

1 Gregory K. Wilkinson Bar No. 054809
Michelle Ouellette, Bar No. 145191
2 Edward L. Bertrand, Bar No. 193745
BEST BEST & KRIEGER LLP
3 3750 University Avenue
P.O. Box 1028
4 Riverside, California 92502
Telephone: (909) 686-1450
5 Telecopier: (909) 686-3083
6 Attorneys for Santa Ynez River Water
Conservation District, Improvement District No. 1
7 and Cachuma Conservation Release Board
8

FILED
11/13/05
RIVERSIDE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:
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)

MOTION TO STRIKE; MOTION
FOR DISMISSAL OF PARTY

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 **I. INTRODUCTION**

2 The City of Santa Barbara, Goleta Water District, Montecito Water District, Carpinteria
3 Valley Water District and Santa Ynez River Water Conservation District, Improvement District
4 No. 1 (hereinafter the "Cachuma Member Units") hereby move to strike the material presented by
5 California Trout ("Cal Trout"), the California Department of Fish and Game ("CDFG") and
6 NOAA Fisheries as "Appendices" to their closing briefs.¹ Not only is the presentation of such
7 material after the close of the State Board's hearing incompatible with the requirements of the
8 Board's Supplemental Notice of Phase 2 of Public Hearing; it also violates the State Board's
9 administrative regulation as well as Government Code Section 11513 and long-settled California
10 case law. The acceptance of such material as part of the administrative record herein would be
11 incompatible with fundamental canons of procedural due process of law.

12
13 In addition, the Cachuma Member Units move for the dismissal of NOAA Fisheries as a
14 party to these proceedings. By letter dated May 29, 2003, NOAA Fisheries was previously
15 allowed to participate in the Cachuma Project hearing as a party even though it had failed to
16 timely submit a Notice of Intent to Appear. At the same time, however, NOAA Fisheries was
17 advised that "failure to comply in the future with the procedural requirements for participation as
18 a party in a hearing is grounds for dismissal as a party. (Cal. Code Regs., Title 23, Section 648.1,
19 subd. (c).)" The referenced section of the California Code of Regulations provides:

20
21 Persons who fail to comply with the procedural requirements
22 specified in the hearing notice for participating as parties in a
23 proceeding may be dismissed as parties to the proceeding.

24 Here, the Supplemental Notice of Phase 2 hearing set forth the date by which testimony,
25 exhibits, lists of exhibits and qualifications was required to be submitted to the State Board.

26
27 ¹ Insofar as NOAA Fisheries is concerned, this Motion to Strike is directed only at Appendix B. Appendix A
28 consists of NOAA Fisheries' comment letter regarding the State Board's draft EIR and is already in evidence as
Cachuma Member Unit Exhibit 247.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 NOAA Fisheries' attempt to offer a "Santa Ynez River Fish Passage Feasibility Analysis" of
2 unknown origin, nearly three months after the conclusion of the hearing disregards the
3 requirements of the hearing notice imposed upon all of the participating parties. If the State
4 Board's prior warning of the consequences of a future failure to comply with procedural
5 requirements is to have any meaning at all, the response to NOAA Fisheries' attempt to evade the
6 filing date for exhibits imposed on all parties by the Board's Supplemental Hearing Notice should
7 be the dismissal of NOAA as a party to these proceedings.

8
9 **II. THE STATE BOARD SHOULD STRIKE AND EXCLUDE**
10 **FROM THE RECORD THE APPENDICES OFFERED BY**
11 **CAL TROUT, CDFG AND NOAA FISHERIES**

12 The administrative regulations adopted by the State Board provide in part that:

13 It is the policy of the State and Regional Boards to discourage the
14 introduction of surprise testimony and exhibits. (Cal. Code Regs.,
15 Title 23, Section 648.4 subd. (a))

16 To this end, the administrative regulations provide that when the State Board issues a
17 hearing notice:

18 The hearing notice may require that direct testimony be submitted
19 in writing prior to the hearing. Copies of written testimony and
20 exhibits shall be submitted to the Board and to other parties
21 designated by the Board in accordance with provisions of the
22 hearing notice or other written instructions provided by the Board.

