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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF U.S. BUREAU OF)
 RECLAMATION WATER RIGHT)
 PERMITS 11308 AND 11310)
 (Applications 11331 and 11332) TO)
 DETERMINE WHETHER ANY MODI-)
 FICATIONS IN PERMIT TERMS AND)
 CONDITIONS ARE NECESSARY TO)
 PROTECT PUBLIC TRUST VALUES)
 AND DOWNSTREAM WATER)
 RIGHTS ON THE SANTA YNEZ)
 RIVER BELOW BRADBURY DAM)
 AND TO CONSIDER CHANGE PETI-)
 TIONS FOR WATER RIGHT PER-)
 MITS 11308 AND 11310)
 _____)

PHASE I

Hearing Date: November 6, 2000
 (Scheduled for November 6, 7, 13 and 14)

CLOSING BRIEF OF CACHUMA
 CONSERVATION RELEASE BOARD

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I. INTRODUCTION

On November 6, 2000, the State Water Resources Control Board ("State Board," "Board" or "SWRCB") conducted Phase I of the Cachuma Project Hearing pursuant to its Notice of Public Hearing, dated September 25, 2000 ("Hearing Notice"), to review the U.S. Bureau of Reclamation Water Right Permits 11308 and 11310, Applications 11331 and 11332, to determine whether any modifications in permit terms and conditions are necessary to protect public trust values and downstream water rights on the Santa Ynez River below Bradbury Dam and to consider change petitions for water right Permits 11308 and 11310. This closing brief addresses Key Issues No. 1 and No. 2 for Phase I of the Cachuma Project Hearing as set forth in the Hearing Notice, as follows:

- "1. Would approval of the petitions for change and purpose and place of use result in any changes in Cachuma Project operations and flows in the Santa Ynez River, compared to the operations and flows that would exist if water from the Project were delivered only to areas within the current place of use?
- "2. Has Reclamation complied with Order WR 94-5? If not, what enforcement or other action, if any, should the SWRCB take?"

In both their pre-hearing submissions and in evidence and testimony admitted at the hearing, Reclamation and the Member Units have demonstrated with certainty through substantial and uncontroverted evidence that approval of the change petitions will neither result in any changes to the Cachuma Project operations nor result in changes in flows in the Santa Ynez River. Consequently, approval of the change petitions cannot cause harm to legal water users, and the change petitions should be approved.

Under the evidence before the Board, it is clear that action may be taken to approve the change petitions without further compliance with the California Environmental Quality Act ("CEQA"). It can be seen *with certainty* that approval of the change petitions cannot constitute a "project" under CEQA as there will be no requisite change in the environment. Moreover, even if approval of the change petitions constitute a "project" under CEQA, the approval falls under at least three CEQA exemptions precluding application of CEQA. Furthermore, the Board is bound to conclusively presume that the negative declaration prepared by COMB fully complies with CEQA. Finally, the change petitions must be approved, regardless of whether or not the

decision is subject to CEQA.

With regard to Key Issue No. 2, Reclamation and the Member Units submitted substantial uncontroverted evidence establishing that Reclamation and the Member Units have complied with Order 94-5. Consequently, no enforcement action is required by the Board.

II. THE STATE BOARD SHOULD APPROVE THE PETITIONS TO CHANGE THE PLACE OF USE AND PURPOSE OF USE FOR RECLAMATION WATER RIGHT PERMITS 11308 AND 11310.

A. SUBSTANTIAL UNCONTROVERTED EVIDENCE SHOWS WITH CERTAINTY THAT APPROVAL OF THE CHANGE PETITIONS WILL NOT RESULT IN ANY CHANGES IN CACHUMA PROJECT OPERATIONS OR FLOWS IN THE SANTA YNEZ RIVER AND WILL NOT HARM LEGAL WATER USERS

The administrative standard to determine whether to approve the petitions to change the purpose of use and place of use contained under water right Permits 11308 and 11310 is set forth in California Code of Regulations section 791, as follows:

“After notice of an application to appropriate water has been given pursuant to Article 3, changes in point of diversion, place of use, or purpose of use as stated in the application, permit, or license may be allowed only upon petition and provided that the petitioner establishes that the proposed change(s) will neither in effect initiate a new right nor injure any other legal user of water.” (Cal.Code Regs. § 791(a); *see also*: Wat.Code § 1702).

Key Issue Number One for the Phase I Hearing clearly implicated the question of injury to any other legal water user. Reclamation and the Member Units provided substantial uncontroverted evidence that approval of the change petitions is simply a de facto consolidation of the permitted place of use and the actual place of use. In other words, neither the manner in which the Cachuma Project is operated nor the flows of the Santa Ynez River are changed by approval of the change petitions. Without a change in operation or flows, there can be no injury to any other legal user of water.

Several uncontroverted facts demonstrate that approval of the change petitions will not

result in any changes in Cachuma Project operations and flows in the Santa Ynez River.

