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THE EMMA G. TREBILCOT TRUST
7

8 STATE OF CALIFORNIA
9 STATE WATER RESOURCES CONTROL BOARD
10

11 In the matter of:

12 TECHNICAL AND MONITORING REPORT
13 ORDER R5-2010-0049 FOR THE WIDE
14 AWAKE MERCURY MINE, COLUSA
15 COUNTY, CALIFORNIA (CENTRAL VALLEY
REGIONAL WATER QUALITY CONTROL
BOARD)

File No. _____

**PETITION FOR REVIEW AND
REQUEST FOR ABEYANCE**

16
17 **INTRODUCTION**

18 The EMMA G. TREBILCOT TRUST ("Petitioner" or "Trust") submits this Petition for
19 Review to the State Water Resources Control Board ("State Board") pursuant to Water Code
20 section 13320 and Code of Regulations, Title 23, section 2050.

21 Petitioner seeks the State Board's review of the Central Valley Regional Water Quality
22 Control Board's ("Regional Board") May 27, 2010 Technical and Monitoring Report Order R5-
23 2010-0049 (the "Order"), issued under Water Code section 13267. The Order would require the
24 Petitioner to investigate discharges of mining waste from a former mercury mine site. Petitioner
25 was a short-term, transient owner of the property several decades after the mine became inactive,
26 and did not know of or discharge mining waste. Moreover, Petitioner is a trust for the benefit of
27 four charities that did not own or exercise control over the property.
28

1 Petitioner, at this time, requests that this Petition be held in abeyance under Code of
2 Regulations, Title 23, section 2050.5, subdivision (d), in order that discussions with the Regional
3 Board may continue. Petitioner has informed the Regional Board of this request and has been
4 advised that the Regional Board does not object. Petitioner will notify the State Board and the
5 Regional Board if discussions conclude and the abeyance should be lifted.

6 Petitioner reserves its right to revise or supplement this Petition and Request for Abeyance
7 at the time the abeyance is lifted.

8 **DESCRIPTION OF ACTION SUBJECT TO REVIEW**

9 The action subject to review is the Regional Board's May 27, 2010 Technical and
10 Monitoring Report Order R5-2010-0049, issued under Water Code section 13267. The Order
11 requires Petitioner to investigate, characterize and monitor mercury discharges from a former
12 mercury mine site known as the Wide Awake Mine, located in Colusa County. A copy of the
13 Order is attached under **Exhibit A**.

14 **MANNER IN WHICH PETITIONER IS AGGRIEVED**

15 Petitioner is aggrieved because Petitioner is a named discharger under the Order and
16 would be directly liable for the costs of complying with the Order.

17 Further, Petitioner is a trust created in March 1988 and having, as beneficiaries, four
18 charities: Shriners Hospital for Crippled Children, Salvation Army, San Francisco Lighthouse for
19 the Blind & Visually Impaired, and Lion's Eye Foundation. The costs of investigation required
20 under the Order would be paid from funds held in trust for these charities, which never owned or
21 controlled the property. These charities, as beneficiaries of Petitioner, also would be aggrieved by
22 the Order.

23 **FACTUAL BACKGROUND**

24 The Wide Awake Mine is a former mercury mine located in Colusa County, about one
25 mile southwest of the Wilbur Springs resort and 26 miles southwest of the town of Williams. The
26 Wide Awake Mine was initially built in the 1870s, and it was then that most of the mercury output
27 took place. Mining ceased before 1901, and a limited amount of mining or processing is reported
28

1 to have briefly resumed in the 1930s and 1940s. These activities had been abandoned for decades
2 before the Trust gained ownership of the Property.

3 The Wide Awake Mine is part of the Sulphur Creek watershed, an area that is
4 characterized by numerous inactive mercury and gold mines. The Wide Awake Mine is located
5 next to an unnamed drainage which enters Sulphur Creek about one-third to one-half mile to the
6 north. Downstream from this confluence, Sulphur Creek intersects with Bear Creek after about
7 one and a half miles. Bear Creek intersects with Cache Creek nine miles downstream, which, in
8 turn, drains to the Sacramento River (due to diversions Cache Creek flows reach the Sacramento
9 River only in wet years).

10 Sulphur Creek is considered "impaired" for mercury due to natural conditions, and
11 exhibits this condition independent of any anthropogenic sources. The Regional Board's staff
12 acknowledged this in a March 2007 staff report concerning a proposed Basin Plan amendment for
13 Sulphur Creek: "Sulphur Creek has never supported [municipal and domestic supply beneficial
14 uses] due to naturally occurring conditions that prevent them from being attained."

15 The Trust is a "testamentary" trust, meaning that it was created through the
16 implementation of a will. The Trust was created at the direction of Emma G. Trebilcot's will after
17 she died on December 22, 1986. Ms. Trebilcot had previously acquired the former mine as a part
18 of a much larger tract of land willed to her in April 1977 upon Ruth B. Gibson's death. Ms.
19 Trebilcot received the Property in undivided shares with F.B. Smith, who later transferred his
20 share to Ms. Trebilcot in August 1978, making Ms. Trebilcot the sole owner from then until her
21 death.

22 After Ms. Trebilcot's death, the probate court issued a March 28, 1988 order placing the
23 Property in trust according to Ms. Trebilcot's will. This order marks the establishment of the
24 Trust and the beginning of the Trust's ownership of the Property.

25 Ms. Trebilcot's will stated that the Trust was to be established for the benefit of four
26 charities: Shriners Hospital for Crippled Children, the Salvation Army, San Francisco Lighthouse
27 for the Blind & Visually Impaired, and the Lion's Eye Foundation. Wells Fargo was appointed
28

1 the trustee. The Trust assets, then and at all times since, have been held by Wells Fargo for the
2 benefit of these four charities.

3 Wells Fargo worked to sell the Property immediately after the Trust was established. On
4 May 19, 1988, less than two months after the Property was received in trust, Wells Fargo entered
5 into a listing agreement with a realty company to sell the Property. The Trust sold the Property
6 less than two years later, in December 1989, to Goshute Corporation.

7 The Trust did not develop or improve the Property during its ownership, or conduct or
8 authorize activities that could have exacerbated any pre-existing pollution.^[1] The Trust only held
9 the Property while it was listed for sale. The charities, likewise, never exercised ownership or
10 control of the Property, or authorized any activities on the Property at any time.

11 The Trust's use of the Property also was restricted during its short ownership due to a
12 preexisting lease to Homestake Mining Company. The lease was entered in August 1978, well
13 before the Trust took ownership; like its ownership of the Property, the Trust assumed this lease
14 obligation as a result of the March 1988 court order. The lease provided the lessee with
15 "exclusive possession" of the Property for mining.

16 There is no insurance available to reimburse the Trust or the charitable beneficiaries for
17 monies that would be lost as a result of the Order. The impacts of the loss of all or any part of the
18 Trust corpus will be felt directly and solely by the charities, which have no way to spread these
19 costs or pass them to another. Representatives of the charities intend to appear at the hearing to
20 discuss these impacts in more detail.

21 In the time since the Trust sold the Property, the Property has been transferred on several
22 occasions, all detailed in the record. None of the transactions involved the Trust or its charitable
23 beneficiaries.

24 **REASONS WHY ACTION IS INAPPROPRIATE AND IMPROPER**

25 The Order is inappropriate and improper, as it relates to Petitioner, for the following
26 reasons:
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1 1. **The Trust did not cause or contribute to any discharge.** The Wide Awake Mine
2 was part of a hilly, unimproved 100-acre tract (the "Property"). The Trust received the Property
3 involuntarily by court order in March 1988, and immediately listed the Property for sale. During
4 the period the Property was listed, the trustee did not occupy or improve the Property, knew of no
5 pollution (the possibility of mercury discharges has only recently been recognized), or exacerbate
6 any discharges that may have been occurring. Rather, the Trust owned the Property remotely and
7 sold it in December 1989, after a period of one year and nine months.

8 2. **The Order would inequitably affect four charities.** The trustee, Wells Fargo
9 Bank, N.A., has since 1988 managed the Trust for the benefit of four charities that would be
10 financially damaged by the Order: Shriners Hospital for Crippled Children, Salvation Army, San
11 Francisco Lighthouse for the Blind & Visually Impaired, and Lion's Eye Foundation. None had
12 any ownership in or possessed control over the Property. The Order would, nonetheless, directly
13 affect the monies held in trust for these charities for over 20 years. The beneficiaries have
14 developed reasonable expectations that Trust funds will remain available for charitable purposes
15 in the future, and not be taken by the Regional Board to investigate a century-old mine that neither
16 the Trust nor beneficiaries had any connection to. Neither the trustee nor the charities are insured
17 in any way to prevent this result.

18 3. **The Regional Board has not carried its burden of showing that an illegal**
19 **discharge of mercury occurred during the Trust's ownership.**

20 The Regional Board has not demonstrated the existence of any discharge of mercury
21 during the Trust's ownership of the Property. The Regional Board also has not demonstrated any
22 mercury discharge during the Trust ownership that exceeded any regulatory requirements
23 applicable to discharges of mercury at that time.

24 The points and authorities in support of the legal issues raised in this Petition are contained
25 in the September 16, 2009 Comments provided by Petitioner (attached as **Exhibit B**). In addition,
26 Petitioner is providing in support of this Petition oral testimony and statements made at the
27 October 7, 2009 hearing before the Regional Board (a copy of the transcript is attached as **Exhibit**
28 **C**), as well as the comments and in Petitioner's April 29, 2010 comment letter on the revision

1 made to the Order (attached as **Exhibit D**). Exhibits B, C, and D are hereby incorporated by
2 reference.

3 **ACTION REQUESTED OF STATE BOARD**

4 Petitioner requests that the State Board vacate and/or reverse the Order, as it relates to
5 Petitioner.

6 **NOTIFICATION TO REGIONAL BOARD**

7 A copy of this Petition has been sent to the Regional Board at the following address:
8 Patrick Pulupa and Lori Okun, State Water Resources Control Board, 1001 I Street, Sacramento,
9 California, 95814.

10 For reference, Petitioner's address is: c/o Wells Fargo Bank, N.A. (trustee), 1740
11 Broadway Street, Denver, Colorado, 80274, (303) 863-5705. For the purposes of this matter,
12 Petitioner should be contacted through Diepenbrock Harrison at the address and telephone number
13 listed in the caption.

14
15 Dated: June 28, 2010

DIEPENBROCK HARRISON
A Professional Corporation

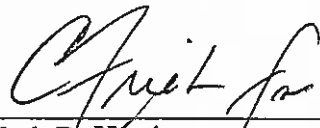
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18 By: 
19 Mark D. Harrison
20 Sean K. Hungerford
21 Attorneys for
22 THE EMMA G. TREBILCOT TRUST
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EXHIBIT A

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

**TECHNICAL AND MONITORING REPORT ORDER R5-2010-0049
FOR**

**HOMESTAKE MINING COMPANY, EMMA G. TREBILCOTT TRUST,
ROBERT LEAL, NBC LEASING, INC.,
CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER, DAVID G.
BROWN, ROY TATE, AND MERCED GENERAL CONSTRUCTION**

**THE WIDE AWAKE MERCURY MINE
COLUSA COUNTY**

This Order is issued to Homestake Mining Company, Emma G. Trebilcott Trust, Robert Leal, NBC Leasing, Inc., Cal Sierra Properties, Roy Whiteaker and Gladys Whiteaker, David G. Brown, Roy Tate, and Merced General Construction (hereafter collectively referred to as Dischargers) based on provisions of California Water Code (CWC) section 13267, which authorizes the Central Valley Water Quality Control Board (Central Valley Water Board or Board) to require the submittal of technical and monitoring reports.

The Central Valley Water Board finds, with respect to the Dischargers' acts or failure to act, the following:

1. The Wide Awake Mine (hereafter "Mine") is an inactive mercury mine with mining waste that includes in part, mine cuts, waste rock, and tailings that erode, or threaten to erode, into a Sulphur Creek tributary during storm runoff conditions. These wastes have eroded into drainage swales, ditches, and a tributary to Sulphur Creek, which is tributary to Cache Creek. The Mine has discharged and continues to discharge or threatens to discharge mining waste into waters of the state. These discharges have affected water quality, and continuing erosion of mining waste into Sulphur Creek will further affect water quality. .
2. The Mine is located in the Sulphur Creek Mining District (District) of Colusa County, about one mile southwest of the Wilber Springs resort and about 26 miles southwest of Williams. The 100-acre property is described by Assessor's Parcel Numbers 018-200-010-000, 018-200-11-000, and 018-200-12-000 in Sections 28 and 29, Township 14 North, Range 5 West, Mount Diablo Base and Meridian (MDBM), as shown in Attachment A, a part of this Order.
3. Mining waste has been discharged at the Mine since mining activities began in the 1870s. Mining waste has been discharged onto ground surface where it has eroded into Sulphur Creek, resulting in elevated concentrations of metals within the creek. Mining waste discharged onto ground surface has not been evaluated for its potential impact to ground water. The Dischargers either own, lease or operate, or have owned, leased, or operated the mining site where the Mine is located and where mining waste has been discharged. In its current condition, mining waste is causing or threatens to cause a discharge of pollutants to waters of the state.
4. The Central Valley Water Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) states: "By 6 February 2009, the Regional Water Board shall adopt cleanup and abatement orders or take other

appropriate actions to control discharges from the inactive mines (Table IV-6.4) in the Cache Creek watershed." Basin Plan p. IV-33.05. Mercury levels are already above applicable objectives in Sulphur Creek and Cache Creek, which constitutes a condition of pollution or nuisance.

5. The Prosecution Team conducted a title review of property records from the Colusa County Records Office. The parties named in this Order as Dischargers are known to presently exist or have a viable successor. The basis of liability for each Discharger is addressed below under Dischargers' Liability.
6. This Order may be revised to include additional Dischargers as they become known, and may include additional current or former owners, leaseholders, and operators.

Mining History

7. Mercury was discovered in the District in the 1870s, and the mine was developed at that time. The Mine was opened in the 1870s and may have been originally known as the Buckeye Mine, a name retained until the 1890s, at which time it was renamed the Wide Awake Mine. This information is described in the *CalFed-Cache Creek Study, Task 5C2: Final Report. Final Engineering Evaluation and Cost Analysis for the Sulphur Creek Mining District*, prepared by Tetra Tech EM Inc., September 2003 (hereafter CalFed Report).
8. Early production was from shallow workings and later, in the 1870s, a 500-foot vertical shaft was sunk with levels at 190, 290, and 390 feet below the ground surface. During shaft dewatering, water flowing to Blank Spring, a small local thermal spring 400 meters to the northwest of the Mine, was intersected. Efforts were made to drain the shaft by driving a drainage tunnel, but operations ceased shortly thereafter. Some ore from the nearby Empire mine was probably processed at the Mine during this period (CalFed Report).
9. The mine was worked extensively for several years in the 1870s with a reported output of approximately 1,800 flasks of mercury (one flask equals 76 pounds). Ore processing facilities in the 1870s included a Knox-Osborne 10-ton furnace and two small retorts. A small amount of production is reported during the 1890s and early 1900s (CalFed Report).
10. In the late 1890s and early 1900s, an effort was made to rehabilitate the vertical shaft and extensive surface facilities were constructed, including a 24-ton Scott furnace, enclosed hoist house, and bunkhouses (CalFed Report).
11. Some work was done in 1932 and 1943, and a moderate production was reported. The production in 1943 may have been in conjunction with mining and processing of ore from the nearby Manzanita mine to the north at a facility that was constructed on the Wide Awake property by the operators of the Manzanita mine (CalFed Report).
12. Total mercury production at the mine was probably not much greater than 1,800 flasks, most of which was produced in the 1870s (CalFed Report).

13. The Wide Awake Mine is intermediate in size and production relative to other mines in the Sulphur Creek Mining District. Remains of the Scott furnace and the rotary furnace with condenser coils remain largely intact on-site (CalFed Report).

Mining Waste Description and Characterization

14. Mining waste at the Mine includes mercury-bearing material from mine cuts, waste rock, tailings, waste around the perimeter of and within the processing facilities, and contaminated sediment within drainage swales, and ditches. Mining waste at the Mine erodes or threatens to erode into a Sulphur Creek tributary with stormwater runoff (CalFed Report).
15. The Mine contains about 20,000 cubic yards (CY) of processed tailings spread over an area of approximately 1.25 acres. An estimated 8,000 CY of waste rock is immediately adjacent to and within the tributary to Sulphur Creek. Another waste rock dump exposed in the eastern stream bank below the rotary furnace may contain up to 11,000 CY. An estimated 400 kilograms (kg) of mercury remains at the Mine, almost entirely within the mixed calcine (tailings) and waste piles (CalFed Report).
16. In 2002, waste extraction tests were conducted on mining waste. The results exceeded water quality objectives for the metals antimony, arsenic, chromium, mercury, and nickel. Maximum concentrations detected were: antimony - 107 micrograms per liter (ug/L), arsenic - 24.6 ug/L, chromium - 33.3 ug/L, mercury - 21 ug/L, and nickel - 102 ug/L. The potential for water-rock interaction to mobilize mercury from tailings is thought to be minimal based on analysis of waste extraction test (WET) leachates. However, water-rock interaction likely mobilizes mercury based on detection of mercury in a WET leachate sample from waste rock approximately 250 feet downstream from the 1940s furnace (CalFed Report). Complete characterization of the soil and mining waste at the site has not been performed.
17. The Mine waste rock and tailings are susceptible to erosion from uncontrolled stormwater runoff. Surface water runoff transports mercury-laden sediment into a tributary to Sulphur Creek, which is tributary to Cache Creek. Approximately 8 tons/year of sediment from the Mine is estimated to erode from mining waste located immediately adjacent to and within the tributary to Sulphur Creek. The estimated mercury lode from this Mine is 0.02 to 0.44 kg/yr or 2.4% of the total mine related mercury lode of 4.4 to 18.6 kg/yr to Sulphur Creek. It is estimated that the Mine contributes 1.53% of the mine related mercury lode from the District (CalFed Report).
18. Mercury concentrations detected in mining waste at the Mine range from 5.0 to 1,040 milligrams per kilogram (mg/kg). Site background concentrations range from 2.37 to 90 mg/kg (CalFed Report).
19. Aqueous mercury concentrations in Sulphur Creek are among the highest in the Cache Creek watershed, and remain elevated during non-peak flow periods. Active hydrothermal springs constantly discharge into Sulphur Creek, with mercury concentrations ranging from 700 to 61,000 nanograms per liter (ng/L) (CalFed Report).

20. Particulate bound mercury in Sulphur Creek comes mostly from sediments and mercury-bearing mine waste mobilized into the creek during storms. All the mines together are estimated to contribute about 78% of the total mercury load. The Wide Awake Mine sub watershed is estimated to contribute about 7 % of the total mercury load. Similar to total and dissolved concentrations, methyl mercury concentrations in Sulphur Creek are among the highest reported for the Cache Creek watershed. Methyl mercury concentrations were as high as 20.64 ng/L in Sulphur Creek above the confluence with Bear Creek. (*Sulphur Creek TMDL for Mercury, Final Staff Report, January 2007.*¹).
21. Mercury is a toxic substance, which can cause damage to the brain, kidneys, and to a developing fetus. Young children are particularly sensitive to mercury exposure. Methyl mercury, the organic form of mercury that has entered the biological food chain, is of particular concern, as it accumulates in fish tissue and in wildlife and people that eat the fish. Mine waste present at this Mine may also pose a threat to human health due to exposure (dermal, ingestion, and inhalation) through recreational activities (hiking, camping, fishing, and hunting) or work at the site.

Regulatory Considerations

22. Section 303(d) of the Federal Clean Water Act requires states to identify waters not attaining water quality standards (referred to as the 303(d) list). Since 1990, Sulphur Creek has been identified by the Central Valley Water Board as an impaired water body because of high aqueous concentrations of mercury.
23. The Basin Plan designates beneficial uses of the waters of the state, establishes Water Quality Objectives (WQOs) to protect these uses, and establishes implementation policies to achieve WQOs.
24. Studies were conducted that demonstrated that the municipal and domestic supply (MUN) beneficial use and the human consumption of aquatic organisms beneficial use did not exist and could not be attained in Sulphur Creek from Schoolhouse Canyon to the mouth, due to natural sources of dissolved solids and mercury. The Central Valley Water Board, in Resolution R5-2007-0021, adopted a basin plan amendment that de-designated these uses in Sulphur Creek from Schoolhouse Canyon to the mouth. The remaining beneficial uses for Sulphur Creek, a tributary of Cache Creek, are: agricultural supply; industrial service supply; industrial process supply; water contact recreation and non-contact water recreation; warm freshwater habitat; cold fresh water habitat; spawning, reproduction, and/or early development; and wildlife habitat.
25. The beneficial uses of underlying groundwater, as stated in the Basin Plan, are municipal and domestic supply, agricultural supply, industrial service supply, and industrial process supply.

¹ The report is available at http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_hg/sulphur_creek_tmdl.pdf

26. The Central Valley Water Board adopted site-specific water quality objectives for Sulphur Creek in Resolution R5-2007-0021. The WQOs now listed in the Basin Plan for Sulphur Creek state that waters shall be maintained free of mercury from anthropogenic sources such that beneficial uses are not adversely affected. During low flow conditions, defined as flows less than 3 cfs, the instantaneous maximum total mercury concentration shall not exceed 1,800 ng/L. During high flow conditions, defined as flows greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35 mg/kg. Both objectives apply at the mouth of Sulphur Creek. Exceedances of the water quality objective in Sulphur Creek during high flow events are documented in Appendix C (page 24) of the *Staff Report for the Amendment to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Determine Certain Beneficial Uses are Not Applicable in and Establish Water Quality Objectives for Sulphur Creek*² dated March 2007 which is part of the administrative record of this Order.
27. Sulphur Creek is tributary to Bear Creek, which is tributary to Cache Creek. Beneficial uses of Bear and Cache Creeks are municipal and domestic supply (MUN), agriculture – irrigation and stock watering, contact and non-contact recreation, industrial process and service supply, warm freshwater habitat, spawning – warm and cold, wildlife habitat, cold freshwater habitat, and commercial and sport fishing. Cache Creek is impaired for mercury and therefore has no assimilative capacity. Any discharges of mercury or mercury-laden sediments that reach Cache Creek therefore threaten to cause or contribute to a condition of pollution or nuisance. Cache Creek drains to the Cache Creek Settling Basin, which discharges to the Yolo Bypass and flows into the Sacramento-San Joaquin Delta Estuary. Data documenting exceedances of water quality objectives in Cache and Bear Creeks are found in Table 3.2 (page 9) of the October 2005 staff report entitled *Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control of Mercury in Cache Creek, Bear Creek, Sulfur Creek, and Harley Gulch*, which is part of the administrative record of this Order.³
28. The Cache Creek Watershed Mercury Program, included in the Basin Plan, requires responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (i.e., Cache Creek and its tributaries). The Basin Plan, Chapter IV, page 33.05 states that,

Responsible parties shall develop and submit for Executive Officer approval plans, including a time schedule, to reduce loads of mercury from mining or other anthropogenic activities by 95% of existing loads consistent with State Water Resources Control Board Resolution 92-49. The goal of the cleanup is to restore the mines to premining conditions with respect to the discharge of mercury. Mercury and methylmercury loads produced by interaction of thermal springs with mine wastes from the Turkey Run and Elgin mines are considered to be anthropogenic loading. The responsible parties shall be deemed in compliance with this requirement if cleanup actions

² This report is available at
http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/sulphur_creek_ho/sulphur_creek_staff_final.pdf

³ This report is available at
http://www.swrcb.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/cache_sulphur_creek/cache_creek_hq_final_rpt_oct2005.pdf

and maintenance activities are conducted in accordance with the approved plans. Cleanup actions at the mines shall be completed by 2011.

29. The Basin Plan, Chapter IV, page 33.05 states that,

The Sulphur Creek streambed and flood plain directly below the Central, Cherry Hill, Empire, Manzanita, West End and Wide Awake Mines contain mine waste. After mine cleanup has been initiated, the Dischargers shall develop and submit for Executive Officer approval a cleanup and abatement plan to reduce anthropogenic mercury loading in the creek.

30. Under CWC section 13050, subdivision (q)(1), "mining waste" means all solid, semisolid, and liquid waste materials from the extraction, beneficiation, and processing of ores and minerals. Mining waste includes, but is not limited to, soil, waste rock, and overburden, as defined in Public Resources Code section 2732, and tailings, slag, and other processed waste materials...." The constituents listed in Findings No. 14 and 15 are mining wastes as defined in CWC section 13050, subdivision (q) (1).

31. Because the site contains mining waste as described in CWC sections 13050, closure of Mining Unit(s) must comply with the requirements of California Code of Regulations, title 27, sections 22470 through 22510 and with such provisions of the other portions of California Code of Regulations, title 27 that are specifically referenced in that article.

32. Affecting the beneficial uses of waters of the state by exceeding applicable WQOs constitutes a condition of pollution as defined in CWC section 13050, subdivision (f).

33. Under CWC section 13050, subdivision (m) a condition that occurs as a result of disposal of wastes, is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property, and affects at the same time any considerable number of persons, is a nuisance.

34. Mine waste has been discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.

35. CWC section 13304(a) states that:

Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a Regional Water Board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a Regional Water Board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to

comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

36. The State Water Resources Control Board (State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under CWC Section 13304*. This Resolution sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution No. 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution No. 92-49 and the Basin Plan establish cleanup levels to be achieved. Resolution No. 92-49 requires waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with California Code of Regulations, title 23, section 2550.4. Any alternative cleanup level to background must: (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Board.

37. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Central Valley Water Board's policy for managing contaminated sites. This policy is based on CWC sections 13000 and 13304, California Code of Regulations, title 23, division 3, chapter 15; California Code of Regulations, title 23, division 2, subdivision 1; and State Water Board Resolution Nos. 68-16 and 92-49. The policy addresses site investigation, source removal or containment, information required to be submitted for consideration in establishing cleanup levels, and the basis for establishment of soil and groundwater cleanup levels.

38. The State Board's *Water Quality Enforcement Policy* states in part:

At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the Central Valley Water Board allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the Order should require the discharger(s) to abate the effects of the discharge (Water Quality Enforcement Policy, p. 19).

39. CWC section 13267 states that:

- (a) A regional board, in establishing or reviewing any water quality control plan or waste discharge requirements, or in connection with any action relating to any plan or requirement authorized by this division, may investigate the quality of any waters of the state within its region.
- (b) (1) 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, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of 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 burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from

the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports.

