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7 and Cachuma Conservation Release Board
8

9 STATE OF CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD
11

12 In the Matter of:

13 Hearing to Review the United States
Bureau of Reclamation Water Right
14 Permits 11308 and 11310 (Applications
11331 and 11332) to Determine Whether
15 Any Modifications in Permit Terms and
Conditions Are Necessary to Protect Public
16 Trust Values and Downstream Water
Rights on the Santa Ynez River Below
17 Bradbury Dam (Cachuma Reservoir)

CLOSING BRIEF OF THE
CACHUMA MEMBER UNITS

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1 **I. INTRODUCTION**

2 The Cachuma Conservation Release Board¹ and the Santa Ynez River Water
3 Conservation District, Improvement District No. 1 (collectively the "Cachuma Member Units")
4 herewith submit their closing brief regarding Phase 2 of the Cachuma Project hearing. In this
5 brief, the Member Units will address the "Key Issues" identified in the SWRCB's Supplemental
6 Notice of Phase 2, Public Hearing issued on August 13, 2003.² As will be seen in the material
7 that follows, the Member Units believe the State Board should modify Reclamation's Cachuma
8 water rights permits in accordance with the Settlement Agreement executed by CCRB and I.D.
9 No.1 and downstream water rights interests on December 17, 2002. Among other things, the
10 Agreement resolves water quantity and quality issues that have long plagued relationships
11 between those who rely upon the Cachuma Project for water supplies and those who hold water
12 rights to the waters of the Santa Ynez River itself. Failing to acknowledge the Settlement
13 Agreement and amend WR 89-18 as requested would simply rekindle controversies regarding
14 Cachuma Project impacts to water quality and quantity that the Agreement finally put to rest.

15
16 For similar reasons, Reclamation's petitions for a change in the purpose and place of use
17 of Cachuma Project water should be approved. By its terms, the Settlement Agreement
18 withdraws the City of Lompoc's protest to the change of use petition. No protest, other than
19 Lompoc's, survived Phase I of the hearings and no party to the Phase 2 hearing attempted to
20 challenge the petitions. Again, the Settlement Agreement provides the basis for resolving a key
21 issue raised in the Board's most recent hearing notice: the petitions for change in purpose and
22 place of use should be approved.

23
24
25 ¹ The Cachuma Conservation Release Board or "CCRB" is comprised of the City of Santa Barbara, Goleta Water
26 District, Montecito Water District and Carpinteria Valley Water District. I.D. No. 1 holds both a contract for
Cachuma water and appropriative water rights to the Santa Ynez River as a downstream interest.

27 ² For reasons that, hopefully, will be evident to the reader, this brief will address the Key Issues identified by the
28 Board in a somewhat difference sequence than they are presented in the Supplemental Hearing Notice. Doing so, we
believe, will lend more coherency to this Closing Brief and the responses and recommendations contained herein.

1 The Cachuma Member Units also believe it is unnecessary to modify Reclamation's
2 Cachuma Project permits to protect public trust resources – with one exception. Currently, the
3 Cachuma Project is being operated in accordance with the terms and conditions of the Biological
4 Opinion issued to Reclamation by NOAA Fisheries in September 2000. To remove any
5 inconsistency which may exist between the Cachuma permits and the Biological Opinion, the
6 Cachuma Member Units believe it would be appropriate for the State Board to insert into the
7 permits the same condition requiring compliance with the requirements of the ESA that was
8 imposed upon Reclamation's Central Valley Project permits by Water Right Decision 1641.

9
10 At the same time, the Member Units also believe the SWRCB should adopt Alternative
11 3C as its preferred method of Cachuma Project operation. Doing so will provide the Board's
12 endorsement of a plan to surcharge Lake Cachuma with more than 9,000 acre feet of Santa Ynez
13 River water to enhance habitat conditions for steelhead and other public trust resources. No party
14 to the hearing opposed the use of surcharge for that purpose and issues regarding the timing of the
15 surcharge were resolved by the Statement of Agreement between the Member Units and the
16 County of Santa Barbara presented to the Board on November 12, 2003.

17
18 Finally, the Member Units believe it is unnecessary for the State Board to amend the
19 Cachuma Project permits to require studies, impose timetables, require a new Cachuma
20 operational regime, set criteria or establish new urban water conservation standards. As shown
21 during the hearings, NOAA Fisheries has already embarked upon a recovery planning process
22 that will involve numerous studies and develop objective, measurable criteria for steelhead
23 recovery. These studies will occur and measurable criteria will be developed by NOAA without
24 the necessity of conditions imposed through the Cachuma permits on Reclamation. Moreover, as
25 the evidence also showed, the broadly-representative Adaptive Management Committee
26 established by the Cachuma biological opinion has already committed to study fish passage
27 around Bradbury Dam and a variety of other subjects. No evidence whatsoever was adduced to
28 suggest that the Committee's studies will not be carried out.

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1 The proposal that the Cachuma Project permits be amended to require study and
2 implementation of the radical release regime of Alternative 3A2 (and 3A2, as modified) is,
3 likewise, unnecessary. Unlike the balanced release regime provided in the Lower Santa Ynez
4 Fish Management Plan and the NOAA Biological Opinion, Alternative 3A2 would promote
5 catastrophic water supply shortages throughout most of the Member Units' service areas during
6 droughts. Nor would these shortages be made up by the conservation measures suggested by Cal
7 Trout. The City of Santa Barbara and the Goleta Water District (who together consume about
8 70% of the Cachuma Project's operating yield) are among the State's leaders in water
9 conservation. They and the other Member Units are actively involved in implementing the best
10 management practices developed by the California Urban Water Conservation Council as the
11 commonly accepted standard for urban water conservation in California. Cal Trout's suggestions
12 regarding urban water conservation are not commonly accepted and, if adopted, could result in
13 unknown costs -- both social and economic -- throughout the region.
14

15 We thus turn to the Key Issues raised by the SWRCB's August 13, 2003 Supplemental
16 Notice of Phase 2 Public Hearing.

17 **II. RESPONSE TO KEY ISSUES**

18 **A. Should Reclamation's water rights permits be modified in accordance** 19 **with the Settlement Agreement between Cachuma Conservation** 20 **Release Board, Santa Ynez River Water Conservation District, Santa** 21 **Ynez River Water Conservation District Improvement District No. 1,** **and the City of Lompoc relating to the operation of the Cachuma** **Project?**

22 **Specifically, should Reclamation's water right permits be**
23 **modified in accordance with two enclosures submitted to the**
24 **SWRCB by Reclamation under cover letter dated February 26,**
25 **2003, entitled "Proposed Modifications to WR 73-37 as**
amended by WR 89-18 pertaining to Permits 11308 and 11310
(Applications 11331 and 11332)" and "revised USBR Exhibit 1,
February 1, 2003?" (Key Issue 6)

26 The Cachuma Member Units believe the Bureau of Reclamation's water rights permits for
27 the Cachuma Project should be modified in accordance with the Settlement Agreement (MU
28

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1 Exh. 220a) and in accordance with the enclosures provided by Reclamation to the SWRCB (DOI
2 Ex. 10).