1. **SUBSTANTIAL UNCONTROVERTED EVIDENCE ESTABLISHES WITH CERTAINTY THAT THE PROJECT IS OPERATED TO THE FULL PERMITTED CAPACITY AND THAT NEITHER PROJECT DIVERSIONS NOR DOWNSTREAM FLOWS WILL BE ALTERED IF THE CHANGE PETITIONS ARE APPROVED**

The crux of Key Issue No. 1 stated in the Hearing Notice is the fact that each Member Unit operates an integrated water system that commingles Cachuma Project water and supplemental non-Project water. (Phase I Hearing Reporters Transcript pp.48, 98-99; Exhibit No. DOI-2, p.3; Member Units Exhibit No.3, p.3). ¹ The integrated distribution systems which commingle Project water are the most cost effective and environmentally sound means to distribute Cachuma Project water because it would be very inefficient to construct separate, duplicative and parallel, systems to deliver separate waters. (RT 98-99; Member Units Exhibit No.3, p.3).

Because the Member Units operate integrated distribution systems, Cachuma Project water is untraceably commingled with non-Project waters used by the Member Units. Hence, molecules of Project water are unavoidably delivered to annexed portions of Member Units' service areas which were annexed to their boundaries subsequent to issuance of the Permits, but have not been added to the place of use in Permits 11308 and 11310. (RT 74-97; Exhibit No. DOI-2, p.3; Member Units Exhibit No.3, p.3). However, as further illustrated below, neither the annexations nor the commingling of Project with non-Project waters affect the supply of or demand for Cachuma Project water. Thus, approval of the change petitions will not affect Cachuma Project operations, flows in the Santa Ynez River, diversion or storage amounts, frequency of Reservoir spills, or the supply of or demand for Cachuma Project water. (RT 71; Exhibit Nos. DOI-1, DOI-2; Member Units Exhibit No.3).

Approving the change petitions will not result in any changes in Cachuma Project

¹Hereinafter citation to the Phase I Hearing Reporter's Transcript will be "RT" followed by a page designation.

operations or flows in the Santa Ynez River or otherwise affect the water supply available to the Member Units from the Cachuma Project. (RT 71; Exhibit No. DOI-2, p.16). The supply of Cachuma Project water available to the Member Units is a finite amount, limited by the terms of Permits 11308 and 11310, the contract between Reclamation and the Santa Barbara County Water Agency, State Board water right orders, and public trust protections.

Cachuma Project water supply is governed by Permits 11308 and 11310. Combined, Permits 11308 and 11310 provide for direct diversion of 150 cubic feet per second and annual storage of 550,000 acre-feet. (RT 43-44; Exhibit No. DOI-2, p.9; Staff Exhibit By Reference Nos. 1, 2). Approval of the change petitions will have no effect whatsoever on the limited supply of water made available to the Cachuma Project under Permits 11308 and 11310.

The Master Contract between Reclamation and the Santa Barbara County Water Agency further controls the Cachuma Project water supply that is available to the Member Units. Specifically, the Master Contract limits the Member Units' water entitlement to the Project's operational yield, which Reclamation has determined to be approximately 25,714 acre-feet per year. (RT 35, 74 and 99-100; Exhibit No. DOI-2, p.7; Exhibit No. DOI-1c; Member Units Exhibit No.3, p.4-5;). Clearly, the Member Units are prohibited from using more Project water than that amount fixed by the Master Contract with Reclamation.

Moreover Cachuma Project operations or flows in the Santa Ynez River are fixed by State Board water right decisions and orders. The Cachuma Project Master Contract subordinates itself to SWRCB Decision 886 and Water Right Orders WR 89-18 and WR 94-5. (RT 105; Member Unit Exhibit No.3, p.1; Member Unit Exhibit Nos. 100, 105, 108, 114, 115). Those decisions require Project operations and flows in the Santa Ynez River that will protect downstream water rights and public trust resources. Therefore, the supply of Cachuma Project water available to the Member Units is limited by the amount of water required to satisfy downstream water rights and protect public trust resources. (RT 105; Member Unit Exhibit No.3, p.1; Member Unit Exhibit Nos. 100, 105, 108, 114, 115).

Finally, approval of the change petitions is the proper administrative method to consolidate the purposes of use set forth in Permits 11308 and 11310. Such consolidation will reflect the fact that all water used under both Permits is diverted from the same source,

distributed through the same integrated distribution system, and used for the same set of beneficial purposes. (RT 50; Exhibit No. DO-2, p.7). When the permit applications were filed in 1946, it was the accepted practice of the SWRCB to request separate actions for different consumptive purposes. (RT 50). "If these applications were made today to the State Board, we would not file the separate applications. We would file the same purposes of use under all applications being filed for a single project, such as Cachuma." (RT 82). No party submitted any evidence or testimony that consolidation of the purposes of use would affect Project operations or River flows.

Substantial uncontroverted evidence shows with certainty that approval of the change petitions will not, and can not, affect Project operations or flows in the Santa Ynez River. The change petitions are merely an administrative consolidation of the places and purposes of use -- they do not involve changes in diversion, storage, or Member Unit entitlement to Project water. No party submitted contrary evidence on these points. Because Project operations and flows in the River are not affected, approval of the change petitions will not operate to the injury of any legal user of the water involved. Therefore, approval of the change petitions is proper.

