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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

Hearing to Review the U.S. Bureau of
Reclamation Water Rights Permits
(Applications 11331 and 11332) – Cachuma
Project Phase 2

**CALIFORNIA TROUT, INC.'S
OPPOSITION TO MOTION TO
DISQUALIFY; AFFIDAVIT OF PETER
GLEICK; AFFIDAVIT OF DANA
HAASZ; AFFIDAVIT OF KAREN M.
KRAUS**

1 The Santa Ynez River Water Conservation District, Improvement District No. 1 and the
2 Cachuma Conservation Release Board ("Member Units") have moved, pursuant to Government Code
3 Sections 11425.30(a) and 11425.40(a), to disqualify Dr. Gary Wolff from serving as a "presiding
4 officer" in this Hearing to Review the U.S. Bureau of Reclamation Water Rights Permits (Applications
5 11331 and 11332) ("Cachuma Hearing" or "Proceedings"). The Member Units have failed to
6 demonstrate that Dr. Wolff is subject to disqualification under either provision, and their Motion to
7 Disqualify must be denied.

8 **I. Introduction**

9 The Member Units' Motion to Disqualify Dr. Wolff focuses on one aspect of these Proceedings
10 before the State Water Resources Control Board ("SWRCB" or "Board") – Key Issue 3d. Key Issue 3d
11 raises the issue of "[w]hat water conservation measures could be implemented in order to minimize any
12 water supply impacts" that could result if the Bureau of Reclamation's permits are modified to protect
13 public trust resources.¹ During these Proceedings, several parties, including California Trout, Inc.
14 ("CalTrout"), presented evidence on Key Issue 3d through written and oral testimony. Those parties that
15 presented testimony were subject to cross examination during the Cachuma Hearing. Dr. Peter Gleick
16 and Ms. Dana Haasz, both employees of the Pacific Institute for Studies in Development, Environment,
17 and Security ("Pacific Institute"), prepared and presented evidence regarding Key Issue 3d on behalf of
18 CalTrout.

19 Dr. Wolff, who was recently appointed as a member of the SWRCB, was also employed by the
20 Pacific Institute during the time that Dr. Gleick and Ms. Haasz prepared and presented their testimony.
21 Dr. Wolff did not prepare or present testimony on behalf of CalTrout. However, during his employment
22 at the Pacific Institute, Dr. Wolff participated in the research, development and preparation of a report
23 entitled *Waste Not, Want Not: The Potential for Urban Water Conservation in California* ("*Waste Not,*
24 *Want Not*" or "Report"). Dr. Gleick and Ms. Haasz utilized portions of this Report for some aspects of
25 their testimony in these Proceedings.

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28 ¹ In total, five broad "Key Issues" were identified by the Board for the Cachuma Hearing. See, Key
Issues 3a-d, 4a-b, 5a-b, 6, and 7a-b. SWRCB "Notice of Field Orientation Tour and Supplemental
Notice of Phase 2 of Public Hearing" (Aug. 13, 2003).

1 Although all parties have submitted evidence in these Proceedings and a hearing has been held,
2 resolution of this matter remains pending. Thus, Dr. Wolff will now be in a position to participate in the
3 SWRCB's ongoing consideration and ultimate resolution of these Proceedings. The Member Units
4 assert that Dr. Wolff should be disqualified as "presiding officer"² pursuant to Government Code
5 Sections 11425.30(a) and 11425.40(a) due to his connection to the Pacific Institute and to his co-
6 authorship of *Waste Not, Want Not*. The Member Units incorrectly represent that Dr. Wolff "served as
7 investigator, prosecutor, or advocate" in these Proceedings or their preadjudicative stage, and that he "is
8 subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or
9 advocate" in these Proceedings or their preadjudicative stage. The Member Units also wrongly conflate
10 Dr. Wolff's expertise with respect to Key Issue 3d with a "bias, prejudice, or interest" towards
11 CalTrout's position on that issue. Dr. Wolff's employment with the Pacific Institute and his co-
12 authorship of *Waste Not, Want Not* do not warrant Dr. Wolff's disqualification as a "presiding officer"
13 in these Proceedings, and the Member Units have failed to identify any other basis to disqualify Dr.
14 Wolff.

15
16 **II. Dr. Wolff Is Not Subject To Disqualification Under Government Code Section 11425.30**

17 Under Government Code Section 11425.30(a), a person may not serve as presiding officer in an
18 adjudicative proceeding if "(1) [t]he person has served as investigator, prosecutor, or advocate in the
19 proceeding or its preadjudicative stage;" or "(2) [t]he person is subject to the authority, direction, or
20 discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its
21 preadjudicative stage." Cal. Gov. Code § 11425.30(a). With respect to this provision, the Law Revision
22 Commission states:

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26 ² "Presiding Officer" means "the agency head, member of the agency head, administrative law judge,
27 hearing officer, or other person who presides in an adjudicative setting." Cal. Gov. Code § 11405.80.
28 The Member Units do not specify whether they intend that Dr. Wolff be disqualified from acting as a
"hearing officer" in these Proceedings, or whether they intend to disqualify Dr. Wolff from participating
in any capacity. For purposes of this Opposition, we assume the Member Units intend that Dr. Wolff
should not participate in these Proceedings in any capacity.

