

**STATE OF NEW MEXICO
COUNTY OF GRANT
SIXTH JUDICIAL DISTRICT**

GILA RESOURCES INFORMATION
PROJECT (GRIP), ALLYSON SIWIK,
DIANE G. "SALLY" SMITH, and
Does 1 through 50, inclusive,

Action No.: _____

Petitioners,

vs.

Judge:

PHELPS DODGE CORPORATION,
A Series of Registered New Mexico
Corporations, Their Successor(s)-In-
Interest, and Does 1 through 50, inclusive,

Respondents.

_____ /

**EXPEDITED PETITION FOR ISSUANCE OF
TEMPORARY RESTRAINING ORDER
RE TEMPORARY INJUNCTION OF
HURLEY SMELTER AND STACKS DEMOLITION**

COME NOW Petitioners, Gila Regional Information Project (hereinafter, "GRIP"), Allyson Siwik, its Executive Director, GRIP, and Diane G. "Sally" Smith, its President, GRIP, and Does 1 through 50, inclusive (hereinafter individually and collectively, "Petitioners"), by and through their attorney, Douglas Craig Littlejohn, Littlejohn Law Office, and hereby respectfully make *expedited* motion to this honorable Court for grant of their Petition for Issuance of a Temporary Restraining Order, pursuant to the Rules of Civil Procedure for the District Courts, Rule 1-066, subd. (B), **Injunctions and receivers**, NMRA, 2005, and in an

expedited fashion, pursuant to Sixth Judicial District Court Local Rules, Rule 6-204, subsection (H), **Expedited matters**, NMRA 2005. Time is of the utmost essence in this expedited Petition.

Petitioners seek to *temporarily restrain* Respondents, *Phelps Dodge Corp., et al.* (hereinafter collectively, "*Phelps Dodge*"), from proceeding with their current plans to demolish the Hurley Smelter and stacks in Grant County, currently set to occur *in eleven (11) days*, on **May 25th, 2007**, until such time as all adequate and due measures are taken, to ensure the reasonable and due protection and preservation of the general public's health and safety, and the environment, both before, during, and after the demolitions, and only after reasonable consultation with and input from all appropriate authorities, and adequate and due notice to all affected parties.

This Expedited Petition for Issuance of Temporary Restraining Order is supported by this Notice of expedited petition and Petition, by the within Memorandum of Points and Authorities, by the *Affidavits of Allyson Siwik and Sally Smith*, attached hereto and incorporated by this reference as **Exhibits "A" and "B,"** on all other attached and incorporated Exhibits, on all other pleadings and papers on file in the action, and on such further and additional oral and documentary evidence as may be presented at the hearing hereon.

As further grounds for issuance of said temporary restraining order, Petitioners do state:

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

RESPONDENTS HAVE NOT MADE ADEQUATE AND DUE PROVISION FOR THE PUBLIC HEALTH, SAFETY AND WELFARE, HAVE NOT CONSULTED ADEQUATELY WITH ALL INTERESTED PARTIES, HAVE NOT NOTIFIED THE PARTIES PROPERLY, AND AS A RESULT POSE THE UNREASONABLE RISK OF CAUSING IRREPARABLE HARM TO THE GRANT COUNTY COMMUNITY IF THEIR DEMOLITION PLANS ARE ALLOWED TO PROCEED AS PLANNED

A. Introduction:

1. Petitioners will respectfully show the Court that, sitting *in equity* and not at law, and *balancing* as required the equities as pleaded by the parties, and after carefully weighing and considering the relative merits and demerits of the various positions stated, the Court will be *well within its exercise of reasonable and sound discretion*, to issue the TRO requested, to:

- (1) prevent *potential irreparable injury* to homes, health, and property,
- (2) preserve the status quo on the ground, and
- (3) allow reasonable time to prepare for a hearing on the merits

of Petitioners' follow-on request for issuance of a Temporary Injunction – both mandatory and prohibitory – enjoining *Phelps Dodge* from proceeding with its current stack and smelter demolition plans until certain prerequisite criteria are met.

Specifically, Petitioners intend to show that the Hurley demolition is slated to use *explosives*. As such, by all rights it may be viewed as an *ultra-hazardous activity*, which should be carefully monitored, prepared for, and notified about.¹

2. Petitioners will further show that the injunction would be *temporary* in nature only, necessary to remain in effect only until such time as a *safe and sane* demolition has been planned for, the relevant community individuals and entities are properly notified and consulted, and the demolition completed. Once a successful, non-harmful demolition has been conducted and certified to the proper authorities, the injunction would expire by its own terms.

3. Petitioners will show, under the ever-broadening liberality of “protectable interests” recognized by courts in the equitable TRO/injunction context, that they have clear, specific, and historically acknowledged standing, as parties that *Phelps Dodge* has seen fit in the past, and to date (albeit marginally), to bring into the demolition advisement process.²

¹ . A propos of ultra-hazardard activity: “Commercial application of explosives worldwide consumes hundreds of thousand tons of explosives, annually. From time to time, controversy arises between quarry operators, commercial blasters and *adjacent commercial or private property owners*.” See, website, *Controlled Demolitions, Inc.* – www.controlled-demolition.com. (Italics added.)

² Petitioners are prepared to show at the hearing that GRIP is a community-based, IRC § 501(c)(3) non-profit organization, located in Silver City, New Mexico, that works to promote community health by protecting the environment and natural resources in southwestern New Mexico. The vast majority of members of GRIP live in Grant County, including areas in the vicinity of the Chino, Tyrone, and Continental mines, all owned by Phelps Dodge. GRIP has been actively involved in mining issues since its founding in 1997. Members of GRIP’s Staff and Board of Directors have participated in mining issues locally and statewide for many years. GRIP President, Sally Smith, made significant contributions to the development of the 1993 Mining Act regulations, and since passage of the Act she has tracked the Mining and Minerals Division (MMD) permitting process for all three Phelps Dodge mines located in Grant County. Ms. Smith was a member of the MMD Director’s Advisory Committee for over five (5) years. This committee advises the MMD director on guidelines and rule changes to the Mining Act. Ms. Smith has also served on the Community Work Group (CWG), a panel of community members that provides informed recommendations regarding decisions made under the Chino Administrative Order on Consent. During her ten (10) years of participation on the CWG, Ms. Smith has made significant contributions to the process for evaluating the potential health and environmental effects of past mining activities at the Chino mine. See, *Affidavit of Allyson Siwik, supra.*; *Affidavit of Sally Smith, supra.*

Moreover as members and (*Phelps Dodge*-acknowledged) representatives of the general public of Grant County, and as clearly interested parties of long-standing involvement in *Phelps Dodge* environmental issues, who intend to personally attend and witness the demolitions themselves, Petitioners will be seen to enjoy standing to seek the requested injunctive relief from potentially tortious and highly-dangerous and destructive activity by *Phelps Dodge* – indeed, classic ultra-hazardous activity. *Affidavit of Allyson Siwik, supra.*; *Affidavit of Sally Smith, supra.*

4. Petitioners will argue at the hearing that the potential tortious conduct threatened by any demolition mishap includes, but is not limited to: (1) nuisance, (2) trespass to land and chattels, (3) destructive waste, (3) conversion from trespass to chattels, and, above all, (5) *personal injury or death*.

