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The Honorable Chris Wickham

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DEC 12 2008

BRICKLIN NEWMAN DOLD, LLP

<input type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing set
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Date <u>Friday, January 9, 2009</u>
Time: <u>9:00 a.m.</u>
Judge/Calendar: <u>The Honorable Anne Hirsch</u>

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

TAYLOR RESOURCES, INC., a Washington corporation, also known as TAYLOR SHELLFISH FARMS

Petitioners,

v.

PIERCE COUNTY, a political subdivision of the State of Washington,

Respondent.

and

NORTH BAY PARTNERS, a family partnership; FOSS M. LESLIE ETAL, Taxpayers of record for the property at issue,

Additional Parties.

No. 08-2-00904-9

TAYLOR RESOURCES, INC.'S MOTION TO STRIKE THIRD PARTY PETITION OR, IN THE ALTERNATIVE, MOTION TO DISMISS THIRD PARTY PETITION FOR LACK OF JURISDICTION, AND MEMORANDUM IN SUPPORT THEREOF

I. RELIEF REQUESTED

In a proceeding that is related to but separate from this matter, the Shorelines Hearings Board ("SHB") has issued a non-final order on a motion to dismiss "(Order)" in which the SHB held that it has jurisdiction over Pierce County's rescission of a shoreline

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1 permit issued to Petitioner Taylor Resources, Inc. ("Taylor") for a commercial geoduck
2 farm in unincorporated Pierce County. Intervenor-Respondent Coalition to Protect Puget
3 Sound Habitat ("Coalition") has attempted to appeal the SHB's Order on motions by filing
4 what it calls a "Third Party Petition for Review" of the SHB's decision with this Court as
5 an ancillary pleading in Taylor's pending LUPA action.

6 The Coalition's Third Party Petition for Review ("Petition") is not an appropriate
7 vehicle for appealing an SHB decision. Furthermore, even if appeal through a third-party
8 petition is allowed, the Coalition's Petition is an improper attempt to file an interlocutory
9 appeal of the SHB's non-final Order. Accordingly, pursuant to CR 12(f) and CR 14(a),
10 Taylor moves this Court for an order striking the Petition as improper. In the alternative,
11 pursuant to CR 12(b)(1), Taylor moves the Court for an order dismissing the Petition for
12 lack of jurisdiction.

13 II. STATEMENT OF FACTS

14 A. Taylor's Appeals

15 On August 8, 2007, Pierce County issued Administrative Determination SD 22-00
16 (the "Administrative Determination"), which is the subject of these proceedings. *See*
17 Declaration of Duncan M. Greene ("Greene Decl."), Attachment 1. In the Administrative
18 Determination, the County reversed its previous interpretation that the Taylor's permit did
19 not expire and found that "the permit has expired and further work at the site will require
20 application for approval of a new shoreline substantial development permit." *See id.*, p. 1.

21 Taylor appealed the Administrative Determination to the County Hearing
22 Examiner on August 22, 2007. Greene Decl., Attachment 2. After four days of hearing,
23 the Examiner issued an Amended Report and Decision on Reconsideration dated June 12,
24 2008 (the "Examiner's Amended Decision"), affirming the Administrative Determination.

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1 Greene Decl., Attachment 3. The Administrative Determination and the Examiner's
2 Amended Decision (collectively referred to herein as the "County Decision") effectively
3 rescinded Taylor's shoreline permit by terminating the authorization previously granted
4 by the County to conduct ongoing farming activities on the Foss site.

5 Taylor appealed the Examiner's Amended Decision to this Court pursuant to the
6 Land Use Petition Act (LUPA) under Cause No. 08-2-01571-5. Greene Decl., Attachment
7 4. Taylor also appealed the Examiner's Amended Decision to the SHB pursuant to the
8 Shoreline Management Act (SMA) under SHB No. 08-017. Greene Decl., Attachment 5.¹
9 The LUPA appeal was stayed by stipulation of the parties "until the Shorelines Hearings
10 Board enters a final order or until a Superior Court reverses a Shorelines Hearings Board
11 decision that the Shorelines Hearings Board has jurisdiction." Greene Decl., Attachment
12 6.

