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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

LEEON HILLMAN; CRAIG TUCKER; DAVID BITTS; KARUK TRIBE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE RIVER; KLAMATH RIVERKEEPER; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; and DOES 1-100,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FISH AND GAME and DONALD KOCH, DIRECTOR, CALIFORNIA DEPARTMENT OF FISH AND GAME, and DOES 1-100, inclusive,

Defendants.

Case No. RG09 434444

THE MINERS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE MATERIALS CITED IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing:
Date: June 9, 2009
Time: 11:00 a.m.
Judge: Hon. Frank Roesch
Dept:: 31

Trial Date: None Set
Action Filed: February 5, 2009

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STATUTES

Summary of Argument

Plaintiffs' case for an injunction is founded on a single declaration of its own counsel, with numerous attachments. Most constitute out-of-court, unsworn statements advanced for the asserted truth of the statements within them. They are to be excluded as hearsay. A few fail on other grounds discussed in Point III.

The Declarations of Neil Manji and Banky Curtis fail on other grounds: they are so conclusory as to have no relevance to the question of whether suction dredging operations operating under 2009 permits are causing actual harm to fish. They are also to be excluded on the ground that they represent a bad-faith reversal of position in contradiction to the prior sworn statement of Mr. Manji and all official acts of the Department.

Argument

I. THE RULE AGAINST HEARSAY BARS MOST OF PLAINTIFFS' EXHIBITS

Section 527 of the Code of Civil Procedure does permit the Court to rely sworn statements in the form of affidavits or declarations in resolving plaintiffs' motion for preliminary injunction, but it remains plaintiffs' burden "to show, by evidence which would be admissible in open court," the facts in support of their motion. *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21. And to the extent that the Saxton Declaration contains hearsay or inadmissible opinion evidence, it is inadmissible. *Id.* at 22. In particular, "[i]t is well established that where materials are properly incorporated by reference into an affidavit, they must conform to the rules of evidence". *Dugar v. Happy Tiger Records, Inc.* (1974) 41 Cal. App.3d 811, 815.

Most of plaintiffs' exhibits consist of hearsay: "a statement made by a witness that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated". Evidence Code § 1200(a). The evidence is to be barred unless specifically authorized by law. *Id.* § 1200(b). The following exhibits incorporated into Ms. Saxton's declaration fall within the scope of the hearsay rule.

Exhibit C: A letter from the State Water Resources Control Board;

Exhibit F: A letter from a U.S. Fish and Wildlife Service employee;

Exhibit G: An e-mail from a California Department of Conservation employee;

Exhibit H: An e-mail and letter from a U.S. Geological Survey employee;

Exhibit I: A letter from a U.S. Forest Service employee;

Exhibit J: An e-mail from a U.S. Forest Service employee;

Exhibit L: An anti-mining article written by plaintiff Sierra Fund;

Exhibit O: An AP news article and public comment thereon; and

Exhibit S: An e-mail from a Department of Fish and Game representative.

Other exhibits also constitute hearsay, but items such as the number of suction dredge permits issued (Exhibits M and T), or the list of listed species in California (Exhibit R) constitute business records.

To the extent the court were to admit any of the hearsay evidence the Miners are moving to strike, the Miners are entitled to subpoena and cross examine the declarants. Evidence Code § 1203(a) ("The declarant of a statement that is admitted as hearsay may be called and examined by any adverse party as if under cross-examination concerning the statement). The Miners assume that the Court will strike the hearsay statements of non-parties, but if not, the Miners assert the right to cross-examine the declarants pursuant to § 1203(a).

A. Judicial Notice Cannot Save the Exhibits

The most obvious reason that the Court cannot take judicial notice is that plaintiffs have not, as required by Rule 3.1113(l), made a specific request for judicial notice, much less one in a "separate document listing the specific items for which notice is requested".

And even such a request for judicial notice were filed on the basis that some of these documents are apparently drawn from the files of the Department of Fish and Game, it is well-settled that judicial notice may not be taken of materials in the files that are not themselves official acts of the agency. *Stevens v. Superior Court* (1999), 75 Cal. App.4th 596, 607-08 (declining to take judicial notice of materials in Department of Insurance files submitted by insurers).

