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**BEST BEST & KRIEGER LLP**

A CALIFORNIA LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

INDIAN WELLS  
(760) 568-2611

IRVINE  
(949) 263-2600

ONTARIO  
(909) 989-8584

LAWYERS  
3750 UNIVERSITY AVENUE  
POST OFFICE BOX 1028  
RIVERSIDE, CALIFORNIA 92502-1028  
(951) 686-1450  
(951) 686-3083 FAX  
BBKLAW.COM

SACRAMENTO  
(916) 325-4000

SAN DIEGO  
(619) 525-1300

WALNUT CREEK  
(925) 977-3300

GREGORY K. WILKINSON  
(951) 826-8270  
GREGORY.WILKINSON@BBKLAW.COM  
FILE No. 26260.00000

July 21, 2006

**VIA OVERNIGHT MAIL**

Victoria Whitney, Division Chief  
State Water Resources Control Board  
Division of Water Rights  
1001 "I" Street  
Sacramento, CA 95814

Re: Hearing to Review the United States Bureau of Reclamation Water Right Permits 11308 and 11310 (Applications 11331 and 11332) to Determine Whether any Modifications In Permit Terms and Conditions are Necessary to Protect Public Trust Values and Downstream Water Rights on the Santa Ynez River Below Bradbury Dam (Cachuma Reservoir)

Dear Ms. Whitney:

Enclosed please find an original and one copy of the *Reply to California Trout, Inc.'s Opposition to Motion to Disqualify* submitted on behalf of the Santa Ynez River Water Conservation District, Improvement District No. 1 and the Cachuma Conservation Release Board in the above-referenced matter.

Yours very truly,



Linda Peabody  
Legal Secretary to Gregory K. Wilkinson  
of BEST BEST & KRIEGER LLP

GKW:lcp

cc: Ernest Mona (w/ enc.)  
Dana Heinrich (w/ enc.)

1 Gregory K. Wilkinson, Bar No. 054809  
2 Charity Schiller, Bar No. 234291  
3 BEST BEST & KRIEGER, LLP  
3750 University Avenue, Suite 400  
4 Riverside, CA 92501  
Telephone: (909) 686-1450  
Facsimile: (909) 686-3083

5 Attorneys for Santa Ynez River Water  
6 Conservation District, Improvement District No. 1  
and Cachuma Conservation Release Board

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STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:  
Hearing to Review the United States  
Bureau of Reclamation Water Right  
Permits 11308 and 11310 (Applications  
11331 and 11332) to Determine Whether  
Any Modifications in Permit Terms and  
Conditions Are Necessary to Protect Public  
Trust Values and Downstream Water  
Rights on the Santa Ynez River Below  
Bradbury Dam (Cachuma Reservoir)

REPLY TO CALIFORNIA TROUT,  
INC.'S OPPOSITION TO MOTION  
TO DISQUALIFY

1 **I. INTRODUCTION**

2 Through its Opposition to Motion to Disqualify, California Trout, Inc. (“Cal Trout”)  
3 admits that that Dr. Gary Wolff co-authored the Pacific Institute’s “Waste Not, Want Not”  
4 report;<sup>1</sup> that Dr. Wolff was, and currently remains, employed by the Pacific Institute; and that Dr.  
5 Wolff’s colleagues at the Pacific Institute provided testimony regarding Key Issue 3 based on the  
6 “Waste Not, Want Not” report.<sup>2</sup> In addition, the “Waste Not, Want Not” report was heavily  
7 relied on both by Cal Trout and by its Pacific Institute expert witnesses during the Cachuma  
8 Project Hearing and subsequent briefing. Despite these facts, Cal Trout alleges that the Cachuma  
9 Member Units have not shown “that Dr. Wolff is incapable of judging this controversy fairly.”  
10 This proposed standard, however, is an overstatement of the law, which does not require that the  
11 Member Units prove actual bias. Further, and contrary to Cal Trout’s allegations, the Member  
12 Units are not seeking to disqualify Dr. Wolff based on his knowledge of California water law or  
13 water-related issues. Rather, Government Code sections 11425.30 and 11425.40, as well as due  
14 process concerns, require that Dr. Wolff be disqualified from presiding over, or participating in,  
15 this proceeding based on his authorship of the “Waste Not, Want Not” report and the clear and  
16 objective appearance of bias which that authorship introduces.