3
4 The uncontradicted evidence presented to the State Board during the course of the hearing
5 is that the Settlement Agreement is an "historic agreement" reached by all of the water entities on
6 the Lower Santa Ynez River as well as the Cachuma Member Units along Santa Barbara's south
7 coast who receive water from the Cachuma Project. MU Exh. 219, p.3; Exh. 220, p.1; R.T. 201.
8 In essence, it resolves decades of legal wrangling among and between the entities who hold water
9 rights downstream of the Cachuma Project and those who rely upon the Project for their water
10 supplies. As stated by Charles Evans:

11
12 "It meant that there was peace on the Santa Ynez River ... water rights peace for the first
13 time ever" R.T. 201

14
15 Moreover, this peace was secured in a context that puts the Member Units squarely in
16 support of the 2000 Biological Opinion issued by NOAA Fisheries for the Cachuma Project as
17 well as the Fish Management Plan developed for the Lower Santa Ynez River with the assistance
18 of the Department of Fish and Game. MU Exh. 220a, p.7; R.T. 201; R.T. 530-31. Indeed, the
19 Phase 2 hearing confirmed that the Cachuma Member Units have consistently exercised a
20 leadership role with regard to the funding, study and development of fishery protection measures
21 on the Santa Ynez River, The Settlement Agreement is simply one more manifestation of that
22 leadership.

23
24 The provisions of the Settlement Agreement (MU Exh. 220a) are straightforward. The
25 testimony of William Mills (R.T. 202-207) and Ali Shahroody (R.T. 207-220) described them in
26 some detail. MU Exh. 220. Significantly, because the Agreement is largely self-executing
27 among its signatories, the changes necessitated in prior SWRCB Order WR 89-18 are limited in
28 number (R.T. 202, 203, 208) and technical – rather than substantive – in character. R.T. 204,

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1 208. One change arises from Paragraph 1.3 of the Agreement and involves the conjunctive use of
2 the Below Narrows Account. R.T. 208. In essence the parties have agreed to rely upon the upper
3 percolation curve exclusively (Curve A) starting from October 1 until 50,000 acre feet of water is
4 measured cumulatively at the Narrows. R.T. 210. After that, the upper curve will continue to be
5 used to calculate credits to the Below Narrows Account (BNA), but the lower curve (Curve B)
6 would also be used to determine the difference in the amount of credits between the upper curve
7 and lower curve with half the difference being set aside as a drought water credit for Member
8 Units reliant upon the Project. R.T. 210-211. The first change to WR 89-18 submitted by
9 Reclamation thus provides the Member Units with additional drought protection that may be
10 utilized when the storage in Cachuma Reservoir drops below 100,000 acre feet (and shortages are
11 required to be taken). R.T. 211.

12
13 The second change arises from Paragraph 1.4 of Condition 5 of WR 89-18 and involves a
14 change in two measuring points used to determine whether a livestream condition exists in the
15 River.³ R.T. 212. Because fish releases are made by Reclamation and thus keep the mainstem of
16 the Santa Ynez River wet at times when it otherwise would have been dry, Reclamation moved its
17 San Lucas Bridge observation point to San Lucas Creek in 1993 in order to more accurately
18 determine if livestream conditions exist. R.T. 215. The proposed changes to 89-18 submitted by
19 Reclamation seek to confirm that change. Id. Similarly, because fish releases may reach the
20 Narrows and thus affect livestream determinations at the Floradale Bridge, an adjustment
21 (reflected in Attachment H to DOI Exh. 10) is being sought to WR 89-18 in order to determine
22 the existence of natural flow without the fish releases. R.T. 215-216.

23
24
25
26 ³ Under the provisions of WR 89-18, credits are accrued in the ANA only when no continuous livestream exists. If a
27 livestream exists along the entire Lower Santa Ynez, the Cachuma Project is presumed to be storing water that would
28 otherwise be flowing to the ocean; hence no credits accrue to the ANA for the purpose of satisfying downstream
water rights holders. If the Project stores when a livestream condition does not exist, credits accumulate in the ANA
depending upon the amount of de-watered storage that exists above the Narrows. R.T. 212-214.

1 Notably, because the Settlement Agreement was developed over an extended period of
2 time through a process that involved the Cachuma Member Units as well as downstream water
3 rights holders, no evidence was presented by any Member Unit or downstream water right holder
4 in opposition. To the contrary, after the Settlement Agreement was presented by the Member
5 Units, it was endorsed by Reclamation, the City of Solvang, the Santa Ynez River Water
6 Conservation District and the City of Lompoc. R.T. 220, 238, 468. Further, NOAA Fisheries
7 testified that the Agreement is acceptable (R.T. 715)—as it should be, since it includes support
8 for both the NOAA Biological Opinion and the Lower Santa Ynez River Fish Management Plan.
9 MU Exh. 220a, pp. 4,7.
10

11 Apart from the Member Units' direct testimony, and the above-described endorsements,
12 no other testimony was offered with respect to the Settlement Agreement. Simply stated, no
13 evidence was received by the SWRCB that challenged either the Agreement or the proposed
14 technical amendments of WR 89-18. In these circumstances, the Member Units submit that
15 Reclamation's water rights permits should be modified in accordance with the two enclosures
16 submitted by Reclamation under cover of letter dated March 21, 2003 entitled "Proposed
17 Modifications to WR 73-37 as amended by WR 89-18 Pertaining to Permits 11308 and 11310 and
18 Revised USBR Exhibit 1, February 1, 2003."
19

20 **B. Has operation of the Cachuma Project injured any senior water rights**
21 **holders through reduction in the quantity of water available to serve**
22 **prior rights and, if so, to what extent?**

23 **Has any senior legal user of water been injured due to changes**
24 **in water quality resulting from operation of the Cachuma**
25 **Project? (Key Issues 4 and 5)**

26 Absent the Agreement executed by the Cachuma Member Units and downstream water
27 rights holders, these two questions could have become areas of significant contention during the
28 hearing. As testified by Charles Evans, the Member Units and the City of Lompoc were not able,
through a process of analysis, to answer the outstanding questions (framed in Key Issues 4 and 5)

1 about Cachuma Project impacts (R.T. 199); a point confirmed by the testimony of Gary Keefe
2 and Tim Durbin for the City. See, e.g., R.T. 471, 472, 488.

3
4 Rather than continuing to argue about the existence or extent of impacts as a result of the
5 operation of the Cachuma Project, the Member Units and downstream interests, instead, focused
6 their efforts upon developing an agreement that both sides could accept in lieu of conclusive
7 proof about impacts. MU Exh. 219, p.3; R.T. 199-201; R.T. 472-473. The result is the
8 Settlement Agreement presented to the SWRCB as Member Unit Exhibit 220(a) and described by
9 Messrs. Evans, Mills and Shahroody in their written and oral testimony. MU Exhs. 219, 220;
10 R.T. 197-218. Not only does the Agreement resolve actual and potential disputes regarding
11 Reclamation's obligation to release water from Bradbury Dam for the protection of downstream
12 water right holders (R.T. 201, 471-472) it ends years of claims and litigation (including one
13 lawsuit brought against the SWRCB, R.T. 200) between downstream users and Cachuma Project
14 proponents. R.T. 200.

15
16 In short, if the Agreement is acknowledged by the SWRCB and WR 89-18 is amended to
17 make the technical changes described in the testimony of Mr. Shahroody and Ms. Struebing (MU
18 Exh. 220, pp. 8-13; DOI Exh. 10; R.T. 208-220) Key Issues 4 and 5 are rendered moot. Indeed,
19 because the parties to the Agreement supported the Agreement before the SWRCB, as required by
20 the terms of the Agreement itself, (MU Exh. 220(a) p.4) they did not become embroiled in
21 complex disputes regarding Cachuma Project impacts during the hearing. To the contrary, they
22 agreed that the Settlement Agreement resolved their concerns. Should the SWRCB thus decide to
23 acknowledge the Agreement and make the changes to WR 89-18 supported by the Cachuma
24 Member Units and all of the downstream water rights holders, Key Issues 4 and 5 are put to rest.
25 If, on the other hand, the SWRCB wishes to pursue Key Issues 4 and 5 notwithstanding the
26 Agreement, the Cachuma Member Units believe the hearings would have to be reopened in order
27 to allow for the presentation of the conflicting evidence that exists on the subject of impacts.

