EXHIBIT A

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June 4, 1993

John J. Verber, Esq.
Larson & Burnham
1901 Harrison Street
11th Floor
Oakland, California 94612

Re: County of Santa Clara v. Myers Industries, Inc., et al., No. C-92 20246 JW (PVT);

State of California v. BKHN Inc. and the County of Santa Clara, No. C-92 20521 JW (PVT)

(Consolidated)

Dear John:

This letter follows our telephone conversation earlier today regarding Sun Company, Inc.'s ("Sun") status.

Based on my telephone conversation with you last week, we understood that Sun would send us a letter that would clearly identify the entity or entities that are responsible for the liabilities of Cordero Mining Company ("Cordero"), a former Nevada corporation, at the Almaden site as alleged. We are in receipt of a letter from Sun dated June 3, 1993 which states "Sun (or certain of its subsidiaries) not Oryx Energy Company, is responsible for the liabilities, if any, of the Cordero Mining Company ("Cordero"), a former Nevada corporation, at the Almaden Quicksilver County Park." (emphasis added). As discussed, the letter from Sun which was supposed to clarify its position regarding the proper party, instead introduces a new ambiguity on the issue. If Sun is responsible, a letter from Sun should so state without a qualification suggesting that one of its subsidiaries may be responsible instead. Alternatively, if Sun and a subsidiary are both responsible, a letter should clearly identify Sun and the subsidiary as the entities responsible. If Sun refuses to provide the information, we will be left with little choice but to join Sun as a cross-defendant and to conduct discovery regarding the various corporate relationships of Sun's subsidiaries.

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As you are aware, we request this clarification because we intend to amend our cross-claims to name the Sun-related entity as a cross-defendant and to dismiss Oryx. Please appreciate that our request is intended to avoid any questions down the road as to which Sun entity(ies) is(are) the proper defendant(s) in the case. Unfortunately, as it stands now the identity of the Sun entity(ies) responsible for Cordero's activities as alleged is unclear.

We understand that Sun has conducted some initial investigation into Cordero's activities at the site which indicate that Cordero may have conducted only exploratory activities for mercury at the site, rather than mercury production. We understand further that Sun believes liability attaches only for mercury production, rather than mercury mining activities or operations, and, thus, requests that it not be joined or that it be dismissed if we are provided with declarations from former Cordero employees indicating that Cordero did not produce mercury at the site. Sun indicated that it may file a Rule 11 motion if we do not agree to a dismissal or non-joinder of Sun if we are provided with that information.

As you are aware, the allegations in the complaints in these consolidated cases are not limited to mercury production, but refer generally to "mercury mining operations" or "mercury mining activities." (See e.g. County's First Amended Complaint, ¶¶ 5-9, 12-13; State's Complaint, ¶¶ 4, 6). The amended cross-claims, in turn, include allegations that essentially mirror the complaints, namely that Cordero "leased the Property or portions thereof, and/or conducted and/or permitted mercury mining activities at the Property of portions thereof." (Amended Cross-claim of BKHN, ¶ 8). Simply put, at this juncture, we do not believe there is any basis for Sun's interpretation of the complaints limiting liability to mercury production. Moreover, even assuming that Sun's recent research and interpretation of the complaints is correct (i.e., that Cordero conducted only exploratory work and liability attached only to mercury production)[1/], Sun (or a Sun-related entity) is a proper cross-defendant for the liabilities of Cordero as alleged because Cordero is alleged to be a lessee of the site, which itself can lead to liability under section 107(a)(2) of CERCLA.

Please be advised that we intend to join Sun (and/or the Sun-related entity identified by Sun) as a cross-defendant and that we will not dismiss that cross-defendant on the basis of

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1/ Of course, we do not admit that Sun's research or interpretation is correct.

statements that Cordero conducted only mercury exploratory activities at the site. In addition, if Sun makes a Rule 11 motion on the grounds we have discussed, please be advised that we will move for sanctions as well.

After you have had an opportunity to consider this, please contact us to discuss and to let us know whether Sun will provide a letter clarifying whether Sun and/or a related entity is responsible for Cordero as alleged.

Very truly yours

Peter R. Krakaur

Peter R. Krakaur

PRK:phb

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EXHIBIT B

93-156
Corresp.

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July 22, 1993

The Honorable James Ware
Judge of the United States District Court
Northern District of California
280 S. 1st Street
San Jose, CA 95113

RECEIVED
JUL 26 19[illegible]
R. W. WILLIAMS

Re: County of Santa Clara v. Myers, et al.
USDC-ND Action No. C-91 20246 JW (PVT)
and C-91 10521 JW (PVT) (Consolidated)

Dear Judge Ware:

This office represents Sun Company, Inc. (Sun) in the above-referenced matter. Sun was just recently brought into this action by way of BKHN Inc.'s cross-claim. Sun is responsible for the liabilities, if any, of Cordero Mining Company, arising out of its activities at the Almaden Quick Silver County Park.

During the course of my investigation into Cordero's activities at the site, I had occasion to speak with J. Eldon Gilbert, the former President of Cordero Mining Company. Mr. Gilbert informed me that he is in very poor health. In order to preserve Mr. Gilbert's testimony, we would like to take Mr. Gilbert's deposition as soon as possible. Unfortunately, discovery is currently stayed in this action.

Consequently, I respectfully request that you sign the enclosed Stipulation and Order Re Discovery authorizing the parties to proceed with Mr. Gilbert's deposition. Mr. Gilbert has suggested July 29, 1993 for his deposition and has graciously agreed to make his home available for the deposition. This date is acceptable to counsel for the various parties.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

LARSON & BURNHAM

John J. Verber

JJV:pl
Enclosures
cc: All Counsel
115180

EXHIBIT C

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Attorneys for Defendants,
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MYERS INDUSTRIES, INC.,
BUCKHORN INC., BKHN INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SANTA CLARA, Plaintiff, vs. MYERS INDUSTRIES, INC., et al., Defendants.	No. C-92 20246 JW (PVT) C-92 20521 JW (PVT) (Consolidated) **SECOND AMENDED CROSS-CLAIM OF MYERS INDUSTRIES, INC., BUCKHORN INC., and BKHN INC.**
MYERS INDUSTRIES, INC.; BUCKHORN INC.; BKHN INC., Cross-Claimants, vs. CHICAGO TITLE INSURANCE COMPANY; SUN COMPANY, INC.; NEWSON, INC.; SANTA CLARA VALLEY WATER DISTRICT, Cross-Defendants.	
AND RELATED CLAIMS AND ACTIONS	

Cross-claimants MYERS INDUSTRIES, INC., BUCKHORN, INC., AND BKHN, INC. (collectively referred to herein as "CROSS-CLAIMANTS"), and each of them, for their second amended cross-claims in these consolidated cases, allege against cross-defendants, and each of them, as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over these cross-claims pursuant to: section 113(b) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(b), and 28 U.S.C. § 1331, pursuant to the principles of pendent jurisdiction and of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this District under 42 U.S.C. § 9613(b) and 28 U.S.C. section 1391(b) in that (a) a substantial part of the events giving rise to the claims asserted herein occurred in this District, and (b) the property that is the subject of this action is situated in this District.

PARTIES

3. Cross-claimant BKHN, INC. ("BKHN") is a corporation organized under the laws of the State of Ohio, and is the successor in interest by merger agreement to New Idria, Inc., a former Nevada corporation, f/k/a New Idria Mining & Chemical Company ("NIMCC"). In or about November 1968, NIMCC purchased parcels ("Parcels") of real property located in Santa Clara County, California which lie within the current boundaries of real property currently known as the Almaden Quicksilver County Park ("PROPERTY"). Between in or about July 1973 and in or

about June 1975, NIMCC sold its Parcels to plaintiff County of Santa Clara ("COUNTY").

4. Cross-claimant BUCKHORN, INC. ("BUCKHORN") is a corporation organized under the laws of the State of Delaware.

5. Cross-claimant MYERS INDUSTRIES, INC. ("MYERS") is a corporation organized under the laws of the State of Ohio.

6. Plaintiff COUNTY is the current owner of the PROPERTY. The COUNTY filed this action, No. C-92 20246 JW (PVT), against CROSS-CLAIMANTS and others seeking to recover its alleged costs and damages associated with the investigation and remediation of the alleged release and/or threatened release of hazardous substances, including mercury at the PROPERTY. The State of California ("STATE"), on behalf of the California Department of Toxic Substances Control ("DTSC"), filed an action, No. C-92 20521 JW (PVT), against the COUNTY and BKHN seeking to recover the STATE's alleged oversight and remedial action costs associated with the PROPERTY. The STATE's action has been consolidated with the COUNTY's action. The COUNTY's complaint in action No. C-92 20246 JW (PVT) ("the County Action") shall be referred to herein as "the County Complaint." The STATE's complaint in action No. C-92 20521 JW (PVT) ("The State Action") shall be referred to herein as "the State Complaint."

7. CROSS-CLAIMANTS are informed and believe, and thereon allege, that cross-defendant CHICAGO TITLE INSURANCE COMPANY ("CTIC"), is or at all relevant times herein was, a Missouri corporation, and is the successor by merger to Ticor Title Insurance Company of California ("Ticor"). CROSS-CLAIMANTS are

further informed and believe, and thereon allege, that CTIC is the successor to, or otherwise responsible for the liabilities of, California Pacific Title Insurance Company ("California Pacific").

8. CROSS-CLAIMANTS are informed and believe, and thereon allege, that California Pacific owned the PROPERTY or portions thereof when mercury mining operations were conducted and/or during the disposal of hazardous substances, including mercury, from in or about 1960 until in or about 1968.

9. CROSS-CLAIMANTS are informed and believe, and thereon allege, that CORDERO MINING COMPANY ("Cordero") is or was a Nevada Corporation doing business in California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that from in or about 1951 and through in or about 1953, Cordero leased the PROPERTY or portions thereof, and/or conducted and/or permitted mercury mining activities at the Property or portions thereof.

10. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the activities, acts and/or omissions of Cordero at the PROPERTY or portions thereof caused, permitted, or contributed to the release or threatened release of hazardous substances, including mercury at the PROPERTY or portions thereof.

11. CROSS-CLAIMANTS are informed and believe, and thereon allege, that cross-defendant SUN COMPANY, INC. ("SUN") is, and was at relevant times herein, a Pennsylvania corporation authorized to do and doing business in California. CROSS-CLAIMANTS are further informed and believe, and thereon allege,

that SUN is the successor to and/or otherwise responsible for any and all liabilities of Cordero arising from or related to Cordero's acts or omissions at the PROPERTY.

12. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the claims alleged herein against cross-defendant SUN arise out of the same transactions and occurrences that are the subject matter of the State Complaint, the County Complaint, and Counterclaims related thereto in that the acts and/or omissions of Cordero caused some or all of the conditions at the PROPERTY that are the subject of those complaints and counterclaims and in that SUN is responsible for Cordero's liabilities as alleged herein.

13. CROSS-CLAIMANTS are informed and believe, and thereon allege, that New Almaden Corporation ("New Almaden Corp.") was a Delaware corporation formed in or about March 1940 and did business in the State of California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that New Almaden Corp. leased the PROPERTY or portions thereof, and conducted and/or permitted mercury mining activities at the PROPERTY or portions thereof from in or about May 1940 to in or about November 1945. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that New Almaden Corp.'s acts and/or omissions at the PROPERTY or portions thereof caused, permitted and/or contributed to the release or threatened release of hazardous substances, including mercury at the PROPERTY or portions thereof.

