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January 4, 2015

Via E-Mail, First Class Mail and Hand Delivery
(see enclosed Proof of Service)

State Water Resources Control Board
Division of Water Rights
Attn: California WaterFix Hearing Staff
P.O. Box 2000
Sacramento, CA 95812-2000
CWFhearing@waterboards.ca.gov

Re: **City of Sacramento's Protest and Notice of Intent to Appear -
California WaterFix Petition for Change Hearing**

Dear California WaterFix Hearing Staff:

On behalf of Protestant City of Sacramento, we hereby submit the enclosed Protest, and accompanying Notice of Intent to Appear, related to the Department of Water Resources' and the United States Bureau of Reclamation's water rights change petition for the California WaterFix Project.

As explained in the enclosed protest, Protestant has previously coordinated and collaborated with other North State Water Alliance (NSWA) and American River Water Agencies (ARWA) parties in preparing and submitting detailed comments on the Bay-Delta Conservation Plan Draft EIR/EIS (DEIR/EIS), and the California Water Fix Recirculated DEIR/Supplemental DEIS (RDEIR/SDEIS). The City of Sacramento will similarly be coordinating with the NSWA and ARWA parties to present a consolidated case-in-chief during the SWRCB's hearing on certain common issues, including issues regarding whether the requested changes would operate to the injury of any legal user of the water involved and whether the requested changes would unreasonably affect fish and wildlife. Consistent with this approach, Protestant and other NSWA and ARWA parties have identified in their respective Notices of Intent to Appear both witnesses who will be providing testimony to support their respective protests, and witnesses who will be providing testimony on certain common issues.

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Other parties, with concerns similar to those of the NSWA and ARWA parties, may adopt, in whole or in part, these expert witnesses' testimony to support their respective protests. For this reason, these experts also may be listed on those other parties' Notices of Intent to Appear.

We are seeking to adhere to the SWRCB's directive that only witnesses for Part I be identified in the current Notices of Intent to Appear. However, many of us have endeavored to take environmental matters, including instream flow and fisheries, into account including in our water planning, operations, and impact analyses. Please be aware that it may not be possible in all respects to separate the intertwined topics of water supply and environment.

If you have any questions regarding the enclosed protest or notice of intent to appear, please do not hesitate to contact me.

Respectfully submitted,

LENNIHAN LAW
A Professional Corporation

By: 
Martha H. Lennihan

Enclosure(s) as Indicated

Cc w/enc:
California Department of Water Resources
c/o James Mizell
1416 Ninth Street, Room 1104
Sacramento, CA 95818
James.Mizell@water.ca.gov

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U.S. Bureau of Reclamation
c/o Amy Aufdemberge
U.S. Department of Interior
Office of Regional Solicitor, Pacific Southwest Region
2800 Cottage Way
Sacramento, CA 95825-1898
Amy.Aufdemberge@sol.doi.gov

Randi Knott, Office of the City Manager
Joe Robinson, Office of the City Attorney
Bill Busath, Department of Utilities

North State Water Alliance
American River Water Agencies

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P. O. Box 2000, Sacramento, CA 95812-2000
Info: (916)341-5300, FAX (916)341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

PROTEST – PETITION
This form may also be used for objections

**PETITION FOR TIME EXTENSION, CHANGE, TEMPORARY URGENT CHANGE
OR TRANSFER ON**

APPLICATION ____ PERMIT ____ LICENSE ____ (see Attachment Item 1)

**of the California Department of Water Resources (“DWR”) and the United States
Department of the Interior, Bureau of Reclamation (“Reclamation”)**

I (We) have carefully read the NOTICE OF PETITION, REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE CALIFORNIA WATERFIX PROJECT, dated October 30, 2015

Address, email address and phone number of protestant or authorized agent:

CITY OF SACRAMENTO
Martha H. Lennihan
LENNIHAN LAW,
A Professional Corporation
1661 Garden Highway, Suite 102
Sacramento, CA 95833

(916) 799-4460 cell (preferred)
(916) 646-4460 office
mlennihan@lennihan.net

Supplemental sheets are attached. To simplify this form, all references herein are to protests and protestants although this form may be used to file comments on temporary urgent changes and transfers.

Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS
(Prior right protests should be completed in the section below):

- the proposed action would not best serve the public interest
- the proposed action would be contrary to law
- the proposed action would have adverse environmental impacts

State facts which support the foregoing allegations: **see Attachment Item 2**

Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.) **see Attachment Item 3**

Protest based on INJURY TO PRIOR RIGHTS:

To the best of my (our) information and belief the proposed change or transfer would result in injury as follows: **see Attachment Item 4**

Protestant claims a right to the use of water from the source from which petitioners are diverting, or propose to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative right or riparian right): **see Attachment Item 5**

List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree): **see Attachment Item 5**

Where is your diversion point located? **see Attachment Item 5**

If new point of diversion is being requested, is your point of diversion downstream from petitioners' proposed point of diversion? **see Attachment Item 5**

The extent of present and past use of water by protestant or its predecessors in interest is as follows: **see Attachment Item 5**

Under what conditions may this protest be disregarded and dismissed? **see Attachment Item 3**

All protests must be signed by the protestant or authorized representative:

Signed  Date: January 4, 2016

Martha H. Lennihan, Lennihan Law APC
Authorized representative for the CITY OF SACRAMENTO

All protests must be served on the petitioner. Provide the date served and method of service used: **see Attachment Item 6**

ATTACHMENT TO CITY OF SACRAMENTO'S PROTEST TO WATER RIGHTS CHANGE PETITION OF DWR AND RECLAMATION FOR CALIFORNIA WATERFIX PROJECT

Introduction

Protestant previously has coordinated and collaborated with other North State Water Alliance (NSWA) and American River Water Agencies (ARWA) parties in preparing and submitting detailed comments on the Bay-Delta Conservation Plan Draft EIR/EIS (DEIR/EIS), and the California Water Fix Recirculated DEIR/Supplemental DEIS (RDEIR/SDEIS). Protestant similarly will be coordinating with the other NSWA and ARWA parties to present a consolidated case-in-chief during the SWRCB's hearing on certain common issues, including issues regarding whether the requested changes would operate to the injury of any legal user of the water involved and whether the requested changes would unreasonably affect fish and wildlife. Consistent with this approach, Protestant and the other NSWA and ARWA parties have identified in their respective Notices of Intent to Appear both witnesses who will be providing testimony to support their individual protests and witnesses who will be providing testimony on certain common issues.

Item 1 (Petitioners' Permits)

DWR: Permits 16478, 16479, 16481 and 16482 (Applications 5630, 14443, 14445A, 17512)

Reclamation: Permits 11315, 11316, 11967, 11968, 11969, 11971, 11973, 12364, 12721, 12722 and 12723 (Applications 13370, 13371, 5628, 15374, 15375, 16767, 17374, 17376, 5626, 9363 and 9364)

Item 2 (facts supporting protest based on environmental or public interest considerations)

Water Code section 1701.2, subdivision (c), requires a water rights change petition to include “all information reasonably available to the petitioner, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.”

Although the supplement to DWR’s and Reclamation’s August 25, 2015 Petition (the “Petition”) contains some general statements about the California WaterFix Project’s alleged benefits to fish and wildlife (see Petition Supplement, pp. 14-15), the Petition does not contain sufficient information to satisfy the requirements of Water Code section 1701.2, subdivision (c).

The Petition does not discuss any of the evidence presented in NSWA’s July 28, 2014 comments on the DEIR/EIS or in NSWA’s October 30, 2015 comments on the RDEIR/SDEIS. That evidence describes in great detail the adverse effects that the proposed California WaterFix Project would have on fish and wildlife.

Among other things, NSWA’s comments include detailed comments by fisheries expert Dave Vogel, which concluded that the California WaterFix Project would cause catastrophic adverse impacts on anadromous salmonids. Most notably, because of the proposed Project intakes’ locations on the Sacramento River, there would not be sufficient sweeping velocities to avoid impingement of fish against the intake screens and associated injuries. The estimated fish exposure times in front of the proposed intakes (which is a measure of the threat to migrating salmonids) are very long, especially in comparison to exposure times for other fish screens in California.