1 [A] person has “served” in any of the capacities mentioned if the person has personally
2 carried out the function, and not merely supervised or been organizationally connected
3 with a person who has personally carried out the function.

4 West’s Ann. Cal. Gov. Code § 11425.30 (Law Revision Commission Comments – 1995 Addition). In
5 addition:

6 The separation of function requirements are intended to apply to substantial involvement
7 in a case by a person, and not merely marginal or trivial participation. The sort of
8 participation intended to be disqualifying is meaningful participation that is likely to
9 affect an individual with a commitment to a particular result in a case.

10 Id.

11 The Member Units assert that Dr. Wolff “served as an expert for CalTrout,” and that he
12 “undertook work as an engineer and economist for the Pacific Institute on one of the ‘Key Issues’
13 involved in the Cachuma Project hearing.” Motion to Disqualify at 7 and 8. These statements are
14 blatantly false and mislead the Board into the impression that Dr. Wolff participated in the Cachuma
15 Proceedings.

16 The single truth underlying the Member Units’ statements is that while Dr. Wolff was employed
17 by the Pacific Institute, he co-authored *Waste Not, Want Not*. This Report was one of many references
18 consulted and cited by Dr. Gleick and Ms. Haasz when they prepared their testimony on behalf of
19 CalTrout. CalTrout Exhibit 50; Affidavit of Peter Gleick (“Gleick”) at ¶¶ 8-9; Affidavit of Dana Haasz
20 (“Haasz”) at ¶¶ 7-8. However, *Waste Not, Want Not* was not prepared on behalf of CalTrout. Gleick at ¶
21 5; Haasz at ¶ 4. The Report was not prepared to advocate a particular position in these Proceedings or to
22 present evidence in these Proceedings. Id. Similarly, no information from CalTrout or these Proceedings
23 was used in the Report. Id. In fact, the Pacific Institute was unaware of these Proceedings before the
24 analysis for the Report was completed. Id.

25 In addition, although Dr. Wolff was employed by the Pacific Institute at the same time that Dr.
26 Gleick and Ms. Haasz prepared their testimony, Dr. Wolff himself did not serve or appear as an expert
27 for CalTrout with respect to these Proceedings. Affidavit of Karen M. Kraus (“Kraus”) at ¶¶ 2-5;
28 CalTrout’s “Notice Of Intent to Appear” (identifying only Dr. Gleick and Ms. Haasz as experts

1 regarding "water supply"). CalTrout did not solicit Dr. Wolff's participation in these Proceedings or
2 otherwise direct Dr. Wolff to conduct any investigation, research or analysis for these Proceedings.
3 Kraus at ¶ 3. CalTrout's only communication with the Pacific Institute consisted of conversations and
4 writings among and between CalTrout and Dr. Gleick and Ms. Haasz, who were jointly responsible for
5 developing their testimony on behalf of CalTrout. Kraus at ¶ 4. Dr. Gleick and Ms. Haasz also did not
6 direct Dr. Wolff to conduct any investigation, research, or analysis for purposes of preparing their
7 testimony in these Proceedings. Gleick at ¶ 9; Haasz at ¶ 9. Dr. Wolff was not involved in the analysis
8 Dr. Gleick and Ms. Haasz conducted for their testimony, nor did he even review their testimony. *Id.*

9 Thus, Dr. Wolff did not serve as an expert or any other form of investigator, prosecutor, or
10 advocate in these Proceedings. The only association the Member Units can demonstrate between Dr.
11 Wolff and these Proceedings is that he was organizationally connected to the Pacific Institute employees
12 who did prepare testimony for these Proceedings, and that he co-authored a report consulted and cited to
13 by Dr. Gleick and Ms. Haasz. Neither of these associations ranks as even "marginal or trivial
14 participation" by Dr. Wolff in the Cachuma Hearing, much less the "substantial involvement in a case"
15 that Section 11425.30 is intended to preclude. West's Ann. Cal. Gov. Code § 11425.30 (Law Revision
16 Commission Comments – 1995 Addition). Furthermore, upon commencement of his term as a member
17 of the SWRCB, Dr. Wolff will no longer be an employee of the Pacific Institute. Thus, he will not be
18 subject to the authority, direction, or discretion of any person who has served as investigator, prosecutor,
19 or advocate in these Proceedings or in their preadjudicative stage.

