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THE NATURE CONSERVANCY  
7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
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12 RICHARD M. FELDMAN, an individual;  
13 ROBERT LEE PUDDICOMBE, an  
individual; and  
14 IN DEFENSE OF ANIMALS, a California  
15 non-profit corporation,  
16 Plaintiffs,

17 v.

18 FRAN MAINELLA, in her official  
capacity as the Director of the National  
19 Park Service;  
20 KATE FAULKNER, in her official  
capacity as the Chief of Natural Resources  
21 Management at Channel Islands National  
Park;  
22 NATIONAL PARK SERVICE, a bureau  
23 of the U.S. Department of the Interior;  
24 THE NATURE CONSERVANCY, an  
international non-profit corporation; and  
25 DOES 1-5, inclusive,  
26 Defendants.  
27

Case No. CV 05-04900 DT (CWx)

**DEFENDANT THE NATURE  
CONSERVANCY'S OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

Hearing Date: March 27, 2006

Hearing Time: 10:00 a.m.

Judge: Hon. Dickran Tevrizian

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## I. INTRODUCTION

Of the seven claims Plaintiffs raise in this litigation, they have chosen to seek partial summary judgment with respect to only one – their claim that the National Park Service and The Nature Conservancy violated the California Environmental Quality Act (“CEQA”). This claim is completely meritless. Neither the National Park Service (a federal agency) nor The Nature Conservancy (a non-profit private corporation) is subject to CEQA in this litigation. Thus, it is therefore irrelevant whether the draft environmental impact statement (“EIS”) for the Santa Cruz Island Primary Restoration Plan was submitted to the State Clearinghouse, because CEQA applies only to a state agency’s discretionary action.<sup>1</sup> Plaintiffs’ motion for partial summary judgment should thus be denied.

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## II. ARGUMENT

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The Nature Conservancy’s motion for summary judgment, filed with this Court on February 3, 2006, includes a discussion of the facts and procedural history of this case. The Nature Conservancy hereby incorporates that discussion in its opposition to Plaintiffs’ motion for partial summary judgment. Additionally, The Nature Conservancy notes that the Ninth Circuit Court of Appeals affirmed in an unpublished memorandum this Court’s denial of Plaintiffs’ motion for preliminary injunction. Exhibit A (*Feldman v. Mainella*, No. 05-56581 (9th Cir. Feb. 15, 2006) (memorandum affirming denial of preliminary injunction)).

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<sup>1</sup> Plaintiffs provide a footnote blithely stating that Section 15205(b)(4) of the California Code of Regulations contains a “typographical error” and that “‘EIR’ should read ‘EIS’.” Plaintiffs’ Br. at 2 fn.2. Plaintiffs offer no support, however, for this unfounded assertion, and it is far from clear whether “EIR” in Section 15205(b)(4) is in fact a typographical error.

1           **A. Defendants Are Not Subject to CEQA.**

2           Plaintiffs' motion for partial summary judgment alleges that the Park Service  
3 and The Nature Conservancy violated the California Environmental Quality Act,  
4 Cal. Pub. Res. Code §§ 21000-21177. In particular, Plaintiffs claim that CEQA  
5 required Defendants to submit the draft EIS for the Santa Cruz Island Primary  
6 Restoration Plan to the State Clearinghouse.<sup>2</sup> Plaintiffs are wrong and completely  
7 misapprehend the applicability of CEQA.

8           CEQA applies only to "discretionary projects proposed to be carried out or  
9 approved by public agencies." Cal. Pub. Res. Code § 21080(a). For purposes of  
10 CEQA, a public agency is "any state agency, board, or commission, any county,  
11 city and county, city, regional agency, public district, redevelopment agency, or  
12 other political subdivision." *Id.* at 21063. The California Code of Regulations  
13 further specify that a "public agency" under CEQA "does not include agencies of  
14 the federal government." 14 Cal. Code Regs. § 15379; *see also Gentry v. City of*  
15 *Murrieta*, 36 Cal.App.4th 1359, 1389 (Cal. Ct. App. 1995) ("Federal agencies . . .  
16 are not 'public agencies' within the meaning of either CEQA or the [CEQA]  
17 Guidelines."). Further, CEQA does not apply to The Nature Conservancy in the  
18 absence of any discretionary approval by a state or local agency. 14 Cal. Code  
19 Regs. § 15002(c), (i); *see id.* § 15379. Plaintiffs have not identified any  
20 discretionary approval by any state or local agency necessary for The Nature  
21 Conservancy's participation in the feral pig eradication program. Thus, neither the  
22 Park Service nor The Nature Conservancy is subject to CEQA in this litigation.

