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12 STATE WATER RESOURCES CONTROL BOARD
13 DIVISION OF WATER RIGHTS

14 In the Matter of:) Hearing Officer: Charles Hoppin
15)
16 Proposed Revocation of License 659) **SPECIAL APPEARANCE OF THE**
17 (Application 553) of the Morongo Band of) **UNITED STATES DEPARTMENT**
18 Mission Indians) **OF THE INTERIOR, BUREAU OF**
19) **INDIAN AFFAIRS TO CONTEST**
20) **JURISDICTION RE: NON-**
21) **WAIVER OF SOVEREIGN**
22) **IMMUNITY**
23)

24 The United States Department of the Interior, Bureau of Indian Affairs (BIA), by special
25 appearance of undersigned counsel without conceding jurisdiction or waiving sovereign
26 immunity or any other defense, respectfully responds to the State Water Resources Control
27 Board (State Water Board) letter, dated December 7, 2012 ("Letter of December 7, 2012"), in
28 which the State Water Board, as part of a proceeding to revoke license 659 held by the United
States in trust for the Morongo Band of Mission Indians (Morongo Band), determined that the
United States has waived its sovereign immunity such that license 659 is subject to revocation in
this purely administrative proceeding before the State Water Board. Also, in its Letter of

SPECIAL APPEARANCE OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF
INDIAN AFFAIRS TO CONTEST JURISDICTION RE: NON-WAIVER OF SOVEREIGN IMMUNITY

1 December 7, 2012, the State Water Board provided an opportunity for the BIA to appear at a
2 supplemental hearing to present direct testimony and exhibits, cross examine witnesses, present
3 rebuttal testimony or exhibits and submit a closing argument. This Response should not be
4 construed as a formal appearance in this case by the United States or as a waiver of its sovereign
5 immunity or any other argument that the United States should appear before the State Water
6 Board to address the merits of the proposed revocation.

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8 We wish to advise the State Water Board and other parties that there is no applicable
9 waiver of the sovereign immunity of the United States that allows for BIA to be joined
10 involuntarily as a party in this case. Therefore, because the State Water Board lacks jurisdiction
11 over BIA, BIA cannot be named as a party to this case. As detailed below, the subject
12 administrative proceeding before the State Water Board is not a suit, as required by the
13 potentially applicable waiver of sovereign immunity in the “McCarran Amendment.” Moreover,
14 the State Water Board proceedings violate the exclusive jurisdiction doctrine and are infirm.
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17 Accordingly, this action before the State Water Board regarding the Notice of
18 Revocation should be dismissed.

19 **I. Factual Background¹**

20 The State Water Board's predecessor issued a water right license to a private corporation
21 (*i.e.*, non-tribal and non-federal) in 1928. That right was then subject to a proceeding initiated in
22 1922, under state law: “In the Matter of the Determination of the Relative Rights, Based Upon
23 Prior Appropriation, of the Various Claimants to the Waters of Whitewater River and its
24 Tributaries, in San Bernardino and Riverside Counties, California.” The Whitewater
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28 ¹ This factual background is taken largely from the State Water Board’s Letter of December 7, 2012, and is assumed to be accurate for the purposes of this Response.

