

2003 JUN 13 AM 11:21

DIV OF WATER RIGHTS  
SACRAMENTO

1 ALAN B. LILLY, STATE BAR NO. 107409  
2 RYAN S. BEZERRA, STATE BAR NO. 178048  
3 BARTKIEWICZ, KRONICK & SHANAHAN  
4 A PROFESSIONAL CORPORATION  
5 1011 TWENTY-SECOND STREET  
6 SACRAMENTO, CALIFORNIA 95816  
7 TELEPHONE: (916) 446-4254  
8 TELECOPIER: (916) 446-4018

9 Attorneys for Yuba County Water Agency  
10 and Browns Valley Irrigation District

11 STATE WATER RESOURCES CONTROL BOARD

12 HEARING TO AUGMENT  
13 ADMINISTRATIVE RECORD AND TO  
14 RECONSIDER WATER-RIGHT DECISION  
15 1644

16 ) JOINT CLOSING BRIEF OF YUBA  
17 ) COUNTY WATER AGENCY AND  
18 ) BROWNS VALLEY IRRIGATION  
19 ) DISTRICT

COPY

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

1           **I.       Yuba and Browns Valley Did Not Receive A Fair Hearing**

2           On Key Issue No. 1, Yuba County Water Agency ("Yuba") and Browns Valley Irrigation  
3 District ("Browns Valley") refer the State Water Resources Control Board (the "State Board") to the  
4 arguments presented in the following documents filed in the Yuba County Superior Court, copies  
5 of which were served on the State Board when the documents were filed in court: (a) Yuba's and  
6 Browns Valley's Memorandum of Points and Authorities in Support of Motion for Leave to Take  
7 Depositions, filed September 10, 2001, pp. 10-13; (b) Yuba's and Browns Valley's Reply  
8 Memorandum of Points and Authorities in Support of Motion for Leave to Take Depositions, filed  
9 September 28, 2001, pp. 8-10; (c) Court's Ruling on Motion for Discovery, filed October 19, 2001,  
10 pp. 3-9; (d) Yuba's and Browns Valley's Memorandum of Points and Authorities in Support of  
11 Motion for Leave to Take Deposition of Andrew Sawyer, filed August 14, 2002, pp. 4-8; (e) Yuba's  
12 and Browns Valley's Reply Memorandum of Points and Authorities in Support of Motion for Leave  
13 to Take Deposition of Andrew Sawyer, filed September 12, 2002, pp. 1-8; (f) Yuba's Opening Brief,  
14 filed March 17, 2003, pp. 87-93; and (g) Yuba's and Browns Valley's Memorandum of Points and  
15 Authorities in Support of Motion to Admit New Evidence, filed March 17, 2003, pp. 4-9.

16           A new Court of Appeal decision also supports Yuba's and Browns Valley's arguments. In  
17 *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, the court held that the  
18 city denied a private party a fair hearing where the city's hearing officer was advised by an attorney  
19 who previously had taken a position on a contested hearing issue. (*Id.* at pp. 84-85, 89-90, 98.)  
20 *Nightlife Partners* thus refutes the argument that the personal interests of Mr. Mainz, Ms. Low and  
21 Mr. Sawyer are irrelevant because they only advised the State Board and were not members of the  
22 Board itself. *Nightlife Partners* also shows that Mr. Mainz's and Ms. Low's extensive activities for  
23 DFG and the USFWS and later work for the State Board during its hearings and subsequent actions  
24 denied Yuba and Browns Valley a fair hearing. Like the attorney in *Nightlife Partners*, Mr. Mainz  
25 and Ms. Low took positions on contested issues while working for DFG and USFWS, and then  
26 confidentially advised the SWRCB on these same issues. Under *Nightlife Partners* and the  
27 authorities listed in the papers cited above, the State Board should not have allowed Mr. Mainz and  
28 Ms. Low to participate in its proceedings that led to D-1644.

