factors

³² The future level of demand for other areas served by YCWA may also vary depending upon market conditions, water conservation efforts and implementation of a conjunctive use program.

including future hydrology, future water demand based on market conditions and other factors, and future operational decisions of YCWA and other water diverters. The modeling results described in Attachments 6 through 10 of YCWA's petition do not warrant reconsideration of Decision 1644.

6.3.2 YCWA's Analysis of Recent Fishery Data

The second declaration submitted by YCWA is an analysis by a fisheries biologist of the need for the instream flows required under Decision 1644 for April, May, and June in view of recently available data from a rotary screw trap that was collected by DFG during 2000. (YCWA Petition, Attachment 11.) The biologist concludes that the data for 2000 indicate that most juvenile chinook salmon had already emigrated out prior to the increase in spring flows called for in Decision 1644. The DFG data show the majority of juvenile steelhead left after April 21, but the biologist concluded that the relatively low numbers of steelhead indicate that the steelhead may have actively avoided the rotary screw trap. The biologist also concludes that the data did not show a strong relationship between flow rates and emigration of either steelhead or chinook salmon. Based on the data from the rotary screw trap collected in 2000 and the biologist's declaration regarding that data, YCWA argues that Decision 1644 should be reconsidered "so the SWRCB can adjust the spring instream flow requirements so that they are supported by the relevant evidence."

The new evidence about juvenile chinook salmon and steelhead emigration does not warrant reconsideration of Decision 1644 for several reasons. First, it is difficult to draw general conclusions on fishery emigration from a single year's data from a single study. Second, different experts' interpretations of the same data often vary considerably as was apparent during the hearing. Third, although the biologist cited by YCWA reached a conclusion about the timing of juvenile chinook salmon emigration, he did not believe the data were sufficient to reach a similar conclusion about juvenile steelhead emigration. In establishing increased minimum flow requirements for late April through June, Decision 1644 refers to the need to provide adequate flows for both juvenile chinook salmon and steelhead emigration, as well as the benefits of increased spring flows to attract American shad into the Yuba River for spawning. (Decision 1644, pp.61-66.) Although the data on steelhead for 2000 was limited, it shows that the majority

of the trapped steelhead emigrated after the increased minimum flows came into effect on April 21.

Numerous witnesses testified in the hearing about the benefits of high spring flows to aid emigration of chinook salmon and steelhead. Decision 1644 recognizes that the data from an emigration study would be helpful in evaluating the subject of appropriate spring flows. If review of several years' data on chinook salmon and steelhead emigration establishes that the timing or magnitude of spring flows should be modified, then, in the exercise of its continuing authority, the SWRCB can consider modification based on the evidence available at that time. Neither the very limited additional data referred to by YCWA and Browns Valley, nor the interpretation of that data described in the declaration submitted by YCWA is sufficient to warrant reconsideration of the decision.

6.3.3 Draft FERC Report on the Yuba River Development Project

YCWA submitted a supplement to its petition for reconsideration to which it attached a Draft Biological Evaluation of four FERC licensed projects on the Yuba River dated April 2001. The draft evaluation concludes that, overall, “the ongoing normal operations of the [Yuba River Project] do not adversely affect Central Valley steelhead or spring-run chinook salmon, and many aspects of project operation have, in fact, enhanced conditions for these species in the lower Yuba River.”³³ The draft report states that the greatest potential for adverse effects on the two listed species is uncontrolled flow reductions due to unexpected outages that could occur under current project configuration.³⁴ In addition to the fact that the draft report has not been finalized and approved by FERC, the conclusions of the draft report do not merit reconsideration of Decision 1644 for several reasons.

First, the draft report's conclusion cited by YCWA is not inconsistent with the overall findings of Decision 1644. Although Decision 1644 cites evidence of significant fish losses at YCWA diversion facilities and other occasional problems, the decision does not conclude that the

³³ (Draft Biological Analysis, FERC Project Nos. 2246, 6780, 1403, and 2266, April 2001, p. 37.)

³⁴ The draft FERC report recognizes adverse effects of the project on individual fish. Therefore, the statement that the project has not adversely affected spring-run chinook salmon or steelhead is understood to refer to the overall population numbers for each species.

ongoing normal operation of YCWA's projects have reduced the overall populations of Central Valley steelhead or spring run chinook salmon.

