SOMACH, SIMMONS & DUNN
A Professional Corporation
STUART L. SOMACH, ESQ.
SANDRA K. DUNN, ESQ
400 Capitol Mall, Suite 1900
Sacramento, California 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199

LAW OFFICES OF DONALD B. MOONEY
DONALD B. MOONEY
129 C Street, Suite 2
Davis, California 95616
Telephone: (530) 758-2377
Facsimile: (530) 758-7169

Attorneys for City of Lompoc

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

Hearing 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 (Cachuma Reservoir)	CITY OF LOMPOC'S CLOSING BRIEF FOR PHASE 2

//

//

//

//

//

//

//

//

//

//

//

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

The City of Lompoc ("Lompoc") respectfully submits the following closing brief on Phase 2 of the Hearing to Review the United States 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 (Cachuma Reservoir).

The only modifications necessary to Reclamation's water right permits are those identified in the December 17, 2002, Settlement Agreement Between Cachuma Conservation Release Board, Santa Ynez River Water Conservation District ("SYRWCD"), Santa Ynez River Water Conservation District Improvement District No. 1 ("SYRWCD-ID#1"), and the City of Lompoc Relating to the Operation of the Cachuma Project (hereinafter "Settlement Agreement") (Member Units ("MU") Exh. 220a.). The modifications provided for in the Settlement Agreement achieve Lompoc's long-term objective that the United States Bureau of Reclamation ("Reclamation" or "USBR") operate the Cachuma Project in such a manner so as to avoid adversely affecting Lompoc's downstream groundwater rights, including water quality.

Acceptance of the Settlement Agreement is also critical to providing essential downstream flood protection. The Settlement Agreement supports Reclamation's adoption and continued use of "Modified Winter Storm Operations" as described in USBR Technical Memorandum No. WR8130-RA-TM-00-2, entitled "Risk Based Evaluation, Modified Storm Operations-Bradbury Dam", dated February 2000, and the Santa Barbara County Water Agency report entitled "Report of Modified Storm Operations, Bradbury Dam, Cachuma Project, Santa Barbara County, California," dated December 29, 1998. (See Settlement Agreement, ¶ 2, MU Exh. 220a.) The Modified Winter Storm Operations provide the City of Lompoc and its residents, as well as other entities and individuals downstream of Bradbury Dam, a level of protection and security from major flooding that simply did not exist before 1998. The importance of this added protection to Lompoc and its residents cannot be overstated.

//

//

For the reasons more fully discussed herein, Lompoc urges the State Water Resources Control Board ("SWRCB") to make only those modifications to Reclamation's water right permits consistent with paragraphs 1.3 and 1.4 of Exhibits B and C of the Settlement Agreement.

II. BACKGROUND INFORMATION

A. The Santa Ynez River Watershed

The Santa Ynez River originates in the Juncal Canyon area of the Santa Ynez Mountains and traverses Santa Barbara County from east to west. The river runs for approximately 70 miles to the Pacific Ocean, passing the cities of Santa Ynez, Solvang, Buellton, and Lompoc, with its mouth near the town of Surf. (Decision No. D 886 ("D 886") at pp. 9-10.)

Three dams are located on the Santa Ynez River: (1) Juncal Dam (Jameson Lake), owned and operated by the Montecito Water District; (2) Gibraltar Dam and Reservoir, owned and operated by the City of Santa Barbara; and (3) Bradbury Dam (Cachuma Reservoir), owned and operated by Reclamation. (*Id.*) Completed in 1953 as part of the Cachuma Project, Bradbury Dam and Cachuma Reservoir are, by far, the largest on the Santa Ynez River. Bradbury Dam is located approximately 20 miles downstream of Gibraltar Dam. Diversion of water from Cachuma Reservoir is made to five of the Cachuma Member Units via the 6.4-mile long Tecolote Tunnel. (*Id.* at p. 13.)

Below Bradbury Dam, the Santa Ynez River flows west through the broad part of the Santa Ynez Valley near Buellton. From Buellton, the Santa Ynez River flows west through a reduced stretch to the Narrows located adjacent to the City of Lompoc. From the Narrows, the river emerges onto the broad flat Lompoc Plain and flows past Lompoc across the Lompoc Plain. The Lompoc Plain is a flat alluvial plain and is bordered on the north, east, and south by hills or low mountains. The Plain is about twelve miles long and three miles wide at its maximum extent. The Santa Ynez River empties into the Pacific Ocean at Surf.