17  
18 **II. ARGUMENT**

19 **A. Government Code Sections 11425.30 and 11425.40 Require that**  
20 **Dr. Wolff be Disqualified**

21 Government Code section 11425.30, subdivision (a), provides that a person may be  
22 disqualified from presiding over an adjudicative proceeding if the person also served – or is  
23 subject to the authority, direction, or discretion of someone who served – as an investigator or  
24 advocate in the proceeding or its pre-adjudicative stage. Further, Government Code section

25  
26 <sup>1</sup> As described in the Cachuma Member Unit’s Motion for Disqualification, the “Waste Not, Want Not” report is  
27 included in this Proceeding as Cal Trout Exhibit 63 and is more particularly titled: “Waste Not, Want Not: The  
28 Potential for Urban Water Conservation in California.” (Motion to Disqualify, p. 3:2-5)

<sup>2</sup> Specifically, Key Issue 3 inquired “What water conservation measures could be implemented in order to minimize  
water supply impacts?” (See discussion at Motion to Disqualify, pp. 2:11-3:14.)

1 11425.40, subdivision (a), provides that a person may be disqualified from an adjudicative  
2 proceeding for “bias, prejudice, or interest.” Despite Cal Trout’s efforts to sanitize his prior  
3 activity, Dr. Wolff meets the criteria for disqualification under both sections 11425.30 and  
4 11425.40 and, accordingly, may not preside over this proceeding.<sup>3</sup>

5 Cal Trout argues that section 11425.30 does not apply to Dr. Wolff because he did not  
6 have any “substantial involvement” with this matter and that, when this proceeding is actually  
7 heard, Dr. Wolff will no longer be employed by the Pacific Institute. (Cal Trout’s Opposition,  
8 p. 4:13-15.) In addition, Cal Trout argues that section 11425.40 does not provide a basis for  
9 disqualification because Dr. Wolff’s involvement with the “Waste Not, Want Not” report was  
10 limited; because the “Waste Not, Want Not” report is not the “lynchpin of Cal Trout’s position on  
11 Key Issue 3d;” and because Dr. Wolff’s knowledge of water conservation issues is general in  
12 nature and unrelated to this proceeding. (See Cal Trout’s Opposition, pp. 5:17-23, 6:14-15.)  
13 These arguments obscure the pivotal and substantial role that Dr. Wolff’s “Waste Not, Want Not”  
14 report plays in these proceedings as well as the deference and bias created by Dr. Wolff’s  
15 authorship of the report and continued employment by the Pacific Institute.

16 In its Closing Brief, Cal Trout relies heavily upon the “Waste Not, Want Not” report and  
17 upon the testimony of Peter Gleick and Dana Haasz interpreting that report. (See Closing Brief,  
18 pp. 24:7-28:20; see also Public Hearing Phase 2 Transcripts [November 13, 2003], p. 901  
19 [Testimony of Ms. Haasz discussing the “Waste Not, Want Not” report].) Indeed – and despite  
20 Cal Trout’s assertion that the “Waste Not, Want Not” report was merely one of many reports that  
21 Mr. Gleick and Ms. Haasz relied upon to support their testimony regarding Key Issue 3 – Cal  
22 Trout’s Closing Brief makes clear that “many of the conclusions in their written testimony are  
23 based on the methodology developed for the Pacific Institute’s report . . . .” (Cal Trout’s Closing  
24 Brief, p. 25:4-6 [citing the “Waste Not, Want Not” report].) Further, Cal Trout’s attempt to parse

25 <sup>3</sup> Cal Trout raises the question of whether “presiding over” means that Dr. Wolff may not have *any* involvement with  
26 the proceeding. They assume that this is the meaning of Government Code section 11405.80 as it applies to  
27 Government Code sections 11425.30 and 11425.40. (Cal Trout Opposition, p. 2:26-28.) The Cachuma Member  
28 Units agree. The purpose of the Government Code provisions prohibiting Dr. Wolff’s participation in the proceeding  
would be frustrated if Dr. Wolff refrained from appearing on the State Board’s dais but continued to participate in the  
proceeding behind the scenes.