Second, the main fishery protection measure in Decision 1644 is the establishment of minimum flow requirements to comply with Fish and Game Code section 5937 and the public trust doctrine. The historic flows in the lower Yuba River have generally been well above the presently applicable minimum requirements. Therefore, the fact that a FERC draft report concludes that spring-run chinook salmon and steelhead have not been adversely affected at the historic flows does not mean that fish would be protected if the flows were reduced to the levels allowed under the 1965 agreement or the levels recommended by YCWA.

A third reason that the draft FERC report does not warrant reconsideration of Decision 1644 is that the focus of the report is on project releases upstream of Daguerre Point Dam, rather than on flows below the major irrigation diversions at that dam.³⁵ In contrast, Decision 1644 closely examines the effects of irrigation diversions on the flows and fishery in the reach of the river between Daquerre Point Dam and Marysville.

Finally, it should be apparent that each new draft report on some aspect of Yuba River fisheries cannot justify reopening a lengthy evidentiary hearing process for all parties to weigh in with their opinions on the meaning of the new report. The SWRCB conducted two lengthy evidentiary hearings with dozens of expert witnesses and hundreds of exhibits on fishery and other issues. The draft FERC report is one in a series of studies and reports on fish in the Yuba River, many of which are already in the record. The conclusion of the report cited by YCWA is not inconsistent with the findings of Decision 1644 and it does not warrant reconsideration of the decision.

³⁵ The FERC draft report states: "Our analysis focuses on the Narrows and Garcia Gravel Pit Reaches of the river, which extends as far downstream as Daguerre Point Dam. This is the reach of the river most influenced by releases from the Yuba River Project. Although the project must meet minimum flow requirements below Daguerre Point Dam, the irrigation diversions at Daguerre Point Dam have a major effect on flows downstream of the dam." The FERC report indicates that at flow levels below 730 cfs, the flows above Daguerre Point Dam are governed by releases from PG&E's Narrows I Powerhouse which is already subject to the flows in the DFG Fisheries Management Plan pursuant to the term of PG&E's FERC License. (Draft Biological Analysis, FERC Project Nos. 2246, 6780, 1403, and 2266, April 2001, pp.14-17.)

6.4 The Alleged Errors of Law Specified in the YCWA Petition Provide No Basis for Reconsideration of Decision 1644.

The petitions submitted by YCWA and other water diverters contend that Decision 1644 contains several errors of law that justify reconsideration of the decision. The points raised in the petitions are discussed below.

6.4.1 Authority of the SWRCB

YCWA alleges that the public trust doctrine and article X, section 2 of the California Constitution do not authorize the SWRCB to establish the instream flow requirements specified in Decision 1644 or take actions to improve water temperatures because there is no evidence that YCWA's operations have been unreasonable and there is no evidence that YCWA's operations have had any significant adverse impacts on fish. (YCWA Petition, p. 19.) Our response to this is threefold. First, the record shows that although the development of New Bullard Bar has had some fishery benefits, diversions under YCWA's permits have killed many thousands of fish. (Decision 1644, pp. 87-98.) Second, the SWRCB has authority to condition YCWA's water right permits as specified in Decision 1644 under the legal doctrines and statutes discussed at length in the decision. Finally, YCWA's contention that Decision 1644 would require YCWA to release water from storage "during almost all Septembers and Octobers, about half of all Novembers, and a significant number of other months" is not supported by the record or by the declaration cited in YCWA's petition. (YCWA Petition, p. 19, and p. 24 of Attachment 6.)³⁶

6.4.2 YCWA's Water Rights Are Defined by the Terms of its Permits

YCWA contends that Decision 1644 should be reconsidered because it "improperly ignores YCWA's request that it retain the right to divert or transfer, downstream of the Marysville gage, any additional water that is required to implement the new instream flow requirements." (YCWA Petition, p.19.) YCWA's argument about "retaining" the right to divert water

³⁶ The declaration referred to by YCWA identifies the months in which some unquantified amount of stored water would be released under the assumptions that the declarant used in his analysis. (YCWA Petition, Attachment 6, p. 24.) The declaration does not say, however, who would be required to provide the stored water. As discussed in footnote 19 on page 33 of Decision 1644, the Federal Energy Regulatory Commission presently requires Pacific Gas and Electric Company to release up to 45,000 acre-feet of water from storage in order to provide instream flows in the Yuba River. Thus, the statement that an unquantified amount of stored water may be released in certain months establishes nothing about the effect of Decision 1644 on the availability of water to YCWA water users.

downstream of the Marysville gage appears to be based on a misconception of what its water right permits represent. Water Code section 102 provides:

“All water within the State is the property of the people of the State, but the right to use of the water may be acquired by appropriation in the manner prescribed by law.”

