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CAL-SIERRA PROPERTIES and
MERCED GENERAL CONSTRUCTION, INC.

CALIFORNIA REGIONAL WATER CONTROL BOARD
CENTRAL VALLEY REGION

v.

CAL-SIERRA PROPERTIES and
MERCED GENERAL CONSTRUCTION, INC.

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

RE: WIDE AWAKE MERCURY MINE
No. R5-2009-xxxx

REBUTTAL EVIDENCE, ARGUMENT, AND RESPONSE OF RESPONDENTS FILING REGARDING CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC.

1. PREFACE

The allegations and points and authorities herein compliment the allegations, objections and points and authorities heretofore filed herein on behalf of CAL-SIERRA PROPERTIES.

CAL-SIERRA PROPERTIES was a partnership composed of ROY D. WHITEAKER and his wife, GLADYS J. WHITEAKER. ROY and GLADYS WHITEAKER appear to have been dropped from the pleadings by the Water Board. I represent CAL-SIERRA PROPERTIES, a defunct California partnership. If MR. and MRS. WHITEAKER are still parties, I will represent them as well as their former partnership.

I am also appearing for and representing MERCED GENERAL CONSTRUCTION, INC., another respondent.

I have tried to explain to a fellow lawyer how a person who has some present interest in

an allegedly contaminated site in California can be determined to be a "discharger" although he did not contribute to the pollution which occurred before he acquired his interest in the polluted site. He did not believe me, even when I advised him the California Appellate Courts had decided such an innocent person is a "discharger."

By taking what may appear to be inconsistent positions in this pleading, Plaintiff is not waiving any arguments made herein.

A waiver of conflicts of interest has been executed by CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION INC., and an association of attorney is being filed.

In Respondent's pleadings, Respondent CAL-SIERRA PROPERTIES is sometimes referred to as CAL-SIERRA, and Respondent MERCED GENERAL CONSTRUCTION, INC. as MERCED GENERAL, and Petitioner as WATER BOARD.

2. A. DECLARATION OF ROY D. WHITEAKER

ROY D. WHITEAKER declares as follows:

This declaration modifies and takes the place of my declaration of July 9, 2009.

I am a former partner in CAL SIERRA PROPERTIES, hereafter "CAL SIERRA." I am married to GLADYS WHITEAKER and all references to "my wife" are to her.

The real property in Colusa County, hereafter "the property" was purchased by CAL SIERRA in 1997 and sold in 1999.

CAL SIERRA was a partnership whose partners were, at all times, my wife and me. It was dissolved after 1999 and has no existence at this time. CAL SIERRA purchased the

property, on which the Wide Awake Mine is alleged to be located, hereafter " the property" solely, as an investment opportunity, for the sum of $1,500.00

CAL SIERRA's interest and MERCED GENERAL's interest were the same in the property which consisted of a one-half undivided interest each in approximately 57 acres of mountain property, which was divided into five (5) parcels.

The property, but no right to the mine or mineral rights, was purchased by CAL SIERRA PROPERTIES in 1997. It was purchased solely as an investment, and was subsequently sold in 1999. I have been advised the mine has been closed and covered for many years, well before CAL SIERRA acquired the property the mine is alleged to be on.

The Petitioner, called hereafter the "WATER BOARD" is attempting to require some of the various property owners, to develop plans to clean up the alleged mercury runoff from all the various properties that have drainage into nearby creeks.

Until recently, I thought the Wide Awake Mine was on the property. Now I am not sure of that at all. The entire area is undeveloped. There are no roads or fence lines. I only had an idea where the CAL-SIERRA land was. It appears the Water Board has stated the mine is on a parcel of real estate in which CAL-SIERRA had no interest. I've never seen the remains of the mine and have no idea if it is or was on the CAL-SIERRA property.

At no time has CAL SIERRA, me, or my wife, developed the property, worked the property, mined the property, nor disturbed the physical nature of the property in any way.

CAL SIERRA did not own any of the mineral rights to the mine/ or the entire property. CAL SIERRA was not legally authorized to conduct any mining activity in a mine or on the property.

I was recently asked by e-mail for permission from Water Board personnel to enter the property to inspect its mineral content, and I informed them CAL-SIERRA never had any mineral rights and no longer owned the property, and therefore I had no authority to grant them permission to enter the property or search for minerals.

I have actually only been physically on the property on approximately three (3) occasions. My wife has never been there.

The primary concern of the Petitioner appears to be the amount of mercury runoff-drainage from the tailings of mining activity back in the early 1890's into Sulphur Creek and subsequently into Cache Creek. There are other old, abandoned mines and mercury laden hot springs in the area also, and I believe some, if not all, are receiving the same attention from the Water Board CAL-SIERRA is.

I have also been informed that mercury content is high in the entire region and it is considered a natural mineral for that area. It has probably been draining into area creeks since the beginning. It appears to me it would be impossible to eradicate mercury from the area.

If a plan and clean-up is necessary, it would appear to me that the responsibility for the mercury content contained in the mining tailings would lie with the mining company(ies). Without their activity there would be no mercury in the mining tailings. They left the tailings, they should clean them up. Maybe the Superfund or something like it could get it done.

