

# Alden Law Firm

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September 16, 2009

Kenneth Landau  
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Re: Draft Order on Central, Cherry Hill, Empire, Manzanita, and West End Mines,  
Colusa County: Submission of Dr. Richard Miller

Dear Mr. Landau:

This is submitted on behalf of Dr. Richard Miller who has been designated as a party in the Draft Cleanup and Abatement Order for the Central, Cherry Hill, Empire, Manzanita and West End Mine sites.

According to the evidentiary materials submitted by the Prosecution Team (see, Summary of Evidence), the only legal and factual basis for including Dr. Miller as a designated party is that he is the passive record holder of title to the property on which the alleged wastes are present. Staff summarily has dismissed the significant restrictions on Dr. Miller's control over this property which are imposed by a **Conservation Easement** on the property. In fact, the Conservation Easement so restricts Dr. Miller's control over activities on the property that he cannot be deemed to have "caused or permitted" waste discharges under Board policy, and is not able to undertake the cleanup and abatement measures called for by the Draft Order. Dr. Miller has never held an unencumbered fee interest in the property sufficient to permit him to control the alleged discharges or engage in the level of activities which would be required by the Draft Order.

## **1. The History of Dr. Miller's Acquisition of Title to the Homestake Property**

Dr. Miller purchased the neighboring Wilbur Hot Springs in 1972 to operate as a health facility. During the past 37 years that property has been open to the general public as well as being the site for seminars and treatment programs all relating to health, ecology and human consciousness. Programs conducted there have included resident artist programs, California's first alternative birthing seminars, health and poetry seminars, University of California Medical

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School faculty seminars, Vipassana meditation seminars, Biodynamic gardening seminars and the Cokenders Alcohol and Drug Rehabilitation Programs (founded by Dr. Miller.)

During its years of operation, the Wilbur Hot Springs property has been subject to minimal development, and the area has been maintained as close as possible to pristine condition. Wilbur has stayed off the electric grid, and all power is solar or hydroelectric. When circumstances permitted, the facility has provided its own food from on-site gardens. It is, in short, maintained as a place where for a reasonable cost, the public can retreat into a sanctuary and reconnect with nature.

A major problem developed in the 1990's as much of the neighboring property was acquired by the Bureau of Land Management and opened to the public for hunting. This became a major safety issue for users of the Wilbur property, with bullets actually landing within several feet of on-site residences. Accordingly, when the American Land Conservancy began to acquire these neighboring properties and was looking for a private buyer who would purchase them for preservation as open space by simultaneously conveying back to ALC a conservation easement, this provided Dr. Miller an opportunity to help restore the historic buffer zone around Wilbur Hot Springs. He also saw it as an opportunity to help secure and preserve a significant property in its natural state, something consistent with the purpose of Wilbur Hot Springs. So he stepped forward and engaged in discussions with ALC.

By July 1999, ALC had acquired 1,411 acres of adjoining lands and had entered into negotiations with Homestake Mining Co. for the donation of an additional 120 acres of property – the mining properties which are the subject of this proceeding. On July 20, 1999, Homestake and ALC entered into a donation agreement whereby Homestake donated the property to ALC, and ALC accepted “...all of [Homestake's] right title and interest in and to the Property, together with any and all improvements, fixtures, timber, water and minerals located thereon and any and all rights appurtenant thereto...” (See, Donation Agreement, Tab 4, § 1). The Donation Agreement provided that title to the mining property would be conveyed “...to either Donee [ALC] or, upon the direction of Donee, directly to the third party acquiring title to the Subject Property from Donee...” (*Id.*, § 4.)

On September 20, 1999, Dr. Miller entered into a Purchase and Sale Agreement with ALC (Tab 2 hereto.) That Agreement states that:

“Buyer [D. Miller] desires to purchase from Seller [ALC], and Seller desires to sell to Buyer, fee title to the Subject Property, subject to a conservation easement [in the form attached as Exhibit C] ... which conservation easement will set forth certain permitted and prohibited uses on the Subject Property and limit further development of the Subject Property.” (emphasis added). (Tab 2, page 2, paragraph E.)

