

**PROPOSAL TO PROVIDE
LEGAL SERVICES FOR THE BENICIA ARSENAL
INVESTIGATION AND CLEANUP PROJECT**

PRESENTED TO



City of Benicia

NOVEMBER 4, 2010



BEST BEST & KRIEGER
ATTORNEYS AT LAW

1. INTRODUCTION

Best Best & Krieger LLP (“BB&K”) is a full-service public agency law firm with nearly 200 attorneys in eight offices across the State, delivering effective, timely and service-oriented solutions to complex legal issues facing public agencies. We are pleased to present this proposal to provide legal services to the City of Benicia (“City”) in connection with the Benicia Arsenal Investigation and Cleanup Project .

BB&K understands the scope of services included in the Request for Qualifications, is well equipped to advise and represent the City, and will comply with the City’s conditions. Our knowledge and familiarity with toxics cleanup and litigation for public agencies allows us to provide focused and cost-effective legal services.

BB&K proposes the legal team of **Gene Tanaka, Sam Emerson and Melanie Donnelly**. As further detailed below, the proposed attorneys have the experience and expertise necessary to assist the City with its legal issues since they all have significant involvement in municipal litigation.

BB&K is enthusiastic about the possibility of being selected as legal counsel to the City. We encourage you to contact our references listed in Section 7 below. We also welcome the opportunity to meet in person to discuss our capabilities and readiness to provide legal services.

2. APPROACH

The objective is to get the US Army Corps of Engineers (“Army Corps”) to perform a CERCLA quality investigation and cleanup of the Benicia Arsenal (“Arsenal”) at its expense, with minimal expense to the City. The challenge is to persuade the Army Corps to perform this work and/or obtain the assistance of the California Department of Toxics Substance Control (“DTSC”) to force compliance by the Army Corps. Since litigation is undesirable and a negotiated outcome is preferable, the tone set by counsel for the City is important. We would strive for a cooperative approach and only ratchet up the pressure as needed. This Section will discuss: (a) negotiated agreement; (b) DTSC proceedings; (c) litigation; and (d) other revenue sources.

A. Negotiated Agreement

Although a negotiated agreement is best for all parties, the Army Corps appears to be stonewalling the process. From our review of the documents, the Army Corps is by far the most liable party. Measured by CERCLA criteria, it generated most, if not all, of the waste that must be cleaned up, and it was an owner of the Arsenal for over 100 years. Despite its efforts to argue "beneficial reuse," there did not appear to be much information to support this defense. On the other hand, the other parties who were invited to the recent meeting by the DTSC, Rita A. Gonsalves Trust, Benicia Industries, Inc., Valero Refining Company and Arsenal Park Limited Partnership (collectively, “Other PRPs”), do share limited liability as present property owners, and in the case of the City, may have liability for its storm drain system.

Therefore, the first step will be to talk with the City, DTSC and Other PRPs to understand the parties and their issues and to see whether there are opportunities to negotiate a solution with the Army Corps. At the same time, it will be just as important for us to understand the facts and legal issues. An informed position will be more persuasive and better protect the City. To aid the discussions, we suggest a Joint Defense Agreement among the City and Other PRPs to help present

a united front and increase our leverage. Under a typical agreement, the parties agree that: their communications are privileged to enhance cooperation; the statutes to limitations to sue each other will be tolled to prevent them from suing each other; and any party may withdraw from the agreement if it is contrary to their interests.

If negotiations are not successful, the next step would be to consider the DTSC's administrative process. However, negotiations can and should be reviewed if circumstances change.

B. DTSC Proceedings

It was unclear from the documents whether the DTSC intends to proceed against the City and Other PRPs in the Imminent and Substantial Endangerment Determination and Remedial Action Order ("ISEO"), or just focus on the Army Corps. The DTSC September 15, 2010 letters scheduling the September meeting suggested that an ISEO would be issued against the United States, and its correspondence and e-mails implied they are only pursuing the Army Corps. However, the September 15, 2010 letters and the draft ISEO include the City's and Other PRPs' property ownership. While an ISEO may not be based on property ownership alone, the DTSC may issue other cleanup orders to property owners, and as noted above, the City may have risk from its storm water system that could form the basis of an ISEO.

If the DTSC only intends to pursue the Army Corps, then the City may be able to avoid the expense of this fight while benefiting from a favorable outcome. However, if the DTSC includes the City or the Army Corps can bring the City into the proceedings, then City will face significant legal and expert costs. However, most of the proceedings involve administrative hearings, binding arbitration or state court writ proceedings, which are usually less expensive than traditional court trials. Nevertheless, the City should try to negotiate favorable terms for any DTSC order; a process that may be enhanced by working with the Other PRPs.

If the DTSC proceedings take a bad turn or the DTSC is ineffective, the parties may engage in traditional litigation.

C. Litigation

There are several litigation scenarios, none of which are good. For example, the DTSC may sue the Army Corps in federal court (the United States is immune from suit in State court). This is unlikely because in our experience with the DTSC, they have been loathe to litigate, especially against a major party such as the United States. Alternatively, one or more of the Other PRPS may sue to force the Army Corps to clean up its property like they did in the Tourtelot Site case. Also, the City may sue the Army Corps to force them to clean up the contamination either directly or in response to claims by the DTSC. Regardless of the scenario, once the litigation starts, the City is likely to be dragged into the lawsuit as a defendant or cross-defendant by another party seeking to reduce its exposure.

D. Other Revenue Sources

Two other revenue sources are insurance policies and indemnity provisions. Given the length of time the City has owned the property, it may have insurance policies that contain limited or even no pollution exclusions. These may provide protection from claims by the DTSC or other

parties. Similarly, we would want to review the City's lease agreement with Benicia Industries and any other party with which it contracted to see if there is an indemnity provision for these matters.

3. DESCRIPTION OF ORGANIZATION, MANAGEMENT AND TEAM MEMBERS

A. Team Members

BB&K proposes **Gene Tanaka**, **Samuel Emerson** and **Melanie Donnelly** to provide legal services to the City. Mr. Tanaka resides in our Walnut Creek office and will serve as the main contact for the City. He will oversee all legal work and will be assisted by Sam Emerson and Melanie Donnelly.

(1) Gene Tanaka, Partner



LITIGATION COUNSEL

Gene Tanaka, Partner
Office Direct: (925) 977-3301

PROFESSIONAL CHRONOLOGY

BB&K Since 1985
Municipal Litigation Since 1985

Gene Tanaka is a partner in the Municipal Law practice group and the managing partner of BB&K's Walnut Creek and Sacramento offices. Gene's practice is focused on toxics litigation and land use.

Gene has handled numerous toxics cases for cleanup or damages under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), Resource Conservation and Recovery Act ("RCRA"), nuisance and trespass law. Gene has done this work on behalf of the County of Los Angeles, City of Colton, the City of Merced, the Press Enterprise Company, Padre Dam Municipal Water District and many other clients. He has worked on the Stringfellow cleanup litigation in U.S. District Court, the Montrose case in U.S. District Court involving cleanup of contaminants in the Pacific Ocean and a Republic Imperial Acquisition Corporation landfill.

Gene graduated from Columbia Law School in 1981 and from Columbia College in 1978. Gene has been an instructor and assistant team leader at the National Institute of Trial Advocacy, Rocky Mountain Regional and the Pacific Regional. Gene has taught a hazardous materials litigation course for the University of California at Riverside Extension School. Gene has also published several articles regarding land use litigation.

(2) Samuel L. Emerson, Associate



LITIGATION COUNSEL

Sam Emerson, Associate
Office Direct; (916) 551-2824

PROFESSIONAL CHRONOLOGY

BB&K Since 2002
Municipal Litigation Since 2002

Sam Emerson is an associate with Best Best & Krieger LLP in the Litigation Practice Group of the Sacramento office. Mr. Emerson received his Juris Doctorate from Loyola Law School in Los Angeles in 2002. He received his B.A. in International Relations from Brigham Young University in Provo, Utah.

Mr. Emerson has litigation experience in a number of private and public areas of the law. He provides legal services for a number of public agencies on a variety of litigation matters. Mr. Emerson has successfully litigated many public law cases pertaining to land use and property issues, such as receiverships, revocation of conditional use permits, and obtaining injunctive relief against public health and safety hazards. Mr. Emerson also has advised public schools on student speech and organization policies and has experience litigating issues surrounding Indian Gaming.

Mr. Emerson belongs to the American Bar Association and State Bar of California. He is admitted to practice in all courts in California as well as the United States District Court for the Eastern District of California. Mr. Emerson is also fluent in Spanish and helped organize literacy programs for the National Institution of Education for Adults (INEA) in Puebla, Mexico.

(3) Melanie Donnelly, Associate



LITIGATION COUNSEL

Melanie Donnelly, Associate
Office Direct: (925) 977-3309

PROFESSIONAL CHRONOLOGY

BB&K Since 2006
Municipal Law Since 2005

Melanie Donnelly is an associate with the Municipal Law Practice Group of BB&K's Walnut Creek Office. Ms. Donnelly serves as Assistant City Attorney for the cities of Lafayette and Clearlake, and for the Town of Colma.

In her capacity as Assistant City Attorney, Ms. Donnelly represents clients in litigation and in transactional matters. She provides transactional advice in a variety of areas including: conflicts of interest, land use and planning, the Brown Act/Open Meeting Law, constitutional law, code enforcement, public works construction and disclosure of public records. She also represents city councils and planning commissions at their meetings.

Prior to joining the firm Ms. Donnelly practiced commercial litigation in San Francisco representing clients in a variety of areas including toxic tort, personal injury, breach of contract, professional malpractice, insurance and asbestos defense.

In addition to the lawyers listed in this proposal, BB&K has nearly 200 other lawyers and paralegals at every experience level to assist the City, as needed. Biographies of all BB&K attorneys are available on the firm's Website: www.BBKlaw.com.

4. ORGANIZATION QUALIFICATIONS

A. Gene Tanaka's Ongoing Matters

Gene Tanaka is committed to three main ongoing matters, which are also relevant for his qualifications to handle the City's matter.

(1) Los Angeles County/BKK Landfill

Gene represents Los Angeles County in negotiating cleanup orders with the DTSC for a County Landfill, supervising the preparation and implementation of the remedial action plan, and obtaining recovery of the County's costs from PRPs. Gene is assisted by a senior attorney and

Melanie on this matter. If prior billing remains consistent, this should occupy approximately 10 hours per month of his time.

(2) City of Colton/Perchlorate Litigation

Gene is representing the City of Colton (“Colton”) in federal court, in state court and before the Regional Water Quality Control Board regarding a 6 mile long perchlorate plume contaminating water supply wells in Colton, City of Rialto and West Valley Water District. Discovery has been stayed for settlement negotiations. Gene works with another partner and an associate on this matter. Presently, it is occupying approximately 50 hours per month of his time, and if the stay is lifted, he expects to devote about 75 hours per month and will push additional work to his partner.

(3) City of Merced/Abarca Litigation

Gene represents the City of Merced (“Merced”) in federal court regarding a toxic tort and inverse condemnation flood case brought by 2000 plaintiffs. Phase 1 regarding the extent, duration and toxicity of the spread of contamination is set for a three month trial on November 23, 2010. However, the City expects to either settle, avoid the trial when the Judge rules on its pending Motion for Summary Adjudication, or face a much narrower case after the Judge rules on motions by other Defendants. Gene works with a senior attorney on this matter. This is occupying about 100 hours a month of his time and will require most of his time if it goes to trial. However, this is not an issue if the City avoids the trial or after February, when the trial should be concluded.

See case list attached as Appendix A for a longer list of Gene’s case experience.

B. Sam Emerson’s Ongoing Matters

Sam Emerson is committed to three ongoing matters:

(1) Hacienda la Puente School District/Civil Rights Litigation

Sam represents the Hacienda La Puente School District in its defense of a class action lawsuit regarding prisoner education rights in the Los Angeles County Jail. Presently, this case occupies approximately 30 hours per month of Sam’s time. Were this case to go to trial next year, it would likely require most of his time for the months of February, March, and April of 2011. However, this matter will likely be resolved in advance of trial via summary judgment motions which are scheduled to be heard in January of 2011.