B. Lompoc's Use of Water from the Lompoc Groundwater Plain

Lompoc owns and operates nine domestic water supply wells that are all located within the boundaries of Lompoc. (Lompoc Exh. 1 at p. 5.) The wells are of varying capacity between 250 and 2,000 gallons per minute. (*Id.*) The groundwater from these wells is Lompoc's sole source of water. In addition to the wells, Lompoc's domestic water supply system also includes a water treatment plant,

and distribution facilities for the delivery of potable water supplies to its residents. (*Id.*) Lompoc provides water service to approximately 39,000 persons. (*Id.*)

Lompoc's wells withdraw groundwater from the main zone of the upper aquifer in the eastern Lompoc Plain. (*Id.*) All of the water produced by Lompoc's domestic water supply wells is used within Lompoc's water service area. (*Id.*) Lompoc's water service area is wholly within the Santa Ynez River watershed. (*Id.*) Lompoc does not export, transport, or remove any water pumped from its domestic water supply wells from the Santa Ynez River watershed. (*Id.*)

Lompoc's water use has averaged approximately 5,700 acre-feet per year since 1989. (*Id.*) Lompoc has an extremely low per capita consumption of about 124 to 128 gallons per day. (RT 475.) Despite a continuing increase in population, Lompoc's water use has remained relatively stable due to the implementation of aggressive conservation measures and public awareness. (*Id.*; RT 475-476.) Since 1991, Lompoc has stabilized its water use by employing measures such as the requirement to contribute or retrofit existing water uses in the city to completely offset new water use. For example, six existing houses have to be retrofitted to offset the construction of one new house. (RT 476.)

C. The Cachuma Project

The Cachuma Project is located on the Santa Ynez River, about 25 miles northwest of Santa Barbara. (Department of the Interior ("DOI") Exh. 1 at p. 2.) Bradbury Dam impounds the runoff from the upper Santa Ynez River, creating Cachuma Reservoir. Bradbury Dam is located approximately 45.7 miles from the mouth of the Santa Ynez River and has a drainage area of approximately 421 square miles. Cachuma Reservoir has a current water storage capacity of approximately 188,000 acre-feet. (MU Exh. 2 at p. 4.) Cachuma Project facilities include Bradbury Dam, Cachuma Reservoir, Tecolote Tunnel, the South Coast Conduit, and four small regulating reservoirs along the South Coast. (DOI Exh. 1 at p. 3.)

Reclamation began impounding water behind Bradbury Dam in 1953. Cachuma Project water is diverted out of the watershed (exported) via the Tecolote Tunnel to the Cachuma Member Units in the South Coast area of Santa Barbara County.

//

//

D. SWRCB Decisions and Orders Regarding Reclamation's Water Rights Permits

On February 28, 1958, the State Water Resources Board ("WRB"), predecessor of the SWRCB, adopted D 886, which approved Reclamation's Applications 11331 and 11332. On March 19, 1958, the WRB issued Permits 11308 (Application 11331) and 11310 (Application 11332). Permit 11308 allows for a year-around direct diversion of 100 cubic feet per second ("cfs"). Permit 11310 allows for a year-around direct diversion of 50 cfs. The total amount of water that may be appropriated for storage under both permits is 275,000 acre-feet per annum ("afa").

Lompoc's concern in 1958, as well as now, was to ensure that the operation of the Cachuma Project did not impact the groundwater basin and Lompoc's water rights. (Lompoc Exh. 1 at p. 4.) In response to Lompoc's protest to Reclamation's water right applications, Reclamation committed not to interfere with the natural percolation of water below the Cachuma Project by exporting water needed for downstream water users from the basin. (D 886 at p. 29.) Based upon this commitment, the WRB imposed a condition that the Cachuma Project "not reduce natural recharge of ground water from the Santa Ynez River." (D 886, Condition 11, at p. 33; Permit 11308, Condition 5.) The WRB also retained jurisdiction for fifteen (15) years over Reclamation's permit to, among other things, enforce this condition. (D 886 at pp. 21-30, Condition 13 at p. 36.) Reclamation's permits required Reclamation to perform studies and investigations to determine the amount, time, and rate of releases needed to protect downstream water uses and provide for the natural recharge of the ground water. *(Id.)*

In a continuing effort to protect its downstream water rights, Lompoc has participated in the SWRCB's subsequent proceedings regarding the operation of the Cachuma Project. (Lompoc Exh. 1 at p. 4.) Each proceeding was for the express purpose of developing an operating regime for the Cachuma Project that protected senior downstream water rights as required in D 886.