1 As discussed in Yuba's court papers, the State Board also should not have allowed Mr.  
2 Sawyer to participate in the State Board's confidential preparation of the draft decisions, or in the  
3 deliberations, that ultimately led to D-1644, while he also was a member and the chairman of the  
4 Executive Committee, chair of the Legal Committee and chair of the Political Committee of the  
5 Mother Lode Chapter of the Sierra Club, a party to the D-1644 proceedings.

6 Because these individuals did participate in the State Board's proceedings that led to D-1644,  
7 Yuba and Browns Valley did not receive a fair hearing, and the State Board therefore should not re-  
8 adopt D-1644. The State Board must hold a fair and impartial hearing before it adopts any new  
9 lower Yuba River instream-flow requirements.

10  
11 **II. The New RST Data Shows That D-1644's Findings Regarding The April  
21-June 30 Period Are Incorrect**

12 The primary findings on which D-1644's April 21-June 30 instream-flow requirements are  
13 based on findings that juvenile chinook salmon and steelhead rear in the lower Yuba River and  
14 emigrate from the river during this period. (D-1644, pp. 61-62.) However, the new RST data show  
15 that these findings are incorrect. (Staff Exhibit No. 5.) In fact, almost all of the juvenile salmon  
16 emigrate for the lower Yuba River before April 21, and almost all juvenile steelhead emigrate either  
17 before April 21 or after June 30. While DFG, DOI and SYRCL criticized Mr. Bratovich's testimony  
18 regarding the RST data because DFG never performed trap-efficiency tests for this RST, Mr.  
19 Bratovich's use of the RST data to determine the timing of salmon and steelhead emigration actually  
20 was completely consistent with DFG's intended use of that data:

21 The purpose of the [RST] monitoring was to begin development of baseline  
22 information for juvenile salmon and steelhead trout life history strategies on the Yuba  
23 River. Data were collected to determine and document species and race composition,  
24 the timing of downstream movement below the spawning area, duration of  
downstream movement and the condition and size of downstream migrants. Data  
from an uncalibrated trap represent trends (size of fish outmigrating and timing of  
movement) . . . .

25 (2003-DFG-2, p. 1 (emphasis added); see also Yuba's Opening Brief, filed March 17, 2003, pp. 61-  
26 66; Yuba's Memorandum of Points and Authorities in Support of Motion to Admit New Evidence,  
27 filed March 17, 2003, pp. 11-12; Yuba's Reply Memorandum of Points and Authorities in Support  
28 of Motion to Admit New Evidence, pp. 2, 8-9.)

1 D-1644's reliance on juvenile salmonid emigration to support its high April 21-June 30  
2 instream-flow requirements for spring-run chinook salmon and steelhead emigration, the two ESA-  
3 listed species, also was refuted by Mr. Nelson's testimony. At the hearing, Mr. Nelson testified that  
4 juvenile steelhead emigrate throughout the year, and that the emigration of any spring-run Chinook  
5 salmon tails off during April of each year.

6 D-1644 also cited steelhead rearing and American shad attraction as additional reasons for  
7 its April 21 through June 30 instream-flow requirements. (D-1644, p. 61.) However, there is no  
8 evidence that these high requirements are necessary, or even desirable, for steelhead rearing, and the  
9 attraction of American shad, a non-native species that does not have habitat-specific spawning  
10 requirements, does not justify the very substantial water costs associated with these requirements.

