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Filed OCT 19 2012,  
ROSA JUNQUEIRO, CLERK  
By PAMELA CONN  
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN JOAQUIN

SOUTH YUBA WATER DISTRICT AND  
CORDUA IRRIGATION DISTRICT,

Petitioners,

v.

STATE WATER RESOURCES CONTROL  
BOARD, CALIFORNIA DEPARTMENT OF  
FISH AND GAME, et al.,

Respondents,

YUBA COUNTY WATER AGENCY, et al.

Real Parties In Interest.

Lead Case No. CV 026505

STATEMENT OF DECISION

1 This matter came regularly before this court for hearing on March 23, 2012 in  
2 Department 13 of the Superior Court, the Honorable Lesley D. Holland presiding. The  
3 following appearances were noted:

4 Minasian, Spruance, Meith & Sexton, LLP, by Paul Ryan Minasian, appeared  
5 as attorneys of record for Plaintiff/Petitioners South Yuba Water District and  
6 Cordua Irrigation District;

7 Kamala D. Harris, Attorney General of California, by Deputy Attorneys General  
8 Clifford T. Lee and Tara L. Mueller, appeared as attorneys of record for  
9 Defendant/Respondent State Water Resources Control Board, and the individual  
members thereof;

10 Kamala D. Harris, Attorney General of California, by Deputy Attorney General  
11 Matthew Bullock, appeared as attorneys of record for Defendant/Respondent  
and Real Party in Interest California Department of Fish and Game;

12 Bartkiewicz, Kronick & Shanahan, by Alan B. Lilly and Katrina C. Gonzales,  
13 appeared as attorneys of record for Real Party in Interest Yuba County Water  
Agency;

14 Gallery & Barton, APLC, by Jesse W. Barton, appeared as attorneys of record  
15 for Petitioner and Real Party in Interest Brophy Water District;

16 Brad Daniels, Attorney at Law, appeared as attorney of record for petitioner  
17 Trout Unlimited; and

18 Water and Power Law Group, by Richard Roos-Collins, appeared as attorney of  
19 record for petitioners South Yuba River Citizens League, Friends of the River,  
and the Bay Institute.

20 The record of the administrative proceedings having been received into evidence  
21 by the Court and the legal briefs and other writings submitted by the parties having  
22 been read and considered, oral argument having been presented, and the matter having  
23 been submitted for decision, the Court makes the following statement of decision  
24 denying the claims presented and relief requested by Plaintiff/Petitioners South Yuba  
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1 Water District and Cordua Irrigation District and Plaintiff/Petitioner Brophy Irrigation  
2 District.<sup>1</sup>

3  
4 **I. BACKGROUND**

5 At issue in this litigation is Revised Water Right Decision 1644 (RD 1644).  
6 The State Water Resources Control Board (SWRCB) adopted original Decision 1644  
7 (D 1644) on March 1, 2001. By its terms, D 1644 amended the Yuba County Water  
8 Agency's (YCWA) water right permits to require increased in-stream flows in the  
9 Lower Yuba River. D 1644 was challenged in Yuba County Superior Court and the  
10 court remanded the decision back to the SWRCB for reconsideration in light of new  
11 evidence. In compliance with the court order, SWRCB conducted further hearings on  
12 the matter and adopted RD 1644 on July 16, 2003. By adopting RD 1644, the SWRCB  
13 amended YCWA's water right permits. Generally speaking, the changes required  
14 increased cold water in-stream flows in the Lower Yuba River and upgrades in fish  
15 screening and protection.  
16

17 **A. Actions Filed**

18 RD 1644 was challenged in five separate actions, originally filed in Yuba  
19 County. Those actions were consolidated and transferred to San Joaquin County in April  
20 2005. Two of the five actions were voluntarily dismissed and the action filed by the  
21 citizens groups is not being pursued, leaving the following two actions as part of this  
22 case:  
23  
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25 <sup>1</sup> On December 15, 2011, the State Water Resources Control Board and the Department of  
26 Fish and Game filed separate requests for judicial notice of certain public documents. No party  
27 has objected to these requests for judicial notice and the requests are therefore granted. During  
28 the March 23, 2012 hearing in this matter, the Department of Fish and Game requested judicial  
notice of a February 29, 2012 National Marine Fisheries Service biological opinion regarding the  
U.S. Army Corp of Engineers' operation of Englebright and Daguerre Point dams, which the  
Court denied.

1           1) *South Yuba Water District and Cordua Irrigation District v. State Water*  
2           *Resources Control Board* (First Amended Petition for Writ of Mandamus); and

3           2) *South Yuba Water District and Cordua Irrigation District v. State Water*  
4           *Resources Control Board and California Department of Fish and Game* (First  
5           Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive  
6           Relief).

7           In addition to the actions brought against the SWRCB, Brophy Water District  
8           filed a First Amended Complaint for Declaratory Relief and Petition for Writ of  
9           Mandate against the California Department of Fish and Game (DFG), which is part of  
10          the consolidated proceedings.

11          **B. Stay of Proceedings**

12           Soon after the transfer, the petitioners began settlement discussions with the  
13           DFG and the Department of Water Resources (DWR) and the U.S. Bureau of  
14           Reclamation (USBR). A stay of all proceedings was granted on March 13, 2006.

15          **C. Negotiation of Settlement**

16           In April 2005, YCWA, several Yuba River water districts and agencies, DFG,  
17           DWR, and USBR, and four of the five environmental petitioners “approved principles  
18           for agreements for a proposed settlement regarding in-stream flow requirements and  
19           other issues related to diversion and use of water from the Lower Yuba River.” This  
20           approval became known as the “Yuba Accord.”

21           On April 27, 2007, YCWA submitted to the SWRCB a petition to modify its  
22           water right permits and a petition for long term transfer of water. The petitions were  
23           designed to amend RD 1644 and YCWA’s water right permits to implement the Yuba  
24           Accord.  
25  
26  
27  
28

1       **D. EIR of Yuba Accord**

2               YCWA and the USBR prepared a joint environmental impact report (EIR) and  
3 environmental impact statement (EIS) on the Yuba Accord pursuant to the California  
4 Environmental Quality Act (CEQA) and the National Environmental Policy Act  
5 (NEPA).  
6

7               YCWA certified the final EIR/EIS on October 23, 2007. On October 26, 2007,  
8 and pursuant to Public Resources Code section 21152, subdivision (a), YCWA filed a  
9 Notice of Determination to approve the Yuba Accord with the State Office of Planning  
10 and Research.

