BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 99-TC- 15
Education Code Sections 44395 and 44396; Statutes 1998, Chapter 33 1,	***Teacher Incentive Program***
Filed on June 29, 2000,	STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7
by San Diego Unified School District, Claimant.	*(Adopted on February 27, 2003)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on March 5, 2003.

PAULA HIGASHI, Executive Director

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STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 23, 2003. Mr. Arthur M. Palkowitz appeared for claimant San Diego Unified School District. Mr. Michael Wilkening and Ms. Susan Geanacou appeared on behalf of the Department of Finance.

At the hearing, testimony was given, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission approved the staff analysis for the test claim presented by a 5-O vote.

BACKGROUND

On June 29, 2000, claimant, San Diego Unified School District, submitted a test claim alleging a reimbursable state mandate for school districts to engage in activities resulting from the state establishment of a one-time $10,000 merit award for public school teachers who are certified by the National Board for Professional Teaching Standards.' The claim arises from enactments or amendments to Education Code sections 44395 and 44396, as added by Statutes 1998, chapter 33 1, operative January 1, 1999. As background, the following findings of the Legislature in Statutes 1998, chapter 33 1, describe the purpose of establishing the National Board for Professional Teaching Standards Certification Incentive Program:

(1) In an educational program, teacher knowledge, skills, and abilities are among the most important factors in determining pupil achievement.

(2) The National Board for Professional Teaching Standards [NBPTS] has instituted a rigorous certification process that identifies teachers who possess and can demonstrate the state-of-the-art knowledge, skills, and abilities of the teaching profession.

[1] Based upon the filing date, the reimbursement period for this test claim begins no earlier than July 1, 1998. (Gov. Code, § 17557, subd. (c).)

(3) It is desirable that school districts in California employ in the public schools as many teachers as possible who have attained certification from the [NBPTS].

(4) It is essential that California encourage teachers to challenge themselves by undergoing the certification process established by the [NBPTS].

At the time the legislation was enacted, the Senate Floor Committee recognized that 68 teachers in California were certified by the NBPTS.[2]

Claimant's Position

The claimant alleges the following activities impose reimbursable costs mandated by the state:

- Ensure that teachers employed by the school district or by charter schools affiliated with the school district are informed about the Teacher Incentive Program and provide inforrnation and application materials to interested teachers. (Ed. Code, § 44395, subd. (c).)
- Accept applications from teachers employed by the school district or by charter schools for which the school district is the chartering entity. (Ed. Code, § 44396, subd. (b).)
- Review the applications to determine whether the applicant has met the state criteria, certify eligibility, and forward the application to the CDE. (Ed. Code, § 44396, subd. (c).)
- Process the $10,000 merit awards when the CDE approves the applications. (Ed. Code, § 44396, subd. (d).)
- Review the requirements of Statutes 1998, chapter 33 1, establish policies and procedures for implementation, and train staff on the additional duties required to carry out the legislation.

The claimant also asserts that, due to the $10,000 award, "the employing school districts are required to pay the benefits and employer costs associated with the payment of the incentive award, including contributions to the State Teachers Retirement System or Public Employees Retirement System and premiums for unemployment insurance worker's compensation, Medicare, and life insurance."

The claimant concludes that none of the Government Code section 17556 exceptions to finding costs mandated by the state apply to this test claim. The claimant specifically asserts that there are no other federal or state constitutional provisions, statutes or executive orders impacted, and that Statutes 1998, chapter 33 1 appropriated no funds for the reimbursable activities alleged.

State Agency Position

DOF's September 12, 2000 response to the test claim allegations states agreement with the claimant on some of the identified new administrative activities, including making information and application materials available; accept, review, certify and forward applications; and allocate funds to approved teachers. However DOF argues that:

[2] Assembly Bill 868, Senate Floor Analysis, August 10, 1998.