CAL SIERRA never owned any of the mineral rights. Therefore neither CAL-SIERRA PROPERTIES, my wife, nor I could authorize any mining activity on the property.

Information from North State Title Company indicates MERCED GENERAL CONSTRUCTION, Inc., et al. had, and still has, an interest in the property similar to CAL-

SIERRA's. We each had an undivided one-half interest in the property.

The REGIONAL WATER QUALITY CONTROL BOARD has a copy of the CAL-SIERRA deed to David Brown and Roy Tate and their wives.

In summary, my wife has never been on the property. Neither CAL SIERRA, nor my wife, nor I ever saw any mining activity on the property. I am not at all certain the mine was on the property. I was told the mine was closed. None of us ever owned the mineral rights to the mine. None of us have ever discharged anything from a mine. CAL SIERRA has not in any way been a "discharger" of any contaminant on the property. CAL SIERRA sold its one-half in the property on which the mine is alleged to be located to DAVID G. BROWN and ROY TATE.

The times I was at the property I observed what appeared to be a large brick structure, a small fenced area with the remains of what appeared to be a building foundation. I did not see a mine, I was told one had been filled in. I did not recognize what has been described as mine tailings, nor would I have known mine tailings if I had seen them. Now I know the mine tailings are several round mounds which are covered with vegetation. The description of the property by the WATER BOARD is vague. I do not know if the remnants of the mine are located on the property CAL-SIERRA owned.

Water run off from this 57 acres would consist of discharges from springs, other mines, and winter/spring rains and which originate from the BUREAU OF LAND MANAGEMENT land above the mine and run along the property site. Significant rain run off might empty into Sulphur Creek, however; rain run off from the mine tailings would be minute.

Those responsible for the mining operation and leaving of tailings should be responsible for the cleanup. If the mine is not conclusively proven to be on the property CAL-SIERRA

owned, CAL-SIERRA should be absolved of any liability in this matter.

I declare under penalty of perjury the foregoing is true and correct and this declaration is executed at Yuba City, California on September 11, 2009.

ROY D. WHITEAKER

2. B. DECLARATION OF KEVIN GARCIA

KEVIN GARCIA declares as follows:

I am the President of MERCED GENERAL CONSTRUCTION, INC.

MERCED GENERAL CONSTRUCTION, INC. acquired the property in question on January 1, 2005 by grant deed an agreement to settle a debt from NBC LEASING. I intended to use it for shooting sport/target practice. As of today I have never been to the property and do not know exactly where it is located. Subsequently I have no knowledge as to where the mine is located nor have I ever seen the mine.

Until recently, I had no knowledge of the location of the Wide Awake Mine. I am still unclear as to where the mine is located as Mr. Teja had informed me that the Water Board has stated that the mine is on a parcel of real estate in which MERCED GENERAL CONSTRUCTION, INC. Or I have no interest. So I remain unclear as to where the location of the mine is.

At no time has MERCED GENERAL CONSTRUCTION, INC., or I ever been to the property, developed the property, worked on the property, nor disturbed the physical nature of the property in any way.

MERCED GENERAL CONSTRUCTION, INC. doesn't now, and never has owned any

of the mineral rights to the mine/or any of the property. The mineral rights were reserved to the Grantor in the deed to MERCED GENERAL CONSTRUCTION, INC.

MERCED GENERAL CONSTRUCTION, INC. Was not legally authorized to conduct any mining activity in a mine or on the property.

The primary concern of the Petitioner appears to be the amount of mercury runoff drainage from the tailings of mining activity back in the early 1890's into Sulphur Creek and subsequently into Cache Creek. I've been told there are other old, abandoned mines and mercury laden hot springs in the area as well, and I believe some, but not all are receiving the same attention from the Water Board that MERCED GENERAL CONSTRUCTION, INC. is.

I have also been informed that mercury content is high in the entire region and it is considered a natural mineral for that area. It has most likely been draining into the area creeks since the beginning. It appears to me it would be impossible to eradicate the mercury from the area.

If a plan and clean-up is necessary, it would appear to me that the responsibility for the mercury content contained in the mining tailings should lie with the mining company(ies). Without their activity there would be no mercury in the mining tailing. They left the tailings, they should clean them up. Maybe the Superfund or something like it could get it done.

MERCED GENERAL CONSTRUCTION, INC. never owned any of the mineral rights. Therefor neither MERCED GENERAL CONSTRUCTION, INC., nor I could authorize any mining activity on the property.

In summery, I have never been on the property and subsequently MERCED GENERAL CONSTRUCTION, INC. nor I ever any mining activity on the property. I have no knowledge of

the location of the mine being on the property. I was never told of a mine. Neither MERCED GENERAL CONSTRUCTION, INC. nor I ever owned the mineral rights to the mine. Neither MERCED GENERAL CONSTRUCTION, INC. nor I have in no way been a "discharger" of any contaminant on any property.

If the mine is not conclusively proven to be on the property MERCED GENERAL CONSTRUCTION, INC. owned, MERCED GENERAL CONSTRUCTION, INC. should be absolved of any liability in this matter.

I declare under penalty of perjury the foregoing is true and this declaration is executed in Madera, California on September 9, 2009.

