

1 Nicholas J. Wallwork (9582) (nwallwork@steptoe.com)
 Fredric D. Bellamy (10767) (fbellamy@steptoe.com)
 2 STEPTOE & JOHNSON LLP
 201 E. Washington St., Ste. 1600
 3 Phoenix, AZ 85004-2382
 Telephone: (602) 257-5200
 4 Facsimile: (602) 257-5299
 Attorneys for Plaintiffs PDMI and Inspiration
 5

J. Stanton Curry (7683) (jsc@gknet.com)
 6 Kevin E. O'Malley (6420) (keo@gknet.com)
 Wm. Charles Thomson (4269) (wct@gknet.com)
 7 Michael K. Kennedy (4224) (mkk@gknet.com)
 GALLAGHER & KENNEDY
 8 2575 E. Camelback Rd.
 Phoenix, AZ 85012-9225
 9 Telephone: (602) 530-8000
 Facsimile: (602) 520-8500
 10 Co-Counsel for Plaintiff PDMI

11 UNITED STATES DISTRICT COURT
 12 DISTRICT OF ARIZONA

13	The Pinal Creek Group,)	No. CIV 91-1764 PHX DAE (MEA)
14	Plaintiff,)	Plaintiffs PDMI and Inspiration's Response to BHP Copper Inc.'s Motion for Sanctions
15	vs.)	
16	Newmont Mining Corp.,)	
17	Defendants.)	

18
 19 PDMI and Inspiration respectfully submit this Response to BHP Copper Inc.'s
 20 Motion for Sanctions and to CanadianOxy's Joinder of that motion. For the reasons
 21 discussed herein, BHP's motion should be denied in its entirety.

22
 23
 24
 25
 26
 27
 28

TABLE OF CONTENTS

1

2 MEMORANDUM OF POINTS AND AUTHORITIES 1

3 I. PDMI AND INSPIRATION DID NOT VIOLATE THE JUNE 30 ORDER WITH REGARD

4 TO GOLDER DOCUMENTS THAT THEY DID NOT PRODUCE..... 6

5 A. Portions of Geochemical Fingerprinting Project. 7

6 B. The Phase 18 Remobilization Modeling Project..... 9

7 C. Portions of Miami Unit No. 2 Remediation..... 9

8 D. Portions of Golder Progress Reports. 11

9 E. Projects Mentioned or Possibly Mentioned to Dr. Fetter..... 11

10 II. THE POST-JULY 12 SUPPLEMENTAL PRODUCTIONS IDENTIFIED BY BHP AS

11 VIOLATIONS OF THE JUNE 30 ORDER DO NOT WARRANT SANCTIONS. 13

12 A. The Well Fouling Investigation..... 14

13 B. The Miami Unit No. 2 Remediation Analysis. 15

14 C. Chloride Fingerprint Work..... 16

15 D. Webster Gulch Source Control Analysis. 17

16 E. Golder Invoices and Progress Reports..... 18

17 1. Golder Invoices..... 18

18 2. Golder Progress Reports. 19

19 III. THE RECORD DOES NOT SUPPORT AN AWARD OF SANCTIONS, GIVEN PDMI

20 AND INSPIRATION’S GOOD FAITH EFFORTS TO COMPLY. 21

21 A. BHP Obtained the June 30 Order Based on a Representation that the Order

22 Was Narrowly Focused. 22

23 B. PDMI and Inspiration Attempted in Good Faith to Comply with the June 30

24 Order..... 23

25 C. BHP Made Unsupported and Irresponsible Allegations, and Changed Its

26 Interpretation of the June 30 Order..... 25

27 D. PDMI and Inspiration Continued Their Good-Faith Efforts to Comply in the

28 Face of BHP’s Steadfast Refusal to Meet and Confer and BHP’s

Unreasonable Demands. 27

E. The Court Clarified the Meaning of the June 30 Order and Rejected BHP’s

Arguments. 28

F. PDMI and Inspiration Conducted an Audit of the Production and Produced

Some Additional Documents..... 29

1	G. BHP Filed a Motion Ignoring the Court’s March 22, 2007 Order and Making Arguments Based on Distorted Facts and Supposition.....	29
2	IV. PDMI AND INSPIRATION DID NOT VIOLATE THEIR SUPPLEMENTAL DISCOVERY OBLIGATIONS.....	30
3		
4	A. The Specified Golder Files Constitute Privileged Information and Work Product, Immune from Discovery Absent a Showing of Substantial Need.....	32
5	B. The Parties Have Always Treated Legal Consultants’ Projects as Work Product and Privileged Information.....	34
6		
7	C. Both the Magistrate Judge and this Court Have Determined that the Golder Files Are Protected Work Product.	35
8	D. In Protecting Their Confidential Work Product, PDMI and Inspiration Did Not Waive Their Work Product by Not Providing a Privilege Log.	35
9		
10	1. PDMI and Inspiration Voluntarily Produced Work Product in the Form of Data and Put BHP on Notice Regarding Other Project Documents That Were Being Withheld on Work Product Grounds.	36
11		
12	2. BHP Did Not Argue Waiver in Its Motion to Compel the Production of Golder Work Product, and CanadianOxy Even Agreed in Writing that Privilege Logs Were Not Required for Withheld Consultant Documents.....	38
13		
14	3. The June 30 Order Does Not Require a Privilege Log for Documents Outside the Scope of the Order Withheld on the Basis of Work Product.	39
15		
16	4. With Regard to Two of the Categories, the Issue of a Privilege Log Is Now Moot Because the Documents at Issue Have Been Produced.	40
17		
18	E. BHP Never Discussed with PDMI and Inspiration BHP’s Alleged Basis for Believing That Any of the Withhold Work Product Should Be Produced.	40
19	F. Under the Standards Established By BHP’s Own Conduct in Supplementing Discovery Responses, PDMI and Inspiration’s Supplementations Were Timely.	41
20		
21	1. BHP Withheld Information From Its Discovery Responses, and Further Misrepresented the Completeness of Its Production When PDMI and Inspiration Moved To Compel Disclosure.	43
22		
23	2. BHP Withheld New Information Regarding the Impact of Its Acid Hydromining at Miami Unit No. 2.	45
24		
25	3. BHP Withheld Data and Information Regarding New Monitoring Wells Drilled to Monitor Contamination Emanating From Solitude.	48
26		
27	4. BHP Withheld New Data and Information Pertaining to New Wells Drilled to Monitor Contamination Emanating From Copper Cities.	50
28	V. PDMI AND INSPIRATION DID NOT ABUSE THE JUDICIAL PROCESS.....	52

1	A. PDMI and Inspiration Did Not Abuse the Judicial Process With Respect to the Two New 48 Shaft Monitoring Wells and Dr. Fetter’s Statements.....	52
2	1. PDMI and Inspiration Had No Obligation to Divulge Work Product Not Considered by Dr. Fetter at His Deposition.	53
3	2. The Preliminary Data from the Two New 48 Shaft Monitoring Wells Do Not Establish That PDMI and Inspiration Had Motivation to Conceal It.	54
4		
5	B. PDMI and Inspiration Did Not Conceal the Well Fouling Investigation and the 48 Shaft Monitoring Well Data from Dr. Davis at His Deposition.	58
6		
7	C. PDMI and Inspiration Did Not Make a False Representation to the Court By Filing a <i>Daubert</i> Motion to Exclude Dr. Davis.	59
8		
9	D. PDMI and Inspiration Did Not Make False Statements About the Well Fouling Investigation in Their Reply in Support of Cross Motion to Limit Golder Depositions.	59
10		
11	E. PDMI and Inspiration Disclosed Dr. Bethke’s Relationship with Golder and Had No Duty to Correct Dr. Bethke’s Testimony Because It Was Accurate. ..	60
12	VI. SANCTIONS AGAINST PDMI AND INSPIRATION ARE UNWARRANTED AND INAPPROPRIATE.....	64
13		
14	A. Legal Standard For Sanctions.	65
15	B. Sanctions Are Not Appropriate For Any of the Four Categories of Supplemental Post-July 12 Productions.....	67
16	1. The Miami Unit No. 2 Remediation Analysis.	67
17	2. Chloride Fingerprint Work.....	68
18	3. Webster Gulch Source Control Analysis.	69
19	4. Golder Invoices and Progress Reports.....	70
20	VII. BHP’S REFUSAL TO MEET AND CONFER REGARDING THE PRODUCTION SUBSTANTIALLY EXACERBATED THIS DISCOVERY DISPUTE, CONTRIBUTED TO THE DELAYS, AND VIOLATED THE LOCAL AND FEDERAL RULES.....	71
21		
22	VIII. CONCLUSION	72

23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 After more than a decade of litigation, hundreds of thousands of pages of
3 produced documents and the depositions of scores of witnesses, BHP has moved to
4 dismiss this case on sanctions. BHP’s overzealous pursuit of discovery violations has
5 delayed the litigation for over a year and, in that time, BHP has changed its
6 interpretation of the June 30 Order to suit its needs, made unsupported and irresponsible
7 accusations, and continually refused invitations to meet and confer. Despite the time
8 BHP has devoted to this effort, close scrutiny of the motion that took BHP almost a full
9 year to draft demonstrates that none of the allegations of willful misconduct is true.
10 Instead, BHP’s motion relies on distorting the facts and unsupported supposition.

11 To make up for its inability to meet its burden to show willful violations of the
12 June 30 Order, BHP asserts, without having complied with Local Rule 7.2(j), that PDMI
13 and Inspiration failed to supplement discovery responses. BHP also asserts that PDMI
14 and Inspiration abused the judicial process. However, given BHP’s overbroad
15 interpretation of the Magistrate Judge’s June 30 Order – that put an entirely new spin on
16 it within days after PDMI and Inspiration’s right to appeal that Order had expired – in
17 combination with BHP’s threat of contempt proceedings against Golder (which BHP has
18 dropped now that it has received privileged work product), another question before this
19 Court is whether BHP has abused the judicial process.

20 With respect to the alleged Order and discovery violations, the heart of BHP’s
21 motion is an argument that BHP has already lost: whether the Well Fouling
22 Investigation and 48 Shaft monitoring well data are work product required to be
23 produced under the June 30 Order. Of all the exhibits that BHP attaches as evidence of
24 misconduct, more than half pertain to these two projects. This Court held in its March
25 22, 2007 Order, in no uncertain terms, that such information is work product not subject
26 to the Order. Therefore, to a large extent, BHP’s motion is merely a motion for
27 reconsideration of the Court’s prior order.

28

1 With respect to the facts, BHP continues with its assertion that it “fortuitously
2 discovered” the two new 48 Shaft monitoring wells by noticing a cryptic entry in a two
3 hundred page cost report. Yet, based on documents attached to BHP’s own motion, it is
4 undisputed that BHP was informed of the Well Fouling Investigation and the plan to
5 install the two 48 Shaft monitoring wells as far back as November 2005 when PDMI
6 and Inspiration voluntarily produced data from the Well Fouling Investigation. Nor has
7 BHP explained how anyone could willfully conceal such a project when the wells were
8 drilled on the side of a hill in plain view of the main highway in town and the office of
9 BHP’s own consultant, MWH. (*See* photograph attached as Exh. 1 showing the drill rig
10 in plain view). The fact that BHP did not know that the project was named the “Well
11 Fouling Investigation” makes no difference; BHP had the data prior to the January 20,
12 2006 deadline for supplemental expert reports, and its expert, Dr. Davis, could have
13 used this information. The reality is that BHP failed to direct Dr. Davis to analyze it at
14 the time. This is no reason to sanction PDMI and Inspiration.

15 Dr. Davis also complains loudly that he could have used the 48 Shaft monitoring
16 well information to expand his January 2006 supplemental opinion (though the wells did
17 not exist until April 2006). Closer scrutiny of Davis’s January 2006 opinion, however,
18 demonstrates that Dr. Davis always ignored the recent existing data when performing
19 his calculations, having incorporated no new data from nearby wells since 2003 and
20 totally disregarding any impact whatsoever created by PDMI’s pumping water from the
21 48 Shaft. This should put to bed, once and for all, BHP’s pursuit of sanctions regarding
22 the Well Fouling Investigation and 48 Shaft monitoring wells. Moreover, as it turns out
23 and as explained in detail in this Response, BHP hid from PDMI and Inspiration, and
24 even Dr. Davis, the information BHP obtained from new wells that BHP had drilled.

25 Thus, after BHP was given an unprecedented opportunity to conduct a year-long
26 fishing expedition that included delving into the work product of PDMI and Inspiration,
27 the end result is a small group of documents produced post-July 12, 2006, that do not
28 show any willful misconduct by PDMI, Inspiration, or their litigation consultant,

1 Golder, or any substantial prejudice suffered by BHP. At the same time, BHP continues
2 to demand extraordinary relief in the form of dispositive sanctions that would be
3 unprecedented under almost any circumstances.

4 At first blush, the numerous exhibits BHP provided to the Court may seem
5 daunting. BHP attaches 166 exhibits, not including a new supplemental Affidavit of Dr.
6 Andy Davis (which itself is accompanied by another dozen exhibits), to its fifty-page
7 motion. However, of those 166 exhibits, fewer than half are cited to as evidence of
8 misconduct. Of these exhibits, at least forty-eight of them pertain to BHP's trumped up
9 allegations concerning the Well Fouling Investigation and April 2006 48 Shaft
10 monitoring wells, subjects this Court already addressed. Further scrutiny of the
11 remaining documents shows that they contain for the most part either information that
12 BHP already knew about, and used to cross-examine the experts (including Dr. Fetter),
13 or information that is so insignificant that lack of its earlier production cannot have
14 caused prejudice. Moreover, with the exception of a few categories of documents that
15 are not called for by the June 30 Order and that remain work product never challenged
16 by any prior BHP discovery motion, the *documents have now been produced, thus*
17 *making the issue moot and eliminating any prejudice.*

18 The categories of exhibits that BHP alleges are evidence of misconduct are listed
19 in greater detail in the table attached hereto as Appendix A. For the Court's
20 convenience, included is a brief description of BHP's argument, and PDMI and
21 Inspiration's Response. As shown by this table, most of the alleged violations pertain to
22 documents the Court determined were outside the scope of the June 30 Order, or that
23 PDMI and Inspiration reasonably believed were not within the scope of the Order based
24 on BHP's representations in its Motion to Compel. BHP's Motion to Compel clearly
25 stated that "BHP is not requesting broad access to Golder's entire files as a litigation
26 consultant for PDMI/Inspiration." *See* BHP's Motion to Compel, at 2 (Docket 1752).
27 After July 12, 2006, however, BHP changed its position, regarding the meaning of the
28 June 30 Order, stating: "Golder and PDMI and Inspiration should produce to BHP to

1 review *all the work that Golder had done at the request of PDMI and Inspiration as the*
2 *party, PDMI and Inspiration as to lawyers,* and also to produce all unredacted invoices
3 between June '03 and June '06, over a three-year period.” See March 21, 2007 Hearing
4 Transcript, at 19, attached as Exh. 2 (emphasis added). It is BHP’s bait and switch that is
5 the true abuse of the judicial process.

6 BHP argues that PDMI and Inspiration violated the June 30 Order by not
7 producing five categories of Golder documents: (1) portions of the Golder progress
8 reports; (2) portions of the geochemical fingerprinting project; (3) the Phase 18
9 remobilization modeling project; (4) portions of the analysis of the Miami Unit No. 2
10 remediation; and (5) certain projects mentioned to Dr. Fetter. However, further
11 examination reveals that none of these five categories of documents is subject to the
12 June 30 Order because the documents are neither work done for the testifying experts
13 nor related to the subject matter of the supplemental expert reports. Similarly, despite
14 numerous invitations to meet and confer, BHP never discussed with PDMI and
15 Inspiration its position that four of the five categories of these documents are subject to
16 the Order.

17 BHP also argues that PDMI and Inspiration violated the June 30 Order by
18 producing five categories of Golder documents after July 12, 2006: (1) portions of the
19 Well Fouling Investigation; (2) portions of the analysis of the Miami Unit No. 2
20 remediation; (3) portions of the chloride fingerprint work; (4) portions of the Webster
21 Gulch source control analysis; and (5) Golder invoices and progress reports. Again, this
22 Court has already held that the Well Fouling Investigation and April 2006 48 Shaft
23 monitoring well data, are not subject to the June 30 Order. With respect to the other four
24 categories of documents produced after July 12, 2006, some of the post-July 12
25 supplemental production was a result of PDMI and Inspiration’s good faith
26 interpretation of the June 30 Order. Other supplemental production was the result of the
27 sheer size and complexity of the production, and the short time allotted to accomplish it.

28

1 After a full year of leading with an assertion that PDMI and Inspiration violated
2 the June 30 Order, BHP now leads with an argument that PDMI and Inspiration should
3 be sanctioned for breaching their obligation to supplement discovery. Specifically, BHP
4 alleges that PDMI and Inspiration have breached their supplementation obligation by
5 untimely producing two other categories of documents (Well Fouling Investigation and
6 Lost Gulch Investigation) and not producing three other categories of documents
7 (Webster Lake Infill, Slag Pile Reclamation, and Upper Bloody Tanks Wash
8 Performance Assessments).

9 In this Response, PDMI and Inspiration demonstrate that (1) all five of these
10 categories of documents are work product; (2) the parties have always treated these
11 types of documents as work product; and, (3) this Court has ruled that these documents
12 (in particular the Well Fouling Investigation) are work product. Moreover, even with
13 respect to projects that include work product, PDMI and Inspiration voluntarily and
14 timely produced the raw data collected from the projects so that BHP could perform its
15 own analysis. PDMI and Inspiration further informed BHP that the remaining
16 documents concerning the project, such as PDMI and Inspiration's confidential analysis
17 of the data, were being withheld as work product. Despite numerous invitations to meet
18 and confer, BHP has never before asserted that PDMI and Inspiration's discovery
19 obligations require that the three categories of non-produced work product be produced.
20 Further, BHP itself delayed the production of well data on its failed remediation at its
21 Miami Unit # 2 acid hydromining site. *See infra*, Section IV.F.

22 As a third and final category of supposed sanctionable conduct, BHP alleges that
23 PDMI and Inspiration made four "false" statements, most of which pertain to the 48
24 Shaft monitoring wells. The statements that BHP refers to are not false. Further, this
25 Court has already considered and rejected the argument that the data from these April
26 2006 wells were within the scope of the June 30 Order and recognized further that the
27 projects remain work product. Even if PDMI and Inspiration elected to waive that
28 privilege, the information could not properly be provided to the experts after the January

1 20, 2006 deadline for the submission of final expert reports, unless the parties first
2 obtained the Court's permission to supplement their expert reports.

3 In short, the only violations for which this Court might consider sanctions are the
4 supplemental post-July 12 productions of portions of four categories of documents.¹
5 These documents have now been produced. Dispositive or exclusionary sanctions are
6 not appropriate, especially here, where PDMI and Inspiration did not willfully violate
7 the Order and BHP cannot establish substantial prejudice was the result. In many
8 instances, the documents concern peripheral issues. In other instances, BHP already had
9 the information contained in the documents produced after July 12. To the extent there
10 is new information, PDMI and Inspiration continue to support allowing each party's
11 experts an opportunity to provide an additional supplemental opinion considering all
12 data generated or produced since the January 20, 2006 deadline for the submission of
13 the last supplemental expert reports. BHP's Motion argues that the new information is
14 significant, but BHP, oddly enough, has opposed supplemental opinions, which is
15 perhaps the only form of relief to which it is entitled.²

16 **I. PDMI AND INSPIRATION DID NOT VIOLATE THE JUNE 30 ORDER WITH**
17 **REGARD TO GOLDER DOCUMENTS THAT THEY DID NOT PRODUCE.**

18 BHP asserts that PDMI and Inspiration have violated the June 30 Order by not
19 producing all or a portion of five categories of Golder documents: (1) portions of the
20 Geochemical Fingerprinting documents; (2) the Phase 18 Remobilization Modeling
21 Project; (3) portions of the Miami Unit No. 2 Closure Analysis Project; (4) portions of

22
23 ¹ The search of Golder documents potentially responsive to the June 30 Order
24 was formulated and executed by outside counsel and Golder. PDMI and Inspiration
25 personnel did not participate directly and did not make any decisions about which
Golder documents would or would not be produced. *See* Affidavit of Nicholas J.
Wallwork at 18, attached as Exh. 3.

26 ² PDMI and Inspiration's lack of invective and hyperbole should not be
27 interpreted as a lack of passion or commitment to our position. Rather, it is our preferred
28 approach consistent with what we believe to be a more rational, non-reactionary
approach to curable timing/disclosure challenges that have confronted all parties and
which, to some extent, were inevitable given the ongoing operations and remediation at
this complex site.

1 Golder progress reports; and, (5) the following projects possibly mentioned by Golder to
2 Dr. Fetter: Mass Balance Above Kiser Basin; Mass Balance Below Kiser Basin; and
3 Comprehensive Historic Mass Loading. The record demonstrates that BHP's allegations
4 of serious misconduct are not accurate, especially given BHP's change in position on the
5 documents it requested in its Motion to Compel and the vagueness in the accompanying
6 June 30 Order, which BHP itself drafted. PDMI, Inspiration and Golder put forth
7 extreme efforts to comply with the June 30 Order in good faith, while properly asserting
8 certain objections in light of BHP's overreaching and unsupported interpretation that
9 BHP advanced for the first time after the July 12, 2006 production deadline had already
10 passed.

11 PDMI and Inspiration did not violate the June 30 Order by not producing the
12 foregoing documents because the work represented by the documents was neither done
13 for the experts, nor related to the subject matter of the supplemental expert reports. *See*
14 March 22, 2007 Order (Docket 1920) (clarifying those documents required to be
15 produced pursuant to the June 30 Order).

16 **A. Portions of Geochemical Fingerprinting Project.**

17 BHP's first allegation is that PDMI and Inspiration wrongfully concealed and
18 continues to conceal portions of Golder's work on geochemical fingerprinting. *See Mot.*
19 at § III.B.4.a. The portions of Golder's geochemical work at issue here are those
20 portions that do not relate to the subject matter in Fetter's, Bethke's and Brown's
21 supplemental reports. Similar to the Court's finding that all well data – such as data
22 from the new 48 Shaft monitoring wells – are not addressed in Dr. Fetter's
23 Supplemental Report, all geochemical fingerprinting work does not relate to the subject
24 matter of Fetter's, Bethke's and Brown's supplemental reports. The supplemental
25 reports of PDMI and Inspiration's experts only examine iron, copper, and chloride. *See*
26 Waples Deposition 4/30/07 at 131:6-136:9, attached as Exh. 4. The work product in
27 question here relates to Golder's analysis of isotopes and constituents other than iron,
28 copper and chloride.

1 BHP's argument that all geochemical fingerprint work is related is a gross
2 overgeneralization and far too broad. As the Court explained in its March 22 Order,
3 when determining the subject matter of the supplemental report, one must look to the
4 **specific subject matter** addressed in the report and not the **general subject matter**.³
5 *See* March 22, 2007 Order at 8 (Docket 1920). The specific subject matter of Dr.
6 Fetter's supplemental report is the use of iron, copper and chloride. *See* Fetter
7 Supplemental Expert Report, at 2-7, 12-13, 18-22, and 26, attached as Exh. 5; Wickham
8 Deposition 4/25/07 at 223:12-22, attached as Exh. 6. Golder's work with other
9 constituents was performed for purposes of attacking BHP's expert, Dr. Davis, on topics
10 that were not requested by Dr. Fetter nor part of his supplemental report. Affidavit of
11 Nicholas J. Wallwork at ¶ 58, attached as Exh. 3. In addition, as the Golder employees
12 have testified, these studies were also never given to any of the experts. *See* Exh. 6 at
13 144:7-145:18. BHP's argument, that isotope fingerprint work is related to the subject
14 matter of Dr. Fetter's 2006 supplemental report merely because Dr. Fetter was informed
15 that Golder was going to do such work, is nonsensical. Dr. Fetter's 2006 supplemental
16 report does not even mention isotope fingerprints. *See* Exh. 5.