23           Accordingly, because neither the Park Service nor The Nature Conservancy  
24 is subject to CEQA, and no proper CEQA defendant has been named in this  
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26           <sup>2</sup> The State Clearinghouse is within the State's Office of Planning and  
27 Research, and performs a variety of functions under CEQA. *See* 14 Cal. Code  
28 Regs. § 15023.

1 lawsuit, there is no basis for Plaintiffs' CEQA challenge. It follows, therefore, that  
2 Defendants were not required to submit the draft EIS for the Santa Cruz Island  
3 Primary Restoration Plan to the State Clearinghouse pursuant to Section 15205 of  
4 the California Code of Regulations.

5 This conclusion is buttressed by the text of Section 15205, which specifies  
6 the submittal of "environmental documents" to the State Clearinghouse. 14 Cal.  
7 Code Regs. § 15205(b). The definition of "environmental documents" includes  
8 "documents prepared under NEPA *and used by a state or local agency in the place*  
9 *of an initial study, negative declaration, or an EIR*"<sup>3</sup> pursuant to CEQA. *Id.* §  
10 15361 (emphasis added). Here, the draft EIS for the Santa Cruz Island Primary  
11 Restoration Plan was not used by a state or local agency in the place of an initial  
12 study, negative declaration, or an environmental impact report (*i.e.*, an "EIR"), and  
13 thus, it is not an "environmental document" for purposes of Section 15205. Nor is  
14 the draft EIS an "environmental document" for purposes of Section 15023(c),  
15 which requires the State Clearinghouse to distribute "*environmental documents to*  
16 *State agencies, departments, boards, and commissions for review and comment.*"  
17 *Id.* § 15023(c) (emphasis added).

18 Thus, even if the Park Service or The Nature Conservancy were subject to  
19 CEQA, which they clearly are not, there would be no requirement to submit the  
20 Santa Cruz Island Primary Restoration Plan draft EIS to the State Clearinghouse  
21 because the EIS is not subject to Section 15205. Plaintiffs' citation to the state  
22 case<sup>4</sup> *Rural Landowners Ass'n v. City Council*, 143 Cal.App.3d 1013 (Cal. Ct.

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25 <sup>3</sup> Although similar to a NEPA "EIS" (or "environmental impact statement"),  
26 an "EIR" (or "environmental impact report") is an environmental review document  
prepared pursuant to CEQA.

27 <sup>4</sup> Plaintiffs are wrong, of course, when describing this case as issuing from  
28 the federal Ninth Circuit Court of Appeals. Plaintiffs' Br. at 7:7, 7:12.

1 App. 1983) is not to the contrary, as it bears absolutely no resemblance to the  
2 instant case.

3 In any event, Plaintiffs' assertion that "no California agencies had the  
4 opportunity to officially comment through the Clearinghouse" (Plaintiffs' Br. at  
5 7:16-17) makes little sense, given that the EIS was not required to be submitted to  
6 the Clearinghouse and that several California agencies received copies of the draft  
7 EIS for their review and comment. These agencies included the California  
8 Department of Fish and Game, the California Environmental Protection Agency,  
9 the Central Coast Regional Water Quality Control Board, the California Coastal  
10 Commission, and the State Historic Preservation Officer. AR 701, 1065-1066; *see*  
11 *also* AR 155-156 (letter from California Department of Fish and Game regarding  
12 meetings with The Nature Conservancy and the Park Service to discuss the  
13 project's planning process). As recipients of the draft EIS, these state agencies  
14 were plainly given the opportunity to review and comment on the Santa Cruz  
15 Island Primary Restoration Plan draft EIS.

16 **B. Plaintiffs Are Barred by Laches from Bringing Their CEQA**  
17 **Claim.**

18 As argued in The Nature Conservancy's motion for summary judgment  
19 papers, Plaintiffs are late in bringing their CEQA claim, and thus, are barred by  
20 laches. *See Lathan v. Volpe*, 455 F.2d 1111, 1122 (9th Cir. 1971); *see also Smith v.*  
21 *Schlesinger*, 371 F. Supp. 559, 561 (C.D. Cal. 1974). First, Plaintiffs unreasonably  
22 delayed until May 2005 to file their lawsuit against The Nature Conservancy and  
23 the Park Service, even though the pig eradication program was noticed by the Park  
24 Service as early as September 1999. AR 84-85. Second, Plaintiffs' delay will  
25 result in prejudice to the Park Service, The Nature Conservancy, and other third  
26 parties. There are significant costs associated with the mobilization of staff and  
27 equipment to the Island, and the need to make up for lost ground as pigs repopulate  
28 and move into previously cleared areas. <sup>4</sup>Declaration of Norman Macdonald in

1 Opposition to Plaintiffs' Ex Parte Application for a Temporary Restraining Order  
2 at 4:13-18, 4:24-25, 5:3-7, 5:7-23.