Water Code section 1250 et seq. defines the method of acquiring an appropriative water right through filing and obtaining approval of a water right application with the SWRCB. A water right permit “gives the right to take and use the water only to the extent and for the purpose allowed in the permit.” (Water Code § 1381.) Any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed. (Water Code § 1391.)

In short, the water right represented by a water right permit or license is defined by the terms and conditions of that permit or license at a given time. The Water Code includes several provisions by which a water right holder may request a temporary or long-term change in the terms or conditions of a permit or license. (E.g., Water Code §§ 1435 et seq. and 1700-1737.) As discussed in Decision 1644, YCWA has requested and obtained SWRCB approval for numerous temporary transfers of water under its permits in the past that involved use downstream of the Marysville gage in areas outside of YCWA’s place of use. Following issuance of Decision 1644, YCWA once again filed a petition for a temporary transfer pursuant to Water Code section 1725 et seq. and was authorized to transfer 50,000 acre-feet of water for use outside of Yuba County. (SWRCB Order WR 2001-03-DWR, issued March 9, 2001.)

YCWA’s rights under its water right permits at any particular time remain defined by the terms and conditions of those permits, including any temporary or permanent revisions of those terms and conditions. YCWA’s permits do not grant an ongoing right to divert or transfer water downstream of the confluence of the Yuba River with the Feather River. Therefore, YCWA has no such right to “retain.” The fact that Decision 1644 did not condition establishment of revised instream flow requirements upon YCWA’s retention of a right that it does not presently hold is not legal error.³⁷

³⁷ YCWA has filed a change petition to expand the authorized place of use under its permits to include the service area of the State Water Project and Central Valley Project. Due to the pendency of the proceedings leading to [footnote continues on next page]

A primary focus of the current proceeding has been on establishing the instream flow requirements in YCWA's water right permits necessary for compliance with Fish and Game Code section 5937 and other legal requirements. Issues regarding YCWA's proposals to transfer water to other areas can properly be addressed at a later time in the context of acting upon those proposals, whether the proposals are for temporary transfers or for a permanent expansion of YCWA's place of use.³⁸ Rather than attempting to balance public trust uses of water against abstract or undefined competing uses to deliver an unknown amount of water for use in other areas, the SWRCB can undertake the required balancing only when it has a specific proposal before it.

Contrary to the YCWA's contention in its petition for reconsideration, Decision 1644 does not prevent or make future water transfers impossible.³⁹ Computer modeling results show that at the existing level of demand, the amount of water remaining in storage at the end of the irrigation season is frequently above minimum carryover storage requirements. The extent to which YCWA engages in future water transfers will depend upon a number of variables including future hydrology, YCWA's actual future level of demand for local use, the extent to which conjunctive use programs are employed to serve local needs during years when there is a high demand for surface water transfers to other regions, and the economic incentives for water transfers. Water Code section 1725 allows for temporary transfer of the amount of water that would have been consumptively used or stored by a water right holder. Based on the record

Decision 1644 and other legal requirements, the SWRCB has not yet acted upon that petition. As announced by the Hearing Officer at the outset of the resumed water right hearing in February of 2000, the SWRCB will address the issues raised by YCWA's pending change petition in separate proceedings.

³⁸ In contrast to prior petitions for temporary transfers of specified amounts of water pursuant to Water Code section 1725 et seq., the petition dated February 4, 2000, requests a permanent amendment in YCWA's place of use to include the entire service areas of the State Water Project (SWP) and the Central Valley Water Project (CVP), as they may be revised from time to time. The petition further seeks to amend YCWA's permits to include points of diversion "at the SWP's North Bay Aqueduct and Clifton Court Forebay, the CVP's Tracy pumping plant and other existing points of diversion that are owned by entities other than DWR or the USBR that are used to deliver water to purveyors within the SWP and CVP service areas." (S-YCWA -22, supplement, p.3.) In accordance with the Hearing Officer's statement at the start of the 2000 hearing, the YCWA petition was not noticed as a subject of this proceeding and, therefore, was not acted upon in Decision 1644.