NSWA’s comments also include expert analyses by Professor Robert Latour, which describes how operation of the proposed new California Water Fix diversion facilities would have adverse impacts on Delta smelt life stages, including survival, growth, maturation schedules, and reproductive success over short, medium and long time periods. The Petition does not discuss any of this information and instead simply states that the proposed new points of diversion would be located outside of the primary habitat of Delta smelt and longfin smelt. (Petition Supp., at pp. 7-8.)

NSWA’s comments also state that operation of the California WaterFix Project’s proposed north Delta diversion could adversely affect Sacramento Valley waterfowl and the Pacific Flyway by reducing diversions of water in the Sacramento Valley that support avian habitat values on both irrigated cropland and wetlands. Mark Petrie of Ducks Unlimited described these impacts in detail in his comments submitted to the State Water Resources Control Board in 2012. (See http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/mark_petrie.pdf.)

Item 3 (conditions under which this protest may be dismissed)

Protestant is working with the other NSWA and ARWA parties to develop proposed conditions for DWR's and Reclamation's water right permits that would be sufficient to allow protestant to dismiss its protest. Protestant and the NSWA parties plan to submit those proposed conditions for or during the SWRCB's hearing on DWR's and Reclamation's Petition. In general, those conditions would require DWR and Reclamation to operate the State Water Project and the Central Valley Project in a manner that would eliminate the potential impacts described in Items 2 and 4 of this protest.

Item 4 (facts supporting protest based on injury to prior rights)

NSWA and ARWA parties divert and use water under various water right permits and licenses, pre-1914 appropriative and riparian rights, and contracts with DWR and Reclamation. Protestant's specific rights are described in Attachment Item 5.

If the SWRCB were to grant DWR's and Reclamation's water rights change Petition, and if DWR and Reclamation then were to operate the State Water Project ("SWP") and Central Valley Project ("CVP") to divert and re-divert water at the proposed new points of diversion, then NSWA and ARWA parties including the City of Sacramento could be injured in several ways, including the following: (a) the new operations of the SWP and CVP could result in lower SWP and CVP settlement contract and water service contract water supplies being available for diversion and use by NSWA parties than would occur without the California WaterFix project; (b) these new operations could change the amounts of storage in SWP and CVP reservoirs and the flows in rivers controlled by the SWP and CVP, and as a result, could create physical limitations on the abilities of NSWA and ARWA parties to divert water under their SWP and CVP contracts, their Warren Act and other contracts or their water rights; and (c) the new Delta flow criteria required by Water Code section 85086, subdivision (c)(2) could be incorporated into a revised Bay/Delta Water Quality Control Plan, and NSWA members could be required to contribute to the implementation of those new requirements.¹ If the SWRCB issues an order approving DWR's and Reclamation's Petition, then the order should include sufficient conditions on DWR's and Reclamation's operations of the SWP and CVP to assure that such potential injuries to NSWA and ARWA parties will not occur.

Water Code section 1702 provides that, before the SWRCB may issue an order granting a water rights change petition, "the petitioner must establish, to the satisfaction of the board, and it shall find, that the change will not operate to the injury of any legal user of the water involved." To meet the requirements in section 1702 that apply to petitioners, and to assist the SWRCB in meeting its obligations under Water Code section 1702, the SWRCB's regulations, California Administrative Code, title 23, section 794, subdivision (a), require each water rights change petition to provide various types of information, including the following:

- (1) The amount(s) of water which would have been diverted, consumptively used, or stored under the water right in the absence of the proposed

¹ Water Code section 85086, subdivision (c)(2), provides that any SWRCB order approving the California WaterFix petition "shall include appropriate Delta flow criteria." Water Code section 85086, subdivision (c)(1) provides that these criteria "shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions." Parts I and II of the SWRCB's hearing on the California WaterFix petition will need to address the issue of ensuring that the appropriate flow criteria contained in any SWRCB order on the petition are capable of being implemented without causing injury to other legal users of water and without causing any unreasonable effects on fish and wildlife.

change(s), (a) during the period for which the change is requested, or (b) in a maximum year if the change is permanent;

(2) The amount(s) of water proposed for change, transfer or exchange;

...