20 Government Code Section 11425.30, therefore, provides no basis to disqualify Dr. Wolff from
21 these Proceedings.

22 23 **III. Dr. Wolff Is Not Subject To Disqualification Under Government Code Section 11425.40**

24 Under Government Code Section 11425.40, a presiding officer may also be subject to
25 disqualification for "bias, prejudice, or interest in the proceeding." Cal. Gov. Code § 11425.40(a).

26 However:

27 [i]t is not alone or in itself grounds for disqualification, without further evidence of bias,
28 prejudice, or interest, that the presiding officer . . . [h]as experience, technical

1 competence, or specialized knowledge of, or has in any capacity expressed a view on, a
2 legal, factual, or policy issue presented in the proceeding.”

3 Cal. Gov. Code § 11425.40(b).³ In addition, “[a] party’s unilateral perception of bias cannot
4 alone serve as a basis for disqualification,” and a challenge to a presiding officer’s impartiality
5 “must set forth concrete facts demonstrating bias or prejudice.” State Water Resources Control
6 Board Cases, 136 Cal. App. 4th 674, 840-41 (2006).

7 The Member Units argue that Dr. Wolff has “bias, prejudice, or interest” in these Proceedings
8 because “the testimony of Cal Trout’s experts and substantial portions of Cal Trout’s Closing Brief cite
9 to and rely upon Dr. Wolff’s ‘Waste Not, Want Not’ report.” Motion to Disqualify at 6. Thus, these
10 Proceedings “may be partly resolved based upon the State Board’s determination of the credibility and
11 content” of the Report, and Dr. Wolff’s “judgment as a decision maker, albeit perhaps unconsciously,
12 could be skewed in favor of the conclusions stated in his own report, as advanced by the testimony of his
13 colleagues” Motion to Disqualify at 6.

14 CalTrout does not dispute that Dr. Wolff is an author of *Waste Not, Want Not*, or that CalTrout’s
15 experts consulted and cited to this Report. However, the Member Units do embroider upon the truth here
16 to press their cause. For example, to refer to *Waste Not, Want Not* as “Dr. Wolff’s ‘Waste Not, Want
17 Not’ report” suggests that he is the sole, or even lead, author of this Report. In fact, Dr. Wolff was one
18 of seven co-authors of this Report, and Dr. Gleick, not Dr. Wolff, was the lead author of the Report.
19 Gleick at ¶¶ 2-3; Haasz at ¶ 3. Dr. Wolff’s responsibilities for this Report consisted primarily of portions
20 of the economic analysis in Section 5 of *Waste Not, Want Not*, which collected data and analyzed the
21 cost-effectiveness of a urban water conservation options throughout the State. Gleick at ¶ 4.

22 It is also erroneous to suggest that Dr. Wolff’s contributions to *Waste Not, Want Not*, or the
23 Report in its entirety, are the lynchpin of CalTrout’s position on Key Issue 3d. Gleick and Haasz’s
24 testimony did address the cost effectiveness of water conservation options for the Member Units, but
25 also a number of other issues, including the potential water savings that could be realized by the
26 Member Units if they applied existing technologies and policies to promote water conservation and the
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28 ³ Notably, the Member Units fail to identify this provision of Government Code Section 11425.40 in
their Motion to Disqualify.

1 quality of the Member Units' current water conservation efforts. CalTrout Exhibit 50; Gleick at ¶ 7;
2 Haasz at ¶ 6; CalTrout Closing Brief at 21-25. Moreover, to develop their testimony, Gleick and Haasz
3 used a wide range of information and data, including the best available information collected from the
4 California Urban Water Conservation Council "Best Management Practices" reports, Department of
5 Water Resources Urban Water Management Plans, Water Conservation Plans required by the U.S.
6 Bureau of Reclamation contract, and direct contact with the Cachuma Project Member Units. Gleick at
7 ¶¶ 8-9; Haasz at ¶¶ 7-8. Portions of *Waste Not, Want Not* were also used to prepare their testimony,
8 including estimates of the cost-effectiveness of a wide range of conservation and efficiency options
9 statewide, but only after review by Dr. Gleick and Ms. Haasz to determine that these estimates were
10 appropriate for the Cachuma region. ⁴ *Id.*

11 In truth, the only concrete facts that the Member Units have demonstrated here are that Dr. Wolff
12 was employed at the Pacific Institute and that he was a co-author of *Waste Not, Want Not*. As discussed
13 above, however, Dr. Wolff did not serve as an investigator, prosecutor, or advocate in these
14 Proceedings. In addition, his co-authorship of *Waste Not, Want Not* was entirely unrelated to these
15 Proceedings. The Member Units state "[i]t should be understood that the Cachuma Member Units are
16 *not* suggesting it is Dr. Wolff's knowledge of California water issues that merits his disqualification"
17 from these Proceedings. Motion to Disqualify at 7 (emphasis in original). In fact, this is precisely what
18 their Motion boils down to, as Dr. Wolff's Pacific Institute employment and co-authorship of *Waste Not,*
19 *Want Not* are merely a reflection of his knowledge and expertise regarding water conservation issues,
20 and these connections are the only link between Dr. Wolff and these Proceedings.