1 adjudication resulted in the issuance of a final order of determination by the State Water Board's
2 predecessor and the issuance of a decree by the Riverside County Superior Court in 1938
3 confirming the water right license.² The Morongo Band acquired the water right license in 2001
4 through a land acquisition. The State Water Board, Division of Water Rights, issued a Notice of
5 Proposed Revocation of the license in 2003. The proceedings before the State Water Board also
6 began in 2003 and have been the subject of several delays. In 2005, while the proceedings were
7 pending before the State Water Board, the Morongo Band conveyed the land served by the
8 license to the United States in trust for the benefit of the Morongo Band.
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11 The Morongo Band filed a Motion to Dismiss the revocation proceeding, raising the issue
12 that the United States is an indispensable party which cannot be joined due to the lack of waiver
13 of sovereign immunity. Because the Morongo Band did not file its motion until after parties had
14 filed testimony and exhibits for the hearing scheduled in May 2012, the State Water Board
15 proceeded with the hearing on the merits of the Notice of Revocation. The Morongo Band
16 participated in the evidentiary hearing. At the hearing, a representative of the BIA presented a
17 policy statement, confirming that the land and license 659 are now held in trust by the United
18 States for the benefit of the Morongo Band. BIA also noted in its policy statement of its serious
19 concern that BIA was not provided notice of the revocation proceeding.
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25 ² The Whitewater River adjudication was initiated pursuant to a petition of the Coachella Valley County Water
26 District filed with the California Department of Public Works (predecessor agency to the State Water Board) that
27 resulted in the issuance of an "Order Determining and Establishing the Several Rights by Appropriation to the Use
28 of the Waters of the Whitewater River Stream System" by the Department of Public Works and subsequently, a
decree by the Riverside County Superior Court. Without waiving any rights to contest the nature of the proceeding
resulting in the Whitewater River decree, it will be assumed that the Whitewater River adjudication was conducted
in conformance with state law regarding the determination of relative rights to a stream system as contemplated
under the McCarran Amendment.

1 Based on the information provided to the State Water Board by the Morongo Band and BIA,
2 the State Water Board acknowledged BIA's interest in the land and license 659 and determined
3 that BIA was not provided sufficient notice to ensure its full participation in the evidentiary
4 hearing. The State Water Board found that, pursuant to Water Code Section 1675, license 659
5 could not be revoked without due notice to BIA, the licensee, and after a hearing, if requested by
6 the licensee. Letter of December 7, 2012, p. 5. Based on that determination, the State Water
7 Board has provided an opportunity for the BIA to appear at a supplemental hearing to present
8 direct testimony and exhibits, cross examine witnesses, present rebuttal testimony or exhibits
9 and submit a closing argument. The State Water Board stressed that BIA's participation is
10 optional and should only be requested if, after reviewing the existing record, BIA would like to
11 reopen the hearing and present additional evidence.
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14 While the State Water Board provided for the BIA to present additional evidence at a
15 supplemental hearing, the State Water Board denied the Morongo Band's motion regarding the
16 indispensable party and sovereign immunity issues. The State Water Board held that the
17 McCarran Amendment and case law interpreting it provide that once a water right has been
18 adjudicated in a comprehensive state adjudication of the rights to a stream system, that
19 "sovereign immunity is waived with respect to any subsequent proceeding to administer that
20 right." Letter of December 7, 2012, pp. 4-5. The State Water Board concluded that "[i]n this
21 case, License 659 was adjudicated as part of a comprehensive adjudication of the appropriate
22 rights to the Whitewater River Stream System. Therefore, the United States has waived
23 sovereign immunity under the McCarran Amendment with respect to the instant proceeding to
24 determine whether the right has been forfeited for non-use." *Id.* at 5.
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II. Legal Background: Sovereign Immunity and the McCarran Amendment.

BIA is an agency of the United States Government, located in the United States Department of the Interior. The United States Supreme Court has frequently held that waivers of sovereign immunity must be strictly construed in the government's favor, and must be unequivocally expressed in statutory text. *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *Department of the Army v. Blue Fox*, 525 U.S. 255, 261 (1999) (citing cases). “The United States does not waive sovereign immunity by implication; any waiver must be unequivocally expressed,” *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 142 (9th Cir. 1987), *aff’d*, *California v. United States*, 490 U.S. 920 (1989)(*per curiam*), and “‘must be strictly construed in favor of the United States,’ and not enlarged beyond what the language of the statute requires.” *United States v. Idaho*, 508 U.S. 1, 7 (1993), quoting *Ardestani v. INS*, 502 U.S. 129, 137 (1991), and citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). “A party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity.” *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987), citing *Holloman v. Watt*, 708 F.2d at 1401. *See also, e.g., Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995); *Tracy v. United States*, 243 F.R.D. 662, 665 (D. Nev. 2007).

