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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,)
11 Plaintiff,)
12 v.)
13 STATE OF NEVADA; NEVADA STATE)
DEPARTMENT OF CONSERVATION)
14 AND NATURAL RESOURCES; R.)
MICHAEL TURNIPSEED, P.E., in his)
15 official capacity as Director, Department of)
Conservation and Natural Resources; and)
16 HUGH RICCI, P.E., in his official capacity)
as State Engineer for the State of Nevada,)
17 Defendants.)

Case No. CV-S-00-0268-RLH (LRL)

**NEVADA AGENCY'S MEMORANDUM
IN OPPOSITION TO MOTION TO LIFT
STAY AND TO GRANT LEAVE TO
FILE A SUPPLEMENTAL AND
SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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19 Defendant, State of Nevada, through the Nevada Agency for Nuclear Projects (Nevada
20 Agency), by and through its counsel, Brian Sandoval, Nevada Attorney General, and Marta A.
21 Adams, Senior Deputy Attorney General, respectfully submits this memorandum in opposition
22 to the Motion to Lift Stay and to Grant Leave to File a Supplemental and Second Amended
23 Complaint for Declaratory and Injunctive Relief (Motion) filed by Plaintiff, United States of
24 America (the Government) on behalf of the United States Department of Energy (DOE).

25 **I. Introduction.**

26 On February 11, 2005, the Government filed this motion asking this Court to lift the
27 current stay so that it can file a Second Amended Complaint in this case. As the basis for its

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1 motion, the Government cites to the recent “umbrella” decision¹ of the United States Court of
2 Appeals for the District of Columbia Circuit (DC Circuit), incredibly asserting that this decision
3 furthers the development of the Yucca Mountain repository and supports DOE’s renewed
4 pursuit of additional water for certain scientific work beyond the water currently being used for
5 site maintenance. The Government ignores the operative final judgment of the DC Circuit,
6 which invalidated the radiation standard indispensable to any licensing of the Yucca
7 Mountain repository. Contrary to the Government’s arguments and largely as a result of the
8 DC Circuit’s decision, DOE is in an even less viable legal position than ever to seek
9 additional water for uses beyond the currently stipulated site maintenance and public health
10 and safety uses. In fact, as articulated below, DOE has sufficient water for its present needs
11 and is not subject to the regulations of the United States Nuclear Regulatory Commission
12 (NRC) until it submits a license application.

13 Distilled to its essence, the DC Circuit decision places ultimate development of the
14 proposed Yucca Mountain repository into grave doubt. The DC Circuit invalidated the
15 primary radiation standard promulgated by the United States Environmental Protection
16 Agency (EPA) which established the acceptable limit for the escape of radiation from the
17 proposed repository. In so doing, the DC Circuit held unlawful the fundamental standard by
18 which the safety of any repository proposed to be licensed by DOE is to be measured.
19 Accordingly, the DC Circuit left the project with no present path forward and a large number
20 of formidable institutional hurdles that are likely to prove insurmountable.

21 Without a radiation standard in place, DOE cannot file a supportable license
22 application with NRC. At a minimum, promulgation of a new EPA standard can be expected
23 to take years.² Until a license application is submitted to NRC, DOE is not subject to NRC’s

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25 ¹ A variety of challenges were filed to the statutory and regulatory regimes governing the proposed
26 Yucca Mountain repository. The cases were consolidated and an overarching decision was reached addressing
27 each separate issue. See *Nuclear Energy Institute, Inc. v. The United States Environmental Protection Agency*,
28 373 F.3d 1251 (D.C. Cir. 2004) (*NEI v. EPA*) (rehearing and rehearing *en banc* denied September 1, 2004). No
party sought an appeal of this decision.

² The previous EPA effort (measured from the National Academy of Sciences’ report) required six
years.

1 jurisdiction and has no authority to assert requirements contained in NRC's regulations for
2 additional water. For the following reasons, in light of the comprehensive decision issued by
3 the DC Circuit, sound judicial reasoning and economy dictate that this Court continue the stay
4 of this litigation. DOE has the water it needs for site maintenance and simply has no
5 authority to seek water for other uses. To avoid "having the tail wag the dog" (i.e., allowing
6 this water case to proceed, when the project is not), Nevada Agency respectfully submits that
7 the Court should continue the stay of this litigation. See March 12, 2003, Order at 5.