5. Petitioners will then show that any legal remedy is *inadequate*, because the real property comprising the Town of Hurley and environs is *unique*, and its injury would be likewise *unique*, not fungible, and because the *other* types of damage threatened, *e.g.*, to the public health, safety, and welfare although perhaps legally recompensable to some extent, are otherwise *irreparable* in nature, so that no amount of money or its equivalent could completely and adequately compensate therefor.

6. Petitioners will show that they themselves, and *even more so* the residents of the Town of Hurley (and all spectators to the historic demolition event, including Petitioners), have a protected *and protectable* right and interest that is clearly cognizable by this honorable Court, to wit: to prevent and restrain potential tortious injury to their persons, their real property, and their personal health, safety and welfare, at the hands of the Respondents herein.

7. *Enforcement* of the initial restraining order is highly *feasible* and can easily be monitored by the Court. *Phelps Dodge* would simply be (1) ordered to *cease and desist* from taking any further steps with regard to its current demolition plans (prohibitory injunction), and (2) ordered to make all reasonable and adequate plans, after due consultation with the interested parties, and the fashioning of a workable, known, and *conscientiously disseminated* plan, before demolition can proceed (mandatory injunction).

8. There would be *no undue hardship* to *Phelps Dodge* by order of temporary restraint. In balancing the relative benefits to the interested parties against the burdens imposed on Respondents, Petitioners will show that any damage to the corporate entity does not *outweigh* the potential for grave and irreparable harm, should its demolition plans go awry.

9. Petitioners would show that Respondents do not have any defenses, such as *laches*, unconscionability, or unclean hands on the part of the Petitioners, or that there exists any impossibility of the restraint requested.

10. With respect to any bond requirement to reimburse *Phelps Dodge* for damages proximately cause by any *improvident* issuance of a TRO or injunction (which damages *Petitioners readily admit there will be for Phelps Dodge* in any event, provident or otherwise), given the *relative* financial equities in the matter, Petitioners will respectfully request that the Court, pursuant to Rule 1-066, subsection (C), Injunctions and receivers, NMRA 1978, after weighing and considering the equities presented, exercise its sound discretion by waiving any such bond requirement, or *at minimum* require only a *realistic* bonding requirement that Petitioner, on proper showing, can reach. See, *Affidavit of Allyson Siwik, supra*.

11. In sum then Petitioners will show that they and all others similarly situated members of the community will suffer great and irreparable injury if this Petition for TRO is not granted, and that denial thereof creates a *unacceptable risk* of irreparable injury to the health, safety and welfare of the citizens of Grant County, that *heavily outweighs* any possible showing of harm *Phelps Dodge* may produce.

12. Petitioners further and in *entire good faith* believe it *probable* they will prevail on the substantive merits of their factual claims presented herein (discussed next at Part C), and will likewise prevail in obtaining a temporary injunction, substantially in the form or forms outlined herein.

13. Petitioners will show how, under the “rushed” circumstances of this emergency litigation (a rush, Petitioners will show, caused *exclusively* by *Phelps Dodge*), that they have given PD as *adequate and due notice* of their intentions herein and the points and arguments supporting them as those circumstances would reasonably allow. *Affidavit of Allyson Siwik, supra.*

14. Petitioners will then pray the Court issue the TRO as requested, or substantially as requested, and set the matter for further proceedings re whether the more formal Temporary Injunction should issue.

B. Jurisdiction and Venue:

1. Petitioner, Gila Regional Information Project (GRIP), is listed with the New Mexico Corporations Commission (since 1997) as a not-for-profit, IRC Section 501(c)(3) organization, whose declared purpose is to “protect and nurture human communities by safeguarding the natural resources that sustain us all; and [t]o safeguard natural resources by

facilitating informed public participation in resource use decisions.” *Affidavit of Allyson Siwik, supra.*

Per the New Mexico Corporation Commission, GRIP’s current *Officers* are: President (and Petitioner) – Diane G. (Sally) Smith; Vice President – Jesse Franklin-Owens; Secretary, Harry Browne; Treasurer – Harry Browne. The other named Petitioner herein, Ms. Allyson Siwik, has since joined GRIP as Executive Director (the current online Corporation Commission listing does not reflect this Office).

GRIP’s *Directors* are Michael Berman, Jesse Franklin-Owens, David Rose, and Maynard “Dutch” Salmon. The Court may take judicial notice of the above-stated jurisdictional facts. Rules of Civil Procedure for the District Courts, Rule 11-201, **Judicial notice of adjudicative facts**, NMRA 1993.

2. Respondent, *Phelps Dodge Corporation, et al.*, is a New York corporation, with its principal place of business in the State of Arizona, and is also incorporated, registered, and per the Corporations Commission is registered and doing business in the State of New Mexico. Cf., *Phelps Dodge Corp. v. El Paso Corp.*, 142 P.3d 708, 709 (Ariz. Ct. App., Div. 1, 2006). The New Mexico State Corporations Commissions reflects the following corporate registrations:

Phelps Dodge Chino, Inc., Phelps Dodge Corporation, Phelps Dodge Development Corporation, Phelps Dodge Energy Services, LLC, Phelps Dodge Exploration Corporation, Phelps Dodge Fuel Development Corporation, Phelps Dodge Hidalgo, Inc., Phelps Dodge Mercantile Company (2 listings: AC 0591438 and AC 1333756), Phelps Dodge Refining Corporation, Phelps Dodge Supply Company, and Phelps Dodge Tyrone, Inc.

3. Petitioners do not presently know, nor can they presently allege, the true names or capacities of either the Petitioner or Respondent DOES 1 through 50, inclusive, and therefore petition on behalf of said Doe Petitioners and as against said Doe Respondents by those fictitious names. Petitioners are informed and believe, and based on said information and belief allege, that each of these DOE Petitioners and Respondents, 1 through 50, inclusive respectively, was and is in some manner legally involved in and responsible for the events, happenings and matters stated in this Petition. The true names, capacities, and relationships of these DOE Petitioners and Respondents, 1 through 50, inclusive, will be alleged by amendment to this Petition at such time as the same are well and truly ascertained by Petitioners.

4. The *res* at issue and in equity, *Phelps Dodge's* now-moribund “Hurley Smelter,” whose two “stacks” are scheduled to be “dropped” on May 25th, 2007, is located in the Town of Hurley, Grant County, State of New Mexico, and is therefore within both the territorial and jurisdictional confines of this honorable Court. As such the Court enjoys plenary personal and subject matter jurisdiction in the matter.

5. Moreover, venue lies as well in the Sixth Judicial District Court.³

³ Section 38-3-1, NMSA 1978, provides in pertinent part:

38-3-1. County in which civil action in district court may be commenced.

All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:

A. First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

...

D. (1) When lands or any interest in lands are the object of any suit *in whole or in part*, the suit shall be brought in the county where the land or any portion of the land is situate.

... (Italics and emphasis added.)

