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May 28, 2019

SUBMITTED VIA ELECTRONIC AND FIRST CLASS MAIL
(COMMENTLETTERS@WATERBOARDS.CA.GOV)



Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: COMMENT LETTER - Cachuma Project Revised Draft Order

Dear Ms. Townsend

These comments are submitted on behalf of Santa Ynez River Water Conservation District, Improvement District No.1 (ID No.1) with respect to the State Water Resources Control Board's (State Board) March 27, 2019 "Revised Draft Order (RDO) In the Matter of Permits 11308 and 11310 (Applications 11331 and 11332) Held by the United States Bureau of Reclamation for the Cachuma Project on the Santa Ynez River in Santa Barbara County." ID No.1 appreciates the opportunity to comment.

Summary

For the reasons set forth in our December 9, 2016 comment letter,¹ ID No.1 continues to support Alternative 3C evaluated in the State Board's Final Environmental Impact Report. However, to the extent the State Board proceeds with the adoption of Alternative 5C in the final water rights order on the Cachuma Project permit amendments (Final Order), ID No.1 provides the following comments and recommendations, focusing on the proposed changes to the RDO made by the State Board since the release of the September 7, 2016 Draft Order (Draft Order). ID No.1 contends that the revisions suggested herein, including deletions to certain language in the RDO, are needed before a Final Order is issued by the State Board.

- The State Board should closely re-examine and modify the RDO's discussion of legal standards regarding the public trust doctrine and Fish and Game Code Section 5937, as described in greater detail below.
- As acknowledged in footnote 17 of the RDO, the flow regime and water release triggers adopted by the State Board for Reclamation's operation of the Cachuma Project must

¹ ID 1 hereby incorporates by reference its December 9, 2016 comment letter.
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BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 2

conform with state water law standards, including Article X, Section 2 of the California Constitution, such that water released for the purported benefit of steelhead and other public trust resources must be demonstrated to provide actual benefits and thus avoid an unreasonable use, unreasonable method of use, and waste of water.²

- The RDO’s newly added water supply impact analysis must be corrected.
 - The figures in Adjusted Tables 4-17 and 4-25a regarding water supply shortages and impacts (namely, the far-right columns marked “with desal”) are inaccurate and should be fixed.
 - ID No.1 does not have a right or physical access to utilize desalinated water produced by the City of Santa Barbara.
 - The RDO’s newly-inserted references to generalized testimony that further conservation could offset Alternative 5C’s water supply impacts to ID No.1 are factually unsupported, contrary to substantial evidence in the record, and should be deleted from the Final Order.
 - Using corrected water supply impact and shortage information will allow the State Board to properly consider the public interest in its public trust balancing analysis.
- Potential mid-year changes to Table 2 flows to respond to changing conditions would require a full analysis under the California Environmental Quality Act (CEQA) before being instituted, not merely compliance with the “CEQA Guidelines” as described in the RDO. Further, the language deleted from the Draft Order (see RDO redline § 5.3.3.5) giving the Executive Director authority to authorize a long-term reduction or termination of Table 2 flows should be re-inserted into the Final Order.
- ID No.1 strongly supports Drought Offramp Alternative 2 as an implementable and objective mechanism to preserve storage in Cachuma Reservoir to address recurring drought conditions. (See ID No.1 December 9, 2016 comments, Attachment A, Stetson Engineers, “Sensitivity Analysis of Alternative 5C using Lake Cachuma Inflow Trigger of 70,000 AF instead of 33,707 AF” (“2016 Stetson Technical Memorandum”).)
- ID No.1 also continues to support the findings in the 2016 Stetson Technical Memorandum that the 70,000 AF trigger be utilized at all times for the demarcation between Table 1 and Table 2 flows, independent of the storage condition in Cachuma Reservoir and the sequence of dry years. Consistent use of the 70,000 AF trigger point would create very similar downstream flow levels while also protecting against water supply shortages, thus better balancing the needs of the fishery and the public interest.
- The RDO improperly purports to delegate authority to the Deputy Director to interfere in negotiations between the Bureau of Reclamation and the County of Santa Barbara regarding the new Cachuma Project water supply contract. Such language must be deleted in the Final Order. Reclamation already mandates conservation. Further, the

² See ID No. 1 December 9, 2016 comment letter, pp. 32-34.
18613.00007\32079532.1



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 3

Cachuma Member Units already achieve unprecedented conservation and are incentivized to conserve due to state law standards and climate conditions.