40. Each Discharger named in this Order "has discharged, discharges, or is suspected of having discharged or discharging . . . waste" within the region of the Central Valley Water Board. The Dischargers own, lease, or operate, or have owned leased, or operated the mining sites subject to this Order. Additional findings establishing the liability of each Discharger pursuant to CWC section 13267 are set forth below in Findings 53-62.
41. The technical reports required by this Order are necessary to ensure the protection of the waters of the state, comply with the Basin Plan's requirement for responsible parties to develop plans to reduce existing loads of mercury from mining or other anthropogenic activities by 95% in the Cache Creek watershed (Basin Plan, Chapter IV, page 33.05, see Finding 28), to further characterize the location of mining wastes, to complete a conceptual site model for the eventual cleanup of the mining sites and determine what cleanup measures are necessary, and to provide additional information about suspected past or future discharges. While no specific cost for the required reports has been estimated, the need for cleanup is well established. (See, e.g., the Basin Plan's Cache Creek Watershed Mercury Program.) The technical or monitoring report is necessary to accomplish the cleanup. (See, State Water Board Resolution 92-49.) The investigation is as limited as possible, and is consistent with orders requiring investigation or cleanup at other sites.
42. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code, section 21000 et seq.), pursuant to California Code of Regulations, title 14, section 15321(a) (2). The implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15307 and 15308. The implementation of this Order also constitutes basic data collection, research and/or resource evaluation activities which do not result in a serious or major disturbance to an environmental resource, and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14 sections 15306.

Dischargers' Liability

43. The meaning of "discharge" under Porter-Cologne includes not only the initial introduction of waste into the environment, but also the continued migration and spread of the contamination, including the migration of waste from soil to water. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; see also 26 Ops.Atty.Gen. 88, Opinion No. 55-116, [1955]). Waste piles at the mining sites have and continue to discharge, and threaten to discharge, mercury and other pollutants to surface waters as stated in Findings 14-21 above.

44. Owners, lessees, and operators of a property that is a source of passive discharge of pollutants are liable for the discharge even if they did not own, lease, or operate the property at the time of initial discharge of pollutants. (State Board Order WQ 86-2 [*Zoecon Corp.*]; State Board Order WQ 92-13 [*Wenwest, Inc., et al.*]; State Board Order WQ 89-8 [*Spitzer et al.*]). An owner, lessee, or operator has the ability to control the passive release of pollutants from the property. The Dischargers may have prevented mine materials and enriched mercury soil from entering surface waters through a number of measures including, but not limited to: relocating material piles away from waterways, placing barriers, such as grass covered berms, between mine materials and waterways, recontouring and revegetating material piles and areas of surface disturbance by mining activity to reduce erosion, redirecting storm runoff around material piles and areas of surface disturbance to reduce erosion, stabilizing of stream banks containing enriched mercury alluvium to minimize erosion during storm events. An owner, lessee, or operator may have knowledge of a passive discharge by notification in a deed or lease, even if the owner, lessee, or operator never observes the discharge. The mining claim was listed on county Assessor's Parcels for the mine property.
45. The Central Valley Water Board has the authority under Water Code section 13267 to require a technical report from any individual or entity "suspected" of having discharged or discharging waste. Each of the owner, leaseholder, or operator Dischargers is subject to the Central Valley Water Board's section 13267 authority because, based on evidence in the record, they have or had an ownership, tenancy, or operation interest in the mining sites during a time period when waste piles were discharging or are suspected of discharging mercury and other pollutants to surface waters.
46. "Evidence" for purposes of CWC section 13267 "means any relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in a civil action" (CWC § 13267, subd. (e).) There is adequate evidence in this case that each Discharger had an ownership, leasehold, or operator interest in the property and to suspect that each Discharger discharged waste.
47. As established in Findings 14-21 mercury is mobilized by storm water runoff, slope failure, or water-rock interaction from mine waste. In addition, disturbed sediments can migrate across the property and be deposited where they are later discharged to waters of the state. Each of the Dischargers owned the property in question for at least twelve months. Although the Board did not consider rain data for each year at the Hearing, the Board takes official notice that there are no years on record during the relevant period of time when it did not rain at all.
48. The State Water Board has held that all dischargers are jointly and severally liable for the discharge of waste. (State Board Order WQ 90-2 [*Union Oil Company*]). At this stage, the Board has not determined the relative mercury contributions of various dischargers. Even if the Board was inclined to apportion responsibility, which it is not, apportionment would be premature at this time.

49. The State Water Board has determined that it is inappropriate to require certain dischargers to participate in a cleanup, even though the dischargers have some legal responsibility for cleanup. (See, State Water Board Order WQ 92-13 (*Wenwest*). In *Wenwest*, the State Board held that an interim owner of a property with passive discharge would be released from being named as a responsible party under the specific facts of that case including (1) that the discharger had only owned the property for a short period of time, (2) the ownership was for the limited purpose of conveyance to a transferee, (3) the ownership occurred at a time when there was limited understanding of the problems associated with the passive discharge, (4) the discharger did not conduct any activities which might have exacerbated the problem, (5) clean-up was already proceeding, and (6) there were several additional responsible parties. Several Dischargers named in this Order argue that they should not be liable for clean-up under the *Wenwest* factors. However, this Order is limited to site investigation. Even assuming the *Wenwest* factors apply to site investigations, the Board finds none of the named Dischargers satisfy the *Wenwest* factors because no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence and cannot be held liable for the investigation or clean-up.
50. In the context of clean-up orders (CWC section 13304), the Central Valley Water Board may find certain dischargers to be only secondarily liable for clean-up. (See State Board Order WQ 87-6 [*Prudential Ins. Co.*] and State Board Order WQ 86-18 [*Vallco Park, Ltd.*]). Even if the secondary liability concept can be applied in the section 13267 context, it is not appropriate here. The Central Valley Water Board considered whether any named Dischargers should be secondarily liable and has concluded that all Dischargers should be primarily liable. Here, the investigation and cleanup is not proceeding and the parties that actively engaged in the mining operations at the root of the ongoing discharge are no longer in existence. Accordingly, all named Dischargers to the Order stand on essentially the same footing and should be treated alike. (State Board Order WQ 93-9 [*Aluminum Company of America et al.*])
51. The Board considered whether interim landowners and lessees should be held liable for passive discharges to surface waters even though the specific discharges during the time of interim ownership may have in the intervening years left the Sulphur Creek/Cash Creek watersheds. The Board finds that such interim landowners are liable under this Order. As a preliminary matter, the migration of pollutants from soil in one area of the property to soil in another area, from where it may later be discharged into the surface waters, is a discharge for which an interim owner may be liable. Additionally, in accordance with *City of Modesto Redevelopment Agency v. Superior Court* ((2004) 119 Cal.App.4th 28), the Board may look to the law of nuisance to interpret liability in the context of a section 13304 clean-up order. California Civil Code section 3483, which codified the common law duty of successive owners to abate a continuing nuisance, states that every successive owner of property who neglects to abate a continuing nuisance created by a former owner is liable in the same manner as the one who first created it. In accordance with this principle, interim owners could have been named in a section 13304 order and it is even more appropriate to name them in this section 13267 Order where the Board need only establish that the interim owners are "suspected" of discharging waste.

52. Cal Sierra and Merced Construction asserted that the Order may be barred by the doctrine of laches. In order to prevail on a defense of laches in an administrative proceeding, the defendant must establish an unreasonable delay in bringing the action, "plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay." (*Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 672). Here, the discharges being investigated are continuous and therefore there is no unreasonable delay in bringing an Order for investigation of the conditions of the ongoing discharge. Furthermore, the Board has been diligently working toward addressing the discharge of mercury in the Cache Creek watershed through several complex and time-intensive regulatory steps, including preparation of the Cal-Fed Report (see Findings 7-21) and two Basin Plan amendments (Findings 24-28). There is no evidence in the record that the Board acquiesced in the discharges, or that Cal Sierra or Merced Construction relied specifically on any inaction on the part of the Board in deciding to purchase, sell, or operate the mine property.
53. The property on which Wide Awake Mercury Mine was located has been identified as Assessor's Parcel Number 018-200-003-000 until 16 October 1995 and Assessor's Parcel Numbers 0180-200-010-000, 018-200-011-000, and 018-200-012-000 from 16 October 1995 to the present. The Dischargers named in this Order have owned or leased the relevant parcels as follows in Findings 55-62.
54. At least one Discharger named in this Order has argued that mining waste was not present on the specific parcel it owned. Evidence in the record indicates that all three parcels created after the 16 October 1995 split of Assessor's Parcel Number 0180-200-003-000 were part of the mine property, but the CalFed Report does not reference individual parcels. There is sufficient evidence before the Board to suspect that each Discharger owned property that discharged mine waste because each Discharger owned, leased, or operated a parcel that constituted part of the mine property. If the Board concludes, based on the technical reports required by this Order that a particular parcel was not a source of waste discharges, the affected Dischargers will have no further responsibility for clean-up. Similarly, affected Dischargers will not have further clean-up responsibility if the timing of waste discharges relative to property ownership or control was such the Discharger(s) did not cause or permit the discharge of waste.
55. EMMA G. TREBILCOTT TRUST: The Emma G. Trebilcott Trust (Trust) owned Assessor's Parcel Number 018-200-003-000 from 28 March 1988 to 5 December 1989. The property was placed in the Trust by court order following the death of Emma G. Trebilcott, the previous owner of the parcel. At its creation, the Trust did not assume any liabilities that arose during the lifetime of Ms. Trebilcott. Within two months, the Trust entered into a listing agreement with a realty company for sale of the property and held the property pending its eventual sale in December 1989, without developing or improving the property during its ownership. The Trust assets are now held by Wells Fargo Bank, NA, for the benefit of four charities. The Trust retained the mineral rights to the parcel following its sale, leasing the rights during its ownership of the parcel and through 20 May 1993 to Homestake Mining Company. It appears that the mineral rights have been retained by the Trust to date; however, liability under this Order is being imposed due to the Trust's ownership of the

parcel until its 5 December 1989 sale and not under its retention of the mineral rights because this Order only addresses surface discharges. The Trust, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or suspected of eroding into surface waters during the time that the Trust held title to the property, the Trust is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

56. HOMESTAKE MINING COMPANY: Homestake Mining Company (Homestake) was a lessee of the mineral rights to Assessor's Parcel Number 018-200-003-000 from 20 July 1978 to 20 May 1993. Homestake was not an owner of the parcel during this time period and there is no evidence that Homestake operated any mine on the site. Homestake has provided evidence that its activity on the site was limited to mining exploration activity consisting primarily of seven drill pads of dimensions 30 by 50 feet or less, all of which were subsequently reclaimed, and that no road work took place under its lease. However, the lease provided that Homestake had exclusive possession of the property for mining purposes and the lease's scope included control of tailings and waste piles on the mining property. The owner reserved surface rights for livestock grazing and other agricultural uses only and water development incidental to such use. Under the terms of its lease, Homestake exercised control over the property and had the ability to prevent mine materials and enriched mercury soil from entering waterways. Homestake, by holding a leasehold interest giving it control over the property during a time when mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Homestake held a leasehold interest in the property, Homestake is a person who has discharged, discharges, or is suspected of having discharged or discharging wastes into waters of the state.

57. ROBERT LEAL: Robert Leal owned the parcel on which the mine was located (variously numbered Assessor's Parcel Number 018-200-03-000 until 16 October 1995, and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 thereafter) from 28 February 1990 to 1 November 1995. Leal owned the mine property during this time period and leased it to another party not named in this order for grazing. Leal did not own the mineral rights to the property. Leal entered an easement agreement with Homestake for Homestake's access to the property. Leal, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Leal held title to the property, Leal is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

The Board finds that Leal should not be released from this Order under the *Wenwest* factors. In addition to the reasons laid out in Finding 49 (no clean-up is currently proceeding at the mine site and the Dischargers that caused the initial discharges during mining operations are no longer in existence), Leal's ownership extended over several years and was not for a short period of time and his ownership of the property was not for the limited purpose of conveyance to a transferee.

Leal has argued that this Order may constitute a "taking" of property without just compensation. A regulatory action may constitute a taking when it deprives a property owner of all economically beneficial use of that property. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Leal does not currently own the mine property. This Order may impose certain costs on Leal, but does not deprive him of economically beneficial use of any property.

58. CAL SIERRA PROPERTIES, ROY WHITEAKER AND GLADYS WHITEAKER: Cal Sierra Properties (Cal Sierra) held an ownership interest in Assessor's Parcel Number 018-200-010-000 from 16 October 1995 to 10 September 1999 and Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000 from 1 November 1995 to approximately 1 January 2004. Cal Sierra did not own the mineral rights to those parcels. Cal Sierra, by taking title to the property where mining waste was present, assumed responsibility for managing the discharges from the waste. As these wastes were eroding or are suspected of eroding into surface waters during the time that Cal Sierra held title to the property, Cal Sierra is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state. Cal Sierra was a general partnership that has been dissolved. Roy and Gladys Whiteaker were general partners, and are therefore personally liable for Cal Sierra's obligations.
59. NBC LEASING, INC.: NBC Leasing, Inc. (NBC Leasing) held an ownership interest in Assessor's Parcel Number 018-200-003-000, upon which the mine was located, from 15 August 1990 to 16 October 1995. After that parcel was split into three, NBC Leasing continued to own Assessor's Parcel Number 018-200-010-000 until 7 March 1996 and has continued in its ownership of parcel numbers 018-200-011-000 and 018-200-012-000 to date. NBC Leasing did not and does not own the mineral rights to the parcels. NBC Leasing, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that NBC Leasing held title and continues to hold title to the property, NBC Leasing is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
60. DAVID G. BROWN. David G. Brown is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Brown has had an ownership interest in parcel 018-200-010-000 since 10 September 1999 and in parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Brown does not own the mineral rights to the parcels. Brown, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Brown has held title to the property, Brown qualifies a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.

61. ROY TATE. Roy Tate is a current owner of Assessor's Parcel numbers 018-200-010-000, 018-200-011-000 and 018-200-012-000. Tate has owned parcel 018-200-010-000 since 10 September 2009 and parcels 018-200-011-000 and 018-200-012-000 since approximately 1 January 2004. Tate does not own the mineral rights to the parcel. Tate, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or are suspected of eroding and continue to erode into surface waters during the time that Tate has held title to the property, Tate is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
62. MERCED GENERAL CONSTRUCTION, INC: Merced General Construction, Inc. (Merced General) is a current owner of Assessor's Parcel number 018-200-010-000 and has owned the parcel since approximately 1 January 2005. Merced General does not own the mineral rights to the parcel. Merced General, by taking title to the property where mining waste was present, assumed responsibility for appropriately managing the discharges from the waste. As these wastes were eroding or were suspected of eroding and continue to erode into surface waters during the time that Merced General has held title to the property, Merced General is a person who has discharged, discharges, or is suspected of having discharged or discharging waste into waters of the state.
63. The Executive Officer may add additional responsible parties to this Order without bringing the matter to the Central Valley Water Board for a hearing, if the Executive Officer determines that additional parties are liable for investigation of the mine waste. The Executive Officer may remove Dischargers from this Order if the Executive Officer receives new evidence demonstrating that such Dischargers did not cause or permit the discharge of waste that could affect water quality. All Dischargers named in this Order and any responsible parties proposed to be added shall receive notice of, and shall have the opportunity to comment on, the addition or removal of responsible parties.

IT IS HEREBY ORDERED that, the Dischargers, and their agents, assigns and successors, in order to meet the provisions contained in Division 7 of the California Water Code and regulations, plans and policies adopted thereunder,:

1. Conduct all work in conformance with the Regional Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV).

Waste Characterization

2. By **26 July 2010**, submit a *Mining Waste Characterization Work Plan* (hereafter *Characterization Plan*) for the Mine site. The Characterization Plan shall assess the nature and extent and location of mining waste discharged at the site and the potential threat to water quality and/or human health. The Characterization Plan shall describe the methods that will be used to establish background levels for soil, surface water, and ground water at the site, and the means and methods for determining the vertical and lateral extent of the mining waste.

The Characterization Plan shall also address slope stability of the site and assess the need for slope design and slope stability measures to minimize the transport of mining waste-laden soils to surface water and ephemeral streams. The Characterization Plan shall adopt the time schedule as described below in items 3 through 13 below for implementation of the proposed work.

3. Within **30 days** of staff concurrence with the Characterization Plan, but no later than **27 September 2010**, begin implementing the Characterization Plan in accordance with the approved time schedule, which shall become part of this Order.
4. By **27 January 2011**, submit a *Mining Waste Characterization Report* (hereafter *Characterization Report*) for the Mine. The Characterization Report shall include:
 - a. A narrative summary of the field investigation;
 - b. A section describing background soil concentrations, mining waste concentrations, and the vertical and lateral extent of the mining waste;
 - c. Surface water and ground water sampling results;
 - d. A section describing slope stability and erosion potential and recommendations for slope stabilization;
 - e. An evaluation of risks to human health from site conditions, and;
 - f. A map and description of the current or historic location of mining waste, including waste that has eroded or migrated over land to a location where it was, or could be, discharged to waters of the State;
 - g. A work plan for additional investigation, if needed, as determined by staff. If no additional investigation is needed, this report shall be the Final Characterization Report.
5. By **27 January 2011**, submit a *Surface and Ground Water Monitoring Plan* (hereafter *Monitoring Plan*) for the Mine. The Monitoring Plan shall describe the methods and rationale that will be used to establish background levels for surface water and ground water at the site. The Monitoring Plan shall also address long-term monitoring necessary to confirm the effectiveness of the remedies.

Water Supply Well Survey

6. By **27 September 2010**, submit the results of a water supply well survey within one-half mile of the site and a sampling plan to sample any water supply well(s) threatened to be polluted by mining waste originating from the site. The sampling plan shall include specific actions and a commitment by the Dischargers to implement the sampling plans, including obtaining any necessary access agreements. If the Dischargers demonstrate that exceedances of water quality objectives in the water supply well survey discussed above are the result of naturally occurring hydrothermal sources, then the Dischargers may request a waiver of requirements No. 7 and 8 listed below.
7. Within **30 days** of staff concurrence with the water supply well sampling plan, the Dischargers shall implement the sampling plan and submit the sampling results in accordance with the approved time schedule, which shall become part of this Order.

8. Within **30 days** of staff notifying the Dischargers that an alternate water supply is necessary, submit a work plan and schedule to provide an in-kind replacement for any impacted water supply well. The Dischargers shall implement the work plan in accordance with an approved time schedule, which shall become part of this Order.

General Requirements

The Dischargers shall:

9. Pursuant to CWC section 13365, reimburse the Central Valley Water Board for reasonable costs associated with oversight of the investigation of the site. Within **30 days** of the effective date of this Order, the Dischargers shall provide the name and address where the invoices shall be sent. Failure to provide a name and address for invoices and/or failure to reimburse the Central Valley Water Board's oversight costs in a timely manner shall be considered a violation of this Order. If the Central Valley Water Board adopts Waste Discharge Requirements (WDRs), review of reports related to writing of the WDRs and all compliance measures thereafter would be subject to the fees required by issuance of the Order and the reimbursement under this requirement would no longer apply.
10. Submit all reports with a cover letter signed by the Dischargers. In the cover letter, the Dischargers shall express their concurrence or non-concurrence with the contents of all reports and work plans.
11. Notify staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.
12. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning work.
13. Continue any investigation, reporting or monitoring activities until such time as the Executive Officer determines that sufficient work has been accomplished to comply with this Order. The Executive Officer, with concurrence from the Prosecution Team, and after soliciting comments from the remaining named parties, may determine that a party named to this Order has satisfied or will satisfy their obligations under this Order by performing or agreeing to perform substantial work that results in a more complete understanding of the scope of the problems at the Site, consistent with the obligations imposed by this 13267 Order. After such a determination has been made, the Prosecution Team will be directed to compel the remaining named parties to fulfill the remaining obligations under this Order.

Investigation of Additional Responsible Parties

14. The Prosecution Team shall complete its investigation of other entities that are or may be responsible for investigation or cleanup of the Mine. This investigation shall include, without limitation, the Bureau of Land Management. The Prosecution Team may issue subpoenas, or may request the Executive Officer to issue orders under section 13267, as appropriate. This directive is without prejudice to any rights of any person to contest such subpoena(s)

or order(s). Any person may provide evidence relevant to liability (or lack thereof); whether or not that person is the subject of a subpoena or section 13267 order. The Prosecution Team shall report the results of its investigation to the Executive Officer, with a copy to all parties and interested persons, by 30 November 2010. The Executive Officer may extend this deadline.

Any person signing a document submitted under this Order must make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

In accordance with California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments must be performed by or under the direction of registered professionals competent and proficient in the fields pertinent to the required activities. All technical reports specified herein that contain work plans for, that describe the conduct of investigations and studies, or that contain technical conclusions and recommendations concerning engineering and geology must be prepared by or under the direction of appropriately qualified professional(s), even if not explicitly stated. Each technical report submitted by the Dischargers must contain the professional's signature and, where necessary, his stamp or seal.

The Executive Officer may extend the deadlines contained in this Order if the Dischargers demonstrate that unforeseeable contingencies have created delays, provided that the Dischargers continue to undertake all appropriate measures to meet the deadlines and make the extension request in advance of the expiration of the deadline. The Dischargers shall make any deadline extension request in writing prior to the compliance date. An extension may be denied in writing or granted by revision of this Order or by a letter from the Executive Officer. Any request for an extension not responded to in writing by the Board shall be deemed denied.

If, in the opinion of the Executive Officer, the Dischargers fail to comply with the provisions of this Order, the Executive Officer may issue a complaint for administrative civil liability. Failure to comply with this Order may result in the assessment of an Administrative Civil Liability of up to \$1,000 per violation per day pursuant to the California Water Code section 13268. The Central Valley Water Board reserves its right to take any enforcement actions authorized by law.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Water Board by 5:00 p.m. on the next business day.

Copies of the law and regulations applicable to filing petitions may be found on the Internet at:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality
or will be provided upon request.

I, Pamela Creedon, do hereby certify that the foregoing is a full, true, and correct copy of an
Order issued by the Central Valley Water Board on 27 May 2010

PAMELA C. CREEDON, Executive Officer

EXHIBIT B

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6 Attorneys for:
THE EMMA G. TREBILCOT TRUST
7

8 CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
9 CENTRAL VALLEY REGION
10

11 In the matter of:
12 DRAFT CLEANUP AND ABATEMENT ORDER
13 THE WIDE AWAKE MERCURY MINE
14 COLUSA COUNTY
15

16
17 **COMMENTS ON DRAFT CLEANUP AND ABATEMENT ORDER**
18 **SUBMITTED BY THE EMMA G. TREBILCOT TRUST**

19 **INTRODUCTION**

20 This law firm represents Wells Fargo Bank, N.A., the trustee for the Emma G. Trebilcot
21 Trust. We appreciate the opportunity to provide arguments and evidence regarding the proposed
22 Cleanup and Abatement Order ("CAO") for the former Wide Awake Mine, located in Colusa
23 County, California.

24 We strongly dispute, however, that the CAO is valid or warranted against the Trust.
25 Contrary to the Prosecution Team's (hereinafter, "Prosecution") statement, the Trust did not hold
26 title to the former mine from 1977 to 1990. The Trust in fact owned the property (hereinafter, the
27 "Property") for less than two years, from March 1988 to December 1989. The Trust received the
28 Property involuntarily by court order, as part of a much larger tract, and immediately put it up for

1 sale. During the brief period of the Trust's ownership, the trustee did not occupy the Property and
2 did nothing to exacerbate any preexisting conditions, but, rather, worked to sell the Property from
3 afar. Moreover, during this period, the Trust's ability to control the Property was very limited due
4 to a preexisting lease conferring upon Homestake Mining Company the "exclusive possession" of
5 the former mining site.

6 More importantly, Wells Fargo, as trustee, has at all times managed the Trust for the
7 benefit of four charities that would be financially damaged by the CAO: the Shriners Hospital for
8 Crippled Children, Salvation Army, San Francisco Lighthouse for the Blind & Visually Impaired,
9 and Lion's Eye Foundation. None of the charities have had any direct ownership in the Property
10 or possessed any actual control, and like Wells Fargo they did not know of any discharges and did
11 nothing to exacerbate any preexisting pollution. The CAO would, nonetheless, directly affect the
12 monies held in trust for these charities. This is a patently inequitable result. The Trust funds have
13 been held for more than 20 years. The beneficiaries have, quite reasonably, come to rely on the
14 expectation that these funds will remain available for charitable purposes in the future, and not be
15 siphoned by the actions of the Regional Board to clean up a century-old mine that they had
16 nothing to do with. Neither Wells Fargo nor the charities are insured in any way to prevent this
17 result.

18 The State Water Resources Control Board ("State Board") has held that equitable factors
19 may warrant releasing an innocent former owner of polluted property from liability under Porter
20 Cologne. We believe this case presents a compelling use of this doctrine. This is based on the
21 short period of the Trust's ownership, on the lack of evidence that the Trust or its beneficiaries
22 were aware of any discharges or did anything to exacerbate preexisting conditions, on the lack of
23 control over the Property by the Trust, and on the fact that the CAO would take directly from
24 charities that rely on these funds. To these factors, we add that the Prosecution has not carried its
25 burden of showing that an illegal discharge of mercury occurred during the Trust's ownership.

26 We ask, accordingly, that the Regional Board remove the Trust from the CAO.

27 ///

28 ///

1 **FACTUAL BACKGROUND**

2 **The Wide Awake Mine**

3 The Wide Awake Mine is a former mercury mine located in Colusa County, about one
4 mile southwest of the Wilbur Springs resort and 26 miles southwest of the town of Williams. The
5 Wide Awake Mine was initially built in the 1870s, and it was then that most of the mercury output
6 took place. Mining ceased before 1901, and a limited amount of mining or processing is reported
7 to have briefly resumed in the 1930s and 1940s. These activities had been abandoned for decades
8 before the Trust gained ownership of the Property.

9 The Wide Awake Mine is part of the Sulphur Creek watershed, an area that is
10 characterized by numerous inactive mercury and gold mines. The Wide Awake Mine is located
11 next to an unnamed drainage which enters Sulphur Creek about one-third to one-half mile to the
12 north. Downstream from this confluence, Sulphur Creek intersects with Bear Creek after about
13 one and a half miles. Bear Creek intersects with Cache Creek nine miles downstream, which, in
14 turn, drains to the Sacramento River (due to diversions Cache Creek flows reach the Sacramento
15 River only in wet years).

16 Sulphur Creek is considered "impaired" for mercury due to natural conditions, and
17 exhibits this condition independent of any anthropogenic sources. The Regional Board's staff
18 acknowledged this in a March 2007 staff report concerning a proposed Basin Plan amendment for
19 Sulphur Creek: "Sulphur Creek has never supported [municipal and domestic supply beneficial
20 uses] due to naturally occurring conditions that prevent them from being attained." (Appendix A,
21 at 3.)

