

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

**MEETING OF JANUARY 14 AND 15, 2009
Truckee**

ITEM: 5

SUBJECT: CONSIDERATION OF A SETTLEMENT OF CLAIMS THROUGH THE ADOPTION OF AN ADMINISTRATIVE CIVIL LIABILITY ORDER FOR EVERD A. MCCAIN, B.J. DEIS, AND MCCAIN AND ASSOCIATES FOR VIOLATION OF (1) WASTE DISCHARGE PROHIBITIONS SPECIFIED BY THE *WATER QUALITY CONTROL PLAN FOR THE LAHONTAN REGION*, (2) CLEAN WATER ACT SECTION 301, (3) CALIFORNIA WATER CODE SECTION 13267, (4) CALIFORNIA WATER CODE SECTION 13304, AND (5) CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION - BELFAST RANCH – SKEET DAM AND BUZ DAM, LASSEN COUNTY, WDID NOS. 6A180508N05 AND 6A180105013

CHRONOLOGY: November 16, 2007 Administrative Civil Liability Complaint No. R6T-2007-0007 issued.

March 13, 2008 Water Board conducted a hearing regarding Administrative Civil Liability Complaint No. R6T-2007-0007. The Water Board directed the Dischargers and the Water Board's Prosecution and Advisory Teams to meet in an attempt to develop an acceptable settlement.

November 13, 2008 Water Board's Prosecution Team and the Dischargers reached an agreement to settle the Complaint.

ISSUES: Should the Water Board adopt the proposed ACL Order effectuating a settlement between the Water Board and Everd A. McCain, B.J. Deis, and McCain and Associates?

Does the proposed liability of \$65,000 sufficiently address the alleged violations?

05-0001

DISCUSSION:

B.J. Deis, a California corporation is the legal owner of Lassen County Assessor Parcel Numbers (APN) 101-080-18-11, 109-060-16-11, 101-080-13-11, 109-060-13-11, and 109-060-20-11 (Property). Skeet Dam and Buz Dam are located on the Property, which is also referred to as Belfast Ranch. McCain and Associates operates as an agent for B.J. Deis in the engineering, permitting and licensing process for various projects that take place on the Property including the construction of Skeet Dam and the repair of Buz Dam. Additionally, Mr. McCain is a California registered professional civil engineer and a corporate officer of McCain and Associates, a California corporation. Acting as a licensed civil engineer on behalf of McCain and Associates, Mr. McCain designed and provided direct oversight of the dam construction for both Buz and Skeet Dams located on Belfast Ranch. Mr. McCain had substantial control over the permitting, design, construction, and regulatory compliance associated with the construction of Buz Dam and Skeet Dam. Collectively B.J. Deis, McCain and Associates and Mr. McCain are known herein as the Dischargers.

On November 16, 2007, the Water Boards' Assistant Executive Officer issued Administrative Civil Liability Complaint No. R6T-2007-0007 (Complaint). The Complaint was issued in response to violations associated with (1) the unauthorized construction of Skeet Dam, (2) the discharge of wastes to Willow Creek that resulted from the failure of Skeet Dam and Buz Dam, and for violations of (1) Water Code section 13267 (Orders for Technical Reports) and (2) Water Code section 13304 (Cleanup and Abatement Order). Following the March 13, 2008 public hearing regarding the Complaint, the Water Board directed its staff and the Dischargers to meet and attempt to settle the Complaint.

The Water Board's Prosecution Team and Mr. McCain have agreed upon a proposed settlement of the Complaint. The proposed settlement includes an administrative civil liability of \$65,000. The terms of the Settlement Agreement require the Dischargers to (1) pay a liability in the amount of \$65,000 over a three-year period, and (2) inspect, maintain, and annually report on the stabilization and runoff control/treatment measures, and the fish passage measures, as described in the July 12, 2008 Modified Stabilization Plan¹. The Settlement Agreement also establishes a process for permitting either (a) the rebuilding of one or both of the dams, or (b) the removal of all or part of one or both of the dams and the associated restoration of the creek.

¹ The measures outlined in the Modified Stabilization Plan have been implemented by the Dischargers and accepted by the Prosecution Team.

A 30-day comment period was provided for the proposed settlement agreement, which ended December 29, 2008, at 5:00 p.m.

RECOMMENDATION:

Adoption of the Administrative Civil Liability Order as proposed.

ENCLOSURES:

1. Proposed Administrative Civil Liability Order with the following attachment:
 - A. Settlement Agreement
2. Administrative Civil Liability Complaint No. R6T-2007-0007

ENCLOSURE 1

05-0004

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6T-2009-(PROPOSED)

**ADMINISTRATIVE CIVIL LIABILITY ORDER
FOR EVERD A. MCCAIN, B.J. DEIS, AND MCCAIN AND ASSOCIATES
FOR VIOLATIONS OF (1) WASTE DISCHARGE PROHIBITIONS SPECIFIED BY THE
WATER QUALITY CONTROL PLAN FOR THE LAHONTAN REGION,
(2) CALIFORNIA WATER CODE SECTION 13267, (3) CLEAN WATER ACT
SECTION 301, (4) CALIFORNIA WATER CODE SECTION 13304 AND (5) CLEAN
WATER ACT SECTION 401 WATER QUALITY CERTIFICATION -
BELFAST RANCH – SKEET DAM AND BUZ DAM, LASSEN COUNTY,
WDID NOS. 6A180508N05 AND 6A180105013**

INTRODUCTION

1. By this Order, the Regional Water Quality Control Board, Lahontan Region (Water Board) imposes administrative civil liability on Everd A. McCain, B.J. Deis, and McCain and Associates (hereafter referred to as the "Dischargers") pursuant to a settlement agreement. The issuance of an order pursuant to settlement agreement is authorized by Government Code section 11415.60.

BACKGROUND

2. Pursuant to Water Code section 13323, the Assistant Executive Officer of the Water Board issued Administrative Civil Liability Complaint No. R6T-2007-0007 (Complaint) to the Dischargers on November 16, 2007. The Complaint alleged that the Dischargers violated (1) waste discharge prohibitions specified by the *Water Quality Control Plan for the Lahontan Region*, (2) California Water Code section 13267, (3) Clean Water Act section 301, (4) California Water Code section 13304, and (5) a Clean Water Act Section 401 Water Quality Certification. The alleged violations were a result of the construction and failure of Buz Dam and Skeet Dam. The Complaint proposed that the Dischargers be assessed \$100,000 in administrative civil liability pursuant to Water Code sections 13268, 13350, and 13385. The specific alleged violations are listed in Attachment D of the Complaint.
3. On March 13, 2008, the Water Board held a public hearing where testimony and evidence was provided by the Dischargers and Water Board Prosecution Staff. The Water Board closed the public hearing, and without deliberating upon the testimony and evidence, directed the Dischargers and Water Board Prosecution Staff (hereinafter referred to as "the Parties") to meet and confer with the Water Board's Executive Officer and Water Board's Counsel (hereinafter referred to as "the Advisory Staff") in an effort to settle the Complaint.

05-0005

4. On April 7, 2008 and again on May 1, 2008, the Parties and Advisory Staff met to discuss possible settlement, as directed to by the Water Board.
5. On July 10, 2008, the Parties met to discuss specific work needed to stabilize sites associated with Buz and Skeet Dams.
6. On October 1, 2008, Water Board staff inspected Belfast Ranch and found that Dischargers had stabilized the remaining dam structures and areas affected by dam construction such that they are no longer sources of sediment to the creek. The dam stabilization measures also provide fish passage through the remaining dam structures.
7. On November 13, 2008, the Parties signed a Settlement Agreement (Attachment A), which includes this Order in draft form. The terms of the Settlement Agreement include:
 - a. Paying a liability in the amount of \$65,000 over a three-year period.
 - b. Inspecting and maintaining the stabilization and runoff control/treatment measures, and the fish passage measures, as described in the July 12, 2008 Modified Stabilization Plan, and annually reporting on maintenance of these measures in accordance with the schedule set forth in the Settlement Agreement.
 - c. Complying with all applicable legal requirements, including but not limited to compliance with any water quality certification conditions that may be imposed by the Lahontan Water Board for all work on the dams, including but not limited to stabilization, maintenance, rebuilding, and/or partial or complete removal.
 - d. Submitting a permit application that is accompanied by design plans signed and stamped by a California registered professional engineer found to be acceptable to the Water Board in accordance with the procedures set forth in the Settlement Agreement in the event that the Dischargers propose to reconstruct one or both of the dams, and/or remove one or both of the dams and restore the creek.
 - e. Submitting a proposal addressing the final fate of the remaining dam structures if the Dischargers are unable to rebuild one or both of the dams due to decisions rendered by the State Water Board or another entity. If the Dischargers propose to leave any portion of the remaining dam structures in place, the proposal will include an impacts analysis of leaving the identified portions of the dam structures in place as proposed. The impacts analysis will at a minimum address actual and potential water quality impacts to the creek. The proposal will be submitted within 180 days of either: (a) written notice from the Executive Officer that no judicial challenge has been made within the time provided by statute for such challenge, or that such challenges were filed but all claims contained therein have been resolved denying Dischargers water rights or other permits and approvals necessary to rebuild the dams and operate the reservoirs, or (b) five years from the date of this Order, whichever occurs first.

8. Notice of the Settlement Agreement was provided to the public and the public received no less than 30 days to comment. The Water Board has considered all the comments that have been received.

FINDINGS

9. The proposed Settlement Agreement is in the public interest.
10. The adoption of this Order accepting the Settlement Agreement is exempt from the provisions of the California Environmental Quality Act, in accordance with California Code of Regulations, title 14, section 15321, subdivision (a)(2) (Enforcement Actions by Regulatory Agencies).
11. Any aggrieved person may petition the State Board to review the action in accordance with Water Code section 13320 and the State Board's regulations. The petition must be received by the State Board within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions are available at http://www.waterboards.ca.gov/public_notices/petitions/water_quality, and will also be provided upon request.
12. State Board and Water Board staff have spent time responding to the incident and preparing this enforcement action. Estimated staff costs for investigating the project and preparing the Complaint are estimated at \$48,433.

IT IS HEREBY ORDERED THAT:

1. The Water Board imposes administrative civil liability against the Dischargers in the amount of \$65,000.
2. The Dischargers must provide payment to the California State Water Resources Control Board, Cleanup and Abatement Account (CAA) and Waste Discharge Permit Fund (WDPF) as set forth in the Settlement Agreement and as specified below by the following schedule.

Payment Due Date	Total Payment	Breakdown of Amount/ Fund
February 16, 2009	\$25,000	CAA - \$23,000 WDPF - \$2,000
February 16, 2010	\$20,000	CAA - \$18,400 WDPF - \$1,600
February 16, 2011	\$20,000	CAA - \$18,400 WDPF - \$1,600

Payment checks are to be made out to the State Water Resources Control Board and marked "Cleanup and Abatement Account" or "Waste Discharge Permit Fund," as appropriate, and delivered to the Water Board by the deadline at 2501 Lake Tahoe Boulevard, South Lake Tahoe, California 96150.

05-0007

3. If the Dischargers fail to make any of the specified payments to the State Board's Cleanup and Abatement Account and Waste Discharge Permit Fund by the deadline specified in this Order, any and all remaining unpaid liability shall become due and payable 30 days upon receipt of written notice (payment notice) by the Water Board's Executive Officer (Executive Officer). A payment notice will be issued only after following the procedures described in Requirement No. 10, below. The Water Board may enforce this Order to collect any and all unpaid sums by applying for a judgment pursuant to Water Code section 13328. The Executive Officer is hereby authorized to pursue a judgment pursuant to Water Code section 13328 if the criteria specified in this paragraph are satisfied.
4. The Dischargers must inspect and maintain the stabilization and runoff control/treatment measures, and the fish passage measures described by the July 12, 2008 Modified Temporary Stabilization Plan. Inspection and maintenance must be done in accordance with the inspection/maintenance schedule specified by the July 12, 2008 Modified Temporary Stabilization Plan.
5. The Dischargers must submit an annual Inspection/Maintenance Report by October 15 of each year, with the first report due by October 15, 2009 and the final report due by October 15, 2011. The annual reports must include the elements described in the Settlement Agreement.
6. The Dischargers must comply with all applicable legal requirements, including but not limited to compliance with any water quality certification conditions that may be imposed by the Water Board for all work on the dams, including but not limited to stabilization, maintenance, rebuilding, and/or partial or complete removal.
7. For all future applications submitted to the Water Board for dam reconstruction or dam removal/habitat restoration for Skeet Dam and/or Buz Dam, the Dischargers must submit a permit application that is accompanied by design plans signed and stamped by a California registered professional civil engineer found to be acceptable to the Water Board in accordance with the procedures set forth in the Settlement Agreement.
8. If the Dischargers are unable to rebuild one or both of the dams due to decisions rendered by the State Water Board or another entity, the Dischargers will submit a proposal addressing the final fate of the remaining dam. If the Dischargers propose to leave any portion of the remaining dam structures in place, the proposal will include an impacts analysis of leaving the identified portions of the dam structures in place as proposed. The impacts analysis will at a minimum address actual and potential water quality impacts to the creek. The proposal will be submitted within 180 days of either: (a) written notice from the Executive Officer that no judicial challenge has been made within the time provided by statute for such challenge, or that such challenges were filed but all claims contained therein have been resolved denying Dischargers water rights or other permits and approvals necessary to

05-0008

rebuild the dams and operate the reservoirs, or (b) five years from the date of this Order, whichever occurs first.