13 **B. The Coalition's Petition**

14 On August 22, 2008, the Coalition filed a motion to dismiss Taylor's appeal to the
15 SHB for lack of jurisdiction, arguing that the County Decision did not constitute "the
16 granting, denying, or rescinding of a permit" over which the Board has jurisdiction
17 pursuant to RCW 90.58.180(1). Greene Decl., Greene Decl., Attachment 7. After
18 reviewing the pleadings and record evidence submitted by the parties, the SHB concluded
19 that the County Decision "constituted the rescission of Taylor's on-going authorization to
20 farm geoducks" on the Foss site, reserving for resolution at hearing the issue of "whether
21 a permit rescission was warranted in this case." Greene Decl., Attachment 8.

22 On November 14, 2008, the Coalition filed its Third Party Petition for Review
23 with this Court pursuant to the Administrative Procedures Act (APA) seeking an order
24

25 ¹ Both the LUPA appeal and the SHB appeal of the Examiner's Amended Decision were consolidated with existing appeals of the Examiner's original decision.

1 directing the SHB to dismiss Taylor's appeal for lack of jurisdiction. Greene Decl.,
2 Attachment 9.² On December 2, 2008, Taylor filed a motion for summary judgment with
3 the SHB that, if granted, will resolve the SHB proceeding without the need for a hearing.
4 Greene Decl., Attachment 10.

5 III. STATEMENT OF ISSUES

- 6 1. Should the Court strike the Coalition's Petition as improper where it is not
7 authorized by the APA, LUPA, or the Superior Court Civil Rules?
- 8 2. Should the Court dismiss the Coalition's Petition for lack of jurisdiction where
9 the Coalition has failed to exhaust its administrative remedies as required by the
10 APA?

11 IV. EVIDENCE RELIED UPON

12 This motion is supported by the evidence from the Hearing Examiner's record and
13 other evidence attached to the Declaration of Duncan M. Greene submitted herewith.

14 V. ARGUMENT AND AUTHORITY

15 A. The Court Should Strike the Coalition's Petition Because It is Not 16 Properly Before this Court.

17 The authority cited by the Coalition does not support the filing of its interlocutory
18 appeal. As discussed in the following sections, the Petition is not authorized under the
19 APA, LUPA, or the Superior Court Civil Rules. Accordingly, the Court should strike the
20 Petition.

21 1. The Coalition's Petition is Not Authorized Under the APA.

22 Judicial review of decisions of the SHB is governed by the APA. RCW
23 90.58.180(3). "The APA provides the exclusive means for seeking judicial review of
24 agency action." *King County v. Central Puget Sound Growth Management Hearings Bd.*,

25 ² The Coalition also filed with its Petition a Motion to Lift Stay and a Motion for Partial Summary
Judgment.

1 138 Wn.2d 161, 979 P.2d 374 (1999) (citing RCW 34.05.510) (emphasis added). The
2 APA provides that “proceedings for review under this chapter shall be instituted by paying
3 the fee required under RCW 36.18.020 and filing a petition in the superior court, at the
4 petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or
5 principal place of business, or (c) in any county where the property owned by the
6 petitioner and affected by the contested decision is located.” RCW 34.05.514(1).

7 The Coalition’s Petition does not comport with the requirements of the APA,
8 which clearly anticipates that new proceedings will be instituted when a petition is filed.
9 See RCW 34.05.514(1). There is nothing in the APA that authorizes an appeal of a SHB
10 decision to be filed as an ancillary pleading in a pending LUPA proceeding challenging a
11 different decision from a different administrative tribunal. The Coalition states that its
12 Petition is filed under the APA but fails to cite a single provision of the APA in support of
13 its Petition. See Petition, pp. 2, 6, n.1. Instead, the Coalition relies on the provisions of
14 LUPA to justify the filing of its Petition. See Petition, p. 6 (citing RCW 36.70C.030(2)).
15 Because judicial review of SHB decisions is governed by the APA and not LUPA, LUPA
16 cannot authorize this Court to review the SHB’s jurisdictional decision as part of this
17 pending LUPA action. See *Harrington v. Spokane County*, 128 Wn. App. 202, 213, 114
18 P.3d 1233 (2005) (“To obtain judicial review of the shoreline hearings board’s action, the
19 applicant proceeds under the adjudicative review provisions of the Administrative
20 Procedure Act, chapter 34.05 RCW, not LUPA.”) (emphasis added).