8 **II. Procedural Background.**

9 In July 1997 DOE filed five applications³ with the Office of the State Engineer under
10 provisions of state water law to *permanently* appropriate 430 acre-feet of groundwater in
11 anticipation of a congressional decision authorizing application to NRC for the construction
12 and operation of a proposed high-level nuclear waste repository at Yucca Mountain. In State
13 Engineer's Ruling No. 4848 (Ruling 4848), the State Engineer denied DOE's applications for
14 permanent use because he determined that the purposes intended for the water, namely for
15 construction and operation of the proposed Yucca Mountain high-level nuclear waste
16 repository,⁴ threaten to prove detrimental to the public interest.⁵

17 Following issuance of Ruling 4848, the Government filed both a complaint in this Court
18 and a "protective" notice of appeal in state district court in Tonopah.⁶ By order entered on
19 September 21, 2000, this Court dismissed the federal complaint, choosing to abstain from a
20 review of Ruling 4848 on the grounds that the appeal constitutes a state water law matter

21 ³ Application Nos. 63263, 63264, 63265, 63266, and 63267.

22 ⁴ Pursuant to his statutory directive, the State Engineer specifically determined that DOE intended the
23 water for the construction and operation of the proposed high-level nuclear waste repository at Yucca Mountain.
See Ruling 4848 at 17.

24 ⁵ The Nevada water code at NRS 533.370(4) provides, in pertinent part, that:

25 [W]here there is no unappropriated water in the proposed source of supply, or
26 where its proposed use or change conflicts with existing rights, . . . or threatens
to prove detrimental to the public interest, the State Engineer shall reject the
application and refuse to issue the requested permit.

27 ⁶ *United States v. State Engineer*, Case No. 15722, Fifth Judicial District Court, State of Nevada,
28 County of Nye.

1 capable of resolution in state court. The Government appealed this Court's dismissal to the
2 United States Court of Appeals for the Ninth Circuit. Finding that the Government had set
3 forth a not "insubstantial" claim of federal preemption, the Ninth Circuit reversed and
4 remanded the case back to this Court for consideration of the federal question.⁷ See *United*
5 *States v. Morros*, 268 F.3d 695 (9th Cir. 2001).

6 After initiating its appeal of Ruling 4848, DOE began pursuing extensions of its
7 temporary permits authorizing water use for Yucca Mountain site characterization. By letter
8 dated November 29, 2001, DOE requested extensions to its *temporary* water permits,⁸
9 ostensibly to continue its "industrial" use of water for *site characterization* purposes.⁹ By the
10 time the State Engineer responded to DOE's extension request for the temporary site
11 characterization permits, the Secretary of Energy had notified the Governor of his intention to
12 recommend the Yucca Mountain site to the President and had thus indicated that site
13 characterization was complete.¹⁰ Based on DOE's own representations that site
14 characterization at Yucca Mountain is complete,¹¹ State Engineer Hugh Ricci denied the
15 requested temporary extensions by letter dated February 7, 2002. The basis for the February
16 2002 denial is that DOE is no longer pursuing site characterization activities for which the
17 water was originally appropriated.¹²

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19 ⁷ By Order dated December 21, 2001, the Ninth Circuit also denied the State of Nevada's Petition for
20 Rehearing and Suggestion for Rehearing *En Banc* filed jointly by the Nevada Agency and the State Engineer.

21 ⁸ Permit Nos. 57373, 57374, 57376, 58827, 58828, and 58829.

22 ⁹ "Site characterization" constitutes statutorily-defined preparatory activities preceding recommendation
23 of the Yucca Mountain site for development of the proposed repository. 42 U.S.C. § 10133.

24 ¹⁰ On February 14, 2002, Secretary of Energy Spencer Abraham recommended the Yucca Mountain
25 repository to the President. On February 15, 2002, President George W. Bush recommended the repository to
26 Congress.