9. If the Dischargers fail to satisfy the obligations as described by Requirements No. 4, 5, 6 and/or 7, above, any and all remaining unpaid liability shall become due and payable 30 days upon receipt of written notice (payment notice) by the Executive Officer. A payment notice will be issued only after following the procedures described in Requirement No. 10, below.
10. The Executive Officer and the Dischargers must follow the procedures cited below prior to the Executive Officer issuing a payment notice in response to the Dischargers' failure to satisfy any obligations as described in Requirements No. 2, and/or 4 - 7, above.
 - i. The Executive Officer issues to the Dischargers a letter identifying the alleged violations that would be the basis for issuing a payment notice. The letter will offer the Dischargers an opportunity to meet with the Executive Officer and Assistant Executive Officer within 30 days of receiving the letter identifying the alleged violations. The meeting will allow the Dischargers an opportunity to address the alleged violations and explain why issuing a payment notice is not justified because of events beyond the Dischargers' control.
 - ii. The Dischargers must submit to the Executive Officer and Assistant Executive Officer a written description/explanation of the events the Dischargers believe prevented them from satisfying the relevant obligation(s) described by Requirements No. 2, and/or 4 - 7, above. The written explanation will include, but not be limited to, how the events caused the delay and were beyond the Dischargers' control, the duration of the delay, a description of all actions the Dischargers have taken and will take to minimize the delay, and a schedule of such actions. The written explanation must be received at the Water Board's South Lake Tahoe office a minimum of five days prior to the Dischargers meeting with the Executive Officer and Assistant Executive Officer.
 - iii. Within two weeks of the above-referenced meeting, the Executive Officer will issue either (1) a letter explaining why there will be no payment notice in response to the alleged violations, or (2) a payment notice that provides the basis for such a notice.
11. If the Dischargers do not comply with the payment notice upon its receipt (i.e., payment made within 30 days of receipt), the Executive Officer is hereby authorized to pursue a judgment pursuant to Water Code section 13328.
12. This Order resolves all claims and liability for the alleged violations identified in ACL Complaint No. R6T-2007-0007.

05-0009

I, Harold J. Singer, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region, on January 15, 2009.

HAROLD J. SINGER
EXECUTIVE OFFICER

Attachment: A. Settlement Agreement

05-0010

ATTACHMENT A

05-0011

SETTLEMENT AGREEMENT
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION
AND
EVERD MCCAIN, B.J. DEIS AND
MCCAIN AND ASSOCIATES

ACL COMPLAINT NO. R6T-2007-0007

WHEREAS,

1. The Prosecution Staff of the California Regional Water Quality Control Board – Lahontan Region (Prosecution Staff) issued an Administrative Civil Liability Complaint to Everd McCain, B. J. Deis, and McCain and Associates (collectively referred to herein as "McCain") on November 16, 2007. The Prosecution Staff and McCain are the "Parties" to this Agreement. The Complaint alleges numerous violations of the Water Code and seeks imposition of a \$100,000 assessment for the alleged violations.
2. The violations relate to McCain's construction and maintenance of two dams on Willow Creek, referred to as Buz Dam and Skeet Dam and failure of the dams with resulting significant sediment discharges into the creek.
3. McCain disputes the allegations of the Complaint.
4. Buz Dam was last repaired and/or rebuilt in 2002 and was damaged by storms during December 2005/January 2006. McCain has stabilized the remaining dam structure such that it is no longer a source of

05-0012

McCain Settlement Agreement

sediment to the creek, and it now provides for fish passage through the remaining structure.

5. Skeet Dam was constructed in 2005 and was also damaged by storms in December 2005/January 2006. McCain has stabilized the remaining dam structure and areas affected by dam construction such that they are no longer sources of sediment to the creek. The dam stabilization measures also provide fish passage through the remaining dam structure.
6. McCain has applied to the State Water Resources Control Board (State Water Board) for water rights authorization for the reservoirs created by Buz and Skeet Dams. Water rights issues are exclusively within the jurisdiction of the State Water Board. The Lahontan Water Board has no authority over the water rights issues. The State Water Board has recently issued a Notice indicating its intent to revoke water right authorizations for the reservoirs. McCain has requested a hearing on the Notice. Accordingly, the outcome of the water rights issues is unknown and uncertain. In the event that the issues are resolved in McCain's favor, McCain intends to rebuild Buz and Skeet Dams.
7. If McCain proposes dam reconstruction, the Lahontan Water Board retains jurisdiction over Clean Water Act Section 401 Certification and other Lahontan Water Board permitting issues related to the dam reconstruction. At such time as a proposal to repair or rebuild, if any,

McCain Settlement Agreement

is submitted by McCain to the Lahontan Water Board, along with detailed construction design, the Lahontan Water Board will evaluate the proposal and may issue a Section 401 Water Quality Certification and/or any related orders necessary to rebuild one or both dams.

This Settlement Agreement does not in any way guarantee that the Lahontan Water Board will issue a Section 401 Water Quality Certification and/or other related orders necessary to rebuild one or both dams. The Lahontan Water Board retains its legal discretion to either issue or deny any Section 401 Water Quality Certification and/or other related orders.

8. A hearing was held regarding the Complaint before the Lahontan Water Board on March 13, 2008. At the conclusion of the hearing, the Lahontan Water Board closed the hearing record and directed the Parties (Prosecution Staff and McCain), joined by the Executive Officer and Board Counsel to explore the possibility of resolving the issues by means of a negotiated settlement.
9. In accordance with the Lahontan Water Board's directive, the Parties along with the Executive Officer and Board Counsel met in Truckee, CA on April 7, 2008 to discuss possible settlement of the Complaint.
10. The Parties met again in Susanville, CA on May 1, 2008 to discuss possible settlement.
11. The Parties met again on July 10, 2008 in Susanville, CA to discuss work needed to stabilize the site.

McCain Settlement Agreement

12. The Prosecution Staff and McCain met on October 1, 2008 at Belfast Ranch to (1) inspect the stabilization and runoff control/treatment measures for the remaining dam structures and other areas affected by dam construction, and (2) observe the fish passage measures implemented under the guidance of Department of Fish and Game staff. The Prosecution Staff observed that the stabilization and runoff control/treatment measures identified in McCain's July 12, 2008 Modified Temporary Stabilization Plan had been satisfactorily implemented. McCain remains responsible for maintaining the effectiveness of stabilization and runoff control/treatment measures, and will submit to the Lahontan Water Board annual reports regarding maintenance activities.
13. The Parties have expressed their desire to resolve the matter through settlement in order to avoid uncertainty of result and to avoid the cost of further litigation.

WHEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Everd McCain certifies that he is authorized to act on behalf of B. J. Deis and McCain and Associates and to enter into this Agreement on their behalf.
2. The Prosecution Staff agrees to request that the Lahontan Water Board adopt an Order reducing the assessment to \$65,000, from \$100,000. McCain agrees to make an initial payment of \$23,000 to the

McCain Settlement Agreement

State Water Resources Control Board Cleanup and Abatement Account (CAA) and \$2,000 to the State Water Resources Control Board Waste Discharge Permit Fund (WDPF) within thirty (30) days of adoption of an Order by the Lahontan Water Board effectuating this Settlement Agreement. Thereafter, the balance shall be paid in two installments. The first installment of \$20,000 shall be paid by February 16, 2010 with payment of \$18,400 to the CAA and \$1,600 to the WDPF. The final installment of \$20,000 shall be paid by February 16, 2011 with payment of \$18,400 to the CAA and \$1,600 to the WDPF.

3. McCain agrees to:

- a. Inspect and maintain the stabilization and runoff control/treatment measures, and the fish passage measures, as described in the July 12, 2008 Modified Temporary Stabilization Plan.
- b. McCain will submit an annual Inspection/Maintenance Report by October 15 of each year, with the first report due by October 15, 2009 and the final report due by October 15, 2011. The annual reports will at a minimum include the following elements:
 - i. Individual reports for each inspection that is conducted during the preceding 12 months (October – September). The individual inspection reports will identify (1) any conditions requiring maintenance; (2) the maintenance activities that

McCain Settlement Agreement

- will address maintenance needs; and (3) when such maintenance activities will be completed.
- ii. A maintenance log for the preceding 12 months that identifies when maintenance activities identified in the individual inspection reports were completed.
 - c. All work on the dams, including but not limited to stabilization, maintenance, rebuilding, and/or partial or complete removal, shall be done in compliance with all applicable legal requirements, including but not limited to compliance with any water quality certification conditions that may be imposed by the Lahontan Water Board. The maintenance and stabilization measures referred to in Requirement No. 3a will not require any further permits or 401 Certification from the Lahontan Water Board unless another agency's regulatory process necessitates it.
 - d. For all future applications submitted to the Lahontan Water Board for dam reconstruction or dam removal/habitat restoration for Skeet Dam and/or Buz Dam, McCain must submit a permit application that is accompanied by design plans signed and stamped by a California registered professional engineer found to be acceptable to the Lahontan Water Board in accordance with the following procedures:

McCain Settlement Agreement

- i. Prior to submitting any permit application and/or design plans, McCain will submit at least one candidate with supporting documentation (e.g., resume, minimum of three references, copy of current registration) that satisfies the following minimum qualification criteria:
- California registered professional engineer.
 - For rebuilding one or both dams-Has a minimum of 10 years of experience designing and inspecting/overseeing construction of embankment dams in California.
 - For rebuilding one or both dams-Has completed design and construction inspection/oversight of a minimum of two embankment dam projects in California during the past five years.
 - For removing all or a portion of one or both dams-Has a minimum of 10 years of experience designing and inspecting/overseeing construction of stream restoration projects within California.
 - For removing all or a portion of one or both dams-Has completed design and construction inspection/oversight of a minimum of two stream restoration projects in California during the past five years.

McCain Settlement Agreement

- ii. The Executive Officer will evaluate the candidates to verify that they satisfy the minimum qualifications criteria, above. The Executive Officer will provide McCain a written notice with the results of the verification process within 45 days of receiving McCain's candidate list.
- iii. McCain will then be able to select an engineer identified in the Executive Officer's written notice as having satisfied the minimum qualification criteria. McCain will submit a written notice to the Lahontan Water Board's South Lake Tahoe office identifying the engineer McCain has selected to comply with Requirement No. 3d, above, within 60 days of receiving the Executive Officer's written notice.
- e. If McCain is unable to rebuild one or both of the dams due to decisions rendered by the State Water Board or another entity, McCain will submit a proposal addressing the final fate of the remaining dam structures. If McCain proposes to leave any portion of the remaining dam structures in place, the proposal will include an impacts analysis of leaving the identified portions of the dam structures in place as proposed. The impacts analysis will at a minimum address actual and potential water quality impacts to the creek. The proposal will be submitted within 180 days of either: (a) written notice from the Executive Officer that no judicial challenge has been made within the time

McCain Settlement Agreement

provided by statute for such challenge, or that such challenges were filed but all claims contained therein have been resolved denying McCain water rights or other permits and approvals necessary to rebuild the dams and operate the reservoirs, or (b) five years from the date that this Settlement Agreement is accepted by the Lahontan Water Board, whichever occurs first.

4. McCain's failure to satisfy the obligations as described by Requirements No. 2 and 3a – 3d, will result in any remaining unpaid liability becoming due and payable within 30 days upon receipt of written notice (payment notice) by the Lahontan Water Board Executive Officer. A payment notice will not be issued until the following procedures have been completed:
 - a. The Executive Officer issues McCain a letter identifying the alleged violations that would be the basis for issuing a payment notice. The letter will offer McCain an opportunity to meet with the Executive Officer and Assistant Executive Officer within 30 days of receiving the letter identifying the alleged violations. The meeting will allow McCain an opportunity to address the alleged violations and explain why issuing a payment notice is not justified because of events beyond McCain's control.
 - b. McCain must submit to the Executive Officer and Assistant Executive Officer a written description/explanation of the events McCain believes prevented McCain from satisfying the relevant

McCain Settlement Agreement

obligation(s) described by Requirements No. 2 or 3a – 3d, above. The written explanation will include, but not be limited to, how the events caused the alleged violation(s) and were beyond McCain's control, the duration of the relevant events and associated alleged violation(s), a description of all actions McCain has taken and will take to minimize the duration of the relevant events and associated alleged violation(s), and a schedule of such actions. The written explanation must be received at the Lahontan Water Board's South Lake Tahoe office a minimum of five (5) days prior to McCain's meeting with the Executive Officer and Assistant Executive Officer.

- c. Within two weeks of the above-referenced meeting, the Executive Officer will issue either (1) a letter explaining why there will be no payment notice in response to the alleged violations, or (2) a payment notice that provides the basis for such a notice.

If McCain does not comply with the payment notice upon its receipt, the Executive Officer will apply for a judgment to the appropriate court pursuant to Water Code section 13328. Additionally, the failure to comply with permit and other legal requirements or to obtain permits may also subject McCain to separate enforcement actions.