17 The reality is that these documents are quite simply not subject to the June 30
18 Order, and were expressly identified by PDMI and Inspiration as being withheld on that
19 basis. Nonetheless, BHP rejected PDMI and Inspiration's repeated requests to meet and
20 confer over these and the other Golder projects PDMI and Inspiration listed as being, in
21 our view, outside the scope of the Order. *See supra* Section III. Apparently BHP was
22 content to leave PDMI and Inspiration in the position of playing a guessing game
23 regarding BHP's position until receiving BHP's June 1, 2007 Motion for Sanctions.

24
25
26 ³ To hold otherwise would also not make sense, because it is BHP's burden to
27 establish extraordinary circumstances and substantial need for the work product. A
28 broad interpretation of what falls within the same subject matter would eliminate BHP's
burden, especially when its Motion to Compel was based, in BHP's own words, on a
narrow request for work product.

1 **B. The Phase 18 Remobilization Modeling Project.**

2 BHP argues that PDMI and Inspiration violated the June 30 Order by not
3 producing documents related to Golder’s geochemical column studies undertaken to
4 evaluate the analysis of BHP’s expert, Dr. Davis. *See* Mot. at 23, § III.B.4.b. BHP
5 claims these documents had to be produced because Dr. Bethke mentions column
6 studies generally in his supplemental report. The only relation to Dr. Bethke’s opinion is
7 that Dr. Bethke quite pointedly rejected this method as something that he would ever
8 consider, even if Dr. Davis performed it correctly. *See* Exh. 4 at 113:5-118:19. At no
9 point does Dr. Bethke try to recreate or mimic Dr. Davis’s model, as Golder did to assist
10 PDMI and Inspiration counsel. The results of Golder’s limited reactive transport
11 modeling were never even provided to Dr. Bethke. *See id.* at 122:1-13. As BHP already
12 knows, the modeling was not performed to assist PDMI and Inspiration’s expert Dr.
13 Bethke, but rather to assist PDMI and Inspiration counsel in the cross-examination of
14 BHP’s own expert, Dr. Davis. *See id.* at 120:22-121:10; 128:9-12.

15 There is therefore no indication that the foregoing documents are subject to the
16 June 30 Order. Understandably, BHP may want a glimpse of this privileged work
17 product in order to better defend Dr. Davis during his cross-examination at trial, but
18 BHP’s desire to know Golder’s analysis alone is not enough to put this work product
19 within the scope of the Order.

20 **C. Portions of Miami Unit No. 2 Remediation.**

21 BHP also complains that PDMI and Inspiration continue wrongfully to withhold
22 work product pertaining to Golder’s evaluation of BHP’s Miami Unit No. 2 tailings
23 remediation. *See* Mot. at 29-30, § II.B.4.f. This accusation is particularly ironic, given
24 BHP’s own recalcitrance in failing to supplement the data it has collected on the
25 remediation and failing to disclose the data to PDMI and Inspiration, discussed in
26 greater detail in Section IV.F of this Response. Here again, the record does not support
27 BHP’s allegations.
28

1 PDMI and Inspiration continue to withhold only certain portions of Golder's
2 work on the Miami Unit No. 2, namely the work product related solely to providing
3 advice to PDMI and Inspiration's counsel for purposes of challenging and cross-
4 examining BHP and CanadianOxy witnesses on BHP's failed efforts at BHP's Miami
5 Unit No. 2 Tailings. *See* April 20, 2007 Correspondence from N. Wallwork to W.
6 Pearson, attached as Exh. 7; Exh. 3 at ¶ 58. With respect to these documents, PDMI and
7 Inspiration clearly informed BHP that certain documents relating to BHP's Miami Unit
8 No. 2 had not been produced and were not subject to the June 30 Order. Specifically,
9 PDMI and Inspiration described the information being withheld as "Miami Unit No. 2
10 Closure-work done to evaluate BHP's closure plan of the No. 2 Tails, other than work
11 done on the issues of water infiltration analysis and in-situ neutralization method of
12 remediation." *See* Exh. 7. These documents have not been produced because the work
13 was not done for the experts and does not relate to the subject matter of the 2006 expert
14 reports. *See id.*; *see* also Exh. 3 at ¶ 58.

15 The information relating to Miami Unit No. 2 that PDMI and Inspiration's
16 experts opine on was produced earlier. In his 2006 report, PDMI and Inspiration's
17 expert Mr. Brown discusses water infiltration of the Miami Unit No. 2 cover. *See* Brown
18 Report, attached as Exh. 8. That information was produced. *See* January 23, 2006
19 Correspondence from L. Cooper to S. Swindle, attached as Exh. 9. In his 2006
20 supplemental report, Dr. Bethke discusses the in-situ neutralization method of
21 remediation at Miami Unit No. 2. *See* Bethke Second Supplemental Report, attached as
22 Exh. 10. That information was produced. *See* Exh. 9. No other aspect of the Miami Unit
23 No. 2 remediation is discussed in any supplemental report, and, therefore, the foregoing
24 documents are not subject to the June 30 Order. Once again, PDMI and Inspiration
25 identified these categories of documents as being, in our view, outside the scope of the
26 June 30 Order. *See supra* Section III. Once again, BHP refused to meet and confer,
27 instead asserting that it was entitled to these documents only in the context of seeking
28 sanctions.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

D. Portions of Golder Progress Reports.

BHP argues that the June 30 Order requires the production of completely unredacted Golder invoices, and that PDMI and Inspiration have violated the June 30 Order by failing to produce completely unredacted Golder invoices. This is not true. As BHP knows, completely unredacted Golder invoices have already been produced. *See* Correspondence from F. Bellamy to W. Pearson, attached as Exh. 11. Further, when BHP claims that invoices still have not been produced in unredacted format, it is actually referring to Golder’s *progress reports*, not its invoices. The progress reports are not invoices. Golder, itself, considers the invoices and progress reports to be two separate documents. *See* Exh. 6 at 32:24-33:12.

Moreover, the June 30 Order does not require the production of completely unredacted Golder invoices. Rather, the June 30 Order requires production of “[a]ll invoices by Golder, in unredacted form, *regarding work that Golder has done for Fetter, Bethke and Brown or related to the subject matter in Fetter’s, Bethke’s and Brown’s Supplemental Reports, since June 1, 2003.*” *See* June 30 Order at 13 (Docket 1808) (emphasis added). Therefore, even if the progress reports are considered invoices, a clear reading of the Order still allows privileged information to be redacted where an entry refers to work that was not done for the experts and not related to the subject matter of the supplemental reports. PDMI and Inspiration have produced progress reports in a redacted format. *See* Exh. 11.

21
22
23
24
25
26
27
28

E. Projects Mentioned or Possibly Mentioned to Dr. Fetter.

BHP claims that PDMI and Inspiration withheld information in three categories that were mentioned to Dr. Fetter as potential subject matters for his supplemental expert report, though never addressed by Dr. Fetter: (1) total metals currently present in the aquifer downstream from Kiser Basin for 2003 - present; (2) total metals currently present in the aquifer upstream from Kiser Basin, and (3) comprehensive historic mass loading of metals from Property A and Property B. However, Dr. Fetter does not opine on any of these three topics in his January 2006 supplemental report, and the work was

1 not done for Dr. Fetter. The fact that Golder may have mentioned a topic to Dr. Fetter
2 does not make it subject to the June 30 Order, if the work was not done for Dr. Fetter
3 and he never addressed it in his January 2006 report. Moreover, BHP's claim that two of
4 these topics were mentioned to Dr. Fetter is unsubstantiated.

5 More specifically, with regard to the first category, it is true that Dr. Fetter does
6 opine on total metals in the aquifer downstream from Kiser Basin *for the time period*
7 *before 2002* in his 2003 *rebuttal* report. *See* Fetter Rebuttal Report at 15-16, attached as
8 Exh. 12; Exh. 6 at 272:7-18. But that is the end of it, and the Order specifies work after
9 2003 for the supplemental reports. In Dr. Fetter's 2006 supplemental report, Dr. Fetter
10 does not update his calculations regarding total metals present in the aquifer downstream
11 from Kiser Basin, which is the issue addressed by the documents BHP now claims
12 should be produced. *See* Exh. 5. Dr. Fetter specifically directed Golder that he did not
13 want an update of that information because he did not intend to include it in his 2006
14 supplemental expert report. *See* Exh. 6 at 272:7-18.

15 With regard to the second category, Dr. Fetter's 2006 supplemental report
16 contains no discussion at all regarding the total metals present in the aquifer upstream
17 from Kiser Basin. *See* Exh. 5. In addition, and contrary to BHP's assertion, Dr. Fetter
18 does not testify that he discussed this subject with counsel as a potential topic for his
19 2006 supplemental report. Rather, Dr. Fetter states twice that he does not recall, and
20 then he agrees with counsel for BHP that he was told "something" about "mass balance"
21 that Golder was doing. *See* Fetter Deposition, 5/4/06 at 117:6-11, attached as Exh. 13. In
22 fact, only a few days later, Dr. Fetter prepared a list of specific tasks for Golder to
23 perform to assist him in preparing his 2006 supplemental expert report. *See*
24 FetterSupp.01003-04 (Fetter invoice referencing preparation of list of items for Golder
25 on 10/15/05), attached as Exh. 14; Fetter Depo. Ex. 5029 (List of Golder Tasks),
26 attached as Exh. 15. This issue was not among those topics. *See* Exh. 15 (Item 5 refers
27 to hydraulic conductivity in Upper Bloody Tanks Wash; items 6 and 7 refer to mass flux
28 in Upper Bloody Tanks Wash).

1 With regard to the third category, Dr. Fetter's 2006 supplemental report contains
2 no discussion at all regarding comprehensive historic mass loading. *See* Exh. 5.
3 Furthermore, comprehensive historic mass loading is not listed as one of the tasks that
4 Golder performed for Dr. Fetter. *See* Exh. 15. In addition, and contrary to BHP's
5 characterization, Golder's Matt Wickham did not testify that he discussed
6 comprehensive historic mass loading with Dr. Fetter as a potential topic for Dr. Fetter's
7 2006 supplemental report. Mr. Wickham testified that he does not recall specifically
8 what was said about total historic mass loading at the April 21, 2005 meeting. *See* Exh.
9 6 at 175:14-21. He further testified that the discussion of total historic mass loading may
10 have been referring to statements contained in the opposing experts' reports, not
11 Golder's results or Golder's interpretations of that work. *See id.* at 183:21-184:6;
12 185:22-188:9.

13 In summary, these three miscellaneous categories that BHP claims were
14 mentioned to Dr. Fetter are not subject to the June 30 Order, and like BHP's other
15 categories, rather than informing PDMI and Inspiration of BHP's basis for claiming
16 entitlement to them, BHP instead chose to raise them only in the context of seeking
17 sanctions.

18 **II. THE POST-JULY 12 SUPPLEMENTAL PRODUCTIONS IDENTIFIED BY BHP AS**
19 **VIOLATIONS OF THE JUNE 30 ORDER DO NOT WARRANT SANCTIONS.**

20 BHP asserts that PDMI and Inspiration have violated the June 30 Order by
21 producing a portion of five categories of Golder documents after July 12, 2006: (1) the
22 Well Fouling Investigation; (2) Miami Unit No. 2 Remediation analysis; (3) Chloride
23 fingerprint analysis; (4) Golder invoices and progress reports; and, (5) Webster Gulch
24 Source Control analysis. As explained below, any delays in producing these documents
25 were not willful, and none of PDMI and Inspiration's supplemental productions
26 warrants sanctions.

1 **A. The Well Fouling Investigation.**

2 BHP claims that PDMI and Inspiration wrongfully concealed Golder’s Well
3 Fouling Investigation and the data from the 48 Shaft monitoring wells, and that PDMI
4 and Inspiration should be sanctioned because some of the documents were not produced
5 until November 2006. *See Mot.* at 26 – 27, § III.B.4.d. Most of this argument appears
6 aimed at providing Dr. Davis an opportunity to provide a supplemental opinion,
7 disguised as an exhibit to BHP’s Motion, without leave of the Court. However, it has
8 already been decided by the Court that the Well Fouling Investigation and the 48 Shaft
9 monitoring well data are not even subject to the June 30 Order.

10 In its March 22, 2007 Order, the District Court stated that “the parties dispute
11 centers on whether the Well Fouling Investigation and the data from the 48 Shaft
12 monitoring wells are part of the subject matter of the experts’ supplemental reports.” *See*
13 *March 22, 2007 Order* at 6 (Docket 1920). In its brief leading to the March 22 Order,
14 BHP makes the same argument that it makes here: that the Well Fouling Investigation is
15 a subject of Dr. Fetter’s 2006 supplemental report because the 2006 supplemental report
16 discusses the fact that the 48 Shaft withdrawal system was designed to be in contact
17 with the alluvial aquifer and capture the discharge from Webster Gulch. *See id.* at 7.⁴
18 The Court rejected BHP’s argument: “Since BHP has not established that the
19 supplemental experts’ reports discuss the data from the 48 shaft monitoring wells, or
20 that data from the wells existed prior to January 2006, or that the supplemental reports

21 _____
22 ⁴ In its reply brief, PDMI and Inspiration explained that the Well Fouling
23 Investigation was performed as part of PDMI and Inspiration’s source control
24 remediation obligations imposed by its Consent Decree with ADEQ and pursuant to a
25 Clean Water Act Order issued by the United States Environmental Protection Agency.
26 Specifically, the focus of the investigation was principally to address the formation of
27 precipitates on the pumping wells and 48 Shaft. *See Reply in Support of Cross Motion*
28 *re Scope of Golder Depositions*, at 8-11 (Docket 1897); *see also* PDMI and Inspiration’s
Response to BHP’s Motion for Order Clarifying Scope of the Golder Depositions and
Cross Motion re Scope of Golder Depositions (Docket 1893) (incorporated herein by
reference). At his deposition, Golder’s Jake Waples explains that the plan was to
eliminate the precipitates by raising the water level in the shaft. The purpose of the
installation of the 48 Shaft monitoring wells was principally to determine whether the
water levels had been raised sufficiently to eliminate the precipitates. *See Exh. 4* at
288:9-290:14.

1 discuss the Well Fouling Investigation, it may not question Golder about such data or
2 investigation.” *Id.* at 8.⁵ BHP did not object to this Order or move for reconsideration.
3 Yet, BHP continues to complain that this information should have been provided earlier
4 and still argues for sanctions based on its own view of the June 30 Order. In reality,
5 BHP received a gift of being able to see documents not called for by the Order and for
6 which it cannot show substantial need based on the Court’s recent holding.⁶

7 **B. The Miami Unit No. 2 Remediation Analysis.**

8 PDMI and Inspiration produced some documents concerning the Miami Unit No.
9 2 Remediation Analysis (related to cover infiltration and in-situ remediation) on August
10 31, 2006. *See* August 31, 2006 Correspondence from F. Bellamy to W. Pearson,
11 attached as Exh. 17. BHP claims that PDMI and Inspiration should be sanctioned for
12 this delayed production.⁷ This concerned work that Golder had done earlier that was not
13 done for the experts. *See* Exh. 3 at ¶ 51. When counsel for PDMI and Inspiration
14 initially produced files on July 12, 2006, they reasonably expected that this work was
15 not within the scope of the Order because it was not created to assist the experts. *See id.*
16 Rather, they interpreted the Order in good faith to require only the production of work
17 done for the experts. *See id.* On August 31, 2006, following subsequent reviews of
18 documents not produced (and even though PDMI and Inspiration believed that these

19 ⁵ At their recent depositions, the Golder witnesses testified that they did not
20 disclose the April 2006 installation of the 48 Shaft monitoring wells to Dr. Fetter, and
21 that they did not provide Dr. Fetter with any sampling data concerning the 48 Shaft
22 monitoring wells. *See* Exh. 6 at 344:21-346:11; Weinig Deposition, 4/26/07 at 56:12-20,
23 attached as Exh. 16; Exh. 4 at 282:16-287:7.

24 ⁶ To the extent that there was any abuse of the judicial process, it is BHP’s
25 overbroad interpretation of the June 30 Order and threat of contempt proceedings that fit
26 this category, not PDMI and Inspiration’s maintaining these documents as work product
27 outside the scope of the Order.

28 ⁷ These documents were produced as GolderSuppN.00014-19 (Golder Scope of
Work to Predict Future Mass Loading from the Miami Unit); GolderSuppN.00020-197
(work on the estimation of precipitation infiltration through the tailings and the
estimation of future mass loading through the Miami Unit No. 2 Tailings);
GolderSuppN.00001 (containing 236 electronic files relating to Golder’s review of the
No. 2 Tailings infiltration, 222 of which are modeling files); GolderSuppN.00407-428
(work relating to relating to the review and evaluation of the project, including the
proposed technology); GolderSuppN.00429-463 (Golder’s written comments regarding
BHP’s closure plans).

1 earlier work documents were not required under the June 30 Order), the documents were
2 produced out of an abundance of caution and as a showing of good faith.⁸ *See id.*

3 **C. Chloride Fingerprint Work.**

4 BHP claims that PDMI and Inspiration should be sanctioned for delaying the
5 production of chloride fingerprint work that Golder did in 2003 and 2004. *See Mot.* at
6 27-28. This work was produced on August 31, 2006, with a follow-up production on
7 April 20, 2007, of additional documents identified in counsel's final audit of Golder's
8 voluminous index of electronic files. As background, Golder performed two phases of
9 chloride fingerprint work. The first phase was performed in 2003/2004 and was not done
10 for the experts. *See id.* at ¶ 52. The second phase was performed in 2005 at Dr. Fetter's
11 request. *See id.* The first phase of 2003/2004 chloride fingerprint work was originally
12 not produced, pursuant to counsel's good faith interpretation of the Order, because the
13 work was not done for the experts. *See id.* The second phase of chloride fingerprint
14 work was produced on July 12, 2006 and much of it had previously been produced with
15 the experts' files on January 23, 2006 to the extent that it was provided to Dr. Fetter. *See*
16 *id.*

17 With regard to the first phase, Golder missed a reference that the results of this
18 work were shared with Dr. Fetter in a telephone call, and therefore did not include the
19 work with the material that they had gathered for potential production. *See id.* On or
20 about August 16, 2006, Golder provided a chloride memorandum to counsel for PDMI
21 and Inspiration for potential production. *See id.* PDMI and Inspiration's counsel acted
22 quickly to produce the file on August 31, 2006. *See id.* Counsel for PDMI and
23 Inspiration also identified additional documents in a final audit of Golder documents and

24 ⁸ On January 23, 2006, PDMI and Inspiration produced Mr. Brown's expert file,
25 which all concerned Miami Unit # 2. *See Exh. 9.* His file contained work done by
26 Golder to assist him. On April 25, 2006, PDMI and Inspiration produced additional files
27 relating to their work for Mr. Brown. *See April 25, 2006 Correspondence from F.*
28 *Bellamy to W. Pearson, attached as Exh. 18.* Finally, on July 12, 2006, PDMI and
Inspiration produced a large volume of documents relating to Golder's work evaluating
Miami Unit No. 2 closure plans. *See e.g. GolderSupp.00275, 492-528, attached as Exh.*
19; see also July 12, 2006 Correspondence from F. Bellamy to W. Pearson, attached as
Exh. 20.

1 produced these additional documents on April 20, 2007. *See id.* The delay in counsel's
2 production was purely unintentional, and the supplemental production resulted from an
3 exhaustive final audit by counsel of Golder's computer index (which is itself over 1,000
4 pages) as part of counsel's good faith efforts to ensure compliance with the June 30
5 Order.

6 **D. Webster Gulch Source Control Analysis.**

7 BHP argues that PDMI and Inspiration should be sanctioned for delaying the
8 production of Golder's 2003 Webster Gulch source control analysis. The documents
9 were produced on August 15 and August 31, 2006, with an additional production on
10 April 20, 2007 following counsel's final audit of the Golder documents. *See id.* at ¶ 53.
11 Any delayed production was not a result of misconduct. Golder performed Webster
12 Gulch Source Control Analysis work in 2003. *See id.* The work was originally not
13 produced, pursuant to counsel's good-faith interpretation of the Order, because PDMI
14 and Inspiration's counsel understood that this project was not undertaken to assist the
15 experts, a position that Golder confirmed at Mr. Weinig's deposition. *See Exh. 16 at*
16 *176:21- 177:5; Exh. 3 at ¶ 53.* Following the July 12, 2006 production, however, other
17 documents showed that Golder discussed this project during a telephone call in which
18 Golder shared the results of this work with Fetter. *See Exh. 3 at ¶ 53.* When PDMI and
19 Inspiration discovered this communication, the related documents were produced on
20 August 15 and 31, 2006, which constituted all of the documents concerning this issue
21 known to exist at the time. *See id.* During a subsequent review to audit the Golder
22 documents, a few additional working papers were discovered,⁹ and these were produced
23 on April 20, 2007.¹⁰ *See id.* Thus, counsel for PDMI and Inspiration believed in good

24 ⁹ Contrary to CanadianOxy's representation, Golder's Walter Weinig did not
25 testify that the work papers were stored on the computer in the same location as the
26 October 18, 2003 email. Rather, he testified that the work papers were stored together,
27 some on his laptop and some on the main computer. *See Exh. 16 at 30:22-36:18.*

28 ¹⁰ CanadianOxy complains about the supposed late production of an email
concerning a Hydro-Geo Chem Report. However, the email was dated February 8, 2006,
which is after the January 20, 2006 deadline for the submission of the supplemental
expert reports. Pursuant to the reasoning of the Court's March 22, 2007 Order, this
email would not be covered by the June 30 Order. *See March 22, 2007 Order (Docket*

1 faith that these documents were unrelated to assisting the experts, but were willing to
2 produce the documents once it became clear that some of this information was actually
3 communicated to Dr. Fetter.

4 **E. Golder Invoices and Progress Reports.**

5 Complete and unredacted copies of all Golder invoices covering the time period
6 of June 2003 through May 2006 (the latest invoice that had been received at the time of
7 the entry of the June 30 Order) were provided to BHP on August 31, 2006. *See* Exh. 17.
8 Golder progress reports, which are not the same as invoices, were produced in redacted
9 format on November 29, 2006. *See* Exh. 11. As discussed below, these supplemental
10 productions are not appropriately sanctionable, and any consequent delay was not
11 prejudicial.

12 **1. Golder Invoices.**

13 With respect to the timing of the production of unredacted invoices, PDMI and
14 Inspiration interpreted the Order in good faith to mean that any portions of the invoices
15 relating to work done strictly as a litigation consultant could be redacted as work
16 product and as an attorney-client communication. *See* June 30 Order at 13 (Docket
17 1808); *see also* Exh. 3 at ¶ 54. Golder's invoices covered both its role in assisting the
18 experts and its separate role as a litigation consultant. *See* Exh. 3 at ¶ 54. A privilege log
19 detailing this position was provided with the production on July 12. *See* July 12, 2006
20 Correspondence, attached as Exh. 20.

21 Soon after the July 12 production, it came to PDMI and Inspiration's counsel's
22 attention that one attorney working on this aspect of the Golder production had applied a
23 more narrow interpretation than intended. *See* Exh. 3 at ¶ 54. Because the parties had not
24 agreed until October 2005 that supplemental reports would be allowed, the attorney
25 narrowly interpreted the June 30 Order as only requiring the production of invoices

26 1920). Moreover, the Hydro-Geo Chem report discussed in the email had been
27 previously produced prior to July 12, 2006. Further, Geomega evaluates the Hydro-Geo
28 Chem Report in a January 19, 2006 memorandum entitled "Analysis of Ongoing
Loading from Webster Gulch to Kiser Basin." *See* January 19, 2006 Geomega
memorandum at 2-3, attached as Exh. 21.