14. CROSS-CLAIMANTS are informed and believe, and thereon allege, that W.H. Newbold's Sons & Co. ("Newbold Partnership"),

is or was a partnership established in or about 1844 in the State of Pennsylvania, and at all relevant times herein did business in the State of California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that the Newbold Partnership promoted, formed, underwrote, incorporated, and/or arranged for the incorporation in the State of Delaware the New Almaden Corp. for the purposes of conducting mining activities at the PROPERTY or portions thereof.

15. CROSS-CLAIMANTS are informed and believe, and thereon allege, that at all times herein mentioned there existed a unity of interest and ownership between the Newbold Partnership and New Almaden Corp. such that any individuality and separateness between them ceased to exist. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that New Almaden Corp. was a mere shell, instrumentality, and conduit through which the Newbold Partnership carried on its mining activities at the PROPERTY or portions thereof.

16. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the Newbold Partnership was at all times relevant herein, the alter ego of the New Almaden Corp. in that (1) the Newbold Partnership completely influenced, controlled, dominated, governed, managed, directed and/or operated New Almaden Corp.; (2) the Newbold Partnership directed, authorized, and/or controlled the acts, including without limitation mercury mining activities, of the New Almaden Corp. at the PROPERTY of portions thereof; (3) some or all of the officers, directors, and/or partners of the Newbold Partnership were the principals, partners, officers, and/or directors of

New Almaden Corp.; and/or (4) the Newbold Partnership received distributions, royalties, and or other payments from New Almaden Corp. resulting from New Almaden Corp.'s mining activities at the PROPERTY or portions thereof. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that by virtue of the distributions and activities alleged herein, the Newbold Partnership is the successor to all of the liabilities of New Almaden Corp., including liabilities associated with the PROPERTY.

17. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the activities, acts and/or omissions of New Almaden Corp. caused some or all of the conditions at the PROPERTY that are the subject of the State Complaint, the County Complaint, and Counterclaims related thereto.

18. CROSS-CLAIMANTS are informed and believe, and thereon allege, that adherence to the fiction of the separate existence of New Almaden Corp. as an entity distinct from the Newbold Partnership under the circumstances would permit an abuse of the corporate privilege and would sanction fraud and/or promote injustice in that New Almaden Corp. was responsible for some or all of the costs and damages alleged in the Complaint and related Counterclaim and in that the Newbold Partnership is responsible for the liabilities of the Newbold Partnership as alleged therein.

19. CROSS-CLAIMANTS are informed and believe, and thereon allege, that cross-defendant NEWSON, INC. ("NEWSON"), f/k/a/ W.H. Newbold's Son & Company, Inc., is or was at relevant times herein was a Pennsylvania corporation. CROSS-CLAIMANTS are

further informed and believe, and thereon allege, that NEWSON is the successor to and/or is otherwise responsible for the liabilities of the Newbold Partnership, including liabilities of New Almaden Corp. resulting from, caused by, or associated with mercury mining and related activities at the PROPERTY or portions thereof.

20. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the claims alleged herein against cross-defendant NEWSON arise out of the same transactions and occurrences that are the subject of the State Complaint, the County Complaint, and Counterclaims related thereto in that New Almaden Corp. caused some or all of the conditions at the PROPERTY that are the subject those complaints and counterclaims and in that NEWSON is responsible or otherwise liable for the liabilities of New Almaden Corp. and/or the Newbold Partnership as alleged herein.

21. CROSS-CLAIMANTS are informed and believe, and thereon allege, that cross-defendant Santa Clara Valley Water District ("DISTRICT") is a special district created in 1951 under the Santa Clara County Flood Control and Water Conservation District Act, Stats. 1951, ch. 1405, p. 3337. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that the DISTRICT is the successor-in-interest to the Santa Clara Valley Water Conservation District ("SCVWCD"), a special district created by the Water Conservation Act of 1931, Uncodified Acts, Act 9127c, now codified at Water Code §§ 74031 et seq. The DISTRICT can be sue and be sued on its own name. (Water Code § 74640).

22. CROSS-CLAIMANTS are informed and believe, and thereon allege, that (a) in or about 1935, the SCVWCD built and maintained roads at the PROPERTY; and (b) commencing in or about 1935, and continuing thereafter, SCVWCD constructed and maintained the Almaden and Guadalupe reservoirs on adjacent property. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that the activities of the SCVWCD at the PROPERTY caused or contributed to the release or threatened release of hazardous substances, including but not limited to mercury, at the PROPERTY that are the subject of the State Complaint, the County Complaint, and Counterclaims related thereto. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that some or all of the costs allegedly incurred by COUNTY for which recovery and a declaration of liability is sought in the Complaint, were caused, in whole or in part, by the acts or omissions of the SCVWCD in constructing and maintaining said reservoirs.

23. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the claims alleged herein against the DISTRICT arise out of the same transactions and occurrences that are the subject of the State Complaint, the County Complaint, and Counterclaims related thereto.

24. CROSS-CLAIMANTS presented a claim ("Claim") to the DISTRICT under section 910 of the California Government Code and under section 74645 of the California Water Code on or about July 21, 1992, for all costs and damages that CROSS-CLAIMANTS have incurred and will incur for the environmental investigation and cleanup at the PROPERTY in relation to the

lawsuit filed by plaintiff COUNTY. On or about September 16, 1992, BKHN presented to the DISTRICT "BKHN Inc.'s Amended Claim Presented To The Santa Clara Valley Water District," ("Amended Claim") amending BKHN's claim against the DISTRICT to include the costs and damages associated with the State Complaint.

25. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the DISTRICT failed to act on the Claim within period provided under the Government Code, and that the Claim is deemed denied by the DISTRICT.

26. Cross-defendants CTIC, SUN, NEWSON, and DISTRICT shall collectively be referred to herein as "the CROSS-DEFENDANTS."

27. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the issues of law and fact concerning the liability of the CROSS-DEFENDANTS, and each of them, for the costs and damages alleged by the CROSS-CLAIMANTS are common to the issues of law and fact arising from the complaints and counterclaims in these consolidated cases.

ALLEGATIONS REGARDING THE HISTORY
AND INVESTIGATION OF THE
ALMADEN QUICKSILVER COUNTY PARK

28. CROSS-CLAIMANTS are informed and believe, and thereon allege, that in or about 1845, mercury and mercury-containing ore were discovered in the New Almaden District of California, in areas located within what would later become the geographical boundaries of County of Santa Clara, California. CROSS-CLAIMANTS are further informed and believe, and thereon allege, that mercury mining activities soon commenced in or about that year at the New Almaden Mines, and that mining and

related operations continued at the New Almaden Mines for many decades thereafter.

29. CROSS-CLAIMANTS are informed and believe, and thereon allege, that the New Almaden Mines currently lie within the boundaries of the PROPERTY.

30. On or about October 23, 1987, pursuant to California H & S Code sections 205 and 206, and to California's Carpenter-Pressley-Tanner Hazardous Substance Account Act ("HSAA"), H & S Code §§ 25300 et seq., DTSC, f/k/a Department of Health Services, issued a Remedial Action Order ("RAO") to the COUNTY and BKHN, alleging that the PROPERTY's soil and surface waters are contaminated with mercury at levels above applicable regulatory standards and that the COUNTY and BKHN are "responsible persons or parties as defined by [ ] Section[s] 25319, 25360, and 25385.1(g)" of the HSAA, for the remediation of the PROPERTY.

31. The liability of any person or entity for the costs and expenditures associated with the investigation and cleanup of hazardous substances, including mercury, at the PROPERTY is governed by Sections 25360, 25361, 25362, and 25363 of the HSAA, including, without limitation, the apportioned liability provisions of Section 25363(a)-(c).

FIRST CLAIM FOR RELIEF
(Equitable Indemnity Under State Law)

32. CROSS-CLAIMANTS re-allege and incorporate herein by reference each and every allegation set forth in paragraphs 1-31.

33. The COUNTY has filed the County Action against CROSS-CLAIMANTS, and each of them, and others, including certain CROSS-DEFENDANTS, seeking relief relating to its alleged costs and damages associated with the past and future investigation and cleanup of the alleged release and/or threatened release of hazardous substances, including mercury, at the PROPERTY. The STATE has filed the State Action against BKHN and the COUNTY is seeking recovery of alleged costs associated with the past and future investigation and cleanup of the alleged release and/or threatened release of hazardous substances, including mercury at the PROPERTY. CROSS-CLAIMANTS have denied liability for any of the COUNTY's alleged costs and damages. BKHN has denied liability for any of the STATE's alleged costs. However, in the event that any party to these consolidated cases should establish any liability on the part of CROSS-CLAIMANTS, or any of them, which liability is expressly denied, CROSS-CLAIMANTS or some of them, may be obligated to pay sums in excess of their equitable share of liability, if any. In that event, CROSS-CLAIMANTS or some of them would be entitled to recover some or all of such costs from the CROSS-DEFENDANTS, and each of them, based on the fault respectively attributable to the CROSS-DEFENDANTS, and each of them. CROSS-CLAIMANTS, and each of them, request an adjudication and determination of the respective proportions or percentages of fault, if any, on the part of the CROSS-CLAIMANTS, or any of them, and on the part of the CROSS-DEFENDANTS, and each of them.

WHEREFORE, CROSS-CLAIMANTS, and each of them, pray for judgment against the CROSS-DEFENDANTS, and each of them, in the County Action as set forth below; and,

WHEREFORE, BKHN prays for judgment against the CROSS-DEFENDANTS, and each of them, in the State Action as set forth below.

SECOND CLAIM FOR RELIEF
(Declaratory Relief Under State Law)

34. CROSS-CLAIMANTS re-allege and incorporate herein by reference each and every allegation set forth in paragraphs 1-33.

35. An actual controversy now exists among CROSS-CLAIMANTS and the CROSS-DEFENDANTS, and each of them, in that CROSS-CLAIMANTS, on the one hand, contend that the CROSS-DEFENDANTS, and each of them, are liable to CROSS-CLAIMANTS for removal and remedial action costs associated with the alleged release and/or threatened release of hazardous substances, including mercury, at the PROPERTY which CROSS-CLAIMANTS have incurred, may incur in the future and/or may be held liable for in the County Action; whereas CROSS-CLAIMANTS are informed and believe, and thereon allege, that the CROSS-DEFENDANTS, and each of them, on the other hand, deny that they are liable for any such costs.

36. An actual controversy now exists among BKHN and the CROSS-DEFENDANTS, and each of them, in that BKHN, on the one hand, contends that the CROSS-DEFENDANTS, and each of them, are liable to BKHN for removal and remedial action costs associated with the alleged release and/or threatened release of hazardous

substances, including mercury, at the PROPERTY which BKHN has incurred, may incur in the future and/or may be held liable for in the State Action; whereas BKHN is informed and believes, and thereon alleges, that the CROSS-DEFENDANTS, and each of them, on the other hand, deny that they are liable for any such costs.

37. CROSS-CLAIMANTS, and each of them, desire a determination of the respective rights, duties, and liabilities of CROSS-CLAIMANTS, the CROSS-DEFENDANTS, and each of them, with respect to the removal and remedial action costs and obligations claimed herein and in the complaints and counterclaims, as well as their rights, duties, and liabilities for such costs and obligations in the future. Such a declaration is necessary and appropriate at this time to avoid a multiplicity of actions and to effectuate a just and speedy resolution of the issues and liabilities alleged herein.

38. Pursuant to Section 1060 of the California Code of Civil Procedure, and/or to Section 25360.4(c) of the HSAA, CROSS-CLAIMANTS, and each of them, are entitled to a declaration of the parties' respective rights and duties as more fully described herein.