Moreover, judicial notice of government documents extends only to the official acts themselves, and not "`the truth of all matters stated therein'". *Mangini v. R.J. Reynolds Tobacco Co.* (1994), 7 Cal.4th 1057, 1063 (*quoting Love v. Wolf* (1964), 226 Cal. App.2d 378, 403), *overruled on other grounds, In re Tobacco Cases II* (2007), 41 Cal.4th 1257; *see also In re Tanya F.* (1980) 111 Cal. App.3d 436, 440 ("a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file"); *People v. Long* (1970), 7 Cal. App.3d 586, 591 ("While the courts take judicial notice of public records, they do not take notice of the truth of matters stated therein").

In considering the admissibility of certain factual statements contained in reports of the California Debris Commission, the Court of Appeals noted:

> "These reports are based on studies made by engineers with opinions and the conclusions drawn from these studies. But engineers are not infallible, nor are all statements contained in the reports, even though stated as facts, irrefutable . . . To assert the immutableness of statements in official documents would constitute abdication by the courts in favor of adjudication by engineering fiat." *Beckley v. Reclamation Board* (1962) 205 Cal. App.2d 734, 742.

Plaintiffs would have this Court abdicate its role as trier of fact in favor of "adjudication by biologist fiat". It is precisely such abdication that this Court resisted in Case No. RG05 211597, understanding that the Miners were and are entitled to an opportunity to disprove asserted contentions of fact vital to their continued operations.

II. THE ONLY SWORN STATEMENTS, THOSE OF MESSRS. MANJI AND CURTIS, SHOULD BE STRICKEN FROM THE RECORD AS WELL.

A. The Manji and Curtis Declarations Are Too Conclusory To Support an Injunction.

The cornerstone of plaintiffs' case for an injunction is two declarations previously submitted as Exhibits to a Case Status Report filed in Case No. RG05 211597: the Declaration of Neil Manji in Support of Defendants' Case Management Statement and the Declaration of Banky E. Curtis in Support of Defendants' Case Management Statement. Both Declarations

offers little more than a conclusion of fact and a conclusion of law:

> "The Department believes suction dredge mining under the existing regulations in the Klamath, Scott and Salmon River watersheds is resulting in deleterious impacts on coho salmon . . . Because of this, the Department also believes its current suction dredge permitting program is not in compliance with California Fish and Game Code § 5653, subdivision (b), and section 5653.9." (Curtis Decl. ¶ 4.)

As the Court of Appeals has emphasized, "[w]hile [an] injunction may rest upon either a verified complaint or affidavits, the law is settled that the allegations of either must be factual; conclusory averments in either are insufficient to support issuance of an injunction." *Finnie v. Town of Tiburon* (1988) 199 Cal. App.3d 1, 14-15. Mr. Curtis' Declaration manifestly runs afoul of this rule: in substance it is testimony as to a conclusion of law and is inadmissible. *See Summers v. A.L. Gilbert Co.* (1999) 69 Cal. App.4th 1155, 1178-79.

So is Mr. Manji's Declaration. While he purports to "provide additional detail to the court regarding the Department's opinion," *careful scrutiny of his Declaration reveals no facts whatsoever concerning "suction dredge mining under the existing regulations"*. Put another way, Mr. Manji's declaration does not refute the simple truth that there is no evidence that any suction dredge mining in California operating in compliance with extant regulations has ever injured or killed a single fish.

There are at least three additional grounds for exclusion of these Declarations, including: (1) the peculiar change in Mr. Manji's testimony from asserting "potential" for effects to asserting the existence of adverse effects; (2) his apparent reliance on data withheld from the Miners; (3) his lack of pertinent experience or expertise; (4) his rank speculation and misuse of pure theory untethered to the reality of suction dredge mining under extant regulations; and (5) his failure to account for or address additional regulatory restrictions governing suction dredge mining. Ultimately, he is neither a percipient nor an expert witness, and not competent to testify in this action.

1. Self-serving declarations contradicting a witness' own prior testimony should be stricken.

As of January 2006, Mr. Manji testified:

> ". . . the existing regulations governing suction dredging . . . serve to permit suction dredging activities while, at the same time, providing protection for spawning adult salmonids, including chinook salmon, and the developing eggs and larvae of such species, which remain in the gravel following spawning. The existing regulations provide this protection by establishing watercourse-specific closures and seasonal restrictions on suction dredging activities." (RJN7 (Manji Decl. ¶ 3).)