³⁹ YCWA's petition alleges that "the actual impacts of D-1644 on future out-of-County water transfers are not speculative at all-no future transfers would be possible." (YCWA Petition, p. 20.)

before us, the SWRCB cannot reasonably conclude that future transfers of water from YCWA will be “impossible.”

6.4.3 The SWRCB Was Not Required to Prepare an Environmental Impact Report Prior to Adoption of Decision 1644

YCWA and other water distributors argue that Decision 1644 should be reconsidered because the SWRCB did not prepare an environmental impact report (EIR) before adopting the decision. YCWA alleges that Decision 1644 will require water users to either pump a significant amount of groundwater or fallow irrigated land, and that the decision will require a shift of hydroelectric power generation from summer months to spring months. Therefore, YCWA contends that Decision 1644 is not exempt from CEQA under the ongoing project exemption under Public Resources Code section 21169, or under any of the categorical exemptions specified in the applicable regulations.

The Yuba River Project was authorized prior to enactment of the California Environmental Quality Act (CEQA) and, therefore, was exempt from preparation of an EIR. (Pub. Res. Code § 2269.) Along with irrigation and hydropower production, fishery protection and enhancement are listed as authorized purposes of use for water diverted by the project. The instream flow requirements established by Decision 1644 are well within the recent historical flows on the lower Yuba River for all months. The increased flow requirements during the spring months normally do not require release of stored water, but rather require bypass of a portion of the natural flow for protection of fish. The increased minimum flow requirements for the summer months are higher than the minimum flows specified in the 1965 agreement with DFG, but are generally lower than the flows that have been present in the river, and usually lower than the summer flows that would actually be present in the river, even under YCWA’s flow proposal.

The record shows the Yuba River Project has not been operated according to a stationary set of operating criteria. Rather, YCWA has varied the flows in the river to meet changing demands for the various uses of water authorized under its permits. In some instances, the flows provided by YCWA have benefited the fish and, at other times, higher flows at certain times would have been better.

In *Nacimiento Regional Water Management Advisory Committee v. Monterey County Regional Agency* (1993) 15 Cal.App.4th 200 [19 Cal.Rptr.2d 1], the California Court of Appeal held that varying the amounts of water released from a reservoir in order to meet competing interests is part of an ongoing project and, therefore, exempt from CEQA. Consistent with that holding, YCWA does not prepare an EIR for operation of its facilities each year even though annual operational decisions result in varying the flows in the Yuba River, varying the amount of water in carryover storage, and varying the amount of water delivered to various uses. The possibility of deficiencies in the amount of water available for offstream uses was recognized in YCWA's contracts which allow for imposing up to a 50 percent deficiency in water deliveries to Cordua Irrigation District, Hallwood Irrigation District, and the Dantoni area. (Decision 1644, p. 23.)

Despite the presence of two species of fish that are listed as threatened under the federal Endangered Species Act, and the insistence of state and federal fishery agencies that higher minimum flows during some periods are needed to provide adequate fish habitat, YCWA has varied its annual operations continually without preparation of an EIR. The minimum flow requirements established in Decision 1644 are all well within the range of past flows provided by YCWA, but the present water right permits do not require that those minimum flows be maintained on an ongoing basis. In an instance where fish protection and enhancement are listed as purposes of use under YCWA's water right permits, it makes no sense to argue that annual changes in water releases for irrigation and power production are exempt from CEQA, but that an EIR is necessary before requiring YCWA to provide specified flows needed for protection of fish.

In this instance, the *Nacimiento* ruling exempting operational decisions for ongoing projects from CEQA is complimented by the provisions of California Code of Regulations, title 14, sections 15307 and 15308. As discussed in Decision 1644, those sections establish categorical exemptions from CEQA for actions that are taken by regulatory agencies to assure maintenance, restoration or enhancement of a natural resource and actions taken by regulatory agencies for protection of the environment. In addition, the flow requirements specified in Decision 1644 are exempt from CEQA under section 15321 of the regulations as an enforcement action to define

the instream flow requirements necessary for compliance with Fish and Game Code section 5937.

