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16 NANCY CRAWFORD-HALL, an individual, and
 17 SAN LUCAS RANCH, INC., a California
 corporation,

18 Petitioners,

19 v.

20 CACHUMA OPERATION AND MAINTENANCE
 21 BOARD, and DOES 1-20,

22 Respondents.

23 CACHUMA CONSERVATION RELEASE
 24 BOARD, and DOES 21-50,

25 Real Parties in Interest.
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Case No. 1171135

OPENING BRIEF OF PETITIONERS
 NANCY CRAWFORD-HALL AND
 SAN LUCAS RANCH, INC.

(CCP §§ 1085, 1094.5; PRC §§ 21168,
 21168.5)

Date: October 25, 2006
 Time: 9:30
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The Honorable Diana R. Hall

OPENING BRIEF OF PETITIONERS NANCY CRAWFORD-HALL AND SAN LUCAS RANCH, INC.

WC-119180

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1 **I. INTRODUCTION**

2 Petitioners Nancy Crawford-Hall and San Lucas Ranch, Inc. bring this action under the
3 California Environmental Quality Act (“CEQA”) to challenge Respondent Cachuma Operation and
4 Maintenance Board’s (“COMB”) violation of CEQA in its preparation and certification of the
5 Environmental Impact Report/Environmental Impact Statement for the Fish Management Plan for the
6 Lower Santa Ynez River (“FMP EIR”). COMB previously attempted to carry out the Fish
7 Management Plan (“FMP”)—a variety of water release measures for Bradbury Dam and construction
8 activities on the tributaries of the Lower Santa Ynez River, ostensibly aimed at improving habitat
9 conditions for the Southern California steelhead—without environmental review. But this Court
10 ordered COMB to comply with CEQA by preparing an Environmental Impact Report (“EIR”).
11 COMB’s EIR, however, violates several of CEQA’s mandatory provisions and must be set aside.

12 First, COMB violated CEQA by improperly acting as the “lead agency” for environmental
13 review of the proposed water release activities. CEQA mandates that there be only one lead agency
14 to conduct environmental review of a project, and that this should be the agency with primary
15 responsibility for carrying out a project. The State Water Resources Control Board (“State Water
16 Board”), not COMB, is primarily responsible for the water releases that COMB proposes in the FMP.
17 Thus, the State Water Board, not COMB, should have acted as the lead agency. The State Water
18 Board, in fact, has prepared its own draft EIR analyzing many of the same activities that COMB
19 analyzes in the FMP EIR, but reaching different conclusions than COMB concerning the activities’
20 environmental effects. COMB’s attempt to usurp the lead agency role has caused confusion among
21 the public and the expert agencies. This is precisely what CEQA seeks to avoid.

22 Moreover, COMB’s improper arrogation of itself as lead agency has compromised the entire
23 environmental analysis. COMB even resorted to discarding uncontroverted expert testimony
24 showing that one set of proposed FMP activities would amount to “trout murder.” This is telling of
25 COMB’s true purpose in preparing the FMP EIR. Far from seeking to protect steelhead, COMB’s
26 primary goal seems to be to ensure its water deliveries at the lowest costs. Indeed, it was not until the
27 California Sportfishing Protection Alliance filed a complaint with the State Water Board in 1987
28 alleging that operation of the Bradbury Dam was harming steelhead that COMB was forced to take

1 an interest in the fish. Fearing that the State Water Board might respond to the complaint by
2 curtailing water deliveries from Bradbury Dam, or mandating expensive mitigation measures, COMB
3 has attempted to be the first to define the proper measures for protecting steelhead in hopes that the
4 State Water Board will acquiesce to its proposals. But CEQA does not permit an interested agency to
5 commandeer the lead agency role from the proper agency. Here, COMB's failure to allow State
6 Water Board to act as lead agency violated CEQA.

7 Second, the FMP EIR's environmental setting, project description, and cumulative impacts
8 analysis were prepared in violation of CEQA because they omit meaningful discussions of the on-
9 going proceedings before the State Water Board concerning the status of Reclamation's permits for
10 water releases from the Bradbury Dam as well as the State Water Board's attendant environmental
11 review, and of how the proceedings could impact the activities considered in the FMP EIR. The State
12 Water Board, not COMB, has exclusive jurisdiction over permitting water releases from Bradbury
13 Dam and is actively considering a different water release plan than COMB has approved. Indeed, the
14 State Water Board's draft EIR designates an environmentally superior alternative that would not
15 allow for the water releases COMB proposes in the FMP EIR. Should the State Water Board decide
16 not to approve permits tailored to COMB's preferences, the new water release permits will essentially
17 nullify the analysis in the FMP EIR. Rather than address these issues squarely in the FMP EIR,
18 COMB attempted to hide the ball, downplaying the potential ramifications of the State Water Board's
19 proceedings and declaring that no analysis is necessary because the State Water Board's review is
20 "distinctly different" and too "speculative." But CEQA requires public disclosure, not concealment.
21 The FMP EIR's failure to address the potential consequences of the State Water Board's on-going
22 proceedings violates CEQA.