He explained that any additional restrictions were designed to substantially *lessen the potential* for significant impacts on various fish species that suction dredging *could* cause in the Klamath, Scott, and Salmon River watersheds". (RJN7 (Manji Decl. ¶ 5; emphasis added).)

But in October, he changed his testimony to declare that the dredging "is having deleterious effects" (*Id.* ¶ 8.) It is settled law that "[w]here a party's self-serving declarations . . . purport to impeach that party's own prior sworn testimony, they should be disregarded". *See Archdale v. American Int'l Specialty Lines Co.* (2007) 154 Cal. App.4th 449, 473. Unless Mr. Manji can provide evidence of additional data received between January and October, his Declaration should be stricken on this ground alone. Insofar as Mr. Curtis relies upon Mr. Manji his Declaration falls as well.

2. Testimony cannot be based on secret data.

Up until Case No. RG05 2114597 was filed, it was evident that the Department had no data whatsoever to support any changes to existing suction dredge mining regulations. This is confirmed in a letter of February 24, 2005, from Regional Manager (and now Director) Donald Koch, who specifically advised federal agency proponents of more restrictive regulations that: "Any changes to the suction dredging regulations will have to be supported by data that clearly confirm that the current regulations result in negative impacts to fish, and that the changes would decrease those impacts." (RJN4 (2d McCracken Decl. Ex. 4).) A review of the federal agency records appears to confirm that no such data were ever provided. (*See* RJN3 (Maria Decl. ¶ 15).)

When the Miners learned that the Department and Tribe had entered into their secret deal in Case No. RG05 211597 to restrict mining, they issued Public Records Act requests on

December 23, 2005, to which the Department responded on January 3, 2006 indicating that all records were exempt from production under Government Code § 6254(b) as "records pertaining to pending litigation"—only certain historical materials were produced. (*See generally* RJN4 (2d McCracken Decl.)) Thereafter, the Miners sought the data through discovery, but the Tribe and Department, moved for a protective order against any and all discovery. In rejecting the stipulated judgment, the Court agreed with the Tribe and Department that the discovery we had sought was not pertinent to the question whether to accept the stipulated judgment, and granted their motions "without prejudice" to further discovery, if necessary, on future issues. (Order, June16, 2006, at 8.) They have refused to produce it ever since, despite repeated requests in the wake of the settlement of RG05 211597. (*See* Buchal Decl. ¶¶ 2-4.)

Ultimately, this Court asked the Miners to identify "the type and forms of discovery [we] expect to need" (RJN11 (Order, September 8, 2006)), making it clear to the Tribe and Department that they would ultimately be required to come forward with some affirmative evidence of harm and that an evidentiary hearing would have to be held before entry of any injunction, and that the Department and Tribe would be required to come forward with evidence of harm.

The requirement that a motion for preliminary injunction be supported by specific, factual averments cannot be met by shifting testimony based on secret facts that a party in litigation continuously refuses to disclose. To consider Mr. Manji's testimony in the circumstances of this case is so fundamentally unfair as to deny the Miners due process of law.

3. Mr. Manji is not qualified as an expert, and is not a percipient witness.

Pursuant to Evidence Code § 720, an expert needs "special knowledge, skill, experience, training or education sufficient to qualify him as an expert *on the subject to which his testimony relates*". There is no evidence that Mr. Manji has ever gone underwater to watch a suction

dredge in operation, which may account for his peculiar opinions.

Mr. Manji reports that his work as a fisheries biologist "focused on the Klamath River specifically from 1984 to 1986" (Manji Decl. ¶ 4)—a period of time that preceded the existing regulations. Thereafter, he apparently served as Fisheries Program Manager for the "eight counties that comprise the Department's Northern California—North Coast Regional Office" and "oversaw all fisheries programs in the Region". (*Id.*) He reports no involvement in any research specifically connected with suction dredge mining and no specific observations of suction dredge mining; ultimately, no facts support the notion that his "professional experience as a fisheries biologist" qualifies him to render any opinions about suction dredge mining at all.