The water agencies contend that the categorical exemptions under the CEQA Guidelines do not apply under the provision of California Code of Regulations, title 14, section 15300.2(c). Section 15300.2(c) states that the categorical exemptions do not apply “where there is a reasonable possibility that the activity will have a significant effect on the environment because of unusual circumstances.” Two observations are relevant in response to the contention that the categorical exemptions do not apply. First, anytime that the SWRCB establishes instream flow requirements to enforce Fish and Game Code section 5937, the water diverter could argue that, in some years, compliance with the flow requirements will reduce the water available for irrigation or other uses and, therefore, will have a significant adverse environmental effect. Yet, petitioners cite no court decision holding that establishing instream flow requirements to enforce Fish and Game Code section 5937 requires preparation of an EIR.

The baseline for determining if an action may have a significant adverse environmental effect is the set of existing physical conditions at the time the action is taken, not some speculative prediction of what those conditions may be in the future. (*Environmental Information and Planning Council v. County of El Dorado* (1982) 131 Cal.App.3d 350. See also *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 126 [104 Cal.Rptr.2d 326, 346.] [In some circumstances, the appropriate baseline may be the level of water use at a time significantly before the agency takes final action, especially where setting the baseline at the time the agency takes final action would create an incentive for a party to increase its water use during the pendency of proceedings before the agency].) The existing physical conditions with respect to YCWA’s water diversions are not defined by a prediction of “full development” conditions that are unlikely to occur for the reasons discussed in Decision 1644. Rather, the existing physical conditions for YCWA’s water diversions are a variable pattern of diversions in which the amount of water diverted for irrigation changes considerably from year to year. For example, irrigation deliveries went from 249,583 acre-feet in 1997 down to 193,011 acre-feet in 1998 and back up to 239,011 acre-feet in 1999. Similarly, during dry years, water users in YCWA have historically increased use of groundwater in order to make more surface

water available for other uses.⁴⁰ Some of the areas to which YCWA plans to serve surface water in the future currently rely primarily on groundwater. Establishing instream flow requirements that may result in their continued use on groundwater in some years is not an adverse environmental effect for purposes of CEQA.

In California, it is a fact of life that the amount of water available for irrigation varies from year to year as does the resultant substitution of groundwater when surface water is not available or is used for some other purpose. Examining potential effects of the Decision 1644 flow requirements on YCWA's water deliveries requires recognition of the fact that surface water deliveries and groundwater use in YCWA's place of use have both fluctuated from year to year depending on a variety of conditions. The instream flow standards established in Decision 1644 would represent little change in that situation and would not reduce present surface water deliveries at all in most years. Thus, there are no "unusual circumstances" that would overcome the categorical exemptions that apply under the CEQA Guidelines to the flows established in Decision 1644.

6.5 The Findings and Provisions of Decision 1644 Regarding the Browns Valley Irrigation District's Pre-1914 Water Rights Are Supported by the Record and Are Consistent With Applicable Law

Browns Valley contends that the findings in Decision 1644 concerning its pre-1914 water right are not supported by the record, that the SWRCB lacks authority to "modify" Browns Valley's pre-1914 right, and that the decision improperly directs Browns Valley to file complete Statements of Water Diversion and Use pursuant to Water Code section 5103. Browns Valley's water rights are addressed on pages 158 to 160 and pages 183 and 184 of Decision 1644.

The decision states that Browns Valley received a certificate from the State Water Commission that prescribed a time for completion of an appropriation for agricultural use initiated prior to 1914. By letter dated March 26, 1929, Browns Valley submitted information to document completion of its pre-1914 right. The letter provided information for diversions only during the

⁴⁰ Data provided by YCWA show that, in 1991, water users in YCWA increased groundwater pumping by 82,018 acre-feet in order to make surface water available for sale and transfer to the State Water Bank. (Decision 1644, page 112, citing S-YCWA 27.)

irrigation season. Browns Valley later received a letter dated April 1, 1929, acknowledging that it had put 47.2 cubic feet per (cfs) second of water to beneficial use under its pre-1914 right. Based on evidence in the record that Browns Valley had also diverted lesser quantities of water for use in other months, Decision 1644 includes a table showing Browns Valley's monthly diversions under claim of pre-1914 water rights within the period prescribed by the Water Commission for perfecting its pre-1914 appropriation. (Decision 1644, p. 159, Table 23.) The table shows that Browns Valley's maximum diversions for the months of November through March were less than the 47.2 cfs diverted during the irrigation season.

