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STATE WATER RESOURCES
CONTROL BOARD

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DIVISION OF WATER RIGHTS
SACRAMENTO

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:)

Hearing to Determine Whether to Adopt Draft)
Cease and Desist Orders (CDOs) against the)
United States Bureau of Reclamation and the)
California Department of Water Resources)

(CDO Nos. 262.31-16 and 262.31-17))
)
)
)

**CLOSING BRIEF
OF THE UNITED STATES
BUREAU OF
RECLAMATION**

I. INTRODUCTION

The United States Bureau of Reclamation (USBR) hereby moves for an order denying the State Water Resources Control Board, Division of Water Rights, Prosecution Team's request for the State Water Resources Control Board (SWRCB or "the Board") to issue Draft CDO Nos. 262.31-16 and 17 against USBR and the California Department of Water Resources (DWR). The Prosecution Team's Draft CDOs are legally and factually insufficient, and cannot properly be issued against USBR or DWR.

Adopting the Prosecution Team's arbitrary and capricious interpretations of what

constitutes a "violation" under D-1641 for the term and condition regarding salinity objectives at the three interior south Delta stations, and when such a violation is "threatened" under Cal. Water Code § 1831, would result in an impermissible attempt by the Board to make the CVP and the SWP solely responsible for salinity conditions downstream of Vernalis for which the Board has specifically found that neither is the sole cause, and that neither has full control. Adoption of the CDO against the USBR would result in an impermissible water right action that violates state and federal law, and the terms of the Board's own D-1641.

II. SUMMARY OF FACTS

On March 15, 2000, the Board issued Revised Water Right Decision 1641 (D-1641) which, among other things, implements the Board's 1995 Bay-Delta Water Quality Control Plan through various water rights held by the USBR and DWR for operation of certain facilities of the CVP and SWP. With respect to causes of salinity concentrations downstream of Vernalis, the Board found that, "[w]ater quality in the southern Delta downstream of Vernalis is influenced by San Joaquin river inflow; tidal action; diversions of water by the SWP, CVP, and local water users; agricultural return flows; and channel capacity." (WRE-05, D-1641, p. 86). The Board further found that, "**[e]ven when salinity objectives are met at Vernalis, the interior Delta objectives are sometimes exceeded. ... Exceedance of the objectives in the interior Delta is in part due to water quality impacts within the Delta from in-Delta irrigation activities.**" (Citations omitted. Emphases added.). (*Id.* at 87).

The 1995 Bay-Delta Water Quality Control Plan set water quality standards for Vernalis (C-10), and the three interior south Delta measuring stations (Brandt Bridge, Old River near Middle River, and Old River at Tracy Road Bridge, or C-6, C-8 or P-12,

respectively) at a maximum 30-day running average of mean daily EC (mmhos/cm) of 0.7 in April through August and 1.0 in September through March. The Board thereafter issued D-1641, and conditioned water rights of the USBR and DWR, implementing the 1995 Plan. The full responsibility for salinity objectives at Vernalis was imposed on USBR through D-1641, consistent with past Board decisions such as D-1422 for salinity control in the San Joaquin River Basin. USBR has actively managed project operations for salinity standards at Vernalis for several decades. The Board, however, in D-1641, did not impose full responsibility on either USBR or DWR for salinity objectives at the three interior south Delta stations below Vernalis. Instead, the Board devised an implementation scheme that recognizes only partial responsibility on the part of USBR and DWR, consistent with Board findings.

The Board recognized the utility of the permanent barrier program planned by the USBR and DWR, and imposed a term and condition on USBR and DWR water rights of 1.0 mmhos/cm, year round, until "the benefits of the permanent barriers" are achieved. (WRE-05, D-1641, p. 88). D-1641 requires permanent barriers, or equivalent measures, to be installed by April 1, 2005, and requires the "USBR and DWR to be responsible for actions required by CEQA, NEPA, and the federal and State ESA prior to constructing the barriers." (*Id.*). In addition, D-1641 orders that certain water rights of the USBR and DWR be held to substantively similar conditions, as follows:

This permit is conditioned upon implementation of the water quality objectives for agricultural beneficial uses in the southern Delta, as specified in Table 2, attached, at the following locations in the southern Delta:

- a. San Joaquin River at Brandt Bridge (Interagency Station No. C-6);
- b. Old River near Middle River (Interagency Station No. C-8); and
- c. Old River at Tracy Road Bridge (Interagency Station No. P-12).

