

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
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)

REPLY TO OPPOSITIONS TO MOTION TO
STRIKE AND MOTION FOR DISMISSAL

18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2
3 Three months after Phase II of the Cachuma Project hearings closed, three parties,
4 California Trout (“Cal Trout”), the Department of Fish & Game (“CDFG”) and NOAA Fisheries,
5 submitted new exhibits to their closing briefs. Less than a week before, ensuring that no rebuttal
6 would be allowed, they secured a letter from the Board stating that reply briefs would not be
7 allowed.¹ Submitting these new exhibits violates the Notice of Hearing, the Board’s regulations,
8 the Government Code, case law and fundamental canons of due process. The opposing parties
9 now claim that these new exhibits are admissible because they are not evidence – a statement
10 directly contradicted by Cal Trout in writing within the past two weeks.²

11
12 If Cal Trout “Appendices” 1, 3, and 4 summarize, distill, or are redundant or reflective of
13 testimony already submitted, the opposing parties never explain why these exhibits were not
14 proffered in October or November or why they do not cite to the record, as the balance of the
15 closing briefs do so meticulously. Cal Trout “Appendix” 2 is additional written cross-
16 examination of one of the Cachuma Member witnesses which should be stricken, as suggested by
17 Cal Trout, because the hearing transcript shows that it was not a “written submission” intended by
18 the Board. That the aggrieved parties may have an opportunity to address the acceptability of the
19 Board’s permit conditions in comments to a proposed Order is no consolation because this does
20 not redress the legal injury to the Cachuma Member Units, it deprives the Board of an adequate
21 record, and the aggrieved parties will not necessarily have an opportunity to comment.

22
23 The opposing parties attempt to parse a creative argument for their actions from
24 imaginative interpretations of straightforward statements made by the Hearing Officer. Their

25
26 ¹ February 11, 2004, SWRCB Letter responding to California Trout, Inc’s. inquiry regarding the submittal of reply
briefs. <http://www.waterrights.ca.gov/hearings/cachumahearing.htm>.

27 ² In connection with quasi-legislative proceedings to consider the Fish Management Plan/BO EIR/EIS Cal Trout has
28 written to COMB that these same exhibits are “substantial evidence.” This statement is appended. COMB is a JPA
comprised of four of the Cachuma Member Units.

1 interpretations will be addressed directly. However, the principle underlying the motion to strike,
2 and the notices, regulations, statutes, and case law upon which it relies, is that fundamental due
3 process is violated when one set of parties is allowed to present surprise evidentiary exhibits and
4 written cross-examination of an opposing witness as part of their closing briefs, after taking
5 extraordinary measures to ensure that rebuttal will not be accepted, which puts Cal Trout 28
6 pages beyond the 30 page closing brief limit set by the Board. This is particularly so when those
7 parties claim before the Board that the exhibits are not evidence when, less than a week earlier,
8 Cal Trout claimed in a quasi-legislative proceeding regarding the Fish Management Plan/BO
9 EIR/EIS that these same exhibits constitute substantial evidence.³

10 NOAA Fisheries, in particular, has ignored the Board's rules before and during the
11 hearing. NOAA Fisheries was admonished that a new violation would be grounds for dismissal.
12 Two of NOAA's principal witnesses were prohibited from presenting oral testimony beyond the
13 scope of their written testimony specifically regarding fish passage alternatives and the need for
14 additional instream flow studies.⁴ This new violation merits their dismissal.

16 **II. THE MATERIALS TO BE STRUCK ARE EVIDENCE**

17 Less than two weeks ago, Cal Trout submitted a letter to COMB, appended, which
18 submits into evidence the closing briefs of Cal Trout, CDFG and NOAA Fisheries, with the
19 "appendices". The letter states that "substantial evidence" supports Cal Trout's conclusions that
20 BO measures do not protect steelhead as a public resource, that downstream water rights releases
21 should be modified, that water conservation is another source of water to protect steelhead, that
22 fish passage around Bradbury is a potentially feasible alternative and that adaptive management is
23 ineffective without measurable standards for success as defined by Cal Trout. These are, of
24 course, the same arguments made by the opposing parties in their closing briefs. Cal Trout is

25 _____
26 ³ A minor extension of the doctrine of judicial estoppel would also support disregarding this argument because the
27 opposing parties are taking inconsistent positions before the Board and COMB. Judicial estoppel has been applied
28 for inconsistent positions in two quasi-judicial proceedings. In this instance, the other proceeding is a quasi-

⁴ RT 664-665; 934-935.