2. **SUBSTANTIAL UNCONTROVERTED EVIDENCE
ESTABLISHES WITH CERTAINTY THAT THE FULL MEMBER
UNIT CONTRACT ENTITLEMENT TO PROJECT WATER CAN
BE USED WITHIN THE ORIGINAL PLACE OF USE**

Approving the change petitions will not result in any changes in Cachuma Project operations or flows in the Santa Ynez River because such approval will not change or otherwise affect the Member Units' demand for Cachuma Project water.² The Member Units use, and for many years have used, their full entitlement to Project water and that amount is fully subscribed within the originally permitted place of use. (RT 44; Exhibit No. DOI-2, p.3). The Member Units' contract entitlement is not sufficient to satisfy total water demand within the permitted place of use. Thus, the Member Units will always demand their full contract entitlement regardless of whether the petitions are granted or not. (RT 97 & 104; Member Units Exhibit

²Demand is measured by actual water use (RT 14-17).

No.3, p.6-7).

Demand for Cachuma Project water will not be affected by approving the change petitions. Kate Rees testified that water demand within the permitted place of use is equal to water demand within the Member Units' entire service areas, minus the aggregate water demand in the area sought to be added to the permitted place of use. (RT 103-104; Member Units Exhibit No.3, p.6-8, Appendix B). Annual water demand within the permitted place of use, derived in this manner, has consistently exceeded the Member Units' contract entitlement of 25,714 acre-feet. (RT 104 & 106; Member Units Exhibit No.3, p.5-7). In fact, the Member Units are required to use approximately 7,500 acre-feet of supplemental water per year to meet demand within the permitted place of use, without taking into account any water demand in the area sought to be added. (RT 104; Member Units Exhibit No.3, p.7). Because Project water is the least expensive water supply available to the Member Units, they will continue to demand their full entitlement. (RT 104; Member Units Exhibit No.3, p.7).

The record shows with certainty that granting the change petitions will not affect the demand for Cachuma Project water because the total water demand within the existing place of use far exceeds the Member Units' entitlement to Project water and the Project's entire yield is fully subscribed within the permitted place of use. The change petitions are merely an administrative consolidation of the permitted place of use and the actual place of use -- they will not affect demand for Project water and do not affect Project operations or River flows. No party submitted contrary evidence on this point. Because Project operations and flows in the River are not affected, approval of the change petitions will not operate to the injury of any legal user of the water involved. Therefore, approval of the change petitions is proper.

3. **SUBSTANTIAL UNCONTROVERTED EVIDENCE
ESTABLISHES WITH CERTAINTY THAT SUPPLEMENTAL
SOURCES OF WATER ARE REQUIRED AND AVAILABLE TO
COVER THE ADDITIONAL DEMANDS OF BOTH THE
ORIGINAL AND THE PROPOSED EXPANDED PLACES OF USE**

As set forth above, the entire Cachuma Project yield is fully subscribed within the originally permitted place of use and is not sufficient to satisfy the demand therein. Therefore,

supplemental sources of water are required to cover the additional demands of both the original and the proposed expanded places of use.

Supplemental sources of local and imported water are adequately and reliably available to the Member Units to satisfy total water demand within their respective service areas. (RT 106-107; Member Units Exhibit No.3, Appendix B). For example, the City of Santa Barbara uses water from Gibraltar Reservoir and the Montecito Water District receives water from Jameson Reservoir. (RT 107). Historically, all of the Member Units have produced groundwater within their boundaries, and that practice continues to date. (RT 106-107; Member Units Exhibit No.3, Appendix B). Additionally, State Water Project supplies are now available to the Member Units. (RT 106).

The availability of reliable and adequate supplies of non-Project water underscores the fact that approval of the change petitions will not affect Cachuma Project operations or flows in the Santa Ynez River. The Member Units can only rely on the Cachuma Project to the extent of their contract entitlement. All other water demand, both within and outside the existing place of use, is predicated on and satisfied by the availability of supplemental non-Project water. Again, the change petitions are merely a request for administrative consolidation required by the fact that Project water and supplemental waters are commingled through the integrated distribution systems and delivered to territories expanded beyond the permitted place of use. Hence, it can be seen with certainty that approval of the change petitions will not result in a change to Cachuma Project operations or flows in the Santa Ynez River.

B. THE ONLY REMAINING PROTEST, FILED BY THE CITY OF LOMPOC, HAS NOT BEEN PERFECTED, IS NOT WELL TAKEN AND SHOULD BE DISMISSED; THE CHANGE PETITIONS SHOULD BE APPROVED MINISTERIALLY

The State Board should dismiss the City of Lompoc's protest because the City of Lompoc, the sole remaining protestant, failed to submit any hearing exhibits to support its protest to the change petitions (Wat.Code § 1335; Cal.Code Regs, tit. 23, §§ 750, 796).

By letters dated December 6, 1999, the State Board dismissed the protests of the City of Solvang, the California Sportfishing Protection Alliance, Mr. Steve Jordon, and the Department

of Fish and Game for failing to submit objections regarding how the environment or prior rights would be injured due to the expanded place and purpose of use.³

The State Board is authorized to dismiss a protest, without the need for a hearing, for failure by the protestant to respond to correspondence from the Board concerning the protest. (Cal. Code Regs., tit. 23, §§ 750; Wat. Code § 1335). The Phase I Hearing Notice clearly constitutes a correspondence from the State Board to the City of Lompoc requesting information relevant to the City's protest to the change petitions. The Phase I Hearing Notice clearly required the City of Lompoc to present a factual case, if any it had, that approval of the petitions will injure any legal use of water by the City of Lompoc. Notwithstanding this opportunity, the City of Lompoc did not submit written testimony, exhibits, or provide witnesses to contend that approval of the change petitions will affect Santa Ynez River in any manner which will injure the City of Lompoc. In fact, no party, including the City of Lompoc, offered a single shred of evidence in opposition to the substantial facts presented by Reclamation and the Member Units.