3 **C. Plaintiffs Failed to Exhaust Their CEQA Claim, and Are**  
4 **Therefore Barred from Raising It Now.**

5 Plaintiffs must exhaust their administrative remedies before raising them in  
6 court. *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002).  
7 Plaintiffs never raised any issue concerning either the Park Service or The Nature  
8 Conservancy's alleged need to comply with CEQA. AR 714, 708-733. Because  
9 the Park Service was not given notice of this claim "sufficient to allow it to resolve  
10 the claim, the claim was not properly exhausted and is not subject to judicial  
11 review." *Id.*; see also *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515,  
12 1528 fn.18 (10th Cir. 1992) (noting that a "reviewing court will not consider  
13 contentions which were not pressed upon the administrative agency").

14 **III.**  
15 **CONCLUSION**

16 Based on the foregoing, The Nature Conservancy respectfully requests this  
17 Court deny Plaintiffs' motion for partial summary judgment.

18 Dated: March 3, 2006

19 Respectfully Submitted,

20 ANDREW B. SABEY  
21 SCOTT B. BIRKEY  
22 MORRISON & FOERSTER LLP

23 BY:

24   
25 Scott B. Birkey

26 Attorneys for Defendant  
27 THE NATURE CONSERVANCY  
28

# **EXHIBIT A**

**FILED**

**FEB 15 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**RICHARD M. FELDMAN, an individual;  
et al.,**

**Plaintiffs - Appellants,**

**v.**

**FRAN MAINELLA, in her official  
capacity as the Director of the National  
Park Service; et al.,**

**Defendants - Appellees.**

**No. 05-56581**

**D.C. No. CV-05-04900-DT**

**MEMORANDUM\***

**Appeal from the United States District Court  
for the Central District of California  
Dickran M. Tevrizian, District Judge, Presiding**

**Submitted February 13, 2006\*\***

**Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.**

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument and therefore denies appellants' request for oral argument. *See* Fed. R. App. P. 34(a)(2).

This preliminary injunction appeal comes to us for review under Ninth Circuit Rule 3-3. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

We subject a district court's order regarding preliminary injunctive relief to only limited review. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999). Our review of an order regarding a preliminary injunction "is much more limited than review of an order involving a permanent injunction, where all conclusions of law are freely reviewable." *Id.* A decision regarding a preliminary injunction is reviewed for abuse of discretion, which occurs only if the district court based its decision on either an erroneous legal standard or clearly erroneous factual findings. *Id.*

The district court did not abuse its discretion here. *See Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984). We therefore affirm the district court's order denying plaintiffs' motion for a preliminary injunction. Our disposition will affect the rights of the parties only until the district court renders final judgment. *Sports Form, Inc. v. United Press International*, 686 F.2d 750, 752 (9th Cir. 1982).

**AFFIRMED.**

1 **CERTIFICATE OF SERVICE BY MAIL**  
2 (Fed. R. Civ. Proc. rule 5(b))

3 I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address  
4 is 101 Ygnacio Valley Road, Suite 450, P.O. Box 8130, Walnut Creek, California 94596-8130; I  
5 am not a party to the within cause; I am over the age of eighteen years and I am readily familiar  
6 with Morrison & Foerster's practice for collection and processing of correspondence for mailing  
7 with the United States Postal Service and know that in the ordinary course of Morrison &  
8 Foerster's business practice the document described below will be deposited with the United  
9 States Postal Service on the same date that it is placed at Morrison & Foerster with postage  
10 thereon fully prepaid for collection and mailing.