- Statutes 1998, chapter 33 1 does not "contain a requirement for an employer to pay employer costs associated with the award payments."
- In addition, the "award does not meet the criteria for 'creditable compensation' pursuant to Education Code [section] 22119.2, which would require the employer to pay such costs as Medicare, Unemployment, State Teachers Retirement System (STRS), etc."

DOF filed comments on the draft staff analysis on January 6, 2003, expressing agreement with the conclusions, while reiterating that DOF does not expect districts to reach the statutory minimum cost threshold for filing a mandate reimbursement claim.

COMMISSION FINDINGS

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[3] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service. The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[4] To determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose costs mandated by the state.[5]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?[6]

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local

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[3] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[4] *County of Los Angeles v. State of California (1987) 43* Cal.3d *46, 56; Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[5] Government Code section 175 14.

[6] Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
(a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

governments and do not apply generally to all residents and entities in the state.[7] The court has held that only one of these findings is necessary?

The Commission finds that Statutes 1998, chapter 33 1 imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public, because Statutes 1998, chapter 33 1 requires school districts to engage in new administrative activities related to the establishment of a one-time $10,000 merit award for public school teachers certified by the NBPTS. The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.[9]

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, because the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Accordingly, the Commission finds that administrative activities required by the new merit award constitute a "program" and, thus, are subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program upon school districts within the meaning of article XIII B, section 6 of the California Constitution?

The claimant contends that the test claim legislation imposes a new program or higher level of service upon school districts by requiring specific new activities and costs related to the administration of the $10,000 merit award for public school teachers certified by the NBPTS. The analysis for finding a new program or higher level of service must examine whether the test claim legislation requires a school district to engage in the claimed activities, and whether such activities constitute a new program or higher level of service when compared to prior law.

Education Code sections 44395 and 44396, as added by Statutes 1998, chapter 33 1, are analyzed below for whether they impose mandatory new activities upon school districts.

Test Claim Statutes:

Education Code section 44395.

This code section, as added by Statutes 1998, chapter 33 1 ,[10] follows in pertinent part:

> (a) The National Board for Professional Teaching Standards Certification Incentive Program is hereby established to award grants to school districts for the purpose of providing merit awards to teachers who are employed by school districts or charter schools, are assigned to teach in California public schools, and

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[7] *County of Los Angeles, supra, 43* Cal.3d 46, 56.

[8] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[9] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at page 172 states "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function . . . administered by local agencies to provide service to the public."

[10] Operative January 1, 1999. This section was amended by Statutes 2000, chapter 70. No test claim or amendment has been filed on the new legislation as it impacts Education Code section 44395.

> have attained certification from the National Board for Professional Teaching Standards. The amount of the merit award shall be ten thousand dollars ($10,000) per teacher and shall be of a one-time nature on behalf of any one teacher.
>
> (b) The State Department of Education shall administer the program and shall develop, in consultation with the Commission on Teacher Credentialing, certification and merit award inforrnation, criteria, procedures, and applications, all of which shall be submitted to the State Board of Education for approval. Amendments requested by the State Board of Education to that information, criteria, procedures, and applications shall be made before the dissemination of information and the award of any grants under this article.
>
> (c) The State Department of Education shall distribute to school districts information developed pursuant to subdivision (b) about the certification process established by the National Board for Professional Teaching Standards along with application materials and instructions for the merit award program. Each school district shall make every effort to ensure that teachers employed by the district or by charter schools affiliated with the district are informed about the program and can acquire the necessary application and information materials.

Claimant asserts, "subdivision (c) requires school districts to ensure that teachers employed by the school district or by charter schools affiliated with the school district are informed about the Teacher Incentive Program." Claimant further alleges that subdivision (c) requires districts "to provide information and application materials" to interested teachers.

DOF, in its comments of September 12, 2000, concurs with the claimant that the language of Education Code section 44395, subdivision (c) "does create a reimbursable state mandate." However, DOF makes the following comment:

> However, this requirement could be fulfilled as simply as providing each teacher, in the simplest forrn possible (ex. a one page document), with a brief description of the program and the internet address to the [CDE's] web page on the National Board for Professional Teaching Standards Certification Incentive Program, which contains all the necessary information and contacts to receive the application forms. In addition, the [CDE] currently directs districts to simply tell teachers to contact the [CDE] for guidance on the certification process. Therefore the costs for this activity should be minimal.