22 **The Trust**

23 The Trust is a "testamentary" trust, meaning that it was created through the
24 implementation of a will. The Trust was created at the direction of Emma G. Trebilcote's will after
25 she died on December 22, 1986. Ms. Trebilcote had previously acquired the former mine as a part
26 of a much larger tract of land willed to her in April 1977 upon Ruth B. Gibson's death (Appendix
27 B, probate court order). Ms. Trebilcote received the Property in undivided shares with F.B. Smith,
28 who later transferred his share to Ms. Trebilcote in August 1978 (Appendix C, deed), making Ms.

1 Trebilcot the sole owner from then until her death.

2 After Ms. Trebilcot's death, the probate court issued a March 28, 1988 order (Appendix D)
3 placing the Property in trust according to Ms. Trebilcot's will. This order marks the establishment
4 of the Trust and the beginning of the Trust's ownership of the Property.

5 Ms. Trebilcot's will stated that the Trust was to be established for the benefit of four
6 charities: Shriners Hospital for Crippled Children, the Salvation Army, San Francisco Lighthouse
7 for the Blind & Visually Impaired, and the Lion's Eye Foundation. Wells Fargo was appointed
8 the trustee. The Trust assets, then and at all times since, have been held by Wells Fargo for the
9 benefit of these four charities.

10 Wells Fargo worked to sell the Property immediately after the Trust was established. On
11 May 19, 1988, less than two months after the Property was received in trust, Wells Fargo entered
12 into a listing agreement with a realty company to sell the Property (Appendix E, letter). The Trust
13 sold the Property less than two years later, in December 1989, to Goshute Corporation (Appendix
14 F).

15 The Trust did not develop or improve the Property during its ownership, or conduct or
16 authorize activities that could have exacerbated any pre-existing pollution.¹ The Trust merely
17 held the Property pending its eventual sale. The charities, likewise, never exercised ownership or
18 control of the Property, or authorized any activities on the Property at any time. Each charity will,
19 however, be financially affected if the CAO is adopted as proposed. The CAO would require the
20 Trust to spend the Trust corpus towards mine cleanup and monitoring – activities that, according
21 to the record, may cost over a million dollars – causing the loss of this income to the charities and
22 the people that rely on them. Each charity has sent a letter to the Regional Board objecting to the
23 CAO, attached under Appendix G for reference, and their representatives are expected to
24 participate at the hearing.

25 The Trust's use of the Property also was restricted during its short ownership due to a
26 preexisting lease to Homestake Mining Company ("Homestake"). The lease (Appendix H) was

27 ¹ The Trust has retained certain subsurface rights (i.e., mineral, oil and gas, and geothermal rights) in the Property, but
28 this does not give the Trust the right to use the surface of the Property, and in any event, these rights have not been
exercised at any time.

1 And to be clear, the Trust is not responsible for liability incurred by Ms. Trebilcote during
2 her life. A testamentary trust that receives property through probate takes it free of the decedent's
3 debts and liabilities whether "due, not due, or contingent, and whether liquidated or unliquidated."
4 (Prob. Code, § 9000, subd. (a).) This basic function of the Probate Code operates to discharge all
5 claims against an estate that arose during the decedent's lifetime, unless such claims are resolved
6 during probate proceedings. (Prob. Code, § 9002 ["claim that is not filed as provided in this part
7 is barred"].) The "claims bar" is triggered by the giving of notice to actual and potential creditors
8 through publication and other means. (Prob. Code, § 9001.) These requirements were followed
9 during the probate proceedings for Ms. Trebilcote's estate. Attached as Appendix I are the relevant
10 portions of the probate court's files, showing that notice was given as required by law. Hence, the
11 claims bar applies.

12 Consequently, the Trust's liability under the CAO, if any, can exist only with respect for
13 the period of its independent ownership of the Property from March 1988 to December 1989.

14 **B. The Trust should be dismissed under *Wenwest*.**

15 In *Wenwest et al.*, Order No. WQ 92-13, the State Board recognized that its cleanup and
16 abatement authority under Water Code section 13304 may be trumped by equitable factors where
17 the potential discharger is an interim owner of property. There, the State Board determined that
18 Wendy's International was not responsible for cleaning up land affected by pollution that predated
19 Wendy's ownership. Wendy's had acquired land that included a leaky underground storage tank.
20 The acquisition was made, however, not to develop the land but for the purpose of selling the land
21 to a franchisee. Wendy's owned the property for four months, did not know the full scope of the
22 pollution, and did nothing to exacerbate it. In these circumstances, the State Board held that a
23 water-quality enforcement action against Wendy's was unwarranted.

24 The State Board listed several factors that it relied on to release Wendy's from cleanup
25 liability. For comparison, we have listed the factors verbatim from *Wenwest* within the left-hand
26 column below, and the comparable factors relative to the Trust on the right. This chart shows that
27 each of the equitable factors considered in *Wenwest* are matched by the same or similar equitable
28 factors here.

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Wenwest factors	Trebilcot Trust factors
Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.	Factor is present - the Trust's ownership was purely involuntary, and the Trust immediately placed the Property for sale.
Wendy's owned the site for a very brief time.	Factor is present - the Trust acquired the Property in March 1988, placed it for sale less than two months later, and sold in December 1989.
The franchisee who bought the property from Wendy's is named in the order.	Factor is present - all past and existing owners are named in the CAO.
Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem.)	Factor is present - the Trust never mined the site, or exacerbate the spread of pollutants.
Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.	Factor is present - the Trust never engaged in any activity that could have exacerbated preexisting conditions.
While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.	Factor is present - the Trust did not know of the nature or extent of any pollution.
Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.	Factor is present - there is no evidence that data regarding the potential discharges from the former mine was developed when the Trust owned the Property.
There are several responsible parties who are properly named in the order.	Factor is present - there are numerous other parties named in the CAO.
The cleanup is proceeding.	Factor is present - the Regional Board has initiated a broad enforcement strategy and the cleanup will proceed in the Trust's absence.

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{00191948, 1}

1 Because *Wenwest* turned on equitable factors, the impact of the CAO on the Trust's
2 beneficiaries can and should also be considered. The Trust's assets are currently managed for the
3 benefit of Shriners Hospital for Crippled Children, the Salvation Army, San Francisco Lighthouse
4 for the Blind & Visually Impaired, and Lion's Eye Foundation. For the nearly 20 years since the
5 Trust sold the property, these charities have budgeted with an expectation that the Trust assets will
6 be available for charitable goals. The CAO would disrupt such expectations by taking the Trust's
7 funds for remediation, despite their complete lack of culpability, and despite that other dischargers
8 remain to satisfy the CAO. This is a highly inequitable result and makes this a more compelling
9 use of the *Wenwest* doctrine than even the facts in *Wenwest* allowed.

10 **C. The State Board's test for former landowner liability has not been met**

11 The Prosecution also has not, as a purely legal matter, established the Trust's liability.
12 The Prosecution appears to incorrectly assume that simply because the Trust owned the Property,
13 for however short a time, the Trust must be imputed both knowledge of pollution on the Property
14 and the ability to control it. The State Board, however, has never held that a former landowner is
15 automatically liable for ongoing discharges outside of the landowner's knowledge.

16 Rather, the State Board applies a three-part test for determining whether former
17 landowners should be liable for a discharge: (1) whether they had a significant ownership interest
18 in the property at the time of the discharge; (2) whether they had knowledge of the activities that
19 resulted in the discharge; and (3) whether they had the legal ability to prevent the discharge. (See
20 *Wenwest et al.*, Order No. WQ 92-13, *Stuart Petroleum*, Order No. WQ 86-15.) As follows, none
21 of these parts has been established against the Trust.

22 **1. Ownership interest at the time of the discharge**

23 First, the Prosecution has failed to demonstrate, with any reasonable or competent
24 evidence, that a discharge of mercury occurred between March 1988 to December 1989, when the
25 Trust owned the Property. Without such evidence, the Regional Board lacks a basis to exercise its
26 cleanup authority against the Trust.

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1 This conclusion is revealed clearly through a careful review of the “5C2 Report”³
2 (Appendix J). The 5C2 Report is the only evidence the Prosecution has relied upon to establish a
3 discharge by the Trust. The function of the 5C2 Report is to inventory the site conditions existing
4 at the time that the report was prepared, in 2003. The 5C2 Report does not, however, include any
5 attempt to quantify the amount of mercury leaching from the former Wide Awake Mine into to the
6 watershed at any point in time. The authors were not concerned with this question and simply did
7 not undertake that analysis.

8 While the 5C2 Report did refer to a study by Churchill and Clinkenbeard which did
9 attempt such an estimate (the 0.02-0.44 kg/yr estimate that underlies the CAO), the authors of the
10 5C2 Report also discounted this as an “overestimate” resulting from improper testing. (Appendix
11 J, at 3-15 [emphasis added].) Moreover, the 5C2 Report authors indicated that the mechanism for
12 mercury transport into the watershed was poorly understood. They observed that mercury samples
13 had a low transport potential (see Appendix J, at 3-46 [“The potential for water-rock interaction to
14 mobilize mercury from tailings is thought to be minimal...”]), and that there was a lack of visible
15 evidence supporting the 8 ton/yr estimate of sediment transport from the mine (Appendix J, at 3-
16 46 [“Evidence for significant erosion by runoff from these cuts such as incised channels, rills, or
17 sediment aprons were not observed.”])

18 These gaps and uncertainties within the 5C2 Report leave this fundamental question
19 unanswered: How much mercury was discharged from the Wide Awake Mine site to the Sulphur
20 Creek watershed between March 1988 and December 1989, when the Trust owned the Property?
21 The 5C2 Report simply provides no answer to this question, and consequently, the CAO against
22 the Trust cannot be sustained.

23 The Prosecution may respond that it does not need to demonstrate precisely how much
24 mercury was delivered into the watershed, so long as the Regional Board is comfortable that *some*
25 quantity of mercury made its way out of the former mine site during the Trust’s ownership. This,
26 however, ignores the applicable standard of proof. Enforcement must be predicated on “credible
27 and reasonable” evidence that a person is responsible for a discharge of pollutants: “[T]here must

28 ³ Formally titled “CallFed – Cache Creek Study” dated September 2003.
{00191948, 1}

1 be a reasonable basis on which to name each party. There must be substantial evidence to support
2 a finding of responsibility for each party named. This means credible and reasonable evidence
3 which indicates the named party has responsibility.” (*Order No. WQ 85-7 (Exxon, Co., U.S.A.)*.)
4 The Regional Board (here, the Prosecution) has this burden of proof. (*See Beck Development Co.,*
5 *Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1205-1206.) When
6 no analysis has been attempted to calculate the amount of mercury discharged from the site during
7 the Trust’s ownership, we submit that no credible and reasonable evidence of a discharge has been
8 proffered to this body to establish its cleanup authority against the Trust.

9 Indeed, lacking such evidence in the record, the Prosecution cannot meet the essential
10 requirements of Water Code section 13304. Liability under Section 13304, subdivision (a), is not
11 predicated on a “one molecule” of pollution rule. Rather, liability exists only when a discharge of
12 pollutants creates an exceedance of the applicable limits of the pollutant as defined by State Board
13 or Regional Board orders, or under prevailing nuisance laws:

14 Any person who has discharged or discharges waste into the waters
15 of this state **in violation of any waste discharge requirement or**
16 **other order or prohibition issued by a regional board or the**
17 **state board**, or who has caused or permitted, causes or permits, or
18 threatens to cause or permit any waste to be discharged or deposited
19 where it is, or probably will be, discharged into the waters of the
20 state **and creates, or threatens to create, a condition of pollution**
or nuisance, shall upon order of the regional board, clean up the
waste or abate the effects of the waste, or, in the case of threatened
pollution or nuisance, take other necessary remedial action,
including, but not limited to, overseeing cleanup and abatement
efforts.

21 (Water Code, § 13304, subd. (a) [emphasis added].) Consequently, the Trust’s liability requires
22 the Prosecution to establish the existence of a discharge, during the Trust’s period of ownership,
23 that exceeded the regulatory requirements which applied at that time. The record, however, does
24 not include any evidence of the water-quality objectives, if any, that existed during the period of
25 the Trust’s ownership. Indeed, the only evidence of numeric objectives that have been introduced
26 by the Prosecution are those that currently are in effect, but as with most government regulations,
27 such standards are not retroactive unless given specific legislative intent. (*Beck Development Co.,*
28 *Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1207; *Evangelatos*

1 v. *Superior Court* (1988) 44 Cal.3d 1188, 1207; *Blumenfeld v. San Francisco Bay Conservation*
2 *Comm.* (1974) 43 Cal.App.3d 50, 59.)

3 In fact, it appears the Regional Board did not adopt numeric objectives for mercury
4 applicable to Sulphur Creek until very recently. In October 2005, the Regional Board adopted
5 numeric water-quality objectives for mercury for the Cache Creek watershed, which includes
6 Sulphur Creek. (Appendix K.) Thus, there is no evidence in the record of any specific water-
7 quality objectives for mercury in place during the Trust's ownership. Consequently, the record
8 cannot support a finding that a discharge took place during the Trust's brief ownership at levels
9 that violated any applicable requirements to trigger Water Code section 13304.

10 Finally, the Prosecution has not established that any mercury contributions to the
11 watershed from the Wide Awake Mine between March 1988 and December 1989 constituted a
12 nuisance. In the water quality setting, a nuisance can be established as a violation of a particular
13 water-quality standard (nuisance per se), or through a consideration and balancing of factors such
14 as the extent to which a discharge interfered with the use of property, or the number of people that
15 were affected. (*Beck Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44
16 Cal.App.4th 1160, 1207 [citation omitted]; Water Code, § 13305, subd. (m).) The Prosecution has
17 not established a nuisance per se because, as noted above, it has not established a violation of any
18 specific water-quality standard against the Trust. The Prosecution also has failed to establish any
19 nuisance based on a "balancing of factors" approach because the Prosecution has not attempted to
20 introduce evidence regarding the effect of discharges during the Trust's ownership on nearby uses
21 of property, or the number of people affected, and to what degree, etc.

22 Indeed, the rather apparent reality is that any possible mercury discharge during the
23 Trust's short ownership would have been extremely minor and took place against "background"
24 mercury from natural sources. Given this setting, the record does not begin to support a finding
25 that the Trust caused or contributed to a nuisance.

26 2. Knowledge of the cause of the discharge

27 The second part of the test is whether the former landowner had knowledge of the
28 activities that resulted in a discharge. The State Board holds that liability may result if a property

1 owner “permits” a discharge to occur *provided that* the person had awareness of the condition that
2 gave rise to the discharge, i.e. “knew or should have known” of the discharge. (*San Diego Unified*
3 *Port District*, Order No. WQ 89-12; *United States Department of Agriculture, Forest Service*,
4 Order No. WQ 87-5; *Stuart Petroleum*, Order No. WQ 86-15.) The Prosecution has not submitted
5 any evidence, however, that the Trust “knew or should have known” that the former mine site was
6 slowly discharging mercury to the watershed. When the Trust received the Property, the mine had
7 been closed and inactive for many decades. There is nothing apparent in the condition of the land
8 that would lead an average person to suspect that discharges were occurring, or that the Trust – or
9 anyone else – knew of the discharges. Indeed, it appears that even the Regional Board’s staff was
10 not aware of the potential discharges, considering that the 5C2 Report, the centerpiece of the CAO
11 against the Trust, is dated 2003. Additionally, the fact that a former mine site was on the Property
12 is not sufficient to establish that the Trust should have known of a potential problem. The vicinity
13 is characterized by many similar inactive mines, and in fact, this site would not pose a problem if
14 not for the additional fact of the tailings piles.

15 In summary, the record is absent of evidence that the trustee or beneficiaries had any
16 specific knowledge of discharges. The record also lacks evidence showing that it was a matter of
17 such general knowledge that a former mine might have been a continuing source of mercury that
18 the Trust should have known of it. The Prosecution has, in fact, provided no evidence whatsoever
19 on these points.

20 3. Legal ability to prevent the discharge

21 The third, and final, element of the State Board’s test is whether a person had the legal
22 ability to control the discharge. On this the Homestake lease is determinative. The lease provided
23 Homestake with “exclusive possession” of the Property, including the Wide Awake Mine site, for
24 mining purposes. In effect, the former landowner ceded possession of the Property to Homestake
25 during the period the lease was in force, and the Trust remained bound to the lease’s requirements
26 during its ownership. Because the Property was in the possession of another, the Trust lacked the
27 legal ability to control the discharge.

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1 The Prosecution may suggest that a carve-out provision in the lease (see Paragraph 3,
2 allowing restricted grazing and agriculture) retained, for the Trust, sufficient control over the
3 Property to perform the remedial work proposed in the Statement of Evidence (under “Ability to
4 Control”). It is pure fiction, however, to assume, that the Homestake lease would have permitted
5 the remedial activities the Prosecution suggests (i.e., relocating material piles, redirecting runoff,
6 recontouring the land, and stabilizing the stream banks). The Prosecution suggests that the Trust
7 could have entered the leased premises, retaken possession of prior mining areas, and undertaken
8 significant earthmoving, consistent with a lease that affords exclusive possession of the premises
9 to Homestake. We believe the far more realistic view is that, had the Trust made such a proposal
10 during its ownership, Homestake would have steadfastly refused, and at the very least, the Trust’s
11 legal ability to prevail would have been uncertain.

12 **D. The CAO exceeds the Regional Board’s authority by attempting to make the Trust**
13 **responsible for the entire cleanup, rather than its proportionate share.**

14 The CAO is premised on the Prosecution’s theory that each discharger is jointly and
15 severally liable for the cleanup, regardless of each party’s proportional liability. The CAO would,
16 in other words, make the Trust responsible for the entire cleanup regardless of the Trust’s actual
17 contribution. This logic strains logic and credulity; it is patently unreasonable to suggest that the
18 Trust is responsible for the entire mine waste cleanup, costing millions, merely because the Trust
19 might be attributed a small part of it.

20 We have reviewed this theory against state law, and found that joint and several liability
21 against dischargers is not supported either by the language of Porter-Cologne or basic California
22 legal principles.

23 The pertinent Porter-Cologne language is in Water Code section 13304. That section
24 provides that “[a]ny person” who has discharged waste in violation of law “shall upon order of the
25 regional board, clean up the waste or abate the effects of the waste...” (Water Code, § 13304,
26 subd. (a) [emphasis added].) By specifying that liability applies only with respect to “the” waste
27 discharged, a literal reading of section 13304 limits the Regional Board to imposing liability only
28 for the discharges attributable to a particular discharger. This interpretation of section 13304 has

1 been recognized by commentators. (Manaster & Selmi, California Environmental Law and Land
2 Use Practice (Mathew Bender) Ch. 32, § 32.34.)

3 This fairer view of liability also follows longstanding California law, which holds that
4 multiple tortfeasors are liable only for their individual contributions to a nuisance. (See 5 Witkin,
5 Summary of California Law (10th ed. 2005) Torts, § 50, p. 118.) As an example, in *Griffith v.*
6 *Kerrigan* (1952) 109 Cal.App.2d 637, the owner of a peach orchard sued the owner of an
7 adjoining rice field and the owner of a nearby canal. The plaintiff alleged that the flooding of the
8 rice fields, and leaks in the canal, both served to raise the ground water table on plaintiff's
9 property and damage crops. The court rejected plaintiff's claim that each defendant was severally
10 liable for all damages, citing the rule that "each is liable only for such proportion of the harm
11 caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm
12 bears to the total harm." (*Id.*, at 639; see also *Carlotto, Ltd. v. County of Ventura* (1975) 47
13 Cal.App.3d 931 [requiring apportionment of damages from flooding and siltation of plaintiff's
14 property]; *California Orange Co. v. Riverside Portland Cement Co.* (1920) 50 Cal.App. 522
15 [where two cement plants were responsible for depositing cement dust on plaintiff's orchards,
16 each was liable only for its proportion of the total damages caused by dust from the respective
17 plants]; *Connor v. Grosso* (1953) 41 Cal.2d 229 [various persons dumped dirt on plaintiff's
18 property; where one did not act in concert with others, he is not liable for the removal of others'
19 dirt].)

20 Thus, under either section 13304 or established state law, the Trust cannot be held
21 responsible for the entire Wide Awake Mine cleanup. Some mechanism of apportionment must
22 be included within the CAO to render it consistent with Porter-Cologne and state law generally.
23 Absent such provisions, the CAO is legally defective and should not be finalized.

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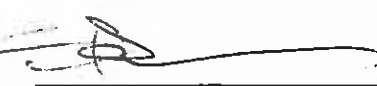
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CONCLUSION

In summary, we believe the facts clearly and forcefully show that the Trust is not a proper party, and accordingly, we ask that the Regional Board release the Trust from the CAO. On behalf of Wells Fargo and the beneficiaries, we appreciate the opportunity to provide the Regional Board with this submittal, and look forward to the October hearing on this matter.

Dated: September 16, 2009

DIEPENBROCK HARRISON
A Professional Corporation

By: 
Mark D. Harrison
Sean K. Hungerford
Attorneys for
THE EMMA G. TREBILCOT TRUST

1 Re: *DRAFT CLEANUP AND ABATEMENT ORDER*
2 *THE WIDE AWAKE MINE, COLUSA COUNTY*
3 California Regional Water Quality Control Board, Central Valley Region

3 **PROOF OF SERVICE**

4 I, Gilberto J. Castro, declare:

5 I am a citizen of the United States, employed in the City and County of Sacramento,
6 California. My business address is 400 Capitol Mall, Suite 1800, Sacramento, California 95814. I
7 am over the age of 18 years and not a party to the within action.

8 I am familiar with the practice of Diepenbrock Harrison for collection and processing of
9 correspondence, said practice being that in the ordinary course of business, correspondence is
10 sealed, given the appropriate postage and placed in a designated mail collection area. Each day's
11 mail is collected and deposited in the United States Postal Service.

12 On September 16, 2009, I served the attached,

13 **COMMENTS ON DRAFT CLEANUP AND ABATEMENT ORDER**
14 **SUBMITTED BY THE EMMA G. TREBILCOT TRUST**

15 (BY U.S. MAIL) I placed such sealed envelope, with postage thereon fully prepaid for first-
16 class mail, for collection and mailing at Diepenbrock Harrison, Sacramento, California,
17 following ordinary business practices as addressed as follows, and/or

18 (BY PERSONAL SERVICE) I caused each such envelope to be delivered by hand to the
19 addressees at the addresses listed below; and/or

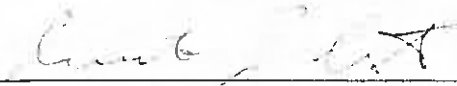
20 (VIA FEDERAL EXPRESS) I caused each such envelope to be delivered via Federal
21 Express overnight service to the addressees at the addresses listed below; and/or

22 (VIA FACSIMILE) I caused each such document to be sent by facsimile machine number
23 (916) 446-4535 to the following persons or their representative at the addresses and the
24 facsimile numbers listed below; and/or

25 (VIA EMAIL) I caused each such document to be sent by electronic mail to the addressees
26 at the email addresses listed below.

27 **SEE ATTACHED MAILING LIST.**

28 I declare that I am employed in the office of a member of the bar of this Court at whose
direction the service was made. Executed on September 16, 2009, at Sacramento, California.



Gilberto J. Castro

1 Re: *DRAFT CLEANUP AND ABATEMENT ORDER*
2 *THE WIDE AWAKE MINE, COLUSA COUNTY*
3 California Regional Water Quality Control Board, Central Valley Region

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EXHIBIT C

CENTRAL VALLEY
REGIONAL WATER QUALITY CONTROL BOARD

HEARING PANEL

ITEM 7

WIDE AWAKE MINE, COLUSA COUNTY -
CONSIDERATION OF A CLEANUP AND ABATEMENT ORDER

WEDNESDAY, OCTOBER 7, 2009

HELD AT
CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD
RANCHO CORDOVA, CALIFORNIA

ORIGINAL

COPY

REPORTED BY:

ESTHER F. SCHWARTZ
CSR NO. 1564

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ATTENDEES

BOARD MEMBER HEARING PANEL:

KARL E. LONGLEY, CHAIRMAN
KATE HART
DAN ODENWELLER
SANDRA O. MERAZ

ADVISORY TEAM:

PAMELA CREEDON, EXECUTIVE OFFICER
KENNETH LANDAU
CHRISTOPHER FOE

COUNSEL:

LORI OKUN

PROSECUTION TEAM:

VICTOR IZZO
JOE KARKOSKI
JEFF HUGGINS
JOHN RUSSELL

COUNSEL:

PATRICK PULUPA

EMMA G. TREBILCOTT TRUST:

GERALD SHUPE
STEVEN T. RICE
ALAN ANDERSON
DENNIS NOBLE

COUNSEL:

SEAN HUNGERFORD

HOMESTAKE MINING COMPANY:

COUNSEL:

GERALD F. GEORGE

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ATTENDEES (CONT.)

ROBERT LEAL AND JILL LEAL:

COUNSEL:

LAWRENCE BAZEL

MERCED GENERAL CONSTRUCTION & CAL SIERRA PROPERTIES:

ROY WHITEAKER

COUNSEL:

G. DAVE TEJA

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RANCHO CORDOVA, CALIFORNIA

WEDNESDAY, OCTOBER 7, 2009, 1:30 P.M.

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CHAIRMAN LONGLEY: We are back in session. This is the time and place for a public hearing to consider issuance of a cleanup and abatement order for the Wide Awake Mine in Colusa County.

The purpose of this hearing is to consider relevant evidence and testimony regarding the proposed order for this mine. At the hearing the Central Valley Water Board will consider whether to issue the order as proposed or whether to modify or remand the order or to consider other actions to control discharges from the mines.

This hearing will be conducted in accordance with the previously issued hearing procedures for this matter. Because we do not have a quorum of Board Members present, we will proceed with a hearing panel, with the final Board deliberation and voting on the proposed order at a future meeting. I will now ask our legal counsel to explain the hearing panel process.

MS. OKUN: A lot of people who are in the audience now were here this morning. Is there anyone in the audience that needs any additional

1 information or explanation about procedures and what
2 we are doing today?

3 MS. HART: There are new folks, Lori.

4 MS. OKUN: We don't have a quorum of Board
5 today. So this was noticed as a hearing panel.
6 This panel will hear the evidence. This is the
7 opportunity for an evidentiary hearing on the
8 proposed order. So there will not be an opportunity
9 to provide additional evidence unless the Chair
10 allows for additional evidence or reopens the
11 hearing. At the close of this panel hearing, the
12 panel will deliberate, possibly in closed session,
13 about what recommendations they want to make to the
14 full Board on this proposed order.