In accordance with its retained jurisdiction over Reclamation's permits, the SWRCB issued orders modifying Reclamation's water rights permits in 1973 (Water Rights Order No.73-37 ("Order WR73-37")) and in 1989 (Water Rights Order No. 89-18 ("Order WR 89-18").) The

//

1973 and 1989 Orders preserved the fundamental requirement that water be released to provide natural recharge of ground water basins. The 1973 Order contains the following:

> Water of the Santa Ynez River shall be stored in and released from Lake Cachuma in such amounts and at such times and rates as . . . (b) will be sufficient, together with inflow from downstream tributary sources, *to maintain percolation of water from the stream channel as such percolation would occur from unregulated flow, in order that the operation of the project shall not reduce natural recharge of ground water from the Santa Ynez River.*

(Condition 5, Order WR 73-37, at p. 3.

Moreover, both Orders WR 73-37 and 89-18 contain specific conditions that direct management of the reservoir to meet the general requirement of protecting downstream uses.

In 1994, the SWRCB adopted Order WR 94-5 continuing its reserved jurisdiction. Order WR 94-5 requires Reclamation to commence the studies and investigations that were mandated 1958 by WRB D 886, and again in Permits 11308 and 11310, Order WR 73-7 and Order WR 89-18. Order WR 94-5 requires the studies and investigations be complete by 2000, forty-two years after the issuance of Reclamation's permits. Order 94-5 also requires the preparation of an environmental review document pursuant to the California Environmental Quality Act ("CEQA").

E. Lompoc's Historical Dispute with the Cachuma Project

The City of Lompoc's purpose and goal in this proceeding, as in previous proceedings on the Cachuma Project, is to protect the quantity and quality of its downstream water rights. (Lompoc Exh. 1 at p. 5; RT 477.) Since this process was initiated many years ago, Lompoc's primary concern regarding the Cachuma Project has been the potential impact to groundwater recharge and a resulting reduction in groundwater levels in the Lompoc region. (Lompoc Exh. 1 at p. 6.)

Lompoc's expert groundwater hydrologists, Timothy J. Durbin and Dr. Jeffrey Lefkoff, have conducted an extensive investigation of the current and past operation of the Cachuma Project and the Project's relationship with the groundwater basin in Lompoc. (Lompoc Exh. 1 at p. 6; Lompoc Exh. 2; Lompoc Exh. 3.) Lompoc's consultants prepared a detailed groundwater model demonstrating the Cachuma Project's historic impact on the groundwater basin in the Lompoc Plain and on Lompoc's groundwater wells. (Lompoc Exh. 1 at pp. 6-7; Lompoc Exh. 3 at pp. 1-3; SWRCB Exh. 10.) Lompoc has spent in excess of $1.5 million for this investigation and modeling. (RT 477.)

Mr. Durbin's and Dr. Lefkoff's investigation and modeling conclude that under the historic operating scenario for the Project, the Lompoc Plain is not in overdraft, but the Cachuma Project has resulted in an adverse impact to the groundwater quality of the groundwater basin. (Lompoc Exh. 3 at p. 2.) The modeling showed that historically the operation of the Cachuma Project significantly reduced the quality of groundwater in the eastern Lompoc Plain and groundwater basin and significantly reduced the quantity of water recharged to the basin from the Santa Ynez River. (Lompoc Exh. 3 at p. 2.) The dissolved solids and salinity concentrations of the recharge water in the Lompoc Plain are determined primarily by the dissolved solids and salinity concentrations at the Narrows. (Lompoc Exh. 1 at p. 6.) The historical operation of the Cachuma Project increased the salinity of Santa Ynez River streamflows at the Narrows in two significant ways: (1) evaporation from the reservoir surface increases the dissolved solids concentration in the outflow, and (2) diversions to South Coast through Tecolote Tunnel and diversions to SYRWCD-ID#1 through the dam's outlet works decrease the average outflow from the Reservoir which increases the relative contribution of tributary inflows between Bradbury Dam and the Narrows to the total flow at the Narrows. (*Id.*) These tributary inflows have a higher average dissolved solids and salt concentration than inflows above Bradbury Dam. (*Id.*) As a result of these two factors, the operation of the Cachuma Project contributes to the salinization of the groundwater in the Lompoc groundwater basin that the City of Lompoc extracts for its municipal uses. (Lompoc Exh. 3.)