And that is what the parties did. As evidenced by the escrow instructions (Tab 6 hereto), escrow closed on the sale by ALC of all 1500 acres, including the Homestake Parcel, on or about

November 11, 1999. (Tab 6, ¶ F.) Upon the closing, Dr. Miller paid ALC the sum of \$459,300 (Tab 2, ¶ 3) and acquired title to all 1531 acres, title being conveyed – in the case of the mining properties -- directly by Homestake to Dr. Miller upon written instructions from ALC. (Tab 6, ¶ 1,2.) Simultaneously, Dr. Miller executed the Conservation Easement as required by, and in the form included in, the Purchase and Sale Agreement. (*Id.*, ¶ A(3) and D). That Conservation Easement is attached hereto as Tab 3.

The Purchase Agreement and Conservation Easement (discussed in greater detail below) collectively meant that substantial property rights, including all development rights, were never acquired by Dr. Miller. All of the property rights acquired by Dr. Miller were subject to a contractual obligation to immediately and simultaneously relinquish a substantial portion of them back to ALC. The Easement, in other words, expressly limited the property rights acquired by Dr. Miller, and expressly kept to ALC specific rights in regard to, among other things:

“...at the sole discretion of [ALC], conducting certain restoration activities on the Property, including without limitation, re-vegetation of banks, restoration of the riparian corridor, repair of erosion sites, eradication of noxious weeds and fisheries enhancement projects...” Tab 3, page 2, § 2 (b) (iii).

The Conservation Easement gives ALC the right to:

“...prevent any activity on or use of the Property that is inconsistent with the conservation purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by any such inconsistent activity or use.” Tab 3, page 2, § 2 (c).

As is evidenced by the appraisal which was done on this property, Tab 1 hereto, page 1, Dr. Miller paid fair market value for this property, including the Homestake Parcel, without any adjustment in purchase price to account for either the Conservation Easement or the presence on the Homestake Parcel of historic mining sites.<sup>1</sup> This is further evidenced by the January 11, 1999 letter attached as Tab 5 hereto from ALC to Dr. Miller, in which it is apparent that the price of the Homestake Parcel was separately negotiated at fair market value with no adjustment for any potential environmental conditions. While the final price for the entire property was ultimately arrived at through normal buyer-seller negotiations, nowhere in the documentation for this transaction, including the appraisal which was done, was any discount from fair market value made to reflect any potential environmental liabilities.

It is worth emphasizing that the price paid by Dr. Miller for the Homestake Parcel was not discounted by the appraiser or in the transaction documents to account for the presence of

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<sup>1</sup> The appraised value of the property without consideration of the easement or any environmental liabilities was \$500,000. (Tab 1, page 1.) The value after taking the easement into consideration was \$260,000. *Id.* Thus, allowing for the range of values inherent to appraisals and the benefits of normal buyer-seller negotiations, Dr. Miller essentially paid full market value for the property.

historic mining sites on the property. This was because, during the Phase I Property Assessment conducted on behalf of ALC, a representative of the Central Valley Regional Water Quality Control Board informed the parties that, in his opinion, wastes from the mines on the Homestake Parcel were not contributing to any surface water mercury contamination, and that the sources of mercury in regional waters was most likely attributable to natural geothermal resources or to upstream mining operations. See page 5 of Phase I Preliminary Environmental Site Assessment, included as an Addendum to Appraisal Report, Tab 1.

Accordingly, we have Homestake donating the property in its entirety to ALC and, presumably, obtaining the advantages of a tax deduction for donating the property. We have ALC, while never appearing as a title holder of record, obtaining "all right, title and interest" in the Homestake Property from Homestake – that is, obtaining 100% of the attributes of property ownership -- and then completely and entirely controlling the disposition of the Homestake Parcel by selling it to Dr. Miller. Whatever portion of the total purchase price may have been attributable to the Homestake Parcel was pure profit to ALC, it having obtained it by donation. Simultaneously, and as a pre-condition to the entire transaction, we have Dr. Miller conveying back to ALC the Conservation Easement with an appraised value of \$240,000, (Tab 1, page 1), essentially one-half of the entire value of the property, thus returning to ALC in one fell sweep of the pen some of the most valuable attributes of property ownership – the right to control development and other uses (except those limited uses specifically left with Dr. Miller) of the property.