15 They may announce their decision after the
16 deliberations and they may not. But either way, we
17 will provide a written recommendation from the panel
18 to the full Board which will probably take the form
19 of a draft order or draft orders. There likely will
20 be significant changes to the proposed order, so we
21 will be -- if that is the case, we will allow all
22 the parties to provide written comments on any
23 changes that the panel hearing proposed.

24 In terms of the time, we had originally
25 thought that this could be to the December meeting

1 of the Board. That seems unlikely at this point.
2 Dr. Longley, will read in the rest of the procedural
3 discussion and order for parties' testimony. We did
4 have some questions about this.

5 The way we set the order is that the
6 Prosecution Team goes first. The parties who were
7 granted additional hearing time go next, and
8 everyone else goes in the order in which they were
9 listed in the proposed order. If the parties have
10 had any discussions about what order they prefer to
11 go and want to change that, just bring that to our
12 attention.

13 On the issue of the late submittal of the
14 Prosecution Team's rebuttal discussion, that was the
15 exact same document that Dr. Longley just struck in
16 the prior matter, other than the removal of a few
17 parties who aren't relevant to this proceeding, the
18 discussion of Basin Plan amendment. We did receive
19 responses to that on Wide Awake from Merced
20 Construction and Cal Sierra Properties. So since
21 the Board will be striking the rebuttal discussion,
22 we will strike the responses to it. Homestake also
23 responded to it. We will not be striking the
24 objections to the rebuttal discussion.

25 CHAIRMAN LONGLEY: That is correct.

1 MS. OKUN: That is all.

2 CHAIRMAN LONGLEY: Number of participants
3 have been designated as parties in this proceeding,
4 and they are: the Central Valley Water Board
5 Prosecution Team, Homestake Mining Company, Emma G.
6 Trebilcott Trust, Robert Leal, Jill Leal, NBC
7 Leasing, Inc., United States Bureau of Land
8 Management, Charles Millard Tracy and Janet Dee
9 Tracy, James Dale Whiteaker and Sally C. Whiteaker,
10 Cal Sierra Properties, Glen Mills, Inc., Terri King
11 Brown and David G. Brown, Leah C. Tate and Roy Tate,
12 and Merced General Construction.

13 In the matter of separation functions. To
14 help ensure the fairness and impartiality of this
15 proceeding, the functions of those who will act in a
16 prosecutorial role by presenting evidence for
17 consideration by the Central Valley Water Board,
18 otherwise known as the Prosecution Team, have been
19 separated - and by the way the Prosecution Team is
20 sitting over here on my left - have been separated
21 from those who will provide advice to the Central
22 Valley Water Board, otherwise known as the Advisory
23 Team, and they are sitting on my right, and this is
24 as stated in the previously issued hearing
25 procedures.

1 In the matter of hearing time limits. To
2 ensure that all participants have an opportunity to
3 participate in the hearing, the following time
4 limits shall apply: The Board Prosecution Team's,
5 Robert Leal and the Emma G. Trebilcott Trust shall
6 each have combined 45 minutes to present evidence,
7 cross-examine witnesses, if warranted, and provide a
8 closing statement. Homestake Mining Company, NBC
9 Leasing, Inc., Cal Sierra Properties, Glen Mills,
10 Inc., David G. Brown, Roy Tate and Merced General
11 Construction shall each have 15 minutes to present
12 evidence, including, I might add, evidence presented
13 by witnesses called by the designated parties and to
14 cross-examine witnesses, if so warranted, and to
15 provide a closing statement.

16 Additional time may be provided at the
17 discretion of the Chair upon a showing that
18 additional time is necessary. Although the previous
19 hearing procedures stated that the Bureau of Land
20 Management, Dave and Sally Whiteaker, Charles
21 Millard and Janet Dee Tracy and Jill Leal would each
22 have 15 minutes, the Prosecution Team has removed
23 these parties from the proposed cleanup and
24 abatement order. Unless there are objections, these
25 parties have three minutes each to address the

1 Board.

2 Are there any objections?

3 Seeing none, we will proceed with then
4 describing the process.

5 At this time evidence should be introduced on
6 whether the Board should adopt the cleanup and
7 abatement order.

8 All persons expecting to testify, please stand
9 at this time, raise your right hand and take the
10 following oath.

11 (Oath administered by Chairman Longley.)

12 CHAIRMAN LONGLEY: We will now begin with
13 testimony by the prosecution staff.

14 MR. IZZO: Good afternoon, Mr. Chairman,
15 Members of the Board. My name is Victor Izzo. I am
16 a senior engineering geologist in the Board's
17 Sacramento office, and I have taken the oath.

18 This presentation is to discuss and present
19 information on the proposed cleanup and abatement
20 order for the Wide Awake Mine. We are incorporating
21 late revisions to the cleanup and abatement order
22 into this presentation. The changes are changes in
23 the reports' due dates. These revisions are due to
24 having a panel hearing and final decision delayed to
25 the December Board meeting. There will be some

1 duplication of the last staff presentation for the
2 record.

3 This presentation is divided into five
4 sections. The first section is an overview of
5 Sulphur Creek mining district cleanup project, which
6 includes multiple mining sites on and around Sulphur
7 Creek. Wide Awake is one part of the Sulphur Creek
8 mining district. Please note that the overview
9 brings in information why we are requiring
10 characterization and possible cleanup based on the
11 characterization and are not part of these orders,
12 except as for information.

13 Then I will explain the definition of a
14 discharger under 13304, an overview of areas of
15 concern is where I will discuss the potential mining
16 areas that pose a threat to water quality. Then I
17 will discuss the cleanup and abatement order
18 requirements and what the specific tasks mean.

19 I will present how we identify dischargers,
20 then individual dischargers evidence will be
21 presented. This presentation gives a response to
22 almost all the dischargers comments.

23 Sulphur Creek is a tributary to Bear Creek,
24 which is a tributary to Cache Creek which is near
25 --ends at the City of Woodland, which is about 20

1 miles northwest of Sacramento. And Sulphur Creek is
2 about seven miles east of Clear Lake.

3 Sulphur Creek watershed consists of Sulphur
4 Creek, East Branch and West Branch. In the earlier
5 presentation we already discussed that Elgin, and
6 Rathburn/Petray Mines already have been issued
7 cleanup and abatement orders and are in the same
8 watershed as mines being discussed today. We just
9 finished discussing the Central Group, on the bottom
10 right side of the map.

11 The Wide Awake is just south of the previous
12 discussed Central Group highlighted in red. All the
13 mines on the map were identified as impacting and/or
14 threatening water quality, and these mines are
15 contributing to the mercury sediment in the creek
16 with elevated mercury concentrations.

17 The next slide is describing why these mines
18 were identified for clean and explains the Board
19 authority in issuing these orders. CalFed's Cache
20 Creek Study 5C1 and 5C2 identify mine waste
21 discharges in Sulphur Creek. The 5C2 report was
22 completed in September 2003. These reports found
23 high mercury and other metals in Sulphur Creek.
24 These reports also found that mercury-laced mining
25 waste was contributing to the high mercury

1 concentrations. The 5C1 and 5C2 reports also
2 identified the discharge of mining waste to surface
3 water in this area and are primarily associated with
4 erosion of mine tailings or waste rock.

5 In 2005, in response to these issues noted by
6 CalFed reports, the Central Valley Water Board
7 created the Cache Creek Mercury Program. Out of the
8 this program came two important Basin Plan
9 amendments. The first amendment, adopted in 2005,
10 directed the Board to issue cleanup and abatement
11 orders or to take other appropriate action to
12 control discharges from the Central Group and the
13 Wide Awake mining areas.

14 A second amendment, adopted in 2007,
15 dedesignated some of the beneficial uses of Sulphur
16 Creek because naturally occurring mercury sources
17 make the stream unusable as a source of drinking
18 water and as a source of edible fish. The 2007
19 Basin Plan amendment also set site-specific water
20 quality objectives at levels that account for the
21 naturally occurring mercury.

22 Under the California Water Code, Section
23 13304, any person who has caused or permitted waste
24 to be discharged or deposited in waters of the state
25 and creates or threatens to create a condition of

1 pollution or nuisance shall, upon this order of the
2 Regional Board, cleanup the waste or abate the
3 effects of the waste.

4 In order to respond to the comments raised by
5 the discharger, let's examine the language of Water
6 Code Section 13304. There are four phrases that
7 we'd like to explain. These questions are: What is
8 a discharger? Who is any person who has cause or
9 permitted waste to be discharged or deposited? What
10 is a condition of pollution or nuisance? And what
11 does it mean to cleanup the waste?

12 Many of the dischargers have commented that
13 they didn't mine the sites, so they shouldn't be
14 responsible for the cleanup. However, the State
15 Board has recognized two types of discharger,
16 traditional dischargers and passive discharges.
17 Traditional discharges are the type of discharges
18 that are typically associated with water pollution,
19 discharges from pipes, sewage spills, et cetera.

20 However, the State Board has also recognized
21 passive discharges create liability. A passive
22 discharge occurs when a property owner doesn't do
23 anything more than allow the waste to leak, erode or
24 leach from the property.

25 For example, if someone dumps a drum of

1 leaking waste at a site, and the waste contacts
2 waters of the state, than a person is a discharger.
3 The Board may order them to cleanup the waste. If
4 someone buys the property with leaking drums, this
5 person is also a discharger, although they did not
6 initially dump the waste at the site. This is
7 because the leaking drums are sill passively
8 discharging waste into waters of the state. The
9 Board may also order the property owner to cleanup
10 the waste.

11 The Prosecution Team combed through the Colusa
12 County property records to locate everyone who
13 owned, operated or leased the mining site since the
14 mining waste was generated. The Prosecution Team
15 then weeded out the individuals and companies who
16 lacked the ability to control the waste, such as
17 companies that only held geothermal exploration
18 leases that didn't allow them to manage the waste.
19 The remaining parties were named in the order.

20 The next question that arises: What is a
21 condition of pollution and nuisance? The Water Code
22 defines pollution as an alteration of the quality of
23 the water of the state by waste to a degree which
24 unreasonably affects the waters for beneficial uses.

25 The beneficial uses of Sulphur Creek were so

1 heavily impacted that by naturally occurring and
2 anthropogenic sources of mercury that the Board
3 decided that these beneficial uses would never be
4 attained. So in 2007, the Board adopted a Basin
5 Plan amendment that set wastewater objectives at
6 levels that naturally occurring background levels.
7 The stream still exceeds these levels due to the
8 erosion from the abandoned mine sites. This
9 contribution above naturally occurring background
10 levels is the condition of pollution that the
11 Central Valley Water Board must address.

12 Lastly, several dischargers commented that they
13 can only be ordered to cleanup the waste that
14 escapes from their property during the time they
15 controlled the sites. Since these wastes have
16 already flowed to the Pacific, these commentators
17 argue they can no longer be ordered to cleanup
18 anything. Does the Water Code suggest that those
19 owners should not share responsibility of the
20 cleanup because the waste that eroded off their
21 property has already done its damage?

22 In order to figure out this question, the
23 prosecution looked at the courts. In the City of
24 Modesto Redevelopment Agency, the California
25 Superior Court stated that established principles of

1 nuisance law can be used to interpret obligations
2 under Water Code Section 13304.

3 Civil Section 3483, enacted in 1872, contains
4 an establishes principle of nuisance law. This
5 section says that every successive owner of property
6 who neglects to abate for continuing nuisance upon
7 such property created by a former owner is liable.
8 Therefore, there in the same manner as the one who
9 created it. The Prosecution Team contends that this
10 allows the Board to order past owners, operators and
11 lessees who had the authority to control the
12 discharge to participate in the cleanup.

13 Overview of areas of concern. This section
14 will discuss and show the likely areas of erosion
15 and discharge.

16 As discuss with the previous presentation, the
17 major sources of potential pollution from mines are
18 mining waste. Floodplain mining waste is when
19 erosion of mining waste or direct discharge of
20 mining waste into the floodplain.

21 Retort and mining facilities. The ore
22 processing facilities. And the discharge from
23 portals, underground or surface workings.

24 At tailing piles and mining waste rock piles
25 rainwater can infiltrate or runoff with elevated

1 metals and salt concentrations, degrading waters of
2 the state. As I discussed earlier, we have erosion
3 and we end up with some sediment load and we could
4 also have some dissolved entry into the creek.

5 This 2001 aerial photo, which we can identify
6 several surface features. Down here on the bottom
7 part of the photo we have a processing facility.
8 Right here is what is called the red dirt pile,
9 which appears to be from a processing facility. And
10 we have some mine waste further down in the creek.
11 There are other processing facilities and mining
12 waste piles, underground workings that are visible
13 from this aerial photo.

14 Here is a processing facility, a fairly large
15 furnace retort facility. Here is this red dirt
16 pile. I want you to note how fine grained this
17 material appears to be from the photo. Also, right
18 adjacent to it is an intermittent stream. All this
19 material could erode into the stream and head down
20 to Sulphur Creek.

21 This is a picture from the Miller's property
22 looking up at this property because we weren't
23 allowed on this property. And you can note the
24 waste material or loose unconsolidated material
25 here. Right along the creek, eroding. Also, we had

1 this bumpy terrain again. This is an indication of
2 loose, unconsolidated material.

3 As you can see from previous photographs,
4 there are significant mining waste and erodible
5 slopes from mining that are the cause of discharge
6 of mercury-laden sediment into Sulphur Creek,
7 which would flow into Cache Creek.

8 As established in 2005 and 2007 Basin Plan
9 amendments and associated reports, the mines are
10 causing exceedances above water quality objectives.
11 Therefore, the mines are causing a condition of
12 pollution or nuisance.

13 Cleanup and abatement order. The Basin Plan
14 amendment requires cleanup of these sites by the
15 31st of December 2011. The steps and timelines I
16 will describe in the next two slides are meant to
17 meet that deadline for Wide Awake Mine. Because of
18 the Basin Plan required cleanup dates, the schedule
19 is very aggressive and is based on the Basin Plan.
20 The CAO requires both characterization and
21 remediation of the mine waste.

22 The first report required in the CAO is the,
23 characterization plan due on the 15th February 2010.
24 A conceptual model needs to be developed and a
25 sampling plan to determine a soil and groundwater

1 background concentrations, and a plan to determine
2 the lateral and vertical extent of the mining waste.
3 An implementation of the characterization plan is
4 required, which would be allowed by the main waste
5 characterization report, providing extent of the
6 mining waste and concentration in the waste.

7 The site remediation workplan describes the
8 remedies selection process for cleanup and why
9 certain remedies were chosen. The remedy would be
10 based on the ability to cleanup the mining waste to
11 the background concentration, or to the lowest level
12 achievable. Site implementation plan describes the
13 preferred remediation activities for the site
14 cleanup. The implementation plan and the approved
15 time schedule shall become part of this order.

16 Fieldwork plan for cleanup. By the 31st of
17 December 2011 cleanup and abate the effects,
18 including threats to human health and waters of the
19 state of mining waste discharged from the past
20 mining activities at the Wide Awake Mine.

21 Discharge identification. Staff did a review
22 of the Colusa County assessor's office public
23 records, federal and state information and Internet
24 searches to identify potential responsible parties.
25 The two binders on the table to the far left are

1 just for the Wide Awake responsible parties search.
2 We identified past miners, operators, landowners,
3 lessees and operators of the site. Staff then
4 identified what companies and individuals still
5 exist and can they be named as discharger.

6 We then named these parties in the CAOs. This
7 naming of dischargers is no different than we do on
8 other sites. Everyone named in the CAOs in the
9 Sulphur Creek either mined, owned, leased or
10 otherwise operated the property containing the
11 mining waste.

12 The Prosecution Team put together evidence
13 documents for your consideration as part of the
14 agenda package. They include periods of discharger
15 ownership of parcels that likely contain mining
16 waste. Each discharger had control of the property.
17 Evidence obtained from the county records, state and
18 federal agency and the web.

19 The next part of this presentation we will be
20 discussing individual dischargers which include many
21 companies buying, selling, leasing mining
22 properties.

23 Emma Trebilcott owned the mining property from
24 1977 to 1988, leasing the property to Homestake
25 Mining Company in 1978. After Emma Trebilcott's

1 death, the Trebilcott Trust owned the mining
2 property from 1988 to 1990, however, maintaining the
3 mineral rights after selling the property and the
4 lease contract with Homestake Mining Company.

5 Trebilcott Trust maintained the mining lease
6 with Homestake Mining Company until 1993. It
7 appears Trebilcott Trust may continue to own the
8 mineral rights of the mining property. The Emma G.
9 Trebilcott Trust has the ability to cleanup and
10 abate the discharge of mining waste from the mines.

11 Because of the facts presented, Emma G.
12 Trebilcott Trust was a passive discharger because of
13 their land ownership for two years and their
14 approximately five year lease of the mining and
15 mineral rights.

16 Robert Leal purchased the Wide Awake Mine
17 property in 1990 from the Goshute Corporation. Wide
18 Awake Quicksilver Load Mining was listed on the
19 deed. They provided easements to Homestake Mining
20 Company for access to the property. Robert Leal had
21 the ability to cleanup and abate the discharge of
22 mining waste from the mines.

23 Because of the facts presented, Robert Leal
24 was a passive discharger because of his land
25 ownership for five years and should have known that

1 the mine existed on the property because of the
2 property named in the mining and easements with the
3 mining company.

4 Homestake leased the property in 1978 from Emma
5 G. Trebilcott. The lease includes all water and
6 mining rights. The lease gave Homestake exclusive
7 control of the property for mining purposes and the
8 property owner used the property for agricultural
9 purposes as long as it did not interfere with
10 mining. Homestake had the ability to cleanup and
11 abate the discharge of mine waste from the mines.

12 Because of the facts presented, Homestake
13 Mining Company is, at minimum, a passive discharger
14 because of their lease of the mining properties for
15 15 years where they had control of the mining waste
16 piles and did mining exploration.

17 Cal Sierra Properties owned all or a part of
18 the Wide Awake mine properties from October 1995 to
19 April 2004. Cal Sierra Properties had the ability
20 to cleanup and abate the discharge of mining waste
21 from the mines.

22 Because of the facts presented, Cal Sierra
23 Properties was a passive discharger because of land
24 ownership for approximately nine years.

25 David Brown, Roy Tate and NBC Leasing each

1 owned a percentage of the Wide Awake Mine property
2 from September 1999 to present.

3 Merced General, Incorporated owned a portion
4 of the Wide Awake Mine property from June 2005 to
5 present. David Brown, Roy Tate, and NBC Leasing and
6 Merced General Construction, Incorporated, had the
7 ability to cleanup and abate the discharge of mine
8 waste from the mines.

9 Because of the facts presented, David Brown,
10 Roy Tate, NBC Leasing and the Merced General
11 Construction Company are passive dischargers because
12 of the land ownership.

13 Conclusion. These mines pose a continuing
14 threat to water quality. The Basin Plan identifies
15 these mines as sources of mercury to the Cache Creek
16 watershed. The dischargers identified had the
17 ability to cleanup and abate the discharge. All of
18 the dischargers listed in the cleanup and abatement
19 order fit the criteria under Water Code 13304.

20 Staff recommendation. The Board should issue
21 the proposed cleanup and abatement order with late
22 revisions.

23 This concludes our presentation for the Wide
24 Awake Mine cleanup and abatement order. I would
25 like to add this presentation and the files into the

1 record. I am happy to answer any of the questions
2 at this time.

3 CHAIRMAN LONGLEY: Thank you, Victor.

4 MR. IZZO: You're welcome.

5 CHAIRMAN LONGLEY: Further questions from
6 Members of the Board?

7 Do any of the designated parties desire to
8 cross-examine?

9 UNIDENTIFIED AUDIENCE MEMBER: Yes.

10 CHAIRMAN LONGLEY: Any other designated
11 parties wish to cross-examine at this time?

12 We will take you first, sir.

13 MR. BAZEL: Good afternoon. I am
14 Lawrence Bazel. I represent Mr. and Mrs. Robert and
15 Jill Leal.

16 Mr. Izzo, is there any evidence that Robert
17 Leal ever conducted operations on the site?

18 MR. IZZO: What do you mean by
19 "operations"?

20 MR. BAZEL: You said that some of the
21 dischargers were operators of the site. Do you have
22 any evidence Mr. Leal conducted any kind of business
23 operations on the site?

24 MR. IZZO: The only evidence I have is that
25 he was an owner.

1 MR. BAZEL: You don't know if he ever set
2 foot on the site; isn't that right?

3 MR. IZZO: That's correct.

4 MR. BAZEL: Is there any evidence that
5 anyone ever told Robert Leal at any time before 2009
6 that the site was discharging mercury?

7 MR. IZZO: Not that I know of.

8 MR. BAZEL: That the site was causing a
9 nuisance?

10 MR. IZZO: Not that I know of.

11 MR. BAZEL: Or that he should do anything
12 on the site to protect public health or the
13 environment?

14 MR. IZZO: Not that I know of.

15 MR. BAZEL: I asked you whether anyone told
16 him. Now let me ask whether there is any evidence
17 that Mr. Leal knew at any time before 2009 that the
18 site was discharging mercury?

19 MR. IZZO: Not that I know of.

20 MR. BAZEL: Any evidence that he knew it
21 was causing a nuisance?

22 MR. IZZO: No.

23 MR. BAZEL: Any evidence that he knew he
24 should do anything on the site to protect public
25 health or the environment?

1 MR. IZZO: Could you repeat that?

2 MR. BAZEL: Is there any evidence that
3 Robert Leal knew at any time before 2009 that he
4 should do anything on the site to protect public
5 health and the environment?

6 MR. IZZO: The only thing he should have
7 known, there was a mine site there. Based on his
8 deed and that there is some evidence that there was
9 some leases, right-a-ways to mining companies. But
10 besides that, I have no evidence whether he knew or
11 not.

12 MR. BAZEL: Now is there any allegation of
13 any discharge from the Wide Awake mine itself?

14 MR. IZZO: Well, when -- just for
15 clarification. When I consider a mining site I
16 consider all waste throughout, all mining features.
17 And based on 5C2, there is indications of discharge
18 from the site.

19 MR. BAZEL: I have no problem with the
20 concept that the Board staff and Prosecution Team
21 are alleging discharge from the site. I am just
22 trying to distinguish between discharges from the
23 mine shaft itself. In your presentation you just
24 talked about waste piles and processing facilities
25 and things like that.

1 Is there any evidence of discharge from the
2 mine shaft itself?

3 MR. IZZO: Not that I am aware of.

4 MR. BAZEL: The current mine site property
5 is divided up into three parcels that have long
6 numbers, but end in 10, 11 and 12. Do you know what
7 I am talking about?

8 MR. IZZO: Yes, I do.

9 MR. BAZEL: The piles that you identified
10 in your presentation, which parcels were they on?

11 MR. IZZO: Well, 5C2 report, it really
12 doesn't identify parcels. And I would have to look
13 at the parcel map to identify it. But it's -- all
14 this was at one time one mining site.

15 MR. BAZEL: Is there any evidence in the
16 record that it wasn't two mining sites?

17 MR. IZZO: No, there is no evidence. I
18 mean, depends. Again, the definition to me that is
19 the Wide Awake Mine; is all one mine site.

20 MR. BAZEL: Is there any evidence in the
21 record about Buckeye Mine.

22 MR. IZZO: Not that I am aware of.

23 MR. BAZEL: Would it help to remind you
24 that when I deposed you your answer to which parcels
25 the piles were on, you said the pile that you

1 photographed was on Parcel 11? Do you remember
2 that?

3 MR. IZZO: Not exactly. But looking at the
4 piles on the map, it would -- to me it looks like
5 it's possibly ten and 11.

6 MR. BAZEL: Let me ask: Who prepared your
7 ownership history that Prosecution Team is using
8 here today?

9 MR. IZZO: Do you mean -- I mean, all three
10 of us - Jeff, I and Ms. Sparks - worked on
11 collecting the actual data. The actual site
12 location -- owner and leases documents.

13 MR. BAZEL: Who is Ms. Sparks?

14 MR. IZZO: A staff person in the Sacramento
15 office.

16 MR. BAZEL: Did you use a title company or
17 title expert to determine who had title?

18 MR. IZZO: I did not use a title company.

19 MR. BAZEL: Thank you. No other
20 questions.

21 CHAIRMAN LONGLEY: The gentleman over here
22 on my left had his hand up. Could you come forward?
23 At this time around I'm asking for a showing of
24 hands rather than going through the long list of
25 designated parties.

1 MR. TEJA: Dave Teja representing Cal
2 Sierra Properties and also Merced Construction
3 Company, Inc. Pardon me, I got that wrong. Merced
4 General Construction, Inc. I'm sorry.

5 Before I say anything I would like to ask the
6 Prosecution Team some questions. I'm not -- I am
7 going to try to avoid repeating the questions That
8 Mr. Bazel asked. But one of the things that came
9 out in your opening statement was each mine. Now we
10 are talking about several mines. We're only talking
11 about the Wide Awake Mine?

12 MR. IZZO: Unless you're talking about the
13 early slides that showed the mines in the Sulphur
14 Creek area. We are only talking about the Wide
15 Awake Mine here.

16 MR. TEJA: Are there any other mines close
17 to the location where you believe the Wide Awake is
18 located?

19 MR. IZZO: There is approximately five plus
20 mines just north of that.

21 MR. TEJA: How far is the nearest one away?
22 How far is the farthest one away?

23 MR. IZZO: This would be kind of a guess.
24 I would say a third of a mile, and the farthest is
25 about a mile. Of those five mines.

1 MR. TEJA: Do they all drain directly into
2 Sulphur Creek?

3 MR. IZZO: They surround Sulphur Creek.
4 They could drain into Sulphur Creek, yes.

5 MR. TEJA: What do you mean should drain?

6 MR. IZZO: Without some further
7 characterization it would be difficult to know
8 exactly which mines and how much discharges occur at
9 each mine. The data we have in the 5C2 report does
10 give information on discharges from the mines, but
11 we need further characterization to refine that.

12 MR. TEJA: Well, it appears to me that from
13 the -- in the beginning you claimed that the Wide
14 Awake mine was on Sulphur Creek?

15 MR. IZZO: Now I showed a picture in the
16 tributary that goes to Sulphur Creek.

17 MR. TEJA: Does that tributary have a name?

18 MR. IZZO: I believe it is unnamed on the
19 maps I have seen.

20 MR. TEJA: Is it on all your maps?

21 MR. IZZO: I don't know if it's all the
22 maps, but it's definitely on the USGS map. It shows
23 a drainage there.

24 MR. TEJA: Do you have any evidence at all
25 that anybody on behalf of Cal Sierra, Mr. Whiteaker

1 or anybody on behalf Merced General Construction
2 conducted any business operations on the mine at
3 all?

