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7 SPORTFISHING PROTECTION ALLIANCE, FRIENDS
OF THE RIVER, and the WINNEMEM WINTU TRIBE
8

9 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

10 NORTH COAST RIVERS ALLIANCE,
11 CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE, FRIENDS OF THE RIVER, and the
12 WINNEMEM WINTU TRIBE,

13 Plaintiffs,

14 v.

15 KENNETH SALAZAR, Secretary of the United
States Department of the Interior, DONALD R.
16 GLASER, Regional Director of the United States
Bureau of Reclamation, MICHAEL JACKSON, Area
17 Manager of the South-Central California Area Office
of the United States Bureau of Reclamation, and
18 UNITED STATES BUREAU OF RECLAMATION,

19 Defendants.
20

) Civ. No.

) **COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

21 **INTRODUCTION**

22 1. Plaintiffs NORTH COAST RIVERS ALLIANCE, CALIFORNIA SPORTFISHING
23 PROTECTION ALLIANCE, FRIENDS OF THE RIVER, and the WINNEMEM WINTU TRIBE
24 (collectively, “plaintiffs”) hereby sue defendants KENNETH SALAZAR, DONALD R. GLASER,
25 MICHAEL JACKSON, and the UNITED STATES BUREAU OF RECLAMATION (collectively,
26 “Reclamation”) and seek from this Court an order declaring invalid Reclamation’s approval of 11 water
27 service contracts, collectively called the San Luis Unit Water Service Interim Renewal Contracts 2010-
28 2013 (hereinafter “interim contracts”), entered into under the Central Valley Project Improvement Act

1 (“CVPIA”), Public Law No. 102-575, 108 Stat. 4600, Title XXXIV (1992). Specifically, plaintiffs
2 challenge the Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”) that
3 Reclamation adopted for the interim contracts because the EA and FONSI violate the National
4 Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 et seq. The EA and FONSI assume that
5 Reclamation has no discretion to reject the interim contracts or even to reduce the quantities of water they
6 export from the Sacramento River Delta (“Delta”) despite the growing environmental impact such water
7 exports are having on the Delta’s increasingly imperiled salmon, steelhead, sturgeon and other fish and
8 wildlife. Because Reclamation considers continued water delivery to be the environment baseline, the
9 EA and FONSI conclude that the interim contracts will have no effect on the environment.
10 Consequently, they fail to consider any alternatives or mitigation measures that would reduce the interim
11 contracts’ impacts or even seriously examine those impacts at all. Reclamation’s erroneous premise that
12 it lacked disapproval authority thus rendered its NEPA process a meaningless charade, devoid of any
13 effective environmental review of the interim contracts’ adverse effects, and of alternatives and
14 mitigations that would avoid or reduce those effects.

15 2. Plaintiffs have not previously sought court review of these interim contracts because they
16 had understood that Reclamation would soon complete preparation of an EIS on the long term contracts
17 intended to replace them. That expectation was dashed when on December 12, 2011 Reclamation
18 announced that it was commencing yet another meaningless round of toothless review of two-year interim
19 contracts to be approved in 2012 or 2013. By releasing a draft EA for this new round of contracts that
20 repeats the same errors and omissions of its predecessor, Reclamation has confirmed the futility of
21 delaying court review any longer. The new contracts would authorize water deliveries beginning on
22 March 1, 2012 or March 1, 2013 without Reclamation’s consideration of any reduction, let alone
23 elimination, of these water deliveries and their impacts. Plaintiffs will challenge the new deficient EA
24 and FONSI upon their approval in a supplemental complaint or separate lawsuit to be consolidated by
25 stipulation or motion with this action. Reclamation’s recurring approvals of the two-year renewals based
26 on the same erroneous premise of disapproval impotence and deficient NEPA review are “capable of
27 repetition,” yet “evading review” by the judiciary. *U.S. v. Juvenile Male*, 131 S.Ct. 2860, 2865 (2011),
28 quoting *Weinstein v. Bradford*, 423 U.S. 147, 148–149, 96 (1975) (per curiam). Thus this action will not

1 become moot after the interim contracts challenged herein expire in 2012 or 2013. *Id.*

2 3. Plaintiffs seek speedy adjudication of this matter to halt the accelerating decline of Delta
3 fish and wildlife that is exacerbated by the water diversions that by the interim contracts authorize, and to
4 curtail the worsening contamination of ground and surface water resources in the Central Valley caused
5 by the needlessly harmful irrigation practices that these contracts induce and perpetuate. Reclamation
6 must analyze the environmentally destructive impacts of the interim contracts in a thorough and accurate
7 environmental review that considers alternatives that would avoid or reduce such impacts.

