FRANK R. JOZWIAK, Wash. Bar No. 9482
THANE D. SOMERVILLE, Wash. Bar No. 31468
Morisset, Schlosser & Jozwiak
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
Telephone: 206-386-5200
Facsimile: 206-386-7322
E-mail: f.jozwiak@msaj.com
t.somerville@msaj.com
Attorneys for Plaintiff Quechan Indian Tribe

BRYAN R. SNYDER, Cal. Bar No. 125212
Law Office of Bryan R. Snyder
1245 Island Avenue
San Diego, California 92101
Telephone: 619-398-8379
Facsimile: 619-398-8377
E-mail: BSnyder@SDtrialattorney.com
Local Counsel for Plaintiff Quechan Indian Tribe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, a federally recognized Indian Tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; United States Bureau of Land Management; Ken Salazar, Secretary of the Interior; Robert Abbey, Director, Bureau of Land Management; Teri Raml, District Manager, BLM California Desert District; Margaret Goodro, Field Manager, BLM El Centro Field Office Defendants	Civil Action No. 10cv2241 LAB CAB PLAINTIFF'S CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION HON. LARRY ALAN BURNS U.S. DISTRICT COURT JUDGE Hearing Date: December 13, 2010 Hearing Time: 11:15 AM Courtroom 9, 2nd floor ORAL ARGUMENT REQUESTED

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I. The IVS Project Is Not Legally Permissible on Class L Lands.

Compliance with a land use plan is a substantive obligation. *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007); 43 C.F.R. § 1601.0-2. The CDCA Plan does not permit consumptive uses on Class L lands that will diminish or degrade sensitive natural and cultural values. PI 004857, 4865. The FEIS confirms that the lands at issue have sensitive natural and cultural values. *See* Plaintiff's Memo., Dkt. #4-1, Section 3. The FEIS also confirms that the IVS Project will in fact diminish and degrade these sensitive resource values with its 30,000 "suncatchers," miles of new roads, and related infrastructure spread over 6,500 acres of public lands. *Id.* Under the substantive limitations of the CDCA Plan, the IVS Project may not go forward on these Class L lands, and injunctive relief is warranted.

Defendants correctly state that the CDCA Plan provides for (or does not prohibit) some level of solar energy production on Class L lands. PI 004859. However, this does not mean that all solar projects, no matter how large, intensive, or destructive are permissible on all Class L lands. In fact, on Class L lands, consumptive uses are allowed "only up to the point that sensitive natural and cultural values might be degraded." PI 004865. Defendants focus solely on the Plan language that conditionally permits solar, while ignoring the substantive limitations on that authorization where Class L lands are involved.

Defendants incorrectly argue that the only prerequisite to developing solar on Class L lands is compliance with NEPA. Dkt. #22, p. 19. Preparation of an EIS certainly is required, but the purpose of NEPA is to inform and guide the ultimate determination of whether a specific solar project is environmentally acceptable and compatible with specific Class L lands. *Center for Biological Diversity v. United States Dep't of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (noting purpose of NEPA is to ensure that agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts); 40 C.F.R. § 1502.1. Since consumptive uses, like energy development, are only conditionally allowed on Class L lands and only so long as resources are not diminished or degraded, the CDCA Plan requires Interior to study the proposed project impacts before it makes any decision. However, NEPA review is not an end in itself. The purpose of

requiring NEPA review is to determine *whether* the proposed project is compatible with Class L lands and the substantive provisions of the CDCA Plan. If not, the project may not proceed.

Defendants apparently believe that Interior could permissibly authorize any solar, wind, or geothermal energy project on any Class L lands, no matter how destructive or impactful the project to the Class L resources, so long as it studies the impact first. This argument completely ignores, and effectively reads out of the CDCA Plan, the substantive limitations on the use of Class L lands in Chapters 2 and 3 of the CDCA Plan. The obligation to prepare an EIS is a separate and additional procedural obligation that is independent and in addition to the substantive limitations on development of Class L lands. It is the latter substantive limitations that Interior has ignored throughout this proceeding. If NEPA analysis shows the project is not consistent with the substance of the CDCA Plan, Interior must deny the application. PI 5034 (solar plants permissible on Class L lands only if "environmentally acceptable").