(2) City of San Ramon/Receivership Litigation

Sam represents the City of San Ramon in its petition for appointment of receiver over substandard property pursuant to Health and Safety Code section 17980.7. Presently, the receivership action occupies approximately 20 hours per month of his time, however, he anticipates that all aspects of this litigation will be resolved by January of 2011.

(3) City of Los Banos /Nuisance Abatement Litigation

Sam represents the City of Los Banos in nuisance litigation pursuing clean-up of several commercial properties. Presently, this litigation occupies approximately 25 hours per month of his

time. Trial for this matter has been set for May of 2011. Were this case to go to trial, it would likely require approximately 80 hours per week of Sam's time for the months of April and May of 2011. However, the City expects to settle its involvement in this case on or before January of 2011.

C. Melanie Donnelly's Ongoing Matters

Melanie Donnelly is committed to two ongoing matters:

(1) City of Lafayette/Receivership Litigation

Melanie represents the City of Lafayette in its petition for appointment of receiver over substandard property pursuant to Health and Safety Code section 17980.7. Presently, the receivership action occupies approximately 10 hours per month of his time, however, she anticipates that all aspects of this litigation will be resolved by January of 2011.

(2) Office Depot/Qui Tam

Working with a team of three other BB&K attorneys, Melanie represents several of the firm's city and school district clients in an action for violations of the False Claims Act brought by a qui tam plaintiff against Office Depot that is pending under seal. Presently, this case occupies approximately 10-20 hours per month of Melanie's time, and once the seal is lifted, and the case gets fully underway with discovery and law and motion, she expects to devote between 20-30 hours per month as needed.

5. SCOPE OF WORK

Based on the approach outlined in Section 2 above, this Section is divided into three sections: (a) Negotiated Agreement; (b) DTSC Proceedings; and (c) Litigation.

A. Negotiated Agreement

This should involve the following:

- Meet with City and review background materials. The purpose is to understand the City's goals and objectives, its evaluation of the other parties, and whether and how a negotiated settlement may be achieved. The purpose is also to visit the site and obtain background materials.
- Meet with the Other PRPs. The goal is to discuss their objectives, their evaluations of a negotiated settlement, and opportunities to cooperate, including a joint defense agreement.
- Review insurance policies and contracts. This is intended to uncover other revenue sources. If there are disputes with insurers, we would need to involve attorneys from another firm since we do not handle coverage disputes.
- Prepare Joint Defense Agreement among the PRPs. This is intended to facilitate cooperation.

- Meet with DTSC. The purpose is to discuss efforts to obtain cooperation by the Army Corps, and to determine their intent with respect to the City.
- Negotiate settlement agreement.

B. DTSC Proceedings

If the City is not a party to these proceedings, then its role would be limited to the first three items. Otherwise, the scope includes all of the following items:

- Meetings and other communications with the City regarding status and obtaining direction.
- Meetings and other communications with third parties.
- Review pleadings and other documents for the DTSC proceedings.
- Prepare pleadings and other court documents.
- Engage and supervise experts in: munitions production and use; soil and groundwater contamination; and PRP cost allocation.
- Conduct factual investigation.
- Prepare for and appear at hearings and trial.

C. Litigation

If the City is not involved in the litigation, the scope of work only includes the first three items. If the City is a party to the litigation, then the scope of work includes all of the following tasks:

- Meetings and other communications with the City regarding status and obtaining direction.
- Meetings and other communication with third-parties.
- Review pleadings and other documents for the litigation.
- Prepare pleadings and other court documents.
- Engage and supervise experts in: munitions production and use; soil and groundwater contamination; and PRP cost allocation.
- Conduct factual investigation.
- Prepare for and appear at hearings and trial.

As you will note many of the litigation tasks are the same as the tasks for the DTSC proceedings. The big difference is that in litigation, the amount of time required is much greater since there are likely to be more issues, more parties, more court procedures to follow, and much more discovery, investigation and expert work.

6. PROPOSED PROJECT SCHEDULE AND BUDGET

The attorney rates for the team members are : \$305 per hour for Partners, \$268 per hour for Senior Associates, and \$251 for Junior Associates. These rates are guaranteed for one year from the start of the project.

A. Negotiated Agreement

For a negotiated agreement, the schedule and budget items below track the items in the Scope of Work in Section 5 above.

- Meet with the City and review background materials – to do in the first month and estimated budget of \$9,000 (30 hours x \$300 per hour).
- Meet with Other PRPs – to do in the first month and estimated budget of \$4,500 (15 hours x \$300 per hour).
- Review City insurance policies and contracts – to do in the first month and estimated budget of \$2,750 (10 hours x \$275 per hour).
- Prepare Joint Defense Agreement – to do in the first month and estimated budget of \$2,750(10 hours x 275 per hour).
- Meet with DTSC – to do in the second month and estimated budget of \$4,500 (15 hours x \$300 per hour).
- Negotiate settlement agreement – to do in the third and fourth months and estimated budget of \$12,000 (40 hours x \$300 per hour).

35,500

B. DTSC Proceedings

This budget is only for the first year. In addition, we have not estimated a schedule since it will proceed after negotiations fail and will be governed in part by other parties. The budget items listed below track the items in the Scope of Work in Section 5 above.

- Communications with City – estimated budget of \$13,750 (50 hours x \$275 per hour).
- Communications with third parties – estimated budget of \$13,750 (50 hours x \$275 per hour).
- Review pleadings and other documents – estimated budget of \$13,750 (50 hours x \$275 per hour).

- 301,250
- Prepare pleadings and other court documents – estimated budget of \$55,000 (200 hours x \$275 per hour).
 - Experts – estimated budget of \$150,000 (\$50,000 x 3 experts).
 - Fact investigation – estimated budget of \$55,000 (200 hours x \$275 per hour).
 - Prepare for and appear at hearings, etc. – not applicable in the first year.

C. Litigation

This budget is only for the first year. Here too, we have not estimated a schedule since it will proceed after negotiations fail and will be governed in part by other parties. The budget items below track the items from the Scope of Work in Section 5 above.

- 411,250
- Communications with City – estimated budget of \$13,750 (50 hours x \$275 per hour).
 - Communications with third parties – estimated budget of \$13,750 (50 hours x \$275 per hour).
 - Review pleadings and other documents – estimated budget of \$13,750 (50 hours x \$275 per hour).
 - Prepare pleadings and other court documents – estimated budget of \$110,000 (400 hours x \$275 per hour).
 - Experts – estimated budget of \$150,000 (\$50,000 x 3 experts).
 - Discovery and fact investigation – estimated budget of \$110,000 (400 hours x \$275 per hour).
 - Prepare for and appear at trial – not applicable in the first year.

7. REFERENCES, RELATED EXPERIENCE AND EXAMPLES OF WORK

A. References

(1) Client References for Gene Tanaka

Gregory G. Diaz, City Attorney, City of Merced
678 West 18th St., Merced, CA 95340

Phone: (209) 385-6868; Email: DiazG@cityofmerced.org

Description of Services: Lead counsel for City of Merced in toxic tort litigation

Hannah Chen, Senior Analyst, County of Los Angeles Executive Office,
Capital Improvement Projects/Debt Management
500 W Temple St., Room 754, Los Angeles, CA 90012
Phone: (213) 974-1953; Email: hchen@ceo.lacounty.gov
Description of Services: : Lead counsel for County of Los Angeles in negotiating
landfill cleanup with DTSC and cost recovery from PRPs.

Please take note that Ms. Chen is currently on maternity leave, but a arrangements
can be made to contact her.

(2) Client Reference or Sam Emerson

Thomas W. Wagoner, General Manager, Lake Hemet Municipal Water District
P.O. Box 5039, Hemet, CA 92544-0039
Phone: (951) 658-3241 ext. 240; Email: twagoner@lhmwd.org
Description of Services: Sam successfully represented the District as trial counsel in
defense of inverse condemnation claims related to alleged defects in the District's
water system.

(3) Client Reference for Melanie Donnelly

Steven Falk, City Manager, City of Lafayette
3675 Mt. Diablo Blvd., Suite 210, Lafayette, California 94549
Phone: (925) 299-3211; Email: SFalk@ci.lafayette.ca.us
Description of Services: Assistant City Attorney.

B. Examples of Work

See examples of work attached as Appendix B.

8. CONCLUSION

Thank you for considering this proposal. BB&K would be pleased to serve as outside legal
counsel to the City and would be honored to be selected to provide legal services in connection with
the Benicia Arsenal Investigation and Cleanup Project. We look forward to the opportunity to
discuss our proposal with the City in more detail.

If you require any additional information, please contact me at (925) 977-3301 or at
gene.tanaka@bbkllaw.com.

Respectfully Submitted,
BEST BEST & KRIEGER LLP

By: 

Gene Tanaka, Partner

APPENDIX A

Gene Tanaka's Case List

- City of Colton, etc. v. American Promotional Events – West, et al., United States District Court, C.D. Cal., Case No. ED CV 04-00079 PSG. Gene represents City of Colton in a CERCLA action for perchlorate contamination to the Rialto – Colton Groundwater Basin. Colton has sued approximately 15 parties, including former government contractors and fireworks manufacturers for response costs in excess of \$50 million. The case is ongoing.
- Abarca, et al. v. Merck & Co., Inc., et al., United States District Court, E.D. Cal., Case No. 1:07-CV-00388 OWW. Gene represents the City of Merced in an action brought by approximately 2200 Plaintiffs against, among others, Merck & Co., Inc. and four public agencies. Plaintiffs' claims concern alleged chemical and biological contamination, Clean Water Act (CWA) violations, Resource Conservation and Recovery Act (RCRA) violations and flood damages. After several motions to dismiss, Plaintiffs dismissed their CWA and RCRA claims against the City. The case is ongoing.
- City of Needles, etc., v. California Department of Health Services, etc., et al., Los Angeles Superior Court, Case No. BC 091340. Gene represented the City of Needles in one of two related lawsuits which successfully overturned the decision to license a low level radioactive waste facility at Ward Valley, California. This case was brought pursuant to the California Radiation Control Law and CEQA.
- Committee to Bridge the Gap, etc., et al. v. Manuel Lujan, Jr., etc., et al., United States District Court, N.D. Cal., Case No. C-93-0196 MHP. Gene represented the City of Needles in an action which successfully blocked the transfer of the property for the LLRW facility at Ward Valley by the United States to California. This action was brought pursuant to NEPA and the Federal Land Policy and Management Act.
- United States of America, etc., et al. v. Montrose Chemical Corporation of California, etc., et al., United States District Court, C.D. Cal., Case No. 90-3122 AAH. This lawsuit was filed by the United States and California under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") for injury to natural resources in and around the Channel Islands, the Palos Verdes Shelf, the San Pedro Channel and the Los Angeles and Long Beach Harbors caused by DDT, PCB and other hazardous substances. Several of the corporate defendants filed third-party claims and cross-claims against more than 150 governmental entities. Gene represented three such governmental entities: the City of Fontana, the City of Claremont and the Cucamonga County Water District.
- United States of America, etc. v. J.B. Stringfellow, Jr., etc., et al., United States District Court, C.D. Cal., Case No. CIV 83-2501 JMI. This is an action begun by the United States and California in 1983 to clean up the Stringfellow toxic dump site. Gene represented one of the approximately 100 parties in this action. Gene was also representing his client in related insurance coverage matters, and the majority of its fees were paid by its insurers.