4 MR. IZZO: I don't have any evidence of
5 that.

6 MR. TEJA: Do you have any evidence to
7 dispute the declaration under penalty of perjury by
8 the owner -- president, excuse me, of the Merced
9 General Construction Corporation that he had never
10 been on the property, never seen it?

11 MR. IZZO: I don't know if he ever saw the
12 property or not.

13 MR. TEJA: What about Mr. Whiteaker who is
14 the active partner in Cal Sierra Properties, do you
15 have any evidence or information that he was ever on
16 the property?

17 MR. IZZO: I have no evidence that he was
18 on the property.

19 MR. TEJA: Neither one of these people
20 could have conducted business operations there?

21 MR. PULUPA: They could have conducted
22 operations. We don't have any evidence.

23 MR. TEJA: Do you have any evidence that
24 they did?

25 MR. PULUPA: That is what we are saying, we

1 don't have any evidence they did. They owned the
2 property.

3 MR. TEJA: Did any of my clients or their
4 agents have any knowledge or do you have any
5 evidence they had any knowledge about mercury
6 contamination of the Wide Awake Mine site?

7 MR. IZZO: Since when? You mean --

8 MR. TEJA: Since they bought the property,
9 each owned an undivided one-half interest in the
10 property.

11 MR. IZZO: Right. Could you repeat that
12 question?

13 MR. TEJA: Well, from the time they
14 purchased the two interests in the property, do you
15 have any evidence that either of them knew about
16 mercury contamination in the mine site?

17 MR. IZZO: Personal knowledge?

18 MR. TEJA: Yes.

19 MR. IZZO: Starting in January --

20 MR. PULUPA: We don't have any evidence
21 they have personal knowledge.

22 MR. TEJA: Do you have any evidence that
23 they knew of it on a personal basis?

24 MR. PULUPA: There is a number of property
25 documents that relate to mining claims on that

1 property.

2 MR. TEJA: Is the mining claim -- is a
3 mining claim shown on any of the assessor parcel
4 maps that your agency looked at?

5 MR. IZZO: Yes.

6 MR. TEJA: Which ones?

7 MR. IZZO: On the county assessor parcels
8 there is mining claims listed on there.

9 MR. TEJA: Is there -- do you have a map
10 showing a parcel claim on an assessor's map?

11 MR. IZZO: It was part of the evidentiary
12 document that we submitted and it was, I believe,
13 Attachment A.

14 MR. TEJA: In what way did either of my
15 clients cause or permit pollution from the mine
16 site?

17 MR. IZZO: Yes.

18 MR. TEJA: How?

19 MR. PULUPA: At that time through the
20 passage of discharge waste during the time they
21 owned the property.

22 MR. TEJA: You don't have any evidence that
23 either one was there shoveling dirt into a creek or
24 gully or whatever?

25 MR. PULUPA: No.

1 MR. TEJA: Is that tributary that you
2 talked about, is that really a creek? It looks like
3 a gully to me.

4 MR. IZZO: It is an intermittent stream.

5 MR. TEJA: How intermittent? Does it have
6 water in it for three days? A year?

7 MR. PULUPA: It really depends on the
8 stream flows. I think that has stream flowing in it
9 during wet years. There will be more infiltration
10 from the streams and it could have water a little
11 longer in dry years.

12 MR. TEJA: Wouldn't you say, wouldn't you
13 agree that, if it was a stream, it would have a
14 water source?

15 MR. PULUPA: Streams have water in them,
16 yes.

17 MR. TEJA: What is the water source of this
18 so-called tributary?

19 MR. IZZO: Basically, rain and springs.

20 MR. TEJA: When it rains?

21 MR. PULUPA: And springs.

22 MR. IZZO: And springs.

23 MR. TEJA: Are all the people that you have
24 named as owners from way back when, people who owned
25 or operated mine sites?

1 MR. PULUPA: Some people leased the site.

2 MR. TEJA: Some were lessees. Okay. Is
3 there any evidence at all that either of my clients
4 or anybody at their instruction operated or mined
5 anything from the Wide Awake Mine site?

6 MR. IZZO: Based on information we have, it
7 doesn't appear anybody mined in the 1990s.

8 MR. TEJA: As a matter of fact, isn't it a
9 fact that the mine is unlocatable because it's been
10 filled in?

11 MR. IZZO: Actually, my understanding, you
12 can still mine the mine. We weren't allowed on the
13 property to go investigate that.

14 MR. TEJA: You asked my client Roy
15 Whiteaker if he would give you permission to go on
16 the property and he said no because he didn't own
17 it?

18 MR. HUGGINS: Jeff Huggins. I did find Mr.
19 Whiteaker's former property owner. We did ask him
20 permission to access the property site. He properly
21 pointed out he did not own the site anymore, and
22 asked that we call Mr. Tate who is the owner. We
23 did call Mr. Tate, and he refused us access to the
24 property.

25 MR. TEJA: Section 3483 of the Civil Code

1 provides, and I guess we have all read it, that a
2 person is liable who had control of the discharge
3 from that mine site.

4 Did either of my clients actually have control
5 of a discharge?

6 MR. PULUPA: They owned the mine site.

7 MR. TEJA: Pardon me?

8 MR. PULUPA: They owned the mine site.

9 MR. TEJA: Was there a discharge from the
10 mine site?

11 MR. PULUPA: Yes.

12 MR. TEJA: What evidence do you have of a
13 mine discharge?

14 MR. PULUPA: 5C2 report shows that mine
15 waste is eroding during the time your clients owned
16 the parcels.

17 MR. TEJA: Eroding. That just means
18 crumbling away; doesn't it?

19 MR. PULUPA: Among other things, yes.

20 MR. TEJA: Does it mean rock or soil are
21 eroding and having mercury tumble out of them?

22 MR. IZZO: What it means is that we have
23 sediment being eroded into the creek, and there is
24 mercury that is part of that sediment.

25 MR. TEJA: Has anybody actually tested the

1 sediment in this tributary that I call a gully?

2 MR. IZZO: My recollection, yes, there is
3 sediment samples directly in the creek.

4 MR. TEJA: Have you made them available to
5 me in the course of the proceedings?

6 MR. PULUPA: They are in the 5C2 report.

7 MR. TEJA: I am really kind of curious
8 about something.

9 MS. OKUN: I just want to point out that
10 since you are representing two parties, you have a
11 total of 30 minutes for those parties but the
12 cross-examination does count toward your
13 presentation time, unless the chair grants
14 additional time.

15 CHAIRMAN LONGLEY: You are down to less
16 than five minute.

17 MR. TEJA: When the boss tells me to shut
18 up, I usually do. I do want to ask a couple more
19 questions.

20 Who prepared the report in the buff pages that
21 has the assessor's parcel number? I just wrote
22 three X's and three O' and 009.

23 MR. PULUPA: The buff sheet doesn't
24 represent parcel number.

25 MR. TEJA: I don't remember the entire

1 number because the last number of parcel nine which
2 you corrected recently.

3 MR. PULUPA: I have no idea what you're
4 talking about.

5 MR. TEJA: In the buff sheets there was
6 Exhibit B. I believe it was in the buff sheet. It
7 appears in various places in your pleadings. And
8 you corrected it yesterday.

9 MR. PULUPA: Do you mean the Attachment B
10 which we changed to say Mr. Leal is not a
11 corporation, but he is a person, an individual?

12 MR. TEJA: I didn't bring it up here with
13 me, but it's called Attachment B, and I think that
14 is it right there. Looks like it.

15 Thank you.

16 MR. PULUPA: What is the question?

17 MR. TEJA: Who prepared the original one?

18 MR. IZZO: Of these attachments?

19 MR. TEJA: It was attachment to the
20 pleadings.

21 MR. IZZO: And you want to know who is the
22 original one who developed this attachment?

23 MR. TEJA: Yes.

24 MR. IZZO: Well, I did the first draft. We
25 all worked on it together, three of us.

1 MR. TEJA: Then you made a new draft
2 yesterday?

3 MR. PULUPA: Yes.

4 MR. TEJA: You actually changed the
5 assessor's parcel number of the property where the
6 mine is located?

7 MR. PULUPA: No.

8 MR. TEJA: It is the same as it was
9 originally?

10 MR. IZZO: Yes.

11 MR. TEJA: Thank you very much.

12 CHAIRMAN LONGLEY: Thank you.

13 Mr. George.

14 Could you come to the microphone and identify
15 yourself, please?

16 MR. HUNGERFORD: Apologize. Should have
17 raised my hand sooner. Sean Hunger for the Emma G.
18 Trebilcott Trust. I just want to ask a
19 clarification from the Prosecution Team.

20 Mr. Izzo, in your opening remarks you said
21 that the trust or you indicated, as I understood,
22 that the trust had liability for periods after it
23 had sold the service of the property where it
24 continued to have a lease with Homestake Mining
25 Company. My question to you is: Are you

1 attributing liability to the trust for periods after
2 the trust sold the property but where it continued
3 to own mineral estate?

4 MR. PULUPA: We've assessed liability on
5 the basis of the trust ownership. They had retained
6 mineral rights to that property afterward.

7 MR. HUNGERFORD: The reason I ask, the
8 prosecution put out this mining cleanup and
9 abatement order for everything, each of the parties.
10 And the timing of the liability, of our liability,
11 the trust, was from 1977 to 1990. That is something
12 that we have -- we need to correct. You guys have
13 already acknowledged that. You are going to correct
14 that. But the reason I am asking the question is
15 because the mining lease actually went beyond 1990.
16 I believe 1993.

17 So Mr. Izzo, you mentioned there is a
18 five-year period that the trust had a mining lease
19 with Homestake. So I want to know or at least to
20 clarify is that you're not claiming that we have
21 liability for periods after the point in time that
22 we left the property, but we continued to have
23 mineral estate. I can ask it a different way.

24 Am I right that the prosecution's claiming
25 that the period of liability you're attributing to

1 the trust is from 1989 to 1990?

2 MR. PULUPA: We are not sure. We assessed
3 liability based on ownership. We have to review
4 some of the mineral rights documents in terms of
5 where they began. One of my --

6 MS. CREEDON: We need to have Jeff speak
7 into the microphone.

8 MR. HUGGINS: I will let Patrick answer
9 that question.

10 MR. PULUPA: Liability is assessed on basis
11 of ownership, not on the mineral rights.

12 MR. HUNGERFORD: So is -- then let me ask
13 more clearly. Are you assessing liability for the
14 trust or any time after December of 1990, which is
15 when the trust sold the property to Goshute,
16 Incorporation?

17 MR. PULUPA: No.

18 MR. HUNGERFORD: Thank you very much.

19 MS. OKUN: I hate to complicate things even
20 further, but did you mean December of 1989 which is
21 when --

22 MR. HUNGERFORD: I'm sorry, December 1989.
23 I misspoke. Thank you.

24 CHAIRMAN LONGLEY: Mr. George, thank you
25 for your patience on behalf of Homestake. I believe

1 you want to cross-examine?

2 I don't believe there are any more crosses
3 after this. You would also be up to present your
4 testimony of cross-examination.

5 MR. GEORGE: I will keep the cross short, I
6 think.

7 MS. GEORGE: Mr. Izzo, you're familiar with
8 the affidavit of Karl Burke which updated September
9 16th, 2009, which was filed on behalf of Homestake
10 in this matter?

11 MR. IZZO: Yes.

12 MR. GEORGE: Does the Prosecution Team
13 dispute the descriptions of the activities of
14 Homestake at the Wide Awake site, which are in that
15 affidavit?

16 MR. IZZO: As far as I know, that is all
17 the information we have on what Homestake did at
18 that site, just what is provided by Karl.

19 MS. GEORGE: So the Prosecution Team has
20 not provided any evidence contradicting that?

21 MR. IZZO: No.

22 MS. GEORGE: Asking a little bit about that
23 tributary. In the affidavit Mr. Burke indicates
24 that he looked at that tributary in August of this
25 year and that there was no water in that tributary

1 at the time.

2 Do you dispute that?

3 MR. IZZO: I would have to go with his
4 observation since I wasn't there.

5 MS. GEORGE: I believe in your deposition
6 last week you stated that you had been present in
7 June of this year and observed the tributary at that
8 time, and you described the tributary flow as
9 perhaps three inches in width and a half inch in
10 depth; is that correct?

11 MR. IZZO: Actually, no. That observation
12 was based on -- I was out there in, and I'm kind of
13 guessing here, around 1992 which another study that
14 was being done on mining; that is when I observed
15 some flow out of that creek.

16 MR. GEORGE: That was the --

17 MR. IZZO: That was that one inch and three
18 inches wide.

19 MS. GEORGE: You did not observe any flow
20 in June?

21 MR. IZZO: Quite frankly, I don't remember
22 looking down into the stream at that location
23 because we weren't on-site. So there was flow
24 farther down, but that could be from blank springs.

25 MS. GEORGE: Streams seems a little

1 excessive for the nature of the flow, but I will let
2 that pass. One final question. Are you aware of
3 any contact or any request by the Regional Board to
4 Homestake during the time it held it's mine
5 exploration and development lease, any requests by
6 the Regional Board that Homestake take any action
7 with respect to either waste piles or tailings on
8 the Wide Awake property?

9 MR. IZZO: Not that I am aware of.

10 MR. GEORGE: No further questions.

11 CHAIRMAN LONGLEY: Thank you, sir. Before
12 you go any further then, for the benefit of those
13 who have come in after this proceeding started, does
14 any designated parties or the Central Valley
15 Regional Board Prosecution Team, Homestake Mining
16 Company, Emma G. Trebilcote Trust, Robert Leal, Jill
17 Leal, NBC Leasing, Inc., United States Bureau of
18 Land Management, Charles Millard Tracy and Janet Dee
19 Tracy, James Dale Whiteaker and Sally C. Whiteaker,
20 Cal Sierra Properties, Glen Mills, Inc., Terri King
21 Brown and David G. Brown, Leah C. Tate and Roy Tate,
22 and Merced General Construction -- having read all
23 of those, are any of the designated parties that
24 wish to -- well, read all of those, we will start
25 with testimony from the designated parties.

1 MS. CREEDON: May I ask a question, please,
2 first? Am I allowed to ask questions?

3 CHAIRMAN LONGLEY: You certainly are.

4 MS. CREEDON: Thank you very much.

5 Victor, I have a question for you. The
6 tributary to Sulphur Creek, how would you define
7 that creek, as perennial or ephemeral stream?

8 MR. IZZO: Ephemeral.

9 MS. CREEDON: What does that mean?

10 MR. IZZO: It flows on occasion.

11 MS. CREEDON: What would trigger the need
12 for that flow on that occasion?

13 MR. IZZO: Rainfall.

14 MS. CREEDON: When is the highest risk for
15 erosion to occur from land?

16 MR. IZZO: During and after a rainfall,
17 which is generally during the winter, in that area.

18 MS. CREEDON: Would there be some
19 occurrences in the spring or summer for rainfall to
20 occur?

21 MR. IZZO: Actually, when I was up there in
22 June, we were having a thunderstorm. You could have
23 thunderstorms.

24 MS. CREEDON: Thank you very much.

25 CHAIRMAN LONGLEY: We will now begin with

1 testimony by other designated parties. We will
2 start with Homestake Mining Company.

3 MS. GEORGE: We have no additional
4 testimony.

5 CHAIRMAN LONGLEY: Thank you, sir.

6 The Trebilcott Trust. I hope I'm pronouncing
7 that correctly.

8 MR. HUNGERFORD: Yes. Sean Hungerford for
9 the Trebilcott Trust. Treb-bill-cot. I made the
10 same mistake for a long time until I was recently
11 corrected. I have a short PowerPoint. I also would
12 first like to apologize to Mr. George. I cut you
13 off a few minutes ago. I didn't see you raise your
14 hand because of the pillar. I apologize to
15 everyone.

16 Good afternoon, Members of the Board. My name
17 is Sean Hungerford. I am representing the
18 Trebilcott Trust. I would like to thank you for
19 giving me the opportunity to speak today, and to
20 explain to you why I think the trust to be released
21 from the cleanup and abatement order. I'm not going
22 to have very extensive comments. Everything that I
23 say is supported by information that we have already
24 put into the record. So in keeping with the hearing
25 procedures, I am not going to be introducing new

1 information. I do have a PowerPoint that just
2 briefly follows along my comments.

3 Let me start by introducing the trust. The
4 Trebilcott Trust is a testamentary trust, which
5 means that it sprung into existence after the death
6 of Ms. Trebilcott. Let me give you a few dates,
7 just to put that into perspective.

8 Ms. Trebilcott was a single woman, a widower
9 who received this property in 1977 as an
10 inheritance. She received it after the death of
11 Ruth Gibson. It wasn't just the mining site that
12 she received; it was a large parcel, totaling about
13 2,700 acres. The mine site was just a part of it.
14 Ms. Trebilcott owned the property for about nine
15 years, until her death in December of 1986. And at
16 that point in time, the property came into the
17 control of the probate court. Probate proceedings
18 went on for about a year and half. In March of
19 1988, probate court in Colusa County Superior Court
20 issued its final order.

21 The order did a couple of things. It
22 discharged all of the debts and liabilities on the
23 part of Ms. Trebilcott. It also established the
24 trust, and at the same time transferred ownership
25 the property, including the Wide Awake Mine, into

1 the trust. So from the Board's standpoint, there
2 are a couple of things I would like you to take away
3 from this.

4 First of all, the trust didn't have a legal
5 existence prior to March of 1988. It was a court
6 order that established the trust. The second thing
7 is that the trust has no responsibility for
8 liabilities on the part of Ms. Trebilcott that arose
9 during her lifetime. This is something that we
10 briefed in our papers. It is the an essential
11 function of the probate code which operates to
12 discharge known and unknown or contingency liability
13 on the part of the deceased. So at the point in
14 time that the Trebilcott Trust took ownership of the
15 property, it did not take any liabilities that might
16 have arose from Ms. Trebilcott.

17 The second thing I just want to be clear is
18 the relationship of the parties here. There is the
19 trustee, which is Wells Fargo Bank, and there are
20 four beneficiaries. Each of the beneficiaries are
21 charities. There is Shriners Hospital for Children.
22 There is Lions Eye foundation. There is the
23 Lighthouse for the Blind and Visually Impaired, and
24 the Salvation Army. These are charities that were
25 in place in 1988 when the trust was established, and

1 they continue to be beneficiaries now.

2 I would like to take a few moments and focus on
3 the period of the trust ownership. The first thing
4 is that it was very short. The trust was
5 established and received the property in March of
6 1988, and it immediately put the property on the
7 market. Within two months it had contacted a realty
8 company and placed the property up for sale. This
9 is again documented by information we put into the
10 record. It was sold in December of 1989 to Goshute
11 Corporation who owned the facility. Not been named
12 as a discharger here, which means it owned the
13 property for one year and nine months.

14 Second thing I want to emphasize, there is no
15 evidence of any knowledge during the trust short
16 ownership that there was a mercury problem with the
17 property. We have -- there's nothing been placed on
18 the record in that regard, no notices from the
19 Regional Board or any other state agency that there
20 was a problem with mercury. And you will hear in a
21 moment a representative of Wells Fargo explain there
22 is certainly nothing they had in their records to
23 show there was a former mine on the property
24 contributing mercury into the watershed.

25 And the third thing that is going to become

1 clear, not only from materials we've already
2 submitted, but through the testimony you will hear
3 instead that there was no mining undertaken by the
4 trust itself, no property development, no ground
5 disturbance activities. The only thing that was in
6 place was an existing lease to Homestake, which
7 preexisted the trust receiving the property.

8 So before we go on, I have a couple witnesses
9 I want to introduce. I would just like to cover
10 where we are at with the trust. First, the trust
11 isn't a mining company. It isn't a developer, not a
12 land speculator. They didn't even receive the
13 property that they owned by choice. They received
14 it by a court order. They attempted immediately to
15 sell the property, and then, in fact, the trust did
16 sell the property within a relatively short period
17 of time. During the time of their ownership, there
18 is no evidence that they did anything to either
19 cause, create or exacerbate any of the conditions on
20 the property that are now the subject of this
21 hearing.

22 With that I would like introduce a couple
23 people. First of all, I would like to call Gerald
24 Shupe.

25 CHAIRMAN LONGLEY: Before you go there, you

1 said that the property was sold to whom?

2 MR. HUNGERFORD: Goshute. I don't know if
3 I'm pronouncing it correctly. Goshute,
4 G-O-S-H-U-T-E, Corporation. There is the deed
5 recording that transaction attached to our papers.

6 MR. HUNGERFORD: Can you please state your
7 name?

8 MR. SHUPE: Gerald A. Shupe.

9 CHAIRMAN LONGLEY: Before you proceed, did
10 you take the oath, sir?

11 MR. SHUPE: Yes, I did.

12 MR. HUNGERFORD: So please state your
13 name.

14 MR. SHUPE: Gerald A. Shupe.

15 MR. HUNGERFORD: Who are employed by?

16 MR. SHUPE: Wells Fargo.

17 MR. HUNGERFORD: What are you
18 responsibilities for Wells Fargo Bank?

19 MR. SHUPE: Real estate held in estates and
20 trusts in Northern California.

21 MR. HUNGERFORD: In that capacity, have you
22 reviewed Wells Fargo Banks' files in the Trebilcott
23 Trust and are you familiar with their content?

24 MR. SHUPE: I am.

25 MR. HUNGERFORD: Can you tell us how long

1 the trust owned the property?

2 MR. SHUPE: Approximately a year and eight
3 months.

4 MR. HUNGERFORD: During that time are you
5 aware of any effort that Wells Fargo made to develop
6 the property?

7 MR. SHUPE: There is no record of that.

8 MR. HUNGERFORD: In fact, Wells Fargo was
9 attempting to sell the property?

10 MR. SHUPE: Yes.

11 MR. HUNGERFORD: To your knowledge, have
12 the beneficiaries, the four charities that I listed
13 earlier, have they had any involvement in the
14 management of the trust assets?

15 MR. SHUPE: To the best of my knowledge,
16 no.

17 MR. HUNGERFORD: Their involvement was, and
18 to and your knowledge, remains -- is limited to
19 receiving income payment from the trust?

20 MR. SHUPE: Yes.

21 MR. HUNGERFORD: Are you aware of any
22 evidence that Wells Fargo Bank or any of the
23 beneficiaries had any knowledge during the trust
24 ownership of the property that the Wide Awake Mine
25 was a source of mercury discharges?

1 MR. SHUPE: I have no such knowledge.

2 MR. HUNGERFORD: Are you aware of any
3 insurance held by Wells Fargo Bank that would
4 provide coverage for payments made to remediate the
5 site?

6 MR. SHUPE: I am not aware of any such
7 insurance.

8 MR. HUNGERFORD: No other questions.

9 MR. HUNGERFORD: Do you want to keep
10 cross-examining?

11 CHAIRMAN LONGLEY: Yes, sir. I do have a
12 question. I don't have a blue card for you. And
13 for the record we need to identify -- your name,
14 sir?

15 MR. SHUPE: Gerald Shupe, S-H-U-P-E.

16 CHAIRMAN LONGLEY: Address?

17 MR. SHUPE: 400 Capitol Mall, Suite 702,
18 Sacramento, 95814.

19 CHAIRMAN LONGLEY: Thank you very much.

20 Are there any questions by Board Members?

21 Thank you.

22 MR. SHUPE: Thank you.

23 MR. HUNGERFORD: Next I would like to ask
24 Steven Rice to come up.

25 Please state your name.

1 MR. RICE: I am Steven - I go by middle
2 initial - T., as in tango, last name Rice, R-I-C-E.
3 Steven with a v.

4 MR. HUNGERFORD: What organization are you
5 involved with.

6 MR. RICE: The Salvation Army, its regional
7 headquarters known as the Del Oro Division in
8 Sacramento, California.

9 MR. HUNGERFORD: Can you tell me generally
10 your responsibilities, your involvement with The
11 Salvation Army?

12 MR. RICE: I carry a title, legal and
13 estates director. I'm responsible for the estate
14 administration of those gifts that come to us
15 virtually by that method.

16 MR. HUNGERFORD: Are you familiar with The
17 Salvation Army's position as a beneficiary of the
18 Trebilcott Trust?

19 MR. RICE: Yes, I am.

20 MR. HUNGERFORD: You are familiar with The
21 Salvation Army's receipt of income payments from the
22 trust?

23 MR. RICE: Yes, I am.

24 MR. HUNGERFORD: Can you tell me who
25 depends on the income The Salvation Army receives

1 from the trust?

2 MR. RICE: The easiest answer is to refer
3 to the last known records, at least that we have
4 compiled at this point, would be to the fiscal year,
5 September 30, 2008, in that one year, from October
6 the 1st, 2007 and September 30th, 2008, 600-, few
7 shy of that, more than 599,000 individuals receive
8 services from The Salvation Army throughout the
9 region that we know as the Del Oro Division. And of
10 that, over 300,000 were first time. And we don't
11 know what it is this year. I can tell you it is
12 going to be more than that.

13 MR. HUNGERFORD: Does The Salvation Army,
14 to your knowledge, have any insurance that would
15 cover them in the event of a loss of income from the
16 trust?

17 MR. RICE: No. I've been an employee of
18 The Salvation Army for 18 years. I was formerly a
19 finance officer for The Salvation Army and Salvation
20 Army officer in the '70s and early '80s. I am
21 familiar with Salvation Army risk management issues,
22 including any policies that we have. We do not have
23 an insurance policy that would cover any loss of
24 these moneys to The Salvation Army.

25 MR. HUNGERFORD: Is it accurate to say the

1 loss of trust income is going to be felt by The
2 Salvation Army in the programs that it supports?

3 MR. RICE: Yes. And the people ultimately
4 that it serves.

5 MR. HUNGERFORD: Thank you.

6 I'm sorry, any questions?

7 CHAIRMAN LONGLEY: Are their questions for
8 -- thank you.

9 MS. CREEDON: I don't have a question for
10 this gentleman. After he is done with the other, I
11 would like to ask the gentleman from Wells Fargo a
12 couple of questions.

13 CHAIRMAN LONGLEY: Certainly. Do you have
14 any further testimony, sir?

15 MR. HUNGERFORD: I do. I have two more
16 people.

17 Alan Anderson, please come up.

18 State your name.

19 MR. ANDERSON: My name is Alan Anderson.

20 A-L-A-N. Anderson with S-O-N.

21 MR. HUNGERFORD: Who are you employed by?

22 MR. ANDERSON: Shriners Hospitals for
23 Children in Northern California.

24 MR. HUNGERFORD: What is your capacity with
25 Shriners?

1 MR. ANDERSON: I am the director of
2 development. My task is to raise money for our
3 health care and research programs.