KEVIN GARCIA

3. THE PROSECUTION'S THEORY OF THE CASE IS UNCLEAR

Respondents CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. adopt the objections and motions in response to the prosecution team's "clarification" of July 16, 2009, by Respondent ROBERT LEAL's attorney, Mr. Lawrence S. Bazel.

The prosecution team has not clarified anything so far.

My clients did not have notice of the nuisance. As former owners, CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. would have no liability unless they had notice of the nuisance. There is no evidence they had notice.

My clients have no idea what the evidence against them may be. I have been as candid with the prosecution as I could be, but I don't know what their case is.

The more I hear, the less I understand the theory of the prosecutor's case.

4. RESPONDENTS CAL-SIERRA AND MERCED GENERAL CONSTRUCTION, INC. HAVE NOT OWNED THE REAL PROPERTY ON WHICH THE WIDE AWAKE MINE IS SITUATED

Attached hereto, marked "Exhibit A" and incorporated herein is a copy of a telefax transmission from North State Title Company in Colusa, California. This shows the three properties conveyed by Respondent CAL-SIERRA to Respondents BROWN and TATE. The relevant properties are:

APN	ACREAGE
018-200-010	30.29
018-200-011	14.35
018-200-012	55.57
Total	100.00 acres

The three parcels are indicated by arrows on the plat map.

Also attached hereto, marked "Exhibit B," and incorporated herein is a copy of Attachment B from Petitioner's pleadings. It contains the bold print sentence, "Parcel 018-200-009 is the mine property." Parcel 018-200-009 was split in 1995. This exhibit shows CAL-SIERRA owned parcels 018-200-010, 018-200-011, and 018-200-012 (but not the mine property) from October 16, 1995, and November 1, 1995, to September 10, 1999, and January 1, 2004.

The Parcel map in Exhibit A shows the following legends:

Hughes Mill Site
Montecilo
North Star
Little Giant
Dewey
Empire
Hidden Treasure
Bethel

These appear to be mine sites.

None of the above data shows on Parcel 11, 12, or 13. Wide Awake Mine is not shown on the parcel map.

The records does show CAL-SIERRA's and MERCED GENERAL's interests were in Parcels APN 018-200-010, APN 018-200-011, and APN 018-200-012

Nothing shows conclusively that CAL-SIERRA owned any interest in the property on which the Wide Awake Mine is supposed to be located.

CAL-SIERRA did not own any mineral rights on the property owned. Even if CAL-SIERRA had owned the property on which the Wise Awake Mine was supposedly located, it did not have any rights to the mine or the minerals.

5. RESPONDENT CAL-SIERRA PROPERTIES NOT PROPERLY IDENTIFIED AS AN OWNER OF THE PROPERTY ON WHICH THE WIDE AWAKE MINE WAS LOCATED

The REVISED DRAFT CLEANUP AND ABATEMENT ORDER, WIDE AWAKE MINE, COLUSA COUNTY, dated June 10, 2009 includes Attachment B.

Attachment B mentions an Assessor's Parcel Number split on May 10, 1993. It also contains this statement: "Parcel 018-200-009-000 is the mine property." (emphasis added)

Attachment B further refers to Assessor's Parcel Number 018-200-009-000 and lists its owners from May 20, 1993, through September 10, 1999. The list does not list CAL-SIERRA PROPERTIES or MERCED GENERAL CONSTRUCTION, INC. as owners at any time.

Attachment B shows CAL-SIERRA owned an interest in Assessor's Parcels Number 018-200-010-000. It shows MERCED GENERAL CONSTRUCTION, INC. had an interest in Assessor's Parcel Numbers 018-200-011-000 and 018-200-012-000.

Attachment B also appears in other filings by the Petitioner.

Attached hereto, marked Exhibit C , and incorporated herein, is a copy of a North State Title Company Summary of the Interest of Merced General Construction, Inc., Assessor Parcel Number 018-200-010.

Also attached hereto, marked Exhibit D and incorporated herein, is a copy of a Colusa County Recorder's plat map. This shows among other things Assessor's Parcel Numbers/Lots 10, 11, and 12. It does not show Lot 9. North State Title Company has advised the author no Assessor's map for Parcel Number 018-200-009-000 can be located.

The data and information provided by the Petitioner, North State Title Company, and the

public record shows Respondents CAL-SIERRA and MERCED GENERAL CONSTRUCTION, INC. never owned the real property on which the Wide Awake Mine was supposedly located.

6. VIABLE SUCCESSORS OF CAL-SIERRA PROPERTIES HAVE LIABILITY CAL-SIERRA PROPERTIES MIGHT BE FOUND TO HAVE

DAVID BROWN, ROY TATE, and their wives,"viable successors" to CAL SIERRA PROPERTIES, hereafter "CAL SIERRA." These persons succeed CAL SIERRA in ownership of the property on which the mine is allegedly located, hereafter "the property," and some, or all of them, appear to still own the property. Declarant is informed and believes and on information and belief, avers these persons and entities are actively engaged in business.

These parties assumed the ownership of the property and any liability for the mine on September 1, 1997, when CAL SIERRA transferred its interest in the property.

Webster's Ninth New Collegiate Dictionary defines "viable" as, among other things, "capable of existence and development as an independent unit."

The successors in interest of CAL SIERRA acquired exactly the interests of CAL SIERRA in the property and are capable of existence and development of the property as an independent unit.