- The RDO improperly orders incorporation into the Final Order of the terms and conditions of a future NMFS Biological Opinion (BiOp) for the Cachuma Project. The terms of any future BiOp would need to be evaluated according to standards applicable under state law (e.g., balancing) before incorporation could be considered. Furthermore, incorporation of new or additional terms and conditions of a future BiOp into the State Board water rights permits would first require a full analysis under the California Environmental Quality Act (CEQA).
- The Final Order should remove any requirement to undertake a fish passage feasibility study. As acknowledged in § 5.3.2 of the RDO, a passage study was already undertaken in 2000. Substantial evidence in the record demonstrates that passage is virtually infeasible and that circumstances/conditions related to passage have not changed in the interim. Requiring an additional passage study is arbitrary and capricious, and an abuse of discretion because Congress has not authorized Reclamation to conduct such a study, and the study of steelhead passage above Bradbury Dam involving the upper Santa Ynez River watershed is beyond the scope of the key hearing issues for the Project.
- ID No.1 joins the comments being submitted by the Santa Ynez Water Conservation District (Parent District) related to the protection of priority downstream water rights. Any Final Order term mandating a re-evaluation of the timing of downstream water rights releases would be inconsistent with multiple prior orders and decisions of the State Board and potentially interfere with downstream rights.

Comments

I. The Final Order Must Recite and Apply the Correct Legal Standards

As reflected in ID No.1's previous comment letter,³ *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446, directs the State Board to "take the public trust into account in the planning and allocation of water resources, and to protect the public trust uses whenever feasible." Fish and Game Code section 5937 provides that an owner of a dam "shall . . . allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." Notwithstanding these applicable legal standards, the RDO continues to conflate and misuse "restore", "protect", "recovery", and "conserve", among other terms, in purporting to apply a hybrid legal standard to the Cachuma Project. The RDO further asserts that the term "restore" is simply "a shorthand reference for the concept of keeping fish below a dam in good condition . . . when the fish are not currently in good condition." (See RDO § 3.2.) This new "shorthand reference" has no legal support, it adds

³ See ID No.1 December 9, 2016 comment letter, pp. 24-32.
18613.00007\32079532.1



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend

May 28, 2019

Page 4

confusion, and creates even greater concern about the shifting legal standards. Indeed, it is patently unclear what restore/restoration, recovery, and conserve mean in the RDO. Without clarity, the RDO will be extremely difficult to implement.

By expressly and implicitly applying a “restoration” standard to the Cachuma Project which is not reflected in the statutory and case law, the RDO fails to apply the proper legal standards and the full suite of balancing requirements necessary to protect the broader public interest. (See Cal. Const., Article X, Section 2, National Audubon; Water Code, §§ 1243, 1253-1257.) In particular, in issuing the Final Order, the State Board must expressly weigh whether all of the terms and conditions in the RDO are necessary to protect steelhead or other public trust resources in the Santa Ynez River below Bradbury Dam, as measured against the significant water supply impacts and other adverse effects on the public interest arising from implementation of Alternative 5C. To the extent any measures are not shown to actually benefit (and may even harm) public trust resources, such measures should be removed from the Final Order. Releasing water without knowing whether it will keep steelhead in good condition below the Dam, or whether it may encourage the propagation of beavers and steelhead-consuming bass, must be weighed against the result of losing stored water for future fishery flows and human needs. The Final Order must include Findings that its terms and conditions will not result in the waste, unreasonable use, or unreasonable method of use of water in accordance with applicable state law standards.

The RDO’s suggestion that the public trust doctrine may include “fish passage requirements” should be deleted from the Final Order.⁴ Fish and Game Code Section 5937 expressly applies only to fish below a dam, not above it. Post-record comments and information provided by NMFS on this subject do not authorize or justify a requirement to order additional feasibility studies. (See also May 2019 comments regarding fish passage feasibility studies submitted by the Cachuma Conservation Release Board (CCRB).)