23 Third, the FMP EIR violates CEQA because it relies on conclusions not supported by
24 substantial evidence. Specifically, the FMP EIR concluded that upper Hilton Creek, a tributary that
25 feeds into the Lower Santa Ynez River, has suitable habitat for steelhead. However, the FMP EIR
26 ignores unrebutted expert evidence submitted by Petitioner that upper Hilton Creek has only sporadic
27 water flows during the rainy season, runs completely dry during the summer months when steelhead
28 need water for rearing, and contains unsuitable substrate for steelhead spawning. The FMP EIR cites

1 no reliable data or other scientific evidence or reports to support its conclusion that upper Hilton
2 Creek has adequate steelhead habitat, nor does it provide reasoned analysis supported by evidence to
3 explain why it ignored the significant environmental issues raised by Petitioner's expert.

4 Finally, COMB violated CEQA by finding that it could mitigate to a level of less than
5 significance the dramatic impacts of surcharging Cachuma Reservoir (which COMB proposes to do
6 in order to guarantee its water deliveries from Bradbury Dam). Among other things, surcharging
7 Cachuma Reservoir will flood 90 acres of land and several critical public facilities, including a water
8 treatment plant. COMB found that this flooding impact was less than significant because the water
9 treatment plant would be moved prior to the surcharging. In fact, the record shows that there is *no*
10 obligation to move the water treatment plant prior to surcharging, and that surcharging can occur
11 even if the water treatment plant is not moved. Contrary to CEQA's requirements, COMB cannot
12 support its finding that the impacts from surcharging have been, or will be, mitigated to a level of less
13 than significance.

14 COMB's failure to comply with CEQA's requirements, and its failure to provide substantial
15 evidence to support the FMP EIR's conclusions and its own findings are error. This Court should
16 issue a writ of mandate setting aside COMB's certification of the FMP EIR.

17 **II. FACTUAL BACKGROUND**

18 **A. The Bradbury Dam And Related Facilities Are Operated By Reclamation And** 19 **COMB Pursuant To Permits Issued By The State Water Board.**

20 In 1953, the Bureau of Reclamation ("Reclamation") completed construction of the Bradbury
21 Dam on the Santa Ynez River, creating Lake Cachuma. (39 AR 371:17395.)¹ Though Reclamation
22 continues to own and operate the Bradbury Dam, in 1956, the federal government transferred
23 operation and maintenance of dam-related facilities to several local water agencies pursuant to a joint
24 powers agreement. The local water agencies operate under the name of COMB (*see also* 47 AR
25 445:21323), and its members are sometimes collectively referred to as the Cachuma Project Member
26 Units ("Cachuma Member Units.") (39 AR 371:17395.)

27 ¹ Citations to the Administrative Record ("AR") are in the following format: "[Volume Number] AR
28 [Tab Number]:[Bates Page Number]."

1 The California State Water Resources Control Board (“State Water Board”) has exclusive
2 jurisdiction to determine the timing and amount of water released from Bradbury Dam and controls
3 dam operations in California through a permit process. In 1958, the State Water Board’s predecessor
4 issued Permits 11308 and 11310 to Reclamation, which allowed Reclamation to divert and store
5 water from the Santa Ynez River using Cachuma Project facilities. (47 AR 445:21323.) The State
6 Water Board has continued its jurisdiction through a series of subsequent water rights permits, Order
7 WR 73-37 in 1973 and Order WR 89-18 in 1989, and has retained jurisdiction over the amount and
8 timing of release of water from Bradbury Dam. (*Id.* at 21323-324.)

