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**BEFORE THE STATE WATER RESOURCES CONTROL BOARD
OF THE
STATE OF CALIFORNIA**

In the Matter of:

FISHERY RESOURCES AND WATER
RIGHT ISSUES OF THE LOWER YUBA
RIVER

**CLOSING BRIEF OF
SOUTH YUBA WATER DISTRICT,
CORDUA IRRIGATION DISTRICT and
BROPHY WATER DISTRICT**

RECONSIDERATION HEARING ON
DECISION 1644

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1 I. Due process as a minimum requires that when property interests are affected as is the case
2 in regard to this Decision, the Board Members making the Decision must have heard,
3 considered and weighed all of the evidence. That has not occurred, and the Decision
4 should be rescinded.

5 The Superior Court sent this matter back for findings and determinations by the Board.
6 One of the reasons for that, no doubt, was to provide the Board with an opportunity to supplement
7 the Record that, in fact, due process and fair hearing requirements were met. This Board should
8 rescind Decision 1644 and recommence its review of the evidence, deliberations and
9 determinations in light of the following facts which are uncontroverted on the Record.

10 No State Water Resources Control Board Member making the Decision 1644 has reviewed
11 all of the evidence in this matter, weighed that evidence and considered that evidence. This is a
12 Decision made by the SWRCB's Staff Members, not by the Board. Section 183 of the Water
13 Code requires in part:

14 "Any hearing or investigation by the Board may be conducted by
15 any member upon authorization of the Board and he shall have the
16 powers granted to the Board by this section, but any final action of
17 the Board shall be taken by a majority of all of the members of the
18 Board at a meeting duly called and held . . ."

19 Don Maughan heard all of the testimony and considered the Exhibits in the 1992 Hearing
20 which began on February 10, 1992. No other Member of the Board adopting Decision 1644 in
21 2001 was a Member of the State Water Resources Control Board at the time of the 1992 Hearings
22 except for James M. Stubchaer who was appointed on March 9, 1992 after a substantial portion of
23 the hearing had occurred.

24 The 2000 Hearings were conducted on the basis of prohibiting the submission of evidence
25 and testimony or exhibits presented and of the Record in the first Hearing in 1992. None of the
26 decision makers, John W. Brown (appointed July 15, 1993), Mary Jane Forster (appointed July 5,
27 1993), James M. Stubchaer (appointed March 9, 1992) and Arthur G. Baggett (appointed June 1,
28 1999), attended, heard or apparently read transcripts of the evidence in the 1992 Hearings. No
Member of the Board deciding Decision 1644 has affirmed that he or she has read the transcripts
and considered the testimony and evidence, including exhibits, in both the 1992 and 2000
Hearings.

1 The United States Supreme Court declared due process to require that "... the one who decides
2 must hear." *Morgan* 298 U.S. 480-481. In certain circumstances, a Judge or Board Member may
3 read the transcript as a substitute. *Strange v. City of Berkeley* (1962) 210 Cal.App.2d 325, citing
4 *Cooper v. State Board of Medical Examiners* (1950) 35 Cal.2nd 242, 246. There is no substantial
5 evidence that this was done in this circumstance. The 2003 Hearing evidenced that the Board
6 elected to utilize the deliberative process privilege to prevent evidence of the role of the Staff and
7 Board Members in preparing the Draft Decisions and Final Decision in 2001. We are left,
8 therefore, with the bare fact that in 1994 a Staff Decision and a Draft Decision was created two
9 years after Don Maughan had left the Board in November of 1992 and with no other Board
10 Member having full knowledge of the evidence. This Board followed the outlines of that Draft
11 Decision in Decision 1644. The Decision, for the protection of the Board's stature, needs to be
12 withdrawn both because of the new evidence and this procedural deficit. The inescapable
13 conclusion is that due process and a fair procedure has not occurred in these circumstances.
14

15 II. The fact of the Staff Member Mainz's involvement in the merits of this matter on behalf of
16 DFG and DFG's participation in determining the very issues Mr. Mainz was an advocate
17 for DFG upon, creates clear evidence of bias and a lack of fair process.

18 South Yuba Water District (SYWD) has produced unrefuted evidence that Mike Mainz
19 designed on behalf of the Department of Fish & Game (DFG) in 1988 the tests and studies to
20 allow DFG to attempt to prove that the South Diversion fish protection screen did not comply
21 with the Contract terms. This is a mere four (4) years after the execution of the 1984 Contract
22 between the DFG and SYWD. The Agreement specified the design of a rock gabion fish
23 protection device, and which Contract contained provisions stating that if the facility complied
24 with a 95% effectiveness that the DFG could be required to represent to all governmental entities,
25 including the SWRCB, that the facility fully complied with all reasonable standards for protecting
26 the fishery. The DFG Contract with South Yuba Water District specified that it would not take
27 any action directly or indirectly to challenge the suitability of the structure if it was 95% effective.