8 **JURISDICTION AND VENUE**

9 4. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal
10 question), 1337 (regulation of commerce), 1346 (United States as defendant), 1361 (mandamus against an
11 officer of the United States), 2201 (declaratory judgment), and 2202 (injunctive relief), and under the
12 Administrative Procedure Act (“APA”), 5 U.S.C. sections 701-706 (review of final agency action)
13 because (1) the action arises under the APA and NEPA; (2) Reclamation is an agency of the United States
14 government and the individual defendants are sued in their official capacities as officers of the United
15 States; (3) the action seeks a declaratory judgment voiding Reclamation’s final agency approvals of the
16 interim contracts; and (4) the action also seeks further injunctive and mandamus relief until Reclamation
17 complies with applicable law.

18 5. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(e)(2) because
19 Reclamation and one or more individual defendants officially reside, one or more of plaintiffs’ causes of
20 action arose, and some of the lands and waters involved in the action are located, in this judicial district.

21 6. There exists now between the parties hereto an actual, justiciable controversy in which
22 plaintiffs are entitled to have a declaration of their rights and of Reclamation’s obligations, and further
23 relief because of the facts and circumstances hereinafter set forth.

24 7. This Complaint is timely filed within the applicable six-year statute of limitations set forth
25 in 28 U.S.C. section 2401(a).

26 8. Plaintiffs have standing to assert their claims and have exhausted all applicable remedies.

27 **PARTIES**

28 9. Plaintiff NORTH COAST RIVERS ALLIANCE (“NCRA”) is a non-profit unincorporated

1 association with members throughout Northern California. NCRA was formed for the purpose of
2 protecting California's rivers and watersheds from the adverse effects of excessive water diversions, ill-
3 planned urban development, harmful resource extraction, pollution, and other forms of degradation. Its
4 members use and enjoy California's rivers and watersheds for recreational, aesthetic, scientific study, and
5 related non-consumptive uses. The interests of NCRA and its members have been, are being, and unless
6 the relief requested herein is granted, will be adversely affected by Reclamation's approval of the interim
7 contracts without proper NEPA review, and by the interim contracts' consequent, unexamined, and
8 inadequately mitigated impacts on the environment.

9 10. Plaintiff CALIFORNIA SPORTFISHING PROTECTION ALLIANCE ("CSPA") is a
10 non-profit corporation organized under the laws of the State of California. CSPA has thousands of
11 members who reside and recreate throughout California. CSPA's members are citizens who, in addition
12 to being duly licensed sport fishing anglers, are interested in the preservation and enhancement of
13 California's public trust fishery resources and vigorous enforcement of California's environmental laws.
14 CSPA members have been involved for decades in public education and advocacy efforts to protect and
15 restore the public trust resources of California's rivers. CSPA members use California's rivers and the
16 Delta for recreation, scientific study, and aesthetic enjoyment. The interests of CSPA and its members
17 have been, are being, and unless the relief requested herein is granted, will be adversely affected by
18 Reclamation's approval of the interim contracts without proper NEPA review, and by the interim
19 contracts' consequent, unexamined, and inadequately mitigated impacts on the environment.

20 11. Petitioner FRIENDS OF THE RIVER was founded in 1973 and is incorporated under the
21 non-profit laws of the State of California, with its principal place of business in Sacramento, California.
22 Friends of the River has more than 5,000 members dedicated to the protection, preservation, and
23 restoration of California's rivers, streams, watersheds, and aquatic ecosystems. Friends of the River has
24 been involved in activities to protect and restore the Sacramento-San Joaquin Delta for more than 30
25 years. Many of Friends of the River's members recreate on California rivers and in the Delta. The
26 interests of Friends of the River and its members have been, are being, and unless the relief requested
27 herein is granted, will be adversely affected by Reclamation's approval of the interim contracts without
28 proper NEPA review, and by the interim contracts' consequent, unexamined, and inadequately mitigated

1 impacts on the environment.

