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The Honorable Edward F. Shea

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

DONNELLY R. VILLEGAS, an enrolled member of the Spokane Tribe of Indians;

Plaintiff,

v.

UNITED STATES OF AMERICA; ET AL.,

Defendants.

CASE NO. CV-12-0001-EFS

DEFENDANT DAWN MINING COMPANY LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO JOIN AN INDISPENSABLE PARTY

Defendant DAWN MINING COMPANY LLC ("Dawn") submits the following Memorandum of Points and Authorities in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to Join an Indispensable Party ("Motion"), filed concurrently herewith.

I. Introduction and Background

Plaintiff Donnelly R. Villegas filed this action seeking *inter alia* declaratory and injunctive relief, and damages for alleged injuries to his interests in certain allotted Indian land (the "allotment") located within the Spokane Indian Reservation in Stevens County, Washington. Compl. at ¶ 1. From 1954 to 1981, the allotment was allegedly leased to Dawn and operated intermittently as a uranium mine. Among other relief, Plaintiff requests that the Court "[p]reliminarily and permanently enjoin all Defendants from further damaging, devaluing, and interfering with Plaintiff's' uranium and rights therein." Compl. at Section XIV, ¶ A.

The Court should dismiss Plaintiff's requests for injunctive relief for two reasons. First, the injunctive relief is barred by section 113(h) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(h), which deprives the Court of subject matter jurisdiction over these claims. Second, Plaintiff has failed to join the Spokane

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Tribe of Indians ("Tribe"), which is necessary and indispensable to the resolution of his claims for injunctive relief.

II. Plaintiff's' Request for Injunctive Relief Should be Dismissed for Lack of Jurisdiction Under CERCLA § 113(h)

The U.S. Environmental Protection Agency ("EPA") is currently directing implementation of a remedial action at the former Midnite Mine site ("Midnite Mine," or "site," which includes the allotment and surrounding tribal lands), pursuant to its authority under CERCLA. The only activities that Dawn or Newmont USA Limited ("Newmont") are conducting at the site relate to implementing this remedial action at EPA's direction. Pursuant to Section 113(h) of CERCLA, this Court lacks jurisdiction to consider Plaintiff's claims seeking to enjoin or interfere with these ongoing remedial actions. 42 U.S.C. § 9613(h). Consequently, Dawn moves to dismiss Plaintiff's request for injunctive relief pursuant to Fed. R. Civ. P. 12(b)(1).

In the face of a motion to dismiss for lack of jurisdiction, the party asserting subject matter jurisdiction has the burden of proving that it exists. *Tonasket v. Sargent*, __ F. Supp.2d __; 2011 WL 5508992, *1 (E.D. Wa. 2011). Courts may look beyond the pleadings and consider additional evidence to determine whether the requisite jurisdictional facts exist. *Colwell v. Dept. of Health and Human Serv's*, 558 F.3d 1112, 1121 (9th Cir. 2009); *St. Clair v. City of Chico*, 880 F.2d

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199, 210 (9th Cir. 1989). A brief overview of CERCLA and the relevant facts demonstrates that subject matter jurisdiction does not exist for Plaintiff's requested injunctive relief.

CERCLA provides a comprehensive statutory framework for cleaning up releases or threatened releases of hazardous substances. 42 U.S.C. §§ 9601-9675. CERCLA's "timing of review" provision in § 113(h), is intended to ensure prompt cleanup of contaminated sites by barring legal challenges that "might interfere" with ongoing CERCLA cleanup actions. *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995). "To ensure that cleanup efforts would not be delayed by litigation," section 113(h) provides that federal courts shall not have jurisdiction "to review any challenges to removal or remedial actions selected under Section 9604 or 9606(a)" of CERCLA, except in limited enumerated cases.[1] *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995); 42 U.S.C. § 9613(h).

The Ninth Circuit has recognized that Section 113(h) amounts to a "blunt withdrawal of federal jurisdiction (internal quotation omitted) over challenges to ongoing CERCLA removal or remedial actions. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011); *McClellan Ecological Seepage*

[1] All five of the statutory exceptions refer to specific actions authorized under CERCLA and are not relevant to the claims asserted by Plaintiff.