23 Where any of the provisions of this section have not been complied
24 with, the presiding officer may refuse to admit the proposed
25 testimony or the proposed exhibit into evidence, and shall refuse to
26 do so where there is a showing of prejudice to any party or the
27 Board. (Cal. Code Regs., Title 23, Section 648.4 subd. (c), (e))

28 Consistent with its regulations, the State Board issued a Supplemental Notice of Phase 2
of Public Hearing on August 13, 2003. In bold face type, the Supplemental Notice advised all of
the parties, including Cal Trout, CDFG and NOAA Fisheries when their exhibits were due:

1 **Copies of witnesses' proposed testimony, exhibits, list of**
2 **exhibits, and qualifications must be received by the SWRCB no**
3 **later than October 15, 2003 at 12:00 p.m. and served on the**
 parties who have indicated their intent to appear by that date.
 (Supp. Notice of hearing, p. 5, emphasis in original)

4 None of the materials now offered by Cal Trout, CDFG and NOAA Fisheries as
5 appendices to their closing briefs were provided to either the State Board or served on the other
6 parties to the hearing in compliance with the above directive.

7
8 Moreover, *none* of the materials now offered as appendices were provided during the
9 course of the State Board's hearing, where they could be cross-examined by the other parties.

10 This additional failure presents a second basis for the exclusion of these materials from the
11 administration record. The State Board's administrative regulations further provide:

12 Adjudicative proceedings will be conducted in accordance with the
13 provisions and rules of evidence set forth in Government Code
14 Section 11513. (Cal. Code Regs., Title 23, Section 648.5.1)

15 Reference to Government Code Section 11513 shows that it, in turn, states:

16
17 Each party [to an administrative adjudication] shall have these
18 rights: to call and examine witnesses, to introduce exhibits; *to*
19 *cross examine opposing witnesses on any matter relevant to the*
20 *issues even though that matter was not covered in the direct*
 examination; to impeach any witness regardless of which party first
 called him or her to testify; and *to rebut the evidence against him or*
 her. (Government Code Section 11513(b); emphasis added)

21 By attaching a so-called "Santa Ynez Fish Passage Feasibility Analysis" of unknown
22 origin to their closing briefs, Cal Trout, CDFG and NOAA Fisheries are each attempting to
23 circumvent the requirements of the Government Code and this Board's own regulations. Without
24 attempting to lay any foundation, the three entities have simply presented a document three
25 months after the close of the hearings that: (1) was never subjected to cross-examination, and
26 (2) cannot be rebutted except through the engagement of experts at substantial additional cost to
27 the other parties.

1 Cal Trout then goes farther by offering: (1) a "Response to Rebuttal Testimony of Misty
2 Gonzales," that should have been presented as rebuttal at the hearing – but wasn't; (2) a "Water
3 Conservation Study" that appears to be an exhibit in support of direct testimony and thus should
4 have been filed and served by October 15, 2003 – but wasn't; and (3) a purported "Study Plan"
5 for "Modifications to Downriver Water Rights Release Schedule" that also appears to be an
6 exhibit in support of direct testimony that should have been filed and served by October 15, 2003
7 – but wasn't. None of the foregoing documents were offered during the evidentiary hearing
8 conducted in October and November, 2003; none were subjected to cross-examination; and, with
9 the close of the evidentiary record, no rebuttal is now possible.

10
11 The cases confirm that the foregoing materials may not be considered by the Board and
12 must be excluded from the administrative record. Indeed, a failure to do so would amount to a
13 denial of a hearing. For example, in *English v. City of Long Beach* (1950) 35 Cal.2d 155, the
14 California Supreme Court stated the following with respect to quasi-adjudicatory proceedings of
15 the type conducted in connection with the Cachuma Project permits:

16
17 In conducting the hearing, the board acts as a local administrative
18 tribunal, and it has the power to make final adjudications of fact in
19 connection with matters properly submitted to it. The action of
20 such an administrative board exercising adjudicatory functions
21 when based upon information of which the parties were not
22 apprised and which they had no opportunity to controvert *amounts*
to a denial of a hearing. Administrative tribunals which are
23 required to make a determination after a hearing cannot act upon
24 their own information *and nothing can be considered as evidence*
25 *that was not introduced at a hearing of which the parties had notice*
26 *or at which they were present.*

23 35 Cal.2d 155 at 158 (emphasis added, citations omitted); see also *La Prade v. Department of*
24 *Water & Power* (1945) 27 Cal.2d 47

