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October 17, 2003

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By E-Mail and U.S. Mail

Andrew Fecko
Environmental Scientist
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, CA 95814
P.O. Box 100
Sacramento, CA 95812-0100

Re: Cachuma Project Hearing: Policy Statement

Dear Mr. Fecko:

We represent Nancy Crawford-Hall, the owner and operator of the San Lucas Ranch in Santa Barbara County, California. The San Lucas Ranch is adjacent to Lake Cachuma and the Bradbury Dam.

Enclosed for your and the State Water Resource Control Board's review are copies of materials submitted on behalf of Ms. Crawford-Hall and San Lucas Ranch to the Cachuma Operations and Maintenance Board ("COMB") and the U.S. Bureau of Reclamation ("Bureau"), in response to COMB's and the Bureau's joint EIR/EIS for the Lower Santa Ynez River Fish Management Plan and Biological Opinion for the Cachuma Project. These materials are relevant to the Board's Cachuma Project Hearing because they raise questions about certain actions proposed by COMB and the Board in connection with their operation of the Cachuma Project, which actions are allegedly intended to protect the public trust resources, including endangered steelhead trout, in the Santa Ynez River watershed area.

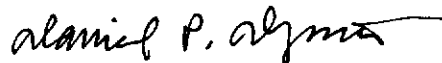
As is explained in these materials, there is no scientific or evidentiary basis for COMB's and the Bureau's assertion that their actions will benefit endangered steelhead. To the contrary, the best available science and all the evidence in the record before COMB and the Bureau demonstrate that their proposals will have severe, adverse effects

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on endangered steelhead. We intend to prepare and submit a more detailed policy statement before the close of the Hearings. However, because the protection and preservation of public trust resources in the Santa Ynez River watershed area, including endangered steelhead trout, are within the Board's jurisdiction, and because the Board has the authority to require COMB and the Bureau to modify their proposals if necessary to protect these public trust resources, we wanted the Board to have the benefit of reviewing these materials before its Hearings begin.

If you have any questions about these materials or would like to discuss their contents between now and October 29, 2003, please contact Andrew B. Sabey of our firm. Mr. Sabey can be reached at the above address, or by calling (925) 295-3300. His e-mail address is ASabey@mof.com. After October 29, 2003, please contact me. Thank you for your consideration of these materials. We hope they are helpful to you and the Board, and we will provide additional details before the close of the Hearings.

Very truly yours,



Daniel P. Doporto

Enclosure

cc: Nancy Crawford-Hall (w/o enclosure)
Andrew B. Sabey (w/o enclosure)
Dr. Alice A. Rich (w/o enclosure)

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U.S. Bureau of Reclamation
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Re: Draft Program and Project Specific Environmental Impact
Report/Environmental Impact Statement
Lower Santa Ynez River Fish Management Plan and Cachuma
Project Biological Opinion for Southern Steelhead Trout

Dear Ms. Rees and Mr. Young:

On behalf of Nancy Crawford-Hall and the San Lucas Ranch, we have reviewed the Draft Program and Project Specific Environmental Impact Report/Environmental Impact Statement (the "draft EIR/EIS") for the Lower Santa Ynez River Fish Management Plan and Cachuma Project Biological Opinion for Southern Steelhead Trout (collectively, the "Project"). Pursuant to the Notice of Availability published by the Cachuma Operation and Maintenance Board ("COMB") and the U.S. Bureau of Reclamation ("Bureau") (jointly, the "Lead Agencies"), we submit this letter to notify COMB and the Bureau that the draft EIR/EIS does not comply with the requirements of the California Environmental Quality Act ("CEQA") or the National Environmental Policy Act ("NEPA").

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Both CEQA and NEPA require that the draft EIR/EIS provide sufficiently detailed information about the environmental setting for the Project and the Project itself, and sufficiently detailed analysis of the potential environmental impacts of the Project, to permit informed public participation and informed decision-making by the Lead Agencies. See 14 Cal. Code Regs. § 15151; *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692 (1990); *Sierra Club v. United State Army Corps of Engineers*, 701 F. 2d 1011 (1983). In order to satisfy the requirements of CEQA and NEPA, the draft EIR/EIS must provide enough information to allow decision-makers and the general public to fully understand the scope and environmental implications of the Project, the proposed mitigation measures, and the alternatives. *Laurel Heights Improvement Ass'n v. Regents of the Univ. of California*, 6 Cal. 4th 1112 (1993); *Sierra Club*, 701 F. 2d 1011. The draft EIR/EIS does not satisfy these basic legal requirements because, among other things, it: (1) does not include a complete, accurate and stable project description; (2) fails to adequately analyze a sufficient range of alternatives; (3) fails to adequately analyze the Project's impacts on the environment, including biological and land use impacts; and (4) improperly defers mitigation measures.

I. The draft EIR/EIS's Project Description is Inadequate and is Incapable of Accurate Determination at This Time

Under both CEQA and NEPA, the draft EIR/EIS must include a stable and consistent project description that includes foreseeable modifications to the proposed project. See, e.g., *Laurel Heights Improvement Ass'n v. Regents of the Univ. of California*, 47 Cal. 3d 376 (1988); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F. 2d 79 (1975). The draft EIR/EIS does not satisfy this fundamental requirement because the actions described as the Project are not within the control of the Lead Agencies and are, at this very time, being reviewed by other state and federal agencies with jurisdiction over those actions to determine whether they should or must be modified to comply with applicable laws. Based on the current status of those reviews and on recent judicial decisions, it is reasonably foreseeable, if not likely that the "Project" will undergo significant changes in the immediate future. Under the circumstances, the Project description in the draft EIR/EIS is inherently unstable and incomplete. The draft EIR/EIS fails to adequately disclose the fact that the actions comprising the Project are not within the control of the Lead Agencies, or that there is a substantial likelihood that those actions will be modified in the immediate future.

The draft EIR/EIS describes the Project as a collection of 28 separate actions, most of which the Lead Agencies are required to carry out under mandates by other state and federal agencies, primarily the State Water Resources Control Board ("Board") and the National Marine Fisheries Service ("NMFS"). For example, the seven actions

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described in the draft EIR/EIS as "releases for fish" are required by both the Board, under the terms of its Water Rights Order 94-5, and the NMFS, under its 2000 Biological Opinion for the Cachuma Project (DEIR/DEIS at 2-1 through 2-2 and Table 2-1). However, both the timing and amount of those releases are within the jurisdiction of the Board, not COMB or the Bureau.

There is a substantial likelihood that the Board's ongoing Cachuma Hearings will result in modifications to the flow levels in the Santa Ynez River, requiring changes in the "fish release" elements of the Project described in the draft EIR/EIS. In November 2001, in responding to the Lead Agencies' Notice of Preparation ("NOP") for the draft EIR/EIS, the Board urged the Lead Agencies to defer their preparation of the draft EIR/EIS to allow the Board to complete its Cachuma Hearings:

If COMB and the USBR prepare the proposed EIR/EIS before the SWRCB certifies a final EIR [for the Cachuma Hearings], the EIR/EIS is likely to be inadequate because it fails to adequately address the flow requirements that will apply, or fails to address some of the fish enhancement measures to be implemented, unless the EIR/EIS is modified to incorporate any revisions made in the SWRCB's EIR.

See Board's Response to NOP (DEIR/DEIS, Appendix D). Nonetheless, the Lead Agencies inexplicably ignored the Board's advice and proceeded with its draft EIR/EIS without considering the possibility that they will be required to modify their "Project."

In its response to the NOP, the Board also advised the Lead Agencies that its ongoing Cachuma Hearings would extend to a wide range of measures to protect public trust resources in the Santa Ynez River watershed area, which resources include endangered steelhead trout and other special-status species. *Id.* There, the Board specifically notified the Lead Agencies that, in addition to revised flow release requirements, it would consider fish enhancement measures "other than those identified in the Biological Opinion." *Id.* In the Cachuma Hearings, the Board has indicated to the parties in the Cachuma Hearings that it will take evidence on and consider the possibility of restoring access for steelhead to habitat on the upper Santa Ynez River, above the Bradbury Dam. See Attachment A (August 13, 2003 Ruling of Board's Hearing Officer for Cachuma Hearings). Several parties have notified the Board that they intend to present evidence and testimony on the feasibility and desirability of restoring access for steelhead to habitat above the Dam, including the California Department of Fish And Game and the NMFS, which authored the BO that serves as the basis for the Project. See Attachment B (NMFS's Notice of Intent to Appear at Cachuma Project Hearings) and C (Dept. of Fish And Game's Notice of Intent to Appear at Cachuma Project Hearings). Prior to the preparation of the draft EIR/EIS, the

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Lead Agencies specifically rejected the possibility of creating steelhead access to the upper Santa Ynez River watershed area. As a result, the draft EIR/EIS does not adequately consider or evaluate measures available to restore access for steelhead to the upper watershed area as an alternative to the habitat enhancement elements of the proposed Project.

Similarly, there are approximately 15 'habitat enhancement' actions included in the Project which are based on the requirements in the NMFS's Biological Opinion. DEIR/DEIS, Table 2-1. The purpose of the Biological Opinion, and one of the stated purposes of the Project itself, is to comply with the requirements of the federal Endangered Species Act ("ESA") with respect to endangered steelhead. DEIR/DEIS at 1-2. The primary basis for preparation of the Biological Opinion was the NMFS's listing of steelhead as endangered under the ESA, and its designation of the lower Santa Ynez River watershed area as critical habitat for steelhead. DEIR/DEIS at 1-4. However, both the listing of steelhead and the critical habitat designation are undergoing changes which are reasonably likely to require modifications to the Project.

The draft EIR/EIS acknowledges, parenthetically and without explanation, that the NMFS's critical habitat designation for steelhead has been set aside. DEIR/DEIS at 1-4. However, the draft EIR/EIS does not acknowledge, or even mention, that the NMFS is in the process of developing a new critical habitat designation for steelhead, which designation must be published no later than June 2004. See Attachment D (excerpts¹ from Consent Decree and Stipulated Order, filed September 15, 2003, *Pacific Coast Federation of Fisherman's Ass'n v. National Marine Fisheries Service*, U.S. District Court for the District of Columbia, Case No. 03-1833), ¶ 3.

The draft EIR/EIS also fails to acknowledge that, since December 2002, the NMFS has been re-evaluating the status of endangered steelhead with the goal of taking action on its listing as an endangered species in April 2004. See Attachments E (NMFS's Notice of Endangered and Threatened Species Status Review, 67 Fed. Reg. 79898) and F (Defendants' Motion to Dismiss, filed April 21, 2003, *Modesto Irrigation District v. Evans*, United States District Court for the Eastern District of California, Case No. CIV-F-02-6553) at 7:24. According to the NMFS, the changes to existing steelhead listing will be "meaningfully changed." See Attachment G (Memorandum and Order Re: Motion to Dismiss, *Modesto Irrigation District v. Evans*, *supra*) at 19:16.

¹ To reduce the volume of paper submitted with these comments, we have provided excerpts of most attached documents. We are happy to provide complete copies of all attachments, upon request.

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Throughout the time during which the Lead Agencies have been preparing their draft EIR/EIS, numerous environmental organizations and public agencies in California have filed lawsuits against the NMFS challenging the NMFS's listing of steelhead as an endangered species in California. See Attachments H (Complaint for Declaratory and Injunctive Relief, *Modesto Irrigation District v. Evans, supra*) and I (Complaint for Declaratory and Injunctive Relief, *Environmental Defense Center, Inc. v. Evans, U.S. District Court for the Central District of California, Case No. CV-02-9607*). These lawsuits, together with the NMFS's current status review of endangered steelhead, raise the distinct possibility that the NMFS's listing of steelhead as an endangered species in California may be set aside or vacated. Such action could release the Lead Agencies from the requirements of the 2000 Biological Opinion, including the requirements to implement the habitat enhancement measures included in the Project.

These ongoing proceedings at the Board and the NMFS will, in all likelihood, require substantial changes to the scope and elements of the Project described in the draft EIR/EIS. Under both CEQA and NEPA, a project description must be stable and consistent, and include all reasonably foreseeable modifications to the proposed project. The draft EIR/EIS wholly ignores the potential changes to the Project that may be required as a result of these ongoing proceedings. Because the actions that make up the Project are not within the control of the Lead Agencies, and because the state and federal agencies with jurisdiction and control over those actions are even now in the process of re-evaluating those actions, it is impossible for the Lead Agencies to ensure that the Project that they are ultimately permitted to implement will be the same Project that is described in the draft EIR/EIS. Consequently, the Project description in the draft EIR/EIS is incapable of accurate determination at this time and is inadequate under CEQA and NEPA.

II. The draft EIR/EIS Fails to Analyze a Sufficient Range of Alternatives

The Lead Agencies' failure to fully acknowledge the implications of the related, ongoing Board and NMFS proceedings also fatally undermines the draft EIR/EIS's alternatives analysis, for two reasons. First, the Lead Agencies' have admitted that the Board may require them to implement steelhead habitat enhancement actions other than those included in the Project. One of the measures that the Board is considering in its ongoing Cachuma Hearings is creating steelhead access to the upper watershed area. See Attachments A, B and C. The Board has it made abundantly clear, over the objections of COMB's member units, that it considers the Lead Agencies' focus on the lower watershed area for purposes of enhancing steelhead habitat to be arbitrary and inappropriate. Attachment A. Moreover, the Board is not bound by the Lead Agencies'

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questionable assertion that it is 'infeasible' to create access to the upper watershed area. Consequently, there is a reasonable and very real possibility that the Board will require the Lead Agencies to create such access for steelhead as a condition of the Bureau's permit to operate the Cachuma Project. In light of this reasonable possibility, it was arbitrary and capricious for the Lead Agencies to refuse to consider project alternatives involving the creation of access for steelhead to the upper watershed area.

Second, it was improper for the Lead Agencies to reject alternatives involving steelhead access to the upper watershed area before preparing the draft EIR/EIS, and based solely on the studies in the Fish Management Plan ("FMP"). Both CEQA and NEPA require agencies to rigorously explore and evaluate all reasonable alternatives that would fulfill the purposes and needs of the proposed project. Here, a primary purpose of the Project is to improve habitat for steelhead. DEIR/DEIS at 1-2. Every study of steelhead in the Santa Ynez River watershed area that we are aware of--including the Fish Management Plan and this draft EIR/EIS--has concluded that the upper watershed area provides more and higher quality habitat than the lower watershed area. Despite this overwhelming scientific consensus, the Lead Agencies elected, well in advance of the preparation of the draft EIR/EIS, not to include in its alternatives analysis an alternative that would provide steelhead with access to the upper watershed area, because it deemed such an alternative "infeasible." In effect, the Lead Agencies concluded that they need not consider alternatives that were not deemed feasible in the FMP. This reasoning puts the cart before the horse. The FMP is an element of the Project that is under consideration in the draft EIR/EIS. The Lead Agencies cannot limit the range of alternatives to be considered in the draft EIR/EIS to those included in the Project itself. In doing so, the Lead Agencies have attempted to limit the range of alternatives to the Project and the 'no project' alternative.

Moreover, the findings and analysis in the FMP focused primarily on fishery issues and did not include an adequate analysis of non-fishery impacts. Under both CEQA and NEPA, the draft EIR/EIS must evaluate both the fishery and non-fishery impacts of the Project. Because the focus of the draft EIR/EIS is much broader than the focus of the FMP, the range of alternatives needed to allow the decisionmakers to make an informed decision about the project is correspondingly broader. In other words, the Lead Agencies cannot rely solely on the feasibility determinations and alternatives analysis developed in the FMP to comply with their CEQA and NEPA obligations.