9 **B. The State Water Board Is Currently Conducting Proceedings And Completing**
10 **An EIR Concerning Cachuma Project Water Rights And Public Trust Resources**
11 **Such As Steelhead.**

12 The Bradbury Dam was constructed at a time when its impacts on the Southern California
13 steelhead trout were not considered or evaluated. Steelhead are born in freshwater, migrate to the
14 ocean, and then return to freshwater to spawn. (29 AR 176:13479.) The upper reaches of the Santa
15 Ynez River provided important spawning habitat for steelhead, and the majority of steelhead in the
16 Santa Ynez River spawned and reared above the current site of the Bradbury Dam. (*Id.* at 13481.)
17 Construction of the Bradbury Dam completely blocked upstream passage of steelhead, and eliminated
18 the Santa Ynez River’s upper watershed as habitat for spawning steelhead. (*Id.* at 13464.) This
19 decimated the steelhead population on the Santa Ynez River. (*Id.* at 13480.) While it is believed that
20 the Santa Ynez River system once supported one of the largest runs of steelhead in southern
21 California (an estimated 20,000 adult fish per year), the current run of adult steelhead in the Santa
22 Ynez River system is believed to be less than 100 adult fish per year. (*Id.*)

23 In 1987, the California Sportfishing Protection Alliance (“CSPA”) filed a complaint with the
24 State Water Board alleging that Cachuma Project operations had impacted steelhead trout in violation
25 of the constitutional prohibition against the misuse of water. (47 AR 445:21324.) In 1990, the State
26 Water Board held a consolidated hearing on outstanding issues in the Santa Ynez River watershed,
27 including Reclamation’s permits and the CSPA’s complaint. (*Id.*) Among other things, the State
28 Water Board recognized that it needed to evaluate “potential mitigation measures for the remnant
steelhead fishery.” (7 AR 35:2663.) Accordingly, in December 1994, the State Water Board issued

1 Order WR 94-5, setting a December 2000 deadline to commence hearings on whether Reclamation's
2 permits should be modified to protect public trust values (such as steelhead) and downstream water
3 rights on the Santa Ynez. (*Id.*)

4 On May 19, 1999, the State Water Board issued a Notice of Preparation ("NOP") of an
5 Environmental Impact Report ("EIR") analyzing the environmental impacts of various alternatives
6 for operating Bradbury Dam, with each alternative designed to protect downstream water rights and
7 public trust resources. (47 AR 445:12324-325.) Also, per Order WR 94-5, the State Water Board
8 initiated hearings in November 2000 to determine if changes were needed to Reclamation's permits
9 to protect public trust values and downstream water rights on the Santa Ynez River. (*Id.* at 21312.)
10 Reclamation, the Cachuma Member Units, the California Department of Fish and Game ("Fish &
11 Game"), the National Marine Fisheries Service and other interested parties are participating in the on-
12 going hearings. (*See* 49 AR 447; 50 AR 450; 54 AR 452, 453, 454 and 457.)

13 On August 8, 2003, in connection with its permit hearing, the State Water Board released for
14 public comment a draft EIR on modifications to Reclamation's permits ("State Water Board Draft
15 EIR"). (47 AR 445:21292-542.) The State Water Board Draft EIR evaluates the impacts of various
16 permitting alternatives, including: (1) revised water release requirements for fishery resources and
17 downstream water rights protection in the Santa Ynez River;² (2) the proposed surcharge of Lake
18 Cachuma; and (3) a reduction in the water supply of the Cachuma Member Units, which could occur
19 if the State Water Board imposes revised release requirements on Reclamation. (*Id.*) The
20 alternatives being analyzed in the State Water Board EIR include many, if not most, of the same
21 activities that COMB has attempted to analyze in the FMP EIR. (*Id.* at 21350-57.) The State Water
22 Board hearings on Reclamation's permits are on-going, and the State Water Board has not yet issued
23 a Final EIR.

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27 ² The main purpose of the revised water releases is to improve summer rearing habitat conditions and
28 to facilitate upstream migration for steelhead below Bradbury Dam. (*See* 47 AR 445:21339-41.)

1 **C. COMB And Reclamation Developed The Fish Management Plan And Biological**
2 **Opinion To Attempt To Protect Water Deliveries.**

3 In 1993, after the State Water Board's 1990 hearing that suggested that changes may be
4 imposed on COMB as a result of the Cachuma Project's impact on steelhead, COMB and others
5 became concerned about the potential impact steelhead would have on its water deliveries. To
6 address this concern, COMB and others began a "voluntary" effort to investigate native fishery
7 resources along the lower Santa Ynez River below Bradbury Dam. (39 AR 371:17396.) In June
8 1994, various agencies, including some of the Cachuma Member Units, agreed to establish the Santa
9 Ynez River Technical Advisory Committee ("SYRTAC"), which was to study and develop
10 recommendations for long-term fishery management downstream of Bradbury Dam. (29 AR
11 177:13574.) Ultimately, SYRTAC was tasked with preparing the Fish Management Plan for the
12 Lower Santa Ynez River ("FMP"). (*Id.*)