Acceptance of Defendants' argument will have grave implications for the lands in the CDCA, of which one million acres are currently targeted for renewable energy development. According to Defendants, so long as Interior conducts a study first, any level of resource impact associated with renewable energy development is permissible on Class L lands. If Defendants' argument is accepted, there will be no limit on the size, scale, intensity, scope, or level of impact associated with renewable energy development (wind, solar, geothermal) on Class L lands. This argument is not consistent with the letter or spirit of the CDCA Plan.

Defendants incorrectly argue that the IVS Project conforms with the CDCA Plan, because Interior amended the Plan in this proceeding to authorize solar development on the IVS Project site. Dkt. #24, p. 9. Because solar projects are not *per se* authorized on Class L lands, the CDCA drafters took the extraordinary step of requiring a site-specific Plan amendment before permitting use of any Class L lands for any solar energy development.[1] PI 004939.

[1] Interior incorrectly argues that amendments of this kind are commonplace. Dkt. #22, n.8. Many of the 147 total amendments made to the CDCA Plan over the past 30 years have been designed to protect additional resources or to designate additional lands for protection. PI 4985-4993. Amendments designed to facilitate a specific project are exceptionally rare. *Id.* The specific amendment at issue here, approving a solar project on Class L lands, is unprecedented.

Absent a site-specific Plan Amendment, no solar development of any size or scale may occur on any Class L lands. In this case, the Plan Amendment does nothing more than "identify the site as available for solar energy." PI 000063. As stated in the ROD, "an amendment to the CDCA Plan is necessary to include the IVS Project site for solar use and include it in the Plan because it was not already identified as a site for power generation in that Plan." PI 000007. "The proposed LUP Amendment to be made by BLM is a site identification decision only." PI 000042. The Plan Amendment affirmatively allows solar development on the site at issue, but it does not authorize a specific solar project. The ROD confirms that, regardless of the Plan Amendment, any specific solar project ultimately developed on this site must still conform to the substantive requirements of the Class L designation:

> Because the proposed solar project and its alternatives are located within MUC L, the classification designations govern the type and degree of land use action allowed within each classified area. All land use actions and resource management activities on public lands within an MUC designation must meet the guidelines for that class.

PI 000042. The applicable substantive "guidelines" are found in Chapter 2 of the CDCA Plan, and also in the individual "Plan Elements," which provide "more specific application, or interpretation, of multiple-use class guidelines for a given resource and its associated activities." PI 004685. In summary, the Plan Amendment that opens this land for solar development does not insulate Interior's separate decision to approve the specific IVS Project.

Defendants' attempts to distinguish the *Brong* case are unpersuasive. They incorrectly argue that the plan at issue in *Brong* "strictly prohibited" logging. Dkt. #22, p. 20, n.9. In fact, the plan in *Brong* conditionally allowed limited logging in certain situations, much like the plan at issue here conditionally allows solar development on Class L lands. *Brong*, 492 F.3d at 1126-27. Also, Interior's contention that the CDCA Plan does not "prioritize environmental concerns over other values" is refuted by the plain language of the Plan itself. The Class L designation "protects sensitive, natural, scenic, ecological, and cultural resource values." PI 004857. In the Class L designation, "judgment is called for in allowing consumptive uses only up to the point that sensitive and natural and cultural values might be degraded." PI 004865. The CDCA Plan implements a Congressional intent to protect and preserve the desert

environment, while also allowing multiple uses where appropriate. 43 U.S.C. § 1781. Lands in Class M and Class I prioritize the use of land over resource protection, but Class L lands (at issue here) clearly prioritize resource preservation. As in *Brong*, Interior's action to approve the IVS Project on these Class L lands is inconsistent with the clear direction and intent of the CDCA Plan.[2] *See Brong*, 492 F.3d at 1127 (enjoining action inconsistent with land use plan).