BROWN and TATE are both "viable successors" of CAL SIERRA.

The WATER QUALITY CONTROL BOARD has referred to several Water Code provisions which support CAL SIERRA's position the "viable successors" would be liable instead of CAL SIERRA, if anyone is liable at all.

Section 13267(b) of the Water Code, refers, in part, to "any person who has discharged ... waste" CAL SIERRA is not such a "person."

Section 13267(c) refers, in part to , "Consent of the owner or possessors of the facilities." CAL-SIERRA is not such an "owner or possessor."

From the facts and law, it is clear that (1) CAL SIERRA PROPERTIES is not a discharger, and (2) having transferred the property on which the mine may be, to TATE and BROWN, CAL- SIERRA is protected from liability by virtue of having created viable successors.

7. RESPONDENTS DID NOT DISCHARGE WASTE

CAL-SIERRA PROPERTIES, and MERCED GENERAL CONSTRUCTION, INC. are alleged to be "discharger" due to their failure to comply with former Section 13054.1 of the Water Code. The statute does not require them to file a report of discharge. They are facing an attempt to impose liability on them when they were unable to report "any material change or proposed change in the character, location, or volume of the discharge." Neither CAL-SIERRA or MERCED GENERAL saw any "discharge," and they are literally accused of discharging rocks. There is no evidence either moved a single rock from any pile of tailings.

The Respondents are simply not in violation of former Section 13054 of the Water Code. They were, in no way, persons purporting to discharge sewage or waste. They were purporting to do nothing. They had no idea there was a problem.

They have asked me, "How does the Water Board distinguish the mercury content of the tailings from the general and natural occurrence of mercury in the mountain area around the mine?" I cannot answer this.

They have asked me "how can anyone say Sulphur Creek is contaminated by mercury from the Wide Awake Mine?" I cannot answer this.

8. DISCHARGERS WHO CANNOT BE AND/OR ARE NOT IDENTIFIED ARE GIVEN AN ARBITRARY ADVANTAGE

Many other persons/entities can be "dischargers." The following are some who fit the category "dischargers" of mercury:

The natural soil of the mountains
Hot springs
Upstream mines
Upstream tailings and similar deposits
Mine owners
Mine operators
Mine workers
Hikers
Campers
Hunters
Geologists
Others

My clients and I realize this is a stage of the proceedings where dischargers are to be identified. The dischargers then have to fight among themselves to establish proportionate clean up liability.

However, there is a catch. Suppose Adam, Bill, and Carl all contribute to pollution. Suppose the prosecutors of dischargers decide to bring their action only against Adam, omitting Bill and Carl arbitrarily from their list of dischargers/respondents. Suppose Adam is one of a group of such selected dischargers who are all convicted and now must determine among themselves what proportions each should bear of the $10,000,000.00 in damages, which are not shared by Bill, Carl and other identifiable dischargers and who are not liable to pay their share of the cost. This is grossly unfair to Adam.

This is going on in the instant case. All polluters are not being prosecuted. The ones who

arbitrarily have not been prosecuted appear to get off scot-free.

This process, practiced by the Water Board in this action, is an obvious, egregious violation of due process of law as far as the selected defendants are concerned. Where is the due process under the law in such arbitrariness?

The WATER BOARD has not given any reasonable reason why some dischargers are prosecuted and some are not.

Why should CAL-SIERRA and MERCED GENERAL be singled out for punishment and others left out and escape punishment?

9. LACK OF NOTICE OF A NUISANCE CANNOT SUPPORT LIABILITY OF A DISCHARGER BY OPERATION OF LAW

I suppose it necessarily follows the rule that a discharger by operation of law, can be liable for a mercury contamination perpetrated by a former owner of his property, but the discharger in fact is not liable once he sells his polluted property to an innocent purchaser, which CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. both are.

However, in Preston v. Goldman (1986) 42 Cal. 3d 108, 110, the Supreme Court held that liability is terminated upon termination of ownership and control. CAL-SIERRA PROPERTIES is a former part-owner, who transferred its interest in the allegedly polluted property allegedly containing the mine, who sold and transferred the property in question to TATE and BROWN, who are viable successors to CAL-SIERRA PROPERTIES.

The California Supreme Court decided long ago that a person may not be held liable for a continuing nuisance without notice of the nuisance:

> The rule seems to be well established that a party who is not the original creator of a nuisance is entitled to notice that it is a

> nuisance, and a request must be made, that it may be abated before an action will lie for that purpose, unless it appear that he had knowledge of the hurtful character of the erection. This rule...is adopted for the reason that it would be a great hardship to hold a party responsible for consequences of which he may be ignorant.
>
> Grigsby v. Clear Lake Water Works Co. (1870) 40 Cal. 396, 407

Respondent MERCED GENERAL CONSTRUCTION, INC., as well as CAL-SIERRA PROPERTIES, were ignorant of the existence of any nuisance.

CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC. purchased the property on which the mine is supposed to be located, one of the partners was on the property three times, the President of MERCED GENERAL CONSTRUCTION, INC. was never on it. Neither was aware of ant nuisance on the property.

10. CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC HAD NO NOTICE

CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. had no notice of the existence of the mine until after the purchase of the two half interests in the property, were complete. The mine was completely inoperative during CAL-SIERRA PROPERTIES ownership and still is under MERCED GENERAL CONSTRUCTION, INC.'s ownership.

CAL-SIERRA PROPERTIES nor MERCED GENERAL CONSTRUCTION should be facing "the great hardship to hold a party responsible for consequences of which he may be liable without notice." A person cannot be liable for a nuisance if he did not receive notice that it is a nuisance. Grigsby v. Clear Lake Water Works Co., supra.

Mr. Bazel argues very ably that his client, MR. LEAL, is not liable for the nuisance

created by his predecessors in interest. Leal brief pages 4-7. CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. adopt his arguments and also make the same argument. The mine is a nuisance of which neither CAL-SIERRA PROPERTIES, or MERCED GENERAL CONSTRUCTION, INC. were notified or aware.

11.. CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC. ARE ENTITLED TO DUE PROCESS OF LAW

The unfairness of charging my clients with a nuisance which should have been evident and corrected over 100 years ago is an obvious denial of due process of law.

People vs. Truckee Lumber, 116 Cal. 397, (1897) has been cited for the proposition pollution of ground water is a nuisance per se. We are told the Wide Awake Mercury Mine has been in operation since 1890. That is 109 years ago. It ceased operation over 30 years ago. Why hasn't the Petitioner acted expeditiously in dealing with the Wide Awake Mine? They have procrastinated to the point they are literally abusing the rule that subsequent owners are liable for damages by their predecessors.

In another similar action, SWRC B/OCC File A-1824 , [Party one] a holding company bought [Party two's] assets out of bankruptcy. [Party one] stored leftover chemicals on the property, burned waste on the property, and sold the property after four month's ownership. The Advocacy Team concluded "there is not sufficient evidence to support naming [Party One] to the Proposed Amended CAO," Advocacy Team Rebuttal Brief, June 6, 2007, page 30.

The only difference in the instant facts and the SWRC B/OCC File A-1824 facts appear clearly to be neither CAL-SIERRA nor MERCED GENERAL stored pollutants or burned them on the mine or the property CAL-SIERRA owned for a short time and MERCED GENERAL

now has owned for a short time.

The exceptions in the Deeds to Respondents except "all oil, gas, minerals and other hydrocarbons etc.," as reserved in the deed from Wells Fargo Bank, N.A. as Trustee of the EMMA G. TREBILCOT TRUST to Goshute Corporation recorded February 28, 1990, Book 649, Official Records, page 109.

This clearly constitutes an "Express Assumption" (actually a retention). Thus, there is no basis for liability to be imposed on MERCED GENERAL or CAL-SIERRA. Advocacy Team Rebuttal Brief, supra, page 43.

MERCED GENERAL and CAL-SIERRA did not carry on any mining activities. There is no successorship liability on the part of either CAL-SIERRA or MERCED GENERAL. Louisiana-Pacific Corporation v. Asarco, 909 F. 2d 1260.

These Respondents should not "take the fall" for an alleged offense they could not have known about and could not have done anything to correct. They owned ½ undivided interests in 57 acres, the mine was closed, they had no rights or interest in the mine, and they never observed any drainage, let alone toxic drainage from the tailings. They did not own any mineral rights. They could not report what they did not know. Vicarious liability can't go this far without violating Due Process considerations.

Many definitions of Due Process describe it in the context of a trial by the ordinary procedures of a court. There is more, however.

My law school Black's Dictionary provides:

> "Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights,

and exclude such is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private right."

"If any question of fact or liability be conclusively presumed against him, this is not due process of law. Ziegler v. Railroad Co., 58 Ala. 599."

The prosecution is asking the Board to find facts and liabilities which will cost millions of dollars. Due process cannot be interpreted to impose such penalties on any person or entity not even aware of the purported violation.

On June 6, 2007 Petitioner Filed an Advocacy Team Rebuttal Brief in SWRCB/OCC File A-1824, which contains the following:

"The Advocacy Team...has been actively investigating sources of discharges at the site since 2002. The Team is well aware of the possibility that others bear some liability for those discharges. The Advocacy Team takes seriously its duty to obtain an expedient investigation and cleanup of the discharges that are the subject of this proceeding...The Advocacy Team has concluded...that pursuit of those other entities using its limited resources at this time would not lead to an expeditious commencement of remediation. The Regional Board is authorized to name all appropriate parties in a CAO action...Though other parties may later be named in this matter at an appropriate time and in an appropriate proceeding, the Advocacy Team has exercised its discretion in an effort to promote an expeditious remediation...The named parties remain fully liable and are required to comply with the CAO requirements regardless of whether others may be named to the CAO at a later date."

This "pick off the strays and stragglers" or "expeditious remediation" approach may be a good policy for infantrymen and hunters, but selective prosecution has no place in an American courtroom or in an administrative hearing.

Not only is this approach condoned by the Water Board, unfair, it smacks at least of prosecuting the "little guys" and letting the "big fish" go their merry ways. It punishes the parties who bought the properties instead of the ones who created the pollution and made the mess. Quoting a mentor who used to keep me on track, "It just ain't right."

"It just ain't right," but it is being done in this case. It can be described as "Get the innocent ones and let the real polluters go." That would, after all, be an easy way out.