(6) The existing and the proposed diversion, release and return flow schedules if stored water is involved or if the streamflow regime will be changed.

...

(9) Information identifying any effects of the proposed change(s) on other known users of water, including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s).

DWR's and Reclamation's Petition for the California WaterFix Project does not contain this required information. Instead, the Petition simply states that it is "limited in scope" and "proposes only to add points of diversion and redirection" and not to change "any other aspect of existing SWP/CVP permits." (Petition Supp., at p. 1.)

The Petition goes on to state that "operations both now and in the future will not impact the quantity of water available for water users in the watershed because these demands are accounted for prior to diversions to storage or export." (Petition Supp., at p. 19.) The Petition, however, does not demonstrate that the proposed changes would not operate to the injury of any legal user of the water involved because: (i) the Petition does not describe any definite operation plan for the CVP and the SWP with the proposed new points of diversion, and (ii) the modeling conducted by DWR and Reclamation during the CEQA/NEPA process was flawed (see NSWA's July 28, 2014 comments on the DEIR/EIS and NSWA's Oct. 30, 2015 comments on the RDEIR/SDEIS.) As discussed in the MBK Engineers technical memoranda that were included in NSWA's comments, the modeling that DWR and Reclamation conducted for the DEIR/EIS and RDEIR/SDEIS has the following flaws:

1. The incorporation of climate change into the model improperly relies on only one climate change projection when many climate change scenarios are possible, and improperly ignores reasonably foreseeable adaptation measures.
2. The model was built on a benchmark study that had numerous inaccuracies.
3. The model coding and data issues significantly skew the analysis and conflict with actual real-time operational objectives and constraints.
4. The "high outflow scenario" is not sufficiently defined for analysis.
5. Delta Cross-Channel operational assumptions overestimate October outflow.

6. San Luis Reservoir operational assumptions produce results inconsistent with real-world operations.

The Petition refers to the analysis of Alternative 4A in the California WaterFix RDEIR/SDEIS. (Petition Supp., at pp. 12, 13.) However, neither the Petition nor the RDEIR/SDEIS contains sufficient information regarding the details of how the CVP and SWP would be operated if the SWRCB were to grant the Petition, particularly with respect to the amounts of spring outflow and the quantity and timing of water diverted at the proposed new points of diversion and re-diversion. For example, the RDEIR/SDEIS and the Petition state that additional outflow may be required in order to meet the needs of threatened and endangered fish species (RDEIR/SDEIS at p. 4.1-13; Petition Supp., at p. 13), but neither the Petition nor the RDEIR/SDEIS describes the quantity, the timing or the source of water for this additional outflow. In addition, the Petition does not state when water would be diverted at each of the various existing and proposed points of diversion or what the quantities of diversions at each point of diversion would be. The Petition does not even state how DWR and Reclamation would make the decisions about where and when to divert water. As a result, neither interested parties nor the SWRCB can evaluate the potential effect of proposed Project operations.

Moreover, the modeling runs used for the environmental analysis in the RDEIR/SDEIS: (i) do not comport with the proposed flows in Alternative 4A, and (ii) overestimate Delta outflow and underestimate exports by several hundred thousand acre-feet per year. For example, the model calculates compliance with salinity water quality objectives mandated by State Water Resources Control Board Revised Decision 1641 ("RD-1641") at Three Mile Slough. In contrast, Alternative 4A contemplates compliance with the same salinity requirement at Emmaton, which is located substantially downstream from Three Mile Slough. Compliance with this requirement at Three Mile Slough would require less outflow than would be required for compliance with the same requirement at Emmaton. Because the modeling analysis assumed compliance with this requirement would occur at Three Mile Slough while the proposed Alternative 4A now contemplates compliance with this requirement at Emmaton, the estimates of the outflows needed to meet salinity standards that were used in the modeling are too low.