The Commission finds that the plain language of subdivision (c), although imprecise in legislating that the "school district ***shall make*** every effort," clearly requires some action on the part of districts to comply with the statutory directive "to ensure that teachers . . . are informed about the program and can acquire the necessary application and information materials." Therefore, the Commission finds that Education Code section 44395, subdivision (c), as added by Statutes 1998, chapter 33 1, imposes a new program or higher level of service upon school districts for the following activity:

- Inform teachers employed by the school district, or by charter schools affiliated with the district, about the National Board for Professional Teaching Standards Certification Incentive Program and how they can acquire the necessary application and information materials distributed by the CDE. (The CDE shall distribute to school districts information about the certification process

established by the National Board for Professional Teaching Standards along with application materials and instructions for the merit award program.)

However, any reimbursement for this activity is limited to January 1, 1999 through July 4, 2000, the operative date of Statutes 1998, chapter 33 1, until the operative date of Statutes 2000, chapter 70. Statutes 2000, chapter 70 amended subdivision (c) to provide that "[e]ach school district is *strongly encouraged* to ensure that teachers employed by the district or by charter schools affiliated with the district are informed about the program and can acquire the necessary application and information materials." (Emphasis added.) As discussed in *Long Beach,* "mandates" is to be understood "in the ordinary sense of 'orders' or 'commands.'"[11] The plain language of the statute no longer mandates school districts to inform teachers about the program, but instead merely uses precatory words, "encouraging" school districts to inform teachers about the program. Therefore, effective July 5, 2000, Education Code section 44395, subdivision (c), no longer imposes a new program or higher level of service upon school districts.

Education Code section 44396.

Education Code section 44396, subdivisions (a) through (c), as added by Statutes 1998, chapter 33 1,[12] provides:

> (a)(l) To the extent that funds are available for that purpose, a teacher who meets the criteria approved by the State Board of Education pursuant to subdivision (b) of Section 44395 is eligible for a merit award and may apply for the award by following the procedures and instructions developed pursuant to subdivision (b) of Section 44395.
>
> (2) A teacher who attained certification from the National Board for Professional Teaching Standards before the effective date of the act adding this section and who was employed by a school district or charter school and assigned to teach in a California public school on the date of certification may apply for a merit award if he or she meets all the other requirements of this article.
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> (b) Teachers shall submit their application to the school district employing them. Teachers employed by a charter school shall submit their application through the school district granting the school's charter.
>
> (c) When a school district receives an application, it shall certify that the applicant is employed by the district or a charter school operating under a charter granted by the school district and that the applicant has met all the criteria established pursuant to subdivision (b) of Section 44395. The school district shall then submit the application to the State Department of Education for its review and approval.

Claimant alleges that the legislation "requires school districts to accept applications from teachers employed by the school district or by charter schools for which the school district is the chartering entity," and to review and certify the application. Claimant further alleges that

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[11] ***Long Beach** Unified **School Dist., supra,*** 225 Cal.App.3d at page 174.

[12] Operative January 1, 1999. This section was amended by Statutes 2000, chapter 70; no test claim or amendment has been filed on this legislation as it impacts Education Code section 44396.

Education Code section 44396, subdivision (c), requires the school district "to forward the application to the CDE for CDE's review and approval."

DOF agrees that Statutes 1998, chapter 33 1 requires "that districts review and certify teachers applications for the merit award and then forward the applications to the [CDE]," thus imposing a new program or higher level of service. DOF makes the additional observation that "these costs should be minimal since the requirement could be simply met by requiring the teacher, when submitting the application, to provide a copy of the certification document from the National Board for Professional Teacher Standards and certifying the teacher's employment status and then mailing the application and supporting documents to the [CDE]."