Essentially, the City of Lompoc has defaulted on and abandoned its protest to the change petitions and the State Board should dismiss the City's protest, without further requirement for hearing. Moreover, where no valid protest remains, the State Board staff should approve the change petitions as a ministerial decision, without need to further consider the issue in Phase II or any other hearing process before the Board. (Wat. Code § 1351; Cal. Code Regs., tit. 23 § 796).

Even if the petitions are not approved ministerially by the staff, the State Board is required to approve the change petitions pursuant to Water Code section 1705 for the same reasons set forth above: that the City of Lompoc has failed in every respect to submit evidence to support its protest of the change petitions. Section 1705 provides:

³As provided in the December 1999 SWRCB letters, Water Code section 1335 provides that the board may cancel a protest for failure to timely provide information requested by the board. Section 1335(d) is particularly germane. "If the protest is based on an allegation that the proposed appropriation would not be in the public interest, would adversely affect public trust uses, or would have adverse environmental impact, the board may cancel the protest for failure to submit information requested by the board if the board determines both of the following: (1) The public review period has expired for any draft environmental document or negative declaration required to be circulated for public review and comment ... (2) In the absence of the requested information, there is no substantial evidence in light of the whole record to support the allegation." (Wat. Code § 1335(d)).

“After the hearing the board shall grant or refuse, as the facts warrant, permission to change the point of diversion, place of use, or purpose of use.” (Wat. Code § 1705).

Again, the Hearing Notice for Phase I clearly imposed a duty upon the City of Lompoc and other parties to present any facts they may have to show that approval of the change petitions would affect Project operations or flows in the Santa Ynez River in any way that will injure their legal water uses. Nevertheless, and in light of the substantial and comprehensive factual submittal by Reclamation and the Member Units, no party, including the City of Lompoc, offered any contrary evidence.

Now that a hearing has been provided on the sole, remaining protest, the Board is required to approve the change petitions because the facts show, with certainty, that approval of the change petitions will not affect Project operations, will not affect flows in the Santa Ynez River, and will not injure any other legal user of the water involved.

C. THE HEARING OFFICER PROPERLY EXCLUDED THE CEQA PRESENTATION PROFFERED BY THE CITY OF SOLVANG.

As the CEQA related evidence proffered by the City of Solvang was not relevant and was beyond the scope of issues set forth in the Hearing Notice, the Hearing Officer properly excluded this evidence and argument. Moreover, approval of the change petitions is proper without further compliance with CEQA. (RT 173-174).

1. THE CITY OF SOLVANG FAILED TO COMPLY WITH THE HEARING NOTICE AND THE BOARD'S PROCEDURAL RULES

California Code of Regulations, title 23, section 648.4 provides that the State Board has discretionary authority to require parties to submit all testimony and exhibits prior to the hearing in a manner set forth in the hearing notice. (Cal. Code Regs., tit. 23, § 648.4). The State Board may also refuse to admit testimony that is outside the scope set forth in the hearing notice. (Id.). As previously noted, the Phase I Hearing Notice set forth two Key Issues, as follows:

- “1. Would approval of the petitions for change and purpose and place of use result in any changes in Cachuma Project operations and flows in the Santa Ynez River, compared to the operations and flows that would exist if water from the Project were delivered only to areas within the current place of use?
- “2. Has Reclamation complied with Order WR 94-5? If not, what enforcement or

other action, if any, should the SWRCB take?"

Neither of these issues encompasses CEQA compliance. Therefore, it was completely within the Board's authority and consistent with Section 648.4 for the Board to preclude the City of Solvang from introducing evidence concerning CEQA related issues in Phase I of the current hearing.

Furthermore, the City of Solvang failed to comply with the Hearing Notice and the State Board's procedural rules when it proposed to introduce Phase I exhibits on November 2, 2000. The City of Solvang served the Phase I parties with two exhibits, pertaining to CEQA, by overnight service on November 2, 2000 with a stated intention to introduce those exhibits at the Phase I proceeding. However, the Hearing Notice expressly required all Phase I exhibits to be filed with the Board and served on Phase I parties by October 23, 2000. This was a second basis to preclude the City of Solvang from raising CEQA issues in the proceeding. (Cal.Code Regs., tit. 23, § 648.4).

2. THE CHANGE PETITIONS MAY BE APPROVED WITHOUT FURTHER COMPLIANCE WITH CEQA

Approval of the change petitions is proper without further processing under CEQA. The strong weight of authority shows that the State Board Staff should have approved the change petitions long ago, and is authorized as a matter of law to do so now. Although the State Board properly excluded Solvang's CEQA presentation, the following CEQA analysis is presented in abundance of caution and to show that these positions were presented in the administrative record.

a. IT CAN BE SEEN WITH CERTAINTY THAT APPROVAL OF THE CHANGE PETITIONS WILL NOT RESULT IN ANY PHYSICAL CHANGE IN THE ENVIRONMENT AND, THEREFORE, IS NOT A PROJECT

As set forth above, Reclamation and the Member Units established, *with certainty*, by substantial and uncontroverted evidence in the record that approval of the change petitions will not affect Cachuma Project operations or flows in the Santa Ynez River. Approval of the change petitions is merely an administrative activity that is required to coincide purposes and places of

use for a commingled water supply. Accordingly, no supportable argument exists that approval of the change petitions will carry any environmental consequence.