APPENDIX A

- Penny Newman, etc., et al. v. J.B. Stringfellow, Jr., etc., et al., Riverside County Superior Court, Case No. 165994 MF. This was an action by over 4,000 individual plaintiffs alleging tort damages arising from the Stringfellow site. Gene provided second party review of the litigation and handled insurance coverage issues for one of the defendants in this matter. BB&K's client settled and the settlement was paid by the insurer.
- Four Corners Pipe Line Company v. Ron E. Varela Company, etc., et al., Riverside County Superior Court, Case No. 215349. This was an action by an Arco subsidiary to recover over \$5,800,000 for alleged damages arising from the rupture of its pipeline during road construction near the City of Beaumont, California. Gene represented the owner of a poultry waste processing facility that allegedly contributed to erosion of the ground above the pipeline and made it vulnerable to the construction accident. Gene obtained summary judgment for its client.
- Casmalia Disposal Site, Santa Barbara County, California. Gene currently represents the City of Arcadia, and previously, represented the Jurupa Unified School District, the City of Azusa and the Riverside County Office of Education in connection with toxic waste claims brought by the United States Environmental Protection Agency under CERCLA Superfund provisions and RCRA. The case is still pending as to the City of Arcadia. The other clients settled.
- Communities for a Better Environment, et al v. South Coast Air Quality Management District, et al., United States District Court, C. D. Cal., Case No. 97-6916 HLH, Central District of California. Gene represented the South Coast Air Quality Management District ("SCAQMD") in an action brought by Communities for a Better Environment, Clean Air Act Coalition and Natural Resources Council challenging SCAQMD's actions under the 1994 State Implementation Plan. Plaintiffs and the SCAQMD reached a settlement of that action.
- Communities for a Better Environment v. South Coast Air Quality Management District, CENCO, City of Santa Fe Springs et al., United States District Court, C. D. Cal., Case No. 00-05665-HAM, Central District of California. Gene represented the SCAQMD in litigation brought by Communities for a Better Environment challenging the validity of permits issued by the SCAQMD and the City of Santa Fe Springs to an oil refinery and alleging violations of the emissions provisions of the Clean Air Act.

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 20 CITY OF COLTON

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CLERK, U.S. DISTRICT COURT
 CENTRAL DIST. OF CALIF.
 RIVERSIDE

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

15 CITY OF COLTON, a California
 16 municipal corporation,
 17 Plaintiff,
 18 v.
 19 AMERICAN PROMOTIONAL
 20 EVENTS, INC.; AMERICAN
 21 PROMOTIONAL EVENTS, INC.-
 22 WEST; AMERICAN WEST, INC.;
 23 AMERICAN WEST MARKETING,
 24 INC.; AMERICAN PYRODYNE;
 25 ASTRO PYROTECHNICS, INC.;
 26 BLACK & DECKER INC.;
 27 COUNTY OF SAN BERNARDINO;
 28 EMHART INDUSTRIES, INC.;
 FREEDOM FIREWORKS, INC.;
 GOODRICH CORPORATION;
 HARRY HESCOX; KEN
 THOMPSON, INC.; KWIKSET
 LOCKS, INC.; KWIKSET
 CORPORATION; PYRODYNE
 AMERICAN CORPORATION;
 PYRO SPECTACULARS, INC.;
 PYROTRONICS CORPORATION;

Case No. **ED CV 09 - 01864 VAP**
 PLAINTIFF CITY OF COLTON'S
 COMPLAINT FOR: (OPX)

1. RESPONSE COSTS PURSUANT TO CERCLA (42 U.S.C. § 9607(a));
2. RESPONSE COSTS PURSUANT TO HSA (CAL. HEALTH & SAFETY CODE §§ 25300-25395.45);
3. RESPONSE COSTS PURSUANT TO PORTER-COLOGNE ACT (CAL. WATER CODE §§ 13000-13365);
4. NUISANCE;
5. PUBLIC NUISANCE;
6. TRESPASS;
7. DECLARATORY RELIEF PURSUANT TO THE DECLARATORY JUDGMENT ACT (28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 9623(g)(2)); and
8. DECLARATORY RELIEF UNDER STATE LAW (CAL. CODE CIV. PROC. § 1060).

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RIALTO CONCRETE PRODUCTS,
INC.; ROBERTSON'S READY
MIX, INC.; THOMAS O. PETERS;
THE 1996 THOMAS O. PETERS
AND KATHLEEN S. PETERS
REVOCABLE TRUST;
STONEHURST SITE, LLC; TUNG
CHUN COMPANY; TROJAN
FIREWORKS CO.; WHITTAKER
CORPORATION; WONG CHUNG
MING; and DOES 1-10,

Defendants.

DEMAND FOR JURY TRIAL
(FRCP 38)

COMPLAINT

Plaintiff City of Colton ("Colton") alleges:

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction over Colton's claims for relief under Federal law pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9607(a), § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA").

2. This Court has subject-matter jurisdiction over Colton's remaining claims for relief under State law pursuant to 28 U.S.C. § 1367 because those claims are so related to Colton's Federal claims that they form part of the same case or controversy under Article III of the United States Constitution. The State law and Federal law claims are so intertwined that it is appropriate for this Court to exercise its jurisdiction over the State law claims.

3. The properties and natural groundwater resources that are the subject of this action are located in San Bernardino County, California, which is in the Central District of California. The release of hazardous substances into the environment and related wrongful acts that are alleged in this Complaint occurred at properties located in San Bernardino County, California, which is in the Central District of California. Accordingly, venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

LAW OFFICES OF
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25 Colton is also i
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PARTIES

Case 5:09-cv-0186

a California municipal corporation organized and existing
State of California and located in San Bernardino County,
a population in excess of 50,000 persons and is responsible
able and reliable drinking water for all of its residents and the
holds and businesses located in the City. Colton possesses
nd unadjudicated proprietary water rights to draw water from
ndwater Basin ("Rialto-Colton Basin"). Colton relies almost
Colton Basin to meet its water needs.

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4. Col

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California. Col

160-Acre Site

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valuable adjudic
the Rialto-Colto
entirely on the R

formed and believes that West Coast Loading Corporation
ornia corporation and the owner and operator of a 160-acre
located above the Rialto-Colton Basin, at 3196 North Locust
nia ("160-Acre Site"), from between approximately 1952

5. Col

("WCLC") was
parcel of real pr
Avenue, Rialto,
and 1957. Colt
design, manufac
and other hazard

formed and believes that WCLC used the real property to
nd test military munitions products containing perchlorate
stances. Colton is informed and believes that as part of the
g and testing of products, WCLC processed perchlorate for
erchlorate off-site to other manufacturers, and engaged in
resulted in perchlorate and other hazardous substances being
l into the soils and groundwater of the Rialto-Colton Basin.
d and believes that WCLC cleaned machines, tools, and
ethylene ("TCE") that resulted in TCE being released into
er of the Rialto-Colton Basin.

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1 6. Colton is informed and believes that Defendant Kwikset Locks, Inc.
2 ("KLI") was a California corporation and the parent company of WCLC. Colton is
3 informed and believes that KLI entered into contracts with the United States
4 military for WCLC's munition products described above and controlled WCLC's
5 operations described above. Colton is informed and believes that KLI is the
6 corporate successor in interest to WCLC by means of its acquisition, merger, de-
7 factio merger, and/or assumption of liabilities of WCLC.

8
9 7. Colton is informed and believes that Defendant Emhart Industries, Inc.
10 ("Emhart") was a Connecticut corporation and the corporate successor in interest to
11 WCLC and KLI by means of its acquisition, merger, de-facto merger, and/or
12 assumption of liabilities of WCLC and KLI.

13
14 8. Colton is informed and believes that Defendant Black & Decker Inc.
15 ("Black & Decker") was a Delaware corporation and the corporate successor in
16 interest to WCLC, KLI and Emhart by means of its acquisition, merger, de-facto
17 merger, and/or assumption of liabilities of WCLC, KLI and Emhart.

18
19 9. Colton is informed and believes that Defendant Kwikset Corporation
20 ("Kwikset") is a Delaware corporation and the corporate successor in interest to
21 WCLC, KLI and Emhart by means of its acquisition, merger, de-facto merger,
22 and/or assumption of liabilities of WCLC, KLI and Emhart.

23
24 10. Colton is informed and believes that, following the acquisition of
25 Emhart by Black & Decker in 1989, Emhart and Black & Decker operated such that
26 each did not maintain corporate separateness, making each the alter ego of the
27 other. As a result, Emhart and Black & Decker are equally subject to the liabilities
28 of the other.

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1 11. Colton is informed and believes that Defendant Goodrich Corporation
2 (“Goodrich”) is a New York corporation and was the owner and operator of the
3 160-Acre Site from between approximately 1957 through 1964. Colton is informed
4 and believes that Goodrich used the real property to design, manufacture and test
5 propellant products containing perchlorate and other hazardous substances. Colton
6 is informed and believes that as part of the designing, manufacturing and testing of
7 products, Goodrich processed perchlorate for its products, shipped perchlorate off-
8 site to other manufacturers, and engaged in disposal activities that resulted in
9 perchlorate and other hazardous substances being discharged and released into the
10 soils and groundwater of the Rialto-Colton Basin. Colton is also informed and
11 believes that Goodrich cleaned machines, tools and products with TCE that resulted
12 in TCE being released into the soils and groundwater of the Rialto-Colton Basin.
13

14 12. Colton is informed and believes that Apollo Manufacturing (“Apollo”)
15 manufactured fireworks containing perchlorate on the 160-Acre Site from between
16 approximately 1966 through 1985. Colton is informed and believes that: in 1968,
17 two explosions occurred at the Apollo Manufacturing plant; in December 1980, a
18 fire occurred in a storage building of the plant; and in 1985, there was a fire in a
19 waste pit used by the plant.
20

21 13. Colton is informed and believes that Defendant Pyrotechnics
22 Corporation (“Pyrotechnics”) is a California corporation, is the successor to Apollo
23 and was also known as Red Devil Fireworks Company, Clipper Pyrotechnics, Inc.,
24 Atlas Fireworks Company, Inc., Apollo Manufacturing Company, United
25 Fireworks Manufacturing Company, Inc., California Fireworks Display Company
26 and Fireworks Display Company. Colton is informed and believes that Pyrotechnics
27 operated a fireworks manufacturing facility on the 160-Acre Site from 1968
28 through 1989. Colton is informed and believes that Pyrotechnics used the real

1 property to design, manufacture and test fireworks products containing perchlorate
2 and other hazardous substances.

3
4 14. Colton is informed and believes that as part of the designing,
5 manufacturing and testing of fireworks products, Pyrotronics processed perchlorate
6 for its products and engaged in disposal activities of perchlorate that resulted in
7 perchlorate and other hazardous substances being discharged and released into the
8 soils and groundwater of the Rialto-Colton Basin. For example, Colton is informed
9 and believes that Pyrotronics continued to use a burn pit present on the 160-Acre
10 Site for disposal and burning of fireworks waste products through the early 1970s.
11 Following closure of the burn pit, Colton is informed and believes Pyrotronics
12 constructed and used a concrete pit ("Swimming Pool") on the 160-Acre Site for
13 the disposal of fireworks waste products.

14
15 15. Colton is informed and believes that Defendant Harry Hescox
16 ("Hescox") served as: Treasurer for Clipper Pyrotechnics, Inc.; Manager, Executive
17 Vice-President and President of Red Devil Fireworks Company; and President and
18 consultant of Pyrotronics. Colton is informed and believes that in these various
19 capacities, Hescox actively participated in the following operations and disposal
20 activities of the facility: purchasing products and supplies; manufacturing and
21 testing fireworks products; processing perchlorate for other companies;
22 constructing the Swimming Pool; and disposing of fireworks waste products in the
23 burn pit and Swimming Pool. These activities resulted in perchlorate and other
24 hazardous substances being discharged and released into the soils and groundwater
25 of the Rialto-Colton Basin.

26
27 16. Colton is informed and believes that Defendants American Pyrodyne,
28 Pyrodyne American Corporation, American West, Inc., American West Marketing,

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1 Inc., Freedom Fireworks Inc., and American Promotional Events, Inc. (collectively,
2 "APE Entities") were Alabama corporations and operated a fireworks facility on the
3 northern portion of the 160-Acre Site from 1989 through 2002. Colton is informed
4 and believes that the APE Entities used the real property to design, assemble and
5 test fireworks products containing perchlorate and other hazardous substances.
6 Colton is informed and believes that as part of the designing, assembling and
7 testing of fireworks products, the APE Entities processed perchlorate for their
8 products and engaged in disposal activities that resulted in perchlorate and other
9 hazardous substances being discharged and released into the soils and groundwater
10 of the Rialto-Colton Basin.