1 right. The “appendices” are evidence – untimely, surprise evidence in this proceeding. The
2 averments of each of the opposing parties to the contrary are not only unsupported but self-
3 contradicted.
4

5 **III. THE MATERIALS TO BE STRUCK ARE EXHIBITS, NOT APPENDICES**
6

7 The materials to be struck are exhibits, regardless of their characterization by the opposing
8 parties. Mr. Silva made a brief remark at the end of the hearing about appendices. He did not,
9 however, permit exhibits. Black’s Law Dictionary (6th ed.) defines an exhibit as a “paper,
10 document, chart, map, or the like, referred to and made a part of an affidavit, pleading or brief.”
11 An appendix is “supplementary materials added to appellate brief; e.g. record on appeal.” An
12 appendix is further defined by reference to the Federal Rules of Appellate Procedure as “parts of
13 the record to which the parties wish to direct the particular attention of the court.” If the opposing
14 parties had appended pages from the reporters’ transcripts, a page from an exhibit of particular
15 significance, or even a copy of a new case decided since the hearing and referenced in the closing
16 brief, or, as the moving party has done, a copy of a letter by the opposing party contradicting
17 statements made in a pleading, such materials may have been the proper subjects of an appendix.
18 However, the materials to be struck were “made part of” each of the opposing parties briefs.⁵
19

20 **IV. CAL TROUT “APPENDIX” 2 MUST ALSO BE STRICKEN BECAUSE IT IS**
21 **NOT A “WRITTEN SUBMISSION” AS DESCRIBED IN THE HEARING**
22 **TRANSCRIPT**

23 Cal Trout claims that its Appendix 2 was intended by the Hearing Officer. The hearing
24 transcript reveals otherwise. At RT 1077, Cal Trout’s attorney stated “we’ll have to deal with this
25 in our written submittals if that is appropriate.” The Hearing Officer responded “You still have a
26 chance with your written.” The Hearing Officer did not state that Cal Trout would be given an
27

28 ⁵ See Cal Trout Closing Brief, pp. 14, 23, 25, 28; CDFG Closing Statement, p. 21; NOAA Closing Brief, p. 17.

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

1 opportunity for written cross-examination. He also did not state that such a written cross-
2 examination could be submitted as an "appendix" to circumvent the page limit on closing briefs.
3

4 Cal Trout's closing brief contains a lengthy section analyzing Ms. Gonzales' testimony.
5 The Cachuma Member Units have not raised a procedural objection to that portion of Cal Trout's
6 closing brief. However, Cal Trout has to abide by the rules just as the other parties must.
7 Nothing in the Hearing Officer's statement implies the contrary. In fact, even in its opposition
8 papers, Cal Trout tries to obtain the benefit of a double standard. At page 4, footnote 5, Cal Trout
9 states "hearing procedures do not provide an opportunity to rebut rebuttal evidence." Yet that is
10 exactly what "Appendix" 2 attempts to do.

11 V. **AN OPPORTUNITY TO COMMENT ON THE PROPOSED ORDER IS**
12 **INSUFFICIENT DUE PROCESS**

13 That the aggrieved parties may have an opportunity to address the acceptability of the
14 Board's permit conditions in comments to a proposed Order, as suggested by Cal Trout, is no
15 consolation for three reasons. First, the potential opportunity to comment has never been found
16 legally to be a proper substitute for the statutory, regulatory, judicial and constitutional due
17 process rights afforded parties to an administrative proceeding. Second, allowing one set of
18 parties additional opportunities to present evidence not afforded to other parties deprives the
19 Board of its right to consider the full range of balanced testimony, as tested through cross-
20 examination and rebuttal, before issuing a draft Order. Third, it is presumptuous for Cal Trout to
21 assume that the contents of new exhibits will be reflected in the Board's proposed order. The
22 exhibits should be struck. If they are not, they must be disregarded.⁶ Because they must be
23 disregarded in the proposed Order, it is not true that the Cachuma Member Units will necessarily
24 have an opportunity to comment on the exhibits, aside from the fact that not striking the exhibits
25 is a fundamental due process violation.