21 In spite of the APA’s silence on this issue, the Coalition argues that “[c]ourts can
22 consider cross or counter petitions under the APA,” citing *King County v. Central Puget*
23 *Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999) (“*King*
24 *County*”). The petitions discussed in *King County*, however, are clearly distinguishable
25 from the Coalition’s Petition. In *King County*, the court considered a counter-petition and
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1 cross-petition that was filed under the APA in a pending APA appeal. *See King County*,
2 138 Wn.2d at 170 (“While King County began the work necessary to comply with the
3 Board's remand order, it simultaneously instigated an Administrative Procedure Act
4 (APA) appeal of that order to the King County Superior Court . . . Friends filed an answer,
5 counter-petition and cross-petition in response to King County's CPP suit”). Here, the
6 Coalition is attempting to file an interlocutory appeal of the SHB’s decision under the
7 APA as a counter-petition or cross-petition in this pending LUPA appeal.

8 In short, nothing in *King County* or the APA authorizes or even contemplates the
9 filing of an interlocutory appeal of an agency decision under the APA in the form of a
10 counter-petition or cross-petition filed in an ongoing LUPA action. The Coalition’s
11 Petition should therefore be stricken.

12 **2. The Coalition’s Petition is Not Authorized Under LUPA.**

13 The Coalition cites RCW 36.70C.030(2) for the proposition that “superior court
14 civil rules govern procedural matters” in LUPA actions. *See* Petition, p. 6. As discussed
15 above, because the APA governs judicial review of SHB decisions, RCW 36.70C.030(2)
16 cannot authorize this court to review the SHB’s jurisdictional decision.

17 However, even if the Court considers the Civil Rules as a possible basis for the
18 Coalition’s Petition, the Civil Rules do not authorize the Coalition’s interlocutory appeal
19 because the Petition is neither a “third party complaint” under CR 14 nor a “counterclaim”
20 under CR 13.

21 **a) The Petition is not a “third party complaint” under CR**
22 **14.**

23 The Coalition argues that its Petition is proper under CR 14, which authorizes the
24 filing of third party complaints. *See* Petition, p. 6. CR 14(a) provides in pertinent part as
25 follows:

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1 When Defendant May Bring in Third Party. At any time after
2 commencement of the action a defending party, as a third party
3 plaintiff, may cause a summons and complaint to be served upon a
4 person not a party to the action who is or may be liable to him for all or
5 part of the plaintiff's claim against him. The third party plaintiff need
not obtain leave to make the service if he files the third party complaint
not later than 10 days after he serves his original answer. Otherwise he
must obtain leave on motion upon notice to all parties to the action.

6 CR 14(a) applies when a claim originates "in the assertion of a liability against the
7 defendant which the defendant then attempts to pass on, in whole or in part, to the third
8 party." *Reed v. Streib*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965).

9 Because the Petition is not a "third party complaint" as defined in CR 14(a), the
10 Coalition's reliance on CR 14 is misplaced. CR 14(a) authorizes third party plaintiffs to
11 serve complaints only "upon a person . . . who is or may be liable to him for all or part of
12 the plaintiff's claim against him." Here, in an attempt to fit its interlocutory appeal within
13 the provisions of CR 14(a), the Coalition has named the SHB as a "Third Party
14 Respondent" in this pending LUPA action. *See* Petition, pp. 1, 6 ("Nominally, this
15 pleading is directed at and seeks relief from the Shorelines Hearings Board"). The SHB is
16 not, however, a person who may be liable to the Coalition for Taylor's claims against the
17 County. *See* CR 14(a). This is not a case in which the Coalition could attempt to pass
18 liability on to a third party such as the SHB. *See Reed*, 65 Wn.2d at 708.³ The relief sought
19 by the Coalition in its Petition (reversal of the SHB's jurisdictional decision) would not
20 advance the relief sought by Taylor (an order that its permit remains in effect). Thus, CR
21 14(a) simply does not apply in this case and cannot authorize the Coalition's Petition.