5. The Parties agree that they will not contest the proposed Administrative Civil Liability Order before the Lahontan Water Board, the State Water

McCain Settlement Agreement

Board, or any court. The Proposed Administrative Civil Liability Order is included hereto as Attachment A.

6. In the event that this Agreement does not take effect because it is not accepted by the Lahontan Water Board or its delegate, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect the Lahontan Water Board will render a decision regarding adoption of, rejection of, or modification of, the proposed Administrative Civil Order presented to the Lahontan Water Board at the March 13, 2008 hearing, or referral of the matter to the California Attorney General. The Parties acknowledge that the Lahontan Water Board's decision will be based upon the evidence and testimony contained in the hearing record. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence into the hearing record. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to:
 - 1) objections related to prejudice or bias of any of the Lahontan Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Lahontan Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of information provided through status reports at Lahontan Water Board meetings and/or reviewing this Agreement, and therefore may have formed

impressions or conclusions, prior to making a decision on the

Complaint in this matter.

B. J. DEIS, MCCAIN AND ASSOCIATES
AND EVERD MCCAIN

By Everd A. McCain
Everd McCain

Date: Nov. 13, 2008

APPROVED AS TO FORM

By Jorge A. Leon
Jorge A. Leon, Counsel for
The Prosecution Team

Date: November 14, 2008

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, LAHONTAN REGION

By Robert Dodds
Robert Dodds, Assistant
Executive Officer

Date: November 13, 2008

05-0023

ENCLOSURE 2

05-0024

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

In the matter of Everd A. McCain, B.J. Deis and McCain)	
and Associates: Violation of (1) Waste Discharge)	COMPLAINT NO.
Prohibitions Prescribed in the <i>Water Quality Control Plan</i>)	R6T-2007-0007
for the <i>Lahontan Region</i> (2) Clean Water Act Section 301,)	FOR ADMINISTRATIVE
(3) California Water Code Section 13267, (4) California)	CIVIL LIABILITY
Water Code Section 13304, and (5) Clean Water Act)	
Section 401 Water Quality Certification, Belfast Ranch -)	
Skeet Dam and Buz Dam, Lassen County, WDID Nos.)	
6A180508N05 and 6A180105013)	

**EVERD A. MCCAIN, B. J. DEIS AND MCCAIN AND ASSOCIATES, YOU ARE
HEREBY GIVEN NOTICE THAT:**

1. You are charged with violating provisions of law and regulations for which the Lahontan Regional Water Quality Control Board (Lahontan Water Board) may impose administrative civil liability pursuant to California Water Code (Water Code) section 13268, subdivision (a)(1), Water Code section 13350, subdivision (a)(1), and Water Code section 13385, subdivisions (a)(2), (a)(4), and (a)(5).
2. A summary of allegations is provided below. Specifically, you have violated the following:
 - A. Waste Discharge Prohibitions specified by the *Water Quality Control Plan for the Lahontan Region* (Basin Plan) by discharging waste earthen materials into Willow Creek as a result of the failures of both Buz and Skeet Dams. These discharges adversely affected water for the beneficial uses designated for Willow Creek.
 - B. Clean Water Act section 301 by discharging earthen materials into Willow Creek to construct Skeet Dam without a section 404 dredge and fill permit from the Army Corp of Engineers and a Clean Water Act section 401 Water Quality Certification from the Lahontan Water Board.
 - C. Water Code section 13267 by failing to submit required reports and documentation by their due dates.
 - D. Water Code section 13304 by failing to implement measures to temporarily stabilize the site as required by Cleanup and Abatement Order (CAO) No. R6T-2006-0001, as amended.

05-0025

- E. Clean Water Act section 401 Water Quality Certification (401 Certification) by failing to submit required revegetation monitoring reports for the Buz Dam Repair Project.
3. Unless waived, a hearing on this matter will be held before the Lahontan Water Board within 90 days following the issuance of this Complaint. Everd A. McCain, B.J. Deis and McCain and Associates, or their representatives, will have an opportunity to address and contest the allegations in this Complaint and the imposition of civil liability by the Lahontan Water Board. An agenda showing the approximate time set for the hearing will be mailed to you not less than ten days before the hearing date.
 4. At the hearing, the Lahontan Water Board will consider whether to affirm, reject, or modify (either increase or decrease) the proposed civil liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

ALLEGATIONS

5. Dischargers

B.J. Deis, a California corporation (corporate number C1133202), is the legal owner of Lassen County Assessor Parcel Numbers (APN) 101-080-18-11, 109-060-16-11, 101-080-13-11, 109-060-13-11, and 109-060-20-11 (Property). Skeet Dam and Buz Dam are located on the Property. As the legal owner of the Property, B.J. Deis is responsible for activities that take place on the Property. B.J. Deis is also the discharger identified in the 401 Certification issued by the Lahontan Water Board for repair work on Buz Dam. As the discharger named in the 401 Certification, B.J. Deis is responsible for complying with the terms and conditions specified by the 401 Certification. Additionally, B.J. Deis is a discharger identified in CAO No. R6T-2006-0001, as amended, and is responsible for complying with the requirements specified by that CAO.

Mr. Everd A. McCain, a corporate officer of B.J. Deis. Mr. McCain and his wife, Mrs. Iona I. McCain, operate an agricultural business known as Belfast Ranch on the Property. In addition, Mr. McCain is a California registered professional civil engineer (license no. 14203) and a corporate officer of McCain and Associates, a California corporation (corporate number C0559933) (commonly known as McCain Associates).

McCain and Associates operates as an agent for both Belfast Ranch and separately for B.J. Deis in the engineering, permitting and licensing process for various projects that take place on the Property including the construction of Skeet Dam and the repair of Buz Dam.

Acting as a licensed civil engineer on behalf of McCain and Associates, Mr. McCain designed and provided direct oversight of the dam construction for both Buz and Skeet Dams. McCain and Associates, therefore is also responsible for the impacts

resulting from construction and failure of Buz Dam and Skeet Dam. Additionally, McCain and Associates is a discharger identified in CAO No. R6T-2006-0001, as amended, and is responsible for complying with the requirements of that CAO.

Mr. McCain had substantial, if not exclusive, control over the permitting, design, construction, and regulatory compliance associated with the construction of Buzz Dam and Skeet Dam. Mr. McCain also exercised substantial control over the actions required for compliance with CAO No. R6T-2006-0001.

B.J. Deis (as property owner; as discharger named in the 401 Certification and CAO No. R6T-2006-0001, as amended) and McCain and Associates (as party responsible for Skeet Dam design and construction, Buz Dam repairs; and as discharger named in CAO No. R6T-2006-0001, as amended), and Mr. McCain (as an individual with substantial control over the Project and a corporate officer of B.J. Deis and McCain and Associates with control over those corporation's compliance with the CAO NO R6T-2006-0001, as amended) are hereinafter referred to as the "Dischargers."

6. Property

The Property is located in Lassen County approximately 14 miles northeast of Susanville, 3.2 miles north of County Road A-27, and west of Belfast Road, at 480-205 Belfast Road. Willow Creek, which is tributary to the Susan River, flows through the property. (See Attachment A – Vicinity Map.)

The Property includes two earthen dams, Buz Dam and Skeet Dam, and their associated reservoirs (or lakes) located on Willow Creek. (See Attachment A – Vicinity Map and Attachment B – Site Map.)

7. Facilities

Buz Dam. Buz Dam, which was originally constructed in 1982, is located on the Property within Lassen County, Section 24, T30N, R13E. Based on the 1981 plan set for the dam and additional drawings provided by Mr. McCain, the reported dam dimensions are approximately 18 feet high, 20 feet crest width, and 300-350 feet crest length. Winter storms and poor construction methods caused Buz Dam to fail during 1994 and 1995¹. The Lahontan Water Board issued a 401 Certification for the repair of Buz Dam in August 2002. The work permitted by the August 2002 401 Certification included reconstructing the dam and spillway, and re-armoring the streambank immediately downstream of the dam.

¹ Dam failure was due to the use of erodible soils as the primary fill material as documented in McCain and Associates' November 23, 2005 submittal addressed to Harold Singer and received at the Lahontan Water Board office on November 28, 2006.

Skeet Dam. Skeet Dam is located on the property within Lassen County, Section 18, T30N, R14E. Construction of Skeet Dam began during the summer of 2005. Staff observations during an August 25, 2005 inspection of the property found that the construction of Skeet Dam that summer involved building a new dirt road and excavating from two borrow areas to provide material for the dam. Earthen materials from the borrow areas were side-casted at two locations into the canyon that Willow Creek flows through. The side-casted earthen materials were then placed into Willow Creek to provide the fill to create Skeet Dam.

McCain and Associates reported in an Application for 401 Certification submitted to the Lahontan Water Board staff (staff) on October 6, 2005 (after Skeet Dam was partially constructed), that Skeet Dam was approximately 24 feet high and 190 feet crest length. Skeet Dam was to create a reservoir measuring 570 feet long and up to 160 feet wide.²

Buz and Skeet Dams

Buz and Skeet Dams failed during a period of high creek flows during December 16, 2005 through December 31, 2005. The failures of the dams resulted in an unauthorized discharge of earthen materials (clay, rock, and concrete) directly to Willow Creek.

8. Permitting History

- A. **Buz Dam.** During 2001 and 2002, the Lahontan Water Board received information from McCain and Associates on behalf of B.J. Deis, and all applicable fees, to complete an application for 401 Certification for the repair of Buz Dam. On August 9, 2002, the Lahontan Water Board issued B.J. Deis a 401 Certification for the repair of Buz Dam. The 401 Certification requires the relocation of wetland vegetation, the creation of wetlands, and the annual submission of revegetation monitoring reports to the Lahontan Water Board beginning on October 15, 2003, and continuing through October 15, 2007.
- B. **Skeet Dam.** On October 6, 2005, the Lahontan Water Board received an application for 401 Certification from McCain and Associates on behalf on B.J. Deis for the Skeet Dam Project, which was nearly finished. On November 8, 2005, the Lahontan Water Board denied 401 Certification for the Skeet Dam Project because the October 6, 2005 application from McCain and Associates did not demonstrate that (1) the project, which was nearly complete, complied with applicable water quality standards and other regulatory requirements and (2) adequate mitigation measures had been implemented or proposed to offset impacts to wetlands and other waters of the United States.

² Information provided by Application for 401 Water Quality Certification dated October 6, 2005 submitted by McCain and Associates.

9. Enforcement History

In response to (1) the unauthorized discharge of earthen materials to Willow Creek and (2) violations of the 401 Certification, and (3) violations of CAO No. R6T-2006-0001 as amended, the Lahontan Water Board issued the Dischargers the following enforcement actions.

Enforcement Orders	Issue Date
Notice of Violation (NOV) of 401 Certification/13267 Order for Information associated with the Lake Buz Repair Project	February 16, 2006
Cleanup and Abatement Order (CAO) No. R6T-20006-0001 - To cleanup and abate effects of unauthorized discharges associated with Skeet Dam and Buz Dam	May 5, 2006
Amended CAO No. R6T-2006-0001-A1 – Extending compliance dates for temporary and permanent action to stabilize the dam sites.	August 9, 2006
Water Code section 13267 Order – Ordering submittal of information concerning the temporary stabilization plan	August 9, 2006
NOV of CAO No. R6T-2006-0001 - Failure to submit required technical information concerning Skeet Dam and Buz Dam	August 9, 2006
NOV of Water Code section 13267- Failure to submit required information for temporary stabilization plan	September 22, 2006
NOV of (1) CAO No, R6T-2006-0001 as amended, (2) Water Code section 13267 Order for Information, and (3) 401 Certification for failure to submit required information	March 27, 2007
NOV of CAO No. R6T-2006-0001-A1 for failure to submit adequate wetlands delineation	July 13, 2007

10. Violation – Basin Plan Prohibitions

The Discharger violated the following prohibitions specified in the Basin Plan, adopted pursuant to Water Code section 13243.

Unit/Area Specific Prohibitions- Susanville Hydrologic Unit

- A. "The discharge of waste earthen materials or of any other waste as defined in Section 13050(d) of the California Water Code which would violate the water quality objectives of this Basin Plan or otherwise adversely affect the water for beneficial uses of this Basin Plan, is prohibited."

Regionwide Prohibitions

- B. "The discharge of waste which causes violation of any narrative water quality objective contained in this Plan, ... is prohibited."

For Settleable Materials, the Basin Plan contains the following language:

"Waters shall not contain substances in concentrations that result in deposition of material that causes nuisance or that adversely affects the water for beneficial uses."

The Dischargers violated prohibitions A and B cited above when waste earthen materials were discharged to Willow Creek as a result of the gradual failure of both Skeet and Buz Dams during the high flow period between December 16, 2005 and December 31, 2006. The failure of Skeet and Buz Dams resulted in the discharge of waste earthen materials (rock, grout, sediment) to Willow Creek. When the dams failed, portions of the dam material deposited (or settled out) into Willow Creek and buried the creek bed. The discharge of these settleable materials adversely affected water for the beneficial uses designated for Willow Creek.

On February 1, 2006, staff inspected the property after learning that both Buz Dam and Skeet Dam had failed. Mr. and Mrs. McCain accompanied staff during their inspection. Staff noted the following observations about the discharge.

