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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of: Hearing to Review the United States Bureau of Reclamation Water Right Permits 11308 and 11310 (Applications 11331 and 11442) to Determine Whether Any Modifications in Permit Terms and Conditions are Necessary to Protect Public Trust Values and Downstream Water Rights on the Santa Ynez River Below Bradbury Dam (Cachuma Reservoir)	**CLOSING BRIEF OF THE BUREAU OF RECLAMATION**

I. INTRODUCTION

The United States Bureau of Reclamation (USBR or "Reclamation") is filing this Closing Brief pursuant to the schedule established by the State Water Resources Control Board (SWRCB or "the Board") at the close of the hearing held in this matter in October and November 2003. Reclamation requests the SWRCB to, among others, approve the changes to Water Rights Order 89-18 as provided in the Settlement Agreement, and as shown in DOI Exhibit 10, and approve Reclamation's petitions for change of place and purpose of use.

II. BACKGROUND

The Cachuma Unit of the Santa Barbara County Project (hereinafter "Cachuma Project") was authorized in 1948 pursuant to federal reclamation laws (Reclamation Act of June 17, 1902, and acts amendatory or supplementary thereto).[1] In accordance with federal reclamation law, the United States Department of the Interior (DOI) completed, among others, investigations, surveys, studies, and comprehensive basin plans in cooperation with other federal agencies and State and local governments to determine whether the project was feasible. Section 1 of the federal Flood Control Act of 1944 (58 Stat. 887), and Section 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187). As a result of these studies and resulting recommendations, including those made by the State of California,[2] it was determined the project was urgently needed to provide water supply to the south coast of Santa Barbara County. DOI Exh. 1b, p. III. The Cachuma Project was authorized in 1948 for the primary purposes of municipal, domestic and irrigation needs. Id. at 18. Congress then appropriated funding to begin construction. Construction of Bradbury Dam was completed by Reclamation in 1953 and construction of the Tecolote Tunnel was completed by Reclamation in 1956.

Pursuant to federal Reclamation law, and California state law, the USBR applied for state water right permits for the Cachuma Project (Application Nos. 11331 and 11332). The applications were approved in 1958, as Permit Nos. 11308 and 11310, respectively, by Decision

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[1]For a detailed description of the Cachuma Project facilities, see Testimony of Michael P. Jackson, DOI Exh. 5, pp. 2-5.

[2]The California State Water Rights Board, predecessor to the State Water Resources Control Board (SWRCB), acknowledged in Decision No. D 886, February 28, 1958, at p. 25, that the California water agency (then the State Division of Water Resources) recommended to DOI in 1948, that, " ... no water from the Cachuma unit ... be dedicated to the protection or propagation of fish life on that stream."

No. D 886. The permits authorize USBR to store up to a total of 275,000 acre-feet, annually, in Cachuma Lake or Reservoir, impounded by Bradbury Dam, for irrigation, domestic, salinity control, incidental recreational purposes, stock watering (Permit No. 11308), and municipal and industrial purposes (Permit No. 11310).

The water right applications for the Cachuma Project were approved under the condition that the project be operated to protect vested prior water rights on the Santa Ynez River below the dam. Permit Nos. 11308 and 11310, Condition 5. Reclamation was also required by the permits to conduct various monitoring studies and investigations to ensure that vested prior rights downstream from Cachuma would continue to have the same water available as under unregulated flow. The State Water Rights Board, now the SWRCB, reserved jurisdiction under the permits so that enough information could be obtained to determine the amounts, timing and rates of releases needed to protect downstream water rights.

Water from the Cachuma Project currently serves a population of approximately 300,000 people in Santa Barbara County and provides irrigation water to more than 38,000 acres of cropland in the Santa Ynez Valley. DOI Exh. 1f, p. Ex-1. In 1949, Reclamation entered into a water service contract with the Cachuma Member Units,[3] to furnish Cachuma Project water to end users. Originally, the contract was for an amount not to exceed 32,000 acre-feet per year. The contract was renewed in 1996, and because of reduced capacity of Cachuma Reservoir, the contract limit was reduced to 25,700 acre-feet per year. See, DOI Exh. 1c, p. 5. The Member

[3]The master contract is with the Santa Barbara County Water Agency for the benefit of the Cachuma Member Units, which, today, consists of: Carpinteria Valley Water District; Montecito Water District; Goleta Water District; City of Santa Barbara; and Santa Ynez River Water Conservation District, Improvement District #1.