WHEREFORE, CROSS-CLAIMANTS, and each of them, pray for judgment against the CROSS-DEFENDANTS, and each of them, in the County Action as set forth below; and,

WHEREFORE, BKHN prays for judgment against the CROSS-DEFENDANTS, and each of them, in the State Action as set forth below.

THIRD CLAIM FOR RELIEF
(Declaratory Relief Under Federal Law)

39. CROSS-CLAIMANTS re-allege and incorporate herein by reference each and every allegation set forth in paragraphs 1-38.

40. An actual controversy now exists between CROSS-CLAIMANTS and the CROSS-DEFENDANTS, and each of them, in that CROSS-CLAIMANTS, on the one hand, contend that the CROSS-DEFENDANTS, and each of them, are liable to CROSS-CLAIMANTS, and each of them, for removal and remedial action costs associated with the alleged release and/or threatened release of hazardous substances, including mercury at the PROPERTY which CROSS-CLAIMANTS have incurred and may incur in the future and/or may be held liable for in the County Action; whereas CROSS-CLAIMANTS are informed and believe, and thereon allege, that the CROSS-DEFENDANTS, and each of them, on the other hand, deny that they are liable for any such costs.

41. An actual controversy now exists among BKHN and the CROSS-DEFENDANTS, and each of them, in that BKHN, on the one hand, contends that the CROSS-DEFENDANTS, and each of them, are liable to BKHN for removal and remedial action costs associated with the alleged release and/or threatened release of hazardous substances, including mercury, at the PROPERTY which BKHN has incurred, may incur in the future and/or may be held liable for in the State Action; whereas BKHN is informed and believes, and thereon alleges, that the CROSS-DEFENDANTS, and each of them, on the other hand, deny that they are liable for any such costs.

42. CROSS-CLAIMANTS, and each of them, desire a determination of the respective rights, duties, and liabilities of CROSS-CLAIMANTS, the CROSS-DEFENDANTS, and each of them, with respect to the removal and remedial action costs and obligations claimed herein and in the complaints and counterclaims, as well as their rights, duties, and liabilities for such costs and obligations in the future. Such a declaration is necessary and appropriate at this time to avoid a multiplicity of actions and to effectuate a just and speedy resolution of the issues and liabilities alleged herein.

43. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and/or to 28 U.S.C. §§ 2201 and 2202, CROSS-CLAIMANTS, and each of them, are entitled to a declaration of the parties' respective rights and duties as more fully described herein.

WHEREFORE, CROSS-CLAIMANTS, and each of them, pray for judgment against the CROSS-DEFENDANTS, and each of them, in the County Action as set forth below; and

WHEREFORE, BKHN prays for judgment against the CROSS-DEFENDANTS, and each of them, in the State Action as set forth below.

FOURTH CLAIM FOR RELIEF
(Contribution and/or Indemnity under the HSAA)
(By BKHN Only)

44. BKHN re-alleges and incorporates herein by reference each and every allegation set forth in paragraphs 1-43.

45. BKHN has incurred and paid removal and remedial action costs for the PROPERTY in accordance with the HSAA and/or CERCLA, including, but not limited to, the costs of

complying with the RAO to investigate and remediate the alleged mercury contamination at the PROPERTY. BKHN is informed and believes, and thereon alleges, that it will incur additional removal and remedial action costs to investigate and remediate the alleged mercury contamination at the PROPERTY.

46. Cross-defendants CTIC, SUN, and NEWSON, and each of them, are persons who are liable under the HSAA and/or CERCLA for removal and remedial action costs associated with the PROPERTY in that each of them (1) owned the PROPERTY or portions thereof at the time of disposal or release of hazardous substances, including mercury at the PROPERTY; and/or (2) operated the PROPERTY or portions thereof, at the time of a disposal or release of hazardous substances, including mercury, at the PROPERTY; and/or (3) arranged for the disposal or release of hazardous substances, including mercury, at the PROPERTY.

47. BKHN is informed and believes, and thereon alleges, that cross-defendant DISTRICT, as successor in interest to the SCVWCD, is a person who is liable under the HSAA and/or CERCLA for removal and remedial action costs associated with the PROPERTY in that the SCVWCD built and maintained roads at the PROPERTY, and, by virtue thereof, operated the PROPERTY or portions thereof, at the time of a disposal or release of hazardous substances, including mercury, at the PROPERTY, and/or arranged for the disposal or release of hazardous substances, including mercury, at the PROPERTY.

48. The CROSS-DEFENDANTS, and each of them, have not had, and are not currently having, their liability discharged under the HSAA.

49. Pursuant to Section 25363(e) of the HSAA, H & S Code § 25363(e), BKHN is entitled to statutory contribution and/or indemnity from the CROSS-DEFENDANTS, and each of them, for all costs incurred and to be incurred to investigate and/or remediate the alleged mercury contamination at the PROPERTY that are in excess of BKHN's equitably allocated share of the removal and remedial action costs at the PROPERTY, if any, based on the actions of NIMCC.

WHEREFORE, BKHN prays for judgment in the State Action and in the County Action against the CROSS-DEFENDANTS, and each of them, as set forth below.

FIFTH CLAIM FOR RELIEF
(Contribution Under CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1))
(By BKHN Only)

50. BKHN re-alleges and incorporates herein by reference each and every allegation set forth in paragraphs 1-49.

51. The PROPERTY is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

52. The CROSS-DEFENDANTS, and each of them, are "persons" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

53. Cross-defendants CTIC, SUN, and NEWSON, and each of them, are persons who are liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), because they (1) owned the PROPERTY or portions thereof at the time of disposal

or release of hazardous substances, including mercury at the PROPERTY; and/or (2) operated the PROPERTY or portions thereof, at the time of a disposal or release of hazardous substances, including mercury at the PROPERTY; and/or (3) arranged for the disposal or release of hazardous substances, including mercury at the PROPERTY.

54. BKHN is informed and believes, and thereon alleges, that Cross-defendant DISTRICT, as successor-in-interest to SCVWCD, is a person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. §9607(a), because the SCVWCD built and maintained roads at the PROPERTY, and, by virtue thereof, operated the PROPERTY or portions thereof, at the time of a disposal or release of hazardous substances, including mercury, at the PROPERTY, and/or arranged for the disposal or release of hazardous substances, including mercury, at the PROPERTY.

55. In the event that BKHN is held liable for any amount in excess of its equitably allocated share of the removal or remedial action costs associated with the PROPERTY, if any, the CROSS-DEFENDANTS, and each of them, are liable to BKHN for any such excess amount under the statutory right to contribution, based on equitable factors as the court determines are appropriate, on those provided under § 113(f)(1) of CERCLA, 42 U.S.C. § 9613, or otherwise under the federal common law of contribution.

WHEREFORE, BKHN prays for judgment in the State Action and in the County Action against the CROSS-DEFENDANTS, and each of them, as set forth below.

SIXTH CLAIM FOR RELIEF
(State Law Contribution)
(By BKHN Only)

56. BKHN re-alleges and incorporates herein by reference each and every allegation set forth in paragraphs 1-55.

57. BKHN has incurred removal and remedial action costs associated with the PROPERTY in accordance with the HSAA or CERCLA beyond its proportionate share. BKHN is informed and believes, and thereon alleges, that it will incur additional removal and remedial action costs for the PROPERTY in accordance with the HSAA or CERCLA beyond its proportionate share.

58. BKHN is informed and believes, and thereon alleges, that in the event that BKHN is deemed to be liable for removal and remedial action costs incurred and to be incurred for the PROPERTY, the CROSS-DEFENDANTS, and each of them, would also be liable for such costs because they are liable for such costs under the HSAA. BKHN is further informed and believes, and thereon alleges, that it would be entitled to contribution for all costs which it each has incurred and will incur beyond its proportionate share, if any, based on the actions of NIMCC, from the CROSS-DEFENDANTS, and each of them.

WHEREFORE, BKHN prays for judgment in the State Action and in the County Action against the CROSS-DEFENDANTS, and each of them, as set forth below.

PRAYER

WHEREFORE, CROSS-CLAIMANTS, and each of them, pray:

1. That CROSS-CLAIMANTS, and each of them, may have a declaration of the respective proportion or percentage of fault, if any, of the CROSS-CLAIMANTS, the CROSS-DEFENDANTS, and each of them, and all other parties to these consolidated cases, for the release or threatened release of hazardous substances, including mercury at the PROPERTY; and, if any judgment is entered in favor of either plaintiff in the State Action or the County Action against any CROSS-CLAIMANT as defendant therein, then, that judgment together with interest and costs, be entered in favor of CROSS-CLAIMANTS, and each of them, and against the CROSS-DEFENDANTS, and each of them, for indemnity and/or contribution, requiring them to pay CROSS-CLAIMANTS that proportion or percentage of any such judgment that is attributable to the proportion or percentage of assessed or assessable against said CROSS-CLAIMANTS that is not equitably attributable to them based on the alleged actions or omissions of NIMCC; and otherwise to indemnify and exonerate CROSS-CLAIMANTS, and each of them, against all such liability.

2. That in the event that any party to the State Action and/or the County Action should establish any liability on the part of CROSS-CLAIMANTS, or any of them, the Court find that on the basis of equitable indemnity, the CROSS-DEFENDANTS, and each of them, are obligated to pay all costs and damages resulting from the investigation or remediation of the PROPERTY that represent a proportion or percentage of fault not

attributable to any act or omission of the CROSS-CLAIMANTS, any of them, or of any person or corporation for whose liabilities they may be responsible.

3. That CROSS-CLAIMANTS, and each of them, may have a declaration of the respective rights, duties, and obligations, if any, of the CROSS-CLAIMANTS and the CROSS-DEFENDANTS, and each of them, for the removal and remedial action costs and obligations claimed herein, as well as their rights, duties, and liabilities for such costs and obligations in the future.

4. For costs of suit incurred in the prosecution of this Cross-claim.

5. For reasonable attorneys fees as may be permitted by statute or common law.

6. For interest on sums recoverable in this action.

7. For such other further relief as the Court may deem proper.

WHEREFORE, in addition, BKHN prays for:

1. For contribution and/or indemnity from the CROSS-DEFENDANTS, and each of them, under Section 25363 of the HSAA.

2. For contribution from the CROSS-DEFENDANTS, and each of them, under Section 113(f) of CERCLA.

3. For contribution from the CROSS-DEFENDANTS, and each of them, under State common law.

DATED: June 16, 1993

ROBERT D. WYATT
DAVID D. COOKE
PETER R. KRAKAUR
BEVERIDGE & DIAMOND

By Peter R. Krakaur
Peter R. Krakaur

Attorneys for Defendants, Counterclaimants, Cross-Claimants, MYERS INDUSTRIES, INC., BUCKHORN INC., and BKHN INC.

Re: In the Matter of the Claim of Sun Company, Inc.

DECLARATION OF SERVICE BY MAIL

[Code Civ. Proc. §§ 1013a(3), 2015.5]

I declare:

I am over age 18, not a party to this action, and am employed in Alameda County at 1901 Harrison Street, 11th Floor, Oakland, California 94612 (mailing address: Post Office Box 119, Oakland, California 94604).