27 ¹¹ On January 10, 2002, the Secretary of Energy gave a 30-day notice to the Governor of Nevada of his
28 intent to recommend to the President approval of the Yucca Mountain site for the development of a high-level
nuclear waste repository.

¹² Consistent with the Secretary of Energy's notice of his intended recommendation of the Yucca
Mountain site to the President by letter dated January 10, 2002, and DOE's own *Yucca Mountain Science and
Engineering Report*, site characterization activities are complete upon site recommendation. Because site
characterization is complete, water is no longer necessary for that activity.

1 On or about March 7, 2002, the Government filed a First Amended Complaint for
2 Declaratory and Injunctive Relief, attempting to incorporate allegations relative to the State
3 Engineer's February 2002 denial of its temporary permits. On March 29, 2002, Nevada
4 Agency and the State Engineer filed Answers to the First Amended Complaint. In addition,
5 Nevada Agency filed a Motion to Strike those new paragraphs pertaining to the State
6 Engineer's February 2002 temporary permit denial on the grounds that such matters pertain
7 to issues beyond those remanded to this Court by the Ninth Circuit.

8 On April 8, 2002, pursuant to the Nuclear Waste Policy Act (NWPA), Governor Kenny
9 Guinn submitted Nevada's official Notice of Disapproval of the proposed Yucca Mountain
10 repository to Congress, thereby vetoing the site selection decision of the President. Pursuant
11 to NWPA Section 115, Congress passed a joint resolution overriding the Notice of
12 Disapproval. NWPA § 115, 42 U.S.C. § 10135. The President signed the Yucca Mountain
13 Development Act (alternatively, Joint Resolution or YMDA) on July 23, 2002. With enactment
14 of the YMDA, DOE was required by statute to submit a license application to NRC within 90
15 days. NWPA §114(b), 42 U.S.C. § 10134(b). To date, DOE has not filed its license
16 application, and for the reasons cited in the following section, it is a matter of sheer
17 speculation whether DOE can actually file a legally complete license application in the
18 foreseeable future.

19 On December 3, 2002, the Government filed a renewed motion for preliminary
20 injunction, alleging an imminent shortage of potable water for site maintenance, fire
21 protection, and other uses. Following the entry of a stipulation reached among the parties on
22 December 18, 2002, allowing for adequate water for site maintenance and public health and
23 safety needs, the Court vacated the hearing scheduled for December 23, 2002.

24 In its March 11, 2003, Order, this Court held that:

25 [T]he State Engineer incorrectly (though not arbitrarily or
26 capriciously) abused his discretion by relying on N.R.S. 459.910
27 to make his determination [in Ruling 4848] of whether the
28 applications threaten to prove detrimental to the public interest;
and further finds no evidence or authority that the State Water
Law has been preempted.

1 March 11, 2003, Order at 11. The Court then remanded the matter to the State Engineer for
2 further hearing on the issue of whether DOE's proposed use "threatens to prove detrimental
3 to the public interest" within the meaning of NRS 533.370. On August 20 and 21, 2003, the
4 State Engineer conducted a hearing pursuant to remand and issued Ruling 5307, once again
5 denying DOE's applications on detriment to the public interest grounds.

6 In response to Ruling 5307, the Government filed a Motion for Leave to File a
7 Supplemental and Second Amended Complaint. Because of the pendency of the DC Circuit
8 litigation and the likelihood that "definitive declarations of the law" with respect to the Yucca
9 Mountain project would emanate from the litigation, this Court stayed these proceedings.
10 March 11, 2003, Order at 5.

11 **III. The DC Circuit's Decision, Invalidating the Foundational Radiation Standard for**
12 **Yucca Mountain, Unmistakably Justifies Maintaining the Stay.**

13 The DC Circuit considered several challenges brought by the State of Nevada and
14 others to the Yucca Mountain Project. Nevada challenged key regulations issued by the
15 three federal agencies with responsibility for the site: the EPA, NRC, and DOE. Nevada also
16 challenged the constitutionality of the Joint Resolution through which Congress selected
17 Yucca Mountain as the repository site and other actions of the President and the Secretary of
18 Energy. *NEI v. EPA*, 373 F.3d 1251, 1261, 1262 (D.C. Cir. 2004). While the DC Circuit did
19 not rule in favor of Nevada in all of the challenges, its July 9, 2004, decision, taken as a
20 whole, imposes a presently insurmountable roadblock to the construction of the Yucca
21 Mountain nuclear waste repository.