1 **C. Should the petitions for change in purpose and place of use be**
2 **approved? (Key Issue 7)**

3 The Cachuma Member Units' response to Key Issue 7 will be brief. Simply stated, no
4 evidence was presented during the Phase 2 hearing in opposition to the petitions for change in the
5 Cachuma Project purpose and place of use previously submitted by Reclamation to the SWRCB.
6 This circumstance is not especially surprising given the execution of the Settlement Agreement
7 discussed above. By the terms of the Agreement (3.2); (MU Exh. 220(a), p.7) the City of
8 Lompoc – the only remaining protestant of Reclamation's pending petitions – expressly agreed to
9 withdraw the protest it presented in Phase I of the Cachuma hearings. Given Lompoc's
10 concurrence with the Agreement, no other party to the Phase II proceeding possessed the standing
11 to contest the Reclamation petitions. And, as the record amply demonstrates, no one did.

12
13 In short, the petitions for change in purpose and place of use should be approved.
14 Similarly, for the additional reasons described immediately above, the Settlement Agreement
15 should be acknowledged and WR 89-18 modified in the limited manner sought by Reclamation,
16 the Member Units and downstream water right holders.

17 **D. Should Permits 11308 and 11310 be modified to protect public trust**
18 **resources?**

19 **1. What flow requirements, including magnitude and duration of flows**
20 **released from Bradbury Dam, are necessary to protect public trust resources,**
21 **including, but not limited to, steelhead, red-legged frog, tidewater goby and**
22 **wetlands, in the Santa Ynez River downstream of Bradbury Dam? What**
23 **terms, conditions or recommendations contained in the Biological Opinion, if**
24 **any, should be incorporated into Reclamation's water rights permits?**

25 **2. What other measures, if any, are necessary to protect public trust**
26 **resources?**

27 **3. How will any proposed measures designed to protect public trust**
28 **resources affect Reclamation and the entities that have water supply contracts**
 with Reclamation?

4. What water conservation measures could be implemented in order to
 minimize any water supply impacts? (Key Issue 3)

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1 The requirements that effectively control the operation of the Cachuma Project are set
2 forth in the Biological Opinion adopted by NOAA Fisheries on September 11, 2000. SWRCB
3 Exh. 11. Reclamation, the Member Units and downstream water right holders have all pledged to
4 support the B.O. and voluminous evidence was presented regarding efforts to improve habitat,
5 increase flow releases and remove passage barriers in order to implement the requirements
6 imposed in the document. MU Exhs. 224, 226 and R.T. 282-297; DOI Exh. 12; R.T. 297-302. If,
7 despite the substantial evidence of support for and compliance with the requirements of the B.O.,
8 the SWRCB believes it is appropriate to amend the Cachuma permits to make compliance a
9 condition of Cachuma operations, then the Member Units submit that a condition similar to that
10 imposed upon Reclamation by D-1641 regarding operation of the Central Valley Project would
11 be appropriate. That condition provides:

12 This permit does not authorize any act which results in the taking of
13 a threatened or endangered species or any act which is now
14 prohibited, or becomes prohibited in the future, under either the
15 California Endangered Species Act (Fish and Game Code Sections
16 2050 to 2097) or the federal Endangered Species Act
17 16 U.S.C.A. Sections 1531 to 1544). If a "take" will result from
18 any act authorized under this water right, the permittee/licensee
19 shall obtain authorization for an incidental take prior to construction
20 or operation of the project. Permittee / Licensee shall be
21 responsible for meeting all requirements of the applicable
22 Endangered Species Act for the project authorized under this permit
23 / license. D-1641, p.148 7.

24 Not only would such a condition have the effect of imposing all of the requirements of the
25 NOAA Biological Opinion upon the Cachuma Project permits held by Reclamation, it would also
26 comport with the evidence of benefit to steelhead and other species resulting from
27 implementation of the B.O., adduced at the hearing. By the same token, attempting to impose
28 even more stringent conditions upon the operation of the Project – particularly the operations
alternative suggested by Cal Trout – would likely bankrupt the Project during any one of the
periodic dry cycles that regularly afflict the Santa Ynez River watershed. In no sense would such
a result promote the public interest. Nor is it compatible with the reasonableness standard that
governs all water use in California, including public trust use.

1 The State Board EIR alternative that most closely matches the Cachuma operational
2 regime authorized by the NOAA Biological Opinion is Alternative 3C. The Cachuma Member
3 Units endorse that alternative. Indeed, the Lower Santa Ynez River Fish Management Plan
4 ("FMP") developed by the Santa Ynez River Technical Advisory Committee ("SYRTAC")
5 mirrors the B.O. and is compatible with Alternative 3C. Notably, the testimony of a variety of
6 witnesses was that implementation of the B.O. and FMP would significantly improve conditions
7 for steelhead and other public trust species. Jean Baldrige so testified (R.T. 295) and Dr. Charles
8 Hanson confirmed that the FMP and B.O. were both developed as a result of numerous studies
9 conducted in the Santa Ynez River to identify the limiting factors, the opportunities and the
10 constraints within various portions of the Santa Ynez watershed as they affect habitat quality and
11 availability. R.T. 280.

12
13 According to Dr. Robert Titus of the Department of Fish and Game ("CDFG") the studies
14 recounted by Dr. Hanson were part of a long-term study plan that he (Dr. Titus) coauthored. R.T.
15 531. The purpose of the study plan was to identify, in a systematic way, the flow and non-flow
16 actions that will improve conditions for public trust resources in the lower Santa Ynez River
17 watershed. Id. The results of those studies, Dr. Titus also testified, provide the scientific
18 underpinnings for the FMP – whose implementation is now underway. R.T. 532. Not
19 surprisingly, Dr. Titus also testified that implementation of the FMP will have the potential to
20 improve mainstream habitat conditions below Bradbury Dam (R.T. 536) – something that can be
21 confirmed only after the actions of the FMP are provided time to materialize and to be evaluated.
22 R.T. 537.

23
24 In this regard, Dr. Titus also testified that a clear shift back toward anadromy would be an
25 indicator of threshold success in the restoration of steelhead (R.T. 538) and then confirmed that
26 evidence of a shift back to anadromy on the Santa Ynez River is already being observed. Id. Dr.
27 Titus also noted that flow by itself will not restore steelhead in the Santa Ynez (R.T. 539) and
28 recognized that the FMP includes actions that will contribute to steelhead recovery. R.T. 540.