Buz Dam. Approximately 15 feet of dam height and approximately 50 feet crest length washed away from Buz Dam. Portions of the dam material, consisting of rock, soil, clay, and concrete, deposited (or settled out) over an approximately 100-foot length of Willow Creek downstream of Buz Dam. Deposition in other areas downstream of Buz Dam was likely, but those areas were not inspected.

Skeet Dam. Approximately 15 to 20 feet of dam height and approximately 60 feet crest length washed away from Skeet Dam. Portions of the dam material, consisting of rock, soil, clay, and concrete, deposited (or settled out) over an approximately 250 to 300-foot length of Willow Creek downstream of Skeet Dam.

The exposed vertical sides of the washed out portions of both Skeet and Buz Dams exposed a clay core to further water erosion even after the high flow period ended. In a submittal dated March 7, 2006, McCain and Associates acknowledge the following:

"Between December 16 and December 31, 2005, significant erosion occurred to the spillway area of Lake Buz Dam. The effects of that erosion exposed barren and erodible soils along the walls of the dam at the upstream face, the clay core and the filter areas of the dam."³

Furthermore, McCain and Associates acknowledge that both dams eroded gradually and that the erosion continued well past December 31, 2005 when the high flows receded:

"Both dams eroded gradually because of in-sufficient grouting of the rock fill...Buz Dam had sustained two winters of normal rainfall with only the surface rocks grouted. The extreme high flows of this past winter were able to find a weak area in the sloped surface and erode an area which then exposed un-grouted rock fill beneath the surface, which then progressively eroded up the slope until it reached the spillway crest. The continued flows then undermined the clay core and filter material under the crest until the concrete cap on the crest gradually broke off until the front edge was reached. The flows then concentrated in the eroded area and gradually widened and deepened. The high water flows continued until after mid April and only recently have diminished. The washed out area did not stabilize at a sustainable slope until just recently."⁴

It is likely that the discharges of earthen materials associated with the dam failures extended beyond the December 31, 2005 date. Nevertheless, for purposes of calculating the number of days that Basin Plan violations occurred, Water Board staff only considered the initial 16-day period of high flow from December 16, 2005 until December 31, 2005 when the dams gradually failed and the bulk of the dam material was discharged into Willow Creek. Subsequent discharges associated with continued erosion of the exposed dam sides were not considered in calculating the days of violation due to the difficulty of determining the rate and extent of such erosion.

³ Source: McCain and Associates submittal titled "Lake Buz Corrective Action Plan," dated March 7, 2006 and received March 8, 2006.

⁴ Source: McCain and Associates May 19, 2006 submittal addressed to Harold Singer and received at the Lahontan Water Board office on May 19, 2006.

The discharge incidents associated with the failure of Skeet and Buz Dams resulted in creek conditions that adversely affected the water for some of the beneficial uses designated for Willow Creek. The beneficial uses identified in the Basin Plan for Willow Creek include:

Municipal and Domestic Supply (MUN)	Agricultural Supply (AGR)
Ground Water Recharge (GWR)	Fresh Water Replenishment (FRSH)
Water Contact Recreation (REC-1)	Non-contact Water Recreation (REC-2)
Commercial and Sportfishing (COMM)	Warm Fresh Water Habitat (WARM)
Cold Fresh Water Habitat (COLD)	Wildlife Habitat (WILD)
Spawning, Reproduction, and Development (SPWN)	

The COLD and WARM beneficial uses present in Willow Creek are summarized, in part, in a 2003 report prepared by the Department of Fish and Game (DFG) and the Bureau of Land Management, which documents the stream habitat conditions in Willow Creek. The fisheries surveys documented in the 2003 report indicate that Willow Creek supports a diversity of fish species including speckled dace, Lahontan reddsides, tui chub, Tahoe sucker, paiute sculpin, and brown trout. The three most abundant species at the time of the survey were Lahontan reside, Tahoe sucker, and speckled dace. The report indicates that brown trout production is limited probably due to the high water temperatures during the summer, which reach the upper tolerance of most trout species. The 2003 report also found that Willow Creek supports a diversity of invertebrate taxa, which indicates a variety of aquatic habitats including slow-water pool, fine sediment, and aquatic vegetation.⁵

The discharge incidents associated with the failure of Skeet and Buz Dams resulted in creek conditions that adversely affected the water for the COLD, WARM, WILD, and SPWN beneficial uses for the following reasons:

The sediment deposited within Willow Creek buried sections of creekbed, adversely affecting habitat for fish and stream invertebrates (COLD and WARM). Human-caused sedimentation in surface waters, such as the sedimentation to Willow Creek that resulted from the dam failures, can adversely affect aquatic ecosystems and the food webs that support them.⁶

⁵ Source: Summary of Stream Habitat Conditions – Willow Creek (EL 178, 179, 180, 184, 185, 204) prepared by the Department of Fish and Game and the Bureau of Land Management, 2003.

⁶ Studies by Suttle and others have found that fine-sediment deposition has been shown to decrease growth and survival of juvenile steelhead trout. Declines are associated with a shift in invertebrates from available prey to unavailable burrowing taxa. Additionally, declines are also associated with increases in salmonid activity and injury that result with higher levels of sedimentation. (Suttle, Kenwyn, M.E. Power, J. M. Levin, and C. McNeely. 2004. *How fine sediment in riverbeds impairs growth and survival of juvenile salmonids*, Ecological Applications 14(4): 969-974.)

The earthen materials deposited on the streambed would have also affected the spawning and rearing habitat of the fish present in Willow Creek. The earthen materials that were deposited into Willow Creek buried any spawning gravels, fish eggs, and/or fry that were present during the dam failures.⁷

All life stages of fish (embryo, juvenile, adult) and the invertebrate assemblages present in Willow Creek were adversely affected by the discharges of waste earthen and settleable materials, since these discharges (1) reduce habitat for existing stream invertebrates and (2) increase turbidity which adversely affects food sources and feeding activity for fish and other higher aquatic organisms. Additionally, impacts to cold and warm freshwater habitats may adversely impact wildlife, such as waterfowl, that depend on these prey species (fish and invertebrates) for survival and growth.

For the reasons stated above, the unauthorized waste discharges resulting from the failure of Skeet and Buz Dams adversely affected the water for the COLD, WARM, SPWN, and WILD beneficial uses designated for Willow Creek and, therefore, constitute violations of the Basin Plan prohibitions cited above.

Authority and Potential Civil Liability

Water code section 13385, subdivision (a)(4) authorizes the Lahontan Water Board to impose civil liability for violations of Basin Plan prohibitions. Water Code section 13385, subdivision (a)(4) states:

Any person who violates any of the following shall be liable civilly in accordance with this section: . . . (4) Any order or prohibition issued pursuant to Section 13243 or Article 1 (commencing with Section 13300) of Chapter 5, if the activity subject to the order or prohibition is subject to regulation under this chapter.

The Dischargers violated Basin Plan prohibitions when earthen materials were discharged into Willow Creek during the construction of Skeet Dam and the failure of Skeet and Buz Dams as described in Finding No. 10 above.

Water Code section 13385, subdivision (c) specifies the maximum potential liability the Lahontan Water Board may impose under Water Code section 13385, subdivision (a)(4) authority. Water Code section 13385, subdivision (c) states:

⁷ Studies by Chapman indicate that fine sediments deposited in riverbeds can reduce the survival of embryos and emergence of fry from nests in the riverbed (redds) by decreasing dissolved oxygen and water exchange and entrapping emerging fry. (Chapman, D.W. 1988. Critical review of variables used to define effects of fines in redds or large salmonids. Transactions of the American Fisheries Society. 117:1-21.)

"Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 ... of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

In this matter, the maximum civil liability under Water Code section 13385, subdivision (c)(1) is **\$320,000** for discharging earthen materials to Willow Creek as a result of the construction of Skeet Dam and the failure of both Skeet and Buz Dams. (See Attachment D - Worksheet 2- Belfast Ranch-ACL Complaint - Water Code section 13385 Civil Liability.)

This civil liability is based upon the following violation periods:

- (1) Sixteen (16) days (December 16, 2005 - December 31, 2005) for violating Basin Plan prohibitions for discharging earthen and settleable materials to Willow Creek when Skeet Dam failed.
- (2) Sixteen (16) days (December 16, 2005 - December 31, 2005) for violating Basin Plan prohibitions for discharging earthen and settleable materials to Willow Creek when Buz Dam failed.

11. Violation – Water Code section 13267

Water Code section 13267, subdivision (b)(1) states, in part,

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, ...waste within its region... that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

The Dischargers violated Water Code section 13267 subdivision (b)(1) by failing to submit the following reports and/or documentation by specified due dates:

- A. By July 15, 2006, a site plan, for Lake Buz, that delineates the quantity, condition, and location of the existing wetland mitigation areas and a remedial action plan if the required mitigation areas have not been established.

(Requirement specified in the February 16, 2006 Water Code section 13267 Order)(February 2006 Order).

On May 4, 2006, Lahontan Water Board staff sent the Dischargers a letter reminding them about the information required by the upcoming July 15, 2006 compliance date.

Correspondence from McCain and Associates dated May 8, 2006 states:

"We will begin work on the site plan and remedial action plan which are due by July 15, 2006, as soon as we hear from you that the enclosed Corrective Action Plan is acceptable."

Lahontan Water Board staff informed the Dischargers that their Corrective Action Plan for Lake Buz was acceptable in a certified letter dated May 22, 2006.

On March 27, 2007, the Lahontan Water Board sent the Dischargers, through certified mail, an NOV informing them they were in violation of the February 2006 Order. The NOV indicated that the Dischargers had violated the February 2006 Order by failing to submit a site plan or a remedial action plan that addresses the wetlands mitigation areas associated with the Lake Buz Dam Project and gave them until April 6, 2007 to comply or submit a schedule for compliance.

On April 3, 2007, staff received correspondence dated April 1, 2007 from McCain and Associates in which Mr. McCain states:

"I apologize for not submitting the site plan and remedial action plan as required by the February 16, 2006, [sic] Order. I did not realize the requirements of the 2002 Certification were still in affect. I will proceed with a survey of the site conditions and should be able to submit the required plans by May 31, 2007."

The site plan and remedial action plan have yet to be submitted.

- B. By October 12, 2006, verification including photo-documentation and an affidavit that all temporary stabilization methods identified in the temporary stabilization plan have been completed. (CAO Requirement No. 5.)

Correspondence dated October 5, 2006 from McCain and Associates noted that the following measures identified in the accepted temporary stabilization plan had not been completed: (1) removing the concrete debris, and (2) placing rip-rap on the exposed vertical sides of the eroded portions of Skeet and Buz Dams.⁸

⁸ Source: October 5, 2006 submittal from McCain and Associates sent to Harold Singer and received at the Lahontan Water Board office on October 6, 2006.

The October 5, 2006 letter also included four photographs, dated September 29, 2006. The photographs illustrate that several temporary stabilization measures had been implemented; however, they also illustrate that the containment trench was not built as proposed in the May 19, 2006 temporary stabilization plan submitted by McCain Associates. The October 5, 2006 submittal did not include any written statements or photographs that indicated the temporary measures to stabilize Site D had been completed.

In an April 1, 2007 submittal, McCain and Associates stated that the reason portions of the temporary stabilization plan had not been implemented was because Mr. McCain had yet to obtain permission from the DFG to remove the concrete debris from Willow Creek and place rip-rap in Willow Creek.

McCain and Associates' April 1, 2007 submittal included three photographs. The April 1, 2007 photographs illustrated that rock check dams had been placed within the containment trench. Though the rock check dams had been installed, the photographs also illustrated that the containment trench was still not constructed as proposed and as accepted by the Water Board staff.

On August 7, 2007, on behalf of B.J. Deis, Mr. McCain hand delivered a submittal to the Water Board office. The August 7, 2007 submittal stated that temporary stabilization work (that remained to be completed pursuant to CAO R6T-2006-001 as amended) began on June 7, 2007 and was completed on July 24, 2007. The August 7, 2007 submittal also contained six photographs. Two of the photographs indicated that the larger construction debris had been removed from Willow Creek and placed along the cut slope of the access road. Four of the photographs showed that rip-rap had been placed on the eroded vertical faces of Buz and Skeet Dams (Sites E and F) and within portions of the creekbed.

On September 14, 2007 Water Board staff sent the Dischargers a letter requesting they submit documentation regarding the implementation of stabilization measures for Site D. On September 25, 2007, on behalf of B.J. Deis and McCain and Associates, Mr. McCain submitted written and photo-documentation, dated September 22, 2007, that indicated temporary stabilization measures (i.e., hand seeding and establishment of vegetative cover) had been completed for Site D. The September 22, 2007 documents, in combination with the previous narrative and photo documentation, satisfied CAO Requirement No. 5.

- C. By July 3, 2006, a certified delineation of all wetlands and other surface water types impacted from (a) the construction activities associated with building Skeet Dam, the fish screen and intake control tower structure, the unpaved access road, and the perimeter impoundment referred to as the Pressure Reservoir, and (b) the filling of Skeet Dam. (CAO Requirement No. 6)

In the May 19, 2006 submittal to the Water Board, the Dischargers stated that :

“The wetlands delineation could be completed by July 3, 2006, as requested by the CAO.”