1 issued after October 2005 on the assumption that that was when work actually began on
2 the reports. *See id.* Likewise, the attorney also redacted all entries not specifically
3 contained in Golder’s Category 10 “Litigation and Expert Witness Support,” again on
4 the assumption that only the work in that category was covered by the June 30 Order.
5 *See id.* Immediately after July 12, 2006, when PDMI and Inspiration’s counsel
6 undertook another review of the production, counsel discovered the mistake. *See id.*
7 Even though counsel believed they could have continued to redact certain projects from
8 the invoices, they elected to remove any basis for dispute and, on August 31, 2006,
9 PDMI and Inspiration produced completely unredacted Golder invoices from June 2003
10 through May 2006. *See id.*

11 **2. Golder Progress Reports.**

12 Like the initial production of invoices, the Golder progress reports produced on
13 July 12, 2006 had all entries redacted except for those falling under Category 10
14 “Litigation and Expert Witness Support.” *See id.* at ¶ 55. In addition, they were
15 produced only for the time period after October 2005, when the parties had agreed that
16 supplemental reports would be allowed. *See id.*

17 Given the massive accumulation of paper and different types of documents that
18 Golder created over the years, some in electronic form and some in hard copy, and given
19 the seven-day time frame for handing the information over to BHP, it is true that a
20 number of references in the progress reports were missed.¹¹ *See id.* Without time to read
21 every single document from beginning to end, other portions of the documents
22 describing the non-expert related tasks were redacted. *See id.* For example, when it was

23 ¹¹ The June 30 Order set a July 12, 2006 deadline, leaving only seven business
24 days for compliance (including Monday, July 3, 2006, the day before the Independence
25 Day holiday). Based on PDMI and Inspiration’s good faith interpretation of the Order as
26 calling for a narrow production, counsel elected neither to object to the Order nor to
27 seek additional time. However, in hindsight, it is abundantly clear that full compliance
28 in a single week was impossible, given the complexities of applying the Order and the
need to protect work product outside the scope of the Order. A realistic time frame for
such an unprecedented and complex production would have been several months,
though cooperation with opposing counsel could have streamlined the process
substantially. *See* Exh. 3, ¶15, 16.

1 discovered that expert-related work, or work related to the same subject matter, was
2 sometimes mixed in with these other task descriptions, such that the initial review did
3 not catch everything, these other portions of the Golder progress reports were produced.

4 *See id.*

5 BHP's allegations that PDMI and Inspiration willfully "concealed" or
6 "obstructed" the production of this information is without support. Given the volume of
7 information and electronic files, Golder and counsel for PDMI and Inspiration did the
8 best job they could by July 12, 2006. BHP has uncovered no evidence of willful
9 misconduct with respect to the portions of progress reports that were redacted. Again,
10 when the mistake was discovered during a review after the July 12, 2006 production, the
11 progress reports were produced in largely unredacted form covering the entire time
12 period beginning in June 2003. *See id.*

13 With respect to any prejudice caused by the delay, BHP overstates the utility and
14 importance of the entries in the progress reports that were not produced in unredacted
15 form until November 29, 2006, claiming they provide a critical "road map" of contacts
16 between Golder and the experts. In reality, as shown below, BHP already had the
17 information concerning the contacts in question from documents produced by PDMI and
18 Inspiration on or before July 12, 2006.

19 **Progress report entry – Summary of Webster Gulch information provided to**
20 **Dr. Fetter.** BHP already knew this. Dr. Fetter's notes from the October 23, 2003
21 telephone conference between Golder and Dr. Fetter on the issue were produced
with Dr. Fetter's file on January 23, 2006. *See* FetterSupp.00938-941, attached as
Exh. 22.

22 **Progress Report entry – November 2003 meeting with Dr. Bethke.** BHP
23 already knew about this meeting and that Dr. Bethke was directing the work he
requested from Golder. Information related to this meeting was produced with
24 Dr. Bethke's files on January 23, 2006, including his invoices evidencing the
meeting. *See* BethkeSupp.00047, attached as Ex. 23. Additional information
25 regarding the November 2003 meeting, including files shown to, but not given to,
Dr. Bethke, were provided from Golder's files on April 25, 2006—two months
26 prior to the June 30 Order. *See* as Exh. 18; GolderSupp.00121-122, attached as
Exh. 24.

27 **Progress report entry – Mass balance model applying method outlined by**
28 **Dr. Fetter.** BHP already knew this information because it concerned mass
balance work done for the area between Kiser Basin and Lower Pinal Creek by

1 Golder for Dr. Fetter related to Dr. Fetter's rebuttal expert report in this matter.
2 See Exh. 12 at 15-16; Exh. 6 at 272:7-18. This work was produced in 2003 with
3 Dr. Fetter's files in connection with that report.

- 4 **Progress report entry – September 9 and 10, 2003 meeting with the experts.** BHP
5 already knew about this meeting. It was reflected in the experts' invoices
6 produced on January 23, 2006. See BethkeSupp.00038, attached as Exh. 25.
- 7 **Progress Report Entry – Coordination with the experts and April 19, 2005
8 meeting.** BHP already knew this information. Golder's assistance to the experts
9 was disclosed in each expert's January 20, 2006 report. See Exh. 5 at 10; Bethke
10 Supplemental Report at 1-2, attached as Exh. 26; Exh. 8 at 19. Specifically, the
11 April 19, 2005 meeting was reflected in the experts' invoices produced with their
12 files on January 23, 2006. See FetterSupp.00986, attached as Exh. 27. The same
13 is true for other contacts that the experts may have had with Golder personnel.
- 14 **Progress report entry - December 2005 meeting with testifying experts.** BHP
15 already knew about this meeting. The December 2005 meeting with the experts is
16 noted in the expert's invoices produced on January 23, 2006. See Exh. 9; Exh. 14.
- 17 **Progress report entry - Recommendations for testifying experts related to
18 BHP's No. 2 Tailings reclamation program.** BHP already knew that Golder
19 had assisted the experts on this issue. It was no secret that Golder was assisting
20 Mr. Brown and Dr. Bethke. Golder's assistance was disclosed in the January 20,
21 2006 expert reports. See Exh. 8 at 19; Exh. 10 at 1. The assistance was also
22 evident through the production of Mr. Brown and Dr. Bethke's expert files. Some
23 additional information relating to Golder's assistance to Mr. Brown on these
24 issues was provided from Golder's files on April 25, 2006. See Exh. 18;
25 GolderSupp.00033-51, attached as Exh. 28.
- 26 **Progress report entry - Golder responded to specific requests for data and
27 analysis from Dr. Fetter.** BHP already knew this. Dr. Fetter discussed Golder's
28 assistance in his January 20, 2006 supplemental expert report. See Exh. 5 at 10.
BHP questioned Dr. Fetter about this during his deposition. See Exh. 13 at 23:11-
23, 24:19-25:3, 28:10-19. This information was produced with Dr. Fetter's files
on January 23, 2006. See Exh. 9; FetterSupp.01061 and 1082, attached as Exh.
29. The July 12, 2006 production contained additional confirmation of Golder's
assistance. See Exh. 20; GolderSupp.00130-135, 220-222, 281, 540-541, and
803, attached as Exh. 30.

21 Thus, while the Progress Reports provided some general information (largely
22 duplicated as boilerplate from month to month) about what Golder was doing, these
23 reports revealed nothing specific that BHP did not already know.

24 III. THE RECORD DOES NOT SUPPORT AN AWARD OF SANCTIONS, GIVEN PDMI 25 AND INSPIRATION'S GOOD FAITH EFFORTS TO COMPLY.

26 BHP has alleged that PDMI and Inspiration have committed willful violations of
27 the June 30 Order. These allegations must be considered in the full context of BHP's
28 overzealous pursuit of sanctions and PDMI and Inspiration's good faith efforts to

1 comply with the June 30 Order. As set forth herein, BHP: (1) prepared a vague proposed
2 Order requiring production; (2) obtained issuance of that Order by representing that it
3 was narrow in scope; (3) later asserted that the Order actually had a much broader scope,
4 but refused to reveal what that broader scope was; (4) refused numerous requests to
5 meet and confer to discuss and attempt to resolve the parties' conflicting interpretations
6 of the Order or narrow the dispute; (5) made unsupported charges and threatened
7 sanctions within days after the deadline for a response to the Order; (6) asserted that
8 PDMI and Inspiration failed to produce documents that did not even exist at the time
9 that the expert reports were finalized; (7) stubbornly continued to pursue sanctions even
10 after this Court rejected its arguments; and, (8) filed a sanctions motion based on
11 innuendo, supposition, and distortion of the facts.

12 **A. BHP Obtained the June 30 Order Based on a Representation that the**
13 **Order Was Narrowly Focused.**

14 In its Motion to Compel, BHP's claim was that it needed PDMI and Inspiration's
15 work product because PDMI and Inspiration's experts were assisted by Golder. *See*
16 BHP's Motion to Compel, at 8 (Docket 1752). Golder's assistance to the testifying
17 experts was no secret, however. PDMI and Inspiration had previously produced their
18 experts' entire files, which included communications to and from Golder. *See* Exh. 9. In
19 addition, Golder's project manager was deposed three times in this and related cases,
20 and each time he was questioned extensively about interactions with the testifying
21 experts. *See* Exh. 3 at ¶ 5. The experts themselves were deposed twice, and were
22 questioned about assistance received from Golder. *See id.* BHP even filed a motion in
23 *limine* to disqualify Dr. Fetter on the basis that some of his opinions were based on
24 Golder's calculations. *See* BHP's Motion in *Limine* to Exclude Fetter, 6/23/2006,
(Docket 1798).

25 After the June 30 Order, counsel for PDMI and Inspiration worked in good faith
26 to accomplish the production of Golder work product relating to their assistance of the
27 experts. *See* Exh. 3 at ¶ 19. This was not an ordinary document production, but, rather,
28

1 was a production of confidential work product, including internal Golder memoranda
2 relating to their assistance of the experts but never shared with them, and
3 communications with counsel regarding this work. *See id.* at ¶ 20. Before the Order, it
4 was never contemplated that these work product documents, which spanned many years,
5 would have to be produced. *See id.* While PDMI and Inspiration were obligated to
6 produce what was required by the Order, counsel also had an obligation to protect work
7 product that was not subject to the Order. *See id.*

8 For the most part, the language of the June 30 Order was adopted from a draft
9 Order proposed by BHP. *See* draft Order attached to Motion to Compel (Docket 1752).
10 Although the June 30 Order was somewhat vague, PDMI and Inspiration’s counsel
11 thought its meaning was clear when read in the context of what BHP represented in its
12 Motion to Compel. *See* Exh. 3 at ¶ 16. BHP stated that it “was not requesting broad
13 access to Golder’s entire files as a litigation consultant.” *See* Motion to Compel, at 2
14 (Docket 1752). Rather, it was seeking only the files “related to the technical work
15 performed by Golder for Fetter, Bethke and Brown.” *See id.* In reliance thereon, counsel
16 for PDMI and Inspiration set out to produce all of the Golder documents related to work
17 performed by Golder for the expert witnesses in preparing their supplemental reports.¹²
18 *See* Exh. 3 at ¶ 16. Unbeknownst to PDMI and Inspiration, BHP would very shortly
19 adopt a much broader interpretation of the June 30 Order.

20 **B. PDMI and Inspiration Attempted in Good Faith to Comply with the**
21 **June 30 Order.**

22 Assembling the Golder documents for production was an arduous task. *See id.* at
23 ¶ 21. Golder has for many years performed several functions for PDMI at the Site. In
24 addition to providing assistance to the experts, Golder has provided regulatory
25 compliance assistance to counsel for PDMI regarding ongoing mining operations and
26 source control efforts. *See id.* at ¶ 2; Exh. 6 at 62:2-17. Golder also provided litigation

27 ¹² *See also* PDMI and Inspiration’s Response to Expedited Order to Vacate Trial
28 Date, (Docket 1838) and PDMI and Inspiration’s Cross Motion to Limit Scope of
Golder Depositions, (Docket 1893) (both incorporated herein).

1 consulting services to PDMI's counsel regarding the cost recovery litigation. *See* Exh. 3
2 at ¶ 2; Exh. 6 at 14:15-19. These activities resulted in the creation of many work product
3 and privileged documents, a large number of which were highly technical in nature. *See*
4 Exh. 3 at ¶ 3. Even as of 2002, when Golder's Matt Wickham was first deposed, he
5 estimated that the Denver office had approximately 96 banker's boxes of files and 1024
6 gigabytes of electronic information. *See* Wickham Deposition, 8/13/2002, at 50:5-50:15,
7 attached as Exh. 31.¹³ By 2006, the computer indices of the documents alone were over
8 a thousand pages. *See* Exh. 3 at ¶ 3.

9 Both counsel and Golder worked diligently in identifying documents for
10 production, and counsel for PDMI and Inspiration traveled to Golder's offices in Denver
11 to assist in the effort. *See id.* at ¶ 9. In total, counsel (including paralegals) spent over
12 250 hours before July 12, 2006 reviewing the documents and preparing them for
13 production. *See id.* at ¶ 21. Golder personnel also spent significant time on the
14 production. *See* Exh. 6 at 58:21-59:9; Exh. 16 at 184:21-185:5. Counsel for PDMI and
15 Inspiration produced documents and digital files that totaled well over 200,000 pages.¹⁴
16 *See id.* at ¶ 22. As can be expected with any large production, some documents that
17 should have been produced were missed. This is particularly true where, as here, the

18
19 ¹³ BHP, having received this deposition transcript, knew the large number of
20 documents within Golder's archives, as well as the types of projects that Golder worked
21 on, well before it filed its Motion to Compel. The number of documents and electronic
22 files was perhaps why BHP's Motion to Compel was careful not to demand all of
23 Golder's projects, a request that surely would have been denied as being overbroad and
24 unduly burdensome had that demand been made evident at the time. BHP later changed
25 its approach to demand everything, but not until after the time had run for appealing the
26 Magistrate Judge's decision. *See* Exh. 3 at ¶43 & 47.

27 ¹⁴ BHP asserts that this production is largely redundant. In fact, there are several
28 instances where documents may initially appear to be redundant, but are actually
separate modeling runs. *See* Exh. 3 at ¶23. BHP also complains that many of the
documents were duplicative of documents previously produced to them. It should not
come as a surprise that the files of the testifying experts contain many of the same
documents that Golder's files contained because everyone knew that Golder was
assisting the experts. *See id.* The July 12, 2006 production consisted of Golder's files of
the work done for the experts. PDMI and Inspiration made a good faith effort to provide
a *complete* file of the work done for the experts. In doing so, there also were many
documents that had not been produced before, including Golder's handwritten notes,
internal memoranda and emails, and external memoranda and emails to counsel. *See id.*

1 documents are highly technical in nature, are challenging for non-scientist lawyers to
2 understand and largely exist electronically in a multiplicity of formats, so that counsel's
3 review is inherently difficult. *See id.* at ¶ 26. Also, some documents were
4 inappropriately culled as a result of a too narrow interpretation of the Order by one
5 attorney. *See id.* at ¶ 27, 54 & 55. When it was discovered that certain documents may
6 have been missed, counsel for PDMI and Inspiration immediately initiated further
7 review to supplement the production where appropriate. *See id.* at ¶ 29.

8 **C. BHP Made Unsupported and Irresponsible Allegations, and Changed
9 Its Interpretation of the June 30 Order.**

10 On July 20, 2006, just a few days after the deadline had passed for appealing the
11 June 30 Order, BHP began asserting an overbroad interpretation of the June 30 Order,
12 claiming to have "fortuitously discovered" the existence of two monitoring wells at 48
13 Shaft that had just been installed in April 2006. *See* July 20, 2006 email from W.
14 Pearson to L. Cooper, attached as Exh. 32. BHP further claimed that PDMI and
15 Inspiration had been concealing the existence of these two wells. BHP's allegations of
16 concealment have been preposterous from the beginning, regardless of whether the
17 information is deemed responsive to the Order. PDMI and Inspiration voluntarily
18 produced data from its Well Fouling Investigation in November 2005, including a
19 survey showing proposed locations for the two new 48 Shaft monitoring wells. *See* Nov.
20 10, 2005 correspondence from B. Bade to W. Pearson, enclosing PDMI.17167, attached
21 as Exh. 33; Marvin Davis Survey of 48 Shaft produced on PDMI.17167, attached as
22 Exh. 34. Incredibly, BHP attaches this survey to its Motion for Sanctions. *See* Exh. C to
23 Affidavit of Dr. Davis. In addition, PDMI had made public filings announcing its
24 intention to install the wells. *See* Notices, attached as Exh. 35. Furthermore, the wells
25 were installed by a large drilling rig on a hillside plainly visible from U.S. Highway 60,
26 that runs through town and past BHP and PDMI's neighboring properties, and plainly
27 visible from the offices of BHP's consultant MWH. *See* Exh. 1. In July 2006, BHP
28 demanded that PDMI and Inspiration produce the sampling results from the wells, even

1 though the samples had only recently been taken and the results had not yet been
2 finalized, or conveyed to PDMI, Inspiration or their counsel. *See* Exh. 32. PDMI gave
3 the preliminary results to BHP on July 24, 2006. *See* July 24, 2006 Letter from L.
4 Cooper to W. Pearson, attached as Exh. 36. Consistent with their prior practices, as
5 evidenced by the voluntary production of the Well Fouling Investigation data, PDMI
6 and Inspiration always intended to produce the raw data from the new 48 Shaft
7 monitoring wells seasonably and voluntarily as soon as the data were final, including
8 any depth to groundwater elevations after the surface elevation of each well was
9 surveyed. *See* Exh. 3 at ¶ 38; Exh. 6 at 354:16-358:2 (testimony of Matthew Wickham),
10 (“It was my understanding that the installation, construction of those wells, and that the
11 data that they generated would always be available to the parties in this matter. I think it
12 would be silly to assume otherwise. The same can be said for the 48 shaft monitor wells
13 that were put in.” 354:19-25) (“I’d like to reiterate that my understanding was that the
14 information regarding these new monitoring wells that were going on would always be
15 shared.” 357:11-14). BHP’s argument to the contrary is meritless speculation.

16 On July 27, 2006, BHP filed an irresponsible and misleading Motion claiming a
17 serious violation of the June 30 Order arising from PDMI and Inspiration’s alleged
18 concealment of the existence of the monitoring wells and PDMI and Inspiration’s failure
19 to produce the preliminary sampling results on July 12, 2006. *See* Motion for Expedited
20 Order, 7/27/2006 (Docket 1814). To the astonishment of PDMI and Inspiration, BHP
21 argued that the sampling results from the new wells fell within the scope of the June 30
22 Order despite the fact the wells were not even in existence on the January 20, 2006
23 deadline for the submission of supplemental expert reports. *Id.* On July 31, 2006, based
24 on BHP’s mischaracterization of the facts, the Magistrate Judge issued an Order that,
25 among other things, threatened case-dispositive sanctions. *See* Order dated 7/31/2006
26 (Docket 1816).

27

28

1 **D. PDMI and Inspiration Continued Their Good-Faith Efforts to**
2 **Comply in the Face of BHP’s Steadfast Refusal to Meet and Confer**
3 **and BHP’s Unreasonable Demands.**

4 In the meantime, PDMI and Inspiration attempted to finish their review of the
5 production. Although it was apparent, given BHP’s argument about the new monitoring
6 wells, that BHP’s interpretation of the Order was much broader than what BHP had
7 previously represented to the Court and parties when pursuing its Motion to Compel, it
8 was not clear exactly how broad BHP’s interpretation was. Therefore, on or around July
9 27, 2006, PDMI and Inspiration requested that BHP meet and confer regarding that very
10 subject. *See* Nov. 22, 2006 Correspondence from F. Bellamy to W. Pearson, attached as
11 Exh. 37 (recounting July 27, 2006 telephone conversation).¹⁵ BHP rejected this request.
12 *See id.* It was the first of many such requests that BHP rejected.

13 PDMI and Inspiration did their best to complete the supplemental production
14 despite BHP’s refusal to meet and confer. *See* Exh. 3 at ¶ 43. Additional documents
15 were produced in July and August 2006. *See id.* at ¶ 29, 30 & 31. These productions
16 included documents that PDMI and Inspiration’s counsel believed were not subject to
17 the June 30 Order, but that they felt compelled to produce given the circumstances. *See*
18 *id.* at ¶ 32. Between July 13 and August 31, 2006, PDMI and Inspiration produced an
19 additional 1,408 pages and 440 digital files. *See id.* at ¶ 33. On August 31, 2006, PDMI
20 and Inspiration declared through counsel that their production was substantially
21 complete, although they stated there would soon be some additional documents

22 ¹⁵ *See also* December 5, 2006 Facsimile from W. Pearson to F. Bellamy, attached
23 as Exh. 38 (also recounting July 27, 2006 telephone conversation, but noting that BHP
24 did not believe that any meet-and-confer meeting was necessary because BHP believed
25 that the subpoena was clear on its face). Ongoing disputes revealed in the depositions
26 and underlying BHP’s motion demonstrate that BHP’s interpretation of the language it
27 drafted referring to the “subject matter” certainly was not clear on its face, either to
28 PDMI and Inspiration’s counsel or to Golder. *See* Exh. 16 at 175:22-178:12, (testimony
of Walter Weinig) (“Q. Do you believe the subject matter of that work you did in late
2003 is the same subject matter that is included in Dr. Fetter’s opinion 16 on page 8 of
his supplemental report? A. From a – from a technical standpoint I would say that its
different.” (176:21-177:5)) (objections omitted) (“You could make the statement that
any evaluation of groundwater contamination anywhere in the State of Arizona is the
same subject matter. But we felt it was reasonable, for example, that that would be an
overbroad interpretation ...”(178:8-178:12)).

1 produced. *See* Exh. 17. Also, on August 31, 2006, counsel for PDMI and Inspiration
2 provided BHP with a list of document categories that they believed were not subject to
3 the June 30 Order, and requested that BHP meet and confer regarding the production.
4 *See id.*; Exh. 3 at ¶ 45. BHP did not respond. *See* Exh. 3 at ¶ 45.

5 Counsel for PDMI and Inspiration produced the Well Fouling Investigation and
6 Lost Gulch Investigation documents as they were reviewed from September through
7 November 2006. Counsel for PDMI and Inspiration felt that these documents were not
8 responsive to the Order, but they produced them anyway in an abundance of caution and
9 a showing of good faith. *See* Exh. 3 at ¶ 46; Exh. 11; Exh. 37; Correspondence from F.
10 Bellamy to W. Pearson, Sept. 1, 2006, attached as Exh. 39. On November 29, 2006,
11 PDMI and Inspiration completed their line-by-line review of the progress reports, and
12 these were produced. *See* Exh. 3 at ¶ 46. In November 2006, PDMI and Inspiration once
13 again requested that BHP meet and confer regarding the production and identify any
14 categories of documents that BHP maintained should be produced. *See* Exh. 37. Once
15 again, BHP did not respond. *See* Exh. 3 at ¶ 45.