Units reimburse the United States for the majority of the costs associated with the operation and maintenance of the Project. DOI Exh. 5, p. 5.

The SWRCB has continued its reserved jurisdiction under Permits 11308 and 11310 to the present.[4] In the late 1980's and early 1990's, operation of Cachuma Reservoir to satisfy downstream water rights was still a contested issue. Also at that time a severe drought had occurred in the Santa Ynez River basin, resulting in additional concerns regarding steelhead, and the impact of the Cachuma Project on steelhead below Bradbury Dam. In response, the SWRCB, by Order WR 94-5, adopted November 17, 1994, continued its reserved jurisdiction to establish long-term permit conditions to protect downstream water right holders and to determine whether modifications to permit conditions would be required to protect public trust resources. WR 94-5 also required that a hearing be commenced no later than December 1, 2000. On September 25, 2000, the SWRCB issued a Notice of Public Hearing to be conducted in two phases. Key Issues were identified in that notice for both Phase 1 and Phase 2. Phase 1 of the hearing occurred on November 6, 2000, pertaining primarily to issues regarding Reclamation's petitions for change in place and purposes of use. Phase 2 of the hearing occurred in October and November of 2003. This Closing Brief addresses Phase 2 of those hearings, and the Key Issues raised by the SWRCB's August 13, 2003, Supplemental Notice of Phase 2 Public Hearing.

Between the SWRCB's issuance of WR 94-5 and these hearings, two significant events occurred: (1) in 1997, the Southern California steelhead Evolutionary Significant Unit (ESU)

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[4]For a detailed history of the SWRCB orders and issues throughout the years regarding Permits 11308 and 11310, see Testimony of JoAnn Struebing, DOI Exh. 7, pp. 4-14. The history shows a preference by the SWRCB to not prescribe flow or operational regimes where more information is needed, and to encourage cooperation between parties to resolve issues, rather than resolution by unilateral SWRCB action.

(hereinafter "steelhead") was listed by NOAA Fisheries as an endangered species under the federal Endangered Species Act[5] (ESA); and (2) In 2002, the Cachuma Member Units and downstream water rights interests achieved a settlement agreement, which incorporates conjunctive use releases for the benefit of fish and settles longstanding issues relating to quantity and quality of water available to downstream water right holders.

A. Listing of Steelhead Under ESA and NOAA Fisheries' Biological Opinion.

The listing of steelhead found in the Santa Ynez River system as endangered under the federal ESA means that both Reclamation and NOAA Fisheries have distinct federal obligations to protect the steelhead. Reclamation completed formal ESA Section 7 consultation with NOAA Fisheries on Cachuma Project operations which resulted in NOAA's non-jeopardy, "Endangered Species Act Section 7 Consultation, Biological Opinion, U.S. Bureau of Reclamation Operation and Maintenance of the Cachuma Project on the Santa Ynez River in Santa Barbara County, California, September 11, 2000," SWRCB Exh. 9 (hereinafter, the "BO"). Reclamation's proposed action that was the subject of the consultation with NOAA Fisheries included a number of additions and modifications to Cachuma Project operations, including conjunctive operation of water releases for downstream water rights, fish passage, Hilton Creek watering system, reservoir surcharge and enhancement of fish habitat in the main stem of the Santa Ynez River.

NOAA Fisheries concluded that these additions and modifications, as well as other actions included in the BO are, "likely to appreciably increase the likelihood of survival and recovery of the ESU by increasing its numbers and distribution." BO p. 67. Implementation of the actions prescribed in the BO, such as surcharge, and implementation of the Fish Management

[5] 16 U.S.C. § 1531, *et seq.*

Plan will provide benefits to the steelhead that will aid in its recovery. Actual planning for recovery of the steelhead, under the federal ESA, is the responsibility of NOAA Fisheries. NOAA is required to determine objective, measurable criteria through recovery plans which will result in the delisting of listed species.