2 12. Petitioner WINNEMEM WINTU TRIBE is a Native American Tribe whose aboriginal
3 territory includes the upper watersheds of the Central Valley Project, including the McCloud and
4 Sacramento Rivers. Many of these lands were inundated by construction of Shasta Dam. Petitioner
5 WINNEMEM WINTU TRIBE was traditionally dependent on salmon fishing for both subsistence and
6 cultural purposes, and maintains an exceptional interest in the continued viability of California's salmon
7 runs which pass through the Delta. Petitioner WINNEMEM WINTU TRIBE is a strong proponent of
8 Delta restoration, and will be adversely affected by Reclamation's approval of the interim contracts
9 without proper NEPA review, and by the interim contracts' consequent, unexamined, and inadequately
10 mitigated impacts on the environment.

11 13. Plaintiffs' injuries are fairly tracable to Reclamation's actions. These injuries are actual,
12 concrete, and imminent and cannot be adequately remedied by money damages. Plaintiffs have no plain,
13 speedy, or adequate remedy at law. Accordingly, plaintiffs seek injunctive, mandamus and declaratory
14 relief from this Court to rectify Reclamation's unlawful acts.

15 14. Defendant KENNETH SALAZAR is the Secretary of the United States Department of the
16 Interior and in that capacity was responsible for the United States Bureau of Reclamation's approval of
17 the interim contracts. He is sued in his official capacity.

18 15. Defendant DONALD R. GLASER is the Regional Director of the United States Bureau of
19 Reclamation, and he participated in its approval of the interim contracts. He is being sued in his official
20 capacity.

21 16. Defendant MICHAEL JACKSON is the Area Manager for the South-Central California
22 Area Office of the United States Bureau of Reclamation, and he participated in its approval of the interim
23 contracts. He is being sued in his official capacity.

24 17. Defendant UNITED STATES BUREAU OF RECLAMATION is the federal agency
25 within the United States Department of the Interior charged with managing the Central Valley Project
26 ("CVP"). The United States Bureau of Reclamation approved the interim contracts challenged in this
27 litigation.

28 ///

BACKGROUND

1
2 18. The Central Valley Project Improvement Act (“CVPIA”) was enacted by Congress on
3 October 30, 1992 for the express purpose of ameliorating the adverse environmental impacts that result
4 from Central Valley Project operations. CVPIA, *supra*, §§ 3402(a)-(b), 3406(b). In order “[t]o address
5 impacts of the Central Valley Project on fish, wildlife and associated habitat,” CVPIA requires
6 environmental review – including the preparation of an Environmental Impact Statement (“EIS”) under
7 NEPA – before any long-term water service contract can be renewed by Reclamation. CVPIA §§
8 3402(a), 3404(c)(1). Despite the fact that Congress enacted the CVPIA almost 20 years ago, Reclamation
9 has not yet completed its EIS for the long-term contracts. Instead, it has repeatedly issued “interim”
10 contract renewals of two years’ duration, none of which have ever been examined in an EIS as mandated
11 by Congress for the long-term contracts.

12 19. These short-term, interim contracts are authorized by the CVPIA to bridge the gaps
13 between expiration of previous long-term contracts for delivery of CVP water negotiated by Reclamation
14 and the completion of environmental review for, and finalization of, the new long-term contracts. The
15 informed approval – or disapproval – of these short-term contracts is within the discretion of
16 Reclamation. CVPIA § 3404(c)(1). Specifically, the CVPIA states:

17 (c) Renewal of Existing Long-Term Contracts. – Notwithstanding the provisions of the Act of July
18 2, 1956 (70 Stat. 483), the Secretary *shall*, upon request, renew any existing long-term repayment
19 or water service contract for the delivery of water from the Central Valley Project for a period of
20 25 years and *may renew such contracts for successive periods* of up to 25 years each.