22 Finding that EPA had "unabashedly rejected" the findings of the National Academy of
23 Sciences (NAS), the DC Circuit invalidated *the* essential fundamental component of the
24 project, the EPA radiation standard. The DC Circuit also vacated NRC's Yucca Mountain
25 licensing rule insofar as it relied on the unsound EPA rule. *Id.* at 1270, 1285, 1299. The EPA
26 radiation standard is the foundational legal standard establishing the parameters by which
27 protection of the public and the environment is achieved. Without having in place a lawful
28 standard for the "acceptable" escape of radiation by which any repository license application

1 will be evaluated, DOE can, neither logically nor legally, move forward with a license
2 application. By the same token, DOE cannot, legitimately, seek water beyond that required to
3 maintain the site during the current hiatus between site characterization and the filing of a
4 license application with NRC. Neutral commentators surmise that the Government may never
5 be able to promulgate a substitute standard consistent with applicable law that Yucca
6 Mountain can meet. In any event, the promulgation of a new EPA radiation standard would
7 require years, not months, and only then, at its completion, can NRC proceed to change its
8 own licensing rule that will govern whether the repository is eligible for a construction
9 permit.¹³ Despite DOE's somewhat vague assertions that it needs water now to conduct new
10 studies,¹⁴ it has no authority to do anything other than maintain the site until it files a license
11 application with NRC. Again, it bears repeating that pursuant to a stipulation among the
12 parties and as approved by this Court, DOE has sufficient water to maintain the site and
13 provide for basic public health and safety needs.

14 As noted above, in addition to rejecting the EPA radiation standard, the DC Circuit
15 vacated the NRC rule governing repository licensing. *Id.* at 1285, 1299. This means that
16 there is currently no rule by which to license the project. Only after EPA promulgates a new
17 radiation standard can the NRC promulgate new licensing regulations. Thus an NRC
18 licensing proceeding is on hold until the radiation standard is resolved. While it is true that
19 Nevada did not prevail in its challenge to the Joint Resolution, the effect of the DC Circuit's
20 decision was to send the project back to "square one" of the regulatory process. Read in
21 context, the Government's attempt to marginalize Nevada's pivotal victory on the radiation
22 standard as having "no bearing on this case" amounts to wishful thinking in the extreme. See
23 Motion at 8 n.4.

24 _____
25 ¹³ See, e.g., *Nevada's Clout Evident in Waste Site Battle*, LOS ANGELES TIMES, Feb. 13, 2005 (noting that
26 "outside experts say it could take years to finalize a rule" and that until then, "the Energy Department has no
27 hope of getting a license for the dump.").

28 ¹⁴ See, for example, footnote 5 at page 8 of its Motion. There, the United States argues that delays
caused by the State are harming DOE by "preventing it its rightful access to water." Clearly, at the end of a
licensing proceeding, once begun with the filing of a complete license application, DOE will need to have
secured its water rights. That point in time is years from now at the earliest.

1 **IV. Provisions of NWPA Support This Court's Maintenance of a Stay.**

2 The Government acknowledges that even with enactment of YMDA, DOE is authorized
3 "to seek appropriate regulatory approvals from the NRC to construct and operate a
4 repository" at Yucca Mountain. Motion at 7. The purpose of the licensing proceeding before
5 NRC is to determine whether the proposed repository is in fact licensable and meets public
6 health and safety standards. The Government argues that because the "validity of the YMDA
7 and the obligations of DOE to proceed under the NWPA have been affirmed and finally
8 resolved through" the DC Circuit, this Court should determine whether the State Engineer is
9 preempted from denying DOE water "to fulfill its obligations" under federal law. Motion at 8.