21 Dr. Wolff was tasked with researching, developing, and preparing his portions of this Report
22 because of his experience, technical competence, and specialized knowledge of water-efficiency
23 economics. Gleick at ¶ 4. However, this "experience, technical competence, or specialized knowledge"
24 in itself is not a basis to disqualify a presiding officer. Cal. Gov. Code § 11425.40(b). Moreover, even if
25 Dr. Wolff's portions of *Waste Not, Want Not* constitute a particular viewpoint on any of the legal,
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28 ⁴ Similarly, although CalTrout's Closing Brief does cite to *Waste Not, Want Not*, it is hardly accurate to
assert that "substantial portions of Cal Trout's Closing Brief cite to and rely upon" the Report.

1 factual or policy issues presented in these Proceedings,⁵ such a viewpoint, in itself, is also insufficient to
2 disqualify Dr. Wolff from these Proceedings. Cal. Gov. Code § 11425.40(b).

3 The situation presented here is exactly the situation anticipated – and allowed – by Government
4 Code Section 11425.40(b). This provision acknowledges that administrative decision makers may be
5 appointed, in part, based on the experience, technical competence, and specialized knowledge that they
6 can bring to bear on the matters before them. This is true for the members of the SWRCB. See, e.g., Cal.
7 Water Code § 175 (requiring four out of five Board Members to have expertise in water supply, water
8 rights, and/or water quality). Dr. Wolff himself was appointed to the Board based, in part, on his
9 expertise in the areas of “economics and engineering of resource use, including water quality; water,
10 energy and materials end-use efficiency; and incentive policies.”⁶ If the Member Units’ position here is
11 to be accepted, then Dr. Wolff’s role in the preparation of *Waste Not, Want Not* would not only
12 disqualify him from these Proceedings, any other SWRCB proceeding that involves water conservation
13 issues.⁷ This outcome is precisely what Government Code Section 11425.40(b) intends to avoid.

14 Dr. Wolff does have “experience, technical competence, or specialized knowledge” regarding
15 water conservation, but under the plain language of Section 11425.40, this in itself does not warrant
16 disqualification. The Member Units have identified no other evidence that supports their unilateral and
17 entirely speculative conclusion that Dr. Wolff’s judgment “could be skewed” in favor of CalTrout’s
18 position.⁸

19 Government Code Section 11425.40, therefore, provides no basis to disqualify Dr. Wolff from
20 these Proceedings.

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22 ⁵ Attributing a particular viewpoint to Dr. Wolff from this Report would be entirely speculative as he
23 was one of seven co-authors, and he was not the lead author of the Report.

24 ⁶ www.waterboards.ca.gov/about/members.html (as of July 10, 2006).

25 ⁷ This Report could also be utilized by a wide range of parties appearing before the Board. It has
26 received extensive independent review, including an independent assessment and review conducted at
27 the direction of the California Urban Water Agencies, which concluded, “We believe the report has been
28 a valuable contribution to a higher level of interest among policymakers regarding the potential savings
resulting from urban water conservation ... It is a solid piece of technical work with clearly displayed
assumptions, data and analyses.” In addition, many of the technical conclusions of the Report have been
adopted in work of the California Department of Water Resources and CalFed. Gleick at ¶ 2.

⁸ The Member Units’ suggestion that new Board members and staff will be unable to balance out Dr.
Wolff’s purported bias is pure speculation and also provides no evidence of bias on Dr. Wolff’s part.

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2 **IV. Dr. Wolff's Participation In These Proceedings As A Presiding Officer Does Not Violate**
3 **Due Process Requirements**

4 Government Code Sections 11425.30 and 11425.40 reflect the due process principle that a fair
5 adjudication requires an unbiased decision maker. Withrow v. Larkin, 421 U.S. 35, 47 (1975). Dr.
6 Wolff's participation as a presiding officer in these Proceedings does not violate this principle.

7 Those who contend that an administrative decision maker is biased "must overcome a
8 presumption of honesty and integrity in those serving as adjudicators," and must demonstrate that "the
9 probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally
10 tolerable."⁹ Withrow v. Larkin, 421 U.S. 35, 47 (1975); see, also, Kloepfer v. Commission on Judicial
11 Performance, 49 Cal. 3d 826, 834 (1989).

12 In Withrow, the Court considered if a violation of due process occurred when the same medical
13 board investigated whether a physician violated the law and then subsequently held a hearing to
14 determine whether to suspend the physician's medical license. 421 U.S. 35, 46. The Court held that this
15 "combination of investigative and adjudicative functions" did not in itself demonstrate that there was an
16 intolerably high risk of actual bias or prejudgment, or that "the adjudicators would be so psychologically
17 wedded to their complaints that they would consciously or unconsciously avoid the appearance of
18 having erred or changed position." Id. at 47, 57. In reaching this conclusion, the Court noted that "the
19 mere exposure to evidence" presented in a non-adversarial setting is "insufficient to impugn the
20 fairness" of a decision maker. Id. at 55.