Permittee has latitude in its method for implementing the water quality objectives at Stations C-6, C-8, and P-12, above; however, a barrier program in the southern Delta may help to ensure that the objectives are met at these locations. If Permittee exceeds the objectives at stations C-6, C-8, or P-12, Permittee shall prepare a report for the Executive Director. The Executive Director will evaluate the report and make a recommendation to the SWRCB as to whether enforcement action is appropriate **or the noncompliance is the result of actions beyond the control of the Permittee.** (Emphases added).

(WRE-05, D-1641, pp.159 and 160, see also pp. 161-163). This last provision is key, and recognizes that the Board has no authority to bring an enforcement action for a water quality objective that the projects are not solely responsible, and is beyond the control of the projects.

Table 2 of D-1641 sets forth water quality objectives to be implemented through D-1641. The three interior south Delta stations below Vernalis include a provision detailed in footnote 5. Footnote 5 states, as follows:

The 0.7 EC objective becomes effective on April 1, 2005. The DWR and the USBR shall meet 1.0 EC at these stations year round until April 1, 2005. The 0.7 EC objective is replaced by the 1.0 EC objective from April through August after April 1, 2005 if permanent barriers are constructed, or equivalent measures are implemented, in the southern Delta and an operations plan that reasonably protects southern Delta agriculture is prepared by the DWR and the USBR and approved by the Executive Director of the SWRCB. The SWRCB will review the salinity objectives for the southern Delta in the next review of the Bay-Delta objectives following construction of the barriers.

(WRE-05, D-1641, p. 182). The permanent barriers have yet to be installed, but USBR and DWR have recently completed a voluminous draft EIS/EIR for the Southern Delta Improvement Program, which includes the permanent barrier program. Progress is being made on the installation of the permanent barriers.¹ (Tr., November 17, 2005, p. 163).

¹ Progress is also being made towards actions to enhance future water management flexibility and capabilities to address the competing needs of water level protection, water circulation patterns for water quality benefits, and fishery management. (See also, Tr., November 17, 2005, pp. 163-165).

Instead of recognizing the progress of the permanent barrier program, which must first undergo NEPA, CEQA, and federal and state ESA requirements, among others, the Prosecution Team underwent a myopic analysis, and a narrow reading of D-1641, to draft the CDOs at issue. There can be no question that the intent of D-1641, when read in its entirety, is to not make the projects solely responsible for achieving or maintaining the interior south Delta objectives, and to only make the projects responsible for exceedances that the projects can control. The Prosecution Team's Draft CDOs undermine the regulatory scheme adopted by the Board in D-1641 and makes the projects solely responsible for the interior south Delta objectives.

On February 14, 2005, USBR and DWR jointly filed two petitions: 1) a Petition for Temporary Urgency Change pursuant to Water Code Section 1435 that would authorize a delay in the effective dates for 180 days; and 2) a Petition for Change pursuant to Water Code Section 1700 that would authorize delay until December 31, 2008. In the cover letter accompanying the petitions, USBR and DWR explain delays in the barrier project, for reasons beyond the control of USBR and DWR, and outline due diligence on the part of USBR and DWR. (WRE-06, p. 2, 5-7). The letter explained that if the effective date for the 0.7 EC objective were not delayed, USBR and DWR would be stuck between possible violations of D-1641, or possible violations of the California statutory and Constitutional mandates not to waste or unreasonably use water. (*Id.* at 8). This is because until the barrier program can be constructed, or other equivalent measures can be determined and implemented, USBR, DWR and the Board have all recognized that salinity conditions downstream of Vernalis are not solely caused by USBR or DWR, and cannot be effectively controlled nor managed by USBR or DWR through increased flows or export restriction measures. (WRE-05, D-1641, p. 10, 88; WRE-06, p. 8). On

February 24, 2005, the Board denied USBR and DWR's petition for temporary urgency change, primarily due to a lack of urgency. (Water Right Order 2005-0009).