Similarly, the RDO’s added references to NMFS’s interpretation of federal Endangered Species Act (ESA) standards are not directly relevant to the balancing to be undertaken by the State Board under applicable state law in considering the needs of public trust resources, the public interest, and the reasonable and beneficial use doctrine.⁵ In particular, the newly-added footnote 16 and the final sentence in Section 3.5.1 of the RDO purportedly interpreting the ESA should be deleted. Similarly, newly added Section 3.5.7 and the newly added text in Section 5.3.1.3.3 related to the NMFS Southern California Steelhead Recovery Plan—which the RDO

⁴ See RDO Section 3.1.2. For the same reason, the added words “and ordering studies of passage around Bradbury Dam” should be deleted from Section 3.3 of the RDO.

⁵ See ID No.1 December 9, 2016 comment letter, pp. 30-34; see also RDO, footnote 17. ID No.1 also objects to any requirements in the RDO giving NMFS authority to approve studies or other requirements of the Final Order, which will be a product of state law standards and requirements. (See e.g., RDO Section 5.3.3.6, RDO redline, p. 98.)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend

May 28, 2019

Page 5

acknowledges is not part of the administrative record (see footnote 29)—should also be deleted in their entirety.

II. The RDO's New Water Supply Impacts Analysis Must be Corrected in the Final Order

The RDO's new water supply impact analysis is incorrect (RDO Section 5.3.3.3.). ID No.1 has previously provided information about the estimated water supply impacts of Alternative 5C. (See ID No.1 December 9, 2016 comment letter, pp. 16-22 and Attachment "A", Stetson Engineers analysis.) That information is expressly incorporated into these comments and should be utilized by the State Board in producing the Final Order in accordance with its obligation to perform public trust balancing. Adjusted Tables 4-17 and 4-25a should be recalculated and modified to delete the column entitled "with desal."

The Final Order should also expressly acknowledge that, even to the extent the City of Santa Barbara desalination facility is operational, ID No.1, as a Member Unit of the Cachuma Project, has no contractual or other right, nor physical access, to any water produced by that facility. Based upon the above, all language and figures in the RDO referencing the potential availability of desalinated water to ID No.1 should be eliminated. In particular, the newly added sentence that "[h]aving an additional 3,125 afa of desalination water available would eliminate the Member Units' water supply impacts, compared to baseline conditions" (RDO Section 5.3.3.4) is entirely unfounded as applied to ID No.1 and should be deleted.

The RDO's newly added text regarding water conservation should also be stricken. (See RDO Section 5.3.3.3, RDO redline, p. 82). The written testimony provided by the Pacific Institute and Cal Trout several years ago is incorrect and unreliable. (See also ID No.1 December 9, 2016 comment letter, pp. 31-32.) Prolonged and recurring drought conditions, coupled with significant conservation efforts within ID No.1's service area, have hardened demands to historically low levels. The suggestion that a further 5,000 to 7,000 acre feet of water can be saved (whether partially by ID No.1 or in total by all of the Cachuma Member Units) is fiction and finds no support in the record. In fact, the RDO itself acknowledges that the testimony of Ms. Cooley was not based on any localized analysis and was patently inconsistent with testimony provided by a local expert. (RDO § 5.3.3.3.) The RDO's newly added references to purported conservation opportunities should be eliminated.⁶

⁶ As previously noted to the State Board, ID No.1 has limited potential options to backfill any shortages resulting from implementation of Alternative 5C. Water quality concerns, including Chromium-6 issues, have placed severe constraints on ID 1's ability to produce groundwater from the Santa Ynez Uplands groundwater basin. And, the coming implementation of the Sustainable Groundwater Management Act (SGMA) in the basin is likely to further constrain groundwater availability. Further, opportunities to acquire transfer water from the State Water Project are already limited. With the coming implementation of the Bay-Delta Water Quality Control Plan update—whether through voluntary settlement agreements among contractor/transferrors or direct action by the State Board—it is

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BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 6

In preparing and adopting the Final Order, and in undertaking the legally required public trust balancing, the State Board must fully consider the public interest, including the water supply impacts to the Cachuma Member Units of imposing Alternative 5C. Final Order, Section 8.1, should reflect those impacts. We believe that, once the State Board fully considers the correct information, it will no longer conclude that there will be only “minor reduction in the Member Units’ water supplies that may result during drought conditions from implementation of Alternative 5C.” (RDO, § 5.3.3.5, redline, p. 90.)