21 The circumstances objected to here by the Member Units have even less potential for biased
22 decision making than those allowed by the Supreme Court under due process principles. Dr. Wolff has
23 not conducted any investigation, prosecution, or advocacy for these Proceedings. His co-authorship of
24 *Waste Not, Want Not* was not related to these Proceedings or carried out on behalf of CalTrout. His
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27 ⁹ The Member Units assert that due process in an administrative hearing "demands an appearance of
28 fairness and the absence of even a *probability* of outside influence on the adjudication." Motion to
Disqualify at 6-7 (citing to Nightlife Partners v. City of Beverly Hills, 108 Cal. App. 4th 81 (2003)). This
standard in Nightlife Partners is notably out of step with the seminal case of Withrow and is not
supported by any case citation.

1 participation in the research and development of *Waste Not, Want Not*, is “the mere exposure to
2 evidence,” which the Supreme Court has held is “insufficient to impugn the fairness” of an
3 administrative decision maker. *Id.* at 55. The Member Units have failed to identify anything other than
4 their own speculative assertions to suggest that Dr. Wolff is so vested in the conclusions of *Waste Not*
5 *Want Not* that he is incapable of an impartial review of all of the evidence presented by all of the parties
6 in these Proceedings. In short, it has not been demonstrated that Dr. Wolff is incapable of judging this
7 controversy fairly on the basis of *all* the evidence presented.

8 The cases cited by the Member Units do not advance their cause. None of these cases apply
9 Government Code Section 11425.30 or Section 11425.40 to disqualify a presiding officer. Some of the
10 cases are simply not relevant to their Motion.¹⁰ The remaining cases present due process concerns that
11 are easily distinguished from the circumstances presented here. For example, in Mennig v. City Council
12 of City of Culver, 86 Cal. App. 3d 341 (1978), the Court concluded that members of a City Council that
13 had voted to discharge the Police Chief had become “so personally embroiled” in the dispute at the core
14 of their administrative decision that there was a sufficiently high probability of actual bias to warrant
15 their disqualification. 86 Cal. App. 341, 351. The Court specifically noted that this personal
16 embroilment went beyond the tolerable level of “prior knowledge of the factual background which bears
17 upon its decision or even a prehearing expression of opinion on the result.” *Id.* at 350-351. As discussed
18 above, Dr. Wolff’s employment at the Pacific Institute and his co-authorship of *Waste Not, Want Not* do
19 not rise beyond this level, and the Member Units have identified no concrete facts to demonstrate that
20 Dr. Wolff is “personally embroiled” in the outcome of these Proceedings.

21 Nightlife Partners v. City of Beverly Hills, 108 Cal. App. 4th 81 (2003), and Nasha v. City of Los
22 Angeles, 125 Cal. App. 4th 470 (2nd A.D., 2004), both involved circumstances where the administrative
23 decision maker (or an advisor to that decision maker) also acted as an advocate in the same proceedings.

24 _____
25 ¹⁰ Williams v. County of Los Angeles, 22 Cal. 3d 731 (1978), considered whether a party had been
26 provided the “right to respond” before an impartial reviewer, but not whether the review was
27 “impartial.” Haas v. County of San Bernadino, 27 Cal. 4th 1017 (2002), considered whether an
28 administrative officer’s pecuniary interest in an outcome required disqualification. Pecuniary interests
have been distinguished by the U.S. Supreme Court as the type of situation where the probability of
actual bias is too high to be constitutionally tolerable. Withrow, 421 U.S. at 47. However, there is no
evidence or allegation here that Dr. Wolff has a pecuniary interest in the outcome of these Proceedings.

1 In Nightlife Partners, the same city attorney who reviewed and ultimately denied a business license
2 renewal application also served as advisor to the presiding officer reviewing that denial on appeal.¹¹ 108
3 Cal. App. 4th 81, 84-85. In Nasha, a member of a Planning Commission, in anticipation of that
4 Commission's hearing regarding a development project, authored a newsletter article "that clearly
5 advocated a position *against the project*." 125 Cal. App. 4th 470, 484 (emphasis added). As
6 demonstrated above, however, Dr. Wolff has not performed any investigation, prosecution, or advocacy
7 for these Proceedings. Thus, Dr. Wolff's participation in the Cachuma Hearing as a "presiding officer"
8 would not put him in the position of serving "dual" or "overlapping" roles in these Proceedings. Motion
9 to Disqualify at 7.