21 (1) No such renewals shall be authorized until appropriate environmental review,
22 including the preparation of the environmental impact statement required in section 3409
23 of this title, has been completed. Contracts which expire prior to the completion of the
24 environmental impact statement required by section 3409 *may be renewed for an interim*
25 *period* not to exceed three years in length, and for successive interim periods of not more
26 than two years in length, until the environmental impact statement required by section
27 3409 has been finally completed, at which time such interim renewal contracts shall be
28 eligible for long-term renewal as provided above. . . .

1 CVPIA § 3404(c)(1) (emphasis added). Thus, under the CVPIA’s plain language, Reclamation lacks
2 discretion to disapprove the initial long-term contract renewals, but retains full discretion to disapprove
3 interim contracts, which “*may* be renewed for an interim period,” and successive long-term contracts
4 which Reclamation similarly “*may* renew.” *Id.* (emphasis added).

5 20. Since passage of the CVPIA in 1992, the Sacramento River winter and spring run Chinook
6 salmon, Central Valley steelhead, North American green sturgeon and Delta smelt have been driven
7 perilously close to extinction. Winter run Chinook salmon were initially listed as a federally threatened
8 species in 1990 (55 Fed. Reg. 46515), and then due to continuing population declines, declared
9 endangered in 2005 (70 Fed. Reg. 37160). Their critical habitat in the Sacramento River and its
10 tributaries was designated in 1993. 58 Fed. Reg. 33212. Spring run Chinook salmon were listed as
11 threatened, and their critical habitat designated, in 2005. 70 Fed. Reg. 37160, 52488. Central Valley
12 steelhead were listed as threatened in 2000 (65 Fed. Reg. 52084) and their critical habitat was designated
13 in 2005 (70 Fed. Reg. 52488). The Southern Distinct Population Segment (“DPS”) of North American
14 green sturgeon was listed as threatened in 2006 (71 Fed. Reg. 17757) and its critical habitat was
15 designated in 2008 (73 Fed. Reg. 52084). Delta smelt were listed as endangered in 1993 (58 Fed. Reg.
16 12854) and their critical habitat was designated in 1994 (59 Fed. Reg. 65256). Seventeen species of fish
17 indigenous to the Delta have already gone extinct; just 12 indigenous species remain. Habitat for the
18 Sacramento River winter and spring run Chinook salmon, Central Valley steelhead, Southern DPS of the
19 green sturgeon, and the Delta smelt has suffered progressively worsening degradation over the last several
20 decades from excessive Delta water exports by the CVP and the State Water Project (“SWP”). Those
21 exports decrease freshwater flows, and increase salinity and the concentration of herbicides, pesticides
22 and toxic agricultural runoff, in the Delta.

23 21. On June 4, 2009 pursuant to its consultation duties under section 7 of the Endangered
24 Species Act (“ESA”), 16 U.S.C. section 1536, the National Marine Fisheries Service (“NMFS”) informed
25 Reclamation that:

26 Based on the best available scientific and commercial information, NMFS’ final
27 [Biological] Opinion concludes that the CVP/SWP operations are *likely to jeopardize* the
28 continued existence of Federally listed:

- 1 • Endangered Sacramento River winter-run Chinook salmon (*Oncorhynchus*
- 2 *tshawytscha*),
- 3 • Threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*),
- 4 • Threatened Central Valley steelhead (*O. mykiss*),
- 5 • Threatened Southern Distinct Population Segment (DPS) of North American
- 6 green sturgeon (*Acipenser medirostris*), and
- 7 • Southern Resident killer whales (*Orcinus orca*) [who feed on the salmon].

8 NMFS also concludes that the proposed action is *likely to destroy or adversely modify* the
 9 designated critical habitats of

- 10 • Central Valley spring-run Chinook salmon,
- 11 • Central Valley spring-run Chinook salmon, and
- 12 • Central Valley steelhead, and
- 13 • proposed critical habitat for the Southern DPS of North American green
- 14 sturgeon.

15 NMFS letter to defendant Donald R. Glaser transmitting final Biological Opinion on CVP/SWP
 16 operations dated June 4, 2009, at pages 1-2 (emphasis added).