1 out those portions of the “Waste Not, Want Not” report specifically authored by Dr. Wolff and to  
2 thereby vitiate any bias, are unconvincing. Cal Trout admits that Dr. Wolff specifically authored  
3 those sections of the report which “analyzed the cost-effectiveness of a [sic] urban water  
4 conservation option throughout the State.” (Cal Trout’s Opposition, p. 5:20-21.) This issue is  
5 central to the resolution of Key Issue 3, and was repeatedly addressed both in testimony presented  
6 during the Cachuma Project Hearing as well as in Cal Trout’s Closing Brief. (See, e.g., Public  
7 Hearing Phase 2 Transcripts [November 13, 2003], pp. 1041-42 [Testimony of Ms. Kraus], 1063-  
8 67 [Testimony of Ms. Gonzales]; Cal Trout’s Closing Brief, pp. 22:4-6, 24:26-28.) Finally, Cal  
9 Trout admits that Dr. Wolff was, and currently remains, employed by the Pacific Institute. (Cal  
10 Trout’s Opposition, pp. 4:16-17.) Accordingly, Dr. Wolff is presently subject to the authority,  
11 direction, and discretion of the Pacific Institute and its president/founder, Peter Gleick.<sup>4</sup> Cal  
12 Trout’s assurances that Dr. Wolff will, upon commencement of his term on the State Water  
13 Resources Control Board (“State Board”), fully and effectively divorce himself from all loyalties,  
14 interest, and deference to the conclusions set forth in his own report as well as the testimony of  
15 his long-time, Pacific Institute colleagues is contrary to human experience. (Cf. *Withrow v.*  
16 *Larkin* (1975) 421 U.S. 35, 47 [inquiries into potential bias should include “a realistic appraisal of  
17 psychological tendencies and human weakness”].) Accordingly, Dr. Wolff is not the disinterested  
18 decisionmaker called for by Government Code sections 11425.30 and 11425.40, and he is subject  
19 to disqualification from this proceeding.  
20

21 **B. Due Process Considerations Require that Dr. Wolff be Disqualified**

22 Cal Trout argues that Dr. Wolff cannot be disqualified on the basis of “speculative  
23 assertions” or mere “prior knowledge of the factual background” involved in this proceeding.  
24 (Cal Trout’s Opposition, p. 9:4, 16.) The Cachuma Member Units entirely agree, and if Dr.  
25

26 <sup>4</sup> It is noteworthy that the disqualification provisions of Government Code section 11425.30 are not dissimilar to the  
27 those which disqualify an entire law firm based on the conflicts of interests of one the firm’s attorneys. (See, e.g.,  
28 *Rosenfeld Construction Company, Inc. v. Superior Court* (1991) 235 Cal.App.3d 566, 576; *Elan Transdermal Ltd. v.*  
*Cygnus Therapeutic Systems* (1992) 809 F.Supp. 1383, 1387 [It is a “common-sense notion that people who work in  
close quarters talk with each other, and sometimes about their work.”].)

1 Wolff's sole prior involvement in this proceeding was simply a disinterested reading of the  
2 evidence or mere knowledge about California water conservation, this Motion would not be  
3 before the State Board. Here, however, Dr. Wolff personally authored the evidence at issue and  
4 is a colleague of the two key expert witnesses whom Cal Trout relies upon for its interpretation  
5 of Key Issue 3. Accordingly, "experience teaches that the probability of actual bias on the part  
6 of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin*  
7 (1975) 421 U.S. 35, 47.)

8 Further, and contrary to Cal Trout's suggestion that the Member Units must  
9 "demonstrate that Dr. Wolff is incapable of judging this controversy fairly" (Cal Trout's  
10 Opposition, p. 9:6-7), case law establishes that the Member Units need only show "a clear  
11 appearance of unfairness and bias." (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108  
12 Cal.App.4th 81, 94 [emphasis in original].)<sup>5</sup> Indeed, "the issue presented is not whether there  
13 [is] actual bias, but whether the hearing [meets] minimum constitutional standards of due  
14 process." (*Nightlife Partners*, supra, 108 Cal.App.4th at p. 86.) Where, as here, the presumption  
15 that administrative decisionmakers will carry out their duties with integrity and honesty is  
16 overcome by an unacceptable probability of bias, the decisionmaker is subject to disqualification  
17 on due process grounds. (See, e.g., *Breakzone Billiards v. City of Torrance* (2000) 81  
18 Cal.App.4th 1205, 1236; see also *Withrow*, supra, 421 U.S. at p. 47 ["Not only is a biased  
19 decisionmaker constitutionally unacceptable but our system of law has always endeavored to  
20 prevent even the probability of unfairness" (internal quotations omitted).].)