The Commission agrees that the requirements are new, and finds that Education Code section 44396, subdivision (c), as added by Statutes 1998, chapter 33 1, imposes a new program or higher level of service upon school districts for the following activities:

- Upon receipt of an application for the National Board for Professional Teaching Standards Certification Incentive Program, certify that the applicant is employed by the district or a charter school operating under a charter granted by the school district and that the applicant has met all the criteria established pursuant to Education Code section 44395, subdivision (b).
- Submit the application to the CDE for its review and approval.

Additional analysis is required for Education Code section 44396, subdivision (d), as follows:

> (d) The State Department of Education shall approve an application that meets the criteria established pursuant to subdivision (b) of Section 44395. To the extent funds are available, the State Department of Education shall apportion funds to the school district in the amount of ten thousand dollars ($10,000) for each approved application. The school district shall use funds apportioned to it pursuant to this subdivision to provide a one-time merit award of ten thousand dollars ($10,000) to each teacher whose application is approved by the State Department of Education.

Claimant alleges that a new program or higher level of service is imposed by subdivision (d), by requiring "school districts to process incentive awards in the amount of $10,000 to those teachers whose applications have been approved by the CDE." Claimant goes further, arguing:

> As a result of those payments, the employing school districts are required to pay the benefits and employer costs associated with the payment of the incentive award, including contributions to the State Teachers Retirement System or Public Employees Retirement System and premiums for unemployment insurance worker's compensation, Medicare, and life insurance.

DOF concurs that Education Code section 44396, subdivision (d) imposes a new program or higher level of service by requiring "that districts allocate funds to teachers whose application has been approved by the [CDE]." However, DOF *does not* agree that Statutes 1998, chapter 33 1 also "contains a requirement for an employer to pay employer costs associated with the award payments."

Although elements of the Education Code sections enacted by Statutes 1998, chapter 33 1, have been found by the Commission to impose a new program or higher level of service within the

meaning of article XIII B, section 6 of the California Constitution, each of claimant's allegations must satisfy the scheme established in the Constitution, and as interpreted by the courts. Here, claimant makes an allegation of increased costs for employer payroll contributions without establishing that those costs are incurred through carrying out the governmental function of providing a service to the public, or by engaging in unique requirements that do not apply generally to all residents and entities of the state.

On the simplest level, the plain language does not require the school district to make contributions to retirement plans, insurance plans, or Medicare. Some of these employer contributions originate in federal law, others may be based upon collective bargaining agreements. The merit award may or may not qualify as wages, compensation or salary for these purposes. However, that analysis does not need to be undertaken in order to establish that none of the potential employer contribution costs are reimbursable under article XIII B, section 6.

In *City of Richmond v. Commission on State Mandates,* the court determined that an amendment to Labor Code section 4707 impacting benefits payments under the Public Employees Retirement System (PERS), although it only applied to local government and increased the cost of providing services, was *not* equivalent to requiring an increased level of service to the public:

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. *A higher cost to local governmentfor compensating its employees is not the same as a higher cost of providing services to the public. (City of Anaheim v. State of California (1987)* 189 Cal.App.3d 1478, 1484.) . . . In *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, the increase in certain workers' compensation benefits resulted in an increase in the cost to local governments of providing services. Nonetheless, the Supreme Court found no "higher level of service" under section 6.[13] (Emphasis added.)

After acknowledging that Richmond's argument — additional costs under PERS and workers' compensation for a specific group of local employees resulting from a statutory amendment imposed a unique requirement on local government – "has surface appeal," the court went on to conclude that the Commission's findings to the contrary were ultimately correct. In reaching this conclusion, the court relied on the Supreme Court's statement of the purpose of article XIII B, section 6 in *County of Los Angeles v. State of California:*

> Section 6 was designed to prevent the state from forcing programs on local government. "[T]he intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to 'force' programs on localities." *(County of Los Angeles v. State of California, supra, 43* Cal.3d at pp. 56-57.) "The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." [Citation.] "Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their

[13] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

> taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. *Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage - costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (Id.* at p. 6 1 .) (Emphasis added.)[14]

Under this legal analysis, the potential increased costs in employer payroll contributions incurred by the school district employer for "providing" the merit award are not reimbursable under article XIII B, section 6 of the California Constitution. Reimbursement is limited to the administrative costs of providing the funds to the teacher after the State presents the school district with the $10,000 award.