By definition, if it can be seen *with certainty* that approval of the change petitions will not result in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, that action is not a "project" under CEQA. (Pub. Res. Code § 21065; Cal. Code Regs., tit. 14, § 15378).

"Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (Cal. Code Regs., tit. 14, § 15061(b)(3)).

Reclamation and the Member Units have established *with certainty*, through substantial evidence that approval of the change petitions will not affect Project operations or flows in the Santa Ynez River. Since no party submitted any evidence to the contrary, it can be seen *with certainty* that approval of the change petitions will not have any direct or indirect effect on the environment. Thus, approval of the change petitions cannot be a "project" under CEQA and, therefore, is not subject to CEQA (Cal. Code Regs., tit. 14, § 15060(c)(3)).

b. **EVEN IF APPROVAL OF THE CHANGE PETITIONS IS A PROJECT UNDER CEQA, THE APPROVAL FALLS WITHIN THREE CEQA EXEMPTIONS**

Assuming, arguendo, that approval of the change petitions is a "project" under CEQA, the approval is exempt from CEQA review. Projects may be either statutorily or categorically exempt. (Pub. Res. Code § 21084; Cal. Code Regs., tit. 14, § 15061).

i. **PRE-CEQA PROJECTS ARE NOT RETROACTIVELY SUBJECT TO CEQA**

Projects approved prior to CEQA's enactment are exempt from CEQA review. That is, projects completed prior to 1970, including the Cachuma Project, are not retroactively required to undergo environmental review to determine whether their completion will have a significant environmental effect. The legislature has enacted several "grandfather" clauses to confirm that CEQA does not apply to previously constructed or previously approved projects. (Pub. Res. Code §§ 21169-21171). The scope of the exemption provided of pre-CEQA projects was

articulated in Bresnahan v. City of Pasadena (1975) 48 Cal.app.3d 297, as follows:

“The single purpose of section 21169, the ‘grandfather’ clause, appears to have been to grant relief from the hardship engendered by requiring EIR’s on projects already approved by the appropriate governmental bodies upon which other parties have acted to their detriment.” (Bresnahan 48 Cal.App.3d at 306).

Assuming again, arguendo, that CEQA applies in some manner to approval of the change petitions, the only activities taken which arguably could affect the environment in any foreseeable manner are the annexations which took place over twenty-five years ago and which created the necessity to petition for changes in the place of use for Permits 11308 and 11310. These annexations, however, occurred prior to CEQA’s enactment and/or prior to the California Supreme Court decision in Bozung v. Local Agency Formation Commission (1975) 13 Cal.3d 263. (Member Units Exhibit No.3, Appendix A).⁴ Therefore, CEQA simply cannot apply to these annexation decisions. (Cal. Code Regs., tit. 14, § 15261(a); *see also*: Nacimiento, *supra*).

ii. **APPROVAL OF THE CHANGE PETITIONS IS PART OF AN ONGOING PROJECT**

CEQA does not apply to “ongoing projects” that do not have a new significant effect upon the environment. (Cal. Code Regs., tit. 14, § 15261). In Nacimiento Regional Wat. Mgt. Advis. Com. v. Monterey County Wat. Res. Agency (1993) 15 Cal.App.4th 200, the Court of Appeal held that a water release schedule for a reservoir constructed prior to CEQA’s enactment in 1970 was exempt under CEQA Guidelines section 15261. The court premised its holding on the facts that the release schedule was an intrinsic part of the ongoing reservoir project and did not modify reservoir capacity nor project operations:

“Whether an activity requires environmental review depends upon whether it expands or enlarges project facilities or whether it merely monitors and adjusts the operation of existing facilities to meet fluctuating conditions.” (Nacimiento 15 Cal.App. 4th at 205).

Substantial uncontroverted evidence establishes with certainty that approval of the change

⁴It was not until 1975, in Bozung, that the California Supreme Court held that LAFCO approval of a city annexation is a “project” within the meaning of CEQA, and that decision has been cited in subsequent decisions for the proposition that annexations that presage or accommodate anticipated changes in the extent or nature of land use. All of the Member Unit annexations which are predicate to the change petitions predate Bozung.

petitions would not modify Cachuma Project operations or flows in the Santa Ynez River, nor otherwise expand project facilities. To the contrary, denial of the change petitions would require expanded distribution facilities in order to separately provide Project water strictly within the originally permitted place of use. Accordingly, the Nacimiento decision illustrates that approval of the change petitions is an administrative activity that is an inherent part of the ongoing Cachuma Project and exempt from CEQA review under Section 15261 (Cal. Code Regs. § 15261(a)).⁵

iii. **APPROVAL OF THE CHANGE PETITION IS A MINISTERIAL ACT**

“Ministerial projects” are statutorily exempt from CEQA. (Pub. Res. Code § 21080(b); Cal. Code Regs., tit. 14, § 15268). “Ministerial projects” are those that involve “little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.” (Cal. Code Regs., tit. 14, § 15369). Rather, the public official is limited to applying law to the facts as presented. (Cal. Code Regs., tit. 14, § 15369). A ministerial decision only involves the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. (Id).