10 Finally, in Quintero v. City of Santa Ana, 114 Cal. App. 4th 810 (2003), the court found an
11 unreasonably high probability of actual bias because an attorney "prosecuting" the matter at issue before
12 the administrative board had acted as that board's legal advisor in multiple historic and ongoing matters.
13 Although, the attorney was not acting as both prosecutor and legal advisor in the matter at issue, the
14 court held that the "totality of circumstances" and the evidence regarding the "frequent contacts"
15 between the board and the attorney in other cases presented a high risk the board would give more
16 credence to the attorney's position in the matter at issue.¹² 114 Cal. App. 4th at 814-818. Here, other than
17 the mere fact of Dr. Wolff's employment at the Pacific Institute, the Member Units have failed to
18 provide any evidence that demonstrates a high probability that Dr. Wolff would simply defer to
19 CalTrout's position, rather than exercising his independent judgment to evaluate the Key Issues based
20 on all the evidence presented.

21 Thus, in contrast to the factual situations presented in the above cases, Dr. Wolff did not perform
22 any investigation, prosecution, or advocacy for these Proceedings, is not "personally embroiled" in the
23 outcome of these Proceedings, and has no reason to simply defer to the judgment of CalTrout. The
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25 ¹¹ As previously mentioned, the legal standard identified in Nightlife Partners is also inconsistent with
26 the standard articulated by the U.S. Supreme Court in Withrow.

27 ¹² The Board has previously noted that Quintero's "presumption that agency decisionmakers will
28 necessarily be biased in favor of agency staff who are serving as advisors to the agency in an unrelated
proceeding is contrary to the presumption established in Withrow that agency decision makers will
perform their duties with honesty and integrity." SWRCB Order No. WRO 2004-0034, 2004 Cal. ENV
LEXIS 92, *22-23.

1 Member Units have provided no evidence to suggest that Dr. Wolff's employment with the Pacific
2 Institute or his co-authorship of *Waste Not, Want Not* present a high probability that he will actually be
3 biased in favor of CalTrout or in favor of Dr. Gleick and Ms. Haasz's testimony on behalf of CalTrout.

4 Thus, Dr. Wolff's participation as a presiding officer in these Proceedings does not violate the
5 administrative due process requirements.

6
7 **V. Conclusion**

8 For the reasons stated above, the Member Units' Motion to Disqualify Dr. Gary Wolff should be
9 denied.

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12 Dated: July 11, 2006

Respectfully submitted,
ENVIRONMENTAL DEFENSE CENTER

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15 By: Karen M. Kraus

Karen M. Kraus
Attorneys for CALIFORNIA TROUT, INC.

AFFIDAVIT OF PETER GLEICK

I, Peter Gleick, declare as follows:

1. I am a co-founder and current President of the Pacific Institute for Studies in Development, Environment, and Security ("Pacific Institute"). I am a member of the U.S. National Academy of Sciences, elected Fellow of the American Association for the Advancement of Science and the International Water Resources Association, and a MacArthur Foundation Fellow. The Pacific Institute is an independent, non-profit organization that has provided research and policy analysis on issues at the intersection of sustainable development, environmental protection, and international security since the late 1980s. Among the many issue areas we focus on are sustainable water use, water-use efficiency, and cost-effectiveness of water management options. The Pacific Institute works at the international, national, state, and local levels doing quantitative analysis of water issues, and our studies have been used by government agencies, local communities, non-profit organizations, academics, and others in decisions about water policy and management. For example, our analysis of water conservation and efficiency potential in the urban sector of California has been used for long-term planning by the California Department of Water Resources.

2. In my capacity as an employee with the Pacific Institute, I was the lead author of a report entitled *Waste Not, Want Not: The Potential for Urban Water Conservation in California* ("*Waste Not, Want Not*" or "the Report"). The Report received extensive outside review, as noted in the Acknowledgements to the Report, and it was the subject of an independent assessment and review conducted for the California Urban Water Agencies, which concluded "We believe the report has been a valuable contribution to a higher level of interest among policymakers regarding the potential savings resulting from urban water conservation...It is a solid piece of technical work with clearly displayed assumptions, data and analyses."¹ In addition, many of the technical conclusions of the Report have been adopted in work of the California Department of Water Resources and CalFed.

3. Several other employees of the Pacific Institute, including Dr. Gary Wolff, researched, developed and prepared portions of *Waste Not, Want Not*. The Report had seven authors in total.

¹ A&N Technical Services Inc. Memorandum, August 2, 2004. Review of Pacific Institute Report *Waste Not, Want Not*. For the California Urban Water Agencies Conservation Committee. Sacramento, California. <http://www.cuwa.org/library/WasteNotWantNot.pdf>

1 4. Dr. Wolff was responsible for portions of the economic analysis in Section 5 of *Waste Not,*
2 *Want Not*, which collected data and analyzed the cost-effectiveness of a wide range of urban water
3 conservation options throughout the State. Dr. Wolff was assigned this responsibility because of his
4 experience, technical competence, and specialized knowledge of water-efficiency economics.