11
12 17. Colton is informed and believes that Defendant American Promotional
13 Events, Inc.-West ("APE-West") is an Alabama corporation and corporate
14 successor in interest to Pyrotronic's, Defendant Trojan Fireworks Co. and the APE
15 Entities. Colton is informed and believes that APE-West operated a fireworks
16 facility on the northern portion of the 160-Acre Site from 2002 through the present.
17 Colton is informed and believes that APE-West used the real property to design,
18 assemble and test fireworks products containing perchlorate and other hazardous
19 substances. Colton is informed and believes that as part of the designing,
20 assembling and testing of fireworks products, APE-West processed perchlorate for
21 its products and engaged in disposal activities that resulted in perchlorate and other
22 hazardous substances being discharged and released into the soils and groundwater
23 of the Rialto-Colton Basin.

24
25 18. Colton is informed and believes that Pyro Spectaculars, Inc. ("Pyro
26 Spectaculars") is a California corporation and owns and/or operates a fireworks
27 manufacturing facility on the northern portion of the 160-Acre Site from 1969
28 through the present. Colton is informed and believes that Pyro Spectaculars used

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1 the real property to design, manufacture and test fireworks products containing
2 perchlorate and other hazardous substances. Colton is informed and believes that as
3 part of the designing, manufacturing and testing of fireworks products, Pyro
4 Spectaculars processed perchlorate for its products and engaged in disposal
5 activities of perchlorate that resulted in perchlorate and other hazardous substances
6 being discharged and released into the soils and groundwater of the Rialto-Colton
7 Basin. For example, Colton is informed and believes that as of January 1984, Pyro
8 Spectaculars was disposing of up to 20 aerial shells, which contained potassium
9 perchlorate, per month into the Swimming Pool owned by Pyrotronics or its related
10 corporate entities.

11
12 19. Colton is informed and believes that Defendant Ken Thompson, Inc.
13 ("Ken Thompson") is a California corporation and the current owner of one or more
14 parcels of real property located at the 160-Acre Site. Colton is informed and
15 believes that Ken Thompson's land was used by WCLC, Goodrich and Pyrotronics
16 to design, manufacture and test military munitions, rockets and fireworks
17 containing perchlorate and other hazardous substances. Colton is informed and
18 believes that as part of the designing, manufacturing and testing of munitions,
19 rockets and fireworks products, the manufacturers on Ken Thompson's property
20 processed perchlorate for their products and engaged in disposal activities that
21 resulted in perchlorate and other hazardous substances being discharged and
22 released into the soils and groundwater of the Rialto-Colton Basin. Colton is
23 informed and believes that Ken Thompson's failure to properly close the
24 Swimming Pool and its dust suppression activities contributed to the discharge and
25 release of perchlorate and other hazardous substances into the soils and
26 groundwater of the Rialto-Colton Basin.

27
28 20. Colton is informed and believes that Defendant Rialto Concrete

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1 Products, Inc. ("Rialto Concrete") is a California corporation and the current
2 operator of one or more parcels of real property located at the 160-Acre Site.
3 Colton is informed and believes that Rialto Concrete's property was used by
4 WCLC, Goodrich and Pyrotronics to design, manufacture and test military
5 munitions, rockets and fireworks containing perchlorate and other hazardous
6 substances. Colton is informed and believes that as part of the designing,
7 manufacturing and testing of munitions, rockets and fireworks, the manufacturers
8 on Rialto Concrete's property processed perchlorate for their products and engaged
9 in disposal activities that resulted in perchlorate and other hazardous substances
10 being discharged and released into the soils and groundwater of the Rialto-Colton
11 Basin. Colton is informed and believes that Rialto Concrete's failure to properly
12 close the Pyrotronics Swimming Pool and its dust suppression activities contributed
13 to the discharge and release of perchlorate and other hazardous substances into the
14 soils and groundwater of the Rialto-Colton Basin.
15

16 21. Colton is informed and believes that Defendant Wong Chung Ming is
17 a citizen of Hong Kong and Defendant Tung Chun Company is a company
18 organized under the laws of Hong Kong. Colton is informed and believes that since
19 1988, Defendants Wong Chung Ming and Tung Chun Company (collectively
20 "Wong") have owned parcels in the northern portion of the 160-Acre Site which
21 were used by Pyro Spectaculars, the APE Entities and/or APE-West to design,
22 manufacture and test fireworks products containing perchlorate and other hazardous
23 substances. Colton is informed and believes that as part of the designing,
24 manufacturing and testing of fireworks, the manufacturers on Wong's property
25 processed perchlorate for their products and engaged in disposal activities that
26 resulted in perchlorate and other hazardous substances being discharged and
27 released into the soils and groundwater of the Rialto-Colton Basin.
28

Stonehurst Site

1
2
3 22. Colton is informed and believes that Defendant Trojan Fireworks Co.
4 (“Trojan”) was a California corporation, was a corporate parent and/or affiliate of
5 Defendant Astro Pyrotechnics, Inc., and was doing business as Freedom Fireworks.
6 Colton is informed and believes Trojan sold Defendant Astro Pyrotechnics, Inc. to
7 Pyro Spectaculars in 1988. Colton is informed and believes that Trojan sold
8 Freedom Fireworks to APE, or one of its predecessors in interest in 1989. Colton is
9 informed and believes that Trojan owned and operated a fireworks manufacturing
10 facility on property located above the Rialto-Colton Basin, at 2298 West
11 Stonehurst, Rialto, California (“Stonehurst Site”), from approximately 1971 through
12 1987. Colton is informed and believes that Trojan used the real property to design,
13 manufacture and test fireworks products containing perchlorate and other hazardous
14 substances. Colton is informed and believes that as part of the designing,
15 manufacturing and testing of fireworks products, Trojan processed perchlorate for
16 its products and engaged in disposal activities that resulted in perchlorate and other
17 hazardous substances being discharged and released into the soils and groundwater
18 of the Rialto-Colton Basin.

19
20 23. Colton is informed and believes that Defendant Astro Pyrotechnics,
21 Inc. (“Astro”) was a California corporation and a corporate subsidiary, division
22 and/or affiliate of Trojan and later, Pyro Spectaculars. Colton is informed and
23 believes that Astro owned and operated a fireworks manufacturing facility at the
24 Stonehurst Site from 1974 through 1990. Colton is informed and believes that
25 Astro used the real property to design, manufacture and test fireworks products
26 containing perchlorate and other hazardous substances. Colton is informed and
27 believes that as part of the designing, manufacturing, and testing of fireworks
28 products, Astro processed perchlorate for its products and engaged in disposal

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2 discharged and

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4 24. C

5 ("Whittaker")-SS Document 1 Filed 10/02/2009 Page 15 of 41

6 AMEX Produ

7 believes that vlted in perchlorate and other hazardous substances being
8 real property used into the soils and groundwater of the Rialto-Colton Basin.

9 through 1974

10 property to de is informed and believes that Defendant Whittaker Corporation

11 explosive pro Delaware corporation and a corporate successor in interest to

12 is informed arnc. and Tasker Industries. Colton is further informed and

13 explosives, vker owned and operated an explosives manufacturing facility on

14 disposal activid at the Stonehurst Site from between approximately 1964

15 discharged andlton is informed and believes that Whittaker used the real

16 manufacture and test military and commercial pyrotechnic and

17 25. Containing perchlorate and other hazardous substances. Colton

18 and/or Defenceves that as part of the designing, manufacturing and testing of

19 Trust (collecter processed perchlorate for its products and engaged in

20 Stonehurst, Sat resulted in perchlorate and other hazardous substances being

21 manufacture ased into the soils and groundwater of the Rialto-Colton Basin.

22 substances. (

23 manufacturing is informed and believes that Defendant Thomas O. Peters

24 processed perae 1996 Thomas O. Peters and Kathleen S. Peters Revocable

25 resulted in pe("Peters") were the owners of real property located at the

26 released into which was used by fireworks manufacturers to design,

27 informed and fireworks products containing perchlorate and other hazardous

28 and/or operate is informed and believes that as part of the designing,

RVLITVCBEECHAMV750 testing of fireworks, the manufacturers on Peters' property

te for their products and engaged in disposal activities that

rate and other hazardous substances being discharged and

ils and groundwater of the Rialto-Colton Basin. Colton is

es that from 1973 to 1988, Thomas O. Peters, was the owner

officer and/or director of Trojan when it engaged in the

1 activities that

1 activities described above on Peters' property.

2

3 26. Colton is informed and believes that Defendant Stonehurst Site, LLC
4 ("Stonehurst") was and/or is the owner of real property located at the Stonehurst,
5 Site, which was used by fireworks manufacturers to design, manufacture and test
6 fireworks products containing perchlorate and other hazardous substances. Colton
7 is informed and believes that as part of the designing, manufacturing and testing of
8 fireworks, the manufacturers on Stonehurst's property processed perchlorate for
9 their products and engaged in disposal activities that resulted in perchlorate and
10 other hazardous substances being discharged and released into the soils and
11 groundwater of the Rialto-Colton Basin.

12
13 Landfill Site

14

15 27. Colton is informed and believes that Defendant County of San
16 Bernardino ("County") is a county organized and existing under the laws of the
17 State of California. Colton is informed and believes that since approximately 1958,
18 the County has continuously been the owner and operator of a public solid waste
19 disposal facility known as the Mid-Valley Sanitary Landfill located above the
20 Rialto-Colton Basin, in Rialto, California ("Landfill Site"). Colton is informed and
21 believes the Landfill Site accepted wastes containing perchlorate, TCE and other
22 hazardous substances from others from approximately 1958 to present, and the
23 perchlorate, TCE and other hazardous substances were discharged and released into
24 the soils and groundwater of the Rialto-Colton Basin.

25

26 28. Colton is informed and believes that in approximately 1999, the
27 County expanded the Landfill Site by demolishing and razing former military
28 bunkers and importing and using contaminated soils and fill materials from the

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1 bunker area to construct expanded landfill areas. This contaminated soil discharged
2 and released perchlorate, TCE and other hazardous substances into the soils and
3 groundwater of the Rialto-Colton Basin.

4
5 29. Colton is informed and believes Defendant Robertson's Ready Mix,
6 Inc. ("Robertson's") is a California corporation. Colton is further informed and
7 believes that gravel washing operations conducted by Robertson's, and arranged by
8 the County, on the County's property at the Landfill Site have further caused and
9 contributed to discharges and releases of perchlorate and other hazardous
10 substances into the soils and groundwater of the Rialto-Colton Basin.

11
12 30. On January 17, 2003, Colton and County entered into a Tolling
13 Agreement tolling the statute of limitations for the claims set forth in this
14 Complaint ("Tolling Agreement"). On January 30, 2004, Colton and the County
15 extended the Tolling Agreement.

16
17 31. On August 8, 2005, Colton filed a tort claim for the claims set forth in
18 this Complaint. The County rejected this claim. On November 20, 2006, Colton
19 filed another tort claim for the claims set forth in this Complaint. Accordingly,
20 Colton has complied with the California Tort Claims Act.

21
22 32. Defendants Does 1 through 10 are each responsible in some way for
23 the acts alleged in this Complaint. When Colton becomes aware of their true names
24 and capacities, Colton will amend this Complaint accordingly.

25
26 BACKGROUND

27
28 33. Colton is informed and believes that the activities described above of

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1 all Defendants resulted in discharges and releases of perchlorate, TCE and other
2 hazardous substances which have over time significantly contaminated the soil and
3 groundwater of the Rialto-Colton Basin and produced a plume of hazardous
4 substances from its original source area located in the City of Rialto ("Rialto") to
5 Colton to the southeast. Along its path, the plume has contaminated the Rialto-
6 Colton Basin and more than a dozen municipal drinking water wells.