B. The Settlement Agreement and Reclamation's Proposed Modifications.

On December 17, 2002, the Cachuma Conservation Release Board (CCRB),[6] the Santa Ynez River Water Conservation District, the Santa Ynez River Water Conservation District, Improvement District No. 1, and the City of Lompoc entered into an historic Settlement Agreement (MU Exh. 220A) which settles many of the SWRCB's identified Key Issues for Phase 2 of the Public Hearing, particularly those pertaining to downstream water rights.

Reclamation supports the Settlement Agreement as indicated by its March 21, 2003, letter to the SWRCB. DOI Exh. 10. The Settlement Agreement is consistent with operation of Bradbury Dam as described in the BO. DOI Exh. 5, p. 11. Enclosed with USBR's letter are specific proposed modifications to the terms and conditions of Permits 11308 and 11310. Reclamation requests that the SWRCB adopt the proposed modifications as submitted to the SWRCB as: "Proposed Modifications to Order WR 73-37, as amended by Order WR 89-18, Pertaining to Permits 11308 and 11310 (Applications 11331 and 11332)" and "Revised USBR Exhibit 1, dated February 1, 2003." Reclamation believes that the evidence now before the Board shows that the modifications proposed by Reclamation in its attachments to the March 21, 2003, letter, are the only modifications required at this time to protect downstream water rights

[6]The CCRB is a joint powers agency consisting of the City of Santa Barbara, Montecito Water District, Goleta Water District and Carpinteria Valley Water District.

and public trust resources.

III. RECLAMATION'S RESPONSE TO KEY ISSUES

Key Issue 3.

Should Permits 11308 and 11310 be modified to protect public trust resources?

a. What flow requirements, including magnitude and duration of flows released from Bradbury Dam, are necessary to protect public trust resources, including, but not limited to, steelhead, red-legged frog, tidewater goby and wetlands, and in the Santa Ynez River downstream of Bradbury Dam? What terms, conditions recommendations contained in the Biological Opinion, if any, should be incorporated into Reclamation's water right permits?

b. What other measures, if any, are necessary to protect public trust resources?

c. How will any proposed measures designed to protect public trust resources affect Reclamation and the entities that have water supply contracts with Reclamation?

d. What water conservation measures could be implemented in order to minimize any water supply impacts?

Reclamation refers to the Member Units' Closing Brief and Santa Ynez River Water Conservation District's Closing Brief related to protection of public trust resources for additional discussion of this key issue.

The SWRCB has an obligation to consider public trust resources in allocation of water to avoid unnecessary or unjustified harm to such resources, and to preserve, so far as consistent with the public interest, public trust resources. *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 446. However, all uses of water in California are subject to the reasonable use standard, Id. at 443, and the goal of the public trust doctrine in the California water rights system is to achieve a balance of considerations. See Id. at 445, and Water Code § 1257.

Reclamation believes that the balance of evidence accepted into the record shows that the SWRCB, following its consideration of the public trust resources, can only come to one conclusion: that full implementation of the BO and the Fish Management Plan[7], and the actions of the Adaptive Management Committee (AMC), together with NOAA Fisheries' recovery planning efforts, obviate any need for the SWRCB to order flow requirements, or incorporate the terms, conditions and recommendations contained in the BO, or to order any additional studies, or any other measure, for the protection of steelhead or other public trust resources.

NOAA's recovery planning efforts for Southern California steelhead will be comprehensive, will include more than just the Santa Ynez River, and will include up to 15 different NOAA scientists as well as representatives of other agencies. R.T. 633 - 634. It will include the determination of objective, measurable criteria for delisting, a comprehensive list of actions necessary to meet those criteria, and an estimate of the cost and time to meet the criteria. 16 U.S.C. § 1533(f); R.T. 632. In addition, it will also include a comprehensive assessment of factors responsible for the decline of the species that are impeding its recovery, and include a comprehensive monitoring program. R.T. 633. A key part of the recovery process will be the development of viability criteria. R.T. 635. NOAA's recovery process will result in much needed information regarding the impact of Bradbury Dam on steelhead, above and below the dam.