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1 Dennis McEwan's testimony was similar to that of Dr. Titus. He recognized, first, that the
2 FMP developed by the SYRTAC and now being implemented, is consistent with the general
3 strategies of the California Steelhead Plan he coauthored. R.T. 545-546. It is helping to maintain
4 steelhead runs and to develop additional scientific data on the Santa Ynez River. R.T. 547. He
5 testified further, as did Dr. Titus, that CDFG helped design the SYRTAC studies that were
6 undertaken to develop the flow regime for the Lower Santa Ynez River that is found in the FMP.
7 R.T. 550. Further, Mr. McEwan testified that each and every one of the short-term actions he
8 recommended for the restoration of steelhead habitat have either been taken already or are being
9 worked on through the FMP. R.T. 558
10

11 NOAA Fisheries also supports the Fish Management Plan and implementation of the
12 Biological Opinion. R. T. 714-715. Similarly, it is not opposed to the Settlement Agreement. Id.
13 Not only did NOAA Fisheries *not* ask the SWRCB to impose flow release obligations on
14 Reclamation that are different than those included in the B.O. (R.T. 714) but it *supports* the use of
15 surcharge at Lake Cachuma for fisheries purposes. Id. These views should not be surprising. As
16 Mr. James Lecky, NOAA's Assistant Regional Administrator, confirmed, operation of the
17 Cachuma Project as described in NOAA's 2000 Biological Opinion should result in "observable
18 improvement" in the condition of Santa Ynez River steelhead (R.T. 711-712); a conclusion
19 suggested by the B.O. itself, which found that operation of the Project in accordance with its
20 terms and conditions would "appreciably increase" the likelihood of survival and recovery of the
21 entire Southern California steelhead ESU. R.T. 711.
22

23 In sum, operation of the Cachuma Project in accordance with Alternative 3C will produce
24 surcharge to be used to increase fishery releases from the Project in compliance with a Biological
25 Opinion expected to result in observable improvements in steelhead survival and recovery. It will
26 result in Project operations that are consistent with the strategies of the statewide steelhead
27 recovery plan produced by CDFG and will improve conditions for public trust resources in the
28 watershed. While NOAA's Assistant Regional Administrator conceded that the

1 recommendations of his Agency did not attempt to balance competing beneficial uses of water; he
2 also recognized that it is the State Board's obligation to undertake such balancing. R.T. 715.
3 Imposing the ESA compliance condition also imposed in D-1641 and quoted above, will achieve
4 that end. It will obligate Reclamation to meet the terms of the NOAA B.O. without unreasonably
5 affecting the operation of the Cachuma Project to also satisfy the needs of competing municipal,
6 industrial and agricultural users.

7
8 **III. THE ADDITIONAL STUDIES SOUGHT BY NOAA**
9 **FISHERIES ARE PROPERLY A PART OF NOAA'S OWN**
10 **RECOVERY PLANNING PROCESS, NOT THE CACHUMA**
11 **PROJECT PERMITS**

12 A sizeable body of evidence was adduced at the hearing which demonstrates that the
13 Cachuma Member Units have undertaken (and funded) numerous studies of public trust needs in
14 the Santa Ynez watershed; that they support the NOAA Biological Opinion; and that they are
15 already implementing the measures of both the B.O. and the FMP. Despite the foregoing
16 evidence, several parties to the hearing proposed numerous additional requirements that, they
17 contend, should be imposed in the Cachuma Project permits. In the remaining portion of this
18 Closing Brief, we address those proposals.

19 Notwithstanding the fact that Reclamation and the Cachuma Member Units have
20 satisfactorily completed every one of the studies ordered by the SWRCB in WR 94-5, NOAA
21 Fisheries sought to have six additional study requirements imposed in Reclamation's Cachuma
22 Project permits.⁴ MU Exh. 247. (Lecky comment letter of 10/7/03) Thus, NOAA urged the
23 Board to amend the Cachuma permits to require, inter alia, an investigation of fish passage for
24 Bradbury Dam and Cachuma Reservoir; a study of fish flows to support migration above
25 Bradbury Dam; an investigation of channel forming flows in the mainstem below Bradbury Dam
26 and; a detailed analysis of Alternative 3A2, presented eight years ago -- and rejected -- in the

27
28 ⁴ The six studies sought in NOAA's EIR comment letter of October 7, 2003, appear to include only a small fraction
of the 12 studies sought by Mr. Li and the additional studies sought by Mr. Mann and Dr Cluer.

1 EIR/EIS developed for Cachuma Project contract renewal. Moreover, NOAA sought to have the
2 SWRCB order the studies to be undertaken by an "independent consultant" under the auspices of
3 the State Board, subject to technical review by a group that, notably, excludes the Member Units.
4 The Member Units apparently, however, would have the sole opportunity to pay for the studies –
5 even though no one at NOAA could or would venture an opinion about their cost. In the opinion
6 of the Member Units, the NOAA proposal is not only disingenuous, it is, quite possibly, illegal.

7
8 Under cross-examination NOAA's supervisory fisheries biologist, Mr. Craig Wingert,
9 admitted that NOAA is required by the Endangered Species Act to develop a recovery plan for
10 the Southern California steelhead and that such an effort was recently initiated. R.T. 676-677.
11 Mr. Lecky, also admitted the studies NOAA desires to have imposed on the Cachuma Project
12 permits are related to the recovery planning effort undertaken by NOAA and that, if they are not
13 ordered by the State Board, they would likely be undertaken by NOAA – at NOAA's expense – as
14 it implements its Biological Opinion and develops its recovery plan. R.T. 683. The federal
15 Endangered Species Act supports these admissions.

16
17 Under Section 4(f) of the ESA (16 U.S.C. §1533(f)), the Secretary of Commerce is
18 directed to develop recovery plans that include: (1) site-specific management actions necessary
19 to achieve the plan's goal for the conservation and survival of the species; (2) objective,
20 measurable criteria which, when met, will result in removal of the species from the endangered
21 list; and (3) estimates of the time and cost of carrying out those measures. 16 U.S.C.
22 §1533(f)(1)(B)(i-iii). Nothing in the ESA authorizes the Secretary to shift the burden of
23 preparing a recovery plan – including the studies that underlie such a plan – to others through a
24 conveniently timed water right proceeding.

25
26 Further, it is not at all certain that the proposed NOAA studies are within the scope of this
27 proceeding. For example, even if NOAA's own ESA recovery planning obligations are ignored,
28 and, even applications to operate Gibraltar and Juncal dams were before the Board – which they

1 are not – the NOAA proposal to study fish flows to support migration, spawning and rearing
2 *above* Bradbury Dam raises substantial jurisdictional questions. This occurs since the water
3 rights and operations of those dams are not the product of a State Board order but, instead, the
4 result of a judicial determination by the California Supreme Court. See *Gin S. Chow v. Santa*
5 *Barbara* (1933) 217 Cal. 673, as recently confirmed in *Jordan v. City of Santa Barbara et. al.*
6 (1996) 46 Cal. App. 4th 1245, 1263-1265.⁵ Even more significantly, the nexus of such a study to
7 the operations of Bradbury Dam and Reclamation's permits (Reclamation having no control over
8 upstream flows), is tenuous at best. Similarly, the NOAA proposal to order a multi-decade study
9 of channel forming flows in the Lower Santa Ynez appears to lead the SWRCB into the uncharted
10 waters of federal flood control. Assuming such a study is ordered, what is the SWRCB supposed
11 to do with the results? Will it order the Bureau to modify its regime of Winter Storm Operations?
12 Frankly, that prospect seems doubtful. While *NOAA Fisheries* might attempt to regulate federal
13 actions through a species recovery plan, federal flood control is an area the State Board has
14 consistently avoided in its decisions. Thus, while State Board intervention in the "channel
15 forming" flows of the Santa Ynez River might be of interest to certain plaintiffs lawyers, we
16 suspect it is not an area the Board will – or should – enter absent serious consideration of the
17 consequences of doing so. See e.g., *Paterno et. al. v. State of California et. al.*, 2003 Cal. App.
18 Lexis 1771 (Filed 11/26/03).

