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STATE WATER CONTROL BOARD
 04 FEB 27 PM 2:46
 CITY OF WATER RIGHTS
 SACRAMENTO

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9 Attorneys for City of Lompoc

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

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

**CITY OF LOMPOC'S
 MOTION TO STRIKE**

17 The City of Lompoc respectfully requests that the State Water Resources Control Board
 18 strike the following documents: 1) Appendices 1-4 to the Closing Brief of California Trout, Inc.;
 19 2) Appendix 1 to the Closing Brief of California Department of Fish and Game; and 3)
 20 Appendix B to the Closing Brief of NOAA Fisheries. Additionally, Lompoc requests that the
 21 SWRCB strike the portions of the parties' Closing Briefs that rely upon or reference the extra
 22 record evidence within the Appendices. 1) Cal Trout's Closing Brief: a) page 14, lines 15-19
 23 (referencing Appendix 1); page 23, lines 3-4 (referencing Appendix 2); b) page 25, lines 17-20
 24 (referencing Appendix 3); c) page 28, lines 18-19, page 28, footnote 46, and page 29, lines 1-2
 25 (referencing Appendix 4); d) page 29, lines 17-21 (referencing Appendices 3 and 4); e) and page
 26 30, lines 12-16 (referencing Appendices 1, 3 and 4); 2) NOAA Fisheries' Closing Brief: page
 27 17, lines 23-28; 3) and DFG's Closing Brief, page 21, lines 19-22.

1 **DISCUSSION**

2 In addition to joining in the Member Units' Motion to Strike (See Member Units' Motion to
3 Strike, page 2, line 8 to page 5, line 20, Lompoc offers the following points and authorities in support
4 of this Motion to Strike.

5 **A. Appendix 1 to Cal Trout's and DFG's Closing Brief; Appendix B to**
6 **NOAA Fisheries' Closing Brief**

7 Despite the extensive testimony provided by DFG, Cal Trout and NOAA Fisheries regarding
8 the need to study the feasibility of fish passage around the dam, DFG, Cal Trout and NOAA
9 Fisheries attempt to introduce additional evidence through the Appendix entitled "Santa Ynez River
10 Fish Passage Feasibility Analysis." This proposed Feasibility Analysis makes no reference to any
11 testimony, oral or written. Moreover, nothing within the document indicates who authored the
12 proposed Feasibility Analysis. Interestingly, the proposed Feasibility Analysis is attached as an
13 appendix to each entity's closing brief. Obviously, DFG, Cal Trout and NOAA Fisheries
14 coordinated the development of the proposed Feasibility Analysis and all three have advocated that the
15 SWRCB direct implementation of the Feasibility Analysis. While these three parties jointly
16 developed this proposal, they did not see fit to present this proposal during the evidentiary hearing
17 where it would be subject to the scrutiny of cross-examination and rebuttal testimony. (See Title 23,
18 Cal. Code Regs., § 648.5.1; Gov't Code, § 11513(parties have the right to cross-examine opposing
19 witnesses).)

20 As the proposed Feasibility Analysis was not submitted during the evidentiary hearing, or
21 subject to cross-examination and has been submitted after the close of the evidentiary record, the
22 SWRCB should strike the Appendix, as well as any and all references to Appendix 1 in the Closing
23 Briefs.

24 **B. Appendix 2 to Cal Trout's Closing Brief**

25 Appendix 2 to Cal Trout's Closing Brief, purports to provide a response to rebuttal testimony
26 of Misty Gonzales. Through Appendix 2, however, Cal Trout attempts to violate the hearing
27 officer's ruling regarding page limitations for closing briefs. The hearing office, with agreement of
28 the parties, limited closing briefs to 30 pages. (RT 1120, lines 9-15.) Cal Trout submitted a 30-page

1 closing brief. Cal Trout managed to get around the 30-page limit by attaching a four plus page
2 appendix that should have been included within body of the closing brief. Appendix 2 is nothing
3 more than a blatant attempt to avoid the 30-page limit agreed to by the parties at the close of the
4 hearing. Cal Trout essentially acknowledges that this information is appropriate in the Closing Brief
5 when it indicates that Appendix 2 contains a detailed response to Ms. Gonzales' rebuttal testimony,
6 limited to evidence in the hearing record. (Cal Trout Closing Brief at p. 23, lines 3-4.) Moreover, Cal
7 Trout then states, "[s]ome of the more significant inaccuracies are highlighted here." (*Id.*) As
8 Appendix 2 to Cal Trout's Closing Brief amounts is being offered simply as additional closing
9 argument and therefore exceeds the agreed upon 30-page limit, the SWRCB should strike Appendix
10 2.