On July 6, 1993, following ordinary business practices, I placed for collection and mailing at the office of LARSON & BURNHAM, located at 1901 Harrison Street, 11th Floor, Oakland, California 94612, a copy(ies) of the attached:

CLAIM AGAINST PUBLIC ENTITY

in a sealed envelope(s), with postage fully prepaid, addressed to:

Clerk of the Board of Supervisors
County of Santa Clara
70 West Hedding, 10th Floor, East Wing
San Jose, CA 95110

I am familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 6, 1993

Barbara Miller

Barbara Miller

EXHIBIT D

93-126 Pleadings

RECEIVED
JUL 14 1993
R. W. WILLIAMS

ROBERT J. LYMAN, State Bar No. 085240
JOHN J. VERBER, State Bar No. 139917
LARSON & BURNHAM
A Professional Corporation
P.O. Box 119
Oakland, CA 94604
Telephone: (510) 444-6800
Facsimile: (510) 835-6666

Attorneys for Cross-Defendant
SUN COMPANY, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SANTA CLARA,

Plaintiff,

v.

MYERS INDUSTRIES, INC., et al.,

Defendants.
_____/

MYERS INDUSTRIES, INC.; BUCKHORN INC.; BKHN INC.,

Cross-Claimants,

v.

CHICAGO TITLE INSURANCE COMPANY; SUN COMPANY, INC.; NEWSON, INC.; SANTA CLARA VALLEY WATER DISTRICT,

Cross-Defendants.
_____/

AND RELATED CLAIMS AND ACTIONS
_____/

///

No. C-92 20246 JW (PVT)
C-92 20521 JW (PVT)
(Consolidated)

ANSWER TO SECOND AMENDED CROSS-CLAIM, COUNTER CLAIMS, AND CROSS-CLAIMS OF SUN COMPANY, INC.

[JURY TRIAL DEMANDED]

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SUN MD0001919

Defendant, Sun Company, Inc. ("Sun"), answers the second amended cross-claim of Myers Industries, Inc., Buckhorn, Inc., and BKHN, Inc. as follows:

I. JURISDICTION AND REVENUE

1. Sun admits that this court has jurisdiction over the allegations asserted in the cross-claim.

2. Sun admits that venue is proper.

A. Parties.

3. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3 through 8 of the second amended cross-claim and, therefore, denies said allegations.

4. Answering paragraph 9, Sun admits that Cordero Mining Company ("Cordero") is or was a Nevada Corporation doing business in California. Sun denies the remaining allegations of paragraph 9.

5. Sun denies the allegations contained in paragraph 10.

6. Sun admits the allegations contained in paragraph 11.

7. Sun denies the allegations contained in paragraph 12.

8. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 13 through 25 of the second amended cross-claim and, therefore, denies said allegations.

9. Paragraph 26 contains no allegations and no response is required.

10. To the extent the allegations in paragraph 27 state legal conclusions, it requires no response; however, if an

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SUN MD0001920

answer is deemed required, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies said allegations.

B. **Allegations Regarding The History and Investigation Of the Alameda Quicksilver County Park.**

11. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 28 through 30 of the second amended cross-claim and, therefore, denies said allegations.

12. Paragraph 31 contains no allegations and no response is required, however, if an answer is deemed required, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the second amended cross-claim and, therefore, denies said allegations.

II. **FIRST CLAIM FOR RELIEF (Equitable Indemnity Under State Law)**

13. Answering paragraph 32, Sun incorporates its admissions and denials pleaded in response to paragraph 1 through 31, inclusive.

14. Answering paragraph 33, Sun admits that the County of Santa Clara ("County") and State of California ("State") have filed actions. Sun is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 33 of the second amended cross-claim and, therefore, denies said allegations.

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SECOND CLAIM FOR RELIEF
(Declaratory Relief Under State Law)

15. Answering paragraph 34, Sun incorporates its admissions and denials pleaded in response to paragraphs 1 through 33, inclusive.

16. Answering paragraph 35, Sun admits that an actual controversy exists between cross-claimants and Sun regarding liability to cross-claimants for removal and remedial action costs associated with the investigation and clean up of the property. Sun further admits that it denies liability for any such costs. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 insofar as they pertain to other parties and, therefore, denies said allegation.

17. Answering paragraph 36, Sun admits that an actual controversy exists between BKHN and Sun regarding liability to cross-claimants for removal and remedial action costs associated with the investigation and clean up of the property. Sun further admits that it denies liability for any such costs. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 36 insofar as they pertain to the other parties and, therefore, denies said allegations.

18. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the second amended cross-claim and, therefore, denies said allegations.

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19. Answering paragraph 38, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38 of the second amended cross-claim and, therefore, denies said allegations.

THIRD CLAIM FOR RELIEF
(Declaratory Relief Under Federal Law)

20. Answering paragraph 39, Sun incorporates its admissions and denials pleaded in response to paragraphs 1 through 38, inclusive.

21. Answering paragraph 40, Sun admits an actual controversy now exists between cross-claimants and cross-defendants regarding liability for removal and remedial action costs at the property, but denies that it is liable for any remedial or response costs incurred or to be incurred by cross-claimants or for which cross-claimants may be liable. Sun is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 40 of the second amended cross-claim and, therefore, denies said allegations.

22. Answering paragraph 41, Sun admits that an actual controversy exists between BKHN and Sun regarding liability to BKHN for removal and remedial action costs associated with this property, but denies that it is liable for any remedial or response costs incurred or to be incurred by BKHN or for which BKHN may be liable. Sun is without knowledge or information sufficient to form a belief as to the truth and the remaining allegations contained in paragraph 41 of the second amended cross-claim and, therefore, denies said allegations.

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SUN_MD0001923

23. Answering paragraph 42, Sun admits that cross-claimants request a judicial determination. Sun is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 42 of the second amended cross-claim and, therefore, denies said allegations.

24. Answering paragraph 43, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the second amended cross-claim and, therefore, denies said allegations.

FOURTH CLAIM FOR RELIEF
(Contribution and/or Indemnity Under the HSAA)
(By BKHN Only)

25. Answering paragraph 44, Sun incorporates its admissions and denials pleaded in response to paragraphs 1 through 43, inclusive.

26. Answering paragraph 45, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of the second amended cross-claim and, therefore, denies said allegations.

27. Answering paragraphs 46, Sun denies the allegations of paragraph 46 insofar as they pertain to it, but admits on information and belief each and every allegation regarding other cross-defendant.

28. Answering paragraphs 47 and 48, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 47 and 48 of

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the second amended cross-claim and, therefore, denies said allegations.

29. Answering paragraph 49, Sun denies that BKHN is entitled to statutory contribution and/or indemnity from it. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 49 and insofar as they pertain to any other party and, therefore, denies said allegations.

FIFTH CLAIM FOR RELIEF
(Contribution Under Cercla Section 113(f)(1), 42 U.S.C. Section 9613(f)(1))

30. Answering paragraph 50, Sun incorporates its admissions and denials pleaded in response to paragraphs 1 through 49, inclusive.

31. Answering paragraphs 51 and 52, Sun admits the allegations contained therein.

32. Answering paragraph 53, Sun denies the allegations of paragraph 53 insofar as they pertain to it, but admits on information and belief each and every allegation regarding other cross-defendants.

33. Answering paragraph 54, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

34. Answering paragraph 55, Sun denies that it is liable to BKHN for any amount. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 55 insofar as they pertain to any other party.

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SIXTH CLAIM FOR RELIEF
(State Law Contribution)

35. Answering paragraph 56, Sun incorporates its admissions and denials pleased in response to paragraphs 1 through 55, inclusive.

36. Answering paragraph 57, Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the second amended cross-claim.

37. Answering paragraph 58, Sun denies the allegations of paragraph 58, insofar as they pertain to it. Sun is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 58 insofar as they pertain to other parties.

FIRST AFFIRMATIVE DEFENSE

38. The second amended cross-claim does not state facts sufficient to state a claim upon which belief may be granted against Sun.

SECOND AFFIRMATIVE DEFENSE

Cross-complainants claims against Sun are barred, in whole or in part, by the applicable statutes of limitation.

THIRD AFFIRMATIVE DEFENSE

Cross-complainants' claims against Sun are barred, in whole or in party, by the defenses set forth in CERCLA, 42 U.S.C. section 9601, et seq.

FOURTH AFFIRMATIVE DEFENSE

Any release or threat of release of any hazardous substances, and any damage therefrom, or cause solely by an act

or omission of a third party or parties other than Sun, its employees or agents, or one whose act or omission occurred in connection with a contractual relationship existing directly or indirectly with Sun.

FIFTH AFFIRMATIVE DEFENSE

All acts which this answering cross-defendant is alleged to have committed, and all acts by other persons for whom this answering cross-defendant is alleged to be legally responsible, occurred on or before January 1, 1954, were not in violation of existing State or Federal law or regulations at the time they occurred, and were lawful at the time they were committed.

SIXTH AFFIRMATIVE DEFENSE

The methods of operation at the property employed by this answering cross-defendant, if any, or by any person or entity for whom this answering cross-defendant is found to be legally responsible, if any, were neither unnecessary nor injurious.

SEVENTH AFFIRMATIVE DEFENSE

The rights and duties of the parties are governed solely by the provisions of the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health and Safety Code section 25300, et seq.

EIGHTH AFFIRMATIVE DEFENSE

The California State Hazardous Substance Account is required, pursuant to Cal. Health and Safety Code section 25363(c), to pay all costs and expenditures are recoverable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. section 9601, et seq., and the

Carpenter-Presley-Tanner Hazardous Substance Account Act, they are not attributable to the actions of, and apportioned among the parties, including this answering cross-defendant.

NINTH AFFIRMATIVE DEFENSE

The liability of this answering cross-defendant, if any, and such liability is denied, is limited to those costs and expenditures that are attributable to its actions, or to the actions of any person or entity for whom it is legally responsible.

TENTH AFFIRMATIVE DEFENSE

This action is not ripe for adjudication in that cross-complaints have failed to exhaust their administrative revenues.

ELEVENTH AFFIRMATIVE DEFENSE

Cross-claimants are barred, in whole or in part, by the doctrine of laches.

TWELFTH AFFIRMATIVE DEFENSE

Cross-complainants are barred, in whole or in part, by the doctrine of unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

Cross-complainants are barred, in whole or in part, by the doctrine of estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

Cross-complainants failed to join indispensable parties as required by Federal Rules of Civil Procedure rule 19.

FIFTEENTH AFFIRMATIVE DEFENSE

Cross-complaints failed to mitigate, minimize, or avoid

the damages allegedly sustained, and any recovery against the cross-defendant must be reduced accordingly.

SIXTEENTH AFFIRMATIVE DEFENSE

Recovery under claims for relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, and to the Carpenter-Presley-Tanner Hazardous Substance Account Act to constitute the retroactive application of a statute in violation of this answering cross-defendant's rights under the United States and California Constitutions to due process of law.

IV. COUNTER AND CROSS-CLAIM (Contribution Under 42 U.S.C. Section 9613(f)(1))

1. SUN realleges and incorporates herein by reference each and every allegation to which it has admitted in its responses to the second amended cross-claim of Myers Industries, Inc., Buckhorn Inc., and BKHN Inc.

2. On information and belief, SUN alleges that the property is a "facility" as defined in 42 U.S.C. section 9601(9).

3. On information and belief, SUN alleges that a release and/or threatened release of hazardous substances, as defined respectively in 42 U.S.C. sections 9601(22) and 9601(14), has occurred at the property.

4. On information and belief, SUN alleges that the County of Santa Clara is the current owner of the property and is a "person" responsible for response costs under 42 U.S.C. sections 9601(21) and 9607(a)(1).

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5. Pursuant to California Government Code section 910, on or about July 7, 1993, SUN filed a claim against the County of Santa Clara for contribution under 42 U.S.C. section 9613(f)(1).