11              No person or entity filed a CEQA challenge to the final EIR/EIS for the Yuba  
12 Accord.<sup>2</sup>  
13

14              Notice of the petitions was given to the public and all interested parties –  
15 including all parties to this case.

16       **E. Decision of the SWRCB**

17              On March 18, 2008, the SWRCB adopted the Yuba Accord in-stream flow  
18 requirements (Order WR 2008-0014) and approved YCWA's petitions subject to  
19 specified terms and conditions. On March 21, 2008, the SWRCB filed a Notice of  
20 Determination of its approval of YCWA's petitions, subject to certain terms and  
21 conditions.  
22

23       ///

24       ///

25       ///  
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27              <sup>2</sup> There is no dispute among the parties on this factual point. There was no EIR on RD  
28 RD 1644. The EIR was done on the Yuba Accord (WR 2008-0014 at p. 46.) The Yuba Accord used  
RD 1644 as the baseline for its EIR analysis.

1       **F. Petitions for Reconsideration**

2               YCWA and the Anglers Committee and the California Salmon and Steelhead  
3 Association each filed petitions for reconsideration of Order WR 2008-0014. The  
4 SWRCB considered and denied these petitions on May 20, 2008.

5       **G. Proceedings Following Board Approval of Amendments**

6               After its decision on May 20, 2008, the SWRCB met and conferred with all of  
7 the parties to these consolidated cases to determine the status of the pending actions in  
8 light of the SWRCB's adoption of Order WR 2008-0014. The SWRCB learned that  
9 three water districts – South Yuba Water District (SYWD), Cordua Irrigation District  
10 (CID), and Brophy Water District (Brophy) – intended to continue to prosecute their  
11 claims in two of the four actions.  
12

13               On August 3, 2010, the SWRCB moved to terminate the stay and the motion  
14 was granted by the Court on September 9, 2010.  
15

16       **1. SYWD and CID Amended Petition for Writ of Mandate**

17               The first Amended Petition for Writ of Mandate is strictly a CEQA challenge.  
18 Generally, the petition challenges the legality of the SWRCB's decision not to prepare  
19 an EIR for RD 1644, but rather to issue a Notice of Exemption relating to RD 1644.  
20

21       **2. SYWD and CID First Amended Petition for Writ of Mandate and**  
22       **Complaint**

23               The First Amended Petition and Complaint encompasses a CEQA challenge  
24 and more. Primarily, and by their complaint, Petitioners maintain that for several  
25 reasons, the SWRCB had no authority to adopt and implement RD 1644. Petitioners  
26 also seek a writ challenging RD 1644 on the grounds that there is no substantial  
27 evidence to support its adoption. Secondly, Petitioners assert another CEQA  
28

1 challenge to RD 1644 via a writ; they challenge the baseline used in the EIR for WR  
2 2008-0014 arguing that it was unstudied and so, the EIR is insufficient and/or defective.

## 3 **II. DISCUSSION**

4 It is an undisputed fact that there was no CEQA review prior to the SWRCB's  
5 adoption and implementation of RD 1644. It is also undisputed that: 1) Petitioners  
6 timely challenged RD 1644; 2) the in-stream flow requirements of RD 1644 were  
7 superseded by the Yuba Accord; and 3) there was no CEQA objection to the Yuba  
8 Accord.  
9

10 At the heart of Petitioners' argument is the question of whether the SWRCB  
11 has authority to impose certain in-stream flow requirements upon YCWA and its  
12 Member Districts and further, whether it has the authority to require the Member  
13 Districts to spend their money/resources for new fish screens at certain diversion points.  
14

### 15 **A. Are the CEQA Challenges to RD 1644 Moot or Time-Barred?**

16 The resolution of this issue requires the Court to pinpoint what part of RD 1644  
17 is at issue in these petitions and what part, if any, is not. A close review of the petitions  
18 and the Order in RD 1644 reveals that Petitioners challenge the provisions of RD 1644  
19 regarding in-stream flow, flow fluctuations, water temperature and fish screens. The  
20 review further indicates that there are other substantive provisions of RD 1644 which  
21 have not been challenged.  
22

23 The next question then is whether the adopted provisions of the Yuba Accord  
24 (WR 2008-0014) amended or superseded the challenged provisions of RD 1644 so as to  
25 render the challenges moot.

#### 26 **1. Are Any of the Challenges Moot?**

27 Having compared the orders of RD 1644 and WR 2008-0014, the Court finds:  
28



1. The in-stream flow requirements of RD 1644 have been completely superseded by WR 2008-0014;
2. The water temperature requirements of RD 1644 remain intact and have been supplemented by WR 2008-0014;
3. The flow fluctuation requirements of RD 1644 remain intact; and
4. The fish screen requirements of RD 1644 remain intact.

Thus, the only aspect of RD 1644 that can be considered moot is the in-stream flow requirements. The remaining challenged provisions are intact.

Accordingly, the CEQA challenge to RD 1644 is not moot, except insofar as it concerns the in-stream flow requirements.

## **2. Are Any of the Challenges Time-Barred?**

The SWRCB submits that “the in-stream flow requirements currently in effect were adopted by the Board in 2008, [and so,] to the extent Petitioners object to the environmental analysis for the operative in-stream flows in the lower Yuba River, [Petitioners] were obliged to challenge the CEQA compliance for these revised flows within the 30-day statute of limitations.” (Opposition, page 12:18-12; see also Public Resources Code, section 21167.) Petitioners did not. (WR 2008-0014 at p. 46.)

Petitioners did not address the statute of limitations argument head-on but rather urged that if RD 1644 is vacated to allow for environmental review, then WR 2008-0014 is undermined since its EIR is based upon unstudied provisions of RD 1644 which will no longer be in effect.