On page 30 of the SWRCB/OCC File A-1824, there is a very interesting sentence, "The Advocacy Team did not name Pyrotronics to the CAO because the firm is defunct, and there are no known legally liable successors." I assume this is a matter of policy, but it is relevant here.

CAL-SIERRA PROPERTIES is defunct, but some Respondents in the instant case are not defunct, and I have identified "viable dischargers" to the Petitioner. (I assume "viable dischargers" and "legally liable successors" are one and the same.) The people my clients sold these acres of land to are alive and in business. My clients have asked, "Why Me?" I can't explain it logically. Why aren't my clients eligible for the break Pyrotronics received in the case cited?

12. THE BURDEN OF PROOF SHOULD BE BEYOND A REASONABLE DOUBT AND TO A MORAL CERTAINTY

I assume Petitioner will argue the usual civil burden of proof will apply to this case.

The clean up costs are estimated to exceed a total $10,000,000.00 to be divided among

the "dischargers." This will be tantamount to bankruptcy or loss of everything owned by the "small fry" Respondents, including CAL-SIERRA, MERCED GENERAL CONSTRUCTION, INC., and probably others.

The proof in such a case should be much greater then a preponderance of the evidence. Where so much is at stake, Due Process of Law demands a greater burden of proof, or it is meaningless.

13. PETITIONER HAS VIOLATED RESPONDENT CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC. RIGHTS BY ARBITRARILY SELECTING THEM AS RESPONDENTS

Attachment B is interesting. The names of W.H. Shelback, Andrew A. Gibson, W.H. Martin, G.A. Martin, Mrs. Andrew (Bessie?) A. Gibson, Ruth A. Gibson, F.B. Smith, Homestead Mining Company, Terri King Brown, Leah C. Tate, and probably others, most of whom appear to be "dischargers in fact" as well as "dischargers by operation of law" are conspicuously absent from the list of Respondents.

Petitioner has given no reason why these people and entities are not before the Board.

Brown and Tate are easily identified, and easy to locate, but appear to have been summarily dismissed.

Homestead is an active company.

If Andrew Gibson's interest terminated in 1965 anf Ruth A. Gibson's interest terminated in 1965 and 1977, they or their heirs could have been located and charged.

Where is the evidence of a comprehensive title search, a search of land records, a search of public records, or a search of corporate records? I personally know about U.S. genealogy. I

am more of a plagiarist than a genealogist, but I have ancestral tracings of my ancestors back to the 19th century and earlier. There are many genealogist who could have traced these omitted respondents. Why wasn't this avenue pursued?

I am assuming, of course, that if a "discharger by operation of law," like my clients, can be prosecuted for polluting, the heirs and beneficiaries of deceased dischargers can be prosecuted for the errors of their ancestors. My clients are innocent purchasers of real property. Should the heir who inherited real property be treated any differently?

The inexplicable omission of people and entities who are dischargers in fact is, as to Respondents CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. an egregiously unfair procedure and a clear violation of Due Process of Law. (I discuss Due Process considerations elsewhere in this pleading.)

14. SULPHUR CREEK IS MORE A GULLY THAN A CREEK

A map, Figure H5, in the Advocacy Team Submission, Order No. R8-2005-053 shows the site of Wide Awake Mine. Although the word "creek" is on the map above and below the mine site, Sulphur Creek is not identified or listed on Figure H5. (There are some references in the file to the East Branch of Sulphur Creek. I cannot locate any such creek on any of the maps I have examined.)

Incidentally, Figures H5 and H6 both show Blank Spring uphill from the Wide Awake Mine. No samples are identified as taken near Blank Spring, although the springs in the ares are notorious dischargers of mercury. Wilbur Hot Springs and other springs are above Sulphur Creek.

Figure H6 shows about 19 samples having been collected from the area of the mine. None were taken from the "creek," Blank Spring, or anywhere else near the mine

Maybe there was no reason to take samples from Sulphur Creek because it has been dry. It appears to be what I would call more a "gully," than a creek. My clients argue the 19 or so soil samples Petitioner refers to may relate to an old mine or its tailings, but Petitioner has not tied the samples to pollution of Sulphur Creek or the Cache Creek watershed.

15. SULPHUR CREEK IS NOT CONTAMINATED

Technically, my clients appear to have been accused of discharging a "pile of rocks." Failure to disclose essential elements leads to "sand bagging" at trial. The objectionable matter appears to be mine tailings, or "a pile of rocks." What is the evidence of "discharge"? It is very hard to believe a pile of rocks are being released into, and are contaminating Sulphur Creek, especially since Sulphur Creek itself appears not to be contaminated.

16. THERE IS EVIDENCE WHICH DISPUTES PETITIONER'S ALLEGED CONTAMINATION

On November 6, 1992 Charles W. Whitecomb, a district Geologist for the Bureau of land Management sent a memo to the Manager of the Clear Lake Resource area.

This memo was concerned with, inter alia, the property on which the Wide Awake Mine is located.

Mr. Whitecomb says a couple of things in the memorandum.

First, "The Wide Awake Mine apparently operated from 1896 to 1900." This also relates to the issue of the Statute of Limitations.