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Situation, 47 F.3d at 328. Section 113(h) "bans all challenges to ongoing removal or remedial actions." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 238 (9th Cir. 1995). The Ninth Circuit has repeatedly held that Section 113(h) jurisdictionally bars suits which may interfere with ongoing CERCLA cleanup actions. *See, e.g., Pakootas*, 646 F.3d at 1221-22 (private suit seeking penalties for past violations of EPA order was dismissed under Section 113(h) because payment of penalties may affect a responsible party's incentives and financial ability to perform ongoing cleanup); *Hanford Downwinders Coalition, Inc.*, 71 F.3d at 1482-83 (request for injunction requiring federal agency to begin a health surveillance program was dismissed under Section 113(h) because the suit sought to improve or alter clean-up related actions); *McClellan*, 47 F.3d at 329-330 (claims seeking injunction to require additional reporting and permitting barred by Section 113(h)).

On January 17, 2012, this Court approved a consent decree among the United States, Dawn and Newmont, providing for completion of EPA's ongoing CERCLA remedial action at the Midnite Mine. *See* Consent Decree entered in *United States v. Dawn Mining Co., LLC*, No. CV-05-0202-JLQ, Dkt. No. 553 (Jan. 17, 2012) ("CD").[2] The history of EPA's remedial activities at the site is summarized in that CD, as referenced below.

[2] The Consent Decree and its attachments, including the ROD, is available from the Court's docket, as cited above. Due to its length (over 150 pages), it has not

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In May 2000, EPA added the Midnite Mine to the National Priorities List under CERCLA. 60 F.R. 30482. The site is situated within the Spokane Indian Reservation and encompasses the allotment. *See* Appendix A to CD, Figure 6-1. Before selecting the remedy, EPA prepared a remedial investigation and feasibility study ("RI/FS"), pursuant to CERCLA regulations, to evaluate remedial action alternatives for the site. CD, p. 3. EPA provided public notice of the RI/FS, and accepted public comments on the proposed remedial alternatives. *Id.* By Record of Decision ("ROD"), dated September 2006, EPA selected a remedial action. *See* Appendix A to CD. The Tribe concurred with EPA's selected remedy. *Id.* at p. 1-1. EPA's selected remedy includes numerous on-the-ground components to address past mining disturbance, including: backfilling waste rock and ore stockpiles into historic mining pits; construction of engineered liner and drainage systems in those pits; construction of vegetated covers on the backfilled pits; collection and treatment of mine pit and seep waters; grading and revegetation of areas cleared of mine waste; and reclamation of roads and other historic mining disturbance. *Id.* at pp. 2-92 to 2-115. The selected remedy sets specific clean-up standards that must be met. *Id.* at 2-64 to 2-72.

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been attached to this Memorandum. However, if requested, Dawn will provide copies to the Court and all parties.

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In November 2008, EPA issued an order to Dawn and Newmont directing the companies to perform certain aspects of EPA's selected remedy. CD, p. 4. The companies undertook the work required by that order, entered into settlement negotiations with the United States, and ultimately agreed upon settlement terms, which were incorporated into the CD. The CD provides for payment and funding of past and future cleanup-related costs, and requires Dawn and Newmont to implement EPA's selected remedy in accordance with a detailed scope of work setting forth requirements to construct, monitor and maintain the remedy. *See* Appendix B to CD. The CD further requires Dawn and Newmont to provide financial assurances totaling $193 million to ensure timely completion of the remedial action. CD, p. 21. On September 30, 2011, the United States lodged the proposed CD with this Court, and the CD was made available for a 30-day public comment period. No comments were received on the proposed CD, and on November 12, 2011, the United States filed a Motion to Enter Proposed Consent Decree. On January 17, 2012, this court approved entry of the CD, and remedial work continues pursuant to the terms thereof.