4 MR. HUNGERFORD: You are familiar with that
5 Shriners is a beneficiary of the Trebilcott Trust?

6 MR. ANDERSON: Yes, I am.

7 MR. HUNGERFORD: The fact that Shriners
8 receive income payments from the trust?

9 MR. ANDERSON: Yes.

10 MR. HUNGERFORD: Can you tell what these
11 income payments go to support?

12 MR. ANDERSON: At Shriners Hospital for
13 Children, as a fully independent healthcare
14 organization, income such as that derived from the
15 trust and all donations provide primary healthcare
16 for children suffering from orthopedic conditions,
17 spinal cord injuries and acute burns. Our only
18 source of income for covering this healthcare is
19 through charitable contributions.

20 Last year we admitted more than 3,000 new
21 patients. We care for approximately 25,000 each
22 year.

23 MR. HUNGERFORD: Does Shriners have any
24 insurance or way of passing along the loss of
25 income?

1 MR. ANDERSON: No, we do not.

2 MR. HUNGERFORD: Any questions?

3 CHAIRMAN LONGLEY: Are there any questions
4 by Members of the Board?

5 Do you have further testimony?

6 MR. HUNGERFORD: I have one more witness.

7 CHAIRMAN LONGLEY: Thank you. Then we will
8 do cross. Thank you.

9 MR. HUNGERFORD: If I can ask Dennis Noble.

10 THE COURT: Sir, did you fill out a card?

11 MR. NOBLE: I did, sir.

12 CHAIRMAN LONGLEY: For some reason, I'm not
13 getting all the cards. If you will give us your
14 name and address, and whether you have taken the
15 oath.

16 MR. NOBLE: I have taken the oath. My name
17 is Dennis Noble, N-O-B-L-E. I have an office in
18 Tracy, California, 120 East 12th Street, Tracy,
19 California 95376.

20 CHAIRMAN LONGLEY: I apologize.

21 Thank you.

22 MR. HUNGERFORD: You traveled from Tracy to
23 be here this afternoon?

24 MR. NOBLE: I did.

25 MR. HUNGERFORD: Thank you for that.

1 Which organization are you involved with?

2 MR. NOBEL: I represent the Lions Eye
3 Foundation of California-Nevada. That is Lions,
4 L-I-O-N-S, a nonprofit organization. I am the
5 chairperson of the Wills and Bequests Committee of
6 that organization.

7 MR. HUNGERFORD: You're familiar generally
8 with the fact that Lions Eye Foundation is a
9 beneficiary of the Trebilcott Trust?

10 MR. NOBEL: Yes, I am.

11 MR. HUNGERFORD: You receive income
12 payments from the trust?

13 MR. NOBLE: Yes.

14 MR. HUNGERFORD: Can you tell who depends
15 on the income from the trust?

16 MR. NOBLE: Point of clarification the
17 Lions Eye Foundation only supplies and does surgical
18 or procedures on eyes to restore sight, improve
19 sight or prevent blindness. Only surgical
20 operations, not glasses. In that regard we perform
21 approximately 80 to 90 surgical procedures a quarter
22 with a value of somewhere around \$700,000 to our
23 recipients. Recipients are needy, of course. In
24 this day and age there is a lot more needy than we
25 all need, I think. And we are getting many more

1 referrals at this time for this procedure which we
2 do not charge anybody for.

3 MR. HUNGERFORD: Does Lions Eye Foundation
4 have any insurance or a way of covering itself for
5 losses of income?

6 MR. NOBLE: No, it doesn't.

7 CHAIRMAN LONGLEY: Any questions of the
8 panel?

9 MR. HUNGERFORD: I have a few more
10 comments. I will reserve my time.

11 I just want to turn briefly to the issue of
12 liability and emphasize a couple of points that we
13 raised in our papers. First, in our written
14 comments that we submitted to the Board, we argued
15 that the Wenwest decision should apply here. The
16 reasons for that I think are pretty clear. I think
17 you all are familiar with the facts of Wenwest.
18 Essentially, Wendy's International of the fast food
19 fame briefly owned a piece of property that was
20 previously, I believe, a gas station. And it was
21 contaminated; and they owned the property for a
22 period of a few months. Sold it to a franchisee.
23 During that period of time, there was evidence that
24 Wendy's knew or had some evidence or knowledge of
25 the fact that there was contamination of the

1 property. Yet sold the property. The State Board
2 ultimately found that because it was a short-term
3 owner, because it hadn't created the problem or
4 didn't do anything to exacerbate it, it should be
5 released from liability.

6 We have in our materials provided a table. If
7 you haven't reviewed the papers, I would ask that
8 you do that. It just really goes through each one
9 of the factors that was relied upon by the Wenwest
10 Board to make that finding. We just put the
11 corresponding factor in for the Trebilcote Trust. I
12 think or I hope that everyone agrees that all of the
13 factors that apply to Wenwest apply here. I am not
14 going to go into those in detail or belabor that
15 point. I do want to make one additional
16 observation.

17 That is the Wendy's International, Wendy's is
18 a large corporation. I think that we can reasonably
19 infer they are in the business of owning properties,
20 that they have numerous properties. They probably
21 are insured to the hilt, and they are as positioned
22 as any company can be to pass along the cost of
23 doing business to a larger group of people.
24 Notwithstanding that, the State Water Resources
25 Control Board let them off the hook. We are not

1 presented with that situation here. Clearly, the
2 people they are going to be affected by this order
3 from the trust perspective are four charitable
4 organizations. They don't have insurance. Wells
5 Fargo doesn't have insurance. The people that are
6 going to be affected are going to be the charities
7 and the people that rely on them.

8 So I would submit to this point that we have
9 even a stronger case than was present in Wenwest,
10 and the reasoning and policy behind that decision
11 applies here. I will also wanted to just note that
12 the inequities that I see in this situation are even
13 worse when you consider the quality of the evidence
14 that's been submitted on behalf of the Prosecution
15 Team. I reviewed the cases.

16 To me I believe that, at a minimum, the
17 Prosecution Team should make an effort to look at
18 the period of time that we owned the property and
19 make some determination of what was the extent of
20 discharge that took place during that period of
21 time. That is not in the record. The 5C1 and 5C2
22 reports, they're fine. They do a good job of
23 recording the current conditions on the property.
24 What they don't do is look back in time and support
25 the argument that I think the prosecution is trying

1 to make here, which is going back through varying
2 periods of time, and there are all sorts of factors
3 that can come in to play. You know, Ms. Creedon
4 mentioned earlier the fact that rains could have an
5 affect on the extent of discharge. Well, there's
6 been no analysis of what sort events or what sort of
7 precipitation we had in the past that could affect
8 it differently with any of the dischargers. So that
9 is just an example of one of the things that needs
10 to be looked at in more detail.

11 Without getting into the technical minutia of
12 these technical arguments, I just want to make one
13 final observation. That looking at the evidence
14 that's been put before the Board, that even in the
15 most charitable light, it is clear that there is
16 very, very little mercury that possibly could have
17 made its way out of this site during this short
18 one-year-nine-month period that the trust owned the
19 property. And I think it is abundantly clear that
20 it wasn't any actions by the trustee, Wells Fargo
21 Bank, or the beneficiaries that created that
22 situation or exacerbated that. I simply don't think
23 that under the Wenwest decision, nor under the State
24 Water Resources Control Board's standards of
25 liability that liability here begins against the

1 trust is appropriate.

2 That is all I have for right now. Look
3 forward to closing statement.

4 CHAIRMAN LONGLEY: Thank you, sir.

5 We will start -- at this point are there any
6 questions from members of the panel?

7 We are going to cross-examination, but our
8 Executive Officer had a question.

9 MS. CREEDON: I have a couple that I need
10 to have clarified. Mr. Hungerford, the property was
11 sold. The mineral rights, is that still retained by
12 the trust?

13 MR. HUNGERFORD: Mineral rights are still
14 retained by the trust.

15 MS. CREEDON: Are they earning income from
16 that mineral rights?

17 MR. HUNGERFORD: No.

18 MS. CREEDON: In terms of -- and maybe this
19 is more for the individual from Wells Fargo. But
20 when the property was being sold, was there any
21 property assessment, environmental assessment done
22 that could be evidence in the record that knowledge
23 was known about the mercury mine?

24 MR. HUNGERFORD: I will just give you my --
25 based on my reading of the materials in the files of

1 Wells Fargo, there wasn't any assessment of the mine
2 done. There was -- Wells Fargo had general
3 information about the property and the condition of
4 the vicinity, but there was no study done of the
5 mine site.

6 MS. CREEDON: Usually banks go into this
7 extensively and review when they own properties like
8 this. Understand their liability in lending money.
9 Would it make sense maybe they would understand the
10 risk of owning a mining property and the risk that
11 present them to the environment?

12 MR. HUNGERFORD: I would have to
13 speculate.

14 MS. CREEDON: A hypothetical, but that's
15 asked of my staff, so I thought I would ask those
16 questions. Also, is there any reason or evidence to
17 believe that it did not rain during the 18 months
18 the property was owned by the trust?

19 MR. HUNGERFORD: I think there is no
20 evidence in the record as all of that. I am
21 assuming --

22 MS. CREEDON: That it did or did not rain,
23 you do not know either way?

24 MR. HUNGERFORD: I haven't studied it and
25 there is no evidence in the record to the extent

1 what rains there would have been and what the
2 capacity of storms would have been to deliver
3 mercury into the watershed; we don't know. And that
4 is part of the problem that I have with state of the
5 record.

6 MS. CREEDON: I understand that. But I
7 would say in the '80s that was a period of time when
8 we were not in a dry drought period. The
9 probability of a rain event occurring within those
10 18 months is probably pretty good.

11 MR. HUNGERFORD: I can't dispute. I would
12 like to take a moment. You did mention something
13 that I didn't respond to. That was the retention of
14 mineral rights by the trust. I just want to make a
15 comment just so that everyone is clear the way that
16 I see this.

17 Yes, the trust has retained the mineral
18 rights. But the state's standard of liability is
19 essentially continuing ability of legal authority to
20 control the source of the discharge. The retention
21 of mineral rights, we briefed this in our papers.
22 It does give the rights holder some limited
23 authority to access the surface estate for the
24 purposes of exercising those rights, conducting
25 mining activities. It does not give the rights

1 holder the ability, unfettered ability, to go onto
2 the property and take care of other conditions.
3 This is the effects of mining but it is not any
4 mining that was done by the trust or out of an
5 exercise of the trust's mineral rights.

6 I don't think there is any argument that can
7 be made legally or otherwise that we had the legal
8 ability after we sold the property in 1989 to come
9 back on the property and rectify whatever discharges
10 were taking place.

11 MS. CREEDON: I appreciate that. I don't
12 think at this point we are assessing any kind or
13 discussing liability in terms of who does what or
14 who accesses the site. It is just ownership, who is
15 a named as a party by an order of this Board. I
16 just want to make the record clear, that I truly
17 appreciate the clients Mr. Hungerford represents,
18 and I this is in no way a reflection of my opinion
19 of the trust and who they provide money to. It is
20 just getting some things straight for the record.

21 CHAIRMAN LONGLEY: Thank you very much for
22 the clarification.

23 I have previously read the list of designated
24 parties a couple of times, in fact. Somebody wants
25 me to read it again I will. Otherwise I will ask

1 are there any designated parties who wish to
2 cross-examine?

3 Seeing none, I will ask the Prosecution Team
4 if they wish to cross examine.

5 MR. PULUPA: No.

6 CHAIRMAN LONGLEY: Thank you very much,
7 sir.

8 MR. HUNGERFORD: Thank you, sir.

9 CHAIRMAN LONGLEY: I will next call on
10 Lawrence Bazel, representing Robert and Jill Leal.

11 MR. BAZEL: I'm Larry Bazel. With the
12 Chair's permission, I would like to save my time for
13 closing argument. We don't have any additional
14 facts to add into evidence.

15 CHAIRMAN LONGLEY: That would be fine.
16 Thank you.

17 I will next call on G. Dave Teja - I hope I
18 pronounced that correctly - representing Cal Sierra
19 Properties.

20 MR. TEJA: I dug out the documents that I
21 referred to and couldn't identify as to source. The
22 first one is a letter from the Central Valley
23 Regional Water Board. It's dated June 10 of 2009.
24 And elicited addressees are attached. But what I
25 was talking about and trying to ask counsel about

1 was Attachment B to the letter which refers to
2 assessor parcel number 018200003000 and has the
3 legends on it parcel 018200009000 is the mine
4 property.

5 Do you want to see that?

6 MR. HUGGINS: It would be helpful.

7 MR. TEJA: Can I have it back? The other
8 document, the other Attachment B is one that was
9 faxed to me after 2:30 yesterday afternoon. My
10 secretary was out of office. I immediately objected
11 to it. Then Ms. Okun made an E-mail with a copy to
12 me saying this should be submitted to the Board
13 today. It has -- it is the same as the other one
14 with a number of changes. It doesn't bother to say
15 exactly where the mine is, except that it says at
16 one point parcel 01820003000 remains the mine
17 property.

18 I've added a number of things in my pleadings
19 challenging the location of the mine. I, frankly,
20 don't see anything that locates this mine firmly on
21 my client's property. I would like to reserve the
22 rest of my argument, if I may.

23 CHAIRMAN LONGLEY: Certainly.

24 MS. OKUN: Can I just ask a question?

25 CHAIRMAN LONGLEY: Yes.

1 MS. OKUN: So I understand the documents we
2 are taking about. Yesterday there was an E-mail
3 with some late revisions that proposed date changes
4 to reflect the order wasn't adopted today. And
5 there was always one correction to Attachment B. So
6 now instead of saying Robert Leal is an agent, he is
7 an individual.

8 Are there any other changes besides those?

9 MR. IZZO: No.

10 MS. OKUN: Thank you.

11 CHAIRMAN LONGLEY: Mr. Bazel sat down, but
12 is there any Member of the Panel that had a
13 question?

14 Mr. Teja, excuse me. Is there any Member of
15 the Panel that has a question?

16 MS. HART: I guess for the Prosecution
17 Team. Is the contention that Mr. Teja's clients,
18 Cal Sierra and Merced General Construction are
19 liable on the ground of owning property just because
20 the mine is on it or because there are mine tailings
21 on it?

22 MR. IZZO: Again, there is mine waste on
23 it. And the mine, where I think it is, would be on
24 the property, too. But again it is where the mine
25 waste is.

1 MS. HART: Is there any evidence in the
2 record that would show there are -- there is either
3 the mine or mine tailings or mine waste on
4 Mr. Teja's clients' property.

5 MR. IZZO: Yes, there is.

6 MS. OKUN: That is the 5C2 report.

7 MR. IZZO: 5C2 report shows it. Also based
8 on that aerial photo and our oversight, you can see
9 mine waste on the site and also our photographs.

10 MS. OKUN: Those are the specific parcels
11 that Mr. Teja's clients own?

12 MR. IZZO: Yes. Those are the parcels.

13 CHAIRMAN LONGLEY: At this point are there
14 any other designated parties who wish to
15 cross-examine Mr. Teja?

16 Thank you.

17 I should have called your name earlier, sir,
18 when I called your attorney's name. Mr. Robert
19 Leal, do you wish to testify?

20 MR. BAZEL: I'm Larry Bazel. Again, I am
21 representing Mr. Leal and when I said we would wait
22 on closing argument, that was for Mr. Leal.

23 CHAIRMAN LONGLEY: I have a card here where
24 he says he wishes to speak. Need to cover all
25 bases.

1 MR. BAZEL: Sorry.

2 CHAIRMAN LONGLEY: Next we will take
3 testimony from Mr. Ray Whiteaker regarding Cal
4 Sierra Properties or representing Cal Sierra
5 Properties?

6 MR. WHITEAKER: Good afternoon. My name is
7 Roy Whiteaker, W-H-I-T-E-A-K-E-R. I am a former
8 owner of Cal Sierra Properties, a general
9 partnership, which no longer exists today.

10 MR. TEJA: When was Cal Sierra created?

11 MR. WHITEAKER: Approximately 1985.

12 MS. HART: Mr. Teja, could you make sure
13 your microphone is on.

14 MR. TEJA: When was Cal Sierra Properties
15 created?

16 MR. WHITEAKER: Approximately 1985.

17 MR. TEJA: When and how did it terminate?

18 MR. WHITEAKER: It terminated just by
19 allowing the general partnership to lapse.

20 MR. TEJA: Was the Wide Awake Mine on the
21 property that was owned in Lake County by Cal
22 Sierra?

23 MR. WHITEAKER: Cal Sierra owned 50 percent
24 undivided interest of 57 acres. I have no idea
25 whether there was a mine on the property or not.

1 MR. PULUPA: We are not talking about any
2 mines in Lake County.

3 MR. WHITEAKER: I didn't say Lake County.

4 MR. TEJA: You said Lake County.

5 MR. WHITEAKER: I'm sorry, I meant Colusa
6 County. Same answer.

7 MR. TEJA: Did Cal Sierra own the mineral
8 rights to the one-half undivided interest?

9 MR. WHITEAKER: No, sir.

10 MR. TEJA: Did you ever mine for gold, pan
11 for gold, otherwise seek to recover any mineral or
12 mercury from the property?

13 MR. WHITEAKER: No, I did not. I did not
14 have any written minerals right to do that.

15 MR. TEJA: Were you ever notified that
16 there was a nuisance or some sort of pollution of
17 any sort on the property?

18 MR. WHITEAKER: I had no idea there was
19 anything on the property other than the land that
20 was there which was covered with brush and trees.
21 And I didn't know there was mine tailings on the
22 property.

23 MR. TEJA: Did you ever have control, did
24 Cal Sierra or any of its agents ever have control of
25 the discharge of any matter from anything on the

1 property?

2 MR. WHITEAKER: No, sir. We had no control
3 or had nothing to do with the discharge. Would not
4 have been able to control it because we didn't know
5 it existed.

6 MR. TEJA: You indicated that you don't
7 know whether there was a mine on the property.
8 Could you expand on that a little bit?

9 MR. WHITEAKER: I was on the property on
10 two occasions in the total time that I owned the
11 half interest. By the way, I only owned that
12 interest from 1995 to 1999. I sold all the property
13 in 1999. And I believe that the report's earlier
14 date that I owned it was till 2004. But we had
15 nothing, absolutely nothing, to do with the mine.
16 Didn't know there was a mine. Never saw a mine. I
17 did see the brick structure there. It looked like
18 an oven of some type to me. This was a little
19 fenced in area where there might have been a
20 building at one time, which no longer was there.
21 That's actually all I ever saw on the property.

22 MR. TEJA: Do you know for sure that that
23 was on the property that you owned at the time?

24 MR. WHITEAKER: No. There were no fences
25 and no boundaries lines. I did not know exactly

1 where the property lied within that area. We were
2 given a plot map.

3 MR. TEJA: I think that is all.

4 CHAIRMAN LONGLEY: Thank you very much,
5 sir.

6 Are there any questions from the panel?

7 MS. OKUN: I have a couple questions.

8 CHAIRMAN LONGLEY: Sure. Go ahead.

9 MS. OKUN: Your wife, Sally Whiteaker, was
10 a partner in Cal Sierra Properties; is that correct?

11 MR. WHITEAKER: My wife is Gladys
12 Whiteaker.

13 MS. OKUN: Who is Sally Whiteaker?

14 MR. WHITEAKER: Sally Whiteaker is my
15 daughter-in-law, and she was never a partner.

16 MS. OKUN: Who are the other partners of
17 Cal Sierra?

18 MR. WHITEAKER: My wife and I are the only
19 partners and were the only partners.

20 MS. OKUN: Thank you.

21 CHAIR LONGLEY: Thank you.

22 MS. CREEDON: Dr. Longley.

23 CHAIRMAN LONGLEY: Go head.

24 MS. CREEDON: You purchased the property in
25 1995?

1 MR. WHITEAKER: Yes.

2 MS. CREEDON: Did you have a property
3 assessment at the time you purchased the property.

4 MR. WHITEAKER: Property assessment?

5 MS. CREEDON: Yes. Usually when you go buy
6 a property you do an assessment of the property to
7 see what hazards or environmental condition are.

8 MR. WHITEAKER: No, ma'am we did not.

9 MS. CREEDON: You bought the property for
10 what purpose?

11 MR. WHITEAKER: For resale.

12 MS. CREEDON: You said you didn't do any
13 mining because you didn't have any mineral rights.
14 And you are denying that you knew there was a mine.
15 So which was it, did you not mine because you didn't
16 want to mine or because you didn't have the mineral
17 rights?

18 MR. TEJA: Objection. That is an
19 unintelligible question. She talks about two
20 different things as if they're related directly to
21 each other.

22 MS. CREEDON: In response to not mining was
23 because he did not have mineral rights. You are
24 saying --

25 MR. WHITEAKER: Just I could not mine

1 because I didn't own any rights to mine because I
2 didn't have the mineral rights. I had no desire to
3 mine. I didn't buy the property for that purpose.
4 And never used it for that purpose.

5 MS. CREEDON: But you were not aware of A
6 mine at all on the site or mine tailings?

7 MR. WHITEAKER: Was not.

8 MS. CREEDON: During the time you owned the
9 property did it rain?

10 MR. WHITEAKER: Did it rain? I am sure it
11 did, yes.

12 MS. CREEDON: Thank you.

13 CHAIRMAN LONGLEY: Thank you.

14 At this point in time do any designated
15 parties wish to cross-examine?

16 Does the Prosecution Team wish to
17 cross-examine?

18 MR. PULUPA: No.

19 CHAIRMAN LONGLEY: At this point we've
20 finished with the testimony and we are ready for
21 closing arguments. We are going to take a
22 five-minute recess, and we will be back in session
23 in approximately five or six minutes.

24 (Break taken.)

25 CHAIRMAN LONGLEY: We need to come back

1 into session, please.

2 Before we go to closing statement, I have a
3 card from one interested party, a Mr. Robert
4 Schneider. And Bob Schneider was a member the Board
5 for many years, a former Chair of this Board.

6 MR. ODENWELLER: Couldn't resist?

7 MR. SCHNEIDER: Tried to stay away, Dan.
8 My name is Bob Schneider. It is nice to be back.
9 Thank you for your service.

10 My name is Bob Schneider. I work with a
11 regional conservation organization called Tuleyome
12 based in Woodland. We work within the northern
13 intercoast range and the western Sacramento Valley,
14 which does include the entire Cache Creek River
15 drainage. First, I want to thank staff for their
16 good work on these reports and the work that's gone
17 on.

18 I don't have much background here, because I
19 wasn't here at the start. This has been a long
20 process of assessing mercury contamination in this
21 region, and it's also in the Putah Creek region,
22 Black Creek reservoirs and other areas. And Cache
23 Creek, basically, is responsible for about half the
24 mercury that is put into the Delta system. The
25 other half - this is broad numbers - and the other

1 half comes from the Sacramento River. This was the
2 primary source for mining mercury and then it was
3 used for amalgamation with gold during the mining
4 years in the Sierra Nevada.

5 It is and continues to be a very significant
6 issue. This has been followed up with Board work on
7 Clear Lake, Cache Creek, Harley Gulch, Sulphur Creek
8 TMDL work that began to move us forward in this
9 process. It is being pushed also by the good work
10 that staff is doing on the Delta methylmercury TMDL
11 that will be before this Board in the not too
12 distance future. We hope in the near term, in fact.
13 This is part of a much larger program.

14 First, I want to say I'm really sympathetic to
15 the individual owners that get caught up in these
16 things. We've certainly been through this on
17 numerous occasions with the dry cleaners, but that
18 is how the law reads and that is where the
19 responsibilities lie at this point. We have to move
20 this forward in this direction and hopefully at that
21 point maybe other funding from state or federal
22 grants will become available to help with these
23 cleanups, but we have to move these processes
24 forward first before we move in that direction.

25 All of these sources, all that have occurred in

1 this region, whether they are mines or they are
2 tailings or they are roads or anthropomorphic
3 sources of mercury that contribute to this problem,
4 all of these sources interchangeably need to be
5 addressed, whether the mines or the tailings or the
6 road. The people who owned these mines at any point
7 in time have a responsibility for getting that
8 cleanup done. There has been extensive information
9 available on this. There's been tremendous
10 research. You've certainly heard about the 5C2
11 report, a lot of CalFed and other TMDL programs have
12 done this. Certainly, all that is here in the
13 Board's file. But I don't know how much was brought
14 forward in these cases. It is important to remember
15 that.

16 The law is clear, again, about the responsible
17 parties. Even all of these mine wastes, in
18 particular Sulphur Creek, exceed California Toxics
19 Rule, it is my understanding, in terms of mercury.

20 So a couple other real quick comments. This
21 is a very flashy drainage in the Coast Range. What
22 that means is you will get a storm, and it will rain
23 a couple inches and you'll get flows that will
24 increase dramatically and then will subside, and
25 that is why in the summer you have no flows. That

1 is why you have an ephemeral drainage.

2 Just as an example, Cache Creek might be
3 flowing at 3,000 cubic feet per second one day and
4 24 hours later it could be 30- or 60,000 cubic feet
5 per second. It is dramatic changes and dramatic
6 events which cause this erosion and transport of
7 sediment with mercury attached.

8 So while you can look at a dry stream in
9 the summer, the key issue here is in these winter
10 storm events is when you get this to happen. It is
11 episodic. Doesn't happen all the time, but it is
12 real and it occurs. So I just want to say one
13 thing. I spent 20 years as a builder and developer
14 in Davis. If I ever wanted to buy land and wanted a
15 bank loan, man, there was due diligence. They knew,
16 and I did the reports to make sure that that was
17 clean. Just, I find that -- I'm not going to
18 question somebody's judgment. I might say maybe the
19 right hand didn't talk to the left hand in that
20 case.

21 Thank you very much. Any questions?

22 CHAIRMAN LONGLEY: Any questions of the
23 panel?

24 Thank you, Bob.

25 We next go to closing arguments and start at

1 the bottom of the list. Merced General
2 Construction.

3 Who are you speaking on behalf of?

4 MR. BAZEL: This is Larry Bazel. I don't
5 mean to be difficult, but before we start, I would
6 like to make an objection about the order. We think
7 the Prosecution Team should go first. The
8 Prosecution Team has the burden. All along in this
9 procedure we have been asked pretty much to prove
10 that we are not liable. It's really the
11 prosecution's burden to prove that we are liable. I
12 would like to hear their legal arguments and then
13 respond to them, rather than vice versa.