As previously noted, upon the City of Lompoc’s failure to submit written testimony, exhibits or witnesses, resulting in an abandonment of its protest, the State Board may dismiss the City’s protest and refer the matter to the State Board staff to process the change petition. Approval by State Board staff would clearly constitute a ministerial act and, therefore, will be exempt from the requirements of CEQA. (Cal. Code Regs., tit. 14 §§ 15369, 15268).

c. **EVEN IF APPROVAL OF THE CHANGE PETITION IS NOT EXEMPT FROM CEQA, THE NEGATIVE DECLARATION BY COMB WAS PROPER AND, AS A RESPONSIBLE AGENCY, THE BOARD IS BOUND TO ACCEPT THE NEGATIVE DECLARATION**

⁵It is also clear that approval of the change petitions, if a “project” under CEQA, would also fall under the Class 1 Categorical Exemptions for existing facilities created by Public Resources Code section 21084 and described in detail under Section 15301 of the CEQA Guidelines.

Assuming finally, arguendo, that approval of the change petitions is a CEQA "project" that is not exempt from CEQA review, COMB was appropriately designated as the lead agency to prepare the Negative Declaration for the change petitions, and the State Board is required to assume that the Negative Declaration is proper under CEQA.

Where two public agencies have a substantial claim to serve as the lead agency for preparing an environmental analysis for a project, those public agencies may designate the lead agency by way of agreement. (Cal. Code Regs., tit. 14, § 15051(d)). The State Board agreed to that very arrangement in July 1998 when it asked for a local agency to take on the responsibility of lead agency under CEQA for the change petitions for Permits 11308 and 11310. The Cachuma Operations and Maintenance Board assumed lead agency status and prepared, circulated and adopted a Negative Declaration for change petitions. (Staff Exhibit By Reference No.3; Hearing Notice, p.8).

CEQA Guidelines section 15231 provides that the Negative Declaration adopted by COMB as the lead agency shall be conclusively presumed by the State Board to comply with CEQA unless and until a legal proceeding determines that the negative declaration does not comply with CEQA. (Cal. Code Regs., tit. 14, § 15231; *see also*: Pub. Res. Code § 21167.3(b)). Public Resources Code section 21167.3 also requires the State Board to presume that the Negative Declaration complies with CEQA and, further, provides that approval of the change petitions shall constitute permission to proceed under the changes in purpose and place of use, subject to final disposition of any action or proceeding brought against the Negative Declaration. (Pub. Res. Code § 21167.3(b)). The effect of these provisions was upheld in City of Redding v. Shasta County Local Agency Formation Com. (1989) 209 Cal.App.3d 1169, 1178-1179.

The Negative Declaration prepared and adopted by the Cachuma Operations and Maintenance Board was offered and admitted as evidence to the record as Staff Exhibit By Reference No. 3. (Hearing Notice, p.8). Generally, the document provides an analysis similar to the one provided above; that approval of the change petitions will not affect Cachuma Project operations, flows in the Santa Ynez River, diversion or storage amounts, frequency of Reservoir spills, or the supply of or demand for Cachuma Project water. The Negative Declaration illustrates that approval of the change petitions would result in no physical change to the

environment, much less result in a significant physical change. (Cal. Code Regs., tit. 14, § 15061(b)(3)). The conclusions reached in the Negative Declaration are strongly reinforced by the substantial and uncontroverted evidence admitted to the record in the Phase I proceeding. Therefore, there exists no basis for the State Board to assert, or reassert, lead agency status or to undertake new environmental review or preparation of an EIR. (Cal. Code Regs., tit. 14, § 15162).

Moreover, any position that approval of the change petitions results in piecemeal review is a red herring. Well over 20 years separates the *de facto* changes in place and purpose of use from the requirement to prepare an EIR under WR 94-5. So too, the change petitions were originally filed in 1983 -- seventeen (17) years ago -- and long before the Cachuma Project EIR was required under WR 94-5. Combining an after-the-fact environmental analysis of the change petitions into the WR 94-5 EIR would pervert the entire logic of CEQA and subject the EIR to confusion and infirmity. It is the combining of, not the segmentation of, CEQA processes that would here distort CEQA if the change petitions were combined into the EIR under Order WR 94-5. Therefore, any argument that approval of the change petitions involves piecemeal environmental review should be disregarded.

III. SUBSTANTIAL UNCONTROVERTED EVIDENCE SHOWS THAT RECLAMATION AND THE MEMBER UNITS HAVE COMPLIED WITH ORDER 94-5 AND, THEREFORE, NO ENFORCEMENT ACTION IS REQUIRED BY THE BOARD

Substantial evidence shows with certainty that Reclamation has complied with Order WR 94-5 and that no enforcement action is required by the State Board. Notably, no contrary evidence was submitted on this issue.