17 22. The Sacramento River winter and spring run Chinook salmon, Central Valley steelhead,
 18 Southern DPS of the green sturgeon and Delta smelt are all indicator species for the health of the Bay-
 19 Delta ecosystem and for the other special status fish species that inhabit this fragile estuary. These
 20 species are put at further risk by Reclamation’s continuing failure to conduct a serious environmental
 21 impact analysis for the CVP’s short-term water contracts. Among the other special status Delta species
 22 impacted by this lack of analysis are the Sacramento splittail, Longfin smelt, and White sturgeon.

23 23. On or about February 27, 2010, Reclamation issued a FONSI and EA addressing the “San
 24 Luis Unit Water Service Interim Renewal Contracts 2010-2013.” Based on that FONSI and EA,
 25 Reclamation approved 11 interim renewal contracts, including contracts with Westlands Water District
 26 (“WWD”), the City of Tracy, the City of Huron, the City of Coalinga, the City of Avenal, and the
 27 California Department of Fish and Game (“CDFG”). Water delivery pursuant to Reclamation’s contracts
 28 with WWD and the City of Tracy commenced on March 1, 2010. Water delivery for its contracts with

1 the cities of Huron, Coalinga, and Avenal, and with CDFG commenced one year later, on March 1, 2011.
2 EA 1. Under the interim contracts, water deliveries from the Central Valley Project are unchanged from
3 previous interim renewal contracts.

4 24. In its EA for the interim contracts, Reclamation ignored the CVPIA language granting it
5 discretion to disapprove the interim contracts and claimed that it lacked any discretion to reject the
6 contracts or even to reduce deliveries. Based on this faulty premise, the EA analyzes only two
7 alternatives, the Proposed Action and the No Action Alternative, both of which continue water diversions
8 and deliveries *in the same amounts*. Because the EA considers continued water delivery to be the
9 environmental baseline, it concludes that the signing of the interim contracts will have no effect on the
10 environment. Similarly, the EA concludes without substantive analysis that the interim contracts will not
11 violate any other federal environmental laws on the grounds that Reclamation lacks discretion to
12 disapprove them, or to reduce deliveries of water if they are approved.

13 25. The EA improperly limits its Study Area for the interim contracts to their delivery or
14 service areas. By doing so, Reclamation ignored the interim contracts' principal environmental impacts,
15 including their impacts on the CVP's source watersheds – including the American, Trinity, and
16 Sacramento rivers – and their imperiled fish and wildlife, and on the Delta itself.

17 **LEGAL BACKGROUND**

18 26. NEPA requires the preparation of an EIS if a proposed major federal action has the
19 potential to significantly affect the quality of the human environment. 42 U.S.C. § 4332. Even if a
20 project's risks of environmental harm are uncertain, if they are potentially significant, an EIS is required.
21 *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

22 27. However, a proper finding by an agency that a proposed action will produce no significant
23 impact on the environment relieves the agency of its duty to prepare an EIS. 40 C.F.R. § 1501.4(e). But
24 an agency cannot simply issue a conclusory statement claiming the absence of significant impacts.
25 Instead, the agency must support each finding of “no significant impact” with a “concise public
26 document,” known as an environmental assessment, or EA. 40 C.F.R. § 1501.4(a)-(b), 1508.9. The EA
27 must “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an
28 environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1)

1 (emphasis added). Although an EA need not be as thorough as an EIS, the agency must still conduct a
2 “comprehensive assessment of the expected effects of a proposed action” to determine if that action is
3 significant. *Foundation on Economic Trends v. Weinberger*, 610 F.Supp. 829, 837 (D.C.D.C. 1985)
4 (quoting *Lower Alloways Creek Tp. v. Public Service Elec.*, 687 F.2d 732, 740 (3rd Cir. 1982)).
5 Reclamation failed to do so here.

6 **FIRST CLAIM FOR RELIEF**

7 (Violation of the National Environmental Policy Act – Inadequate EA)

8 (Against All Defendants)

9 28. The paragraphs set forth above are realleged and incorporated herein by reference.