III. The draft EIR/EIS Fails Adequately to Analyze the Project's Environmental Impacts

The draft EIR/EIS fails to identify or analyze the Project's potential environmental impacts in the following areas.

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A. Impacts on Water Supply, Cattle Grazing and Mineral Resources on San Lucas Ranch

The draft EIR/EIS's conclusion that the Hilton Creek modification elements will not cause any potentially significant impacts on the water supply and cattle grazing and mining activities on San Lucas Ranch is not supported by, and in fact, directly conflicts with the relevant evidence contained and described in the draft EIR/EIS.

The draft EIR/EIS acknowledges that the Bee Rock Quarry is located within the upper Hilton Creek watershed on an unnamed tributary immediately upstream of Hilton Creek. DEIR/DEIS at 7-9. In fact, Ms. Crawford-Hall has previously and repeatedly advised COMB that the Quarry is the only source of high quality limestone within 300 miles of Santa Barbara, and the only source of rip-rap within 60 to 70 miles. See Attachment J (Cal. Dept. of Conservation, Active Mineral Producers in California, 1999). As such, the Quarry is a unique and valuable mineral resource that benefits all the residents of southern California by providing low-priced aggregate and rip-rap for, among other things, street maintenance and flood control. Aside from mere existence in the Hilton Creek watershed, none of this information about the Quarry appears to have been included in the draft EIR/EIS.

The draft EIR/EIS also acknowledges that San Lucas Ranch conducts cattle operations within the Hilton Creek watershed, and that Ms. Crawford-Hall diverts water from Hilton Creek for use on the Ranch pursuant to water rights permits issued by the State Water Resources Control Board. The draft EIR/EIS further acknowledges that the presence of steelhead on upper Hilton Creek could have significant adverse impacts on existing land uses on San Lucas Ranch, requiring the termination or modification of grazing and mining activities. DEIR/DEIS at 7-10.

In the same context, the draft EIR/EIS repeatedly states that, as a result of the Project, "it is expected that there will be frequent and abundant steelhead" on upper Hilton Creek. *Id.* at 7-9. Remarkably, however, the draft EIR/EIS then concludes that there will be no significant impacts on land use activities on the Ranch, and therefore no mitigation measures are required, because steelhead will 'rarely' and only 'periodically' migrate to upper Hilton Creek:

The potential periodic occurrence of steelhead on upper Hilton Creek would not, in and of itself, cause any effects on grazing in the watershed, the operations of the gravel mine, or the continued diversion of the creek. However, if steelhead were to spawn and rear on the upper creek on more than a rare basis, there is a potential for land use activities in the watershed area to be affected.

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DEIR/DEIS at 7-10. The draft EIR/EIS's conclusion that there will be no impacts on land uses on San Lucas Ranch directly conflicts with its multiple statements that "there will be frequent and abundant steelhead on upper Hilton Creek," and that steelhead migration to upper Hilton Creek on "more than a rare basis" could require the termination or modification of grazing and mining activities.

There is no explanation or evidentiary support in the draft EIR/EIS for the Lead Agencies' assertion that steelhead will only 'rarely' or 'periodically' migrate to upper Hilton Creek. To the contrary, the Lead Agencies repeatedly insist that "there will be frequent and abundant steelhead on upper Hilton Creek." *Id.* at 7-9. Thus, there is no substantial evidence in the record to support the Lead Agencies' conclusion that there will be no potentially significant impacts on land uses on San Lucas Ranch (or on other land uses in the Hilton Creek and Santa Ynez River watershed areas).

By the same token, there is no substantial evidence in the record for the Lead Agencies' conclusion that the Project would not "conflict with existing zoning for agricultural use" or "[i]nvolve other changes in the existing environment which, due to their location or nature, could result in conversion of farmland to non-agricultural use." By asserting that (a) there will be frequent migrations of steelhead to upper Hilton Creek, and (b) that frequent steelhead migration to upper Hilton Creek could require the San Lucas Ranch to curtail its cattle grazing activities, the draft EIR/EIS demonstrates that there is a clear conflict between the Project and the existing agricultural zoning which could force the conversion of San Lucas Ranch lands to non-agricultural use. There is no explanation or evidentiary support in the draft EIR/EIS for the Lead Agencies' conclusion to the contrary.

Just two years ago, in October 2001, the Santa Barbara Superior Court issued a writ of mandate setting aside COMB's mitigated negative declaration for these same Hilton Creek habitat modification projects because, among other things, "COMB failed to investigate or properly evaluate potential impacts to agriculture, mineral resources, water supply, land uses, or the impact of the overall Hilton Creek project on the endangered species itself." Attachment K ¶ 2. Although the draft EIR/EIS purports to constitute "project-level" environmental review for the Hilton Creek projects under both CEQA and NEPA, it contains no more analysis of these impacts than was contained in the mitigated negative declaration that was set aside by the court. As a result, it is, on its face, inadequate under CEQA and NEPA.

B. Endangered Species

Concurrent with these comments, Ms. Crawford-Hall is submitting the comments of fishery biologist Dr. Alice A. Rich of A. A. Rich & Associates. In her

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comments, Dr. Rich details numerous Project impacts on endangered steelhead that are not identified or adequately discussed in the draft EIR/EIS.

In addition, the draft EIR/EIS fails to adequately evaluate the Project's impacts on endangered steelhead and other protected species should one or more speculative elements of the Project not be implemented. All of the conclusions in the draft EIR/EIS regarding the Project's impacts and the effect of the proposed mitigation measures are based on the assumption that all of the Project's 28 individual elements will be fully implemented. This assumption is not warranted. The draft EIR/EIS repeatedly emphasizes the conditional nature of virtually all of its individual elements, based on the primary jurisdiction of the State Water Resources Control Board over minimum releases, the NMFS's regulatory authority over endangered species, the need to obtain voluntary cooperation from numerous landowners, and the uncertainty of funding for a majority of the habitat modification proposals. *See, e.g.*, DEIR/DEIS Chapters 1 and 2, and Table 2-1. Thus, it is clear from the Project description that many of the Project elements may never be implemented, or at least may not be implemented within a reasonable period of time. *Id.*

By failing to consider the possibility that less than all 28 elements of the Project would be implemented together, the draft EIR/EIS fails to consider or identify numerous potentially significant Project impacts. For example, the Lead Agencies' conclusion that the Project will not cause any adverse impacts on steelhead or other endangered species is based on two assumptions: (a) there will be increased releases of water from Lake Cachuma to maintain minimum flow levels in the lower Santa Ynez River, and (b) all of the steelhead habitat modification projects planned for the mainstem and tributaries of the lower Santa Ynez River will be fully implemented. The primary purpose of maintaining minimum flow levels in the River is to increase migration opportunities for steelhead and improve access to spawning and rearing areas in the mainstem and tributaries of the River below Bradbury Dam. The primary purpose of the habitat modification projects is to create, expand and improve the spawning and rearing grounds that will be the target of the increased migration. These elements of the Project are intended to work together to increase the likelihood of survival and recovery of endangered steelhead. DEIR/DEIS at 2-2.

However, eleven of the fifteen habitat modification projects described in the draft EIR/EIS cannot not be implemented without the voluntary cooperation of private landowners. DEIR/DEIS, Table 2-1. Moreover, it appears from the draft EIR/EIS that only one of the relevant landowners has indicated that it will cooperate to implement the Project. *Id.* In analyzing the Project's potential impacts on steelhead, and concluding that it will not have any significant adverse impacts, the draft EIR/EIS fails to account

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for the possibility that some or all of the habitat modification projects will not be implemented. There is no analysis in the draft EIR/EIS of the impacts of increasing flows in the River without simultaneously creating new spawning and rearing habitat areas and improving and increasing the existing areas. The lack of existing, high quality spawning and rearing areas in the lower River and tributaries is documented in the Fish Management Plan, which was, in part, prepared to demonstrate the need for the habitat modifications described in the draft EIR/EIS.

This omission also creates an analytical gap in the reasoning leading to the Lead Agencies' conclusion that the Project will not have any significant adverse impacts on steelhead. This analytical gap in the Lead Agencies' environmental analysis renders the draft EIR/EIS defective.

IV. The draft EIR/EIS Improperly Defers Mitigation Measures

According to the draft EIR/EIS, the Project's proposal to surcharge Lake Cachuma by 3.0 feet would submerge and result in the loss of the numerous recreational and utility facilities at and around Lake Cachuma County Park, including a water treatment plant, two sewer lift stations, the parking lot, the service road, the marina, the boat launch ramp, a foot bridge, two shops at the marina, a picnic area and several trails. The draft EIR/EIS admits that the loss of these facilities would be a significant, adverse impact, but summarily concludes that this significant impact will be adequately mitigated by "relocating the facilities in accordance with the requirements of the Recreation Agreement with the Bureau of Reclamation." At the same time, however, the draft EIR/EIS admits that "the timing of the facility relocation is unknown, and full funding has not been secured to date."

According to the draft EIR/EIS, the Recreation Agreement expired in January 2003, but was extended for two years to provide time to the County and the Bureau to negotiate a new, long-term contract. Thus, the Recreation Agreement is now set to expire in 2005. Because there is currently no schedule to carry out the relocation of the lost facilities, there is no assurance that the relocation will occur before the expiration of the Recreation Agreement. Because there is no identified funding source for the relocation, there is no assurance that the relocation will ever occur. If COMB and the Bureau elect to proceed with the Project in the face of these uncertainties, they would be, in effect, improperly deferring the development of mitigation for this admittedly significant impact.

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V. There is No Substantial Evidence in the Record or the draft EIR/EIS for the Lead Agencies' Conclusions Regarding the Suitability of Hilton Creek as Habitat for Endangered Steelhead.

In addition to this letter, Ms. Crawford-Hall and San Lucas Ranch have submitted comments prepared by fishery biologist Dr. Alice A. Rich regarding the Project's proposals to modify Hilton Creek in an effort to create suitable steelhead habitat on Lower Hilton Creek, on the Bureau's property, and to create access for steelhead to Upper Hilton Creek, on San Lucas Ranch. Dr. Rich has determined, based on her extensive studies of both Lower and Upper Hilton Creek, that the net effect of the Project's proposed modifications to Hilton Creek will be extremely harmful to steelhead. Dr. Rich has also concluded that there is no substantial evidence in the draft EIR/EIS, or in the FMP or the BO, to support the Lead Agencies' assertions that Hilton Creek has sufficient suitable habitat to support the migration of steelhead. To the contrary, Dr. Rich's studies confirm that numerous factors make Hilton Creek entirely unsuitable as a candidate for the steelhead habitat enhancement proposals included in the Project.

First and foremost among these factors is the chronic lack of water in Hilton Creek. Study after study, including the FMP and the BO, have concluded that Hilton Creek is, at best, an "intermittent" creek that goes dry even during above-average rainfall years. *See, e.g.,* DEIR/DEIS at 2-22. That Hilton Creek lacks sufficient water to support steelhead is demonstrated by the Lead Agencies' creation of a "supplemental watering system" on Lower Hilton Creek to allow steelhead to migrate from the mainstem of the Santa Ynez River to Lower Hilton Creek. *See* DEIR/DEIS at 2-22 through 2-23. Although the supplemental watering system will not affect conditions or increase flows on Upper Hilton Creek, the Lead Agencies nonetheless baselessly assert that the improvements on Lower Hilton Creek will result in "frequent and abundant steelhead" on Upper Hilton Creek. DEIR/DEIS at 7-9. The DEIR/DEIS does not even attempt to explain, however, how steelhead will survive on Upper Hilton Creek, which is not affected by the supplemental watering system, given the admitted lack of water. As Dr. Rich demonstrates in her comment letter, removing natural passage barriers and creating artificial flows on Lower Hilton Creek to allow steelhead to migrate to Upper Hilton Creek will lead only to their deaths by desiccation or predation by mammals. In fact, Dr. Rich has concluded that conditions on Upper Hilton Creek are so hostile to steelhead that artificially enhancing flows and removing the existing natural passage barriers on Lower Hilton Creek to seduce migration to Upper Hilton Creek is "tantamount to trout murder." There is no explanation or discussion in the DEIR/DEIS regarding what effect the admitted lack of water on Upper Hilton Creek will have on

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steelhead that are allowed, through the Project's modifications on Lower Hilton Creek, to migrate to Upper Hilton Creek.

A second factor contributing to Hilton Creek's hostile steelhead habitat identified by Dr. Rich is the lack of suitable substrate in the creekbed for spawning. Through extensive sampling of the creekbed, Dr. Rich demonstrates that Upper Hilton Creek lacks suitable gravel substrate to allow for successful spawning. The DEIR/DEIS contains no substantial evidence or data regarding substrate conditions on Upper Hilton Creek. Similarly, Dr. Rich's studies demonstrate that the water temperature data in the DEIR/DEIS for Hilton Creek is flawed, and that water temperatures on Hilton Creek are potentially lethal to steelhead and too high to promote successful spawning and rearing.

Although the Lead Agencies assert that artificially supplementing the flows and removing the natural passage barriers on Lower Hilton Creek will result in "frequent and abundant steelhead" on Upper Hilton Creek, DEIR/DEIS at 7-9, this conclusion is not supported by substantial evidence in the record and is contrary to the best available science on steelhead migration and accepted hydro engineering principles. To evaluate the effects of the passage barriers on Hilton Creek, Ms. Crawford-Hall retained the services of fishery biologist and bioengineer Wayne Daley of Daley Design of Bainbridge Island, Washington. Mr. Daley conducted a site survey of portions of Hilton Creek and the Santa Ynez River, and performed an in-depth review of the literature regarding fish passage issues in both the Hilton Creek and Santa Ynez River drainages. His literature review also included materials in the administrative record for *Crawford-Hall v. Cachuma Operations and Maintenance Board*, Santa Barbara Superior Court, Case No. 01045423, which includes the FMP and BO.

Based on his site survey and literature review, and on his own calculations and analysis, Mr. Daley reached several conclusions regarding the suitability of Hilton Creek as steelhead habitat. Using the U.S. Geological Survey's topography map for the Santa Ynez drainage, Mr. Daley calculated the stream gradients for Hilton Creek to be between 6.9% and 13.3% between the mainstem of the Santa Ynez River and approximately one mile above Highway 154. According to research developed by the U.S. Army Corps of Engineers,² the availability of suitable spawning habitat for steelhead becomes restricted when gradient levels exceed 2%. Based on the topographic conditions on Hilton Creek and this existing research, Mr. Daley concluded that there is a limited probability that there is suitable spawning habitat at any point on Hilton Creek.

² Bell, Fisheries Handbook of Engineering Requirements and Biological Criteria. Fish Passage Development and Evaluation Program. Corps of Engineers, North Pacific Division, Portland, Oregon (1989).