The August 9, 2006 NOV informed the Dischargers that they continued to violate CAO No. R6T-2006-0001, in part, because they did not submit a wetlands delineation to comply with CAO Requirement No. 6.

In correspondence dated August 25, 2006, the Dischargers reported the following regarding their compliance with CAO Requirement No 6:

On page 1 of 9, “I [Mr. McCain] have been unable to contract for the wetlands delineation.”

On page 5 of 9, “I have yet been able to complete the engagement [of] a consultant to do the certified delineation of the areas requested. I am working on doing so and will submit the completed delineation as soon as possible.”⁹

On March 27, 2007, the Lahontan Water Board again put the Dischargers on notice that they continued to be in violation of CAO No. R6T-2006-0001-A1, in part, for failing to comply with CAO Requirement No. 6 for failure to submit a certified wetlands delineation of all wetlands and other surface water types impacted from the construction of Skeet Dam and the filling of Skeet Dam reservoir.

The April 1, 2007 submittal from McCain and Associates provided the following information regarding the delinquent wetlands delineation:

“Pacific Northwestern Biological Resources Consultants has completed the initial wetlands field survey, the delineation flag line has been surveyed and a draft report has been prepared. I [Mr. McCain] felt that the initial delineation was lacking enough soil data points and have asked the Consultant to analyze the soil that does exist with appropriate data points that I will then survey to complete the delineation. Mr. Ponte is extremely busy and I am having trouble getting them to complete the project, but we should be able to provide you with a Corps acceptable delineation within two months.”¹⁰

On May 24, 2007, the Dischargers submitted a “Preliminary Wetland Delineation for Lake Skeet Dam and Reservoir” dated May 23, 2007. On July 13, 2007 the

⁹ Source: August 25, 2006 submittal from McCain and Associates addressed to Harold Singer and received at the Lahontan Water Board office on August 29, 2006.

¹⁰ Source: April 1, 2007 submittal from McCain and Associates addressed to Harold Singer and received at the Lahontan Water Board office on April 6, 2007.

Water Board sent the Dischargers a certified letter informing the Dischargers that they were in violation of CAO No. R6T-2006-0001-A1, partly because their "Preliminary Wetland Delineation for Lake Skeet Dam and Reservoir" was not acceptable and did not fulfill CAO Requirement No. 6. The Water Board's July 13, 2007 letter also identified what minimum requirements should be submitted with a final wetland delineation in order for the Lahontan Water Board to consider the submittal complete.

In the Dischargers' August 7, 2007 submittal, they included information intended to respond to the Water Board's July 13, 2007 NOV. Staff has determined that the August 7, 2007 did not contain the required information identified in the July 13, 2007 NOV. As such, the Dischargers continue to be in violation Water Code 13267 for failing to submit a certified wetlands delineation of all wetlands and other surface water types impacted from the construction of Skeet Dam and the filling of Skeet Dam reservoir (CAO Requirement No. 6).

Authority and Maximum Potential Civil Liability

Water Code section 13268, subdivision (a)(1) authorizes the Lahontan Water Board to impose civil liability for violations of Water Code section 13267 orders for information. Water Code section 13268, subdivision (a)(1) states:

"Any person failing or refusing to furnish technical or monitoring program reports as required by subdivision (b) of Section 13267... is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."

The Dischargers violated Water Code section 13267 for failing to submit technical reports and documentation as described in Finding No. 11 above.

Water Code section 13268, subdivision (b)(1) specifies the maximum potential liability the Lahontan Water Board may impose under Water Code section 13268, subdivision (a)(1) authority. Water Code section 13268, subdivision (b)(1) states:

"Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violation occurs."

In this matter, the maximum civil liability under Water Code section 13268, subdivision (b)(1) is **\$793,000** for violating Water Code section 13267. (See Attachment D, Worksheet 4 - Belfast Ranch - ACL Complaint - Water Code section 13268 Civil Liability.)

For purposes of calculating days of violation, the Lahontan Water Board used May 1, 2007 as the end date for the violation period. This civil liability is based upon the following violation periods:

- (1) Two hundred and ninety (290) days (July 16, 2006- May 1, 2007) for failing to submit a site plan for Lake Buz (required in the February 16, 2006 Water Code section 13267 Order).
- (2) Two hundred and one (201) days (October 13, 2006 – May 1, 2007) for failing to submit verification (photographs and an affidavit) that the temporary stabilization plan was fully implemented (CAO Requirement No. 5).
- (3) Three hundred and two (302) days (July 4, 2006 – May 1, 2007) for failing to submit a wetlands delineation for Lake Skeet (CAO Requirement No. 6).

12. Violation – Clean Water Act section 301

The discharge of fill material to the waters of the United States without a Clean Water Act section 404 dredge and fill permit issued by the Army Corp of Engineers is a violation of Section 301 (a) of the Clean Water Act. Furthermore, section 401 of the Clean Water Act requires that a discharger obtain a water quality certification from the Lahontan Water Board prior to being issued a section 404 dredge and fill permit.

The Dischargers violated Clean Water Act section 301 by discharging earthen materials into Willow Creek to construct Skeet Dam without a section 404 dredge and fill permit from the Army Corp of Engineers and a section 401 Certification from the Lahontan Water Board.

During an inspection of the property on August 25, 2005, Mr. McCain told staff he began building Skeet Dam in June 2005. Observations made by staff during the August 25, 2005 inspection confirmed that earthen materials had been directly pushed into Willow Creek to construct Skeet Dam. Staff determined that Skeet Dam was being built without Lahontan Water Board authorization (i.e., 401 Certification). Staff informed Mr. McCain that at a minimum, a 401 Certification should have been obtained from the Lahontan Water Board prior to starting dam construction. The Lahontan Water Board has no record of receipt of a report of waste discharge or other permit application from the Dischargers prior to the June 2005 construction of Skeet Dam.

Authority and Maximum Potential Civil Liability

Water code section 13385, subdivision (a)(5) authorizes the Lahontan Water Board to impose civil liability for violations of the Clean Water Act section 301. Water Code section 13385, subdivision (a)(5) states:

“Any person who violates any of the following shall be liable civilly in accordance with this section: . . .

05-0039

- (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.”

The Discharger violated Sections 301 and 401 of the Clean Water Act by discharging fill material to the waters of the United States without a Clean Water Act section 404 dredge and fill permit and a Clean Water Act section 401 water quality certification as described in Finding 12 above.

Water Code section 13385, subdivision (c) specifies the maximum potential liability the Lahontan Water Board may impose under Water Code section 13385, subdivision (a)(5) authority. Water Code section 13385, subdivision (c) states:

“Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 ... of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.”

In this matter, the maximum civil liability under Water Code section 13385, subdivision (c)(1) is **\$10,000** for discharging fill material to the waters of the United States without a Clean Water Act section 404 dredge and fill permit or 401 water quality certification. See Attachment D - Worksheet 2- Belfast Ranch- ACL Complaint - Water Code section 13385 Civil Liability.)

For purposes of calculating the violation period, Lahontan Water Board staff believes it is reasonable to assume it took the Dischargers a minimum of one day to directly push the fill material into Willow Creek for the construction of Skeet Dam. This civil liability is based upon the following violation period:

One (1) day of violating Clean Water Act sections 301 and 401 for discharging fill material without a section 404 dredge and fill permit from the Army Corp of Engineers and a water quality certification for the Lahontan Regional Board.

13. Violation – Water Code section 13304 (CAO No. R6T-2006-0001-A1)

On May 5, 2006, CAO No. R6T-2006-0001 was issued pursuant to Water Code section 13304 (a). Among other requirements, the CAO required the Dischargers to implement measures that would temporarily and permanently stabilize the site. On August 9, 2006 CAO No. R6T-2006-0001 was amended by issuing CAO No. R6T-2006-0001-A1. The requirements in the amended CAO remained the same, however, the amended CAO did extend some of the compliance dates to allow the Dischargers more time to implement the temporary stabilization measures.

Requirement No. 4 of the CAO required the Dischargers to implement a temporary stabilization plan to address erosion from all unstable areas including: (a) the side-cast area adjacent to and above the road, and upstream of Skeet Dam (Site A) (Attachment C identifies the locations of Sites A – F referred to above and elsewhere in this Complaint), (b) the side-cast area adjacent to and eastward of Skeet Dam, and above the unpaved road (Site B), (c) the road surface and cut and fill slopes associated with the entire unpaved road eastward of Lake Skeet and Lake Buz (Site C), (d) the outside face of the berm containing the Pressure Reservoir, which is located on land above the Willow Creek canyon (Site D), (e) the vertical sides of the washed out portion of Skeet Dam (Site E), and the vertical sides of the washed out portion of Buz Dam (Site F).

In addition to stabilizing the sites identified above, the CAO also required the Dischargers to remove construction debris (i.e., grout, rock, filter material, clay core material) that had been deposited in the creek and along the dam face.

The Dischargers violated the following CAO requirement:

By September 28, 2006, in accordance with a Lahontan Water Board-accepted temporary stabilization plan, complete temporary stabilization of all unstable areas. (CAO Requirement No. 4.)

The Dischargers violated CAO Requirement No. 4 when they failed to fully implement the Lahontan Water Board-accepted temporary stabilization plan by September 28, 2006. The Dischargers documented their inability to fully implement the plan in their submittals dated October 5, 2006 and April 1, 2007. (See information provided about the October 5, 2006 and the April 1, 2007 submittal in Finding 11. B. above.)

Based on the information and photo-documentation provided in the October 5, 2006 submittal, staff concluded that the Dischargers had not fully implemented the temporary measures proposed to stabilize Sites D, E, or F by the September 28, 2006 due date. The October 5, 2006 submittal also indicated that the Dischargers had not complied with the component of the temporary stabilization plan that required the Dischargers to remove the construction debris that had deposited in Willow Creek. Additionally, information provided in the Dischargers' October 5, 2006

and April 1, 2007 submittals indicated that some of the measures (specifically the containment trench system) proposed to stabilize Sites A-C, had not been completed as proposed by the Dischargers' in their May 19, 2006 and August 25, 2006 submittals, and as accepted by the Lahontan Water Board.

The Dischargers' August 7, 2007 submittal provided information and photographs that indicated (1) the temporary stabilization measures to stabilize Sites E and F had been implemented and (2) the construction debris had been removed from Willow Creek. The Dischargers' September 22, 2007 documents indicated that the temporary stabilization measures for Site D had been completed.

Although there were deviations between the Dischargers' proposed/accepted temporary stabilization measures and what was constructed, staff considers the temporary stabilization plan to be fully implemented as of July 24, 2007, as indicated in the Dischargers' August 7, 2007 and September 22, 2007 documents.

Authority and Maximum Potential Civil Liability

Water code section 13350, subdivision (a)(1) authorizes the Lahontan Water Board to impose civil liability for violations of a cleanup and abatement order. Water Code section 13350, subdivision (a)(1) states:

"Any person who (1) violates any cease and desist order or cleanup and abatement order hereafter issued, reissued, or amended by a regional board or the state board...shall be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e)."

The Dischargers violated Water Code section 13304 (CAO No. R6T-2006-0001-A1) for failing to fully implement the work proposed in the temporary stabilization plan as described in Finding No. 13 above.

Water Code section 13350 subdivision (e) specifies the maximum potential liability the Lahontan Water Board may impose under Water Code section 13350, subdivision (a)(1) authority. Water Code section 13350, subdivision (e) states:

"The state board or a regional board may impose civil liability administratively pursuant to Article 2.5 (commencing with section 13323) of Chapter 5 either on a daily basis or on a per gallon basis, but not both.

(1) The civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day the violation occurs.

In this matter, the maximum civil liability under Water Code section 13350, subdivision (e)(1) is **\$1,070,000** for violating CAO No. R6T-2006-0001-A1 by failing to completely implement the temporary stabilization plan. (See Attachment

D, Worksheet 3 - Belfast Ranch-ACL Complaint - Water code section 13350 Civil Liability.)

For purposes of calculating the violation period, the Lahontan Water Board used May 1, 2007 as the end date of the violation period. This civil liability is based upon the following violation period:

- (1) Two hundred and fourteen (214) days (September 29, 2006 – May 1, 2007) for not fully implementing the temporary stabilization plan.

14. Violation – Clean Water Act Section 401 Water Quality Certification

On August 9, 2002, B.J. Deis was issued a 401 Certification for the repair of Buz Dam. It is B.J. Deis' responsibility to comply with the Standard and Additional Conditions prescribed in the 401 Certification.

Additional Condition No. 14 requires, "Revegetation monitoring reports shall be submitted to this Regional Board annually by October 15 beginning October 15, 2003 through October 15, 2007."

Monitoring reports for 2003, 2004, and 2005. B.J. Deis violated this requirement when it failed to submit revegetation monitoring reports for years 2003 through 2005.

During an August 25, 2005 staff inspection of the property, staff told B.J. Deis's representative, Mr. McCain, that the required revegetation monitoring reports due annually for 2003 and 2004 had not been submitted to date, and this constituted a violation of the 401 Certification.