10 DOE's arguments aside, its contention that water is needed for continued "scientific"
11 tests during this pre-licensing phase is not supported by the law. Section 114(b) of NWPA
12 provides that DOE must submit a license application within ninety days of any congressional
13 override of Nevada's notice of disapproval. 42 U.S.C. § 10134(b). Given this relatively short
14 period for DOE to actually file a license application with NRC, it is clear that Congress
15 anticipated no additional site-related or site characterization activity to occur during the
16 modest time period following Congress's decision, but before DOE submits a license
17 application. DOE has not, nor can it, file a license application until the issue of the EPA
18 radiation standard is resolved. DOE's public announcements that it will file a license
19 application by the end of 2005 are simply not credible when it similarly "promised" a license
20 application before the end of 2004. Regardless of when (or even if) DOE files a license
21 application, it does not change the statutory requirements under which the agency must
22 operate.

23 Beyond the very real question of when DOE can file its license application with NRC,
24 Congress provided in Section 114(d) of NWPA that NRC may spend three years, or even four
25 (upon its request), to consider and rule on DOE's license application. 42 U.S.C. § 10134(d).
26 Given NRC's overriding mandate to license the repository only if public health and safety are
27 proven to be duly protected, it is ludicrous for DOE to suggest that, by enactment of YMDA or
28 issuance of the DC Circuit's decision, there is an imperative for this Court to determine

1 federal preemption of the State Engineer's deliberative processes set forth in Nevada water
2 law. At this juncture, the only known element is that DOE cannot move forward without a
3 sustainable EPA radiation standard.

4 Notably, 10 C.F.R. Part 63 confers no independent jurisdiction on DOE to continue its
5 scientific activities following site characterization prior to submission of a license application.
6 Part 63 is in fact a regulation applicable to NRC and its licensing of the proposed repository
7 once an application is submitted by DOE. Consequently, Part 63 governs the *NRC's* conduct
8 in its review and decision-making process related to DOE's license application for
9 construction authorization, operation, and permanent closure of the repository. Part 63 is not
10 a regulation imposing affirmative duties on DOE independent of a license application.

11 At present, DOE is a "prospective applicant" only. 10 C.F.R. § 63.16(g). Part 63
12 imposes no obligations on a "prospective applicant" other than to report to NRC on site
13 characterization activities not less than once every six months. 10 C.F.R. § 63.16(b). NRC is
14 authorized by Part 63 to review those activities, visit and inspect the site, and comment to
15 DOE in what is described as an "informal conference between a prospective applicant and
16 the NRC staff . . . and [is] not part of a proceeding under the Atomic Energy Act of 1954, as
17 amended." 10 C.F.R. § 63.16(g).¹⁵

18 The only Yucca Mountain-related activity that occurs at NRC following the site
19 characterization stage, but before the construction authorization, is the licensing proceeding
20 itself. The licensing proceeding does not begin until DOE submits a license application, and
21 DOE cannot obtain such a license without an effective radiation standard. Once begun, the
22 licensing proceeding can take up to four years. NWPA §114(d), 42 U.S.C. § 10134. Only
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24 ¹⁵ In addition to these factors, NRC is precluded from docketing any license application filed by DOE
25 until six months after DOE has made a valid certification of its relevant documentary material and has made its
26 documentary material publicly available on the Licensing Support Network (LSN). 10 C.F.R. § 2.1012. In
27 anticipation of its previously predicted license application filing date of December 2004, DOE tendered a
28 purported LSN certification on June 30, 2004. That certification, however, was vacated by NRC's Atomic Safety
and Licensing Board because it was grossly incomplete. Even now, DOE has delivered only 1.4 million
documents to NRC for inclusion in the LSN and has acknowledged its anticipated total will be three to four
million documents. Thus the timing of this prerequisite to any license application is problematic and speculative
at best.

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2 when NRC licensing is complete, DOE must then demonstrate that it has obtained necessary
3 water rights. 10 CFR § 63.121(d).