19
20 Further, it is unclear why NOAA (and CDFG and Cal Trout) believe it is necessary for the
21 State Board to order a study of fish passage around Bradbury Dam and Cachuma Reservoir –
22 particularly a study to be carried out by an "independent consultant" subject to technical review
23 by a group that excludes the Member Units. MU Exh. 247, p.3⁶. The uncontradicted testimony at

24
25 ⁵ Neither the City of Santa Barbara nor the Montecito Water District are under any administrative or judicial
26 compulsion to deal with fish flows above Bradbury Dam; nonetheless, both are already cooperatively participating in
27 the Upper River studies currently being undertaken by the Adaptive Management Committee.

28 ⁶ The Cachuma Member Units do not deny that further study of passage around Bradbury Dam is appropriate and
have never contended otherwise. As the evidence adduced at the hearing demonstrated, there are numerous issues –
biological and economic – that *should* be studied to determine whether passage is feasible and should be undertaken.
These issues range from the height of Bradbury Dam and the physical size of the reservoir (R.T. 552, 569-570) to the
capture of downstream migrants (R.T. 553), a fluctuating reservoir pool (R.T. 569), predation in the lake (R.T. 570)

1 the hearing was that the Adaptive Management Committee ("AMC") established by NOAA's own
2 biological opinion has already created a study plan that includes an evaluation of passage around
3 Bradbury Dam. R.T. 685. As several witnesses from NOAA and CDFG recognized, the AMC is
4 broadly representative since it includes NOAA, CDFG, the Bureau, the U.S. Fish and Wildlife
5 Service, the Cachuma Member Units and downstream water rights holders, see, e.g. MU
6 Exh. 269, slide 14.⁷ R.T. 684-685. Moreover, no evidence was adduced that the AMC would
7 neglect to undertake any of the studies it has planned or that it would conduct its studies in an
8 untimely manner. As Mr. Lecky recognized, if "independence" involving such a study is desired,
9 the results developed by the AMC in its fish passage evaluation could be subjected to independent
10 peer review. R.T. 685.

11
12 By the same token, nothing in the record before the State Board leads to the conclusion
13 that a study of fish passage must be ordered into the Cachuma Project permits for it to occur. It
14 will be undertaken by the AMC and, if for some unforeseen reason that does not occur, it will be
15 undertaken by NOAA as part of its obligation to implement its Biological Opinion and develop a
16 steelhead recovery plan -- particularly if the study is as important to steelhead recovery as NOAA
17 suggests. For similar reasons, it is unnecessary for the SWRCB to specify dates for the
18 completion of such studies. No testimony was presented to suggest that the AMC will fail to
19 undertake any of the studies it has already identified, including the study of fish passage. If target
20 dates are as essential as NOAA Fisheries suggests, then prescribing them is within NOAA's

21
22
23 and topography at the dam site. *Id.* If trap and haul activities are to be investigated, NOAA Fisheries, itself, has
24 raised concerns about the benefits of such a program to native steelhead in the lower river (MU Exh. 248, p. 2) and
25 the ability to distinguish downstream smolts from native rainbow trout. *Id.*, p. 3. Indeed, as recently as 1999, NOAA
26 suggested that trap and haul alternatives *not* be studied, but deferred until other options were fully implemented. *Id.*,
27 p. 3; MU Exh. 249, p. 1) The principal point regarding a passage study, thus, is not *whether* it should be done, but
28 when and by whom. As NOAA's Assistant Regional Administrator testified, his agency now has initiated its
recovery planning process and the Adaptive Management Committee-- which has already expressed its intent to
examine passage --would be an appropriate entity to carry out such a study. R.T. 685.

⁷ One entity that is not included on the AMC is Cal Trout which, so far at least, has refused to sign the most recent
MOU regarding fisheries on the Santa Ynez River. R.T. 1025. Because the MOU involves not only benefits but
some burdens, their signature is a condition precedent to their participation on the AMC.

1 discretion as part of its recovery planning process. Such dates need not be prescribed in
2 Reclamation's water right permits.

3
4 Further it is unclear why NOAA Fisheries believes it is essential for the SWRCB to insert
5 automatic 3-5 year hearing re-opener provisions in the Cachuma permits. According to Mr.
6 Wingert, completion of the Recovery Plan will require five to six years. R.T. 679. As he also
7 recognized, the Board has already reserved continuing jurisdiction over Reclamation's permits
8 and will almost certainly continue to do so in any water right order it issues in the future. *Id.* If
9 NOAA believes sufficient new scientific data will be collected by evaluating the actions
10 implemented through the FMP or through studies undertaken as part of the recovery planning
11 process to warrant re-opening the hearing, the existing reservation of jurisdiction will allow
12 NOAA to petition the Board to do so – at that time. By contrast, given the uncertain length of
13 time needed to evaluate the actions that are part of the FMP (see e.g., R.T. 536-537) as well as the
14 lack of any deadlines for the production of either a steelhead recovery plan or the plan's
15 underlying studies, an automatic 3-5 year re-opener provision is likely to lead to an expensive
16 and, quite possibly, premature administrative effort. In light of the Board's reservation of
17 continuing jurisdiction, an automatic re-opener is unnecessary.

18
19 Finally, the Cachuma Member Units submit it would be inconsistent with the State
20 Board's statutory obligations to order Reclamation (and the Member Units) to undertake further
21 analysis and evaluation of Alternative 3A2 – already analyzed, evaluated and rejected in the 1995
22 EIS/EIR for Cachuma Project contract renewal. As explained by the court in *United States v.*
23 *State Water Resources Control Bd.*, 182 Cal.App.3d at 114.:

24
25 In the final analysis, the touchstone for the Board's actions is the "public interest."

26
27 Nothing about Alternative 3A2, or the dry year variation offered by Cal Trout, is
28 compatible with the "public interest" in Cachuma Project water supplies. Notably, none of the

1 NOAA witnesses had considered the water supply impacts of Alternative 3A2 before it was
2 recommended. R.T. 706. Mr. Lecky did concur, however, that Alternative 3A2 would reduce the
3 average Cachuma Project operational yield by an additional 45%.⁸ R.T. 707. Asked if any other
4 Bureau project had incurred a 45% reduction in yield through regulatory action, he could name
5 only one: the Klamath Project .R.T. 708⁹
6

7 That Alternative 3A2 could result in similar consequences in the more urban environs of
8 Santa Barbara County was confirmed by the rebuttal testimony of Ali Shahroody and Steve
9 Mack. Based upon a study of Alternative 3A2, using the Santa Ynez River Hydrology Model
10 ("SYRHM") Mr. Shahroody showed that Alternative 3A2 would reduce the operational yield of
11 the Cachuma Project by an average of 80% in each year of the three-year drought 1949-1951.
12 MU Exh. 264, p.5; Exh. 265, slides 7 -8; R.T. 972. In 1951, the yield reduction would be 96%.
13 Id.
14

15 Nor would Cal Trout's proposal to "adjust" Alternative 3A2 for dry years significantly
16 mitigate these adverse consequences. Once the errors in Cal Trout's methodology are corrected
17 (see MU Exh. 264, pp. 1-3) the average annual Project release increases significantly. The Santa
18 Ynez River Model shows that Alternative 3A2, when adjusted for dry years as Cal Trout
19 proposes, reduces the Cachuma Project operational yield by 67% on average for each year of the
20 critical drought period. In 1951, the reduction would be 84%. MU Exh. 264, p.5; Exh. 265,
21 slides 7-8; R.T. 972. Moreover, because of the high rates of release for fish required by

22 ⁸ Cachuma Project operational yield has already been reduced from the original 32,000-33,000 acre feet per year
23 anticipated when Project contracts were entered. MU Exh. 234, slide 14; R.T. 68. The operating draft of the
24 Cachuma Project has been reduced to 25,700 acre feet (about 25,115 AFY of long term yield). See Table 4-16 of
25 SWRCB EIR and Table 5-10 of Member Unit draft EIR/EIS. Operation of the Project in accordance with Alternative
26 3A2 would thus result in a reduction of operational yield (25,700 acre-feet) by 45%. (1995 EIS/EIR, p. Es-33).