The State Water Board asserts that the McCarran Amendment provides a waiver of sovereign immunity for the instant revocation proceeding. The United States agrees that the McCarran Amendment provides the only potential waiver of sovereign immunity that would allow the United States to be joined in this proceeding. The McCarran Amendment provides that:

- (a) Joinder of United States as defendant; costs
- Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for

1 the administration of such rights, where it appears that the United States is the owner
2 of or is in the process of acquiring water rights by appropriation under State law, by
3 purchase, by exchange, or otherwise, and the United States is a necessary party to
4 such suit. The United States, when a party to any such suit, shall (1) be deemed to
5 have waived any right to plead that the State laws are inapplicable or that the United
6 States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to
7 the judgments, orders, and decrees of the court having jurisdiction, and may obtain
8 review thereof, in the same manner and to the same extent as a private individual
9 under like circumstances: Provided, That no judgment for costs shall be entered
10 against the United States in any such suit.

11 (b) Service of summons

12 Summons or other process in any such suit shall be served upon the Attorney General
13 or his designated representative.

14 (c) Joinder in suits involving use of interstate streams by State

15 Nothing in this section shall be construed as authorizing the joinder of the United
16 States in any suit or controversy in the Supreme Court of the United States involving
17 the right of States to the use of the water of any interstate stream.

18 43 U.S.C. § 666. Thus, the State Water Board's ability to assert jurisdiction over the United
19 States is defined and limited by the express terms of the McCarran Amendment. Critically, the
20 burden of showing an "unequivocal waiver of sovereign immunity" rests on the State Water
21 Board. e.g., *Baker*, 817 F.2d at 562; *Cato*, 70 F.3d at 1107; *Tracy*, 243 F.R.D. at 665. The State
22 Water Board has not carried that burden.

23 The State Water Board determined that the United States waived sovereign immunity
24 related to this revocation proceeding under the second prong of the McCarran Amendment,
25 which follows adjudication of rights to the use of water of a river system or other source, 43
26 U.S.C. § 666(a)(1), and addresses "the administration of such rights, where it appears that the
27 United States is the owner of or is in the process of acquiring water rights by appropriation
28 under State law, by purchase, by exchange, or otherwise, and the United States is a necessary
party to such suit." 43 USC § 666 (a)(2).

1 The waiver of immunity in subsection (a)(2) of the McCarran Amendment applies only
2 after a comprehensive general stream adjudication under subsection (a)(1) has occurred. *e.g.*,
3 *Dugan v. Rank*, 372 U.S. 609, 617-19 (1963); *Metro. Water Dist.*, 830 F.2d at 144 (both cases
4 “expressly limit the government’s consent in waiving sovereign immunity under the McCarran
5 Amendment to those cases that implicate ‘the rights of *all* claimants on a stream.’” *Orff v.*
6 *United States*, 358 F.3d 1137, 1143 n.3 (9th Cir. 2004)(emphasis in original).) As noted above, it
7 is assumed, for the purposes of this Response, that the prior Whitewater River Adjudication and
8 resulting decree issued by the Riverside County Superior Court, was a comprehensive general
9 stream adjudication proceeding within the meaning of section (a)(1) of the McCarran
10 Amendment.³

11 Under that assumption, section (a)(2) of the McCarran Amendment provides for the consent
12 of the United States in a suit for the administration of the water rights previously determined in a
13 decree. License 659 is one of those rights. The Ninth Circuit has explained what a suit for
14 administration of a decree encompasses.

15 To administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to
16 its meaning, to construe and to interpret its language. Once there has been such an
17 adjudication and a decree entered, then one or more persons who hold adjudicated water
18 rights can, within the framework of § 666(a)(2), commence among others such actions
19 as described above, subjecting the United States, in a proper case, to the judgments,
20 orders and decrees of the court having jurisdiction.