The scope of injunctive relief Plaintiff requests is broad, and includes a prohibition on all activities on the allotment and elsewhere at the Midnite Mine that would potentially interfere with any uranium deposits or piles in which he has an interest. Such a prohibition would impair implementation of the ongoing

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remedial action prescribed by the CD. Consequently, Plaintiff's request for such injunctive relief is barred by the jurisdictional limit under CERCLA § 113(h), and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

III. Plaintiff's Request for Injunctive Relief Should be Dismissed Under Federal Rule of Civil Procedure 19

A. Background and Legal Standard

As set forth above, EPA has selected a CERCLA remedial action for the Midnite Mine. The Spokane Tribe of Indians concurred with EPA's selected remedy. CD at p. 1-1, *see also*, Appendix A to CD at Appendix A, *Spokane Tribe Letter of Concurrence*. The remedy requires extensive physical activities at the site, on both the allotment and adjacent tribal lands, in order to meet clean-up criteria prescribed by EPA. *See supra*, pp.6-7.

Plaintiff's claims are based on his interest in allotment 156. However, the Tribe holds an undivided ½ interest in the same allotment. *See* Compl. at ¶42; *see also*, Exhibit A attached hereto, Bureau of Indian Affairs Title Status Report (showing that the Tribe holds an undivided ½ interest in allotment 156). The court should dismiss Plaintiff's request for injunctive relief because he has failed to join the Tribe, which is both a necessary and indispensable party to this case.

Federal Rule of Civil Procedure 19(a) provides that parties who are subject to service of process and whose joinder will not deprive the court of jurisdiction

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"must be joined" in an action under certain circumstances. While Rule 19 has been amended and no longer uses the terms "necessary" or "indispensable," federal courts continue to use these terms when analyzing dismissal pursuant to Rule 19. *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 969 n.6 (9th Cir. 2008). Federal Rule of Civil Procedure 12(b)(7) permits a litigant to file a motion to dismiss for failure to join a party under Rule 19. Fed. R. Civ. Pro. 12(b)(7).

Rule 19 provides a "three-step process" to determine whether an action should be dismissed for failure to join an indispensable party. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). First, the court must determine whether the party is a "required party" under Rule 19(a). *Id.* This determination is a two part analysis which considers: (1) whether complete relief could be awarded without joining the non-party; or (2) whether the non-party has a legally protected interest in the action that would be "impaired or impeded," or whether the non-party is situated such that disposing of the action in its absence may leave an existing party subject to a substantial risk of multiple inconsistent obligations. Fed. R. Civ. Pro. 19(a)(1)(A)-(B); *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 996-97 (9th Cir. 2011); *Bowen*, 172 F.3d at 688.

Second, once a party is determined to be necessary, the court must determine whether joinder is feasible. *Id.* Finally, if joinder is not feasible, the Court must determine whether the party is "indispensable," meaning "whether, in equity and

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good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. Pro. 19(b). This analysis considers the potential prejudice that might result to the absent or existing parties; whether any prejudice can be lessened or avoided through careful shaping of relief; whether judgment rendered in the party's absence would be adequate; and whether the plaintiff would have an alternative forum for its claims if the action was dismissed. Fed. R. Civ. Pro. 19(b)(1)-(4). In deciding a motion to dismiss for failure to join a party required by Rule 19, the court may consider material outside the pleadings. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960).

B. The Tribe is a Necessary Party

i. Complete Relief is Not Possible among the Current Parties.

The Tribe holds an undivided ½ interest in the allotment. When two or more entities own separate undivided interests in the same land, they hold their interests as tenants in common. *Falaschi v. Yowell*, 24 Wash. App. 506, 508-09 (1979) (citing *Anderson v. Snowden*, 44 Wash. 274 (1906)). Plaintiff requests an injunction that would prevent Dawn and other Defendants from "damaging," "devaluing," or otherwise "interfering with" unspecified uranium located at the mine site. *See* Compl. at ¶ 67 and Section XIV, ¶ ¶ A & C. Plaintiff alleges that some of this uranium exists on the allotment, and some exists "in stockpiles at the

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mine site," but has been "separated from Plaintiff's Allotment." Compl. at ¶ 67. An injunction against the Defendants in this case would not prevent the Tribe from taking action which might affect Plaintiff's interests in uranium at the allotment or elsewhere at the Midnite Mine. As an owner of the allotment and the other portions of the Midnite Mine, the Tribe has possessory interests in these lands, and is free to enter, occupy and physically alter the property to the extent its actions do not interfere with the CERCLA remedy. However, the requested injunction would not bind the Tribe, since it is not a party to the action.