5 5. *Waste Not, Want Not* was not prepared on behalf of California Trout, Inc. ("CalTrout"). It
6 was not prepared to advocate a particular position during the Cachuma Water Rights Hearing, Phase 2
7 ("Cachuma Hearing") or for the purpose of presenting evidence in the Cachuma Hearing. No
8 information from CalTrout or from the Cachuma case was used in the Report; indeed, the Pacific
9 Institute was unaware of any aspects of the Cachuma Hearing before the analysis for the Report was
10 completed.

11 6. In the Summer and Fall of 2003, and in my capacity as an employee with the Pacific
12 Institute, I jointly prepared and submitted, along with Ms. Dana Haasz (also an employee with the
13 Pacific Institute during this time period), written testimony on behalf of CalTrout for the Cachuma
14 Hearing. This written testimony is CalTrout Exhibit 50. Ms. Haasz and I also presented oral testimony
15 and were subject to cross examination during the Cachuma Hearing on November 12-13, 2003.

16 7. For our testimony for the Cachuma Hearing, Ms. Haasz and I evaluated and reported on the
17 potential water savings that could be achieved by the Member Units by applying existing technologies
18 and policies to promote water conservation. We also identified the costs associated with such measures
19 and evaluated and reported on their cost-effectiveness compared to the Member Units' costs of acquiring
20 water, including the cost of Cachuma Project water.


21 8. To prepare our testimony we used a wide range of information and data, including the best
22 available information collected from the California Urban Water Conservation Council "Best
23 Management Practices" reports, Department of Water Resources Urban Water Management Plans, and
24 Water Conservation Plans required by the U.S. Bureau of Reclamation contract. Cachuma-specific data
25 on water use and costs were developed through direct contact with the Cachuma Project Member Units.

26 9. Portions of *Waste Not, Want Not* were also used to prepare our testimony, including
27 estimates of the cost-effectiveness of a wide range of conservation and efficiency options statewide,
28 after our review to determine that these estimates were appropriate for the Cachuma region. In the

1 course of his employment with the Pacific Institute, Dr. Wolff did not serve as investigator, prosecutor
2 or advocate in the Cachuma Hearing proceedings. I did not direct Dr. Wolff to conduct any separate
3 investigation, research, or analysis for purposes of preparing the testimony for the Cachuma Hearing.
4 Nor did I solicit any review from Dr. Wolff about the Cachuma case. Ms. Haasz is no longer employed
5 by the Pacific Institute. I spoke with Ms. Haasz by phone on June 13, 2006. She stated that she did not
6 direct Dr. Wolff to conduct any investigation, research, or analysis for purposes of preparing the
7 testimony for the Cachuma Hearing, that Dr. Wolff was not involved in the analysis prepared for this
8 testimony, and that he did not review the testimony.

9 10. Upon the commencement of his term as a member of the State Water Resources Control
10 Board, and for the duration of that term, Dr. Wolff will not be an employee of the Pacific Institute and
11 will not be subject to the authority, direction, or discretion of the Pacific Institute.

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13 I declare under penalty of perjury that the foregoing is true and correct and that this Affidavit
14 was executed on June 26, 2006 at Oakland, California.

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18 Peter Gleick
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AFFIDAVIT OF DANA HAASZ

I, Dana Haasz, declare as follows:

1. From February 1998 to April 2004, I was employed by the Pacific Institute for Studies in Development, Environment and Security ("Pacific Institute") as a Senior Associate for the Water and Sustainability Program. My area of expertise was water-use efficiency.

2. During my employment with the Pacific Institute, I developed and prepared portions of a report entitled *Waste Not, Want Not: The Potential for Urban Water Conservation in California* ("*Waste Not, Want Not*" or "the Report").

3. Several other employees of the Pacific Institute, including Dr. Gary Wolff, researched, developed and prepared portions of *Waste Not, Want Not*. The Report had seven authors in total. Dr. Peter Gleick was the lead author of the Report.

4. *Waste Not, Want Not* was not prepared on behalf of California Trout, Inc. ("CalTrout"). It was not prepared to advocate a particular position during the Cachuma Water Rights Hearing, Phase 2 ("Cachuma Hearing") or for the purpose of presenting evidence in the Cachuma Hearing. No information from CalTrout or from the Cachuma case was used in the Report. The Pacific Institute was unaware of any aspects of the Cachuma Hearing before the analysis for the Report was completed.

5. In the Summer and Fall of 2003, and in my capacity as an employee with the Pacific Institute, I jointly prepared and submitted, along with Dr. Gleick, written testimony on behalf of CalTrout for the Cachuma Hearing. This written testimony is CalTrout Exhibit 50. Dr. Gleick and I also presented oral testimony and were subject to cross examination during the Cachuma Hearing on November 12-13, 2003.