Interior's determination that the IVS Project is consistent with the substantive requirements of Class L lands, which prohibit projects that diminish or degrade sensitive natural and cultural values, is arbitrary, capricious, an abuse of discretion, and inconsistent with the CDCA Plan. Development of the IVS Project on these lands is prohibited and preliminary injunctive relief is required to preserve the status quo pending completion of this litigation.

II. Interior's Examination of Cumulative Effects Plainly Violates NEPA.

Interior defends its selection of the "Plaster City area" for its cumulative effects analysis solely through *post hoc* rationalizations. An agency's decision can be upheld only on the basis of the reasoning contained within that decision. *Arrington v. Daniels*, 516 F.3d 1106, 1112-13 (9th Cir. 2008). Interior's *post hoc* defenses, which find no support anywhere in the text of the FEIS itself, are not entitled to any deference in this Court. *Id.; Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (stating that "courts may not accept agency counsel's post hoc rationalizations for agency action"); *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1071-72 (9th Cir. 2004).

Interior's opposition brief asserts that "BLM considered" or "BLM determined" various factors when deciding to limit the geographic area of its analysis, but Interior cannot point to any portion of the FEIS to support these arguments. Dkt. #22, p. 13-14. The FEIS asserts in one conclusory sentence that Interior limited the area of analysis to the Plaster City area. PI 904. There is no explanation or rationale in the FEIS for why Interior limited the analysis to this area or how the boundaries of the "Plaster City" area were determined. *See* PI 1716.

[2] An impetus for the CDCA Plan was the pressing demands, including energy, of a growing population in Southern California, which threatened the desert and required planning to avoid a "reactive" (site by site) management approach. 43 U.S.C. § 1781(a); PI 005020, 005077-5078.

Defendants' reliance on *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003) is misplaced. In *Selkirk*, the agency limited its cumulative effects analysis to pre-existing species management geographic units. *Id.* at 951. There is nothing irrational or arbitrary about limiting analysis to a defined management unit. In fact, that is what the Tribe has argued for in this case. The FEIS in *Selkirk* provided a clear rationale for why the agency was not extending its analysis beyond the management unit. *Id.* Any such reasoning is noticeably absent here. Interior's failure to analyze cumulative effects within the defined management unit, the CDCA, has significant consequences. By narrowing the scope of impact, Interior was able to ignore the cumulative effects of the numerous large-scale solar projects that it was simultaneously approving on other CDCA lands. This error is not limited to cultural resources, but extends to other resources addressed in the FEIS as well. Notably, the CDCA Plan was developed and is expressly designed to avoid this kind of piecemeal management. PI 5078 (noting that failure to develop plan would result in piecemeal, reactive, management).

The facts here are similar to *Native Ecosystems Council v. Dombeck*, 304 F.3d 886 (9th Cir. 2002) where the Court rejected the agency's attempt to avoid discussion of other current or foreseeable projects within the management unit. The Court rejected the agency's effort to "amend road density standards throughout the forest piecemeal, without ever having to evaluate the amendments' cumulative environmental impacts." *Id.* at 897. This Court need not find that an agency can never lawfully engage in a cumulative effects analysis at a level less than the defined management unit. However, the agency always must show that it engaged in reasoned decision-making when selecting an area smaller than the defined management unit. In this case, the FEIS fails to demonstrate any reasoned basis for selection of the "Plaster City" area and fails to explain why Interior refused to consider the cumulative effects of the numerous large-scale solar projects that Interior was simultaneously approving on other public lands in the CDCA. Interior's narrow and cursory analysis violates NEPA.