16 **E. The Court Clarified the Meaning of the June 30 Order and Rejected**
17 **BHP’s Arguments.**

18 In November 2006, cross motions were filed seeking the Court’s interpretation of
19 the June 30 Order in the context of determining the proper scope of the Golder
20 depositions. Confirming its dramatic reversal from the narrow interpretation in its
21 Motion to Compel, BHP asserted that the Order required the production of *all* Golder
22 documents: “Judge Anderson said in the order that Golder and PDMI and Inspiration
23 should produce to BHP to review all the work that Golder had done at the request of
24 “Golder and PDMI and Inspiration should produce to BHP to review *all the work that*
25 *Golder had done at the request of PDMI and Inspiration as the party, PDMI and*
26 *Inspiration as to lawyers, and also to produce all unredacted invoices between June ‘03*
27 *and June ’06, over a three-year period.” See* Exh. 2 at 19. By Order dated March 22,
28 2007, the Court rejected BHP’s broad interpretation of the Order, and held that the June

1 30 Order required the production of a document not reflecting work done for the expert
2 only if the document concerned the same subject matter that was specifically mentioned
3 in the supplemental expert reports. *See* March 22, 2007 Order (Docket 1920). In the
4 March 22 Order, applying this standard the Court also rejected BHP's argument that the
5 Well Fouling Investigation and the 48 Shaft well sampling results were subject to the
6 June 30 Order. *Id.* The Court thereby rejected BHP's main argument for sanctions that it
7 had been asserting for the previous eight months. Nevertheless, BHP stubbornly refused
8 to drop its sanctions argument, and, in fact, in the instant motion tries to reargue the
9 same arguments that have already been rejected.

10 **F. PDMI and Inspiration Conducted an Audit of the Production and**
11 **Produced Some Additional Documents.**

12 Counsel for PDMI and Inspiration conducted an audit of the Golder documents in
13 a good-faith effort to verify compliance, including with respect to the Court's March 22,
14 2007 clarification of the June 30 Order. *See* Exh. 3 at ¶ 48. The audit involved a review
15 of the 1,000 plus page indices of Golder documents and many hours of discussions
16 between Golder and counsel for PDMI and Inspiration. *See id.* at ¶ 48. On April 20,
17 2007, PDMI and Inspiration produced some additional documents as a result of the
18 audit. *See* April 20, 2007 Correspondence from N. Wallwork to W. Pearson, attached as
19 Exh. 7. Once again, PDMI and Inspiration sought to get BHP to meet and confer. *Id.*
20 BHP did not respond. *See* Exh. 3 at ¶ 49. In one final attempt, PDMI and Inspiration
21 offered to meet and confer with BHP at the Golder depositions. BHP stated that it would
22 not do so. *See* Exh. 4 at 26:21-28:22.

23 **G. BHP Filed a Motion Ignoring the Court's March 22, 2007 Order and**
24 **Making Arguments Based on Distorted Facts and Supposition.**

25 When BHP finally filed its Motion for Sanctions, it was based on innuendo,
26 supposition, and a distortion of the facts. The Motion also attempts to reargue issues that
27 were rejected by the Court in the March 22, 2007 Order. BHP argues for sanctions for
28 the production of documents post-July 12 when that production was in part the result of
its own obstructionist actions. BHP also argues for sanctions for the production of

1 documents after July 12 even though in some cases it had the same information from
2 other documents produced earlier. BHP argues for sanctions for the non-production of
3 documents that are clearly not subject to the Order. Finally, BHP even has the temerity
4 to argue that the work product that it had moved to compel was really not work product
5 at all, and that PDMI and Inspiration violated their discovery obligations in not
6 producing it earlier.

7 **IV. PDMI AND INSPIRATION DID NOT VIOLATE THEIR SUPPLEMENTAL**
8 **DISCOVERY OBLIGATIONS.**

9 BHP's new main argument is that PDMI and Inspiration violated their discovery
10 supplementation obligations by failing to timely produce two categories of documents:
11 (1) the Well Fouling Investigation; and (2) the Lost Gulch Investigation.¹⁶ BHP also
12 argues that PDMI and Inspiration violated their discovery supplementation obligations
13 by not producing the following three categories of documents: (1) Webster Lake Infill;
14 (2) Slag Pile Reclamation; and (3) Upper Bloody Tanks Wash ("UBTW") Source
15 Control Performance Assessment/APP Addendum B.

16
17
18 ¹⁶ PDMI and Inspiration produced these two categories of documents even
19 though counsel believed that the documents were work product and not responsive to
20 the June 30 Order. *See* Exh. 3 at ¶46. Even if the documents in these two categories
21 were not work product, PDMI and Inspiration still would not have violated their Rule
22 26(e) discovery supplementation obligations because the documents were actually
23 seasonably produced. The data from the new monitoring wells at 48 Shaft and Lost
24 Gulch were produced respectively in July, September, and November 2006. *See* Exhs.
25 36, 37 and 39. BHP argues that the data should have been produced before the expert
26 depositions in May 2006, but the data had not been finalized at that time or conveyed to
27 PDMI, Inspiration or their counsel. Further, the experts were precluded from
28 considering data generated after January 20, 2006, the deadline for the submission of
final supplemental expert reports. *See* March 22, 2007 Order (Docket 1920) (Court to
consider whether experts will be allowed to supplement by considering data generated
after January 20, 2006). In any event, as set forth in Section V.A., herein the preliminary
data does not contradict Dr. Fetter's opinion or support Dr. Davis's opinion. Rule 26(e)
requires supplementation where "the response is in some material respect incomplete or
incorrect." *See Bunch v. United States*, 680 F.2d 1271, 1280-81 (9th Cir. 1982). Finally,
the comparison of water levels in Webster Gulch is not Dr. Fetter's primary method of
determining the source of contaminants at Kiser Basin. Rather, Dr. Fetter uses
fingerprint analysis as his primary basis. *See* BHP's Motion for Sanctions at 22:10-11
("Geochemical fingerprinting permeates nearly every page of Fetter's Supplemental
Report.").

1 PDMI and Inspiration did not violate their discovery supplementation obligations
2 with regard to these Golder documents because all five of the categories listed by BHP
3 constitute protected work product and privileged information.¹⁷ The parties in this
4 litigation have long treated documents created by consulting experts retained by counsel
5 as work product and privileged information. In addition, both the Magistrate Judge and
6 the District Court have held that Golder’s documents are work product without objection
7 by BHP. Further, PDMI and Inspiration have not waived the work product and privilege
8 protection. While PDMI and Inspiration voluntarily produced the raw data, PDMI and
9 Inspiration consistently put BHP on notice that the other project documents, such as
10 documents analyzing the data, were being withheld on work product grounds. Finally,
11 when BHP informed PDMI and Inspiration that it thought that the Well Fouling
12 Investigation and Lost Gulch Investigation should be produced, PDMI and Inspiration
13 produced all work product regarding those two projects to avoid further dispute over the
14 issue. *See* Exh. 37. As for the other three projects, until filing the present motion, BHP
15 never responded to PDMI and Inspiration’s counsel’s entreaties to inform them if BHP
16 believed such projects should be produced and the basis for its belief.

17 BHP’s new main argument fails for yet another reason. With respect to what
18 constitutes “timely” supplementation, any delay that has occurred in producing these
19 documents is no greater than (and, in fact, much shorter than) the delay BHP routinely
20 created in producing its own data and information. In fact, with respect to such projects
21 such as source control of the ongoing contamination coming from BHP’s Miami Unit
22 No. 2 operation, BHP’s delay has far exceeded any delay of information coming from
23 PDMI and Inspiration. In other instances, such as when BHP has received data from
24 new groundwater monitoring wells that BHP has drilled, BHP delayed producing such
25 data for over a year. For good reason, BHP’s Motion is therefore silent on informing the

26
27 ¹⁷ BHP has argued that only one of these categories of documents – the Well
28 Fouling Investigation – is also subject to the June 30 Order. In Section II herein, PDMI
and Inspiration explain why the Well Fouling Investigation is not subject to that Order.

1 Court what constitutes an acceptable time period for disclosing new information
2 because, by any standard, BHP itself will have exceeded it by a far greater degree than
3 PDMI and Inspiration.

4 Similarly, BHP's Motion is also silent on how the alleged delay caused prejudice
5 to BHP because the Golder documents have now been produced. It is now up to BHP to
6 perform whatever analysis of the data it deems necessary. Courts universally recognize
7 that an opposing party is not allowed access to work product when its own expert can
8 perform the same analysis. *See FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1046
9 (E.D. Cal. 2002) (exceptional circumstances for obtaining work product do not exist
10 where there is no showing that a plume of contamination has deteriorated or cannot be
11 studied by other experts in the field). BHP cannot complain now when BHP failed to
12 instruct Dr. Davis to provide an analysis of data that was produced earlier.

13 **A. The Specified Golder Files Constitute Privileged Information and**
14 **Work Product, Immune from Discovery Absent a Showing of**
15 **Substantial Need.**

16 In this case, the five projects at issue are all projects on PDMI's property being
17 carried out (or are under consideration) pursuant to the terms of a Consent Decree with
18 the Arizona Department of Environmental Quality ("ADEQ"), a Clean Water Act Order
19 issued by the United States Environmental Protection Agency ("EPA"), the Arizona
20 Aquifer Protection Permit Program, or legal obligations to reclaim. PDMI has obtained
21 counsel to provide it legal assistance in complying with these regulatory obligations. *See*
22 *Exh. 3 at ¶ 2*. Counsel have, in turn, retained Golder to provide technical information
23 and opinions to assist counsel in providing legal advice to PDMI regarding these
24 regulatory obligations. *See id.* This material is work product and privileged information.
25 *See In re Grand Jury Subpoena (Mark Torf/Torf et al.)*, 357 F.3d 900 (9th Cir. 2004)
26 (fact that investigator also acted as environmental consultant on cleanup did not
27 preclude application of work product to documents produced in that capacity.) *BHP is*
28 *seeking access to this work product without showing the required substantial need.* In
fact, BHP cannot show substantial need for Golder's work and analysis. This is not a

1 situation where the aquifer has been destroyed and no longer exists. If groundwater
2 sampling information was so important to BHP's expert opinions, there was nothing
3 stopping BHP from seeking to drill its own well or undertaking its own analysis. *See*
4 *FMC*, 196 F. Supp. 2d at 1046.

5 Rule 26(b)(3), which incorporates the work product doctrine into the civil
6 procedure rules, provides that "a party may obtain discovery of documents and tangible
7 things otherwise discoverable...and prepared in anticipation of litigation or for
8 trial...only upon a showing that the party seeking discovery has substantial need of the
9 materials...and the party is unable without undue hardship to obtain the substantial
10 equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). The purpose of the
11 work product doctrine is to protect an attorney's mental processes so that the attorney
12 can analyze and prepare for the client's case without interference from an opponent. *See*
13 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 26.70 (3d ed. 1997). In addition,
14 courts recognize that there is an unfairness in letting a party, through discovery, obtain
15 free of charge the material gathered or prepared by its adversary, as such a course would
16 penalize diligence and put a premium on laziness. *See* Wright, Miller & Marcus, *Federal*
17 *Practice and Procedure: Civil 2d* § 2021 (2d ed. 1994).

18 Courts have held that an environmental consultant's work product, including
19 technical and factual information, prepared by consultants retained to assist attorneys is
20 protected attorney work product and attorney client information. *E.g.*, *Olson v.*
21 *Accessory Controls & Equip. Corp.*, 757 A.2d 14, 36-37 (Conn. 2000) ("[T]he trial
22 court reasonably found that [the environmental consultant's report concerning waste
23 contamination at the property] was connected intimately to the rendering of legal advice,
24 and hence properly extended the attorney client privilege....") (*distinguishing U.S.*
25 *Postal Service v. Phelps Dodge Refining*, 852 F. Supp. 156 (E.D.N.Y. 1994) as lacking a
26 clear indication that the environmental report was submitted to an attorney for legal
27 advice); *State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 192, 777 P.2d 686, 690 (1989)
28 (holding an environmental consultant's waste and soil sampling report to be attorney

1 work product, and also stating in dictum that that the attorney-client privilege “must
2 apply not only to attorneys but to their agents as well.”) To hold otherwise would create
3 a chilling effect on environmental projects, and would result in clean-ups that lack
4 direction, are ineffective and that cost more than they would with sound legal and
5 technical advice.

6 **B. The Parties Have Always Treated Legal Consultants’ Projects as
7 Work Product and Privileged Information.**

8 The parties have long acknowledged that projects such as the Well Fouling
9 Investigation were protected work product and privileged information, and have treated
10 them as such. For example, on November 10, 2005, as part of its supplemental
11 document production, PDMI and Inspiration informed BHP that Golder was engaged in
12 certain confidential projects.¹⁸ *See* Exh. 33. PDMI and Inspiration produced the data
13 from the work, but stated that they would not produce the other materials, such as
14 analysis and reports, because those other documents were protected work product. *See*
15 *id.* BHP never objected. *See Id.*

16 This type of arrangement is also memorialized in a communication from
17 CanadianOxy, a party who has largely been acting in concert with BHP. In that
18 communication, it was acknowledged that CanadianOxy would produce only the raw
19 data regarding the work done by its consulting expert: “We also previously have
20 produced or agreed to make available raw data (e.g., photos, sampling results) gathered
21 by MFG.... That leaves materials prepared by MFG at the request of counsel to assist us
22 in defending against plaintiffs’ claims. Those documents, as we discussed, are protected
23 from discovery as attorney work product.” *See* Email from S. Swindle to L. Cooper,
24 March 5, 2003, attached as Exh. 41. Moreover, BHP’s Motion to Compel essentially
25 acknowledged the work product status of Golder’s files. *See* BHP’s Motion to Compel
26 (Docket 1752).

27 ¹⁸ PDMI and Inspiration also had objected to BHP’s 2003 discovery request
28 directed to these issues on work product grounds. *See* Plaintiffs PDMI and Inspiration’s
Objections and Responses to BHP’s Combined Requests for Documents and
Interrogatories, dated May 28, 2003, attached as Exh. 40.

1 **C. Both the Magistrate Judge and this Court Have Determined that the**
2 **Goldner Files Are Protected Work Product.**

3 BHP moved for the production of PDMI and Inspiration’s work product on the
4 basis of “substantial need.” *See id.* The June 30 Order holds that “there is no dispute
5 here that what BHP is seeking falls within the definition of work product: the requested
6 materials are documents or tangible things prepared in anticipation of (or during)
7 litigation by PDMI/Inspiration’s representative, Goldner.” *See* June 30 Order, at 10-11
8 (Docket 1808). BHP did not appeal that Order. When the District Court, on November
9 14, 2006, issued an Order stating that “this Court, therefore, clarifies the record to reflect
10 that, in the Magistrate’s June 30, 2006 Order, the Magistrate held that the documents
11 BHP requested were protected as work product...”, BHP again did not object or seek
12 reconsideration. *See* Order Clarifying the Record Contained in Order Dated October 17,
13 2006, Nov. 14, 2006 (Docket 1889).

14 This Court again reaffirmed the work product nature of Goldner’s work in its
15 March 22, 2007 Order concerning the scope of the Goldner depositions. In that Order, the
16 Court held that “BHP may not question Goldner personnel about other work performed
17 by Goldner for PDMI/Inspiration [specifically referring to the Well Fouling Investigation,
18 among other things], unless and until it proves to this Court that such information is
19 essential and that it cannot be obtained any other way.” *See* March 22, 2007 Order, at 8-
20 9 (Docket 1920). The Court also held that BHP could not question Goldner about the new
21 48 Shaft monitoring well results because it had not established the requisite exceptional
22 circumstances regarding that work product (i.e., the experts’ reports did not discuss the
23 data). *See id.* at 8-9. BHP did not move for reconsideration of the March 22, 2007 Order.
24 Because the documents at issue are work product, this Court need not address BHP’s
25 claim that PDMI and Inspiration failed to timely supplement.

26 **D. In Protecting Their Confidential Work Product, PDMI and**
27 **Inspiration Did Not Waive Their Work Product by Not Providing a**
28 **Privilege Log.**

 BHP asserts that PDMI and Inspiration have waived their work product
protection by concealing documents and not providing a privilege log. However, (1)

1 PDMI and Inspiration did not conceal documents; rather, they voluntarily produced
2 work product in the form of data for the projects and put BHP on notice regarding other
3 project documents that were being withheld on work product grounds sufficient to
4 maintain the privilege; (2) CanadianOxy even agreed in writing that no privilege logs
5 were required for withheld consultant documents; (3) to the extent that BHP now argues
6 the disclosure practice should have been more detailed, BHP failed timely to provide
7 complete privilege logs of the projects of its own consultants; (4) with respect to the
8 June 30 Order, the Order did not require a privilege log for documents outside the scope
9 of the Order that were withheld on the basis of work product; and (5) with respect to two
10 of the categories (Well Fouling Investigation and Lost Gulch Investigation), the issue of
11 a privilege log is now moot because the documents have been produced and BHP can
12 fully examine the basis for the privilege claims.

13 **1. *PDMI and Inspiration Voluntarily Produced Work Product in the***
14 ***Form of Data and Put BHP on Notice Regarding Other Project***
15 ***Documents That Were Being Withheld on Work Product***
Grounds.

16 PDMI and Inspiration did not conceal the existence of Golder's projects. To the
17 contrary, they voluntarily produced the protected work product data from these projects,
18 which gave notice to BHP that the project existed, and also informed BHP that other
19 documents from the projects were not being disclosed on work product grounds. For
20 example, on November 10, 2005, PDMI and Inspiration supplemented their discovery
21 responses by voluntarily producing the raw data from the Well Fouling Investigation.
22 *See* Exh. 33. From this data, a BHP technical expert could determine much about the
23 project, including the wells that were being looked at, the data parameters that were
24 being considered, and the proposed locations for new wells. *See* printout of select data
25 from PDMI.17167, produced on Nov. 10, 2005, attached as Exh. 42. In the November
26 10, 2005 correspondence, PDMI and Inspiration informed BHP that other Golder
27 documents, including analysis and reports, were being withheld as work product. *See*
28 Exh. 33. No formal privilege log was provided. BHP did not object. As another

1 example, PDMI and Inspiration provided the data from the UBTW Source Control
2 Performance Assessments/Addendum B to BHP on November 10, 2005 when they
3 provided BHP with the submissions made to ADEQ on this project. *See* Exh. 33.

4 Just as they had earlier voluntarily produced the work product data from the Well
5 Fouling Investigation, the testimony supports that PDMI and Inspiration would, as they
6 had in the past, produce the new data from the related 48 Shaft monitoring wells after
7 the wells were surveyed and the data were finalized. *See* Exh. 3 at ¶ 38; Exh. 6 at
8 354:16-358:2. In fact, when BHP asked for the data earlier than either party was
9 accustomed to producing such information, PDMI and Inspiration voluntarily expedited
10 the disclosure.¹⁹ *See* Exh. 32; Exh. 36.

11 Data from two other projects mentioned by BHP, the Lost Gulch Investigation
12 and the Webster Lake Infill projects, did not yet exist because both projects were in the
13 preliminary stages. *See* Exh. 3 at ¶ 57. As for the Slag Pile Reclamation project, it
14 simply never occurred to PDMI and Inspiration that BHP would want data concerning
15 slag. No party has claimed that slag caused contamination at the Site. *See id.*
16 Nevertheless, PDMI and Inspiration have produced non-privileged documents
17 concerning these three projects: (1) a PowerPoint presentation on the slag pile
18 reclamation project (moreover, the project is clearly visible to BHP employees next door
19 as well to all motorists who drive through town on U.S. Highway 60); (2) an aerial
20 photograph of the Webster Infill project enhanced by computer graphics to show how
21 the area would look if the infill project were performed (the project still is in the internal
22 review phase at PDMI and has not yet been approved); and (3) PDMI's detailed written
23 comments to ADEQ responding to ADEQ's draft Aquifer Protection Permit (APP) for
24 its operations in the Globe-Miami area. *See* PowerPoint "Phelps Dodge Corporation
25 Miami #1 Slag Reclamation Project", labeled PDMI.40948-973, attached as Exh. 43;
26 Aerial photographs of proposed Webster Lake Infill project, labeled PDMI.40974-975,

27
28 ¹⁹ The Court essentially affirmed with its March 22, 2007 Order that PDMI and Inspiration's production of the data from the Well Fouling Investigation was voluntary.

1 attached as Exh. 44; Exh. 11; April 20, 2007 Correspondence from N. Wallwork to W.
2 Pearson, attached as Exh. 45; PDMI's comments to ADEQ on the draft APP, labeled as
3 PDMI.42172-241, attached as Exh. 46.

4 **2. *BHP Did Not Argue Waiver in Its Motion to Compel the***
5 ***Production of Golder Work Product, and CanadianOxy Even***
6 ***Agreed in Writing that Privilege Logs Were Not Required for***
7 ***Withheld Consultant Documents.***

8 When BHP moved to compel production of certain Golder files, it argued that it
9 had a substantial need for the Golder work product, but it did not argue that the lack of a
10 formal privilege log was problematic in any way. *See* BHP's Motion to Compel (Docket
11 1752). Now BHP argues that the failure to produce a formal privilege log constitutes a
12 waiver of work product protection. However, BHP cites no case holding that where a
13 party is otherwise put on notice of the withholding of documents, that the lack of a
14 formal privilege log constitutes a waiver of work product protection. Contrary to BHP's
15 inference, there is also no absolute requirement to provide a privilege log. In cases
16 involving voluminous documents, it is sufficient that a party is put on notice of the
17 categories of documents withheld. *See Imperial Corp. v. Durkin*, 174 F.R.D. 475, 477
18 (S.D. Cal. 1997) (*citing* Advisory Committee Notes to Rule 26). The case cited by BHP,
19 *Burlington Northern & Santa Fe Ry. v. U.S. Dist. Ct.*, 408 F.3d 1142, 1149 (9th Cir.
20 2005)), stands only for the well-known proposition that a mere blanket objection in
21 response to a Rule 34 request is ineffective to avoid a waiver of a privilege. However,
22 PDMI and Inspiration have not asserted a blanket objection. They actually informed
23 BHP of the existence of a confidential project, voluntarily produced the work product
24 data from that project, and informed BHP that they were withholding the other
25 documents concerning the project on work product grounds. *See* Exh. 33.

26 In fact, PDMI and Inspiration even had a written understanding with
27 CanadianOxy that no privilege logs would be required for consultant files withheld from
28 discovery. In a communication dated March 5, 2003, CanadianOxy writes regarding its
consultant files that: "We don't think we should have to produce a privilege log for

1 these materials because there cannot be any serious dispute that they are privileged.” *See*
2 Exh. 41. Likewise, it was acknowledged that no privilege log would have to be provided
3 regarding Golder documents withheld: “We agree that no privilege log is necessary for
4 materials prepared by Golder that plaintiffs confirm are unrelated to work for which
5 plaintiffs are seeking to recover Golder’s fees.” *Id.* BHP knew that this was the practice
6 of these parties.

7 The CanadianOxy communication also recognized the practical impossibility of
8 such a requirement: “If the rule were otherwise, you could send us a request for all our
9 communications with our clients, and then demand that we spend the time and resources
10 necessary to produce a log of each communication.” *Id.* As both BHP and CanadianOxy
11 knew based on the testimony of Matt Wickham in 2002, Golder worked on a variety of
12 projects and had amassed over 96 boxes of files and over 1024 gigabytes of electronic
13 information by that date. *See* Exh. 31 at 50:5-51:15. In any event, as a showing of good
14 faith, PDMI and Inspiration’s counsel have provided BHP with a detailed list of Golder
15 work product that have not been produced, and BHP has refused to meet and confer to
16 discuss PDMI and Inspiration’s basis for claiming privilege or work product immunity.
17 *See supra* Section III.

18 **3. *The June 30 Order Does Not Require a Privilege Log for***
19 ***Documents Outside the Scope of the Order Withheld on the Basis***
of Work Product.