The argument raises the question of whether Petitioners were required to renew their challenge to RD 1644 when WR 2008-0014 was being considered.

Moreover, as argued by the SWRCB, Public Resources Code section 21167.2 provides that if no action challenging a final EIR is timely filed, the EIR “shall be conclusively presumed to comply with CEQA “for purpose for its use by responsible agencies.” In the context of this case, Public Resources Code section 21167.2 precludes



1 Petitioners from making its baseline challenge. The baseline used in the EIR for WR  
2 2008-0014 is conclusively presumed to comply with CEQA. *Woodward Park*  
3 *Homeowners Assn. v. Garreks* (2000) 77 Cal.App.4th 880 is not helpful to Petitioners.

4 **B. Was RD 1644 Exempt from CEQA?**

5 The SWRCB primarily urges that the “on-going project” exemption applies to  
6 excuse the preparation of an EIR prior to its adoption of RD 1644. (See Cal.Code Regs.  
7 tit. 14, § 15261.) Section 15261 reads, in pertinent part:

8 (a) If a project being carried out by a public agency was approved prior to  
9 November 23, 1970, the project shall be exempt from CEQA unless either of  
10 the following conditions exists:

11 A substantial portion of public funds allocated for the project have not been  
12 spent, and it is still feasible to modify the project to mitigate potentially  
13 adverse environmental effects, or to choose feasible alternatives to the project,  
14 including the alternative of “no project” or halting the project; provided that a  
15 project subject to the National Environmental Policy Act (NEPA) shall be  
16 exempt from CEQA as an on-going project if, under regulations promulgated  
17 under NEPA, the project be too far advanced as of January 1, 1970, to require  
18 preparation of an EIS.

19 (2) A public agency proposes to modify the project in such a way that the  
20 project might have a new significant effect on the environment.

21 The SWRCB in filing its Notice of Exemption (NOE), explained:

22 Water rights were issued to YCWA [by the SWRCB] in 1966, and construction  
23 of New Bullard’s Bar Reservoir was completed in April 1970. The flows and  
24 water temperatures present on the lower Yuba River since the construction of  
25 New Bullard’s Bar Reservoir are dependent primarily upon hydrologic  
26 conditions and annual operational decisions based on meeting competing  
27 project objectives, including fishery needs. Fishery enhancement was one of  
28 the original project objectives, and the flow requirements specified in Revised  
Decision 1644 are well within the historic range of what has existed on the  
lower Yuba River since 1970.)

(Administrative Record (AR), Disk 6, 03COR0209.)

1 In further support of the exemption, the SWRCB cites *Nacimiento Regional*  
2 *Water Mgmt. Advisory Com. v. Monterey Co. Water Resources Agency* (1993) 15  
3 Cal.App.4th 200.

4 Petitioners, on the other hand, urge that the critical inquiry in determining  
5 whether a statutory exemption applies is whether the activity is a continuation of the  
6 status quo, or whether the activity constitutes a modification to the project such that new  
7 environmental impacts may arise. In support of the Petitioners' argument that RD 1644  
8 "reflects a dramatic departure from historical operations and the pre-project status quo,"  
9 Petitioners cite to *County of Amador v. El Dorado County Water Agency* (1996) 76  
10 Cal.App.4th 931.

11  
12 **1. Discussion – Nacimiento Regional Water Management**

13 In *Nacimiento Regional Water Management Advisory Committee v. Monterey*  
14 *County Water Resources Agency* (1993) 15 Cal.App.4th 200, the water agency built a  
15 dam many years prior to CEQA. The application to build the dam provided for the  
16 storage and annual release of water for various uses. The Agency had not conducted an  
17 "environmental review" for the construction or operation of the reservoir, or for the  
18 annual release schedules either before or after November 23, 1970, the effective date of  
19 CEQA. At issue was the 1991 annual release schedule. The Agency's 1991 release  
20 schedule allowed for releases that dropped the water elevation of the reservoir to 689  
21 feet. The petitioners asserted, and the trial court agreed, that the release schedule  
22 "would negatively impact environmental concerns." Still, the trial court held that the  
23 annual 1991 release schedule was exempt from environmental review because it is part  
24 of an on-going project; that is, the operation of the reservoir.

25 The Court of Appeal affirmed, explaining:  
26  
27  
28

1 [T]he 1991 release schedule is a normal, intrinsic part of the ongoing operations  
2 of the reservoir project which does not constitute any modification thereof,...

3 Whether an activity requires environmental review depends upon whether it  
4 expands or enlarges project facilities or whether it merely monitors and adjusts  
5 the operation of existing facilities to meet fluctuating conditions.

6 (*Nacimiento, supra*, 15 Cal.App.4th at pp. 203-205.)

7 The Court of Appeal relied upon *Upper Snake River v. Hodel* (9th Cir. 1990)  
8 921 F.2d 232, wherein the 9th Circuit concluded that periodically adjusting the flow of  
9 water from a dam and reservoir does not require environmental review because it does  
10 not constitute an expansion or revision of the reservoir project. (*Nacimiento, supra*, 15  
11 Cal.App.4th at p. 206, *quoting Upper Snake River, supra*, 921 F.2d at p. 234 [“The trial  
12 court ruled that the extent of injury to the fish population was immaterial to the  
13 determination of whether an EIS was required because’...the fluctuation flows are  
14 routine actions which are contingent upon Mother Nature for snow-pack, runoff,  
15 precipitation, and carryover.””]

16 The Court of Appeal continued,

17 As in the instant case, “[t]he Bureau [of Reclamation in *Upper Snake, supra*,]  
18 has neither enlarged its capacity to divert water...nor revised its procedure or  
19 standards for releases... and the drawdown of reservoirs. It is simply operating  
20 the Division within the range originally available pursuant to the authorizing  
21 statute, in response to changing environmental conditions.”...

22 ...[T]he release schedule is...exempt from CEQA...

23 (*Nacimiento, supra*, 15 Cal.App.4th at pp. 207-209.)