Moreover, the flawed modeling that was used for the DEIR/S and not corrected for the RDEIR/SDEIS overestimated Delta outflows by about 200,000 acre-feet/year and underestimated exports to the CVP South of Delta and SWP contractors by about the same amount. That flawed modeling further underestimated diversions at the North Delta Diversion by about 500,000 acre-feet/year, thereby overestimating flows into the Delta and concluding that Project operations in the Delta would be much more benign than they actually would be.

Operations of the SWP and CVP using the proposed points of diversion and rediversion must preserve water right priorities. (*El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal. App. 4th 937, 966.) Petitioners must demonstrate how future operations of the CVP and SWP would avoid requiring upstream senior diverters and CVP and SWP contractors that would not be benefitted

by the proposed changes to forego diversions so that the CVP and SWP can meet their operational requirements.

For example, in dry years such as those experienced in the last two years, DWR and Reclamation have not been able to meet the D-1641 flow and salinity requirements and have had to file several temporary urgency change petitions, which asked the SWRCB to reduce these requirements. Meeting existing flow and salinity requirement therefore could require additional flows in the interior Delta during future dry years. However, the proposed new diversion of water north of the Delta would reduce freshwater inflows into the Delta. To meet even existing standards while reducing Delta inflows, the CVP and SWP would need some new source of water, but no new source of water is described in the Petition.

The RDEIR/SDEIS states that such water would be obtained through water transfers, project reoperation or other sources. (RDEIR/SDEIS at 4.1-6.) However, this general statement does not meet the requirement that the petitioners demonstrate that the proposed California WaterFix Project would not injure other legal users of water. Petitioners must submit sufficient evidence and an adequate operational plan to establish that they would not operate facilities at the proposed points of diversion and re-diversion in a manner that would injure other legal users of water.

Petitioners DWR and Reclamation operations using the proposed new points of diversion could injure the Protestant's exercise of its rights under its water rights and settlement contract with Reclamation, including by decreasing the water available for diversion, the timing and level of flows affecting Protestant's ability to divert, and Reclamation's ability to comply with its settlement contract obligations to Protestant. Petitioners have made no showing that such injury will not occur, in spite of the clear potential for such injury. In addition, Protestant's ability to divert water at the E. A. Fairbairn Water Treatment Plant intake for itself and its wholesale customers is constrained by conditions in Permit Nos. 11358, 11359, 11360, and 11361 that limit diversions if lower American River flow falls below the so-called Hodge flow criteria.² Operations of CVP and SWP reservoirs using the proposed points of diversion and rediversion could result in increased frequency of these diversion limitations, which would reduce the amount of water Protestant is able to divert at its E. A. Fairbairn Water Treatment Plant intake for use by Protestant's retail water service customers and for delivery to Protestant's wholesale customers. DWR and Reclamation must demonstrate that CVP and SWP operations using the proposed points of diversion and rediversion will not cause injury to Protestant and its wholesale customers by increasing the frequency of these diversion limitations at the E. A. Fairbairn Water Treatment Plant intake.

² Whenever flow bypassing the diversion at the E. A Fairbairn Water Treatment Plant intake is greater than the Hodge Flow Criteria, Sacramento diversions at that point of diversion may not be greater than the following:

January through May	120 cfs
June through August	155 cfs
September	120 cfs
October through December	100 cfs

Finally, DWR and Reclamation must demonstrate that the future CVP and SWP operations with the proposed changes in points of diversion would not injure the ability of users within the area of origin to meet area of origin demands in the future. Protestants divert and use water within areas where water currently being exported originates. California law expressly recognizes the prior right of communities in these areas of origin to the water that is currently being exported, to the extent that water will be needed in the future to adequately supply the beneficial needs of those areas. (Water Code §§ 10505, 10505.5, 11460, 11463, and 11128; see *also* §§ 12200-12220.) Demand for water in counties of origin is expected to increase in the future and the likelihood that less water will be available for export is reasonably foreseeable.