On November 28, 2005, the Lahontan Water Board received a November 23, 2005 letter from McCain and Associates. McCain and Associates acknowledged, "Mitigation monitoring reports have not been submitted." (page 5 of 7, section (1))

During a December 13, 2005 staff inspection of the property, staff again informed Mr. McCain that the required revegetation monitoring reports, now including the 2005 report, had not been submitted. Staff suggested submitting the necessary reports as soon as possible as this would have a bearing on what enforcement action was taken.

After receiving a February 16, 2006 NOV and Order for Information, a revegetation monitoring report was submitted, and received on March 8, 2006, satisfying the reporting requirements for 2003-2005.

Monitoring report for 2006. B.J. Deis further violated this 401 Certification requirement when it submitted the revegetation monitoring report due on October 15, 2006 on May 22, 2007, two-hundred and eighteen (218) days late.

On May 4, 2006, staff sent B.J. Deis a letter reminding B.J. Deis that though its monitoring report requirements for October 15, 2003 – December 15, 2005 had been fulfilled, the 401 Certification still required B.J. Deis to submit the revegetation monitoring reports during 2006 and 2007.

Authority and Maximum Potential Civil Liability

Water code section 13385, subdivision (a)(2) authorizes the Lahontan Water Board to impose civil liability for violations of a 401 Certification. Water Code section 13385, subdivision (a)(2) states:

"Any person who violates any of the following shall be liable civilly in accordance with this section: . . .

- (2) Any waste discharge requirements or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160. . .

The Dischargers also violated their 401 Certification associated with the repair of Buz Dam for failing to submit revegetation monitoring reports as described in Finding No. 14 above.

Water Code section 13385 subdivision (c) specifies the maximum potential liability the Lahontan Water Board may impose under Water Code section 13385, subdivision (a)(2) authority. Water Code section 13385, subdivision (c) states:

"Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 . . . of Chapter 5 in an amount not to exceed the sum of both of the following:

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons."

In this matter, the maximum civil liability under Water Code section 13385, subdivision (c)(1) is **\$10,710,000** for violating the 401 Certification issued for the repair of Buz Dam. (See Attachment D - Worksheet 2- Belfast Ranch-ACL Complaint – Water Code section 13385 Civil Liability.)

For purposes of calculating the violation period for the maximum potential liability, the Lahontan Water Board assigned a separate violation period to each of the delinquent reports. For purposes of calculating the violation period for the delinquent 2006 report, the Lahontan Water Board used May 1, 2007 as the end date of the violation period. This civil liability is based upon the following violation period:

- (1) Three hundred and sixty-five (365) days (October 16, 2003 – October 15, 2004) of violating the 401 Certification for Buz Dam for failing to submit the 2003 revegetation monitoring report due October 15, 2003.
- (2) Three hundred and sixty-five (365) days (October 16, 2004 – October 15, 2005) of violating the 401 Certification for Buz Dam for failing to submit the 2004 revegetation monitoring report due October 15, 2004.
- (3) One hundred and forty-three (143) days (October 16, 2005 – March 7, 2006) for violating the 401 Certification for Buz Dam for failing to submit the 2005 revegetation monitoring report due October 15, 2005.
- (4) One hundred and ninety-eight (198) days (October 16, 2006 – May 1, 2007) of violating the 401 Certification for Buz Dam for failing to submit the 2006 revegetation monitoring report due October 15, 2006.

MAXIMUM POTENTIAL CIVIL LIABILITY AMOUNT

The total maximum potential liability for the violations identified above is **\$12,903,000**. (See Attachment D – Worksheet 1 – Maximum Potential Civil Liability.) This is based upon the methods for calculating the maximum potential liability as defined by Water Code sections 13385, 13350, and 13268, and also described above in Finding Nos. 10-14.

The maximum potential liability associated with Water Code sections 13268, 13385, and 13350 is divided between two funds: the Cleanup and Abatement Account (CAA) and the Waste Discharge Permit Fund (WDPF). The maximum potential liability associated with Water Code sections 13268 and 13385 totals **\$11,833,000**. Liabilities collected under Water Code sections 13268 and 13385 are deposited into the CAA. The maximum potential liability associated with violations of Water Code section 13350 totals **\$1,070,000**. Liabilities collected under Water Code section 13350 are deposited into the WDPF.

PROPOSED CIVIL LIABILITY

15. Factors Affecting the Amount of Civil Liability

Water Code section 13385, subdivision (e) and Water Code section 13327 requires the Lahontan Water Board to consider enumerated factors when it determines the amount of civil liability for a discharge covered by section 13385 and 13350 respectively. The Assistant Executive Officer of the Lahontan Water Board considered those factors in recommending the amount of the administrative civil liability:

a. *The nature, circumstances, extent, and gravity of the violations;*

Discharge-related violations. Beneficial uses for Willow Creek include COLD, WARM, SPWN, and WILD (as defined earlier in Finding No. 10), among others. As such, these waters support (1) cold and warm water ecosystems, (2) aquatic habitat necessary for reproduction and early development of fish and wildlife, and (3) wildlife habitats which often depend, in part, on aquatic life for food sources.

The construction of Skeet Dam and the failure of Skeet and Buz Dams resulted in the deposition of a large volume of earthen and waste materials to Willow Creek. The dam failures created visible deposition zones where the heavier earthen materials and other dam debris (i.e., rock, grout) covered the creek channel and its floodplain, were created. These deposition zones measured approximately 250-300 feet (Skeet Dam) and approximately 100 feet (Buz Dam) in channel length. Within the deposition zones, the discharge of the waste materials buried sections of creekbed and adversely affected the beneficial uses of Willow Creek as described in Finding No. 10.

The discharge episodes that deposited waste materials to Willow Creek, at a minimum, also created a threatened condition of pollution within Willow Creek. Water Code section 13050, subsection (1)(1)(A), defines

"Pollution" to include an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects the waters for beneficial uses.

Discharging the earthen materials and other dam debris to Willow Creek altered the water quality to a degree that at a minimum, threatened to unreasonably affect the waters for the COLD, WARM, SPWN, and WILD beneficial uses in the creek section that was subjected to the discharge. The deposited material (1) buried sections of the creekbed making spawning gravels unavailable, (2) smothered and/or displaced existing fish eggs and aquatic invertebrates, and (3) created temporary turbid conditions that may have hindered the foraging success of fish and/or wildlife that typically search for prey in the affected sections of Willow Creek.

Additionally, the State Water Resources Control Board's 2002 Water Quality Enforcement Policy (2002 Enforcement Policy) has developed criteria to assist the Regional Water Boards in identifying priority violations. The 2002 Enforcement Policy identifies that violations of prohibitions contained in the Basin Plan that result in an adverse impact to beneficial uses are considered priority violations. The discharges of earthen materials to Willow Creek that violated Basin Plan prohibitions and adversely impacted beneficial uses as described in Finding No. 10 are considered priority violations.

Report-related violations. The reporting violations have impeded the Lahontan Water Board staff's ability to track progress regarding wetlands mitigation and cleanup and abatement activities. However, compared with the other violations subject to this administrative civil liability (i.e., violations of Basin Plan prohibitions, CAO No. R6T-2006-0001 as amended, and Clean Water Act section 301), the reporting violations have not resulted in a direct impact or potential impact to water quality and/or beneficial uses. As such, staff believes the gravity of report-related violations is substantially less than that of violations associated with the discharges of wastes, addressing the impacts of the discharges, and implementing measure to prevent additional waste discharges.

b. *Whether discharge is susceptible to cleanup or abatement;*

The discharge of earthen materials to Willow Creek that resulted from the construction of Skeet Dam and the failure of Skeet and Buz Dams are at a minimum, susceptible to partial cleanup and abatement. CAO R6T-2006-0001 and CAO R6T-2006-0001-A1 required the Dischargers, in part, to clean up and abate the effects of the discharge of concrete, rock, clay, and filter material into waters of the state. The CAOs, in part, required the Dischargers to clean up and abate some of the effects of the discharge by recovering construction debris from Willow Creek. However, the waste earthen materials and debris have yet to be removed from the creek, and doing so may prove more damaging than beneficial, especially for the clay core material.

The degree of toxicity of the discharge;

There were no analyses performed to determine the degree of toxicity of the discharges.

d. *Ability to pay;*

In correspondence dated August 17, 2007 and received at the Water Board office on August 20, 2007, the Dischargers provided the Water Board with copies of 2003-2006 income tax returns for both McCain and Associates and B.J. Deis corporations. In correspondence dated September 22, 2007, and received at the Water Board on September 25, 2007, the Dischargers explained that the due to

limited revenues, the Dischargers were not required to complete the portions of the tax forms that list corporation assets, liabilities, and shareholders' equity. This explanation was in response to staff's earlier request for such information. Without such information it is not possible to accurately assess the corporate Dischargers ability to pay. In addition, the Water Board has not received any information concerning Mr. McCain's ability to pay as an individual.

The State Water Resources Control Board's 2002 Enforcement Policy places the burden of proof regarding a discharger's ability to pay a liability upon the discharger. To date, the Dischargers have provided insufficient financial information to merit a reduction in liability based upon their ability to pay. The Dischargers continue to have an opportunity to provide the requested financial information to the Lahontan Water Board showing an inability to pay the proposed liability.

e. *The effect on the Discharger's ability to continue its business;*

Lahontan Water Board staff is not aware of any reason that the Discharger's ability to continue business would be affected by the proposed liability. The Discharger now has the opportunity to provide any information to the Lahontan Water Board showing an inability to continue its business due to payment of the proposed liability.

f. *Any voluntary clean-up efforts undertaken by the violator,*

Lahontan Water Board staff does not have any information indicating that the Dischargers initiated any clean-up efforts prior to receiving CAO No. R6T-2006-0001, which ordered them to clean up and abate the effects of the unauthorized discharge of earthen materials and other dam debris to Willow Creek.

g. *Prior history of violations;*

The Dischargers have no recorded prior violations with the Lahontan Water Board. The violations referred to in this Administrative Civil Liability, however, include non-compliance of requirements that have due dates dating back to 2003.

h. *Degree of culpability;*

B.J. Deis is subject to this Complaint because it is responsible for the activities and impacts associated with Skeet Dam and Buz Dam, which are located on properties owned by B.J. Deis. Additionally, as the current property owner, B.J. Deis knew, or should have known that there were waste discharges associated with the construction of Skeet Dam and the failure of Skeet and Buz Dams, and it had the ability to control the waste discharges. B.J. Deis is also a discharger named in permits and enforcement actions directly related to the two dam

projects; therefore, B.J. Deis is responsible for complying with the permits and enforcement actions.

McCain and Associates is subject to this Complaint because it had direct oversight of Skeet Dam and Buz Dam design and construction, and it knew or should have known that there were waste discharges associated with the construction of Skeet Dam and the failure of Skeet and Buz Dams, and it had the ability to control the waste discharges. Additionally, McCain and Associates is a discharger named in enforcement actions directly related to both dam projects; therefore, McCain and Associates is responsible for complying with the enforcement actions.

Mr. McCain is a corporate officer of both B.J. Deis and McCain and Associates as well as the registered engineer and employee of McCain and Associates. Mr. McCain is responsible as the individual who had substantial, if not exclusive control, over the permitting, design, construction, and compliance with the permits and enforcement actions.

Additionally, all parties named in this Complaint were involved in securing the appropriate dredge and fill permits and water quality certification for Buz Dam. Accordingly, the Dischargers knew or should have known that they were required to obtain the same permits prior to the construction of Skeet Dam. At a minimum, Dischargers have a working knowledge of the Lahontan Regional Board's permitting process and could have easily inquired about the need to obtain permits prior to constructing Skeet Dam. Accordingly, the Dischargers level of culpability merits a substantial liability.

i. *Economic savings resulting from the violation; and,*

If the Dischargers had submitted an application for 401 Certification for the construction of Skeet Dam, the typical filing fee submitted with the application is \$500. Staff is unaware of any other avoided costs associated with the violations including the discharge incidents.

j. *Other matters as justice may require.*

Staff Costs

Staff have spent time investigating the project and preparing the Complaint. Estimated staff costs for investigation and Complaint preparation are **\$48,433**.

Violation Period for Recommended Liability for Reporting Violations

In determining the recommended liability associated with reporting violations, Lahontan Water Board staff believes it is reasonable to base violation periods according to when the Dischargers were notified of an upcoming reporting date

or first notified of a past due reporting date. This approach in some instances, results in a violation period less than that used to calculate the maximum potential liability. This situation occurs when the Dischargers fail to submit a report on time and after some time passes, receives an NOV or other notification of the violation.

Delayed Implementation

Some of the temporary stabilization work required by CAO No. R6T-2006-001, as amended, involved in-stream work that may have required authorization from the Corps and the DFG. In numerous submittals from the Dischargers, Mr. McCain explains that the measures to stabilize Sites E and F were not implemented and the construction debris was not recovered from Willow Creek by the CAO-specified compliance date because the Dischargers had not received authorization from the Corps and/or the DFG to do so.

There was some confusion between the Dischargers and these agencies regarding what type of authorization (verbal or written) was required before beginning the work. Staff acknowledges and understands the delaying effect of the confusion. Therefore, the proposed liability does not include any consideration of the violations associated with the delayed implementation of temporary stabilization measures for Sites E and F, or for recovery of construction debris.