21 Here, Cal Trout admits that Dr. Wolff co-authored the Pacific Institute's "Waste Not,  
22 Want Not" report; that Dr. Wolff is employed by the Pacific Institute; and that Dr. Wolff's

23 <sup>5</sup> Cal Trout disparages the *Nightlife* decision as being "out of step" with the U.S. Supreme Court case of *Withrow v.*  
24 *Larkin*, but it is an axiom of constitutional law that state courts may interpret their state constitutions to grant greater  
25 rights than those afforded under the federal constitution. (See, e.g., *People v. Monge* (1997) 16 Cal. 4th 826, 871  
26 ["we remain free to continue our long-standing and constitutionally authorized practice, in appropriate situations, of  
27 interpreting our state Constitution to grant greater protection to state residents than would be afforded by the high  
28 court under the federal Constitution."]; *Bennett v. Livermore Unified School Dist.* (1987) 193 Cal.App.3d 1012  
[citing *Mandel v. Hodges* (1976) 54 Cal.App.3d 596, 616 ["California courts alone determine the rights guaranteed  
by the California Constitution so long as those rights extend equal or greater protection to those guaranteed by the  
federal Constitution under totally similar provisions of the Bill of Rights."].) Accordingly, should *Nightlife* grant the  
Cachuma Member Units greater due process protections, this would not conflict with the *Withrow* decision.

1 colleagues at the Pacific Institute testified as to Key Issue 3 based on the “Waste Not, Want Not”  
2 report. Further, the conclusions provided by the “Waste Not, Want Not” report have been  
3 heavily relied upon by Cal Trout in its Closing Brief and remain at issue as to the State Board’s  
4 resolution of Key Issue 3. (See discussion *infra* at § II.A.) Accordingly, these facts demonstrate  
5 far more than the mere “subjective” or “unilateral” perception of bias looked down upon by the  
6 courts. (See, e.g., *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.)

7 Finally, Cal Trout’s heavy reliance on the *Withrow* decision is misplaced because the  
8 facts of *Withrow* are readily distinguishable. In *Withrow*, a board of medical examiners  
9 investigated several allegations that a doctor had committed professional misconduct. Following  
10 the investigation, the board held a hearing in which it concluded that the doctor had committed  
11 professional misconduct and suspended the doctor’s medical license. The doctor alleged that his  
12 due process rights were violated because the same panel that had investigated the misconduct  
13 also served as the adjudicatory body weighing the evidence. The Supreme Court explained that  
14 the mere combination of the investigative and adjudicatory functions, without more, is not  
15 sufficient evidence of bias constituting a violation of due process. (*Withrow*, *supra*, 421 U.S. at  
16 p. 54.) The Court then found that “there was no more evidence of bias or the risk of bias or  
17 prejudice than inhered in the fact that the Board had investigated and would now adjudicate.”  
18 (*Id.*) None of the members of the Board had any personal connection with the investigation or  
19 adjudication, and the board’s procedures did not, in practice, act to prejudice the doctor’s  
20 interests. Thus, the Court ruled that the doctor’s due process rights were not violated. (*Id.* at  
21 p. 55.)

22 Here, in contrast, Dr. Wolff is not merely a disinterested panel member who is reviewing  
23 the evidence and testimony with fresh eyes. Instead, “a realistic appraisal of psychological  
24 tendencies and human weakness” suggest that Dr. Wolff’s judgment as to the credibility of the  
25 “Waste Not, Want Not” report as well as the interpretation and credibility he assigns to the  
26 testimony of his colleagues, Mr. Gleick and Ms. Haasz, will be tainted by the fact that Dr. Wolff  
27 personally *authored* the evidence at issue. (*Withrow*, *supra*, 421 U.S. at p. 47 [explaining that  
28 inquiries into potential bias should include a realistic assessment of the human condition].) As

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

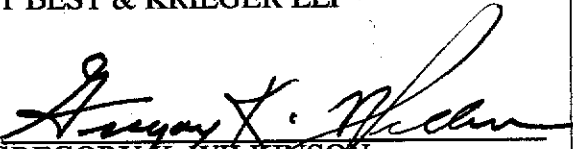
1 such, the facts here do not involve the sterile combination of the investigative and adjudicative  
2 functions raised in *Withrow*. Instead, Dr. Wolff actually created the evidence which he will now  
3 be called upon to judge and, as such, there is an unacceptable probability of actual bias.  
4 Accordingly, due process concerns require that Dr. Wolff be disqualified from presiding over  
5 this proceeding.