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Ms. Kate Rees
Mr. David Young
September 30, 2003
Page Thirteen

Mr. Daley also specifically identified several impassable barriers on Lower and Upper Hilton Creek, and concluded that steelhead would be probably be unable to navigate the "the continuous presence of additional or difficult or impassable barriers to upstream migration above State Highway 154 and the reach between the highway and the section that is being watered by the Bureau." Based on research and studies by Robert Aaserude and Jon Osborn of Albrook Hydraulics Laboratory,³ Mr. Daley calculated that an adult steelhead in Hilton Creek could achieve a maximum leap of 7.1 feet under perfect conditions (taking into account, among other things, fish size, water temperature, water velocity, streambed gradient). During his site visits, Mr. Daley measured many passage barriers up to 10 feet with no resting areas, and concluded that a healthy adult steelhead that was able to migrate to Upper Hilton Creek "will be so compromised that there will be little or no energy remaining for the fish to spawn."

Mr. Daley also concluded that the Lead Agencies' installation of the supplemental watering system on Lower Hilton Creek created physical habitat "that did not exist prior to this diversion." Although he visited Upper Hilton Creek just a few days after a major storm event, there was no water in the creek:

"If steelhead or very large rainbow trout could reach the area above the Bureau diversion during a period of heavy rainfall, these fish would have no water to survive in for the duration of their juvenile life stage which can last up to 2 years prior to migration to the ocean. If the adults were successful in finding a small area to spawn, there is little chance of survival of the eggs or the swim-up fry. The eggs might survive in the moist gravel. However, as soon as they hatched into yolk sac fry there would be no water in the gravel for this fish to survive."

Mr. Daley's findings and conclusions regarding the suitability of Hilton Creek for steelhead are consistent with the findings and conclusions described in Dr. Rich's comment letter, submitted concurrently with this letter.

³ Aaserude and Osborn, New Concepts in Fish Ladder Design, Part 2 of 4. Bonneville Power Administration Project No. 82-14 (1985).

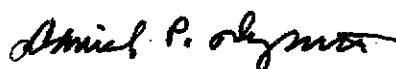
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Ms. Kate Rees
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Page Fourteen

VI. Conclusion

We appreciate this opportunity to provide comments on the draft EIR/EIS. We would be pleased to provide the Lead Agencies with further information and support for the comments set forth above, upon request. Thank you for your consideration.

Very truly yours,



Daniel P. Doport

cc: Andrew B. Sabey
Nancy Crawford-Hall
Dr. Alice A. Rich
Steven E. Kirby

ATTACHMENT A



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Executive Office

1001 I Street, 25th Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5615 • FAX (916) 341-5621 • www.swrcb.ca.gov



Gray Davis
Governor

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.swrcb.ca.gov.

AUG 13 2003

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AUG 14 2003

PRISON - FOERSTER

To: Enclosed Cachuma Hearing
Service List

CACHUMA PROJECT HEARING – APPLICATIONS 11331 AND 11332

Enclosed please find a notice of field orientation tour and supplemental notice of Phase 2 of the Cachuma Project hearing. Please review these materials carefully, as they contain important information concerning the upcoming hearing. The enclosed notice addresses most of the procedural issues raised at the pre-hearing conference held on May 13, 2003. This letter addresses two outstanding issues concerning the scope of Phase 2 that were raised at the pre-hearing conference.

The first issue is whether the scope of the hearing should be changed in light of the settlement agreement recently reached by the Cachuma Conservation Release Board, Santa Ynez River Water Conservation District (SYRWCD), Santa Ynez River Water Conservation District, Improvement District No. 1 (SYRWCD, ID#1), and the City of Lompoc. At the pre-hearing conference, parties to the agreement and the U.S. Bureau of Reclamation (Reclamation) suggested that the agreement resolves key hearing issues 4a, 4b, 5a, 5b, 6a, and 6b, which concern the releases necessary to satisfy downstream water rights, and whether to approve the change petitions filed by Reclamation.

At the present time, however, resolution of these issues is not final because they are related to the unresolved issue of the releases necessary to protect public trust resources. The settlement agreement is predicated on the assumption that the terms of the Biological Opinion issued by the National Marine Fisheries Service (NOAA Fisheries) are adequate to protect public trust resources. The agreement specifies procedures for conjunctive operation of the Cachuma Project so that, a certain percentage of the time, releases from the Above Narrows Account (ANA) for the benefit of SYRWCD also serve to meet the target rearing flows required by the Biological Opinion.

Key provisions of the settlement agreement are not effective, and the parties may terminate the agreement, unless the State Water Resources Control Board (SWRCB) adopts an order in this proceeding that makes certain technical amendments to the provisions governing the ANA, without material change. The agreement may not be effective and may be terminated if the SWRCB modifies Reclamation's permits in order to protect public trust resources in a manner that is different from the modifications advocated by the parties to the agreement. Accordingly, the key hearing issues concerning the releases necessary to satisfy downstream water rights and

California Environmental Protection Agency



AUG 13 2003

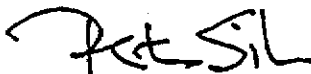
whether to approve Reclamation's change petitions remain within the scope of the hearing. Although the key hearing issues have been retained in the enclosed supplemental notice, they have been modified slightly in recognition of the fact that a settlement agreement has been reached.

The second outstanding issue concerns my May 29, 2003 ruling that participants in Phase 2 will be allowed to present evidence on whether Reclamation's permits should be modified to address any impacts of Cachuma Project operations to public trust resources above Bradbury Dam. The Cachuma Member Units have requested reconsideration of my ruling. SYRWCD, ID#1 joins in this request; NOAA Fisheries and California Trout, Inc. oppose it. The Member Units argue that due process calls for reconsideration because the SWRCB's past rulings, reservation of jurisdiction over Reclamation's permits, and authority to protect public trust resources are "oriented" downstream of Bradbury Dam.

The request for reconsideration of my previous ruling is denied. The fact that SWRCB Order WR 94-5 and other past SWRCB rulings focused on public trust resources downstream of Bradbury Dam does not preclude the SWRCB from considering measures to protect public trust resources above the dam, provided that the SWRCB provides parties who could be affected with adequate notice and any action taken is consistent with the SWRCB's reserved jurisdiction or continuing authority. As described in my May 29 ruling, the September 25, 2000 hearing notice defines the hearing issues broadly and encompasses consideration of measures necessary to protect public trust resources above the dam. The Member Units and other parties may submit legal argument concerning the scope of the SWRCB's reserved jurisdiction and public trust authority in their closing briefs. Similarly, the Member Units may present evidence and argument during the hearing in support of their position that effective passage for steelhead requires further study.

If you have any questions about this ruling, please contact Dana Differding, Staff Counsel, at (916) 341-5188.

Sincerely,



Peter S. Silva
Hearing Officer

Enclosures

cc: See next page

California Environmental Protection Agency



ATTACHMENT B



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

Office of General Counsel
Southwest Region
501 W. Ocean Boulevard, Suite 4470
Long Beach, California 90802
(562) 980-4080
(562) 980-4084 (fax)

September 9, 2003

RECEIVED

SEP 11 2003

HARRISON & FOERSTER

VIA FedEx

Ms. Katherine Mrowka
Mr. Andrew Fecko
Division of Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95812-2000

Re: Phase 2, Cachuma Project Hearing - Applications 11331 and 11332

Dear Ms. Mrowka and Mr. Fecko:

Enclosed is a revised Notice of Intent to Appear with a list of witnesses who will testify on behalf of NOAA Fisheries and the required Statement of Service. If you have any questions please call me at your earliest convenience.

Christopher Keifer
NOAA Office of General Counsel

cc: Cachuma Service List



Printed on Recycled Paper



NOTICE OF INTENT TO APPEAR

NOAA Fisheries _____ plans to participate in the water right hearing regarding:
(name of party or participant)

Cachuma Project - Applications 11331 and 11332
Phase 2 October 21, 22, and 23 , 2003

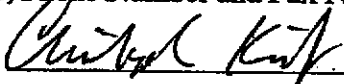
- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we agree to accept electronic service of hearing-related materials.

I/we plan to call the following witnesses to testify at the hearing:

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
James Lecky	Relationship between Biological Opinion and Recovery Planning	20 mins.	yes
Jonathon Mamm	Fish passage issues at Bradbury Dam	20 mins.	yes
Craig Wingert	Salmonid Recovery Planning process	20 mins.	yes
Dr. Peter Adams	Steelhead Recovery Planning and the Santa Ynez River	20 mins.	yes
Mark Capelli	Recovery Planning/ESA Section 7	20 mins.	yes
Dr. David Boughton	Santa Ynez River Steelhead	20 mins.	yes
Dr. Brian Chuer	Fluvial geomorphology	20 mins.	yes
Dr. Stacy Li	Steelhead instream flow needs	20 mins.	yes
Eric J. Shott	Cachuma Biological Opinion	20 mins.	yes

(If more space is required, please add additional pages or use reverse side)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative

Signature:  Dated: 9 SEP 03

Name (Print): Christopher Keifer

Mailing NOAA Office of General Counsel

Address: 501 W. Ocean Blvd., Ste. 4470 Long Beach, CA 90802

Phone Number: (562) 980-4076 Fax Number: (562) 980-4084

E-mail Address: christopher.keifer@noaa.gov

ATTACHMENT C

DEPARTMENT OF FISH AND GAME

OFFICE OF THE GENERAL COUNSEL
1416 NINTH STREET, 12TH FLOOR
SACRAMENTO, CA 95814
(916) 654-3821



September 10, 2003

Mr. Andrew Fecko
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

RECEIVED

SEP 11 2003

BRISON & FOERSTER

Re: *CACHUMA PROJECT HEARING - APPLICATIONS 11331 AND 11332*

Dear Mr. Fecko:

Enclosed are an original and six copies of the Department of Fish and Game's (DFG) revised Notice of Intent to Appear (NOIA) in the above-named hearing. Also, I have enclosed a statement of service of DFG's revised NOIA on the participants on the service list for the hearing.

Please put my name on the service list as the attorney of record for DFG. Nancee Murray should be removed from the same.

If you have any questions, please contact me at (916) 657-4091.

Sincerely,

A handwritten signature in cursive script that reads "Harlee Branch".

Harlee Branch
Staff Counsel

HB/hb

Enclosure(s)

NOTICE OF INTENT TO APPEAR

CA Dept. of Fish & Game _____ plans to participate in the water right hearing regarding:
(name of party or participant)

PHASE 2 OF CACHUMA PROJECT HEARING
Applications 11331 and 11332

Scheduled for
October 21, 22, and 23, 2003

- I/we intend to present a policy statement only;
- I/we intend to participate by cross-examination or rebuttal only
- I/we agree to accept electronic service of hearing-related materials
- I/we plan to call the following witnesses to testify at the hearing:

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
Chuck Raysbrook	General Policy Issues	20 min.	NO
Rob Titus	DFG participation in Lower SY		
	River Fish Management Plan (FMP):		
	Relation between FMP and Key		
	Hearing Issues #3a-b	20 min.	YES
Dennis McEwan	DFG's "Steelhead Restoration		
	and Management Plan for California"		
	and how it relates to the FMP and		
	Key Hearing Issues #3a-b	20 min.	YES
Marcin Whitman	Fish Passage: Fish Passage		
	Feasibility Studies: relation		
	to Key Hearing Issues #3a-b	20 min.	YES

(If more space is required, please add additional pages or use reverse side)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative

Signature: *Harlee Branch* Dated: 9/10/03

Name (Print): Harlee Branch, Staff Counsel

Mailing Address: Department of Fish & Game, Office of the General Counsel
1416 9th Street, 12th Floor

Phone Number: (916) 657-4091 Fax Number: (916) 654-3805

E-mail Address: hbranch@dfg.ca.gov

ATTACHMENT D

PATTI GOLDMAN (DCB #398565)
MICHAEL MAYER (DCB #458415)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
pgoldman@earthjustice.org
mmayer@earthjustice.org

Attorneys for Plaintiffs

FILED
SEP 15 2003
NANCY MAYER WENTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PACIFIC COAST FEDERATION OF)
FISHERMEN'S ASSOCIATIONS, INSTITUTE)
FOR FISHERIES RESOURCES, CENTER FOR)
BIOLOGICAL DIVERSITY, OREGON)
NATURAL RESOURCES COUNCIL, PACIFIC)
RIVERS COUNCIL, and ENVIRONMENTAL)
PROTECTION INFORMATION CENTER,)

Civ. No.

03 1833

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE,)

Defendant.)

**CONSENT DECREE
AND STIPULATED ORDER OF DISMISSAL**

This Consent Decree and Stipulated Order of Dismissal ("Consent Decree" or "Agreement") is made by and between the Plaintiffs Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Center for Biological Diversity, Oregon Natural

CONSENT DECREE AND STIPULATED
ORDER OF DISMISSAL - 1 -

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

(2)

3

NOW, THEREFORE, it is AGREED between the Parties and ORDERED as follows:

I. DEFINITIONS

1. Unless otherwise expressly provided, terms used in the Consent Decree that are defined in the ESA or in implementing regulations shall have the meaning assigned to them therein as of the date that this Consent Decree is entered by the Court.

II. TERMS OF THE AGREEMENT

2. On or before March 1, 2004, NMFS will provide Plaintiffs with a status report on the progress NMFS is making in developing the proposed rule(s) to designate critical habitat for those of the 20 ESUs^{1/} of salmon and steelhead that are included on the lists of threatened and endangered species as of March 1, 2004. A status report will not be required for any ESU for which a proposed rule has already been issued. The contents of the Status Report will be determined by NMFS in its sole discretion.

3. On or before June 30, 2004, NMFS will submit to the Federal Register for publication the proposed rule(s) designating critical habitat for those of the 20 ESUs that are included on the lists of threatened and endangered species as of June 30, 2004.

^{1/} The term 20 "ESUs" as used in this Consent Decree means Puget Sound, Upper Columbia River spring-run, Lower Columbia River, and Upper Willamette River chinook as listed under the Endangered Species Act ("ESA"), 16 U.S.C. Section 1533, at 64 FR 14308 (March 24, 1999); California Central Valley spring-run chinook and California Coastal chinook as listed under the ESA at 64 FR 50394 (September 16, 1999); Hood Canal summer-run chum and Columbia River chum as listed under the ESA at 64 FR 14508 (March 25, 1999); Ozette Lake sockeye as listed under the ESA at 64 FR 14528 (March 25, 1999); Oregon Coast Coho as listed under the ESA at 63 FR 42587 (August 10, 1998); Upper Columbia River, Snake River Basin, Southern California, South Central California Coast and Central California Coast steelhead as listed under the ESA at 62 FR 43937 (August 18, 1997); Lower Columbia River and California Central Valley Steelhead as listed under the ESA at 63 FR 13347 (March 19, 1998); Upper Willamette and Middle Columbia River steelhead as listed under the ESA at 64 FR 14517 (March 25, 1999) and Northern California steelhead as listed under the ESA at 65 FR 36074 (June 7, 2000).

ATTACHMENT E

LEXSEE 67 fed reg 79898

FEDERAL REGISTER

Vol. 67, No. 251

Proposed Rules

DEPARTMENT OF COMMERCE (DOC)

National Oceanic and Atmospheric Administration (NOAA)

National Marine Fisheries Service (NMFS)

50 CFR Parts 223 and 224

[Docket No. 021219319-2319-01; I.D. 121702B]

Endangered and Threatened Species: Status Review Updates for Snake River Sockeye Salmon and Southern California Steelhead; and Additional Information Request for Nine Evolutionarily Significant Units of West Coast Steelhead

67 FR 79898

DATE: Tuesday, December 31, 2002

ACTION: Notice of updated status reviews; request for information.

To view the next page, type .mp* TRANSMIT.