In evaluating whether Mr. Manji qualifies as an expert, it is important for the Court to understand that the Department does (or at least did) employ persons with considerable expertise and direct observations of suction dredge mining. For example, Mr. Dennis Maria, formerly employed full time by the Department "as the watershed biologist assigned to the portion of the Klamath River watershed extending upstream from the confluence of the Trinity River to the Oregon Border"—the precise area of concern to the Tribe and the focus of this Court's Order and Consent Judgment in Case No. RG05 211597—has testified, unlike Mr. Manji, to having "spent a lot of time observing dredging operations on the Scott, Salmon and Klamath Rivers". (RJN3 (Maria Decl. ¶ 4).) "This included underwater observations of suction dredging operations in order to determine the effects of suction dredging on fish, benthic organisms and other species". (*Id.*) He describes detailed inspections of suction dredging operation (*Id.* ¶ 11); one such report concluded: "I saw nothing that would be considered a violation or that would have a significant impact to the fishery or significantly negatively impact the overall biotic community of the salmon River"(RJN13, at 3).

Mr. Maria, having worked on most heavily mined river reaches in California (31 years with the Department, and 24 years on the Klamath (*see* RJN3 (Maria Decl. ¶¶ 2-3)), concluded:

> "In all my years of experience, I have never seen evidence of a single fish killed by suction dredge mining, even juvenile fish, because the Department has restricted such activity in the only period when mining is likely to cause actual injury by digging into fish redds or areas where alevins (sac-fry) would be present. To the extent that otherwise lawful activities are to be restricted because of potential impacts to fish, a very great number of activities, including boating on the Klamath River, swimming in the Klamath River, any disturbance of earth near the Klamath River, and fishing while wading in the Klamath River could all be restricted with equal biological justification."

(RJN8: 2d Maria Decl. ¶ 6.) By contrast, the opinions of a non-expert bureaucrat should be stricken from the record.

4. Mr. Manji's citation to secondary literature cannot save his Declaration.

Mr. Manji helpfully lists the "existing scientific literature" on which he relies in Exhibit A to his declaration, which is meaningless as hearsay proffered by a non-expert. *Not one example of this literature even purports to be a scientific study of the effects of suction dredge mining in the Klamath, Scott or Salmon Rivers under the existing regulations.* Mr. Manji's testimony begins with a purely theoretical overview in which:

- He alludes to "poor mining practices," without regard to the lawfulness of such practices (¶ 9);
- He alludes to "localized and temporary sediment loads"—akin to what anyone walking in a river might cause (*e.g.*, Saxton Decl. Ex. B)—without reference to any harm to fish therefrom (*id.*);
- He points out positive and negative impacts of making the loosened gravel attractive to fish, without any attempt to identify a *net* effect (*id*.)
- He alludes to "temporary and localized declines in invertebrate populations", again without reference any effects on fish (*id.)*

Mr. Manji asserts that there is data concerning when fish are present in the Klamath River, and claims that "suction dredge mining is currently authorized under the existing regulations during times of the year when coho are migrating and spawning, as well as when

coho eggs and larvae are developing". (¶ 10.) But his testimony is entirely general as to the presence of coho—somewhere in the river—while the regulations are highly specific, and limit dredging river reach by river reach based on the Department's 1994 conclusions about the presence of coho and other fish.

Thus while Mr. Manji cites the specific regulations and open dates for mining in several river reaches, he nowhere presents data demonstrating that fish are affected *in those reaches during those times.* By contrast, the percipient Departmental biologist actually on the scene for years confirms, for example, that there is no evidence of "fish spawning in the Klamath River between September 15th and September 30th that would provide a biological basis for curtailing the dredging season to exclude that time period". (RFN8 (2d Maria Decl. ¶ 2).)

Mr. Manji next turns to issues "regarding the use of dredge tailings as spawning substrate". (¶ 12) Here he points out that the fish, because they prefer loose gravel, may spawn on the loose gravel left behind by miners, and notes that such loose gravel is often scoured out by high flows. But Mr. Manji offers no data whatsoever to show that so much as a single salmon redd has ever been scoured out in this fashion. More importantly, the 1994 EIR properly recognized that "suction dredges can actually improve spawning riffles by loosening and clearing spawning gravels or increasing available spawning gravels". (RJN3 (Attachment to Maria Decl., at 5).) To entertain an opinion on the issue that does not balance the positive effects of improving salmon habitat with the negative risks is akin to accepting the response to an incomplete hypothetical question. Indeed, since the salmon evolved to spawn in, and manifestly prefer, looser gravel inherently more likely to be moved by river flows, their risk assessment in choosing nests is of some merit to consider, but Mr. Manji does not even address the issue. He offers pure speculation, not facts, to support his opinion.