The excessive salinity in Lompoc's water supply causes infrastructure and water supply problems. Even after expensive treatment, Lompoc's water supply is relatively high in salinity. The groundwater salinity resulting from the operation of the Cachuma Project taxes Lompoc's water supply and treatment capabilities.

F. The Current Operating Regime for the Cachuma Project Does Not Negatively Impact the Lompoc Groundwater Plain and Lompoc's Senior Downstream Water Rights

Based upon the modeling conducted, Lompoc's consultants have concluded that under the current operating regime, including the downstream water rights releases as required in Water Rights Order No. 89-18 and the commingling of water from the State Water Project ("SWP") imported by the Central Coast Water Authority ("CCWA"), the groundwater quality in the eastern portion of the

Lompoc groundwater basin will return to a no Project condition within the foreseeable future. (Lompoc Exh. 3 at p. 2.) However, any change in the downstream release program under Water Right Order No. 89-18 or a change in the commingling of the CCWA's imported water will result in the adverse water quality impact noted above continuing for a number of years or indefinitely. (*Id.* at p. 3.) Thus, the continuation of the current operating regime under WR Order 89-18, including the CCWA's commingling of water from the SWP, is critical to ensuring that the Cachuma Project does not impair Lompoc's senior groundwater rights. (*Id.*)

III. DISCUSSION

A. KEY ISSUE 4: Has any senior, legal user of water been injured due to changes in water quality resulting from the operation of the Cachuma Project?

1. Has operation of the Cachuma Project affected water quality in the Lompoc Plain Groundwater Basin in a manner that impairs any senior water right holder's ability to beneficially use water under prior rights?

2. What permit terms, if any, should be included in Reclamation's water right permits to protect senior water right holders from injury due to changes in water quality?

As previously noted, the City of Lompoc's purpose and goal in this proceeding, as in previous proceedings on the Cachuma Project, is to protect the quantity and quality of its downstream water rights. (Lompoc Exh. 1 at pp. 5-6.) As discussed above, Lompoc's sole source of water is groundwater withdrawn from the main zone of the upper aquifer. (Lompoc Exh. 1 at p. 5.) Under California water law Lompoc possesses an appropriative right to extract groundwater in the Lompoc Plain for municipal and industrial use. (See *San Bernardino v. Riverside* (1921) 186 Cal. 7, 25.) Thus, Lompoc is a legal user of groundwater from the Lompoc Groundwater Plain. Moreover, Lompoc's appropriative groundwater rights are senior in priority to Reclamation's water rights for the Cachuma Project. (See D 886.)

Lompoc's rights to groundwater extend beyond having a sufficient quantity of water. The right to groundwater also includes a right to the quality of groundwater. (See *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 26 (a junior appropriator may not materially deteriorate the quality of water for use by an appropriator with a superior appropriative water right).)

//

Lompoc and its experts have conducted an extensive investigation of the current and past operation of the Cachuma Project and the Project's relationship with the groundwater basin in Lompoc. (Lompoc Exh. 1 at p. 6; Lompoc Exh. 3 at pp. 1-3.) Lompoc's consultants have prepared a detailed groundwater model demonstrating the Cachuma Project's historic impact on the groundwater basin in the Lompoc Plain and on Lompoc's groundwater wells. (SWRCB Exh. ___.) The groundwater model also clarifies that under the current operation of the Cachuma Project, which includes the commingling of CCWA's SWP water, the groundwater quality in the eastern Lompoc groundwater basin will return to a no Project condition within the foreseeable future. (Lompoc Exh. 3 at p. 3.)

B. KEY ISSUE 5: Has operation of the Cachuma Project injured any senior water right holders through reduction in the quantity of water available to serve prior rights and, if so, to what extent?

Based upon the investigation, modeling and analysis completed by Lompoc's consultants Timothy J. Durbin and Dr. Jeffrey Lefkoff, the current operation of the Cachuma Project under Water Rights Order No. 89-18 has not reduced the quantity of water available to Lompoc, a senior downstream water right holder.

C. KEY ISSUE 6: Should Reclamation's water rights permits be modified in accordance with the Settlement Agreement Between Cachuma Conservation Release Board, Santa Ynez River Water Conservation District, Santa Ynez River Water Conservation District Improvement District No. 1, and the City of Lompoc Relating to the Operation of the Cachuma Project? Specifically should Reclamation's water rights permits be modified in accordance with the two enclosures submitted to the SWRCB by Reclamation?