On March 25, 2005, DWR sent a letter to the Board, explaining why it would not be seeking a reconsideration of Water Right Order 2005-0009. In that letter, DWR explains data and information presented to the Board through the 2005 workshop for revising the 1995 Bay-Delta Water Quality Control Plan. The data shows that, "water quality in the Southern Delta varies depending on water year type. Water quality often exceeds 0.7 in July and August in average to dry years." (WRE-07, p. 1). However, the letter goes on to explain that the 2005 hydrologic conditions would likely be a wet year, but that some forecasts showed that salinity could still increase in July and August and may exceed the 0.7 objective. If forecasts closer to the July and August period had still showed likely exceedances, USBR and DWR would have filed another petition for a temporary urgency change. However, forecasts in 2005 did not show any exceedances of the 0.7 in 2005 and, in fact, data from that time period shows that the 0.7 EC 30-day average objective was never exceeded. (WRE-09).

In May, 2005, it became apparent that USBR and DWR's attempts to work with and keep the Board informed regarding the barrier program and the lack of the ability to control the 0.7 EC objectives in the southern Delta through project operation, would instead be used against USBR and DWR for a myopic and inappropriate enforcement action: the Prosecution Team issued CDO Nos. 262.31-16 and 17. The CDOs prematurely find that USBR and DWR project operations pose a threatened violation of the 0.7 EC objective, in direct contravention to the findings of D-1641 that acknowledge that neither USBR nor DWR are solely to blame for salinity conditions in the interior south Delta, and cannot fully control the salinity levels at the three stations. The CDOs

have placed the Board and the projects in adversarial positions, and has affected the working relationships between the staffs of all of the agencies. (See Tr., November 17, 2005, p. 154).

On August 4, 2005, the Board set a hearing date to commence on October 24, 2005. The hearing continued for five and one-half days between October 24, and November 21, 2005.

At the hearing, cross-examination of the Prosecution Team's expert, Charles Lindsay, the primary author of the CDOs, made clear that Mr. Lindsay did not differentiate between the 1995 Bay-Delta Water Quality Control Plan and the implementation scheme in D-1641. (Tr., October 24, 2005, p. 130). Mr. Lindsay did not give full or proper consideration of sections of D-1641 regarding the requirement that the Executive Director make findings regarding whether any noncompliance was a result of actions beyond the control of the USBR or the DWR. (Tr., October 24, 2005, p. 158). Mr. Lindsay considered only the letters detailed above, Table 2, and data that he arbitrarily interprets as a "threatened violation."

Mr. Lindsay primarily concluded that a "threatened violation" of the 0.7 would occur from statements made in the February 14, 2005, joint letter (WRE-06), which states, "Water quality often exceeds .7 EC in July and August in average to dry years." (Tr., October 24, 2005, p. 166). However, nowhere in the record is there evidence that the 0.7 term and condition has ever been violated in the past. (Tr., October 24, 2005, p. 184). Mr. Lindsay makes no attempt to, and cannot, forecast when the next average or dry year may occur, and does not take into account project water supplies or any possible re-operations for the future.

Mr. Lindsay arbitrarily concludes that an average to dry year may occur in the

next four years, and assumes the past will be precisely repeated. In Mr. Lindsay's mind, this is enough to satisfy his interpretation that a "threatened violation" need only have "some likelihood" of occurring in the future, (Tr., October 24, p. 155), and that a "violation" in this case need not have any connection to whether an exceedance was beyond the control of the USBR or DWR (Tr., October 24, p. 187). When asked on cross-examination how Mr. Lindsay defined the temporal aspects of a "threatened violation" in this instance, Mr. Lindsay responded that he, "was looking at the possibility between now and 2009." (Tr., October 24, p. 156). In other words, Mr. Lindsay would have the Board exercise its new authority to issue a CDO against threatened violations in circumstances where no past violations have been found, and that, theoretically, exceedances may occur within four years into the future, without regard to additional actions which might be taken by the permittee, or whether the permittee will have control over the exceedance. The Board should consider whether this is good precedent for how the Board will use this new authority in the future.

In fact, upon further cross-examination, it became evident that Mr. Lindsay has no special knowledge of the hydrology of the Bay-Delta system (Tr., October 24, 2005, p. 180), no knowledge of USBR operations or water supply available in project facilities (Tr., pp. 139-145), no independent knowledge to support his belief that a violation of the 0.7 objective is "threatened" (Tr., October 24, 2005, p. 144), no understanding of the relationship between project operations and salinity conditions below Vernalis (Tr., October 24, 2005, pp. 157, 189), did not consider whether the projects could or would be re-operated in the future in an attempt to prevent exceedances (Tr., p. 173), did not evaluate whether more releases would have any effect on the objectives (Tr., October 24, 2005, pp. 84-5), and has no regard for whether meeting the 0.7 objective would result in

an unreasonable use of water (Tr., October 24, 2005, p. 197). Therefore, Mr. Lindsay could also not have considered how to balance such re-operations with other permit conditions and beneficial uses in the San Joaquin basin.