Dr. Miller did not benefit in any material way from this transaction. Yes, he obtained a tax deduction which reduced the costs of the transaction to him; but he still incurred most of the purchase price as an out-of-pocket expense. For this expenditure, he was able to gain the qualitative benefits of having helped preserve a significant property in perpetuity and help restore the sanctuary atmosphere for Wilbur Hot Springs, which it already had enjoyed for nearly 30 years. But none of this amounts to any quantifiable financial or other material benefit to him. In contrast, others – most notably Homestake and ALC, appear to have profited quite nicely from Dr. Miller's public spiritedness.

## **2. Dr. Miller Never Has Had Sufficient Control Over the Property to Control the Waste Piles or Respond to the Draft Order.**

The Prosecution Team's legal theory in support of its naming of Dr. Miller as a responsible party to the Draft Order rests on two propositions: 1) that Dr. Miller "voluntarily" conveyed the Conservation Easement to ALC, thus attempting to divest himself of liability by conveying it to another; and 2) that Dr. Miller, and not ALC, possesses the aspects of property ownership which enable an owner to control the waste discharges in question and to undertake the activities required by the Draft Order. (See, Tab 7, June 16, 2009 letter from Victor Izzo to Dr. Miller.) Neither of these propositions is true.

**a) Dr. Miller Took Title Subject to the Conservation Easement.**

The Prosecution Team rests its case heavily on its misunderstanding and belief that Dr. Miller voluntarily relinquished his property interests as owner by conveyance of the Conservation Easement. As indicated in the staff letter attached hereto as Tab 7, Staff believes that the establishment of the Conservation Easement on Dr. Miller's property was discretionary on his part, and that it would be against public policy to permit a property owner to seek to avoid "owner" liability for cleanup and abatement activities simply by creating a conservation easement.

As described above, this is manifestly not true. The properties to which Dr. Miller holds title were acquired and packaged by the American Land Conservancy for the purpose of creating a Conservation Easement prior to Dr. Miller's taking title. In the Purchase and Sale Agreement between Dr. Miller and ALC (Tab 2), the imposition of the Conservation Easement was a condition of sale. Moreover, the expressed intent of the Agreement was that Dr. Miller acquire title subject to the Conservation Easement. (Tab 2, ¶ E.) Even at the micro-second-long moment in time between the conveyance of title to Dr. Miller and his re-conveyance of property rights back to ALC, Dr. Miller held that title encumbered by a contractual obligation to re-convey a significant portion of the rights of ownership back to ALC. Accordingly, Dr. Miller never possessed an unencumbered fee title to this property, and did not divest himself of any rights or obligations of ownership in conferring the Conservation Easement. He never possessed them to begin with.

As Staff has acknowledged in its June 16, 2009 letter to Dr. Miller:

"If you took the property subject to the conservation easement and if the conservation easement restricted all activities on your property, it may have been appropriate for the Board to exclude you from the draft Cleanup and Abatement Orders. Both of these factors would show that you lacked the ability to control the active discharge of wastes from your property." Tab 7, Page 2, ¶ 4. (emphasis added)

We address the "restriction of activities" question in the section below. It is clear, however, that Dr. Miller did in fact "take the property subject to the Conservation Easement", as he never had even the right to acquire the property without the Easement and never even for a moment in time possessed title to the property unencumbered by the obligations of the Easement.

**b) The Conservation Easement Limits Dr. Miller's Control Over Waste Discharges and Precludes His Undertaking the Actions Required by the Draft Order.**

The scope of the Conservation Easement is vast, and does in fact preclude Dr. Miller from controlling the waste discharges in question and from undertaking activities required by the Draft Order. It is true that the goals of the Conservation Easement are to protect and preserve the

conservation values of the property, but these conservation values are appurtenant to ALC's interest in and obligations with respect to the property, not Dr. Miller's. Dr. Miller has no obligation or right under the Easement to undertake such preservation measures. The Easement simply prohibits him from undertaking activities which would subvert those conservation values, and transfers to ALC all development rights and all discretion over the undertaking of any activities not expressly reserved to Dr. Miller, which are all, ultimately, limited to enabling the recreational use of the property.