7
8 34. Perchlorate is principally used to accelerate the combustion of rocket
9 fuel and propellants and for the manufacture of explosives, munitions, flares,
10 ordnance and pyrotechnic products such as fireworks. Due to its ignitability and/or
11 other characteristics as an oxidizing agent, perchlorate that is disposed of,
12 discharged or released into the environment is a "hazardous substance" within the
13 definition of CERCLA. 42 U.S.C. § 9601(14)(c); 40 C.F.R. §§ 261.2,
14 261.3(a)(2)(i), 261.20(a); Castaic Lake Water Agency v. Whittaker Corp., 272
15 F.Supp.2d 1053, 1059-1060 (C.D. Cal. 2003). The United States Environmental
16 Protection Agency ("EPA") has determined that perchlorate causes adverse human
17 health effects, including inhibition of iodine uptake to the thyroid gland, adverse
18 physical and developmental problems in pregnant women and their developing
19 fetuses, and behavioral changes and mental retardation in children. Perchlorate is a
20 salt which dissolves readily in water, spreads rapidly with the water through
21 permeable and semi-permeable soils down through the unsaturated zone and into
22 groundwater, and requires expensive remediation technologies to remove from
23 water or to reduce the levels below governmental established limits.

24
25 35. TCE is a colorless liquid which is used as a solvent for cleaning metal
26 parts. TCE dissolves in water, but it can remain in groundwater for a significant
27 period of time. Due to the fact that it is a chlorinated solvent, when TCE is
28 disposed of, discharged or released into the environment, it is a "hazardous solid

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1 waste” within the definition of CERCLA. 42 U.S.C. § 9601(14)(c); 40 C.F.R. §§
2 261.2, 261.3(a)(2)(iv)(A), 261.31(a), 304.2. The EPA has determined that TCE
3 causes adverse human health effects, including damage to the nervous system, liver
4 and lung damage, abnormal heartbeat, coma, and possibly death. California has
5 adopted the EPA standard maximum contaminant level for TCE in drinking water
6 of 5 ppb. 22 C.F.R. § 64444.

7
8 36. In 1997, the California Department of Health Services (“DHS”) set the
9 action level for perchlorate in drinking water at 18 ppb. In 2002, the DHS lowered
10 the action level for perchlorate to 4 ppb. In 2004, the DHS raised the perchlorate
11 action level to 6 ppb. Effective October 2007, the California Department of Public
12 Health, formerly DHS, set the Maximum Contaminant Level (“MCL”) for
13 perchlorate at 6 ppb. Beyond that level, water purveyors cannot serve water to
14 consumers and must take appropriate remedial steps so that the perchlorate level is
15 at or below the MCL.

16
17 37. In 2002, after the action level for perchlorate in drinking water wells
18 was reduced to 4 ppb, Colton was forced to take three of its drinking water wells
19 out of service. In particular, Colton Well Nos. 15, 17, and 24 were taken off-line
20 because perchlorate was detected between at least 4 and 10 ppb, which was at or
21 above the action level. Colton’s ability to provide drinking water to its residents
22 has been hampered because of the discovery of perchlorate in these three wells, and
23 Colton was forced to declare a state of emergency and start conservation programs
24 to help alleviate the demand on the water system.

25
26 38. The perchlorate and TCE contamination is a problem for the Rialto-
27 Colton Basin that is affecting the drinking water wells of other water purveyors,
28 including the Rialto and the West Valley Water District in a similar way. More

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1 than one dozen drinking water wells have been contaminated in the Rialto-Colton
2 Basin and taken off-line because perchlorate was detected between 4 and 800 ppb.

3
4 39. Colton has spent in excess of \$7,000,000 to address the perchlorate
5 contamination in its wells. These monies were spent investigating the
6 contamination, performing well-head treatment and other response costs.
7 Preliminary efforts, analysis, and characterization indicates that the contamination
8 of Colton's wells originated on Defendants' properties located in Rialto, and that
9 the contamination traversed the Rialto-Colton Basin in a southeasterly direction to
10 Colton. Preliminary efforts, analysis, and characterization also indicates that the
11 large perchlorate plume will continue to migrate toward Colton and will
12 significantly contaminate Colton's water supply for a period of many years.

13
14 40. Pursuant to the National Contingency Plan ("NCP"), Colton: reviewed
15 available information and prepared a Preliminary Assessment Report; prepared a
16 Work Plan for two monitoring wells to help determine the extent of the
17 contamination in the Rialto-Colton Basin ("Work Plan"); prepared a Community
18 Involvement Plan for the Work Plan; revised the Work Plan and Community
19 Involvement Plan; made all of the above documents available to the public; held
20 public hearings regarding the Work Plan and Preliminary Assessment Report;
21 participated in numerous public meetings regarding the contamination; and installed
22 two monitoring wells contemplated by the revised Work Plan.

23
24 42. In September 2009, the EPA listed the 160-Acre Site on the National
25 Priorities List.

26
27 ///

28

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FIRST CLAIM FOR RELIEF

(Recovery of Response Costs and Damages

Pursuant to CERCLA § 107(a) Against All Defendants)

43. Colton incorporates by reference the allegations of paragraphs 1 - 42.

44. Through this Claim for Relief, Colton seeks to recover only its response costs for the release and threatened release of hazardous substances in the Rialto-Colton Basin. It does not seek to recover through this Claim any of the approximately \$4.2 million in expenses it incurred for treating water in Wells 15, 17, and 24 prior to November 2006.

45. Colton is a "person" as defined in CERCLA § 101(21). Colton has incurred and/or will continue to incur substantial response costs to investigate the nature and scope of contamination, treat drinking water, monitor releases, identify potentially responsible parties and other costs. All such response costs have been and will be necessary and consistent with the NCP.

46. Each Defendant is a "person" within the meaning of CERCLA § 101(21); 42 U.S.C. § 9601(21).

47. CERCLA § 107(a)(1) imposes liability on any "person" who is the owner or operator of a facility for all necessary response costs incurred by a person consistent with the NCP.

48. CERCLA § 107(a)(2) imposes liability on any "person," who at the time of a disposal of any hazardous substances, owned or operated any facility at which such hazardous substances were disposed, for all necessary response costs

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1 incurred by a person consistent with the NCP.

2

3 49. CERCLA § 107(a)(3) imposes liability on any “person” who arranges
4 for the disposal of hazardous substances, or arranges with a transporter for transport
5 or disposal of hazardous substances owned or possessed by such persons, for all
6 necessary response costs incurred by a person consistent with the NCP.

7

8 50. The real property and facilities above the Rialto-Colton Basin where
9 hazardous substances were disposed and/or discharged are considered “facilities”
10 within the meaning of CERCLA § 101(9).

11

12 51. The actions of each Defendant with regard to the disposal of hazardous
13 substances, including perchlorate and TCE, at the real property and facilities above
14 the Rialto-Colton Basin, constitute a release or threatened release of hazardous
15 substances at a facility within the meaning of CERCLA § 101(22).

16

17 53. As a direct and proximate result of Defendants’ releases or threatened
18 releases of hazardous substances from facilities above the Rialto-Colton Basin,
19 Colton has incurred and will continue to incur response costs.

20

21 54. Pursuant to CERCLA § 107(a), each Defendant is liable to Colton for
22 all necessary response costs incurred by Colton in responding to the release of
23 hazardous substances .

24

25 55. As a direct and proximate result of Defendants’ conduct, Colton is
26 entitled to recover its past, present and future response costs, together with interest,
27 from Defendants pursuant to CERCLA § 107(a). Those response costs include, but
28 are not limited to:

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1 (A) Approximately \$350,000 per year in operations and
2 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

3
4 (B) Approximately \$2.2M to construct two monitoring wells,
5 investigate the contamination, monitor the releases, identify potentially responsible
6 parties and other costs since November 2006.

7
8 (C) Future operations and maintenance costs to treat water,
9 investigate the contamination, monitor the releases, identify potentially responsible
10 parties and other costs.

11
12 SECOND CLAIM FOR RELIEF

13 (Recovery of Response Costs and Damages Pursuant to HSAA,
14 Cal. Health & Safety Code §§ 25300-25395.45, Against All Defendants)

15
16 56. Colton incorporates by reference the allegations of paragraphs 1 - 42.

17
18 57. Through this Claim for Relief, Colton seeks to recover only its
19 response costs for the release and threatened of hazardous substances in the Rialto-
20 Colton Basin. It does not seek to recover through this Claim any of the
21 approximately \$4.2 million in expenses it incurred for treating water in Wells 15,
22 17; and 24 prior to November 2006.

23
24 58. Colton is a "person" as defined in the Carpenter-Pressley-Tanner
25 Hazardous Substances Account Act ("HSAA"), Health & Safety Code § 25319.
26 Colton has incurred and/or will continue to incur, substantial response costs to
27 investigate the nature and scope of the contamination, treat drinking water, monitor
28 the releases, identify potentially responsible parties and other costs.

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1 59. Each Defendant is a “responsible party” within the meaning of Health
2 & Safety Code § 25323.5 and CERCLA § 101(21), 42 U.S.C. § 9601(21).

3
4 60. Defendants’ activities that precede the enactment of the HSAA are
5 nevertheless subject to retroactive liability because they were in violation of the
6 then existing Dickey Water Pollution Control Act, formerly California Water Code
7 § 13054, and California Civil Code §§ 3479 and 3480.

8
9 61. Health & Safety Code § 25363(e) imposes liability on any
10 “responsible party,” who is the owner or operator of a facility, was the owner or
11 operator of any facility at which such hazardous substances were disposed of,
12 arranged for the disposal of hazardous substances, or arranged with a transporter for
13 transport of disposal of hazardous substances owned or possessed by such persons,
14 for the response costs incurred.

15
16 62. The actions of each Defendant with regard to the disposal of hazardous
17 substances, including perchlorate and TCE, at the real property and facilities above
18 the Rialto-Colton Basin, constitute a release or threatened release of hazardous
19 substances at a facility within the meaning of the HSAA.

20
21 63. As a direct and proximate result of Defendants’ releases or threatened
22 releases of hazardous substances from facilities above the Rialto-Colton Basin,
23 Colton has incurred and will continue to incur response costs.

24
25 64. As a direct and proximate result of Defendants’ conduct, Colton is
26 entitled to recover its past, present and future response costs, together with interest,
27 from Defendants pursuant to Health & Safety Code § 25363(e). Those response
28 costs include, but are not limited to:

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1 (A) Approximately \$350,000 per year in operations and
2 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

3
4 (B) Approximately \$2.2M to construct two monitoring wells,
5 investigate the contamination, monitor the releases, identify potentially responsible
6 parties and other costs since November 2006.

7
8 (C) Future operations and maintenance costs to treat water,
9 investigate the contamination, monitor the releases, identify potentially responsible
10 parties and other costs.

11
12 THIRD CLAIM FOR RELIEF

13 (Recovery of Response Costs and Damages Pursuant to Porter-Cologne
14 Act, Cal. Water Code §§ 13300-13365, Against All Defendants)

15
16 65. Colton incorporates by reference the allegations of paragraphs 1 - 42.

17
18 66. Colton is a "governmental agency" under the California Porter-
19 Cologne Water Quality Control Act ("PCA"), Water Code § 13304(c)(1). Colton
20 has incurred and/or will continue to incur, substantial response costs to investigate
21 the nature and scope of the contamination, perform well-head treatment and
22 otherwise address the contamination.

23
24 67. Each Defendant is a "person who discharged the waste" within the
25 meaning of the PCA, Water Code § 13304(a).