20 The June 30 Order does not require a privilege log for documents that are outside
21 the scope of the Order and that are withheld as work product. Rather, it only requires a
22 privilege log where documents otherwise subject to the Order are being withheld due to
23 a privilege other than work product: “PDMI and Inspiration shall produce ... 10. A
24 privilege log detailing documents or communications *requested under paragraphs one*
25 *through nine* but not produced under a claim of privilege *other than work product*
26 *privilege.*” *See* June 30 Order, at 12-14 (Docket 1808) (emphasis added). Because the
27
28

1 five categories of documents withheld are not subject to the June 30 Order, no privilege
2 log is required by the June 30 Order.²⁰

3 **4. With Regard to Two of the Categories, the Issue of a Privilege**
4 **Log Is Now Moot Because the Documents at Issue Have Been**
5 **Produced.**

6 PDMI and Inspiration have produced the documents concerning the Well Fouling
7 Investigation and the Lost Gulch Investigation even though counsel believe that the
8 documents constitute protected work product. Therefore, the issue of a privilege log
9 with regard to these two categories is moot. BHP may examine the documents
10 themselves to determine the basis of the privilege.

11 **E. BHP Never Discussed with PDMI and Inspiration BHP's Alleged**
12 **Basis for Believing That Any of the Withhold Work Product Should**
13 **Be Produced.**

14 BHP demanded that PDMI and Inspiration produce the work product for the Well
15 Fouling Investigation and the Lost Gulch Investigation, and counsel for PDMI and
16 Inspiration did so, even though the material was protected work product not subject to
17 the June 30 Order (as the Court so held in its March 22, 2007 Order). PDMI and
18 Inspiration produced the documents during 2006 out of an abundance of caution to
19 narrow the parties' dispute, and to demonstrate their good faith. *See* Exh. 3 at ¶ 46.

20 PDMI and Inspiration also requested on several occasions that BHP inform them
21 if it was asserting that the documents concerning any other projects should be produced.
22 *See* Exhs. 7, 17, and 37. Specifically, PDMI and Inspiration provided BHP with a
23 detailed list of the categories of Golder projects, and invited BHP to meet and confer on
24 the list to ask any questions; BHP also had the opportunity to ask Golder witnesses
25 about counsel's list of confidential Golder projects to allay any concerns that BHP might
26 have about the existence and purposes of other Golder consulting work that PDMI and
27 Inspiration were not producing as protected work product. *See* Exhs. 7, 17, and 37. BHP
28 refused to respond. *See* Exh. 3 at ¶ 45 & 49. In fact, that PDMI and Inspiration became

²⁰ BHP acknowledges that four of the five categories are not subject to the Order. In Section II, *supra*, PDMI and Inspiration explained why the fifth category – the Well Fouling Investigation – is not subject to the Order.

1 aware that BHP was asserting that work product from the Webster Lake Infill, Slag Pile
2 Reclamation and UBTW Source Control Performance Assessment/Addendum B
3 projects should be produced only when BHP filed its Motion for Sanctions on June 1,
4 2007.

5 **F. Under the Standards Established By BHP's Own Conduct in**
6 **Supplementing Discovery Responses, PDMI and Inspiration's**
7 **Supplementations Were Timely.**

8 Even assuming, for purposes of argument, that any of the documents are not
9 protected as work product, any delay that occurred is far less than the delay that PDMI
10 and Inspiration routinely encountered when BHP disclosed information. Some of this
11 delay in producing information is set forth in PDMI and Inspiration's Motion for
12 Sanctions Against BHP, filed on June 1, 2007. In addition, as set forth in more detail
13 below, BHP often failed timely to produce data from its many new monitoring wells.

14 The pattern of BHP's delayed production of source control projects and
15 monitoring well data is clear based upon the belated productions listed below, showing
16 that BHP withheld information in some instances for over a year. Of critical importance,
17 BHP delayed producing existing data until after the October 21, 2005 deadline for
18 updating groundwater monitoring well data and the January 20, 2006 deadline for
19 supplemental expert opinions, thus depriving PDMI and Inspiration's experts from
20 being able to use the information:

- 21 April 2003: PDMI/Inspiration serve discovery on BHP, requesting any
22 information on BHP's Miami Unit No. 2 Remediation Project and Copper Cities
23 wells.
- 24 May - June 2003: BHP responds to written discovery, merely referring PDMI/
25 Inspiration to BHP's water quality database productions for sampling data.
- 26 November 2004 – January 2005: BHP drills nine new monitoring wells CC-092
27 to CC-100 at Copper Cities, and begins sampling, but produces none of the data.
- 28 September 14 - 23, 2005: BHP completes a new well at its Solitude location, and
takes initials samples, but produces none of the data.
- October 15-18, 2005: BHP completes new monitoring wells at Miami Unit No. 2,
and samples them at least six times thereafter, but produces none of the data.

- 1 ❑ October 21, 2005: Court deadline for producing new water quality data comes
2 and goes without BHP producing any information from any of the
3 aforementioned wells or incorporating it into its productions of BHP's water
4 quality database.
- 5 ❑ November 3, 2005: BHP finally updates its water quality database, but continues
6 to omit data from new Miami Unit No. 2 wells, Copper Cities wells CC-092 to
7 100 and new Solitude wells.
- 8 ❑ November 18, 2005: PDMI and Inspiration file a Motion to Compel at the
9 deadline to force disclosure of new well data and information regarding BHP's
10 Miami Unit No. 2 remediation project.
- 11 ❑ November 18, 2005: BHP supplements its Answers to written discovery, but
12 continues to conceal data obtained from its Miami Unit No. 2 wells and Copper
13 Cities wells. BHP also falsely states the Copper Cities wells were not sampled.
- 14 ❑ November 18, 2005: BHP requests that PDMI and Inspiration withdraw their
15 Motion to Compel, and falsely states that BHP had already supplied the
16 information demanded.
- 17 ❑ December 1, 2005: After PDMI and Inspiration withdraw their Motion to
18 Compel, BHP discloses late productions of sampling data for the five new Miami
19 Unit Monitoring Wells, but continues to conceal post-injection sampling data.
- 20 ❑ December 7, 2005: BHP finally produced for the first time sampling data
21 collected from its new Copper Cities Wells and new Solitude Well between 2004
22 - 2005.
- 23 ❑ January 4, 2006: BHP issues an internal memo on the Miami Unit No. 2
24 remediation "Pilot Test," stating the Miami Unit remediation injection should be
25 terminated. BHP withheld this memo.
- 26 ❑ January 19, 2006: BHP produces an updated water quality database, but omits
27 data for Miami Unit No. 2, Copper Cities CC-092 - 100, and Solitude wells.
- 28 ❑ January 20, 2006: Supplemental expert opinions are due.
- ❑ February 6, 2006: BHP finally provides the post-injection data from the 2005
 sampling of the new Miami Unit No. 2 Injection wells, but not until after PDMI
 and Inspiration's supplemental expert opinions were due.
- ❑ February 10, 2006: BHP finally updates its water quality database, showing
 comprehensive sampling of the Copper Cities (CC) wells began in 2004, but not
 until after the supplemental expert opinions were due.
- ❑ August 2006: MWH issues its final Pilot Test Summary Report for the Miami
 Unit No. 2 Remediation, which contradicts Dr. Davis's Opinion. BHP does not
 produce it.
- ❑ December 6, 2006: Months after Dr. Davis's deposition, BHP finally produces
 the MWH report showing the outcome of the failed injection remediation to
 address source control at the Miami Unit No. 2.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. BHP Withheld Information From Its Discovery Responses, and Further Misrepresented the Completeness of Its Production When PDMI and Inspiration Moved To Compel Disclosure.

In May 2003, PDMI and Inspiration's First and Second Set of Interrogatories and Requests for Production requested monitoring well data collected at BHP's Miami Unit No. 2,²¹ and also asked whether BHP had installed any new monitoring wells at BHP's Copper Cities locations.²² With respect to wells at the Miami Unit No. 2 and Copper Cities, BHP responded in 2003 by referring PDMI and Inspiration to BHP's production of its water quality databases. *See* Exh. 47. Later, however, BHP omitted the sampling results from its new Miami Unit No. 2 wells from being included in the water quality database productions until after the October 2005 and January 2006 deadlines. BHP also misled PDMI and Inspiration in BHP's November 2005 Supplemental Responses to the PDMI and Inspiration discovery requests, stating that the new Copper Cities wells (CC-092 to CC-100), were not sampled.²³ To the contrary, later database productions confirm that BHP undertook a comprehensive sampling program as early as 2004 for these wells.²⁴

In short, BHP did not disclose its ongoing well sampling program for most of these wells until after the deadlines in October 2005 and January 2006. BHP's refusal to

²¹ *See* PDMI and Inspiration's Motion for Sanctions Against BHP, at 4-7 for an overview of BHP's acid hydromining operations and extreme and self-serving allocation formula.

²² *See* Exh. 47, Plaintiff BHP Copper Inc.'s Answers to Plaintiffs' First Set of Interrogatories and Requests for Production Regarding Remaining Issues, at 7, 13 (Interrogatory No. 8 and Request No. 8, asking for information about new wells at Miami Unit No. 2), and Exh. 48, Defendant BHP Copper Inc.'s Answers to Plaintiffs' Second Set of Interrogatories and Requests for Production Regarding Remaining Issues, dated May 30, 2003, at 4 (responding to Interrogatory No. 1), 16 (Request No. 1) and Attachment 1 (responding with respect to Copper Cities locations).

²³ *See* Exh. 49, Plaintiff BHP Copper Inc.'s Supplemental Answers to Plaintiffs' First and Second Set of Interrogatories and Requests for Production Regarding Remaining Issues, dated November 18, 2005, which omit any sampling results and states the Copper Cities wells (CC-92 to CC-100) and states the wells are not sampled. (*Id.* at 6, Response to Interrogatory 5.d, and Attachment 1, showing CC-092 through CC-100 as "Not Sampled.")

²⁴ *See* Exh. 50, Printout from BHP Access database produced on February 10, 2006, showing comprehensive sampling of the Copper Cities (CC) wells beginning in November 2004.

1 update its water quality database and discovery responses, despite the Court's October
2 21, 2005 deadline, resulted in PDMI and Inspiration having to file a Motion to Compel
3 on November 18, 2005, the date the Court set for filing discovery motions. *See* PDMI
4 and Inspiration's Motion to Compel (Docket 1715). Only then did BHP supplement its
5 production, but its responses were still far from complete.

6 BHP's main argument that PDMI and Inspiration should be sanctioned for failing
7 to supplement their responses becomes even more egregious when one considers that, in
8 late November 2005, BHP requested that PDMI and Inspiration withdraw their Motion
9 to Compel based on personal assurances from BHP's counsel that its supplemental
10 productions were complete and that they included all of the responsive, non-privileged
11 documents in BHP's possession that were generated since the close of discovery in May
12 2003, including PDMI and Inspiration's demand for well and water quality data. *See*
13 Nov. 18, 2005 Correspondence from P. Gates to B. Bade, attached as Exh. 51.²⁵ BHP's
14 counsel assured PDMI and Inspiration that BHP would supplement its production of
15 documents from their expert witnesses in accordance with the Federal Rules of Civil
16 Procedure. *See id.* Based on BHP's representations, PDMI and Inspiration agreed to
17 withdraw their Motion to Compel.²⁶

18 BHP counsel's assurances proved to be totally untrue, as shown by the bullet
19 points above. BHP continued to withhold new data until long after the October 2005 and
20 January 2006 deadlines (including information gathered from its new monitoring wells
21 at Copper Cities as early as November 2004). It is now clear that BHP affirmatively
22 misrepresented the completeness of its production in order to persuade PDMI and
23 Inspiration to withdraw their Motion to Compel.

24
25
26 ²⁵ This letter was received after PDMI and Inspiration served their Motion to
Compel (Docket 1721).

27 ²⁶ *See* Plaintiffs Phelps Dodge Miami, Inc.'s and Inspiration Consolidated Copper
28 Co.'s Notice of Withdrawal of their Motion to Compel Supplemental Discovery (Docket
1724).

1 **2. *BHP Withheld New Information Regarding the Impact of Its***
2 ***Acid Hydromining at Miami Unit No. 2.***

3 BHP also concealed and delayed producing information about its source control
4 efforts – namely the development and test results of its Miami Unit No. 2 remediation in
5 the fall of 2005. BHP even failed to produce raw data until after the January 20, 2006
6 deadline, the disclosure deadline for supplemental expert reports. The test results from
7 those new monitoring wells demonstrate the continuing impact of BHP’s acid
8 hydromining operation, showing that acidic and metal-laden solutions continue to
9 migrate from the site into the groundwater at Bloody Tanks Wash despite BHP’s
10 attempt to close the site and neutralize these solutions. This well information existed and
11 should have been produced not later than the Court’s October 21, 2005 deadline.²⁷

12 Instead of timely producing this information, BHP again followed a practice of
13 late disclosures. BHP ignored PDMI and Inspiration’s demand that it supplement its
14 discovery responses in late 2005, and continued to withhold much of the information
15 until after the Court’s January 20, 2006 deadline for supplemental expert reports. Even
16 when BHP provided a Supplemental Response in November 2005, BHP’s response
17 failed to provide the new data. *See* Exh. 49. BHP’s counsel knew about the project
18 because they were involved in reviewing the plans for this project in February 2005.²⁸

19 Unlike BHP’s allegations with respect to PDMI and Inspiration source control
20 documents, BHP’s omissions constitute clear violations of the Court’s October 21, 2005
21 and January 20, 2006 deadlines that have caused PDMI and Inspiration prejudice. BHP
22 continued to omit the sampling data from the wells that it had gathered when it produced
23 its updated versions of BHP’s water quality database on October 21, 2005 and January
24 19, 2006. It was not until February 6, 2006 that BHP finally produced results showing

25 ²⁷ *See* Scheduling Order (Docket 1716), which required the production of “all
26 non-privileged well and water quality data created and gathered since the close of Phase
27 II discovery on May 30, 2003” by no later than October 21, 2005. After PDMI
28 employees witnessed the drill rigs in the Fall of 2005, PDMI and Inspiration
immediately demanded the results of any sampling, but BHP withheld key results until
after the supplemental expert reports were due the following January.

²⁸ *See* Exh. 52, Feb. 15, 2005 E-mail from W. Pearson to C. Stevens, MWH
Global, “Questions to MWH.”

1 the subsequent chemical testing of these wells, which was conducted after the initial
2 round of sampling that began on October 19, 2005, and which demonstrated the
3 remediation process had little impact. *See* Chart showing MU No. 2 testing, produced by
4 BHP on Feb. 6, 2006, attached as Exh. 53. In fact, the February 6, 2006 production from
5 BHP verifies that BHP sampled its new monitoring wells *at least six times* between
6 October 19, 2005 and January 3, 2006, yet it withheld the sampling data. *See id.* Even
7 the February 10, 2006 production of BHP's updated database contained incomplete
8 data.²⁹

9 Concealing this information was prejudicial to PDMI and Inspiration because the
10 information gathered from BHP's new monitoring wells, injection wells and other
11 sampling locations implicates the ongoing contamination from BHP's acid
12 hydromining.³⁰ The new monitoring and injection wells are located at the heart of the
13 Miami Unit No. 2 hydromining site, and provide data from locations never before
14 drilled or sampled. *See* Final Pilot Test Work Plan – In Situ Remediation Project Miami
15 Unit No. 2, MWH, dated October 2005 at Figure 2-3, attached as Exh. 56. Vertically,
16 BHP's boreholes extend through the residual tailings at the acid hydromining site that
17 are located directly over Bloody Tanks Wash.³¹ By withholding the results until 2006,
18 BHP prevented PDMI and Inspiration's experts from using the information to rebut Dr.

19 _____
20 ²⁹ *See* Exh. 54, printout from BHP database produced on February 10, 2006
21 showing monitoring well locations, but omitting any reference to the MU-IJ injection
22 well locations or samples taken from those wells in 2005 or 2006.

23 ³⁰ That BHP's information gathering did not begin until October of 2005 at this
24 location is, in itself, suspect, because BHP realized the seriousness of the impacts of its
25 hydromining when it halted that process in 2001. *See* PDMI and Inspiration's Motion
26 for Sanctions Against BHP (Docket 1940), discussing the May 2001 PowerPoint. Rather
27 than immediately ascertain the extent of the contamination, BHP delayed any attempt to
28 neutralize and then close that facility until late 2005, and instead relied solely on the
Kiser Basin wells - jointly operated with PDMI and Inspiration - to capture the
contamination moving toward Pinal Creek. It was not until October, 2005 that BHP's
contractors began drilling. *See* Exh. 55, showing completion dates for the Miami Unit
No. 2 wells in October, 2005.

³¹ *See* Exh. 56 at 1-1 ("The primary objective of the pilot testing is to demonstrate
technology or technologies for in-situ geochemical remediation of groundwater over an
area underlying approximately 15-20% of the Miami Unit No. 2 Tailings in Bloody
Tanks Wash, Miami, Arizona.")

1 Davis. By BHP's own belated admissions, the data now show that the Miami Unit No. 2
2 tailings, the huge source of contaminant "loading" created by CanadianOxy's operation
3 that BHP acid-hydr mined as recently as 2001 along the Bloody Tanks Wash:

- 4 Cannot be easily neutralized³²
- 5 Generates metal-laden contamination that continues to flow from Miami Unit No.
6 2 towards Kiser Basin to this day³³
- 7 Is a substantial source of the contaminants generating ongoing cleanup costs,
8 contradicting Dr. Davis's opinion in that regard.³⁴

8 BHP's failure to timely produce this information unfairly prejudiced PDMI and
9 Inspiration by making it more difficult to rebut Dr. Davis, who includes in his opinions
10 projections of the future impact of Miami Unit No. 2 and attempts to minimize it,
11 assuming, without any proof, that BHP's remediation effort would be successful.³⁵

12 Recent information from MWH demonstrates that Dr. Davis's optimistic
13 projections concerning the experimental remedial process never materialized.³⁶ The
14 August 2006 Pilot Test Summary Report, based on data obtained in late 2005 and
15 January 2006, lists factors that impacted the Pilot Test Results and doomed the project,
16 including:

- 17 Significantly higher concentrations in the groundwater at the pilot test area than
18 those evaluated in the batch and column testing;

19 _____
20 ³² See Exh. 57, Pilot Test Summary Report, In-Situ Remediation Project Miami
21 Unit No. 2 Tailings, MWH, August 2006, at Table 2 (BHPSUP030403) showing pH
22 samples consistently below pH 4 at the last sampling date.

23 ³³ See *id.* at ES-2 ("Inability to inject Bauxsol which 1) impacted the
24 effectiveness of the emulsified vegetable oil (did not get a pH increase necessary to
25 stimulate sulfate-reducing bacteria) and 2) did not provide the expected direct metals
26 removal through pH increase and fixation processes.") In fact, MWH observed that
27 "during the test, constituent concentrations in monitoring wells generally increased." *Id.*
28 at ES-1 (BHPSUP 030365).

³⁴ See *id.* at ES-2, observing "significantly higher concentrations" impacting the
groundwater in the pilot test area and advising further characterization of the water
quality in alluvial flat area of the MU#2 before attempting any full-scale treatment.

³⁵ See Exh. 58, Davis 2006 Supplemental Report at 44-46 ("Hydromining of the
No. 2 Tailings permanently removed a potential source overlying the alluvium
...ongoing site closure activities will eliminate future releases from the Site").

³⁶ See Exh. 57 at ES-1, ES-2.

1 □ Inability to inject Bauxsol which 1) impacted the effectiveness ... and 2) did not
2 provide the expected direct metals removal through pH increase and fixation
3 processes;

4 □ Significantly higher concentrations of acidic minerals/fluids in aquifer matrix....
5 See Exh. 56 at ES-2, BHPSUP030366. The MWH report then offers Considerations for
6 Full-scale Treatment and Conclusions, which include:

- 7 □ The feasibility of and associated cost of injecting Bauxsol should be reevaluated;
- 8 □ Given the significantly higher concentrations observed in the pilot test area, the
9 water quality of the groundwater beneath the alluvial flat area of MU#2 should be
10 characterized prior to implementation of any full-scale treatment;
- 11 □ Injection of Bauxsol may not be possible using typical injection wells.

12 See *id.* at ES-2, ES-3 (BHPSUP030366-67). The attached memorandum reveal that the
13 failure was known for some time, and before the Court’s January 20, 2006 expert report
14 deadline. See *id.* at BHPSUP030400. Yet nowhere in the documents that Dr. Davis’s
15 firm, Geomega, produced is there any indication that BHP provided this information to
16 Dr. Davis. BHP waited until December 6, 2006, months after Dr. Davis’s deposition, to
17 produce the final report showing the outcome of his chosen remediation method. See *id.*
18 By no measure was this latter information timely disclosed. BHP’s allegation that PDMI
19 and Inspiration “spoon fed” their experts pales in comparison.

20 **3. BHP Withheld Data and Information Regarding New Monitoring
21 Wells Drilled to Monitor Contamination Emanating From
22 Solitude.**

23 In addition to delayed production of the 2005 sampling at BHP’s Miami Unit No.
24 2, which demonstrated that the remediation was not working, BHP and its counsel were
25 particularly recalcitrant with respect to producing new monitoring well data and
26 information obtained from BHP’s other properties at the Pinal Creek Site. New
27 monitoring wells were drilled at BHP’s Copper Cities and Solitude operations at the
28 Pinal Creek site, yet the water quality information was withheld for months, and in some
 instances, over a year.

 BHP drilled new wells at its Solitude location in September and October 2005,
prior to the October 21, 2005 deadline for disclosure of water quality data and the

1 January 20, 2006 deadline for supplemental expert reports.³⁷ BHP then delayed
2 producing any sampling data until after the October 21, 2005 deadline, despite the fact
3 that some of these wells were also drilled prior to the October 2005 deadline for
4 producing monitoring well information.³⁸

5 These wells are of particular importance because Dr. Davis concludes that
6 Solitude tailings “are not contributing metals and acid to Pinal Creek, and will not in the
7 future.” *See* Exh. 57 at 47. Yet the state agency, ADEQ, has never been so convinced,
8 especially when ADEQ required BHP to conduct additional drilling and monitoring.³⁹
9 Documents that BHP delayed producing until December 2006 indicate that ADEQ, at
10 least as far back as November 2005, required BHP to renew sampling at its old
11 monitoring wells (such as RG-1 and RG-3) and contemplate even more monitoring
12 wells. *See* Exh. 61. Dr. Davis’s January 20, 2006 Report, in which he concludes that
13 Solitude poses no threat, is thus inherently unreliable without consideration of the
14 existing information from these wells. BHP clearly had new data, but refused to update
15 Dr. Davis even though the data were available before the deadline for supplementation
16 of expert reports. The thousand-fold increases in iron and copper from Solitude (a BHP
17 source of metals) help explain why.⁴⁰

18
19 ³⁷ *See* Exh. 59, diagram of well installed on Oct. 6, 2005, produced by BHP on
January 4, 2006, but without any sampling results.

20 ³⁸ *See* Exh. 60, Ariz. Dept. of Water Resources groundwater well records
21 indicating BHP drilled at least three additional monitoring wells in the vicinity of well
MW05-ST-01 (shown in Exh. 59) between September 14 and September 23, 2005. BHP
22 has never produced any data or sampling results from these wells.

23 ³⁹ *See* Exh. 61, November 23, 2005 Correspondence from E. Pond, ADEQ to W.
Fuller, BHP, requiring additional water quality monitoring of downgradient wells “for
24 the same parameters being sampled in the new monitor wells being installed as part of
the Solitude Unit Site Characterization Plan.” (Produced by BHP on December 6, 2006).