4 **V. DOE Has Water for its Current Uses.**

5 On December 18, 2002, the parties to this litigation filed a Joint Stipulation and Motion
6 to Vacate Hearing. The stipulation provides that upon entry of the Court's order approving
7 the stipulation, DOE is permitted to utilize its J-13 well for its potable water needs. The
8 Government contends that the stipulation only addresses its potable water needs (at the
9 heart of its earlier motion for preliminary injunction) and not its "other" water needs incident to
10 its permanent applications. At present, during this hiatus period before DOE files its license
11 application with NRC, DOE's needs for non-potable water are minimal at best. Assuming,
12 however, that DOE requires non-potable water for any legitimate authorized use, there is
13 certainly a strong likelihood that the State Engineer would consider an application to
14 accommodate a short-term purpose if supported by DOE's application and the articulation of
15 a purpose for which it is authorized.

16 Nevada water law requires that the proposed purpose for the water shall be identified
17 when an applicant files its applications with the State Engineer.¹⁶ The purpose of the water at
18 issue here is to allow construction and operation of the proposed repository. Because DOE
19 cannot file its license application with NRC until the EPA standard issue is resolved and then
20 will need another three to four years for the licensing process to run its course, there is ample
21 time for DOE to obtain water for its legitimate uses.

22 Even if the State Engineer were (as DOE argues) required to authorize the use of
23 water to the extent necessary to allow DOE to carry out activities mandated by NWPA, the
24 activities so "mandated" do not include construction or operation of the proposed repository,
25 the very purposes for which DOE filed its permanent applications. Pursuant to NWPA, DOE
26

27 ¹⁶ NRS 533.335(4) requires that the purpose for which the application is made shall be included in
28 every application filed with the State Engineer. DOE originally filed its application for permanent water for
"industrial" purposes, but the State Engineer specifically held that the purposes were for the construction and
operation of the proposed repository. Ruling 4848.

1 needs a license for these activities and does not presently have one. In any event, DOE
2 cannot be prejudiced by a stay of this Court's deliberations, as long as DOE has sufficient
3 water at its disposal for its needs before it files its license application with NRC.

4 This Court has the "inherent power to control the disposition of the causes on its
5 docket in a manner which will promote economy of time and effort for itself, for counsel, and
6 for litigants." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). This Court may
7 appropriately "find it is efficient for its own docket and the fairest course for the parties to
8 enter a stay of an action before it pending resolution of independent proceedings which bear
9 upon the case." *Leyva v. Certified Grocers of California*, 593 F.2d 857, 863 (9th Cir. 1979).
10 See also *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Stern v. United States*, 563
11 F. Supp. 484, 489 (D. Nev. 1983). Nevada Agency submits that until DOE is a bona fide
12 license applicant, DOE cannot support its contentions that it requires water for additional
13 scientific work that likely should have occurred during site characterization.

14 Among the "competing interests" which should be considered in connection with a stay
15 request are:

16 [T]he possible damage which may result from the granting of a
17 stay, the hardship or inequity which a party may suffer in being
18 required to go forward, and the orderly course of justice measured
in terms of a simplifying or complicating of issues, proof, and
questions of law which could be expected to result from a stay.

19 *CMAX*, 300 F.2d at 268. See also *Landis*, 299 U.S. at 254-55. Nevada Agency respectfully
20 contends that a consideration of these "competing interests" in the context of this case points
21 this Court toward the exercise of its discretion to continue the stay of these proceedings
22 pending DOE's actual filing of a license application with NRC. Although the United States
23 asserts potential harm to its interests, DOE has water to conduct its authorized activities and
24 the ability to seek additional water should it apply and support its application with legitimate
25 authority. On the other side of the balance, there can be no genuine dispute that the
26 interests of the parties and the "orderly course of justice," *CMAX*, 300 F.2d at 268, are served
27 by continuing the stay. Continuation of the stay permits the Court to allow the NWPA
28 processes to unfold without unnecessary expenditure of its judicial resources.

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2 **VI. Conclusion.**

3 Based on the foregoing, the Nevada Agency for Nuclear Projects respectfully submits
4 that this Court should continue the stay of this case.

5 DATED this _____ day of February, 2005.

6 BRIAN SANDOVAL
7 Attorney General

8 By: _____
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CERTIFICATE OF SERVICE

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I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this _____ day of February, 2005, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

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