## 24 **2. Discussion – County of Amador v. El Dorado County Water Agency**

25 To contrast, the Court looks to *County of Amador v. El Dorado County Water*  
26 *Agency* (1996) 76 Cal.App.4th 931, a case in which DFG, the County of Amador, and a  
27 coalition of concerned citizens sued the county water agency and irrigation districts  
28 asserting that an EIR was necessary for the agency/district’s purchase and proposed use

1 of an existing water project. For purposes of this decision, here are the relevant facts.  
2 The water agency and irrigation district “embarked on an ambitious project to provide  
3 water to a burgeoning population.” (*Id.* at p. 940.) Part of the project involved the  
4 purchase from PG&E of “Project 184,” a hydroelectric project. Significantly, “[i]n  
5 addition to gaining ownership of this project, defendants also sought to shift the focus of  
6 Project 184 to provide not only hydroelectric power, but consumptive water supplies as  
7 well.” (*Ibid.*) The defendants concluded that the project was exempt from CEQA review  
8 asserting, *inter alia*, the ongoing project exemption.  
9

10 The *County of Amador* Court concluded that the exemption was not applicable  
11 and explained that:  
12

13 Because of the remarkable change in proposed operation from nonconsumptive to  
14 consumptive use, this exemption is in applicable... [T]he Irrigation District sought  
15 to expand the project to include consumptive water use, significantly changing the  
16 focus of Project 184 to the extent that it cannot be termed an “ongoing project”

(*County of Amador, supra*, 76 Cal.App.4th at p. 969.)

### 17 **3. Discussion – Application to Instant Case**

18 Generally speaking, RD 1644 amended YCWA’s water right permits to require  
19 increased cold water in-stream flows in the lower Yuba River. Petitioners claim that the  
20 purpose and effect of RD 1644 is “to create an artificial type of fish hatchery using  
21 stored water [from Bullards Bar Dam] to create high volume and cold flows in a valley  
22 level portion of the Yuba River where warm air temperatures prevent those natural  
23 conditions, and the increased flows are to mitigate for the claimed blocking by dams of  
24 fish access to the upper Yuba River” where the salmon and steelhead would otherwise  
25 swim and spawn.  
26  
27  
28

1           The first question, then, is whether fishery enhancement was one of the original  
2 project objectives and whether flow requirements, generally, were contemplated as a  
3 means to achieve “fishery enhancement.” The SWRCB presented evidence from the  
4 administrative record of RD 1644 that confirms that fishery mitigation and enhancement  
5 was, in fact, an objective of the Yuba River Development Project.  
6

7           In addition, no party challenged the SWRCB’s position that “the flow  
8 requirements specified in RD 1644 are well within the historic range of what has existed  
9 on the lower Yuba River” since reservoir construction was completed in 1970.

10          Thus, the Court finds that the “on-going project” exemption applies and RD 1644  
11 is, therefore, exempt from CEQA.

12          Accordingly, the SYWD and CID First Amended Petition and the CEQA  
13 claims set forth in the SYWD and CID First Amended Petition and Complaint are  
14 hereby denied.  
15

16          The remaining discussion relates to the First Amended Complaint and  
17 Petitioners’ arguments that the SWRCB does not have the authority to impose certain in-  
18 stream flow requirements upon YCWA and its Member Districts and further, the  
19 SWRCB does not have the authority to require the Member Districts to spend their  
20 money/resources on new fish screens at certain diversion points.  
21

22          **C. Procedural Deficiencies in the Hearings/Decision to Adopt RD 1644**

23          The SWRCB asserts that Petitioners – as “subordinate political entities” to the  
24 State – lack standing to bring a challenge on due process grounds. The SWRCB  
25 explains that the “constitutional rights [of due process] are intended to limit  
26 governmental action *vis-à-vis* individual citizens.” (*Star-Kist Foods, Inc. v. County of*  
27 *Los Angeles* (1986) 42 Cal.3d 1, 8; see also, *Board of Supervisors v. McMahon* (1990)  
28

1 219 Cal.App.3d 286, 296 ["Subordinate political entities, as 'creatures' of the state, may  
2 not challenge state action as violating the entities' rights under the due process or equal  
3 protection clauses of the Fourteenth Amendment..."]; *Santa Monica Community College*  
4 *District v. Public Employment Relations Board* (1980) 112 Cal.App.3d 684, 690  
5 ["District does not assert a violation of constitutional guarantees of due process. The  
6 reason for this omission is undoubtedly the long line of cases which hold that a public  
7 entity, being a creature of the state, is not a 'person' within the meaning of the due  
8 process clause, and is not entitled to due process from the state."]

9  
10 Petitioners maintain that they do have standing because they are asserting the  
11 due process violations on behalf of their member landowners. Petitioners cite *Central*  
12 *Delta Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th  
13 621, 629-630 in support:

14  
15 Where a water district or agency is expressly authorized under its enabling statute  
16 to sue on behalf of its constituent water users, it may do so even without naming  
17 any of those users as party plaintiffs. (Code Civ. Proc., § 368, subd. (a)(4); *Orange*  
18 *County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 167-170  
19 [343 P.2d 450].)

20 Moreover, a political subdivision of the state may challenge the  
21 constitutionality of a statute or regulation on behalf of its constituents where the  
22 constituents' rights under the challenged provision are "inextricably bound up with" the  
23 duties under its enabling statutes. (See *Selinger v. City Council* (1989) 216 Cal.App.3d  
24 259, 271; see generally *Singleton v. Wulff* (1976) 428 U.S. 106, 114-116) Under the  
25 statutes cited by the agencies, it is clear that the agencies' duties are bound up with a  
26 determination whether the challenged provisions violate the rights of the agencies'  
27 constituent water users.  
28



1           The Court notes that the first exception does not apply because the “landowner  
2 assistance” language is not present in Petitioners’ enabling statutes. As to the second  
3 exception, Petitioners are not challenging a statute or regulation but rather, an  
4 administrative proceeding. Accordingly, the Court finds that Petitioners have no  
5 standing to challenge the constitutionality of the SWRCB proceedings in which it  
6 adopted RD 1644.  
7

8           Because the court finds that petitioners lack standing to bring their due process  
9 claims, the court declines to rule on the merits of petitioners’ due process claims.  
10