Browns Valley's petition includes a copy of a memorandum dated October 8, 1931 in which an engineer with the Division of Water Resources refers to a report that states diversions under Browns Valley's pre-1914 right during June, July, and August very closely approximate 47.2 cfs, and, therefore, that figure may "be taken as the extent of the right." (Browns Valley Petition, Attachment 1.) In arguing that Decision 1644 should be reconsidered, Browns Valley alleges that the State Water Commission concluded "BVID has a year-round right to divert 47.2 cfs from the Yuba River." (Browns Valley Petition, p. 3.) In fact, the document referred to by Browns Valley says nothing about a "year-round" right. The document refers to water use that is consistent with the findings in Decision 1644 regarding Browns Valley's rights for irrigation, but the document is silent on diversions in the non-irrigation season.

In arguing that the SWRCB lacks authority to "modify" its rights, Browns Valley misinterprets Decision 1644. Table 23 on page 159 of the decision simply shows the maximum quantity of water that Browns Valley had diverted in any month during the period specified for completion of its pre-1914 appropriation. A fundamental tenet of the law of prior appropriation is that a water right is established by reasonable and beneficial use. The quantity of water that may be diverted under an appropriative right during a particular season is measured by the amount of water actually put to beneficial use in that season. (*Tulare Irrigation District v. Lindsay Strathmore Irrigation District* (1935) 3 Cal.2d 489 [45 P.2d 972, 1007].) Establishing a pre-1914 right to divert up to 47.2 cfs for agricultural use during the irrigation season does not mean that a water user has a pre-1914 right to divert 47.2 cfs year-round. In addition, once an appropriative water right has been established, it may be lost by abandonment or by five or more

years of non-use. (Water Code § 1241; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578 [99 Cal.Rptr. 446.]

The proceedings leading to Decision 1644 were not a statutory adjudication of water rights or similar proceeding in which the rights of all diverters in a particular area are defined. (Water Code § 2500 et seq.) The SWRCB did not undertake to determine the extent to which Browns Valley has maintained its use of water under its pre-1914 right. Table 23 of Decision 1644 simply sets forth the maximum rates of diversion that occurred during the period specified for Browns Valley to perfect its pre-1914 right. Thus, while the findings in the decision recognize the limit of what Browns Valley may plausibly claim under a pre-1914 right, Decision 1644 is not an adjudication of what that right actually is at the present time. In view of Browns Valley's unsubstantiated claim to a year-round right to divert 47.2 cfs, Decision 1644 properly puts Browns Valley on notice that water diversions in excess of its pre-1914 right or other authorization may be considered a trespass pursuant to Water Code section 1052 et seq.

The provisions of Decision 1644 directing Browns Valley to submit triennial supplemental Statements of Water Diversion and Use with complete monthly and annual water diversion information simply direct the district to comply with statutory requirements under Water Code section 5103 et seq. The SWRCB recognizes that, in accordance with Water Code section 5108, the sanctions for failure to provide the required information are very limited. There is no provision in Decision 1644 to the contrary.

7.0 REVISIONS TO DECISION 1644

Decision 1644 provides that water year classifications shall be made on April 1 of each year in accordance with the forecast of unimpaired flow of the Yuba River at Smartville published in Department of Water Resources Bulletin 120. The water year type for the preceding water year is to remain in effect until the next April 1 forecast is available. YCWA's petition objects that the water year classification provisions of Decision 1644 "would prevent YCWA from shifting to a new water year type during February, March, or May even though a shift may be appropriate and could save substantial amounts of water." (YCWA Petition, p. 15.)

Using the April 1 forecast for determining water year classification has the two advantages: (1) the April 1 forecast is less subject to change than earlier forecasts; and (2) using the April 1 forecast allows YCWA to plan for flow changes that become effective on April 21st of each year. In the event of a change between the April 1 forecast and the May 1 forecast, however, there could be a relatively significant change in the applicable minimum flows, particularly during May and June, and also in the summer months during the period that the interim flows apply. In view of the amount of water involved, and the fact the May 1 forecast is expected to be more accurate than earlier forecasts, it is reasonable to provide for revising the water year type based on information from the May 1 forecast. Therefore, we conclude that paragraph “b” on page 174 of Decision 1644 should be revised accordingly as specified below in this order.