That USBR and DWR are not solely responsible for salinity conditions at the three interior south Delta stations has not only been acknowledged by the Board, but is also acknowledged by witnesses at the CDO hearing. Upon cross-examination of witnesses put on by the South Delta Water Agency, Mr. Jerry Robinson admitted that the salinity conditions below Vernalis were degraded by agricultural and municipal discharges below Vernalis, but nonetheless he further testified that USBR and DWR should be solely responsible for meeting the water quality objectives in the 1995 Plan below Vernalis. (Tr., Monday, November 7, 2005, pp. 110-111).

III. SUMMARY OF ARGUMENT

A. Board's Authority to Issue CDOs for Threatened Violations. The authority for the Board to issue CDOs for "threatened violations" of water right terms and conditions is relatively new. AB 2267 was passed by the California legislature in 2002 and amends Cal. Water Code § 1831 to include the authority of the Board to issue CDOs based on "threatened violations." As of yet, there is no published case law that construes this new authority. However, the underlying facts of this case do not fit at all into the "threatened violation" category. The Prosecution Team's expert testified that based purely on past, raw data, when the objective for salinity was 1.0, and not 0.7, he believes a violation of the 0.7 is "somewhat likely" between now and "2009." He testified that he knows nothing of hydrology, water supplies, and operation of the projects in the San Joaquin. He also improperly fails to follow the process in D-1641 that requires analysis of a past-occurred exceedance and a determination of whether an exceedance is beyond

the control of USBR, before the Board can claim a violation.

Not only does this case not fit the intended purpose of the authority to issue CDOs for "threatened violations," the California state courts have held that whether a CDO is proper depends on, "whether the means utilized have a real and substantial relation to the objects sought to be attained." Hesperia Land Development Co. v. Superior Court of Los Angeles County, 184 Cal. App. 2d 865, 875 (Cal. Ct. App. 1960).² In this case, the CDO does not have a real and substantial relation to the attainment of salinity objectives below Vernalis because the Board has already found that neither the USBR, nor DWR, can fully control, or are the sole causes for, salinity conditions in the interior south Delta.

The CDO also does not have a real and substantial relation to forcing the permanent barrier program because the record shows that progress is being made in that regard, and the Board acknowledges that such a program, or equivalent measures, must first undergo federal and state NEPA, CEQA and ESA requirements. In addition, federal projects require Congressional appropriations, adherence to applicable federal, state and local permitting requirements, as well as compliance with other applicable federal and state laws and regulations. No timeline in a water right permit can control the timing, or outcome, of these processes that the Board acknowledges are required for a permanent barrier project, or equivalent measures. The Board's issuance of a CDO in this instance is improper.

B. Other Constraints on the Board When Acting on Water Rights. Among the various constitutional and statutory constraints on the Board when taking action on water rights, the Board should keep in mind several key constraints applicable to this

² The Hesperia case regards a CDO issued by the Real Estate Commissioner pursuant to the California Business Code.

matter. As stated by the Court of Appeal of California, First Appellate District, Division

One:

The role of the Board in acting upon permit applications has been aptly described by this court as a 'necessary balancing process' requiring 'maximum flexibility' in considering competing demands of flows for instream purposes and diversions for agricultural, industrial, domestic and other consumptive uses to arrive at the public interest. ... We think the Board could properly conclude that **the public interest in the projects requires that they be held responsible only for water quality degradation resulting from the projects' own operations.** ... The implementation program was flawed by reason of the Board's failure, in its water quality role, to take suitable enforcement action against other users as well. (Citations omitted. Emphasis added.).

United States v. State Water Resources Control Bd., 182 Cal. App. 3d 82, 126

(Cal. Ct. App. 1986). In addition, when acting upon water rights of the USBR, the Board must bear in mind that state water law does not control the distribution of water for federal reclamation projects if inconsistent with Congressional directives. California v. United States, 438 U.S. 645, 668 (1978).³ Holding USBR responsible for an objective that the Board has found USBR not solely responsible, and beyond the full control of USBR, runs afoul of state law, federal law, and the terms and conditions of the Board's own D-1641.