27 ⁹ As the State Board is well aware, the Klamath Project is not exactly a textbook example of careful balancing to
28 arrive at a result consistent with the public interest. In 2001, the Endangered Species Act was applied in a manner
that resulted in the termination of irrigation deliveries to farmers on the west side of the Klamath Project in the
middle of the irrigation season as a result of minimum lake levels imposed under the ESA. The consequential loss of
crops, jobs and farms received national attention and, as subsequently determined by the National Academy of
Sciences, was unnecessary for the survival of the short-nosed suckers residing in Upper Klamath Lake. The inverse
condemnation litigation resulting from the events of 2001 is still pending before the Court of Federal Claims.

1 Alternative 3A2, substantial reductions would necessarily occur in the delivery of State Water
2 Project supplies already contracted for by the Member Units. MU Exh. 264, p.6; Exh. 265,
3 slide 15; R.T. 973-974. Those reductions occur because the high rate of release for fish under
4 Alternative 3A2 requires the use of the Bradbury Dam outlet works (in addition to releases down
5 Hilton Creek) creating a conflict with the use of the outlet works for delivery of SWP water.¹⁰
6

7 Mr. Mack put these reductions into a water supply perspective in his rebuttal testimony.
8 In normal years, Alternative 3A2 even if adjusted for dry years, would put Improvement District
9 No. 1 into an immediate water supply shortage while water supplies in the City of Santa Barbara,
10 Montecito and Goleta would barely cover currently existing demand. MU Exh. 266, p.2. In
11 drought years all of these entities would suffer severe water supply shortages even at current
12 levels of demand, with the shortages ranging from 9% in the City of Santa Barbara to 46% in
13 Montecito. Id., p.3. At levels of already planned future demand, the shortages are, of course,
14 even larger. Id.
15

16 Because full-time water cops, minimal toilet flushing, painted lawns, and widespread
17 landscape destruction do not appear to be compatible with the public interest in Santa Barbara
18 County, the Member Units submit that further study of Alternative 3A2 is not warranted. Further,
19 because Alternative 3A2 is so evidently infeasible, the Member Units do not believe the Board's
20 draft EIR need be amended and re-circulated or its final EIR delayed to include Alternative 3A2.
21 Finally, the Member Units believe that if NOAA Fisheries and Cal Trout wish to study
22 Alternative 3A2 further, despite the evidence regarding its impacts, they should be free to do so.
23 To impose such study as a condition of the Cachuma Project permits, however, is unsupportable
24 in light of the evidentiary record.

25 _____
26 ¹⁰ Under the NOAA biological opinion, the release of SWP water down the River is limited to a maximum of 50% of
27 the total release and is entirely prohibited during the period when steelhead may be imprinting. R.T. 990. Thus,
28 SWP water must be delivered to Cachuma Reservoir in order to be fully utilized. This delivery is normally
accomplished through the Bradbury Dam outlet works. Because Alternative 3A2 commandeers the outlet works for
fish releases, the average annual SWP water supply is reduced by as much as 42% under Alternative 3A2 as proposed
by NOAA and 39% when Alternative 3A2 is modified as proposed by Cal. Trout. MU Exh. 264, p. 6.

1 **IV. THE WATER SUPPLY IMPACTS OF THE CACHUMA**
2 **OPERATIONAL ALTERNATIVE PROPOSED BY CAL**
3 **TROUT WILL NOT BE MADE UP BY THE HEROIC**
4 **LEVELS OF WATER CONSERVATION THEY PROPOSE**

5 About 70% of the operational yield of the Cachuma Project is consumed by the City of
6 Santa Barbara and the Goleta Water District. MU Exh. 277, p. 1. As described in the testimony
7 of Ms. Kate Rees (MU Exh. 209) and confirmed by the rebuttal testimony of Ms. Mary Ann
8 Dickinson (MU Exh. 277), the Executive Director of the California Urban Water Conservation
9 Council ("CUWCC"), both entities are among the leaders in urban water conservation in
10 California – and have been for decades. R.T. 1055. As Ms. Dickinson also testified, the three
11 smaller Member Units have typical water conservation activities for districts of their size. MU
12 Exh. 277, p. 3; R.T. 1055. The testimony of Ms. Rees described, in detail, the water conservation
13 activities that occur within the Cachuma Project service area and the Member Units submit that
14 those activities equal or exceed the conservation efforts of any other area of the State.

15 Equally important, as Ms. Dickinson stated without contradiction, the standard for urban
16 water conservation in California is the MOU monitored by CUWCC and signed by more than 300
17 entities – including California Trout and the Pacific Institute. MU Exh. 277; p 1; R.T. 1053. It is
18 not some error riddled evaluation (R.T. 1063-1067); that has been signed onto by not a single
19 water purveyor; and that incorporates a variety of potential expenses for the typical urban water
20 consumer.

21
22 Ms. Dickinson got it right when she testified that the water conservation issue raised by
23 Cal Trout has consequences that extend far beyond this hearing. R.T. 1060. If the water
24 conservation efforts of the Cachuma Member Units and their substantial compliance with the Best
25 Management Practices of an MOU endorsed by hundreds of entities¹¹ – including those now
26

27
28 ¹¹ As Ms. Dickinson also testified, compliance with the 14 BMPs contained in the water conservation MOU is not
required, by its terms, until 2007. R.T.1055.

1 urging a different standard – are not enough, then the Board should prepare itself to make a
2 similar finding for every urban district in California.

3
4 Moreover, apart from the policy consequences associated with Cal Trout's proposal for
5 urban water conservation, it is unclear how their proposal will avoid the injury to water users
6 inherent in the Cachuma operational alternative (Alternative 3A2 adjusted for dry years) they
7 endorse. The water savings projected by Cal Trout's water conservation witnesses assume 100%
8 penetration of their conservation measures. MU Exh. 277, p. 5. Even the most ardent advocate
9 would concede, however, that such penetration is likely to take time, as existing washing
10 machines, dishwashers and toilets age and are replaced. According to Cal Trout, nonetheless, the
11 imposition of Alternative 3A2 is to be immediate. Thus, even if the water savings projected by
12 Cal Trout were sufficient to cover the water supply impacts of 3A2 – which they are not¹² – the
13 time lag could be devastating if a drought were to intervene.¹³ Nor are those consequences likely
14 to be avoided by belt-tightening in the agricultural sector. As testified to by Lee Bettencourt and
15 Matt Roberts and confirmed by Joseph De Maggio, agricultural users of Cachuma Project water
16 are all metered and are already highly efficient. MU Exhs. 213, 215 and 218. Their efficiency,
17 in fact, already far exceeds the average agricultural efficiency projected by the California
18 Department of Water Resources for California agriculture in the year 2020. MU Exh. 213, p.16.