After many years of negotiations, evaluations, studies, administrative hearings, and several lawsuits, Lompoc and other interested parties agreed to support the current operating regime under Water Rights Order No. 89-18 ending fifty years of disputes over the operations of the Cachuma Project. The Settlement Agreement was approved by Lompoc's City Council in December 2002. (MU Exh. 220a.) Lompoc urges the SWRCB to modify Reclamation's water right permits consistent with the provisions of the Settlement Agreement.

//

//

//

1. The Settlement Agreement Protects Lompoc's Senior Downstream Water Rights

As maintained throughout the long history of this Project, Lompoc's sole objective is to ensure that the Cachuma Project does not adversely impact Lompoc's water rights in either quantity or quality. The requested modification to Reclamation's water rights permits as provided in the Settlement Agreement, as well as the other provisions of the Settlement Agreement, will adequately protect Lompoc's senior downstream water rights and will not adversely affect water quality in the Lompoc Plain Groundwater Basin. Therefore, Lompoc believes that the SWRCB should modify the water rights permits consistent with paragraphs 1.3 and 1.4 of the Settlement Agreement. (See MU Exh. 220a.)

2. The Settlement Agreement Provides for the Parties to Support Reclamation's Modified Storm Operations

Although the Cachuma Project's storm operations is not within the SWRCB's jurisdiction or a key issue in this hearing process, it is critical for the SWRCB to understand the importance of the Modified Storm Operations contained in the Settlement Agreement. (See Settlement Agreement, ¶ 2.) Reclamation staff asserts that the Cachuma Project is a water supply project and not an authorized flood control project. (Lompoc Exh. 1 at p. 11; DOI Exh. 6 at p. 6; RT 89.) No storage space is dedicated for flood control. (RT 89.) As such, Reclamation has historically operated the Cachuma Project to maximize water supply and storage of water without planning for or providing for downstream flood protection. (Lompoc Exh. 1 at p. 11; RT 89.)

In January/February1998, a series of powerful winter storms in Southern California brought to the forefront the critical need to modify operations of the Cachuma Project for downstream flood control protection. (Lompoc Exh. 1 at pp. 10-12.) These storms brought near record flows to the Santa Ynez River. (*Id.*) During the storm that ended one Tuesday morning, the Santa Ynez River was at its maximum carrying capacity of 20,000 to 29, 000 cfs. (*Id.*; RT 102.) Prior to these storms, the Cachuma Reservoir had not yet filled to capacity and thus the Cachuma Reservoir offered some limited downstream flood control protection. (Lompoc Exh. 1 at p. 12.) However, this minimal

//

flood control protection was insufficient to avoid some flooding of agricultural land downstream of Lompoc. (*Id.*)

As more storms made their way to the California central coast, the National Weather Service forecasted that Santa Barbara County would receive up to 10 inches of rain in the mountains within 48 hours. (*Id.*) The Santa Barbara County Flood Control District's meteorologist predicted six inches of rain for the mountains. (*Id.*) Based upon either of these predictions, a significant potential existed for wide-spread flooding downstream of the Cachuma Project. Making matters worse, another storm was predicted to hit Santa Barbara County only two days later. (*Id.*) The situation posed a grave risk to life and property to the residents of the City of Lompoc. (*Id*; RT 102.)

After intense negotiations just prior to the arrival of the storms, Reclamation's staff indicated a willingness to cooperate in avoiding or minimizing this impending disaster by making pre-releases from the reservoir in order to have reservoir capacity to capture the imminent flood flows. (*Id.*) Clearly, had Reclamation not modified its project operations by making the pre-releases at the insistence of Lompoc, the Santa Barbara Water Conservation and Flood Control District, and the Santa Ynez River Water Conservation District, portions of Lompoc and the Lompoc Valley would have experienced serious flooding threatening life and property. (Lompoc Exh. 1 at p. 12; RT 101-102.) Reclamation's pre-release of water from Lake Cachuma allowed the peak flows to be captured by Bradbury Dam, thus preventing uncontrolled spills into the Santa Ynez River. (*Id.*) The pre-releases of stored water allowed Reclamation to control the out-flows from the dam so that they did not exceed the downstream carrying capacity of the Santa Ynez River. (RT 102.)