To view a specific page, transmit p* and the page number, e.g. p*1

[*79898]

SUMMARY: The National Marine Fisheries Service (NMFS) is currently reviewing the status of 25 Evolutionarily Significant Units (ESUs) of salmon and steelhead (*Oncorhynchus* spp.) that are currently listed as threatened or endangered species under the Endangered Species Act (ESA) of 1973, as amended, or listed as a candidate species. NMFS is announcing that it will also be updating the status of two additional anadromous salmonid ESUs currently listed as endangered species: Snake River sockeye salmon (*O. nerka*) and Southern California steelhead (*O. mykiss*). NMFS is also announcing that its status review updates for all listed steelhead ESUs will also address resident rainbow trout (*O. mykiss*) populations associated with each ESU. To ensure that these status reviews are complete and based upon the best available scientific information, NMFS is soliciting information and data regarding the status of these ESUs, including information on resident rainbow trout populations associated with steelhead ESUs. These status review updates will be completed after a revision of NMFS' policy regarding the consideration of hatchery fish in ESA status reviews of Pacific salmonids. At such time that the status reviews are updated, NMFS will consider whether there is a need to reevaluate critical habitat designations, protective [*79899] regulations, or any ongoing recovery planning efforts for these ESUs.

DATES: Information and comments on this action must be received by February 14, 2003.

ADDRESSES: Information and comments on this action should be submitted to the Assistant Regional Administrator, Protected Resources Division, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213, or Assistant Regional Administrator, Protected Resources Division, Northwest Region, NMFS, 525 NE Oregon Street, Suite 500, Portland, OR 97232. Comments will not be accepted if submitted via e-mail or the Internet. However, comments may be sent via fax to the Southwest Region (562-980-4021) or the Northwest Region (503-230-5435).

FOR FURTHER INFORMATION CONTACT: Craig Wingert, NMFS, Southwest Region (562) 980-4021, Scott Rumsey, NMFS, Northwest Region (503) 872-2791, or Barry Thom, NMFS, Office of Protected Resources (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Background

On February 11, 2002, NMFS announced it was undertaking updated status reviews for 25 Evolutionarily Significant Units (ESUs) of salmon and steelhead on the West coast (67 FR 6215). These updated status reviews are in progress and include 24 of 26 currently listed salmon and steelhead ESUs, as well as one candidate ESU (Lower Columbia River coho salmon). The status review updates for 14 of these ESUs were triggered by NMFS's acceptance of five de-listing petitions requesting that the ESUs should be de-listed on the basis of the September 2001 U.S. District Court ruling in *Alsea Valley Alliance v. Evans* (Alsea decision). The Court held that NMFS made an improper distinction under the ESA by treating certain artificially propagated salmon populations included in a "distinct population segment" differently from natural populations in the same DPS in making its listing determinations. In the same *Federal Register* notice, NMFS also announced that it would not revisit the status of the endangered Snake River sockeye or the endangered Southern California steelhead ESUs because the listing determinations for these ESUs were unaffected by the ESA interpretative issues stemming from the *Alsea* decision.

NMFS is planning to undertake updated status reviews for both of these ESUs. In the case of the Snake River sockeye, this is based on two considerations. First, the status of the ESU has not been updated since 1991 and since there is at least 10 years of new information available an update is warranted. Second, NMFS is developing a new hatchery listing policy that will give consideration to artificial propagation programs in future salmon and steelhead listing determinations. Since this ESU contains a captive hatchery population, it is appropriate to conduct an updated status review and apply the policy to this ESU so that a consistent approach will have been used in all NMFS' listing determinations for Pacific salmonids. In the case of Southern California steelhead, NMFS has determined that an updated status review is appropriate based on two considerations. First, the last comprehensive status review was completed in 1996 and thus several years of new information may be available that should be considered in a status update. Second, issues have been raised in recent litigation (*Environmental Defense Center v. Evans*) about the status of resident rainbow trout populations above and below barriers, their relationship to steelhead populations below barriers, and whether or not resident forms should be part of the listed steelhead ESU. These issues warrant further consideration and are most appropriately addressed in an updated status review.

NMFS has also determined that the issues regarding the relationship between resident rainbow trout and steelhead that were raised in the *Environmental Defense Center v. Evans* case may also apply to the 9 ESUs of steelhead for which updated status reviews have already been initiated (see 67 FR 6215; February 11, 2002). Accordingly, NMFS has expanded these 9 steelhead ESU status review updates to further consider resident rainbow trout and their relationship to steelhead. To ensure that NMFS has the best available scientific and commercial data to address these issues, this *Federal Register* notice specifically requests information on resident rainbow trout populations associated with these 9 steelhead ESUs.

In conducting these status review updates and making any future listing determinations for these ESUs, NMFS will utilize the best available scientific and commercial data and coordinate with the U.S. Fish and Wildlife Service (FWS).

NMFS will also consider conservation efforts that provide substantial benefit to the protection and conservation of these ESUs (see joint NMFS- FWS "Proposed Policy on Evaluating Conservation Efforts"; 65 FR 37102; June 13, 2000).

Description of ESUs to be Reviewed

The following sections describe the Snake River sockeye and Southern California steelhead ESUs that will be updated. The year of the most recent status review and the latest data utilized are also provided for each ESU to indicate the available data that would be most valuable to NMFS (e.g. information since the most recent status review) in conducting the status review updates.

Snake River Sockeye Salmon ESU

The Snake River sockeye ESU was listed as an endangered species on November 20, 1991 (56 FR 58619). The ESU includes all naturally spawned populations of sockeye salmon in Redfish Lake in the Salmon River Basin, Idaho. The ESU also includes a captive hatchery population of sockeye salmon. The status of the ESU was last reviewed in 1991 (Waples *et al.*, 1991) utilizing data through 1990.

Southern California Steelhead ESU

The Southern California steelhead ESU was listed as an endangered species on August 18, 1997 (62 FR 43937). The ESU was defined to include all naturally spawned steelhead populations (and their progeny) occupying rivers from the Santa Maria River, San Luis Obispo County, California (inclusive) southward to Malibu Creek, Los Angeles County, California. Resident forms of steelhead (i.e. rainbow trout) above and below barriers were not included in the final listing determination. However, the status review noted that the resident life history form may be a significant part of the ESU, but that there was insufficient information regarding resident trout to reasonably evaluate their status or interactions with steelhead (Busby *et al.* 1966). On May 1, 2002, NMFS redefined the geographic range of this ESU to include all naturally spawned steelhead (and their progeny) occupying rivers from the Santa Maria River, San Luis Obispo County, California (inclusive) to the U.S.-Mexico Border based on new information indicating that steelhead spawned in at least one location south of Malibu Creek (67 FR 21586). Resident forms of steelhead (i.e. rainbow trout) were not included in this range extension. The status of this ESU was last reviewed comprehensively in 1996 based on the best data available at that time (Busby *et al.* 1996).

The 9 steelhead ESUs for which NMFS is requesting additional information on resident rainbow trout populations are described in the [*79900] February 11, 2002, Federal Register notice announcing the west coast status review updates (67 FR 6215). They include the following ESUs: South-Central California Coast steelhead, Central California Coast steelhead, Upper Columbia River steelhead, Snake River Basin steelhead, Lower Columbia River steelhead, California Central Valley steelhead, Upper Willamette River steelhead, Middle Columbia River steelhead, and Northern California steelhead.

Information Solicited

To ensure that the status review updates are complete and based on the best available and most recent scientific and commercial data, NMFS is soliciting information and comments (see DATES and ADDRESSES) concerning the Snake River sockeye and Southern California steelhead ESUs. NMFS is soliciting pertinent information on naturally spawned and hatchery populations within these ESUs including: data on population abundance, recruitment, productivity, escapement and reproductive success; historical and present data on hatchery releases, outmigration, survival, returns, straying rates, replacement rates, and reproductive success in the wild; data on age structure and migration patterns of juveniles and adults; meristic, morphometric, and genetic studies; and spatial and temporal trends in the quality and quantity of freshwater, estuarine, and marine habitats. NMFS is particularly interested in receiving such information for the period subsequent to the most recent status review for the two ESUs (see Description of ESUs to be Reviewed).

In the case of Southern California steelhead and the other 9 ESUs of west coast steelhead, NMFS is also soliciting pertinent information about resident rainbow trout populations above and below barriers within the geographic range occupied by the ESU. NMFS in particular is seeking information regarding: the relationship between resident rainbow trout and steelhead; the range, distribution, and habitat-use patterns of resident rainbow trout populations; the

abundance, density, and presence/absence of resident rainbow trout; genetic or other relevant data indicating the amount of exchange and the degree of historic and current relatedness between steelhead and resident rainbow trout life history forms; the existence of natural and artificial barriers to anadromous steelhead populations; the relationship of resident fish located above impassible barriers to anadromous and resident populations below such barriers; and the spatial and temporal trends in the quality and quantity of freshwater habitat, particularly above barriers.

Conservation Efforts to Protect ESUs

Section 4(b)(1)(A) of the ESA requires the Secretary to make listing determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of a species and after taking into account efforts being made to protect the species. Therefore, in making its listing determinations, NMFS first assesses the status of the species and identifies factors that have led to their decline. NMFS then assesses conservation efforts to determine whether they ameliorate a species' extinction risk. In judging the efficacy of conservation efforts, NMFS considers the following: the substantive, protective, and conservation elements of such efforts; the degree of certainty that such efforts will be reliably implemented; the degree of certainty that such efforts will be effective in furthering the conservation of the species; and the existence of monitoring provisions to determine the effectiveness of conservation efforts and that allow for adaptive management. In some cases, conservation efforts may be relatively new or may not have had sufficient time to demonstrate their biological benefit. In such cases, provisions of adequate monitoring and funding for conservation efforts are essential to ensure that the intended conservation benefits are realized. NMFS encourages all parties to submit information regarding ongoing conservation efforts to protect the Snake River sockeye and Southern California steelhead ESUs, as well as information on recently implemented or planned activities and their likely impact on these ESUs.

The complete citations for the references in this document can be obtained by contacting NMFS or via the Internet (see ADDRESSES and FOR FURTHER INFORMATION CONTACT).

Authority: *16 U.S.C. 1531 et seq.*

Dated: December 23, 2002.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 02-32953 Filed 12-30-02; 8:45 am]

BILLING CODE 3510-22-S

ATTACHMENT F

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CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
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7 Attorneys for Defendants Donald Evans,
8 in his official capacity as Secretary of Commerce;
National Marine Fisheries Service ("NMFS");
9 Dr. William T. Hogarth, in his official capacity as
Assistant Administrator for Fisheries, NMFS;
10 D. Robert Lohn, in his official capacity as
Regional Administrator, Northwest Region NMFS; and
11 Rodney McInnis, in his official capacity as
Acting Regional Administrator, Southwest Region, NMFS.

12
13 IN THE UNITED STATES DISTRICT COURT FOR THE
14 EASTERN DISTRICT OF CALIFORNIA

15 MODESTO IRRIGATION DISTRICT,
16 a California irrigation district, et al.,

17 Plaintiffs,

18 v.

19 DONALD L. EVANS, in his official capacity as
Secretary of Commerce, et al.,

20 Defendants,

21 and

22 NORTHERN CALIFORNIA COUNCIL OF
23 FEDERATION OF FLY FISHERS, et al.,

24 Defendant-Intervenor-Applicants.

CIV-F-02-6553 OWW DLB

**MOTION TO DISMISS
FOR MOOTNESS OR,
IN THE ALTERNATIVE,
FOR A STAY**

25
26 I. INTRODUCTION

27 Defendants hereby move this Court to dismiss plaintiffs' complaint for declaratory and
28 injunctive relief for prudential mootness. In the alternative, defendants ask that this Court grant

1 anadromous and resident populations below such barriers; and the spatial and
2 temporal trends in the quality and quantity of freshwater habitat, particularly
above barriers.

3 Id. at 79,900.

4 On February 19, 2003, NMFS published on its website the "Preliminary conclusions
5 regarding the updated status of listed ESUs of West Coast salmon and steelhead." See Northwest
6 Fisheries Science Center, *Draft Report of Updated Status of Listed ESUs of Salmon and*
7 *Steelhead* (visited April 2, 2003) <<http://www.nwfsc.noaa.gov/cbd/trt/brt/brtrpt.html>>. The draft
8 presumes "that coastal *O. mykiss* that are above man-made barriers are part of the Central Valley
9 EUS, because these populations were probably exhibiting some degree of anadromy and
10 interacting with each other on evolutionary time scales prior to barrier construction." Id. at 96.
11 Because the revised hatchery policy remains in draft form, the updated status reviews do not
12 attempt to revisit the ESU determinations for hatchery fish. The updated status reviews do,
13 however, classify hatchery fish in one of four categories depending on the derivation of the
14 hatchery fish. Id. at <<http://www.nwfsc.noaa.gov/cbd/trt/brt/backintro.pdf>> p. 8. The Biological
15 Review Team has yet to determine how the categorization of hatchery fish will affect ESU
16 membership, id., but the Coleman NFH and Feather River hatchery populations in the Central
17 Valley California ESU of steelhead are classified as category 2 fish (e.g. derived from local
18 natural populations but have undergone moderate genetic change), and the Nimbus and
19 Mokolunne hatchery populations are classified as category 4 fish (e.g. derived from populations
20 that are not part of the ESU of interest).

21 III. ARGUMENT

22 After receiving the final Biological Review Team's updated status report, NMFS will
23 determine what changes, if any, to propose to the listing status of the affected ESUs. NMFS
24 anticipates publishing revised proposed listing determinations on April 31, 2004, and revised
25 final listing determinations on December 31, 2004. See Exhibit 1, ¶ 3. At bottom, plaintiffs'
26 complaint seeks NMFS' reconsideration of the agency's treatment of hatchery and resident fish
27 in the Central Valley California Steelhead ESU listing, which is precisely what defendants are in
28 the process of doing. Defendants do not contend that the issues stemming from the listing of the

ATTACHMENT G

9/11/03

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EASTERN DIST. OF CALIF.

BY: 

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MODESTO IRRIGATION DISTRICT, et)
al.,)
)
Plaintiffs,)
)
v.)
)
DONALD L. EVANS, et al.,)
)
Defendants.)

CIV-F-02-6553 OWW DLB
MEMORANDUM AND ORDER RE:
MOTION TO DISMISS FOR
MOOTNESS, OR IN THE
ALTERNATIVE, MOTION FOR A
STAY

Before the court is defendants' motion to dismiss for mootness or, in the alternative, motion for stay. Doc. 26, filed April 21, 2003. Plaintiffs oppose the motion. Doc. 35, filed May 15, 2003. Defendant-intervenors filed a notice of non opposition May 16, 2003. Doc. 36. The matter was heard July 14, 2003.

I. BACKGROUND

This case arises out of the National Marine Fisheries Service's listing of the Central Valley California Steelhead (*Onchorynchus mykiss*) under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., as threatened in certain rivers within

H1

1 actions violate the APA because defendants acted in a manner that
2 was "arbitrary, capricious, an abuse of discretion, or otherwise
3 not in accordance with the law." Doc. 1 ¶ 43 at 10. Fourth
4 Claim for Relief.