6  
7 **III. CONCLUSION**

8 Although Cal Trout attempts to characterize the Cachuma Member Units' concern as a  
9 mere "unilateral perception of bias," the record demonstrates that there is a clear, objective  
10 appearance of bias which is forbidden by both the Government Code and by the requirements of  
11 due process. This clear, objective appearance of bias is evidenced by the facts that Dr. Wolff  
12 authored the Pacific Institute's "Waste Not, Want Not" report; that Dr. Wolff's Pacific Institute  
13 colleagues heavily relied on this report when providing testimony in this proceeding; that Cal  
14 Trout similarly places great reliance on the "Waste Not, Want Not" report in supporting its  
15 position as to Key Issue 3; and that, if this Motion to Disqualify is denied, Dr. Wolff will be  
16 placed in the position of determining the value and credibility of his own report and the testimony  
17 of his own colleagues. Such facts demonstrate that the probability of actual bias is too high to be  
18 constitutionally tolerable. Accordingly, the Cachuma Member Units respectively request that this  
19 Motion for Disqualification be granted.

20 Dated: July 21, 2006

BEST BEST & KRIEGER LLP

21  
22  
23 By:   
24 GREGORY K. WILKINSON  
25 CHARITY SCHILLER  
26 Attorneys for Santa Ynez River Water  
27 Conservation District, Improvement  
28 District No. 1 and Cachuma Conservation  
Release Board



**CACHUMA HEARING  
PHASE 2  
SERVICE LIST**

<p>Cachuma Conservation Release Board Mr. Gregory K. Wilkinson Best Best &amp; Krieger LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 (909) 686-1450 (909) 686-3083 fax <a href="mailto:GKWilkinson@BBKlaw.com">GKWilkinson@BBKlaw.com</a></p>	<p>City of Solvang Mr. Christopher L. Campbell Baker, Manock &amp; Jensen 5260 N. Palm Avenue, Suite 421 Fresno, CA 93704 (559) 432-5400 <a href="mailto:CLC@BMJ-law.com">CLC@BMJ-law.com</a></p>	<p>U.S. Bureau of Reclamation Mr. Stephen Palmer Office of the Regional Solicitor 2800 Cottage Way, Room E-1712 Sacramento, CA 95825 (916) 978-5683 (916) 978-5694 fax</p>
<p>Department of Water Resources Mr. David Sandino 1416 Ninth Street, Room 1118 Sacramento, CA 94236-0001 (916) 653-5129 (916) 653-0952 fax</p>	<p>Santa Ynez River Water Conservation District, Improvement District No. 1 Mr. Gregory K. Wilkinson Best Best &amp; Krieger LLP 3750 University Avenue, Suite 400 Riverside, CA 92501 (909) 686-1450 (909) 686-3083 fax <a href="mailto:GKWilkinson@BBKlaw.com">GKWilkinson@BBKlaw.com</a></p>	<p>California Sportfishing Protection Alliance Mr. Jim Crenshaw 1248 E. Oak Avenue Woodland, CA 95695</p>
<p>City of Lompoc Ms. Sandra K. Dunn Somach, Simmons &amp; Dunn 813 Sixth Street, Third Floor Sacramento, CA 95814-2403 (916) 446-7979 (916) 446-8199 fax <a href="mailto:SDunn@lawssd.com">SDunn@lawssd.com</a></p>	<p>California Trout, Inc. c/o Ms. Karen Kraus Environmental Defense Center 906 Garden Street Santa Barbara, CA 93101 <a href="mailto:KKraus@EDCnet.org">KKraus@EDCnet.org</a></p>	<p>Santa Barbara County Parks Ms. Terri Maus-Nisich Director of Parks 610 Mission Canyon Road Santa Barbara, CA 93105</p>
<p>Santa Ynez River Water Conservation District Mr. Ernest A. Conant Law Offices of Young Wooldridge 1800 – 30<sup>th</sup> Street, Fourth Floor Bakersfield, CA 93301 (661) 327-9661 (661) 327-0720 fax <a href="mailto:EConant@YoungWooldridge.com">EConant@YoungWooldridge.com</a></p>	<p>Department of Fish and Game Office of the General Counsel Mr. Harlee Branch 1416 Ninth Street, 12<sup>th</sup> Floor Sacramento, CA 95814 (916) 654-3821 (916) 654-3805 fax</p>	<p>Mr. Christopher Keifer NOAA Office of General Counsel Southwest Region 501 W. Ocean Blvd., Suite 4470 Long Beach, CA 90802-4213 (562) 980-4001 (562) 980-4018 fax</p>
<p>CPH Dos Pueblos Associates, LLC Mr. Richard W. Hollis 211 Cannon Perdido Street Santa Barbara, CA 93101</p>		