6. On information and belief, SUN alleges that cross-claimants Myers Industries, Buckhorn Inc., and BKHN Inc. and cross-defendants Chicago Title Insurance Company ("CTIC") and Newson Inc. ("NEWSON") are "persons" who are liable under 42 U.S.C. section 9601(21) and 9607(a)(2) and/or 9670(a)(3) because they: (1) owned the property or portions thereof at the time of disposal or release of hazardous substances, including mercury, at the property; and/or (2) and operated the property or portions thereof, at the time of disposal or release of hazardous substances, including mercury, at the property; and/or (3) arranged for the disposal or release of hazardous substances, including mercury, at the property.

7. If SUN is found liable to cross-claimants, then cross-claimants, the County of Santa Clara, and the other cross-defendants are all liable to SUN for contribution pursuant to 42 U.S.C. section 9613(f)(1).

SECOND COUNTER AND CROSS-CLAIM
(Contribution Under HSAA)

8. SUN realleges and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 5.

9. On information and belief, SUN alleges that the property is a "facility" as defined in 42 U.S.C. section 9601(9) and the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health and Safety Code section 25300 et seq.

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10. On information and belief, SUN alleges that a release and/or threatened release of hazardous substances, as defined respectively in 42 U.S.C. section 9601(22) and 9601(14) and the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health and Safety Code section 25300 et seq., has occurred at the property.

11. On information and belief, SUN alleges that the County is the current owner of the property and is a "person" responsible for response costs under 42 U.S.C. section 9601(21) and 9607(a)(1) and the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health and Safety Code Section 25300, et seq.

12. Pursuant to Cal. Government Code section 910, on or about July 7, 1993, SUN filed a claim against the County of Santa Clara for contribution under the Carpenter-Presley-Tanner Hazardous Substance Account Act.

13. On information and belief, SUN alleges that cross-claimants Myers Industries, Inc., Buckhorn Inc., BKHN Inc., and cross-defendants CTIC and NEWSON are both "persons" who are liable under 42 U.S.C. sections 9601(21) and 9607(a)(2), and/or 9670(a)(3) et seq., and the Carpenter-Presley-Tanner Hazardous Substance Account Act, Cal. Health and Safety Code section 25300 et seq. because they: (1) Owned the property or portions thereof at the time of disposal or release of hazardous substances, including mercury, at the property; and/or (2) operated the property or portions thereof, at the time of disposal or release of hazardous substances, including mercury,

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at the property; and/or (3) arranged for the disposal or release of hazardous substances, including mercury, at the property.

14. If SUN is found liable to cross-claimants, then cross-claimants, the County of Santa Clara, and cross-defendants are liable to SUN for contribution, pursuant to section 25363(e) of the HSAA.

Wherefore this answering cross-defendant prays for judgment as follows:

1. That cross-claimants take nothing by reason of the second amended cross-claim on file herein;

2. For contribution from cross-claimants and cross-defendants, and each of them, under section 113(f) of Cercla;

3. For contribution from cross-claimants and cross-defendants, and each of them, under section 25363 of the HSAA;

4. For reasonable attorney's fees;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court deems proper.

III. JURY TRIAL

SUN hereby demands a trial by jury pursuant to Federal Rules of Civil Procedure 38 for such claims as it is entitled.

DATED: July 6, 1993

LARSON & BURNHAM

By: _____
John J. Verber
Attorneys for Cross-defendant SUN COMPANY, INC.

108141

LAW OFFICES OF LARSON & BURNHAM A PROFESSIONAL CORPORATION

SUN_MD0001932

Re: County of Santa Clara v. Myers Industries, et al
Court: United States District Court, Northern District
Action No.: C-91 20246 JW (PVT) C-91 20521 JW (PVT) Consolidated

DECLARATION OF SERVICE BY MAIL

[Code Civ. Proc. §§ 1013a(3), 2015.5]

I declare:

I am over age 18, not a party to this action, and am employed in Alameda County at 1901 Harrison Street, 11th Floor, Oakland, California 94612 (mailing address: Post Office Box 119, Oakland, California 94604).

On July 7, 1993, following ordinary business practices, I placed for collection and mailing at the office of LARSON & BURNHAM, located at 1901 Harrison Street, 11th Floor, Oakland, California 94612, a copy(ies) of the attached:

ANSWER TO SECOND AMENDED CROSS-CLAIM, COUNTER CLAIMS, AND CROSS-CLAIMS OF SUN COMPANY, INC.

in a sealed envelope(s), with postage fully prepaid, addressed to:

(SEE LIST ATTACHED)

I am familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: July 7, 1993

Pat Livingston

Pat Livingston

PROOF OF SERVICE BY MAIL

Re: County of Santa Clara v. Myers Industries, et al
Court: United States District Court, Northern District
Action No.: C-91 20246 JW (PVT) C-91 20521 JW (PVT) Consolidated

DECLARATION OF SERVICE BY MAIL (CONTINUED)

IN-HOUSE COUNSEL FOR SUN:
Robert W. Williams, Esq.
Senior Counsel
Sun Company, Inc.
Ten Penn Center
1801 Market Street
Philadelphia, PA 19103-1699

Plaintiff STATE OF CALIFORNIA'S COUNSEL:
Daniel E. Lungren Attorney General of the
State of California
Theodora Berger, Assistant Attorney General
Susan S. Fiering, Deputy Attorney General
2101 Webster St., 12th Floor
Oakland, CA 94612-3049

Plaintiff COUNTY OF SANTA CLARA'S COUNSEL:
Lawrence A. Hobel
Deborah A. Sivas
Nicholas van Aelstyn
Heller, Ehrman, White & McAuliffe
333 Bush Street, Suite 3100
San Francisco, CA 94104

Steven M. Woodside
Ann Miller Ravel
Kathy Kretchmer
Kathryn A. Berry
County of Santa Clara
70 West Hedding St., 9th Flr. East
San Jose, Ca 95110

Defendant MYERS INDUSTRIES, BUCKHORN INC., & BKHN INC.:
Robert D. Wyatt
David D. Cooke
Peter R. Krakaur
Beveridge & Diamond
One Sansome Street, Suite 3400
San Francisco, CA 94104

PROOF OF SERVICE BY MAIL

Re: County of Santa Clara v. Myers Industries, et al
Court: United States District Court, Northern District
Action No.: C-91 20246 JW (PVT) C-91 20521 JW (PVT) Consolidated

DECLARATION OF SERVICE BY MAIL (CONTINUED)

represents title company:
John W. Fowler, Esq.
Dana M. McRae
McCutchen, Doyle, Brown & Enersen
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San Jose, CA 95113

represents title company:
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Attorneys for Cross-Defendant SANTA CLARA VALLEY WATER DISTRICT:
Kevin T. Haroff
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San Francisco, CA 94101

General Counsel:
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Santa Clara Valley Water District
5750 Almaden Expressway
San Jose, CA 95118

Newson, Inc.:
Charles E. Padgett, Esq.
Secretary, Newson, Inc.
c/o Fahnestock & Company, Inc.
110 Wall Street
New York, NY 10005

PROOF OF SERVICE BY MAIL

EXHIBIT E

DANIEL E. LUNGREN Attorney General
of the State of California
THEODORA BERGER, State Bar No. 050108
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2101 Webster St., 12th Floor
Oakland, CA 94612-3049
Telephone: (510) 286-3892

Attorneys for Plaintiff and Counterdefendant State of California Department of Toxic Substances Control and Counterdefendants Hazardous Substances Account and Hazardous Substances Cleanup Fund

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, on behalf of the State of California Department of Toxic Substances Control Plaintiffs, v. BKHN, INC. and THE COUNTY OF SANTA CLARA, Defendants. AND RELATED CLAIMS AND ACTIONS	NO. C-95 02249 SC No. C-95 02250 SC (Consolidated) CONSENT DECREE WITH BKHN, INC., BUCKHORN, INC., MYERS INDUSTRIES, INC., SUN COMPANY, INC. AND NEWSON, INC.

1. INTRODUCTION

On August 11, 1992, the State of California on behalf of the State Department of Toxic Substances Control ("Department") filed a Complaint pursuant to 42 U.S.C. sections 9601 et seq. ("CERCLA") against BKHN, Inc. The Department and defendants BKHN, Inc., Buckhorn, Inc., Myers Industries, Inc. (hereinafter collectively "BKHN"), the Sun Company, Inc. ("Sun")

and Newson, Inc. ("Newson")[1] now settle that action on the terms set forth hereafter.

2. COMPLAINT

2.1 The Complaint in this case alleges that the Department incurred costs in responding to the contamination on the Alamaden Quicksilver County Park, located in Santa Clara County (hereinafter "Site"). The Department alleges that those costs, as of June 30, 1995 were approximately $512,000.

2.2 The Complaint seeks recovery of the costs incurred by the Department in removing, remediating and overseeing the removal and remediation of the contamination at the Site.

3. JURISDICTION

The Department, BKHN, Sun and Newson agree that the United States District Court for the Northern District of California has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction over the parties to this Consent Decree.

4. SETTLEMENT OF DISPUTED CLAIMS

4.1 The Consent Decree was negotiated and executed by the Department, BKHN, Sun and Newson in good faith to avoid prolonged and complicated litigation and to further the public interest.

4.2 The Consent Decree represents a fair, reasonable and equitable settlement of the matters addressed herein. For

---

1. Buckhorn Industries, Inc., Myers Industries, Inc., the Sun Company and Newson, Inc. are defendants in the consolidated action of *County of Santa Clara v. BKHN, Inc. et al.*, No. 95-02249 SC.

the purpose of the Consent Decree, except as provided in paragraph 4.3 below, BKHN, Sun and Newson admit none of the allegations of the Complaint. Except as provided in paragraph 4.3 below, nothing in the Consent Decree shall be construed as an admission by BKHN, Sun or Newson of any violation of law or of any issue of law or fact and nothing in the Consent Decree shall prejudice, waive, or impair any right, remedy, or defense that BKHN, Sun or Newson may have in any other or further legal proceeding. Without limiting the foregoing, BKHN has asserted and this Court has ruled that the Department has no right under CERCLA to recover certain costs incurred in overseeing work performed by a private party (hereinafter "Oversight Cost Issue"). On this basis the Court entered an Order granting partial summary judgment in favor of BKHN. Pursuant to the terms of this Consent Decree and contingent upon BKHN's, Sun's and Newson's compliance with the terms of this Consent Decree, the Department waives its right to relitigate and/or appeal the Oversight Cost Issue against BKHN, Sun or Newson with respect to costs that are released by this Consent Decree. The Department does not waive its right to relitigate and/or appeal the Oversight Cost Issue against BKHN, Sun or Newson with respect to costs that do not relate to the Site and/or costs that are not covered and released by this Consent Decree, including costs that the Department is entitled to pursue under paragraphs 7 and 8 of this Consent Decree. Subject to the above, this Consent Decree does not constitute evidence or admissions as to the Department's right to recover oversight costs nor does it constitute

collateral estoppel or res judicata as to the Department's right to litigate the Oversight Cost Issue.

4.3 Notwithstanding the provisions of paragraph 4.2 above or any other provision of this Consent Decree, the findings of fact, conclusions of law, and order of the Court rendered in this action on April 11, 1996, shall be binding on the parties hereto, with full collateral estoppel or issue preclusion effect in any subsequent claim or proceeding involving Newson and any other party hereto.

5. **DEFINITIONS**

5.1 All terms that are used in this Consent Decree that are defined in CERCLA, 42 U.S.C. section 9601, shall have the same meaning as the definitions used in that section.

5.2 "Additional response costs" shall mean all response costs not covered by the release in this Consent Decree.