ii. Plaintiff's Lawsuit Implicates the Tribe's Legally Protectable Interests

a. The Relief Sought Will Impair or Impede the Tribe's Ability to Protect its Interests

The Tribe's interests in the allotment and its own lands are the sort of "interest" directly implicated by Rule 19(a)(1)(B). *See, e.g., Pit River Home and Ag. Coop. Assoc. v. United States,* 30 F.3d 1088, 1099 (9th Cir. 1994) (Non- party Indian tribe and beneficial owner of property at the center plaintiff's claims, "clearly has a legal interest in the litigation, which could be impaired by the disposition of this action without its presence."); *see also, ICON Group, Inc. v. Mahogany Run Devel.* Corp., 112 F.R.D. 201, 204 ("Tenancy in common implicates virtually all of Rule 19(a) concerns."), *vacated on other grounds*, 829, F. 2d 473 (3rd Cir. 1987); *Hoheb v. Muriel*, 753 F.2d 24, 27 (3rd Cir. 1985)

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(dismissing action pursuant to Rule 19 for failure to join co-tenants in common). Each co-tenant has the right to possess all parts of the land at all times. W. B. Stoebuck & J. Weaver, 17 Wash. Prac., Real Estate § 1.31 (2d Ed. 2011). The Tribe's interests are legally protectable interests under Rule 19.

However, "the Rule 19(a)(2) 'interest' requirement is not limited to a 'legal' interest, but one to be determined from a practical perspective." *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1093 (9th Cir. 1985) (citation and internal quotations omitted). In addition to its interests in real property, the Tribe has an interest in its sovereign ability to manage its own lands and internal affairs. *See, e.g., American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (absent tribe had a sovereign interest in negotiating its own contracts); *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [their] legal duties judicially determined without consent.") (internal quotations omitted); *Confederated Tribes of the Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991) (judgment precluding federal recognition of non-party tribe would alter tribe's sovereign authority to govern reservation). The Tribe has also claimed an interest in the implementation of the CERCLA remedy EPA has selected, as reflected in its concurrence in that remedy and the numerous comments

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submitted by the Tribe during the course of its selection. *See*, Appendix A to CD at Appendix B, *Responsiveness Summary*.

The Plaintiff seeks relief that, as a practical matter, will impair or impede the Tribe's interests not only in the allotment, but in other Tribal lands encompassing the Midnite Mine. Fundamentally, Dawn and Newmont will be unable to carry out the remedy, since they will be prevented from taking the physical actions on the property, which are required by the CD. The inability to carry out the remedy will impair the Tribe's interest in seeing that the condition of the mine site is addressed, particularly because the land uses the Tribe anticipates for the site may not be achieved, as the Tribe has explained in its concurrence letter and comments to the ROD. This would impair and impede the Tribe's traditional interests as a landowner and cotenant of the allotment, as well as its sovereign interests in governing its own lands.

b. <u>The Current Defendants Will Be Subject to Multiple Inconsistent Obligations</u>

The United States' previous lawsuit against Dawn and Newmont, arising out of historic mining activities at the Midnite Mine, was resolved by this court's entry of the CD. The CD constitutes a final fudgment in accordance with Federal Rules of Civil Procedure 54 and 58. CD, p. 50. The CD requires Dawn and Newmont to implement EPA's selected remedial action. This, in turn, requires physical

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activities on the allotment and other portions of the Midnite Mine, which Plaintiff seeks to enjoin. If the injunctive relief is granted, Dawn and Newmont will be unable to comply with the CD, and may face additional litigation. This is precisely the kind of inconsistent obligation that Rule 19 is intended to prevent. *See, e.g., National Wildlife Fed. v. Espy*, 43 F.3d 1337, 1344 (9th Cir. 1995) (If the non-party "were not bound by the outcome of this case and sought relief at variance with the judgment [the defendant] would face a substantial risk of inconsistent obligations.").

C. Joinder of the Tribe Is Not Feasible

An Indian tribe has sovereign immunity "absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). "[T]ribes, by reason of sovereign immunity, cannot be sued." *Blake v. Arnett*, 663 F.2d 906, 913 (9th Cir. 1981) (*citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165, 172 (1977)). The Tribe is also immune from the process of the court. *See United States v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992). Sovereign immunity thus makes a tribe's joinder infeasible for purposes of Rule 19. *See Dawavendewa v. Salt River Project Ag. Improvement and Power*

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Dist., 276 F.3d 1150, 1160-61 (9th Cir. 2002). The Spokane Tribe is thus immune from suit, and its joinder pursuant to Rule 19 is infeasible.