22
23
24 ³ *See also Brown v. Spokane County Fire Protection Dist. No. 1*, 21 Wn. App. 886, 891, 586 P.2d 1207 (1978)
25 (CR 14(a) should not be construed "to change the cause of action as asserted, or to substitute another cause of
action for it").

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1 **b) The Petition is not a “counterclaim” under CR 13.**

2 The Coalition also suggests that its Petition is proper under CR 13, which
3 authorizes counterclaims. *See* Petition, p. 6. CR 13(e) provides as follows:

4 Counterclaim Maturing or Acquired After Pleading. A claim which
5 either matured or was acquired by the pleader after serving his pleading
6 may, with the permission of the court, be presented as a counterclaim
by supplemental pleading.

7 A “counterclaim” is a claim against “an opposing party.” *See* CR 13(a), (b).

8 The SHB is the proper Respondent to the Coalition’s Petition. Because the SHB is
9 not an “opposing party” in this LUPA action, the Coalition’s Petition is not a counterclaim
10 and cannot be filed as such. The only possible mechanism for bringing a third party such
11 as the SHB into this LUPA action is a third-party complaint, but as discussed above, the
12 Petition is also not a proper third-party complaint. Thus, the Petition does not fall within
13 the meaning of “counterclaim” under CR 13 or “third party complaint” under CR 14 and
14 should be stricken.⁴

15 In summary, because the Coalition’s Petition is not authorized under the APA,
16 LUPA, or the Civil Rules, the Petition is not properly before this Court and should be
17 stricken.

18 **B. The Court Should Dismiss the Coalition’s Petition Because it Lacks
19 Jurisdiction Over the Petition.**

20 In the alternative, even if the Court finds the Coalition’s Petition is procedurally
21 proper, the Court should dismiss the Petition pursuant to CR 12(b)(1) because the Court
22 lacks jurisdiction over the Petition. By attempting to file an interlocutory appeal of the
23

24 ⁴ Even if this were an appropriate action for a counterclaim, CR 13(e) requires “permission of the court”
25 before the pleading can be filed. The Coalition has not filed a motion seeking such permission. The
Petition should be stricken for that reason as well.

1 SHB's order, the Coalition has failed to exhaust its administrative remedies. As a result,
2 this Court lacks jurisdiction to review the SHB's decision.⁵

3 **1. The APA Requires Exhaustion of Administrative Remedies.**

4 The APA provides that "[a] person may file a petition for judicial review under
5 this chapter only after exhausting all administrative remedies available within the agency
6 whose action is being challenged," with certain exceptions that do not apply here. RCW
7 34.05.534.⁶ The doctrine of exhaustion of administrative remedies "is founded upon the
8 belief that the judiciary should give proper deference to that body possessing expertise in
9 areas outside the conventional expertise of judges." *Citizens for Mount Vernon v. City of*
10 *Mount Vernon*, 133 Wash.2d 861, 866, 947 P.2d 1208 (1997). The exhaustion doctrine is
11 based on a number of principles, including the following:

12 It avoids premature interruption of the administrative process, provides
13 for full development of the facts, and allows the exercise of agency
14 expertise. The doctrine also protects the autonomy of administrative
15 agencies by giving them the opportunity to correct their own errors. It
16 discourages litigants from ignoring administrative procedures by resort
17 to the courts. Finally, we, in the judicial branch, essentially recognize
18 the agency's expertise.

19 *Harrington v. Spokane County*, 128 Wn. App. 202, 210-11, 114 P.3d 1233 (2005)

20 (internal citations omitted).

21 ⁵ Alternatively, if the Court does not consider the Coalition's failure to exhaust its administrative remedies
22 to be a jurisdictional issue, the Petition should be dismissed pursuant to CR 12(b)(6) for failure of the
23 pleading to state a claim upon which relief can be granted. For the reasons discussed herein, this Court
24 cannot grant the Coalition's requested relief until the Coalition has exhausted its administrative remedies.