A second necessary revision to Decision 1644 is correction of interim and long-term flow figures shown for July 3 in the tables on pages 174 and 175 of Decision 1644. The flows shown in the tables should be revised to show a separate minimum flow requirement on July 3 so that the flows specified in the tables comply with the flow reduction provisions of condition 3b. on page 177 of Decision 1644. In addition, the interim flow requirements previously shown for the period of September 15 through October 1 of critical years should be shown for the period of September 15 through September 30. Therefore, the tables for both long-term and interim instream flow requirements should be revised as shown below in this order.

The deficiency clause provisions of pages 180 through 182 of Decision 1644 establish a procedure for requesting revisions in the instream flow requirements based on projected water supply deficiencies in excess of 20 percent for a particular year. The term on page 181 states that any requests for an adjustment of flows shall be submitted by April 7 of the year for which the flow reduction is requested in order to facilitate action by the Division Chief prior to April 21. In a situation in which the water year classification changes based on the May 1 forecast, it is possible that a request for adjustment of instream flow requirements may be submitted under the Deficiency Clause provisions following issuance of the May 1 forecast. Whether the request is based on the April 1 forecast or the May 1 forecast, the information from the relevant forecast may not be available until several days after the first of the month. In recognition of the fact that the water year classification may change based on the May 1 forecast,

and that the forecast information may not be immediately available at the first of the month, the SWRCB concludes that the provisions of Decision 1644 specifying the time for YCWA to submit a request under the Deficiency Clause should be revised as shown in the order below.

Finally, as discussed in Section 6.2.3 above, the date for submission of the plan from Brophy Water District should be corrected to March 31, 2002.

8.0 CONCLUSION

This proceeding leading to Decision 1644 was a long but productive process in which a great deal of evidence was presented regarding fishery needs and competing demands for water for offstream purposes. Despite the remaining disagreements among the parties, the record shows that the water supplies in the Yuba River Basin are sufficient to meet competing water needs to an unusually high degree. Based on our review of the record and the issues raised in the petitions for reconsideration, the SWRCB finds that all parties to the proceeding received a fair hearing, that Decision 1644 is supported by substantial evidence, that the additional evidence that became available after the hearing does not warrant reconsideration of the decision, and that Decision 1644 is consistent with applicable law. None of the petitions for reconsideration raise any issues requiring reconsideration or revision of Decision 1644 with the exception of the modifications set forth below. The SWRCB concludes that the record does not support other modifications to Decision 1644 and the petitions for reconsideration should be dismissed.

ORDER

IT IS HEREBY ORDERED that the provisions of Water Right Decision 1644 are amended as follows:

1. The first term to be added to permits 15026, 15027, and 15030 of Yuba County Water Agency as set forth on pages 173 through 175 of Decision 1644 is revised to read as follows:
 1. For the protection of fish and other public trust resources in the lower Yuba River, permittee shall release or bypass sufficient water to maintain the following instream flows in the lower Yuba River. The minimum flow requirements shall be maintained as measured by a 5-day

running average of average daily streamflows with instantaneous flows never less than 90 percent of the specified flow requirements.

- a. Beginning April 21 of 2006, streamflow shall be maintained at or above the flows specified in the following table as measured at the USGS gaging installations at Marysville and Smartville.

Long-Term Instream Flow Requirements

Periods	Wet, Above Normal & Below Normal Years (cfs)		Dry Years (cfs)		Critical Years (cfs)		Extreme Critical Years* (cfs)	
	Smartville Gage	Marysville Gage	Smartville Gage	Marysville Gage	Smartville Gage	Marysville Gage	Smartville Gage	Marysville Gage
Sept. 15 - Oct 14	700	250	500	250	400	250	400	250
Oct 15 - Apr 20	700	500	600	400	600	400	600	400
Apr 21 - Apr 30	--	1,000	--	1,000	--	1,000	--	500
May 1 - May 31	--	1,500	--	1,500	--	1,100	--	500
Jun 1	--	1,050	--	1,050	--	800	--	500
Jun 2	--	800	--	800	--	800	--	500
Jun 3 - Jun 30	--	800	--	800	--	800	--	500
Jul 1	--	560	--	560	--	560	--	500
Jul 2	--	390	--	390	--	390	--	390
Jul 3	--	280	--	280	--	280	--	280
Jul 4 - Sept. 14	--	250	--	250	--	250	--	250