11           **D. Does RD 1644 Violate Petitioners’ Contractual Rights to Water?**

12           Petitioners hold water supply contracts with the YCWA for the purpose of  
13 receiving surface water from the winter storage of New Bullard’s Bar Reservoir.  
14 According to the Petitioners, the mandated in-stream flow restrictions of RD 1644  
15 reduce the amount of storage water available to them and therefore constitutes an  
16 unconstitutional taking of property without due process or just compensation as well as  
17 an unconstitutional impairment of a contract. (U.S. Const., art. I, § 10; Cal. Const. art. I,  
18 § 9; see *United States v. SWRCB* (1986) 182 Cal.App.3d 82, 146-148.)  
19

20           Preliminarily, water rights are not like real property rights, and by their very  
21 nature are “limited and uncertain.” (See *United States v. SWRCB, supra*, 182  
22 Cal.App.3d at p. 104, and *National Audubon Society v. Superior Court* (1983) 33 Cal.3d  
23 419, 445-448.) “[N]o water rights are inviolable; all water rights are subject to  
24 governmental regulation” and “no one has a vested right to use water in a manner  
25 harmful to the state’s waters.” (*United States v. SWRCB, supra*, 182 Cal.App.3d at p.  
26 106.) “Holders of water service contracts are subject to all of the limitations that apply  
27 to holders of water rights, including public trust and reasonable use limitations.” (See  
28



1 *SWRCB Cases, supra*, 136 Cal.App.4th at p. 806, fn. 54; see also *United States v.*  
2 *SWRCB, supra*, 182 Cal.App.3d at pp. 146-148.) Accordingly, Petitioners' water  
3 contracts are derivative of the YCWA water right permits and all of their terms and  
4 conditions. The YCWA permits are expressly subject to the public trust doctrine and  
5 reasonable use doctrine and, as a matter of law, the SWRCB has the authority to  
6 reconsider original permit terms and conditions.  
7

8 Accordingly, Petitioners do not have a reasonable expectation that a certain or  
9 guaranteed amount of water will be delivered to them and so, Petitioners cannot show an  
10 unconstitutional "taking" or impairment of contract. (*United States v. SWRCB, supra*.  
11 182 Cal.App.3d at p. 147.)

12 Moreover, the in-stream flow requirements of RD 1644 have been completely  
13 superseded, and so this challenge is moot.  
14

15 **E. Does RD 1644 Violate Cal. Code Reg., Tit. 23, § 784?**

16 California Code of Regulations, title 23, section 784, subdivision (a) provides  
17 that:  
18

19 (a) In exercising its discretionary authority respecting applications to appropriate  
20 water, including prescribing or modifying permit terms and conditions, the  
21 [SWRC] Board may require releases of water diverted and stored whenever such  
22 releases are determined by the Board to be in the public interest or are needed to  
23 protect public trust uses of water, if such requirement is reasonable...

24 California Code of Regulations, title 23, section 784, subdivision (b) provides:  
25

26 Notwithstanding subsection (a) of this section, after a permit has been issued  
27 and construction has commenced or substantial financial commitment for  
28 construction has been undertaken by the permittee, the Board will not require a  
release or bypass of water authorized to be appropriated by such permit unless  
the permittee agrees to such bypass or release or unless the Board at the time  
the permit was issued expressly reserved jurisdiction to require such bypass or  
release. This subsection shall not apply to the continuing authority of the

1 Board to regulate appropriations of water so as to conform with Section 780 of  
2 this subchapter.<sup>3</sup>

3 Petitioners contend that the SWRCB did not reserve to itself the authority to  
4 modify the terms and conditions of the YCWA permits. Thus, Petitioners characterize  
5 the in-stream flow requirements as “beyond the authority of the SWRCB or an  
6 unconstitutional deprivation of property, or impairment of contract.” (Opening Brief,  
7 page 31:22-23.) “This is a subject for condemnation...not acquisition by regulation.”  
8 (Opening Brief, page 32:18-19.)  
9

10 The SWRCB did, in fact, reserve to itself the authority to modify the terms and  
11 conditions of the permits and more particularly, to do so under the public trust doctrine  
12 and the reasonable use doctrine. As the SWRCB argues “petitioners have been on notice  
13 for over 23 years that the Board may require the release of stored water for public trust  
14 purposes.” (Opposition, pages 31-32: AR, Disk 3, COR0506, 0514-0515 Disk 5:  
15 REX1058, 1065-1066, 1069, 1077.) Accordingly, California Code of Regulations, title  
16 23, sections 780 and 784 have not been violated and allow for the in-stream flow  
17 requirement.  
18

19 Moreover, the term and condition of which Petitioners are complaining is the  
20 in-stream flow requirement. As discussed above, the in-stream flow requirements of RD  
21 1644 are moot and so, this challenge is also moot.  
22

23 **F. Does RD 1644 Exceed the Public Trust Doctrine?**

24 Petitioners argue that the Public Trust Doctrine is meant to protect the *natural*  
25 state of the environment. In support of the argument, Petitioners cite to and rely upon  
26 *National Audubon Society v. Superior Court, supra*, 33 Cal.3d 419. Petitioners maintain  
27

---

28 <sup>3</sup> Section 780 does not apply because there is not issue of waste or an unreasonable use of  
water.