C. Facts:

6. Demolition of a decrepit and toxin-laden copper smelter is an enormous undertaking, not one to be taken lightly. *Phelps Dodge* is planning to demolish arguably the *largest structures* in Grant County. No one needs to point out that these facilities are highly dangerous facilities – both when in operation in the past and now, standing closed – and *still* contain significant levels of federally-identified hazardous materials, including, but not limited to, heavy metals, contaminated dust and debris, asbestos, and other potential moderate to severe hazards to human and ecological health.⁴

⁴ “The smelting plant distills copper ore from unuseable rock, called ‘slag,’ by superheating unprocessed rock to a temperature in excess of 2,000 degrees Fahrenheit. During the process, the ore rises to the top, where it is harvested, while the slag sinks to the bottom of the furnace where it drains through a valve called a ‘skim hole.’ From there, the slag passes down a chute into a fifteen-foot-tall iron cauldron called a ‘ladle,’ located in a tunnel below the furnace. Ordinarily, when the ladle reaches three-quarters of its thirty-five-ton capacity, workers use a ‘mudgun’ to plug the skim hole with clay, thus stopping the flow of molten slag and permitting a specially designed truck, called a ‘kress-haul,’ to enter the tunnel and lift and remove the ladle.” Description of Hurley Smelter operation, *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 34 P.3d 1148, 1151 [*Phelps Dodge* stripped of Workers’ Compensation Act protection for intentional infliction of injuries resulting in death].

“Emissions from primary copper smelters are principally particulate matter and sulfur oxides (SOx). Emissions are generated from the roasters, smelting furnaces, and converters. Fugitive emissions are generated during material handling operations. Roasters, smelting furnaces, and converters are sources of both particulate matter and SOx. Copper and iron oxides are the primary constituents of the particulate matter, but other oxides, such as arsenic, antimony, cadmium, lead, mercury, and zinc, may also be present, along with metallic sulfates and sulfuric acid mist. Fuel combustion products also contribute to the particulate emissions from multiple hearth roasters and reverberatory furnaces.” *Description of Primary Copper Smelting Emissions* from U.S. Environmental Protection Agency: *AP 42, Fifth Edition* Compilation of Air Pollutant Emission Factors, Volume 1: Stationary Point and Area Sources, January 1995.

“Primary copper smelters can potentially emit significant amounts of certain toxic metals listed as hazardous air pollutants (HAP) in Clean Air Act (CAA) section 112(b)(1). These metals include antimony, arsenic, beryllium, cadmium, cobalt, lead, manganese, nickel and selenium. Exposure to these substances has been demonstrated to cause adverse health effects such as diseases of the lung, kidney, central nervous system, and cancer.” From: *Federal Register*: June 12, 2002 (Volume 67, Number 113); “National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelting.”

Phelps Dodge’s consultant has apparently identified arsenic, cadmium, chromium, copper, lead, molybdenum, and zinc, as metals to test for in connection with demolition. See, May 1st, 2007 “Draft” of “Ambient Air Monitoring During the Chino Smelter Stack Demolition,” by *Guardian Consulting Co., Inc.*, attached hereto and fully incorporated by this reference as **Exhibit “#.”**

7. The company identified as “in cooperation” with *Phelps Dodge* in conducting these demolitions is *Controlled Demolition, Inc.*, of Maryland. “*PD Quicknews*,” May 09, 2007, attached hereto and fully incorporated by this reference as **Exhibit “C.”**

8. On its website, *Controlled Demolition, Inc.* advises visitors *at the very top* of its “Chimneys” section that, “The removal of tall structures exposes workers to the risk of working at high elevations for extended periods of time. The height and potential reach of those structures also exposes workers and facilities nearby to the consequences of *unexpected collapse* during demolition.” (Emphasis and italics added.) See, www.controlled-demolition.com. **Exhibit “D,”** attached hereto and fully incorporated by this reference.

9. Petitioners also bring to the Court’s attention an Associated Press (AP) press release of August 7th, 2000 (nearly *seven years* ago, [technically] during the last century). In describing *Controlled Demolition’s* highly-planned and U.S. EPA-monitored demolition of the (former) American Smelting and Refining Company’s two *circa*-1918 stacks in Murray, Utah, the article stated:

A huge cloud of dust lifted into the air and drifted toward downtown Salt Lake City as *dozens of guns* sprayed about **80,000 gallons of water** into the air to capture contaminants including *lead, arsenic and asbestos*. The U.S. *Environmental Protection Agency* monitored air quality before and after the explosion, detecting no asbestos. (Emphasis and italics added.)

So far as Petitioners have been informed by *Phelps Dodge* representatives to date, and after examining matters on the ground in Hurley itself, no *firm* plans to use water or other contaminant suppressants have been announced or are in place at Hurley. *Affidavit of Sally Smith, supra.*

10. Again, at least insofar as Petitioners been made aware as of the date of this filing, *Phelps Dodge* has not sought *any* involvement of the Federal EPA, and has only *peripherally advised* the State EPA, in these matters of some public *and environmental* health and safety moment. See, *Clean Air Act of 1990*.⁵ Petitioners are also informed through third parties (orally and through local news) that plans *may* exist for *Phelps Dodge* to have contaminant and dust suppression on-hand, but Petitioners have not seen any specific details. *Affidavit of Allyson Siwik, supra.*

11. Petitioners are prepared to show that *Phelps Dodge* has communicated poorly with the Hurley Community, the state Environmental Department, with Petitioners, and with other agencies and organizations. Although *Phelps Dodge* has held some undetermined number of public meetings *re* demolition, so far as Petitioners are aware, only *general* information about the event has been furnished to anyone outside Phelps Dodge personnel. *Affidavit of Allyson Siwik, supra; Affidavit of Sally Smith, supra.*

⁵ Time allowing, Petitioners would like to bring any *evidence* under the Clean Air Act of potential and substantial endangerment of public health and welfare to the attention of the U.S. Environmental Protection Agency. Clear federal authority exists to do so under the Act itself:

42 U.S.C. § 7603. Emergency Powers. “Notwithstanding any other provisions of this Act, the Administrator upon receipt of evidence that a *pollution source or combination of sources* (including moving sources) is presenting an *imminent and substantial endangerment to public health or welfare, or the environment*, may bring suit on behalf of the United States in the appropriate United States district court to *immediately restrain* any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.” Title 42 U.S.C. Section 7603. (July 14, 1955, ch. 360, title III, Sec. 303, as added Pub. L. 91-604, Sec. 12(a), Dec. 31, 1970, 84 Stat. 1705;

12. *Phelps Dodge* has stated that they will communicate the **exact** details of the Hurley demolitions for the *first time* at a public meeting planned for May 22nd – *three (3) days* prior to the *planned* demolition. “*PD Quicknews*,” Exhibit “C,” *supra*. Petitioners submit this leaves an unrealistic timeframe within which to address the numerous clear and existing concerns about health and welfare surrounding the demolitions.

13. Moreover, again (at least insofar as Petitioners have been informed), *Phelps Dodge* will not meet with the New Mexico Environment Department’s Air Quality Bureau (AQB) concerning use and placement of air quality monitors until May 17th, *one week* prior to the *planned* demolition.

14. The plans to meet with the AQB were apparently only made after Petitioners alerted *Phelps Dodge* that the AQB would like to coordinate with them on air quality monitoring of the demolition. *Affidavit of Allyson Siwik, supra*. Again, this arguably *hastily organized* meeting appears to leave insufficient time to deal with any air quality monitoring issues that may arise during those discussions.