11 **B. Appendix 3 to Cal Trout's Closing Brief**

12 Appendix 3 suffers from the same problem as Appendix 1 discussed above. Appendix 3
13 purports to propose a Water Conservation Study, yet there is nothing indicating who authored this
14 proposed study. The proposed Water Conservation Study makes no reference to any testimony or
15 other evidence contained in the record. Thus, it appears to be another effort to circumvent the
16 requirement that testimony and evidence be submitted during the evidentiary portion of the hearing
17 and be subject to cross-examination. (See Title 23, Cal. Code Regs., § 648.5.1; Gov't Code, §
18 11513(parties have the right to cross-examine opposing witnesses).) To this end, the SWRCB
19 should strike Appendix 3 to Cal Trout's Opening Brief, as well as any and all references within the
20 Closing Brief to Appendix 3.

21 **D. Appendix 4 to Cal Trout's Closing Brief**

22 From the City of Lompoc's perspective, Appendix 4 to Cal Trout's Closing Brief is the most
23 egregious effort to introduce extra-record evidence. Appendix 4 purports to be a study plan for
24 modifying downstream water rights release schedule. During the four days of hearing, Cal Trout
25 offered no testimony, let alone any expert testimony, regarding hydrology or the project's impacts to
26 downstream water rights. Now, after the close of the record, Cal Trout submits a five-page study plan
27 regarding hydrology, water rights, and releases for downstream water rights. Nothing within the
28 proposed study plan indicates that it was prepared and/or reviewed by a qualified expert in hydrology.

1 Moreover, by proposing this study plan during the closing brief, as opposed to during the evidentiary
2 hearing, the anonymous preparers of the proposed study plan escapes the scrutiny of cross-
3 examination. (See Title 23, Cal. Code Regs., § 648.5.1; Gov't Code, § 11513(parties have the right
4 to cross-examine opposing witnesses).)

5 The proposed study is also confusing, as it is unclear as to whether it is intended to support Cal
6 Trout's proposed Alternative 3A2, or whether it is intended to start from scratch and develop an
7 entirely new downstream water rights release regime. In either instance, it is inappropriate. As such,
8 the SWRCB should strike Appendix 4 from the record.

9 Quite simply, Cal Trout failed to introduce any evidence regarding hydrology and the impacts
10 that Alternative 3A2 would have on downstream water rights. Cal Trout attempts a creative cure to its
11 obvious lack of evidence and testimony by simply requesting more studies. Unfortunately, Cal Trout
12 seems to have missed the part of the hearing discussing the extensive studies and modeling that has
13 occurred in the last 10 to 12 years. Lompoc has spent in excess of \$1.5 million studying the
14 Cachuma Project's impacts on downstream water rights. (Lompoc Exh. 1.) Cal Trout had the
15 opportunity to submit evidence as to whether its proposed Alternative 3A2 would impair downstream
16 water rights. Cal Trout, for whatever reason, made the decision not to submit any such evidence.
17 The SWRCB should not now reward Cal Trout's failure to submit such evidence.

18 Cal Trout provides no reference to the record to support proposed Study Plan. For example,
19 the proposed Study Plan identifies various tasks and timelines for the initiation of the various tasks.
20 (See Appendix 4 at pp. 2-4.) Cal Trout provides no reference to any evidence in the record to support
21 the various tasks or the proposed timeline for completion of the tasks. Cal Trout provides no
22 information as to whether the proposed study plan was prepared by a qualified expert or Cal Trout's
23 attorneys. Cal Trout provides no information as to whether all or portions of the proposed study plan
24 have already been conducted by the Member Units, the Bureau of Reclamation, the City of Lompoc,
25 the Santa Ynez River Water Conservation District, or other entities. In fact, from reviewing the
26 proposed study, one would assume that there have been little or no studies regarding flow
27 requirements for steelhead and downstream water rights. The extensive written and oral testimony
28 indicates quite the opposite.