Second, " The Wide Awake Mine" was developed by a 470 foot shaft with develop

headings on the 190, 290, 390, levels. Apparently little ore was mined and treated from this mine. (emphasis added)

Third, "the danger of there being large amounts of hazardous mercury at this site is probably minor. The waste rock from the mine and furnace on the dump would contain little or no mercury. There might be some mercury found in and around where the mercury was removed from the retorts. It would be necessary to determine where these areas are and take soil samples to determine if there is any mercury contamination of the ground."

17. RESPONDENTS MERCED GENERAL CONSTRUCTION, INC. AND CAL-SIERRA PROPERTIES HAVE NO RESPONSIBILITY FOR ANY OF THE ALLEGED MERCURY RUN OFF

Neither CAL-SIERRA PROPERTIES, nor MERCED GENERAL CONSTRUCTION, INC. have ever owned the mineral rights for, or the mercury on, any of the properties in question.

Attached hereto and marked Exhibit E, and incorporated herein, is a copy of a Grant Deed to Respondent MERCED GENERAL CONSTRUCTION, INC., which was recorded June 7, 2005. It contains exception of mineral rights in the following language:

> EXCEPTING THEREFROM all oil, gas minerals and other hydrocarbons, etc., as reserved in DEED from Wells Fargo Bank, N.A., as Trustee of the Emma G. Trebilcot Trust to Goshute Corporation, Recorded February 29, 1990, Book 649 official Records, page 109. (emphasis added)

The ROBERT LEAL deed, by which CAL-SIERRA PROPERTIES became the owner of the land on which the WIDE AWAKE MINE is supposed to be located, was executed on October 02, 1995. A copy of the deed from ROBERT LEAL is attached, marked Exhibit F and

incorporated herein.

The GRANT MILLS, INC. deed, by which MERCED GENERAL became the owner of the same land, which was executed October 02, 1995 and recorded October 16, 1995, contains the following language:

> EXCEPTING therefrom all oil, gas minerals and other hydrocarbons, etc., as reserved in deed from Wells Fargo Bank, N.A., as trustee of the Emma G. Trebilcot Trust to Goshute Corporation, recorded February 28, 1990, Book 649 Official Records, page 109. (emphasis added)

Mercury, known since ancient times, is a heavy, silvery, metallic mineral. See Mineral Information Institute at Mercury@www.mii.org.

To own is to have power over. Webster's Ninth New Collegiate Dictionary, page 843.

A "reservation" has been described as:

> **reservation** n. a provision in a deed which keeps (reserves) to the grantor some right or portion of the property. The language might read: "Sarah Sims reserves to herself an easement of access to lots 6,7 and 8," or "reserves mineral rights," or "except she reserves lot 5." Free Online Law Dictionary, Reservation Synonyms, at http://legaldictionary.thefreedictionary.com/reservation (emphasis added).

U.S. Legal provides another definition:

> Exception Clause- This clause in a deed where exceptions to title conveyed may be listed. Example, "Less and Except a prior reservation of all oil gas and mineral rights in the property conveyed."http://definitions.uslegal.com/c/contract-for-deed/ (emphasis added)

The Free Dictionary provides and then defines:

> Mineral right is a term encompassing all the ways a person can have a possessory interest in minerals in the ground. It includes the right to enter the land and occupy it in order to remove the minerals. Mineral rights can be retained when land is sold or conveyed, thus making it possible for someone to own the right to mine minerals without owning the land. A right of entry onto the land can be held by the grantor who retains the mineral rights, or other arrangements can be made to gain access to the mineral. Mineral rights can be leased or sold. A landowner who leases mineral rights often receives a royalty, or a percentage of the value of the minerals which are mined by the leaseholder.
> Http://legaldictionary.thefreedictionary.com/Mineral+Right

There is no contrary evidence. The two deeds both reserved the rights to the mercury in and about the real property on which the Wide Awake Mine is or was supposed to be located..

ROBERT LEAL, not CAL-SIERRA PROPERTIES, owned and had the power over the rights to the mercury described by the Water Board. Neither did MERCED GENERAL acquire or have such power or rights.

CAL-SIERRA PROPERTIES cannot be found liable for the mercury contamination alleged.

MERCED GENERAL CONSTRUCTION, INC. cannot be found liable for the mercury contamination alleged.

18. THE ACTION AGAINST RESPONDENTS IS BARRED BY THE STATUTE OF LIMITATION

The Statute of Limitations is 3 years. Code of Civil Procedure Section 338. Petitioner should have filed its petition within 3 years of learning of the possibility of contamination. The rule is if the injury (nuisance or trespass) is permanent, as in the instant case, the statute runs

after three years. Mangini v. Aerojet-General Corporation (1996) 12 Cal 4th 1087; Steven McNichols, Revisiting Mangini II: Should the Burden of Proof in Contamination Nuisance Cases Be Re-examined. California CEB online.

Obviously, the Petitioner had knowledge of the nuisance complained of for over 3 years before this action.

To comply with the statute of limitations under CC§338, the Petitioner must file a complaint within 3 years of learning of the contamination, McNichols, supra, page 7, Section 338 California Code of Civil Procedure.

The action, as to both Respondents I represent, should be dismissed for not meeting statutory requirements, if nothing else.