Mr. Manji next articulates concern about "fine sediments suspended from suction dredging" (¶ 14), with the implicit notion that a miner may someday bury a salmon nest in mud and suffocate the eggs. Again, there are no facts to indicate that such an event has ever occurred.

Worse still, Mr. Manji misuses the studies he does cite. One leading study he cites, Harvey (1986), declared that "local turbidity increases below active dredging probably did not affect invertebrates and fish". (*Quoted in* RJN2 (Greene Decl. ¶ 35).) His concerns about "entrainment" into suction dredges is also fanciful; asserting that miners might someday suck a baby fish into a dredge and thereby kill it, is a far cry from possessing facts that show that this has ever occurred.

Mr. Manji next articulates concern about "oversummering habitat". (¶ 16.) He speculates that dredge tailings can alter habitat depth by filling in pools (¶ 17), without mentioning that new pools are created. He later returns to the subject and claims (again without supporting facts), that the net effect is negative. (¶ 18) By contrast, Mr. Maria, the percipient witness, testified that the holes and rock piles left by suction dredgers constitutes some of the *only available oversummering habitat* in some reaches of the relevant rivers. (RJN8 (Maria Decl. ¶ 12); *see also* RJN4 (2d McCracken Decl. Ex. 5, at 1)) Mr. Manji refers to changes in streambed morphology (¶ 17) without mentioning that the relevant rivers are highly dynamic and constantly changing, without providing a single example of any adverse effect whatsoever. Ultimately, Mr. Manji's synthesis of hearsay is not tethered to any actual observations of California suction dredge miners operating under California regulations.

Mr. Manji notes that the dredging often "releases prey items for immediate consumption" by coho, a presumptively positive effect, but then darkly warns that "in the longer term, dredging causes localized drecreases in macroinvertebrate populations". (¶ 17) He is now contradicting himself (¶ 9 ("*temporary* and localized declines in invertebrate populations"; emphasis added)) *and* the literature, which correctly notes no permanent impacts whatsoever. More importantly, knowing that miners help feed the fish, against some uncertain and temporary loss of invertebrates in the tiny holes they dig, does not constitute proof of any adverse impact—but merely proof of another benefit.

Mr. Manji ultimately retreats to the notion that there are "thermal refugia" in the Klamath, Shasta, Scott and Salmon River where salmon congregate in cooler water. (¶ 18) His apparent reasoning is fish will flee to warmer water whenever a suction dredge is present in their environment. Again, this is what comes of having a non-percipient witness testify. The Department's 1994 EIR found: "*All observers would agree* that fish do congregate near the effluent of suction dredges to prey on the invertebrates pulled from the substrate." (RJN3 (Attachment to Maria Decl. at 5; emphasis added).) Moreover, actual measurements of the alleged thermal refugia reveal that they are "small in size when not altogether absent". (RJN5 (2d Greene Decl. ¶ 6).) Indeed, the Department's percipient witness testified that "the lower reaches of the Scott and Salmon Rivers are generally too warm in summertime to provide habitat for juvenile coho in particular and to a large extent most other salmonid species . . .". (RJN8 (2d Maria Decl. ¶ 2).)

Perhaps most significantly, essentially all of Mr. Manji's conclusory and general observations about potential adverse impacts of suction dredge mining are precisely the sort of general concerns reviewed in the 1994 EIR (*see generally* RJN3 (Attachment to Maria Decl.), and crystallized into regulations at that time. No specific, factual allegations have emerged to revisit the conclusions of that process.

Ultimately, Mr. Manji's declaration is properly understood as akin to earlier declarations presented by the Tribe: "data-free submissions that cannot support a regulation change at this time". (RJN3 (Maria Decl. ¶ 14).) It is neither expert testimony nor "[r]ationally based on the perception of the witness" within the meaning of Evidence Code § 800. It does not have the factual support necessary to constitute admissible evidence, much less support entry of an injunction.