Interior attempts to defend the adequacy of its discussion of cumulative effects *within* the Plaster City area by directing the Court to irrelevant issues. First, Interior describes its inventory of cultural resources within the Project area. Dkt. #22, p. 15. Then, it argues that it

considered the direct and indirect effects of the Project itself. *Id.* Third, it argues that it should receive credit for its analysis of cumulative effects to other resources like air or water (an argument never endorsed by the Ninth Circuit). Interior never actually responds to the Tribe's argument that the cumulative effects analysis lacks "a sufficiently detailed catalogue of past, present, and future projects, and . . . adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment" as required by the Ninth Circuit. *Te-Moak Tribe v. Interior*, 608 F.3d 592, 603 (9th Cir. 2010). Interior does not offer any substantive defense to the Tribe's contention that the analysis lacks "quantified or detailed information" about cumulative effects resulting from the identified projects. *Id.*

Instead of defending the substance of the cumulative effects analysis, Defendants simply argue that the Court should defer to Interior's judgment. As evidenced by the numerous cases cited on page 3 of Plaintiff's Memo, Dkt. #4-1, and as recently re-affirmed in *Center for Biological Diversity v. United States Department of the Interior*, 623 F.3d 633 (9th Cir. Sept. 23, 2010), the Ninth Circuit Court of Appeals does not condone blind deference to agency arguments that a cumulative effects analysis was sufficiently thorough. *Id.* at 650 (finding that Interior violated NEPA and FLPMA and stating that "we are compelled *not* to defer when an agency has acted arbitrarily and capriciously").

Defendants' reliance on *League of Wilderness Defenders v. Allen*, 615 F.3d 1122 (9th Cir. 2010) is misplaced. In fact, the thorough analysis provided by the agency and upheld by the Court in *Allen* exemplifies how deficient Interior's analysis is here. In *Allen*, the agency "provided a table listing past, present, and foreseeable future projects, followed by a detailed description of the relevant activities and the status of the projects." *Id.* at 1136. Then:

> With regard to the spotted owl, the EIS contains a thorough twenty-three-page discussion of previous declines, trends, and threats to the spotted owl population and habitat. It discusses each of the activities listed in the table to 'assess whether, in combination with the Five Buttes Project, there would be overlap of time and space.' The EIS then describes possible overlapping effects from other projects and natural disasters such as wildfires, mushroom harvesting, and planned vegetation projects, and conducts a similar analysis with regard to soil quality, fires, fuels, and other species.

Id. In *Allen*, the agency expressly prepared its analysis in accordance with a methodology approved by the Council for Environmental Quality (CEQ). *Id.* The Court found no fault with the agency's express reliance on a CEQ memorandum that permits an agency, where appropriate, to describe the "aggregate effects" of past actions in the area, rather than providing individual data on the time, place, and scale of each individual past action. *Id.*

Allen provides no support for Interior's cursory discussion of cumulative effects here. First, any argument that Interior was relying on CEQ's aggregate effects methodology is not supported by the FEIS itself. Nowhere does Interior purport to rely on the CEQ guidance or purport to apply the aggregate effects methodology in the FEIS. Also, the cursory discussion in this FEIS pales in comparison to the analysis performed by the agency in *Allen*. There is no detailed analysis here about what cultural resources are generally present in the "Plaster City" area, no quantified determination of how past projects have impacted the cultural resources in the area, no estimate of what number or percentage of cultural resources will remain undisturbed (even in the aggregate) after the reasonably foreseeable projects are developed. The reader of the EIS is not left with any specific understanding of how development of the IVS Project, in conjunction with the other past, present, and reasonably foreseeable projects, will impact cultural resources located in the "Plaster City" area. This deficiency renders the EIS invalid.