5 The legal rationale underlying plaintiffs' second and fourth
6 claims for relief is identical to their first and third claims,
7 i.e., the government may not list as endangered anything less
8 than a species, subspecies or distinct population segment under
9 the ESA. Defendants have stated they are evaluating the
10 relationship between resident populations of *O. mykiss* and
11 anadromous steelhead populations. Reply Brief, Doc. 39 at 3.
12 Defendants assert that, "at the end of the reconsideration
13 process, NMFS will make updated proposed and final listing
14 determinations for the Central Valley California ESU of steelhead
15 that will be consistent with the Asea decision, which means that
16 the determinations will be meaningfully changed." *Id.*
17 Defendants represent they intend to comply with Asea.

18 Plaintiffs suggest defendants' review will not "actually
19 address the issue of anadromous vs. resident populations."
20 Plaintiffs state that NMFS excluded resident forms of *O. mykiss*
21 because the United States Fish and Wildlife Service ("USFWS"),
22 "which has jurisdiction over non-anadromous species, has
23 concluded that resident forms of *O. mykiss* should not be listed."
24 Doc. 35, fn. 3 at 7. Plaintiffs contend, without explanation or
25 legal citation, that a "jurisdictional dispute," exists and
26 "nothing in defendants' motion suggests any resolution to this
27 jurisdictional dispute, or that the dispute will be resolved
28 through the on-going review process." *Id.* Defendants do not

ATTACHMENT H

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8 *Additional Counsel of Record Continued Next Page*

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EASTERN DISTRICT OF CALIF.
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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

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13 MODESTO IRRIGATION DISTRICT, a California
14 irrigation district; TURLOCK IRRIGATION
15 DISTRICT, a California irrigation district; MERCED
16 IRRIGATION DISTRICT, a California irrigation
17 district; OAKDALE IRRIGATION DISTRICT, a
California irrigation district; SOUTH SAN JOAQUIN
IRRIGATION DISTRICT, a California irrigation
district; and STOCKTON EAST WATER DISTRICT,
a political subdivision of the State of California,

Plaintiffs,

vs.

20 DONALD L. EVANS, in his official capacity as
21 Secretary of Commerce; NATIONAL MARINE
22 FISHERIES SERVICE; DR. WILLIAM T.
23 HOGARTH, in his official capacity as Assistant
24 Administrator for Fisheries, National Marine Fisheries
25 Service; D. ROBERT LOHN, in his official capacity
as Regional Administrator, Northwest Region National
Marine Fisheries Service; and RODNEY McINNIS, in
his official capacity as Acting Regional Administrator,
Southwest Region, National Marine Fisheries Service.

Defendants.

)
) CIV-F-02-6553 ONW DLB
) Case No.
) COMPLAINT FOR DECLARATORY AND
) INJUNCTIVE RELIEF

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Attorneys for Stockton East Water District

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INTRODUCTION

1. This action arises from the failure of the National Marine Fisheries Service ("NMFS") to comply with the obligations imposed upon it by the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., when it listed as threatened (a) naturally spawning, but not hatchery, populations, of *Oncorhynchus mykiss* [west coast rainbow trout and steelhead] (hereinafter "*O. mykiss*"), and (b) anadromous members, but not resident members, of *O. mykiss*, in certain rivers within the Central Valley of California, including the Merced River, the Tuolumne River, the Stanislaus River and the Calaveras River.

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JURISDICTION

2. Jurisdiction is conferred by 16 U.S.C. § 1540 (c) and (g) (ESA); 5 U.S.C. §§ 701 et seq. (APA); and 28 U.S.C. §§ 1331 (federal question) and 2201 (declaratory relief).

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VENUE

3. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391 (e) because some or all of the Plaintiffs reside in this District, and because a substantial part of the events or omissions giving rise to the claims occurred in this District.

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PARTIES

A. Plaintiffs

4. Plaintiffs Modesto Irrigation District ("Modesto") and Turlock Irrigation District ("Turlock") are California irrigation districts organized and operating pursuant to Division 11, commencing with section 20500, of the California Water Code. Modesto is located in Stanislaus and Tuolumne Counties. Turlock is located within Stanislaus, Merced, and Tuolumne Counties. Modesto and Turlock own and operate Don Pedro Dam and other facilities that divert water from the Tuolumne River. Don Pedro Dam is subject to a license issued by the Federal Energy Regulatory Commission ("FERC"), and thus Modesto's and Turlock's operations are subject to consultation between NMFS and FERC under section 7 of the ESA when FERC is proposing to authorize an action regarding the project.

5. Plaintiff Merced Irrigation District ("Merced") is a California irrigation district organized and operating pursuant to Division 11, commencing with section 20500, of the California

1 Water Code. Merced is located in Merced County. Merced owns and operates facilities that divert
2 water from the Merced River. Those facilities are subject to licenses issued by FERC, and Merced's
3 operations are subject to consultation between NMFS and FERC under section 7 of the ESA when
4 FERC is proposing to authorize an action regarding the project.

5 6. Plaintiff Oakdale Irrigation District ("Oakdale") is a California irrigation district
6 organized and operating pursuant to Division 11, commencing with section 20500, of the California
7 Water Code. Oakdale is located primarily in Stanislaus County. Plaintiff South San Joaquin Irrigation
8 District ("South San Joaquin") is a California irrigation district organized and operating pursuant to
9 Division 11, commencing with section 20500, of the California Water Code. South San Joaquin is
10 located primarily in San Joaquin County. Oakdale and South San Joaquin own and operate facilities
11 that divert water from the Stanislaus River. Some of their facilities are the subject of permits issued by
12 FERC, and thus are subject to consultation between NMFS and FERC under section 7 of the ESA
13 when FERC is proposing to authorize an action regarding the project.

14 7. Plaintiff Stockton East Water District ("Stockton East") is a political subdivision of the
15 State of California organized and operating pursuant to a special act of the California Legislature,
16 Chapter 819, statutes of 1971, as amended, and Division 21, commencing with section 74000, of the
17 California Water Code, where not inconsistent with the special act. Stockton East is located primarily
18 in San Joaquin County. Stockton East owns and operates facilities that divert water from the
19 Stanislaus River, Calaveras River and Mormon Slough in Calaveras, Tuolumne, Stanislaus and San
20 Joaquin Counties. Some of Stockton East's facilities are the subject of permits issued by the Corps of
21 Engineers pursuant to section 404 of the Clean Water Act (13 U.S.C. § 1344), and are thus subject to
22 consultation between NMFS and the Corps of Engineers under section 7 of the ESA when the Corps of
23 Engineers is proposing to authorize an action regarding the project.

24 8. Plaintiffs have satisfied the requirements of 16 U.S.C. § 1540 (g) by providing each of
25 the Defendants written notice of the violations alleged herein on June 19, 2002, such notice being more
26 than 60 days in advance of the filing of this Complaint.

27 9. Each of the Plaintiffs is injured by the failure as described herein of Defendants to
28 comply with the ESA and the APA because the water rights, water supply, and water supply facilities

1 relied upon by Plaintiffs depend on or are located on rivers allegedly occupied by the Central Valley,
2 California steelhead ESU as designated by NMFS, and each of the Plaintiffs is subject to potential civil
3 or criminal liability if its activities therein are deemed to harm *O. mykiss*.

4 **B. Defendants**

5 10. Defendant Donald L. Evans is the Secretary of Commerce, and is sued herein in his
6 official capacity. The Secretary is responsible under the ESA to determine if a species is threatened or
7 endangered.

8 11. NMFS is an agency within the Department of Commerce; the Secretary of Commerce
9 has delegated to NMFS certain responsibilities for implementing the ESA, including determining
10 whether species, subspecies or distinct population segments of steelhead are threatened or endangered
11 under the ESA.

12 12. Defendant Dr. William T. Hogarth is the Assistant Administrator for Fisheries, NMFS,
13 and is sued herein in his official capacity. The Secretary has delegated to NMFS, and to Defendant
14 Hogarth, his responsibility for listing decisions under the ESA relating to anadromous species of fish.

15 13. Defendant D. Robert Lohn is the Regional Administrator, Northwest Region, of NMFS,
16 and is sued herein in his official capacity. The Northwest Region encompasses California, Oregon,
17 Washington, and Idaho. The Regional Administrator generally acts for and under the direction of the
18 Secretary and the Assistant Administrator for Fisheries with regard to the administration of the ESA
19 within the Northwest Region.

20 14. Defendant Rodney McInnis is the acting Regional Administrator, Southwest Region, of
21 NMFS, and is sued herein in his official capacity. The Southwest Region encompasses, among other
22 jurisdictions, California, Arizona and Nevada. The Regional Administrator generally acts for and
23 under the direction of the Secretary and the Assistant Administrator for Fisheries with regard to the
24 administration of the ESA within the Southwest Region.

25 **GENERAL ALLEGATIONS**

26 15. Congress enacted the ESA to provide a program for the "conservation of . . .
27 endangered *species* and threatened *species*." (16 U.S.C. § 1531 (b) (italics added).)

28 16. The ESA defines "species" as "any subspecies of fish or wildlife or plants, and any

1 distinct population segment of any species of vertebrate fish or wildlife which interbreeds when
2 mature." (16 U.S.C. § 1532 (16).)

3 17. Congress did not define the term "distinct population segment," and the ESA does not
4 set forth any criteria upon which that term should be defined.

5 18. On November 20, 1991, NMFS issued its "Policy on Applying the Definition of Species
6 Under the Endangered Species Act to Pacific Salmon" (hereinafter, the "ESU Policy"). (56 Fed. Reg.
7 58,612 (November 20, 1991).) In the ESU Policy, NMFS introduced the term "evolutionarily
8 significant unit" ("ESU") to interpret the ESA's meaning of "distinct population segment." NMFS
9 determined that a stock of Pacific salmon would be considered a distinct population, and therefore a
10 "species" under the ESA, if it represents an evolutionarily significant unit of the biological species. In
11 order to be considered an ESU, a stock must meet two criteria: (1) it must be substantially
12 reproductively isolated from other conspecific population units, and (2) it must represent an important
13 component in the evolutionary legacy of the species. (56 Fed. Reg. at 58,618.) Though the ESU
14 Policy was adopted specifically for Pacific salmon, NMFS has applied it to steelhead as well. (61 Fed.
15 Reg. 4722, Feb. 7, 1996.)

16 19. On March 19, 1998, the Defendants issued a "Final Rule" pertaining to the listing of
17 steelhead in the Central Valley, California ESU. (63 Fed. Reg. 13347, March 19, 1998.) In that
18 listing, NMFS stated that the Central Valley, California ESU occupies the Sacramento and San Joaquin
19 Rivers and their tributaries (*Id.*, at p. 13353.) Such tributaries include the Merced River, as to which
20 Plaintiff Merced has water rights, the Tuolumne River, as to which Plaintiffs Modesto and Turlock
21 have water rights, the Stanislaus River, as to which Plaintiffs Oakdale and South San Joaquin have
22 water rights and Plaintiff Stockton East has contractual rights to water, and the Calaveras River, as to
23 which Plaintiff Stockton East has water rights, as well as contractual rights to water.

24 20. NMFS included, as part of the ESU, hatchery populations from the Coleman National
25 Fish Hatchery and Feather River Hatchery. (*Id.*, at p. 13354.) Despite the fact that NMFS identified
26 the ESU, or in the words of the ESA, a "distinct population segment," to include hatchery stocks,
27 NMFS listed only naturally spawned populations of steelhead in the Central Valley, California
28 steelhead ESU. (*Id.*, at p. 13369.)

1 21. NMFS found that under certain circumstances, resident forms (i.e., those that spend
2 their entire lives in fresh water) and anadromous forms (i.e., those that migrate to the ocean as
3 juveniles and return to spawn in fresh water) of *O. mykiss* are "capable not only of interbreeding, but
4 also of having offspring that express the alternate life history form, that is anadromous fish can
5 produce nonanadromous offspring, and vice versa." (*Id.*, at p. 13351.) Notwithstanding the fact that
6 resident and anadromous forms of *O. mykiss* are, therefore, not "substantially reproductively isolated,"
7 as required by NMFS' own ESU Policy, NMFS listed only anadromous members of *O. mykiss*, and did
8 not list resident *O. mykiss* in the same streams. (*Id.*, at p. 13369.)

9
10 **FIRST CLAIM FOR RELIEF**

11 **(Declaratory Relief - Violation of 16 U.S.C. § 1533 (b); 28 U.S.C. § 2201)**

12 22. Plaintiffs incorporate by reference, repeat, replead, and reallege as though set forth in
13 full at this place each and every allegation contained in Paragraphs 1 through 21, inclusive.

14 23. The ESA provides for the listing of threatened or endangered "species" and defines
15 species as "any subspecies of fish . . . and any distinct population segment of any species . . . which
16 interbreeds when mature." (16 U.S.C. § 1532 (16).)

17 24. The Defendants defined the distinct population segment to be those populations of *O.*
18 *mykiss* within the Sacramento and San Joaquin Rivers and their tributaries, including two hatchery-
19 spawned populations.

20 25. Despite identifying a distinct population segment that included both naturally spawned
21 and hatchery populations of *O. mykiss*, the Defendants listed only a portion of that distinct population
22 segment, i.e., naturally spawned populations.

23 26. Plaintiffs contend (a) that Defendants are required to list a species, a sub-species or a
24 distinct population segment of a species, and not may not list smaller population groups; (b) that
25 naturally spawned populations of *O. mykiss* do not constitute a species, sub-species or a distinct
26 population segment of a species when hatchery populations are present and capable of interbreeding
27 with the naturally spawned population; and (c) that the Defendants' action in listing only naturally
28 spawned populations of *O. mykiss* was contrary to their authority under, and thus a violation of, the
ESA. Plaintiffs are informed and believe, and thereon allege, that Defendants contend that their

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15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA

18 ENVIRONMENTAL DEFENSE CENTER,)
19 INC., a non-profit corporation,)
20 CALIFORNIA TROUT, INC., a non-)
21 profit corporation, CENTER FOR)
22 BIOLOGICAL DIVERSITY, a non-)
23 profit corporation, HEAL THE)
24 BAY, a non-profit corporation,)
25 FRIENDS OF THE SANTA CLARA)
26 RIVER, a non-profit)
27 corporation, INSTITUTE FOR)
28 FISHERIES RESOURCES, a non-)
profit corporation, and PACIFIC)
COAST FEDERATION OF FISHERMEN'S)
ASSOCIATIONS, a non-profit)
corporation,)

Plaintiffs,)

vs.)

29 NORMAN MINETA, Secretary of)
30 Commerce, PENELOPE DALTON,)
31 Assistant Administrator for)
32 Fisheries, National Marine)
33 Fisheries Service, JIM LECKY,)
34 Director of Protected Resources)
35 Division Southwest Region,)

36 Corrected Complaint for 1
37 Declaratory and Injunctive Relief

FILED
U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FRANCISCO
JAN 5 2001

CV02-9607 RBK(Mex)
Case No. ~~SACV 00-1212 AUS (BLK)~~

CORRECTED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

JAN 5 2001

CV

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ORIGINAL

1 National Marine Fisheries)
2 Service, and BRUCE BABBITT,)
3 Secretary of the Interior, and)
4 JAMIE RAPPAPORT-CLARK, Director)
5 of the Fish and Wildlife)
6 Service,)
7 Defendants.)

7 JURISDICTION

8 1. This Court has jurisdiction over this action pursuant
9 to 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331 (federal question
10 jurisdiction), and 16 U.S.C. § 1540(g) (citizen suits under the
11 ESA).