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1 Mr. Mainz designed the test and investigation, and when the results of the test and
2 investigation was placed into evidence by DFG (without the correction factors, thus overstating
3 fish losses), Mr. Mainz, now sitting as a Staff Member of the SWRCB, was expected to weigh the
4 test results on the screen and the testimony of Mr. Mensch and Mr. Odenweller that they could not
5 prove that the screen was not within the 1984 Contract standards but they wanted the SWRCB,
6 nevertheless, to conclude that the water diverters should pay the costs of building new or different
7 facilities. Mr. Mainz apparently was the drafter of the fish issue portions of the Staff Analysis and
8 Draft Decision in 1994 (although we do not know this absolutely because of the claim of the
9 deliberative privilege) and responsible for analysis and weighing of the evidence. This is a clear
10 case of a prosecutor for DFG also serving as a judge on those same issues.

11 The United States Supreme Court directs in determining whether due process and a fair
12 proceeding has been provided that evidence of an impartial decision maker is essential. *Goldberg*
13 *v. Kelly* 397 U.S. 254, 267, 271; *In re Murchison* 349 U.S. 133. When the investigatory role is
14 exercised by the Staff of the decision maker, such a fundamental failure to follow fair procedural
15 rights and to create an impartial tribunal by the probability of unfairness is shown that the
16 Decision must be set aside. The Court in *Applebaum v. Board of Directors* 104 Cal.App.3d 648,
17 659 stated:

18 "The investigation was not conducted by state employees insulated
19 from the adjudicatory body by layers of public bureaucracy; it was
20 done by a group which included the instigator of the charges, had
21 overlapping member in the body (Executive Committee) which
22 reviewed both initial and final decisions and to which the majority
23 of the formal adjudicators later belonged. The question before us is
whether the situation, completely apart from any question of actual
bias on the part of any of the physicians involved and from the merit
of the charges presents a violation of fair procedure rights to an
impartial tribunal by virtue of a practical probability of unfairness.
We hold that it does." [emphasis added]

24 At another point in *Applebaum, supra*, (page 658), the Court points out that whenever a
25 combination of investigatory prosecutorial and adjudicatory functions in a decision-making body
26 occur, the Court will look hard at whether fair process and due process exists.

27 Here, the text of the Staff Report and the Draft Decision prepared apparently in 1994 with
28 the help of Mr. Mainz with regard to the South Yuba Diversion is illustrative of a lack of

1 procedural due process. Those drafts do not explain how the State Board could reach the
2 conclusion that the terms of the 1984 Contract between the Department of Fish & Game and
3 SYWD in which special design and a performance criteria was specified had not been met when
4 the only objective evidence is that with the exact testing regimen, developed by Mr. Mainz, now a
5 Staff Member of the SWRCB (albeit then an employee of the DFG), indicated greater than 95%
6 effectiveness. The 1984 Agreement and the Yuba County Superior Court Judgment are ignored,
7 and SYWD and BWD are directed to again comply with CEQA an issue determined by the
8 Superior Court.

9 Nor do the SWRCB Staff Report and Draft and Final Decision explain the conclusion that
10 the SYWD and BWD should pay the costs of modifying and changing the fish screen facility
11 when there is no evidence that the 1984 Agreement was not fully complied with and Fish & Game
12 Code Section 5989 requires once a screen is built to the satisfaction of DFG under the 1984
13 Agreement terms, it is DFG that must pay the costs of modifying the design and construction
14 features. The inescapable conclusion is that Mr. Mainz and DFG had unduly influenced the
15 decisionmaking process and a strong probability of bias and unfairness exists. The fact that Mr.
16 Mainz' involvement in the test design was never divulged gives rise to an inescapable inference
17 when he was the cross-examiner of South Yuba and Brophy's fish expert who testified on this
18 very issue. In *Golden Days Schools, Inc., v. State Department of Education* 83 Cal.App.4, 695,
19 (Sept. 2000), the Court stated:

20 "The claim that the combination of investigatory and adjudicatory
21 functions creates an unconstitutional risk of bias has been difficult
22 to sustain, but in federal practice it has been addressed by the rule
23 that no employee involved in investigating or prosecuting a case
24 may participate as an adjudicator."