26
27 ⁶ The Board's decision must be based exclusively on "evidence of record." Government Code section 11425.50. If
28 the exhibits are evidence, they are untimely. If they are not, they must be disregarded. The exhibits do not cite to the
record and are not part of the record.

1 **VI. CONCLUSION**

2 For the foregoing reasons, the appendices attached by Cal Trout, CDFG and NOAA
3 Fisheries to their closing briefs should be struck from the administrative record and given no
4 consideration by the State Board.⁷ Further, NOAA Fisheries should be forthwith dismissed as a
5 party to these proceedings in accordance with Section 648.1(c) of the Board's regulations and the
6 hearing officer's prior ruling of May 29, 2003.

7
8 Dated: March 5, 2004

9
10 Respectfully submitted,

11 BEST BEST & KRIEGER LLP

12 

13 Gregory K. Wilkinson
14 Michelle Ouellette
15 Edward L. Bertrand
16 Attorneys for the Improvement District No. 1
17 and Cachuma Conservation Release Board

18
19
20
21
22
23
24
25
26
27 ⁷ Again, the lone exception to this result is Appendix A to NOAA Fisheries' closing brief, which is already in
28 evidence as Member Unit Exh. 247.



February 26, 2004

Cachuma Operations and
Maintenance Board
Attention: Kate Rees
3301 Laurel Canyon Road
Santa Barbara, CA 93105

RECEIVED

FEB 27 2004

3301 LAUREL CANYON ROAD

Department of the Interior, Bureau of Reclamation
South-Central California Area Office
Attention: David Young
1243 N Street
Fresno, CA 93721

**Re: Supplemental Comments on Draft Program and Project-Specific
Environmental Impact Report / Environmental Impact Statement for the
Lower Santa Ynez River Fish Management Plan and Cachuma Project
Biological Opinion for Southern Steelhead Trout**

Dear Ms. Rees and Mr. Young:

The Environmental Defense Center ("EDC") submits these supplemental comments on the Draft Program and Project-Specific Environmental Impact Report / Environmental Impact Statement ("DEIR/S") for the Lower Santa Ynez River Fish Management Plan ("FMP") and Cachuma Project Biological Opinion for Southern Steelhead Trout ("BO") on behalf of California Trout ("CalTrout"). The attachments to this letter constitute additional substantial evidence that the DEIR/S is premature until the CEQA lead agency State Water Resources Control Board ("SWB") makes a final decision regarding whether any new or modified permit terms and conditions are necessary to protect public trust resources from the adverse effects of the U.S. Bureau of Reclamation's ("Bureau") water rights permits 11308 and 11310 for the Cachuma Project. This evidence also bolsters CalTrout's position, stated in its September 30, 2003 letter concerning the DEIR/S, that the DEIR/S reaches inaccurate preliminary conclusions regarding the significance of environmental impacts, the feasibility of mitigation measures and alternatives, the ability of the project and alternatives to fulfill the objectives.

The exhibits to this letter were submitted to the SWB as part of its ongoing water rights hearing and the SWB's associated CEQA process. CalTrout is submitting this evidence after the comment period for the Draft EIR/S and this is another practical problem that results from COMB and the Bureau proceeding with their environmental review before the actual lead agency has completed its own environmental analysis. The SWB prepared a draft Environmental Impact Report and is the sole agency responsible for determining which

906 Garden Street, Santa Barbara, CA 93101 Phone (805) 963-1622 FAX (805) 962-3152
2021 Sperry Avenue, Suite 18, Ventura, CA 93003 Phone (805) 677-2570 FAX (805) 677-2577
www.edcnet.org

Printed on Recycled Paper

measures are required to protect public trust resources from the effects of the Cachuma Project, and which of those measures are feasible.