6. For our testimony for the Cachuma Hearing, Dr. Gleick and I evaluated and reported on the potential water savings that could be achieved by the Member Units by applying existing technologies and policies to promote water conservation. We also identified the costs associated with such measures and evaluated and reported on their cost-effectiveness compared to the Member Units' costs of acquiring water, including the cost of Cachuma Project water.

7. To prepare our testimony we used a wide range of information and data, including the best available information collected from the California Urban Water Conservation Council "Best

1 Management Practices" reports, Department of Water Resources Urban Water Management Plans, and
2 Water Conservation Plans required by the U.S. Bureau of Reclamation contract. Cachuma-specific data
3 on water use and costs were developed through these reports and direct contact with the Cachuma
4 Project Member Units.

5 8. Portions of *Waste Not, Want Not* were also used to prepare our testimony, including
6 estimates of the cost-effectiveness of a wide range of conservation and efficiency options statewide,
7 after our review to determine that these estimates were appropriate for the Cachuma region.

8 9. In the course of his employment with the Pacific Institute, Dr. Wolff did not serve as
9 investigator, prosecutor or advocate in the Cachuma Hearing proceedings. I did not direct Dr. Wolff to
10 conduct any separate investigation, research, or analysis for purposes of preparing the testimony for the
11 Cachuma Hearing. Nor did I solicit any review from Dr. Wolff about the Cachuma case. Dr. Wolff was
12 not involved in the analysis prepared for this testimony, and he did not review the testimony.

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14 I declare under penalty of perjury that the foregoing is true and correct and that this Affidavit
15 was executed on July 7, 2006 at San Francisco, California.

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19 Dana Haasz
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AFFIDAVIT OF KAREN M. KRAUS

I, Karen M. Kraus, declare as follows:

1. I am a staff attorney at the Environmental Defense Center in Santa Barbara, California. The Environmental Defense Center ("EDC") represents California Trout, Inc. ("CalTrout") in this Hearing to Review the U.S. Bureau of Reclamation Water Rights Permits (Applications 11331 and 11332) ("Cachuma Hearing" or "Proceedings"). I am the lead attorney at EDC for these Proceedings.

2. As lead attorney, I was responsible for the solicitation and management of the multiple experts who researched, prepared and submitted testimony on behalf of CalTrout in these Proceedings, including Dr. Peter Gleick and Ms. Dana Haasz at the Pacific Institute.

3. EDC did not solicit Dr. Wolff's participation in these Proceedings. EDC did not direct Dr. Wolff to conduct any investigation, research, or analysis for purposes of preparing the testimony for the Cachuma Hearing. EDC did not communicate with Dr. Wolff regarding these Proceedings.

4. EDC's only communication with employees of the Pacific Institute consisted of conversations and writings among and between EDC and Dr. Gleick and Ms. Haasz, who were jointly responsible for developing their testimony on behalf of CalTrout.

5. Dr. Wolff did not appear at the Cachuma Hearing.

I declare under penalty of perjury that the foregoing is true and correct and that this Affidavit was executed on July 11, 2006 at Santa Barbara, California.



Karen M. Kraus

1 STATE OF CALIFORNIA
2 STATE WATER RESOURCES CONTROL BOARD

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4 In the Matter of:
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6 Hearing to Review the U.S. Bureau of
7 Reclamation Water Rights Permits
8 (Applications 11331 and 11332) – Cachuma
9 Project Phase 2
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CERTIFICATE OF SERVICE

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15
16 I am employed in the County of Santa Barbara, California. I am over the age of 18 and not a
17 party to the within action. My address is 906 Garden Street, Santa Barbara, CA 93101.

18 On July 11, 2006, I served:

19 **CALIFORNIA TROUT, INC.'S OPPOSITION TO MOTION TO DISQUALIFY;**
20 **AFFIDAVIT OF PETER GLEICK; AFFIDAVIT OF DANA HAASZ; AFFIDAVIT OF**
21 **KAREN M. KRAUS**

22 on all parties identified on the attached Service List by sending a true and correct copy thereof (hard
23 copy or electronic, as provided for in the Hearing Procedures) in a sealed envelope with first class
24 postage thereon fully prepaid in the United States mail at Santa Barbara, California and addressed
25 according to the attached Service List.

26 I declare under penalty of perjury that the foregoing is true and correct and executed on July 11,
27 2006 at Santa Barbara, California.

28

Karen M. Kraus

Cachuma Project Hearing
Phase-2 Hearing
Final Service List

Updated 01/05/2004

(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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Mr. Christopher L. Campbell
Baker, Manock & Jensen
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Fresno, CA 93704
clc@bmj-law.com

U.S. Bureau of Reclamation
Mr. Stephen R. Palmer
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
Fax: (916) 978-5694

Santa Ynez River Water Conservation
District, Improvement District No. 1
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Santa Ynez River Water
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