### 11 **III. The State Board Must Re-Run The Hydrological Model With Correct** 12 **Water Demands**

13 Curt Aikens's testimony demonstrates that D-1644 incorrectly found that it is "unclear as to  
14 when and if the projected demands for surface water in the Wheatland and Dry Creek areas will be  
15 reached." (See D-1644, p. 107.) Conveyance facilities now have been constructed and Dry Creek  
16 Mutual Water Company's demand for Yuba River water from those facilities now has grown to  
17 12,308 af/yr, making the delivery of all or almost all of the full contract amount of 16,743 af/yr very  
18 likely to occur within the next several years. (Staff Exhibit No. 6, pp. 1-2.) DWR's \$3,150,000  
19 grant to Yuba to build delivery facilities to Wheatland Water District makes deliveries to that District  
20 highly probable. (Staff Exhibit No. 6, exh. E.) This evidence shows that D-1644 incorrectly used  
21 an estimate of 273,847 af/yr as Yuba's total future water demand in modeling the water-supply  
22 impacts of D-1644's long-term instream-flow requirements. (D-1644, pp. 111-114.) Mr. Aikens's  
23 testimony shows that the correct estimate of future demand is much higher. Because D-1644's  
24 assessment of its water-supply impacts depended on its too-low demand estimate, the State Board  
25 must vacate D-1644 and re-run its hydrological model with correct water demands, and consider  
26 accurately modeled water-supply impacts of any proposed new instream-flow requirements, before  
27 adopting any such requirements. (See also Yuba's Opening Brief, filed March 17, 2003, pp. 55-56;  
28 Yuba's Memorandum of Points and Authorities in Support of Motion to Admit New Evidence, filed

1 March 17, 2003, pp. 12-14; Yuba's Reply Memorandum of Points and Authorities in Support of  
2 Motion to Admit New Evidence, pp. 2.)

3 **IV. The State Board Should Not Re-Adopt The D-1644 Instream-Flow**  
4 **Requirements Because They Would Impair New Colgate Powerhouse's**  
5 **Unique and Crucial Flexibility To Generate Electricity**

6 David Ashuckian of the California Energy Commission staff testified that the Commission  
7 did not predict California's 2000 Electricity Crisis, and that the Commission only compares available  
8 generation capacity and projected electrical demands, without considering individual real-world  
9 events like days that are hotter than 1-in-10 days. He testified that the May 28, 2003 Stage One  
10 Electrical Emergency occurred largely because the day was a 1-in-40 hot day. (See 2003-YCWA-2.)  
11 Both the 2000 crisis and the recent emergency show that individual real-world operational events  
12 not considered by the Commission dramatically affect California's electricity supplies and demands.

13 The fact that such real-world events have such dramatic effects shows that the State Board  
14 should not re-adopt D-1644's instream-flow requirements, which would prevent Yuba from storing  
15 tens of thousands of acre-feet of water during the winter and spring, for use during the summer  
16 months for electrical power generation, and thereby would reduce the amounts of the electricity that  
17 the New Colgate Powerhouse could generate during the critical summer months. As Dr. House  
18 testified, New Colgate's generation flexibility is crucial because there must be electrical generation  
19 facilities that can provide immediate responses via automatic generation control and other ancillary  
20 services to the frequent, rapid changes in California's electricity demands. Dr. House also explained  
21 that hydroelectric plants are essentially the only type of generation facilities that are this flexible, and  
22 that New Colgate is one of the few hydroelectric plants in California that is large enough to meet  
23 these immediate response requirements. New Colgate's capability and flexibility are most crucial  
24 during summer months, when nearly all power plants in California must generate at high levels to  
25 meet California's electricity demands, and only very few facilities are available respond to major  
26 changes in electricity demands.

27 Because the D-1644 instream-flow requirements would substantially reduce New Colgate's  
28 flexibility to provide these critical ancillary electrical services, the State Board should not re-adopt  
those requirements.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**


The State Board should, as directed by the Yuba County Superior Court, vacate D-1644. The State Board should not then re-adopt D-1644. D-1644 was prepared through an unfair hearing and deliberation process. D-1644 is based on findings regarding the timing of juvenile salmon and steelhead emigrations and the future surface-water demands of the Dry Creek Mutual Water Company and the Wheatland Water District that new evidence demonstrates are not correct. D-1644 also would have serious adverse impacts on the hydroelectric power generation of the New Colgate Powerhouse, which are not recognized in D-1644.