1 that RD 1644 creates an artificial environment by sending more waters and colder waters  
2 to a valley-level stretch of the Yuba River so that salmon and steelhead, fish that would  
3 otherwise not be able to survive in that stretch, can swim and spawn. Petitioners assert  
4 that the SWRCB is using the Public Trust Doctrine to “create a new project using the  
5 water and facilities owned by Yuba County residents,...without due process and  
6 compensation. ...[T]he doctrine may not be used to justify depriving the Agency and its  
7 Member Units of water or the use of facilities to store water to which they are entitled.”  
8 Opening Brief, page 33:15-21. Petitioners further argue that “man-created reservoirs  
9 and water supplies are not subject to the Public Trust Doctrine.” (*Golden Feather*  
10 *Community Assn. v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276, 1285.)  
11

12           Once again, at the center of this argument is the concept that the SWRCB is  
13 “taking” Petitioners’ water since it is the “taking” that will create the new fish habitat.  
14 As discuss above, the “taking” argument is based upon the in-stream flow requirements  
15 of RD 1644. Those in-stream flow requirements, however, are moot because they were  
16 superseded by the in-stream flow requirements of WR 2008-0014. Accordingly,  
17 Petitioners’ argument that RD 1644 exceeded the Public Trust Doctrine is moot. The  
18 complaint does not challenge WR 2008-0014.  
19

20           Even if the argument were not moot, it fails because the Public Trust Doctrine  
21 protects *all* fishery resources in *all* waters of the state wherever they may be found and  
22 regardless of how they got there. Fish and Game Code, section 5937 is a statutory  
23 codification of the Public Trust Doctrine and it protects all fishery resources located  
24 downstream of a dam, even those “planted” there. (*California Trout, Inc. v. SWRCB*  
25 (1989) 207 Cal.App.3d 585, 630; see also *People v. Truckee Lumber Co.* (1897) 116  
26 Cal. 397, 399-401.)  
27  
28

1           *National Audubon Society v. Superior Court, supra*, is a case in which the  
2 Supreme Court explained that “traditionally, [the public trust doctrine is] defined in  
3 terms of navigation, commerce and fisheries.” (33 Cal.3d at p. 434.) Thus, the Supreme  
4 Court expressly recognized that fisheries are a public value and worthy of public  
5 stewardship. In other words, the establishment of a fishery is certainly within the scope  
6 of the public trust doctrine.  
7

8           In *National Audubon Society*, the Supreme Court also recognized the tension  
9 between the public trust doctrine and the appropriative water rights system in California.  
10 The Supreme Court concluded that both systems needed to be considered and worked  
11 together:  
12

13           In our opinion, both the public trust doctrine and the water rights system  
14 embody important precepts which make the law more responsive to the diverse  
15 needs and interests involved in the planning and allocation of water resources.  
16 ...[W]e reach the following conclusions:

17           The state as sovereign retains continuing supervisory control over its navigable  
18 waters and the lands beneath those waters. This principle, fundamental to the  
19 concept of the public trust, applies to rights in flowing waters as well as to rights  
20 in tidelands and lakeshores; it prevents any party from acquiring a vested right  
21 to appropriate water in a manner harmful to the interests protected by the public  
22 trust.

23           As a matter of current and historical necessity, the Legislature, acting directly or  
24 through an authorized agency such as the Water Board, has the power to grant  
usufructuary licenses that will permit an appropriator to take water from flowing  
streams and use that water in a distant part of the state, even though this taking  
does not promote, and may unavoidably harm, the trust uses at the source  
stream. The population and economy of this state depend upon the appropriation  
of vast quantities of water for uses unrelated to in-stream trust values.  
California's Constitution, its statutes, decisions, and commentators all emphasize  
the need to make efficient use of California's limited water resources:  
all recognize, at least implicitly, that efficient use requires diverting water from  
in-stream uses, ...

25           The state has an affirmative duty to take the public trust into account in the  
26 planning and allocation of water resources, and to protect public trust uses  
27 whenever feasible. Just as the history of this state shows that appropriation may  
28 be necessary for efficient use of water despite unavoidable harm to public trust  
values, it demonstrates that an appropriative water rights system administered  
without consideration of the public trust may cause unnecessary and unjustified  
harm to trust interests.

1           Once the state has approved an appropriation, the public trust imposes a duty of  
2           continuing supervision over the taking and use of appropriated water. ...

3           (*National Audubon Socy, supra*, 33 Cal.3d at pp. 445-447.)

4           The Supreme Court recognized, "[T]he function of the Water Board has  
5           steadily evolved from the narrow role of deciding priorities between competing  
6           appropriators to the charge of comprehensive planning and allocation of waters. This  
7           change necessarily affects the board's responsibility with respect to the public trust. The  
8           board of limited powers of 1913 had neither the power nor the duty to consider interests  
9           protected by the public trust; the present board, in undertaking planning and allocation of  
10          water resources, is required by statute to take those interests into account." (*National*  
11          *Audubon Socy, supra*, 33 Cal.3d at p. 444.)

12           In *Golden Feather Community Association v. Thermalito Irrigation District*  
13           (1989) 209 Cal.App.3d 1276, the Third District Court of Appeal expressed its opinion  
14           on the public trust doctrine. It explained:  
15

16           In general, the public trust doctrine posits that the 'sovereign owns all of its  
17           navigable waterways and the lands lying beneath them 'as trustee of a public  
18           trust for the benefit of the people.'... The People of California did not surrender  
19           their right to common usage of navigable waters to the state; the state holds land  
20           in its sovereign capacity in trust for the public purposes of navigation and  
21           fishery, and a public easement and servitude exists for these purposes. Any  
22           conveyance of trust property to a private individual is necessarily subject to the  
23           public trust and the state remains trustee with the duty to supervise the trust...

24           ...In the final analysis the public trust doctrine cannot be divorced from the  
25           particular circumstances involved. In short, the circumstances which will  
26           warrant application of the term "public trust" and the consequences of  
27           characterizing an interest of the state as a trust interest are not uniform. Where it  
28           is necessary to protect public trust interests the state may have power over  
          properties which are not themselves within the public trust, but this does not  
          mean that such properties are deemed to be added to the public trust, nor that all  
          incidents of the public trust are applicable to such properties. *In all cases, the*  
          *application of the public trust doctrine depends upon the interest for which*  
          *protection is sought and the manner in which that interest is to be protected.*  
          *Decisional authorities have, thus far at least, consistently limited application of*  
          *the public trust doctrine to circumstances where the interest to be protected is a*  
          *traditional public trust interest. Where such an interest is involved the courts*  
          *have held that the state has broad powers to protect those interests, even where*

1 otherwise nonpublic trust properties are affected.

2 (*Id.* at 1283-1286, emphasis added.)