14 CHAIRMAN LONGLEY: I am going to deny that,
15 sir. Are you representing Merced General
16 Construction?

17 MR. BAZEL: I am representing Robert Leal.

18 MS. OKUN: Typically, In a court the moving
19 part would go first. At the Board, we typically
20 have staff presenting the item, would be the
21 Prosecution Team in this case, go last. If after
22 they present their closing statement, you feel that
23 there is new evidence or new legal theories that you
24 haven't had the opportunity to respond to before, I
25 think you should restate your objection at that

1 time.

2 CHAIRMAN LONGLEY: And I will make a
3 decision at that time. And who are you
4 representing, Mr. Bazel [verbatim] for the record?

5 MR. TEJA: Merced General Construction, and
6 I also represent Cal Sierra Development. And most
7 of my argument concerns both of them. And I think
8 Ms. Okun said I would have 30 minutes. I don't know
9 how much I've used up already.

10 MR. LANDAU: The clock was adjusted to 30
11 minutes, and so you have 12 minutes and eight
12 seconds left of the 30.

13 MR. TEJA: I better get going.

14 CHAIRMAN LONGLEY: That is for both
15 parties?

16 MR. LANDAU: That was for the two 15-minute
17 allocations.

18 MR. TEJA: In my points and authorities I
19 have discussed the question of the ownership of the
20 mine. Not the ownership of any property. But
21 ownership of property does not mean ownership of the
22 mine. And I am really concerned about that because
23 their Exhibit B from that letter that I described a
24 few minutes ago is completely different as far as
25 the mine ownership is concerned from the amendment

1 that they faxed or E-mailed to people last night.

2 So there's also a question, looking at the
3 maps, that have appeared primarily in publications
4 of the Water Board, is really hard for me to tell
5 exactly where the mine is. But it seems like that
6 it is a couple thousand feet at least from Sulphur
7 Creek. And if you are dealing with smaller parcels
8 of land, which you probably are in this case, 2,000
9 feet can make a lot of difference. But at any rate,
10 I have not really heard any evidence that either of
11 my clients actually owned the mine or the mine
12 property, or what had been the mine or the mine
13 property.

14 I think that is a great issue that the
15 prosecution has missed. In my points and
16 authorities I have provided copies of the pertinent
17 maps.

18 I don't call that tributary anything but a
19 gully. I'm kind of a country boy, and I've been
20 around streams and I've been around gullies. A
21 gully is just a little wash kind of thing that might
22 have a little water in it sometime when the rain has
23 gone beyond soaking into the ground around it.

24 Now I want to talk about reservation of
25 rights. Neither of my I clients had, and it is

1 undisputed, neither of them had the right to any
2 minerals on the property that they acquired. By the
3 way, when I argue something like this, I am not
4 conceding that they acquired the mine property. But
5 as far as the reservation of rights is concerned,
6 mercury is a mineral, and they had no right to do
7 anything about the minerals, including the mercury.
8 One dictionary definition I cited states mineral
9 rights is a term encompassing all the ways a person
10 can have a possessory interest in minerals.

11 The plaintiffs -- pardon me, the prosecution
12 argues that they are not talking about mercury; they
13 are talking about cleaning up the discharge from the
14 tailings. Well, if they are not talking about
15 mercury, why are we here. What they are talking
16 about is alleviating pollution by mercury which is a
17 mineral which did not belong to either of my clients
18 at anytime. And I have already apologized to
19 Mr. Leal in one of my points and authorities,
20 talking about the fact that I pointed at him as the
21 owner of the mineral rights. And that, of course,
22 is not correct. He was just the grantor to one of
23 my clients. The mineral rights appear to go all the
24 way back to Emma Trebilcott or her trust.

25 And at any rate, one of the definitions

1 includes this: A reservation operates exclusively
2 in favor of the grantor. That's from an old book,
3 but it is still cited. And it doesn't operate in
4 favor of the grantee. If you're talking about
5 alleviating mercury pollution, you can't be just
6 talking about the land. You've got to be talking
7 about the mercury, and my clients had no rights to
8 do anything about the mercury.

9 I just don't see that they can seriously
10 argue if they are trying to get the land cleaned up
11 that somebody can't -- has the -- can do it without
12 dealing with the mercury. And my guys didn't own
13 the mercury.

14 The other thing I would -- another thing I
15 would like to mention is estoppel by laches. My
16 points and authorities on this issue have not been
17 rebutted by prosecution. Laches is a interesting
18 concept. It doesn't, in and of itself, have
19 anything to do with the statute of limitations.
20 It's just a situation that arises when somebody sits
21 on his rights and doesn't do anything about it. And
22 then 30 or 35 years later he comes along and files
23 an action; and that is really what's happening here.
24 The Board has known about this situation from at
25 least 1975. And here we are, what, 34 years later

1 with an action being filed. If they had taken
2 prompt action, they would have alerted my clients
3 not to buy the property. And one of the things that
4 estoppel by laches is a question whether or not the
5 poor guy that doesn't know about something for
6 number of years can complain and ask a lawsuit
7 against him been dropped is that he does something,
8 he takes some action without knowing about what the
9 problem is that changes his position. And you talk
10 about a change in position, I don't see how you can
11 have a change any more than the case of my two
12 clients that either buying or not buying the
13 property.

14 I spent some time talking about due process of
15 law, and I really question whether the Water Code
16 sections that are relevant here stand up to the due
17 process test. Due process is just doing what is
18 right according to the law. And if the law is
19 wrong, it can be held to violate due process. And I
20 cited Ziegler versus Railroad. It is an older
21 Alabama case, but the court there said if any
22 question of fact or liability be conclusively
23 presumed against him, this is not due process of
24 law. Him being a defendant in that case. It is not
25 due process to just assume from the fact of

1 ownership of a piece of property that the owner is
2 responsible for everything on that piece of
3 property. If it is something that he can control,
4 maybe he is. In this case one of my clients didn't
5 even go to the property. Never was there. And you
6 have heard Mr. Whiteaker's testimony that he doesn't
7 know for sure that the mine was on his property.
8 And I will get to that in a moment.

9 The discharger of mercury as a pollutant is a
10 nuisance. And one of the requirements of
11 prosecution for a nuisance in California is that --
12 in this case it would be the respondents should be
13 required to be given a statutory notice, and it's
14 required by Grigsby versus Clear Lake, which is
15 cited in several places in the papers in this
16 proceeding. It would be a great hardship to hold a
17 party responsible for consequences of which he may
18 be ignorant.

19 You've got Mr. Garcia's affidavit or
20 declaration under penalty of perjury in the file.
21 He didn't have any inkling what was going on. You
22 heard Mr. Whiteaker testify today he didn't have any
23 -- anything, he didn't realize there was a problem.
24 At any rate, it seems difficult to me to hold these
25 innocent people liable. And it seems pretty clearly

1 to violate the procedural due process that we are
2 all entitled to.

3 Another thing, I don't know why parties that
4 should have been in here aren't here or have been
5 dropped. We got, according to the schedule, we got
6 a response due February 15th. That's three and a
7 half, four and a half months from now. And that is
8 our proposed remediation, assuming that we are found
9 guilty.

10 CHAIRMAN LONGLEY: I think you have to
11 check the record. We are changing those dates.

12 MS. HART: The February 15th is the first
13 due date. Just so you are clear, Mr. Teja, there is
14 a characterization study potentially; that's only if
15 the entire Board. This is just a panel that will be
16 making recommendation. That is only if the entire
17 Board approves and adopts the CAO, which is still up
18 for debate. Just so you are clear.

19 MR. TEJA: We are under a gun of some sort,
20 at some point to take action. It just simply
21 doesn't seem right that you can identify maybe a
22 dozen and half polluters and you take action against
23 a handful. What about Goshute Corporation? What
24 about the people that have been dropped from this
25 action? I mean, they've still been referred to, but

1 they aren't part of it. And there are a number of
2 people. What about the Bureau of Land Management,
3 why were they not brought into this? I think if you
4 ask the Prosecution Team, they would say that there
5 probably is pollution on some of the property that
6 they owned. That is another issue here. Forget the
7 mines. Just look at the Pacific Coast range; it's
8 interlaced with mercury. How can you distinguish
9 what comes from mine tailings or another source from
10 a mine and what is kicked loose by the hooves of the
11 elk herd that we all know about that frequents this
12 area? There is no evidence of a cow that is
13 slobbering and salivating like the cows that are
14 subject -- I read that someplace. No evidence of
15 that. I raise the question if this was so terrible,
16 it is so deadly, why didn't we have an autopsy deer
17 showing that he had actually died, he or she had
18 actually died, of mercury contamination and mercury
19 poisoning?

20 But anyway, I don't think that selective
21 prosecution like this has any place in America law.
22 You've got a whole bunch of people that are guilty
23 by some theory that dischargers by operation of law
24 are passive discharges are guilty whether they had
25 anything to do with the problem or not. Why would

1 you not prosecute all of them and why would you
2 leave the ones that you did pick on to pay the whole
3 bill?

4 CHAIRMAN LONGLEY: Thank you.

5 MR. TEJA: Thank you.

6 CHAIRMAN LONGLEY: Is there any
7 representative here from Leah Tate and Roy Tate?

8 A representative from Terri King Brown and
9 David G. Brown?

10 Representative from Glen Mills Inc.?

11 UNIDENTIFIED AUDIENCE MEMBER: I have no
12 presentation.

13 CHAIRMAN LONGLEY: James Dale Whiteaker,
14 you have a closing statement?

15 He said he was representing Merced and Cal
16 Sierra. Were you representing Mr. Whiteaker at the
17 time you made that statement, sir?

18 MR. TEJA: Yes. I didn't understand that
19 he was a party. Originally he was, but I thought he
20 was dropped.

21 CHAIRMAN LONGLEY: Thank you.

22 Charles Millard Tracy and Janet Dee Tracy.

23 MR. TEJA: They've been dropped, too, Your
24 Honor.

25 CHAIRMAN LONGLEY: They are on the list of

1 designated parties. Have to go through it.

2 United States Bureau of Land Management.

3 NBC leasing.

4 Jill Leal.

5 MR. BAZEL: This is Larry Bazel. I
6 represent Jill Leal. Jill Leal is here.

7 Would you stand, please?

8 Thank you.

9 Jill Leal was originally named as owner of the
10 property. Prosecution Team now agrees that she's
11 never owned the property, not a former owner. And
12 we are in agreement with that. We thank them, and
13 that is all we have to say.

14 CHAIRMAN LONGLEY: Robert Leal.

15 MR. BAZEL: I have a much longer statement.
16 Larry Bazel here representing Robert Leal. Robert
17 Leal is here.

18 Would you stand, please?

19 Thank you.

20 I'll be making four main arguments. The first
21 is that the law inquiries notice, notice of a
22 nuisance, for Mr. Leal to be held liable. The
23 second is that it requires fault. This is not a
24 no-fault statute. Third is that it is not fair to
25 hold him liable. These are the Wenwest factors that

1 you heard about before. The fourth is that there
2 is no evidence that a discharge from the Wide Awake
3 Mine caused the nuisance during his ownership.

4 Before getting into those arguments, though, I
5 would like to start with some background. Mr. Leal
6 has submitted a declaration and these facts aren't
7 disputed by the Prosecution Team. Mr. Leal is a
8 farmer, has no knowledge about mining, about
9 mercury, about chemistry, about toxicology. And he
10 had no knowledge about the economic risk of buying a
11 mine site. If he did, he wouldn't have bought it.

12 He bought the property, bought an interest in
13 the property because he knew Tom Nevis. Tom Nevis
14 had purchased the property through Goshute.
15 Goshute, you've heard, was a property owner that is
16 not here. Tom Nevis needed money and Mr. Leal
17 provided that money and got a half interest in
18 return. If he had been a sophisticated purchaser,
19 since he was essentially acting as a bank, he
20 wouldn't have put his name on the property.
21 He would have taken a security interest in the
22 property and we wouldn't be here. He would have put
23 it in a corporation that would have had no other
24 assets. He didn't do that. If anything else, that
25 is very strong evidence that he didn't understand

1 that this property needed something that took money.
2 He didn't understand that the property could be
3 causing a nuisance, could hold him liable, could get
4 him here 19 years later.

5 This is a figure that is in the record. I
6 think it is from the Prosecution Team to show the
7 mine site. The coloring is mine. The current
8 parcels that make up the mine site are 10, 11, 12.
9 Mr. Leal owned a half interest in ten. There is no
10 evidence that he held any interest in 11 and 12.
11 Only one deed in the record deeding anything to him,
12 and it refers to a mine claim on the parcels that
13 are now ten, but not on 11.

14 So we've heard some of the waste piles that
15 are at issue here on 10 and some on 11. Mr. Leal,
16 therefore, is being held liable for waste discharges
17 on land that he did not even own. The rights he
18 received were limited. He didn't receive the
19 mineral rights; you've heard that. What he got was
20 subject to two leases that were in place before he
21 bought it. One is a mineral and surface lease, and
22 one is a grazing lease. He did not even have the
23 right to possess the property when he got it. That
24 wasn't an issue, of course, because he wasn't
25 planning to do anything with the property, except to

1 have it resold for a profit. That was the original
2 concept. He didn't operate the site. When he or
3 Goshute Corporation, NBC Leasing, or whoever had the
4 other interest, tried to sell it. They tried to
5 sell it to BLM, BLM found out about the mine site
6 and sent the district geologist to invest.

7 And the district geologist's report is very
8 interesting. Here is a report from an expert in
9 1992. What he said is danger of mercury at the site
10 probably minor. The waste rock contained little or
11 no mercury, and it would be necessary to take soil
12 samples. The essence of the report is clear. This
13 is no big deal. He did not recommend that BLM not
14 buy it. But BLM went ahead and bought other
15 property. They carved out the part on the Wide
16 Awake Mine site, and that is why they are not here
17 today.

18 After that Mr. Leal and Mr. Whiteaker tried to
19 find the mine. They went up and tried to look at
20 the property. Mr. Leal testified in his declaration
21 that he did see some bricks. But since then we've
22 seen several items in the photographs and Mr. Leal
23 did not see them. He didn't see the large
24 structures; he didn't see the piles and he doesn't
25 know what tailings are. He didn't know, it is

1 undisputed, that mercury might be leaving the site,
2 that anything on the site might be causing a
3 nuisance and that he should be doing anything on the
4 site to protect public health or the environment.
5 No one ever told him. He had no knowledge.

6 So that gets you to first argument. Notice.
7 Before I get to notice, let me say that what I'm
8 hearing sounds like a position of the Prosecution
9 Team is that there is automatic liability. If you
10 own the property in the past and you have ability to
11 control, there is liability.

12 There is actually a third part and that is
13 notice. And it is true both under case law and
14 under State Board decisions - and I will get to
15 that. I want to say this is pushing liability
16 beyond anything I think that has ever been pushed
17 before. First of all, passive dischargers are not
18 always liable. Under CERCLA they are not. This
19 isn't CERCLA, I understand. But useful reference.
20 This isn't a groundwater site because a typical
21 groundwater site you're a passive discharger in the
22 past. The contamination leaks, goes into the ground
23 under the site and stays there.

24 Water Code 13304 says that if you discharged -
25 and it says other things - if you discharged, you

1 could be ordered to cleanup the waste. And it is
2 clearly the waste that you discharged. The
3 contaminated groundwater site, the waste that
4 discharged as a passive discharger is still in the
5 ground. It is down below. You are being ordered to
6 cleanup the waste that you discharged. Not here.
7 We've heard that the particles from the red
8 tailings, calcined tailings part, pile - I will get
9 to that - are very fine grains. That suggests that
10 they erode pretty easily. And that fact to some
11 extent helps the Prosecution Team, but it also says
12 that fine grain particles can travel far fast.

13 What Mr. Leal is being ordered to do is not
14 cleanup any waste that he has passively discharged.
15 He is being ordered to cleanup the tailings pile
16 that someone else put there. That is not his
17 discharge. The discharge the Prosecution Team is
18 alleging is the discharge from the pile to the
19 intermittent tributary. They are not saying that
20 pile itself was passively discharged. It was just
21 sitting there. It is rocks, some of it.

22 Well, the argument is not that Mr. Leal placed
23 the tailings pile there; it is that he passively
24 discharged eroded material from the pile to the
25 intermittent stream.

1 Well, here is the law we are relying on.
2 First, the party who is not the original creator of
3 the nuisance is entitled to notice before an action
4 will lie, which means before it can be held liable.
5 This is a Supreme Court case from 1870. It is old
6 law. It is still good law. And it was picked up by
7 the State Board in the Wenwest decision. Wenwest
8 decision says to hold a former owner liable, there
9 is a three-part test. And one may have to do --
10 well, one in three that Prosecution Team have
11 considered. The second part of the test is did they
12 have knowledge. And here Mr. Leal did not have the
13 kind knowledge that was required.

14 It is true that the deed he got talks about a
15 mine claim. The mine claim certainly doesn't tell
16 you there is discharge. It doesn't tell you that
17 there is a nuisance, and it doesn't tell you that
18 you're discharging mercury or causing exceedances of
19 water quality objectives.

20 As I previously said, he didn't have any notice
21 of the allege discharged, and he didn't have any
22 notice of the alleged condition of pollution and
23 nuisance. And he didn't have any notice that he
24 should be taking any action on the property at all.

25 So the first conclusion is that the law

1 requires notice. He didn't receive notice and,
2 therefore, he is not liable.

3 Second, he is not at fault. For this I go to
4 the section that the Prosecution Team relies on, and
5 it is a Civil Code Section, 3483; and it does talk
6 about nuisance and successive owners of property.
7 This is a section that does a successive owner of
8 property, like Mr. Leal, who neglects to abate a
9 continuing nuisance, can be liable. The key word
10 here is neglect. Neglect means negligence. There
11 is nothing that says that every successive owner of
12 the property is liable regardless of whether the
13 owner knows about it or does anything wrong or not.
14 Neglect is the key word here. No evidence of
15 neglect, negligence or fault.

16 That is the second conclusion. Law requires
17 fault. It is not a no-fault statute. He was not at
18 fault, so, therefore, he is not liable.

19 Third is it would be unfair. This is the
20 Wenwest case and Wenwest factors. And I'm referring
21 to it here as leniency. Wenwest says that even when
22 a person is really liable under the three part test
23 there, previously mentioned, that is in the Wenwest
24 test also, the Regional Board can exercise leniency.
25 And the Wenwest decision identified factors. But it

1 said under the circumstances here we don't think
2 Wendy's, I believe it was, should be held liable.
3 It didn't say these are the only factors that you
4 should ever consider. It didn't say that all the
5 factors are required. It just said under the
6 circumstances here. And it is clear that under the
7 circumstances here means, come on, we got to be
8 fair. And here it's just too unfair, whether or not
9 they are technically liable, to hold Wendy's which
10 is, as you heard, a big sophisticated corporation,
11 liable.

12 Here, though, Wenwest factors, as we saw them,
13 we saw nine other people, eight, but the ones that
14 we think are more important are over on the left
15 here. Wendy's had nothing to do with the activities
16 that caused the leaks, didn't exacerbate it. It
17 only had some knowledge. There Wendy's was liable
18 because it had knowledge. It had knowledge that the
19 property was contaminated. It bought it. It knew
20 it was a contaminated property, but it was some
21 knowledge. At the time the issue was just being
22 recognized as a general problem, and then purchased
23 property just for conveying it and some other
24 things.

25 Here Mr. Leal had nothing to do with the

1 cause, which is the pile or the piles. He certainly
2 didn't exacerbate it. He not only didn't have some
3 knowledge, he didn't have any knowledge. The issue
4 was sufficiently new that the district geologist
5 from the Bureau of Land Management goes up and looks
6 at the property and says, "Ah, no big deal." He
7 only had partial ownership of the property. No
8 possession. Purchased it for resale. Other parties
9 on the draft order.

10 So the factors, Wenwest factors, are applying
11 here to Mr. Leal. He shouldn't be held liable.
12 Third conclusion, therefore, the Wenwest factors
13 allow leniency. Leniency should be applied here.

14 Fourth conclusion. This one might surprise
15 you. Mine site was not creating a nuisance. How
16 could it be that when we are talking about mercury?
17 It wasn't creating a nuisance? Kind of interesting.
18 13304 authorizes cleanup and abatement orders. As
19 you have heard from Prosecution Team, when a person
20 causes or permits waste to be discharged where it
21 creates a condition of pollution and nuisance.
22 You've heard all of this.

23 So what was the nuisance? The draft cleanup
24 and abatement order makes very clear that the MUN
25 consumption of aquatic organism did not exist and

1 could not be attained at that time due to natural
2 sources. The mine site could not have been causing
3 a nuisance in the sense that these objectives or
4 beneficial uses couldn't be obtained because they
5 couldn't been obtained no matter what. They can't
6 be attained now. They never could be obtained
7 because there's so much natural mercury in the area,
8 so much natural mercury in the stream. During low
9 flow the mercury comes from the high mercury springs
10 and the very high standard for dissolved mercury
11 adopted by the Board has a water quality objective
12 that testifies to how much mercury is around. The
13 number, I want to say, is 1,800. It is a big
14 number. That is not natural conditions. Other than
15 that, I didn't see anything in the Prosecution
16 Team's papers that identified any water quality
17 objectives.

18 There's certainly nothing that were exceeded.
19 There is nothing in the draft cleanup and abatement
20 order that shows exceedance of specific water
21 quality objectives or beneficial uses. When I
22 looked at the staff report on the TMDL, there is not
23 a real statement that says that mercury is causing
24 exceedances of these water quality objectives. What
25 it says is there is a lot of evidence that mercury

1 is eroding into the creek. We would like to take it
2 back to natural conditions as best we can. Fine.

3 But what we're talking about was there an
4 exceedance of water quality objectives in the early
5 1990s. Well, I can't find it in the draft CAO. I
6 can't find it in the staff report for the Sulphur
7 Creek TMDL. The 5C2 report is an awfully big
8 report. I don't remember any specific discussions
9 there. I remember there are a lot of data.

10 Here's something from the 5C2 report. This
11 gets us to nuisance. What really are we talking
12 about? We're talking about discharges from the Wide
13 Awake Mine site. Here is a figure from the 5C2
14 report. The 5C2 report is the report of what is
15 coming off the site. Staff did not collect any new
16 data. I guess they went up and tried to take a
17 look. They looked at aerial photographs, the 5C2
18 report. They went onto the site. They took data.
19 They relied on data from the 5C1 report. This was
20 big comprehensive stuff. Here is what they say.

21 There are three areas. The one on the right
22 is the mine area. They don't show erosion from the
23 mine area. One, the green circle, is waste rock.
24 There they specifically say little or no erosion.
25 And then there is - let's call it orange - orange

1 circle. That they call calcined tailings. By all
2 accounts that is the red pile that the Prosecution
3 Team identified. That is next to the intermittent
4 -- ephemeral, sorry, tributary and that is where the
5 erosion is coming from. That is what the 5C2 report
6 says. It says, it's got kilograms per year, .4 to
7 eight tons per year total material. That is where
8 the eight tons number came from. It says it comes
9 from the calcined tailings pile.

10 So what kind of mercury do we have in the
11 calcined tailings pile? Well, go to the 5C1 report.
12 They took two samples from it. And it's really
13 clear that the samples are described as calcined
14 tailings, red calcined tailings from a large mixed
15 waste pile. I think the fact it is red helps
16 everyone identify it. And two numbers that I got
17 were 10 and 30. There is a Regional Board sample
18 that has since shown up. It was probably from the
19 same pile that is 13. They are all in the same
20 range. Let's call it 20. Twenty is not a high
21 number. Twenty is lower than the screen values that
22 everyone used for campers and so on and so forth.
23 Lower than EPA PRG for industrial. These numbers,
24 by the way, come out of the 5C2 report, I think.

25 The thing that is interesting about it is it's

1 also -- the 20 is also less than the new water
2 quality objective which is 35. And the 35 that is
3 the ratio of mercury to total suspended solids.
4 If you take all the water out of the creek, and this
5 is in high flows, it applies to more than 3 cfs, you
6 get 35 or less. You are talking about natural
7 conditions. That is what we have out there.

8 So the calcined pile couldn't cause violations
9 of the existing water quality objectives because
10 concentrations aren't high enough. What the cleanup
11 and abatement order, the draft, what it really does
12 is not cleanup, ask Mr. Leal to cleanup the waste
13 that he discharged. What it really does is it
14 implements the TMDL. That is what the Prosecution
15 Team says and that's true. When you think about
16 what a TMDL is doing, it is not really cleaning up
17 past waste. What it is doing is it is controlling
18 future discharges to bring the water into compliance
19 with its applicable standards. For future
20 discharges you shouldn't hold past owners liable.

21 So the fourth conclusion is that the cleanup
22 and abatement order is authorized only when a
23 discharge creates a condition of pollution and
24 nuisance. There is no evidence there was a nuisance
25 in the early 1990s. The available evidences is, no,

1 there wasn't a nuisance, couldn't cause a nuisance.
2 Any erosion would be consistent with natural
3 conditions. Also, let me say here, that you might
4 very well say we are not only worried about erosion
5 from waste piles, we are also worried about erosion
6 from roads, erosion from anything else. We want to
7 keep mercury out of the creek. Fine. That is a
8 different set of cleanup and abatement orders. This
9 one is about mine waste. If we want to talk about
10 roads, there are a lot of roads out there I'm told.
11 There a lot of people who have talked about all the
12 disturbances that have taken place out there. It is
13 a different issue.

14 So my main conclusion, summing it all up, I
15 have to say this went faster than I thought it
16 would. Before I get to this, though, I think we've
17 heard that, well, of course, they knew, they should
18 have known. First of all, I think it is absolutely
19 clear that Mr. Leal did not know. Everyone agrees
20 that there is no evidence of any knowledge that
21 would make him aware that he should have done
22 anything on the property or that there was a
23 discharge of mercury that might be causing a
24 violation of water quality standards. But the
25 argument, the implicit argument, that he should have

1 known. Don't people always do environmental reports
2 before they purchase property? And the key answer
3 to this is when I asked Mr. Izzo: What evidence is
4 in the record about what nontech people knew about
5 mine sites in the 1990s? The answer is there is no
6 evidence in the record. There is no evidence when
7 people routinely did Phase I environmental reports
8 or anything like that. I think you can take from
9 the evidence here that when a sophisticated
10 purchaser like Wells Fargo doesn't have a Phase I
11 report for this and an expert like the district
12 geologist says this property is no big deal, you
13 can't expect someone like Mr. Leal -- you can't
14 expect a farmer to know that he should do a Phase I
15 report in a situation like this.