A. RECLAMATION HAS COMPLETED AND SUBMITTED TO THE BOARD THE FINAL EIS/EIR FOR PROJECT CONTRACT RENEWAL AS REQUIRED BY PARAGRAPH 3(A)

State Board Order WR 94-5, Paragraph 3(a) required completion of the final Cachuma Project contract renewal EIS/EIR. That document was offered and admitted as evidence into the record in the Phase I proceeding as Staff Exhibit By Reference No. 5. (Hearing Notice, Staff

Exhibits By Reference, p.8). Additionally, Michael Jackson, Deputy Area Manager for South Central California, testified that the final Cachuma Project contract renewal EIS/EIR was submitted to the State Board by Reclamation on December 12, 1995. (RT 52-53; Exhibit DOI-1, p.9).

Thus, substantial uncontroverted evidence shows that Reclamation has complied with Paragraph 3(a).

B. RECLAMATION AND THE MEMBER UNITS HAVE SUBMITTED THE REPORTS AND DATA COMPILATIONS RESULTING FROM FISHERY MOUs AS REQUIRED BY PARAGRAPH 3(B)

Paragraph 3(b) required the reports or data compilations resulting from the MOUs, including any extensions thereof, entered into by some of the parties for cooperation in research related to the protection of fish and fish habitat for the portion of the Santa Ynez River below Bradbury Dam. Mr. Jackson testified that Reclamation has complied with this requirement by submitting a compilation report to the State Board on September 10, 1996 and by completing and submitting the Final Lower Santa Ynez River Fish Management Plan. (RT 53; Exhibit DOI-1, p.9). The April 20, 1999 Draft Fish Management Plan was offered and admitted as evidence into the record as Staff Exhibit by Reference No. 9. (Hearing Notice, Staff Exhibits By Reference, p.8). The Final Fish Management Plan, dated October 2, 2000, was offered and admitted as evidence into the record as Member Units Exhibit No. 35.

Jean Baldrige provided extensive testimony on Paragraph 3(b) compliance on behalf of the Member Units and ID No. 1. Ms. Baldrige identified the massive cooperative effort toward research and fish maintenance in the Santa Ynez River and its tributaries below Bradbury Dam. Federal, state, and local agencies have participated in data compilation regarding the fishery, fishery habitat, and hydrology of the lower Santa Ynez River pursuant to four consecutive memoranda of understanding, beginning in 1993. (RT 123-134; Member Units Exhibit Nos. 11-14). Pursuant to those understandings, numerous committees composed of policy makers, biology, hydrology and fishery experts have worked together to complete several contemporary studies and analyses regarding the Southern California steelhead trout. Ms. Baldrige testified about voluntary water releases from Cachuma Project yield, extensive field research, myriad

technical meetings, and Section 7 Consultation with the National Marine Fisheries Service. (RT 123-134; Member Units Exhibit No.10, p.1-8). Those processes have produced the Santa Ynez River Fisheries Management Alternatives Report, the Long Term Study Plan, numerous Compilation Reports, the 1996-1997 Synthesis Report, the Lower Santa Ynez River Fish Management Plan, and the NMFS Biological Opinion. (Member Units Exhibit Nos. 15, 20, 27, 31, 34, 35; Staff Exhibit By Reference No.4; Hearing Notice, p.8). Each work is predicated on the science-based compilation and evaluation of a wide range of potential management alternatives to improve conditions for fishery resources (RT 123-134; Member Units Exhibit No.10, p.4-8).

Thus, substantial uncontroverted evidence shows that Reclamation has complied with Paragraph 3(b).

C. RECLAMATION HAS SUBMITTED THE RIPARIAN VEGETATION MONITORING REPORT AS REQUIRED BY PARAGRAPH 3(C)

Paragraph 3(c) required a report on the riparian vegetation monitoring program in and along the margins of the Santa Ynez River below Bradbury Dam. The Santa Ynez River Vegetation Monitoring Study, dated April 2000, was offered and admitted as evidence to the record in the Phase I proceeding as Staff Exhibit By Reference No. 8 (Hearing Notice, Staff Exhibits By Reference, p.8). Additionally, Mr. Jackson testified that the Vegetation Monitoring Study was submitted to the State Board, and that receipt of that document was acknowledged by the Board in July 2000. (RT 53-54; Exhibit DOI-1, p.9).

Thus, substantial uncontroverted evidence shows that Reclamation has complied with Paragraph 3(c).

D. THE MEMBER UNITS SUBMITTED SUBSTANTIAL EVIDENCE SHOWING THE INFORMATION DEVELOPED AND CONCLUSIONS REACHED THROUGH SEVERAL PHASES OF NEGOTIATIONS WITH THE CITY OF LOMPOC AS REQUIRED BY PARAGRAPH 3(D)