The limitations on Dr. Miller's control over the property are evidenced by the very narrowly defined uses which he can make of the property, the limits imposed on his activities, and the need for ALC's permission before any different uses can be undertaken. The limitations on Dr. Miller's ownership interest in the property are particularly apparent when one considers the actions which the Summary of Evidence alleges are within his control as an "owner". The Prosecution Team lists, as tasks which would be potentially required of Dr. Miller:

- Relocating material piles away from waterways.
- Placing barriers, such as grass covered berms, between mine materials and waterways
- Re contouring and re-vegetation of material piles and areas of surface disturbance by mining activity to reduce erosion
- Redirection of storm runoff around material piles and areas of surface disturbance to reduce erosion
- Stabilization of stream banks containing enriched mercury alluvium to minimize erosion during storm events.

In fact, Dr. Miller cannot engage in any of these activities.

The specific rights and obligations of ownership explicitly reserved to Dr. Miller include management of woodland resources (see, Tab \_\_, page 3, ¶ 8), maintenance of existing infrastructure (such as fences, roads, ditches and ponds), use of the property for recreational and educational purposes that require no development of the land, including wildflower viewing, hiking and nature study, use for hunting, undertaking of conservation practices that promote soil stabilization and reduce erosion in accordance with sound, generally accepted practices, removal of invasive plant species, and construction of two lodge facilities and appurtenant infrastructures. None of these rights or obligations encompasses the sorts of activities necessary to control waste discharges from the mine tailings area or to undertake the remedial measures specified by Staff.

The Staff noted in its June 16, 2009 letter to Dr. Miller (Tab 7) that one of the Permitted Uses and Practices granted to Dr. Miller by the Conservation Easement is the undertaking of "conservation practices" to promote soil stabilization and to reduce erosion. However, the obligation to undertake "conservation practices" in the regular course of property maintenance is a far cry from any affirmative obligation or right to undertake restoration or remedial measures. This permitted use fairly must be interpreted in the context of all of the permitted and prohibited

activities which define Dr. Miller's rights and obligations on the property, which fairly may be understood to be related to general ordinary maintenance of the property and its existing infrastructure to enable its use for recreational purposes. (See, Exhibits B and C to Conservation Easement, "Prohibited Uses and Practices" and "Permitted Uses and Practices." (Tab 3, pages B-1 and 2 and C-1 and 2). Nowhere in the Conservation Easement does it confer upon Dr. Miller the general obligation to maintain the general condition or conservation values of the property, let alone undertake significant restoration or remediation work. All of his rights and obligations pertain to the maintenance of existing infrastructure and the enabling of continuing recreational use.

This becomes even more apparent when the list of activities prohibited to Dr. Miller by the Conservation Easement is examined. Under the Easement, Dr. Miller is specifically prohibited from:

- Impairing the conservation purpose of the Easement (as described therein, i.e., preservation of the property in its present state)
- the construction of any improvements to the property
- the use of any motorized vehicles off roadways on the Property
- The paving, construction or relocation of any roadway, including...any bulldozing or grading required in connection therewith
- The exploration, development, mining extraction, severance or removal of any minerals [or other earth materials] in, on and/or under the Property, in whatever form or character
- The cutting, uprooting or removal of any trees or other natural growth located on the Property, except as may be required for fire prevention, trail maintenance, utility access etc; although Dr. Miller is affirmatively authorized to remove non-native species from elsewhere on the property, he is specifically prohibited from doing so in any riparian corridor.
- The damming, diverting or other interference of any natural water flow on, under or through the Property, or the filling of any portion of the Property with any substance, including any exchange, replacement or removal of any soils or other substances from the Property. (emphasis added) (Conservation Easement, Tab 3, Exhibit B "Prohibited Uses and Practices", pages B-1 and 2.)

These prohibited activities alone should make clear that Dr. Miller does not have the right or obligation to undertake major soil excavation or grading activities necessary to control waste discharges or to conduct remediation activities. He cannot undertake any "exchange, replacement or removal of any soils." He cannot even disturb non-native plant species from the riparian areas, which presumably would be part of any of the grading work which would be required under the Draft Order. Taken together with his limited affirmative rights of use, it is clear he does not possess the requisite interest in and control over the property.