26 Notably, Cal Trout, CDFG and NOAA Fisheries were all provided an opportunity to
27 present rebuttal testimony at the conclusion of the Cachuma hearing. Both Cal Trout and CDFG
28 took advantage of the opportunity, R.T. 1091, 1110, with Cal Trout calling Dr. Craig Fusaro and

1 CDFG calling Mr. Dwayne Maxwell. Neither witness, however, offered any of the exhibits
2 attached as appendices to the Cal Trout or CDFG closing briefs. NOAA Fisheries offered no
3 rebuttal witnesses or exhibits at all. The attempt of all three parties to do so now, months after the
4 close of the hearing, is well within the ambit of the Supreme Court's statement quoted above.
5 The material cannot be considered as evidence since it was not introduced at the hearing at which
6 the other parties – including the Cachuma Member Units – were present. Further, consideration
7 of the material by the State Board would amount to the denial of a hearing to parties like the
8 Cachuma Member Units, who have no opportunity to cross-examine the documents or their
9 authors or present rebuttal evidence, as provided by Government Code Section 11513.

10
11 Finally, the belated attempt of Cal Trout, CDFG and NOAA Fisheries to present new
12 exhibits should also be evaluated in light of the State Board's administrative regulation describing
13 the "Order of Proceedings." (Cal. Code Regs., Title 23, Section 648.5) In relevant part, it
14 provides:

15
16 After conclusion of the presentation of evidence, all parties
17 appearing at the hearing may be allowed to present a closing
18 statement. (Cal. Code Regs., Title 23, Section 648.5 subd. (d))

18 While closing statements are permissible, nothing in the administrative regulations
19 permits parties to the hearing to present further exhibits (or "Appendices") once the presentation
20 of evidence has concluded.²

21
22 **III. NOAA FISHERIES SHOULD BE DISMISSED AS A PARTY
TO THE HEARING**

23 Following the pre-hearing conference conducted on May 13, 2003, NOAA Fisheries was
24 permitted to participate as a party despite the fact it had – for more than two years – failed to
25 comply with the requirement that it submit a Notice of Intent to Appear. (See May 29, 2003

26
27 ² Moreover, if Cal Trout attempts to argue that its new evidence is somehow just a part of its "Closing Statement,"
28 then it has far exceeded the 30-page limit for such statements imposed by the hearing officer. R.T 1120. As is
evident, however, none of the appendices consist of closing statements. Instead, in every instance, they amount to
exhibits that could, and should have, been presented at the hearing, if not before.

1 Ruling of Mr. Silva). Although the hearing officer was “troubled by NOAA Fisheries’ failure to
2 follow the procedural requirements set forth in the hearing notice,” NOAA was nonetheless
3 allowed to participate because: (1) no party would be prejudiced by NOAA’s participation since
4 the deadline to exchange testimony had not yet passed; (2) NOAA’s participation would be
5 valuable since it had listed the Southern California steelhead ESA, authored the Biological
6 Opinion for the Cachuma Project and was going to soon commence recovery planning for the
7 species; and (3) excluding NOAA would make it difficult for the SWRCB to ensure that the
8 record included the evidence necessary to properly evaluate impacts on fisheries. *Id.*, p. 1. The
9 hearing officer’s ruling then stated:

10
11 Accordingly, I will allow NOAA Fisheries to participate. *NOAA Fisheries is advised, however, that failure to comply in the future with the procedural requirements for participation as a party in a hearing is grounds for dismissal as a party.*

12
13 *Id.*, pp. 1-2 (emphasis added).
14

15 The hearing officer’s advice to NOAA was based upon the State Board’s own regulations
16 which, in part, provide:
17

18 Persons who fail to comply with the procedural requirements
19 specified in the hearing notice for participation as parties in a
20 proceeding may be dismissed as parties to the proceeding.