Paragraph 3(d) required information developed and conclusions reached, if any, during the negotiations among the Cachuma Member Units and the City of Lompoc. The written testimony of Steve Mack, Water Supply Manager for the City of Santa Barbara, was submitted

as Member Units Exhibit No. 50. That testimony was verified and adopted by Charles Evans, consultant manager for the Cachuma Conservation Release Board and Improvement District No. 1, in Member Units Exhibit No. 50A, submitted at the Phase I Hearing and admitted into the record as evidence without objection. (RT 109). Mr. Evans presented the testimony in Member Units Exhibit No. 50 as his own. Mr. Evans provided extensive testimony regarding compliance with Paragraph 3(d). Mr. Evans described the extended negotiation processes between the City of Lompoc and the Member Units to address outstanding issues between the parties. Beginning in 1993 with the Contract to Establish Negotiation Process (Member Units Exhibit No. 51), the Member Units and the City of Lompoc set out to resolve concerns relative to water quantity and quality in the Lompoc Plain. Facilitated by policy and technical committees, the parties developed information regarding historic groundwater supply and salinity in the Lompoc Plain, potential water management solutions, and costs. (RT 115-116; Member Units Exhibit No.50, p.1-5). That negotiation process ceased when the City of Lompoc filed a claim against Reclamation alleging impacts caused by the Cachuma Project. (RT 116; Member Units Exhibit No.50, p.5). The parties next attempted to gain consensus on the factors affecting Lompoc water quality through a Memorandum of Understanding and the Work Plan Manager process. Pursuant to that process, approximately three years of additional work was completed and several surface and groundwater models were proposed. (RT 116-117; Member Units Exhibit No.50, p.5-9). In 1999, however, the parties had not reached agreement on the technical evaluation and methodology used by City of Lompoc's consultant. (RT 117; Member Units Exhibit No.50, p.8).

The parties have continued to develop information regarding surface and groundwater modeling, State Water Project exchange, and conjunctive water use through the Invitation to Talk process. Twelve meetings have been held under Invitation to Talk and the parties are optimistic that consensus can be reached in the near future. (RT 118-119; Member Units Exhibit Nos.80, p.4-6, 81-85).

Thus, substantial uncontroverted evidence shows that Reclamation has complied with Paragraph 3(d).

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E. THE MEMBER UNITS PRESENTED SUBSTANTIAL EVIDENCE THAT THE MANUAL FOR THE SANTA YNEZ RIVER HYDROLOGY MODEL IS A REPORT OR COMPILATION SHOWING THE IMPACTS OR LACK THEREOF OF THE CACHUMA PROJECT ON DOWNSTREAM WATER RIGHT HOLDERS AS REQUIRED BY PARAGRAPH 3(E)

Paragraph 3(e) required a study report, or compilation of other existing materials, which clearly describes the impacts, or lack thereof, of the Cachuma Project on downstream diverters as compared to conditions which would have existed in the absence of the Cachuma Project.

William Mills, member of the Santa Ynez River Hydrology Committee, testified regarding the Santa Ynez River Hydrology Model Manual. (Member Units Exhibit Nos.90, 91). The Manual is a mathematical compilation of enormous amounts of data concerning the hydrology mechanics of the Santa Ynez River watershed and serves as an instructional guideline for the work-in-progress modeling that has been underway since 1978. (RT 136; Member Units Exhibit No.90, p.2). The Manual has been updated over the years to include coverage on conjunctive use operations, water supply, water quality, and fishery related water releases. (RT 138; Member Units Exhibit No.90, p.2-4). Mr. Mills notes that thousands of man-hours have been dedicated by numerous agencies in preparing the Manual. (RT 136).

Thus, substantial uncontroverted evidence shows that Reclamation has complied with Paragraph 3(e).

IV. CONCLUSION

Approval of Reclamation's change petitions for Permits 11308 and 11310 is long overdue. The petitions should have been ministerially granted seventeen years ago, without the need for environmental review. Nevertheless, a Negative Declaration has been adopted and a hearing has been conducted. No further delay is warranted.

Reclamation and the Member Units have submitted substantial factual evidence to the record which shows with certainty that approval of the change petitions will not affect Cachuma Project operations or flows in the Santa Ynez River. No party, including the City of Lompoc, introduced any contrary evidence.

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Therefore:

- (1) It has been shown with certainty that approval of the petitions shall not have any effect on the environment, obviating any further CEQA review;
- (2) It has been shown with certainty that approval of the change petitions will not operate to the injury of any legal user of the water involved;
- (3) The city of Lompoc's protest should be dismissed; and
- (4) The change petitions should be approved immediately.

Finally, Reclamation and the Member Units submitted substantial uncontroverted evidence to the record establishing compliance with State Board Order WR 94-5. Therefore, no enforcement action is required by the Board.

DATED: January 5, 2001

Respectfully submitted,

McCORMICK, KIDMAN & BEHRENS, LLP

By: 

PAETER E. GARCIA

Attorneys for Cachuma Conservation
Release Board

PROOF OF SERVICE
CCP 1013a(3)
FRCP 5(b)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of 18 and not a party to the within proceeding; my business address is: 695 Town Center Drive, Suite 400, Costa Mesa, California 92626-7187.

On January 5, 2001, I served the foregoing documents described as **CLOSING BRIEF OF CACHUMA CONSERVATION RELEASE BOARD** on the interested parties in this proceeding.

SEE ATTACHED SERVICE LIST

(BY REGULAR MAIL) by placing the true copies thereof enclosed in sealed envelopes addressed as stated below:

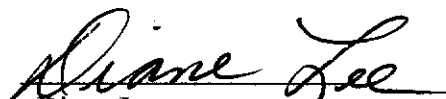
As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY PERSONAL SERVICE) I caused to be delivered by hand to the offices of the addressee.

(BY OVERNIGHT COURIER) I caused the above-referenced envelope(s) to be delivered to an overnight courier service for delivery to the addressee(s).

Executed on January 5, 2001, at Costa Mesa, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Diane Lee

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