ALC , on the other hand, is specifically authorized to undertake erosion control and does have the right and obligation to maintain the general conservation values of the property. The Conservation Easement conveys to ALC the right to :

- To identify, preserve and protect in perpetuity the conservation values of the Property
- To enter upon the Property...in order to inspect, observe and study the Property for the purposes of (i) identifying the current uses and practices of the Property, (ii) monitoring the uses and practices of the Property to determine whether they are consistent with this Grant, (iii) at the sole discretion of Grantee [ALC], conducting certain restoration activities on the Property, including without limitation, re-vegetation of banks, restoration of the riparian corridor, repair of erosion sites ...”
- To prevent any activity on or use of the Property that is inconsistent with the conservation purpose of this Easement.... (Conservation Easement, Tab \_\_, page 2, ¶¶ 2. (a), (b), (c).)

Staff has suggested that remediation of mercury discharges at the site is consistent with preserving the conservation values of the property. That may be. But the conservation values of the property are appurtenant to ALC's property interest, the value of the Conservation Easement, and fall well within its affirmative obligation to preserve and protect those values. The specific rights explicitly reserved to ALC would permit ALC to control waste discharges and to implement each of the remediation measures listed above which Staff --incorrectly-- alleges to be within Dr. Miller's purview.

Inherent in the policies underlying the naming of property owners as Responsible Parties, including the policies reflected in the Zoecon and Wenwest decisions of the State Water Resources Control Board, is that the owners of properties where passive migration of waste material has occurred are or have been in a position to take measures to ameliorate the conditions on the property. It is clear that Dr. Miller has never possessed, and does not presently enjoy, an ownership interest in this property sufficient to take such actions. It is ALC which possesses, through the nature of its property interest, its obligations to preserve the conservation values of the property and its discretionary control over all non-recreational activities and its right to undertake restoration and erosion control measures, the control of the property necessary to ameliorate conditions at the property and to respond to the Draft Order.

In its Summary of Evidence, Staff cavalierly dismisses the restrictions imposed on Dr. Miller's control of the property by the Conservation Easement by stating:

“Dr. Richard Miller has claimed that a conservation easement that has been recorded for his property precludes him from taking actions to control the discharges, but the documents referenced in Attachment B, as well as the grading activities that he has conducted on the property, suggest that his ability to abate to pollution issues on his property are not limited by the easement that he has recorded.” (Evidence Document pages 2-3).

The “Attachment B” which staff references is simply a list of the various conveyances of title in regard to the property, and does nothing to address the actual extent of the limitations which the Conservation Easement imposes. Accordingly, the documents “referenced in Exhibit B” do nothing to support Staff’s position.

The allegation of “grading activities” having been undertaken by Dr. Miller is just plain wrong, and is unsupported by any evidence Staff cites. Dr. Miller has never engaged in any grading activities, except for road maintenance activities specifically permitted by the Conservation Easement. In fact, the only activities along these lines which have occurred under the Conservation Easement have been by ALC, as it has acknowledged. (*See*, Letter dated August 18, 2009 to K. Landau from A. Jahns.<sup>2</sup>)

ALC appears to take the remarkable position that since its right to conduct restoration activities under the Conservation Easement is discretionary and not obligatory, it cannot be required by the Board to undertake such activities. *Id.* The fact that it can choose to undertake such activities in and of itself demonstrates that such activities lie within the rights conveyed to ALC under the Conservation Easement. Dr. Miller has no such option, as his property rights do not include, and in fact preclude, his engaging in such activities.

ALC’s entire argument as to why Dr. Miller, and not ALC, possesses the property interest and bundle of rights necessary to control discharges and comply with the order consists of a collection of truisms which completely beg the question. ALC contends that Dr. Miller acquired all residual rights not specifically granted to him or specifically prescribed. *Id.* While this completely ignores the rights and obligations of ownership which ALC acquired, it also completely begs the question of whether the rights which Dr. Miller does in fact have provide him the degree of control over the property necessary to control discharges and comply with the specifications of the Draft Order. As we have demonstrated above, the rights Dr. Miller acquired do not permit such activities.

Similarly, ALC argues that the Conservation Easement provides that nothing contained in the grant of easement relieves Dr. Miller of any obligation or restriction on the use of the Property imposed by law. *Id.* This once again begs the question. Obligations and restrictions may be imposed on an owner of property, but they cannot expand the level of ownership interest an owner has. In this case, the question which ALC’s argument leaves entirely unaddressed is – who is the “owner” when it comes to the obligations and restrictions which the Board seeks to impose in this proceeding? As demonstrated above, all of the attributes of ownership which relate to the control of any discharge from the mine wastes, and to an ability to comply with the Draft Order fall within the parameters of ownership which were retained by ALC pursuant to the Conservation Easement.