25 ⁶ Accordingly, the SHB's rules of practice and procedure authorize appeals of final decisions but do not
authorize interlocutory appeals of SHB jurisdictional decisions. *See* WAC 461-08-570 ("A petition for
review must be filed with superior court within thirty days of the date that the board issues its final order or
decision.") (emphasis added). *See also Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440,
54 P.3d 1194 (2002) (distinguishing final and interlocutory orders). Under the principle of *expressio unius*,
the inclusion of "final" implies the exclusion of orders on motions like the order at issue here that do not
finally resolve a case. *See Adams v. King County*, ___ Wn.2d ___, 192 P.3d 891 (2008).

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1 **2. Exhaustion of Administrative Remedies is a Jurisdictional**
2 **Requirement.**

3 When reviewing an administrative decision, the Superior Court is acting in its
4 limited appellate capacity, and all statutory procedural requirements must be met before
5 the court's appellate jurisdiction is properly invoked. *Fay v. Northwest Airlines, Inc.*, 115
6 Wn.2d 194, 197, 796 P.2d 412 (1990). In such cases, the exhaustion requirement
7 “prevents a party from omitting to use, or starting to use but then abandoning before final
8 conclusion, the only forum that has original jurisdiction.” *Chaney v. Fetterly*, 100 Wn.
9 App. 140, 146, 995 P.2d 1284 (2000) (emphasis added).

10 While the Coalition disagrees with the SHB’s ruling that it has original jurisdiction
11 over Taylor’s claims against the County, it is without question that the SHB is the only
12 forum that has original jurisdiction over the Coalition’s claims against the SHB (as
13 presented in the Petition). Therefore, because this Court is being asked to act in its limited
14 appellate capacity, its jurisdiction is not properly invoked until all administrative remedies
15 before the SHB have been exhausted.

16 **3. The Coalition Has Failed to Exhaust its Administrative**
17 **Remedies.**

18 By filing an interlocutory appeal of the SHB’s non-final Order on motions rather
19 than waiting to appeal a final SHB order, the Coalition has failed to exhaust its
20 administrative remedies. The Coalition has attempted to do precisely what the exhaustion
21 doctrine prohibits: “starting to use but then abandoning [the SHB] before final
22 conclusion.” *See Chaney*, 100 Wn. App. at 146.

23 Moreover, the Coalition’s Petition flies in the face of the policies that underlie the
24 exhaustion doctrine. The Petition asks this Court to prematurely interrupt the SHB
25 administrative process, which would preclude full development of facts and the exercise

1 of the SHB's expertise. *See Harrington*, 128 Wn. App. at 210. Consideration of the
2 Petition by this Court would undermine the autonomy of the SHB and encourage litigants
3 to ignore administrative procedures by resort to the courts. *See id.* Finally, by asking this
4 Court to reverse the SHB's jurisdictional determination before it has issued a final
5 decision, the Petition disregards the deference given by courts to the SHB's expertise. *See*
6 *id.*

7 **4. The Courts Have Held that Interlocutory Appeals of SHB**
8 **Jurisdictional Decisions Are Improper.**

9 Because exhaustion of administrative remedies is required before a litigant may
10 proceed to court, the courts have held that interlocutory appeals of SHB decisions are
11 improper. *See Snohomish County v. State Shorelines Hearings Bd.*, 108 Wn. App. 781, 32
12 P.3d 1034 (2001). There, the County attempted to file an interlocutory appeal of the
13 SHB's decision to deny its motion to dismiss for lack of jurisdiction. *See id.* at 784. The
14 trial court rejected the County's appeal, finding that "the County had an adequate remedy
15 at law through direct appeal of the SHB's final judgment." *Id.* at 785-6. The Court of
16 Appeals agreed, holding that "[a] petitioner's wish to avoid the delay and expense of a trial
17 is insufficient to justify issuing an interlocutory writ," "even when the party argues that
18 the tribunal below lacked jurisdiction, as the County argued in this case." *Id.* at 786.⁷

19 Similarly, the Coalition's desire to avoid what it perceives to be "cumbersome
20 preparation and litigation" before the SHB is insufficient to justify the Coalition's
21 interlocutory appeal.⁸ The Coalition should not be permitted to abandon the SHB forum to
22 pursue interlocutory relief in this Court, particularly when a summary judgment motion is
23 pending that could resolve the appeal without the need for a hearing.