6. **SETTLEMENT**

6.1 BKHN and Sun shall pay a total of $163,400 to the Department within 60 days of the date on which this Decree is approved by the Court. The Department shall credit the money first toward its nonoversight response costs incurred at the Site and then toward any other costs incurred at the Site, as it deems appropriate.

6.2 Newson shall pay a total of $6,000 to the Department within three days of receipt of notice of approval of this Decree by the Court.

6.3 BKHN, Sun and Newson shall pay the amounts set forth in paragraphs 6.1 and 6.2 above by check or money order

made out to the Department of Toxic Substances Control and identified with the docket number of this case and Project Code 200005. Payment shall be mailed to:

Department of Toxic Substances Control
Accounting/Cashier
400 P Street, 4th Floor
P.O. Box 806
Sacramento, CA 95812-0806

A copy of the check shall be mailed to:

Barbara Cook
Site Mitigation Branch
Department of Toxic Substances Control
Region 2
700 Heinz Ave., Suite 200
Berkeley, CA 94710

7. DEPARTMENT'S RESERVATION OF RIGHTS

Except as expressly provided in the Consent Decree, nothing in the Consent Decree is intended nor shall it be construed to preclude the Department from exercising its authority under any law, statute or regulation. Furthermore, nothing in the Consent Decree is intended, nor shall it be construed, to preclude any federal or state agency, department, board or entity from exercising its authority under any law, statute or regulation. Notwithstanding any other provision in the Settlement Agreement and Consent Decree, the Plaintiff reserves the right to institute proceedings in this action or in a new action seeking to compel BKHN, Sun or Newson to perform response work at the Site or seeking reimbursement of additional response costs at the Site or seeking to impose liability based on any other claim arising out of the presence at the Site, release at the Site or disposal at the Site of mercury or of

hazardous substances or hazardous wastes containing mercury in any form if:

(a) conditions previously unknown to the Department for which BKHN, Sun or Newson is liable under any statute or law are discovered at the Site after the entry of the Consent Decree and these conditions indicate that (1) a hazardous substance has been or is being released at the Site or there is a threat of such release into the environment and (2) the response performed at the Site is not protective of human health and the environment, with respect to such previously unknown conditions;

(b) information is received after the entry of the Consent Decree concerning matters for which BKHN, Sun or Newson is liable, and this information indicates and the Director determines that the response performed at the Site is not protective of human health and the environment.

8. **CONSENT DECREE WITH COUNTY OF SANTA CLARA**

BKHN and Newson have entered into a separate Settlement Agreement and Decree with the County of Santa Clara ("County Decree") (copy attached hereto). Pursuant to the terms of the County Decree, BKHN has agreed to pay certain sums of money to the County to be used for implementation of the Department's Remedial Action Plan and for reimbursement of past response costs and Newson has agreed to pay certain sums of money to BKHN. The parties hereby agree that as regards BKHN and Sun, the release set forth in paragraph 9 below shall not apply in the event that BKHN fails to establish a line of credit as set forth in paragraphs 5 and 6 of the County Decree or in the event of a finding by this Court at any time thereafter that BKHN has failed to comply with the terms of the County Decree and BKHN fails to cure such breach within fifteen (15) days of a determination by the Court; provided, however, that notwithstanding the foregoing,

acceptance by the Department of the payments required by paragraph 6 bars the Department from seeking to recover from BKHN or Sun any costs incurred through the date on which BKHN failed to comply with the terms of the County Decree, as determined by the Court. Acceptance by the Department of the payments required by paragraph 6 will not bar the Department from seeking to recover from BKHN or Sun any costs incurred after the date on which BKHN failed to comply with the terms of the County Decree, as determined by the Court, and will not bar the Department from seeking to require BKHN or Sun to complete any remediation on the Site in the event that BKHN has been found by the Court to have failed to comply with the County Decree. The parties hereto further agree that as regards Newson, the release set forth in paragraph 9 below shall not apply in the event Newson fails to make the payment set forth in paragraph 4.b of the County Decree.

9. **RELEASE**

Except as provided in paragraph 7 above and subject to the exception for noncompliance with the County Consent Decree set forth in paragraph 8 above, this Consent Decree releases Sun, Newson and BKHN, and each of them, upon full payment required by paragraph 6, from (a) any and all liability based on the Complaint filed in this action, (b) any and all liability, based on the facts alleged in the Complaint filed in this action, for costs incurred at the Site that are recoverable pursuant to Division 20, Ch. 6.8, Article 6 of the California Health & Safety Code, and (c) from all other claims, demands, liens, liabilities, costs, losses, damages and expenses that relate to the Site

itself, regardless of when they accrued or may accrue in the future, or of when they were incurred or may be incurred in the future, arising out of the presence at the Site, release at the Site or disposal at the Site of mercury or of hazardous substances or hazardous wastes containing mercury in any form. Notwithstanding the above, the parties agree that nothing in this Consent Judgment and/or release shall be construed to release BKHN, Sun and/or Newson from any claims, demands, liens, liabilities, costs, losses, damages and expenses, including, but not limited to claims for damages to natural resources, that arise out of conditions that are outside of the Site, even if the claims result from the presence at the Site, release at the Site or disposal at the Site of mercury or of hazardous substances or hazardous wastes containing mercury in any form. Furthermore, the parties agree that nothing in this Consent Judgment and/or release shall affect the ability of any other federal or state agency, department, board or entity from exercising its authority under any law, statute or regulation, including, but not limited to, bringing a claim against BKHN, Sun or Newson for damages to natural resources.

10. **DISMISSAL OF CLAIMS**

BKHN's counterclaims against the Department and the Hazardous Substances Account and Hazardous Substances Cleanup Fund for any costs covered by this Consent Decree shall be and are hereby dismissed with prejudice. Nothing in this paragraph shall prevent BKHN from asserting any defense to liability or any

counterclaim including, without limitation, defenses of collateral estoppel and res judicata as to any costs that the Department may seek pursuant to paragraph 7 or in any other action. Nothing in this paragraph shall prevent the Department from challenging all such asserted counterclaims and defenses.

11. CONTRIBUTION PROTECTION

This Settlement Agreement and Consent Decree constitutes the resolution of BKHN's, Sun's and Newson's liability to the Department in a judicially approved settlement within the meaning of section 113(f)(2) of CERCLA, 42 U.S.C. Section 9613(f)(2). The parties intend that this Consent Decree provide protection to BKHN, Sun and Newson against all claims for contribution to the fullest extent provided by law. Notwithstanding the above, nothing in this Consent Decree shall bar any claims by the County of Santa Clara against BKHN, Sun or Newson, arising from the contamination of the Site.

12. MODIFICATION OF CONSENT DECREE

This Consent Decree may be modified upon written approval of the parties hereto and the Court.

13. APPLICATION OF CONSENT DECREE

This Consent Decree shall apply to and be binding upon the Department, BKHN, Sun, Newson, their directors, officers, employees and agents and the successors or assigns of any of them.

14. AUTHORITY TO ENTER

Each signatory to this Consent Decree certifies that he or she is fully authorized by the party he or she represents to

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enter into this agreement, to execute it on behalf of the party represented and legally to bind that party.

15. INTEGRATION

This Consent Decree constitutes the entire agreement between the parties and may not be amended or supplemented except as provided for in the Consent Decree.

16. RETENTION OF JURISDICTION

The Court shall retain jurisdiction of this matter until the requirements of this Consent Decree have been fully satisfied.

17. ATTORNEYS FEES AND COSTS

Each party to this Consent Decree shall bear its own costs and attorneys' fees incurred in connection with this litigation.

18. EXECUTION OF DECREE

This Consent Decree may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

19. APPROVALS OF PARTIES

Plaintiff, the California Department of Toxic Substances Control consents to this Consent Decree by its duly authorized representative as follows:

DATED: November 13, 1996

Barbara J Cook

BARBARA COOK
Branch Chief for Site Mitigation, Region 2
Department of Toxic Substances Control

SUN_MD0002074

APPROVED AS TO FORM:

DATED: _____

DANIEL E. LUNGREN
Attorney General of the
State of California
THEODORA BERGER
Assistant Attorney General
SUSAN S. FIERING
Deputy Attorney General

By: _____
SUSAN S. FIERING
Attorneys for the Department
of Toxic Substances Control

Defendant, BKHN, Inc. consents to this Consent Decree as follows:

BKHN, INC.

DATED: 14 Nov '96 By: _____
Its: President

Defendant, Buckhorn, Inc. consents to this Consent Decree as follows:

BUCKHORN, INC.

DATED: 14 Nov '96 By: _____
Its: President

Defendant, Myers Industries, Inc. consents to this Consent Decree as follows:

MYERS INDUSTRIES, INC.

DATED: 14 Nov '96 By: _____
Its: President

APPROVED AS TO FORM:

DATED: _____

DANIEL E. LUNGREN
Attorney General of the
State of California
THEODORA BERGER
Assistant Attorney General
SUSAN S. FIERING
Deputy Attorney General

By: _____
SUSAN S. FIERING
Attorneys for the Department
of Toxic Substances Control

Defendant, BKHN, Inc. consents to this Consent Decree as follows:

BKHN, INC.

DATED: 14 Nov '96 By: _____
Its: President

Defendant, Buckhorn, Inc. consents to this Consent Decree as follows:

BUCKHORN, INC.

DATED: 14 Nov '96 By: _____
Its: President

Defendant, Myers Industries, Inc. consents to this Consent Decree as follows:

MYERS INDUSTRIES, INC.

DATED: 14 Nov '96 By: _____
Its: President

APPROVED AS TO FORM:

BEVERIDGE & DIAMOND

DATED: November 13, 1996 By: _____
DAVID COOKE, ESQ.
Attorneys for BKHN, Inc.,
Buckhorn, Inc. and
Myers Industries, Inc.

Defendant, Sun Company, Inc. consents to this Consent Decree as follows:

SUN COMPANY, INC.

DATED: _____ By: _____
Its:

APPROVED AS TO FORM:

LARSON AND BURNHAM

By: _____
JOHN VERBER, Esq.
Attorneys for Sun Company, Inc.

Defendant, Newson, Inc. consents to this Consent Decree as follows:

NEWSON, INC.

DATED: _____ By: _____
Its:

APPROVED AS TO FORM:

BEVERIDGE & DIAMOND

DATED: _____ By: _____
DAVID COOKE, ESQ.
Attorneys for BKHN, Inc., Buckhorn, Inc. and Myers Industries, Inc.

Defendant, Sun Company, Inc. consents to this Consent Decree as follows:

SUN COMPANY, INC.

DATED: _____ By: _____
Its:

APPROVED AS TO FORM:

LARSON AND BURNHAM

By: _____
JOHN VERBER, Esq.
Attorneys for Sun Company, Inc.

Defendant, Newson, Inc. consents to this Consent Decree as follows:

NEWSON, INC.

DATED: November 14, 1996 By: _____
Its: CHAIRMAN & CEO

SUN_MD0002078

APPROVED AS TO FORM:

WHITMAN BREED ABBOTT & MORGAN

By: _____
PAUL WORKMAN, Esq.
Attorneys for Newson, Inc.

IT IS SO ORDERED.

DATED: _____

_____
HONORABLE SAMUEL CONTI
United States District Court
Judge

APPROVED AS TO FORM:

BEVERIDGE & DIAMOND

DATED: _____ By: _____
DAVID COOKE, ESQ.
Attorneys for BKHN, Inc., Buckhorn, Inc. and Myers Industries, Inc.