At the conclusion of the 1998 storm season, the parties began discussions to implement permanent operating procedures to protect downstream life and property from flooding. In December 1999, Reclamation released a draft Technical Memorandum for modified storm operations for Bradbury Dam. (Lompoc Exh. 1 at p. 2; see also MU 220a at p. 6.) The proposed modifications identified the procedures for determining how much and when water will be released from Cachuma Reservoir in order to protect downstream interests from potential floods. (See SBCWA Exh. 6, 8.)

//

The importance to the City of Lompoc and its residents of the modified storm operations and their continued support of those operations cannot be overstated. The modified storm operations ensures that the neither the City, nor any other party, will be required to frantically negotiate with Reclamation regarding the operation of the project as powerful winter storms race across the Pacific Ocean slamming into the mountains of Santa Barbara County.

D. KEY ISSUE 7: Should the Petitions for change in purpose and place of use be approved?

Pursuant to the terms of the Settlement Agreement, Lompoc has withdrawn its protest to Reclamation's petitions for change in purpose and place of use. (See Settlement Agreement at ¶ 3.2; MU Exh. 220a.)

E. Substantial Evidence Does Not Support the Adoption of Alternative 3A2

California Trout ("CalTrout") proposed that the Cachuma Project be operated as described in the Alternative 3A2 of Reclamation's Cachuma Contract Renewal EIR/EIS. This proposed Alternative 3A2 involves making releases from the Cachuma Reservoir to provide perennial streamflow at specified seasonal rates. (CalTrout Exh. 90 at p. 7.) CalTrout's proposal includes a modification to Alternative 3A2, which is referred to as Alternative 3A2 Dry. Alternative 3A2 Dry is similar to Alternative 3A2, except that the specified seasonal rates for the former are reduced during dry years. (*Id.* at p. 8.)

Lompoc objects to Alternative 3A2 and/or Alternative 3A2 Dry on the grounds that they would significantly impair Lompoc's downstream senior water rights in terms of water quality. As discussed below, substantial evidence in the record simply does not support the adoption of Alternative 3A2. Moreover, CalTrout provided absolutely no evidence, let alone expert testimony in hydrology or reservoir operations, regarding the impact that Alternative 3A2 would have on downstream water rights.

1. Alternative 3A2 Would Impair Lompoc's Senior Downstream Water Rights

An appropriator is entitled to protection against acts that materially deteriorate the quality of the water for the uses to which the prior appropriator wishes to apply the water. (*Phoenix Water Co. v.*

Fletcher (1887) 23 Cal. 481, 487 ("The prior appropriator is clearly entitled to protection against the acts which materially diminish the quantity of water to which he is entitled, or deteriorate its quality, for the uses to which [the appropriator] wishes to apply it."); *Wright v. Best* (1942) 19 Cal. 368, 378.) In *Wright v. Best* the court stated that:

> [I]t is an established rule in this state that an appropriator of waters of a stream, as against upper owners with inferior rights of use, is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights. *Any material deterioration of the quality of the stream by subsequent appropriators or others without superior rights entitles him to both injunctive and legal relief.*

(*Wright v. Best*, *supra*, 19 Cal.2d at 378) (emphasis added).) In *Joerger v. Pacific Gas & Electric Co.*, *supra*, 207 Cal. at 26, the court stated that:

> So far as the rights of the prior appropriator are concerned any use which defiles or corrupts the water so as to essentially impair its priority and usefulness for the purpose for which the water was appropriated by the prior appropriator is an invasion of his private rights for which he is entitled to a remedy both at law and equity.

As previously stated, and as acknowledged in Reclamation's water rights permit for the operation of the Cachuma Project, Lompoc possesses a higher priority water right than that possessed by Reclamation. Thus, Reclamation's operation of the Cachuma Project may not materially deteriorate the quality of groundwater in the eastern Lompoc Plain. The evidence before the SWRCB indicates that implementation of CalTrout's Alternative 3A2 would materially deteriorate the quality of groundwater in the eastern Lompoc Plain. (Lompoc Exh. 5.) Neither CalTrout, nor any other party, offered any evidence, let alone substantial evidence, to refute the testimony that Alternative 3A2 would impair senior downstream water rights.