III. Mid-Year Modifications to Table 2 Flows over the Objections of Reclamation or a Cachuma Member Unit are Improper without Due Process and CEQA Compliance

The RDO proposes a mechanism to allow for in-year modifications to the required Table 2 flows as an adaptive management measure. (RDO redline, pp. 91, 119, 124, 145; Order, Para. 29.) However, any such changes can be made only upon agreement by the Cachuma Member Units and Reclamation, and only if no additional water supply impacts will occur as a result of the changes. The RDO indicates that the State Board Executive Director (ED) may override opposition to a proposed change to Table 2 flows by the Cachuma Member Units or Reclamation if the ED determines “the change is warranted and that it will not cause a greater water supply impact than would occur under the existing schedule” and the ED complies with the “CEQA Guidelines” (RDO, redline, p. 91; RDO Order, ¶¶ 16(c), 16(d), 28(a), 31.) These provisions are objectionable and must be rewritten to clarify that the water supply impact analysis must be peer reviewed by the Cachuma Member Units and Reclamation, and that any such change(s) to Table 2 flows must undergo a full analysis under the CEQA statutes before being instituted. The proposal for the ED to observe only the CEQA “Guidelines” does not comply with applicable law. (See, e.g., RDO Order, ¶ 31.) The provision should also expressly acknowledge that the full due process rights of the Cachuma Member Units and Reclamation must be observed. Before Table 2 flows are modified, public trust balancing must also be utilized to justify any flow changes.

In addition, the Final Order should retain language deleted from the RDO (at the end of Section 5.3.5.5) to allow the ED to authorize a long-term reduction or termination of Table 2 flows upon a demonstration that the flows will not benefit the fishery, or may harm the fishery.

IV. Automatic Offramp Alternative 2 Should Be Included In The Final Order

ID No.1 agrees with the critical need to preserve storage in Cachuma Reservoir for the benefit of fish flows and human needs, particularly during drought conditions. Attachment A to

anticipated transfer water will become even more difficult to obtain. (See ID No.1 December 9, 2016 comment letter, pp. 17-20.)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 7

ID No.1's December 9, 2016 comment letter provides detailed technical information regarding operational triggers that can help protect those benefits. (See also ID No.1 December 9, 2016 comment letter, pp. 7, 13-14.) For the reasons discussed in ID No.1's previous comment letter, if the State Board decides to proceed with Alternative 5C, ID No.1 supports including Drought Off-Ramp Alternative 2 in the Final Order. Alternative 1 and discretionary review by the Executive Director would require CEQA review and has the greater potential for controversy and hurdles for the State Board given the requirements of Article X, Section 2, the public trust doctrine, and related state statutes.

V. ID No.1 Continues to Support the Use of the 70,000 AF Trigger Point

The 2016 Stetson Technical Memorandum explained in detail why the use of a 70,000 AF trigger to mark the change from Table 1 to Table 2 flows in all water year types (and not just during critical droughts) would result in very similar downstream flows as Alternative 5C, while likely preventing the number and severity of water supply shortages. (ID No.1 December 9, 2016 comment letter, p. 39-40, Attachment A.) ID No.1 asks that the State Board closely review that Technical Memorandum and strongly consider including a 70,000 AF trigger for all water year types in the Final Order. Consistent use of that trigger provides very similar benefits and flows to steelhead as using the 33,707 AF threshold. Use of the 70,000 AF trigger also better reflects a public trust balancing, particularly in view of the significant water supply impacts to ID No.1 of use of the 33,707 AF trigger in Alternative 5C. At the very least, until studies are completed that indicate the flows in Table 2 show actual benefit to steelhead, the average inflow target of 70,000 AF should be used instead of 33,707 AF. Given that the benefits from the Table 2 flows are currently unknown and may actually degrade habitat for steelhead (i.e., more non-native predators and beaver dams), using the average inflow target of 70,000 AF would reach the correct public trust balance in the interim until the study of Table 2 flows is completed.