21 *South Delta Water Agency v. U.S., Dept. of Interior, Bureau of Reclamation*, 767 F.2d 531, 541
22 (9th Cir. 1985), quoting *United States v. Hennen*, 300 F. Supp. 256, 263 (DC Nev. 1968). The

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25 ³ A proper proceeding under 43 U.S.C. § 666(a)(1) must be a “comprehensive” determination of all water rights,
26 sometimes called a general stream adjudication. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 548-52
27 (1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810. Such a proceeding must be
28 an “adjudication of the rights of all claimants to a river or stream,” in which “all existing water rights claims in the
river system will have been determined when the adjudication is finished.” *United States v. Oregon Water
Resources Dept.*, 44 F.3d 758, 764, 768 (9th Cir. 1994).

1 federal First Circuit Court of Appeals in 2002 found that subsection (a)(2) of the McCarran
2 Amendment did not authorize a purely administrative proceeding to administer water rights that
3 had been previously determined in a suit under subsection (a)(1). *United States v. Puerto Rico*,
4 287 F.3d. 212 (2002).

5
6 In *Puerto Rico*, the agency charged with administering water rights in Puerto Rico attempted
7 to restrict the use of water under a water right permit issued by Puerto Rico to the United States.
8 The Court held that the proceeding initiated by Puerto Rico to administer the permit was purely
9 administrative, contrary to the express requirement of the McCarran Amendment, and that even
10 though the decision by the administrative agency was subject to judicial review, that fact did not
11 bring the proceeding within the McCarran Amendment's waiver of sovereign immunity. *Id.* at
12 219, 221. The Court compared the proceeding conducted by Puerto Rico with the process
13 considered in *United States v. Oregon Water Resources Dept.* Unlike in *Puerto Rico*, the
14 statutory scheme considered in Oregon was a unitary scheme that contained two interconnected
15 tracks, and while the action could be commenced administratively by the agency, that action
16 automatically would proceed to a judicial forum upon completion of the administrative process.
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19 *Id.* at 219.

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21 Without acknowledging any of this pertinent case law, the State Water Board relied on two
22 cases to support its position that once a water right has been adjudicated within the meaning of
23 section (a)(1) of the McCarran Amendment, then under section (a)(2) of the McCarran
24 Amendment sovereign immunity is waived with respect to any subsequent proceeding to
25 administer the right. Letter of December 7, 2012, p. 5 (emphasis added). In the first case,
26 *United States v. Hennen*, 300 F. Supp. 256 (DC Nev. 1968), the court's reasoning expressly
27 tracked our position here rather than the State Water Board's. The *Hennen* court held that a pre-
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1 McCarran Amendment adjudication conducted in conformance with Nevada state law was
2 within the meaning of section (a)(1) of the McCarran Amendment as to the determination of
3 water rights. *Id.* at 258. The court then reviewed the process to administer water rights
4 determined in the underlying adjudication and held that such a proceeding was also within the
5 McCarran Amendment waiver of sovereign immunity because the action was initiated in state
6 court and the United States was served as provided in the McCarran Amendment. *Id.* at 258,
7 264. Here, contrary to the process for administering a decree addressed in *Hennen*, the
8 revocation process is before the State Water Board and was not initiated in state court where the
9 decree was issued, nor was the United States served as provided by the McCarran Amendment.⁴
10 Here, the *Hennen* case does not support the State Water Board's determination that the United
11 States has waived sovereign immunity for the instant revocation proceeding, instead it highlights
12 the infirmities with the current administrative revocation proceeding.
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16 The second case cited by the State Water Board to support its determination that the United
17 States had waived sovereign immunity and is bound by the State Water Board's revocation
18 proceeding is a Colorado Supreme Court case. In the Colorado case, an action was commenced
19 in state court to quiet title to a portion of a previously decreed water right. *The Federal Youth*
20 *Center v. District Court*, 575 P.2d 395 (1978). The United States entered a special appearance
21 in state court to contest the jurisdiction over an agency of the United States which held a portion
22 of the water right at issue in the quiet title action. The Colorado Supreme Court held that the
23 United States waived its sovereign immunity under section (a)(2) of the McCarran Amendment
24 because the quiet title action was part of the "entire body of water law administration procedures
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28 ⁴ Section (b) of the McCarran Amendment requires that "[s]ummons or other process in any such suit shall be served upon the Attorney General or his designated representative." 43 U.S.C. § 666(b).