24 ⁷ While the Coalition has styled its interlocutory appeal as a "Third Party Petition for Review" rather than a
25 petition for writ of review, the same principles apply to any interlocutory appeal of a SHB decision.

⁸ *See* Coalition's Motion to Lift Stay, p. 5.

1 **5. The Cases Cited by the Coalition Do Not Excuse its Failure to**
2 **Exhaust Administrative Remedies.**

3 In support of its argument that it should not be required to exhaust its
4 administrative remedies in this case, the Coalition cites two decisions involving the Public
5 Employment Relations Commission (PERC). See Coalition's Motion to Lift Stay, p. 5
6 (citing *Spokane County v. State*, 136 Wn.2d 644, 648, 966 P.2d 305 (1998) ("*Spokane*
7 *County*"); *Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 905-6, 890 P.2d 1047
8 (1995) ("*WSBA*"). These decisions do not justify the Coalition's failure to exhaust
9 administrative remedies in this case.

10 In *Spokane County*, the Court held that exhaustion was not required because the
11 remedies prescribed by the bargaining act or the contract at issue "would have been futile
12 where the controversy centers on the applicability of the act." See *Spokane County*, 136
13 Wn.2d at 652. This holding was based on an exception to the exhaustion requirement that
14 allows a court to waive the exhaustion requirement upon a showing that "exhaustion of
15 remedies would be futile." See RCW 34.05.534(3)(b). Here, because the Coalition has
16 made no showing that exhaustion would be futile, the exhaustion requirement must be met
17 before the Coalition proceeds to court.

18 Moreover, the court's holding in *Spokane County* was expressly limited to "cases
19 dealing with the jurisdiction of PERC" and has not been followed outside of the PERC
20 context. See *Spokane County*, 136 Wn.2d at 652. In cases involving agencies other than
21 PERC, courts have waived the exhaustion requirement only "when there is a "[t]otal and
22 inarguable absence of jurisdiction." See *City of Moses Lake v. Grant County Boundary*
23 *Review Board*, 104 Wn. App. 388, 15 P.3d 716 (2001) (emphasis added). That is clearly
24 not the case here, as evidenced by the Board's decision that it has jurisdiction over
25 Taylor's appeal.

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1 Finally, the cases cited by the Coalition did not involve interlocutory appeals of
2 agency decisions, but rather were filed as petitions seeking writs of prohibition before any
3 formal decision had been made by PERC. *See Spokane County*, 136 Wn.2d at 648; *WSBA*,
4 125 Wn.2d at 905-6. Accordingly, the petitioners in those cases were invoking the original
5 jurisdiction of the court, not its appellate jurisdiction. *See WSBA*, 125 Wn.2d at 906 (“This
6 court has original jurisdiction in this matter pursuant to Const. art. 4, § 4 and RAP 16.2”).
7 The cases cited by the Coalition do not apply to its Petition, which invokes this Court’s
8 appellate jurisdiction, and do not change the jurisdictional nature of the exhaustion
9 requirement in this case. *See Fay*, 115 Wn.2d at 197; *Chaney*, 100 Wn. App. at 146.

10 Because the Coalition may still prevail on the merits before the SHB and has an
11 adequate remedy at law by direct appeal of the SHB’s final order if it does not prevail, the
12 Court should reject the Coalition’s attempt to abandon the SHB process. Exhaustion of
13 administrative remedies is a jurisdictional requirement, and the Coalition has made no
14 showing that exhaustion would be futile in this case or that any other exception to the
15 exhaustion requirement applies.

16 VI. CONCLUSION

17 For the reasons stated herein, Taylor respectfully requests that the Court issue an
18 order pursuant to CR 12(f) striking the Coalition’s Petition as improper. Alternatively,
19 Taylor requests that the Court issue an order pursuant to CR 12(b)(1) dismissing the
20 Petition for lack of jurisdiction.
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1 DATED this 12th day of December, 2008.

2 GORDONDERR LLP

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4 By: 

5 Samuel W. Plauché, WSBA #25476
6 Duncan Greene, WSBA #36718
7 Attorneys for Taylor Resources, Inc.
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