VI. RDO Provisions Allowing the State Board Deputy Director to Interfere with Reclamation Contract Negotiations Should be Removed

For the reasons set forth in the comment letter submitted by CCRB, all provisions in the RDO purporting to delegate authority to the State Board Deputy Director to modify Reclamation's permits if it does not timely achieve water supply contract amendments with Santa Barbara County Water Agency, including demand management measures, must be eliminated. (See RDO, §§ 8.1.2, 8.5, Order, ¶¶ 34, 35.) Reclamation already requires Member Units to engage in significant conservation efforts. Moreover, ID No.1 and the other Cachuma Member Units are already achieving unprecedented levels of conservation, and are fully incentivized to conserve under state law standards, particularly in view of climatic and other conditions affecting the Cachuma Project and other sources of water supply.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 8

VII. Incorporation of the terms of a Future Biological Opinion into the State Board Order is Improper

The RDO improperly includes new language that the terms of any new NMFS Biological Opinion (BiOp) can be incorporated by the State Board ED “upon request of right holder [Reclamation].” (RDO Order, ¶¶ 15, 29.) First, the enforceability of the terms of any future BiOp would need to be evaluated according to standards under state law (e.g., balancing). Also, in responses to comments from NMFS, the State Board has previously acknowledged that incorporation of the terms of any final BiOp into the water rights order is unnecessary. (State Board letter to NFMS, May 27, 2011) (“SWRCB may consider amending Reclamation’s permits requiring compliance with any new or revised Biological Opinion, but Reclamation’s responsibilities with regard to the terms contained in any Biological Opinion are not dependent upon those terms being incorporated into Reclamation’s permits.”)) Furthermore, incorporation of new or additional terms and conditions of a future BiOp into the State Board water rights permits would require a full analysis under CEQA before being considered. Due process and a hearing before the Board also would be required. (CCR, tit. 23, § 780(a): “No action will be taken pursuant to this paragraph unless the board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Sec. 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.”).

VIII. The RDO’s Requirement to Prepare A Passage Feasibility Study Is Inappropriate

ID No.1 joins the comments submitted by CCRB regarding the legal impropriety and lack of need for the Final Order to include a passage feasibility study requirement.⁷ (See RDO, §§ 3.1.2, 3.3, 5.3.2 Order, ¶ 24(a).) Reclamation is not authorized by Congress to prepare such a study. (See ID No.1 December 9, 2016 comment letter, p. 13.) And, as acknowledged in the RDO, a passage feasibility analysis was already conducted in 2000, passage was determined to be virtually infeasible on multiple grounds, and the potential for passage above Bradbury Dam has not changed in the interim.⁸

IX. Downstream Flows Must Be Protected

ID No.1 joins the comments submitted by the Santa Ynez River Water Conservation District regarding the protection of downstream water rights. In particular, the RDO’s addition of a proposed condition that a new instream flow study is to “[e]valuate whether the timing of

⁷ Note that the six Quiota Creek habitat improvements projects referenced in Section 5.3.3.1.3. of the RDO, along with additional passage improvement projects on Quiota Creek, have been completed.

⁸ Pages 128-129 of the RDO add text to include fish and wildlife conservation as an authorized purpose of use for Cachuma supplies. It does not appear that Congress has identified fish and wildlife conservation as one of the authorized purposes of the Cachuma Project.



BEST BEST & KRIEGER 
ATTORNEYS AT LAW

Jeanine Townsend
May 28, 2019
Page 9

releases made pursuant to Water Right Order 89-19 should be revised” (RDO, Order ¶ 24.b(6)) must be deleted.