It is clear from the language in D-1641 that the Board intended the 0.7, not as a substantive, protective term and condition in USBR and DWR water rights⁴, but as a "hammer clause" intended to force construction of a permanent barrier program, despite the need to comply with other substantive and procedural laws prior to determining the

³ Section 101 of Pub. Law 99-546, 100 Stat. 3050, allows the Secretary of the Interior to request the U.S. Attorney General to bring an action in a court of proper jurisdiction for the purposes of determining the applicability of Bay-Delta water quality standards to the CVP, if, in the Secretary's determination, the standards are not consistent with Congressional directives.

⁴This is evident from the fact that the standard originally imposed on the projects prior to April 1, 2005, was 1.0 year round. Nothing in D-1641 would support a position that after April 1, 2005, the conditions in the interior south Delta suddenly require a new, more restrictive, standard to be more protective over the one imposed for the last five years.

impact of such a program. An additional problem is that the Board chose a hammer clause that is unenforceable as an illegal attempt to make the projects bear the full burden of salinity conditions for which they are not responsible, and cannot fully control.

C. Burden of Proof. In administrative proceedings for an agency's enforcement action, the burden of proof is on the agency. In this case, the Prosecution Team must show by clear and convincing evidence that USBR and DWR have threatened a violation, and such cannot be based on surmise, conjecture, theoretical conclusions, or uncorroborated hearsay. Cornell v. Reilly, 127 Cal. App. 2d 178, 184-5 (Cal. Ct. App. 1954). As detailed below, the Prosecution Team has not met its burden and relies heavily on conjecture and theoretical conclusions in its case for a "threatened violation" of the 0.7 EC objective, as implemented in the USBR and DWR water rights.

D. D-1641. Under D-1641, a violation of the terms and conditions on USBR and DWR water rights to meet the three interior south Delta objectives, as implemented, cannot properly be the subject of preemptory relief. This is because a violation on the part of USBR and DWR can be only properly determined following an evaluation of a past occurred exceedance. This evaluation results in a recommendation of the Executive Director to the Board regarding whether any exceedance was within the control of USBR or DWR. If the Board finds that an exceedance was not within the control of USBR or DWR, no violation has occurred, and USBR and DWR are not liable for the exceedance. It was never contemplated by the Board in D-1641 that USBR and DWR would be liable for any and all exceedances at the three interior south Delta stations. Again, this is because the Board finds that neither USBR nor DWR are solely responsible for salinity conditions below Vernalis, and, therefore D-1641 contains the provision requiring evaluation of exceedances.

Because a violation can only be determined following analysis of past documented, actual exceedances, preemptory relief is not properly issued against USBR or DWR for threatened violations. This is especially true in this case where the drafter of the CDOs has no knowledge of the hydrology of the basin, no knowledge of forecasted supply or available water supplies in the projects, how those supplies relate to salinity standards below Vernalis, how the projects may be re-operated, and therefore what choices may or may not be available to USBR between competing water needs. In light of D-1641, it would be difficult, if not impossible, to forecast a violation even considering or estimating such information (which changes on a daily basis, and is therefore not available prior to a documented exceedance), and wholly arbitrary and capricious to forecast a violation without it. As acknowledged by the Court in Central [Delta]⁵ Water Agency v. United States, 327 F.Supp. 2d 1180 (D.Cal. 2004), "The Bureau continuously modifies its accounting and forecasting to meet salinity standards even under adverse supply conditions." (*Id.* at 1210). Such daily dynamic hydrologic conditions and complex management decisions for multiple regulatory requirements and beneficial uses by USBR cannot be predetermined, especially not years in advance, to arrive at the conclusion that there exists a "threatened violation."

E. There is No Violation of the 0.7 EC Objective. As of this date, neither USBR, nor DWR, has ever been in violation of the terms and conditions in D-1641 regarding the 0.7 EC objective for the three interior south Delta stations. There is no evidence in the record of any such violation and the Prosecution Team does not claim that any such violation has ever occurred.

F. There is No Evidence of a "Threatened Violation" of the 0.7 EC Objective.

⁵ This case has been incorrectly published as "Central Valley Water Agency v. United States".