The AMC is established by the BO and is authorized under the terms of the BO to make modifications to certain protocols prescribed in the BO. BO, p. 8. In addition, there is a

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[7]The Lower Santa Ynez River Fish Management Plan, October 2, 2000, DOI Exh. 1f, was prepared by the Santa Ynez River Technical Advisory Committee as a result of the fisheries program established by the 1993 Fisheries Memorandum of Understanding.

consolidated AMC which includes members from the AMC as it was established by the Fish Management Plan. NOAA Fisheries participates in the consolidated AMC at the staff level. R.T. 992. The AMC is responsible for implementing the BO and the Fish Management Plan. The AMC includes members from Reclamation, California Department of Fish and Game, NOAA Fisheries, Santa Ynez River Water Conservation District, CCRB, ID#1, U.S. Fish & Wildlife Service, and the City of Lompoc. R.T. 302.

The consolidated AMC monitors daily such things as modifications to fish passage. As testified to by David Young, an environmental specialist for Reclamation, an example would be that in late spring, releases for fish passage may need to be modified in order to focus on outmigrating smolts, monitoring critical riffle areas relative to passage flows in the main stem. Id. The AMC is the vehicle in which to accomplish the day-to-day management of releases and flows.

The AMC is also responsible for and committed to monitoring conditions for steelhead and implementing studies required and recommended by the BO, as well as those discussed in the Fish Management Plan. MU Exh. 226, p. 40. A detailed summary of the accomplishments of Reclamation, through the AMC, to date, can be found in the testimony of David Young, DOI Exh. 6, pp. 7-10. The Cachuma Project is currently operated in accordance with the terms and conditions of the BO. To date, implementation of the BO has included numerous Reclamation actions, such as: providing instream flows for Hilton Creek, modifying fish impediments, providing flows for the management area between Bradbury Dam and Highway 154, preparation of a draft plan for supplemental fish passage releases below Bradbury Dam, monitoring studies, and ramping down for water releases. R.T. 301.

The current flow regime mandated by the BO is based upon a multitude of factors, and includes ongoing monitoring and additional studies. The AMC is responsible for real-time management of the flows required in the BO. It is Reclamation's position that there is no need for the Board to further define a flow regime below Bradbury Dam. As testified to by Ali Shahroody, Cachuma Project contributions to the flows mandated in the BO vary from year to year, due to the hydrology of the Santa Ynez River. R.T. 311. In addition, James Lecky, Assistant Regional Administrator for NOAA Fisheries testified that the assumptions made for managing flow requirements, "need to be tested through observations and some adaptive management." R.T. 628. NOAA Fisheries is not requesting the Board to change any flows required by the BO. R.T. 714. The BO and Fish Management Plan have yet to be fully implemented, including surcharge which will increase the water supply available for fish. The evidence shows that it would be premature, and, therefore, not meaningful, for the Board to order any specific flow regime at this time. The flow regime mandated by the BO adequately protects public trust resources, and is supported by NOAA Fisheries. R.T. 714.

The Board need not incorporate any of the terms, conditions or recommendations of the BO into Reclamation's water right permits. The terms and conditions of the BO are already mandatory obligations of Reclamation. BO, p. 72; 16 U.S.C. § 1536 (b)(4)(C)(iv); and see *Bennett v. Spear,* 520 U.S. 154, 158 (1997). In addition, through studies and monitoring requirements in the BO, and through NOAA's recovery planning processes, more information about steelhead in the Santa Ynez River will be obtained. R.T. 632-35. Should Reclamation or NOAA reinitate consultation that results in modified terms and conditions of the BO (See R.T. 670), Reclamation would then hold water right permits with requirements that are inconsistent

with NOAA's BO. Reclamation and NOAA's obligations under the federal ESA should be allowed to proceed and Reclamation's operation of Bradbury Dam should be allowed to adapt to information obtained in the future, as needed, without seeking the Board's modification of terms and conditions of Reclamation's water rights.

The Board also need not incorporate any of the recommendations of NOAA's BO into Reclamation's water right permits. Again, full implementation of the BO and Fish Management Plan, NOAA's recovery planning process, and the activities of the AMC make it unnecessary for the Board to order any of the recommendations of the BO. The studies recommended in the BO will be accomplished through other means.