10 29. Reclamation based its EA and FONSI for the interim contracts on the false premise that in
11 renewing the interim contracts it had no discretion to reduce or eliminate water deliveries. The plain
12 language of the CVPIA – with which Reclamation attempts to support this false premise – demonstrates
13 to the contrary that Reclamation’s approval of the interim contracts is discretionary and therefore a full
14 review of the environmental impacts of the interim contract renewals is required by NEPA.

15 30. Reclamation’s claimed lack of discretion to disapprove the interim contracts or reduce
16 their deliveries caused it to ignore and trivialize the interim contracts’ environmental impacts and
17 alternatives that would avoid or reduce these impacts, rendering its EA an empty exercise. The EA’s
18 principal defects include the following errors and omissions, among others:

19 a. The EA fails to identify and analyze the interim contracts’ principal environmental
20 impacts because it assumes incorrectly that Reclamation’s continued delivery of water in
21 the same quantities is the baseline or background against which to measure the interim
22 contracts’ impacts. Consequently, the EA failed to compare the environmental impacts of
23 Reclamation’s proposal to divert and deliver massive quantities of water with the reduced
24 impacts of halting or reducing those diversions and deliveries.

25 b. The EA fails to consider a reasonable range of alternatives. It considers only two
26 alternatives, the Proposed Action and the No Action Alternative. The No Action
27 Alternative, however, is the *same project* as the Proposed Action with only one small
28 pricing difference. Under both so-called “alternatives,” Reclamation would continue to

1 deliver water in the same amounts to the contractors. The No Action Alternative failed to
2 consider *non-renewal* of the contracts, contrary to the expressly discretionary terms of the
3 CVPIA. Alternatives proposing a reduced quantity of water deliveries were likewise
4 improperly eliminated from consideration.

5 c. The EA ignores the environmental impacts of the interim contracts' water deliveries on the
6 source watersheds – including the American, Trinity, and Sacramento Rivers – and their
7 imperiled fish and wildlife, and on the Delta itself. It unlawfully excludes these directly
8 impacted natural resources from the EA's unduly narrow Study Area, which is improperly
9 restricted solely to the service areas of the San Luis Unit contractors.

10 d. The EA failed to consider the effects of diverting and delivering massive quantities of
11 water, versus halting or reducing those deliveries, on Reclamation's compliance with other
12 environmental laws such as the Endangered Species Act (16 U.S.C. section 1531 et seq.),
13 the Clean Water Act (33 U.S.C. section 1251 et seq.) and the Migratory Bird Treaty Act
14 (16 U.S.C. section 703 et seq.).

15 31. Reclamation's failure to prepare a legally adequate EA and FONSI for the interim
16 contracts is arbitrary and capricious, a failure to proceed in the manner required by law, not supported by
17 substantial evidence, and thus in violation of NEPA and the APA.

18 **SECOND CLAIM FOR RELIEF**

19 (Violation of National Environmental Policy Act – Failure to Prepare an EIS)

20 (Against All Defendants)

21 32. Plaintiffs incorporate by reference all preceding paragraphs.

22 33. Approval of each of the interim contracts is a major federal action that may significantly
23 affect the quality of the human environment. Therefore, Reclamation should have prepared an EIS for
24 them. Because it failed to do so, Reclamation's approval of the interim contracts is arbitrary and
25 capricious, a failure to proceed in the manner required by law, not supported by substantial evidence, and
26 thus in violation of NEPA and the APA.

27 **PRAYER FOR RELIEF**

28 34. As relief for the above violations of law, plaintiffs respectfully request the following:

1. A declaration that defendants acted contrary to law by issuing a FONSI for the interim contract renewals based on an EA that is legally inadequate and without preparing the EIS that is required.
2. An order requiring defendants to withdraw their FONSI for the interim contract renewals until such time as defendants have complied with NEPA and the APA.
3. An injunction against further water deliveries pursuant to the interim contracts until defendants have complied with NEPA and the APA.
4. An award of costs and reasonable attorney's fees and expenses incurred in the litigation of this action under the Equal Access to Justice Act, 28 U.S.C. section 2412, and any other applicable fee recovery law or doctrine.
5. Any other relief that this Court deems just and proper.

Dated: December 30, 2011

Respectfully submitted,

/s/ STEPHAN C. VOLKER
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