D. The Tribe Is Indispensable

Whether a party is indispensable, and an action should therefore be dismissed in its absence, turns on the four factors set out in at Rule 19(b).

i. The Tribe Will Be Prejudiced

Determination of prejudice to a non-party requires essentially the same inquiry as required under Rule 19(a) for determining that a non-party has a legally protectable interest. *Dawavendewa*, 276 F.3d at 1162 (citing *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999)). The injunctive relief requested will impede the Tribe's ability to enjoy the possessory interests it has in the allotment and the other land it owns at the Midnite Mine. In addition, the injunction will interfere with the Tribe's sovereign interests and interests in seeing that the remedial action is carried out. *See supra*, pp. 11-13.

ii. The Court Cannot Mitigate the Prejudice

Any injunctive relief will prejudice the Tribe's interests, since it will necessarily limit use of the subject lands, and thereby interfere with the Tribe's real property interests both on and off the allotment, the Tribe's claimed interest in seeing the remedy implemented and the Tribe's sovereign interests in governing the reservation. *C.f. Pit River*, 30 F. 3d at 1101-02 ("any decision adverse to the

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Tribe would prejudice the [Tribal] Council in its governance of [Tribal lands]"); *Dawavendewa*, 276 F.3d at 1162 (similar).

iii. The Court Cannot Grant Adequate Relief

The Ninth Circuit has repeatedly found that complete relief cannot be afforded under circumstances similar to those at hand. For example, in *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), the court of appeals recognized that even if injunctive relief were granted against the federal officials who were defendants in that case, the non-party Quinault Nation could "continue to assert sovereign powers and management responsibilities over the reservation," making the injunctive relief ineffective. *Id.* at 1498. In *Dawavendewa*, *supra*, the defendant sought an injunction against federal and private parties requiring implementation of nondiscriminatory employment practices in carrying out a contract with the Navajo Nation. 276 F.3d at 1155. The Court noted that despite an injunction, the Navajo Nation could still attempt to enforce its employment policies in tribal court, or otherwise, and found that an injunction would therefore not afford complete relief. *Id.*

iv. Lack of an Alternative Forum Does Not Weigh in Plaintiff's Favor.

The Ninth Circuit has long recognized that "a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign

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immunity." *Confederated Tribes*, 928 F.2d 1496, 1500 (9th Cir. 1991). "If a necessary party is immune from suit, there may be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Kescoli v. Babbit*, 101 F.3d 1304, 1311 (9th Cir. 1999). Where, as here, the other Rule 19(b) factors weigh against allowing an action to proceed, dismissal is appropriate despite the lack of an alternative forum. *Id.*; *see also, Pit River*, 30 F.3d at 1102-03 (dismissing claims with prejudice despite lack of an alternative forum due to tribe's sovereign immunity); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (tribe's interest in sovereign immunity outweighed plaintiff's interest in litigating claim, despite lack of alternative forum). As in the majority of cases considering the issue, the Tribe's interest in maintaining sovereign immunity outweighs Plaintiff's interest in injunctive relief, and the lack of an alternative forum does not weigh in Plaintiff's favor.

IV. Conclusion

Section 113(h) of CERCLA withdraws the Court's subject matter jurisdiction over Plaintiff's claims for injunctive relief, and such claims should be dismissed under Fed. R. Civ. Pro. 12(b)(1). Those claims should also be dismissed under Fed. R. Civ. Pro. 12(b)(7) because the Spokane Tribe of Indians is an indispensable party that cannot be joined to this action. Therefore Dawn respectfully requests entry of an Order dismissing Plaintiff's claims for injunctive

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relief with prejudice, and granting such further relief as the Court deems just and proper.

Respectfully submitted this 15th day of March, 2012.

By s/ MICHAEL R. THORP
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I hereby further certify that on this day I caused a true and correct copy of the foregoing to be served, as indicated, upon the following non-CM/ECF participants:

No manual recipients

DATED this 15th day of March, 2012.

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