25 ⁴⁰ *See* Exh. 58 at 47, § 9.1.5.1, a conclusion based upon Dr. Davis’s incorrect
assumption that “there have been no additional data collected” from wells in the area.
26 That error is understandable if BHP never told Dr. Davis about the new wells it drilled
and/or sampled in 2005, which show a dramatic increase in metal loading from Solitude.
27 *See* Exh. 62, printout from BHP’s Water Quality Database, showing a marked increase
in metals sampled in 2001 from well RG-2 (less than 1 mg/L Total Iron and non-detect
28 for Copper prior to 2002) to 147 mg/L Total Iron and over 1000 mg/L Copper in new
well MW-05-ST-01 sampled in October 2005.

1 **4. BHP Withheld New Data and Information Pertaining to New**
2 **Wells Drilled to Monitor Contamination Emanating From**
3 **Copper Cities.**

4 Similarly, BHP withheld information pertaining to new sampling and studies
5 focusing on its Copper Cities property formerly operated by CanadianOxy. Permits filed
6 with the Arizona Department of Water Resources indicate that BHP completed drilling
7 new monitoring wells by the end of 2004.⁴¹ BHP then withheld the test results from the
8 wells from being included in its updated water quality databases (including the October
9 2005 production required by the Court’s Order) and did so *for more than a year*.⁴² BHP
10 delayed until February 10, 2006, almost three weeks after the deadline for PDMI and
11 Inspiration’s supplemental expert opinions on January 20, 2006.

12 Without the information from these new Copper Cities wells, Dr. Davis was not
13 privy to the full picture on which to base his “historical environmental harm” theory of
14 allocation,⁴³ and, similarly, PDMI and Inspiration were not provided the recent sampling
15 results with which one might cross-examine Dr. Davis. As just one example of how
16 those results differ from Dr. Davis’s opinion that there is no environmental harm at
17 Copper Cites, BHP’s recent April 2007 production of Tinhorn Wash Supplemental
18 Hydrologic Report observes that:

19 The results of the November 30, 2004 sampling event of CC-100 indicate
20 that concentrations of beryllium, cadmium, chromium, mercury, and
21 nickel exceeded Arizona Aquifer Water Quality Standards (AWQS). The
22 results of the January 13, 2005 sampling event indicate beryllium,
23 cadmium and mercury exceeded Arizona Aquifer Water Quality Standards
24 (AWQS). . . .⁴⁴ in both cases, beryllium was an order of magnitude above
25 the standard.

26
27
28

⁴¹ See Exh. 63, ADWR permits for BHP’s new monitoring wells CC-092 to CC-100, showing wells installed in 2004 and early 2005.

⁴² See Exh. 50, printouts from BHP’s water quality database produced on February 10, 2006, which includes, for the first time, information for wells CC-092 to CC-100, showing wells installed in 2004 and 2005, and sampled over a year earlier, beginning on November 30, 2004.

⁴³ See Exh. 58 at 6.

⁴⁴ See Exh. 64, Copper Cites Site – Site Characterization Report – Tinhorn Wash Supplemental Hydrogeologic Report, MWH, March 2007 (Produced April, 2007) at 6, § 3.2 Groundwater Chemistry Analysis.

1 The Report thus observes, based on samples taken from the new well CC-100 prior to
2 the October 2005 deadline for producing such information and a host of draft reports
3 created prior to Dr. Davis's January 20, 2006 opinion, that there is metal-laden
4 groundwater impacting Tinhorn Wash from Copper Cities. *See* Exh. 63.

5 The prejudice to PDMI and Inspiration created by this failure to disclose is that
6 the data from these monitoring wells, CC-92 through CC-100, may implicate not only
7 BHP, but also CanadianOxy, with whom BHP is now aligned. Many of these wells are
8 located around the Copper Cities Deep Pit, used to hold some of the acidic waste
9 generated by BHP's acid hydromining from 1989 to 2001, in addition to earlier uses.
10 ADEQ and BHP have been at odds over whether the Copper Cities Deep Pit is leaking.⁴⁵
11 In addition, when the pit is filled to higher levels, solutions from BHP's acid
12 hydromining may escape to areas upgradient of Tinhorn Wash. During storm events,
13 *Tinhorn Wash flows toward Pinal Creek*. The data from these other new monitoring
14 wells drilled in 2004, located around the Copper Cities Deep Pit, were not produced
15 until a year after these wells were drilled. Here again, BHP waited until after court
16 deadlines to produce information that may implicate it for the impact of its acid
17 hydromining activities with respect to both Bloody Tanks Wash and Tinhorn Wash
18 adjacent to the Copper Cities operation.

19 In summary, unlike the April 2006 48 Shaft monitoring well documents that BHP
20 accuses PDMI and Inspiration of waiting too long to produce (in July 2006), these BHP
21 documents were (1) in existence prior to the January 2006 deadline for supplemental
22 expert reports; and (2) in the possession of BHP's counsel during the expert's 2006
23 deposition. Neither of these factors is true with respect to the 48 Shaft monitor wells or
24

25 ⁴⁵ *See* Exh. 65, Email from E. Pond (ADEQ) to M. Bunkers, October 15, 2003,
26 Re: BHP Copper Cities Sampling Report, stating "this confirms my suspicion that there
27 is migration away from the pit." *See* Exh. 66, Notice of Administrative Deficiencies, Re:
28 Aquifer Protection Permit (APP) Other Amendment Application – Administrative
Review, BHP – Copper Cities Deep Pit, Aug. 4, 2004 (requiring BHP to submit fifteen
different studies on the Deep Pit).

1 the source control documents that BHP now claims PDMI and Inspiration should have
2 produced in response to their discovery obligations.

3 **V. PDMI AND INSPIRATION DID NOT ABUSE THE JUDICIAL PROCESS.**

4 **A. PDMI and Inspiration Did Not Abuse the Judicial Process With**
5 **Respect to the Two New 48 Shaft Monitoring Wells and Dr. Fetter's**
6 **Statements.**

7 The heart of BHP's motion is still its argument that the Well Fouling
8 Investigation and new 48 Shaft monitoring well data (to the extent the data existed)
9 should have been produced immediately in April 2006, when the field work was first
10 performed, and no later than May 2006 at Dr. Fetter's deposition (even through the
11 deposition concerned his January 2006 supplemental opinions). Though this Court held
12 in its March 22, 2007 Order that such information is work product not subject to the
13 June 30 Order, BHP's Motion for Sanctions essentially asks the Court to reconsider that
14 ruling.

15 BHP's argument is illogical in the extreme. It represents a last-ditch effort to
16 convince this Court that information from April 2006 should have been provided so that
17 Dr. Davis could update his opinions, even after the January 2006 disclosure deadline. To
18 support its argument, and without leave of the Court, BHP provides a new declaration
19 from Dr. Davis despite the deadline, and despite having opposed allowing supplemental
20 expert opinions to consider data obtained after January 20, 2006.

21 Further examination of the facts, however, demonstrates that there is no evidence
22 of concealment. BHP's argument is also illogical because (1) the information that Dr.
23 Davis needs to confirm his analysis did not exist as of May 2006, (2) even if it did exist,
24 counsel had no obligation to disclose this work product at the time, and (3) the January
25 20, 2006 deadline for supplementing opinions was long past. Because there was no
26 obligation to disclose this information, Dr. Davis's new declaration is an unpermitted
27 supplemental opinion filed without leave of the Court and should be stricken from the
28 record.⁴⁶ For a host of other reasons, PDMI and Inspiration's counsel believe that Dr.

⁴⁶ Dr. Davis's declaration offers an expert opinion that the new well data somehow disprove aspects of Dr. Fetter's opinions. Since BHP opposed PDMI and

1 Davis's declaration is scientifically unsound and does not provide evidence PDMI and
2 Inspiration had motivation to conceal the new information (which has since been
3 disclosed).

4 **1. *PDMI and Inspiration Had No Obligation to Divulge Work***
5 ***Product Not Considered by Dr. Fetter at His Deposition.***

6 Pursuant to the Court's Order, expert witnesses in this case could only consider
7 facts in existence as of January 20, 2006, which is the deadline for submission of their
8 final supplemental expert reports. *See* Nov. 4, 2005 Scheduling Order (Docket 1716). In
9 its March 22, 2007 Order, this Court in fact recognized that an amendment of the
10 scheduling order would be necessary for the experts to consider post-January 20, 2006
11 data. *See* March 22, 2007 Order (Docket 1919). Given the vague hypothetical question
12 that BHP's counsel asked Dr. Fetter at his deposition (the purpose of which was to
13 explore the bases for his January 20, 2006 report, not to conduct additional fact
14 discovery regarding PDMI's activities at the site), there was certainly no obligation of
15 counsel to volunteer information that (1) was work product, (2) was not considered by
16 Dr. Fetter in forming his opinion, (3) was not clearly called for by the question asked,
17 and (4) pertained to undefined data that was not known to exist, even among those in
18 attendance at the deposition. In addition, the hypothetical question BHP asked focused
19 on what information Dr. Fetter would need, not whether a well existed, and at no point
20 during this questioning did counsel ever ask a follow-up question to further elicit
21 information on all the data that Dr. Fetter might need to complete the hypothetical.

22 The entire thrust of BHP's Motion merely assumes that the data Dr. Fetter was
23 talking about was data showing that some portion of the alluvial aquifer was saturated.
24 Yet, counsel for BHP never asked that question, nor was Dr. Fetter asked whether

25 Inspiration's request to allow Dr. Fetter to review and offer his own expert opinion on
26 the significance of their post-January 2006 data, BHP's tactic of offering Dr. Davis's
27 declaration is unfair, particularly in the context of a motion for sanctions. Moreover, that
28 BHP apparently feels the need to offer expert testimony to support its motion
underscores that the dispute is appropriately resolved by allowing supplemental expert
opinions on the merits.

1 additional depth to groundwater data was something he would need from a well in this
2 location. BHP's motion glosses over the fact, as does Dr. Davis (in his new
3 supplemental opinion that is now offered without leave of the Court), that surface
4 elevations were not even known to exist by those in attendance at the deposition, even
5 assuming that this information was (1) not work product, and (2) proper for PDMI and
6 Inspiration to disclose to Dr. Fetter. Had PDMI and Inspiration disclosed new
7 information at that time, no doubt BHP would have brought yet another motion to
8 exclude Dr. Fetter on that basis.

9 **2. *The Preliminary Data from the Two New 48 Shaft Monitoring***
10 ***Wells Do Not Establish That PDMI and Inspiration Had***
11 ***Motivation to Conceal It.***

12 Dr. Davis's declaration argues that the preliminary and unfinalized data from the
13 48 Shaft monitoring wells proves that Dr. Fetter was wrong. *See* Affidavit of Dr. Davis,
14 attached to BHP's Motion for Sanctions. However, PDMI and Inspiration's counsel
15 believe that as it turns out, the preliminary data, when analyzed with the elevations that
16 both sides obtained in August 2006, show that Dr. Fetter's opinion is far more accurate
17 than Dr. Davis's opinion. With respect to the preliminary data, at most they indicated
18 there was water in the alluvial aquifer at one of the new monitor wells, but not the other.
19 Even so, Dr. Fetter never opined that the alluvial aquifer was dry; he opined that the
20 water in the alluvial aquifer at Webster Gulch did not flow to Kiser Basin. *See* Exh. 7 to
21 BHP's Mot. at 8-10. Dr. Fetter's widely used textbook, "Contaminant Hydrogeology,"
22 provides a section on computation of capture zones, which was the focus of BHP's
23 question. *See* excerpts from C.W. FETTER, JR., *Applied Hydrology*, attached as Exh. 67,
24 at 405-417. The extent of the capture zone depends on the well-discharge rate, aquifer
25 thickness, and regional flow – not on complete dewatering of the formation. No mention
26 is made of a requirement for complete dewatering of an aquifer as a necessary condition
27 for 100% capture of groundwater flow, and Dr. Davis has provided no authority to the
28 contrary. Even with the new 48 Shaft monitoring well data, Dr. Davis provides no

1 update of his calculation of groundwater escaping Webster Gulch. Now that he has the
2 data, that gap in his new analysis is telling indeed.

3 In order to determine whether groundwater is flowing and in what direction, one
4 needs to have groundwater level elevations. *See* Affidavit of W. Weinig, attached as
5 Exhibit A to Golder’s Response to BHP’s Motion to Extend Pre-Trial Deadlines, ¶ 33
6 (Docket 1837). As Dr. Davis concedes in Paragraph 11 of his declaration, “measurement
7 of groundwater elevations was a primary purpose of installing the wells.” Calculation of
8 groundwater elevations compared to sea level obviously requires two pieces of
9 information: (1) the depth from the top of well to water in the well, which was measured
10 in April 2006, and (2) a reference elevation for the top of the well measuring point in
11 comparison to sea level, which was not known until August 2006. Useful information to
12 determine the groundwater flow direction was not available until the wells were
13 surveyed later in August, 2006, after Dr. Fetter’s May 2006 deposition, at which time
14 BHP and PDMI and Inspiration obtained the information *at the same time*. *See id.*, ¶ 37-
15 38. Closer scrutiny of how both BHP and Dr. Davis dance around this fact in BHP’s
16 allegations and in Dr. Davis’s Declaration demonstrates that BHP’s allegations of
17 concealment are something that BHP itself knows are untrue.

18 In addition, the simple fact is that Dr. Davis never uses groundwater level
19 elevations in the vicinity of the 48 Shaft on which to base his opinion. His opinion only
20 looks at the wells in the area of the WWDW groundwater wells and well No. T3A1
21 located further towards the mouth of Webster Gulch. While it is somewhat difficult to
22 discern from Dr. Davis’s Figure 1 attached to his declaration, due to the scale Dr. Davis
23 uses, Dr. Davis simply draws a straight line from the groundwater elevation at WWDW
24 to the groundwater elevation at T3A1, giving absolutely no effect to the water being
25 withdrawn by the 48 Shaft well and drift. *See* Davis Decl, to BHP Mot., at Fig. 1. To
26 illustrate how this ignores the most basic groundwater hydrology principles, using Dr.
27 Fetter’s textbook, Dr. Davis’s method would be the equivalent of drawing the
28 groundwater levels along a straight line represented by the “Original water table” line,

1 without any impact or capture zone created whatsoever by the well in the lower
2 diagram. *See Exhibit 67, Fig. 9.12 at p. 409.* Dr. Davis now complains that new data are
3 available to show more accurately how deep the capture zone is, but the reality is that he
4 always drew a straight line, ignoring it ever existed, contrary to basic hydrological
5 principles.

6 Once the elevations were measured in August of 2006, the new 48 Shaft
7 monitoring well data did not support Dr. Davis's assumption that there is no capture
8 zone. The table below shows the groundwater elevations at the new wells, Monitor Well
9 48MW-1 and 48MW-2, in comparison to Monitor Well T3A1, the well that Dr. Davis
10 uses in his analysis. *See Davis Decl., Figure 1.* As can be seen, once the survey data
11 were available in August 2006 from which to calculate groundwater elevations, the
12 groundwater gradient was actually *from T3A1 toward 48MW-2*, directly opposite to Dr.
13 Davis' assertion based only on the detection of water in 48MW-1 and 48MW-2 on those
14 dates. The groundwater elevation at T3A1 is higher than at 48MW-2, and approximately
15 equal to the average groundwater elevation measured at the two new wells.

16 **April 2006 Groundwater Elevations with August 2006 Survey Data**

17

Location	Groundwater Elevation (ft AMSL) and Date
48MW-1	3264.04 (4/12/06)
48MW-2	3254.64 (4/13/06)
T3A1	3258.79 (4/12/06, interpolated between 3259.08 on 4/5/06 and 3257.68 on 5/13/06)

18
19
20

21 As Dr. Fetter states in his May 4, 2006 deposition, "The key issue is whether or not the
22 water level in the alluvium is lower than the water level in T3A1." *See Fetter Dep., Exh.*
23 13 at 204:23-25. The depth-to-groundwater measurements made in April 2006 and the
24 surveyed elevations and locations identified in August 2006, thus directly contradict Dr.
25 Davis' assertions in his affidavit regarding the conclusions that could be drawn in April
26 2006 or even August 2006. They are in fact consistent with Dr. Fetter's opinion
27 expressed during his deposition. Dr. Davis attempts to gloss over this fact in his affidavit
28

1 by failing to include the April 2006 groundwater elevations (based on the August 2006
2 survey data, which were in his possession when the Davis affidavit was drafted).

3 Moreover, in his 2006 supplemental opinion, Dr. Davis never considers any
4 groundwater elevation levels in the area after 2003, even if one uses the flawed
5 methodology he employed in his opinion. Ironically, using updated groundwater level
6 elevations and Dr. Davis's own method of calculating the groundwater flow, it is clearly
7 apparent that Dr. Davis overestimates the groundwater flow from Webster Gulch, rather
8 than the opposite. Davis's calculations for his January 20, 2006 opinion are based on a
9 spreadsheet that was an exhibit to his May 2006 deposition. *See* Exh. 5117 to 5/4/06
10 Deposition of Davis at 5, attached as Exh. 68. From this table, Dr. Davis derived his
11 range of loading from Webster Gulch, putting it between 900 lbs/day to almost 4500
12 lbs/day. *Id.* Dr. Davis inexplicably fails to update his calculated metal loads to 2005,
13 even though he had the relevant data in his possession at the time. Using Davis' own
14 methodology, even to the point of failing to account for mass removed at 48 Shaft,
15 updated calculations are shown in the last two columns below:

16 **Updated "T3A1 Mass Loading.xls"**

17

18 Sample Date	T3A1 water level (ft amsl)	Sat Area (ft²)	Gradient	Sum 5 Metals (mg/L)	140 ft/day Load lbs/day	280 ft/day Load lbs/day
19 Aug-05	3281.88	15174	0.006	259	221	443
20 Aug-06	3255.55	3523	0.010	1269	399	798

21 These results probably show why Dr. Davis ignores recent data, and why his new
22 2007 Declaration is likely to be hotly disputed at trial on scientific grounds as to his
23 claim that the new 48 Shaft monitoring well data confirm his opinions. Rather than a
24 range of 900 lbs/day to almost 4500 lbs/day, the range of metals loading from Webster
25 Gulch is now lower than his previous lower estimate, and sometimes far less than the
26 900 lbs/day minimum Dr. Davis calculated earlier. To put these numbers in perspective,
27 Dr. Davis opined that BHP's hydromining contributed up to 10,010 pounds of metals
28 per day to the aquifer, or about 3.65 million pounds of metals in a year, when he

1 provided internal estimates to BHP in 2001. *See* Exh. 2 to PDMI and Inspiration's
2 Motion for Sanctions, at 11, Docket 1946. The net result is that loading from BHP's
3 Miami Unit No. 2 dwarfs that of Webster Gulch, and may amount to 90% of the loading
4 entering Kiser Basin, using Dr. Davis's own method. Based on recent data, the actual
5 loading from Webster Gulch is significantly less than what Dr. Davis estimated in his
6 expert report.

7 **B. PDMI and Inspiration Did Not Conceal the Well Fouling**
8 **Investigation and the 48 Shaft Monitoring Well Data from Dr. Davis**
9 **at His Deposition.**

10 BHP argues that PDMI and Inspiration concealed the existence of the Well
11 Fouling Investigation from Dr. Davis during his deposition, implying that they somehow
12 had a duty to reveal it even though the deposition's purpose was to enable PDMI and
13 Inspiration's counsel to question Dr. Davis on the bases of his January 20, 2006
14 supplemental opinions. As previously set forth in Sections II and IV herein, the Well
15 Fouling Investigation constituted protected work product that was not subject to the June
16 30 Order.

17 In any event, PDMI and Inspiration simply had no obligation to produce their
18 work product in May 2006, prior to the June 30 Order, to enable Dr. Davis to understand
19 Golder's analysis of data. As previously explained, PDMI and Inspiration had already
20 voluntarily produced the raw data from the Well Fouling Investigation to BHP in 2005.
21 Dr. Davis could have done his own analysis. BHP also argues that PDMI and Inspiration
22 concealed the data from the 48 Shaft monitoring wells from Dr. Davis at his deposition.
23 Again, as set forth in Sections II and IV herein, at the time of Dr. Davis's deposition, the
24 available data in question constituted preliminary information from unsurveyed wells
25 that Golder had not yet provided to PDMI and Inspiration or their counsel. In addition,
26 as set forth in Section V.A above, the Court has yet to allow supplementation of
27 opinions based on data generated after January 20, 2006 in any event.
28

1 **C. PDMI and Inspiration Did Not Make a False Representation to the**
2 **Court By Filing a *Daubert* Motion to Exclude Dr. Davis.**

3 BHP claims that PDMI and Inspiration made a false representation by filing a
4 motion in *limine* to exclude Dr. Davis without mentioning the preliminary data from the
5 48 Shaft monitoring wells. This is not correct. PDMI and Inspiration filed the motion in
6 *limine* because Dr. Davis's expert reports had failed to consider that there was any
7 source control [i.e., pumping] at 48 Shaft at all. See PDMI's and Inspiration's Motion to
8 Exclude BHP's Inaccurate Expert Testimony re PDMI's Source Control Measures in
9 Webster Gulch (Docket 1801). In other words, he completely ignored the existence of
10 the 48 Shaft groundwater capture system and all data associated with it, as described in
11 Section V.A.2 above. In such a situation, the existence of preliminary data at the 48
12 Shaft monitoring wells, which were in addition to all of the other data ignored by Dr.
13 Davis, was completely irrelevant to the motion. If Dr. Davis did not consider **any**
14 available data regarding 48 Shaft, it would do no good to discuss the existence of
15 **additional** data. Here again, BHP claims that PDMI and Inspiration should have
16 disclosed the water level data at the time of filing the June 23, 2006 motion in *limine*,
17 but PDMI and Inspiration did not in fact have water level data until August 2006 when
18 the wells were surveyed.⁴⁷

18 **D. PDMI and Inspiration Did Not Make False Statements About the**
19 **Well Fouling Investigation in Their Reply in Support of Cross Motion**
20 **to Limit Golder Depositions.**

21 BHP claims that, in PDMI and Inspiration's Reply in Support of Cross Motion to
22 Limit Golder Depositions, PDMI and Inspiration falsely asserted that the Well Fouling
23 Investigation and the 48 Shaft monitoring wells were unrelated to Dr. Fetter's opinions
24 contained in his supplemental reports. To the contrary, PDMI and Inspiration's assertion
25 was and is a true statement. The purpose of the Well Fouling Investigation was

26 ⁴⁷ CanadianOxy makes the same argument with regard to PDMI and Inspiration's
27 motion in *limine* to exclude Messrs. Horton and Gailey. That motion was based on the
28 use by those two experts of a groundwater model that was not generally accepted. See
PDMI and Inspiration's Motion to Exclude the Expert Opinion of Paul Horton and
Robert Gailey (Docket 1802). The existence of preliminary data from unsurveyed 48
shaft wells is completely irrelevant to the motion.

1 principally to investigate the cause of the formation of precipitates on pumping wells in
2 Webster Gulch. *See* Well Fouling Investigation Scope of Work, attached as Exhibit 102
3 to BHP’s Motion for Sanctions.⁴⁸

4 In the course of the Well Fouling Investigation, Golder determined that the
5 remedy for the formation of precipitates in 48 Shaft was to raise the water level in 48
6 Shaft. *See* Exh. 4 at 288:17-290:14. The 48 Shaft monitoring wells were installed
7 principally for the purpose of determining whether the water levels in 48 Shaft had been
8 raised sufficiently enough to accomplish this purpose. *See id.* The installation of the
9 monitoring wells and the data from the monitoring wells were not disclosed to Dr.
10 Fetter, nor would it have been proper to do so without leave of the Court in light of the
11 January 20, 2006 deadline. *See id.* Indeed, as the Court has held, Dr. Fetter’s 2006
12 supplemental expert report does not mention either the Well Fouling Investigation or the
13 48 Shaft monitoring wells.⁴⁹ *See* March 22, 2007 Order (Docket 1920).