12 2. An actual controversy exists between the parties
13 within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

14 3. Pursuant to section 11(g) of the ESA, on October 19,
15 1999 and June 20, 2000, Plaintiffs provided the Defendant NMFS
16 with sixty days notice of their intent to sue.

17 INTRODUCTION

18 4. Plaintiffs ENVIRONMENTAL DEFENSE CENTER, CENTER FOR
19 BIOLOGICAL DIVERSITY, CALIFORNIA TROUT, INC., HEAL THE BAY,
20 PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, FRIENDS OF
21 THE SANTA CLARA RIVER, AND INSTITUTE FOR FISHERIES RESOURCES
22 challenge the failure of the National Marine Fisheries Service
23 (NMFS) and the U.S. Fish and Wildlife Service (FWS) to conserve
24 all populations of Southern California Steelhead trout under the
25 Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44. In
26 particular, NMFS and FWS failed to list under the ESA the entire
27 Southern California Steelhead Evolutionary Significant Unit and
28 arbitrarily excluded certain populations of steelhead from this

1 ESA listing. NMFS also failed to designate as critical habitat
2 areas essential to the species' conservation. As a result,
3 Southern California steelhead and essential steelhead habitat
4 found upstream of man-made impassable barriers and south of
5 Malibu Creek, California are not receiving ESA protection.
6 Plaintiffs seek declaratory and injunctive relief compelling
7 NMFS and FWS to consider including steelhead upstream of man-
8 made impassable barriers and south of Malibu Creek as part of
9 the listed Southern California Steelhead Evolutionary
10 Significant Unit and to consider designating critical habitat in
11 these areas.

12 PARTIES

13 5. Plaintiff ENVIRONMENTAL DEFENSE CENTER (EDC) is a public
14 interest, non-profit corporation with offices in Santa Barbara,
15 Ventura, and San Luis Obispo, California. EDC was founded in 1977
16 to protect and preserve the unique biological features of these
17 areas, including the habitat necessary for Southern California
18 steelhead. EDC actively works to preserve all native species,
19 including Southern California steelhead, and their habitat areas.
20 EDC monitors the status of native species and aggressively
21 advocates for protection and restoration of habitat critical to the
22 survival of these species. In particular, EDC seeks to secure
23 legal protection for the remaining populations of Southern
24 California steelhead. EDC, its staff, board of directors, and
25 members derive scientific, educational, aesthetic, and spiritual
26 benefit from the steelhead's existence in the wild and from the
27 ecosystem upon which the Southern California steelhead depends.
28 EDC members and supporters live, work, and recreate in and near

1 coastal streams in Southern California, including Santa Barbara and
2 Ventura Counties that serve as habitat for Southern California
3 steelhead. Defendants' decisions excluding ESA listing protection
4 for steelhead upstream of man-made impassable barriers and
5 excluding such areas as critical habitat has harmed and will
6 continue to harm the interests of EDC and its members until and
7 unless this Court provides the relief prayed for in this complaint.

8 6. Plaintiff CALIFORNIA TROUT, INC. (CalTrout) is a non-
9 profit, tax-exempt corporation organized under the laws of the
10 State of California with its principle place of business in San
11 Francisco, California. CalTrout is a statewide conservation
12 organization that was founded in 1971 to protect and restore
13 wild trout, native steelhead, and the waters that nurture them
14 and to create high quality fishing adventures for the public to
15 enjoy. CalTrout is supported by over 5,000 members residing
16 throughout the State of California, and approximately forty
17 affiliated local angling clubs. These members derive quality of
18 life experiences, while contributing to the State of
19 California's number one industry, i.e. recreation and tourism
20 economies, by fishing for coldwater fish such as native
21 steelhead. A portion of these angling experiences occur in
22 Southern California rivers and streams either above man-made
23 impassable barriers, which impede the upstream reproduction
24 migration of native steelhead, or outside the geographic range
25 established for Southern California steelhead -- south of Malibu
26 Creek. CalTrout seeks to secure legal protection for the
27 remaining populations of steelhead. CalTrout and its members
28 derive scientific, educational, aesthetic, and spiritual benefit

1 from the steelhead's existence in the wild and from the
2 ecosystem upon which the steelhead depends. CalTrout and its
3 members live, work, and recreate in and near coastal streams in
4 Southern California, including Santa Barbara, Ventura, Los
5 Angeles, Orange, and San Diego Counties that serve as habitat
6 for Southern California steelhead. Defendants' decisions
7 excluding ESA listing protections for steelhead upstream of man-
8 made impassable barriers and south of Malibu Creek and excluding
9 such areas as critical habitat has harmed and will continue to
10 harm the interests of CalTrout and its members until and unless
11 this Court provides the relief prayed for in this complaint.

12 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is
13 a New Mexico non-profit corporation with over 5,000 members and
14 offices in San Diego and Berkeley, California, Tucson and
15 Phoenix, Arizona, and Silver City, New Mexico. The Center is
16 dedicated to the preservation, protection, and restoration of
17 biodiversity, native species, and ecosystems in the West and
18 elsewhere. The Center's staff and members regularly use, and
19 intend to continue to use, coastal streams in Southern
20 California, for observation, research, aesthetic enjoyment, and
21 other recreational, scientific, and educational activities. The
22 Center submitted comments on NMFS' proposal to designate
23 critical habitat and testified at public hearings. Center staff
24 and its members have visited most coastal Southern California
25 streams historically and/or currently occupied by southern
26 steelhead, including those in Santa Barbara, Ventura, Los
27 Angeles, Orange and San Diego counties, and have researched the
28 biology of steelhead, the factors contributing to the decline of

1 the species, and the coastal stream habitat that is essential
2 for recovery of the species, and intend to continue to do so.
3 The Center brings this action on its own institutional behalf
4 and on behalf of its staff and members nationwide, including
5 staff and members who live and work near and regularly visit and
6 use the areas which serve as habitat for Southern steelhead.
7 Defendants' decisions excluding ESA listing protections for
8 steelhead upstream of man-made impassable barriers and south of
9 Malibu Creek and excluding such areas as critical habitat has
10 harmed and will continue to harm the interests of Center and its
11 members until and unless this Court provides the relief prayed
12 for in this complaint.

13 8. Plaintiff HEAL THE BAY is a California nonprofit
14 environmental group working to make Southern California coasts
15 healthy and safe again for people and marine life. Heal the Bay
16 is located in Santa Monica, California, and has 10,000 members,
17 including residents and visitors of the Malibu Creek and Malibu
18 Lagoon areas. Heal the Bay uses public education, scientific
19 research and advocacy to encourage prudent stewardship of the
20 Southern California coasts and coastal watersheds. A
21 significant portion of Heal the Bay's membership derives
22 recreational and scientific benefit from the Southern
23 Californian steelhead. Heal the Bay is an active member of the
24 Steelhead Recovery Task Force of the Santa Monica Mountains and
25 the Southern California Steelhead Recovery Coalition. In
26 addition, as part of Heal the Bay's *Stream Team* watershed
27 mapping program, the organization has done extensive geographic
28 information system mapping of the upper tributaries of Malibu

1 Creek above Rindge Dam, documenting good quality potential
2 steelhead habitat in these areas. Heal the Bay submitted
3 detailed comments to NMFS on the proposed critical habitat
4 designation for the southern steelhead on May 6, 1999. Heal the
5 Bay asked NMFS to expand the critical habitat designation to
6 include all of Malibu Creek, its tributaries, Malibu Lagoon, and
7 a 200-foot riparian buffer zone along each waterway.
8 Defendants' decisions excluding ESA listing protections for
9 steelhead upstream of man-made impassable barriers and south of
10 Malibu Creek and excluding such areas as critical habitat has
11 harmed and will continue to harm the interests of Heal the Bay
12 and its members until and unless this Court provides the relief
13 prayed for in this complaint.

14 9. Plaintiff FRIENDS OF THE SANTA CLARA RIVER (FSCR) is a
15 California non-profit corporation. FSCR is concerned with the
16 lack of protection, preservation, and enhancement of the natural
17 qualities of the Santa Clara River corridor as a complete
18 ecosystem, the preservation of natural diversity within the
19 Santa Clara River watershed, and the maintenance of the rural
20 qualities of the Santa Clara Valley. FSCR and its individual
21 members have an interest in ensuring the continued existence of
22 steelhead, particularly within the Santa Clara River.
23 Individual FSCR members use and enjoy publicly-accessible lands
24 in the Santa Clara River watershed for environmental,
25 educational, scientific, recreational, and aesthetic purposes.
26 In particular, FSCR seeks to secure legal protection for the
27 remaining populations of steelhead. FSCR members derive
28 scientific, educational, aesthetic, and spiritual benefit from

1 the steelhead's existence in the wild and from the ecosystem
2 upon which the steelhead depends. FSCR members and supporters
3 live, work, and recreate in and near coastal streams in Southern
4 California, including the Santa Clara River watershed, that
5 serve as habitat for Southern California steelhead. Defendants'
6 decision not to list steelhead upstream of man-made impassable
7 barriers and not to designate such areas as critical habitat has
8 harmed and will continue to harm the interests of FSCR and its
9 members until and unless this Court provides the relief prayed
10 for in this complaint.

11 10. Plaintiff INSTITUTE FOR FISHERIES RESOURCES (IFR) is a
12 California nonprofit public benefit corporation dedicated to the
13 restoration and protection of marine and anadromous salmonid
14 fisheries, including Southern California steelhead. IFR is
15 closely affiliated with Pacific Coast Federal of Fishermen's
16 Associations (PCFFA) and both funds and manages PCFFA whose
17 staff and members have worked for the protection of salmon and
18 steelhead, including the Southern California steelhead. IFR and
19 its member associations thus have a direct as well as indirect
20 interest in the protection of Southern California steelhead and
21 the ecosystem upon which the Southern California steelhead
22 depends. Defendants' decisions excluding ESA listing protection
23 for steelhead upstream of man-made impassable barriers and south
24 of Malibu Creek and excluding such areas as critical habitat has
25 harmed and will continue to harm the interests of the IFR and
26 its members until and unless this Court provides the relief
27 prayed for in this complaint.

28

1 11. Plaintiff PACIFIC COAST FEDERATION OF FISHERMEN'S
2 ASSOCIATIONS (PCFFA) is the west coast's largest trade
3 organization of commercial fishermen. PCFFA is a federation of
4 23 commercial fishermen's vessel owner associations and port and
5 marketing associations with many member associations in the
6 southern and central California area. Steelhead, though not a
7 commercially fished species, are nevertheless so weakened that
8 they are a constraining factor in the management of many other
9 commercially harvested species far up the California coastline,
10 directly and indirectly affecting the incomes of PCFFA members.
11 ESA protection for steelhead will also benefit the same river
12 ecosystems once home to coho salmon and chinook salmon, which
13 are commercially fished, which were once abundant in Southern
14 California and which can be reintroduced into southern
15 California river systems once those rivers have been made safe
16 for steelhead, which is closely related and a member of the
17 salmonid family. PCFFA and its member associations thus have a
18 direct as well as indirect financial interest in the protection
19 of Southern California steelhead. Defendants' decisions
20 excluding ESA listing protection for steelhead upstream of man-
21 made impassable barriers and south of Malibu Creek and excluding
22 such areas as critical habitat has harmed and will continue to
23 harm the interests of PCFFA and its members until and unless
24 this Court provides the relief prayed for in this complaint.

25 12. Defendant NORMAN MINETA is sued in his official
26 capacity as the Secretary of Commerce (Secretary). The
27 Secretary is the federal official whom the ESA vests with
28

1 responsibility for listing anadromous species and designating
2 critical habitat under the ESA.

3 13. Defendant PENELOPE DALTON is sued in her official
4 capacity as the Assistant Administrator for Fisheries of NMFS.
5 Ms. Dalton is legally charged with overseeing the management and
6 conservation of marine fisheries and the protection of coastal
7 fisheries habitat under the ESA.

8 14. Defendant JIM LECKY is sued in his official capacity
9 as the Division Director of the Protected Resources Division,
10 Southwest Region, of NMFS. Mr. Lecky is legally charged with
11 administering the ESA, including review and approval of proposed
12 and final listing decisions and critical habitat designations
13 for endangered and threatened species.

14 15. Defendant BRUCE BABBITT is sued in his official
15 capacity as the Secretary of the Interior (Secretary). The
16 Secretary is the federal official whom the ESA vests with
17 responsibility for listing terrestrial and freshwater species
18 and designating critical habitat under the ESA.

19 16. Defendant JAMIE RAPPAPORT-CLARK is sued in her
20 official capacity as the Director of the United States Fish and
21 Wildlife Service (FWS). Ms. Clark is legally charged with
22 administering the ESA, including review and approval of proposed
23 and final listing decision and critical habitat designations for
24 endangered and threatened species.

25 THE ENDANGERED SPECIES ACT

26 17. The ESA is a federal statute that "provide[s] a means
27 whereby the ecosystems upon which endangered species and
28 threatened species depend may be conserved." 16 U.S.C. §

1 1531(b). To achieve its objectives and goals, the ESA directs
2 NMFS and FWS to determine which species are "threatened" and
3 "endangered" within the meaning of the ESA. 16 U.S.C. § 1533.
4 An "endangered" species includes "any species which is in danger
5 of extinction throughout all or a significant portion of its
6 range." 16 U.S.C. § 1532(6). A "threatened" species includes
7 "any species which is likely to become an endangered species
8 within the foreseeable future through out all or a significant
9 portion of its range." 16 U.S.C. § 1532(20).

10 18. NMFS and FWS share responsibilities for administering
11 the ESA. 50 C.F.R. § 402.01(b). According to a 1974 Memorandum
12 of Understanding (MOU) between NMFS and FWS, NMFS retains
13 jurisdiction to determine whether to list and protect under the
14 ESA marine mammals and anadromous fish species that reside in
15 marine or estuarine waters for all or a major portion of their
16 lifetimes. FWS retains jurisdiction over plant and animal
17 species that live on the land and fish species that spend the
18 majority of their lives in freshwater. For certain species,
19 NMFS and FWS retain joint jurisdiction and, in such cases, must
20 make a joint determination whether a species should be added to
21 the list of threatened and endangered species.

22 A. Listing Under The ESA

23 19. NMFS and FWS have only three options when considering
24 the listing of imperiled species. NMFS may only list species,
25 subspecies, or a distinct population segment. "Species," as
26 defined under the ESA, includes any subspecies of fish or
27 wildlife or plants, and any "distinct population segment of any
28 species of vertebrate fish or wildlife which interbreeds when

1 mature." 16 U.S.C. § 1532 (16). In 1991, NMFS adopted a policy
2 that applies the "distinct population segment" (DPS) concept to
3 different species of Pacific Coast salmonids, including
4 steelhead trout. 56 Fed. Reg. 58612, 58618 (1991). According to
5 this policy, a steelhead population, like Southern California
6 steelhead, may be listed under the ESA if it represents an
7 evolutionary significant unit (ESU) of the biological species.
8 See Id. As a result, NMFS uses the terms ESU and DPS
9 interchangeably for describing steelhead populations.

10 20. Once NMFS or FWS identify or define the species being
11 considered for ESA listing, the agency must then consider and
12 apply the five listing factors. NMFS and FWS must list a
13 species as endangered or threatened if any one or more of the
14 following factors are present:

- 15 (A) the present or threatened destruction, modification or
 - 16 curtailment of its habitat or range;
 - 17 (B) overutilization for commercial, recreational,
 - 18 scientific or educational purposes;
 - 19 (C) disease or predation;
 - 20 (D) the inadequacy of existing regulatory mechanisms; or
 - 21 (E) other natural or man-made factors affecting its
- 22 continued existence.