19
20 In short, there is an urban water conservation standard in California and it is *not* the
21 standard proposed by Cal. Trout. It is the MOU monitored by CUWCC. Even though full

22
23 ¹² According to the Pacific Institute's most optimistic estimate, full implementation of the water conservation
24 measures they propose would reduce consumption within the Cachuma Member Units by 5,000-7,000 afy. CT.
25 Exh. 50, p. 16. According to the testimony of Mr. Shahroody, however, the cumulative shortage in water supplies
26 generated by Cal Trout's 3A2 alternative would be 51,570 acre feet over the three-year period 1949-1951 (an average
of more than 17,000 afy), not counting the reduction in SWP deliveries associated with Alternative 3A2. MU Exh.
264, pp. 5, 6; MU Exh. 265, slide 8. If the 1951 water year were to recur, the shortage generated by Cal Trout's
proposed operational scheme would be 21,700 acre feet. Not even the Pacific Institute suggests their conservation
measures could close such a gap.

27 ¹³ According to the testimony of Mr. Mack, current storage at Lake Cachuma is 115,000 acre feet and is declining.
28 R.T. 979. When it reaches 100,000 acre feet, a drought is deemed to be in progress and shortages in Cachuma
deliveries begin to be taken. MU Exh. 207, p. 9.

1 compliance with the BMPs of the MOU is not expected for another three years, the large majority
2 of Cachuma water is consumed within the City of Santa Barbara and Goleta Water District which
3 have already met the requirements of 12 of the 14 BMPs. R T.1056. The remaining water is
4 consumed within smaller member units whose compliance is typical for districts of their size.
5 Simply put, Cal Trout chose the wrong target when it challenged the water conservation efforts of
6 the Member Units.

7
8 **V. THERE IS NO EVIDENTIARY BASIS FOR IMPOSING**
9 **CRITERIA FOR STEELHEAD RECOVERY IN THE**
10 **CACHUMA PROJECT PERMITS**

11 According to Cal Trout, the Cachuma Project permits should be amended to incorporate
12 objective, measurable criteria for steelhead recovery in the Santa Ynez River. C.T. Exh. 30, p.14.
13 The hearing record shows there are several problems with this proposal.

14 First, there are insufficient scientific data available to do so. For example, when asked,
15 the fishery experts of the CDFG could not describe how many steelhead are currently in the Santa
16 Ynez River; what flows are required to restore steelhead; or what a viable population size is for
17 steelhead in the Santa Ynez River. R.T. 527-528. Indeed, as Mr. Mc Ewan testified regarding the
18 latter question: "I don't think that there is anybody here that can tell you what that number is
19 because the National Marine Fisheries Service recovery process is working on that now." R.T.
20 528

21
22 This points up the second problem with Cal Trout's request. As Mr. McEwan also
23 recognized (R.T. 530) and Mr. Wingert and the ESA confirmed, it is NOAA Fisheries' statutory
24 duty to develop "objective, measurable criteria" for recovery and include them in a recovery plan.
25 R.T. 676-677; 16 U.S.C. §1533(f)(1)(B)(ii). It is most certainly not the SWRCB's responsibility
26 to guess at criteria that have not been developed – particularly in light of the testimony produced
27 at this hearing – and attempt to impose such guesstimates as operational criteria for a critically
28 important water supply project.

1 **VI. IMPLEMENTATION OF THE BIOLOGICAL OPINION,**
2 **THE FISH MANAGEMENT PLAN AND ALTERNATIVE 3C**
3 **WILL PROTECT PUBLIC TRUST RESOURCES AS**
4 **REQUIRED BY CALIFORNIA LAW**

5 Like all other water uses in California, public trust uses must conform to the standard of
6 reasonable use. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443; *People*
7 *ex. rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749-750. Thus, as
8 a matter of practical necessity, the State may have to approve appropriations despite foreseeable
9 harm to public trust uses. *National Audubon, supra* at 446. In short, public trust uses are part of
10 the balancing process to be undertaken by the SWRCB to arrive at the public interest. See Water
11 Code §1257.

12 Here, the record shows that implementation of the B.O. and the FMP as well as the
13 provision of spawning, rearing and migration flows developed by surcharging Lake Cachuma to
14 provide additional water devoted to fishery purposes, will reasonably protect public trust
15 resources without creating unacceptably large impacts to competing beneficial uses. According
16 to the testimony of Jean Baldrige, the FMP will provide a substantial biological benefit for
17 steelhead and other public trust resources in the Lower Santa Ynez River. MU Exh. 226, p.45.
18 Moreover, as she noted, a variety of investigations are already underway or are planned for the
19 upper Santa Ynez River basin. *Id.* pp. 30-35. It was also the testimony of the CDFG witnesses
20 that the FMP will improve the existing fishery resources of the Santa Ynez and habitat conditions
21 below Bradbury Dam. R.T. 536. Indeed, it was the testimony of Dr. Titus that the actions
22 proposed in the FMP will likely contribute to the State's responsibility to protect public trust
23 resources. *Id.* Consistently, Mr. McEwan testified that restoring connectivity to the Santa Ynez
24 River is part of the goal of ensuring compliance with Fish and Game Code §5937 (R.T. 559) and
25 later admitted that, as a result of the B.O. and FMP, connectivity is now occurring in the Lower
26 Santa Ynez River. R.T. 561. ¹⁴

27
28 ¹⁴ Mr. McEwan also testified under cross-examination that he never raised any concern about compliance with Fish
RVPUB\GKW\664420.1

1 Similarly, Mr. Lecky testified that NOAA Fisheries supports the B.O., the FMP and the
2 Settlement Agreement. R.T. 714-715. As he also testified, the B.O. itself recognizes that the
3 actions it requires will appreciably increase the likelihood of steelhead recovery in the Santa Ynez
4 River. R.T. 711-712; B.O. p.67. Finally, under cross-examination, even Cal Trout's witness, Mr.
5 Keegan, admitted that there have already been habitat improvements in Salsipuedes Creek (R.T.
6 877) and that further restoration actions will be undertaken as the FMP is implemented. Id.
7

8 While several witnesses testified about the "good condition" requirement of Fish and
9 Game Code §5937, it quickly became evident that no single definition of the term has been
10 adopted (R.T. 564) and that fisheries biologists have differing interpretations of it. R.T. 294, 564
11 and 851. Further, there was little disagreement that the fish now existing below Bradbury Dam
12 are in good condition on an individual level. MU Exh. 226, p.43; R.T. 811. In addition, the
13 evidence shows that completion of the FMP would meet the criteria for "good condition"
14 developed by Ms. Baldrige and Dr. Moyle at the population level. MU 226, p.44. While the
15 preponderance of predators in the Santa Ynez River may limit the ability of Reclamation to meet
16 Ms. Baldrige's (and Dr. Moyle's) definition of good condition at the community level, (id.,
17 p.45) there was also testimony that flow increases, by themselves, will not restore steelhead (R.T.
18 539-540) and would not reduce or eliminate downstream predators. R.T. 295.
19

20 In sum, the evidence shows that conditions for public trust species in the Santa Ynez
21 River are already improving and will continue to do so as the B.O. and FMP are implemented. It
22 shows that individual fish are already in good condition and that the habitat conditions needed for
23 increased population abundance will continue to be realized as the B.O. and FMP are
24 implemented. It also shows that investigations of the Upper Basin above Bradbury Dam are
25 underway and will occur through the normal operations of the Adaptive Management Committee
26 and that they need not be forced by State Board order.
27

28 and Game Code § 5937 when the FMP was under review at the Department. R.T. 563

1 **VII. THE IMPACT OF SURCHARGE UPON THE COUNTY**
2 **PARK AT LAKE CACHUMA IS NO LONGER AN ISSUE**

3 The existing appropriative water rights permits issued to the Bureau for the Cachuma
4 Project authorize the storage of 275,000 acre feet of water behind Bradbury Dam – more than
5 enough to store the additional 9,200 acre feet of water provided by 3.0' of surcharge for fishery
6 purposes. In its testimony filed prior to the hearings, however, the County of Santa Barbara
7 ("County") raised an issue regarding the impact of surcharge on certain facilities it operates at the
8 Park located on the southern rim of Lake Cachuma. CSB Exhs. 3 and 4.