2002 Enforcement Policy

The 401 Certification for the repair of Buz Dam specified conditions that required the B.J. Deis to submit revegetation monitoring reports. By receiving revegetation monitoring reports, staff would be able to determine if B.J. Deis had fulfilled the compensatory mitigation required as part of the project.

The 2002 Enforcement Policy states, "Failure to comply with conditions specified in the certification is a priority violation." The Dischargers' failure to comply with the conditions in their 401 Certification requiring the submittal of annual revegetation reports is a priority violation. Additionally, failure to submit the required revegetation reports has prevented both B. J. Deis and staff from determining if compensatory wetlands mitigation has been successfully progressing, or if additional action is required to compensate for the lost of wetlands habitat associated with the repair of Buz Dam.

Lahontan Water Board's Notice to Dischargers

The Lahontan Water Board's May 4, 2006 letter to the Dischargers put the Dischargers on notice that B.J. Deis was still required to submit annual revegetation monitoring reports for the years 2006 and 2007. The May 4, 2006 letter and the March 27, 2007 NOV also reminded the Dischargers that they

were still required to submit (a) a site plan that delineates the quantity, condition, and location of the existing wetland mitigation areas for Buz Dam and (b) a remedial action plan if the required mitigation areas had not been established. Despite these notifications, Lahontan Water Board staff did not receive the 2006 revegetation monitoring report until May 22, 2007, and staff has still not received the site plan, and a remedial action plan if necessary.

Repeated Violation of Requirements

The Dischargers' non-submittal of annual revegetation monitoring reports for the years 2003 - 2006 constitutes repeated violations of requirements. These repeated violations are evidence of a pattern of non-compliance with Water Board requirements.

After receiving the Lahontan Water Board's February 16, 2006 Water Code section 13267 Order for Information, the Dischargers were quick to provide a revegetation monitoring report by the compliance date. The report the Dischargers provided covered the 2003 - 2005 reporting period. Even after receiving the February 16, 2006 Water Code section 13267 Order for Information, a subsequent reminder letter about the upcoming due dates, and the March 27, 2007 NOV, however, the Dischargers again failed to submit the 2006 annual revegetation monitoring report that was required by August 9, 2002 401 Certification.

16. Amount of Civil Liability

The Assistant Executive Officer of the Lahontan Water Board considered the above-referenced factors and proposes that administrative civil liability be imposed by the Lahontan Water Board in the amount of **\$100,000** pursuant to Water Code sections 13268, 13350 and 13385.

This recommended amount is significantly lower than the maximum potential amount partly because a large portion (\$10,710,000) of the maximum liability is associated with reporting violations. While the reporting violations have impeded the Lahontan Water Board staff's ability to track progress regarding mitigation and cleanup and abatement activities, the direct impacts to water quality and beneficial uses associated with reporting violations have been minimal compared to those associated with the discharge incidents. This approach avoids overly burdensome liability associated with long violations periods that had minimal water quality impact.

WAIVER OF HEARING

You may waive the right to a hearing. Waiver of your right to a hearing constitutes acceptance of the assessment of civil liability in the amount set forth within the Complaint. If you wish to waive your right to a hearing, an authorized person must sign the waiver form below, and send it with two separate cashier's checks or money orders divided and made payable as follows:

1. **\$92,000** payable to the **California State Water Resources Control Board, Cleanup and Abatement Account.**
2. **\$8,000** payable to the **California State Water Resources Control Board, Waste Discharge Permit Fund.**

Send your remittance to the address below.

Lahontan Water Quality Control Board
Attn: Robert S. Dodds, Assistant Executive Officer
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Please note that any waiver will not be effective until reasonable opportunity for public participation has been provided pursuant to federal National Pollutant Discharge Elimination System regulations (40 Code of Federal Regulation [CFR] parts 122, 123, and 124). The Lahontan Water Board will notify interested persons of any proposed settlement for the recommended liability and will solicit comments on the settlement for a period of thirty (30) days. Any settlement will not become final until after the public comment period.

Ordered by:



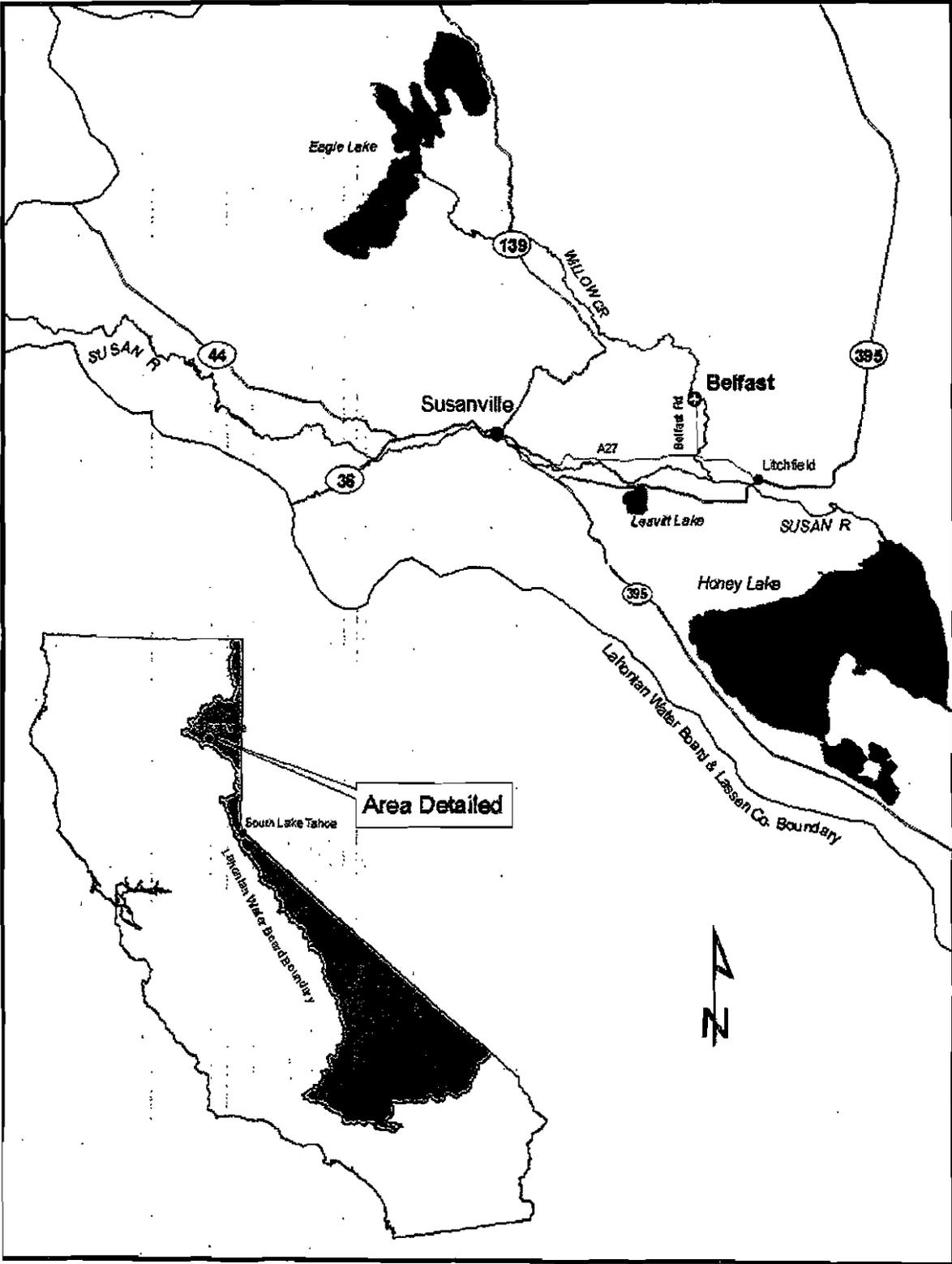
ROBERT S. DODDS
ASSISTANT EXECUTIVE OFFICER

Dated: November 16, 2007

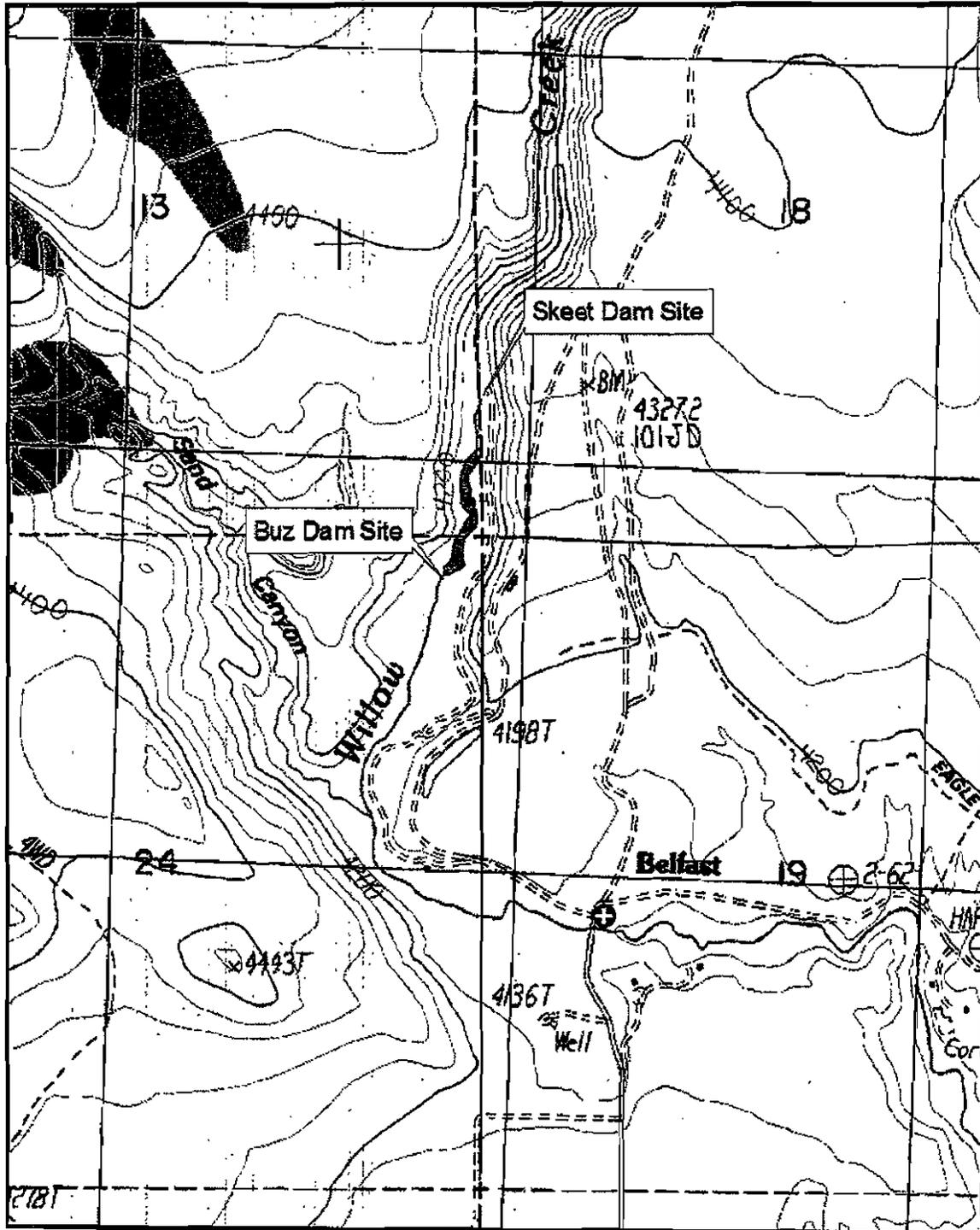
- Attachments:
- Attachment A: Vicinity Map – Belfast Ranch
 - Attachment B: Site Map – Belfast Ranch
 - Attachment C: Map identifying locations that require stabilization (Sites A – F)
 - Attachment D: Belfast Ranch Liability Spreadsheets (contains Worksheets 1-4)