At the hearing, and in its comment letter to the SWRCB's Draft Environmental Impact Report (DEIR), NOAA suggested numerous studies for the Board to require. However, upon further inquiry, it turned out that many of these studies would be undertaken by NOAA pursuant to its recovery planning obligations, or could be required of Reclamation by NOAA through the terms of the BO (R.T. 683), or were beyond the scope of the Cachuma Project (R.T. 671). NOAA had not made any attempt to estimate the costs for the studies it suggested. R.T. 675. The existing AMC is already committed to undertaking a broad range of studies, and NOAA admitted that its suggestion that studies be "independently reviewed" could be achieved by peer review of the AMC's work. R.T. 685.

The most controversial studies suggested at the hearing for Reclamation to now undertake were studies involving fish passage above Bradbury Dam. Considering the information to be gained through NOAA's recovery planning process, it is questionable whether such studies are now timely. For example, there is not sufficient information regarding the genetics of the fish

above Bradbury to know whether it would be a good idea to intermix those populations with fish below Bradbury Dam. R.T. 442-444. NOAA has acknowledged this lack of information. R.T. 690. In addition, Reclamation does not own or operate either the Juncal or Gibraltar dams above Bradbury, and therefore cannot regulate the flow above Bradbury Dam. R.T. 63. Further, the AMC is already committed to studying issues regarding fish passage above Bradbury Dam. R.T. 685.

As to other public trust resources, such as the red-legged frog, tidewater goby or wetlands, no evidence was adduced at the hearing regarding the Board's need for protection of these resources. In fact, Jean Baldridge testified that tidewater goby was found in abundance (R.T. 292) and that releases for fish passage were not found to adversely impact other resources. Id.

Although it was suggested at the hearing that California Fish & Game Code § 5937's "good condition" requirement is the standard for consideration of public trust fisheries, it was made clear at the hearing that the California Department of Fish & Game (DFG) has never adopted any definition of "good condition" (R.T. 577-79), that DFG was not aware of any notice to Reclamation for violation of § 5937 as a result of Cachuma Project operations (R.T. 579-80), and that fisheries scientists disagree regarding the proper definition of "good condition" (R.T. 564).

It is Reclamation's position that alternative 3(C) of the Board's August 2003, draft EIR (SWRCB Exh. 10), provides the best balance of interests, and, therefore, should be adopted by the SWRCB as its preferred alternative to protect public trust resources.

Key Issues 4 and 5.

Has any senior, legal user of water been injured due to changes in water quality resulting from operation of the Cachuma Project?
Has operation of the Cachuma Project injured any senior water right holders through reduction in the quantity of water available to serve prior rights and, if so, to what extent?

Reclamation refers to the Member Units' Closing Brief related to Key Issues 4 and 5. As summarized by the Member Units' Closing Brief, the Member Units and the City of Lompoc were not able to answer the outstanding questions in Key Issues 4 and 5. Rather than arguing about the existence or extent of impacts to quality and quantity of downstream water rights, the Member Units and downstream interests developed an agreement for future operations, acceptable to all parties, in absence of conclusive proof about past impacts, if any. MU Exh. 219, p. 3; R.T. 199-201; R.T. 472-473. The Settlement Agreement renders Key Issues 4 and 5 moot, and ends years of claims and litigation over these matters. Reclamation believes it is, therefore, imperative that the SWRCB not upset this delicate balance, acknowledge the Agreement and modify WR 89-18 as requested by Reclamation, consistent with the Settlement Agreement.

Both the Member Units and the Santa Ynez River Water Conservation District believe that if the SWRCB does not acknowledge the Settlement Agreement, and does not modify WR 89-18 as requested by Reclamation in its letter dated March 21, 2003, further hearings would be necessary to resolve issues regarding quality and quantity impacts to prior downstream water rights. Further hearings for the purpose of determining impacts to prior downstream water rights would be an unreasonable use of public resources, especially in the face of a Settlement Agreement already reached by the impacted parties. Because there was no objection to the

Settlement Agreement by any party holding downstream water rights, the SWRCB should modify the permits as requested by Reclamation to implement the Settlement Agreement entered into by the affected parties.