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<sup>2</sup> At the time of this writing, this response by ALC has not yet been posted by Staff on the Board’s Website: [Summary of Evidence](#). Presumably it will be posted by the date of hearing, as it is part of the administrative record.

## Conclusion

Since these specific problems with the Staff's case were first brought to Staff's attention (*see*, letter dated June 19, 2009, listed by Staff in the "Comments Received" section of their Summary of Evidence ), Staff has never responded or been able to produce any evidence or analysis justifying continuing to name Dr. Miller as a responsible party. Even now, in response to being required to present its evidence and legal theory by the Board's Order re Revised Hearing Procedures, all Staff appears able to argue in support of its naming of Dr. Miller as a responsible party is that he "holds title".

Staff has acknowledged that if Dr. Miller accepted the property subject to the Conservation Easement, which he did, and if the Easement limited his activities in such a way as to preclude him from undertaking the activities potentially required by the Draft Order, which it does, it would be inappropriate to include him as a responsible party to the Order. Nonetheless, having had both of these facts amply demonstrated, the Prosecution Team continues to press for his inclusion on the Order. Dr. Miller respectfully requests that he be removed from the Order, as his ownership interest and control over this property is insufficient to cause him to be defined as a discharger under Board precedent and policy, and is insufficient to enable him to comply with the terms of the Order.

This is not to say that Dr. Miller does not wish to do what he can to facilitate any actions undertaken in response to any Orders the Board may issue. Dr. Miller's entire career has been devoted to healing and to using the benefits of nature as a healing catalyst. As he has informed Staff all along, he will fully cooperate -- to the limited extent he has any say in or control over the matter -- with the Board and with the parties to the Order so that the necessary work can proceed. Since he is holder of record of the title to the property, it may be that the Board or the parties may wish some formalization of this offer, in which case Dr. Miller would gladly enter into an enforceable agreement to grant whatever permissions may be thought necessary from him, given the limitations on his property rights. However, the primary permissions which will be necessary in order to conduct such activities must necessarily come from the owner of the Conservation Easement, ALC.

Dr. Miller entered into this transaction with ALC to help fund and otherwise enable the establishment of a significant wildlife conservation area by agreeing to act as the title holder of record, and by accepting certain specific and limited obligations to facilitate the continued usability of the property for recreational purposes. He has gained no material economic benefit from acting as the holder of title of record for the property and cannot expect to in the future. Dr. Miller paid fair market value for the property and would reap no economic benefit from cleanup and abatement, since neither the appraised value nor the purchase price reflected any reduction in value due to environmental conditions, and since cleanup and abatement of the property would directly affect the conservation values of the property -- ALC's property interest -- and would have no economic effect whatsoever on the value of Dr. Miller's limited property interest.

It would be contrary to public policy to name Dr. Miller as a responsible party merely as a passive holder of title to a property in which he has never had any material economic stake, in respect of which he has possessed almost none of the significant rights, benefits or obligations of property ownership, and over which he does not possess and never has exercised the kind of control necessary to control waste streams on the property or to implement the terms of the Draft Order.

Very truly yours,



David W. Alden

cc: Lori Okun (w/encl.)(electronic copy)  
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Exhibits to September 16, 2009  
Submittal  
by Dr. Richard Miller  
to  
Regional Water Quality Control Board  
Central Valley Region

- Tab 1--** Appraisal Report by J.P. Saake (doc. # 0677)  
**Tab 2** –Purchase and Sale Agreement Between Dr. Miller and ALC (#0678)  
**Tab 3** – Conservation Easement (#0679)  
**Tab 4** – Donation Agreement Between Homestake and ALC (#0680)  
**Tab 5** – ALC Letter of January 11, 1999 to Dr. Richard Miller (#0681)  
**Tab 6** – Escrow Instructions From ALC re Homestake Parcel (#0682)  
**Tab 7** – June 16, 2009 Letter to Dr. Miller from Victor Izzo (RWQCB) (#0689)