Conclusion

ID No.1 requests that the State Board adopt Alternative 3C. To the extent Alternative 5C is selected, ID No.1 requests that the modifications and deletions described above be made to render the Final Order more protective of local water supply needs, better balanced, and more legally defensible.

Sincerely,

A handwritten signature in black ink that reads "Steven M. Anderson" with a long horizontal line extending to the right.

Steven M. Anderson
of BEST BEST & KRIEGER LLP

cc: Cachuma Service List

Cachuma Project Evidentiary Hearing

UPDATED SERVICE LIST

(March 26, 2019)

Corrected for typographical errors

The parties whose email addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.

<p>Cachuma Conservation Release Board Mr. Kevin O'Brien Downey Brand LLP 621 Capitol Mall, Floor 18 Sacramento, CA 95814 kobrien@downeybrand.com nbigley@downeybrand.com pcantle@ccrb-board.org</p> <p><i>updated 02/25/2019</i></p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock & Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 ccampbell@bakermanock.com</p> <p><i>updated 07/29/2011</i></p>
<p>Santa Ynez River Water Conservation District, Improvement District No. 1 Mr. Paeter Garcia 3622 Sagunto St. Santa Ynez, CA 93460 pgarcia@syrwd.org</p> <p>Mr. Steve M. Anderson Best Best & Krieger LLP 3390 University Avenue, 5th Floor Riverside, CA 92501 steve.anderson@bbklaw.com</p> <p><i>updated 03/09/2018</i></p>	<p>City of Lompoc Mr. Nicholas A. Jacobs Somach, Simmons & Dunn 500 Capitol Mall Suite 1000 Sacramento CA 95814 njacobs@somachlaw.com</p> <p><i>updated 01/06/2014</i></p>
<p>Santa Ynez River Water Conservation District Mr. Steven M. Torigiani Law Offices of Young Wooldridge, LLP 1800 30th Street, 4th Floor Bakersfield, CA 93301 storigiani@youngwooldridge.com</p> <p><i>updated 02/26/19</i></p>	<p>California Trout, Inc. Ms. Linda Krop Ms. Maggie Hall Ms. Tara Messing Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 lkrop@environmentaldefensecenter.org mhall@environmentaldefensecenter.org tmessing@environmentaldefensecenter.org</p> <p><i>updated 03/08/2018</i></p>

Cachuma Project Evidentiary Hearing

UPDATED SERVICE LIST

(March 26, 2019)

Corrected for typographical errors

The parties whose email addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.

<p>County of Santa Barbara Mr. Michael C. Ghizzoni, County Counsel Ms. Johannah Hartley, Deputy 105 E. Anapamu Street Santa Barbara, CA 93101 jhartley@co.santa-barbara.ca.us</p> <p><i>updated 03/09/2018</i></p>	<p>U.S Bureau of Reclamation Ms. Amy Aufdemberge 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 Fax (916) 978-5694 AMY.AUFDEMBERGE@sol.doi.gov</p> <p><i>updated 08/12/16</i></p>
<p>California Department of Fish and Wildlife Ms. Nancee Murray Senior Staff Counsel 1416 Ninth Street, 12th Floor Sacramento, CA 95814 Nancee.Murray@wildlife.ca.gov</p> <p><i>updated 08/15/2016</i></p>	<p>Bureau of Reclamation, Mid-Pacific Region Mr. Michael Jackson Area Manager South-Central California Area Office 1243 N Street Fresno, CA 93721-1813 mjackson@usbr.gov</p>
<p>Montecito Water District Mr. Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 red@eslawfirm.com</p>	<p>Santa Barbara County CEO's Office Ms. Terri Maus-Nisich, Assistant CEO 105 E. Anapuma Street, 4th Floor Santa Barbara, CA 93101 tmaus@co.santa-barbara.ca.us</p> <p><i>updated 09/07/2016</i></p>

The parties listed below did not agree to accept electronic service, pursuant to the rules specified by this hearing notice.

<p>NOAA Office of General Counsel Southwest Region Mr. Dan Hytrek 501 West Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 Dan.Hytrek@noaa.gov</p> <p><i>updated 05/13/2011</i></p>	
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