15. Petitioners are not aware of any formal or sufficiently *specific* statement by *Phelps Dodge* concerning any weather-direction testing devices are planned to be on-site, to determine if meteorological conditions are acceptable for demolition. *Phelps Dodge* has told the press, Petitioners, and the “Community Work Group for the Administrative Order on Consent” (“CWG,” a citizen panel that has been reviewing testing and clean-up of historic waste in and around the Chino Mine since 1997), that it will not “drop” the stacks on a high-wind day, or on a day when the wind direction would blow materials toward the town. *Affidavit of Sally Smith, supra*.

amended Pub. L. 95-95, title III, Sec. 302(a), Aug. 7, 1977, 91 Stat. 770; Pub. L. 101-549, title VII, Sec. 704, Nov. 15, 1990, 104 Stat. 2681.)

16. Petitioners have not been advised by *Phelps Dodge* as to the threshold wind-speed *velocity* above which demolition would not take place. Nor does anyone appear to know definitely yet which wind *direction(s)* will be acceptable, given the surrounding physical and meteorological circumstances. Petitioners have heard *Phelps Dodge* representatives suggest that winds out of the southwest (*i.e.*, heading northeast) are preferred. *Affidavit of Sally Smith, supra*. To date Petitioners have not been advised of any contingency plans Phelps Dodge may have made for bad weather.

17. Petitioners have been previously advised that the *soils* around the Hurley Smelter were sampled by *Phelps Dodge*, and contain approximately twenty- to thirty-percent (20-30%) copper, according to the New Mexico Environmental Department.

18. Petitioners are informed and believe that *Phelps Dodge* has already spent approximately five million dollars (\$5,000,000.00) remediating the soils of participating residents' lots in Hurley, as well as certain contaminated common areas. Furthermore, under currently-existing interim agreements, *Phelps Dodge* will not be required to "revisit" the soils issue at Hurley for five (5) years. *Phelps Dodge* has told Petitioners that they have no plan to *test* soils after the demolition unless they detect a "spike" in their air-quality measurement monitors.⁶ Otherwise the corporation has stated that it plans to *re-test* the yards and common areas at the Five Year Review stage. *Phelps Dodge* has not stated to Petitioners whether the corporation has any intention of re-remediating any *re-contaminated* soils if necessary, and whether or not any compensation will be available. The sole discussion appears to have centered testing, not remediation. See, *Affidavit of Sally Smith, supra*.

⁶ To the contrary, *Guardian Consulting Co., Inc.*, states in its "Draft" advisory (**Exhibit "E"**) that it does intend to use monitoring devices at the site. So at this juncture Petitioners do not know.

19. To date *Phelps Dodge* has also not furnished any expert or other opinion (at least that Petitioners have been made aware of) concerning what the *action levels* are for ambient concentrations of particulate matter and other constituents, such as asbestos and the heavy metals listed, *ante*, below which the public health must be protected.⁷ *Ibid.*

20. Petitioners' best information is that at least *one* of the Hurley stacks, the shorter, older *Kennecott Copper Company* stack, is still contaminated with significant levels of asbestos, classified by EPA as a Group A known human carcinogen.⁸ *Affidavit of Sally Smith, supra.*

⁷ “The size of particles is directly linked to their potential for causing health problems. Small particles less than 10 micrometers in diameter pose the greatest problems, because they can get deep into your lungs, and some may even get into your bloodstream.

“Exposure to such particles can affect both your lungs and your heart. Small particles of concern include ‘inhalable coarse particles’ (such as those found near roadways and dusty industries), which are larger than 2.5 micrometers and smaller than 10 micrometers in diameter; and ‘fine particles’ (such as those found in smoke and haze), which are 2.5 micrometers in diameter and smaller.

“Particle pollution - especially fine particles - contains microscopic solids or liquid droplets that are so small that they can get deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of problems, including:

- increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing, for example;
- decreased lung function;
- aggravated asthma;
- development of chronic bronchitis;
- irregular heartbeat;
- nonfatal heart attacks; and
- premature death in people with heart or lung disease.

“People with heart or lung diseases, children and older adults are the most likely to be affected by particle pollution exposure. However, even if you are healthy, you may experience temporary symptoms from exposure to elevated levels of particle pollution.” *U.S. EPA: www.epa.gov/air/particlepollution/health/html.*

⁸ “Effects on the lung are a major health concern from asbestos, as chronic (long-term) exposure to asbestos in humans via inhalation can result in a lung disease termed asbestosis. Asbestosis is characterized by shortness of breath and cough and may lead to severe impairment of respiratory function. Cancer is also a major concern from asbestos exposure, as inhalation exposure can cause lung cancer and mesothelioma (a rare cancer of the thin membranes lining the abdominal cavity and surrounding internal organs), and possibly gastrointestinal cancers in humans. EPA has classified asbestos as a Group A, known human carcinogen.” *U.S. EPA: <http://www.epa.gov/ttn/atw/hlthef/asbestos.html>*

Petitioners are informed and believe that certain particularly *vulnerable* people (e.g., those with compromised immune systems, e.g., AIDs- or Lupus-related) or certain highly *reactive* individuals, can contract the almost-always fatal mesothelioma cancer from asbestos exposure from *inhaling* or swallowing asbestos.⁹

21. Based on decades of smelting rock and using an array of exotic and toxic chemicals over the *better part of a century* (cf., footnote 4, *ante*), Plaintiffs concur in the assessment of *Guardian Consulting Co., Inc.*, and reasonably suspect that other *potentially toxic* materials are contained within and around the stacks slated for demolition, including, but not limited to beryllium (not identified by the company), and contamination from other *potential* heavy metals. So far as Petitioners are aware, little to nothing has been prepared by *Phelps Dodge* that adequately addresses – *or at all* – most of these legitimate public health and safety concerns.

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“Malignant mesothelioma is a disease in which malignant (cancer) cells form in the lining of the chest or abdomen.

Malignant mesothelioma is a disease in which malignant (cancer) cells are found in the pleura (the thin layer of tissue that lines the chest cavity and covers the lungs) or the peritoneum (the thin layer of tissue that lines the abdomen and covers most of the organs in the abdomen). Being exposed to asbestos can affect the risk of developing malignant mesothelioma.

Many people with malignant mesothelioma have worked or lived in places where they inhaled or swallowed asbestos. After being exposed to asbestos, it usually takes a long time for malignant mesothelioma to occur. “*Information About Malignant Mesothelioma*” (Courtesy of the National Cancer Institute), www.mesothel.com.

22. So far as Petitioners are aware, the New Mexico Department of Health has likewise *not* been notified of the demolition by *Phelps Dodge*, only by Petitioners, so that the Health Department appears to be neutralized in any ability to participate *or at least provide input* on how the public health and safety could be adequately protected during demolition. Instead, Petitioners believe, based on agency comments made to them personally, Petitioners were the *first* responsible party to report the matter to that agency. *Affidavit of Allyson Siwik, supra*; *Affidavit of Sally Smith, supra*.

23. Petitioners themselves have made repeated requests of *Phelps Dodge* and the NMED for any available contingency, safety, or evacuation plans, and so far as Petitioners have been made aware by *Phelps Dodge*, no major state or local agency has seen *or prepared* any such plans. *Affidavit of Sally Smith, supra*.