The Prosecution Team's evidence of a threatened violation is woefully inadequate and constitutes an arbitrary and capricious abuse of discretion. A similar attempt to make USBR preliminarily responsible for violations of salinity standards at Vernalis, based on hypothetical future conditions and conjecture, was denied by the Court in Central Delta Water Agency v. Unites States, 327 F.Supp. 2d 1180 (D.Cal. 2004).

In that case, plaintiffs, Central Delta Water Agency, and South Delta Water Agency, et al., relied on a model that purportedly forecasted exceedances of the salinity standards at Vernalis, as well as out-of-context statements made by USBR. The Court concluded that, "Plaintiffs offer only allegations, not evidence that the Bureau's management of the CVP has caused them any harm or will in the future." The Court went on to find no evidence of an actual violation, and therefore, "[t]his speculative potential injury, which assumes [the U.S. Department of the] Interior will intentionally violate the law by not acting to meet its legal duties ... without any evidence that Interior has permitted the Vernalis Standard to be violated, does not prove that [USBR, and others] have violated, are violating, or 'will violate the Vernalis Standard.'" (Id. at 1212).

Similarly, in this case, the Prosecution Team assumes that USBR is liable for exceedances beyond its control, has not considered whether USBR can take future actions within its control to effect the objectives below Vernalis, to the extent possible, and has not shown any past actual violation, and, therefore the Prosecution Team's case is insufficient to conclude that USBR is "threatening" to violate the 0.7 EC term and condition at the three interior stations below Vernalis. As in the Central Delta Water Agency case, the Prosecution Team advance only hypothetical possibilities of what may happen in the future, for which it provides no independent evidence. The Court in Central Delta Water Agency denied summary judgment to Plaintiffs and granted USBR's

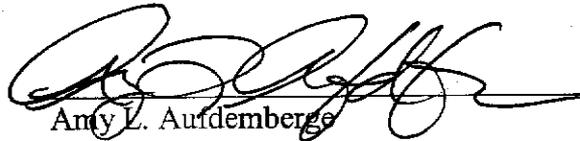
motion for summary judgment.

The Prosecution Team's definition of "threatened violation," as the mere possibility to occur by 2009, based solely on past, raw data, and which ignores the full regulatory scheme of D-1641, is arbitrary and capricious. USBR can find no support in any law of California for a regulatory agency to issue a CDO to a permittee for a violation that is assumed could possibly occur sometime within the wide span of the next four years. In addition, the Prosecution Team admits there has been no past violation of the 0.7 objective. The Prosecution Team has not met its burden by clear and convincing evidence, and improperly relies on conjecture and theoretical possibilities. The Prosecution Team's request for issuance of the CDOs should be denied.

IV. CONCLUSION

USBR respectfully requests that the Board deny the Prosecution Team's request to issue the draft CDOs. Issuance of the CDOs would violate state and federal law, as well as the terms set forth by the Board in D-1641. What is needed is future cooperation, in a non-adversarial stance, regarding progress towards a permanent barrier program, to which USBR is fully committed. In the meantime, USBR respectfully requests that the Board issue a reasonable hearing date for the long-term petitions filed on February 14, 2005, under Water Code Section 1700.

Respectfully submitted on this 12th day of December, 2005,



Amy L. Aufdenberge
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Attorney for USBR

CERTIFICATE OF SERVICE

Re: In the Matter of: Hearing to Determine Whether to Adopt Draft Cease and Desist Order (CDOs) against the United States Bureau of Reclamation the California Department of Water Resources.

I, the undersigned, declare that:

I am a citizen of the United States, over the age of eighteen. On December 12, 2005, I served the

“CLOSING BRIEF OF THE UNITED STATES BUREAU OF RECLAMATION”

by placing the foregoing document, enclosed in a sealed envelope via hand delivery and certified mail at Sacramento, California to the following:

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by placing the foregoing document, enclosed in a sealed envelope via certified mail and email when appropriate at Sacramento, California to the following:

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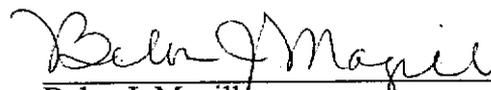
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I certify that the foregoing is true under penalty of perjury. Executed this 12th day of December, 2005, at Sacramento, California.



Belva J. Magill
Legal Assistant