25 The DFG employee, Mike Mainz, was the chief author of the effort and the prosecution of
26 DFG attempting to extract DFG from its 1984 Contract and Stipulated Judgment in the Superior
27 Court of Yuba County in 1988. In 1989, Mr. Mainz became a Staff Member of the SWRCB and
28 effectively was placed into the position where he became the adjudicator as to whether or not
29 DFG should be extracted from its requirements and whether the fish screen met legal
30 requirements by the SWRCB process. There is no substantial evidence that the South Diversion

1 does not meet all requirements of the 1984 Agreement. Here, the absence of any Board Member
 2 which considered and weighed all of the evidence together with the role of Mr. Mainz to the Draft
 3 Decision in 1994, which principal provisions were carried forward into the 2001 Decision 1644, is
 4 clear evidence that there was no impartial decision maker. At the best, Mr. Mainz was the
 5 decision maker and he had a prohibited bias and involvement. *Golden Days Schools, Inc. v. State*
 6 *Dept. of Education, supra*, states at page 710:

7 "The concept of fundamental fairness includes the right to an
 8 impartial decision maker." (*Girard v. Klopfenstein, supra*, 930 F.2d
 at p.743; see *Goldberg v. Kelly, supra*, 397 U.S. 254, 271.)

9 As Witkin, *California Procedure 9th Ed., Administrative Proceedings*, Vol. 9, §52, page
 10 1103 states:

11 "The adjudicative function must be separated from the
 12 investigatory, prosecutorial and adversarial functions with the
 agency."

13 Government Code §11425.30(a)(1) requires this separation in a purely administrative hearing.
 14 This hearing goes beyond pure administrative procedure. It is determining property interests
 15 equivalent to the determination by a Court. Jurisdiction to determine public trust issues exists in
 16 both a Court and the SWRCB through the doctrine of concurrent jurisdiction, so any argument
 17 that a more informal procedure should be permitted is illogical when the SWRCB is exercising
 18 the same powers as a Court.

19 If a Judge died and was unable to decide the case, as has happened here in regard to all
 20 Board Members, a new Judge would have to read all of the testimony or convene a new trial.
 21 *Armstrong v. Piquelle* (1984) 157 Cal.App.3d 122; *David v. Goodman* (1952) 14 Cal.App.2nd
 22 571. A Court that discovered a Clerk of the Court with this sort of involvement in the issues
 23 would vacate the Decision and retry the matter in order to maintain the dignity of the Court
 24 proceedings as well as due process. The SWRCB credibility is just as important, and rescission of
 25 Decision 1644 is just as appropriate.

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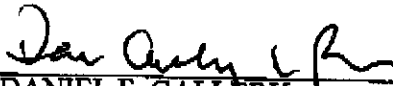
III. Conclusion.


This Board should rescind Decision 1644, ask for continued monitoring and development of scientific fish evidence on a scientific basis, perhaps appointing an independent scientific body to obviate the constant harping of DFG that testing is inconclusive, and citing to some other factor out there which, curiously, always requires use of stored water and the deprivation of that water from the parties that developed the Yuba Project or from the water fowl who depend upon the flooding of the fields in the Fall, and the food sources created by the agricultural use of irrigation water.

This Board will best advance justice and reasonable and beneficial use of water by applying science rather than interpreting this matter as a question of whether or not the State Board's power can prevail.

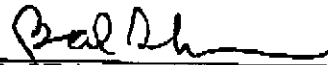
Respectfully submitted,

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DECLARATION OF SERVICE

BEFORE THE STATE WATER RESOURCES CONTROL BOARD
FISHERY RESOURCES AND WATER RIGHT ISSUES ON THE LOWER YUBA RIVER

I, Denise Forde, declare:

I am employed by the law firm of MINASIAN, SPRUANCE, BABER, MEITH, SOARES & SEXTON LLP. My business address is 1681 Bird Street, Post Office Box 1679, Oroville, California 95965-1679. I am over the age of 18 years and not a party to this action.

On June 13, 2003, I served the following document(s) set forth below in the manner indicated:

() **Via Facsimile:** By facsimile machine at the fax number(s) shown below. I caused the machine to print a transmission record of the transmission and no error was reported by the machine.

() **Personal Service:** By personally delivering to the person named below, at the address indicatc.

() **Service by Mail (Deposit):** By enclosing a copy in an envelope addressed as shown below and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

(X) **Service by Mail (Collection):** By enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on June 13, 2003, at Oroville, California, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Document(s) Served: CLOSING BRIEF OF SOUTH YUBA WATER DISTRICT, CORDUA IRRIGATION DISTRICT AND BROPHY WATER DISTRICT

Person(s) Served: SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration of Service was executed on June 13, 2003, at Oroville, California.


Denise Forde

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