05-0052

Attachment A: Vicinity Map



Attachment B: Site Map



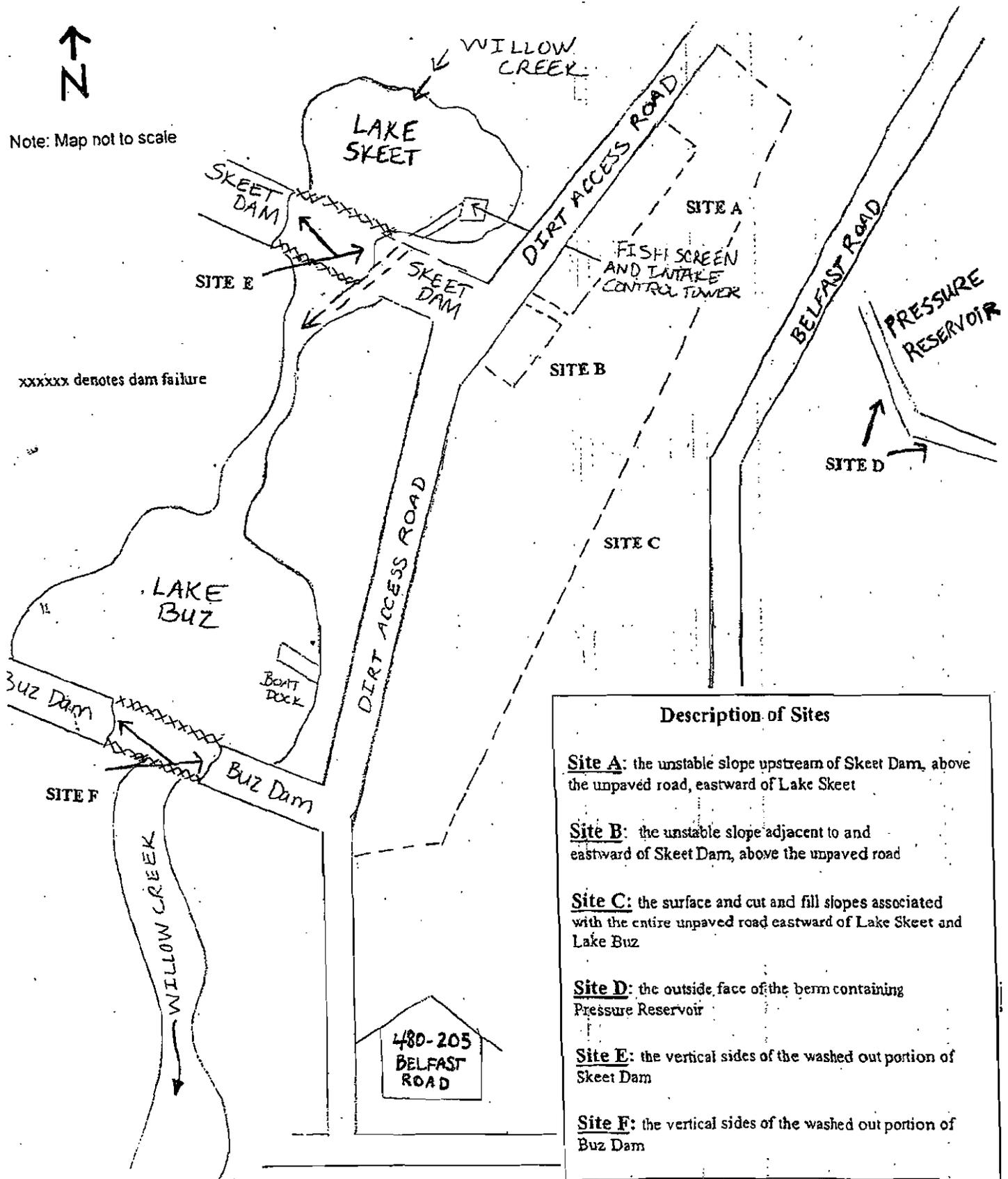
0 0.1 0.2 0.4 Miles



Dam site locations are approximate

05-0054

Attachment C: Map identifying locations (Sites A – F) that required stabilization pursuant to CAO No. R6T-2006-0001, as amended



Description of Sites	
Site A:	the unstable slope upstream of Skeet Dam, above the unpaved road, eastward of Lake Skeet
Site B:	the unstable slope adjacent to and eastward of Skeet Dam, above the unpaved road
Site C:	the surface and cut and fill slopes associated with the entire unpaved road eastward of Lake Skeet and Lake Buz
Site D:	the outside face of the berm containing Pressure Reservoir
Site E:	the vertical sides of the washed out portion of Skeet Dam
Site F:	the vertical sides of the washed out portion of Buz Dam

Attachment D - Worksheet 1 - Maximum Potential Liability						
Violation	Violation	Water Code Liability	Liability (\$/day)	Days	Amount	Notes
Construction of Skeet Dam w/out permit	CWA 301	13385 (c)(1)	10,000	1	\$10,000	Assumes material to build dam was discharged into Willow Creek during one day in June 2005
Basin Plan Prohibition- Discharge of Earthen and Settleable Materials w/failure of Skeet Dam	Basin Plan Prohibition	13385 (c)(1)	10,000	16	\$160,000	Violation Pd 12/16/05-12/31/05 (16 days)
Basin Plan Prohibition- Discharge of Earthen and Settleable Materials w/failure of Buz Dam	Basin Plan Prohibition	13385 (c)(1)	10,000	16	\$160,000	Violation Pd 12/16/05-12/31/05 (16 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2003	401 WQC	13385 (c)(1)	10,000	365	\$3,650,000	Violation period 10/16/03-10/15/04 (365 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2004	401 WQC	13385 (c)(1)	10,000	365	\$3,650,000	Violation period 10/16/04-10/15/06 (365 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2005	401 WQC	13385 (c)(1)	10,000	143	\$1,430,000	Violation period 10/16/05- 03/07/06 (143 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2006	401 WQC	13385 (c)(1)	10,000	198	\$1,980,000	Violation Pd 10/16/06-05/01/07*, Discharger on notice that 2006 report was due in 05/04/06 Water Bd letter to Dischargers
Violation of the CAO for failing to complete Req 4 (Full implementation of the TSP)	13304	13350(e)(1)	5,000	214	\$1,070,000	Violation period is 09/29/06-05/01/07*
Violation of 13267(b)(1) for failing to submit a site plan for Lake Buz	13267(b)(1)	13268(b)(1)	1,000	290	\$290,000	Violation period 07/16/06-05/01/07* (290 days)
Violation of the 13267(b)(1) order in CAO for failing to submit Req 5 (verification that TSP was fully implemented)	13267(b)(1)	13268(b)(1)	1,000	201	\$201,000	Violation period is 10/13/06-05/01/07* (201 days)
Violation of the 13267(b)(1) order in CAO for failing to submit Req 6 (wetlands delineation for Lake Skeet)	13267(b)(1)	13268(b)(1)	1,000	302	\$302,000	Violation period is 07/04/06-05/01/07* (302 days)
Maximum Potential Civil Liability: Water Code Sections 13385 (c)(1), 13350 (e)(1), 13268 (b)(1)					\$12,902,000	*For purposes of determining if violation period, May 1, 2007 was used as the end date in the violation period.

5-0056

10/11/2007

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Attachment D - Worksheet 2 - Water Code section 13385 Civil Liability						
Violation	Violation	Water Code Liability	Liability (\$/day)	Days	Amount	Notes
Construction of Skeet Dam w/out permit	CWA 301	13385 (c)(1)	10,000	1	\$10,000	Assumes material to build dam was discharged into Willow Creek during one day in June 2005
Total Maximum Potential Civil Liability for violation of Clean Water Act section 301					\$10,000	
Basin Plan Prohibition- Discharge of Earthen and Settleable Materials w/failure of Skeet Dam	Basin Plan Prohibition	13385 (c)(1)	10,000	16	\$160,000	Violation Pd 12/16/05-12/31/05 (16 days)
Basin Plan Prohibition- Discharge of Earthen and Settleable Materials w/failure of Buz Dam	Basin Plan Prohibition	13385 (c)(1)	10,000	16	\$160,000	Violation Pd 12/16/05-12/31/05 (16 days)
Total Maximum Potential Civil Liability for violations of Basin Plan Prohibitions					\$320,000	
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2003	401 WQC	13385 (c)(1)	10,000	365	\$3,650,000	Violation period 10/16/03-10/15/04 (365 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2004	401 WQC	13385 (c)(1)	10,000	365	\$3,650,000	Violation period 10/16/04-10/15/06 (365 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2005	401 WQC	13385 (c)(1)	10,000	143	\$1,430,000	Violation period 10/16/05- 03/07/06 (143 days)
Violation of the 401 WQC for failure to submit revegetation monitoring reports for 2006	401 WQC	13385 (c)(1)	10,000	198	\$1,980,000	Violation Pd 10/16/06-05/01/07, Discharger on notice that 2006 report was due in 05/04/06 Water Bd letter to Dischargers
Total Maximum Potential Civil Liability for violations of 401 Certification					\$10,710,000	
Total Maximum Potential Civil Liability for violations of Water Code section 13385(c)(1)					\$11,940,000	For purposes of determining the violation period, May 2007 was used as the end date for the violation period.

05-0057

Attachment D - Worksheet 3 - Water Code section 13350 Civil Liability						
Violation	Water Code Violation	Water Code Liability	Liability (\$/day)	Days	Max Amount	Notes
Violation of the CAO for failing to complete Req 4 (Full implementation of the TSP)	13304	13350(e)(1)	5,000	214	\$1,070,000	Violation period is 09/29/06-05/01/07*
Total Maximum Potential Civil Liability Issued pursuant to Water Code section 13350(e)(1)					\$1,070,000	*For purposes of determining the violation period, May 1, 2007 was used as the end date for the violation period.

05-0058

10/11/2007

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Attachment D - Worksheet 4 - Water Code section 13268 Civil Liability						
Violation	Water Code Violation	Water Code Liability	Liability (\$/day)	Days	Amount	Notes
Violation of 13267(b)(1) for failing to submit a site plan for Lake Buz	13267(b)(1)	13268(b)(1)	1,000	290	\$290,000	Violation period 07/16/06-05/01/07* (290 days)
Violation of the 13267(b)(1) order in CAO for failing to submit Req 5 (verification that TSP was fully implemented)	13267(b)(1)	13268(b)(1)	1,000	201	\$201,000	Violation period is 10/13/06-05/01/07* (201 days)
Violation of the 13267(b)(1) order in CAO for failing to submit Req 6 (wetlands delineation for Lake Skeet)	13267(b)(1)	13268(b)(1)	1,000	302	\$302,000	Violation period is 07/04/06-05/01/07* (302 days)
Total Maximum Potential Civil Liability Issued pursuant to Water Code section 13268 (b)(1)					\$793,000	For purposes of determining the violation period, May 1, 2007 was used as the end date for the violation period.

05-0059

10/11/2007

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California Regional Water Quality Control Board
Lahontan Region



Linda S. Adams
*Secretary for Environmental
Protection*

2501 Lake Tahoe Boulevard, South Lake Tahoe, California 96150
(530) 542-5400 • Fax (530) 544-2271
<http://www.waterboards.ca.gov/lahontan>

Arnold Schwarzenegger
Governor

**WAIVER
OF RIGHT TO A
PUBLIC HEARING**

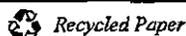
B.J. Deis
c/o McCain and Associates
Everd A. McCain
P.O. Box 448
Susanville, California 96130

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R6T-2007-0007 ISSUED TO EVERD A. MCCAIN, B.J. DEIS, AND MCCAIN AND ASSOCIATES, FOR (1) VIOLATION OF WASTE DISCHARGE PROHIBITIONS SPECIFIED BY THE WATER QUALITY CONTROL PLAN FOR THE LAHONTAN REGION FOR THE UNAUTHORIZED DISCHARGE OF EARTHEN MATERIALS TO WILLOW CREEK, (2) VIOLATION OF WATER CODE SECTION 13267 FOR FAILURE TO SUBMIT TECHNICAL REPORTS (3) VIOLATION OF CLEAN WATER ACT SECTION 301, (4) VIOLATION OF WATER CODE 13304, AND (5) VIOLATION OF CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION – BELFAST RANCH, SKEET DAM AND BUZ DAM, LASSEN COUNTY, WDID NOS. 6A180508N05 AND WDID NO. 6A180105013

By signing below, Everd A. McCain, B.J. Deis, and McCain and Associates, agree that they waive their right to request a hearing before the California Regional Water Quality Control Board, Lahontan Region (Water Board) with regard to the violations alleged in the above-referenced Complaint and to remit payment for the civil liability imposed. (For payment, please make one check payable to the "California State Water Resources Control Board, Cleanup and Abatement Account" in the amount of \$92,000 and one check payable to the "California State Water Resources Control Board, Waste Discharger Permit Fund in the amount of \$8,000.)

Please note that any waiver will not be effective until reasonable opportunity for public participation has been provided pursuant to federal National Pollutant Discharge Elimination System (NPDES) regulations (40 Code of Federal Regulations [CFR] Parts 122, 123, and 124). In accordance with 40 CFR part 123.27(d)(2)(iii), a 30-day public

California Environmental Protection Agency



05-0060

Everd A. McCain, B.J. Deis
and McCain and Associates

comment period will be required for a proposed settlement of administrative civil liability. The Water Board will notify interested persons of any proposed settlement for the recommended liability and will solicit comments on the settlement for a period of 30 days.

Everd A. McCain, B.J. Deis, and McCain and Associates understand that even though this waiver of a right to a hearing has been signed, the Water Board may schedule an agenda item to determine if it will accept the settlement. This agenda item will be limited to a consideration of whether the settlement is in the public interest. The Water Board may accept or reject the settlement or it may reject the Administrative Civil Liability Complaint. If the Water Board accepts the settlement or rejects the Complaint, no further hearing will be required. If the Water Board rejects the settlement, the Water Board will schedule a public hearing at a subsequent meeting. If the Water Board holds a public hearing, it will be noticed and all parties will have the opportunity to present evidence to the Water Board.

Signature Title Date

Print your name

Signature Title Date

Print your name

Signature Title Date

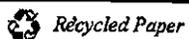
Print your name

Everd A. McCain, B.J. Deis
and McCain and Associates

-3-

Send this signed form and settlement check to:
California Regional Water Quality Control Board – Lahontan Region
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

California Environmental Protection Agency



05-0062