23 16 U.S.C. § 1533 (a) (1); 50 C.F.R. § 424.11 (c). NMFS and FWS
24 must analyze these listing factors "solely on the basis of the
25 best scientific and commercial data available." 16 U.S.C. §
26 1533 (b) (1) (A). Until listing occurs, the ESA does not afford
27 a species substantive protection to ensure conservation and
28 recovery of the species.

29 B. Critical Habitat Under The ESA

30 21. Concurrently with a final rule listing a species as
31 endangered or threatened, NMFS or FWS must publish a final rule

designating the "critical habitat" of the species. 16 U.S.C. §
1533(b)(6)(C).

22. Critical habitat includes those areas which are essential for the conservation of the species and which may require special management or protection. 16 U.S.C. § 1532(5)(A)(i). In determining critical habitat, NMFS and FWS must consider habitats that are representative of the historic geographical and ecological distributions of a species. 50 C.F.R. § 424.12(b)(5). NMFS and FWS shall designate areas outside the geographical area presently occupied by a species when a designation limited to its present range would be inadequate to ensure the conservation of the species. 50 C.F.R. § 424.12(e); 50 C.F.R. § 424.02(d). Under the ESA, the terms "conserve" means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary." 16 U.S.C. § 1532(3). A final designation of critical habitat must be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation. 50 C.F.R. § 424.12(a).

RELEVANT FACTUAL BACKGROUND

A. Southern California Steelhead Trout

23. Steelhead trout are a member of the salmonid family. They are a silvery color, except on the back and head, where they display a steel-blue tint. Steelhead exhibit one of the most ecologically complex set of life history traits of any Pacific salmonid species. Steelhead are anadromous fish. They

1 are born and reared in freshwater streams. As juveniles,
2 steelhead migrate from their freshwater habitat to estuaries,
3 where they adjust to higher salinity levels. Steelhead then
4 migrate to the ocean where they mature into adults and forage on
5 food sources in the ocean. Eventually, adult steelhead migrate
6 back to the freshwater streams, often where they were born, to
7 spawn.

8 24. Some steelhead spend their entire lives in freshwater
9 and are considered resident steelhead trout. These resident
10 steelhead are sometimes referred to as rainbow trout. Resident
11 steelhead interbreed with adult anadromous steelhead returning
12 to their freshwater streams. Since anadromous and resident
13 steelhead produce offspring bearing each other's life forms,
14 they are considered a part of the same salmonid species.

15 25. To breed and develop, steelhead require high quality
16 water conditions, including an annual abundance of cool, clean
17 well-oxygenated water and low suspended sediments year round.
18 Steelhead use all segments of a river or stream to complete the
19 freshwater phase of their life history: estuaries to acclimate
20 to salinity changes; the middle reaches of the main stem to
21 reach tributaries; and the headwater tributaries to spawn and
22 rear. Migration and life history patterns of Southern
23 California steelhead depend more strongly on rainfall and
24 streamflow than populations to the north. Southern California
25 steelhead typically begin migrating to their freshwater habitats
26 in early November and will spawn between January and June.

27 26. Historically, steelhead ranged from the Kamchatka
28 Peninsula in Asia to the northern Baja Peninsula. NMFS divided

1 up the steelhead on the North American Pacific Coast into
2 fifteen different population segments, or evolutionary
3 significant units (ESU), based on genetics, life history,
4 freshwater geographic separation, and environmental features.
5 The Southern California steelhead population is the most
6 southerly ESU. This ESU historically inhabited most coastal
7 streams from the Santa Maria River, San Luis Obispo County, to
8 at least the U.S.-Mexico border.

9 B. Southern California Steelhead ESU Listing And Critical
10 Habitat Designation Process

11 27. On May 20, 1993, NMFS announced it would conduct a
12 status review to identify all coastal steelhead populations
13 within California, Oregon, and Washington. 58 Fed. Reg. 29390.
14 NMFS indicated that it would divide the species into ESUs in
15 these areas and determine whether or not to propose listing
16 under the ESA for any identified ESU.

17 28. Subsequently, on February 16, 1994, NMFS received a
18 petition from the Oregon Natural Resources Council and fifteen
19 co-petitioners to list all steelhead in Washington, Idaho,
20 Oregon, and California as threatened or endangered under the
21 ESA. 59 Fed. Reg. 27527. In response to the petition, NMFS
22 expanded the ongoing status review to include inland steelhead
23 in Washington, Oregon, and Idaho.

24 29. In August 1996, NMFS completed the status review of
25 West Coast Steelhead from Washington, Idaho, Oregon and
26 California. NMFS identified fifteen ESUs of steelhead,
27 including the Southern California Steelhead ESU, in its
28 completed status review. NMFS concluded that the Southern
California Steelhead ESU is presently in danger of extinction.

1 NMFS determined that steelhead in Southern California had
2 already been extirpated from much of their historical range in
3 this region. NMFS cited widespread degradation, destruction,
4 and blockage of freshwater habitats in Southern California, and
5 the continuing threats to habitat and problems associated with
6 water allocation, as factors contributing to the decline of this
7 ESU.

8 30. In the status review, NMFS determined that the
9 Southern California Steelhead ESU occurs from the Santa Maria
10 River, San Luis Obispo County, south to the southern extent of
11 the species' range. The status review indicates that steelhead
12 historically occurred at least as far south as the U.S.-Mexico
13 border. NMFS also indicated that, as of the time of the status
14 review, the southernmost stream used by steelhead for spawning
15 is generally thought to be Malibu Creek, California. However,
16 according to NMFS, in years of substantial rainfall, spawning
17 steelhead can be found as far south as the Santa Margarita River
18 in San Diego County. One table in the status review identifies
19 several streams south of Malibu Creek as part of the Southern
20 California Steelhead ESU, including San Mateo Creek, and the
21 Santa Margarita, San Luis Rey, and Sweetwater rivers of San
22 Diego County. Three maps in the status review identify the
23 Southern California Steelhead ESU as reaching from approximately
24 the Santa Maria River in San Luis Obispo County south to
25 approximately the U.S.-Mexico border.

26 31. On August 9, 1996, NMFS issued a proposed rule to list
27 the Southern California Steelhead ESU as an endangered species.
28 61 Fed. Reg. 41541. In the proposed rule, NMFS determined that

1 steelhead historically occurred as far south as Baja California.
2 61 Fed. Reg. at 41553. NMFS also stated that based on the best
3 available genetic information, it was the consensus of NMFS
4 scientists, as well as regional fishery biologists, that the
5 Southern California Steelhead ESU includes resident populations.
6 61 Fed. Reg. at 41543. In the listing proposal, NMFS recognized
7 that many resident steelhead would be included within the
8 Southern California Steelhead ESU. Nonetheless, NMFS proposed
9 to list only anadromous Southern California steelhead, although
10 NMFS indicated that it would work with FWS prior to the final
11 listing determination to examine the relationship between
12 resident and anadromous forms of steelhead. 61 Fed. Reg. at
13 41543.

14 32. On July 7, 1997, NMFS completed an updated status
15 review for West Coast Steelhead. NMFS reaffirmed its previous
16 conclusion that the Southern California Steelhead ESU includes
17 both anadromous and resident populations. NMFS found that the
18 Southern California ESU should include native populations of
19 resident fish that historically had opportunities to interbreed
20 with steelhead, such as those resident steelhead now located
21 above man-made impassable barriers.

22 33. After NMFS published the proposed rule, FWS
23 acknowledged that resident and anadromous steelhead are
24 identical. In a July 29, 1997 letter, FWS informed NMFS that
25 resident steelhead are genetically similar, if not identical, to
26 anadromous steelhead, and are biologically the same species. In
27 this letter, FWS also asserted authority over resident
28 populations of the Southern California Steelhead ESU. Without

1 explanation or analysis, FWS concluded that resident steelhead
2 do not need ESA protection and decided not to list this portion
3 of the Southern California Steelhead ESU. FWS never conducted a
4 status review of resident steelhead.

5 34. On August 18, 1997, NMFS listed the Southern
6 California Steelhead ESU as an endangered species under the ESA.
7 62 Fed. Reg. 43937. At the time of listing, an estimated 400
8 Southern California steelhead remained, where historically there
9 were over 100,000 fish in Southern California. NMFS excluded
10 from the listing all steelhead upstream of man-made impassable
11 barriers and south of Malibu Creek. In the final rule, NMFS
12 applied its ESU policy and determined, once again, that based on
13 the best available genetic information, it was the consensus of
14 NMFS scientists, as well as regional fishery biologists, that
15 the Southern California Steelhead ESU includes both anadromous
16 and resident populations. 62 Fed. Reg. at 43941. Specifically,
17 NMFS found that resident fish should be included in the Southern
18 California Steelhead ESU where resident fish of native lineage
19 once had the ability to interbreed with anadromous fish but no
20 longer do because they are currently above human-made barriers,
21 and they are considered essential for recovery of the ESU. 62
22 Fed. Reg. at 43941. NMFS stated that several lines of evidence
23 exist to support this conclusion. 62 Fed. Reg. at 43941.

24 35. Nonetheless, NMFS only listed anadromous populations
25 of Southern California steelhead, deferring to FWS's decision
26 regarding resident populations. In addition, NMFS excluded
27 steelhead populations found south of Malibu Creek from the final
28 listing of the Southern California Steelhead ESU. NMFS claimed

1 that no persistent, spawning populations of Southern California
2 steelhead occurred south of Malibu Creek.

3 36. In the final listing of the Southern California
4 Steelhead ESU as an endangered species under the ESA, NMFS
5 stated that critical habitat was not yet determinable. 62 Fed.
6 Reg. 43937, 43953 (August 18, 1997). NMFS stated that the
7 agency intended to develop and publish a critical habitat
8 determination for the Southern California Steelhead ESU within
9 one year from the publication of the final rule listing the
10 species as endangered. 62 Fed. Reg. at 43953.

11 37. On February 5, 1999, NMFS published a proposed rule to
12 designate critical habitat for the Southern California Steelhead
13 ESU. 64 Fed. Reg. 5740. NMFS did not include areas south of
14 Malibu Creek or upstream of man-made impassable barriers as
15 critical habitat for the species.

16 38. In the February 16, 2000 final rule, NMFS designated
17 critical habitat for the Southern California Steelhead ESU, but
18 excluded areas upstream of man-made impassable barriers. 65
19 Fed. Reg. 7764. NMFS also excluded areas south of Malibu Creek
20 which are accessible to steelhead even though NMFS included
21 areas which are accessible to steelhead north of Malibu Creek.
22 65 Fed. Reg. 7764.

23 FIRST CLAIM FOR RELIEF

24 (NMFS's Violation of Section 4 of the ESA - Failure to List
25 Steelhead Upstream of Man-made Impassable Barriers)

26 39. Each and every allegation set forth in the Complaint
27 is incorporated herein by reference.

28 40. NMFS determined that the Southern California Steelhead
ESU includes both anadromous and resident populations. NMFS

ATTACHMENT J



STATE OF CALIFORNIA
GRAY DAVIS
GOVERNOR

THE RESOURCES AGENCY
MARY NICHOLS
SECRETARY FOR RESOURCES

DEPARTMENT OF CONSERVATION
DARRYL YOUNG
DIRECTOR

DIVISION OF MINES AND GEOLOGY
JAMES F. DAVIS
STATE GEOLOGIST

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MORRISON & FOERSTER

**MINES AND MINERAL PRODUCERS
ACTIVE IN CALIFORNIA
(1997-1998)**

By
Kim Larose, Les Youngs,
Susan Kohler-Antablin, and Karen Garden

1999

**CALIFORNIA DEPARTMENT OF CONSERVATION
DIVISION OF MINES AND GEOLOGY
801 K Street, MS 12-30
Sacramento, California 95814**

In cooperation with

**CALIFORNIA DEPARTMENT OF CONSERVATION
OFFICE OF MINE RECLAMATION
801 K Street, MS 09-06
Sacramento, California 95814**

LIST OF ACTIVE MINES IN CALIFORNIA (1997-1998)

SANTA BARBARA

ACIN RANCH SITE 1
SEPULVEDA BUILDING MATERIALS
P.O. BOX 146
CASMALIA, CA 93429
SANTA BARBARA COUNTY
(805) 934-7883
34.63, 120.43, MAP No. 737
Stone/Rock

BEE ROCK QUARRY
GRANITE CONSTRUCTION CO.
HWY. 154 & BRADBURY DAM
SANTA YNEZ, CA 93427
SANTA BARBARA COUNTY
(805) 964-9951
34.55, 119.98, MAP No. 738
Limestone

BOGNUDA
COAST ROCK PRODUCTS, INC.
P.O. BOX 5050
SANTA MARIA, CA 93456
SANTA BARBARA COUNTY
(805) 925-2505
34.85, 120.25, MAP No. 739
Sand and gravel

BUELLFLAT ROCK COMPANY, INC.
BUELLFLAT ROCK COMPANY, INC.
1214 MISSION DRIVE
SOLVANG, CA 93463
SANTA BARBARA COUNTY
(805) 688-3226
34.59, 120.16, MAP No. 740
Sand and gravel

BUELLTON PIT -
GRANITE CONSTRUCTION CO.
400 SOUTH HIGHWAY 101
BUELLTON, CA 93427
SANTA BARBARA COUNTY
(805) 964-9951
34.60, 120.18, MAP No. 741
Sand and gravel

CELITE CORPORATION
CELITE CORPORATION
2500 MIGUELITO ROAD
LOMPOC, CA 93436
SANTA BARBARA COUNTY
(805) 737-1282
34.59, 120.44, MAP No. 742
Diatomite

CITY OF SANTA MARIA-DPW
CITY OF SANTA MARIA-DPW
110 S. PINE STREET, STE. 101
SANTA MARIA, CA 93458-5082
SANTA BARBARA COUNTY
(805) 925-0951
34.96, 120.38, MAP No. 743
Sand and gravel

COLSON QUARRY
G. ANTOLINI & SON
120 EAST HERMOSA STREET
SANTA MARIA, CA 93454
SANTA BARBARA COUNTY
(805) 925-4466
34.94, 120.15, MAP No. 744
Dimension stone

GOOD CHILD
COAST ROCK PRODUCTS, INC.
P.O. BOX 5050
SANTA MARIA, CA 93456
SANTA BARBARA COUNTY
(805) 922-2505
34.85, 120.25, MAP No. 745
Sand and gravel

GREGERSEN PIT
SOLVANG SAND COMPANY
P.O. BOX 68
SOLVANG, CA 93464
SANTA BARBARA COUNTY
(805) 688-8860
34.67, 120.15, MAP No. 746
Specialty sand

GUADALUPE DIVISION
GORDON SAND COMPANY
WEST END OF MAIN STREET
GUADALUPE, CA 93434
SANTA BARBARA COUNTY
(805) 343-1755
34.96, 120.63, MAP No. 747
Silica

LIVE OAK SHALE QUARRY
DANIELS EQUIPMENT, INC.
2891 BASELINE
SANTA YNEZ, CA 93460
SANTA BARBARA COUNTY
(805) 688-1824
34.60, 120.18, MAP No. 748
Shale