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In stark contrast to Cal Trout's failure to provide testimony regarding hydrology and water rights, Lompoc provided undisputed expert testimony regarding the impacts Alternative 3A2 would have on downstream water rights. (See Lompoc Exhibit 5; see also MU Exh. 220a.) Thus, the only evidence before the SWRCB indicates that the implementation of Cal Trout's Alternative 3A2 would materially deteriorate the quality of groundwater in the eastern Lompoc Plain. (*Id.*) Cal Trout creatively attempts to get around their obvious lack of evidence on their proposal by proposing further studies that are not supported by any evidence in the record. The SWRCB should not tolerate or allow Cal Trout's efforts to circumvent the requirement that testimony and evidence must be submitted during the hearing.

To the extent Cal Trout's proposed Study Plan in Appendix 4 seeks to develop an entirely new operating regime to meet downstream water rights, Cal Trout did not introduce any such proposal during the evidentiary hearing. Cal Trout's testimony was limited to proposing Alternative 3A2. Cal Trout now apparently seeks to introduce an entirely new process after the record has been closed, without providing the parties information as to who prepared the proposed study or providing the parties the opportunity to scrutinize the proposed study through cross-examination and rebuttal testimony. As such, the SWRCB should strike Appendix 4, as well as any and all references in Cal Trout's Closing Brief.

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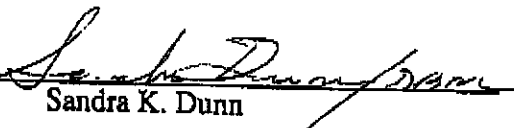
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CONCLUSION

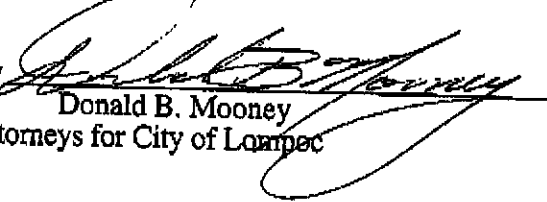
Based upon the foregoing the City of Lompoc respectfully requests that the SWRCB strike the Appendices in the Closing Briefs of Cal Trout, DFG, and NOAA Fisheries.

DATED: February 27, 2004

SOMACH, SIMMONS & DUNN
A Professional Corporation

By 
Sandra K. Dunn

LAW OFFICES OF
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By 
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PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 129 C Street, Suite 2, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On February 27, 2004, I served a true and correct copy of

CITY OF LOMPOC'S MOTION TO STRIKE

X (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the City of Davis, California.

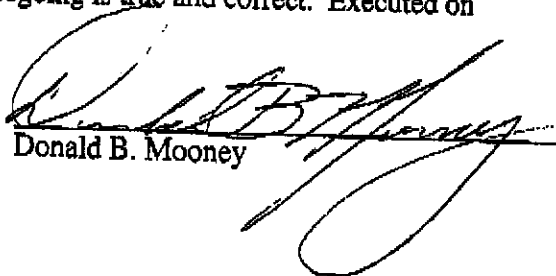
___ (by overnight delivery service) via Federal Express to the person at the address set forth below:

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

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

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 27, 2004, at Davis, California.


Donald B. Mooney

Cachuma Project Hearing**Phase-2 Hearing****Final Service List**

<p>Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best, Best & Krieger, LLP 3750 University Avenue, Suite 400 Riverside, CA 92501</p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704</p>
<p>U.S. Bureau of Reclamation Mr. Stephen R. Palmer 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 Fax: (916) 978-5694</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</p>
<p>California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101</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</p>	<p>Department of Fish and Game Office of General Counsel Mr. Harlee Branch 1416 Ninth Street, 12th Floor Sacramento, CA 95814</p>
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