In response to CalTrout's Alternative 3A2 and 3A2 Dry proposals, SYRWCD's and Lompoc's respective experts analyzed the impacts this operating scenario would have on downstream water users. (See Lompoc Exh. 5; and MU Exh. 220a.) Mr. Durbin analyzed the impacts of the Alternatives 3A2 and 3A2 Dry on the groundwater available to the City of Lompoc. (Lompoc Exh. 5.) This analysis involved comparing Alternatives 3A2 and 3A2 Dry with Alternative 3C from the SWRCB's Draft EIR for these Cachuma Project Water Rights hearings with respect to quantity and salinity of groundwater recharge to the Lompoc basin from the Santa Ynez River. (*Id.*)

Alternative 3C involves the operation of Cachuma Reservoir under WR 89-18, WR 94-5, the Biological Opinion, and a 3.0-foot reservoir surcharge. (*Id.*) Under Alternative 3C, the recharge to the Lompoc groundwater basin is the same as would occur in the absence of the Cachuma Project, with respect to both quantity and quality. This occurs in large part because the releases include direct and mixed releases of SWP water. Alternative 3C also preserves essential elements of WR 89-18.

The groundwater salinity within the Lompoc groundwater basin is highly dependent on the Santa Ynez River streamflow salinity at the Narrows. That streamflow salinity, in turn, depends on the mixing of releases from Cachuma Reservoir with tributary streamflows downstream from Bradbury Dam. Different operations of the reservoir produce different mixing patterns and correspondingly different streamflow-salinity regimens at the Narrows. While Alternative 3C creates a streamflow-salinity regimen that is functionally equivalent to that which would occur with the absence of Cachuma Reservoir, Alternative 3A2 does not.

To the contrary, Mr. Durbin concluded that Alternative 3A2 will result in significantly higher groundwater salinity within the Lompoc groundwater basin. (*Id.*) This alternative will increase the average salinity of recharged streamflow by about 100 mg/L above that which will occur with Alternative 3C. This is the increase in the volume-weighted average recharge salinity. (*Id.*) The average recharge salinity will be 770 mg/L with Alternative 3C, 900 mg/L with Alternative 3A2, and 860 mg/L with Alternative 3A2 Dry. (*Id.*) Thus, Mr. Durbin concluded that Alternative 3A2 represents a 17 percent increase in the average recharge salinity over Alternative 3C, and Alternative 3A2 Dry represents a 12 percent increase in the average recharge salinity. (*Id.*)

The Santa Ynez River Water Conservation District, through Ali Shahroody, also provided testimony regarding the impacts of Alternative 3A2 to water rights releases. (MU Exh. 264-2 at p. 3; RT 1004-05.) Mr. Shahroody concluded that operating the project under Alternative 3A2 would significantly diminish the amount of water delivered to the Below Narrows Account. This would result in a deterioration of the groundwater quality in the Lompoc area. (MU 264-2 at p. 3; RT 1004-05.) Mr. Shahroody further testified that operating under Alternative 3A2 would deplete the Above Narrows Account eliminating drought protection for downstream water users. (*Id.*)

//

A physical solution must take into account the water right priorities and may not be imposed or applied in such a manner as to eliminate vested water rights. (*Peabody* v. *Vallejo* (1935) 2 Cal.2d 351.) Thus, a physical solution must protect the "substantial enjoyment of a prior water right." (*Id.* at pp. 383-384.)

CalTrout's reliance on the public trust doctrine as the legal basis for requiring the SWRCB to impose Alternative 3A2 or 3A2 Dry is misplaced. The public trust doctrine requires the SWRCB to take the public trust into account in allocating water resources to avoid the needless destruction of public trust uses. As a matter of practical necessity the SWRCB may, however, approve appropriations despite foreseeable harm to public trust uses. (*National Audubon Society v. Alpine County* (1983) 33 Cal. 3d 419, 446.)

The application of the public trust doctrine requires the balancing of all interest and legal rights at stake. Substantial testimony was presented regarding the actions being taken to implement the Biological Opinion and Fish Management plan for the protection of public trust resources. Moreover, the public trust doctrine simply cannot be extended to empower the SWRCB to impose conditions on Reclamation which directly result in injury to the prior vested rights of Lompoc.

"SWRCB orders establishing or modifying conditions in permits must be supported by substantial evidence in an administrative record." (In the Matter of Permits 11308 and 11310 Issued Pursuant to (Applications 11331 And 11332), of the United States Bureau of Reclamation, SWRCB Order: WR 95-2 (1995 WL 59086); citing *Bank of America, NTS & C v. SWRCB* (1974) 42 Cal.App.3d 198, 208.) In the present action, neither CalTrout nor any other party presented any evidence to contradict or refute Mr. Durbin's and Mr. Shahroody's conclusions regarding the impacts to groundwater quality and Lompoc's senior water rights. Therefore, there exists no evidentiary nor legal basis to modify Reclamation's permits to operate the project consistent with the proposed Alternative 3A2.