- "Extreme Critical" year classification is defined as: Equal to or less than 540 TAF on the Yuba River Index scale

- b. For purposes of this order, wet, above normal, below normal, dry and critical water year types in the table above are as defined in the Yuba River Index. (See Appendix 1.) Extreme critical water years are defined as years when the Yuba River Index is predicted to be less than 540 thousand acre-feet. Determinations of water year classifications shall be made each year within 5 days of the release of the February 1, March 1, April 1, and May 1 forecasts of unimpaired flow of the Yuba River at Smartville published in California Department of Water Resources Bulletin 120 and any subsequent forecast published by the Department of Water Resources. The final year type for the preceding water year shall remain in effect until the February 1 forecast for the current year is available. If the water year type classification would change based on information available from any Department of Water Resources forecast, then the flow requirements in effect from the time the forecast is available shall remain in effect until the following forecast becomes available. Any changes in flows due to a change in water year classification shall be made in accordance with the criteria specified in condition 3 on pages 177 and 178 of Decision 1644.

- c. In order to avoid potential aggravation of the electrical energy crisis in California present in early 2001, the flows specified above in part “a.” of this term shall come into effect on April 21, 2006. In the interim period, streamflow shall be maintained at or above the flows specified in the following table as measured at the USGS gaging installations at Marysville and Smartville.

Interim Instream Flow Requirements

Period	Wet & Above Normal Years (cfs)		Below Normal Years (cfs)		Dry Years (cfs)	
	Smartville Gage	Marysville Gage	Smartville Gage	Marysville Gage	Smartville Gage	Marysville Gage
Sep 15-Oct 14	700	250	550	250	500	250
Oct 15-Apr 20	700	500	700	500	600	400
Apr 21-Apr 30	--	1,000	--	900	--	400
May 1-May 31	--	1,500	--	1,500	--	500
Jun 1	--	1,050	--	1,050	--	400
Jun 2-Jun 30	--	800	--	800	--	400
Jul 1	--	560	--	560	--	280
Jul 2	--	390	--	390	--	250
Jul 3	--	280	--	280	--	250
Jul 4-Sep 14	--	250	--	250	--	250
Period	Critical Years (cfs)					
	Smartville Gage	Marysville Gage				
Sep 15-Sep 30	400	150				
Oct 1-Oct 14	400	250				
Oct 15-Apr 20	600	400				
Apr 21	--	280				
Apr 22-Apr 30	--	270				
May 1-May 31	--	270				
Jun 1-July 2	--	(See Note)				
July 3-Sep 14	--	100				

Table Note: The interim instream flow requirements for June 1-30 of critical years shall be 245 cfs pursuant to the provisions of the agreement between Yuba County Water Agency and the Department of Fish and Game dated September 2, 1965, except if a lower flow is allowed pursuant to the provisions of the 1965 agreement. The minimum flow on July 1 shall be 70 percent of the flow on June 30, and the minimum flow on July 2 shall be 70 percent of the flow on July 1.

2. The last sentence of the second full paragraph on page 181 of Decision 1644 which addresses the time for submitting a request for a temporary flow reduction under the provisions of the Deficiency Clause is revised to read as follows:

“Any request for a temporary reduction in instream flow requirements shall be submitted no later than 5 days after the date of release of the Department

of Water Resources April 1 or May 1 forecast of unimpaired flow in the Yuba River at Smartville.”

3. The date for submittal of a plan to reduce fish losses by Brophy Water District as required on page 188 of Decision 1644 is corrected to March 31, 2002.

IT IS FURTHER ORDERED that all petitions for reconsideration of Decision 1644 are dismissed.

CERTIFICATION

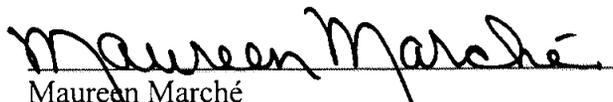
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 17, 2001.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Clerk to the Board