11 I further declare that on the date hereof I served a copy of:

12 **DEFENDANT THE NATURE CONSERVANCY'S**  
13 **OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL**  
14 **SUMMARY JUDGMENT**

15 on the following by placing a true copy thereof enclosed in a sealed envelope addressed as  
16 follows for collection and mailing at Morrison & Foerster LLP, 101 Ygnacio Valley Road,  
17 Suite 450, P.O. Box 8130, Walnut Creek, California 94596-8130 , in accordance with  
18 Morrison & Foerster's ordinary business practices:

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21 100 Pine Street, 20th Floor  
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23 Jonathan Klinck, Esq.  
24 United States Attorney's Office  
25 300 N. Los Angeles Street  
26 Suite 7516  
27 Los Angeles, CA 90012

28 Barbara Goodyear, Esq.  
Office of the Solicitor  
United States Department of the Interior  
1111 Jackson Street, Suite 735  
Oakland, CA 94607

I declare under penalty of perjury that the above is true and correct.

Executed at Walnut Creek, California, this 3rd day of March, 2006.

\_\_\_\_\_  
Margaret D. Rogers

(typed)

\_\_\_\_\_  
(signature)

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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
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15 RICHARD M. FELDMAN, an individual;  
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25 KATE FAULKNER, in her official  
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27 Management at Channel Islands National  
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30 of the U.S. Department of the Interior;  
31 THE NATURE CONSERVANCY, an  
32 international non-profit corporation; and  
33 DOES 1-5, inclusive,  
34 Defendants.

Case No. CV 05-04900 DT (CWx)

**DEFENDANT THE NATURE  
CONSERVANCY'S STATEMENT  
OF GENUINE ISSUES OF  
MATERIAL FACT**

Hearing Date: March 27, 2006

Hearing Time: 10:00 a.m.

Judge: Hon. Dickran Tevrizian

1 The Nature Conservancy offers the following Statement of Genuine Issues of  
 2 Material Fact in response to Plaintiffs Richard M. Feldman, Robert Lee  
 3 Puddicombe, and In Defense of Animals' (collectively, "Plaintiffs") Proposed  
 4 Statement of Uncontroverted Facts and Conclusions of Law.

<u>Plaintiffs' Alleged Uncontroverted Facts</u>	<u>The Nature Conservancy's Controverting Evidence</u>
1. Santa Cruz Island is one of five islands that comprise the Channel Islands National Park.	1. Undisputed.
2. Santa Cruz Island is jointly-owned by Defendants: The Nature Conservancy ("TNC") owns approximately 76% of the Island and the National Park Service ("NPS") owns the remainder.	2. Undisputed.
3. The island is home to a unique ecosystem, including nine species listed as endangered or threatened under the Endangered Species Act.	3. Undisputed as to the uniqueness of the Island's ecosystem. Disputed, however, insofar as the Island includes at least nine plant species, the Santa Cruz Island fox, and the bald eagle, each of which is listed as either endangered or threatened under the Endangered Species Act.

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26 <sup>1</sup> The Administrative Record (*i.e.*, the set of documents considered by the  
 27 Park Service in reaching its decision on the Santa Cruz Island Primary Restoration  
 28 Plan) accompanied the Declaration of Kate Faulkner, Chief of Natural Resources

<u>Plaintiffs' Alleged Uncontroverted Facts</u>	<u>The Nature Conservancy's Controverting Evidence</u>
	Administrative Record ("AR") <sup>1</sup> 596-597, 607-611; 69 Fed. Reg. 10335 (Mar. 5, 2004).
4. The island also contains an estimated 3,000 sites associated with Chumash Native American culture and is listed in the National Register of Historic Places for its archaeological significance.	4. Undisputed as to the number of sites. Disputed, however, insofar as ninety percent of the Island is listed in the National Register of Historic Places. AR 617.
5. The Santa Cruz Island Primary Restoration Plan alleges that the pigs are a major threat to these sites.	5. Undisputed.
6. Pigs have lived on the island since 1852.	6. Undisputed.
7. Annual estimates of the island's pig population have ranged from 1,000 to 5,000.	7. Undisputed.
8. In 1999, the National Park Service published a notice in the Federal Register to prepare an Environmental Impact Statement for the killing of all	8. Disputed. The Federal Register notice was for the preparation of the Santa Cruz Island Primary Restoration Plan Environmental

(Footnote continued from previous page)

Management at the Channel Islands National Park, which was lodged with the Court on November 18, 2005.