24. Petitioners intend to show that *Phelps Dodge's* stated “voluntary” evacuation plan (Petitioners have not seen the plan), may, even without not knowing its contents, *unreasonably place at risk* the health and safety of all citizens of Hurley and the surrounding communities, based on the sheer demographic realities of the town itself (see below). Petitioners will suggest the common sense/common experience notion at hearing that some people simply do not know how, or are unable to look out for themselves properly, even when told, and *particularly when they are not told what is going on* (the notice problem, discussed, *infra*). It is also common knowledge, whether *Phelps Dodge* acknowledges it or not, that there are indeed those who, for whatever reason, choose not to “volunteer” for or join anything – particularly an evacuation – even when shown to be in their best interest.¹⁰ So far as Petitioners are aware, no

¹⁰ The “*Santa Ana*” wildfires in the Santa Monica Mountains of Southern California are arguably a perennial case-in-point.

one at *Phelps Dodge* appears to be talking or thinking along these lines in its demolition preparations.

25. Petitioners believe that in a community where fully 25% of the residents are legally disabled, Phelps Dodge should be ordered to go **door-to-door**, by means of its own agents or employees, and as monitored by the Court, and make *and document* all best efforts to notify each and every contactable resident member of the Town of Hurley, New Mexico, **face-to-face**, and inform them of what Phelps Dodge has in mind. More than one round of contact should be ordered to ensure that those absent at one time of the day can be contacted at another. Hurley is not a large town, and door-to-door, face-to-face contact is manageable and *feasible*.¹¹

26. Petitioners are informed and believe that one or more homes in Hurley are located within approximately 600 feet of the taller 500-foot stack. *Phelps Dodge* tells Petitioners it plans for the two stacks to fall *away* from all residences, but what is the degree of certainty to which the demolition company can predict how the stacks will fall? Petitioners will argue that while *Controlled Demolitions, Inc.*, may have a superlative, even a spotless record in its demolition projects, *no record can remain spotless forever*.

27. Petitioners will note again that the demolition company itself cautions (in its own abundance of caution from liability) that these sorts of stacks can “*collapse*” unexpectedly. *Chimneys*, www.controlled-demolition.com, *supra*. Why then should Petitioners,

¹¹ The following cited data are from the U.S. Census Bureau’s *2000 Census* (www.census.gov):

Population: 1464;
7.2% children under age 5;
19.1% over age 65;
60.3% Hispanic;
58 families below poverty level – 14% (national average – 9.2%);
15.6% of population below poverty level (national average – 12.4%);
26.5% disability status (national average – 19.3%);
One (1) elementary school;
Closest residences approximately *600 feet* from 500-foot smelter stack, *farthest within 3/4 mile*.

or the rest of the community for that matter, simply have to “take PD’s word for it” that everything will work out O.K.? As indicated, so far as Petitioners are aware, neither they nor any of the other federal, state or local agencies listed below, has had sufficient (or any) opportunity to hear from PD’s experts on why they are so confident in the *planned* “drop” direction. *Affidavit of Sally Smith, supra.*

28. Petitioners might note in this regard that it is probably beyond any reasonable legal dispute that a plan (or *lack* thereof) to demolish by *explosion*, all-at-once – an ancient mining smelter, located directly adjacent to a residential and commercial community, constitutes perhaps the *quintessential, casebook example of an ultra-hazardous activity, and why a TRO should issue* in this case until full hearing on the merits of these claims is held.

29. Petitioners have legitimate concerns as to whether any air quality modeling has been conducted that might predict the locations of high ambient particulate concentrations as a result of the demolitions, and whether any residences or commercial establishments, *e.g.*, the elementary school, etc., would be required to evacuate for their safety. Will the children at Hurley Elementary School, for example, be told to stay home if the demolition occurs on a school day, or will the school plan to conduct matters elsewhere, and where?

30. Phelps Dodge representatives have told Sally Smith that Emergency Response Personnel have been contacted and will be on hand for the demolition. *Affidavit of Sally Smith, supra.* No information or specifics have been forthcoming however from *Phelps Dodge* about *what* such response teams might be prepared to expect. Do the response teams have the *resources* to meet all reasonably anticipated risks? What are those risks exactly? Are there *additional* emergency response personnel and equipment available within the area to

provide backup assistance? What would their response time be, if not located directly at the scene at time of demolition? What efforts will be made to make the local populace aware of any emergency services available? *Ibid.*

31. Petitioners will seek to impress upon the Court the critical nature and urgency of the matters raised, invoking as they do the most fundamental interests of the *very health and safety of the public at large.*

32. As noted, *Phelps Dodge's* consultants have provided Allyson Siwik with documentation indicating that it plans to have eleven (11) air quality monitoring devices in place along the smelter fence line, to measure particulate matter, asbestos, and metals concentrations before, during and after the demolition event. *Affidavit of Allyson Siwik, supra; Affidavit of Sally Smith, supra.* Said ambient measurements could help determine when it is safe for the local residents to return home. Monitoring information would also provide an indication of concentrations of heavy metals from soils that have become re-entrained in the ambient air as a result of the demolition, and thus pose a potential or unreasonable public health risk. Petitioners and the Court should be informed of what *types* of monitors are to be used, exactly *which* constituents will be measured, where the monitors will be located, how many there will be, and whether *Phelps Dodge* plans to measure background concentrations.

33. As noted, *Phelps Dodge* earlier spent an estimated \$5 million re-mediating the soils in the residential yards and adjacent areas in Hurley. This action was arguably taken prematurely, under authority of an *Interim* Order stemming from an interim action, as part of the Administrative Order on Consent (AOC) mandated by the state. *Affidavit of Sally Smith, supra.* Petitioners also believe that there may exist a *clear and present danger* that these yards and common areas could *once again* become *re-contaminated* by haphazardly-conducted demolitions. Measuring

concentrations of copper and other types of heavy metals in the soils around the smelter before and after demolition would serve to reasonably indicate any additional deposition of these types of constituents, *as a result of demolition*, and whether there is a subsequent need to again remediate the local residents' yards and common areas. *Affidavit of Allyson Siwik, supra.*

34. As noted, *Phelps Dodge* currently plans to hold its *sole* public meeting scheduled to date on May 22nd in Hurley. Applying fundamental concepts of substantive and procedural due process, Petitioners frame the question before the Court as follows: How, on such short notice, does *Phelps Dodge* intend to notify Hurley residents about the meeting? Moreover, does its currently proposed "voluntary" evacuation plan adequately address the degree of hazard and risk attendant with the operation? What about those residents, as noted, who are unable *or unwilling* to attend the planned meeting or to evacuate?

35. Petitioners wonder, in the 11 days remaining, how *Phelps Dodge* can provide Hurley's residents with a *reasonable time*, and a *reasonable manner*, to air any grievances or concerns they have with the planned event, that could *possibly be acted upon in time* – the very hallmarks of constitutional due process? Is *Phelps Dodge* for example notifying said residents of potential public health and safety risks if high concentrations of particulate matter were to occur as a result of demolition? Post 9-11, with its epic pall of dust and debris broiling over the New York City landscape, it has become common knowledge that short-term exposure to high concentrations of even *non-toxic* particulate matter can aggravate respiratory ailments, such as chronic lung disease, cancer, asthma, emphysema, acute bronchitis, chronic asbestos lung disorder, and its resultant mesothelioma. In light of these realities, Petitioners query whether *Phelps Dodge* is making any special effort to ascertain the residence of and to *notify* these residents in any special way, *e.g.*, face-to-face, door-to-door?