1 of each state, regardless of the forms in which they may exist.” *Id.* at 400. The State Water
2 Board interprets this language to mean that a purely administrative proceeding is within the
3 McCarran Amendment waiver. Letter of December 7, 2012, p. 5. This is not the case.

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5 In contrast to the issue here, the issue in the Colorado case was “whether an action to quiet
6 title to water rights in a Colorado District court falls within this statutory consent to
7 jurisdiction.” *Id.* at 397 (emphasis added). The court held that for water rights that were
8 determined in an adjudication within the meaning of section (a)(1) of the McCarran
9 Amendment, the United States has waived sovereign immunity “to any suit properly
10 commenced for the administration of such rights.” *Id.* at 398 (emphasis added). The revocation
11 before the State Water Board is a purely administrative proceeding and not a suit within the
12 McCarran Amendment waiver.

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14 The Colorado Supreme Court also described the pertinent doctrine of exclusive jurisdiction
15 that determines what the appropriate judicial forum is within a state for actions to administer a
16 water right post-decree. The court held that the “court charged with the obligation for
17 determining [the water right] ownership and relative priorities must have the capacity to settle
18 disputes as to all parties who claim rights in the water at issue.” *Federal Youth Center v. District*
19 *Court*, 575 P.2d at 398. The Court noted that the underlying policies of the McCarran
20 Amendment show that the court that initially adjudicated the water rights and entered the final
21 decree “is the court possessing the jurisdiction to enter orders and decrees with respect thereto
22 and thereafter to enforce the same by appropriate proceedings.” *Id.* This concept of exclusive
23 jurisdiction was also adopted by the Ninth Circuit Court of Appeals in a recent case.

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25 In *State Engineer v. South Fork Band of the Te-Moak Tribe*, 339 F.3d 804 (9th Cir. 2003),
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27 the Ninth Circuit held that the McCarran Amendment waives the United States immunity from
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1 suit for the administration of water rights that were acquired by the United States even though
2 those rights were adjudicated prior to the enactment of the McCarran Amendment, if the prior
3 proceeding was a comprehensive adjudication within the meaning of the McCarran Amendment.
4
5 In determining whether the issue of the administration of water rights held by the United States
6 in trust for the tribe could be determined in federal court as opposed to state court where the
7 initial adjudication took place and the final decree was entered, the court held that the first court
8 to obtain jurisdiction over the water right (the res) retains that jurisdiction pursuant to the long
9 standing doctrine of prior exclusive jurisdiction. *Id.* at 809-811; *United States v. Alpine Land &*
10 *Reservoir Co.*, 174 F.3d 1007, 1012-14 (9th Cir. 1999) (because the federal district court was the
11 court that had entered the original decrees, it maintained exclusive jurisdiction over their
12 administration). In *Te-Moak*, the first court to obtain jurisdiction over the water rights at issue
13 was the state court. *Id.* at 807-808. Thus, as to the rights of the United States in license 659, the
14 Riverside Superior Court appears to have exclusive jurisdiction.
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17 **III. BIA presented a policy statement demonstrating why license 659 should not be**
18 **revoked.**