26
27 68. Defendants' activities that precede the enactment of the PCA are
28 nevertheless subject to retroactive liability because they were in violation of the

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1 then existing Dickey Water Pollution Control Act, formerly California Water Code
2 § 13054, and California Civil Code §§ 3479 and 3480.
3

4 69. On or about June 1, 2002, Colton and other water providers entered
5 into an Agreement with the California Regional Water Quality Control Board,
6 Santa Ana Region ("Regional Board"), to assist the Regional Board in investigating
7 perchlorate contamination in the Rialto-Colton Basin, developing remedies for the
8 contamination, replacing impacted groundwater for customers, and prosecuting
9 responsible parties for the contamination ("Regional Board Agreement").
10

11 70. Shortly thereafter, the Regional Board made minor amendments to the
12 Regional Board Agreement with the water providers ("Revised Regional Board
13 Agreement"). Colton is informed and believes the Regional Board, West Valley
14 Water District, and San Gabriel Valley Water District, doing business as Fontana
15 Water Company, signed the Revised Regional Board Agreement. Colton intended
16 to sign it, but inadvertently failed to do so. Accordingly, on August 2, 2005, Colton
17 signed the Revised Regional Board Agreement.
18

19 71. The PCA, Water Code § 13304(c)(1), allows any government agency
20 to seek recovery for costs actually incurred in cleaning up the waste, abating the
21 effects of the waste, supervising cleanup or abatement activities, or taking other
22 remedial action from the person discharging the waste within the meaning of
23 Section 13304(a). This applies to a discharge of waste which violates "any waste
24 discharge requirement or other order or prohibition ... or threatens to create, a
25 condition of pollution or nuisance..."
26

27 72. The actions of each Defendant with regard to the disposal of hazardous
28 substances, including perchlorate and TCE, at the real property and facilities above

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1 the Rialto-Colton Basin, constitutes a discharge or threatened discharge of waste
2 within the meaning of the PCA, Water Code § 13304(a).

3
4 73. As a direct and proximate result of Defendants' releases or threatened
5 releases of hazardous substances from facilities above the Rialto-Colton Basin,
6 Colton has incurred and will continue to incur response costs.

7
8 74. As a direct and proximate result of Defendants' conduct, Colton is
9 entitled to recover all past, present and future response costs together with interest
10 from Defendants pursuant to Water Code § 13304(c)(1). Those damages include,
11 but are not limited to:

12
13 (A) Approximately \$4.2 million to construct facilities and treat
14 water in Wells 15, 17 and 24 prior to November 2006.

15
16 (B) Approximately \$350,000 per year for operations and
17 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

18
19 (C) Approximately \$2.2 million to construct two monitoring wells,
20 investigate the contamination, monitor the releases, identify potentially responsible
21 parties and other costs since November 2006.

22
23 (D) Future operations and maintenance costs to treat water,
24 investigate the contamination, monitor the releases, identify potentially responsible
25 parties and other costs.

26
27 ///

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1 FOURTH CLAIM FOR RELIEF

2 (Nuisance Against All Defendants)

3
4 75. Colton incorporates by reference the allegations of paragraphs 1 - 42.

5
6 76. Colton seeks economic and property damages incurred for water
7 conservation, Colton's property and Colton's groundwater resources proximately
8 caused by the acts and omissions of Defendants resulting in the environmental
9 contamination migrating from Defendants' facilities above the Rialto-Colton Basin.
10 Colton seeks such damages only to the extent any are not recoverable or available
11 as response costs under CERCLA, are not barred by the provisions of CERCLA,
12 and do not conflict or interfere with the accomplishment and execution of
13 CERCLA's objectives.

14
15 77. Colton is informed and believes that at all times during Defendants'
16 ownership, operation or possession of the facilities above the Rialto-Colton Basin,
17 Defendants used those facilities in violation of the law and public and private safety
18 by improperly releasing, discharging, handling and disposing of hazardous
19 substances, resulting in the groundwater contamination that has migrated
20 throughout the Rialto-Colton Basin and to Colton's wells.

21
22 78. Colton is informed and believes that at the times that Defendants
23 owned, possessed and/or operated the facilities above the Rialto Colton Basin,
24 Defendants knew or should have known that their activities caused the release of
25 hazardous substances, including perchlorate and TCE, into the soil and
26 groundwater.

27
28 79. The contamination in the Rialto-Colton Basin and Colton's wells

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1 caused by the tortious and unlawful disposal and release of hazardous substances,
2 including perchlorate, constitutes a nuisance under California Civil Code § 3479
3 because it is injurious to health so as to interfere with Colton's free use and
4 comfortable enjoyment of its property.

5
6 80. As a proximate result of the nuisance created by Defendants, Colton
7 has incurred and will continue to incur damages and costs. Those damages include,
8 but are not limited to:

9
10 (A) Approximately \$4.2 million to construct facilities and treat
11 water in Wells 15, 17 and 24 prior to November 2006.

12
13 (B) Approximately \$350,000 per year for operations and
14 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

15
16 (C) Approximately \$2.2 million to construct two monitoring wells,
17 investigate the contamination, monitor the releases, identify potentially responsible
18 parties and other costs since November 2006.

19
20 (D) Future operations and maintenance costs to treat water,
21 investigate the contamination, monitor the releases, identify potentially responsible
22 parties and other costs.

23
24 (E) Economic and property damages to water conservation, Colton's
25 property and Colton's groundwater resources.

26
27 ///

28

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FIFTH CLAIM FOR RELIEF

(Public Nuisance Against All Defendants)

1
2
3
4 81. Colton incorporates by reference the allegations of paragraphs 1 - 42.

5
6 82. Colton seeks economic and property damages incurred for water
7 conservation, Colton's property and Colton's groundwater resources proximately
8 caused by the acts and omissions of Defendants resulting in the environmental
9 contamination migrating from Defendants' facilities above the Rialto-Colton Basin.
10 Colton seeks such damages only to the extent any are not recoverable or available
11 as response costs under CERCLA, are not barred by the provisions of CERCLA,
12 and do not conflict or interfere with the accomplishment and execution of
13 CERCLA's objectives.

14
15 83. Colton is informed and believes that at all times during Defendants'
16 ownership, operation or possession of the facilities above the Rialto-Colton Basin,
17 Defendants used those facilities in violation of the law and public and private safety
18 by improperly releasing, discharging, handling and disposing of hazardous
19 substances, resulting in soil and groundwater contamination that has migrated
20 throughout the Rialto-Colton Basin and to Colton's wells.

21
22 84. Colton is informed and believes that at the times that Defendants
23 owned, possessed and/or operated the facilities above the Rialto-Colton Basin,
24 Defendants knew or should have known that their activities caused the release of
25 hazardous substances, including perchlorate and TCE, into the soil and
26 groundwater.

27
28 85. The contamination in the Rialto-Colton Basin and Colton's wells

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1 caused by the tortious and unlawful disposal and release of hazardous substances,
2 including perchlorate, constitutes a public nuisance under California Civil Code §§
3 3479 and 3480 because it is injurious to health so as to interfere with Colton's free
4 use and comfortable enjoyment of its property and adversely affects at the same
5 time an entire community or neighborhood and/or a considerable number of
6 persons.

7
8 86. Colton has statutory authority to bring a civil action to abate nuisances
9 under California Code of Civil Procedure § 731, and California Civil Code §§ 3494
10 and 3490-3495.

11
12 87. The nuisance has caused special injury to Colton because Defendants'
13 releases of hazardous substances has substantially interfered with Colton's free use
14 and substantial enjoyment of its property.

15
16 88. The public nuisance in the soil and groundwater under the facilities
17 affects the entire community at the same time in that the hazardous substances have
18 extensively contaminated the Rialto-Colton Basin, depriving the public of its rights
19 and benefits of free and beneficial use of the Rialto-Colton Basin.

20
21 89. Defendants are liable for abatement of the endangerment to the
22 environment and resulting interference with the public's free use and enjoyment of
23 public property and drinking water supply.

24
25 90. Further, Defendants are liable for damages arising from the
26 interference with the public's free use and substantial enjoyment of public property,
27 and the interference with Colton's free use and enjoyment of its property.
28

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1 91. Defendants have been given notice of the obstruction and
2 endangerment caused by the public nuisance, and have been requested to abate the
3 nuisance, but Defendants have failed and refused to abate the nuisance caused by
4 the contamination or to compensate Colton for damages suffered from the
5 contamination from their property and facilities. Those damages include, but are
6 not limited to:

7
8 (A) Approximately \$4.2 million to construct facilities and treat
9 water in Wells 15, 17 and 24 prior to November 2006.

10
11 (B) Approximately \$350,000 per year for operations and
12 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

13
14 (C) Approximately \$2.2 million to construct two monitoring wells,
15 investigate the contamination, monitor the releases, identify potentially responsible
16 parties and other costs since November 2006.

17
18 (D) Future operations and maintenance costs to treat water,
19 investigate the contamination, monitor the releases, identify potentially responsible
20 parties and other costs.

21
22 (E) Economic and property damages to water conservation, Colton's
23 property and Colton's groundwater resources.

24
25 SIXTH CLAIM FOR RELIEF

26 (Trespass Against All Defendants Except County of San Bernardino)

27
28 92. Colton incorporates by reference the allegations of paragraphs 1 - 42.

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1 93. Colton seeks economic and property damages incurred for water
2 conservation, Colton's property and Colton's groundwater resources proximately
3 caused by the acts and omissions of Defendants resulting in the environmental
4 contamination migrating from Defendants' facilities above the Rialto-Colton Basin.
5 Colton seeks such damages only to the extent any are not recoverable or available
6 as response costs under CERCLA, are not barred by the provisions of CERCLA,
7 and do not conflict or interfere with the accomplishment and execution of
8 CERCLA's objectives.

9
10 94. The contamination in the Rialto-Colton Basin and Colton's wells
11 caused by the tortious and unlawful disposal and release of hazardous substances,
12 including perchlorate and TCE, constitutes a trespass which has interfered with
13 Colton's use of the Rialto-Colton Basin and its property. Colton's trespass claim is
14 based upon California statutory authority including California Civil Code §§ 821,
15 826, 1708, 3281, 3283, 3333, 3334 and California Code of Civil Procedure §
16 338(b).

17
18 95. As a proximate result of the trespass created by Defendants, Colton
19 has incurred and will continue to incur damages and costs alleged above. Those
20 damages include, but are not limited to:

21
22 (A) Approximately \$4.2 million to construct facilities and treat
23 water in Wells 15, 17 and 24 prior to November 2006.

24
25 (B) Approximately \$350,000 per year for operations and
26 maintenance costs to treat water in Wells 15, 17 and 24 since November 2006.

27
28 (C) Approximately \$2.2 million to construct two monitoring wells,

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1 investigate the contamination, monitor the releases, identify potentially responsible
2 parties and other costs since November 2006.

3
4 (D) Future operations and maintenance costs to treat water,
5 investigate the contamination, monitor the releases, identify potentially responsible
6 parties and other costs.

7
8 (E) Economic and property damages to water conservation, Colton's
9 property and Colton's groundwater resources.

10
11 SEVENTH CLAIM FOR RELIEF

12 (Declaratory Relief Pursuant to the Declaratory Judgment Act,
13 28 U.S.C. §§ 2201, 2002, 42 U.S.C. § 9613(g)(2), Against All Defendants)

14
15 96. Colton incorporates by reference the allegations of paragraphs 1 - 42.

16
17 97. Colton seeks declaratory relief under Federal law to determine the
18 respective legal rights and obligations of the parties to this action.

19
20 98. Colton is informed and believes that all legal liability, under Federal or
21 State law which may in the future be asserted by any individual or entity, arising
22 from or related to the contamination of the Rialto-Colton Basin and Colton's
23 property and wells is the sole and actual responsibility of the Defendants. Colton is
24 further informed and believes that all response costs which Colton has incurred or
25 will incur in the future, arising from or related to the contamination of the Rialto-
26 Colton Basin and Colton's property and wells, is the sole and actual responsibility
27 of the Defendants.
28

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1 99. Therefore, Colton is entitled to a judicial declaration that Defendants
2 are liable: to pay Colton for the response costs that it has paid to date; and to pay
3 Colton for its future damages and costs that it may suffer as a result of the
4 contamination of the Rialto-Colton Basin or Colton's property or wells.
5

6 100. In the alternative, Colton is entitled to a declaration that Defendants
7 are liable to pay Colton for such damages and costs including, without limitation,
8 costs or damages awarded in legal or administrative actions; costs of compliance;
9 with any judicial or administrative order; past, current and future response costs;
10 and costs of litigation.
11

12 EIGHTH CLAIM FOR RELIEF

13 (Declaratory Relief Pursuant State Law

14 Cal. Code Civ. Proc. § 1060 Against All Defendants)
15

16 101. Colton incorporates by reference the allegations of paragraphs 1 - 42.
17

18 102. Colton seeks declaratory relief under State law to determine the
19 respective legal rights and obligations of the parties to this action.
20

21 103. Colton is informed and believes that all legal liability, under Federal or
22 State law which may in the future be asserted by any individual or entity, arising
23 from or related to the contamination of the Rialto-Colton Basin and Colton's
24 property and wells is the sole and actual responsibility of the Defendants. Colton is
25 further informed and believes that all response costs which Colton has incurred or
26 will incur in the future, arising from or related to the contamination of the Rialto-
27 Colton Basin and Colton's property and wells is the sole and actual responsibility
28 of the Defendants.