5. Mr. Manji's testimony ignores entirely substantial, additional federal restrictions.

The Miners have conducted extensive negotiations with the Karuk Tribe and reached

agreement on a voluntary set of restrictions then incorporated into Forest Service documents. (*See generally* RJN1 (McCracken Decl. ¶¶ 11-48).) Miners have been refused permission to mine by federal land managers (more precisely, told that substantial additional environmental compliance will be required), in other areas, such as the lower Salmon River. (*Id.* ¶ 41-42.) Even if Mr. Manji were qualified as an expert—and he is not—an expert opinion that fails to consider an entire body of regulation operating to eliminate adverse effects is simply not admissible testimony. His testimony is objectionable for the same reason an incomplete hypothetical is objectionable: the conclusion bears no relationship to real world conditions.

B. Judicial Notice Cannot Save These Declarations.

Nor can the Court take judicial notice of the Declarations of Neil Manji and Banky Curtis, as it is settled law that purportedly factual declarations by agency officials do not constitute "official acts" within the meaning of Evidence Code § 452(c). Thus in *Childs v. State of California* (1983) 144 Cal. App.3d 155, confronted with a factual issue concerning when an agency had mailed a letter, the Court declined to take judicial notice of a declaration "which describes the mailing practices of the State Board of Control". *Id.* at 162. As the Court explained,

> ". . . the declaration here at issue is not an 'official act'; rather, it is merely an individual's description of the general mailing practice of a government agency, a practice which has not been established as governed by specific agency rules. . . In our view, by no permissible expansion of the scope of section 452, subdivision (c) can the declaration be considered an 'official act'. *Id.* at 162.

Here plaintiff proffers declarations that stand at odds with "specific agency rules"—those setting the current dredging seasons. The declarations are not the "official acts" of the Department; the Department's decisions to issue permits are.

III. ADDITIONAL MATERIAL PROPERLY TO BE STRICKEN

A. Plaintiffs' Photograph Is Not Properly Authenticated.

Exhibit B, a photograph, is not properly authenticated, as Ms. Saxton did not take it, and cannot be admitted. It is also not a fair and accurate representation of the subject photographed.

B. Plaintiffs' SMARA Materials Are Irrelevant.

Plaintiffs have lodged a list of sand and gravel mining operations regulated under the Surface Mining and Reclamation Act of 1975, Public Resources Code § 2710 *et seq.*, in the Court, in the form of an e-mail from a state employee. (Saxton Decl. Ex. G.) This list manifestly has nothing to do with suction dredge mining, for as the Exhibit itself suggests (at 2), the tiny holes that miners dig *by hand* are far, far below what SMARA deems significant enough to be subject to regulation: "the removal of overburden or mineral product totals less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre". *See* Public Resources Code § 2714(d).

While the Exhibit is not properly considered as evidence, it does highlight the importance of considering the statutes concerning suction dredge mining in the context of all of the California statutes, which include not merely SMARA, but also the Department's general permitting authority for in-river operations under § 1602 of the Fish and Game Code and other statutes.

C. Portions of Plaintiffs' Memorandum fall with the Exhibits.

As the Exhibits fall, so too should the following portions of plaintiffs' memorandum that cite or otherwise rely on them fall as well:

Page 4, line 24 through page 6, line 8;

Page 6, line 11 through page 7, line 10;

Page 8, lines 6-7;

Page 10, lines 19-21 & 26-28;

Page 11, line 7;

Page 12, lines 19-21;

Page 14, lines 21-22; and

Page 15, lines 5-15 & 18-19.

Some of the purportedly factual statements in these sections are also not supported by any citation of authority and should be disregarded for that reason alone.

Conclusion

For the foregoing reasons, the Miners' motion to strike should be granted.

Dated: May 18, 2009.

By: _____
James L. Buchal
Attorney for Intervenors
THE NEW 49'ERS, INC., a California corporation, and RAYMOND W. KOONS, an individual

PROOF OF SERVICE

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal, LLP and my business address is 2000 SW First, Suite 420, Portland, Oregon 97201.

On May 18, 2009, I caused the following document to be served:

THE MINERS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE MATERIALS CITED IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

in the following manner:

(X) (BY FEDERAL EXPRESS)

( ) (BY FIRST CLASS US MAIL)

( ) (BY FAX)

(X) (BY E-MAIL)

See attached service list

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this Declaration was executed at Portland, Oregon on May 18, 2009.

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