Defendant, Sun Company, Inc. consents to this Consent Decree as follows:

SUN COMPANY, INC.

DATED: 19 Nov 1996 By: _____
Its: Manager, Env. Projects
Director, Remediation Svcs.

APPROVED AS TO FORM:

LARSON AND BURNHAM

By: _____
JOHN VERBER, Esq.
Attorneys for Sun Company, Inc.

Defendant, Newson, Inc. consents to this Consent Decree as follows:

NEWSON, INC.

DATED: _____ By: _____
Its:

SUN_MD0002080

APPROVED AS TO FORM:

BEVERIDGE & DIAMOND

DATED: _____ By: _____
DAVID COOKE, ESQ.
Attorneys for BKHN, Inc., Buckhorn, Inc. and Myers Industries, Inc.

Defendant, Sun Company, Inc. consents to this Consent Decree as follows:

SUN COMPANY, INC.

DATED: 19 Nov 1996 By: _____
Its: Manager, Env. Projects
Director, Remediation Svcs.

APPROVED AS TO FORM:

LARSON AND BURNHAM

11/22/96 By: _____
JOHN VERBER, Esq.
Attorneys for Sun Company, Inc.

Defendant, Newson, Inc. consents to this Consent Decree as follows:

NEWSON, INC.

DATED: 11/20/96 By: _____
Its:

SUN_MD0002081

APPROVED AS TO FORM:

WHITMAN BREED ABBOTT & MORGAN

By: _____
PAUL WORKMAN, Esq.
Attorneys for Newson, Inc.

IT IS SO ORDERED.

DATED: 11/25/96

_____
HONORABLE SAMUEL CONTI
United States District Court
Judge

SUN_MD0002082

EXHIBIT F

Linda S. Adams
Secretary for Environmental Protection

California Regional Water Quality Control Board
Central Valley Region
Karl E. Longley, ScD, P.E., Chair

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
http://www.waterboards.ca.gov/centralvalley

Arnold Schwarzenegger
Governor

23 September 2009

Central Valley Water Board

Sulfur Creek Mine Cleanup and Abatement Orders

Rebuttal Discussion

The Central Valley Water Board's Prosecution Team (Prosecution Team) has received and considered comments made by many of the parties named in the Draft Orders for the Central, Cherry Hill, Empire, Manzanita, and West End Mines CAO (Central Group CAO) and for the Wide Awake Mine CAO (Wide Awake CAO). Taking these comments into consideration, the Prosecution Team recommends several modifications to the Draft Orders, and responds to the comments below.

Modifications to the Responsible Party List

After considering all comments made on the Draft Orders, the Prosecution Team will remove Magma Power and Sunoco/Cordero from the Central Group CAO. This decision was premised on the fact that these entities held geothermal exploration leases that precluded them from managing the mining waste present on the parcels that they controlled. Absent the ability to control the mining waste and its discharge, these parties should not be held responsible for the cleanup.

Secondary Liability

Several of the commenters point to the State Board's Wenwest decision (State Board Order WQ 92-13), and claim that they meet the factors that would put them in a position of secondary liability. The Prosecution Team interprets the Wenwest decision to lay out nine different factors that are to be considered in assigning a party to a position of secondary liability. Those factors are:

1. The property was purchased by the Discharger solely for the purposes of conveying it to another party;
2. The ownership period was brief;
3. The party who received the property from the Discharger is named in the Order;
4. The Discharger had nothing to do with the activity that caused the condition of pollution;
5. The Discharger never engaged in any activity that exacerbated the problem;
6. The Discharger had incomplete knowledge of the pollution;
7. The Discharger purchased the property at a time when the pollutants of concern were just beginning to be recognized as a general problem;

8. There are several other responsible parties named in the Order; and
9. The cleanup is proceeding.

Although few of the parties named in the Order actively participated in profitable mining at the sites, mining waste has been recognized as a problem, due to acid mine drainage and contribution of heavy metals, for many decades (the first Orders by the Central Valley Water Board relating to mine closure were issued in 1958 to the Walker Mine). In addition, cleanups are not proceeding on these mine sites. The Prosecution Team has determined that only one of the responsible parties (American Land Conservancy) may fit the remaining criteria, and will leave it to the Board to determine whether this party should be relegated to secondary responsibility.

Nuisance

This Order is being issued pursuant to California Water Code (CWC) sections 13304 and 13267. It is the contention of the Prosecution Team that all of the parties currently named in the Orders have or had control of the mining waste that has discharged, and is discharging, pollutants to surface waters.

A few of the parties have claimed that a prior owner cannot be held responsible for a cleanup under these code provisions. The basic argument is that the former owners are responsible for cleaning up only the portion of the waste material that eroded during the time of their ownership.

The Prosecution Team disagrees, based on court cases that have analogized cleanup obligations under CWC section 13304 to landowner obligations under the common law of nuisance. In *City of Modesto Redevelopment Agency v. Superior Court*, 19 Cal.App.4th 28, the court concluded that liability as a responsible party under CWC section 13304 should be determined by taking into consideration the common law of nuisance. The court stated that, "the Porter-Cologne Act similarly appears to be harmonious with the common law of nuisance." Under the common law, a landowner's liability can result from actions or from a failure to act. In this case, it is the failure to abate a continuing nuisance (the discharge of hazardous materials from the mine waste site) that imposes liability upon the responsible parties named in the Order.

In 1872, the California legislature codified the duty of successive owners to abate a continuing nuisance, a tenet of the common law of nuisance, when it enacted California Civil Code section 3483. This code section states that,

> Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

Extending the logic of *City of Modesto Redevelopment Agency*, the Prosecution Team contends that if the initial owner could be ordered to abate the continuing nuisance by cleaning up the mining waste, subsequent owners can also be held liable for these cleanup obligations. In other words, when interpreted in light of the common law of nuisance, former owners are liable for abating the entirety of the continuing nuisance that they failed to abate during their time of ownership, not just the waste that eroded into the streams and created the conditions of pollution.

Basin Plan Amendment

On September 14, the Prosecution Team was notified that a Basin Plan Amendment, adopted by the Central Valley Water Board in March of 2007, took effect. This Basin Plan Amendment de-designated the lower stretch of Sulfur Creek (the portion affected by the discharges from the Central Group Mines and the Wide Awake Mine) for the beneficial uses of municipal and domestic supply (MUN) and human consumption of aquatic organisms.

No substantial modification of the Order is required, although minor modifications will need to be made to clarify some of the findings. Wide Awake Mine CAO Findings Nos. 24 & 26 and Central Group CAO Findings Nos. 33 & 35 will need to be modified to be in harmony with the new Basin Plan Amendment. At the time the Draft Orders were developed, the Prosecution Team understood that this Basin Plan Amendment might be approved.

The Basin Plan Amendment was put out for public notice and comment, and was adopted pursuant to the provisions of 40 CFR 131.10, which allows for the de-designation of beneficial uses if natural conditions preclude those uses from ever being attained.

In addition to de-designating the beneficial uses of the waterbody, the Basin Plan Amendment established site-specific criteria based on naturally-occurring background conditions. These site-specific objectives were developed after an evaluation of the factors specified in CWC section 13241. The applicable water quality objective for mercury in the relevant stretch of Sulfur Creek is 1,800 ng/L when flows are less than 3 cfs, and when flows are greater than 3 cfs, the instantaneous maximum ratio of mercury to total suspended solids shall not exceed 35 mg/kg.

The Basin Plan amendment determined that the only anthropogenic sources of mercury to Sulfur Creek were due to the contributions from the mining waste at the inactive mine sites. Remediation of this mine waste in accordance with the proposed CAOs will allow attainment of the site-specific objective in Sulfur Creek.

Central Group CAO

Bailey Minerals

1. Comment: Bailey Minerals asks for an explanation of liability

   Response: Evidentiary documents provided subsequent to Bailey Mineral's comment provide this explanation.

Helen Holliday Foundation (Foundation)

1. Comment: The Foundation claims that it never possessed mineral rights in the mine site, and therefore should not be held responsible for the cleanup.

   Response: Mineral rights are not a prerequisite for holding a party responsible for cleanup. The waste material that is the subject of the Draft Order is mining waste, which is separate from the mineral rights, which concern material that has yet to be

removed from the ground. Mineral rights have been defined in several of the deeds to govern recoverable materials 100 ft. below ground surface.

2. Comment: The Foundation has stated that it should be removed from the Order, because its proceeds are dedicated to charitable functions.

   Response: The Foundation has not cited any Order or statute that would allow the Central Valley Water Board to treat the Foundation different than any other similarly-situated party. It is the obligation of the Central Valley Water Board to treat entities that it regulates in the same manner, regardless of their charter.

Homestake (Comments for both Central Group CAO and Wide Awake CAO)

1. Comment: Homestake points out that it was only involved in "limited exploration activities," and that these limited activities form the basis for its inclusion in the order.

   Response: The exploration activities are not the reason why Homestake was included in the Draft Order. The reason that Homestake is included in the Draft Order is that Homestake was a former owner (see Bailey Minerals grant to Homestake, 6 January 1978) and an operator of the mining site. For parcels that Homestake leased, the scope of Homestake's lease granted it the ability to take actions to control the discharge of wastes from the site.

2. Comment: Homestake contends that it has been unfairly singled out for prosecution, and that the Board cannot place burden on a small number of entities.

   Response: The Prosecution Team conducted a title search of all parties who were involved in the site and had the legal ability to control the mining waste. All parties that the Prosecution Team found to have legal responsibility for the cleanup were named in the Draft Order.

3. Comment: Homestake contends that the proposed timelines in the CAOs are unrealistic and that the timelines must be substantially extended to allow the parties an opportunity to coordinate and develop a thorough Conceptual Site Model (CSM) which will define the studies required to characterize and quantify mercury loading to Sulphur Creek from the various sources.

   Response: The timelines in the CAOs are governed by the directive in the Basin Plan that stipulates that cleanup actions at the mines must be completed by 2011. It should be noted that adoption of the CAOs was previously scheduled for spring of 2009, but several of the named parties requested an extension to the comment deadline of 3 April 2009. Board staff concurred with the extension request and the deadline for comments was extended to 20 May 2009. At a 6 May 2009 meeting to discuss issues related to the draft Order, the parties present asked that the CAOs should be brought before the Board for consideration. As a result, the comment deadline for the CAOs was extended to 1 July 2009. Further scheduling, done at the behest of the Board's Advisory Team, changed the deadlines of the order once again under the final version of the Hearing Procedures.

4. Comment: Homestake asserts that a CSM is needed that addresses all mercury sources to the creek.

Response: Much of the information needed for a CSM is already available through the CALFED 5C2 Report, existing Basin Plan data, and existing geological and mineralization data obtained through previous exploration activities.

5. Comment: Homestake claims that the directive in the Draft Order to remediate "All anthropogenic mercury impacts on Sulfur Creek" is unfair, and that the Draft Order should be amended to Order the cleanup of only the mining-related anthropogenic wastes.

   Response: The Order is directed at the mine wastes at the site, not those associated with other activities. Previously adopted resolutions of the Central Valley Water Board, including the recent Basin Plan Amendment, conclude that mining wastes are causing the contribution of pollution over naturally occurring background levels.

6. Comment: Homestake cites *In Matter of US Cellulose*, State Water Board Order WQ 92-04, to stand for the proposition that lessees should not be assigned obligations under the Draft Orders.

   Response: The circumstances in the instant case differ substantially from those in *US Cellulose*. In that case, the lessee not only never used the tanks that caused the pollution, it "carefully refrained from exercising any control over the tanks and deferred control of the tanks to the [property owners]." There is no evidence in the record to suggest that Homestake deferred this kind of control to the fee title owners.