Because the State Board's authority to set instream-flow requirements for the Yuba River Project is preempted by the Federal Power Act, the State Board should not adopt any new instream-flow requirements for this project. Moreover, even if the State Board decides to reject Yuba's and Browns Valley's arguments regarding federal preemption, the State Board still should not adopt any new instream-flow requirements for this project until the State Board has conducted a new process that fairly and impartially evaluates all of the relevant evidence and that complies with all applicable legal requirements. Yuba and Browns Valley recommend that the State Board give interested parties six months to attempt to reach agreement on appropriate lower Yuba River instream-flow requirements, before the State Board starts any new process regarding this project. Because the anadromous fish in the lower Yuba River thrived under the legal requirements that were in effect before D-1644 was adopted, and there is no evidence that vacating D-1644 now, and, if necessary, starting a fair and impartial proceeding six months from now, will jeopardize these fish.

Dated: June 13, 2003

BARTKIEWICZ, KRONICK & SHANAHAN  
A Professional Corporation

By:   
Alan B. Lilly

By:   
Ryan S. Bezeira

Attorneys for Yuba County Water Agency and  
Browns Valley Irrigation District

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**PROOF OF SERVICE**

I, Terry M. Olson, declare:

I am over the age of eighteen and not a party to this action and work in Sacramento County at Bartkiewicz, Kronick & Shanahan 1011 Twenty-Second Street, Sacramento, California 95816. On **June 13, 2003**, I served the within document: **Joint Closing Brief of Yuba County Water Agency and Browns Valley Irrigation District**.

**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmission report, which was properly issued by the facsimile machine, showing no errors in transmission to those fax numbers is attached.

**BY HAND:** by causing to be delivered via hand delivery a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

**BY MAIL:** by placing for collection and mailing at the offices of Bartkiewicz, Kronick & Shanahan, located at 1011 Twenty-Second Street, Sacramento, California 95816 a copy of the document(s) listed above to the person(s) at the address(es) set forth below. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

**BY OVERNIGHT MAIL:** by placing for overnight delivery by Federal Express a copy of the document(s) listed above enclosed in a sealed mailer to the person(s) at the address(es) set forth below. I am readily familiar with the business' practice for processing of correspondence for delivery by Federal Express and, in the ordinary course of business, the correspondence would be entrusted to Federal Express for overnight delivery on the day on which it is deposited at a Federal Express office.

**BY PERSONAL DELIVERY:** by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

Western Water Company  
c/o Mr. Scott Morris  
Kronick, Moskovitz, Tiedemann & Girard  
400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, CA 95814-4417

Water Resources Control Board Staff  
c/o Mr. Daniel N. Frink  
Senior Staff Counsel  
P.O. Box 2000  
Sacramento, CA 95814

South Yuba Water District  
Cordua Irrigation District  
c/o Mr. Paul R. Minasian  
Minasian, Spruance, Baber, Meith, Soares &  
Sexton, LLP  
1689 Bird Street  
Oroville, CA 95965-1679

California Department of Fish & Game  
c/o Mr. William D. Cunningham  
Deputy Attorney General  
1300 I Street  
Sacramento, CA 95814

Brophy Water District  
c/o Mr. Daniel F. Gallery  
926 J Street, Suite 505  
Sacramento, CA 95814

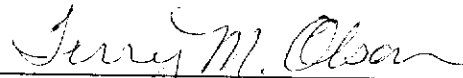
1 Mr. Charlton Bonham  
2 South Yuba River Citizens League, et al.  
3 828 San Pablo Avenue, Suite 208  
4 Albany, CA 94706

4 Mr. Mike Tucker  
5 National Marine Fisheries Service  
6 650 Capitol Mall  
7 Sacramento, CA 95814

U.S. Department of the Interior  
c/o Mr. Alf Brandt, Assistant Regional  
Solicitor  
Regional Solicitors Office  
Pacific Southwest Region  
2800 Cottage Way, E-1712  
Sacramento, CA 95825-1890

8 I declare under penalty of perjury under the laws of the State of California that the foregoing  
9 is true and correct.

10 Executed on June 13, 2003 at Sacramento, California.

11   
12 \_\_\_\_\_  
13 Terry M. Olson

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27