19 The BIA would like to remind the State Water Board that the United States holds license
20 659 and other water rights on the Morongo Reservation in trust for the beneficial use of the
21 Morongo Band. The Morongo Band has the legal responsibility for developing its own water
22 systems on the Reservation including various supporting and related facilities for its members
23 residing on the Reservation. Water is a critical necessity for the Morongo Band. Its members
24 need a reliable and adequate water supply, including safe drinking water and water for
25 agriculture and industrial uses on the Reservation. License 659 is an integral part of the
26 Reservation water supply. BIA urges the State Water Board to exercise its discretion in a
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1 manner that allows the Morongo Band to consolidate license 659 with other water rights to
2 which it has a beneficial interest so that these rights may be put to reasonable beneficial uses in
3 support of the economic development of the Reservation and the self-sufficiency of the Morongo
4 Band.
5

6 **IV. Conclusion**

7 For the foregoing reasons, the United States Department of the Interior, Bureau of Indian
8 Affairs, who holds title to the water right at issue in this case in trust for the benefit of the
9 Morongo Band of Mission Indians, respectfully advises the State Water Board that, given the
10 absence of a waiver of sovereign immunity, the United States and its agencies cannot be named
11 as parties in this revocation proceeding and that the State Water Board lacks jurisdiction over the
12 United States in this action. Further, pursuant to Water Code Section 1675, the State Water
13 Board cannot revoke license 659 without notice and opportunity for a hearing by the licensee.
14 BIA is the licensee as it holds legal title to license 659 in trust for the benefit of the Morongo
15 Band. Thus, the license proceeding must be dismissed.⁵
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18 Respectfully submitted:

19 Date: 02/20/2013


20 Stephen R. Palmer
21 Karen D. Koch
22 Attorneys for the Bureau of Indian Affairs
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27 ⁵ Without waiving its sovereign immunity, or any other argument, BIA reserves the right to present evidence in this,
28 or any related, proceeding concerning license 659.

1 **CERTIFICATE OF SERVICE**

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3 In the Matter of: Proposed Revocation of License 659 (Applications 553) of the
4 Morongo Band of Mission Indians

5 I, the undersigned, declare that I am a citizen of the United States, over the age of
6 eighteen, and not a part of this litigation. On February 20, 2013, I served the following:

7 **“SPECIAL APPEARANCE OF THE UNITED STATES DEPARTMENT OF THE**
8 **INTERIOR, BUREAU OF INDIAN AFFAIRS TO CONTEST JURISDICTION**
9 **RE: NON-WAIVER OF SOVEREIGN IMMUNITY”**

10 by foregoing document, enclosed in a sealed envelope via U.S. Postal Service regular mail and
11 hand delivered at Sacramento, California, to the following:

12 STATE WATER RESOURCES CONTROL BOARD
13 Attention: Charles R. Hoppin, Chairman
14 1001 I Street
Sacramento, California 95814

15 by foregoing document, via electronic mail at Sacramento, California, to the following:

16 THE MORONGO BAND OF MISSION INDIANS
17 c/o Somach, Simmons & Dunn
18 500 Capitol Mall, Suite 1000
19 Sacramento, California 95814
20 Email: dkelly@somachlaw.com
21 Email: ssomach@somachlaw.com

22 by foregoing document, via electronic mail and hand delivered at Sacramento, California, to the
23 following:

24 DIVISION OF WATER RIGHTS
25 PROSECUTION TEAM
26 c/o Samatha Olson
27 State Water Resources Control Board
28 1001 I Street
Sacramento, California 95814
Email: solson@waterboards.ca.gov

1 by foregoing document, enclosed in a sealed envelope U.S. Postal Service regular mail at
2 Sacramento, California, to the following:

3 U.S. Department of the Interior
4 Bureau of Indian Affairs
5 Southern California Agency
6 1451 Research Park Drive, Suite 100
7 Riverside, California 92507-2154

8 U.S. Department of the Interior
9 Bureau of Indian Affairs
10 c/o Kevin Bearquiver
11 Pacific Regional Office
12 2800 Cottage Way, W-2820
13 Sacramento, California 95825

14 I certify that the foregoing is true under penalty of perjury. Executed this 20th day of
15 February, 2013, at Sacramento, California.

16 
17 James L. Hines
18 Administrative Assistant
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