21 Cal. Code Regs., Title 23, Section 648.1 subd.(c))
22

23 Unlike the circumstances that existed at the time of the hearing officer’s May 28, 2003
24 ruling, the facts now are the following: (1) the deadline to exchange testimony has long since
25 passed and the Cachuma Member Units *are* prejudiced by NOAA Fisheries’ attempt to offer a
26 “Santa Ynez River Fish Passage Feasibility Analysis” more than four months after the due date
27 specified in the Supplemental Notice of Phase 2 of Public Hearing and nearly three months after
28 the opportunity for cross-examination and the presentation of rebuttal testimony ended;

1 (2) NOAA Fisheries *did* participate in the hearing and presented evidence regarding the Southern
2 California steelhead ESU, its Biological Opinion; and its recovery planning process; and (3) the
3 record *already* includes -- and has included since the close of the evidentiary hearing on
4 November 13, 2003 -- all of the evidence the Board may properly receive to evaluate impacts on
5 fisheries. In short, *none* of the reasons that supported the earlier decision regarding NOAA's
6 participation as a party continues to exist. Moreover, despite the hearing officer's express notice
7 to NOAA that a future failure to comply with the procedural requirements of the hearing notice
8 for participation as a party would serve as grounds for dismissal as a party, NOAA has done
9 precisely that: it has flaunted the provision of the hearing notice (presented in bold-faced type, no
10 less) that exhibits had to be filed and served not later than October 15, 2003. Rather than comply
11 with this fundamental procedural requirement governing everyone's participation as a party,
12 NOAA, instead, has simply attached yet another exhibit offered for the apparent purpose of
13 attempting to influence the Board's decision on an important issue in the hearing.³
14

15 In all candor, counsel for the Cachuma Member Units has never seen such a crude attempt
16 to ignore the State Board's hearing notice requirements, its regulations or the rules of evidence
17 applicable to a quasi-judicial proceeding. The closest analogy appears to be the circumstances
18 that existed in *United States v. State of Cal.*, 529 F.Supp. 303 (E.D. Cal. 1981). There, the United
19 States, acting through the Bureau of Reclamation, attempted to present a skeleton case to the State
20 Board as a part of the hearings leading to D-1485. After issuance of the water right decision, the
21 United States first sought mandamus in State Court and then, when evidentiary rulings began to
22 go against it, turned to the federal courts alleging a declaratory relief claim which, it hoped,
23 would allow it to present the full case it had declined to present to the State Board. The federal
24 district court rejected the effort and dismissed the action, thus confining Reclamation to the
25 record it had made for itself during the evidentiary hearings before the Board.
26

27 _____
28 ³ Moreover NOAA's effort appears to have been undertaken with the complicity of CDFG and Cal Trout, each of
whom have also attached the identical un-attributed "Analysis" as an appendix to their own closing briefs.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

1 Here, if the warning previously issued by the hearing officer to NOAA Fisheries is to
2 mean anything, it should be enforced. All of the rationales previously given to allow NOAA's
3 participation as a party have been satisfied and yet the agency continues to disregard the
4 procedural requirements emphasized in the Board's Supplemental Notice of Public Hearing.
5 Simply put, no good reason now exists for NOAA's continued participation as a party and it
6 should be dismissed from this proceeding.

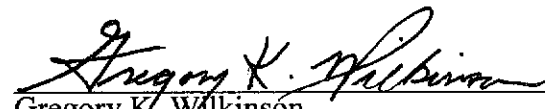
7
8 **IV. CONCLUSION**

9 For the foregoing reasons, the appendices attached by Cal Trout, CDFG and NOAA
10 Fisheries to their closing briefs should be struck from the administrative record and given no
11 consideration by the State Board.⁴ Further, NOAA Fisheries should be forthwith dismissed as a
12 party to these proceedings in accordance with Section 648.1(c) of the Board's regulations and the
13 hearing officer's prior ruling of May 29, 2003.

14
15 Dated: February 18, 2003

16
17 Respectfully submitted,

18 BEST BEST & KRIEGER LLP

19 

20 Gregory K. Wilkinson
21 Michelle Ouellette
22 Edward L. Bertrand

23 Attorneys for the Improvement District No. 1
24 and Cachuma Conservation Release Board
25
26

27
28 ⁴ Again, the lone exception to this result is Appendix A to NOAA Fisheries' closing brief, which is already in evidence as Member Unit Exh. 247.

LAW OFFICES OF
BEST BEST & KRIEGER LLP
3750 UNIVERSITY AVENUE
P.O. BOX 1028
RIVERSIDE, CALIFORNIA 92502

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

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 18, 2004, I served the within document(s):

MOTION TO STRIKE; MOTION FOR DISMISSAL OF PARTY

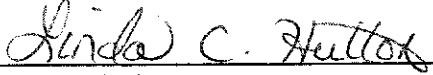
- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Riverside, California addressed as set forth 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 18, 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 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>		