3 Fisheries are a traditional public trust interest. RD 1644 sought to protect fish  
4 and fishing by increasing in-stream flows to the lower Yuba River to compensate for  
5 their loss of habitat in the upper Yuba River. *Golden Feather* explains that the state has  
6 “broad powers” to protect those interests. (*Golden Feather, supra*, 209 Cal.App.3d. at p.  
7 1286.)  
8

9 The cases cited by Petitioners and YCWA are cases in which the public interest  
10 is in the waterway and the waters. The concern in those cases was the natural state of  
11 the waterway. The public interest in this case differs significantly. *The public concern*  
12 *is not the river; it is the fish.*  
13

14 In adopting RD 1644, the SWRCB balanced its responsibility to be the public  
15 trustee for fish with its water appropriation powers through the exercise of its reserved  
16 jurisdiction over the water permits it issued. YCWA seems to suggest that SWRCB  
17 cannot require one entity to mitigate the impacts caused by another entity. Significantly,  
18 it cites to no law or case in support of the statement. The cases above do not suggest  
19 such a limited application. Instead, the SWRCB is the steward for all water, all fish.  
20

21 Accordingly, the SWRCB did not exceed its authority under the Public Trust  
22 Doctrine when it adopted RD 1644.

23 **G. Does RD 1644 Violate Fish and Game Code, Section 5937?**

24 Section 5937 of the Fish and Game Code reads:

25  
26 The owner of any dam shall allow sufficient water at all times to pass through a  
27 fishway, or in the absence of a fishway, allow sufficient water to pass over,  
28 around or through the dam, to keep in good condition any fish that may be  
planted or exist below the dam. During the minimum flow of water in any river  
or stream, permission may be granted by the department to the owner of any  
dam to allow sufficient water to pass through a culvert, waste gate, or over or



1 around the dam, to keep in good condition any fish that may be planted or exist  
2 below the dam, when, in the judgment of the department, it is impracticable or  
3 detrimental to the owner to pass the water through the fishway.

4 Fish and Game Code, section 5937 is said to be a statutory codification of the  
5 Public Trust Doctrine. (SWRCB Opposition, page 32:10-11.) Consistent with that  
6 position, the parties make the same arguments for this issue as they made with regard to  
7 the Public Trust Doctrine, above. Accordingly, this challenge is moot for the same  
8 reasons stated above in the Public Trust Doctrine discussion.

9 Moreover, the Court does not read Fish and Game Code section 5937 to require  
10 a “natural” condition; it specifically refers to “planted” fish. The statute is meant to  
11 ensure that sufficient water is released for the health of the fish. Petitioners read the  
12 phrase “pass through” much too narrowly. The phrase does not negate the dam owner’s  
13 ability to “release” “stored water.” Whether a natural flow or a released flow, all the  
14 statute requires is that a sufficient amount “pass through” for the survival and health of  
15 any fish below the dam.  
16

17 **H. Do the Fish Screen Provisions of RD 1644 Violate Fish and Game Code,**  
18 **Section 5989?**

19 At the heart of this challenge are the following documents: 1) Fish and Game  
20 Code, section 5989; 2) the SYWD-DFG 1984 Contract; 3) the Brophy-DFG 1984  
21 contract; and 4) the Superior Court judgment affirming the SYWD-DFG 1984 contract  
22 and the Brophy-DFG 1984 Contract.

23  
24 Fish and Game Code, section 5989 reads:

25 After acceptance, should the screen fail to function in an efficient manner, no  
26 changes in conditions affecting its operation having occurred subsequent to the  
27 acceptance of the screen, the owner shall not be required to install a new screen.  
28 However, the *department may install another screen at the sole cost and expense*  
*of the department* of a type, size, mesh, and at a location agreed upon by the  
department and the owner, or approved by the Department of Water Resources,



1 as provided in Section 5992 of this code. (Emphasis added.)

2  
3 The 1984 SYWD-DFG Contract and the 1984 Brophy-DFG Contract  
4 (hereinafter collectively referred to as the 1984 DFG contracts) described the design,  
5 location and performance criteria that would apply to the permeable rock levee fish  
6 protection devices to be constructed by the respective water districts in 1985. In  
7 pertinent part, the agreements read:

8  
9 2. If the installation meets the criteria during normal operations for three  
10 irrigation seasons, the *District's sole obligation thereafter shall be to reasonably*  
11 *operate and maintain the rock protection alternative.* (Emphasis added.)

12 Paragraph 4 of the Yuba County Superior Court's Stipulated Judgment reads, in  
13 pertinent part:

14 The aforesaid respective projects of Brophy Water District and of the South Yuba  
15 Water District for the diversion and withdrawal of water from the Yuba  
16 Goldfields and the Yuba River, including the facilities referred to as the river  
17 diversion facilities and the delivery of such waters to the District's respective  
18 service areas, when constructed substantially in accordance with the project  
19 description above set forth or referred to including the standards and *the*  
*mitigation measures therein described will adequately mitigate (a) any adverse*  
*fish life impacts on downstream migrant salmonids and steelhead in the Yuba*  
*River that might result from such river diversion facilities, ...* (Emphasis added.)

20 Petitioners submit that no deficiency notice was ever sent to them regarding the  
21 rock levee fish screens. Opening Brief, page 40:26-28. Pointing to the statute and the  
22 contracts, Petitioners maintain that ANY change or upgrade to the existing fish screens  
23 is the sole responsibility of DFG. Petitioners urge that the SWRCB has no authority to  
24 ignore the statute or the contracts.

25 **1. No SYWD or CID Claim Against DFG, only SWRCB**

26 DFG responded to the Petitioners' fish screen arguments. The SWRCB joined in  
27 DFG's responses. (SWRCB Opposition at 39, n.34.)  
28

1 DFG argued that there is no claim against it except by Brophy; rather, that the  
2 claims are against the SWRCB.<sup>4</sup> DFG further submits that the 1984 Contracts and the  
3 Stipulated Judgment have no relevance in this action because the SWRCB is not a party  
4 to the contract.