Defendants' attempt to distinguish *Te-Moak Tribe* is similarly unavailing. First, *Te-Moak* confirms that the Ninth Circuit continues to reject cumulative impacts analyses that offer nothing more than general and cursory statements. 608 F.3d at 603. The Ninth Circuit mandates an analysis that provides detailed and quantified information about the interrelation of the project with other past, present, and reasonably foreseeable projects. *Id.* at 603-606. *Allen* is also consistent with this mandate. Moreover, the Court in *Te-Moak* cited with approval cases relied upon by the Tribe here, such as *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) and *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989 (9th Cir. 2004). The fact that *Te-Moak* involved review of an EA instead of an EIS does not help Interior. A cumulative effects analysis must be at least as rigorous in an EIS as in an EA. *See, e.g.*, *Lands Council*, 395 F.3d at 1028 (rejecting cumulative effects analysis in an EIS); *Oregon Natural Resources Council Fund*

v. Brong, 492 F.3d 1120, 1134 (9th Cir. 2007) (same). The cumulative effects analysis in the FEIS is cursory, inadequate, and inconsistent with binding Ninth Circuit precedent. The failure to properly evaluate cumulative effects renders the FEIS and the related ROD invalid.

III. Interior's Failure to Complete the Section 106 Process (For Any Phase of the Project) Prior to Executing the ROD Violates the NHPA

Interior defends its NHPA compliance by arguing that it completed its *identification* of cultural resources prior to finalizing the ROD. Dkt. #22, p. 21. Of course, identification is only one of four required steps in the Section 106 process, which requires identification, evaluation, mitigation, and consultation prior to the agency decision. 36 C.F.R. Part 800. Interior failed to evaluate the hundreds of identified resources for NRHP eligibility or to develop appropriate mitigation prior to approving the project.

The Tribe strongly disagrees that Interior has consulted with the Tribe as required by law. Interior has papered the record with project status updates and records of general public meetings in which Interior simply tells tribal members and other attending members of the public what Interior plans to do. Interior confuses "contact" with meaningful "consultation." Tribal concerns about confidentiality and reluctance to express information about their cultural views in an open public forum are well known. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 861-862 (10th Cir. 1995). Thus, formal government-to-government consultation with individual tribes is required to satisfy the Section 106 obligation. Despite Defendants' contentions, meaningful consultation has not occurred.

IVS misleadingly argues that there is "only one known site that is eligible for listing in the [NRHP] that cannot be avoided." Dkt. #24, p. 24.[3] IVS fails to inform the Court that this statement applies only to Phase 1a of the Project (which makes up only 9MW out of 709MW to be developed) and that there are multiple sites in Phase 1a (and all other Phases) for which no eligibility determination has yet been made. Apple Dec. ¶ 13, 14. Eligibility recommendations are now being conducted by the project proponent and without consultation with the Tribe.

[3] The Apple Declaration, ¶ 13, shows how difficult it is to "avoid" cultural sites in this Project (noting that one NRHP-eligible site identified in Phase 1a measures 600 m by 538 m).

Notably, while eligibility determinations are relevant for NHPA purposes, nothing in the CDCA Plan limits protection of cultural resources to only those that are NRHP-eligible.

Interior offers little defense of its decision to execute a Programmatic Agreement in lieu of completing the required Section 106 process. Instead of defending its decision on the merits, Interior argues that nothing in the NHPA requires Interior to explain its reasoning. Dkt. #22, p. 22-23. Yet, the Administrative Procedures Act does require an explanation. *Allen*, 615 F.3d at 1130 (requiring a rational connection between facts found and choice made under APA). Interior's unsupported conclusion that it could not complete the Section 106 process prior to executing its ROD is arbitrary and capricious decision-making in violation of the APA. There is no valid reason why Interior could not complete the required steps of the Section 106 process in this case (at least for Phase I). Interior did not even complete the Section 106 process for *Phase 1a* (the initial 9 MW) prior to signing the ROD. The Section 106 process was simply abandoned in order to ensure that the applicant, IVS, would be able to qualify for hundreds of millions of dollars of federal funding. This is not a reasonable or permissible basis to ignore the Section 106 process.[4]

IV. The Equities and Public Interest Favor Preliminary Injunctive Relief

Interior argues that "BLM's comprehensive analysis of the environmental impacts of the IVS Project" shows an "absence of credible harm to the Plaintiff." Dkt. #22, p. 23. To the contrary, the FEIS confirms significant impacts to cultural and other resources that will result from this Project, including direct impact to cultural sites, devastation of the visual and cultural landscape, and destruction of habitat of species in the Project area, such as the Flat Tailed Horned Lizard. *See* Dkt. #4-1, Sec. 3 (summarizing facts from EIS). IVS' contention that sites will be avoided is contradicted by its own declarant, who states that only 4 of 73 sites in Phase 1b, and 39 of 203 sites in Phase 2, of the Project will be avoided. Apple Dec., ¶ 15.