9
10 During the break which occurred between the October and November hearings, the
11 Cachuma Member Units worked hard to develop a Statement of Agreement with the County to
12 coordinate surcharge efforts with park operations. CSB Exh. 11. Pursuant to the Statement of
13 Agreement (which will be augmented by a more formal MOU) the County will complete
14 modifications to its existing boat launch ramp by April 2004 and will not oppose the surcharge of
15 Lake Cachuma to elevation 751.8 in 2004. To allow the County sufficient time to replace its
16 existing water treatment plant, the Member Units have agreed to seek modification of the
17 Cachuma Operations Manual to preclude surcharge higher than 751.8 (except for winter storm
18 operations) for a period of up to five years. Id. Because no other party to the hearings opposed
19 the surcharge of Lake Cachuma to elevation 753.0 so long as the increased surcharge is used for
20 fishery purposes or to mitigate water supply impacts¹⁵ – which it will be – the Member Units
21 believe the SWRCB is free to adopt Alternative 3C in its draft EIR. ¹⁶

22
23 ¹⁵ In its comments on the SWRCB's draft EIR, Cal Trout stated it supports surcharging Lake Cachuma if necessary to
24 protect public resources in the river or to mitigate significant water supply impacts. Cal Trout comments, pp. 18, 22.

25 ¹⁶ The matter of oak trees also was clarified during the hearing. The program to mitigate for surcharge will use state
26 of the art restoration methods and employ a long-term maintenance program, with an ultimate goal of replacing oak
27 trees at a 2:1 ratio over a 20-year period. R.T. 318-319. One-half of the trees expected to be lost over a period of
28 many years, will be replaced immediately, with a focus on providing new, replacement trees at the park. Id. By way
of contrast, Ms. Marshall – the only witness to raise the oak tree issue – was unfamiliar with the Member Units'
proposed replacement program (R.T. 28) and the County's own oak tree ordinance. R.T. 27. Since half the affected
trees will be replaced immediately and two oak trees will exist for every oak tree lost to surcharge, the Member Units
submit this is a non-issue that should not preclude the Board from adopting Alternative 3C in its draft EIR.

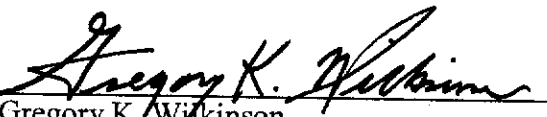
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RIVERSIDE, CALIFORNIA 92502

1 **VIII. CONCLUSION**

2 For the foregoing reasons, the Cachuma Member Units urge the State Board to do
3 the following: (1) acknowledge the Settlement Agreement and modify WR 89-18 as proposed by
4 Reclamation, the Member Units, and downstream water right holders; (2) adopt Alternative 3C in
5 the draft SWRCB EIR as the Board's preferred alternative; (3) approve Reclamation's petitions to
6 change the purpose and place of use of Cachuma Project water; (4) recognize the obligation of
7 NOAA Fisheries to produce – and pay for – a steelhead recovery plan that includes objective,
8 measurable criteria; (5) impose a condition requiring ESA compliance in the Cachuma Project
9 permits comparable to the condition imposed upon the CVP Permits in D-1641; (6) recognize that
10 the Adaptive Management Committee will study fish passage around Bradbury Dam and other
11 issues and not impose the obligation to undertake such studies in Reclamation's appropriate
12 permits; (7) accept the MOU monitored by the CUWCC as the standard for urban water
13 conservation in California and recognize that Cachuma Project water is being provided to areas
14 that are already in substantial compliance with the MOU; and (8) find that Reclamation's public
15 trust obligations regarding the Cachuma Project are satisfied by the B.O., the FMP and the AMC
16 study program and need not be increased through additional conditions imposed upon the
17 Cachuma Permits.

18
19 Dated: February 13, 2004

BEST BEST & KRIEGER LLP

20
21 By: 
22 Gregory K. Wilkinson
23 Michelle Duefflette
24 Edward L. Bertrand
25 Attorneys for Improvement District No. 1
26 and Cachuma Conservation Release Board
27
28

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PROOF OF SERVICE

I, Linda C. Hutton, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Best Best & Krieger LLP, 3750 University Avenue, P.O. Box 1028, Riverside, California 92502. On February 13, 2004, I served the within document(s):

CLOSING BRIEF OF THE CACHUMA MEMBER UNITS

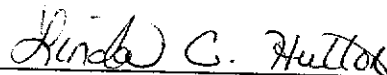
- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Riverside, California addressed as set forth below.
- by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- I caused such envelope to be delivered via overnight delivery addressed as indicated on the attached service list. Such envelope was deposited for delivery by United Parcel Service following the firm's ordinary business practices.

See attached Service List

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid 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.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 13, 2004, at Riverside, California.



Linda C. Hutton

**CACHUMA HEARING
PHASE 2
SERVICE LIST**

<p>Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best Best & Krieger LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 (909) 686-1450 (909) 686-3083 fax GKWilkinson@BBKlaw.com</p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 (559) 432-5400 CLC@BMJ-law.com</p>	<p>U.S. Bureau of Reclamation Mr. Stephen Palmer Office of the Regional Solicitor 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 (916) 978-5683 (916) 978-5694 fax</p>
<p>Department of Water Resources Mr. David Sandino 1416 Ninth Street, Room 1118 Sacramento, CA 94236-0001 (916) 653-5129 (916) 653-0952 fax</p>	<p>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 (909) 686-1450 (909) 686-3083 fax GKWilkinson@BBKlaw.com</p>	<p>California Sportfishing Protection Alliance Mr. Jim Crenshaw 1248 E. Oak Avenue Woodland, CA 95695</p>
<p>City of Lompoc Ms. Sandra K. Dunn Somach, Simmons & Dunn 813 Sixth Street, Third Floor Sacramento, CA 95814-2403 (916) 446-7979 (916) 446-8199 fax SDunn@lawssd.com</p>	<p>California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 KKraus@EDCnet.org</p>	<p>Santa Barbara County Parks Ms. Terri Maus-Nisich Director of Parks 610 Mission Canyon Road Santa Barbara, CA 93105</p>
<p>Santa Ynez River Water Conservation District Mr. Ernest A. Conant Law Offices of Young Wooldridge 1800 - 30th Street, Fourth Floor Bakersfield, CA 93301 (661) 327-9661 (661) 327-0720 fax EConant@YoungWooldridge.com</p>	<p>Department of Fish and Game Office of the General Counsel Mr. Harlee Branch 1416 Ninth Street, 12th Floor Sacramento, CA 95814 (916) 654-3821 (916) 654-3805 fax</p>	<p>Mr. Christopher Keifer NOAA Office of General Counsel Southwest Region 501 W. Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 (562) 980-4001 (562) 980-4018 fax</p>
<p>CPH Dos Pueblos Associates, LLC Mr. Richard W. Hollis 211 Cannon Perdido Street Santa Barbara, CA 93101</p>		