Key Issue 6.

Should Reclamation's water right permits be modified in accordance with the Settlement Agreement Between Cachuma Conservation Release Board, Santa Ynez River Water Conservation District, Santa Ynez River Water Conservation District Improvement District No. 1, and the City of Lompoc Relating to the Operation of the Cachuma Project? Specifically, should Reclamation's water right permits be modified in accordance with the two enclosures submitted to the SWRCB by Reclamation under cover of letter dated February 26, 2003, entitled "Proposed Modifications to WR 73-37 as amended by WR 89-18 Pertaining to Permits 11308 and 11310 (Applications 11331 and 11332)" and "Revised USBR Exhibit 1, February 1, 2003"?

Reclamation's response to Key Issue 6 is, in a word: Yes. The provisions of the Settlement Agreement are described in detail by the testimony of Ali Shahroody at R.T. 208-211. In addition, testimony by Ms. JoAnn Struebing at R.T. 218- 220 details how Reclamation's proposed modifications to WR 89-18 were derived from the provisions of the Settlement Agreement. The modifications reflect the Settlement Agreement and pertain to conjunctive use of the Below Narrows Account, a change in two measuring points used to determine whether a livestream condition exists, and other minor changes to update WR 89-18 due to changes in operations since 1989. R.T. 208-215.

No evidence was presented at the hearing in opposition to the Settlement Agreement or which would call into question whether the Settlement Agreement resolves Key Issues 4 and 5. Therefore, there is no reason for the SWRCB to conclude otherwise. As discussed in Section I. B., *supra*, the SWRCB should modify Reclamation's permits to be consistent with the Settlement

Agreement, as proposed by Reclamation in its two enclosures to Reclamation's March 21, 2003, letter to the SWRCB.

Key Issue 7.

Should the petitions for change in purpose and place of use be approved?

a. Will approval of the change petitions operate to the injury of any legal user of the water involved?

b. Will approval of the change petitions adversely affect fish, wildlife, or other public trust resources?

Under the Settlement Agreement, the City of Lompoc has agreed to withdraw its protest to the change in purpose and place of use presented during Phase 1 of these hearings. No evidence was presented during Phase 2 of these hearings which would show either injury to any legal user of the water involved, or adverse effects to fish, wildlife, or other public trust resources. A detailed history of Reclamation's petitions for change in purpose and place of use can be found in the testimony of Gale Heffler-Scott, DOI Exh. 2, presented in Phase 1. There is nothing in the record which would reasonably support the SWRCB's denial of Reclamation's change of place and purpose of use petitions. Therefore, Reclamation requests that these petitions be approved.

IV. CONCLUSION

The United States Bureau of Reclamation respectfully requests that the Board:

(1) Amend Permits 11308 and 11310 to incorporate modifications as proposed in the enclosures to DOI Exh. 10;

(2) Acknowledge that the actions identified in the BO and the Fish Management Plan, and

those conducted through the AMC, have and will continue to provide benefits to the steelhead;

(3) Recognize NOAA Fisheries' obligation to develop a recovery plan for the steelhead and allow this process to move forward to completion;

(4) Approve the change and place of use petitions which were the subject of the Phase 1 hearing;

(5) Find that Reclamation is in full compliance with WR 94-5;

(6) Adopt alternative 3(C) as the SWRCB's preferred alternative.

Dated: February 17, 2004

Respectfully Submitted,

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Regional Solicitor

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By: Amy L. Aufdemberge
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CERTIFICATE OF SERVICE

RE: Cachuma Project: Permits 11331 and 11332

I, the undersigned, declare that I am a citizen of the United States, over the age of eighteen, and am not a part to this litigation. On February 17, 2004, I served the following:

"CLOSING BRIEF OF THE BUREAU OF RECLAMATION"

by causing the original and six copies to be hand delivered to the following:

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I certify that the foregoing is true under penalty of perjury. Executed this 17th day of February, 2004, at Sacramento, California.

Belva J. Magill
Legal Assistant