14 **E. PDMI and Inspiration Disclosed Dr. Bethke’s Relationship with**
15 **Golder and Had No Duty to Correct Dr. Bethke’s Testimony Because**
16 **It Was Accurate.**

17 BHP’s final argument against PDMI and Inspiration alleges that counsel abused
18 the judicial process by concealing Dr. Bethke’s business relationship with Golder and
19 failing to correct his testimony that he had no plan to use his AMA technology at Pinal
20 Creek. *See* Mot. at 37-41. However, Dr. Bethke’s testimony was accurate, and PDMI

21 ⁴⁸ BHP also argues that the Well Fouling Investigation and Dr. Fetter’s report are
22 related just because Dr. Fetter received data from the Well Fouling Investigation. BHP
23 completely ignores the fact that PDMI and Inspiration provided this same data to BHP
24 on November 10, 2005. *See* Exh. 33. BHP also ignores the fact that what Dr. Fetter
received was just data; Dr. Fetter did not receive any of Golder’s reports and analysis
regarding the Well Fouling Investigation. Further, Dr. Fetter never evaluated well
fouling, nor did he form an opinion on it in his 2006 supplemental expert report.

25 ⁴⁹ BHP also asserts that PDMI and Inspiration falsely state that the Well Fouling
26 Investigation was tabled until April of 2006. However, PDMI and Inspiration’s reply (at
27 page 8, line 11) clearly states that the Well Fouling Investigation “began in 2004,” and
28 the reference to tabling the project referred, in context, to the fact that it was originally
planned that the monitoring wells and the new dewatering well were going to be
installed earlier. However, for various reasons, including the unavailability of drillers
and difficulty in getting reasonable bids, the monitoring wells and dewatering well were
not actually installed until April 2006.

1 and Inspiration disclosed his relationship with Golder at least two months prior to his
2 May 2006 deposition. BHP's argument is based on mischaracterizing its exhibits and
3 Dr. Bethke's testimony in furtherance of BHP's overzealous pursuit of sanctions.

4 As confirmed by the exhibits, PDMI and Inspiration disclosed in March 2006 that
5 Dr. Bethke was working with Golder. BHP's Exh. No. 76 shows Dr. Bethke's
6 presentation to Golder of his patented AMA technology in 2004. Dr. Bethke himself
7 disclosed he was working on such a technology in his Second Supplemental Expert
8 Report, produced on January 20, 2006 in this litigation. *See* Exh. 10 at 1. The Report
9 discloses that he had filed a patent application covering the use of that technology, and
10 accurately states that it was "not recommended for immediate implementation at the
11 Pinal Creek site." *See id.* at 1. As the declaration of Dr. Bethke confirms, that statement
12 is as true today as it was back then. *See* Affidavit of Craig Bethke at ¶ 2, attached as
13 Exh. 69. Dr. Bethke's deposition testimony in that regard was entirely accurate.

14 BHP's chronology of exhibits pertaining to Dr. Bethke's AMA technology is
15 highly misleading and inaccurate in other ways:

- 16 BHP first tries to suggest there was a plan to use Dr. Bethke's AMA technology
17 at the Pinal Creek site by citing BHP Exh. 96, wherein Dr. Bethke refers to
18 Steptoe & Johnson LLP in early 2005. Yet, Steptoe & Johnson did not represent
19 PDMI and Inspiration in early 2005 and had no involvement in the Pinal Creek
20 site at that point in time. Dr. Bethke retained Steptoe & Johnson LLP for advice
21 in licensing his patented technology, a collateral matter not involving the Pinal
22 Creek litigation. BHP is well aware of the fact that Steptoe & Johnson LLP did
23 not become involved in the Pinal Creek litigation until September 2005 when
24 lawyers previously with Beshears Wallwork Bellamy joined Steptoe.
- 25 BHP cites to BHP Exh. 75 to its motion to show that Golder approached PDMI's
26 counsel, Gallagher & Kennedy, on the possible use of AMA technology at a
27 number of PDMI mining locations in 2005. But Exh. 75 confirms that Gallagher
28 & Kennedy and PDMI specifically put any consideration for its use at the Pinal
Creek site on hold in 2005. *See* BHP Exh. 75 at 17.
- BHP's motion misquotes BHP Exh. 75, the March 2006 Business Plan, to
suggest that Dr. Bethke was involved in the scoping project in 2005.⁵⁰ The March
2006 Business Plan, however, never mentions Dr. Bethke was part of these

27 ⁵⁰ *See* BHP's Mot. at 40:12-13 ("Bethke and Golder had scoped and proposed a
28 project for the Pinal Creek Site") and 40:18 ("Bethke and Golder scoped and proposed
for the Pinal Creek Site.")

1 discussions. The agreement was between Golder, PDMI and Gallagher &
2 Kennedy, and did not include Dr. Bethke. *See id.* at 17. Dr. Bethke was not
involved in this early scoping project. *See* Exh. 69 at ¶ 1.

- 3 □ BHP’s use of BHP Exhs. 77 and 78 to allege that Gallagher & Kennedy failed to
4 disclose a conflict of interest is also in error because, by the time of Dr. Bethke’s
5 January 2006 supplemental report, there was no longer any discussion of using
Dr. Bethke’s AMA technology at the Pinal Creek Site. *See* BHP Exh. 78.
Moreover, BHP Exh. 78 does not ask that Dr. Bethke conceal any information; it
just requests that he further describe his involvement and describe it accurately.

6 Dr. Bethke’s deposition testimony in May 2006, during which BHP had an
7 opportunity to question him on the AMA technology, is also entirely accurate. When
8 BHP asked Dr. Bethke whether *he* had investigated the use of the AMA at the Pinal
9 Creek site, he truthfully answered that he had not. *See* BHP Exh. 79 at 625:4-6; 625:16-
10 21. Even if one assumes that the Golder conversation in 2005 was once a “plan” to use
11 the technology at Pinal Creek, that early scoping project was no longer being considered
12 by the time Dr. Bethke first received a copy of the March 2006 Business Plan in April
13 2006. *See* Exh. 69 at ¶ 2. Immediately following Dr. Bethke’s deposition, BHP took
14 issue with some of Dr. Bethke’s answers. *See* May 23, 2006 Correspondence from W.
15 Pearson to L. Cooper, attached as Exh. 70. PDMI and Inspiration responded, as shown
16 by BHP Exh. 80, addressing each of Dr. Bethke’s statements. Even with further review,
17 Dr. Bethke stands by his testimony today. *See* Exh. 69 at ¶ 2.

18 BHP’s allegation that PDMI and Inspiration have abused the judicial process by
19 offering Dr. Bethke as an independent expert is also without merit. There is no
20 requirement that expert witnesses have no collateral relationship with a party involved in
21 the litigation. As courts have allowed, testifying experts may provide consulting services
22 to a party in a variety of capacities, including serving as both an expert witness and
23 remediation consultant. *See In re Grand Jury Subpoena (Mark Torf/Torf, et. al.)*, 357
24 F.3d 900 (9th Cir. 2004.) Even if there were such a requirement, there is no existing plan
25 to use Dr. Bethke’s technology at the Pinal Creek Site and, as Dr. Bethke testified, he
26 has received no compensation in that regard. *See* Exh. 69 at ¶¶ 2, 6.

1 BHP's position that Dr. Bethke had a "conflict of interest" is also inconsistent
2 with BHP's failure to disclose that Dr. Davis might have a "conflict of interest" with
3 respect to his work on the failed Miami Unit No. 2 remediation. Dr. Davis was not only
4 paid to be an expert witness, but he was also paid to evaluate the proposals for the
5 remediation of BHP's Miami Unit No. 2 when he advised BHP on the proposals
6 received in early 2002.⁵¹ Dr. Davis then recommended that BHP accept the proposal of
7 BHP's consultant, MWH, Inc., and gave it his stamp of approval.⁵² BHP paid Dr. Davis
8 to continue reviewing the work conducted by MWH and provide oversight.⁵³ In his
9 separate capacity as an expert witness, Dr. Davis then opined, not surprisingly, that this
10 remediation would be the cure-all for the Miami Unit No. 2. *See* Exh. 58 at 44-46, ¶¶
11 9.1.3, 9.1.3.1. Yet, nowhere in Dr. Davis's report does he disclose his earlier work or
12 interest in the success of the Miami Unit No. 2.

13 BHP's allegation that PDMI and Inspiration abused the judicial process is
14 therefore without merit. PDMI and Inspiration disclosed the Golder/Bethke relationship,
15 and BHP had an ample opportunity to depose Dr. Bethke about it as his deposition. He
16 answered the questions truthfully. After being supplied Golder's additional AMA-
17 related documents following the June 30 Order, BHP never once asked, during three full
18 days of Golder depositions, about any of these Golder documents to further understand
19 the background of Golder's business plan.⁵⁴ It was Golder that authored these
20 documents, not Dr. Bethke. Now, without establishing any foundation, BHP continues
21 its disparaging remarks about Dr. Bethke in order to taint his reputation prior to trial.
22 BHP also accused Dr. Bethke of having stolen proprietary information to patent his

23 ⁵¹ *See* December 2, 2002, Request for Proposal, Miami Unit No. 2 Tailings
24 Remediation Project Proposal Review, labeled BHPFRFP026669-74, attached as Exh. 72.

25 ⁵² *See* July 2, 2002, Memorandum, Remediation Technology Proposals, from
26 Andy Davis, Andrew Nicholson, Steve Helgen, attached as Exh. 73.

27 ⁵³ *See, e.g.*, Exh. 56, the Final Pilot Test Work Plan for Pilot Testing, received by
28 Geomega and then produced by Geomega on December 1, 2005. Dr. Davis's files
contain numerous documents from MWH related to the Miami Unit No. 2 remediation.

⁵⁴ A demand for documents pertaining to Dr. Bethke's AMA technology was also
never included BHP's Motion to Compel.

1 AMA technology back in 2006. *See* June 21, 2006 Email from W. Pearson to L. Cooper,
2 attached as Exh. 71. BHP’s attempt to threaten, bully and slander Dr. Bethke based on
3 unsubstantiated and false allegations should not be condoned.

4 **VI. SANCTIONS AGAINST PDMI AND INSPIRATION ARE UNWARRANTED AND**
5 **INAPPROPRIATE.**

6 As set forth in the previous sections herein, PDMI and Inspiration did not fail to
7 supplement their discovery responses, and have not failed to produce documents
8 required by the June 30 Order. At most, and not surprisingly given the complexity of the
9 production, BHP’s lack of cooperation, and the mere seven-day period (including
10 Monday, July 3rd) provided for the production, there have been portions of four
11 categories of documents produced after the deadline for compliance with the June 30
12 Order. Dispositive sanctions, including evidence exclusion, are wholly inappropriate
13 because BHP has failed to show by clear and convincing evidence that the post-July 12
14 productions (1) were the result of willful misconduct, and (2) caused BHP substantial
15 prejudice concerning a central issue in the case. Furthermore, there should be no
16 monetary sanctions because any post-July 12 production is “substantially justified” or
17 the fees incurred by BHP were not “caused by” a post-July 12 production.

18 For example, a large portion of the costs that BHP has incurred have undoubtedly
19 been to advance arguments about the Well Fouling Investigation and 48 Shaft
20 monitoring wells that the Court has rejected. Sanctions are also inappropriate against
21 PDMI and Inspiration given BHP’s misconduct, including BHP’s withholding data for
22 many new BHP wells and the Miami Unit No. 2 remediation study until well after the
23 Court-ordered deadlines for production, and until after the deadline for supplemental
24 expert reports. Any sanctions against PDMI and Inspiration would be more than offset
25 by sanctions appropriately assessed against BHP. Finally, PDMI and Inspiration and
26 Inspiration personnel did not participate directly and did not make any decisions
27 regarding which Golder documents would or would not be produced. The search for
28

1 Golder documents responsive to the June 30 Order was formulated and executed by
2 outside counsel and by Golder.

3 **A. Legal Standard For Sanctions.**

4 BHP has requested that this Court impose dispositive sanctions against PDMI
5 and Inspiration, including dismissal and default. Alternatively, BHP requests the
6 imposition of exclusionary sanctions that would have a dispositive result, such as the
7 exclusion of their expert witnesses. Sanctions of this nature, which deprive a party of the
8 opportunity to be heard in court, are appropriate only in the most egregious
9 circumstances. *See* October 17, 2006 Order at 12, fn. 7 (Docket 1874); *Fjelstad v.*
10 *American Honda*, 762 F.2d 1334, 1338 (9th Cir. 1985) (“extreme circumstances”). The
11 sanction may not be imposed in the absence of willful misconduct. *See* Transcript of
12 Proceeding, October 12, 2006, at 34, attached as Exh. 74 (“almost malice”); *Fjelstad*,
13 762 F.2d at 1341 (“disobedient conduct which connotes deliberate malfeasance”); *L.*
14 *Tarango Trucking v. County of Contra Costa*, 202 F.R.D. 614, 620 (N.D. Cal. 2001)
15 (“The Court cannot enter default judgment against the defendants without first finding
16 that they acted willfully or in bad faith”).

17 The mere negligent violation of an order is insufficient. *SEC v. Research*
18 *Automation*, 521 F.2d 585, 588 (2nd Cir. 1975) (“the sanction [of dismissal] should not
19 be imposed because of negligence”); *In re Diamond Benefits Insurance*, 2006 WL
20 616625 *6 (D. Ariz. March 10, 2006) (“Under those circumstances [where the
21 imposition of exclusionary sanctions is tantamount to dismissal], mere negligent
22 conduct is insufficient to impose the severe penalty of exclusionary sanctions, and a
23 showing of bad faith is required”). In addition, a party’s misinterpretation of an order,
24 even a negligent misinterpretation, will not support such sanctions. *Fjelstad*, 762 F.2d at
25 1341-42 (“Nothing in the record suggests that American Honda did not sincerely believe
26 that the September 16 Order modified its obligations under the July 29 Order); *Equal*
27 *Employment Opportunity Commission v. Troy State University*, 693 F.2d 1353, 1357
28 (11th Cir. 1983) (“A party’s simple negligence or other action grounded in a

1 misunderstanding of a court order does not warrant dismissal”); *Marshall v. Segona*, 621
2 F.2d 763, 768 (5th Cir. 1980) (same).

3 In addition, the party seeking sanctions must have suffered substantial prejudice
4 concerning a central issue in the case. *See* Exh. 74 at 34 (“extreme prejudice”); *United*
5 *States for the use and benefit of Witec Guam, Inc. v. Kahaluu Construction*, 857 F.2d
6 600, 603-604 (9th Cir. 1988) (prejudice that threatens the outcome of the action); *In re*
7 *Rubin*, 769 F.2d 611, 618 (9th Cir. 1985) (same). This means that the document in
8 question has to be more than merely relevant, it must be critical. *Comeau v. Rupp*, 810
9 F. Supp. 1127, 1166 (D. Kan. 1992 (“The requested documents, although potentially
10 relevant, are not so critical to the Accountant’s case as to warrant the draconian sanction
11 of dismissal”). Further, there cannot be other evidence concerning the issue available to
12 the complaining party. *See Quinn v. City of Kansas City*, 64 F. Supp. 2d 1084, 1095 (D.
13 Kan. 1999) (“Plaintiff’s false testimony has not prejudiced defendants’ ability to present
14 their case at trial. As plaintiff notes, defendants already had much evidence which
15 contradicted plaintiff’s false testimony.”) Also, the issue must be central and not
16 peripheral. *See Kahaluu Construction*, 857 F.2d at 603-04.

17 Further, there will most often be insufficient prejudice if the document in
18 question was ultimately produced, even though it was produced late. *Id.* (“Kahaluu’s
19 deposition, while delayed, was in fact taken before the motion for sanctions was
20 heard”); *McGuire v. Acufex Microsurgical*, 175 F.R.D. 149, 156 (D. Mass. 1997) (“in
21 any event, I find no prejudice to McGuire under the circumstances. The draft was turned
22 over as soon as its existence was discovered by Anderson...”); *Mr. Frank, Inc. v. Waste*
23 *Management*, 591 F. Supp. 859, 864 (N.D. Ill. 1984) (“Mr. Frank would be no better off
24 if WMI had complied with the rules and produced the documents on June 12. The
25 documents still would not have been available for the depositions. Under these
26 circumstances, the court chooses to impose no sanctions.”)

27 Dispositive sanctions must be proven with an extreme amount of evidence. *See*
28 Exh. 74 at 34 (“it would have to be supported by an extreme amount of evidence”);

1 *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997). Finally, it would not be
2 appropriate to default one party for discovery violations when the other party has
3 engaged in similar conduct. *Freeland*, 103 F.3d at 1278 (“In regard to the second factor
4 of the test – prejudice, we believe that in the present case the prejudice to the defendant
5 must be given less weight, because his attorneys also engaged in dilatory conduct, a
6 factor which the district court failed to consider”); *Helmac Products v. Roth Plastics*,
7 814 F. Supp. 560, 578 (E.D. Mich. 1992) (“The Court must determine whether Roth
8 (plastics) can be defaulted for willfully withholding and destroying documents when
9 Helmac may have engaged in similar conduct. Once again, the record must be
10 developed further to permit a just comparison of the conduct at issue.”)

11 **B. Sanctions Are Not Appropriate For Any of the Four Categories of
12 Supplemental Post-July 12 Productions.**

13 Portions of four categories of Golder documents subject to the June 30 Order
14 were produced after July 12, 2006 in this matter: (1) the Miami Unit No. 2 Remediation
15 Analysis; (2) Chloride Fingerprint Work; (3) Webster Gulch Source Control; and (4)
16 Golder invoices and progress reports. As set forth below, sanctions are unwarranted and
17 inappropriate for these four categories of supplemental production.

18 **1. *The Miami Unit No. 2 Remediation Analysis.***

19 Golder did two sets of almost identical Miami Unit No. 2 work regarding
20 infiltration and in-situ remediation. The first set was not done for the experts. *See* Exh. 3
21 at ¶ 51. It was produced on August 31, 2006. *See* Exh. 17. The second set was done for
22 experts. *See* Exh. 3 at ¶ 51. It was timely produced on July 12, 2006. *See* Exh. 20.
23 Dispositive or exclusionary sanctions are inappropriate because the post-July 12
24 production was not the result of wilfull misconduct. Rather, it was the result of a good
25 faith interpretation of the requirements of the June 30 Order. *See* Exh. 3 at ¶ 51. As set
26 forth in Section I herein, it was PDMI and Inspiration’s counsel’s good faith
27 interpretation of the June 30 Order that such Order only required the production of
28 documents relating to Golder’s work for the experts. *See id.* The meaning of the June 30

1 Order was clarified by the Court’s March 22, 2007 Order. Even though PDMI and
2 Inspiration’s counsel did not believe that the subject documents were responsive to the
3 Order, they nonetheless produced them on August 31, 2006 out of an abundance of
4 caution and a show of good faith. *See id*; Exh. 17.

5 In addition, dispositive or exclusionary sanctions are not appropriate because
6 BHP has not suffered substantial prejudice due to the post-July 12 production. In this
7 instance, the delay was short and, moreover, similar information to that contained in the
8 documents produced after July 12, 2006 was produced with the expert files on January
9 23, 2006, and with the timely production on July 12, 2006. *See supra*, Section IV.B.

10 Monetary sanctions regarding this post-July 12 production are also inappropriate
11 because the production was the result of a good faith interpretation of the Order, and this
12 constitutes “substantial justification” under Rule 37(b)(2). Even if monetary sanctions
13 were appropriate, they would be more than offset by sanctions appropriately assessed
14 against BHP.

15 **2. Chloride Fingerprint Work.**

16 Golder did two sets of similar Chloride Fingerprint Work. The first set was not
17 done for the experts. *See* Exh. 3 at ¶ 52. It was produced on August 31, 2006, with a
18 follow-up production on April 20, 2007 following PDMI and Inspiration’s counsel’s
19 final audit of Golder documents. *See* Exhs. 7 and 17. The second set was done for
20 experts. *See* Exh. 3 at ¶ 52. It was produced on July 12, 2006. *See id*. The second set was
21 also conveyed to Dr. Fetter and was produced on January 23, 2006. *See* Exh. 9.
22 Dispositive sanctions are inappropriate because the production post-July 12 was not the
23 result of wilfull misconduct. Although the work was not done for Dr. Fetter, the results
24 of the work were conveyed to Dr. Fetter in a telephone conference. Golder initially
25 missed this fact in its document review. *See* Exh. 3 at ¶ 52. On or about August 16,
26 2006, Golder provided a memorandum to counsel for PDMI and Inspiration for potential
27 production. PDMI and Inspiration’s counsel acted quickly to produce the file on August
28 31, 2006. *See id*. Some additional chloride files were discovered in a supplemental

1 review and were produced soon after they were discovered. *See id.* In addition,
2 dispositive or exclusionary sanctions are not appropriate because BHP has not suffered
3 substantial prejudice as a result of this supplemental production. The production of
4 August 31, 2006 contained similar information to that previously produced, as did the
5 production of April 20, 2007. *See id.* Any sanctions would be more than offset by
6 sanctions that would be appropriately assessed against BHP.

7 **3. *Webster Gulch Source Control Analysis.***

8 Golder documents concerning the Webster Gulch Source Control Analysis were
9 produced on August 15 and 31, 2006, with a final post-audit production of previously
10 missed documents on April 20, 2007. *See* Section II.D, *supra*. Dispositive sanctions are
11 inappropriate because the post-July 12 production was not the result of wilfull
12 misconduct. Although the work was not done for the experts, the results of the analysis
13 were conveyed to Dr. Fetter in a telephone conference. *See* Exh. 3 at ¶ 53. Counsel and
14 the Golder personnel assisting them, missed this fact in their intial document review. *See*
15 *id.* When PDMI and Inspiration’s counsel discovered this in a supplemental review, the
16 documents were produced. *See id.* Counsel also missed a few work papers in the
17 supplemental review. When counsel discovered these work papers in a later, subsequent
18 review, counsel produced them. *See id.* Dispositive sanctions are also inappropriate
19 because BHP has not suffered substantial prejudice as a result of the supplemental
20 production. Most of the documents produced post-July 12 were produced shortly after
21 the deadline. With regard to the documents produced on August 31, 2006, BHP already
22 had Dr. Fetter’s notes from his telephone conversation with Golder regarding Webster
23 Gulch and related third party documents that were relied on by Golder. Therefore, BHP
24 had the information that Golder was providing information to Dr. Fetter in this area, so
25 there is no prejudice. Further, the documents produced on April 20, 2007 contained
26 information similar to that contained in documents produced earlier. *See id.* Even if
27 sanctions were appropriate, they would be more than offset by sanctions appropriately
28 assessed against BHP.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

4. Golder Invoices and Progress Reports.

PDMI and Inspiration produced the unredacted invoices for the full time period on August 31, 2006. *See* Exh. 17. Dispositive sanctions are not appropriate for this supplemental production because it was not the result of wilfull misconduct. Rather, it was the result of a mistakenly narrow interpretation of the Order by one counsel for PDMI and Inspiration. *See* Exh. 3 at ¶ 54. PDMI and Inspiration’s counsel discovered the mistake and promptly corrected it. *See id.* Dispositive sanctions are also inappropriate for the supplemental production of the invoices because BHP did not suffer substantial prejudice. The delay in production was short and there were no pending trial date or pre-trial deadlines.⁵⁵ Again, even if sanctions were appropriate, they would be more than offset by sanctions appropriately assessed against BHP.