Item 5 (specific information regarding Protestant's water rights)

Protestant claims a right to the use of water from the source from which petitioners are diverting, or propose to divert, which right is based on (identify type of right protestant claims, such as permit, license, pre-1914 appropriative right or riparian right):

City of Sacramento Water Rights

Permit No. 11358 (A012140)

Permit No. 11359 (A012321)

Permit No. 11360 (A012622)

Permit No. 11361 (A016060)

Permit No. 992 (A001743)

Pre-1914 appropriative water right, Statement No. 14834

Water Rights Settlement Contract: "Operating Contract Relating to Folsom and Nimbus Dams and their Related Works and to Diversion of Water by the City of Sacramento", entered into by the City and US Bureau of Reclamation on June 28, 1957 (Contract Number 14-06-200-6497)

Camp Sacramento water right on Sayles Creek, tributary to South Fork American River: License No. 001070 (A001853) and riparian right Statement of Water Diversion and Use 25297

List permit or license or statement of diversion and use numbers, which cover your use of water (if adjudicated right, list decree): **See above**

Where is your diversion point located?

1. American River: E. A. Fairbairn Water Treatment Plant intake on the Lower American River downstream of Howe Avenue (and related upstream points of diversion and rediversion) and Sacramento River Water Treatment Plant intake
2. Sacramento River: Sacramento River Water Treatment Plant intake immediately below the confluence of the Lower American River and the Sacramento River
3. Sayles Canyon, tributary to South Fork American River: South 76 degrees thirty minutes East, 1850 feet from the West Quarter corner of Section 16, T 11N, R 17 E, MDB&M, being within the NE1/4 of SW 1/4 of Section 16.

If new point of diversion is being requested, is your point of diversion downstream from petitioners' proposed point of diversion?

All points of diversion are upstream of the proposed new points of diversion. The diversion facilities on the Sacramento and American Rivers can be substantially affected, and even dewatered, by operations of the State Water Project and the

Central Valley Project which operations are implicated by the proposed new points of diversion.

The extent of present and past use of water by protestant or its predecessors in interest is as follows:

The water rights with points of diversion on the American and Sacramento Rivers are the essential foundation of the City's retail and wholesale water supply. They are used at all times during their respective seasons of diversion, other than periodic restrictions for facility maintenance and improvement activities. The specific extent of use is as reported to the SWRCB via Reports of Permittee, Licensee and Statements of Water Diversion and Use on file with the SWRCB, which are incorporated herein by reference.

Item 6 (proof of service)

I, Martha H Lennihan, declare that I am over the age of eighteen years and not a party to the action. My address is 1661 Garden Highway, Suite 102, Sacramento, CA 95833.

On Monday, January 4, 2016, I served the CITY OF SACRAMENTO Cover Letter, Notice of Intent to Appear and Protest in the California WaterFix Hearing Proceeding by e-mail, and by U.S. Mail, placing a true copy in the United States mail enclosed in a sealed envelope with postage fully prepaid, addressed as follows:

Department of Water Resources
c/o James Mizell
1416 Ninth Street, Room 1104
Sacramento, CA 95818

James.Mizell@water.ca.gov

U.S. Bureau of Reclamation
c/o Amy Aufdemberge
U.S. Department of Interior
Office of Regional Solicitor, Pacific Southwest Region
2800 Cottage Way
Sacramento, CA 95825-1898

amy.aufdemberge@sol.doi.gov

On Monday January 4, 2016, I served the CITY OF SACRAMENTO Cover Letter, Notice of Intent to Appear and Protest in the California WaterFix Hearing Proceeding by e-mail, and by hand delivery, to the State Water Resources Control Board:

State Water Resources Control Board
Division of Water Rights
Attn: California WaterFix Hearing Staff
Joe Serna Jr CALEPA Building
1001 I Street, 2nd Floor
Sacramento, CA 95812-2000

CWFhearing@waterboards.ca.gov

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 4, 2016, at Sacramento, California.


Martha H. Lennihan