2. <u>CalTrout Provided No Expert Testimony to Support Alternative 3A2</u>

CalTrout proposes the adoption of Alternative 3A2 through the testimony of Jim Edmondson. (CalTrout Exh. 90 at p. 7.) In his testimony, Mr. Edmondson provides his opinion interpreting hydrologic modeling done regarding the Cachuma Project. (*Id.*) Mr. Edmondson also provides his

opinion on the amount of water that Alternative 3A2 would require. (*Id.* at p. 9.) A review of Mr. Edmondson's resume (statement of qualifications), however, indicates that he is not an expert qualified to render such an opinion. (CalTrout Exh. 91.) Mr. Edmondson's resume indicates that he has no educational training in hydrology. Mr. Edmondson's work experience also indicates that he does not possess the requisite qualifications to offer expert opinion interpreting hydrologic models or expert opinion on the flow requirements for a particular operating scenario. As such, there is no basis for the SWRCB to consider Alternative 3A2 a viable option for the Cachuma Project.

3. Alternative 3A2 Is Not Identified as an Alternative in the State Water Resources Control Board's Draft Environmental Impact Report for the Cachuma Project

As Alternative 3A2 was neither identified nor discussed in the Draft Environmental Impact Report, the SWRCB may not modify the water rights permits consistent with Alternative 3A2 without revising the Draft EIR and recirculating the document for public review. (CEQA Guidelines, §§ 15092, 15088.5.)

//

//

//

//

//

//

//

//

//

//

//

//

//

IV. CONCLUSION

Based upon the foregoing the City of Lompoc encourages the SWRCB to modify Reclamation's water rights permits consistent with paragraphs 1.3 and 1.4 of Exhibits B and C of the Settlement Agreement. The SWRCB's modification of Reclamation's water rights permits consistent with the Settlement Agreement will bring to a close a dispute over the operation of the Cachuma Project that has lasted for nearly fifty years.

SOMACH, SIMMONS & DUNN
A Professional Corporation

DATED: February 17, 2004

By _____
Sandra K. Dunn

LAW OFFICES OF
DONALD B. MOONEY

By _____ FOR
Donald B. Mooney

Attorneys for City of Lompoc

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is Hall of Justice Building, 813 Sixth Street, Third Floor, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On February 17, 2004, I served a true and correct copy of

CITY OF LOMPOC'S CLOSING BRIEF FOR PHASE 2

X (by mail and/or e-mail as indicated on attached Service List) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach, Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

_ (by personal delivery) by personally delivering a true copy thereof to the person and at the address set forth below:

_ (by facsimile transmission) to the person at the address and phone number set forth below:

See attached Service List

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on February 17, 2004, at Sacramento, California.

Susan Bentley

Cachuma Project Hearing
Phase-2 Hearing
Final Service List

Updated 01/05/2004

(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best, Best & Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 gkwilkinson@bbklaw.com SERVED VIA E-MAIL	City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 clc@bmj-law.com SERVED VIA E-MAIL
U.S. Bureau of Reclamation Mr. Stephen R. Palmer 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 Fax: (916) 978-5694	Santa Ynez River Water Conservation District, Improvement District No. 1 Mr. Gregory K. Wilkinson Best, Best & Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 gkwilkinson@bbklaw.com SERVED VIA E-MAIL
California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 kkraus@edcnet.org SERVED VIA E-MAIL	Santa Barbara County Parks Ms. Terri Maus-Nisich Director of Parks 610 Mission Canyon Road Santa Barbara, CA 93105
Santa Ynez River Water Conservation District Mr. Ernest A. Conant Law Offices of Young Wooldridge 1800 – 30th Street, Fourth Floor Bakersfield, CA 93301 econant@youngwooldridge.com SERVED VIA E-MAIL	Department of Fish and Game Office of General Counsel Mr. Harllee Branch 1416 Ninth Street, 12th Floor Sacramento, CA 95814
Christopher Keifer NOAA Office of General Counsel Southwest Region 501 West Ocean Blvd., Ste 4470 Long Beach, CA 90802-4213	