PDMI and Inspiration produced the less-redacted version of the Golder progress reports on November 29, 2006. *See* Exh. 11. Dispositive sanctions are not appropriate for this supplemetal production because it was not the result of willful misconduct. Rather, as previously explained, it was the result of a mistakenly narrow interpretation of the Order by one counsel for PDMI and Inspiration. *See* Exh. 3 at ¶ 54. PDMI and Inspiration’s counsel discovered the mistake and corrected it. *See id.* Moreover, as Golder testified, progress reports are not “invoices.” *See* Exh. 6 at32:24-33:12. Dispositive sanctions are also inappropriate for the supplemental production of the progress reports because BHP did not suffer substantial prejudice. BHP had the same information that was contained in the mistakenly redacted entries from documents that were produced on or before July 12, 2006. Once again, even if sanctions were appropriate, they would be more than offset by sanctions appropriately assessed against BHP.

27
28

⁵⁵ Even before BHP filed its misleading motion to vacate the trial date, the parties were discussing the fact that they were not ready for trial and would need to try to frame a new proposed schedule. *See* Exh. 3, ¶44. Moreover, CanadianOxy’s counsel had filed a notice of trial scheduling conflict seeking to reschedule the Pinal Creek trial. *See id.*

1 VII. **BHP’S REFUSAL TO MEET AND CONFER REGARDING THE PRODUCTION**
2 **SUBSTANTIALLY EXACERBATED THIS DISCOVERY DISPUTE, CONTRIBUTED TO**
3 **THE DELAYS, AND VIOLATED THE LOCAL AND FEDERAL RULES.**

4 On at least five separate occasions, PDMI and Inspiration requested that BHP
5 meet and confer regarding the production under the June 30, 2006 Order. *See* Exh. 3 at ¶
6 43, 45 & 49; *see also* Exhs. 7, 17, and 37. PDMI and Inspiration provided BHP with a
7 list of the categories of documents withheld and asked BHP to identify which categories
8 BHP claimed should be produced. *See* Exhs. 7, 17, and 37. BHP refused. *See* Exh. 3 at ¶
9 45 & 49. In its motion for sanctions, BHP for the first time identifies several categories
10 of documents that it now maintains should be produced.

11 Local Rule 7.2(j) provides that “no discovery motion will be considered or
12 decided unless a statement of moving counsel is attached thereto certifying that after
13 personal consultation and sincere efforts to do so, counsel have been unable to
14 satisfactorily resolve the matter. Any discovery motion brought without prior personal
15 consultation with the other party and a sincere effort to resolve the matter, may result in
16 sanctions.” L.R.Civ.7.2(j). In *Naviant Marketing Solutions v. Larry Tucker*, 339 F.3d
17 180, 187 (3rd Cir. 2003), the Third Circuit held that even though Rule 37(b) of the
18 Federal Rules does not contain an explicit requirement to meet and confer prior to filing
19 a motion for sanctions for violation of an Order, a party must still comply with a local
20 rule that it do so. In that case, the local rule in question, similar to the one in this case,
21 provided that a party must meet and confer before filing a discovery motion.

22 In addition, the Court held that there may also be an obligation to meet and
23 confer pursuant to Rule 37(b) before filing a motion for sanctions where “compliance
24 was open to interpretation.” *Id.* In this case, it is clear beyond reasonable dispute that
25 compliance with the June 30 Order was open to interpretation. BHP changed its original
26 narrow interpretation to argue a broad interpretation, but failed, despite repeated
27 requests from PDMI and Inspiration, to explain exactly what its new interpretation was.
28 Under *Naviant*, this is precisely the type of situation where it is most important to honor
both the letter and spirit of local rules such as L.R.Civ. 7.2(j). Such rules require counsel

1 to work sincerely and diligently to resolve or at least narrow their disputes before
2 seeking judicial intervention.

3 Under the circumstances, if BHP had been less interested in seeking to avoid a
4 trial on the merits through an overzealous pursuit of sanctions, and more interested in
5 actually seeking the information at issue, no doubt this entire dispute would have been
6 substantially diminished if not entirely eliminated. As reflected in the Local and Federal
7 Rules, discovery is intended to be a process of reasonable give and take, not a witch
8 hunt, and that is perhaps especially true in a high-stakes case that has gone on as long
9 this one has. Fairness and the interests of justice demand no less. *See* Fed. R. Civ. P. 1
10 (“These rules...shall be construed and administered to secure the just, speedy, and
11 inexpensive determination of every action.”)⁵⁶

12 VIII. CONCLUSION

13 BHP and CanadianOxy’s overzealous pursuit of sanctions has delayed the
14 litigation for over a year, and the resulting sanctions motion is nothing more than a
15 lengthy compendium of distorted facts and unsupported supposition. BHP’s year-long
16 campaign to smear the character of PDMI and Inspiration’s counsel, experts and
17 consultants, in the final analysis, reveals less about them and more about BHP’s
18 determination to win this high-stakes case at all costs and without a trial on the merits.
19 Based on the foregoing, sanctions against PDMI and Inspiration are not appropriate.

20 However, PDMI and Inspiration believe that any decision to award sanctions
21 should await a trial on the merits, where all experts can fully explain the bases of their
22 technical opinions. PDMI and Inspiration ask that this postponement apply both to BHP
23 and CanadianOxy’s request for sanctions, as well as PDMI and Inspiration’s. The issues
24 are highly complex, especially with respect to the expert opinions and the explanations

25
26 ⁵⁶ In any event, as previously noted, PDMI and Inspiration’s counsel, assisted by
27 their consultant, Golder, were responsible for the production and discovery decisions at
28 issue. To the extent any sanctions may be appropriate, therefore, it would be unfair and
improper to punish the clients and parties, PDMI and Inspiration, under these
circumstances.

1 needed to educate the Court on the information on which each expert relied. Because
2 there will not be a jury, any sanctions deemed appropriate could be ruled on after trial,
3 based on the expert opinions *actually presented*. In addition, the Court may incorporate
4 any such appropriate sanctions as part of the Court's final cost allocation. *See* PDMI and
5 Inspiration's Motion for Sanction Against BHP dated June 1, 2007 (Docket 1940).

6 Finally, PDMI and Inspiration continue to believe that it is appropriate to allow
7 the parties to provide supplemental expert opinions considering all data generated or
8 produced since the January 20, 2006 deadline, and that such supplementation (which
9 BHP should welcome if it truly believes its own claims about the significance of the
10 data) is the only appropriate cure to BHP's and CanadianOxy's complaints.

11 Dated June 18, 2007.

12 STEPTOE & JOHNSON LLP

13 /s/ Nicholas J. Wallwork

14

Nicholas J. Wallwork

15 Fredric D. Bellamy

16 Attorneys for Plaintiffs PDMI and Inspiration

17 GALLAGHER & KENNEDY

18 J. Stanton Curry

19 Kevin E. O'Malley

20 Wm. Charles Thomson

21 Michael K. Kennedy

Certificate of Service

I hereby certify that on June 18, 2007. I caused the attached document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

Mr. William W. Pearson
Ms. Pamela S. Gates
Bryan Cave, LLP
Two N. Central Avenue, Ste. 2200
Phoenix, AZ 85004-4406
Attorneys for Plaintiff BHP Copper Inc.

Mr. Michael P. Berman
Mr. Shane R. Swindle
Ms. Tawn T. Pritchette
Mr. Casey W. Cullings
Perkins Coie Brown & Bain
2901 N. Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
Attorneys for Defendant CanadianOxy Offshore Production Company

Mr. Ernest J. Getto
Mr. Michael G. Romey
Mr. Damon P. Mamalakis
Latham & Watkins
633 W. Fifth St., Ste, 4000
Los Angeles, CA 90071-2007
Attorneys for Defendant CanadianOxy Offshore Production Company

I hereby certify that on June 18, 2007, I caused the attached document to be mailed to the following:

The Honorable David A. Ezra
United States District Court for the District of Hawaii
300 Ala Moana Blvd., Room C-400
Honolulu, HI 96850

The Honorable Mark E. Aspey
United States District Court for the District of Arizona
123 North San Francisco Street, Suite 200
Flagstaff, AZ 86001

/s/ Diane Hodges
Diane Hodges

Appendix A

APPENDIX A

CATEGORIES OF DOCUMENTS ALLEGEDLY IMPROPERLY WITHHELD UNDER JUNE 30 ORDER	
1. Geochemical Fingerprinting Using Isotopes and Constituents Other Than Iron, Copper, and Chloride	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Related to subject matter of PDMI/Inspiration expert Fetter's supplemental report. Fetter opines on geochemical fingerprinting.	<input type="checkbox"/> Not related to subject matter of PDMI/Inspiration expert Fetter's supplemental report. Fetter discusses fingerprinting using only iron, copper and chloride. Does not discuss isotopes or other constituents.
<input type="checkbox"/> Golder informed PDMI/Inspiration expert Fetter that Golder would be performing isotope fingerprint work.	<input type="checkbox"/> Golder's isotope and other constituent (non iron, copper, chloride) fingerprint work was not performed for PDMI/Inspiration expert Fetter. Performed for PDMI/Inspiration counsel for purposes of trial preparation and cross-examination of BHP experts. <input type="checkbox"/> Isotope and other constituent (non iron, copper, chloride) fingerprint work not given to PDMI/Inspiration expert Fetter.
2. Phase 18 Remobilization Modeling	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Related to subject matter of PDMI/Inspiration expert Bethke's supplemental report. Bethke criticizes BHP expert Davis's remobilization modeling.	<input type="checkbox"/> Not related to subject matter of PDMI/Inspiration Bethke supplemental report. Golder's remobilization work not discussed in Bethke supplemental report. <input type="checkbox"/> PDMI/Inspiration expert Bethke rejected such modeling. Stated that such modeling was not something he would consider. <input type="checkbox"/> Work not done to assist PDMI/Inspiration expert Bethke. Work done to assist counsel in preparing to cross-examine BHP expert Davis. <input type="checkbox"/> Golder's remobilization work was not given to PDMI/Inspiration expert Bethke.

APPENDIX A

<p>3. Analysis of Miami Unit No. 2 Remediation In Areas other than Cover Infiltration and In-Situ Neutralization</p>	
<p><i>BHP's Allegation:</i></p>	<p><i>PDMI and Inspiration's Response:</i></p>
<p><input type="checkbox"/> Related to subject matter of supplemental reports. Each PDMI/Inspiration expert discusses Miami Unit No. 2 remediation.</p>	<p><input type="checkbox"/> Not related to subject matter of supplemental reports. No PDMI/Inspiration expert discusses aspects of Miami Unit No. 2 remediation other than cover infiltration and in-situ neutralization.</p> <p><input type="checkbox"/> Work not done for PDMI/Inspiration experts. Work done to assist PDMI/Inspiration counsel in cross-examination of BHP experts and for potential comment to regulatory agencies.</p> <p><input type="checkbox"/> Work not given to PDMI/Inspiration experts.</p>
<p>4. Continued Redactions to Golder's Progress Reports</p>	
<p><i>BHP's Allegation:</i></p>	<p><i>PDMI and Inspiration's Response:</i></p>
<p><input type="checkbox"/> June 30 Order requires production of unredacted invoices.</p>	<p><input type="checkbox"/> Golder's progress reports are not invoices.</p> <p><input type="checkbox"/> Redactions to progress reports do not concern work done for PDMI/Inspiration experts.</p> <p><input type="checkbox"/> Redactions to progress reports do not concern issues related to subject matter of PDMI/Inspiration experts' supplemental reports.</p> <p><input type="checkbox"/> Even if progress reports are invoices, June 30 Order allows redactions for work not done for PDMI/Inspiration experts and not related to subject matter of experts' supplemental reports.</p>
<p>5a. Topic Mentioned or Possibly Mentioned to PDMI/Inspiration Expert Fetter - Total Metals Present in the Aquifer Downstream from Kiser Basin</p>	
<p><i>BHP's Allegation:</i></p>	<p><i>PDMI and Inspiration's Response:</i></p>
<p><input type="checkbox"/> Golder mentioned topic to Fetter as potential subject for supplemental report.</p>	<p><input type="checkbox"/> Not related to subject matter of supplemental report. PDMI/Inspiration expert Fetter does not discuss subject in supplemental report.</p> <p><input type="checkbox"/> PDMI/Inspiration expert Fetter rejected as a subject for supplemental report.</p> <p><input type="checkbox"/> Work not done for PDMI/Inspiration expert Fetter. Work done to assist PDMI/Inspiration counsel in trial preparation.</p> <p><input type="checkbox"/> Work not given to PDMI/Inspiration expert Fetter.</p> <p><input type="checkbox"/> Merely mentioning a topic does not make it a subject matter under Order.</p>

APPENDIX A

5b. Topic Mentioned or Possibly Mentioned to PDMI/Inspiration Expert Fetter – Total Metals Present in the Aquifer Upstream from Kiser Basin	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Golder mentioned topic to PDMI/Inspiration expert Fetter as a potential subject for supplemental report.	<input type="checkbox"/> Claim that Golder mentioned subject to PDMI/Inspiration expert Fetter is unsubstantiated. <input type="checkbox"/> Not related to subject matter of supplemental report. PDMI/Inspiration expert Fetter does not discuss in supplemental report. <input type="checkbox"/> Work not done for PDMI/Inspiration expert Fetter. Work done to assist PDMI/Inspiration counsel in cross-examination of BHP experts. <input type="checkbox"/> Work not given to PDMI/Inspiration expert Fetter.
5c. Topic Mentioned or Possibly Mentioned to PDMI/Inspiration Expert Fetter - Comprehensive Historic Mass Loading	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Golder mentioned topic to PDMI/Inspiration expert Fetter as potential subject for supplemental report.	<input type="checkbox"/> Claim that Golder mentioned subject to PDMI/Inspiration expert Fetter is unsubstantiated. <input type="checkbox"/> Not related to subject matter. PDMI/Inspiration expert Fetter does not discuss in supplemental report. <input type="checkbox"/> Work not done for PDMI/Inspiration expert Fetter. Work done to assist PDMI/Inspiration counsel in cross-examination of BHP experts. <input type="checkbox"/> Work not given to PDMI/Inspiration expert Fetter.
CATEGORIES OF DOCUMENTS PRODUCED AFTER JULY 12, 2006	
1. Well Fouling Investigation	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Required under June 30 Order and not produced until July, Sept. and Nov. 2006.	<input type="checkbox"/> Not subject to Order as determined in Court's March 22, 2007 Order. <input type="checkbox"/> Not related to subject matter of supplemental reports. Not discussed in any PDMI/Inspiration expert supplemental report. <input type="checkbox"/> Work not done for PDMI/Inspiration experts. Done pursuant to obligations under Consent Decree and USEPA Clean Water Act Order. <input type="checkbox"/> Only raw data given to Fetter (and also BHP and CanadianOxy). Analysis, reports, and other documents not provided to PDMI/Inspiration experts.

APPENDIX A

2. Analysis of Miami Unit No. 2 Remediation Related to Infiltration and In-Situ Remediation	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> No documents produced until Aug. 31, 2006.	<input type="checkbox"/> Many documents produced on January 23, 2006 with PDMI/Inspiration expert files and with July 12, 2006 production. <input type="checkbox"/> Follow-up production not result of willful misconduct, rather result of good faith interpretation of Order as requiring only work done for experts. This work not done for PDMI/Inspiration experts. <input type="checkbox"/> No substantial prejudice because previously produced documents contain same or similar information. <input type="checkbox"/> No substantial prejudice because documents produced soon after July 12.
3. Chloride Fingerprint Work	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> No documents produced until Aug. 31, 2006 and April 20, 2007.	<input type="checkbox"/> Many documents produced on January 23, 2006 with PDMI/Inspiration expert files and with July 12, 2006 production. <input type="checkbox"/> Follow-up production not result of willful misconduct. This work not done for PDMI/Inspiration experts, but document review inadvertently missed reference to telephone conveyance of results to PDMI/Inspiration expert Fetter. <input type="checkbox"/> No substantial prejudice because previously produced documents contain same or similar information.

APPENDIX A

4. Webster Gulch Source Control Analysis	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<ul style="list-style-type: none"> <input type="checkbox"/> No documents produced until Aug. 15 and 31, 2006 and April 20, 2007. 	<ul style="list-style-type: none"> <input type="checkbox"/> Some documents produced on January 23, 2006 with PDMI/Inspiration expert files. <input type="checkbox"/> Follow-up production not result of willful misconduct. This work not done for PDMI/Inspiration experts, but document review inadvertently missed reference to telephone conveyance of results to PDMI/Inspiration expert Fetter. <input type="checkbox"/> No substantial prejudice because previously produced documents contain same or similar information. <input type="checkbox"/> No substantial prejudice because most documents produced soon after July 12.
5. Golder Invoices and Progress Reports	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<ul style="list-style-type: none"> <input type="checkbox"/> Unredacted invoices not produced until Aug. 31, 2006. 	<ul style="list-style-type: none"> <input type="checkbox"/> Redacted invoices produced on July 12. <input type="checkbox"/> Follow-up production of unredacted invoices not result of willful misconduct, rather result of mistakenly narrow interpretation of Order by one attorney. Mistake quickly discovered and corrected. <input type="checkbox"/> No substantial prejudice because completely unredacted invoices produced soon after July 12, even though some redactions would have been allowed for work not done for PDMI/Inspiration experts and not related to the subject matter of the supplemental reports.
<ul style="list-style-type: none"> <input type="checkbox"/> Progress reports not produced until Nov. 29, 2006. 	<ul style="list-style-type: none"> <input type="checkbox"/> Redacted progress reports produced on July 12. <input type="checkbox"/> Follow-up production of less redacted progress reports not result of willful misconduct, rather result of mistakenly narrow interpretation of Order by one attorney. Mistake quickly discovered and corrected. <input type="checkbox"/> No substantial prejudice because earlier produced documents contain same information.

APPENDIX A

CATEGORIES OF DOCUMENTS ALLEGEDLY WITHHELD OR PROVIDED UNTIMELY IN VIOLATION OF DISCOVERY OBLIGATIONS: WELL FOULING INVESTIGATION (PROVIDED UNTIMELY), LOST GULCH INVESTIGATION (PROVIDED UNTIMELY), WEBSTER LAKE INFILL (WITHHELD), UPPER BLOODY TANKS WASH PERFORMANCE ASSESSMENTS (WITHHELD), AND SLAG PILE RECLAMATION (WITHHELD)	
<i>BHP's Allegation:</i>	<i>PDMI and Inspiration's Response:</i>
<input type="checkbox"/> Documents required pursuant to discovery obligations.	<input type="checkbox"/> Documents are work product and privileged. <input type="checkbox"/> Parties have always treated consultant files as work product and privileged. <input type="checkbox"/> Court has held that Golder documents are work product. <input type="checkbox"/> Never requested that these work product and privileged documents be produced until July 27, 2006 (for the three categories not produced. Two categories, Well Fouling and Lost Gulch, have been produced).
<input type="checkbox"/> Work product waived because no privilege log.	<input type="checkbox"/> Provided raw data from projects and put parties on notice that other documents withheld. <input type="checkbox"/> CanadianOxy agreed in writing that no privilege log required. <input type="checkbox"/> June 30 Order does not require a privilege log for documents outside scope of Order. <input type="checkbox"/> Issue moot for two categories of documents produced (Well Fouling and Lost Gulch).
ALLEGATIONS OF JUDICIAL ABUSE	
1. Fetter's Alleged Deposition Misstatement Not Corrected	
<input type="checkbox"/> Fetter testified falsely that no wells at 48 shaft. Misstatement not corrected.	<input type="checkbox"/> Experts can only consider facts in existence as of 1/20/06. Wells installed after that date. <input type="checkbox"/> No obligation to divulge work product not considered by PDMI/Inspiration expert Fetter. <input type="checkbox"/> PDMI/Inspiration expert Fetter response at deposition was not clearly called for by the question. <input type="checkbox"/> Question at deposition pertained to undefined data not known to be in existence by those in attendance at deposition. <input type="checkbox"/> Improper to disclose information to PDMI/Inspiration expert Fetter. <input type="checkbox"/> Data was preliminary and did not contradict PDMI/Inspiration expert Fetter opinion. <input type="checkbox"/> Finalized data contradicts BHP expert Davis.

APPENDIX A

<p>2. Alleged Concealment of Well Fouling Investigation and 48 Shaft Data From BHP Expert Davis at Davis Deposition</p>	
<p><input type="checkbox"/> Had a duty to reveal Well Fouling Investigation and 48 Shaft data at deposition of BHP expert Davis.</p>	<p><input type="checkbox"/> Data generated after 1/20/06 not properly considered by experts.</p> <p><input type="checkbox"/> Work product not subject to June 30 Order.</p> <p><input type="checkbox"/> No obligation to divulge work product.</p> <p><input type="checkbox"/> The Well Fouling Investigation data in existence in late 2005 was voluntarily produced. BHP expert Davis could have done own analysis.</p> <p><input type="checkbox"/> 48 shaft data was preliminary at time of BHP expert Davis deposition. Did not have surface elevation measurements needed to determine water levels. Data were past 1/20/2006 deadline for proper consideration.</p>
<p>3. Alleged Improper Motion in Limine to Exclude Davis</p>	
<p><input type="checkbox"/> Motion alleged that BHP expert Davis did not consider important data. Made false representation in filing motion by not mentioning 48 Shaft data that supported Davis opinion.</p>	<p><input type="checkbox"/> Motion actually argued that BHP expert Davis failed to consider 48 shaft groundwater capture system altogether, so existence of additional data irrelevant.</p> <p><input type="checkbox"/> Data were preliminary. Data beyond 1/20/2006 deadline for consideration by experts.</p>
<p>4. Alleged Misrepresentation in Court Filing re Scope of Golder Depositions</p>	
<p><input type="checkbox"/> Misrepresented that Well Fouling Investigation unrelated to PDMI/Inspiration expert Fetter's opinions.</p>	<p><input type="checkbox"/> Representation was true. Purpose of Well Fouling Investigation was to investigate formation of precipitates on wells.</p> <p><input type="checkbox"/> 48 shaft monitoring wells installed mainly to determine if remedy for precipitate formation was working.</p> <p><input type="checkbox"/> Installation of wells and data not disclosed to Fetter.</p> <p><input type="checkbox"/> Supplemental report does not discuss Well Fouling Investigation or 48 Shaft monitoring wells.</p>
<p><input type="checkbox"/> Raw data from Well Fouling Investigation in existence in late 2005 given to PDMI/Inspiration expert Fetter and relied on.</p>	<p><input type="checkbox"/> Raw data also given to BHP.</p> <p><input type="checkbox"/> It was just raw data. PDMI/Inspiration expert Fetter did not get Golder reports or analysis.</p> <p><input type="checkbox"/> PDMI/Inspiration expert Fetter used data in context of issues he was concerned with. Not for his own well fouling investigation.</p>

APPENDIX A

5. Alleged Concealment of Bethke/Golder Business Relationship and Alleged Deposition Misstatement Not Corrected	
<ul style="list-style-type: none"> <input type="checkbox"/> PDMI/Inspiration concealed PDMI/Inspiration expert Bethke's business relationship with Golder 	<ul style="list-style-type: none"> <input type="checkbox"/> PDMI/Inspiration disclosed business relationship between PDMI/Inspiration expert Bethke and Golder in March 2006. <input type="checkbox"/> PDMI/Inspiration Bethke disclosed in 2006 second supplemental report that that he was working on AMA technology.
<ul style="list-style-type: none"> <input type="checkbox"/> PDMI/Inspiration failed to correct Bethke deposition testimony that Bethke had no plan to use AMA technology at Pinal Creek Site. 	<ul style="list-style-type: none"> <input type="checkbox"/> PDMI/Inspiration expert Bethke testified truthfully at deposition. <input type="checkbox"/> Question at deposition was whether Bethke had developed plans to use technology at Pinal Creek Site, and he had not. <input type="checkbox"/> Bethke not part of project scoping that took place in 2005. Those involved were Golder and PDMI. <input type="checkbox"/> Scoping project was put on hold before Bethke deposition.