<p>1 <b><u>Plaintiffs' Alleged Uncontroverted</u></b></p> <p>2 <b><u>Facts</u></b></p> <p>3</p>	<p><b><u>The Nature Conservancy's</u></b></p> <p><b><u>Controverting Evidence</u></b></p>
<p>4 pigs on Santa Cruz Island.</p>	<p>Impact Statement. AR 84-85.</p>
<p>5 9. In 2001, the Draft EIS for the</p> <p>6 program was circulated for comment.</p>	<p>9. Undisputed.</p>
<p>7 10. In 2002, the Final EIS for the Santa</p> <p>8 Cruz Island Primary Restoration Plan</p> <p>9 was approved.</p> <p>10</p> <p>11</p> <p>12</p>	<p>10. Disputed. Although the Final EIS</p> <p>for the Santa Cruz Island Primary</p> <p>Restoration Plan was issued in 2002,</p> <p>the Park Service issued its Record of</p> <p>Decision regarding the Final EIS in</p> <p>2003. AR 984-1000.</p>
<p>13 11. The program includes island-wide</p> <p>14 slaughter of every pig, spraying of</p> <p>15 herbicide over the island via</p> <p>16 helicopter, and prescribed burns</p> <p>17 throughout the island.</p> <p>18</p> <p>19</p> <p>20</p>	<p>11. Disputed. The program did not</p> <p>include the spraying of herbicide or</p> <p>prescribed burns throughout the</p> <p>Island, but only included targeted</p> <p>application of herbicides and</p> <p>prescribed burns on portions of the</p> <p>Island that supported dense stands of</p> <p>fennel. AR 572-573.</p>
<p>21 12. In April 2005, TNC and NPS began</p> <p>22 the pig killing campaign on Santa</p> <p>23 Cruz Island.</p>	<p>12. Undisputed.</p>
<p>24 13. The 249-page Final EIS for the Santa</p> <p>25 Cruz Island Primary Restoration Plan</p> <p>26 does not discuss the California</p> <p>27 Environmental Quality Act.</p>	<p>13. Undisputed.</p>
<p>28 14. No comments from California</p>	<p>14. Undisputed.</p>

<u>Plaintiffs' Alleged Uncontroverted Facts</u>	<u>The Nature Conservancy's Controverting Evidence</u>
agencies are found in the "Responses to Comments" section (Chapter 6) of the Final EIS.	
15. The Santa Cruz Island Primary Restoration Plan Draft EIS was not filed with the Governor's Office of Planning Research Clearinghouse – Defendants believe that CEQA does not apply to their actions.	15. Undisputed.

The Nature Conservancy offers the following Uncontroverted Facts in support of its opposition to Plaintiffs' Motion for Partial Summary Judgment.

<u>UNCONTROVERTED FACT</u>	<u>EVIDENTIARY SUPPORT</u>
1. The National Park Service is a federal agency.	1. AR 560-562.
2. The Nature Conservancy is a private, non-profit organization.	2. AR 561.
3. The following state agencies received a copy of the Draft EIS: California Department of Fish & Game; California Environmental Protection Agency; Central Coast Regional Water Quality Control Board;	3. AR 701, 1065-1066.

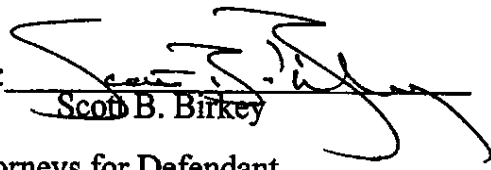
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<b><u>UNCONTROVERTED FACT</u></b>	<b><u>EVIDENTIARY SUPPORT</u></b>
California Coastal Commission; and State Historic Preservation Officer.	

Dated: March 3, 2006

Respectfully Submitted,

ANDREW B. SABEY  
SCOTT B. BIRKEY  
MORRISON & FOERSTER LLP

BY:   
Scott B. Birkey

Attorneys for Defendant  
THE NATURE CONSERVANCY

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**CERTIFICATE OF SERVICE BY MAIL**  
(Fed. R. Civ. Proc. rule 5(b))

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 101 Ygnacio Valley Road, Suite 450, P.O. Box 8130, Walnut Creek, California 94596-8130; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Morrison & Foerster with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

**DEFENDANT THE NATURE CONSERVANCY'S  
STATEMENT OF GENUINE ISSUES OF MATERIAL FACT**

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Morrison & Foerster LLP, 101 Ygnacio Valley Road, Suite 450, P.O. Box 8130, Walnut Creek, California 94596-8130, in accordance with Morrison & Foerster's ordinary business practices:

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United States Department of the Interior  
1111 Jackson Street, Suite 735  
Oakland, CA 94607

I declare under penalty of perjury that the above is true and correct.

Executed at Walnut Creek, California, this 3rd day of March, 2006.

\_\_\_\_\_  
Margaret D. Rogers  
(typed)

\_\_\_\_\_  
(signature)