36. On an important related *equitable* matter, to Petitioners' knowledge, *Phelps Dodge* has not announced any plan to compensate Hurley residents for the reasonable costs of any evacuation, "voluntary" or otherwise, including gas, meals, lodging, and other expenses reasonably incurred during the evacuation period, or proximately caused by absence due to the need to evacuate. Under the circumstances this seems highly *inequitable*.

37. Nor is there any announced plan by *Phelps Dodge* to compensate residents for any damages to their homes caused by the demolition event. Some sort of "plan" to examine home foundations was mentioned by *Phelps Dodge* personnel to Sally Smith, but again, no specifics have been forthcoming. *Affidavit of Sally Smith, supra*.

38. Petitioners are aware of discussions and concern expressed at recent "Community Work Group Meetings," concerning the potential for a *seismic* shock and/or vibration, causing damage to homes and property in Hurley. In light of this apparent reality, has *Phelps Dodge* given any serious consideration to the creation of an escrow account, or the posting of an assurance bond, demonstrating to Hurley residents that adequate and due compensation is readily on tap should the worst occur? At one point in the discussions *Phelps Dodge* raised the issue of bonding, but to Petitioners' knowledge has not pursued the matter. Indeed, has *Phelps Dodge* adequately considered its *own* exposure to property damage liability – both actual, and possibly *feigned* by homeowners – absent its *own* proof of the pre-demolition conditions of residences? Does *Phelps Dodge's* liability insurance cover the potential for damage to property or personal damages from a tragic occurrence of this nature?

39. As the Court, *Phelps Dodge* itself, and the local communities know, for *years* now Petitioners and GRIP have actively supported reclamation and remediation at the Chino and Tyrone mines, as well as the Hurley stacks and smelter. *Affidavit of Sally Smith, supra*. Petitioners

heartily concur with *Phelps Dodge* in the notion that demolition of the smelter and cleanup of the site is in the best *long-term* interest of the public health and safety – and will categorically reject and disprove any suggestion that they are acting as mere “obstructionists” or “spoilors” in this matter.

Ibid.

40. And it is for the very same long-term reasons that *Phelps Dodge* should be restrained for the *short-term* nature of its *thinking re* planning and notification in this matter. Petitioners, while whole-heartedly supporting demolition at Hurley, also believe that said demolition must be conducted with the full participation of all applicable local, state and federal regulators, and only after full public disclosure of the demolition plans themselves and the expertise supporting them, as well as all plans to protect the public health and safety – all of which, are, after all, the *penultimate* duty and obligation of our government to protect.

41. With respect to the relative *equities* in the matter, it is important to note that, while neither Petitioners nor anyone else in the communities stands to *gain* anything of intrinsic value from issuance of the TRO and injunction (beyond the obvious *re* public health and safety), *everyone* involved, including *Phelps Dodge*, has a *very great deal to lose* if current plans go awry.

42. As such, Petitioners respectfully pray the Court order *Phelps Dodge* to finally meet and confer with *all* interested agencies, parties and communities, and *in unison*, tapping into and harnessing the brightest and the best minds and resources available given the vast resources and consequences, that the parties can devise adequate, sensible plans that will reasonably protect the public health and safety during the event itself, and thereafter.

43. Petitioners will also pray that adequate and due compensation of costs and expenses incurred in evacuating the sites be provided by *Phelps Dodge*, and that adequate compensation is available in the *arguably* unlikely event that tragedy should occur.

44. The following parties are being contacted by Petitioners, with a view to having a seat at the table and fully participating in this process:

- Chino AOC Community Workgroup
- Hurley Pride Group
- Town of Hurley
- Town of North Hurley
- Other residents in *pre-determined* impact area of demolition – including Bayard, Santa Clara, Hanover, etc.
- Hurley Police Department, Hurley Fire Department, and Grant County Emergency Response
- Hurley Elementary School Personnel
- Cobre School District Personnel
- All relevant Grant County Personnel
- New Mexico State Department of Game and Fish
- New Mexico State Department of Health
- New Mexico State Environment Department
- U.S. Environmental Protection Agency
- New Mexico State Land Office
- U.S. Forest Service
- U.S. Bureau of Land Management
- Phelps Dodge Hidalgo Inc., P.O. Box 67, Playas, NM 88009
- Southwest Hispanic Roundtable.
- Local Emergency Planning Committee.

Affidavit of Allyson Siwik, supra.

45. Following the issuance of the requested TRO, Petitioners would seek issuance of a *prohibitory* injunction, after a full and fair hearing on the merits, enjoining *Phelps Dodge* from continuing to move forward with its plans to demolish the Hurley Smelter as presently conceived.

46. Petitioners would also seek a companion mandatory injunction at said hearing, ordering Phelps Dodge to consult with all interested parties and prepare acceptable plans for the demolitions that adequately protect the public's health, safety and welfare.

47. By letter of May 11th, 2007, Petitioners (through the undersigned) provided **notice** of the impending nature of and intent to pursue this TRO/injunction proceeding,

and in said letter formally demanded that Phelps Dodge “ CEASE and DESIST” from any further steps taken in furtherance of the demolitions as currently planned and announced. Petitioners further notified counsel for *Phelps Dodge*, Mr. Dalva Moellenberg, Esq., of *Kennedy and Gallagher, P.A.*, 2575 East Camelback Road, Phoenix, Arizona, 85106-9225. *Affidavit of Allyson Siwik, supra.*

48. Respondents, *Phelps Dodge, et al.*, have expressly acknowledged receipt of said letter of 5/11/07. See, *Email from Anthony J. Trujillo, Esq., Gallagher & Kennedy, P.A.*, of Friday, May 11th, 2007, attached hereto and fully incorporated by this reference as **Exhibit “F.”**

49. Petitioners forwarded the same May 11th letter to the following: Hon. Bill Richardson, Governor, State of New Mexico; Secretary Ron Curry, New Mexico State Environment Department; Secretary Michelle Lujan Grisham, New Mexico State Department of Health; Hon. Gary King, Attorney General, State of New Mexico; and Regional Administrator, Richard Greene, U.S. EPA, Region 6. *Affidavit of Allyson Siwik, supra.*

II.

**BALANCING THE EQUITIES, PETITIONERS HAVE SHOWN
THE REQUISITE POTENTIAL FOR IRREPARABLE HARM AND INJURY.
THE POTENTIAL FOR HARDSHIP TO THE COMMUNITIES IS FAR GREATER
THAN ANY POTENTIAL FOR HARDSHIP TO *PHELPS DODGE***

A. Law:

Pursuant to Rule 1-066, subdivision (B), NMRA, 2005, a restraining order may issue upon a showing that immediate and irreparable injury, loss or damage will result to the

applicant.¹²

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1-066. Injunctions and receivers.

A. Preliminary injunctions; appointment of receivers; notice; bond; hearing.

“(1) No preliminary injunction shall be issued nor shall any receiver be appointed without notice to the opposite party.

“(2) Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subparagraph shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

“**B. Temporary restraining order; notice; hearing; duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

“(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

“(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period, except that, if a party adverse to the party obtaining a restraining order shall disqualify the judge who would otherwise have heard the matter, then the order shall be deemed extended until ten (10) days after the designation of another judge or until such earlier time as may be fixed by the judge so designated. The reasons for the extension shall be entered of record.