7. Comment: In situations where Homestake only held leaseholds, these leases had limited rights.

   Response: When Homestake leased parcels, the fee title owner retained certain rights (including geothermal exploration rights). However, the leases that Homestake entered into gave it broad control over the surface and subsurface of the properties. Homestake had the ability to control the discharges of waste from the areas affected by mining waste.

8. Comment: The cleanup ordered in the CAOs is divisible, and the Board should determine liability between the parties.

   Response: A recent Supreme Court case (Burlington Northern) suggests that where there is a reasonable basis for divisibility, responsibility for a cleanup may be divided between responsible parties. The Prosecution Team finds no reasonable basis for divisibility of the cleanup.

Magma – Removed from the Order

Dr. Miller

1. Comment: Dr. Miller never possessed unencumbered fee title to the property.

   Response: The encumberances that Dr. Miller claims alleviate him of responsibility for cleanup of the site are conservation easements that were recorded contemporaneously with his purchase of the property. The conservation easement

does not preclude Dr. Miller from performing the necessary mitigation measures on the property.

2. Comment: "Nowhere in the conservation easement does it confer upon Dr. Miller the general obligation..."

   Response: The obligation to clean up the site is not imposed by the conservation easement. This responsibility is a component of Dr. Miller's ownership interest, and cannot be alienated by a deed restriction or by grant of an easement.

3. Comment: Dr. Miller cites the State Water Board's Wenwest and Zoecon Orders to claim that he is unable to take the necessary actions to remediate the Site.

   Response: Dr. Miller is the current owner of the contaminated property. Neither Wenwest or Zoecon stand for the proposition that a current owner who records a conservation easement escapes liability under CWC section 13304.

4. Comment: Dr. Miller is only a "passive holder of title," and therefore should not be held responsible for the cleanup.

   Response: No such term exists in California law; Dr. Miller holds title to the property with a conservation easement recorded to benefit the American Land Conservancy. The easement does not preclude Dr. Miller from being named in the Order.

5. Comment: Dr. Miller claims that he does not have "development rights," and therefore should not be named in the Order.

   Response: Dr. Miller is correct in that the focus of the inquiry is whether he holds sufficient rights in the property to give him the ability to control the discharges that are causing the water quality impairment. However, Dr. Miller is incorrect in that his lack of development rights precludes him from taking necessary actions to mitigate the discharge of wastes from the property he now owns.

6. Comment: Dr. Miller claims that a Central Valley Water Board staffer informed him, prior to purchasing the property, that no liability remained for the inactive mines.

   Response: This statement mischaracterizes Mr. Croyle's (the former Board staffer) assessment. The property assessment cited by Dr. Miller states:

   > "...none of the mines on the subject property have been granted official closure statues by the regulatory agencies nor has there been any request by the regulatory agencies to begin the closure process. It is possible, however, that official closure of the mines may be requested of the land owner in the future by the regulatory agencies... Items which may need to be addressed include water quality threat, closure and post-closure plans, financial assurance, grading requirements, drainage controls, water monitoring, and containment and cover maintenance. Based on a telephone conversation with Mr. Croyle, at an inactive mine site, if there are no significant tailings, no known mercury "hot spots", and no portal discharge or drainage, the RWQCB (Regional Water Quality Control Board) would not likely aggressively pursue closure of such mine."

   Mining activity from the mines on Dr. Millers property have resulted in mining waste being discharged to ground surfaces where it has eroded into Sulphur Creek.

7. Comment: Dr. Miller states that it would be bad public policy to hold him responsible for the cleanup.

   Response: The Prosecution Team fails to see why it would be bad public policy to include the current landowner in the cleanup of these wastes.

Sunoco/Cordero – Removed from the Order

Terhel

1. Comment: Terhel Farms assets are depleted.

   Response: Ability to pay for a cleanup is not a consideration that the Board may use to excuse responsibility for a cleanup.

ALC

1. Comment: American Land Conservancy is different from the other responsible parties because they hold only a limited property right in the parcels that are discharging waste. American Land Conservancy states that their limited ownership rights put them in a separate category.

   Response: The American Land Conservancy, although it only currently holds conservation easements in the property, actually owned the property from 25 June 1999 until 26 October 1999. This places them in a similar position to other landowners who did not actively create the waste piles.

2. Comment: It would be poor public policy to hold American Land Conservancy liable for the cleanup, as the goals of it's ownership are different from those of other former landowners.

   Response: The Prosecution Team believes that the American Land Conservancy may qualify for secondary liability under the State Board's Wenwest decision (factors are described above). The Prosecution Team will leave it to the discretion of the Central Valley Water Board to determine whether these factors may allow a finding of secondary liability for the American Land Conservancy.

Wide Awake

Cal/Sierra & Merced General Construction

1. Comment: Dischargers comment that they never acquired any interest in the mine or the mineral rights, and this relieves them of responsibility.

   Response: The Dischargers acquired fee title to the property. The discharges are from the mine waste, not from the materials in the ground. The Dischargers have or had the ability to control the discharges from the property that they own(ed).

2. Comment: State Board Resolution 92-49 and the Basin Plan are inapplicable to the Dischargers.

   Response: As persons who have discharged waste into waters of the state, Resolution 92-49 and the Basin Plan are applicable.

3. Comment: The Dischargers have viable successors, and should not be named in the Order.

Response: The State Board has never adopted a policy that rejects the liability of a responsible party because they have viable successors.

4. Comment: Cal Sierra is not a "person" within the meaning of CWC section 13267(b).

   Response: Corporations are persons under California law.

5. Comment: The Dischargers never developed the mine.

   Response: Liability does not attach to the development of a mine under CWC section 13304; it attaches because of a discharge, or threatened discharge, to waters of the state.

6. Comment: The Dischargers never discharged mercury.

   Response: Under the passive discharge theory, recognized by precedential decisions of the State Water Board, the Dischargers have discharged mercury.

7. Comment: Liability is terminated upon termination of ownership and control under *Preston v. Goldman*.

   Response: *Preston v. Goldman* was a case that concerned a dangerous condition (a fountain and pool) at a household. The seller of the house was found not to be liable to purchasers, whose child suffered brain damage when it fell into the pool and almost drowned. The instant situation is different, in that the Dischargers have failed to abate a continuing nuisance. Liability attaches to their failure to according to the theory explained under the heading "Nuisance," above.

8. Comment: Due process requires much greater than a preponderance of evidence.

   Response: The standard of review for this administrative action is whether the Order is supported by substantial evidence in the record, not a preponderance of the evidence or some higher evidentiary standard. *Lake Madrone Water Dist. v. State Water Resources Control Bd.* 209 Cal.App.3d 163, 168.

9. Comment: The discharger claims that there is no link between the mining waste and the contamination in the stream.

   Response: All the information in the record, including the 5C2 Report, the 2005 TMDL Adoption, and the Basin Plan amendment state differently. It is clear that erosion of mine waste is contributing to a condition of pollution in the surface waterbodies.

10. Comment: A statute of limitations applies that limits the Board's ability to impose these Orders.

    Response: Statute of limitations provisions apply only to court actions, and will not preclude a Regional Board from issuing an enforcement order against a past discharger under CWC section 13304(a).

11. Comment: Latches should apply to bar this action.

    Response:

12. Comment: This site should be the subject of a federal Superfund action, not a Cleanup and Abatement Order.

Response: Superfund is not appropriate because responsible parties exist. If the federal CERCLA provisions were applied, a cause of action would lie against the Dischargers in much the same manner.

Robert Leal

1. Comment: Mr. Leal did not have notice of the violations, and therefore cannot be held responsible for the cleanup under the theory that a party who has no notice of the continuing nuisance has no duty to remediate it.

   Response: The deed specifically stated that Mr. Leal took possession of the "Wide Awake Quick Silver Lode Mining Claim." In 1990, it was widely understood that mercury (which was at one time known as "quick silver") was a hazardous substance that had the possibility to wreak enourmous damage on the human nervous system, and that mine waste was an environmental hazard. Mr. Leal would be on constructive notice that the mercury mine that he purchased could be causing a nuisance.

2. Comment: Mr. Leal claims that the Prosecution Team hasn't shown a condition of pollution or nuisance.

   Response: CWC section 13050(l)(1) states that:

   > "Pollution" means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:
   >
   > (A) The waters for beneficial uses.
   >
   > (B) Facilities which serve these beneficial uses.

   At the time that Mr. Leal owned the property, the beneficial uses of Sulfur Creek included municipal and domestic supply (MUN) and human consumption of aquatic organisms. These beneficial uses have been de-designated, and the water quality objectives have been replaced by the site-specific objectives described above. Exceedance of these site-specific objectives constitutes a condition of pollution.

3. Comment: Mr. Leal should only be forced to participate in the cleanup of wastes that migrated off his property, not the waste still remaining.

   Response: Under the common law principles of nuisance, which are described above, Mr. Leal has a responsibility to abate the mining waste.

4. Comment: Mr. Leal did not discharge the waste piles at the site.

   Response: Although Mr. Leal did not discharge the waste piles at the site, during the time of his ownership, those waste piles discharged material that caused exceedances of water quality objectives. Under the State Board order in Zoecon, Mr. Leal discharged waste during the time of his ownership.

5. Comment: Former owners are no longer discharging anything from the site.

   Response: This argument is related to the argument that former owners should not be liable for cleanup. The Prosecution Team contends, according to the arguments that have already been made, that former owners are liable for cleanup under CWC section 13304.

6. Comment: Mr. Leal argues that the volume of mercury is too small for the Board to address.

   Response: Mercury is highly toxic in even small amounts. Even though the mercury contribution from the inactive mines is small when considering the entire contribution of mercury to California waters from all sources, there is no "de minimis" exception that grants reprieve from and enforcement order issued under CWC section 13304.

7. Comment: Wenwest factors are applicable to place the discharger in a position of secondary responsibility.

   Response: In addition to the absence of several factors noted above, which are common to all dischargers, Mr. Leal did not own the property solely for the purpose of transferring it to someone else, nor did he own it for a brief period of time.

8. Comment: The Order is an unconstitutional taking.

   Response: Mr. Leal is not deprived of any of the uses of the mine sites under the Draft Order.

Emma G. Trebilcot Trust

1. Comment: The Trust only owned the owned property from 1988-1989.

   Response: This is correct, and the CAO will be revised accordingly.

2. Comment: There must be substantial evidence to support a finding of responsibility for each party named, and the Board's Prosecution Team does not produce this evidence.

   Response: The Prosecution Team has provided such evidence in the title records of the property, and the description of the waste.

3. Comment: The Discharger argues that the Board is applying a "one molecule" rule.

   Response: Well more than one molecule of substance was released during the period of the Trust's ownership.

4. Comment: Water Quality Objectives are not retroactive.

   Response: The Water Quality Objectives cited in the Draft Order were in effect at the time the discharger owned the property.

5. Comment: Any discharge was minor

   Response: Mercury is highly toxic in even small amounts. Even though the mercury contribution from the inactive mines is small when considering the entire contribution of mercury to California waters from all sources, there is no "de minimis" exception that grants reprieve from and enforcement order issued under CWC section 13304.

6. Comment: Joint and several liability is inapplicable, some mechanism of apportionment should be used.

   Response: In general, the State Water Board has concluded that the Regional Water Boards should not try to apportion liability between parties. See, e.g., Orders Nos. WQ 86-2 and 88-2. In addition, the State Water Board has concluded that liability under CWC section 13304 is joint and several. See Order No. WQ 90-2.