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1 104. Therefore, Colton is entitled to a judicial declaration that Defendants
2 are liable: to pay Colton for the response costs that it has paid to date; and to pay
3 Colton for its future damages and costs that it may suffer as a result of the
4 contamination of the Rialto-Colton Basin or Colton's property or wells.

5
6 105. In the alternative, Colton is entitled to a declaration that Defendants
7 are liable to pay Colton for such damages and costs including, without limitation:
8 costs or damages awarded in legal or administrative actions; costs of compliance;
9 with any judicial or administrative order; past, current and future response costs;
10 and costs of litigation.

11
12 WHEREFORE, Plaintiff Colton prays for judgment against each Defendant
13 as follows:

14
15 1. First, Second and Third Claims For Relief:

16
17 A. For recovery from Defendants of the necessary response costs
18 incurred by Colton in responding to the release and threatened release of hazardous
19 substances from real property and facilities above the Rialto-Colton Basin;

20
21 B. For necessary response costs to be incurred by Colton in
22 continuing to respond to and treat the release and threatened release of hazardous
23 substances from real property and facilities above the Rialto-Colton Basin;

24
25 C. For costs of suit; and

26
27 D. For any other and further relief the Court deems just and proper.
28

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2. Fourth, Fifth, and Sixth Claims For Relief:

A. For general damages consistent with CERCLA and California law caused by the contamination migrating from the real property and facilities above the Rialto-Colton Basin;

B. For special damages consistent with CERCLA and California law caused by the contamination migrating from the real property and facilities above the Rialto-Colton Basin in an amount to be determined at trial;

C. For costs of suit; and

D. For any other and further relief the Court deems just and proper.

3. The Seventh and Eighth Claims For Relief:

A. For declaratory relief and judgment determining the respective legal rights and obligations of all parties to this action;

B. For costs of suit; and

///

///

///

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C. For any other and further relief the Court deems just and proper.

Dated: October 6, 2009

BEST BEST & KRIEGER LLP

By: *Danielle Sakai*

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DEMAND FOR JURY TRIAL

Plaintiff City of Colton demands a jury trial on all matters triable to a jury.

Dated: October 6, 2009

BEST BEST & KRIEGER LLP

By: Danielle Sakai

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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15 ABARCA, RAUL VALENCIA, et.
16 al.,

17 Plaintiffs,

18 v.

19 MERCK & CO., INC., et. al.,

20 Defendants.

Case No. 1:07-CV-00388 OWW DLB

DEFENDANTS CITY OF MERCED'S
AND COUNTY OF MERCED'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
ADJUDICATION RE PHASE 1
ISSUES

[Filed With:

- 1. Notice of Motion and Motion;
- 2. Sep. State. of Undisputed Facts;
- 3. Declaration of Carissa Beecham;
- 4. Notice of Lodging;
- 5. [Proposed] Order]

Hearing Date: August 16, 2010

Time: 10:00 a.m.

Courtroom: 3

Action Filed: March 8, 2007

Trial Date: November 23, 2010

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Page

1. INTRODUCTION 1

2. ANALYSIS 3

 A. SUMMARY ADJUDICATION IS PROPER WHERE PLAINTIFFS FAIL TO PRESENT EVIDENCE TO SUPPORT A NECESSARY ELEMENT OF THEIR CLAIMS 3

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 1. INTRODUCTION

4
5 On August 11, 2009, this Court issued the Order Modifying Scheduling
6 Conference Order, filed August 12, 2009, Doc. No. 540 (“Modified Scheduling
7 Order”), laying out the phases for this litigation.¹ Thereafter, the parties embarked
8 on Phase 1 discovery focused on “the issue of general exposure; that is, whether
9 contaminants . . . have ever reached any location where plaintiffs could have been
10 exposed to them, and if so, when such contaminants arrived, how such
11 contaminants arrived at the location, how long they were present, and at what levels
12 they were present.” (Modified Scheduling Order, 1:23-28.) Phase 1 is also
13 supposed to delineate any alleged pathways of exposure. (Modified Scheduling
14 Order, 2:7-10.) Plaintiffs’ failure to produce admissible evidence of exposure in
15 compliance with the Court’s Order is the basis for this Motion.

16
17 This case arose from two events: chemical contamination emanating from
18 the Baltimore Aircoil Company wood treatment facility (“BAC Site”) and flood
19 waters from the April 2006 flood. Specifically, Plaintiffs allege that Defendants
20 City of Merced (“City”) and County of Merced (“County”) operated storm drain
21 and other facilities that carried chemical contaminants from the BAC Site and
22 biological contaminants from the wastewater treatment facility operated by
23 Defendant Franklin County Water District (“FCWD Facility”) to Plaintiffs’
24 neighborhoods before and during the April 2006 flood.²

25
26 ¹ The Modified Scheduling Order followed Defendants’ Joint Notice of Motion and Motion for Case Management
27 Order re: Exposure, filed March 23, 2009, Doc. No. 355, and Joint Notice of Motion and Motion to Modify the
Scheduling Conference Order, filed April 17, 2009, Doc. No. 380.

28 ² Eighth Amended Complaint, filed March 26, 2010, Doc. No. 633, ¶¶ 82-88 (5th Claim), 96-102 (6th Claim), 110-
116 (7th Claim), 124-128 (8th Claim), 136-138 (9th Claim), 153-155 (11th Claim), 185-188 (13th Claim).

1 Notwithstanding their pleading allegations, discovery conducted by
2 Defendants of Plaintiffs prior to the Modified Scheduling Order established that
3 Plaintiffs lacked scientific or medical evidence that they were exposed to
4 contaminants, much less suffered personal injuries related to exposure. Without the
5 information required to discern different classes of Plaintiff, including whether they
6 were even exposed to contaminants, it was impossible to select representative
7 Plaintiffs for a binding Test Plaintiffs trial. Now that the parties have exchanged
8 expert witness reports and completed Phase 1 discovery, it is abundantly clear that
9 Plaintiffs have no evidence of exposure regarding the City and County.

10
11 As illustrated more fully below, none of Plaintiffs' groundwater experts
12 expressed any opinion that the City or County had any impact on either chemical or
13 biological groundwater contamination. On the other hand, the Public Agencies'³
14 groundwater expert, John Lambie, confirmed that the City and County did not
15 contribute to any groundwater contamination.

16
17 Similarly, Plaintiffs' surface water experts uniformly failed to comply with
18 the Modified Scheduling Order since they did not provide dates or levels of
19 exposure for any group of Plaintiffs. This failure is not surprising because the
20 Public Agencies' surface water expert, Jeff Haltiner, explained that the flood waters
21 were so backed up that any surface waters from the BAC Site would not have
22 reached the area of the levee breach adjacent to the Beachwood neighborhood until
23 after the breach was repaired.

24
25 Because it is undisputed that the City and County did not contribute in any
26 way to Plaintiffs' alleged exposure to contaminants, Plaintiffs cannot prove an

27
28 ³ The Public Agencies are Defendants City, County, Franklin County Water District ("FCWD"), Merced Irrigation District ("MID") and Merced Drainage District No. 1.

1 essential element of their ninth, eleventh and thirteenth claims for relief against the
2 City and County in their entirety, or an essential element of the contamination
3 portion of the fifth, sixth, seventh and eighth claims for relief against the City and
4 County, and the Court should grant summary adjudication of those claims.

5
6 2. ANALYSIS

7
8 A. SUMMARY ADJUDICATION IS PROPER WHERE
9 PLAINTIFFS FAIL TO PRESENT EVIDENCE TO SUPPORT
10 A NECESSARY ELEMENT OF THEIR CLAIMS

11
12 In Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986), the United States
13 Supreme Court held that summary judgment could be granted to a defendant who
14 showed that plaintiffs failed to produce any evidence to support a necessary
15 element of their claim after reasonable discovery. In Celotex, plaintiffs alleged
16 injuries as a result of exposure to defendant's asbestos-containing products. Id. at
17 319. Defendant filed a motion for summary judgment one year after the complaint
18 was filed, noting that plaintiffs "failed to produce evidence that [defendant's]
19 product was the proximate cause of the injuries alleged." Id. at 319. Specifically,
20 defendant presented plaintiffs' answers to interrogatories that requested information
21 regarding exposure to defendant's products. Id. at 320. The D.C. Circuit Court of
22 Appeals found this insufficient to negate an element of the claim. Id. at 321-22.

23
24 The Supreme Court disagreed, and remanded the case to determine whether
25 there was an issue of material fact by way of an absence of evidence. Id. at 327. In
26 so doing, the Supreme Court provided the following direction:

27
28 [T]he plain language of Rule 56(c) mandates the entry of

1 summary judgment, after adequate time for discovery,
2 and upon motion, against a party who fails to make a
3 showing sufficient to establish the existence of an
4 element essential to that party's case, and on which that
5 party will bear the burden of proof at trial. In such a
6 situation, there can be "no genuine issue as to any
7 material fact," since a complete failure of proof
8 concerning an essential element of the nonmoving party's
9 case necessarily renders all other facts immaterial.

10
11 Id. at 322-23 (emphasis in original). As shown here, where Plaintiffs fail to
12 produce admissible evidence of essential elements pursuant to the Modified
13 Scheduling Order, summary adjudication is proper.

14
15 B. THIS COURT SET FORTH THE NECESSARY ELEMENTS
16 FOR PHASE ONE

17
18 In response to Defendants' Cottle Motion and Test Plaintiffs Motion, the
19 Court's Modified Scheduling Order explicitly provided:

20
21 Discovery and expert disclosures in this case shall
22 be conducted in phases. Phase 1 shall be focused on the
23 issue of general exposure; that is, whether contaminants
24 from the former Baltimore Air Coil Company facility
25 (BAC Site), Franklin County Water District or the April
26 2006 flood have ever reached any location where
27 plaintiffs could have been exposed to them, and if so,
28 when such contaminants arrived, how such contaminants

1 arrived at the location, how long they were present, and
2 at what levels they were present.

3
4 (Modified Scheduling Order, 1:23-28.) The Court continued:

5
6 Discovery in Phase 1 shall be limited to the issues
7 relevant to exposure as defined above; that is, discovery
8 reasonably related to identifying all the various ways
9 (whether by water, air, soil, or any other medium) by
10 which a contaminant of concern could reach a location
11 where it could do harm to a human being who is a
12 claimant in this litigation

13
14 (Modified Scheduling Order, 2:7-10.) To address Plaintiffs' failure to produce any
15 evidence that implicates the City and County, we examine the expert opinions
16 regarding the various pathways.