“**C. Security.** No restraining order, preliminary injunction or appointment of a receiver shall issue or occur except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, or whose property may be found to have been thereby wrongfully placed in the hands of a receiver so appointed; provided, however, that for good cause shown and to be recited in the order made, the court or judge may *waive the furnishing of security.* (Italics added.)

Here, Petitioners have no other plain and adequate remedy at law but to request that the Court exercise its inherent *equitable* power to enjoin *Phelps Dodge* from proceeding with its current demolition plans, until Petitioners' concerns on behalf of the public health and safety and the environment have been heard and resolved.

The granting of an injunction is indeed an equitable remedy, and whether to grant equitable relief lies within the sound discretion of the court. *Moody v. Stribling*, 127 N.M. 630, 985 P.2d 1210, ¶ 30 (Ct. App. 1999). Indeed the trial court is required to examine general equitable factors whenever injunctive relief is requested. See, *Cafeteria Operators, L.P.*, 124 N.M. 440, 447, 952 P.2d 435, (Ct. App. 1998) [demolition of building a collateral issue]; *Insure New Mexico, LLC v. McGonigle*, 128 N.M. 611, 614, 995 P.2d 1053 (Ct. App. 2000).¹³

“An injunction is an equitable remedy, left to the sound discretion of the district court so long as the exercise of discretion is consistent with ‘reasonably well established standards’ of fairness and equity. See, 5A Arthur Linton Corbin, *Corbin on Contracts*, § 1136 (1964 & 1997 Pocket Part); *Smith v. McKee*, 116 N.M. 34, 37, 859 P.2d 1061 (1993); *Cafeteria*

“D. **Security; proceedings against sureties.** Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties, if their addresses are known.”

¹³ The *Cafeteria Operators* court earlier identified *seven* (7) factors to weigh in considering whether to grant an injunction: “(1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the delay, if any, in bringing suit; (4) plaintiff's misconduct, if any; (5) the interests of third parties; (6) the practicability of granting and enforcing the order or judgment; and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.” *Cafeteria Operators, L.P., supra*, 124 N.M. at 447.

Operators, L.P., supra, 124 N.M. at 446. See generally, *Wilcox, v. Timberon Protective Ass'n*, 111 N.M. 478, 485-486, 806 P.2d 1068 (Ct. App. 1990) [“In New Mexico, injunctions are granted to prevent irreparable injury”]; *cf. LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017 (Ct.App.1993) [“To obtain a preliminary injunction, a plaintiff must show that ... [it] will suffer irreparable injury unless the injunction is granted.”].¹⁴

The trial court’s discretion will not be disturbed unless there is an abuse of discretion. “An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.” *Sims v. Sims*, 122 N.M. 618, 930 P.2d 153, ¶ 65 (1996); *Insure New Mexico, LLC v. McGonigle, supra*, 128 N.M. at 614.¹⁵

The *Affidavits* submitted by Petitioners in support of the Petition clearly show, by recitation of *very specific facts*, that immediate and irreparable injury or damage may result, unless and until the Court grants a temporary restraining order. Rule 1-066, subd. (B), *supra*; *Affidavit of Allyson Siwik, supra*; *Affidavit of Sally Smith, supra*.

The Court of Appeals has noted that, “injunctions are harsh and drastic remedies [that] should issue only in extreme cases of pressing necessity, and only where there is no

¹⁴ In *Wilcox*, “some homeowners were attempting to enforce a restrictive covenant barring the use of mobile homes in a subdivision. We reversed the trial court’s denial of injunctive relief after engaging in an in-depth analysis of the factors set forth above. 111 N.M. at 486-89, 806 P.2d at 1076-79. The character of the interest to be protected in *Wilcox* was the *architectural and aesthetic integrity of the plaintiff’s community*.” *Cafeteria Operators, L.P., supra*, 124 N.M. at 447. (Italics added.)

If community architectural and aesthetic integrity are proper subjects of injunctive relief, all the more so should the community’s health, safety, and welfare be like proper subjects.

¹⁵ The trial court abuses discretion when it “applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law.” *See N.M. Right to Choose/NARAL v. Johnson*, 127 N.M. 654, 986 P.2d 450, ¶ 7 (1999) [decision premised on a misapprehension of the law may be characterized as an abuse of discretion]; *LaBalbo v. Hymes, supra*, 115 N.M. at 318 [trial court may abuse discretion by applying incorrect standard or incorrect substantive law for preliminary injunction]; accord, *Aragon v. Brown*, 134 N.M. 459, 78 P.3d 913, 916 (Ct. App. 2003).

adequate ... remedy at law.” *Padilla v. Lawrence*, 101 N.M. 556, 562, 685 P.2d 964 (Ct. App.1984).

"In determining whether to grant injunctive relief, a trial court must consider a number of factors and ‘balance the equities and hardships.’” *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 274, 889 P.2d 875 (Ct. App. 1995), *overruled* on other grounds at, 121 N.M. 764, 918 P.2d 350 (1996). These factors include:

- (1) the *character* of the interest to be protected;
- (2) the relative *adequacy* of injunctive relief when compared with other remedies;
- (3) the *interests of third parties*;
- (4) the *practicality* of granting and enforcing the order; and,
- (5) the relative *hardship* likely to result to the respondent if granted and to the petitioner if denied.

Accord, *Insure New Mexico, LLC v. McGonigle, supra*, 128 N.M. at 614; *Wilcox v. Timberon Protective Ass'n, supra*, 111 N.M. at 485-486. Taking these factors one-by-one:

1. *Character of the interest to be protected*: Here is *arguably* of the very highest calibre and consideration, *i.e.*, the public health, safety and welfare, as well as careful stewardship of the environment. Certainly there is nothing *insubstantial* about the health and safety of the residents of Hurley, New Mexico. Petitioners would soberly note that all it would take would be *one serious injury or death* from this demolition to place the entire matter in a *completely different light*. Moreover the “enormous” environmental impact from an operation the size of *Phelps Dodge* has been specifically recognized by our courts. See, *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶ 33 (Ct. App. 2006). This carefully weighed equitable “factor” by all rights should tip in Petitioners’ favor.

2. Adequacy of injunctive relief re other remedies: Again, this is probably one of the most classic of TRO settings, where large factory is set to be demolished directly adjacent to small town. Money damages alone can remedy some types of loss to real property, and lost of most personal property (except *irreplaceable* chattels, *e.g.*, photos, momentos, one-of-a-kind objects, etc.). Petitioners submit however that money alone can never fully remedy a *preventable* death or serious injury. Nor can money adequately remedy an even-more polluted and *unique* environ.

3. Interests of Third Parties: No appreciable interests of third parties appear to exist in this petition matter, inasmuch as *all* citizens within the potential “target” zone for the “drops” would be direct parties plaintiff, not third parties. At bottom this is a dispute between a corporation and local communities and their citizens. Any *third* party’s interest would be only collaterally – and probably only financially – impacted (*e.g.*, damages to an importuned *Phelps Dodge* expert or material man, due to delay).