The Petitioner has not shown anywhere that the default in this case is abatable at a reasonable cost and that the default was temporary. This is a pleading default under the Mangini case. The action is, thus, dismissible for this reason as well.

19. THE DOCTRINE OF ESTOPPEL BY LACHES PROTECTS BOTH CAL-SIERRA PROPERTIES AND MERCED GENERAL CONSTRUCTION, INC.

One hundred years is a very long time to allow an enjoinable, perhaps criminal, act to go on and on. This is a classic example of laches.

Turning to Black's Law Dictionary, we find estoppel is;

> A failure to do something which should be done or to claim or enforce a right at a proper time. Hutchinson v. Kenney, C.C.A.N.C., 27 F.2d 254,256, a neglect to do something which one should do, or to seek to enforce a right at a proper time. Jett vs. Jett, 171 Ky. 548,188 S.W. 669, 672. and an element of the doctrine is that the defendant's alleged change of position for the worse must have been induced by or the resulted from the conduct, misrepresentation, or silence of the

> plaintiff. Croyle v. Croyle, 184 Md. 126, 40 A.2d 374,379. Delay in enforcement of rights until condition of other party has become so changed that he cannot be restored to his former state. Wisdom's Adm'r v. Sims, 284 Ky. 258,144 S.W.2d 232, 235, 236; Oak Lawn Cemetery of Baltimore County v. Baltimore County Com'rs, 174 Md. 356, 198 A. 600, 605, 115 A.L.R. 1478. Essence of 'laches' is estoppel. Burke v. Gunter, 128 N.J. Eq. 565, 17 A.2d 481, 487. Laches is a species of estoppel. Bankers' Trust Co. v. Rood, 211 Iowa 289, 233 N.W. 794, 802, 73 A.L.R. 1421; Stewart v. Pelt, 198 Ark. 776, 131, S.W.2d 644, 648. To create 'estoppel by laches' party sought to be estopped must with knowledge of transaction have done something to mislead other party to his prejudice. Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 235, 236, 284 Ky. 258."

It is extremely difficult for me to believe the Petitioner can ignore a problem, pollution or otherwise, then many years later, impose vicarious liability on a successor in interest, a "discharger by operation of law" who was unaware of the problem.

If the Respondents had known what the Petitioner alleges, they could have changed their positions.

Petitioner is estopped by laches from pursing this onerous case against Respondents CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC.

20. WHY IS A SUPERFUND APPLICATION NOT A BETTER ALTERNATIVE?

> The Superfund is the common name for the Comprehensive Environmental Response, Compensation, and Liabilities Act (CERCA), a United States federal law designated to clean up abandoned hazardous waste sites. Superfund provides broad federal authority to clean up releases or threatened releases of hazardous sustances that may endanger public health or the environment. The law authorized the Environmental Protection Agency (EPA) to identify parties responsible for contamination of sites and compel the parties to clean up the sites. Where responsible parties cannot be

> found, the Agency is authorized to clean up sites itself, using a special trust fund. SUPERFUND-Wikipedia, the free encyclopedia, http://en.wikipedia.org/wiki/superfund, page 5 (emphasis added).

It is obvious all or most of the Coast Range is contaminated with mercury. The Superfund should be available to de-contaminate the mercury pollution in the entire Pacific Coast Range in California. The within action is narrow in its scope. There are dozens or hundreds of larger areas of probable mercury contamination through the mountains which run nearly half the length of our state.

There is no evidence presented by the Petitioner that a Superfund application has been tried.

The Iron Mountain cleanup is a good, and comparable, example of a Superfund cleanup. It is in California. It involved several state and federal agencies (the "cleanup partners" included the Bureau of Land Management, Bureau of Reclamation, the National OCeanic and Atmospheric Administration (NOAA), U. S. Fish and Wildlife Service, U.S. Geological Survey, Petitioner in the within action, California Department of Fish and Game, California Department of State Lands, California Department of Toxic Substances Control, Cal Trout, and Environmental Protection Agency).

(This list prompts a question. The California Fish and Game Department has biologists who autopsy animals. Has a Fish and Game Biologist ever autopsies a deer from the area around the Wide Awake Mine and its surroundings and ascertained it died of mercury poison? The author, a former Reserve Game Warden, prosecutor, and one who has personally discussed their work with Fish and Game Biologists in connection with criminal prosecutions and for general

information.)

This information was located at Digital Iron Mountain Case Study, www.ironmountain.com/dataproduction and abandoned Mine Lands Care Study (2006), www.ironmountain.com/resources/pcproducts/case_study-angesPDF (The vast literature is at www.ironmountain.com.)

The Iron Mountain Mine, in Shasta County polluted the Sacramento River and tributaries. It provided acid mine drainage, copper, cadmium, and zinc. As a result of Superfund, at least, 95% of the historic quantities of pollutants no longer enter the Sacramento River or the City of Redding's drinking water.

All the reasons above and reasons referred to by other Respondents, the application to hold Respondents CAL-SIERRA PROPERTIES and MERCED GENERAL CONSTRUCTION, INC. liable for mercury contamination of Sulphur Creek should be denied.

Respectfully submitted, September 11, 2009.

G. DAVE TEJA, Attorney for Respondents
CAL-SIERRA PROPERTIES and MERCED
GENERAL CONSTRUCTION, INC.