PARKS SAND PIT
PARKS LAND & CATTLE CO., INC.
10020 CALLE REAL
GOLETA, CA 93117
SANTA BARBARA COUNTY
(805) 968-1790
34.46, 119.97, MAP No. 749
Sand and gravel

SISQUOC
KAISER SAND & GRAVEL
5325 FOXEN CANYON ROAD
SANTA MARIA, CA 93454
SANTA BARBARA COUNTY
(805) 937-2091
34.87, 120.22, MAP No. 750
Sand and gravel

SISQUOC MINING OPERATION
COAST ROCK PRODUCTS, INC.
P.O. BOX 5050
SANTA MARIA, CA 93456
SANTA BARBARA COUNTY
(805) 925-2505
34.83, 120.18, MAP No. 751
Sand and gravel

SISQUOC RANCH
COAST ROCK PRODUCTS, INC.
P.O. BOX 5050
SANTA MARIA, CA 93456
SANTA BARBARA COUNTY
(805) 925-2505
34.83, 120.18, MAP No. 752
Sand and gravel

VENTUCOPA PLANT
GENERAL PRODUCTION SERVICE, INC.
P.O. BOX 344
TAFT, CA 93268
SANTA BARBARA COUNTY
(805) 768-4327
34.88, 119.50, MAP No. 753
Sand and gravel

SANTA CLARA

AZEVEDO QUARRY
A.J. RAISCH PAVING COMPANY
P.O. BOX 7092
SAN JOSE, CA 95150-7092
SANTA CLARA COUNTY
(408) 227-9222
37.29, 121.85, MAP No. 754
Stone/Rock

INDEX BY MAP NUMBER (MINE LOCATION NUMBER) AND COUNTY

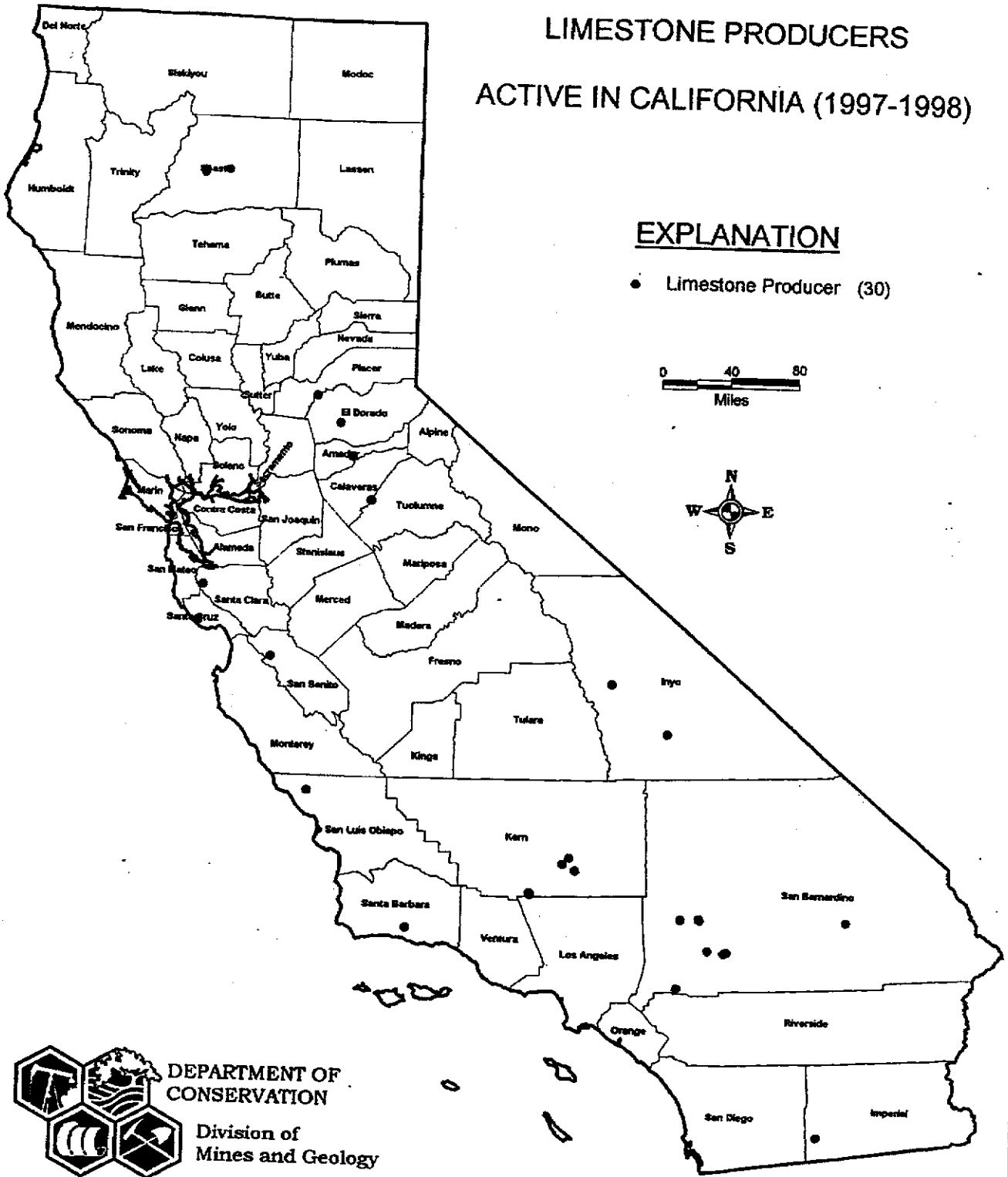
Map No.	COUNTY	MINE NAME	MINE OPERATOR	COMMODITY
715	SAN LUIS OBISPO	MILLHOLLIN PIT	GLENN MILLHOLLIN	
716	SAN LUIS OBISPO	MORRO ROCK & SAND	CAMBRIA ROCK	Stone/Rock
717	SAN LUIS OBISPO	MOUNTAIN SPRINGS SHALE PIT	VIBORG SAND & GRAVEL, INC.	Sand and gravel
718	SAN LUIS OBISPO	MUNARI PIT	WEYRICK SAND & GRAVEL	Shale
719	SAN LUIS OBISPO	NAVAJO ROCK & SAND	NAVAJO CONCRETE	Sand and gravel
720	SAN LUIS OBISPO	NESBITT	M.J. HERMRECK/WILLCO ASSOC.	Sand and gravel
721	SAN LUIS OBISPO	NEWHALL	WILLCO ASSOCIATES	Sand and gravel
722	SAN LUIS OBISPO	NORTH RIVER ROAD PIT	VIBORG SAND & GRAVEL, INC.	Sand and gravel
723	SAN LUIS OBISPO	OCEANO SAND COMPANY	OCEANO SAND COMPANY	Specialty sand
724	SAN LUIS OBISPO	PATCHETT PIT	DECHANCE CONSTRUCTION CO., INC.	Sand and gravel
725	SAN LUIS OBISPO	RANCHO SAN SIMEON PIT	RANCHO SAN SIMEON	Stone/Rock
726	SAN LUIS OBISPO	ROCKY CANYON	WILLCO ASSOCIATES	Decomposed granite
727	SAN LUIS OBISPO	SALINAS RIVER BORROW PIT	CITY OF PASO ROBLES	Sand and gravel
728	SAN LUIS OBISPO	SANTA MARGARITA	HANSON AGGREGATE MID PACIFIC	Sand and gravel
729	SAN LUIS OBISPO	SYCAMORE ROAD PIT	BORZINI SAND & GRAVEL	Sand and gravel
730	SAN LUIS OBISPO	TEMPLETON/ORMONDE	M.J. HERMRECK & WILLCO ASSOC.	Sand and gravel
731	SAN LUIS OBISPO	TIBER CANYON SAND PIT	R. BURKE CORPORATION	Sand and gravel
732	SAN LUIS OBISPO	TROESH READY MIX, INC.	TROESH READY MIX, INC.	Sand and gravel
733	SAN LUIS OBISPO	WHALE ROCK PIT	NEGRANTI CONSTRUCTION	Stone/Rock
734	SAN MATEO	BRISBANE QUARRY	CALIFORNIA ROCK & ASPHALT, INC.	Stone/Rock
735	SAN MATEO	LANGLEY HILL QUARRY	LANGLEY HILL QUARRY	Stone/Rock
736	SAN MATEO	PILARCITOS QUARRY	WEST COAST AGGREGATES, INC.	Decomposed granite
737	SANTA BARBARA	ACIN RANCH SITE 1	SEPULVEDA BUILDING MATERIALS LOMPOC	Stone/Rock
738	SANTA BARBARA	BEE ROCK QUARRY	GRANITE CONSTRUCTION CO.	Limestone
739	SANTA BARBARA	BOGNUDA	COAST ROCK PRODUCTS, INC.	Sand and gravel
740	SANTA BARBARA	BUELLFLAT ROCK COMPANY, INC.	BUELLFLAT ROCK COMPANY, INC.	Sand and gravel
741	SANTA BARBARA	BUELLTON PIT	GRANITE CONSTRUCTION CO.	Sand and gravel
742	SANTA BARBARA	CELITE CORPORATION	CELITE CORPORATION	Diatomite
743	SANTA BARBARA	CITY OF SANTA MARIA-PWD	CITY OF SANTA MARIA-PWP	Sand and gravel
744	SANTA BARBARA	COLSON QUARRY	G. ANTOLINI & SON	Dimension stone
745	SANTA BARBARA	GOOD CHILD	COAST ROCK PRODUCTS, INC.	Sand and gravel
746	SANTA BARBARA	GREGENSEN PIT	SOLVANG SAND COMPANY	Specialty sand
747	SANTA BARBARA	GUADALUPE DIVISION	GORDON SAND COMPANY	Silica
748	SANTA BARBARA	LIVE OAK SHALE QUARRY	DANIELS EQUIPMENT, INC.	Shale
749	SANTA BARBARA	PARKS SAND PIT	PARKS LAND & CATTLE CO., INC.	Sand and gravel
750	SANTA BARBARA	SISQUOC	KAISER SAND & GRAVEL	Sand and gravel
751	SANTA BARBARA	SISQUOC MINING OPERATION	COAST ROCK PRODUCTS, INC.	Sand and gravel
752	SANTA BARBARA	SISQUOC RANCH	COAST ROCK PRODUCTS, INC.	Sand and gravel
753	SANTA BARBARA	VENTUCOPA PLANT	GENERAL PRODUCTION SERVICE, INC.	Sand and gravel
754	SANTA CLARA	AZEVEDO QUARRY	A.J. RAISCH PAVING COMPANY	Stone/Rock
755	SANTA CLARA	CURTNER PRODUCTS	OLIVER DE SILVA, INC.	Fill
756	SANTA CLARA	HANSON PERMANENTE CEMENT QUARRY	KAISER CEMENT CORP.	Limestone

Revised 1999

LIMESTONE PRODUCERS ACTIVE IN CALIFORNIA (1997-1998)

EXPLANATION

- Limestone Producer (30)



DEPARTMENT OF
CONSERVATION
Division of
Mines and Geology

ATTACHMENT K

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9 Attorneys for Petitioner
10 NANCY CRAWFORD-HALL

FILED
SANTA BARBARA
SUPERIOR COURT

OCT - 9 2001

GARY M. BLAIR, EXEC. OFFICER
By *Rosa Reyes*
ROSA REYES, Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA BARBARA - SOUTH COUNTY

13 NANCY CRAWFORD-HALL,

14 Petitioner,

15 v.

16 CACHUMA OPERATION AND
17 MAINTENANCE BOARD, a joint powers
18 authority, and DOES 1 through 10, inclusive,

19 Respondents.

20 UNITED STATES DEPARTMENT OF THE
21 INTERIOR, BUREAU OF RECLAMATION;
22 CALIFORNIA DEPARTMENT OF FISH AND
23 GAME; CACHUMA CONSERVATION
24 RELEASE BOARD,

25 Real Parties in Interest.

No. 01045423

**[PROPOSED] ORDER ISSUING
PEREMPTORY WRIT OF MANDATE
TO SET ASIDE ADOPTION OF
MITIGATED NEGATIVE
DECLARATION AND PROJECT
APPROVAL**

Date: August 3, 2001
Time: 10:00 a.m.
Dept: 5

The Honorable J. William McLafferty

Petition filed: March 19, 2001

CALENDARED
MORRISON & FOERSTER

OCT 22 2001

FOR DATE(S) _____
BY _____

1 The petition of Nancy Crawford-Hall ("Petitioner ") for a writ of mandate ("Writ
2 Petition") came on regularly for hearing on August 3, 2001, at or about 10:00 a.m. in Department
3 5, the Hon. J. William McLafferty, presiding.

4 William H. Hair and Glenn J. Dickinson appeared for Respondent Cachuma Operation
5 and Maintenance Board ("COMB") and real party in interest Cachuma Conservation and Release
6 Board ("CCRB"), Helen G. Arens appeared for real party in interest Department of Fish and
7 Game, and Andrew B. Sabey and Peter Candy appeared for Petitioner Crawford-Hall.

8 The Court, having considered the papers in support and in opposition to the Writ Petition,
9 and having reviewed the administrative record lodged in connection with this action, and having
10 heard and considered the argument of counsel, hereby ORDERS as follows:

11 The Petition for Writ of Mandate is GRANTED.

12 1. The Court finds that the Respondent COMB abused its discretion by failing to
13 consider the whole Hilton Creek Habitat Enhancement and Fish Passage Project (the "Hilton
14 Creek Project"), which is described in the administrative record at pages 5293-5299 and consists
15 of at least the (1) Cascade Chute Project, (2) the Highway 154 Culvert Project, (3) the Watering
16 Systems, and (4) the Channel Extension. Isolating the Cascade Chute Project from consideration
17 as part of the larger Hilton Creek Project violated the California Environmental Quality Act
18 ("CEQA") and prevented the proper environmental impact evaluation.

19 2. COMB failed to investigate or properly evaluate potential impacts to agriculture,
20 mineral resources, water supply, land uses, or the impact of the overall Hilton Creek Project on
21 the endangered species itself.

22 3. The Initial Study COMB prepared for the Cascade Chute Project is inadequate and
23 lacks sufficient information to support the conclusions reached.

24 4. COMB is hereby ordered to set aside its adoption of the Mitigated Negative
25 Declaration and its approval of the Cascade Chute Project.

26 5. The bond in the amount of \$22,000, which Petitioner Nancy Crawford-Hall posted in
27 connection with the preliminary injunction granted in this case on or about May 21, 2001, is
28 hereby dissolved and released in favor of Nancy Crawford-Hall.

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6. Petitioner Nancy Crawford-Hall is the prevailing party and is awarded her costs of suit.

Dated: September __, 2001

By: _____
Judge of the Superior Court

APPROVED AS TO FORM

Counsel for Respondent COMB
and Real Party In Interest CCRB

APPROVED AS TO FORM



Counsel for Real Party in Interest
Dept. of Fish & Game

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6. Petitioner Nancy Crawford-Hall is the prevailing party and is awarded her costs of suit.

Dated: ^{October} ~~September~~ 3, 2001

By: J. WILLIAM McLAFFERTY
Judge of the Superior Court

APPROVED AS TO FORM

W. Dorkin 9/25/01

Counsel for Respondent COMB
and Real Party In Interest CCRB

APPROVED AS TO FORM

Counsel for Real Party in Interest
Dept. of Fish & Game