4. Practicality of granting/enforcing Order: Again, is *highly* practicable. The TRO simple freezes matters in place, preserving the *status quo* on the ground until a hearing on the merits can be held. The injunctions, as mentioned, restrain *Phelps Dodge* to cease and desist from its current “drop” plans, and to formulate a workable and agreed-upon set of protocols, that are properly disseminated and therefore *known* by *all* reasonably-contactable community members, and only after due consultation with *all* interested parties.

And whereas “it is unrealistic to assume that [] judges can unravel complex scientific issues, and therefore such matters are better left to agencies with special expertise” (*Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission, supra*, 2006-NMCA-115 at ¶ 36), the agencies responsible for the types of assessments necessary *do* have such expertise, *should* have been and now should be consulted, and *can* provide practicality by providing technical input for any Court Order in the case.

5. Relative Hardships: Petitioners respectfully submit that the *status quo* is not harming anyone – with the possible exception of *Phelps Dodge's* electric bill. *Phelps Dodge* would be well able to absorb and withstand the costs connected with preserving the *status quo* as requested in a cease-and-desist TRO (as can the citizens of Hurley itself, who appear to have got on all right ever since the smelter closed).

One can see that the final two equitable factors, applied here, weigh financial considerations against community-wide health and safety issues. The *former* are quite readily ascertainable; the *latter* relatively difficult. See, *Wilcox v. Timberon Protective Ass'n, supra*, 111 N.M. at 489; *Cafeteria Operators, L.P., supra*, 124 N.M. at 447; *Aragon v. Brown, supra*, 78 P.3d at 918.

B. Discussion:

Petitioners believe they have adequately brought to the Court's attention the many ways in which irreparable injury could result to human life, limb, and property, and the environment itself, and how numerous aspects of the public health and safety are implicated by *Phelps Dodge's* demolitions. Reasonable minds may differ on whether *Phelps Dodge's* announced plans are adequate to address the concerns raised here, but if tragedy strikes, Petitioners believe there are too many questions left unanswered, and too little time remaining to answer them.

Phelps Dodge will undoubtedly be heard to argue in opposition that it has and will incur a *substantial amount of financial damage* and other inconvenience if a TRO is granted and the currently-planned demolition is delayed while set for a hearing.¹⁶ *Phelps Dodge* may be heard to argue that it has large amounts of men and material in-transit perhaps and non-cancellable/refundable, and that Petitioners have waited until the last possible minute to bring their Petition.

¹⁶ For their part Petitioners are prepared for and amenable to a *short-set* hearing that might actually obviate the need for postponement of the current May 25th date.

Petitioners would observe in response that putting the dollar sign in front of the public health and safety has *rarely been a rewarding public policy*, and has often lead to disaster in the past (*e.g.*, Hurricane Katrina viz. woeful condition of New Orleans' levees). The political fallout from any disaster could likewise be far-ranging. And the "hurry-up" nature of the situation is caused *solely and directly by Phelps Dodge*, which most recently has moved the demolition date up from May 30th to May 25th, without any sign of coming through with any further planning or notification. *Affidavit of Sally Smith, supra.*

"Business is business" so the saying goes. Well, *yes*, and the same goes for bad business. First and foremost this entire "can of worms" can reasonably be viewed as a series of bad business decisions on the part of *Phelps Dodge Corporation*.

For it was *Phelps Dodge itself* in the first instance that had the resources, the talent, and the *opportunity*, to make all necessary and adequate plans for this indisputably ultra-hazardous activity. For whatever *business* reason (probably financial), the Respondent has apparently failed to do so.

As such, *if* restrained, the business corporation should be expected to absorb any damages flowing from a wrongful issuance of restraint. *Phelps Dodge* can be expected to absorb any injunctive losses as well, as part and parcel of the *cost of doing business*, which, again, includes the cost of doing *bad* business (deductions notwithstanding). To be blunt, *Phelps Dodge* appears to have chosen to do this project on-the-cheap and on-the-fly, and it should not.

Moreover it is widely known also throughout the Hurley and Grant County communities that in recent years *Phelps Dodge* has reaped *enormous, bordering on windfall, profits* from the expanding global demand for copper. Rule 11-201, **Judicial notice of adjudicative facts**, *supra*, subsection (B)(1). *Phelps Dodge* therefore has *more than adequate*

resources available to respond in kind for its *own* caused loss, caused by its *own* bad business planning, and no bond should be required of Petitioners prior to resolution.¹⁷

Moreover with all of *Phelps Dodge's* extensive and recent experience in mine-disposal activities, it is at least *puzzling* that the company should appear to be rushing through and advancing this *most dangerous* of operations, with so little preparation, input, or notice.

Two final points: Petitioners know that *many* people in the Grant County community feel a number of different ways about the Hurley stacks and smelter. To many the plant is an eyesore and good riddance. To others it might be historic, nostalgic, personally memorable, just part of the way it was, or not even on the radar screen.

Some of these members of the community however might also appreciate having even a *brief* opportunity to air and share their sentiments, before the demolition takes place.

¹⁷ With *enormous* resources at hand, *Phelps Dodge* could have been expected to have the brightest minds prepare the best-made plans for this demolition. For example, its announced demolition agent, *Controlled Demolitions, Inc.*, appears to offer, “leadership and unparalleled experience [that] gives CDI clients access to a *full range of services and capabilities through a global network of offices and agents*, all dedicated to the precision application of our technology. ... CDI’s personnel work closely with plant managers, production supervisors and safety officers to coordinate preparation and demolition operations with work shifts and delivery schedules. *Safety of operations and maintenance of production capacity are the engines that drive Controlled Demolition Incorporated’s services to the industrial sector.*” See, www.controlled-demolition.com. (Italics added.)

Thus, with its ready and wide access to the best and the brightest, particularly its *demolition* and *air monitoring* experts, *Phelps Dodge* could have come forward with a well-thought-out plan, *far in advance*, could have adequately consulted with all interested parties, and could have provided adequate notice of the event (given a 25% rate of disability).

Instead, thus far *Phelps Dodge* has come forward with a scantily-prepared, poorly thought out, under-consulted, poorly-notified and *incomplete* set of plans here – a series of poor business decisions that the corporation is now asking the community to directly bear the brunt of re impact on their potential health, safety and welfare. These, indeed, Petitioners submit, are the overriding realities and *equities* of the situation.

Lastly, all sentimentality aside, no one should forget the many brave and dedicated men and women, who worked, were injured, and died at the Hurley Smelter. These individuals, many of whom remain county residents or are buried here, might *also* appreciate seeing that this demolition is handled in a sensible and appropriate way.

CONCLUSION

For all reasons stated, and based upon the *equities* presented, Petitioners respectfully pray the Court weight the matter with care, and issue its temporary restraining order, temporarily restraining Respondent, *Phelps Dodge Corporation*, from proceeding as currently planned with its demolition of the Hurley Smelter, and that the Court set the matter for briefing and full hearing on the merits, including presentation of live and documentary evidence as necessary, and that the Court grant Petitioners all further and additional relief as may be just and proper under all the attendant facts and circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, *per request of Respondent, Phelps Dodge*, a true and correct copy of Petitioners' within Expedited Petition for Issuance of Temporary Restraining Order, was served by email attachment to Anthony J. Trujillo, Esq., *Gallagher & Kennedy, P.A.*, Phoenix, Arizona, at ajt@gknet.com <ajt@gknet.com>. this **14th day of May, 2007**.

Douglas Craig Littlejohn