5 DFG's argument, however, ignores the provisions of the 1984 Contracts which  
6 explain that the agreements are being made by "the STATE OF CALIFORNIA, acting  
7 by and through the Department of Fish and Game." (See page 1 of the 1984 contracts;  
8 AR, Disk 1, 92EX3102.) The Stipulated Judgment is signed by the "STATE OF  
9 CALIFORNIA," (See page 5 of the Stipulated Judgment; AR, Disk 1 92EX3110.)  
10 Thus, the State of California and its agencies are bound by the terms of the contracts and  
11 judgment.  
12

## 13 **2. Acceptance of Fish Screens**

14 DFG argues that Fish and Game Code section 5989 does not apply to  
15 Petitioners' screens because the screens were never accepted by DFG. This argument  
16 lacks merit.  
17

18 By virtue of the 1984 DFG Contracts and the Stipulated Judgment, the State of  
19 California, through DFG, expressly accepted the design, location and performance  
20 criteria of the permeable rock levee fish protection devices as adequate for the purpose  
21 of fish protection in the diversion of water. Thus, the focus of DFG's argument is  
22 necessarily post-construction. DFG submits that letters were sent to SYWD to advise it  
23 of the ineffectiveness of the south screen.  
24

25 Significantly, the letters upon which DFG relies for its argument do not  
26 "advise" SYWD of anything. The letters, instead, merely summarize studies that were  
27

---

28 <sup>4</sup> In fact, SYWD and CID did bring a declaratory relief cause of action against DFG. See First Amended Petition and Complaint, page 34:12-15.

1 conducted and the results of the tests. There is no statement by DFG that the screens  
2 were ineffective.

3 Accordingly, the Court finds that the State of California, through DFG, has  
4 accepted the fish screens within the meaning of the statute.

5  
6 **3. Change in Conditions**

7 DFG submits that Fish and Game Code, section 5989 only applies if there was  
8 no change in conditions affecting the fish screen's operation since acceptance. The  
9 change – DFG submits – is the listing of the spring-run Chinook salmon as a threatened  
10 species under state and federal Endangered Species Acts and the listing of steelhead on  
11 the federal threatened species list. DFG contends that “[t]he addition of these species to  
12 the threatened species list significantly changes what is necessary to protect the species  
13 on the river.” (DFG Opposition, page 16:12-14.)

14  
15 In order for Fish and Game Code, section 5989 to apply, the change in  
16 conditions must *affect the screen's operation*. The addition of the Chinook salmon and  
17 steelhead to an endangered list does not constitute such a change.

18 **4. Contract Term**

19 Nowhere in the 1984 DFG Contracts or in the Stipulated Judgment is there an  
20 express obligation or promise on the part of DFG or the State of California to pay for  
21 new fish screens. The only express reference or authority for having DFG pay for new  
22 screens is set forth in Fish and Game Code section 5989.

23  
24 **5. Reconciling RD 1644 and Fish and Game Code Section 5989**

25 RD 1644 has many components to it and among other things, RD 1644  
26 requires:

27 ///

1 [Petitioners to] develop plans to reduce fish losses resulting from diversion of  
2 water into the canals. The plan shall identify proposed sources of funding. ...*In*  
3 *order to continue diversion of water...*, the plans to reduce fish losses...shall be  
4 provided to the Chief of the Division of Water Rights [who] shall review the  
5 adequacy of the plans for the protection of fish and the schedule for *implementing*  
6 the proposed actions.

(RD 1644 at pp. 180-181, AR, Disk 6, 03COR0471-0472, emphasis added.)

6 RD 1644 does not mandate that new or improved fish screens be installed. RD  
7 1644 does not require Petitioners to pay for new screens. In the event that new or  
8 improved fish screens are required as part of the plan to reduce fish losses, Petitioners  
9 would likely cite to Fish and Game code section 5989 as a source for funding for those  
10 screens. Given the arguments here, it seems likely that DFG will challenge any  
11 obligation on its part to pay for new or improved screens. Be that as it may, at this stage  
12 of the proceedings, the parties are not at that juncture. Accordingly, Petitioners'  
13 challenge and/or request for relief is premature.

15 I. **Are the SWRCB's Findings and Decision Regarding the Fish Screen**  
16 **Requirements of RD 1644 Supported by Substantial Evidence?**

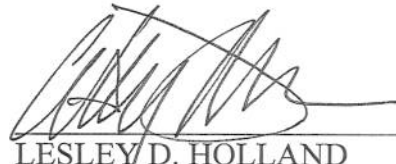
17 Petitioners' final argument challenges SWRCB's decision to adopt/implement  
18 the fish screen requirements of RD 1644. Petitioners submit that there is no evidence  
19 that the current fish protections in place are not adequate and in fact, the evidence is to  
20 the effect that the existing fish screens are working and that the salmon and steelhead  
21 populations are thriving.

23 As DFG points out, "[t]he relevant question is not whether there is evidence in the  
24 record to support Petitioners' position, but whether there is substantial evidence in the  
25 record to support the State Water Board's findings and decisions. (*Paoli v. Calif.*  
26 *Coastal Comm.* (1986) 178 Cal.App.3d 544, 550.) ...[A] court 'may reverse an agency's  
27 decision only if, based on the evidence before the agency, a reasonable person could not  
28

1                   **CONCLUSION**

2                   Defendants/Respondents SWRCB and DFG are prevailing parties. Consistent with  
3 this Statement of Decision, judgment shall be entered denying/dismissing SYWD and  
4 CID's claims against the SWRCB and DFG and denying/dismissing Brophy's claims  
5 against DFG.  
6

7  
8  
9                   Date: 10-19-12

10                   

11                   LESLEY D. HOLLAND  
12 Judge of the Superior Court of the California  
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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN**

Stockton  
222 E Weber AVENUE  
Stockton, CA 95202

**SHORT TITLE:** Yuba County Water Agency VS State Water Resources Control Board et al.

**CLERK'S CERTIFICATE OF SERVICE BY MAIL**

**CASE NUMBER:**  
**CV026505**

I certify that I am not a party to this cause. I certify that a true copy of Statement of Decision from hearing on 3/23/12 was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at Stockton, California, on 10/19/2012.

Clerk of the Court, by: Pamela Cox, Deputy

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**CLERK'S CERTIFICATE OF SERVICE BY MAIL**