17
18 C. THERE IS NO EVIDENCE THAT THE CITY OR COUNTY
19 CONTRIBUTED TO GROUNDWATER CONTAMINATION

20
21 (1) Plaintiffs Did Not Assert That The City or County Caused
22 Groundwater Contamination

23
24 None of Plaintiffs' experts addressed whether any of the City's or County's
25 activities or facilities contributed to the chemical groundwater contamination from
26 the BAC Site or caused biological groundwater contamination from the FCWD
27 Facility:

28

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- Plaintiffs’ expert, Dr. W. Richard Laton, offers opinions on both groundwater and surface water. Although Dr. Laton opined about whether contaminants from the BAC facility reached Meadowbrook Well No. 2, he did not discuss or analyze whether any of the City’s or County’s facilities or activities impacted the chemical plume or contributed any contamination to Meadowbrook Well No. 2. Dr. Laton also failed to opine on whether the City or County caused biological groundwater contamination from the FCWD Facility. (City of Merced’s Separate Statement of Undisputed Facts in Support of Summary Adjudication Re Phase 1 Issues, filed concurrently (“Sep. State.”), 1.)
- Plaintiffs’ expert, Dr. Bartlett, provided a groundwater model regarding alleged contamination in Meadowbrook Well No. 2. However, like Dr. Laton, Dr. Bartlett did not provide any opinions on whether activities or facilities of the City or County contributed to chemical or biological groundwater contamination. (Sep. State., 2.)
- Plaintiffs’ expert, Mr. Marvin F. Glotfelty, only addressed the movement of groundwater into Meadowbrook Well No. 2, and also did not present any opinions in his Report that the City or County had any effect on chemical or biological groundwater contamination. (Sep. State., 3.)
- Plaintiffs’ expert, Dr. Franklin J. Agardy, calculated the mass of contaminant releases from the BAC Site, but made no independent calculations of the effect, if any, of the City or County on those releases. (Sep. State., 4.)

1 Under Celotex, the absence of any evidence alone is sufficient to grant this
2 Motion. But, as explained next, the City and County submitted un rebutted
3 evidence that they did not affect the groundwater contamination.

4
5 (2) The City Or County Did Not Affect Chemical
6 Contamination and Did Not Cause Biological
7 Contamination
8

9 Contrary to Plaintiffs' experts, the Public Agencies' hydrologist, John
10 Lambie, specifically addressed the issue of whether the Public Agencies contributed
11 to the spread of the chemical groundwater contamination or caused biological
12 groundwater contamination:

13
14 1) Actions of the public entity defendants with respect to
15 groundwater have had no measurable impact on the
16 migration of the BAC facility groundwater plumes of
17 chromium and arsenic.

18 . . .

19 3) Actions of MID to operate the El Capitan Canal and store
20 and hold surface water behind Crocker Dam seasonally
21 throughout the years has not and did not materially
22 contribute chromium and arsenic to groundwater from
23 the BAC facility; and

24 4) The FCWD ponds have not and do not impact
25 groundwater or surface water with the alleged pollutants
26 put forth in Robert Rawson's Expert Report.

27
28 (Sep. State., 5-7.) Therefore, not only do Plaintiffs lack evidence that the City or

1 County affected groundwater contamination, but the City and County have
2 presented undisputed evidence that they did not.

3
4 D. THERE IS NO EVIDENCE OF PLAINTIFFS' EXPOSURE
5 TO SURFACE WATER CONTAMINATION

6
7 (1) Plaintiffs Did Not Quantify Any Level of Exposure to
8 Contaminants Through Surface Waters

9
10 Plaintiffs' purported surface water experts, Mssrs. Schaaf, Laton, Rawson
11 and Sert, gave conclusory, unsupported opinions on contaminants in the flood and
12 surface waters, but failed to provide any quantification of the amounts of chemical
13 or biological contamination. For example, Dr. Schaaf responded as follows:

14
15 MR. GREENFIELD: Okay. Now, my question is:
16 Please show me any and all calculations that you
17 performed in order to determine that the substantial
18 amounts of storm water were contaminated?

19 DR. SCHAAF: The amount of contamination
20 wasn't in my purview. My purview was to figure out
21 how much water ran—surface water ran off of that site
22 into the canal over time.

23 MR. GREENFIELD: So am I correct that, as we
24 sit here right now, you have no opinions as to what
25 amounts, if any, of contamination existed in that water?

26 DR. SCHAAF: That's correct.

27 (Sep. State., 8.)
28

1 Dr. Laton also did not quantify any amount of chemical or biological
2 contaminants in flood waters in his initial expert report, rebuttal report, or provide
3 any such opinions at his deposition. Instead, he opined only that chromium from
4 the BAC pond reached the MID canal without any calculation as to an amount:

5
6 MR. TANAKA: Dr. Laton, what are the
7 concentrations of chromium that reached the canal in the
8 pre-1991 era?

9 DR. LATON: I'm assuming that these—the
10 reason they were collected in that pond is that there was
11 nothing prohibiting that water to go into the canal, that
12 these would be the average concentrations reaching it.

13 ...
14 MR. TANAKA: So during the period of 3/30/88
15 through 3/16/89, it is your testimony and your opinion
16 that on average 581 parts per billion of chromium when
17 from the BAC retention pond into the MID canal?

18 ...
19 DR. LATON: That it's not—this is during storm
20 events when the water is able to get in over—into the
21 canal. So it's not like this is a daily thing. So this is the
22 concentration of the water during those events which are
23 present putting water into the canal from one site.

24 MR. TANAKA: What size rain events are you
25 talking about that would do this?

26 DR. LATON: That's another expert's job.

27 MR. TANAKA: You don't know?

28 DR. LATON: I did not opine—I did not address

1 that.

2 MR. TANAKA: You don't know?

3 DR. LATON: No.

4 MR. TANAKA: How many times did they have
5 rain events in an average year in the area of the
6 Merced—of the City of Merced or the county where it
7 would be able to carry 581 parts per billion on average
8 into the canal?

9 DR. LATON: I don't have that information.

10

11 (Sep. State., 9.)

12

13 At the deposition of Mr. Rawson, Plaintiffs' counsel, Mr. Marderosian, made
14 the following representations:

15

16 MR. MARDEROSIAN: He will not be rendering
17 any testimony or opinions as to anything that affects the
18 BAC defendants. No issues regarding chemical
19 contamination or exposure or any chemical interaction
20 from the BAC facility with Franklin County. We don't
21 plan on introducing any testimony or evidence in regard
22 to that issue and don't claim that there was any
23 interaction in that regard from chemicals from that
24 facility and the Franklin County facility.

25

26 (Sep. State., 10.) Mr. Rawson also did not give any opinion as to the amount of any
27 biological contamination from surface waters. (Sep. State., 11.)

28

1 Finally, Mr. Sert acknowledged that his conclusory statements regarding
2 contaminated silt in the floodwaters merely quoted the Schaaf Report and did not
3 represent his own independent opinion.

4
5 MR. LEWIS: And the first sentence of that section
6 states, quote, "Based on the report of plaintiffs' expert,
7 James Schaaf, the 2006 floodwater flows carried
8 contaminated silt from the site into the storm water
9 retention pond, into the El Capitan Canal and into the
10 Beachwood neighborhood, which then went onto
11 residential properties, under residential structures, and
12 into residences."

13 And you cite Mr. Schaaf's 2009 report. Do you
14 see that?

15 MR. SERT: Yes,

16 . . .

17 MR. LEWIS: Mr. Sert, is it accurate that that is
18 not your opinion of what occurred there; you are merely
19 reporting what you understood Mr. Schaaf was opining
20 on in his report?

21 MR. SERT: That's correct.

22
23 (Sep. State., 12.)
24

25 Thus, none of Plaintiffs' surface water experts provided any calculations as
26 to the amount of chemical or biological contamination in surface water to which
27 Plaintiffs were exposed, foreclosing any such claims:
28

1 (2) Flood Waters From The BAC Site Did Not Reach
2 Plaintiffs' Properties
3

4 Public Agencies' surface water hydrologist, Jeffrey Haltiner, explained why
5 any surface water run-off from the BAC Site would not have entered the
6 Beachwood neighborhood from the levee breach. First, the high volume of water in
7 Black Rascal Creek backed up the El Capitan Canal.
8

9 As the flow rate and water levels in Black Rascal Creek
10 increased, flow in El Capitan Canal remained in the
11 upstream direction. This negative upstream flow
12 direction continued until approximately 11:30 a.m. on
13 April 4 when the BAC Pond began to discharge into El
14 Capitan Canal.
15

16 (Sep. State., 13.)
17

18 Second, by the time the flow reversed and water from the BAC reached the
19 area of El Capitan Canal that breached, the levee had been repaired:
20

21 Based on the low velocity in El Capitan Canal from the
22 time the BAC Pond began discharging (11:30) to the time
23 the breach was repaired (five hours later at 16:30), it
24 would have required approximately 10 hours for BAC
25 Pond water to reach the breach. This analysis indicates
26 that water from the BAC Pond did not reach the breach
27 prior to the 16:30 time of repair.
28

1 (Sep. State., 14.)

2
3 On rebuttal, Plaintiffs' expert, Dr. Laton, focused on the fact that soil
4 samples taken at the FCWD yard, which flooded, and the Gospel Defender Church
5 ("Church"), which did not flood, allegedly showed "significantly" higher
6 concentrations of arsenic and chromium: arsenic – 5.4 and 1.6 mg/kg at FCWD
7 and 1 mg/kg at the Church; chromium – 26.2 mg/kg and 10.9 mg/kg at FCWD and
8 6.8 mg/kg at the Church. Based on the difference between the samples taken at a
9 location that was flooded and a location that was not flooded, Dr. Laton concludes
10 the flood waters contained chemical contaminants from the BAC Site. (Sep. State.,
11 15.)

12
13 Dr. Laton's conclusion suffers two infirmities. First, all of the above test
14 results are within naturally occurring background levels of arsenic and chromium
15 concentrations. MID's expert, Vicki Kretsinger-Grabert, opined that naturally
16 occurring levels of arsenic are up to approximately 5.6 mg/kg and chromium are up
17 to approximately 33 mg/kg. (Sep. State., 16.) Second, neither properties are
18 Plaintiffs' properties. (Sep. State., 17.)

19
20 E. THE CITY AND COUNTY DID NOT CONTRIBUTE TO
21 ANY ALLEGED AIR EXPOSURE

22
23 Plaintiffs' air expert, Camille Sears, made no allegations regarding the City's
24 or County's activities impacting surfaces at BAC and contributing to potential air
25 pollution. (Sep. State., 18.) Obviously, whether wind carried surface
26 contamination from the BAC Site does not involve the City or County.
27 Accordingly, the City and County are entitled to summary adjudication regarding
28 this pathway.

F. THERE IS NO EVIDENCE OF EXPOSURE TO THE
YOSEMITE, THORNTON-LOPES AND SOARES
PLAINTIFFS

None of Plaintiffs' experts discuss or analyze chemical or biological exposure to the Yosemite, Thornton-Lopes or Soares Plaintiffs. (Sep. State., 19, 20, 21.) Accordingly, the Court should also grant summary adjudication as to these Plaintiffs.

3. CONCLUSION

The Court's Modified Scheduling Order was clear: in Phase 1, Plaintiffs were required to show evidence that contaminants reached an area where Plaintiffs could have been exposed, when, how, and at what level. Nevertheless, Plaintiffs failed to set forth any admissible evidence that the Public Agencies, including the City and County, affected groundwater contamination, and Plaintiffs did not quantify the alleged surface water contamination. Plaintiffs' failure to provide sufficient evidence of these essential elements mandates that this Court grant summary adjudication in favor of the City and County.

Dated: May 27, 2010.

BEST BEST & KRIEGER LLP

By: /s/

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1 Dated: May 28, 2010.

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2

3

By: /s/

4

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5

6

7 Dated: May 28, 2010.

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8

9

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PROOF OF SERVICE

I, Monica Brozowski, declare:

I am a citizen of the United States and employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2001 North Main Street, Suite 390, Walnut Creek, California 94596. On May 28, 2010, I served a copy of the within document(s):

DEFENDANTS CITY OF MERCED'S AND COUNTY OF MERCED'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION RE PHASE 1 ISSUES

- by transmitting via electronic mail (e-mail) the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek, California addressed as set forth below.
- by placing the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a UPS agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below by way of filing the document(s) with the U.S. District Court, Eastern District of California. Federal Rule of Civil Procedure § 5(b)(2)(E)

SEE ATTACHED SERVICE LIST

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.

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2 *United States District Court, Eastern District of California*
3 *Case No. 1:07 CV 00388 OWW DLB*

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