[4] *Lesser v. City of Cape May*, 110 F. Supp. 2d 303 (D. NJ 2000), relied on by IVS, is not binding here and does not support Defendants' argument that an agency may defer the Section 106 process solely in order to ensure funding for a private applicant's proposal. Rather, the Court in *Lesser* relied on the agency's conclusion that the project was "complex." *Id.* at 318.

Issuance of an injunction would not, as Interior asserts, preclude it from developing renewable resources on public lands. Just in October 2010, Interior approved thousands of megawatts of renewable energy in the CDCA alone. Dkt. #4-1, pp 7-8. This case involves one small piece of Interior's program of renewable energy development. Interior also grossly overstates Section 211 of the Energy Policy Act of 2005, which does not "direct" the Secretary "to approve" renewable energy projects. Instead, Section 211 merely states that "it is the sense of Congress that the Secretary of the Interior should [by 2015] seek to have approved [10,000 MW of] non-hydropower renewable energy projects located on the public lands."[5] Congress did not authorize any "fast-track" program and has not waived or otherwise modified the mandate for full compliance with federal environmental laws in renewable energy applications.

Financial impact to the project applicant, IVS, is not sufficient to trump injunctive relief in this case. *South Fork Band Council v. United States Department of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009). IVS does not own the land at issue. This case involves public land that is governed by a binding federal land use plan that does not allow the kind of large-scale solar project that IVS seeks to develop. IVS is not a non-profit, nor a public agency, nor a municipal utility. It is a private applicant, looking to take advantage of a pure financial opportunity. The public interest in compliance with governing federal law and protection of the lands at issue outweighs the private applicant and Interior's financial interest.

Allegations of lost tax revenue and jobs are speculative and irrelevant. Congress and Interior previously designated this land for preservation in the CDCA Plan. Congress did not indicate in FLPMA, nor did Interior provide in the CDCA Plan, that economic uncertainty or financial need justifies disregard for the Class L designation. The Tribe does not object to economic development on appropriate lands that lack sensitive values. Unfortunately, that is not the situation presented here. Preliminary injunctive relief is in the public interest.

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[5] It is interesting that Interior finds a mandatory directive in Section 211 of the EPAct, but not in NHPA Section 106, which states that federal agencies "shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, . . . take into account the effect of the undertaking on any [property/site] that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f (emphasis added).

Respectfully submitted this 6th day of December, 2010.

MORISSET, SCHLOSSER & JOZWIAK

s/*Frank R. Jozwiak*

Frank R. Jozwiak
Thane D. Somerville
Attorneys for Plaintiff
801 Second Avenue, Suite 1115
Seattle, WA 98104-1909
f.jozwiak@msaj.com
t.somerville@msaj.com
Tel: 206-386-5200

CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2010, the foregoing document was served by electronically transmitting the documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants listed below:

David B. Glazer
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
david.glazer@usdoj.gov

Ayako Sato
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
Ben Franklin Station, P.O. Box 663
Washington, D.C. 20044-0663
ayako.sato@usdoj.gov

Ella Foley Gannon
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
ella.gannon@bingham.com

Julie Jones
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
julie.jones@bingham.com

Verne Ball
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
verne.ball@bingham.com

DATED this 6th day of December, 2010.

MORISSET, SCHLOSSER & JOZWIAK

s/*Frank R. Jozwiak*
Frank R. Jozwiak

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