13 Prior to development of the FMP, on August 18, 1997, the National Marine Fisheries Service
14 ("NOAA Fisheries") listed the Southern California steelhead as an endangered species under the
15 federal Endangered Species Act ("ESA"). (39 AR 371:17398.) This required Reclamation to consult
16 with NOAA Fisheries pursuant to section 7 of the ESA regarding the effects of the Bradbury Dam
17 and dam-related activities on the steelhead. (29 AR 176:13458.) Accordingly, on April 7, 1999,
18 Reclamation initiated consultation with NOAA Fisheries. Thereafter, Reclamation submitted a
19 Biological Assessment to NOAA Fisheries, which described downstream releases for steelhead and
20 habitat conservation measures for tributaries and the main stem of the Santa Ynez River below the
21 dam. (39 AR 371:17398.) The Biological Assessment plan was designed to minimize costs
22 associated with implementing measures for mitigating incidental take of the steelhead, while
23 preserving options for the maximum amount water delivery. (*Id.* at 17398.)

24 On September 11, 2000, in response to the Biological Assessment proposals, NOAA Fisheries
25 issued a Biological Opinion ("BO"), examining whether or not the operation and maintenance of the
26 Bradbury Dam and dam-related facilities, as proposed in the Biological Assessment, would
27 jeopardize the continued existence of the steelhead. (*Id.* at 17399.) The BO concluded that the
28 activities were not likely to jeopardize the continued existence of the steelhead, but were expected to

1 result in some incidental take of steelhead. (*Id.*) Accordingly, an incidental take statement was
2 issued with the Biological Opinion including a number of “reasonable and prudent measures to
3 minimize ‘take’ (*i.e.* harm or mortality) of the southern steelhead. (*Id.*) Many of the “reasonable and
4 prudent measures” were suggested by COMB as low-cost ways to assuage NOAA Fisheries without
5 threatening water deliveries. Under the BO, if the proposed surcharges, as well as other aspects of
6 the BO, were not implemented by 2005, Reclamation would have to reinitiate formal consultation
7 with NOAA Fisheries. (29 AR 176:13534.) Shortly after NOAA Fisheries issued the BO, COMB
8 issued the final FMP, which included many of the same measures suggested in the BO. (39 AR
9 371:17405.) Generally, the FMP and BO propose to (1) implement various programs for surcharging
10 Bradbury Dam and releasing water from Bradbury Dam,³ and (2) perform a variety of construction
11 activities on tributaries that feed into the Lower Santa Ynez River with the hope that they can serve
12 as habitat for steelhead. Reclamation’s plan also included a proposal to surcharge Lake Cachuma to
13 provide additional water for fish releases. (*Id.* at 17398.)

14 **D. COMB Initially Tried To Implement the Fish Management Plan Without**
15 **Environmental Review, But Was Ordered By The Court To Prepare An**
16 **Environmental Impact Report.**

17 Several of the proposed activities in the FMP and BO involved modifications to the timing
18 and amount of water released from Bradbury Dam, precisely the topics under review in the State
19 Water Board’s Cachuma Project hearings. (*See* 39 AR 371:17419-24 (FMP EIR); *compare* 47 AR
20 445:21350-57 (State Water Board EIR).) Other proposed activities in the FMP and the BO included
21 “tributary enhancement measures,” allegedly designed to create new steelhead habitat, improve
22 existing habitat, and create or improve access to new and existing habitat. (39 AR 371:17428-60.)
23 Three of the tributary enhancement measures involved construction activities on Hilton Creek, a
24 small intermittent stream that feeds into the Santa Ynez River just below Bradbury Dam. (*Id.* at
25 17428.) The first 2,980 feet of Hilton Creek nearest the Santa Ynez River is on federal land. (*Id.*)

26 ³ “Surcharging” refers to raising the water level of Lake Cachuma, thereby flooding over 90 acres of
27 land around the periphery of Lake Cachuma and necessitating the removal and relocation of several
28 critical facilities for Lake Cachuma, including a water treatment plant. (*See* 39 AR 371:17585; 29
AR 177:13654.) This includes approximately 24 acres of oak woodland habitat, which would result
in the death of over 450 oak trees. (39 AR 371:17585-87.)