16 So summary. Notice is required both under
17 the Wenwest decision and case law. A person has to
18 know that there is a nuisance there, there is a
19 discharge that should be abated. The person has to
20 be at fault in some way. So not a no-fault statute.
21 Leniency is applicable here. And there really
22 wasn't evidence that there was a nuisance in the
23 early 1990s.

24 Thank you.

25 CHAIRMAN LONGLEY: Thank you very much,

1 sir. We have some questions.

2 MS. HART: Mr. Bazel, is it your
3 proposition that the Leals had no duty to do any
4 sort of due diligence at all, given that no one else
5 apparently had?

6 MR. BAZEL: Yes, they had no duty. Sorry
7 about that. That's right. It was not common
8 practice. But duty there, duty to do due diligence
9 wasn't the standard. The thing about nuisance is
10 the traditional rule about nuisance -- the whole
11 point of notice is that, in a typical situation, you
12 purchase property and maybe we should think in the
13 olden days when people purchased big pieces of
14 property and certainly didn't inspect them all. And
15 you don't know there is problem. You have no duty
16 to do anything. That is the basic approach.

17 But then when someone tells you, "Hey, your
18 property is causing a problem," notice kicks in,
19 duty kicks in. Then you have to do something about
20 it. Once people tell you there is a nuisance and
21 you have knowledge, you can't let the nuisance to
22 continue to go on. But that old case, and the
23 notice provision in Wenwest, are both very clear.
24 Someone has to tell you. And the fact that we are
25 being told now isn't good enough because the duty

1 only kicks in when you own the property.

2 CHAIRMAN LONGLEY: Thank you.

3 Any further questions from Members of the
4 Panel?

5 From our advisory group?

6 Thank you.

7 Thank you, sir.

8 Next is the Emma G. Trebilcott Trust,
9 Mr. Hungerford.

10 MR. HUNGERFORD: I would like to thank the
11 Members of the Board again for the opportunity to
12 speak today.

13 I would like to start just by clarifying
14 something that Mr. Bazel just said. He referenced
15 Wells Fargo Bank as being a sophisticated purchaser
16 of property. And I just want to clarify that Wells
17 Fargo Bank didn't purchase the property. They
18 received the property as a result of a court order.
19 So this wasn't a typical arm's length real estate
20 transaction where the Wells Fargo Bank, as a
21 purchaser, had an opportunity to do a site
22 assessment to determine what sort of environmental
23 liabilities might exist. It was a much different
24 situation.

25 I think it is obvious from the record and from

1 the history here, that wells Fargo took a different
2 approach as the trustee of the trust and immediately
3 tried to sell to market and, in the meantime, just
4 maintain the status quo of the property.

5 In closing, I don't know, but I suspect, that
6 the Wenwest decision is frequently invoked by people
7 before this Board. And we have heard a couple of
8 times today people trying to get out of cleanup and
9 abatement orders for one hardship or another. And I
10 understand that probably as a result of that, maybe
11 this Board is a little jaded about applying the
12 Wenwest decision. Maybe use it only sparingly. But
13 I think that if that decision means anything and
14 offers any continuing guidance to this Board, that
15 it means it has to apply here. Because if you look
16 at who is affected with respect to the trust, you
17 find a rather unique situation. The trust is not a
18 mining company. It doesn't have insurance. The
19 beneficiaries don't have insurance. There is no one
20 to pass along these costs.

21 What you have is a situation where four
22 charities are going to be affected, ones that are
23 going to be damaged by the cleanup and abatement
24 order. And any requirements to pay money, whether
25 it be under 13304 or 13267, just as a matter of

1 investigation. These are people who, for more than
2 20 years now, have relied upon the expectation that
3 this income would be a continuing stream that they
4 would be relying on for decades in the future to
5 support the work that they are doing in the
6 community and support the people that rely on them.

7 So I think for the Board to lay claim to these
8 funds now under these circumstances and with the
9 quality of the evidence that is in the record, I
10 think it's just really inequitable.

11 I also just want to spend one last moment just
12 to put a stake through the heart of any remaining
13 confusion on the issue of the trust retention of
14 mineral rights. A couple people have mentioned that
15 today as being something that should be
16 determinative to the Board's decision. I think it's
17 pretty clear that that is just not the case. If I
18 understand the prosecution's theory, that it is the
19 failure to control surface concentrations that give
20 rise to liability. If that holds water, then the
21 retention of subsurface mineral rights really is
22 irrelevant. The prosecution has already made it
23 clear that they are not holding the trust
24 responsible for liability based solely on their
25 mineral rights. So I just want to add that.

1 With that, I have nothing else. I thank the
2 Board for its time and for the panel. I hope you
3 will pass along my comments to the full Board.

4 CHAIRMAN LONGLEY: Thank you very much.

5 Are there any questions or comments from the
6 panel?

7 Advisory staff?

8 Thank you.

9 MR. HUNGERFORD: Thank you.

10 CHAIRMAN LONGLEY: And next is Homestake
11 Mining Company.

12 MR. GEORGE: Again, thank the Board. It's
13 been a long day.

14 CHAIRMAN LONGLEY: Before you go, sir, you
15 might want to take that last summary down off of the
16 screen. I thank you for your indulgence, sir.

17 MR. GEORGE: Homestake is here in a
18 different posture than all the others who have come
19 before you on the Wide Awake. There's been a lot
20 of, I think, very valuable discussion of the
21 potential liability of owners for conditions on the
22 property that they may not have been aware of at the
23 time they purchased the property. All those things,
24 I think, can be very valuable. But we were not the
25 owner of that property. We have never owned that

1 property. And again the undisputed facts are that
2 we simply did not own the property. We did not own
3 property. We had only a mining and exploration
4 development lease. And the terms of that lease did
5 not give Homestake control of the property. It was
6 not exclusive possession or control of the property.

7 They had the right to have access to the
8 property to carry out their exploration activity and
9 potential development activity after that. But they
10 did not have exclusive possession and control of the
11 property, of the surface of the property or mineral
12 rights. The owner retained the right to use the
13 surface for grazing and other agricultural uses, and
14 to lease or develop oil and gas or geothermal
15 sources. Standard exploration and development
16 lease.

17 And at the time Homestake entered into that
18 lease, there were three other lessees other than the
19 Homestake lease. There was the Terhel Farms grazing
20 lease, which would have involved the entire surface
21 of the property. Sunoco Energy Development had two
22 geothermal leases. And Harrison Martin had an oil
23 and gas lease on the property. All of that
24 documentation is in the record. Also undisputed is
25 the only activities Homestake engaged in on that

1 property were exploratory work. They never operated
2 the mine. They did brief exploratory drilling at
3 only seven locations on that property. Two sites in
4 1979, four sites in 1987, one site in 1991. And in
5 each case, come in for two days. You put up your
6 drill, drilling equipment. You drill your hole.
7 You get your boring, and you plug the hole. The
8 site is then reclaimed and any disturbed area is
9 reseeded. None of these areas would have been any
10 larger than 30 by 50 feet. Most were 10 by 15 feet.
11 So it was very minor disturbance of the surface
12 soil. And more to the point, none of the borings
13 were carried out in waste rock areas or the tailings
14 areas identified in the Regional Board maps. None
15 of them.

16 Only one of them in 1991 was even in the
17 mining area, and as the affidavit of Mr. Burke
18 explains, he personally went to the site, located
19 that boring hole, found it was not fully in the
20 mining area, but on the road to the mining area. He
21 observed all seven sites. They had all been
22 reclaimed. There was no leakage from any of those
23 seven sites on the property. And all of the work
24 and all of the reclamation has been reviewed and
25 approved by Colusa County and by Regional Board.

1 And as I indicated this morning, when I held
2 up the pack of papers, the bulk of the papers in our
3 submission was correspondence back and forward
4 between Homestake Mining and the Regional Board and
5 Colusa County. They were well aware of what was
6 going on. And there was no request from the Regional
7 Board that any work be done with respect to the
8 preexisting waste rock or tailings pile on that
9 property. Homestake did nothing. They did nothing
10 that could have caused a discharge of mercury to the
11 creek.

12 The theory of the Prosecution Team is based
13 simply on ability to control the waste. But that's
14 really -- that's not the rule that is applied by the
15 Regional Board. In the U.S. Cellulose case we had a
16 lessee; that lessee had exclusive possession and
17 control. There were tanks on the site. The lessee
18 determined that he would not exercise any control
19 over those tanks. That was his determination. And
20 when the cleanup was ordered for that property, the
21 prior owner, prior operator, they were held liable.
22 Subsequent operator was held liable. But the lessee
23 who, during his time on that property, when he had
24 control of the property determined not to use those
25 tanks, the State Board held was not liable for that

1 cleanup.

2 In this case Homestake never owned or operated
3 a mine here. Never owned the property. They didn't
4 have exclusive possession and control as lessee.
5 They didn't disturb the areas where they had waste
6 rock and tailings. And everything that Homestake
7 did do on that property was subject to oversight by
8 the Regional Board and Colusa County. And the
9 Regional Board never asked Homestake to do anything
10 with respect to the preexisting waste rock or
11 tailing piles on that property.

12 I think that this is an unprecedented
13 application and expansion of the Water Code
14 liability scheme. And I don't think that anything
15 in the facts in this case with respect to
16 Homestake's activities on that site is sufficient to
17 justify a liability for a cleanup. We would ask
18 that Homestake be taken off the Wide Awake site.

19 With respect to Wide Awake more generally,
20 there hasn't been a lot of the kind of testimony we
21 had this morning about the Central Mine, but the
22 same kinds of difficulties with respect to the
23 quality of the information regarding what's coming
24 off mining sources, what's coming off from other
25 anthropogenic sources, what's coming from hot

1 springs. All of that is there in the spades for the
2 Wide Awake Mine. The same as for the Central Mine.
3 We could ask certainly the way that is being handled
4 in Central, that should we be here for the Wide
5 Awake, that it be handled in the same way.

6 Thank you.

7 CHAIRMAN LONGLEY: Thank you very much,
8 sir.

9 Are there any questions or comments from
10 Members of the Panel or Prosecution Team?

11 Thank you very much.

12 I don't have any further indication -- I need
13 to -- just about forgot closing statement by the
14 Prosecution Team.

15 MR. PULUPA: We have a couple things to
16 say.

17 CHAIRMAN LONGLEY: I thought you were going
18 to be silent.

19 MS. OKUN: I have a couple questions,
20 first.

21 CHAIRMAN LONGLEY: Certainly, go ahead.

22 MS. OKUN: Did the Prosecution Team
23 consider using a 13267 order to cover this site
24 characterization?

25 MR. PULUPA: It was considered, but

1 integrating it into the cleanup and abatement order
2 was the decision in going forward, including
3 characterization report in the cleanup order.

4 MS. OKUN: Why did you decide to go that
5 way, not using 13267?

6 MR. IZZO: First of all, the Basin Plan, it
7 inferred to us that if you wanted to do a 13267 --
8 you want to do a 13304. So what we did is
9 incorporate the 13267 in the 13304. And, again, as
10 you go along, at anytime because of the new data
11 that is coming from the characterization, it may not
12 require a cleanup or it may require significant
13 cleanup.

14 MR. PULUPA: I think that on the basis of
15 the evidence that we had in the record, we found
16 sufficient evidence to justify going forward with a
17 cleanup and abatement order.

18 MS. OKUN: What was the basis to remove the
19 Tracys from the order?

20 MR. PULUPA: If I recall, the Tracys were
21 the -- they granted a utility easement that wasn't
22 on the same parcels that was where the mine was
23 found.

24 MS. OKUN: What about James and Sally
25 Whiteaker?

1 MR. PULUPA: Same.

2 MS. OKUN: That was it.

3 Thanks.

4 CHAIRMAN LONGLEY: Are you ready for
5 testimony -- for closing argument, rather?

6 MR. PULUPA: I will first address some of
7 the contentions that were made by the parties out
8 there. In regard to the Trebilcott Trust - I
9 apologize if I am not saying that right - they did
10 own the parcel for a period of time. And we felt
11 that it was best to leave it to up the Board to
12 apply the Wenwest factor. Very sympathetic to the
13 type of beneficiaries that the trust has.

14 They also mentioned Goshute Corp. That is
15 mentioned by a number of different individuals. We
16 couldn't find that -- there is a number of entities
17 that were included in that property deed that did
18 own the parcel at various times, going back to as
19 far as the original mining companies. Now, a slew
20 of those organizations no longer exist and can't be
21 subject to a cleanup and abate order. They are just
22 not there anymore. We would have loved to order the
23 folks who actually took the mercury out of the
24 ground to do the bulk of these cleanup and abatement
25 orders, attached cleanup and abatement orders.

1 In terms of going forward, we do believe that
2 -- we did not name the Trebilcott Trust based on
3 subsurface mineral rights. The issue covered by the
4 cleanup and abatement orders are the waste piles
5 that are on top of surface there.

6 In regard to the comments made by the
7 Mr. Teja's client, that they could not find the mine
8 itself. It is not the mine or mine shaft that we
9 are really worried about here. It's the mine waste
10 distributed throughout the parcels that they did
11 own. It does include that four-story high furnace
12 that is on the site.

13 Going forward in terms of Mr. Leal, we do see
14 a little bit of cherry-picking of the information by
15 the district geologist. Later on in that same
16 report that was cited, the district geologist goes
17 on to say that there might be some mercury found in
18 and around where the mercury was removed from the
19 retorts. It would be necessary to determine where
20 these areas are and take soil samples to determine
21 if there is any mercury contamination of the ground.
22 I think the 5C2 report demonstrated that the
23 contamination was there and created an issue. This
24 report was given during the time that Mr. Leal owned
25 the property.

1 In terms of CERCLA, a bit of a red herring.
2 CERCLA speaks of disposal, not discharge. We're not
3 taking about the disposal of waste. We are talking
4 about the discharge of waste. These are very
5 different terms legally speaking.

6 In terms of -- you will notice that Mr. Leal,
7 through his attorney, specifically talked about
8 nuisance. There was a nuisance being created. We
9 are talking about a condition of pollution. And I
10 don't necessarily think that Mr. Leal would say the
11 same things regarding pollution. Pollution is the
12 exceedance of the water quality objectives meant to
13 protect the beneficial uses in the stream. Both
14 under the uses that existed at time the Leals owned
15 the parcel and after the Basin Plan amendment in
16 2007 altered those. The 5C2 report contains
17 evidence that discharges from these waste rock piles
18 are contributing to exceedances of these water
19 quality objectives, be they those that were in place
20 prior to the Basin Plan amendment to protect the
21 beneficial uses where the site-specific objectives
22 that were adopted by the Board in 2007.

23 Getting into Homestake's issue. We believe
24 that the lease, the scope of the lease, did cover
25 the management and control of the mine waste piles,

1 the exploitation of these mineral resources in and
2 around this area. And we disagree with Homestake's
3 characterization of the U.S. Cellulose case. In the
4 U.S. Cellulose case it was shown that the lessee
5 very carefully circumscribed the control of the
6 USTs. Entered into an agreement that specifically
7 mentioned they had nothing to do with that. We
8 don't see similar type of care in the way that
9 Homestake entered into their mineral exploration
10 leases at the parcel.

11 Fundamentally, what we are talking about is a
12 mine site that is causing and contributing to
13 exceedances of water quality objectives in Sulphur
14 Creek. We may talk about minute levels of mercury,
15 a few kilograms here and a few kilograms there.
16 This is mercury that travels and eventually becomes
17 available and works its way down throughout the
18 waterways that comprise the Delta. Mercury is a
19 very serious issue for the people that -- for the
20 people that utilize these waterways in a number of
21 different ways.

22 We believe that the Prosecution Team has
23 demonstrated that the requirement for issuing a
24 13304 order are present for all the dischargers that
25 we named. Again, should additional evidence come to

1 light, the cleanup and abatement orders are crafted
2 in such a manner that additional parties can be
3 added to these orders. If the Board should go the
4 way that it did earlier and ask for 13267 orders, I
5 will make the claim that there are different legal
6 standards for holding people accountable for 13267
7 orders. It would be a significant rearrangement of
8 rights and not necessarily all the burdens may fall
9 on the parties similarly as they would in a cleanup
10 and abatement order. Possibly, the current
11 landowners in the prior case, that would be
12 Dr. Miller, could bear more significant burden under
13 a 13267 order than they would under a cleanup and
14 abatement order. We believe that's partially
15 because of the court cases that have basically
16 characterized the 13304 as the ability to abate
17 nuisances and that integrated some aspects of the
18 nuisance law. We are not aware of similar case law
19 on 13267.

20 In short, to summarize, we believe that the
21 reports currently in the record and the deeds and
22 title documents in the record show that there is
23 contribution from these mines to a condition of
24 pollution in Sulphur Creek, and that the parties
25 named in the orders are responsible for that

1 cleanup.

2 CHAIRMAN LONGLEY: Thank you very much.

3 Kate, do you have a question?

4 MS. HART: Yes. I have some follow-up.

5 It sounds clear to me now that the prosecution
6 is pursuing a legal theory under 13340 [verbatim] of
7 the Water Code. Is it the prosecution's contention
8 that Mr. Bazel and others have mischaracterized the
9 required legal elements of that code section, namely
10 that there has to be notice to the parties, fault on
11 behalf of the parties, knowledge of the parties and
12 then that nuisance be proven?

13 MR. PULUPA: We don't think that 13304 is,
14 per se, a nuisance statute, which is essentially
15 what the dischargers have been arguing. That is
16 just a nuisance statute that all the traditional
17 elements of nuisance have to be integrated into
18 orders going forward under 13304.

19 Even if that were the case, we believe that
20 there is significant evidence, including the title
21 documents and the features that are on the land,
22 that these parties would be on constructive notice
23 that there are some mercury issues out there. But
24 our understanding is more that the courts, in,
25 specifically, the City of Modesto case, allows us to

1 bring in evidence or bring in some principles of
2 nuisance to help interpret aspects of 13304 that
3 aren't clear on their face. The aspect of 13304
4 that we don't think is particularly clear on the
5 face is the issue of whether particulate matter that
6 has eroded during the course of somebody's ownership
7 -- again, if you have groundwater contamination, you
8 have an underground storage tank that is, say,
9 leaching benzene or whatever the chemicals are from
10 that underground storage tank, that the cleanup
11 would cover those releases. You would have to go
12 over and cleanup those particles.

13 This site is a little different in that it is
14 a flood that mobilized the sediment into the stream,
15 and that sediment would eventually wash out through
16 the Golden Gate, as Mr. Bazel has said. We believe
17 that a cleanup and abatement order can continue to
18 reach the waste piles themselves by integrating some
19 of the principles of nuisance law.

20 CHAIRMAN LONGLEY: Any further questions
21 from the panel?

22 Thank you very much.

23 Mr. Bazel, you wish to restate your objection?

24 MR. BAZEL: I wish to respond, if I can. I
25 still have time. May I respond?

1 CHAIRMAN LONGLEY: You can respond.

2 MR. PULUPA: We will object. This is
3 outside the hearing procedures, and we have been
4 held to the hearing procedures.

5 CHAIRMAN LONGLEY: I'll go ahead and let
6 Mr. Bazel respond.

7 MR. BAZEL: Thank you. Let me say for a
8 start, no cherry picking. What the district
9 geologist said is there could be mercury in
10 someplaces, which I think are processing areas. And
11 it goes on, and as Mr. Pulupa read the punch line,
12 it would be necessary to take soil samples to
13 determine. That is what I quoted, the punch line.

14 If there is mercury there, there could be.
15 But the district's geologist did not say there is a
16 discharge causing a condition of pollution or
17 nuisance. What he really says is maybe there is
18 some mercury up there. You need to take samples to
19 find out, and you look at the 5C2 Report, there is
20 no evidence of erosion from that area. That's not
21 the discharge at issue.

22 As far as the rest of it, there is nothing in
23 the district geologist's report that says there is a
24 problem. When you read the report as a whole, it's
25 okay.

1 The condition of pollution versus nuisance. We
2 agree the City of Modesto says you can bring in some
3 principles of nuisance. But since cherry picking
4 has been raised as an issue, one of the principles
5 we are bringing in is the notice principle. That is
6 a principal in the law, but it is also in the
7 Wenwest decision. So this is not a leap for us.
8 You have to have notice. The notice question is
9 notice of what? Constructive notice that there is a
10 claim out there. Okay. That is not the kind of
11 notice you need. We are talking about a discharge
12 causing a condition of pollution.

13 CHAIRMAN LONGLEY: I think you have a short
14 period of time. You need to wrap up.

15 MR. BAZEL: I will.

16 I think here in the end, although we keep on
17 hearing that the 5C2 Report shows that there is some
18 exceedances of some objectives, I still haven't
19 heard which, where and when. I don't think it is
20 there.

21 With that, I will stop, except if I might,
22 I'll renew my objection that I don't have yet more
23 time.

24 CHAIR LONGLEY: Thank you.

25 That said, we will then -- the Board will go

1 into executive session. We will return hopefully
2 before 5:00 p.m.

3 (Break taken.)

4 (Board in closed session.)

5 CHAIRMAN LONGLEY: Before I read the panel
6 recommendation, I want to thank all of you for your
7 patience and the very civil way that you have been
8 able to get through this very, very long day.

9 The panel in its deliberations made the
10 following recommendations: To continue the
11 investigative phase. And this may be implemented
12 through the use of appropriate 13267 orders,
13 including appropriate site investigation.

14 Secondly; the panel does not concur entirely
15 with certain arguments made today, and this will be
16 set forth in detail, in more detail, in the written
17 documents which will be developed and provided to
18 you at a later date.

19 That said, I thank you very much, as I said
20 before, for your indulgence.

21 And we will recess until 8:30 tomorrow when we
22 will continue with our agenda.

23 Thank you.

24 (Item 7 concluded at 5:10 p.m.)

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1 REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to printed format, and the pages numbered 4 through 128 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 24th day of October, 2009.



ESTHER F. SCHWARTZ
CSR NO. 1564

EXHIBIT D



JOHN Y. "JACK" DIEPENBROCK
KAREN L. DIEPENBROCK
KEITH W. MCARDIE
BRADLEY J. ELKIN
EILEEN M. DIEPENBROCK
MARK D. HARRISON
GENE H. CHEEVER
LAWRENCE B. GANCA
ANDREA A. MATARAZZO
JOEL PATRICK ERB
JOHN D. RIDER
JEFFREY R. DONSO
JENNIFER L. DARTER
SEAN K. HUTTENFORD
CHRIS A. McCARDLESS
DAVID A. DIEPENBROCK

JEFFREY L. ANDERSON
LEONORA Y. DEICAN
JULIE Y. NEGER
DAVID P. TERNABON
DAN M. SILVERBOARD
JONATHAN A. MARZ
TALENE C. BURCAID
CONSTANCE K. FRIEN
ANTHONY J. COMTEZ
BRADLEY B. JOHNSON

MICHAEL A. MANLEY, Of Counsel

R. JAMES DIEPENBROCK
(1929 - 2002)

April 29, 2010

Via Electronic Mail

Pamela Creedon, Executive Officer
Kenneth Landau, Assistant Executive Officer
State Water Resources Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670

Lori Okun, Senior Staff Counsel
State Water Resources Control Board, Office of Chief Counsel
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Technical and Monitoring Report Order
Order R5-2010-XXX
Wide Awake Mine / Emma G. Trebilcot Trust
Our File No.: 1225-011

Dear Ms. Creedon, Mr. Landau and Ms. Okun:

This law firm represents Wells Fargo Bank, N.A., trustee for the Emma G. Trebilcot Trust ("Trust"). We appreciate the opportunity to comment on the Proposed Technical and Monitoring Report Order ("Proposed Order"), and we thank the Central Valley Regional Board for its consideration of the Trust's position through these proceedings.

We cannot, however, agree with any recommendation that the Proposed Order should be finalized against the Trust, and derivatively, the four charities that rely on the Trust's funding: Shriners Hospital for Crippled Children, the Salvation Army, the San Francisco Lighthouse for the Blind and Visually Impaired, and Lion's Eye Foundation.

Requiring that the Trust pay the costs to investigate and study mercury at the former mine is only marginally better than the original cleanup order. The fact remains

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that these four charities, that had no ownership or control over the property, will find their income reduced as a direct result of this Proposed Order. The Trust would be required to pay costs that include the expense of hiring environmental consultants, and paying for Regional Board staff time. These costs also include the risk that the Trust may find it necessary to shoulder the responsibilities of dischargers that are insolvent, or that refuse to contribute. And the Trust would still, under the Proposed Order, face the open-ended risk of a future cleanup and abatement order after this investigative phase is complete. As such, the costs and potential liabilities associated with the Proposed Order remain significant.

The fact also remains that these four charities had no ownership or control over the property, and that even the Trust had only the most fleeting and tenuous connection to the alleged water-quality issues. The findings in the Proposed Order are clear on this point. Paragraph 55 of the Proposed Order establishes that the Trust (not the charitable beneficiaries) received ownership of the property through a court order in March 1988, listed the property for sale within two months, and soon thereafter sold the property after a brief 20-month period. The Proposed Order further confirms that the Trust never developed or improved the land in any way during its short ownership, nor is there any evidence that the Trust knew of mercury pollution leaving the former mine.

The Trust understands the need to spread environmental costs, and that purchasers of land bear the risk of conditions that they did not create. But against the Trust, the Proposed Order takes this too far. The Trust did not purposefully acquire the property, but received it involuntarily and worked to shed it immediately. In the 20 years since, the charities have developed a reasonable expectation that Trust funds would continue to provide income, and they have budgeted on that expectation. The Proposed Order, if adopted, would hasten the loss of income that began approximately one year ago when the Trust was required to respond to the original order. More importantly, for the future, the adoption of the Proposed Order would place the reliability of the Trust's income stream in question, and force the charities to restructure budgets during what continue to be challenging economic times.

The Regional Board has ample authority to release the Trust based on these findings. As stated by the Trust in its papers and during oral argument at the hearing in October 2009, the State Water Board's precedent in *Wenwest et al.*, Order No. WQ 92-13, should control here. That decision allows the Regional Board to release an innocent landowner on equitable grounds, if the landowner did not cause or exacerbate the threat to water quality. The *Wenwest* decision was tailor-made for situations precisely such as this. The equities clearly favor releasing the Trust to protect the assets of charities that had no relationship to the property or source of pollution.

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Accordingly, we ask on the Trust's behalf that the Regional Board release the Trust from the Proposed Order. In support of this request, the Trust also incorporates by reference all legal and equitable arguments contained in its prior written submissions and all oral argument presented to the Regional Board members in the October 2009 hearing.

The Trust looks forward to presenting its views during the upcoming May hearing. We thank the Regional Board and its staff for the opportunity to provide our comments.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By 
Sean K. Hungerford

CKF:gjc