In comments on the draft staff analysis, dated December 19, 2002, claimant asserts that reliance on *City of Richmond* and *County of Los Angeles* is misplaced based on the facts of the cases. The Commission disagrees and asserts that the courts in these cases are describing the purpose of article XIII B, section 6 and clearly found that an increased cost, as asserted by claimant, is not the same as a higher level of service. To the extent that claimant has actual costs for employer withholdings from the incentive award, which is not conclusive based on the facts presented, those are costs that the employer must bear "for compensating its employees" which "is not the same as a higher cost of providing services to the public?

The Commission finds that Education Code section 44396, subdivision (d), as added by Statutes 1998, chapter 33 1, imposes a new program or higher level of service upon school districts for the following activity:

- Use state-apportioned funds to provide a one-time merit award of ten thousand dollars ($10,000) to each teacher whose application is approved by the CDE. (Reimbursement is limited to the administrative costs of distributing the award.)

Issue 3: Does the test claim legislation found to contain a new program or higher level of service also impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose "costs mandated by the state." Government Code section 175 14 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. Claimant states "[s]chool districts have incurred or will incur costs in excess of $200 per fiscal year to perform the activities" alleged, and none of the Government Code section 17556 exceptions apply.

The Commission agrees that none of the exceptions to finding a reimbursable state mandate under Government Code section 17556 apply here. Accordingly, the Commission finds that the

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[14] Id. at page 1197.

[15] ***Id.*** at page 1196.

activities identified in the conclusion, below, qualify for reimbursement because the activities impose costs mandated by the state within the meaning of Government Code section 175 14.

CONCLUSION

The Commission concludes that Education Code sections 44395 and 44396, as added by Statutes 1998, chapter 33 1, contain new programs or higher levels of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 175 14, for the following specific new activities:

- Inform teachers employed by the school district, or by charter schools affiliated with the district, about the National Board for Professional Teaching Standards Certification Incentive Program and how they can acquire the necessary application and information materials distributed by the CDE. (The CDE shall distribute to school districts information about the certification process established by the National Board for Professional Teaching Standards along with application materials and instructions for the merit award program.) (Ed. Code, § 44395, subd. (c).)[16]
- Upon receipt of an application for the National Board for Professional Teaching Standards Certification Incentive Program, certify that the applicant is employed by the district or a charter school operating under a charter granted by the school district and that the applicant has met all the criteria established pursuant to Education Code section 44395, subdivision (b). (Ed. Code, § 44396, subd. (c).)[17]
- Submit the application to the CDE for its review and approval. (Ed. Code, $44396, subd. (c).)
- Use state-apportioned funds to provide a one-time merit award of ten thousand dollars ($10,000) to each teacher whose application is approved by the CDE. (Reimbursement is limited to the administrative costs of distributing the award.) (Ed. Code, § 44396, subd. (d),)

[16] As added by Statutes 1998, chapter 33 1, operative January 1, 1999. Reimbursement for this activity concludes July 4, 2000, due to substantive amendment by Statutes 2000, chapter 70, operative July 5, 2000.

[17] As added by Statutes 1998, chapter 33 1, operative January 1, 1999.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 958 14.

March 5, 2003, I served the:

Adopted Statement of Decision
Teacher Incentive Program, 99-K-15
San Diego Unified School District, Claimant
Education Code Sections 44395 and 44396
Statutes 1998, Chapter 33

by placing a true copy thereof in an envelope addressed to:

Mr. Arthur M. Palkowitz
San Diego Unified School District
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 5, 2003, at Sacramento, California.

Victoria Soriano
VICTORIA SORIANO