Even though the same environmental consultant worked on the COMB and Bureau DEIR/S and the SWB DEIR, the DEIR/S reaches significantly different tentative conclusions than the SWB DEIR regarding 1) the level of impacts of the identical actions proposed in the overlapping documents, 2) which alternatives and mitigation measures are feasible and avoid or mitigate significant impacts, and 3) what actions are necessary to protect steelhead, a public trust resource. Before COMB and the Bureau's EIR/S can be finalized and certified, these agencies must understand what actions are needed to protect state public trust resources, and must therefore first be informed by the SWB which actions are necessary. Therefore, COMB and the Bureau should defer to, and wait for, the CEQA lead agency - the SWB - to make these decisions before proceeding with environmental review on actions that will in part be determined by the upcoming SWB decision. COMB and the Bureau should not certify this EIR/S or make findings that contradict the evidence in the record. They should not prematurely certify the EIR/S before the SWB determines which actions are necessary to achieve the public trust protection goal. This would presuppose the SWB process outcome by making findings that 1) the Biological Opinion alone protects public trust resources, and that 2) fish passage, modifications to the downstream water rights releases and water conservation are not feasible alternatives.

Given that COMB and the Bureau failed to wait for the SWB's underlying process and decision, CalTrout must submit the following evidence into the EIR/S record after the DEIR/S comment period closed.

- The State Water Resources Control Board Draft EIR
- CalTrout's comments regarding the SWB Draft EIR
- Department of Fish and Game's comments on the Draft SWB EIR
- NOAA Fisheries comments on the Draft SWB EIR
- CalTrout's Testimony and Exhibits from the SWB Hearing Record
- Department of Fish and Game Testimony and Exhibits from the SWB Hearing Record
- NOAA Fisheries Testimony and Exhibits from the SWB Hearing Record
- CalTrout Closing Brief and Appendices submitted to the SWB
- Department of Fish and Game Closing Brief submitted to the SWB
- NOAA Fisheries Closing Brief submitted to the SWB

This substantial evidence supports the following conclusions in the COMB/Bureau EIR/S:

1. The measures contained in the BO including the interim and post-surecharge release schedules are intended to prevent further jeopardy to southern steelhead as a species, but were never intended to and do not protect steelhead in the Santa Ynez River as a public trust resource to the maximum extent feasible nor result in attainment of good condition.

2. Modifying the downstream water rights release schedule is another source of water to protect steelhead. It is a potentially feasible alternative or addition to surcharging which could avoid or help minimize significant impacts to oaks, other biological resources and recreation surrounding the reservoir, while maximizing instream and consumptive uses and minimizing or avoiding the project's potential impacts to water supply.
3. Water conservation is another "source" of water to protect steelhead. It may be a feasible alternative or addition to surcharging to help to avoid or minimize the proposed surcharge's significant impacts to oaks, other biological resources, recreation around the reservoir, and potential water supply impacts, while making water available to protect steelhead as a public trust resource.
4. Fish passage around Bradbury Dam / Cachuma Reservoir (and other dams in the river) is a potentially feasible alternative that should be earnestly pursued to protect and help recover steelhead in the Santa Ynez River.
5. Adaptive Management is ineffective without measurable standards for success.

In conclusion, COMB and the Bureau should wait for the SWB to certify its FEIR before taking further action on their EIR/S. If COMB and Bureau decide not to wait, they should consider and incorporate the attached information.

Sincerely,


Brian G. Trautwein,
Environmental Analyst

cc: CalTrout
Department of Fish and Game
NOAA Fisheries
State Water Resources Control Board

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 March 5, 2004, I served the within document(s):

**REPLY TO OPPOSITIONS TO MOTION TO STRIKE AND
MOTION FOR DISMISSAL**

- 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 March 5, 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>		